S166350

IN THE SUPREME COURT OF CALIFORNIA

BRINKER RESTAURANT CORPORATION, et al.,

Appellants,

v.

SUPERIOR COURT FOR THE COUNTY OF SAN DIEGO,

Respondent.

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSARIO, AMANDA JUNE RADAR, AND SANTANA ALVARADO,

Real Parties in Interest.

After a Decision by the Court of Appeal
Fourth Appellate District, Division One
Court of Appeal Case No. D049331

APPLICATION TO FILE BRIEF, AND BRIEF IN SUPPORT OF APPELLANTS, OF AMICUS CURIAE, THE SAN DIEGO REGIONAL CHAMBER OF COMMERCE

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To the Honorable Ronald M. George, Chief Justice, and the Associate Justices of the California Supreme Court:

I.

INTRODUCTION

Pursuant to California Rules of Court, rule 8.520(f), the San Diego Regional Chamber of Commerce respectfully requests leave to file the attached brief of Amicus Curiae in support of Appellants, Brinker Restaurant Group, *et al.* This application is timely made within 30 days after filing of the last reply brief on the merits.

II.

THE AMICUS CURIAE

Organization: San Diego Regional Chamber of Commerce

III.

STATEMENT OF INTEREST

The San Diego Regional Chamber of Commerce (the "Chamber") listed above is a non-profit, business association representing more than 2,000 member businesses throughout the San Diego region. The Chamber's members include businesses in the high-technology and telecommunications, life sciences, medical services, and hospitality and

tourism industries, and represents over 300,000 employees and jobs in the region. The Chamber is a business advocacy organization interested in local government and regional economic development. The Chamber is actively involved in public policy as it affects business and in providing valuable resources to its members. With more than 130 years of experience, the Chamber offers unprecedented benefits and opportunities to make San Diego businesses prosperous.

Notably, the case on appeal draws from the California Court of Appeal for the Fourth District, Division One, which sits in San Diego. Consequently, the Chamber is compelled to defend the *Brinker* Court's decision in this case both because it directly impacts the Chamber's members, and because the Chamber believes strongly that the issues presented were rightly decided in *Brinker*.

The Chamber is familiar with the questions involved in this case. The Chamber understands that the issues pending before this Court in this case will have a profound impact throughout the state's business communities, and will have critical bearing on how each business values and manages its employees. The Chamber also believes that its collective expertise in the areas of human resources and business management will provide a broader and more balanced perspective to the amici curiae briefs already submitted by other labor, employee and

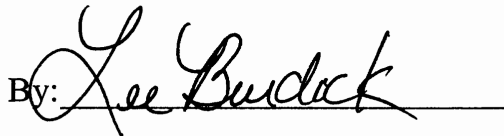
legal organizations, and therefore will benefit the Court as it reviews the issues before it.

IV.

CONCLUSION

For the reasons stated, the Chamber respectfully requests that the Court accept the following brief for filing and for consideration in this case.

Dated: August 19, 2009

By: 

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PROPOSED BRIEF IN SUPPORT OF APPELLANTS OF AMICUS CURIAE, THE SAN DIEGO REGIONAL CHAMBER OF COMMERCE

To the Honorable Ronald M. George, Chief Justice, and the Associate Justices of the California Supreme Court:

I.

ISSUES PRESENTED

This case presents on appeal from a decision of the Fourth District Court of Appeal, Division One (*Brinker Restaurant Corp., et al., v. The Superior Court of San Diego County*, D049331 (4th Dist., Div. One) (July 22, 2008)). Both parties below petitioned for writ of certiorari, and the writ was granted to Brinker Restaurant Group, *et al.* ("Appellants") with the other petitioners, Adam Hohnbaum, *et al.*, granted standing as real parties in interest ("Real Parties"). This case presents the following issues upon which the Chamber wishes to advocate:

1. Understanding the settled law that employers may not impede, discourage or dissuade employees from taking meal periods or rest breaks, whether employers comply with the applicable Labor Code requirements by *providing* meal periods and rest breaks, rather than *ensuring* that they are taken.

2. Whether the Labor Code dictates precisely *when* during an employee's work shift a meal period or rest break must be taken.

II.

INTRODUCTION AND SUMMARY OF ARGUMENT

The San Diego Regional Chamber of Commerce (the "Chamber") is a non-profit, business association whose members are profoundly affected by the historically dogmatic interpretation of the Labor Code sections and Industrial Welfare Commission ("IWC") orders ("IWOs") at issue in this case. In response to that interpretation, the Chamber supports and joins the legal analysis advanced by the Appellants in this case. For that reason, the Chamber can now focus on the policy issues that support the same conclusions advanced by Appellants, but does so from the unique perspective of the Chamber. With that in mind, the Chamber answers the issues stated above as follows:

1. Responsible employers understand and typically comply with the settled law that they may not impede, discourage or dissuade employees from taking meal periods or rest breaks. Consequently, they should be found in full compliance with the applicable Labor Code requirements by *providing* meal periods and rest breaks, regardless of whether the employee chooses to take them. In those cases where it can be shown that an irresponsible employer has actively impeded, discouraged or dissuaded employees from taking meal periods or rest breaks, the *Brinker* holding does nothing to change the fact that an employer already can be – and should be – punished to the full extent of the law.

2. The Chamber states unequivocally that the Labor Code does not dictate precisely *when* during an employee's work shift a meal period or rest break must be taken. In light of employees' increasing demands for flexibility in the timing of these meal periods and rest breaks, employers should not be penalized if the breaks are taken "when practicable."

III.

FACTUAL CONTEXT

Irrespective of the parties and the facts of this case, the Chamber feels compelled to bring to the Court's attention the changing nature of the American workplace and its consequent impact on public policy governing the employer-employee relationship as important context for considering the issues presented.

The American workplace of today is very different from that of our parents. No longer do employees sign on to work at a business and expect or plan to work there the entirety of their careers. Instead, studies have suggested that the average employee stays with a single employer approximately four to six years and then moves on to another employer. This workplace reality places extraordinary burdens on employers who must invest in the training and development of new employees who are largely destined to move on to another employer in a few short years. To attract and retain these employees for as long as possible, and to reap the benefits of their investment, these businesses must compete with other companies and employee opportunities by offering employees flexibility in their workplace choices.

In addition, the nature of the way business is conducted today requires employer flexibility in dealing with employees. Increased demand for and use of new technologies in the workplace as well as remote access and telecommuting has required the restructuring of employer-employee relationships in many instances. In addition, the natural demands of the workplace require flexibility in many instances to protect the public and the employees by ensuring continuity of services despite a technical interpretation of the Labor Code requirements. For instance, many of the Chamber's member companies reflect our region's needs for flexibility in the timing of rest breaks and meal periods:

- High-tech and telecommunications companies that have employees who work in the field now dispatch their employees using text messages, voicemail and email rather than radio calls. Use of these new technologies makes it virtually impossible for an employer to know whether the employee is retrieving his or her email, voicemail or text messages during a meal or rest break, even if the employer is diligently monitoring the taking of meal periods and rest breaks.

- Hospitals simply cannot protect their patients adequately if doctors, nurses and service technicians are required to take a meal period or rest break during the provision of an essential or emergency service. Industry studies have shown that the greatest number of health care mistakes are made during shift changes when one employee

takes over care from another employee, which also occurs when one employee goes on break before the provision of patient care is complete.

- The hospitality and tourism industry, which is extremely important to the San Diego region, depends on the goodwill established through the provision of capable and continuous service once the service provider has undertaken to assist a member of the public.

Furthermore, it must be acknowledged that the Labor Code sections at issue in this case are becoming increasingly abused by disgruntled current and former employees. In many cases, the employee requests from the employer and accepts flexibility in the taking meal periods or rest breaks, but then later demands that a Labor Code violation has occurred and the employee should receive the premium wage for the missed breaks. Worse yet, employees then claim that they represent an entire class of similarly situated employees in an effort to coerce the employer into a large settlement in advance of a class certification.

The *White v. Starbucks Corporation* (497 F.Supp.2d 1080, 2007 U.S. Dist. LEXIS 48922 (N.D. CA) (2007) case serves as one such example. In that case, the U.S. District Court for the Northern District of California considered and dismissed the claim of a Starbucks employee who had worked for the company for only 11 days and then

sued on behalf of a class of employees for meal and rest break violations (497 F.Supp.2d at 1081-82; 2007 U.S. Dist. LEXIS 48922). The Chamber's member companies are experiencing this kind of abuse of process at an increasing rate.[1] In the *White* case, as an example, assuming the employer violated the meal and rest break requirements, the employee would have been entitled to only 11 hours of premium pay (one hour of premium pay for each day a violation occured times a maximum of 11 days worked for Mr. White). The value of the case to the attorneys involved only accrues if the employee can stand in the shoes of a putative class.

As will be discussed in more detail below, it simply makes no sense, as a matter of important public policy, to punish a diligent employer under a strict, dogmatic interpretation of the law in direct contravention of the realities of the changing workplace. The *Brinker* decision strikes the balanced position between protecting employees

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1 It could reasonably be inferred that Real Parties' reading of the current law actually creates the perverse incentive for employees to abuse the system in this manner. See *Brown v. Federal Express Corporation,* 249 F.R.D. 580, 585; 2008 U.S. Dist. LEXIS 17125 at 17 (Cent. Dist. CA) (2008) ("Requiring enforcement of meal breaks . . . also create[s] perverse incentives, encouraging employees to violate company meal break policy in order to receive extra compensation under California wage and hour laws.").

from unscrupulous employers while also allowing diligent employers who comply with the law to operate free of undue coercion from disgruntled employees. For these reasons, the *Brinker* decision should be affirmed.

IV.

LEGAL STANDARD

It goes without saying that the Court is reviewing the *Brinker* decision *de novo*, as the case presents issues of statutory interpretation which can be decided as a matter of law. (See, *e.g.*, *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *In re Clarissa H.* (2003) 105 Cal.4th 120, 125.) Real Parties argue that the appropriate legal standard for statutory construction in this case must be to "liberally construe [the Labor Code] with an eye to protecting employees." (See Opening Brief on the Merits at p. 35 (citations omitted).) However, the Chamber submits that the *Brinker* Court below did, in fact, construe the law to "protect employees." Specifically, the *Brinker* Court recognized that employees in the modern workplace often prefer flexibility both in regard to *whether* they take a meal period or rest break; and, *if* they choose to, *when* those break periods are timed. (See, *e.g.*, *Brinker*, Slip Op. at pp. 28-29.)

The Chamber does not dispute the legal standard of statutory construction urged by Real Parties, only the conclusions they draw therefrom.

V.

DISCUSSION

A. The *Brinker* Court Correctly Concluded that an Employer Fully Complies with the Law When It *Provides* Meal Periods and Rest Breaks, Rather than Requiring an Employer to *Ensure* the Breaks Are Taken.

Real Parties spend many pages of their opening brief arguing that the Fourth District Court of Appeal erroneously focused on the word "provide" in Labor Code sections 226.7 and 512 (and in the associated IWOs) to determine what an employer's compliance obligations are. (Opening Brief on the Merits at pp. 24-26, 34-78.) Real Parties argue instead that the *Brinker* Court should have focused on whether the obligations were mandatory (as in meal periods) or permissive (as in rest breaks). (Opening Brief on the Merits at p. 60.)

This argument entirely begs the question: What does the law require employers to do? It requires them to *provide* meal periods and rest breaks. Although it can be argued that the meal periods are *mandatory* and the rest breaks are *permissive*, the entire issue of employer compliance turns on when does an employer "provide" a

meal period or rest break, and when does it violate the law by failing to "provide" a meal period or rest break.

As a matter of public policy, in light of the realities of the workplace, the *Brinker* Court got it right. "[E]mployers . . . need only provide, not ensure, [meal and] rest periods are taken . . . ." (*Brinker,* Slip Op. at p. 4.) The lower court found persuasive the fact that Brinker Restaurants had company-wide policies in place that provided employees with meal periods and rest breaks. (*Brinker,* Slip Op. at p. 5.) In light of these stated and published policies, *Brinker* concluded that the plaintiffs were then required to show that the employer actively impeded, discouraged or dissuaded the employees from taking the proffered meal periods or rest breaks. These conclusions strike the appropriate balance between the employer's legal obligation and the employee's freedom and need for flexibility in the workplace. (See *Brinker*, Slip Op. at p. 29.)

B. The Labor Code Clearly Allows Meal Periods and Rest Breaks to be Taken "When Practicable" and Does Not Dictate Their Timing.

The Chamber believes that this conclusion is self evident from the language of the statute and the IWOs, and will not spend much time trying to persuade the Court of that fact. Without restating the entirety of Labor Code sections 226.7 and 512 (or the IWOs) regarding the required number and provision of meal and rest breaks, the Court can and should reasonably conclude that the work periods set forth in those statutory provisions establish *how many* breaks are required, and not *when* they are required to be taken.

The Court should recognize, as a matter of public policy, the realities of the modern workplace: That employees often demand flexibility in the scheduling of their breaks, whether to maximize their compensation or for other personal reasons. (See, *e.g.*, *Brinker,* Slip Op. at p. 29.) Employers must by necessity offer such flexibility or risk losing these employees in whom they have invested much to other competitive employment opportunities. Employers should not be penalized for responding to employee needs for flexibility in scheduling meal or rest breaks due to an overly protective or paternalistic interpretation of the law. Such a strict interpretation of the law as that urged by Real Parties allows:

> "employees [ ] to manipulate the process and manufacture claims by skipping breaks or taking breaks of fewer than 30 minutes, entitling them to compensation of one hour of pay for each violation. This cannot have been the intent of the California Legislature, and the court [should] decline[] to find a rule that would create such perverse and incoherent incentives." *(White,* 497 F.Supp.2d at 1089; 2007 U.S. Dist. LEXIS 48922 at 22-23.)

In this case, the Court should decline to create such perverse incentives through judicial interpretation of the statutes presented.

VI.

CONCLUSION

For all of the reasons stated, the Chamber concludes that the lower court correctly held, consistent with important public policy and the realities of the modern workplace, that employers fully comply with the Labor Code and applicable Industrial Work Orders by making meal periods and rest breaks available to employees. The Chamber also urges the Court to affirm the *Brinker* Court's finding that the Labor Code does not require employers to impose a strict schedule on thetiming of meal and rest breaks, but rather to schedule them "when practicable" to meet the needs of both the employer and employee. With these conclusions in mind, the Court should affirm the lower court's *Brinker* decision.

Respectfully submitted,

August 19, 2009

HIGGS, FLETCHER & MACK

By

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The San Diego Regional
Chamber of Commerce

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.504(d)(1), I certify that this proposed Amicus Curiae Brief contains 3103 words, including footnotes.

Dated: August 19, 2009

HIGGS, FLETCHER & MACK LLP

By ______________________
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PROOF OF SERVICE

I, Judy A. Sorensen, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within-entitled action; my business address is 401 West "A" Street, Suite 2600, San Diego, California 92101-7913. On August 19, 2009, I served the within documents, with all exhibits (if any):

APPLICATION TO FILE BRIEF AND BRIEF IN SUPPORT OF APPELLANTS OF AMICUS CURIAE, THE SAN DIEGO REGIONAL CHAMBER OF COMMERCE

☐ Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

☒ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

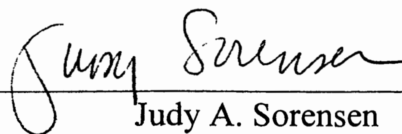
☐ I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses set forth below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses set forth below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

See Attached Service List

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

Executed on August 19, 2009, at San Diego, California.



Judy A. Sorensen

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