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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION 3

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| RAGHUNANDAN MATAM, Plaintiff and Appellant,v.ORACLE CORPORATION, Defendant and Respondent. |  A143830 (Alameda CountySuper. Ct. No. RG 09480164; JCCP No. 004597) |

 Plaintiff Raghunandan Matam (Matam), a former employee of Defendant Oracle Corporation (Oracle), brought this putative class action against Oracle alleging that Oracle committed various violations of California’s wage and hour laws, including by failing to pay class members for overtime and by failing to provide class members with required meal and rest periods. Matam sought certification of the proposed class, relying principally on his expert’s analysis of various Oracle databases to conclude that class members worked overtime for which they were not paid and had meal breaks that were short, late, or missed altogether. Oracle opposed Matam’s motion and submitted the declaration of its own expert, who opined that Matam’s expert had made numerous errors in his method and his calculations, rendering his conclusions unreliable. The trial court agreed, and denied Matam’s motion finding he had failed to demonstrate that common questions predominated and that his claims were capable of class-wide proof. Based upon our review of the record and the parties written briefs, we agree with the trial court’s conclusion. Accordingly, we shall affirm.

**Factual and Procedural Background**

 Oracle develops, sells, and supports more than 10,000 different hardware and software products and technologies, which it provides to large businesses, governments, and other significant institutions. Oracle’s software technologies are used to automate large enterprise functions and transactions involved in large business, educational and government operations. Oracle employees called “Technical Analysts” (TAs) respond to customer service requests in order to provide support to purchasers of Oracle’s products experiencing difficulties. Oracle’s TAs are based in different locations around the world to enable Oracle to provide 24-hour support to its customers.

Matam, a former Oracle employee, worked as a TA in California from approximately September 2006 until March 2008. In 2009, he filed this putative class action against Oracle, alleging that Oracle violated various provisions of the Labor Code by (1) requiring employees to work “off the clock” without compensation (Lab. Code. §§ 204, 218, 218.5, 218.6); (2) failing to pay employees required overtime wages for overtime worked (Lab. Code §§ 510, 1194, 1198); (3) failing to provide employees required meal and rest periods and to make the required premium payments for such non-compliant meal and rest periods (Lab. Code §§ 226.7, 512); (4) failing to provide accurate wage statements (Lab. Code. § 226); and engaged in unfair and unlawful business practices through the above conduct in violation of the Unfair Competition Law (UCL) (Bus. & Prof. Code § 17200 et seq).[[1]](#footnote-1)

1. Motion for Class Certification

Matam moved for certification of a class of “[a]ll current and former employees of Defendant Oracle Corporation (“Oracle”) who held hourly, non-exempt positions of “Technical Analysts” Levels 1 through 5 in California, between August 16, 2006 and the present (the ‘Class Period’)” [[2]](#footnote-2) and five subclasses corresponding to: (1) the “off the clock” claim; (2) the overtime claim; (3) the non-compliant meal break claim; (4) the non-compliant rest break claim; and (5) the wage statement claim. In support of his motion, Matam submitted the declaration of James Lackritz, a retired Professor of Management Information Systems at San Diego State University. Lackritz analyzed three different data sets produced by Oracle: (1) a payroll database (Payroll) reflecting regular and overtime wages paid to class members during bimonthly pay periods ranging from August 1, 2006 through June 15, 2012; (2) a “Project Account Management Reports (PA)” database containing time entries made by a subset of TAs to track time spent on various activities for internal business purposes; and (3) a “time card (OTL)” database, consisting of time entries (time in and out) made by class members into the Oracle Time and Labor application during the class period. Lackritz did not explicitly state any of the factual assumptions that he made regarding these databases. He described his task as “evaluat[ing] whether the OTL database was a consistent indicator of hours worked by employees relevant to the other two databases.”

 Using the time entries in the OTL database, Lackritz purported to calculate class members’ daily and weekly overtime hours, and compared those hours with the overtime hours that appeared in the Payroll database. Lackritz found that for 674 of 926 TAs (72.8%), there were more overtime hours according to his calculations in the OTL database than were reflected in the Payroll database, and for 650 of 926 TAs (70.2%), this difference was larger than one hour. Lackritz concluded that this “raises concerns as to pay periods in which the employees in TA positions were not being paid appropriate overtime.” Lackritz also purported to use the OTL time punch data to calculate missed, late, and short meal breaks for each class member. Lackritz concluded that 12.8% of all shifts longer than five hours had either no meal break, a meal break taken after the fifth hour, or a meal break of less than 30 minutes.[[3]](#footnote-3) Lackritz characterized his opinion as “a study of the discrepancies between the PA database and the OTL and [Payroll] databases as well as a study of the incidence of unrecorded/late/short meal breaks,” “not a study of classwide damages for unpaid overtime or breaks.” In further support of his motion, Matam also submitted the declarations of several class members regarding their experiences with overtime and meal or rest breaks.

 In support of his argument that he had established predominant common questions of law or fact, Matam relied on the Lackritz declaration. In particular, Matam argued that his “off the clock” claim was subject to common proof through Lackritz’s comparison of the PA, Payroll, and OTL databases, that his overtime claim was subject to common proof through Lackritz’s comparison of the overtime he calculated using the OTL data with the overtime reflected in the Payroll database, and that his meal and rest break claims were subject to common proof through Lackritz’s calculation of missed, late, or short meal breaks.[[4]](#footnote-4) Where the hours and overtime reflected in the OTL database exceeded the hours and overtime in the Payroll database, Matam inferred that class members were not paid for those hours or overtime. Matam concluded that “[a]ny differences between Class Members as to off the clock hours worked, or late, short or missed meal and rest breaks go to the issue of damages, and do not preclude certification.”

2. Oracle’s Opposition

 Oracle’s opposition to Matam’s motion focused on the alleged failure of Lackritz’s declaration and his deposition testimony to establish the commonality and predominance requirements. Oracle argued that its policy requiring “pre-approval” of overtime and its policy prohibiting off the clock varied enormously during the class period. In addition, Oracle argued that there was “tremendous variance in the individual meal and rest period practices” of class members throughout the class period. Thus, according to Oracle, the need for individualized inquiries regarding requests for overtime hours and missed meal or rest breaks precluded class certification.

 Oracle supported its opposition with the expert opinion of Stefan Boedeker, a statistician and economist employed as a Director at the Berkeley Research Group. Boedeker challenged nearly every aspect of Lackritz’s opinion, finding that Lackritz’s work “does not follow accepted statistical principles” and that his “flawed assumptions about the data and numerous errors in the calculations, including but not limited to errors in counting hours and overtime recorded, lead to significantly inflated figures of hours worked, and as a consequence, significantly inflate his ‘guesstimates’ of unpaid overtime and missed meal breaks.”[[5]](#footnote-5) In particular, Boedeker found that Lackritz had included “pager” time (when employees were on call but did not actually work), “non-worked” and “sickness” time as reflected in the OTL database as time worked in his analysis, resulting in “vast” overestimates by Lackritz of time actually worked by class members. Boedeker found that Lackritz had made multiple mistakes using “old-format” OTL data in use until January of 2008. Boedeker further described how Lackritz had incorrectly assumed that a column of data in the OTL database labeled “OT wage hours” reflected the amount of overtime paid to class members, when in fact the actual amount of overtime paid was in a different column titled “overtime wages,” which Lackritz did not consider in his analysis. This column included over $21 million in overtime payments to class members during the class period, and according to Boedeker, ignoring this data created the incorrect appearance that insufficient overtime was paid. Boedeker also pointed to Lackritz’s deposition testimony admitting that he made factual assumptions about the data, but nowhere identified them, as he should have done as a matter of appropriate methodology. Boedeker concluded that the “cumulative impact of all these shortcomings produces unreliable and meaningless results which renders [Lackritz’s] declaration useless.”

 Oracle also submitted declarations from 22 putative class members and 20 putative class member managers that, according to Oracle, “reflect broad TA and manager awareness of Oracle’s legally compliant policies regarding meal periods, rest periods and working overtime.” These declarations also, Oracle argued, “exhibit significant diversity of individual TA practice on each of those matters.”

3. The Trial Court’s Decision

 Before addressing Matam’s class certification arguments, the trial court denied Oracle’s motion to strike the Lackritz declaration. However, in so doing, the trial court determined that “Defendant’s objections ‒ which are not adequately addressed by Plaintiff ‒ establish that Mr. Lackritz’s methodology is demonstrably unreliable.” The trial court explained that Lackritz had “failed to identify the assumptions he employed in conducting his analysis; failed to engage in sufficient quality control (resulting in identifiable errors); used a software application that cannot handle the number of lines of data he analyzed, which may have resulted in errors; and included including [sic] nonclass shifts in his analysis.” The trial court also found, as argued by Oracle, that Lackritz failed to consider the column of data in the OTL database showing overtime payments made to the class discussed above, improperly counted “non work” and “sick” time in that database as time worked for the purposes of his analysis, thereby inflating his estimates of overtime worked and the number of meal and rest periods that should have been taken, and failed to accurately analyze the “old-format” OTL data, among other errors.

 The trial court went on to conclude, largely based on the deficiencies outlined above, that Matam had failed to carry his burden to demonstrate commonality and predominance. The trial court considered Matam’s claims that: (1) Oracle failed to pay class members for all hours worked, including required overtime, based on Lackritz’s comparison of the OTL and Payroll databases; (2)(a) Oracle failed to pay required overtime to the 79 TAs who used the PA database, based on Lackritz’s comparison of the OTL and PA databases; and (3) Oracle failed to pay premiums required by the Labor Code for short, missed, or late meal and rest breaks, based on Lackritz’s calculations of the number of such breaks using the OTL database and Oracle’s admission that it did not pay premiums for non-compliant meal or rest breaks during the class period. Because Matam’s argument that each of these claims could be determined based on common proof depended on Lackritz’s analysis of the OTL database, and because of the various errors in that analysis as described above, the trial court concluded that Matam had failed to carry his burden to demonstrate that these claims could be determined based upon common evidence.

 The trial court then considered Matam’s claims that: (2)(b) Oracle’s various policies and procedures regarding overtime, including a policy requiring advance approval of overtime, unreasonably deterred class members from recording overtime or prevented them from receiving approval for it after the fact; and (4) class members were often required to miss, shorten, or delay meal or rest breaks because they could not stop working on urgent or highly technical customer requests.[[6]](#footnote-6) These claims were not based on Lackritz’s analysis, but instead on Oracle’s written policies and procedures as well as the declarations and deposition testimony of putative class members. The trial court considered this evidence, and found that the “written [overtime] policy, while undoubtedly common, provides only general guidance and a set of business objectives which are the basis for the policy” while granting “broad discretion” to various managers as to how to implement it. The trial court also found that the various class member declarations demonstrated “material variation” in how the overtime policy was actually implemented, meaning that the theory could not be tried on a class-wide basis. Finally, on Matam’s claim that the nature of the work prevented class members from taking meal and rest breaks, the trial court weighed the testimony submitted by both parties and concluded that “[a]s with the overtime claim, Plaintiffs have not shown that the ‘nature of the work’ caused missed breaks for a substantial number of TAs, but rather a variety of individualized factors contributed to non-compliant breaks.” The trial court concluded that Matam had failed to satisfy the commonality and predominance requirement with respect to each of his claims, and denied his motion in its entirety.[[7]](#footnote-7)

**Discussion**

1. ***Standard of Review***

 To obtain class certification Matam is required to demonstrate the “existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives.” (*Brinker Rest. Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).) The “ ‘ “community of interest requirement embodies three factors: (1) predominant common questions of 1aw or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.” ’ ” (*Id*.) Matam bears the burden “not merely to show that some common issues exist, but rather, to place substantial evidence in the record that common issues *predominate*.” (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1108.) Matam must also demonstrate the illegal effects of Oracle’s alleged conduct can be proven “efficiently and manageably within a class setting.” (*Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1, 28-29.) “As a general rule if the defendant’s liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.” (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.)

 We review denial of a motion for class certification for abuse of discretion. (See *Brinker*, *supra*, 53 Cal.4th at p. 1017.) “The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: ‘Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.’ [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.]” (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089.) Predominance is a factual question; accordingly, the trial court’s finding that common issues predominate generally is reviewed for substantial evidence. (*Sav–On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 328-329 (*Sav-On*).) “Substantial evidence” is evidence that “is not qualified, tentative and conclusory . . . but rather of ponderable legal significance . . . reasonable in nature, credible and of solid value.” (*Sav-On*, *supra*, 34 Cal.4th at p. 329.) “In determining whether the record contains substantial evidence supporting the ruling, a reviewing court does not reweigh the evidence and must draw all reasonable inferences supporting the court’s order.” (*Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 988 (citing *Sav-On*, 34 Cal.4th at p. 328) (*Dailey*); see *Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 918.)

1. ***The Trial Court Properly Weighed The Parties’ Evidence on Predominance and
 Commonality***

 With respect to his claims based on the OTL data, Matam argues that the trial court abused its discretion by improperly weighing the expert evidence and resolving conflicts between the experts’ reports, thereby “usurping the role of the trier of fact.” In particular, Matam argues that whether Lackritz’s calculations are accurate is a merits question. Similarly, with respect to his non-data based claims, Matam argues that the trial court abused its discretion in weighing the employee and manager declarations submitted by the parties.[[8]](#footnote-8) Matam argues that “whether [he] is ultimately correct” that class members were not properly paid for overtime or missed, short, or late meal breaks is a merits questions not properly resolved at the class certification stage.

 Matam is correct that, in general, the merits of the complaint’s allegations are not at issue on class certification. (*Dailey*, *supra*, 214 Cal.App.4th at p. 990; *Sav–On*, *supra*, 34 Cal.4th at p. 326; see also *Brinker*, *supra*, 53 Cal.4th at p. 1023.) However, the focus of the class certification inquiry is on “the nature of the legal and factual disputes likely to be presented,” as those disputes are framed not only by the complaint but also by defendant’s answer and affirmative defenses. (*Brinker*, *supra*, 53 Cal.4th at p. 1025; see *Fireside Bank*, *supra*, 40 Cal.4th at p. 1092; see also *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440,1450.) Because that inquiry will frequently be “enmeshed” with “issues affecting the merits of a case,” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 443), “when evidence or legal issues germane to the certification question bear as well on aspects of the merits, a court may properly evaluate them.” (*Brinker*, *supra*, at pp. 1023-1024.) In particular, “whether common or individual questions predominate will often depend upon resolution of issues closely tied to the merits.” (*Id*. at p. 1024.) That is because a court must determine “whether the elements necessary to establish liability are susceptible of common proof.” (*Ibid*.)

 “[I]f the parties’ evidence is conflicting on the issue of whether common or individual questions predominate . . . the trial court is permitted to credit one party’s evidence over the other’s in determining whether the requirements for class certification have been met—and doing so is not . . . an improper evaluation of the merits of the case.” (*Dailey*, *supra*, 214 Cal.App.4th at p. 991.) The trial court has “discretion to credit plaintiffs’ evidence on [commonality and predominance] over defendant’s, and we have no authority to substitute our own judgment for the trial court’s respecting this or any other conflict in the evidence.” (*Sav-on*, *supra*, 34 Cal.4th at p. 331; see *Mora v. Big Lots Stores, Inc.* (2011) 194 Cal.App.4th 496, 512 (*Mora*).) Against these background principles, we turn to whether the trial court properly weighed the evidence on commonality or predominance or improperly reached the merits with respect to (1) Matam’s claims based on Lackritz’s data analysis, and (2) Matam’s non-data claims based on Oracle’s policies and procedures.

1. Matam’s Data Based Claims

 We turn first to Matam’s claims that depend on Lackritz’s analysis of the OTL database, namely his claims that Oracle failed to pay class members for all time worked, including overtime, and failed to pay class members premiums for missed, late, or short meal and rest periods.[[9]](#footnote-9) Matam’s theory of liability on his overtime claim is that class members worked overtime in excess of eight hours per day or 40 hours per week, and were not paid the overtime wages required under Labor Code section 510.[[10]](#footnote-10) In support of his argument that liability on this claim could be determined using common proof, Matam relied exclusively on Lackritz’s expert opinion comparing the data in the OTL, PA, and Payroll databases.

 Matam argues that “[d]iscrepancies between hours/meals recorded in OTL and Payroll databases establish Oracle’s liability” and that the hours in the OTL and Payroll databases “must match.” However, Lackrtiz fails to offer any support for this conclusion. Lackritz characterized his task as to “evaluate whether the OTL database was a consistent indicator of hours worked by employees relevant to the other two databases,” and concluded only that his analysis “raises concerns” about whether class members were being paid appropriate overtime. At his deposition, Lackritz expressly disclaimed having any opinion as to whether a “comparison of the OTL data and the Payroll data shows the TAs were not paid for all of the time they recorded,” or that class members had “unpaid overtime.”

 Matam’s theory of liability on his meal break claims is that class members did not take the meal breaks required by Labor Code sections 226.7 and 512, or were forced to take those breaks late, shorten them, or miss them altogether. With respect to this claim, Matam again relied exclusively on Lackritz’s opinion, and his conclusion that approximately 13% of the shifts longer than 5 hours in the OTL database showed a missed, late, or short meal break for which no premiums were paid. Matam argues that Boedeker did not dispute that there were “thousands” of missed, late, or short meal breaks, that Boedeker’s count of missed and short breaks was “very close” to Lackritz’s, and that Boedeker did not dispute that a calculation of missed, short, or late breaks could be made from Oracle’s records.[[11]](#footnote-11) However, the trial court found that Matam had “not established that Mr. Lackritz can reliably identify meal and rest break violations for a substantial number of TAs in the putative class” because of the deficiencies in Lackritz’s analysis of the OTL database, including his inclusion of “pager” time as time worked, his classification of second meal periods after the fifth hour as “late,” and his failure to read the data accurately for shifts that begin before and end after midnight. At his deposition, Lackritz expressly admitted that he was “not concluding that [missed, late or short meal periods] occurred.”

 Nor do we find merit to Matam’s argument that whether Lackritz’s calculations are correct is a “merits” or a “damages” question, inappropriate for resolution at this stage of the litigation. Matam’s *only* evidence that uncompensated overtime and missed, late, or short meal breaks could be established classwide with common proof was Lackritz’s declaration and his comparison of the OTL and Payroll databases. The issue here is whether Matam can establish that class members worked overtime for which they were not paid or had late, short, or missed meal breaks on a classwide basis, and this is a question of *entitlement* to damages, not damages themselves. (See, e.g., *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 756 [affirming denial of class certification where “the individual issues here go beyond mere calculation; they involve each class member’s *entitlement* to damages”].) Here, as noted above, the trial court found that Lackritz’s analysis was “demonstrably unreliable” and “riddled with errors,” leaving Matam with no way to establish liability on a classwide basis. We conclude that the trial court acted within the bounds of its discretion and that substantial evidence supports its determination that a liability determination cannot be made based upon Lackritz’s analysis of the OTL, PA, and Payroll databases. (See *Mora, supra,* 194 Cal.App.4th at pp. 510-512.)

2. Matam’s Non Data-Based Claims

 We next turn to Matam’s claims based on Oracle’s policies and procedures, namely Matam’s claim that Oracle’s overtime policies, including Oracle’s alleged company-wide policy requiring that overtime be approved in advance, prevented class members from recording and being paid for all their overtime, and Matam’s claim that “TAs were often required to miss, shorten, or delay breaks because they could not stop working on urgent or highly technical [service requests].”

 In finding that Matam had failed to establish that these claims could be tried on a classwide basis, the trial court found that Oracle’s “written [overtime] policy, while undoubtedly common, provides only general guidance and a set of business objectives which are the basis for the policy . . . [and] expressly delegates to middle managers broad discretion to implement the policy by devising their own specific policies and procedures, consistent with the stated business objectives.” The trial court then relied on the class member and manager declarations submitted by Oracle to illustrate its finding “a variety of ‘pre-approval’ policies (some of which required no pre-approval at all) for overtime in their work units.” The trial court concluded that “Plaintiff’s theory depends upon the existence of a single, company-wide, strict pre-approval policy that had the effect of preventing or discouraging TAs from reporting overtime actually worked; however, the evidence shows material variation in how various lines of business implemented Oracle’s overtime policy.” The trial court similarly concluded that Matam’s claim that Oracle’s policies regarding overtime limits and prepopulated time cards had an impact on a substantial number of class members was “undermined by evidence of material variation across the putative class.”

 With respect to Matam’s meal and rest break claims, the trial court weighed the testimony of Matam’s witnesses that they did not take proper breaks against Oracle’s evidence, and found that “the testimony of Defendant’s TAs and managers, as well as documentary evidence, discredit Plaintiffs witnesses or, at the least, suggest that Plaintiffs witnesses constitute a very small minority of TAs.” The trial court relied on testimony from Oracle’s managers and employees disputing Matam’s evidence and showing that “Plaintiffs have not shown that the ‘nature of the work’ caused missed breaks for a substantial number of TAs, but rather a variety of individualized factors contributed to non-compliant breaks.” Matam’s argument that his non-data based claims can be proved on a classwide basis requires proof of a uniform policy with a classwide impact. Thus, the trial court was entitled to weigh this evidence in determining whether Matam established a uniform policy susceptible of common proof with regard to Oracle’s liability. (See *Brinker*, *supra*, 53 Cal.4th at p. 1051-52; *Mora*, *supra*, 194 Cal.App.4th at p. 508 [trial court could permissibly credit defendant’s evidence showing no uniform policy and wide variation existed in the type and amount of work performed by class members over plaintiff’s evidence to the contrary in finding commonality and predominance requirements not met].)

 We find support for our conclusion in *Dailey v. Sears, Roebuck & Co*. In *Dailey*, the plaintiff sought certification of a class of managers and assistant managers at Sears and alleged that notwithstanding their classification as exempt employees, Sears implemented policies and procedures which had the effect of requiring them to spend the majority of their time on nonmanagerial, nonexempt work, and that Sears failed to provide them with uninterrupted meal and rest periods. (*Dailey*, *supra*, 214 Cal.App.4th at p. 981.) In support of his argument that he could prove “*both* the existence of Sears’s uniform policies and practices *and* the alleged illegal effects of Sears’s conduct” on a classwide basis, the plaintiff submitted class member declarations and deposition testimony purporting to demonstrate that Sears’s policies caused class members to spend the majority of their time on non-exempt tasks. (*Id*. at p. 989.) Sears submitted its own declarations and deposition testimony of class members and managers to show that the alleged policies and practices either did not exist, or did not have the uniform, illegal effect of requiring class members to perform non-exempt work. (*Id*. at p. 993.) In a brief order, the trial court denied certification on the ground that individual issues predominated. (*Id*. at p. 985.)

 On appeal, as here, the plaintiff argued that the trial court had improperly “focused on the merits” of his claims, asserting that he did not need to prove that uniform policies and procedures actually existed, but only that *if* they existed, liability could be established on a classwide basis. (*Id*. at p. 990.) The *Dailey* court rejected plaintiff’s argument, finding that “[c]ritically, if the parties’ evidence is conflicting on the issue of whether common or individual questions predominate (as it often is and as it was here), the trial court is permitted to credit one party’s evidence over the other’s in determining whether the requirements for class certification have been met—and doing so is not, contrary to Dailey’s apparent view, an improper evaluation of the merits of the case.” (*Id*. at p. 991.) The *Dailey* court concluded that the trial court properly exercised its discretion when it “credited Sears’s evidence indicating that highly individualized inquiries would dominate resolution of the key issues in this case.” (*Id*. at pp. 991-92.)

 In this case, the trial court found that Oracle’s overtime policy provided only general guidance and granted broad discretion to managers. Here, as in *Dailey*, the parties submitted competing declarations and deposition testimony from class members regarding the impact of that policy. The trial court weighed this evidence and ultimately credited Oracle’s evidence over Matam’s, concluding that Matam had failed to demonstrate that Oracle’s policies had a common impact on a substantial portion of the class. Like the *Dailey* court, we conclude that the trial court did not abuse its discretion in doing so, and find that the numerous declarations showing class-wide variation in how Oracle’s policies were implemented provide substantial evidence in support of the trial court’s conclusion that Matam failed to demonstrate that his claims could be proved on a class-wide basis. (See *Dailey*, *supra*, 214 Cal.App.4th at p. 997 [“In light of Sears’s substantial evidence disputing the uniform application of its business policies and practices, and showing a wide variation in proposed class members’ job duties, the trial court was acting within its discretion in finding that plaintiff’s theory of Sears’s liability was not susceptible of common proof at trial”].)

 Matam argues that the concurring opinion of Justice Werdegar in *Brinker* and the recent decision in *Safeway, Inc. v. Superior Court* (2015) 238 Cal.App.4th 1138 (*Safeway*) support certification of his meal break claim. In her concurring opinion in *Brinker*, Justice Werdegar suggested that “[i]f 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,” and that an employer’s assertion that the employee waived his or her opportunity for a meal break is an affirmative defense that must be pled and proved by the employer. (*Brinker*, *supra*, 53 Cal.4th at p. 1053 (Werdegar, J., concurring).) In *Safeway*, the plaintiff obtained class certification of his claim that Safeway violated the UCL by failing to provide meal and rest breaks under Labor Code sections 226.7 and 512, and Safeway sought a writ of mandate directing the trial court to vacate that order. (*Id*. at p. 1145.) The *Safeway* court held that the record supported the conclusion that the plaintiff’s meal break claim was capable of classwide proof, based in part on plaintiff’s expert’s analysis of a “sample of petitioners’ time punch data and payroll records,” from which he “estimated that petitioners’ full records . . . would disclose 27,095,927 ‘meal break violations.’ ” (*Id*. at p. 1158-59; see *id*. at p. 1160 [“[E]stablishing that a significant number of employees accrued unpaid meal break premium wages is capable of common proof, in view of petitioners’ time punch data and the presumption identified by Justice Werdegar”].)

 Justice Werdegar’s concurrence in *Brinker* does not support Matam’s position here. First, the presumption does not apply until the employer’s records “show no meal period for a given shift over five hours.” (*Brinker*, supra, 53 Cal.4th at p. 1053 (Werdegar, J., concurring).) The parties dispute whether Matam’s evidence is sufficient to make this showing on a classwide basis, and the trial court concluded that it was not. Second, even if the presumption applies, it is rebuttable, which means that Oracle would be entitled to present individualized evidence regarding the reason for missed, late, or short meal breaks. It remains Matam’s burden to demonstrate that common questions predominate over these individualized issues. (See *Brinker*, *supra*, 53 Cal.4th at p. 1053 (Werdegar, J., concurring) [“[W]hether in a given case affirmative defenses should lead a court to approve or reject certification will hinge on the manageability of any individual issues”]; *Walsh v. IKON Office Solutions, Inc.*, *supra*, 148 Cal.App.4th at p. 1450 [“The affirmative defenses of the defendant must also be considered [in evaluating commonality and predominance], because a defendant may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues”].)

 In any event, *Safeway* is distinguishable. The petitioners in that case sought “restitution for the class-wide loss of the statutory benefits implemented by section 226.7, not the premium wages accrued by class members.” (*Id*. at p. 1161.) This meant that “establishing real parties’ theory does not necessitate excessive individualized assessments of time punch data or similar inquiries.” (*Ibid*.) Here, by contrast, class members do seek the premium wages for missed meal breaks under Labor Code section 226.7.[[12]](#footnote-12) The question before us is not whether the record would support certification, as in *Safeway*, but only whether there is substantial evidence in the record to support the trial court’s denial of certification, and we agree that there is. (See *Sav-On*, *supra*, 34 Cal.4th at p. 331 [“We need not conclude that plaintiffs’ evidence is compelling, or even that the trial court would have abused its discretion if it had credited defendant’s evidence instead”]; *Mies v. Sephora U.S.A., Inc.* (2015) 234 Cal.App.4th 967, 981 [“Had the trial court done so and reached the contrary conclusion—that individual instead of common issues predominated—denial of certification might have been affirmed on the very same evidentiary record”].) Because the trial court found that Matam did not establish that class members took non-compliant meal breaks or worked time for which they were not paid, it did not abuse its discretion in concluding that Matam had failed to satisfy the commonality and predominance requirements.

**DISPOSITION**

 The order denying class certification is affirmed.

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 Jenkins, J.

We concur:

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McGuiness, P. J.

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Siggins, J.

1. As noted by the trial court, Matam’s UCL claims and his claim that Oracle did not provide accurate wage statements depend on his other theories of liability. [↑](#footnote-ref-1)
2. Matam alleged that there were 929 class members who held the title of TA during the Class Period. [↑](#footnote-ref-2)
3. Lackritz also performed a comparison of the OTL database and the PA database, which was used by only 79 class members, concluding that the PA database reflected more time worked than the OTL data. [↑](#footnote-ref-3)
4. Although Matam relied on Lackritz’s declaration to show that his rest break claim was subject to common proof, Lackritz did not perform any calculation of missed, late, or short rest breaks. [↑](#footnote-ref-4)
5. Oracle also filed a motion to strike Lackritz’s declaration on the basis of numerous evidentiary objections. [↑](#footnote-ref-5)
6. Matam also initially alleged as part of claim (4) that TAs were offered “pre-populated” time cards which discouraged them from accurately entering time worked, but in his reply brief, Matam conceded that discovery had shown that many class members did not use the pre-populated time cards and limited the claim to injunctive relief. The trial court found injunctive relief inappropriate with respect to a function that many class members did not even use, and Matam does not challenge this aspect of the trial court’s ruling on appeal. [↑](#footnote-ref-6)
7. The trial court also found that Matam had failed to satisfy the manageability and superiority requirements, “[g]iven the paucity and/or insignificance of common factual and legal issues, and predominance of individualized issues” and Matam’s failure to “propose[] any mechanism for managing” them. [↑](#footnote-ref-7)
8. Matam also makes somewhat underdeveloped arguments that the trial court “made [its] decision notwithstanding the fact that Matam’s evidence was supported by contemporaneous electronic records,” notes that “little weight should be given to the testimony of *current* employees of defendant,” and details how some of Oracle’s witnesses recanted their declaration testimony during deposition. These arguments are essentially complaints regarding how the trial court weighed the evidence. Because, as we shall discuss, the trial court did not abuse its discretion by weighing the evidence, and because we do not reweigh that evidence on appeal, these arguments fail.

In addition, Matam’s suggestion that, in weighing the evidence, the trial court relied on “the fact that Oracle submitted more employee declarations than Matam” is not supported by the record. Other than observing that Matam had submitted a “handful” of class member declarations and that Oracle submitted declarations “by 22 putative class members . . . and by 16 persons who managed TAs during the class period,” the trial court did not otherwise discuss or in any way rely on the number of declarations submitted by the parties. [↑](#footnote-ref-8)
9. Matam also argues that the trial court exceeded its “gatekeeping” role with respect to expert evidence by finding fault with Lackritz’s conclusions. As discussed above, the trial court was entitled to weigh the parties’ evidence regarding commonality and predominance, including the Lackritz declaration, and accordingly this argument fails. [↑](#footnote-ref-9)
10. Employees are entitled to overtime pay consisting of 1.5 times the usual hourly wage for work in excess of eight hours per day or 40 hours per week, and two times the usual wage for work in excess of 12 hours. (See Lab. Code § 510, subd. (a).) [↑](#footnote-ref-10)
11. Matam asserts in his reply that the fact that Boedeker counted missed and short meal breaks using the OTL data “confirms that such analysis can be done.” However, as Matam acknowledges, Boedeker did not count late meal breaks, which accounted for 82,841 (or approximately 94.8%) of the 87,397 non-compliant meal breaks identified by Lackritz. [↑](#footnote-ref-11)
12. Similarly, in *Culley v. Lincare, Inc.* (E.D. Cal. Aug. 10, 2016 No. 2:15-cv-00081) 2016 WL 4208567, 2016 U.S. Dist. LEXIS 105704, the plaintiff sought restitution under the UCL, and did “not ask the Court to find that Defendant[s] violated the meal period laws under the California Labor Code.” (*Id*. at p. \*7.) The court also found that defendant’s challenges to plaintiff’s expert opinion regarding the meal break claim were not “foundational to [his] method for calculating damages,” and assumed that plaintiff’s expert could “identify which meal periods were omitted, shortened, or delayed.” (*Id*. at pp. \*2, \*7.) [↑](#footnote-ref-12)