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.

APPLICATION OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION AND CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF REAL PARTIES IN INTEREST

and

BRIEF OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION (CELA) AND CONSUMER ATTORNEYS OF CALIFORNIA (CAOC) AS *AMICI CURIAE* IN SUPPORT OF REAL PARTIES IN INTEREST

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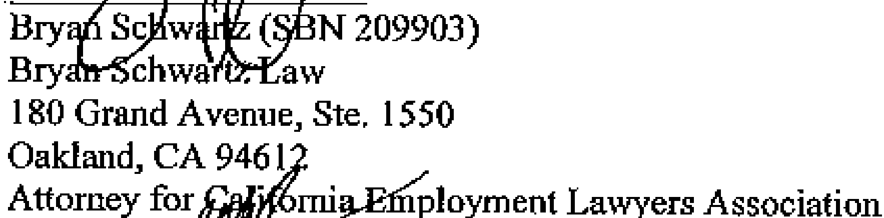
BRIEF OF THE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION AND THE CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF REAL PARTIES IN INTEREST AS *AMICI CURIAE*

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
C.R.C. Rule 8.208

The following application and brief are made by the California Employment Lawyers Association (CELA) and Consumer Attorneys of California (CAOC). These entities are non-profit organizations of attorneys and neither is a party to this action. CELA and the CAOC know of no entity or person that must be listed under (d)(1) or (2) of rule 8.208.

Date: August 18, 2009



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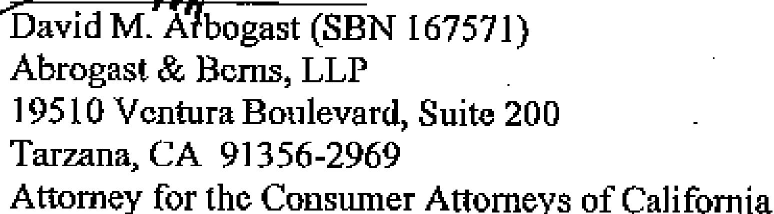

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APPLICATION OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION AND CONSUMER ATTORNEYS OF CALIFORNIA, FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF REAL PARTIES IN INTEREST

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE:

The undersigned respectfully ask permission to file a brief as *amici curiae* in the matter of *Brinker Brinker Restaurant Corporation, et al. v. Superior Court* (2008) 80 Cal.Rptr.3d 781 (hereafter, *Brinker*) under Rule 8.520(t) in support of the Real Parties in Interest, on behalf of the California Employment Lawyers Association (CELA) and Consumer Attorneys of California (CAOC).

CELA is a statewide non-profit organization dedicated to protecting workers' rights. CELA's member attorneys represent employees in all types of employment cases in state and federal courts and before administrative agencies, including employment discrimination, wrongful discharge, wage and hour, and unemployment insurance matters. In each of these substantive areas of law, CELA's members and their clients challenge employers who fail to adhere to California and federal employment laws. CELA frequently appears as amicus curiae in matters before this Court, including, e.g., recent appearances in *Murphy v. Kenneth Cole*

Productions, Inc. (2007) 40 Cal.4th 1094, 56 Cal.Rptr.3d 880, *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 64 Cal.Rptr.3d 773, and *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 81 Cal.Rptr.3d 282.

CELA's members have an abiding interest in interpretations of the California Labor Code, including §§226.7 and 512, most directly at issue in this case, and the Industrial Welfare Commission ("IWC") Wage Orders. In particular, CELA seeks to ensure that the Labor Code's and Wage Orders' meal and rest period provisions are "interpreted broadly in favor of protecting employees," as this Court required in *Murphy*, 40 Cal.4th at 1104, and not in a manner, like that applied in the instant case, which results in merely facially-compliant company policies, but no real breaks for millions of California workers or premiums when they miss breaks.

As an example of CELA's interest in this matter, CELA's undersigned attorney (Schwartz) was formerly an attorney at the firm of Nichols Kaster, LLP, and in that capacity represented approximately over 5,000 putative class members in California in the matter of *Gabriella, et al., v. Wells Fargo Financial, Inc., et al.* (N.D. Cal. 2008) 2008 WL 3200190. In *Gabriella*, the United States District

Court denied class certification of meal and rest period claims under §§226.7 and 512, and under the appropriate Wage Order, following the Court of Appeal's decision at issue here, after indicating at hearing that the Court was inclined to certify a class prior to the *Brinker* decision. The *Gabriella* court stated further that it will reconsider certification if the Supreme Court does not uphold *Brinker*, and all proceedings in *Gabriella* are currently stayed pending the outcome of this case. *Gabriella, et al., v. Wells Fargo Financial, Inc., et al.* (January 26, 2009) Case No. 3:06-cv-04347-SI, Docket #305 (Illston, J.) (attached for the Court's convenience as *Exhibit 1* to the Request for Judicial Notice). *See also, e.g., Lew, et al., v. Countrywide Financial Corporation, et al.* (February 24, 2009) Case No. 3:08-cv-01993-SC, Docket #122 (Conti, J.) (likewise staying all proceedings pending the outcome of this case) (attached for the Court's convenience as *Exhibit 2* to the Request for Judicial Notice). In this manner, CELA's members throughout the state are awaiting the outcome of this case in order to be able to move forward with their pending wage/hour litigation involving meal/rest period premium claims.

CAOC is a voluntary non-profit membership organization of over 3,000 consumer attorneys practicing throughout California. The organization was founded in 1962 and many of its members represent employees in wage and hour litigation. CAOC has taken a leading role in advancing and protecting the rights of workers by (among other activities) submitting amicus briefs in California Supreme Court cases like *Prachasaisoradej v. Ralphs Grocery Co.*, 42 Cal.4th 217 (2007), and *Elsner v. Uveges*, 34 Cal.4th 915 (2004).

In response to Rule 8.520(f)(4), no party or counsel for a party has authored the proposed brief in whole or in part. No party or counsel for a party, and indeed no person, save the authors themselves, have made a monetary contribution to fund the preparation or submission of the following amicus brief.

The proposed brief follows. There is also a separately filed motion for judicial notice.

Executed at Oakland, California, this 18th day of August, 2009.

Application for Leave to File Amicus Brief

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I. INTRODUCTION

For California's meal period laws under the Industrial Welfare Commission's Wage Orders and Labor Code §§226.7 and 512, as amended, to have their intended impact, employers must ensure that employees cease working during meal breaks, or else pay premiums. Likewise, for the rest break laws to provide any real relief to workers, the breaks must be triggered at regular time intervals, *i.e.*, at the two-hour and six-hour marks in an eight-hour workday. The California Employment Lawyers Association (CELA) and the Consumer Attorneys of California (CAOC), assert that *Brinker Restaurant Corporation, et al. v. Superior Court* (2008) 80 Cal.Rptr.3d 781 (Cal.App. 4 Dist.) (hereafter, *Brinker*),[1] misapplied or neglected this Court's decision in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 155 P.3d 284 (hereafter, *Murphy*), in a manner that, unless reversed, will divest *Murphy* and California's relevant Labor Code provisions and Wage Orders of any real significance going forward. In this case alone, employees missed more than a million breaks they should have received, without being paid a single

[1] Hereafter, citations to *Brinker* will be to the California Reporter version.

premium under Cal. Labor Code §226.7.[2]

On the other hand, the Court of Appeal's decision in *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 962-963 (Cal.App. 3 Dist.), *is* consistent with *Murphy*. This Court should hold unequivocally that *Cicairos*, not *Brinker*, correctly reflects employers' burdens under the Wage Orders and Labor Code §§226.7 and 512. *See also* other Courts of Appeal statewide which have relied upon *Cicairos* in holding, contrary to *Brinker*, that an employer's obligations under Labor Code §§226.7 and 512 and the Wage Orders require more than superficial compliance, including but not limited to: *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1199 (Cal. App. 1 Dist.); *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1189, 78 Cal.Rptr.3d 572 (Cal. App. 1 Dist.); *Zavala v. Scott Bros. Dairy* (2006) 143 Cal.App.4th 585, 591-595 (Cal. App. 2 Dist.); and *Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 135 (Cal. App. 2 Dist.).

Were *Brinker* to be affirmed – effectively divesting *Cicairos* and its progeny of authority – the result would be that California's

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[2] *See* Plaintiffs' Opening Brief on the Merits, at p. 16; Plaintiffs' Reply Brief on the Merits, at p. 44.

workers will continue to suffer long hours without meal breaks. Employers will continue to deem that their employees have "voluntarily" chosen to skip their meals in order to continue working. Additionally, without real rest break protections, the result of affirming *Brinker* would be millions more hours of free labor for California employers. Employees will continue to routinely miss rest breaks due to the press of business and labor cost-cutting, though full-time non-exempt employees are entitled to two, ten-minute periods of paid rest without work.

The result of affirming *Brinker* would be a windfall in unpaid premiums for California's employers, who take advantage of employees' inferior bargaining power to foster long intervals of work without breaks. More major California employers will act like Defendants – who did not pay a single premium under §226.7, for years, to thousands of workers – regardless of how many millions of breaks their workers miss.

Though Defendants celebrate the Court of Appeal's decision that "individualized considerations" as to the voluntariness of each missed meal/rest break preclude class certification of these claims (*see infra*), the employer – which bears the burden of complying with the

California Labor Code – never performed any such individualized consideration, as to each of the thousands upon thousands of breaks missed by its employees, to determine its voluntariness. The employer just chose not to pay any premiums.

Amici curiae are not speculating about the outcome of affirming *Brinker*. After *Brinker*, Real Parties in Interest, and many thousands of employees like them statewide, already suffer this reality – grueling work hours, without meal or rest breaks, and without any premiums – which California's Labor Code, Wage Orders, and *Murphy* all prohibit. The Court should not allow California workers to bear this burden and should reverse the Court of Appeals.

II. STATEMENT OF THE CASE

In this case, the employer's own application of the law, its computerized records, and the testimony of the employer's own statistician established 1.6 million meal period violations in the class period, suggesting that employees missed meal breaks 15.4% of the time. Plaintiffs' Opening Brief on the Merits, at p. 16. Survey evidence showed that the Defendants' employees missed their rest

breaks over 90% of the time.[3] Yet, the employer admits that it has not paid *one* premium, ever, under Cal. Labor Code §226.7. Plaintiffs' Reply Brief on the Merits, at p. 44. This employer is dodging paying tens of millions of dollars of wages plus interest.

The record shows further that, at Defendants, pervasive understaffing – beyond the control of the non-exempt employees – caused the frequent, missed meal and rest breaks. Plaintiffs' Opening Brief on the Merits, at pp. 9, 11-12; Plaintiffs' Reply Brief on the Merits, at pp. 43-44. Defendants' managers were pressured to keep down labor costs (*e.g.*, eliminating paid rest breaks, and punctuating meal periods with off-the-clock work) because managers' bonuses are tied to lowering payroll costs. Plaintiffs' Reply Brief on the Merits, at p. 48.

The employer's break policy did not ensure a meal period within each five-hour interval of work, but rather, required non-

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[3]In the Plaintiffs' exhibits to the original Petition, they included employee questionnaires gathered by DLSE. *See* Petitioner's Exhibits, Volume 23, at pp. 6254 – 6500. These show that, when California's Division of Labor Standards Enforcement (DLSE) sued Brinker in 2001, the agency did a survey of payroll records, reinforced by a survey of the employees and found a 90%+ violation rate on rest periods. *Id.* Later, the DLSE audited a Brinker store in Santa Clara, California, and found that "no rest periods" were being given at all. Petitioner's Exhibits, Volume 21, at pp. 5770 – 5773.

exempt workers to labor up to nine hours straight without a meal. Plaintiffs' Opening Brief on the Merits, at 9. Those meal breaks allowed were frequently not 30-minute, uninterrupted breaks, as the Labor Code requires. *Id.* at 12. Likewise, rather than providing employees a genuine opportunity for a paid, 10-minute rest break per four hours worked or "major fraction thereof," as required by the Labor Code, the employer did not allow any paid rest breaks until *after* four full hours of work. *Id.* at 12.

The trial court determined that an employee "must be given" a meal period for every five hours of work. *Id.* at 13. The purpose of section 512, the court determined, was "to protect employees and ensure that they have a thirty-minute meal break every five hours of work." *Id.* "Therefore," the court concluded, "defendant appears to be in violation of §512 by not providing a 'meal period' per every five hours of work." *Id.* After the Court of Appeal denied a writ petition regarding these rulings by the trial court, Plaintiffs moved for certification of a class, with subclasses, of all non-exempt California employees since August 2000. *Id.*

Plaintiffs were not allowed pre-certification merits discovery, but nonetheless presented substantial evidence regarding uniform

meal/rest period policies/practices/procedures statewide, establishing that: Defendants do not ensure that 30-minute, uninterrupted meal periods are taken (*id.* at 15); Defendants do not authorize and permit any rest breaks until after four full hours of labor (*id.*); and Defendants do not provide a rest break before the first meal period. *Id.* at 16. Plaintiffs further showed the existence of common proof of these violations, including a single, centralized computer system which could readily document, *e.g.*, instances in which an employee worked five or more hours without a meal period. *Id.* at 16. Defendants did not collect any signed waivers of meal or rest periods, and have not documented proof of its employees taking regular, paid rest breaks. *Id.* at 16-17. Defendants have not paid any premiums. *Id.* at 44.

Based on the foregoing, the trial court granted class certification holding that "common issues predominate over individual issues" even if meal periods need only be "made available." *Id.* at 19. Thereafter, while the trial court was deciding what methodology could be used to prove the Plaintiffs' class allegations, Defendants filed a writ petition, and the Court of Appeal stayed all trial-level proceedings. *Id.* at 20-21.

In an unpublished opinion, the Court of Appeal reversed the trial court's order granting class certification. *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, 2007 WL 2965604 (Cal.App. 4 Dist. October 12, 2007, nonpub.). Almost immediately, this Court granted review, ordered the Court of Appeal opinion vacated, and transferred the case back for "reconsideration as [the Court of Appeal] sees fit." Plaintiffs' Opening Brief on the Merits, at p. 24 (*citing* S157479, Order filed 10/31/07). On July 22, 2008, in *Brinker*, the Court of Appeal issued a decision identical in all material respects to the decision this Court vacated approximately nine months earlier.

Plaintiffs and *amici* sought this Court's review, arguing that, unless overturned, the *Brinker* decision would eviscerate workplace wage/hour protections, by: splitting with *Cicairos* and the Courts of Appeal following it; ignoring *Murphy*; misconstruing the Labor Code and Wage Orders; and, by effectively eliminating any chance for class certification or statistical/survey proof in wage/hour actions, though this Court has favored class wage/hour litigation and these helpful evidentiary means in *Gentry v. Superior Court*, 42 Cal.4th 443, 165 P.3d 556 (hereafter, *Gentry*), and *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 96 P.3d 194 ("*Sav-On*").

On October 22, 2008, this Court granted review.

III. ARGUMENT

A. *Brinker* Flouts *Murphy,* Which Established that the Right to Lab. Code §226.7 Premiums Is Generally Unwaivable, Like Overtime Pay, So Employers Are Not Shielded from Liability for Premiums by a Facially-Compliant Policy or the Notion that Employees Missed Breaks "Voluntarily."

Though *Murphy* is the California Supreme Court's leading case regarding meal and rest periods, *Brinker* only paid lip service to the decision in its introduction (*Brinker*, 80 Cal.Rptr.3d at 786),[4] and failed to analyze how *Murphy's* reasoning should lead it to decide the extent of the employer's meal/rest period obligations.

1. This Court likened meal and rest period premium pay to overtime pay.

In *Murphy*, this Court held that meal and rest period premiums are wages, not penalties, and therefore not subject to the one-year statute of limitations that applies to claims for penalties. *Murphy*, 40 Cal.4th at 1114. The *Murphy* decision turned on this Court's lengthy discussion of the parallels between meal and rest period premium pay

[4] *Brinker* also cites *Murphy* for the proposition that DLSE opinion letters are not binding, though the latter, certainly, was not the crux of *Murphy*.

and overtime premium pay. *Id.* at 1109-1114. Contrary to the *Brinker* holding (165 Cal.App.4th at 786), as *Murphy* explained, the overtime and meal/rest period requirements are similarly mandatory. To wit, a California employer must pay an employee who works over eight hours a day at 1.5 times his/her regular pay rate for this overtime, whether the employee volunteered to work such overtime or not. Likewise, an employer must pay premiums to an employee who performs service for the employer during meal or rest periods – regardless of the reasons. *See Murphy*, 40 Cal.4th at 1109. The *Brinker* decision says precisely the opposite – saying that an employer's obligation is only to make meal/rest breaks available (*Brinker*, 80 Cal.Rptr.3d at 786, 799, 803, 806-809), and focusing on whether breaks are prohibited or voluntarily declined, which *Brinker* holds is, by its nature, an "individual inquiry." *Id.* at pp. 796, 801, 809.

A California employer must ensure that its employees are paid at the overtime rate for work past eight hours in a day under Labor Code Section 1194 (*inter alia*), because of the "important public policy" underlying the wage and hour laws, which "concern not only the health and welfare of the workers themselves, but also the public health and general welfare." (citations omitted) *Gentry v. Superior*

Court (2007) 42 Cal.4th 443, 456, 165 P.3d 556 (hereafter, *Gentry*). The *Brinker* decision ignored the fact that the same public policy concerns underlie the meal/rest period premium payment requirements, and render them equally non-discretionary – for example: 1) health and safety considerations, including the fact that employees denied their rest and meal periods face greater risk of work-related accidents and increased stress (*Murphy*, 40 Cal.4th at 1113); 2) that the employer should not be unjustly enriched by receiving an extra 20 minutes of "free" work for the employee's missed rest periods (*id.* at 1104); and 3) that "[a]n employee forced to forgo his or her meal period...loses a benefit to which the law entitles him or her." *Id.* Employees have the right to be free of the employer's control during the meal period to use the time for their own purposes. *Id.*

Perhaps most importantly, *Brinker* failed to acknowledge that the California meal/rest period laws, like overtime laws, "serve the important public policy goal of protecting employees in a relatively weak bargaining position against the 'evil of overwork.'" *Gentry*, 42 Cal.4th at 456 (*citing Barrentine v. Arkansas-Best Freight System* (1981) 450 U.S. 728, 739, 101 S.Ct. 1437, 67 L.Ed.2d 641

[commenting on overtime provision of the FLSA].). The California meal/rest period laws, like the FLSA's requirements for overtime and minimum wages, are "designed to prevent consenting adults from transacting"[5] about whether or not workers should take the breaks to which they are entitled.

2. The statutes use virtually identical language to describe employers' overtime and meal period requirements.

The Wage Orders governing meal periods state: "*No 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...." *E.g.*, 8 Cal. Code Regs., §11050, subd. 11(A) (emph. added). The provisions are strikingly similar to the corresponding overtime Wage Order provision. The latter says: "*[E]mployees shall not be employed* more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek." *E.g.*, 8 Cal. Code Regs., §11050, subd. 3(A)(1) (emph. added). The only difference is the use of the passive

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[5] *Walton v. United Consumers Club, Inc.* (7th Cir.1986) 786 F.2d 303, 306. *See also Brooklyn Savings Bank v. O'Neil* (1945) 324 U.S. 697, 65 S.Ct. 895, 89 L.Ed. 1296 (statutory wages cannot be waived by agreement).

voice. The compliance requirements should likewise be identical -- pay premiums where employees work overtime, and pay premiums where employees work through meal breaks.

3. *Brinker* failed to treat meal/rest period premiums like overtime premium pay.

The *Brinker* court held, "The question of whether employees were forced to forgo rest breaks or voluntarily chose not to take them is a highly individualized inquiry that would result in thousands of mini-trials to determine as to each employee if a particular manager *prohibited* a full, timely break or if the employee *waived* it or voluntarily cut it short." (Ital. added) 80 Cal.Rptr.3d at 801. *Brinker* also inappropriately required a showing that an employer "forbid" breaks. *Brinker*, 80 Cal.Rptr.3d at 801. The court made essentially the same rulings as to meal periods. *Id.* at 810. Yet, *Murphy* does not permit the interpretation either that employees may waive breaks broadly, or that managers must actively "prohibit" breaks to be considered to have "forced" employees to work, such that premiums are warranted under Labor Code §§226.7 and 512.

a. *Murphy* does not allow employees to waive their right to breaks, except in enumerated circumstances.

The *Murphy* decision repeatedly emphasized that meal and rest periods, like overtime pay, are "required," "mandated," and "mandatory." *Murphy*, 40 Cal.4th at 1106, 1111, 1113. That is, like overtime (and the minimum wage, for that matter), the right to meal and rest period premiums is generally unwaivable. *See Gentry*, 42 Cal.4th at 456. As such, an employer cannot deny meal/rest premiums, any more than it can deny overtime and minimum wage payments, whenever it claims an employee "voluntarily" worked through breaks, worked overtime, or decided to forego earning the minimum wage.

i. The limited circumstances expressly permitted for waiver of meal periods implicitly prohibit waiver in other circumstances.

Language in IWC Wage Orders and Labor Code section 512 allows for "waiver" of meal periods only: by "mutual consent" when employees work shifts of not more than six hours (*e.g.*, 8 Cal. Code Regs., §11050, subd. 11(A); *see also* Labor Code §512); and, arguably, on shifts of less than 12 hours, so long as an employee has taken a first meal period. Labor Code §512(a). These two circumstances are not at issue in *Brinker*. Likewise, the IWC Wage Orders set forth specific circumstances under which an "on duty"

meal period is permitted: "when the nature of the work prevents an employee from being relieved of all duty" (not the case here, where Defendant has argued that the nature of its work permits most of its employees to take meal periods), *and* by written agreement (which also does not exist here). *E.g.*, 8 Cal. Code Regs., §11050, subd. 11(A). Because the IWC and Legislature expressly allowed waiver or an on-duty meal period *only* in certain limited circumstances, it is reasonable to conclude that waiver is not allowed in other circumstances. *See Murphy*, 40 Cal.4th at 1107 (where Legislature has used specific language in Labor Code, absence of such language elsewhere suggests Legislature's intent).

ii. As with overtime premiums, the "voluntariness" of missing a missed break should not determine whether a premium is owed.

It is well-established in California, like under the Federal Fair Labor Standards Act (FLSA), that the voluntariness of an employee's overtime work has no impact on the employer's obligation to pay overtime premium pay (*i.e.*, 1.5 times regular rate) for the excess hours worked. *See* Cal. Labor Code §510 (overtime must be paid for any work in excess of eight hours in one workday, any work in excess

of 40 hours in any one workweek, and the first eight hours worked on the seventh day of work in any one workweek); *Advanced-Tech Sec. Services, Inc. v. Superior Court* (2008) 163 Cal.App.4th 700, 77 Cal.Rptr.3d 757, 762 (Cal.App. 2 Dist.) (Assembly Bill No. 60 (amending Section 510 in 1999) was to ensure daily overtime pay after 8 hours of work in a day in California); *General Elec. Co. v. Porter* (9th Cir. 1953) 208 F.2d 805, 807 (29 U.S.C. §260 allows good-faith defense to liquidated damages, but employer must pay unpaid overtime compensation under §216 of the FLSA regardless); *Taylor v. Carter*, 948 F.Supp. 1290, 1297(W.D.Tex. 1996) (discussing strict liability for FLSA overtime violations). *See also Bartholomew v. Heyman Properties* (1955) 132 Cal.App.2d Supp. 889, 894-895 (Cal.Super.) (whether or not employee voluntarily worked overtime or worked for less than the minimum wage, *i.e.*, was *in pari delicto* or equally at fault in the fact that overtime was worked or the minimum wage was not paid, is irrelevant under Labor Code, which makes a public policy determination to penalize only the employer with the overtime premium or minimum wage payments). Because meal and rest period premiums are meant to be like overtime premiums, as

discussed in *Murphy*, the supposed voluntariness of a missed break should not determine whether the employer owes premiums.

b. Managers need not "prohibit" breaks, as *Brinker* held, to warrant premium pay under Labor Code §§226.7(b).

Murphy upheld the lower court's decision, characterizing the plaintiff's missed meal and rest periods as "forced," because – though he was a store manager without supervision on-site "prohibiting" a break – the press of business consumed the plaintiff's breaks. *Murphy*, 40 Cal.4th at 1100-1102 n.2, 1113. These missed breaks violated Section 226.7, and triggered the employer's duty to pay premiums. *Id.* As such, *Murphy* holds with *Cicairos*, 133 Cal.App.4th at 963, where the Court of Appeal held that defendant did not fulfill its obligations with respect to breaks, since a witness missed breaks because of the pressure to complete jobs quickly. *Cicairos* explains what this language means and what "affirmative" steps suffice — recording, monitoring, and scheduling meal periods. *Id.* at 962-63. "As a result of" the employer's failure to take these three affirmative steps, "most drivers ate their meals while driving" or "skipped a meal nearly every working day." *Id.* at 962.

Rather than noting the obvious parallels between the evidence establishing violations in *Murphy* and *Cicairos*, and the evidence in the instant case,[6] *Brinker* improperly legislated a new and excessive "prohibition" requirement for premium pay.

c. Employers must provide viable opportunities for rest breaks, which the Court of Appeal failed to recognize.

Amici maintain that for an employee to skip a rest break without the employer owing a premium, the employer must not only "authorize" breaks generally, but must permit them in reality - providing viable opportunities for such breaks. Though *Brinker* and the parties do not explore in depth how this standard should be applied, suffice it to say, the parallel between the statutory and regulatory requirements concerning overtime premiums and meal and rest period premiums (addressed in *Murphy*) dictates that it is insufficient for an employer to merely have a compliant-sounding rest period policy, and then assume that all missed rest breaks have been skipped "voluntarily." For the public health and safety reasons described in *Murphy*, 40 Cal.4th at 1113, and because the Labor Code is construed to afford maximum employee protection, courts should

[6] *See supra* citing Plaintiffs' Opening Brief on the Merits, at pp. 9, 11-12; Plaintiffs' Reply Brief on the Merits, at pp. 43-44.

presume the opposite – *i.e.,* that employees need and want rest breaks. The necessity of class litigation, as a practical matter, to enforce wage and hour laws in many instances (as discussed in *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 165 P.3d 556), means that whether an employer provides rest breaks as a rule should often be evaluated statistically (*see infra*). For example, if employees of a particular employer on average are only taking 50% of their legally-required rest breaks, then, as a matter of law, the employer is not authorizing and permitting them in a compliant manner, and is becoming unjustly enriched by the employees working through their breaks half the time. *Murphy*, 40 Cal.4th at 1104. Certainly, where, as here, the evidence shows that employees miss 90+% of their breaks (*see supra*), the Court of Appeal erred in finding as a matter of law that the employer had no obligation to pay premiums.

4. *Brinker* ignored the fact that, like overtime pay, meal/rest period premiums are designed for "shaping employer conduct" – which does not occur if employers satisfy the statutory requirements simply by having a compliant meal/rest period policy on the books.

The *Brinker* decision took no account of the fact that meal and rest period premiums – like overtime pay – are designed for "shaping employer conduct." *Murphy*, 40 Cal.4th at 1109. Like overtime pay,

the meal and rest period remedy has a "corollary disincentive aspect in addition to its central compensatory purpose." *Id.* at 1110. Employers' conduct will not be "shaped" toward enforcing meal/rest periods, as *Murphy* requires, if employers are never required to pay millions of California employees a single meal/rest period premium, regardless of the number of missed breaks, simply because employers have facially-compliant policies. On the contrary, employers' managers will be/are encouraged by *Brinker* to push employees to work through all meal/rest breaks, if a facially-compliant policy covers their liability and saves them from having to pay any premiums.

Here, Plaintiffs and putative class members missed 1.6 million meal breaks, according to Defendants' own evidence, and surveys showed 90+% missed rest breaks – all without the employer paying a single premium.[7] This case does not present an isolated example. For example, in *Gabriella, et al., v. Wells Fargo Financial, Inc., et al.* (N.D. Cal. 2008) 2008 WL 3200190, the United States District Court acknowledged evidence that the employer (Wells Fargo) did not pay

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[7] Plaintiffs' Opening Brief on the Merits, at p. 16; Plaintiffs' Reply Brief on the Merits, at p. 44; Petitioner's Exhibits, Volume 23, at pp. 6254 – 6500.

any meal and rest period premiums statewide for a significant portion of the class period, and that at least some employees in the putative class of over 5,000 in California missed meal and rest periods. *Id.*, 2008 WL 3200190, at **2-3. Yet, the court held that, in light of *Brinker*, individual questions had to be resolved as to the reasons why each employee missed his/her breaks. *Id*

On the other hand, if *Brinker* is reversed, and if employers ensure that meal/rest period premiums are consistently, automatically assessed, every time employees fail to affirm that they take a meal/rest period, managers will have a strong disincentive from allowing meal/rest period skipping: namely, controlling the bottom-line payroll budget by closely monitoring their non-exempt employees' meal/rest breaks. The latter is precisely the purpose of Section 226.7, as with overtime premiums.

B. *Brinker* Failed to Note that, According to *Murphy*, Section 226.7 was Designed to Strengthen – Not Weaken – the Protections of the IWC Wage Orders, Which Mandate Meal and Rest Periods.

Notwithstanding *Brinker*'s harping on the "fails to provide" language in Section 226.7(a), the mandatory language of the IWC Wage Orders does not include the term "provide" in reference to the

employer's duties. Rather, the term "provide" was only recently introduced in the course of *strengthening* the mandatory meal period provisions of the Wage Orders. *See Murphy*, 40 Cal.4th at 1105-1106. *Brinker*'s interpretation of the term "provide" from Section 226.7 as eradicating the longstanding mandatory meal period requirements of the Wage Orders conflicts with the language and purpose of the statute.

Section 226.7 explicitly requires employers to "provide" meal/rest periods "*in accordance with an applicable order of the Industrial Welfare Commission.*" (emph. added) Cal. Lab. 226.7(b). Employers are still bound to ensure that employees take 30-minute uninterrupted meal periods, and to provide real opportunities for two, 10-minute beaks, or pay premiums. As this Court explained, discussing the version of Section 226.7 ultimately signed into law, the Senate Rules Committee explained that Section 226.7 (as amended in committee) was intended to track existing provisions of the IWC wage orders regarding meal/rest periods (*Murphy*, 40 Cal.4th at 1107 (*citing* Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Bill. No. 2509, as amended Aug. 25, 2000, p. 4)) – prohibiting

employers from employing their non-exempt workers without 30-minute uninterrupted meal periods after five hours.

For more than 30 years, the IWC Wage Orders governing meal periods have dictated: "*No 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..." *E.g.*, 8 Cal. Code Regs., §11050, subd. 11(A) (emph. added). The meal period provision is unambiguous—*employers may not allow employees to work without taking meal periods*, unless those employers pay premiums. *Id.* at subd. 11(B).

C. *Brinker's* No-Timing and One-Break Interpretations Regarding Meal and Rest Periods Would Negate the Purposes of Labor Code §§512, 226.7, and the Wage Orders, Recognized by *Murphy*: to Address Public Health and Safety, and Grant Employees Frequent, Duty-Free Breaks.

Murphy did not mince words about the requirements of the Labor Code and the IWC Wage Orders with respect to meal and rest breaks: employees are entitled to an unpaid, 30-minute, duty-free meal period per five hours of work; and a paid, 10-minute rest period per four hours of work (or major fraction thereof). *Murphy*, 40 Cal.4th at 1104. *See also California Hotel & Motel Assn. v. Industrial Welfare Commission* (1979) 25 Cal.3d 200, 205 n.7 (*citing* IWC Order 5-76,

identical in relevant respects to the current wages orders, providing that a "meal period of 30 minutes per 5 hours of work is generally required," and a "rest period of 10 minutes per 4 hours of work is generally authorized."). *Brinker* seeks to undermine the clear statutory and regulatory purposes described in *Murphy*.

For example, *Brinker* fails to recognize that meal and rest periods under §§512 and 226.7 and the Wage Orders are intended to reduce the risk of work-related accidents and increased stress. *Murphy*, 40 Cal.4th at 1113. According to *Brinker*, a meal period is only required at some point after five hours' work, and not required at any particular time. *Brinker*, 80 Cal.Rptr.3d at 802-805. Thus, a meal period could be provided at the conclusion of a ten-hour shift. As such, non-exempt workers might not have a meal break until after 9 ½ hours of uninterrupted labor, and no rest break before the first meal – with no premiums paid by the employer. *Id.*, 80 Cal.Rptr.3d at 802-805. *See* Plaintiffs' Reply Brief on the Merits, at pp. 31-32. Indeed, where an employee expressly waived a second meal period, the lack of any timing requirement could arguably permit an employer to provide the first meal period only at the end of a 15-hour shift. *Id.*

No reasonable reading of §512(a) ("An 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 30 minutes" (emph. added)) would render such a harsh interpretation. The Court will not require the testimony of a medical expert to know that 9 ½ or more straight hours of physical or even mental labor without a meal break would tax an employee beyond what the legislature has deemed acceptable – especially when the statutes and regulations must be "interpreted broadly in favor of protecting employees." *See Murphy*, 40 Cal.4th at 1104.

Likewise, requiring a paid rest break before a meal break is inherent in the directive that the 10-minute rest occur in each four hours of work (*Murphy*, 40 Cal.4th at 1104), while meals occur in each five hours. That is, paid 10-minute breaks *per* four hours of work, as recognized by *Murphy* (not, until "after four hours of work," as *Brinker* would have it, 80 Cal.Rptr.3d at 797), equals two 10-minute rest breaks per eight-hour day. Semantics cannot hide the fact that eight divided by four still equals two.

Nor can *Brinker's* dictionary acrobatics (trying to distinguish between a "major fraction" and a "majority fraction" - *id.,* 80

Cal.Rptr.3d at 797-799) hide the fact that the "major fraction" of four hours, referenced in the rest period requirement, equals something more than two hours. *See* also Plaintiffs' Reply Brief on the Merits, at pp. 34-35. That is, "major fraction" is synonymous with "more than half." The Wage Orders require that employees who work over six hours (*i.e.,* one four-hour period, plus more than half of a second four-hour period) receive two ten-minute rest breaks.

The plain language of the statute is designed to require regular breaks for employees, to keep them safe, healthy, and not incidentally, productive. *Murphy,* 40 Cal.4th at 1113. The statute grants employees paid time off throughout the workday, which employers may not co-opt as additional work time. *See id.* at 1104.

D. *Brinker*'s Rejection of Survey Statistical Evidence Would Weaken *Sav-On*, and Essentially Preclude Any Class Litigation of Wage/Hour Claims – Though Such is Favored by *Gentry*.

This Court decided *Sav-On,* in part, to welcome a 21st century approach to litigation, which allows usage of survey and statistical data. *See Sav-On,* 34 Cal.4th at 333. This Court explained:

> California courts and others have in a wide variety of contexts considered pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices

> in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate....[T]he use of statistical sampling in an overtime class action "does not dispense with proof of damages but rather offers a different method of proof."

Id. (*quoting Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 750, 9 Cal.Rptr.3d 544)).

Since *Sav-On*, and before *Brinker*, California and federal courts have become more – not less – inclined to rely upon survey and statistical data to permit consideration of class actions. *See, e.g., Dukes v. Wal-Mart, Inc.* (9th Cir. 2007) 509 F.3d 1168, 1176. In *Dukes*, the 9th Circuit held that such information may be used to litigate discrimination claims brought by a class that is "broad and diverse," noting that the *Dukes* class "encompasses approximately 1.5 million employees, both salaried and hourly, with a range of positions, who are or were employed at one or more of Wal-Mart's 3,400 stores across the country." *Id.* at 1176-1177. The Court concluded that, despite the extraordinary spectrum of factual scenarios giving rise to the suit, such a case could be manageable, employing statistical and survey data, *inter alia*. *Id.* at 1183, 1190-93 (*following Hilao v. Estate of Ferdinand Marcos* (9th Cir.1996) 103 F.3d 767, 782-87).

In the wage/hour context, the great jurist Thelton Henderson, of the United States District Court for the Northern District of California, favored "innovative procedural tools that can efficiently resolve individual questions regarding eligibility and damages [such as]....administrative mini-proceedings, special master hearings, and specially fashioned formulas or surveys." *Tierno v. Rite Aid Corp.*, (N.D. Cal. 2006) 2006 WL 2535056, at *11. Without using surveys and other class action mechanisms, the consequence would be dozens or hundreds of individual suits, or likely the abandonment of some individual claims. *Id.* As Judge Henderson explained regarding this outcome, "The former would undoubtedly result in a great duplication of effort given the predominance of common questions of law and fact, while the latter would result in lost access to the courts." *Id.*

Judge Henderson's concerns were echoed by this Court in *Gentry*, which explained that for public policy reasons, class actions are a favored mechanism for vindicating the purposes of California's wage/hour laws. *See Gentry*, 42 Cal.4th at 463 (class litigation "is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation...[and] the disallowance of the class action will likely lead

to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations."). This Court held class actions in wage/hour employment cases are preferable because of, among other reasons: the fear of retaliation employees feel when forced to pursue litigation individually (*Gentry*, 42 Cal.4th at 459-460); the modest individual recovery, which essentially exculpates an employer with problematic wage/hour practices if no class action is certified (*id.* at 457-459); class members' lack of awareness of their rights (*id.* at 461); the random and fragmentary enforcement against a major employer which will occur in the absence of class litigation, resulting in a windfall for wage/hour violators (*id.* at 462); and the transient nature of employees' work in a high-turnover industry, since employees "move on" and are unlikely to seek individual vindication of their rights. *Id.* at 462.

Yet, no wage and hour matter can ever be certified for class litigation if, as *Brinker* holds, statistical and survey data are inadmissable because of the supposed "individualized inquiry" in determining whether an employer allows or forbids breaks. *Brinker*, 80 Cal.Rptr.3d at 801. *Brinker*'s refusal to consider survey and

statistical data in meal/rest litigation is tantamount to a rejection of the class action mechanism, and thus, a rejection of *Gentry* and *Sav-On*.

E. Ruling Upon the Merits of Wage/Hour Claims at the Certification Stage – as *Brinker* does – Contravenes this Court's Rulings as to the Scope of Certification Review.

It is a basic principle of class action review that, in adjudicating a motion for class certification, the court accepts the allegations in the complaint as true, so long as those allegations are sufficiently specific to permit the Court to make an informed decision. *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 443, 97 Cal.Rptr.2d 179 Cal. 2000 ("[W]e are not convinced that certification should be conditioned upon a showing that class claims for relief are likely to prevail."); *Sav-On,* 34 Cal.4th at 327 ("the focus in a certification dispute is on what type of questions-common or individual-are likely to arise in the action, rather than on the merits of the case"). *See also,* e.g., *Blackie v. Barrack* (9th Cir. 1975) 524 F.2d 891, 901 FN17. The merits of the class members' substantive claims are generally irrelevant to this inquiry. *Id. See also Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 177-78, 94 S.Ct. 2140, 40 L.Ed.2d 732. The Court of Appeal overstepped its authority in *Brinker* by deciding substantive questions of fact and law in response to a class certification motion – instead of

merely determining that a common question of fact or law exists and predominates. Indeed, by ruling on the merits without permitting merits-based discovery, Plaintiffs in this matter were deprived of Due Process. *See* Plaintiffs' Reply Brief on the Merits, at pg. 50 n.26.

Fundamentally, since *Brinker* holds that – for all employees involved – the employer's only obligation is to refrain from prohibiting breaks, the Court decided on a question of law applicable to the whole class, without having first certified the class. In other words, *Brinker* held that the defendant employers had sufficient policies under California's meal/rest laws, even though determination of their legitimacy inherently warrants class treatment, as the trial court found below. *See* Plaintiffs' Opening Brief on the Merits, at p. 19 (quoting trial court ruling that, "Defendant's arguments regarding the necessity of making employees take meal and rest periods actually points toward a common legal issue of what defendant must do to comply with the Labor Code."). *See also, e.g., Otsuka v. Polo Ralph Lauren Corp.* (N.D.Cal. 2008) 251 F.R.D. 439, 445, 447 (defendant argued its meal/rest policies were lawful under California law, and the centrality of this question itself warranted certification); *Bibo v. Federal Express, Inc.* (N.D. Cal. 2009) 2009 WL 1068880, *12

(disputed interpretation of timing requirement of meal period statute constitutes "common question of law that unites the [subclass] members"); *Ortega v. J.B. Hunt Transport, Inc.* (C.D. Cal. 2009) ___ F.R.D. ___, 2009 WL 1851330, *6 ("Whatever the legal meaning of the term 'provide' in this context, the question is one common to all potential class members.").

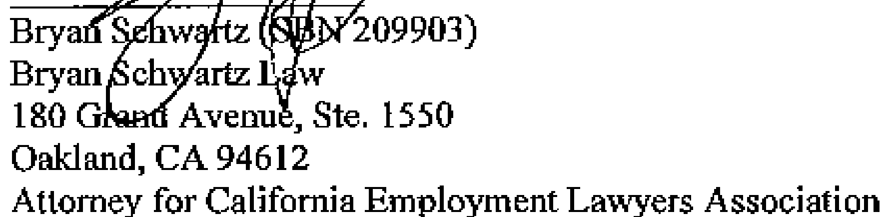
Here, even if the Court of Appeal were correct that (among other conclusions of law it applied to the class as a whole) the employer was only required to make meal periods available (though such is refuted above), the review court should have remanded to the trial court for a determination of whether Plaintiffs could present sufficient common proof that meal periods were, in fact, made available. The review court was not entitled to substitute its judgment for the trial court's determination, which was based on substantial evidence that common issues predominated and could be proven by common proof, such as examination of Defendants' policies, centrally-kept time records, surveys of putative class members, Plaintiffs' declarations, etc. *Sav-On*, 34 Cal.4th at 328; Plaintiffs' Opening Brief on the Merits, *e.g.*, pp. 103, 110, 114-119. By concluding that the Plaintiffs could never show such common proof,

as a matter of law, stating that – regardless of what proof is offered – evaluating meal/rest period compliance is inherently individualized, the Court of Appeal's decision, if not reversed, would eviscerate California's meal/rest period laws. Many, if not most, employees would be left to litigate their numerous common issues individually. If not reversed, *Brinker* would severely undermine California's class action mechanism for employees to vindicate their rights.

IV. CONCLUSION

Amici curiae CELA and CAOC ask the Court to reverse the Court of Appeal.

Date: August 18, 2009



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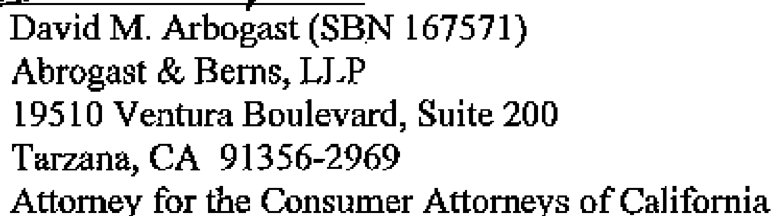

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CRC RULE 14(c)(1) Certification

I, Bryan J. Schwartz, certify that the foregoing Brief of the California Employment Lawyers Association and the Consumer Attorneys of California, as *Amici Curiae* in Support of Real Parties in Interest, was prepared using Word, is double-spaced, contains 1.5 inch margins to the right and left, and is in 14-point font. I further certify that the word count for the text and footnotes is 6,546 words, as reported by an appropriate word count command to the Word program.

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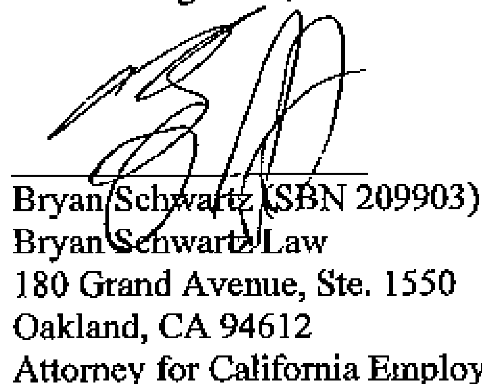

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CERTIFICATE OF SERVICE
(C.C.P. Section 1013A and 2015.5)

I, Bryan J. Schwartz, declare that I am a citizen of the United States, and a resident of California, over 18 years of age, and not a party to the within action. My business address is 180 Grand Avenue, Suite 1550, Oakland, California 94612.

Upon this day, I served the following document(s):

Application of California Employment Lawyers Association and Consumer Attorneys Of California for Leave to File a Brief as *Amici Curiae* in Support of Real Parties in Interest

and

Brief of California Employment Lawyers Association (CELA) and Consumer Attorneys Of California (CAOC) as *Amici Curiae* In Support of Real Parties in Interest

on the following party(s) by placing true copies thereof in sealed envelopes addressed as shown below for service by First Class Mail, and deposited each such envelope, with first-class postage thereon fully prepared, in a recognized place of deposit of the U.S. Mail in Oakland, California, for collection and mailing to the office of the addressee on the date shown herein.

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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 Oakland, California, on August 18, 2009.

Bryan Schwartz