No. S166350

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

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

vs.

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

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

Petition for Review of a Decision of the Court of Appeal, Fourth Appellate District, Division One, Case No. D049331, Granting a Writ of Mandate to the Superior Court for the County of San Diego, Case No. GIC834348
The Honorable Patricia A.Y. Cowett, Judge Presiding

APPLICATION OF ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS; AND BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS IN SUPPORT OF PETITIONERS.

John S. Miller, Jr. (SBN 77446)
Dwayne P. McKenzie (SBN 175162)
Cox, Castle & Nicholson LLP
2049 Century Park East, Suite 2800
Los Angeles, CA 90067-3284
Telephone: (310) 277-4222
Facsimile: (310) 277-7889

Attorneys for the Associated General Contractors of California, Inc.

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To the Honorable Ronald M. George, Chief Justice:

Pursuant to California Rules of Court, rule 8.520(f), the Associated General Contractors of California, Inc. ("AGC") respectfully requests leave to file the attached brief as *amicus curiae* in support of Petitioners.

I. INTEREST OF THE ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA.

AGC is an association of over 1,200 contractors and other related employers employing workers in the building and construction industry in California. AGC's members employ tens of thousands of employees throughout the state and strive to comply with their obligations under California law to provide for minimum working conditions of their employees, including their obligations to provide employees with meal and rest periods.

As representative of its members, AGC has been actively involved for decades with development of working condition requirements for employees in the building and construction industry, including the promulgation of Wage Order No. 16 by the Industrial Welfare Commission ("IWC"), first effective January 1, 2001, which Wage Order was the first to apply to employees in a construction occupation. Two AGC representatives were members of the IWC that adopted Wage Order No. 16 and that modified other Wage Orders to reflect passage of the Eight-Hour Day Restoration and Workplace Flexibility Act. Stats. 1999, ch 134

(Assembly Bill 60). And AGC representatives worked with representatives of the California State Building and Construction Trades Council and staff of the IWC to attempt to develop consensus on meal periods, rest breaks and other provisions in Wage Order No. 16 before its final adoption.

AGC also routinely negotiates collective bargaining agreements with construction trade unions covering the terms and conditions of employment for employees of AGC members, including the terms and conditions of meal and rest periods. AGC is, therefore, particularly qualified to present to the Court the attached brief.

AGC and its members have a strong interest in the Court's decision on this appeal. The diverse range of building and construction performed throughout the state and the often time-sensitive nature of ongoing and sequential construction processes require that employers in the construction industry have flexibility in the day-to-day provision and timing of individual employee meal and rest periods.

AGC members also have an interest in appropriate judicial oversight of the dramatic proliferation of class actions alleging meal period and rest break violations. AGC members operate in a highly competitive system where contracts are awarded to the lowest responsible bidder. Post-construction class actions and the disproportionate defense costs associated with them can quickly wipe out any profit margin on a project, and for many contractors, threaten their ability to continue to be able to do

business, irrespective of whether the meal and rest period claims underlying a class action have significant merit. For these reasons, the outcome of the issues on this appeal and the potential increase in class actions that could result are of paramount importance to AGC members.

II. AGC'S PURPOSE FOR FURTHER BRIEFING.

AGC is familiar with the decision of the Court of Appeal, the facts and circumstances referenced by the Court of Appeal, and the briefs on appeal. AGC supports the analysis of the issues on appeal set forth by Petitioners in their Answer Brief on the Merits. Accordingly, AGC does not propose to revisit those arguments.

The resolution of the issues on appeal will have a significant impact on employers, employees, and their mutual relationships throughout California. AGC believes further briefing is appropriate and necessary to address matters not specifically addressed by the parties' briefs on appeal: (1) the need to consider the issues on appeal in light of the intent of the Legislature and the IWC to establish minimum working conditions for employees while affording those employees and their employers flexibility in the administration of those minimum requirements, (2) the practical effect of Plaintiffs' proposed construction of meal period and rest break requirements necessitating that employers police employees in a manner never intended by the Legislature or IWC, and (3) the nature of Plaintiffs'

interpretation of the meal and rest break laws as a means to promulgate class actions and their abuse.

III. PARTICIPATION IN *AMICUS BRIEF*

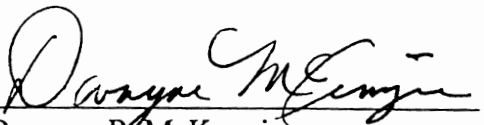
No party to the action, or their counsel, authored any part of AGC's brief or made any monetary contribution towards preparation of AGC's brief. Moreover, no party other than AGC, its members or its counsel, made any monetary contribution towards preparation of AGC's brief.

IV. CONCLUSION

AGC respectfully requests leave to file the attached brief *amicus curiae* in support of Petitioners and in support of affirming the judgment of the Court of Appeal.

DATED: August 18, 2009

COX, CASTLE & NICHOLSON LLP
John S. Miller, Jr.
Dwayne P. McKenzie

By: 
Dwayne P. McKenzie
Attorneys for the Associated General Contractors of California, Inc.

BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA

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I. INTRODUCTION

The Associated General Contractors of California, Inc. ("AGC") submits this brief in support of Petitioners ("Brinker") and of the decision issued by the Court of Appeal below wherein it properly interpreted and applied the provisions of California Labor Code sections 512 and 226.7 and of an Industrial Welfare Commission ("IWC") Wage Order to Plaintiffs' meal and rest period claims.[1]

Primary issues on this appeal are (a) whether employers must not only "provide" employees meal periods but must actually "ensure" that employees take them and (b) whether specific timing requirements are mandated by the inter-operation of sections 512 and 226.7 and the Wage Orders. In all instances, Plaintiffs have prepared an interpretation that removes or limits employer and employee flexibility in the administration of meal periods and rest breaks. Plaintiffs' interpretation fails to acknowledge the recognition of the need for flexibility that is evident from the language of sections 512 and 226.7 and of the Wage Orders, as well as from the Labor Code provisions establishing the IWC and governing its promulgation of the Wage Orders.

Plaintiffs' interpretation would necessitate that employers strictly police employee compliance with meal periods and rest breaks lest the

---

[1] All section references shall be to the California Labor Code unless otherwise stated. "Wage Orders" refer to the IWC Wage Orders, 8 Cal.Code Regs. ("CCR") § 11010, *et seq.*

employers otherwise incur liability for paying employees the one-hour premium required by section 226.7 or risk a claim that the one-hour premium is owed. It is this risk of a claim rather than an actual penalty being owed that would be the driving motivation for employers to begin requiring and policing actual employee compliance. Only by extraordinary efforts can meal and rest period rules be policed sufficiently to prevent isolated violations from being the basis for class actions claiming damages on behalf of tens, hundreds or even thousands of workers. Class actions involving employment claims – particularly wage, overtime, meal period and rest break claims – have already risen sharply since sections 512 and 226.7 were adopted.

The substantial attorneys' fees and other costs necessary to defend a class action, regardless of the merits of the claims, impose severe pressures on employers to settle these wage and hour class actions. Added to this is the likely award of attorneys' fees for class counsel in the event any wages are determined to be unpaid by the defendant employer. And the practical reality of these cases is that even the most accurate and methodical employer will have employees who now and then fail to take a meal period, or who take a meal period early or late in a shift, or who otherwise do not comply with the restrictive meal period and rest break requirements Plaintiffs would have this Court impose.

Employment class actions and their settlements generate considerable attorneys' fees for class counsel, and plaintiffs' attorneys are highly incentivized to allege class claims whenever possible. The ease by which a meal period or rest break violation can be stated as a class action has resulted in abuse of the class action procedures. They are routinely brought without any investigation into the propriety of broad class claims, but instead on the limited basis of the alleged claims of a handful of employees, or even only one.

Plaintiffs' strict interpretation of the meal period and rest break requirements of the Labor Code and the Wage Order will make it easier to allege class claims by removing many of the individual questions that would otherwise predominate, all at a cost of employee and employer flexibility in the administration of meal periods and rest breaks. The Legislature did not intend this result when it adopted sections 512 and 226.7.

The Court of Appeal, like the many federal courts cited by Petitioners (ABM 53-55)[2], properly held that employers are required only to "provide" employees with meal periods. The Court of Appeal also correctly decided the meal period and rest break timing issues presented. As a result, class certification was not appropriate in this case.

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2 "OBM", "ABM", and "RB" mean, respectively, the Opening, Answering and Reply Briefs on the Merits.

Accordingly, the decision of the Court of Appeal should be affirmed in its entirety.

II. LABOR CODE AND WAGE ORDER MEAL AND REST PERIOD REQUIREMENTS INDICATE AN INTENT TO PERMIT EMPLOYEES AND EMPLOYERS FLEXIBILITY IN ADMINISTERING THOSE REQUIREMENTS; NOTHING IN THE HISTORY OF THE MEAL AND REST PERIOD REQUIREMENTS SUGGEST THAT THE STRICT AND DOGMATIC SCHEDULE PROPOSED BY PLAINTIFFS IS REQUIRED.

As a preliminary matter, the fact of this litigation and appeal are evidence that the Legislature, like the IWC for decades before it, intended to adopt minimum meal and rest period requirements while still providing both employers and employees with flexibility. Had the Legislature or IWC intended to impose the strict schedule of meal and rest breaks which necessarily results from Plaintiffs' proposed interpretation of the statutes and Wage Order at issue, those requirements could have been set forth in a straight-forward and concise manner. But neither the Legislature nor the IWC did so. Instead, each used language which affords employers and employees a significant degree of flexibility once the threshold minimum requirements are met.

The IWC, its mandate, and its operation reflect this legislative intent to establish minimum working conditions while maintaining employer and employee flexibility. Since 1919, the IWC has been charged with ascertaining wages, hours and conditions of employment – first with respect to women and children and then, in 1973, with respect to all

employees – and promulgating regulations with regard to the same. Labor Code §§ 1173, 1182; *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 690, 702. The IWC is comprised of both labor and employer representatives. Labor Code § 70.1. The IWC is required to investigate the various occupations, trades and industries in the state. Labor Code § 1173. Before issuing regulations, the IWC must select wage boards, with both employee and employer representatives in the occupation, trade, or industry at issue. Labor Code § 1178.5. And the IWC must prepare proposed regulations and conduct public hearings with respect to the proposals. Labor Code §§ 1178(c), 1181.

The variety of scope of subjects which the IWC addresses in the Wage Orders; the requirements that they be directed towards specific occupations, trades and industries; the participation in the IWC and wage boards by both employee and employer representatives; and the opportunity for public comment and participation in the promulgation of the Wage Orders all reflect a legislative intent for flexibly in setting minimum working requirements for specific employee-employer needs in specific industries. They do not reflect an intent to impose on all employees and employers "one size fits all" standards. Indeed, jobsite construction was never even covered by an IWC Wage Order until Wage Order No. 16 was adopted in 2000.

This flexible, discretionary approach is also reflected in sections 512 and 226.7. The Legislature first codified these provisions in 1999 in the Eight-Hour Day Restoration and Workplace **Flexibility** Act. Stats. 1999, ch 134 (Assembly Bill 60) (emphasis added). As Brinker correctly notes, section 226.7 requires employers to "provide an employee a meal period or rest period," it says nothing of imposing a more restrictive "ensure" requirement. ABM 26. Likewise, section 512 imposes on employers a duty to "provide" meal periods; again with no reference to a more inflexible "ensure" standard. ABM 32.

The general lack of timing requirements in sections 512 and 226.7 and in the Wage Orders also reflects an intent to maintain flexibility above the threshold minimum standards. Section 512(a) states:

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

Wage Order No. 5 (at issue here) similarly states:

> No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of employer and employee.

8 CCR § 11050. Wage Order No. 16 (applicable to the construction industry) specifically references section 512, stating:

> (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of employer and employee. (See Labor Code section 512.)
>
> (B) An employer may not employ an employee for a work period of more than ten (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 employer and employee only if the first meal period was not waived. (See Labor Code section 512.)

8 CCR § 11160. Contrary to Plaintiffs' interpretation, nothing in these provisions directs employers or employees to take meal periods at any particular time, and they do not, as a practical matter, require employers to time meal periods for each consecutive five-hour work period. On their

face, these provisions provide how many hours in a work day will trigger the requirement of a meal period.

The only timing requirements existing for meal or rest periods are the provisions in the Wage Orders that rest periods "insofar as practicable shall be in the middle of each work period." See, *e.g.*, 8 CCR §§ 11050, 11160. Thus, even when a timing requirement is imposed, it is done in a manner that leaves considerable scheduling flexibility for employers and employees.

This flexibility is an acknowledgement of the vast diversity of employers, employees, and working conditions in California. No slate of strict schedules would have sufficiently addressed the myriad needs of California's employers, workforce , and their varied working conditions. Indeed, any regimented proposal regarding meal and rest periods by either the IWC or the Legislature would have certainly been opposed by employer organizations and by those employees comfortable with their working conditions.

On this appeal, Plaintiffs ignore this flexible approach. In their briefs, Plaintiffs analyze the meal and rest break requirements of sections 512 and 226.7, and of the Wage Orders in piecemeal fashion. The result of their analysis is a set of strict meal and rest period requirements which create, when combined, a dogmatic and overly restrictive work schedule.

Plaintiffs would have this Court impose this schedule on all employers and all employees in the state.

According to Plaintiffs, a meal period cannot precede a rest period. OBM 110-11. Rest periods are triggered and required at the 2nd, 6th, and 10th hours of the work day, unless an employee works less than 3 1/2 hours total. OBM 5; ABM 32-33. An employee cannot work more than five consecutive hours at any given time (irrespective of any rest period during those five hours) without a meal break, except in the limited situation where the employee works no more than six hours total and has mutually consented with their employer to waive the meal period. OBM 81-82; RBM 19-20; Cal. Labor Code § 512(a). Rest breaks should be taken in the middle of a work period and, presumably, never at the beginning or end of a work period. See OBM 81-82. Thus, such breaks must be preceded and followed by a period of work. As a result of the foregoing, meal and rest periods cannot be taken consecutively so as to combine them.

The result of Plaintiffs' various interpretations of the meal and rest break provisions when stitched together is the classic 9-to-5 work day: the employees begin work, take their first break period (as close to the second hour as possible), resume work, take a meal break at the middle of the work period (*i.e.*, at the fourth hour, but not later than the fifth hour), resume work, take a second break period around the sixth hour, resume work, and finally finish the work day.

Had the Legislature or IWC sought to impose this schedule – or a similar approximation – on all employees and all employers, they could have done so in a succinct manner. But they did not.

Plaintiffs cite this Court's recognition that statues regulating working conditions are generally construed liberally. *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1111; OBM 35. However, this does not warrant an interpretation that constructs requirements that do not exist. Where the language of the statutes and regulations – as well as the administrative process for promulgating minimum working condition requirements – reflect an intent to permit flexibility, a "liberal" construction of working conditions should not be permitted to remove that intended flexibility. Indeed, preserving flexibility for employees and employers in the provision of meal and rest breaks is not antithetical to construing liberally working condition statutes and regulations. It is under the light of these considerations that the meal and rest period provisions should be interpreted.

In contrast, the brief *amicus curiae* proposed by the California Labor Federation, AFL-CIO ("Federation") attacks the notion of flexibility of meal and rest period requirements. The Federation mischaracterizes Brinker's respect for such flexibility as a disingenuous "plea for 'employee freedom'", one which the Court should look upon with skepticism. Federation Brief *Amicus Curiae*, at 32-37. The Federation is misguided.

As Brinker illustrates in its Answering Brief, the meal and rest periods can be provided in a manner that both meets the minimum protections established by the Legislature and Wage Orders while leaving employers and employees flexibility in their administration.

The Federation's position is further undercut by the fact that it grossly mischaracterizes the effects of Brinker's interpretation on a principal issue on this appeal, *i.e.*, whether employers must "ensure" that employees take meal periods. The Federation argues that if an "ensure" standard is not imposed, "California workers will get off-duty meal periods only if and when they ask for them, provided employees are ready to brave the possible displeasure of supervisors and owners." *Id.*, at 2. The Federation repeats this refrain throughout its brief, framing the issue as one where employees would be left to request meal periods if the Court applies the plain meaning of the word "provide" contained in sections 512 and 226.7. *Id.*, at 3, 27, 30.

The Federation grossly misstates the interpretation of sections 512 and 226.7, and the Wage Orders, offered by Brinker and supported by this *amicus*. No one suggests that employees are required to "ask" for meal breaks. Brinker clearly states at the outset that it "does not dispute that employers must offer meal periods during which employees are 'relieve[d]... of all duty.'" ABM 2. To suggest that employees will be left to ask for meal periods (only if "brave" enough) borders on hyperbole and

is clearly intended to support a result derived not from a reasonable application of the statutory language, but fear of a non-existent bogeyman.

With regard to the construction industry, employers must comply with the meal and rest period requirements of sections 512 and 226.7 and of Wage Order No. 16 under a wide variety of circumstances and conditions. Construction work is performed at all times of the day, indoors and out, and on jobsites as small as a room or as large as many square miles. It is hard work. It is often performed in very hot or cold weather. Employees need breaks and meals if they are to perform well. The vast majority of employers provide such breaks and most employees take such breaks, whether the law requires it or not. However, the nature of construction often makes particular tasks critical in the process and in timing. Because of this, flexibility in scheduling employee meal and rest periods in construction can many times be critical and can impact the cost of construction. For well over half a century, AGC has routinely negotiated with construction trade unions collective bargaining agreements that deal comprehensively with the terms and conditions of employment, including meal and rest periods. These agreements have always maintained needed flexibility.

If Plaintiffs' reasoning is adopted, employers and employees will be substantially limited in the scheduling of meal and rest periods. For instance, assuming, *arguendo*, Plaintiffs' proposition that an employee

cannot work a period longer than five consecutive hours without a meal period (which is not correct), why could an employee not take a meal break at the third hour followed by two rest breaks in the subsequent five-hour work period? The first break could still occur at the fourth hour and a second rest break sometime in the remaining four hours. This schedule could be deemed both reasonable and practicable. However, although it would not violate sections 512 and 226.7, nor the Wage Orders, under Plaintiffs' strict construction, such a schedule would not be permissible because the meal period precedes the first rest period. OBM 110-11. The employer would be required to pay an additional hour's wage pursuant to section 226.7.

As another example, what if an employer provides an employee with a meal period where the employee is relieved of all duties at the fourth hour of an eight hour shift, but the employee chooses instead to take her meal period later in the day, at the sixth hour? Even though the employer provided the meal period and relieved the employee of all duties, Plaintiffs would find that the employer failed to meet the meal period requirements and would require the employer to pay the employee an additional hour of premium pay pursuant to section 226.7. This example is common – particularly in office or small shop, non-production environments – and is one that employers for decades have faced daily, because their individual employees have wanted flexibility in the taking and scheduling of their

individual meal periods and rest breaks for various reasons (wanting to lunch with friends, scheduling personal appointments, etc.).

Plaintiffs ' overly restrictive interpretation of sections 512 and 226.7 and the Wage Orders is not warranted. The Legislature's recognition of the need for flexibility is evident in the statutes governing the IWC and in sections 512 and 226.7. The Court should evaluate the meal and rest period questions at issue in light of this need for flexibility.

III. REQUIRING EMPLOYERS TO ENSURE THAT MEAL AND REST PERIODS ARE TAKEN IN ACCORDANCE WITH THE TIMING REQUIREMENTS PROPOSED BY PLAINTIFFS WILL CAUSE EMPLOYERS TO HAVE TO POLICE EMPLOYEE COMPLIANCE; NOTHING IN THE LEGISLATIVE HISTORY OR THE HISTORY OF THE WAGE ORDERS INDICATES SUCH POLICING EFFORTS SHOULD BE REQUIRED.

Plaintiffs contend that the Labor Code and the Wage Orders impose a "mandatory compliance standard" for meal periods. OBM 4. Plaintiffs further contend that the Labor Code and Wage Orders establish mandatory timing requirements for meal periods and rest breaks. OBM 4-5. They claim that employer compliance with the mandatory meal period requirements is easy and can be achieved by the following "simple steps":

> (1) Inform employees that the law requires them to take a thirty-minute meal period by the fifth hour of their shift;
>
> (2) Incorporate thirty-minute meal periods into the employees' work schedules;

> (3) Provide coverage for the employees or allow them to close down their workstations during lunch;
>
> (4) Pay a premium if lunch is missed (Lab. Code §226.7(b)) and correct whatever caused the problem.

OBM 29.

Plaintiffs summarily ignore the challenges employers will face if the Court adopts Plaintiffs' "enforce" standard for meal periods and the strict timing requirements for both meal periods and rest breaks. The "easy steps" proposed stop short of the difficult, and ultimately impossible, task of enforcing Plaintiffs' version of acceptable compliance by employees.

Even if employers comply with proposed steps (1) through (3), what happens when employees do not take their meal period? Or take less than a thirty minute meal period? Or take their meal period at even a minute after the fifth hour? Plaintiffs' answer is simply for the employer to pay the one-hour premium required by section 226.7 and "correct whatever caused the problem."

Plaintiffs' proposal is a cavalier response to one of the most problematic effects of Plaintiffs' proposed interpretation of the meal and rest period requirements: how to address employee non-compliance, even if minor or inconsequential. The answer is that employers would not have to simply "ensure" that meal periods and rest breaks are taken in compliance

with Plaintiffs' standards, employers would have to police employee compliance.

Where an employer has complied with steps (1) through (3) and the meal period is missed or not taken as Plaintiffs would require, the problem will, most often, be the employee's failure to take his or her meal period. To avoid paying the employee the one-hour premium for the employee's own failure, the employer would have to take corrective action against the employee in the form of disciplinary action. Repeated failures by an employee could and would lead to termination. Otherwise, the employer would bear the repeated cost of the one-hour premium.

Since it generally would not be in the interests of employers – let alone, employees – to discipline employees for minor meal period violations, employers would have to strictly police their employees, at a substantial cost and with additional manpower. Employers declining to adopt a comprehensive policing program expose their businesses to future individual or class action lawsuits at the whim of a single employee or ex-employee.

Employers would have to designate personnel to ensure compliance. Strict enforcement cannot be achieved through time cards alone since time cards may not reflect an employee's actual activities. All too often, employers who rely on time cards must rebut claims that employees performed work off the clock (just as in the present case). Moreover, even

where time cards would evidence a violation, the damage has been done because the "violation" has already occurred, and the employer would then be responsible for paying the section 226.7 premium.

Employers would have to stop violations before they occur. The only real-world way to accomplish this would be to assign personnel to police other employees. The effort, time, and costs of such enforcement would obviously vary from employer-to-employer and from workplace-to-workplace. One certainty is that it will impose costs on employers – in many cases, substantial costs.

Some employers have already started to employ supervisors whose sole duties are to monitor breaks, and to discipline employees who did not take their required breaks. Angela Bradstreet, Division of Labor Standards Enforcement, Memorandum: Report of the Public Forums On Meal and Rest Breaks (2008) at 3, http://www.dir.ca.gov/dlse/mealandrest/MRForumReport.pdf. UPS has reported that between January and August of 2007, it issued 7,200 disciplinary citations and terminated 22 employees for violating meal break requirements in an effort to avoid the possibility of a costly lawsuit. *Id.*

Yet, even such enforcement cannot prevent all non-compliance. Plaintiffs assert anecdotally that one employer who followed the proposed steps achieved a 99.6% compliance rate. OBM 29. This proves nothing.

Plaintiffs' proposed employer process is neither persuasive nor realistic. Employees used to living in a free society and to being responsible for their own lives cannot be monitored at all times. And ongoing changes in the workplace and work habits compound the difficulties for employers following Plaintiffs' suggestion that each manage its non-assembly line workforce as if it were a squad performing close order drills on a military parade ground under the hawk eyes of a cantankerous drill instructor. Telecommuting, cell phones, email devices, and other technological advances are transforming the way people work, blurring the lines of what is the workplace. Employers can provide – make available – meal periods and breaks and refrain from asking an employee to do anything during these periods. But if an employee elects to write and answer an email while at lunch, that employee has not had an "uninterrupted meal period." Under Plaintiffs' strict construction, the employer should have to pay that employee an additional hour of pay. Even if employees are instructed not to read and respond to email, they undoubtedly will.

There is no evidence that the Legislature intended to impose on employers the costs and burdens of policing meal and rest period compliance. Indeed, any such proposal would have been fervently opposed by AGC and by the entire employer community in California. The opposition would have been a blizzard compared to the mere snowstorm of

amicus briefing before this Court. Instead, the Legislature stopped short of imposing an enforcement requirement, obligating employers only to "provide an employee a meal period or rest period." Lab. Code §226.7(b).

Not requiring employers to police meal and rest period compliance does not let employers off the hook. It does not, as Plaintiffs assert, ignore "the many, often subtle, ways employers discourage or impede workers from actually taking breaks that are 'offered' to them." OBM 29. Employers are liable for such discouragement and for other acts or subterfuge intended to circumvent the requirement that employers actually "provide" meal periods and rest breaks.

In the absence of a clear legislative mandate, any imposition of a strict enforcement requirement – and the resultant increased burdens and costs that policing efforts will impose on employers – should come from the Legislature. It should result from the give-and-take of the legislative process, after stakeholders and the public have had an opportunity to voice competing interests.

IV. IN THE EMPLOYMENT CONTEXT, THE CLASS ACTION VEHICLE HAS TRANSFORMED FROM A CLAIMS MANAGEMENT PROCEDURE INTO A LITIGATION WEAPON USED TO COERCE SETTLEMENT; PLAINTIFFS' INTERPRETATIONS OF LABOR CODE AND WAGE ORDER MEAL AND REST PERIOD REQUIREMENTS WILL INCREASE ABUSE OF THE CLASS ACTION PROCESS.

A class action is a procedural device, a primary objective of which is to foster judicial economy and efficiency, benefitting both the court and the

parties. 1 Newberg on Class Actions (4th ed. 2002) § 1:1, 1:6, p. 3, 27; see *Canon U.S.A., Inc. v. Superior Court* (1998) 68 Cal.App.4th 1, 5. In relation to employment litigation – particularly wage, hour, meal period and rest break claims – class actions have become more than a mechanism for adjudicating claims, the class action has become a litigation bludgeon that batters employers by its very use rather than by any underlying merits to the predicate allegations. The mere costs of defending a class action and the threat of attorneys' fees awards make the defense of most employment claims economically impractical. For small and medium employers, the mere cost of defending the suit to a trial is potentially fatal necessitating an urgent settlement effort completely irrespective of the merits. Wage and hour claims are particularly prone to class action treatment since as few as a single alleged violation claimed by as few as one employee are being used to state class claims.

The abuse of the class action mechanism is most notable in the leverage it creates to compel employers to settle irrespective of the merits and in the tactics employed by many counsel to support settlements that compensate class counsel disproportionately to class members.

It is, therefore, not surprising that Plaintiffs frame the issues on this appeal, in substantial part, as an attack on the viability of class actions. Plaintiffs urge this Court to "preserve the class action device as an enforcement mechanism for workers in wage and hour cases." RBM 2.

Enabling wage and hour class actions should not be a consideration in determining the meaning of sections 512 and 226.7. To the contrary, recognition of the abuse of class actions in the wage and hour context sheds revealing light on Plaintiffs' interpretation of the Labor Code and Wage Orders. The position of Plaintiffs on each issue on this appeal would facilitate maintenance of meal period and rest break class actions. The requirement that all employers "ensure" that meal periods be taken regardless of individual circumstances, strict meal and rest period timing requirements, use of statistical evidence to warrant class certification, all make class actions easier to bring and maintain.

Plaintiffs appear to confuse the rights of employees to make a claim for violation of each day's meal period and each day's rest break requirements with the "right" to bring a class action. There is no right to the latter, and resolution of the issues of statutory interpretation in this appeal should not be premised on facilitating such a non-existent right by eliminating the need for examining the facts relevant to each employee's claims of violations.

A. Employment-Related, Meal And Rest Break Class Action Litigation Has Increased Substantially Since Passage of AB 60.

Anecdotal evidence that employment-related class actions have been on the rise has been confirmed. According to a report by the Administrative Office of the Courts ("AOC"), employment-related class action lawsuits are the most frequently filed of all categories of class action

lawsuits in California. Hilary Hehman, Admin. Office of the Courts, Findings of the Study of California Class Action Litigation, 2000-2006 (First Interim Report, March 2009), at 5, *available at* http://www.courtinfo.ca.gov/reference/documents/class-action-lit-study.pdf ("AOC Study"). In the study of class action filings in twelve California counties, the AOC found that employment-related class actions showed the most significant growth between 2000 and 2005, with an overall increase of 313.8%. *Id.* In 2000, class action suits based on employment-related claims comprised 17.1% of all class action filings state-wide. *Id.*, at A1. By 2005, employment class actions comprised almost 42% of all filings, far more than any other type of case. *Id.* General wage, overtime, meal and rest break claims comprised 56.1% of employment class action claims. *Id.*, at B1.

Class action suits with a primary claim based on Labor Code section 512 have shown a significant increase as well. Before 2003, class actions with a primary claim based on violations of section 512 were virtually non-existent. *Id.*, at 8. In 2003, however, the number of employment class actions based primarily on violations of section 512 jumped to 10.5%. *Id.*

B. Wage And Hour Class Actions Impose Substantial Burdens On Employers Compelling Settlement Irrespective Of Whether Claims Violations Were Non-Existent, Nominal Or Substantial; The Interpretation Of The Labor Code And Wage Orders Proposed By Plaintiffs Will Allow For Even Greater Abuse Of The Meal And Rest Period Class Action Vehicle.

It is in this environment of increasing numbers of wage and hour class actions that employers must operate. Employers are acutely concerned over the substantial costs associated with defending class actions. Even though class claims are often alleged with respect to tens, hundreds or even thousands of employees with little or no supporting evidence other than the experiences of named plaintiffs, if even that, employers must at the outset weigh the costs of defense against the likelihood of success.

Opposing class claims is very costly. It commences from the outset with the costs of extensive discovery to deal with the class certification motion. Summary judgment or partial summary adjudication is difficult to obtain and very costly to attempt in California courts. Trial is likely necessary to resolve the litigation if the employer disputes the merits. And the individual damages claimed by the named plaintiffs are low compared to the cost of trial. If trial proceeds, the employer may prevail on most of its defenses yet be saddled with the near certainty of an award of plaintiffs' attorneys' fees if any wages are found to have been owed. Lab. Code § 1194.

Thus, employers settle. Even when the wage and hour "sins" are believed by the employer to be non-existent, it settles. The price tag of trial to achieve absolution is simply too great. This is demonstrated by the statistics. Employment class actions have one of the highest rates of settlement out of all class action types in California. According to the AOC Study, nearly 47% of all employment class actions are settled. AOC Study, at 13, C5. Conversely, only 12.4% of all employment class actions are dismissed with prejudice during the course of litigation. *Id.* Of the 372 employment class actions studied, only two resulted in trial verdicts. *Id.*, at C6. Two out of 372.

The statistics also demonstrate the difficulty of terminating employment class actions, and especially meal and rest period class actions, early on the merits. The AOC Study found that only 3% of employment class actions were resolved on summary judgment, less than any other category of class action claims studied. *Id.*, at C6. This is predictable given the ease with which employees can claim a dispute as to a triable issue of fact in relation to hours worked and the provision of meal periods and rest breaks and given the number of rest breaks and meal periods that are provided for each employee in each year of employment.

The propensity for employment class actions to settle has opened a barn door for abuse. Where violations are strongly contested, a not-uncommon practice is to propose settling the class action by establishing a

large, claims-made settlement pool for all class members even though the parties know that most class members will not be located or come forward to claim their share of the settlement pool. The employer then retains the settlement funds that are not claimed by class members. By structuring settlement in this manner, plaintiffs' counsel are able to claim an attorneys' fee award based on the larger settlement pool.

The substantial attorneys' fees available to class counsel – which fees are likely disproportionate to the damages ultimately paid to individual employees – contribute to the rising number of these claims. Far from being "at risk", as Plaintiffs suggest, the class action mechanism has become the overwhelming weapon of choice in the arsenal of employment plaintiffs' counsel, a weapon that reaps disproportionate returns to the attorney that wields it as opposed to the employees at issue.

In deciding the issues on this appeal, the Court should not ignore the potential practical effects of its determination on maintenance of class actions involving meal periods and rest breaks. Interpreting sections 512 and 226.7 as requiring employers to "ensure" that meal periods are taken will increase the number and likelihood of class actions, because it will remove from relevance the facts concerning individual motivations and the circumstances of the alleged denial of each employee's meal and break periods that would otherwise often predominate, making class actions inappropriate in many cases. Similarly, finding that these meal and rest

period provisions create strict timing requirements will increase the number of class actions since any deviation by even a single employee could be used to state class allegations and seek employee time records to support class certification.

The use of the class action in employment meal and rest period cases has already tipped the scales in favor of plaintiffs and their counsel. The substantial costs in defending these claims, regardless of their merit, and the inherent risks of litigation place substantial pressures on employers to settle. Affirming the decision of the Court of Appeal will not be the end of such class actions as the financial incentives, particularly for plaintiffs' counsel, are too great.

Confirming that employers need only provide meal and rest periods and refusing to adopt Plaintiffs' strict timing requirements may appropriately make some claims inappropriate for class treatment. Yet, even if so, no individual employee will thereby be deprived of their right to state individual claims. The class action procedure is designed to benefit the courts and parties in the adjudication of claims. It should not be confused as a substitute for those claims.

V. CONCLUSION

AGC submits that the decision of the Court of Appeal should be affirmed in its entirety.

Respectfully submitted,

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COX, CASTLE & NICHOLSON LLP
John S. Miller, Jr.
Dwayne P. McKenzie

By: _____
Dwayne P. McKenzie
Attorneys for the Associated
General Contractors of California