CALIFORNIA LEGISLATURE

STATE CAPITOL
SACRAMENTO, CALIFORNIA
95814

September 2, 2008

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

Re: *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, 165 Cal.App.4th 25 (2008). WL 2806613 (July 22, 2008) Fourth Appellate District, Division 1

Honorable Chief Justice and Associate Justices:

The undersigned Members of the California State Legislature write to urge this Court to grant review in the above-entitled case pursuant to California Rules of Court 8.500(g). This case provides this Court with an opportunity to resolve a disagreement between the courts of appeal and to settle an important statewide question of law regarding a fundamental workplace protection involving meal and rest periods.

STATEMENT OF INTEREST

The undersigned leaders of the California State Legislature and the respective Chairs of the Senate and Assembly Labor Committees have a profound public interest in ensuring that fundamental workplace protections established by the Legislature are protected. The right to a meal period under the Industrial Welfare Commission (IWC) Wage Orders was codified by this Legislature in Labor Code Section 512 with the enactment of Assembly Bill 60 in 1999. Moreover, the Legislature also enacted a provision to provide a remedy to employees who are not provided with meal or rest periods in accordance with the applicable IWC Wage Orders. That provision is contained in Labor Code Section 226.7 and was enacted with Assembly Bill 2509 in 2000. As discussed in further detail below, the *Brinker* decision conflicts with other appellate decisions on this subject and has the potential to erode or eviscerate this fundamental workplace protection.

The undersigned have been intimately involved with recent statewide public policy questions surrounding the obligations of employers to provide meal and rest periods. In fact, this specific issue has been the subject of significant legislative and administrative action in recent years. Since the codification of the meal period requirement in 1999, there have been numerous legislative proposals introduced that sought to address, among other things, the nature of an employer's obligation to "provide" meal and rest periods in accordance with the IWC Wage Orders, the time and manner in which such breaks must be provided, the nature of "on-duty" meal periods, collective bargaining exemptions to the meal and rest period requirements, and the nature of the remedy set forth in Labor Code Section 226.7.

In fact, these legislative proposals have increased in recent years and this issue has been one of the most prolific labor and employment subjects to come before the Legislature in recent history.

In addition, this issue has been the subject of proposed administrative action in recent years, in which the Legislature has been significantly engaged. Specifically, on December 10, 2004, the Division of Labor Standards Enforcement (DLSE) of the Department of Industrial Relations (DIR) submitted a proposed emergency regulation to the Office of Administrative Law (OAL) regarding the provision of meal and rest periods in the workplace. On December 20, 2004, DLSE withdrew the proposed emergency regulation and resubmitted a revised proposed regulation under the regular rulemaking process on January 4, 2005. After questions emerged about the legal authority of DLSE to promulgate the proposed regulation, the Assembly Committee on Labor and Employment conducted an oversight hearing on the subject on January 26, 2005. Subsequently, the Legislature passed ACR 43 (J. Horton) which, among other things, made a legislative declaration that the DLSE did not have the authority to promulgate the proposed regulation concerning meal and rest periods, and that the proposal was inconsistent with existing law. On January 13, 2006, DLSE announced that it would not file the proposed regulation with the OAL by the applicable deadline.

In light of these facts, and the likelihood that this decision will have a profound public impact on the nature of these important workplace safeguards that were codified by the Legislature, the undersigned have a significant interest in ensuring that this Court grants review in this matter.

WHY REVIEW SHOULD BE GRANTED

Pursuant to California Rules of Court 8.500(b)(1), this Court may order review of an appellate decision when "necessary to secure uniformity of decision or to settle an important question of law." Both of these conditions are met in this case and therefore this Court should grant review.

First, the *Brinker* decision squarely conflicts with other decisions of the courts of appeals and this Court. The court in *Brinker* decided several significant issues related to the interpretation of California's meal and rest periods requirements. Foremost among these, the court purported to hold that under current law, employers must provide meal periods by making them available, but need not ensure that they are taken.

First, this holding directly conflicts with the decision of another Court of Appeal in *Cicairos v. Summit Logistics, Inc.* (2006) 133 Cal.App.4th 949. In that case, the court concluded that an employer has "an affirmative obligation to ensure that workers are actually relieved of all duty" during their prescribed breaks. This standard allows workers a realistic chance of obtaining a remedy for their missed meal breaks – contrary to the standard set forth in *Brinker*. Therefore, there is significant conflict between these two appellate decisions and the IWC Wage Orders, and this Court should grant review in order to resolve this split in authority.

In addition, other aspects of the *Brinker* decision purport to hold that certain forms of wage and hour cases (including meal and rest period claims) are not amenable to class treatment. However, this purported holding similarly conflicts with a long line of decisions of this Court that, among other things: (1) makes it clear that protections established by the Labor Code and the Wage Orders of the Industrial Welfare Commission are to be liberally construed in a manner that protects workers (see, e.g., *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 690, 702 ["in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection"]); (2) holds that class actions are favored in wage and hour cases (see *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 457-462 [discussing factors favoring class actions in wage and hour cases]); and (3) establishes that courts should be creative in finding ways to manage class actions because the alternative to such forms of litigation may result in a failure of justice (see *Gentry, supra*, 42 Cal.4th at p. 462 ["By preventing 'a failure of justice in our judicial system,' the class action not only benefits the individual litigant but serves the public interest in the enforcement of legal rights and statutory sanctions." (Citations omitted.)].) Because this aspect of the *Brinker* decision also

departs from other well-established authority, review to resolve these conflicts is also appropriate.

Second, review should be granted to settle an important question of law, namely the fundamental nature of an employee's right to meal and rest periods.

These important workplace protections have been enshrined in California law for decades. As this Court recently acknowledged in *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 429 (2007), the Industrial Welfare Commission Wage Orders have included meal and rest break requirements since "1916 and 1932, respectively." *Id.*, at 1105. As discussed above, the Legislature codified the meal period requirement in 1999 with the enactment of Labor Code Section 512. It is important to note that this legislation was in response to administrative action during the Wilson Administration whereby the Industrial Welfare Commission sought to eliminate the eight-hour-day, another long-standing aspect of California employment law. Therefore, the codification of the eight-hour-day and the meal period requirement demonstrates the Legislature's intent to protect these fundamental rights by codifying them into statute.

In addition, the Industrial Welfare Commission and the Legislature, recognizing the lack of an effective enforcement mechanism, in 2000 and 2001 respectively, established a remedy for employer noncompliance with the meal and rest period requirements in the form of an addition hour of pay for missed breaks – further evidence that the Legislature viewed these safeguards as important and worth protecting.

This lengthy legislative and administrative history clearly demonstrates the important nature of this area of the law. Unfortunately, the holding in the *Brinker* case has the potential to undermine the fundamental right to meal and rest periods that the Legislature sought to guarantee by enacting Labor Code Section 226.7. As discussed above, the *Brinker* decision directly contradicts holdings in other appellate cases and therefore has created significant confusion for both employees and employers as to the fundamental nature of this right.

For the aforementioned reasons, we respectfully urge this Court to grant review in this matter to settle this important issue of law and to resolve the disagreement between the courts of appeal.

Sincerely,

DON PERATA, President Pro Tempore
California State Senate

KAREN BASS, Speaker
California State Assembly

CAROLE MIGDEN, Chair
Senate Committee on Labor and
Industrial Relations

SANDRÉ R. SWANSON, Chair
Assembly Committee on Labor and
Employment

PROOF OF SERVICE

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is 1020 "N" Street, Room 155, Sacramento, CA 95814.

On September 2, 2008, I served the foregoing document described as **AMICUS LETTER IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

I then served each document in the manner described below:

[XX] **BY MAIL:** I placed each for deposit in the United States Postal Service this same day, at my business address shown above, following ordinary business practices.

[ ] **BY FAX**: I transmitted the foregoing document(s) by facsimile to the party identified above by using the facsimile number indicated. Said transmission(s) were verified as complete and without error.

[ ] **BY UNITED PARCEL SERVICE:** I placed each envelope for deposit in the nearest United Parcel Service drop box for pick up this same day and for "next day air" delivery.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed September 2, 2008 at Sacramento, California.

Lorie Erickson