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Via Messenger

August 29, 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,
California Court of Appeal, 4th Appellate District, Div One,
D049331

Dear Chief Justice and Associate Justices:

This is a letter under Rule 8.500(g) in support of the petition for review in this matter.

Interest of Amicus

Our client is the California Labor Federation, AFL-CIO, a person within the meaning of Rule 8.500(g). The Federation is chartered by the American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") and is an unincorporated association of affiliated labor organizations in California representing over two million workers in the state. The Federation's affiliates and their members are deeply interested in the issues in this action. If employers need not ensure meal breaks are actually taken by workers, as provided in the IWC Wage Orders and more recently in Labor Code §512, then unions must affirmatively negotiate the actual taking of such breaks and may no longer assume that the actual taking of such breaks are fundamental minimum labor standards imposed by law for the welfare of California workers. In addition, the

Federation has historically played a role in the legislative process for such minimum labor standards for all workers in California including the unorganized. The opinion from which review is sought lessens the protections of all workers in the state, including the most vulnerable. Instead of being made to take breaks, employees will get them only if and when they ask for them and provided of course that employees are ready to brave the displeasure of owners and supervisors.

The Federation was the proponent of A.B. 60 which added the meal period language in Labor Code §572 at issue in this case.

Review is Necessary

Review is "necessary to secure uniformity of decision or to settle an important question of law." CRC Rule 8.500(b)(1).

As the petition for review more fully advises the Court, the Opinion is in conflict with Cacairos v. Summit Logistics, Inc. (2005) 133 Cal.App. 4th 949. The issue is in at least two cases in the Court of Appeal as the petitioners also represent. In addition, and as the petition also advises the Court, there are federal district court decisions in California going both ways. Sooner rather than later one such case will surely reach the Ninth Circuit where it is certainly likely on the current state of the law that the Ninth Circuit will formally request this Court for a decision on a controlling question of California law where understandably the Circuit cannot clearly discern what that law is. CRC Rule 8.540. A grant of review now would well serve overall judicial efficiency.

Judicial efficiency has in the past also played a role in leading this Court to assume jurisdiction when combined with a recognition of the statewide importance of the Wage Orders of the California Industrial Welfare Commission (IWC). In Industrial Welfare Commission v. Superior Court (1980) 27 Cal. 3d 690, employer challenges to the 1976 Wage Orders were pending in four superior courts when this Court granted a writ petition of the IWC and exercised this Court's original jurisdiction to take the actions to itself. This Court had just decided related issues under the 1976 Wage Orders a year earlier in California Hotel and Motel Assn. v. Industrial Welfare Commission (1979) 25 Cal. 3d 200. In assuming original jurisdiction this Court said it was doing so "[i]n view of the

large number of employees affected by the challenged orders, and the tortuous litigation history" which had prevented the implementation of part of the Orders. 27 Cal.3d at 699. Certainly the history of litigation over meal periods is just as tortuous. This Court has just seen a year ago one manifestation of the importance of this issue in Murphy v. Kenneth Cole Productions, Inc. (2007) 40 Cal. 4th 1094. It seems clear now that the even more fundamental right of employees actually to take a meal period without having to screw up their courage to ask their employer to do so is a pressing issue for the vast majority of California workers, divides the courts and badly needs resolution.

A further reason for review is that the California Labor Commissioner has directed her staff to stop following Cacairos and to give full effect to the Opinion from which review is now being sought. http://www.dir.ca.gov/DLSE/Brinker_memo_to_staff-7-25-08.pdf. (A copy is attached. Rule 8.500(g)(2) and Rule 8.504(d(C).) This Memorandum to DLSE Staff is dated July 25, 2008, i.e. even before the Opinion below was final in the Court of Appeal. The significance of this directive is that the DLSE hearing officers/deputies will take as the applicable law the Opinion below in all wage claims involving meal periods in the procedures under Labor Code §§98, 98.1 and 98.2 and that the Opinion below will control the Labor Commissioner's prosecutorial responsibilities and power to intervene in court proceedings under Labor Code §§98.3 and 98.5 respectively. Under Labor Code §98.4 staff attorneys may and sometimes must represent financially indigent wage claimants in the superior court. The professional duty of these lawyers to their client wage claimants should require them to urge Cacairos to be the better reasoned result. Certainly in the face of conflicting appellate decisions the superior court not only can but "must make a choice between the conflicting decisions." Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 456. If the superior courts must be open to considering both opinions, then the lawyers for the Labor Commissioner must make the argument based on Cacairos because that would be in the best interests of the wage claimants. Yet, the Memorandum of the Labor Commissioner summarily directs DLSE staff to follow only the Opinion below – a directive that will persist throughout the State for the indefinite future, implicating the Labor Commissioner's activities on behalf of the poorest workers amongst us. This Court's grant of review would of course immediately supercede the Opinion below and force the Labor Commissioner immediately to follow Cacairos because the agency must follow a definitive appellate opinion

construing a statute. Henning v. Industrial Welfare Commission (1988) 46 Cal. 3d 1262, 1270. We recognize that the present Labor Commissioner's motive to favor the interests of the employer community over "the general welfare of employees" [1] may not be directly relevant to which of the conflicting Court of Appeal opinions is correct, but this unseemly rush to embrace the one and to ignore the other reinforces the need for review by this Court now lest an erroneous view of the law controls the Labor Commissioner's activities for the indefinite future.

That the Opinion below and now the Labor Commissioner have an erroneous view of the law is something the Federation would hope to address in a separate application and amicus curiae brief if this Court grants review. Briefly, the following legal points are among the major reasons why the Opinion is erroneous and why review is merited.

1. Historically, the IWC has required employers to ensure a meal period break is taken as part of the IWC's charge to prescribe "minimum" requirements for wages, hours and working conditions – beginning in 1916 – for women and children initially and then in 1972 - 1973 for "all" employees in the state. Industrial Welfare Commission v. Superior Court (1980) 27 Cal. 3d 690, 700-701. The meal period was just one of the "standard conditions of labor demanded by the health and welfare" of California employees. Ibid; Labor Code §1182. Thus, for example, this Court summarized the meal provision in Wage Order 5 of the 1976 Orders as "[a] meal period of 30 minutes per 5 hours of work is generally required." California Hotel & Motel Assn. v. Industrial Welfare Commission supra, 25 Cal. 3d at 206 n. 7 (emphasis added). See too California Manufacturers' Assoc. v. Industrial Welfare Commission (1980) 109 Cal. App. 3d 95,114. Historically, there was never an understanding that the meal period was a privilege only to be claimed by a worker who had the courage of Oliver Twist requesting more gruel.[2]

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[1]Calif. Constitution Art XIV, §1; Labor Code §1178.

[2]It is expected that other amicus letters will describe the practical importance of meal and rest breaks to the physical and mental health of California workers.

2. As noted above, the Federation was the proponent of A.B. 60 which added §512 to the Labor Code in 1999. Stats 1999, ch. 134 §6. The Federation caused the introduction of A.B. 60 (Knox) in reaction to the elimination of the 8 hour day by Governor Wilson's appointees to the IWC. A.B. 60 was titled "The Eight Hour Day Restoration and Workplace Flexibility Act." Stats 1999, ch. 134 §1. As we will hopefully be able to show more fully if review is granted, the bill made other corrective changes to what the IWC had done or to block further feared eroding of minimum worker standards by the IWC. One of these "fears" was a fear that the IWC would weaken the meal period standard. Thus, one part of A.B. 60 was intended as a codification of the IWC standard requiring that meal periods generally be taken. Stats 1999, ch. 134 §6. The Legislative Counsel explicitly said, "This bill would codify that prohibition" against employing an employee for a period of more than 5 hours per day without "providing" the employee with a meal period. Legislative Counsel's digest for A.B. 60 as introduced, p. 3 of bill (and p. 2 of bill as approved by Governor). Thus, "providing a meal period" was understood to mean an employer still had what was then a long-standing historical, general obligation to make sure employees actually took a meal break.

3. The Opinion below gives undue importance to the dictionary's parsing of to "provide" and no importance at all to the history that was being codified. Slip Opinion p. 42 et seq.

The ambiguity in the word "provide" is easily resolved by the extrinsic history of what was being codified. Murphy v. Kenneth Cole Production, Inc., supra, 40 Cal. 4th at 1103 (extrinsic aids to assist in interpretation).

Even when a statute is seemingly clear or plain this Court has insisted that the "purpose" of a statute must control.

> "But the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose ... The meaning of a statute may not be determined from a simple word ...."
> Lungren v. Deukmejian (1988) 45 Cal. 3d 727, 735.

How much more true should this search for "purpose" determine the meaning of each word, including the ambiguous word "providing", in Labor Code §512.

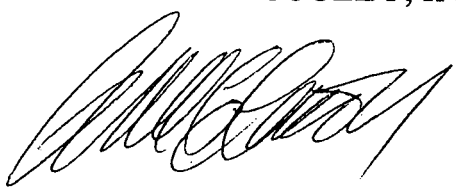
4. The Opinion below is problematic even from a simple reading of Labor Code §512(a). This is because the section allows for a waiver of the meal period by mutual consent of employer and employee where the total work period for the day is more than 5 hours but not more than 6. (There is a similar waiver provision for the second meal period.) There is no intelligible reason for a waiver if an employer's duty is nothing more than not to stand in the way of an employee who wants to take his/her meal break. The waiver only makes sense if the employer has the obligation to ensure the meal period is taken and the employee consents to not do so because of the short work day.

There are other considerations supporting review. The Federation respectfully submits that the foregoing alone are enough to merit review.

Thank you.

Very truly yours,

LAW OFFICES OF
CARROLL & SCULLY, INC.



Donald C. Carroll
SBN 34569

DCC:kjm
ope-3-afl-cio
Enclosure
cc: Art Pulaski

State of California
DIVISION OF LABOR STANDARDS ENFORCEMENT - HQ
MEMORANDUM

TO: **DLSE Staff**

FROM: **Angela Bradstreet, Labor Commissioner**
Denise Padres, Deputy Chief
Robert Roginson, Chief Counsel

DATE: **July 25, 2008**

SUBJECT: Binding Court Ruling on Meal and Rest Period Requirements

On July 22, 2008, the California Court of Appeal issued its decision in *Brinker Restaurant Corp. v. Superior Court of San Diego County (Hohnbaum), (2008) ___ Cal.App.4th ___ , 2008 WL 2806613.* The court in *Brinker* decided several significant issues regarding the interpretation of California's meal and rest period requirements. The decision is a published decision, and its rulings are therefore binding upon the Division of Labor Standards Enforcement (DLSE).

The decision in *Brinker* included the following rulings regarding the interpretation of California's meal and rest period requirements:

Meal Periods

- The court held that Labor Code § 512 and the meal period requirements set forth in the applicable wage order mean that employers must provide meal periods by making them available, but need not ensure that they are taken. Employers, however, cannot impede, discourage or dissuade employees from taking meal periods.[1]

- The court rejected the so-called "rolling five-hour" requirement as being inconsistent with the plain meaning of Labor Code § 512 and the applicable wage order.[2] An employer must make a first 30-minute meal period available to an

[1] Slip Op. at pp. 4, 34 and 41-47.
[2] Slip Op. at pp. 4 and 34-41.

hourly employee who is permitted to work more than five hours *per day*, unless (1) the employee is permitted to work a "total work period per day" that is six hours or less, and (2) both the employee and the employer agree by "mutual consent" to waive the meal period.[3] The court also found section 512 to plainly provide that an employer must make a second 30-minute meal period available to an hourly employee who has a "work period of more than 10 hours *per day*" unless (1) the "total hours" the employee is permitted to work per day is 12 hours or less, (2) both the employee and the employer agree by "mutual consent" to waive the second meal period, and (3) the first meal period "was not waived."[4]

Employers are not required to provide a meal period for every five consecutive hours worked.[5] The court held that the employer's practice of providing employees with an "early lunch" within the first few hours of an employee's arrival at work did not violate California law, even though that would mean that the employee might then work in excess of five hours without an additional meal period.[6]

Rest Periods

- The court held that the rest period requirements set forth in the applicable wage order mean that employers must provide rest periods, but need not ensure that they are taken. Employers, however, cannot impede, discourage or dissuade employees from taking rest periods.[7]

- The court held that employers need only authorize and permit rest periods every four hours or major fraction thereof and they need not, where impracticable, be in the middle of each work period.[8] The court interpreted the phrase "major fraction thereof" to mean the time period between three and one-half hours and four hours and not to mean that a rest period must be given every three and one-half hours.[9] In so doing, the court rejected as incorrect a 1999 interpretation by the Labor Commissioner that the term "major fraction thereof" means an employer must provide its employees with a 10-minute rest period when the employees work any

[3] Slip Op. at p. 36.
[4] Slip Op. at p. 37.
[5] Slip Op. at p. 4.
[6] Slip Op. at pp. 34-41.
[7] Slip Op. at pp. 4 and 31.
[8] Slip Op. at pp. 4 and 28-29.
[9] Slip Op. at p. 24.

> time over the midpoint of each four hour block of time.[10] The court ruled that the rest periods must be given if an employee works between three and one-half hour and four hours, but if four or more hours are worked, it need be given only every four hours, not every three and one-half hours.[11]
>
> The court also ruled that the applicable wage order rest period provisions do not require employers to authorize and permit a first rest period before the first scheduled meal period. Rather, the applicable language of the wage order states only that rest periods "insofar as practicable shall be in the middle of each work period." Accordingly, the court concluded, as long as employers make rest periods available to employees, and strive, where practicable, to schedule them in the middle of the first four-hour work period, employers are in compliance with that portion of the applicable wage order.[12]

The court relied upon the plain meaning of the Labor Code and applicable wage order provisions in making its determinations. The court found persuasive the reasoning in the federal district court decisions in *White v. Starbucks* (ND Cal. July 2, 2007) 497 F.Supp.2d 1080 and *Brown v. Federal Express Corp.* (CD Cal. Feb. 26, 2008) 2008 WL 906517, and concluded that employers need not ensure meal periods are actually taken, but need only make them available.[13] The court distinguished the decision in *Cicairos v. Summit Logistics, Inc.* (2006) 133 Cal.App.4th 949, concluding that the facts in *Cicairos* established that the employer failed to make meal periods available to employees and that the court there only decided meal periods must be provided, not ensured.[14]

All staff must follow the rulings in the *Brinker* decision effective immediately and the decision shall be applied to pending matters. Please ensure that any wage claim filed with DLSE that has a meal or rest period issue is reviewed by your Senior Deputy prior to making any final determination on its merits.

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[10] Slip Op. at p. 25.
[11] Slip Op. at pp. 27-28.
[12] Slip Op. at pp. 28-29.
[13] Slip Op. at p. 44.
[14] Slip Op. at pp. 44-47.

CERTIFICATE OF SERVICE
(C.C.P. Section 1013A and 2015.5)

I, Kathy Mullins, declare that I am a citizen of the United States, over 18 years of age, and not a party to the within action. My business address is 300 Montgomery Street, Suite 735, San Francisco, California 94104.

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

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

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

(A) By First Class Mail: I am readily familiar with the practice of the Law Offices of Carroll & Scully, Inc. for the collection and processing of correspondence for mailing with 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) By Personal Service: I personally delivered the above document(s) to the office of the addressee on the date shown herein.

(C) By Messenger Service: I am readily familiar with the practice of the Law Offices of Carroll & Scully, Inc. for messenger delivery, and I delivered each such envelope to a courier employed by SILVER BULLET EXPRESS COURIER, 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) By Overnight/Mail Courier: By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above, and placing each for collection by 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) By Facsimile: I served such document(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 Srauss Hauer & Feld 2029 Century Park East, Suite 2400 Los Angeles, CA 90067	Respondent Brinker Restaurant
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(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 August 29, 2008 at San Francisco, California.

Kathy Mullins