

BERNADETTE SANTOS, et al., Plaintiffs/Appellants/Petitioners, vs. VITAS  
HEALTHCARE CORPORATION OF CALIFORNIA, et al., Defendants/Respondents.

S195866

SUPREME COURT OF CALIFORNIA

*2011 CA S. Ct. Briefs 95866; 2011 CA S. Ct. Briefs LEXIS 1303*

August 24, 2011

AFTER A DECISION BY THE COURT OF APPEAL SECOND APPELLATE  
DISTRICT, DIVISION EIGHT. CASE NO. B222645. APPEAL FROM THE  
SUPERIOR COURT OF LOS ANGELES COUNTY. THE HONORABLE EMILIE H.  
ELIAS, PRESIDING.

Petition for Appeal

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**TITLE: Petition for Review**

**TEXT: I.**

**ISSUE PRESENTED**

This petition raises questions of statutory interpretation and judicial economy that are of widespread importance for millions of California employers and their employees:

Whether California employers must ensure that their employees take duty-free meal breaks that are of at least 30 minutes in duration and within the first 5 hours of work.

**II.**

**INTRODUCTION**

This case ("*Vitas*") presents precisely the same issue regarding requirements for employee meal periods which is already before this Court in *Brinker Restaurant Corp. v. Sup. Ct. (2008) 165 Cal.App.4th 25 (Brinker)*, review granted October 22, 2008, and *Brinkley (Fred) v. Public Storage (2008) 167 Cal.App.4th 1278 (Brinkley)*, review granted January 14, 2009, as well as several other cases raising that issue in which the Court has also granted review. The issue of whether an employer is required to ensure that employees take meal periods is one [\*2] which implicates millions of California employees and employers.

In its ruling denying class certification of December 31, 2009, the trial court relied on *Brinker* which had already been granted review by this Court more than a year earlier.

For all of the reasons stated below, the Court should grant review of the *Vitas* ruling on the meal break issue.

### III.

#### WHY REVIEW SHOULD BE GRANTED

##### A. The Ensure vs. Provide Meal Break Issue

This Court should grant the Petition for Review with respect to the issue of whether employers must ensure that employees take meal breaks (rather than merely provide such breaks): (1) because the issue is already pending before this Court; (2) to secure uniformity of decision because the *Vitas* opinion directly conflicts with another California Court of Appeal decision (*Cicairos*); and (3) to settle an important question of law concerning a fundamental issue relating to the health and welfare of California employees.

*First* the issue of whether or not California employers have an affirmative obligation to ensure that workers are actually relieved of all duty during meal breaks is **presently pending before this** [\*3] *Court*. This Court has already granted review on a grant and hold status to the following cases: *Brinkley v. Public Storage, Inc.* (2008) 167 Cal.App.4th 1278, review granted January 14, 2009, S168806; *Faulkinbury v. Boyd & Associates* (2010) 185 Cal.App.4th 1363, review granted October 13, 2010, S184995; *Brookler v. Radioshack Corp.* (2010) Cal.App. LEXIS 1674, review granted November 17, 2010, S186357; *Hernandez v. Chipotle Mexican Grill* (2010) 189 Cal.App.4th 751, review granted January 26, 2011, S188755 (*Hernandez*); *Tien v. Tenet Healthcare Corp.* (2011) 124 Cal.Rptr.3d 829, review granted May 18, 2011, S191756 (*Tien*); and *In re Lamps Plus Overtime Cases* (2011) 125 Cal.Rptr.3d 590, review granted July 20, 2011, S194064 (*Lamps Plus*).

Presently, the controlling authority is *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 35 Cal.Rptr.3d 243. In *Cicairos*, the Third District Court of Appeal held that an employer's obligation to provide employees with an adequate meal period was not satisfied "by assuming that the meal periods were taken, [\*4] because employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty.'" *Id.* at 962. In *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25, 80 Cal.Rptr.3d 781, however, the Fourth District Court of Appeal refused to follow *Cicairos* and held that employers "need only provide [meal breaks] and not ensure they are taken." *Id.* at 786. The *Brinker* decision created a clear split in appellate court authority on this issue and, on October 22, 2008, this Court granted review of the *Brinker* decision.

The Eighth Division of the Second Appellate District, from which review is sought in the instant case, ruled according to how the court in *Brinker* had ruled. (*Hernandez, supra*, 189 Cal.App.4th 751.) However, on less than a month after Division Eight entertained oral argument in *Vitas*, this Court granted review of *Lamps Plus*, stating that "Further action in this matter is deferred pending consideration and disposition of a related issue in *Brinker Restaurant Corp. v. Superior Court*, S166350." (See California Supreme Court website.)

The primary issue raised [\*5] by the instant Petition for Review is identical to that presented by *Brinker* - whether employers have an affirmative obligation to ensure that workers are actually relieved of all duty or whether employers need only provide employees with meal breaks. (*Santos v. Vitas Healthcare Corp. of California* 2011 WL 2803370, \*9: ["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 employee need only offer meal periods, but need not ensure employees take those periods.** (footnote omitted.)"] (emphasis added)). Because the identical issue raised by the instant Petition for Review is presently pending before this Court, this Court should grant and hold the matter pending resolution of the issues raised in the *Brinker* Petition for Review. (See Cal. Rules of Court, Rule 8.512(d)(2) ["On or after granting review, the court may order action in the matter deferred until the court disposes of another matter or pending further order of the court."]; *Eisenberg, et al., California Practice Guide: Civil Appeals and Writs*, P 13:125

[\*6] (2007) ["[The] 'grant and hold' procedure commonly occurs when several appeals present the same issue and in fact accounts for a significant number of cases granted review."]. As set forth above, this Court has already followed this procedure in six other similar cases: *Brinkley*, *Faulkinbury*, *Brookler*, *Hernandez*, *Tien*, and *Lamps Plus*.

**Second**, regardless of *Brinker*, the *Vitas* opinion directly conflicts with *Cicairos*. Thus, Supreme Court review is "necessary to secure uniformity of decision . . ." Cal. Rules of Court, Rule 8.500(b)(1). As previously noted, in *Cicairos*, the Third District Court of Appeal held that an employer's obligation to provide employees with an adequate meal period was not satisfied "by assuming that the meal periods were taken, because employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty.'" (*Cicairos*, 133 Cal.App.4th at 962.) In *Vitas*, however, the Second District Court of Appeal refused to follow *Cicairos* and held that meal period laws do not *obligate* employees to take meal periods or employers to ensure that meal periods are taken. (*Vitas* at [\*7] \*9.)

The *Vitas* decision also conflicts with other authorities which, like *Cicairos*, hold that employers have an affirmative obligation to ensure that their employees take their meal breaks. (See, e.g., *Wang v. Chinese Daily News, Inc.*, 435 F.Supp.2d 1042, 1059 n.21 (C.D. Cal. 2006) ["[I]t is the employer's burden to compel the worker to cease work during the meal period."]; *Perez v. Safety-Kleen Systems, Inc.*, 2007 WL 1848037, \*7 (N.D. Cal. June 27, 2007) ["[A]n employer must do something affirmative to provide a meal period, and may not merely assume such breaks are taken."]; n1 *Stevens v. GCS Service, Inc.*, U.S.D.C. Case No. 04-1337 CJC (CD. Cal. Apr. 6, 2006) ("Under California law, [the employer] had an **affirmative obligation to ensure** that its employees were relieved of all duty during meal breaks.") (emphasis added), *Valenzuela v. Giumarra Vineyards Corp.*, 2009 U.S. Dist. LEXIS 26997.

n1 Less than a week after the *Brinker* decision (and before this Court granted review of that decision), the *Perez* Court revised its earlier ruling regarding meal breaks and held that employers "need only make [meal breaks] available, not ensure they are taken," *Perez v. Safety-Kleen Systems, Inc.*, 2008 WL 2949268, \*47 (N.D. Cal. My 28, 2008).

[\*8]

In fact, before *Brinker*, the Division of Labor Standards Enforcement ("DLSE") Operations and Procedures Manual ("DLSE Manual") also concluded that an employer had an obligation to ensure that employees took their meal breaks. (*Id.* ["[T]he burden of insuring that employees take a meal period within the specified time is on the employer . . . **It is the employer's burden to compel the worker to cease work during the meal period.**"] (emphasis added).) Just three days after the *Brinker* decision (and before *Brinker* became final), the DLSE quickly jettisoned this long-standing interpretation and revised the DLSE Manual to state that "employers must provide meal periods by making them available, but **need not ensure that they are taken.**" (*Id.* at 45.2.1 (emphasis added).) n2 Given the obvious conflict between *Cicairos* and *Vitas* (and numerous other authorities, including the grant and hold cases), this Court should grant review to resolve this split in authority and secure uniformity of decision.

n2 Although this Court granted review in *Brinker*, the DLSE has not revised the DLSE Manual to reflect the DLSE's *pre-Brinker* interpretation of the meal break requirement.

[\*9]

**Third**, Supreme Court review is also appropriate "to settle an important question of law." Cal. Rules of Court, Rule 8.500(b)(1). Here, the issue of whether California employers have an affirmative obligation to ensure that workers are actually relieved of all duty during meal breaks raises a fundamental issue relating to the health and welfare of California employees.

California law has long recognized that employee meal and rest breaks are essential to the health and welfare of California employees. "Meal and rest periods have long been viewed as part of the remedial worker protection

framework." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1105, 56 Cal.Rptr.3d 880.)

The importance of the meal period issue is also demonstrated, in part, by the widespread legal commentary in response to *Brinker*.

Based on the foregoing, it is evident that the issue of whether employers must ensure that employees take their meal breaks is an important and unsettled area of law, requiring uniformity of decision. Absent guidance from this Court, the split in authority between *Vitas* and *Cicairos* will only continue to cause confusion among lower [\*10] courts, employers and employees. n3

n3 Indeed, numerous state and federal trial courts continue to confront this issue. *See, e.g., Grassi v. Party City Corp.*, Case No. GIC 874341 (San Diego Co., Aug. 8, 2008); *Bell v. Superior Court*, Case No. S160423 (Cal. Apr. 25, 2008); *Castro v. White Cap Constr. Supply*, Case No. CSC-05-446144 (San Francisco Co., Jan. 4, 2008); *Torres v. ABC Security*, Case No. RG04-158774 (Alameda Co., Dec. 12, 2006); *Gonzalez v. Nestle Waters N. Am. Holdings*, Case No. BC321485 (Los Angeles Co., Feb. 8, 2006); *Savaglio v. Wal-Mart Stores, Inc.*, Case No. C-835687 (Alameda Co., Nov. 6, 2003); *Gabriella v. Wells Fargo Fin. Corp.*, 2008 WL 3200190 (N.D. Cal. Aug. 4, 2008); *Perez v. Safety-Kleen Sys., Inc.*, 253 F.R.D. 508 (N.D. Cal. 2008); *Salazar v. Avis Budget Group, Inc.*, 251 F.R.D. 529 (S.D. Cal. 2008); *Kenny v. Supercuts, Inc.*, 252 F.R.D. 641 (N.D. Cal. 2008); *Brown v. Federal Express Corp.*, 249 F.R.D. 580 (C.D. Cal. 2008); *White v. Starbucks Corp.*, 497 F.Supp.2d 1080 (N.D. Cal. 2007); *Perez v. Safety-Kleen Sys., Inc.*, 2007 WL 1848037 (N.D. Cal. Jun. 27, 2007).

[\*11]

#### **B. The Court's Reliance on a Depublished Opinion**

The sole authority relied upon by the Trial Court in denying certification on the meal break issue was *Brinker*, *supra*. This Court had already granted review in *Brinker* on the very same issues. The Court of Appeal in *Vitas* affirmed the trial court's reliance on *Brinker* even though *Brinker* had already been depublished, thus effectively creating a new rule: trial courts need not conform their orders to changes in status of previously citable precedent.

#### **IV.**

#### **STATEMENT OF FACTS**

The case was initiated upon the filing of the original class action complaint on September 27, 2006. (Joint Appendix ["JA"] at JA 1.) The current operative complaint is the Third Amended Class Action Complaint ("TAC"), deemed filed by order of the Trial Court on February 24, 2009. (JA 3744.) The TAC alleges five causes of action:

- 1) Failure to Pay Wages (Industrial Welfare Commission Wage Order No. 7-2001);
- 2) Failure to Pay Overtime Compensation (Labor Code §§ 510, 1194 & 1198);
- 3) Failure to Provide Meal and Rest Periods (Labor Code §§ 226.7 & 512); and
- 4) Unlawful Business Practices [\*12] (Bus. & Prof. Code §§ 17200, *et seq.*). (JA 6-26.)

By further operation of the Trial Court's order of February 24, 2009, Defendant was deemed to have filed its Answer to the TAC on March 26, 2009. (JA 1-5, 3744.)

On February 26, 2009, Plaintiffs filed their Motion for Class Certification. (JA 27-63.) Plaintiffs sought 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. (JA 37.) n4

n4 Plaintiffs also sought the certification of a Rest Break Class which was not the subject of the appeal.

[\*13]

Plaintiffs argued in the Motion for Class Certification that they had submitted evidence of a common practice of requiring employees to retrieve voicemails *before* their eight-hour shift began (to know which patients to visit) and to input data related to their visits into the computer (VRU) *after* their eight-hour shift was over, all the while discouraging employees from reporting such time due to the company's restrictions on overtime. Plaintiffs' argument was *not* that Defendant had failed to pay for time actually reported but that Defendant had *reason to believe* employees were incurring compensable time while performing the required voicemail retrieval and VRU inputting before and after their eight-hour shifts. (JA 27-63, 3416-3427.)

Plaintiffs also argued that they had submitted evidence of a common policy to deny compensation for the time employees spent traveling from home to their first appointments, and back home from their last appointments, even though they had an "assigned workplace" as defined by the Department of Labor Standards Enforcement (DLSE), thus entitling them to such compensation. (JA 27-63, 3416-3427.)

Plaintiffs further argued that they had [\*14] submitted evidence of a common practice of (1) depriving employees of their statutory meal breaks by requiring them to keep their pagers on and respond to calls during their meal breaks; (2) maintaining an affirmative practice through 2007 to *not* compensate employees for missed or late-taken meal breaks; (3) failing to automatically compensate class members for missed or late-taken meal breaks until June of 2008. (JA 27-63, 3416-3427.)

At the November 23, 2009 hearing on the Motion for Class Certification, Plaintiffs argued extensively in favor of certification based on the arguments raised in their papers. (Reporter's Transcript ["RT"].) The Trial Court took the matter under submission.

On December 31, 2009, the Trial Court issued an order denying the Motion for Class Certification. (JA 3726.) The Trial Court set forth the following reasons for denying the motion:

1) Ascertainability Lacking

*a. Overtime Claim*

"The problem with the proposed definition of the Straight/Overtime Class is that it includes a legal conclusion. Whether an employee was improperly compensated is a legal question for the Court to decide; it is not an objective characteristic [\*15] that would aid potential class member in determining his or her membership in the class. Thus, the proposed class definition is deficient and needs to be amended if the class were to be certified." (JA 3728.) n5

...

Moreover, Plaintiffs have failed to "demonstrate a means of identifying class members." ... Defendant's "records can[not] be used to distinguish admission nurses, chaplains, and sales representatives who performed unpaid work from the other employees listed in [the] records." (JA 3729.)

*b. Meal Break Claim*

"The above analysis concerning the [Overtime Class] applies with equal force here. The Meal Break Class is not ascertainable because Plaintiffs do not meet their burden to show a reasonable means of identifying class members." (JA 3737.) n6

n5 While the Trial Court suggested in a footnote that the cure for this deficiency "may be to remove the word 'properly' from the proposed definition" (JA 3728) (which Plaintiffs' counsel had in fact suggested at the hearing [RT 3:9-10]), the Trial Court never actually gave Plaintiffs the opportunity to amend the class definition.  
[\*16]

n6 Curiously, despite finding that the members of the proposed classes could not reasonably be identified, the Trial Court nonetheless found that the classes were sufficiently numerous to satisfy the numerosity requirement. (JA 3728.)

2) Common Questions of Fact or Law Not Predominating

*a. Overtime Claim*

*i. Voicemail & VRU*

"[T]here is no evidence here of a common practice to not pay for time spent retrieving voicemails and inputting data [since there is] no evidence that any employee actually reported overtime and was not paid." (JA 3733.)

...

"Also, it creates individual issues rather than common ones as the Court would have to conduct mini-trials to determine which employees reported overtime work but were not paid." (JA 3734.)

*ii. Travel Time*

"The record includes evidence suggesting that [Defendant] had a common policy of not paying employees for time spent driving to and from their homes before and after field assignments."

...

"[However,] employers do not need to provide travel time compensation to employees in [\*17] industries where the employees 'are not assigned to a specific workplace' [.] Such is the case in this action. There is no customary office or fixed place of business that the employees regularly travel to."

...

"[Moreover,] [t]he Court would have to individually assess whether the employees had to commute 'substantial distance[s]' to the various work locations." (JA 3735-3736.)

*iii. Pagers*

"The Court finds that individual issues predominate, especially because the declarations cited by Plaintiffs are subjective and do not show a failure to compensate any employee who reported off-the-clock work regarding use of pagers." (JA 3735.)

*b. Meal Break Claim*

"The parties disagree as to whether [Defendant] needed to compel its employees - as opposed to offer them the opportunity - to take meal breaks and to monitor compliance with the meal break requirements. As the parties acknowledge, the California Supreme Court recently granted review of *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25 in order to address this issue."

...

"The Court finds [Defendant's] position compelling. Though [\*18] *Brinker* cannot be cited as authority as a result of the Supreme Court's grant of review, the Court agrees with the reasoning in *Brinker* and finds that it correctly states the law. Employers must provide meal breaks, but they do not need to ensure that employees take meal breaks. As such, to determine whether meal break violations occurred here, the Court would have to conduct mini-trials to decide whether the employees, in consideration of their unique daily tasks and circumstances, had appropriate opportunities to schedule meal breaks. These individual issues predominate." (JA 3737-3738.) n7

3) Typicality and Adequacy Lacking

*a. Overtime Claim*

"Due to the existence of predominating individual issues, the Court does not need to address the typicality and adequacy elements. Still, the Court agrees with [Defendant] that Plaintiffs are not typical and adequate since individual issues predominate." (JA 3736.)

*b. Meal Break Claim*

"It is unnecessary to address the typicality and adequacy criteria given the lack of commonality." (JA 3738.)

4) Superiority Lacking

*a. Overtime Claim*

"The class method is inferior [\*19] where, as here, individual issues predominate." (JA 3737.)

*b. Meal Break Claim*

"The Court finds the class method inferior because individual issues predominate." (JA 3738.)

n7 The Trial Court cited no authority for the proposition that "*Brinker* ... correctly states the law" and "[e]mployers must provide meal breaks, but they do not need to ensure that employees take meal breaks." (JA 3738.)

Plaintiffs filed their Notice of Appeal on March 1, 2010. (JA 3739.)

On July 14, 2011, the Court of Appeal rendered its decision, affirming in part and reversing in part the Trial Court's Judgment ("Opinion" or "*Vitas*"). The only relevant part of the Opinion concerned the affirmance of the Trial Court's ruling on the meal break issue. n8

n8 A true and correct copy of the Court of Appeal's opinion, showing its filing date, is attached hereto as Exhibit 1. (See also unpublished opinion at *Santos v. Vitas Healthcare Corp. of California* 2011 WL 2803370.) This Petition for Review only concerns the part of the opinion entitled "Alleged Denial of Meal Periods." (*Id.* at \*9-10.)

[\*20]

No petition for rehearing was filed.

**V.**

**DISCUSSION**

**A. Review Is Necessary to Resolve Important Questions Concerning Meal Breaks**

*Vitas* declined to follow *Cicairos* and held that individual issues would predominate "if the employer need only offer meal periods, but need not ensure employees take these periods." (*Vitas* at \*9.) *Vitas* conceded that its finding is unsettled and cited to the cases pending before this Court. (*Vitas* at 9, fn. 8).

**First**, *Vitas* failed to recognize that the IWC Wage Orders concerning meal breaks: (1) were enacted decades before they were codified in the Labor Code; (2) require employers to ensure meal breaks; and (3) are even *more* protective of employees than the Labor Code provisions. As such, *Vitas* erred by concluding that the word "provide" in Labor Code section 512 trumped the Wage Orders when, in fact, the Legislature merely intended section 512 to codify the protections set forth in the more protective Wage Orders.

"The IWC was a five-member appointive board established by the Legislature in 1913, authorized to formulate wage orders governing employment in California." (*Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 433-34, 41 Cal.Rptr.3d 482.) [\*21] "The Legislature authorized the [IWC] to adopt orders, rules, regulations, and policies to fix the wages, hours, and working conditions of employees . . ." (*California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 211, 157 Cal.Rptr. 840.) "Concerned with the health and welfare of employees, the IWC issued wage orders mandating the provision of meal . . . periods in 1916 . . ." (*Murphy, supra*, 40 Cal.4th at 1105.) "The wage orders required meal . . . periods after specified hours of work." (*Id.*) The meal period requirement has "been substantially the same since 1947." (*California Manufacturers Assn. v. Industrial Welfare Com.* (1980) 109 Cal.App.3d

95, 114, 167 *Cal.Rptr.* 203.) Thus, the IWC has "**guaranteed** work-free meal periods" California employees for decades. *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1077 (9th Cir. 2005) (emphasis added). In fact, employers frequently police their work force in many areas. For example, employers routinely ensure that overtime is worked, that safety rules are followed and that no lewd or improper conduct takes place in the workplace. Moreover, [\*22] employees cannot unilaterally arrive late, work through lunch, and tell their employers that they are leaving early.

Here, the pertinent IWC Wage Order provides: "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 . . ." 8 C.C.R. § 11040, P 11(A). Thus, under the Wage Orders, a "meal period of 30 minutes per 5 hours of work is generally required." (*California Hotel & Motel*, 25 *Cal.3d* at 206 (quotation omitted).) The IWC confirmed that employees must receive meal periods. *See* IWC, Statement as to the Basis, Wage Orders - 1 -13, 15 & 17 (Jan. 1, 2001) ("Any employee who works more than six hours in a workday **must receive** a 30-minute meal period.") (emphasis added); IWC, Summary of Interim Wage Order-2000 (Mar. 2000) ("An employee **must receive** a thirty-minute meal period for every 5 hours of work.") (emphasis added).

In 1999, the California Legislature codified the meal break requirements set forth in the pre-existing Wage Orders. (*See Cal. Labor Code* § 512; *see also* 1999 Cal. Legis. Serv. Ch. 134, A.B. No. 60 ["Existing wage orders of the [IWC] prohibit [\*23] an employer from employing an employee for a work period of more than 5 hours per day without providing the employee with a meal period of not less than 30 minutes . . . **This bill would codify that prohibition.**"] (emphasis added); *Valles*, 410 F.3d at 1077 ["In 1999, the legislature codified the **existing wage order requirements regarding meal periods** . . ."] (emphasis added). "In 2000, due to a lack of employer compliance, the IWC added a pay remedy to the wage orders, providing that employers who fail to provide a meal or rest period 'shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day' that the period is not provided." (*Murphy*, 40 *Cal.4th* at 1105-06 (quotation omitted); *see also Valles*, 410 F.3d at 1077 ["In June 2000, following public hearings, the IWC amended the wage order that had, for years, *guaranteed meal breaks* by adding a penalty provision."]; 8 C.C.R. § 11040, P 11(B).) Also in 2000, the California Legislature enacted Labor Code section 226.7, providing for a penalty for an employer's failure to comply with the meal period requirements [\*24] set forth in the Wage Orders.

Based on the foregoing, it is evident that the Wage Orders obligate employers to ensure meal breaks and that Labor Code sections 226.7 and 512 merely codified the meal break requirements set forth in the Wage Orders. Moreover, as noted above, section 226.7 was enacted because employers were not complying with the meal break requirements. *See Bearden*, 138 *Cal.App.4th* at 434 (noting that Assembly Bill 2509 was "introduced to **strengthen** the enforcement of existing wage and hour standards contained in current statutes and wage orders.") (emphasis added). As such, it is nonsensical to construe the Labor Code provisions as *easing* an employers' obligation regarding meal breaks when changes to the Wage Orders and Labor Code were deemed necessary to compel employer compliance with meal break requirements. (*See Industrial Welfare Com. v. Superior Court* (1980) 27 *Cal.3d* 690, 733, 166 *Cal.Rptr.* 331 ["Industrial Welfare Orders may provide more restrictive provisions than are provided by (the general) statutes adopted by the Legislature . . ."] (quotation omitted).) In sum, when the pertinent statutory provisions [\*25] are read in context with the IWC Wage Orders, it is evident that these provisions obligate employers to affirmatively ensure that employees take 30-minute uninterrupted meal periods. n9

n9 It is also illogical to conclude that section 512 reversed the decades-long meal break requirement. *See Industrial Welfare Com.*, 27 *Cal.3d* at 734 (noting that interpretation of statutory provisions should not depart from a "long-continued and consistent administrative interpretation" which "has received at least silent acquiescence from the Legislature").

**Second**, *Vitas* violated fundamental rules of statutory interpretation by focusing on a dictionary definition of the word "provide" and ignoring the context and purpose of the pertinent provisions. "The fundamental principle of statutory interpretation is 'the ascertainment of legislative intent so that the purpose of the law may be effectuated . . .'"

(*Pollack v. Department of Motor Vehicles* (1985) 38 Cal.3d 367, 272, 211 Cal.Rptr. 748.) [\*26] "This principle requires [courts] to determine the objective of the Legislature and to interpret the law so as to give effect to that objective even when such an interpretation appears to be at odds with conventional usage or the literal construction of the statutory language." (*Id.*) "The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context . . ." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, 248 Cal.Rptr. 115.) "[E]ach sentence must be read not in isolation but in the light of the statutory scheme . . ." (*Id.*) Moreover, "[t]o seek the meaning of a statute is not simply to look up dictionary definitions and then stitch together the results." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114, 86 Cal.Rptr.2d 884 [quotation omitted].)

*Vitas* simply did not consider the long-recognized remedial purpose of the meal period requirement - to protect the health and welfare of California employees. Meal period rules have been part of California's health, safety and welfare regulations for decades. (See *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 456, 64 Cal.Rptr.3d 773 (2007) [\*27] ["California courts have long recognized [that] wage and hours laws 'concern not only the health and welfare of the workers themselves, but also the public health and general welfare.'" (quotation omitted); see also *Murphy*, 40 Cal.4th at 1105 (Meal breaks are "part of the remedial worker protection framework."). In fact, "health and safety considerations . . . are what motivated the IWC to adopt mandatory meal and rest periods in the first place." *Murphy*, 40 Cal.4th at 1113. Moreover, the IWC and California Labor Commissioner have long recognized that meal periods are in the interest of the health and the welfare of the employee. *Vitas* also failed to consider that "statutes governing conditions of employment are to be construed broadly in favor of protecting employees." (*Murphy*, 40 Cal.4th at 1103; see also *id.* at 1104 ["[S]ection 226.7 . . . is to be interpreted broadly in favor of protecting employees . . ."]. Finally, *Vitas* failed to consider that *IWC Wage Orders* must also be liberally construed to protect workers. In sum, *Vitas* erred by relying on arguments set forth in cases now depublished [\*28] and pending before this Court.

**Finally**, *Vitas* also failed to consider the clear distinction in which the Wage Orders (which are controlling) utilize the word "provide." The Wage Orders impose a penalty "[i]f an employer fails to *provide* an employee a meal period in accordance with the applicable provisions of this order . . ." 8 C.C.R. § 11040, P 11(B) (emphasis added). The Wage Orders also impose a penalty "[i]f an employer fails to **provide** an employee a rest period in accordance with the applicable provisions of this order . . ." *Id.*, P 12(B) (emphasis added). Yet the meal period provision utilizes *mandatory* language ("No employer shall employ any person") whereas the rest period provision utilizes *permissive* language pertaining to rest periods ("Every employer shall authorize and permit all employees to take rest periods . . ."). Compare *id.*, P 11(A) with *id.*, P 12(A). Thus, the "failure to provide" penalty can apply in two strikingly different situations. As such, the *Vitas* court erred in relying upon now depublished opinions that conclude that the term "provide" (in section 512) relieved employers of their affirmative [\*29] obligation to ensure that employees take meal breaks.

## **B. Review Is Necessary in Order to Ensure That Trial Courts Do Not Continue to Cite to Depublished Opinions**

The *Vitas* court, in approving the of Trial Court's reliance on depublished opinions, has created precedent that will allow trial courts to ignore changes in law and thereby require appellate review of easily correctable orders.

Notwithstanding the rules regarding reconsideration set forth in Code of Civil Procedure § 1008, courts have inherent constitutional authority to reconsider their rulings at any time so to conform them to changes in law. The court's authority to conform its rulings to law is constitutional in nature. (See *Case v. Labzen Financial Co.* (2002) 99 Cal.App.4th 172, 183, citing to Cal. Const., Sec III, art. 3). The purpose of the power is "the orderly and effective administration of justice." (*Kollander v. Superior Court* (2002) 98 Cal.App.4th 304, 312). "A court could not operate successfully under the requirement of infallibility in its interim rulings. Miscarriage of justice results where a court is unable to correct its own perceived legal errors...." (*People v. Castello* (1998) 65 Cal.App.4th 1242, 1249). [\*30]

The preservation [and allocation] of judicial resources, is a matter that is squarely in the constitutional purview of this Court to decide. Petitioners urge this Court to follow the reasoning set forth in *Darling, Hall & Rae v. Kin* (1999)

75 Cal.App.4th 1148. The *Darling, Hall* court, after concluding a trial court's authority to reconsider is not constrained by Code of Civil Procedure § 1008, opined that trial court's exercise its discretion to preserve judicial resources: "... [Code of Civil Procedure] Section 1008 is designed to conserve the court's resources by constraining litigants who would attempt to bring the same motion over and over. On the other hand, the same judicial resources would be wasted if the court could not, on its own motion, review and change its interim rulings." (*Darling, Hall & Rae, supra at 1156-1157*).

A judgment is final where no issue is left for future consideration except for the fact of compliance or non-compliance with the terms of the judgment. (*Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit District (1976) 65 Cal.App.3d 121, 129*). Up to the point that a judgment or, [\*31] for that matter, an appealable order is final, the courts have inherent constitutional power to modify it so that it complies with the current state of the law. (*Id.*). The Trial Court should have exercised its discretion and modified its ruling deny class certification as it was solely based on a case that had been taken up by this Court for review. The Trial Court's failure to do so, resulted in a waste of judicial resources. This Court, in order to preserve judicial resources, should rule that trial courts must revisit any order that is based on case law that becomes uncitable up and until there is a final judgment in the matter.

## VI.

### CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant review of the Court of Appeal's ruling on the meal break issue and hold it pending disposition of *Brinker* and *Brinkley*.

Dated: August 23, 2011

ARIAS OZZELLO & GIGNAC LLP

By: /s/ [Signature]  
MIKE ARIAS  
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*Attorneys for Plaintiffs/Appellants/Petitioners*

### CERTIFICATION

**Line Spacing:** This Petition was double spaced, except for indented quotations and footnotes, which were [\*32] all single spaced.

**Typeface and Size:** The typeface selected for this Brief is 13 point Times New Roman. The font used in the preparation of this Petition is proportionately spaced.

**Word Count:** The word count for this Petition, excluding Table of Contents, Table of Authorities, Proof of Service, Verification and this Certification is approximately 5,527 words. This count was calculated utilizing the word count feature of Microsoft Word 2010.

Dated: August 23, 2011

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**PROOF OF SERVICE BY MAIL**

I am employed in the State of California, County of Los Angeles.

I am over the age of 18 and not a party to the within suit; my business address is 6701 Center Drive West, Suite 1400, Los Angeles, California 90045.

On **August 23, 2011**, I served on the interested parties in said action the within documents:

**PETITION FOR REVIEW**

by placing a true copy thereof enclosed in a sealed envelope, postage prepaid, in the United States Mail at Los Angeles, California, addressed as follows:

**SEE ATTACHED [\*33] SERVICE LIST**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **August 23, 2011**, at Los Angeles, California.

Ashley Hart  
Type or Print Name

/s/ [Signature]  
Signature

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[SEE EXHIBIT "1" IN ORIGINAL]