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d/b/a AB TRUCKING (erroneously sued as AB TRUCKING, INC.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

LAVON GODFREY and GARY GILBERT, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

OAKLAND PORT SERVICES CORPORATION d/b/a AB TRUCKING, and DOES 1 through 20, inclusive,

Defendants.

CASE NO. RG 08-379099

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MEMORANDUM RE: (1) WHETHER PLAINTIFFS' MOTION COMPLETELY DISPOSES OF A CAUSE OF ACTION, AN AFFIRMATIVE DEFENSE, A CLAIM FOR DAMAGES, OR AN ISSUE OF DUTY; AND (2) WHETHER A CONTINUANCE OF THE TRIAL DATE MIGHT BE APPROPRIATE IN LIGHT OF THE NOVEMBER 8, 2011 HEARING DATE IN BRINKER RESTAURANT CORPORATION, ET AL. v. SUPERIOR COURT (HOHNBAUM) (CALIFORNIA SUPREME COURT CASE NO. S166350)

DATE: October 28, 2011
TIME: 2:00 p.m.
DEPT: 20, Fourth Floor
ACTION FILED: March 28, 2008
TRIAL DATE: November 29, 2011

Defendant OAKLAND PORT SERVICES CORPORATION d/b/a/ AB TRUCKING respectfully requests, pursuant the California Evidence Code section 452(d)(1), that this Court take permissive judicial notice of the following two documents:

1. Plaintiffs', Real Parties in Interest, and Petitioners' Opening Brief on the Merits, *Brinker Restaurant Corporation et al. v. Superior Court (Hohnbaum)* (S166350), of which a true

and correct copy of the first 14 pages of the brief minus the table of authorities, is attached hereto as Exhibit "A."

2. Real Parties in Interest's Answer Brief on the Merits, *Brinker Restaurant Corporation et al. v. Superior Court (Hohnbaum)* (S166350), of which a true and correct copy of the first 24 pages is attached hereto as Exhibit "B."

Dated: October 28, 2011

JAY IAN ABOUDI, ATTORNEY AT LAW

JAY IAN ABOUDI
Attorney for Defendant
OAKLAND PORT SERVICES
CORPORATION d/b/a AB TRUCKING
(erroneously sued as AB TRUCKING, INC.)

Exhibit "A"

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

OPENING BRIEF ON THE MERITS

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I. ISSUES PRESENTED FOR REVIEW

This case presents the following issues:

1. *Meal Period Compliance Issue*: Under the Labor Code (§§226.7 and 512) and Industrial Welfare Commission ("IWC") Wage Orders (¶11),[1] must an employer actually relieve workers of all duty so they can take their statutorily-mandated meal periods, as held in *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949 (2005), *review & depub. denied*, no. S139377 (01/18/06)? Or may employers comply simply by making meal periods "available," as held in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, 165 Cal.App.4th 25 (Jul. 22, 2008)?

2. *Meal Period Timing Issue*: Do the Labor Code (§§226.7 and 512) and Wage Orders (¶11) impose a timing requirement for meal periods? Or can employers provide a meal period at *any* time during a shift of up to ten hours without becoming liable for an extra hour of pay under section 226.7(b), as held in *Brinker*?

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[1] Wage Order 5-2001, which governs this case, is codified at 8 Cal. Code Regs. §11050. All references to "Wage Orders" are to Wage Order 5 unless otherwise specified. All statutory references are to the Labor Code unless otherwise specified.

"Pet." refers to Brinker's writ petition filed below on September 1, 2006. "PE" refers to Brinker's exhibits in support of its writ petition. "RJN" refers to plaintiffs' request for judicial notice filed below on February 2, 2007. "Slip op." refers to the Court of Appeal's opinion filed on July 22, 2008. "MJN" refers to the motion for judicial notice filed on January 20, 2009, concurrently with this brief.

3. *Rest Break Compliance Issue*: Under the Labor Code (§226.7) and Wage Orders (¶12), which require ten minutes' rest time "per four (4) hours or major fraction thereof," must employers provide a ten-minute rest break to employees who work between two and six hours, a second ten-minute rest break to employees who work more than six hours and up to ten, a third ten-minute rest break to employees who work more than ten hours and up to fourteen (etc.), as stated in DLSE Op.Ltr. 1999.02.16? Or may an employer compel employees to work an eight-hour shift with only a single rest break, as held in *Brinker*?

4. *Rest Break Timing Issue*: Under the Labor Code (§226.7) and Wage Orders (¶12), may employers withhold the first rest break until after the first meal period, as held in *Brinker*?

5. *Survey and Statistical Evidence Issue*: May trial courts accept expert survey and statistical evidence as a method of proving meal period, rest break, and/or "off-the-clock" claims on a classwide basis?

6. *Standard of Appellate Review Issue*: When an appellate court reviews an order *granting* class certification, does the appellate court prejudicially err by: (a) deciding issues not enmeshed with the class certification requirements; (b) applying newly-announced legal standards to the facts, then reversing the class certification order with prejudice, instead of remanding for the certification proponent to attempt to meet the new standards, and for the trial court to apply the new standards to the facts in the first instance;

or (c) reweighing the evidence instead of reviewing the trial court's predominance finding under the substantial evidence standard of review?

Petition for Review filed Aug. 29, 2008 at 1-3.

II. INTRODUCTION

This case arises at the crossing point of two of this Court's key precedents—*Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094 (2007), in which the Court construed the "premium wage" remedy enacted in 2000 for meal period and rest break violations—and *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319 (2004), in which the Court announced principles for lower courts to employ in assessing whether common questions predominate in wage and hour cases for class certification purposes.

Plaintiffs Adam Hohnbaum, Illya Haase, Romeo Osorio, Amanda June Rader, and Santana Alvarado ("plaintiffs") are hourly non-exempt workers for Brinker Restaurant Corporation, operator of restaurant chains including Chili's and the Macaroni Grill ("Brinker"). In 2004, they sued Brinker for failure to comply with California law governing meal periods, rest breaks, and off-the-clock work. In 2006, after considering an extensive evidentiary record, the trial court granted class certification.

Brinker filed a petition seeking interlocutory appellate review, which the Court of Appeal (Fourth Appellate District, Division One) granted. The Court of Appeal reversed the class certification order, and in so doing, decided four critical questions of law in a manner that not only contravenes the plain language of the governing IWC Wage Orders and Labor Code provisions, but also upends vital protections that

California workers have enjoyed for decades. The Court of Appeal's holdings present a very real threat to the health and safety of not only the impacted workers, but also the public—in other words, everyone whom our meal period and rest break laws were intended to protect.

The first critical question is whether, under the Labor Code and Wage Orders, an employer must actually relieve workers of all duty so they can take their non-waivable, statutorily-mandated meal periods, as held in *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949 (2005), *review & depub. denied*, no. S139377 (2006), or whether employers may comply simply by making meal periods "available," as the Court of Appeal held in this case.

The answer can be found through a careful review of the plain language of the Wage Orders and their adoption history dating back to the 1930s. For decades, the Wage Orders have imposed a mandatory compliance standard ("no employer shall employ") for meal periods, and a permissive compliance standard ("authorize and permit") for rest breaks. When the Legislature enacted Labor Code sections 226.7, 512, and 516, it intended to codify, not relax, the mandatory meal period compliance standard, thus preserving the distinction between meal periods and rest breaks. *All* of the legislative and regulatory history points inexorably to this conclusion. Yet the Court of Appeal panel considered none of that history, focusing instead on a dictionary definition of a single word—"provide."

The second critical question is whether the Labor Code and Wage Orders impose a *timing* requirement for meal periods, or whether employers may impose an "early lunching" schedule that requires people to work up to ten hours straight without a meal. Here, too, the Court of Appeal chose the less protective option. Once again, however,

the fifty-year history of the Wage Orders' language demonstrates beyond any doubt that employers may not schedule work periods longer than five hours without a meal.

Instead of enforcing this longstanding rule, the Court of Appeal determined that Labor Code sections 512 and 516 annulled it in favor of a dramatically weaker one—even though the legislative history of both statutes confirms that the Legislature intended to *codify* the Wage Orders' existing protections, thereby shielding workers from then-recent regulatory efforts to impair those protections.

What's more, the Court of Appeal ignored this Court's settled precedent, *Industrial Welfare Commission v. Superior Court*, 27 Cal.3d 690 (1980), which acknowledged and enforced the IWC's power to impose "more restrictive" compliance standards than the Labor Code. This power has been unquestioned for decades, and nothing in either section 512 or section 516 evinces any intent to eliminate it.

The two other questions relate to rest breaks.

May employers refuse to provide rest breaks until after employees have worked four full hours—even though the Wage Orders require "ten (10) minutes net rest time per four (4) hours *or major fraction thereof*"? The Court of Appeal said yes, contrary to Division of Labor Standards Enforcement ("DLSE") enforcement policy of 60 years' standing. This means that an employee working an eight-hour shift would accrue just one rest break, not two—a revolutionary reinterpretation of California's rest break protections. Once again, a careful look at the history of the Wage Orders' language—which has been unchanged for over sixty years—confirms unequivocally that the Court of Appeal's interpretation was wrong.

Finally, may employers require workers to postpone their rest breaks until after the first meal period—pushing the meal period to the beginning of the work period and the rest time to the end—even though the DLSE believes that "the first rest period should come sometime before the meal break"? The Court of Appeal's contrary holding topples this well-established and commonsense interpretation, reducing the rest break requirement to a charade.

After ruling on these legal questions, the Court of Appeal reversed the entire class certification order with prejudice. The core reason for the reversal was the Court's meal period compliance holding—that meal periods need only be "made available" to workers who may then choose to "decline" them. According to the Court, individualized questions surrounding the reason for each missed meal period would overwhelm any common ones.

But the Court of Appeal failed to perceive that any such individualized questions would be irrelevant to plaintiffs' *other* claims. Common questions predominated on plaintiffs' claims for meal period timing, rest break compliance, and rest break timing. Brinker's uniform policy did not even "make" compliant meal periods or rest breaks "available." Therefore, there was nothing for the workers to "decline," so no individualized issues. Brinker's common policy, coupled with its corporate records of workers' shift lengths (which the Wage Orders require every employer to keep), are all the proof needed to establish the violations. The class certification order should have been affirmed respecting these claims.

The Court of Appeal then disregarded plaintiffs' extensive evidentiary showing that, even applying a "make available" compliance

standard, common questions predominated on plaintiffs' remaining claims for meal period, rest break, and off-the-clock violations.

This evidentiary showing included declarations documenting Brinker's pervasive understaffing—the root cause of widespread meal period and rest break violations for waitstaff, bartenders, cooks, and kitchen personnel. Plaintiffs presented testimony of Brinker executives establishing Brinker's uniform meal period and rest break policies and its centralized computer system tracking each work period and shift. And, to shore this up, they proffered expert survey and statistical evidence as a way to manage any remaining individualized issues. Through this evidence, plaintiffs established a pervasive pattern and practice of common violations—companywide.

The trial court accepted this evidentiary showing, and granted class certification, but the Court of Appeal reversed—in an opinion that re-weighs the evidence and finds it insufficient, as a matter of law, to ever support class certification in a meal period, rest break, or off-the-clock case. In so holding, the Court of Appeal contravened the most basic principles enunciated in *Sav-on*.

Sav-on prohibits appellate courts from re-weighing the evidence of predominance—but that is precisely what the Court of Appeal did. *Sav-on* also expressly approves expert survey and statistical evidence as a method of common proof in wage and hour cases—yet the Court of Appeal summarily rejected that evidence. And *Sav-on* bars procedures that would shift the burden of proof at the class certification stage. Under *Sav-on*, plaintiffs are not required to *disprove* all of the defendant's affirmative defenses. Yet that is what the Court of Appeal, in effect, required in this case, and found lacking.

The Court of Appeal's judgment should be reversed and the class certification order reinstated. At stake is the public policy—recognized in *Sav-on* and *Gentry v. Superior Court*, 42 Cal.4th 44 (2007)—supporting the rights of workers to seek redress against their employers for chronic violations of California's minimum workplace regulatory standards and to jointly prosecute such claims through the class action vehicle. "[R]etaliation against employees for asserting statutory rights under the Labor Code is widespread." *Gentry*, 42 Cal.4th at 461. Workers are often "unaware that their legal rights have been violated." *Id.* The class action device is often the only way to deter employers who fail to maintain minimum workplace standards and to provide redress for injured workers.

The Court of Appeal misinterpreted every legal question presented to it—then misapplied basic rules governing appellate review of class certification orders. Plaintiffs respectfully ask this Court to reverse the judgment and reinstate the certification order.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. The Meal Period, Rest Break, and Off-The-Clock Claims

In 2000, the DLSE began investigating Brinker for meal and rest break violations involving its hourly restaurant employees. 1PE197:16-19; 17PE4789-4804; 22PE6138-6139. In 2002, after the DLSE filed suit, Brinker paid a monetary settlement (covering violations from October 1999 through December 2001) and agreed to a court-ordered injunction to ensure its compliance with California meal and rest break laws. Pet. ¶7; 1PE197:19-28; 2PE375:7-20; 17 PE 4789-4804; 18PE4840-4844.

Exhibit "B"

S166350

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Petitioners,

v.

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

Respondent.

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

Real Parties in Interest.

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

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INTRODUCTION

By statute and regulation, California workers have the right to take meal and rest breaks, and no one in this case disputes that right. Instead, Plaintiffs want this Court to declare – contrary to the plain language of the governing statutes and contrary to the Court of Appeal's well-reasoned opinion – that California employers must not only *provide* meal periods to their employees but also *ensure* that the meal periods are taken, that meal and rest periods must be scheduled according to Plaintiffs' strict formula rather than with the flexibility mandated by the Legislature, and that notwithstanding the necessarily individual reasons particular employees might have for skipping or shortening a meal period, Plaintiffs' claims are susceptible to class treatment.

The *Brinker* Court of Appeal addressed all of Plaintiffs' claims, explained that none of them is amenable to class treatment because individual issues predominate, and harmonized its conclusions with this Court's decisions in *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319 and *Murphy v. Kenneth Cole Prods.* (2007) 40 Cal.4th 1094, and the Third Appellate District's opinion in *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949. That *Brinker* got it right is confirmed by the fact that nine federal courts have reached the same result.

As we will show in this brief, (1) employers need only provide meal periods, not ensure they are taken; (2) an employee's right to a meal period is determined by the total number of hours worked per day, not by the number of consecutive hours worked following the last meal; (3) a rest period must be authorized and permitted for every four hours of work "or major fraction thereof," but need be in the middle of each work period only "insofar as practicable;" and (4) none of the theories of recovery advanced by Plaintiffs is amenable to class treatment under the facts of this case.

The Court of Appeal's opinion should be affirmed.

STATEMENT OF THE ISSUES

Because Plaintiffs' framing of the issues is in many respects misleading, Brinker restates the actual issues before this Court as follows:

1. *Meal Period Compliance Issue*. The issue before this Court is *not* whether an employer must "actually relieve workers of all duty so they can take their statutorily-mandated meal periods" or whether employers may "comply simply by making meal periods 'available.'" (Opening Brief on the Merits ("OB"), p. 1.) Brinker does not dispute that employers must offer meal periods during which employees are "relieve[d] . . . of all duty." (*Ibid.*) Nor does Brinker dispute that the Labor Code mandates that employers provide meal periods to their hourly employees. The *actual* issue is whether an employee can choose, for whatever personal reason the employee may have, not to take the meal period that the employer makes available, or whether – as Plaintiffs argue – the employer must "*ensure that work stops* for the required thirty minutes" (*id.*, p. 28, emphasis added).

2. *Meal Period Timing Issue*. The issue is *not*, as Plaintiffs state, whether the Labor Code "impose[s] a timing requirement for meal periods." (OB, p. 1.) It indisputably does: Employers must provide a first meal period to employees working "more than five hours per day," and a second meal period to employees working "more than 10 hours per day." (Lab. Code, § 512, subd. (a).) The *actual* issue is whether an employee's meal period entitlement is measured by the total number of hours worked "per day," as the Labor Code states, or by the number of consecutive hours that have elapsed since the preceding meal, as Plaintiffs claim (OB, pp. 82, 84).

3. *Rest Period Timing Issues*. There are two issues about the proper timing of rest periods:

(a) Must employers determine the "total hours worked daily" and authorize rest periods "at the rate of ten (10) minutes net rest time

per four (4) hours or major fraction thereof," as the Wage Order requires (Regs., § 11050, subd. (12)(A)),[1] or must employers time rest periods at the two-hour, six-hour, and ten-hour marks of an employee's shift, as Plaintiffs claim (OB, pp. 104, 106). Contrary to what Plaintiffs state, the issue is *not* whether an employer may "compel employees to work an eight-hour shift with only a single rest break" (OB, p. 2), as both *Brinker* and the Wage Order make clear that an employee working an eight-hour shift is entitled to *two* rest periods. (July 22, 2008 Slip Opinion ("Slip Op."), pp. 24, 28, 31.)

(b) Must a rest break be permitted in the middle of each four-hour work period "insofar as practicable," as the Wage Order states (Regs., § 11050, subd. (12)(A)), or must a rest break invariably be permitted before the first meal period – even when the first meal period is scheduled early in an employee's shift – as Plaintiffs argue (OB, pp. 110-111).

4. *Survey, Statistical, or Other Representative Evidence*. Can Plaintiffs' meal period, rest period, and off-the-clock claims – which require individualized inquiries into whether a particular manager at a particular restaurant on a particular shift discouraged or prohibited a break or encouraged or permitted off-the-clock work – be decided by way of survey, statistical, or other representative evidence.

5. *Appellate Review Issues*. There are three appellate review issues before the Court:

(a) Must an appellate court reverse a certification order that rests on the erroneous legal assumption that the law applicable to

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[1] All references to "Regs." are to title 8 of the California Code of Regulations.

Plaintiffs' claims does not need to be established before deciding whether individual or common issues predominate.

(b) Must an appellate court remand a certification decision when there are no factual issues remaining to be resolved and the only issues before it are purely legal.

(c) Does an appellate court err in noting the *absence* of any evidence of a class-wide policy or practice of prohibiting meal or rest periods or requiring off-the-clock work, and holding that – without such evidence – Plaintiffs' claims, by their nature, require individual liability determinations.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

1. Meal Periods

Before 2000, there was no statutory meal period requirement in California; meal period regulations were found only in wage orders promulgated by the Industrial Welfare Commission ("IWC"). Moreover, before 1980, the meal period provision in the wage order covering employees in the restaurant industry applied only to women and minor employees.[2] (Plaintiffs' January 20, 2009 Motion for Judicial Notice ("MJN"), Exs. 8-17 [attaching wage orders from 1919 through 1968].) Even when that wage order's meal period provision was broadened to encompass men, it still included no enforcement or penalty provision. It simply stated, in relevant part:

> No employer shall employ any person for a work period of more than five (5) hours without

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[2] While the 1976 wage order included men, this Court held in *California Hotel and Motel Assn. v. IWC* (1979) 25 Cal.3d 200, that it was invalid as promulgated for failure to include an adequate statement of basis. (*Id.* at p. 216.)

> a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.

(Regs., § 11050, subd. (11)(A); Wage Order No. 5-80 (January 1, 1980) [MJN Ex. 19], ¶ 11.)[3] Violators could be sanctioned only through a court-imposed injunction or a Notice to Discontinue Labor Law Violations issued by the State Labor Commissioner.

When the Legislature decided to codify "[e]xisting wage orders" into the Labor Code, its understanding was clear: wage orders "prohibit an employer from employing an employee for a work period of more than 5 hours per day without *providing* the employee with a meal period." (AB 60, Legislative Counsel Digest (July 21, 1999) [MJN Ex. 58], p. 2, emphasis added.) Labor Code section 512, effective January 1, 2000, thus only obligated employers to *provide* meal periods, not – as Plaintiffs insist – "*ensure that work stops*" (OB, p. 28, emphasis added):

> An employer may not employ an employee for a work period of more than five hours per day without *providing* the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employee may not employ an employee for a work period of more than 10 hours per day without *providing* the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(Lab. Code, § 512, subd. (a), emphasis added.)

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[3] This language has remained essentially unchanged since 1952.

Less than six months after section 512 went into effect, the IWC expressly incorporated section 512's requirement that employers "*provide*" meal periods into Wage Order 5-2001.[4] As amended in June 2000, the Wage Order included a penalty provision:

> If an employer fails to *provide* an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not *provided.*

(Regs., § 11050, subd. (11)(B), emphasis added.)

After the Wage Order was amended to reflect the Legislature's determination that employers need only "provide" meal periods, the Legislature amended Labor Code section 516, cautioning that all IWC wage orders must be consistent with section 512. Section 516, as amended in September 2000, states in full:

> *Except as provided in Section 512*, the Industrial Welfare Commission may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers.

(Lab. Code, § 516, emphasis added.)

In the same month, the Legislature enacted its own penalty provision applicable to both meal and rest periods, Labor Code section 226.7. Consistent with the "provide" language of section 512 and the recently amended Wage Order, section 226.7 states that employers who "*require* any employee to work during any meal or rest period," or "fail[] to *provide*

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[4] Unless otherwise indicated, "Wage Order" refers to Wage Order 5-2001, governing all employees in the public housekeeping industry – "mean[ing] any industry, business, or establishment which provides meals, housing, or maintenance services . . . ." (Regs., § 11050, subd. (2)(P).)

an employee a meal or rest period" owe the employee an "additional hour of pay":

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

(Lab. Code, § 226.7, emphasis added.)

2. Rest Periods

The Wage Order's rest period provision also has remained constant since 1952:

> Every employer shall authorize and permit all employees to take rest periods, *which insofar as practicable shall be in the middle of each work period.* The authorized rest period time shall be based on the *total hours worked daily* at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose *total daily work time* is less than three and one-half (3 1/2) hours.

(Regs., § 11050, subd. (12)(A), emphasis added; Wage Order 5-52 (May 15, 1952) [MJN Ex. 14], ¶ 12.) Employers are thus directed to determine "the total hours worked daily" and authorize rest periods "at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof." (*Ibid.*) Contrary to what Plaintiffs insist (OB, pp. 110-111), the Wage Order contains *no* requirement that a first rest period be scheduled before the first meal period.

In June 2000, the IWC added an "hour of pay" penalty to the rest period provision, using the same language as in its simultaneously enacted meal period penalty provision:

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

(Regs., § 11050, subd. (12)(B), emphasis added.) Thus, both the meal and rest period provisions of the Wage Order, as amended in 2000, use the term "provide" to describe an employer's obligation.

Moreover, a few months later, the Legislature enacted section 226.7, which – as discussed above – penalizes employers for "*requir[ing]* any employee to work" through or "fail[ing] to provide" either a meal *or* a rest period. (Lab. Code, § 226.7, emphasis added.) The Legislature's clear intent was to establish an identical compliance standard for meal and rest periods – not two different compliance standards, as Plaintiffs would have it. (OB, p. 28.)

Unlike meal periods, which are unpaid, rest periods are paid and considered "hours worked." (Regs., § 11050, subds. (11)(A), (12)(A).) Because rest periods are "on-the-clock," there is no need to record them. "Off-the-clock" meal periods, by contrast, must be recorded so that employers can maintain "accurate information with respect to each employee," including "[t]otal hours worked." (*Id.*, § 11050, subd. (7)(A).)

B. Factual Background

At the time of briefing on Plaintiffs' class certification motion, Brinker operated 137 restaurants in California, including Chili's Grill & Bar and Maggiano's Little Italy. (3PE644.) Brinker previously owned the Cozymel's Coastal Grill and Corner Bakery Cafe chains, but Cozymel's

Coastal Grill was sold December 24, 2003 and Corner Bakery Cafe was sold February 2, 2006. (*Ibid.*) Brinker also owned the Macaroni Grill chain, but it was sold November 20, 2008.

1. Brinker's Meal Period, Rest Period, And Off-The-Clock Policies

Brinker's "Break and Meal Period Policy for Employees in the State of California" includes a form to be signed by all employees. With respect to meal breaks, that form states: "I am entitled to a 30-minute meal period when I work a shift that is over five hours." (19PE5172.)

As to rest breaks, the form provides: "If I work over 3.5 hours during my shift, I understand that I am eligible for one ten-minute rest break for each four hours that I work." (19PE5172.) Contrary to what Plaintiffs argue (OB, p. 15), Brinker's policy is that a rest period must be authorized *within* – not after – every four-hour work period. (21PE5913-5915.)

Brinker's policy also states that an employee's failure to follow Brinker's meal and rest break policies "may result in disciplinary action up to and including termination." (19PE5172.)

With regard to off-the-clock work, Brinker's "Hourly Employee Handbook" states in relevant part: "It is your responsibility to clock in and clock out for every shift you work. . . . [Y]ou may not begin working until you have clocked in. Working 'off the clock' for any reason is considered a violation of Company policy." (19PE5181.) The Handbook further states: "If you forget to clock in or out, of if you believe your time records are not recorded accurately, you must notify a Manager immediately, so the time can be accurately recorded for payroll purposes." (*Id.* at 5181-5182.)

2. DLSE Investigation And Settlement

In 2002, the California Division of Labor Standards Enforcement ("DLSE") initiated an investigation regarding Brinker's alleged failure to provide meal and rest breaks, among other things. No final conclusions of

wrongdoing were reached, and Brinker admitted no wrongdoing. (2PE358-359.) Brinker entered into an injunction to ensure future compliance with wage and hour laws (18PE4840), and the Los Angeles County Superior Court overseeing the injunction has not found – nor has there been any allegation – that Brinker has violated the injunction.

C. Procedural History

1. Plaintiffs' Complaint

In 2004, Plaintiffs filed a class action complaint against Brinker on behalf of current and former hourly employees who had "experienced *Defendants' common company policy of depriving employees of rest periods and meal periods* . . . ." (1PE182 [First Amended Complaint], emphasis added.) Specifically with respect to rest periods, Plaintiffs alleged: "Defendants have had *a consistent policy of requiring* Restaurant Non-Exempt Employees within the State of California, including *Plaintiffs, to work through rest periods and failing to provide rest periods of at least ten minutes per four hours worked or major fraction thereof* . . . ." (1PE180 [First Amended Complaint], emphasis added.) With respect to meal periods, Plaintiffs alleged: "Defendants have had *a consistent policy of requiring* Restaurant Non-Exempt Employees within the State of California, including *Plaintiffs, to work through meal periods and/or work at least five (5) hours without a meal period* . . . ." (*Ibid.* [First Amended Complaint], emphasis added.)

2. The Trial Court's July 2005 Opinion On The Meal Period Timing Issue

In connection with an ongoing mediation, the parties in 2005 asked the trial court to rule on three legal issues to "assist in resolution of this putative class action lawsuit." (21PE5732.) Among the three issues was

"whether [Brinker] was required to provide a meal period for each five-hour block of time worked." (*Id.* at 5733.)

The trial court stated in a July 1, 2005 opinion that "the DLSE wants employers to provide employees with break periods and meal periods toward the middle of an employee[']s work period in order to break up that employee's 'shift.'" (21PE5726.) It concluded: "[D]efendant appears to be in violation of § 512 by not providing a 'meal period' per every five hours of work." (*Ibid.*)

Although the trial court cautioned at the time that its opinion on the meal period timing issue and the other two legal issues presented were "advisory opinions only" (21PE5724), two weeks later it stated that its "advisory ruling is confirmed by the court as an order" (1PE208). But when Brinker petitioned the Court of Appeal for review of that order, the court denied review, concluding that the ruling was advisory in nature: "The review of an advisory opinion would result in an advisory opinion. California courts generally have no power to render an advisory opinion. The petition is denied." (*Brinker Restaurant Corp. v. Superior Court* (Jan. 20, 2006, D047509 [nonpub. opn.].) In its July 22, 2008 published opinion, however, the Court of Appeal stated that its "order was erroneous as the 'advisory' opinion by the trial court was later confirmed by the court as an official order." (Slip Op., p. 35, fn. 8.)

3. Plaintiffs' Motion For Class Certification

On April 28, 2006, Plaintiffs moved to certify a class of "all present and former employees of [Brinker] who worked at a Brinker owned restaurant in California, holding a non-exempt position, from and after August 16, 2000." (2RJN7385.) The class was comprised of the following six sub-classes:

> (1) employees "who worked one or more work periods in excess of three and a half (3.5) hours

without receiving a paid 10 minute break during which the Class Member was relieved of all duties";

(2) employees "who worked one or more work periods in excess of five (5) consecutive hours, without receiving a thirty (30) minute meal period during which the Class member was relieved of all duties";

(3) employees "who worked 'off-the-clock' or without pay";

(4) former employees who "were not paid the amounts owed to them in a timely manner following termination of their employment";

(5) "[c]lass members who signed fully or partially enforceable arbitration agreements"; and

(6) "[p]resent employees entitled to injunctive relief."

(2RJN7385-7386.) Plaintiffs' putative class was estimated to include 59,451 employees. (4PE987.)

Plaintiffs recognized that the fourth, fifth, and sixth subclasses were by nature conditional. The fourth subclass for "waiting time penalties" "flow[ed] from [the meal period, rest period, and off-the-clock] violations." (1PE40.) Plaintiffs asked the court to certify the fifth "arbitration" subclass pending their receipt of "discovery responses as to how many Class members signed Arbitration Agreements" and "determination of the issue of whether or not arbitration as to the sub-class . . . is appropriate" (2RJN7386, fn. 1) – a determination that was never made. The final "injunction" subclass was based on Plaintiffs' intent "to seek Injunctive Relief prohibiting Defendants from violating [the trial court's] Orders of July 15, 2005, soon after the Class Certification Hearing." (2RJN7386, fn. 2.) Plaintiffs, however, never sought the anticipated injunction.

In support of their motion for class certification, Plaintiffs submitted the declarations and deposition testimony of 33 current and former Brinker employees. Plaintiffs' witnesses professed knowledge only of what occurred at the particular restaurants where they worked, during their particular shifts. Plaintiffs submitted no evidence from Brinker managers or executives suggesting that Brinker had violated its stated meal period, rest period, or off-the-clock policies.

Despite Plaintiffs' claim that Brinker maintained a "consistent policy of requiring [non-exempt employees] to work through meal periods and/or work at least five (5) hours without a meal period" (1PE180), a number of Plaintiffs' witnesses testified that they regularly took 30-minute, uninterrupted meal periods when they worked more than five hours. (19PE5206-5207, 5283-5284, 5371; 20PE5436, 5477, 5507.) Named Plaintiffs Romeo Osorio and June Rader testified that they were provided meal periods, but sometimes decided to skip them to finish a shift early or to maximize tips. (20PE5487-5490 [Osorio Dep. Tr.]; 5508 [Rader Dep. Tr.].)[5] Osorio further testified that at the restaurant where he worked, there were "breakers" assigned to relieve employees during their meal periods. (20PE5478, 5487-5490.) Plaintiffs' other witnesses testified that they, too, were given meal periods, albeit sometimes early in their shifts. (1PE132, 140, 163, 171; 19PE5206, 5221-5222, 5270, 5282-5284, 5310, 5371-5372.)

Even the remaining declarations did not evidence a "consistent policy of requiring" employees to work through meals. Nearly a third of

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[5] While Plaintiffs point to the absence of *written* waivers in their statement of facts (OB, p. 17), there is no statutory requirement that waivers be in writing – and Plaintiffs do not suggest otherwise. In any event, as explained in detail in section I.A.2.b, below, many employees do not "waive" meal periods within the meaning of section 512, but rather choose not to take meal periods they are offered. (Lab. Code, § 512, subd. (a).)

Plaintiffs' witnesses made no mention of meal periods at all in their declarations. (1PE92, 103, 108, 114, 122, 124, 128, 138, 143, 151.) Moreover, some declarants claimed that they "did not receive an uninterrupted off-duty 30 minute meal break for every five hours [] worked," but at their depositions admitted that they *did* in fact regularly receive meal periods when they "worked over five hours." (Compare 1PE100 with 19PE5206-5207 and 1PE110 with 19PE5310.)

As to Plaintiffs' claim that Brinker maintains "a consistent policy of requiring [non-exempt employees] to work through rest periods and failing to provide rest periods of at least ten minutes per four hours worked or major fraction thereof" (1PE180), a number of Plaintiffs' witnesses testified that they were regularly permitted to take rest breaks. (19PE5311, 5373; 20PE5511-5514.) While others testified that they were not permitted rest breaks (1PE122, 124, 138, 134), none testified – as Plaintiffs claim (OB, p. 12) – that they were not authorized a rest break until after working four hours.

Plaintiffs' evidence also did not demonstrate that "Brinker pervasively requires 'off-the-clock' work during meal periods because workers are pervasively interrupted while on break." (OB, p. 12.)[6] More than half of Plaintiffs' declarants made no reference to off-the-clock work (1PE92, 103, 108, 110, 114, 122, 124, 128, 132, 134, 138, 143, 145, 151, 156, 158, 160, 171), and several who did stated merely that they "performed job duties while clocked out for meal breaks or for the day" (1PE130, 140). Those witnesses failed to indicate whether they were *required* to work off the clock or did so by their own choice, or whether their supervisors had any inkling that they were performing work off the clock in violation of Brinker policy. Moreover, named Plaintiff Rader

[6] Plaintiffs' off-the-clock claim is limited "to time worked while clocked out for meal periods." (OB, p. 12.)

testified that "non-managerial employees" – not Brinker managers – would interrupt her meal periods to ask her questions about her tables. (20PE5502.) Another one of Plaintiffs' witnesses testified that when employees left for lunch but forgot to clock out, or returned from a meal and forgot to clock back in, managers appropriately adjusted their time cards. (19PE5288.)

4. Brinker's Opposition To Class Certification

In opposition to class certification, Brinker submitted the declarations of 336 putative class members stating that they were regularly provided 30-minute meal breaks. (6PE1564-11PE3026.) Brinker also submitted the declarations of 716 employees stating that they were allowed rest breaks (11PE3032-13PE3598; 16PE4351-17PE4784), and 19 managers stating that they permitted their employees to take breaks (3PE699, 707, 721, 726, 736, 745, 761, 769, 783, 792, 800, 824, 842, 860, 877; 4PE896, 909, 931, 944). Ninety-seven percent of Brinker's declarants testified that their managers did not ask them to work during their meals. (4PE986.)

Brinker argued in opposition to class certification that because rest and meal periods need only be provided – not necessarily taken – it can only be determined on an individual basis whether a violation occurred. (3PE650-659.) Brinker cited the declarations of numerous putative class members who testified that they skipped breaks for a variety of personal reasons. (*Id.*, citing 3PE721-722, 780, 812, 823, 828, 834, 843-844, 861, 871, 873-874, 4PE906-907.)

5. The Trial Court's Certification Order

On July 6, 2006, the trial court granted Plaintiffs' motion for class certification. It stated:

> Defendant's arguments regarding the necessity of making employees take meal and rest periods actually points toward a common legal issue of

> what defendant must do to comply with the Labor Code. Although a determination that defendant need not force employees to take breaks may require some individualized discovery, the common alleged issues of meal and rest violations predominate.

(1PE1-2.) In its brief, conclusory order, the trial court did not mention any other common issues. (*Ibid.*)

6. Brinker's Writ Petition And The Court Of Appeal's Order To Show Cause

On September 1, 2006, Brinker sought a writ from the Court of Appeal, contending that the trial court could not have decided whether individual or common issues predominate without first determining the law governing Plaintiffs' claims. (Petition for Writ of Mandate, Prohibition, Certiorari, Or Other Appropriate Relief ("Petition"), pp. 6-7.) Brinker maintained that had the trial court decided – in keeping with the relevant Labor Code and Wage Order provisions – that it has no obligation to force its employees to take meal and rest periods, the trial court necessarily would have concluded that individual issues predominate and class certification is inappropriate. (*Ibid.*) Similarly, because an employer is only liable for off-the-clock work if it had actual or constructive knowledge that such work was performed, Plaintiffs' off-the-clock claims could only be resolved on a case-by-case basis after determining whether individual managers knew or should have known that an employee was working off the clock. (*Id.*, pp. 1-2.)

In opposition to the Petition, Plaintiffs argued that Brinker's own time records, in addition to "statistical methodology and proof," would show the "widespread nature of Brinker's violations" and also manage the individual inquiries surrounding their claims. (Preliminary Opposition to the Petition, p. 2.) Plaintiffs further argued that common legal questions involving the proper timing of meal and rest periods supported the trial

court's certification order – specifically, whether an employer must provide a meal period "for each five (5) hour period an employee works," and whether an employer must provide a first rest period "prior to the meal period." (*Id.*, pp. 1-2.)

In reply, Brinker urged the Court of Appeal to define the law applicable to Plaintiffs' meal period, rest period, and off-the-clock claims, and hold that Plaintiffs' theories about the proper timing of meal and rest periods have no basis in either the Labor Code or the Wage Order. (Reply Brief in Support of Petition, pp. 5-6, 10-13.) Brinker also argued that no "statistical methodology" is capable of bypassing the highly individual inquiries necessary to establish liability with respect to each class member. (*Id.*, p. 3.) Brinker explained, for example, that a time card's indication of a missed meal period could mean that the meal period was prohibited, or could just as easily mean that the employee chose to skip that particular meal. (*Id.*, p. 16.)

With respect to rest periods – which are unrecorded – Brinker maintained that it could only be determined on an individual basis whether a particular manager prohibited a timely break or whether an employee chose not to take it. (Reply Brief in Support of Petition, p. 2.) Similarly, without any records of off-the-clock work, the trier of fact would have to assess the credibility of the employee claiming to have performed off-the-clock work and decide whether the employee's manager knew or should have known that such work was performed. (*Ibid.*)

On December 7, 2006, the Court of Appeal issued an Order to Show Cause. In their Return to the Order to Show Cause, Plaintiffs identified another common legal question purportedly justifying certification – whether employers are obligated to permit a first meal period for every *three and one-half hours* of work. (Return to Order to Show Cause, p. 16.) Brinker responded that the Wage Order only requires a rest period for every

four hours of work (Reply to Return to Order to Show Cause, p. 29) – as Plaintiffs themselves had originally stated in their complaint and motion for class certification. (1PE23; *id.*, 44, fn. 7.)

7. The Court Of Appeal's October 12, 2007 Opinion

In an unpublished October 12, 2007 opinion, the Court of Appeal agreed with Brinker that the trial court had erred in "certifying the proposed class and subclasses without first determining as to each type of claim both the theory of liability and the elements that must be proven to hold Brinker liable." (*Brinker Restaurant Corp. v. Superior Court* (Oct. 12, 2007, D049331) 2007 WL 2965604, *9.) The Court of Appeal defined the "elements that must be proven" with respect to Plaintiffs' rest period claims, holding that the Wage Order mandates a rest period for every four hours – not three and one-half hours – of work, and that a rest break before the first meal period is not required. (*Id.* at *10-11.) Because Brinker's policy is consonant with the Wage Order and because whether any particular manager at any particular restaurant on any particular shift failed to authorize a rest period is an inherently individual question, the Court of Appeal held that the trial court had abused its discretion in finding Plaintiffs' rest period claims amenable to class treatment. (*Id.* at *12.)

The Court of Appeal also held that the trial court erred in its July 2005 ruling that "early lunching" is prohibited, and that an employer must "make a 30-minute meal period available to an hourly employee for every five *consecutive* hours of work. (*Brinker*, *supra*, 2007 WL 2965604 at *13, emphasis added.) The court, however, did not address whether employers must provide or ensure their employees' meal periods, instead remanding that issue to the trial court. (*Id.* at *19.) By its express terms, the October 2007 decision was immediately final. (*Id.* at *21.)

On October 26, 2007, the Court of Appeal informed this Court that it had made a clerical error in ordering its October 12, 2007 opinion

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

Contrary to the position they had previously taken, in supplemental briefing Plaintiffs joined Brinker and expressly requested that the Court of Appeal "decide the pure legal question of whether, under California law, meal periods must be 'ensured' or merely 'made available.'" (Plaintiffs' December 17, 2007 Supplemental Brief ("Supp. Brief"), p. 10.) Plaintiffs also changed their position with respect to the timing of rest periods: Although they had previously argued that employees are entitled to a 10-minute rest period every *three and one-half* hours (Return to Order to Show Cause, p. 16), Plaintiffs now maintain that employees are entitled to a first rest period after working *two* hours, a second rest period after working *six* hours, and a third rest period after working *ten*. (Supp. Brief, p. 20.)

8. The Court Of Appeal's July 22, 2008 Decision

On July 22, 2008, the Court of Appeal filed its unanimous, published decision, again holding that the trial court had erred in failing to decide the law applicable to Plaintiffs' meal period, rest period and off-the-clock claims before certifying the class. (Slip Op., pp. 22-23.) The Court of Appeal determined the elements of Plaintiffs' rest period claims as it had on October 12, 2007 (*id.*, pp. 22-31), and again held that employers are not required to offer meal periods for every five consecutive hours of work (*id.*, pp. 34-41). It also held that employers are obligated only to provide, not to ensure, their employees meal periods. (*Id.*, pp. 41-47.)

Having defined *all* elements of Plaintiffs' claims, the Court of Appeal addressed whether the "'*theor[ies] of recovery* advanced by the proponents of certification [are], as an analytical matter, likely to prove amenable to class treatment.'" (Slip Op., p. 21, quoting *Sav-on*, *supra*, 34

Cal.4th at p. 327, original emphasis.) Deciding that they are not, the Court of Appeal granted Brinker's writ petition and directed the trial court to enter a new order denying class certification. The following paragraphs summarize the key points in the Court of Appeal's decision.

a) Plaintiffs' rest period claims

In defining the elements of Plaintiffs' rest period claims, the Court of Appeal held – based on the Wage Order's plain provisions – that an employer must offer one rest period for every four-hour work period unless the total work period is between three and one-half and four hours, in which case the employee is also entitled to a rest break. (Slip Op., p. 24.) Contrary to what Plaintiffs insist, and as explained in further detail in section III.A.2, below, the Court of Appeal did *not* hold that "an employee working an eight-hour shift would accrue just one rest break, not two." (OB, pp. 24-25.) Rather, under the court's plain language reading of the Wage Order, an employee working eight hours – two four-hour work periods – is entitled to two rest periods. (Slip Op., pp. 24, 28, 31.)

The Court of Appeal rejected Plaintiffs' argument that a rest period must be authorized every three and one-half hours, as well as their alternative contention that "employees are entitled to a second rest period after working six hours, and a third rest period after working 10 hours." (Slip Op., p. 28.) It explained: "If the IWC had intended that employers needed to provide a second rest period at the six-hour mark, and a third rest period at the 10-hour mark, it would have stated so[.]" (*Ibid.*)

With regard to Plaintiffs' claim that employers must authorize the first rest period of the shift before the first meal period, the Court of Appeal held that the Wage Order does not support Plaintiffs' theory – it states only that rest periods "'*insofar as practicable shall be in the middle of each work period.*'" (Slip Op., p. 28, quoting Regs., § 11050, subd. (12)(A),

emphasis added.) A first rest break timed after an early meal period could still fall in the "middle" of a four-hour work period. (*Ibid.*)

The Court of Appeal also confirmed that employers need only "authorize and permit," not ensure, their employees' rest periods – a point that Plaintiffs acknowledged, but that the trial court held was a "common legal issue" justifying class certification. (Slip. Op., p. 30.) The court held that if the trial court had decided that issue, it necessarily would have denied certification because a trier of fact "cannot determine on a class-wide basis whether members of the proposed class of Brinker employees missed rest breaks as a result of a supervisor's coercion or the employee's uncoerced choice. . . . *The issue of whether rest periods are prohibited or voluntarily declined is by its nature an individual inquiry.*" (*Id.*, p. 31, emphasis added.)

Addressing Plaintiffs' argument that the case should be remanded to allow the trial court to assess their "expert statistical and survey evidence," the Court of Appeal held that such evidence could "not show *why* rest breaks were not taken," or "*why* breaks of less than 10 uninterrupted minutes were taken." (Slip Op., p. 32, original emphasis.) It concluded that while under *Sav-on*, "courts *may* use such evidence in determining if a claim is amenable to class treatment," here such evidence would be useless because employees often voluntarily take rest periods shorter than 10 minutes, or skip them altogether. (*Ibid.*, emphasis added, citing *Sav-on*, *supra*, 34 Cal.4th at p. 333.)

b) Plaintiffs' meal period claims

Plaintiffs raised two central arguments with respect to their meal period claims: first, that employees are entitled to a meal period after five *consecutive* hours of work, and second, that employers must ensure that their employees take the meal periods they offer. The Court of Appeal rejected both claims, and held that because employers need only make meal

breaks available, Plaintiffs' meal period claims – like their rest period claims – can only be litigated on an individual basis.

With respect to Plaintiffs' theory that a meal period must be provided for every five consecutive hours of work, the Court of Appeal held that under Labor Code section 512(a), employees are entitled to one meal after working "'more than five hours per day,'" and a second meal after working "'more than ten hours per day.'" (Slip Op., pp. 35-36, quoting Lab. Code, § 512(a).) It rejected Plaintiffs' theory that "early lunches" are prohibited, reasoning that neither the Labor Code nor the Wage Order contains any "restriction on the timing of meal periods." (Slip Op., p. 40.)

With regard to the "provide v. ensure" issue, the Court of Appeal held that "the plain language of section 512(a)" – stating that employers must "*provid[e]*" meal periods – makes clear that "meal periods need only be made available, not ensured, as plaintiffs claim." (Slip Op., p. 42.) It explained that *Cicairos v. Summit Logistics, Inc.* offers no support for Plaintiffs' position that employers are the guarantors of their employees' meal periods because that case addressed an employer's failure to *provide* meal periods – not its failure to ensure them. (*Id.*, pp. 44-46.) The *Brinker* court also held that the obligation to "provide" meal periods means that "employers cannot *impede, discourage or dissuade* employees from taking [them]." (*Id.*, p. 4, emphasis added.)

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

> It would need to be determined as to each employee whether a missed or shortened meal period was the result of an employee's personal choice, a manager's coercion, or, as plaintiffs