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 BRIEF ON THE MERITS

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I. INTRODUCTION

Brinker's answer urges this Court to interpret California's critical meal period and rest break protections in a fundamentally flawed way.

On the core meal period compliance question this case raises, Brinker highlights a single word in the statutory scheme—"provide"—and contends, based on a dictionary definition of that word, that California employers need only make meal periods "available" to workers. Yet the Wage Orders the Legislature intended to "codify" unquestionably require employers to affirmatively relieve workers of duty so that they may actually *take* those meal periods.[1]

Brinker says the Wage Orders do not matter; all that matters, according to Brinker, is that one word—"provide." In fact, Brinker goes so far as to mis-frame the question. Throughout its answer, Brinker characterizes the issue as "*provide*" vs. "ensure," when the real question is what does "provide" mean—"*make available*" vs. "ensure"?

Brinker's interpretation is deeply flawed. It would ignore the Labor Code's plain language, which expressly incorporates the Wage Orders' mandatory compliance standards. It would contravene the Legislature's expressly-stated intent, which was to "codify" those standards. And it would dramatically weaken, not "codify," those standards, the meaning of which has been settled for over half a century. The single word "provide" cannot carry the weight Brinker would lay on it.

Nor can Brinker's approach be squared with this Court's statutory interpretation precedents, which require analysis of *all* the plain language, not just some of it. Section §226.7's plain language expressly incorporates

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[1] Unless otherwise specified, "Wage Orders" refers to Order 5 of the Industrial Welfare Commission ("IWC") (8 Cal. Code Regs. §11050). Statutory references are to the Labor Code unless otherwise identified.

"the applicable provisions of" the Wage Orders, using the word "provide" to simultaneously reference the Orders' mandatory meal period requirement, and their permissive rest break requirement.

In short, the parties have offered conflicting, text-based interpretations of the word "provide," which means it is ambiguous. As a result, the Court turns to other indicia of legislative intent. When it comes to Labor Code section 226.7, the Legislature was "fully aware of the IWC's wage orders," making *them* a critical source of meaning. *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1110 (2007).

The correct statutory interpretation approach does not consider just the word "provide," but places it in context, construing it together with adjacent statutes on the same subject (enacted in the same legislative session), and harmonizing them. It considers the overarching reason for the Legislature's decision, in 1999, to enter this field of regulation for the first time in over ninety years—to *preserve* worker protections, not relax them. And, most importantly, it considers the Wage Orders' language and the IWC's intent in drafting them. After all, the Legislature's stated intent was to "codify" the Wage Orders—as even Brinker concedes.

That is plaintiffs' approach to statutory interpretation. It leads inexorably to the conclusion that the Court of Appeal erroneously decided each of the four meal period and rest break issues discussed below.

What's more, the Court of Appeal's holding contradicted the settled rule stated in *Industrial Welfare Commission v. Superior Court*, 27 Cal.3d 690 (1980), that Wage Orders may be more protective than the Labor Code's minimum floor.

As for class certification, Brinker again attempts to mis-frame the issues and draw attention away from the fundamental errors in the Court of Appeal's approach to review. The Court of Appeal reweighed the

evidence, plain and simple, contrary to *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319 (2004). Unable to refute that as a factual matter, Brinker attempts to characterize *Sav-on* as "inapplicable." It is not.

Where, as here, the trial court expressly finds that common questions predominate regardless of how the underlying interpretive disputes are resolved, the reviewing court must review *that* finding for substantial evidence under *Sav-on*. The Court of Appeal utterly failed to do so. Instead, it reached and decided a series of common legal questions, none of which was enmeshed with class certification issues. No precedent of this Court sanctions that approach. Then, the Court of Appeal brushed aside *Sav-on*, substituted its judgment for the trial court's, and decided class certification for itself—as if the trial court had never ruled.

This Court should preserve the class action device as an enforcement mechanism for workers in wage and hour cases. *See Gentry v. Superior Court*, 42 Cal.4th 443 (2007). The Court of Appeal's judgment should be reversed, and the class certification order reinstated.

II. STATUTORY INTERPRETATION PRINCIPLES AND BRINKER'S FALSE FRAMING OF THE ISSUES

The parties agree that the Legislature intended to "codify" the "existing" Wage Orders' meal period provisions when it enacted both section 226.7 and section 512. ABM5, 44, 46; OBM58-62, 90-93.[2] Indeed,

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[2] "ABM" means Brinker's Answer Brief on the Merits, filed May 1, 2009. "OBM" means plaintiffs' Opening Brief on the Merits, filed January 20, 2009. "MJN" refers to the consecutively-numbered exhibits to the motions for judicial notice filed on January 20, April 20, and concurrently herewith. "RJNSC" refers to plaintiffs' request for judicial notice filed with this Court on August 29, 2008. "Brinker MJN" refers to Brinker's motion for judicial notice filed with its answer brief. "PE," "RJN," and "Slip op." have the same meanings as in plaintiffs' opening brief.

the legislative history on this point is indisputable. *See id.* (citing history).

The parties disagree, however, on how to determine what the "existing" Wage Orders meant when they were "codified"—and therefore on what meaning the Legislature "codified" by enacting these two statutes.

Plaintiffs' approach involves turning to the text of the "existing" Wage Orders to determine that meaning—as section 226.7's plain language explicitly instructs. OBM35-62. This approach considers the enactment history of that text, as well as evidence of its drafters' intent and its administrative enforcement history. This approach then considers whether the language of the codifying statutes is consistent with the "existing" Wage Orders and whether it can be read in a manner that harmonizes all the language and effectuates the Legislature's intent to "codify" the Orders.

As explained in plaintiffs' opening brief and below, it is consistent, and it can be harmonized.

Brinker's approach would disregard the Wage Orders' text entirely. Brinker argues that because the codifying statutes use the word "provide," the codified Orders (no matter their text) also must have meant "provide" (whatever "provide" means). *E.g.*, ABM 5, 38, 39, 44, *passim*. According to Brinker, "all that matters is how the Legislature interpreted [the Wage Orders'] language when it 'codified' it in 2000." *Id.* 44. Brinker would have the Court confine its search for intent to (a dictionary definition of) one word used in the "codifying" statutes, without also considering the words used in the "codified" Orders—or how those Orders were interpreted and applied by the agencies charged with issuing and enforcing them.

Brinker's approach is flawed for several reasons, each of which is discussed in detail in Parts IV.A-C, below (pp. 50-67).

First, while it purports to be a "plain-language" reading, it ignores parts of the codifying statutes' plain language—namely, the parts that

expressly incorporate the Wage Orders' compliance standards. In this case, the Wage Orders' plain text prohibits employers from permitting employees to work more than five hours without relieving them of duty for a meal period—an interpretation, moreover, that the Orders' rich adoption, amendment and enforcement history unwaveringly supports.

Second, it is contrary to this Court's statutory interpretation precedents—which require, among other things, that statutes addressing the same subject (especially those enacted during the same legislative session) be read together. Here, sections 512 and 226.7 must be read collectively, together with the Wage Orders they "codify," as "blending into each other and forming a single statute."[3]

Third, it leads to a false framing of the core meal period compliance issue raised in this case. Over and over, Brinker's brief characterizes the issue as "'provide' vs. 'ensure.'" *See, e.g.*, ABM1, 5, 22, 24-26, 29, 30-31, 33, 35-39, 41-42, 45.[4] That is not the question. The question is what does "provide" mean as used in these particular statutes and Wage Orders? Does "provide" mean "affirmatively relieve of duty" (as held in *Cicairos*) or does it mean "make available" (as held in *Brinker*)?

Brinker's framing of the issue assumes that the word "provide" means "make available"—but that is precisely the question the Court must answer. The Court should not be led astray by Brinker's distorted framing.

At bottom, the parties have presented competing text-based interpretations of the word "provide" as used in sections 226.7, 512 and the Wage Orders. If Brinker's interpretation is reasonable, then the word is

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[3] *Meija v. Reed*, 31 Cal.4th 657, 663 (2005); *see Garcia v. McCutchen*, 16 Cal.4th 469, 476 (1997); *Sacramento & San Joaquin Drainage Dist. v. Riley*, 199 Cal. 668, 676 (1926).

[4] Brinker also mis-frames the meal period timing issue and the two rest break issues. ABM2-3; *see* Parts V-VI, below.

ambiguous, and the Court must "look to extrinsic sources" to determine its meaning. *Murphy*, 40 Cal.4th at 1105. Because, as the parties agree, the Legislature intended to "codify" the Wage Orders, the best indicia of meaning is the language of the Wage Orders themselves.

III. THE HISTORY OF THE WAGE ORDERS' LANGUAGE, SHOWN IN DOCUMENTS FROM THE DIR ARCHIVE, FULLY SUPPORTS PLAINTIFFS' INTERPRETATION

A. Meal Periods: Employers Must Relieve Workers of All Duty for Mandatory Meal Periods and Must Do So For Each Five-Hour Work Period

A review of the historical development of the Wage Orders' meal period language demonstrates the IWC's intent to require (a) mandatory meal periods, (b) of at least thirty minutes, (c) during which employees are relieved of all duties and not permitted to work, (d) spaced at regular intervals through the day that eliminate work periods exceeding five hours. This is the compliance standard that the Legislature "codified" in sections 226.7 and 512.

1. IWC Wage Orders, 1916-1998

The IWC's first Wage Order with a meal period requirement was issued in 1916. It barred employers from "permit[ting]" employees to "return to work" during a "noon day meal" of not "less than one-half-hour":

> 1. *No person, firm or corporation shall employ or suffer or permit any woman or minor to work* in any fruit or vegetable canning establishment in which the conditions of employment are below the following standards:
>
> ….
>
> (20) TIME FOR MEALS. Every woman and minor shall be entitled to *at least one hour for noon day meal*; provided, however, that ***no woman or minor shall be permitted to return to work in less than one-half hour.***

Wage Order 2, ¶1(20) (Feb. 14, 1916, eff. Apr. 14, 1916) (MJN Ex. 76). (emphasis added).[5] In other words, the order requires a meal period of at least thirty minutes during which employees are not permitted to work—just as the Wage Orders do today.

The commissioners who adopted this Order agreed that work should stop for at least thirty minutes, and that, as to timing, meal periods should take place at "noon day"—after the employee has worked several hours. *See* IWC Transcript of Public Hearing (Feb. 11, 1916) at 38-43, *passim* (MJN Ex. 283). The only point of debate was how long the meal period should be, thirty minutes or one hour. *See id.* at 41 ("half an hour would not give [workers] dyspepsia"). As a compromise, the order makes it "obligatory upon the employer, to permit them an hour for lunch if they desire, leaving it to…the employee as to whether they shall return earlier if they choose." *Id.* at 39:8-11; *see also* IWC Transcript of Public Hearing in the Fruit and Vegetable Canning Industry (Mar. 28, 1917) ("1917 Transcript") at 43 (MJN Ex. 284) (Wage Order 2 decreed that employees "could not go back to work in less than a half hour").

In 1917, the IWC readopted the same meal period language, but added a new sentence: "If work is to be continued through the evening, every woman and minor shall be entitled to at least one hour for the evening meal." Wage Order 4 (Apr. 16, 1917, eff. Jun. 15, 1917), ¶21

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[5] From 1916 to approximately 1933, the IWC used a numerical numbering system (1-18) to identify its Wage Orders by industry. Wage Order 18 (Dec. 4, 1931, eff. Feb. 26, 1932) (MJN Ex. 80) is the last in this series. Most of the orders were amended from time to time. In 1942-1943, the IWC abandoned the original numbering system, assigned new numbers to each industry, and adopted the suffix "NS" to refer to them. *See*, *e.g.*, Wage Order 1NS (Apr. 9, 1942, eff. Jun. 29, 1942) (MJN Ex. 92). That numbering system is still in use today, except that the year, rather than the "NS" suffix, is used to identify the orders.

(MJN Exs. 77, 117).[6] The new order contemplated two meals—one "noonday meal" and one "evening meal."

In 1919, the IWC issued Wage Order 4 Amended (Jan. 7, 1919, eff. Mar. 8, 1919) ¶21 (MJN Ex. 78). This order retained the same "noon day" meal and "evening meal" language, and also prohibited employees from remaining in the work room if a lunch room is available—making it even clearer that employers may not permit employees to work during meals:

> *….[W]ithout exception where [lunch room] space is provided,* ***all women shall be required to leave and remain out of the workroom during the meal.***

Id. ¶22 & n.* (emphasis added).

In March 1928, the IWC added a meal period requirement to Wage Order 3 (for the canning industry). The language was identical to that of Wage Order 4 Amended, except that Wage Order 3a made clear that both the "evening meal" and the "noon-day" meal shall be at least thirty minutes, and included a more precise *timing* requirement for the evening meal:

> Every woman and minor shall be entitled to at least one hour for noon-day meal; provided, however, that *no woman or minor shall be permitted to return to work in less than one-half hour*. ***If work is to be continued beyond 7.30 p.m.,*** every woman and minor shall be entitled to at least one hour for the evening meal, and ***no woman or minor shall be permitted to return to work in less than one-half hour.***

Wage Order 3a (May 11, 1923, eff. Aug. 8, 1923, amended Mar. 26, 1928, eff. Jun. 4, 1928), ¶12 (MJN Ex. 125).[7] This change was intended to make

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[6] When the IWC adopted a Wage Order for mercantile establishments two years later, it included identical meal period language. Wage Order 13 (Dec. 19, 1919, eff. Feb. 17, 1920) (MJN Ex. 79).

[7] When Wage Order 3 was again amended in 1929, the meal period language was unchanged. *See* Wage Order 3a (Jun. 26, 1929, Sept. 14, 1929) (MJN Ex. 126).

clear that "in no case shall [employees] have less than one-half hour." IWC Transcript of Public Hearing (Feb. 14, 1928).

Meanwhile, in the mid-1920s, the IWC adopted a series of Wage Orders for the motion picture industry. The first such order expressly required employers to comply with Wage Order 4 Amended, and included, for extras working on location, this language: "***Every woman and minor shall be entitled to not less than ½ hour for each meal.***" Wage Order 16 (Jan. 8, 1926, eff. Mar. 16, 1926), ¶¶4, 5(g) (MJN Ex. 242). In a bulletin dated January 1928, the IWC emphasized that "***the minimum meal period shall be one-half hour.***" Wage Order 16–Bulletin No. 1 (Jan. 6, 1928) (MJN Ex. 243) (emphasis added).

The next Order, applicable to extras, not only required a minimum meal period of thirty minutes, but also imposed a more precise *timing* requirement—within 5½ hours after reporting for work:

> **Meal periods.** Designated meal periods are not included in computing time of employment. ***Minimum meal period shall be one-half hour.*** Maximum meal period shall be one and one-half hours. *A meal period shall be <u>provided</u>* ***no later than five and one-half hours after an extra is told to and does report for employment.***

Wage Order 16A, ¶3 (Jan. 30, 1931, eff. Apr. 11, 1931) (MJN Ex. 245) (emphasis added). Notably, the IWC used the generic word "provide" to reference the mandatory meal period requirement.

Four months after that, the IWC adopted a separate order for motion picture production workers with a modified timing requirement. Instead of requiring a single meal period within 5½ hours after reporting to work, the new order prohibits all "excessive" periods of work without a meal:

> **Meal Periods.** Every woman shall be entitled to at least one hour for meals. *Minimum meal period shall be one-half hour*; maximum meal period shall be one and one-half hours. ***No***

> ***woman shall be permitted to work an excessive number of hours without a meal period.*** Food and hot drinks shall be provided for women who are required to work after 11.30 p.m.

Wage Order 17 (Jun. 1, 1931, eff. Aug. 11, 1931) (MJN Ex. 246) (emphasis added). This order makes clear that *no* periods of "excessive" work may be "permitted" without a meal period.

Six months later, in December 1931, the IWC adopted Wage Order 18, which contained uniform sanitary regulations to govern "any establishment or industry." Wage Order 18 (Dec. 4, 1931, eff. Feb. 26, 1932) (MJN Exs. 11, 80). This order's meal period requirement combines three elements from earlier orders. Employers may not "permit[]" employees to "return to work" in less than thirty minutes (*see* Wage Order 2 (1916)); must require employees to leave and remain out of the work room if a lunch room is available (*see* Wage Order 4 Amended (1919)); and may not "permit[]" employees to work "an excessive number of hours" without a meal period (*see* Wage Order 17 (1931)):

> *No person, firm or corporation shall employ* or suffer or permit any woman or minor to work in any establishment or industry in which the conditions of employment are below the standards set forth hereinafter ….
>
> ….
>
> **10. MEALS**
>
> Every woman and minor shall be entitled to at least one (1) hour for meals; provided however, that ***no woman or minor shall be permitted to return to work in less than one-half (½) hour***, and provided, further, that ***no woman or minor shall be permitted to work an excessive number of hours without a meal period***.
>
> *… [W]ithout exception where [lunch room] space is provided, all women and minors* ***shall be required during the meal period to leave and remain out of the room in which they are regularly employed.***

Wage Order 18 (Dec. 4, 1931, eff. Feb. 26, 1932), ¶¶10, 11 & n.* (MJN Exs. 11, 80) (emphasis added).

Instead of specifying two specific meals ("noonday" and "evening"), like the earlier orders, the 1931 order prohibited all periods of "excessive" work without a meal. *Id.* ¶10. The order thus continued to require multiple meal periods depending the length of time worked. *See id.* ¶4(j) (contemplating employers maintain "regularly established meal periods").

The word "excessive" came to be generally "interpreted to mean after four and a half or five hours of work." Minutes of a Meeting of the IWC (Jan. 6, 1933) at 701443122 (MJN Ex. 288); *see also* Wage Order 16A (1931) (MJN Ex. 245) (quoted above; meal period required no later than 5½ hours after reporting to work). The IWC interpreted the requirement strictly. It declined to grant an exemption for the mercantile industry requiring "only a fifteen-minute lunch period for women employed *six* hours," noting that "the regulations on meal periods must apply alike to all industries." *Id.* at 701443125 (emphasis added).

Every Wage Order issued since Order 18 has included not only a mandatory thirty-minute meal period requirement, but also a timing requirement. In 1933, the IWC amended Wage Order 9, governing general and professional offices, to require a meal period after not more than five hours' work and to make clear that the employer bears the burden of relieving employees of duty:

> A meal period of not less than one-half (½) hour must be given to all employees *after not more than five (5) hours of employment.* ***The employer is responsible for seeing that this time is taken.***

Wage Order 9 Amended (Jun. 21, 1933, eff. Aug. 28, 1933), ¶9(a) (MJN Ex. 141) (emphasis added); *see* Minutes of a Meeting of the IWC (Jun. 21, 1933), at 701443225 (MJN Ex. 289) (adopting Order 9 Amended and

declining to impose four-hour timing limit rather than five).

The meal period requirement applied even during night shifts, and even if compliance required the employer to hire a "relief" worker "to leave her home at 4:30 a.m. to relieve the night [worker] for a half-hour." Minutes of a Meeting of the IWC (Jul. 26, 1935), at 701446108 (MJN Ex. 290) (interpreting Wage Order 9 Amended). Every employee working an eight-hour shift "must be allowed a meal period of not less than one-half hour after five hours of employment"—unless a special exemption was granted. *Id.* at 701446106-107 (special exemption granted allowing the employer to require the night worker to take an on-duty meal period).

In 1939, the IWC clarified that "an excessive number of hours" means 4½ hours for an eight-hour shift (or, in professional offices, 5 hours), and that, under both Order 18 and Order 9 Amended, "the employer is responsible for seeing that the time is taken":

> Meal period of ***not less than one-half hour*** must be given to all women working on an eight hour shift ***after 4½ hours of employment***, except under the Office Order, which provides that a meal period of not less than one-half hour must be given after five hours of employment. ***The employer is responsible for seeing that the time is taken.***

Minutes of a Meeting of the IWC (Aug. 19, 1939), at 701450133 (General Card No. 14) (MJN Ex. 291) (emphasis added).

In 1942 and 1943, the IWC issued a new set of Orders covering ten industries. Wage Orders 1NS, 2NS, 3NS, 4NS, 5NS, 6NS, 7NS, 8NS, 9NS, 10NS (MJN Exs. 92, 104, 127, 142, 12, 164, 180, 197, 210, 222). Each "NS" order required employers to comply with the sanitary regulations of Order 18[8] and also included separate meal period language, which remains

[8] *See, e.g.*, Wage Order 1NS, ¶14 ("Every employer in the manufacturing industry, in addition to the foregoing provisions, is required to comply with the provisions of the [IWC] Order prescribing sanitary

essentially unaltered today.

Wage Order 5NS, for the public housekeeping industry, continued the same mandatory thirty-minute meal period language from Wage Order 18, but: (a) introduced the term of art "work period"; (b) designated five hours as the longest work period without a meal; and (c) created an exception for shifts not exceeding six hours:

> ***No employer shall employ*** any woman or minor for a ***work period of more than five (5) hours*** without an allowance of not less than thirty (30) minutes for a meal. If during such meal period the employee cannot be ***relieved of all duties and permitted to leave the premises***, such meal period shall not be deducted from hours worked. ***However, if the employee's work for the day will be completed within six (6) hours, such meal period need not be given.***

Wage Order 5NS (Apr. 14, 1943, eff. Jun. 28, 1943), ¶3(d) (MJN Ex. 12) (emphasis added).[9] (Later, "need not be given" would be changed to "may be waived.")

Also, each "NS" order included definitions for the first time. *See, e.g.*, Wage Order 5NS, ¶2. "**'Employ'** means to engage, suffer, or permit to work." *Id.* ¶2(c). Hence, "no employer shall employ" means "no employer shall engage, suffer or *permit* to work." (Emphasis added.) As a result, Wage Order 5NS prohibits employers from "*permit*[*ing*] any woman or minor [to work]" without the specified meal periods—just like Order 18 and the current Orders.

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regulations for all industries."); *see also* Wage Order 5NS, ¶14 (MJN Ex. 12) (same); 7 Ops.Cal.Atty.Gen. 124, 125 (1946) (MJN Exs. 357, 379) ("Order No. 18…is to be read in connection with each order as though it were an integral part thereof.").

[9] Each Wage Order contained meal period language similar to Order 5NS, with minor wording variations. *See* Wage Orders 1NS, ¶5(c); 2NS, ¶5(c); 3NS, ¶5(d); 4NS, ¶4(e); 6NS, ¶3(d); 7NS, ¶3(d); 8NS, ¶3(e); 9NS, ¶3(e); 10NS, ¶3(d).

The IWC Wage Boards' findings bear this out: "***The Commission finds it is necessary to <u>insure</u> a meal period after not more than 5 hours of work in order to protect the health of women and minors***." Minutes of a Meeting of the IWC and Wage Order 5NS (Apr. 14, 1943), at 703439106 (MJN Ex. 302) (emphasis added).[10] The Wage Boards determined that "thirty minutes is the least time in which an employee can eat a meal without impairment of health." *Id.*; *see also* Minutes of a Meeting of the IWC (Jun. 14, 1943), at 703445145 (MJN Ex. 303) (Wage Board for Order 8NS; "[n]ot less than 30 minutes for lunch"). Eight Wage Boards found that to protect workers' health, their meal periods must be "***insure[d]***."[11]

The meal period requirement of the "NS" series prohibits "early lunching" of the kind practiced by Brinker. One IWC agent inspected a mercantile establishment and found that "employees who work from 9:00 a.m. to 6:00 p.m. receive their meal period between 11:00 a.m. and 12:00

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[10] *See also* Transcript of Proceedings of Wage Board in Public Housekeeping Industry (Oct. 7, 8 and Nov. 16, 1942) ("Oct. 1942 Transcript"), at 703428119 (MJN Ex. 294) (same); Minutes of a Meeting of the IWC and Wage Order 5NS (Apr. 6, 1943), at 703438107 (MJN Ex. 301) (same). This Wage Board adopted two earlier versions of Order 5NS, one on Feb. 5, 1943 (MJN Ex. 294) and another on April 6, 1943 (MJN Ex. 301), but each of these was rescinded before it went into effect (*see id.* at 703438102; *see also* MJN Ex. 302 at 703439101-102; MJN Ex. 304). Each time, the Wage Board made identical findings.

[11] Minutes of a Meeting of the IWC (Oct. 24, 1942), at 703415197 (Order 3NS; Canning and Preserving) (MJN Ex. 295); Minutes of a Meeting of the IWC (Dec. 28, 1942), at 703423109 (Order 4NS; Professional, Technical, Clerical and Similar Occupations) (MJN Ex. 296) (same); Minutes of a Meeting of the IWC (Apr. 5, 1943), at 703437110 (Order 6NS; Laundry, Dry-Cleaning and Dyeing) (MJN Ex. 300); *id.* at 703437144 (Order 7NS; Mercantile); Minutes of a Meeting of the IWC (Jun. 14, 1943), at 703445153 (Order 8NS; Products after Harvest) (MJN Ex. 303); *id.* at 703445194 (Order 9NS; Transportation; six hours' work instead of five); *id.* at 703445227 (Order 10NS; Recreation and Amusement).

noon, *leaving a stretch of 6 hours to be worked after lunch*." Minutes of a Meeting of the IWC (Jan. 29, 1943), at 703426115 (MJN Ex. 297) (emphasis added). The IWC refused to allow it, finding it contrary to the Wage Orders, and instructed the employer that "women or minors may not be employed more than five (5) hours unless such period is broken by a meal period of not less than thirty (30) consecutive minutes during which the employee is relieved of all duties." *See id.* (citing Order 2NS, ¶5(c)).

The responsibility to "insure" meal periods remained the employer's. The mercantile order contemplates that a relief worker "be employed regularly to work a lunch hour to relieve the full time clerk [and to] report[] to work expecting and knowing that she is to receive but one hour's employment per day…." 2 Ops.Cal.Atty.Gen. 235, 236 (Sept. 21, 1943) (MJN Exs. 357, 378).

To deviate from the Wage Orders' requirements, employers had to petition for an exemption—which IWC granted on a limited basis, particularly during wartime.[12] The IWC denied one manufacturer's request to allow on-duty meal periods, but granted an exemption reducing the meal period to twenty minutes. *See* Minutes of a Meeting of the IWC (Sept. 21, 1942), at 703405102-103 (MJN Ex. 293).[13]

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[12] The War Production Act, effective February 5, 1943, required that, "to increase production and to win the war…restrictions upon the hours and conditions of work be relaxed to such an extent as may be compatible with [worker] health and safety." War Production Act (Stats. 1943, ch. 14) (Feb. 5, 1943) (MJN Ex. 357). The IWC adopted procedures for issuing war production permits, including procedures for "meal period relaxations." Procedure–War Production Permits (Jan. 27, 1944) (MJN Ex. 357).

[13] *Accord*: Minutes of a Meeting of the IWC (Feb. 27, 1943) (MJN Ex. 298) (allowing on-duty meal periods for female gas station attendants); Minutes of a Meeting of the IWC (Apr. 3, 1943)) (MJN Ex. 299) (granting exemptions allowing on-duty meal periods for female factory workers); Letter to Canning Industry re Order No. 3NS (Jun. 2, 1943) (MJN Ex. 356,

Without such an exemption, however, the Wage Orders prohibited employers from allowing employees to work more than five hours without relieving them of duty for a thirty-minute meal period. The Wage Orders prohibited work periods exceeding five hours either before or *after* a first meal period. *See* MJN Ex. 297, at 703426115.

In 1947, the IWC introduced three short-lived changes that were eliminated when the Orders were reissued in 1952. Wage Orders 1R, 2R, 3R, 4R, 5R, 6R, 7R, 8R, 9R, 10R (Feb. 8, 1947, eff. Jun. 1, 1947) (MJN Exs. 93, 105, 128, 144, 13, 165, 181, 198, 211, 223).

First, instead of "no employer shall employ," the 1947 Wage Orders (¶10) said "no employee shall be required to work." In 1952, however, the IWC restored the "no employer shall employ" language to all of the Orders (¶11)—reconfirming that employers may not permit employees to work without "insuring" their meal periods. Wage Orders 1-52, 2-52, 3-52, 6-52, 8-52, 9-52, 10-52 (May 16, 1952, eff. Aug. 1, 1952) (MJN Exs. 94, 106, 129, 166, 199, 212, 224); Wage Orders 4-52, 5-52 (May 15, 1952, eff. Aug. 1, 1952) (MJN Exs. 145, 14).[14] The 1952 orders continued to define the word "Employ" as "engage, suffer or permit to work." *See id.*, ¶2(d).

Second, eight of the ten 1947 orders (all except Orders 3R and 8R) required a meal period within five hours "after reporting to work,"

#2) (granting permission to employ women after 11 p.m.—which the wage order would otherwise prohibit—provided that "a meal period of not less than thirty consecutive minutes shall be given after not more than five (5) hours of work" and that "the standards set up in [IWC] Order No. 18, 'Sanitary Regulations …,' shall be observed"); Procedure – War Production Permits (Jan. 27, 1944) (MJN Ex. 357#2) (allowing on-duty, paid meal periods so long as "there is ample uninterrupted time on the job for eating").

[14] The IWC did not adopt any Wage Order 7-52. Instead, Wage Order 1-52 covered both the manufacturing and the mercantile industries. *See* Wage Order 1-52 (May 16, 1952, eff. Aug. 1, 1952) (MJN Exs. 94, 182).

temporarily limiting the meal period requirement to just one meal period within the first five-hour work period of the day. *See*, *e.g.*, Wage Order 5R (MJN Ex. 13), ¶10. Indeed, in the 1947 orders, the meal period paragraph's heading was written in the singular—"MEAL PERIOD." *Id.* In 1952, "after reporting to work" was removed from all the orders, and the "NS" series language, requiring a meal period for all five-hour work periods, was restored. *See*, *e.g.*, Wage Order 5-52, ¶11 (MJN Ex. 14). Additionally, the heading was changed to the plural—"MEAL PERIODS." *Id.*

Third, only two of the 1947 orders continued the exemption (first appearing in the "NS" series) stating that "no meal period need be given" to employees working shifts not exceeding six hours. Wage Orders 3R, 8R, ¶10 (MJN Exs. 128, 198). In 1952, the IWC restored the six-hour-shift language to all of the orders, but instead of saying "no meal period need be *given*," the 1952 orders state that "the meal period may be *waived*." *See*, *e.g.*, Wage Order 5-52, ¶11 (MJN Ex. 14) (emphasis added). This change conforms with the amendment substituting "no employer shall employ" for "no employee shall be required to work." Both changes confirm that the employer must relieve *all* employees of duty for mandatory meal periods, which only those on six-hour shifts may choose to "waive."

In other words, contrary to Brinker's contentions, a holding that meal periods need only be "made available," rather than "insured," would make *all* meal periods waivable, when the IWC's intent was that only *some* should be. ABM35-36, 122-23. Under such an interpretation, the six-hour waiver language would have no meaning at all.

One of the Wage Board reports bears this out. In urging adoption of the six-hour-shift language, the industry members of the manufacturing Wage Board observed that the "5-hour requirement" could only be "waive[d]" "voluntarily":

> We feel that in those operations where a break in the continuous production process might not be practical or too expensive, that *employees may voluntarily waive the 5-hour requirement* without hardship. We point out in this connection that *this is a voluntary waiver on the part of the employee only in such instances as the entire day's shift is completed in six hours.*

Recommendations of Industry Members of the Wage Board (approx. Nov. 1951), at 7 (MJN Ex. 315) (emphasis added).

For the first time, all of the 1947 Orders imposed a rest period requirement for all employees (not merely those who were required to remain standing). *See, e.g.*, Wage Order 5R, ¶11 (MJN Ex. 13). The rest period requirement imposed a notably different substantive compliance standard than for meal periods:

> *Every employer shall authorize* all employees to take rest periods which, insofar as practicable, shall be in the middle of each work period. ….

Id. (emphasis added).

In 1952, the IWC changed this to "[e]very employer shall authorize *and permit*" rest breaks (not merely "authorize" them, as in the 1947 orders). *See, e.g.*, Wage Order 5-52, ¶11 (emphasis added). Notably, the IWC considered, and declined, "changing the word 'authorize' to 'require'." Minutes of a Meeting of the IWC (Mar. 1, 1952), at 703455254 (MJN Ex. 318). The compliance standard for rest breaks ("authorize and permit") was, and continues to be, materially different than for meal periods ("no employer shall employ"). As further discussed below, the IWC has maintained the distinction between meal periods and rest breaks through the present day—with the notable exception of Wage Order 14.

In May 1957, the IWC issued a set of eleven new Wage Orders, followed by a twelfth order in October 1957. *See* Wage Orders 1-57, 2-57,

3-57, 4-57, 5-57, 6-57, 7-57, 8-57, 9-57, 10-57, 11-57 (May 30, 1957, eff. Nov. 15, 1957) (MJN Exs. 95, 107, 130, 146, 15, 167, 183, 200, 213, 225, 234); Wage Order 12-57 (Oct. 7, 1957, eff. Jan. 1, 1958) (MJN Ex. 248). In April 1961, it issued orders 13-61 and 14-61 for two new industries. Wage Orders 13-61 (Industries Preparing Agricultural Products for Market, On the Farm), 14-61 (Agricultural Occupations) (Apr. 28, 1961, eff. Aug. 28, 1961) (MJN Exs. 256, 267).[15]

The meal period language of twelve of these fourteen orders was identical and unchanged from the 1952 series. *See, e.g.*, Wage Order 5-57, ¶11 (MJN Ex. 15).[16] All fourteen orders maintained the laxer compliance standard for rest breaks, requiring employers merely to "authorize and permit" them. *See, e.g.*, Wage Order 5-57, ¶12.

In 1957, as in 1952, employee representatives proposed substituting the word "require" for "permit" in the rest break provision. The manufacturing industry Wage Board voted down this motion, evincing its intent to continue the more lenient compliance standard—and reinforcing the conclusion that the meal period compliance standard is stricter. *See* Wage Order 1-57, ¶12 (MJN Ex. 95); Summary of Actions Taken by the Wage Board for Order No. 1-52 for the Manufacturing Industry following

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[15] Wage Order 14-61 was the first order for agricultural occupations since Wage Order 14 (May 25, 1920, eff. July 24, 1920) (MJN Ex. 266) was rescinded in 1922. *See* Explanatory Note re Wage Orders for Agricultural Occupations (MJN Ex. 265); Minutes of a Meeting of the IWC (Feb. 24, 1922) (MJN Ex. 285) (rescinding the agricultural order). As a result, the sanitary provisions of Wage Order 18 (1931) (all occupations and industries) continued to govern the agricultural industry into the 1960s.

[16] Order 12-57, governing the motion picture industry, imposed the same mandatory meal period requirement on employers, but: (a) allowed 5½ hour work periods; (b) fixed a maximum meal period length of one hour; and (c) authorized no waiver for six-hour shifts. Wage Order 12-57, ¶11 (MJN Ex. 248). Order 14-61, governing agricultural occupations, had no meal period language. (MJN Ex. 267.)

Oct. 1 and 2, 1956 Meetings (Oct. 1956), at 2 (MJN Ex. 320).

Preliminarily, the Chair observed "that when the Commission adopted this section [on rest periods] it obviously intended that it be permissive only and not mandatory." Record of Proceedings – Wage Board for Order 1, Los Angeles, Oct. 1 and 2, 1956 (Oct. 4, 1956) at 3 (MJN Ex. 322). The Secretary to the IWC agreed: "[T]he Commission's intent is that the employer should authorize this time. If the employer does not authorize the time he is in violation of the law." *Id.*

The employee representatives argued that the permissive rest period requirement was "unenforceable":

> [I]n a number of small, unorganized shops in the garment industry deprive women employees of the rest periods by virtually undetectable methods. …[I]n these shops there is simply an understanding that any employee who demands a rest period will be fired. These employees are so intimidated…that they will not even ask for the rest periods guaranteed them by the Order. …[T]he proposed amendment…would simply make it possible to carry out the original intent of the Commission.

Report of the Wage Board for Order 1-52 for the Manufacturing Industry following Oct. 1 and 2, 1956 Meetings (Oct. 1956), at 10 (MJN Ex. 321); *see also* Record of Proceedings, *supra*, at 3 (MJN Ex. 322) ("employer can by devious methods coerce the employee not to take the rest period, by the threat of losing her job").

The employer representatives disagreed—offering the same arguments Brinker advances today respecting mandatory meal periods:

> [The amendment] would constitute an infringement upon individual liberty. They argued that *an employee has a right to take a rest period, but should not be forced to take one against her will.* Some employees prefer to work during the rest period in order to catch up or, in the case of piece workers, to increase their earnings.

Report, *supra*, at 11 (MJN Ex. 321) (emphasis added). The Chair believed that "if the rest-period requirement were made mandatory, then each employer would be in technical violation of the Order each time an employee, with or without [the employer's] permission, worked during a prescribed rest period." *Id.* The Chair also disagreed that the existing standard was "unenforceable." Record of Proceedings, *supra*, at 9 (MJN Ex. 322). Because of these concerns, the Chair voted against the motion, and the permissive compliance standard for rest periods was preserved. *Id.*; Summary of Actions, *supra*, at 2-3 (MJN Ex. 320).

Notwithstanding concerns that a mandatory compliance standard "forces" employees to take breaks "against [their] will," no one on the manufacturing Board, or any other Board, moved to relax the mandatory meal period compliance standard. The distinction between mandatory meal periods and permissive rest breaks was preserved in Order 1-57, as in the rest of the Orders—and remains in the Orders to this day.

In 1963, the IWC issued thirteen amended Orders. Wage Orders 1-63, 2-63, 3-63, 4-63, 5-63, 6-63, 7-63, 8-63, 9-63, 10-63, 11-63, 12-63, 13-63 (Apr. 18, 1963, eff. Aug. 20, 1963) (MJN Exs. 96, 108, 131, 147, 16, 168, 184, 201, 214, 226, 235, 249, 257).[17] The meal period language is uniform across all but one of these orders, and incorporates three changes from the 1957/1961 series.

First, it clarifies that the six-hour waiver applies only if the meal period is "waived *by mutual consent of employer and employee*." Second,

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[17] No amended agricultural order was adopted in 1963. In 1965, however, a meal period requirement identical to the first sentence of the other orders was introduced into the agricultural order. *See* Wage Order 14-65, ¶10 (MJN Ex. 268); *see also* Summary of Wage Board Recommendations for Consideration by the IWC in Revision of Commission Orders (Feb. 24, 1967) at 32 (MJN Ex. 335) (quoting "present" meal period provisions of all orders).

it adds a sentence clarifying that a meal period is considered "on duty," and must be paid, unless the employee "is relieved of all duty."[18] Third, it requires employers to designate suitable eating space if "employees are required to eat on premises":

> **11. MEAL PERIODS**
>
> (a) No employer shall employ any woman or minor for a work period of more than five (5) hours without a meal period of not less than thirty (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 employee. Unless the employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked.* An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty.
>
> (b) In all places of employment where employees are required to eat on premises, a suitable place for that purpose shall be designated.

See, *e.g.*, Wage Order 5-63, ¶11 (MJN Ex. 16).[19]

The laxer "authorize and permit" rest period standard was unchanged across all the 1963 Orders. *See*, *e.g.*, Wage Order 5-63, ¶12.[20]

The change to the language authorizing "waiver" for six-hour shifts resulted because "there was doubt as to whether the election should be the

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[18] The amendment to the "on duty" language served to "require a meal period of less than thirty minutes duration be counted as time worked." Minutes of Executive Sessions (1963), at 800410141 (MJN Ex. 376#19).

[19] Order 12-63, for the motion picture industry, had the same variations as Order 12-57. *See* Wage Order 12-63, ¶11 (MJN Ex. 249).

[20] The motion picture industry Wage Order required "additional interim rest periods" for "performers engaged in strenuous physical activity." Wage Order 12-63, ¶12(b). The "authorize and permit" rest period requirement was added to the agricultural order in 1965. Wage Order 14-65, ¶11 (MJN Ex. 268).

employee, by the employer, or by mutual consent." Report of the Wage Board for IWC Order 5 – Public Housekeeping Industry (Jun. 7-8, 1962), at 7 (MJN Ex. 324); *see also* Report and Recommendations of 1962 Wage Board for Order No. 9-57 – Transportation Industry (Jun. 11, 1962, at 6) (MJN Ex. 325) (current language "fails to specify who may waive").

Employer representatives in the mercantile industry argued that the employer, not the employee, should be allowed to decide—making some of the same arguments still heard from employers like Brinker today:

> [W]aiver by mutual consent would interfere with management's right to schedule the hours of work. The employer must make arrangements for coverage on the sales floor at all times, and these arrangements require advance planning. ….[A] change would infringe on the right of the employer to manage the operation of his own business. …. The 6 hour shift without a meal period is important in order to provide for full coverage of the sales floor at all times.

Report of the Wage Board for IWC Order 7–Mercantile Industry (Jun. 26, Jun. 27 and July 9, 1962), at 14 (MJN Ex. 326).

The IWC rejected these arguments, and a "mutual consent" requirement was adopted, thereby "put[ting] in formal language what has been the policy and approach of the Commission and its Staff." *Id.* at 14, 19 (comment of Chair); *see also, e.g.*, Wage Order 5-63, ¶11; Summary of Recommendations by Wage Boards for Consideration by the Commission in the Reopening of the IWC Orders (Nov. 7, 1962), at 15 (MJN. Ex. 327). In the full IWC's words: "For the convenience of both employer and employee, the Commission felt *the requirement for a meal period within a work period not exceeding six hours* may be waived *by mutual consent*." Findings, IWC Meetings (1963), at 800410133 (MJN Ex. 376#14) (emphasis added).

In 1968, the IWC issued another set of amended Wage Orders, but

did not change the meal period language.[21] Wage Orders 1-68, 2-68, 3-68, 4-68, 5-68, 6-68, 7-68, 8-68, 9-68, 10-68, 11-68, 13-68, ¶11 (MJN Exs. 97, 109, 123, 148, 17, 169, 185, 202, 215, 227, 236, 258). [22]

The Wage Board for the mercantile industry considered—and rejected—a proposal to eliminate waivers for six-hour shifts entirely. *See* Report of the IWC Wage Board for Order 7 – Mercantile Industry (Dec. 14-15, 1966), at 6 (MJN Ex. 330).[23] The amendment's opponents acknowledged that the six-hour-shift waiver is the orders' *only* exception to "a forced meal period" after five hours. Minority Report of Employer Members of Wage Board for Order No. 7 Mercantile Industry (Feb. 15, 1967) at 8 (MJN Ex. 334). According to another industry Wage Board, the mandatory language "requires the employer to *provide* meal periods" at appropriate "intervals"—another generic use of the word "provide." Report and Recommendations of the Wage Board for IWC Wage Order 12 – Motion Picture Industry (Oct. 21, 1966) at 6 (describing Order 12-63) (MJN Ex. 328).

In 1976, when it issued the next series of Orders,[24] the IWC made only one change to the meal period language, which made it more difficult

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[21] That of the agricultural Order was amended to track paragraph 11(a) of the other orders. Wage Order 14-68, ¶10 (MJN Ex. 269); Report of the IWC Wage Board for Order 14 – Agricultural Occupations (Dec. 19-20, 1966 and Jan. 5, 1967), at 14 (MJN Ex. 331).

[22] The motion picture Wage Order continued to impose slightly different requirements. *See* Wage Order 12-68, ¶11 (MJN Ex. 250).

[23] The proposed amendment initially carried (Report, *supra*, at 6 (MJN Ex. 330)), but ultimately failed (Wage Order 7-68, ¶11 (MJN Ex. 185)).

[24] Wage Orders 1-76, 3-76, 4-76, 5-76, 6-76, 7-76, 8-76, 9-76, 10-76, 11-76, 12-76, 13-76, 14-76 (Jul. 27, 1976, eff. Oct. 18, 1976) (MJN Exs. 98, 133, 149, 18, 170, 186, 203, 216, 228, 237, 251, 259, 22); Wage Order 2-76 (Sept. 17, 1976, eff. Oct. 18, 1976) (MJN Ex. 110); Wage Order 15-76 (Jul. 17, 1976, eff. Oct. 18, 1976) (MJN Ex. 275).

for an employer to claim that an "on duty" meal period was proper:

> An "on-duty" meal period is permitted only when the nature of the work prevents an employee from being relieved of all duty *and when by written agreement between the parties an on-the-job paid meal period is agreed to*.

See, e.g., Wage Order 5-76, ¶11(a) (italicized language added in 1976).[25]

The amendment "requir[ing] a 'written agreement'" "was requested by employee representatives," but "such documentation [of] mutual consent would also serve to protect employers in case of complaint." Statement of the Basis for Order 1-76, *supra*, at 800410137 (MJN Ex. 376#15); *see also* Draft Statement as to the Basis, Order 5-76, *supra*, at 33 (MJN Ex. 361) (same). No other changes were made.

If, as Brinker argues, meal periods need only be "made available," then any employee could choose at any time to work while eating—that is, to take an "on duty" meal. The Wage Orders, however, expressly prohibit this except when "the nature of the work prevents an employee from being relieved of all duty" *and* the employee agrees in writing.

In reissuing the mandatory meal period compliance standard, the IWC repeatedly emphasized that meal periods, to be compliant, must be *off-duty*. It saw:

> no reason to change its earlier findings that *a 'duty free' meal period* is necessary for the welfare of employees, and that 30 minutes is the minimum time that will serve the purpose. The section is sufficiently flexible to allow for situations in which such an arrangement is not possible.

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[25] The IWC amended the motion picture order's meal period language to make it identical to the other orders. *Compare, e.g.*, Wage Order 5-76, ¶11, *with* Wage Order 12-76, ¶11. Orders 14-76 and 15-76, for agricultural and household occupations, are also identical except they omit subparagraph (B). *Compare* Wage Order 15-76, ¶11 *with* Wage Order 14-76, ¶11.

Statement of Findings by the IWC in Connection with the Revision in 1976 of its Orders Regulating Wages, Hours, and Working Conditions (Aug. 13, 1976), at 42, ¶11 (MJN Ex. 337) (emphasis added).[26] The IWC also noted that since 1916, the Wage Orders have "made some provision for meal periods *away from work*, varying over the years from 30 minutes to 45 minutes to one hour." Statement of the Basis for IWC Order No. 1-76, at 800410137 (MJN Ex. 376#15) (emphasis added).[27]

The more lenient rest period compliance standard ("authorize and permit") was unchanged and uniform across all the 1976 orders. *See, e.g.*, Wage Order 5-76, ¶12.

The Wage Orders issued in 1980 retained the same meal period and rest break language, with one notable exception. Wage Orders 1-80, 2-80, 3-80, 4-80, 5-80, 6-80, 7-80, 8-80, 9-80, 10-80, 13-80, 15-80 (Sept. 7, 1979, eff. Jan. 1, 1980) (MJN Exs. 99, 111, 134, 150, 19, 171, 187, 204, 217, 229, 260, 276).[28] The meal period language of Wage Order 14-80, agricultural

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[26] In *California Hotel & Motel Assn. v. Industrial Welfare Commission*, 25 Cal.3d 200, 216 (1979), this Court held that the Statement of Findings was not sufficiently detailed to satisfy Labor Code section 1177, which requires the IWC to prepare a Statement as to the Basis for each change to its Wage Orders. As evidence of the IWC's intent, however, the Statement of Findings remains relevant. Indeed, the DLSE included an excerpt from the Findings in its analysis folder on "Meal Periods." *See* MJN Ex. 376#15 (pp. 800410134-35).

[27] *See also* Draft Statement of the Basis for Wage Order 5-76 (draft Nov. 1, 1979) at 33 (MJN Ex. 361) (same); IWC 1976 Wage Orders Booklet, at 3 (MJN Ex. 373) ("an employee working a full day *must have* a 30-minute *off-duty* meal period") (emphasis added); Summary of Basic Provisions, 1976 Wage Orders (MJN Ex. 374) (same).

[28] The other exception was that the motion picture and broadcasting Orders restored the 1968 meal period language, requiring a meal period after six hours' work instead of five. Orders 11-80, 12-80 (MJN Exs. 238, 252). This was done after a former motion picture Wage Board member pointed out that most industry collective bargaining agreements "called for

occupations, was changed from "No employer shall employ" to "authorize and permit"—the same lenient compliance standard as for rest breaks. Wage Order 14-80, ¶11 (MJN Ex. 23). As discussed in plaintiffs' opening brief, the IWC made this change knowing that it was relaxing the meal period compliance standard for this industry. OBM51-53; *see also* Highlights of Labor Standards in Agriculture from IWC Order 14-80 (MJN Ex. 362) (under Order 14-80, "[e]mployers must *allow*" both meal *and* rest periods (emphasis added)).

The Statements as to the Basis for the 1980 amendments again emphasize that compliant meal periods are duty-free:

> A "*duty free*" meal period is necessary for the welfare of employees. This section is sufficiently flexible to allow for situations where that is not possible. [¶] The Commission received no compelling evidence and concluded that there was no rationale to warrant any change in this section, *the basic provisions of which go back more than 30 years*.

See, *e.g.*, Statement as to the Basis for Order No. 1-80, ¶11 (MJN Ex. 99) (emphasis added). And the IWC continued to summarize the Orders as requiring that "an employee…*must have* a 30-minute *off-duty* meal period." IWC 1980 Wage Orders Booklet, at 3 (MJN Ex. 375) (emphasis added).

As for timing, a 1982 IWC letter confirmed that, unless a formal exemption is granted, the Wage Orders require a meal period at proper intervals, for *each* five-hour work period—even if the employees would prefer to forego their second meal. Letter from IWC Executive Officer Margaret T. Miller to Mr. Klaus Wehrenberg (Jul. 13, 1982) (MJN Ex. 376#20). The letter flatly rejects the notion that the Wage Order does not require a meal period after the second five-hour work period:

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meal periods after six hours." Transcript of Proceedings before the IWC (Aug. 15, 1979), at 796419358-360 (MJN Ex. 338); *see also* Part V.C.1, below (pp. __-__).

> Another kind of problem that has arisen where employers have scheduled 11- or 12-hour shifts has been *the failure to provide for a second meal period after the second five hours of work*. ….One major employer recently argued that the IWC meal periods regulation does not require the two meal periods, but the meaning of that section is [that] meal periods must be *provided* "*at such intervals as will result in no employee working longer than five consecutive hours without an eating period*."

Id. at 800410113 (emphasis added). The IWC has granted formal exemptions "[w]here employers can show that the employees do have a chance to eat a second time *and* employees prefer to forego the second meal period in order to leave earlier," but without an exemption, the Wage Orders require mandatory meal periods at appropriate "intervals"—including a second meal following a second five-hour work period. *Id.*[29] Also, the letter's use of the word "provide" confirms, again, that in IWC parlance, this word is simply a general way to reference the mandatory meal period requirement, and is not intended to define that requirement.

The IWC's Executive Officer expressly rejected an employer's argument (identical Brinker's) that "Section 11 [means] that after an employee has worked five hours, he or she qualifies for a meal period at some time during the workday, no matter how long that work day may be," calling that argument "contrary both to the IWC intent and to a reasonable reading of the order." Memorandum of Margaret Miller, IWC Executive Officer, "MEAL PERIODS" (March 5, 1982) (MJN Ex. 376#24, p. 800410152). The use of the term of art "work period" in the meal period provision ("no employer shall employ any employee for a *work period* of more than five hours without a meal period") bears this out:

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[29] As of the 2000 series, exemptions from the meal period requirements are no longer available. *See, e.g.*, Wage Order 4-2000, ¶17 (MJN Ex. 154).

> **In the context of IWC orders, "work period" is a continuing period of hours worked.** …. [¶] …. It is not the same as a shift. **A period of work ends when a meal or recess period begins, and a new work period begins after the meal period.**
>
> Thus when employees work a twelve-hour shift, they are entitled to one meal period after the first five hours of work and a second meal period after their second *work period* of five hours.

Id. (emphasis added). Accordingly, if another five-hour "work period"—such as those created by Brinker's early lunching practice—ensues after the first meal period, the Wage Orders' plain language requires another mandatory meal period. Alternatively, the employer may time the meal periods at appropriate "intervals" that avoid all five-hour work periods. Or (since 2000) the employer may pay premium wages.

In a memorandum of the same vintage, the IWC confirmed that on a 12-hour shift, "*[t]wo* (unpaid) meal periods of 30 minutes each … are required." IWC undated document "Meal and Rest Periods: On 12-Hour Shifts" (MJN Ex. 376#22, p. 800410149) (emphasis added). This is so even if the employees "would rather work through 6½ or 7 hours after the first meal period and go home than take a second meal period." IWC undated document "Exemptions" (MJN Ex. 376#23, p. 800410150).[30] Generally speaking, the IWC "stick[s] with the most protective standard." Research: Meal Periods (Jun. 15, 1984) (MJN Ex. 376#25; 800410156).

In 1988, the IWC amended four Wage Orders without changing the meal period, rest period, or recording language. Wage Orders 1-89, 4-89,

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[30] *See also* IWC Note to File: Meal Periods (Sept. 12, 1986) (MJN Ex. 376#21, p. 800410142) (Wage Orders do not permit employers and employees to agree to on-duty paid meal periods simply "because the [employee] wants to leave a half hour early every day"; instead, a formal exemption is required).

5-89, 10-89 (Sept. 23, 1988, eff. Jun. 1, 1989) (MJN Exs. 100, 151, 157, 230).[31] The IWC "found no rationale to warrant any change in [the meal period] section, the basic provisions of which date back more than 30 years." Statement as to the Basis, Wage Order 1-89 (MJN Ex. 100).

A 1989 Interpretive Bulletin confirms, once again, that the Wage Orders require a meal period for *each* five-hour work period. Notably, the Bulletin uses the word "provide" to refer generically to the two differing compliance standards for meal periods and rest breaks:

> Under sections 11 and 12 of the Orders, meal periods and rest periods must be *provided* to employees based on the number of hours worked. Under Section 11, *employees on 12 hour shifts would have to be provided 2 meal periods* unless an agreement is reached in writing…pursuant to the language in Section 11 [for on-duty meals] or an exemption is granted by the Labor Commissioner pursuant to section 17 of the Orders. Rest periods pursuant to Section 12 must also be *provided for every 4 hour work period* and, accordingly, in a 12 hour schedule 3 rest periods must be *provided*.

Interpretive Bulletin No. 89-1 (Jun. 13, 1989) at 796410105-106 (MJN Ex. 373) (emphasis added). In this Bulletin, as elsewhere, the word "provide" refers simultaneously to the mandatory "no employer shall employ" standard for meal periods, and to the permissive "authorize and permit" standard for rest breaks.

In 1993, the IWC added new paragraph 11(C) to Wage Orders 4 and 5, allowing health care industry employees working lengthy shifts to waive (in writing) one of their *two* meal periods:

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[31] The IWC also made a number of amendments in the mid-1980s with no relevant changes. *See* Wage Orders 8-80 (amendment to Section 3A), 13-80 (amendment to Section 3A), 2-80 Updated, 3-80 Updated, 5-80 (amendment to Section 3), 6-80 Updated, 7-80 Revised, 2-80 Updated, 8-80 Revised, 11-80 Updated, 12-80 Revised, 13-80 Revised, 14-80 Revised, 15-86 Updated, 8-80 (amendment to Section 3), 9-90 (MJN Exs. 205, 261, 112, 134, 156, 172, 188, 113, 206, 238, 253, 262, 272, 277, 278, 207, 218).

> (C) Notwithstanding any other provision of this order, employees in the health care industry ***who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to a meal period.*** In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such waiver is in effect.

Wage Orders 4-89, 5-89 (Amendments to Sections 2, 3, & 11), ¶11(C) (Aug. 21, 1993) (MJN Exs. 152, 158) (emphasis added). As discussed in plaintiffs' Opening Brief, this amendment was needed because, without it, the meal period language "does not permit employees to waive their *second* meal periods." OBM85 (quoting IWC Charge to the 1996 Wage Boards, IWC Orders 1, 4, 5, 7 and 9) (MJN Ex. 29) (emphasis added)).

This amendment was carefully crafted to permit waiver of only a single meal period:

> …only insofar as waiving "a" meal period or "one" meal period, not "any" meal period. Since the waiver of one meal period allows employees freedom of choice combined with the protection of at least one meal period on a long shift,…the [amendment] permits employees to waive *a second meal period* provided the waiver is documented in a written agreement voluntarily signed by both the employee and the employer….

Statement as to the Basis, Wage Order 5-89 (Amendments to Sections 2, 3 & 11) (Aug. 21, 1993) (MJN Ex. 158) (emphasis added).

In sum, there can be no doubt that the Wage Orders require a meal period for *each* five-hour work period, and that long shifts trigger *two* meal periods, only one of which may be waived, and then only in writing.

In 1998, the IWC removed the words "in the health care industry,"

thereby granting all employees the right to waive their "second meal period" "on a long shift." Wage Orders 4-98, 5-98, ¶11(C) (Apr. 1, 1997, eff. Jan. 1, 1998) (MJN Exs. 20, 153). The IWC added identical language to four more orders amended that year. Wage Orders 1-98, 4-98, 7-98, 9-98 (eff. Jan. 1, 1998), ¶11(C) (MJN Exs. 101, 153, 189, 219).

Again, "[t]he IWC decided that waiver of one meal period allows an employee freedom to choose between leaving work one half-hour earlier or taking *a second meal period* on a long shift." Statement as to the Basis, Overtime and Related Issues (Orders 1, 4, 5, 7 and 9) (Apr. 11, 1997) at 8 (MJN Ex. 30); *see also* MJN Exs. 101, 153, 189, 219 (same); Minutes of Public Meeting of IWC (Jun. 28, 1996) at 712406112 (MJN Ex. 341) (before amendment, Orders "require[d] that employees ***must take*** *a second meal period* on an extended shift when they preferred to waive that meal period and leave earlier"; "the language in [the meal period section] does not permit employees to waive their second meal periods on a shift").[32]

Paragraphs (A) and (B)—including the core "no employer shall employ" language—were unchanged across all the orders, and remained identical to the 1976, 1980, and 1989 series, discussed above.

As this history shows, as of 1998, the core meal period language, unchanged since 1952, required employers to ensure that workers are actually relieved of duty for meal periods each five-hour work period.

2. Post-AB 60 Wage Orders, 2000-2001

In 1999, the Legislature enacted AB 60, adding Labor Code section 512, intended to "codify" the "existing wage orders'" meal period requirements (OBM60 (citing AB 60, Legislative Counsel Digest, at 2 (July

[32] *See also* Transcript of Public Hearings of the IWC (Apr. 4, 1997) (MJN Ex. 345) (reflecting general understanding that, without amendment, a second meal period would accrue that could not be waived).

21, 1999) (MJN Ex. 58)).

Notably, AB 60 not only adopted section 512, but also simultaneously "reinstated" "Wage Orders 1-89, 4-89 as amended in 1993, 5-89 as amended in 1993, 7-80, and 9-90"—reflecting the Legislature's approval of those Orders' provisions—and its understanding that they were wholly consistent with the new statute. *Id.*, §21, at p. 14 (MJN Ex. 58).[33] At the same time, it *revoked* the five 1998 Orders (1-98, 4-98, 5-98, 7-98, and 9-98 (MJN Exs. 101, 153, 20, 189, 219)), which had instituted weekly, instead of daily, overtime (¶3(A)), and which had expanded the meal period waiver right (¶11(C)), as discussed above. *Id.*

Accordingly, as of AB 60's effective date, California's meal period requirements included *not just* Labor Code section 512, *but also* the language of the expressly "reinstated" Wage Orders. If the Legislature had intended to substantively change the meal period compliance standard, it would not have reinstated any Orders imposing that standard. To understand California's meal period laws, therefore, section 512 and the reinstated Orders must be read together.

The reinstated Orders' meal period language originated in the 1952 Orders and had been unchanged since the 1976 Orders. The language was identical across all the Orders, except that Orders 4 and 5, as amended in 1993, included an additional paragraph for health care workers:

> **11. MEAL PERIODS**
>
> (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (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

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[33] *See Carter v. California Dep't of Veterans Affairs*, 38 Cal.4th 914, 925 (2006) ("An uncodified section is part of the statutory law.").

> the employer and employee. Unless the employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to.
>
> (B) In all places of employment where employees are required to eat on premises, a suitable place for that purpose shall be designated.
>
> (C) **[Wage Orders 4 and 5 Only]** Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to a meal period. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such waiver is in effect.

Wage Orders 1-89, 4-89 (Amendments to Sections 2, 3 & 11), 5-89 (Amendments to Sections 2, 3, & 11), 7-80, 9-90 (MJN Exs. 100, 151-52, 157-58, 187, 218).

As discussed above, reinstated Orders 4 and 5 permitted health care workers to waive (in writing) *either one* of the two meal periods that would accrue to them on shifts exceeding eight hours. The second sentence of section 512 (AB 60, §6) accorded a modified version of this right to all workers:

> ….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*.

Under this language, the second meal period (but not the first) may be waived (in writing) by workers on shifts exceeding 10 but not 12 hours. Labor Code §512(a), second sentence. This preserved the written waiver right that had been added to five Orders in 1998, but that AB 60 expressly revoked. *See* AB 60, §21.

Health care workers governed by reinstated Orders 4 and 5—the only ones who, under the reinstated Orders, may waive (in writing) their first meal period—may waive one of their two meal periods, but not both. Reinstated Orders, ¶11(C). Those who work more than 12 hours may waive neither. Lab. Code, §512(a), second sentence. The only other employees who may waive *any* meal period are (a) those on shifts not exceeding six hours (Reinstated Orders, ¶11(A), first sentence, Lab. Code §512(a), first sentence), or (b) those for whom "the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to" (Reinstated Orders, ¶11(A), third sentence).

What the IWC did next confirms this.

Shortly after AB 60 passed, the IWC issued the Interim Wage Order, which combined section 512 and the reinstated Orders. The meal period text consisted of the first sentence of the reinstated Orders plus the second sentence of section 512. Interim Wage Order—2000, ¶10 (eff. Mar. 1, 2000) (MJN Ex. 21). The Interim Order also confirmed that the same Orders "reinstated" by AB 60 (Orders 1-89, 4-89 (as amended in 1993), 5-89 (as amended in 1993), 7-80 and 9-90) were again "reinstated, as modified in the Interim Wage Order, until the effective date of wage orders promulgated by the Commission pursuant to Labor Code §517"; and that

Orders 2-80, 3-80, 6-80, 8-80, 10-89, 11-80, 12-80, 13-80 and 15-86 "remain in full force and effect except to the extent that they are modified by the Interim Wage Order."[34] *Id.*, Summary (emphasis added).[35]

The Interim Wage Order significantly "modified" the earlier Wage Orders' alternative workweek provisions. *See id.*, Summary & ¶5. The meal period provisions, however, were not "modified" except to add the additional written waiver right from section 512. As the IWC's Summary of those provisions explains:

> An employee *must receive a thirty-minute meal period for every 5 hours of work.* Pursuant to mutual consent by the employer and the employee: (1) an employee may waive a thirty-minute meal period if the day's work will be completed in no more than 6 hours; (2) an employee may waive the second of 2 thirty-minute meal periods when the day's work will be completed in no more than 12 hours and the first thirty-minute meal period was not waived.

Interim Wage Order—2000, Summary (MJN Ex. 31) (emphasis added). The "reinstated" orders also preserved a third waiver right—the right to agree (in writing) to an "on duty" meal period. *See, e.g.*, Wage Orders 1-89, 2-80, 5-89 (amended 1993) (¶11(A), second and third sentences).

In other words, in the IWC's view, nothing in AB 60—including its use of the word "provide"—changed the mandatory meal period compliance standard from the Orders that AB 60 expressly "reinstated" and

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[34] This wreaked temporary havoc in the motion picture industry because Wage Order 12-80 (¶11) (MJN Ex. 253) had required meal periods after six hours' work, not five. *See* Transcript of Public Meeting of IWC (May 5, 2000), at 712427154-147 (MJN Ex. 349). The six-hour limit was restored in Wage Order 12-2000. (MJN Ex. 254).

[35] "Except for the section pertaining to penalties, the Interim Wage Order does not apply to any person" covered by Order 14-80, governing agricultural occupations. Interim Wage Order—2000, Summary (eff. Mar. 1, 2000) (MJN Ex. 21).

that had been in place since 1916. Rather, the Legislature simply used the word "provide" as it had been used in DIR Interpretive Bulletin No. 89-1 (MJN Ex. 372), discussed above—as a generic way to reference and codify the reinstated Wage Orders' mandatory standard.[36]

Nor did AB 60 change the requirement for "a thirty-minute meal period for every 5 hours of work," as Brinker contends. Rather, it merely preserved employees' right to waive the second meal period that accrues on shifts of between 10 and 12 hours. AB 60 revoked the 1998 series of Orders, which contained overtime language offensive to the Legislature, but which had allowed employees on overlength shifts to waive (in writing) their second meal period. The reinstated earlier series of Orders had proper overtime language, but limited the waiver right to health care workers. The second sentence of Labor Code section 512 preserved that element from the revoked 1998 Orders, and expanded it to cover all workers.

In AB 60, the Legislature also directed the IWC, by July 1, 2000, to "adopt wage, hours, and working conditions orders consistent with this

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[36] Brinker cites a transcript of an IWC public meeting in which the participants talked about "providing" meal periods. ABM42-43 (citing Transcript of a Public Hearing of the IWC (Jun. 30, 2000) (Brinker MJN Ex. 3)). The participants simply used that word as it had been used by IWC commissioners since 1931—as a generic way to refer to *either* the mandatory meal period requirement *or* the permissive rest period requirement, depending on the context. Wage Order 16A, ¶3 (Jan. 30, 1931, eff. Apr. 11, 1931) (MJN Ex. 245); Report and Recommendations of the Wage Board for IWC Wage Order 12 – Motion Picture Industry (Oct. 21, 1966) at 6 (describing requirement Order 12-63) (MJN Ex. 328); Wage Orders 1-76, ¶7(A)(6), 9-76, ¶7(A)(6) (MJN Exs. 98, 216); Letter from IWC Executive Officer Margaret T. Miller to Mr. Klaus Wehrenberg (Jul. 13, 1982) (MJN Ex. 376#20); Interpretive Bulletin No. 89-1 (Jun. 13, 1989) at 796410105-106 (MJN Ex. 373); *see also* Transcript of Public Meeting of IWC, at 712427170 (May 5, 2000) (MJN Ex. 349) (before premium pay remedy, all DLSE could do was "file an action for injunctive relief and get a court order ordering an employer to *provide* the workers…with the *appropriate meal and rest periods*" (emphasis added)).

chapter," and to "include regulations" on specified matters relating to the workweek, as well as "such other regulations as may be needed to fulfill the duties of the commission pursuant to this part." AB 60, §11 (enacting Lab. Code §517(a)).

The 2000 Orders (eff. October 1, 2000) all continued to retain the mandatory meal period compliance language from the reinstated orders—which had been unchanged since the 1976 Orders—including the "no employer shall employ" language originating from the 1916 order.[37] Indeed, when the IWC began drafting its next series of Orders, it used the text of the reinstated orders as a starting point. *See, e.g.*, Draft of Amendments to Wage Order 5-89 (as amended in 1993) (draft Nov. 5, 1999) (MJN Ex. 367); Draft of Amendments to Wage Order 5-89(93) – *Draft compliance with Interim Wage Order 2000* (undated; approx. 2000) (MJN Ex. 368).

Every sentence of the reinstated Orders' meal period language was preserved in the 2000 series. The "no employer shall employ" language of the first sentence became part of paragraph 11(A) of each 2000 order. The "on-duty" meal period language of the second and third sentences became paragraph 11(C) of each 2000 order (except Orders 4, 5, and 14, where it was added to paragraph 11(A), and Order 12, where it became paragraph 11(B)). The "eating space" language of the fourth sentence was retained as either paragraph 11(C), (D), or (E) of each 2000 order.

In addition, the second sentence of Labor Code section 512 was adopted verbatim as paragraph 11(B) of each order except Orders 4, 5, 12, and 14, in which that language was not included. Instead, the language

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[37] Wage Orders 1-2000, 2-2000, 3-2000, 4-2000, 5-2000, 6-2000, 7-2000, 8-2000, 9-2000, 10-2000, 11-2000, 12-2000, 13-2000, 14-2000, 15-2000 (eff. Oct. 1, 2000) (MJN Exs. 102, 114, 136, 154, 383, 173, 190, 208, 220, 232, 239, 254, 263, 273, 279).

allowing health care workers on extended shifts to waive "a meal period" was included as paragraph 11(D) of Orders 4-2000 and 5-2000, after being amended to read "one of their two meal periods." MJN Exs. 154, 383. Hence, the Wage Orders and section 512(a) (second sentence) operated together to expand the waiver right to all covered employees—as AB 60 was intended to do.

Finally, the IWC added a new premium pay provision as paragraph 11(B), (C), or (D) of each 2000 Order (except Order 14). The IWC added this to the rest break provisions as well (¶12(B) of each order). These provisions stated that if an employer "fails to provide" *either* a meal period *or* a rest break "in accordance with the applicable provisions of this Order," the employer shall pay an extra hour of pay. The substantive compliance standards for rest breaks ("authorize and permit"), like those for meal periods ("no employer shall employ"), were unchanged, and the word "provide" was used to refer generically to both. (Later, the Legislature used the same "provide" parlance in Labor Code section 226.7(b).)

The 2000 series of orders confirms that AB 60 did not, as Brinker contends, expand employees' right to waive the day's *first* meal period. As before, the first meal period may be waived only by (a) employees on shifts not exceeding six hours; (b) employees who agree (in writing) to an on-duty meal period; and (c) health care workers on lengthy shifts, who may waive (in writing) one of their two meal periods. *See* Transcript of Public Hearing of the IWC, at 712418218:20-22 (Nov. 8, 1999) (MJN Ex. 347) (for non-health care workers on shifts exceeding six hours, "there's only one way you can still waive that first meal period, and [that's] through an on-duty meal period"). The second meal period may only be waived by (a) health care workers on lengthy shifts who did not waive (in writing) their first meal period or agree (in writing) to an on-duty first meal period; and (b) workers on shifts between 10 and 12 hours who did not agree (in

writing) to an on-duty first meal period.

The IWC rejected a proposal to allow workers on 12-hour shifts to waive their second meal period by agreeing to take it on-duty—even if they did not agree to an on-duty first meal period. Minutes of Public Hearing of the IWC (May 26, 2000), at 2 (MJN Ex. 350). Hence, under current law, such workers may waive the second meal period only in one situation—"[if] the nature of the work prevents [them] from being relieved of all duty." *See, e.g.*, Wage Order 5-2001, ¶11(A).

On June 30, 2000, the IWC issued the 2001 series of orders.[38] The only substantive change to the meal period language was in Order 5, which added a subparagraph expanding on-duty meals for certain residential care facility employees. Wage Order 5-2001, ¶11(E) (MJN Ex. 5). In its Statement as to the Basis, the IWC reconfirmed that "*[a]ny* employee who works more than six hours in a workday *must receive* a 30-minute meal period," which "may be waived" *only* for employees working "more than five hours but less than six hours in a day." Statement as to the Basis for 2000 Amendments (Jun. 30, 2000, eff. Jan. 1, 2001) at 20 (MJN Ex. 32) (emphasis added).

In September 2000, the Legislature enacted section 226.7, expressly incorporating the 2001 Wage Orders into law. *See* Part IV.D, below (pp. 67-69).

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[38] Wage Orders 1-2001, 2-2001, 3-2001, 4-2001, 5-2001, 6-2001, 7-2001, 8-2001, 9-2001, 10-2001, 11-2001, 12-2001, 13-2001, 14-2001, 15-2001, 16-2001, 17-2001 (MJN Exs. 103, 115, 137, 155, 5, 174, 191, 209, 221, 233, 241, 255, 264, 274, 280, 281, 282). Order 16 was the first Order for "Certain On-Site Occupations in the Construction, Drilling, Logging and Mining Industries," and Order 17 covered "Miscellaneous Employees."

B. The Meal Period Recording Requirement Confirms The Mandatory Compliance Standard and Allows Violations to be Tabulated from Employers' Records

The Wage Orders' meal period *recording* requirement further confirms that employers have an affirmative obligation to relieve workers of duty for meal periods, and that workers may not waive them except in limited, specified circumstances. *See*, *e.g.*, Wage Order 5-2001, ¶7(A)(3) (MJN Ex. 5). The IWC instituted this requirement precisely because meal periods, unlike rest breaks, are mandatory and unwaivable (except in narrow circumstances and in writing). For enforcement purposes, an employer's violation of the Wage Orders' meal period requirements can be determined from employer's meal period records and no other evidence.

A review of the history of this requirement bears this out.

Until 1942, the IWC required employers to record only "the number of hours worked." *See*, *e.g.*, Wage Order 11A (Manufacturing Industry) (Jan. 30, 1923, eff. May 8, 1923), ¶7 (MJN Ex. 90); Wage Order 12A (Hotels & Restaurants) (Jun. 8, 1923, eff. Sept. 14, 1923), ¶6 (MJN Ex. 10). Most of the 1942/1943 "NS" orders required employers to keep more precise records, and to capture:

> Hours employed, which shall show *the beginning and ending of hours employed* by the employee each work day, which shall be recorded each day at the time the employee begins and ends employment.

Wage Order 5NS, ¶8(a)(7) (MJN Ex. 12) (emphasis added).[39] In turn, "hours employed" was defined as "all time during which…[a]n employee is suffered or *permitted to work*, whether or not required to do so." *Id.* ¶2(f)(2) (emphasis added). Because employers may not "permit"

[39] Slightly different wording was used in Orders 1NS (¶8(a)(7)) and 2NS (¶9(a)(7)) (MJN Exs. 92, 104).

employees to work during meal periods, "the beginning and ending" of each meal period must be recorded. *See id.* ¶¶2(c), 3(d).

Sitting in executive session, the public housekeeping industry Wage Board acknowledged that the amended language requires employers to record meal periods. The amendment's purpose was to capture hours *actually* worked (not merely those scheduled), including meal periods during which the employee actually stopped working. *See* Transcript, Executive Session of the Wage Board Appointed by the IWC for the Public Housekeeping Industry (Nov. 16, 1942), at 10:22-12:12, 13:6-17, 14:9-11 (MJN Ex. 305). "[It] is necessary when [the worker] comes to work, *when she leaves at noontime*, if she does, when she comes back to work, or if she is on a split shift, if she has a break, *that that time be recorded*. ….[E]very time the [employees] come to work they can write down in their own handwriting that they came to work at 8:00 or 7:00 or 8:10, *and they left for lunch at 12:10, for example*." *Id.* at 13:14-17, 14:9-11 (emphasis added).

An employer representative's comment that "I, for one, would have to have a policeman to see them do that" (*see id.* at 14:12-15:11) was ultimately rejected, and the language quoted above requiring daily, real-time recording was adopted (*see* Minutes of a Meeting of the IWC and Wage Order 5NS (Apr. 14, 1943) at 703439119 (MJN Ex. 302)).

The canning industry Order included an even more explicit meal period recording requirement:

> All starting and stopping times of hours worked, as defined under Section 2(f),…*including the beginning and ending of meal periods,*…shall be recorded at the time they occur and in the worker's presence….

Wage Order 3NS, ¶8(b) (MJN Ex. 127) (emphasis added).

Over time, the IWC made the requirement more and more definite., and since 1963, all of the Orders have explicitly required that "meal

periods…shall also be recorded." *See, e.g.*, Wage Order 5-63, ¶7(a)(3) (MJN Ex. 16).[40]

The IWC has repeatedly acknowledged that the meal period recording requirement's prime purpose is to enable easy *enforcement*. This, in turn, shows that meal periods are mandatory, that employers must ensure that workers take them, and that employees may not choose to decline them.

For example, in 1966, the mercantile industry Wage Board refused to eliminate the recording requirement, noting that "without the recording of all in-and-out time, *including meal periods, the enforcement staff would be unable to investigate and enforce the provisions of the order*." *See* Report of the IWC Wage Board for Order 7 – Mercantile Industry (Dec. 14-15, 1966), at 4-5 (MJN Ex. 330) (emphasis added). In other words, because meal periods are mandatory and may not be declined except by express written waiver, the employer's records will reveal all violations. Any missed (and therefore unrecorded) meal period equals a violation.

The public housekeeping industry Wage Board likewise refused to weaken the recording requirement, noting that "[t]he requirement of accurate records was a protection *for the employee*." Notes of Secretary for the IWC Wage Board for Order 5 – Public Housekeeping Industry (Jan. 10 and 11, 1967) at 17 (MJN Ex. 333) (emphasis added). It further noted that the burden of keeping accurate records was the employer's, and that "proper supervision" can "eliminate inaccurate recording before the time cards reached the computers. If an employee persisted in inaccurate recording, disciplinary measures should be taken." *Id.* at 16-17.

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[40] The agricultural wage order did not expressly require meal period recording until 1976. *See* Order 14-65, ¶6; Order 14-76, ¶7(A)(3) (MJN Exs. 268, 270); Report of the IWC Wage Board for Order 14– Agricultural Occupations (Dec. 19-20, 1966, Jan. 5, 1967), at 20-21 (MJN Ex. 331).

Finally, in 1979, when the manufacturing industry Wage Board rejected yet another proposal to weaken the recording requirement, one Board member noted that "[i]f the time of that meal period were not recorded, we would have problems enforcing that section. ….Instead of *looking at time cards*, we would have to talk to employees and ask them what time they usually got a meal period." Excerpt from Wage Board Report and Recommendations, 1978-1979, at 15 (MJN Ex. 339) (emphasis added). "Recording meal periods makes it possible to enforce meal periods *by looking at records*." *Id.* at 16 (emphasis added).

This is precisely how the DLSE used Brinker's own records when it investigated Brinker in this case. 21PE5770-5910.

In sum, the meal period recording language, which has been unchanged since 1963, shows that meal periods are mandatory, may not be simply offered and declined, and any meal period not reflected in the employer's records is a noncompliant one. An employer's meal period violations therefore can be easily established and tabulated classwide. *See Murphy*, 40 Cal.4th at 1114 (employers' records contain "the evidence necessary to defend against plaintiffs' claims").

C. Rest Breaks: "Every Four Hours or Major Fraction" Triggers a Rest Break at the Second, Sixth, Etc. Hours and One Rest Break Must be Permitted In the Work Period Preceding the First Meal

A closer look at the historical development of the Wage Orders' rest break language shows that: (1) "four hours or major fraction" triggers a rest break at the second, sixth, and so on hours; and (2) a rest break must be "authorized and permitted" in the work period preceding the first meal period. Since the earliest orders, the IWC intended to break up the work day with periodic rest breaks, meal periods, and rest breaks.

1. "Every Four Hours or Major Fraction"

The Wage Orders' rest break language originates in Wage Order 18 from 1931: "[W]hen women and minors are required by the nature of their work to stand, a relief period shall be given every two (2) hours of not less than ten (10) minutes." Wage Order 18, ¶12(a) (MJN Ex. 80).

The 1942 Orders continued this requirement, slightly modified:

> No employee whose work requires that she remain standing shall be required to work more than two and one-half (2½) hours consecutively without a rest period of ten (10) minutes. No wage deduction shall be made for such rest period.

See, *e.g.*, Wage Orders 3NS, 5NS, ¶3(e) (MJN Exs. 127, 12).[41] Order 4NS, governing professional and clerical occupations, required rest periods not just for workers required to stand, but for *all* telephone, telegraph and teletype operators. Wage Order 4NS, ¶4(f) (MJN Ex. 142 at 703423116).

At the same time, the 1942 Orders continued to require compliance with Wage Order 18, which required a rest break "every two hours," not every 2½ hours. *See*, *e.g.*, Wage Order 4NS, ¶11. As a result, there was no real dispute that the early orders' plain language triggered a rest break "every two hours." *See* 7 Ops.Cal.Atty.Gen. 124, 125-126 (1946) (MJN Exs. 357, 379).

In 1947, the IWC substituted "four hours working time, or *majority fraction* thereof" instead of specifying two hours. *See*, *e.g.*, Wage Order 5R, ¶11 (MJN Ex. 13). As applied to rest periods, any time over two hours is the "majority fraction" of four. Hence, the change in wording did not substantively alter the language triggering a rest break every two hours.

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[41] While some of the 1942 Orders included no explicit rest period requirement, each 1942 Order incorporated the sanitary provisions of Order 18. *See*, *e.g.*, Wage Orders 1-NS, 2-NS ¶14 (MJN Exs. 92, 104).

At the time, the term "majority fraction" was well-established in IWC parlance to mean anything over half. For example, the IWC construed "'any fraction of fifteen minutes' as contained in Section 3(e) of Order No. 1NS…to mean the *majority fraction* thereof, or eight minutes or more." Minutes of a Meeting of the IWC (Jun. 14, 1943), at 703445138 (MJN Ex. 303) (emphasis added); *see also* Interpretation of Order No. 1NS (Mar. 11, 1944) ("Section 3(e), 'Any fraction of fifteen minutes' shall be interpreted to mean the majority fraction thereof, or 8 minutes or more.") (MJN Ex. 356); Action taken by IWC (Sept. 11, 1943), at 3 (same) (MJN Ex. 357#6).

The term "majority fraction" had been used since 1931 to fix the number of required toilets and water faucets:

> The number of water-closets to be *provided* shall be not less than one for every twenty (20) women and female minors *or majority fraction thereof*….
>
> At least twenty (20) lineal inches of washing space with one (1) water supplied faucet shall be provided for each thirty (30) women or female minors employed, *or majority fraction thereof*….

Wage Order 18 (1931), ¶¶4(i), 6 (MJN Ex. 80) (emphasis added). [42] A "majority fraction" of 20 employees is any over 10, and of 30 any over 15.

The 1947 orders, which introduced the term "majority fraction" for rest breaks, also used that term to describe the number of toilets. *See, e.g.*, Wage Order 5R, ¶14 (MJN Ex. 13) ("one toilet for every twenty-five (25) female employees or majority fraction thereof"). In 1952, the IWC changed "majority fraction" to "major fraction" for rest periods, but not for toilets. *See, e.g.*, Wage Order 5-52, ¶¶12, 15 (MJN Ex. 14). In 1957, the toilets language was changed to "major fraction" as well. *See, e.g.*, Wage

[42] The word "provided" in the toilets provision is telling. Certainly, the IWC did not intend to allow employers to merely *offer* to install toilets.

Order 5-57, ¶¶12, 15 (MJN Ex. 15).

The available reports surrounding the 1952 and 1957 amendments do not indicate any substantive reason for this change.[43] As previously discussed, it was merely a grammatical correction. OBM108. Indeed, an IWC document tracking amendments to the rest break language did not even mention the change from "majority" to "major." History of Basic Provisions in a Representative Order of the IWC…Rest Periods, 801426138 (MJN Ex. 377#5). The fact that the toilets language was also changed belies the Court of Appeal's conclusion (and Brinker's argument) that the amendment had something to do with the 3½-hour exception added to the rest break provision in 1952. OBM108 (citing Slip op. 27); ABM94.

The "major fraction" language has not been amended since 1952. For fifty years, it has been consistently interpreted in the same way as "majority fraction": "A *major fraction* of four hours, for purposes of determining whether a rest period is due, is more than half, or anything over two hours." Research: Rest Periods "Major Fraction" (Jan. 1984), 801426144 (MJN Ex. 377#8) (emphasis added); *see also* Research: Rest Periods (July 19, 1990), 801426112 (MJN Ex. 377#2) ("As soon as an employee works two hrs & one min (*major fraction thereof/more than ½*) the [employee] is entitled to 10 net minutes break." (emphasis added));

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[43] *See* Report of Chairman of Wage Board – Manufacturing Industry (Nov. 5, 1951) (MJN Ex. 314); Recommendations of Industry Members of Manufacturing Wage Board (approx. Nov. 1951) (MJN Ex. 315); IWC Summary of Wage Board Recommendations (Dec. 12, 1951) (MJN Ex. 316); IWC Transcript of Proceedings (Feb. 1-2, 1952) (MJN Ex. 317); Minutes of a Meeting of the IWC (Mar. 1, 1952) (MJN Ex. 318); Minutes of a Meeting of the IWC (Apr. 18-19, 1952) (MJN Ex. 319); Summary of Actions Taken by the Wage Board for Order No. 1-52 (Oct. 1956) (MJN Ex. 320); Report of the Wage Board for Order No. 1-52 (Oct. 1956) (MJN Ex. 321); Record of Proceedings – Wage Board for Order 1 (Oct. 4, 1956) (MJN Ex. 322); Summary of Changes in Existing IWC Orders Under Consideration by the Commission (MJN Ex. 323).

DLSE Op.Ltr. 1999.02.16 (MJN Ex. 37); DLSE Manual §45.3.1 (June 2002) (MJN Ex. 49).

Accordingly, the rest break language triggers a break at the second, sixth, and tenth hours, and so on, depending on the length of the shift. An eight-hour shift triggers two rest breaks totaling twenty minutes (not one, as the *Brinker* panel effectively held), and a twelve-hour shift triggers three totaling thirty minutes (not two). *See, e.g.*, Meal and Rest Periods: On 12-Hour Shifts, 800410149 (MJN Ex. 376#22) ("three paid rest periods of 10 minutes each are required on a 12-hour shift"); IWC memo, "Exemptions," 800410150 (MJN Ex. 376#23) ("[e]mployees on a 10-hour shift [who] work 1½ or 2 hours overtime" accrue a "third required rest period"); Record of Proceedings – Wage Board for Order 1, Los Angeles, Oct. 1 and 2, 1956 (Oct. 4, 1956) at 2-3 (MJN Ex. 322) ("major fraction" means "a 6½ hour day" triggers "two 10 minute rest periods" (comments of Secretary Braese)); Interpretive Bulletin No. 89-1 (Jun. 13, 1989) at 796410106 (MJN Ex. 373) ("in a 12 hour schedule 3 rest periods must be provided").

2. Rest Break During Work Period Preceding First Meal

"[T]he Commission's intent in establishing these requirements was to give employees periodic breaks in the workday." IWC Letter from Leslie M. McNeil to Cal B. Watkins (Aug. 15, 1983), 801426129 (MJN Ex. 377#4).[44] Accordingly, "whenever possible and practicable, rest periods should be in approximately the middle of the work period." Division of Industrial Welfare Enforcement Manual, 801426101 (April 1959) (MJN Ex. 377#1); Letter from Secretary of the IWC to Ms. Victoria Karnes (Jul. 21, 1978) (MJN Ex. 360) (Order 4-76 "requir[ed] a rest period of ten

[44] *Accord*: Meal and Rest Periods: On 12-Hour Shifts, 800410149 (MJN Ex. 376#22) ("It was the intent of the Commission to give employees periodic breaks in the workday, and to permit rest periods in addition to meal periods." (underscore original)).

minutes, *within* every four-hour work period"—not after it); Highlights of Labor Standards in Agriculture from IWC Order 14-80 (MJN Ex. 362) (Order 14-80 required an "(unpaid) meal period *after* 5 hours of work" but "a paid rest period *for every* 4 hours worked" (emphasis added)).

In particular, rest periods should be spaced around the meal periods—including one during the work period before the first meal period:

> [T]hree paid rest periods of 10 minutes each are required on a 12-hour shift. Rest periods should be scheduled *in the middle of each work period*, that is, *between the beginning of work and the next meal period*.

Meal and Rest Periods: On 12-Hour Shifts, 800410149 (MJN Ex. 376#22) (dated approx. early 1980s) (emphasis added); *see* OBM110-11 (quoting DLSE Op.Ltr. 2001.09.17 (MJN Ex. 40)).[45]

This is because "the general health and welfare of employees requires periods of rest during long stretches of physical and/or mental exertion." Statement of Findings, *supra*, at 42, ¶12 (MJN Ex. 337). To be meaningful, rest periods should be "properly spaced" through the workday. DIW Manual, *supra*, 801426101 (MJN Ex. 377#1).

Brinker may point out language suggesting that "it would be acceptable, if mutually agreed to by the employer and employee," and if "not practical to take them in the middle of each work period," "to combine the two 10 minute rest periods into one rest period of 20 minutes net rest time." IWC Letter, *supra*, 801426120 (MJN Ex. 377#4); Meal and Rest Periods: On 12-Hour Shifts, 800410149 (MJN Ex. 376#22).[46] *Contra*

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[45] *See* Transcript of Proceedings of Wage Board in the Canning and Preserving Industries, 703414115:12-14 (Apr. 10, 1942) (MJN Ex. 292) (production improves on shifts of "7½ hours work and a half hour lunch with the rest periods in between").

[46] *Accord*: Record of Proceedings–Wage Board for Order 1, Los Angeles, Oct. 1 and 2, 1956 (Oct. 4, 1956) at 2-3 (MJN Ex. 322); DIW

DLSE Op.Ltr 2001.09.17 at 4 (MJN Ex.40) ("A combined 20 minute rest period is never allowed under ordinary circumstances. [T]he first rest break must precede the meal period and the second break must follow the meal period."). That is not an issue in this case because Brinker never authorizes 20-minute rest periods if the first one was skipped. All rest periods in Brinker's restaurants are ten minutes.[47]

As discussed in plaintiffs' opening brief, Brinker's "early lunching" schedule does not authorize or permit a rest break in the work period preceding the first meal period. OBM110. Instead, it authorizes and permits, at most, a single ten-minute afternoon rest period—thereby shortening the rest time workers should be getting. Whether this common policy violates the law, as argued above, is a question common to the class.

IV. THE MEAL PERIOD COMPLIANCE ISSUE

There can be no doubt that the Wage Orders impose on employers an affirmative duty to ensure that workers are relieved of duty for their meal periods, and that employers may not merely "offer" meal periods or make them "available." Brinker contends that statutes expressly intended to "codify" the Orders (and remedy non-compliance) instead radically changed them—when nothing in the legislative history reveals any such intent. Read in context instead of isolation, the word "provide" is consistent with the Legislature's clear intent to "codify" the Wage Orders.

A. Brinker's "Plain-Language" Reading of the Statues and Wage Orders Ignores Parts of The Plain Language

1. Section 226.7

Focusing on the word "provide," Brinker contends that section

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Manual, *supra*, 801426101 (MJN Ex. 377#1) (same).

[47] Every mention of Brinker's policy refers to ten-minute breaks, *never* twenty-minute ones. *E.g.*, 19PE5172, 21PE5913:1-11.

226.7's "plain language" requires employers to merely offer meal periods. ABM 5-7, 26-28. The problem with Brinker's "plain-language" argument is that it ignores parts of the plain language.

The first sentence of section 226.7(b) contains language modifying the word "provide," which Brinker's argument (ABM26) ignores: "If an employer fails to *provide…in accordance with an applicable order of the Industrial Welfare Commission*." Lab. Code §226.7(b) (emphasis added). The rest of section 226.7(a), which Brinker also ignores, contains the same modifying language: "No employer shall require any employee to work during any meal or rest period *mandated by an applicable order of the Industrial Welfare Commission*." *Id.* §226.7(a) (emphasis added).

It is impossible to determine what it means to "provide" a meal period or rest period "in accordance with an applicable [IWC] order" without looking at the language of the "applicable orders."[48] And, because section 226.7 specifically references the Wage Orders, they are considered "incorporated" into the statute. *See People v. Cooper*, 27 Cal.4th 38, 44 (2002) (citing *Palermo v. Stockton Theatres, Inc.*, 32 Cal.2d 53, 58-59 (1948)); *In re Jovan B.*, 6 Cal.4th 801 (1993).

The meal period compliance standard that both subsections' plain language expressly incorporates states: "No employer shall employ any person for a work period of more than five hours without a meal period…." 8 Cal. Code Regs. §11050, ¶11(A). The differing rest period standard imposes a less stringent requirement: "Every employer shall *authorize and*

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[48] The parties agree that the Wage Orders to which section 226.7 refers are the *current* orders, issued in June 2000. ABM6, 44-45; *see* Part IV.D, below. Because section §226.7 specifically references the Wage Orders, they are considered "incorporated" into the statute. *See People v. Cooper*, 27 Cal.4th 38, 44 (2002) (citing *Palermo v. Stockton Theatres, Inc.*, 32 Cal.2d 53, 58-59 (1948)); *In re Jovan B.*, 6 Cal.4th 801 (1993).

permit all employees to take rest periods…." *Id.* ¶12(A) (emphasis added). The word "provide" refers to either of these two compliance standards, depending on the context.

Brinker highlights the word "require" in section 226.7(a) (ABM27), but that word is modified by additional text expressly referencing the Wage Orders, which Brinker disregards. Also, section 226.7(b), which created the remedy this case seeks to enforce, references *not* section 226.7(a), but the Wage Orders. Nothing in the word "require" suggests an intent to *displace* the Wage Orders with a more lenient standard, as Brinker claims. On the contrary, the remedy provision expressly *incorporates* them.

Brinker also contends that if the Legislature "intended to prohibit employers 'from allowing employees' to work during a meal period," "it would have said so" in section 226.7 by saying "require or permit." ABM27-28. Brinker relies on two statutes (Lab. Code §§90.5, 6402) prohibiting employers from "requiring or permitting" employees to work under substandard or unlawful work conditions.

The problem with this argument is that "require or permit" would not have worked in sentences meant to reference the Wage Orders' *two* differing compliance standards for meal periods and rest breaks.

For meal periods, the Legislature had no need to use "require or permit" because the expressly-incorporated Wage Orders already included that concept. The Orders define the word "Employ" as "engage, suffer, or permit to work." 8 Cal. Code Regs. §11050(¶2(D)). Hence, "no employer shall employ" means "*no employer shall engage, suffer or <u>permit</u> any person to work*…without a meal period."

For rest breaks, saying "require or permit" would have *changed* the Wage Orders' compliance standard. Brinker's proposed wording—"no employer shall *require or permit* any employee to work during any…rest

period"—is materially different from "every employer shall *authorize and permit*…rest periods," which the incorporated Wage Orders say. It would make no sense to use the wording Brinker proposes for rest breaks.[49]

The word "provide" serves to simultaneously capture, in one sentence, the Wage Orders' mandatory meal period compliance standard ("no employer shall employ") and its permissive rest break compliance standard ("every employer shall authorize and permit"). Even this Court has used the word in that generic way. *Murphy*, 40 Cal.4th at 1105 ("wage orders mandating the *provision* of meal and rest periods" date back to "1916 and 1932, respectively" (emphasis added)).

Accordingly, a plain-language reading of section 226.7 must also consider the Wage Orders' plain language. So read, there is nothing inconsistent between section 226.7 and the Wage Orders' longstanding meal period compliance requirement.

2. The Wage Orders

Brinker's analysis of the Wage Orders also ignores parts of the text. As a result, Brinker grievously mischaracterizes them.

Relying entirely on the Wage Orders' *remedy* provisions (paragraphs 11(B) and 12(B)),[50] Brinker asserts that the IWC "amended the Wage Order[s] to clarify that employers need only 'provide' meal periods to their employees." ABM25; *see id.* at 6, 29. Brinker insists that the Wage Orders "use the term 'provide' to describe an employer's obligation," and "it was

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[49] As discussed in Part III.A, above (pp. 19-21), in the 1950s the IWC considered, and rejected, proposals to substitute "require" for "authorize" and "permit" in the rest period provision.

[50] Brinker calls the remedy a "penalty," contrary to this Court's holding in *Murphy*. ABM6, 8, 41-42; *see* 40 Cal.4th at 1110-11.

that [obligation] that section 226.7 referenced." ABM 8, 44-45 (emphasis original); *id.* 41-42 (IWC "embraced [a] provide" standard).

Those assertions are false.

When the IWC added the remedy provisions in June 2000, it left the compliance language of paragraphs 11(A) and 12(A), quoted above, completely untouched. Brinker avoids mentioning that. ABM25, 41-42, 44-45. When the Legislature enacted section 226.7 three months later, it adopted *those* compliance standards.

The Wage Orders' remedy provisions (paragraphs 11(B) and 12(B)) make this plain. Like section 226.7, they contain no compliance language at all. Rather, they use the word "provide" to incorporate the compliance standards of the adjacent paragraphs: "If an employer fails to *provide* an employee a meal period *in accordance with the applicable provisions of this Order*…." 8 Cal. Code Regs. §11050(¶11(B)) (emphasis added). Notably, identical language is used for rest breaks: "If an employer fails to *provide* an employee a rest period *in accordance with the applicable provisions of this Order*…." *Id.* §11050(¶12(B)) (emphasis added).

In other words, like section 226.7, the Wage Orders' remedy provisions expressly direct the reader to the earlier paragraphs' *compliance* provisions, using "provide" to refer generically to both meal periods and rest breaks. As with section 226.7, one cannot know what it means to "provide" meal or rest periods "in accordance with the applicable provisions of this Order" without looking at "the applicable provisions of this Order"—that is, paragraphs 11(A) and 12(A).

In sum, the "employer's obligation" resides in the compliance paragraphs, not the remedy paragraphs, and *they* are what the Legislature referenced in section 226.7. Brinker's contrary assertion is disingenuous.

Next, Brinker contends that the Wage Orders "in no way indicate[]

that employers are also obligated to *ensure* that the provided meal periods are taken." ABM29-30 (emphasis in original). Again, Brinker ignores their plain language, including the definition of the word "employ," as well as the stark contrast between the meal period standard ("no employer shall suffer or permit any person to work" without meal periods) and the rest break standard ("every employer shall authorize and permit" rest breaks). Under this plain language, employers may not "permit" employees to work during their meal periods. Put another way, employers must *ensure* that their employees take their meal periods and perform no work during them.

Brinker contends that the early Wage Orders support its contrary interpretation (ABM30), but they do not.

Citing Wage Order 18 from 1931, Brinker argues that "when the IWC wants to 'ensure' that employers take specific action, it knows exactly how to do so." ABM 30 (citing Wage Order 18 (Dec. 4, 1931) (MJN Ex. 11)). Brinker relies on language ("no woman or minor shall be permitted to return to work in less than one-half (1/2) hour") that means exactly the same thing as the current Orders: "No employer shall employ any person … without a meal period of not less than 30 minutes." 8 Cal. Code Regs. §11050(¶11(A)). The term "employ" means "engage, suffer, or *permit* to work." *Id.* §11050(¶2(D) (emphasis added). Hence, the current language means what it always has: "No employer shall *permit* any person to work…without a meal period of not less than 30 minutes."

Brinker cites two other early wage orders as examples of instances when the IWC "requir[ed] that employers *ensure*" something. ABM 30 (citing Wage Order 12, ¶1 (July 31, 1920) (MJN Ex. 9); Wage Order 5NS, ¶3(a) (June 28, 1943) (MJN Ex. 12)). The first of these states: "*No person, firm or corporation shall employ* or suffer or permit any woman or female minor to be employed…at a rate of wages less than $16 a week." Wage

Order 12, ¶1 (July 31, 1920) (MJN Ex. 9) (emphasis added). The other states: "*No employer shall employ* any person under the age of eighteen (18) years for more than eight (8) hours in any one day…." Wage Order 5NS, ¶3(a) (June 28, 1943) (MJN Ex. 12) (emphasis added).

This language drives home the opposite point. Paragraph 11(A) of the current Wage Orders uses the same language as these two early orders: "*No employer shall employ* any person" without a meal period. Like the current Orders, Order 5NS from 1943 defines "employ" as "engage, suffer, or permit to work." *Compare* Wage Order 5NS, ¶2(c) *with* 8 Cal. Code Regs. §11050(¶2(D)).[51] And paragraph 3(d) of Order 5NS, governing meal periods, is basically identical to the current Orders. Wage Order 5NS, ¶3(d) (emphasis added).

All of these orders "requir[e] that employers *ensure*" something. Paragraph 11(A) of the current Orders uses the exact same language for meal periods as the parts of the early orders on which Brinker relies.

Notably, the IWC has *not* required employers to ensure rest breaks. Paragraph 12(A) of the Orders require rest breaks to be "authorized and permitted"—a materially different compliance standard. OBM 37-38 (citing 8 Cal. Code Regs. §11050(¶12(A)).

Brinker's response to this point again ignores key parts of the Wage Orders' language. ABM 30-31. Brinker highlights the word "provide," but fails to mention that whenever that word is used respecting rest breaks, it *always* refers back to the compliance standard of paragraph 12(A). Lab.

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[51] Definitions were not added to the Wage Orders until the "NS" series in 1943. Wage Order 12 from 1920 contained no definitions. Accordingly, the concept of "suffer or permit to work" was included in that order's compliance language: "No person, firm or corporation shall employ *or suffer or permit* any woman or minor to be employed …." Wage Order 12, ¶1 (Jul. 31, 1920) (emphasis added) (MJN Ex. 9).

Code §226.7(b) ("provide an employee a meal or rest period *in accordance with an applicable order of [IWC]*") (emphasis added); 8 Cal. Code Regs. §11050(¶12(B)) ("provide an employee a rest period *in accordance with the applicable provisions of this Order*") (emphasis added).

Brinker contends that, notwithstanding the differing language, the Wage Orders' meal period and rest break requirements are identical, and that "*neither* provision creates an employer duty to *ensure* that employees take the breaks available to them." ABM31 (emphasis original). According to Brinker, "[t]he different language is easily explained by the fact that 10-minute rest periods and 30-minute meal periods necessarily entail different degrees of effort on the employer's part. While an employer must simply 'authorize and permit' brief rest periods, an employer must *make* allowance for the longer meal period." *Id.* (emphasis original).

Brinker cites no authority in support of this invention. If it were true, and the *length* of the two types of breaks explained the differing language, then the IWC would not have used the "authorize and permit" language for *both* 30-minute meal periods *and* 10-minute rest breaks in Wage Order 14. OBM38 (citing 8 Cal. Code Regs. §11050(¶¶11(A), 12(A)). Brinker's theory also contradicts ninety years of amendment history, discussed above.

The Court should decline Brinker's invitation to construe the word "provide" in a vacuum that ignores the full text of section 226.7 and the Wage Orders, and that dismisses the compliance standards of Wage Orders that section 226.7(b) explicitly enforces.

3. Section 512

Next, Brinker turns to Labor Code section 512. Brinker's reading hones in on the word "providing"—taken once again out of context—then ignores the rest of the statute's text. ABM32-34.

The full text closely parallels the Wage Orders. While the Orders say "No employer shall employ any person…without a meal period," section 512 says "An employer may not employ any person…without providing a meal period…." The operative word in both provisions is "*employ*," which means "engage, suffer or *permit* to work."[52] Both provisions prohibit employers from *permitting* employees to work without stopping for the specified 30-minute meal periods.

Brinker's entire argument rests on the notion that, by inserting the word "providing," the Legislature cancelled out the words "may not employ" and changed them to a permissive, "may employ" standard—substantively diminishing a 90-year-old compliance standard. If the Legislature had intended to do that, it would not have retained the "may not employ" language, which plainly prohibits employers from *permitting* employees to work without their meal periods. The Court should not adopt such an extreme departure from the ordinary meaning of "may not employ" without more concrete evidence of the Legislature's intent.

Brinker's argument also ignores the rest of the sentence in which the word "providing" appears: "…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(a) (emphasis added). If the Legislature intended that "providing" means employees can decline all "offered" meal periods anyway, it would not have also stated that sometimes they can be "waived."

Brinker's only response is to say that "skipping or shortening" a meal is different from "waiving" it (ABM34-35), but both involve

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[52] The Labor Code does not define this word, but the "codified" Wage Orders do. *See Ramirez v. Yosemite Water Co.*, 20 Cal.4th 785, 795 (1999) (using Wage Orders' definition of term undefined in Labor Code).

"intentional relinquishment of a known right"—*viz.*, the right to take a meal, which even Brinker's "offer" standard theoretically affords workers. *City of Ukiah v. Fones*, 64 Cal.2d 104, 107 (1966); *see* Part VII.D, below (pp. 122-24).

The waiver language came from Wage Orders whose amendment history makes clear that employers are *never* excused from "giving" workers their meal periods. *Compare* Wage Order 5NS(¶3(d)) (MJN Ex. 12) ("such meal period need not be given") *with* 8 Cal. Code Regs. §11050 (¶11(A)) ("the meal period may be waived"). *See* Part III.A.1, above (pp. 17-18). Brinker contends that section 512 permits employees to "decline" their meal periods, but that would be the same as "waiving" them. This interpretation would deprive the express waiver language of any meaning.

Brinker offers no response to the point that sections 512(c) and 512(d) create exemptions to the meal period requirement for certain unionized workers. OBM49-50. If all meal periods can be declined anyway, those exemptions would be unnecessary.

Brinker asserts that, instead of considering the entire statute, the Court should use a dictionary to determine what "providing" means. ABM 32-34. Doing so would mean ignoring not only the rest of section 512's language, but also the context in which the word is used in an adjacent, later-enacted statute, section 226.7, and in the Wage Orders, to which section 226.7 twice refers.

Sections 226.7, 512 and the Wage Orders section 226.7 incorporates must be "read together." *Mejia*, 31 Cal.4th at 663; *Garcia*, 16 Cal.4th at 476. This is particularly true because sections 512 and 226.7 were enacted during the same legislative session. *Sacramento & San Joaquin Drainage Dist.*, 199 Cal. at 676.

As discussed above, Brinker's dictionary definition of "providing"

makes no sense in the context of section 226.7, where the word is used to refer to two plainly different compliance standards for meal periods and rest breaks—only one of which is consistent with Brinker's "make available" definition. Section 226.7 is the later-chaptered statute, and it prevails. Gov. Code §9605; *In re Thierry S.*, 19 Cal.3d 727, 738-39 (1977).

The better approach is to reconcile the language.[53] Plaintiffs' interpretation—that "provide" references the Wage Orders' two differing compliance standards for meal periods and rest breaks, depending on the context—is a reasonable one supported by section 226.7 and paragraphs 11(B) and 12(B) of the Wage Orders. Nothing in section 512 precludes it. If the Court considers Brinker's interpretation reasonable, then the word "provide" is ambiguous and the Court must turn to other indicia of legislative intent, such as enactment history.

B. Brinker Misinterprets the Legislative History

Brinker concedes, as it must, that the Legislature intended to "codify" the Wage Orders' "existing" meal period provisions when it enacted both section 226.7 and section 512. ABM5, 44, 46. The legislative history is indisputable on this point. AB 2509, Senate Third Reading (Aug. 28, 2000) at 4 (MJN Ex. 61) (section 226.7 "[p]laces into statute the existing provisions" of the Wage Orders); AB 60, Legislative Counsel Digest (July 21, 1999) at 2 (MJN Ex. 58) (section 512 enacted to "codify" "existing wage orders"); SB 88, Senate Third Reading (Aug. 16, 2000) at 5 (MJN Ex. 64) (same). *Accord*: *Murphy*, 40 Cal.4th at 1107 (section 226.7 "intended to track the existing provisions of the IWC wage orders regarding meal and rest periods" (citing AB 2509, Senate Third Reading)).

Brinker relies heavily on legislative committee reports that use the

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[53] *People v. Lamas*, 42 Cal.4th 516, 525 (2007); *Fair v. Bakhtiari*, 40 Cal.4th 189, 199 (2006).

word "provide" to summarize the Wage Orders. *E.g.*, ABM 38-39, 44 (quoting AB 2509, Third Reading, Senate Floor Analysis (Aug. 28, 2000) at 4 (MJN Ex. 61) (Section 226.7 "places into statute the existing provisions of the [IWC] requiring employers to *provide* a 10-minute rest period for every four hours and a 30-minute meal period every five hours.")).[54]

According to Brinker, because that is how the Legislature summarized the Wage Orders, that is what the Wage Orders mean—regardless of what the Orders themselves say or what their adoption history shows. *E.g.*, ABM 44 ("all that matters is how the Legislature interpreted that same language when it 'codified' it in 2000").

This Court rejected an identical argument in *Murphy*.

In *Murphy*, a floor analysis stated that section 226.7 "codif[ied] the lower *penalty* amounts adopted by the [IWC]." *Id.* at 1110 (quoting AB 2509, Assembly Floor Analysis (Aug. 25, 2000) (emphasis added)). This Court did not accept that as conclusive. Instead, it held that "[t]he manner in which *the IWC* used the word 'penalty' *undermines* the Court of Appeal's reliance on the use of the word in the legislative history." *Id.*

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[54] *See also* ABM 5, 44 (quoting AB 60, Legislative Counsel Digest (July 21, 1999) at 2 (MJN Ex. 58) ("Existing wage orders prohibit an employer from employing an employee for a work period of more than 5 hours per day without *providing* the employee with a meal period.")).

Brinker also cites two reports using the word "require" (ABM37), yet in both, that word is modified by express reference in the same sentence to the IWC's Orders. ABM 37 (citing, *e.g.*, AB 2509, Leg. Counsel's Digest (Feb. 24, 2000) at 3 (Brinker MJN Ex. 1) ("requires any employee to work during a meal or rest period *mandated by an order of the commission*" (emphasis added)). Like "provide," "require" in these materials should not be interpreted in a manner inconsistent with the Wage Orders. Indeed, as discussed below, this Court declined to treat as conclusive the word "penalty" in one of those same reports. *Murphy*, 40 Cal.4th at 1110.

(emphasis added). The Legislature was "fully aware of the IWC's wage orders in enacting section 226.7," so its use of the word "penalty" "should be informed by the way the IWC was using that word." Indicia of *the IWC's intent* showed that the remedy was "a premium wage to compensate employees"—notwithstanding the word "penalty" in the legislative history. *Id.* (citing Transcript, IWC Public Hearing (Jun. 30, 2000)).

In other words, to determine what the "codified" Wage Orders meant, the Court logically turned to the Wage Orders and *their* adoption history—not a summary in a floor analysis.

The Wage Orders' plain language and their adoption history unwaveringly support a mandatory meal period compliance standard. *See* Parts III.A-B, above (pp. 6-44). Moreover, the IWC has long used the word "provide" to refer generically to the Wage Orders' two differing compliance standards for meal periods and rest breaks. *See, e.g.*, Interpretive Bulletin No. 89-1 at 796410105-06 (Jun. 13, 1989) (MJN Ex. 373); Transcript of Public Meeting of IWC, at 712427170 (May 5, 2000) (MJN Ex. 349); Part III.A, above (pp. 9, 24, 27-28, 30, 36-37 & n.36). That is how it was used in the hearing transcript Brinker highlights. ABM 42-43 (citing Transcript of Public Hearing of IWC (Jun. 30, 2000) (Brinker MJN Ex. 3)). That is how it was used in the Wage Orders' remedy paragraphs, and thus in section 226.7, which "codified" them.

Section 512 also "codified" the "existing" Orders. To read the word "providing" in section 512 as Brinker suggests would dramatically weaken—not "codify"—the Orders' long-established meal period compliance standard. It would also contravene the overarching purpose of AB 60, which was to *forestall* attempts to weaken the Wage Orders, not weaken them itself. OBM61-62. Brinker's only response to that argument appears in footnotes with no analysis. ABM39n.10, 79n.31.

In AB 60, the Legislature not only "codified" the Wage Orders' meal period compliance standard, but also "reinstated" five Wage Orders containing that standard. AB 60, §21, at 14 (MJN Ex. 58) (reinstating Order 5-89 (amended 1993) (MJN Ex. 158) and four others). At the same time, the Legislature rescinded five orders with overtime language it wished to change. *Id.* (declaring Order 5-98 (MJN Ex. 20) and four others "null and void"). Had the Legislature also wished to change the Orders' meal period requirement—by adding the word "provide" or otherwise—it would not have reinstated any Orders containing that requirement. Instead, it would have revoked them, like the overtime Orders.

Three months after the IWC continued the same meal period compliance language in its 2001 series of Orders (issued in June 2000), the Legislature explicitly incorporated those Orders into section 226.7 and restated its intent to "codify" the Orders. Again, if the Legislature wished to change the Orders, it would not have expressly referenced them in section 226.7. And if it believed section 512 had changed the Orders, it would have referenced that section instead.

Citing an un-enacted 2003 bill that would have amended section 226.7, Brinker claims that "the Legislature did not—and did not intend to—impose an ensure standard with respect to meal periods when it enacted section 226.7." ABM37-38n.9 (citing AB 1723, amended Sept. 8, 2003 (2003-2004 Reg. Sess.) (Brinker MJN Ex. 2)). Actually, the bill proves the opposite. The Senate Floor Analysis shows that the Legislature understood that under "existing law," "employers have an affirmative obligation to provide meal periods," but "[f]or rest periods, employers only have to 'authorize and permit' a rest to be taken." AB 1723, Third Reading, Senate Floor Analysis (Sept. 8, 2003) at 3 (MJN Ex. 381). The bill would have "[p]lace[d] an affirmative obligation on employers to provide rest periods," but would not have changed the compliance standard for meal periods. *Id.*

In other words, the bill confirms that the Legislature understood that "existing law"—*i.e.*, section 226.7 and the Wage Orders it incorporates—imposes an "affirmative obligation" on employers for meal periods, while imposing a laxer standard for rest breaks. It also shows that the Legislature considers the word "provide" consistent with the stricter "affirmative obligation" standard. It flatly contradicts Brinker's argument.[55]

Read together, these materials steadfastly show that the Legislature intended to codify, not weaken, the Wage Orders' meal period compliance standard. Proof of that intent trumps even contrary plain language. *Arias v. Superior Court*, ___ Cal.4th ___, 2009 WL 1838973, *3 (Jun. 29, 2009) ("A literal construction of an enactment…will not control when such a construction would frustrate the manifest purpose of the enactment as a whole."; "'The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.'" (quoting *Lungren v. Deukmejian*, 45 Cal.3d 727, 735 (1988))).

C. Brinker Misconstrues the Historical Wage Orders and Their Enactment and Enforcement History

As discussed in Part III, above, the Wage Orders' text and adoption history leave no room for argument that meal periods need only be "made available," rather than ensured. Brinker relies on three aspects of that history, but none supports its position.

1. The Early Wage Orders

As discussed above, Brinker misconstrues Wage Orders 12 (1920), 18 (1931) and 5NS (1943) (MJN Exs. 9, 11, 12). Their language uniformly supports the conclusion that the current Wage Orders, whose meal period

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[55] Another failed bill would have defined "providing" as "giving an opportunity," further contradicting Brinker's position. *See* SB 1539 (2007-2008 Reg. Sess.) as introduced (Feb. 22, 2008) (MJN Ex. 382).

language has been unchanged since 1952, require employers to affirmatively relieve workers of duty and ensure that they take their meal periods. *See also* Part III.A-B, above (pp. 6-44).

2. The 1979 Amendment to Wage Order 14

In response to the 1979 amendment to Wage Order 14, which adopted an "authorize and permit" compliance standard for both meal periods and rest breaks (OBM51-52), Brinker claims that "[n]othing indicates…that Wage Order 14's pre-amendment meal period provision required employers to ensure that all offered meal periods were taken." ABM44. On the contrary, as discussed in detail above, that is precisely what the pre-amendment provision ("no employer shall employ") required.

Indeed, based on the 1979 transcripts discussed in plaintiffs' opening brief, the Chief Judge of the Eastern District "strongly suspects that the 'no employer shall employ' language imposes an ***affirmative duty on an employer to ensure*** that meal periods are taken." *Valenzuela v. Giumarra Vineyards Corp.*, ___ F.Supp.2d ___, 2009 WL 900735, *8 n.3 (E.D. Cal. Mar. 31, 2009) (emphasis added) (citing *Murphy* and *Cicairos*). As will be seen (Part IV.E.2, below (pp. 72-75)), no other federal judge has considered this material.

3. The 2000 Amendments

As also discussed above, Brinker's analysis of the 2000 amendments (ABM41-45) addresses only the remedy provisions, not the *compliance* provisions to which the remedy provisions expressly refer. The IWC retained the compliance provisions unaltered, belying Brinker's contention that "the June 2000 amendments…signal the IWC's understanding that neither meal periods nor rest periods need be ensured."

4. The DLSE Opinion Letters

Contrary to what Brinker contends (ABM47-49), the DLSE's position had been clear and consistent until three days after the Court of Appeal issued its unpublished opinion in this case. As early as 1988, the DLSE described its "historical" enforcement position as employees must be "relieved of all duties" for their meal periods, or the time is "considered 'hours worked.'" DLSE Op.Ltr. 1988.01.05 (MJN Ex. 34). The DLSE restated this position even more clearly in six subsequent letters as well as its Manual. DLSE Op.Ltrs. 2001.04.02, 2001.09.17, 2002.01.28, 2002.09.04, 2003.08.13, 2003.11.03 (MJN Exs. 39, 40, 41, 43, 380, 46); DLSE Manual, §45.2.1 (June 2002) (MJN Ex. 49).

Brinker relies heavily on a 1991 opinion letter, saying that it reflects the DLSE's "original position" on meal periods. ABM47-48 (citing DLSE Op.Ltr. 1991.06.03 (MJN Ex. 35)). Brinker overlooks the 1988 letter quoted above. Also, in 2003, the author of the 1991 letter issued a new letter confirming that "[i]n contrast" to the "authorize and permit" standard, "no employer shall employ" "reflects the mandatory language contained in Labor Code §512" for meal periods. DLSE Op.Ltr. 2003.08.13 at 1 (MJN Ex. 380). The DLSE has taken this position "consistently." *Id.* at 2 (citing DLSE Op.Ltr. 2002.06.14 (MJN Ex. 42).

Only the DLSE's 2008 activity, which post-dates both the Court of Appeal's unpublished opinion and the DLSE's entry into this case as an amicus, is unreliable. *See Murphy*, 40 Cal.4th at 1105 n.7 (DLSE actions that "flatly contradict" earlier positions in "highly politicized" meal period arena are unreliable); *Jones v. Tracy School Dist.*, 27 Cal.3d 99, 107 (1979) (declining to defer to DIR memorandum created "after [agency] had become an amicus curiae in this case"; "[t]his chronology…substantially dilutes the authoritative force of the memorandum"); DLSE Publication

Request (Oct. 29, 2007) (MJN Ex. 55). Nothing dilutes the authoritative force of the letters that pre-date these events.

D. Brinker Ignores the Timing of Section 516's Amendment and its Plain Language, Which Show that Section 516 Does Not Impact the Current Orders

Both Brinker and the panel make much of Labor Code section 516, which was adopted effective January 1, 2000 as part of AB 60. ABM45-46. Their reliance on section 516 is misplaced.

As originally enacted, section 516's plain language expressly authorized the IWC to "adopt or amend" its meal period regulations "[n]otwithstanding any other provision of law." AB 60, §10 (MJN Ex. 58) (emphasis added). Section 517(a), enacted with section 516, directed the IWC to issue new Wage Orders by July 1, 2000, which it accordingly did on June 30, 2000. *Id.*, §11 (Lab. Code §517(a)); *see* Wage Order 5-2001 (Jun. 30, 2000, eff. Jan. 1, 2001) (MJN Ex. 5) (8 Cal. Code Regs. §11050); *Murphy*, 40 Cal.4th at 1105, 1109 (IWC added pay remedy on June 30, 2000 (citing 8 Cal. Code Regs. §11070, ¶¶11(D), 12(B))).[56] These Orders were slated to go into effect by operation of law on January 1, 2001, with no further action by the IWC. The Legislature is presumed aware of this.[57]

On September 19, 2000—three months *after* the IWC issued these Orders—section 516 was amended to read "[e]xcept as provided in Section 512." SB 88, §4 (MJN Ex. 63).[58] Brinker concedes the timing point.

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[56] *See also* Statement as to the Basis for 2000 Amendments (Jun. 30, 2000, eff. Jan. 1, 2001) (MJN Ex. 32).

[57] *Sara M. v. Superior Court*, 36 Cal.4th 998, 1015 (2005) (Legislature presumed aware of regulations adopted pursuant to express statutory direction); *Mountain Lion Foundation v. Fish & Game Comm'n*, 16 Cal.4th 105, 129 (1997) (same); *see Murphy*, 40 Cal.4th at 1110 ("the Legislature was fully aware of the IWC's wage orders in enacting section 226.7").

[58] SB 88 went to in effect immediately as urgency legislation. The

ABM6 (§516 amended "after" current Orders); OBM63 (same).

As discussed in plaintiffs' Opening Brief, the amendment to section 516 did not diminish the IWC's power to adopt more protective requirements than the Labor Code. OBM62-66, 95-101. But even if it had, the 2001 Wage Orders were adopted on June 30, 2000, *before* section 516 was amended in September 2000. Had the Legislature objected to any of the 2001 Orders' provisions, it would have expressly rescinded them, as it rescinded the 1998 Orders in AB 60. (*See* Part III.A, pp. 6-41). It did not. Brinker's (and the panel's) reliance on amended section 516 is therefore misplaced. The pre-amendment language governs.

The Legislature was entirely satisfied with the 2001 Orders. Ten days after it amended section 516, it enacted section 226.7, which expressly incorporated the "applicable order[s] of the [IWC]." AB 2509, §7 (MJN Ex. 60). Again, this was *after* the IWC had already adopted the 2001 Orders. Thus, as Brinker itself points out, the Wage Orders section 226.7 explicitly references are the current, 2001 Orders. ABM44-45; *see also Murphy*, 40 Cal.4th at 1110 (legislative analysis referenced IWC's pay remedy, which was non-existent before 2001 Orders dated Jun. 30, 2000 (citing AB 2509, Assy. Floor Analysis (Aug. 25, 2000)).

In sum, when the current orders were adopted, the IWC was unquestionably empowered to amend the meal period provisions in any manner it deemed "consistent with the health and welfare of [California] workers"—so long as they contained *greater* protections than section 512. AB 60, §10 (Lab. Code §516).[59] The Legislature took no steps to rescind

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urgency, however, was not preventing the IWC from amending its Orders. Rather, it was "to protect businesses that rely on the computer industry as well as certain vital health care professions." SB 88, §5 (MJN Ex. 63).

[59] *See* Transcript of Public Meeting of IWC, at 712427153 (May 5, 2000) (MJN Ex. 349) ("[Y]ou have to read those two sections [512 and

any of the current orders, either in SB 88 or in AB 2509, as it had done in AB 60 (discussed above). Its failure to do so demonstrates it approved the current orders and considered them entirely consistent with Labor Code section 512 and the orders that AB 60 reinstated—including their mandatory meal period compliance (and timing) requirements.

Brinker also overlooks section 516's plain language, which concerns *only* the IWC's power to "adopt or amend" its Orders. OBM99. This case rests on core meal period compliance language unchanged since 1952. When regulations are reissued, as here, unchanged provisions are construed as "being continuously in force" since their original enactment. *In re White*, 163 Cal.App.4th 1576, 1581 (2008); *see People v. Morante*, 20 Cal.4th 403, 430 n.14 (1999) ("portions not modified are to be considered as having been the law from the time when they were enacted" (citing Gov. Code §9605)); *IWC v. Superior Court*, 27 Cal.3d at 715 (unchanged provision of reissued Wage Orders "simply continu[ed] in effect a regulation that has previously become a part of the standard working conditions"); Statement as to the Basis for 2000 Amendments (Jun. 30, 2000, eff. Jan. 1, 2001) at 19 (MJN Ex. 32) (2001 Orders "continue the preexisting requirement" for meal periods).[60] The IWC has not "adopted or amended" the core compliance language in decades, so section 516 does not apply. *See IWC v. Superior Court*, 27 Cal.3d at 716 (noting "IWC's retention of [its] long-standing provisions…[for] rest [and] meal periods").

516] together. …[R]ead together, it's suggesting that California could increase its protections for workers, but couldn't go beneath the statutory standard set forth in the Labor Code. Otherwise, [section 512] would have no meaning whatsoever." (comments of Commissioner Broad)).

[60] *Accord*: Lab. Code §2 ("The provisions of this code, insofar as they are substantially the same as existing provisions relating to the same subject matter, shall be construed as restatements and continuations thereof and not as new enactments.").

For these reasons, and for the additional reasons discussed in Part V.D, below (pp. 90-95), Brinker's reliance on section 516 is misplaced.

E. Case Law Does Not Support Brinker's Position

None of the case law Brinker cites supports its position. AMR50-58.

1. Brinker Misconstrues *Cicairos* and *Murphy*

In *Cicairos*, the Court of Appeal correctly held, in light of section 512, the Wage Orders, and one of the DLSE's many opinion letters, that "employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty'" for their meal periods. *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949, 953, 962-63 (2005) (quoting DLSE Op.Ltr. 2002.01.28 (MJN Ex. 41)).

Brinker asserts that this language from *Cicairos*, instead of meaning what it says, means something else altogether. According to Brinker, "an affirmative obligation to ensure that workers are actually relieved of all duty" merely "describ[es] an employer's obligation to provide its employees the opportunity to take a work-free meal period." ABM54.

The one thing that "an affirmative obligation to ensure that workers are actually relieved of duty" plainly does *not* mean is merely "provide an opportunity" to stop working.

Cicairos explains what "ensure that workers are actually relieved of duty" means and what "affirmative" steps suffice. 133 Cal.App.4th at 962-63. Compliant steps include recording, monitoring, and scheduling meal periods—none of which the employer in *Cicairos* did. *Id.* "As a result of" those three omitted affirmative steps, "most drivers ate their meals while driving or else skipped a meal nearly every working day." *Id.* at 962. In other words, by not taking those steps the employer failed to "ensure that [the drivers were] actually relieved of duty." *See id.*

Brinker tries to distinguish *Cicairos* on its facts, but the effort fails. ABM53-54. *After* explaining how the employer's conduct had already resulted in on-duty or "skipped" meals, the *Cicairos* court identified "further[]" facts that exacerbated the violation—"pressur[ing] drivers" and "making [them] feel that they should not stop for lunch." 133 Cal.App.4th at 962. Of course the law prohibits that, as even Brinker concedes. But the violation was complete when the employer failed to meet its "affirmative obligation to ensure that [its drivers were] actually relieved of duty" by scheduling, monitoring, and recording their meal periods. *See id.*

Brinker concedes that employers must record meal periods, but claims they need not monitor them. ABM55. Nonsense. Employers cannot record them if they do not monitor them. As *Cicairos* makes clear, the most effective way to comply is to not just monitor, but also schedule employees' meal periods. 133 Cal.App.4th at 962. Merely adopting a policy allowing them is not enough. *Id.*

Murphy confirms *Cicairos* in a slightly different factual setting. As the facts of *Murphy* make clear, a retail employer's affirmative obligation includes hiring adequate staff so that workers can be actually relieved of duty for their meal periods. 40 Cal.4th at 1100.

Brinker's analysis of *Murphy* ignores this factual background. ABM50-52. *Those* are the facts to which this Court was referring when it said that the plaintiff store manager had been "forced to forego" his meal periods. 40 Cal.4th at 1113, *passim*. The opinion did not inquire into whether he "chose" to "skip or shorten" his breaks and keep working because that inquiry was irrelevant to the violation. It was enough that the employer had failed to ensure that he was, in fact, *actually* relieved of duty.

Brinker attempts to diminish the importance of the meal period recording requirement, which *Murphy* held gives employers "the evidence

necessary to defend against plaintiffs' claims." *Id.* at 1114; ABM52-53. Contrary to Brinker's position, this is true whether plaintiffs claim a single missed meal or dozens. That paragraph of *Murphy* was talking about "plaintiffs" generally, not the individual plaintiff store manager. *Any* unrecorded meal period constitutes a violation.

2. Brinker's Reliance on Federal Trial-Level Decisions is Misplaced

Brinker's reliance on a series of federal trial-level decisions is equally misplaced. ABM 55-58; Supp. Brief 06/02/09.

None of these decisions considered the implications of the distinction in wording between the Wage Orders' compliance standards for meal periods ("no employer shall employ") and rest breaks ("authorize and permit"). Nor did any case consider the administrative enforcement history showing that the Wage Orders impose two differing compliance standards, or observe that the Legislature intended to codify *those* standards. Not surprisingly, each case reached the wrong result.[61]

One of these cases, *Brown v. Federal Express Corp.*, 249 F.R.D. 580 (C.D. Cal. 2008), starkly illustrates these errors. 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

[61] Federal trial judges can certainly be wrong about questions of California law. For example, before *Murphy*, several federal courts incorrectly held that the 226.7(b) remedy was a "penalty." *See, e.g.*, *Corder v. Houston's Rests., Inc.*, 424 F.Supp.2d 1205, 1210 (C.D. Cal. 2006); *Pulido v. Coca-Cola Enters., Inc.*, 2006 WL 1699328, *5 (C.D. Cal. May 25, 2006).

("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*.

The rest of the cases are equally wrong:

- One case parroted the Wage Orders' language, but failed to consider the implications of the differing compliance standards, then exacerbated this oversight by citing *no* legislative or administrative history. *White v. Starbucks Corp.*, 497 F.Supp.2d 1080, 1085, 1087-89 (N.D. Cal. 2007).
- One case quoted the Labor Code, but ignored the Wage Orders entirely, then simply followed earlier decisions, including *Brown*. *Salazar v. Avis Budget Group, Inc.*, 251 F.R.D. 529, 532-33 (S.D. Cal. 2008).
- One case quoted the Labor Code and the Wage Orders' *remedy* language, but ignored the Wage Orders' *compliance* language, then followed earlier decisions, including *Brown*. *Kenny v. Supercuts, Inc.*, 252 F.R.D. 641, 642, 645 (N.D. Cal. 2008).
- One case quoted the Wage Orders' *rest* period compliance language ("authorize and permit"), then decided the *meal* period question based on *that* language (and *Brown* and *Brinker*), while wholly ignoring the Wage Orders' meal period language. *Kimoto v. McDonald's Corps.*, 2008 WL 4690536 (C.D. Cal. Aug. 19, 2008).
- Two cases acknowledged that the Labor Code "codified existing wage orders," but then overlooked the Wage Orders' differing compliance language, instead relying entirely on earlier decisions, including *Brown* and (in one case) *Brinker*. *Perez v. Safety-Kleen Systems, Inc.*, 253 F.R.D. 508, 512-15 (N.D. Cal.

2008) (citing *Brown* and *Brinker*);[62] *see Marlo v. United Parcel Service, Inc.*, 2009 WL 1258491, *5, *8-*9 (C.D. Cal. May 5, 2009) (citing *Brown*).

- Three cases simply followed earlier decisions without independent analysis and without quoting or considering *any* of the language—statute or Wage Order. *Wren v. RGIS Inventory Specialists*, 256 F.R.D. 180, 208 (N.D. Cal. 2009); *Watson-Smith v. Spherion Pacific Workforce, LLC*, 2008 WL 5221084, *2-*3 (N.D. Cal. Dec. 12, 2008); *Gabriella v. Wells Fargo Financial, Inc.*, 2008 WL 3200190, *3 (N.D. Cal. Aug. 4, 2008).

Brinker asserts that "[n]ot a single federal case has gone the other way." ABM57. Not so. In *Stevens v. GCS Service, Inc.*, No. 04-1337CJC (C.D. Cal. Apr. 6, 2006) (RJNSC Ex. M), the court followed *Cicairos* and held that the employer had an "affirmative obligation" to ensure employees were relieved of all duty during meal breaks. *Id.* at 22:12-15, 23:25-27; *see* Petition for Review, 08/29/08, at 14 (discussing *Stevens*).

In fact, in one series of federal cases, the court considered the Wage Orders' differing compliance standards for meal periods and rest breaks *and* their administrative adoption history—including the 1979 hearing transcripts surrounding the IWC's amendment of Order 14 (MJN Exs. 25, 26). Based on that material, the Chief Judge of the Eastern District "strongly suspects that the 'no employer shall employ' language imposes an *affirmative duty on an employer to ensure* that meal periods are taken." *Valenzuela*, 2009 WL 900735 at *8n.3 (emphasis added) (citing *Murphy* and *Cicairos*). He refused to rely on *Brown* and its progeny. *Id.*; *see also Robles v. Sunview Vineyards of Cal., Inc.*, 2009 WL 900731, *8n.3 (E.D.

[62] Notably, before *Brinker*, this court followed *Cicairos*. *Perez v. Safety-Kleen Sys., Inc.*, 2007 WL 1848037, *8 (N.D. Cal. June 27, 2007).

Cal. Mar. 31, 2008) (same); *Doe v. D.M. Camp & Sons*, 2009 WL 921442, *8n.2 (E.D. Cal. Mar. 31, 2009) (same).

In other words, the only federal judge who took time to consider the Wage Orders' differing compliance language *and* their adoption history concluded that employers must affirmatively relieve workers of duty so that they may take their meal periods. The other federal trial court decisions are simply wrong.

F. Brinker's Policy Arguments Ignore the IWC's Careful Policy-Weighing Process

Brinker claims that the Legislature "presumably" considered the "policy implications" of what it enacted. ABM58-59. Presumably so. And it decided to expressly incorporate the Wage Orders' two differing compliance standards for meal periods and rest breaks. Lab. Code §226.7.

The IWC not just "presumably," but actually, considered policy ramifications when it adopted those two standards. We know it did because the Labor Code requires it.

Before the IWC may issue or amend any Wage Orders, it must follow the elaborate requirements of Labor Code sections 1171 through 1188. Among other things, the IWC must conduct a preliminary investigation and hold public hearings, then make preliminary findings that working conditions in a given industry may be "prejudicial to the health, morals, or welfare of employees." Lab. Code §1178. After those initial findings, the IWC must select an industry Wage Board composed of an equal number of employer and employee representatives, plus a non-voting IWC representative as Chair. *Id.* §1178.5(b). The Wage Board must conduct its own investigation then report back to the IWC with recommendations. *Id.* After receiving the Wage Board's report, the IWC must prepare proposed regulations, publish them, then hold noticed public

hearings in three cities. *Id.* §§1181, 1178.5(c). The proposed regulations must include any Wage Board recommendation supported by at least two-thirds of the Board members. *Id.* §1178.5(c). Then, the IWC must issue notice of a public meeting, at which it may finally adopt or amend a Wage Order. *Id.* § 1182; Gov. Code § 11125.

Through this complex and balanced process, the IWC has already thoroughly considered every policy question Brinker can name. For example, the IWC has addressed "the fact that workers who skip their meal periods can leave work earlier." ABM61. It carefully decided that workers on long shifts—but no others—should be allowed to "waive [their] second meal period," because this "allows employees freedom of choice combined with the protection of at least one meal period." Statement as to the Basis, Wage Order 5-89 (Amendments to Sections 2, 3 & 11) (MJN Ex. 158).

The Wage Orders' meal period language, developed over more than 90 years of policy weighing, reflects a careful balance of every competing interest. The IWC's process is far more thorough than any the Legislature or this Court can or does conduct. The Legislature, who delegated this policy-making power to the IWC in the first place, chose to rely on its judgments by expressly "codifying" its meal period compliance standard into law. In this Court's words, "[t]he likely chagrin of the regulated should not obscure the underlying social need that prompts the regulation." *IWC v. Superior Court*, 27 Cal.3d at 734.

G. Regulations Established to Protect the Public Interest May Not Be Waived

Brinker concedes that meal period laws protect "not only the health and welfare of the workers themselves, but also the public health and general welfare." ABM62 (quoting OBM72). However, Brinker offers no response to plaintiffs' argument that as a matter of law, statutes enacted to

protect the public interest may not be waived. OBM76-77. In a footnote, Brinker says that this argument "is not an issue before this Court," referencing its position that allowing workers to "decline" meal periods would not be tantamount to "waiver." ABM35n.8. For reasons stated above, it most certainly is. By not responding, Brinker concedes the point.

V. THE MEAL PERIOD TIMING ISSUE

The Wage Orders' plain language and adoption history also makes clear that meal periods are required for *every* five-hour work period. *This* is the standard that the Legislature "codified" in sections 226.7 and 512—notwithstanding Brinker's arguments to the contrary.

Brinker's policy and practice requires workers to take "early lunches," creating a post-meal stretch of time exceeding five hours, without authorizing (much less ensuring) any further meal period. Whether this uniform policy and practice violates the Labor Code and Wage Orders is a common question that predominates over any individualized ones. Class certification of the meal period timing claim should have been affirmed.

A. Common Questions Predominate on the Meal Period Timing Claim Notwithstanding Brinker's Arguments

The Court of Appeal failed to perceive that common questions independently predominated on this claim, and erred by reversing the class certification order respecting it. OBM78-80. Brinker makes two arguments in response. One of them—that this Court's resolution of the timing issue will leave no more common questions (ABM119-20)—is addressed below. Part VII.B (pp. 110-12). The other rests on a misunderstanding of the timing claim.

According to Brinker, even if the Wage Orders require meal periods for each five-hour work period, its violations could not be proven classwide from payroll records if the early meals were "offered" but waived.

ABM120-21. This argument has several problems. If meal periods must be ensured (*i.e.*, received and taken), not merely made available, a meal missing from the records equals a violation for those class members, who will be entitled to an hour's premium pay. For all class members who *did* take the early meals Brinker required, the records *will* reveal all noncompliant succeeding work periods—regardless of the "ensure" vs. "make available" question. That is because Brinker's uniform, classwide policy undisputedly fails to authorize (much less ensure) any further meal period for employees who work more than five hours after the first one (and Brinker pays no premium wages). OBM78-79, 81 (citing record).

That is the uniform, classwide violation presented by this claim. Both the law and the policy are common to the class. Whether the policy violates the law is the overarching common question that this claim presents, and it predominates over any others Brinker can identify. *See Bibo v. Federal Express, Inc.*, 2009 WL 1068880, *12 (N.D. Cal. Apr. 21, 2009) (certifying "tardy" meal claim; dispute over meal period timing "is a common question of law that unites the members of [the] subclasses").

Brinker does not dispute that courts bear an independent duty to consider and certify appropriate subclasses. OBM80. The Court of Appeal erred by failing to do that here. At a minimum, the trial court should be directed to certify a meal period timing subclass on remand.

B. Brinker's Interpretation Would Contravene the Legislature's Intent to "Codify" Existing Wage Orders

The Court of Appeal held that California law imposes no timing requirement for meal periods, and that meal periods may be pushed to the beginning or end of the workday, leaving lengthy stretches of work—up to 9½ hours straight—without a meal. Brinker's answer falls far short of effectively defending that holding.

1. Brinker's Reliance on the Words "Per Day" is Misplaced

Brinker's first argument rests heavily on the words "per day" in section 512. Brinker claims that those words are "incompatible" with the Wage Orders—which have, since 1952, prohibited work periods exceeding five hours, thereby imposing a timing requirement. According to Brinker, those words flat-out abolished that requirement for California workers, allowing employers to schedule meals at any time during the workday based on their own business preferences and without regard for employees' welfare. ABM66-68. Fixated on those two words, Brinker even aims at reframing the entire issue presented for this Court's review. ABM2.

Brinker's reliance on the words "per day" is misplaced. Brinker's reading of those words would undermine every one of the Legislature's stated purposes in enacting section 512 and AB 60. Standing alone, those words are not enough to overcome that stated intent.

Brinker concedes that when the Legislature enacted section 512, it intended to "codify" the Wage Orders' "existing" standards. ABM 5, 44, 46, 69. One cannot know what the Legislature "codified" without considering the Wage Orders' language. The Wage Orders plainly prohibit "work period[s] of more than five hours without a meal period"—and have since 1952. OBM 82-89 (citing 8 Cal. Code Regs. §11050, ¶11(A); Wage Order 5-52, ¶11 (MJN Ex. 14)).[63] To interpret the words "per day" as Brinker urges, would weaken, not "codify," the Wage Orders.

The Legislature was not attempting to weaken the Wage Orders by enacting section 512. Section 512 was part of an effort to restore the eight-

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[63] As discussed above, a "work period" is a term of art meaning "a continuing period of hours worked," and "a new work period begins after the meal period." Memorandum of IWC Executive Officer, *supra*, at 800410152 (MJN Ex. 376#24); *see* Part III.A, above (pp. 28-29).

hour workday, which the IWC had tried to eliminate from the Wage Orders in 1997. OBM 61-62 (citing AB 60, Legislative Counsel Digest, *supra*, at 2). The Legislature was attempting to *forestall* future attempts to weaken the Orders, not to weaken them itself. Reading the words "per day" to suggest otherwise pushes them far beyond what they will bear.

In fact, several factors show that the Legislature was aware of and approved the Orders' longstanding timing requirement:

- First, as discussed above, when the Legislature enacted section 512 it also "reinstated" five earlier Wage Orders, all of which contained that requirement. AB 60, §21, at 14 (MJN Ex. 58) (reinstating Order 5-89 (amended 1993) (MJN Ex. 158) and four other Orders).

- Second, after the IWC continued that requirement in its 2001 Orders, the Legislature explicitly incorporated it into section 226.7, and stated again its intent to "codify" the Orders. AB 2509, Senate Third Reading, *supra*, at 4 (MJN Ex. 61).

- Third, in section §512(b), added in 2000 (just before section 226.7), the Legislature authorized the IWC to relax the meal period requirement by allowing meal periods "to *commence* after six hours of work" instead of five—making clear that section 512 codified the existing Orders' rules on meal period *timing*. (Emphasis added.)

As explained in plaintiffs' opening brief, section 512 can easily be harmonized with section 226.7 and the Wage Orders by recognizing that even if the Wage Orders impose a more stringent meal period timing requirement, it is not an inconsistent one. OBM90. Brinker's interpretation—that the words "per day" were meant to displace, then radically weaken, California's longstanding meal period protections—finds

no support in the legislative history, and the text of section 226.7 and the "codified" Wage Orders contradicts it.

Brinker's only response to these points relies on a legislative report using "per day" to describe the Wage Orders' "existing" provisions, plus the contention that such descriptions are conclusive, regardless of what the Orders themselves say or what their adoption history shows. ABM 69-70. Again, *Murphy* rejected such an approach to statutory interpretation. 40 Cal.4th at 1110. Moreover, other reports contradict Brinker's position. One confirms the Legislature's understanding that "existing" Wage Orders "requir[e]…a 30-minute meal period *every five hours*." AB 2509, Third Reading, Senate Floor Analysis, *supra*, at 4 (MJN Ex. 61). Each report expressing the intent to "codify" "existing" Wage Orders does the same.

The words "per day" cannot be read inconsistently with the Legislature's clearly-expressed intent to "codify" the Orders—an intent that appears not only in multiple reports but also in AB 60's text. They represent "a mere change in phraseology" which "does not result in a change of meaning unless the intent to make such a change clearly appears." *Mosk v. Superior Court*, 25 Cal.3d 474 (1979), *superseded on other grounds as stated in Adams v. Commission on Judicial Performance*, 8 Cal.4th 630, 650 (1994). Even the rule against "surplusage," which Brinker invokes (ABM67), yields when its application would defeat the Legislature's intent. *In re J.W.*, 29 Cal.4th 200, 209 (2002) (citing *People v. Rizo*, 22 Cal.4th 681, 687 (2000)). Most likely, the words "per day" were included to satisfy the single-subject rule by topically relating section 512 to restoring the eight-hour workday. *See Marathon Entertainment, Inc. v. Blasi*, 42 Cal.4th 974, 988-89 (2008) (explaining "single-subject" rule).[64]

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[64] *See* Amicus Letter of former Assemblyman Wally Knox (author of AB 60), 09/11/08, at 5.

The Legislature's later decision to reference the Wage Orders, not section 512, in section 226.7 supports this conclusion.

2. Brinker's Reliance on the Rest Break Timing Requirement is Misplaced

Brinker invokes the Wage Orders' rest period timing language ("insofar as practicable…in the middle of each work period"), claiming that the Legislature "opted not to include an analogous timing restriction in section 512." ABM 68, 72 (quoting 8 Cal. Code Regs. §11090(¶12(A)). Again, Brinker is wrong. The meal period timing restriction derives from the Wage Orders and operates by limiting the length of each work period to five hours. Rest break timing then depends on the length of the work periods. These are two different, but complementary and equally effective, ways of imposing a timing requirement.

3. Brinker's Reliance on the Ten-Hour Waiver Provision is Misplaced

Brinker also relies heavily—and again out of context—on section 512's "ten hours per day" language. Brinker contends that if the Wage Orders imposed a timing requirement, there would be no need to specify that a second meal period accrues after ten hours' work, and that "Plaintiffs' construction erases approximately half the relevant statutory language." ABM 67-68.

Not so. It is Brinker, not plaintiffs, who attempts to erase half the relevant language. Brinker ignores the rest of the sentence in which the "ten hours per day" language appears:

> 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*….

Lab. Code §512(a). This sentence preserves and codifies the right to waive the second meal period on long shifts, which had been part of several Wage Orders that AB 60 rendered "null and void," including Order 5-98(¶11(C)) (MJN Ex. 20). AB 60, §21 at 14 (MJN Ex. 58). The Legislature had to identify the second meal period in order to preserve this right by stating that it could be waived.

Contrary to Brinker's position, the "ten hours" sentence actually confirms the Wage Orders' longstanding timing requirement. On a ten-hour shift, if the first meal period is correctly timed (at the midpoint of the shift, which is the only way to avoid work periods exceeding five hours) a second meal period is triggered after the tenth hour. This sentence then permits that second meal period to be waived. Brinker's (and the Court of Appeal's) interpretation would mean that the first meal period could be delayed until the ninth hour of work, followed by a second meal period just an hour later (which could then be waived). That is absurd. The Legislature could not have intended such a result.

C. Contrary to Brinker's Interpretation, The Wage Orders Contain a Clear Timing Requirement

Turning to the Wage Orders, Brinker contends that even their plain language is insufficient to create a timing requirement. ABM 69-77, 83-85. Brinker is wrong.

1. The Motion Picture Order Refutes Brinker's Position

Brinker contends that the motion picture Order (8 Cal. Code Regs. §11120) imposes a more explicit timing requirement, inferring therefrom that the other Orders do not. ABM 72. Brinker is mistaken, and its reliance on this Order misplaced.

As discussed above, from 1926 to 1957, the motion picture Orders used slightly different—but no less mandatory—meal period wording than

the other Orders. *See* Wage Order 16 (Jan. 8, 1926, eff. Mar. 16, 1926) (MJN Ex. 242); Wage Order 16A (Jan. 30, 1931, eff. Apr. 11, 1931) (MJN Ex. 245); Wage Order 17 (Jun. 1, 1931, eff. Aug. 11, 1931) (MJN Ex. 246); Wage Order 17R (Apr. 9, 1949, eff. Jul. 1, 1949) (MJN Ex. 247); Wage Order 12-57 (MJN Ex. 248).

The first sentence of the 1963 motion picture Order stated: "No employer shall employ any woman or minor for a work period of more than five and one-half (5½) hours without a meal period of not less than thirty (30) minutes nor more than one (1) hour." Wage Order 12-63, ¶11 (MJN Ex. 249). This was the same as the other 1963 Orders, except that it: (a) allowed 5½-hour work periods (instead of 5-hour ones); (b) fixed a maximum meal period length of one hour; and (c) authorized no waiver for six-hour shifts. *Cf.*, *e.g.*, Wage Order 5-63, ¶11 (MJN Ex. 16).

According to the motion picture Wage Board, this language required "meal periods *at intervals* of no more than five and one-half hours." Report and Recommendations of the Wage Board for IWC Wage Order 12–Motion Picture Industry (Oct. 21, 1966) at 6 (MJN Ex. 328) (emphasis added).[65] When revising the 1963 order, that Wage Board originally wished to preserve the 5½-hour interval "for the first meal period," but for "those work periods in which a second or subsequent meal periods are required," "*extend*[]" "*the interval* between the meal periods…to six hours." *Id.* (emphasis added). Accordingly, this sentence was drafted for the 1968 Order:

> Subsequent meal periods for all women and minor employees shall be called not later than ***six (6)*** hours after the termination of the preceding meal period.

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[65] This Report also uses the word "provide"—showing once again that this is a reasonable way to reference an indisputably mandatory meal period requirement (as the development of the motion picture language bears out).

See Wage Order 12-68, ¶11(a) (MJN Ex. 250) (emphasis added). After further consideration, the Wage Board ultimately decided to extend *both* the first, as well as the second and subsequent, meal period intervals to six hours. *See id.* The final version of the order, including the first sentence, therefore ended up reading:

> No employer shall employ any woman or minor for a work period of more than ***six (6)*** hours without a meal period of not less than thirty (30) minutes nor more than one (1) hour. Subsequent meal periods for all women and minor employees shall be called not later than ***six (6)*** hours after the termination of the preceding meal period.

Id. (emphasis added). The same result could have been accomplished without the previously-drafted second sentence. As the Wage Board Report makes clear, that sentence emerged only because the Board initially planned to expand the intervals only for second and subsequent meals.

In 1976, this language was replaced with language identical to the other 1976 Orders—imposing a five-hour interval between *all* meals. *Compare* Wage Order 12-76, ¶11(A) *with* Wage Order 5-76, ¶11(A) (MJN Exs. 251, 18). In 1980, the 1968 language was restored to the motion picture Order and added to the broadcasting Order. *See* Wage Orders 11-80, 12-80 (MJN Exs. 238, 252). This was done because the 1976 Order's five-hour interval conflicted with most industry collective bargaining agreements, which, consistent with the 1968 Order, "called for meal periods after six hours." Transcript of Proceedings before the IWC (Aug. 15, 1979), at 796419358-360 (MJN Ex. 338).

According to the Statement as to the Basis, the revision merely "chang[ed] the previous five hours to six." Statement as to the Basis for Wage Order 12-80, ¶11 (MJN Ex. 252). The IWC found "no rationale to justify any other change in this section, *the basic provisions of which date back more than 30 years*." *Id.* (emphasis added); *see also* Statement as to

the Basis for Wage Order 11-80, ¶11 (MJN Ex. 238) (same).

The language has not since been amended. *See* Wage Orders 12-80 (Revised); 12-2000, ¶11(A); 12-2001, ¶11(A) (MJN Exs. 253, 254, 255).[66]

As its adoption history makes clear, the motion picture Order provides no support for Brinker's argument that the IWC "chose not to" include a timing requirement in any other Orders. ABM72. The motion picture Order derives from an (inelegant) 1968 amendment intended to "extend…the interval" between work periods from 5½ hours to six. Notwithstanding the second sentence, that amendment created no new or unique requirement for meal periods "at intervals." That requirement already existed in the first sentence, and had for decades, in the motion picture Order and the other Orders. Brinker's reliance on it is misplaced.

2. Brinker Misconstrues the Wage Orders' Adoption and Enforcement History

Next, Brinker turns to the other Wage Orders' adoption and enforcement history, misconstruing it as badly as the motion picture Order. ABM 73-77, 85-85.

The Wage Orders' adoption history is discussed in detail in Part III.A, above (pp. 6-40). As that discussion makes plain, the Wage Orders' current language prohibits work periods exceeding five hours without a meal period, compliance with which requires proper meal *timing*.

Brinker places particular weight on the 1952 amendment, which removed the words "after reporting to work" from the 1947 orders, restoring the 1943 language. *See* Order 5NS, ¶11 (1943) (prohibiting "a work period of more than five hours without a meal period"); 5R, ¶11

[66] It was, however, removed from the broadcasting Order in 2000, when that Order was made identical to most of the other Orders. *See* Wage Orders 11-2000, 11-2001 (MJN Exs. 240, 241).

(1947) ("[n]o employee shall be required to work more than five consecutive hours after reporting to work, without a meal period"); 5-52, ¶11 (prohibiting "a work period of more than five hours without a meal period") (MJN Exs. 14, 15, 16).

According to Brinker, the 1943 language was "clear that a meal period must only be provided for every five hours of work, and…the 1947 Order's clarification that those five hours start once an employee 'reports for work' was unnecessary." ABM 74. Plaintiffs contend that by eliminating that proviso, and restoring the 1943 language, the IWC confirmed that the Wage Orders require a meal period after *any* five-hour work period, not just the first one of the day. OBM 83-84.

Brinker challenges plaintiffs to produce historical material beyond the plain text, such as "hearing transcripts" or "correspondence," to support their interpretation. ABM 74. There are many:

- The first sentence of the 1943 Orders—which is identical to the current Orders—prohibited early lunching schedules that "leav[e] a stretch of 6 hours to be worked after lunch." Minutes of a Meeting of the IWC (Jan. 29, 1943), at 703426115 (MJN Ex. 297) (citing Wage Order 2NS, ¶5(c) (MJN Ex. 104)). *That* is the language and prohibition restored in 1952.

- The first sentence of the 1963 Orders—which were unchanged from the 1952 Orders and are essentially identical to the current ones—required meal periods at the specified "intervals." Report and Recommendations of the Wage Board for IWC Wage Order 12 – Motion Picture Industry (Oct. 21, 1966) at 6 (MJN Ex. 328).

- The first sentence of the 1980 Orders—also unchanged since 1952 and identical to the current Orders—requires meal periods "at such *intervals* as will result in no employee working longer

than five consecutive hours without an eating period." Letter from IWC Executive Officer, *supra*, at 800410113 (MJN Ex. 376#20) (emphasis added).

- The first sentence of the 1980 Orders does *not* mean that "after an employee has worked five hours, he or she qualifies for a meal period at some time during the workday, no matter how long that work day may be." Memorandum of IWC Executive Officer, *supra*, at 800410152 (MJN Ex. 376#24). Rather, it requires a meal period after any "work period of five hours." *Id.*
- The current language requires "a 30-minute meal period within each five-hour time frame." DLSE Op.Ltr. 2003.08.13 (MJN Ex. 380) (citing 8 Cal.Code Regs. §11140(¶11(A)).

All of this material flatly contradicts Brinker's (and the Court of Appeal's) interpretation.

Brinker also relies on the word "consecutive," which was temporarily added in 1947 then removed in 1952, claiming that the IWC would have retained that word if it meant "every five consecutive hours of work." ABM 74. There was no need to. The 1952 Orders restored the term of art "work period," which had been temporarily removed in 1947. It means "a continuing period of hours worked." Memorandum of IWC Executive Officer, *supra*, at 800410152 (MJN Ex. 376#24). Retaining the word "consecutive" would have been redundant.

Turning to Wage Order 5-76, Brinker asserts that this Court's summary in *California Hotel*—"A meal period of 30 minutes per 5 hours of work is generally required"—is "consistent with" the "per day" language of section 512. ABM74-75 (quoting *California Hotel*, 25 Cal.3d at 205 n.7). Brinker provides no explanation or support for this assertion. It is wrong. As Brinker concedes, the Court of Appeal erroneously thought Order 5-76

differed from the current Orders. ABM75&n.29. It therefore incorrectly failed to follow *California Hotel*.

Next, Brinker challenges plaintiffs' reliance on the 1993 and 1998 amendments, asserting that they merely extended a waiver right to certain employees. ABM 75-77. This challenge misses plaintiffs' point, which relates to *what* these amendments allowed employees to waive: the "second meal period on a long shift" exceeding eight hours. Statement as to the Basis, Overtime and Related Issues (Orders 1, 4, 5, 7, and 9), *supra*, at 8 (MJN Ex. 30). According to multiple IWC reports, the waiver language was needed, because without it, the existing (and since unchanged) compliance language required a second meal period on long shifts. *See, e.g.*, *id.*; IWC Charge to the 1996 Wage Boards, *supra* (MJN Ex. 29); Statement as to the Basis, Wage Order 5-89 (1993 amendments), *supra* (MJN Ex. 158); Minutes of Public Meeting of IWC, *supra* (MJN Ex. 341); Part III.A, above (pp. 6-40).

Brinker says it cannot find this requirement in the waiver amendments, but Brinker is looking for it in the wrong place. The existing compliance language ("no employer shall employ any person for a work period of more than five hours without a meal period"), not the amendments, is what entitled some "employees working fewer than 10 hours" to a second meal. ABM76. The compliance language has not changed since 1952 and continues to require a meal period whenever a work period exceeds five hours.

Wage Orders 4 and 5 contain a waiver right for health care workers that confirms the timing requirement. Under those Orders, certain employees "who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to one of *their two* meal periods." 8 Cal. Code Regs. §§11040(¶11(C)), §11050(¶11(C)) (emphasis added). This

language contemplates that a second meal period can, in fact, be triggered after the eighth hour, not just the tenth (as Brinker claims). This would happen if the first meal period was scheduled early, before the third hour of work. The second meal would be triggered five hours after that, before the employee ever reached ten hours. While health care workers on lengthy shifts may waive that second meal, Brinker's employees may not.

Finally, Brinker contends that plaintiffs cite "only a single [DLSE] letter" supporting their interpretation. ABM83 (citing DLSE Op.Ltr. 2002.06.14 (MJN Ex. 42)). That is disingenuous. Plaintiffs cited not only the DLSE letter, but also the Wage Orders' language since 1932; this Court's construction in *California Hotel*; multiple IWC reports surrounding the 1993 and 1998 amendments; multiple IWC reports surrounding the 2000 amendments (which Brinker ignores); and the DLSE Manual. OBM82-87. And now, in answer to Brinker's challenge, plaintiffs cite significant additional interpretive material dating back to the 1940s (above).

All this leads inexorably to the DLSE's conclusion—that the Wage Orders impose a timing requirement; that "each five-hour 'work period' stands alone"; and that employers may not require employees on eight-hour shifts "to take a meal period within the first hour of the work day so as to accommodate the employer's schedule" because the Wage Orders prohibit all pre- and post-meal work periods exceeding five hours. DLSE Op.Ltr. 2002.06.14 at 3.

D. Section 516 Did Not Divest the IWC of Power to Impose More Restrictive Meal Period Standards

Brinker's heavy reliance on section 516 is misplaced. ABM77-83. Section 516 does not impact the current Orders, but even if it did, it did not withdraw the IWC's power to adopt more protective standards than the Labor Code minimums. The Court of Appeal erroneously held otherwise.

1. Section 516 Is Irrelevant to the Current Orders

For three initial reasons discussed above, section 516 does not "invalidate" the current Wage Orders, as Brinker maintains. First, the IWC issued the current Orders *before* section 516 was amended, while it was unquestionably still empowered to adopt any standards consistent with worker health and welfare. *See* Part IV.D, above (pp. 67-69). Second, section 516 concerns only the IWC's power to "adopt or amend" its orders, which has not happened. The relevant language stands unchanged since 1952. *See* Part IV.D, above (pp. 69-70). Third, section 516 applies only if one assumes that section 512 imposes different requirements than the Wage Orders. Section 226.7 belies this assumption. The language of both can and should be harmonized in a manner consistent with the IWC's decades-old standards. *See* Part V.B-C, above (pp. 78-90).

2. Section 516 Neither Requires "Absolute Consistency" Between the Wage Orders and Section 512, Nor Abrogates *IWC v. Superior Court*

Brinker interprets section 516 to require "absolute consistency with section 512." ABM78-80. If correct, this interpretation would abrogate *IWC v. Superior Court*. It is wrong for several reasons.

Such an interpretation contradicts the overarching purpose of the three acts—AB 60 (of which section 516 was originally a part), AB 2509 and SB 88—all of which were intended to "codify" existing Wage Orders and prevent the IWC from *weakening* their standards, as the 1998 Orders attempted to do. OBM62-66, 97-99. Nothing in any of these acts purported to alter the long-established "relationship between" the Wage Orders and the Labor Code's "general statutory provisions," which set a compliance *floor* for the IWC to work up from. *IWC v. Superior Court*, 27 Cal.3d at 733-34 (citing 2 Ops.Cal.Atty.Gen. 456 (1943)); OBM95-96.

Brinker's only response to this argument is relegated to a footnote,

where Brinker claims that plaintiffs "cite nothing" to support it. ABM79n.31. The support comes from the text of all three acts, the 1998 Orders, and associated legislative history. OBM62-66, 97-99.

Instead of reading the acts together, or explaining how its interpretation can be reconciled with their enactment history, Brinker singles out two legislative reports, one saying that the "IWC's authority to adopt or amend orders…must be consistent with" section 512, and another saying that the Orders should not "conflict with" section 512. ABM79-80 (citing SB 88, Senate Third Reading (Aug. 16, 2000); *id.*, Legislative Counsel Digest (MJN Exs. 63, 65)).

This does not support Brinker's interpretation. "Consistent" does not mean "identical"—which is precisely what this Court held in *IWC v. Superior Court*. More protective Wage Orders have never been considered "inconsistent with" the Labor Code. 27 Cal.3d at 733-34. Here, the Wage Orders are "consistent" with section 512 because (to the extent they may differ) they are more protective and employers can comply with them without violating section 512's floor. OBM90. Brinker does not dispute this, instead reasserting that the Orders "cannot set a compliance standard that differs with section 512." ABM79-80. The only authority Brinker cites—legislative history saying "consistent" (not "identical")—does not support this assertion.

Brinker also ignores what else SB 88 did. It added subsection 512(b), authorizing the IWC to extend the interval between meal periods from five to six hours—a *less* protective standard. SB 88, §1 (MJN Ex. 63). Yet section 516, as originally drafted, already allowed the IWC to do that, or make any other change, "notwithstanding" section 512. Amending section 516 was necessary to preserve section 512(b)'s new six-hour compliance floor, as well as section 512(a)'s original five-hour floor.

In a footnote, Brinker calls this argument "stitch[ed] out of whole cloth." ABM79n.31. Hardly. It comes from the text of SB 88.

Brinker also ignores the impact of section 226.7, enacted days after SB88. Section 226.7 expressly adopts the Wage Orders, *not* section 512, as its compliance standard—flatly contradicting Brinker's contention that section 512 embodies our State's only meal period rule or that section 516 requires the Wage Orders to be identical to section 512. OBM64, 97. Brinker nowhere addresses this inconsistency.

Neither section 512 nor section 516 contains any *remedy* for noncompliance. The primary remedy this case seeks is premium wages under section 226.7(b), which enforces the Wage Orders, *not* section 512. Brinker's misreading of section 516 essentially asks the Court to rewrite section 226.7(b) by substituting "section 512" in place of "an applicable [IWC] order." This is not the Court's function.

Next, Brinker attempts to distinguish *IWC v. Superior Court* on its facts (ABM80-81), but the effort fails. *IWC* states a clear rule of law that cannot be "distinguished" away.

Brinker claims that *IWC* involved "different Labor Code provisions," but sections 512 and 516 are "general statutory provisions," even more so than section 554 in *IWC* (which governed agricultural employees). 27 Cal.4th at 733. Brinker asserts that *IWC* was decided "two decades before…section 516 was enacted," but the Legislature, which is presumed aware of this Court's precedents, chose to place sections 512 and 516 squarely within the very range of statutes ("sections 510-556") *IWC* identified. *Id.* Brinker argues that the Wage Orders in *IWC* involved a "single specialized industry," but the Court's analysis did not hinge on that. *Id.* at 733-34. On the contrary, one of the Court's earlier cited cases stated the same rule but involved the restaurant industry and Order 12. *Id.* at 733

(citing *California Drive-in Restaurant Ass'n v. Clark*, 22 Cal.2d 287, 290-91 (1943) (citing Wage Order 12 (1923) (MJN Ex. 10))).

None of Brinker's purported distinctions makes any substantive difference or diminishes *IWC*'s precedential force.[67] The rule *IWC* states applies to *all* overlapping Labor Code and Wage Order provisions, including those involved in this case.

Brinker falls back on *Bearden v. U.S. Borax, Inc.*, 138 Cal.App.4th 429 (2006), but wholly fails to address plaintiffs' point that the Wage Order in *Bearden* dropped below the Labor Code's floor, making it "inconsistent" with that floor and invalidating it regardless of section 516. ABM82.[68]

At bottom, Brinker contends that section 512 operates as not just a floor, but also a ceiling. This would contravene a principle dating back to the 1940s of which the Legislature is presumed aware. *See IWC*, 27 Cal.3d at 733 (citing *Clark* and AG letter, both dated 1943); *Burden v. Snowden*, 2 Cal.4th 556 564 (1992) (Legislature presumed aware of AG opinion letters relating to "subject matter of proposed legislation"). If that is what the

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[67] Brinker contends that because of these purported differences, there was "no reason for the Legislature to 'abrogate' the decision when it enacted section 516." ABM81n.32. The likelier explanation is that the Legislature did not think section 516 altered the rule of *IWC*. After all, the Legislature thought it had "codified" the Wage Orders.

[68] Brinker's answer highlights a fact that further undermines its reliance on *Bearden*. ABM82n.33. Although the Wage Order in *Bearden* (Order 16) "went into effect" after section 516 was amended, it was *issued* (like the other current Orders) three months *before*—as Brinker acknowledges elsewhere in its brief. ABM6; *see* MJN Ex. 7. Apparently, no party pointed out in *Bearden* that section 516's pre-amendment language should have applied. Order 16 is also distinguishable from Order 5 because it covered a new industry for the first time, whereas Order 5's meal period provisions merely "continued in effect" language originally adopted for the restaurant industry in 1952. *IWC*, 27 Cal.3d at 715. Section 516 applies only when the IWC "adopts or amends" an Order, so even if it governs Order 16, it does not apply to the relevant parts of Order 5.

Legislature intended, something in the legislative history would have said so. No such intent appears. The current Wage Orders' more protective terms are valid.

E. No "Policy" Consideration Justifies Brinker's Interpretation

Brinker's final argument rests on ill-conceived "policy" notions. ABM86-87. Brinker assumes that moving the meal to mid-shift is the only way to comply with the Wage Orders. That is not so. As repeatedly explained (OBM82, 101-02), that is just one way to comply; other ways include ending the shift earlier, scheduling a second meal, or paying the premium wage. To use Brinker's hypothetical, on a shift starting at 2:00 p.m., the meal may be scheduled at 4:00-4:30, so long as, by 9:30 (five hours later), either (a) the shift ends; or (b) another meal is scheduled. No "policy" argument supports the notion that employees benefit by working up to 9½ hours straight without stopping to eat, which is what Brinker would like to continue requiring of its hourly workers.

VI. THE REST BREAK ISSUES

The Court of Appeal improperly reversed class certification of plaintiffs' two particularized rest break claims: (1) failure to "authorize and permit" a rest break "per four hours [worked] or major fraction thereof" (OBM2, 103-109); and (2) failure to "authorize and permit" a rest break in the work period before the first meal period (OBM 2, 102-111). In so doing, it incorrectly resolved two legal questions raised by those claims.

A. The Rest Break Compliance Issue

1. Common Questions Predominated on the Rest Break Compliance Claim

Brinker's answer mis-frames the rest break compliance issue by trying to convert it into one of "timing." ABM2-3, 88-94, 121. As the

petition for review and plaintiffs' opening brief make clear, this question is about the *number* of rest breaks *triggered* during the workday—one "per four hours or major fraction thereof." Petition for Review, 08/29/08, Issue #3; OBM 2, 102-09. It is not about "timing," as Brinker contends.

Contrary to what Brinker says, plaintiffs do not contend that employees must "*receive* rest periods at the two-hour and six-hour marks." ABM 121. Rather, plaintiffs contend that the law *triggers* rest periods at those marks. OBM 103-09 (citing DLSE Op.Ltr 1999.02.16 (MJN Ex. 37)). True, the triggered rest breaks must be *scheduled* "insofar as practicable…in the middle of each work period." 8 Cal. Code Regs. §11050(¶12(A)). This claim, however, does not assert a violation of that scheduling requirement. Rather, it asserts that Brinker uniformly "authorizes and permits" fewer rest breaks than the Wage Orders call for.

Brinker's uniform rest break policy, as applied in the workplace, does not "authorize and permit" a rest break until "*after* [workers'] fourth hour"—not after a "major fraction" of four hours, as the Wage Orders require. OBM103 (quoting 21PE5913:1-9; 19PE5172). In other words, plaintiffs contend, the policy "authorizes and permits" only one rest break in an eight-hour day.[69]

What the Wage Orders require, and whether Brinker's policy violates them, are predominating common questions.

Brinker contends that this part of the rest break claim cannot be assessed classwide because "there is no statutory requirement that rest periods be recorded." ABM121. Again, Brinker misunderstands the claim,

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[69] Brinker asserts that plaintiffs "do not dispute that Brinker's policy is consistent with the Court of Appeal's interpretation of the Wage Order." ABM 121. Plaintiffs make no concession of the kind. Whether Brinker's policy violates the Wage Orders is a common merits question to be determined classwide on remand.

which is that Brinker uniformly fails even to "authorize and permit" compliant rest breaks. Class members could not have waived rest periods that were never authorized or permitted in the first place. The fact-finder can easily resolve this claim on a classwide basis, with or without records.

In sum, common questions predominated on this part of plaintiffs' rest break claim, and the Court of Appeal erred by holding otherwise.

2. Brinker Misreads the Court of Appeal's Opinion, Which Halves California Workers' Rest Breaks

Brinker misconstrues the Court of Appeal opinion, incorrectly claiming that the opinion does not halve workers' triggered rest breaks. ABM 89-90. According to Brinker, the Court of Appeal held that "an employee working eight hours…is entitled to *two* rest periods," not one. *Id.* That interpretation cannot be reconciled with the opinion's language.

The Court of Appeal expressly held that a rest break is not triggered until "after" a "full four hours'" work:

> [I]f one has a work period of seven hours, the employee is entitled to a rest period *after* four hours of work because he or she *has worked a full four hours*, not a "major fraction thereof."

Slip op. 24 (emphasis added). The Court of Appeal thus rejected the argument that a rest break is triggered upon completion of any time over two hours' work (and any time over six and ten hours' work, etc.)—nullifying the "major fraction" language entirely.

Taking the opinion to its logical extreme, a worker on an eight-hour shift would receive one rest break, triggered "after" the worker "has worked a full four hours." No second rest break would be triggered until "after" the worker has worked another "full four hours"—that is, at quitting time.

Other language in the opinion bears this out. Under the Court of

Appeal's interpretation, a rest break would be triggered without working a *full four hours* only for the smallest subset of workers: "It is only when an employee is scheduled for a shift that is more than three and one-half hours, but less then four hours, that he or she is entitled to a rest break *before the four hour mark*." Slip op. 24 (emphasis added). This holding flatly contradicts the Wage Orders' plain language (as discussed in more detail below)—and confirms that the opinion would halve the number of rest breaks for workers on eight-hour shifts. They would not get one until *after* "the four hour mark."

The panel also rejected point-blank the argument that "four hours or major fraction" triggers a rest break at the midpoint of *each* four-hour work period, meaning not just at the second, but also at the sixth and tenth hours of work (and so on): "If the IWC had intended that employers needed to provide a *second* rest period at the six-hour mark, and a *third* rest period at the 10-hour mark, it would have stated so…." Slip op. 28 (emphasis added). Yet the IWC did precisely that—through the term "per four hours or major fraction thereof." This language underscores the Court of Appeal's erroneous thinking that no "second" rest break is triggered until "after" eight full hours of work, when the employee has already gone home.

In sum, Brinker misunderstands the Court of Appeal's ruling and the harm it would cause California workers if upheld.

3. Brinker Misreads the Plain Text of the Current and Historical Wage Orders, Which Trigger a Rest Break Upon Completion of Two Hours' Work, Not Four

Quoting the Court of Appeal's opinion, Brinker contends that "'the term "major fraction thereof" can only be interpreted as meaning the time period between three and one-half hours and four hours.'" ABM 88-89, 91. This argument ignores the Wage Orders' plain text and their enactment history, and would nullify part of their language.

Like the Court of Appeal, Brinker misconstrues the exception for workers on shifts not exceeding 3½ hours. That exception states: "However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours." 8 Cal. Code Regs. §11050, ¶12(A). Brinker says "[t]he notion that the IWC bestowed on employees the right to a rest period in one sentence only to withdraw it in the following sentence makes no sense at all." ABM 91; *id.* at 94. Of course it does. That is the very nature of an *exception*. The IWC reasoned that workers whose day will end after just 3½ hours' work can do without the rest break that "four hours or major fraction" would otherwise trigger at the second hour.

Indeed, if "four hours or major fraction" triggered no rest break until "after" "four full hours," as the Court of Appeal held, the IWC would have had no need to state this exception. Under the Court of Appeal's interpretation, no one "whose total daily work time is less than three and one-half (3½) hours" would ever be entitled to a rest break. The IWC never would have adopted the exception.

The IWC considered it critical for workers on eight-hour days to receive two rest breaks, one triggered at the second hour and the other triggered at the sixth, spaced as near the middle of each four-hour work period as practicable, with a meal period in between. This idea—rest approximately every two hours—has been in the Wage Orders from the beginning. *See, e.g.*, Wage Order 18(¶12(a)) (1931) (MJN Exs. 11, 80) (rest period "every two (2) hours"); Wage Order 5NS(¶3(d)) (1943) (MJN Ex. 12) (employees may not work more than "two and one-half (2½) hours consecutively without a rest period"); Wage Order 5R(¶11) (1947) (MJN Ex. 13) ("four hours working time, or majority fraction thereof"); Wage Order 5-52(¶12) (MJN Ex. 14) ("per four hours, or major fraction thereof").

Brinker's interpretation also ignores the fact that the IWC also changed "majority fraction" to "major fraction" in the toilets provision in the 1950s. *See* Part III.C.1, above (pp. 45-48). This amendment shows that the grammatical correction had nothing to do with the 3½-hour exception added to the rest break provision at that time.

Brinker tries to distinguish the early wage orders by arguing that they applied only to workers required to "remain standing." ABM 93-94. According to Brinker, the early wage orders "logically imposed a stricter limit" for "standing" workers, which the IWC weakened in 1947, when it changed "more than two and one-half hours consecutively" to "four hours…or majority fraction thereof." *Id.*

That argument is illogical. In 1947, the IWC *expanded* the rest break requirement to cover *all* workers, not just those required to stand. If Brinker's interpretation were correct, that would mean the IWC *weakened* the protections for "standing" workers, leaving those workers with half the breaks the 1931 order required. Nothing in the 1947 amendment suggests an intent to decrease the number of rest breaks for "standing" workers or any other workers. To the contrary, the amendment's purpose was to *expand* the rest break requirement (approximately every two hours) to all.

Finally, Brinker contends that the Wage Orders' language "contradicts" DLSE Opinion Letter 1999.02.16, and attempts to distinguish that letter on the same basis as the Court of Appeal—that it relied on a 1948 enforcement manual that construed the 1947 Orders. ABM92-93 (citing DLSE Op.Ltr 1999.02.16 (MJN Ex. 37). The effort falls flat. "Major fraction" and "majority fraction" mean the same thing now as they did in 1947—any time over two hours. The DLSE and its predecessor correctly concluded, in 1999 and in 1948, that the term "four hours or major fraction"—or "majority fraction"—triggers a rest period at the second,

sixth, and tenth hours of work (and so on). Brinker calls plaintiffs' interpretation of the Wage Orders "inventive" (ABM 92), but it has been part of their plain text for over seventy years.[70]

The Court of Appeal's interpretation reads the phrase "major fraction thereof" out of the Wage Order entirely. Its basis for doing so—the exception for 3½-hour shifts added in 1952—does not hold up under close scrutiny. The very inclusion of that exception confirms plaintiffs' and the DLSE's reading. Rest periods are triggered at the second, sixth, and tenth hours (etc.) *except* for workers who complete their day's work within 3½ hours. The Court of Appeal erred by holding otherwise.

B. Rest Break Timing: A Rest Break Must Be "Authorized and Permitted" in the Work Period Preceding the Meal

The Court of Appeal also erred on rest break timing—whether a rest break must be "authorized and permitted" during the work period before the meal. As explained in plaintiffs' opening Brief, because Brinker's uniform policy does not "authorize and permit" proper rest breaks, this part of plaintiffs' rest break claim raises common questions of law. OBM110.

Brinker can dispute this only by once again mischaracterizing the issue. Plaintiffs' point is not that "Brinker does not *require* that employees take their first rest break before the first meal." ABM 122 (emphasis added)). Rather, the point is that Brinker does not *permit* it for workers scheduled for early meals. *See* 21PE5913:1-8, 21:E5914:1-5915:11. Whether the law requires employers to "authorize and permit" a rest break during the work period preceding the first meal is a common legal question. There will be no need for "case-by-case" analysis of whether workers

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[70] *See, e.g.*, Record of Proceedings – Wage Board for Order 1, Los Angeles, Oct. 1 and 2, 1956 (Oct. 4, 1956) at 2-3 (MJN Ex. 322) ("major fraction" means "a 6½ hour day" triggers "two 10 minute rest periods" (comments of Secretary Braese)); Part III.C, above (pp. ___-___).

"waived" rest breaks that Brinker never "authorized or permitted."

Brinker is also wrong on the merits.

Brinker contends that the Wage Order "says nothing suggesting that the first rest break must be taken before the first meal period." ABM 95. That is wrong. The concept is inherent in the Wage Order's use of the term "work period."

As used in the Wage Orders, "work period" is a term of art meaning a consecutive period of hours worked. An ordinary work day consists of two "work periods," one before and one after the meal period. *See* Part III.A, above (pp. 28-29). The Wage Orders require rest breaks to be scheduled "insofar as practicable…in the middle of *each work period*." 8 Cal. Code Regs. §11050 (¶12(A)) (emphasis added). To be in the middle of "each work period," at least one rest break must take place during the work period that precedes the meal period. *See* Part III.C.2, above (pp. 48-50).

Brinker also contends that DLSE Op.Ltr. 2001.09.17 (MJN Ex. 40), which expressly adopts this interpretation, is "unreliable" for several reasons. ABM 95-98. None of the reasons bears examination.

First, Brinker says that the letter "did not address" the issue in question. *Id.* at 96. Wrong. The letter plainly states that "[a]s a general matter, the first rest period should come sometime before the meal break." DLSE Op.Ltr. 2001.09.17, at 4. This conclusion is entirely consistent with the Wage Orders' plain language.

Second, Brinker says that if the rest break were properly scheduled, "the breaks would be condensed and an 'overlength work period' would follow the meal." ABM 97. That would only happen if Brinker continues to violate the law governing meal period timing (discussed above). Brinker can easily avoid "overlength work periods" by ending workers' shifts no later than five hours after the early meal. This point simply underscores the

systemic problems with Brinker's shift and break scheduling, particularly its "early lunching" practice.

Third, Brinker contends that the letter did "not take into account the relevant language of the Wage Order." ABM 98. That is not correct. The letter quoted the "relevant language" in full. DLSE Op.Ltr. 2001.09.17 at 4. Indeed, the "relevant language" of the Wage Order under consideration (Order 16) is identical to Order 5—a point on which Brinker does not attempt to defend the Court of Appeal. *Compare* 8 Cal. Code Regs. §11160(¶11(A)) *with* 8 Cal. Code Regs. §11050(¶12(A)). And Brinker wholly ignores DLSE Op.Ltr. 2002.01.28 (MJN Ex. 41), which made clear that for language "present in all of the wage orders," the interpretations of Op.Ltr. 2001.09.17 apply to all.

Fourth, Brinker contends that "the IWC adopted a more flexible approach to account for the diversity of the modern workplace." ABM 98. Yet the relevant language was adopted in 1952 and has not since been amended to reflect any "modern" concerns. The DLSE reconfirmed the rest break timing requirement in 2001—well within the "modern" era.

In fact, Order 16 reflects *greater* flexibility in rest period scheduling than the other Orders. The first sentence of Order 16 is identical to the other Orders, but the second sentence allows employers to "stagger[] rest periods to avoid interruption in the flow of work" and to "schedul[e] rest periods to coincide with breaks in the flow of work that occur in the course of the workday." Order 16-2001, ¶11(A) (MJN Ex. 281). In the DLSE's view, even with *that* language, the Order's first sentence continues to require a rest break during the work period preceding the meal.

The human need for rest and nourishment has not diminished since 1952. The Wage Orders have always contemplated periodic breaks throughout the workday. Brinker calls on this Court to eliminate the Wage

Orders' basic meal and rest period framework under the disguise of "flexibility." The DLSE was not deceived, nor should this Court be.

The Wage Order's plain language requires a rest break to be scheduled within "each work period." That necessarily includes the "work period" that precedes the meal period. The DLSE's 1999 interpretation was correct. The Court of Appeal had no reasoned basis to hold otherwise.

VII. THE CLASS CERTIFICATION ORDER SHOULD HAVE BEEN AFFIRMED

As explained in plaintiffs' Opening Brief, the Court of Appeal erred in five critical ways in reviewing the trial court's class certification order:

- First, it failed to consider whether common questions predominated regardless of how the legal questions Brinker raised were resolved. OBM34, 78-80, 103-05, 110, 113-14.
- Second, it re-weighed the evidence of predominance, contrary to *Sav-on*. *Id.* at 116-22, 132-33.
- Third, it substituted its judgment for the trial court's by peremptorily rejecting proffered survey and statistical evidence as a method of common proof, contrary to *Sav-on*. *Id.* at 123-27.
- Fourth, it permitted an affirmative defense, standing alone, to defeat certification, contrary to *Sav-on*. *Id.* at 127-32.
- Finally, it failed to remand for the trial court to reconsider class certification in light of any newly-announced legal standards, contrary to *Washington Mutual*. *Id.* at 133-34.

Brinker's response attempts to shift the focus away from the Court of Appeal's errors. According to Brinker, the Court of Appeal merely held that the trial court applied "improper criteria" or "erroneous legal assumptions" by failing to "define the elements" of plaintiffs' claims before

granting class certification. ABM99-100, 102-03. Brinker maintains that this holding had "nothing to do" with whether substantial evidence supported the class certification order under *Sav-on*. *Id.* at 102.

Brinker even says that this Court's directives in *Sav-on* are "inapplicable" to this case. *Id.* at 103.

Brinker's characterization disregards the central errors in the Court of Appeal's class certification analysis—and forgets that this Court's review lies from the Court of Appeal's decision. Eisenberg et al., *Cal. Prac. Guide: Civil Appeals & Writs*, §13.4 (Rutter Group 2008).

The Court of Appeal should have considered, as an initial matter, the trial court's express holding that common questions predominated regardless of how the legal questions Brinker raised were resolved. 1PE1-2. Under *Sav-on*, that finding should have been reviewed for substantial evidence. Instead of following *Sav-on*, the Court of Appeal reached out and decided all the common legal questions, then substituted its judgment for the trial court's by re-weighing the predominance evidence—precisely as *Sav-on* prohibits. Slip op. 31-33, 47-52.

This proceeding challenges *those* errors. It was the Court of Appeal, not the trial court, who applied "improper criteria" and "erroneous legal assumptions" in this case—by failing to follow *Sav-on*. Its judgment should be reversed.

A. The Court of Appeal Erred by Failing to Consider, as an Initial Matter, Whether Substantial Evidence Supported the Certification Order Regardless of How the Underlying Common Legal Questions Were Resolved

Brinker makes much of the trial court's supposed failure to "define the elements of the claims" before granting class certification. ABM99-100, 102-103; *see* Slip op. 4, 21-22. Brinker contends, citing *Washington Mutual Bank, FA v. Superior Court*, 24 Cal.4th 906 (2001), that the trial

court made an "erroneous legal assumption" by granting class certification without reaching and deciding the common questions of law the case presented. ABM99, 102; *see also* Slip op. 21-22.

Brinker mistakes both the holding and the scope of *Washington Mutual*. Nothing in *Washington Mutual* requires trial courts to reach and decide disputed questions of California law before granting certification. At most, *Washington Mutual* requires trial courts to consider and assess predominance and manageability *in light of* the potential impact of disputed legal issues. The trial court did precisely that. 1PE1-2.

Washington Mutual involved *nationwide* class certification. The class members' contracts contained choice-of-law clauses, which the defendant argued "meant that the action would entail the application of the laws of all 50 states." 24 Cal.4th at 913. The trial court granted nationwide class certification without examining the choice-of-law clauses and deciding "what law applies"—that is, whether California law, or some combination of other states' laws, governed the class members' claims. *Id.* at 911-13. As a result, the trial court failed to consider whether the class members' claims raised non-common *legal* questions, and if so, whether those questions could be effectively managed. *Id.* at 922-23.

This Court ordered the trial court to revisit class certification and make these determinations on remand:

> [A] trial court cannot reach an informed decision on predominance and manageability without first determining *whether class claims will require adjudication under the laws of other jurisdictions* and then evaluating the resulting complexity where those laws must be applied.

Id. at 927 (emphasis added). It concluded that the order granting nationwide class certification "was premised upon the faulty legal assumption that *choice-of-law issues* need not be resolved as part of the

certification process." *Id.* (emphasis added).

The Court of Appeal selectively quoted this language from *Washington Mutual*, omitting the parts referencing the unique choice-of-law problem that case presented. Slip op. 22. Here, it is undisputed that California law applies uniformly to the class members' claims. There was no possibility that differing and unmanageable laws might apply. The trial court considered Brinker's arguments concerning *interpretation* of the uniformly applicable law, "evaluat[ed] the resulting complexity," and found that common questions predominated regardless. 1PE1-2. *Washington Mutual* requires no more.

In fact, *Washington Mutual* acknowledged that even choice-of-law questions need *not* be resolved at the class certification stage if the class proponent shows that common questions predominate regardless:

> While our decision today generally requires trial courts to decide disputes regarding choice-of-law provisions before certifying a nationwide class action, *we do not rule out the possibility that*, on rare occasions, *such disputes need not be resolved prior to certification.* For example, it may be that issues regarding the applicability of choice-of-law agreements need not be decided *if the class action proponent establishes, in the first instance, that application of all contractually designated laws will not defeat predominance or manageability* and that all other prerequisites for certification of a nationwide class are met.

Id. at 929 n.4 (emphasis added). That is precisely what occurred here. The Court of Appeal wholly overlooked that fact and this part of *Washington Mutual*.

Neither *Hicks v. Kaufman and Broad Home Corp.*, 89 Cal.App.4th 908 (2001), nor *Sav-on* supports the Court of Appeal's approach. Slip op. 21 (citing those cases); ABM99 (same). In *Hicks*, the trial court incorrectly resolved a dispute over interpretation, then denied class certification based

on that incorrect legal ruling. 89 Cal.App.4th at 916-23. The appellate court reversed, holding that if the trial court had correctly interpreted the law, the predominance evidence would have been sufficient. *Id.* The legal dispute was dispositive only because evidence had *not* been proffered to show that common questions predominated either way. *See id.* at 923. In this case, by contrast, the trial court *granted* certification because the evidence of predominance *was* sufficient either way.

In *Sav-on*, this Court said that class certification considers "whether the *theory of recovery* advanced…is…likely to prove amenable to class treatment." 34 Cal.4th at 327 (emphasis added). However, "'[r]eviewing courts consistently look to the *allegations of the complaint and the declarations of attorneys* representing the plaintiff to resolve this question.'" *Id.* (quoting *Richmond v. Dart Industries, Inc.*, 29 Cal.3d 462, 478 (1981)) (emphasis added). Nothing in *Sav-on* directs lower courts to reach and resolve questions of law not determinative of predominance.

Correctly read, neither *Washington Mutual*, *Hicks*, nor *Sav-on* supports the Court of Appeal's reversal of class certification in this case. This case involves an ordinary California class, in which California law uniformly applies. The parties offer differing *interpretations* of the law—but that simply raises legal questions whose resolution will be common to the class. The trial court did not disregard the differing interpretations, as in *Washington Mutual*; rather, it correctly granted class certification on substantial evidence that common questions predominated regardless of which party's interpretation was correct. The trial court reserved decision on the common legal questions for the merits phase of the case.

This is the ordinary approach to class certification. Its correctness has been confirmed in countless cases. *See, e.g.*, *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 713-17 (1967); *Medrazo v. Honda of North Hollywood*, 166

Cal.App.4th 89, 100 (2008); *Rose v. City of Hayward*, 126 Cal.Appp.3d 926, 933 (1981).[71] Some of those cases involve the same meal period compliance question as here. *See, e.g.*, *Ortega v. J.B. Hunt Transport, Inc.*, ___ F.R.D. ___, 2009 WL 1851330, *6 (C.D. Cal. May 19, 2009) ("Whatever the legal meaning of the term 'provide' in this context, the question is one common to all potential class members.").[72]

The Court of Appeal's approach would convert every class certification motion into a summary judgment proceeding in which the trial court would decide all the common questions of law—regardless of whether their resolution impacted predominance or manageability. This Court has already rejected such an approach. It impermissibly intrudes on the merits at the class certification stage. *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 440, 443 (2000) (merits questions should be decided through procedurally appropriate motions except to extent "enmeshed" with class

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[71] Brinker attempts to distinguish these cases, asserting that "in none of [them] was the appellate court asked to decide the very issues that ostensibly supported class certification." ABM119. However, it was Brinker, not plaintiffs, who urged the appellate court to decide these issues—leading to the erroneous rulings that plaintiffs had no choice but to challenge in this Court. *See* Part VII.B, below.

[72] *Accord*: *Bibo v. Federal Express, Inc.*, 2009 WL 1068880, *10 (N.D. Cal. Apr. 21, 2009) (meal period question constitutes "shared legal dispute" that "militates in favor of class certification, since it must be resolved for the class as a whole"); *Otsuka v. Polo Ralph Lauren Corp.*, 251 F.R.D. 439, 447 (N.D. Cal. 2008) ("This disputed question of California law…is itself a common issue of overriding importance in this action"); *Alba v. Papa John's USA, Inc.*, 2007 WL 953849, *14 (C.D. Cal. Feb. 7, 2007) ("Whether [defendants' uniform] policy satisfies the right to meal and rest periods under California law is a question of law…common to the proposed subclass [and] one that predominates over individual factual questions that may arise"); *Cornn v. United Parcel Service, Inc.*, 2005 WL 588431, *4, *11-*12 (N.D. Cal. Mar. 14, 2005) ("the overarching common issue is whether the statute requires an employer to [ensure meal periods] or…only…to make such meal periods available"), *reconsid. granted in part on other grounds*, 2005 WL 2072091 (N.D. Cal. Aug. 26, 2005)

certification issues); *see Bibo*, 2009 WL 1068880 at *6 (meal period compliance question is "a merits issue that is improper to decide on a motion for class certification").[73]

In sum, the Court of Appeal—not the trial court—made an erroneous legal assumption in this case. It improperly reached and decided common legal questions not enmeshed with class certification, then erred again by re-weighing the evidence of predominance. Its approach contravened *Linder*, *Washington Mutual*, and *Sav-on*.

B. After the Court of Appeal's Legal Errors Are Reversed, Common Questions Will Still Predominate

As explained in plaintiffs' opening brief, common questions predominated on plaintiffs' meal period compliance and timing claims, as well as plaintiffs' two particularized rest break claims (failure to "authorize and permit" a rest break after two hours' work or before the first meal period), regardless of how the four underlying legal questions were resolved. OBM34, 78-80, 103-05, 110.[74] That alone demonstrates that the Court of Appeal erred by reversing the class certification order wholesale.

In response, Brinker says that "plaintiffs…are asking this Court to answer those exact legal questions," and that once they are resolved, there will be nothing left to certify. ABM118-22. That makes no sense.

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[73] The summary judgment statute, for example, passes constitutional muster only because of its strict procedural requirements. *Bahl v. Bank of America*, 89 Cal.App.4th 389, 395 (2001). Such requirements are woefully absent from the class certification procedure—particularly in this case, in which pre-certification merits discovery was denied. 2RJN7394:22-7395:9.

[74] Brinker incorrectly asserts that "Plaintiffs are *not* claiming that the 'provide [sic] v. ensure' issue is a common legal question justifying certification." ABM118n.48. Plaintiffs clearly state that "[t]he trial court's class certification order should have been affirmed regardless of how the underlying meal period compliance question is answered." OBM34.

First of all, it was *Brinker*, not plaintiffs, who urged the Court of Appeal to reach and decide these questions. *Compare* Petition for Writ of Mandate, 09/01/06, 7(¶17), 13-17, 17-21 (arguing that trial court should have reached and decided meal period compliance question) *with* Real Parties' Return, 02/01/07, 29-32; Supp. Brief, 08/27/07, 12-13 (arguing that substantial evidence supported certification regardless of how question was resolved).[75] When the Court of Appeal decided them incorrectly, plaintiffs had no choice but to seek this Court's intervention.[76] The parties agree that this Court should decide the issues for the benefit of the named plaintiffs, the certified class and workers statewide.

Second, after this Court reverses those errors, multiple key common questions will remain for the trial court to decide on remand. The primary ones involve whether Brinker's uniform policies and practices violate the law as this Court construes it—that is, whether Brinker fails to "provide"

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[75] The three other questions 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). In its reply, Brinker seized on these common questions—for the first time—and asserted that the trial court *should have decided* them. Reply, 04/03/07, 21-25, 29-31. Then, during oral argument, Brinker invited the Court of Appeal to decide them, which it did, without briefing, in violation of Government Code section 68081. *See* Petition for Review, 10/22/07, No. S157479, at 8, 32-33.

[76] Given the original unpublished opinion's language on meal period compliance (*e.g.*, Slip op., 10/12/07, 30-31), remand to the trial court to decide the question "in the first instance" would have been a useless exercise. *See* Petition for Review, 10/22/07, No. S157479, 4-5 n.4, 19 n.4. After this Court's grant-and-transfer order (dated 10/31/07), plaintiffs asserted that a more forthright ruling would better serve judicial economy. Supp. Letter Brief, 12/17/07, 10-11. Knowing that the Court of Appeal intended to reach and decide the remaining questions, as Brinker had urged, plaintiffs briefed those issues as well. *Id.* Continuing to argue that class certification could be affirmed without resolving these questions would have been futile. *See People v. Redmond*, 29 Cal.3d 904, 917 (1981).

compliant meal periods; imposes an unlawful "early lunching" policy; "authorizes and permits" too few rest breaks; and maintains a pattern and practice of understaffing resulting in off-the-clock work. Others include whether Brinker's violations trigger the pay remedy of section 226.7(b) and the Wage Orders, and whether injunctive relief is appropriate.

Brinker's argument assumes that the four common legal issues presented for this Court's resolution are the *only* common questions the case raises, but that is simply wrong.

This Court should reverse the Court of Appeal's judgment, reinstate the trial court's certification order, and remand for classwide resolution of the remaining common issues, including issuance of classwide relief.

C. Substantial Evidence Supports the Trial Court's Finding that Common Questions Predominate on All Claims

Given the trial court's finding that common questions predominated regardless of how the underlying legal disputes were resolved (1PE1-2), *Sav-on* required the Court of Appeal to consider whether substantial evidence supported that finding. The Court of Appeal utterly failed to do so, instead engaging in an improper appellate re-weighing process. Brinker's only response is to invite this Court to engage in the same process. It should decline the invitation. Substantial evidence supported the class certification order, and it should have been affirmed.

1. Brinker Does Not Dispute that Common Questions Predominate on the Meal Period Claim if an "Affirmative Duty" Compliance Standard Governs

As discussed in plaintiffs' opening brief, if employers have an affirmative obligation to relieve workers of all duty for their meal periods, then common questions plainly predominate, and the order certifying the meal period claim for class treatment should have been affirmed.

OBM114-15.[77] Brinker's answer does not dispute this. ABM99-118, *passim*. Hence, at a minimum, the Court of Appeal's judgment reversing class certification of the meal period claim should itself be reversed.

2. Common Questions Also Predominate Even If Both Meal Periods and Rest Breaks May be "Waived"

As for the remaining claims, substantial evidence supported class certification even if a more lenient, "authorize and permit" compliance standard allows meal periods and rest breaks to be "waived." Substantial evidence also supported certification of the claim for "off-the-clock" work during meal periods. Brinker's contrary arguments are based on a myopic view of the record that ignores the governing standard of review.

a. The Court of Appeal Improperly Re-Weighed and Rejected Plaintiffs' Declarations and Deposition Testimony

According to Brinker, the record contains "no evidence" of "company-wide policies or practices" leading to missed meal periods, rest breaks, or work while clocked out for meals. ABM100, 103-04, 107-09.

Brinker is mistaken. As plaintiffs' opening brief explains (OBM9-12, 15-17, 116-22), the record is replete with such evidence, and it is more than sufficient to uphold the class certification order under *Sav-on*:

- Brinker executives testified that the company maintains uniform, companywide policies governing meal periods, rest breaks, and off-the-clock work. OBM15, 81 (citing, *e.g.*, 1PE259:14-261:14, 265:23-266:9, 2PE329:3-10, 19PE5172). Even Brinker does not contest this. ABM9 (citing 19PE5172).

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[77] *See also Cornn*, 2005 WL 588431 at *11 ("If employers must ensure that meal periods are taken, as Plaintiffs contend, then the Court need not make any individualized inquiries as to why any given driver may not have taken a thirty-minute lunch period.").

- Brinker executives testified that Brinker maintains a common, centralized computer payroll system recording every shift. OBM16-17 (citing, *e.g.*, 1PE296:4-14, 1PE293:4-17).

- Employee declarations show Brinker's companywide pattern and practice of imposing "early lunches," leading to work periods of up to nine hours straight with no meal period allowed. OBM9-10 &n.3 (citing, *e.g.*, 1PE97:8-10 (7:00a.m.-5:00p.m. shift; 9:00a.m. lunch required; no second meal allowed during succeeding 7½ hours), 132:16-18 ("I was typically required to take my meal period during the first hour of my scheduled shift [and] was expected to work the rest of my shift without another break"), 171:8-10 ("I would be told to take my meal break one (1) hour after arriving at work. I would then invariably work more than an additional five (5) consecutive hours without a meal break.")).

- Brinker executives' testimony confirms Brinker's uniform policy prohibiting "early-lunching" workers from taking any further meal period for up to nine hours straight. *E.g.*, 2PE440:7-18 (worker on eight-hour shift who took meal period at first hour "would be entitled to the one meal period" only), 456:5-20 ("they do not receive a second one until they hit ten hours"); 21PE5913:18-24, 5914:16-25 (managers may require early lunching within first hour worked), 5915:20-21 (worker on nine-hour shift who took early meal would be "entitled to a second meal" only "if he had worked more than ten hours").

- Employee declarations show Brinker's companywide pattern and practice of understaffing, leading to missed meal periods, rest breaks, and work while clocked out for meals. OBM9-12 & nn.2, 4-5 (citing, *e.g.*, 1PE126 (meal periods missed because "[n]o one

was scheduled or available to cover my tables"); 1PE132 (rest breaks missed because "an insufficient number of cooks" were employed); 1PE166 (off-the-clock work "because there were no other employees available to cover my job duties"); 1PE122 (rest breaks missed "due to high customer volume and short-staffing" and "no one was available to cover my tables"); 1PE148 (rest breaks missed "because there are no available servers to cover my assigned tables"); 1PE149 (off-the-clock work because "there is not another employee available to cover my job duties")).

- Employee declarations show Brinker managers' companywide awareness of the pervasive understaffing problem. *E.g.*, 1PE97:17-18) ("Our managers are well aware that we work during our meal periods"), 126:22 ("I complained to my managers [and] was told…I could not leave the floor"); 105:27-28 ("I was instructed to clock out for my break and work through it"); 130:21-23 ("I often complained to the shift manager and the general manager [but] was told the restaurant was short-staffed on the cook line and no one was available to relieve me."), 140:24-26 ("I complained to [the] shift supervisor [and was told] 'We need the computers to reflect what the law says.'").

- Brinker executives' testimony shows Brinker has done nothing, companywide, to comply with California's meal period, rest break and off-the-clock laws—except issue a uniform written policy—and has never paid premium wages to any class member. *E.g.*, 2PE451:8-12, 2PE213:11-17.

In other words, as in *Sav-on*, "[t]he record contains substantial, if disputed, evidence" that pervasive understaffing was Brinker's companywide practice. 34 Cal.4th at 329. As in *Sav-on*, "[t]he record also

contains substantial evidence" that the understaffing created "widespread, de facto" meal period, rest break and off-the-clock violations. *Id.* As in *Sav-on*, substantial evidence shows that "'no compliance program [has] ever existed, and no single class member has ever received [premium wage] compensation.'" *Id.* at 332 (quoting trial court). As in *Sav-on*, this "*theory* is amenable to class treatment." *Id.* at 329 (emphasis added).[78]

Brinker's attacks on this proof merely repeat the Court of Appeal's re-weighing process—and invite this Court to indulge in it as well. The Court should not. *Sav-on* prohibits appellate re-weighing.

Brinker says that "one-third of the declarants make no mention of meal periods" and "half of [them] make no reference to off-the-clock work"—inviting the Court to infer that those declarants never experienced understaffing, missed their meal periods or worked off the clock. ABM108. That was for the trial court to infer, or not, based on the totality of the evidence—which included many declarations detailing class members' missed meals and off-the-clock work (by Brinker's count, two-thirds and half of the total, respectively). "[Q]uestions as to the weight and sufficiency of the evidence [and] the inferences to be drawn therefrom…are matters for the trial court to decide." *Sav-on*, 34 Cal.4th at 334.

Brinker claims that "several" declarants "fail to state 'the reason *why* they worked off the clock'" during meals or "'whether their supervisors had knowledge'" of it. ABM108 (quoting Slip op. 51).[79] Yet many declarants (quoted above) explained that the reason was understaffing, and that they

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[78] *Accord*: *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1536 (2008) (reversing denial of class certification of rest break claim based on common "overall impact of [company] policies on its drivers").

[79] Brinker contends that some worked off-the-clock "by their own choice." ABM108. The idea that an hourly worker would "choose" to work without pay is absurd.

had complained to their managers. "[T]he trial court was entitled to credit plaintiffs' evidence on these points…." *Sav-on*, 34 Cal.4th at 331. Also, liability for off-the-clock work depends on an objective, "knew or should have known" standard, well-suited for class treatment. *Morillion v. Royal Packing*, 22 Cal.4th 575, 585 (2000). The Court of Appeal parroted the objective standard (Slip op. 51), but did not consider whether the trial court properly granted certification in light of it.

Brinker claims that some declarants "testified that they usually *did* receive meal breaks—albeit early in their shifts." ABM108. These declarations establish a companywide "early lunching" policy—as even Brinker's description concedes. The trial court was entitled to accept them. *Sav-on*, 34 Cal.4th at 331. Whether the "early lunching" policy violates the law (as argued above) is a question common to all class members.

Brinker claims that the declarations "crumbled when the declarants were deposed." ABM107-08.[80] That was for the trial court to consider and resolve—which it did, in the declarants' favor. Brinker also characterizes plaintiffs' declarations as "cookie-cutter." ABM107. The *Sav-on* defendant labeled them "boilerplate." 34 Cal.4th at 333. "Such observations…go to the weight of the evidence, a matter generally entrusted to the trial court's discretion." *Id.* at 334.

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[80] Brinker cites testimony of two witnesses, but mischaracterizes both. One experienced *early lunching*, followed by no further meal: "I never received a meal break when I had to work more than five consecutive hours after the first meal break." 1PE100. This is wholly consistent with her deposition, where she testified only that she received "a" meal period "on days when she worked more than five hours"—but *not* that she received a second one. 19PE5206-07. The other witness, who worked for Brinker about 40 days between November 2004 and January 2005, estimated that he missed uninterrupted off-duty meal breaks about 35% of the time. 1PE110. When deposed, he quantified this as about ten meals—generally consistent with his 35% estimate. 19PE5310.

Brinker claims that the declarations show "only what particular employees experienced at particular restaurants during particular shifts." ABM107. This overlooks the many declarants who worked at several restaurants. *See, e.g.*, 1PE116 ("I have worked in two (2) different concepts and three (3) different Brinker restaurants. Therefore, I have a good understanding of the Brinker policies and can tell you that the policies regarding meal and rest breaks do not vary between Brinker's different types of restaurants."); 1PE160 ("I did not require any additional training when moving between the three (3) different Brinker restaurants I worked in over the past approximate seven (7) years. That is because the policies and procedures are the same….").[81] The trial court was entitled to accept this testimony as substantial evidence of Brinker's companywide practices.

Perhaps recognizing that the Court of Appeal erred by crediting Brinker's declarations over plaintiffs' contrary ones, Brinker makes no attempt to rely on those. ABM99-118, *passim*; Slip op. 32, 49. Those declarations were gathered by adverse attorneys who acted as Brinker's "lawyer advocate at all times." 22PE5962:22-5063:15. The trial court properly rejected them. *Espinoza v. Domino's Pizza, LLC*, 2009 WL 882845, *12 (C.D. Cal. 2009) (rejecting "unreliable" employee declarations obtained by employer's attorneys); *Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189, 197 (N.D. Cal. 2004) (same).

As explained in plaintiffs' opening brief, instead of accepting the evidence that supported class certification, the Court of Appeal re-weighed it, rejected it, then credited other evidence. OBM117-22. Brinker's only response is a footnote contending that the panel merely "not[ed] a conflict in the evidence." ABM104n.43. Not so. The panel *reversed* class

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[81] *Accord*: 1PE122, 128, 148, 151, 153, 156, 171 (declarants who worked in more than one restaurant or hourly position).

certification after *resolving* the conflicts differently than the trial court. This was error.

Read together, plaintiffs' declarations tell the tale of a companywide pattern and practice of understaffing—the common root cause of meal period and rest break violations and off-the-clock work. The trial court was entitled to credit this evidence, and the reviewing court must accept it as true under *Sav-on*. It fully supports the finding that common questions predominated—particularly when coupled with expert survey and statistical evidence (discussed below).

b. The Court of Appeal Improperly Re-Weighed and Rejected the Proffered Survey and Statistical Evidence

The Court of Appeal also rejected plaintiffs' proffered statistical and survey evidence as a method of common proof—even though the trial court accepted it. This, too, contravened *Sav-on*. OBM123-27.

In response, Brinker asserts without elaboration that statistical and survey evidence of the sort approved in *Sav-on* cannot be used as a method of classwide proof. ABM108-09. Like the Court of Appeal, Brinker avers that such evidence could not capture the reason *why* a break was missed. *Id.* 105-06. Brinker cites no authority to support this claim. Not surprisingly, it is wrong.

When the Court of Appeal stayed the case, the parties were preparing to present their survey and statistical experts' reports. 2RJN7444:17-18, 7546:1-19; RJN12/17/07 (Exs. 1-2).[82] Those reports

[82] If the case had not been stayed, those reports—and the trial court's manageability hearings—would have been completed two years ago, in March 2007. 2RJN7546:1-19. The Court of Appeal refused to augment the record to include transcripts of the expert depositions completed before the stay. Order 04/23/08.

would have explained precisely how the surveys would be designed and their results analyzed. They can be designed to capture any factor the Court holds relevant—including whether a worker chose to "waive" a break.

Plaintiffs' survey expert, Dr. Jon Krosnick, understood that "workers may be offered the opportunity [to take rest breaks] and then waive that break if they so choose"—the compliance standard Brinker advances for meal periods as well. RJN12/17/07, Ex. 1 at 46:19-47:3. Dr. Krosnick expressly testified that he could design and implement a survey to capture "the frequency with which [such waivers] happened." *Id.* at 51:11-12; *see also id.* 113:4-6 ("a questionnaire could be designed to effectively measure the behavioral events of interest").

Plaintiffs' expert statistician, Dr. Harold Javitz, would then use the survey results, coupled with Brinker's payroll records, to extrapolate the number of violations. RJN12/17/07, Ex. 2 at 64:11-14, 120:13-16. Brinker's records are "clean" and "amenable to statistical analysis." *Id.* at 101:7-10. From data on class members' shift lengths, he will calculate the number of meal periods and rest breaks triggered by law. *Id.* at 23:10-11, 23:16-24:17, 31:23-32:9. If meal periods are mandatory, those violations can be tabulated from the records. *Id.* at 23:10-15. Timing violations can also be tabulated. *Id.* at 23:16-19. If meal periods, like rest breaks, can be waived, he can "tabulate the number of individuals who…missed a meal break for various reasons if such a question were asked on the survey." *Id.* at 147:4-7. His calculations can be adjusted depending on "what constitutes a violation." *Id.* at 31:23-32:9.

Brinker's challenge to plaintiffs' reliance on the payroll records misconstrues how this evidence will be used. ABM109-11. It will reveal the number and length of the class members' shifts, and thus the number of meal periods and rest breaks Brinker was required either to offer or ensure.

For rest periods, and if necessary for meal periods, the records will be supplemented with survey results revealing the frequency of voluntary "waivers" (if any). The survey results will also reveal the frequency of involuntarily-interrupted meal periods (*i.e.*, off-the-clock work).

Brinker itself retained an expert statistician who employed the records in precisely this way—and found significant violations applying Brinker's interpretation of the law. OBM18 (citing 3PE647:3-4, 650:6-7; 4PE983-989). Brinker's only response now is to try to renounce its own expert's analysis. ABM110n.45.

The proffered survey and statistical proof will be common to the class. Brinker may challenge the experts' methodology, but this goes merely to its weight—a question the trial court considered at length during the hearing. OBM19 & n.9 (citing argument in briefing and at hearing). Under *Sav-on*, the trial court did not abuse its discretion in accepting plaintiffs' proffered method of common proof. *Sav-on*, 34 Cal.4th at 333.

Brinker argues that *Sav-on* does not "require" or "compel" courts to accept this form of proof, or decree that it is "always appropriate." ABM116-18. Plaintiffs do not contend otherwise. What *Sav-on* does hold, however, is that if the trial court accepts proffered statistical and survey evidence as a method of common proof, the reviewing court may not second-guess its judgment. That is what the Court of Appeal did here.

Brinker also claims that a series of federal trial-level decisions rejected survey and statistical evidence as a method of common proof. ABM111-12 (citing *Brown*; *Salazar*; *Gabriella*; *Kenny*; *Kimoto*; *Wren*); *see* Part IV.E.2, above (pp. 72-75). That is wrong. No such evidence was proffered in any of those cases. By contrast, the cases in which such evidence was proffered have uniformly *accepted* it. *See*, *e.g.*, *Salvas v. Wal-Mart Stores, Inc.*, 893 N.E.2d 1187, 1205 (Mass. 2008); *Iliadis v. Wal-*

Mart Stores, Inc., 922 A.2d 710, 717, 723-25 (N.J. 2007); *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215 (Mo.App. 2007).

Brinker attempts to distinguish these cases on one basis—that they involved evidence of a "companywide practice" of pressuring managers to reduce labor costs through financial incentives. ABM113-114 (quoting *Hale*; *Iliadis*; *Salvas*; *Braun v. Wal-Mart Stores, Inc.*, 2003 WL 22990114 (Minn.Dist. Nov. 3, 2003)). Brinker ignores the substantial evidence in *this* record of Brinker's own similar companywide practice. *See, e.g.*, 24PE6502:16-24 (manager bonuses tied to "lowering payroll costs"; "keeping labor costs down…is probably "the most pressure intense part of being a Brinker manager"). The cases are not meaningfully distinguishable.

Finally, Brinker claims that "most courts" have refused to certify meal period, rest break and off-the-clock claims "for the same reasons cited [by the Court of Appeal]." ABM114-115 (citing eight cases). On the contrary, "most courts" have certified, and continue to certify, such claims. OBM112 n.53 (citing cases), 133 (citing six cases); Supp. Brief, 08/27/07, 9-11 (citing seven more cases). Recent examples include *Espinoza*, 2009 WL 882845; *Bibo*, 2009 WL 1068880; *Ortega*, 2009 WL 1851330; and *Franco v. Athens Disposal Co.*, 171 Cal.App.4th 1277, 1298-99 (2009) (common questions predominate in meal and rest case).

Trial courts routinely exercise their discretion to certify meal period, rest break, and off-the-clock claims for class treatment. That some trial courts may have denied certification simply emphasizes the discretionary nature of the ruling. The trial court did not abuse its discretion here.

D. The Court of Appeal Erred By Permitting an Affirmative Defense, Standing Alone, to Defeat Class Certification

In response to the point that affirmative defenses, standing alone, may not defeat class certification (OBM127-32), Brinker makes two

arguments, neither of which has merit (ABM122-26).

First, Brinker contends that whether an employee voluntarily chose to decline an offered break—*i.e.*, "waived" the break—is an element of the violation, rather than an affirmative defense. ABM122-23. That is not correct. "Waiver" means "the intentional relinquishment of a known right." *City of Ukiah v. Fones*, 64 Cal.2d 104, 107 (1966). That is precisely what Brinker claims. All plaintiffs must prove is that the breaks were not taken (or never authorized at all). Brinker will have to prove "waiver." Waiver is an affirmative defense, which Brinker will bear the burden to prove. *Id*. at 108; *see* DLSE Op.Ltr. 2003.08.13 at 2 (MJN Ex. 380) ("authorize and permit" standard; "burden is on the employer to show that [the employee] has knowingly and voluntarily decided not to take the meal period").

Brinker's contention is belied by its own regular use of the term "waiver" to describe this defense. *See*, *e.g.*, Answer to Petition for Review, 09/18/08, at 27 ("the company's waiver defense precluded class certification"); Reply, 04/03/07, at 23 ("[T]he Labor Code allows Brinker employees to waive meal periods."); Petition, 09/01/06, at 19 ("Plaintiffs' theory [is] that employers must police their employees to ensure that meal periods are never waived…."); Class Cert. Opp., 05/12/06, 3PE655:3-5 ("Brinker must only 'make available' a meal period, which on the spur of the moment can be…'waived' in whole or in part by the employee"); Answer, 07/01/05, 2RJN7378 ("waiver" affirmative defense).

Even the Court of Appeal characterized the defense as "waiver," as did one of the federal cases on which Brinker relies. Slip op. 30-31 ("whether…employees missed rest breaks as a result of a supervisor's coercion or the employee's uncoerced *choice to* ***waive*** *such breaks and continue working*" (emphasis added)); *Wren*, 256 F.R.D. at 208 ("individualized inquiries will be necessary…to determine *the reason meal*

breaks were missed and whether they were ***waived***").[83]

Second, Brinker contends that this affirmative defense, standing alone, may defeat certification when common questions otherwise predominate on liability. ABM123-26. However, as explained in plaintiffs' opening brief, *Sav-on* expressly holds otherwise, as does *Lockheed Martin Corp. v. Superior Court*, 29 Cal.4th 1096 (2003). Such a rule would impermissibly shift the burden of proving the "waiver" defense from Brinker onto plaintiffs. OBM127-32.[84] Brinker cites no contrary authority, and its efforts to distinguish *Sav-on* and *Lockheed* fall flat.

The three main cases on which Brinker relies do not support its position. ABM123-24 (citing *Block v. Major League Baseball*, 65 Cal.App.4th 538, 544 (1998); *Kennedy v. Baxter Healthcare Corp.*, 43 Cal.App.4th 799, 811 (1996); *Gerhard v. Stephens*, 68 Cal.2d 864, 913 (1968)). All involved non-common questions on liability and damages—not just defenses. OBM130 (discussing *Gerhard* and *Kennedy*); *Block*, 65 Cal.App.4th at 543-44 (discussing individualized liability and damages issues; "these three factors, taken together" justified denying certification). Brinker cites no case in which non-common questions surrounding defenses *alone* were allowed to defeat certification.

The Court of Appeal contravened *Sav-on* and *Lockheed* by permitting an affirmative defense to defeat class certification when common questions predominated on liability.

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[83] *See also* DLSE Op.Ltr. 2002.01.28 (MJN Ex. 41) ("if an employee *…freely chooses without any coercion or encouragement to forego or* ***waive*** *a rest period*.") (emphasis in original).

[84] It would also be manifestly unfair in this case, given that pre-certification merits discovery had been denied. 2RJN7394:22-7395:9.

E. The Court of Appeal Erred by Failing to Remand for the Trial Court to Apply its Newly-Announced Legal Standards to the Facts and Decide Class Certification Anew

As explained in plaintiffs' opening brief, the Court of Appeal contravened *Washington Mutual* by reversing class certification "with prejudice," and by failing to remand for the trial court to decide class certification afresh in light of any newly-announced legal standards. OBM133-34. Brinker's only response is that no possible evidentiary showing could ever meet those newly-announced standards. ABM126-27.

If this Court announces any new legal standards, *Washington Mutual* makes plain that remand to the trial court for reconsideration of class certification is proper. 24 Cal.4th at 928. The authorities Brinker cites (ABM127) were not class certification cases, and are therefore inapposite. Under *Washington Mutual* and basic principles of fairness, plaintiffs should be afforded an opportunity to meet the new standards on remand.

VIII. CONCLUSION

For the reasons discussed above and in Real Parties' opening brief, the Court of Appeal's judgment should be reversed and the class certification order reinstated. At a minimum, the case should be remanded to the trial court for class certification to be considered anew.

Dated: July 6, 2009

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 39,314 words (including footnotes and excluding the parts identified in Rule 8.504(d)(3)).

Dated: July 6, 2009

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