S166350

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

THE SUPERIOR COURT FOR 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

ANSWER TO POST-HEARING AMICUS BRIEF OF CALIFORNIA EMPLOYMENT LAW COUNCIL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Brinker Restaurant Corporation, Brinker International, Inc., and Brinker International Payroll Company, L.P. ("Brinker") hereby respectfully submit this Answer to the Post-Hearing Amicus Curiae Brief of California Employment Law Council Addressing Retroactive or Prospective Effect of Forthcoming Decision ("CELC Amicus Brief").

Brinker agrees with the CELC Amicus Brief that California law does not require that employers offer a meal period every five consecutive hours – what this Court and the parties have referred to as a "Rolling Five" rule. (CELC Amicus Brief, pp. 2-3.)

Brinker also agrees that if this Court *does* adopt a Rolling Five rule, it should do so on a prospective basis only because neither the Wage Order, nor the California Division of Labor Standards Enforcement ("DLSE"), nor any other authority provided employers fair notice that they were required to provide their employees a second meal period five hours after the first meal, rather than one meal period for every five hours worked. As a result, retroactive application of a Rolling Five rule would violate the federal and state due process rights of Brinker and other conscientious employers, who could not reasonably have known that their efforts to create a flexible workplace for their employees and a workable business schedule for themselves were against the law, and that they could be subject to multi-million dollar liabilities for this unknowing violation.

ARGUMENT

I. THERE IS NO ROLLING FIVE REQUIREMENT. EVEN IF THERE WERE, IT WAS NOT SUFFICIENTLY CLEAR TO GIVE EMPLOYERS FAIR NOTICE OF ITS REQUIREMENTS.

Members of this Court suggested at oral argument that while Labor Code section 512 prescribes the "number of meal breaks," requiring one meal break for every five hours of work, the Wage Order may require a second meal period five hours after the end of the preceding meal period. However, the language of the Wage Order and the obligations it imposes on employers are actually no different from those imposed by the Labor Code.

The Labor Code states:

> An 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 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

(Lab. Code, § 512, subd. (a).)

Using nearly identical language, the Wage Order states:

> 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, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.

(Cal. Code Regs., tit. 8, § 11050, subd. (11)(A).) Both the Labor Code and Wage Order thus provide that an employee working more than five hours *in a day* is entitled to a 30-minute meal period, unless the employee works six hours or less *in a day*, in which case the meal period may be waived – neither states that an employee is entitled to a meal period every five *consecutive* hours.

If there were any ambiguity in that language, the Statement as to the Basis for the 2000 Amendments to the Wage Order – which "provide[s] an explanation of how and why the [IWC] did what it did" and "reflect[s] the factual, legal, and policy foundations for the action taken" (*Small v. Superior Court* (2007) 148 Cal.App.4th 222, 232-233, internal citations and quotations omitted) – confirms that the Wage Order was creating a meal period entitlement for employees who work more than five hours "in a day," with a waiver exception for employees who work "less than six hours in a day." (Statement as to the Basis for the 2000 Amendments to Wage Orders 1 through 15 and the Interim Wage Order [MJN Ex. 32], p. 20.) Thus, the Statement as to the Basis provides, in relevant part:

> Any employee who works more than six hours *in a workday* must receive a 30-minute meal period. If an employee works *more than five hours but less than six hours in a day*, the meal period may be waived by the mutual consent of the employer and employee.

(*Ibid.*, emphasis added.)

At argument, Justice Liu posited that the Wage Order's waiver exception may apply to the work period *after the first meal* – that "if an employee has lunch from 12 to 12:30 and their day's work ends at 6," it "falls squarely within this language . . . that says that except when a work period of not more than six hours will complete the day's work, the meal period may be waived." Brinker submits – consistent with the IWC Statement as to the Basis quoted above – that the waiver exception applies only when an employee works "less than six hours *in a day*" – not when an employee works less than six hours *after the first meal.* (Statement as to the Basis for the 2000 Amendments to Wage Orders 1 through 15 and the Interim Wage Order [MJN Ex. 32], p. 20, emphasis added.)

Had the IWC intended for the waiver exception to apply when an employee works less than six hours after the first meal, surely it would have said so. Indeed, it would have included two waiver clauses – one waiver clause pertaining to the first meal period, and a second waiver clause pertaining to the second meal period. That, of course, is precisely what the Legislature did when it enacted section 512, allowing for the waiver of the first and second meal periods in separate clauses. (Lab. Code, § 512, subd. (a) ["An 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, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual

consent of the employer and the employee only if the first meal period was not waived."].)[1] Thus, section 512 grants all California employees the right to a second meal period when they work more than 10 hours in a day. (*Ibid.*)

As Brinker argued in its Answer Brief on the Merits (pp. 67-68) and at argument, were this Court to hold that employers must provide a meal period for every five consecutive hours of work, it would have to strike approximately half the statute – the words dictating that an employee's meal period entitlement is measured by the total number of hours worked "per day," the words indicating that employees working "more than 10 hours per day" are entitled to a second meal period, and the words describing waiver of the second meal period. After all, there would be no need to consider any of that if a Rolling Five rule governs:

> An 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 30 minutes, except that if the total work period ~~per day~~ of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. ~~An 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~~

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[1] In fact, most other wage orders, like section 512, include two waiver clauses and specify that employees are entitled to a second meal period after working 10 hours in a day. (Wage Orders 1-3, 6-11, 13, 15-17, available at http://www.dir.ca.gov/iwc/wageorderindustries.htm.)

~~minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.~~

(Lab. Code, § 512, subd. (a), strikethroughs added.) It is black letter law that such interpretations that "render words surplusage are to be avoided." (*Woods v. Young* (1991) 53 Cal.3d 315, 323; see also *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1155 ["'[C]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.'"], quoting *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22.)

Plaintiffs likely will respond that there would be no surplusage problem if employers appropriately timed the first meal period to avoid work periods (before or after the meal) exceeding five hours. But the IWC included no timing requirement in the Wage Order, and its decision must be respected. Indeed, had the IWC intended to require that meal periods be scheduled "between the third and fifth hours" of an employee's shift as Plaintiffs contend (Opposition to Application of CELC for Leave to File Post-Hearing Amicus Brief Addressing Retroactive or Prospective Effect of Forthcoming Decision ("Opposition to CELC Application"), pp. 6, 15), it could easily have done just that. In fact, it *did* create a "timing" requirement in the very next subdivision of the Wage Order but only for rest periods, instructing that *rest periods "insofar as practicable shall be in*

the middle of each work period." (Cal. Code Regs., tit. 8, § 11050, subd. (12)(A), emphasis added.)

The IWC also knew exactly how to create a requirement mandating that a second meal be provided a certain number of hours after the end of the first. After all, it included just such a rule in its entertainment industry order: "Subsequent meal period for all employees shall be called not later than six (6) hours *after the termination of the preceding meal period.*" (Cal. Code Regs., tit. 8, § 11120, subd. (11)(A), emphasis added.) No such timing requirement is contained in the Wage Order applicable here.

The *only* court to address the meal period timing issue has decided in Brinker's favor. In *Nguyen v. Baxter Healthcare Corp.* (C.D. Cal., Nov. 28, 2011, No. 8:10-cv-01436) 2011 WL 6018284, plaintiff maintained that her employer violated the meal period statutes and applicable wage order by failing to properly "time" her meal periods. (*Id.* at *7.) The federal court dismissed that argument on summary judgment, holding that "*[t]here is no language as to when a first meal break must occur or if the meal breaks need to be timed.* Rather, Section 512 states a thirty-minute meal break must be provided 'for work of more than five hours *per day.*'" (*Ibid.*, first emphasis added, quoting Lab. Code, § 512, subd. (a).)

Brinker respectfully requests that this Court likewise hold that under the plain language of section 512 and the Wage Order, meal periods must be provided for every five hours that an employee works – and that no

"timing" or Rolling Five requirement exists. If this Court disagrees, at the very least it should hold that the law was not sufficiently clear to afford Brinker and other employers fair notice that a Rolling Five rule was in place, as discussed in more detail next.

II. IF THIS COURT HOLDS THAT ROLLING FIVE IS THE LAW, ITS DECISION SHOULD BE APPLIED PROSPECTIVELY BECAUSE BRINKER AND OTHER EMPLOYERS WERE NOT GIVEN FAIR NOTICE THAT SUCH A RULE EXISTS.

If this Court rules against Brinker on the Rolling Five issue, its decision should be given prospective application to avoid violating Brinker's federal and state due process rights. Retroactive application of a Rolling Five rule would ensnare not only Brinker but untold numbers of employers who tried to lawfully accommodate their employees' various scheduling requests and had no reason to believe they could be violating the law.

A. Brinker Was Not Given Fair Notice That It Was Required To Provide Its Employees A Second Meal Period Five Hours After The First Meal.

"Due process requires that the government provide citizens and other actors with sufficient notice as to what behavior complies with the law. Liberty depends on no less: '[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" (*United States v. AMC Entertainment,*

Inc. (9th Cir. 2008) 549 F.3d 760, 768, quoting *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108.) Brinker was not afforded fair notice of a Rolling Five rule, nor was any other employer.

1. The Wage Order and its regulatory history did not provide fair notice.

The applicable Wage Order did not give people of "ordinary intelligence a reasonable opportunity to know" that measuring meal periods by the number of hours an employee worked in a day – and not by the number of hours worked since the preceding meal – "is prohibited." (*AMC Entertainment, supra*, 549 F.3d at p. 768.) As discussed above, the Wage Order contains no "timing" requirement with respect to meal periods, as it does with respect to rest periods (Cal. Code Regs., tit. 8, § 11050, subd. (12)(A)); it does not mandate subsequent meal periods "after the termination of the preceding meal period," as the entertainment industry wage order does (Cal. Code Regs., tit. 8, § 11120, subd. (11)(A)). Indeed, a close review of the regulatory history reveals that the only time the regulations required a meal period after five consecutive hours of work was in 1947, and that requirement was deleted in 1952. (Brinker's Answer Brief on the Merits ("ABM"), pp. 73-74.)

Federal constitutional cases hold that when a regulation "[o]n [its] face . . . reveal[s] no rule or combination of rules providing fair notice that [it] prohibit[s]" certain conduct, due process precludes a finding of

retroactive liability. (*General Elec. Co. v. United States Environmental Protection Agency* (D.C. Cir. 1995) 53 F.3d 1324, 1330; *Gates & Fox Co., Inc. v. Occupational Safety and Health Review Com.* (D.C. Cir. 1986) 790 F.2d 154, 156 [holding that "as drafted," the regulation at issue "fails to give fair notice" that the company could be sanctioned for certain conduct]; *Phelps Dodge Corp. v. Federal Mine Safety and Health Review Com.* (9th Cir. 1982) 681 F.2d 1189, 1193 [holding that a mine safety regulation that "inadequately expresses an intention to reach the activities" in question cannot serve as the basis for the issuance of a citation or the levy of a fine].)

This Court's recent decision in *Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, is also instructive. There, this Court rejected defendant's argument that its statutory interpretation should be applied only prospectively because "the statute provides constitutionally adequate notice of proscribed conduct." (*Id.* at p. 536.) Here, prospective application *is* warranted because the Wage Order did *not* provide constitutionally sufficient notice – under the state or federal constitution – that Rolling Five was the law.

While at argument, the Chief Justice and Justice Chin referred to the regulatory history surrounding the May 16, 1952 amendment to the Wage Order, the 1952 amendment to the Wage Order is most significant for its

deletion of the word "consecutive" – signaling that *no* Rolling Five requirement exists. (ABM, pp. 72-73.)[2]

2. The DLSE did not provide fair notice.

The DLSE also did not give fair, consistent warning that Brinker could be held liable for not providing its employees a meal period every five *consecutive* hours. In 2004, the year Plaintiffs filed this lawsuit, the DLSE *withdrew* the letter it had issued two years earlier endorsing a Rolling Five rule. (MJN Ex. 42.) The DLSE never again indicated support for the rule, and in 2008 rejected it in no uncertain terms:

> While the Division has varied in its interpretation of this so-called "rolling five" hour rule in the past, there is no controlling legal authority interpreting California's meal period regulations to require employers to provide meal periods every five hours. Until such authority exists interpreting the wage orders and Labor Code § 512 to require employers to provide meal periods every five hours, the Division will not interpret California's meal period provisions in that fashion.

(Memo to DLSE Staff re Court Rulings on Meal Periods, dated October 23, 2008 [MJN Ex. 57], p. 5.)

Brinker, in sum, cannot be held liable for adopting a Wage Order interpretation that the DLSE, the agency responsible for enforcing the

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[2] In their Opposition to CELC Application (pp. 7-8), Plaintiffs rely on a number of pre-1952 wage orders that are inapposite because their language materially differs from the current Wage Order.

Wage Order, has approved for more than seven years. (*United States v. Chrysler Corp.* (D.C. Cir. 1998) 158 F.3d 1350, 1356 ["[A]n agency is hard pressed to show fair notice when the agency itself has taken action in the past that conflicts with its current interpretation of a regulation."].) Any other outcome would be constitutionally unfair.

3. The trial court's July 2005 decision, which the Court of Appeal first deemed advisory and then reversed, did not provide fair notice.

Plaintiffs also suggest that the trial court's July 2005 endorsement of a Rolling Five rule put Brinker on notice that early lunching was prohibited. (Opposition to CELC Application, pp. 3, 14.) Not so.

The trial court's Rolling Five "decision" was issued as an "advisory opinion[] only," though two weeks later the trial court stated that its "advisory ruling is confirmed . . . as an order." (21PE5724, 1PE208.) But when Brinker petitioned the Court of Appeal for review of that order, the court denied review, concluding that the ruling was advisory: "The review of an advisory opinion would result in an advisory opinion. California courts generally have no power to render an advisory opinion. The petition is denied." (*Brinker Restaurant Corp. v. Superior Court* (Jan. 20, 2006, D047509 [nonpub. opn.].) An advisory opinion that the trial court had no "power to render" (*ibid.*) cannot have put Brinker on notice that Rolling Five was the law.

Moreover, on October 12, 2007, the Court of Appeal held that on "further review," "the trial court's July 2005 order was *not* an advisory opinion," but that it was "erroneous" – an employer does *not* have an obligation to "make a 30-minute meal period available to an hourly employee for every five consecutive hours of work." (*Brinker Restaurant Corp. v. Superior Court* (Oct. 12, 2006, D049331) 2007 WL 2965604, at *13-14.) The Court of Appeal confirmed that opinion in its July 22, 2008 decision, holding that neither the Labor Code nor the Wage Order contains any "restriction on the timing of meal periods." (Slip Opinion, p. 40.)

Thus, the trial court's July 2005 Rolling Five opinion was either advisory or it was wrong. Either way, Brinker had no reason to believe it correctly stated the law, and it did not provide fair notice of a lawful Rolling Five requirement.

4. The "popular" employment law treatises Plaintiffs cite only confirm that the law was unsettled, and did not provide fair notice.

Plaintiffs also point to two employment law treatises (Opposition to CELC Application, p. 13), neither of which supports their position that the law on Rolling Five was clear, and neither of which establishes that Brinker and countless other employers in California were provided with fair notice of a lawful Rolling Five requirement.

The Simmons treatise, in fact, highlights the uncertainty surrounding Rolling Five by laying out arguments on both sides of the issue. The

treatise states that while "Labor Code Section 512 does not *require* a second meal period unless an employee exceeds 10 hours," "a second meal period *may* be necessary, even for an eight-hour shift, if an employee takes a meal period too early in the shift." (Richard J. Simmons, California's Meal and Rest Period Rules: Proactive Strategies for Compliance (2d ed. 2007) § 2.3(a), p. 11, emphasis added.) It elaborates that Rolling Five is "arguably" the law, but that "[i]t can be argued that this result is illogical and contrary" to the interests of employers and employees alike:

> For example, if more than five hours remain in the balance of the shift, after the employee returns from a meal period, a second meal period is *arguably* owed. However, under this interpretation, an employee must be provided a second meal period prior to the end of the five-hour period, even if it requires the employee to leave work for 30 minutes and return simply for a brief time before clocking out for the day. *It can be argued that this result is illogical and contrary to the interests of the employee and the employer. Indeed, it would significantly inconvenience both and force the employee to remain 30 minutes longer than he or she would like.*

(*Ibid.*, emphasis added.)[3]

The Wilcox treatise, contrary to what Plaintiffs suggest, says nothing about Rolling Five, and instead simply paraphrases the rules set forth in the statute and Wage Order:

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[3] Plaintiffs carefully omit from their brief the last two sentences of this paragraph.

> A nonexempt employee working more than five hours must be provided with a meal period of at least 30 minutes. However, if a work period of not more than six hours will complete the day's work, the meal period may be waived by mutual consent of employer and employee. In addition, an employee working more than 10 hours per day must be provided with a second meal period of not less than 30 minutes. However, if the total hours worked are no more than 12, the second meal period may be waived by mutual consent of the employer and the employee, but only if the first meal period was not waived.

(1 Wilcox, California Employment Law § 3.23 at 3-168.)

In sum, Brinker did not receive fair notice that Rolling Five was the law because the Wage Order does not clearly establish it, and because there is no "binding or persuasive authority . . . in support of the proposition that . . . meal periods must be timed . . . ." (*Nguyen*, *supra*, 2011 WL 6018284, at *7.) "Where, as here, the regulations and other policy statements are unclear, where the petitioner's interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' . . . and may not be punished" civilly or criminally. (*General Elec. Co.*, *supra*, 53 F.3d at pp. 1333-1334.)

B. Not Only Brinker, But Other Innocent Employers Trying To Create A Flexible, Efficient Workplace Were Not Given Fair Notice That Rolling Five Was The Law.

Retroactive application of a Rolling Five rule would violate not only Brinker's due process interests, but also the due process rights of countless

other employers who assumed – based on the language of the Wage Order and the DLSE's rejection of a Rolling Five rule – that they were not required to provide their employees with a meal period every five consecutive hours.

Take, for example, a coffee shop owner who has employed the same barista for the past 10 years. The barista begins his nine-hour shift each day at 8:30 a.m., and likes to coordinate his lunch break with his wife, who works across the street. To accommodate the barista's personal request, the coffee shop owner has allowed him to take an "early" lunch every day from 11:30 a.m. to 12 p.m. The barista then returns to the store, and works until 5:30 p.m, with one or two rest breaks.

Should this Court apply a Rolling Five rule retroactively, the coffee shop owner would be subject to a lawsuit for not having provided his employee a second meal period at 5:00 p.m., five hours after his return from lunch. Although the barista most likely would have declined that meal period – given that only 30 minutes remained in his shift – the employer still would be liable for not having offered it. People of "'ordinary intelligence'" should not have to suffer the consequences of conduct they did not have "'a reasonable opportunity to know'" was prohibited (*AMC Entertainment, supra*, 549 F.3d at p. 768, quoting *Grayned, supra*, 408 U.S. at p. 108) – consequences that, as the CELC

points out (CELC Amicus Brief, pp. 4-7), could cost innocent employers many millions of dollars.

That result is all the more unfair given that the DLSE itself, the agency responsible for enforcing the Wage Order, explicitly renounced a Rolling Five requirement more than three years ago, and more than seven years ago withdrew its support for such a rule. (MJN Exs. 42, 57.) Under those circumstances, it cannot be said that employers were provided constitutionally adequate notice.

CONCLUSION

For all of the foregoing reasons, Brinker respectfully requests that this Court hold that there is no Rolling Five requirement in California. Alternatively, due process requires that this Court apply any Rolling Five rule prospectively, as Brinker and other employers did not receive fair notice – from the Wage Order, from the DLSE, or from any other authority – that Rolling Five was the law. "Put [] colloquially, '[t]hose regulated by an administrative agency are entitled to know the rules by which the game will be played.'" (*AMC Entertainment, supra*, 549 F.3d at p. 768, quoting *Ala. Prof'l Hunters Ass'n v. FAA* (D.C. Cir. 1999) 177 F.3d 1030, 1035.) That did not happen here.

Respectfully submitted,

Dated: January 3, 2012

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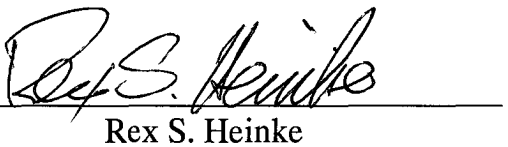
By 
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CERTIFICATE OF COMPLIANCE

[Cal. Rules of Court, rule 8.504(d)]

This brief consists of 4,209 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: January 3, 2012

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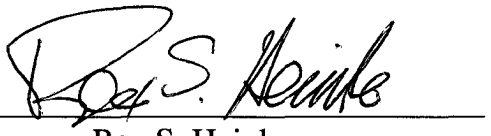
By 

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2029 Century Park East, Suite 2400, Los Angeles, CA 90067. On January 3, 2012, I served the foregoing document described as: **ANSWER TO POST-HEARING AMICUS BRIEF OF CALIFORNIA EMPLOYMENT LAW COUNCIL** on the interested parties below, using the following means:

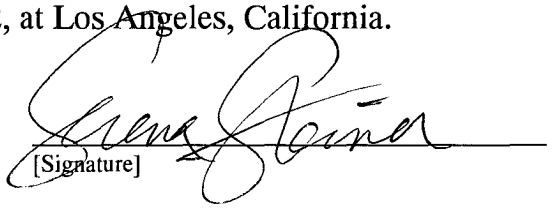
SEE ATTACHED SERVICE LIST

☒ BY UNITED STATES MAIL I enclosed the document in a sealed envelope or package addressed to the respective addresses of the parties stated above and placed the envelopes for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid at Los Angeles, California.

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

Executed on January 3, 2012, at Los Angeles, California.

Serena L. Steiner
[Print Name of Person Executing Proof]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