Case No. S166350

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRINKER RESTAURANT CORPORATION, et al.,
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 Number D049331, Granting a Writ of Mandate to the Superior Court of California, County of San Diego, Case No. GIC834348, Hon. Patricia A.Y. Cowett

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST, AND PROPOSED AMICUS BRIEF OF ROGELIO HERNANDEZ

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS/REAL PARTIES IN INTEREST

Pursuant to California Rule of Court 8.520(f), Rogelio Hernandez respectfully seeks permission to file the accompanying amicus brief in support of Plaintiffs/Real Parties in Interest.

Mr. Hernandez is the plaintiff and putative class representative in *Rogelio Hernandez v. Chipotle Mexican Grill, Inc.*, No. S188755, a meal-and-rest-break class action in which this Court granted review on January 26, 2011, but deferred merits briefing until after the Court decides this case. The proposed amicus brief addresses an important issue raised in this case and in *Chipotle*, which amicus believes was not sufficiently addressed in the prior briefing.

The first four Issues Presented in the *Brinker* Petition for Review, which were the main focus of the parties' briefs and the prior amicus briefs, ask the Court to determine the substantive meal-and-rest-break standards applicable to California workers. Issue No. 5, which this Court also accepted for plenary review, involves a separate issue concerning what types of proof should be admissible to prove classwide liability once the governing legal standards are resolved – *i.e.,* what should happen in this and other cases *after* this Court decides the threshold legal standard for meal periods and rest breaks under California law. As phrased in the Petition for

Review, Issue No. 5 asks:

> *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?

This is a critically important issue. According to the Court of Appeal, the trial court erred in certifying a class because, under the "make available" standard that the appellate court held should apply to meal period and rest break claims, plaintiff restaurant workers could prove their case *only* on a worker-by-worker, break-by-break basis, and could *not* establish classwide liability through expert surveys, statistical evidence, and/or representative testimony, either alone or in combination. *See* Slip op. 4, 31-32, 48-49, 51-52.

Knowing what types of classwide evidence may be used to prove meal period and rest break violations under California law has tremendous practical and legal importance. The other plaintiffs' amici have not focused on this issue, however, and the applicable case law has not been updated since the final set of party briefs was filed on October 8, 2009.[1/]

[1/] The only amicus brief in support of the plaintiffs that even touched on these issues was the brief filed on August 18, 2009 by the Impact Fund *et al.*, which principally focused on why the same standards applicable to presenting classwide evidence in pattern-and-practice discrimination cases should as a general matter apply to meal-and-rest-break claims – a conclusion with which Mr. Hernandez agrees, but which is different than

(continued...)

Proposed amicus Rogelio Hernandez, through his undersigned counsel, is familiar with these issues, with the facts and arguments raised in this case, and with the use of statistical evidence, expert surveys, and representative testimony in state and federal employment class actions. The accompanying brief focuses on the precise legal claims and theories presented by the *Brinker* plaintiffs, analyzes them in the context of wage-and-hour claims generally, and demonstrates why, on the factual record presented, classwide proofs should be available to prove those claims no matter *how* this Court rules on the threshold legal questions.

Although the merits briefing in this case was completed in 2009, there are at least four reasons why good cause exists for the late filing of Mr. Hernandez's proposed amicus brief. *See* Rule of Court 8.520(f)(2) ("For good cause, the Chief Justice may allow later filing").

First, this Court did not issue its grant-and-hold order in Mr. Hernandez's case until January 26, 2011, and this brief was prepared by his undersigned counsel as soon thereafter as possible.

[1/] (...continued)
the points that he proposes to make in the accompanying brief. (Two of the amicus briefs filed on behalf of Brinker also included a discussion of the class action issues, but without specifically addressing the precise claims asserted by plaintiff and how they can be proved through common evidence. *See* Amicus Brief of Chamber of Commerce, at 30-57; Amicus Brief of National Retail Federation, at 37-55.)

Second, the class certification issues in Mr. Hernandez's case against Chipotle Mexican Grill, Inc. (which, like this case, involves restaurant worker plaintiffs) and in several of the other grant-and-hold cases, substantially overlap with the class certification issues in this case, although there are important factual differences between those cases – and among wage-and-hour cases generally – that the Court may want to consider in analyzing the class action issues presented.[2/]

Third, the arguments and analysis set forth in the proposed amicus brief have not been made previously by any of plaintiffs' amici, and Mr. Hernandez's analysis relies in part on several cases that had not yet been

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[2/] In *Chipotle*, the Issues Presented included:

1. How should the burden of proof be allocated in an employment case when the employer's liability rests upon the accuracy of its own time records (including records that California law requires the employer to maintain)?

2. Regardless of who bears the burden of proof, may an employer insist upon individualized worker-by-worker and break-by-break testimony to establish whether its time records are accurate in documenting which breaks were actually missed?

3. In an employment class action, may a plaintiff satisfy the threshold showing necessary for certification by showing that classwide liability may be established by the employer's time records coupled with evidence of uniform workplace practices and policies, where the employer proposes to defend by conducting a worker-by-worker, time record-by-time-record inquiry into the accuracy of its records?

See Pet. for Review in No. S188755, at 3.

decided when the parties filed their the last set of briefs in the fall of 2009.

Fourth, and finally, no party will be prejudiced by permitting this filing, as oral argument has not yet been scheduled in *Brinker*.

Because the proposed amicus brief will assist the Court in deciding the important issues presented, and because good cause exists for the late filing, the Court should grant permission for the attached brief to be filed and should permit the parties to file any answer to the arguments and analysis presented within 20 days after filing, pursuant to Rule of Court 8.520(f)(7).

February 17, 2011

Respectfully submitted,

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PROPOSED AMICUS BRIEF OF ROGELIO HERNANDEZ

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

DOCKETED CASES

STATUTES AND REGULATIONS

IWC WAGE ORDERS

MISCELLANEOUS

INTRODUCTION

There is no dispute that statistical evidence, expert surveys, and representative testimony constitute legitimate forms of proof that can be used to establish liability and/or damages in class actions, as well as in individual litigation. *See, e.g., Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 333; Manual for Complex Litigation, Fourth, §11.493 at 102; D. Kaye & D. Freedman, Reference Guide on Statistics at 83-178, published in Federal Judicial Center, *Reference Manual on Scientific Evidence* (West Group, 2d ed. 2000); S. Diamond, Reference Guide on Survey Research at 229-76, published in Federal Judicial Center, *Reference Manual on Scientific Evidence* (West Group, 2d ed. 2000); Real Parties' Opening Brief on the Merits ("OBM") at 123-27 & n.57 and cases cited; Real Parties' Reply Brief on the Merits ("RBM") at 40-41 & n.18, 46-49 and cases cited. Even the Court of Appeal below accepted this general evidentiary principle. Slip op. 32, *citing Sav-On*, 34 Cal.4th at 333 ("it is clear that courts may use such evidence in determining if a claim is amenable to class treatment"). The question posed by this case, which the Court will reach after deciding what substantive legal standards apply to meal period and rest break claims in California, is whether the trial court abused its discretion in finding that such evidence may be used to establish

liability and damages in *this* case, on *these* facts, and on *this* record – the question presented in the Petition for Review's Issue No. 5.[3/]

If this Court holds that California employers must affirmatively relieve their workers from duty during meal periods, there seems to be little dispute that plaintiffs will be able to prove their meal period claims through Brinker's own contemporaneous, electronic time records (which, under California law, must accurately record each meal period taken and missed). *See infra* at 6-10; OBM at 114-15. It should also be true that plaintiffs will be able to prove several of their other classwide claims through those time records as well, including their challenges to Brinker's "early lunching," rest break compliance ("four hours or major fraction"), and rest break timing ("no-rest-break-before-the-first-meal-period") policies. *See infra* at 17-21; OBM at 78-80, 103-05, 110.

The real evidentiary dispute in this case, as in several of the other grant-and-hold cases (although not in *Chipotle*, for the reasons explained *infra* at 11-13), is whether plaintiffs can prove their *other* claims on a classwide basis, including whatever claims may in fact require resolution of

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[3/] Issue No. 5 asks:

> 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?

a legitimate disagreement about "why" a particular break was missed. *See infra* at 23-34.

Plaintiffs' class certification briefs explained how a combination of expert survey analysis, representative testimony, and statistical evidence could be used to prove their classwide claims, a topic that was also a major focus of the trial court's class certification hearing. *See* OBM at 18-19 & n.9 (citing record); *infra* at 12-14. The trial court, in certifying the class, agreed that plaintiffs could prove their claims through classwide evidence. *See* 1PE001-002. Yet the Court of Appeal reversed, even though appellate courts are required to defer to a trial court's factual findings in adjudicating a class certification motion, including by deeming the trial court to have made all factual findings necessary to support its ruling. *See, e.g., Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436; *Sav-On*, 34 Cal.4th at 326, 329 (reviewing court must "presume[e] in favor of the certification order . . . the existence of every fact the trial court could reasonably deduce from the record.").

According to the Court of Appeal, no representative testimony (no matter what it encompasses), no survey (no matter how expertly devised), no statistical evidence (no matter how large or representative the sample or how statistically significant the outcome), and no other common proof (in

whatever form – even the employer's own payroll records) could be sufficient to prove *any* of plaintiffs' claims, including the claim that Brinker did not "authorize or permit" them to take legally mandated breaks. Under the Court of Appeal's approach, plaintiffs had the affirmative burden of proving *why* they failed to take each missed break, which they could only establish through individualized, worker-by-worker, break-by-break testimony. Slip. op. 22 ("had the court correctly decided the elements of plaintiffs' rest, meal break and off-the-clock claims, it could have only concluded liability could only be established by making individual inquiry into each plaintiff's claims"); *id.* 31 ("The issue of whether rest periods are prohibited or voluntarily declined is by its nature an individual inquiry."); *id.* 32 ("while it is clear that courts may use [expert statistical and survey evidence] in determining if [some types of claims are] amenable to class treatment," the proofs required in a meal-and-rest break case like this can only be established through "individualized inquiry"); *id.* 47-48 ("The reason meal breaks were not taken can only be decided on a case-by-case basis.").

There are two overarching flaws in the Court of Appeal's analysis of this classwide proof issue (separate and apart from its misstatement of the applicable meal period standard). First, the Court's conclusions about what

evidence plaintiffs needed to prove classwide liability rested upon generalizations and assumptions that are not supported by the facts of this case. *See infra* at 6-34. Second, in requiring worker-by-worker and break-by-break proof, the Court overlooked that many meal and rest break cases (like *Brinker* itself, and *Chipotle*) raise legal claims that realistically can *only* be litigated through a combination of employer time records, representative testimony and/or survey evidence and statistical analysis – *even if those cases are litigated on behalf of individual claimants instead of a class. See infra* at 34-37.

The reality is that few workers or supervisors in any employment case are likely to have a specific, reliable recollection at the time of trial about the circumstances of each separate meal period and rest break that may have been missed several years earlier – out of dozens, hundreds, or even thousands of missed breaks. (In this case, for example, defendant's own expert testified that as of May 2006, the class period already encompassed more than 10.6 million separate workshifts. *See* 4PE988:1.) Consequently, where a legitimate dispute exists under the governing legal standard (whatever it may be) about "why" a particular break was missed – or whether it was missed, if there are no time records or if the employer has falsified its records, as in *Jaimez v. Daihos USA* (2010) 181 Cal.App.4th

1286, 1303, *review denied* No. S180841 – representative testimony, surveys, and statistical analysis may be the *only* way to protect the meal period and rest break rights guaranteed by the California Legislature.[4/]

ARGUMENT

I. Individualized, Break-By-Break Evidence Is Not Required to Establish Classwide Liability Under Any of the Plaintiffs' Legal Theories.

The Court of Appeal's opinion principally focused on the difficulty of proving "why" the plaintiff class members missed particular rest breaks (and meal periods, under the Court of Appeal's "make available" standard). According to the Court of Appeal, workers asserting a claim governed by a "make available" standard must affirmatively establish, for each missed break, the reason why they did not take that break, and the employer is correspondingly entitled to inquire into the particular circumstances of every single missed break. *See, e.g.*, Slip op. 4, 31-32, 48, 51.

[4/] The term "representative testimony" has been used in two different ways in the case law. Sometimes it describes testimony from witnesses selected by the parties or through some other selection procedure that is not designed to ensure true randomness or representative status, who testify about common practices as the witness perceived them. Sometimes it refers to testimony from witnesses who are randomly selected through a process designed to identify a truly representative sample of the class, as in *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, who are then commonly asked uniform, pre-determined questions that can then be analyzed to an acceptable level of statistical validity. On the facts of this case, either definition would yield sufficiently reliable results to justify affirming the trial court's class certification decision.

Contrary to the Court of Appeal's assumption, many of plaintiffs' legal theories do not require *any* inquiry into "why" a particular break was missed. Not only is this true with respect to several of plaintiffs' claims for backpay and premium wages (*see infra* at 17-21, even if some of those claims may require individualized determinations once Brinker's aggregate liability is established), but it is certainly true with respect to plaintiffs' request for a classwide injunction, in which they seek to enjoin Brinker from continuing to engage in its unlawful meal-and-rest-break practices (much as the DLSE did in settling the earlier classwide administrative case against Brinker for engaging in the same practices now at issue). *See* OBM at 13-14 n.6.[5/]

A. Claims that Can Be Proven Classwide Without the Need for Expert Surveys or Statistical Evidence.

Plaintiffs allege that Brinker deprived class members of meal and rest break rights through application of several different classwide policies. Plaintiffs can establish Brinker's liability for most of these violations without having to present any evidence as to "why" the particular violation

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[5/] Although scarcely mentioned in Brinker's briefs and not mentioned at all by the Court of Appeal, the trial court separately certified plaintiffs' requested class of current employees seeking injunctive relief, and the equitable claims of those employees should go forward on remand no matter how this Court rules on any of the remaining issues. Brinker's original writ petition in the Court of Appeal did not challenge this part of the trial court's ruling. *See* OBM at 13-14 n.6.

occurred.

1. Meal Period Compliance: Plaintiffs' principal allegation is that Brinker failed to affirmatively relieve class members from duty in order to give them full, timely meal periods, as required by Labor Code §226.7 and §512 and IWC Wage Order 5-2001 §11. *See* OBM at 1, 15, 34-78; RBM at 4-19. Whether this "affirmatively relieve from duty" standard is the legally correct standard and, if so, how it should be applied, is the principal dispute between the parties (because Brinker concedes that it does not require any of its employees to take meal periods. *See* Slip op. 5, quoting 19PE5172).[6/]

If plaintiffs are correct in their articulation of the proper meal period standard under California law (as Mr. Hernandez believes they are), they should be able to prove *when* Brinker violated its legal obligations largely by relying on Brinker's own computerized time records, which document every meal period taken (and when it was taken, *see infra* at 9), and correspondingly, every meal period missed – or unlawfully delayed or

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[6/] Defendant and its amici create a false dichotomy by contending that the critical dispute is whether an employer must "ensure" or only "provide" meal periods to its employees. *See, e.g.,* Answer Brief on the Merits ("ABM") at 1-2, 22, 24-26, 35-39. It is far more accurate under the governing legal authorities to ask, not whether the employer has "ensured" its employees' meal periods, but whether it has affirmatively relieved its employees from duty for a full, timely meal period (rather than, for example, pressuring them to work through lunch without a break). *See, e.g.,* RBM at 3-4.

shortened). *See* 1PE226:3, 232:4-24, 244:11-17, 293:4-17, 296:4-18; 2PE325:9-17 (describing Brinker's centralized electronic timekeeping record system); *see also* OBM at 114-15.

California law, as set forth in IWC Wage Order 5-2001 §7(A)(3) (and in each of the other Wage Orders applicable to employers in other industries), requires employers to maintain accurate time records that document every meal period taken and missed:

> (A) *Every employer shall keep accurate information with respect to each employee including* the following: . . .
>
> (3) *Time records showing* when the employee begins and ends each work period. *Meal periods*, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

(Emphasis added); *see Franco v. Athens Disposal Co.* (2009) 171 Cal.App.4th 1277, 1299. Because Brinker's electronic time records document on a worker-by-worker, shift-by-shift basis every meal period taken, they also necessarily document every meal period that *should have been taken but was not* (because they show which class members worked five hours or more on a shift without taking a full 30-minute meal period).

Under plaintiffs' proposed "affirmatively relieve from duty" standard, there should be no need to inquire into *why* any particular missed meal period was not taken. The only issue under that standard is *whether*

(and, if so, *when*) the required meal periods were taken. Classwide proof in the form of contemporary electronic time records maintained in accordance with Wage Order 5-2001 §7(A)(3) should be sufficient to establish that proof, and that documentary evidence can be supplemented with testimony from class members and supervisors to place the time records in their factual context. *See* OBM at 14, 114-15.[7/]

[7/] Brinker does not seem to dispute that its time records accurately reflect which meal periods were taken and which were not (although plaintiffs' "time-shaving" allegations reflect the class members' disagreement about whether those records accurately document all violations that occurred, *see* OBM at 12, 115 & n.54, 132-33; RBM at 42-46). Even if Brinker had sought to distance itself from its own records (as the employer did in *Chipotle*, for example), however, the law is clear that where a worker's wage-and-hour claim *could* be proven through its employer's accurate time records, the consequence of the employer's failure to keep such accurate records must fall on the employer, not the plaintiff worker. *See, e.g.*, *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727 ("where the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer, not the employee. . . . The employee has carried out his burden . . . if he produces sufficient evidence to show the amount and extent of work as a matter of fact and reasonable inference."); *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1536 n.11 ("To the extent such data [needed to prove on-call hours] are not readily accessible, that absence is attributable to the inadequacy of [the employer's] own records and cannot be relied upon to resist the attempt of its employees to [prove their case]"); *Amaral v. Cintas Corp.* (2008) 163 Cal.App.4th 1157, 1187-91 (placing burden of proof on employer to prove which employees did not work on contract, where employer could have maintained accurate records of service contract work); *Aguiar v. Cintas Corp.* (2006) 144 Cal.App.4th 121, 134-35 (employer cannot defeat classwide liability by asserting inaccuracy or incompleteness of its own records); *Cicairos v. Summit Logistics* (2005) 133 Cal.App.4th 949, 961 (shifting burden to employer in light of failure to keep records to prove that

(continued...)

Even under a "make available" standard, though, which is the standard urged by Brinker and its employer group amici, classwide meal period violations – as well as rest break violations governed by that standard – can in some circumstances be established through the employer's own time records, without any particularized inquiry into why each given break was missed.

In a case like *Chipotle*, for example, the employer conceded that it had a strict "tap-on-the-shoulder" break policy (as many employers do, particularly in the fast-food restaurant business). That type of policy prohibits workers from taking any meal or rest break unless and until their supervisor directs them to clock out, and it strictly prohibits them from

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[7/] (...continued)
it provided meal breaks); *see also Jaimez*, 181 Cal.App.4th at 1303 (allowing plaintiff to prove classwide meal-and-rest break violations through "survey evidence or testimony from a random and representative sampling of class members" even where defendant did not maintain accurate break records). As the U.S. Supreme Court explained in *Anderson v. Mt. Clements Pottery Co.* (1946) 328 U.S. 680:

> [W]here the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a . . . difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty. . . .

Id. at 687.

working through a designated break. *See* Pet. for Review in S188755 at 3-4, 6-7. In such tap-on-the-shoulder cases, the only time a break can be missed is when a supervisor fails to tell the affected worker to take the break – which means the employer has "prohibited" that missed break, which would be unlawful under any standard. Consequently, the only question relevant to liability in such cases is how to prove *which* breaks are missed. In those cases, the plaintiff workers should be allowed to rely on the employer's time records to prove which meal periods were unlawfully denied (and which rest breaks, too, if the employer keeps records of rest breaks as it did in *Chipotle*). *Cf.* OBM at 16; 1PE226:3, 244:11-17; 2PE325:9-17 (noting that Brinker's "Meal Period Compliance Report" enumerates all instances in which 30-minute meal periods were not taken on shifts that exceeded five hours).

Although the record in *Chipotle* differs from the record in *Brinker* (in part because the employer in *Chipotle* expressly admitted that no breaks could be taken unless designated by a supervisor), there is nonetheless substantial evidence in the *Brinker* record, cited by plaintiffs in the trial court but ignored by the Court of Appeal, that Brinker, too, had a common practice of prohibiting plaintiff class members from taking breaks until

specifically sent on break by their supervisors.[8/] Indeed, the Court of Appeal *acknowledged* that plaintiffs had submitted to the trial court "statistical and survey evidence that allegedly showed that even after its settlement with the DLSE, Brinker continued to prevent its employees from taking meal and rest periods." Slip op. 14. The *Brinker* record also contains substantial evidence that the company had a general practice of not allowing class members to take meal periods and rest breaks when its restaurants were busy or understaffed.[9/] As a result, if plaintiffs' evidence of these classwide policies is found credible at trial, that evidence would be sufficient to establish that plaintiffs' missed breaks were attributable to Brinker's classwide practices.

Based on plaintiffs' evidence, which the trial court was entitled to rely upon in its class certification ruling, there was no need for survey

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[8/] *See, e.g.,* OBM at 9-10 n.3, citing, e.g., 1PE112:18-19; *id.* at 17, citing 1PE122:13-16, 124:11-14, 126:11-13, 18-20, 130:22-23, 132:10-13, 138:10-13, 143:12-16, 148:13-14, 166:16-19, 168:13-16; *see also* 1PE126:10-20, 130:7-8, 168:13-16.

[9/] *See, e.g.,* OBM at 9 & n.2, citing 1PE112:17-20, 126:17-20, 130:11-14, 134:16-18, 140:24-26, 145:8-12, 148:18-22, 153:15-20, 158:11-13, 166:16-20. This understaffing problem – which is a common classwide issue that is the root cause of many of the violations alleged by plaintiffs and documented by plaintiffs' evidence – also results in class members often not being allowed to take timely rest breaks. *See* OBM at 11 & n.4, citing 1PE122:13-16, 124:11-14, 126:10-16, 130:7-8, 132:10-14, 21-22, 134:11-13, 140:8-12, 145:7, 148:12-15, 153:15-20, 158:11-13, 166:11-13, 168:13-16; RBM 43-44, citing 1PE97:17-18, 130:21-23, 140:24-26.

evidence or statistical analysis to show "why" the missed meal periods documented in Brinker's time records were not taken. All plaintiffs should have been required to present to establish meal period liability in such circumstances were the employer's time records coupled with credible witness testimony that Brinker's supervisors had a practice of not allowing full timely meal periods when the restaurants were busy or understaffed.

There is nothing unusual about allowing such an approach to proving classwide meal-and-rest-break liability, especially in light of recent case law. Many courts – including, most notably, in a series of cases decided after briefing was completed in this case – have held that class certification is proper where the plaintiffs present substantial testimonial evidence that work pressures imposed by their employer had the effect of preventing or substantially impeding their ability to take meal periods or other breaks. *See, e.g., Jaimez,* 181 Cal.App.4th 1286; *Wang v. Chinese Daily News* (9th Cir. 2010) 623 F.3d 743, 758; *Dilts v. Penske Logistics, LLC* (S.D. Cal. 2010) 267 F.R.D. 625, 638. This case is no different.

In *Jaimez*, 181 Cal.App.4th 1286, plaintiff route drivers contended that their employer did not schedule regular break times, pressured them to work through breaks by "ma[king] it extremely difficult to timely complete the deliveries and take all required meal and rest breaks," and required them

to sign documents "indicating that they took a meal break, regardless of whether they actually took the break." *Id.* at 1294-95, 1304-05. Although the employer countered with 25 class member declarations stating that drivers were encouraged to take all breaks and given sufficient time to do so, *id.* at 1295, the Court of Appeal reversed the trial court's denial of class certification and ordered the trial court to certify the proposed class, holding that on the facts presented, liability and damages could be established though common proof, including by sampling and representative testimony. *Id.* at 1304-05. While individual worker testimony might be relevant to determine whether the employer's policies did in fact "ma[k]e it extremely difficult for [plaintiffs] to timely complete the deliveries and take all required rest breaks," there nonetheless existed an overarching, common question concerning the overall impact of those policies on the employees' ability to take those breaks. *Id.* at 1299, 1304. As the Court of Appeal explained:

> There may well be, as [the employer] argues, reasons why [plaintiffs] chose not to take a rest break. Nevertheless, for purposes of the class certification motion, the predominant common factual issue is whether [plaintiffs] missed breaks because [the employer's] policy and practice of designating delivery schedules and routes precluded [them] from timely completing their routes and taking the legally required rest breaks. As one court has observed: "This issue is subject to common proof, including evidence of schedules, a sample of the actual route times, and driver testimony. This issue

> predominates over individualized inquiries required because 'determinations about hours worked are routine in class actions involving alleged denials of overtime pay and meal/rest periods.'"

Id. at 1305, quoting *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Services, Inc.* (S.D. Cal. 2009) 72 Fed.R.Serv.3d 900.

In *Dilts v. Pensky Logistics*, 267 F.R.D. 625, the district court granted certification of plaintiff driver/installers' California meal and rest break claims, despite the employer's argument that liability could not be established without proving "the reasons why breaks were missed or delayed." *Id.* at 637. Even though plaintiffs' evidence of being pressured to work through breaks was found by the trial court to be "largely anecdotal," the court found that precise determinations of defendant's liability and aggregate damages obligations could be established through properly conducted "statistical sampling, at least when paired with persuasive direct evidence," given the types of workplace practices identified by plaintiffs that arguably had the effect of preventing or discouraging them from taking timely breaks. *See id.* at 637-38, citing *Morgan v. Family Dollar Stores, Inc.* (11th Cir. 2008) 551 F.3d 1233, 1276-80.

Finally, in *Wang v. Chinese Daily News*, 623 F.3d 743, the Ninth Circuit not only affirmed the trial court's certification of a class of

newspaper reporters who alleged overtime and meal period violations, but it also affirmed a jury verdict in favor of the class, concluding that the evidence was sufficient to support the jury's finding that defendant newspaper committed classwide violation of California's meal period requirements, given the testimony of "[s]everal reporters" that they rarely could take uninterrupted breaks, testimony from others that they were required to carry pagers and were always on-call, and additional evidence – none of which appeared to require the testimony of each and every class member – that the reporters "did not have time to take meal breaks because they worked long, harried hours and faced tight deadlines." *Id.* at 758.

Like the courts in these cases, the trial court in *Brinker* (and in *Cicairos v. Summit Logistics* (2005) 133 Cal.App.4th 949, 962, which also involved workplace policies that had the effect of discouraging workers from taking legally mandated breaks) acted well within in its discretion in allowing plaintiffs to proceed on a classwide basis given the substantial evidence supporting their principal theory of recovery.

2. Meal period timing: Plaintiffs' second set of claims also should not have been held to require individualized inquiry into causation. According to the evidence cited by plaintiffs, Brinker has a classwide policy of mandating "early lunching"; that is, Brinker requires employees with

shifts longer than five hours to take their meal periods within the first two hours after starting work, and does not allow those employees to take a second meal period unless the employee's shift ends up lasting ten hours that day or more. *See* OBM at 1, 9-10, 15, 78-102, citing 19PE5172; *see also* 1PE97:8-10, 110:17-18, 112:18-19, 130:14-15, 132:16-18, 134:18-20; 2PE440:7-18, 456:5-20; Slip op. 5, 34-41; RBM at 19-32. This practice, whose existence Brinker does not dispute, routinely results in class members working much longer than five hours at a time without a 30-minute meal period. *Id.*

If Brinker's "early lunching" practice violates Labor Code §226.7 and §512 and Wage Order 5-2001 §12 as plaintiffs (and Mr. Hernandez) contend, those violations can be proven through Brinker's time records and the other supporting evidence cited in OBM at 9-10 & n.3, 78-80. The fact that this "early lunching" policy may not have affected all class members equally makes no difference, because Brinker's time records (which by law must document each meal period taken, *see supra* at 9) will establish the times and places when each violation occurred.[10/] That is, those records will

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[10/] Brinker repeatedly suggests that plaintiffs have the burden of proving that *every* break was denied and that *every* class member was subjected to *every* wrongful act alleged in plaintiffs' complaint. *See, e.g.,* ABM at 110 (citations omitted) ("even by Plaintiffs' own estimate, Brinker's records demonstrate that for most of the class period meals were missed less than (continued...)

show when an employee's initial meal period was taken each day and when that employee worked for more than five additional hours after taking an initial meal period – thus documenting each "early lunching" violation (which Brinker could easily have avoided by moving its employees' meal periods closer to the mid-point of their lengthy workshifts or by ending those workshifts earlier). *See* OBM at 78-82.

3. Rest break compliance: Plaintiffs next allege that Brinker unlawfully refuses to make *any* rest break available until an employee has worked four full hours or more on a particular shift. *See* OBM at 102-09. According to plaintiffs, Brinker's policy and practice of refusing to permit any rest breaks until after four hours of work violates Labor Code §226.7 and Wage Order 5-2001 §12, which require a 10-minute rest break "per four (4) hours *or major fraction thereof*" of work time. (Emphasis added). *See* OBM at 2, 5, 12, 102-09, citing 1PE122:13-16, 124:11-14, 134:7, 138:10-13, 140:8-12; 19PE5172; 21PE5913:1-9, 5914:1-5915:11; RBM 32-

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10/ (...continued)
25 percent of the time. Thus, rather than "creat[ing] an inference of a company-wide practice . . . [t]he time records actually demonstrate the individual nature of the inquiry."); *see also id.* at 100-01, 104, 107-08. But for common issues to "predominate," plaintiffs need only show that there was a common practice that affected many class members such that it would be more practical and efficient to adjudicate this case on a classwide basis. *Bell*, 115 Cal.App.4th at 744 (overtime class properly certified even though nine percent of class members worked no overtime and thus had no claim).

35. Again, Mr. Hernandez agrees with plaintiffs that this practice is unlawful under California law. And again, this violation can be proven through Brinker's time records alone, supplemented by explanatory testimony from several class member witnesses. If an employer does not allow any rest breaks until after the completion of four hours of work, and if the contemporaneous time records document the total number of hours worked each shift (including each shift that was longer than 3-1/2 hours),[11/] those records necessarily establish which workers on which shifts were denied their right to a rest break "per four (4) hours or major fraction" of work time. *See* OBM at 103-05.

4. Rest break timing: Plaintiffs next allege, and Brinker concedes, that the company has a policy of not permitting its employees to take any rest break at all until after their first meal period has been taken – thus effectively pushing that first rest break to the end of the employee's shift. Plaintiffs contends that this policy violates Labor Code §226.7 and Wage Order 5-2001 §12 (and, again, Mr. Hernandez agrees). *See* OBM at 2, 6, 12, 16, 109-11, citing 19PE5172; 21PE5913:1-8, 5914:1-5915:11; RBM at 35-36; *see also* Slip. op. 5, 8-10. If the Court concludes that Brinker's

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[11/] *See* Wage Order 5-2001 §12(A) (carving out an exception "for employees whose total daily work time is less than three and one-half (3-1/2) hours").

policies are unlawful in this regard, plaintiffs will be able to prove this claim through time records as well, because those records will identify each workshift in which a meal period was taken within the first two hours after that shift began (which, under Brinker's policy, is a shift at which the company did not authorize or permit any rest breaks until at least four hours after the meal period ended – which could be as long as 6-1/2 hours after the shift began). *See* OBM at 110.

B. Claims that Can Be Proven Classwide Through a Combination of Representative, Survey, and Statistical Evidence.

Each of the claims described above can be established through existing classwide evidence, in particular, through Brinker's time records (because, for those claims, the untimely or missed breaks will be documented in the employer's own records and were concededly caused by that employer's challenged policies). In addition, plaintiffs allege several claims that cannot be proven through time records alone, but may nonetheless be established through reliable, well-accepted forms of classwide evidence.

1. Off-the-Clock Claims. First, plaintiffs assert that Brinker's supervisors frequently required employees to return to work before completing their full 30-minute meal periods, especially during busy

periods when the restaurants were understaffed. *See* OBM at 12, 132-33. Describing these claims as "off-the-clock" violations, plaintiffs contend that Brinker did not permit employees to clock back in from meal periods until 30 minutes had passed from the start of their meal periods, even when they were called back to work early. OBM at 12 & n.5, 132-33, citing 1PE112:18-20, 126:18-20, 130:17-18, 136:21-23, 149:1-5, 153:18-20, 166:16-19, 168:21-24; 20PE5665:22-25.

There is no doubt that this allegation, if true, states a valid claim for relief, because the Labor Code and Wage Orders require employers to pay for all time worked and to pay an additional hour's wages for each incomplete meal period cut short when an employee is called back to work early. Certainly the fact of this classwide violation can be proven through representative testimony (to establish that the practice of cutting meal periods short was common when the restaurants were busy). Moreover, the frequency of these off-the-clock violations – and thus Brinker's aggregate liability – can be established through a combination of representative testimony and survey evidence. After all, there is only one possible cause of these shortened meal breaks established by the record (supervisor pressure). And, under the *Mt. Anderson* line of cases cited *supra*, at 10-11 n.7, plaintiffs should be permitted to prove this claim through reasonable

inference, since Brinker violated its legal duty to maintain accurate meal period records under Wage Order 5-2001 §(7(A)(3) by its practice of not permitting to workers to clock back in when called back early from a meal period before completing the full 30-minute break.[12/]

2. Rest Break Claims. For the reasons explained *supra* at 7-21, even under a "make available" standard, classwide liability for meal period violations can be established in many circumstances through the employer's time records – either alone or coupled with whatever representative

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[12/] Brinker contends that these interrupted-meal-break off-the-clock claims are not susceptible to class-wide proof because they require plaintiffs to prove not only that their meal breaks were interrupted but also that Brinker "knew or had reason to know th[at] work was being performed" during those breaks. ABM at 106. There is no reason why that separate showing should be required. Because plaintiffs have limited their off-the-clock claims to instances in which a manager required a worker to return early from break, the "knew or should have known" standard is necessarily met every time a meal period is cut short. Moreover, there is a logical reason why the record contains no evidence of any worker voluntarily returning to work early from a meal period. Under Brinker's challenged policy, the worker remains clocked-out – and thus unpaid – for the full 30 minutes whether or not the worker returns to work early. As a result, the only rational reason a worker would return early from a meal period is that a supervisor cut short the break (but did not let the worker clock back in until the full 30 minutes had expired). Because plaintiffs could have proved the precise number of such shortened meal periods if Brinker had complied with its legal obligation to maintain accurate meal period records, *see supra* at 9-11 n.7, plaintiffs should be able to prove this claim through representative testimony and/or survey evidence sufficient to establish a just and reasonable inference of the frequency with which supervisors called class members back to work before their full 30-minute meal periods were taken.

testimony, documents, or other evidence is needed to show that the missed or shortened meal periods documented in the employer's time records were the result of the employer's policy or practice of not taking affirmative steps to relieve employees from their job duties. This same analysis approach to proving liability and quantifying the employer's violations equally applies to rest break claims in cases, like *Chipotle*, where the employer maintains rest break time records and not just meal period records. *See* Pet. for Review in No. S188755, at 7, 17-19.

Even where the employer does not maintain contemporaneous rest break records, as here, a combination of surveys, statistical sampling, and representative evidence may be used to prove and quantify claims for rest break violations.

Because the trial court proceedings were stayed before the parties submitted their statistical experts' reports and detailed proposed methodologies to the trial court, *see* Ct. of Appeal Order (Dec. 7, 2006), OBM at 20-21, plaintiffs never had the opportunity to demonstrate with any specificity how their experts proposed to gather and quantify the evidence of Brinker's alleged violations. However, when the trial court granted class certification, it was fully aware of the parties' positions concerning the possible use of survey and statistical evidence to prove these claims, as the

parties had briefed and argued the issue in connection with the class certification hearing. *See* OBM at 19-20 & n.8, citing record; 1PE41 at 4, 16-17 (Pl. Mem. in Support of Class Certification); 21PE5687-88, 5690-92, 5694-95 (Pl. Reply Mem. in Support of Class Certification) (noting *inter alia* that in the prior state administrative proceedings, the DLSE "produced 257 employee surveys . . . showing Brinker's refusal to provide employees with breaks . . . 84.4% of the time."); 21 PE5770-5910 (DLSE report); 23PE6242-6500 (DLSE questionnaires).

The Court of Appeal rejected the trial court's conclusion that plaintiffs could establish Brinker's liability through expert surveys, statistical analysis, and other classwide proof because, according to the Court of Appeal, such evidence could never establish "why" any particular rest break (or meal period) was missed.[13/] But the Court of Appeal's

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[13/] Although the Court of Appeal was correct that Brinker's *time records* would not show "why" any particular break was missed, the Court mistakenly attributed this limitation to plaintiffs' other categories of proposed classwide evidence as well, without seeming to differentiate among the different categories of evidence and what they could meaningfully establish. *Compare, e.g.,* Slip Op. 48 ("plaintiffs' computer and statistical evidence submitted in support of their class certification motion . . . could only show the fact that meal breaks were not taken, or were shortened, not why") *and id.* at 49 (emphasis in original) ("While time cards might show when meal breaks were taken and when they were not, they cannot show *why*") *with id.* at 32 (emphasis in original) (rejecting plaintiffs' efforts to rely on "'expert statistical and survey evidence'" because "that evidence only purported to show when rest breaks were taken,

(continued...)

conclusion that some theories of recovery required plaintiffs to prove "why" a break was missed should have been the start of its class certification inquiry, not the end of that inquiry.

The trial court record refers to 16 million time cards covering 10 million shifts and 60,000 current and former employees. 4PE987-88. Despite the Court of Appeal's contrary suggestion, that cannot possibly mean there are 16 million possible separate answers to the "why" question. *Cf.* Slip op. 32 ("The question of whether employees were forced to forgo rest breaks or voluntarily chose not to take them is a highly individualized inquiry that would result in thousands of mini-trials . . . ."). Although the Court of Appeal repeatedly suggested that expert surveys and other classwide evidence cannot be used to prove liability because every missed break could have been missed for a different reason, logically there can only be two answers to the "why" question that might be legally material to this case.

One answer might be that the class member voluntarily chose not to take a particular break for personal reasons – for example, because working through a paid rest break might result in the worker getting more customer

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13/ (...continued)
or not. It did not show *why* rest breaks were not taken. It could also not show *why* breaks of less than 10 uninterrupted minutes were taken.").

tips. The other answer might be that the class member's failure to take a break resulted, not from the employee's voluntary choice, but from supervisor pressure to keep working through a break because the restaurant was busy and understaffed. *See* OBM at 9-11; RBM 43-44. While there may be some minor variants in these answers (depending on what the personal reasons were, for example, or whether the supervisor pressure was explicit), at no point in its opinion did the Court of Appeal suggest any *other* types of reasons why Brinker's workers might skip their breaks. *See, e.g,* Slip op. 48 ("It would need to be determined as to each employee whether a missed or shortened meal period was the result of an employee's personal choice, a manager's coercion, or, as plaintiffs argue, because the restaurants were so inadequately staffed that employees could not actually take permitted meal breaks."). Nor did Brinker suggest any other possible answers in its Answering Brief. *See* ABM at 109-10 (emphasis in original) ("a time record indicating a missed or shortened meal tells nothing about *why* the meal was missed or shortened – whether because a manager required it or because an employee chose to skip or take a shortened break."); *id.* at 116, citing Slip op. 48 (brackets in original) (under the Court of Appeal's analysis and under Brinker's characterization of the law, the only dispute that needs to be resolved as to each missed break is "whether

'Brinker failed to make [the meal or rest period] available, or [the] employee[] chose not to take [it]'").[14/]

Under these circumstances, the parties' experts should have little difficulty developing a reliable, non-biased, validated survey (and a methodology for administering it and analyzing its results) that credibly evaluates the frequency of missed breaks that resulted from supervisor pressure rather than voluntary worker choice (if those instances exist at all).

Social scientists experienced in developing surveys, whether for litigation or otherwise, commonly follow a series of procedural steps designed to ensure survey accuracy and reliability (although there are many ways to conduct a survey that should pass judicial muster). *See* Floyd J. Fowler Jr., Survey Research Methods (Applied Social Research Methods) (Sage Publications, 4th ed. 2008) at 4-8; Robert Groves, Floyd J. Fowler Jr., Mick Couper, James Lepkowski, Eleanor Singer, Roger Tourangeau,

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[14/] Given the limited number of answers possible to the "why" question in this case, the fact that Brinker had a classwide practice of discouraging workers from taking breaks when restaurants were busy or overstaffed could also be established by the testimony of a handful of similarly situated workers describing comparable practices in a range of Brinker restaurants – without formal surveys, sampling, or other more sophisticated investigative tools. *See supra* at 14-17, citing cases. As the cited cases demonstrate, if the testimony of representative witnesses attesting to these workplace pressures is sufficiently clear, survey evidence would not even be needed, as that testimony would itself constitute substantial evidence sufficient to support a trier of fact's finding of classwide liability.

Survey Methodology (Wiley Series in Survey Methodology) (2d ed. 2009) at 41-48, 63. First, a relatively small portion of the targeted population may be identified (usually through a randomized selection process) and interviewed to enable the experts to determine what questions to ask, what terminology to use, and how to frame the questions to ensure accurate, meaningful unbiased responses. *See* Survey Research Methods at 20-24, 115-18; Survey Methodology at 94, 103-06, 138, 22; Peter Marsden, James Wright, Handbook of Survey Research (Emerald Pub Group, 2d ed. 2010), "Question and Questionnaire Design," at 263-314. A separate small portion of the targeted population may then be selected as a "focus group," to enable the experts to test the questions and types of responses they generate, to evaluate the effectiveness of the survey in eliciting accurate responses (including by the use of separate, unrelated questions used for test validation purposes). *See* Survey Methodology at 26. Then, the survey may be administered to a large randomized sample of the population (whose size may depend on the population's homogeneity with respect to the issues in question and how many variables are at issue), and the results may be tabulated and presented through expert testimony. *See* Survey Research Methods at 20-24; Survey Methodology at 269, 365.

Brinker dismisses the possibility that survey experts could devise a

valid questionnaire and follow-up protocol that would reliably determine, for the class member population, the frequency and timing of missed breaks attributable to supervisor pressure rather than voluntary choice (or whatever the dividing line might be, as articulated in the first part of the Court's decision in this case). In a single conclusionary sentence, Brinker asserts:

> No statistical sample or survey could untangle the highly complex and often unspoken employer-employee dynamics involved and bypass the inherently individualized inquiries necessary to establish liability with respect to each class member.

ABM at 109. But the professional literature – and decades of judicial experience in both the state and federal courts systems – demonstrates precisely the opposite. After all, as the Court of Appeal explained in *Bell v. Farmers* (which approved the use of randomized sampling, followed by depositions of the sampled class members and expert statistical analyses of the results to calculated aggregate overtime liability), the use of statistical sampling does not relieve plaintiff's burden to prove its case,

> but rather offers a different method of proof, substituting inference from membership in a class for an individual employee's testimony of hours worked for inadequate compensation. It calls for a particular form of expert testimony to carry the initial burden of proof, not a change in substantive law.

Bell, 115 Cal.App.4th at 750; *accord Sav-On*, 34 Cal.4th at 333 (citing this

language with approval).[15] The Court of Appeal's contrary approach, which would require every worker alleging a meal or rest break violation to testify about – and to recall – the specific circumstances of each missed break dating back to the start of the limitations period, is neither necessary nor appropriate.

The Manual on Complex Litigation, as well as the leading treatises on scientific evidence published by the Federal Judicial Center, are uniform in concluding that expert surveys and statistical analyses are useful tools for proving disputed facts on a classwide basis. For example, the Manual for Complex Litigation, Fourth, §11.493 at 102 explains:

> Statistical methods can often estimate, to specified levels of accuracy, the characteristics of a "population" or "universe" of events, transactions, attitudes, or opinions by observing those characteristics in a relatively small segment, or sample,

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[15] *See also Dilts*, 267 F.R.D. at 638 (certifying California meal and rest break class; rejecting argument that statistical sampling should not be used to prove liability in California meal and rest break class action because the "only proper way to litigate these claims is trial testimony by and cross-examination of each claimant," and concluding that "[a]s to liability, the use of statistical sampling, at least when paired with persuasive direct evidence, is an acceptable method of proof in a class action"); *Adoma v. Univ. of Phoenix* (E.D. Cal. 2010) 270 F.R.D. 543, 548-51 (granting class certification in overtime case and approving the use of representative testimony and statistical sampling of time records to prove liability and damages, despite arguments that employees kept inaccurate time records); Newberg & Conte, 3 Newberg on Class Actions (4th ed. 2002) §10.5 at 483 ("Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually, will not withstand analysis.").

> of the population. Acceptable sampling techniques, in lieu of discovery and presentation of voluminous data from the entire population, can save substantial time and expense, and in some cases provide the only practicable means to collect and present relevant data.

Similarly, the "Reference Guide on Statistics" and the "Reference Guide on Survey Research," both of which are published in the Federal Judicial Center's *Handbook on Scientific Evidence,* repeatedly confirm the value of properly conducted scientific surveys.[16/] Indeed, the case law and social science literature establish that, as a mechanism for determining a defendant's aggregate liability (which is all that due process requires, *see Bell*, 115 Cal.App.4th at 751-53 and cases cited),[17/] properly conducted

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[16/] *See* D. Kaye & D. Freedman, Reference Guide on Statistics, at 102 ("[A] good survey defines an appropriate population, uses an unbiased method for selecting the sample, has a high response rate, and gathers accurate information on the sample units. When these goals are met, the sample tends to representative of the population: the measurements within the sample describe fairly the characteristics in the population."); S. Diamond, Reference Guide on Survey Research, at 231-32 (footnotes omitted) ("As a method of data collection, surveys have several crucial potential advantages over less systematic approaches. When properly designed, executed, and described, surveys (1) economically present the characteristics of a large group of objects or respondents and (2) permit an assessment of the extent to which the measured objects or respondents are likely to adequately represent a relevant group of objects, individuals, or social units.").

[17/] *See also In re Pharmaceutical Industry Average Wholesale Price Litig.* (1st Cir. 2009) 582 F.3d 156, 197-98 (quoting 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* (4th ed. 2002) §10.5 at 483-86) ("The use of aggregate damages calculations is well established in federal

(continued...)

surveys and statistically valid analyses of those survey results can yield even more accurate results than would occur by class member-by-class-member trial testimony (because the process of aggregation can eliminate what might appear to be meaningful, but turn out to be statistically insignificant, variances in individual testimony). *See Braun v. Wal-Mart, Inc.* (D. Minn. 2008) 2008 WL 2596918 at *121 n.35, quoting *Long v. Trans World Airlines, Inc.* (N. D. Ill. 1991), 761 F.Supp.1320, 1329 n.10 ("it is often true that 'aggregate evidence of the defendant's liability is more accurate and precise than . . . individual proof of loss' or witness testimony."); *id.* citing *In re Simon II Litig.* (E.D. N.Y. 2002), 211 F.R.D. 86, 148, *vacated and remanded on other grounds* (2d Cir. 2005) 407 F.3d 125 (statistical evidence is notably a "more accurate and comprehensible form of evidence" than testimony from masses of witnesses); *Bell*, 115 Cal.App.4th at 747 n.19 ("In many cases such an aggregate calculation will be far more accurate than summing all individual claims.").

Allowing meal-and-rest-break cases involving common issues to proceed with classwide evidence is particularly important given the reality that without class actions, few if any individual workers will have the

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17/ (...continued)
court and implied by the very existence of the class action mechanism itself. . . . '[A]n aggregate monetary liability award for the class will be binding on the defendant without offending due process.'").

resources – or the prospect of a sizeable enough potential recovery – to pursue these types of claims at all. *See Sav-On,* 34 Cal.4th at 333, 339 n.10; *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 462, 465-66; *Franco*, 171 Cal.App.4th at 1298-99; *Bell*, 115 Cal.App.4th at 750-51 (explaining why classwide treatment of low-wage workers' wage claims avoids "the sort of random and fragmentary enforcement that will fail to effectively assure compliance" if such workers are forced to proceed on an individual basis); *see also Jaimez*, 181 Cal.App.4th at 1298, quoting *Linder*, 23 Cal.4th at 435 (courts considering class certification motions should evaluate "whether the class approach would actually serve to deter and redress alleged wrongdoing."). At the very least, this case should be remanded for the trial court to complete the manageability proceedings that were underway when the Court of Appeal issued its stay order. *See* OBM at 20-21, 127.

II. Effective Case Management Principles Require the Use of Representative Testimony, Statistical Sampling, and Other Extrapolation Techniques Whether the Litigation Proceeds on a Classwide Basis or an Individualized Basis.

"[M]andatory rest and meal breaks have 'long been viewed as part of the remedial worker protection framework' designed to protect workers' health and safety," Slip op. 3, quoting and citing *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, 1105, 1113. The right to such breaks is fundamental and non-waivable. *Franco*, 171 Cal.App.4th at 1290-93.

Implicit in the Court of Appeal's holding that plaintiffs' classwide methods of proof were legally inadequate was its belief that the right to meal periods and rest breaks can *only* be protected if plaintiffs provide direct testimony, establishing on a break-by-break basis why a particular break, once permitted or made available, was not actually taken. But if the Court of Appeal were correct, and if class member surveys, representative testimony, and statistical analyses of the resulting evidence could *never* be used to prove such violations when causation (*i.e.*, the "why" question) is at issue, the practical effect would be to preclude even individual meal-and-rest-break cases, because most such litigation involves at least *some* reasonable extrapolation from the evidence to establish liability and damages. Therefore, if the Court of Appeal's approach is carried to its logical conclusion, not only will class actions no longer be available to remedy meal period and rest break violations allegedly caused by supervisor pressure or coercion, but realistically, few if any workers would be able to prosecute such claims even on an individual basis.

In this case, the 60,000 class members worked more than 10 million shifts during the limitations period, as of the time of the class certification hearing (and, of course, the numbers have increased since then). 4PE987-88. Assuming for sake of illustration one meal period and two rest breaks

per shift, each individual Brinker employee would have approximately 500 breaks at issue if he or she were to pursue individual litigation. Even if the employee claimed to have been pressured not to take a break 20% of the time, that would still require break-by-break proof of 100 separate incidents per worker under the Court of Appeal's theory, covering a period of several years prior to trial.

As a practical matter, it is doubtful whether any single plaintiff, let alone a group of co-workers or the entire proposed class of crew members, could affirmatively document the circumstances surrounding so many missed breaks per worker without representative testimony or extrapolation from some workers' evidence. Thus, whether this case proceeds only on behalf of the five class representatives (or the roughly three dozen individuals who signed declarations on plaintiffs' behalf) or as a class action on behalf of all similarly situated Brinker employees, it can *only* be adjudicated through some form of representative evidence. No matter how many or how few plaintiffs pursue claims individually in this case, the trial court cannot adjudicate each contested time record separately; and the same efficient case management techniques that would enable one, or a handful, of plaintiffs to litigate their claims through representative testimony and employer time records could easily be applied to the entire class. So, even

without the class action overlay, the Court of Appeal must be found to have erred in not permitting plaintiffs to meet their threshold burden through evidence and reasonable inferences drawn from Brinker's time records and some form of representative testimony. *See Mendoza*, 199 Cal.App.3d at 726-27; *Mt. Clemens*, 328 U.S. at 687.

Dated: February 17, 2011

Respectfully submitted,

ALTSHULER BERZON LLP

By: _____

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CERTIFICATE OF WORD COUNT

I hereby certify pursuant to Rule 8.504(d)(1) of the California Rules of Court that this Proposed Amicus Brief is proportionally spaced, has a typeface of 13 points or more, and contains 8,881 words, excluding the cover, tables, signature block, and this certificate, which is fewer than the number of words permitted by the Rules of Court. Counsel relies on the word count of the word processing program used to prepare this brief.

Dated: February 17, 2011

Michael Rubin
Attorney for Amicus Rogelio Hernandez

PROOF OF SERVICE
Code of Civil Procedure §1013

CASE: ***Brinker Restaurant v. Superior Court (Hohnbaum)***

CASE NO: California Superior Court, Case No. S166350
(CA Court of Appeal Case, 4th App. D., Div. 1, No. D049331;
San Diego County Superior Court, Case No. GIC834348

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On February 17, 2011, I served the following document(s):

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST, AND PROPOSED AMICUS BRIEF OF ROGELIO HERNANDEZ

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

By First Class Mail: I placed the envelope, sealed and with first-class postage fully prepaid, for collection and mailing following our ordinary business practices. I am readily familiar with the practice of Altshuler Berzon LLP for the collection and processing of correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Mail Postal Service in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this February 17, 2011, at San Francisco, California.

J Perley

Jean Perley