IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JESSICA GESSELE, ASHLEY ORTIZ, NICOLE GESSELE, TRICIA TETRAULT, and CHRISTINA MAULDIN, on behalf of themselves and all others similarly situated,	**3:14-CV-01092-BR**
Plaintiffs,	**OPINION AND ORDER**
v.	
JACK IN THE BOX, INC., a corporation of Delaware,	
Defendant.	

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BROWN, Judge.

This matter comes before the Court on Plaintiffs' Motion (#126) for Rule 23(b)(3) Class Certification. For the reasons that follow, the Court **GRANTS in part** and **DENIES in part** Plaintiffs' Motion.

BACKGROUND

Prior to September 30, 2011, Defendant Jack in the Box, Inc., owned and operated several restaurants in Oregon. From May 2006 through September 2011 Defendant sold its Oregon restaurant to various franchise operators as follows:

May 1, 2006:	six stores
March 29, 2010:	21 stores
March 7, 2011:	13 stores
September 30, 2011:	three stores

After September 30, 2011, Defendant did not own or operate any stores in Oregon and did not have any Oregon employees. The last Jack in the Box location at which any of the named Plaintiffs worked was sold to Northwest Group, Inc. (NWG) on March 29, 2010.

Plaintiffs were employed by Defendant in its Oregon restaurants at various times. Plaintiffs received their final paychecks from Defendant on the following dates:

Tricia Tetrault:	July 11, 2008
Ashley Ortiz:	December 26, 2008
Nicole Gessele:	March 20, 2009
Jessica Gessele:	November 23, 2009
Christina Mauldin:	March 30, 2010

On August 13, 2010, Jessica Gessele, Ashley Ortiz, Nicole

Gessele, and Tricia Tetrault, on behalf of all those similarly situated, filed a putative class-action Complaint (*Gessele I*, Case No. 3:10-CV-00960-ST)[1] in this Court against Jack in the Box for violation of the minimum-wage and overtime provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*, and various Oregon wage-and-hour laws. *Gessele I* was assigned to Magistrate Judge Janice M. Stewart.

On May 16, 2011, Jessica Gessele, Ashley Ortiz, Nicole Gessele, and Tricia Tetrault filed a First Amended Complaint in *Gessele I* in which they added Christina Mauldin as a named Plaintiff.

On March 20, 2012, Jessica Gessele, Ashley Ortiz, Nicole Gessele, Tricia Tetrault, and Christina Mauldin filed a Second Amended Complaint in *Gessele I* in which they alleged Defendant (1) failed to pay minimum wages in violation of the FLSA, (2) failed to pay overtime wages in violation of the FLSA, (3) failed to pay minimum wages in violation of Oregon Revised Statutes § 653.025, (4) failed to pay overtime wages in violation of Oregon Revised Statutes § 653.261, (5) failed to pay all wages due after termination of Plaintiffs' employment in violation of Oregon Revised Statutes § 652.140, (6) deducted unauthorized amounts from Plaintiffs' paychecks in violation of Oregon Revised

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[1] In *Gessele I* Ashley Ortiz proceeded as Ashley Gessele and Christina Mauldin proceeded as Christina Luchau.

Statutes § 652.610, and (7) failed to pay all wages when due as required by Oregon Revised Statutes § 652.120.

On August 13, 2012, Jessica Gessele, Ashley Ortiz, Nicole Gessele, Tricia Tetrault, and Christina Mauldin filed a Motion to Certify Oregon Rule 23(b)(3) Classes and Alternative Motions to Either Certify Hybrid FLSA Classes or Certify FLSA 216(b) Collectives in *Gessele I*.

On December 13, 2012, Jessica Gessele, Ashley Ortiz, Nicole Gessele, Tricia Tetrault, and Christina Mauldin filed a Motion for Leave to File Third Amended Complaint in *Gessele I*. On January 7, 2013, Magistrate Judge Stewart denied the Motion on the grounds of undue delay and prejudice.

On January 28, 2013, Magistrate Judge Stewart issued Findings and Recommendation in which she recommended granting in part and denying in part the Motion to Certify. Specifically, Magistrate Judge Stewart recommended conditional certification of the proposed FLSA Workers Benefit Fund and Shoe Collectives and Subcollectives under § 216(b) and certification of the proposed Rule 23(b)(3) Oregon Workers Benefit Fund and Shoe Classes and Subclasses. Magistrate Judge Stewart recommended denying certification of the proposed FLSA Break Collective and the Rule 23(b)(3) Break Classes and Subclasses.

On April 1, 2013, Judge Haggerty entered an Order adopting the January 28, 2013, Findings and Recommendation; conditionally

certifying Plaintiffs' proposed FLSA Workers' Benefit Fund and Shoe Collectives and Subcollectives under § 216(b); certifying Plaintiffs' proposed Rule 23(b)(3) Oregon Workers Benefit Fund and Shoe Classes and Subclasses; and denying certification of the FLSA Break Collective and the Rule 23(b)(3) Break Classes and Subclasses.

On May 7, 2013, Defendant filed a Motion for Summary Judgment in *Gessele I* as to all of the claims of Jessica Gessele, Ashley Ortiz, Nicole Gessele, Tricia Tetrault, and Christina Mauldin on the grounds that their FLSA claims were barred by the statute of limitations and that this court may not exercise supplemental jurisdiction over Plaintiffs' state-law claims.

On June 26, 2013, *Gessele I* was reassigned to this Court.

On November 5, 2013, Jason Diaz filed a Consent to Join Law Suit in *Gessele I*. Diaz, however, did not become a named Plaintiff in *Gessele I*.

On March 19, 2014, this Court issued an Opinion and Order in *Gessele I* in which it granted Defendant's Motion for Summary Judgment on the ground that Jessica Gessele, Ashley Ortiz, Nicole Gessele, Tricia Tetrault, and Christina Mauldin were required to file written consents with the Court to commence their FLSA collective action, but they failed to file those written consent forms timely. The Court, therefore, concluded it never acquired jurisdiction over the FLSA claims of Jessica Gessele, Ashley

Ortiz, Nicole Gessele, Tricia Tetrault, and Christina Mauldin, and, as a result, the Court could not exercise supplemental jurisdiction over their state-law claims. The Court also concluded Jessica Gessele, Ashley Ortiz, Nicole Gessele, Tricia Tetrault, and Christina Mauldin did not file written consents within the applicable limitations period; neither equitable tolling nor equitable estoppel applied; and, therefore, their FLSA claims were barred by the applicable statute of limitations. The Court dismissed the FLSA claims of Jessica Gessele, Ashley Ortiz, Nicole Gessele, Tricia Tetrault, and Christina Mauldin with prejudice and dismissed their state-law claims without prejudice.

On April 16, 2014, Jessica Gessele, Ashley Ortiz, Nicole Gessele, Tricia Tetrault, and Christina Mauldin filed in *Gessele I* an unopposed Motion to Amend/Correct in which they moved the Court to amend its March 19, 2014, Opinion and Order to dismiss their FLSA claims without prejudice on the ground that the Court lacked jurisdiction over those claims.

On May 15, 2014, the Court granted the Motion to Amend/Correct in *Gessele I* and issued an Amended Opinion and Order in which it granted Defendant's Motion for Summary Judgment on the ground that Jessica Gessele, Ashley Ortiz, Nicole Gessele, Tricia Tetrault, and Christina Mauldin failed to timely file written consent forms as required by the FLSA. The Court,

therefore, never acquired jurisdiction over Jessica Gessele, Ashley Ortiz, Nicole Gessele, Tricia Tetrault, and Christina Mauldin's FLSA claims, and, as a result, the Court could not exercise supplemental jurisdiction over their state-law claims. Accordingly, on May 15, 2014, the Court entered a Judgment dismissing the entire matter without prejudice.

On June 10, 2014, Jessica Gessele, Ashley Ortiz, Nicole Gessele, Tricia Tetrault, Christina Mauldin, and Jason Diaz filed a putative class action against Jack in the Box in Multnomah County Circuit Court (*Gessele II*) in which they alleged claims for violation of Oregon's wage-and-hour laws, violation of the FLSA, breach of fiduciary duty, and equitable and quasi-contractual claims for return of money.

On July 9, 2014, Defendant removed *Gessele II* to this Court on the ground of federal-question jurisdiction based on Plaintiffs' FLSA claims and/or jurisdiction under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d)(2).

On August 8, 2014, Plaintiffs filed a Motion to Remand Case to State Court on the grounds that (1) issue preclusion/ collateral estoppel barred litigation of *Gessele II* in this Court; (2) if issue preclusion did not bar litigation, the "law of the case" barred litigation in this Court; and (3) judicial estoppel barred litigation of *Gessele II* in this Court even if neither issue preclusion nor law of the case barred such

litigation.

On October 17, 2014, the Court entered an Opinion and Order in *Gessele II* in which it granted in part and denied in part Plaintiffs' Motion to Remand. The Court concluded (1) although issue preclusion barred relitigation as to whether the Court had jurisdiction to hear the FLSA claims of Jessica Gessele, Ashley Ortiz, Nicole Gessele, Tricia Tetrault, and Christina Mauldin, it did not bar litigation of Diaz's FLSA claims against Defendant brought for the first time in *Gessele II*; (2) relitigation of this Court's jurisdiction was not barred by the law of the case; (3) because Diaz was never a named Plaintiff in *Gessele I*, the Court's decision regarding its jurisdiction over that matter did not apply to Diaz, and, therefore, judicial estoppel did not apply nor require remand of Diaz's FLSA claims; (4) judicial estoppel applied to and estopped Defendant from relitigating the issue of this Court's lack of jurisdiction over the FLSA claims of Jessica Gessele, Ashley Ortiz, Nicole Gessele, Tricia Tetrault, and Christina Mauldin; and (5) Defendant did not waive its right to remove *Gessele II* by pursuing dismissal in *Gessele I* on jurisdictional grounds.

On October 29, 2014, Defendant moved for a stay of *Gessele II* pending the outcome of Defendant's appeal of the Court's October 17, 2014, Opinion and Order, which Defendant intended to file in the Ninth Circuit.

On November 6, 2014, the Court granted Defendant's Motion for Stay.

On June 11, 2015, the Ninth Circuit issued a Mandate in which it reversed in part the Court's October 17, 2014, Opinion and Order and remanded the matter to this Court for further proceedings. Specifically, the Ninth Circuit held (1) Defendant is precluded from relitigating "the jurisdictional issues" in *Gessele I* by the doctrine of issue preclusion; (2) because *Gessele I* did not address the timeliness of the new FLSA claims asserted in *Gessele II* nor jurisdiction under CAFA, Defendant "is not precluded from invoking federal jurisdiction" in *Gessele II*; (3) Defendant's position in *Gessele I* that the Court lacked jurisdiction over the FLSA claims asserted in that matter "is not inconsistent with [Defendant's] . . . [assertion in *Gessele II* that] there is no time bar to the newly asserted FLSA claims, or that the district court has CAFA jurisdiction over the state-law claims"; and (4) Defendant did not waive its right to remove *Gessele II* "through its filings in the state court or its prior conduct in this litigation."

On August 31, 2015, Defendant filed a Motion for Partial Summary Judgment in *Gessele II*; Plaintiffs filed a Motion for Partial Summary Judgment (Statute of Limitations) and to Establish Tolling for FLSA Collective Members; and Plaintiffs filed a Motion for Partial Summary Judgment on Jack in the Box's

8th (Private Right Of Action), 9th (Due Process) and 12th (Preemption) Affirmative Defenses. The Court took the Motions under advisement on October 5, 2015.

On December 22, 2015, the Court issued an Order in which it denied as premature (1) those portions of Defendant's Motion for Partial Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment (Statute of Limitations) relating to whether the California putative class members are subject to binding settlements in two California state cases; (2) those portions of Defendant's Motion for Partial Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment (Statute of Limitations) relating to Defendant's status as a joint employer; and (3) Plaintiffs' Motion for Partial Summary Judgment on Jack in the Box's 8th (Private Right Of Action), 9th (Due Process) and 12th (Preemption) Affirmative Defenses as to Defendant's Ninth Affirmative Defense. The Court granted the parties leave to renew those Motions after limited discovery and after the Court issued its Opinion and Order on the remaining portions of the pending Motions.

On February 16, 2016, the Court heard oral argument on those portions of the pending Motions for Partial Summary Judgment that it did not address in its December 22, 2015, Opinion and Order.

On March 10, 2016, the Court issued an Opinion and Order in which it granted Defendant's Motion for Partial Summary Judgment;

denied Plaintiffs' Motion for Partial Summary Judgment (Statute of Limitations) and to Establish Tolling; and granted in part and denied in part Plaintiff's Motion for Partial Summary Judgment on Jack in the Box's 8th (Private Right Of Action), 9th (Due Process) and 12th (Preemption) Affirmative Defenses. Specifically, the Court (1) granted Plaintiffs' Motion for Partial Summary Judgment as to Defendant's Eighth Affirmative Defense and dismissed that Defense with prejudice; (2) granted Plaintiffs' Motion for Partial Summary Judgment as to Defendant's Twelfth Affirmative Defense as to those portions of Plaintiffs' Seventh and Eighth Claims that are preempted by the FLSA or Oregon's wage-and-hour laws as set out in the March 10, 2016, Opinion and Order; and (3) denied in part Plaintiffs' Motion for Partial Summary Judgment as to Defendant's Twelfth Affirmative Defense as to those portions of Plaintiff's Seventh and Eighth Claims that are not preempted by the FLSA or Oregon's wage-and-hour laws as set out in the March 10, 2016, Opinion and Order. In summary, the Court's rulings had the following effect:

(1) This matter would go forward as to named Plaintiffs' state wage-and-hour claims; Jason Diaz's FLSA claims; and named Plaintiffs' FLSA claims from March 29, 2010, to the present, and

(2) There were not any motions pending for certification of a class or collective action or any motions pending as

to Defendant's status as a joint employer, as to the effect of the California settlement, or as to whether Diaz's FLSA claims are subject to mandatory arbitration.

On March 24, 2016, the parties filed a Joint Statement in which they agreed the following claims remained in this matter: (1) Plaintiffs' state wage-and-hour claims; (2) Plaintiffs' Seventh and Eighth Claims to the extent that they do not overlap with state or federal statutory claims; (3) Diaz's FLSA claims; and (4) Plaintiffs' FLSA claims from March 29, 2010, to the present.

On July 7, 2016, the Court issued an Order in which it granted Defendant leave to file dispositive motions as to

(1) All FLSA claims from March 29, 2010, to the present on the ground that Defendant is not a joint employer of franchisee employees;

(2) All FLSA claims asserted by Jason Diaz on the ground that Diaz failed to file a written consent under the FLSA;

(3) All of Diaz's state and federal claims on the grounds that (a) he is required to arbitrate those claims and (b) Diaz failed to pursue his claims in arbitration after his individual lawsuit (3:11-cv-0006-JO) was dismissed; and

(4) All FLSA claims of any California putative class members subject to the class settlements in the cases of *Frederick v. Jack-In-The-Box, Inc.*, No. RIC50144, and *Olvera v. Jack In The Box, Inc.*, No. 37-2013-00072707.

On September 1, 2016, Defendant filed the Motion for Partial Summary Judgment permitted by the Court in its July 7, 2016, Order.

On December 13, 2016, the Court issued an Opinion and Order in which it granted in part and denied in part Defendant's Motion as follows:

1. granted Defendant's Motion as to Plaintiffs' FLSA claims from March 29, 2010, on the ground that Defendant was not Plaintiffs' joint employer during that period;
2. granted Defendant's Motion as to Diaz's state and federal claims on the ground that he is required to arbitrate his claims under the terms of the arbitration agreement; and
3. denied as premature Defendant's Motion as to the FLSA claims of California putative class members subject to the class settlements in the *Frederick* and *Olvera* cases.

The Court directed the parties to file a Joint Status Report

identifying the claims and Plaintiffs that remained in this matter.

On February 2, 2017, the Court held a status conference and directed Plaintiffs to file their Motion to Certify Rule 23(b)(3) Classes by March 3, 2017.

On March 2, 2017, Plaintiffs filed a Motion for Rule 23(b)(3) Class Certification. The Court took the Motion under advisement on April 18, 2017.

STANDARDS

"Parties seeking class certification bear the burden of demonstrating that they have met each of the four requirements of Federal Rule of Civil Procedure 23(a) and at least one of the requirements of Rule 23(b)." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979-80 (9th Cir. 2011)(citation omitted). Rule 23(a) requires a party seeking class certification to establish:

> (1) that the class is so large that joinder of all members is impracticable (numerosity); (2) that there are one or more questions of law or fact common to the class (commonality); (3) that the named parties' claims are typical of the class (typicality); and (4) that the class representatives will fairly and adequately protect the interests of other members of the class (adequacy of representation).

Id. at 980 (citing Fed. R. Civ. P. 23(a)). Plaintiffs here seek class certification pursuant to Rule 23(b)(3), which provides a "class action may be maintained if Rule 23(a) is satisfied" and

"the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule — that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)(emphasis in original). Certification of a class "is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* (quotation omitted).

DISCUSSION

Plaintiffs move to certify four classes:

(1) The Workers' Benefit Fund (WBF) Class, which consists of all Oregon employees of stores operated by Defendant who had a WBF assessment deducted from their paychecks between August 13, 2004, and February 10, 2012;[2]

[2] As noted, Defendant sold the last of its Oregon locations to a franchisee on September 30, 2011. Accordingly, as of September 30, 2011, Defendant did not have any employees in Oregon. Thus, it is questionable whether any putative Plaintiff for any of the proposed classes will be able to recover damages

(2) The Shoe Class, which consists of Defendant's Oregon employees who had a deduction from their paychecks to pay for slip-resistant shoes on or after August 13, 2004;

(3) The Franchise Transfer Class, which consists of Defendant's Oregon employees at the time that Defendant's stores were transferred to franchise operators on or after August 13, 2004; and

(4) The Unpaid Break Class, which consists of Defendant's Oregon employees who "clocked out for one or more breaks for which they were not paid (between 20 and 30 minutes in Kronos or time codes LBU, SMB, SGM, SGMPR or GAP in Jack's Timekeeping), during any workweek the regular payday for which was on or after August 13, 2004."

I. Defendant's Overarching Objections

Defendant asserts as to all of Plaintiffs' proposed classes that class counsel is inadequate; class representatives cannot fairly and adequately protect the interests of other members of the class; and, therefore, the requirements of Federal Rule of Civil Procedure 23 have not been met.

A. Class Counsel

In her January 28, 2013, Findings and Recommendation

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after that period.

Magistrate Judge Stewart found class counsel, Jon Egan, to be adequate to satisfy the requirements of Rule 23(a). As noted, on April 1, 2013, Judge Haggerty adopted Magistrate Judge Stewart's Findings and Recommendation, including her finding as to the adequacy of Jon Egan as class counsel.

Defendant, however, contends "the backdrop for this inquiry has changed significantly since Judge Stewart analyzed adequacy of counsel in January 2013." Specifically, Defendant notes the Court dismissed *Gessele I* in 2014 because Plaintiffs failed to file written consent forms within the limitations period as required by the FLSA. This Court also held in March 2016 that Plaintiffs' pre-franchise FLSA claims were not "saved" by the filing of *Gessele II* in state court. Defendant asserts the "repercussions of Plaintiffs' failure to commence their FLSA claims within the statute of limitations has been dramatic. That failure by counsel, in combination with this Court's rejection of Plaintiffs' joint-employer theory, has not only eliminated the named Plaintiffs' FLSA claims but all claims asserted outside Oregon."

Plaintiffs, on the other hand, assert none of the Rule 23 class members suffered any prejudice to their Oregon wage-and-hour claims as a result of the Court's dismissal of the FLSA claims. In addition, Plaintiffs' counsel asserted several arguments on summary judgment in support of his good-faith

understanding of the law as to written consent to join an FLSA action and as to the joint-employer theory. Although this Court disagreed with Plaintiffs' arguments at summary judgment, the Court does not find Plaintiffs' counsel is inadequate under Rule 23(a)(4).

Under Rule 23(a)(4) "the Court's inquiry is directed to whether counsel are (i) 'qualified, experienced and generally able to conduct the litigation' and (ii) will 'vigorously prosecute the interests of the class.'" *Stitt v. San Francisco Muni. Transp. Agency*, 2014 WL 1760623, at *7 (N.D. Cal. May 2, 2014)(quoting Rule 23(a)(4)). "These standards are generally met with members of the bar in good standing typically deemed qualified and competent to represent a class absent evidence to the contrary." *Id.* (citation omitted). Jon Egan is a member of the Oregon bar in good standing and has experience in wage-and-hour law.

The Court, therefore, concludes on this record that Plaintiffs' counsel is adequate and satisfies the requirements of Rule 23(a)(4).

B. Named Plaintiffs

Defendant also generally asserts the named Plaintiffs are inadequate because they cannot fairly and adequately protect the interests of other members of the class.

The Ninth Circuit has held constitutional due-process

concerns require absent class members must be afforded adequate representation by representative class plaintiffs before the entry of a judgment that binds them. *Hanlon v. Edwards*, 150 F.3d 1011, 1020 (9th Cir. 1998). The adequacy of representation inquiry raises two questions: "(1) [D]o the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id.* (citation omitted). The Ninth Circuit has held "the adequacy-of-representation requirement is satisfied as long as one of the class representatives is an adequate class representative." *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F3d 1152, 1162 n.2 (9th Cir. 2001).

Defendant contends some of the named Plaintiffs acted as managers at various times during their employment with Defendant. In that capacity they decided which employees went on breaks, when they went on breaks, and how long their breaks would last, and they were tasked with obtaining employees' permission to deduct the purchase price of slip-resistant shoes from their paychecks. According to Defendant, therefore, the named Plaintiffs' interests are adverse to employees in the putative classes who did not act as managers at any time. Defendant relies on *Hernandez v. Chipotle Mexican Grill, Inc.*, 118 Cal. Rptr. 3d 110 (Cal. App. 2010), to support its position.

In *Hernandez* the court denied class certification in part on the ground that some of the employees moved in and out of managerial responsibilities even though all employees shared the same job title. The court concluded under those specific circumstances that there was "substantial evidence of conflicts of interest among the putative class members" because "some putative class members may accuse other putative class members of violating their meal and rest period rights." 118 Cal. Rptr. 3d at 122. The court found the defendant had "demonstrated antagonism of so substantial a degree as to defeat the purpose of class certification." *Id.* at 122-23. The California Supreme Court remanded the matter and directed the court to review its order in light of developing California law. *Hernandez v. Chipotle Mexican Grill, Inc.*, 143 Cal. Rptr. 3d 526 (2012). On remand the court upheld the denial of class certification in part because it concluded "individual issues predominate[d]." *Hernandez v. Chipotle Mexican Grill, Inc.*, 146 Cal. Rptr. 3d 424, 436-37 (Cal. App. 2012). The court noted in order to determine whether the defendant violated California's break laws, the court would have to consider the violations on a "restaurant-by-restaurant" and "supervisor-by-supervisor" basis because it was impossible to tell merely from employees' job titles whether they acted as managers or had managerial duties and responsibilities. *Id.* at 436-37.

The facts of this case differ from those in *Hernandez*. For example, the record reflects Defendant's employees, unlike those in *Hernandez*, have different job titles depending on their responsibilities. The record reflects only team leaders and management employees are tasked with ensuring that other employees authorize payroll deductions when ordering slip-resistant shoes and/or take 30-minute meal breaks. Thus, in contrast to *Hernandez*, individualized management issues can be identified via job title, and, if necessary, the Court can divide the classes into subclasses related to management authority.

In addition, as noted, the Ninth Circuit has held "the adequacy-of-representation requirement is satisfied as long as *one* of the class representatives is an adequate class representative." *Las Vegas Sands, Inc.*, 244 F.3d at 1162 n.2 (emphasis added). Defendant does not assert and the record does not reflect all of the named Plaintiffs acted in a managerial capacity.

The Court concludes on this record that Plaintiffs are adequate class representatives pursuant to Rule 23(b)(4).

II. WBF Class

As noted, Plaintiffs seek to certify a WBF Class which consists of all Oregon employees of stores operated by Defendant who had a WBF assessment deducted from a paycheck between

August 13, 2004, and February 10, 2012.[3]

A. WBF background

The WBF is a program that provides various benefits to workers injured on the job in Oregon since 1966. The program is funded by an assessment paid by every employer and employee to the State of Oregon based on the number of hours worked by the employee. The WBF assessment rate is determined by the State of Oregon, which mandates "[e]mployers pay at least half . . . of th[e] assessment, and deduct no more than half from workers' wages." Decl. of Jon Egan, Ex. 7 at 1. For example, in 2003 the WBF assessment rate was 3.6¢ per hour. Egan Decl., Ex. 6 at 1. Employers, therefore, were required to pay to the WBF at least 1.8¢ for every hour that their employees worked during 2003. Although employers were permitted to pay more than 1.8¢, they were not permitted to withhold from their employees' paychecks more than 1.8¢ for every hour that their employees worked during 2003.

Every year Oregon publishes a new WBF assessment rate and mails the information about the rate and a written notice to all employers registered with the Oregon Secretary of State. The record reflects Oregon mailed the WBF assessment rate notices to

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[3] As noted, it is questionable whether any putative Plaintiff for any of the proposed classes will be able to recover damages for the period after September 30, 2011, the date on which Defendant transferred the last of its Oregon stores to franchisees.

Defendant and Defendant does not dispute it received the notices.

B. Discussion

The record reflects Oregon's WBF assessment rate was less than 3.6¢ every year from 2004 to 2012 . *See* Egan Decl., Ex. 6 at 1. Plaintiffs allege Defendant, nevertheless, continued to withhold 1.8¢ from its employees' paychecks and to pay that money to WBF despite the decrease in the WBF assessment rate. For example, in 2007 the WBF assessment rate was 2.8¢ for every hour that Oregon employees worked. Defendant continued to withhold 1.8¢ from its Oregon employees' paychecks and to pay that money to the WBF even though Defendant paid only 1.0¢ to the WBF as the employer portion for every hour that its employees worked.

Defendant concedes it "over-withheld" assessments for the WBF from its Oregon employees from August 13, 2004, through February 10, 2012, and, as a result, it "does not challenge certification of Plaintiff's WBF class under Rule 23(a)(2) on substantive grounds." As noted, however, Defendant only objects to the WBF Class on the grounds of the adequacy of class counsel and class representatives.

The Court already has concluded both class counsel and named Plaintiffs are adequate and satisfy the requirements of Rule 23(b)(4). The Court, therefore, also concludes Defendant's objections do not provide a sufficient basis to decline to

certify the WBF Class.

On this record the Court concludes Plaintiffs have satisfied the requirements of Rule 23 with respect to the WBF Class, that the questions of law or fact common to WBF Class members predominate over any questions affecting only individual members, and that a class action is the best way to adjudicate the controversy fairly and efficiently. Accordingly, the Court grants Plaintiffs' Motion to Certify the WBF Class.

III. The Shoe Class

As noted, Plaintiffs also seek to certify the Shoe Class, which consists of Defendant's Oregon employees who had deductions from their paychecks on or after August 13, 2004, to pay for slip-resistant shoes.

A. Shoe-Class Background

During the period at issue Defendant required employees to wear closed-toe, slip-resistant shoes. Beginning in early 2003 Defendant required its employees to purchase slip-resistant shoes from Shoes for Crews. Defendant's stores also have slip guards that employees can wear over their shoes when they forget to wear slip-resistant shoes or while they are waiting for their slip-resistant shoes to arrive. Employees are not supposed to wear the shoe guards "forever" and must eventually purchase their own shoes. Employees may either buy the slip-resistant shoes directly from Shoes for Crews or buy them through a payroll

deduction. When employees buy the shoes through a payroll deduction, Defendant purchases the shoes from Shoes for Crews and deducts the price of the shoes from the employee's wages over four paychecks. If an employee was terminated before February 2012 with an unpaid balance for shoes, Defendant deducted the entire balance from the employee's final paycheck. If an employee was terminated after February 2012 with a balance due for shoes, Defendant deducted only one of the remaining payments rather than the entire balance from the employee's final paycheck.

Shoes for Crews provided Defendant with a $2 rebate for every pair of shoes sold to one of Defendant's employees. Defendant did not pass on the $2 rebate to its employees; *i.e.*, Defendant did not reduce by $2 the amount it deducted from its employees' paychecks for shoes. Shoes for Crews also provided Defendant with an indemnity program under which it reimbursed Defendant for medical expenses incurred by an employee as a result of a slip and fall while the employee was wearing Shoes for Crews slip-resistant shoes.

When Defendant first began requiring employees to purchase slip-resistant shoes from Shoes for Crews, employees did so through a paper order form that included an authorization that stated:

> Shoes for Crews ® Voluntary Shoe Purchase Agreement
>
> I do hereby authorize the Company to deduct the balance owed on my shoe purchase following the Payroll Department's receipt of the Shoes for Crews invoice. If I terminate my position prior to the Shoes for Crews purchase being paid in full, I authorize the Company to deduct the unpaid balance from my final paycheck. I understand it is my responsibility to return shoes to the Shoes for Crews warehouse if a shoe size change or refund is desired. THIS IS A VOLUNTARY PROGRAM AND IS NOT A CONDITION OF EMPLOYMENT WITH THE COMPANY.

Decl. of Douglas Parker, Ex. M at 19. Plaintiffs assert Defendant's Human Resources Project Manager Susan Pettijohn testified at deposition that at some point in the "early to mid-2000[s]" Defendant "went to a phone ordering process where the acknowledgment [to deduct the cost of Shoes for Crews from the employee's paycheck] was more verbal. . . . So [Defendant] wasn't able to track that as well." The Court notes the pages and testimony of Pettijohn that Plaintiffs rely on are not part of the record. Defendant, however, did not seek to file a sur-reply to contest the testimony of Pettijohn relied on by Plaintiffs. In addition, Defendant submitted other portions of Pettijohn's deposition testimony in which she stated telephone ordering of Shoes for Crews "became an option," and the telephone ordering option did not include the authorization statement that was part of the paper order system. The Court, therefore, accepts as true for purposes of analysis of the class certification that Defendant began to permit telephone ordering

of Shoes for Crews, the telephone ordering system did not specifically include the authorization statement, and Defendant could not track employee authorizations to deduct payments from employees' paychecks on orders for shoes made over the telephone. Moreover, Defendant destroyed various company records when Defendant sold its Oregon stores to franchisees, including the shoe-deduction authorization forms. One of Defendant's former Area Coaches, Jeffrey Tennant, testified at deposition that "[n]othing is around from [Defendant] at any of the [Oregon stores]. All paperwork has been destroyed from the franchise transition." Parker Decl., Ex. J at 3. Tennant testified Defendant's paper files were not digitized and sent to corporate. "On the day of the transitions we were directed to ensure that company things from the store were thrown out, as far as email programs and such, wiping those clean, to make sure there was no information that should be given to the franchisee." *Id.* Thus, there is not any paper or electronic record of employees' authorizations for shoe-purchase deductions.

B. The Law

Plaintiffs contend Defendant deducted the amounts for Plaintiffs' slip-resistant shoes from Plaintiffs' paychecks in violation of Oregon law.

Oregon Revised Statutes § 652.610(3)(b) provides in relevant part: "An employer may not withhold, deduct or divert

any portion of an employee's wages unless . . . [t]he deductions are voluntarily authorized in writing by the employee, are for the employee's benefit and are recorded in the employer's books."

C. Discussion

As noted, Plaintiffs seek to certify a class of Defendant's Oregon employees who had deductions from their paychecks on or after August 13, 2004, to pay for slip-resistant shoes. Specifically, Plaintiffs assert they did not authorize Defendant in writing to deduct any of their wages for shoes purchased through telephone orders, at one point Defendant destroyed whatever written authorizations for written shoe orders that it had, and any deductions for such orders were for the benefit of Defendant because Defendant received a $2 rebate from Shoes for Crews as well as accident indemnification.

Defendant does not dispute the proposed Shoe Class satisfies the numerosity requirement of Rule 23(a). Defendant, however, asserts Plaintiffs have not established either the commonality or typicality requirements of Rule 23(a) as to the Shoe Class. Specifically, Defendant asserts in order to determine liability for shoe deductions, the Court would have to conduct an individualized inquiry for each employee as to whether: (1) the employee authorized shoe deductions using the shoe order form, (2) the deductions were for the employee's benefit (which involves a series of additional individual

inquiries), and (3) the deductions took an employee below minimum wage or the required overtime rate.

The Court notes whether individual employees authorized shoe deductions using the shoe order form is an affirmative defense that applies to the merits of individual putative Plaintiffs' claims. Plaintiffs' allegations of spoilation by Defendant as to shoe-authorization forms also apply to the merits of Plaintiffs' claim, and, therefore, such inquiries are not directly relevant to class-certification analysis.

Defendant also asserts the Court should not certify the Shoe Class on the ground that Plaintiffs' shoe claim fails as a matter of law because Oregon Revised Statutes § 652.610(3)(b) permits deductions as long as they "are for the employee's benefit." The parties spend considerable time disputing whether § 652.610(3)(b) must be interpreted to permit deductions only if they are solely for the employee's benefit or if it also permits deductions that are for the benefit of both the employer and the employee. Again, this issue applies to the merits of Plaintiffs' shoe claims and, therefore, is not directly relevant to the class-certification analysis. Nevertheless, the Court notes the interpretation of "for the employee's benefit" is one that is common among all class members and typical of the Shoe Class. In any event, after the parties have litigated the merits of these issues, the Court can revise the Shoe Class as necessary.

Defendant asserts the Court should not certify the Shoe Class because the Court would have to conduct an individualized damages inquiry as to whether the deductions resulted in an employee being paid below minimum wage or the required overtime rate. Courts, however, have held individualized damages calculations are insufficient to deny class certification when the damages inquiry would be relatively straightforward and based, at least in part, on common evidence. *See, e.g., Phelps v. 3PD, Inc.*, 261 F.R.D. 548, 562 (D. Or. 2009)("While the damages inquiry will be individualized, this will likely be a fairly straightforward computation once liability is established and the amount of deductions calculated. Overall, the common issues on the O.R.S. 652.150 claim predominate over the individual issues."). Here the Court concludes the individualized damages calculations will be relatively straightforward computations based on employees' hours worked, wages earned, and shoe deductions taken.

On this record the Court concludes Plaintiffs have satisfied the requirements of Rule 23(a) with respect to the Shoe Class, that the questions of law or fact common to Shoe Class members predominate over any questions that only affect individual members, and that a class action is the best way to adjudicate the controversy fairly and efficiently. Accordingly, the Court grants Plaintiffs' Motion to Certify the Shoe Class.

IV. Franchise Transfer Class

Plaintiffs seek certification of the Franchise Transfer Class, which consists of Defendant's Oregon employees at the time that Defendant's stores were transferred to franchise operators on or after August 13, 2004.

A. Franchise Transfer Class Background

Defendant transferred over 50 stores from Defendant's ownership to franchise ownership from 2006 through September 30, 2011. Specifically, Defendant franchised six stores on May 1, 2006; 21 stores on March 29, 2010; 13 stores on March 7, 2011; and three stores on September 30, 2011. As noted, Defendant did not have any employees in Oregon after the final franchise transfer on September 30, 2011.

B. Discussion

The parties do not dispute the fact that when a business transfers to new ownership under Oregon law, the transfer effectively terminates all employees' employment under the old employer for purposes of Oregon's wage-and-hour laws. *See, e.g., Wilson v. Smurfit Newsprint Corp.*, 197 Or. App. 648, 656 (2005)("In short, all plaintiffs were terminated for purposes of O.R.S. 652.140(1) and O.R.S. 652.150(3) when defendant sold its Newberg facility to SP.").

Oregon Revised Statutes § 652.140(1) provides:

> When an employer discharges an employee or when employment is terminated by mutual agreement, all

> wages earned and unpaid at the time of the discharge or termination become due and payable not later than the end of the first business day after the discharge or termination.

Plaintiffs assert 31 employees did not receive their paychecks by the end of the first business day after Defendant transferred its operations to franchisees (May 1, 2006) as mandated by § 652.140(1). Similarly, 400 employees did not receive their paychecks by the end of the first business day after Defendant transferred its operations to franchisees on March 29, 2010.[4] Plaintiffs assert the Franchise Transfer Class meets the requirements of Rule 23(a) because the same violation of § 652.140(1) was perpetrated on each member of the proposed class and named Plaintiff Christina Mauldin was among the employees who was paid late after the March 2010 transfer. According to Plaintiffs, therefore, this class meets the commonality and typicality requirements of Rule 23.

Defendant, however, contends the Court should not certify this class because it had a "practice" to pay employees their final wages within one day of separation of their employment due to the transfer of stores to franchisees. Thus, there is not any evidence that Defendant had a policy or practice

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[4] Plaintiffs assert Defendant has failed to produce employee payroll records after February 2011, and, therefore, Plaintiffs are unable to state with any degree of certainty how many (if any) employees were not timely paid after the franchise transfers in March and September 2011.

of paying employees late, and, therefore, individual questions of fact predominate. For example, Defendant asserts the fact-finder will have to examine whether an employee voluntarily quit before the transfer and, if so, whether the employee provided notice to Defendant.[5]

Plaintiffs note in their Reply that Defendant mischaracterizes the class proposed by Plaintiffs. Specifically, Plaintiffs limit the proposed Franchise Transfer Class to individuals "who were employed at Oregon stores operated by [Defendant] *at the time those stores were transferred* to franchise operators." Emphasis added. Thus, by definition, employees who quit prior to the transfer are not members of the proposed class, and the fact-finder will not have to engage in an individualized evaluation of whether an employee quit or was terminated.

On this record the Court concludes Plaintiffs have satisfied the requirements of Rule 23(a) with respect to the Franchise Transfer Class, that the questions of law or fact common to Franchise Transfer Class members predominate over any questions affecting only individual members, and that a class action is the best way to adjudicate the controversy fairly and

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[5] Oregon Revised Statutes § 652.140(2) provides different timelines from those set out in § 652.140(1) for payment of final wages when an employee quits with or without notice to the employer.

efficiently. Accordingly, the Court grants Plaintiffs' Motion to Certify the Franchise Transfer Class.

V. Unpaid Break Class

Plaintiffs seek to certify an Unpaid Break Class that consists of Defendant's Oregon employees who "clocked out for one or more breaks for which they were not paid (between 20 and 30 minutes in Kronos or time codes LBU, SMB, SGM, SGMPR or GAP in Jack's Timekeeping), during any workweek the regular payday for which was on or after August 13, 2004."

A. Unpaid Break Class Background

It is undisputed that Defendant has a company-wide meal-and-break policy. The Oregon-specific portion of Defendant's policy provided employees were to receive a "30 minute meal break for shifts of 6 hours or more." Parker Decl., Ex. AA at 2-3. In addition, Defendant's Oregon employees signed On-Duty Meal Policy Agreements in which employees "agree[d] with [Defendant] that on those sporadic occasions when the nature of my work prevents me from being relieved of all duties during my required meal period, I shall be paid for those meal periods." Egan Decl., Ex. 30. It is also undisputed that on occasion Plaintiffs had meal breaks of less than 30 minutes. The record reflects restaurant managers were authorized to ask employees to come back early from their meal periods if the restaurant was "really busy" and that Plaintiffs expected to be paid for their

meal breaks when they did not take the entire 30-minute meal break due to being asked to return to work by a manager.

At the beginning of the class period (August 13, 2004), Defendant used the timekeeping system Kronos. The Kronos system consisted of wall-mounted keypunch pads that fed employee key-punch information into the on-site office computer running the Kronos software. In order to log a time punch into the Kronos system, the employee entered his employee number using the keypad and pressed "enter." The system did not provide a way for employees to indicate whether they were punching in or out of work. Kronos also did not contain a way for employees to indicate whether they were punching in or out from a shift, a rest break, or a meal period. The Kronos system simply logged the time of an employee's various punches, and Defendant's computers compared the punches to each other to determine the reason for each punch. Under the Kronos system each employee should have an even number of punches each day that he worked because each "in" punch should be paired with an "out" punch. If there were an odd number of punches for an employee, the computer would produce an error message and a manager had to fix it manually before the computer would accept the employee's punches for the day.

Defendant selected the Kronos system program that used punch-in and punch-out calculation rules that did not pay

employees for any breaks longer than 20 minutes regardless of whether the break was a rest break (which Oregon law does not require to be paid) or a meal period and regardless whether an employee was called back to work from a meal break by a manager. For example, one of Defendant's People and Organizational Effectiveness Managers, Shelly Rohlfs, testified at deposition:

> Q: Are there breaks for which [Defendant] pays its employees and breaks for which it doesn't pay its employees?
>
> A: Yes.
>
> Q: Okay. Where is the dividing line between those two?
>
> A: So we have break that - anything less than 20 minutes is paid, anything more than 20 minutes is not.
>
> Q: What about 20 on the dot?
>
> A: 20 minutes or - or less is -is paid.
>
> * * *
>
> Q: Okay. Is . . . 30 minutes the companywide standard for how long managers are supposed to give for a . . . meal period . . . ?
>
> A: 30 minutes is the practice. We give - we call a half-an-hour [meal] break.
>
> * * *
>
> Q: But if for some reason someone isn't able to take their full 30 minutes, let's say that their manager asks them to come back afer 28 because of the press of business or for whatever other reason. . . . Your understanding is that it's unpaid as long as it's more than 20 minutes?

A: That's my understanding.

* * *

Q: So what's your understanding of [Defendant's 30-minute meal policy]?

* * *

A: Okay. So if . . . somebody is sent on a meal period and they were unable to finish their meal period, then they would be paid for that time that they were out. So if it was, "I sent you on your half-an-hour break and you were only able to take 15 minutes," you'd be paid for that time. Wouldn't count as not paid.

Q: I see. But if . . . to keep with your example, if you sent me on the half-an-hour break and I took 22 minutes, that wouldn't be paid; is that right?

A: Based on the way it calculates today, yes.

Q: Okay. And to your understanding, that's the way it's always been calculated?

A: Yes.

Egan Decl., Ex. 28 at 2-4, 7-8. Thus, Defendant did not pay employees for interrupted meal breaks that were more than 20 minutes and less than 30 minutes. As noted, under the Kronos system there was not any way for an employee or manager to indicate whether a break of more than 20 minutes but less than 30 minutes was an interrupted meal period or a long rest break. Defendant also did not keep any records from which it could be determined whether an in-and-out punch combination that was more than 20 minutes but less than 30 minutes was an interrupted meal

period or a longer rest break.

At some point Defendant switched to a different timekeeping system called Jack's Timekeeping, which uses a software clock integrated into the point-of-sale cash registers used by employees. Under the Jack's Timekeeping system employees must indicate when they are punching in or out whether the punch is for the beginning or the end of a shift, the beginning or the end of a rest break, or the beginning or the end of a meal period. Unlike the Kronos system, which relied on the time between two punches to decide whether an employee was on a meal period or rest break, Jack's Timekeeping relies on employees' designations when they punch in or out. In addition, under Jack's Timekeeping if an employee presses the "End Meal" button less than 30 minutes after the employee has selected "Start Meal," an error message pops up noting the meal period was not long enough and a supervisor must override the system to enter the shorter meal period. Thus, employees cannot clock in early from a 30-minute meal period without a supervisor override.

After Defendant imports all of its employees' time punches from Jack's Timekeeping into its computers in San Diego, Defendant's system breaks up the employees' punched time into various time codes that determine whether the time constitutes a paid break. These time codes include BRK (break), LBP (long break paid), and LBU (long break unpaid). Under Jack's

Timekeeping rest periods of 20 minutes or less are coded as BRK or LBP and are paid. The portion of any rest period that goes over 20 minutes is coded LBU, and the portion of the period over 20 minutes is not paid. Meal periods under Jack's Timekeeping are unpaid regardless of length. When an employee clocks out using the "Start Meal" button, the resulting break is coded as SGM (short graveyard meal), SGMPR (short graveyard meal payroll reallocation), or SMB (short meal break) and is unpaid regardless of its length.[6]

B. Oregon Unpaid Break Law

Oregon Administrative Rule 839-020-0050(2) provides in relevant part:

> [E]very employer shall provide to each employee, for each work period of not less than six or more than eight hours, a meal period of not less than 30 continuous minutes during which the employee is relieved of all duties. . . . [I]f an employee is not relieved of all duties for 30 continuous minutes during the meal period, the employer must pay the employee for the entire 30-minute meal period.

Defendant asserts in its Response that "recent jurisprudence in this Court . . . makes clear that an employer does not violate the regulation if it has 'provided' the requisite breaks regardless of whether the employee has always taken the full 30-minute break." Defendant relies on *Marshall v.*

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[6] Plaintiffs note in their Motion that unpaid meal breaks longer than 30 minutes are not at issue in this action.

Pollin Hotels II, LLC, in which Magistrate Judge Papak noted:

> Finally, regarding the fifth factor, Oregon law requires employers to provide employees a continuous 30-minute break for each work period over six hours. Or. Admin. R. 839-020-0050. However, this court has previously construed that rule as merely requiring employers to provide 30-minute breaks; it does not require employers to police their employees' breaks. *Weir v. Joly*, No. 3:10-CV-898-HZ, 2011 WL 6778764, at *7 (D. Or. Dec. 23, 2011). As the *Weir* court explained:
>
> > Weir also seems to take the position that an employer must pay an employee for a break of less than 30 minutes, no matter the reason. For instance, if the employee took a 29-minute meal break and happened to clock in a minute before 30 minutes had passed, the employer must pay the employee for the entire 30 minutes. Although Oregon courts have not spoken on this issue, I do not agree with Weir's interpretation of the rule. The rule requires that employers "provide" a meal break of 30 continuous minutes during which the employee is relieved of all duties. OAR 839-020-0050. To require an employer to police when an employee clocks in and out would be an unreasonable burden on the employer. The outcome would be an employee who could take a proper meal break, but then demand that it [be] paid simply by clocking in early.
>
> *Weir*, 2011 WL 6778764, at *7 (footnote omitted).

170 F. Supp. 3d 1290, 1300 (D. Or. 2016).

Plaintiffs, however, assert Oregon Administrative Rules require employers to be responsible for monitoring employees' breaks and meal periods contrary to the court's conclusion in *Marshall*. Specifically, Rule 839-020-0040(2) provides: "Work requested or required is considered work time. Work not

requested, but suffered or permitted is considered work time." Similarly, Rule 839-020-0040(4) provides: "It is the duty of the employer to exercise control and see that the work is not performed if it does not want the work to be performed. The mere promulgation of a policy against such work is not enough." In *Dusan-Speck v. St. Charles Health System, Inc.*, Chief Judge Ann Aiken summarized Rule 839-020-0040 as requiring "[i]f an employer does not want work performed, then it is responsible for ensuring that such work is not performed; it cannot sit back and accept the benefits of an employee's 'work time' without providing compensation." No. 6:13-CV-00358-AA, 2013 WL 4083617, at *2 (D. Or. Aug. 9, 2013).

As noted, the Oregon courts have not addressed this issue, and interpretation of the law is unsettled in this district.

C. Discussion

Defendant asserts the Court should not certify Plaintiffs' Unpaid Break Class because there is not any evidence of a company-wide policy or practice of calling employees back from meal periods early, and any deviation from Defendant's stated 30-minute meal-break policy is a highly individualized situation requiring the Court to answer numerous individualized questions, including:

- Whether that employee was compensated appropriately for each meal period;

- Whether the employee mistakenly clocked back in early following his or her meal period;
- Whether the employee who mistakenly clocked back in early was actually provided an opportunity to be relieved of all duties for 30 minutes;
- Why the employee may have clocked back in early;
- Whether the employee failed to clock out for a meal period but was actually provided an opportunity to be relieved of all duties for 30 minutes;
- Whether the employee had knowledge of Defendant's break policies;
- Whether a supervisor had to override/edit an employee's early clock in;
- If a supervisor did perform an override/edit, whether that action converted a short meal period into a paid rest break; and
- Whether anything was done by a supervisor to account for a short meal period, including giving the employee an additional break later in the shift.

Defendant asserts these circumstances reflect the existence of individualized issues that predominate over issues common to the class. For example, Ashley Ortiz had three breaks that were between 20 and 30 minutes in 445 work days. Parker Decl., Ex. Y at 1. Ortiz testified she did not remember how many times her manager called her back from a meal period, but she recalled it was generally due to a "big rush of customers." Parker Decl., Ex. A at 5. Ortiz testified she could not remember whether she was allowed to make up the time that she missed in her 30-minute meal period when she was called back early. Jessica Gessele had

41 breaks between 20 and 30 minutes in 663 work days. Parker Decl., Ex. Y at 1. All but two of those breaks were between 27 and 29 minutes. Jessica Gessele testified she would cut her meal period short when she was a team leader if she saw another employee struggling. Parker Decl., Ex. B at 9. Jessica Gessele testified when she was a team leader, she was not aware whether employees on her shift failed to record a 30-minute meal period and she did not ask her employees to take less than 30-minute meal periods. *Id.* Jessica Gessele did not recall why any specific meal period was less than 30 minutes. Nicole Gessele had 14 breaks between 20 and 30 minutes in 544 work days. Parker Decl., Ex. Y at 2. Nicole Gessele testified she would occasionally return voluntarily from her meal period before 30 minutes had passed because the restaurant was "swamped," and occasionally her manager asked her to return from her meal period before 30 minutes. Parker Decl., Ex. C at 3. Nicole Gessele stated she made sure members of her team took meal periods when she was a team leader. She did not, however, track whether her team members punched back in at 28 or 29 minutes because she "wasn't supervising their punch-in and punch-out." Parker Decl., Ex. C at 4. Christina Mauldin had 16 breaks between 20 and 30 minutes in 309 work days. Parker Decl., Ex. Y at 1. Mauldin testified she could not remember why she took a break between 20 and 30 minutes on any particular date, but if she clocked back in

before 30 minutes on a meal period it was because she was the only manager on the floor and had to go back if there was a rush, because she was called back by her manager, or because she saw other employees needed help. Parker Decl., Ex. D at 20. Mauldin also testified she would talk to any employee or their team leader when she was a manager if the employee was taking less than 30-minute meal breaks. *Id.* Jason Diaz, who worked for Defendant in Oregon but who is no longer a named Plaintiff, testified he did not recall a time when he failed to get a full 30-minute meal period or was required to work while on a meal break. Parker Decl., Ex. BB at 6-7. Diaz also testified he did not remember any employees complaining to him that they did not receive meal periods. *Id.* at 8. All of the named Plaintiffs and Diaz testified if they forgot to punch in or out from a break, their managers would often point it out and adjust the system to reflect their times in and out.

The record reflects even among the named Plaintiffs that (1) there were various reasons why they may have taken breaks between 20 and 30 minutes, (2) they could not remember specifically why any particular break was between 20 and 30 minutes, and (3) Defendant's supervisors were trained to try to ensure that their employees received 30-minute meal periods. Thus, for each break between 20 and 30 minutes the fact-finder must examine the reason the employee clocked back in between 20

and 30 minutes to determine whether the break at issue was a shortened meal break, a longer rest break, or an accidental failure to punch back in from a break timely; whether the employee reported the discrepancy to his or her supervisor; and whether the supervisor attempted to correct the issue.

On this record the Court concludes the individualized inquiry exceeds the common class questions and resolution of the unpaid break claims is not amenable to efficient classwide resolution. The Court, therefore, concludes Plaintiffs have not established sufficient commonality and typicality to support certification of the Unpaid Break Class.

Accordingly, the Court denies Plaintiffs' Motion to Certify the Unpaid Break Class.

CONCLUSION

For these reasons, the Court **GRANTS in part** and **DENIES in part** Plaintiffs' Motion (#126) for Rule 23(b)(3) Class Certification as follows:

(1) **GRANTS** Motion to Certify the WBF Class,

(2) **GRANTS** Motion to Certify the Shoe Class,

(3) **GRANTS** Motion to Certify the Franchise Transfer Class, and

(4) **DENIES** Plaintiffs' Motion to Certify the Unpaid Break Class.

The Court **DIRECTS** the parties to confer and to file **no later than July 10, 2017**, a Joint Status Report jointly proposing a case-management schedule to advance this case to ultimate resolution. The Court will set a status conference with the parties after receiving and reviewing the Joint Status Report.

IT IS SO ORDERED.

DATED this 12th day of June, 2017.

Anna J. Brown

ANNA J. BROWN
United States District Judge