Case 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,

v.

SUPERIOR COURT FOR 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,

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

APPLICATION OF THE NATIONAL RETAIL FEDERATION, THE NATIONAL COUNCIL OF CHAIN RESTAURANTS, CONTAIN-A-WAY, INC., USA WASTE OF CALIFORNIA, INC., CALIFORNIA BUILDING INDUSTRY ASSOCIATION, CALIFORNIA PROFESSIONAL ASSOCIATION OF SPECIALTY CONTRACTORS, WESTERN GROWERS ASSOCIATION, AMERICAN STAFFING ASSOCIATION, CALIFORNIA HOTEL & LODGING ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF BRINKER RESTAURANT CORPORATION, ET AL. AND FOR AFFIRMATION

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APPLICATION FOR PERMISSION TO FILE AN AMICI BRIEF

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to California Rule of Court 8.520(f)(1), the National Retail Federation, National Council of Chain Restaurants, Contain-A-Way, Inc., USA Waste of California, Inc., California Building Industry Association, California Professional Association of Specialty Contractors, Western Growers Association, American Staffing Association, California Hotel & Lodging Association and National Association of Manufacturers (collectively, "Amici") respectfully apply for leave to file the attached amicus curiae brief in support of Brinker Restaurant Corporation, Brinker International, Inc. and Brinker International Payroll Company, L.P. (collectively "Brinker"). Amici are familiar with the questions presented by this case and seek leave to address the nature of an employer's duty to provide meal periods and the role of statistical evidence at class certification of meal periods, rest breaks, and off-the-clock work cases.

STATEMENTS OF INTEREST

The National Retail Federation is the world's largest retail trade association, with membership from a wide array of retail formats and channels of distribution, including department, specialty, discount, drug, grocery and independent stores, chain restaurants, as well both catalogue

and Internet sales. The National Retail Federal also includes the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.6 million U.S. retail companies, more than 25 million employees – about one in five American workers. As the industry umbrella group, NRF also represents over 100 state, national and international retail associations. The retail industry employs more than 2.77 million Californians.

The National Council of Chain Restaurants ("NCCR") is a Division of the National Retail Federation and focuses exclusively on representing the interests of chain restaurants in California and nationwide. NCCR has approximately 30 member companies, 6 of which are headquartered in the State of California, and nearly all of which either have company-owned or franchised restaurants in California.

Contain-A-Way, Inc. (CAW) operates of over 300 recycling centers in 218 cities throughout California, fulfilling the purposes of the California Beverage Container Recycling and Litter Reduction Act, California Public Resources Code sections 14500 *et seq.* CAW employs over 500 Californians.

USA Waste of California, Inc., a wholly owned subsidiary of Waste Management Holdings, Inc., provides comprehensive waste and environmental services throughout California. It has more than 2 million customers in California, owns 78 facilities and, along with its subsidiary

entities, employs hundreds of drivers in California.

California Building Industry Association ("CBIA") is a California statewide non-profit trade association representing over 4,000 businesses — homebuilders, land developers, remodelers, subcontractors, architects, engineers, designers, and other industry professionals. CBIA's members are involved in all aspects of the planning, building, and construction industry and work with local authorities in the planning stages of building projects. CBIA's members employ over one hundred thousand Californians.

California Professional Association of Specialty Contractors ("CALPASC") is a California association dedicated to serving specialty trade contractors, with over 450 member companies representing construction trade contractors and their suppliers. CALPASC is headquartered in Sacramento and has local chapters throughout the state, including Northern California, the Orange County/Inland Empire, and in San Diego. Its mission is to build and maintain a strong local trade contractor community, ensuring the long-term survival and success of their businesses, and to advocate as a single voice for specialty contractors, suppliers and related businesses to affect change in the California legislative, regulatory and judicial arenas.

Western Growers Association ("WGA") is a nonprofit trade organization that represents 90 percent of the growers, shippers and packers

of fresh produce, fruit and nuts in California and Arizona. Of WGA's 3000 members, 2200 are Californians. WGA members account for 50 percent of the total production of fresh produce in the United States. WGA has a long-standing interest in all matters generally affecting growers, shippers and packers of fresh produce.[1]

The American Staffing Association ("ASA") promotes legal, ethical, and professional practices for the $91 billion U.S. staffing industry, which includes both temporary and contract employees. ASA members account for 85% of U.S. staffing industry sales and operate more than 15,000 offices throughout the nation. In 2007, California staffing companies employed 1,220,851 people for temporary or contract work, of which 421,122 temporary and contract employees bridged to permanent jobs. Furthermore, staffing firms operate some 3,477 offices in California and generated more than $8.7 billion in annual payroll in 2007.

The California Hotel & Lodging Association ("CH&LA") is the largest and most influential state lodging association in the world, with a history of more than one hundred years of representing the unique interests of each segment of California's diverse lodging industry. The CH&LA is also a part of the American Hotel & Lodging Association,

[1] *See, e.g., City of Barstow v. Mojave Water Agency* (2000) 23 Cal. 4th 1224 (submitting an amicus curiae brief); *see also, Western Crop Protection Assn. v. Davis* (2000) 80 Cal. App. 4th 741 (appearing as a plaintiff).

which represents some 10,000 members nationwide, accounting for more than 1.4 million guest rooms. The CH&LA represents the $47.4 billion California lodging industry with approximately 534,000 employees and close to 600,000 guest rooms.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standard.

Amici have vital interests in seeking confirmation from this Court regarding the nature of California employers' duty to provide meal periods and the admissibility of survey and statistical evidence in motions to certify class claims regarding meal periods because Amici and/or their members are responsible for complying with California's meal period laws and paying appropriate premium wages and related penalties for failure to do so.

BASIS FOR REQUEST FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Of the several issues presented on appeal, Amici address only

two that are on review. Specifically, Amici address the first and fourth issues as summarized by Brinker as follows:

1. Whether an employee can choose, for whatever personal reasons the employee may have, not to take a meal period that the employer makes available, or whether – as Plaintiffs argue – the employer must "*ensure that work stops* for the required 30 minutes."

4. Whether Plaintiffs' meal period, rest period, and off-the-clock claims – which require individualized inquiries into whether a particular manager at a particular [place of employment] on a particular shift discouraged or prohibited a break or encouraged or permitted off-the-clock work – can be decided by way of survey, statistical or other representative evidence.

The attached proposed amicus curiae brief explains why the Court of Appeal's holdings on each of these issues were correct and why it is of vital importance to the industries employing millions of Californians that this Court affirm the holding of the Court of Appeal. This amicus curiae brief will assist the Court in resolving these issues because it provides insight and examples across numerous industries as to the impact this Court's ruling will have on California employees and employers.

CONCLUSION

For the foregoing reasons, the amici curiae respectfully request that the court accept the accompanying brief for filing in this case.

Respectfully submitted,

Dated: August 18, 2009

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AMICUS CURIAE BRIEF

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeal properly concluded that an employer's duty to "provide" meal periods is a duty to make meal periods available, not a duty to ensure meal periods are actually taken, and that the statistical evidence proffered by Plaintiffs in the trial court is irrelevant to determining whether any employer afforded an employee the opportunity to take a meal period or rest break.

California's meal period law is embedded in three sources. Labor Code section 512 establishes an employer's duty to provide meal periods. Labor Code section 226.7 establishes the consequence for failing to provide compliant meal periods. And the Wage Orders establish the parameters of a compliant meal period, i.e., when the duty to provide meal periods is triggered (i.e., when an employee works more than five hours, etc.), the length of the meal period (i.e., no less than 30 minutes), and when no meal must be provided (i.e., when the nature of the duties prevent an employer from providing meal periods). Because Labor Code section 512 establishes the duty to provide meal periods, this Court should look to its language in order to determine the nature of the duty to "provide" meal periods.

Any statutory analysis has up to three levels of inquiry. First, courts are to consider the plain language of the statute in question because

the plain language is generally considered the best evidence of what the Legislature intended. The plain language of Labor Code section 512, including the statute's waiver provisions, unequivocally establishes the Legislature intended employers to make meal periods available, not to force employees to take them.

Second, and only if the plain language of the statute is ambiguous, courts may look to extrinsic evidence, including the statute's legislative history, to determine a statute's meaning. Because the plain language of Labor Code section 512 unequivocally establishes a duty to make meal periods available, no court should conduct a further inquiry. However, even if this Court were to look beyond the plain words of the statute, the legislative history of section 512, including that the Legislature inserted the word "provide" when it codified the meal period duty and that Labor Code section 512 was passed in order to enhance flexibility in the workplace, establishes the Legislature intended to create a duty to make meal periods available, not a duty to force employees to take them.

Third, and only if the first two steps of statutory interpretation fail to establish the meaning of a statute, courts are to apply reason, common sense and practicality to determine the meaning of a statute. Again, because the first two steps unequivocally establish the meaning of section 512, there is no need to engage in the third step of statutory construction. However, even if this Court were to apply the third step of

the analysis, it too proves that Labor Code section 512 creates a duty only to make meal periods available, not to force employees to take them. Under all rules of statutory interpretation, the Court of Appeal properly interpreted the nature of an employer's duty to provide meal periods under Labor Code section 512 as a duty to make meal periods available.

The Court of Appeal concluded that, while statistical evidence of objective data, like time records, could indicate when a meal period was skipped, short, or late, statistical evidence could not reveal *why* any particular meal was skipped, short, or late, nor could statistical evidence reveal *whether or why* an employee worked through a rest break or off the clock. The Court of Appeal's holdings were spot on. Statistical evidence of *objective* data can be meaningful in motions for class certification and class action litigation, but statistical analyses of *subjective* survey results is no more reliable than the answers of those who were surveyed. Because putative class members responding to surveys have a vested interest in the outcome of litigation, their survey responses are inherently biased, and there is no way - not through statistical analysis or otherwise - to rid the survey evidence of this inherent taint. Since bias and credibility can only be assessed on an individual basis, with the aid of cross-examination, statistical analyses of subjective survey results cannot create common questions of fact that will predominate in meal period, rest break or off-the-clock class actions, and therefore have no meaningful role

in these types of disputes.

ARGUMENT

I. CALIFORNIA LAW REQUIRES EMPLOYERS TO MAKE MEAL PERIODS AVAILABLE, NOT TO ENSURE THEY ARE TAKEN.

As Plaintiffs note, California's meal period laws are found in three primary sources – Labor Code section 512, which codified an employer's duty to provide meal periods; Labor Code section 226.7, which codified the consequences for failing to provide meal periods; and the Wage Orders, which establish the parameters of a compliant meal period.

Because Labor Code section 512 is the statute that establishes an employer's duty to provide meal periods, this Court should look first to Labor Code section 512 to determine the nature of that duty, i.e., whether the duty is to make meal periods available or a duty to ensure meal periods are taken. In making that determination, the Court is bound to follow the rules of statutory interpretation.[2] The rules of statutory interpretation establish a three-step approach:

- First, courts are to look to the language of the statute. If the meaning of the language of the statute is clear, courts are to conclude their analysis and enforce the plain language.

- Second, and only if the language of the statute is

[2] *See Herman v. Los Angeles County Metropolitan Transportation Authority* (1999) 71 Cal. App. 4th 819, 825-826.

ambiguous, courts may look to extrinsic evidence to resolve the ambiguity.

• Third, if the extrinsic evidence does not resolve the ambiguity, courts must apply reason, practicality and common sense to interpret the statute in harmony with the apparent legislative intent and the overall statutory scheme.[3]

The plain language of Labor Code section 512 clearly establishes that the Legislature intended to obligate employers to make meal periods available without obligating them to actually force employees to take those meal periods. But even if this Court were to look beyond the statute's plain language, extrinsic evidence and common sense both support a "make available" standard.

A. The First Step Of Statutory Analysis Establishes "Provide" Means "Make Available."

The plain language of Labor Code section 512's "provide" indisputably means "make available". Additionally, the waiver provisions of section 512 prove the Legislature intended "provide" to mean "make available." As Brinker notes, once the Legislature established the duty to "provide" meal periods in section 512, that duty was later incorporated into both the Wage Orders and related statutes' discussion of the meal period duty. This Court need look no further than the plain language of the applicable laws to conclude "provide" means "make available," not

[3] *Id.*

"ensure."

1. There is no dispute "provide" means "make available."

Statutory interpretation must begin with the language of a statute because that language is generally considered the best indicator of the Legislature's intent:

> [I]t is the language of the statute itself that has successfully braved the legislative gauntlet. It is the language which has been lobbied for, lobbied against, studied, proposed, drafted, restudied, redrafted, voted on in committee, amended, reamended, analyzed, reanalyzed, voted on by two houses of the Legislature, sent to a conference committee, and, after perhaps more lobbying, debate and analysis, finally signed into law by the Governor. The same care and scrutiny does not befall the committee reports, caucus analyses, author's statements, legislative counsel digests and other documents which make the statute's "legislative history."[4]

As Plaintiffs concede, the ordinary meaning of "provide" is "make available." No authority indicates "provide" means "ensure."

Moreover, when the Legislature uses the same word in enacting analogous statutes, or uses words that have previously been interpreted by courts, it is presumed the Legislature intended the word to have the same meaning.[5] Courts have repeatedly concluded that when

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[4] *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal. App. 4th 1233, 1238.

[5] *Los Angeles Metropolitan Transit Authority v. The Brotherhood of Railroad Trainmen* (1960) 54 Cal. 2d 684, 688-689 (holding the

legislators create a duty to provide a benefit, they intend to create a duty to make a benefit available, not a duty to ensure employees use the benefit:

- Analyzing an employer's duty to provide a safe work environment, this Court has long concluded that an employer's duty to "furnish"[6] a safe work environment is not a duty to "insure" no injuries occur.[7]
- For the health and welfare of employees, many state laws require employers to "provide" safety devices for employees. Multiple courts have concluded the duty to "provide" safety devices is a legal duty to make the device available, not a duty to ensure employees actually use them.[8]
- In the context of construction laws, the right to a mechanics

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Legislature intended "concerted activity" to have the same meaning it had under analogous statutes and prior judicial interpretations), overruled on other grounds by *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564.

[6] "Furnish" means "provide." Merriam-Webster Dictionary, *available at* http://www.merriam-webster.com/dictionary/furnish.

[7] *Brett v. S.H. Frank & Co.* (1908) 153 Cal. 267, 272 (stating "[t]he law, in justly requiring that an employer shall *furnish* reasonably safe appliances and a reasonably safe place for the performance of his work, *does not make him an insurer* of his employees against all accidents;" emphasis added).

[8] *See, e.g., Usery v. Kennecott Copper Corp.* (10th Cir. 1977) 577 F.2d 1113, 1119; *Borton, Inc. v. Occupational Safety & Health Review* (10th Cir. 1984) 734 F.2d 508, 510 ("In *Kennecott* we declared that the term "provide" is not ambiguous ... Thus, there is no need to look beyond the face of [the statute] to discover the meaning of "provide"); *Jamillo v. Anaconda Co.* (N.M. Ct. App. 1981) 95 N.M. 728, 729.

lien attaches when the materials are "furnished."[9] The Court of Appeal has held that the right to a lien arises when a contractor delivers goods to the job site, regardless of whether the goods are actually used in construction:

> *We need only resort to the first level of statutory analysis – the ordinary meaning of the language* – to determine whether the beams were "*furnished*" to the site within the meaning of the release. The usual, ordinary import of "*furnish*" is to *make something available.* The first definition of "furnish" in Webster's Third New International Dictionary (1986) at page 923, is: "*to provide or supply* with what is needed, useful, or desirable." To deliver materials to a job site is certainly to "provide" materials.[10]

Thus, in both the context of employee safety and in general, courts have concluded a duty to provide or furnish something is a duty to make it available, not a duty to ensure it is used. This Court should find the Legislature intended the word to have the same meaning in Labor Code section 512.

2. The waiver provisions of section 512 prove "provide" means "make available."

Plaintiffs contend that the waiver provisions of Labor Code section 512 prove meal periods may only be waived in limited circumstances, and consequently, the Legislature must have expected

[9] Cal. Civ. Code § 3262(d)(1).
[10] *Halbert's Lumber, Inc.*, 6 Cal. App. 4th at 1240 (emphasis added).

employers to ensure meal periods are taken in all other situations.[11] Not so. The discussion of meal period waivers in section 512, and the second meal period waiver in particular, unequivocally establish the Legislature fully intended employees who work more than six hours to be empowered to waive the first meal period if they so choose.

Regarding first meal periods, section 512 states:

> 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***. [Emphasis added.]

Plaintiffs argue employees may only waive their first meal period if they work six or fewer hours.[12] However, the language of the second meal period waiver specifically proves that is not true. Regarding second meal periods, section 512 states:

> An employer may not employ an employee for more than 10 hours 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***. [Emphasis added.]

The first and second meal period waiver provisions read

[11] Plaintiffs' Opening Brief (hereafter "Pls.' O.B.") at 45-46.
[12] Pls.' O.B. at 45-50.

together illustrate the Legislature did not intend to obligate employers to ensure meal periods are actually taken. If an employer's duty to "provide" a meal period is a duty to "ensure" the meal period is taken, an employee who works more than six hours could never waive the first meal period. As the surety, the employer would be obligated to force the employee to take the break notwithstanding the employee's preferences. However, the second meal period waiver provision specifically states that employees can waive the first meal period even after six hours of work.

The only way the Plaintiffs' interpretation works, is if this Court rewrites the statute as follows:

> "An employer 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 work day is no more than 12 hours, the second meal period may be waived by the mutual consent of the employer and employee ~~only if the first meal period was not waived~~."

The principles of statutory construction do not permit courts to disregard statutory language. Courts are to interpret statutes so as to give each word of the statute meaning and cannot render words of a statute mere surplusage.[13] If this Court were to interpret the employer's duty to "provide" meal periods under Labor Code section 512 as a duty to "ensure" meal periods are taken, the Court would be ignoring the final phrase and the

[13] *See White v. County of Sacramento* (1982) 31 Cal.3d 676, 681.

second condition of the second meal period waiver, thereby violating basic rules of statutory interpretation.

In contrast, under a "make available" standard, the statute is functional and meaningful at every level. It is only under a "make available" interpretation that an employee working more than six hours could elect to waive the first meal period. Assuming none of the exceptions to an employer's duty to provide meal periods apply, here is how the statute works:

- If an employee works no more than six hours, the employee can waive the opportunity for a first meal period and agree to be scheduled to work six hours straight.

- If an employee works more than six hours, an employee cannot waive the employer's duty to make the first meal period available. The employer must make the first meal period available, but the employee may decide whether to take the first meal period.

- If the employee works more than 10 hours but less than 12 hours and has taken the first meal period, the employee may waive the employer's duty to make the second meal period available.

- If the employee works more than 10 hours but less than 12 and has not taken the first meal period, the employee may not waive the employer's duty to make the second meal period available. The employer must make the second meal period available, but the employee

may decide whether to actually take it.

Thus, the waiver provisions of section 512 are further proof that the plain language of the statute confirms a duty to make meal periods available, not a duty to ensure meal periods are taken.

3. As Brinker notes, once the Legislature established a duty to "provide" meal periods, that duty was incorporated into all subsequent related statutes and Wage Orders.

As Brinker notes, after the Legislature enacted Labor Code section 512, the duty to "provide" meal periods was incorporated into the Wage Orders and subsequent statutory amendments and enactments related to meal periods.[14] Specifically, in January 2000, the Legislature enacted Labor Code section 512 establishing employers' duty to "provide" meal periods. Then in June 2000, the IWC amended the Wage Orders to require an additional hour of pay only "if an employer fails to ***provide***" meal periods in accordance with the provisions of the Wage Orders. And in September 2000, the Legislature enacted both Labor Code section 516, which prohibits the IWC from creating meal period regulations that conflict with Labor Code section 512, and Labor Code section 226.7, which states, "If an employer fails to ***provide*** an employee with a meal period or a rest period in accordance with an applicable Wage Order, the employer shall pay the employee one additional hour of pay..." Thus, all sources of

[14] Brinker Answer, at 5-7.

California's meal period laws use the "provide" standard.

Plaintiffs argue that when the Legislature referenced the Wage Orders in Labor Code section 226.7, it intended to create a duty to "ensure" meal periods are taken. Not so. The Legislature referenced the Wage Orders in section 226.7 in order to incorporate the parameters of compliant meal periods as set forth in the Wage Orders, including: when the duty to provide a meal period is triggered, i.e., after five hours of work, etc.; the length of the meal period that must be provided, i.e., no less than 30 minutes; and when no duty to provide a meal period exists, i.e., when the nature of an employee's work prevents the employer from being able to provide the opportunity for a meal period. Moreover, because Labor Code section 512(b) authorizes the IWC to adopt working conditions permitting a meal period to commence after six hours of work, the Legislature needed to require employers to provide meal periods "in accordance with an applicable order of the Industrial Welfare Commission" so that the Legislature would capture not only the parameters already contained in the Wage Orders, but also any new working conditions the IWC might adopt pursuant to Labor Code section 512(b).

When statutory language is clear and unambiguous, courts are bound to enforce it and should look no further to determine the statute's

meaning.[15] Because all sources of California's meal period laws establish a duty to "provide" meal periods, and because the plain meaning of "provide" – as established through dictionary definitions, prior judicial interpretations and section 512's meal period waiver provisions – all establish "provide" means make available, this Court should conclude its analysis at this first step of statutory interpretation.

B. Even Extrinsic Evidence Of The Meaning Of Labor Code section 512 Establishes The Legislature Intended "Provide" To Mean "Make Available."

The second step of statutory construction, which should only be taken if a statute is ambiguous on its face, is to look to extrinsic evidence, such as the statute's legislative history and its placement in the overall statutory framework, for the meaning of the statute.[16]

1. Section 512's Variation From The Language Used In The Wage Orders Must Be Enforced.

After asking this Court to ignore the plain language of Labor Code section 512, Plaintiffs further urge this court to disregard the legislative history of Labor Code section 512, which unequivocally states the Legislature intended to codify a duty to "provide" meal periods. Plaintiffs instead ask this Court to focus solely on Plaintiff's rendition of the administrative interpretations of the meal period provisions found in

[15] *Halbert's Lumber, Inc.*, 6 Cal. App. 4th at 1239 ("If the meaning is without ambiguity, doubt, or uncertainty, then the language controls.").
[16] *Herman*, 71 Cal. App. 4th at 826.

Wage Orders. However, Plaintiffs have failed to offer any evidence suggesting that the Legislature considered the historical interpretations of the Wage Orders suggested by Plaintiffs when it enacted section 512. As Brinker notes, the Wage Orders' meal period provisions and section 512 are both wholly consistent with the "make available" standard.

However, even assuming the Legislature considered *Plaintiffs' characterization* of the administrative interpretations of the Wage Orders' meal period provisions when enacting section 512, i.e., that the Wage Orders establish a duty to ensure meal periods are taken, the rules of statutory construction require this Court to conclude the Legislature rejected those interpretations. The Legislature simply ***did not*** replicate the language of the Wage Orders when enacting section 512. Instead, the Legislature inserted language that had never before appeared within the Wage Orders by explaining that an employer's obligation is to "provide" meal periods.

While reasonable minds are free to dispute whether the inserted language modified or merely clarified the meal period obligation that previously existed under the Wage Orders, two facts are not debatable: first, Labor Code section 512 differs from the Wage Orders by the addition of the "provide" standard; and, second, the rules of statutory construction require the statute to be read in a manner that recognizes this addition. When construing statutes, courts may "... not insert what has been omitted

or omit what has been inserted."[17] This Court is bound to give meaning to the word "provide." Once the plain language of the statute is given primacy, it becomes obvious that Plaintiffs' interpretation of section 512, i.e., that "provide" means "ensure", departs markedly from both the English language and the canons of statutory construction.

Moreover, as Plaintiffs admit, when the Legislature uses materially different language in drafting statutes addressing the same or similar topics, the normal inference is the Legislature intended a difference in meaning.[18] So again, even if, as Plaintiffs contend, the meal period provisions of the Wage Orders created a duty to "ensure" meal periods are taken, this Court must conclude the Legislature intended to create a different duty when it inserted the word "provide" into the statute. It is undisputed that "provide" has a materially different meaning than "ensure."

2. The Rules of Statutory Construction Require Courts to Consider The Framework In Which A Statute Is Enacted.

Section 512 was added to the Labor Code as part of the "Eight-Hour Day Restoration and *Workplace Flexibility Act* of 1999". (Emphasis added.) Beyond restoring daily overtime rules, the Workplace Flexibility Act implemented other measures aimed at permitting flexibility

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[17] *Manufacturer's Life Ins. Co. v. Superior Court* (1995)10 Cal. 4th 257, 274; *cf*. Cal. Code Civ. Proc. § 1857.

[18] Pls.' O.B. p. 37; *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal. 4th 1094, 1109.

in scheduling and completing work time – such as permitting employees to agree to alternative workweek arrangements or to perform make-up time outside of the daily overtime requirements where work is missed due to the employee's personal obligations.[19] Thus, the Workplace Flexibility Act, true to its given name, provided employees with the option of choosing to modify their work schedules to fit their personal prerogatives.

Plaintiffs' fundamental disagreement with the Court of Appeal's decision is that the decision "empowers employees" to choose whether and when to take a meal period.[20] Plaintiffs argue that all employees should be managed under the strictest interpretation of the meal period law, ensuring all employees are subject to the standards necessary to protect the most vulnerable employee. This application of the law flies in the face of the flexibility the act was intended to provide. Plaintiffs cannot harmonize their interpretation with the stated purpose of the Act, which was to provide flexibility to all workers. Construing "provide" to mean "make available", on the other hand, provides the precise flexibility the Legislature wanted employees to have in controlling their work schedules.

C. Interpreting "Provide" To Mean "Ensure" Defies Common Sense And Proves Impractical.

The third step of statutory construction, which should be taken only if the plain language and extrinsic evidence do not establish the

[19] *See* Cal. Lab. Code §§ 511, 513.
[20] Pls.' O.B. at 72-73.

meaning of a statute, is to apply reason, common sense and practicality to the language of the statute.[21] The Court need never get to this step, but even if it did, these principles establish that the only feasible interpretation of section 512 is one that finds the Legislature intended to obligate employers to make meal periods available, not to ensure meal periods are taken.

As this Court has repeatedly and recently noted, courts should apply common sense to statutory language to make it both workable and reasonable. Courts must avoid interpretations that result in mischief or absurdity.[22]

1. None of Plaintiffs' Public Policy Arguments Jibe With The Stated Purpose Of The Statute.

Plaintiffs attempt to justify their tortured reading of section 512 by suggesting that if employees are given the option to, but not forced to, take their meal period: both the employees and the public will be at risk of mishaps caused by employee exhaustion; employers will devise devious compensation schemes aimed at punishing those who take their meal periods; and employees who choose to take breaks will be given slighted glances, discriminated against, disciplined, or even fired.[23] Even cursory analysis of these arguments shows they carry no weight.

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[21] *Herman*, 71 Cal. App. 4th at 826.
[22] *See Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 567.
[23] Pls.' O.B. at 30, 72-73.

Plaintiffs argue that employees and the public will be at risk unless employers force employees to eat and rest each workday. But Plaintiffs go on to admit that neither eating nor resting is critical during a meal period. Plaintiffs confirm employees "may choose to eat a meal, run a personal errand, socialize with friends, or merely relax."[24] If, as Plaintiffs concede, neither eating nor resting is essential, then why would the Legislature require employers to ensure meal periods are taken? And if, as Plaintiffs concede, employees are empowered to decide not to eat during a meal period, or to run an errand rather than rest during a meal period, then employees should be equally empowered to decide to work through a meal period so they can finish work early to attend a child's school function.

Plaintiffs also warn that a "make available" meal period standard will drive "devious" compensation schemes, like piece rate systems, designed to discourage meal periods.[25] This argument fails at every level. First, piece rate compensation, which admittedly is designed to reward greater productivity, is entirely lawful.[26] Second, Plaintiffs premise this argument on input from amici who suggest employees will be motivated to work through *rest breaks*, not meal periods, in order to

[24] Pls.' O.B. at 28.
[25] Pls.' O.B. at 30, 49.
[26] *See* Cal. Lab. Code § 200 (defining wages to include piece rate compensation).

enhance their hourly rate of pay.[27] But, this has always been lawful. As Plaintiffs concede, employees are empowered to waive paid rest breaks. Consequently, piece rate employees have always been able to choose between taking their rest breaks and diluting their hourly rate of pay or working through their rest breaks and enhancing their hourly rate of pay. There is nothing "devious" about it. Third, because meal periods are unpaid time, whether a piece rate employee decides to take a meal period has *no effect* on his or her hourly rate of pay. Piece rate employees who take meal periods can work the same total number of hours as those who choose to work through meal periods, and still, the only factor driving their hourly rate is their productivity.

Relying on unfounded conjecture from amici, Plaintiffs claim that unless employers are required to ensure employees take meal periods, employers' only motivation will be to "pile on" work without regard to employee safety.[28] Empirical data indicates employers are successfully improving employee health and safety, not putting it at risk. The California Commission on Health and Safety and Workers' Compensation reports that since 2001, "Ongoing *cooperative efforts among* workers, *employers*,

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[27] Pls.' O.B. at 30 ("Employers have countless ways to discourage workers from taking breaks ranging from outright prohibition, to more subtle measures such as adoption of piece rate compensation schemes that force workers to choose between *rest breaks* or a lower hourly rate of compensation;" emphasis added).

[28] Pls.' O.B. at 30.

employer and labor *organizations*, government agencies, health and safety professionals, independent researchers, and the public *have resulted in significant reductions in workplace injuries, illnesses and deaths*."[29] Between 2001 and 2007, overall incidents of workplace injury or illness have declined from between 18 to 37 percent, and these declines have been seen in California's major industries.[30] Moreover, the rising cost of health care coverage for employees is driving employers to improve employee health through wellness programs, including programs designed to improve employee nutrition, exercise and stress relief.[31] And numerous studies have confirmed it is far most cost-effective to create work environments designed to keep employees than to incur the cost of hiring and training

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[29] The California Commission on Health and Safety and Workers' Compensation, *Selected Indicators in Health and Safety and Workers' Compensation: 2008 Report Card for California*, at 46, *available at* http://www.dir.ca.gov/chswc/AnnualReportpage1.html. at 46. (Emphasis added.)

[30] *Id*. at 46-54. "The total number of recordable injury and illness cases dropped by 18.7 percent, the number of lost work-time cases declined by 18 percent, and the number of days-away from work cases decreased by 32.7 percent, all from 2001 to 2007." *Id*. at 48. "Not only have the overall California occupational injury and illness incidence rates declined, but also the incidence rate in major industries have declined." *Id*. at 54.

[31] *See* The Littler Report, *Employer Mandated Wellness Initiatives: The Continuum From Voluntary To Mandatory Plans:* pp. 2-4 (April 2008), *available at* http://www.littler.com/PressPublications/Lists/Littler%20Reports/DispReport.aspx?id=25.

replacements.[32] The value of a healthy workforce has motivated, and continues to motivate, employers to protect employee safety, not put it at risk.

Finally, Plaintiffs argue that an obligation to "make meal periods available" equates to no obligation at all. Not so. Under Labor Code section 226.7, if an employer fails to provide employees with a meal period, they will be liable for the additional hour of pay. And if employers discriminate against, discipline, or fire employees who choose to take their meal periods, employees may seek relief in the same way they can and with respect to other adverse employment actions taken in violation of public policy. They can file claims for wrongful discharge/discipline.[33]

2. An Ensure Standard Is Impractical and Undesirable From The Perspective Of Both Employees and Employers.

The consequences to both employers and employees proposed by Plaintiffs for an employer's failure to exactly manage its employees' meal periods are unduly severe and absurd. As demonstrated by the examples below, enforcement of an "ensure" meal period standard would create costly and unreasonable management burdens for employers and

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[32] *See* The New England Journal of Higher Education, *Employee Turnover* (Spring 2003), *available at* http://findarticles.com/p/articles/mi_qa3895/is_200304/ai_n9193113/?tag=rel.res1 ("An analysis of federal data by the Employment Policy Foundation suggests that replacing a lost employee costs approximately 25 percent of the person's annual salary plus benefits").

[33] *See Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 172.

would deprive employees of the very flexibility the Legislature has endeavored to provide them.

a. An "ensure" interpretation would have negative consequences to employees in all industries.

An "ensure" scenario would work to employees' detriment, regardless of the industry. If "provide" means "ensure":

- Employees who are scheduled to work only six hours, and who elect to waive their first meal period, would be forced to take an unpaid, 30-minute meal period, even if their workday ended up lasting 6 hours and one minute, or six hours and 10 minutes, or six hours and 15 minutes. The employer would have no choice but to force the employee to clock out for thirty minutes and then return to finish the minimal amount of remaining work, and the employee would have no discretion to waive the opportunity for a 30-minute meal period.

- Employees would be subject to discipline every time they are even moments late to clock out for a meal period (i.e., if the employee begins his/her meal period a few minutes after the start of the fifth hour of work). This may be the case even if the employer allowed the employee to start his/her meal period on time, but the employee was delayed in

getting to the time clock because of a social conversation with a co-worker, because he or she was finishing a transaction, or because the time on his or her watch did not synchronize with the time clock. The employer would have no option but to pay the employee an additional hour of pay and discipline the employee, even if the employee objected that the momentary delay was at the employee's own election.

- Employees would be subject to discipline every time they are moments early in clocking back in for a meal period (i.e., if the employee returns to work within 25, rather than 30, minutes). The employer would have no option but to pay the employee the additional hour of pay and discipline the employee, even if the employee objected that s/he was sufficiently rested and ready to return to work.

- Employees would be stripped of their ability to decide if they want to work through their meal periods to end the workday 30 minutes earlier and engage in personal pursuits. Forcing employees to take unpaid, unwanted meal periods that extend their workdays by another 30 minutes, is paternalistic and an absurd interpretation of a statute designed to add flexibility to the workplace.

b. An "ensure" interpretation would have negative consequences for employees in the restaurant industry.

As Brinker notes, imposing the rigid meal period rules proposed by Plaintiffs on restaurant employees unnecessarily jeopardizes restaurant employees' ability to receive tips. For example:

- A restaurant employee working an opening shift may have the opportunity for an unpaid, 30-minute meal period within the first two or three hours of work, but may not want to take one. Later, as the fifth hour of work approached, the employee may have the opportunity to take a meal period, but s/he would lose a substantial amount of money in tips for the tables s/he has been waiting leading up to the meal period. Forcing the employee to take his/her meal period at the fifth hour, and to forego the tips because another employee will have to assume responsibility for the tables during the meal period, is unnecessarily harsh.

- Assume the same restaurant employee feels as though s/he can take a less-than-30-minute meal period and have a sufficient amount of time to rest and eat without sacrificing the tables s/he is servicing. Forcing the employee to take a full 30-minute meal period and to sacrifice the tips associated with the employee's tables, merely to comply with the rigid

meal period rules proposed by Plaintiffs is unnecessarily harsh.

- Assume the same employee will have collected all, or the majority of his/her tips, if the employee works five and one-half hours before taking his/her meal period. Forcing the employee to start his/her meal period within the first five hours and to sacrifice the tips associated with the employee's tables, merely to comply with the rigid meal period rules proposed by Plaintiffs is unnecessarily harsh.

c. An "ensure" interpretation would have negative consequences for employees in the retail industry.

Many retail employees earn their wages in commissions. For reasons similar to those relating to restaurant employees, the rigid "ensure" meal period rules proposed by Plaintiffs would work to the detriment of retail employees.

- Commissioned retail employees may have the opportunity for a meal period within the first five hours of work, but because they are in the midst of a sale for which they will receive a substantial commission, they may want to forestall their meal in order to retain the commission. Forcing the employee to start his/her meal period within the first five hours and to sacrifice the commission associated with a sale,

merely to comply with the rigid meal period rules proposed by Plaintiffs is unnecessarily harsh.

- Commissioned retail employees may want to take a less-than-30-minute meal period because they can return to work when customer traffic is heaviest and/or because they want to end their workday earlier. Forcing these employees to stay clocked out for a full 30 minutes just to comply with the rigid meal period constraint proposed by Plaintiffs is unduly harsh and paternalistic.

- Many retail employees are evaluated based on the number of sales they make. Consequently, retail employees who have a sale pending just before the rigid meal period deadline proposed by Plaintiffs arrived would be forced to choose between working through their meal period in order to retain credit for the sale, or handing the sale over to a co-worker and taking the meal period in order to avoid discipline or possible termination for failure to record a "timely" meal period.

d. An "ensure" interpretation cannot practically be managed in the recycling or waste management industries.

The "ensure" standard advanced by Plaintiffs creates compliance and flexibility issues in the recycling and solid waste

management industries because there is no on-site supervisor to police the taking of meal periods and because employees cannot always control their ability to take a timely meal period.

- Employees at recycling centers work alone or with a single co-worker. The employees are empowered to open and close the recycling centers throughout the workday so that they comply with the hours of operation and with meal and rest period requirements. Supervisors are responsible for a widespread geographical territory, and there is no management present at each recycling center to personally observe whether and when employees are taking meal and/or rest periods or the duration of those meal and/or rest periods. It is up to the employees themselves to decide whether, when and for how long to take a meal or rest period.
- Although recyclers can require their employees to record compliant meal periods in order to "ensure" proper meal periods are taken, Plaintiffs argue employers cannot rely on time records because employees record meal periods they do not actually take. If this Court sanctions Plaintiffs' interpretation of the meal period law, every employer will be subject to a meal period class action unless they have proof more reliable than employee time records that employees

actually took their meal periods.

- Recycling center employees require flexibility because they must sometimes adjust their schedules to accommodate customer demand. These employees have no control over when customers will arrive to drop off materials for recycling or over the quantity of materials dropped off by any one customer. While recyclers must post the scheduled time for the employee's meal break with its hours of operation, the employee may need to temporarily delay the start of a meal period to complete the processing of customers' materials.
- Application of the "ensure" standard to solid waste truck drivers in the waste industry creates compliance and operational issues. For most of their workdays, such drivers are physically remote from any company facility and supervisors are not present to "ensure" that drivers (a) take the correct number of meal periods, (b) take them at the prescribed time, and/or (c) take them for the prescribed duration. As a practical matter, those decisions are *de facto* left to the driver.
- The ensure standard also does not allow for employee preference. Drivers in the solid waste industry start their days very early, often before 4:00 a.m. Few employees are

interested in lunch at 9:00 a.m., and many prefer to complete their routes so they can finish their workday in the afternoon.

- The nature of a garbage truck driver's work and the need to comply with other local ordinances and State laws and to ensure safe operations highlight the need for flexibility. For example, drivers may need to adjust their schedules to accommodate school opening and closing times, and municipalities often regulate service hours, requiring drivers to work schedules that comply with those requirements. As another example, some drivers spend most of their days on highways. It is simply not safe to pull over on the side of the freeway to take a meal period.

e. An "ensure" interpretation would have negative consequences for employees and employers in the construction and home building industries.

Flexibility in determining whether to take a meal period, when to take it, and for how long is critical for construction workers for a number of reasons:

- In many instances, construction workers would prefer to postpone their meal period so they can finish the task before them. If they only have a few more sections of tile or shake to lay on a roof, it is frustrating to have to get off the roof at

the at the fifth hour, take a 30 minute lunch, and climb back on the roof for only a few minutes of additional work. This also needlessly increases the frequency of the most dangerous task associated with this job – getting on and off the roof.

- Many construction workers would also prefer to push past the fifth hour of work or shorten their meal period to finish a job if it appears the weather is about to turn and disable them from finishing.
- Because construction goes in steps, other portions of the job are often on hold until the previous trade finishes their work – these employees want the option of shortening or postponing their meal period so they can complete their task and allow other crews to get on with their work.
- Construction workers often prefer to take their meal period when mobile lunch trucks arrive. Because different crews begin work at different times, lunch trucks may not arrive before the fifth hour of every construction employee's shift.
- Construction workers also want the ability to skip their first or second meal periods if it will allow them to wrap up work, avoid the heavy commute traffic, and ultimately get home sooner.
- Because construction workers typically work at mobile job

sites, and in different areas spread throughout those job sites, requiring contractors to "police" meal periods is not practical.

Homebuilders employ licensed real estate sales persons to sell the homes. Their job is to meet all prospective buyers who come to the community, show them the model homes, show them the lots where homes may be built, and prepare the paperwork to enter into a contract of sale with the customer. Ensuring these employees take meal periods in accordance with the strict guidelines proposed by Plaintiffs is unreasonable and impractical because:

- These sales employees often work alone at a community of homes under construction. They may have an office in a trailer, or a sales office in the community, or in a model home. There is no on-site supervision of the employees. The nearest supervisor may be miles away and responsible for sales employees at several different communities under construction. Consequently, the employer cannot "ensure" employees take meal periods in strict compliance with the requirements proposed by Plaintiffs.
- As noted above, Plaintiffs contend employers cannot rely on time records indicating a compliant meal period has been taken, because Plaintiffs contend employees regularly work through meal periods even when they have clocked out.

- These sales employees have no control over when a prospective buyer may come to view a property. The employees may plan to take a meal period within the first five hours of work, but if a prospective buyer arrives shortly before the planned meal period, the prospective buyer may not be finished viewing the property before the deadline for the employee's meal period lapses. If Plaintiffs' interpretation of the meal period law is adopted, the sales employee will be forced to tell the prospective buyer that the sales employee is leaving for a 30-minute lunch, thus jeopardizing the sale and its related commission.

f. An "ensure" interpretation would have negative consequences for agricultural employees and employers.

Plaintiffs argue the language of Wage Order 14 proves that all employers outside of the agricultural industry have a duty to "ensure" meal periods are taken and a duty to "authorize and permit" rest breaks. Plaintiffs argue that because the IWC amended Wage Order 14 to require agricultural employers to only "authorize and permit" both meal periods and rest breaks, all other Wage Orders that reference no specific enforcement standard for meal periods must be understood to require employers "ensure" meal periods are taken. What Plaintiffs fail to mention is that employee advocacy groups, such as California Rural Legal

Assistance, Inc. assert that agricultural employers must still "ensure" employees take their meal periods.

Farm workers work in "crews" spread widely among fields on massive farms in rural areas. Pickers walk down rows (aka furrows) of trees, bushes, vines and beds with a picking cart containing baskets which they fill with the produce they hand pick and place on a truck waiting at the end of the row. The truck will often tow a picnic table to be used during lunches and breaks.

- Because pickers work on remote farms, they do not have sufficient time to travel to a restaurant for a meal. While some workers may pack a meal which they stow in a cooler kept in their cars, the prevailing practice on farms across the state is for farm workers to purchase their meals from a lunch truck. Because there are numerous crews spread widely throughout the farms, it is not possible for the lunch truck to get to every team before the fifth hour of work.
- Good agricultural practices require that employees do not have plastic, glass, or other food over the fruit and vegetables they are picking. As a result, meals must be consumed at the road adjoining the row of produce they are picking. If Pickers find themselves in the middle of a row when the fifth hour arrives often prefer to finish the row they are working on

before taking their lunch. This avoids the additional walk to and from the road for lunch and saves more of the 30-minute break time to eat and relax.

g. An "ensure" interpretation cannot be managed by employers in the temporary staffing industry.

Although approximately three million temporary and contract employees go to work for U.S. staffing companies every business day, the employees are generally not supervised by the staffing companies that employ them. Instead, these temporary employees work at the client's place of business, under the direction of the client. While a staffing company can contractually "provide" that its employees receive rest and meal breaks at the client's place of business, because the staffing company typically does not supervise its own employees, it cannot "ensure" that these employees are always taking their breaks or taking them at the correct times. The ASA accordingly opposes any effort to make the California meal and rest break laws less flexible such that its members would be held liable for not "ensuring" that their employees always took their breaks.

h. An "ensure" interpretation would have negative consequences in the hospitality industry.

In the hospitality industry, many properties have mobile employees such as housekeeping, engineering, and maintenance staff, who are not subject to direct supervision throughout most of their workday. The

only way to ensure that such employees take a lunch would be to recall them to a central location at a set time, which is both inefficient and inconvenient to an employee who might which to have flexibility over, say, finishing a floor of rooms near the central office and then checking out rather than having to stop at a more distant location and traverse the property, which are sometimes substantial in size. Also, due to diversity of hotel functions, some employees will have similar concerns to those raised by the restaurant industry (e.g., wait staff at a hotel restaurant).

D. Conclusion

Applying the rules of statutory interpretation leads, inescapably, to the conclusion that an employer's duty to "provide" a meal period is a duty to make meal periods available, not a duty to ensure they are taken. In an attempt to distract this Court from that conclusion, Plaintiffs ask this Court to disregard the plain language of Labor Code section 512 (and all subsequent enactments and amendments to California's meal period laws), disregard the legislative history of Labor Code section 512 and ignore the fact that the meal period provisions of the Wage Orders do not, on their face, establish a duty to "ensure" meal periods are taken. Instead, Plaintiffs ask this Court to focus solely on administrative interpretations of the meal period provisions of the Wage Orders (including interpretations from the DLSE which have been withdrawn and which this Court has already concluded are inherently unreliable), to conclude that the

duty to "provide" meal periods is a duty to "ensure" they are taken. To do so, as Brinker notes, would be to turn the rules of statutory interpretation on their head.

II. STATISTICAL EVIDENCE DOES NOT RAISE COMMON QUESTIONS OR CREATE COMMON PROOF THAT PREDOMINATE OVER INDIVIDUAL ISSUES

Plaintiffs' brief conflates a number of distinct, but related concepts. At various points they argue for the admissibility of "representative evidence," "sampling," "statistical data," and "surveys."[34] "Representative evidence" is a conclusory description of evidence adduced from a sample. However, not all sampling methodologies will yield representative results. Indeed, that the evidence adduced from a sample of self-interested plaintiffs cannot be accepted at face-value, because credibility is in issue, is one of the major arguments against using a survey in the context of this case. "Sampling," if done randomly, merely assures that the evidence adduced from the sample will closely approximate the evidence that would be provided by the class as a whole, if they were polled in the same manner. However, as noted below, a sample drawn from biased respondents will itself be biased, and that bias cannot be reduced by increasing the size of the sample. Finally, although "statistics" may have a rightful place in some types of litigation, its probative value necessarily

[34] *See* Pls.' O.B. at 123-25.

depends on the quality of the data and as explained below, and the objectivity of the survey responses. Because surveys designed to assess whether meal period, rest break or off-the-clock violations occurred would elicit inherently subjective and biased responses, statistical summaries of that evidence have no probative value in these types of class actions.

A. Plaintiffs' Proposed Survey Is Too Vaguely Described to be Accorded any Weight

Notwithstanding Plaintiffs' claims regarding "statistics," the Court of Appeal correctly noted that objective data could "only show the fact that meals breaks were not taken, or were shortened, not why," i.e., whether these acts were voluntary or involuntary.[35] Plaintiffs object and contend that "in fact, expert survey and statistical data *can* show *why* a meal period or rest break was missed or *why* off-the clock work was done."[36] Yet, Plaintiffs and their *amici* remain disturbingly vague as to how these methods will accomplish that feat. These details are important because, as powerful as these methodologies may be, they are vulnerable to the well-worn maxim, "garbage in, garbage out."[37]

Although Plaintiffs suggest that the answer lies in a "well-

[35] Opinion at 49.
[36] Pls.' O.B. at 126.
[37] *See* http://en.wikipedia.org/wiki/Garbage_In,_Garbage_Out (providing definition of the expression "garbage in, garbage out") (last visited April 8, 2009).

done survey,"[38] Plaintiffs fail to explain exactly who would be surveyed, how the survey would be drawn, by whom it would be administered, what those surveyed would be asked, or in what sense the survey will be "well done." These are critical details, which if examined closely, as they are below, cannot be appropriately addressed in surveys of putative class members who have a vested interest in the outcome of litigation.

As importantly, Plaintiffs provide no reason to suppose that a survey will reveal that the reasons "why" meal breaks were missed or shortened, or why all hours worked were not recorded, will be common to the class. A survey obviously can limit a respondent's answers to just a few, and in that way subsume individual differences. However, the very purpose of the motion for class certification is to determine whether common questions of law or fact predominate – whether a common policy or practice caused all putative class members to be affected in the same way.

B. Surveys of Self-Interested Respondents Are Inherently Biased

1. Class Members Are Presumptively Self-Interested and their Survey Responses Are Hearsay

Not only are Plaintiffs silent regarding the details of their survey, they ignore as well the critical question of why the survey responses of self-interested class members who know that their answers

[38] Pls.' O.B. at 124, n.56.

will influence how much they may recover monetarily, would be admissible without affording a defendant an opportunity to cross-examine and test the credibility of these survey respondents. Because cross-examination is necessary to assess the reliability of survey evidence provided by interested respondents, the parties inevitably will be required to adduce individual testimony, for the survey cannot provide reliable class-wide data.

Survey evidence, by design, consists of hearsay—respondents are surveyed outside of the courtroom and their answers are offered for their truthfulness.[39] The rule against hearsay evidence exists, of course, to protect a party from out-of-court statements from individuals who are unavailable to be cross-examined. The exceptions to this rule exist principally because the circumstances that give rise to the hearsay statement minimize concerns regarding the credibility of the out of court statements. For example, a "spontaneous utterance" is admissible because the circumstances are deemed to preclude the thoughtfulness and guile that are likely to cause the speaker to deceive. Similarly, a "dying declaration" may be admissible because, given the circumstances, courts generally recognize that the speaker has little motivation to speak falsely. The

[39] *See, e.g.*, Shari S. Diamond, *Reference Guide on Survey Research*, 233 n.12 (2nd ed. 2000), available from the Federal Judicial Center online at http://www.fjc.gov (discussing exceptions to the hearsay rule found by various courts).

safeguard that applies to expert testimony, which permits the expert to rely on evidence that otherwise would be inadmissible, inheres in the expert's scientific methodology.

Although the survey responses usually are synthesized by statisticians, who as experts may seek to present this evidence to the court or jury, the ultimate question is whether the methodology of these experts removes from the survey the taint of hearsay which otherwise makes these out-of-court statements inadmissible. Indeed, it is well-established in California that a party's *sworn* interrogatory responses cannot be used affirmatively by that party. What then makes the unsworn answers of class members admissible when offered in summary fashion through an "expert"?

Obviously, were someone stationed outside the courtroom to interview prospective witnesses, and attempt to testify as to the content of those interviews, the hearsay nature of this testimony would be starkly apparent. However, no legal principle suggests that merely bundling together hearsay testimony, and laundering it through an expert, in and of itself makes it admissible. Rather, to transform inadmissible hearsay into admissible expert testimony requires a scientific method that has been proven to wring from these data the presumed lack of trustworthiness that

generally bars hearsay testimony.[40] However, because Plaintiffs omit the details of their survey/statistical approach, *a fortiori* they are unable to explain how it will spin the dross of hearsay into the gold of admissible evidence.

A threshold concern in survey research, the branch of social science concerned with this issue, is how to design the survey so as to elicit unbiased responses. As with other forms of scientific research, the "gold standard" is the "double-blind experiment."

> To ensure objectivity in the administration of the survey, it is standard interview practice to conduct double-blind research whenever possible: both the interviewer and the respondent are blind to the sponsor of the survey and its purpose. Thus, the survey instrument should provide no explicit clues (e.g., a sponsor's letterhead appearing on the survey) and no implicit clues (e.g., reversing the usual order of the yes and no response boxes on the interviewer's form next to a crucial question, thereby potentially increasing the likelihood that no will be checked) about the sponsorship of the survey or the expected responses…When interviewers are well trained,

[40] "In addition, if a survey shows guarantees of trustworthiness equivalent to those in other hearsay exceptions, it can be admitted if the court determines that the statement is offered as evidence of a material fact, it is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and admissibility serves the interests of justice. Fed. R. Evid. 807; *e.g.*, *Keith v. Volpe*, (C.D. Cal. 1985) 618 F. Supp. 1132; *Schering*, 189 F.3d at 232. Admissibility as an exception to the hearsay exclusion thus depends on the trustworthiness of the survey." Diamond, *supra* note 38, 233 n.12.

> their awareness of sponsorship may be a less serious threat than respondents' awareness.[41]

Experts typically survey absent class members under circumstances that are far removed from this ideal. Absent class members are likely either to have opted into the proceeding or received prior notice of the class action. Additionally, they may have been contacted by attorneys or learned from other sources the issues in the case and the grounds alleged for recovery. Accordingly, it is highly likely, if not certain, that class members responding to the survey know that it is litigation-related, and to take things but a small step further, know how their answers will affect their own chances of recovery.

Under these circumstances, questionnaire responses more closely resemble the testimony of interested parties, submitted as declarations in support of, or in opposition to, summary judgment. The fact that an expert interprets these declarations and offers summaries to the court, does little to make this testimony more trustworthy, or admissible, than the declaration of an interested witness in the trial of a single-plaintiff case.

2. The Bias Inherent in the Testimony of Interested Witnesses Cannot Be Purged Statistically

Bias is the Achilles heel of statistics. No increase in sample

[41] *Id.* at 266.

size, no amount of randomization, and no amount of repetition will free statistical estimates from bias if the underlying population or their responses are themselves biased. For example, to predict the winner of the presidential election, one would not sample delegates to the nominating conventions of either political party, because these delegates are likely to be biased in their leanings and therefore provide an erroneous measure of the actual support for one candidate or the other. This would be true no matter how many delegates were surveyed; in fact, the larger the sample, the more certain are the results to be biased. This principle is aptly summed up in the leading textbook by the late Professor David Freedman, of the University of California at Berkeley: "When a selection procedure is biased, taking a large sample does not help. This just repeats the basic mistake on a larger scale."[42]

Self-interest is an obvious source of bias. Suppose a baseball team is interested in building a new stadium but has announced that unless there is a sufficient showing of interest by the community, they will move the team to another city rather than build the stadium. If a survey is conducted among fans attending the team's home games, these fans have a strong incentive to exaggerate their interest in attending future games for, by doing so, they increase the likelihood that the team will not move. If indeed this fan base is biased in its responses, increasing the number of fans

[42] David Freedman, *et al.*, *Statistic*s, 335 (4th ed.).

who are surveyed, or randomly selecting every third, fourth, or tenth one, will not cure the problem because each of these individuals has a similar incentive to overstate their true intentions.

In litigation, a party's self-interest is assumed. This is reflected in the California Rules of Evidence:

> Self-serving statements, that is, declarations in the interest of the declarant, are ordinarily inadmissible. Accordingly, litigants will not be permitted to strengthen their case by their own self-serving declarations, whether written or oral. Although a litigant's own declarations may be used against him or her as admissions, they may not be used in his or her favor. Consequently, extrajudicial statements of a party in his or her own behalf and interest, made in the absence of the opposite party and constituting no part of the res gestae, are not generally admissible. Also, self-serving declarations contained in pleadings filed in other judicial proceedings are not admissible as evidence in favor of the declarant.[43]

Survey evidence achieved prominence in trademark litigation. A frequent allegation in these cases was that the mark of one company resembled too closely the mark of another, and therefore caused consumers to confuse the two brands. As Professor Diamond has noted: "A routine use of surveys in federal courts occurs in Lanham Act cases, where the plaintiff alleges trademark infringement or claims that false advertising has

[43] 31 Cal. Jur. 3d Evid. § 242 (Declarations of parties; self-serving statements).

confused or deceived consumers. The pivotal legal question in such cases virtually demands survey research because it centers on consumer perception and memory (*i.e.*, is the consumer likely to be confused about the source of a product, or does the advertisement imply an inaccurate message?)."[44] In these cases, it would have been naive to survey employees of the defendant company and ask if they were confused about which company was signified by the trademark. Knowing that their answers could injure their employer, and perhaps threaten their own jobs, these self-interested employees would be expected to deny any confusion. Accordingly, experts in these cases often relied on "mall surveys" of disinterested consumers.[45]

Self-interest is bound to bias the responses of putative class members in this case. Asking employees how often, or why, they missed meal or rest periods, or the amount of time they worked that was unrecorded, is tantamount to polling them regarding how much they wish to recover in the present litigation. Certainly by now all putative class members understand that the more frequently and consistently they claim to have missed their breaks, and to the extent they were not "provided," the

[44] Diamond, *supra* note 38, at 235.

[45] A survey of members of the Council of American Survey Research Organizations, the national trade association for commercial survey research firms in the United States, revealed that 95% of the in-person independent contacts in studies done in 1985 took place in malls or shopping centers. Diamond, *supra* note 39 at 244 n. 60 (citation omitted).

more they can recover in this litigation. Moreover, nowhere do Plaintiffs or *amici* suggest that integral to their proposed methodology is any requirement that plaintiffs' attorneys refrain from explaining to putative class members precisely how their responses may influence their recovery. Thus, any survey of the putative class inevitably will elicit self-serving responses, and there is nothing in the realm of statistics that is calculated to remove this obvious bias.

C. Plaintiffs Misapply the Case Law Regarding Survey Evidence

Prior to the flood of employment class actions in recent years,[46] and the accompanying search for a means to manage these cases, statistical analysis and survey data were limited to contexts in which the objectivity or impartiality of these data were beyond challenge. Although Plaintiffs, at page 124, present a string of citations to cases that purportedly admitted "such methods of proof," the evidence in those cases is far different than the survey evidence at issue here, and have none of the earmarks of bias associated with self-serving testimony. The first case they cite is *International Bhd. of Teamsters v. United States.*[47] That landmark discrimination case concerned racial patterns of hiring and employment.

[46] *See* Hehman, *Findings of the Study of California Class Action Litigation*, 2000-2006, First Interim Report, 5 (March 2009), *available at* http://www.courtinfo.ca.gov/reference/caclassactlit.htm (employment class actions constitute more than 40 percent of all class actions filed in California).

[47] *International Bhd. of Teamsters v. United States* (1977) 431 U.S. 324; Pls.' O.B. at 124.

The data at issue was derived from the company's employment records, and unlike surveys from interested parties conducted solely for purposes of litigation, those records were business records that were admissible independently of the fact that they were the subject of statistical analysis.[48] Thus, the employment pattern characterized by the "inexorable zero" in the hiring of African Americans was established by objective data.

Similarly, *Alch v. Superior Court*, is a disparate impact discrimination case that also relied on the statistical analysis of *objective* data residing in the employer's business records. *Stephens v. Montgomery Ward*,[49] a discrimination case, also relies upon the employer's personnel records. Indeed, in *Dukes v. Wal-Mart Stores*, also cited by Plaintiffs, the Ninth Circuit *refused* to certify a promotion class that included employees for whom there was no objective record that they sought the promotions at issue.

Bell v. Farmer's Insurance Exchange,[50] cited with approval by this Court,[51] involved the sampling of *deposition* testimony, which of course permitted those class members who were deposed to be cross-examined. Further, the important question of credibility was waived by the

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[48] This is not to suggest that experts may only rely upon evidence that otherwise is admissible. Nevertheless, experts do not have license to rely upon evidence that is inherently unreliable merely because they are experts.
[49] *Stephens v. Montgomery Ward* (1987) 193 Cal. App. 3d 411, 421; Pls.' O.B. at 124.
[50] *Bell v. Farmers Ins. Exchange* (2004) 115 Cal. App. 4th 715, 757.
[51] *Sav-On Drug Stores v. Superior Court* (2004) 34 Cal. 4th 319, 333.

defendant: "Following the depositions of the 295 employees in the sample, FIE and plaintiffs agreed to work calendars, *i.e.*, tabulations of data, that reflected the content of each employee's testimony. *FIE later waived the right to impeach the employees' testimony at trial."*[52]

Similarly, the Wal-Mart overtime cases relied upon by Plaintiffs are inapposite. As in the discrimination cases, the contested data were admitted because they were business records and fell within that ancient exception to the hearsay rule. In *Salvas*, the court noted: "Both the timekeeper records and the point-of-sale register records were 'made in good faith in the regular course of business' before this action began."[53] Similarly, in *Iliadis v. Wal-Mart Stores*, the court observed merely that the evidence in dispute came from the employer's business records and had no occasion to consider the bias inherent in surveys of self-interested parties.[54] *Hale v. Wal-Mart Stores* is to the same effect.[55] As the Court of Appeal noted, however, statistical analyses of Brinker's business records, i.e., its time records, does not add value to the critical question at issue in these cases – *why* in some instances no meal periods, short meal periods, or late meal periods recorded.

Capital People First is a case that challenges the treatment of

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[52] *Bell*, 115 Cal. App. 4th at 757(emphasis added).
[53] *Salvas .v Wal-Mart Stores, Inc.* (Mass. 2008) 893 N.E. 2d 1187, 1206.
[54] *Iliadis v. Wal-Mart Stores, Inc.* (N.J. 2007) 191 N.J. 88, 922 A. 2d 710, 723.
[55] *Hale v. Wal-Mart Stores* (Mo. Ct. App. 2007) 231 S.W. 3d 215, 227-28.

disabled individuals.[56] The sampling in that case concerns protocols known as Individual Program Plans, which are rehabilitative treatments developed for each putative class member. These plans pre-exist the litigation and their content was not in dispute. *Lockheed Martin v. Superior Court* [57] concerns the analysis of objective hydrological data that also exist independently of the litigation. *Reyes v. Board of Supervisors*,[58] advocated consideration of representative *cases*, to determine how the county was treating non-willful noncompliance with its work program requirement. It did not approve or even discuss the propriety of gathering this information by means of surveys. In fact, no California court appears to have considered the question of how survey methodologies fare in solving the problem of bias inherent in the responses of self-interested parties who are well aware of the effect of their answers on their likely recovery.

The errors in Plaintiffs' argument therefore are quite transparent. Plaintiffs first conflate the concepts of sampling, representativeness, statistical analysis, and surveys as if they were all of a piece. Next they collect cases that endorse one or another of the first three, and impute these holdings to the fourth type of evidence--surveys. However, because only this last category of evidence directly implicates the

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[56] *Capital People First v. Department of Developmental Svcs.* (2007) 155 Cal. App. 4th 676, 684-85; Pls.' O.B. at 124.
[57] *Lockheed Martin v. Superior Court* (2003) 29 Cal. 4th 1096, 1106-08.
[58] *See Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1279.

hearsay rule and the credibility problems associated with self-interested parties, and because Plaintiffs offer only survey evidence to prove their case, Plaintiffs' authorities simply do not support their argument regarding the value of survey evidence.

D. Plaintiffs' Amici Misapply the Pattern or Practice Paradigm

The arguments of the *amici* are equally specious. The letter submitted by The Impact Fund, Equal Rights Advocates, the Lawyer's Committee for Civil Rights of San Francisco Bay Area, and Public Advocates in support of Plaintiffs' petition for review advances the following syllogism in arguing for reversal: (1) pattern or practice allegations often are supported by statistical evidence; (2) the *Brinker* plaintiffs allege a pattern or practice; therefore (3) it is error to exclude statistical evidence in this pattern and practice case.[59] They caution this Court that if this syllogism is rejected, "the same rationale could deny class treatment of a claim that an employer discriminated against a protected class ...."[60] The error, of course, is that "statistics" are not generic. In fact, this syllogism confuses "statistics" with "data."

"Statistics" is the discipline concerned with the scientific study of data. "Data" are the facts—often represented numerically—to

[59] "The rationale of the *Brinker* court, ... , ignores the theory of plaintiffs' case that there was a pattern or practice of denial of meal and rest periods, and rules out the primary evidence that could show such a pattern." Impact Fund at 2.
[60] *Id.*

which the principles of the discipline are applied. Although the science of statistics is invariant from case to case, the data to which "statistics" is applied are highly case-specific. In this instance, surveying self-interested parties creates the intractable problem of bias. However, recognizing that these data are likely to be infused with bias does not disparage the discipline of statistics. Rather, it merely acknowledges that a house is no stronger than the foundation on which it is built.

The inferences that derive from the data discussed in *Teamsters* and the disparate impact cases cited by the *amici* differ from the survey evidence that would be gathered in meal period, rest break and off-the-clock cases because they derive from objective business records regarding employment applications, hiring, promotion, etc., that are created contemporaneously with those actions and on which the employer routinely relies. Those data are a far cry from after-the-fact recollection of self-interested class members. Accordingly, distinguishing between sets of *data* in this manner in no sense threatens the usefulness of sound statistical methods in appropriate circumstances.

Moreover, the Third Circuit very recently reversed a district court that relied upon the pattern or practice framework to certify a class that, as here, sought to engraft that theory on-to claims other than those arising under Title VII. As that panel, which included Justice Sandra Day O'Connor, noted:

> The Teamsters framework was judicially promulgated as a method of proof for pattern-or-practice claims brought by the government under Title VII, as that statute authorizes-it provides a means by which courts can assess whether a particular form of statutorily prohibited discrimination exists,... Thus, the Teamsters framework might assist a court's analysis of whether a defendant has engaged in a pattern or practice of discrimination prohibited under Title VII and, if so, to whom relief should be awarded. It is Title VII, however, that defines the scope of prohibited discrimination and sets the substantive boundaries within which the method of proof must operate. ... Even if the Teamsters framework is recognized as an acceptable method of proof for pattern-or-practice claims ..., this determination would not, by its own force, affect what patterns or practices constitute discrimination prohibited by the statute. Nor would the framework, once adopted, independently dictate what substantive elements must meet the requirements of Rule 23 in order to reach a classwide finding of unlawful discrimination under that statute.[61]

Thus, merely because Plaintiffs allege a pattern or practice does not mean that the power of statistical proof in Title VII claims necessarily is shared by the survey evidence advocated by Plaintiffs.

A pattern or practice is proved by establishing that the unlawful conduct is the employer's standard operating procedure, its usual way of doing business. In a discrimination case, it is a reasonable

[61] *Hohider v. United Parcel Service, Inc.* (3rd Cir. 2009) --- F.3d ----, 2009 WL 2183267 *8.

possibility that all class members, even those who have fared exceedingly well, were subject to this unlawful policy or practice. Those class members who have done well under that discriminatory regime presumably would have done even better were there no discrimination at all.

This dimension is absent from the claims asserted by Plaintiffs. That is, it is nonsensical to suggest that an employee who missed no meal breaks nevertheless was injured by working in employment where a pattern or practice existed. Either a particular employee missed a break on a particular occasion, and therefore was injured, or he or she did not, and therefore suffered no injury. Additionally, there is no case law assessing how frequently breaks must be missed in order to evidence a "standard operating procedure" – the defining characteristic of a pattern or practice. Does a pattern or practice exist if on the vast majority of occasions the employer complied with the Labor Code requirements, although each class member testifies to some small number of instances in which he or she failed to take a break? Although a pattern or practice theory appears superficially to compress the myriad individual issues into just one, *i.e.*, whether or not the pattern or practice exists? That is not a "common question" that pertains to Rule 23, because it is irrelevant to the ultimate questions of who, if anyone, missed a meal period, or a rest break, or worked during unrecorded time, and how often did that occur?

E. Conclusion

This brief does not, and should not be read to, argue against the use of survey research as a legitimate statistical methodology. Indeed, Professor Diamond, in her article on survey research, cited by Plaintiffs, observes: '[S]cience and the law share, at the deepest possible level, the same aspirations and many of the same methods. Both disciplines seek, in structured debate, using empirical evidence, to arrive at rational conclusions that transcend the prejudices and self-interest of individuals." In litigation, the antidotes to prejudice and self-interest are cross-examination and controverting evidence. In science, the checks consist of methods such as the double-blind experiment, in which neither the subject nor the researcher knows who receives the treatment and who the placebo. However, when a party is stripped of its right to cross-examine survey respondents, and the surveys themselves tap into the self-interest of those respondents, the safeguards of both law and science are sacrificed for the sake of expediency.

Dated: August 18, 2009

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CERTIFICATE OF COMPLIANCE

[CAL. RULES OF COURT, RULE 8.204(C)]

This brief consists of 12,628 words as counted by the Microsoft Word version 2003 word processing program used to generate the brief (13,913 words if the words in the Application are also included).

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