

No. S166350

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRINKER RESTAURANT CORPORATION, BRINKER
INTERNATIONAL, INC., and BRINKER INTERNATIONAL PAYROLL
COMPANY, L.P.

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO,

Respondent.

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO,
AMANDA JUNE RADER and SANTANA ALVARADO,
Real Parties in Interest.

Petition for Review of a Decision of the Court of Appeal, Fourth Appellate
District, Division One, Case No. D049331, Granting a Writ of Mandate to the
Superior Court for the County of San Diego, Case No. GIC834348
Honorable Patricia A.Y. Cowett, Judge

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Defendants'¹ answer opens with three fallacies.

The first fallacy—one that many defendants in meal period class actions attempt to perpetuate—is that plaintiffs would have employers “force” unwilling employees to sit down “in the corner” and eat their lunch. Answer at 1. That is not correct.

Plaintiffs contend that the law requires employers to ensure that employees are *not performing work* for the required thirty minutes—or pay the extra hour of pay mandated by Labor Code section 226.7. Plaintiffs’ position comes directly from the Wage Orders, under which employers may not “employ” any worker during a required meal period. 8 Cal. Code Regs. §11050(¶11(A)). “Employ” means “engage, suffer, or permit to work.” *Id.* §11050(¶2(D)). Hence, to comply with the law, employers must not “suffer or permit” employees to perform any work during their meal periods. As *Cicairos* put it, “employers have an affirmative obligation to ensure that workers are actually relieved of all duty.” *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949, 962-63 (2005).

The second fallacy is that employers are incapable of complying with that legal standard. Defendants would have this Court believe that they cannot control their own workplace and are powerless to prevent employees from working when they should not be. Answer at 1. That, too, is incorrect. If employers wish to avoid liability for additional pay (such as the meal period premium or overtime), they must “exercise [their] control and see that the work is not performed if [they do] not

¹ “Defendants” means Brinker Restaurant Corp.; Brinker International, Inc.; and Brinker International Payroll Co., collectively.

want it to be performed.” *Morillion v. Royal Packing*, 22 Cal.4th 575, 585 (2000). In the real world, they do exactly that.

The third fallacy—one repeated throughout the answer—is to misstate the meal period compliance question. The question, at bottom, is what does it mean to “provide” a meal period in accordance with the Wage Orders? Does “provide” mean “make available,” as *Brinker* holds, or “ensure that workers are actually relieved of all duty,” under *Cicairos* and the Wage Orders? To frame the issue as “‘provide’ vs. ensure,” as defendants do repeatedly (Answer at 1, 8-10), is wrong and misleading.

Defendants make no effort to dispute the widespread significance of the core meal period compliance question this case raises. In fact, their own request for publication of the panel’s October 2007 opinion recognized the broad importance of *all* issues raised in the petition:

The rest period, meal period, and off-the-clock issues addressed in [the] opinion affect many thousands of California employers and employees. The importance of this case to the community at large is evidenced by the amicus briefs filed by eight different employer organizations representing the interests of tens of thousands of California employers—not to mention the amicus briefs filed by employee organizations on Plaintiffs’ behalf.

Publication Request, *Brinker Restaurant Corp. et al.*, 10/23/07.

Twelve amicus letters have already been filed in support of review. The letters stress the *Brinker/Cicairos* split and the widespread importance of the issues this case raises—both the substantive meal period and rest break rulings and the class certification implications. *Brinker* threatens to preclude an entire category of cases—meal period, rest break, and off-the-clock cases—from use of the class action device.

For the reasons discussed in the petition and below, review should be granted.

II. ARGUMENT

A. Review Should Be Granted to Restore Uniformity of Decision on the Meal Period Compliance Issue

1. Contrary to Defendants' Position, *Brinker* Creates a Direct Split In Authority With *Cicairos*

Defendants deny that *Brinker* creates a split with *Cicairos*. Answer 9-10.

Many employer-side organizations disagree. Nine of them recognized “the conflict between the holdings in *Cicairos* ... (that employers must ‘ensure’ their employees ‘receive’ [meal periods]) and *White v. Starbucks Corp.* (N.D. Cal. 2007) 497 F.Supp.2d 1080, 1088-1089 (that Labor Code Sections 512(a) and 226.7 only require that an employer offer meal breaks...)”² *Brinker* expressly adopted *White*’s holding. Slip op. 43-47. Another employer-side letter acknowledged that *Brinker* “appears to have interpreted the word ‘provide’ in the statute in a way that differs from the court in *Cicairos*.”³

A chorus of amicus letters supporting review emphasizes the *Brinker/Cicairos* split and predicts widespread confusion among lower courts if the split is not resolved.⁴

² Employer Group *et al.*, Publication Request, 10/22/07, at 9.

³ Proskauer Rose LLP, Publication Request, 10/21/07, at 1.

⁴ *E.g.*, California Labor Federation, AFL-CIO, Amicus Letter, 08/29/08, at 2-3; Members of the California State Legislature, Amici Letter, 09/02/08, at 3; Alameda Central Labor Council *et al.*, Amici Letter, 09/05/08, at 6-7 (“ACLC Letter”); Consumer Attorneys of California, Amicus Letter, 09/10/08, at 1 (“CAOC Letter”); California Employment Lawyers Association, Amicus Letter, 09/10/08, at 2

The split with *Cicairos* is starkly illustrated by *Brown v. Federal Express Corp.*, 249 F.R.D. 580 (C.D. Cal. 2008), on which *Brinker* heavily relied (at 43-44, 46) and which defendants' answer highlights (at 13-14).

Cicairos involved Safeway delivery truck drivers and *Brown* involved FedEx truck drivers. *Cicairos*, 133 Cal.App.4th at 955; *Brown*, 249 F.R.D. at 582-86. In both cases, the truck drivers were out of direct contact with the employer for much of the day.⁵ In both cases, the employer had adopted a policy purportedly allowing the truck drivers to take meal periods. In both cases, the employer was alleged to have failed to arrange the truck drivers' work schedules so that they were relieved of duty for long enough to take the required breaks. In both cases, the employers were required by law to record employees' meal periods. 8 Cal. Code Regs. §11050(¶7(A)(3)) ("Meal periods...shall be recorded.").

Despite these similarities, in *Cicairos*, the employer was held to have violated the law, whereas in *Brown*, the employer was held to have complied. Given the factual similarities between the two cases, the outcomes should have been the same. The only explanation for the divergent outcomes is the courts' conflicting legal conclusions.

("CELA Letter"); Gelasio Salazar *et al.*, Amici Letter, 09/11/08, at 6; Barry Broad, Amicus Letter, 09/11/08, at 3 ("Broad Letter"); Miles E. Locker, Amicus Letter, 09/12/08, at 2 ("Locker Letter"); Kevin Tien Amicus Letter, 09/16/08, at 1 ("Tien Letter").

⁵ *Cicairos* flatly rejected the employer's argument that "meal periods and rest breaks were the sole responsibility of the drivers because the company could not regulate the drivers' activities on the road." 133 Cal.App.4th at 962.

Brinker followed *Brown* without stopping to consider *Brown*'s overwhelming factual resemblance to *Cicairos*—thereby creating a direct split in authority with *Cicairos*.

2. The Federal District Court Decisions Exacerbate the *Brinker/Cicairos* Split and Demonstrate the Widespread Importance of the Meal Period Issue

Defendants rely on a series of federal district court decisions (previously cited in the review petition) to support the notion that “the *Brinker* court got it right.” Answer 12-16. What these federal district court decisions actually show is that the meal period compliance question is arising repeatedly in actively-litigated class-action cases across California. In fact, most of the federal judges said they were trying to determine what this Court would do if faced with the issue. The cases make plain that this Court’s guidance is needed for litigants in state and federal courts alike.

Again, a close review of one of these federal decisions—*Brown*—shows how the federal bench first went astray and how *Brinker* was consequently led off track.

Like *Brinker*, the *Brown* court interpreted California’s meal period requirement based on a single word in the regulatory scheme—“provide”—then, like *Brinker*, consulted a dictionary to determine its meaning out of context. *Brown*, 249 F.R.D. at 585 (citing *Merriam Webster’s Collegiate Dictionary* (10th ed. 2002)). *Brown*, like *Brinker*, wholly overlooked the Wage Orders’ differing standards for meal periods (“no employer shall employ”) and rest breaks (“authorize and permit”). *Id.* at 584-85 (quoting ¶11 but nowhere mentioning ¶12). *Brown*, like *Brinker*, compounded this error by then ignoring the administrative and legislative history. *See id., passim.*

Defendants' answer makes no effort to refute any of this or to defend the flawed reasoning of *Brinker* or *Brown*.

The DLSE has long recognized that the Wage Orders' differing language creates a "distinction between meal periods and rest periods." DLSE Op.Ltr. 2002.01.28 (2RJN7564); *see* DLSE Op.Ltr. 2001.09.17 (22PE6221); DLSE Enforcement Manual (2002 Update) at 45-4 (RJN05/11/07, Ex. 4); Locker Letter, *supra*, at 5-6 (discussing DLSE's enforcement position).

The Legislature's intent in enacting both section 226.7 and section 512 was to *codify* the Wage Orders' two *differing* compliance standards—which had existed for decades. *See* Wage Order 5-76(¶11(A), 12) (RJN12/17/07, Ex. 3). Legislative analyses for both statutes use the word "provide" to refer collectively to the two differing compliance standards. AB 2509, Third Reading, Senate Floor Bill Analysis, at 4 (08/28/00) (section 226.7 "[p]laces into the statute the existing provisions of the Industrial Welfare Commission requiring employers to provide a 10-minute rest period for every four hours and a 30-minute meal period every five hours." (emphasis added)) (RJN12/17/07, Ex. 1); AB 60, Legislative Counsel Digest, at 2 (07/21/99) ("Existing wage orders...prohibit an employer from employing an employee...without providing the employee with a meal period..." (emphasis added)). That, in turn, is precisely how the word "provide" was used in the statutes.

Instead of considering any of this legislative history, both *Brinker* and *Brown* relied purely on a dictionary.

The *Brinker* and *Brown* statutory interpretation technique also negated the language in section 512(a) and Wage Order ¶11(A) that allows meal periods to "be waived by mutual consent" or be "on-duty"

in certain circumstances. If, as *Brinker* and *Brown* held, meal periods need never be more than offered, there would be no reason to state that sometimes “waive[r]” or “on-duty” meals are allowed. *Brinker*’s only mention of this language is to assert, without explanation, that “plaintiffs’ interpretation of section 512(a) is inconsistent with the language allowing employees to waive their meal breaks for shifts less than five [*sic*] hours.” Slip op. 42; *see also* Moory Brookler, Amicus Letter, 09/22/08, at 9-11 (explaining how *Brinker* nullifies the waiver language).

In sum, the federal decisions on which defendants rely are just as flawed as *Brinker* because none of them considered how the word “provide” is used in section 226.7, the Wage Orders, the legislative history, or by the DLSE. *Cicairos*, by contrast, was fully aware of these factors, as its reliance on the leading DLSE opinion letter demonstrates. *Cicairos*, 133 Cal.App.4th at 962-63 (quoting DLSE Op.Ltr. 2002.01.28 (2RJN7564)). The federal cases simply exacerbate the split between *Brinker* and *Cicairos* and underscore the need for this Court’s review.

3. Review is Needed to Elaborate on *Murphy* and Resolve the Ongoing Doubt Concerning Its Impact on the Meal Period Issue

Defendants contend that *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094 (2007) supports *Brinker*’s holding that meal periods need only be “made available.” Answer 11-12. If that were true, surely the *Brinker* opinion would have discussed *Murphy* in its analysis. It did not, instead paying only lip service to the decision. Slip op. 3, 26.

The reality is that *Murphy* does not resolve the meal period compliance question, and that unless this Court further explains

Murphy, the decision will continue to be cited by litigants on both sides, exacerbating the confusion created by the *Brinker/Cicairos* split. *E.g.*, *Salazar v. Avis Budget Group, Inc.*, 251 F.R.D. 529, 533 (S.D. Cal. 2008) (denying certification, citing *Murphy*); *Perez v. Safety-Kleen Sys., Inc.*, ___ F.R.D. ___, 2008 WL 2949268, *5 (N.D. Cal. 2008) (same); *Brookler v. RadioShack Corp.*, No. BC313383 (Los Angeles Co., 09/06/07) at 1 (RJNSC, Ex. I) (refusing to decertify class post-*Murphy*; *Murphy* “provides no guidance or new interpretation”).

Once again, *Brown* illustrates the problem. *Brown* cited *Murphy* in support of its conclusion that employers are “required only to make meal periods...available” to workers. *Id.* at 585-86. However, *Brown* failed to consider the *conduct* by which *Murphy* held that the employer violated its meal period obligations.⁶ In *Murphy*, a store manager had to work while eating lunch and sometimes could not even take a restroom break because no other employees were there to relieve him. *Murphy*, 40 Cal.4th at 1100. In other words, it was by understaffing the store that the employer failed to satisfy its meal period obligations—and became liable for an extra hour of pay under section 226.7. *See id.*

Brown construed *Murphy* in a vacuum that did not consider *Murphy*’s facts, and *Brinker* ignored *Murphy* entirely. *See* CELA Letter, *supra*, at 1 (“*Brinker* misapplied or neglected this Court’s decision in *Murphy*....”). Unless review is granted to explain *Murphy*, lower courts will continue to be led astray. Only this Court can definitively construe *Murphy* and resolve the meal period compliance issue once and for all California workers.

⁶ “It is elementary that the language used in any opinion is to be understood in the light of the facts ... then before the court.” *McDowell and Craig v. City of Santa Fe Springs*, 54 Cal.2d 33, 38 (1960).

B. Review Should Be Granted to Resolve the Important Questions of Law Raised by the Other Meal Period and Rest Break Issues in This Case—Issues That Are of Critical Importance for Millions of California Workers

Defendants attempt to minimize the significance of the remaining meal period and rest break issues by arguing that they amount to “a mere ‘error correction’ argument.” Answer 16. Not so. These are “important questions of law” that will have real-world, adverse effects on millions of California workers. These questions need to be settled along with the meal period compliance issue.

This is so for two reasons that go far beyond the *Brinker* panel’s specific errors.

First, three days after *Brinker* was decided, the DLSE chose to adopt *Brinker*’s holdings on these issues as its enforcement policy for all non-exempt California workers, “effective immediately”—a 180° reversal of its prior enforcement policy.⁷ Simultaneously, the DLSE revised its Enforcement Manual to reflect not only *Brinker*’s meal period compliance holding, but also its meal period timing and rest break holdings.⁸

Accordingly, *Brinker*’s holdings now represent California’s statewide enforcement policy for all administrative proceedings. California workers have already felt the consequences. “[N]umerous

⁷ Labor Commissioner Memorandum to DLSE Staff (07/25/08) at 4 (http://www.dir.ca.gov/DLSE/Brinker_memo_to_staff-7-25-08.pdf, viewed 09/29/08).

⁸ DLSE Enforcement Manual (Rev. 07/08), §§45.2.1, 45.3.1 (http://www.dir.ca.gov/dlse/DLSEManual/dlse_enfcmanual.pdf, viewed 09/29/08) (adopting *Brinker*’s meal period compliance and timing holdings and rest break holdings).

workers represented by DLSE in meal break enforcement matters had their cases dropped” as a result. Broad Letter, *supra*, at 2; *see also* ACLC Letter, *supra*, at 2 (DLSE action “has magnified *Brinker’s* negative effect on working people in California”).

The only thing that can change that is for this Court to grant review, strip *Brinker* of its precedential status, and decide these questions for itself.

Second, *Brinker’s* holdings represent a radical departure on points of law that had been considered settled for years:

- Meal Period Timing. Since 1980, the IWC’s power to adopt Wage Orders with “more restrictive provisions” than the Labor Code has been unquestioned. *Industrial Welfare Commission v. Superior Court*, 27 Cal.3d 690, 733 (1980). *Brinker’s* meal period timing holding—that California law imposes no timing requirement for meal periods—upends this settled principle. It also reduces the meal period requirement “to a meaningless charade, with ‘meal periods’ at the very beginning or very end of a shift providing no benefit to employees whatsoever.” Locker Letter, *supra*, at 9.
- Rest Break Compliance. Since 1948, the DLSE has interpreted the Wage Orders as requiring a rest break for employees who work “any time over the midpoint of any four-hour block of time.”⁹ *Brinker’s* holding—that no rest break is triggered until “after” four full hours are

⁹ DLSE Op.Ltr. 1999.02.16 (quoting 1948 Interp.Memo.) (original underscoring) (RJN12/17/07, Ex. 1).

worked—is a radical deviation from existing law and would halve California workers’ rest break entitlement. *See* ACLC Letter, *supra*, at 3-4 (“Before *Brinker* [the right to two rest breaks in a typical eight-hour workday] unequivocally governed all workplaces in California. Since the issuance of *Brinker* these basic workplace rights are no longer certain. Unions may now be required to bargain for these rights rather than bargain up from this floor of rights that was solid for decades.”).

- Rest Break Timing. Since 2001, the DLSE has interpreted the Wage Orders to require that “the first rest period should come sometime before the meal break.” DLSE Op.Ltr., 2001.09.17 (22PE6221). *Brinker’s* contrary holding topples this well-established and commonsense interpretation, reducing the rest break requirement to a charade as well.

As discussed in the petition for review, all of these holdings are erroneous. Petition 20-26. But the point of that discussion—which defendants miss—is that the holdings represent extreme departures from previously-unquestioned law and that they drastically diminish employee rights. This, in turn, demonstrates the importance of the issues and the need for definitive rulings from this Court.

It is no exaggeration to say that *Brinker’s* holdings will affect millions—all California workers governed by the Wage Orders that the DLSE is charged with enforcing. The issues will arise not only in pending cases, and not only in administrative proceedings, but also in workplaces across California. The Court should review these critical issues now.

C. Review Should Be Granted to Ensure the Continuing Vitality of This Court’s Class Action Precedents and to Restore Uniformity of Decision

1. *Brinker* Contravened *Sav-on* by Rejecting the Proffered Statistical and Survey Evidence Out of Hand and By Reweighing the Evidence for Itself

Brinker is seen as a watershed decision on class certification issues as well. Broad Letter, *supra*, at 3-4; Locker Letter, *supra*, at 10; CAOC Letter, *supra*, at 2-4; The Impact Fund *et al.*, Amici Letter, Sept. 22, 2008, at 1-5 (all discussing *Brinker*’s class action implications).

Employer-side interests have already begun to cite *Brinker* as prohibiting class certification in wage and hour cases—period. A group of nine employer-side organizations has asserted that *Brinker* “makes clear that, *as a matter of law*, Labor Code section 512, subdivision (a) requires that *no future class action should be certified on this issue.*” Employer Group, Publication Request, 10/22/07, at 8 (emphasis added). Since *Brinker*, multiple trial courts have set hearings—on their own motion—to reconsider class certification orders in similar cases. Tien Letter, *supra*, at 1-2 (describing cases in which trial courts requested further class certification briefing post-*Brinker*); RJNSC Ex. E (*Grassi* order). Many defendants have moved to decertify previously-certified classes.

Defendants contend that *Brinker* reversed class certification after applying *Sav-on*¹⁰ to facts specific to this case. Answer 21-23. Not so, or it would not have had the impact described above. A careful reading of the opinion bears this out. Petition 27-28, 30-31; Slip op. 32, 47-49, 51 (holding that, as a matter of law, no showing could ever be sufficient

¹⁰ *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319 (2004).

to establish meal period, rest break, or off-the-clock claims classwide, regardless of the nature of any proffered expert survey or statistical evidence).

Elsewhere in their answer, defendants themselves describe *Brinker* as holding that “meal period and rest break claims *cannot* be established via statistical or representative evidence.” Answer 23; *id.* at 28 (“*no* ‘evidentiary showing’ could eliminate the individual inquiries”). The importance of this issue for California workers statewide cannot be understated. *Gentry v. Superior Court*, 42 Cal.4th 443, 459-61 (2007) (class action procedure essential to effective enforcement of California’s employment laws).

As explained in the review petition, *Brinker* exacerbates a split among appellate courts respecting the *standard of appellate review* of class certification orders when survey and statistical evidence is proffered. Petition 26-29 & nn. 26-27 (citing cases). Defendants overlook this, relying instead on trial-level federal cases that, of course, involved no appellate review issues and in which no survey or statistical evidence was even proffered. Answer 23-24 (citing *Brown*; *Salazar*; *Kenny v. Supercuts, Inc.*, 2008 WL 2265194 (N.D. Cal. Jun. 2, 2008); *Gabriella v. Wells Fargo Fin. Corp.*, 2008 WL 3200190 (N.D. Cal. Aug. 4, 2008)). These cases have no bearing on the lack of uniformity of decision among California’s appellate courts on this point.

Finally, defendants deny that the *Brinker* panel re-weighed the evidence—including the survey and statistical evidence; the competing declarations; and the “waiver” evidence. Answer 26-27. The opinion speaks for itself. Petition 27, 29-30 (discussing opinion’s re-weighing process and factual findings).

Brinker threatens to eliminate survey and statistical evidence as a method of common proof for all meal period, rest break, and off-the-clock cases—of which dozens are pending across the state. *Brinker* engaged in an appellate re-weighting process that *Sav-on* prohibits. Review should be granted to prevent this from happening, to maintain *Sav-on*'s continuing vitality as precedent, and to preserve the class action device for wage and hour cases generally.

2. *Brinker* Contravened *Linder* by Deciding Legal Questions Not Enmeshed With Class Certification

Defendants assert that plaintiffs “urged” the *Brinker* panel to make merits determinations contrary to *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429 (2000). Answer 24-25. That is incorrect.

Plaintiffs repeatedly argued that substantial evidence supported the class certification order regardless of how the meal period compliance question was resolved. *E.g.*, Real Parties’ Return, 02/01/07, 29-32; Supplemental Brief, 08/27/07, 12-13. After the *Brinker* panel issued an unpublished opinion leaving no doubt of its view on that question, while simultaneously purporting to remand for the trial court to resolve it in the first instance (a useless exercise given the unpublished opinion’s language), plaintiffs asserted post-remand that a more forthright ruling would better serve judicial economy. Issues are not waived when, as here, further objection would be futile. *People v. Redmond*, 29 Cal.3d 904, 917 (1981).

The remaining legal issues came up only because plaintiffs *mentioned* them as common legal questions supporting affirmance of class certification. *E.g.*, Return 16, 36, 37 & n.23 (mentioning common meal period timing and rest break issues). *Brinker* reached out to decide

those issues even though none was “enmeshed” with the elements of certification and none had even been briefed. That contravened *Linder*.

Brinker’s approach puts every class action proponent in an untenable position on appeal. If *Brinker* stands, pointing out the common legal questions that support affirmance of certification will be construed as an invitation for the appellate court to decide them—regardless of whether the trial court decided them and even if their merits were never briefed. Plaintiffs made the best of the panel’s insistence on deciding these issues by addressing them in their post-remand supplemental letter brief.

A procedure more contrary to *Linder* can hardly be imagined. Review should be granted to assure that lower appellate courts follow *Linder*’s directives and to eliminate confusion over what issues are, and are not, “enmeshed” with certification.

3. *Brinker Contravened Washington Mutual by Failing to Remand for the Trial Court to Apply the New Legal Standards to the Facts in the First Instance*

Defendants’ only response to plaintiffs’ *Washington Mutual*¹¹ argument is to assert that *Brinker* correctly ruled, as a matter of law, that no possible evidentiary showing could ever support class certification. Answer 28-29. As already discussed, the continuing vitality of survey and statistical evidence as a method of common proof is an issue of widespread importance affecting thousands of workers in dozens of current and future wage and hour cases.

¹¹ *Washington Mutual Bank, FA v. Superior Court*, 24 Cal.4th 906 (2001).

Any order granting review should encompass the *Washington Mutual* issue. If this Court agrees that the *Brinker* panel correctly reached, and correctly announced, new legal standards for meal period and rest break claims, it will be necessary to decide what happens next and whether remand is appropriate under *Washington Mutual*.

D. Contrary to Defendants' Position, the Petition for Review Challenges the Panel's Reversal of Class Certification of Plaintiffs' "Off-The-Clock" Claim

Defendants' answer incorrectly asserts that "plaintiffs have not sought review" of *Brinker*'s reversal of class certification of the "off-the-clock" claim. Answer 8 n.1. The "off-the-clock" claim is repeatedly discussed in the review petition. It argues that *Brinker* improperly reweighed, and summarily rejected, survey and statistical evidence that the trial court found sufficient classwide proof of not only the meal period and rest break claims, but also the "off-the-clock" claim. Petition 2, 11-12, 26-29, 31.

The "off-the-clock" claim is expressly encompassed in Issue No. 5 for review: "May trial courts accept expert survey and statistical evidence as a method of proving meal period, rest break, **and/or 'off-the-clock' claims** on a classwide basis?" Petition 2 (bold added). It is also encompassed in Issue No. 6 for review, relating to *Brinker*'s misapplication of the appellate standard of review as to *all* of plaintiffs' claims. *Id.*; *see id.* at 11 ("This petition raises a second set of critical issues that will inevitably arise in...**off-the-clock class actions** across California:...") (bold added)).

The petition points out that *Brinker* improperly "re-weigh[ed] the proffered expert survey and statistical evidence, then [found] it inadequate as a matter of law to support certification of

petitioners'...**off-the-clock claims.**" *Id.* at 27 (citing *Brinker*, slip op. 51, discussing "off-the-clock" claim), 28 ("survey and statistical evidence *can* show...**why off-the-clock work was done**"), 29 (citing *Brinker*, slip op. 51-52 (discussing "off-the-clock" claim)), 31 ("This Court should grant review to explain how *Sav-on* and *Linder* operate in the specific context of...**off-the-clock class actions**") (bold added).

III. CONCLUSION

For the reasons discussed above, the petition for review should be granted.

Dated: September 29, 2008

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH WORD COUNT REQUIREMENT**

Pursuant to Rule of Court 8.504(d)(1), the undersigned hereby certifies that the computer program used to generate this brief indicates that it does not exceed 4,200 words (including footnotes and excluding the parts identified in Rule 8.504(d)(3)).

Dated: September 29, 2008

Kimberly A. Kralowec