ARBOGAST & BERNS LLP
Attorneys at Law
19510 Boulevard •Suite 200 • Tarzana, California 91356-2969
Telephone (818) 961-2000 • Fax (818) 867-4820
www.law111.com

September 10, 2008

Honorable Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Brinker Restaurant v. Superior Court (Hohmbaum), S166350 (D049331)

Honorable Justices:

Consumer Attorneys of California ("CAOC") respectfully submits this letter in support of the petition for review filed in the above referenced matter.

Interest of CAOC

CAOC is a voluntary non-profit membership organization of over 3,000 consumer and employment attorneys practicing throughout California. The organization was founded in 1962 and many of its members represent employees in wage and hour litigation. CAOC has taken a leading role in advancing and protecting the rights of workers by (among other activities) submitting amicus briefs in California Supreme Court cases like Prachasaisoradej v. Ralphs Grocery Co. (2007) 42 Cal.4th 217, and Elsner v. Uveges (2004) 34 Cal.4th 915.

Overview

The Fourth Appellate District, Division 1, has created a clear-cut split in authority on one of the most hotly-litigated wage and hour questions–whether employers must actually ensure that workers are relieved of all duty during statutorily-mandated meal periods.

In Cicairos v. Summit Logistics, Inc. (2005) 133 Cal.App.4th 949, the Third Appellate District held that "employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty'" for their meal periods. Id. at 962-63 (quoting DLSE Op.Ltr. 2002.01.28.) Here, the Fourth District refused to follow Cicairos, holding instead, that "employers need not ensure meal breaks are actually taken, but need only make them available." Brinker Restaurant Corp. v. Superior Court (2008) 165 Cal.App.4th 25, 56.

Further, while recognizing that a meal period is required for employees who work a shift longer than five hours, Brinker held that the meal period need not be given at any particular time during the workday. 165 Cal.App.4th at 52-54. Under the Fourth District's logic, an employer may force employees to work nearly *ten hours straight without a meal* or may require employees to take their lunch at the beginning of the shift, thereby defeating the very purpose of requiring meal breaks altogether – promoting the health and welfare of workers by providing an interruption from a long period of work for the purposes of a meal.

The Fourth District's decision also significantly curtails employees' rest break rights. For 60 years, the DLSE has interpreted "per four hours of work ***or major fraction thereof***" to mean "***any*** time over the midpoint of any four-hour block of time." Wage Order 5 (¶12(A)) (emphasis added); DLSE Op.Ltr. 1999.02.16 (quoting 1948 Interp.Memo.); DLSE Enforcement Manual (2002 Update), §45.3.1 ("DLSE follows the clear language of the law and considers any time in excess of two (2) hours to be a major fraction mentioned in the regulation.") Despite this well established reasoning, the Fourth District held that a rest break is not triggered until "after" an employee has worked a full four hours." 165 Cal.App.4th at 44. Under the Fourth District's interpretation, an employee who works an eight-hour shift is only entitled to their first rest break after their forth hour, but not a second one, as the second one would not be triggered until "after" the eighth hour–when the employee has already gone home. Thus, by reducing the number of rest breaks employers must provide in half, the Fourth District took it upon itself to substantially diminish the rest break rights of millions of California workers.

In addition, even though the DLSE believes "the first rest period should come sometime before the meal break (DLSE Op.Ltr., 2001.09.21), the Fourth District held that an employer need not provide a rest break before the first meal period. 165 Cal.App.4th at 46. This reasoning allows employers to provide meal periods and rest periods simultaneously, even though the IWC clearly separated two different kinds of breaks, at different times of the day, for different purposes.

The Fourth District's decision also conflicts with this Court's approval of the use of expert statistical and sampling evidence in class action litigation. See, e.g. Sav-on Drug Stores, Inc. v. Superior Court (2004) 34 Cal4th 319, 333:

> California courts and others have in a variety of contexts considered pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate.

Categorically rejecting even the possibility of proving widespread conduct with statistical or sampling evidence, the Fourth District held that the plaintiff's meal period, rest break, and off-the-clock claims could "*only* be decided on a case-by-case basis." 165 Cal.App.4th at 58. The extremely narrow approach adopted by the Fourth District not only conflicts with Sav-on but also directly conflicts with other Court of Appeal panels, who not only have accepted such common proof, but have *reversed* trial courts for rejecting it. See, e.g. Capitol People First v. Department of Developmental Services (2007) 155 Cal.App.4th 676, 695 (By "discarding" this evidence "out of hand," "the trial court turned its back to methods of proof commonly allowed in the class action context."); see also Estrada v. FedEx Ground Package System, Inc. (2007) 154 Cal.App.4th 1, 13-14 (affirming class certification based on representative testimony); Alch v. Superior Court, ___ Cal.App.4th ___, 2008 WL 3522099, *9 (Aug. 14, 2008) ("[Plaintiffs] cannot prove their disparate impact claims without access to evidence from which they can perform a statistical analysis.").

Finally, by ordering class certification denied "without prejudice" the Fourth District contravened this Court's admonition that, when a court of appeal vacates a class certification order based on erroneous legal assumptions, it must then remand for the trial court to apply the correct legal assumptions and "consider afresh" whether class certification should be granted. See, e.g., Washington Mutual Bank, FA v. Superior Court (2001) 24 Cal.4th 906, 928. The Fourth District inexplicably failed to follow this rule.

Review Is Necessary to Resolve These Conflicting Appellate Court Decisions and Uncertainty in the Law

Review is necessary in order to resolve these important issues that directly affect the availability of class action relief in the vast majority of wage and hour class actions brought in this state. Without review, disharmony and non-uniform decisions will flourish, leaving many if not all workers without an effective remedy.

Review is also necessary to provide guidance to appellate courts on the standard of review to be employed when reviewing the class certification decisions. The Fourth District trampled on the broad discretion entrusted to trial courts when ruling on a motion for class certification. The Fourth District impermissibly analyzed the merits of the case and re-weighed the evidence. See, e.g. Fireside Bank v. Superior Court (2007) 40 Cal.4th 1069, 1089; Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 436.

Indeed, by re-weighing "plaintiffs' employee declarations" against "Brinker's manager declarations," and "concluding under the facts presented to the trial court in this case [that] the claims in this case are not suitable for class treatment," the Fourth District improperly stepped outside the boundary of appropriate appellate review. In disregard of the deferential standard of review mandated by this Court, the Fourth District interjected its view of the quality and nature of the evidence in place of the trial court's.

Conclusion

The Fourth District's decision represents an improper and unwise interpretation of meal period, rest break and off-the-clock claims, is diametrically opposed to this Court's prior decisions concerning class action procedure, and will likely have a significant impact on the application of California's wage and hour laws. The decision creates confusion as to the relief employees may pursue and the evidence upon which trial courts throughout the state may rely upon in resolving these claims. CAOC urges the Court to grant review in light of the importance of these legal issues to California citizens and to the courts of this state.

Respectfully submitted,

ARBOGAST & BERNS LLP

By: _____

David M. Arbogast
19510 Ventura Boulevard, Suite 200
Tarzana, CA 91356-2969
Tel.: (818) 961-2000
Fax: (818) 867-4820
darbogast@law111.com

On behalf of Amicus
Consumer Attorneys of California

DECLARATION OF SERVICE BY MAIL

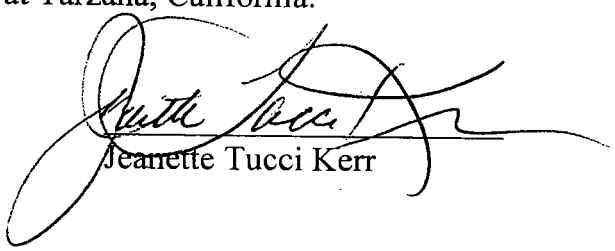
I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 11377 W. Olympic Boulevard, Fifth Floor, Los Angeles, California 90064-1683.

2. That on September 11, 2008, declarant served Consumer Attorneys of California's Amicus Letter dated September 11, 2008 by depositing a true copy thereof in a United States mail box at Tarzana, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 11th day of September, at Tarzana, California.



Jeanette Tucci Kerr

SERVICE LIST

Brinker Restaurant v. Superior Court (Hohmbaum), S166350 (D049331)

Karen J. Kubin, Esq. MORRISON & FOERSTER, LLP 425 Market Street San Francisco, CA 94105	Counsel for Defendants and Petitioners Brinker Restaurant Corp. et al.
Rex S. Heinke, Esq. Joanna R. Shargel, Esq. AKIN GUMP STRAUSS HAUER & FELD LLP 2029 Century Park East, Suite 2400 Los Angeles, CA 90067	Counsel for Defendants and Petitioners Brinker Restaurant Corp. et al.
L. Tracee Lorens, Esq. LORENS AND ASSOCIATES 1202 Kettner Blvd., Suite 4100 San Diego, CA 92101	Counsel for Plaintiffs, Real Parties in Interest, and Petitioners Adam Hohnbaum et al.
Robert C. Schubert, Esq. Kimberly A. Kralowec, Esq. SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP One Embarcadero Center, Suite 1650 San Francisco, CA 94111	Counsel for Plaintiffs, Real Parties in Interest, and Petitioners Adam Hohnbaum et al.
William Turley, Esq. Robert Wilson, III, Esq. THE TURLEY LAW FIRM, APLC 555 West Beech Street, Suite 460 San Diego, CA 92101-3155	Counsel for Plaintiffs, Real Parties in Interest, and Petitioners Adam Hohnbaum et al.
Timothy D. Cohelan, Esq. Michael D. Singer, Esq. COHELAN & KHOURY 605 C Street, Suite 200 San Diego, CA 92101 Telephone: (619) 595-3001	Counsel for Plaintiffs, Real Parties in Interest, and Petitioners Adam Hohnbaum et al.

Courtesy Copies:

Hon. David B. Oberholtzer
San Diego County Superior Court
Hall of Justice, Department 67
330 W. Broadway
San Diego, CA 92101

California Court of Appeal
Fourth Appellate District, Division One
Symphony Towers
750 B Street, Suite 300
San Diego, CA 92101

ARBOGAST & BERNS LLP
Attorneys at Law
19510 Boulevard •Suite 200 • Tarzana, California 91356-2969
Telephone (818) 961-2000 • Fax (818) 867-4820
www.law111.com

September 12, 2008

Honorable Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Brinker Restaurant v. Superior Court (Hohmbaum), S166350 (D049331) - Notice of Errata

Honorable Justices:

Consumer Attorneys of California ("CAOC") respectfully submits this Notice of Errata to their letter in support of the petition for review filed in the above referenced matter.

In the first sentence of the second paragraph on page 3 of CAOC's letter, the phrase "without prejudice" should have been "***with prejudice***." See Brinker Restaurant Corp. v. Superior Court (2008) 165 Cal.App.4th 25, 62. The second paragraph on page 3 should now read:

> Finally, by ordering class certification denied "*with prejudice*" the Fourth District contravened this Court's admonition that, when a court of appeal vacates a class certification order based on erroneous legal assumptions, it must then remand for the trial court to apply the correct legal assumptions and "consider afresh" whether class certification should be granted. See, e.g., Washington Mutual Bank, FA v. Superior Court (2001) 24 Cal.4th 906, 928. The Fourth District inexplicably failed to follow this rule.

Respectfully submitted,

ARBOGAST & BERNS LLP

By: _____
David M. Arbogast

On behalf of Amicus
Consumer Attorneys of California

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 11377 W. Olympic Boulevard, Fifth Floor, Los Angeles, California 90064-1683.

2. That on September 12, 2008, declarant served Consumer Attorneys of California's Notice of Errata dated September 12, 2008 by depositing a true copy thereof in a United States mail box at Tarzana, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of September, at Tarzana, California.

Jeanette Tucci Kerr

SERVICE LIST

Brinker Restaurant v. Superior Court (Hohmbaum), S166350 (D049331)

Karen J. Kubin, Esq. MORRISON & FOERSTER, LLP 425 Market Street San Francisco, CA 94105	Counsel for Defendants and Petitioners Brinker Restaurant Corp. et al.
Rex S. Heinke, Esq. Joanna R. Shargel, Esq. AKIN GUMP STRAUSS HAUER & FELD LLP 2029 Century Park East, Suite 2400 Los Angeles, CA 90067	Counsel for Defendants and Petitioners Brinker Restaurant Corp. et al.
L. Tracee Lorens, Esq. LORENS AND ASSOCIATES 1202 Kettner Blvd., Suite 4100 San Diego, CA 92101	Counsel for Plaintiffs, Real Parties in Interest, and Petitioners Adam Hohnbaum et al.
Robert C. Schubert, Esq. Kimberly A. Kralowec, Esq. SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP One Embarcadero Center, Suite 1650 San Francisco, CA 94111	Counsel for Plaintiffs, Real Parties in Interest, and Petitioners Adam Hohnbaum et al.
William Turley, Esq. Robert Wilson, III, Esq. THE TURLEY LAW FIRM, APLC 555 West Beech Street, Suite 460 San Diego, CA 92101-3155	Counsel for Plaintiffs, Real Parties in Interest, and Petitioners Adam Hohnbaum et al.
Timothy D. Cohelan, Esq. Michael D. Singer, Esq. COHELAN & KHOURY 605 C Street, Suite 200 San Diego, CA 92101 Telephone: (619) 595-3001	Counsel for Plaintiffs, Real Parties in Interest, and Petitioners Adam Hohnbaum et al.

Courtesy Copies:

Hon. David B. Oberholtzer
San Diego County Superior Court
Hall of Justice, Department 67
330 W. Broadway
San Diego, CA 92101

California Court of Appeal
Fourth Appellate District, Division One
Symphony Towers
750 B Street, Suite 300
San Diego, CA 92101