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
Honorable Patricia A.Y. Cowett, Judge

OPPOSITION TO APPLICATION OF CALIFORNIA EMPLOYMENT LAW COUNCIL FOR LEAVE TO FILE POST-HEARING *AMICUS* BRIEF ADDRESSING RETROACTIVE OR PROSPECTIVE EFFECT OF FORTHCOMING DECISION

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I. INTRODUCTION

There are three reasons why this Court should deny the application of California Employment Law Council ("CELC") to file an untimely, post-argument amicus brief.

First, CELC had every opportunity to address the retroactivity issue in its August 18, 2009 amicus brief. CELC has long known of plaintiffs-real parties' argument that California law requires a 30-minute unpaid meal period after five hours of continuous work. Indeed, CELC's present counsel, Paul Hastings, was counsel for defendant Brinker in this very case when the trial court ruled in favor of plaintiffs on that meal period timing issue *more than six years ago*, in July 2005. CELC makes no effort to show that anything new has happened since briefing was completed, either legally or factually, to cast doubt on the presumption that civil case decisions are retroactively applied. Nor does CELC offer any excuse for having waited until two weeks after oral argument to raise this issue for the first time.

Second, CELC's proposed brief is entirely unhelpful, as it does not even make a colorable showing that this Court's ruling should be prospective only. CELC's one-sided brief ignores all of plaintiffs' (and the trial court's) meal period timing arguments with which it disagrees, and makes no effort to refute plaintiffs' showing that the trial court's ruling was fully consistent with decades of settled administrative interpretation.

Third, CELC's proposed brief rests, not on reasoned analysis, but on speculative and hyperbolic arguments that are entirely unsupported by factual citation to this record or any other record. CELC threatens dire consequences—a "tsunami" of class action lawsuits—if the trial court is affirmed. But colorful threats are no substitute for careful analysis, and

CELC's implied assumptions and careless predictions are easily shown to be illogical and overblown.

Disagreement with the legal positions taken by a party at oral argument has never constituted good cause for post-argument merits briefing; and if CELC's untimely brief is accepted in this case, any amicus or party could submit new briefing after every future oral argument, to bolster its side's legal position, to provide the answers it wished had been given in response to the Justices' questions, or to point to aspects of the opposing party's analysis that the Court might have explored in greater depth.

Alternatively, if CELC's application is granted, plaintiffs request leave to respond on the merits to demonstrate why the Court's ruling—whatever it may turn out to be—should be applied retroactivity (although perhaps it might be best, if the Court does request briefing, for the Court to make that request *after* the decision is filed, so the parties may address the Court's actual, rather than its hypothetical, rulings).

II. DISCUSSION

A. CELC Had Ample Opportunity to Address the Presumptively Retroactive Effect of the Court's Forthcoming Decision

CELC asserts that its untimely post-argument brief should be accepted "because the oral argument dealt with an issue that the prior briefing of the parties and amici had overlooked: whether this Court's decision should be retroactive or prospective." CELC App. at 1.

Certainly CELC harbored no expectation that this Court would ignore plaintiffs' challenge to Brinker's "early lunching" policy or to the Court of Appeal's reversal of the trial court's ruling on meal period timing. CELC's current law firm was lead counsel for Brinker in the trial court

through July 2006 (*see* 3PE636, 639, 669; 4PE983; 1RJN7085)—one year *after* the meal period timing issue was briefed, argued, and decided by the trial court in plaintiffs' favor. 1PE196-200, at 198:8-10 (stipulation submitting meal period timing issue for decision); 1RJN7085-7338 (briefing); 1PE202-206, 208 (July 2005 tentative and final rulings holding that Brinker "appears to be in violation of §512 by not providing a 'meal period' for *every five hours of work*." (emphasis added)).[1] CELC's law firm also represented Brinker when it unsuccessfully challenged that ruling in the writ petition that the Court of Appeal summarily denied in January 2006. *See* 2RJN7339-7370 (No. D047509); 2RJN7371.

CELC cannot credibly assert that the possibility of a retroactive ruling never occurred to its lawyers or to Brinker or any other amici during the three years of briefing that preceded oral argument. As CELC itself acknowledges, decisions of this Court are presumptively retroactive; and if Brinker or any of its amici believed that special circumstances warranted a different result in this case, they had ample opportunity to explain why (at a time when plaintiffs could have timely responded).

B. CELC's Proposed Brief Does Not Make Even a Colorable Argument to Overcome the Presumption of Retroactivity

CELC is wrong in asserting that "the Court would benefit from hearing CELC's views" on "the possible retroactive effect" of a ruling on meal period timing (CELC App. at 2), because those views consist of little more than empty rhetoric. A ruling that affirms the trial court's July 2005 ruling on meal period timing could not upset any reasonably settled expectations, because the Wage Orders have always required meal periods for each five-hour work period and those Wage Orders were explicitly

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[1] "RJN" refers to plaintiffs' request for judicial notice filed in the Court of Appeal on February 2, 2007.

incorporated by Labor Code §226.7—a critical statutory provision that, tellingly, CELC does not even mention.

1. Retroactivity is the Norm, Not the Exception

"The general rule that judicial decisions are given retroactive effect is basic in our legal tradition" and "familiar to every law student." *Newman v. Emerson Radio Corp.*, 48 Cal.3d 973, 978 (1989). "Exceptions" to the rule are "rare," even when a new decision "represent[s] a clear change in the law" and even when the change "could not have [been] anticipated prior to [the new] decision." *Id.* at 978, 982. Only the most "compelling and unusual circumstances" justify "departure from the general rule." *Id.* at 983. No such circumstances exist here.

As a preliminary matter, there will be no "clear change in the law" if the Court rules in plaintiffs' favor—the first prerequisite for considering prospective application. The Court's opinion will not change "a given construction [of a statute] by a court of last resort," *Newman*, 48 Cal.3d at 982, no matter what the Court rules, because this Court has never before ruled on the substantive standards governing meal period timing and compliance. Moreover, even if CELC were right that affirming the trial court would effect a substantive change in the law (despite decades of administrative construction supporting that ruling), CELC's argument would still fail once the Court considered the other pertinent retroactivity factors: the purpose of the announced rule; the extent of public reliance on the prior rule; the public's ability to foresee the change, and the effect on the administration of justice. *Peterson v. Superior Court*, 31 Cal.3d 147, 152-53 (1982).

None of these factors supports CELC's position; and although CELC is asking this Court to let it file a post-argument brief addressing

retroactivity, its proposed brief barely addresses those issues except in the most conclusory, non-analytical fashion.

Judicial decisions in civil cases are only made prospective where, as a threshold matter, the new rule contradicts prior *uniform* appellate interpretations. Each of the cases relied upon by CELC, for example, reversed a consistent line of appellate authority. In *Claxton v. Waters*, 34 Cal.4th 367, 378-79 (2004), this Court held certain evidence inadmissible that all prior appellate decisions had held admissible. In *Woods v. Young*, 53 Cal.3d 315, 330 (1991), the Court resolved a statute of limitations question in a manner directly contrary to the "unanimous conclusion" of "seven published Court of Appeal decisions." In *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal.4th 95, 121-22 (2006), the Court rejected longstanding appellate decisions of another state that litigants my have reasonably believed were applicable to their case. In *Camper v. Workers' Comp. Appeals Bd.*, 3 Cal.4th 679, 688-69 (1992), the Court interpreted a statutory filing deadline in a manner contrary to "unanimous and unquestioned" prior appellate authority. And, in *Estate of Propst*, 50 Cal.3d 448, 463 (1990), the Court changed a rule stated in an unbroken series of appellate decisions, including three decisions of this Court, dating back to 1932.

CELC does not cite *any* court decisions to support its position that California law allows employers to require "early lunching" or otherwise to require workers to remain on duty without a 30-minute meal period for more than five hours at a stretch (or, according to CELC, up to "nine or more hours … before a statutory entitlement to a second meal" (CELC Br. 4)). Nor do any such court decisions exist, except for the vacated Court of Appeal decision in this very case.

2. California Has Required Proper Meal Period Timing Since the Earliest Wage Orders

CELC's proposed brief is really little more than an effort to re-argue the merits of the meal period timing issue. That is not proper, of course, but CELC's arguments are readily refuted.

The Wage Orders prohibit employers from employing workers "for a work period of more than five (5) hours without a meal period of not less than 30 minutes." 8 Cal. Code Regs. §11050(¶11)(A). This language has been unchanged since 1952. *See* Wage Orders 5-52 (¶11) (Aug. 1952), 5-57 (Nov. 15, 1957), 5-63 (Aug. 20, 1936), 5-68 (Feb. 1, 1968), 5-76 (Oct. 18, 1976), 5-80 (Jan. 1, 1980), 5-98 (Jan. 1, 1998), Interim Wage Order - 2000 (Mar. 1, 2000), 5-2001 (Oct. 1, 2000) (MJN Exs. 5, 14-21).

A "work period" is a term of art meaning "a continuing period of hours worked."[2] The term is repeatedly used this way throughout the Wage Orders, including in the recordkeeping provision (employers must keep "time records showing when the employee begins and ends each ***work period***" (8 Cal. Code Regs. §11050, ¶7(A)(3))) and in the rest break provision (requiring rest breaks "in the middle of each ***work period***" (8 Cal. Code Regs. §11050, ¶12(A))). A typical shift consists of a "work period," followed by a "meal period," followed by another "work period." *Id.*, ¶11(A).[3] On an eight-hour shift, this allows the employer to designate any time within a two-hour window for the meal period—*i.e.*, any time between the third and fifth hours of work.

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[2] Memorandum of IWC Executive Officer, "MEAL PERIODS" (03/05/82) (MJN Ex. 376#24; 800410152).

[3] The Wage Orders define a "shift" as "designated hours of work by an employee, with a designated beginning time and quitting time." 8 Cal. Code Regs. §11050, ¶2(Q). In the trial court's words, "[w]ithin a shift there are 'work periods' and 'meal periods.'" 1PE203.

To avoid "a work period of more than five (5) hours," as the Wage Orders require, meal periods must be timed to occur "at such *intervals* as will result in no employee working longer than five consecutive hours without an eating period."[4] In other words, the Orders require "a 30-minute meal period within *each* five-hour time frame." DLSE Op.Ltr. 2003.08.13 at 2 (MJN Ex. 380) (emphasis added).[5]

The earliest Wage Orders confirm this interpretation. *See generally* Locker-Broad Amicus Brief at 3-15. For instance, the IWC's 1931 sanitary order governing all industries stated: "[N]o women or minor shall be permitted to work *an excessive number of hours* without a meal period." Wage Order 18 (Dec. 4, 1931, eff. Feb. 26, 1932) (MJN Exs. 11, 80) (emphasis added). The word "excessive" came to be generally "interpreted to mean after four and a half or five hours of work." Minutes of a Meeting of the IWC (Jan. 6, 1933) at 701443122 (MJN Ex. 288); *see also* Wage Order 16A (1931) (MJN Ex. 245) (meal period required no later than 5-1/2 hours after reporting to work); Minutes of a Meeting of the IWC (Aug. 19, 1939), at 701450133 (General Card No. 14) (MJN Ex. 291) (4-1/2 hours for an eight-hour shift or, in professional offices, five hours).

This requirement was made even more explicit in 1943 when the IWC adopted the "NS" series of Wage Orders. These Orders introduced the term of art "work period," and limited the maximum length of the "work periods" to five hours. Wage Order 5NS (Apr. 14, 1943, eff. Jun. 28, 1943), ¶3(d) (MJN Ex. 12) ("No employer shall employ any woman or

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[4] Letter from IWC Executive Officer (07/13/82), at 800410113 (MJN Ex. 376#20) (emphasis added).

[5] *Accord* DLSE Op. Ltr. 2002.06.14 (MJN Ex. 42) ("each five-hour 'work period' stands alone"). The DLSE's amicus brief, filed on August 26, 2009, does not address meal period timing or argue that the Wage Orders do not impose a timing requirement.

minor for *a work period of* more than five (5) hours without an allowance of less than thirty (30) minutes for a meal." (emphasis added)); Minutes of a Meeting of the IWC and Wage Order 5NS (Apr. 14, 1943), at 703439106 (MJN Ex. 302) ("The Commission finds it is necessary to insure a meal period after not more than 5 hours of work in order to protect the health of women and minors." (emphasis added)).

The same language has continued through the current Wage Orders. 8 Cal. Code Regs. §11050, ¶11(A). Those Wage Orders prohibit the "early lunching" practices that Brinker unlawfully imposes on its workers. *See* Minutes of a Meeting of the IWC (Jan. 29, 1943), at 703426115 (MJN Ex. 297) (1943 Orders prohibit work schedules "leaving a stretch of 6 hours to be worked after lunch"); Report and Recommendations of the Wage Board for IWC Wage Order 12–Motion Picture Industry (Oct. 21, 1966) at 6 (MJN Ex. 328) (1963 Orders require "meal periods *at intervals* of no more than five and one-half hours" (emphasis added)); *California Hotel & Motel Assn. v. Industrial Welfare Commission*, 25 Cal.3d 200, 205 n.7 (1979) (1976 Orders require "[a] meal period of 30 minutes *per 5 hours of work*" (emphasis added)); IWC Summary of Interim Wage Order—2000 (eff. Mar. 1, 2000) (MJN Ex. 31) ("An employee must receive a thirty-minute meal period for *every 5 hours of work*." (emphasis added)); IWC Summary of Amendments to Wage Orders 1-13, 15 and 17 (Jan. 1, 2001) at 4 (MJN Ex. 33) (same language).[6]

In 2000, the Legislature enacted Labor Code §226.7 for the expressly stated purpose of "codify[ing]" the Wage Orders, including their

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[6] In 1947, the term of art "work period" was removed and replaced with "five (5) consecutive hours after reporting to work." Wage Order 5R, ¶10 (Jun. 1, 1947) (MJN Ex. 13). In 1952, however, "work period" was *restored* and the language adopted that remains in place today. Wage Order 5-52, ¶11 (MJN. Ex 14).

timing requirement. AB 2509, Third Reading, Senate Floor Bill Analysis, at 4 (Aug. 28, 2000) (MJN Ex. 61). As the Senate Floor Analysis explains, §226.7 "[p]laces into statute the existing provisions of the [Wage Orders] requiring … a 30-minute meal period *every five hours*." *Id.* (emphasis added). The intent was to address the problem of "chronic violators" who "work their employees long hours without rest periods." *Id.*; *see Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1105 (2007) (§226.7 enacted "due to a lack of employer compliance" with Wage Orders).

CELC wholly ignores §226.7, even though it is the most recently enacted statute on the subject of meal periods. Section 226.7 explicitly incorporates the Wage Orders and does not contain *any* language that Brinker or its amici has argued is inconsistent with the Wage Orders' longstanding timing requirement.[7] Even if there were some inconsistency, moreover the Wage Orders may be more protective of workers' rights than

[7] CELC now contends that "most California employers" altered their meal-period policies in 2000 in reliance on the words "per day" in Labor Code §512 (*see* CELC Br. at 2), but those words do not appear anywhere in §226.7 or the Wage Orders. "Per day" is merely a topical reference intended to relate §512 to the rest of AB 60. *See* Amicus Letter of former Assemblyman Wally Knox (author of AB 60), 09/11/08, at 5. AB 60 addresses daily work time. The words "per day" were used throughout the rest of the bill (both in the text and in the Legislative Council's Digest) where the purpose is to expand workers' daily pay protections by expanding daily overtime. *See generally* AB 60 (MJN Ex. 58). CELC's argument assumes that the words "per day" were used everywhere else in AB 60 to *expand* workers' daily pay protections, but were used in §512 to *contract* workers' daily meal period protections. That is illogical. It makes no sense to conclude that a bill sponsored by the California Labor Federation would do such a thing, especially when there is no indication anywhere in the legislative history that this was the Legislature's intent.

the minimum floor set by the Labor Code, as this Court held in *Industrial Welfare Commission v. Superior Court*, 27 Cal.3d 690 (1980).[8]

Accordingly, while CELC repeatedly insists that a ruling in favor of plaintiffs would effect a sea change in employers' obligations, it never persuasively explains *why*, and its arguments wholly ignore Labor Code §226.7 and the Wage Orders. No contrary argument worthy of this Court's consideration is presented in CELC's proposed brief.

C. CELC's Proposed Brief Rests Upon Threats of Economic Harm that are Entirely Unsupported by Evidence or Logic

1. CELC's Balancing of the Equities Misstates the Critical Facts

CELC makes what is, in essence, a skewed argument about fairness. It argues on one side of the equitable balance that meal-and-rest-break violations are "victimless" offenses (CELC Br. at 10), which is a stunningly tone-deaf argument in a case affecting thousands of low-wage restaurant workers whom Brinker forces to work on their feet, many in hot kitchens or dishwashing stations, without a break for extended hours at a time. CELC then contrasts the claimed technical nature of Brinker's pervasive violations with the supposedly dire consequences that "most California employers" will face if the Court's decision applies retroactively (CELC Br. at 1, 3, 4).

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[8] Also, at the time the IWC adopted the current Orders, codified at 8 Cal. Code Regs. §11050, *passim*, the IWC was explicitly empowered to "adopt or amend" the Orders in any manner it deemed consistent with worker health and safety, "*[n]otwithstanding any other provision of law*." Lab. Code §516 (AB 60, as adopted eff. 1/1/00) (emphasis added) (MJN Ex. 58, §10). Contrary to CELC's position (Br. at 1, 7, 10), the IWC was *not* affected, at that time, by any later-adopted amendment to section 516. "Most California employers" should have known this.

In making its ham-handed threat of economic catastrophe, CELC necessarily makes certain unstated assumptions—none of which is the least bit supportable. First, it assumes that "most" California employers, like Brinker, impose early lunching policies on their workers in violation of California law. Second, it assumes that those employers "altered" their prior legally compliant meal period timing policies in 2000, in "reasonabl[e] reli[ance]" on the "literal words" of the Labor Code (CELC Br. at 4), and did not revisit the legality of those policies despite the Legislature's express incorporation of the Wage Order language in Labor Code §226.7, or the IWC's reiteration of that same Wage Order language, both of which happened later in the same year (*see* CELC Br. at 1, 2, 3, 7).

Neither of these implied assumptions is supported by record cites or any other evidence. Nor do they make any sense.

First, as to CELC's assertion that the meal period violations alleged by plaintiffs here are "victimless" (CELC Br. at 10), the administrative and judicial authorities cited by plaintiffs show precisely the opposite. As the IWC long ago concluded, based on decades of scientific study and research, the availability of periodic meal and rest breaks is critical to worker health and safety, and to the safety and well-being of their customers as well. *See Murphy*, 40 Cal.4th at 1105; *see also Gentry v. Superior Court*, 42 Cal.4th 443, 456 (2007).[9] That is why the Legislature concluded, in an effort to boost meal period compliance, that when an employer violates the minimum meal-and-rest break requirements imposed by law, the aggrieved

[9] *E.g.*, IWC Transcript of Public Hearing (Feb. 11, 1916) at 41(MJN Ex. 283) (thirty-minute minimum meal period originally adopted to avoid "giv[ing workers] dyspepsia"); Minutes of a Meeting of the IWC and Wage Order 5NS (Apr. 14, 1943), *supra*, at 703439106 (MJN Ex. 302) ("The Commission finds it is necessary to insure a meal period after not more than 5 hours of work in order to protect the health of women and minors.").

workers are entitled to be paid an additional hour's wage as compensation. That requirement is designed to discourage employers from violating the law (*Murphy*, 40 Cal.4th at 1110); and to ensure that if violations do occur, the workers will be compensated for harm they suffered as a result of their employer's unlawful conduct.[10]

Second, as to the supposed harm to employers if called to task for their unlawful conduct, CELC's arguments lack any factual foundation. There is no indication in the record, or as a matter of common sense, that *any* significant number of employers, let alone "most California employers," impose an early lunching policy similar to Brinker's, which requires its workers to take a meal period within the first hour after coming to work or not at all, and then forces them to stay on duty without any further meal break through the rest of their shift. Nor is there any logical reason why most law-abiding employers would impose such an early lunching/extended work period requirement, which is unsafe, unhealthy, and likely to have adverse impacts on customers and clients no less than on the workers themselves.

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[10] CELC makes the curious statement, as if it were musing over litigation tactics instead of seeking leave to file an untimely brief in a real case affecting real workers, that "it is unfortunate that the 'Rolling 5' issue comes before this court in *Brinker*, a case involving waiters and waitresses working dinner shifts." CELC Br. at 4. While this case does of course affect waiters and waitresses, it also affects Brinker's bus persons, prep-cooks, cooks, dishwashers, and many other vulnerable low-wage workers, who are equally affected by Brinker's unlawful policies and who are especially susceptible to the company's pressure to work long-unbroken hours. Factory workers, garment industry workers, and many other categories of low-wage workers throughout the State will also be affected by the *Brinker* decision, as *these* are the powerless workers who are at the greatest risk of being forced to work long extended stretches without a meal period in violation of California law. *See* Worksafe Law Center Amicus Brief, filed August 19, 2009; Bet Tzedek Legal Services Amicus Brief, filed August 20, 2009.

In deciding whether to accept CELC's brief for filing, the Court should recognize that CELC does not even *try* to cite any evidence to support its self-serving assertions about what "most California employers" have done or what those employers "previously thought to be settled law." CELC App. at 3; CELC Br. at 1. In fact, those assertions are easily rebutted. If CELC had bothered to look at the most popular treatises on California Employment Law, it would have realized that the authors of those treatises—including attorneys from the very law firms who represent the Employers Group (Shepard Mullin) and CELC (Paul Hastings) as amici in this case—have for years been warning California employers that they should "provide meal periods at a time during the work day that avoids *any* actual work periods in excess of five hours." *See* Simmons, *California's Meal and Rest Period Rules: Proactive Strategies for Compliance* §2.3(b) (2d ed. 2007) (emphasis added) (copy attached); Wilcox, *California Employment Law* §3.23 at 3-168 ("A nonexempt employee working more than five hours must be provided with a meal period of at least 30 minutes."). As the Simmons treatise explains:

> [T]he timing of meal periods is important. … [A] second meal period may be necessary, even for an eight-hour shift, if an employee takes a meal period too early in the shift. For example, if more than five hours remain in the balance of the shift, after the employee returns from a meal period, a second meal period is arguably owed.

Id. §2.3(a). This treatise also includes a chart illustrating the meal period timing window for eight-hour shifts starting at different times. *See id.* §2.3(e). CELC's assertion that "most" employers "reasonably relied" on a construction that would allow employers to work up to "nine or more hours" without being entitled to a meal period (CELC Br. at 4) rests on nothing more than CELC's say-so.

Indicative of its aggressive advocacy, CELC seems to be arguing for prospective application of this Court's upcoming decision not only as to all non-party employers in the State (including defendants in the half-dozen grant-and-hold cases, *none* of whom seem to have an early lunching policy similar to Brinker's), but *even as to Brinker itself*. Given the facts of record, any such limitation would be a complete travesty.

Brinker has been on notice since at least 2002 that the DLSE considered its early lunching policy to be unlawful, when Brinker agreed to pay a $10 million settlement to its workers after reviewing hundreds of pages of DLSE documents itemizing its extensive violations of California meal and rest break law. 2PE348-368, 18PE4840-44. Brinker also knew that the DLSE's follow-up audit in 2003 showed that Brinker was *still* engaged in unlawful early lunching, with workers commonly being forced to remaining working without break for periods in excess of 6.5 hours, 21PE5770-71; and that the trial court in July 2005 had concluded that Brinker's policy was unlawful (which is what triggered Brinker's first, unsuccessful writ petition). *See* 1PE204, 208. Even after these developments, Brinker did not change—or even re-evaluate—its unlawful policies. To the contrary, Brinker's own PMK witnesses, Director of Human Resources and Compliance Ginger Hukill and Legal Compliance Manager Barbara Youngman, both testified that Brinker's early lunching policy continued unabated even after the stipulated DLSE injunction and even after that trial court found that policy to be unlawful. 1PE266, 2PE329, 440, 456-57. And Joseph Taylor, Brinker's Vice President and Head of Corporate Compliance, testified that as of the date of his deposition, Brinker had still made no effort to make sure it was in compliance with California law or the DLSE injunction (which remained in effect through 2006, 18PE4840-44). *See* 2PE451, 21PE5936.

This is as far from "reasonable reliance" as could possibly be imagined.

2. CELC's Economic Calculations are Overblown

Finally, CELC tries to support its request for leave to file an untimely brief by referring to an anticipated "tsunami" of litigation that could cause unsuspecting California employers to be liable for "massive damages" if this Court's ruling is not made prospective only. CELC Br. at 5-7.

In the first place, the Court's ruling could only affect those employers, like Brinker, that have a workplace-wide policy and practice of requiring early lunching followed by a long unbroken stretch of work that exceeds five hours or more—*i.e.*, employers who violate the law. In a typical workplace, with an eight-hour shift and a half-hour unpaid meal period, no potential for liability exists as long as the employer schedules its workers to take their meal period between the third and fifth hours (and relieves them of all duty during that time). The meal period timing claim only exists in this case because of Brinker's requirement that meal periods must be taken at the very start of most workers' shifts, because only then could more than five hours (or, more commonly, six or seven) elapse between the end of the meal period and the end of the shift.

CELC nonetheless warns about the hypothetical employer that regularly requires its workers to perform some overtime work after an eight-hour shift, but then risks millions of dollars in back wages and penalties by unwittingly failing to provide a second meal period before that overtime work began. CELC Br. at 4, 10-11. While CELC boldly asserts that "most California employers" will find themselves in that dilemma if the Court's ruling is deemed retroactive, the numbers just don't add up. No second meal period would be required for overtime worked performed at

the end of an eight-hour shift unless and until five hours has passed since the end of the last meal period. In a 9-5 workday, for example, if lunch is taken from 1:00-1:30, a second meal period would not be required unless overtime continued past 6:30 p.m.

CELC also grossly exaggerates the economic impacts of a retroactive ruling on any employer that does impose an unlawful early lunching policy.

For pure hyperbolic effect, and without any basis in fact, CELC asserts that "most" California employers: 1) require unlawful early lunching, which itself is highly doubtful; 2) pay their workers an average wage of $25 per-hour—more than three times the minimum wage that most Brinker employees receive and a far higher wage than most non-exempt private sector workers are paid in this State; 3) pay those wages on a weekly rather than bi-weekly basis (thus doubling the potential pay-period penalties); and 4) have such a high turnover rate that most potential claimants are former employees entitled to Labor Code §203 waiting time penalties (assuming a willful violation), rather than current employees who are not entitled to any waiting time penalties at all. CELC Br. at 5-8. CELC also assumes that most California employers have huge workforces (*id.* at 8), even though census data shows that only 0.8% of California private sector employers employ more than 500 workers.[11] While CELC's numbers are dramatic, they're factually baseless. Just as this Court previously denied amici Employers Group's request to take judicial notice of the amount and frequency of prior meal period settlements, *see* Oct. 31, 2011 Order, this Court should now deny CELC's request to present an

[11] http://www.census.gov/epcd/susb/2008/ca/CA--.HTM

entirely fabricated scenario about damages and penalties that exists only in CELC's imagination.

Whatever this Court eventually rules, California employers will not be liable for meal period timing violations (just like they will not be liable for failing to relieve workers of all duty obligations during a timely meal period) *unless* they knew or should have known that the employee was working at the time. The standard is "suffer or permit," which is the same standard that governs employer liability for *all* work performed, whether pre- or post-shift, and whether the overtime rules apply or not.[12] If an employer suffers or permits its employees to work when more than five hours have elapsed since the end of their last meal period, or when they should be on break, or when then are entitled to statutory overtime, the employer should be liable.[13] There is nothing inequitable about that rule, and certainly nothing that would require it to be prospective only.

III. CONCLUSION

For the reasons set forth above, CELC's application to file an untimely post-argument brief should be denied. Alternatively, should the

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[12] *See*, *e.g.*, *Morillion v. Royal Packing*, 22 Cal.4th 575, 585 (2000); *Martinez v. Combs*, 49 Cal.4th 35, 70 (2010) ("the basis of liability is the [employer's] knowledge of and failure to prevent the work from occurring"). *Compare Forrester v. Roth*, 646 F.2d 413 (9th Cir. 1981) ("suffer or permit" standard for overtime did not create liability when an employee deliberately concealed overtime work) *with Burry v. National Trailer*, 338 F.2d 422 (6th Cir. 1964) (employees worked unreported overtime with employer's knowledge; overtime owed).

[13] *Martinez*, 49 Cal.4th at 72 (employers "set [workers'] hours, telling them when and where to report to work and when to take breaks"); *Morillion*, 22 Cal.4th at 585 ("[I]t is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed.").

Court grant the application, plaintiffs-real parties respectfully request an opportunity to file a response to CELC's brief.

Dated: December 2, 2011

Respectfully submitted,

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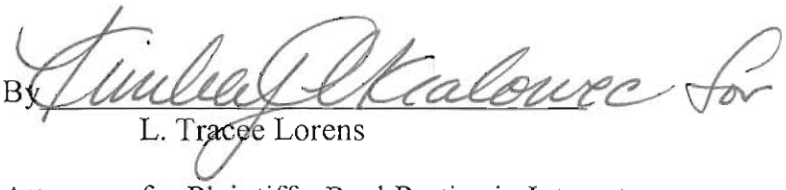
By 
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WORD COUNT CERTIFICATE

The undersigned hereby certifies that the computer program used to generate this brief indicates that the text consists of 5,285 words, including footnotes.

Dated: December 2, 2011

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ATTACHMENT

CALIFORNIA'S MEAL AND REST PERIOD RULES:

PROACTIVE STRATEGIES FOR COMPLIANCE

Second Edition

By

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Summary Of Meal Period Rules

Length of Shift	Meal Period Owed [18]	Waiver Permissible
No More Than 5 Hours	None	N/A
Over 5, But No More Than 6 Hours	Yes	Yes, by mutual consent of the employee and the employer
Over 6, But No More Than 10 Hours	Yes	Only if the nature-of-the-work standards of the applicable Wage Order are satisfied and the employee signs a voluntary, revocable, written agreement
Over 10, But No More Than 12 Hours	Generally Two	Second meal period may be waived by mutual consent only if the first meal period was not waived[19]
Over 12 Hours	At Least Two	Only if nature-of-the-work standards of the applicable Wage Order are satisfied and the employee signs a voluntary, revocable, written agreement[20]

2.3 Meal Period Windows

(a) The Five-Hour Standard: The Labor Code states that employers may "not employ an employee for a work period of more than five hours per day without providing the employee with a meal period." Based on this language, it is evident that employees may not work more than five hours without the benefit of a meal period, unless an exception to the rule exists. Even though the Labor Code does not specify the precise

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18/ The meal period may be no less than 30 minutes under Labor Code Section 512.

19/ Wage Orders 4 and 5 authorize waivers under more liberal standards for health care employees. The rules are explained in Section 2.4(e) below.

20/ The Labor Code does not expressly address waivers where employees exceed 12 hours. However, the Wage Orders arguably allow waivers in certain instances. Employers should consult with their legal counsel regarding the permissibility of any waivers before allowing them.

time the meal period must be provided, the statute and most Wage Orders can be construed to require that meal periods begin by the end of the fifth hour of work when no waiver or exception exists.[21/]

Based on this interpretation, the timing of meal periods is important. It also suggests that a second meal period may be necessary, even for an eight-hour shift, if an employee takes a meal period too early in the shift. For example, if more than five hours remain in the balance of the shift, after the employee returns from a meal period, a second meal period is arguably owed.[22/] However, under this interpretation, an employee must be provided a second meal period prior to the end of the five-hour period, even if it requires the employee to leave work for 30 minutes and return simply for a brief time before clocking out for the day. It can be argued that this result is illogical and contrary to the interests of the employee and the employer. Indeed, it would significantly inconvenience both and force the employee to remain 30 minutes longer than he or she would like.

This is illustrated by the following example. Assume the scheduled shift for an eight-hour employee spans from 7:00 a.m. to 3:30 p.m. Because the shift starts at

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21/ It can be argued that the meal period must begin by the end of the sixth hour under some circumstances. The DLSE's proposed regulations adopted this position. Labor Code Section 512(b) states that the IWC may adopt orders "permitting a meal period to commence after six hours of work" if it determines that the order is consistent with the health and welfare of the affected employees. It can be argued that this language should be read to allow meal periods to commence at any time during the first six hours of work. It also suggests that the Legislature was not opposed to the idea that meal periods commence later, e.g., after six hours of work, where employees are not harmed. Wage Orders 1 (manufacturing industry) and 12 (motion picture industry) contain such rules.

22/ Labor Code Section 512 does not require a second meal period unless an employee exceeds 10 hours.

7:00 a.m., the meal period must begin by 12:00 noon to commence by the end of the fifth hour of work. If an employee takes a meal period too early in the shift, e.g., from 8:00 - 8:30 a.m., seven hours of work will remain after the employee returns at 8:30 a.m. This raises a question as to whether a second meal period must be provided before 1:30 p.m., i.e., the end of the fifth hour following the employee's resumption of work at 8:30 a.m.

(b) Timing Of Meal Periods: Employers are encouraged to **provide** meal periods at a time during the work day that avoids any actual work periods in excess of five hours.[23/] This suggests that meal periods for employees who work an eight-hour shift be provided sometime during a brief "window" so that the employees will not work more than five hours either before their meal period begins or after it ends.

(c) Illustration Of Window Concept: Assume an employee's schedule for a day spans 8.5 hours, which includes eight hours of work and a 30-minute meal period. If the employee completes the meal period before the 3.5-hour mark in the 8.5-hour schedule, the employee will have more than five hours of work left before the day ends. The meal period window for an eight-hour shift therefore begins at the 3.5-hour mark and closes at the end of the fifth hour. If the 30-minute meal period **ends** on or after the 3.5-hour mark and **begins** by the end of the fifth hour, the employee will not work over five hours without the benefit of a meal period. The 30-minute meal period should begin during a window that opens at the 3.0 mark and closes at the five-hour mark. If the meal period exceeds 30 minutes, the window would be larger and the meal period could start before the 3.0 mark. For instance, a one-hour meal period could begin at or after the 2.5-hour mark without ending before the 3.5-hour mark. The window concept recognizes that a problem with the

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23/ Exceptions to the five-hour standard apply to some employers. In addition, the Legislature, the courts or the appropriate agencies may offer clarification in the future that affords greater flexibility based on the current or new standards.

five-hour standard may occur if an employee takes a meal period too early or too late in the shift.[24/]

For example, if an employee starts an eight-hour shift at 9:00 a.m., the meal period should end no earlier than 12:30 p.m. (3.5 hours into the shift) and should begin no later than 2:00 p.m. (the end of the fifth hour). If the meal period is 30 minutes, it should begin sometime between 12:00 noon (so that it ends no earlier than 12:30 p.m.) and 2:00 p.m. Of course, a meal period may be longer than 30 minutes. Where that occurs, it may begin earlier than 12:00 noon as long as it does not end before the 3.5-hour mark and there are therefore five or fewer hours left in the work day when the meal period ends.

(d) Staggering Meal Periods: Employers may be forced to stagger the meal periods of employees in a work unit to schedule them within the windows. Unfortunately, this may often prevent employers from granting employee requests to take their meal periods at the time they prefer or to take them with their co-workers. The rigid standards thus come at a price to employees and employers due to the loss of flexibility.

(e) Meal Period Chart: The following chart illustrates the window periods for eight-hour shifts. The windows are based on the time a shift begins. If an employee starts a shift earlier than scheduled or completes it later than scheduled, variations in the windows may occur. The courts will be forced to determine what impact unexpected changes in the length of work periods, as well as the times they begin and end, may have on meal period compliance.

24/ It does not take into consideration the argument that can be made (which was reflected in the DLSE's now withdrawn proposed regulations) that the meal period can begin by the end of the sixth hour of work.

8-HOUR SHIFT STARTS	MEAL PERIOD SHOULD NOT *END* BEFORE[25/]	MEAL PERIOD SHOULD BEGIN BY	MEAL PERIOD WINDOW[26/]
1:00 a.m.	4:30 a.m.	6:00 a.m.	4:00-6:00 a.m.
2:00 a.m.	5:30 a.m.	7:00 a.m.	5:00-7:00 a.m.
3:00 a.m.	6:30 a.m.	8:00 a.m.	6:00-8:00 a.m.
4:00 a.m.	7:30 a.m.	9:00 a.m.	7:00-9:00 a.m.
5:00 a.m.	8:30 a.m.	10:00 a.m.	8:00-10:00 a.m.
6:00 a.m.	9:30 a.m.	11:00 a.m.	9:00-11:00 a.m.
7:00 a.m.	10:30 a.m.	12:00 noon	10:00-12:00 noon
8:00 a.m.	11:30 a.m.	1:00 p.m.	11:00-1:00 p.m.
9:00 a.m.	12:30 p.m.	2:00 p.m.	12:00-2:00 p.m.
10:00 a.m.	1:30 p.m.	3:00 p.m.	1:00-3:00 p.m.
11:00 a.m.	2:30 p.m.	4:00 p.m.	2:00-4:00 p.m.
12:00 noon	3:30 p.m.	5:00 p.m.	3:00-5:00 p.m.
1:00 p.m.	4:30 p.m.	6:00 p.m.	4:00-6:00 p.m.
2:00 p.m.	5:30 p.m.	7:00 p.m.	5:00-7:00 p.m.
3:00 p.m.	6:30 p.m.	8:00 p.m.	6:00-8:00 p.m.
4:00 p.m.	7:30 p.m.	9:00 p.m.	7:00-9:00 p.m.

25/ This column identifies the time a meal period may **end**. A 30-minute meal period may begin up to 30 minutes before the times identified in this column. The time the meal period should **begin** will depend on the length of the meal period. For example, for a 30-minute meal period to end on or after 12:30 p.m., it must begin no earlier than 12:00 noon. In contrast, a meal period of 45 minutes can begin on or after 11:45 a.m. and a meal period of 60 minutes can begin at 11:30 a.m. or later.

26/ This column identifies the window in which a 30-minute meal period arguably should begin.

8-HOUR SHIFT STARTS	MEAL PERIOD SHOULD NOT *END* BEFORE	MEAL PERIOD SHOULD BEGIN BY	MEAL PERIOD WINDOW
5:00 p.m.	8:30 p.m.	10:00 p.m.	8:00-10:00 p.m.
6:00 p.m.	9:30 p.m.	11:00 p.m.	9:00-11:00 p.m.
7:00 p.m.	10:30 p.m.	12:00 a.m.	10:00-12:00 a.m.
8:00 p.m.	11:30 p.m.	1:00 a.m.	11:00-1:00 a.m.
9:00 p.m.	12:30 a.m.	2:00 a.m.	12:00-2:00 a.m.
10:00 p.m.	1:30 a.m.	3:00 a.m.	1:00-3:00 a.m.
11:00 p.m.	2:30 a.m.	4:00 a.m.	2:00-4:00 a.m.
12:00 a.m.	3:30 a.m.	5:00 a.m.	3:00-5:00 a.m.

2.4 Exceptions To General Meal Period Rules And Waivers

As explained above, eligible employees must receive a meal period of no less than 30 minutes. Exceptions to the general rule do exist. They are discussed below. Because the exceptions are construed narrowly, employers should not rely on any exception without the advice of their legal counsel.

(a) Employees Who Work No More Than Five Hours: Employers may not employ an employee for a work period of more than five hours without providing the employee with at least a 30-minute meal period. No meal period is required when an employee works five or fewer hours.

(b) Employees Who Work No More Than Six Hours: Employees may voluntarily agree with their employer to waive their right to a meal period as long as they do not work more than six hours in the day. Accordingly, an employee need not be given an opportunity to take a meal period or to eat under such circumstances, provided he or she

agrees with the employer to waive such right. There is no requirement that the waiver be in writing, but it is often viewed as prudent to document the waiver in a written agreement.[27/] Because the law requires "mutual consent of both the employer and employee," an employer cannot simply require an employee to waive the right to a meal period under this exception. Similarly, an employee cannot demand the right to waive a meal period if the employer is unwilling to agree.

(c) The "Nature-Of-The-Work" Exception For On-Duty Meal Periods: An exception contained in the Wage Orders provides relief from the meal period requirements even if an employee's assigned day's work exceeds six hours. Under this exception, an employee may enter into a written agreement with his or her employer to work an "on-duty meal period" that is counted as time worked. Such an on-duty meal period is permissible only under very limited circumstances. The employer must be able to show: (1) *the nature of the work* prevents the employee from being relieved of all duty,[28/] (2) the employee and the employer have agreed, in writing, to an on-the-job meal period, and (3) the employee is paid for the meal period. The agreement must also state that the employee may, in writing, revoke the agreement at any time. The employee who agrees to an on-duty meal period must be provided with the opportunity to eat while performing his or her duties.

27/ This differs from the on-duty meal period rules described below. Under those rules, the agreement must be written and the employee must be permitted to eat while on duty. See DLSE Enforcement Policies and Interpretations Manual §§ 45.2.3 and 45.2.5.

28/ The DLSE has indicated that the determination of whether the "nature of the work" exception applies must be made on a **case-by-case and day-by-day basis**. See DLSE advice letter dated December 14, 2001. This suggests that an individualized analysis of the facts is necessary.

(d) Work Exceeding 10 Hours: Employees who work more than 10 hours are entitled to a second meal period of not less than 30 minutes. However, if their total hours do not exceed 12 in the day, they can agree with their employer to waive the second meal period if the first meal period was not waived.[29/] Once again, this waiver requires mutual consent of both the employee and the employer.

(e) Employees In The Health Care Industry: Wage Orders 4 and 5 include unique rules.[30/] They provide that employees in the health care industry who work shifts in excess of eight hours "may voluntarily waive their right to *one of their two* meal periods." The Wage Orders do not refer to a 12-hour standard. The waiver must be documented in a written agreement that is voluntarily signed both by the employee and the employer. The employee must also be able to revoke the waiver at any time by providing the employer at least one day's written notice. Furthermore, the employee must be fully compensated for all work time, including any on-the-job meal period, while such a waiver is in effect.

(f) Other Exceptions: The Labor Code and Wage Orders provide additional exceptions for employees in some industries.[31/] For example, the following exceptions exist:

29/ See Labor Code Section 512. As explained below, Wage Orders 4 and 5 contain different rules for health care employees.

30/ The IWC's Statement As To The Basis for its 2000 Wage Orders and the DLSE's in-depth analysis of AB 60 issued in December of 1999 both noted that Labor Code Section 516 authorized the IWC to adopt these rules. It adopted the rules placed in Wage Order 5, § 11 on June 30, 2000.

31/ See Labor Code § 512 and Wage Order 5, § 11.

(1) Baking, Motion Picture And Broadcasting Industries: Labor Code Section 512 contains special rules for some union employees in the wholesale baking, motion picture and broadcasting industries.

(2) Manufacturing Industry: Union employees working in the manufacturing industry who are covered by Wage Order 1 are subject to special rules. Wage Order 1 provides that the parties to a valid collective bargaining agreement may agree to a meal period that commences after no more than six hours of work.

(3) Residential Care Employees: Special rules apply to employees working in certain residential care settings covered by Wage Order 5.

(4) Motion Picture Workers: Wage Order 12 allows employees in the motion picture industry to begin their meal period later than the other Wage Orders allow. The special rules in Wage Order 12 prohibit employees from working over six hours (rather than five) without a meal period of 30 to 60 minutes.

(5) Construction Workers: Wage Order 16 covers certain construction employees. It contains a special provision for employees covered by a collective bargaining agreement that meets certain conditions.[32/] This exception was found invalid.

32/ A court of appeal concluded in Bearden v. U.S. Borax, 138 Cal.App.4th 429 (2006), that the IWC exceeded its authority in adopting this rule on October 23, 2000, after the IWC's authority in Labor Code Section 516 was narrowed, effective September 19, 2000, by SB 88. The IWC adopted the meal period rules in Wage Orders 1-15 on June 30, 2000, before SB 88 narrowed its authority. Wage Order 16 was adopted later. See Wage Order 16, § 10(E), which reads as follows:

"(E) Collective Bargaining Agreements. Subsections (A), (B), and (D) of Section 10,
(continued...)

These exceptions are not examined in detail. Employers who are governed by the exceptions should consider them further with their legal counsel. Employers should also understand that union employees who are exempt from the state overtime rules because of their collective bargaining agreement are not automatically exempt from the meal and rest period rules.[33/]

2.5 The Obligation To Authorize And Permit Rest Periods

The rest period rules established by California law are set forth in the Wage Orders of the IWC, not the Labor Code.[34/] The rest period standards differ from the meal period standards that require employers to "provide" meal periods to eligible employees. The rest period rules appear more flexible. The Wage Orders require employers to "**authorize and permit**" employees to take rest periods at the rate of 10 minutes net rest for each four hours of work or "major fraction" of a four-hour period, i.e., a period in excess of two hours. Accordingly, employees who work eight-hour shifts are entitled to two rest periods. Three rest periods normally must be "authorized and permitted" for employees who work a 12-hour shift. The Wage Orders also state that employees must be authorized and permitted to take their rest periods in the middle of each work period insofar as it is practicable.

32/ (...continued)
Meal Periods, shall not apply to any employee covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of the employees, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage."

33/ See Cicairos v. Summit Logistics, Inc., 133 Cal.App.4th 949 (2005), Bearden v. U.S. Borax, supra, and Zavala v. Scott Brothers Dairy, 143 Cal.App.4th 585 (2006).

34/ Nevertheless, Labor Code Section 226.7 prohibits employers from requiring an employee to work during a rest period mandated by a Wage Order and authorizes sanctions where violations occur. The rest period rules are set forth in Section 12 of each of the Wage Orders other than Wage Order 16.

PROOF OF SERVICE

I, the undersigned, hereby declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States; am over the age of 18 years; am employed by THE KRALOWEC LAW GROUP, located at 188 The Embarcadero, Suite 800, San Francisco, California 94105, whose principal attorney is a member of the State Bar of California and of the Bar of each Federal District Court within California; am not a party to the within action; and that I caused to be served a true and correct copy of the following documents in the manner indicated below:

1. OPPOSITION TO APPLICATION OF CALIFORNIA EMPLOYMENT LAW COUNCIL FOR LEAVE TO FILE POST-HEARING *AMICUS* BRIEF ADDRESSING RETROACTIVE OR PROSPECTIVE EFFECT OF FORTHCOMING DECISION; and
2. PROOF OF SERVICE.

☑ **By Mail**: I placed a true copy of each document listed above in a sealed envelope addressed to each person listed below on this date. I then deposited that same envelope with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that upon motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

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[Case No. D049331]

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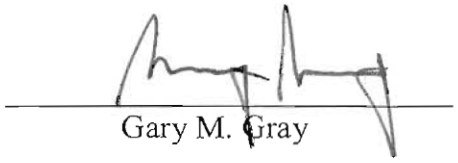

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