

1 HONORABLE RICHARD A. JONES
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MICHAEL BRADY, et al.,

11 Plaintiffs,

12 vs.

13 AUTOZONE STORES, INC., and
14 AUTOZONERS LLC,

15 Defendants.
16
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CASE NO. C13-1862 RAJ

ORDER

18 **I. INTRODUCTION**

19 This matter comes before the Court on the parties' submissions regarding the
20 impact of a Washington Supreme Court Advisory Opinion on this Court's Class
21 Certification Order, which denied Plaintiff Michael Brady's ("Mr. Brady" or "Plaintiff")
22 Motion for Class Certification. Dkt. ## 80-85. After consideration of the parties'
23 briefing, the Opinion from the Washington Supreme Court, the record and pleadings in
24 this case, and this Court's previous Orders, this Court declines to amend its prior Class
25 Certification Order. Based on the record before it, the Court finds that Mr. Brady still has
26 not met his burden to show that common issues of law or fact predominate to make class
27 action the superior vehicle.

1 Accordingly the Court will not disturb its prior Order denying class certification.
2 This Order also concludes with a deadline for the parties to issue another joint statement
3 on a schedule for trying Mr. Brady's individual claims.

4 **II. BACKGROUND**

5 In September 2013, Plaintiff Michael Brady filed an Amended Class Action
6 Complaint in state court seeking unpaid wages for meal breaks that Defendants allegedly
7 withheld from employees. Dkt. # 1. In response, Defendants sought removal to a federal
8 venue pursuant to 28 U.S.C. § 1332(d). *Id.* Mr. Brady later moved this Court to certify a
9 class. Dkt. # 23. Mr. Brady moved to certify the following two classes:

10 Class 1: All former and current hourly-paid AutoZone store employees who
11 worked more than five hours in a day but did not receive a meal break within
12 five hours of the start of their shifts, for the period of September 25, 2010, to
the date of the Class Notice.

13 Class 2: All former and current hourly-paid AutoZone store employees who
14 worked more than five hours after the conclusion of a meal break but did not
15 receive a second meal break within five hours after the conclusion of the first
meal break, for the period of December 12, 2009, to the date of the Class
Notice.

16 *Id.* Mr. Brady relied primarily on establishing a classwide basis for liability through the
17 use of certain AutoZone time-card data, which would track whether an employee
18 punched out after a period of five hours. *See, e.g.*, Dkt. # 23 at 10-13. After a thorough
19 review of the relevant law and record before it, the Court concluded that Mr. Brady had
20 failed to carry his burden under Federal Rule of Civil Procedure 23(b)(3) to show that (1)
21 common questions of law and fact predominated over questions affecting individual
22 members, and (2) that a class action was superior to other means to adjudicate the
23 controversy. Dkt. # 62. The Court expressly denied the notion that Washington has
24 adopted a strict liability approach to the taking of meal breaks, as Mr. Brady suggested.
25 *Id.* at 9. In doing so, the Court found that class certification would be inappropriate
26 considering the individuality component and unique fact scenarios associated with each
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1 potential violation of the meal break statute. *Id.* at 11. Accordingly, the Court denied
2 Mr. Brady’s motion for class certification. *Id.*

3 Mr. Brady sought review of this denial in the Ninth Circuit Court of Appeals, but
4 that court would not permit Mr. Brady to appeal the decision. Dkt. ## 63, 67. Instead of
5 moving forward with his individual claims, Mr. Brady moved to certify two questions to
6 the Washington Supreme Court: (1) whether monetary damages are available for
7 violations of WAC 296-126-092; and (2) whether a plaintiff must show the reason for
8 why he did not receive a timely meal break in order to prove a violation of WAC 296-
9 126-092. Dkt. # 68.

10 This Court granted Mr. Brady’s motion to certify in part, but certified two
11 different questions for the Washington Supreme Court:

- 12 1. Is an employer strictly liable under WAC 296-126-092?
- 13 2. If an employer is not strictly liable under WAC 296-126-092, does the
14 employee carry the burden to prove that his employer did not permit the
15 employee an opportunity to take a meaningful break as required by WAC 296-
16 126-092?

17 Dkt. # 73. The Washington Supreme Court ruled that the answer to the first question was
18 “no,” because employees may waive their meal breaks. *Brady v. AutoZone Stores, Inc.*,
19 188 Wn.2d 576, 582 (2017). As to the second question, the Washington Supreme Court
20 stated that “an employee asserting a meal break violation under WAC 296-126-092 can
21 meet his or her prima facie case by providing evidence that he or she did not receive a
22 timely meal break.” *Brady*, 188 Wn.2d at 584. Once this happens, “[t]he employer may
23 then rebut this by showing that in fact no violation occurred or a valid waiver exists.” *Id.*
24 at 584-85.

25 Following the Opinion from the Washington Supreme Court, this Court ordered
26 the parties to file a legal memorandum “addressing the impact, if any,” that the opinion
27 issued by the Washington Supreme Court has on this Court’s Order denying class

1 certification. Dkt. # 80. Both parties submitted a memorandum and reply. Dkt. ## 81-
2 85.¹

3 III. LEGAL STANDARD

4 The court’s decision to certify a class is discretionary. *Vinole v. Countrywide*
5 *Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009). Federal Rule of Civil Procedure 23
6 guides the court’s exercise of discretion. A plaintiff “bears the burden of demonstrating
7 that he has met each of the four requirements of Rule 23(a) and at least one of the [three
8 alternative] requirements of Rule 23(b).” *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d
9 718, 724 (9th Cir. 2007). Rule 23(a) requires a plaintiff to demonstrate that the proposed
10 class is sufficiently numerous, that it presents common issues of fact or law, that it will be
11 led by one or more class representatives with claims typical of the class, and that the class
12 representative will adequately represent the class. *Gen. Tel. Co. of the S.W. v. Falcon*,
13 457 U.S. 147, 161 (1982); Fed. R. Civ. P. 23(a). If a plaintiff satisfies the Rule 23(a)
14 requirements, he must also show that the proposed class action meets one of the three
15 requirements of Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186
16 (9th Cir. 2001). A party seeking class certification must affirmatively demonstrate his
17 compliance with [Rule 23]—that is, he must be prepared to prove that there are in fact
18 sufficiently numerous parties, common questions of law or fact, etc.” *Wal-Mart Stores,*
19 *Inc. v. Dukes*, 564 U.S. 338, 351 (2011); *see also Comcast Corp. v. Behrend*, 569 U.S.
20 27, 33(2013) (requiring the party seeking certification to affirmatively demonstrate
21 compliance with Rule 23 “through evidentiary proof”). While the defendant has the

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23 ¹ The Court notes that Defendants’ submissions are replete with footnoted legal citations, which
24 this Court strongly disfavors. Dkt. ## 81, 85. Footnoted citations serve as an end-run around
25 page limits and formatting requirements dictated by the Local Rules. *See* Local Rules W.D.
26 Wash. LCR 7(e). Moreover, several courts have observed that “citations are highly relevant in a
27 legal brief” and including them in footnotes “makes brief-reading difficult.” *Wichansky v.*
Zowine, No. CV-13-01208-PHX-DGC, 2014 WL 289924, at *1 (D. Ariz. Jan. 24, 2014). Should
Defendants continue in this practice, the Court will disregard any argument or legal citation
contained in footnotes.

1 concern of the Rule 23(b)(3) predominance test is whether ‘adjudication of common
2 issues will help achieve judicial economy.’” *Vinole*, at 944 (quoting *Zinser*, 253 F.3d at
3 1189). Thus, the Court must determine whether resolution of common questions would
4 resolve a “significant aspect” of the class members’ claims such that there is “clear
5 justification” for class treatment. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th
6 Cir. 1998) (citations omitted).

7 **A. Mr. Brady Has Still Failed to Prove Predominance**

8 To meet the predominance requirement, common questions of law and fact must
9 be “a significant aspect of the case . . . [that] can be resolved for all members of the class
10 in a single adjudication.” *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th
11 Cir. 2012) (internal quotations omitted). Brady primarily seeks to show violation of the
12 WAC meal period provision (and thereby class-wide liability) through time-card “punch-
13 in/punch-out” data, which he contends shows a “violation” of the statute each time an
14 employee punched out after the five-hour mark.² The Court is thus tasked with
15 determining whether this data alone is, in light of the opinion of the Washington Supreme
16 Court, sufficient to overcome Plaintiff’s burden of establishing predominance. The Court
17 previously concluded that this evidence was not sufficient, and sees no reason to deviate
18 from its earlier determination.

19 Put simply, the Court still does not believe that the time-card data is a reliable
20 indicator, as Mr. Brady contends, that a particular employee did not “receive” a meal
21 break. As AutoZone notes, the time-card data only shows that a particular employee
22 worked a 5+ hour time block. Because the Washington Supreme Court held that strict
23 liability does not exist under WAC 296-126-092 for any missed meal breaks, the Court

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25 ² Although Mr. Brady previously sought to establish classwide liability through certain
26 AutoZone written policies, this evidence was rejected by this Court, and Brady does not
27 challenge that part of the ruling or address these policies in his current briefing. Dkt. # 62 at 13-
14. Accordingly, this argument seemingly abandoned, the Court will not consider it here.

1 cannot conclude that a 5+ hour time punch is prima facie evidence of a violation. As this
2 Court already observed, the time-card data does not “distinguish between meal breaks
3 taken and not punched, meal breaks not taken at the employee’s discretion, and meal
4 breaks not taken because AutoZone denied the employee a meaningful opportunity.”
5 Dkt. # 62, at 11.

6 AutoZone already presented a plethora of evidence in the form of declarations and
7 other records indicating that there were many reasons why a 5+ hour time block did not
8 adequately indicate that an employee did not receive a meal break. Dkt. # 62 at 11-12.
9 AutoZone submitted dozens of declarations from AutoZone employees verifying that the
10 time-card data would not reflect, for instance, when employees work on personal matters
11 on company time, when employees take paid meal breaks on the clock, or when
12 employees forget to punch out. *See, e.g.*, Dkt. ## 46-1, 46-2, 46-19. Mr. Brady does not
13 address or contest this evidence. Taken as whole, these declarations cast serious doubt
14 into the ability of the AutoZone time-card data alone to indicate that a particular
15 employee did not “receive” a timely meal break simply because of a 5+ hour time punch
16 on their AutoZone record. Plaintiff’s proffered evidence is simply not a reliable indicator
17 of whether a meal break violation occurred, or of which individuals belong in the class.
18 *See, e.g., In re Taco Bell Wage & Hour Actions*, No. 1:07-CV-1314-LJO-DLB, 2012 WL
19 5932833, at *11 (E.D. Cal. Nov. 27, 2012), *report and recommendation adopted sub*
20 *nom. In re Taco Bell Wage & Hour*, No. CV F 07-1314 LJO DLB, 2013 WL 28074 (E.D.
21 Cal. Jan. 2, 2013) (denying class certification based on time-card data because the
22 “likelihood that the records are not accurate reflections of whether rest breaks were taken
23 or not renders ascertainability in the class difficult”).

24 Contrary to Mr. Brady’s assertions, the Washington Supreme Court did not
25 describe what it means to “receive” a timely meal break, or what evidence would show
26 that an employee did not receive such a break. Mr. Brady suggests that the Washington
27 Supreme Court specifically held that “payroll records” alone were sufficient evidence,

1 | when submitted by plaintiffs, to establish that an employee did not receive a timely meal
2 | break. Dkt. # 82 at 7-9. This Court disagrees. The Washington Supreme Court raised
3 | the possibility that payroll records may be used by *defendants* in rebutting a prima facie
4 | claim by plaintiffs. *Brady*, 188 Wn.2d at 584-85 (“The employer may then rebut this
5 | [prima facie] showing by showing that in fact no violation occurred or a valid waiver
6 | exists . . . this should not be an onerous burden on the employer, who is already keeping
7 | track of the employee’s time for payroll purposes.”). The Washington Supreme Court
8 | said nothing about what sort of evidence was appropriate for plaintiffs to uphold their
9 | own burden of production. This Court has already held that the time-card data was not
10 | sufficient to establish predominance, and the Opinion does not address this issue.³ As
11 | this Court predicted in its previous Order, this answer by the Washington Supreme Court
12 | “would not change the Court’s denial of class certification because Mr. Brady has not
13 | met his burden either way with the submitted evidence.” Dkt. # 73 at 4.

14 | The time-card data could theoretically be more persuasive if accompanied by
15 | evidence of a common AutoZone policy, formal or informal, that applied to all class
16 | members and resulted in their respective alleged violations. But Mr. Brady still has not
17 | provided such evidence of a common policy or culture, or adequately alleged its
18 | existence. This Court has already ruled that Mr. Brady “failed to meet his burden of
19 | identifying a common method of proving AutoZone’s liability.” Dkt. # 62 at 11. This
20 | Court has already held that Mr. Brady did not present any evidence of an “unwritten
21 | policy or practice of coercion by AutoZone supervisors encouraging or incentivizing
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23 |
24 | ³ This Court does not necessarily believe that time-card data or payroll records are categorically
25 | incapable of proving that an employee did not receive a timely meal break. It is theoretically
26 | possible that some payroll records do provide reliable indicators as to whether an employee
27 | received a meal break, and these records may be sufficient to uphold plaintiff’s burden of
proving a prima facie violation. However, in this particular case, the specific time-card data
offered by Mr. Brady is insufficient.

1 employees to skip breaks.” *Id.* This continues to be the case. In his briefing, Mr. Brady
2 again fails to allege or provide any common thread linking the smattering of time-card
3 data to any common policy or action by AutoZone. Without this common thread, this
4 Court cannot conclude that common issues of law or fact predominate over what still
5 appears to be a highly individualized inquiry into whether an AutoZone employee
6 properly received a meal break. *See, e.g., Dilts v. Penske Logistics, LLC*, 315 F.R.D. 591
7 (S.D. Cal. 2016) (finding that predominance was not met, with respect to subclass of
8 employees alleging that employer violated California law by failing to provide required
9 rest breaks, where there was no evidence that employer had common policy or practice of
10 denying rest breaks that would support class-wide determination of liability).

11 None of the additional authorities cited by Mr. Brady compel the certification
12 under federal law of a meal break class based solely on the type to time-card data at issue
13 here. Mr. Brady relies heavily on *Tyson Foods, Inc. v. Bouephakeo*, 136 S.Ct. 1036,
14 1048 (2016) in arguing that the time-card data is “the best and most reliable ‘common
15 method’ for establishing liability.” Dkt. # 82 at 8. This case is distinguishable because
16 the plaintiffs in *Tyson Foods* had alleged and proven a common policy with respect to
17 donning and doffing gear applied equally to all class members, and that was the driving
18 force behind the alleged violations, not time-card data alone. *Tyson Foods* 136 S. Ct. at
19 1040. Mr. Brady alleges no such common policy applied to the violations he attributes to
20 AutoZone. Similarly, the other federal authorities Mr. Brady relies on also considered
21 situations there was also evidence and allegations of a “common policy” or practice
22 producing the violations, in addition to any time-based data. *Vaquero v. Ashley Furniture*
23 *Indus., Inc.*, 824 F.3d 1150, 1154 (9th Cir. 2016) (finding that compensation policy
24 applied to entire class acted as common theory of liability); *Torres v. Mercer Canyons*
25 *Inc.*, 835 F.3d 1125, 1135 (9th Cir. 2016) (affirming predominance finding because “the
26 existence of a common policy” would “drive the resolution” of plaintiff’s claims);
27 *Yokoyama v. Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010) (in

1 annuity-based consumer protection action, finding common theory of liability based on
2 uniform written offering materials which controlled every purchase). Without a common
3 practice, policy, or action by AutoZone that applies classwide, the Court would be forced
4 to engage in a separate inquiry for nearly every potential class member to determine if the
5 5+ hour time punches at issue were truly meal break violations, or whether they were
6 excused because of late punch-outs, waiver, or another valid defense. This approach is
7 not mandated by any federal authority.⁴

8 Ultimately, Mr. Brady does not cite any authority that would compel this Court to
9 certify the meal break class based solely on the proffered time-card data. This Court has
10 already held that the time-card data was merely “conjecture” and “conclusion,” which is
11 not enough to establish predominance. Dkt. # 73 at 4. Nothing in Mr. Brady’s
12 submission or the Washington Supreme Court Opinion changes this. Even under the test
13 put forth by the Washington Supreme Court, this Court does not believe that the time-
14 card data in this case, by itself, establish a classwide basis for liability by supporting a
15 finding that an employee did not receive a timely meal break.

16 1. Individualized inquiries as to waiver would overwhelm common questions

17 The Court also notes that proposed class members would be subject to affirmative
18 defenses that turn on individualized factual allegations. “Affirmative defenses should be
19 considered in making class certification decisions.” *Waste Mgmt Holdings, Inc. v.*
20 *Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000) (quoting *Castano v. American Tobacco Co.*,

22 ⁴ Mr. Brady also relies on *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946)
23 *superseded by statute on other grounds*, Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61
24 Stat. 84. Dkt. # 82 at 9. The Court believes *Mt. Clemens* is of little importance to the question of
25 whether to certify Mr. Brady’s proposed class. *Mt. Clemens* was not a class action case and did
26 not address the issue of predominance for class certification. The plaintiffs in *Mt. Clemens* were
27 demanding unpaid compensation under the Fair Labor Standards Act for hours worked, but not
properly recorded by their employer. *Id.* at 688. In that case the employers were not permitted
to hide behind inadequate records as mitigating proof the employees did not work the hours they
alleged. *Id.* *Mt. Clemens* presented a factual and legal scenario distinct from the present case,
and concerned itself with damages, but provided no test for determining initial liability. *Id.*

1 84 F.3d 734, 744 (5th Cir. 1996) (“[A] court must understand the claims, defenses,
2 relevant facts, and applicable substantive law in order to make a meaningful
3 determination of the certification issues”). While it is true that the mere existence of
4 affirmative defenses “does not compel a finding that individual issues predominate over
5 common ones,” *Williams v. Sinclair*, 529 F.2d 1383, 1388 (9th Cir. 1975), such defenses
6 cannot be ignored when making a predominance decision. “[A] class cannot be certified
7 on the premise that [the defendant] will not be entitled to litigate its . . . defenses to
8 individual claims.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011). “The
9 potentially individualized nature of affirmative defenses requires that courts consider
10 such defenses in undertaking the predominance analysis.” *See* Newberg on Class Actions
11 § 4:55 (5th ed. 2017). Moreover, as the Supreme Court has ruled, individualized damage
12 issues can defeat predominance if they “overwhelm questions common to the class.” *See*
13 *Comcast Corp. v. Behrend*, 569 U.S. 27, 34, 133 S. Ct. 1426, 1433, 185 L. Ed. 2d 515
14 (2013) (reversing certification of class because lower court failed to consider damages
15 arguments, as in this case “[q]uestions of individual damage calculations will inevitably
16 overwhelm questions common to the class”).

17 As the Washington Supreme Court has made clear, employers are entitled to rebut
18 claims of violations under WAC 296-126-092 with evidence for the affirmative defense
19 that the individual waived their break. *Brady*, 188 Wn.2d at 584-85. Here, the record
20 indicates that dozens, if not hundreds, of AutoZone employees waived their meal breaks
21 in various ways. AutoZone has submitted a multitude of evidence and dozens of
22 declarations that these waivers, which could be written, verbal, or implied, were
23 commonplace in AutoZone stores throughout the State of Washington. Dkt. ## 46-5 to
24 46-19. AutoZone also submitted evidence that the waiver practices varied between
25 different AutoZone stores, and were sometimes tailored to individual AutoZone
26 employees based on the employee’s request. *See, e.g.*, Dkt. # 45 at 8-9. This defense
27 does not simply go to damages; it goes to the underlying liability under WAC 296-126-

1 092. In order to ascertain classwide composition and liability, the Court would thus be
2 forced to engage in an individualized inquiry for thousands of employees to determine if
3 a WAC 296-126-092 violation occurred, whether the individual is properly included in
4 the class, and the extent of their damages. The presence of these individualized inquiries
5 to determine liability and then damages would make a class proceeding unmanageable.

6 Ultimately, although the Washington Supreme Court opinion does not directly
7 mirror this Court's Order, there is nothing in that Opinion that changes the deficiencies in
8 the evidence submitted by Mr. Brady in support of certification. The Opinion did not
9 relieve Mr. Brady of his burden under federal law to prove, with adequate evidence, the
10 predominance of common issues of fact or law over individual differences. The time-
11 card data that Mr. Brady relies upon is still not individual or common proof that each
12 employee did not receive a meal break, and is subject to individual proof of waiver for
13 each employee and each alleged violation. The Court finds that Mr. Brady still has not
14 met his burden on predominance with the evidence he provided.

15 **B. Mr. Brady Has Still Failed to Prove Superiority**

16 The Court also finds that Mr. Brady has still failed on the superiority prong. "If
17 each class member has to litigate numerous and substantial separate issues to establish his
18 or her right to recover individually, a class action is not superior." *Zinser v. Accufix*
19 *Research Institute, Inc.*, 253 F.3d 1180, 1192 (9th Cir. 2001) (internal quotation marks
20 omitted). As discussed above, the determination of whether or not the putative class
21 members either missed, waived, or did not receive their meal breaks would require
22 individual inquiries for almost every individual claimed to be in the class. The Court is
23 still not convinced, as was Plaintiff's burden, that the class action is a superior vehicle by
24 which to litigate these numerous individual inquiries. The Court's earlier decision that
25 Mr. Brady failed to carry his burden under the superiority prong of Rule 23(b)(3) stands.

1 **V. CONCLUSION**

2 For the reasons stated above, this Court declines to disturb its earlier ruling
3 denying Mr. Brady’s Motion for Class Certification. Based on the record before it, the
4 Court finds that Mr. Brady still has not met his burden to show that common issues of
5 law or fact predominate to make class action the superior vehicle.

6 In the Court’s previous Class Certification Order, the Court instructed the parties
7 to meet and confer to discuss a schedule for trying Mr. Brady’s individual claims. Dkt. #
8 62 at 15. Because Mr. Brady then proceeded to appeal this Court’s Order and request a
9 stay of Mr. Brady’s individual claims, this joint submission never occurred in earnest.
10 Accordingly, the Court again orders the parties to meet and confer regarding a schedule
11 for trying Mr. Brady’s individual claims, and to file a joint statement no later than two
12 weeks from the date of this Order.

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14 DATED this 23rd day of July, 2018.

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18 The Honorable Richard A. Jones
19 United States District Judge
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