

OCT 29 2012

October 29, 2012

Frank A. McGuire Clerk

DeputyVIA 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:** *Hernandez v. Chipotle Mexican Grill, Inc.*, 208 Cal.App.4th 1487 (Aug. 21, 2012; pub. ord. Aug. 30, 2012), Case Nos. B216004, S205875

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 *Hernandez v. Chipotle Mexican Grill, Inc.*, 208 Cal.App.4th 1487 (2012), No. B216004 (Second Appellate District). The *Hernandez* opinion was issued on August 21, 2012, was certified for publication on August 30, 2012, and became final on Saturday, September 29, 2012. See Rule of Court 8.264(b)(3), (c)(1). A petition for review was filed on October 10, 2012 (per Rule of Court 8.25(b)) and is pending (No. S205875). 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.

Hernandez 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, *Hernandez* simply readopted

its own analysis from its earlier, vacated opinion, with a tacked-on paragraph at the end 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).

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

Hernandez is one of the cases in which this Court issued a "grant and hold" order pending resolution of *Brinker*. *Hernandez v. Chipotle Mexican Grill*, No. S188755 (review granted Jan. 26, 2011).

The original *Hernandez* opinion was handed down on September 30, 2010. It was modified following a petition for rehearing on October 28, 2010. *Hernandez v. Chipotle Mexican Grill, Inc.*, 189 Cal.App.4th 751, 118 Cal.Rptr.3d 110 (2010), *review granted*.

This Court granted review on January 26, 2011 and stayed further proceedings pending resolution of *Brinker*. More than a year later, on April 12, 2012, the Court handed down its opinion in *Brinker*. On June 20, 2012, the Court transferred *Hernandez* back to the Court of Appeal with "directions to vacate its decision and to reconsider the cause in light of" *Brinker*. On August 21, 2012, after the parties filed supplemental briefing under Rule 8.200(b), the Court of Appeal handed down its new opinion. On August 30, 2012, the opinion was certified for publication. The opinion was modified following a rehearing petition on September 25, 2012.

The original *Hernandez* opinion and the new *Hernandez* opinion, together with the two modification orders, are extremely similar. Attached hereto as **Exhibit A** is a redline comparison between the original and new opinions and modification orders. 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 *Hernandez* 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 *Hernandez* opinion does not follow this Court’s reasoning in *Brinker*. Instead, the new *Hernandez* opinion readopted the reasoning stated in its original 2010 opinion. Four full pages of reasoning are copied verbatim from the original opinion (slip op. at 10-14)—reasoning presumptively rejected when the Supreme Court granted review in 2010, and reasoning conspicuously not adopted in the Supreme Court’s own *Brinker* opinion.

Two examples illustrate the point.

First, the new *Hernandez* opinion, like the original 2010 *Hernandez* opinion, both rely on a dictionary definition of the word “provide,” which appears in Labor Code section 512, as well as a federal district court order relying on the same dictionary-based reasoning to hold that meal periods need only be “made available.” Slip op. at 12-13 (citing *Brown v. Federal Express Corp.*, 249 F.R.D. 580, 585 (C.D. Cal. 2008); Webster’s Ninth Collegiate Dictionary (1986)); see also *Brinker Restaurant Corp. v. Superior Court*, 80 Cal.Rptr.3d 781, 806-07 (Ct. App. 2008), review granted (Court of Appeal opinion in *Brinker* also relying on combination of dictionary and *Brown* to analyze meal period question).

This Court, although it was strenuously urged to do so, both in the merits briefing and in numerous amicus briefs, did not resort to that analysis. Instead, the Court carefully reviewed the language of the current and historical Wage Orders governing meal periods, along with contemporaneous DLSE opinion letters, and only then turned to Labor Code section 512, to consider that enactment “against this background.” 53 Cal.4th at 1034-38. The Court relied on neither the dictionary nor *Brown*. See *id.*, *passim*. Yet the new *Hernandez* opinion revives both the dictionary and *Brown* as sources of meaning of California’s meal period laws, when it is this Court’s *Brinker* opinion that should instead serve that function.

If *Hernandez* remains published, trial courts may consider themselves justified in returning to *Brown*, rather than *Brinker*, for guidance when adjudicating future meal period cases.

Second, the new *Hernandez* opinion, like the original 2010 *Hernandez* opinion, rejected *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949 (2005) because “[t]he DLSE has withdrawn the opinion letter upon which *Cicairos* based its analysis.” Slip op. at 14. This Court, in contrast, cited *Cicairos* as the primary example of a case in which the employer had not satisfied its meal period obligations because it “undermine[d] a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks.” *Brinker*, 53 Cal.4th at 1040 (citing *Cicairos*, 133 Cal.App.4th at 962-63). The employer and amici in *Brinker* urged this Court to reject *Cicairos* on the same basis as did the *Hernandez* panel in its original and new opinions, but this Court conspicuously did not do so.

The published *Hernandez* opinion thus reintroduces into California jurisprudence arguments and positions that this Court consciously chose not to adopt in *Brinker*. The possibility that this Court’s careful guidance may be discarded as a result is strong. Lower courts may turn to *Hernandez*, see that opinion’s analysis, and stop there, rather than turning back to *Brinker* as they should do (and as the *Hernandez* panel should have done).

In fact, the *Hernandez* 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 *Hernandez* panel went astray in exactly the same manner. Its opinion contains four 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.

The *Hernandez* panel tacked on a single paragraph at the end of its analysis to address *Brinker*, but this does not cure the problem. Slip op. at 14-15. The paragraph declares that “*Brinker* has conclusively resolved this issue contrary to *Hernandez’s* position,” and quotes this part of the *Brinker* opinion:

An employer’s duty with respect to meal breaks ... is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so.

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

Hernandez, slip op. at 14-15 (quoting *Brinker*, 53 Cal.4th at 1040-41) (emphasis added).

The problem with the tacked-on paragraph is twofold. First, it is not followed by any application of the legal standard stated in *Brinker* to the *facts* of the case. As the Court observed in language not quoted in *Hernandez*, “What will suffice [for employer compliance] may vary from industry to industry, and we cannot in the context of this class certification proceeding delineate the full range of approaches that in each instance might be sufficient to satisfy the law.” *Brinker*, 53 Cal.4th at 1040. Second, it omits critical language in which this Court refined its holding in *Brinker*:

[A]n employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks. (*Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 962-963; *see also Jaimez v. DAIHHS USA, Inc.* [(2010)] 181 Cal.App.4th [1286,] 1304-1305, [proof of common scheduling policy that made taking breaks extremely difficult would show violation]; *Dilts v. Penske Logistics, LLC* (S.D. Cal. 2010) 267 F.R.D. 625, 638 [indicating informal anti-meal-break policy “enforced through ‘ridicule’ or ‘reprimand’” would be illegal].) The wage orders and governing statute do not countenance **an employer’s exerting coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally protected breaks.**

Id. (emphasis added).

Had the *Hernandez* panel acknowledged this part of the Court’s analysis in *Brinker*, it may well have reached a different outcome. Indeed, the primary problem with the *Hernandez* approach of starting over with its own analysis, rather than following this Court’s binding analysis, is that doing so is likely to lead to differing outcomes in litigated cases. The published status of *Hernandez* means that lower court outcomes may be similarly impacted.

Broadly speaking, this Court *rejected* the contention that “an employer is only obligated to ‘make available’ meal periods, with no responsibility for whether they are taken.” *Brinker*, 53 Cal.4th at 1034. Instead, *Brinker* makes clear that the employer *does* have a responsibility extending beyond “offering” meals, and that this obligation 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.” *Id.* at 1040. Instead of following the analysis of *Brinker*, *Hernandez* reverts to analysis copied from a 2010 opinion that this Court ordered vacated, and to authorities (*Brown* and the dictionary) that led the *Brinker* appellate panel to hold that “employers ... need only make [meal periods] available.” *Brinker*, 80 Cal.Rptr. 3d at 807 (citing *Brown*, 249 F.R.D. 580; *White v. Starbucks Corp.*, 497 F. Supp. 2d 1080 (N.D. Cal. 2007)).

With that rejected standard plainly in its mind, the Court of Appeal in *Hernandez* overlooked a critical part of this Court’s holding in *Brinker*:

Claims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and

properly, found suitable for class treatment. (See, e.g., *Jaimez v. DAIOWS USA, Inc.* [(2010)] 181 Cal.App.4th [1286], 1299-1305; *Ghazaryan v. Diva Limousine, Ltd.* [2008] 169 Cal.App.4th [1524], 1533-1538; *Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1205-1208.)

Brinker, 53 Cal.4th at 1033. The *Hernandez* court did not mention this language or make any attempt to consider whether “a uniform policy consistently applied to a group of employees” had been proven in that case. What the *Hernandez* plaintiffs showed—a “tap-on-the-shoulder” policy whereby workers were never actually “relieved ... of all duty” for meal periods unless and until a supervisor told them to take a break—easily meets the *Brinker* standard just quoted. The *Hernandez* panel’s insistence on adhering to the vacated analysis and approach of its 2010 opinion led it to avoid evaluating, in light of *Brinker*, either the facts of the case or the central class certification question presented to it on remand.

If *Hernandez* 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 *Hernandez*.

Respectfully submitted,


Kimberly A. Kralowec
State Bar No. 163158

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 21, 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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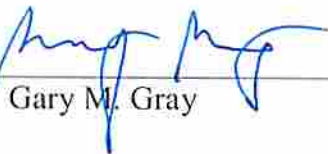
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Executed October 29, 2012 at San Francisco, California.



Gary M. Gray

EXHIBIT A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

ROGELIO HERNANDEZ,

Plaintiff and Appellant,

v.

CHIPOTLE MEXICAN GRILL, INC.,

Defendant and Respondent.

B216004

(Los Angeles County
Super. Ct. No. BC373759)

APPEAL from the judgment of the Superior Court of Los Angeles County.
Terry A. Green, Judge. Affirmed.

Altshuler Berzon, Michael Rubin, James M. Finberg, Eve [H. Cervantez](#),
Danielle E. Leonard; Rastegar & Matern, Matthew J. Matern and Douglas W. Perlman
for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Richard J. Simmons, ~~and~~ [Geoffrey D.](#)
[DeBoskey](#), [Derek R. Havel](#), [Jason W. Kearnaghan](#) and [Daniel J. McQueen](#) for
Defendant and Respondent.

* * * * *

INTRODUCTION

Plaintiff and appellant Rogelio Hernandez (Hernandez) ~~appeals~~appealed from the order denying his motion for class certification and granting the motion to deny class certification of defendant and respondent Chipotle Mexican Grill, Inc. (Chipotle). We ~~held~~held that the trial court did not abuse its discretion and ~~affirm~~affirmed. In doing so, we ~~conclude~~concluded that employers must provide employees with breaks, but need not ensure employees take breaks. (*Hernandez v. Chipotle Mexican Grill, Inc.* (2010) 189 Cal.App.4th 751, review granted Jan. 26, 2011, S188755.) We issued our decision 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, issued its decision in *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*].” (*Hernandez (Rogelio) v. Chipotle Mexican Grill, Inc.* (June 20, 2012, S188755) 2012 Cal. Lexis 5867.) 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. ~~Factual background~~Background

Chipotle is a fast food restaurant chain, currently employing about 3,000 hourly employees in its approximately 130 California restaurants. All Chipotle employees are nonexempt, hourly workers entitled to overtime compensation when earned, including managers, except for the salaried position of “restaurateur.” Each Chipotle restaurant is managed by either a restaurateur or a general manager. Some employees move in and out of supervisory roles. For example, employees may be responsible for

scheduling meal and rest breaks on some shifts and weeks, but not on others. The average Chipotle employee earns \$8.37 per hour. The number of employees at each Chipotle restaurant varies from 18 to 40. Also, staffing patterns and work shift lengths vary from restaurant to restaurant, season to season, and day to day, as do the busy periods.

Chipotle's corporate headquarters establishes employment policies for its restaurants. Chipotle's written policies require managers to provide employees with meal and rest breaks. Managers are to determine when, or if, employees are permitted to take breaks. Employees are not permitted to self-initiate breaks and are prohibited from skipping breaks. Chipotle mandates employees take one uninterrupted 30-minute meal break if they work over five hours, and two 30-minute meal breaks if they work more than 10 hours. Managers are to provide employees with a 10-minute rest break if they work three and one-half hours or more. If employees work more than six hours a day, they are to take two paid rest breaks of at least 10 minutes each.

Chipotle directs employees to record their breaks. Chipotle pays employees for the time they take for breaks even though they are relieved of duty and free to leave the restaurant, so there is no financial incentive for employees to record all breaks accurately. Chipotle provides free food and beverages to encourage employees to take their meal breaks and provides comfortable break facilities. Paying for meal periods and providing free food is part of Chipotle's culture and helps Chipotle recruit and retain employees.

Hernandez worked in the Chipotle Manhattan Beach restaurant from February 2002 until it closed in May 2003. Soon thereafter, he worked in the Hawthorne restaurant, where he remained until Chipotle terminated his employment in July 2006. During his employment, Hernandez was an hourly worker.

2. Procedure

a. The operative complaint

Hernandez filed this lawsuit against Chipotle on his behalf and on behalf of a proposed class of similarly situated nonmanagerial employees. Hernandez alleged Chipotle violated labor laws by denying employees meal and rest breaks.

b. Chipotle's motion to decertify the class

Chipotle moved to deny class certification and strike the class allegations. Chipotle contended it had met its responsibility under California law to *provide* (authorize and permit) employees with meal and rest breaks.

Chipotle submitted 57 declarations from employees who attested that they had received all meal and rest breaks. The employees further declared that some employees occasionally had forgotten to record breaks, or had recorded them inaccurately. Chipotle submitted 16 manager declarations in which the managers declared the following: Employees received meal and rest breaks in compliance with state law. Management did not allow employees to return early from breaks. Because Chipotle paid for breaks, employees did not always remember to clock in and out when going on a break. When employees forgot to clock in and out at the beginning or end of their shifts, management instructed the employees to notify their manager, who then corrected the records. But Chipotle instructed its managers not to correct time records if an employee forgot to clock in and out for meal and rest breaks or if they made a mistake in doing so, because their pay would not be affected. Nonetheless, some managers edited employees' time records to record meal and rest breaks when an employee forgot to clock in or out.

Chipotle also submitted the declaration of Human Resource Director Brian Brown, who explained Chipotle's organization and methods of operation. He declared in part: "Because crew members are paid for meal and rest breaks, they do not have a financial incentive to record their breaks accurately and occasionally fail to do so. Some crew members simply forget to clock in or out or to record their breaks. . . . [I]f a crew member records the start of a meal break and forgets to record the time it ends,

the meal break is still fully paid. As a result, the records do not always indicate that meal periods are taken, even when they are provided. They also do not indicate the reason why breaks are not recorded, even when they are provided and made available.”

c. Hernandez’s motion to certify the class

About two weeks after Chipotle filed its motion, Hernandez moved for class certification. Hernandez estimated that the class consisted of thousands of current and former employees who worked millions of shifts for Chipotle beginning in July 2003. The proposed class excluded those individuals in managerial positions. Hernandez conceded that California employers need only provide employees with *rest* breaks. However, Hernandez cited *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 to support his theory that California employers were obligated to *ensure* employees took *meal* breaks.

Hernandez submitted a compilation of his time records. He also submitted excerpts from his deposition in which he testified to the following: While employed by Chipotle in Manhattan Beach, he always received his meal and rest breaks, except on one occasion. However, when he worked in Hawthorne, managers interrupted his meal breaks two to three times a week.

Hernandez additionally submitted declarations from a total of 23 nonmanagement, hourly employees who worked at Chipotle restaurants in California. The employees declared that sometimes their managers denied or interrupted their breaks, in varying degrees.

Pursuant to court order, Chipotle served a computerized spreadsheet with statistics relating to employee time records. Thereafter, Hernandez filed a supplemental expert declaration from professor of statistics Richard Kakigi, Ph.D. He had analyzed Chipotle’s clock-in and clock-out data from July 1, 2003 through February 9, 2009, for nonexempt employees, “excluding employees who *exclusively* occupied any of the five management positions for the entire class period.” (Fn. omitted, italics added.). Professor Kakigi concluded as follows: Ninety-two percent

of the employees had missed at least one meal break. On average, each employee missed meal breaks on 20.5% of his or her workdays. “All stores (100%) had at least one missed meal break. On average, each employee had a missed meal break on 20.5% of his or her workdays.” Eighty-eight percent of employees had at least one missed rest break, and on average each employee had a missed rest break on 13.0% of his or her workdays. All stores (100-%) had at least one missed rest break, and on average each store had a missed rest break on 13.0% of its employee workdays.¹ In reaching his conclusions, Dr. Kakigi classified as missed meal breaks instances where the records did not reflect any break period, as well as instances where an employee had taken a meal break of less than 30 minutes. He classified breaks of 30 minutes or longer as meal breaks and breaks 10 to 29 minutes long as rest breaks.

In response, Chipotle argued the professor’s conclusions had no value because (1) he counted as a missed break any employee who refused to take a break, as well as those who might have reported back to work one minute early; (2) the employee records included those who worked occasionally as managers, thereby creating an inherent conflict of interest among putative class members; (3) the records did not establish a universal policy or practice as they demonstrated that on the “vast majority of workdays and for the vast majority of employees, meal periods were taken”; and (4) the records did not establish why breaks were not taken or were too short.

d. The trial court’s ruling on the motion to decertify and the motion to certify

After a lengthy hearing, the trial court issued a comprehensive written ruling. The court found Hernandez had established the factors of numerosity, ascertainability of the class, typicality of Hernandez’s claims, and adequacy of Hernandez and his counsel as representatives. However, the court denied certification on the grounds that

¹ Thus, out of 2,074,451 shifts, 424,341 shifts (or 20.5%) did not contain time punches for a meal break of 30 minutes or longer. Of those employee shifts, there were 270,245 workdays that did not contain time punches for a rest break within the first four hours of 10 minutes or longer, for a total of 13%.

individual issues predominated over common issues, and class treatment was not superior to individual actions.

The trial court held that with regard to *rest* breaks, as conceded by Hernandez, employers need only authorize and permit such breaks, which means to make them available. The trial court recognized that the California Supreme Court had granted review of ~~two cases~~ *Brinker* to decide whether California law required employers to *ensure* employees take *meal* breaks, or if the proper standard was that employers need only *provide* employees with the opportunity to take such breaks.² The trial court concluded the Supreme Court likely was to decide California employers were required to *provide* employees with the ability to take breaks, not to *ensure* breaks be taken. The trial court further ruled that although there were common questions regarding whether Chipotle's policy was to provide breaks, whether employees "missed or received shorten[ed] meal and rest breaks[,] and whether such constituted an unfair business practice, these questions do not predominate." The trial court stated that if the Supreme Court held employers had to *ensure* employees take breaks, class action treatment of this case would be appropriate.

The trial court found that class adjudication of the wage and hour break claims was not manageable, nor would it provide a substantial benefit to the court or parties. Rather, individual inquiry was "required to determine if [Chipotle] is liable for denying proper meal and rest breaks to each of its thousands of employees." Further,

² ~~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, and *Brinkley v. Public Storage (2008) 167 Cal.App.4th 1278,* review granted ~~Jan. January~~ 14, 2009, No. S168806) ~~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." 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 reconsideration in light of *Brinker*. (*Brinkley (Fred) v. Public Storage* (June 20, 2012, S168806) 2012 Cal. Lexis 6819.)

adjudication of these individual issues rendered classwide adjudication unmanageable because, even if an employee's time record indicated a break was missed, that in and of itself did not establish that Chipotle failed to provide, authorize or permit the employee to take a meal or rest break. Additionally, Hernandez failed to present a clear outline of how the court and parties could use a sampling of testimony to address all of the individual questions that had to be answered.

DISCUSSION

1. Class actions and the 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 ~~Et.~~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. Employers ~~need only provide employees with breaks~~ Need Only Provide Employees With Breaks.

The trial court first held that California law requires that employers *provide*, but not *ensure*, employees take meal and rest breaks. Since we must ascertain if the trial court’s ruling was based upon an erroneous legal analysis (*Linder, supra*, 23 Cal.4th at pp. 435-436), we turn to this legal issue.

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

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* periods 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.³

³ 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

“[T]he Industrial Welfare Commission (IWC) ‘is . . . empowered to formulate regulations (known as wage orders) governing employment in the State of California[.]’ ” (*Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1534, citing *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 561-562.) 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, supra*, at p. 1534.)

Wage Order 5-2001, which governs restaurant workers like the Chipotle 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, § 11050, subd. 11.)⁴ Similarly, Wage Order 5-2001 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, § 11050,

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.” (Italics added.)

⁴ California Code of Regulations, title 8, section 11050, 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.— . . . [¶] (B) 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.)

subd. 12.)⁵ California employers are required to keep accurate records of meal, but not rest, breaks. (Cal. Code Regs., tit. 8, § 11050, subd. 7; cf. *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1299.)

Hernandez admits employers must *provide*, i.e., *authorize and permit*, employees to take rest breaks, but contends a different standard applies to meal breaks and thus, the trial court’s legal analysis was faulty. This contention is not persuasive. “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.*, 40 Cal.4th 1094, 1104 (2007). 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 v. Federal Express Corp.* (C.D.Cal. 2008) 249 F.R.D. 580, 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 (e.g., Lab. Code, § 226.7, subd. (a) [“No employer shall require any employee to work during any meal or

⁵ California Code of Regulations, title 8, section 11050, subdivision 12 states in part: “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 of pay at the employee’s regular rate of compensation for each workday that the rest period is not provided.” (Italics added.)

rest period . . .”]) 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. The mandatory language does not mean employers must *ensure* employees take meal breaks. 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), as well as California Code of Regulations, title 8, section 11050, subdivisions 11 and 12. (See fn. 4 & fn. 5, *ante.*) “Provide” means “to supply or make available.” (Webster’s Ninth Collegiate Dictionary (1986) p. 948.)

Hernandez relies on *Cicairos v. Summit Logistics, Inc.*, *supra*, 133 Cal.App.4th 949 (*Cicairos*) to argue employers must *ensure* meal breaks are taken. In *Cicairos*, an employer did not schedule meal breaks for its truck driver employees, established a system whereby drivers were pressured to make a certain number of trips during a work day, had a monitoring system to track drivers, and did not include a code for rest stops in its computer system. (*Id.* at p. 962.) These and other aspects of the work environment effectively deprived drivers of an opportunity to take breaks. In reversing a summary judgment granted to the employer with regard to meal break claims, the appellate court relied upon a January 28, 2002 opinion letter from the Division of Labor Standards Enforcement (DLSE). *Cicairos* stated, “Under the facts presented . . . the [employer’s] obligation to provide the plaintiffs with an adequate meal period is 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.’ (Dept. of Industrial Relations, DLSE, Opinion Letter No. 2002.01.28 (Jan. 28, 2002) p. 1.)” (*Cicairos, supra*, at pp. 962-963.) With regard to rest breaks, *Cicairos* held “the [employer] could . . . be liable if the plaintiffs did not take their full 10-minute rest breaks because, as a practical matter, the defendant did not *permit* the plaintiffs to take their rest breaks. (See Cal. Code Regs., tit. 8, § 11090, subd. 12(A) [employer must authorize *and permit* rest period].) . . . [¶] The defendant has not

proven it supplied the plaintiffs with their rest periods; therefore, summary judgment was improper.” (*Cicairos, supra*, at p. 963.)⁶

Cicairos does not assist Hernandez. The DLSE has withdrawn the opinion letter upon which *Cicairos* based its analysis. (Dept. of Industrial Relations, DLSE, Opinion Letter (October 23, 2008) [“Court Rulings on Meal Periods”].) ~~-(2AA263)-~~ In doing so, the Division stated: “Taken together, the language of the statute and the regulation, and the cases interpreting them demonstrates compelling support for the position that employers must provide meal periods to employees but do not have an additional obligation to ensure that such meal periods are actually taken.” (Dept. of Industrial Relations, DLSE, Opinion Letter (October 23, 2008) at p. 2.) Further, *Cicairos*’s conclusion relating to meal breaks did not depend upon an “ensure” standard. Rather, the facts in *Cicairos* were such that the employer’s business practices effectively deprived employees of the ability to take meal breaks. (Dept. of Industrial Relations, DLSE, Opinion Letter (October 23, 2008) at p. 5.)

———Also, *Brinker* has conclusively resolved this issue contrary to Hernandez’s position. 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

⁶ *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.

[liability for premium pay under Wage Order No. 5, subdivision 11\(B\) and Labor Code section 226.7, subdivision \(b\).” \(Brinker, supra, 53 Cal.4th at pp. 1040-1041.\)](#)

Lastly, Hernandez’s position also is not practical. “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. *See White v. Starbucks Corp.*, 497 F.Supp.2d 1080, 1088-89 (N.D.Cal.2007). 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 v. Federal Express Corp.*, supra, 249 F.R.D. at p. 585.) ~~Thus, although the Supreme Court has yet to decide the issue, we hold that the trial court used the correct legal analysis with regard to meal breaks. 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.)~~

b. The trial court was not foreclosed from addressing the legal issue.

Citing *Linder*, supra, 23 Cal.4th 439, Hernandez argues the trial court should not have addressed whether employers must *provide* meal breaks rather than *ensure* they be taken because a certification issue is “essentially a procedural one that does not ask whether an action is legally or factually meritorious.” (*Id.* at pp. 439-440; accord, *Sav-On Drug Stores*, supra, 34 Cal.4th at p. 326.)

However, neither *Linder* nor other Supreme Court authority forecloses 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. 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; *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906 [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]; contra, *Medraza v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 97-98.)

Hernandez also points to *Jaimez v. Daihatsu USA, Inc.* (2010) 181 Cal.App.4th 1286 (*Jaimez*) to support his argument that the trial court should not have examined the *provide* versus *ensure* legal issue. 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 there were predominant common factual issues whether the employees missed meal breaks because of 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 meal breaks even if no break was taken, and after 2006, employees had to sign a manifest indicating they took a meal break, regardless of whether they took the break, in order to get paid. (*Id.* at p. 1304.) Since the employer’s practices presented the predominant common 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. ~~The trial court appropriately decided the threshold legal issue as it could not otherwise assess whether class treatment was warranted.~~

Brinker recognized 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.) The trial court appropriately decided the threshold legal issue as it could not otherwise assess whether class treatment was warranted. **3. ——— The trial court did not abuse its discretion in denying certification.**

3. The Trial Court Did Not Abuse Its Discretion in Denying Certification.

a. There is substantial evidence supporting the trial court’s ruling that individual issues predominate.

The declarations and depositions of putative class members showed Chipotle did not have a universal practice with regard to breaks. Some employees declared they always missed meal breaks; some declared they received meal breaks, but not rest breaks; one declared his meal and rest breaks were combined; some did not declare they were denied meal breaks; and others declared their breaks were delayed. Employees declared their meal breaks were interrupted with varying degrees of frequency, as demonstrated by one employee who declared he was frequently denied his first rest break, but always denied his second break. In the 73 declarations provided by Chipotle, employees declared they had always been provided breaks. Hernandez himself admitted that except for one occasion, managers in the Manhattan

Beach restaurant always provided him with an opportunity to take his breaks, but managers in the Hawthorne restaurant denied him meal breaks two or three times a week.

The evidence before the trial court suggested that in order to prove Chipotle violated break laws, Hernandez would have to present an analysis restaurant-by-restaurant, and perhaps supervisor-by-supervisor. Given the variances in the declarations, Hernandez did not 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 [certification appropriate where there were allegations employer had policy of prohibiting certain employees from taking breaks].) Even if Chipotle managers directed when employees could take breaks, there was substantial evidence that Chipotle’s supervisory personnel did not uniformly handle breaks. The only evidence of a *company-wide policy and practice* was Chipotle’s evidence that it provided employees with meal and rest breaks as required by law.

In his supplemental brief, Hernandez contends that the trial court erroneously concluded that meal and rest period claims are “categorically unsuitable for class treatment.” We disagree. Based on the available evidence, the trial court reasonably concluded that individual issues predominated and therefore class certification was not appropriate. Nothing in *Brinker’s* majority opinion precludes such a finding. (*Brinker, supra*, 53 Cal.4th 1004.)

b. The time records do not demonstrate Hernandez can prove on a classwide basis that Chipotle failed to provide employees with breaks.

Hernandez argues he can prove Chipotle has not provided meal and rest breaks by using employee time records that show employees did not clock in and out for meal and rest breaks. However, there is substantial evidence the time records may be unreliable, because Chipotle paid employees for breaks and, thus, employees lacked an

incentive to clock in and out, and many did not do so. Chipotle instructed managers not to correct erroneous time records of meal and rest breaks since Chipotle paid employees for breaks, so there was no benefit gained by such time-record corrections. A trier of fact will have to ascertain if Chipotle employees actually missed breaks, or simply forgot to record them, as well as the reason why employees might have missed breaks or went back to work before completing them. In light of the size of the proposed class, there could be thousands of mini-trials to address the factual issues, supporting the trial court's conclusion that class treatment is not superior to individual lawsuits. (*Kenny v. Supercuts, Inc.* (N.D.Cal. 2008) 252 F.R.D. 641, 646 [class allegations that employer failed to provide meal breaks; disparity in employees' time records showed individual inquiry required].)⁷

c. Hernandez's evidence does not undermine the trial court's ruling.

In the trial court, Hernandez pointed to Professor Kakigi's analysis to suggest certification was appropriate because sampling of testimony and expert analysis would

⁷ Hernandez also argues Chipotle cannot rely upon the inaccuracy of its own records to defeat certification because Chipotle was required to keep accurate records of all meal breaks taken. (Cal. Code Regs., tit. 8, § 11050, subd. 7; *Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 134-135 [employer who failed to keep accurate records in wage and hour claim class action case had burden of proof where employer permitted employees to work on many contracts and not just one at issue and where required records would have permitted determination of subclasses]; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721 [in non-class action case, burden of producing evidence shifted to employer where employer falsified records and failed to keep accurate records of work performed].) First, we doubt this argument applies to rest break claims, as employers are not obligated to keep records of rest breaks. (Cal. Code Regs., tit. 8, § 11050, subd. 7.) Further, here there was no evidence Chipotle falsified records or purposefully failed to keep records. Certification of a class is not required simply because an employer's records of meal and rest breaks are not 100 percent accurate. [To the extent that Justice Werdegar's concurring opinion in *Brinker* urges that the failure to keep accurate time records creates a rebuttable presumption that employees were not relieved of duty \(*Brinker, supra*, 53 Cal.4th at p. 1053 \(Werdegar, J., concurring\)\), "concurring opinions are not binding precedent." \(*In re Marriage of Dade* \(1991\) 230 Cal.App.3d 621, 629.\)](#)

prove the case. (*Sav-On Drug Stores, supra*, 34 Cal.4th at p. 333 & fn. 6.) The trial court correctly concluded that introducing evidence by the use of a sampling of employee testimony was not manageable. “It is not sufficient . . . simply to mention a procedural tool; the party seeking class certification must explain how the procedure will effectively manage the issues in question.” (*Dunbar v. Albertson’s, Inc.* (2006) 141 Cal.App.4th 1422, 1432.)

Professor Kakigi did not show a sampling of testimony would simplify a trial. He found that 92 percent of Chipotle’s employees missed at least one meal break. We have already noted there are reasons to doubt whether the time records on which his analysis was based are reliable proof of missed breaks. As the trial court noted, “What percentage of the 92% have innocent explanations? If, for example, 75% of the 92% have innocent explanations for the missed break, it would not be rational to allow each side the same number of ‘samples’ to put forth at trial. The Court must know this percentage in order to determine how many samples to allocate to each party. A census on the 92% of employees is required.”

Additionally, Professor Kakigi premised his conclusions on the erroneous legal standard that Chipotle had to *ensure* employees took breaks. He assumed a break was missed if an employee clocked back in one minute early from a break, without accounting for why that occurred. As a practical matter, employees may have voluntarily chosen to return to work early. There was evidence some employees occasionally forgot to record their breaks and sometimes they recorded breaks inaccurately. 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, for example, if that employee willingly decided to forgo a break, there was no unlawful conduct.

Further, the professor’s conclusions did not demonstrate Chipotle had a practice of denying breaks. Professor Kakigi stated that 92 percent of employees missed *a* break and all restaurants showed missed breaks. However, Professor Kakigi did not demonstrate a pattern or practice of missed breaks, for example, with evidence that missed breaks occurred more frequently at certain times, in specific restaurants, during

certain seasons or shifts; nor did he offer any explanation why some employees at the same restaurant had different experiences.

d. There is substantial evidence of conflicts of interest among the putative class members.

The last reason provided by the court to deny certification was that members of the putative class had conflicts of interests.⁸ There was substantial evidence that some employees move in and out of supervisory roles with the responsibility to provide meal and rest breaks for themselves and other employees on the shift, without a change of title or other indicia of managerial status. Therefore, some putative class members may accuse other putative class members of violating their meal and rest period rights. The trial court did not abuse its discretion in concluding the likelihood that some class members might testify against other class members demonstrated antagonism of so substantial a degree as to defeat the purpose of class certification.

(*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 472).)

Because the trial court applied the proper legal standard in ruling on Hernandez's motion, remand is unnecessary. (Compare *Brinker, supra*, 53 Cal.4th at p. 1049 [remand necessary because the trial court relied on erroneous legal assumptions].)

DISPOSITION

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

GRIMES, J.

~~We Concur:~~ WE CONCUR:

⁸ In his supplemental brief, Hernandez urges that this issue should be reexamined in light of *Brinker*. However, *Brinker* is silent on the issue of class conflicts.

BIGELOW, P. J.

FLIER, ~~ACTING P. J.~~ ~~O'CONNELL, J.*.~~

~~* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.~~

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROGELIO HERNANDEZ,

Plaintiff and Appellant,

v.

CHIPOTLE MEXICAN GRILL, INC.,

Defendant and Respondent.

B216004

(Super. Ct. No. BC373759)

ORDER MODIFYING OPINION,

~~**CERTIFYING FOR PUBLICATION,**~~

~~**AND DENYING PETITION FOR**~~

~~**REHEARING**~~

[NO CHANGE IN JUDGMENT]

THE COURT:

The opinion filed on ~~September~~August 21, 2012, and certified for publication by order filed on August 30, 2010~~2012~~, is modified as follows:

On page 4, the first full paragraph- which begins with “Chipotle submitted 57 declarations” is replaced in its entirety ~~is replaced~~ with the following ~~modified~~ paragraph:

Chipotle also submitted the declaration of Human Resource Director Brian Brown, who explained Chipotle’s organization and methods of operation. He declared in part: “Because crew members are paid for meal and rest breaks, they do not have a financial incentive to record their breaks

accurately and occasionally fail to do so. . . . [I]f a crew member records the start of a meal break and forgets to record the time it ends, the meal break is still fully paid.” Several Chipotle crew members and managers corroborated Mr. Brown’s testimony that employees do not always remember to “clock-out” before going on a break. For example, David Pineda, the service manager at Chipotle’s Hawthorne location testified, “Although we emphasize that employees should clock in and out for their meal and rest periods, I am aware that some employees do not always do so. Because the company pays employees for their meal and rest period time, employees do not always think to clock-out before going on a break.”

This modification effects no change in judgment.

~~— The opinion filed on September 30, 2010, was not certified for publication in the Official Reports. For good cause the opinion, as modified, should now be published in the Official Reports, and it is so ordered.~~

~~— Appellant’s petition for rehearing is denied.~~

~~BIGELOW, P. J.~~

~~FLIER, Acting P. J.~~

~~GRIMES, J. — O’CONNELL, J.*~~