S166350

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

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

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

PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, CASE NO. D049331, GRANTING A WRIT OF MANDATE TO THE SUPERIOR COURT FOR THE COUNTY OF SAN DIEGO, CASE NO. GIC834348, HONORABLE PATRICIA A.Y. COWETT, JUDGE

BRINKER'S REPLY TO REAL PARTIES' ANSWER TO AMICUS CURIAE BRIEF OF CALIFORNIA EMPLOYMENT LAW COUNCIL

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INTRODUCTION

Rolling Five is not explicitly stated in the Wage Order, is not part of the Labor Code or its legislative history, and has been rejected by the DLSE and the one federal court to squarely address the issue. As such, Brinker and other employers had no fair notice that it was necessary to time their employees' meal periods by the precise parameters Plaintiffs propose, and to retroactively impose a Rolling Five requirement would violate their due process rights. The Court of Appeal's reasonable construction of the Wage Order should be adopted in line with the "established rule" that interpretations that create "constitutional infirmities" are to be avoided. (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 846-847.)

Should this Court hold that Rolling Five is the law, it should apply that holding prospectively to avoid these compelling due process concerns. As discussed below, Plaintiffs' position that Brinker was afforded fair notice of a Rolling Five requirement is based on mischaracterizations of the record. The DLSE, the agency responsible for enforcing the Wage Order, *renounced* a Rolling Five rule more than seven years ago – giving Brinker and other employers every reason to believe they were acting in compliance with the law. If ever there were a decision that required prospective application, a decision that Rolling Five is the law is it.

ARGUMENT

I. THE COURT OF APPEAL'S DECISION THAT ROLLING FIVE IS NOT THE LAW IS WELL-FOUNDED, AND SHOULD BE UPHELD TO AVOID CONSTITUTIONAL PROBLEMS.

As Brinker explained in its Answer to Post-Hearing Amicus Brief of California Employment Law Council ("Brinker's CELC Answer"), neither the Wage Order nor Labor Code section 512 explicitly requires that employers offer a meal period every five consecutive hours. While Plaintiffs fault the CELC for not "mention[ing]" Labor Code section 226.7, which incorporates the Wage Order (Real Parties' Answer to Amicus Curiae Brief of California Employment Law Council ("Plaintiffs' CELC Answer"), p. 30), the Wage Order and the Labor Code impose identical obligations on employers – *both* require a meal period for every five hours worked, and *neither* creates a Rolling Five requirement.[1] This Court should follow that plain language. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585 [holding that to "substitute[] other words for the express language contained [in a wage order] . . . amounts to improper judicial legislation"].)

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[1] Thus, contrary to what Plaintiffs suggest, Brinker is not arguing that AB 60 "eliminate[d] the Wage Orders' timing requirement" or "stripp[ed] away meal period protections" (Plaintiffs' CELC Answer, pp. 32-33); it is arguing the Wage Order and section 512 are consistent in their requirement that a meal period must be provided for every five hours that an employee works – not every five *consecutive* hours.

While Plaintiffs lean heavily on indicia of what they contend the IWC intended, the most significant indication of its intent is found in its Statement as to the Basis, which reflects the Wage Order's "factual, legal, and policy foundations." (*Small v. Superior Court* (2007) 148 Cal.App.4th 222, 232-233.) As Brinker explained in its CELC Answer (pp. 3-4), the Statement as to the Basis reveals a clear intent that employers provide meal periods when an employee works "more than five hours . . . *in a day*" (Statement as to the Basis for the 2000 Amendments to Wage Orders 1 through 15 and the Interim Wage Order [MJN Ex. 32], p. 20) – not, as Plaintiffs claim, when an employee works any "continuing period" of five hours (Plaintiffs' CELC Answer, p. 26).

Additional regulatory history supports the Court of Appeal's decision that no Rolling Five requirement exists. Before the current version of the Wage Order was issued in 1952, a Rolling Five requirement *was* built into the wage order, but was then deleted. In 1932, for example, the wage order stated that "no woman or minor shall be permitted to work an *excessive number of hours* without a meal period" (MJN Exs. 11, 80, emphasis added), and in 1947, the wage order was amended to state that "[n]o employee shall be required to work more than five (5) *consecutive* hours after reporting for work, without a meal period of not less than thirty (30) minutes" (MJN Ex. 13, emphasis added).

In 1952, however, the word "consecutive" was deleted (MJN Ex. 14) – signaling the IWC's intent *not* to impose a Rolling Five requirement for meal periods, but rather to require that a meal period be provided before the beginning of the sixth hour of work (not more than five hours) and before the beginning of the eleventh hour (not more than ten hours), regardless of the interval between the two meal periods. Plaintiffs' contention that "[t]he earliest Wage Orders confirm the IWC's intent to protect worker health and safety by limiting the number of hours they may work without a meal," citing *pre*-1952 wage orders (Plaintiffs' CELC Answer, pp. 27-29), does not explain the IWC's deletion of the word "consecutive" in 1952.

Plaintiffs would have this Court believe that the omission of the word "consecutive" is insignificant because they say that the IWC's 1952 minutes suggest that a Rolling Five requirement was intended:

> The meal period provision was amended to permit a 6-hour work period without a meal when such a work shift would complete the day's work, and the additional provision that a meal period shall be every 5 hours rather than providing only one meal period within the first 5 hours.

(Minutes of a Meeting of the IWC (May 16, 1952), cited in Plaintiffs' CELC Answer, p. 29.) But those minutes, clarifying that an employee is entitled to not "only *one* meal period within the first 5 hours," but a meal period for "*every 5 hours*" of work, are entirely consistent with the Court of

Appeal's decision and the IWC's deletion of "consecutive." If there is a conflict between them, the language of the Wage Order (i.e., the deletion of "consecutive") should control over the ambiguous minutes. (*Taxara v. Gutierrez* (2003) 114 Cal.App.4th 945, 950 [regulatory history should be considered only "'[w]hen the agency's intent cannot be discerned directly from the language of the regulation'"], quoting *Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1235.)

Plaintiffs' reliance on a letter and a memo from 1982 written by a single IWC staff member, Margaret Miller, is equally unavailing. (Plaintiffs' CELC Answer, p. 26, fns. 16 & 18, citing MJN Exh. 376 #s 20 & 24.) The 1982 missives, like the 1952 minutes, focus on the fact that a second meal period is triggered when an employee works more than ten hours. (MJN Exh. 376 #20 [July 13, 1982 letter addressing circumstances "where employers have scheduled 11- or 12-hour shifts" and have "fail[ed] to provide for a second meal period after the second five hours of work"]; MJN Exh. 376 #24 [March 5, 1982 memo stating that "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"].) Brinker has never maintained otherwise (Answer Brief on the Merits ("ABM"), pp. 64-66; Brinker's CELC Answer, p. 5), and thus Plaintiffs' reliance on the 1982 letter and memo, which concern the failure to provide a second meal period to employees working more than 10 hours,

misses the mark.[2] In any event, whether the letter and memo qualify as IWC regulatory history is questionable because they were written by a single IWC staff member – *not* an IWC constituent member – and were not adopted by the IWC. (Brinker's Consolidated Answer to Amicus Curiae Briefs, pp. 23, 28.)

Plaintiffs further claim that this Court's decision in *California Hotel and Motel Assn. v. IWC* (1979) 25 Cal.3d 200, supports a Rolling Five rule (Plaintiffs' CELC Answer, pp. 29-30), when in fact that case simply states: "A meal period of 30 minutes per 5 hours of work is generally required." (*California Hotel, supra*, 25 Cal.3d at p. 205, fn. 7.) That language, indicating that employees are entitled to a meal period for every five hours they work, is completely consistent with the Court of Appeal's decision that employees earn one meal period when they work "'more than five hours per day,'" and a second meal period when they work "'more than 10 hours per day.'" (Slip Op., pp. 36-37, quoting Lab. Code, § 512, subd. (a).)

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[2] Another inapposite authority cited by Plaintiffs in support of a Rolling Five requirement is an August 13, 2003 DLSE opinion letter, which addresses the meal period compliance question ("provide" v. "ensure") – not the meal period *timing* issue. (Plaintiffs' CELC Answer, p. 26, citing MJN Exh. 380). Deference is not due an agency interpretation that nowhere "discusses the relevant statutory [or regulatory] language or reflects 'careful consideration' of the precise issue before" this Court. (*People v. Cole* (2006) 38 Cal.4th 964, 987, quoting *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.)

The one case directly on point, *Nguyen v. Baxter Healthcare Corp.* (C.D. Cal., Nov. 28, 2011, No. 8:10-cv-01436) 2011 WL 6018284, flatly rejects a Rolling Five rule. While Plaintiffs complain that *Nguyen* did not "consider any of the materials discussed" in their brief (Plaintiffs' CELC Answer, p. 31), the federal court *did* consider plaintiff's "lengthy exegesis of legislative history" and concluded that she had "not furnished any binding or persuasive legal authority – and the Court is aware of none – in support of the proposition that . . . meal periods must be timed under Section 226.7, Section 516, or [the applicable wage order]." (*Id.* at *7.)

The Court of Appeal's interpretation of the Wage Order, in sum, is supported by the Wage Order's plain language, its regulatory history, the position of the DLSE, and the single case on point. That interpretation should be affirmed not only because it is correct, but also because the Wage Order "must be construed, if possible, to avoid constitutional issues." (*People v. Brown* (1993) 6 Cal.4th 322, 335; see also *Gilbert v. City of San Jose* (2003) 114 Cal.App.4th 606, 613 [construing ordinance to avoid constitutional problems where "we can so construe" it].) As discussed below, if this Court were to interpret the Wage Order to include a Rolling Five rule – and apply that interpretation retroactively – it would violate the due process rights of Brinker and other employers who were not given fair notice of the existence of a lawful Rolling Five requirement.

II. RETROACTIVE APPLICATION OF A ROLLING FIVE RULE WOULD VIOLATE THE DUE PROCESS RIGHTS OF BRINKER AND OTHER EMPLOYERS WHO WERE NOT GIVEN FAIR NOTICE OF THE REQUIREMENT.

"Civil as well as criminal statutes must be sufficiently clear as to give a fair warning of the conduct prohibited, and they must provide a standard or guide against which conduct can be uniformly judged by courts and administrative agencies." (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 231; *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 316 (dis. opn. of Baxter, J.) [This Court "must uphold the standards of statutory clarity required by the Constitution."].) As Justice Baxter aptly stated: "Due process demands that any statute be precise enough to convey its meaning to a person of reasonable intelligence." (*Ibid.*)

As explained in Brinker's CELC Answer (pp. 9-11), the Wage Order contains no explicit "timing" requirement with respect to meal periods, in sharp contrast with the "timing" requirement that exists with respect to rest periods or with the entertainment industry wage order's plain mandate that meal periods be timed from the "termination of the preceding meal

period."[3] Because the Wage Order does not "provide[] constitutionally adequate notice of proscribed conduct," any decision that a Rolling Five requirement exists should be applied only prospectively. (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 536; *United States v. AMC Entertainment, Inc.* (9th Cir. 2008) 549 F.3d 760, 768 ["'[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'"], quoting *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108.)[4]

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[3] Curiously, Plaintiffs cite the entertainment industry wage order for the proposition that meal periods are required at certain "'intervals'" (Plaintiffs' CELC Answer, p. 29, citing MJN Exh. 328), but the entertainment industry wage order explicitly ties the second meal period to the number of hours that have elapsed since "the termination of the preceding meal period." (Cal. Code Regs., tit. 8, § 11120, subd. (11)(A), discussed in Brinker's CELC Answer, p. 7 & ABM, p. 72.) No such timing requirement exists in the Wage Order applicable here. The entertainment industry wage order demonstrates that the IWC knows how to write a timing requirement that provides fair notice to regulated employers if that is what it wants.

[4] For the same reasons, if this Court decided that the Wage Order requires a rest period to always be taken before the first meal period, which it does not (ABM, pp. 95-98), such a decision should be applied prospectively. The Wage Order states only that rest periods "insofar as practicable shall be in the middle of each work period" (Cal. Code Regs., tit. 8, § 11050, subd. (12)(A)), nowhere suggesting that the first rest period must be taken before the first meal period. (ABM, pp. 95-98.) Moreover, just as with the Rolling Five issue, the DLSE has not given employers fair notice that a rest period invariably must be taken before the first meal period. (*Ibid.*)

Plaintiffs' arguments that Brinker *was* given fair notice that Rolling Five was the law fall flat. First, Plaintiffs insist that the trial court's July 2005 Rolling Five opinion provided Brinker "actual notice that its early lunching policy might be declared unlawful." (Plaintiffs' CELC Answer, pp. 12-13, 16.) But fair notice does not derive from an interlocutory trial court decision, but rather from an administrative agency interpreting the regulation or the regulation itself. Moreover, as explained in Brinker's CELC Answer (pp. 12-13), the Court of Appeal held that the 2005 opinion was advisory and thus of no authoritative value. When the Court of Appeal later decided that the trial court's Rolling Five decision was *not* advisory, it held that it was erroneous. (*Ibid.*)

Plaintiffs' contention that the trial court's certification order notified Brinker that it "had a classwide policy of deliberate head-in-the-sand non-compliance" (Plaintiffs' CELC Answer, p. 17) is also without merit. The trial court never decided that Brinker had a classwide policy of non-compliance – rather, it decided only that common issues would predominate over individual ones in the resolution of Plaintiffs' claims, justifying class treatment. "[I]n determining class certification questions, the courts do not decide the merits of the case." (*Lewis v. Robinson Ford Sales, Inc.* (2007) 156 Cal.App.4th 359, 367.)

Next, Plaintiffs contend Brinker had fair notice because it "knew that the DLSE . . . had declared aspects of its meal-and-rest-break policies to be

unlawful." (Plaintiffs' CELC Answer, p. 15.) Plaintiffs mischaracterize the record. The DLSE's 2002 investigation into Brinker's alleged failure to provide meal and rest breaks resulted in no final conclusions of wrongdoing – and Brinker admitted no wrongdoing whatsoever. (2PE358-359.) Moreover, the Los Angeles County Superior Court overseeing the injunction designed to ensure Brinker's *future* compliance with wage and hour laws has not found any violation – in fact, no violation has ever been alleged. (ABM, pp. 9-10.) Plaintiffs' assertions that "violations" were found, and that Brinker "fail[ed] to remedy those violations" (Plaintiffs' CELC Answer, p. 15), are unsupported.

The notion that the DLSE gave Brinker fair notice is completely undermined by the fact that the DLSE rejected a Rolling Five rule over seven years ago. (Brinker's CELC Answer, pp. 11-12.) The letter the DLSE issued in 2002 endorsing Rolling Five (MJN Ex. 42) was withdrawn in 2004, the year Plaintiffs filed suit, "and therefore cannot be relied upon to support plaintiffs' claims." (Slip Op., p. 40.) In 2008, the DLSE explicitly stated that "[u]ntil such authority exists interpreting the wage orders and Labor Code § 512 to require employers to provide meal periods every five hours, *the Division will not interpret California's meal period provisions in that fashion.*" (MJN Ex. 57, emphasis added.) As a result, Plaintiffs' statement that "Brinker has known since at least the DLSE's 2003 follow-up audit in Santa Clara that the DLSE considered [its early

lunching] policy unlawful" (Plaintiffs' CELC Answer, p. 16) is inaccurate. (*United States v. Chrysler Corp.* (D.C. Cir. 1998) 158 F.3d 1350, 1356 ["[A]n agency is hard pressed to show fair notice when the agency itself has taken action in the past that conflicts with its current interpretation of a regulation."].) The DLSE's actions support Brinker's position, not Plaintiffs' position.

Next, Plaintiffs argue that employment treatises "have been warning California employers" that Rolling Five is the law (Plaintiffs' CELC Answer, p. 20), when in fact the treatises at best only underscore the confusion surrounding the issue. (Brinker's CELC Answer, pp. 13-15 [explaining that the Simmons treatise states that Rolling Five is "'arguably'" the law, but also arguably "'illogical and contrary to the interests of the employee and the employer'"], quoting Richard J. Simmons, California's Meal and Rest Period Rules: Proactive Strategies for Compliance (2d ed. 2007) § 2.3(a), p. 11.)

Finally, even if this Court decides that the May 16, 1952 minutes support Plaintiffs' position that the IWC intended to impose a Rolling Five requirement, a single paragraph buried in obscure 60-year-old minutes cannot have "conveyed [the Wage Order's] meaning to a person of reasonable intelligence." (*People ex rel. Lungren, supra*, 14 Cal.4th at p. 316 (dis. opn. of Baxter, J.).) Prospective application of any Rolling Five requirement is thus constitutionally required.

III. PLAINTIFFS' ATTEMPTS TO REARGUE THE MERITS OF THE MEAL PERIOD COMPLIANCE ISSUE ARE IMPROPER.

Plaintiffs spend the final 12 pages of their brief restating their argument that employers must not simply make meal periods available, but must "*confirm that proper meal periods have been taken.*" (Plaintiffs' CELC Answer, p. 39, emphasis added.) Such arguments have no place here because – as Plaintiffs readily admit – "CELC's brief does not address" the meal period compliance question at all. (*Id.*, p. 33.)

While Brinker refers this Court to its extensive briefing on the meal period compliance issue, which fully responds to Plaintiffs' arguments (ABM, pp. 24-64), if this Court considers Plaintiffs' brief on this issue, Brinker quickly makes three points of clarification:

First, Plaintiffs claim that "[c]ontrary to suggestions during oral argument, plaintiffs' position is not that 'provide' means 'ensure.'" (Plaintiffs' CELC Answer, p. 37.) But in response to Justice Liu's questioning at argument, Plaintiffs' counsel confirmed their "position that *the employer has to ensure that the meal period is actually taken* by the employee." As Plaintiffs' counsel elaborated: "*[T]he employer's obligation is to ensure that the worker is not performing work . . . .*"

Indeed, Plaintiffs have consistently maintained in their briefs, both before and after oral argument, that "employers must . . . *confirm that proper meal periods have been taken.*" (Plaintiffs' CELC Answer, p. 39,

emphasis added; *id.*, p. 40 [Labor Code section 226.7 "is designed to create an incentive for employers to use their existing controls for the purpose of *making sure workers take their meal periods.*"], emphasis added; Plaintiffs' Opening Brief on the Merits, p. 28 [arguing that employers must "*ensure that work stops* for the required thirty minutes"], emphasis added.) Plaintiffs' protestations aside, their unmistakable position is, and has always been, that "'provide' means 'ensure.'"

Second, despite what Plaintiffs suggest, the law *can* prohibit employers from "pil[ing] on the work to dissuade or discourage [their] workers from taking a break" (Plaintiffs' CELC Answer, p. 39), without interfering with employees' right to decline a meal period. The Court of Appeal, in fact, rejected an "ensure" standard while making crystal clear at the outset of its opinion that "*employers cannot impede, discourage or dissuade employees from taking meal periods.*" (Slip Op., p. 4, emphasis added.) Thus, under the Court of Appeal's opinion, an employer who "discourages its employees from taking their full 30-minute meal periods" "has not complied with the law – even if it has a paper policy stating that meal periods are available." (Plaintiffs' CELC Answer, pp. 39-40, 44.)

Finally, Plaintiffs showcase the opinion of one judge from the Eastern District of California, who "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. (E.D.Cal. 2009) 614 F.Supp.2d 1089, 1098, fn. 3, cited in Plaintiffs' CELC Answer, pp. 42-44.) The language on which Plaintiffs rely, however, is pure dicta, as the federal court itself acknowledges. (*Id.* at p. 1099 ["As stated before, the court need not make a ruling on the precise meaning of IWC Order 14-2001. The court agrees that under the applicable meal period regulations, *employers are required at minimum to offer employees a meal period after a work period of five hours. Whether employers are required to do more is a question that need not be answered.*"], emphasis added; see also ABM, p. 57, fn. 20.)

Twelve federal courts have squarely held that California employers need only provide their employees meal periods – not ensure that they are taken. (Brinker's Answer to Amicus Curiae Brief of Rogelio Hernandez, p. 15, fn. 9 [explaining that as of March 28, 2011, eleven federal courts had embraced a "provide" standard]; *Nguyen*, *supra*, 2011 WL 6018284, at *7.)[5] While Plaintiffs sweepingly insist that those decisions "*all* suffer

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[5] Plaintiffs' claim that three Court of Appeal decisions have applied what they consider "the correct legal standard" (Plaintiffs' CELC Answer, p. 42) is mistaken. The Third District's decision in *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, is entirely consistent with a "provide" standard (ABM, pp. 53-55), and the court in *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, did not decide whether an employer must "provide" meal periods or "ensure" that provided meals are taken (*id.* at p. 1303). Similarly, the court in *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, held that class certification was appropriate in view of defendant's policy requiring drivers to take meal and rest breaks while they were on-call and in uniform, without ever considering the "provide v. ensure" question (*id.* at pp. 1528-1529, 1534).

from similar analytical flaws" (Plaintiffs' CELC Answer, p. 41, fn. 30), it is *Plaintiffs*, not twelve federal courts, whose analysis is flawed.

CONCLUSION

For all of the foregoing reasons, Brinker respectfully requests that this Court hold there is no Rolling Five requirement in California. If there *is* such a requirement, due process requires that it be applied prospectively, as Brinker and other employers did not receive fair notice – from the Wage Order, from the DLSE, or from any other authority – that Rolling Five was the law.

Respectfully submitted,

Dated: January 12, 2012

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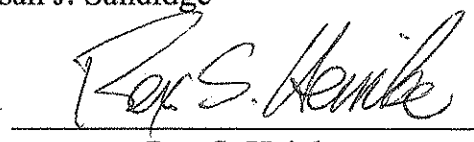
By 
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CERTIFICATE OF COMPLIANCE

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

This brief consists of 3,806 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: January 12, 2012

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2029 Century Park East, Suite 2400, Los Angeles, CA 90067. On January 12, 2012, I served the foregoing document described as: **BRINKER'S REPLY TO REAL PARTIES' ANSWER TO AMICUS CURIAE BRIEF OF CALIFORNIA EMPLOYMENT LAW COUNCIL** on the interested parties below, using the following means:

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