No. 17-55606

In the United States Court of Appeals for the Ninth Circuit

JAMES COLE, on behalf of himself and all other similarly situated,
Plaintiff-Appellant,

v.

CRST VAN EXPEDITED, INC., an Iowa Corporation, FKA CRST, INC., and DOES, 1-50, inclusive,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

The dispute in this case comes down to a disagreement about the standard of liability under California's meal- and rest-break laws. In CRST's view, an employer only violates the break laws if it *prevents* employees from taking breaks. That standard is purely prohibitory—it does not impose any affirmative obligation to provide the breaks required by law. CRST's reliance on the standard allows it to argue that it complied with the break laws despite having never authorized its employees to take the required breaks. The fact that employees *did* miss breaks, CRST argues, should be blamed on the employees' decisions to voluntarily skip those breaks rather than on the company's failure to authorize them. To prove otherwise, employees under CRST's standard would have to show, "on a … break by break basis," that the company forced them to miss specific breaks. CRST Br. 3. Moreover, those individualized inquiries would prevent a plaintiff from satisfying the requirements for class certification or establishing class-wide liability absent evidence that the company uniformly prevented *all* employees from taking *all* breaks. CRST does not dispute that such a showing would be impossible in virtually all cases.

CRST's extraordinarily narrow reading of the meal- and rest-break laws would trivialize an employer's responsibilities under the break laws and gut enforcement of those laws. To adopt such an interpretation of California's remedial worker-protection scheme should require, at the very least, strong authority under California law. CRST, however, identifies none. The language of the California Labor Code, the IWC wage order, and the decisions of both the California

Supreme Court and the lower courts in California all impose an affirmative obligation on employers to "provide" employees with the required breaks.

CRST persuaded the district court to adopt the wrong standard, and that legal error infected the court's decisions both on summary judgment and on decertification of the meal- and rest-break subclasses. For that reason, those decisions should be reversed.

I. CRST is liable under the meal- and rest-break laws for failing to provide employees with the required breaks.

A. CRST rests its argument on its position that the meal- and rest-break laws do not require employers to do anything to provide employees with meal and rest breaks. In CRST's view, an employer fully complies with the break laws' requirements as long as it does not "prevent or obstruct" employees from taking those breaks. CRST Br. 1. It is thus not the employer, but individual employees who are responsible for informing themselves about their rights and, apparently, authorizing themselves to take the breaks required by law.

Despite the company's claim that the standard it advances is the "established" law in California, CRST Br. 1, the standard lacks any legal support. In fact, it is not even clear where the standard comes from. CRST, like the district court below, vaguely attributes it to *Brinker Restaurant Corp. v. Superior Court*, 273 P.3d 513 (Cal. 2012), but does not cite any particular portion of the opinion in that case. *See* CRST Br. 1–3, 6–7, 41–42. *Brinker* does say that an employer cannot "impede or discourage" employers from taking breaks. 273 P.3d at 536–37. But that prohibition does not suggest that employers are not required to authorize those breaks in the

first place. On the contrary, *Brinker*'s holding presumes that the employer has provided breaks that could be impeded or obstructed.

Aside from *Brinker*, the only California authority on which CRST relies is *Murphy v. Kenneth Cole Products, Inc.*, 155 P.3d 284 (Cal. 2007). CRST Br. 26. But *Murphy*, decided five years before *Brinker*, is about the statute of limitations for meal- and rest-break claims, not the standard of liability for those claims. *See Murphy*, 155 P.3d at 287. The decision's statement that an employee is entitled to premium wages under the break laws if "forced to forgo rest and meal periods," although describing the facts of that case, does not purport to decide the general standard applicable to break claims, and certainly does not hold that an employer is liable *only* if it forces employees to forgo breaks. *Id.* at 289, 296. Rather, the decision repeatedly notes that employers are liable under the break laws when they fail to "provide" employees with the required breaks. *Id.* at 289, 291, 292, 294, 295. To read the language on which CRST relies as an exhaustive statement of the liability standard is especially untenable after *Brinker*, which comprehensively reviewed employers' obligations under the break laws without mentioning the language from *Murphy*.

The only cases that have actually adopted CRST's standard are a line of federal district court decisions, of which the decision below is a part. *See* CRST Br. 27 n.4. Those decisions, which hold that an employer's only obligation is not to "prevent" employees from taking breaks, not only lack support in California law but "conflict[]" with a competing "line of California Court of Appeal cases" holding that an employer is liable if it fails to provide employees with the required

breaks. *Cummings v. Starbucks Corp.*, 2014 WL 1379119, at *18–20 (C.D. Cal. 2014). The district court decisions thus ignore the consensus of California courts on a question of substantive state law and, for that reason, should not be regarded as persuasive authority.

Aside from its lack of legal support, CRST's "prevent" standard has nothing else to recommend it. The California Supreme Court has repeatedly stressed that the remedial nature of the meal- and rest-break laws requires that they be "construed broadly in favor of protecting employees." *Murphy*, 155 P.3d at 289; *see also Brinker*, 273 P.3d at 527. It is difficult to imagine an interpretation of the break laws that would more effectively thwart the laws' purpose of protecting the health and welfare of employees than CRST's interpretation. CRST's reading of the law would take responsibility for providing breaks out of the hands of the party best positioned to understand, communicate, and consistently implement those requirements—the employer. Instead, it would require each employee to learn about the law's requirements and, on the assumption that the employer would comply with the law, take unauthorized meal and rest breaks on their own initiative. By putting the whole burden of compliance on employees, CRST's position guarantees that those employees will not take all the breaks to which they are entitled and that they will thus face the increased stress and risk of work-related accidents that the break laws were intended to prevent. *See Murphy*, 155 P.3d at 296.

B. Before turning to the correct standard of liability under the break laws, CRST's brief requires us to disclaim reliance on a different standard that we do not, and never have, endorsed. According to CRST, our argument is that the

break laws require employers to "ensure" that employees take all the break time to which the law entitles them. *See* CRST Br. 1, 3, 15–16. It is clear why CRST would *like* that to be our position—the "ensure" standard was unambiguously rejected by the California Supreme Court in *Brinker* as "lack[ing] any textual basis" in the law. 273 P.3d at 535. But we have never advocated for that standard. Our argument is not that CRST failed to *ensure* that employees took breaks, but that it failed to *provide* employees with those breaks in the first place. *See* Cole Br. 21. (noting an employer's "affirmative obligation is to provide—but not police—meal periods and rest breaks").

Nor did Cole "initially obtain[] certification" of the break subclasses in the district court under the "ensure" standard. CRST Br. 1. The district court expressly disclaimed reliance on that standard, which it noted was at that time the subject of a split in authority and of the California Supreme Court's grant of review in *Brinker*. ER 321. The question on which the district court actually certified the subclasses was the question whether CRST *provided* its employees with the required breaks. "[T]he Court need not predict the outcome of the California Supreme Court's review" in *Brinker*, it wrote, because "whatever the legal meaning of the term 'provide' in this context, the question is one common to all potential class members." *Id.* As explained below, the requirement that employers "provide" breaks remains the proper standard under *Brinker*, and decertification of the subclasses was thus not justified, as CRST appears to suggest, by the district court's reliance on the wrong standard.

C. The correct standard of liability under the break laws requires neither that an employer "prevented" nor that it "ensured" the required meal and rest breaks, but that it "provided" employees with those breaks. The "provide" standard is the only standard that accords with the language of the break laws and the IWC wage order, which say that an employer must pay a premium wage if it "fails to provide" a required break. Cal. Labor Code § 226.7; 8 C.C.R. §§ 11090(11)(D), (12)(B); *see also* Cal. Labor Code § 512(a) ("An employer may not employ an employee … without *providing*" the required meal breaks). It is also the only standard that the California Supreme Court has endorsed. As the Court held in *Brinker*, "[a]n employer's duty … is an obligation to *provide* [breaks] to its employees." 273 P.3d at 536 (emphasis added).

The requirement that employers "provide" employees with breaks "imposes an affirmative obligation" on employers requiring them to "authorize" employees to take the required breaks. *Benton v. Telecom Network Specialists, Inc.*, 220 Cal. App. 4th 701, 728 (Ct. App. 2013). As this Court has recognized, determining whether an employer has satisfied that obligation requires courts to focus on the employer's policies (or lack of policies) regarding those breaks. *See Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 961–62, 963 (9th Cir. 2013). To comply with the law, "[a]n employer is required to authorize and permit the amount of [meal and rest] break time called for under the wage order for its industry." *Brinker*, 273 P.3d at 532. "If it does not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required—it has violated the wage order and is liable." *Id.* Following *Brinker*,

California courts have consistently held that an employer violates the break laws if it fails to provide a compliant break policy, or if it provides a noncompliant policy. *See, e.g.*, *Faulkinbury v. Boyd & Assocs., Inc.*, 216 Cal. App. 4th 220, 237 (Ct. App. 2013).

CRST disputes that the break laws impose any affirmative duty on employers to provide the required breaks, arguing that its "only affirmative obligation" under the break laws is to post a copy of the applicable wage order. CRST Br. 9, 27–28, 52. But the posting requirement is just one section of the California Labor Code and of the wage order. *See* Cal. Labor Code § 1183(d); 8 C.C.R. § 11090(22). CRST's position ignores all the other sections, including the language affirmatively requiring it to "provide" breaks. *See, e.g.*, Cal. Labor Code § 226.7. In any event, as the district court recognized, ER 7, CRST has not established that it posted the wage order in a "conspicuous" and "frequented" location of the workplace as the break laws require. Cal. Labor Code § 1183(d); 8 C.C.R. § 11090(22). Although CRST's brief repeatedly asserts that the company posted the order, it never claims that the location was conspicuous. *See* CRST Br. 12, 18–19, 35, 59.

The company also disputes the relevance of its lack of a compliant break policy to its liability under the break laws. CRST Br. 27–30. It does not explain, however, how that position is consistent with *Brinker*'s holding that an employer "has violated the wage order and is liable" when its policy fails to provide all the required breaks. *Brinker*, 273 P.3d at 532. Although the company does attempt to distinguish the facts of some of the lower-court cases applying *Brinker*, CRST 30–31 & n.7, it cannot deny the strength of the collective holding in those cases, recognized by this Court in *Abdullah*, that an employer's "liability, if any, would arise

upon a finding that its uniform … break policy, or lack of policy, was unlawful." *Faulkinbury*, 216 Cal. App. 4th at 237; *see Abdullah*, 731 F.3d at 961–62. Nor can it identify any contrary California authority supporting its position.

Even if the law requires some employers to implement break policies, CRST argues that such policies should not be required in cases "where employees work in the field free of supervision and control." CRST Br. 28. The company, however, does not explain why a break policy would be an inappropriate way to provide breaks to employees in the field. If anything, a policy is *more* important when an employer cannot directly supervise breaks on a day-to-day basis. Other cases involving such employees have thus looked to the employer's policy, or lack of policy, in examining liability. *See, e.g.*, *Godfrey v. Oakland Port Servs. Corp.*, 230 Cal. App. 4th 1267, 1287 (Ct. App. 2014) (truck drivers); *Benton*, 220 Cal. App. 4th at 729–30 (technicians working in the field); *Bradley v. Networkers Int'l, LLC*, 211 Cal. App. 4th 1129, 1150–51 (Ct. App. 2012) (same).

CRST relies on a Division of Labor Standards Enforcement (DLSE) opinion letter, cited in *Brinker*, 273 P.3d at 534, that addresses the meal-break requirements as applied to a company that employed service technicians working in the field. DLSE Opinion Letter No. 1991.06.03 (June 3, 1991). The company, which "advised [its employees] that they [were] entitled to a thirty-minute lunch period each day," sought clarification about its "obligation to provide meal periods for workers." *Id.* The DLSE responded that, "[s]o long as the employer *authorizes* the lunch period within the prescribed period and the employee has a reasonable opportunity to take the full thirty-minute period free of any duty, the employer has satisfied his or

her obligation." *Id.* (emphasis added). The DLSE letter does not support CRST's argument because, unlike the company there, CRST does not advise employees about the meal and rest breaks to which they are entitled and has never authorized such breaks.

Neither *Brinker* nor the DLSE letter conclude, as CRST claims, that "an employer has discharged the *entirety of its obligations to 'provide' meal breaks*" as long as "the employee has a reasonable opportunity to take the full thirty-minute period free of any duty." CRST Br. 28 (emphasis added). *Brinker* relies on the DLSE letter for its conclusion that freedom from duty is a requirement of an off-duty meal break. 273 P.3d at 534. It does not suggest that such a break could satisfy an employer's obligations under the break laws if the break were never provided to employees. Nor does *Brinker*'s observation that "what will suffice may vary from industry to industry," on which CRST relies, suggest that any industry is exempt from the "obligation to provide" breaks. *Id.* at 537. After all, the IWC wage order applicable to CRST's employees, IWC Wage Order 9-2001, is specific to the transportation industry and requires employers to pay a premium wage if they "fail to provide" breaks. 8 C.C.R. § 11090(11)(D), (12)(B).

D. Having staked its argument on the wrong standard, CRST makes no effort to meet the right one. The company identifies nothing that it did—in the form of a policy or otherwise—to authorize its employees to take the required breaks. Although it claims to have "encourage[d]" employees to take breaks, CRST Br. 32, the breaks that it encouraged (fifteen minutes every five hours) were just a fraction of what California law requires. Rather than helping CRST, that noncompliant

policy establishes its liability under the break laws. *See Brinker*, 273 P.3d at 531; *Faulkinbury*, 216 Cal. App. 4th at 237. Companies have faced liability for far less serious violations. *See, e.g.*, *Brinker*, 273 P.3d at 531 (claim that the defendant company's policy provided employees a ten-minute rest break for every four hours worked, rather than every four hours "or major fraction thereof" as required). And the fact that CRST may have sometimes allowed additional breaks when "needed," CRST Br. 32, such as when drivers were fatigued or facing dangerous conditions, does not bring the policy into compliance. The breaks provided by California law are not restricted to such emergencies.

Under the correct standard, CRST's failure to provide the required meal and rest breaks establishes that the company failed to satisfy its obligations under the break laws. Far from supporting the district court's grant of summary judgment to CRST, the uncontested evidence thus shows that it was the break subclasses that were entitled to summary judgment.

II. The decisions of individual employees do not affect CRST's liability or require decertification of the break subclasses.

A. Once CRST's "prevent" standard is disposed of, its other arguments fall away. The proper standard—which requires an employer to *provide* its employees with all the meal and rest breaks required by law—focuses the legal question on the *employer*'s failure to meet its obligations under the break laws rather than on the decisions of individual *employees*. Under that standard, there is no need to decide whether CRST's employees voluntarily waived breaks or were forced to miss them—the question that CRST sees as the "critical liability question in any meal

and rest break claim." CRST Br. 51 n.9. When an employer has failed to meet its obligation to provide the required breaks, its employees have no breaks to waive. Thus, "the fact that an employee did not take the break[s] cannot reasonably be considered a waiver." *Bradley*, 211 Cal. App. 4th at 1151. Of course, employers, as we have acknowledged, are not obligated to *ensure* that employees take all their breaks, and an employer that has complied with its obligation to provide breaks is thus not liable when an employee voluntarily skips those breaks. But when an employer, like CRST, "*fails* to provide legally compliant meal or rest breaks, the court may not conclude employees voluntarily chose to skip those breaks." *Alberts v. Aurora Behavioral Health Care*, 241 Cal. App. 4th 388, 410 (Ct. App. 2015).

For that reason, the California Supreme Court in *Brinker* rejected the precise argument that CRST advances. As here, the plaintiffs in *Brinker* claimed that the defendant company's break policy failed to provide all the breaks required by law. *See Brinker*, 273 P.3d at 531. The Court of Appeal concluded that the claim was not amenable to class treatment, reasoning that "because rest breaks can be waived … any showing on a class basis that plaintiffs or other members of the proposed class missed rest breaks or took shortened rest breaks would not necessarily establish, without further individualized proof," that the employer violated the break laws. *Id.* at 531–32. The California Supreme Court reversed, holding that "liability could be established" with evidence that the company's break policy failed to provide the required breaks without inquiring into the reasons that individual employees missed breaks. *Id.* at 531. As the Court explained: "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." *Id.* at 532.

Ignoring that holding from *Brinker*, CRST relies on *Alcantar v. Hobart Service* for the conclusion that this case does not satisfy Rule 23(b)(3)'s predominance requirement because "questions as to why [employees] missed their meal and rest breaks, whether because of their employer's failure to provide them or their own choice to forgo them, would predominate over questions common to the class." 800 F.3d 1047, 1054 (9th Cir. 2015). CRST puts far too much weight on *Alcantar*'s one-sentence holding. The case does not purport to disturb *Brinker*'s holding that employees cannot voluntarily waive breaks that the employer has never provided. Nor could it, given that the waiver is a question of substantive state law. And the decision does not suggest that meal- and rest-break claims categorically fail the predominance standard. Rather, *Alcantar*'s narrow holding is that the district court did not abuse its discretion in concluding that the plaintiff's theory of liability *in that case* failed to satisfy the predominance test. *See id.* at 1054.

The theory of liability in *Alcantar* was that the employer—despite a policy affirmatively requiring employees to take meal breaks and to inform a manager about missed breaks—had an "*unofficial* policy" that "rendered meal and rest breaks unavailable." *Alcantar v. Hobart Serv.*, 2012 WL 5946129, at *4–5 (C.D. Cal. 2012) (emphasis added). The district court held that, even if the employee could establish such an unofficial policy, "individualized questions would predominate" as to whether the policy was responsible for a particular employee's failure to take a break. *Id.* at *5. *Alcantar* is thus akin to decisions in which an employer, despite a

"facially lawful" break policy, is alleged to have unofficially deprived employees of breaks. *Flores v. Supervalu, Inc.*, 509 F. App'x 593, 594 (9th Cir. 2013); *see also Wright v. Renzenberger, Inc.*, 656 F. App'x 835, 837–38 (9th Cir. 2016). In such cases, *Brinker*'s holding that employees cannot waive breaks that an employer has never provided has no application because the employers *did* authorize breaks. But where, as here, the theory of liability is based on "[t]he *lack* of a meal/rest break policy and the uniform *failure* to authorize such breaks," *Brinker*'s holding applies and the employer's liability turns on "matters of common proof." *Abdullah*, 731 F.3d at 962 (emphasis added) (quoting *Bradley*, 211 Cal. App. 4th at 1150).

B. CRST's reliance on evidence that individual employees took breaks, when considered in light of the correct standard, is also irrelevant. Under that standard, an employer that "has not authorized and not provided legally-required meal and/or rest breaks … has violated the law." *Bradley*, 211 Cal. App. 4th at 1151. Subsequent evidence that "an employee may have actually taken a break" does not change that. *Id.* If it could, establishing entitlement to class certification and class-wide liability would require showing that *all* employees "missed *all* breaks to which they were entitled," a requirement that "would prevent certification of virtually any wage and hour class." *Alberts*, 241 Cal. App. 4th at 407 (emphasis added). Whether or not individual CRST employees took breaks is thus irrelevant to the company's liability under California law. Instead, such evidence is relevant only to show damages. *Faulkinbury*, 216 Cal. App. 4th at 235.[1]

[1] As we pointed out in our opening brief (at 34–35), the evidence that individual employees took breaks in any case does not show that any employees took *all*

Under the correct standard, which looks to CRST's uniform policies rather than the decisions of employees, there are no individual issues of the sort that the district court concluded required decertification of the break subclasses. "Claims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment." *Brinker*, 273 P.3d at 531. That is true even though individual questions, like whether some employees took some breaks, may still have to be decided for purposes of determining damages. *See Leyva v. Medline Indus. Inc.*, 716 F. 3d 510, 513–14 (9th Cir. 2013) (citing *Brinker*, 273 P.3d at 546).

CRST nevertheless argues that it would be an abuse of discretion for a court to rely on an employer's policy "to the near exclusion of other relevant factors touching on predominance." CRST Br. 29 (quoting *Abdullah*, 731 F.3d at 964). But as we pointed out in our opening brief (at 38–40), the cases where this Court has held that exclusive reliance on a policy was inappropriate are cases where liability turned not on the policy itself but on the individualized *application* of that policy to employees. *See Abdullah*, 731 F.3d at 965. Here, in contrast, the substantive state law requires courts to "focus on the policy itself." *Faulkinbury*, 216 Cal. App. 4th at 232. That is not to say that courts in particular cases cannot consider additional evidence that is relevant to the question of whether an employer has provided the required breaks. But the only individualized evidence that CRST identifies here is

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the breaks to which they were entitled under California law, and CRST does not dispute that. *See Bradley*, 211 Cal. App. 4th at 1150 (holding that similar defense was unsupported where the employer presented no "declarations or deposition testimony suggesting that the required breaks were regularly taken."

evidence that some employees took some breaks, which, as already explained, is irrelevant to liability under California law. *See id.* at 235. Courts are not required to look past uniform policies that are determinative of liability under state law to rely instead on individualized evidence that the same law considers irrelevant.

III. CRST is also liable because its uniform policies prevented employees from taking the required breaks.

Even under the only question that CRST considers relevant—whether it "prevented or obstructed" the breaks required by law—the undisputed evidence establishes the company's liability. That evidence shows that the company *did* prevent breaks, both with a break policy that provided fewer and shorter breaks than the break laws require and a scheduling policy that made taking all the required breaks impossible.

A. CRST's brief characterizes its policy of limiting drivers to one fifteen-minute break every five hours as less a requirement than a sort of advisory minimum, which allowed employees to take "at least" that many breaks. CRST Br. 32. That is not, however, how CRST characterized the policy to the employees themselves. Its instruction to employees was to take "1 break every 5 hours" of which "[e]ach break = .25 hour (15 minutes)." ER 103–04 ¶ 21, 276.

As our opening brief explained (at 30), the evidence that CRST encouraged drivers to take "at least" that much break time means, at most, that employees could take additional breaks *out of necessity,* because of fatigue or dangerous driving conditions. That is the conclusion that the district court reached. ER 5 ("Defendant encourages its drivers at their orientations never to drive more than five hours

without taking at least 15-minute breaks. … Drivers are also permitted to take breaks when they feel fatigued."). And CRST does not argue otherwise here. *See* CRST Br. 32 ("CRST regularly instructed drivers to take breaks *when needed*." (emphasis added)). Even assuming that CRST did allow for such breaks, the company still prevented employees from taking most of the break time to which they were entitled and did not have to justify through *need*.

B. As to its requirement that drivers complete their trips at an average speed of at least fifty miles per hour, CRST claims that the requirement was used only "to estimate the amount of time a trip [would] take" and did not "represent CRST's expectation or establish a delivery deadline." CRST Br. 34. On that point, CRST parts ways with the district court, which concluded that the "evidence in the record shows that Defendant has a policy requiring drivers to average a minimum of 50 miles per hour." ER 12, 14. The district court's conclusion is the only conclusion supported by the record. Both the company's orientation materials and its drivers' handbook stressed, with bold text and exclamation points, that "**CRST's total transit time standard is 50 mph!**" ER 274. Drivers were told: "From Pickup to Delivery, you must average **50 mph**, including DOT required Rest Breaks, fuel stops, driver swaps, meals, breaks, showers, weigh stations, traffic, etc." ER 274.

CRST's contention that the fifty-miles-per-hour standard was used as a "trip planning guide" does not contradict that evidence. CRST Br. 12. If drivers were required to maintain a fifty-miles-per-hour speed while driving, they would need to have planned their trips accordingly. Conversely, if employees were required to plan their trips using the fifty-miles-per-hour standard, a reasonable inference is

that they would have been expected to follow those plans. And that is what CRST's evidence shows. (SER 3 ("That's what we're kind of asking them to look at *and be able to do within this time*." (emphasis added)). Again, the evidence establishes, at most, that drivers could depart from the policy when necessary for safety. (SER 4 ("Safety would be the governing aspect of that.")). It does not establish that drivers were free to regularly drive more slowly than the standard required just so they could take all the breaks provided by California law.

Nor is the evidence contradicted by CRST's contention that delivery deadlines could leave a "buffer" that might have allowed a driver traveling at fifty miles per hour to arrive early. (SER 3). The evidence on which CRST relies does not suggest that the availability of such a buffer would permit drivers to intentionally violate the company's fifty-miles-per-hour policy. As CRST says, drivers could take advantage of any buffer to deliver on time in the event of a breakdown or other emergency. CRST Br. 34. Otherwise, drivers could heed CRST's exhortation to "[t]ry to … deliver early!!!" ER 279.

C. Even if CRST's policies had no binding effect at all, they would still show the company's liability. An employer violates the break laws if it "encourage[es] the skipping of legally protected breaks" or "discourage[s]" employees from taking those breaks. *Brinker*, 273 P.3d at 536–37. Even if CRST were right that the policies were just guidelines, they were guidelines that encouraged employees to take far fewer and shorter breaks than the break laws provide. *Encouraging* employees to take one fifteen-minute break every five hours also *discouraged* them from taking the much longer breaks to which they were entitled. Likewise, to require employees to

plan their trips under the fifty-miles-per-hour standard was to encourage them to forgo breaks that could not be accommodated under their required schedules. That is especially true given the lack of any authorization or encouragement to take the breaks required by law and the constant pressure to "keep the truck moving," to make only "necessary stops," and to "try to ... deliver early." ER 13, 112–13 ¶ 6, 117, 120–21, 122, 125, 131 ¶ 26, 273.

Under these facts, CRST's claim that employees could have chosen to take all the breaks required by law is simply not believable. For that to have happened, each employee would have had to independently learn about the law's requirements, even though CRST's own management was ignorant of the law. (FER 2–3) They would have had to conclude that CRST would abide by those requirements, at a time when CRST itself believed that the break requirements were preempted by federal law and inapplicable to its employees. They would have had to ignore CRST's instruction to take one fifteen-minute break every five hours of driving on the assumption that the instruction, despite its mandatory language, was purely advisory. Despite CRST's warnings against unnecessary stops and repeated exhortation to always keep their trucks moving, they would then have had to take additional break time without CRST's authorization—and not just a little more time, but three times more break time than CRST told them to take. For the employees to spend that much time on breaks would also have required them to set aside the trip plans that the company required them to develop and the company's emphatic direction to maintain a fifty-miles-per-hour average speed. Given all that,

CRST cannot plausibly claim that it did not at least discourage employees from taking all the breaks to which they were entitled.

D. At a minimum, the evidence that CRST expressly told employees to take just one fifteen-minute break every five hours and to maintain an average speed of fifty miles per hour conflicts with CRST's characterization of those policies as advisory guidelines that did not discourage additional breaks. The evidence is thus disputed. Moreover, whatever CRST's policies mean, their meaning is the same for all members of the break subclasses. This Court should at the very least reverse the district court's orders granting summary judgment to CRST on Cole's claims and decertifying the break subclasses so that a factfinder can resolve whether the company's policies mean what they say and whether those policies discouraged employees from taking all the breaks to which they were entitled.

IV. The company's failure to record meal breaks or pay for rest breaks are additional reasons for its liability.

Although not necessary to Cole's argument, two additional points—the presumption arising from CRST's failure to record meal breaks and its uncontested failure to pay for rest breaks—further support CRST's liability under the break laws.

A. CRST disputes that its failure to provide meal breaks can be presumed based on its failure to keep records of such breaks. Although the company made no effort to comply with the break laws' recordkeeping requirement, it argues that it nevertheless did keep records of breaks in the form of the driver logs required by the federal hours-of-service rules governing truck drivers. CRST Br. 40–42. The

problem with CRST's reliance on those logs is that the logs were not designed to satisfy California's recordkeeping requirement and the rules are thus not strict about requiring drivers to record off-duty time. Although drivers in certain circumstances "*may* record meal and other routine stops … as off-duty," they are not *required* to do so. *Hours of Service for Commercial Motor Vehicle Drivers; Regulatory Guidance Concerning Off-Duty Time*, 78 Fed. Reg. 41852 (July 12, 2013). As a result, CRST concedes that the logs "do not show whether drivers took or missed breaks on a particular day." ER 258 ¶ 33.

Given that concession, the driver logs cannot satisfy the company's obligation to "keep *accurate* information" about the meal periods taken by its employees. 8 C.C.R. § 11090(7)(A) (emphasis added). Inaccurate records do not further the recordkeeping requirement's purpose of facilitating enforcement and would never trigger an employer's obligation to pay premium wages for missed breaks. *See Brinker*, 273 P.3d at 545 & n.1 (Werdegar, J., concurring). And allowing an employer to rely on such records would "offer … an incentive to avoid its recording duty and a potential windfall" for failure to accurately record breaks—the very harms that the presumption aims to avoid. *Id.*

In the alternative, CRST argues that the presumption does not exist under California law. But although it is true that the California Supreme Court has not yet adopted the presumption, that is not the end of the question. In the absence of a California Supreme Court decision, the court must "predict how the [Court] would decide the issue, using intermediate appellate court decisions, statutes, and

decisions from other jurisdictions as interpretive aids." *Gravquick A/S v. Trimble Navigation Int'l, Ltd.*, 323 F.3d 1219, 1222 (9th Cir. 2003).

Here, the best evidence of how the California Supreme Court would decide the issue is the concurring opinion in *Brinker*. 273 P.3d 513 at 544 (Werdegar, J., concurring). As the concurrence points out, the presumption is already established in lower-court decisions in California. *See id.* at 545 & n.1. It is supported by the opinion of the DLSE, *id.*, an authority that the Court considers highly persuasive. *Id.* at 529 n.11. It is essential to effective enforcement of the break laws and accomplishment of their remedial objectives. *Id.* at 545. And it is analogous to the federal rule shifting the burden of proof to employers who fail to comply with the record-keeping requirement of the Fair Labor Standards Act. *Id.* at 545 n.1 (Werdegar, J., concurring) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686–88 (1946)).

For the reasons the concurring opinion identifies, the California Supreme Court would likely adopt the presumption if directly faced with the question. Recognizing that, lower courts in California have continued to apply the presumption. *See, e.g.*, *Safeway, Inc. v. Superior Court,* 238 Cal. App. 4th 1138, 1160 (Ct. App. 2015). CRST identifies no contrary authorities and suggests no reasons why the Court might reach a different result.

Finally, CRST argues that applying the presumption on a class-wide basis would violate the Rules Enabling Act, 28 U.S.C. § 2072(b), by depriving it of its right to "contest liability with respect to individual class members." CRST Br. 45. That argument was rejected by the U.S. Supreme Court in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2016). *Tyson Foods* held that the use of representative

evidence was permissible in a class action under the Fair Labor Standards Act where the employer had failed to keep the time records the law required. *Id.* at 1042–44. Like CRST here, the defendant argued that to allow employees to establish liability with such evidence would deprive it of the "ability to litigate its defenses to individual claims." *Id.* at 1046. The Court disagreed. The permissibility of an evidentiary rule, it held, "turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." *Id.* at 1046. Because representative evidence was permissible in individual actions, the Court held that it must be permissible in class actions too. *Id.* at 1046.

Likewise, because the presumption arising from an employer's failure to keep records would be available in an individual case, it "cannot be deemed improper merely because the claim is brought on behalf of a class." *Id. Tyson Foods* makes clear that it is CRST's position, not Cole's, that would "ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge … any substantive right.'" *Id.* (quoting 28 U.S.C. § 2072(b)).

B. CRST argues that this Court should not consider the undisputed fact that it never paid employees for rest breaks because Cole did not include it in his complaint. CRST Br. 46. But pointing out that CRST never paid for rest breaks is not the same as raising a new "unpled wage payment claim." *Id.* To be clear, Cole's only claim related to rest breaks is the one in the complaint—that CRST failed to provide the rest breaks required by California Labor Code § 226.7 and "applicable IWC Wage Orders." ER 365 ¶ 40. But under the view of the law that

CRST is pressing, the fact that the company did not *prevent* employees from taking rest breaks satisfied its statutory obligation to *provide* those breaks. In responding to that argument, it is necessary for Cole to point out that any rest breaks so provided would not satisfy all of the law's requirements—in particular, the requirement that rest breaks must be paid. *See* Cal. Labor Code § 226.7(d); 8 C.C.R. § 11090(12)(B).

There is nothing unfair about allowing Cole to make that point. The argument should be no more surprising to CRST than an argument, for example, that the meal breaks it provided were only twenty-five minutes long instead of the required thirty. What *is* unfair is dismissing a plaintiff's rest break claim on the ground that the employer complied with the break laws without allowing the plaintiff to point out that the employer did not, in fact, comply.

V. Questions regarding the evidence and method for determining when drivers were in California are best left to the district court.

CRST's remaining argument is that decertification of the break subclasses was appropriate because, although the subclasses' claims are limited to work in California, "Cole presented no evidence or method for determining when he or other over-the-road drivers left or entered the state on their way to or from destinations around the country." CRST Br. 57. Actually, Cole's expert in the district court explained the evidence and method for doing just that. (FER 10). Briefly, the evidence showed that each CRST truck is equipped with a GPS device that tracks and automatically transmits the truck's location to CRST, and that the company routinely uses that data to calculate the miles traveled by the truck in each state. (FER 5). Based in part on that evidence, Cole's expert submitted a "trial

roadmap" explaining how the CRST employees entitled to damages under California law could be identified and how their damages could be efficiently calculated. (FER 7–23).

Although this Court may affirm for any reason supported by the record, any issues surrounding the GPS evidence, Cole's expert, or the trial roadmap do not call for resolution based on the single paragraph of argument in CRST's brief. "[T]o determine in the first instance whether or not existence of a ground [for denial of class action status] is to be found in the record" would mean that this court "would have to deal with subsidiary questions requiring resolution of factual disputes or exercise of discretion judicial actions which are not appropriately a part of the appellate function." *Inda v. United Air Lines, Inc.*, 565 F.2d 554, 563 (9th Cir. 1977). Moreover, although CRST disputed the conclusions of Cole's expert in the district court, the court did not reach CRST's arguments and the company does not advance them here. In the absence of either a district court decision or appellate briefing on which to decide the issue, any remaining objections that CRST may have to Cole's evidence are best left to resolution by the district court on remand. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 499 (9th Cir. 2011) (remanding an issue that was neither adequately briefed nor decided by the district court).

CONCLUSION

This Court should reverse the district court's denial of partial summary judgment to the meal- and rest-break subclasses and its grant of summary judgment to CRST on the meal- and rest-break claims. Because the district court

granted summary judgment to CRST on Cole's Unfair Competition Law claim only because it was derivative of his meal- and rest-break claims, ER 22–23, the Court should also reverse the grant of summary judgment on that claim. Finally, the Court should reverse the court's decertification of the break subclasses.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,999 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Baskerville font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2018, I electronically filed this brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

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