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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 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*). *Brinker* 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. 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.

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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.

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.' [Citation.] 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.' [Citations.] . . . . [¶] . . . '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. . . . [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*).) 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*).) 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 arguably 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 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.]" (*Arenas v. El Torito Restaurants, Inc.* (2010) 183 Cal.App.4th 723, 732.)

i. **Meal Periods**

The trial court found individual questions of proof predominated. The court explained:

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[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.)

"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. The court's findings coincide with the common-sense notion that individual questions about the reasons an 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 take those periods.[6]

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[6] "The law on this issue is unsettled. In *Cicairos*[, *supra*,] 133 Cal.App.4th 949, . . . the Court of Appeal held that an employer's obligation to provide employees with an adequate meal period was not satisfied 'by assuming that the meal periods were taken, because employers have "an affirmative obligation to ensure that workers are actually relieved of all duty." ' [Citation.] We note that the California Supreme Court has granted review in two cases that conflict with *Cicairos*. (See *Brinker*[, *supra*,] 165 Cal.App.4th [at p.] 31 [holding that employers 'need only provide [meal breaks] and not ensure they are taken'], review granted Oct. 22, 2008, S166350; *Brinkley*[, *supra*,] 167 Cal.App.4th [at p.] 1290 [holding that 'California law does not require an employer to ensure that employees take rest periods. An employer need only make rest periods available'], review granted Jan. 14, 2009, S168806.)" (*Jaimez*, *supra*, 181 Cal.App.4th at p. 1303.) In January 26, 2011, the Supreme Court granted review in a third case that conflicts with *Cicairos*. (See *Hernandez v. Chipotle Mexican Grill, Inc.* (2010) 189 Cal.App.4th 751 [118 Cal.Rptr.3d 110, 113] [employer must make meal breaks available but need not compel employees to take them], S188755.)

ii. **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 rest breaks, 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.

iii. **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 . . . ."

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 *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"].) In any case, although the Supreme Court's granting of review in *Brinkley* and *Brinker* meant they were no longer citable, the trial court found their analysis of the law was more persuasive than *Cicairos*. 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."

We hold the trial court was correct. Labor Code section 512, subdivision (a) states that employers must *provide* employees with meal periods of not less than 30 minutes if they work shifts of more than 5 hours per day and a second 30-minute meal period if they work shifts longer than 10 hours per day. Labor Code section 226.7, subdivision (a) states: "No employer shall require any employee to work during any meal . . . period mandated by an applicable order of the Industrial Welfare Commission." In keeping with

the ordinary dictionary meaning of "provide," which means "to supply or make available," (Webster's 9th New Collegiate Dict. (1984) p. 948), the mandatory language does not mean employers must *ensure* employees take meal breaks. "The California Supreme Court has described the interest protected by meal break provisions [to mean] 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.' " (*Brown v. Federal Express Corp.* (C.D.Cal. 2008) 249 F.R.D. 580, 585 (*Brown*), quoting *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, 1104.) Consistent with the purpose of requiring employers to provide employees with meal breaks, the Labor Code uses mandatory language (e.g., Lab. Code, § 226.7, subd. (a) ["No employer shall require any employee to work during any meal or rest period . . . ."]) precluding employers from pressuring employees to skip breaks, declining to schedule breaks, or establishing a work environment that discourages employees from taking their breaks. A corollary to an employer's obligation to ensure that its employees are free from its control for 30 minutes is the employer must not compel the employees to do any particular thing during that time – including, if employees so choose, not taking their meals. (*Brown, supra,* at p. 585.)

In any event, *Cicairos* does not, contrary to appellants' assertion, establish that an employer must guarantee employees take their meal periods. Thus, even though the trial court was 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. 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; it follows that an employer who frustrates its employees' exercising 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 breaks does not equate with the obligation to ensure that an employee actually takes the break. Here, the trial court found overwhelming evidence that Tenet's policies allowed meal periods. That policy satisfied Tenet's legal obligation required nothing more. (*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"].)

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 *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*.[7] Hence, the court's error, if any, in failing to sua sponte invite supplemental briefing on *Brinkley* was harmless.

D. *Court Did Not Erroneously Rule on Merits in Preferring Analysis of* Brinker *and* Brinkley *Over* Cicairos

The court found "by any measure" that Tenet made meal periods "available." Appellants note that class certification raises procedural hurdles which appellants must overcome, but does not require appellants, nor permit the court, to address the merits of appellants' class claims. "The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.' [Citation.]" (*Sav-On Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at p. 326.) Appellants contend the court 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. " 'To obtain [class] certification, a party must establish the existence of both an ascertainable class and a well-defined community of interest

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[7] *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 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.

among the class members.' [Citations.] 'The community of interest requirement involves three factors "[one of which is] predominant common questions of law or fact . . . ." [Citation.]' [Citation.]" (*Jaimez, supra,* 181 Cal.App.4th at p. 1298.) The applicable body of law pertinent to a particular type of claim frames those questions which must predominate. "In order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916; see also Thomas, Cal. Civil Courtroom Handbook & Desktop Reference (2010 ed.) Determination and Ruling, § 8:44, citing *Hicks,* at p. 916 ["Whether common issues predominate over individual issues necessarily involves an examination of the issues framed by the pleadings and the law applicable to the causes of action alleged so that the court can consider the form a trial of those issues would take"].) Here, the trial court's consideration of the scope of Tenet's obligation to provide meal periods went to the court's framing of those matters involving common questions of law or fact needed to determine the suitability of class treatment of appellants' claims.

We reject as misplaced appellants' reliance on *Linder, supra,* 23 Cal.4th 429, to support their contention that the trial court overstepped its authority by addressing legal questions in denying appellants' motion for class certification. Appellants rest their contention on *Linder*'s 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.) *Linder* does not, however, 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. (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1091-1092.) *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,* at p. 1092, citing *Linder,* at p. 443.) The trial court thus did not overstep

its authority when it determined that Tenet's duty to provide a meal period obligated it only to make such periods available to employees.

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.