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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 EIGHT

BERNADETTE SANTOS et al.,

Plaintiffs and Appellants,

v.

VITAS HEALTHCARE CORPORATION  
OF CALIFORNIA et al.,

Defendants and Respondents.

B222645

(Los Angeles County  
Super. Ct. No. BC359356)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Emilie H. Elias, Judge. Affirmed in part and reversed in part.

Arias Ozzello & Gignac, Mike Arias, Mikael H. Stahle and Mark A. Ozzello, for  
Plaintiffs and Appellants.

Curiale Hirschfeld Kraemer, Reed E. Schaper and Robert R. Flemer, for  
Defendants and Respondents.

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Plaintiffs Bernadette Santos, Joyce White, Keith Knoche, and Jerry Shirley, for themselves individually and as proposed class representatives, appeal from the trial court's denial of their motion for class certification. We affirm in part and reverse in part.

## **FACTS AND PROCEEDINGS**

Respondent VITAS Healthcare Corporation of California provides end-of-life hospice care and bereavement services to terminally ill patients in patients' homes and nursing facilities. (VITAS is a subsidiary of respondent Chemed Corporation, but Chemed Corporation's conduct is not at issue in this appeal.) VITAS employs teams of admissions nurses, chaplains, and sales representatives to deliver its care to patients. Appellant Bernadette Santos worked for VITAS as an admissions nurse, appellants Keith Knoche and Jerry Shirley were chaplains, and appellant Joyce White was a sales representative.

In 2006, appellants filed their original complaint (later superseded by their operative third amended complaint) for themselves and as proposed class representatives for all other similarly situated VITAS employees. (Code Civ. Proc., § 382 [permits class actions].) Their complaint alleged causes of action against VITAS for not paying class members their earned wages and overtime, failing to provide them with meal breaks and rest periods, and engaging in unfair competition. Their complaint claimed the following:

- VITAS required every team member to check the company's voice mail system every day before leaving home for work to receive updated reports about the patients that team members were scheduled to visit that day. Appellants assert the voice mail messages were lengthy, lasting from 30 to 60 minutes. According to appellants, VITAS did not pay team members for their time listening to the messages.

- VITAS maintained a telephonically-controlled computerized database known as VRU (Voice Response Unit). According to appellants, VITAS required team members to call into VRU from a land line telephone (not a cell phone) after work each day to input into the system their billing and activity codes for that day's patient visits. Appellants allege inputting each day's codes involved substantial time for which VITAS did not pay team members.
- VITAS did not pay team members for their "inordinate" travel time at the beginning of the day from home to their first patient visits, and for their travel time returning home after their last patient visits of the day.
- Appellants allege VITAS told team members to take meal breaks while driving from one patient visit to the next, thereby depriving team members of the 30-minute, uninterrupted meal break to which the law entitled them.

Appellants' complaint sought recovery of unpaid wages, overtime, and statutory wage penalties for all VITAS admissions nurses, chaplains, and sales representatives. Appellants thereafter moved for certification of the following classes:

"Subclass I: (Straight/Overtime) All persons who were employed by Defendants in California as Admission Nurses (from April 4, 2000), Chaplains, and Sales Representatives (from September 27, 2002), to the present, who were not properly compensated for all time worked in any given workday and/or any given workweek."

"Subclass II: (Meal Breaks) All persons who were employed by Defendants in California as Admission Nurses (from April 4, 2000 to the present), Chaplains, and Sales Representatives (from September 27, 2002 to the present), who did not

receive meal periods pursuant to the applicable Cal. Lab. Code and Industrial Welfare Commission Wage Order Requirements.”

“Subclass III: (Rest Breaks) All persons who were employed by Defendants in California as Admission Nurses (from April 4, 2000 to the present), Chaplains, and Sales Representatives (from September 27, 2002 to the present), who did not receive rest periods pursuant to the applicable Cal. Lab. Code and Industrial Welfare Commission Wage Order Requirements.”

After the hearing, the court issued a 13-page order denying the motion for class certification on multiple grounds. This appeal followed. In July 2011 in an unpublished opinion, we affirmed in part and reversed in part the trial court’s order. Appellants filed a petition for review. In September 2011, our Supreme Court issued a grant-and-hold order in this matter pending its decision in *Brinker Restaurant v. Superior Court*, review granted September 28, 2011, S166350. In April 2012, our Supreme Court issued its decision in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*) and transferred this matter to us with directions to vacate our earlier decision and to reconsider the cause in light of *Brinker, supra*. We now do so.

### **STANDARD OF REVIEW**

“A motion to certify a class action is not a trial on the merits, nor does it function as a motion for summary judgment.” (*Carabini v. Superior Court* (1994) 26 Cal.App.4th 239, 245; see also *Brinker, supra*, 53 Cal.4th at p. 1023.) Class certification “ ‘is essentially a procedural [question] that does not ask whether an action is legally or factually meritorious.’ ” (*Brinker* at p. 1023; *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*)). “ ‘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.]’ ” (*Jaimez v. DAIOWS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1298 (*Jaimez*)). To the extent a trial court may, but is not always required to, consider a proposed class action’s substance or merits, it may do so to determine whether factual or legal questions common to all class members are likely to play a predominant role in driving the litigation, thus making the action amenable to class treatment. (*Brinker* at p. 1021.) “As the focus in a certification dispute is on what type of questions—common or individual—are likely to arise in the action, rather than on the merits of the case [], in determining whether there is substantial evidence to support a trial court’s certification order, [the reviewing court] consider[s] whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.’ [Citation.]” (*Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1531; *Bomersheim v. Los Angeles Gay and Lesbian Center* (2010) 184 Cal.App.4th 1471, 1481 [“Questions of fact and law are ‘predominant’ if the factual and legal issues ‘common to the class as a whole [are] sufficient in importance so that their adjudication on a class basis will benefit both the litigants and the court.’ ”].) In determining amenability, courts may look to the complaint and declarations of counsel. (*Sav-On, supra*, at p. 327.)

We review the trial court’s resolution of the foregoing certification questions for abuse of discretion. “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, supra*, 34 Cal.4th at pp 326-327, quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436; *Hernandez v. Chipotle Mexican Grill, Inc.* (Aug. 21, 2012, B216004) 2012 WL 3579567, [p. 5].) However, “[w]e 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, supra*, 181 Cal.App.4th at pp. 1297-1298; *Hernandez v. Chipotle Mexican Grill, Inc., supra*, [p. 5].)

## DISCUSSION

### A. *Uncompensated Travel Time*

VITAS did not pay team members for their travel time from home to their first patient visits at the beginning of the workday, nor for their commute home after the last patient visit of the day. The VITAS representative most knowledgeable about VITAS’ compensation policies testified in her deposition as follows:

“Q. [D]o [proposed class members] get paid for the time that they spend driving to their first appointment? A. No. Q. Do they get paid for the time that they spend driving from their last appointment? A. No. Q. Is that a policy that applies to all [proposed class members] in California? A. To the best of my knowledge, yes.”

Appellants sought class certification for VITAS employees who were not paid for their travel time. The court denied certification because it found VITAS had no legal obligation to pay for the travel time of employees who did not have a customary workplace to which they commuted each day. In support, the court relied on an advice letter from the Department of Labor Standards Enforcement (DLSE). The DLSE letter opined the law did not require an employer to compensate employees for commuting time when the employees “are not assigned to a specific workplace and [thus] have a reasonable expectation that they will be routinely required to travel reasonable distances to job sites on a daily basis.”

Appellants contend the court erred in denying certification because the court examined the merits of whether proposed class members had a customary workplace. Additionally, appellants complain, the court disregarded the substantial evidence that

they had a customary workplace because they attended weekly team meetings in VITAS's company offices.

Appellants' contentions are unavailing. The trial court may consider the legal merits of a proposed class's claims when those merits intertwine with the proposed class's viability. (*Brinker, supra*, 53 Cal.4th at pp. 1023-1024; *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1092, citing *Linder v Thrifty Oil Co., supra*, 23 Cal.4th at p. 443.) "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.) Here, the trial court's consideration of appellants' evidence of a workplace to which they customarily reported went to the existence of a common question of law or fact necessary for determining the suitability of class treatment of appellants' claims; without a customary workplace, class members were not entitled to compensation for their travel time. We agree with the trial court's conclusion that, at least under the guidelines and examples discussed by the DLSE in its letter, weekly meetings at company offices is not substantial evidence that class members were "assigned to a specific workplace." (*Brinker* at p. 1029 fn. 11 ["DLSE's opinion letters, 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"]; *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 584 (*Morillion*) [recognizing as "persuasive" statements concerning labor law contained in DLSE advice letters]; *Marin v. Costco Wholesale Corp.* (2008) 169 Cal.App.4th 804, 815 [DLSE advice letters may "provide guidance in similar subsequent cases"].) Thus, the DLSE letter provides no support for appellants' position.

Under *Morillion, supra*, 22 Cal.4th 575, appellants were not under VITAS's "control" during their commutes in a manner that would have entitled them to travel-time compensation. *Morillion* held that farm workers were entitled to pay for the time they rode their employer's bus from a central departure point to a field to begin work. Central to *Morillion's* holding was the fact that the workers were under the employer's physical

control because the employer required the workers to take the bus. (*Id.* at pp. 582, 586-588.) Relevant, here, however, was *Morillion's* pronouncement that “while the time [the farm workers] spent traveling on [the employer’s] buses to and from the fields is compensable as ‘hours worked’ . . . , the time [the workers] spent commuting from home to the departure points and back again is not” because the workers were not under the employer’s control during their commutes. (*Id.* at pp. 587-588; accord 29 U.S.C. § 251 et seq. (Portal-to-Portal Act) [§ 254, subd. (a); travel time to workplace not ordinarily compensable under federal labor law].) Likewise here, VITAS did not control the manner or circumstances of the commutes by class members to their first patient visits or home. For this reason, and because class members had no specific workplace, the trial court did not abuse its discretion in denying certification of claims for uncompensated travel time.

*B. Uncompensated Straight-Time and Overtime*

1. As applied to team members’ three job categories

Appellants sought class certification for “all employees who were not properly compensated for all time worked in any given workday and/or any given week.” These employees’ claims rested on uncompensated time spent checking voicemail messages before the start of each work day and inputting activities reports into the VRU system after work.<sup>1</sup> The court denied certification of claims for uncompensated work time because appellants submitted no evidence that VITAS refused to pay employees for work time that the employees reported. The court explained, “there is no evidence here of a common practice to not pay for time spent retrieving voicemails and inputting data. Indeed, the evidence seems to be to the contrary. Plaintiffs fail to cite even one instance where an employee reported overtime work and was not paid for it. Vitas, on the other

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<sup>1</sup> Appellants included travel time within their claim for uncompensated straight-time and overtime, but we have found, *supra*, that the trial court correctly denied certification of that portion of their claim.

hand, attaches management declarations and deposition testimony stating that “[a]ll reported overtime is paid . . . .” The court found that appellants’ “declarations establish, at most, that the declarants were unable to complete all of their tasks during the normal eight hour workday and subjectively felt uncomfortable about reporting all overtime hours worked. Because of their subjective nature, the declarations fail to show a common policy and give rise to individual questions.” Because appellants, in the court’s estimation, failed to show a predominance of common questions of law or fact, the court denied certification. (*Sav-On*, 34 Cal.4th at p. 326 [class certification requires a “community of interest” which involves, among other things, predominant common questions of law or fact].) We find the court erred because it misapprehended appellants’ wage claims.

To promote the welfare of workers and the public, society imposes hour and wage laws on employers. (*Brinker, supra*, 53 Cal.4th at p. 1026; *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1430; *Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal.App.3d 16, 29; *California Grape and Tree Fruit League v. Industrial Welfare Commission* (1969) 268 Cal.App.2d 692, 703.) An employer is liable for overtime if it “ ‘knows or has reason to believe that [the employee] is continuing to work. . . . In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed.’ ” (*Morillion, supra*, 22 Cal.4th at p. 585; see also *Brinker* at p. 1040 fn. 19.)<sup>2</sup> An employer may not shirk that duty. (See Lab. Code, § 1199 [misdemeanor to pay less than legally mandated overtime wage];

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<sup>2</sup> VITAS cites *Lindow v. United States* (1984) 738 F.2d 1057, 1060 for the proposition that an employer must *actually* know the employee has worked overtime, but VITAS misreads *Lindow*. Disavowing older authority that had required “actual” knowledge, the *Lindow* court stated “ ‘we have more recently held that “an employer who knows or should have known that an employee is or was working overtime’ is obligated to pay overtime. [Citation.] An employer who is armed with this knowledge cannot stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation.” [Citation.]’ ” (*Id.* at pp. 1060-1061.)

*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1148-1149.) To ensure that employees receive their overtime pay, employers must keep accurate payroll records. (Lab. Code, § 1174, subd. (d) [employer’s duty to keep payroll records; Lab. Code, § 1175, subd. (d) [misdemeanor for employer not to keep payroll records].) An employer may not delegate to employees the duty to keep accurate payroll records, nor may the employer turn a blind eye to its employees’ accrual of overtime by shifting to employees the duty to claim overtime when the employer knows, or has reason to know, the employees are working overtime. (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1189 [may not shift record keeping burden to employees]; *Brinker* at p. 1053 fn. 1 [discussing employer’s record-keeping obligations] (conc. opn., Werdegar, J.); accord Lab. Code, § 1194, subd. (a) [“Notwithstanding any agreement to work for a lesser wage, any employee receiving less than . . . legal overtime compensation . . . is entitled to recover in a civil action the unpaid balance of the full amount of . . . overtime compensation . . .”].)

Here, appellants claim VITAS’s policies required class members to retrieve voicemail messages and input activity data “off the clock” without pay, resulting in uncompensated overtime. According to appellants, VITAS directed class members to check their voicemail before beginning work each day to receive updates about the health and condition of patients the class members were scheduled to visit that day. Appellants submitted more than a half-dozen declarations by appellants and other proposed class members attesting to the retrieval of these voice mails taking a minimum of 30 minutes each day, time for which they were not compensated.<sup>3</sup> Appellants also alleged VITAS’s

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<sup>3</sup> The following VITAS employees submitted declarations attesting to the uncompensated time they spent listening to voicemails each morning: admissions nurse Janine Cantrell – at least 45 minutes; admissions nurse Arden Daniels – 45 to 60 minutes on average; Chaplain Jerrold Hollobaugh – at least 30 minutes; Chaplain Keith Knoche – at least 30 minutes; admissions nurse Terri McKibbon – up to one hour at the beginning of each work week on Mondays and about 45 minutes the other days of the week; appellant Bernadette Santos – up to one hour on Mondays and about 45 minutes the other days of the week; appellant Jerry Shirley – at least 30 minutes; Chaplain Patricia Williams – at least 30 minutes. VITAS correctly notes that the court excluded from

policy virtually compelled class members to input their daily activity data into the company's VRU (Voice Response Unit) on their own time from their home telephones.<sup>4</sup> The VITAS representative most knowledgeable about the company's compensation policies testified as follows:

“Q. It's true, is it not, that field workers are asked, indeed, required to make entries on the VRU system at some point during the workday during the day? A. Yes. . . . Q. . . [E]mployees do this by the use of a Touch-Tone phone, correct? A. That's correct. Q. And is it true that cell phones are not allowed in the process of inputting time in that area? A. Cell phones are suggested – not to use cell phones, since they drop calls and it's suggested to use a land line. Q. It's your understanding that that is the company policy to discourage that? A. Yes. . . . Q. If the employee does not have access to a land line between 8:00 and 5:00, if that's the employee's schedule, what is the employee to do if the employee cannot use his or her cell phone? A. Then they would use their home phone, if that's what they need to do. Q. And they would do that after their shift? A. That's right.”

Appellants thus submitted to the court substantial evidence that class members labored off-the-clock performing work-related duties without compensation before beginning work and after their shifts ended.<sup>5</sup> The juxtaposition of VITAS's policy of no

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evidence those portions of class members' declarations that discussed the experience of co-workers or what the declarant supposed VITAS's policies to be. But the declaration testimony cited at the beginning of this footnote does not suffer from those infirmities because the stated facts reflected each declarant's personal knowledge, and thus the court did not exclude the statements.

<sup>4</sup> Starting in 2005, VITAS began to replace VRU with CarePlanIT, but the parties offer no argument that the switchover affected appellants' claims.

<sup>5</sup> Respondents assert they submitted multiple employee declarations stating the employees did not need to work off the clock to check their voicemail and input their activity reports into VRU, or if they did work overtime, it was for too short a period for the employees to bother reporting it. These declarations create a conflict in the evidence going to the factual merits of appellants' claims which is not properly before us in reviewing the court's certification ruling. (*Sav-On, supra*, 34 Cal.4th at p. 326; *Carabini v. Superior Court, supra*, 26 Cal.App.4th at p. 245.)

pay for travel-time with its requirement that employees check their voicemail before their first patient visit and input their VRU activity reports after completing their last patient visit, suggests VITAS knew, or had reason to know, class members were working off-the-clock without compensation. VITAS cannot have it both ways. It cannot deem its employees to be off-the-clock during their commute from home to their first patient and from their last patient to home, yet direct them to perform work-related duties of checking their voicemail before arriving at their first patient and inputting their activity reports by a telephone land line (in all likelihood from home) after their last patient. Given that VITAS had reason to know employees were working off-the-clock, VITAS was legally obligated either to ensure the employees did not perform such work or, failing that, to compensate them. (*Morillion, supra*, 22 Cal.4th at p. 585; see also *Brinker, supra*, 53 Cal.4th at pp. 1051-1052.) VITAS could not lawfully shrug its shoulders and turn away.<sup>6</sup>

In addition to denying certification of the straight-time/overtime class because no evidence showed VITAS refused to pay *reported* overtime, the court also denied certification on the ground the class was not ascertainable in two respects.

Ascertainability of a class depends, among other things, on the class's definition and on a means of identifying the class. (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) The court noted that a class's definition must be objectively ascertainable so that potential class members can reasonably determine whether they are a member of the class or not. (E.g. *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 14.) The court found the class definition was deficient because it contained a legal conclusion of whether class members were "properly" compensated. (But see *Hicks v. Kaufman and Broad Home Corp., supra*, 89 Cal.App.4th at p. 915 ["A class is still ascertainable even if the definition pleads ultimate facts or conclusions of law."].) Accepting the court's finding, appellants proposed amending the class definition to remove the word

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<sup>6</sup> Indeed, it appears the VRU system could log the length and time of day of incoming calls by its employees, but VITAS disabled the logging feature because it claimed to have no use for the data.

“properly.” The court did not take up appellants’ proposal, and offered no reason for not doing so. The court’s seeming oversight was error. (*Hicks* at p. 916 [“if necessary to preserve the case as a class action, the court itself can and should redefine the class where the evidence before it shows such a redefined class would be ascertainable”].) Because we review only the reasons the trial court offers for its certification ruling, the court’s failure to explain why amending the definition would not have saved the class definition precludes us from affirming the court’s implied ruling that the definition was beyond repair. (*Jaimez, supra*, at 181 Cal.App.4th at pp. 1297-1298; *Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1205.)

The second respect in which the court found the class was not ascertainable rested on appellants’ proposal to use VITAS payroll records to identify class members. The court found the payroll records were an inadequate means because those records identified ALL chaplains, nurses, and sales representatives (which numbered 505), whereas class members were only those “who did not receive compensation for all straight and overtime hours worked.” We understand this finding to rest on the trial court’s apparent view that appellants’ complaint sought recovery for *reported*, but uncompensated, work time. We have noted, however, that appellants’ wage claims involve unreported time that VITAS reasonably should have known class members were working. In any case, a successful certification motion does not require that the motion individually identify every class member from the outset; it is sufficient that information, such as company records, exists that establish “the basic parameters of the class.” (*Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1334-1336.) VITAS’s employee records numbering 505 potential class members are such records.

Finally, the court denied certification on the grounds appellants were not typical of class members, and class proceedings were not superior to individual actions. The court did not discuss these grounds. Instead, it rested its findings on its determination that common questions of law or fact did not predominate, a determination which we have held flowed from the court’s misapprehension of appellants’ uncompensated wage claims. Because the premise on which these findings were flawed, so too were the

findings resting on that premise. (*Jaimez, supra*, 181 Cal.App.4th at pp. 1297-1298 [when reviewing an order denying class certification, appellate courts “consider only the reasons cited by the trial court for the denial . . .”])

2. *Overtime Exemption of Sales Representatives Properly a Class Question*

The proposed class of employees denied compensation included VITAS’s sales representatives. VITAS asserted the sales representatives were not entitled to overtime pay because they were “outside salespersons” exempt from overtime laws. An outside salesperson is defined as someone “who customarily and regularly works more than half the working time away from the employer’s place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.” (Cal. Code Regs., tit. 8, § 11070, subd. (J).) Before appellants moved for class certification, VITAS moved for summary adjudication of its affirmative defense that its sales representatives were outside salespersons exempt from overtime laws. (VITAS’s motion is not in the record, but VITAS’s opposition to class certification refers to the motion.) In denying VITAS’s motion, the court adopted a five-factor test articulated in *Barnick v. Wyeth* (C.D.Cal. 2007) 522 F.Supp.2d 1257, for determining whether an employee is an outside salesperson. *Barnick’s* factors are: “(1) ‘[T]he job was advertised as a sales position and the employee was recruited based on sales experience and abilities.’ [¶] (2) ‘Specialized sales training’ [¶] (3) ‘Compensation based wholly or in significant part on commissions’ [¶] (4) ‘Independently soliciting new business’ [¶] (5) ‘[R]eceiving little or no direct or constant supervision in carrying out daily work tasks.’ ” (*Id.* at p. 1262.) The trial court denied VITAS’s motion for summary adjudication because the court found *Barnick’s* factors raised triable issues of fact.

In opposing appellants' motion for class certification, VITAS reiterated the applicability of *Barnick's* five-factor test.<sup>7</sup> The court agreed about *Barnick's* applicability. The court further found *Barnick's* five factors presented "inherently individualized" questions for determining whether a VITAS sales representative fell within the outside-salesperson exemption to overtime laws. The trial court's order denying certification does not recite any substantial evidence supporting its conclusion that the outside-salesperson exemption presents predominantly individual questions for VITAS sales representatives. Neither the court's order nor the parties suggest VITAS had different categories of sales representatives for which *Barnick's* five factors might bestow exemption from overtime laws but not for others. In the absence of substantial evidence of different categories of sales representatives, it stands to reason that most, if not all, VITAS sales representatives are exempt, or none are. Given that state of affairs, the court mistakenly concluded the exemption presents predominately individualized questions of law or fact. (*Sav-On, supra*, 34 Cal.4th at pp. 326-327 [substantial evidence must support trial court ruling that individual questions predominate].) Hence, the court erred in rejecting class inclusion of the wage claims of sales representatives.

## 2. *Alleged Denial of Meal Periods*

Appellants sought certification of "all employees who did not receive meal periods as required by the Labor Code and the applicable Wage Order." Appellants allege employees missed their meal periods either because their work loads prevented them from taking the time to stop working to eat a meal, or because VITAS's requirement that employees keep their pagers turned on during meal breaks meant they did not enjoy the

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<sup>7</sup> *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450 [affirmative defense may defeat certification]; but see *Weinstat v. Dentsply Internat., Inc.* (2010) 180 Cal.App.4th 1213, 1235 ["the possibility that a defendant may be able to defeat the showing of an element of a cause of action ' "as to a few individual class members[,] does not transform the common question into a multitude of individual ones . . . ." ' "].)

uninterrupted 30-minute meal break to which the law entitled them. The court denied certification because it held that the law required VITAS to offer only meal breaks, not to ensure employees took them. *Brinker* establishes that the trial court correctly applied California law, for “an employer must relieve the employee of all duty for the designated [meal] period, but need not ensure that the employee does no work.” (*Brinker, supra*, 53 Cal.4th at p. 1034; see also *Hernandez v. Chipotle Mexican Grill, Inc., supra*, 2012 WL 3579567, [p. 8] [*Brinker* “conclusively” resolves employer need not ensure employee takes meal period].)

Substantial evidence existed that VITAS offered meal breaks to its employees. VITAS told employees during orientation that they needed to take their meal breaks. VITAS’s written policies stated employees were entitled to a 30-minute meal break during any shift of five or more hours. The trial court found that the reasons an employee might not take a meal break involved predominantly individual questions not amenable to common proof. 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. The trial court’s finding was not an abuse of discretion.

Appellants’ citation to *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 is unavailing. *Cicairos* stands for the proposition that an employer must not frustrate the exercise of employees’ meal periods. (*Id.* at pp. 962-963.) To the extent individual work schedules or pagers may have interfered with, or prevented, an employee from taking a meal period, the trial court’s finding that individual questions predominated was within the realm of reasonable findings such that it was not an abuse of discretion. Even if *Cicairos* could be properly read to require employers to ensure meal breaks that reading would now conflict with *Brinker*, which we are obligated to follow.

3. *Alleged Denial of Rest Periods*

Appellants sought certification of “all employees who did not receive rest periods as required by the Labor Code and the applicable Wage Order.” The trial court denied certification for “the same reasons it denies certification of the Meal Breaks Class.” Appellants do not separately address the trial court’s error, if any, in denying certification of a rest-period class. Accordingly, we pass on any further discussion of the point, and affirm that part of the order.

**DISPOSITION**

The court’s order denying certification of Subclass I covering straight time and overtime is reversed and the court is ordered to certify the class as defined by the motion for class certification except (1) for the exclusion of travel time and (2) subject to further amendment by appellants or the court sua sponte considering the propriety of including the word “properly” within the definition’s phrase, “properly compensated.” In all other respects, the court’s order denying certification is affirmed. Appellants to recover their costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.