

SUPREME COURT
FILED

November 2, 2012

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Frank A. McGuire Clerk
Deputy

VIA HAND DELIVERY

Honorable Chief Justice and Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: **Request for Depublication of Opinion:**
Lamps Plus Overtime Cases, 209 Cal.App.4th 35 (Aug. 20, 2012; pub. ord. Sept.
5, 2012), Case Nos. B220954, S206007

Dear Honorable Justices:

Pursuant to Rule of Court 8.1125, I write on behalf of Adam Hohnbaum, Illya Haase, Romeo Osorio, Amanda June Rader, and Santana Alvarado to request depublication of the Court of Appeal's opinion in *Lamps Plus Overtime Cases*, 209 Cal.App.4th 35 (2012), No. B220954 (Second Appellate District). The *Lamps Plus* opinion was issued on August 20, 2012, was certified for publication on September 5, 2012, and became final on October 5, 2012. See Rule of Court 8.264(b)(3), (c)(1). A petition for review was filed on October 16, 2012 (per Rule of Court 8.25(b)) and is pending (No. S206007). This depublication request is timely filed within 30 days after the opinion became final. See *id.*, Rule 8.1125(a)(4).

Statement of Interest and Summary of Grounds for Depublication

Adam Hohnbaum, Illya Haase, Romeo Osorio, Amanda June Rader, and Santana Alvarado were the plaintiffs and petitioners in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, No. S166350. In April 2012, this Court handed down its opinion with instructions to the Court of Appeal to "remand to the trial court for it to reconsider meal period subclass certification in light of the clarification of the law we have provided." *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, 53 Cal.4th 1004, 1052 (2012). The Court of Appeal did so on June 14, 2012. Accordingly, proceedings have resumed in the trial court, where the case is currently active and pending.

Mr. Hohnbaum and his fellow plaintiffs continue to have a strong interest in the correct development of the law governing meal periods and, particularly, in ensuring that this Court's opinion in their case, which the trial court will be construing and applying as their matter proceeds on remand, is not misinterpreted in published Court of Appeal opinions.

Lamps Plus is one of the "grant and hold" cases in which this Court directed the Court of Appeal to apply *Brinker* on remand. Instead of doing so, however, *Lamps Plus* simply readopted

its own analysis from its earlier, vacated opinion, with one paragraph added in the middle of that analysis purporting to address *Brinker*. In so doing, the Court of Appeal failed to adhere to the rule of stare decisis or to this Court's explicit directive. The resulting opinion "could lead to unanticipated misuse as precedent" and therefore should be depublished. See Eisenberg et al., *California Practice Guide: Civil Appeals & Writs* §11:180.1 (Rutter Group 2011).

***Lamps Plus* is One of the *Brinker* "Grant and Hold" Cases That This Court Took Up for Review Then Remanded Back for Further Proceedings**

Lamps Plus is one of the cases in which this Court issued a "grant and hold" order pending resolution of *Brinker*. *Lamps Plus Overtime Cases*, No. S194064 (review granted July 20, 2011). The original *Lamps Plus* opinion was handed down on May 10, 2011. *Lamps Plus Overtime Cases*, 195 Cal.App.4th 389, 125 Cal.Rptr.3d 590 (2011), review granted. This Court granted review on July 20, 2011 and stayed further proceedings pending resolution of *Brinker*.

On April 12, 2012, this Court handed down its opinion in *Brinker*. On June 20, 2012, the Court transferred *Lamps Plus* back to the Court of Appeal with "directions to vacate its decision and to reconsider the cause in light of" *Brinker*. On August 20, 2012, after the parties filed post-*Brinker* letter briefs, the Court of Appeal handed down its new opinion. On September 5, 2012, the opinion was certified for publication.

The original *Lamps Plus* opinion and the new *Lamps Plus* opinion are extremely similar. Attached hereto as **Exhibit A** is a redline comparison between the original and new opinions. All references in this letter to "slip op." are to the redline comparison. As will be seen, the Court of Appeal simply readopted the reasoning of its earlier opinion, and its wording almost verbatim, adding a single isolated paragraph purporting to address *Brinker*.

The *Lamps Plus* Opinion Does Not Follow this Court's Analysis in *Brinker*. Instead, the Panel Merely Readopted its Own Pre-Remand Analysis from its 2010 Opinion. That Contravenes the Rule of Stare Decisis as Well as This Court's Remand Order.

As the Court is well aware, under the doctrine of stare decisis, "[t]he decisions of this court are binding upon and must be followed by all" lower courts, which "must accept the law declared by courts of superior jurisdiction." *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455 (1962) (citing *People v. McGuire*, 45 Cal. 56, 57-58 (1872); *Latham v. Santa Clara County Hospital*, 104 Cal.App.2d 336, 340 (1951); *Globe Indemnity Co. v. Larkin*, 62 Cal.App.2d 891, 894 (1944)).

This means lower courts are not only bound by the result in a Supreme Court case, but also "must follow the reasoning found therein." *Loshonkohl v. Kinder*, 109 Cal.App.4th 510, 517 (2003) (citing *Auto Equity Sales*, 57 Cal.2d at 455) (emphasis added); see also *People v. Perez*, 182 Cal.App.4th 231, 245 (2010) ("we are bound by [the Supreme Court's] reasoning" (emphasis added)); *Priceline.com Inc. v. City of Anaheim*, 180 Cal.App.4th 1130, 1149 (2010) ("we are constrained to analyze this case under the rationale stated [by the Supreme Court]"); *WSS Indus. Const., Inc. v. Great West Contractors, Inc.*, 162 Cal.App.4th 581, 596 (2008) ("We are bound by this reasoning."); *Atkinson v. Golden Gate Tile Co.*, 21 Cal.App. 168, 174 (1913)

(lower courts have “no option but *to follow and apply the reasoning* [of Supreme Court opinions] in disposing of the points made [in later cases]” (emphasis added)).

This is so whatever the lower court “may think of the reasoning” when considering similar issues in future cases. *Vielehr v. State Personnel Bd.*, 32 Cal.App.3d 187, 193 (1973). The Supreme Court’s analysis and reasoning in its opinions is not to be set aside and ignored by lower courts, particularly where the analysis was “responsive to an argument raised by counsel” and “probably intended for guidance of the court and attorneys upon a new hearing.” *United Steelworkers of America v. Board of Education*, 162 Cal.App.3d 823, 834-35 (1984) (citing *Auto Equity Sales*, 57 Cal.2d at 455; *Wall v. Sonora Union High Sch. Dist.*, 240 Cal.App.2d 870, 872 (1966)).

Here, the new *Lamps Plus* opinion does not follow this Court’s reasoning in *Brinker*. Instead, the new *Lamps Plus* opinion readopted the reasoning stated in its original 2011 opinion. Six pages of reasoning are copied verbatim from the 2011 opinion (slip op. at 11-16)—reasoning presumptively rejected when the Supreme Court granted review in 2011, and reasoning conspicuously not adopted in the Supreme Court’s own *Brinker* opinion.

Lamps Plus begins its analysis by citing federal decisions issued before *Brinker* and discussing what federal courts did pre-*Brinker*:

Federal courts have consistently found that California employers are required only to make uninterrupted meal and rest periods *available* to their employees.

Slip op. at 13 (emphasis in original) (citing *Brown v. Federal Express Corp.*, 249 F.R.D. 580, 585 (C.D. Cal. 2008)). Elsewhere, the opinion mentions with approval “numerous federal authorities” holding that employers need only “provide employees the opportunity to take breaks.” *Id.* at 7-8 (citing *Brown*, 249 F.R.D. at 586-587; *Kenny v. Supercuts, Inc.*, 252 F.R.D. 641 (N.D. Cal. 2008); *Salazar v. Avis Budget Group, Inc.*, 251 F.R.D. 529 (S.D. Cal. 2008); *Perez v. Safety-Kleen Systems, Inc.*, 253 F.R.D. 508 (N.D. Cal. 2008); *Marlo v. United Parcel Service, Inc.*, 2009 WL 1258491 (C.D. Cal. 2009); *White v. Starbucks Corp.*, 497 F.Supp.2d 1080 (N.D. Cal. 2007)).

Then, the *Lamps Plus* opinion goes on to rely on a dictionary definition to determine what employers must do to comply with California law, which is an approach this Court did not resort to in *Brinker*:

[E]mployers must only *provide* breaks, meaning, make them available. Our interpretation of the meal break requirement is supported by the definition of the word “provide” as used in [the Labor Code and Wage Orders]. “Provide” means “to supply or make available.” (Webster’s Tenth Collegiate Dictionary (1993), p. 937.)

Id. In this respect, the new *Lamps Plus* analysis closely resembles that employed by the Court of Appeal in *Brinker*, which relied on a combination of a dictionary definition and *Brown* to analyze the meal period question. See *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*,

80 Cal.Rptr.3d 781, 806-07 (Ct. App. 2008), *review granted* (citing Merriam-Webster's Collegiate Dictionary (11th ed. 2006); *Brown*, 249 F.R.D. 580; *White*, 497 F.Supp.2d 1080).

This Court's *Brinker* opinion did not use this analysis or rely on any federal district court rulings to determine what California's meal period laws require. In the briefing, the Court was strenuously urged to rely on the dictionary and federal cases such as *Brown*. The Court easily could have adopted the reasoning and analysis of *Brown* if it had wished to do so, but it did not. Instead, the Court took a different approach. It carefully reviewed the language of the current and historical Wage Orders governing meal periods, along with contemporaneous DLSE opinion letters, as well as the later enactment of Labor Code section 512, and evaluated California's meal period requirements "against this background." *Brinker*, 53 Cal.4th at 1034-39.

This Court then held, based on *that* careful analysis, that "provide" does not mean simply make meal periods "available" or "offer an opportunity" to take them, as *Lamps Plus* declares on the authority of a dictionary. *Lamps Plus*, slip op. at 9, 13; *see Brinker*, 53 Cal.4th at 1034 (summarizing employer's argument that it "is only obligated to 'make available' meal periods, with no responsibility for when they are taken"). Instead, the Court held that the employer *does* have a responsibility that extends beyond merely "offering" meals or making them "available," and that this responsibility requires an employer to actually "relieve[] its employees of all duty" and "relinquish[] control over their activities," while at the same time refraining from "exerting coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally protected breaks." *Brinker*, 53 Cal.4th at 1040. These are "fundamental employer obligations," and they go beyond merely "offering" breaks. *Id.* at 1038-39.

While the *Lamps Plus* opinion adds a paragraph in the middle of its analysis addressing *Brinker* (slip op. at 14), the paragraph does not quote the opinion's most important language. Nor does the *Lamps Plus* opinion make any effort to apply the *Brinker* holdings to the facts of the case before it.

Instead of following this Court's analysis in *Brinker*, the *Lamps Plus* opinion restores both the dictionary and federal decisions such as *Brown* to the status of sources of meaning of California's meal period laws. The *Lamps Plus* opinion also reintroduces into California jurisprudence pre-*Brinker* holdings, such as "employers are required only to make uninterrupted meal and rest periods *available*," that are inconsistent with the actual holding of *Brinker*. If *Lamps Plus* remains published, trial courts may consider themselves justified in returning to cases like *Brown*, rather than *Brinker*, for guidance when adjudicating future meal period cases. They may see the analysis of *Lamps Plus* and stop there, instead of turning to *Brinker* as they should. The published status of the *Lamps Plus* opinion thus threatens to weaken what the Court *did* hold in *Brinker*.

The *Lamps Plus* opinion closely resembles the improper lower court opinion in *Auto Equity Sales*. There, this Court deprecated the lower court opinion for including "a detailed statement of *that court's* interpretation" of the relevant legal issue, and a discussion of "why *that* interpretation is sound," when instead stare decisis required the lower court to follow the reasoning of the higher court's binding opinion. *Auto Equity Sales*, 57 Cal.2d at 456 (emphasis added). The *Lamps Plus* panel went astray in exactly the same manner. Its opinion contains six

pages of its own, pre-*Brinker* analysis of the legal issue, which diverges from this Court's actual analysis in critical ways, creating the risk that lower courts will follow *that* analysis, rather than this Court's binding one, in future cases.

If *Lamps Plus* remains a citable precedent and is not depublished, other lower courts may follow its lead down the same improper analytical path, one that overlooks this Court's analysis and pronouncements in *Brinker* in a manner that could be outcome-determinative.

Conclusion

For all of these reasons, the Court is respectfully asked to enter an order depublishing the Court of Appeal's new opinion in *Lamps Plus*.

Respectfully submitted,


Kimberly A. Kralowec
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cc: See attached proof of service

PROOF OF SERVICE

I, the undersigned, hereby declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States; am over the age of 18 years; am employed by THE KRALOWEC LAW GROUP, located at 188 The Embarcadero, Suite 800, San Francisco, California 94105, whose principal attorney is a member of the State Bar of California and of the Bar of each Federal District Court within California; am not a party to the within action; and that I caused to be served a true and correct copy of the following documents in the manner indicated below:

1. REQUEST FOR DEPUBLICATION OF OPINION FILED AUGUST 20, 2012; and
2. PROOF OF SERVICE.

By Mail: I placed a true copy of each document listed above in a sealed envelope addressed to each person listed below on this date. I then deposited that same envelope with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that upon motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

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Gary M. Gray

EXHIBIT A

Filed 5/10/11

~~CERTIFIED FOR PUBLICATION~~ Filed 8/20/12 Opinion following remand from Supreme Court.
Certified for publication 9/5/12 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LAMPS PLUS OVERTIME CASES~~;~~

B220954

MARLON FLORES et~~;~~ al.,

JCCP No. 4510

Plaintiffs and Appellants,

(Los Angeles County
Super. Ct. No. BC357662)

v.

LAMPS PLUS, INC., et al.

Defendants and Respondents.

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

Krutcik & Georggin, James A. Krutcik, A. Nicholas Georggin, and Joo Hee Kershner for Plaintiffs and Appellants.

Sidley Austin, Douglas R. Hart and Beth Ann Scheel for Defendants and Respondents.

SUMMARY

Plaintiffs and appellants Marlon Flores, Hooman Khalili, and Ryan McGuinness ~~appeal~~appealed from the order denying their motion for class certification of their labor claims against Lamps Plus, Inc., Pacific Coast Lighting, Inc., and Lamps Plus Centennial, Inc. (Lamps Plus, or defendants). ~~Because we conclude~~We published an opinion concluding that employers must provide employees with breaks, but need not ensure employees take breaks, that individual disputes ~~dominate all of plaintiffs' claims, and the class representatives are inadequate, we hold the trial court did not abuse its discretion in denying the motion and therefore affirm.~~dominated all of plaintiffs' claims, and the class representatives were inadequate. We held the trial court did not abuse its discretion in denying the motion and therefore affirmed the trial court's order. (Lamps Plus Overtime Cases (2011) 195 Cal.App.4th 389, review granted July 20, 2011, S194064.) Our decision was issued while awaiting the California Supreme Court's decision in *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25, review granted October 22, 2008, S166350. The California Supreme Court granted review of our case, decided *Brinker*, and has since remanded the case "with directions to vacate [our] decision and to reconsider the cause in light of *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 [*Brinker*]." (Lamps Plus Overtime Cases (June 20, 2012, S194064) 2012 Cal. Lexis 6067.) Following remand, the parties submitted supplemental briefs about the impact of *Brinker* on this case. Finding that our decision is consistent with *Brinker*, we affirm the trial court's order denying class certification.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts:

Lamps Plus is a retail lighting chain, employing thousands of nonmanagerial hourly employees in its 29 stores in California during the relevant period. Lamps Plus's corporate headquarters are in California. It has centralized timekeeping and

payroll systems that are operated from headquarters, and all of its corporate policies and procedures are issued from headquarters.

The Lamps Plus workforce includes managers-in-training, assistant managers, store managers, stockroom people, cashiers, and others performing office, display, cleaning, and sales duties. The number of employees and types of positions vary from store to store. All Lamps Plus employees are nonexempt, except the store managers. Even assistant managers are nonexempt hourly employees. All employees use the same timekeeping system.

Lamps Plus has an employee handbook that includes a policy requiring meal and rest breaks. Its meal and rest break policy provides that its nonexempt employees “must” take an uninterrupted meal period of at least 45 minutes after not more than five hours of work. Employees are “entitled” to take a second meal period if they work more than 10 hours. “Employees are required to take [unpaid] meal periods, and should not eat at their desks or work stations.” Nonexempt employees are “authorized and permitted” to take a 15-minute paid rest period “for every four hours, or major fraction of four hours, that they work.” The policy also provides for written waiver of the meal periods for employees working a shift of six hours or less, as well as written waiver of the second meal period for those employees working between 10- and 12-hour shifts. Employees are required to sign an acknowledgment providing: “I acknowledge that I have received a copy of the Company’s meal and rest break policy, and I acknowledge and I agree that I will comply with the policy. I further agree that if I am not provided with the meal and rest periods specified in the policy, I will contact Human Resources”

Meal and rest periods are scheduled by the employee’s supervisor. Meal periods are logged in the timekeeping system, but rest periods are not. Lamps Plus uses a progressive discipline system for violations of the meal and rest period policy.

Lamps Plus has a uniform procedure for payment of wages upon both voluntary and involuntary terminations, administered from headquarters. The procedures require that managers prepare and submit a termination report to Lamps Plus’s central human

resources department for processing. The last day worked by an employee is determined from the termination report. The payroll department is then responsible for transmitting the final paycheck to the employee. The paycheck is sent by courier to the employee's store, or is sent by mail at the request of the employee.

All three plaintiffs reported to the same manager at the same Lamps Plus store in San Rafael, which is only one of the 29 stores Lamps Plus operates in California. Marlon Flores (Flores) worked at Lamps Plus's San Rafael store as a full-time sales associate from January 2003 to July 2003, and as a part-time sales associate from August 2003 to December 2003. Hooman Khalili (Khalili) was briefly employed as a part-time stock person in the San Rafael Lamps Plus store between September 2003 and February 2004. During that time, Khalili worked a total of only 12 shifts. Ryan McGuinness (McGuinness) worked as a full-time sales associate at Lamps Plus's San Rafael store, from September 2003 to May 2005.

2. Procedure:

a. The operative complaint:

Flores, Khalili, and McGuinness (collectively plaintiffs) filed this lawsuit against Lamps Plus on their own behalf and on behalf of a putative class of similarly situated nonmanagerial employees. They allege Lamps Plus violated labor laws by denying meal and rest breaks, requiring off-the-clock work, failing to provide itemized wage statements, and failing to timely pay wages due upon termination. Their complaint states causes of action for: (1) failure to pay wages for all time worked; (2) failure to pay all overtime wages; (3) failure to pay minimum wages; (4) failure to provide rest breaks; (5) failure to provide meal breaks; (6) late payment of all accrued wages and compensation; (7) unfair business practices (Bus. & Prof. Code, § 17200); (8) conversion of accrued wages and compensation; (9) violation of Civil Code section 52.1; and (10) declaratory relief. The complaint rests on the theory that California employers must *ensure* employees take meal and rest breaks, and that Lamps Plus had companywide practices of not paying wages timely upon termination and requiring off-the-clock work.

b. The class certification motion and opposition.

Plaintiffs moved for class certification, estimating a total of 2,608 current and former employees in the putative class of nonmanagerial, nonexempt hourly employees. Plaintiffs sought certification of seven subclasses, including: (1) employees who worked more than five hours and did not receive a 30-minute meal period; (2) employees who worked more than 10 hours and did not receive at least two 30-minute meal periods; (3) employees who worked at least three and a half hours and did not receive a 10-minute rest period; (4) employees who worked at least six hours and did not receive two 10-minute rest periods; (5) all employees subject to a salesperson performance-tracking policy; (6) employees belonging to the above subclasses who terminated their employment during the class period; and (7) all class members who did not timely receive all wages due upon termination.

The parties conducted precertification discovery, and Lamps Plus produced timekeeping records from a random sampling of putative class members. Plaintiffs retained a third party provider of data entry and data processing services that compiled the sample time records into spreadsheets. Plaintiffs also retained a mathematics and statistics expert, Dr. Robert Fountain, who analyzed Lamps Plus's time card data, termination and final pay data, and other administrative data. In addition to submitting the work products and opinions of these retained experts, plaintiffs submitted portions of the transcripts of depositions of key Lamps Plus representatives, portions of their own deposition testimony, declarations of some employees, and responses to an employee questionnaire furnished by plaintiffs' counsel to a random sample of employees.

Dr. Fountain opined the timekeeping records demonstrated that 91.9 percent of the sample employees experienced meal period violations. Also, Dr. Fountain concluded that 63.6 percent of the sampled employees received their final paychecks late after termination of their employment.

Plaintiff Flores testified in his deposition that he would sometimes arrive at work early on Saturday and not punch in until his shift was scheduled to begin, and he

performed work before he punched in. Flores also reported that his supervisor told employees to work off the clock. He also testified that he worked during his lunch break, for example, getting inventory from the warehouse for a customer. When he took breaks in the break room, he would be interrupted by a coworker or a manager to assist customers. He also testified to working overtime hours after punching out. Sometimes he did not take a lunch break because the store was busy. However, he did not recall a manager ever telling him he could not take a lunch break.

Plaintiff Khalili testified in his deposition that he was occasionally asked to work off the clock, for example, to assemble an item and deliver it to a customer's home or carry an item to a customer's car. Most of the time, he clocked out for lunch and in after his lunch break. But he sometimes did not get a lunch break.

Plaintiff McGuinness testified in his deposition that his manager never told him he could not take a lunch break. He also testified that he understood he could take his rest breaks during the day. However, there were some days when he did not take rest breaks. “[W]e were never told we could not take a lunch break, specifically. However, we felt that if we took a lunch or a meal break during the certain busy times, there could have been maybe some repercussions for that.” He recalled taking meal breaks on a “consistent basis.” However, his breaks were often less than 30 minutes long.

Five employees, including the named plaintiffs, submitted declarations in support of the class certification motion. These declarations generally averred that meal and rest periods were missed. Also, some employees declared they did not receive their final paychecks on their last day of work. Others stated that they did receive their final paychecks on the last day of employment.

Plaintiffs' counsel distributed a questionnaire to a sampling of putative class members. Some employees responded, saying they often missed meal and rest breaks; others said they always received their meal and rest breaks; and still others said they always received either their meal break or their rest break, but not both. The questionnaire did not ask why a break was missed. Also, some involuntarily

terminated employees said they did not receive their final paychecks on their last day of work. Others said they did receive their final paychecks on their last day of work.

In response to the certification motion, Lamps Plus pointed out several weaknesses in plaintiffs' evidence, including (1) errors in Dr. Fountain's mathematical analysis; (2) an admission by plaintiff Flores that he suffered a conviction for driving under the influence; (3) that all named plaintiffs worked at the same San Rafael store, under the same manager; (4) Khalili's poor memory of his brief employment; (6) the largely varying responses to plaintiffs' questionnaires; and (6) Dr. Fountain's admission in deposition that he did not include in his meal and rest period analysis whether the employees' shifts were six hours or less, or 10 hours or less.

Plaintiffs' reply included a supplemental declaration from Dr. Fountain, further analyzing the information contained in the employee questionnaires, including an assessment of meal and rest period violations and off-the-clock work.

c. The trial court's ruling on the class certification motion:

After the hearing on the motion, the trial court took the matter under submission and later issued a comprehensive ruling denying the certification motion. The trial court found that plaintiffs had established numerosity and ascertainability of the class. However, the court concluded that individual issues predominated over common issues as to the meal and rest period claims, and class treatment was not superior to individual actions. The trial court reasoned, with regard to meal and rest breaks, that employers need only authorize and permit them, which means make them available, but not ensure they are taken. The trial court recognized the California Supreme Court ~~hashad~~ granted review of ~~two cases~~ *Brinker* to decide whether California law requires employers to *ensure* employees take breaks, or if employers need only *provide an opportunity* for employees to take breaks.¹ The trial court relied on numerous federal

¹ ~~The two cases presently before~~ At the time of the trial court's ruling, the Supreme Court ~~had granted review in~~ *Brinker Restaurant Corp. v. S.-C., Superior Court, supra*, 165 Cal.App.4th 25, review granted ~~Oct.~~ October 22, 2008, S166350

authorities holding that California employers were required to provide employees the opportunity to take breaks, not to *ensure* breaks are taken.²

The trial court also concluded that commonality had not been established for the remaining claims, as they all required an individualized assessment, and there was no evidence of any illegal companywide policy. The trial court also concluded that class treatment of the claims was not manageable and would not provide a substantial benefit to the court or parties. Rather, because individual inquiries predominated, the trial court determined that class treatment was not superior to individual actions.

~~(*Brinker*)², and *Brinkley v. Public Storage* (2008) 167 Cal.App.4th 1278, review granted Jan. January 14, 2009, S168806 (*Brinkley*)) will address, which addressed the “proper interpretation of California statutes and regulations governing an employer’s duty to provide meal and rest breaks to hourly workers.” While these cases have been pending before the Supreme Court, review has been granted. On April 12, 2012, the California Supreme Court issued its decision in *Brinker, supra*, 53 Cal.4th 1004. On June 20, 2012, *Brinkley* was remanded to the Court of Appeal for a number of appellate decisions addressing the meal and rest period issue, including this division’s opinion in *Hernandez* reconsideration in light of *Brinker*. (*Brinkley (Fred) v. Chipotle Mexican Grill, Inc.*, review granted January 26, 2011, S188755 [finding that employers must only provide breaks, and need not ensure they are taken], as well as *Faulkenbury v. Boyd & Associates*, review granted October 13, 2010, S184995 [addressing meal and rest period violations], among others. Another decision by this division, *Tien v. Tenet Healthcare Corp.* (2011) 192 Cal.App.4th 1055, concluded there is no obligation to ensure that breaks are taken. (*Id.* at pp. 1066-1067.) Appellant in that case has petitioned for review, and as of the time of the filing of this opinion, the Supreme Court has taken no action on the petition. *Public Storage* (June 20, 2012, S168806) 2012 Cal. Lexis 6819.)~~

² See *Brown v. Federal Express Corp.* (C.D.Cal. 2008) 249 F.R.D. 580, 586-587 (*Brown*); *Kenny v. Supercuts, Inc.* (N.D.Cal. 2008) 252 F.R.D. 641, 646 (*Kenny*); *Salazar v. Avis Budget Group, Inc.* (S.D.Cal. 2008) 251 F.R.D. 529, 532; *Perez v. Safety-Kleen Systems, Inc.* (N.D.Cal. 2008) 253 F.R.D. 508, 515; *Marlo v. United Parcel Service, Inc.* (C.D.Cal. 2009) 2009 U.S. Dist. Lexis 41948 at *27-28; *White v. Starbucks Corp.* (N.D.Cal. 2007) 497 F.Supp.2d 1080, 1088.

DISCUSSION

1. Class Action Standard of Review.

Code of Civil Procedure section 382 authorizes class actions “when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court” (See also Cal. Rules of Court, rule 3.760 et seq.) Class certification requires the party seeking certification to prove “(1) . . . a sufficiently numerous, ascertainable class, (2) . . . a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. [Citations.] In turn, the ‘community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.’ [Citation.]” (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089 (*Fireside Bank*), citing among others, Code Civ. Proc., § 382 & *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On Drug Stores*).)

“A class action may be maintained even if each member must individually show eligibility for recovery or the amount of damages. But 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. [Citations.] . . . ‘[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.]” (*Arenas v. El Torito Restaurants, Inc.* (2010) 183 Cal.App.4th 723, 732 [order denying certification on misclassification allegations affirmed where trial court found tasks performed by restaurant managers, and time devoted to each task, varied widely from restaurant to restaurant].)

A ruling on certification is reviewed for abuse of discretion. (*Sav-On Drug Stores, supra*, 34 Cal.4th at p. 326.) “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. The denial of certification to an entire class is an appealable order [citations], but in the absence of other error, 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]. Under this standard, an order based upon improper criteria or incorrect assumptions calls for reversal ‘ “even though there may be substantial evidence to support the court’s order.” ’ [Citations.]” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436 (*Linder*); accord, *Sav-On Drug Stores, supra*, at pp. 326-327.)

Thus, “[t]he appeal of an order denying class certification presents an exception to the general rule that a reviewing court will look to the trial court’s result, not its rationale. If the trial court failed to follow the correct legal analysis when deciding whether to certify a class action, ‘an appellate court is required to reverse an order denying class certification . . . , “even though there may be substantial evidence to support the court’s order.” ’ [Citations.] In other words, we review only the reasons given by the trial court for denial of class certification, and ignore any other grounds that might support denial.” (*Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828-829.) “ ‘[W]here a certification order turns on inferences to be drawn from the facts, “ ‘the reviewing court has no authority to substitute its decision for that of the trial court.’ ” ’ [Citations.]” (*Sav-On Drug Stores, supra*, 34 Cal.4th at p. 328.)

2. Commonality.

Plaintiffs contend that common issues predominate, and that none of the asserted claims requires individual inquiry. Common issues predominate when they would be “the principal issues in any individual action, both in terms of time to be expended in their proof and of their importance.” (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 810.) “[T]he community of interest requirement is not satisfied if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover.” (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 459.)

a. Meal and rest period claims.

The trial court concluded California law requires employers only to provide employees with meal and rest breaks, not to ensure the breaks are taken. If the trial court is correct in its analysis of the law, its ruling is entitled to substantial deference. (*Linder, supra*, 23 Cal.4th at pp. 435-436.) Because we find the trial court’s legal analysis is correct, and substantial evidence demonstrates individualized inquiry is necessary, we affirm the order denying certification.

i. The trial court’s legal analysis was correct.

California law governing wages and working conditions is embodied, to a large extent, in Labor Code section 1171 et seq. and the regulations (wage orders) promulgated by the Industrial Welfare Commission (IWC).³ Labor Code section 226.7, subdivision (a) states: “No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.” Labor Code section 512, subdivision (a) states that employers must provide employees with meal breaks of not less than 30 minutes if they work shifts of more than five hours per day and a second 30-minute meal break if they work shifts longer than 10 hours per day.⁴

³ The Legislature stopped funding the IWC in 2004, but its wage orders remain in full force and effect. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1102, fn. 4.)

⁴ Labor Code section 512, subdivision (a) states: “An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.”

Labor Code section 516 specifically authorizes the IWC to “adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers.” IWC’s wage orders are codified in the California Code of Regulations. (E.g., *Sav-On Drug Stores*, *supra*, 34 Cal.4th at p. 324; *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1534.)

Wage Order 7-2001, which governs mercantile workers like the Lamps Plus employees, echoes the language of Labor Code section 512. It requires employers to *provide* employees with a meal period of not less than 30 minutes for a work period of more than five hours. (Cal. Code Regs., tit. 8, § 11070, subd. 11.)⁵ Similarly, Wage Order 7-2001 states that employers are to *authorize and permit* employees to take a 10-minute rest break for every four hours worked. (Cal. Code Regs., tit. 8, § 11070, subd. 12.)⁶ California employers are required to keep accurate records of meal, but

⁵ California Code of Regulations, title 8, section 11070, subdivision 11 states in pertinent part: “Meal Periods [¶] (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day’s work the meal period may be waived by mutual consent of the employer and the employee. [¶] . . . [¶] (D) If an employer *fails to provide* an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation for each workday that the meal period is not provided.” (Italics added.)

⁶ California Code of Regulations, title 8, section 11070, subdivision 12 states: “Rest Periods [¶] (A) Every employer *shall authorize and permit* all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages. [¶] (B) If an employer *fails to provide* an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour

not rest, breaks. (Cal. Code Regs., tit. 8, § 11070, subd. 7; cf. *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1299.)

Federal courts have consistently found that California employers are required only to make uninterrupted meal and rest periods *available* to their employees. “The California Supreme Court has described the interest protected by meal break provisions, stating that ‘[a]n employee forced to forgo his or her meal period . . . has been deprived of the right to be free of the employer’s control during the meal period.’ *Murphy v. Kenneth Cole Prods., Inc.*, [*supra*,] 40 Cal.4th 1094 [at p. 1104.] It is an employer’s obligation to ensure that its employees are free from its control for thirty minutes, not to ensure that the employees do any particular thing during that time. Indeed, in characterizing violations of California meal period obligations in *Murphy*, the California Supreme Court repeatedly described it as an obligation not to force employees to work through breaks. [Citation.]” (*Brown, supra*, 249 F.R.D. at p. 585, fn. omitted.)

Consistent with the purpose of requiring employers to provide employees with meal breaks, the Labor Code and the IWC use mandatory language precluding employers from pressuring employees to skip breaks, declining to schedule breaks, or establishing a work environment discouraging or preventing employees from taking such breaks. (See, e.g., Lab. Code, § 226.7, subd. (a) [“No employer shall require any employee to work during any meal or rest period . . .”].) This mandatory language does not mean employers must *ensure* employees actually take meal breaks. Rather, employers must only *provide* breaks, meaning, make them available. Our interpretation of the meal break requirement is supported by the definition of the word “provide” as used in Labor Code sections 226.7, subdivision (b), and 512, subdivision (a) (“providing”), as well as California Code of Regulations, title 8, section 11070, subdivisions 11 and 12. (See fns. 5 & 6, *ante*.) “Provide” means “to supply or make

of pay at the employee’s regular rate of compensation for each work day that the rest period is not provided.” (Italics added.)

available.” (Webster’s Tenth Collegiate Dictionary (1993) p. 937.) The language regarding rest breaks is more permissive. An employer need only “*authorize and permit*” rest breaks. (Cal. Code Regs., tit. 8, § 11070, subd. 12, italics added.)

And, any debate about an employer’s obligation regarding meal breaks has been squarely resolved by *Brinker*. In *Brinker*, our Supreme Court determined that “[a]n employer’s duty with respect to meal breaks under both section 512, subdivision (a) and Wage Order No. 5 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. [¶] On the other hand, the 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 and create liability for premium pay under Wage Order No. 5, subdivision 11(B) and Labor Code section 226.7, subdivision (b).” (*Brinker, supra*, 53 Cal.4th at pp. 1040-1041.)

Plaintiffs rely on *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 (*Cicairos*) to argue employers must *ensure* meal and rest breaks are actually taken. *Cicairos* involved an appeal from summary judgment in favor of an employer on the employees’ meal and rest period claims. The Court of Appeal reversed, determining that triable issues of fact existed as to whether the employer had a policy against providing breaks. 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*, at pp. 955-956.) These and other aspects of the work environment effectively deprived drivers of an opportunity to take breaks. The Court of Appeal determined that 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.)⁷

Cicairos does not assist plaintiffs and is distinguishable on its facts. The mandate that an employer may not frustrate the exercise of employees’ meal breaks is not equivalent to an obligation to ensure that an employee actually takes the break. Unlike the employer in *Cicairos*, in this case, there is overwhelming evidence that Lamps Plus’s policies allowed and encouraged meal periods. (See *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, supra*, 252 F.R.D. at p. 646 [“*Cicairos* is not persuasive authority for the proposition that employers must ensure that their employees take meal breaks”].) *And, Brinker* squarely rejected the proposition that an employer must police its employees to ensure that breaks are actually taken. (*Brinker, supra*, 53 Cal.4th at pp. 1040-1041 [*Brinker* relied on *Cicairos* only for the proposition that “an employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks”].)

The notion that an employer must ensure all employees take their meal and rest periods is utterly impractical. “Requiring enforcement of meal breaks would place an undue burden on employers whose employees are numerous or who . . . do not appear to remain in contact with the employer during the day. [Citation.] See *White v. Starbucks Corp.*, [*supra*,] 497 F.Supp.2d 1080, 1088-[1089.] It would also create perverse incentives, encouraging employees to violate company meal break policy in order to receive extra compensation under California wage and hour laws. [Citation.]” (*Brown, supra*, 249 F.R.D. at p. 585.)

⁷ *Cicairos* concerned Wage Order 9-2001 (Cal. Code Regs., tit. 8, § 11090) covering workers in the transportation industry, but the pertinent wage order provisions are materially similar.

All nonexempt Lamps Plus employees must sign a form stating they acknowledge the company upholds the rest and meal break laws, they will comply with the policy, and they will report any missed break to human resources. Lamps Plus made clear its commitment to follow the law by authorizing supervisors and managers to take disciplinary action to enforce the policy, up to the point of suspending employees who did not take their scheduled breaks. Under plaintiffs' hypothesis of the law, even an employer like Lamps Plus, which notified its employees they must exercise their right to take breaks or risk suffering discipline for failing to take a scheduled break, must nonetheless pay a penalty to every employee who chooses to skip a rest and/or meal break.

This plainly does not make sense. If that were the law, then most employers would have no choice but to terminate the employment of those who, from time to time, may choose not to take their breaks. To so interpret the rest and meal break statutes would not be in keeping with our duty to construe the Labor Code statutes regulating the conditions of employment liberally, "with an eye to protecting employees." (*Murphy v. Kenneth Cole Productions, Inc.*, *supra*, 40 Cal.4th at p. 1111; accord, *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794.) Employees would not benefit by plaintiffs' theory of the law, as they may be tempted to risk the "stick" of discipline in pursuit of the "carrot" of a penalty payment, or they could be punished despite their *choice* to miss all or part of a rest or a meal break to earn a commission. Also, an employer would be penalized despite using its best efforts to provide rest and meal breaks. Therefore, ~~although consistent with~~ the Supreme Court ~~has yet to decide the~~ Court's resolution of this issue in *Brinker*, we hold that the trial court used the correct legal analysis with regard to meal and rest breaks. (*Brinker, supra*, 53 Cal.4th at pp. 1040-1041.)

ii. The trial court did not improperly reach the "merits" of plaintiffs' claims.

Plaintiffs contend the trial court improperly reached the merits of plaintiffs' claims when it determined that California law requires employers to provide but not to

ensure breaks are taken. Citing *Linder*, plaintiffs contend that the certification question is “essentially a procedural one that does not ask whether an action is legally or factually meritorious.” (*Linder, supra*, 23 Cal.4th at pp. 439-440; accord, *Sav-On Drug Stores, supra*, 34 Cal.4th at p. 326.) Plaintiffs urge that the trial court improperly focused on individual factual issues rather than plaintiffs’ theory of recovery. In their supplemental brief, plaintiffs contend that *Brinker* held that “a trial court should not resolve any dispute concerning the elements of a claim unless resolution is essential to the predominance analysis, and even then, the evaluation should be the bare minimum necessary.”

~~However, no~~ No case prevents a court from examining a legal issue when ruling on a certification motion. “[*Linder*] said only that a plaintiff need not establish a likelihood of success on the merits in order to obtain class certification. It does not follow that, in determining whether the criteria of Code of Civil Procedure section 382 are met, a trial or appellate court is precluded from considering how various claims and defenses relate and may affect the course of the litigation, considerations that may overlap the case’s merits. [Citation.] . . . *Linder* . . . expressly recognized that ‘whether the claims or defenses of the representative plaintiffs are typical of class claims or defenses’ was an issue that might necessarily be intertwined with the merits of the case, but which a court considering certification necessarily could and should consider. [Citations.]” (*Fireside Bank, supra*, 40 Cal.4th at pp. 1091-1092; see *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 915 [choice of law issue had to be resolved before certification of nationwide class was addressed as it was key to predominance and manageability]; *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450 [affirmative defenses may be considered to defeat certification].)

Plaintiffs also rely on *Jaimez v. Daihatsu USA, Inc.* (2010) 181 Cal.App.4th 1286 (*Jaimez*) to support their argument that the trial court should not have examined the legal issue of whether an employer must *provide* or *ensure* that employees take breaks. In *Jaimez*, Division One of this district reversed the denial of class certification in a

case that, like *Cicairos*, involved employees who were on the road most of the day or at customers' places of business. *Jaimez* found it unnecessary to decide whether employers need only provide meal breaks and not ensure employees take them. (*Jaimez, supra*, at pp. 1303-1304.) The declarations established predominant common factual issues regarding the missed meal breaks due to the employer's practice of designating delivery schedules and routes that made it impossible for employees to both take their breaks and complete their deliveries on time. (*Id.* at pp. 1300-1301.) Before 2006, the employer had a practice of deducting 30 minutes per shift for a meal break even if no break was taken; and after 2006, employees had to sign a manifest indicating they took a meal break in order to get paid, regardless of whether they actually took the break. (*Id.* at p. 1304.) Since the employer's practices were common and predominant factual issues on the meal and rest break claims, *Jaimez* did not have to consider whether the employer violated a duty to provide or to ensure breaks. *Jaimez* does not hold that in every wage and hour case, even those presenting entirely different factual issues, courts may not consider the merits of a legal issue in order to rule on class certification. ~~Here, on facts completely different than those at issue in *Jaimez*~~

Brinker acknowledged that “[w]hen evidence or legal issues germane to the certification question bear as well on aspects of the merits, a court may properly evaluate them. [Citations.] The rule is that a court may ‘consider[] how various claims and defenses relate and may affect the course of the litigation’ even though such ‘considerations . . . may overlap the case’s merits.’ ” (*Brinker, supra*, 53 Cal.4th at pp. 1023-1024.) “Presented with a class certification motion, a trial court must examine the plaintiff’s theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate. 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.” (*Id.* at p. 1025.)

Here, the trial court appropriately decided the threshold legal issue, as no other means would permit assessment of whether class treatment of Lamps Plus’s employees’ claims was warranted.

iii. Substantial evidence supports the trial court’s ruling.

The declarations, depositions, and questionnaire responses of putative class members showed that Lamps Plus did not have a universal practice of denying employees their breaks. The evidence establishes that Lamps Plus had a meal and rest period policy conforming to the applicable laws and wage orders, and that Lamps Plus disciplined its employees for failing to comply with the policy. Further, the breadth of supposed “violations” is widely variable. Some employees declared they often missed meal and rest breaks; others declared they always received their meal and rest breaks; and still others declared that they always received either their meal break or their rest breaks, but not both. Some employees declared their meal breaks were uninterrupted, and others claimed interruptions of varying degrees. Even the named plaintiffs have divergent experiences, despite all having worked at the same store and reported to the same manager. They each report a different number of alleged violations and differing reasons for the claimed violations.

Given the variances in the declarations, questionnaires, and deposition testimony, plaintiffs failed to demonstrate a common practice or policy. (E.g., *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1350 [“When variations in proof of harm require individualized evidence, the requisite community of interest is missing and class certification is improper”]; compare with *Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1207, 1208 [certification appropriate where employer had policy of prohibiting certain employees from taking breaks].) Even though managers directed when employees could take breaks, to accommodate customer flow and staffing requirements, substantial evidence demonstrates significant variances in Lamps Plus’s practices. The only evidence of a companywide policy and practice was the evidence that Lamps Plus had a policy to provide employees with

meal and rest breaks as required by law, and that employees were disciplined for failing to conform to this policy.

Plaintiffs' theory that chronic understaffing led to classwide violations of the meal and rest period law has been rejected by the courts. (See *Brown, supra*, 249 F.R.D. at pp. 582, 587.) Plaintiffs have not cited a single case ratifying this theory. Furthermore, the evidence does not support a pervasive understaffing theory and, instead, simply indicates that employees had difficulty taking breaks during certain busy times. It is not clear that breaks could not be taken at some other, less busy time, which complies with the law.

Plaintiffs point to employee timekeeping records and to Dr. Fountain's expert declaration, urging that the records and declaration demonstrate that employees often did not clock out for breaks of 10 or 30 minutes. However, because rest periods were paid, employees had no reason to record them. Also, there were methodological weaknesses with Dr. Fountain's analysis. The analysis did not consider whether meal periods were validly waived by an employee working six hours or less, or 10 hours or less. (Lab. Code, § 512, subd. (a).) A trier of fact will have to determine if Lamps Plus employees actually missed breaks, or simply forgot to record them, as well as the reasons why employees might have missed breaks or returned to work before completing them.

Dr. Fountain admitted during deposition that there was no methodology for determining *why* breaks were not taken or were abbreviated. He premised his analysis on the erroneous legal assumption that Lamps Plus was required to ensure that breaks were taken. He assumed a break was missed if an employee clocked in one minute early from a break without accounting for why that occurred. As a practical matter, employees may have any number of reasons to return to work early. And, there was evidence some employees returned to work voluntarily because they wanted to help a customer, or they wanted to leave work early instead of taking a lunch break. Even if the employee records showed an employee did not take a break at all, the reason for

that “missed” break must be ascertained, because if that employee willingly decided to forgo a break, there was no violation of law.

iv. The trial court did not abuse its discretion in denying the request for a stay pending resolution of *Brinker* and *Brinkley*.

Plaintiffs asked the trial court to stay its ruling for the meal and rest period subclasses until the California Supreme Court has issued its opinions in *Brinker* and *Brinkley*. The court decided the class certification motion in its entirety, and we can find no error with its ruling. And in any event, this issue is now moot.

“Trial courts generally have the inherent power to stay proceedings in the interests of justice and to promote judicial efficiency.” (*Freiberg v. City of Mission Viejo* (1995) 33 Cal.App.4th 1484, 1489.) We review a trial court’s ruling on a stay for abuse of discretion. (See, e.g., *Weile v. Sturtevant* (1917) 176 Cal. 767, 768.)

The trial court was well within its discretion to rule on the appropriateness of class resolution of the meal and rest period claims. Decisions in *Brinker* and *Brinkley* have had been pending for some time, and it would hardly be efficient to stall resolution of all class actions claiming meal and rest period violations in the interim. ~~Additionally, to the extent that plaintiffs request this court to issue a stay, we conclude that a stay is not necessary, for these same reasons.~~

b. Off-the-clock claims.

Plaintiffs next contend that common questions of law and fact predominate their claim that employees were not compensated for all time worked, contending that Lamps Plus had a policy requiring off-the-clock work. Employers can be held liable for claims of working off the clock only if the employer knows, or should have known, employees were working off the clock. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585.)

Plaintiffs point out that of the 40 questionnaires turned in by Lamps Plus employees, over half of the responding employees said Lamps Plus required them to work off the clock. On the other hand, almost half of the responding employees reported no off-the-clock work. Even the named plaintiffs did not uniformly report

working off the clock. With almost as many employees reporting they were not required to work off the clock as those who claimed they were, the evidence does not lead to an inference there was a companywide policy requiring such work. Also, the evidence does not demonstrate Lamps Plus knew of any widespread off-the-clock work. The employee questionnaires were nonspecific and asked general questions, such as “Did you ever perform work after hours?” without inquiring whether any Lamps Plus manager had knowledge of this work. Lamps Plus had a policy requiring employees to record the hours worked. Determining whether Lamps Plus managers knew or should have known about off-the-clock work will be a fact-intensive inquiry, necessarily involving investigation of the individual circumstances of each employee’s off-the-clock work.

c. Waiting time claims.

Plaintiffs contend that employees were not timely paid after termination of their employment. California law requires employers to pay terminated employees’ wages within prescribed timelines, and provides for penalties for the willful failure to do so. (Lab. Code, §§ 201, 202, & 203.) Specifically, Labor Code section 201 provides that if an employer discharges an employee, wages earned and unpaid at the time of the discharge are due and payable immediately. (§ 201, subd. (a).) Section 202 provides that a quitting employee who gives more than 72 hours’ notice is also entitled to receive wages on the last day of work. (§ 202, subd. (a).) The willful failure to pay wages subjects an employer to continuing-wage penalties. (§ 203.)

Lamps Plus had a policy to pay wages upon termination. The policy sets forth the procedure for both voluntary and involuntary terminations, and calls for a termination report compiled by the manager, and submitted to Lamps Plus’s central human resources department for processing. The last day worked is determined from the termination report. The payroll department is responsible for transmitting the final paycheck to the employee. The paychecks are sent by courier to the employee’s store, or are sent by mail at the request of the employee.

The timekeeping records, responses to questionnaires, and Dr. Fountain's analysis reveal varied experiences among the employees. Plaintiffs argue that Lamps Plus has unreliable records of when it paid its terminated employees, and the class should not be punished by Lamps Plus's failure to adequately document payment of final wages.⁸ However, California employers are not obligated to keep a record of the date of final pay for each employee, or of the date on which each employee gave notice of termination. (See Cal. Code Regs., tit. 8, § 11070, subd. 7; Lab. Code, § 226.) The vast majority of the data plaintiffs relied upon -- excluding Lamps Plus's own records -- did not adequately set forth the circumstances of the termination, such as how much notice was given. The class members' testimony and declarations varied widely, undermining any inference of a companywide policy of failing to pay wages. The trial court could reasonably conclude that individualized inquiry was required, and that plaintiffs did not establish classwide violations. In any event, as discussed in Part 3 below, it does not appear that any of the proposed class representatives was denied a timely final paycheck.

d. Itemized wage statements.

Plaintiffs advance a theory that to the extent the above violations were committed, Lamps Plus failed to provide accurate wage statements (e.g., statements that reflected statutory compensation for employees who missed meal and rest periods). The trial court determined that class certification of wage statement violations required class members to show actual injury from the noncomplying pay stubs. (Lab. Code, § 226.) To recover damages for inaccurate wage statements, an employee must suffer injury as a result of a knowing and intentional failure by an

⁸ In their supplemental brief, plaintiffs rely on Justice Werdegar's concurring opinion in *Brinker* for the proposition that Lamps Plus's failure to keep accurate time records creates a rebuttable presumption that violations occurred, and therefore supports certification. (*Brinker, supra*, 53 Cal.4th, p. 1053 (Werdegar, J., concurring).) We need not address this argument since "concurring opinions are not binding precedent." (*In re Marriage of Dade* (1991) 230 Cal.App.3d 621, 629.)

employer to comply with the statute.⁹ The injury requirement in Labor Code section 226, subdivision (e) cannot be satisfied simply if one of the nine itemized requirements in section 226, subdivision (a) is missing from a wage statement. (See *Jaimez, supra*, 181 Cal.App.4th at p. 1306; see also *Elliot v. Spherion Pacific Work, LLC* (C.D.Cal. 2008) 572 F.Supp.2d 1169, 1181.) By employing the term “ ‘suffering injury,’ ” the statute requires that an employee may not recover for violations of section 226, subdivision (a) unless he or she demonstrates *an injury* arising from the missing information. (*Jaimez*, at pp. 1306-1307.) Therefore, the trial court’s legal analysis was correct.

Also, to the extent that none of the above claims were appropriate for class resolution, this derivative claim also fails, and the trial court’s ruling is supported by substantial evidence.

e. Unfair competition claim.

The complaint states a violation of Business & Professions Code section 17200 et seq. “The Unfair Business Practices Act defines ‘unfair competition’ as any ‘unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising’ (§ 17200.) The Legislature intended this ‘sweeping language’ to include ‘ “anything that can properly be called a business practice and that at the same time is forbidden by law.” ’ [Citation.]” (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266.) Here, it is clear that this claim is derivative of the others, as it relies on violations of the same laws and is based on the

⁹ Labor Code section 226, subdivision (e) states: “An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney’s fees.”

same evidence discussed above. Therefore, the trial court properly concluded that class treatment of this claim was not warranted.

3. Adequacy and Typicality

Having concluded that common questions of law do not predominate, we need not decide whether the trial court's ruling on the related issues of adequacy and typicality was in error. (*Fireside Bank, supra*, 40 Cal.4th at p. 1089 [the community of interest requirement includes three factors: “ ‘(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class’ ”].) Nevertheless, we will discuss these factors briefly.

Before a class can be certified, the court must be satisfied that the named plaintiffs can adequately represent the class and that their claims are typical. “ ‘ “[A] plaintiff seeking to maintain a class action must be a member of the class he claims to represent. [Citations.]” [Citation.]’ [Citation.] The class representative must be situated similarly to class members. [Citation.] ‘It is the fact that the class plaintiff’s claims are typical and his representation of the class adequate which gives legitimacy to permitting him to bind class members who have notice of the action. [Citations.]’ [Citation.] Further, ‘there can be no class certification unless it is determined by the trial court that similarly situated persons have sustained damage. There can be no cognizable class unless it is first determined that members who make up the class have sustained the same or similar damage.’ ” (*Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 663-664.)

Class representatives are fiduciaries, and concerns regarding their credibility may support a finding that they are inadequate. (See, e.g., *Savino v. Computer Credit, Inc.* (2d Cir. 1998) 164 F.3d 81, 87; *In re Proxima Corp. Sec. Litig.* (S.D.Cal. May 3, 1994, Fed. Sec. L. Rep. (CCH) ¶ 98, 236) 1994 U.S. Dist. Lexis 21443; *In re Computer Memories Securities Litigation* (N.D.Cal. 1986) 111 F.R.D. 675, 682-683; *Cohen v. Beneficial Loan Corp.* (1949) 337 U.S. 541, 549.) Here, the trial court concluded that none of the named plaintiffs could adequately represent the proposed class.

Flores's credibility was subject to attack because he has two felony and three misdemeanor convictions for drunk driving, disorderly conduct, and street racing. (Evid. Code, §§ 788, 1101.) During his deposition, when asked if he had ever been convicted of a crime, he admitted to only one conviction in 2001 for driving under the influence, for which he was placed on five years' probation and served 90 days in jail. Flores is clearly not an adequate class representative because his character for truthfulness may be impeached by his criminal convictions and by his lack of candor in admitting to them when examined under oath in deposition.

Khalili worked part time over the course of a few months and, in total, he worked only 12 shifts at Lamps Plus. He remembered very little about his short tenure at Lamps Plus and often responded that he "didn't remember" when asked specific questions about the conditions of employment alleged in the complaint. He testified he was asked to work off the clock but did not remember by whom or how many times he worked off the clock. He testified, "I don't remember how many times, but I can tell you it was multiple." When pressed to estimate how many times he worked off the clock over the course of his 12-shifts employment with Lamps Plus, whether it was 10 times or more, he testified, "It was definitely less than a thousand." Such testimony demonstrates that not only is Khalili's memory unreliable, but so is his sincerity in trying to honestly answer questions under oath. This seriously impacts his ability to represent the class. He cannot meaningfully testify to the alleged violations, and his testimony raises doubt that he experienced any at all.

As for McGuinness, he testified that he "took meal breaks on a consistent basis," and that his manager never told him he could not take a meal or rest break. When asked if there was ever a time when he chose not to take a break because he wanted to complete a sale, he responded, "Yes, [frequently]." He also testified that he understood he was obligated to take meal and rest breaks in compliance with Lamps Plus's policy. Further, he understood that it was his obligation to clock in when he "started working" and to clock out when he "stopped working," and that he did so throughout his employment. Plainly, McGuinness does not fairly represent a class of

employees who were denied Labor Code rights because, by his own testimony, Lamps Plus provided all the rights to which he was entitled by law.

With regard to the claim for late payment of final wages, plaintiffs' counsel told the trial court during argument of the class certification motion that two of the named plaintiffs, Flores and Khalili, were suspended or placed "on call" before the date of their employment termination, so it could not be determined whether or not they were paid late. McGuinness testified that his final paycheck was not late. It does not appear that any of the named plaintiffs may represent a class of employees who were denied their rights under Labor Code section 203.

4. Superiority:

Plaintiffs further contend that the trial court erred when it found that the class action mechanism was not superior to litigation of individual claims. Plaintiffs have the burden to show that the class action mechanism is superior to other available methods for the fair and efficient resolution of the controversy. (*Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 772-773.) In light of the size of the proposed class, there could be thousands of mini-trials to address the factual issues. This clearly supports the trial court's conclusion that class treatment is not superior to individual lawsuits.

5. Evidentiary Rulings and Omission of Class Member Testimony:

~~Lastly, plaintiffs~~ Plaintiffs take issue with the trial court's evidentiary rulings and the omission of certain evidence. Plaintiffs argue for the first time in their reply brief that the trial court committed prejudicial error when it failed to consider evidence submitted by a putative class member Chad Clark. "Arguments cannot properly be raised for the first time in an appellant's reply brief, and accordingly we deem them waived in this instance." (*Cold Creek Compost, Inc. v. State Farm Fire & Casualty Co.* (2007) 156 Cal.App.4th 1469, 1486.)

Plaintiffs also contend that the trial court erroneously overruled their objections to Attorney McQueen's declaration, arguing that it consisted of impermissible expert opinion to the extent that it sought to refute the findings in Dr. Fountain's research

methodology. If the evidentiary ruling was in error, any error was clearly harmless. Plaintiffs here failed to meet their burden in moving for class certification. The propriety of the trial court's ruling does not depend on any evidentiary showing made by defendants.

6. Remand Is Unnecessary.

Lastly, in their supplemental briefs following remand from the Supreme Court, plaintiffs urge that remand to the trial court is necessary so that it can evaluate plaintiffs' evidence in light of *Brinker*. Specifically, plaintiffs urge that their evidence on the meal period issue was at odds with the holding in *Brinker*, and therefore this evidence must be reassessed on remand. *Brinker* concluded "an employer's obligation is to provide a first meal period after no more than five hours of work and a second meal period after no more than 10 hours of work." (*Brinker, supra*, 53 Cal.4th at p. 1049.) In the trial court, plaintiffs, like the plaintiff in *Brinker*, had urged that state law obligates an employer to provide a 30-minute meal period at least once every five hours. *Brinker* squarely rejected this theory. (*Ibid.*) While *Brinker* acknowledged that remand on this issue was necessary, it is factually distinguishable from our case. In *Brinker*, the trial court had certified an over-inclusive meal period subclass, based on the erroneous assumption that a meal period had to be offered for every five hours of work. (*Ibid.*) Here, regardless of the required timing of any second meal period, the trial court concluded that individual issues predominated and denied certification. Therefore, remand on this issue is unnecessary. Because it is clear that the trial court's ruling was consistent with *Brinker*, we see no purpose in remanding this case.

DISPOSITION

Because there is substantial evidence to support the trial court's ruling, we affirm the order denying certification. Lamps Plus is awarded its costs on appeal.

CERTIFIED FOR PUBLICATION

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.

Filed 9/5/12

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LAMPS PLUS OVERTIME CASES

B220954

MARLON FLORES et al.,

JCCP No. 4510

(Los Angeles County

Super. Ct. No. BC357662)

Plaintiffs and Appellants,

ORDER CERTIFYING OPINION

FOR PUBLICATION

v.

LAMPS PLUS, INC., et al.

[NO CHANGE IN JUDGMENT]

Defendants and Respondents.

THE COURT:*

The opinion in the above-entitled matter filed on August 20, 2012, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports, and it is so ordered, with no change in judgment.

* BIGELOW, P. J.

FLIER, J.

GRIMES, J.