No. S166350

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

vs.

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

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE RADER and SANTANA ALVARADO,
Real Parties in Interest.

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

REPLY BRIEF ON THE MERITS

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I. INTRODUCTION

Brinker's answer urges this Court to interpret California's critical meal period and rest break protections in a fundamentally flawed way.

On the core meal period compliance question, Brinker highlights a single word in the statutory scheme—"provide"—and contends, based on a dictionary definition, that California employers need only make meal periods "available" to workers. Yet the Wage Orders the Legislature intended to "codify" unquestionably require employers to affirmatively relieve workers of duty so they may actually *take* those meal periods.[1] According to Brinker, the Wage Orders do not matter; all that matters is that one word—"provide."

Brinker's interpretation is deeply flawed. It ignores the Labor Code's plain language, which expressly incorporates the Wage Orders' compliance standards (using the word "provide" to simultaneously reference the Orders' mandatory meal period requirement and the permissive rest break requirement). It contravenes the Legislature's expressly-stated intent, which was to "codify" those standards. It would dramatically weaken, not "codify," those standards, the meaning of which has been settled for decades.

The correct statutory interpretation approach does not consider just the word "provide," but places it in context, harmonizing it with adjacent statutes on the same subject from the same legislative session. It considers the Legislature's overarching reason for entering this field of regulation in 1999, for the first time in over ninety years—which was to *preserve* worker protections, not relax them.

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[1] Unless otherwise specified, "Wage Orders" refers to Order 5 of the Industrial Welfare Commission ("IWC") (8 Cal. Code Regs. ("CCR") §11050), and statutory references are to the Labor Code.

Most importantly, it considers the Wage Orders' language and the IWC's intent in drafting them. When the Legislature enacted section 226.7, it was "fully aware of the IWC's wage orders," making *them* a critical source of meaning. *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1110 (2007).

This is plaintiffs' approach to statutory interpretation. It leads inexorably to the conclusion that the Court of Appeal erroneously decided each of the four meal period and rest break issues discussed below, and contravened the settled rule of *Industrial Welfare Commission v. Superior Court*, 27 Cal.3d 690 (1980), that Wage Orders may impose protections greater than the Labor Code's minimum floor.

As for class certification, Brinker attempts to mis-frame the issues and draw attention away from the fundamental errors in the Court of Appeal's approach to review. The Court of Appeal reweighed the evidence, plain and simple, contrary to *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319 (2004). Unable to refute that as a factual matter, Brinker attempts to characterize *Sav-on* as "inapplicable." It is not.

Where, as here, the trial court expressly finds that common questions predominate regardless of how any underlying interpretive disputes are resolved, the reviewing court must review *that* finding for substantial evidence under *Sav-on*. The Court of Appeal utterly failed to do so. Instead, it reached and decided a series of common legal questions, none of which was enmeshed with class certification issues. No precedent of this Court sanctions that approach.

This Court should preserve the class action device as an enforcement mechanism for workers in wage and hour cases. *Gentry v. Superior Court*, 42 Cal.4th 443 (2007). The Court of Appeal's judgment should be reversed, and the class certification order reinstated.

II. STATUTORY INTERPRETATION PRINCIPLES AND BRINKER'S FALSE FRAMING OF THE ISSUES

The parties agree that the Legislature intended to "codify" the "existing" Wage Orders' meal period provisions when it enacted both section 226.7 and section 512. ABM5, 44, 46; OBM58-62, 90-93.[2] The parties disagree, however, on how to determine what the "existing" Wage Orders meant when they were "codified"—and therefore on what meaning the Legislature "codified" by enacting these two statutes.

Brinker's approach would disregard the Wage Orders' text entirely. Brinker argues that because the codifying statutes use the word "provide," the codified Orders (no matter their text) also must have meant "provide" (whatever "provide" means). *E.g.*, ABM 5, 38, 39, 44, *passim*. According to Brinker, "all that matters is how the Legislature interpreted [the Wage Orders'] language when it 'codified' it in 2000." *Id.* 44.

Brinker's approach is flawed for several reasons, each of which is discussed in detail below (Part III.A-C; pp. 5-15).

First, while it purports to be a "plain-language" reading, it ignores parts of the codifying statutes' plain language—namely, the parts that expressly incorporate the Wage Orders' compliance standards. In this case, the Wage Orders' plain text prohibits employers from permitting employees to work more than five hours without relieving them of duty for a meal period—an interpretation, moreover, that the Orders' rich adoption, amendment and enforcement history unwaveringly supports.

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[2] "ABM" and "OBM" mean the Answer and Opening Briefs on the Merits. "MJN" refers to the exhibits to motions for judicial notice filed on 01/20, 04/20, and 07/06/09. "RJNSC" refers to plaintiffs' request for judicial notice filed with this Court on 08/29/08. "Brinker MJN" refers to Brinker's motion for judicial notice. "PE," "RJN," and "Slip op." have the same meanings as in the OBM.

Second, it is contrary to this Court's statutory interpretation precedents—which require, among other things, that statutes addressing the same subject (especially those enacted during the same legislative session) be read together. Here, sections 512 and 226.7 must be read collectively, together with the Wage Orders they "codify," as "blending into each other and forming a single statute."[3]

Third, it leads to a false framing of the core meal period compliance question. Over and over, Brinker's brief characterizes that question as "'provide' vs. 'ensure.'" *E.g.*, ABM1-2, 22, 24-26, 35-39, *passim*. That is not the question. The question is what does "provide" mean as used in these particular statutes and Wage Orders? Does "provide" mean "affirmatively relieve of duty" (as held in *Cicairos*) or does it mean "make available" (as held in *Brinker*)?

At bottom, the parties have presented competing text-based interpretations of the word "provide" as used in sections 226.7, 512 and the Wage Orders. If multiple interpretations are reasonable, then the word is ambiguous, and the Court must "look to extrinsic sources" to determine its meaning. *Murphy*, 40 Cal.4th at 1105. Because, as the parties agree, the Legislature intended to "codify" the Wage Orders, the best indicia of meaning is the language of the Wage Orders themselves.

III. THE MEAL PERIOD COMPLIANCE ISSUE

The Wage Orders impose on employers an affirmative duty to ensure that workers are relieved of duty for their meal periods; employers may not merely "offer" or make meal periods "available." Brinker contends that statutes expressly intended to "codify" the Orders (and

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[3] *Meija v. Reed*, 31 Cal.4th 657, 663 (2003); *see Garcia v. McCutchen*, 16 Cal.4th 469, 476 (1997); *Sacramento & San Joaquin Drainage Dist. v. Riley*, 199 Cal. 668, 676 (1926).

remedy employer non-compliance) instead radically changed them—when nothing in the legislative history reveals any such intent. Read in context instead of isolation, the word "provide" is consistent with the compliance standard the Legislature "codified" in sections 226.7 and 512.

A. The Wage Orders' Adoption History Shows that Employers Must Ensure that Workers Are Relieved of Duty for Meal Periods

From the beginning, the IWC intended to require employers to affirmatively relieve workers of duty for thirty-minute meal periods. The earliest Order with meal period language prohibited employers from "permitt[ing] [employees] to return to work in less than one-half hour." Wage Order 2, ¶1(20) (Feb. 14, 1916, eff. Apr. 14, 1916) (MJN Ex. 76). Another early Order stated: "The employer is responsible for seeing that the time is taken." Order 9 Amended, ¶9(a) (Jun. 21, 1933, eff. Aug. 28, 1933) (MJN Ex. 141).

In 1943, the IWC continued this requirement using the basic language still in the Orders today: "No employer shall employ any woman or minor for a work period of more than five (5) hours without an allowance of not less than thirty (30) minutes for a meal." Order 5NS(¶3(d)) (Apr. 14, 1943, eff. Jun. 28, 1943) (MJN Ex. 12). The IWC also adopted the definition of "employ" still in place today: "engage, suffer or permit to work." *Id.* ¶2(c).

Hence, in 1943 and now, "no employer shall employ any person" means "no employer shall *permit* any person to work" without the specified meals. This language was "necessary to ***insure*** a meal period after not more than 5 hours of work in order to protect the health of [workers]." Minutes of Meeting of IWC (Apr. 14, 1943) (MJN Ex. 302; 703439106(¶15)) (emphasis added). Eight 1943 Wage Boards concurred

that this language would protect worker health by "insur[ing]" proper meal periods."[4]

B. Brinker's "Plain-Language" Reading of the Statues and Wage Orders Ignores Parts of The Plain Language

1. Section 226.7

Focusing on the word "provide," Brinker contends that section 226.7's "plain language" merely requires employers to "offer" meal periods. ABM5-7, 26-28. Brinker's so-called "plain-language" argument ignores parts of the plain language.

The first sentence of section 226.7(b) contains language modifying the word "provide": "If an employer fails to *provide…in accordance with an applicable order of the [IWC].*" Lab. Code §226.7(b) (emphasis added). Section 226.7(a) contains the same modifying language: "No employer shall require any employee to work during any meal or rest period *mandated by an applicable order of the [IWC].*" *Id.* §226.7(a) (emphasis added).

One cannot determine what it means to "provide" a meal or rest period "in accordance with an applicable [IWC] order" without considering the "applicable orders."[5] Because §226.7 specifically references the Wage Orders, they are considered "incorporated" into the statute. *See People v. Cooper*, 27 Cal.4th 38, 44 (2002).

The meal period compliance standard incorporated into section 226.7 states: "No employer shall employ any person for a work period of

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[4] *Id.*; MJN Exs. 295 (703415197(¶19)); 296 (703423109(¶23)); 300 (703437110(¶13), 703437144(¶12)); 303 (703445153(¶17); 703445194(¶16), 703445227(¶18)).

[5] The parties agree that the Orders to which §226.7 refers are the *current* orders, issued in June 2000. ABM6, 44-45; Part IV.D.1, below (p. 28).

more than five hours without a meal period...." 8CCR§11050(¶11(A)). The rest period standard imposes a less stringent requirement: "Every employer shall *authorize and permit* all employees to take rest periods...." *Id.* ¶12(A) (emphasis added). As used in §226.7, the word "provide" refers to either of these two compliance standards, depending on the context.

Brinker highlights the word "require" in §226.7(a) (ABM27), but that word is modified by additional text expressly referencing the Wage Orders. Also, §226.7(b), which created the remedy this case seeks to enforce, references *not* §226.7(a), but the *Wage Orders*. Nothing in the word "require" suggests an intent to *displace* the Wage Orders with a more lenient standard, as Brinker claims. On the contrary, the *remedy* provision expressly *incorporates* them.

Brinker asserts that if the Legislature "intended to prohibit employers 'from allowing employees' to work" during meal periods, "it would have said so" by saying "require or permit" in §226.7. ABM27-28. However, "require or permit" would not have worked in sentences meant to reference the Orders' *two* compliance standards.

For meal periods, the Legislature had no need to say "require or permit" because the Orders' definition of "employ" already includes that concept. 8CCR§11050(¶2(D)). For rest breaks, "require or permit" would have *altered* (not "codified") the compliance standard. "No employer shall *require or permit* any person to work without...rest periods" is materially different from "Every employer shall *authorize and permit*...rest periods."

The word "provide" serves to simultaneously capture, in one sentence, the Wage Orders' directive meal period compliance standard ("no employer shall employ") and its permissive rest break compliance standard ("every employer shall authorize and permit"). Even this Court has used the word in that generic way. *Murphy*, 40 Cal.4th at 1105 ("wage orders

mandating the *provision* of meal and rest periods" date back to "1916 and 1932, respectively" (emphasis added)). So read, there is nothing inconsistent between section 226.7 and the Wage Orders' longstanding meal period compliance requirement.

2. The Wage Orders

Because Brinker's analysis of the Wage Orders also ignores parts of the text, Brinker grievously mischaracterizes the Orders.

Relying entirely on the Orders' *remedy* provisions (¶¶11(B), 12(B)), Brinker asserts that the IWC amended the Orders "to clarify that employers need only 'provide' meal periods to their employees." ABM25; *see id.* 6, 29. Brinker insists that the Orders "use the term 'provide' to describe an employer's obligation," and "it was *that* [obligation] that section 226.7 referenced." ABM8, 44-45 (emphasis original); *id.* 41-42.

Those assertions are incorrect.

When the IWC added the remedy provisions in June 2000, it left the compliance language (¶¶11(A), 12(A)) completely untouched. Brinker avoids mentioning that. ABM25, 41-42, 44-45. When the Legislature enacted §226.7 three months later, it adopted *those* compliance standards.

The Orders' remedy provisions (¶¶11(B), 12(B)) make this plain. Like §226.7(b), they contain no compliance language at all. Rather, they use the word "provide" to incorporate the adjacent paragraphs' compliance standards: "If an employer fails to *provide* an employee a meal period *in accordance with the applicable provisions of this Order*...." 8CCR§11050(¶11(B)) (emphasis added). Notably, identical language is used for rest breaks: "If an employer fails to *provide* an employee a rest period *in accordance with the applicable provisions of this Order*...." *Id.* §11050(¶12(B)) (emphasis added).

In other words, like §226.7, the Orders' remedy provisions expressly direct the reader to the earlier paragraphs' *compliance* provisions, using "provide" to refer generically to both meal and rest periods. The "employer's obligation" resides in the compliance paragraphs, not the remedy paragraphs. *They* are what the Legislature referenced in §226.7.

Brinker contends that the Orders "in no way indicate[] that employers are...obligated to *ensure* that the provided meal periods are taken." ABM29-30 (emphasis in original). Again, Brinker ignores the plain language, the definition of the word "employ," and the stark contrast between the meal period standard ("no employer shall employ") and the rest break standard ("authorize and permit"). Under this plain language, employers may not "permit" employees to work during their meal periods. Put another way, employers must *ensure* that their employees take their meal periods and perform no work during them.

Brinker contends that the early Wage Orders support its contrary interpretation (ABM30), but they do not.

Order 18 (Dec. 4, 1931) (MJN Ex. 11), which Brinker cites ("no woman or minor shall be permitted to return to work in less than one-half (1/2) hour"), means exactly the same thing as the current Orders: "No employer shall employ [*i.e.*, "engage, suffer or *permit* to work"] any person...without a meal period of not less than 30 minutes." 8CCR§11050(¶¶2(D), 11(A)).

Two other early Orders that Brinker cites (ABM30) both use the "no employer shall employ" language, one for minimum wages and the other maximum work hours. Orders 12(¶1) (1920), 5NS(¶3(a)) (1943) (MJN Exs. 9, 12). These Orders prohibit employers from permitting employees to work without the specified wages or maximum hours—just like the current Orders do with meal periods.

Brinker contends that, notwithstanding the differing language, the Wage Orders' meal and rest period requirements are identical, and that "*neither* provision creates an employer duty to *ensure* that employees take the breaks available to them." ABM31 (emphasis original). Brinker says the differing *lengths* of the two types of breaks (30-minute meals vs. 10-minute rests) explains the differing language. *Id.* If this were true, the IWC would not have used "authorize and permit" for *both* meal periods *and* rest breaks in Order 14. OBM38 (citing 8CCR§11050(¶¶11(A), 12(A)).

Brinker responds to the 1979 transcript explaining Order 14's amendment (OBM51-52) by arguing that "[n]othing indicates" that "Order 14's pre-amendment meal period provision required employers to ensure that all offered meal periods were taken." ABM44. That is precisely what it required. Based on that same transcript, one federal judge "strongly suspects" that "no employer shall employ" "imposes an affirmative duty on an employer to ensure that meal periods are taken." *Valenzuela v. Giumarra Vineyards Corp.*, 614 F.Supp.2d 1089, 1098n.3 (E.D. Cal. 2009).

The Court should decline Brinker's invitation to construe the word "provide" in a vacuum that ignores §226.7's full text and that dismisses the compliance standards of Orders that §226.7(b) explicitly enforces.

3. Section 512

Brinker's reading of §512 also focuses on the word "providing"—again out of context—and ignores the statute's full text. ABM32-34.

The full text closely parallels the Wage Orders. While the Orders say "No employer shall employ any person...without a meal period," §512 says "An employer may not employ any person...without providing a meal period...." The operative word in both provisions is "*employ*," meaning "engage, suffer or *permit* to work." Both provisions prohibit employers

from *permitting* employees to work without stopping for the specified meal periods.

Brinker contends that, by inserting the word "providing," the Legislature negated the words "may not employ" and changed them to a permissive, "may employ" standard—substantively diminishing a 90-year-old compliance standard. If the Legislature had intended to do that, it would not have retained the "may not employ" language, which prohibits employers from *permitting* employees to work without their meal periods. The Court should not adopt such an extreme departure from the ordinary meaning of "may not employ."

Brinker's argument also ignores the rest of the sentence in which the word "providing" appears: "...except that if the total work period per day...is no more than six hours, *the meal period may be waived by mutual consent of both the employer and employee*." Lab. Code §512(a) (emphasis added). If the Legislature intended "providing" to mean that employees can decline all "offered" meal periods anyway, it would not have specified precise circumstances in which they can be "waived."

Brinker's only response is that "skipping or shortening" a meal is different from "waiving" it (ABM34-35), but both involve "intentional relinquishment of a known right"—*viz.*, the right to take a meal, which even Brinker's "offer" standard theoretically affords. *City of Ukiah v. Fones*, 64 Cal.2d 104, 107 (1966); Part VI.D, below (pp. 49-50). Brinker says §512 permits employees to "decline" their meals, which is the same as "waiving" them. The express waiver language would become meaningless.

Brinker offers no response to the point that §512(c) and (d) create exemptions to the meal period requirement for certain workers, which would be unnecessary if all meal periods could be declined anyway. OBM49-50.

Brinker urges the Court to consult a dictionary to determine what "providing" means. ABM32-34. Doing so would mean ignoring not only the rest of §512's language, but also the context in which the word is used in an adjacent, later-enacted statute (§226.7), and in the Orders, to which §226.7 twice refers. These enactments must be "read together." *Mejia*, 31 Cal.4th at 663. Brinker's dictionary definition of "providing" makes no sense in the context of §226.7, where the word is used to refer to two plainly different compliance standards for meal periods and rest breaks—only one of which is consistent with Brinker's "make available" definition. Section 226.7 is the later-chaptered statute, and it prevails. Gov. Code §9605; *In re Thierry S.*, 19 Cal.3d 727, 738-39 (1977).

Instead, the Court should reconcile the enactments. *E.g.*, *People v. Lamas*, 42 Cal.4th 516, 525 (2007). Plaintiffs' interpretation—that "provide" references the Orders' two differing compliance standards for meal periods and rest breaks, depending on the context—is a reasonable one supported by the text of §226.7 and the Orders (¶¶11(B), 12(B)). Nothing in section 512 precludes it.

C. Brinker Misinterprets the Legislative History

The evidence that the Legislature intended to "codify" the Orders' "existing" meal period provisions when it enacted sections 226.7 and 512 is overwhelming. *E.g.*, AB 2509, Senate Third Reading (08/28/00) at 4 (MJN Ex. 61) (§226.7 "[p]laces into statute the [Orders'] existing provisions"); AB 60, Legislative Counsel Digest (07/21/99) at 2 (MJN Ex. 58) (§512 enacted to "codify" "existing wage orders"); SB 88, Senate Third Reading (08/16/00) at 5 (MJN Ex. 64) (same). *Accord*: *Murphy*, 40 Cal.4th at 1107 (§226.7 "intended to track" Orders' "existing provisions").

Brinker relies heavily on legislative reports using the word "provide" to summarize the Orders. *E.g.*, ABM38-39, 44 (quoting AB 2509, Senate

Third Reading (08/28/00) at 4 (MJN Ex. 61)).[6] According to Brinker, because that is how the Legislature summarized the Orders, that is what the Orders mean—regardless of what the Orders themselves say or what their adoption history shows. *E.g.*, ABM44.

This Court rejected an identical argument in *Murphy*.

In *Murphy*, a floor analysis stated that §226.7 "codif[ied] the lower *penalty* amounts adopted by the [IWC]." *Id.* at 1110 (quoting AB 2509, Assembly Floor Analysis (08/25/00) (emphasis added)). This Court did not accept that as conclusive. Instead, it held that "[t]he manner in which the IWC used the word 'penalty' undermines the [lower court's] reliance on the use of the word in the legislative history." *Id.* The word "penalty" in the reports "should be informed by the way the IWC was using that word." *Id.* (citing Transcript, IWC Public Hearing (06/30/00)).

Put another way, to determine what the "codified" Wage Orders meant, the Court logically turned to the Orders and *their* adoption history—not a summary in a floor analysis.

The Wage Orders and *their* adoption history unwaveringly support a mandatory meal period compliance standard. As for "provide," the IWC often uses that word to refer generically to the Orders' two differing compliance standards for meal and rest periods. *E.g.*, Interpretive Bulletin No. 89-1, at 796410105-06 (06/13/89) (MJN Ex. 372); Transcript of Public Meeting of IWC, at 712427170 (05/05/00) (MJN Ex. 349). That is how it

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[6] Brinker also cites reports saying "require," but that word is always modified with references to the Orders. ABM37 (citing, *e.g.*, AB 2509, Leg. Counsel's Digest (02/24/00) at 3 (Brinker MJNEx. 1) ("requires any employee to work during a meal or rest period *mandated by an order of the commission*" (emphasis added)). Like "provide," "require" in these reports should not be interpreted in a manner inconsistent with the Orders. *Murphy*, 40 Cal.4th at 1110 (declining to treat word "penalty" in one of same reports as conclusive).

was used in the hearing transcript Brinker highlights. ABM42-43 (citing Transcript of Public Hearing of IWC (06/30/00)). That is how it was used in the Orders' remedy paragraphs (¶¶11(B), 12(B)), and in section 226.7, which "codified" them.[7]

Brinker's interpretation is also contrary to the legislative history of AB 60, which enacted §512. To read the word "providing" in §512 as Brinker suggests would contravene AB 60's overarching purpose, which was to *forestall* attempts to weaken the Wage Orders, not weaken them itself. OBM61-62.[8] Brinker's only response to that argument appears in footnotes with no analysis. ABM39n.10, 79n.31.

In AB 60, the Legislature not only "codified" the Orders' meal period compliance standard, but also "reinstated" five Orders containing that standard. AB 60, §21, at 14 (MJN Ex. 58) ("reinstat[ing]" Order 5-89 (amended 1993) (MJN Ex. 158) and four others).[9] Simultaneously, the Legislature rescinded five Orders with problematic overtime language. *Id.* (declaring Order 5-98 (MJN Ex. 20) and four others "null and void"). Had the Legislature wished to change the Orders' meal period requirement—by adding the word "provide" or otherwise—it would have rescinded, not reinstated, Orders containing that requirement (like it did for overtime).

Three months *after* the IWC continued the same meal period language in its Orders issued in June 2000, the Legislature explicitly incorporated those Orders into §226.7 and restated its intent to "codify" them. If the Legislature wished to change the Orders, it would not have

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[7] *Accord*: *Murphy*, 40 Cal.4th at 1105 ("wage orders mandating the provision of meal and rest periods").

[8] *See* Amicus Letter of former Assemblyman Wally Knox (AB 60 author), 09/11/08 ("Knox Letter"), at 4.

[9] "An uncodified section is part of the statutory law." *Carter v. California Dep't of Veterans Affairs*, 38 Cal.4th 914, 925 (2006).

referenced them in §226.7. If it believed §512 changed the Orders, it would have referenced that section instead.

An un-enacted 2003 bill to amend §226.7, which Brinker cites,[10] demonstrates the Legislature's understanding that "existing law" imposes two different compliance standards: "employers have an affirmative obligation to provide meal periods," but "only have to 'authorize and permit' a rest [period] to be taken." AB 1723, Third Reading, Senate Floor Analysis (09/08/03) at 3 (MJN Ex. 381). The Legislature considered the word "provide" consistent with the "affirmative obligation" standard.[11]

Read together, these materials steadfastly show that the Legislature intended to preserve, not weaken, the Orders' meal period compliance standard. Proof of that intent trumps even contrary plain language. *Arias v. Superior Court*, ___ Cal.4th ___, 2009 WL 1838973, *3 (Jun. 29, 2009); *Lungren v. Deukmejian*, 45 Cal.3d 727, 735 (1988).

D. Brinker Misinterprets the Enforcement History

Over twenty years ago, the DLSE's "historical" enforcement position was that employees must be "relieved of all duties" for meal periods. DLSE Op.Ltr. 1988.01.05 (MJN Ex. 34). The DLSE restated this position unequivocally in six subsequent opinion letters and its Manual. DLSE Op.Ltrs. 2001.04.02, 2001.09.17, 2002.01.28, 2002.09.04, 2003.08.13, 2003.11.03 (MJN Exs. 39-41, 43, 380, 46); DLSE Manual, §45.2.1 (June 2002) (MJN Ex. 49).

Brinker claims a 1991 letter reflects the DLSE's "original position" (ABM47-48 (citing DLSE Op.Ltr. 1991.06.03 (MJN Ex. 35)), overlooking

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[10] ABM37-38n.9 (citing AB 1723, amended 09/08/03 (2003-2004 Reg. Sess.) (Brinker MJN Ex. 2)).

[11] *Cf.* SB 1539 (2007-2008 Reg. Sess.) (02/22/08) (MJN Ex. 382) (failed bill would have defined "providing" as "giving an opportunity").

the 1988 letter and a 2003 letter (by the 1991 letter's author) confirming that "authorize and permit" is to be "contrast[ed]" with "no employer shall employ." DLSE Op.Ltr. 2003.08.13 at 1 (MJN Ex. 380).

Only the DLSE's 2008 activity, post-dating both the unpublished opinion and the DLSE's entry into this case as an amicus, is unreliable. *Murphy*, 40 Cal.4th at 1105 n.7 (DLS E actions that "flatly contradict" earlier positions in "highly politicized" meal period arena are unreliable); *Jones v. Tracy School Dist.*, 27 Cal.3d 99, 107 (1980) (rejecting DIR memorandum created "after [agency] had become an amicus curiae"; "[t]his chronology...substantially dilutes [its] authoritative force"); DLSE Publication Request (10/29/07) (MJN Ex. 55). Nothing dilutes the authoritative force of letters pre-dating these events.

E. Case Law Does Not Support Brinker's Position

None of the case law Brinker cites supports its position. AMR50-58.

1. Brinker Misconstrues *Cicairos* and *Murphy*

According to Brinker (ABM54), "an affirmative obligation to ensure that workers are actually relieved of all duty" (*Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949, 962-63 (2005)), instead of meaning what it says, merely "describ[es] an employer's obligation to provide its employees the opportunity to take a work-free meal period."

"An affirmative obligation to ensure that workers are actually relieved of duty" plainly does *not* mean merely "provide an opportunity" to stop working. *Cicairos* explains what this language means and what "affirmative" steps suffice—recording, monitoring, and scheduling meal periods. *Id.* at 962-63. "As a result of" the employer's failure to take these three affirmative steps, "most drivers ate their meals while driving" or "skipped a meal nearly every working day." *Id.* at 962.

Brinker's effort to factually distinguish *Cicairos* fails. ABM53-54. *After* explaining how the employer's conduct already caused on-duty and "skipped" meals, *Cicairos* identified "further[]" facts that exacerbated the violation ("pressur[ing] drivers" not to "stop for lunch"). 133 Cal.App.4th at 962. The law prohibits that, even Brinker concedes. But the violation was complete when the employer failed to meet its "affirmative obligation to ensure that [its drivers were] actually relieved of duty" by scheduling, monitoring, and recording their meal periods. *See id.*

Murphy confirms *Cicairos* in a slightly different factual setting. Under *Murphy*, a retail employer's affirmative obligation includes hiring adequate staff so that workers can be actually relieved of duty for their meal periods. *See* 40 Cal.4th at 1100, *passim*.

Brinker's analysis of *Murphy* (ABM50-52) ignores these *facts*, to which the Court was referring when it said plaintiff had been "forced to forego" his meal periods. 40 Cal.4th at 1113, *passim*. The opinion did not inquire into whether he "chose" to "skip or shorten" his breaks and keep working because that inquiry was irrelevant. It was enough that the employer had failed to ensure that he was, in fact, *actually* relieved of duty.

Brinker attempts to diminish the meal period recording requirement, which *Murphy* held gives employers "the evidence necessary to defend against plaintiffs' claims." *Id.* at 1114; ABM52-53. This is true whether plaintiffs claim a single missed meal or dozens. *Any* unrecorded meal period constitutes a violation.

2. Brinker's Reliance on Federal Trial-Level Decisions is Misplaced

None of the federal trial-level decisions Brinker cites (ABM55-58; Supp. Brief 06/02/09) considered the distinction between the Orders' compliance standards for meal and rest periods; the adoption history

showing the Orders impose two differing standards; or the Legislature's intent to "codify" those standards. Not surprisingly, those decisions reached the wrong conclusion.

Brinker asserts that "[n]ot a single federal case has gone the other way." ABM57. Wrong. A federal judge who took time to consider the Orders' differing standards *and* their adoption history—including the 1979 transcript surrounding Order 14's amendment—"strongly suspects" that "no employer shall employ" "imposes an affirmative duty on an employer to ensure that meal periods are taken." *Valenzuela*, 614 F.Supp.2d at 1098 n.3 (Ishii, C.J.). *Accord*: *Robles v. Sunview Vineyards of Cal., Inc.*, 2009 WL 900731, *8n.3 (E.D.Cal. Mar. 31, 2009); *Doe v. D.M. Camp & Sons*, 2009 WL 921442, *8n.2 (E.D.Cal. Mar. 31, 2009). Another federal judge agrees with *Cicairos*. *Stevens v. GCS Service, Inc.*, No. 04-1337CJC (C.D. Cal. 04/06/06), 22:12-15, 23:25-27 (RJNSC Ex. M) (Carney, J).

F. Brinker's Policy Arguments Ignore the IWC's Careful Policy-Weighing Process

Brinker claims that the Legislature "presumably" considered the "policy implications" of what it enacted. ABM58-59. Presumably so—and decided to expressly incorporate the Wage Orders' two differing compliance standards for meal periods and rest breaks. Lab. Code §226.7.

The IWC unquestionably considered policy ramifications before adopting those standards. Labor Code §§1171-88 require the IWC to extensively investigate any proposed standards, appoint Wage Boards with both employer and employee representatives, and hold multiple public hearings before adopting or amending any Orders. This lengthy, balanced process ensures that the IWC thoroughly considers every policy question employer-side interests can name.

The Wage Orders' meal period language, developed over more than 90 years of policy weighing, reflects a careful balance of every competing interest. The Legislature, who delegated this policy-making power to the IWC in the first place, chose to rely on its judgments by expressly "codifying" its meal period compliance standard. "The likely chagrin of the regulated should not obscure the underlying social need that prompts the regulation." *IWC v. Superior Court*, 27 Cal.3d at 734.

G. Regulations Established to Protect the Public Interest May Not Be Waived

Brinker admits that meal period laws protect not only worker health "but also the public health and general welfare." ABM62. However, Brinker mentions only in a footnote the argument that as a matter of law, statutes enacted to protect the public interest may not be waived. ABM35n.8; OBM76-77. By not responding, Brinker concedes this point.

IV. THE MEAL PERIOD TIMING ISSUE

The Wage Orders' plain language and adoption history makes clear that meal periods are required for *every* five-hour "work period." *This* is the standard that the Legislature codified in §§226.7 and 512.

A. Common Questions Predominate on the Meal Period Timing Claim Notwithstanding Brinker's Arguments

In response to the argument that common questions independently predominated on the timing claim, Brinker says that even if the Orders require meal periods for each five-hour "work period," payroll records would not establish Brinker's violations if the first "offered" meal was "waived." ABM120-21.

This argument has several problems. If meal periods must be ensured (*i.e.*, received and taken), not merely "made available," an unrecorded meal equals a violation, and those class members will be

entitled to compensation. For class members who *did* take the early meals Brinker required, the records *will* reveal all noncompliant succeeding work periods—regardless of the "ensure" vs. "make available" question. That is because Brinker's uniform, classwide policy undisputedly fails to authorize (much less ensure) any further meal period for employees who work more than five hours after the first one (and Brinker pays no premium wages). OBM78-79, 81 (citing record).

That is the uniform, classwide violation this claim presents. The law and Brinker's policy are common to the class. Whether the policy violates the law is the overarching common question, and it predominates over any others Brinker can identify. *See Bibo v. Federal Express, Inc.*, 2009 WL 1068880, *12 (N.D. Cal. Apr. 21, 2009) (meal period timing dispute constitutes "common question of law that unites the [subclass] members").

Brinker does not dispute that courts bear an independent duty to consider and certify appropriate subclasses. OBM80. The Court of Appeal erred by failing to do that here. At minimum, the trial court should be directed to certify a meal period timing subclass on remand.

B. Contrary to Brinker's Interpretation, The Wage Orders Contain a Clear Timing Requirement

Brinker disputes plaintiffs' interpretation of the Wage Orders (OBM82-89), arguing that they impose no timing requirement. ABM69-77, 83-85. Brinker is wrong.

1. Brinker Misconstrues the Wage Orders' Adoption and Enforcement History

Since 1952, the Wage Orders have plainly prohibited employers from employing any person for "a work period of more than five hours without a meal period...." 8CCR§11050(¶11(A)); Order 5-52, ¶11 (MJN Ex. 14). The term "work period" operates to require proper meal *timing*.

In IWC parlance, "work period" is a term of art meaning "a continuing period of hours worked." Memorandum of IWC Executive Officer, "MEAL PERIODS" (03/05/82) (MJN Ex. 376#24; 800410152). A separate "work period" precedes and follows each "meal period." *Id.* The Orders prohibit "work periods" exceeding five hours. To avoid overlong "work periods," meal periods must occur "at such *intervals* as will result in no employee working longer than five consecutive hours without an eating period." Letter from IWC Executive Officer (07/13/82), at 800410113 (MJN Ex. 376#20) (emphasis added). In other words, the Orders require "a 30-minute meal period within *each* five-hour time frame." DLSE Op.Ltr. 2003.08.13 at 2 (MJN Ex. 380) (emphasis added).

The Orders do *not* mean (as the Court of Appeal held) "that after an employee has worked five hours, he or she qualifies for a meal period at some point during the work day, no matter how long that work day may be." Memorandum of IWC Executive Officer, *supra*, at 800410152 (MJN Ex. 376#24). That interpretation is "contrary both to the IWC intent and to a reasonable reading of the order." *Id.*

Brinker misinterprets the 1952 amendment, which removed "after reporting for work" from the 1947 orders, restoring the 1943 language. Orders 5NS(¶3(d)) (1943) (prohibiting "a work period of more than five hours without...a meal"); 5R(¶11) (1947) ("more than five consecutive hours after reporting for work, without a meal period"); 5-52 (¶11) (1952) (same as 5NS) (MJN Exs. 12, 13, 14). Brinker says that "after reporting to work" was "unnecessary" because the 1943 Orders already included that limitation. ABM74.

No so. By eliminating that phrase, restoring the 1943 language, the IWC confirmed that the Orders require a meal period after *any* five-hour work period, not just the first one. Many historical materials (which

Brinker challenges plaintiffs to produce (ABM74)) confirm this, including the IWC Memorandum and Letter just quoted. In addition:

The 1943 Orders (first sentence)—which are identical to the current Orders—prohibited early lunching schedules that "leav[e] a stretch of 6 hours to be worked after lunch." Minutes of Meeting of IWC (01/29/43) 703426115 (MJN Ex. 297) (referencing Order 2NS(¶5(c)) (1942) (MJN Ex. 104)). *That* is the prohibition restored in 1952.

Similarly, the first sentence of the 1963 Orders—unchanged from the 1952 Orders and essentially identical to the current ones—required meal periods at the specified "intervals." Report and Recommendations of Wage Board for Order 12 (10/21/66), at 6 (MJN Ex. 328).

Brinker also relies on the word "consecutive," temporarily added in 1947 then removed in 1952, claiming that the IWC would have retained that word if it meant "every five consecutive hours of work." ABM74. There was no need to. The 1952 Orders restored the term of art "work period," meaning "a continuing period of hours worked." The word "consecutive" would have been redundant.

Brinker asserts that this Court's summary of Order 5-76 in *California Hotel*[12]—"A meal period of 30 minutes per 5 hours of work is generally required"—means the Orders impose no timing obligation. ABM74-75. That is incorrect. Brinker admits that Order 5-76 is identical to the current Orders—and concedes the Court of Appeal's error in thinking otherwise. ABM75&n.29. *California Hotel* should have been followed.

Brinker challenges plaintiffs' reliance on the 1993 and 1998 amendments, asserting that they merely extended a waiver right to certain employees. ABM75-77. This challenge misses plaintiffs' point, which is

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12 *California Hotel & Motel Assn. v. Industrial Welfare Commission*, 25 Cal.3d 200, 205 n.7 (1979).

what these amendments allowed employees to waive: the "second meal period on a long shift" exceeding eight hours. Statement as to the Basis, Overtime and Related Issues (Orders 1, 4, 5, 7, and 9), at 8 (MJN Ex. 30). The waiver language was needed because without it, the existing (and since unchanged) compliance language required a second meal period. *E.g.*, *id.*; IWC Charge to 1996 Wage Boards (MJN Ex. 29); Statement as to the Basis, Order 5-89 (1993 amendments) (MJN Ex. 158).

2. The Motion Picture Order Refutes Brinker's Position

Brinker contends that the motion picture Order (8CCR§11120) imposes a more explicit timing requirement, inferring therefrom that the other Orders do not. ABM72. Brinker is mistaken.

The 1963 motion picture Order (first sentence) stated: "No employer shall employ any woman or minor for a work period of more than five and one-half (5½) hours without a meal period...." Order 12-63(¶11) (MJN Ex. 249). This language (in essentials, identical to the current Orders) required "meal periods at intervals of no more than five and one-half hours...." Report and Recommendations of Wage Board for Order 12, *supra*, at 6 (MJN Ex. 328).

When revising this Order, the IWC originally wished to preserve the 5½-hour interval "for the first meal period," but "extend[]...the interval...to six hours" for "work periods in which a second or subsequent meal periods are required." *Id.* Accordingly, this sentence was drafted:

> Subsequent meal periods...shall be called not later than ***six (6)*** hours after the termination of the preceding meal period.

Order 12-68(¶11(a)) (MJN Ex. 250) (emphasis added). After further consideration, the IWC decided to also extend the *first* interval. *See id.* These two sentences resulted:

> No employer shall employ any woman or minor for a work period of more than ***six (6)*** hours without a meal period.... Subsequent meal periods...shall be called not later than ***six (6)*** hours after the termination of the preceding meal period.

Id. (emphasis added). The same result could have been accomplished without the second sentence, which emerged only because the IWC initially planned to expand only the "second and subsequent" intervals.

In 1976, a five-hour interval (instead of six) was imposed between all meals. *Compare* Order 12-76(¶11(A)) *with* Order 5-76(¶11(A)) (MJN Exs. 251, 18). When the 1968 language was restored in 1980, this merely "chang[ed] the previous five hours to six." Order 12-80(¶11(A)) & Statement as to the Basis, ¶11 (MJN Ex. 252).

In sum, the motion picture Order's second sentence, added in 1968, creates no new or unique requirement for meal periods "at intervals." That requirement already existed in the first sentence of all the Orders, had for decades, and continues today.

C. Brinker's Interpretation Would Contravene the Legislature's Intent to "Codify" Existing Wage Orders

Brinker argues that the words "per day" in §512 are "incompatible" with the Orders and abolished their timing requirement—allowing employers to schedule meals at any time during the workday, based on their own business preferences, without regard for employees' welfare. ABM66-68.

Brinker's interpretation would undermine every one of the Legislature's stated purposes in enacting §512 and AB 60.

By enacting §512, the Legislature was not attempting to weaken the Orders, but to "codify" them—as Brinker concedes. ABM5, 44, *passim.* Section 512 was part of an effort to restore the eight-hour workday, which the IWC had tried to eliminate from the Orders in 1997. OBM61-62 (citing

AB 60, Legislative Counsel Digest, *supra,* at 2). The Legislature was attempting to *forestall* future attempts to weaken the Orders, not to weaken them itself. Reading the words "per day" to suggest otherwise pushes them beyond what they will bear.

Several factors show that the Legislature was aware of and approved the Orders' longstanding timing requirement:

- First, when the Legislature enacted §512, it also "reinstated" five earlier Orders all containing that requirement. AB 60, §21, at 14 (MJN Ex. 58) (reinstating Order 5-89 (amended) (MJN Ex. 158) among others).
- Second, after the IWC continued that requirement in its 2001 Orders, the Legislature explicitly incorporated it into §226.7, stating again its intent to "codify" the Orders. AB 2509, Senate Third Reading, *supra*, at 4 (MJN Ex. 61).
- Third, the Legislature added section 512(b) in 2000 (just before §226.7), authorizing the IWC to allow meal periods "to *commence* after six hours of work" instead of five—making clear that §512 is about *timing*.

Section 512 can easily be harmonized with §226.7 and the Orders by recognizing that even if the Orders' meal period timing requirement is more stringent, it is not inconsistent. OBM90. Brinker's interpretation—that the words "per day" were meant to displace, then radically weaken, California's longstanding meal period protections—finds no support in AB 60's legislative history. The text of §226.7 and the "codified" Orders contradicts it.

Brinker counters all these indicia of intent with a single legislative report using "per day" to describe the Wage Orders' "existing" provisions, contending that such descriptions are conclusive. ABM69-70 (citing MJN

Ex. 58). *Murphy* rejected that statutory interpretation approach. 40 Cal.4th at 1110. Another report confirms that "existing" Orders "requir[e]...a 30-minute meal period *every five hours*." AB 2509, Senate Third Reading, *supra*, at 4 (MJN Ex. 61) (emphasis added).

The words "per day" represent "a mere change in phraseology," which "does not result in a change of meaning unless the intent to make such a change clearly appears." *Mosk v. Superior Court*, 25 Cal.3d 474, 493 (1979), *superseded on other grounds*, *Adams v. Commission on Judicial Performance*, 8 Cal.4th 630, 650 (1994). Even the rule against "surplusage" yields when its application would defeat legislative intent. *In re J.W.*, 29 Cal.4th 200, 209 (2002). Most likely, the words "per day" were included to satisfy the single-subject rule by topically relating §512 to restoring the eight-hour workday. *Marathon Entertainment, Inc. v. Blasi*, 42 Cal.4th 974, 988-89 (2008) (explaining "single-subject" rule).[13] The Legislature's later decision to reference the Orders, not §512, in §226.7 supports this conclusion.

Brinker invokes the Orders' rest period timing requirement ("insofar as practicable...in the middle of each work period"), claiming that the Legislature "opted not to" include one in §512. ABM68, 72 (quoting 8CCR§11090(¶12(A)). Again, Brinker is wrong. The meal period timing restriction operates by limiting the length of each "work period" to five hours. Rest break timing depends on the length of the "work periods." These are complementary ways of imposing a timing requirement.

Finally, Brinker relies on §512's "ten hours per day" language, arguing that "Plaintiffs' construction erases approximately half the relevant statutory language." ABM67-68. Not so. Brinker is the one who ignores the rest of the sentence in which "ten hours per day" appears: "*except that*

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[13] *See* Knox Letter, *supra*, at 5.

if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent...." §512(a) (emphasis added).

This language preserves and codifies the right to waive the second meal period on long shifts, which had been part of several Orders that AB 60 rendered "null and void," including Order 5-98 (¶11(C)) (MJN Ex. 20). AB 60, §21 at 14 (MJN Ex. 58). The Legislature had to identify the second meal period in order to preserve this right by stating that it could be waived.

The "ten hours" sentence confirms the Orders' longstanding timing requirement. On a ten-hour shift, if the first meal period is correctly timed (at the midpoint—the only way to avoid "work periods" exceeding five hours) a second meal period is triggered after the tenth hour. This sentence then permits that second meal period to be waived. Brinker's interpretation would mean that the first meal period could be delayed until the ninth hour, followed by a second meal period just an hour later (which could then be waived). The Legislature could not have intended that absurd result.

D. Section 516 Did Not Divest the IWC of Power to Impose More Restrictive Meal Period Standards

Brinker's heavy reliance on §516 is misplaced. ABM45-46, 77-83. Section 516 does not impact the current Orders, but even if it did, it did not withdraw the IWC's power to adopt more protective standards than the Labor Code minimums.

1. Section 516 is Irrelevant to the Current Orders

As originally enacted, §516 authorized the IWC to "adopt or amend" its meal period regulations "[n]otwithstanding any other provision of law." AB 60, §10, at 9 (MJN Ex. 58). Section 517(a) directed the IWC to issue new Orders by July 1, 2000. *Id.*, §11. On June 30, 2000, the IWC adopted the current, "2001" series of Orders. *See* Order 5-2001 (Jun. 30, 2000, eff. Jan. 1, 2001) (MJN Ex. 5) (8CCR§11050); *Murphy*, 40 Cal.4th at 1105,

1109 (IWC added pay remedy on 06/30/00).[14] The Legislature is presumed aware of this.[15]

On September 19, 2000—three months *after* the IWC issued the 2001 Orders—§516 was amended to read "[e]xcept as provided in Section 512." SB 88, §4 (MJN Ex. 63). Brinker concedes the timing point. ABM6 (§516 amended "after" current Orders). Thus, when the 2001 Orders were adopted, the IWC was unquestionably still empowered to adopt any standards consistent with worker health and welfare, "notwithstanding" §512. The later amendment to §516 is irrelevant.

The 2001 Orders were also adopted *before* the Legislature enacted §226.7. AB 2509, §7 (MJN Ex. 60). Thus, as Brinker observes (ABM44-45), the Orders §226.7 references are the current, 2001 Orders. For that additional reason, §516, which was amended *before* §226.7, does not apply.

Section 516's plain language concerns *only* the IWC's power to "adopt or amend" its Orders. This case rests on core meal period compliance language unchanged since 1952. When regulations are reissued, as here, unchanged provisions are construed as "continuously in force" since their original enactment. *In re White*, 163 Cal.App.4th 1576, 1581 (2008); *see People v. Morante*, 20 Cal.4th 403, 430 n.14 (1999) (citing Gov. Code §9605); *IWC v. Superior Court*, 27 Cal.3d at 715; Statement as to the Basis for 2000 Amendments, at 19 (MJN Ex. 32) (2001 Orders "continue the preexisting requirement" for meal periods).

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[14] *Accord*: Statement as to the Basis for 2000 Amendments (Jun. 30, 2000, eff. Jan. 1, 2001) (MJN Ex. 32).

[15] *Sara M. v. Superior Court*, 36 Cal.4th 998, 1015 (2005) (Legislature presumed aware of regulations adopted at its direction); *Mountain Lion Foundation v. Fish & Game Comm'n*, 16 Cal.4th 105, 129 (1997) (same); *see Murphy*, 40 Cal.4th at 1110 ("Legislature was fully aware of the IWC's wage orders in enacting section 226.7").

The IWC has not "adopted or amended" the core compliance language in decades, so §516 does not apply.

2. Section 516 Neither Requires "Absolute Consistency" Between the Wage Orders and Section 512, Nor Abrogates *IWC v. Superior Court*

Brinker interprets §516 to require "absolute consistency with section 512." ABM78-80. If correct, this interpretation would abrogate *IWC v. Superior Court*. It is wrong for several reasons.

Such an interpretation contradicts the overarching purpose of the three acts—AB 60 (of which §516 was originally a part), AB 2509 and SB 88—to "codify" existing Orders and prevent the IWC from *weakening* their standards, as the 1998 Orders had done. OBM62-66, 97-99. Nothing in any of these acts purported to alter the long-established "relationship between" the Orders and the Labor Code's "general statutory provisions," which set a compliance *floor* for the IWC to work up from. *IWC v. Superior Court*, 27 Cal.3d at 733-34 (citing 2 Ops.Cal.Atty.Gen. 456 (1943)); OBM95-96.

Brinker claims that plaintiffs "cite nothing" to support this argument. ABM79n.31. The support comes from the text of all three acts, the 1998 Orders, and associated legislative history. OBM62-66, 97-99.

Instead of reading the acts together, or reconciling its interpretation with their enactment history, Brinker singles out two legislative reports, one saying the "IWC's authority to adopt or amend orders...must be consistent with" §512, and another that the Orders should not "conflict with" §512. ABM79-80 (citing SB 88, Senate Third Reading (08/16/00); *id.*, Legislative Counsel Digest (MJN Exs. 63, 64)).

These do not support Brinker's interpretation. "Consistent" does not mean "identical"—as this Court held in *IWC v. Superior Court*. More

protective Orders have never been considered "inconsistent with" the Labor Code. 27 Cal.3d at 733-34. Here, the Orders are "consistent" with §512 because (to the extent they may differ) they are more protective and employers can comply with them without violating §512's floor.

Brinker also ignores that SB 88 added §512(b), authorizing the IWC to extend the interval between meal periods from five to six hours—a *less* protective standard. SB 88, §1 (MJN Ex. 63). Yet §516, as originally drafted, already allowed the IWC to do that "notwithstanding" §512. Amending §516 was necessary to preserve §512(b)'s new six-hour compliance floor, as well as section 512(a)'s original five-hour floor.

In a footnote, Brinker calls this argument "stitch[ed] out of whole cloth." ABM79n.31. Hardly. It comes from SB 88's text.

Brinker also ignores the impact of §226.7, enacted days *after* SB88. Section 226.7 expressly adopts and enforces the Wage Orders, *not* §512, as its compliance standard—flatly contradicting Brinker's contention that §512 embodies California's only meal period rule or that §516 requires the Orders to be "identical" to §512.

Neither §512 nor §516 contains any *remedy* for noncompliance. The primary remedy this case seeks is premium wages under §226.7(b), which enforces the Orders, *not* §512. Brinker's reading of §516 essentially asks the Court to rewrite §226.7(b) by substituting "section 512" in place of "an applicable [IWC] order." This is not the Court's function.

Next, Brinker attempts (ABM80-81) to distinguish *IWC v. Superior Court* on its facts, claiming that *IWC* involved "different Labor Code provisions." But §§512 and 516 are "general statutory provisions," even more so than §554 in *IWC* (agricultural employees). 27 Cal.3d at 733. Brinker asserts that *IWC* pre-dates §516 by "two decades," but the Legislature, presumed aware of this Court's precedents, placed §§512 and

516 squarely within the very range of statutes ("sections 510-556") *IWC* identified. *Id.* Brinker argues that the Orders in *IWC* involved a "single specialized industry," but the Court's analysis did not hinge on that. *Id.* at 733-34. Rather, *California Drive-in Restaurant Ass'n v. Clark*, 22 Cal.2d 287, 290-91 (1943), cited in *IWC*, involved the restaurant industry.

Brinker reverts to *Bearden v. U.S. Borax, Inc.*, 138 Cal.App.4th 429 (2006), but fails to address plaintiffs' point that the Order in *Bearden* dropped below the Labor Code's floor, making it "inconsistent" with that floor and invalidating it regardless of §516. ABM82.[16]

At bottom, Brinker contends that §512 operates as not just a floor, but also a ceiling. This would contravene a principle dating back to the 1940s of which the Legislature is presumed aware. *See IWC*, 27 Cal.3d at 733 (citing *Clark* and AG opinion, both dated 1943); *Burden v. Snowden*, 2 Cal.4th 556, 564 (1992) (Legislature presumed aware of AG opinions). If that is what the Legislature intended, something in the legislative history would have said so.

E. No "Policy" Consideration Supports Brinker's Position

Brinker's final, "policy"-based argument assumes that moving the meal to mid-shift is the only way to comply with the Orders. ABM86-87. Not so. Other ways include ending the shift earlier, scheduling a second meal, or paying premium wages. Using Brinker's hypothetical, on a shift starting at 2:00p.m., the meal may be scheduled at 4:00-4:30, so long as, by 9:30 (five hours later), either (a) the shift ends; or (b) another meal is

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[16] Also, while the Order in *Bearden* (Order 16) went into effect after §516 was amended, it was *issued* (with the other current Orders) three months *before*. ABM6; MJN Ex. 7. Apparently, no party argued that §516's pre-amendment language should have governed. Also, §516 would govern *Bearden* because Order 16 was "adopted" to cover a new industry, whereas Order 5 "continued in effect" 1952 language that has not since been "adopted or amended." *IWC*, 27 Cal.3d at 715.

scheduled. No "policy" argument supports the notion that employees benefit by working up to 9½ hours straight without stopping to eat.

V. THE REST BREAK ISSUES

The Court of Appeal improperly reversed class certification of plaintiffs' two particularized rest break claims: (1) failure to "authorize and permit" a rest break "per four hours [worked] or major fraction thereof" (OBM103-09); and (2) failure to "authorize and permit" a rest break in the "work period" before the first meal period (OBM110-11).

A. The Rest Break Compliance Issue

1. Common Questions Predominated on this Claim

Brinker's answer mis-frames the rest break compliance issue by trying to convert it into one of "timing." ABM2-3, 88-94, 121. Plaintiffs' argument is not that employees must "*receive* rest periods at the two-hour and six-hour marks" (ABM121), but that the law *triggers* them at those marks. OBM103-09; DLSE Op.Ltr 1999.02.16 (MJN Ex. 37).[17]

Brinker's uniform rest break policy, as applied in the workplace, does not "authorize and permit" a rest break until "*after* [workers'] fourth hour"—not after a "*major fraction*" of four hours, per the Orders. 21PE5913:1-9; 19PE5172. That rest breaks need not be recorded (ABM 121) is irrelevant. The point is that proper breaks were never "authorized and permitted" at all. Employees could not have "waived" rest periods that Brinker never authorized or permitted.

What the Wage Orders require, and whether Brinker's uniform policy violates them, are predominating common questions.

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[17] The triggered breaks must be *scheduled* "insofar as practicable...in the middle of each work period"—but this claim does not assert violation of that scheduling requirement.

2. Brinker Misreads the Court of Appeal's Opinion, Which Halves California Workers' Rest Breaks

Brinker misconstrues the Court of Appeal opinion, claiming it does not halve workers' triggered rest breaks. ABM89-90. This interpretation cannot be reconciled with the opinion's express holding that a rest break is not triggered until "after...[an employee] has worked a full four hours, not a 'major fraction thereof.'" Slip op. 24 (emphasis added).

Taken to the logical conclusion, a worker on an eight-hour shift would receive one rest break, triggered "after" the worker "has worked a full four hours." No second break would be triggered until "after" another "full four hours" of work—that is, at quitting time. *See id.* (rest breaks never triggered "before the four hour mark" *except* for employees working shifts 3½ to 4 hours).

The panel flatly disagreed that "four hours or major fraction" triggers a rest break at the midpoint of *each* four-hour work period: "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...." Slip op. 28 (emphasis added). The IWC stated precisely that—by saying "*per* four hours *or major fraction* thereof."

3. Brinker Misreads the Plain Text of the Current and Historical Wage Orders, Which Trigger a Rest Break Upon Completion of Two Hours' Work, Not Four

Brinker contends that "'major fraction thereof' can only be interpreted as meaning the time period between three and one-half hours and four hours." ABM88-89, 91. This misconstrues the exception for workers on shifts not exceeding 3½ hours: "[A] rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours." 8CCR§11050(¶12(A)). Brinker says it "makes no sense" that "the IWC bestowed on employees the right to a rest period in

one sentence only to withdraw it in the following sentence." ABM91, 94. Yes, it does. This is an *exception*. The IWC reasoned that workers whose day ends after 3½ hours' work can do without the rest break that "four hours or major fraction" would otherwise trigger at the second hour.

If "four hours or major fraction" triggered no rest break until "after" "four full hours," as the Court of Appeal held, the 3½-hour exception would have been unneeded.

Brinker relies on the 1950s amendment from "majority" to "major," claiming the change had something to do with the 3½-hour exception. ABM92-93. But the IWC made an identical change to the toilets language, confirming that it was merely a grammatical correction. *Compare* Order 5R (¶14) (1947) ("one toilet for every twenty-five...employees or majority fraction thereof") *with* Order 5-57(¶15) (1957) (same language except "major fraction") (MJN Exs. 13, 15).

Brinker argues that the early Orders "imposed a stricter limit" because they applied only to workers required to "remain standing," and that the IWC weakened the limit in 1947 by changing "more than two and one-half hours consecutively" to "four hours...or majority fraction thereof." ABM93-94. That is illogical. In 1947, the IWC *expanded* the rest break requirement to cover *all* workers, not just those required to stand; it did not intend to decrease the number of rest breaks for *any* workers.

Rest approximately every two hours has been required since the earliest Orders. *E.g.*, Orders 18(¶12(a)) (1931) (rest period "every two (2) hours"); 5NS(¶3(e)) (1943) ("two and one-half (2½) hours consecutively without a rest period"); 5R(¶11) (1947) ("four hours working time, or majority fraction thereof"); 5-52 (¶12) (1952) ("per four hours, or major fraction thereof") (MJN Exs. 11-14). The IWC has never weakened this standard.

Finally, Brinker says the Orders "contradict[]" Op.Ltr. 1999.02.16, citing that letter's reliance on a manual construing the 1947 Orders. ABM92-93. But "major fraction" and "majority fraction" mean the same thing now as in 1947—any time over two hours. The DLSE and its predecessor correctly concluded, in 1999 and in 1948, that "four hours or major fraction" (or "majority fraction") triggers a rest period at the second, sixth, and tenth hours of work (and so on). Brinker calls this conclusion "inventive" (ABM92), but the Orders have required it for decades.[18]

B. Rest Break Timing: A Rest Break Must Be "Authorized and Permitted" in the Work Period Preceding the Meal

The Court of Appeal also improperly reversed class certification of the rest break timing claim, which Brinker mischaracterizes.

Plaintiffs' point is not that "Brinker does not *require* that employees take their first rest break before the first meal" (ABM122 (emphasis added)), but that Brinker does not *permit* it for workers scheduled for early meals. OBM110; 21PE5913:1-8, 21:E5914:1-5915:11. Whether employers must "authorize and permit" a rest break during the "work period" preceding the first meal is a common legal question. Whether Brinker violated the law is a common factual one. "Case-by-case" analysis of "waiver" is unneeded because the common theory underlying this claim is that Brinker never "authorized or permitted" proper breaks at all.

Brinker contends that the Orders "say[] nothing suggesting that the first rest break must be taken before the first meal period." ABM95. They do. The term "work period" definitionally encompasses that concept.

As used in the Orders, "work period" means "a continuing period of hours worked," and an ordinary work day consists of two—one before and

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[18] *E.g.*, Record of Proceedings–Wage Board for Order 1 (10/04/56) at 2-3 (MJN Ex. 322) ("6½-hour day" triggers "two 10-minute rest periods").

one after the meal period. Memorandum of IWC Executive Officer, *supra*, at 800410152 (MJN Ex. 376#24). The Orders require that rest breaks be scheduled "insofar as practicable...in the middle of *each work period.*" 8CCR§11050(¶12(A)) (emphasis added). To be "in the middle of *each* work period," at least one rest break must occur during the "work period" preceding the meal—*i.e.*, "between the beginning of work and the next meal period." Meal and Rest Periods: On 12-Hour Shifts, 800410149 (MJN Ex. 376#22) (dated approx. early 1980s).

Brinker incorrectly labels DLSE Op.Ltr. 2001.09.17 (MJN Ex. 40), which expressly adopts this view, as "unreliable." ABM95-98. Brinker says the letter "did not address" the issue, but it plainly states: "As a general matter, the first rest period should come sometime before the meal break." DLSE Op.Ltr. 2001.09.17, at 4. Brinker says that rest breaks, if properly scheduled, "would be condensed and an 'overlength work period' would follow the meal," but proper meal period timing would avoid that. Brinker says the letter did "not take into account" the Order's "relevant language," but the letter quoted it in full. *Id.*

The human need for rest and nourishment has not diminished since 1952, when the "relevant language," including the term of art "work period," was first adopted. Brinker calls on this Court to eliminate the Wage Orders' basic meal and rest period framework under the guise of "flexibility." The DLSE was not deceived, nor should this Court be.

VI. THE CLASS CERTIFICATION ORDER SHOULD HAVE BEEN AFFIRMED

The Court of Appeal erred in five critical ways in reviewing the trial court's class certification order:

- First, it failed to consider whether common questions predominated regardless of how the legal questions Brinker raised were resolved. OBM34, 78-80, 103-05, 110, 113-14.
- Second, it re-weighed the evidence of predominance, contrary to *Sav-on*. *Id.* 116-22, 132-33.
- Third, it substituted its judgment for the trial court's by peremptorily rejecting proffered survey and statistical evidence as a method of common proof, contrary to *Sav-on*. *Id.* 123-27.
- Fourth, it permitted an affirmative defense, standing alone, to defeat certification, contrary to *Sav-on*. *Id.* 127-32.
- Finally, it failed to remand for the trial court to reconsider class certification in light of any newly-announced legal standards, contrary to *Washington Mutual*. *Id.* 133-34.

Brinker's response attempts to shift the focus away from the Court of Appeal's errors. According to Brinker, the Court of Appeal merely held that the trial court applied "improper criteria" or "erroneous legal assumptions" by failing to "define the elements" of plaintiffs' claims before granting class certification. ABM99-100, 102-03. Brinker maintains that this holding had "nothing to do" with whether substantial evidence supported the class certification order under *Sav-on*. *Id.* at 102.

Brinker's characterization disregards the central errors in the Court of Appeal's class certification analysis—and forgets that this Court's

review lies from the Court of Appeal's decision. Eisenberg et al., *Cal. Prac. Guide: Civil Appeals & Writs*, §13.4 (Rutter Group 2008).

The Court of Appeal should have considered, initially, the trial court's express holding that common questions predominated regardless of how the legal questions Brinker raised were resolved. 1PE1-2. Under *Sav-on*, that finding should have been reviewed for substantial evidence. Instead of following *Sav-on*, the Court of Appeal reached out and decided all the common legal questions, then re-weighed the predominance evidence—precisely as *Sav-on* prohibits. Slip op. 31-33, 47-52.

A. The Court of Appeal Erred by Failing to Consider, as an Initial Matter, Whether Substantial Evidence Supported the Certification Order Regardless of How the Underlying Common Legal Questions Were Resolved

Citing *Washington Mutual Bank, FA v. Superior Court*, 24 Cal.4th 906 (2001), Brinker highlights the trial court's supposed failure to "define the elements of the claims." ABM99-100, 102-103. Brinker mistakes both the holding and the scope of *Washington Mutual*.

Washington Mutual involved *nationwide* class certification. The defendant argued that choice-of-law clauses in the class members' contracts "meant that the action would entail the application of the laws of all 50 states." 24 Cal.4th at 913. The trial court granted nationwide class certification without examining the choice-of-law clauses and deciding "what law applies"—that is, whether California law, or some combination of other states' laws, governed. *Id.* at 911-13. As a result, the trial court failed to consider whether the claims raised non-common *legal* questions, and if so, whether those questions could be effectively managed. *Id.* at 922-23.

This Court ordered the trial court to revisit class certification and make these determinations on remand:

> [A] trial court cannot reach an informed decision on predominance and manageability without first determining whether class claims will require adjudication under the laws of other jurisdictions and then evaluating the resulting complexity where those laws must be applied.

Id. at 927. The order granting nationwide class certification "was premised upon the faulty legal assumption that choice-of-law issues need not be resolved as part of the certification process." *Id.*

The Court of Appeal selectively quoted this language, omitting the parts referencing the unique choice-of-law problem *Washington Mutual* presented. Slip op. 22. Here, it is undisputed that California law uniformly applies to the claims. The trial court considered Brinker's arguments concerning *interpretation* of the uniformly applicable law, "evaluat[ed] the resulting complexity," and found that common questions predominated regardless. 1PE1-2. *Washington Mutual* requires no more.

In fact, under *Washington Mutual*, even choice-of-law questions need *not* be resolved at the class certification stage "if the class action proponent establishes, in the first instance, that application of all contractually designated laws will not defeat predominance or manageability." *Id.* at 929 n.14. That is essentially what occurred here. The class proponent established, in the first instance, that applying the opponent's interpretation of the law would not defeat predominance. The Court of Appeal wholly overlooked that part of *Washington Mutual.*

Brinker cites *Hicks v. Kaufman and Broad Home Corp.*, 89 Cal.App.4th 908 (2001), and *Sav-on*, but neither case supports the Court of Appeal's approach. ABM99.

In *Hicks*, the trial court incorrectly resolved an interpretation dispute, then denied class certification based on that incorrect ruling. 89 Cal.App.4th at 916-23. The appellate court reversed, holding that if the

trial court had correctly interpreted the law, the predominance evidence would have been sufficient. *Id.* The interpretation dispute was dispositive only because evidence had *not* been proffered to show that common questions predominated either way (unlike this case). *See id.* at 923.

In *Sav-on*, this Court said that class certification considers "whether the *theory of recovery* advanced...is...likely to prove amenable to class treatment." 34 Cal.4th at 327 (emphasis added). However, "'[r]eviewing courts consistently look to the allegations of the complaint and the declarations of attorneys representing the plaintiff to resolve this question.'" *Id.* (quoting *Richmond v. Dart Industries, Inc.*, 29 Cal.3d 462, 478 (1981)). Nothing in *Sav-on* directs lower courts to reach and resolve questions of law not determinative of predominance.

This case involves a California class, in which California law uniformly applies. The parties offer differing *interpretations* of California law—but that simply raises legal questions whose resolution will be common. The trial court did not disregard the differing interpretations, as in *Washington Mutual*; rather, it correctly granted class certification on substantial evidence that common questions predominated regardless of which party's interpretation was correct. The trial court reserved decision on the common legal questions for the merits phase of the case.

This is the ordinary approach to class certification, and many courts facing the meal period compliance question have taken it. *E.g.*, *Ortega v. J.B. Hunt Transport, Inc.*, ___ F.R.D. ___, 2009 WL 1851330, *6 (C.D. Cal. May 18, 2009) ("Whatever the legal meaning of the term 'provide' in this context, the question is one common to all potential class members.").[19]

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[19] *Accord*: *Bibo*, 2009 WL 1068880 at *10 (meal period question constitutes "shared legal dispute" that "must be resolved for the class as a whole"); *Otsuka v. Polo Ralph Lauren Corp.*, 251 F.R.D. 439, 447 (N.D.

B. After the Court of Appeal's Legal Errors Are Reversed, Common Questions Will Still Predominate

Brinker says that "plaintiffs...are asking this Court to answer" the four legal questions discussed above, and that once they are resolved, there will be nothing left to certify. ABM118-22. That makes no sense.

Brinker, not plaintiffs, originally urged the Court of Appeal to reach and decide these questions. *Compare* Petition for Writ of Mandate, 09/01/06, 7(¶17), 13-21 (trial court should have reached and decided meal period compliance question) *with* Return, 02/01/07, 29-32; Supp.Brief, 08/27/07, 12-13 (substantial evidence supported certification regardless).[20] When the Court of Appeal decided them incorrectly, plaintiffs had no choice but to seek this Court's intervention.[21] The parties agree that this Court should decide the issues for the benefit of the named plaintiffs, the certified class and workers statewide.

Even after this Court rules, numerous common questions will remain for decision on remand, including whether Brinker's uniform policies and practices violate each part of the law as this Court construes it; whether

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Cal. 2008); *Alba v. Papa John's USA, Inc.*, 2007 WL 953849, *14 (C.D. Cal. Feb. 7, 2007); *Cornn v. United Parcel Service, Inc.*, 2005 WL 588431, *4, *11-*12 (N.D. Cal. Mar. 14, 2005), *reconsid. granted in part on other grounds*, 2005 WL 2072091 (N.D. Cal. Aug. 26, 2005).

[20] The three other questions came up only because plaintiffs *mentioned* them as common legal questions supporting affirmance. *E.g.*, Return 16, 36-37 & n.23 (*mentioning* common meal period timing and rest break issues). In its reply, Brinker seized on these questions and asserted that the trial court *should have decided* them. Reply, 04/03/07, 21-25, 29-31. The Court of Appeal then decided them without briefing, contravening Government Code section 68081. Petition for Review, 10/22/07, No. S157479, at 8, 32-33.

[21] Given the original unpublished opinion's language (*e.g.*, Slip op., 10/12/07, 30-31), continuing to argue that class certification could be affirmed without resolving these questions would have been futile. *See People v. Redmond*, 29 Cal.3d 904, 917 (1981).

Brinker's violations trigger the pay remedy of §226.7(b) and the Orders; and whether injunctive relief is appropriate.

C. Substantial Evidence Supports the Trial Court's Finding that Common Questions Predominate on All Claims

Brinker invites this Court to engage in the same improper appellate re-weighing process as the Court of Appeal. The Court should decline the invitation. *Sav-on* prohibits appellate re-weighing.

1. Brinker Does Not Dispute that Common Questions Predominate on the Meal Period Claim if an "Affirmative Duty" Compliance Standard Governs

Brinker does not dispute that if employers have an affirmative obligation to relieve workers of all duty for meal periods, common questions plainly predominate. ABM99-118, *passim*; OBM114-15. At minimum, the judgment reversing class certification of the meal period claim should itself be reversed.

2. Common Questions Also Predominate Even If Both Meal Periods and Rest Breaks May be "Waived"

Substantial evidence supported class certification even if a more lenient, "authorize and permit" compliance standard allows both meal and rest periods to be "waived." Substantial evidence also supported certification of the claim for "off-the-clock" work during meal periods. Brinker's contrary arguments are based on a myopic view of the record that ignores the governing standard of review.

a. The Court of Appeal Improperly Re-Weighed and Rejected Plaintiffs' Declarations and Deposition Testimony

According to Brinker, the record contains "no evidence" of "company-wide policies or practices" leading to missed meal periods, rest breaks, or work while clocked out for meals. ABM100, 103-04, 107-09.

Brinker is mistaken. The record is replete with such evidence (OBM9-12, 15-17, 116-22), and it is more than sufficient to uphold the certification order under *Sav-on*:

- Brinker executives testified that the company maintains uniform, companywide policies governing meal periods, rest breaks, and off-the-clock work. OBM15, 81 (citing, *e.g.*, 1PE259:14-261:14, 1PE265:23-266:9; 2PE329:3-10; 19PE5172).
- Employee declarations show Brinker's companywide pattern and practice of imposing "early lunches," leading to work periods of up to nine hours straight with no further meal period allowed. OBM9-10 &n.3 (citing, *e.g.*, 1PE97:8-10, 132:16-18, 171:8-10).
- Brinker executives' testimony confirms Brinker's uniform policy prohibiting "early-lunching" workers from taking any further meal period for up to nine hours straight. *E.g.*, 2PE440:7-18 (worker on eight-hour shift who took meal at first hour "would be entitled to the one meal period" only), 2PE456:5-20 ("they do not receive a second one until they hit ten hours"). *Accord*: 21PE5913:18-24; 21PE5914:16-25; 21PE5915:20-21.
- Employee declarations show Brinker's companywide pattern and practice of understaffing, leading to missed meal periods, rest breaks, and work while clocked out for meals. OBM9-12 & nn.2, 4-5 (citing, *e.g.*, 1PE122 (rest breaks); 1PE126 (meal periods); 1PE166 (off-the-clock).
- Employee declarations show Brinker managers' companywide awareness of the pervasive understaffing problem. *E.g.*, 1PE97:17-18 ("Our managers are well aware that we work during our meal periods"); 130:21-23 ("I often complained to the shift manager and the general manager"); 140:24-26.

- Brinker executives' testimony shows Brinker has done nothing, companywide, to comply with California's meal period, rest break and off-the-clock laws—except issue a policy—and has never paid any premium wages. *E.g.*, 2PE451:8-12, 213:11-17.

In other words, as in *Sav-on*, "[t]he record contains substantial, if disputed, evidence" that pervasive understaffing was Brinker's companywide practice. 34 Cal.4th at 329. "The record also contains substantial evidence" that the understaffing created "widespread, de facto" meal period, rest break and off-the-clock violations. *Id.* "'[N]o compliance program [has] ever existed, and no single class member has ever received [premium wage] compensation.'" *Id.* at 332 (quoting trial court). This "*theory* is amenable to class treatment." *Id.* at 329 (emphasis added).

Brinker's attacks on plaintiffs' proof merely repeat the Court of Appeal's re-weighing process.

Brinker says "one-third of the declarants make no mention of meal periods" and "half of [them] make no reference to off-the-clock work"—inviting the Court to infer that those declarants never experienced understaffing, missed their meals or worked off the clock. ABM108. But the many record declarations detailed class members' missed meals and off-the-clock work (by Brinker's count, two-thirds and half of the total, respectively). "[Q]uestions as to the weight and sufficiency of the evidence [and] the inferences to be drawn therefrom...are matters for the trial court to decide." *Sav-on*, 34 Cal.4th at 334.

Brinker claims that "several" declarants "fail to state 'the reason *why* they worked off the clock'" during meals or "'whether their supervisors had

knowledge'" of it. ABM108 (quoting Slip op. 51).[22] Yet many declarants explained that the reason was understaffing, and that they had complained to their managers. "[T]he trial court was within its discretion to credit plaintiffs' evidence on these points...." *Sav-on*, 34 Cal.4th at 331.

Also, liability for off-the-clock work depends on an objective, "knew or should have known" standard, well-suited for class treatment. *Morillion v. Royal Packing*, 22 Cal.4th 575, 585 (2000). The Court of Appeal parroted the objective standard (Slip op. 51), but did not consider whether the trial court properly granted certification in light of it.

Brinker says some declarants "testified that they usually *did* receive meal breaks—albeit early in their shifts." ABM108. These declarations document Brinker's common "early lunching" practice, and the trial court was entitled to accept them. *See Sav-on*, 34 Cal.4th at 331.

Brinker claims that the "cookie-cutter" declarations "crumbled when the declarants were deposed." ABM107-08.[23] That was for the trial court to consider and resolve—which it did, in the declarants' favor. Characterizations like "boilerplate" "go to the weight of the evidence, a matter generally entrusted to the trial court's discretion." *Id.* at 333-34.

Brinker says the declarations show "only what particular employees experienced at particular restaurants during particular shifts." ABM107.

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[22] Brinker contends that some worked off-the-clock "by their own choice." ABM108. The idea that an hourly worker would "choose" to work without pay is absurd.

[23] Brinker mischaracterizes two witnesses' testimony. One declared she experienced *early lunching* followed by no further meal. 1PE100. She testified at deposition that she received "a" meal period "on days when she worked more than five hours"—but *not* that she received a second one. 19PE5206-07. The other witness, who worked for Brinker about 40 days, estimated that he missed meal periods about 35% of the time. 1PE110. When deposed, he quantified this as about ten meals—generally consistent with his 35% estimate. 19PE5310.

Yet many declarants worked at several restaurants. *E.g.*, 1PE116 ("I have worked in two (2) different concepts and three (3) different Brinker restaurants...and can tell you that the policies regarding meal and rest breaks do not vary.").[24] The trial court was entitled to accept this testimony as substantial evidence of Brinker's companywide practices.

Instead of accepting the evidence that supported class certification, the Court of Appeal re-weighed it, rejected it, then credited other evidence. OBM117-22. Brinker responds in a footnote contending that the panel merely "not[ed] a conflict in the evidence." ABM104n.43. Not so. The panel *reversed* class certification after *resolving* the conflicts differently than the trial court. This was error.

Plaintiffs' declarations reveal a companywide pattern and practice of understaffing—the common root cause of meal period and rest break violations and off-the-clock work. The trial court was entitled to credit this evidence, and the reviewing court must accept it as true under *Sav-on*. It fully supports the predominance finding—particularly when coupled with expert survey and statistical evidence.

b. The Court of Appeal Improperly Re-Weighed and Rejected the Proffered Survey and Statistical Evidence

Brinker asserts that survey and statistical evidence of the sort approved in *Sav-on* cannot be used as a method of classwide proof, asserting (without authority) that such evidence cannot capture the reason *why* a break was missed. ABM105-06, 108-09. Brinker is wrong.

When the Court of Appeal stayed the case, the parties were preparing to present their experts' reports. 2RJN7444:17-18, 7546:1-19;

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[24] *Accord*: 1PE122, 128, 148, 151, 153, 156, 160, 171 (declarants from more than one restaurant or position).

RJN12/17/07 (Exs. 1-2).[25] Those reports would have explained precisely how the surveys would be designed and their results analyzed. They can be designed to capture any factor the Court holds relevant—including whether a worker chose to "waive" a break.

Plaintiffs' survey expert, Dr. Jon Krosnick, understood that "workers may be offered the opportunity [to take rest breaks] and then waive that break if they so choose"—the compliance standard Brinker advances for meal periods as well. RJN12/17/07, Ex. 1, 46:19-47:3. He could design and implement a survey to capture "the frequency with which [such waivers] happened." *Id.* 51:11-12; *see also id.* 113:4-6 ("a questionnaire could be designed to effectively measure the behavioral events of interest").

Plaintiffs' expert statistician, Dr. Harold Javitz, would then use the survey results, coupled with Brinker's payroll records, to extrapolate the violations. RJN12/17/07, Ex. 2, 64:11-14, 120:13-16. From data on shift lengths, he will calculate the number of meal and rest periods triggered by law, depending on "what constitutes a violation." *Id.* 23:10-11, 23:16-24:17, 31:23-32:9. If meal periods are mandatory, those violations can be tabulated from the records; timing violations can also be tabulated. *Id.* 23:10-19. If meal periods, like rest breaks, can be "waived," he can "tabulate the number of individuals who...missed a meal break for various reasons if such a question were asked on the survey." *Id.* 147:4-7.

Brinker's challenge to plaintiffs' reliance on payroll records misunderstands how those records will be used. ABM109-11. They will reveal the number and length of the class members' shifts, and thus the number of required meal and rest periods. For rest breaks, and if necessary for meal periods, the records will be supplemented with survey results

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[25] The Court of Appeal refused to consider expert deposition transcripts completed before its stay. Order 04/23/08.

revealing the frequency of any voluntary "waivers" and any involuntarily-interrupted meal periods (*i.e.*, off-the-clock work).

Brinker's own expert employed the records in precisely this way—and found significant violations applying Brinker's version of the law. OBM18 (citing 3PE647:3-4; 3PE650:6-7; 4PE983-989). Now, Brinker tries to renounce its own expert. ABM110n.45.

Brinker claims that various federal trial-level decisions rejected survey and statistical evidence as a method of common proof. ABM111-12 (citing cases). But no such evidence was proffered in those cases. Cases in which such evidence was proffered uniformly *accept* it. *E.g.*, *Salvas v. Wal-Mart Stores, Inc.*, 893 N.E.2d 1187 (Mass. 2008); *Iliadis v. Wal-Mart Stores, Inc.*, 922 A.2d 710 (N.J. 2007); *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215 (Mo.App. 2007).

Brinker attempts to distinguish those cases on one basis—that they involved evidence of a "companywide practice" of pressuring managers to reduce labor costs through financial incentives. ABM113-14. Brinker ignores the substantial evidence in *this* record of Brinker's own similar "companywide practice": "[K]eeping labor costs down...is probably the most pressure-intense part of being a Brinker manager" because managers' bonuses are tied to "lowering payroll costs." 24PE6502:16-24.

Finally, Brinker claims that "most courts" have refused to certify meal period, rest break and off-the-clock claims "for the same reasons cited [by the Court of Appeal]." ABM114-15 (citing eight cases). On the contrary, "most courts" have certified, and continue to certify, such claims. OBM112 n.53 (citing cases), 133 (six cases); Supp. Brief (08/27/07), 9-11 (seven more cases). Recent examples include *Espinoza v. Domino's Pizza, LLC*, 2009 WL 882845 (C.D. Cal. 2009); *Bibo*, 2009 WL 1068880; *Ortega*,

2009 WL 1851330; and *Franco v. Athens Disposal Co.*, 171 Cal.App.4th 1277, 1298-99 (2009).

The proffered survey and statistical proof will be common to the class. Brinker may challenge the experts' methodology, but this goes to weight—which the trial court considered at length below. OBM19 & n.9 (citing oral and written arguments). Under *Sav-on*, the trial court did not abuse its discretion in accepting plaintiffs' proffered method of common proof. 34 Cal.4th at 333.

D. The Court of Appeal Erred By Permitting an Affirmative Defense, Standing Alone, to Defeat Class Certification

Brinker makes two faulty arguments in response to the point that affirmative defenses, standing alone, may not defeat class certification.

First, Brinker contends that whether an employee voluntarily chose to decline an "offered" break—*i.e.*, "waived" the break—is an element of the violation, not a defense. ABM122-23. But "waiver" means "intentional relinquishment of a known right." *City of Ukiah*, 64 Cal.2d at 107-08. It is an affirmative defense. *Id.* All plaintiffs must prove is that the breaks were not taken (or never authorized). Brinker will have to prove "waiver." *Id.*; DLSE Op.Ltr. 2003.08.13 at 2 (MJN Ex. 380) ("authorize and permit"; "burden is on the employer to show that [the employee] has knowingly and voluntarily decided not to take the meal period").

Brinker itself regularly describes this defense as "waiver." *See, e.g.*, Answer to Review Petition (09/18/08), at 27 ("company's waiver defense"); Reply (04/03/07), at 23 ("Labor Code allows...employees to waive meal periods"); Petition (09/01/06), at 19 ("employers must police...employees to ensure that meal periods are never waived"); Class Cert. Opp. (05/12/06), 3PE655:3-5 (meal periods "on the spur of the

moment can be...'waived'"); Answer (07/01/05), 2RJN7378 ("waiver" affirmative defense).

Second, Brinker contends that this defense, standing alone, may defeat certification when common questions otherwise predominate on liability. ABM123-26. However, *Sav-on* expressly holds otherwise, as does *Lockheed Martin Corp. v. Superior Court*, 29 Cal.4th 1096 (2003). Such a rule would impermissibly shift the burden of proving "waiver" from Brinker onto plaintiffs. OBM127-32.[26] Brinker cites no contrary authority, and its efforts to distinguish *Sav-on* and *Lockheed* fall flat.

The three cases Brinker cites (ABM123-24) do not support its position because all involved non-common questions on liability and damages—not just defenses. OBM130 (discussing *Kennedy v. Baxter Healthcare Corp.*, 43 Cal.App.4th 799, 810-11 (1996); *Gerhard v. Stephens*, 68 Cal.2d 864, 912-13 (1968)); *see Block v. Major League Baseball*, 65 Cal.App.4th 538, 543-44 (1998) ("three factors"—liability, damages, *and* defenses—"taken together" supported certification denial). Brinker cites no case in which non-common questions surrounding defenses *alone* were allowed to defeat certification.

E. The Court of Appeal Erred by Failing to Remand for the Trial Court to Decide Class Certification Anew

The Court of Appeal contravened *Washington Mutual* by reversing class certification "with prejudice," and by failing to remand for the trial court to decide class certification afresh in light of newly-announced legal standards. OBM133-34. Brinker's only response is that no possible evidentiary showing could ever meet those new standards. ABM126-27.

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[26] It would also be manifestly unfair in this case, given that pre-certification merits discovery had been denied. 2RJN7394:22-7395:9.

Washington Mutual makes plain that, if this Court announces any new legal standards, remand to the trial court for redetermination of class certification is proper. 24 Cal.4th at 928. The authorities Brinker cites (ABM127) were not class certification cases, and are inapposite. Under *Washington Mutual* and basic fairness principles, plaintiffs should be afforded an opportunity to attempt to meet the new standards on remand.

VII. CONCLUSION

The Court of Appeal's judgment should be reversed and the class certification order reinstated. Alternatively, the case should be remanded for the trial court to consider class certification anew.

Dated: July 20, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT REQUIREMENT

Pursuant to Rule of Court 8.504(d)(1), the undersigned hereby certifies that the computer program used to generate this brief indicates that it does not exceed 14,000 words (including footnotes and excluding the parts identified in Rule 8.504(d)(3)).

Dated: July 20, 2009

Kimberly A. Kralowec

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 Schubert Jonckheer Kolbe & Kralowec LLP, Three Embarcadero Center, Suite 1650, San Francisco, California 94111.

On July 20, 2009, I served the foregoing document(s) described as

REPLY BRIEF ON THE MERITS

on the person listed below by placing a copy in a sealed envelope and delivering, by hand, to the address below:

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and on the person(s) listed below by placing a said copy with postage thereon fully prepaid, in the United States mailbox at San Francisco, California, addressed as follows:

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Hon. David B. Oberholtzer San Diego County Superior Court Hall of Justice, Department 67 330 W. Broadway San Diego, CA 92101	Trial Court Judge

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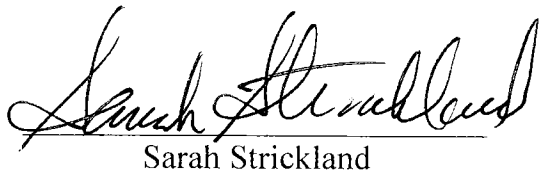
Court of Appeal

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

Executed July 20, 2009 at San Francisco, California.



Sarah Strickland