IMPACT FUND

125 University Avenue, Suite 102, Berkeley, CA 94710-1616
Tel 510.845.3473 | Fax 510.845.3654 | impactfund@impactfund.org | www.impactfund.org

September 22, 2008

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Schubert Jonckheer Kolbe & Kralowec LLP

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

Re: *Brinker Restaurant Corp. v. Superior Court* (No. S166350) Rule 8.500(g) Letter in Support of Petition for Review

Dear Chief Justice George and Associate Justices:

This letter urging the Court to grant the Petition for Review of the Court of Appeal's decision in *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal. App. 4th 25, is submitted on behalf of Equal Rights Advocates, the Impact Fund, the Lawyer's Committee for Civil Rights of the San Francisco Bay Area, and Pubic Advocates. We are California-based nonprofit advocacy organizations dedicated to advancing and protecting the civil rights of minority groups, women, and persons with disabilities. As part of these efforts, we undertake litigation to enforce federal and state laws prohibiting discrimination in the workplace. We write today regarding the Court of Appeal's discounting of the important role pattern and practice evidence may play in determining whether class certification is appropriate.

I. The *Brinker* court's error in dismissing pattern and practice evidence is illustrative of a conflict in the lower courts

We write to urge the Court to review the *Brinker* decision because it creates a split among the Courts of Appeal and illustrates the need for further guidance on the relevance of survey and statistical evidence in demonstrating that an employer's centralized policy or practice lends itself to the maintenance of a class action. In *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, this Court confirmed that class certification determinations in wage and hour actions

can be based on "pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices," *id.* at 333. The relevance of such evidence has long been recognized in employment discrimination cases as well. *See Int'l Bhd. of Teamsters v. United States* (1977) 431 U.S. 324, 337-40, *cited with approval in Sav-on*, 34 Cal. 4th at 333 n.6.

Following *Sav-on*, the Court of Appeal reversed a denial of class certification because the trial court had "discard[ed] out of hand appellants' pattern and practice evidence," and thus had "turned its back on methods of proof commonly allowed in the class action context." *Capitol People First v. Dep't of Dev. Servs.* (2007) 155 Cal. App. 4th 676, 695. *Capital People First* stands in sharp contrast to the understanding of the *Brinker* court, which acknowledged that courts may use pattern and practice evidence to determine the propriety of class certification, but ultimately "discard[ed] out of hand," *id.*, the possibility that plaintiffs could have proffered such evidence to demonstrate the predominance of common questions, *Brinker*, 165 Cal. App. 4th at 49, 59. The court did so by failing to recognize that statistical and survey evidence could create an inference that Brinker employees were not taking meal or rest breaks as the result of a class-wide policy or practice. *See, e.g., id.* at 59 (explaining that pattern and practice evidence could never show why meal breaks were not taken).

The rationale of the *Brinker* court, that breaks must be evaluated on an individual basis, ignores the theory of plaintiffs' case that there was a pattern or practice of denial of meal and rest periods, and rules out the primary evidence that could show such a pattern. The same rationale could deny class treatment of a claim that an employer discriminated against a protected class because, *arguendo*, each employment decision must be assessed separately for evidence of discriminatory intent. *Contra Alch v. Superior Court* (2008) 165 Cal. App. 4th 1412, 1428 ("Statistical proof is indispensable in a disparate impact case . . . ."); *Alch v. Superior Court* (2004) 122 Cal. App. 4th 339, 380 ("Plaintiffs 'normally seek to establish a pattern or practice of discriminatory intent by combining statistical and nonstatistical evidence . . . .'") (quoting 1 Lindemann & Grossman, *Employment Discrimination Law*, 45 (3d ed. 1996)). While statistics alone do not provide "the reasons" for an employer's decision, a pattern of conduct demonstrated by statistics can raise an inference of class-wide unlawful behavior, whether in the context of a wage and hour violation or employment discrimination. If liability is subsequently established, each class member is then presumed to have

been subjected to the unlawful behavior. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal. App. 4th 715, 750, *cited with approval in Sav-on*, 34 Cal. 4th at 333.

In this case, plaintiffs could have put forth pattern and practice evidence showing that most meal or rest breaks were never taken. Such evidence, if statistically significant, could be indicative of a class-wide policy or practice by defendant of discouraging or preventing meal and rest periods. *See Alch*, 122 Cal. App. 4th at 381 n.35 ("'Statistics alone may be used to establish a prima facie pattern-or-practice case where a gross, statistically significant, disparity exists.'"); *see also Capital People First*, 155 Cal. App. 4th at 692-93 ("[C]ourts may consider pattern and practice [or] statistical and sampling evidence . . . to assess whether that common behavior toward similarly situated plaintiffs renders class certification appropriate."); *Armstrong v. Davis* (9th Cir. 2001) 275 F.3d 849, 868 ("[C]ommonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members."). Alternatively, such evidence could raise an inference of the *impossibility* of taking meal or rest breaks due to class-wide employment policies not directly related to breaks but which affect the ability of employees to take breaks without jeopardizing their employment or earnings. Of course, taking note of the potential of such statistical evidence at the class certification stage does not bind the finder of fact at the merits stage, where such evidence may be supplemented by additional evidence and sources of proof.

Rather than consider whether pattern and practice evidence might have been significant enough to permit reasonable inferences of defendant's class-wide behavior, however, the Court of Appeal erroneously concluded that such evidence *could never be relevant* to the question why employees did not take meal or rest breaks. *See, e.g., Brinker*, 165 Cal. App. 4th at 59 ("While time cards might show when meal breaks were taken and when they were not, they cannot show *why*.").

This error by the Court of Appeal reflects similar confusion among trial courts, which have frequently failed to recognize the importance of pattern and practice evidence in certifying classes of similarly-situated employees. *See, e.g., Parris v. Lowe's HIW, Inc.* (Cal. Ct. App. July 30, 2007) 2007 WL 2165375, *2 (trial court denied class certification despite the "pervasive scope" of an off-the-clock problem that might have been demonstrated through "statistical sampling evidence"); *In re Home Depot Overtime Cases* (Cal. App. Dep't Super. Ct. Feb. 2, 2006) 2006 WL 330169, *4 (dismissing out of hand the ability of statistical

evidence to demonstrate the amount of time employees spent on exempt and non-exempt work).

III. The decision below contravenes this Court's holdings on the proper role of a court reviewing a class certification order

We also urge the Court to grant the Petition for Review because the Court of Appeal erred by divesting the trial court of its discretion to make inferences from statistical evidence. Trial courts "'are afforded *great discretion* in granting or denying certification'" and their rulings on class certification will stand unless "'improper criteria were used'" or "'erroneous legal assumptions were made.'" *Sav-on*, 34 Cal. 4th at 326-27 (quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 435-36) (emphasis added). For this reason, "[w]here a certification order turns on inferences to be drawn from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." *Id.* at 328 (internal quotation marks omitted) (alteration in original).

Here, the Court of Appeal first determined that employers need only make available meal and rest periods, not ensure that they are actually taken. After announcing this new interpretation of the Labor Code and regulations, the Court of Appeal proceeded to examine the evidence presented to the trial court and decide that plaintiffs had failed to demonstrate the predominance of common questions. This was procedurally improper. Instead, because "the weight of the evidence [is] a matter generally entrusted to the trial court's discretion," *id.* at 334, the Court of Appeal should have remanded the case to the trial court to determine, in the first instance, whether statistical or survey evidence could lead to an inference that defendant had a class-wide policy or practice of routinely preventing and/or discouraging its hourly employees from taking meal and rest periods.[1]

In other words, where certification of the class could "turn[] on inferences to be drawn from the facts," *id.* at 328, the proper sequence is for the reviewing court to rule on the legal question and then remand to permit the trial court to determine

[1] Had this case been remanded, plaintiffs assert they could have presented evidence from which the trial court reasonably could have inferred that a statistically high rate of missed meal and rest periods was due to a class-wide pattern and practice of discouraging and/or preventing hourly employees from taking these breaks. This inference could have been based on Brinker's policy of requiring its hourly food servers to transfer tables – and thereby lose tips – when taking a meal or rest period. The inference also could have been based on declarations from current and former hourly employees showing that employees were affirmatively prevented from taking meal and rest periods and that Brinker had a class-wide practice of routinely understaffing its restaurants.

what inferences can be drawn from the pattern and practice evidence. In this case, the trial court never had the opportunity to apply the facts to the new substantive rule established by the Court of Appeal. This Court should overturn that approach to preserve the role of the trial court as required in *Sav-on*. *See id.* at 328, 331.

Accordingly, we urge this Court to grant the Petition for Review to clear up confusion about the use of pattern and practice evidence in the certification context and to correct the errors of the Court of Appeal.

Sincerely,

Brad Seligman

Cc: Counsel of record

1 PROOF OF SERVICE

2 I, Tony Dang declare that:

3 I am employed at the Impact Fund, 125 University Avenue, Suite 102, Berkeley,

4 California, 94710. I am over the age of 18 years and not a party to this action. On September

5 22, 2008, I served a true and correct copy of the following document(s):

6 **Rule 8.500(g) Letter in Support of Petition for Review**

7 Karen J. Kubin, Esq.
MORRISON & FOERSTER, LLP
8 425 Market Street
San Francisco, CA 94105

Rex S. Heinke, Esq.
Joanna R. Shargel, Esq.
AKIN GUMP STRAUSS HAUER & FELD LLP
9 2029 Century Park East, Suite 2400
Los Angeles, CA 90067

10

11 L. Tracee Lorens, Esq.
12 LORENS AND ASSOCIATES
1202 Kettner Blvd., Suite 4100
13 San Diego, CA 92101

Robert C. Schubert, Esq.
Kimberly A. Kralowec, Esq.
SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP
One Embarcadero Center, Suite 1650
14 San Francisco, CA 94111

15

William Turley, Esq.
16 Robert Wilson, III, Esq.
THE TURLEY LAW FIRM, APLC
17 555 West Beech Street, Suite 460
San Diego, CA 92101-3155

Timothy D. Cohelan, Esq.
Michael D. Singer, Esq.
COHELAN & KHOURY
605 C Street, Suite 200
18 San Diego, CA 92101
Telephone: (619) 595-3001

19

20 Julie Su, Esq.
ASIAN PACIFIC AMERICAN LEGAL
21 CENTER
1145 Wilshire Boulevard, 2nd floor
22 Los Angeles, California 90017
Tel: (213) 977-7500 x 240
23 Fax: (213) 977-7595

Peter Zschiesche
EMPLOYEE RIGHTS CENTER
San Diego-Imperial Counties Labor Council
3717 Camino Del Rio South
San Diego, CA 92108
Tel: (619) 283-5411
Fax: (619) 281-1296

24

25

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25

Irma Herrera
EQUAL RIGHTS ADVOCATES
1663 Mission St., Suite 250
San Francisco, CA 94103
Tel: (415) 621-0672
Fax: (415) 621-6744

Donna Ryu
UC HASTINGS COLLEGE OF THE LAW
HASTINGS CIVIL JUSTICE CLINIC
100 McAllister Street, Suite 300
San Francisco, California 94102
Tel: (415) 557-7887
Fax: (415) 557-7895

Margarita Prado-Alvarez
KATHARINE & GEORGE ALEXANDER COMMUNITY LAW CENTER
SANTA CLARA UNIVERSITY SCHOOL OF LAW
1030 The Alameda
San Jose, CA 95126
Tel: (408) 288-7030
Fax: (408) 288-3581

Matthew Goldberg
LEGAL AID SOCIETY-EMPLOYMENT LAW CENTER
600 Harrison Street, Suite 120
San Francisco, CA 94107
Tel: (415) 864-8848
Fax: (415) 864-8199

Anamaria Loya
LA RAZA CENTRO LEGAL
474 Valencia Street, Suite 295
San Francisco, CA 94103
Tel: (415) 553-3429
Fax: (415) 255-7593

D. Michael Dale
NORTHWEST WORKERS' JUSTICE PROJECT
917 Southwest Oak Street, Suite 426
Portland, OR 97205
Tel: (503) 525-8454

Marci Seville (SBN 67491)
GOLDEN GATE UNIVERSITY SCHOOL OF LAW
WOMEN'S EMPLOYMENT RIGHTS CLINIC
536 Mission Street
San Francisco, CA 94105-2968
Tel: (415) 442-6675
Fax: (415) 896-2450

[X] Via First Class Mail to Attorneys

TONY DANG
IMPACT FUND