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November 15, 2017

Honorable Chief Justice and Associate Justices of the
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: Depublication Request on behalf of Consumer Attorneys of California
Bartoni v. American Medical Response West
(2017) 11 Cal.App.5th 1084, No. A143784 (Cal. App. May 24, 2017)

May It Please the Court:

Statement of Interest

The Consumer Attorneys of California (COAC), a voluntary membership organization, represents approximately 6,000 attorneys practicing throughout California. The organization was founded in 1962. Its membership is comprised of attorneys who represent plaintiffs in employment matters and fight to protect landmark employment legislation. COAC has taken a leading role in advancing and advocating the rights of injured Californians in both the Courts and the Legislature.

Timeliness of Request

Any person can request depublication of a decision within thirty days of the date the decision was final in the Court of Appeal.[1] The Court of Appeal issued its unpublished decision on April 25, 2017, and modified the decision on denial of rehearing and certified it for publication on May 24, 2017. The opinion became final June 23, 2017. Thus, this request for depublication is timely.

Summary Grounds for Depublication

Consumer Attorneys of California respectfully requests this Court depublish *Bartoni v. American Medical Response West* (2017) 11 Cal.App.5th 1084, No. A143784 (*Bartoni*).

[1] Cal.R.Ct. 8.1125(a)(4).

Bartoni should be depublished because it directly conflicts with this Court's decisions in *Augustus v. ABM Services, Inc.,* [2] and *Brinker Restaurant Corp. v. Superior Court,* [3] and therefore threatens to upend the force, clarity, and effect of those decisions on future litigants and lower courts dealing with similar issues.

In *Augustus,* this Court recently announced that the employer obligations for providing meal periods that the court articulated in *Brinker*, i.e., the employer must relinquish control and relieve employees of all duties, apply with equal force with regard to authorizing and permitting rest periods. After unifying the standards for providing meal and rest periods, the *Augustus* Court went on to hold that employees who are on-call are not relieved of duties and relinquished of control. *Augustus* further held that employees who are on-call during breaks are not relieved of all duties or relinquished of employer control, regardless of whether they get called back to work during on-call periods.

Bartoni should be depublished because it directly conflicts with this Court's ruling in *Augustus* in two critical respects. One, *Bartoni* holds that employees can be on-call during meal periods, whereas they cannot be for rest periods. In other words, it divides what *Augustus* unified with respect to employer obligations to provide meal and rest periods. Finally, *Bartoni* parts company with *Augustus* in holding that employees who are on-call during meal periods are only under duty and employer control when they are actually called back to work. This, too, directly conflicts with *Augustus*, which expressly rejected the same argument and held employees are under employer control during breaks simply by the fact of being on-call and regardless of whether they are actually called back to work.

Should the decision not be depublished, the force, import, and clarity of *Augustus* and *Brinker* will be lost on lower courts. As if the *Augustus* decision never happened, if the *Bartoni* decision is not depublished, lower courts will be left to determine whether and the extent to which the employer's duty to provide meal and rest periods is the same or different. Likewise, if the decision is published, lower courts will be left with the confusion of when being on-call rises to the level of employer control for purposes of providing meal and rest periods – confusion this Court expressly intended to eliminate in *Augustus*. Permitting *Bartoni* to be published also means employees and employers will not have clarity on their respective rights to receive and obligations to provide meal and rest periods.

To avoid these upending and conflicting results, CAOC respectfully requests the Court order the decision in *Bartoni* depublished.

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[2] *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 271-272 (2016) (*Augustus*).
[3] *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1038–1039 (*Brinker*).

Discussion

In Direct Conflict With This Court's Binding Decision in *Augustus*, the *Bartoni* Opinion Rules that *Augustus'* Prohibition of Requiring Employees to Be On-Call During Breaks Only Applies to Rest, and not Meal, Periods

Citing to its decision in *Brinker,* the California Supreme Court reasoned in *Augustus*, "[w]e have explained that during meal periods, employers must 'relieve the employee of all duty and relinquish any employer control over the employee and how he or she spends the time.'"[4]

Then, the Court found the employer's responsibilities for providing meal periods it interpreted in *Brinker* are the same for rest periods:

> "It would be difficult to cast aside section 226.7's parallel treatment of meal periods and rest periods and conclude that employers had completely distinct obligations when providing meal and rest periods. What makes sense instead is to infer that **employers' responsibilities are the same for meal and rest periods** – an inference that also reflects the protective purpose of both…"[5]

Accordingly, the *Augustus* Court held, as with meal periods, "during rest periods employers must relieve employees of all duties and relinquish control over how employees spend their time."[6]

After ruling that employers' responsibilities are the *same* for meal and rest periods, the court turned to whether an employer relieves employees of all duties and relinquishes control when it requires employees to remain on-call.[7] The Court answered this question in the negative, plainly holding that requiring employees to remain on-call during breaks "cannot be reconciled" with the requirement applicable to both meal and rest periods that "employees must not only be relieved of work duties, but also be freed from employer control over how they spend their time."[8]

ABM pressed the *Augustus* Court to rule that the on-call employee is only subject to employer control when he or she is actually called back to duty. This Court declined the invitation. Opting to fashion a bright-line rule affording clarity to employers and employees, the *Augustus* court held the on-call requirement alone subjects employees to employer control, regardless of whether they are actually called back to work while on-call:

> "ABM recognizes that the employer has a break-related obligation to its employees. But it suggests that we define that obligation by distinguishing between, on the one hand, requiring a guard to work and, on the other hand, requiring a guard to remain on duty or on call. It would also have courts determine whether an on-call obligation *unreasonably* interferes with an employee's opportunity to take an uninterrupted rest period. this proposed course would result in less clarity and considerably greater administrative complexities. And it makes for an awkward fit with section 226.7's text, which forbids

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[4] *Augustus, supra,* 2 Cal.5th at 265.
[5] *Id.* (emphasis added).
[6] *Id.* at 269 (citing *Brinker*, *supra*, 53 Cal.4th at 1038-1039) (emphasis added).
[7] *Id.*
[8] *Id.* at 269-270 (citing *Brinker, supra,* 53 Cal.4th at 1039-1040).

> employers from requiring employees to work during any meal *or* rest period, and Wage Order 4, which requires employers to provide rest periods and explicitly indicates that employees must generally be relieved of all duty during meal periods."[9]

Bartoni directly contravenes and is a step backwards from both *Brinker* and *Augustus*. Improperly departing from *Augustus*, *Bartoni* held that being on-call during meal and rest periods *only* violates the duty to provide rest periods. The *Bartoni* decision further conflicts with *Augustus* in stating that, during meal periods, an on-call employee would only be subject to employer control if and when the employer actually calls the employee to duty.

In *Bartoni*, the trial court denied certification of the meal and rest break subclasses because "a meal or rest period during which an employee remains 'on call' but is not actually interrupted is properly characterized as an 'off duty' period."[10] The Appeals Court in *Bartoni*, ruled that the trial court's decision was "based on an erroneous legal premise insofar as rest periods are concerned."[11] The *Bartoni* decision reasoned, "[b]ecause the trial court's decision to deny class certification with respect to AMR's overarching rest period policy rests on its legal conclusion that a rest period during which an employee remains on call may be considered an off-duty rest period, and because that conclusion is incorrect under *Augustus,* we must reverse and remand…"[12]

Ignoring this Court's ruling in *Augustus* that the employer obligations for providing meal and rest periods are the same, the *Bartoni* Court holds that, unlike for rest periods, the employer *can* require employees to be on-call for meal periods. Expressly contravening *Augustus* again, the *Bartoni* decision ruled that, unlike for rest periods, the on-call employee taking a meal period is only subject to employer control if and when the employer actually calls the employee back to work. Relying on a DLSE opinion letter the *Augustus* Court specifically rejected and an unpublished appellate court decision, the *Bartoni* Court of Appeals ruled:

> The DLSE has opined that an employee required to carry a pager has a duty-free meal period for purposes of compensation unless he or she 'responds, as required, to a pager call during the meal period.' (DLSE Opinion Letter, Jan. 28, 1992, p. 3)[13] Accordingly, the trial court appropriately rejected plaintiffs' view that an on-call meal period is necessarily 'on-duty' for purposes of the wage and hour laws. Thus we disagree with plaintiffs' contention that the trial court's denial of class certification as to the overarching meal period policy relied on an erroneous legal assumption.[14]

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[9] *Augustus, supra,* 2 Cal.5th at 271-272 (no emphasis added).
[10] *Bartoni*, *supra,* 11 Cal.App.5th at 1092.
[11] *Id.*
[12] *Id.* at 1103.
[13] In *Augustus*, the Court ruled that the exact letter the *Bartoni* Court of Appeals relied on was superseded by *Brinker*: "In *Brinker,* we clarified the meaning of the relevant statutory and wage order provisions. During meal breaks, we held, employers must relieve employees of all duty and relinquish any control over employees and how they spend their time." *Augustus, supra,* 2 Cal.5th at 268, n. 11, (citing *Brinker, supra,* 53 Cal.4th at 1038-1039).
[14] *Bartoni, supra,* 11 Cal.App.5th at 1101.

If *Bartoni* is Not Depublished, the Clarity and Force of *Augustus* and *Brinker* Will be Lost on Lower Courts Dealing with Similar Meal and Rest Period Issues

If *Bartoni* is not depublished, the great strides this Court took to clarify and unify the employer obligations with regard to providing meal and rest periods will likely be lost on lower courts dealing with similar meal and rest period issues in future cases. It's substantial misapplication of *Augustus* and *Brinker* will be relied on in other appellate court cases, as well as federal district courts, which will once again lead to inconsistent decisions and rulings on the nature and extent of the employer obligation to provide meal and rest periods that preceded *Brinker* and *Augustus* – splits of authority *Brinker* and *Augustus* were expressly intended to eliminate. To avoid these unjust consequences, it is respectfully requested the Court grant this request and enter an order depublishing the *Bartoni* decision.

Conclusion

For the foregoing reasons, COAC respectfully request this Court order depublication of the *Bartoni* opinion.

Respectfully Submitted,

THE TURLEY & MARA LAW FIRM, APLC

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David Mara, Esq.