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September 12, 2008

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

Re: ***Brinker Restaurant Corporation v. Superior Court (Adam Hohnbaum)***
Case No. S166350 (4th Appellate District, Div. One, Case No. D049331)
Amicus Curiae Letter (Rule 8.500(g))

Honorable Chief Justice and Associate Justices:

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

Statement of Interest

I am a member of the California Bar, and have been engaged exclusively in the practice of labor and employment law for the past 25 years. For much of that time, from 1990 to 2006, I was employed as an attorney for the Division of Labor Standards Enforcement ("DLSE"), and served as the chief counsel for the Labor Commissioner from 1998 to 2001. In that capacity, I issued many of the Labor Commissioner's opinion letters, including several letters interpreting meal and rest period requirements under California law. During the period following the enactment of AB 60 (Labor Code §500, et seq.), I provided advice to the Industrial Welfare Commission ("IWC") regarding the Labor Commissioner's wage and hour enforcement policies, speaking before the IWC at public hearings on multiple occasions, including on May 5, 2000, when I testified about the DLSE's enforcement of meal period requirements. I also played a substantial role in drafting the DLSE's 2002 Enforcement Policies and Interpretations Manual, including sections on meal and rest period requirements. My responsibilities at DLSE included staff training and public education, and I have spoken at numerous training sessions and seminars on meal and rest period requirements.

Also, as a DLSE attorney, I litigated several cases involving meal and rest period issues, in the context of representing individual claimants in de novo proceedings pursuant to Labor Code §98.4, and in representing the Labor Commissioner in civil actions brought against employers under Labor Code §98.3, and in defending lawsuits brought by various employers challenging the validity of meal and rest period requirements.

While no longer at DLSE, I have continued to share my knowledge and expertise in this area with the wage and hour law community, speaking on numerous occasions before various bar organizations on meal and rest period issues, including, most recently, serving as a panel member for a tele-seminar, "*Brinker*: the End of California Meal and Rest Break Litigation – or Only the Beginning," sponsored by the Labor and Employment Law Section of the State Bar.

As I will discuss below, it is my belief that absent review, *Brinker* will have disastrous consequences for California's working men and women. The decision eviscerates long-established meal and rest period requirements, and precludes any sort of meaningful enforcement. My extensive knowledge of this area of law, and my years of enforcement experience, serve as the foundation for my interest in this matter, and it is from that perspective that I wish to address this Court in support of the petition for review.

<u>Reasons to Grant Review</u>

1. Review Is Necessary to Secure Uniformity of Decision

This Opinion poses a direct conflict with *Cicairos v. Summit Logistics, Inc.* (2006) 133 Cal.App.4th 949, on the issue of whether employers have "an affirmative obligation to ensure that workers are actually relieved of all duty" during a required meal period (*Cicairos,* at p. 962) or whether employers "need not ensure meal periods are actually taken, but need only make them available." (*Brinker,* Opinion at p. 44.)

Brinker also conflicts with this Court's analysis of the interplay between labor standards established by statute and those founded upon orders of the IWC. The touchstone of this Court's analysis of this issue is its pronouncement that "the Industrial Welfare Orders may provide more restrictive provisions than are provided by the general statutes adopted by the Legislature on this subject in sections 510-556." (*Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 690, 733.) Starting from that premise, this Court upheld the validity of IWC wage order requirements that provided

certain agricultural workers with a day of rest, notwithstanding Labor Code §554, which expressly exempted those agricultural workers from a statutory day of rest requirement founded upon Labor Code §551. This Court characterized the employers' contention that the IWC was precluded from providing these workers with greater protection than set out in the statute as "a fundamental misconception of the relationship between the general statutory provisions of section 510-556 and the more specific regulations embodied in the IWC wage orders." (*Ibid.*)

The *Brinker* Opinion is premised upon this exact "fundamental misconception." The Opinion turns the legislative purpose on its head, concluding that Labor Code §§512 and 516 function as a ceiling, invalidating stricter meal period requirements that have been contained in the IWC orders for the past half-century, notwithstanding the complete absence of any legislative history suggesting any such intent. In contrast, *Bearden v. U.S. Borax , Inc.* (2006) 138 Cal.App.4th 429, properly viewed these statutory minimum labor standards as a floor, designed to prevent the IWC from adopting regulations that provide workers with less protections that those contained in the statutory scheme. Thus, an IWC regulation that was adopted in October 2000, establishing an opt-out from meal period requirements, was held invalid by *Bearden,* as the exemption established by the IWC had not been codified in Section 512.

Brinker, while purporting to follow *Bearden,* actually conflicts with that case. When the *Bearden* court reasoned that "section 516, as amended in 2000, does not authorize the IWC to enact wage orders inconsistent with the language of section 512," it was using the term "inconsistent with" in a specific context, i.e., to mean wage order provisions that undercut the protections set out in section 512. (*Bearden, supra,* at p. 433-438.) *Brinker* ignores that context, and instead considers any wage order meal period provision that is not a verbatim copy of the language of section 512 to be *ipso facto* inconsistent with section 512. Eschewing any analysis to determine whether the IWC meal period provisions are actually in conflict with the more general requirements of section 512, *Brinker* instead is founded on the flawed theory that section 512 now operates as the sole source of meal period requirements. Nothing in *Bearden* suggests such a result. Nor does the plain language of Section 516, which states: "Except as provided in Section 512, the Industrial Welfare Commission may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers." Moreover, the fact that §516, as amended, was enacted more than two months *after* June 30, 2000, the date the IWC adopted all of the 2000 and 2001 wage orders (except for Order 16-2001, the order considered in *Bearden*), leaves one to wonder how section 516 can be read to retroactively apply to these other previously adopted wage orders.

2. Review Is Necessary to Settle Important Questions of Law

As noted by this Court in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1105-1006:

> Meal and rest periods have long been viewed as part of the remedial worker protection framework. Concerned with the health and welfare of employees, the IWC issued wage orders mandating the provision of meal and rest periods in 1916 and 1932, respectively. The wage orders required meal and rest periods after specified hours of work. The only remedy available to employees, however, was injunctive relief aimed at preventing future abuse. In 2000, due to a lack of employer compliance, the IWC added a new pay remedy to the wage orders...." (Citations omitted.)

The new pay remedy – the extra hour of pay at the employee's regular rate of compensation owed for each workday "an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order" (see, e.g.., IWC Order 5-2001 §11(B)) and for each workday "an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order" (see, e.g., IWC Order 5-2001, §12(B)) – did not change the underlying substantive requirements for meal and rest periods. These substantive requirements have been unchanged for more than half a century. (See, *California Manufacturers Association v Industrial Welfare Commission* (1980) 109 Cal.App.3d 95, 114-115, noting that the wage order's meal period requirements have "been substantially the same since 1947." Also, see *Brinker* Opinion at pp. 26-27, noting that current rest period requirements were adopted in 1952.)

Yet, *Brinker* now interprets these substantive requirements in a way that is radically different from how they have been interpreted and enforced by the DLSE over the past several decades. At stake in this dispute are some of the most fundamental and well-established protections for California employees.

A. The Nature of the Employer's Obligation to Provide a Meal Period

The wage orders state: "No employer shall employ any person for a work period of more than five (5) hours without a meal period...." The term "employ" is defined in the wage orders to mean "engage, suffer, or permit to work." At all times prior to the issuance of the *Brinker* Opinion, DLSE interpreted this to mean that an employer does not satisfy its obligation to provide a meal period by merely allowing the employee to take one. The employer violates the wage order by suffering or permitting the employee to

work during a required meal period. The employee is therefore required to ensure that the employee is actually relieved of all duty and performs no work during a required duty-free meal period. There are two exceptions to this set out in the wage orders. First, "when a work period of not more than six hours will complete the day's work, the meal period may be waived by the mutual consent of the employer and the employee." Second, an on-duty meal period "shall be permitted only when the nature of the work prevents the employee from being relieved of alkl duty and when by written agreement between the parties an on-the job paid meal period is agreed to." Absent these express exceptions, the employee must be off-duty (i.e., not "engage[d], suffer[ed], or pemit[ted] to work") during the required meal period.

This enforcement policy was consistent with this Court's construction of the phrase "suffer and permit" in *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 584-585: "Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift.... The employer knows or has reason to believe that he is continuing to work and the time is working time. In all such cases it is the duty of the management to exercise its control and see that work is not performed if it does not want it to be performed." (Citations omitted.) And this enforcement policy was expressly followed by the court in *Cicairos.* In contrast, *Brinker* excuses employers from any duty to manage their workplaces so as to ensure that their workers actually are relieved of all duty and are not working during required off-duty meal periods: "the California Supreme Court, if faced with this issue, would require only that an employer *offer* meal breaks, without forcing employers actively to ensure that workers are taking these breaks." (*Brinker* opinion, at p. 43, citing *White v. Starbucks Corp.* (N.D. Cal. 2007) 497 F.Supp.2d 1080, 1088-1089.)

Brinker excuses employers from this duty because "making employers ensures of meal breaks – would be impossible to implement for significant sectors of the mercantile industry (and other industries) in which large employers may have hundreds or thousands of employers working multiple shifts." (*Ibid.)* How exactly is this any different from the employer's duty to ensure that such employees either stop working after their eight hour shifts or receive overtime pay for work performed in excess of eight hours? The question of *why* an employee worked during a required off-duty meal period is no more relevant than the issue of *why* an employee worked past the end of an eight hour shift. As long as the work is required, or suffered, or permitted by the employer, it subjects the employer to liability, in the one instance for overtime compensation, in the other for meal period premium pay. And the requirement that employers maintain records of all hours worked makes employer monitoring (of overtime work and work performed during required off-duty meal periods) anything but impossible. (See IWC Order 5-2001, §7(A), requiring

employers to keep accurate "time records showing when the employee begins and ends each work period," and records of all "meal periods" except for those "during which operations cease.")

The DLSE's historic enforcement policy reflected the greater burden placed on employers under the IWC's meal period requirements than under its rest period requirements, which task employers with a less strict affirmative duty to "authorize and permit all employees to take rest periods." (See, IWC Order 5-2001, §12.) The only exception to this meal period/rest period dichotomy is found in IWC Order 14-2001 (and its predecessor, Order 14-1980), which governs employees in agricultural occupations. That the IWC understood that there is a difference between the "no employer shall employ" meal period standard, and the "authorize and permit" standard for rest periods (and for meal periods under Order 14 starting in 1980), is strikingly revealed by the testimony before the IWC Commissioners at its public hearing of August 27, 1979, in the context of the Commission's discussion about the proposal to amend the meal period requirement in Order 14, which until then, was the same as that in every other wage order. A proponent of the amendment urged its adoption, so that growers would "not be in the position where we have to police and order an employee to quit working" and take his required meal break. (Transcript of 9/27/79 IWC hearing, p. 140-141, filed on 5/11/07 with the court of appeal as Exhibit 1 attached to Real Parties In Interests' Motion for Judicial Notice.) In response to a question as to the effect of the proposed "authorize and permit" language, Commissioner Howard Wackman II, who made the motion to amend the meal period requirement, observed that under the less strict "authorize and permit" language, the employer would no longer have to be "mandatorily forcing that worker to take the time off." (*Id.*, at p. 134)

Brinker, in contrast, held that there is not a whit of difference between what the employer must do to comply with its obligation to provide rest periods and its obligation to provide meal periods, holding that employers are not required to ensure that off-duty meal breaks are actually taken. This would come as a great surprise to the IWC that amended Order 14 in 1979 specifically to replace the general requirement for "employer policing" of meal periods with a less strict standard governing agricultural workers – while retaining the existing "policing" requirement in every other wage order.

Brinker reaches this conclusion by completely ignoring the distinction between the IWC's "no employer shall employ" meal period requirement and its "authorize and permit" rest period requirement. The Opinion never quite explains the reason for this omission, though it appears to be founded in the court's erroneous view that Labor Code §512(a) is the sole source of the employer's duty to "provide" a meal period to its

employees: "from the plain language of section 512(a), meal periods need only be made available, not ensured as plaintiffs claim." (*Brinker* Opinion, at p. 42.) The court's sole focus on section 512 cannot be reconciled with the fact that one year *after* the passage of section 512, the Legislature enacted Labor Code section 226.7, which, at subsection (b), imposed an extra hour of pay liability "[i]f an employer fails to provide an employee with a meal or rest period *in accordance with an applicable order of the Industrial Welfare Commission.*" (Emphasis added.).

Surely the Legislature was well aware, when it enacted section 226.7, that under all of the applicable IWC orders (except Order 14), an employer's obligation to "provide" a required meal period ("no employer shall employ") qualitatively differed from its obligation to "provide" a required rest period ("authorize and permit"). *Brinker* isolates the word "provide" and assigns it a meaning that is utterly at odds with the actual context in which it is used in section 226.7 with regard to meal periods. In contrast, in a series of opinion letters, the DLSE set forth the key distinction between the employer's duty to provide meal periods and the duty to provide rest periods: "Unlike meal periods, during which the employer has an affirmative obligation to ensure that workers are actually relieved of all duty, not performing any work, and free to leave the worksite, the employer is merely required to 'authorize and permit all employees to take rest periods.'" (See, eg., DLSE OL 2001.09.17, at p. 4., attached as Exhibit 3 to RPI's 5/11/07 Motion for Judicial Notice.)

Brinker got the answer wrong because it got the question wrong. *Brinker* asked what an employer must do to provide a meal period under Labor Code section 512. The relevant question, for purposes of determining liability for the extra hour of pay under Labor Code §226.7(b), is what must an employer do to "provide an employee with a meal or rest period *in accordance with* [the] *applicable order of the Industrial Welfare Commission.*" *Brinker* suggests that the amendment of Labor Code §516 made section 512 the sole source of meal period obligations, ignoring the fact that the same very same Legislature that passed SB 88 (amending §516), *subsequently* passed AB 2509 (enacting §226.7). Senate Bill 88 was first passed the Senate, and then was passed in the Assembly on August 25, 2000. Assembly Bill 2509 passed in the Assembly on August 29, and in the Senate on August 30, 2000. The order in which these bills passed leaves no doubt that *Brinker* erred by failing to consider and enforce the applicable IWC order's meal period requirements. Under the legislative scheme, if an employer complies with the requirements for meal periods, as set out in the applicable IWC order, the employer meets its obligation to "provide" meal periods "in accordance with [that] applicable order;" otherwise, the employer does not. Compliance is measured against the wage order, not section 512.

Even looking at Section 512 by itself, in isolation from the wage orders, *Brinker*'s analysis runs afoul of the most basic rules of statutory constriction. Section 512 sets out two very specific circumstances under which a required meal period may be waived: "if the total work period per day of the employee is no more than six hours, the meal period [which is required if the employee works more than five hours] may be waived by mutual consent of both the employer and the employee," and the second meal period, which is required if the employee works more than 10 hours in a day, may be waived by mutual consent "if the total hours worked is no more than 12 hours" and "if the first meal period was not waived." Nothing in this statute purports to authorize a waiver of the right to a first meal period if the employee works more than six hours in a day, and nothing in this statute purports to authorize a waiver of the second meal period if the employee works more than twelve hours in a day. *Brinker* would make the express language permitting waiver under these narrow circumstances utterly superfluous, because *Brinker* holds that the employee can always waive a required off-duty meal period no matter how many hours an employee works in a day. If *Brinker* is right about that, then why would the Legislature have gone to the trouble of specifying very precise circumstances under which meal periods can be waived? Under the maxim of statutory construction, *expressio unius est exclusio alterius*, if exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary." (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 105, 116.) Here, there is absolutely no evidence of any contrary legislative intent to allow employee waivers under any and all circumstances, as held in *Brinker*.

B. The Meal Period Timing Requirement

For decades, DLSE read the wage orders to impose a timing requirement as to when meal periods must be provided during the workday. Under the wage orders: "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...." DLSE interpreted this to mean that the meal period must occur at or near the mid-point of the workday, so that the employee does not work more than five hours before starting the meal period or more than five hours after completing the meal period. In a typical 8 hour workday, this would mean that the meal period must occur no earlier than the 3rd hour of work, and no later than the 5th hour of work. This is consistent with the way that this Court summarized the meal period provision in IWC Order 5-76 - - a provision that is identical to that in the controlling wage order herein, Order 5-2001. (*California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 205, fn. 7.) In contrast, *Brinker* concluded that "[n]o such restriction on the timing of meal periods is contained in the wage order." (*Brinker* opinion, at p. 40.)

This was not a hypothetical issue, and the DLSE had occasions to enforce this timing requirement, even before the adoption of the extra hour of pay remedy. Approximately twelve years ago, I handled a case for DLSE in which we were preparing to file a lawsuit for injunctive relief against the owner of an auto repair shop for failing to comply with the meal period timing requirement. An investigation revealed the employees were not getting any meal breaks. The deputy labor commissioner served the employer with a notice that meal breaks were required. His response was to implement a system whereby the employees were required to report to work half an hour earlier than they had been, to then to punch out immediately after punching in, to then take their half hour "meals breaks" and then, to punch back in and work for the rest of the shift. Astonishingly, this phony "meal period" would meet with approval under *Brinker*. But DLSE, at least then, understood that this sort of "meal period" does not satisfy the requirements of the wage order, and the employer was informed that an action for injunctive relief would be filed unless the meal periods were scheduled and given to workers at the required time at or near the mid-point of their shifts. The employer changed its practice, so as to come into compliance with the timing requirement, making the filing of the lawsuit unnecessary.

This timing requirement is necessary to effectuate the overriding purpose of the meal period – to promote the health and welfare of employees. These "health and safety considerations ... are what motivated the IWC to adopt mandatory meal and rest periods in the first place." (*Murphy v. Kenneth Cole Productions, supra,* 40 Cal.4th at p. 1113.) The IWC meal period provisions, including the five hour rule, are founded upon "the most basic demands of an employee's health and welfare." (*California Manufacturers Assn. v. Industrial Welfare Com., supra,* 109 Cal.App.3d at p. 115.) The anytime during the work shift "meal period" sanctified by *Brinker* does not serve as a real break from the day's work, and utterly fails to promote the employee's heath and welfare. The employer's duty to provide a meal period is reduced to a meaningless charade, with "meal periods" at the very beginning or very end of a shift providing no benefit to employees whatsoever.

By first holding that required meal periods need only be "made available," and then holding that the one required meal period during a ten hour shift can be "made available" at any time during the shift, *Brinker* provides a road map to every employer on how to ensure that workers do not take any meal period during a shift. Just offer the employees the opportunity to take the "meal period" so early or so late during the shift that no rational employee would choose to take an unpaid half hour for a "meal" that is so obviously needed for sustenance and refreshment around the middle of the shift – not at or near the very beginning or end of the shift.

C. Other Considerations

Throughout the entire time I was at DLSE, the Division enforced meal period requirements by examining the employer's time records, in order to determine whether the records showed that the employees were: 1) off-duty for a meal period of no less than 30 minutes, (2) during a point in the workday such that they did not have more than five hours of work prior to the start of the meal period or after the conclusion of the meal period. As a general rule, employees were only interviewed to confirm that the time records were accurate, and to make certain that the employees were free to leave the employer's premises during their off-duty meal period time. (See *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968.) The fact that employer non-compliance could be so starkly revealed by time records alone made these particularly appropriate cases for class-wide treatment, even though, of course, DLSE can obtain class-wide relief for employees without filing a class action, by bringing a lawsuit with the Labor Commissioner as a plaintiff pursuant to Labor Code §98.3.

Coincidentally, one of the first meal period cases handled by DLSE following the adoption of the extra hour of pay remedy was a case against Brinker Restaurant Corporation, discussed in the Opinion at p. 7. The Opinion notes that in 2002, DLSE filed a lawsuit against Brinker, and that the parties reached a settlement agreement under which Brinker paid $10,000,000 to settle the lawsuit. What surprised me, however, was the assertion in the Opinion that this all happened "before [DLSE] reached any final conclusions as to liability and damages." *(Id.)* Having been one of the DLSE attorneys assigned to that case, I feel compelled to assure this Court that in all of the years I was at DLSE, our agency would *never* file a lawsuit against any employer until DLSE reached a final conclusion as to that employer's liability. DLSE never has, and hopefully, never will, operate in any other fashion. That case against Brinker was no exception. Though the *Brinker* court obviously does not agree with the test for liability that the DLSE followed at that time (and that DLSE had followed for decades previously), the lawsuit filed by the DLSE indicated beyond any doubt that the DLSE had reached a conclusion that Brinker was then liable for the extra hour of pay remedy because it had failed to provide meal periods, and had failed to provide rest periods, in accordance with the requirements of the applicable IWC order. And at that time (and for decades before that), DLSE understood that these requirements included the obligation to relieve the employee of all duty so that no work is performed during a required off-duty meal period, and to ensure that the required off-duty meal period occurs during a point in the workday so that the employee does not work more than five hours before or after the one required meal period during a shift of up to ten hours.

Now facing the consequences of the extra hour of pay remedy, employers like Brinker have been aggressive in attacking the DLSE's historic enforcement positions on the nature of the employer's duty to provide meal periods and the meal period timing requirement. For years prior to the adoption of the new remedy, these enforcement positions generated little interest, probably because the only consequence of non-compliance was the possibility of injunctive relief. The extra hour of pay remedy was adopted in part "as an incentive for employers to comply with labor standards." (*Murphy v. Kenneth Cole Productions, Inc., supra,* 40 Cal.4th at p. 1110.) It would be a tragic irony if the remedy created by the IWC and the Legislature, to enhance employer compliance with long-standing meal period requirements, instead becomes the catalyst for doing away with those substantive requirements. In order to save those substantive requirements from obliteration, it is essential that this Court grant plaintiff's petition for review.

Respectfully submitted,

Miles E. Locker
SBN 103510

PROOF OF SERVICE
(CCP §1013a(2).)

Case Name: **Brinker Restaurant Corporation v. Superior Court (Adam Hohnbaum, Real Party in Interest)**
California Supreme Court Case No. S140308

I, Miles E. Locker, hereby certify that I am an active member of the State Bar of California and am not a party to the within matter, that my business address is 4156 - 22nd Street, San Francisco, California 94114, and that on **September 12, 2008,** I served the attached

AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW

on the parties listed in the following attachment by placing true copies thereof in sealed envelopes addressed as shown, and deposited those envelopes in a mailbox maintained by the U.S. Postal Service in San Francisco, California, for delivery, with first class postage thereon fully prepaid

Executed on September 12, 2008, at San Francisco, California. I certify under penalty of perjury that the foregoing is true and correct.

Miles E. Locker

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