**PROPOSED TENTATIVE**

Plaintiffs Juan Navas, Martha Lopez Herrera, Benjamin Hernandez Ramos, Maria Zamora, Maria Julia Laines Diaz, and Carmelo Martinez (collectively, plaintiffs) filed a first amended complaint (FAC) on September 18, 2017, against Fresh Venture Foods, LLC (defendant or Fresh Venture) and Marisol Garcia Sandoval dba Central City Labor. On September 18, 2017, plaintiffs amended their wage and hour complaint to add a cause of action under the Private Attorneys General Act ("PAGA"). The FAC alleges: (1) failure to pay minimum wages; (2) failure to pay overtime wages; (3) failure to provide meal periods or pay additional wages in lieu; (4) failure to provide rest periods or pay additional wages in lieu; (5) failure to pay wages of terminated or resigned employees; (6) failure to itemize wage statements; (7) failure to indemnify employees; (8) violation of unfair competition law; and (9) PAGA claim. Plaintiffs include class action allegations in their complaint. Defendants have answered. The procedural and background history of this matter has been detailed in previous orders, and will not be recounted here. Jury trial is now scheduled for August 18, 2025. A CMC is scheduled for May 14, 2025.

On calendar is plaintiffs' joint motion for summary adjudication. They ask the court to enter judgment in their favor as the ninth cause of for civil penalties under the Private Attorney General Act based on meal violations. They rely on Justice Werdegar's concurring opinion in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, in which Justice Werdegar opined that when an employer does not record that its employee has taken a meal break, a rebuttable presumption should arise that a meal break was not provided. "If an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided. This is consistent with the policy underlying the meal period recording requirement, which was inserted in the IWC's various wage orders to permit enforcement. [Citation.]" (*Id*. at p. 1053.) In 2021, our high court adopted Justice Werdegar's discussion of this rebuttable presumption "in full." (*Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 75 ["we now adopt her discussion of the rebuttable presumption in full"]; see also *Estrada v. Royalty Carpet Mills, Inc.* (2024) 15 Cal.5th 582, 618 [seeming to allow rebuttable presumption for meal break violations in the PAGA context, as well as employer's ability to rebut through representative testimony, surveys, and statistical analyses, along with other types of evidence]; and fn. 37 ["time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations at summary judgment"].)

Specifically, plaintiffs, in reliance on the rebuttable assumption established by *Donohue* and progeny, contend that summary adjudication as to ninth cause of action is appropriate because there are 125,838 meal period violations that appear from the face of the timekeeping and payroll records involving aggrieved employees during the appropriate PAGA period (or at least up until March 2023), as identified by plaintiffs' database expert. It is undisputed (Issue

No. 2 of plaintiffs' separate statement) that the relevant time frame for the PAGA cause of action is June 15, 2016, to the present. It is further undisputed that defendant Fresh Venture has produced all timekeeping and payroll records through July 2024 (Issue No. 3 of plaintiff's separate statement).

Specifically, per plaintiff attorney Stan Mallison's declaration, plaintiffs' expert "has conducted a database analysis of all timekeeping any payroll records for the aggrieved employees covered by PAGA, to count up the number of meal period violations appearing in the Defendants' records. He has also counted up the number of violations of the named Plaintiff during the longer four-year statute of limitations corresponding to their individual claims. That is, Plaintiffs' expert has identified all meal period-eligible shifts (e.g., over 5 hours) which show meal period violations (i.e., short, late, and missing) on the face of the timekeeping cards. To the extent any violations were remedied, they were removed from total count. Plaintiffs' expert also de-duplicated the violations – that is, a meal period that is both short and late is only counted as one violation. The end result of that analysis shows 125,720 unremedied meal period violations suffered by aggrieved employees during the PAGA period, and an additional 78 unremedied meal period violations suffered by the named Plaintiff prior to the PAGA period during the time period relevant to their individual claims."

Attached as Exhibit 21 to plaintiffs' evidentiary proffer is the declaration from expert Aaron Woolfson, which also includes Exhibits A to K. Mr. Woolfson indicates that he relied on payroll data between 2016 and March 13, 2023 (see fn. 7 of declaration).[1] Based upon his review of this data, Mr. Woolfson makes the following conclusions in support of the rebuttable presumption per *Donohue:*

- There were 400,098 shifts worked by 1,521 employee between June 15, 2016, and March 13, 2023;
- Out of 400,098 shifts worked by 1,521 employees during this same period, there were 392,066 shifts worked by 1,492 employees who worked more than 5 hours.
- There 378,797 shifts of greater than 6 hours;
- There were 86,003 shifts greater than 10 hours;
- There were 139,781 shifts greater than 5 hours with no recorded meal or shortened or late meal, which was reduced to 125,760 shifts based appropriate reductions (this was 32.08% of all shifts and involved 1,259 employees.
- There were 130,527 shifts of greater than 6 hours with no recorded meal, or a recorded meal but it was short or involved a late meal, or a shift over 10 hours

[1] Plaintiffs on May 2, 2025, refiled Mr. Mallison's declaration (as well as all 505 pages of his evidentiary proffer), explaining that "Exhibits 1, 2, 4, and 6 to the [original] Declaration of Stan S. Mallison were blank and unviewable by Defense Counsel, and also became aware that Plaintiff's exhibit 21 to the Declaration of Stan S. Mallison did not include the declarant's signature." The court has relied on this proffer when addressing the merits of and opposition to the summary adjudication motion.

> without a second meal, with the number reduced to 117,064 after appropriate reductions made (this constituted 30.90% of shifts and involved 1,222 employees).

Defendant Fresh Venture opposes the motion on a number of different grounds. First, it claims the motion is untimely. Second it advances 42 evidentiary objections to plaintiff's evidentiary proffer (including Nos. 35 to 42 to Mr. Woolfson's and Mr. Mallison's declarations). Third, it claims that it has presented sufficient evidence to create a triable issue of material fact to rebut the presumption contemplated by *Donohue*, as it has presented the following evidence: 1) Fresh Venture's lawful written meal period policy and training procedures; 2) statistical evidence from plaintiff's expert Kevin Taylor establishing "very high rates of meal period compliance" in Fresh Venture's timekeeping data; 3) "hundreds" of sample written meal period waivers (out of more than 11,000), documenting when employees missed meal periods, they did so due to their own voluntary choice; and 4) declaration testimony from "dozens" of Fresh Venture employees attesting that they were provided with the opportunity to take meal periods and were never asked or forced to skip meal periods," as well as testimony "from named Plaintiffs themselves that they were responsible for deciding when to take their meal breaks and/or for how long."

Plaintiffs filed a reply on May 2, 2025, along with a response separate statement. Plaintiffs reiterate that they have presented sufficient evidence to trigger the rebuttable presumption contemplated by *Donohue*. Further, they contend that defendants have failed to present competent rebuttal evidence, arguing 1) that general polices are insufficient to counter the rebuttable presumption; 2) that defendants have presented only "anecdotal declarations" (described as a "small number of cherry-picked declarations from employees claiming they generally received their meal periods"), which is insufficient; and 3) that defendant's expert critique by Kevin Taylor of Aaron Woolfson's methodology/conclusions is insufficient because he "offers no affirmative statistical analysis disproving the meal period violations facially evident from Defendant's own records . . . ." In short, according to plaintiffs, defendants have provided no statistical, scientific, or systemic rebuttal evidence, offering only "isolated anecdotes, generalized policies, and methodological nit-picks of Plaintiff's expert."

Defendants Marisol Garcia Sandoval, dba Central City Labor, has filed under separate cover a joinder in Fresh Venture's opposition. They present no additional arguments. All briefing has been considered.

The court will first comment on plaintiffs' response separate statement and then examine defendant's evidentiary objections to plaintiff's evidentiary proffer. The court will thereafter summarize the legal principles that frame the inquiry, including more recent federal cases that provide guidance in how to address he *Donahue* presumption, and then apply those rules to the issues before the court. The court will conclude with a summary of its conclusions.

*A) Plaintiff's Response Separate Statement*

Plaintiffs have filed with their reply a document labelled "Response to Defendant Fresh Venture Food, LLC's Separate Statement," addressing the new issues of claimed undisputed fact in defendant's response separate statement (i.e., Defendant's Issue Nos. 1 to 33.) For the record, nothing in the Rules of Court or the summary judgment statutory scheme authorizes this document. (See, e.g., *Nazir v. United Airlines, Inc.* (2009) 176 Cal.App.4th 242, 249, 252 ["There is no provision in the statute" for a reply separate statement ].) However, as plaintiff in the separate statement has not submitted new evidence, limiting its references to evidence previously in the record, and to the extent the response may be helpful to the court in addressing the issues, it will be examined. (See, e.g., *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316 [filing a reply separate statement citing new evidence not filed or cited in moving party's original separate statement is unauthorized and raises significant due process concerns]; see Code Civ. Proc., § 437c, subd. (b)(4) [the reply shall not include any new evidentiary matter, additional facts, or separate statement submitted with the reply not presented in the moving papers or opposing papers," effective Jan. 1, 2025].)

*B) Defendant's Evidentiary Objections*

Defendant has advanced 42 evidentiary objections to plaintiff's evidentiary proffer.[2] The court will address the merits of the objections associated with each challenged declaration, as follows:

- Evidentiary Objection Nos. 1 to 3 to certain statements made in plaintiff Benjamin Hernandez's declaration. The court overrules all three objections, as no statements are introduced for the truth of the matter stated (in fact, any statements seem admissible for the nonhearsay purpose based on their impact on declarant); the declarant indicates he has personal knowledge of the substance of the statements, meaning there is sufficient prima facie evidence of foundation; and the subject matter of the statements is not speculative.
- Evidentiary Objection Nos. 4 to 10 to certain statements made in plaintiff Maria Zamora's declaration. The court overrules No. 4, as there is a certified translator's declaration attached to Ms. Zamora's Spanish declaration. The court overrules No. 5 because the statement is admissible for a nonhearsay purposes – the statement's impact on declarant. The court overrules Nos. 6 to 10 because the statements are not offered as hearsay, and Ms. Zamora declares she has personal knowledge of everything that was said, establishing a prima facie basis for foundation.

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[2] The court is relying on plaintiff's proffer submitted on May 2, 2025, when addressing these objections.

- Evidentiary Objection Nos. 11 to 15 to certain statements made in plaintiff Juan Navas's declaration. The court overrules No. 11 as there is certified translator's declaration attached to Mr. Navas' Spanish declaration. The court overrules Nos. 12 to 14, because the statements are not being offered as hearsay, are not speculative, and Mr. Navas has expressly indicated he has personal knowledge of the subject matter of the statements, establishing a sufficient basis for foundation. The court overrules No. 15, because the statement in the declaration does not contradict statements made during Mr. Navas's deposition. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 22, relied upon by *Archdale v. American Internat. Specialty Lines Ins. Co*. (2007) 154 Cal.App.4th 449, 473.) While during his deposition Mr. Navas claimed that he was given the opportunity to waive his meal periods and be paid an additional hour, in his declaration he explains that no one explained the waiver and the waiver was actually involuntary. The statements are sufficiently congruent to avoid the exclusionary ambit of *D'Amico* and progeny.
- Evidentiary Objection Nos. 16 to 21 to certain statements made in plaintiff Julia Laines Diaz's declaration. The court overrules No. 16, as it appears Ms. Diaz understands and speaks English, as she signed her declaration in English (there is no Spanish translation offered). The court overrules Nos. 17 to 21, as the statements are not offered as hearsay, the declarant states she has personal knowledge of all statements made, offering sufficient prima facie evidence of foundation, and the statements are not speculative.
- Evidentiary Objection Nos. 22 to 28 to certain statements made in plaintiff Carmelo Martinez's declaration. The court overrules No. 22, as a certified translator's declaration has been offered (and attached to the Spanish declaration). The court overrules No. 23 as there is a nonhearsay purpose for the recounted statement (i.e., its impact on declarant). The court overrules Nos. 24 to 28 because the declarant indicates she has personal knowledge of the subject matter of all statements, establishing a prima facie basis for foundation, the remaining statements challenged are not offered as hearsay, and they are not speculative.
- Evidentiary Objection Nos. 29 to 34 to certain statements made in plaintiff Martha Lopez Herrera's declaration. The court overrules No. 29 as there is a certified translator declaration attached to Mr. Herrera's Spanish declaration. The court overrules No. 30 as there is a nonhearsay purpose to the out-of-court statement as offered (i.e., its impact on declarant). The court overrules No. 31 to 34 because the statements are not offered as hearsay, declarant states she has personal knowledge of the substance of all statements made, meaning a prima facie case for foundation has been established, and the statements are not speculative.
- Evidentiary Objection Nos. 35 to 41 to expert Aaron Woolfson's declaration. The court overrules No. 35, as plaintiffs on May 2, 2025, submitted a signed copy of Mr. Woolfson's declaration. The court overrules No. 36, because Mr. Woolfson, given his

expertise, was able to review relevant electronic data in order to make a number of conclusions. There is sufficient foundation to support his methodology and expert conclusions. The fact Mr. Woolfson testified during his deposition that he does not know why "any meal periods" were missed, late, or short, does not undermine the fact (as relevant per *Donohue*) that the timecards at times fail to reflect the omissions, which is the *sine qua non* of the rebuttable presumption. Defendant's challenges go to weight, not admissibility. The court also overrules No. 37, 38, 39, 40, and 41, which recount the same objections jot for jot, for the same reasons, without nuance.

- Evidentiary Objection No. 42 to attorney Stan Mallison's declaration. Mr. Mallison in paragraph 6 simply recounts the conclusions reached by his expert Mr. Woolfson. He is not testifying separately on the matter, and the court views his declaration as a summary of the relevant points encapsulated in Mr. Woolfson's expert declaration. As Mr. Woolfson's expert testimony is admissible, the summary offered by Mr. Mallison (as helpful to the court) is also admissible. The court therefore overrules No. 42.
- The court overrules all 42 evidentiary objections advanced by defendant.

C) *Legal Background*

The rebuttable presumption of meal period violations applies at summary judgment/adjudication. (*Donohue, supra,* 11 Cal.5th at p. 74.) *Donohue* sets the contours of how the rebuttable presumption works. The rebuttable presumption applies if defendant did not maintain records tracking when and for how long plaintiffs took meal breaks. (*Donohue, supra,* at p. 74.) It applies not only to records showing missed meal periods, but applies to records showing short and delayed meal periods. (*Id.* at p. 75.) The court was clear about what this meant. "Applying the presumption does not mean that time records showing missed, short, or delayed meal periods result in 'automatic liability.' If time records show missed, short, or delayed meal periods with no indication of proper compensation, then a rebuttable presumption arises. Employers can rebut the presumption by presenting evidence that employees were compensated for noncompliant meal periods or that they had in fact been provided compliant meal periods during which they chose to work. 'Representative testimony, surveys, and statistical analysis,' along with other types of evidence, are available as tools to render manageable determinations of the extent of liability.'" The *Donohue* court, looking to Justice Werdegar's concurring opinion in *Brinker*, noted that evidence of "waiver" could be used to create a triable issue of fact. (*Donohue, supra*, at p. 75 ['waiver" means an employee chose to work when he or she was not required to do so].) Notably, however, while *Donohue* focused on waiver as an affirmative defense as a way to rebut the presumption (explaining that an employer can plead and prove employees were offered compliant meal breaks but waived them (*id*. at p. 76)), that was not the only defense available. (*Id.* at p. 80.)

*Donohue* summarized its conclusion as follows: "An employer is liable only if it does not provide an employee with an opportunity to take a compliant meal period. The employer is not liable if the employee chose to take a short or delayed meal period or no meal period at all. The employee is not required to police meal periods to make sure no work is performed. Instead, the employer's duty is to ensure that it provides the employee with bona fide relief from duty and that this is accurately reflected in the employer's time records. Otherwise, the employer must pay the employee premium wages for any noncompliant meal period. [Citation.] If the time records show noncompliant meal periods, then a rebuttable presumption of liability arises. This presumption applies at the summary judgment stage, and the employer may rebut the presumption with evidence of a bona fide relief from duty or proper compensation . . . ."

The *Donohue* court, after crafting these new standards, reversed and remanded to the trial court to apply the rules. In so doing it provided further guidance to the trial court "on how the rebuttable presumption should be applied [] in light of the usual summary adjudication standards." For our purposes (as plaintiffs have filed the summary adjudication motion), our high court observed that "when a plaintiff moves for summary adjudication, the plaintiff meets 'his or her burden of showing that there is not a defense to a cause of action' if the plaintiff 'prove[s] each element of the cause of action entitling the party to judgment on the cause of action.' (Code Civ. Proc., § 437, subd. (c)(1).) [Plaintiff] can satisfy that burden by using time records to raise a rebuttable presumption of meal period violations. Once the plaintiff meets that burden the burden shifts to the defendant 'to show that a triable issue of one or more material facts exists as to the cause of action or defense.' (*Ibid.*) But the plaintiff bears the ultimate burden of persuasion to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. . . ." (*Id*. at p. 79.)

CACI 2766B provides a useful yardstick for determining the interplay between the rebuttable presumption per *Donohue* and what defendant needs to do to rebut that presumption. The instruction makes it clear that an employer must keep accurate records of the start and end times of each meal break violation; if the trier of fact decides that plaintiff has shown that defendant did not keep accurate records of compliant meal breaks (either because the records show missed shortened, or delayed meal breaks), then the trier must find for plaintiff "unless defendant proves all of the following: 1) defendant provided plaintiff a reasonable opportunity to take uninterrupted 30-minute meal breaks on time; 2) defendant did not impede plaintiff from taking 30-minute meal breaks; 3) that defendant did not discourage plaintiff from taking 30-minute meal breaks; 4) that defendant relieved plaintiff of all duties during 30-minute meal breaks; and 5) defendant relinquished control over activities during the 30-minute meal break." If defendant has proved all of the above, then there has been no meal break violations.

There is little to no published California appellate authority addressing the type of evidence an employer must present to rebut the *Donohue* presumption[3] (i.e. evidence of "bona fide relief from duty or proper compensation"). (*Donahue, supra,* at p. 78.) Our high court in *Duran v. U.S. Bank National Assn*. (2014) 59 Cal.4th 1, at least in the context of class action liability, has indicated that ***if*** statistical evidence is used, inferences from the part to the whole are justified only when the sample is representative. (*Id*. at 38; see *id.* at p. 49 ["The sample relied upon must be representative and the results obtained must be sufficiently reliable to satisfy concerns of fundamental fairness."].)

More helpful are federal district court cases in providing an illustrative guide in analogous circumstances. For example, in *Morgan v. Rohr, Inc.* (S.D. Cal., Dec. 20, 2023, No. 20-CV-574-GPC-AHG) 2023 WL 8811816, at *1, as relevant for our purposes, plaintiff moved for summary adjudication on the meal period claims, relying on the rebuttable presumption in *Donohue*. The court noted that *in Donohue*, if an employer's time records are incomplete, inaccurate, or show noncompliant meal periods, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided. "Defendants' failure to introduce a proper timekeeping mechanism resulted in the creation of an inaccurate and incomplete time record. Plaintiffs' expert reports that Defendants failed to accurately record 1,040,699 meal periods. [] This is sufficient to trigger the rebuttable presumption." (*Id.* at p. 6.)

That was not the end of the inquiry. "In order to rebut the *Donohue* presumption, Defendants must prove that they (1) provided a reasonable opportunity to take uninterrupted thirty-minute meal breaks on time; (2) did not impede class members from taking thirty-minute breaks; (3) did not discourage class members from taking thirty-minute meal breaks; (4) relieved class members of all duties during the thirty-minute meal breaks; and (5) relinquished control over class member activities during the thirty-minute breaks. Judicial Council of California Civil Jury Instruction 2766B." (*Morgan, supra, at p.* 6.) The *Morgan* court observed that while "employers do not escape liability simply by having a formal policy of providing meal and rest breaks," citing to *Boyd v. Bank of Am. Corp.*, 300 F.R.D. 431, 442 (C.D. Cal. 2014), the court observed that evidence "relating to the [collective bargaining agreements], meal period policies, training, and absence of any union grievances complaining about noncompliant meal breaks, though not dispositive of the issue, ***provides a measure of proof in support of rebutting the presumption***. ***The remaining question is whether this class-wide proof coupled with declarations and deposition testimony from employees and supervisors overcomes the presumption***."

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[3] Justice Werdegar's concurring opinion in *Brinker* (which was adopted in full by the majority in *Donohue*) is also not specific about the type of evidence that can be utilized by an employer to rebut the presumption created by time records that fail to show appropriate meal breaks or compensation in lieu thereof. Justice Werdegar, as did the *Donohue* majority, noted simply that representative testimony, surveys and statistical data are available. (53 Cal.4th at p. 1054.)

The *Morgan* court then looked to *Donahue* to help resolve the latter determination.

"In *Donohue*, the court reversed a summary judgment for the employer who relied on a policy and training which emphasized that the meal period was an "uninterrupted 30 minute" break, during which employees were "relieved of all job duties," were "free to leave the office site," and "control[led] the time.' 11 Cal. 5th at 62. The policy further specified that supervisors should not "*impede* or *discourage* team members from taking their break." *Id.* In addition, the employer submitted declarations from thirty class members who stated that they "always" or "usually" took lunches that were at least thirty minutes long. *Id.* at 64. No declarant stated that a supervisor had tried to discourage him or her from taking a full or timely meal period and the class representative had certified that he had not been denied meal breaks. *Id.* These facts closely match those offered by Defendants. ***The reversal in Donohue would certainly preclude granting summary judgment in favor of Defendants***. ***But a question remains whether this evidence creates a genuine issue of fact that the presumption of liability has been rebutted such that Defendants survive Plaintiffs' motion for summary adjudication of these issues***." (*Id*. at p. 7, emphasis added.)

The *Morgan* court then went on as follows:

"Three district courts have addressed the rebuttable presumption in the context of class certification. In *Garcia v. Cent. Coast Restaurants, Inc.*, defendants argued that the *Donohue* presumption had been rebutted through 'five declarations from current employees who' stated that missed meal periods were either voluntarily taken or properly compensated. No. 18-CV-02370-RS, 2022 WL 657972, at *6 (N.D. Cal. Mar. 4, 2022). *Garcia* addressed whether the evidence presented — five declarations — would defeat the *Donohue* presumption, preventing plaintiff from relying on the presumption as a class-wide theory of liability to support commonality. No. 18-CV-02370-RS, 2022 WL 657972, at *6. The court rejected the argument, finding that five declarations could 'hardly be considered representative' given the thousands of potential class members and were 'insufficient to rebut the *Donohue* presumption at' the class certification stage. *Id.* The court reasoned further that because the declarations came from current employees, the declarations could be subject to 'bias and coercion.' *Id.* at *6 n.4.[5] *Garcia* did not directly address the issue presented here, that is, whether five declarations coupled with other evidence could create at least a genuine issue of material fact as to rebuttal of the presumption. *See id.*

In *Santillan v. Verizon Connect, Inc.*, the rebuttable presumption factored into the court's discussion of predominance. No. 3:21-CV-1257-H-KSC, 2022 WL 4596574, at *12 (S.D. Cal. June 13, 2022). There, defendants presented evidence that their training program and

procedures informed employees of their right to a thirty-minute meal period. *Id.* at *13. Defendants also presented evidence consisting of five declarations from putative class members, that "indicated that they take their full meal periods." *Id.* The court found that the rebuttable evidence could be considered on a class-wide basis and did not defeat predominance. *Id.* The court concluded that *Donohue* created common "questions with regard to Verizon's liability" and certified the meal period class, inherently holding that, at the class certification stage, defendant's evidence was insufficient to overcome the *Donohue* presumption. *See id.* Again, the issue in *Santillan* was not whether this evidence created a genuine issue of fact on the application of the presumption of liability.

Defendants, here, direct the Court to *Vega v. Delaware N. Companies, Inc.*, where the court held that thirty-six declarations in conjunction with the posting of the wage order and inconsistencies in the plaintiff's declarations were sufficient to rebut the presumption at the class certification stage. No. 1-19CV00484-ADA-SAB, 2023 WL 6940198, at *20 (E.D. Cal. Oct. 20, 2023). The court distinguished *Garcia*, noting that defendants had presented more than the five declarations presented in *Garcia. Id.*

***While the Court does not find that Defendants' proof has rebutted the Donohue presumption, it does find that there is a genuine issue of fact as to whether the presumption has been rebutted. Here, Defendants have presented over thirty witnesses that testify that they always received their first meal breaks, that their meal breaks were often longer than thirty minutes, and that their meal breaks were not cut short by their supervisors. When analyzed alongside Defendants' CBAs, training, and posted policies, the Court concludes that the Defendants have created at least a genuine issue of fact as to whether the presumption has been rebutted. . .*** . . ." (*Morgan, supra, at pp.* 7–8, emphasis added.)

In *Smith v. 9W Halo Western OpCo L.P.* (N.D. Cal., Mar. 28, 2025, No. 20-CV-01968-AMO) 2025 WL 948003, at *4, in the context of class certification (in which the rebuttable presumption per *Donohue* is relevant to establish commonality and predominance of law or fact), the court found plaintiff had "established that the *Donohue* presumption applies. Smith's expert, James Toney, reviewed the timekeeping and payroll records [defendant employer] produced and concluded that out of the sampled shifts eligible for a meal break, 6.2% showed a missed first meal break, 8.9% showed a late first meal break, and 42.2% showed a short first meal break. [] Toney further estimated 3.7% of shifts showed a missed second meal break. *Id.* Smith's expert identified presumptive meal break violations in more than half of the records examined, which suffices to invoke the *Donohue* presumption. *See Garcia v. Cent. Coast Restaurants, Inc.*, No. 18-CV-02370-RS, 2022 WL 657972, at *6 (N.D. Cal. Mar. 4, 2022) ("[T]hat records show 17% of shifts show a possible meal period violation is sufficient to invoke the presumption from *Donohue*."). Smith additionally presents ten declarations from former Angelica employees, who

attest they were at times unable to take a 30-minute meal break due to their workload." Defendant, however, has failed to rebut the presumption, because "it has not put forth its own expert to provide another estimate of potential meal break violations or contest Toney's estimate, and instead presents eleven declarations from former employees asserting that any meal period they skipped in the course of their employment was skipped voluntarily.[] However, [defendant employer] has provided the Court with no reason to conclude that these declarations are representative and thus cannot rebut the presumption on their basis alone. *See Garcia v. Cent. Coast Restaurants, Inc.*, No. 18-CV-02370-RS, 2022 WL 657972, at *6 (N.D. Cal. Mar. 4, 2022) (finding five declarations, "when considering the thousands of potential members of the proposed class, can hardly be considered representative and are insufficient to rebut the *Donohue* presumption at this time"); *see also McCollum v. TGI Fridays Inc.*, No. 8:22-CV-00392-FWS-JDE, 2024 WL 5423064, at *12 (C.D. Cal. Mar. 6, 2024) (finding twelve declarations from current employees and eight declarations of managers insufficient to rebut the *Donohue* presumption where 99.3% of employee shifts showed a meal period violation and the proposed class consisted of over 3,000 employees). In sum, Smith has established a presumption of meal break violations from Angelica employees' records and thus has demonstrated commonality and predominance as to the Recordkeeping Meal Period and Auto-Deduct Classes." (*Id.* at pp. 4-5.)

*D) Merits*

The court makes three preliminary observations before addressing the merits of the summary adjudication motion. First, the court finds the summary adjudication motion timely (even under the new filing rules effective January 1, 2025). Code of Civil Procedure section 437c, subdivision (a)(2) requires that the summary adjudication motion be served 81 days before the hearing. Plaintiff served and filed the motion on February 20, 2025. Counting backwards from the hearing date of May 14, 2025 (Code Civ. Proc., § 12c), 81 days before the hearing date (excluding the hearing date) is Saturday, February 23, 2025. Service was accomplished electronically, meaning two (2) courts days for service must be added to the calculus. As noted in Code of Civil Procedure section 12c, subdivision (b), additional days added for service "shall be computed by counting backward from the day determined in accordance with subdivision (a)." That means the motion had to be served no later than Thursday, February 20, 2025. It was filed and served on that day. As the motion is clearly being heard more than 30 days before trial begins, it is timely.

Second, the court is not persuaded by plaintiff's apparent claim that ***only*** scientific evidence can be used to satisfy defendant's rebuttal obligation. Nothing in *Donahue* indicates as much – in fact, the high court seems to have identified *various t*ypes of evidence as permissible for this purpose, including representative testimony, surveys, "along with other types of evidence." Further, it is the employer's burden is to provide "evidence of bona fide relief from duty or compensation." That is, defendant must "provide evidence that employees voluntarily

chose to work during off-duty meal periods that appear in the time records to be short or delayed." Certainly nothing in the federal cases cited above have suggested that only scientific evidence can be utilized for this purpose, and nothing in CACI No. 2766B, which discussed the rebuttable presumption at trial, suggests as much. Plaintiffs cite to *Duran, supra*, 59 Cal.4th 1 for the proposition that "any attempt to undermine showing a systemic liability must itself be based on scientifically reliable proof." Plaintiff overreads *Duran*. *Duran* stands for the unremarkable proposition that if statistical evidence is utilized, inferences from the part to the whole are justified only when the sample is representative. (*Id.* at p. 39; see p. 49 [assuming that sampling may be an appropriate means of proving liability of damages in a wage and hour class action, the sample relied upon must be representative and the results obtained must be sufficiently reliable to satisfy concerns of fundamental fairness].) *Duran* requires fundamental fairness when using sampling evidence, nothing more.[4]

Third, the court finds (contrary to defendant's claim) that plaintiffs have presented a sufficient factual predicate to support the *Donohue* rebuttable presumption. Here, plaintiff has shown via expert testimony that time records show defendant's noncompliance with California law concerning meal periods, as contemplated by *Donohue.* Time records are required to be accurate, and in this matter plaintiff has presented sufficient evidence to show they were not. Mr. Wolfson looked at time records between 2016 and March 13, 2023, and found that from a total of 400,098 shifts worked by 1,521 employees during this same period, there were 392,066 shifts worked by 1,492 employers who worked more than 5 hours. He found there were 139,781 shifts greater than 5 hours with no recorded meal period, or if recorded were shortened or late, which was reduced to 125,760 based appropriate reductions (amounting to 32.08% of all shifts and involved 1,259 employees). This evidence is similar to the evidence presented in *Donohue* (time records show 10,110 short meal periods and 6,651 delayed meal periods for which premium wages were not pay, evidence which triggered the rebuttable presumption.) (*Donohue, supra*, at p. 79.)

With this, the issue for the court to decide, therefore, is whether defendant has presented sufficient evidence to establish disputed issues of material fact despite plaintiffs' initial rebuttable presumption showing (i.e., a bona fide relief from duty or proper compensation). The court will look to the totality of evidence in making this determination, keeping in mind that the normal rules on summary adjudication apply (i.e., construing the evidence in light most favorable to the nonmoving party.) (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 206.)

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[4] Our high court's decision in *Estrada v. Royalty Carpet Mills, Inc*. (2024) 15 Cal.5th 582, which concluded trial courts do not have the inherent authority to strike PAGA claims on manageability grounds, underscores the point. The *Estrada* court noted that in the PAGA context, trial courts, when affirmative defenses following a meal break claim are raised, can use representative testimony, surveys, statistical evidence, along with other types of evidence, to manage PAGA cases, citing *Donohue, supra*. (*Id*. at p. 619.) The *Estrada* court did not suggest that only scientific evidence was appropriate for this purpose.

The court finds initially that defendant's reliance on its policies and procedures concerning meal periods, as contained in its employee handbook, as well as its training procedures about its meal policy, is relevant, although not dispositive, in meeting its burden to rebut the presumption. Defendant maintains a written meal policy, and all employees are provided with a copy of it. There is undisputed evidence that since the current payroll system, from 2018 (i.e., during the window examined by plaintiff's expert), plaintiff has paid 6,941 hours of meal period premiums (for a total value of $10,199.55). Defendant provides meal period trainings to ensure that employees understand these policies, and all new employees are provided training in this regard. As part of the policy and training, employees are told about the policies. As noted in *Morgan v. Rohr, supra*, while employers cannot escape liability simply by having a formal policy (and presumably training on it), the evidence is relevant in providing some measure of proof in support of rebutting the *Donohue* presumption, as it frames the inquiry and potentially sets the stage for the inquiry. The court finds *Morgan v. Rohr* persuasive, and determines the issue is whether *other* evidence exists to support rebuttal.

There is. Defendant points to "dozens" of declarations submitted by employees who have provided sworn declarations "demonstrating that [defendant] provides nonexempt employees with the opportunity to take legally compliant periods." Defendant contends that these are "representative testimony" contemplated by *Donahue* and are offered as rebuttal of the presumption. Specifically, defendant has attached as exhibits declarations in Exhibit 17 and Exhibits 21- 53 (33 in total), which contain declarations from non-supervisorial employees to the effect that each receives its first meal break, that all employees are free to do what they want during their meal break, and that each employee controls his or her schedule. Further, defendant has provided declarations from lead and supervisorial employees (Exhibits 54 to 62 – totaling 19 additional declarations), indicating that at no point did anyone in authority impede or discourage any employee from taking their meal periods. Again, as noted in *Morgan v. Rohr, supra,* while federal district court cases have indicated that five declarations are not sufficiently representative, while 36 declarations are when coupled with other evidence, here we have 52 (also coupled with evidence of policies and training procedures and evidence of premium payments). This evidence is something the federal court in *Morgan v. Rohr* found both admissible, representative, and relevant. The same is true here. (See *Morgan v. Rohr, supra,* at pp. 7-8 ["Here, Defendants have presented over thirty witnesses that testify that they always received their first meal breaks, that their meal breaks were often longer than thirty minutes, and that their meal breaks were not cut short by their supervisors.") This court finds *Morgan*'s analysis persuasive on this point as well.[5]

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[5] Plaintiff in reply contends that these "anecdotal declarations are insufficient," relying on *Duran v. U.S. Bank National Assn., supra*, 59 Cal.4th 1. Plaintiff does not address, however, the relevant and persuasive analysis addressing a similar number of declarations in *Morgan v. Rohr*, and the cases cited therein. Plaintiff's challenge to these declarations based on statistical improprieties in any event finds no footing in *Duran*. In fact, the converse seems true. The *Duran* court itself observed that "representative testimony ***and*** sampling may sometimes be appropriate tools. (*Duran, supra,* 59 Cal.4th at p. 35, emphasis added; see also *People v. Ashford University, LLC*

Defendant has also submitted uncontested evidence that a substantial number of defendant's employees *voluntary waived* their meal periods. In fact, recent published California appellate authority has acknowledged that preemptive waivers of meal periods can be relevant in this context. In *Bradsbery v. Vicar Operating, Inc.* (Apr. 21, 2025, No. B322799) ___ Cal.App.5th ___ [2025 WL 1155812, at *1], the court concluded that revocable, prospective meal waivers signed by employees can be enforceable in the absence of any evidence the waivers are unconscionable or unduly coercive. Significantly, the *Bradsbery* court rejected plaintiff's claim that *Brinker* (and thus by logic *Donohue*) precluded prospective meal waivers between an employer and employee. (*Id.* at pp. 11-12 ["Plaintiffs overread *Brinker*, especially when considering the legislative and administrative history of section 512 and the wage orders, which reflect the Legislature and IWC authorized prospective waivers of meal periods, even when they had not yet been earned or accrued. Although *Brinker* addressed the nature of the meal period and when the meal period accrued, it did not address the timing or circumstances under which a meal period can be waived. Even if an employee's right to a meal period arises after five hours of work, Plaintiffs do not explain why they cannot prospectively waive it"].) Defendant here has introduced evidence that as of November 2023, it had over 11,000 pages of signed meal waivers from employees, and that the waiver of meal periods is voluntary. (Issue Nos. 18 and 19 of plaintiff's Separate Statement). It is undisputed that such waivers are voluntary, and defendant claims without dispute that it does not pressure or encourage employees to waive their meal periods. (Issues Nos. 20 and 21 of plaintiff's Separate Statement.)

Finally, and again while itself not dispositive, plaintiff's expert, Mr. Kevin Taylor, in a November 23, 2023, signed declaration (attached as Exhibit 20 to defendant's evidentiary proffer), indicates that his review of 467,363 shifts during the appropriate PAGA time frame "reflects a very high level of meal and period compliance. The data reflects that during the Analysis Period, putative class members who worked a shift of six hours or more clocked out for a meal period approximately 99.7% of the time. The data further reflects that these meal periods were taken before the fifth hour of work approximately 94.1% of the time and had an average break of 31.9 minutes." The court acknowledges that Mr. Woolfson's declaration was signed on February 19, 2025. Still, Mr. Woolfson in his declaration indicates his analysis was limited "to the timings of meals that were contained within the date that Defendants' Expert Kevin Taylor

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(2024) 100 Cal.App.5th 485, 513.) More significantly, plaintiff does not argue and has not demonstrated that these declarations suffer from the same defects that were at issue in *Duran*. In *Duran*, the trial court devised a plan to determine the extent of defendant employer's liability to all class members by extrapolating from a random sample, focusing on the habits of 21 plaintiffs (and no evidence was permitted outside these 21, when there was a class of 260); after the second phase, which focused on testimony from statisticians, the court extrapolated the average amount of overtime, resulting in a verdict of $15 million. The verdict could not stand, according to the *Duran* court, because the trial court's flawed implementation of sampling prevented defendant from impeaching the model adopted. Here, the purpose is completely different – whether defendant has provided sufficient evidence to raise a disputed issue of material fact. Any sampling offered by defendant is not similarly situated to the sampling at issue in *Duran*.

relied when proffering his opinions . . . ." Plaintiff in reply fails to address the inconsistencies between the two experts as presented, which is his ultimate burden under the present circumstances.[6]

In summary, the court overrules all 42 evidentiary objections advanced by defendant. The court denies plaintiff's summary adjudication motion. While the court finds that plaintiffs have presented sufficient evidence to support a rebuttable presumption that there were meal violations as contemplated by *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, defendant has in turn presented sufficient evidence to show genuine issues of disputed fact to rebut the presumption, based on the existence of work polices and the implementation of training videos (as well as evidence of compensation for missed meal periods), the 53 declarations that seem to act as a representative testimony of bona fide compliance, the 11,000 pages of voluntary meal waivers executed by employees, and the apparent conflict between plaintiff's and defendant's experts on the meaning of the data and the scope of the recording violations. While the court does not find any one piece of evidence dispositive, it finds that the evidence *collectively* creates a genuine issue of material fact. The court in *Morgan v. Rohr, Inc.* (S.D. Cal., Dec. 20, 2023, No. 20-CV-574-GPC-AHG) 2023 WL 8811816, at *1 concluded after examining the evidence in opposition to plaintiff's summary adjudication that the employer had " presented over thirty witnesses that testif[ied] that they always received their first meal breaks, that their meal breaks were often longer than thirty minutes, and that their meal breaks were not cut short by their supervisors," meaning (according to the court) that there were genuine issues of material fact as to whether the presumption has been rebutted. The same seems true here, bolstered further by evidence of a large number of voluntary waivers of meal periods by employees and underscored by conflicting and competing expert testimony offered by plaintiff and defendant respectively. The court finds *Morgan v. Rohr* analysis to be persuasive and applicable in the present context.

The court directs defendant to provide a proposed order for signature. There is a CMC scheduled for today. The parties are directed to appear either in person or via Zoom.

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[6] The *Donohue* court made it crystal clear that when plaintiff files a summary adjudication motion, and even should plaintiff present a sufficient evidentiary basis to support the rebuttable presumption, the plaintiff "bears the ultimate burden of persuasion to show that no genuine issue of material facts exists and that it is entitled to judgment as a matter of law." (*Donohue, supra,* 11 Cal.5th at p. 80.) Plaintiff still has the burden to show no issue of disputed fact exists even if the rebuttable presumption is triggered. Here, plaintiffs have not met this burden.