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September 11, 2008

Honorable Ronald M. George, Chief Justice
and the Associate Justices
CALIFORNIA SUPREME COURT
350 McAllister Street
San Francisco, California 94102

Re: *Brinker Restaurant Corp., et al. v. Superior Court (Hohnbaum)*
California Supreme Court Case No. S166350

Dear Chief Justice George and Associate Justices:

Pursuant to Rule of Court 8.500, subd. (g), Gelasio Salazar and Saad Shammas respectfully submit this letter in support of the Petition for Review filed on August 29, 2008, in the matter of *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25 ("*Brinker*") by Petitioners, Adam Hohnbaum, *et al.*

I. The Applicants' Interest.

On November 27, 2006, Gelasio Salazar ("Salazar") and Saad Shammas ("Shammas") – acting individually, and on behalf of similarly situated current and former employees in California – filed a putative wage and hour class action lawsuit in Superior Court in San Diego against their employers, Avis Budget Group, Inc., et al. ("Avis"). In that lawsuit, Salazar and Shammas asserted that Avis had not adequately provided them and certain other Avis employees with required meal periods, and had thereby violated Labor Code sections 512 and 226.7, as well as certain sections of California's Industrial Welfare Commission ("IWC") Wage Order No. 9-2001 (Cal. Code Regs., tit. 8, section 11090).

Avis responded by removing that lawsuit to federal district court (S.D. Cal.) under the Class Action Fairness Act ("CAFA"), and the district court later denied class certification. It did so based solely on the conclusion that Avis was merely obligated under California law to make meal periods "available" to its employees like Salazar and Shammas, rather than to "ensure" that those meal periods were actually ever taken; as a result, the district court concluded it could not certify a class of such persons because the issue of whether employees availed themselves of the opportunity to take meal periods requires individualized inquiries, which would predominate over common questions.

In reaching the conclusion it did, the district court expressly rejected the Third District Court of Appeal's decision in *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 962-963 ("*Cicairos*"), which had previously held that California employers "have an affirmative obligation to ensure that workers are actually relieved of all duty" during their statutorily mandated meal periods, and therefore cannot superficially "provide" meal periods by simply assuming they are being taken. Relying instead on a recent rash of both published and unpublished federal district court cases for authority (see *White v. Starbucks Corp.* (N.D. Cal. 2007) 497 F.Supp.2d 1080; *Brown v. Fed. Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580; and *Kenny v. Supercuts, Inc.* (N.D. Cal 2008) 2008 WL 2265194), the district court announced that it was not obligated to follow *Cicairos*: Without explanation or analysis, it speculated that this Court would decide the "ensure" versus "provide" issue contrary to *Cicairos* if that issue were before it.

Salazar and Shammas subsequently petitioned the Ninth Circuit Court of Appeal to review the district court's decision, or alternatively, to certify that critical issue for review by this Court. That petition was recently denied by the Ninth Circuit on September 10, 2008, effectively leaving Salazar and Shammas with no other immediate avenue for review. (See *Salazar v. Avis Budget Group, Inc.*, No. 08-80105.)

Thus, like the employee-plaintiffs in *White, Brown,* and *Kenny* noted above, Salazar and Shammas have found that some district courts, unwilling to follow *Cicairos*, have *denied* certification of meal period claims brought under state law because of their disagreement with the holding in *Cicairos*. Yet other federal district courts continue to recognize the vitality of *Cicairos* and have *granted* class certification of meal period claims, reasoning that meal period compliance is a predominating common legal question properly decided at the merits stage. (See, e.g., *Cervantez v. Celestica Corp.* (C.D. Cal. 2008), 2008 WL 2949377; *Otsuka v. Polo Ralph Lauren Corp.* (N.D. Cal. 2008) 2008 WL 3285765; *Wiegele v. Fedex Ground Package Sys., Inc.* (S.D. Cal. 2008) 2008 WL 410691; Alba *v. Papa John's USA, Inc.* (C.D. Cal. 2007) 2007 WL 953849; *Cornn v. United Parcel Service, Inc.* (N.D. Cal 2005) 2005 WL 588431, *reconsid. granted in part on other grounds*, 2005 WL 2072091; *Wang v. Chinese Daily News, Inc.* (C.D. Cal. 2005) 231 F.R.D. 602.)

Undoubtedly, the Fourth District's recent decision in *Brinker* is likely only to foment further confusion and controversy in the federal judiciary, as it directly conflicts with the Third District's prior decision in *Cicairos*. As an ever growing number of labor and employment class action lawsuits are diverted to federal court under CAFA, this Court's intervention is needed to resolve the "ensure" versus "provide" debate to clarify for the federal courts an employer's obligations under Labor Code sections 512 and 226.7 and the IWC's Wage Orders. Indeed, the interests of millions of California workers – like Salazar and Shammas – hang in the balance.

II. Why Review Should Be Granted.

As explained above, the Petition now before this Court involves the critical question of whether California law requires employers "to ensure" or merely "to provide" meal breaks for their employees. Notwithstanding California's long established meal period laws and regulations which demonstrate that employers in California are obligated actively to ensure that their employees take required meal periods and are relieved of all work-related duties for each five-hour shift worked, and irrespective of settled California case law – like *Cicairos* – which has confirmed the scope of that obligation, a burgeoning body of federal district court decisions holds that to satisfy Labor Code sections 512 and 226.7, an employer need only make a meal break "available." Fuel will now only be added to that debate by the recent *Brinker* decision, which altogether ignores the purpose and development of California's meal period laws, and directly conflicts with *Cicairos*. Accordingly, it is for those two fundamental reasons that Salazar and Shammas urge this Court now to review *Brinker*.

1. *Brinker* Directly Conflicts with the Labor Code and Applicable Wage Orders.

Meal period rules have been part of the framework of California's health, safety, and welfare regulations for decades, as found in the California IWC Wage Orders. The IWC Wage Order No. 9, states in relevant part, *"[n]o 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 . . ." and *"[a]n employer may not employ* an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes . . ." (Cal. Code Regs. tit. 8, §§ 11090(11)(A) and (B) (2008) [emph. added].) The term "employ" means to "engage, suffer, or permit to work." (*Id.* at § 11090(2)(D).) Read together, the Wage Order mandates "no employer shall engage, suffer or permit any person to work" more than 5 hours, and "an employer may not engage, suffer or permit" an employee to work more than 10 hours, without the employee taking a full 30 minute meal period. In other words, employers must *ensure* that their employees are relieved of all work-related duties when the employee works 5 (or 10) hours.

This standard requires more than the low threshold of merely offering employees break time, particularly since "California courts have long recognized that wage and hour laws concern not only the health and welfare of the workers themselves, but also the public health and general welfare." (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 456 [citations omitted].) For these reasons, statutes governing conditions of employment "are to be liberally construed with an eye to protecting employees." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340; *see also Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 794.) Indeed, as this Court has recently confirmed, "health and safety considerations . . . are what motivated the IWC to adopt *mandatory* meal periods in the first place." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1114 [emph. added].)

For the first time in 1999, the Legislature codified the Wage Orders' mandates into Labor Code section 512, to require that "[a]n employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than thirty minutes . . ." and "[a]n employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes . . . ." (Lab. Code § 512(a).) Intending to adopt the Wage Orders' restrictions regarding meal periods, the Legislature expressly recognized that the Wage Orders prohibit an employer from employing an employee without the meal period protections, and that the bill enacting Section 512 "would codify that prohibition." (1999 Cal. Legis. Serv. Ch. 134, A.B. No. 60 (West).)

Only further underscoring its intent to perpetuate the Wage Orders' meal period mandates, in 2000 the California Legislature enacted Labor Code section 226.7. In so doing, it codified for the first time the Wage Orders' requirement that an employer shall owe an hour of additional pay to each employee who works during a meal period, as "mandated by an order of the commission." (2000 Cal. Legis. Serv. Ch. 876, A.B. No. 2509 (West).) Specifically, the payment obligation is triggered where an employer fails "to provide an employee with a meal period . . . in accordance with an applicable order of the [IWC] . . .," by ensuring the employee is free from all work-related activity. (Lab. Code § 226.7 (West 2001); Cal. Code Regs. tit. 8, §§ 11090(11) (A) and (B) (2008).) The Legislature's clear intent to codify the Wage Order's rules show that the employer's mandatory obligations with respect to meal periods require an employer to ensure that its employees take their meal periods, *i.e.,* are completely free of all work-related duties.

As evidenced by the express language of the meal period provisions of the Labor Code and the applicable Wage Orders, a California employer has an affirmative obligation to do more than simply "provide" a meal period; it must actively ensure that its employee take a thirty-minute period during which he is relieved of all work duties. Yet *Brinker* blithely ignores that language and the context in which it was developed and enacted, resorting instead to using a *dictionary* as its sole interpretive tool to determine what the Legislature meant when it used the word "provide" in section 522, subd. (a). Doing so ignores well-settled, fundamental rules of statutory interpretation. (See *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 ["The meaning of a statute may not be determined from a single word or sentence . . ." and "[l]iteral construction should not prevail if it is contrary to the legislative intent apparent in the statute"].) It also does violence to the significant development of that concept in the Wage Orders and the legislative history explaining what the word "provide" means. Indeed, *Brinker* was not free to disregard those interpretative tools in favor of stilted dictionary definitions which are inconsistent with the purpose of the very code section it was interpreting. (See *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 53-54.)

The Court of Appeal in *Brinker* also failed to consider what the Legislature meant by the term "provide" in Labor Code sections 512 or 226.7, by failing to review the substantial record submitted by the Real Parties in Interest regarding the legislative history, including the hearing transcripts from the IWC; *Brinker* also could have, but did not pay attention to the Statement as to the Basis of the 2000 Wage Orders, which summary is required of the IWC when revisions or amendments to IWC Wage Orders are issued. (See *California Hotel and Motel Association v. IWC* (1979) 25 Cal.3d 200, 213; see also Labor Code §1177.) "The statement should reflect the factual, legal and policy foundations for the action taken" and is an "explanation of how and why the commission did what it did." (*California Hotel and Motel Association v. IWC, supra,* 25 Cal.3d at p. 213.)

In this instance, the 2000 Statement as to the Basis was published *after* the enactment of Labor Code section 512. The Real Parties in Interest in *Brinker* drew the Court of Appeal's attention to the mandatory language in that document, to wit: "Any employee who works more than 6 hours in a work day **must receive** a 30-minute meal period."[1] In a separate Summary of Interim Wage Order 2000, dated March 1, 2000, the IWC also stated "An employee ***must receive*** a thirty-minute meal period for every 5 hours of work." In addition, in the IWC's Summary of Amendment to Wage Orders 1-13, 15, and 17, dated October 1, 2000, it again commented, "Other than as specified in Orders 4, 5 and 12 an employee ***must receive*** a thirty-minute meal period for every 5 hours of work."

Even the Ninth Circuit Court of Appeals recited an analysis of the IWC's historical documents in *Valles v. Ivy Hill Corp.* (9th Cir. 2005) 410 F.3d 1071, 1077-1082 (in which it ultimately held that the meal period rights of California employees are derivative of the Labor Code, and therefore not subject to waiver in a collective bargaining agreement nor to preemption by federal law), such as the Real Parties in Interest urged here. *Brinker*, however, engaged in no such discussion. *Valles* also illustrates the earlier point about confusion of the proper standard in the federal court system: *Valles*'s inquiry began with the remark: ". . . [f]or over half a century, the Industrial Welfare Commission ("IWC") – the state agency responsible for promulgating regulations that govern wages, hours, and working conditions in California – has guaranteed work-free meal periods to manufacturing workers in California, including those covered by collective bargaining agreements, pursuant to its authority under § 1173 of the Labor Code." (*Id.*, at p. 1077 [internal citations omitted]). Yet, district courts have still struggled with the "ensure" versus "provide" standard, as evidenced by the conflicting decisions they have rendered in recent years.

In sum, if an ambiguity exists in the "provide" language found in either Labor Code sections 512 or 226.7, *Brinker* should have utilized the significant interpretative tools at its disposal –

[1] See Real Parties in Interest Request for Judicial Notice in support of Opposition to Petitioners' Writ of Mandate, filed May 7, 2008.

including the relevant legislative history and Wage Orders – to determine what the Legislature meant by using that term. (See, e.g., *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [confirming the fundamental rule that statutory interpretation should focus on the intent of the Legislature so as to effectuate the purpose of the law being construed].) *Brinker*'s utter failure to do so – and to instead supplant that process with the use of a dictionary – leads to an absurd result directly contrary to the purpose of those Labor Code provisions and the Wage Orders they incorporate. Accordingly, this Court's intervention is required to settle this important question of law in a manner consistent with both the purpose and history of sections 512 and 226.7.

2. *Brinker* Directly Conflicts with *Cicairos.*

Although the *Brinker* court attempted to distinguish *Cicairos* on the basis of "public policy" not otherwise reflected in any provision of the Labor Code, there is no getting around the fact that *Brinker* and *Cicairos* directly conflict on their respective interpretations of an employer's meal period obligations under California law.

In *Cicairos,* the Third District found that evidence submitted by the plaintiffs-drivers was sufficient to find a violation of meal period laws, as the employer-defendant did no more than simply assume that its employees were taking their meal periods. (*Cicairos, supra,* 133 Cal.App.4th at 962-963.) Upon those findings, *Cicairos* ruled that because the defendant had a duty under the Wage Orders to record its employees' meal periods, but failed either to maintain records to show whether meal periods were taken or to monitor whether they were being offered or taken, "defendant's obligation to provide the plaintiffs with an adequate meal period [was] not satisfied . . . ." (*Id.* at 962-963.) The *Cicairos* court then crystallized its rationale by quoting the language of the Department of Labor Standards Enforcement ("DLSE") Opinion Letter ". . . because employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty.'" (*Ibid.* [quoting DLSE Op. Letter, Jan. 28, 2002, at 1].)

In stark contrast, the Fourth District in *Brinker* has determined that meal periods need only be "provided" or "made available" to employees, and that "public policy" neither requires employers to ensure those meal periods are being utilized, nor to relieve employees of their duties so those statutorily-mandated meal periods can be taken. (*Brinker, supra,* Slip Opn. at 47.)[2] Consequently, as there simply is no reasonable way to reconcile *Cicairos* and *Brinker* on that critical issue, that split in authority will inevitably lead to further confusion in both state and federal courts interpreting and applying Labor Code sections 512 and 226.7 and the IWC Wage Orders, and substantially undermine the employee protections engendered in those code sections. Accordingly, this Court's intervention is now needed both to facilitate uniformity of decision, and to resolve definitively that important question of law.

[2] Salazar and Shammas cite to the *Brinker* Slip Opinion ("Slip Opn."), as the official pagination of that opinion is yet to be published.

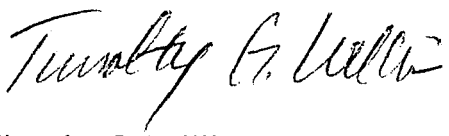
III. Conclusion.

Although formerly settled in *Cicairos*, the scope of an employer's obligations under Labor Code sections 512 and 226.7 and the IWC Wage Orders has now been directly called into question by *Brinker*. As an increasing number of state courts and federal courts (both at the trial court and appellate court level) are now grappling with that issue with widely inconsistent results, a uniform resolution of that issue is critically important to California employees and employers alike.

Accordingly, Salazar and Shammas respectfully request this Court to grant the Petition for Review filed in this matter by Petitioner, Adam Hohnbaum.

Respectfully submitted,

POPE, BERGER & WILLIAMS, LLP



Timothy G. Williams

TGW:

cc: Courts/Counsel of Record

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

I, Sheri B. Alcaraz, declare that I am a citizen of the United States, over 18 years of age, and not a party to the within lawsuit. My business address is 550 West "C" Street, Suite 1400, San Diego, CA 92101.

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

September 11, 2008, letter to the California Supreme Court
Brinker Restaurant Corp., et al. v. Superior Court (Hohnbaum)
California Supreme Court Case No. S166350

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

First Class Mail: I am readily familiar with the practice of Pope, Berger & Williams, LLP for collection and processing of correspondence for mailing with the United States Postal Service. I deposited each such envelope, with first class mail postage thereon fully prepared, in a recognized place of deposit of the U.S. Mail in San Diego, California, for collection and mailing to the office of the addressee on the date shown herein.

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I declare under penalty of perjury under the laws of the State of California that he foregoing is true and correct. Executed on September 11, 2008, at San Diego, California.

Sheri B. Alcaraz