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.,
Petitioners,

vs.

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

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

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIV. 1, NO. D049331, GRANTING A WRIT OF MANDATE TO THE SUPERIOR COURT, COUNTY OF SAN DIEGO, NO. GIC834348, HON. PATRICIA A.Y. COWETT, JUDGE.

APPLICATION OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

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Real Parties in Interest.

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to CRC 8.200(c)(1), the Civil Justice Association of California ("CJAC"), requests permission to file the accompanying brief *amicus curiae* in support of Petitioners, Brinker Restaurant Corporation, et al.

CJAC is a non-profit organization with hundreds of members who are businesses, professional organizations and local government associations. Our principal purpose is to educate the public about ways to make California's civil liability laws more fair, efficient, economical and certain. Toward these ends, we regularly petition the government – the judiciary, the legislature and, through the initiative process, the people themselves – for redress concerning who pays, how much, and to whom when wrongful conduct is charged. (See, *e.g.*, *Shin v. Ahn* (2007) 42 Cal.4th 482; *In re Tobacco Cases II*

(2007) 41 Cal.4th 1257; *Casteneda v. Olsher* (2007) 41 Cal.4th 1205; and *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069.)

This case presents an issue of critical importance to the administration of justice and to the core interests of CJAC's members — *viz.*, whether a court can and should examine applicable law and determine the "elements" of plaintiffs' action when deciding whether to certify the case as a "class action".

We have read the briefs of the parties and opinions and statutes pertinent to the issue presented. We are familiar with several of the leading class action certification opinions of this Court cited and discussed by the parties because we participated as amicus curiae in the argument over their resolution. (See, e.g., *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429; *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319; and *Fireside Bank* (2007) 40 Cal.4th 1069.)

CJAC presents argument and analysis in our brief that we believe complements, but does not duplicate, what the parties have said. We contend that the circumstances animating the issue herein necessitate applying the "elements" of plaintiffs' statutorily-based cause of action to determine whether it is suitable for class treatment. A major "element," of course, is the nature of the *duty* imposed on employers to "provide"their employees rest and meal period breaks and work only "on" and not "off-the clock." This duty is set forth in Labor Code §§ 226.7 and 512, which require employers to make meal and rest period breaks "available" for employees who work more than a specified number of hours and bar employers from interfering with an employee's right to his or her meal and rest periods by forcing the employee to work during them. These laws do not, however, require employers to do more than make the breaks and on-the-clock work schedules available to their employees and express company policy that they take their breaks and not work off-the-clock. Employers have no duty to affirmatively act to "force" their employees to take their breaks or prevent them from working off-the-clock unless they know they are doing so.

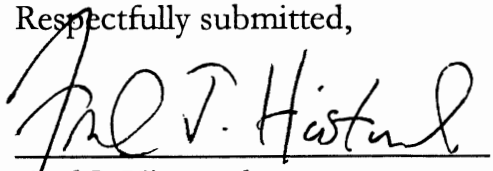
If employers are not obligated to ensure that its employees take their meal and rest period breaks, or that they take them when plaintiffs claim they must be taken, any showing on a class basis that members of the purported employee class missed their breaks or took shortened breaks would not necessarily establish, absent further individualized proof, that Brinker violated applicable law. Certification of the class without reference to what the applicable law requires of employers in this regard puts the "cart before the horse" and makes no judicial or economic sense.

This argument and its explication in the accompanying brief was written solely by CJAC's General Counsel and funded completely by CJAC; no party or any other counsel authored the brief or made a contribution intended to fund its preparation or submission. (CRC 8.520(f)(4).)

Accordingly, CJAC asks the court to accept the accompanying amicus curiae brief for filing.

Dated: August 18, 2009

Respectfully submitted,



Fred J. Hiestand
General Counsel for The Civil
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PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 1121 L Street, Suite 404, Sacramento, CA 95814.

On August 18, 2009, I served the foregoing document(s) described as: Application of the Civil Justice Association of California to File an *Amicus Curiae* Brief in Support of Petitioners in *Brinker Restaurant Corporation, et al. v. Superior Court (Hohnbaum),* S166350 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

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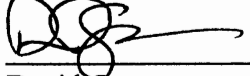
[X](BY MAIL) I am readily familiar with the practice of the Senator Office Building for the collection and processing of correspondence for mailing with the United States Postal Service and such envelope(s) was placed for collection and mailing on the above date according to the ordinary practice of the law firm of Fred J. Hiestand, A.P.C. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 18th day of August 2009 at Sacramento, California.



David Cooper

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INTRODUCTION: IMPORTANCE OF ISSUE AND INTEREST OF AMICUS

The Civil Justice Association of California (CJAC) welcomes the opportunity to address the important issue this case presents[1] — when employees allege violations by their employers of state law governing rest and meal-break periods and off-the-clock work, should the court consider applicable law and the "elements" of plaintiffs' action in deciding whether to certify the case as a "class action"? More particularly, if applicable law does not, contrary to plaintiffs' contention, require employers to *ensure* that their employees take rest and meal period breaks, but only that they make these breaks *available* to employees and not force them to work through the break

[1] By separate application accompanying the lodging of this brief, CJAC seeks the Court's permission to accept it for filing.

periods or work off-the-clock, does this render plaintiffs' action unsuitable for class certification?

This issue of *how* to determine whether to certify a lawsuit as a class action is critical to the administration of justice and to CJAC. "The class certification order . . . is the *most important decision* in a class action case: for the plaintiffs, it means the life or death of their pursuit of their claims; for the defendants, it means a very close line between almost zero liability and so much liability that settlement is the only option."[2]

> In light of the economics and vagaries of litigation, class certification is often the *crucial event* on which a case's trajectory turns. Settlement dynamics illustrate class certification's *central importance* as a litigation event. The prospect of a class trial on behalf of every victim of an industrial accident or a poorly designed drug [or an untaken employee rest or meal break period], rather than individual cases, each with idiosyncratic evidentiary difficulties, may significantly ratchet up the settlement pressure on a defendant. Conversely, denial of class certification may well force plaintiffs facing the prospect of a small recovery to lower their settlement threshold or even abandon their claims altogether.[3]

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[2] Aimee G. Mackay, Comment, *Appealability Of Class Certification Orders Under Federal Rule Of Civil Procedure 23(f): Toward A Principled Approach* (2002) 96 *NW. U. L. REV.* 755, 798 (emphasis added).

[3] David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction* (2007) 48 *WM. & MARY L. REV.* 1247, 1287 (emphasis added); *see also* Martha Neil, *New Route for Class Actions*, 89 A.B.A. J. 48 (July, 2003).

CJAC's members are businesses, local government groups and professional associations committed to educating the public about ways to make our civil liability laws more fair, economical and efficient. Toward that end, CJAC regularly petitions our co-ordinate and co-equal branches of government to provide greater fairness, clarity and uniformity when it comes to determining what circumstances dictate who pays, how much, and to whom for breaches of law. Due to the escalation of purported class action filings in California courts[4], much of CJAC's petitioning as amicus curiae concerns class action issues.[5] This case presents a unique opportunity for the Court to provide much needed guidance on the proper approach for resolving class certification issues concerning alleged violations by employers of employee meal and rest break periods and working off-the-clock.

Since class certification necessitates "a well-defined community of interest"

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[4] Cases raising "class certification" or "meal and rest break" issues similar to what is presented here that have been recently decided or are on "grant and hold" status indicate the recent and rapid rise in class action filings. *See e.g., Bradley v. Networkers International LLC* (Cal.App. 4 Dist.), 2009 WL 265531; *Brinkley v. Public Storage, Inc.* (2008) 84 Cal.Rptr.3d 873; and *National Steel and Shipbuilding Company v. Superior Court*, S141278, dismissed and remanded on May 23, 2007 in light of *Murphy v. Kenneth Cole Productions* (2007) 40 Cal.4th 1094. Weekly, unofficial summaries of class action lawsuits filed in the state and federal courts located in Los Angeles, San Francisco, San Jose, Sacramento, San Diego, San Mateo, Oakland/Alameda and Orange County areas show that "from August 7 - 13, 2009 . . . a relatively large number of new class actions – 56 – were filed. Labor law class actions generally top this list by a wide margin, and this yet again proved to be true. During this reporting period, 33 class actions were filed alleging employment-related claims, representing 59% of the total number of new class actions filed. . . [Eleven] 11 new class actions alleging violations of California's Unfair Competition Law (UCL), which includes false advertising claims (20%), [were filed]." http://classactiondefense.jmbm.com/10class_actions_in_the_news.

[5] See, e.g., *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429 (*Linder*); *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319 (*Sav-On*); and *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069 (*Fireside Bank*).

amongst plaintiffs, determined in part by the presence of "predominant common questions of law or fact,"[6] the parameters of governing law would seem not just pertinent, but essential to that decision. As *Sav-On* found, a critical inquiry in a class certification motion is "whether the *theory of recovery* advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment."[7] This means, in determining whether common questions of law or fact predominate, "the trial court must examine the issues framed by the pleadings and the *law applicable to the causes of action alleged.*" (*Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916, emphasis added.)

THE APPELLATE OPINION

The appellate opinion reversed the trial court's decision certifying this case as a class action because it found the lawsuit premised on "improper criteria" and "erroneous legal assumptions,"[8] namely that it is unnecessary to reach the issue of what the law requires with respect to rest and meal period breaks and off-the-clock work. Most importantly, the appellate opinion examined applicable law upon which plaintiffs base their claims and found it does not require employers to *ensure* their employees actually take their rest periods, only that they be made available and not be prohibited or interfered with by the employer. Since employees may choose not to take their rest and meal period breaks, the appellate opinion explained, the "question

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[6] *Fireside Bank, supra,* 40 Cal.4th at 1089.

[7] *Sav-On, supra,* 34 Cal.4th at 327; emphasis added.

[8] *Linder, supra,* 23 Cal.4th at 436.

of whether employees were forced to forgo . . . breaks or voluntarily chose not to take them is a highly individualized inquiry that would result in thousands of mini-trials to determine as to each employee if a particular manager prohibited a full, timely break or if the employee waived it or voluntarily cut it short."[9] Accordingly, the unanimous appellate panel concluded, plaintiffs' rest and meal break claims are not amenable to class treatment.

Similarly, plaintiffs' off-the-clock work claims are also not amenable to class treatment because liability for this offense only attaches if it can be shown that the employer knew or should have known the employee was working off-the-clock. While statistical and survey evidence may well be available to show the frequency with which employees worked during a meal period and the number of times changes were made to time cards, such evidence would not show on a class wide basis *why* employees worked off-the-clock, whether they were required to do so, did so of their own volition, or whether their supervisors had knowledge of such activities. Since Brinker has a written policy prohibiting off-the clock work, allegations that a purported class of employees did just that in violation of the policy would require individual inquiries as to whether any employee actually worked off-the-clock, whether managers had actual or constructive knowledge of such work and whether managers forced or encouraged such work. Considering these various elements of off-the-clock work claims, "individual issues predominate" so as to render the action unsuitable for class certification. (Opn. p. 51.)

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[9] Slip Opinion, p. 32, 42 (Opn.).

A vast majority of courts that have considered whether to examine California law on rest and meal breaks and off-the-clock work in deciding the class certification issue agree with the appellate opinion that they should; and if they find employees may voluntarily waive their breaks, class certification is inappropriate. Indeed, "[i]t would be unjust to allow the parties to continue litigating this matter on a legal theory that cannot ultimately be sustained." (*Bennett v. Regents of Univ. of Calif.* (2005) 133 Cal.App.4th 347, 355.)

Amicus agrees with the majority of courts and the appellate opinion herein, and explains in the following pages why state law does *not* require employers to *ensure* that their employees take rest and meal breaks and don't work off-the-clock. If the law did require employers to affirmatively "ensure" that their employees actually take their meal and rest breaks and punch their clocks correctly, then this case would be appropriate for class treatment. That we have not as a state imposed such onerous obligations and powers on employers over employees, however, means that the myriad reasons some employees may choose to work through their entitled breaks in violation of company policy defeats the "commonality" essential for class certification.

SUMMARY OF ARGUMENT

Plaintiffs' attempt to micro-manage through class action litigation Brinker Restaurant's (Brinker's) conduct with respect to the scheduling of rest and meal period breaks and clocking-in for hours worked in its 137 restaurants by its 59,451 employees, is based on their parsing of Labor Code §§ 226.7 and 512. These statutes require employers to make meal and rest period breaks available for employees who work more than a specified number of hours and bar employers from interfering with

an employee's right to his or her meal and rest period by forcing the employee to work during it. These laws do not, however, require employers to "ensure" that their employees actually take their meal periods.

This distinction is crucial when it comes to deciding whether this case qualifies for class action certification. If employers are not obligated to ensure their employees take meal and rest period breaks, or that they take them when plaintiffs claim they must be taken, any showing on a class basis that members of the purported employee class missed their breaks or took shortened breaks would not necessarily establish, absent further individualized proof, that Brinker violated applicable law. As the appellate opinion explains, "[B]ecause the trier of fact cannot determine on a class-wide basis whether members of the proposed class of Brinker 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,"[10] class certification should be denied. Certification of the class without reference to what the applicable law requires in this regard puts the "cart before the horse" and makes no judicial or economic sense.

The plain meaning of "provide" is to "make available," not to "ensure." Legislative history, particularly the Legislative Counsel's Digest and the Committee and Floor Analysis accompanying the bill that added section 512 to the Labor Code in 1999, reinforces the common sense meaning of "provide" as to "make available." Reading section 512 in *pari materia* with section 226.7 and in context with other provisions and words in the Labor Code is further confirmation of the legislative

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[10] Opn., *supra*, p. 31.

intent that "provide," when it comes to an employer's duty to employees respecting meal periods, means they should be "made available."

A flurry of recent well-reasoned opinions from federal courts in California in the past three years underscore that employers are not required to "ensure" that their employees take their rest or meal periods or eat during them. These opinions warrant affirming the appellate court's conclusion that applicable law does not require employers to "ensure" that their employees actually take their "provided" meal and rest periods or that they take them at the time and frequency plaintiffs demand, making this case too individualized for class treatment.

ANALYSIS

I. THE LABOR CODE DOES NOT REQUIRE EMPLOYERS TO "ENSURE" THAT THEIR EMPLOYEES TAKE MEAL AND REST PERIOD BREAKS, ONLY THAT THE EMPLOYER MAKE THESE BREAKS "AVAILABLE' TO EMPLOYEES.

The linchpin issue[11] in this case concerns the meaning of the word "provide" as it is used in Lab. C. § 512(a), which states, in pertinent part, that one "may not employ an[other] . . . 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 . . .."[12] The term

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[11] Amicus focuses our analysis on the governing statutes and not on the Wage Orders (*e.g.*, Cal. Code Regs., tit. 8 § 11050, sub. 11(A)) purportedly adopted pursuant to the statutes. We believe the language of the statutes themselves are sufficient to resolve the issue raised and that the statutes take precedence over any regulations in conflict with them. See Opn., *supra*, at pp. 37-40.

[12] Lab. C. § 512 (a) & (b) reads in its entirety as follows: "(a) 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 (continued...)

"providing" is not defined in this 1999 statute, which finds the parties at odds over whether it means that employers must give employees an "opportunity" to take a meal or rest period when they work the number of hours specified, or *require* them to take the meal period and rest period at a particular time and "ensure" that they do so.

The gulf separating these differing views of what "provides" means is great, not just semantically but with respect to comparative consequences. An employer who makes available to its employees a meal period with space in which to take it, has a considerably less burdensome responsibility than one who must make sure ("ensure") that employees actually take the meal period and, even perhaps, eat during it. There seems to be little dispute that Brinker has, at least since it entered into a stipulated injunction in 2002 with the California Division of Labor Standards Enforcement, made meal periods available to its California employees. Brinker's written policy, titled "Break and Meal Period Policy for Employees in the State of California," provides with regard to meal breaks, in a form signed by employees, "I am entitled to a 30-minute meal period when I work over 3.5 hours during my shift that is over five hours." (Opn., p. 5) As to rest breaks, the form also provides, "If I work over 3.5

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[12](...continued)
per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 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.

(b) Notwithstanding subdivision (a), the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees."

hours during my shift, I understand that I am eligible for one [10-] minute rest break for each four hours that I work." (*Id.*) Brinker's written policy on rest and meal breaks provides that an employee's failure to follow the aforementioned policies "may result in disciplinary action up to and including termination."[13] (*Id.*)

This confusion over what a single statutory word of seeming simplicity and clarity really means is not unusual but inherent to the legislative process. As a keen observer of the difficulty inherent in quarrying meaning from statutes has written:

> The difficulty [in interpreting statutes] is that what the legislature intended is [not always readily apparent] . . . [¶] This is not the result of inadequate draftsmanship, as is so frequently urged. Matters are not decided until they have to be. . . [T]he precise effect of a bill is not something upon which members have to reach agreement. . . There is a related and an additional reason . . . [for disagreement]. As to what type of situation is the legislature to make a decision? . . . There need be no agreement about what the situation is. The members of the legislative body will be talking about different things . . . The result is that even in a non-controversial atmosphere just exactly what has been decided will not be clear. [¶] Controversy does not help.

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[13] When it comes to the related issue of working off-the-clock, Brinker's "Hourly Employee Handbook" states, "It is your responsibility to clock in and clock out for every shift you work . . . [Y]ou may not begin working until you have clocked in. Working 'off-the-clock' for any reason is considered a violation of Company policy." Brinker's Handbook also states, "If you forget to clock in or out, or if you believe your time records are not recorded accurately, you must notify a Manager immediately, so the time can be accurately recorded for payroll purposes." *Id.* at 5-6.

> Agreement is then possible only through escape to a higher level of discourse . . ..[14]

In other words, the buck stops here because "[t]he legi slature is like a composer. It cannot help itself: It must leave interpretations to others, principally to the courts."[15] This problem is understandably exacerbated when, as here, passage of the statutes in question is animated by an array of strong, juxtaposed political interests.[16]

A. The Plain Meaning of "Provide" is to "Furnish," "Afford" or "Make Available," not to "Require" or "Ensure;" and Labor Code § 512's Legislative History Shows the Intent of the Legislature was to Give "Provide" its Plain Meaning.

There is no specific statutory definition for "provide" in Lab. C. § 512. Thus the task for the court in determining what "provides" means is to "examin[e] the statute's words, giving them a plain and commonsense meaning." (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) The starting point for finding a word's "plain and commonsense" meaning is, of course, "authoritative and recognized published English language dictionaries." (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1426.)

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[14] Edward H. Levi, *AN INTRODUCTION TO LEGAL REASONING* (1949), p. 30-31.

[15] Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation* (1947) 47 *COLUMB. L. REV.* 1259, 1264.

[16] The Senate Floor Analysis lists 21 labor unions and numerous individuals in support, and hundreds of businesses and business organizations in opposition to adding section 512 to the Labor Code. *FLOOR ANALYSIS OF ASSEMBLY BILL 60*, Senate Rules Committee, July 1, 1999, pp. 7-12.

A leading dictionary gives seven meanings of "provide," the first two of which are closely akin to how the word is used in section 512: (1) "to furnish, supply or equip"; and (2) "to afford or yield."[17] This is consistent with *BLACK'S LAW DICTIONARY* (5th ed. 1979), p. 1102, which defines "provide" as meaning "[to] make, procure, or furnish for future use, prepare. To supply; to afford; to contribute." These definitions are substantially similar in meaning to "make available," the definition Brinker urged the court to accept and the definition found in the *AMERICAN HERITAGE DICTIONARY* (4th ed. 2000), p. 676. No definition of "require" or "ensure" is given for "provide" in these dictionaries or any other amicus has been able to find. Significantly, no dictionary definition of "provide" is proffered by plaintiffs in their briefs. On this score, then, the plain meaning of the word "provide" as used in Lab. C. § 512 favors Brinker and undercuts the trial court's definition of what is required of Brinker and, as a consequence, who is to be included and certified as a member of the defined "class" of plaintiff-employees.

To bolster the plain meaning of statutory text, "courts may turn to rules or maxims of construction 'which serve as aids in the sense that they express familiar insights about conventional language usage.'" (Norman J. Singer, 2A *STATUTES AND STATUTORY CONSTRUCTION* (6th ed.2000) p. 107.) Courts also look to the legislative history of enactment. "Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d

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[17] *WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE* (1989), p. 1157.

1379, 1387.) "[W]e may consider a variety of extrinsic aids, including *legislative history*, the statute's purpose, and public policy. (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 738; emphasis added.) Legislative history includes the Legislative Counsel's Digest accompanying the bill[18] and contemporaneous analyses by policy committees and the floor of both houses considering the legislation. "Contemporaneous legislative committee analyses are subject to judicial notice . . . [and are] reliable indicia of the legislative intent underlying the enacted statute." (*In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 719-20; citations omitted.)

A review of the Legislative Counsel's Digest for Assembly Bill 60 (W. Knox, D -1999-2000 Reg. Sess.), which added Lab. C. § 512, describes the law as it was before enactment of the new meal period provision:

> Existing wage orders of the commission [Industrial Welfare Commission] *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* of not less than 30 minutes, with the exception that if the total work period per day of the employee is no more than 6 hours, the meal period may be waived by mutual consent of both the employer and employee.[19]

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[18] *Ailanto Properties, Inc. v. City of Half Moon* (2006) 142 Cal.App.4th 572, 589 ("Most telling is the Legislative Counsel's Digest . . ..").

[19] *LEGISLATIVE COUNSEL'S DIGEST RE: ASSEMBLY BILL 60*, Chap. 134, July 21, 1999, p. 2 (italics added).

The Digest then states what it understands newly added Lab. C. § 512 to do:

> This bill would *codify that prohibition* and also would further *prohibit* an employer from employing 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 . . ..[20]

What then existing law and newly enacted Lab. C. § 512 had in common is that both *forbade* employers from *failing to provide* a meal period for employees who work longer than the hours specified. While those hours were changed slightly in the new law from what the Commission had previously specified, the objective of the orders and section 512 was the same: to *prohibit* an employer from *denying* or *failing to provide* employees with a meal period.

Prohibiting one from doing something – here from failing to make meal periods available to employees – is quite different from requiring one to ensure that employees "take" their meal and rest periods. Neither logic nor semantics supports leaping from a "prohibition" against "not providing" a meal period to "ensuring" that its provision is in fact used by the intended beneficiaries. The difference is that between a free people living in a democracy and subservient subjects to an Orwellian juggernaut, between employers being permitted to treat employees as if they are fully capable of making decisions for themselves as to whether to take a meal period and, if so, what to do during it, or treating them as children who must be coaxed by the command of the sovereign into taking and eating during their assigned meal periods.

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[20] *Id.*

Neither do the Committee analyses for AB 60 give any succor to the lower court's conclusion that "provide" as used in section 512 means that Brinker was henceforth *required* to "ensure" its employees take the meal periods "made available" to them. The policy analysis for the bill when scheduled for hearing before the Assembly Committee on Labor and Employment says of proposed section 512 that it "[c]odifies the current wage order requirement for meal periods after five hours of work, and adds a requirement for a second meal period after 10 hours of work."[21] Yet turning to the "current wage order" about meal periods at the time AB 60 was pending shows the referenced "requirement" to be something considerably less than, and perhaps anything but, a *requirement*: "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."[22] Note the absence of any words between "without" and "a meal period" in the above command, leaving the reader to wonder what, if anything, an employer should do besides make a meal period available to employees, provide them a room in which to take the meal period and inform them of this. The Wage Orders are silent as to whether an employer must "provide" a meal period or "ensure" that employees take the "meal period;" and no inference may reasonably be drawn from

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[21] *BILL ANALYSIS OF AB 60*, Assembly Committee on Labor and Employment, March 17, 1999, p. 4. See also, *BILL ANALYSIS OF AB 60*, Assembly Committee on Appropriations, April 21, 1999, p. 3: [Section 512] "[c]odifies the IWC wage order requirement for meal periods after five hours of work, and imposes a second meal period requirement after 10 hours of work, subject to certain exceptions."

[22] IWC Orders 7-80 and 7-98 both contain the same above quoted language, which plaintiffs consider a "requirement" that Brinker "ensure" its employees take their meal periods.

the silence of that administrative order that employers are *required to ensure* that their employees take their meal periods.

B. Read in Context and *in Pari Materia* with Other Provisions of the Labor Code, section 512 Does Not "Require" Employers to Ensure that Their Employees Take the Meal Periods to which they are Entitled, but to Make Meal Periods "Available" to Them and Abstain from Forcing their Employees to Forgo Them.

Another canon of construction used to ascertain legislative intent from the words used is that the words must be read *in context.* "The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.*, *supra*, 43 Cal.3d at 1387.) An analogue to the context canon is the *pari materia* canon. "One 'elementary rule' of statutory construction is that statutes *in pari materia* – that is, statutes relating to the same subject matter – should be construed together." (*Medical Board v. Superior Court* (2001) 88 Cal.App.4th 1001, 1016.)

Labor Code §§ 226.7 and 512 require employers to "provide" meal and rest periods to their employees. If an employer fails to provide such breaks, Section 226.7(b) requires the employer to pay the employee one additional hour of pay at the employee's regular rate for each day that a meal or rest period was not provided. Section § 226.7 is a related provision to section 512 because it deals with the same subject matter (meal and rest periods) and applies to the same class of persons (employers); hence the two must be read together and harmonized to ascertain what

the Legislature intended employers must do to "provide" their employees meal periods. It provides:

> (a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
>
> (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

The evil section 226.7 seeks to prevent by imposition on an errant employer of a payment worth an hour of the employee's pay, is "forcing" or "requiring" an employee "to work during any meal or rest period." It is this conduct, which subsection (b) of section 226.7 equates with an employer "fail[ing] to *provide* an employee a meal period" that warrants payment by the employer of an additional hour of compensation to the employee. Harmony is achieved between these two sections by reading 512's command to employers that they "provide" their employees a meal-period with section 226.7's command that for the meal-period to be "provided," the employer cannot "require an employee to work during" that time.

Also instructive on whether "provide" as used in section 512 means to "make available" or to "ensure" that employees actually avail themselves of the period, are other references throughout the Labor Code obligating employers to "ensure" certain

things. *See, e.g.*, Lab C. §§ 6386(b)(1) – hazardous substances ("A laboratory employer shall *ensure* that labels of incoming containers of hazardous substances are not removed or defaced."); and 7861(c) – process safety management standards for refinery and chemical plants ("The employer shall *ensure* that each worker necessary to *ensure* safe operation of the facility has received and successfully completed training as specified by this section."). What this shows is that if, as plaintiffs argue, section 512's command to employers to "provide" meal periods for their employees means that they must "ensure" the employees take the meal periods, "the Legislature knew how to say what it meant, and if it meant to say [what plaintiffs' claim], it could have said so. It did not . . .." (*Donnellan v. City of Novato* (2001) 86 Cal.App.4th 1097, 1106.) "Once again, we are confronted with the annoying fact that the Legislature clearly knew how to write the statute to say what the [plaintiffs] say it says, and it didn't." (*Jeffrey v. Superior Court* (2002) 102 Cal.App.4th 1, 8.)

C. The Better Reasoned Opinions that have Interpreted and Applied Labor Code §§ 226.7 and 512 Hold that "Provide" Means "to Make Available" and Does Not Require Employers to "Ensure" that their Employees Take their Meal and Rest Period Breaks.

A bevy of recent opinions from different courts considering whether sections 226.7 and 512 mean employers must make available unpaid meal and rest break periods for employees or "ensure" that the employees partake of these break periods have reached the same conclusion: employers are required to make meal or rest periods available to their employees but are not required to "ensure" that the employees take them.

We begin with *Murphy v. Kenneth Cole Productions, Inc.*, *supra*, 40 Cal.4th 1094, a civil action by a plaintiff against his employer for forcing him to work through most of his entitled meal periods. The Court upheld the right of plaintiff to sue for statutory overtime compensation as a payment subject to a three-year statute of limitations in addition to penalties imposed on his employer by the IWC that were subject to a one-year statute of limitation, but made clear the plaintiff was not afforded the opportunity to take a meal period. In quoting from testimony supporting the measure that enacted Lab. C. § 226.7, Assembly Bill 2509 (Steinberg, 2000 Reg. Sess), *Murphy* explains that the vice sections 226.7 and 512 intended to get at is employers forcing employees to forgo their meal periods and work through them, not the failure of employers to "ensure" that employees take their meal periods:

> This [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 . . . .[23]

Murphy was followed by *White v. Starbucks Corp.* (N.D.Cal. 2007) 497 F.Supp.2d 1080(*Starbucks*), where the federal district court concluded that, under sections 512(a) and 226.7, "California . . . require[s] only that an employer *offer* meal breaks, without forcing employers actively to ensure that workers are taking these breaks," and stated that "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."(*Id.*

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[23] *Id.* at 1110, quoting testimony of IWC Commissioner Barry Broad before IWC Public Hearing, June 20, 2000.

at pp. 1088-1089.) What's more, *Starbucks* explains the absurdity of plaintiffs' reading that the law required employers to ensure that their employees took their meal periods:

> Under [plaintiff's] reading . . . an employer with no reason to suspect that employees were missing breaks would have to find a way to force employees to take breaks or would have to pay an additional hour of pay every time an employee voluntarily chose to forego a break. This 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. 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. This cannot have been the intent of the California Legislature, and the court declines to find a rule that would create such perverse and incoherent incentives.[24]

Starbucks' reading of the pertinent statutory provisions is consistent with the canon of construction admonishing courts to "avoid statutory constructions that lead to illogical or absurd results." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 142.)

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[24] *Id.* at.1089.

Next is *Brown v. Federal Express Corp.* (C.D.Cal. 2008) 249 F.R.D. 580, where couriers and Ramp Transport Driver employees sought certification as a class so they could proceed with their damage claim in federal court for Federal Express' failure to "ensure" that they took their rightful meal periods. The legal question vexing the court in *Brown* was identical to that underlying this case:

> [T]he parties dispute what must be proved in order to demonstrate that Defendant did not provide meal breaks. Defendants argue that employers must only make meal breaks available to employees, and that employees may choose whether or not to take such breaks. *Plaintiffs argue that California law requires employers to ensure that meal breaks are actually taken.*[25]

Brown agreed with defendant's position. After setting forth at length the pertinent language of sections 512 and 226.7 and the applicable IWC Wage Orders, *Brown* explained that "[n]one of these provisions supports plaintiffs' position that defendant was required to ensure that plaintiffs took meal breaks."

> The word "provide" means "to supply or make available." [Citation]. It does not suggest any obligation to ensure that employees take advantage of what is made available to them. [¶] The language of the [IWC] Order applicable . . . comes closest to imposing a duty to enforce meal breaks, stating that "[n]o employer shall employ any person for a work period of more than five (5) hours without a meal

[25] *Id.* at p. 584 (emphasis added).

> period of not less than 30 minutes." [Citation.] However, this language is also consiste nt with an obligation to provide a meal break, rather than to ensure that employees cease working during that time. The California Supreme Court has described the interest protected by meal break provisions, stating that "[a]n employee forced to forgo his or her meal period . . . has been deprived of the right to be free of the employer's control during the meal period." *It is an employer's obligation to ensure that its employees are free from its control for thirty minutes, not to ensure that the employees do any particular thing during that time.* Indeed, in characterizing violations of California meal period obligations in *Murphy,* the California Supreme Court repeatedly described it as an obligation not to force employees to work through breaks.[26]

Most recently, two separate courts independently reached the same conclusion about the scope of sections 512 and 226.7 with respect to employee meal and rest periods: an employer does not have to "ensure" that employees take these breaks, only make them available for employees; and a class action based on the faulty liability theory that an employer has the affirmative duty to "ensure" that plaintiff-employees take their break periods is not appropriate for certification as individual issues predominate over common ones.

In *Kenny v. Supercuts, Inc.* (N.D.Cal.. 2008) 252 F.R.D. 641, the court denied class certification to employees who claimed that Supercuts did not insist that they take

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[26] *Id.* at p. 585 (emphasis added).

their meal and rest periods, making them only available "on paper." The court explained "an employer is not liable for 'failing to provide a meal break' simply because the evidence demonstrates that the employee did not actually take a full 30-minute meal break." (*Id.* at 646.) Further, the court found it "apparent that plaintiff has failed to identify any theory of liability that presents a common question." (*Id.*)

Salazar v. Avis Budget Group, Inc. (S.D. Cal. 2008) 251 F.R.D. 529 also raised and decided the question presented by this appeal:

> Plaintiffs argue defendants must ensure employees actually stop working for thirty minutes each day and if an employee does not take a meal period for any reason, the extra hour of wages must be paid. Defendants argue the statute simply requires employers to make a meal period available, but that employees may voluntarily work through the meal period or any portion thereof, and be paid for that time.[27]

Class certification was denied because "evidence of missed meal-breaks," as opposed to evidence showing an "employee was forced to forego his meal breaks," does not suffice. "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." (*Id.* at p. 534.)

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[27] *Id.* at 532.

CONCLUSION

The well-reasoned appellate opinion should be affirmed. This case is not amenable to class certification. Employees are free under applicable law to choose whether to take a meal or rest breaks "provided" them by their employer, to waive their rights to these breaks for their own reasons. That employees do not take breaks does not mean their employer is in violation of Labor Code provisions requiring it make the breaks available.

Similarly, since employer liability for off-the-clock work requires proof that the employer knew or should have known employees were doing this contrary to express company policy, substantial individualized inquiry is necessary and precludes class certification.

For all these reasons, amicus submits the judgment of the Court of Appeal should be affirmed.

Dated: August 18, 2009

Respectfully submitted,

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