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Opinion following remand from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MORRY BROOKLER,

Plaintiff and Appellant,

v.

RADIOSHACK CORPORATION,

Defendant and Respondent.

B212893

(Los Angeles County

Super. Ct. No. BC313383)

APPEAL from an order of the Superior Court of Los Angeles County.

Edward A. Ferns, Judge. Affirmed.

Law Offices of Ian Herzog, Ian Herzog and Susan Abitanta; Law Offices of Stephen Glick and Stephen Glick; Daniels, Fine, Israel, Schonbuch & Lebovits, Paul R. Fine and Scott A. Brooks for Plaintiff and Appellant.

Jones Day, Robert S. Brewer Jr. and Randy S. Grossman; Niddrie, Fish & Addams and Michael H. Fish for Defendant and Respondent.

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## ***INTRODUCTION***

Morry Brookler appeals from the trial court's order granting his former employer RadioShack's motion for class decertification. In a prior opinion, we reversed the trial court's order, concluding that the trial court had applied an improper legal standard as an employer must not only permit employees to take meal breaks, but must also ensure compliance with its meal period obligations. We noted, however, that our Supreme Court's pending decision in *Brinker Restaurant Corp. v. Superior Court* (review granted Oct. 22, 2008, S166350) would resolve the matter. The California Supreme Court granted review in this case, decided *Brinker*, and subsequently remanded the case with directions to vacate our prior decision and reconsider the cause in light of *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*). Upon remand, the parties filed supplemental briefs as to the impact of *Brinker* on this case. Because the trial court's decision to decertify the class is consistent with *Brinker*, we now affirm.

## ***FACTUAL AND PROCEDURAL SUMMARY***

RadioShack owns and operates about 600 stores in California. Morry Brookler was a former RadioShack employee.

In 2004, Brookler filed his first amended complaint against RadioShack, asserting meal period violations on behalf of himself and a class of persons similarly situated. In May 2005, he filed a motion for class certification, arguing the law requires an employer to ensure that a 30-minute uninterrupted meal period is actually taken by the employee. RadioShack opposed the motion; according to RadioShack, the law only requires an employer to "provide" a meal period. Therefore, an employer has no liability for a meal period violation if the employee, having been provided an uninterrupted 30-minute meal period, voluntarily and freely chooses to forego all or part of it.

In February 2006, the trial court certified a class consisting of "all non-exempted employees at RadioShack stores in California from April 7, 2000 through the present who were not provided an uninterrupted 30-minute meal break following every 5 continuous

hours of work.” Citing *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 963 (*Cicairos*), the trial court initially ruled an employer has “an affirmative obligation to ensure that workers are actually relieved of all duty,” and common factual questions (that a meal period was missed or cut short) predominated and no individualized inquiry (as to the reason the meal period was missed or shortened) was needed to establish liability.

RadioShack’s subsequent writ petition and petition for review were summarily denied.

In July 2008, the Fourth District, Division One, published its opinion in *Brinker Restaurant v. Superior Court*, holding that California law requires an employer to provide uninterrupted 30-minute meal periods, but does not require the employer to ensure such meal periods are taken. The trial court had determined liability would necessarily depend on highly individualized reasons as to why meal periods were missed such that class certification was inappropriate, and under the “provide” standard, this determination was properly upheld. (80 Cal.Rptr.3d 781, 786.)

In August, RadioShack filed a motion to decertify the class based on the Court of Appeal decision in *Brinker*. RadioShack presented evidence that throughout the class period, its nationwide written policy specified that employees are to take meal periods of no less than 30 minutes and that “State laws specifying additional break and meal provisions may apply to this policy.” According to its evidence, it instructed its employees to clock out when taking (and clock back in when returning from) meal periods and taught these policies to its Regional Managers.

According to RadioShack’s evidence, store managers, such as Brookler himself, were responsible for implementing and enforcing RadioShack’s meal period policy at the store level. RadioShack trained its store managers in scheduling and provided each manager with scheduling software to assist with meal period scheduling and coordination for all non-exempt employees during the workday. Further evidence indicated the labor budget for each store was set to accommodate meal periods, not to discourage or preclude them.

In addition, RadioShack lodged deposition transcripts from 21 of its store employees, documenting a wide variety of reasons why employees voluntarily chose to forego a full, uninterrupted meal period, such as a desire to keep working to earn more money, to leave work early or because the employee did not want to eat alone.

In October, after taking the matter under submission, the trial court granted RadioShack's motion for class decertification, ruling in pertinent part as follows:

“The ultimate question in every [purported class action] is whether, given an ascertainable class, 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.’ [(*Brown v. The Regents of the University of California* (1984) 151 Cal.App.3d 982, 989.)]

“. . . Plaintiff's argument that the class members are still entitled to an additional hour of pay for missed meal breaks, regardless of why they missed the meal break is unfounded under the Labor Code. Labor Code [section] 226.7[, subdivision] (b) holds that an additional hour of pay is required only when the employer did not provide a meal period. Furthermore, the issue is not whether the class member should receive any compensation for missed meal periods, but whether Plaintiff can through common proof establish that Defendant is liable for not providing the class members with their meal breaks. Finally, Plaintiff's argument regarding the maintenance of accurate pay records is linked to the determination of whether Defendant provided meals.

“Defendant argues that the recent decision of *Brinker Restaurant Corporation v. Superior Court (Hohnbaum)* (2008) 165 Cal.App.4th 25 [hereinafter 'Brinker'] controls and renders the certified class to no longer consist of predominate [sic] common questions. Contrary to Plaintiff's argument *Cicairos v. Summit Logistics* (2005) 133 Cal.App.4th 949 [hereinafter 'Cicairos'] does not appear to conflict with *Brinker* in that it, as well as federal courts, have specifically held that *Cicairos*'s holding, being read under its facts, was consistent with the holding that [the] employer's obligation is to provide meals. [(*Brinker, supra*, 165 Cal.App.[4th at pp.] 56-57.)] Under the *Cicairos*

facts, the Court found that despite the employer's agreement to schedule meals, it failed to take any steps to allow meals to be taken[;] rather[,] the employer made it difficult for its employees to stop for their meals, which meant that the defendant was not in fact providing meal periods. [(*Id.* at [p.] 57.)]

“The *Brinker* Court held that an employer's obligation is only to provide, i.e. supply or make available, meal breaks, not ensure that employees take their meal breaks. [(*Brinker, supra*, 165 Cal.App.[4th] at [pp.] 54-55.)] Essentially the standard is that an employee must establish that his employer forced, i.e. impeded, discouraged or dissuaded, its employees to forego their meal periods in order to establish liability under Labor Code [sections] 226.7 and 512. [(*Id.* at [pp.] 58-59.)] Furthermore, the Court held that individual questions would predominate in determining whether a missed or shorten[ed] meal break was the result of personal choice or because the employees were actually not permitted to take a meal break. [(*Id.*)]

“Turning to the facts of this case, the presented evidence is that RadioShack throughout the applicable class period has a policy that meal periods are to be taken of no less than 30 minutes; that its[] employees were to clock in and out when they take their meals; and that this policy is taught to its Regional Directors. [Citations to declarations, deposition testimony.] Furthermore, the presented evidence is that the Store Managers (of which Brookler was one) were provided with a software program to assist in scheduling the hours of their employees that included scheduling the sales associate[s'] meal breaks. [Citations to supporting evidence.]

“Therefore, the issue becomes whether Plaintiff through common proof and evidence can establish that despite such policy to provide a meal break, whether the reason why meal breaks were not taken was due to coercion, impediment, or discouragement from Defendant. The deposition transcripts of the class members (Defendant's Exhibits 2-6 and 8-21) reveal a variety of reasons for why a class member skipped their meal break. See Exhibit 1 for a compilation of testimony given. Some reasons include to address customer complaints, no coverage, alone in the store, to earn

commissions, to answer telephone call, so could leave early, store was too busy, insufficient staff, and to answer employee questions. Plaintiff, himself, testified that when he did not take his meal break it was because he just neglected to take his break and that it was his decision to not take a meal break. Depo. of Brookler at 98:2-15, 102:8-17, 104:10-105:21, 214:11-215:2 (Defendant's Exhibit 7).

“The burden lies with Plaintiff that the class remains viable for class adjudication, i.e. that the presented common questions remain predominate. Here, the presented deposition testimony from the putative class members, Plaintiff and some District Managers show[s] that there is no one or a few common reasons for why a class member missed his/her meal period, or did not receive a full 30-minute meal break uninterrupted. Rather, in order to determine Defendant's liability here, individual inquiry would be necessary of each class member to determine if he/she missed a meal period, and if so why. Yet, without these questions being answered, the trier of fact will not be able to determine if Defendant is liable under Labor Code [sections] 226.7 and/or 512, for not providing a meal break. As these issues will require individual inquiry, then common questions will no longer predominate.”

Later that same month (in October 2008), the California Supreme Court granted review in *Brinker*, and Brookler then appealed the trial court's class decertification order. Relying primarily on *Cicairos, supra*, 133 Cal.App.4th 494, Brookler argued in this appeal that the employer has “an affirmative duty to ensure that their employees break for meal periods” and to “ensure that its employees take uninterrupted meal periods.” He also argued common issues predominated under a “provide” (rather than “ensure”) standard of liability. RadioShack objected that Brookler had forfeited the latter issue by failing to raise it in the trial court.

In August 2010, we reversed the trial court's order granting RadioShack's class decertification motion: “Our Supreme Court's decision in *Brinker* will resolve this issue. In the meantime, however, unless and until our Supreme Court holds otherwise, we agree with and adopt the analysis in *Cicairos, supra*, 133 Cal.App.4th 949, holding an

employer's obligation under the Labor Code and IWC wage orders is to do more than simply permit meal periods in theory; it must also provide them as a practical matter. If the employer does not *ensure* compliance with meal period requirements, such behavior violates the Labor Code and corresponding wage orders. (See *id.* at p. 963.)” (*Brookler v. RadioShack* (B212893, Aug. 26, 2010 [nonpub. opn.], italics added.)

In September, RadioShack filed a petition for review of this decision. In November, our Supreme Court granted review (S186357), deferring further action pending the decision in *Brinker*.

In June 2012, our Supreme Court transferred the matter back to this court, “with directions to vacation [our prior] decision and to reconsider the cause in light of *Brinker Restaurant v. Superior Court* (2012) 53 Cal.4th 1004.”

The parties have now filed supplemental briefs and reply briefs.

## ***DISCUSSION***

According to *Brookler*, this court's prior reversal of the decertification order complies with *Brinker* and should be upheld. We disagree.

### **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 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 [56 Cal. Rptr. 3d 861, 155 P.3d 268] (*Fireside Bank*), citing among others, Code Civ. Proc., § 382 & *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 [17 Cal. Rptr. 3d 906, 96 P.3d 194] (*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 [108 Cal. Rptr. 3d 15] [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 [97 Cal. Rptr. 2d 179, 2 P.3d 27] (*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 [97 Cal. Rptr. 2d 226].) ‘ “[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.)” (*Hernandez v. Chipotle Mexican Grill, Inc.* (2012) 208 Cal.App.4th 1487, 1494-1496.)

**The Trial Court Properly Determined that California Law Requires Employers to Provide Employees with Meal Breaks, But Need Not Ensure They Are Taken.**

“[A]ny debate about an employer’s obligation regarding meal breaks has been squarely resolved by *Brinker*. In *Brinker*, our Supreme Court determined that ‘[a]n employer’s duty with respect to meal breaks under both [Labor Code] 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.[<sup>1</sup>] ... [¶] 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

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<sup>1</sup> The *Brinker* court continued: “What will suffice 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.” (53 Cal.4th at p. 1041.)

obligations and create liability for premium pay under Wage Order No. 5, subdivision 11(B) and Labor Code section 226.7, subdivision (b).’ (*Brinker, supra*, 53 Cal.4th at pp. 1040–1041.)” (*Lamps Plus Overtime Cases* (2012) 209 Cal.App.4th 35, 50; see also *Hernandez, supra*, 208 Cal.App.4th at pp. 1496-1500.)

Brookler says *Brinker* did not overrule *Cicairos, supra*, 133 Cal.App.4th 949. As the *Lamps Plus* court observed, *Brinker* relied on *Cicairos* only for the proposition that “an employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks”; *Brinker* squarely rejected the proposition that an employer must police its employees to ensure that breaks are actually taken. (*Lamps Plus Overtime Cases, supra*, 209 Cal.App.4th at p. 50, quoting *Brinker, supra*, 53 Cal.4th at pp. 1040–1041.)

“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.” (*Brinker, supra*, 53 Cal.4th at p. 1022.) The trial court in this case did consider the evidence in the context of the proper legal standard (“provide” rather than “ensure”) and nevertheless concluded class treatment was inappropriate under that standard. Brookler’s argument that he could not have anticipated the applicable law is unavailing. Because the trial court applied the correct legal standard in this case, and its decision is supported by substantial evidence, Brookler has failed to demonstrate an abuse of discretion.

In its supplemental brief, Brookler also says, whether or not decertification is upheld, certification of subclasses is appropriate and should be determined by the trial court. He now proposes Subclass A to include employees who are not allowed to take meal breaks and Subclass B comprised of employees who work off the clock while clocked out on meal breaks. In opposition to RadioShack’s motion to decertify the class, Brookler says, he urged the trial court that he should be permitted to bring a certification motion for two subclasses, but the trial court said potential subclasses were not before the court at that time (and Brookler was not permitted to conduct further discovery as a stay

was in place). In RadioShack's view, Brookler should be precluded from seeking certification of subclasses. The trial court did not consider the question of subclasses. None of the proceedings on appeal, either the initial appeal or this proceeding after remand from the Supreme Court, addresses the issue of subclasses or bars the trial court from considering that issue on remand.

***DISPOSITION***

The order is affirmed. Each side is to bear its own costs of appeal.

**WOODS, Acting P. J.**

**We concur:**

**ZELON, J.**

**JACKSON, J.**