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October 22, 2012

VIA OVERNIGHT DELIVERY

The Honorable Tani Cantil-Sakauye, Chief Justice, and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: **Amicus Curiae Supporting Review** (Cal. Rules of Court, rule 8.500(g))
Hernandez v. Chipotle Mexican Grill Inc. (2012) 208 Cal.App.4th 1487
Supreme Court Case No. S205875
Court of Appeal, Second Appellate District, Division Eight,
Case Number B216004

Dear Honorable Justices:

California Employment Lawyers Association (CELA), as *amicus curiae,* respectfully requests that this Court grant the pending Petition for Review in *Hernandez v. Chipotle Mexican Grill Inc.* ("*Hernandez*").

I. CELA'S INTEREST

CELA is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including wage and hour class actions similar to *Hernandez*. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of public policies set forth in the California Labor Code, including by advocating for effective labor law enforcement procedures such as class actions in appropriate cases. CELA has taken a leading role in advancing and protecting the rights of California employees by, among other things, submitting amicus briefs and letters on issues affecting those rights in wage and hour cases, including Supreme Court amicus briefs in *Murphy v. Kenneth Cole Productions, Inc., Gentry v. Superior Court*, *Brinker Restaurant Corp. v Superior Court*, as well as numerous requests for publication or depublication of opinions. By letter dated October 22, 2012, CELA has also requested this Court depublish *Hernandez*.

II. REASONS FOR REVIEW

1. *Hernandez* should be remanded to the trial court for renewed class certification proceedings consistent with *Brinker Restaurant Corp. v Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*);

2. *Hernandez* presents an important issue for plenary review that affects practitioners state-wide regarding the denial of class certification based on speculative, employer-devised, purported conflicts of interest having no bearing on the rights being asserted by class members, in conflict with *Richmond v. Dart* (1981) 29 Cal.3d 462 (*Richmond*); and

3. *Hernandez* addresses issues currently under review in *Duran v United States Bank, National Assn.* S200923, previously reported at (2012) 203 Cal.App.4th 212.

III. FACTS AND PROCEDUAL HISTORY

The putative class is comprised of the Chipotle fast-food restaurant chain hourly "crew members" alleging claims for denied meal and rest period compensation. Plaintiffs moved for class certification presenting substantial evidence of two policies, a "tap on the shoulder" policy prohibiting employees from taking any break until specifically told by a manager to go on break, and a policy prohibiting employees from skipping any break once told to take it. See *Hernandez,* 208 Cal.App.4th at 1490-1491. Combined with the fact that Chipotle requires its employees to accurately record the start time and end time of every meal period and rest break, the effect is that Chipotle has records documenting every missed break, and no defense that any missed break was the result of employee free choice. Rather, Chipotle's principal liability defense is that some of its time records may be inaccurate.

The trial court denied certification pre-*Brinker*, concluding that individual inquiry was "required to determine if [Chipotle] is liable for denying proper meal and rest breaks to each of its thousands of employees." *Hernandez,* 208 Cal.App.4th at 1494. Without any analysis of how the two policies precluding employee free choice functioned to establish liability, the trial court found individual issues "rendered classwide adjudication unmanageable because, even if an employee's time record indicated a break was missed, that in and of itself did not establish that Chipotle failed to provide, authorize or permit the employee to take a meal or rest break." *Id*. The trial court further stated that class certification would be appropriate if the Supreme Court found employers must ensure that their employees take meal periods. *Id*. Yet inconsistent with that conclusion, the court also denied certification on the basis of a perceived conflict of interest among class members due to the fact that crew members occasionally were responsible for breaking

other crew members, speculating that "some putative class members may accuse other putative class members of violating their meal and rest period rights." *Id.* at 1504.

Plaintiffs appealed, and Division Eight of the Second District Court of Appeal affirmed. With plaintiffs principally relying on *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, the panel in its first, pre-*Brinker* opinion stated that its job was to determine if "the trial court's ("provide") ruling was based upon an erroneous legal analysis." *Hernandez v Chipotle Mexican Grill, Inc.* (2010) 189 Cal.App.4th 751, 760 (superseded opinion). The panel then undertook a statutory interpretation of Labor Code section 226.7 and the IWC wage order meal and rest period history and concluded that the standard applied by the trial court was correct, additionally quoting federal district court language to support that conclusion. *Id.* at 760-763. The panel also confirmed the conflict of interest issue supported denial of certification.

This Court granted review and held the matter without briefing pending its decision in *Brinker*. On remand, Division Eight again affirmed the trial court without further hearing and largely without modification. The panel based its re-issued opinion on plaintiffs' pre-*Brinker* briefing and analysis. The court declined plaintiffs' request for remand to the trial court for a reassessment of class certification evidence under the new *Brinker* standard and did not address plaintiffs' analysis of why Chipotle's "tap on the shoulder" policy made liability issues susceptible to classwide proof. The panel found that the only evidence of a "classwide" policy or practice was defendant's written policy allowing breaks; and it agreed with the trial court's disinclination to address allegations of widespread Labor Code violations through statistical sampling and extrapolation in the absence of a uniform policy or practice affecting all class members.

IV. ARGUMENT

A. Review is Warranted to Permit Plaintiffs the Opportunity to Brief the Arguments and Evidence under the *Brinker* Standard

In *Brinker*, this Court remanded plaintiffs' meal period claims to the trial court for re-evaluation in light of the new substantive standard set forth. The court of appeal should have given the *Hernandez* plaintiffs the same opportunity.

The *Brinker* meal period standard is as follows:

> The employer satisfies this obligation [to provide meal periods] if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable

> opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. What will suffice may vary from industry to industry, and we cannot in the context of this class certification proceeding delineate the full range of approaches that in each instance might be sufficient to satisfy the law.
>
> On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay under Wage Order No. 5, subdivision 11(B) and Labor Code section 226.7, subdivision (b).

Brinker, 53 Cal.4th at 1040-1041.

Critical language appears earlier in the opinion:

> [A]n employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks…The wage orders and governing statute do not countenance an employer's exerting coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally protected breaks.

Brinker. 53 Cal.4th at 1040 [internal citations omitted].

The question following the remand here was whether the evidence established predominating common questions *under the Brinker standard*. For example, does Chipotle's "tap on the shoulder" policy meet the requirement of "reliev[ing] its employees of all duty" and "relinquishing control"? Does plaintiff's theory of recovery that this policy combined with a policy forbidding employees from waiving meal or rest periods and Chipotle's recording of both meal and rest periods present the trial court with sufficient objective evidence based on the time records to overcome any individual issues and manageability issues regarding those employees who did not properly record their break time? Does the considerable amount of expert analysis of the time records provide the trial court with enough confidence to follow Justice Werdegar's concurring opinion

that the records establish prima facie violations, and that affirmative defenses as to waiver may not predominate here? Though not binding precedent, concurring opinions are "persuasive," and the trial court in this matter could have chosen to follow Justice Wergegar's reasoning. See, e.g., *Ricaldi v US Investigations Services LLC* (C.D. Cal. 2012) 2012 U.S. Dist. LEXIS 73279 *14 ("the court notes its agreement with Justices Werdegar and Liu that it is the employer's burden to rebut a presumption that meal periods were not adequately provided, where the employer fails to record any meal periods"); *Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1272 ("we find persuasive and follow Justice Chin's analysis in his concurring opinion in *Cheong*"); *In re Jayson T.* (2002) 97 Cal.App.4th 75, 84 (overruled in part on unrelated grounds in *In re Zeth S.* (2003) 31 Cal.4th 396, 414 ("That gauntlet was taken up by Chief Justice Bird, but anything she said in her separate concurring opinion could only be, at most, persuasive authority for future cases. (For what it is worth, we are persuaded by it.)").

Inasmuch as it is the dominion of the trial court to weigh the evidence against the applicable legal standard, CELA supports either plenary review by the Court, or a grant of review and transfer to the Second District Court of Appeal with directions to remand to the trial court for further proceedings consistent with *Brinker*.

B. The Court of Appeal's Decision Regarding Purported Conflicts of Interest Warrants Review

Hernandez concludes that where some class members may have responsibilities impacting wage and hour rights of other class members, "substantial evidence" of a conflict arises supporting denial of class certification. *Hernandez*, 208 Cal.App.4th at 1504. The potential for mischief from this one-paragraph ruling is manifest. Wouldn't many employers simply put hourly employees in charge of sending other hourly employees on break, to set up a conflict in case they faced a class action for not properly providing breaks? Wouldn't employers find ways in any type of wage case to place some responsibility on other workers with the same job classification, to shift responsibility onto a co-worker to create a conflict? And doesn't this run afoul of the proscription against enrolling putative class members to argue against the class case, which *Richmond* refused to countenance? Isn't the concern in any event illusory, as the employer, not other class members, carries responsibility for failing to provide legally mandated breaks? See *Martinez v. Combs* (2010) 49 Cal.4th 35, 75.

Denying certification based on speculative, future testimonial conflicts not affecting the rights at issue of the class members is contrary to a long line of authority beginning with *Richmond* that caution against denying class certification on the basis of speculative conflicts of interest that may or may not arise in the future. See *Richmond,* 29

Cal.3d at 476 (Court "not prepared to deny class action status at this time upon the prospect of a conflict which may or may not arise in the future [because to] rule otherwise would invite the kind of speculation that went on in the trial court below"); see, e.g., *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1334-35 (potential intra-class conflicts may be resolved through subclassing).

Consequently, review is warranted to assess the scope of conflicts of interest as a basis for denial of class certification.

C. *Hernandez* Presents Issues Under Review in *Duran*

In affirming the trial court, *Hernandez* relied on Chipotle's evidence of no "companywide" policy or practice denying breaks. *Hernandez*, 208 Cal.App.4th 1502. In other words, the court refused to consider certification appropriate absent a universal policy or practice affecting every class member.

It has never been this Court's approach that practices and policies resulting in wage and hour violations—however widespread—only support class certification if they are "companywide." Indeed, this Court found a class trial appropriate even in the face of disputed evidence as to whether overtime exemption status misclassification was defendant's "policy and practice" where the alleged impact was "widespread de facto misclassification." *Sav-On Drugs, Inc. v Superior Court* (2004) 34 Cal.4th 319, 330. Use of the term "widespread" as opposed to "uniform" reveals this Court authorized the class action vehicle even in the absence of a non-compliant "companywide" policy or practice.

The reality of today's workplace is that many companies create facially complaint policies and present self-serving evidence, typically from current employees under their control, notwithstanding rampant or systemic violations. The question whether in such circumstances statistical sampling and class-wide extrapolation of representative evidence is an acceptable class action trial methodology is currently under review in *Duran v United States Bank, National Assn.* S200923.

Accordingly, if the Court declines to grant plenary review, it should at a minimum grant review and hold *Hernandez* for disposition after *Duran* is issued.

Thank you for your consideration of this request.

Very truly yours,
COHELAN KHOURY & SINGER and
CALIFORNIA EMPLOYMENT LAWYERS
ASSOCIATION

Michael D. Singer

cc: Service List on All Counsel
California Employment Lawyers Association
Court of Appeal, Second Appellate District, Division Eight

PROOF OF SERVICE

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is Cohelan Khoury & Singer, 605 "C" Street, Suite 200, San Diego, California 92101-5305.

On October 22, 2012, I served the foregoing documents described as **AMICUS CURIAE SUPPORTING REVIEW** on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

I then served each document in the manner described below:

[XX] **BY MAIL:** I placed each for deposit in the United States Postal Service this same day, at my business address shown above, following ordinary business practices.

[ ] **BY FAX**: I transmitted the foregoing document(s) by facsimile to the party identified above by using the facsimile number indicated. Said transmission(s) were verified as complete and without error.

[ ] **BY UNITED PARCEL SERVICE:** I placed each envelope for deposit in the nearest United Parcel Service drop box for pick up this same day and for "next day air" delivery.

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

Executed October 22, 2012 at San Diego, California.

_____

Michelle Gomez

SERVICE LIST

Hernandez v. Chipotle Mexican Grill Inc.

Case No. S205875

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