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,

v.

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

APPLICATION FOR PERMISSION TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* TECHNET IN SUPPORT OF PETITIONERS BRINKER RESTAURANT CORPORATION, ET AL.

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TO CHIEF JUSTICE GEORGE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rules 8.200(c) and 8.520(f) of the California Rules of Court, proposed *amicus curiae* TechNet ("TechNet") respectfully submits the enclosed brief in support of Petitioners Brinker Restaurant Corporation, Brinker International, Inc., and Brinker International Payroll Company, L.P. ("Petitioners" or "Defendants"). The proposed brief is lodged concurrently with this application.

For the reasons set forth below, Amicus TechNet respectfully urges this Court to affirm the "provide" standard set forth by the Court of Appeals.

I. INTEREST OF *AMICUS CURIAE*

TechNet is the bipartisan, political network of CEOs and Senior Executives that promotes the growth of technology and the innovation economy. TechNet is a voluntary, nonprofit organization that, among other things, promotes the common interests of technology companies and the general public in fostering the development in California of reasonable, equitable, and progressive rules. TechNet members are technology companies that employ workers in innovative work places, jobs and environments centered on creative thinking and flexibility. TechNet focuses on politics and policy in an effort to sustain and advance America's global leadership in innovation. TechNet's membership includes well over one hundred top private sector

technology employers in the State of California, who collectively employ thousands of Californians. TechNet has been granted leave to participate as *amicus curiae* in other of California's leading cases, including General Motors Corp. v. Franchise Tax Bd. (2006) 39 Cal.4th 773 (as part of the California Business Coalition); and Barrett v. Rosenthal (2006) 40 Cal.4th 33 (collectively filed with other interested parties).

II. PROPOSED *AMICUS* PRESENTATION

By the enclosed brief, TechNet presents the following, offering a unique perspective on pertinent issues presented by this appeal: (1) the plain and unequivocal language of the California Labor Code mandates that employers must provide employees with meal breaks, not guarantee that they take them; (2) interpreting the Labor Code to require employers to ensure that employees actually take meal periods that they are provided would lead to absurd results to the detriment of employers, employees, and California as a whole, with such absurdity particularly anticipated to occur within California's important technology sector; (3) a standard requiring employers to police employees to ensure that they take provided meal periods is simply unworkable in a modern work place and for modern jobs held by California employees; (4) the modern work force does not always work in a central office or location where a supervisor or manager is present; (5) non-exempt employees will not be allowed to take

advantage of alternative work arrangements if an "ensure" standard is the law; (6) the state will lose out on the benefits of alternative employment arrangements such as telecommuting; (7) an "ensure" standard would be impossible to enforce for employees performing modern jobs and exclude non-exempt employees from taking advantage of means to advance in their employment; and (8) affirming a "provide" standard would avoid absurd results and still provide employees with protection from malicious employers who force them to work through meal periods.

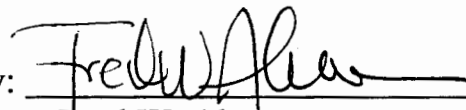
III. CONCLUSION

For the aforementioned reasons, *amicus curiae* TechNet respectfully requests that the Court accept the enclosed brief for filing and consideration.

Dated: August 11, 2009

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI

By: 

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I. INTRODUCTION

The Appellate Court, like the numerous California District Courts that have addressed the issue, correctly interpreted the California Labor Code with respect to an employer's obligation to "provide" non-exempt employees with meal periods. As the plain language of the relevant sections of the Labor Code unequivocally state, California employers need only "provide" or make meal periods available to employees. Employers, however, need not guarantee that employees actually take meal periods that they make available.

Defendant, in its own briefs, has fully and persuasively addressed arguments with respect to the statutory interpretation of the Labor Code that make it clear that the legislature did not intend for California employers to serve as guarantors of the meal periods they are charged with providing. Therefore, *Amicus Curiae*, TechNet ("Amicus") will not repeat points that it agrees with, and that Defendants have already fully and adequately addressed. Instead, Amicus respectfully submits this brief on behalf of its members to demonstrate that adopting an interpretation of the Labor Code that requires California employers to not only make meal periods available, but to affirmatively ensure that employees stop all work and actually take their meal periods, will lead to unfortunate results that will detrimentally affect employees, employers, and the economy and environment of California as a whole.

If the Appellate Court is reversed, the unfortunate results that would follow are apparent when the Court considers members (and their employees) that Amicus represents. Amicus members are technology companies that employ workers in innovative work places, jobs and environments centered on creative thinking and flexibility, in which collaborative work models and team efforts have generally been adopted. Employees of Amicus members perform jobs in which they, not their employers, control the flow of work.

The foregoing is particularly true for the thousands of persons Amicus members employ who telecommute or otherwise work remotely, rather than reporting to a central office. These remote employees are not under constant supervision of a manager. If the Court adopts a ruling that mandates that employers must affirmatively guarantee that their employees stop all work to take the provided meal periods, then the members of Amicus, along with all other California employers, will be left in an impossible position that forces them to reconsider or suspend these innovative and flexible work situations currently enjoyed by employees, and potentially available to many more as technology continues to advance, with benefits to all Californians flowing therefrom. The legislature could not have intended such a result.

As set forth herein, Amicus submits that this Court should affirm the Appellate Court's previous decision, and specifically affirm

that California employers: 1) are only required to provide employees with meal periods; 2) are not affirmatively required to guarantee that employees cease all work and take the meal periods made available to them; and 3) are prohibited from forcing employees to work through meal periods.

II. ARGUMENT

A. The Plain and Unequivocal Language of the California Labor Code Mandates that Employers Must Provide Employees with Meal Breaks, Not Guarantee that they Take Them

When construing a statute, a court "seeks to determine and give effect to the intent of the enacting legislative body." People v. Braxton (2004) 34 Cal.4th 798, 810. In doing so, courts should begin with the language of the statute, affording words their ordinary and usual meaning and viewing them in their statutory context. Alcala v. Superior Court (2008) 43 Cal.4th 1205, 1216. Courts should also presume that every word, phrase, and provision of a statute was intended to have some meaning and perform some useful function. Woods v. Young (1991) 53 Cal.3d 315, 323; see also, Big Creek Lumber Co. v. County of Santa Cruz (2006) 38 Cal.4th 1139, 1155 ("[C]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.", quoting Arnett v. Dal Cielo (1996) 14 Cal.4th 4, 22). As Defendant has persuasively and articulately argued, the plain meaning of sections

227.6 and 512 is clear: the Legislature charged California Employers with the obligation to provide employees with meal periods, and not ensure that they are taken. Amicus will not belabor the Court with a repetition of Defendant's arguments, except to say that adopting the Plaintiffs' interpretation of the Labor Code would ignore the word "provide." Ignoring the word "provide," which is necessary to agree with Plaintiff's labored reading of the laws in question, would violate a fundamental tenet of statutory interpretation (each word must be presumed to have some meaning). If the Court follows this fundamental tenet, it can only reach one conclusion and agree with Defendant.

B. Interpreting the Labor Code to Require Employers to Ensure that Employees Actually Take Meal Periods that they are Provided Would Lead to Irrational Results to the Detriment of Employers, Employees, and California as a Whole

To the extent that the Court finds any ambiguity in the language of the Labor Code, it "may consider the consequences of each possible construction" and "infer that the enacting legislative body intended an interpretation producing practical and workable results rather than one producing mischief or absurdity." Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal.4th 554, 567; see also, Copley Press, Inc. v. Superior Court (2006) 39 Cal.4th 1272, 1291 (stating "[w]here more than one statutory construction is arguably possible,

the [Supreme Court's] 'policy has long been to favor the construction that leads to the more reasonable result'; [t]his policy derives largely from the presumption that the Legislature intends reasonable results consistent with its apparent purpose."); Smith v. Superior Court (2006) 39 Cal.4th 77, 83 (stating "[i]f the statutory terms are ambiguous, [the court] may examine extrinsic sources, including the ostensible objects to be achieved and the legislative history [but] must choose the construction that comports more closely with the Legislature's apparent intent, endeavoring to promote rather than defeat the statute's general purpose, and avoiding a construction that would lead to absurd consequences"). If the Court were to adopt Plaintiff's proposed interpretation and hold that California employers must not only provide employees with meal periods, but actually guarantee that every employee takes his or her provided meal period, the consequences would be unreasonable and disadvantage employers, employees and California as whole.

1. A Standard Requiring Employers to Police Its Employees to Ensure that they Take Provided Meal Periods is Simply Unworkable in a Modern Work Place, Particularly Where a Supervisor or Manager is Not Present

Today's modern work places, particularly those represented by the members of Amicus, do not always involve traditional employment settings or manufacturing facilities where the employer

controls the flow of production. Flexible working environments where individual employees have the ability to choose where and/or when they work are becoming a hallmark of California's modern work force[1]. California employers have responded to the state's enunciated public policy encouraging the use of alternative work arrangements, particularly telecommuting[2] and created a wide ranging and varying degree of non-traditional work environments built upon mutual trust between the employer and employee. Adopting an interpretation of the Labor Code that would require California employers to ensure that its non-exempt employees actually cease all work and take a meal period would make it impossible for employers to offer these alternative work arrangements and flexibility. Furthermore, an "ensure" standard would erode the mutual trust necessary for such arrangements to work by creating perverse incentives for employees to skip their meal periods or to be dishonest about whether they actually took all or some of their provided breaks.

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[1] See, e.g., Tom Kelly, The Ten Faces Of Innovation (Doubleday 2005) at 263 (explaining that companies that are responsive to new business models can overcome traditional power players – that "flexibility is the new strength").

[2] CA.gov – Telework Resources, available at http://www.dgs.ca.gov/Telework (last visited June 30, 2009); see also, Cal. Gov't Code § 14200.1 (2009).

This undesirable circumstance, however, will necessarily follow if Plaintiff's interpretation of the Labor Code is adopted.

a. Non-Exempt Employees Will Not Be Allowed To Take Advantage of Alternative Work Arrangements if an "Ensure" Standard is the Law

Adopting the "ensure" standard that Plaintiff's advocate for would necessarily require that employers police their employees to ensure that they are actually taking their meal periods, and cut-off the ability of employees to perform any work during a lunch period. Both of these requirements are an impossibility where an employee telecommutes or does not work out of a central location where there is a manager present. To perform the necessary policing to comply with an "ensure" standard employers would be left with a limited number of difficult and unreasonable options that still do not guarantee an employee has ceased all work during a designated meal period. Employers could: 1) send a manager to an employee's home or work location when the employee is supposed to be on a meal break; 2) take steps to try and cut-off the ability of an employee to do any work during the period that they are supposed to be taking a meal period; or 3) cease offering alternative work arrangements to non-exempt employees. None of these choices offers a workable situation that preserves the benefits of an alternative work arrangement or gives an employer safe harbor from claims of missed meal periods.

If an employer is forced to send management employees to the locations where telecommuting employees are working from in order to ensure that they are actually taking a meal period, the underlying benefits of remote working policies would be negated and then some.[3] Managers would necessarily spend their days driving (or in some instances flying) from location to location. In addition to the lost productivity of the managers, the environmental and communal benefits associated with removing commuters from highways and roads would be instantly lost. For those employees living in remote communities far from the central location of an employer, there would simply be no way to police their meal time activities. These positions would either have to be moved back to a central location (which would defeat the purpose of their creation in the first instance) or more likely, eliminated.

Trying to turn off an employee's ability to work during a designated meal period is also an ineffective and impossible solution to guarantee that employees are taking their provided meal periods.

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[3] Employers could require its non-exempt employees who work outside of the office to report back to a designated location for their meal period to try and police employee lunch activities. This, however, would defeat the purpose of alternative work arrangements, cut into the productivity of California workers (adding additional drive time to an employee's day), and run afoul of the Labor Code which requires that employees be allowed to leave an employer's premises during their meal periods.

Due to the nature of the jobs of today's modern work force, particularly those performed in a home or virtual office environment there is no real way for an employer to completely turn off an employee's ability to work. Even if an employer were to shut down an employee's computer, or cell/smart phone for some designated period each day, there is simply no way to turn off an employee's brain. In jobs that revolve around creative thinking and do not require a physical presence at any one location in order for an employee to be productive, there is simply no way for an employer to be able to comply with an "ensure" standard in terms of meal periods. Even if employers could take the steps to temporarily disable an employee's means of communication and electronic access to employer resources this would not necessarily protect them from employee claims that they continued to work during their meal period. This could not have been the intended result of the California Legislature.

Faced with no effective option to police employees who work remotely to ensure that they are actually taking meal periods, employers will be left with no choice but to eliminate such arrangements for non-exempt employees or otherwise face certain liability. One disgruntled or dishonest employee who reaped the benefits of a virtual workplace could hold an employer ransom under the guise of a class action by claiming that their employer routinely failed to ensure their meal periods, even if their kitchen were two

steps away from them. In this scenario, under an "ensured" standard, an employer would have no defense where it provided its employees with the flexibility, ability, or option to work remotely. Therefore, to have even a fighting chance of complying with an ensure standard, California employers would necessarily need to exclude non-exempt employees from participating in alternative work arrangements. The Legislature could not have intended this unjust result.

b. The State Will Lose Out on the Benefits of Alternative Employment Arrangements Such as Telecommuting

California employers, in response to the State's enunciated public policy favoring alternative work arrangements[4] have turned to the use of telecommuting and virtual offices not just because it is good for business, but because it also benefits employees and California as a whole. These innovative work environments have numerous benefits for employers, employees and the state.

Alternative work arrangements allow California employers to preserve jobs for California residents by creating jobs and employing individuals outside of urban areas for competitive wages. In other words, jobs that might have been outsourced to cheaper foreign

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[4] CA.gov – Telework Resources, available at http://www.dgs.ca.gov/Telework (last visited June 30, 2009); see also, Cal. Gov't Code § 14200.1 (2009).

locales remain in California. Employers, through the use of virtual offices and telecommuting, are able to employ individuals in places where it does not have a physical office at wages competitive for the employee's location, but less than they would have to pay for a similar employee in a more densely populated urban area.

As an example of the foregoing, Bay Area technology companies through the use of virtual call centers[5] to provide customer service are employing individuals in locations like the Central Valley, where they do not have a physical presence. The Central Valley residents are able to earn a competitive wage and take advantage of the lower cost of living while the employer is able to maintain jobs for Californians (rather than off shoring them) at a cost less than if the job were in the Bay Area. This increases the employment rate of California residents as well as the tax revenue of the state.

Increased employment of California residents is not the only benefit derived from alternative work arrangements. Both the federal and California governments have adopted measures including offering employers tax incentives, to encourage the use of telecommuting and alternative work arrangements because of the benefits to both employees and the country. In addition to improving employee

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[5] Employees are given the tools to receive calls and provide customer service as if they were working from a central call center, when in reality they are working from their homes.

morale, alternative work arrangements that reduce traffic on the state's roads and highways help protect the environment by reducing carbon emissions, particularly during heavy commute times when pollution is at its worst. Additionally, at a time when the country is looking for means to reduce dependence on foreign energy, including oil,[6] telecommuting helps reduce the consumption of gasoline and preserve the earth's natural resources.[7]

Employers see additional benefits from alternative work arrangements that include: 1) decreased costs for office space, 2) improved job satisfaction that leads to decreased labor turnover and increased employee commitment; and 3) increased employee productivity while improving employee work/life balance. If California's non-exempt employees (the majority of California's working population) are excluded from being able to participate in alternative work arrangements because an "ensured" standard makes it impossible for them to do so, employees, employers, and the public as

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[6] Commuting five days a week releases more than 51,000 pounds of CO2 and uses, on average, almost 400 gallons of gas per year. See EnvironmentalLeader.com, Governments Encouraging Telework Programs, available at http://www.environmentalleader.com/2009/01/05/governments-encouraging-telework-programs (last visited June 30, 2009).

[7] Allowing employees to remove themselves from the daily commute, even if they use public transportation, reduces the strain on an already overtaxed California public transportation infrastructure.

a whole will be worse off because of it. This is an irrational result that could not have been what the Legislature intended.

2. An "Ensure" Standard Would Be Impossible to Enforce For Employees Performing Modern Jobs and Exclude Non-Exempt Employees From Taking Advantage of Means to Advance in their Employment

Even outside of alternative work arrangements, enforcement of an "ensure" standard is simply unworkable for today's modern jobs and work force. Technology companies do not, for the most part, employ individuals on a production line. Instead, like many other employers, technology companies measure the productivity of their employees by what they produce with their minds rather than through the number of widgets made or customers served. In performing this type of work, an employee does not have to be in one location, using an employer's tools or resources, or even performing any physical activity to be working. When employees are paid to think how do you ensure that they stop thinking during their meal periods[8]? Absent some way of doing this there is simply no way of "ensuring" than an employee ceases all work during a provided meal period to comply

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[8] See, e.g., The Ten Faces Of Innovation, supra, at 104-106 (relaying a story about Apple Computer contractors who were so passionate about a project that even after the project and their contracts got cancelled they snuck in to Apple for months to continue working on it).

with the standard that Plaintiffs advocate for. Employers, however, will be forced to take extreme measures with respect to their nonexempt employees to try and meet this impossible standard.

For example, it is not an uncommon scene within a technology company (as well as other types of employers) to find employees lunching together in a company cafeteria[9] and discussing a project or some new technology relevant to their work[10]. These conversations build team camaraderie, increase individual development through shared knowledge, and increase quality and production.[11] However,

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[9] Google – The Google Culture, available at http://www.google.com/corporate/culture.html (last visited June 30, 2009); see also, Dean Takahashistaff, Grasping the Googleplex, OAKLAND TRIBUNE, Aug. 6, 2007, available at http://findarticles.com/p/articles/mi_qn4176/is_20070806/ai_n19443559; Miyoko Ohtake, Kitchen Secrets, NEWSWEEK.COM, Apr. 22, 2008, available at http://www.newsweek.com/id/133242.

[10] See, e.g., The Ten Faces Of Innovation, supra, at 149 (suggesting that lunch time brainstorming sessions can be useful and encourages leadership to set them up).

[11] It is also not uncommon for technology companies to have brown bag lunches where they bring in guest speakers or host an employee round table to discuss technological advances within an industry. These types of informal educational opportunities add to employee knowledge, skill sets and marketability. See, e.g., The Ten Faces Of Innovation, supra, at 199 ("Industry-leading companies like Pixar and eBay understand that their highly collaborative environments are central to the happiness and creativity of their talented staffs"). Nonexempt employees, however, will be excluded from such opportunities to the extent that they relate in anyway to

an employer who allowed nonexempt employees to participate in such conversations during their meal periods would do so at their own peril under an "ensured" standard. An exempt manager or supervisor sitting at a lunch table where such conversations were occurring would be forced to ask nonexempt employees to leave or risk their employer facing certain liability if they failed to do so. Likewise, an employer who did not post employees within cafeterias or break rooms to monitor employee conversations would also be at risk.

Even if an employer went to such extreme measures to police and monitor its employees' meal periods, this would not guarantee its compliance under an ensured standard. An employee, incentivized to receive an extra hour of pay, would still be able to allege that he or she continued to think about their job or a specific project or aspect of their job during a meal period and was therefore not relieved of all duties. It would be easy enough for an employee, even where the employer promulgated and preached a policy requiring employees to take their meal breaks, provided them with free food, and monitored employee activity during meal breaks, to allege that due to the expectations of their jobs they had no choice but to continue thinking/working during their meal periods. Under an ensured

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their jobs for fear of liability under an "ensured" standard. See id. at 138 ("Don't relegate team members to the corporate equivalent of football linemen who rarely touch the ball").

standard, an employer would be left with no defense to the employee's allegations and would be forced to pay the employee an extra hour of pay. An employer could discipline an employee for continuing to think about their jobs and not taking a required meal break, but this would also lead to perverse results to the detriment of the employer, the employee and the state. The disciplined employee now would not only have a claim for missed meal periods, but for retaliation for exercising his or her rights to seek the premium for the missed meal period. Increased litigation based on an impossible, essentially strict liability standard could not possibly have been what the Legislature intended. This perverse result would naturally follow, however, if Plaintiff's proposed interpretation is adopted.

C. Affirming a "Provide" Standard Would Avoid Unreasonable Results and Still Provide Employees with Protection from Non-Compliant Employers who Neglect to Provide Meal Periods

The Court of Appeals' plain reading of the Labor Code, without unleashing a parade of unreasonable results to the detriment of employers, employees and the public as a whole, still provides a workable and practical standard that protects employees from unscrupulous employers that otherwise seek to shirk their duties. As the Court of Appeals explained, California employers must do more than simply tell employees to take their meal periods. Contrary to the actions of the employer in Cicairos, to comply with the Labor Code,

an employer must: 1) have a policy of providing employees with meal periods in compliance with the law; 2) provide employees with the means to take their meal periods, including giving them the tools to properly record their meal breaks, 3) not place unrealistic expectations on employees to complete a specific amount of work in a time frame that does provide them with a realistic opportunity to take their meal breaks; and 4) not encourage or force employees to skip their meal breaks. If an employer takes these steps they have met their burden to provide an employee with a meal period.

Once the employer provides its employees with a meal period, if the employee then chooses to forego it, for reasons personal to him or her, then the employer should not be forced to pay a premium. However, if an employer either does not take adequate measures to provide an employee with a meal period or forces the employee to work without a meal break,[12] then the Court of Appeals' plain reading of the Labor Code provides employees with a means to address the situation and hold their deficient employer accountable -- without unleashing the irrational results that would flow from the Plaintiff's proposed interpretation.

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[12] Murphy v. Kenneth Cole Productions, Inc. (2007) 40 Cal.4th 1094, 1104 (repeatedly describing the problem as employees being "required to work through" or "forced to forgo" meal breaks).

III. CONCLUSION

For the reasons set forth herein, together and in concert with the persuasive arguments set forth by Defendant in its own briefs, the Court should affirm the decision of the Court of Appeals and avoid the counter productive repercussions that would otherwise result. Clearly, and as elucidated via the exercise of statutory construction, the legislature did not intend for employers to have to affirmatively police the meal and rest periods "provided" to their employees. The irrationality of this proposition is all the more apparent when employees of the technology sector are taken into consideration – employees who largely control their own working parameters, including remote working conditions, while working in concert with other innovators to develop creative solutions to the world's technology needs. Should this Court hold that employers are affirmatively bound to ensure that employees actually take meal periods, employers will be forced to forego creative working conditions that might otherwise ease congestion, enhance the state's economy, and improve upon the quality of life of all of California. Amicus, on behalf of California's technology sector[13], asks this Court to avoid a result that (i) is unreasonable, based upon the plain and

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[13] Amicus is confident speaking for this important segment of California's industry, as its members directly employ thousands of employees in the technology sector.

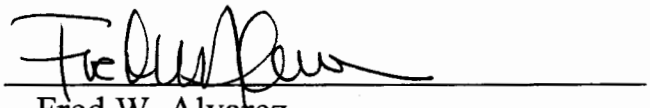
unequivocal language of the Labor Code; (ii) would create a standard that is unworkable in the modern workplace; (iii) would decrease opportunities for non-exempt employees to benefit from alternative work arrangements, such as telecommuting and remote worksites, to the detriment of individuals, employers and the state; and (iv) would unnecessarily interfere with advancement opportunities of non-exempt employees in today's evolving and collaborative working environment.

Amicus submits that this Court should affirm the Appellate Court's previous decision, affirming that California employers: 1) are only required to provide employees with meal periods; 2) are not affirmatively required to guarantee that employees cease all work and take the meal periods made available to them; and 3) are prohibited from forcing employees to work through meal periods.

Dated: August 11, 2009

Respectfully Submitted,

WILSON SONSINI GOODRICH & ROSATI

By: 

Fred W. Alvarez

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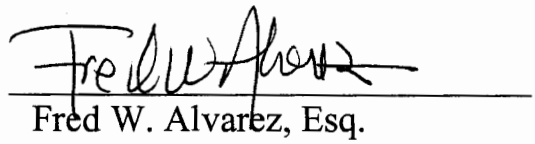
TechNet

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.520

Pursuant to California Rules of Court, Rule 8.520(c)(1), and in reliance on the word count feature of Microsoft Word software used to prepare this document, I certify that this Brief of Amicus Curiae contains 4,427 words, excluding those items identified in Rule 8.520(c)(3).

Dated: August 11, 2009

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: 
Fred W. Alvarez, Esq.

Attorneys for Amicus Curiae
TechNet

PROOF OF SERVICE BY NEXT-DAY DELIVERY

I, Janet Baca, declare:

I am employed in Santa Clara County. I am over the age of 18 years and not a party to the within action. My business address is Wilson Sonsini Goodrich & Rosati, 650 Page Mill Road, Palo Alto, California 94304-1050. I am readily familiar with Wilson Sonsini Goodrich & Rosati's practice for collection and processing of correspondence for next-day delivery by an express mail service. In the ordinary course of business, correspondence would be consigned to an express mail service on this date.

On this date, I served APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICUS CURIAE TECHNET IN SUPPORT OF PETITIONERS BRINKER RESTAURANT CORPORATION, ET AL.; BRIEF OF AMICUS CURIAE TECHNET IN SUPPORT OF PETITIONERS BRINKER RESTAURANT CORPORATION, ET AL. on the person(s) listed below by placing the document(s) described above in an envelope addressed as indicated below, which I sealed. I consigned the envelope(s) to an express mail service by placing it/them for collection and processing on this day, following

ordinary business practices at Wilson Sonsini Goodrich & Rosati.

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Hon. Patricia A.Y. Cowett
San Diego County Superior Court
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San Diego, CA 92101

Clerk of the Court
San Diego County Superior Court
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San Diego, CA 92101

Clerk of the Court of Appeal
Fourth Appellate District
Division One
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Palo Alto, California on August 11, 2009.

Janet Baca