No. S166350

IN THE SUPREME COURT OF CALIFORNIA

Brinker Restaurant Corporation, et al.,
Defendants and Petitioners,

vs.

San Diego County Superior Court,
Respondent,

Adam Hohnbaum, et al.,
Plaintiffs and Real Parties In Interest.

On Review of an Opinion of the California Court of Appeal
Fourth Appellate District, Division One, No. D049331
On Writ Petition from the Superior Court of California
San Diego County Superior Court No. GIC834348
The Honorable Patricia A.Y. Cowett

REQUEST FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF BY CHINESE DAILY NEWS, INC. IN SUPPORT OF DEFENDANTS BRINKER RESTAURANT CORPORATION, ET AL.

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Unlike many newspapers, CDN's labor force is non-unionized, and thus does *not* have collective bargaining agreements with its employees that might otherwise avoid the effects of the legal questions at issue in *Brinker*. In other words, CDN is directly affected by the law under consideration by this Court.

CDN's Interest. CDN is the defendant and appellant in federal litigation titled *Wang v. Chinese Daily News, Inc.*, which involves class action wage and hour claims (for overtime and meal and rest breaks) under California law. The class consists of approximately 250 CDN employees and former employees, including newspaper reporters.

The *Wang* litigation has resulted in several published district court decisions that have been treated as persuasive authorities, even though, as trial court rulings, they have no precedential value. *E.g., Wang v. CDN* (C.D.Cal. 2005) 231 F.R.D. 602 (granting class certification); (C.D.Cal. 2006) 236 F.R.D. 885; (C.D.Cal. 2006) 435 F.Supp.2d 1042, 11 Wage & Hour Cas.2d (BNA) 998. In particular, Plaintiffs even cited *Wang v. CDN, supra*, 231 F.R.D. 602, to this Court in their petition for review, and

opening brief on the merits; and — as one of the earliest rulings addressing the topic — that decision is cited by many of the other cases cited in the briefs on the merits.

The *Wang* litigation resulted in pre-*Brinker* rulings against CDN resulting in a roughly $9 million judgment, currently on appeal to the Ninth Circuit Court of Appeals.

This action presents issues involving whether and how wage and hour class actions should exist and be litigated under California law. No matter how this Court resolves the issues on which review has been granted, the Court's opinion is nearly certain to significantly affect CDN's pending federal appeal (*Wang v. CDN*, 9th Cir. Nos. 08-55483, 08-56740); its business practices; and the newspaper industry generally.

CDN's Position. CDN has carefully reviewed the petition for review materials and the merits briefs already filed in this Court, and thus is familiar with the arguments raised by the parties. CDN's Amicus Brief does not repeat arguments already made, but instead presents its own views on the issues under review. In particular, the attached Amicus Brief will assist the Court in

deciding the issues by providing a broader factual context within which to analyze and develop California law, i.e., from the perspective of the newspaper industry, not presented in the existing briefing.

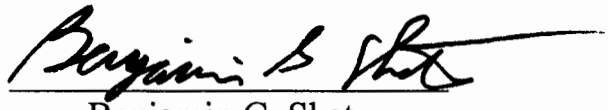
The newspaper industry, and media outlets more generally, forms an important sector of California's economy. Accordingly, CDN respectfully requests that the Court consider its views in evaluating the arguments raised in this action by accepting the attached brief.

Amicus Disclosure Statement. Pursuant to Rule 8.520(f)(4), CDN states that no party or counsel for a party has authored the proposed amicus brief in whole or in part. Further, no party or counsel for a party — and indeed no one other than CDN — has made any monetary contribution to fund the preparation or submission of CDN's proposed amicus brief.

Dated: August 12, 2009

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

By: 

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II.

BRIEF OF AMICUS CURIAE CHINESE DAILY NEWS IN SUPPORT OF BRINKER RESTAURANT CORPORATION

As in other fields, the law regarding meal and rest breaks must be fair to the interests of all parties. The rigid rule sought by the Plaintiffs would be unworkable in many workplace situations. Because the questions of whether breaks are taken and, if not, why not, are peculiarly individual, they are not suited to either black letter rules or across-the-board class determinations. The newspaper business provides a good illustration of the variables and problems inherent in trying to impose the kind of one-size-fits-all rule urged by the Plaintiffs.

Like the reporters at any serious and legitimate media outlet, CDN's reporters work autonomously; originate their own story ideas; gather and synthesize information from multiple sources; and write interesting and compelling stories. They read the output of other media publishers for story ideas; attend press conferences and events related to their beats; conduct interviews for fact and quote

gathering purposes; and draft and edit informative and well-crafted articles.

As a result, CDN's reporters (1) spend most of their work time out of the office; (2) have control over their own schedules; (3) engage in factual investigations in the field, including choosing who to interview, and how and when to do so; (4) select events to attend; and (5) submit their articles to their editors electronically after writing them remotely — *often from their homes*.

The Plaintiffs urge this Court to require employers not only to "provide" meal and rest breaks, as required by statutes and wage orders, but also to "ensure" that each employee takes those breaks by enforcing rigid break schedules. This is incompatible with the modern functioning of the newspaper industry. Reporters voluntarily work odd hours in diverse locations to fulfill their fact gathering and writing duties.[1] Whether out on their beats or writing at home or elsewhere, they are essentially autonomous and not

[1] This is memorably depicted in films such as All The President's Men (Warner Bros. Pictures 1976); The Front Page (Universal Pictures 1974); His Girl Friday (Columbia Pictures Co. 1940); The Front Page (The Caddo Co. 1931); and many others. See also Fletch (Universal Pictures 1985) (lampooning extreme undercover journalism techniques).

subject to supervisory monitoring. Their wage and hour claims turn on highly individualized determinations, not common questions amenable to class treatment. Imposing an "ensure" requirement on such an individualized matrix is unworkable, if not impossible.[2]

Moreover, regardless of their legal exemption status, reporters consider themselves to be professionals. Many CDN reporters have advanced degrees in journalism or mass communication. Newspaper reporting is a demanding, high-pressure job with daily deadlines, judgment calls, and sophisticated responsibilities. The exigencies of reporting often interfere with traditional nine-to-five work hours and noon-to-one lunch breaks. Reporters more often than not eat on-the-run, or lunch at press conference events that provide food to assembled reporters. Reporters committed to their craft do not respond well to the kind of paternalistic supervision that Plaintiffs demand. Indeed, dedicated reporters hot on a story, tracing a lead, or facing a deadline often willingly work overtime and skip meal or rest periods.

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[2] The same is true of other groups of CDN employees, like delivery truck drivers, for example, who may choose to shorten a break or forgo it completely in order to stay ahead of traffic.

Undoubtedly, other industries have their own individual traits, and those who work in them will have individualized reasons for missing or shortening or delaying a scheduled break. To the extent that there are specific, individual problems, they should be examined and dealt with. But the tool should be a scalpel, not an axe. The fundamental point is that taking or missing a break is more likely to be an individual choice rather than a corporate one. The specific circumstances relevant to any given employee preclude mandating across-the-board identical treatment.

Employers should not be responsible for an employee's decision to voluntarily forgo meal periods. Class treatment, therefore, is not appropriate, because no trier of fact can determine on a class-wide basis whether employees missed breaks as a result of coercion or free choice.

In CDN's case, many CDN reporters work primarily from home — and admittedly could take meal and rest breaks whenever they chose. Despite admissions that they were not "prevented" from taking breaks, and in fact did personal chores when working from home (e.g., laundry and other housework), they

argued that the nature of their business meant that they were "on-call" all day long (e.g., reviewing news from other outlets or awaiting return calls from sources), and thus could not take their breaks. That sort of argument makes a mockery of wage and hour laws designed to protect truly oppressed workers.

This Court should make clear that the requirement under California law that employers "provide" meal and rest periods means that breaks must be made available, but does not mean that employers must ensure they are taken. Employees should be entitled to recover only if the employer somehow forces or coerces them to miss their breaks.

III.
CONCLUSION

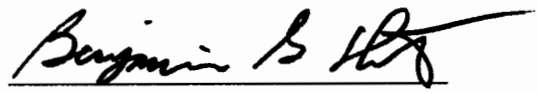
California law should — and does — protect employees. But adopting Plaintiffs' proposed rules of law will have an unwarranted and devastating effect on employers, particularly newspapers. Reporters essentially set their own hours and work at home or in the field away from direct employer supervision. That means any number of scenarios could occur: (1) some could take

regularly scheduled meal and rest breaks; (2) some could continue chasing stories or interviews and miss or delay some breaks; and (3) still others would be (if so inclined) in a position to manipulate the law and manufacture claims (e.g., by skipping breaks or taking breaks of less than the legally mandated times, and then claiming punitive compensation because their employer did not "ensure" that they actually stopped and took their breaks). To account for all the individualized possibilities, this Court should affirm the Court of Appeal's sound analysis.

Dated: August 12, 2009

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

By: 

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CERTIFICATE OF WORD COUNT
California Rule of Court 8.204(c)(1)

Pursuant to California Rule of Court 8.204(c)(1), I certify that this **Amicus Curiae Application And Brief** contains **1,637** words (as counted by the Microsoft® Office Word 2003 word processing program used to generate this brief), not including the tables of contents and authorities, the caption page, signature blocks, or this certification.

Dated: August 12, 2009

Benjamin G. Shatz

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On August 12, 2009 I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

REQUEST FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF BY CHINESE DAILY NEWS, INC. IN SUPPORT OF DEFENDANTS BRINKER RESTAURANT CORPORATION, ET AL.

in a sealed envelope, postage fully paid, addressed as follows:

SEE ATTACHED SERVICE LIST

Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 12, 2009 at Los Angeles, California.

BESS A. HUBBARD

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