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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

KEVIN TIEN et al., Plaintiffs and Appellants, v. TENET HEALTHCARE CORPORATION et al., Defendants and Respondents.	B214333 (Los Angeles County Super. Ct. No. BC315897/ San Diego County Super. Ct. No. GIC813187)

APPEAL from a judgment of the Superior Court of Los Angeles County. Carl J. West, Judge. Affirmed.

Law Offices of Joseph Antonelli, Joseph Antonelli, Janelle Carney; Law Offices of Kevin T. Barnes and Kevin T. Barnes for Plaintiff and Appellant Kevin Tien.

The Kane Law Firm, Bonnie E. Kane; Law Offices of Barry D. Mills and Barry D. Mills for Plaintiffs and Appellants Carole McDonough and Julia Strain.

Gibson, Dunn & Crutcher and Michele L. Maryott for Defendants and Respondents.

Kevin Tien, Carole McDonough, and Julia Strain, for themselves and as class representatives, appeal from the trial court's denial of class certification of their wage-related claims against their former employers, Tenet Healthcare Corporation, and several dozen of its subsidiaries. We affirm.

FACTS AND PROCEEDINGS

In August 2006, appellants Kevin Tien, Carole McDonough, and Julia Strain filed for themselves and as class representatives for all others similarly situated a joint consolidated amended complaint against respondent Tenet Healthcare Corporation and 37 of its subsidiaries.[1] Appellants were hourly employees of Tenet or one of its 37 subsidiaries (collectively Tenet), consisting of hospitals throughout California. Appellants alleged Tenet had not paid appellants and other class members legally mandated additional wages for missed meal periods and rest breaks. Appellants sought certification of four classes for which appellants alleged common questions of law and fact predominated over individual questions.

● Missed Meal Periods: Appellants alleged Tenet did not provide statutory compensation to employees who did not take their 30-minute meal period within 6 hours of starting work, or did not take a second meal period after 10 hours of work.[2] (Lab. Code, §§ 226.7, 512.)

● Missed Rest Breaks: Appellants alleged Tenet failed to provide a rest break for each four hours an employee worked. (Lab. Code, § 226.7.)

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[1] The complaint consolidated Los Angeles Superior Court proceedings in *Tien v. Tenet Healthcare Corp.* filed in June 2003 and San Diego Superior Court proceedings in *McDonough v. Tenet Healthcare, Inc.*, filed in May 2004.

[2] Appellants' motion for class certification added a subclass to the meal period class. The subclass alleged Tenet paid some employees less than the statutory hourly rate in the occasional instances that it paid employees for missed meal periods. Appellants and Tenet stipulated to dismissal of the subclass in December 2008 based on settlement of another class-action lawsuit (the *Pagaduan* action) that is not part of this appeal.

● Waiting Time Penalties: Appellants alleged Tenet did not pay terminated employees all the wages to which the employees were entitled upon their discharge for missed meal periods and rest breaks, and thus were obligated to pay statutory penalties. (Lab. Code, § 200 et seq.)

● Pay Stub Violations: Appellants alleged Tenet's company-wide pay stub format omitted legally required information, including an employee's hourly rates with the number of hours worked at each rate. (Lab. Code, § 226.)[3]

1. *The June 2008 Certification Order*

In September 2007, appellants moved for class certification. After a hearing, the trial court issued in June 2008 its certification order giving appellants most, but not all, of what they sought.

● Missed Meal Period Class Conditionally Certified: The court found that appellants' definition of membership for the missed meal period class involved predominately individual questions of each employee's eligibility for compensation for missed meals, making appellants' definition of the class overly broad and inappropriate for class treatment. The court noted that uncertain compliance by employees with Tenet's electronic time-keeping record system (Kronos) introduced individualized questions whether particular employees took their meal periods. Additionally, the court noted, some employees signed lawful waivers for meals they missed, but the class definition did not take those waivers into account. The court thus exercised its power to narrow the class definition to conditionally grant class certification of the question of the accuracy of Kronos in determining whether employees took meal periods, and to determine whether employees voluntarily signed meal period waivers.

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[3] Appellants alleged other causes of action which are not at issue in this appeal, including unfair business practices, conversion, unjust enrichment, breach of contract, and breach of the covenant of good faith and fair dealing.

● Certified Waiting Time Penalty Class: The court found common questions predominated as to whether Tenet had a company-wide policy of delaying payment of wages owed to discharged employees, thus justifying class treatment.

● Certified Pay Stub Violations Class: The court found Tenet's use of a corporate-wide pay stub format meant common issues predominated, thereby warranting class treatment.

● Denied Certification of Missed Rest Breaks Class: The court found individualized assessment of each employee's eligibility for compensation for missed rest breaks predominated because the class definition did not allow for Tenet's having paid statutory wage penalties to employees who missed their breaks. The court thus found class treatment was inappropriate.

Tenet moved for "clarification and/or reconsideration" of the court's certification order. Tenet asked the court, among other things, to clarify its reasoning that the accuracy of the Kronos affected whether class treatment was proper for employees who missed their meal periods. Tenet also asked the trial court to certify for interlocutory appellate review four ostensibly pure questions of law, one of which was whether an employer's obligation to "provide" a meal period to employees meant Tenet need merely *offer* a meal period, or must *ensure* employees take their meal periods. Opposing Tenet's "clarification/reconsideration" motion, appellants asserted Tenet was attempting to reargue the certification motion without offering any new information, facts, or law. The court heard Tenet's motion in July 2008, during which the court gave the parties written tentative comments stating its intention to take the motion under submission and to clarify certain portions of the June 2008 certification order.

Six days later on July 22, the Fourth District issued its decision in *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25, review granted October 22, 2008, S166350 (*Brinker*). In *Brinker*, the Fourth District held an employer satisfies its obligation to "provide" a meal period by making meal periods available, but

need not guarantee that employees take their periods. Tenet filed with the court a memorandum discussing *Brinker*'s effect on certification of appellants' meal period class. Tenet argued that, under *Brinker*, whether the Kronos was reliable was no longer material because no reasonable dispute existed that Tenet, at the very least, offered its employees the opportunity to take meal periods. Hence, whether Kronos accurately recorded the taking of meal periods was irrelevant because the law did not obligate Tenet to guarantee employees took their meals. Appellants filed a memorandum arguing the opposite. Asserting *Brinker* was wrongly decided, they urged the trial court need not follow *Brinker* because another published decision, *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 (*Cicairos*), obligated an employer to ensure that employees take their meal periods. Appellants additionally asked the court to defer further action in the case until the time for the California Supreme Court to grant review of *Brinker* expired. The trial court agreed.

On October 22, 2008, the Supreme Court granted review of *Brinker*, resulting in ~~its~~ depublication of the Fourth District's opinion. The next day, Tenet and appellants filed with the trial court a joint statement proposing how the court ought to proceed following *Brinker*'s depublication. Appellants urged the court to move the case forward under its June 2008 certification order. Tenet argued, on the other hand, that judicial economy meant the court should stay further proceedings pending the Supreme Court's decision in *Brinker*, which would likely settle the law on an employer's obligation to provide meal periods. At a status conference the next day, the court noted it had stayed proceedings awaiting the Supreme Court's order to grant or deny review in *Brinker*. Because of that stay, the court had postponed ruling on Tenet's pending request for reconsideration of the June 2008 certification order. Following *Brinker*'s depublication, the court intended to let the case proceed. The court announced: "We're going to have to go forward with the case. [¶] I'm not prepared to just sit back and let it stall, given the fact there's some uncertainties in what's going to happen with *Brinker* . . . . [¶] I'm

happy to go ahead – I'll issue a decision. And I'll set a further status conference to kind of get a proposal for merits discovery and a timetable for completing that."

Four days later on October 28, 2008, before the trial court issued its reconsideration order, the Second District filed *Brinkley v. Public Storage, Inc.* (2008) 167 Cal.App.4th 1278, review granted January 14, 2009, S168806 (*Brinkley*). Like *Brinker*, *Brinkley* held that an employer's obligation to "provide" a meal period only obligated the employer to offer a period during which an employee could eat a meal; it did not obligate the employer to ensure the employee took the break. Three weeks later in November 2008, the trial court issued its ruling on Tenet's motion for reconsideration of the June certification order. Declaring *Brinkley* to be a "change of law," the court granted Tenet's motion. (Code Civ. Proc., § 1008 ["If a court at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so on its own motion and enter a different order"]; *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1100-1101.) The trial court having "determine[d] that *Brinkley* . . . a Second District case, is controlling and requires revocation and modification of the prior" June certification order, the court found "that the reasoning and holdings of the *Brinkley* court have a direct impact on this Court's prior order certifying Classes I [meal periods], III [waiting time penalties], and IV [pay stub violations], and require denial of the motion for class certification as to these classes." Finding the evidence overwhelming that Tenet made meal periods available to employees, the court found no need to examine the reliability of the Kronos to determine whether employees took their meal periods because no legal liability arose from an employee's failure to take a meal period. Consequently, the court denied certification of the meal period class. Denial of certification of the meal period class, in turn, triggered denial of certification of the waiting time penalties class because those penalties rested on the now unviable class claim for unpaid wages for missed meal periods. Finally, the court denied certification of the pay stub violations class because *Brinkley* required employees to show actual damages from any nonconforming pay stub, but individual questions predominated in proving those

damages.[4] Appellants asked that the court stay the proceedings pending what appellants (correctly) anticipated was the Supreme Court's impending grant of review in *Brinkley*. Tenet, on the other hand, requested that the court proceed, moving toward a "death knell" dismissal of the class proceeding and what Tenet (correctly) anticipated would be appellant's appeal to this court of the trial court's denial of class certification. The trial court agreed to stay the proceedings until February 2009 pending its further order.

In January 2009, the Supreme Court granted its hold-and-review of *Brinkley* pending its decision in *Brinker*. Appellants thereafter asked the trial court to vacate its November denial of certification order which had gutted its June certification order. Appellants asked the court to reinstate its June order because the November order relied on the no-longer citable *Brinkley*. Pointing to *Cicairos, supra,* 133 Cal.App.4th 949 as purportedly the only published authority on an employer's duty to provide meal periods to employees, appellants asserted the court erred in denying certification. Appellants counsel argued to the court:

"As the court states in its opinion on November 17th, the court found that *Brinkley* was controlling on this court . . . *Brinkley* was not controlling on this court. [¶] If you have divergent opinions from different appellate districts this court is entitled to look at whichever opinion it wants to. So *Brinkley* was not necessarily controlling. The court could have looked at *Cicairos* and stayed with the *Cicairos* decision."

The trial court declined to change its November denial of certification order. The court informed counsel: "*Cicairos* appears to me to be a minority view adopted by one court when a number of courts have taken the *Brinkley/Brinker* view and analysis and it seems stronger to me." This appeal followed. In February 2011 in a published opinion, we affirmed the trial court's order. (*Tien v. Tenet Healthcare Corp.* (2011)

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[4] The court affirmed its certification of the subclass of missed meal periods discussed *ante*, footnote 2, involving Tenet's alleged payment to employees of less than their regular hourly rates for missed meal periods, but noted the pending final settlement of the *Pagaduan* action would likely lead to summary dismissal of that subclass's claims.

121 Cal.Rptr.3d 773.) Appellants filed a petition for review. In May 2011, our Supreme Court issued a grant-and-hold order in this matter pending its decision in *Brinker Restaurant v. Superior Court*, review granted May 18, 2011, S166350. In April 2012, our Supreme Court issued its decision in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*) and transferred this matter to us with directions to vacate our earlier decision and to reconsider the cause in light of *Brinker*, *supra*. We now do so.

DISCUSSION

A. *Denial of Certification Reviewed for Substantial Evidence When Court Applies Correct Legal Analysis*

Appellants contend the court committed multiple errors in denying class certification. We find the court ruled correctly for each of the four proposed classes.

1. Legal Principles Governing Appellate Review

Class certification "is essentially a procedural [question] that does not ask whether an action is legally or factually meritorious." (*Brinker, supra,* 53 Cal.4th at p. 1023.) A trial court ruling on a certification motion determines "whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." (*Id.* at p. 1021.) "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." (*Id.* at p. 1022; see also *In re Lamps Plus Overtime Cases* (Aug. 20, 2012, B220954) 2012 WL 3587610, [p. 5].) "Accordingly, a trial court ruling supported by substantial evidence generally will not be disturbed 'unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]' [citation] . . . ." [Citations.]" (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326-327, quoting *Linder v. Thrifty Oil Co.*

(2000) 23 Cal.4th 429, 435-436 (*Linder*); *Hernandez v. Chipotle Mexican Grill, Inc.* (Aug. 21, 2012, B216004) 2012 WL 3579567, [p. 5].) However, "We do not apply this deferential standard of review if the trial court has evaluated class certification using improper criteria or an incorrect legal analysis. . . . [Citations.] The reviewing court 'must examine the trial court's reasons for denying class certification.' [Citation.] When reviewing an order denying class certification, appellate courts 'consider only the reasons cited by the trial court for the denial, and ignore other reasons that might support denial.' [Citation.]" (*Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1297-1298 (*Jaimez*); see also *In re Lamps Plus Overtime Cases, supra,* [p. 5]; *Hernandez v. Chipotle Mexican Grill, Inc., supra,* [p. 5].) But if the court applies the correct legal standards and principles and finds individualized issues predominate, we review the finding for substantial evidence. "Our task is to determine whether the record contains substantial evidence to support the trial court's predominance finding. [Citation.] . . . [Citation.] We will not reverse the trial court's ruling, if supported by substantial evidence, unless improper criteria were used or erroneous legal assumptions were made." (*Keller v. Tuesday Morning, Inc.* (2009) 179 Cal.App.4th 1389, 1397.)

2. Substantial Evidence Supports Denial of Certification

Tenet notes that appellants do not challenge the sufficiency of the evidence supporting the trial court's findings that individual questions predominated over common questions. Based on appellants' failure to discuss the evidence supporting the trial court's denial of certification, we could find appellants have not preserved the issue for appeal and affirm on that basis alone.[5] But even if preserved, we alternatively find that substantial evidence supported the trial court's findings that individual questions

[5] Appellants identify some of the relevant facts in the section of their opening brief and in some parts of their reply brief that discuss why the trial court's original order was correct. (See part E *post*.) Even in those discussions, appellants violate rules of appellate practice by not citing all the evidence in support of the trial court's final ruling. (*Grombiner v. Swartz* (2008) 167 Cal.App.4th 1365, 1374.)

predominated and affirm for that reason. Case law establishes that "a class action will not be permitted if each member is required to 'litigate substantial and numerous factually unique questions' before a recovery may be allowed. [Citation.] . . . '[I]f a class action "will splinter into individual trials," common questions do not predominate and litigation of the action in the class format is inappropriate. [Citation.]' [Citations.]" (*In re Lamps Plus Overtime Cases, supra*, 2012 WL 3587610, [p. 5].)

(a). Meal Periods

The trial court found individual questions of proof predominated. The court explained: "The Court would be required to conduct highly individualized determinations, including, but not limited to, *whether* putative class members took their meal periods and the reason(s) why meal periods were not taken, before a liability determination could be made. Importantly, a class action is not 'superior' where there are numerous and substantial questions affecting each class member's right to recover, following determination of liability to the class as a whole." (Italics in original.) Here, the court found individual questions swirled around issues such as (1) employees signing, or not signing, missed meal logs which created inconsistencies with time records showing whether meals were taken; (2) certain employees receiving meal periods although time records showed otherwise; (3) employees not clocking out through Kronos but signing correction slips documenting they took their meals, and (4) some employees shorting the clock by starting their meals before clocking out.

Our Supreme Court conclusively established in *Brinker* that California requires only that an employer make a meal period available, not that employees must eat their meals. (*Muldrow v. Surrex Solutions Corp.* (Aug. 29, 2012, D057955, D058958) ___ Cal.App.4th ___ [12 D.A.R. 12,088] ["In *Brinker*, the Supreme Court held that an employer need only *provide* for meal periods, and need not *ensure* that employees take such breaks."].) (Italics in original.) "An employer's duty with respect to meal breaks . . . is an obligation to provide a meal period to its employees. The employer satisfies this

obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30–minute break, and does not impede or discourage them from doing so. . . . [¶] [T]he employer is not obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations . . . ." (*Brinker, supra,* 53 Cal.4th at pp. 1040-1041; see also *Bell v. H.F. Cox, Inc.* (Sept. 5, 2012, B229982, B233136) 2012 WL 3846827, [p. 13] ["an employer must provide an employee a meal period during which the employee is relieved of all duty"]; *In re Lamps Plus Overtime Cases, supra,* 2012 WL 3587610, [p. 7] quoting *Brinker*; *Hernandez v. Chipotle Mexican Grill, Inc., supra,* 2012 WL 3579567, [p. 8] [*Brinker* "conclusively" resolves employer need not ensure employee takes meal period].) The court's findings that individual questions of proof predominated coincide with the common-sense notion that the reasons any particular employee might not take a meal period are more likely to predominate if the employer need only offer meal periods, but need not ensure employees their meals. Thus, the trial court did not abuse its discretion in denying certification of the missed-meal-period class.

(b). Rest Breaks

The trial court found Tenet's policies made 10-minute rest breaks available after every four hours of work. Given that Tenet was obligated only to offer, not ensure, rest breaks (*Brinker, supra,* 53 Cal.4th at pp. 1034, 1040-1041), liability arose for Tenet only if its policy was a policy in name only and unobserved in practice. (Cf. *Jaimez, supra,* 181 Cal.App.4th at pp. 1294; *id.* at pp. 1300, 1304-1305 [employer scheduled work routine that made it virtually impossible as a practical matter for employees to take rest breaks and still complete their assigned work].) The trial court found that because employees did not record their 10-minute breaks on Kronos, the reasons, if any, that

employees might not take their breaks were predominately individualized questions of fact not susceptible to class treatment. Hence, class certification was unwarranted.

(c). Pay Stubs

The court held class certification of pay stub violations required class members to show actual injury from noncomplying pay stubs. (Lab. Code, § 226.) Appellants asserted employees suffered the injury of not being able to understand their pay stubs. The trial court found, however, that individual questions of actual injury predominated over common questions, explaining "The Court would have to determine *whether* each individual class member actually suffered injury or damages as a result of the pay stubs lacking the information required under the Labor Code . . . . Such highly individualized determinations would render the class mechanism impracticable . . . ."

(d). The Trial Court's Ruling was Correct

Because substantial evidence, unchallenged by appellants, supported each of the foregoing denials of class certification, appellants fail to show the court's ruling was error. (*Keller v. Tuesday Morning, Inc.*, *supra*, 179 Cal.App.4th at p. 1397 ["We will not reverse the trial court's ruling, if supported by substantial evidence . . . ."].)

B. *Relying on Depublished* Brinkley

In denying class certification, the trial court's November 2008 order cited *Brinkley* as compelling the denial. Appellants contend the court erred when it refused to reverse its November order after the Supreme Court granted review of *Brinkley* in January 2009. Noting that a court may not cite an unpublished decision (Cal. Rules of Court, rule 8.1115(a)), appellants contend depublication of *Brinkley* necessarily meant reversing the November order which relied on *Brinkley*. Appellants assert the court's refusal to reverse itself was legal error because *Brinkley*'s depublication (and *Brinker*'s a few months earlier) meant, according to appellants, that *Cicairos*, *supra*, 133 Cal.App.4th

949, was the only published authority on point. *Cicairos* being the sole relevant authority, the trial court was, appellants assert, compelled to follow what appellants understood to be *Cicairos*'s holding that employers must ensure employees take their meal periods.

Appellants' contention fails because *Brinkley* was a still-published decision when the trial court relied on it in November 2008; *Brinkley*'s depublication did not occur until January 2009. Although *Brinkley*'s depublication meant the trial court could no longer rely on that decision after January 2009, appellants cite no authority that the court's reliance on *Brinkley* before its depublication violated the rule prohibiting citation of depublished decisions. (Cf. Cal. Rules of Court, rule 8.1115(d) ["A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published"].) Describing the legal reasoning of *Brinkley* and *Brinker* about an employer's obligation to provide meal periods, the trial court concluded: "I've looked at the analysis, I've looked at the logic of it and it makes more sense to me at this juncture." And their analysis made more sense to our Supreme Court, too, when it concluded in *Brinker* that an employer need only make a meal period available. (*Brinker*, *supra*, 53 Cal.4th at pp. 1034, 1038 ["The difficulty with the view that an employer must ensure no work is done—i.e., prohibit work—is that it lacks any textual basis in [any relevant] wage order or statute."].) At bottom, the Supreme Court has directed us to reconsider our decision in light of its decision in *Brinker*. Thus, the changing status of *Brinker* (and *Brinkley*) during the pendency of the litigation is largely beside the point.

In any event, contrary to appellant's assertion, *Cicairos* did not establish that an employer must guarantee employees take their meal periods. Thus, even though the trial court would have been obligated, in the absence of any conflicting appellate authority, to apply *Cicairos* if that decision were applicable to the case before it (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456), the converse was equally true: If *Cicairos* was not precedent for the point appellants were making, the trial court had no duty to follow that opinion. (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 415 [case not

authority for proposition not considered]; *Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 926.)

Cicairos involved an employer at summary judgment in which triable issues of fact existed whether the employer had a policy against providing breaks. Such a policy would have violated an employer's duty to offer meal periods regardless of whether the employer had an additional duty of ensuring employees take their meal periods – an additional duty which *Brinker* conclusively established does not exist. (*Hernandez v. Chipotle Mexican Grill, Inc.*, *supra*, 2012 WL 3579567, [p. 8].) The employer in *Cicairos* pressured its truck driver employees to make a certain number of trips during a work day, monitored their progress with a tracking system, did not include a code in the tracking system for rest stops, and did not schedule meal breaks for the drivers. (*Cicairos, supra*, 133 Cal.App.4th at pp. 955-956.) These and other aspects of the work environment effectively deprived drivers of an opportunity to take breaks. An employer who frustrates its employees' exercise of their right to meal periods violates the employer's obligation to "provide" meal periods. (See *id.* at pp. 962-963.) That an employer may not frustrate the exercise of the employees' meal periods does not, however, create an obligation to ensure that employees actually take their meal periods. *(In re Lamps Plus Overtime Cases*, *supra*, 2012 WL 3587610, [p. 8].) Here, the trial court found overwhelming evidence that Tenet policy allowed meal periods. That policy satisfied Tenet's legal obligation and required nothing more. Because *Cicairos* involved evidence that the employer effectively denied meal periods, *Cicairos* did not discuss whether the employer was obligated to ensure that the employees took their meal periods. (*Cicairos, supra*, 133 Cal.App.4th at pp. 962-963.) Thus, *Cicairos* was not authority for appellants' contention that Tenet was obligated to guarantee appellants take their meal periods. (*Brown, supra*, 249 F.R.D. at p. 586 [*Cicairos* is "consistent with an obligation to make breaks available, rather than to force employees to take breaks"]; see also *Kenny v. Supercuts, Inc.* (N.D.Cal. 2008) 252 F.R.D. 641, 646 ["*Cicairos* is not persuasive

authority for the proposition that employers must ensure that their employees take meal breaks"].) Therefore, the court reasonably chose not to follow *Cicairos*.

C. *Opportunity to Argue* Brinkley*'s Applicability*

Appellants contend the court violated their due process right to be heard when it relied on *Brinkley* to deny certification. According to appellants, the court "wrongfully reconsidered on its own motion [its June certification order] without informing the parties, soliciting briefing and holding a hearing." Appellants assert the court issued its order denying certification "without any notice whatsoever that the Court, on its own motion, would reconsider the order granting certification." Appellants' contention is not well-taken.

First, Tenet's motion for reconsideration of the June certification order was pending in October 2008 when *Brinkley* was decided. Appellants did not request supplemental briefing after *Brinkley* issued, thus waiving their claim that the court denied them the opportunity to brief *Brinkley*'s effect on their class action claims. In any case, the trial court had previously permitted appellants (and Tenet) to submit written argument several months earlier in the summer of 2008 on the Fourth District's yet-to-be depublished opinion in *Brinker* and the legal principles for which it stood, namely that an employer need only make meal periods available, but need not ensure employees take their meals. According to appellants, *Brinker* and *Brinkley* stood for the same proposition; appellants argued, "*Brinkley*'s holding is nearly identical to the now defunct *Brinker*, holding as it pertains to the meal and rest period issues." On appeal, appellants do not identify what new arguments they would have made about the scope of an employer's obligation under *Brinkley* to "provide" meal periods that they had not previously made about that obligation under *Brinker*.[6] Hence, the court's error, if any, in failing to sua sponte invite supplemental briefing on *Brinkley* was harmless.

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[6] *Brinkley* did differ, however, from *Brinker* in holding an employee must show actual injury from receiving a pay stub that did not comply with statutory requirements

D. *Trial Court Properly Considered the Merits of the "Provide vs. Ensure" Issue*

The trial court found "by any measure" that Tenet made meal periods "available." Appellants assert that the court's finding went beyond that permitted on a certification motion. They contend that class certification raises procedural hurdles which appellants must overcome, but does not require appellants, nor permit the court, to address the merits of appellant's claims. " 'The certification question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." ' " (*Brinker, supra,* 53 Cal.4th at p. 1023; *Sav-On Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at p. 326; *In re Lamps Plus Overtime Cases*, *supra*, 2012 WL 3587610, [p. 9].) Appellants contend the trial court improperly probed the merits of their claims when it found Tenet's obligation to "provide" a meal period merely obligated Tenet to make meal periods available without ensuring employees took their meal periods. Thus, according to appellants, the court acted beyond its authority when it found Tenet's offering of meal periods was sufficient to relieve Tenet of class liability.

Appellants are mistaken. "The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class [and] a well-defined community of interest . . . . [Citations] . . . '[T]he "community of interest requirement embodies three factors [one of which is] predominant common questions of law or fact . . . ." (*Brinker, supra,* 53 Cal.4th at p. 1021.) The applicable body of law pertinent to a particular type of claim may frame those questions which must predominate. (*Id.* at pp. 1023-1024.) In those situations, a trial court may not be in a position to decide whether common questions predominate unless it delves into the merits of the underlying claims.

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dictating the pay stub's contents. Appellants' failure to request supplemental briefing on *Brinkley* waives their claim that the court denied them an opportunity to be heard on that matter.

Brinker addresses the point at length in its opinion and squarely rejects the prohibition against consideration-of-the-merits argument that appellants now make. (*Brinker, supra,* 53 Cal.4th at pp. 1023-1026.) *Brinker* first held that a trial court is not always required to consider the merits as part of its common questions analysis. In concluding that the *Brinker* Court of Appeal had erred on this point, the Supreme Court stated that "the Court of Appeal went too far by intimating that a trial court must as a threshold matter always resolve any party disputes over the elements of a claim. In many instances, whether class certification is appropriate or inappropriate may be determined irrespective of which party is correct. In such circumstances, it is not an abuse of discretion to postpone resolution of the disputed issue." (*Id.* at p. 1023.) At the same time, the Supreme Court went on to say that in other instances the trial court must resolve legal or factual issues when they are "*necessary* to a determination whether class certification is proper." (*Ibid.*) Later in its opinion the Supreme Court observed: "To the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them. Out of respect for the problems arising from one-way intervention, however, a court generally should eschew resolution of such issues unless necessary. (See *Fireside Bank v. Superior Court*[(2007) 40 Cal.4th 1069,] 1074; *Schleicher v. Wendt*[(7th Cir. 2010) 618 F.3d 0169,] 685.) Consequently, a trial court does not abuse its discretion if it certifies (or denies certification of) a class without deciding one or more issues affecting the nature of a given element if resolution of such issues would not affect the ultimate certification decision." (*Brinker* at p. 1025; *see also In re Lamps Plus Overtime Cases, supra,* 2012 WL 3587610, [pp. 9-10].)

When trial courts are required to decide whether or not to consider the merits, the Supreme Court has suggested that they act with caution: Inquiries into the merits "are closely circumscribed. As the Seventh Circuit has correctly explained, any 'peek' a court takes into the merits at the certification stage must 'be limited to those aspects of the merits that affect the decisions essential' to class certification. (*Schleicher v. Wendt[, supra,* 618 F.3d at p. 685])." (*Brinker, supra,* 53 Cal.4th at p. 1025.)

Here, the trial court's consideration of the merits, i.e. the scope of Tenet's legal obligation to provide meal periods, went directly to the court's determination of whether common questions of law or facts predominated. Although, as the Supreme Court has observed, a trial court is not always required to consider the underlying merits of the claim in ruling on class certification, it retains discretion to do so in the appropriate case. (*Brinker, supra,* 53 Cal.4th at pp. 1023-1025.) This was an appropriate case.

We reject as misplaced appellants' reliance on *Linder, supra,* 23 Cal.4th 429, to support their contention that the trial court overstepped its authority. Appellants rest their contention on *Linder*'s general observation that class certification involves procedural concerns, leaving challenges to the substantive merits of a proposed class action to mechanisms such as a demurrer or motion for summary judgment. (*Linder* at pp. 440-441.) First, *Linder* does not foreclose courts from examining a legal issue in addressing certification; *Linder* said only that a plaintiff need not establish a likelihood of success on the merits in order to obtain class certification. (See *Brinker, supra,* 53 Cal.4th at p. 1024.) *Linder* expressly recognized that whether the claims of the representative plaintiffs are typical of class claims was an issue that might intertwine with the merits of the case, thus necessarily requiring the court to consider those merits. (*Fireside Bank, supra,* 40 Cal.4th at p. 1092, citing *Linder,* at p. 443; see also *Brinker* at p. 1023 [same].) In any event, *Brinker* not *Linder,* is the present law on the subject and *Brinker* makes clear that consideration of the merits is appropriate in some cases.

E. *Impeaching Court's Final Order with June Order*

Appellants contend that, with one exception involving the court's denial of class certification for the meal break class, the court ruled correctly in its June 2008 order which largely granted class certification. Holding the court's June order up against its November order denying certification, appellants urge us to deem the June order the sounder decision and direct the trial court to reinstate it. We decline appellants' invitation.

A trial court's interim order may not be used to impeach its final order. Appellants' assertion that the June order is better reasoned does not establish that the November order was error, nor does the fact that the June order may, for the sake of argument, have been a reasonable exercise of the court's discretion mean the November order was an abuse of discretion. " '[A] court is not bound by its statement of intended decision and may enter a wholly different judgment than that announced.' [Citation.] 'Neither an oral expression nor a written opinion can restrict the power of the judge to declare his [or her] final conclusion in his [or her] findings of fact and conclusions of law. [Citation.] The findings and conclusions constitute the final decision of the court and an oral or written opinion cannot be resorted to for the purpose of impeaching or gainsaying the findings and judgment. [Citation.]' [Citation.] " (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 646-647.) Appellants' burden is not to prove the June order was correct, but rather to demonstrate that the November order from which they appeal was legally wrong.

Appellants assert little, if any, evidence exists that the court initially intended its June order to be a tentative order. They claim no language within the June order states it was a tentative decision. They additionally note that the order's disposition set forth the next steps the parties were to take in the proceedings, which was consistent with the court envisioning its June order as a final, nontentative ruling. Finally, Tenet styled its motion challenging the June order as a motion for reconsideration and clarification, not as a motion seeking to put the final touches to an interim order. Hence, according to appellants, Tenet's authorities that a party may not use an interim order to impeach a final order are inapt. Be that as it may, regardless of whether the court initially may have envisioned its June order as being the operative certification order, it did not become so. Within days of the court's June order, Tenet filed its motion for "clarification and/or reconsideration," which the court took under submission and later granted. The court's intended final order on certification was its November order, which is the order from which appellants took their appeal and, as the operative order, the one in which they must

show legal error in order to prevail on appeal. In that challenge, they cite no authority elevating the superseded June order to being anything more than largely beside the point.

DISPOSITION

The November 2008 order denying class certification is affirmed. Each side to bear its own costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.