Case No. S166350

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Defendants and Petitioners,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,

Respondent.

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE RADER, and SANTANA ALVARADO,

Plaintiffs and Real Parties in Interest.

On Appeal from the
Fourth Appellate District, Division One, No. D049331
Superior Court of San Diego County, No. GIC834348
Hon. Patricia A.Y. Cowett

BRIEF FOR *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF PETITIONERS

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I. INTRODUCTION

This appeal concerns significant and recurring California meal period law issues that affect virtually every employer and employee, every work day. *Amicus* California Employment Law Council ("CELC") focuses on the two most important issues presented: (1) what an employer's obligation to "provide" unpaid meal periods under the California Labor Code entails, and (2) whether class treatment is appropriate for meal period claims that ultimately turn on individualized circumstances.[1]

First, does the statutory obligation to "provide" meal periods mean what it says, or does it somehow require employers to ensure that employees actually take their breaks? The court of appeal correctly found that the California Labor Code requires employers to "provide" employees with meal periods — *i.e.*, employees may elect to forego the unpaid period provided, and employers will be subject to liability only when employees are forced to forego the period. This interpretation promotes employee

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[1] The "floating five" meal period issue is critical, but CELC does not believe it can seriously be argued that the statute is wrong; otherwise, absurd results follow. Take for example an employee scheduled to work from 9 a.m. to 12 p.m., and 12:30 p.m. to 5:30 p.m., who one day works 15 minutes of overtime. It cannot be that the statute mandates that she take a second meal period based on nothing more than having worked these few

(continued...)

choice, is consistent with the statutory text and underlying Legislative intent, and preserves the considered balance the California Legislature in the Labor Code meal period provisions struck between employee rights, employer obligations, and the realities of the modern workplace.

Second, assuming that the employers are obligated to provide meal periods but not ensure that they are taken, the determinative inquiry becomes whether an employee was forced — or elected — to forego his or her period. This is a fact-intensive and highly individualized inquiry that must be determined on a case-by-case basis, and normally cannot be adjudicated on a classwide basis. The court of appeal thus also correctly found that in this context, absent unusual circumstances, individual issues will predominate over common ones.

Federal courts that have addressed these two issues uniformly have concluded that employers are liable under California law only where they force an employee to forego a meal period and that the resolution of this issue involves predominantly individual questions that are not amenable to class treatment. The Fourth Appellate District below provided meaningful

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extra minutes. To the contrary, the statute requires that a second meal period be provided only after 10 hours worked. CAL. LAB. CODE § 512.

and sorely-needed guidance from a California appellate court on these issues. *Amicus* thus urges the Court to affirm.

II. INTEREST OF *AMICUS*

Amicus CELC is a voluntary, non-profit organization that promotes the common interests of employers and the general public in fostering the development in California of reasonable, equitable, and progressive rules of employment law. CELC's membership includes over 50 private sector employers in the State of California who collectively employ well in excess of a half-million Californians.

CELC has been granted leave to participate as *amicus curiae* in many of California's leading employment cases, including *Jones v. Lodge at Torrey Pines Partnership*, 42 Cal. 4th 1158 (2008); *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007); *Green v. State of California*, 42 Cal. 4th 254 (2007); *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798 (2001); *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317 (2000); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000); *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163 (2000); *Asmus v. Pacific Bell*, 23 Cal. 4th 1 (2000); *White v. Ultramar, Inc.*, 21 Cal. 4th 563 (1999); *Cotran v. Rollins Hudig Hall International, Inc.*,

17 Cal. 4th 93 (1998); *Cassista v. Community Foods, Inc.*, 5 Cal. 4th 1050 (1993); and *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988).

III. THE DUTY TO "PROVIDE" MEAL PERIODS MEANS TO MAKE AVAILABLE — NOT TO ENSURE OR POLICE

California law obligates employers to "provide" meal and rest periods and imposes a premium of one hour's pay for each day that the employer does not provide a statutory break, in addition to pay for the portion of the meal period worked. CAL. LAB. CODE § 226.7; *id.* § 512; *accord* CAL. CODE REGS. tit. 8, § 11050(11), (12). The court of appeal correctly held that the obligation to "provide" means just that, and rejected plaintiffs' argument that "provide" means "ensure" — that employers must force employees actually to take meal periods or face strict liability regardless of the reasons behind the missed meal period. The court of appeal correctly recognized that the "ensure" (or "affirmative obligation") interpretation plaintiffs urge flies in the face of common sense and public policy, ignores the legislative intent behind California's meal and rest period laws, and contradicts the plain meaning of the statutory text.

A. Requiring Employees To Take Meal Periods When They Otherwise Would Elect To Forego Them Contradicts The Underlying Public Policy, Creates Absurd Consequences And Perverse Incentives For Employees And Employers Alike, And Needlessly Burdens The Modern Workplace.

This Court noted in *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007), that "[e]mployees *denied* their rest and meal periods face greater risk of work-related accidents and increased stress," and that "being *forced to forego* rest and meal periods denies employees time free from employer control that is often needed to be able to accomplish important personal tasks." *Id.* at 1113 (emphases added). These dual policy goals — protecting the health and safety of employees and offering time free from employer control — became part of the legislative scheme in 1999 and 2000 with the enactment of California Labor Code sections 226.7 and 512. *See* 2000 CAL. STAT., ch. 876, § 7; 2000 CAL. STAT., ch. 492, § 4; 1999 CAL. STAT., ch. 134, §§ 6, 10; *Bearden v. U.S. Borax, Inc.*, 138 Cal. App. 4th 429, 433-34, 437-38 (2006) (discussing history of enactment).

As shown below, these policy goals are fully satisfied if the employer provides — that is, makes fully available — a meal period. If the employee for reasons of his or her own chooses not to take all or part of the

meal period made available, there should be no statutory violation, as the court of appeal correctly concluded.

1. Interpreting section 512 to require employers to force employees to take their meal periods is paternalistic and yields absurd results.

Making meal periods available (rather than forcing employees to take them) is wholly consistent with the stated policy of California's meal period laws. Well-established law concerning breaks is analogous. Employers must *provide* breaks that employees have the statutory right (but not obligation) to take. This preserves the State's interest in ensuring workers' health, safety, and freedom from the control of their employer because employees remain free to break and rest, eat, or enjoy their free time in any way they see fit. *Cf. Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 586 (2000) (rejecting argument that employees were free of employer control because, while they could read or sleep, they could not engage in other activities), *cited in Murphy*, 40 Cal. 4th at 1113.

The contrary reading plaintiffs advance — one that requires employees to take their meal periods — puts employers in the position of forcing their employees to take their meals even if employees do not want

the unpaid 30-minute break, and punishing or terminating employees who wish to structure their free time differently. This kind of paternalism serves neither employees nor employers where individuals "would understandably rather work during and be paid for their meal periods than to be forced to take off-duty and unpaid meal periods." *See Lanzarone v. Guardsmark Holdings, Inc.*, No. CV-06-1136, 2006 WL 4393465, at *7 (C.D. Cal. Sept. 7, 2006).

Moreover, forcing employees to take provided meal periods, regardless of how they would prefer to structure their free time, produces absurd results. *See Wasatch Prop. Mgmt. v. Degrate*, 35 Cal. 4th 1111, 1122 (2005) ("[T]he statute should be interpreted to avoid an absurd result."). Consider the following absurdities that result from defining "provide" as "forcing an unwilling employee to take":

- "The Waitress and the Big Tippers": A waitress at a fancy restaurant is scheduled to work a seven-hour shift, from 5:00 p.m. to 8:30 p.m., and 9:00 p.m. to 12:30 a.m. She does not like missing out on the tips that are left between 8:30 p.m. and 9:00 p.m., would rather eat on the run, leave work a half-hour earlier, and make more money (since she wouldn't lose

any tips). The employer has no objection. Yet this cannot be done if "provide" means "forced to take."

- "The UPS Driver": A UPS driver is paid by the hour. He brings a bag lunch. He is on the road for the entire day. His employer does not care if he clocks out for lunch, cools his heels in his truck for half an hour, and then clocks in, or if he eats on the run, gets paid the same amount, and goes home a half-hour earlier. An absurd result occurs if "provide" requires the employer to force the employee to pull his truck to the side of the road and take a half-hour unpaid break.

- "The Soccer Mom": A white-collar employee normally works from 8:00 a.m. to 12:00 p.m., and 1:00 p.m. to 5:00 p.m., with a one-hour unpaid meal period. Her son has a soccer game starting at 4:30 p.m. If she skips lunch and eats at her desk, she can put in a full day, not lose pay, and make it to the game. If "provide" means "forced to take," it can't be done.

- "The Working Mom with an Infant Child and the Day Care Center": A mother is scheduled to work from 8:00 a.m. to

12:00 p.m., and 12:30 p.m. to 4:30 p.m. The day care center closes at 5:00 p.m., and charges a late pickup fee of $20 for every 15 minutes after 5:00 p.m. The Mother wants to eat at her desk and not risk incurring the penalty. It would be absurd to force the employer to threaten discharge if she skips the meal break.

The bottom line is that requiring employees to take their meal period, where the employer has provided it within the meaning of the Labor Code and Wage Order 5-2001, creates situations that are patronizing, unfair, and contrary to employees' own interests in controlling their free time.

2. Holding employers strictly liable for employees' failure to take provided meal periods also creates perverse incentives.

Forcing employees to take their meal periods not only deprives them of the hallmark of their freedom from employer control — the right to choose how to spend their time — but also creates perverse incentives that the Legislature could not have intended.

First, as discussed above, forcing employees to clock-out and take their meal period perverts the underlying public policy consideration of providing employees with time free from employer control. Employers will be forced to require employees who otherwise voluntarily would choose to spend their free time differently to follow a strict meal period schedule. And noncompliant employees will risk punishment and even termination for not adhering to a meal period schedule meant to "protect" them.

Second, imposing strict liability on employers for meal periods that their employees miss, regardless of whether employees want or need the break, "suggests a situation in which a company punishes an employee who foregoes a break only to be punished itself by having to pay the employee." *White v. Starbucks Corp.*, 497 F. Supp. 2d 1080, 1089 (N.D. Cal. 2007). As the federal district court in *White* explained, in rejecting an interpretation (like plaintiffs' here) requiring employees to take breaks against their will: "In effect, employees would be able to manipulate the process and manufacture claims by skipping breaks or taking breaks of fewer than 30 minutes, entitling them to compensation of one hour of pay for each violation." *Id.* at 1089; *accord Brown v. Fed. Express Corp.*, 249 F.R.D. 580, 585-86 (C.D. Cal. 2008) ("It would also create perverse incentives, encouraging employees to violate company meal break policy in

order to receive extra compensation under California wage and hour laws."); *Kenny v. Supercuts, Inc.*, 252 F.R.D. 641, 645 (N.D. Cal. 2008) (approving the reasoning in *White* and *Brown*); *Salazar v. Avis Budget Group, Inc.*, 251 F.R.D. 529, 533-34 (S.D. Cal. 2008) (approving the reasoning in *White*, *Brown*, and *Kenny*). The Legislature surely did not intend a system that contradicts employee free choice, and rewards abuse and manipulation.

3. Imposing the burden of policing employees' meal period compliance will unduly and unnecessarily stifle the dynamism of the modern workplace.

One can imagine a context in which requiring employees to take their meal periods, and forcing employers to police compliance, makes sense: Think of an assembly line where employees start with the factory bell at 8:00 a.m., work for four hours with a 15-minute rest period, take a scheduled half-hour lunch at noon that begins and ends with the bell, and then return to work for another four hours with a 15-minute rest period until 4:30 p.m., when the factory bell rings to close the day. Employees work set schedules and in unison; there is no opportunity for one group of employees to continue working and work without their colleagues for half an hour, or

concomitantly, for the group that took its lunch, to work without the other at the end of the day.

This scenario does not describe the modern diversity and dynamism of the typical California workplace. Employees may come and go on their own schedules; no bell rings to start the day and no bell rings to end the day. Work today may be collaborative, work tomorrow may be singular, and work the next day may be in a remote location. As the Northern, Southern, and Central Districts of California have observed, imposing an affirmative obligation to ensure meal periods "would be impossible to implement for significant sectors of the mercantile industry (and other industries) in which large employers may have hundreds or thousands of employees working multiple shifts." *White*, 497 F. Supp. 2d at 1088; *accord Brown*, 249 F.R.D. at 585 ("Requiring enforcement of meal breaks would place an undue burden on employers whose employees are numerous or who, as with [p]laintiffs, do not appear to remain in contact with the employer during the day."); *Kenny*, 252 F.R.D. at 645 (approving the reasoning in *White* and *Brown*); *Salazar*, 251 F.R.D. at 533-34 (approving the reasoning in *White*, *Brown*, and *Kenny*).

Imposing an affirmative obligation to *ensure* that meal periods are taken will needlessly burden the modern workplace. Not only must

employers make meal periods available and relieve employees who wish to exercise their statutory right to breaks, they must monitor employees — wherever they may be working — to ensure that they are actually taking their meal periods even if the employees would rather spend their free time differently. Of course, when employers discover that their employees have skipped meal periods, they must pay each of them an additional hour of pay, even though it already made breaks available and took care that employees could legitimately step away from their jobs. And if employers want to avoid the problem of missed meal periods in the future, they will have to try to prevent them by hiring employees to monitor compliance, or at least make an example of employees who decided for reasons of their own that they wanted to wrap up their work early by voluntarily foregoing a meal period.[2]

In this cyclone of compliance, monitoring, and discipline, one could easily lose sight of the whole point for meal and rest periods: giving employees free time away from their employer's control.

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[2] Plaintiffs contend that employer policing of meal breaks is of no concern because employers are legally required to track employee meal periods anyway. (Plaintiffs' Opening Brief on the Merits ("AOB") at 75.) This begs the question. Employers need to demonstrate their compliance with the meal period requirement, which should be to make available the meal period. Employers should not be required to ensure that employees take the provided periods, either as a matter of law or recordkeeping.

B. The Legislature And The Industrial Welfare Commission Intended To Stop Employers From Forcing Employees To Forego Their Meal Periods, Not To Prevent Employees From Choosing To Skip Them.

The Legislature and the IWC did not intend such burdensome and tiring paternalism. They enacted meal and rest period laws to address employers' failure to make such breaks available to employees. The interpretation that the court of appeal adopted and CELC urges here — requiring employers to make meal periods available — is consistent with this intent. Plaintiffs' interpretation — requiring employers to police and ensure their employees take provided breaks against their will — is not. The legislative history and the scheme of California's meal period law make this clear.

This Court cited much of the relevant legislative history in *Murphy*:

- The statute requires one hour of pay "for each workday that they are *required to work* through a meal or rest period." *Murphy*, 40 Cal. 4th 1094, 1104 (emphasis added).

- "An employee *forced to forego* his or her meal period similarly loses a benefit to which the law entitles him or her." *Id.* (emphasis added).

- "[IWC Commissioner Barry Broad testified] [t]his [meal and rest pay provision applies to] an employer who says, *you do not get lunch* today, you do not get your rest break, you must work now. That is . . . the intent . . . ." *Id.* at 1110 (emphasis added; internal quotation marks omitted; third and fourth alterations in original).

- "[T]he Legislature intended [the meal payment] first and foremost to compensate employees *for their injuries*." *Id.* at 1111 (emphasis added).

- "[E]mployees suffer from being *forced to work* through rest and meal periods." *Id.* at 1113 (emphasis added).

The Court also noted that Assembly Bill 2509, which enacted Labor Code section 226.7, from its inception provided payment to employees who were "*required to* perform any *work*"; that the Senate amendments to Assembly Bill 2509 allowed for the recovery of premiums when statutory

breaks "were not *offered*"; and that the amended version entitled the employee "to the additional hour of pay immediately upon being *forced to miss* a rest or meal period." 40 Cal. 4th at 1106, 1108 (emphases added). *Accord Corder v. Houston's Rests., Inc.*, 424 F. Supp. 2d 1205, 1207, 1208 (C.D. Cal. 2006) ("The Legislature mandated these meal and rest periods . . . in response to the adverse impact it believed resulted from employer practices that *required* employees *to work* long hours and substantial periods of time without meal or rest periods."; "[Assembly Bill 2509] was introduced as a means of enforcing the existing IWC wage order prohibitions against *requiring* an employee *to work* during a meal or rest break . . . .") (emphases added).

The Legislative Digest and committee reports for the relevant statutes are to the same effect. "This bill would require any employer that *requires* any employee *to work* during a meal or rest period mandated by an order of the [IWC] to pay the employee one hour's pay for each workday that the meal or rest period is not provided." 2000 CAL. STAT., ch. 876, Digest (Assembly Bill 2509); *accord* 2000 CAL. STAT., ch. 492, Digest ¶ 4 (Senate Bill 88) (describing employer's duty to provide meal periods); 1999 CAL. STAT., ch. 134, Digest (Assembly Bill 60) (same).

This history makes clear that the Legislature first and foremost was concerned with protecting employees from employer control and making sure that employees were given the opportunity to take duty-free breaks. An interpretation requiring employees to take meal periods without regard for their own preference squarely contradicts the statutory intent.

C. In Any Event, The Statutory Text Imposes A Duty Only To Make Available Meal Periods, Not To Ensure Or To Police That They Are Taken.

"Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation." *Murphy*, 40 Cal. 4th at 1103. Here, the statutory text, itself, supports only one interpretation.

1. "Provide" means provide.

California Labor Code section 512, which was enacted as part of the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999, 1999 Cal. Stat., ch. 134, §§ 1, 6, requires employers to "provide" meal periods: "An employer may not employ an employee for a work period of more than

five hours per day without *providing* the employee with a meal period of not less than 30 minutes . . . ." CAL. LAB. CODE § 512(a) (emphasis added).

One year later, the Legislature amended California Labor Code section 516 to prohibit the IWC from promulgating wage orders inconsistent with section 512. *See* 2000 CAL. STAT. ch. 492, § 4; *accord Bearden v. U.S. Borax, Inc.*, 138 Cal. App. 4th 429, 434-35 (2006) (setting forth history of sections 512 and 516 and applicable wage orders). Shortly thereafter, the Legislature promulgated Labor Code section 226.7, which similarly begins by explaining that an employer may not "*require* an employee *to work* during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission." CAL. LAB. CODE § 226.7(a) (emphasis added). It concludes by imposing premium pay if the employer "*fails to provide* an employee" with a meal or rest period in accordance with the applicable Wage Order. CAL. LAB. CODE § 226.7(b) (emphasis added).

The critical word in both California Labor Code section 226.7 and section 512 is "provide." This Court should neither add to nor detract from the language chosen by the Legislature, but instead ascribe to "provide" its ordinary and plain meaning. CAL. CIV. PROC. CODE § 1858 ("In the construction of a statute or instrument, the office of the Judge is simply to

ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."); *Ramos v. Superior Court*, 146 Cal. App. 4th 719, 727 (2007) (the court must "look first to the words the Legislature used, giving them their usual and ordinary meaning").

What is the common meaning of "provide"? The fourth edition of the *American Heritage Dictionary*[3] defines it thus: "1. To furnish; supply: *provide food and shelter for a family*. 2. To make available; afford: *a room that provides ample sunlight though French windows*. 3. To set down as a stipulation: *an agreement that provides deadlines for completion of the work*." AMERICAN HERITAGE DICTIONARY 676 (4th ed. 2000); *accord* WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1556 (1996) ("provide" means to "make available, furnish; giving example, "to provide employee with various benefits").

[3] In *Murphy*, this Court looked to this same dictionary to define the word "pay" in California Labor Code section 226.7 as part of its analysis of that statute. *See* 40 Cal. 4th at 1104 ("'Pay' is defined as 'money [given] in return for goods or services rendered.' (American Heritage Dict. (4th ed. 2000) p. 1291.)") (alteration in original).

The plain and common-sense meaning of California Labor Code sections 512 and 226.7, therefore, is that employers are obligated to *make available* the required meal period in accordance with the requirements of section 512; only the failure to *make available* the required meal period should result in the one-hour premium set forth in section 226.7. *Accord Kenny*, 252 F.R.D. at 645; *Brown*, 249 F.R.D. at 585 ("None of these provisions [California Labor Code sections 226.7 and 512 and section 11 of the applicable wage order] supports Plaintiffs' position that Defendant was required to ensure that Plaintiffs took meal breaks."); *White*, 497 F. Supp. 2d at 1088-89 ("In short, the employee must show that he was *forced to forego* his meal breaks as opposed to merely showing that he did not take them regardless of the reason.") (emphasis in original).[4]

[4] *See also Salazar*, 251 F.R.D. at 533 ("[T]he Court holds plaintiffs must show defendants *forced* plaintiffs to forego missed meal periods.") (emphasis in original); *Kohler v. Hyatt Corp.*, No. CV 07-782, 2008 U.S. Dist. LEXIS 63392, at *18 (C.D. Cal. July 23, 2008) ("An employee must show that he was 'forced to forego his meal breaks, as opposed to merely showing that he did not take them regardless of the reason.'") (citing *White*); *Perez v. Safety-Kleen Sys., Inc.*, 253 F.R.D. 508, 515 (N.D. Cal. 2008) ("[W]hile employers cannot impede, discourage or prohibit employees from taking meal breaks, they need only make them available, not ensure they are taken."); *Watson-Smith v. Spherion Pac. Workforce, LLC*, No. C 07-05774, 2008 WL 5221084, at *3 (N.D. Cal. Dec. 12, 2008) ("[E]mployers have an obligation to *provide* meal breaks, but are not strictly liable for any employee who fails to take a meal break, regardless of the reason.") (emphasis in original).

Plaintiffs' urged reading of "ensure" into sections 226.7 and 512 is inconsistent with the definition of provide, "insert[s] what has been omitted" in contravention of California Code of Civil Procedure section 1858, and ignores that "words are to be given their plain and common sense meaning." *See Murphy*, 40 Cal. 4th at 1103 (citing *Lungren v. Deukmejian*, 45 Cal. 3d 727, 735 (1988)).[5]

2. Wage Order 5-2001 does not change the plain meaning of the statutory language.

Subsection 11(A) of IWC Wage Order 5-2001 — like IWC Wage Orders 5-1998 and 5-1989 before it — reads in relevant part: "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes . . . ." Plaintiffs wrongly contend that this language supports their "affirmative obligation"

[5] Plaintiffs rely heavily on *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949 (2005). (AOB at 66-69.) *Cicairos*, however, is inapposite because it turned on whether the defendant employer provided meal periods in the first instance. *Id.* at 963 (the evidence indicated that the employer at best simply assumed that employees took meal periods; "Under these facts, the defendant has failed to establish it provided the plaintiffs with their required meal periods."); *see also White*, 497 F. Supp. 2d at 1088-89 (discussing and distinguishing *Cicairos*); *Kenny*, 252 F.R.D. at 645-46 (same).

interpretation. This language is consistent with, and in any event does not alter, the plain meaning of the statutory language.

a. <u>The DLSE itself has construed the language contained in Wage Order 5-2001 to focus on the employer's provision, rather than the employee's taking, of the meal period.</u>

The language of Wage Order 5-2001 is not on its face inconsistent with requiring an employer to "provide" (make available) meal periods. Indeed, in offering guidance on an employer's meal period obligation under subsection 11(A) of then-current Wage Order 5-1989 — whose language carried over to Wage Orders 5-1998 and then 5-2001 — the Division of Labor Standards Enforcement focused on whether the employer provided the employee with a meal period free from duty, not on whether the employer ensured that the employee took the meal period.

In an opinion letter dated June 3, 1991, DLSE Chief Counsel H. Thomas Cadell, Jr. explained: "So long as the employer *authorizes* the lunch period within the prescribed period and the employee has *reasonable opportunity to take* the full thirty-minute period free of any duty, the employer has satisfied his or her obligation." DLSE op. ltr. by H. Thomas

Cadell at 1 (June 3, 1991) (emphasis added). Cadell emphasized that "[t]he worker must be free to attend to *any* personal business he or she may choose during the unpaid meal period." *Id.* (emphasis in original).[6]

b. Alternatively, the Legislature's adoption of the statutory "provide" language post-dates — and thus marks a clarification of or departure from — the Wage Order language.

At the time the Legislature enacted California Labor Code sections 512, 516, and 226.7, IWC Wage Order 5-1998 was the effective wage order. Wage Order 5-1998 — like its predecessor Wage Order 5-1989 and the current Wage Order 5-2001— does not contain the "provide" phrasing that the Legislature subsequently chose to include in Labor Code sections 512 and 226.7 — with its plain and common sense meaning of "to furnish" or "to make available."[7]

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[6] CELC appends the Cadell letter, which is posted on the California Department of Industrial Relations website (http://www.dir.ca.gov/dlse/opinions/1991-06-03.pdf), to this brief.

[7] Following the adoption of Labor Code sections 512, 516, and 226.7, the IWC issued Wage Order 5-2001, at issue here. *See* CAL. CODE REGS. tit. 8, (continued...)

To the extent that the Wage Order language and the statutory language are incompatible on their face (which the DLSE guidance letters discussed above do not suggest), the difference if anything favors CELC's interpretation because the Legislature is presumed to be aware of all existing related laws and their judicial and agency interpretations, when passing a statute. *See Colmenares v. Braemar Country Club, Inc.*, 29 Cal. 4th 1019, 1026 (2003) (presuming Legislature was aware of agency's interpretation of law); *People v. Cruz*, 13 Cal. 4th 764, 774-775 (1996) ("The words of a statute are to be interpreted in the sense in which they would have been understood at the time of the enactment. We presume that the legislators were aware of the law . . . and of judicial decisions interpreting the language they chose to employ."); *Cumero v. Pub. Employment Relations Bd.*, 49 Cal. 3d 575, 596 (1989) ("It is assumed that the Legislature has in mind existing laws when it passes a statute.") (citation and internal quotation marks omitted). In adopting the "provide" phrasing for the Labor Code sections, the Legislature presumably was aware of the language in Wage Order 5-1998 and chose to clarify or deviate from it.

(...continued)

§ 11050, History. Wage Order 5-2001 retained the same language in subsection 11(A) from Wage Orders 5-1998 and 5-1989, but added, among other things, subsection 11(B) setting forth a one-hour premium for missed meal periods consistent with Labor Code section 226.7.

That the order in effect at the time of the enactment of Labor Code sections 512, 516, and 226.7 (*i.e.*, Wage Order 5-1998) did not contain "provide" — and the Legislature's decision to add "provide" to the statute multiple times — thus is critical.[8] The continued omission of "provide" in Wage Order 5-2001 is consistent on its face with the "make available" interpretation and, in any event, is outdated and entitled to no deference.

3. The Legislative scheme also contemplates that employees may skip their meal periods without imposing liability on their employers.

Labor Code section 512(a) reads in its totality:

> An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be

[8] Recently, one judge in the Eastern District of California, in *Valenzuela v. Giumarra Vineyards Corp.*, No. CIV-F-05-1600, 2009 WL 900735 (E.D. Cal. Mar. 31, 2009), analyzed Wage Order 14-2001 — which covers agricultural occupations and, significantly, does *not* contain the "provide" language that appears in other wage orders — and indicated in *dictum* that it would not rely on *White* and its progeny in interpreting Wage Order 14-2001. *Id.* at *8 n.3 (denying employer's motion to dismiss; employer argued that there is no remedy under California Labor Code section 226.7 for Wage Order 14-2001 meal and rest period violations). *Valenzuela* thus did not address the issue presented here and is inapposite, but this Court in any event should disapprove that court's dictum.

> waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 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.*

(emphasis added). Wage Order 5-2001 contains similar language. *See* CAL. CODE REGS. tit. 8, § 11050(11)(A), (B).

Plaintiffs acknowledge that the plain statutory language provides that one whose normal schedule is six hours or less can bilaterally waive in advance an employer's duty to provide a meal period at all.[9] Plaintiffs also

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[9] As Judge Breyer of the Northern District of California observed in *Kenny*, "waiver" in this context refers to waiving the employer's duty to provide meal periods:

> The structure of the statute and the Wage Order demonstrate that the waiver applies to the employer's obligation to "provide" a meal break, not to the employee's decision to take a meal break. In other words, the employer's obligation to provide the employee with a 30-minute meal break may only be waived by mutual consent and only if the employee works less than six hours. The Court does not interpret the waiver language to mean that an employer must ensure that an employee actually take a meal period made available.

Kenny, 252 F.R.D. at 645.

recognize other instances, not applicable here, where the statutory language permits waiver of a meal period (*e.g.*, waiver of second meal periods, waiver of an off-duty, unpaid meal period for an on-duty, paid meal period, waiver pursuant to a valid collective bargaining agreement). (AOB at 45-48.) According to plaintiffs, these are the only circumstances in which the statutory language permits waiver of a meal period.

However, the highlighted language — the last nine words of the provision — also make clear that employees who work more than six hours nevertheless lawfully can waive an otherwise-provided first meal period simply by declining to take it. Employees in a position to receive their second meal period do not qualify for the bilateral advance waiver of the employer's obligation to provide the first meal period because by definition they have worked more than six hours. Yet the last nine words of section 512(a) leave these employees free to waive unilaterally their otherwise-provided first meal period (and, if they do not do so, to waive bilaterally and in advance, the employer's obligation to provide the second meal period).

An interpretation requiring employers to ensure that employees actually take the provided breaks does not give meaning to these last nine words because it does not allow for employees who work more than six

hours to elect not to take the provided first meal period. This interpretation thus must be avoided because it renders these words of section 512(a) surplusage. *See Woods v. Young*, 53 Cal. 3d 315, 323 (1991) ("Interpretations that lead to absurd results or render words surplusage are to be avoided.").

Rather, the statutory language contemplates that employees who work more than six hours have the right, with their employer's permission, to skip their meal period if they so choose. The interpretation the court of appeal adopted and CELC here urges — *i.e.*, that employers have a duty to provide (make available) meal periods, but employees remain free to skip them — thus gives full meaning to the statutory text.

D. Employer Liability For Meal Period Premiums Under California Labor Code Section 226.7 Thus Should Not Attach Unless An Employee Is "Forced To Forego" A Meal Period.

Employers are obligated under California law to "provide" (make available) meal and rest periods, and employees then are free to choose how they would like to structure the time given. Employers should not (as plaintiffs here argue) be obligated to ensure or police compliance, or be

penalized if an employee voluntarily wishes to shorten or skip a meal period.

Every federal court that has addressed this issue — federal courts representing the Northern, Southern, and Central Districts of California — thus have held that "provide" means just that and have imposed liability on employers only where an employee is forced to forego a meal period. *See White*, 497 F. Supp. 2d 1080, 1088-89; *Brown*, 249 F.R.D. at 585-86; *Kenny*, 252 F.R.D. at 646; *Salazar*, 251 F.R.D. at 533-34; *Kohler*, 2008 U.S. Dist. LEXIS 63392, at *18-19; *Perez*, 253 F.R.D. at 515; *Gabriella v. Wells Fargo Fin., Inc.*, No. C 06-4347, 2008 WL 3200190, at *3 (N.D. Cal. Aug. 4, 2008); *Kimoto v. McDonald's Corps.*, No. CV 06-3032, 2008 WL 4690536, at *4-6 (C.D. Cal. Aug. 19, 2008); *Watson-Smith*, 2008 WL 5221084, at *3.[10]

California Labor Commissioner Angela Bradstreet, Deputy Chief Denise Padres, and Chief Counsel Robert Roginson likewise have issued the following guidance, pending this Court's decision in the instant case:

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[10] As set forth above, neither *Cicairos*, nor *Valenzuela*, addresses the issue presented here; those cases are inapposite. (*See* notes 5 & 8, *supra*.) Nevertheless, it the Court somehow were inclined to interpret *Cicairos* and/or *Valenzuela* as holding that employers have an affirmative obligation

(continued...)

"Taken together, the language of the statute and the regulation, and the cases interpreting them demonstrates compelling support for the position that employers must provide meal periods to employees but do not have an additional obligation to ensure that such meal periods are actually taken." DLSE Mem. at 2 (Oct. 23, 2008).

Requiring employers to make available meal periods and punishing employers only when employees are forced to forego their periods best serves public policy and is most faithful to the Legislature's intent and choice of language. *See also White*, 497 F. Supp. 2d at 1088-89 ("In short, the employee must show that he was *forced to forego* his meal breaks as opposed to merely showing that he did not take them regardless of the reason.") (emphasis in original).

While some employers have argued that the plaintiff to prevail must prove that he or she was "forced to forego" a meal period by showing that the employer expressly forbade the taking of the meal period, CELC does not agree with this position. Such a standard is not real-world. In CELC's view, the "provide" standard requires employers to make available meal

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(...continued)
to "ensure" that employees take their provided meal breaks, CELC submits that those cases were wrongly decided.

periods. Where breaks are not made available — for example, where supervisorial instructions or the demands of the job force the employee to forego the meal period — an employer thus is subject to liability and punishment. But where an employer "provides" (*i.e.*, makes available) meal periods, even if an employee elects not to take the provided period, the employer has satisfied its legal obligation and no liability should lie.

IV. WHETHER AN EMPLOYEE IS "FORCED TO FOREGO" A MEAL PERIOD IS A HIGHLY INDIVIDUALIZED INQUIRY THAT ACROSS A PUTATIVE CLASS WILL PREDOMINATE OVER ANY COMMON ISSUES

This Court recognized in *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004), that "the focus in a certification dispute is on what type of questions — common or individual — are likely to arise in the action . . . ." *Id.* at 327. While trial courts have substantial discretion to determine certification, an abuse of discretion will be found if the trial court used improper criteria or erroneous legal assumptions. *Id.* at 326-27.

Assuming that the duty "provide" means just that, as CELC urges, the determinative liability question then becomes whether an employee was forced to forego a provided meal period — whether by the employer's

express prohibition or by the demands of the job. The court of appeal correctly found that these are individualized inquiries that, absent unusual circumstances, will predominate over common issues.

Whether and why a particular employee takes, shorts, or misses a meal period will vary dramatically from employee to employee — and even over time for the same employee — depending on any number of variables (*e.g.*, supervisor, work location, work schedule, nature of job, etc.). *See, e.g., Kohler*, 2008 U.S. Dist. LEXIS 63392, at *19 (to determine liability, "the factfinder would have to conduct individualized inquiries into whether an employee had been 'forced to forego' meal breaks"; "Even with respect to an individual employee, the evidence supporting such a claim could vary depending on the circumstances of each particular missed meal break."); *Kenny*, 252 F.R.D. at 646 (certification unwarranted because individual issues predominate; "Liability cannot be established without individual trials for each class member to determine why each class member did not clock out for a full 30-minute meal break on any particular day.").

For example, in a single work location, one employee may voluntarily skip her meal period so he can leave by 4:00 p.m. to see his daughter's school play; another employee may claim that her boss told her she could not take lunch (which the boss may or may not deny); another

may take a full documented 30-minute break; and yet another may (intentionally or inadvertently) fail to clock out.

In another work location (or even in the same location, on a different day), one employee may take 20 minutes for lunch and voluntarily cut short her break to finish up some loose ends; another may take a full half-hour period but a faulty time clock produces an inaccurate record; and another employee may claim that he skipped his meal period because he felt pressure from his boss to finish some work, though his boss did not actually direct him to skip the meal period. On Monday the same employee may take a full half-hour meal period, while on Wednesday that same employee may opt to skip her meal period to leave early in order to make her evening yoga class.

The variations are endless — and endlessly fact-intensive — as are the particular questions that need to be resolved to determine whether a late, short, or missed meal period was the result of employee choice or employer coercion. Where an employee claims that his or her supervisor interfered with his or her meal period, for example, the factfinder will have to make credibility determinations regarding the employee and the supervisor. There may be triable issues concerning whether the employee attempted to oppose his or her boss' request, or complained to human resources. In each

situation, too, the evidence of written policies, work load, time records, co-workers' ability to take their meal periods, and the like, will vary — in many cases complicated by the passage of substantial time.

In *Brown*, for example, the district court declined to certify the proposed class of certain FedEx drivers based on the predominance of individualized inquiries: "Because FedEx was required only to make meal breaks and rest breaks available to [p]laintiffs, [p]laintiffs may prevail only if they demonstrate that FedEx's policies deprived them of those breaks. Any such showing will require substantial individualized fact finding." 249 F.R.D. at 586. The court observed that drivers' duties "vary significantly" by job classification and an employee's ability to take a break will depend on his or her job duties, volume of work, work flow during the day, route assignment, and work facility, among other things. *Id.* at 586-87.

Similarly in *Kimoto*, the court declined to certify a class of McDonald's crew members based on the predominance of individual issues. 2008 WL 4690536, at *6-7. The court observed: "Assessing whether a McDonald's employee was *authorized* by his or her manager to take a rest or meal period would require an individualized, highly fact-specific inquiry to determine whether a divergent method applied in a

particular restaurant, by particular managers, to particular shifts, to particular crew members." *Id.* at *6 (emphasis in original).

Each individual's meal period history thus must be examined to determine whether he or she was forced to forego a provided break. Given the inherently and highly individualized nature of the meal period inquiry, anecdotal and/or statistical evidence of employees missing meal periods cannot be generalized to a putative class and provides no basis for certification. *See Kenny*, 252 F.R.D. at 646 (anecdotal evidence that employer interfered with employees' right to take meal breaks "actually demonstrate the individual nature of the inquiry"; "Some of these employees clocked out for their full 30-minute meal break nearly all the time, some none of the time, and some part of the time."); *Perez*, 253 F.R.D. at 520 (individual issues predominate; even though plaintiffs offered evidence that some putative class members were required to remain "on duty" during meal breaks, that evidence was not determinative of other putative class members' circumstances); *Kimoto*, 2008 WL 4690536, at *6 (individualized issues predominate; "The Court cannot infer from the summary reports of various employees a company-wide policy of not authorizing meal or rest periods").

The court of appeal below thus correctly found — as has every other court that has found that the obligation to provide meal periods does not mean to ensure — that individual issues predominate in the meal period context and the commonality requirement for class certification cannot be satisfied. *See, e.g., Brown*, 249 F.R.D. at 586; *Kenny*, 252 F.R.D. at 646; *Salazar*, 251 F.R.D. at 533 ("This [make available] interpretation of the statute forecloses class-wide adjudication of claims in this case."); *Kohler*, 2008 U.S. Dist. LEXIS 63392, at *19; *Perez*, 253 F.R.D. at 520; *Gabriella*, 2008 WL 3200190, at *3 ("[B]ecause defendants' liability turns on whether meal and rest periods were made available and the reasons why breaks were missed, individual issues predominate. In order to determine defendants' liability, the parties would be required to litigate each instance of an alleged violation.").

V. CONCLUSION

The court of appeal correctly found that California law requires employers to make meal periods freely available, which employees may choose to take or, with their employer's permission, skip in whole or in part. Liability should lie only when an employee has been forced to forego a meal period. The court of appeal also correctly found that the voluntariness of a skipped, late or short meal period is a highly

individualized inquiry that precludes commonality of issues as required for class certification. The California Employment Law Council thus respectfully requests that the Court affirm the court of appeal below and provide much-needed guidance on California meal period law.

Dated: August 13, 2009

Respectfully submitted,

PAUL, HASTINGS, JANOFSKY & WALKER LLP

By: _____
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CALIFORNIA EMPLOYMENT LAW COUNCIL

LEGAL_US_W # 60866426.5

PROOF OF SERVICE

I, the undersigned, state: I am employed in the City and County of San Francisco, State of California. I am over the age of 18 years, and not a party to the within action. My business address is Paul, Hastings, Janofsky & Walker LLP, 55 Second Street, Suite 2400, San Francisco, CA 94105.

On August 13, 2009, I served the foregoing document(s) described as:

BRIEF FOR *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF PETITIONERS

on the interested parties by placing a true and correct copy thereof in a sealed envelope(s) addressed as follows:

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Executed on August 13, 2009, at San Francisco, California.

JEFF SMITH