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IN THE CALIFORNIA SUPREME COURT

BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC., and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P., a Delaware Corporation, and DOES 1 through 500, inclusive,

Petitioners and Defendants,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,

Respondent.

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE RADER, and SANTANA ALVARADO and ROES 1 through 500, inclusive on behalf of themselves and all others similarly situated, and on behalf of the general public,

Plaintiffs and Real Parties in Interest.

AFTER A DECISION BY DIVISION ONE OF THE FOURTH APPELLATE DISTRICT, CASE NO. D049331

BRINKER'S ANSWER TO PLAINTIFFS' PETITION FOR REVIEW

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INTRODUCTION

The Petition for Review asks this Court to decide that employers must not only *provide* meal periods to their employees, but also *force* their employees to take the offered respite. How? Plaintiffs don't say, because the logical extension of their argument is antithetical to how working-age individuals should be treated. What's an employer to do? Force a recalcitrant employee to stand in the corner until he capitulates and takes his unwanted break? Of course not. Employers should be required to comply with the law by making meal periods and rest breaks *available* while accommodating an employee's personal choice to forego an unpaid 30-minute lunch period to leave early for a dentist's appointment or to meet with a child's teacher.

In its well-reasoned and clearly written opinion, the Court of Appeal in this case (*Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25) addressed all of Plaintiffs' rest break and meal period issues. In doing so, the Court explained that none of them is amenable to class treatment because individual issues predominate, and harmonized its conclusions with this Court's decisions in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, and *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, and the Third District's opinion in *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949. Indeed, more than half a dozen federal courts have confirmed that there is no conflict between this case and *Cicairos* and that *Brinker* got it right. There is no reason for this Court to grant review on any of the issues.

STATEMENT OF THE CASE

1. Background

The relevant facts are not disputed. Brinker Restaurant Corporation, Brinker International, Inc., and Brinker International Payroll Company, L.P. (collectively Brinker) operate restaurants throughout California, including Chili's Grill & Bar, Romano's Macaroni Grill, and Maggiano's Little Italy. (PE 644.) Brinker has had at all pertinent times a written policy providing that employees are entitled to a 30-minute meal period when they work a shift that is over five hours, and "one ten minute rest break for each 4 hours that [they] work." (PE 5172.)

2. Plaintiffs' Motion for Class Certification

On August 16, 2004, Plaintiffs – all of whom are current or former hourly employees – sued Brinker alleging (among other things) they had been deprived of statutorily authorized meal periods and rest breaks. (PE 15.) On April 28, 2006, Plaintiffs moved to certify a class of "all hourly employees of restaurants owned by Defendants in California who have not been provided with meal and rest breaks in accordance with California law and who have not been compensated for those missed meal and rest breaks." (PE 38.) Plaintiffs' putative class was estimated to include 59,451 employees. (PE 987.)

3. The Order Granting Class Certification And Brinker's Writ Petition

On July 6, 2006, the trial court certified a class on Plaintiffs' theory that "common questions regarding the meal and rest breaks are sufficiently pervasive to permit

adjudication in this one class action" (PE 1) – but the only "common question" the trial court identified is "what defendant must do to comply with the Labor Code." (PE 1-2.)

Brinker sought a writ from the Court of Appeal arguing that the trial court could not have decided whether individual or common issues predominate without first determining the law governing Plaintiffs' claims. (Petition for Writ of Mandate, Prohibition, Certiorari, Or Other Appropriate Relief, pp. 6-7.) Brinker explained that, had the trial court correctly defined the elements of Plaintiffs' meal period and rest break claims, it would have had to conclude (as the Court of Appeal later did) that extensive individual inquiries would be necessary to establish liability so class treatment would be impossible. (*Id.* at p. 7.)

4. The Court Of Appeal's 2007 Opinion

In an October 12, 2007 unpublished opinion, the Court of Appeal agreed with Brinker that the trial court had abused its discretion in "certifying the proposed class and subclasses without first determining as to each type of claim both the theory of liability and the elements that must be proven to hold Brinker liable." (*Brinker Restaurant Corp. v. Superior Court* (Oct. 12, 2007, D049331) 2007 WL 2965604, at *9.) The Court of Appeal defined the "theory of liability" and "elements that must be proven" with regard to Plaintiffs' rest break claims (*id.* at *10-11), and rejected the trial court's assumption that the Labor Code requires employers to schedule meal periods in the middle – not the beginning – of their employees' shifts (*id.* at *13), but did *not* decide whether employers must provide or ensure meal periods, instead remanding that issue to the trial court (*id.* at

*19). By its express terms, the October 2007 decision was immediately final. (Cal. Rules of Court, rule 8.264(b)(3).) (*Id.* at *21.)

On October 26, 2007, the Court of Appeal informed this Court that the "immediately final" language was the result of a "clerical error" and asked this Court to grant review and transfer the case back to it. On October 31, 2007, this Court granted review and transferred the case back to the Court of Appeal with directions to "vacate the [original] opinion and reconsider the matter as it [saw] fit."

Contrary to the position they had previously taken, in supplemental briefing Plaintiffs joined Brinker and expressly requested that the Court of Appeal "decide the pure legal question of whether, under California law, meal periods must be 'ensured' or merely 'made available.'" (Plaintiffs' December 17, 2007 Supplemental Brief, p. 10.)

5. The Court Of Appeal's 2008 Opinion

On July 22, 2008, the Court of Appeal filed its unanimous published decision, again holding that the trial court had erred in failing to decide the law governing Plaintiffs' meal period and rest break claims before it certified the class. (Slip Opinion, pp. 22-23.) The court determined the elements of Plaintiffs' rest break claims as it had on October 12, 2007 (*id.* at pp. 22-31), and again held that employers are not required to offer meal periods in the middle of their employees' shifts (*id.* at pp. 34-41). It also held that employers are obligated only to provide meal periods, not ensure that they are taken. (*Id.* at pp. 41-47.)

Having defined *all* of the elements of Plaintiffs' claims, the Court of Appeal considered whether the "*theor[ies] of recovery* advanced by the proponents of

certification [are], as an analytical matter, likely to prove amenable to class treatment." (Slip Opinion, p. 21, original emphasis.) The answer was "no," so the Court of Appeal granted Brinker's writ petition and directed the trial court to enter a new order denying class certification. The following paragraphs briefly summarize the key points in the Court of Appeal's decision.

a) Plaintiffs' Rest Break Claims

In defining the elements of Plaintiffs' rest break claims, the Court of Appeal held – based on the provisions of Industrial Welfare Commission (IWC) Wage Order No. 5-2001 – that an employer must offer one rest break for every four-hour work period unless the total work period is between three and one-half and four hours, in which case the employee is also entitled to a rest break. (Slip Opinion, p. 24.) It rejected Plaintiffs' contention that a rest break must be provided every three and one-half hours, as well as their alternative contention "that employees are entitled to a second rest period after working six hours, and a third rest period after working 10 hours." (Slip Opinion, p. 28.) It explained: "If the IWC had intended that employers needed to provide a second rest period at the six-hour mark, and a third rest period at the 10-hour mark, it would have stated so in [the applicable Wage Order]." (*Ibid.*)

With regard to Plaintiffs' contention that employers must provide the first rest break of the shift before the first meal period, the Court of Appeal held that the applicable Wage Order does not support Plaintiffs' theory – because it states only that rest breaks "'insofar as *practicable* shall be in the middle of each work period.'" (Slip Opinion, p.

28, quoting Cal. Code Regs., tit. 8, § 11050(12)(A), emphasis added by the Court of Appeal.)

The Court of Appeal confirmed that employers need only "authorize and permit," not ensure, rest breaks: "[B]ecause (as the parties acknowledge) Brinker's hourly employees may waive their rest breaks, and thus Brinker is not obligated to ensure that its employees take those breaks, any showing on a class basis that plaintiffs or other members of the proposed class missed rest breaks or took shortened rest breaks would not necessarily establish, without further individualized proof, that Brinker violated [the governing statute and regulation]." (Slip Opinion, p. 31.) Specifically, the Court of Appeal held that, had the trial court decided this legal issue, it "would have denied class certification with respect to plaintiffs' rest break claims because the trier of fact cannot determine on a class-wide basis whether members of the proposed class of Brinker employees missed rest breaks as a result of a supervisor's coercion or the employee's uncoerced choice to waive such breaks and continue working. . . . *The issue of whether rest periods are prohibited or voluntarily declined is by its nature an individual inquiry.*" (*Ibid.*, emphasis added.)

The Court of Appeal rejected Plaintiffs' contention that the rest break claims should be remanded to allow the trial court to assess Plaintiffs' "expert statistical and survey evidence," explaining that such evidence could "not show *why* rest breaks were not taken," or "*why* breaks of less than 10 uninterrupted minutes were taken." (Slip Opinion., p. 32, original emphasis.) As the Court of Appeal put it, *Sav-On* provides that "courts *may* use such evidence in determining if a claim is amenable to class treatment"

but does not compel admission of such evidence where, as here, it would be useless – because employees often *voluntarily* take rest breaks shorter than 10 minutes, or decline them altogether. (*Ibid.*, emphasis added.)

b) Plaintiffs' Meal Period Claims

Plaintiffs raised two fundamental claims with regard to meal periods – that employees are entitled to a meal period in the middle (not at the beginning) of their shift, and that employers must *ensure, i.e., force,* their employees take the meal periods they offer. The Court of Appeal rejected both claims. (Slip Opinion, pp. 41-47.)

First, the Court of Appeal rejected Plaintiffs' claim that a meal period must be provided in the middle of the shift. Under Labor Code section 512(a), employees are entitled to one meal after working "more than five hours per day," and a second meal after working "more than ten hours per day." (Slip Opinion., pp. 35-36, quoting Lab. Code, § 512(a).) It follows, held the Court of Appeal, that there is no Labor Code or Wage Order basis for Plaintiffs' claim that "lunch breaks must be provided in the middle of a shift" (or at any other specific time). (Slip Opinion, p. 40.)

Second, the Court of Appeal held that "the plain language of section 512(a)" – stating that employers must "*provid[e]*" meal periods – means that "meal periods need only be made available, not ensured, as plaintiffs claim." (Slip Opinion, p. 42, original emphasis.) It explained that *Cicairos* did not conflict with its decision, because the evidence in *Cicairos* established that the employer did not *provide* meal periods for its employees. (Slip Opinion, pp. 44-46.)

Accordingly, the Court of Appeal concluded that, "because meal breaks need only be made available, not ensured, individual issues predominate in this case and the meal break claim is not amenable to class treatment." (Slip Opinion, p. 47.) It elaborated:

> It would need to be determined as to each employee whether a missed or shortened meal period was the result of an employee's personal choice, a manager's coercion, or, as plaintiffs argue, because the restaurants were so inadequately staffed that employees could not actually take permitted meal breaks. As we discussed, *ante*, with regard to rest breaks, plaintiffs' computer and statistical evidence submitted in support of their class certification motion . . . could only show the fact that meals were not taken, or were shortened, not why.

(*Id.* at p. 48.)[1]

On August 29, 2008, Plaintiffs timely filed their Petition for Review.

ARGUMENT

I. BECAUSE EVERY CALIFORNIA APPELLATE AND FEDERAL COURT TO ADDRESS THE "PROVIDE *VS.* ENSURE" ISSUE AGREES THAT EMPLOYERS NEED ONLY *PROVIDE* MEAL PERIODS, THERE IS NO CONFLICT FOR THIS COURT TO RESOLVE.

A. *Brinker* Does Not Conflict With *Cicairos* And Is Consistent With *Murphy* – Employers Must Provide, But Need Not Ensure, Meal Periods.

Plaintiffs' Petition hinges largely on a purported conflict between *Brinker* and the Third District's opinion in *Cicairos* – and fails because there simply is no conflict and

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[1] The Court of Appeal similarly held that Plaintiffs' claims that Brinker unlawfully required its employees to work off-the-clock during meal periods are "not amenable to class treatment because, once the elements of those claims are considered, individual issues predominate." (Slip Opinion, p. 51.) Plaintiffs have not sought review of this holding.

because *Brinker* is entirely consistent with this Court's characterization of employers' meal period obligations in *Murphy*.

1. *Brinker* Does Not Conflict With *Cicairos.*

The five plaintiffs in *Cicairos* were truck drivers who sued their employer for alleged rest break and meal period violations – but the posture of the case was entirely different. (*Cicairos*, *supra*, 133 Cal.App.4th at p. 952.) The trial court in *Cicairos* granted a defense motion for summary judgment, thereby resolving the plaintiffs' meal period claims against them; the Court of Appeal reversed, concluding that the employer's management policies and corporate systems prevented it from satisfying its obligation to *provide* meal periods – because, among other things, the employer had an on-board computer system monitoring the drivers' minute-by-minute activities, but failed to "schedule meal periods or include an activity code for them." (*Id.* at pp. 955-956.) As the Third District explained, there was evidence that the employer had "pressured drivers to make more than one daily trip, making drivers feel that they should not stop for lunch." (*Id.* at p. 956.) It was thus hardly surprising that, "[u]nder th[o]se facts" and on review of a summary judgment, the *Cicairos* court concluded that the employer had "failed to establish that it *provided* the plaintiffs with their required meal periods." (*Id.* at p. 963, emphasis added.)[2]

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[2] Although Plaintiffs claim that Brinker's restaurants were understaffed, thus "making it harder [for employees] to stop for lunch" (Petition, p. 18), they did not present any evidence of a centralized practice of discouraging meal periods (and thus cannot align themselves with the *Cicairos* plaintiffs). In fact, one of the named *Brinker* Plaintiffs testified that, at the restaurant where he worked, there were "breakers" assigned to relieve employees during their meal periods (PE 5478, 5487-5490; see also PE 932-

The holding in *Cicairos* – that the employer failed in its "obligation to *provide* the plaintiffs with an adequate meal period [by] assuming that the meal periods were taken" while creating conditions that discouraged meal periods (*Cicairos*, *supra*, 133 Cal.App.4th at p. 962, emphasis added), is completely consistent with the *Brinker* court's holding that "employers cannot *impede, discourage or dissuade* employees from taking meal periods" (Slip Opinion, p. 4, emphasis added). Both *Brinker* and *Cicairos* condemned employer policies and practices that "effectively deprive[d] [their employees] of their breaks," and both opinions are "consistent . . . with a rule requiring an employer to *offer* or *provide* or *authorize and permit* a meal break." (*White v. Starbucks Corp.* (N.D. Cal. 2007) 497 F.Supp.2d 1080, 1089, original emphasis.)

To avoid this conclusion, Plaintiffs fixate on a single sentence in the *Cicairos* opinion – that "employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty'" (*Cicairos*, *supra*, 133 Cal.App.4th at p. 962), ignoring the fact that *Cicairos* was describing the employer's duty to *provide* a work-free meal period – not any duty to ensure that the meal period is taken. As explained in *Brown v. Federal Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580: "It is an employer's obligation to ensure that its employees are free from its control for thirty minutes, not to ensure that the employees do any particular thing during that time." (*Id.* at p. 585.)

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933), and a number of Brinker managers testified about their restaurants' meal period compliance systems (Slip Opinion, pp. 15-17).

2. *Brinker* Is Entirely Consistent With *Murphy.*

This Court's opinion in *Murphy* confirms that the employer's statutory obligation to provide a meal period means guaranteeing its employees "the right to be free of the employer's control during the meal period" (*Murphy, supra,* 40 Cal.4th at p. 1104) – not that they must have lunch. Repeatedly, this Court emphasized that employer liability under Labor Code section 226.7 is triggered not when employees voluntarily decline the breaks they are offered, but only when employees are "*required to work*" through or "*forced to forgo*" meal periods. (*Id.* at pp. 1104, 1108 ["Under the amended version of section 226.7, an employee is entitled to the additional hour of pay immediately upon being *forced to miss* a rest or meal period"], emphasis added; 1113 [describing "the noneconomic injuries employees suffer from being *forced to work* through rest and meal periods"], emphasis added; *ibid.* ["being *forced to forgo* rest and meal periods denies employees time free from employer control that is often needed to be able to accomplish important personal tasks"], emphasis added.)

Murphy also undermines Plaintiffs' contention that employers must guarantee their employees' meal periods but only "authorize and permit" their employees' rest breaks, because in *Murphy* this Court addressed the employer's obligations with regard to meal periods *and* rest breaks in identical terms. (*Murphy, supra,* 40 Cal.4th at pp. 1104 ["Section 226.7, subdivision (b) requires that employees be paid 'one additional hour of pay' for each work day that they are required to work through a meal or rest period"]; 1108 ["Under the amended version of section 226.7, an employee is entitled to the additional hour of pay immediately upon being forced to miss a meal or rest period"];

1113 [referring to the "noneconomic injuries employees suffer from being forced to work through rest and meal periods"]; *ibid.* ["being forced to forgo rest and meal periods denies employees time free from employer control that is often needed to be able to accomplish important personal tasks"].) Although *Murphy* did not directly address the "provide *vs*. ensure" question, its characterization of employers' meal period obligations under the Labor Code is entirely consistent with *Brinker.*

In view of the existing uniformity among California appellate courts, review of this issue is unnecessary.[3]

B. Every Federal Court Addressing The Issue Agrees That California Law Requires Only That Employers Provide, Not Ensure, Meal Periods.

Over the last 14 months, *seven* federal courts in California have confirmed that the *Brinker* court got it right when it held that the Labor Code does not obligate employers to guarantee their employees' meal periods. Not a single federal case has gone the other way.

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[3] A handful of superior court decisions submitted as part of Plaintiffs' Request for Judicial Notice suggest that some trial courts have gone astray and held that employers must *ensure* that their employees take the meal periods they provide. Of course, this Court does not grant review to resolve a split among the superior courts, but rather "'*to supervise and control the opinions of the several district courts of appeal* . . . and by such supervision to endeavor to secure harmony and uniformity in the decisions . . . .'" (*Snukal v. Flightways Mfg., Inc.* (2000) 23 Cal.4th 754, 768, quoting *People v. Davis* (1905) 147 Cal. 346, 347-349, emphasis added.)

Similarly, this Court does not grant review because an issue is "pending before other Court of Appeal panels." (Petition, p. 5.) If and when there is an actual divide among the Courts of Appeal, this Court can then grant review instead of wasting its resources now on the hypothetical conflict that Plaintiffs present.

- In *White*, *supra*, 497 F.Supp.2d 1080, the Northern District (Chief Judge Walker) agreed with Starbucks on summary judgment that "the statutory term 'provide' in Cal. Labor Code §§ 512 and 226.7 demonstrates that the California Legislature intended only for employers to *offer* meal periods – not to ensure that those periods were actually taken." (*Id.* at p. 1088, original emphasis.) Chief Judge Walker concluded that this Court, "if faced with the issue, would require only that an employer *offer* meal breaks, without forcing employers actively to ensure that workers are taking these breaks." (*Id.* at pp. 1088-1089, original emphasis.) And *White,* as did *Brinker,* held that *Cicairos* is "consistent . . . with a rule requiring an employer to *offer* or *provide* or *authorize and permit* a meal break." (*Id.* at p. 1089, original emphasis.)[4]

- In *Brown*, *supra*, 249 F.R.D. 580, the Central District (Hon. Dale S. Fischer) denied the plaintiffs' motion to certify meal period and rest break claims, holding that nothing in the Labor Code or the applicable Wage Order "support[ed] Plaintiffs' position that Defendant was required to ensure that Plaintiffs took meal breaks." (*Id.* at p. 585.) According to *Brown,* the Wage Order's language that "'[n]o 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'" is "consistent with an obligation to provide a meal break, rather than to ensure that employees cease working during that time." (*Ibid.*,

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[4] *White* and several other courts discounted *Cicairos* because the Third District relied exclusively on a non-binding DLSE letter rather than the controlling Labor Code provisions. (*White, supra*, 497 F.Supp.2d at p. 1088; *Brown, supra*, 249 F.R.D. at p. 586; *Kenny v. Supercuts, Inc.* (N.D. Cal., June 2, 2008, No. C 06-07521) 2008 WL 2265194, at *5; *Perez v. Safety-Kleen Systems, Inc.* (N.D. Cal., July 28, 2008, No. C05-5338) ___ F.R.D. ___ [2008 WL 2949268], at *5.)

quoting Cal. Code Regs., tit. 8, § 11090(11).) *Brown* underscored the fact that its decision was supported by *Murphy*, explaining that "in characterizing violations of California meal period obligations . . . the California Supreme Court repeatedly described it as an obligation not to force employees to work through breaks." (*Ibid.*, citations omitted.) Moreover, *Brown* (like *Brinker* and *White*) held that *Cicairos* "is consistent with an obligation to make breaks available, rather than to force employees to take breaks." (*Id.* at p. 596, citation omitted.)

- In *Kenny, supra*, 2008 WL 2265194, the Northern District (Hon. Charles R. Breyer), after analyzing Labor Code sections 512 and 226.7 and the applicable Wage Order, held that the Labor Code "does not require an employer to ensure that an employee take a meal break," and that "an employer is not liable for 'failing to provide a meal break' simply because the evidence demonstrates that the employee did not actually take a full 30-minute break." (*Id.* at *6.) *Kenny* carefully examined the *Cicairos* facts and concluded – as did *Brinker* and *White* and *Brown* – that it "support[s] a finding that the employer did not make meal breaks available, that is, did not provide meal breaks." (*Id.* at *5.)

- In *Salazar v. Avis Budget Group, Inc.* (S.D. Cal., July 2, 2008, No. 07-CV-0064) __ F.R.D. __ [2008 WL 2676626], the Southern District (Hon. Irma E. Gonzalez) "agree[d] with the compelling reasons advanced by the *White*, *Brown*, and *Kenny* decisions for interpreting 'provide' to mean 'make available' rather than 'ensure taken.'" (*Id.* at *4.) As did *Brown*, *Salazar* relied on *Murphy* to bolster its conclusion that

"plaintiffs must show that defendants *forced* plaintiffs to forego missed meal periods." (*Ibid.*, original emphasis.)

- In *Perez, supra*, 2008 WL 2949268, the Northern District (Hon. Phyllis J. Hamilton) held that "while employers cannot impede, discourage or prohibit employees from taking meal breaks, they need only make them available, not ensure they are taken." (*Id.* at *7.) *Perez* (decided one week after *Brinker*) agreed with *Brinker* and its federal counterparts that "*Cicairos* can [] be read to hold that an employer is liable for failing to 'provide' meal breaks if it has a policy or practice of prohibiting or discouraging meal breaks" (*id.* at *5), noting also that its decision is consistent with *Murphy* which "characterized Section 226.7 as prohibiting an employer from requiring an employee to work through a meal or rest period." (*Ibid.*, citation omitted.)

- In *Gabriella v. Wells Fargo Financial, Inc.* (N.D. Cal., Aug. 4, 2008, No. C06-4347) 2008 WL 3200190, the Northern District (Hon. Susan Illston) agreed that "employers are only required to provide meal and rest periods, not to ensure that such breaks are actually taken" (*id.* at *3), finding "the *Brinker* decision to be a good indication of how the California Supreme Court would resolve the issue." (*Ibid.*)

- In *Kimoto v. McDonald's Corp.* (C.D. Cal., Aug. 19, 2008, No. CV06-3032) (attached pursuant to rule 8.504(e) of the California Rules of Court), the Central District (Hon. Philip S. Gutierrez) denied class certification, holding that employers need only provide, not ensure, meal periods and rest breaks. (*Id.* at p. 8.) As did *Gabriella*, *Kimoto* "conclude[d] that th[e] recent decision in *Brinker* provides a good indication of how the California Supreme Court would resolve the issue." (*Id.* at pp. 8-9.)

Not a single federal or California appellate decision has endorsed Plaintiffs' theory that employers are the guarantors of their employees' meal periods.[5] Given the absence of a conflict and the overwhelming, uniform authority on point, this Court's review is wholly unnecessary.

II. THE MEAL AND REST BREAK "TIMING ISSUES" RAISED BY PLAINTIFFS ARE NOT APPROPRIATE FOR REVIEW.

Plaintiffs' request for review of certain meal period and rest break "timing issues" concedes that these issues have not been considered by any other court but justifies its plea on the ground that "courts will *inevitably* face them in the many pending cases." (Petition, p. 10, emphasis added.) Given the absence of any other relevant decisions (much less a conflict among them), all that Plaintiffs can argue is that the Court of Appeal's decision is incorrect – a mere "error correction" argument that does not justify this Court's intervention.

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[5] Plaintiffs' reliance on *Stevens v. GCS Services, Inc.* (C.D. Cal., Apr. 10, 2006, No. SACV 04-1337, Hon. Cormac J. Carney) (Plaintiffs' Request for Judicial Notice, Exh. M) is misplaced because *Stevens* does not hold that employers must ensure their employees' meal periods. Under facts similar to those in *Cicairos*, *Stevens* denied summary judgment because there was "evidence that GCS *discouraged* [plaintiff] from taking the breaks and imposed productivity demands that did not permit them." (*Id.* at pp. 2, 23, emphasis added.) *Stevens* is entirely consistent with *Brinker*, which held that an employer fails in its obligation to *provide* meal periods by "discourag[ing]" or dissuad[ing]" employees from taking them. (Slip Opinion, p. 4.)

A. Meal Period Timing

Plaintiffs offer three arguments in support of their contention that this Court should review *Brinker*'s rejection of their position that the "meal period should be moved closer to the midpoint of the day." (Petition, p. 20, fn. 22.) All are flawed.

First, Plaintiffs suggest the meal period timing issue is an "important question of law" (Cal. Rules of Court, rule 8.500(b)) because, under the Court of Appeal's opinion, hourly employees could "be required to work over fifteen hours straight without a meal period." (Petition, p. 21.) The Court of Appeal held no such thing. Adhering to Labor Code section 512, the Court held that employees working "more than five hours per day" are entitled to one meal period, and employees working "more than ten hours per day" are entitled to a second. (Slip Opinion, pp. 35-36, quoting Lab. Code, § 512(a).) Thus, even if an employee's first meal was scheduled 30 minutes into a double shift, the employee still would be entitled to a second meal period *nine* – not fifteen – hours later (and would be permitted 10-minute rest breaks at four-hour intervals as well). The consequences of the *Brinker* decision are not, as Plaintiffs would have this Court believe, "dire." (Petition, p. 20.)

Second, Plaintiffs contend *Brinker* "creates confusion about" this Court's decisions in *California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, and *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 690. Not so. In a footnote in *California Hotel*, this Court summarized a wage order provision identical to Wage Order No. 5-2001, stating that "[a] meal period of 30 minutes per 5 hours of work is generally required." (*California Hotel*, *supra*, 25 Cal.3d at p. 205, fn. 7.)

Contrary to Plaintiffs' suggestion, *nothing* about *California Hotel*'s paraphrasing of the wage order supports their theory that meal periods must be timed at the "midpoint of the day." (Petition, p. 20, fn. 22.) Consistent with the Labor Code, *California Hotel's* description of the applicable wage order simply requires employers to provide a first meal period to employees who have worked five hours, and a second meal period to employees who have worked ten.[6]

Third, there is no merit to Plaintiffs' claim about friction between *Brinker* and this Court's decision in *Industrial Welfare Commission.* The statement in *Industrial Welfare Commission* that IWC wage orders "may provide more restrictive provisions than are provided by [the general] statutes adopted by the Legislature on this subject [in [Labor Code] sections 510-556]" (*Industrial Welfare Commission*, *supra*, 27 Cal.3d at p. 732), addressed different Labor Code provisions – and did so 19 years before the Legislature enacted the current versions of Labor Code sections 512 and 516. Section 516, as amended in 2000, provides that IWC wage orders "*must be consistent with the specific provisions of Labor Code section 512.*" (*Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 438, emphasis added; see also Lab. Code, § 516.) Had the Legislature intended to allow the IWC to impose greater restrictions on employers than those found

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[6] As the Court of Appeal noted (Slip Opinion, p. 40), although the Wage Order's *rest break* provision *does* include a timing requirement mandating that rest breaks "insofar as practicable shall be in the middle of each work period" (Cal. Code Regs., tit. 8, § 11050(12)(A)), the IWC chose *not* to include an analogous timing restriction in the Wage Order's *meal period* provision. (Cal. Code Regs., tit. 8, § 11050(11)(A) ["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 . . . ."].)

in section 512, it could and most certainly would have said so – instead of mandating absolute consistency with section 512.

In sum, there is no tension between *Brinker* and this Court's decisions in *California Hotel* and *Industrial Welfare Commission*, and the practical implications of the *Brinker* decision do not compel the extreme scenarios Plaintiffs suggest. As *Brinker* does not conflict with any other decision there is nothing to harmonize (*Snukal*, *supra*, 23 Cal.4th at p. 768), and review is not necessary.

B. Rest Break Timing

In a similar vein, Plaintiffs contend this Court should review the Court of Appeal's decision – the only published decision ever to address rest break timing issues in California – that employees are entitled to a rest break for every four hours of work, and that employers are not required to schedule the first rest break before the first meal period. (Petition, pp. 23-26.) This claim is based on Plaintiffs' misunderstanding of the Court of Appeal's opinion, and on the misguided notion that this Court should grant review to decide whether – in this particular case – the Court of Appeal gave the DLSE's wage order interpretations sufficient consideration. Plaintiffs are wrong.

First, with regard to the interval at which rest breaks must be authorized, Plaintiffs misconstrue the Court of Appeal's opinion, contending "*Brinker* cuts in half the number of rest breaks employers must provide," contrary to the DLSE's "longstanding interpretation" that employees are entitled to "two per day for an eight-hour shift." (Petition, p. 24.) *Brinker* does no such thing. *Brinker* makes it perfectly clear that an employee who works an eight-hour shift *is* entitled to two rest breaks – in the Court of

Appeal's words, an employee is entitled to a 10-minute rest break "after four hours of work" *unless* the employee works a shift "between three and one-half and four hours," in which case "he or she is entitled to a rest break before the four hour mark." (Slip Opinion, p. 24.)

Plaintiffs rely on a February 16, 1999 DLSE opinion letter for the contention that employees are entitled to have their first rest break scheduled at the second hour mark and their second rest break at the sixth hour mark. (Petition, p. 24.) However, the Wage Order states quite clearly that employers are obligated to schedule rest breaks "in the middle of each work period" *only "insofar as practicable."* (Cal. Code Regs., tit. 8, § 11050(12)(A), emphasis added.) In any event, "[w]hile the DLSE's construction of a statute is entitled to consideration and respect, it is not binding and it is ultimately for the judiciary to interpret[.]" (*Murphy*, *supra*, 40 Cal.4th at p. 1105, fn. 7.) Whether the Court of Appeal – which devoted nearly three pages of its opinion to the DLSE's February 16, 1999 opinion letter (Slip Opinion, pp. 25-27) – gave adequate "consideration and respect" to the DLSE's opinion in this instance is hardly an "important question of law" worthy of this Court's attention (Cal. Rules of Court, rule 8.500(b)).

Second, Plaintiffs challenge the Court of Appeal's decision that a rest break is not required before the first meal period, pointing to a September 17, 2001 DLSE letter stating that the first rest break should precede the first meal period where the employee is required "to work five hours prior to their 30-minute lunch break." (Petition, p. 25.) The problem with this argument is that Plaintiffs' claim is *not* that they worked five hours

before lunch, but rather that they were required to take meal periods *early* in their shifts – so the September 17, 2001 DLSE letter has no bearing on this case.[7] But even if it did, the DLSE's opinion is not controlling, and the only possible issue for review is whether the Court of Appeal gave sufficient "consideration and respect" to the agency's opinion in this particular case. (*Murphy, supra*, 40 Cal.4th at p. 1105, fn. 7.) As its carefully crafted opinion shows, it did – so there is no "important question of law" warranting this Court's intervention.

III. THERE IS NO REASON TO REVIEW THE COURT OF APPEAL'S DECISION THAT PLAINTIFFS' CLAIMS ARE NOT AMENABLE TO CLASS-WIDE PROOF.

The generic questions of whether trial courts may accept survey and statistical evidence in California class action cases, and what "role" such evidence should be accorded, do not warrant this Court's review. Plaintiffs nevertheless contend review is necessary because *Brinker* is somehow in conflict with *Sav-on*, and because, "in post-*Sav-on* rulings, the trial and appellate courts have reached strikingly inconsistent conclusions about whether and how survey and statistical evidence should be used as a form of common proof, particularly in wage and hour class actions." (Petition, p. 26.) However, *Sav-on* does not *compel* a trial court considering certification issues to rely on statistical evidence. To the contrary, *Sav-on* (1) holds only that there is no "per se bar . . .

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[7] Once again, Plaintiffs ignore the applicable Wage Order's provision that rest breaks should be scheduled "in the middle of each work period" only "insofar as practicable." (Cal. Code Regs., tit. 8, § 11050(12)(A).) And as the Court of Appeal noted, "an employee who takes a meal period one hour into an eight-hour shift could still take a post-meal period rest break 'in the middle' of the first four-hour work period . . . ." (Slip Opinion, p. 28.)

to certification based partly on pattern or practice evidence or similar evidence of a defendant's class-wide behavior" (*Sav-On, supra,* 34 Cal.4th at p. 333), and (2) instructs courts to examine whether "the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment" (*id.* at p. 327).

The *Brinker* court followed *Sav-On* to a tee. After analyzing Plaintiffs' theories of recovery and deciding – as the trial court failed to do – that under California law employees may decline their meal periods and rest breaks, the Court of Appeal held that Plaintiffs' meal period and rest break claims cannot be proved by representative testimony, statistical evidence, or other class-wide proof: "[P]laintiffs' computer and statistical evidence . . . could only show the fact that meal breaks [and rest breaks] were not taken, or were shortened, *not why*. It will require an individual inquiry as to all Brinker employees to determine if this was because Brinker failed to make them available, or employees chose not to take them." (Slip Opinion, p. 48, emphasis added; see also *id.* at p. 32.)

In every appellate decision cited by Plaintiffs (Petition, p. 27), the courts likewise examined the plaintiffs' theories of recovery and determined whether under the circumstances class-wide evidence could establish liability. (*Capitol People First v. Department of Developmental Services* (2007) 155 Cal.App.4th 676, 693, 695 [holding that the trial court erroneously rejected statistical evidence "despite the suitability of this approach where only declaratory and injunctive relief is sought" and where "appellants' theory of recovery . . . focuses on the common practices, policies, acts and omissions of

the state actors and regional centers"]; *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 14 ["The anecdotal evidence . . . was relevant to the class as a whole, not just to the drivers who happened to be the subject of a particular anecdote"]; *Alch v. Superior Court* (Aug. 14, 2008, B203726) 2008 WL 3522099, at *8 ["Statistical proof is indispensable in a disparate impact case"].) Plaintiffs' claim that these cases "flatly disagreed with [the *Brinker*] approach" (Petition, p. 27) is wrong – and there is nothing in *any* of these opinions suggesting even by inference that statistical evidence is always admissible in the class action context. Rather, the differing conclusions merely demonstrate, unremarkably, that application of a settled legal standard to different facts can yield different outcomes.

Moreover, none of Plaintiffs' cases decides whether the particular claims at issue here – meal period and rest break claims – can be resolved on a class-wide basis.[8] What Plaintiffs fail to mention is that a growing number of federal courts have *uniformly* decided – for the same reasons as the *Brinker* court – that meal period and rest break claims *cannot* be established via statistical or representative evidence. (*Brown*, *supra*, 249 F.R.D. at p. 586 ["Because FedEx was required only to make meal breaks and rest breaks available to Plaintiffs," resolution of their claims "will require substantial

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[8] The one decision Plaintiffs cite concerning meal periods and rest breaks, *Burdusis v. Rent-A-Center, Inc.* (Feb. 9, 2005, B166923) 2005 WL 293806, is unpublished and thus improperly cited (Cal. Rules of Court, rule 8.1115). In any event, *Burdusis* did not decide that statistical evidence is required in meal period and rest break class actions, but rather remanded the case to the trial court to reconsider its denial of class certification in light of *Sav-On* and *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715. (*Burdusis*, *supra*, 2005 WL 293806, at *7.)

individualized fact finding"]; *Kenny*, *supra*, 2008 WL 2265194, at *6 ["Liability cannot be established without individual trials for each class member to determine why each class member did not clock out for a full 30-minute meal break on any particular day"]; *Salazar*, *supra*, 2008 WL 2676626, at *4-5 [holding that its "interpretation of the statute" – that "plaintiffs must show defendants *forced* plaintiffs to forego missed meal periods" – "forecloses class-wide adjudication of claims in this case"], original emphasis; *Gabriella*, *supra*, 2008 WL 3200190, at *3 ["In order to determine defendants' liability, the parties would be required to litigate each instance of an alleged [meal period or rest break] violation"].)

In short, the *Brinker* court – as required by *Sav-On* – analyzed Plaintiffs' theories of recovery to determine whether they are amenable to class-wide proof and determined – consistent with every other decision on point – that they are not. Review is unnecessary.

IV. PLAINTIFFS' REMAINING ARGUMENTS ARE FLATLY WRONG.

Plaintiffs contend the Court of Appeal encroached upon the trial court's domain by "choos[ing] to reach out and decide" unspecified merits questions, by "reweigh[ing] the evidence," and by not remanding the case for the trial court to "'consider afresh' whether class certification should be granted." (Petition, pp. 29-30.) Plaintiffs' arguments lack merit and do not provide a basis for review.

A. *Brinker* Is Entirely Consistent With *Linder*.

The notion that the *Brinker* court "intruded on the merits" by deciding the elements of Plaintiffs' meal period and rest break claims (Petition, p. 29) borders on the absurd – because it was Plaintiffs who urged the Court of Appeal to "decide the pure

legal question of whether, under California law, meal periods must be 'ensured' or merely 'made available.'" (Plaintiffs' December 17, 2007 Supplemental Brief, p. 10.) And although the Court of Appeal's original 2007 opinion defined several elements of Plaintiffs' meal period and rest break claims (*Brinker*, *supra*, 2007 WL 2965604, at *10-11, 13), Plaintiffs' subsequently filed supplemental brief never questioned the Court of Appeal's right to decide those claims.

Plaintiffs nevertheless now insist that *Brinker* is "contrary" to *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, because the *Brinker* Court "decide[d]" certain legal issues – issues that Plaintiffs' one-paragraph argument fails to identify – that are not "'enmeshed' with the elements of certification." (Petition, p. 29.) Nonsense. The Court of Appeal merely identified the elements of Plaintiffs' claims but nowhere in its opinion considered whether Plaintiffs' "action is legally or factually *meritorious*." (*Linder*, *supra*, 23 Cal.4th at pp. 439-440, emphasis added.) *Brinker* is entirely consistent with this Court's repeated admonition that courts considering certification *must* analyze the elements of plaintiffs' claims to render an informed certification decision – "considerations that may overlap the case's merits." (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1091-1092; *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1106.)

But even assuming the Court of Appeal decided certain questions that were not "'enmeshed' with the elements of certification" (Petition, p. 29), that fact is specific to this case and does not suggest broader confusion over *Linder*, or the existence of an "important question of law" requiring this Court's intervention (Cal. Rules of Court, rule 8.500(b)).

B. The Court Of Appeal Did Not Weigh The Evidence.

Plaintiffs' contention that the *Brinker* court improperly "weighed the evidence" (Petition, pp. 29-30) mischaracterizes the Court of Appeal's opinion. *Brinker* nowhere "weigh[ed] 'plaintiffs' employee declarations' against 'Brinker's manager declarations.'" (Petition, p. 29, quoting Slip Opinion, p. 49.) To the contrary, the court noted that both sides' evidence "indicated that some employees took meal [and rest] breaks and others did not." (Slip Opinion, p. 49.)

Similarly, *Brinker* did not (as Plaintiffs claim) "re-weigh[] the evidence of a 'waiver' affirmative defense." (Petition, p. 30.) Rather, the court decided that, given the absence of a company-wide policy prohibiting meal periods and rest breaks, Plaintiffs' claims by their very nature are "not amenable to class treatment." (Slip Opinion, p. 32 [the statistical "evidence only purported to show when rest breaks were taken, or not [and] did not show *why* rest breaks were not taken"].) The fact that the *trial court* found Brinker's evidence of waiver "insubstantial" (Petition, p. 30) is inconsequential because the Court of Appeal based its decision not on the substantiality of Brinker's evidence but on the trial court's incorrect assumption that it could be determined on a class-wide basis whether individual employees declined or were "forced to forego" their breaks. (*Linder, supra,* 23 Cal.4th at p. 436 ["an order based upon improper criteria or incorrect assumptions calls for reversal even though there may be substantial evidence to support the court's order"], internal citation omitted.)

C. Brinker's Waiver Defense Precludes Class Certification.

The *Brinker* court's decision that the company's waiver defense precludes class certification because it "raise[s] issues specific to each potential class member" (Slip Opinion, p. 50) is consistent with a number of appellate decisions. (E.g., *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 913 [holding class certification inappropriate, in part, because "defendants would undoubtedly raise the defense of abandonment of the mineral interests as to each alleged member of the class, which . . . creates a factual issue as to the individual owner's intent"]; *Block v. Major League Baseball* (1998) 65 Cal.App.4th 538, 544 [affirmative defenses that entail fact-intensive inquiries specific to each claimant "weigh[] heavily against certification"]; *Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 811 [the fact that affirmative defenses "will require individual litigation of claims" precludes certification].)

This Court's decision in *Sav-On* – in which the employer's affirmative defense concerned company-wide "policies and practices" that *could* be evaluated by way of common proof (*Sav-On*, *supra*, 34 Cal.4th at p. 337) – is not to the contrary. *Sav-On* refused to require "as a prerequisite to certification" that plaintiffs demonstrate the employer's policies were "'right as to all members of the class or wrong as to all members of the class'" because it is the defendant employer, not the plaintiff, who must prove its affirmative defense. (*Id.* at p. 338.) The *Brinker* court, contrary to what Plaintiffs suggest (Petition, p. 30), never asked Plaintiffs to defend the lawfulness of Brinker's policies – but decided only that, because there *are* no company policies

prohibiting meal periods or rest breaks, liability can be determined only on an employee-by-employee basis.[9]

D. *Washington Mutual* Does Not Compel Remand.

Plaintiffs mischaracterize the holding of *Washington Mutual Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, claiming that "when an appellate court vacates a class certification order based on erroneous legal assumptions, it *must* then remand for the trial court to apply the correct legal assumptions and 'consider afresh' whether class certification should be granted." (Petition, p. 30, emphasis added.) Leaving to one side the fact that this "issue" does not justify review, *Brinker* is entirely consistent with *Washington Mutual,* which did not impose a blanket remand requirement whenever a certification order is vacated based on "erroneous legal assumptions." *Washington Mutual* simply decided on the particular circumstances of that case – where highly fact-specific questions such as the scope of a choice of law provision remained unanswered – that remand was appropriate. (*Washington Mutual, supra*, 24 Cal.4th at p. 928.)

Here, by contrast, there were no fact-specific questions for the trial court to settle before certification could be decided. By their nature, Plaintiffs' claims compel the conclusion that *no* "evidentiary showing" (Petition, p. 30) could eliminate the individual inquiries necessary to prove whether each alleged instance of a missed or shortened break was the product of an employee's choice or a manager's coercion. Where, as here, the

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[9] Even if the Court of Appeal *did*, as Plaintiffs claim, "shift[] the burden of proof" or "weigh the evidence" in this particular case (Petition, pp. 29-30), that is hardly an "important question of law" deserving this Court's attention.

legal question before the Court of Appeal did not require resolution of disputed factual issues, appellate courts uniformly agree that remand is unnecessary. (See, e.g., *Faulder v. Mendocino County Bd. of Supervisors* (2006) 144 Cal.App.4th 1362, 1368; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 884-885; *Le Elder v. Rice* (1994) 21 Cal.App.4th 1604, 1608.)

CONCLUSION

In the end, Plaintiffs' plea to this Court to "preserve the class action enforcement mechanism for California's wage and hour laws" (Petition, p. 32) fails to state a proper basis for review and ignores the fact that this Court has said it will not "alter [the] rule of substantive law to make class actions more available." (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462.) For all the reasons discussed above, Plaintiffs' Petition should be denied.

Respectfully submitted,

Dated: September 18, 2008

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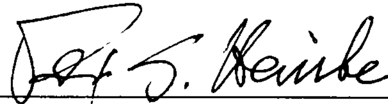
By 
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CERTIFICATE OF COMPLIANCE

[Cal. Rules of Court, rule 8.504 (d)]

This brief consists of 7,937 words as counted by the Microsoft Word version 2002 word processing program used to generate the brief.

Dated: September 18, 2008

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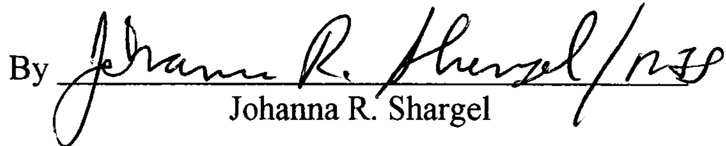
By 
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ATTACHMENT

(California Rules of Court, rule 8.504(e).)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 06-3032 PSG (FMOx)	Date	August 19, 2008
Title	Deanna M. Kimoto, *et al.* v. McDonald's Corps., *et al.*		

Present: The Honorable Philip S. Gutierrez, United States District Judge

Wendy K. Hernandez	Not Present	n/a
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings: **(In Chambers) Order GRANTING Defendant's Motion to Deny Class Certification (DOCUMENT #52), deeming MOOT Plaintiff's *Ex Parte* Application for an Order Continuing Hearing on Defendant's Motion to Deny Class Certification and Plaintiff's Motion for Class Certification to be Heard Concurrently, and deeming MOOT Plaintiff's Motion for Class Certification (DOCUMENT #96)**

Before this Court are Defendant's Motion to Deny Class Certification, Plaintiff's *Ex Parte* Application for an Order Continuing Hearing on Defendant's Motion to Deny Class Certification and Plaintiff's Motion for Class Certification to be Heard Concurrently, and Plaintiff's Motion for Class Certification. On August 18, 2008, the Court heard argument on Defendant's Motion to Deny Class Certification. After consideration of the parties' arguments and papers, the Court hereby GRANTS Defendant's motion, and deems MOOT Plaintiff's *Ex Parte* Application and Motion for Class Certification.

I. BACKGROUND

Deanna M. Kimoto ("Plaintiff") commenced this action by filing a class action complaint against McDonald's Corporation ("Defendant" or "McDonald's") and other Doe defendants in state court, alleging claims for compensation for missed meal and rest periods including waiting time penalties (Cal. Labor Code §§ 203, 226.7 and 558, and Wage Order 5-2001); wages due including waiting time penalties (Cal. Labor Code §§ 201-203 and 1194.2, and Wage Order 5-2001); failure to comply with itemized employee wage statement provisions and to maintain records at a centralized location (Cal. Labor Code §§ 226, 558 and 1174); and unfair competition (Cal. Bus. & Prof. Code, §§ 1700 *et seq.*). On May 17, 2006, Defendant removed

the case to federal court.

Defendant McDonald's presently owns and operates approximately 158 restaurants in California (Tossi Dec., ¶ 4.) From November 14, 2005 though February 25, 2006, Plaintiff worked as an hourly, non-exempt crew member at the McDonald's in Clovis, California. (UF, ¶ 1.) The Complaint alleges that during the Class Period, defined as "four years prior to the filing of this action through the trial date . . . ." (Comp. ¶ 3), McDonald's engaged in a concerted practice of not providing Plaintiff and class members their wages in full or meal and rest periods as required by the Wage Orders and Cal. Labor Code §§ 226.7 and 512. (Comp. ¶ 10.) The Complaint alleges that members who performed work during time they were entitled to take meal and rest periods, are entitled to compensation and wages, and in some cases, overtime pay. (Comp. ¶¶ 25-27.) The Complaint further alleges that Defendant's failure to provide lawful meal and rest breaks resulted in inaccurate wage statements provided to employees, in violation of Cal. Labor Code § 226(a). (Comp. ¶ 30.) Plaintiff seeks to represent the following Plaintiff Class:

> All persons who at any time after four (4) years prior to the filing of the action through the date of trial were non-exempt employees of the Defendants in California.

(Comp. ¶ 11.) The Plaintiff Class contains two subclasses:

> Wage Sub-Class: All Plaintiff Class member who were not fully paid wages as required by the applicable Wage Order(s) of the Industrial Welfare Commission, regulations or statutes.
>
> Meal and Rest Period Sub-Class: All Plaintiff Class member who were not provided lawful meal and rest periods as required by the applicable Wage Order(s) of the Industrial Welfare Commission, regulations or statutes.

(Comp. ¶ 12.)

On October 17, 2006, the Court stayed the action pending the California Supreme Court's decision in *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 56 Cal.Rptr.3d 880

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(2007).[1] A decision in *Murphy* was issued on April 16, 2007, and on July 5, 2007, the Court vacated the stay. On July 22, 2008, Defendant moved to deny class certification and set the hearing date for August 18, 2008. On Thursday, August 14, 2008, the last day to file motions pursuant to the Court's scheduling order, Plaintiff filed a motion to certify the class. (Dock. No. 86.) On Friday, August 15, 2008, Plaintiff filed an *ex parte* application asking the Court to continue the Defendant's motion to deny certification and hear both parties' motions concurrently. (Dock. No. 96.) These motions are now before the Court.

II. LEGAL STANDARD

The decision whether to certify a class is committed to the discretion of the district court within the guidelines of Federal Rule of Civil Procedure 23. *See Cummings v. Connell*, 316 F.3d 886, 895 (9th Cir. 2003). A court may certify a class if a plaintiff has met the four prerequisites of Rule 23(a), and at least one of the alternative requirements of Rule 23(b). *See* Fed. R. Civ. P. 23; *see also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). Plaintiff has the burden to establish that the Rule 23(a) and Rule 23(b) requirements have been met. *Zinser v. Accufix Research Inst., Inc..*, 253 F.3d 1180, 1186 (9th Cir. 2001).

Rule 23(a) sets forth four prerequisites to class certification: (1) the class is so numerous that joinder of all members individually is "impracticable"; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the class representative are typical of the claims or defenses of the class; and (4) the class representative will fairly and adequately protect the interests of all members of the class. Fed. R. Civ. P. 23(a). If all four prerequisites of Rule 23(a) are satisfied, a plaintiff must also establish that one or more of the grounds for maintaining the suit are met under Rule 23(b), including: (1) that there is a risk of substantial prejudice from separate actions; (2) that declaratory or injunctive relief benefitting the class as a whole would be appropriate; or (3) that common questions of law or fact predominate and the class action is superior to other available methods of adjudication. *See* Fed. R. Civ. P. 23(b).

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[1]In *Murphy,* the California Supreme Court address the question of whether the "additional hour of pay" remedy for violations of § 226.7 was a penalty or a wage. *Murphy*, 40 Cal.4th at 1120. The distinction was important because under California Code of Civil Procedure, a three-year statute of limitations applies to wages, while a one-year statute of limitation applies to penalties. Cal. Civ. P.§§ 338(a), 240 (a). The *Murphy* court held that the "additional hour of pay under § 226.7 constitutes a wage or premium pay, and thus is governed by a three-year statute of limitations." *Id.*

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"[D]istrict courts must conduct a rigorous analysis into whether the prerequisites of Rule 23 are met before certifying a class." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996). In determining the propriety of a class action, the court is bound to take the substantive allegations of the complaint as true. *See In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982); *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). However, the court must also consider the nature and range of proof necessary to establish those allegations. *Id.* at 901.

I. DISCUSSION

Defendant sets forth numerous grounds for denying class certification, including that: (i) Plaintiff cannot satisfy the typicality or adequacy requirements of Rule 23(a) concerning her meal and rest period claims; (ii) Plaintiff cannot satisfy the commonality and superiority requirements of Rule 23(b)(3) concerning her meal, rest period, wage statement and overtime claims; (iii) Plaintiff lacks standing to pursue her wage statement claims; and (iv) Plaintiff is barred from seeking certification because she failed to comply with the 90-day requirement of Local Rule 23-3 or Rule 23's requirement that the plaintiff seek certification at an "early practicable time." Fed. R. Civ. P. 23(c)(1)(A).

A. Timing of Certification Motion

As an initial matter, the Court addresses the timing of Plaintiff's motion for class certification. Under Rule 23(c)(1)(A), the Court must determine by order whether to certify the action as a class action at "an early practicable time after a person sues or is sued as a class representative." Fed. R. Civ. P. 23(c)(1)(A).

Here, the Court set the discovery cutoff date for July 14, 2008. (Dock. No. 43.) However, Plaintiff did not file her motion for certification until one full month later, on August 14, 2008 - the last date to file a motion of any kind in this action. Given that trial is just two months away, the Court does not find this to be "an early practicable time" under Rule 23(c)(1)(A). Although Plaintiff correctly contends that the Court's scheduling order *permitted* this late filing of her motion, nothing in any of the Court's orders authorized Plaintiff to bypass her obligation under Rule 23(c)(1)(A). Furthermore, the Court notes that back in October 2007, the parties filed a Joint Request for Clarification proposing August 4, 2008 as the class certification hearing date. (Dock. No. 51.) The Court denied the joint request, thus indicating that an August 2008 hearing date on a motion for class certification would be inappropriate. By filing her motion at this late date, Plaintiff has ignored both the Court's order and Rule

23(c)(1)(A). Nevertheless, while Plaintiff's failure to comply with Rule 23(c)(1)(A) in and of itself warrants denying class certification, the Court will proceed to address the merits of the issue.

B. Commonality under Rule 23(a)(2) and Rule 23(b)(3)

Because a central issue disputed by the parties is whether Plaintiff has shown common questions of law or fact sufficient to meet her burden under Rule 23(a)(2) and shown that these common questions predominate over individual questions under Rule 23(b)(3), the Court will address this issue first.[2]

To fulfill the commonality prerequisite of Rule 23(a)(2), plaintiffs must establish that there are questions of law or fact common to the class as a whole. Fed. R. Civ. P. 23(a)(2). The Ninth Circuit has construed Rule 23(a)(2) permissively. *See Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003). Individual variation among plaintiffs' questions of law and fact does not defeat underlying legal commonality, because "the existence of shared legal issues with divergent factual predicates is sufficient" to satisfy Rule 23. *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1019 (9th Cir. 1998). However, where as here, a plaintiff seeks class certification under Rule 23(b)(3), the plaintiff must satisfy a more stringent standard by showing that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). To determine if common questions of fact predominate, the court "examine[s] the issues framed by the pleadings and the law applicable to the causes of action alleged." *Hicks v. Kaufman and Broad Home Corp.*, 89 Cal.App.4th 908, 916 (2001).

Here, the applicable law is set forth in both the California Labor Code and in Wage Orders promulgated by the Industrial Welfare Commission ("IWC"). The IWC is a quasi-legislative body authorized by statute to promulgate orders regulating wages, hours, and conditions of employment for employees throughout California. *Nordquist v. McGraw-Hill Broadcasting Co., Inc.*, 32 Cal.App.4th 555, 562, 38 Cal.Rptr.2d 221 (1995). Pursuant to this authority, the IWC has promulgated seventeen different "wage orders" that apply to various groups of employees. Cal. Code Regs. tit. 8, §§ 11010- 11170. The Ninth Circuit has stated that

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[2]In her Opposition to Defendant's motion and in her Motion for Class Certification, Plaintiff only seeks certification pursuant to Rule 23(b)(3), and does not mention the other two grounds for maintaining a class action under Rule 23(b)(1) or (b)(2).

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IWC wage orders are "quasi-legislative regulations that are to be interpreted in the same manner as statutes." *Watkins v. Ameripride Services,* 375 F.3d 821, 825 (9th Cir. 2004).

Plaintiff bases her meal, rest period and wage claims on Cal. Labor Code §§ 512(a) and 226.7. Section 512 provides:

> 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, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

Cal. Labor Code §§ 512(a).

Section 226.7 provides:

> (a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
>
> (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

Cal. Labor Code § 226.7.

Subdivision 12 of Wage Order 5-2001 provides, in relevant part:

> (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily time is less than three and on-half (3½) hours. Authorized rest period time shall be counted, as hours worked, for which

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there shall be no deduction from wages.

> (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided

Cal. Code of Reg., title 8, §11050(12)(A).

To start, the parties dispute their interpretation of the California law. Citing persuasive authority, Defendant contends that the phrase "authorize and permit . . . rest periods" and "provide an employee a rest period" in Wage Order 5-2001 means to *make the period available* if he or she wants to take one, but not to ensure that such rest periods are taken. *See White v. Starbucks Corp.*, 497 F.Supp.2d 1080, 1086 (N.D.Cal. 2007) ("[T]he court agrees that the words 'authorize' and 'permit' only require that the employer make rest periods available"); *Lanzarone v. Guardsmark Holdings, Inc.*, 2006 WL 4393465, *6 (C.D.Cal. 2006) ("Under California law, rest periods need only be authorized and permitted, they need not be enforced or actually taken."); *Brown v. Federal Express Corp.*, 249 F.R.D. 580, 585 (C.D.Cal. 2008) ("It is an employer's obligation to ensure that its employees are free from its control for thirty minutes, not to ensure that the employees do any particular thing during that time.") Plaintiff argues that "Defendant's cited authority for the notion that breaks must be offered but not ensured, is unsupported by the facts of this case." (Opp'n at 18.) The question has not yet been decided by the California Supreme Court.

When interpreting state law, federal courts are bound by decisions of the state's highest court. *In re Kirkland,* 915 F.2d 1236, 1238 (9th Cir. 1990). In the absence of such a decision, a federal court should apply the rule that it believes the state supreme court would adopt if faced with the same issue. *See Arizona Electric Power Cooperative, Inc. v. Berkeley*, 59 F.3d 988, 991 (9th Cir. 1995). For example, in *Starbucks Corp.,* the district court held that the California Supreme Court, if faced with the issue, "would require only that an employer offer meal breaks, without forcing employers actively to ensure that workers are taking these breaks. In short, the employee must show that he was forced to forego his meal breaks as opposed to merely showing that he did not take them regardless of the reason." *Starbucks Corp.,* 497 F.Supp.2d at 1088-89. On July 22, 2008, the California Court of Appeal, Fourth Appellate District, issued a decision consistent with Defendant's view in *Brinker Restaurant Corp. v. Superior Court*,--- Cal.Rptr.3d ----, 2008 WL 2806613 (Cal.App. 4 Dist., July 22, 2008).

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The named plaintiffs in *Brinker,* employees of Brinker Restaurant Corporation which operated restaurants such as Chili's Grill & Bar, Romani's Macaroni Grill and Maggiano's Little Italy, asserted three types of wage and hour violations - rest break violations, meal period violations, and off-the-clock/time shaving violations. *Id.* at *2-3. The trial court certified the class, finding that common alleged issues of meal and rest violations predominated, even though "a determination that [Brinker] need not force employees to take breaks may require some individualized discovery." *Id.* at *9.

The court of appeal disagreed, explaining that in a wage and hour case, in order to determine if common issues of fact predominated, the trial court was required "to determine the elements of the plaintiffs' claims. *Id.* at 10. The trial court, however, did not reach the issue of what law applied to the claims. *Id.* By not resolving the applicable law, a "threshold issue," the trial court abused its discretion. *Id.* The court of appeal further explained that had the court properly determined the applicable law, it would have denied class certification:

> Had the [trial] court properly determined that (1) employees need be afforded only one 10-minute rest break every four hours "or major fraction thereof" (Reg. 11050(12)(A)), (2) rest breaks need be afforded in the middle of that four-hour period only when "practicable," and (3) employers are not required to ensure that employees take the rest breaks properly provided to them in accordance with the provisions of IWC Wage Order No. 5, only individual questions would have remained, and the court in the proper exercise of its legal discretion would have denied class certification with respect to plaintiffs' rest break claims because the trier of fact cannot determine on a class-wide basis whether members of the proposed class of Brinker employees missed rest breaks as a result of a supervisor's coercion or the employee's uncoerced choice to waive such breaks and continue working. Individual questions would also predominate as to whether employees received a full 10-minute rest period, or whether the period was interrupted. *The issue of whether rest periods are prohibited or voluntarily declined is by its nature an individual inquiry.*

Id. at *15 (emphasis added). Based on this reasoning, the *Brinker* court vacated the previous class certification order and denied, with prejudice, certification of plaintiffs' rest, meal period and off-the-clock subclasses. *Id.* at *25.

The Court concludes that this recent decision in *Brinker* provides a good indication of

how the California Supreme Court would resolve the issue. If the issue were before it, the California Supreme Court would adopt Defendant's construction of the meal and rest period provisions. Having resolved this legal question for purposes of Defendant's motion, it is apparent that Plaintiff has failed to identify any theory of liability that present common questions that predominate.

Plaintiff's theory appears to be that the McDonald's was too busy to give employees a meaningful opportunity to take break. Assessing whether a McDonald's employee was *authorized* by his or her manger to take a rest or meal period would require an individualized, highly fact-specific inquiry to determine whether a divergent method applied in a particular restaurant, by particular managers, to particular shifts, to particular crew members.

Plaintiff nonetheless argues that common questions predominate because she seeks only to represent those employees who, like herself, were subjected to "late" breaks. What matters, contends Plaintiff, is not whether or how the employees were authorized to take breaks, but ***when*** the breaks were provided. (Opp'n at 17.) To support her claims, Plaintiff has submitted a sampling of time punch meal and rest break data for McDonald's non-exempt California restaurant employees from March 2006 through March 1, 2008 (Lamb Dec., ¶¶ 3-4; Compendium, Ex. 2), and time punch summary reports of various employees. (Compendium, Ex. 3.)

Plaintiff attempts to avoid *Brinker* by redefining the Class. However, even considering Plaintiff's newly defined class, the Court finds that individual questions would still predominate. The Court cannot infer from the summary reports of various employees a company-wide policy of not authorizing meal or rest periods. First, there is no financial incentive for an employee to clock in and out for a ten-minute rest period, since that employee will get paid regardless. Thus, without other evidence, the Court cannot assume that the employees accurately recorded the timing of their breaks. This is especially true in light of Defendant's evidence - declarations by store managers - that often an employee will take a rest period without punching in and out, despite being instructed to do so (Id., Arias Dec., ¶ 20; Allen Dec., ¶ 24; Lee Dec., ¶ 19; Alania Dec., ¶ 12); and that often, employees fail to clock out for meal periods when taken. (Id., Fajardo Dec., ¶ 16; Gutierrez Dec., ¶ 20; Hernandez Dec., ¶ 15.) Second, these time records actually demonstrate the individual nature of the inquiry. Some of the employees clocked out for their full 30 minute meal periods or ten-minute breaks most of the time, and some appear to have clocked out only part of the time. Moreover, Defendant has submitted evidence showing that authorizations to take rest periods and meal breaks vary from manager to manager, and also vary from store to store. (Defendant's Appendix of Evidence, Alania Dec., ¶¶ 12-13; Allen

Dec., ¶¶ 13-14; Gutierrez Dec., ¶ 13; Arias Dec., ¶¶ 10-11,13; Jones Dec., ¶¶ 12-13; Miguel Dec., ¶ 15; Romero Dec., ¶ 8; Lee Dec., ¶ 13; Hernandez Dec., ¶ 12; Garcia Dec., ¶¶ 15-16).

Based on the evidence provided, an employee may have taken a lawful ten-minute break during the first four hour period of a shift, but simply forgot to punch out. On the other hand, the evidence might also show that in a particular case the store manager instructed an employee to help a customer rather than take the ten-minute break. Such an instruction could be viewed as the employer not "providing" a meal break; however, it is an individual question that cannot be resolved class wide. Accordingly, the Court finds that individualized issues predominate because liability cannot be established without individual trials for each class member. Because the Court concludes that certification of the Meal and Rest Period Sub-Class is inappropriate on this ground, the Court does not address the parties' other arguments regarding certification.

Lastly, with respect to Plaintiff's class claims regarding inaccurate wage statements, failure to pay overtime, and unfair competition, these claims are wholly derivative of Plaintiff's meal and rest period claims. Therefore, certification of the Wage Sub-Class fails as well.

IV. <u>CONCLUSION</u>

Because the Court hearing on Defendant's motion to deny certification went forward on August 18, 2008, Plaintiff's *Ex Parte* Application for an Order Continuing Hearing on Defendant's Motion to Deny Class Certification and Plaintiff's Motion for Class Certification to be Heard Concurrently is MOOT.

For the foregoing reasons, the Court DENIES Defendant's Motion to Deny Class Certification. Accordingly, Plaintiff's Motion for Class Certification is MOOT.

IT IS SO ORDERED.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2029 Century Park East, Suite 2400, Los Angeles, CA 90067. On September 18, 2008, I served the foregoing document(s) described as: **BRINKER'S ANSWER TO PLAINTIFFS' PETITION FOR REVIEW** on the interested party(ies) below, using the following means:

SEE ATTACHED SERVICE LIST

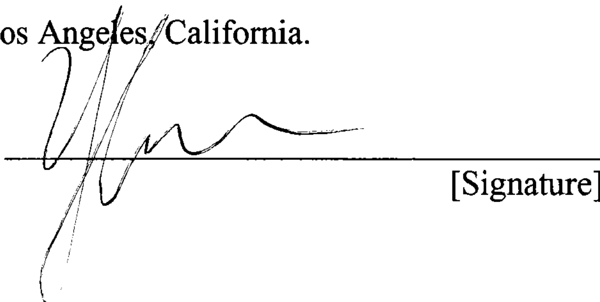
☒ BY UNITED STATES MAIL I enclosed the documents in a sealed envelope or package addressed to the respective address(es) of the party(ies) stated above and placed the envelope(s) for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid at Los Angeles, California.

☒ BY OVERNIGHT DELIVERY I enclosed the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the respective address(es) of the party(ies) stated above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

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

☐ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on September 18, 2008 at Los Angeles, California.



Yvonne Shawver
[Print Name of Person Executing Proof]

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