EDMUND G. BROWN JR.
Attorney General

State of California
DEPARTMENT OF JUSTICE

1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Public: (916) 323-1996
Facsimile: (916) 324-4293
Manuel.Medeiros@doj.ca.gov

September 29, 2008

Honorable Ronald M. George, Chief Justice
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

RE: *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*
California Supreme Court Case No. S166350

Dear Chief Justice George and Associate Justices:

Edmund G. Brown Jr., Attorney General of California, submits this letter in support of a petition for review of the decision by the Court of Appeal, Fourth Appellate District, Division One, in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)* (2008) 165 Cal.App.4th 25 (*Brinker*), pursuant to rules 8.500, subdivision (g), and 8.520, subdivision (f)(7), of the California Rules of Court.

The Attorney General urges review of the decision in *Brinker* for two reasons. First, there appears to be a conflict between the courts of appeal on the nature of an employer's duty to provide rest and meal periods to employees. The issue involves what specific steps an employer must take to meet his obligations under statute and applicable wage orders enacted by the Industrial Welfare Commission (IWC). The Court should review this case to clarify the responsibility of employers and the rights of employees. Second, there is an issue of great importance at stake in this litigation: namely, the health and safety of California employees, which this Court has found is directly related to the rest and meal break periods that employees are statutorily entitled to receive. (See *Murphy v. Kenneth Cole Productions Inc.* (2007) 40 Cal.4th 1094, 1113 (*Murphy*).) For these reasons, the Attorney General respectfully requests that this Court review the *Brinker* decision.

A. Review by the Court Is Necessary to Clarify When an Employer Has Complied With the Requirement to Provide Meal Periods to Employees.

Labor Code section 512 codified the meal period and rest period requirements first mandated by the IWC's wage orders in 1916 and 1932, respectively. Section 512, subdivision (a), of the Labor Code generally describes the circumstances under which an employee is entitled to receive a meal period:

> An employer may not employ an employee for a work period of

> more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

The *Brinker* opinion discusses, among other things, the meaning of the word "providing" as stated in section 512, subdivision (a). After reviewing the dictionary meaning of the word, the court concluded that the term means "to supply or make available." As a result, the court held that the Labor Code only requires that meal periods be made available, not ensured. (*Brinker*, *supra*, 165 Cal.App.4th at p. 55.) The court did not discuss or analyze the specific provisions of Wage Order 5 that allow on-duty meal periods only in the narrowest of circumstances when an employee cannot be relieved of all duty; nor did the court discuss or analyze the IWC's Statement as to the basis for this wage order, which explains the Commission's reasons for these requirements. Instead, in making its finding, the court relied on two federal court decisions that anticipated how this Court might interpret California law.[1]

The decision below appears to be inconsistent with the holding by the Third Appellate District in *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 (*Cicairos*). In *Cicairos*, the plaintiffs (truck drivers) brought an action against their former employer for failure to provide meal periods, rest breaks, and itemized wage statements. (*Cicairos*, *supra*, 133 Cal.App.4th at p. 952.) With regard to the meal period claim, the employer pointed to evidence that it had given employees the statutorily-required meal breaks, and thus there was no violation of Labor Code section 512, subdivision (a), or Wage Order No. 9. (*Ibid.*) The *Cicairos* court disagreed with the employer's evidence, and, relying on a Division of Labor Standards Enforcement (DLSE) opinion letter, held that the employer had an "affirmative obligation to ensure that workers are actually relieved of all duty." (*Id.* at pp. 962-963.)

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[1]See *White v. Starbucks Corp.* (N.D.Cal. 2007) 497 F.Supp.2d 1080 [noting that making employers ensurers of meal breaks would be "impossible to implement for significant sectors of the mercantile industry (and other industries) in which large employers may have hundreds or thousands of employees working multiple shifts."]; *Brown v. Federal Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580 [finding that requiring enforcement of meal breaks would place an "undue burden on employers whose employees are numerous" and "would also create perverse incentives, encouraging employees to violate company meal break policy in order to receive extra compensation under California wage and hour laws."].

The *Brinker* court disagreed with the Third Appellate District, stating that *Cicairos* involved a different wage order[2] and was distinguishable on its facts.[3] In addition, as noted earlier, the *Brinker* court relied on two federal court decisions that had disagreed with *Cicairos*. including *Brown v. Federal Express Corporation, supra,* 249 F.R.D. 580) (*Brown*). (*Brinker, supra*, 165 Cal.App.4th at pp. 55-56.) In *Brown*, the district court observed that *Cicairos* relied upon a non-binding opinion letter by the DLSE in asserting the "affirmative obligation" standard, and thus could be distinguished on that basis as well. (See *Brown, supra,* 249 F.R.D. at p. 586, relying on *Murphy, supra,* 40 Cal.4th at p. 1106, fn. 7 ["While the DLSE's construction of a statute is entitled to consideration and respect, it is not binding and it is ultimately for the judiciary to interpret this statute. [Citations]."]; see also *Kenny v. Supercuts, Inc.* (N.D.Cal. June 2, 2008) 2008 WL 2265194, *4 [noting that the parties agreed that DLSE "opinion letters do not have the force of law"].) Similarly, in *White v. Starbucks* the district court found that the application of *Cicairos* should be limited by the unique facts of that case. (*White v. Starbucks Corp., supra,* 497 F.Supp.2d at p.1089.)

An employee's right to meal and rest-break periods has been the subject of much litigation in our courts and has led to the issuance of numerous decisions, some of which are conflicting, thus causing confusion for employers and employees alike. The Court should review *Brinker*, given the apparent split between the Fourth Appellate District and the Third Appellate District regarding the question whether an employer must ensure that employees actually take their rest and meal breaks.

B. Protecting the Health and Safety of Workers by Ensuring They Receive Their Statutorily-required Meal and Rest Periods Is an Issue of Statewide Importance.

The issue of how employers are to "provide" off-duty meal and rest periods is a matter of great importance that effects virtually all non-exempt employees in this state. As this Court has recognized:

> Employees denied their rest and meal periods face greater risk of work-related accidents and increased stress, especially low-wage workers who often perform manual labor. (citations omitted) Indeed, health and safety considerations (rather than purely economic injuries) are what motivated the IWC to adopt mandatory meal and rest periods in the first place. [Citation.]

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[2]Although the Cicairos case involved a different wage order, 16 of the IWC's 17 industry and occupations orders contain the same requirements for on-duty meal periods.

[3]The *Brinker* court noted that the plaintiffs in *Cicairos* established that the employer had knowledge that employees were driving while eating and did not take steps to address the situation, and thus it was management who deprived the employees of their breaks. (*Brinker, supra*, 165 Cal.App.4th at p. 57.)

(*Murphy, supra,* 40 Cal.4th at p. 1113.) The *Brinker* court acknowledged that "'[m]eal and rest periods have long been viewed as part of the remedial worker protection framework' designed to protect workers' health and safety." (See *Brinker*, *supra*, 165 Cal.App.4th at p. 31, quoting *Murphy*, *supra*, 40 Cal.4th at p. 1105.) The court's analysis, however, missed a relevant part of that framework by not addressing the requirements of the IWC's wage orders that allow on duty meal periods only under certain specific circumstances. In finding that there was no statutory requirement under Labor Code section 512, subdivision (a) (*Brinker, supra,* 165 Cal.App.4th at p. 59), for a written and mutually agreed upon meal-period waiver, the court did not address the specific requirements of Section 11 of Wage Order 5, which provides:

> (A) . . . Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

As the Court noted in *Murphy*, adding to the confusion in this area is the is the DLSE's periodic and inconsistent changes regarding enforcement of the meal and rest period provisions. (*Murphy*, *supra*, 40 Cal.4th at p. 1106.) Moreover, because the IWC has been defunded, the Commission itself has been unable to clarify its intent by amending its wage orders or otherwise weighing in on these issues.

CONCLUSION

The petition for review should be granted to clarify these important issues.

Sincerely,

MANUEL M. MEDEIROS
State Solicitor General

For EDMUND G. BROWN JR.
Attorney General

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Brinker Restaurant v. Superior Court**
California Supreme Court Case No. S166350

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 29, 2008, I served the attached **Letter Dated September 29, 2008 addressed to the Honorable Ronald M. George, Chief Justice and the Associate Justices, California Supreme Court, 350 McAllister Street, San Francisco, CA 94102,** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Rex S. Heinke
Akin Gump Strauss Hauer & Feld LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067
Attorneys for Petitioner Brinker Restaurant Corp.
One Copy

Timothy D. Cohelan
Cohelan & Khoury
605 "C" Street, Suite 200
San Diego, CA 92101-5305
Attorneys for Real Party in Interest Adam Hohmbaum
One Copy

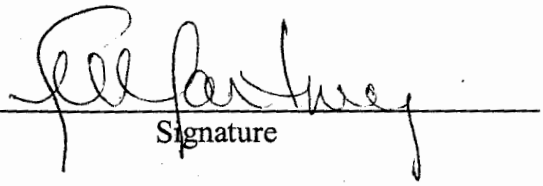
Kimberly Ann Kralowec
Schubert Jonckheer Kolbe & Kralowe LLP
Three Embarcadero Center, Ste 1650
San Francisco, CA 94111
Attorneys for Real Party in Interest Adam Hohmbaum
One Copy

State of California Court of Appeal
Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101
Case No. D049331
One Copy

County of San Diego Superior Court
Central Division - Hall of Justice/Civil
330 West Broadway
San Diego, CA 92101
Case No. GIC834348
One Copy

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 29, 2008, at Sacramento, California.

Christine A. McCartney
Declarant



Signature

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