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October 25, 2012

**VIA OVERNIGHT DELIVERY**

The Honorable Tani Cantil-Sakauye, Chief Justice, and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: **Request for Depublication** (Cal. Rules of Court, rule 8.1125(a))
*Lamps Plus Overtime Cases (Flores v. Lamps Plus)*
(2012) 209 Cal.App.4th 35
Supreme Court Case No. S206007
Court of Appeal, Second Appellate District, Division Eight,
Case Number B220954

Dear Honorable Justices:

California Employment Lawyers Association (CELA), respectfully requests depublication of *Lamps Plus Overtime Cases* ("*Lamps Plus*"). The order to publish *Lamps Plus* was filed on September 5, 2012. A Petition for Review was filed October 16, 2012. This depublication request is timely filed within 30 days after the opinion became final on October 4, 2012. See Rule of Court 8.1125(a)(4).

## I. CELA'S INTEREST

CELA is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including wage and hour class actions similar to *Lamps Plus*. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of public policies set forth in the California Labor Code, including by advocating for effective labor law enforcement procedures such as class actions in appropriate cases. CELA has taken a leading role in advancing and protecting the rights of California employees by, among other things, submitting amicus briefs and letters on issues affecting those rights in wage and hour cases, including Supreme Court amicus briefs in *Murphy v. Kenneth Cole Productions, Inc.*, *Gentry v. Superior Court*, *Brinker Restaurant Corp. v. Superior Court*, as well as numerous requests for publication or depublication of opinions.

By separate amicus letter, CELA will also be asking this Court to grant review of *Lamps Plus* under Rule of Court 8.500(g). *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*) [1] set forth the standard for an employer's obligation to comply with the IWC Wage Order meal period requirements. Though it added a perfunctory recitation of the Brinker standard, *Lamps Plus* has created irreconcilable confusion by also setting forth and relying upon a different standard, republishing the one it adopted prior to *Brinker*. CELA seeks review to allow this Court to provide lower courts, and employers, employees, and their counsel, with definitive, uncontradicted authority regarding substantive rest and meal period compliance and enforcement through the class action vehicle. CELA also seeks review to address the important issue of precluding class actions on the basis of dubious conflicts of interest among putative class members contrived by defendants and not asserted by affected class members, revisiting this Court's seminal decision on such manufactured conflicts in *Richmond v. Dart* (1981) 29 Cal.3d 462 (*Richmond*). Should the Court not grant review, CELA requests the Court depublish *Lamps Plus* to enable practitioners to rely on the established procedures in *Brinker* with which it conflicts.

The same panel that issued *Lamps Plus* as essentially a republication of its pre-*Brinker* opinion and statutory analysis also published *Hernandez v. Chipotle Mexican Grill Inc.* (2012) 208 Cal.App.4th 1487 (*Hernandez*) six days earlier. *Hernandez* contains the identical analysis and language, much of it copied verbatim, that CELA believes runs contrary to *Brinker*. CELA has also submitted letters requesting depublication and seeking review in *Hernandez* under many of the same grounds asserted below, some of which is repeated verbatim.

## II. REASONS FOR DEPUBLICATION

CELA seeks depublication of the *Lamps Plus* decision on remand following *Brinker* for the following reasons:

1. *Lamps Plus*' republication of most of its pre-*Brinker* decision includes statements and standards regarding rest and meal period compliance and class actions that are no longer valid law in California after *Brinker;*
2. *Lamps Plus* fails to meet the standards for publication in Rule of Court, Rule 8.1105(c);
3. *Lamps Plus* does not state the correct standard for application of language from concurring opinions of this Court, nor does it state the correct language approved by this Court as to theories of recovery supporting class certification; and

[1] Cohelan Khoury & Singer are co-counsel in *Brinker*.

4. *Lamps Plus* addresses issues currently under Review in *Duran v United States Bank, National Assn.* S200923, previously reported at (2012) 203 Cal.App.4th 212.

## III. FACTS AND PROCEDUAL HISTORY

Non-exempt Lamps Plus employees filed a putative class action suit for denied meal and rest break compensation and other Labor Code violations. Following certification discovery, plaintiffs moved for class certification, supported by expert testimony that over 90% of the putative class had been denied breaks and declarations and survey questionnaires from multiple class members. "Some employees responded, saying they often missed meal and rest breaks; others said they always received their meal and rest breaks; and still others said they always received either their meal break or their rest break, but not both. The questionnaire did not ask why a break was missed." *Lamps Plus*, 209 Cal.App.4th at 44.

The trial court denied certification. Pre-*Brinker,* the court "relied on numerous federal authorities holding that California employers were required to provide employees the opportunity to take breaks, not to *ensure* breaks are taken." *Lamps Plus*, 209 Cal.App.4th at 45 (original emphasis). The court decided individual issues predominated based on the interpretation that the substantive standard for meal and rest period obligations was identical, *viz.*, "that employers need only authorize and permit them, *which means make them available*." *Id.* (emphasis added).

Plaintiffs appealed, and Division Eight of the Second District Court of Appeal affirmed. With plaintiffs principally relying on *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, the panel in its first, pre-*Brinker* opinion stated that its job was to determine if the trial court's ("make available") ruling was correct." *Lamps Plus Overtime Cases.* (2010) 195 Cal.App.4th 389, 400 (superseded opinion). The panel then undertook a statutory interpretation of Labor Code section 226.7 and the IWC wage order meal and rest period history and concluded that the standard applied by the trial court was correct, additionally quoting federal district court language to support that conclusion. *Id.* at 400-404.

This Court granted review and held the matter without briefing pending the decision in *Brinker.* On remand, Division Eight again affirmed the trial court without further hearing and largely without modification. The panel based its re-issued opinion on plaintiffs' pre-*Brinker* briefing and analysis, presuming plaintiffs relied on the same arguments as if *Brinker* had not rendered many of them superfluous or inapplicable, rejecting requests in supplemental briefing requesting remand to the trial court for a reassessment of class certification evidence under the new *Brinker* standard. Inexplicably,

the court republished its now-superseded statutory analysis of the "provide" and "ensure" issue. With little more than perfunctory mention of *Brinker*, the court reissued its prior opinion notwithstanding that *Brinker* superseded much of the analysis. Rather than have the opinion of an inferior tribunal competing with *Brinker* in providing the standards practitioners are to apply in these cases going forward, *Lamps Plus* should be depublished.

## IV. ARGUMENT

### A. *Lamps Plus* Must Either be Reviewed as Contradictory to *Brinker* or Depublished for Republishing its Superseded Analysis

The lead up to this Court's *Brinker* decision saw a multitude of federal district court and California District Court of Appeal decisions struggling to ascertain the substantive employer obligations for meal and rest period compliance and address the corresponding propriety of aggregating these claims in class actions. The rulings were by no means uniform, presenting conflicting standards that were often confusing and conflicting. With the publication of *Brinker*, this Court provided CELA's practitioners a clear, uniform standard, highlighted as follows:

> The employer satisfies this obligation [to provide meal periods] if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. What will suffice may vary from industry to industry, and we cannot in the context of this class certification proceeding delineate the full range of approaches that in each instance might be sufficient to satisfy the law.
>
> On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay under Wage Order No. 5, subdivision 11(B) and Labor Code section 226.7, subdivision (b).

*Brinker*, 53 Cal.4th at 1040-1041.

Critical language appears earlier in the opinion:

> [A]n employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks...The wage orders and governing statute do not countenance an employer's exerting coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally protected breaks.

*Brinker,* 53 Cal.4th at 1040 [internal citations omitted].

There is no need to restate Brinker's full statutory analysis here; it suffices to state that this Court performed a comprehensive analysis of the relevant statutory and regulatory history and enunciated the requirements for "providing" compliant, timely meal and rest periods, certifying a rest period class and remanding to the trial court the meal period claims for reevaluation under the new standard. In doing so, this Court *rejected* the formulations postulated by trial judges in such cases as *Brown v. Federal Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580 (relying on obiter from this Court's decision in *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094 (*Murphy*) never intended to set substantive standards) and *White v. Starbucks Corp.* (N.D. Cal. 2007) 497 F.Supp.2d 1080, 1088 ("California Legislature intended only for employers to *offer* meal periods - not to ensure that those periods were actually taken") (original emphasis).

Yet *Lamps Plus* revives the rejected federal court cases and the incomplete "offer" and "make available" standards they applied. Not content to take *Brinker's* analysis and apply it to the record or to remand to the trial court, as it did in *Hernandez,* Division Eight once again sets out its independent statutory and regulatory analysis of Labor Code section 226.7 and the wage orders to determine for itself whether employers must "provide" meal periods or "ensure" employees take them, seemingly ignoring that *Brinker superseded* that exercise. *Lamps Plus,* 209 Cal.App.4th at 47-48.

As if *Brinker* had not already done so (and more thoroughly), *Lamps Plus* goes on to recite its previous wage order analysis on the "ensure" or "provide" question to support its conclusion that the trial court's legal analysis of the issue was correct. A lengthy, and now irrelevant, passage follows quoting Labor Code sections 226.7 and 512, describing the IWC, the wage orders, and their function.

Continuing, *Lamps Plus* quotes the meal period standard advanced by Judge Fisher in *Brown v. Federal Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580 with its

improper reliance on dicta from *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094 to support a standard that defines a meal period violation as occurring only when an employee is "forced to forego" a break:

> "The California Supreme Court has described the interest protected by meal break provisions, stating that '[a]n employee forced to forgo his or her meal period ... has been deprived of the right to be free of the employer's control during the meal period.' *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal.4th 1094, 1104, 56 Cal. Rptr. 3d 880, 155 P.3d 284 (2007). It is an employer's obligation to ensure that its employees are free from its control for thirty minutes, not to ensure that the employees do any particular thing during that time. Indeed, in characterizing violations of California meal period obligations in *Murphy*, the California Supreme Court repeatedly described it as an obligation not to force employees to work through breaks. [Citation.]" (*Brown v. Federal Express Corp.* (C.D.Cal. 2008) 249 F.R.D. 580, 585, fn. omitted.)

*Lamps Plus,* 209 Cal.App.4th at 21-22.

But this Court *rejected* the employer's efforts in Brinker to assert that the *Murhpy* "forced to forego" dictum was an actual substantive standard, and it rejected the *Brown* formulation in favor of what is now the law.

Ultimately, *Lamps Plus* decides a "provide" standard applies but instead of looking to this Court to explicate the term, it concludes by citing a dictionary definition of "provide" asserted by defendants and their amici in *Brinker* but rejected by this Court: ""Provide' means 'to supply or make available.' (Webster's 9th New Collegiate Dict. (1986) p. 948.)." *Lamps Plus,* 209 Cal.App.4th at 49-50.

The *Lamps Plus* panel then projects its anachronistic error onto plaintiffs, accusing them of advancing an "ensure" standard as if they had not read *Brinker* and without the opportunity to refocus their arguments to assimilate *Brinker's* application: "Plaintiffs rely on *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 [35 Cal. Rptr. 3d 243] (*Cicairos*) to argue employers must ensure meal and rest breaks are actually taken." *Lamps Plus,* 209 Cal.App.4th at 50. That statement may have been true when the *Lamps Plus* plaintiffs briefed their appeal pre-*Brinker*, but there would be no reason for them to argue for such a standard after *Brinker*. This is why plaintiffs filed two supplemental

briefs following remand from this Court seeking remand to the trial court for an assessment of the evidence under the new *Brinker* standard. Petition for Review, p. 5. But the court declined and instead republished its prior decision and analysis, adding only perfunctory mention of *Brinker*.

Finally reaching *Brinker*, *Lamps Plus* states *Brinker* has "squarely resolved"[2] the "provide" or "ensure" issue "contrary to Hernandez's position." *Lamps Plus,* 209 Cal.App.4th at 49. If the court concedes *Brinker* "squarely" (or "conclusively") decided the issue, then there was no need for it to conduct an independent statutory analysis to reach a result this Court already established. To do so indicates the possibility of reaching a contrary result, prohibited by *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ("all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction"). The panel's statement also demonstrates the impropriety of republication of a superseded opinion, as plaintiffs no longer were advancing an "ensure" position.

It is only at this point in the opinion that *Lamps Plus* recites the controlling law newly enunciated by this Court in *Brinker*. But by then it is too late. Having preceded the statement of the applicable standard by restating old constructions this court rejected, such as the "forced to forego" and "employers must only offer" or "make available" meals periods, *Lamps Plus* has muddied the waters clarified in *Brinker*. Employers may very well seize on the superseded standard to justify failing to meet the *Brinker* requirements and only offer meals without providing the additional safeguards this Court mandated, and employees will suffer the consequences. Depublication of *Lamps Plus* is warranted to prevent this from happening, and to preserve the fundamental integrity of our system of appellate jurisprudence precluding the re-visitation of statutory analysis once this Court has decided the issue.

### B. *Lamps Plus* fails to meet the standards for publication in Rule of Court, Rule 8.1105(c)

If this Court finds *Brinker* and *Lamps Plus* consistent such that review is not warranted, *Lamps Plus* nevertheless fails to meet the standards for publication in Rule of Court, Rule 8.1105(c). The opinion concerns class certification denial of rest and meal period claim. *Lamps Plus* neither creates a new rule of law for certifying such cases, applies the established rules of *Brinker* to a set of facts different as to certification in any significant manner, or modifies, explains, or criticizes existing class trial procedure. With

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[2] The panel said *Brinker* "conclusively resolved" the issue in *Hernandez. Hernandez,* 208 Cal.App.4th 1499.

the expansion of class action practice in recent years, and its impact on large segments of the public, nearly any wage and hour class action involves a legal issue of "continuing public interest." This final criterion does not justify publication of all such opinions, and *Lamps Plus* is not the exceptional case falling under its purview.

**C. *Lamps Plus* does not state the correct standard for application of language from concurring opinions of this Court, nor does it state the correct language approved by this Court as to theories of recovery supporting class certification.**

Plaintiffs argued in supplemental briefing that Lamps Plus' failure to keep accurate time records created a rebuttable presumption that violations occurred, supporting certification, citing Justice Werdegar's concurring opinion in *Brinker. Lamps Plus,* 209 Cal.App.4th at 57, n.8[3]. Though not binding precedent, concurring opinions are "persuasive" and may be relied upon. See, e.g., *Ricaldi v US Investigations Services LLC* (C.D. Cal. 2012) 2012 U.S. Dist. LEXIS 73279 *14 ("the court notes its agreement with Justices Werdegar and Liu that it is the employer's burden to rebut a presumption that meal periods were not adequately provided, where the employer fails to record any meal periods"); *Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1272 ("we find persuasive and follow Justice Chin's analysis in his concurring opinion in Cheong"); *In re Jayson T.* (2002) 97 Cal.App.4th 75, 84 (overruled in part on unrelated grounds in *In re Zeth S.* (2003) 31 Cal.4th 396, 414) ("That gauntlet was taken up by Chief Justice Bird, but anything she said in her separate concurring opinion could only be, at most, persuasive authority for future cases. (For what it is worth, we are persuaded by it.)"). Declining to even consider Justice Werdegar's opinion, *Lamps Plus* stated: "We need not address this argument since 'concurring opinions are not binding precedent ...' (*In re Marriage of* Dade (1991) 230 Cal.App.3d 621, 629 [281 Cal. Rptr. 609].)" *Lamps Plus,* 209 Cal.App.4th at 57. And in direct opposition to Justice Werdegar's formulation, the panel found the absence of mandatory records did *not* establish a rebuttable presumption due to the necessity of determining "why" an employee missed a break for purposes of a waiver defense:

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[3] Justice Werdegar states, in pertinent part: "In returning the case for reconsideration, the opinion of the court does not endorse Brinker's argument, accepted by the Court of Appeal, that the question why a meal period was missed renders meal period claims categorically uncertifiable... An employer's assertion that it did relieve the employee of duty, but the employee waived the opportunity to have a work-free break, is not an element that a plaintiff must disprove as part of the plaintiff's case-in-chief. Rather, as the Court of Appeal properly recognized, the assertion is an affirmative defense, and thus the burden is on the employer, as the party asserting waiver, to plead and prove it." *Brinker*, 53 Cal.4th at 1052 (Werdegar, J., concurring).

> The analysis did not consider whether meal periods were validly waived by an employee working six hours or less, or 10 hours or less. (Lab. Code, § 512, [subd. (a).) A trier of fact will have to determine if Lamps Plus employees actually missed breaks, or simply forgot to record them, as well as the reasons why employees might have missed breaks or returned to work before completing them.

*Lamps Plus,* 209 Cal.App.4th at 54-55.

Since trial courts may henceforth chose to follow Justice Werdegar's reasoning, indicating that the question "why" a break was missed should not be dispositive of a certification denial, the panel's outright refusal to even address the argument raises the prospect that future courts will raise *Lamps Plus* as authority for the proposition that it should not be considered. That specter warrants depublication of the case. See, also, *Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1305 (reasons "why" employees missed waivable rest periods did not predominate over common issue whether policy and practice of schedule design operated to deprive breaks).

Relying again on the authority of a single federal trial judge in a case this court did not follow on class certification standards for meal period claims, *Lamps Plus* states "Plaintiffs' theory that chronic understaffing led to classwide violations of the meal and rest period law has been rejected by the courts. (See *Brown, supra*, 249 F.R.D. at pp. 582, 587.)." That conclusion does not comport with this Court's formulation of the correct class certification analysis. See *Sav-On Drugs, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327 ["[I]n determining whether there is substantial evidence to support a trial court's certification order, we consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment. [Citations.]"].) Though the court went on to determine that Plaintiffs had not supported the theory with substantial evidence, there may be many cases in which chronic and intentional understaffing may result in the impact of class members being denied breaks, which would support certification. The inclusion of the gratuitous statement that this particular theory "has been rejected" may confuse courts in the future and provide and overly broad and invalid basis for defendants to oppose class certification. Accordingly, the case should be depublished.

**D. *Lamps Plus'* Discussion of Issues Under Review in *Duran* Warrants Depublication**

In affirming the trial court, *Lamps Plus* relies on the absence of a showing that Lamps Plus had a "universal practice" of denying employees their breaks. *Lamps Plus,* 209 Cal.App.4th at 53-54. In other words, absent a universal policy or practice affecting every class member, class certification is improper.

It has never been this Court's approach that practices and policies resulting in wage and hour violations—however widespread—do not support class certification unless they are "companywide." Indeed, this Court found a class trial appropriate even in the face of disputed evidence as to whether overtime exemption status misclassification was defendant's "policy and practice" where the alleged impact was "widespread de facto misclassification." *Sav-On Drugs, Inc. v. Superior Court, supra,* 34 Cal.4th at 330. Use of the term "widespread" as opposed to "uniform" reveals this Court authorized the class action vehicle even in the absence of a non-compliant "companywide" policy or practice.

The reality of today's workplace is that many companies create facially compliant policies and present self-serving evidence, typically from current employees under their control, of some measure of compliant practices, notwithstanding rampant or systemic violations. The question whether in such circumstances statistical sampling and class-wide extrapolation of representative evidence is an acceptable class action trial methodology is currently under review in *Duran v United States Bank, National Assn.* S200923.

Accordingly, depublication of *Lamps Plus* is warranted to preserve the class action trial methodology issue for comprehensive review by this Court.

Thank you for your consideration of this request.

Very truly yours,
COHELAN KHOURY & SINGER and
CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

Michael D. Singer

cc: Service List on All Counsel
California Employment Lawyers Association
Court of Appeal, Second Appellate District, Division Eight

**PROOF OF SERVICE**

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is Cohelan Khoury & Singer, 605 "C" Street, Suite 200, San Diego, California 92101-5305.

On October 25, 2012, I served the foregoing documents described as **REQUEST FOR DEPUBLICATION** on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

**SEE ATTACHED SERVICE LIST**

I then served each document in the manner described below:

[XX] **BY MAIL:** I placed each for deposit in the United States Postal Service this same day, at my business address shown above, following ordinary business practices.

[ ] **BY FAX**: I transmitted the foregoing document(s) by facsimile to the party identified above by using the facsimile number indicated. Said transmission(s) were verified as complete and without error.

[ ] **BY UNITED PARCEL SERVICE:** I placed each envelope for deposit in the nearest United Parcel Service drop box for pick up this same day and for "next day air" delivery.

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

Executed October 25, 2012 at San Diego, California.

Michelle Gomez

**SERVICE LIST**

*Lamps Plus Overtime Cases*

Case No. S206007

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