No. S222973

IN THE SUPREME COURT OF CALIFORNIA

APPLE INC.,

Petitioner,

vs.

SUPERIOR COURT OF THE COUNTY OF SAN DIEGO,

Respondent

BRANDON FELCZER, RYAN GOLDMAN RAMSEY HAWKINS, and JOSEPH LANE CARCO,

Real Parties in Interest.

After an Order of the Court of Appeal of the State of California,
Fourth Appellate District, Division One, No. D066625

ANSWER TO PETITION FOR REVIEW

Martin N. Buchanan (SBN 124193)
Law Offices of Martin N. Buchanan
655 W. Broadway, Suite 1700
San Diego, CA 92101
Telephone: (619) 241-9136

Jeffrey L. Hogue (SBN 234557)
Tyler J. Belong (SBN 234543)
Bryce A. Dodds (SBN 293491)
Hogue & Belong
430 Nutmeg Street, Second Floor
San Diego, CA 92101
Telephone: (619) 238-4720
Facsimile: (619) 270-9856

Attorneys for Real Parties in Interest

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INTRODUCTION

Apple, Inc. ("Apple") seeks review of an order summarily denying its petition for writ of mandate challenging class certification under *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*). But neither of the two Issues Presented for Review in Apple's petition is genuinely at issue in this case. In its order granting class certification, the trial court did *not* rely solely on plaintiffs' mere allegations, and it did *not* deprive Apple of the right to present any individual defenses. Apple's petition rests on a caricature of the trial court's order that has no basis in reality. And the Court of Appeal's one-line summary denial of Apple's writ petition created no precedent and decided no issue worthy of Supreme Court review.

In *Brinker*, this Court clarified the law on required rest breaks and meal breaks for nonexempt California employees. Four months later, Apple revised its official corporate Meal and Rest Period Policy to bring it into compliance with *Brinker*. But for years before this revision, Apple's company-wide Meal and Rest Period Policy for nonexempt, non-managerial employees failed to authorize and permit a first meal period within the first five hours of work; failed to authorize and permit a second meal period within the first ten hours of work; and failed to authorize and permit a rest period for every "major fraction" of four hours worked—all in violation of *Brinker*. Apple's official job separation policies also did not comport with California law on the timing of final paychecks.

This is a class action brought on behalf of nonexempt Apple employees seeking penalties for meal and rest period violations and waiting time violations between December 16, 2007 and August 1, 2012, *before* Apple revised its Meal and Rest Period Policy. Plaintiffs' theory of liability

is that Apple is liable for maintaining uniform, company-wide policies that facially violated California's wage and hour laws. The trial court granted class certification based on *Brinker*'s holding that such a "theory of liability—that [the employer] has a uniform policy, and that that policy, measured against wage order requirements, allegedly violates the law— is by its nature a common question eminently suited for class treatment." (*Brinker*, *supra*, 53 Cal.4th at p. 1033.)

As the trial court observed, "[t]his type of theory has routinely been certified post-*Brinker*." (Vol. 40, tab 69, p. 10410; see, e.g., *Hall v. Rite Aid Corp.* (2014) 226 Cal.App.4th 278, 289-294; *Jones v. Farmers Ins. Exchange* (2013) 221 Cal.App.4th 986, 996-997; *Williams v. Superior Court* (2013) 221 Cal.App.4th 1353, 1369-1370; *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 717-730; *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 232-237; *Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129, 1149-1154.)

Apple's petition for review should be denied. The law on this issue has been exhaustively litigated, and is now settled as a result of the *Brinker* line of decisions. Contrary to Apple's petition, the trial court did not base its ruling on mere allegations of uniform and consistently applied policies. The court's order cited and relied on substantial evidence that Apple's official corporate policies were followed in actual practice, as one would expect. Apple's petition is based almost entirely on its own evidence and isolated comments made by the trial judge during arguments on the motion. But the court's oral statements may not be used to impeach its written ruling, which was issued five days later. (*Williams*, *supra*, 221 Cal.App.4th at p. 1361 ["we may not use the court's oral statements to impeach its

written order"].) And the court was not required to credit Apple's conflicting evidence that its own corporate policies were not implemented consistently in actual practice.

The trial court correctly applied *Brinker* and did not abuse its discretion by ruling that the lawfulness of Apple's uniform, company-wide policies is a common issue suitable for class treatment, and any individual issues do not preclude class certification. That is precisely what the *Brinker* case law holds. In fact, Apple's rest period policy was identical to the one at issue in *Brinker*, which this Court found to be "eminently suited for class treatment." (*Brinker*, *supra*, 53 Cal.4th at p. 1033.)

Finally, Apple's overblown claims about being denied the right to defend itself are wholly without support in the record. The trial court only ruled on class certification; it has not made any ruling precluding Apple from presenting evidence of any kind at trial. If anything, the court made clear that Apple *will* be free to present its evidence of alleged compliance with the wage and hour laws. For all these reasons, review should be denied.

STATEMENT OF FACTS

Apple's petition does an excellent job of summarizing its own "mountain of evidence" (Pet. at p. 2), but barely mentions the conflicting evidence submitted by the plaintiffs and relied on by the trial court. Accordingly, plaintiffs will provide a more complete picture of the evidence before addressing Apple's arguments.

A. Rest Period Violations

In *Brinker*, this Court interpreted the relevant Labor Code provisions and wage orders of the Industrial Welfare Commission ("IWC") on rest periods and meal periods. For nonexempt employees, the wage orders require a 10-minute rest period for every four hours of work "or major fraction thereof," except for employees who work fewer than 3.5 hours in a day. (*Brinker*, *supra*, 53 Cal.4th at pp. 1028-1029.) The Supreme Court, adopting the Division of Labor Standards Enforcement's prior interpretation of "major fraction thereof" to mean "any amount of time in excess of two hours" (*id*. at p. 1029), concluded: "Employees are entitled to 10 minutes rest for shifts between three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on." (*Brinker*, *supra*, 53 Cal.4th at p. 1029.)

Before *Brinker*, Apple had a written, company-wide Meal and Rest Period policy applicable to all nonexempt employees. (Vol. 3, tab 13, pp. 774-807; Vol. 24, tab 45, pp. 6070-6075.) With regard to rest breaks, the policy stated: "Apple provides a 10-minute paid rest period for every 4 hours worked by all nonexempt employees." (See, e.g., Vol. 3, tab 13, p. 774.) However, the policy did not provide for a rest period for every

"major fraction" of four hours. (*Ibid*.)

Apple's Meal and Rest Period policy was "supplemented" by a separate "Scheduling" chart that applied to all nonexempt *retail* employees throughout the class period. (Vol. 3, tab 13, pp. 822-870; Vol. 24, tab 45, pp. 6091-6131.) The chart showed that nonexempt retail employees were entitled to one 15-minute rest break if they were scheduled to work from four hours up to eight hours; two 15-minute rest breaks if they were scheduled to work from eight hours up to 9.5 hours; and three 15-minute rest breaks if they were scheduled to work from 10 hours up to 12 hours. (*Ibid*.)

Apple's Meal and Rest Period Policy was available to all employees online on Apple's "HR Web." Apple had a standard practice of referring employees to HR Web for information about meal and rest breaks. (Vol. 23, tab 45, p. 5986.) Apple also trained all new employees on the Meal and Rest Period Policy using standardized materials in a new-hire orientation, known as "Core" or "Market Core" training. (Vol. 10, tab 22, pp. 2541-2542, 2675-2691; Vol. 23, tab 45, pp. 5979, 5981.)

Apple's Meal and Rest Period policy in effect during the class period facially violated *Brinker* by failing to provide a first rest break for shifts of 3.5 to 4 hours; failing to provide a second rest break for shifts of 6-8 hours; and failing to provide a third rest break for shifts of 10-12 hours. The Scheduling chart for retail employees also facially violated *Brinker* by failing to provide a first rest break for shifts of 3.5 to 4 hours, and failing to provide a second rest break for shifts of 6-8 hours.

After *Brinker*, Apple revised its Meal and Rest Period Policy effective August 1, 2012. The revised policy authorized a first rest period

after 3.5 hours of work, a second rest period for 6-10 hours of work, and a third rest period for 10-12 hours of work. (Vol. 4, tab 13, pp. 893-918; Vol. 24, tab 45, pp. 6154-6159.) Apple also revised its Scheduling chart by adding the notation: "CA only: Employees who work more than 6 hours must receive a second 15-minute break." (Vol. 24, tab 45, p. 6162.)

According to Apple's responsible executives, the company was not aware before *Brinker* was decided that employees were entitled to a rest period for every "major fraction" of four hours worked, i.e., more than two hours. This was "a new understanding" for Apple. (Vol. 23, tab 45, pp. 5995-5996; see also Vol. 3, tab 13, p. 761 [acknowledging that Apple's rest period policy changed in response to *Brinker*].)

In discovery, Apple produced the work schedules for 49 different retail stores for a random one-month period during the class period. In this one month alone, there were over 11,000 employee shifts during which Apple did ***not*** provide a scheduled rest break for shifts lasting between 3.5 and 6 hours or did ***not*** provide two scheduled rest breaks for shifts lasting longer than 6 hours. This works out to an average of about 232 rest period violations per month at each of the 49 stores. (Vol. 2, tab 6, pp. 552-555; Vol. 23, tab 35, pp. 5803-5805.)

Apple also produced time records for a random sample of 5 percent of the retail class members and 5 percent of the corporate class members. (Vol. 2, tab 10, p. 569; Vol. 6, tab 14, p. 1650.) In this sample group, there were nearly 61,000 shifts of 6-8 hours during the class period, and approximately 86 percent of employees in the sample had worked 6-8 hour shifts. There were also over 11,000 shifts of 10-12 hours during the class period, and approximately 63 percent of employees had worked 10-12 hour shifts. (Vol. 2, tab 9, pp. 564-565; Vol. 23, tab 41, pp. 5836-5840.) The

named plaintiffs worked multiple shifts of 6-8 hours and/or 10-12 hours during the class period. (Vol. 23, tab 39, pp. 5817-5818.)

Rest periods are not recorded by Apple's employees on their time sheets. According to plaintiffs' expert, John Nienstedt, it would be feasible to conduct a telephone survey of class members to determine whether and how often they worked shifts of 6-8 hours or 8-10 hours without receiving a second or third rest period. A random survey of 400 of the class members would yield a margin of error of only 4.9%, and a larger sample would yield an even smaller margin of error. (Vol. 2, tab 9, pp. 564-567.)

Plaintiffs submitted sworn declarations from 104 of the class members who worked at Apple during the class period, including 60 declarations addressing Apple's failure to provide timely rest breaks. Many of these witnesses were also deposed. The named plaintiffs and their witnesses testified that they did not receive rest breaks in compliance with *Brinker*; that Apple's pre-*Brinker* policy as stated on the HR Web and in actual practice was to provide one rest period for every four full hours of work; that they had to work at least 8 hours to get a second rest period; that they often worked shifts of 6-8 hours without receiving a second rest period; that they missed numerous rest periods; and that they never received any rest period penalty payments. (See, e.g., Vol. 25, tab 45, pp. 6555-6571 [summarizing class member declarations regarding rest break violations at pages 6573-6767]; Vol. 28, tab 46, pp. 7198-7236 [summarizing rest break deposition testimony of class members at pages 7238-8466].)

Apple also had scheduling policies that made it difficult for employees to take timely breaks, because they caused breaks to be scheduled too late in the shifts for employees to take them within the time required by law. There were 73 declarations by class members who stated

that because of the times they were scheduled for breaks, it was often not possible to take them in a timely manner, for reasons including the need to finish with a customer, meet performance metrics, staff busy stores, and attend to the needs of the business. (Vol. 26, tab 46, pp. 6775-6793 [summarizing class member declarations regarding scheduling policies that made timely breaks difficult at pages 6794-7063].)

Apple has no practice or policy of paying the penalty for missed or late rest periods, and it has no record of ever having made a rest period penalty payment to any of its employees during the class period. (Vol. 3, tab 13, pp. 707-708, 755; Vol. 6, tab 14, p. 1664, 1672-1673; Vol. 23, tab 45, pp. 5980-5981, 6021-6023.)

B. Meal Period Violations

In *Brinker*, the Supreme Court also clarified an employer's duty to provide 30-minute meal periods under Labor Code section 512 and the IWC wage orders. The court held: "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 break, and does not impede or discourage them from doing so." (*Brinker*, *supra*, 53 Cal.4th at p. 1040.) "On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed." (*Ibid*.)

With regard to timing, the court held that "an employer's obligation is to provide a first meal period after ***no more*** than five hours of work and a second meal period after ***no more*** than 10 hours of work." (*Brinker*, *supra*, 53 Cal.4th at p. 1049, emphasis added.)

Before *Brinker*, Apple's Meal and Rest Period policy posted on the HR Web for non-managerial employees did not state that employees were

authorized and permitted to take their first meal period *within* the first five hours of work or their second meal period *within* the first ten hours of work.[1] (Vol. 3, tab 13, pp. 774-807; Vol. 24, tab 45, pp. 6070-6075.) The policy merely stated:

- All nonexempt employees who work ***more than*** 5 hours at any time during a work shift must take at least a 30-minute meal period.
- All nonexempt employees who work ***more than*** 10 hours at any time during a work shift must take a second 30-minute meal period.
- Meal periods cannot be taken at the end of an employee's shift in order for the employee to leave work early. (*Ibid*.)

Apple's Scheduling chart for nonexempt retail employees also did not state that employees were permitted to take a first meal period within the first five hours of work. (Vol. 3, tab 13, pp. 822-870; Vol. 24, tab 45, pp. 6091-6131.) On the contrary, in the column for meal breaks, the chart said "None" for scheduled shifts of 3.5 hours, 4.0 hours, 4.5 hours, and 5.0 hours. (Vol. 3, tab 13, p. 824.) Apple's Core and Market Core training materials for the new-hire orientation also did not state that employees could take their first meal period within the first five hours of work and their second meal period within the first ten hours of work. (Vol. 10, tab 22, pp. 2675, 2679, 2685, 2691.)

Within months of *Brinker*, Apple revised its Meal and Rest Period

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[1]Another version of the Meal and Rest Period Policy that was accessible only to managers on HR Web stated that the first meal period had to be taken within the first five hours of the shift. (Vol. 3, tab 13, p. 808.) Only 735 of the more than 18,000 class members were nonexempt retail managers who had access to this version of the policy, and they have been excluded from the meal period subclass. (Vol. 3, tab 13, p. 771; Vol. 40, tab 69, p. 10408.)

Policy for non-managerial employees to state:

- "Nonexempt employees who work more than 5 hours during a work shift are expected to take at least one uninterrupted 30-minute meal period ***before*** the end of the 5th hour of work. For example, if an employee begins work at 8:00 am., the employee ***must*** begin his or her meal period before 1:00 p.m."
- "Nonexempt employees who work more than 10 hours during a work shift are expected to take a second uninterrupted 30-minute meal period ***before*** the end of the 10th hour of work. For example, if an employee begins work at 8:00 am., the employee ***must*** begin his or her meal period before 1:00 p.m. and his or her second meal period before 6:00 p.m." (Vol. 4, tab 13, p. 893, emphasis added.)

As mentioned, Apple produced work schedules for 49 different retail stores for a random one-month period during the class period. In this one month alone, there were over 11,000 employee shifts during which employees were ***not*** scheduled to take a meal period within the first five hours of the shift. (Vol. 2, tab 7, pp. 557-558.)

Meal periods are unpaid and must be recorded on the employee's time cards. Based on their time records, all of the named plaintiffs worked multiple shifts longer than five hours without a meal period punch within the first five hours of work. (Vol. 23, tab 38, p. 5817-5818 [50 for Felczer; 48 for Goldman; 480 for Hawkins; 3 for Carco].) Three of the named plaintiffs also worked shifts longer than 10 hours without a second meal period punch within the first 10 hours of work. (*Ibid*. [1 for Goldman; 149 for Hawkins; 2 for Carco].)

Plaintiffs' expert statistician, Robert Fountain, Ph.D., analyzed the time records produced by Apple for the random sample of 5 percent of the corporate and retail class members. Out of a total sample size of 950

nonexempt employees, there were nearly 100,000 recorded time shifts with missing, late, or short meal periods. For first meal periods, 99 percent of the retail class members and 86 percent of the corporate class members had at least one missing, late, or short meal period. For second meal periods, 100 percent for the retail class members and 99 percent for the corporate class members had at least one missing, late, or short meal period. (Vol. 23, tab 41, pp. 5836-5840.)

Technology consultant Erik Arneson examined time records for Apple employees who filed declarations in support of and opposition to the motion for class certification. The named plaintiffs and their declarants worked a grand total of 45,134 shifts. Of this total, there were 12,247 shifts without a meal period punch before the end of the fifth hour of work and/or without a second meal period punch before the end of the tenth hour of work. On average, the named plaintiffs and their declarants *each* worked 108 shifts without a meal period punch before the end of the fifth hour of work and/or without a second meal period punch before the end of the tenth hour of work. (Vol. 23, tab 38, pp. 5818-5821.)

Ironically, the average was even higher for Apple's own declarants whose time records were produced. On average, their time records showed they *each* worked 140 shifts without a meal period punch before the end of the fifth hour of work and/or without a second meal period punch before the end of the tenth hour of work. (Vol. 23, tab 38, pp. 5821-5823.)

Plaintiffs submitted 86 declarations from class members addressing Apple's failure to provide timely meal breaks. Many of these witnesses were also deposed. The named plaintiffs and their witnesses testified that they did not receive timely meal breaks in compliance with *Brinker*; that Apple's policy as stated on HR Web and in actual practice did not authorize

or permit employees to take a meal period within the first five hours of a work shift; that Apple's policy was that they could receive the meal break anytime except at the end of the shift to leave work early; that they were often unable to take a meal period within the first five hours of a work shift lasting longer than five hours; that they did not waive a timely first meal period; and that they never received any meal period penalty payments. (See, e.g., Vol. 25, tab 45, pp. 6205-6239 [summarizing class member declarations regarding meal break violations at pages 6241-6554]; Vol. 28, tab 46, pp. 7198-7236 [summarizing meal break deposition testimony of class members at pages 7238-8466].)

Apple has no practice or policy of paying the penalty for missed or late meal periods, and it has no record of ever having made a meal period penalty payment to any of its employees during the class period. (Vol. 3, tab 13, pp. 707-708; Vol. 6, tab 14, p. 1654; Vol. 23, tab 45, pp. 5980-5981, 6021-6023.)

C. Waiting Time Violations

California employers must immediately pay any final wages due to a employee who is terminated involuntarily. (Lab. Code, § 201.) For employees who quit voluntarily, employers must pay final wages immediately if the employee has given 72 hours prior notice, and otherwise no later than 72 hours after the resignation. (Lab. Code, § 202.) An employer that fails to comply is subject to waiting time penalties. (Lab. Code, § 203.)

From May 2011 to the present, Apple's official Voluntary Termination Policy for HR and managers was facially unlawful in that it failed to require issuance of final paychecks within 72 hours of the

employee's voluntary termination date, or, if more than 72 hours notice was given by the employee, on the employee's last day of work. (Vol. 7, tab 14, pp. 1855-1873; Vol. 33, tab 46, pp. 8623-8641 [Voluntary Termination Policy lacked any timing requirement for final check].) Apple's Job Abandonment requirement also failed to comply with the 72-hour rule because it required payment within "three business days" of the termination date, rather than 72 hours. (Vol. 7, tab 14, pp. 1875-1892; Vol. 33, tab 46, pp. 8643-8660.)

Apple also had a uniform Payroll Procedures Policy further contributing to the untimely payment of final paychecks. According to this policy, the deadline for final paychecks for involuntary terminations was 10:00 a.m. Pacific time (noon Central time). (Vol. 7, tab 14, p. 1847.) Apple has only a single payroll department located in Austin, Texas, and it is not staffed on weekends. (Vol. 32, tab 46, pp. 8472-8473.)

Apple produced a random sample of its termination records for 100 terminated class members. The records identified the employees by name, type of termination (voluntary or involuntary), termination date, and date of issuance of final paycheck. Forty-seven percent of these terminated employees received their final paycheck more than three days after their termination date. (Vol. 2, tab 11, pp. 575-578; Vol. 7, tab 14, pp. 1831-1832; Vol. 23, tab 44, pp. 5860-5864; Vol. 33, tab 46, pp. 8675-8676.)

Forty of the class members submitted declarations addressing Apple's untimely payments of final paychecks. These class members received their final paychecks more than 72 hours after the voluntary or involuntary termination of their employment. (Vol. 27, tab 46, pp. 7065-7070 [summarizing class member declarations regarding unlawful waiting time at pages 7071-7195].)

ARGUMENT

I.

REVIEW SHOULD BE DENIED ON THE *BRINKER* ISSUES

A. The Trial Court Did Not Rely Solely on Plaintiffs' "Allegations" of Uniform and Consistently Applied Policies

The first Issue Presented by Apple is whether the mere *allegation* that an employer has uniform and consistently applied policies requires class certification, and whether a trial court may simply "disregard" the employer's evidence that its own written policies were not uniformly followed in actual practice. (Pet. at pp. 1, 13-20.) But that is not what happened here. Review should be denied because Apple's petition misstates what the trial court did.

1. The trial court never once suggested that it was relying solely on plaintiffs' "allegations" of a uniform and consistently applied policy, as Apple wrongly claims. In its final order granting class certification, the court repeatedly referred to plaintiffs' *evidence* of Apple's uniform policies and practices, not mere allegations. (See, e.g., Vol. 40, tab 69, p. 10410 ["Plaintiffs *provided evidence* that the meal period policy ... did not inform the non-exempt, non-manager employees that they were permitted to take their meal period within the first five hours of every shift."]; *id*. at p. 10411 ["*the evidence shows* that Defendant failed to authorize a second rest period" for shifts of 6-8 hours]; *id*. at p. 10411 ["Plaintiffs *provided evidence* indicating that Defendant had a uniform scheduling policy that prior to August 1, 2012 made taking meal and rest breaks extremely difficult"]; *id*. at p. 10411 ["In addition, Plaintiffs *presented evidence* that Defendant often scheduled its non-exempt employees for meal periods

starting well after the fifth hour of work."]; *id*. at p. 10411 ["Plaintiffs *presented evidence* that Defendant changed its meal and rest period policy on August 1, 2012, which was approximately eight months *after* this lawsuit was filed"]; *id*. at p. 10411 ["Plaintiffs *presented evidence* that Defendant has a uniform unlawful job abandonment and voluntary termination policy."]; *id*. at p. 10411 ["Plaintiffs *presented evidence* that it had a uniform practice of issuing its final paychecks late as a result of its Payroll Procedures Policy"].)

The trial court also cited to numerous of plaintiffs' exhibits and declarations evidencing the existence of these uniform policies and their implementation in actual practice. (Vol. 40, tab 69, pp. 10411-10412 [citing Plaintiffs' Exhibits D, E, G, I, K, L, M, O, Q, R, S, T, U, V, Q, W, Z, bb, gg, ll, mm, nn, oo, pp, vv, rr, ss, tt, vv, xx, yy and Declarations of Bryce Dodds, Tyler Belong and John Nienstedt].) Apple's petition mentions nothing about the trial court's citations to all this evidence.

2. At the hearing on the motion, the trial court also made clear that it was relying on the actual evidence presented. The court questioned the parties extensively about the contents of Apple's written policies, as well as Apple's actual practices as reflected in the class member declarations and other exhibits. (Vol. 40, tab 68, pp. 10292-10318, 10333-10340, 10370-10371, 10373-10374, 10393.) The court also stated: "It seems to me like there's disputed evidence about how often those erroneous policies resulted in violations of wage and hour laws." (Vol. 40, tab 68, p. 10349.) The court noted that the plaintiffs "have a lot of people who didn't get their meal periods on time and who didn't understand what the rules were." (*Id*. at p. 10360.) The court said, "you would think that if it's in ... the HR manual, ... it's a uniform policy that applies to a class." (*Id*. at p. 10347.)

And the court asked Apple's counsel, "Well, don't they have substantial evidence that the policy drove the practice?" (*Id*. at p. 10370.) Thus, the court relied on the substantial evidence of uniform policies followed by Apple in actual practice—not mere "allegations."

Apple cites various other comments made by Judge Prager during arguments on the motion as proof that he supposedly disregarded Apple's "mountain of evidence." (Pet. at pp. 2, 13.) But a reviewing court "may not use the [trial] court's oral statements *to impeach* its written order." (*Williams*, *supra*, 221 Cal.App.4th at p. 1361, emphasis added.) Otherwise, trial judges would be inhibited from engaging in dialogue with counsel and would "say nothing during argument to avoid creating grounds for impeaching the final order." (*Whyte v. Schlage Co.* (2002) 101 Cal.App.4th 1443, 1451.) "Comments made by the trial court are not rulings to be reviewed on appeal." (*Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal.App.4th 415, 431.)

The final written order contains no suggestion that the trial court disregarded Apple's evidence. (See Vol. 40, tab 69, p. 10404 [stating that the court "fully considered ... the evidence presented"] *id*. at pp. 10404-10405 & 10416 [overruling many evidentiary objections to Apple's evidence]; *id.* at p. 10412 [citing some of Apple's evidence].)

3. Apple relies solely on its own evidence that it supposedly complied with the law. (Pet. at pp. 6-10.) But the question here is not whether *Apple* presented substantial evidence to support a *denial* of class certification; it is whether *plaintiffs* presented substantial evidence to support the order *granting* certification. (*Dailey v. Sears, Roebuck and Co.* (2013) 214 Cal.App.4th 974, 991-992 [losing party challenging class certification ruling misplaced focus on "whether his own evidence"

satisfied substantial evidence standard]; *Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 940-941 [proper question "is not whether substantial evidence might have supported" a different class certification ruling].) "'[I]t is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.' [Citation.]" (*Dailey*, *supra*, 214 Cal.App.4th at p. 992.)

Under these authorities, the trial court was not required to credit Apple's evidence that it purportedly had no uniform policies that were consistently followed in actual practice. As the trial court correctly noted, there was "conflicting evidence" on the issue. (Vol. 40, tab 68, pp. 10368-10369; see also *id*. at p. 10366 ["There's going to be evidence on both sides, I think"].) "[I]f the parties' evidence is conflicting on the issue of whether common or individual issues predominate (as it often is and as it was here), the trial court is permitted to credit one party's evidence over the other's in determining whether the requirements for class certification have been met ...." (*Dailey*, *supra*, 214 Cal.App.4th at p. 991.)

4. The question whether there is substantial evidence that Apple consistently followed its own official written policies in actual practice is not worthy of Supreme Court review. This is a fact-specific question limited to the unique record in this case. The Court should not devote its limited resources to a factual issue that would not advance the development of California law for future cases.

5. In any event, there *is* substantial evidence that Apple's challenged meal and rest break policies were uniform and were followed in actual practice. As detailed in the Statement of Facts above, the challenged policies were part of Apple's official Meal and Rest Break Policy that

applied to all nonexempt, non-managerial employees in the company; these policies were accessible on HR Web to all nonexempt employees; Apple had a company practice of referring employees to HR Web for explanation of its policies; Apple supplemented these policies with a uniform Scheduling chart for retail employees; Apple had uniform training materials for the new-hire orientation on its official meal and rest break policies; Apple's one-month sample of work schedules at 49 stores demonstrated an astronomical number of meal and rest break violations consistent with the challenged policies; Apple's time records for the 5% random sample of class members demonstrated numerous meal break violations consistent with the challenged policies; the 104 declarations submitted by plaintiffs demonstrated a pattern of meal and rest break violations consistent with the challenged policies; and the time records for both plaintiffs' witnesses and Apple's witnesses demonstrated thousands of meal break violations consistent with the challenged policies.

Apple also changed its official Meal and Rest Break Policy only four months after *Brinker* was decided. As the trial court correctly observed, "sudden uniform changes to an employer's policy provides common proof of liability" under *Sav-on Drug Stores, supra*, 34 Cal.4th at p. 330, fn. 4. (Vol. 40, tab 69, pp. 10410-10411.)

There was also ample evidence that the challenged final paycheck policies were uniform and were followed in actual practice. These policies were part of Apple's official Voluntary Termination and Job Abandonment policies and its Payroll Procedures Policy; the termination records for the random sample of 100 class members demonstrated a pattern of late final paycheck violations consistent with the challenged policies; and the declarations of plaintiffs' waiting time witnesses showed the same pattern.

6. Apple's reliance on *Dailey* is misplaced. In *Dailey*, the employer had classified the employees as exempt and had *no* formal written policy on meal and rest breaks. The trial court *denied* class certification, and the Court of Appeal affirmed because there was substantial evidence that the employer had *no* uniform policy or widespread practice of denying meal and rest breaks. (*Dailey*, *supra*, 214 Cal.App.4th at pp. 1000-1002.) In this case, by contrast, Apple *did* have a formal company-wide policy on meal and rest breaks; plaintiffs' theory of liability is that Apple's uniform policy was facially illegal under *Brinker*; the trial court *granted* class certification under the authority of *Brinker*; and there *is* substantial evidence that Apple followed its own official policies in actual practice. *Dailey* confirms that the trial court is permitted to credit one party's evidence over the other's in determining whether there is a uniform policy and common issues predominate. (*Id*. at pp. 991, 1002.)

B. The Trial Court's Class Certification Order Did Not Create a New "Formal Written Policy" Requirement

Apple also claims that the trial court's class certification order created a new legal requirement that employers must "affirmatively adopt and disseminate formal written policies precisely setting forth every single detail regarding employees' rights to take meal and rest breaks ...." (Pet. at p. 17.) According to Apple, "the trial court's 'formal written policy' requirement plainly conflicts with this Court's guidance in *Brinker*." (*Ibid*.) This argument is flawed on multiple levels.

1. The trial court made no such ruling. The trial court merely noted "*it can be argued* that Defendant's meal break policy" is unlawful because the policy did not make employees "aware that they had the right to take a meal period within the first five hours." (Vol. 40, tab 69, p. 10410, emphasis added.) Whoever ultimately turns out to be right on the merits of

this issue, it is a common issue of law whether California employers are liable if their official policies fail to notify employees of their right to take a first meal break within the first five hours of work, fail to notify them of their right to take a second meal break within the first ten hours of work, and fail to notify them of their right to take a rest break for every "major fraction" of four hours worked. Apple does not explain why the resolution of this common issue is not perfectly suited for class treatment.

Under *Brinker*, an employer cannot avoid class certification just by claiming that the plaintiffs' class-wide theory of liability is wrong on the merits. (*Hall*, *supra*, 226 Cal.App.4th at pp. 293-294.) More to the point, an employer cannot defeat certification by contesting the merits of the plaintiffs' theory that it had a duty to adopt policies notifying employees of their "meal and rest period rights." (*Benton*, *supra*, 220 Cal.App.4th at p. 727 [rejecting employer's argument that "it was not required to adopt the sort of meal and rest break policy envisioned by plaintiffs" and ruling that this "goes to the merits of the parties' dispute" rather than certification].)

2. Even if the merits of plaintiffs' theory were at issue here, the theory is perfectly consistent with *Brinker*. Contrary to Apple's petition, plaintiffs' theory is nothing like the one rejected in *Brinker*—that employers allegedly had a duty to "ensure that employees do no work" during breaks. (*Brinker*, *supra*, 53 Cal.4th at p. 1038.) All plaintiffs are claiming is that an employer's official meal and rest break policies must correctly notify employees of their rights to take a meal break within the first five hours of work, take a second meal break within the first ten hours of work, and take a rest break for every "major fraction" of four hours worked. An employer cannot satisfy its duty to "authorize and permit" the legally required breaks (*Bradley*, *supra*, 211 Cal.App.4th at p. 1149) if its policies do not inform

employees of the right to take them within the legally required time periods. If the company's policy does not state the correct time periods for taking breaks, then the policy on its face violates the wage and hour laws, and "the employer's liability arises by adopting a uniform policy that violates the wage and hour laws." (*Faulkinbury*, *supra*, 216 Cal.App.4th at p. 235; see also *Brinker*, *supra*, 53 Cal.4th at p. 1033 [if the employer "adopts a uniform policy authorizing and permitting only one rest break when two are required—it has violated the wage order and is liable"].)

But again, the crucial point is not who is right about the validity of Apple's uniform policies. The crucial point is that their validity *or invalidity* is a common issue suitable for resolution in a class action. (*Benton*, *supra*, 220 Cal.App.4th at pp. 724-725 [reversing denial of class certification where plaintiffs' theory was that employer "was obligated to implement procedures ensuring that technicians received notice of their meal and rest period rights and were permitted to exercise those rights"]; *Bradley*, *supra*, 211 Cal.App.4th at p. 1149 [holding that plaintiffs' challenge to uniform employment policies, including failure to "give any notification to the workers about their entitlement to take meal or rest breaks," involved "common factual and legal issues that are amenable to class treatment"].)

II.

REVIEW SHOULD BE DENIED ON THE *DURAN* ISSUES

Apple also claims that the trial court deprived it of the due process right to present individualized defenses in violation of *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1. (Pet. at pp. 1, 20-27.) According to Apple, by granting class certification, the trial court somehow denied it

of its "due process right to put on testimony and cross-examine witnesses to demonstrate its actual practices and policies, its compliance with the law, and the experiences of individual employees." (Pet. at pp. 21-22.)

1. The trial court did no such thing. Nothing in its order bars Apple from calling witnesses to testify on these subjects or any other at trial. All the court has done is certify a class and subclasses. It has made no ruling that precludes Apple from presenting any evidence or cross-examining any witnesses. In fact, the court acknowledged that Apple's evidence that it supposedly provided timely meal and rest breaks to employees is relevant on damages and could still result in a class-wide judgment in Apple's favor. (Vol. 40, tab 68, pp. 10341-10342, 10344-10345; Vol. 40, tab 69, p. 10410.)

The court even told Apple's counsel that if the class were certified and Apple's contentions were factually correct, then "you're going to prove in [trial] that most people got their breaks on time and people that didn't take them, they just decided not to take them on time and on and on, and then you are going to prevail in this phase of the case and you are going to get res judicata effect ...." (Vol. 40, tab 68, pp. 10341.) In other words, explained the trial court, "if you lose on class certification, you can show minimal or no damages and you'll have res judicata effect and you'll never have to deal with another lawsuit like this ever again." (Vol. 40, tab 68, pp. 10341-10342.) Thus, Apple's claim that the trial court has barred it from presenting a defense is a figment of Apple's own imagination.

2. *Duran* does not assist Apple in the least. *Duran* involved "an exceedingly rare beast: a wage and hour class action that proceeded through trial to verdict." (*Duran*, *supra*, 59 Cal.4th at p. 12.) The theory of liability in *Duran* was that the employer had improperly denied overtime pay to a certified class of loan officers by misclassifying them as exempt employees.

At the class trial, the court heard testimony about the work habits of a flawed sample of only 21 plaintiffs, and it barred the employer from introducing any evidence about the work habits of any other class member outside the sample. Extrapolating from the flawed sample, the trial court ruled that the entire class had been misclassified, and ultimately entered a $15 million judgment against the employer. (*Id*. at pp. 12, 18-20.)

This Court reversed, finding that the sample was unreliable because it was too small, it was not random, and it yielded intolerably large margins of error. (*Duran*, *supra*, 59 Cal.4th at pp. 41-49.) The Court also held that the trial court's refusal to permit any defense evidence about the work habits of other class members improperly deprived the employer of the right to litigate its exemption defense. (*Id*. at pp. 35-38.)

In this case, by contrast, there has been no trial, no extrapolation from a flawed sample, and no ruling that Apple will be precluded from offering any evidence in its own defense. There has only been a class certification order. Apple's claim that it is being deprived of the right to present a defense inexplicably assumes that the trial court will make evidentiary rulings it has not even hinted at making—and has affirmatively indicated it will not make. (Vol. 40, tab 68, pp. 10341-10342.)

3. Apple repeatedly cites a single line in the trial court's order stating, "Plaintiffs [argue] that his [sic] case can be resolved by relying exclusively upon Defendant's unlawful corporate policies and corporate records." (Vol. 40, tab 69, p. 10412.) But this was merely a reference to a sentence in plaintiffs' motion arguing that "[t]he *lion's share* of the litigation ... can be resolved by relying exclusively upon Apple's unlawful corporate policies and corporate records." (Vol. 1, tab 31, p. 51, emphasis added.) Although the trial court agreed with plaintiffs that common issues

predominated, it never suggested that it was barring Apple from defending itself with individualized evidence *other* than its own corporate policies and records. In fact, the court made clear that Apple *could* present such evidence to defend itself at trial. (Vol. 40, tab 68, pp. 10340-10342.)

4. Apple also claims that *Duran* undermines the trial court's conclusion that damages for the rest-break violations can be determined by surveying a representative sample of class members. (Pet. at p. 22.) But *Duran* did not adopt any categorical rule prohibiting sampling or surveys. On the contrary, the Court emphasized: "We have remained open to the appropriate use of representative testimony, sampling, or other procedures employing statistical methodology." (*Duran*, *supra*, 59 Cal.4th at p. 33; see also *In re Cipro Cases I and II* (2004) 121 Cal.App.4th 402, 417-418 ["State and federal courts alike have adopted a more pragmatic approach of allowing damages to be distributed to individual class members based on averages, statistical sampling, extrapolation, or other similar approximations"]; *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 746-751 [trial court has discretion to use random sampling and extrapolation for determination of aggregate classwide damages].) The problem in *Duran* was not with sampling in general, but with the "biased" and unreliable sampling plan used by the trial court. (*Duran*, *supra*, 59 Cal.4th at p. 50.)

Apple does not claim that the type of survey described by plaintiffs' expert could not be conducted so as to obtain reliable and representative results. (Vol. 2, tab 9, pp. 564-567.) As the trial court stated, "if they had a truly statistically based random sampling and they submitted a cross-section of Apple employees, a subclass of them, you could probably determine [with] a high level of confidence the magnitude of the damages." (Vol. 40,

tab 68, p. 10388.)

Apple also complains that it "would not have *any* opportunity to contest the results of this survey with individualized evidence." (Pet. at p. 22.) But Apple does not explain where on earth it is getting this from. Nowhere in the trial court's order does it suggest that Apple cannot contest the results of the survey with individualized evidence—or any other evidence. Once again, the trial court made clear that Apple will be free to present any and all evidence of compliance in its own defense. (Vol. 40, tab 68, pp. 10340-10342.) Thus, the class certification order has in no way denied Apple its right to present a defense.

5. Finally, Apple asserts that plaintiffs' claims cannot be manageably tried on a classwide basis because they present individualized issues whether employees were provided with timely meal and rest breaks. (Pet. at 24-26.) But that is essentially the same argument that was rejected in *Brinker*. Under *Brinker*, plaintiffs' "theory of liability—that [the employer] has a uniform policy, and that that policy, measured against wage order requirements, allegedly violates the law— is by its nature a common question eminently suited for class treatment." (*Brinker*, *supra*, 53 Cal.4th at p. 1033.)

Brinker itself applied this reasoning to a rest period policy identical to the one at issue here. In *Brinker*, the company's official written policy similarly stated that "employees receive one 10-minute rest break per four hours worked." (*Brinker*, *supra*, 53 Cal.4th at p. 1033.) Apple had the same official policy: "Apple provides a 10-minute paid rest period for every 4 hours worked by all nonexempt employees." (Vol. 3, tab 13, p. 774.) *Brinker* held that a challenge to this rest period policy was properly certified as a class action: "Claims that a uniform policy consistently applied to a

group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment." (*Ibid*.)

Brinker rejected the contention that such a claim would require individualized proof to determine whether the class members had waived their rights to a rest break. The Court explained:

> An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required—it has violated the wage order and is liable. No issue of waiver arises for a rest break that was required by law by never authorized; if a break is not authorized, an employee has no opportunity to decline to take it. (*Brinker*, *supra*, 53 Cal.4th at p. 1033.)

Numerous appellate courts have since applied the reasoning of *Brinker* to a variety of claims challenging uniform employment policies, including policies on meal and rest breaks. (See, e.g., *Hall*, *supra*, 226 Cal.App.4th 278 [reversing decertification of class action alleging uniform policy of not providing seats to cashiers]; *Jones*, *supra*, 221 Cal.App.4th 986 [reversing denial of class certification for allegedly uniform policy of denying compensation for preshift work]; *Williams*, *supra*, 221 Cal.App.4th 1353 [vacating denial of class certification for allegedly uniform policy of having adjusters work off the clock]; *Benton*, *supra*, 220 Cal.App.4th 701 [reversing denial of class certification for allegedly uniform policy of failing to give notice of meal and rest period rights]; *Faulkinbury*, *supra*, 216 Cal.App.4th 220 [reversing denial of class certification for allegedly uniform policy of requiring on-duty meal breaks]; *Bradley*, *supra*, 211 Cal.App.4th 1129 [reversing denial of class certification for allegedly uniform company-wide conduct of failing to authorize or provide required

meal and rest breaks].)

These courts have all interpreted *Brinker* the same way: "*Brinker* teaches that we must focus on the policy itself and address the issue whether the legality of the *policy* can be resolved on a classwide basis." (*Faulkinbury*, *supra*, 216 Cal.App.4th at p. 232.) "*[T]he employer's liability arises by adopting a uniform policy that violates the wage and hour laws*. Whether or not the employee was able to take the required break goes to damages ...." (*Id*. at p. 235, emphasis added; accord *Benton*, *supra*, 220 Cal.App.4th at p. 726; *Abdullah v. U.S. Security Associates, Inc.* (9th Cir. 2013) 731 F.3d 952, 961-962; see also *Hall*, *supra*, 226 Cal.App.4th at p. 289 ["courts have also agreed that, where the theory of liability asserts the employer's uniform policy violates California's labor laws, factual distinctions among whether or how employees were or were not adversely impacted by the allegedly illegal policy does not preclude certification"].)

Under post-*Brinker* case law, the *absence* of a required uniform policy is also subject to common proof in a class action. (See, e.g., *Bradley*, *supra*, 211 Cal.App.4th at p. 1150 ["Here, plaintiffs' theory of recovery is based on Networkers' (uniform) *lack* of a rest and meal break policy and its (uniform) *failure* to authorize employees to take statutorily required rest and meal breaks. The lack of a meal/rest break policy and the uniform failure to authorize such breaks are matters of common proof."].) As explained in *Bradley*, "when an employer has not authorized and not provided legally-required meal and/or rest breaks, the employer has violated the law and the fact that an employee *may* have actually taken a break or was able to eat food during the work day does not show that individual issues will predominate in the litigation." (*Id*. at p. 1151.)

These authorities are directly on point. Plaintiffs are challenging

Apple's uniform, company-wide policies on meal periods, rest periods, and final paychecks. They are claiming that Apple's official corporate policies were illegal because they failed to notify employees of their right to take a first meal break within the first five hours, a second meal break within the first ten hours, and a rest break for every "major fraction" of four hours worked, and they failed to require timely payment of final paychecks. Under *Brinker* and its progeny, individual issues about which or how many class members actually received timely meal breaks, rest breaks, and final paychecks do not preclude class certification. (*Brinker*, *supra*, 53 Cal.4th at p. 1033; *Benton*, *supra*, 220 Cal.App.4th at pp. 725-730; *Faulkinbury*, *supra*, 216 Cal.App.4th at pp. 234-237; *Bradley*, *supra*, 211 Cal.App.4th at pp. 1151-1153.)

CONCLUSION

There is no issue worthy of review. The class certification order is consistent with *Brinker* and all post-*Brinker* case law. The trial court correctly certified the class and subclasses based on plaintiffs' class-wide theories of liability and the evidence of uniform Apple policies consistently followed in actual practice. The trial court did not rely solely on plaintiffs' allegations, and it has done nothing to prevent Apple from presenting a full, unimpaired defense to plaintiffs' claims at trial. The petition for review should be denied.

Dated: Dec. __, 2014

LAW OFFICES OF MARTIN N. BUCHANAN

By:_____
Martin N. Buchanan

HOGUE & BELONG
Jeffrey L. Hogue
Tyler J. Belong
Bryce A. Dodds

Attorneys for Real Parties in Interest Brandon Felczer, Ryan Goldman, Ramsey Hawkins, and Joseph Lane Carco

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.504(d) of the California Rules of Court, I certify that the foregoing Answer to Petition for Review was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief is 8,301 words, exclusive of the matters that may be omitted under subdivision (d)(3).

Dated: Dec. __, 2014

LAW OFFICES OF MARTIN N. BUCHANAN

By:_____
Martin N. Buchanan

Attorney for Real Parties in Interest Brandon Felczer, Ryan Goldman, Ramsey Hawkins, and Joseph Lane Carco

CERTIFICATE OF SERVICE

I, Martin N. Buchanan, am employed in the County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is 655 West Broadway, Suite 1700, San Diego, California 92101. On Dec. ___, 2014, I served the **ANSWER TO PETITION FOR REVIEW** by mailing a copy by first class mail in separate envelopes addressed as follows:

Theodore J. Boutrous, Jr. Gibson, Dunn & Crutcher LLP 333 South Grand Ave. Los Angeles, CA 90071 (Attorneys for Petitioner)	Julie A. Dunne Littler Mendelson, P.C. 501 W. Broadway, Suite 900 San Diego, CA 92101 (Attorneys for Petitioner)
Hon. Ronald S. Prager San Diego County Superior Court 330 W. Broadway San Diego, CA 92101 (Respondent)	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on Dec. ___, 2014, at San Diego, California.

_____
Martin N. Buchanan