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VIA MESSENGER

September 10, 2008

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

Re: ***Amicus Curiae Letter (Rule 8.500(g))***
Brinker Restaurant Corporation v. Superior Court (Hohnbaum, et al.)
California Court of Appeal, 4th Appellate District, Division One, D049331

Dear Chief Justice and Associate Justices:

This is a letter under Rule 8.500(g) of the 2008 California Rules of Court in support of the petition for review in *Brinker Restaurant Corporation v. Superior Court (Hohnbaum, et al.),* California Court of Appeal, 4th Appellate District, Division One, D049331 (hereafter, *Brinker*) by Real Parties in Interest Hohnbaum, et al. This letter, on behalf of the California Employment Lawyers Association (CELA), asserts that *Brinker* misapplied or neglected this Court's decision in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 155 P.3d 284 (hereafter, *Murphy*), in a manner that would divest *Murphy* of any real significance going forward, unless this Court accepts the review petition. For California's meal and rest period laws under the Industrial Welfare Commission's Wage Orders and Labor Code §§226.7 and 512, as amended, to have their intended impact, employers must ensure that employees cease working during breaks, or pay premiums.

I. Interest of Amicus

The undersigned writes on behalf of CELA, a "person" within the meaning of Rule 8.500(g), seeking to support the petition for review of Real Parties in Interest. CELA is a statewide non-profit organization dedicated to protecting workers' rights. CELA's member attorneys represent employees in all types of employment cases in state and federal courts and before administrative agencies, including employment discrimination, wrongful discharge, wage and hour, and unemployment insurance matters. In each of these substantive areas of law, CELA's members and their clients challenge employers who fail to adhere to California and federal employment laws. CELA frequently appears as amicus curiae in matters before this Court, including, *e.g.,* recent appearances in the

Murphy case and in *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 165 P.3d 556 (hereafter, "*Gentry*").

CELA's members have an abiding interest in interpretations of the Labor Code, including §§226.7 and 512, most directly at issue in this case, and the Industrial Welfare Commission ("IWC") Wage Orders. In particular, CELA seeks to ensure that the Labor Code's and Wage Orders' meal and rest period provisions are "interpreted broadly in favor of protecting employees," as this Court required in *Murphy*, 40 Cal.4th at 1104, and not in a manner, like that applied in *Brinker*, which results in merely facially-compliant company policies, but no real breaks for millions of California workers or premiums when they miss breaks.

The undersigned is also an attorney at the firm of Nichols Kaster, LLP, and currently representing employees in the matter of *Gabriella, et al., v. Wells Fargo Financial, Inc., et al.*, No. 08-80120 (9th Cir., filed 08/18/08) (pending) and *Gabriella, et al., v. Wells Fargo Financial, Inc., et al.*, 2008 WL 3200190 (N.D. Cal. Aug. 4, 2008), cited at pages 5 and 6 of the Petition for Review of Real Parties in Interest (hereafter, "petition"). In *Gabriella*, the United States District Court has denied class certification of meal and rest period claims under §§226.7 and 512, and under the appropriate Wage Order, following *Brinker*, after indicating at hearing that the Court was inclined to certify a class prior to *Brinker*. The *Gabriella* court stated further that it will reconsider certification if the Supreme Court does not uphold *Brinker*. As such, the undersigned has a personal stake in the Court's determination whether or not to accept the petition.

II. Review is Warranted

The petition outlines in great detail the extent of courts', public, and practitioners' interest in the result of this Court's determination of the split in Courts of Appeal between *Brinker*[1] and *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 962-963. *See* Petition at pp. 3-15. Indeed, *Brinker* rejected not only *Cicairos*, but the other Courts of Appeal statewide which relied upon *Cicairos* in holding that an employer's obligations under Labor Code §§226.7 and 512 and the Wage Orders require more than superficial compliance, including but not limited to: *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1199 (Cal. App. 1 Dist.); *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1189, 78 Cal.Rptr.3d 572 (Cal. App. 1 Dist.); *Zavala v. Scott Bros. Dairy* (2006) 143 Cal.App.4th 585, 591-595 (Cal. App. 2 Dist.); and *Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 135 (Cal. App. 2 Dist.).

The petition also discusses extensively why *Brinker* wrongly relied upon a dictionary definition of the term "provide," taken out of context, to minimize employers' responsibilities under California's meal and rest period laws. *See* Petition at pp. 15-20.

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[1] Hereafter, references to *Brinker* will include citations to the published case, *Brinker Restaurant Corporation, et al. v. Superior Court* (2008) 165 Cal.App.4th 25, 80 Cal.Rptr.3d 781.

Here, CELA focuses first and foremost on how *Brinker* will eviscerate *Murphy*, unless this Court accepts the petition.

A. *Brinker* flouts *Murphy,* which established that the right to meal and rest period premiums is unwaivable, like overtime pay, so employers are not shielded from liability for premiums by a facially-compliant policy or the notion that employees missed breaks "voluntarily."

Though *Murphy* is the California Supreme Court's leading case regarding meal and rest periods, *Brinker* only paid lip service to the decision in its introduction (*Brinker*, 165 Cal.App.4th at 31),[2] and failed to analyze how *Murphy's* reasoning should lead it to decide the extent of the employer's meal/rest period obligations.

1. This Court likened meal and rest period premium pay to overtime pay.

In *Murphy*, this Court held that meal and rest period premiums are wages, not penalties, and therefore not subject to the one-year statute of limitations that applies to claims for penalties. *Murphy*, 40 Cal.4th at 1114. The *Murphy* decision turned on this Court's lengthy discussion of the parallels between meal and rest period premium pay and overtime premium pay. *Id.* at 1109-1114.[3] Contrary to the *Brinker* holding (165 Cal.App.4th at 31), as *Murphy* explained, the overtime and meal/rest period requirements are similarly mandatory, *i.e.*: a California employer must pay an employee who works over eight hours a day at 1.5 times his/her regular pay rate for this overtime, whether the employee personally chose to work such overtime or not; likewise, an employer must pay premiums to an employee who performs service for the employer during meal or rest periods – regardless of the reasons. *See Murphy*, 40 Cal.4th at 1109. The *Brinker* decision says precisely the opposite – focusing on whether breaks are prohibited or voluntarily declined, which *Brinker* holds is, by its nature, an "individual inquiry." *Brinker* at pp. 43, 48, 58.

A California employer must ensure that its employees are paid at the overtime rate for work past eight hours in a day under Labor Code Section 1194 (*inter alia*), because of the "important public policy" underlying the wage and hour laws, which "concern not only the health and welfare of the workers themselves, but also the public health and general

[2] *Brinker* also cites *Murphy* for the proposition that DLSE opinion letters are not binding, though the latter, certainly, was not the crux of *Murphy*.

[3] *See, e.g., Murphy*, 40 Cal.4th at 1109: "[S]tatements made by IWC commissioners during hearings discussing the 'hour of pay' remedy for meal and rest period violations leave no doubt that the remedy was being adopted as a 'penalty' in the same way that overtime pay is a 'penalty'.... As has been recognized, in providing for overtime pay, the Legislature simultaneously created a premium pay to compensate employees for working in excess of eight hours while also creating a device 'for enforcing limitation on the maximum number of hours of work ..., to wit, it is a maximum hour enforcement device.... Describing overtime pay as both a 'penalty' and as 'premium pay' acknowledges that, while its central purpose is to compensate employees for their time, it also serves a secondary function of shaping employer conduct....It is in this same sense that the IWC used the word 'penalty' to describe the meal and rest period remedy." (Citations omitted.)

welfare." (citations omitted) *Gentry*, 42 Cal.4th at 456. The *Brinker* decision ignored the fact that the same public policy concerns underlie the meal/rest period premium payment requirements, and render them equally non-discretionary – for example: 1) health and safety considerations, including the fact that employees denied their rest and meal periods face greater risk of work-related accidents and increased stress (*Murphy*, 40 Cal.4th at 1113); 2) that the employer should not be unjustly enriched by receiving an extra 20 minutes of "free" work for the employee's missed rest periods (*id.* at 1104); and 3) that "[a]n employee forced to forgo his or her meal period...loses a benefit to which the law entitles him or her." *Id.* Employees have the right to be free of the employer's control during the meal period to use the time for their own purposes. *Id.*

Perhaps most importantly, *Brinker* failed to acknowledge that the California meal/rest period laws, like overtime laws, "serve the important public policy goal of protecting employees in a relatively weak bargaining position against the 'evil of overwork.'" *Gentry*, 42 Cal.4th at 456 (*citing Barrentine v. Arkansas-Best Freight System* 450 U.S. 728, 739, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981) [commenting on overtime provision of the FLSA].). The California meal/rest period laws, like the FLSA's requirements for overtime and minimum wages, are "designed to prevent consenting adults from transacting"[4] about whether or not workers should take the breaks to which they are entitled.

2. *Brinker* failed to treat meal/rest period premiums like overtime premium pay.

The *Brinker* court held, "The question of whether employees were forced to forgo rest breaks or voluntarily chose not to take them is a highly individualized inquiry that would result in thousands of mini-trials to determine as to each employee if a particular manager *prohibited* a full, timely break or if the employee *waived* it or voluntarily cut it short." (Ital. added) 165 Cal.App.4th at 49.[5] Yet, *Murphy* does not permit the interpretation either that employees may waive breaks, or that managers must actively "prohibit" breaks to be considered to have "forced" employees to work, such that premiums are warranted under Labor Code §§226.7 and 512.

a. *Murphy* does not allow employees to waive their right to breaks.

The *Murphy* decision repeatedly emphasized that meal and rest periods, like overtime pay, are "required," "mandated," and "mandatory." *Murphy,* 40 Cal.4th at 1106, 1111, 1113. That is, like overtime (and the minimum wage, for that matter), the right to meal

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[4] *Walton v. United Consumers Club, Inc.,* 786 F.2d 303, 306 (7th Cir.1986). *See also Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 65 S.Ct. 895, 89 L.Ed. 1296 (1945) (statutory wages cannot be waived by agreement).

[5] *Brinker* also inappropriately required a showing that an employer "forbid" breaks. *Brinker,* 165 Cal.App.4th at 49.

and rest period premiums is generally unwaivable.[6] *See Gentry*, 42 Cal.4th at 456. As such, an employer cannot deny meal/rest premiums, any more than it can deny overtime and minimum wage payments, whenever it claims an employee "voluntarily" worked through breaks, worked overtime,[7] or decided to forego earning the minimum wage.[8]

b. Managers need not "prohibit" breaks, as *Brinker* held, to warrant premium pay under Labor Code §§226.7(b).

Murphy upheld the lower court's decision, characterizing the plaintiff's missed meal and rest periods as "forced," because – though he was a store manager without supervision on-site "prohibiting" a break – the press of business consumed the plaintiff's breaks. *Murphy*, 40 Cal.4th at 1100-1102 n.2, 1113. These missed breaks violated Section 226.7, and triggered the employer's duty to pay premiums. *Id.* As such, *Murphy* holds with *Cicairos*, 133 Cal.App.4th at 963, where the Court of Appeal held that defendant did not fulfill its obligations with respect to breaks, since a witness missed breaks because of the pressure to complete jobs quickly. *Brinker* improperly legislated a new and excessive "prohibition" requirement for premium pay.

3. *Brinker* ignored the fact that, like overtime pay, meal/rest period premiums are designed for "shaping employer conduct" – which does not

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[6]Language in IWC Wage Orders and Labor Code section 512 allows for "waiver" of meal periods only: by "mutual consent" when employees work shifts of not more than six hours (*e.g.,* 8 Cal. Code Regs., §11050, subd. 11(A); *see also* Labor Code §512); and, arguably, on shifts of less than 12 hours, so long as an employee has taken a first meal period. Labor Code §512(a). These two circumstances are not at issue in *Brinker*. Likewise, the IWC Wage Orders set forth specific circumstances under which an "on duty" meal period is permitted: "when the nature of the work prevents an employee from being relieved of all duty" (not the case here, where Defendant has argued that the nature of its work permits most of its employees to take meal periods), *and* by written agreement (which also does not exist here). *E.g.,* 8 Cal. Code Regs., §11050, subd. 11(A). Because the IWC and Legislature expressly allowed waiver or an on-duty meal period *only* in certain limited circumstances, it is reasonable to conclude that waiver is not allowed in other circumstances. *See Murphy*, 40 Cal.4th at 1107 (where Legislature has used specific language in Labor Code, absence of such language elsewhere suggests Legislature's intent).

[7]It is well-established in California, like under the Federal Fair Labor Standards Act (FLSA), that the voluntariness of an employee's overtime work has no impact on the employer's obligation to pay overtime premium pay (*i.e.,* 1.5 times regular rate) for the excess hours worked. *See* Cal. Labor Code §510 (overtime must be paid for any work in excess of eight hours in one workday, any work in excess of 40 hours in any one workweek, and the first eight hours worked on the seventh day of work in any one workweek); *Advanced-Tech Sec. Services, Inc. v. Superior Court*, 163 Cal.App.4th 700, 77 Cal.Rptr.3d 757, 762 (Cal.App. 2 Dist. June 3, 2008) (Assembly Bill No. 60 (amending Section 510 in 1999) was to ensure daily overtime pay after 8 hours of work in a day in California); *General Elec. Co. v. Porter*, 208 F.2d 805, 807 (9th Cir. 1953) (29 U.S.C. §260 allows good-faith defense to liquidated damages, but employer must pay unpaid overtime compensation under §216 of the FLSA regardless); *Taylor v. Carter*, 948 F.Supp. 1290, 1297(W.D.Tex. 1996) (discussing strict liability for FLSA overtime violations).

[8]*See Bartholomew v. Heyman Properties*, 132 Cal.App.2d Supp. 889, 894-895 (Cal.Super. 1955) (whether or not employee voluntarily worked overtime or worked for less than the minimum wage, *i.e.,* was *in pari delicto* or equally at fault in the fact that overtime was worked or the minimum wage was not paid, is irrelevant under Labor Code, which makes a public policy determination to penalize only the employer with the overtime premium or minimum wage payments).

occur if employers satisfy the statutory requirements simply by having a compliant meal/rest period policy on the books.

The *Brinker* decision took no account of the fact that meal and rest period premiums – like overtime pay – are designed for "shaping employer conduct." *Murphy*, 40 Cal.4th at 1109. Like overtime pay, the meal and rest period remedy has a "corollary disincentive aspect in addition to its central compensatory purpose." *Id.* at 1110. Employers' conduct will not be "shaped" toward enforcing meal/rest periods, as *Murphy* requires, if employers are never required to pay millions of California employees a single meal/rest period premium, regardless of the number of missed breaks, simply because employers have facially-compliant policies.[9] On the contrary, employers' managers will be/are encouraged by *Brinker* to push employees to work through all meal/rest breaks, if a facially-compliant policy covers their liability and saves them from having to pay any premiums.[10]

B. *Brinker* failed to note that, according to *Murphy,* Section 226.7 was designed to strengthen – not weaken – the protections of the IWC Wage Orders, which mandate meal and rest periods.

Notwithstanding *Brinker's* emphasis on the "fails to provide" language in Section 226.7(a), the mandatory language of the IWC Wage Orders does not include the term "provide" in reference to the employer's duties. Rather, the term "provide" was only recently introduced in the course of *strengthening* the mandatory meal period provisions of the Wage Orders. *See Murphy*, 40 Cal.4th at 1105-1106. *Brinker*'s interpretation of the term "provide" from Section 226.7 as eradicating the longstanding mandatory meal period requirements of the Wage Orders conflicts with the language and purpose of the statute.[11] Section 226.7 explicitly requires employers to "provide" meal/rest periods "*in accordance with an applicable order of the Industrial Welfare Commission.*" (emph.

[9] For example, in *Gabriella,* the United States District Court acknowledged evidence that the employer (Wells Fargo) did not pay any meal and rest period premiums statewide for a significant portion of the class period, and that at least some employees missed meal and rest periods. *Id.,* 2008 WL 3200190, at **2-3. Yet, the court held that, in light of *Brinker*, individual questions had to be resolved as to the reasons why each employee missed his/her breaks. *Id.*

[10] On the other hand, if meal/rest period premiums are consistently, automatically assessed, every time employees fail to affirm that they take a meal/rest period, managers will have a strong disincentive from allowing meal/rest period skipping, to wit: controlling the bottom-line payroll budget by closely monitoring their non-exempt employees' meal/rest breaks. The latter is precisely the purpose of Section 226.7, as with overtime premiums.

[11] As this Court explained, discussing the version of Section 226.7 ultimately signed into law, the Senate Rules Committee explained that Section 226.7 (as amended in committee) was intended to track existing provisions of the IWC wage orders regarding meal/rest periods (*Murphy*, 40 Cal.4th at 1107 (*citing* Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Bill. No. 2509, as amended Aug. 25, 2000, p. 4))– prohibiting employers from employing their non-exempt workers without 30-minute uninterrupted meal periods after five hours.

added) Section 226.7(b). Employers are still bound to ensure that employees take meal/rest periods, or pay premiums.

For more than 30 years, the IWC Wage Orders governing meal periods have dictated: "*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...." *E.g.,* 8 Cal. Code Regs., §11050, subd. 11(A) (emph. added).[12] The meal period provision is unambiguous—*employers may not allow employees to work without taking meal periods*, unless those employers pay premiums. *Id.* at subd. 11(B).

C. *Brinker's* no-timing and one-break interpretations regarding meal and rest periods would negate the purposes of Labor Code §§512, 226.7, and the Wage Orders, recognized by *Murphy*: to address public health and safety, and grant employees frequent, duty-free breaks.

Murphy did not mince words about the requirements of the Labor Code and the IWC Wage Orders with respect to meal and rest breaks: employees are entitled to an unpaid 30-minute, duty-free meal period after working for five hours and a paid 10-minute rest period per four hours of work. *Murphy,* 40 Cal.4th at 1104. *Brinker* seeks to undermine the clear statutory and regulatory purposes described in *Murphy.*

For example, *Brinker* fails to recognize that meal and rest periods under §§512 and 226.7 and the Wage Orders are intended to reduce the risk of work-related accidents and increased stress. *Murphy,* 40 Cal.4th at 1113. As the petition indicates, the holdings of *Brinker*, 165 Cal.App.4th at 50-54, could lead to the absurd result that non-exempt workers would not receive a meal break until after 15 hours of work, and no rest break before the first meal. Petition at pp. 21, 25-26.

No reasonable reading of §512(a) ("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" (emph. added)) would render such a harsh interpretation. The Court will not require the testimony of a medical expert to know that 15 hours of physical or even mental labor without a meal would tax an employee beyond what the legislature has deemed acceptable – especially when the statutes and regulations must be "interpreted broadly in favor of protecting employees." *See Murphy,* 40 Cal.4th at 1104.

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[12] In support of the earlier argument that the meal premiums are and should be treated like overtime premiums, it is noteworthy that each Wage Order provision regarding meal breaks is strikingly similar to the corresponding overtime Wage Order provision. The latter says: "*[E]mployees shall not be employed* more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (11/2) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek." *E.g.,* 8 Cal. Code Regs., §11050, subd. 3(A)(1) (emph. added). The only difference is the use of the passive voice.

Likewise, requiring a paid rest break before a meal break is inherent in the directive that the 10-minute rest occur in each four hours of work (*Murphy*, 40 Cal.4th at 1104), while meals occur in each five hours. That is, paid 10-minute breaks *per* four hours of work, as recognized by *Murphy* (not, "until after" four hours of work, as *Brinker* would have it, 165 Cal.App.4th at 43), equals two 10-minute rest breaks per eight-hour day. Semantics cannot hide the fact that eight divided by four still equals two.

Nor can *Brinker's* dictionary acrobatics hide the fact that the "major fraction" of four hours, referenced in the rest period requirement, equals something more than two hours – *i.e.,* "major fraction" is synonymous with "more than half." *Id.,* 165 Cal.App.4th at 45-46. The Wage Orders require that employees who work over six hours (*i.e.,* one four-hour period, plus more than half of a second four-hour period) receive two ten-minute rest breaks.

The plain language of the statute is designed to ensure regular breaks for employees, to keep them safe, healthy, and not incidentally, productive. *Murphy,* 40 Cal.4th at 1113. The statute grants employees paid time off throughout the workday, which employers may not coopt as additional work time. *See id.* at 1104.

D. *Brinker*'s rejection of survey statistical evidence would weaken *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319 ("*Sav-On*"), and essentially preclude any class litigation of wage/hour claims – though such is favored by *Gentry*.

This Court decided *Sav-On,* in part, to welcome a 21st century approach to litigation, which allows usage of survey and statistical data. *See Sav-On,* 34 Cal.4th at 333. This Court explained:

> California courts and others have in a wide 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....[T]he use of statistical sampling in an overtime class action "does not dispense with proof of damages but rather offers a different method of proof."

Id. (*quoting Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 750, 9 Cal.Rptr.3d 544)).

Since *Sav-On,* and before *Brinker*, California and federal courts have become more – not less – inclined to rely upon survey and statistical data to permit consideration of class actions. *See, e.g., Dukes v. Wal-Mart, Inc.,* 509 F.3d 1168, 1176 (9th Cir. 2007). In *Dukes,* the 9th Circuit held that such information may be used to litigate discrimination claims brought by a class that is "broad and diverse," noting that the *Dukes* class "encompasses

approximately 1.5 million employees, both salaried and hourly, with a range of positions, who are or were employed at one or more of Wal-Mart's 3,400 stores across the country." *Id.*, 509 F.3d at 1176-1177. The Court concluded that, despite the extraordinary spectrum of factual scenarios giving rise to the suit, such a case could be manageable, employing statistical and survey data, *inter alia. Id.* at 1183, 1190-93 (*following Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767, 782-87 (9th Cir.1996)).

In the wage/hour context, the great jurist Thelton Henderson, of the United States District Court for the Northern District of California, favored "innovative procedural tools that can efficiently resolve individual questions regarding eligibility and damages [such as]....administrative mini-proceedings, special master hearings, and specially fashioned formulas or surveys." *Tierno v. Rite Aid Corp.*, 2006 WL 2535056, at *11 (N.D. Cal.). Without using surveys and other class action mechanisms, the consequence would be dozens or hundreds of individual suits, or likely the abandonment of some individual claims. *Id.* As Judge Henderson explained regarding this outcome, "The former would undoubtedly result in a great duplication of effort given the predominance of common questions of law and fact, while the latter would result in lost access to the courts." *Id.*

Judge Henderson's concerns were echoed by this Court in *Gentry,* which explained that for public policy reasons, class actions are a favored mechanism for vindicating the purposes of California's wage/hour laws. *See Gentry*, 42 Cal.4th at 463 (class litigation "is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation...[and] the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations.").[13] Yet, no wage and hour matter can ever be certified for class litigation if, as *Brinker* holds, statistical and survey data are unusable because of the supposedly "individualized inquiry" in determining whether an employer allows or forbids breaks. *Brinker*, 165 Cal.App.4th at 48-49. *Brinker*'s refusal to consider survey and statistical data in meal/rest litigation is tantamount to a rejection of the class action mechanism, and thus, a rejection of *Gentry*.

E. Ruling upon the merits of wage/hour claims at the certification stage – as *Brinker* does – contravenes this Court's rulings as to the scope of certification review.

It is a basic principle of class action review that, in adjudicating a motion for class certification, the court accepts the allegations in the complaint as true, so long as those

[13] This Court held class actions in wage/hour employment cases are preferable because of, among other reasons: the fear of retaliation employees feel when forced to pursue litigation individually (*Gentry*, 42 Cal.4th at 459-460); the modest individual recovery, which essentially exculpates an employer with problematic wage/hour practices if no class action is certified (*id.* at 457-459); class members' lack of awareness of their rights (*id.* at 461); the random and fragmentary enforcement against a major employer which will occur in the absence of class litigation, resulting in a windfall for wage/hour violators (*id.* at 462); and the transient nature of employees' work in a high-turnover industry, since employees "move on" and are unlikely to seek individual vindication of their rights. *Id.* at 462.

allegations are sufficiently specific to permit the Court to make an informed decision. *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 443, 97 Cal.Rptr.2d 179 Cal. 2000 ("[W]e are not convinced that certification should be conditioned upon a showing that class claims for relief are likely to prevail."). *See also,* e.g., *Blackie v. Barrack,* 524 F.2d 891, 901 FN17 (9th Cir. 1975). The merits of the class members' substantive claims are generally irrelevant to this inquiry. *Id. See also Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177-78, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). As the petition explains, at pp. 29-31, the Court of Appeal overstepped its authority in *Brinker* by deciding substantive questions of fact and law in response to a class certification motion – instead of merely determining that a common question of fact or law exists and predominates.

Fundamentally, since *Brinker* holds that – for all employees involved – the employer's only obligation is to refrain from prohibiting breaks – the Court is making a ruling on a question of law applicable to the whole class, without having first certified the class. In other words, the *Brinker* court rules that the defendant employers had sufficient policies under California's meal/rest laws, though determination of their legitimacy inherently warrants class treatment. *See, e.g., Otsuka v. Polo Ralph Lauren Corp.,* --- F.R.D. ----, 2008 WL 3285765, **4, 7 (N.D.Cal. 2008) (defendant argued its meal/rest policies were lawful under California law, but the centrality of this question itself warranted certification).

This Court should not permit courts to follow *Brinker* and to begin ruling on facts and commonly-applicable questions of law at the certification stage. The petition for review should be granted.

Thank you for your consideration.

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<u>CERTIFICATE OF SERVICE</u>
(C.C.P. Section 1013A and 2015.5)

I, Melissa Honkanen, declare that I am a citizen of the United States, over 18 years of age, and not a party of the within action. My business address is One Embarcadero Center, Suite 720, San Francisco, California, 94111.

Upon this day, I served the following document(s):

Amicus Curiae Letter (Rule 8.500(g))
<u>Brinker Restaurant Corporation v. Superior Court,</u>
California Court of Appeal, 4th Appellate District, Div One,
D049331

on the following party(s) by placing true copies there of in sealed envelopes addressed as shown below for service as designated below:

(A) <u>By First Class Mail</u>: I am readily familiar with the practice of the law firm of Nichols Kaster, LLP for the collection and processing of correspondence for mailing within the United States Postal Service. I deposited each such envelope, with first class postage thereon fully prepared, in a recognized place of deposit of the U.S. Mail in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) <u>By Personal Service</u>: I personally delivered the above document(s) to the office of the addressee on the date shown herein.

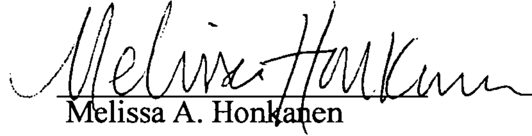
(C) <u>By Messenger Service</u>: I am readily familiar with the practice of the law firm of Nichols Kaster, LLP for messenger delivery, ad I delivered each such envelope to a courier employed by ACE MESSENGER & ATTORNEY SERVICES, INC., with whom we have a direct billing account, who personally delivered each such envelope to the office of the address on the date last written below.

(D) <u>By Overnight/Mail Courier</u>: By placing a true copy of thereof enclosed in a sealed envelope(s), addressed as above, and placing each for collection by overnight mail service or overnight mail service or overnight courier service. I am readily familiar with my firm's business practice of collection and processing of correspondence for overnight mail or overnight courier service, and any correspondence placed for collection for overnight delivery would, in the ordinary course of business, be delivered to an authorized courier or driver business, be delivered to an authorized courier or driver authorized by the overnight mail carrier to receive documents, with delivery fees paid or provided for, that same day, for delivery on the following business day.

(E) <u>By Facsimile</u>: I served such documents(s) via facsimile electronic equipment transmission (fax) on the parties in this action, pursuant to oral and/or written agreement between such parties regarding service by facsimile by transmitting a true copy to the following facsimile numbers:

Type of Service	ADDRESSEE	PARTY
(A)	Rex S. Heinke Akin Gump Strauss Hauer & Feld 2029 Century Park East, Suite 2400 Los Angeles, CA 90067	Respondent Brinker Restaurant
(A)	Karen Joyce Kubin Morrison & Forrester LLP 425 Market Street San Francisco, CA 94105	Respondent Brinker Restaurant
(A)	Timothy D. Cohelan Cohelan & Khoury 605 C Street, Suite 200 San Diego, CA 92101-5305	Real Parties of Interest
(A)	Frederick P. Furth The Furth Firm LLP 225 Bush Street, 15th Floor San Francisco, CA 94101	Real Parties of Interest
(A)	Kimberly Ann Kralowec Schubert Jonckheer Kolbe & Kralowec LLP 3 Embarcadero Center, Suite 1650 San Francisco, CA 94111	Real Parties of Interest
(A)	L. Tracee Lorens Lorens & Associates 1202 Kettner Blvd., Suite 4100 San Diego, CA 92101	Real Parties of Interest
(A)	William Turley The Turley Law Firm, APLC 555 West Beech St, Suite 460 San Diego, CA 92101	Real Parties of Interest
(A)	Clerk California Court of Appeal 4th Appellate District, Division One 750 "B" Street, Suite 300 San Diego, CA 92101	
(A)	Honorable Patricia A.Y. Cowett San Diego County Superior Court P.O. Box 122724 San Diego, CA 92112-2724	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 10, 2008 at San Francisco, California



Melissa A. Honkanen