S166350

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC., and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO,

Respondent.

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE RADER and SANTANA ALVARADO,

Real Parties in Interest.

PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, CASE NO. D049331, GRANTING A WRIT OF MANDATE TO THE SUPERIOR COURT FOR THE COUNTY OF SAN DIEGO, CASE NO. GIC834348 HONORABLE PATRICIA A.Y. COWETT, JUDGE

BRINKER'S SUPPLEMENTAL BRIEF PURSUANT TO RULE 8.520(d)

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Brinker Restaurant Corporation, Brinker International, Inc., and Brinker International Payroll Company, L.P. ("Brinker") file this supplemental brief pursuant to Rule 8.520(d) of the California Rules of Court to bring this Court's attention to a recent federal decision, *Marlo v. United Parcel Service, Inc.* (C.D.Cal., May 5, 2009, No. CV 03-04336) 2009 WL 1258491 [Pregerson, J.], that bears on the question of whether employers must provide meal periods, or also ensure that they are taken. The *Marlo* decision is appropriately raised in a supplemental brief because it was issued on May 5, 2009, after Brinker had filed its Answer Brief on the Merits. (Cal. Rules of Court, rule 8.520(d) ["A party may file a supplemental brief limited to new authorities . . . or other matters that were not available in time to be included in a party's brief on the merits."].)

In *Marlo*, the plaintiff argued – as Plaintiffs do here – "that employers have an affirmative obligation to ensure that workers are actually relieved of all duty during the required meal period." (*Marlo, supra*, 2009 WL 1258491 at *7.) The *Marlo* defendant responded "that it need only provide nonexempt employees the opportunity to take a meal break, not to ensure that meal breaks are actually taken." (*Ibid.*) The defendant further argued that "employers have no obligation to keep track of whether or not their employees actually take the meal period that is provided." (*Id.* at *9.)

Agreeing with the defendant, the *Marlo* court held that Labor Code sections 512 and 226.7, as well as the applicable wage order, "require that employers make a meal period *available* to employees, but place them under no further obligations." (*Marlo, supra*, 2009 WL 1258491 at *9, original emphasis.)[1] It explained:

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[1] The court observed that although the language of section 11(A) of Industrial Welfare Commission ("IWC") Wage Order No. 9 – identical to the language of section 11(A) of IWC Wage Order No. 5, applicable to

> The Court agrees with [defendant] that this is the most natural reading of the statute's language. The Court recognizes that the language used by the [*Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949] court contemplates an affirmative obligation on employers to ensure that employees are relieved of all duty during a meal period. So far as the court can tell, however, the majority of cases addressing *Cicairos* have held that the obligation is one to make a meal period *available.*

(*Ibid.*, citing cases, original emphasis.)

Notably, the *Marlo* plaintiff claimed not to be advocating that "an employer must 'force' an employee to take a break," but only that an employee must be "relieved of all duties so that the employee may take his break." (*Marlo*, *supra*, 2009 WL 1258491 at *9.) The district court concluded that the parties' approaches "primarily differ in phrasing" – both agree that "the opportunity to take a meal break must be a meaningful one for it to count as a meal break 'provided' by the employer." (*Id.* at *10.) Nevertheless, the court found the "'make available' language preferable to the language proposed by [plaintiff], that the employer has an 'affirmative obligation to ensure that the employee is relieved of all duties.'" (*Ibid.*) It elaborated:

> This phrasing from *Cicairos* – especially the term "ensure" – suggests that an employer's obligation is to actually determine that the employee is no longer engaged in job duties, i.e., to *force* a break. Even if [plaintiff] does not suggest that a forced break is required, the

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Brinker employees – is "slightly different" from the language of the Labor Code provisions, it is "consistent . . . with the word 'provide.'" (*Marlo*, *supra*, 2009 WL 1258491 at *9.) The court further noted that section 11(B) of Wage Order No. 9 – like section 11(B) of Wage Order No. 5 – actually uses the word "provide[]." (*Ibid.*)

> Court has some concerns that an instruction using this language would be misleading and/or confusing for a jury. Rather, consistent with the various courts cited above, the Court finds that the employer's obligation is to make a meal period available to an employee.

(*Ibid.*, original emphasis.)

Marlo adds to the list of nine federal courts in California to hold that employers must only provide meal periods to their employees, not ensure that they are taken.[2]

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[2] *Wren v. RGIS Inventory Specialists* (N.D.Cal., Feb. 6, 2009, No. C-06-5778) 2009 WL 301819, *29; *Watson-Smith v. Spherion Pacific Workforce, LLC* (N.D.Cal., Dec. 12, 2008, No. C 07-05774) 2008 WL 5221084, *3; *Kimoto v. McDonald's Corps.* (C.D.Cal., Aug. 19, 2008, No. CV 06-3032) 2008 WL 4690536, *4-6; *Gabriella v. Wells Fargo Financial, Inc.* (N.D.Cal., Aug. 4, 2008, No. C06-4347) 2008 WL 3200190, *3; *Perez v. Safety-Kleen Systems, Inc.* (N.D.Cal. 2008) 253 F.R.D 508, 515; *Kenny v. Supercuts, Inc.* (N.D.Cal. 2008) 252 F.R.D. 641, 645; *Salazar v. Avis Budget Group, Inc.* (S.D.Cal. 2008) 251 F.R.D. 529, 533; *Brown v. Federal Express Corp.* (C.D.Cal. 2008) 249 F.R.D. 580, 585; and *White v. Starbucks Corp.* (N.D.Cal. 2007) 497 F.Supp.2d 1080, 1089. (See Brinker's Answer Brief on the Merits at pp. 55-57.)

Respectfully submitted,

Dated: June 1, 2009

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CERTIFICATE OF COMPLIANCE

[Cal. Rules of Court, Rule 8.520(d)]

This brief consists of 832 words as counted by the Microsoft Word version 2002 word processing program used to generate the brief.

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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, California 90067. On June 1, 2009, I served the foregoing document described as: **BRINKER'S SUPPLEMENTAL BRIEF PURSUANT TO RULE 8.520(d)** on the interested parties below, using the following means:

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Serena L. Steiner
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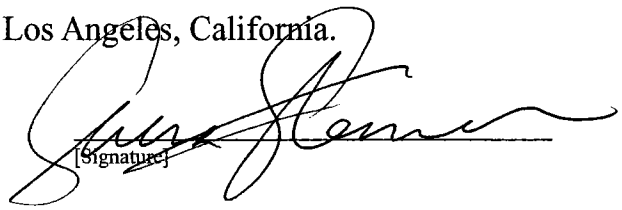
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