S.Ct. Case No.: S166350

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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

vs.

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

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

After Decision by 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

APPLICATION OF GELASIO SALAZAR and SAAD SHAMMAS TO FILE AMICUS BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST, ADAM HOHNBAUM, *et al.*; PROPOSED BRIEF

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APPLICATION TO FILE AMICUS CURIAE BRIEF

AND STATEMENT OF INTEREST OF AMICUS CURIAE

A. Introduction.

Pursuant to California Rules of Court, Rule 8.520(f), GELASIO SALAZAR ("Salazar") and SAAD SHAMMAS ("Shammas"), respectfully request leave to file the enclosed amicus curiae brief in support of Plaintiffs and Real Parties In Interest, ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE RADER and SANTANA ALVARADO (collectively "Real Parties"). This application is made within 30 days of the filing of the Real Parties' Reply Brief in this matter.

Salazar and Shammas are the named plaintiffs in a wage and hour action, who were denied class certification of potential class claims for alleged meal period violations by the Federal District Court for the Southern District of California based on the Court of Appeal's reasoning in this case, and the Federal District Court's express prediction of how this Court will ultimately decide the application of California meal period standards. As a result, their action has "ping ponged" between State and Federal Court as a result of the Class Action Fairness Act, first having been removed under that Act, then remanded following denial of certification. Thus, Salazar and Shammas have experienced firsthand the confusion created in the State and Federal Courts as a result of the conflict between *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25 ("*Brinker*") and *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 ("*Cicairos*").

B. The Applicants' Interest In These Proceedings.

Salazar and Shammas – acting individually and on behalf of similarly situated current and former employees in California – filed a putative wage and hour class action lawsuit in state court against their employer, Avis Budget Group, Inc, *et al.* ("Avis"). In that lawsuit, Salazar and Shammas asserted that Avis had not adequately provided them and certain other Avis employees with required meal periods, and had thereby violated Labor Code sections 512 and 226.7 as well as California's Industrial Welfare Commission ("IWC") Wage Order No. 9-2001 (Cal. Code Regs., tit. 8, section 11090).

After Avis responded by removing that lawsuit to federal district court under the Class Action Fairness Act ("CAFA" – 28 U.S.C. section 1332(d) and 1453(a)), the district court denied class certification, relying on reasoning espoused by the Court of Appeal's decision in this case. Specifically, the district court found that Avis was merely obligated under California law to make meal periods "available" to its employees like Salazar and Shammas, not to "ensure" that those meal periods were actually ever taken. The district court then determined that this interpretation of the California Labor Code foreclosed classwide adjudication of plaintiffs' claims under Fed. R. Civ. P. 23(a)(2) and (b)(3), because individual issues predominated.

In doing so, the district court expressly rejected the Third District Court of Appeal's decision in *Cicairos, supra,* 133 Cal.App.4th at 962-963, which had previously held that California employers "have an affirmative obligation to ensure that workers are actually relieved of all duty" during their statutorily-mandated meal periods, and therefore cannot superficially "provide" meal periods by simply assuming they are being

taken. Relying instead on a recent rash of both published and unpublished federal district court cases for authority (see *White v. Starbucks Corp.* (N.D. Cal. 2007) 497 F.Supp.2d 1080; *Brown v. Fed. Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580; and *Kenny v. Supercuts, Inc.* (N.D. Cal 2008) 2008 WL 2265194), the district court further announced that it was not obligated to follow *Cicairos*, and speculated that this Court would decide the "ensure" versus "provide" issue contrary to *Cicairos* if that issue were before it.

Salazar and Shammas subsequently petitioned the Ninth Circuit Court of Appeal to review the district court's decision, or alternatively, to certify that critical issue for review by this Court. That petition was denied by the Ninth Circuit on September 10, 2008, effectively leaving Salazar and Shammas with no other immediate avenue for review. (See *Salazar v. Avis Budget Group, Inc.*, No. 08-80105). The district court then remanded the action to state court because the court determined that a denial of class certification destroyed CAFA jurisdiction and was, therefore, tantamount to a determination that federal jurisdiction did not exist. The Superior Court has since issued a stay on the action until this Court's ruling is issued.

Thus, like the employee-plaintiffs in *White*, *Brown*, and *Kenny*, Salazar and Shammas have found that some district courts, unwilling to follow *Cicairos*, have denied certification of meal period claims brought under State law. Those courts have reached that conclusion because in finding that employers are only obligated to superficially offer meal periods – but not obligated to ensure those periods are actually provided or to relieve the employee of duty – they determined that the alleged violations are too fact driven for class treatment. Thus, the courts have denied class certification on the grounds

that factual issues predominate. *Yet because federal procedure does not provide a right to appeal from the denial of class certification, those employee-plaintiffs, like Salazar and Shammas, have no immediate avenue for review when class certification is denied.*

On the other hand, some federal district courts continue to recognize the vitality of *Cicairos* and have granted class certification of meal period claims, reasoning that meal period compliance is a predominating common legal question properly decided at the merits stage. (See, *e.g., Cervantez v. Celestica Corp.* (C.D. Cal. 2008) 2008 WL 2949377; *Otsuka v. Polo Ralph Lauren Corp.* (N.D. Cal. 2008) 2008 WL 3285765; *Wiegele v. Fedex Ground Package Sys., Inc.* (S.D. Cal. 2008) 2008 WL 410691; *Alba v. Papa John's USA, Inc.* (C.D. Cal. 2007) 2007 WL 953849; *Cornn v. United Parcel Service, Inc.* (N.D. Cal 2005) 2005 WL 588431, reconsid. granted in part on other grounds, 2005 WL 2072091; *Wang v. Chinese Daily News, Inc.* (C.D. Cal. 2005) 231 F.R.D. 602.)

Accordingly, given this inconsistency in the federal courts, workers in California facing similar wage and hour violations are treated differently depending *not* on the law or facts of their case, *but on the particular views of the district court that happens to hear their case*. Worse still, when federal district courts deny class certification based upon their own incorrect interpretation of California substantive law, wage and hour plaintiffs are left with no viable means of review to challenge those clearly erroneous decisions.

A clear determination by this Court that, indeed, employers are obligated as a matter of California substantive law to "ensure" that their employees take statutorily-mandated meal periods will end this debate and the concomitant procedural dilemma

CAFA has inadvertently created. Such a decision will also ensure that employees in California will be treated fairly and consistently in either federal or state courts, and will be able to enforce the important public policies that both the Labor Code and the Wage Orders were meant to serve.

C. The Need for Further Briefing.

Salazar and Shammas are familiar with the issues raised before this Court, the Labor Code provisions and the regulations and cases interpreting those sections. They are also acutely aware of the confusion created in the federal court system by the conflict between *Brinker* and *Cicairos* and the impact the "provide" as opposed to "ensure" interpretation has had on employees forced by CAFA to pursue their meal period rights in federal court. Having been through the federal court system, Salazar and Shammas can offer this Court a unique view of the issues and the impact its decision will have on plaintiffs swept into federal court by CAFA. This is a perspective that the briefing parties cannot and have not presented on their own.

Accordingly, Salazar and Shammas respectfully request that this Court grant leave to file their proposed amicus brief.

Respectfully submitted,

POPE, BERGER & WILLIAMS, LLP

Date: 8/19/09

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PROPOSED AMICUS CURIAE BRIEF

I.

DISCUSSION

A. The Lower Court's Interpretation of the Meal Period Requirements Directly Conflicts with the Labor Code, Applicable Wage Orders and California Public Policy.

1. The Conflict Between *Cicairos* and *Brinker.*

In 2005, the Third District California Court of Appeal published *Cicairos, supra,* 133 Cal.App.4th 949, after which this Court denied review on January 18, 2006. In *Cicairos*, employees filed a lawsuit against their former employer for violations of the Labor Code and IWC Wage Order provisions regarding, among other items, missed meal periods. The appellate court held that an employer has an affirmative obligation to "ensure" that its employees are relieved of all duty for 30 minutes for every five-hour shift worked for meal periods, and confirmed that an employer cannot meet this obligation by superficially "providing" meal periods and assuming that its employees are taking them. (*Id.* at 962-963.) The court also determined that where a company does not effectively monitor compliance with its purported meal period policies, it violates those meal period laws. (*Id.* at 962.)

Consequently, *Cicairos* found that evidence submitted by the plaintiffs-drivers was sufficient to find a violation of meal period laws, as the employer-defendant did no more than simply *assume* that its employees were taking their meal periods. (*Id.* at 962-963.) Upon those findings, *Cicairos* further ruled that because the defendant had a duty

under the Wage Orders to record its employees' meal periods, but failed either to maintain records to show whether meal periods were taken or to monitor whether they were being offered or taken, "defendant's obligation to provide the plaintiffs with an adequate meal period [was] not satisfied . . . ." (*Id.* at 962-963.) The *Cicairos* court then crystallized its rationale by quoting the language of the Department of Labor Standards Enforcement ("DLSE") Opinion Letter ". . . because employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty.'" (*Ibid.* [quoting DLSE Op. Letter, Jan. 28, 2002, at 1].)

In contrast, the Court of Appeal below in *Brinker* held that employers need only make meal breaks "available," not "ensure" they are taken. In doing so, *Brinker* attempted to distinguish *Cicairos* on the basis of "public policy" not otherwise reflected in any provision of the Labor Code. Nonetheless, the fact remains that the Court of Appeal's decision below and *Cicairos* directly conflict on their respective interpretations of an employer's meal period obligations under California law.

2. California's Well-Established Policy of Requiring Employers to Ensure the Health and Safety of Their Workers.

Meal period rules have been part of the framework of California's health, safety, and welfare regulations for decades, as found in the California IWC Wage Orders. IWC Wage Order No. 9, states in relevant part, "*[n]o 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 . . ." and "*[a]n 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 . . ." (Cal. Code Regs. tit. 8, §§ 11090(11)(A) and (B) (2008) [emph. added].) The term "employ" means to "engage, *suffer*, *or permit* to work." (*Id.* at § 11090(2)(D) [emph. added].) Read together, the Wage Order mandates "no employer shall engage, suffer or permit any person to work" more than five hours, and "an employer may not engage, suffer or permit" an employee to work more than 10 hours, without the employee taking a full 30 minute meal period. In other words, an employer may not permit and must *ensure* that its employee is relieved of all work-related duties for a full meal period when the employee works at least five (or 10) hours.

For the first time in 1999, the Legislature codified the Wage Orders' mandates into Labor Code section 512, to require that "[a]n 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 thirty minutes . . ." and "[a]n 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 . . . ." (Lab. Code § 512(a).) Intending to adopt the Wage Orders' restrictions regarding meal periods, the Legislature expressly recognized that the Wage Orders prohibit an employer from employing an employee without the meal period protections, and that the bill enacting Section 512 "would codify that prohibition." (1999 Cal. Legis. Serv. Ch. 134, A.B. No. 60 (West).)

Only further underscoring its intent to perpetuate the Wage Orders' meal period mandates, in 2000 the California Legislature enacted Labor Code section 226.7. In so doing, it codified for the first time the Wage Orders' requirement that an employer shall

owe an hour of additional pay to each employee who works during a meal period, as "mandated by an order of the commission." (2000 Cal. Legis. Serv. Ch. 876, A.B. No. 2509 (West).) Specifically, the payment obligation is triggered where an employer fails "to provide an employee with a meal period . . . in accordance with an applicable order of the [IWC] . . . ," by ensuring the employee is free from all work-related activity. (Lab. Code § 226.7 (West 2001); Cal. Code Regs. tit. 8, §§ 11090(11) (A) and (B) (2008).) The Legislature's clear intent to codify the Wage Order's rules show that the employer's mandatory obligations with respect to meal periods require an employer to ensure that its employees take their meal periods, *i.e.,* are completely free of all work-related duties.

Thus, the Labor Code requires more than the low threshold of merely offering employees break time, particularly since "California courts have long recognized that wage and hour laws concern not only the health and welfare of the workers themselves, but also the public health and general welfare." (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 456 [citations omitted].) For these reasons, statutes governing conditions of employment "are to be liberally construed with an eye to protecting employees." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340; see also *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 794.) Indeed, as this Court has recently confirmed, "health and safety considerations . . . are what motivated the IWC to adopt *mandatory* meal periods in the first place." (*Murphy v. Kenneth Cole Prods.* (2007) 40 Cal.4th 1094, 1114 [emph. added].)

In *Murphy,* this Court emphasized the importance of a meal break period when it explained that "[a]n employee forced to forgo his or her meal period . . . has been

deprived of the right to be free of the employer's control during the meal period." (*Murphy, supra,* 40 Cal.4th at 1104.) Indeed, in characterizing violations of California meal period obligations in *Murphy*, this Court repeatedly described it as an obligation not to force employees to work through breaks and to affirmatively relieve workers of all duty during the meal period. (See *id.* at 1104 [referring to a meal period as "a duty free meal period" and noting that "[a]n employee forced to forgo his or her meal period . . . loses a benefit to which the law entitles him or her. While the employee is paid for the 30 minutes of work, the employee has been deprived of the right to be free of the employer's control during the meal period"].)

As evidenced by the express language of the meal period provisions of the Labor Code and the applicable Wage Orders, a California employer has an affirmative obligation to do more than simply "provide" a meal period; it must actively ensure that its employee take a 30-minute period during which he is relieved of all work duties. If an employer's duty was merely to "make meal periods available" to employees, then there would be no need for either the Labor Code or the Wage Orders to allow circumstances under which an employee may consent to waive his or her mandatory meal period. (See, *e.g.*, Cal. Lab. Code § 512; Cal. Code Regs. tit. 8, §§ 11090(11)(A) and (B).) Indeed, it is illogical to vest an employee with a right to waive a meal period, if he was not required to take the meal period (that is, to be relieved of all duties) in the first place. Conversely, it is equally illogical to condition the waiver on the employee's consent (mutually with that of his or her employer), if the employer was not otherwise obligated to ensure its employees took meal breaks.

Yet the Court of Appeal in *Brinker* chose to ignore the relevant Labor Code provisions and Wage Orders in the context in which they were developed and ultimately enacted, opting instead to use a dictionary as its sole interpretive tool to determine what the Legislature meant when it used the word "provide" in section 512, subd. (a). Doing so not only ran afoul of well-settled, fundamental rules of statutory interpretation (see *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 ["The meaning of a statute may not be determined from a single word or sentence . . ." and "[l]iteral construction should not prevail if it is contrary to the legislative intent apparent in the statute"]), but also did violence to the significant development of that concept in the Wage Orders and the legislative history, all of which explains what the word "provide" means. Indeed, the *Brinker* court was not free to disregard those interpretative tools in favor of stilted dictionary definitions which are inconsistent with the purpose of the very code section it was purporting to interpret. (See *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 53-54.)

Instead, if an ambiguity exists in the "provide" language found in either Labor Code sections 512 or 226.7, the *Brinker* court should have utilized the significant interpretative tools at its disposal – including the relevant legislative history, Wage Orders, and DLSE's Opinion Letter – to determine what the Legislature meant by using that term. (See, *e.g.*, *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [confirming the fundamental rule that statutory interpretation should focus on the intent of the Legislature so as to effectuate the purpose of the law being construed]; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 561 ["Labor Code sections 61

and 1193.5 specifically empower the DLSE to interpret and enforce orders of the Industrial Welfare Commission ("IWC"), with the primary objective of protecting workers, entitling the DLSE's interpretation of an IWC opinion letter to great weight"].) Because the lower court in *Brinker* failed to do so – choosing instead to supplant that process with the use of a dictionary – its decision is contrary to the purpose of those Labor Code provisions and the Wage Orders they incorporate.

Accordingly, in settling this debate, this Court should give great weight to the Wage Orders, the legislative history of the Labor Code provisions and the DLSE's Opinion Letters. All of those interpretative sources strongly support holding employers responsible for the health and safety of their workers by imposing an affirmative duty to ensure that those workers are afforded mandatory meal breaks and are relieved of all work-related duties during those meal periods. Indeed, California law and public policies require more from employers than mere "lip service." Rather, they require a meaningful attempt to ensure that workers actually take their statutorily-provided meal periods. (See *Gentry, supra,* 42 Cal.4th at 456 [explaining that overtime laws also serve the important public policy goal of protecting employees in a relatively weak bargaining position].)

B. ***Brinker's* Reliance on Federal District Court Authorities Is Misplaced.**

In addition to its misapplication of available interpretative tools, the *Brinker* court was also led to its erroneous interpretation of the requirements of California's meal period laws by a handful of federal district court cases. But like *Brinker*, those cases also failed to consider the history and context of the relevant Labor Code sections or the

pertinent Wage Orders. Moreover, although those federal cases were bound to follow and apply California substantive law, they simply disregard *Cicairos*, holding instead that California employers do not have an affirmative duty to ensure meal periods to their workers.

For example, in *Brown v. Federal Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 585, the court interpreted California's meal period requirement based on a single word in the regulatory scheme – "provide" – then, like the *Brinker* court, consulted a dictionary to determine its meaning completely out of context. (*Id.* [citing Merriam Webster's Collegiate Dictionary (10th ed. 2002)].) In doing so, *Brown* impermissibly overlooked the Wage Orders' differing standards for meal periods ("no employer shall employ") and rest breaks ("authorize and permit"). (*Id.* at 584-85 [quoting ¶11, but nowhere mentioning ¶12, and then compounding that error by ignoring the relevant administrative and legislative history of those Wage Orders].)

Similarly, in *White v. Starbucks Corp.* (N.D. Cal. 2007) 497 F.Supp.2d 1080, 1085, 1087-89, the court simply cited the language of the Wage Orders, but failed to consider the implications of the differing compliance standards. Without taking into account the legislative or administrative history, the *White* court concluded that to survive an employer's summary judgment motion, employees must show that there were forced to forgo their meal periods, and cannot simply rely on their employers' failure to "ensure" those meal periods were provided, a result irreconcilable with *Cicairos*. (*Id.* at 1089.)

From a purely policy-driven perspective, both the *White* and *Brown* decisions were apparently swayed by the mistaken belief that requiring employers to ensure workers were provided with their mandatory meal periods would be "too burdensome." (See, *e.g., White, supra,* 497 F.Supp.2d at 1080; *Brown, supra,* 249 F.R.D at 585.) However, as employers are already required to track whether employees actually take their meal period or consent to waive them, interpreting section 226.7 and 512 to require employers to ensure their employees are actually taking meal periods adds no further burden on employers. (See Cal. Code Regs., tit. 8, § 11050, subd. 11 (A) and (B) [mandating that time records "showing when the employee begins and ends each work period].)

Perhaps recognizing the questionable viability of both the *White* and *Brown* decisions, Brinker has offered a number of additional federal district court decisions which it believes support the Court of Appeal's decision. But a closer examination of those decisions reveals the same fundamental flaw as the *Brinker* opinion itself: they uniformly cite the Labor Code and Wage Orders but then, without analyzing the language of either, simply follow *White, Brown* and *Brinker.* (See, *e.g., Salazar v. Avis Budget Group, Inc.* (S.D. Cal. 2008) 251 F.R.D. 529, 532-33; *Kenny v. Supercuts, Inc.* (N.D. Cal. 2008) 252 F.R.D. 641, 645; *Perez v. Safety-Kleen Systems, Inc.* (N.D. Cal. 2008) 253 F.R.D. 508, 512-15; *Kimoto v. McDonald's Corps.* (C.D. Cal. Aug. 19, 2008) 2008 WL 4690536; *Marlo v. United Parcel Service, Inc.* (C.D. Cal. May 5, 2009) 2009 WL 1258491 *8-*9.) Thus, by their circular citation and reliance on *Brinker* itself, those cases provide little support for *Brinker's* rationale. Equally unhelpful are the other cases Brinker cites, which do little more than follow earlier decisions without any independent

analysis and without quoting or considering any of the language in the statutes or Wage Orders themselves. (See, *e.g., Wren v. RGIS Inventory Specialists* (N.D. Cal. 2009) 256 F.R.D. 180, 208; *Watson-Smith v. Spherion Pacific Workforce, LLC* (N.D. Cal. Dec. 12, 2008) 2008 WL 5221084, *2-*3; *Gabriella v. Wells Fargo Financial, Inc.* (N.D. Cal. Aug. 4, 2008) 2008 WL 3200190, *3.)

Finally, Brinker's hyperbole that "[n]ot a single federal case has gone the other way" is equally dubious. In fact, a number of district court decisions from the Eastern District of California have instead found the conclusions of *White, Brown, Kenny, Perez* and *Salazar* to be suspect: "the court strongly suspects that the 'no employer shall employ . . .' language imposes an affirmative duty on an employer to ensure that meal periods are taken." (*Valenzuela v. Giumarra Vineyards Corp.* (E.D. Cal. 2009) 614 F. Supp. 2d 1089, 1099; see also *Doe v. D.M. Camp & Sons* (E.D. Cal. Mar. 31, 2009) 2009 U.S. Dist. LEXIS 34653 *25; *Robles v. Sunview Vineyards of Cal., Inc.* (E.D. Cal. March 31, 2009) 2009 U.S. Dist. LEXIS 34115 *26.; see also *Lew v. Countrywide Fin. Corp.* (N.D. Cal. Feb. 24, 2009) 2009 U.S. Dist. LEXIS 56191 [staying the matter under this Court settles the dispute between *Brinker* and *Cicairos*].)

Similarly, contrary to Brinker's assertion, the Ninth Circuit has also recognized California's strong public policy of enforcing meal time periods when it held that meal period rights in California are derivative of the Labor Code, and therefore not subject to waiver in a collective bargaining agreement nor to preemption by the federal law. (See *Valles v. Ivy Hill Corp.* (9th Cir. 2005) 410 F.3d 1071, 1077-1082.) Tellingly, the *Valles* court began its analysis as follows:

> For over half a century, the Industrial Welfare Commission ("IWC") – the state agency responsible for promulgating regulations that govern wages, hours, and working conditions in California – *has guaranteed work-free meal periods* to manufacturing workers in California, including those covered by collective bargaining agreements, pursuant to its authority under § 1173 of the Labor Code. (*Id.* at 1077 [internal citations omitted; emph. added].)

Notably, in reaching that conclusion, *Valles* relied on a review of IWC historical documents, including the same IWC "Statement as to the Basis" Real Parties have relied upon in this case. (*Id.* at 1078.) Contrary to any implication that the IWC's authority has been diminished in light of the enactments of sections 512 and 226.7, the Ninth Circuit's analysis in *Valles* only confirms that those statutes were "not intended to restrict the Industrial Welfare Commission in its continuing duties pursuant to Section 1173." (*Valles, supra*, 410 F.3d at 1077.)

Accordingly, while the federal district courts continue to debate the substantive requirements of California's meal period laws, the handful of federal cases which have actually considered the historical development and context of the Labor Code, the Wage Orders, and the DLSE's Opinions have reached the same ineluctable conclusion: employers in this State are required to do more than superficially "offer" meal periods, but rather must monitor those meal periods to ensure that their workers are actually given a "duty free meal break."

C. The Failure to Impose an Affirmative Duty on Employers to Ensure That Meal Periods Are Provided Would Effectively Destroy the Ability of Employees to Redress *Any* Meal Period Violations.

As mentioned at the outset of this brief, as a result of CAFA, a substantial amount of wage and hour lawsuits seeking to redress violations of sections 512 and 226.7 will be heard in federal court, despite the lack of any federal question or diversity jurisdiction. Consequently, California's public policy of encouraging wage and hour disputes to proceed as class actions (see *Sav-On, supra,* 34 Cal.4th at 340) has been severely jeopardized. Indeed, that policy appears to clash directly with the federal policy to allow class certification only if "the trial court is satisfied after rigorous analysis that the prerequisites of Rule 23(a) have been satisfied." (See *General Tel. Co. of S.W. v. Falcon* (1982) 457 U.S. 147, 161.)

Additionally, although in California state court, a denial of class certification is an immediately appealable order (see *Daar v. Yellow Cab Company* (1967) 67 Cal.2d 695, 698-699 [denial of class certification in state court provides an immediate right to appeal]), the same is *not* true in federal court. (See *Coopers & Lybrand v. Livesay* (1978) 437 U.S. 463, 465 [denial of class certification in federal court is not an appealable order].)

Consequently, any interpretation of sections 512 and 226.7 which would merely require an employer to offer meal breaks – but not impose an affirmative duty on them to ensure those meal periods are actually taken – would make it particularly unlikely that class actions seeking to enforce *any* meal period violations will be certified in federal

court. Indeed, where an employer is not obligated to monitor meal periods or to maintain records to ensure those meal periods are taken, employees will be yoked with the impossible burden to demonstrate *at the class certification stage* that while the employer superficially "offered" meal periods, it was impossible for them to actually take those breaks. Indeed, such a shift in the underlying substantive law would raise a number of insurmountable factual issues regarding how each employee was treated and whether they actually had the "opportunity" to take a meal break, ultimately leading district courts to systematically deny class certification in these cases, as the Southern District did in *Salazar, supra,* 251 F.R.D. 529.

Only adding to that procedural conundrum is the fact that in addition to being non-appealable in federal court, such decisions will also likely destroy federal jurisdiction under CAFA. (See *Salazar v. Avis Budget Group, Inc.* (S.D. Cal. Nov. 20, 2008) U.S. Dist. LEXIS 94610 *14 [citing *Brown, supra,* 249 F.R.D. 580].) Consequently, wage and hour plaintiffs swept into federal court by CAFA who have no right to immediate review of a district court's decision denying class certification will likely find themselves back in state court faced with the decision of either pursuing their claims individually (which is financially unviable) or seeking class certification anew in the state court (which theoretically could create CAFA federal jurisdiction again).

Salazar and Shammas are all too familiar with the difficulties of pursuing a class action to enforce their meal period rights under California substantive law, and the resulting "ping pong" process which invariably results when they are bounced back and forth between state and federal court due to CAFA and the different ways both court

systems treat class certification. They are also familiar with the fact that they are left with no avenue of review *in either federal court or state court* to challenge that denial of certification, especially where remand from federal court for lost CAFA jurisdiction shortly follows. Consequently, on behalf of themselves and all California employees who will be swept into federal court due to CAFA and later caught in the same legal purgatory, they respectfully request this Court to resolve these conflicts by interpreting the Labor Code in a manner which will afford them both the substantive and procedural protections originally intended by the Legislature.

II.

CONCLUSION

Based on the foregoing, Salazar and Shammas respectfully request this Court to reverse the Court of Appeal's decision and to interpret the Labor Code and Wage Orders to ensure that California workers are truly provided their mandatory meal periods, and to impose the concomitant duty on California employers to relieve their workers of all duty during those meal periods.

Respectfully submitted,

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