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October 22, 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))
Hernandez v. Chipotle Mexican Grill Inc.
(2012) 208 Cal.App.4th 1487
Supreme Court Case No. S205875
Court of Appeal, Second Appellate District, Division Eight,
Case Number B216004

Dear Honorable Justices:

California Employment Lawyers Association (CELA), respectfully requests depublication of *Hernandez v. Chipotle Mexican Grill Inc.* ("*Hernandez*"). The order to publish *Hernandez* was filed on August 30, 2012. A Petition for Review was filed October 9, 2012. This depublication request is timely filed within 30 days after the opinion became final on September 29, 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 *Hernandez*. 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 *Hernandez* 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, *Hernandez* 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 *Hernandez* to enable practitioners to rely on the established procedures in *Brinker* with which it conflicts.

II. REASONS FOR DEPUBLICATION

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

1. *Hernandez*' 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. *Hernandez* fails to meet the standards for publication in Rule of Court, Rule 8.1105(c);
3. *Hernandez* conflicts with *Richmond* by basing denial of certification on speculative, employer-devised, purported conflicts of interest having no bearing on the rights being asserted by class members; and
4. *Hernandez* addresses issues currently under Review in *Duran v United States Bank, National Assn.* S200923, previously reported at (2012) 203 Cal.App.4th 212.

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

III. FACTS AND PROCEDUAL HISTORY

A shorthand overview of the facts and procedural history is as follows. The putative class is comprised of the Chipotle fast-food restaurant chain hourly "crew members" alleging claims for denied meal and rest period compensation. Plaintiffs moved for class certification presenting substantial evidence of two policies, a "tap on the shoulder" policy prohibiting employees from taking any break until specifically told by a manager to go on break, and a policy prohibiting employees from skipping any break once told to take it. See *Hernandez,* 208 Cal.App.4th at 1490-1491. Combined with the fact that Chipotle requires its employees to accurately record the start time and end time of every meal period and rest break, the effect is that Chipotle has records documenting every missed break, and no defense that any missed break was the result of employee free choice. Rather, Chipotle's principal liability defense is that some of its time records may be inaccurate.

The trial court denied certification. Pre-*Brinker,* the court predicted this Court would find employers are "required to *provide* employees with the ability to take breaks, not to *ensure* breaks be taken." *Hernandez,* 208 Cal.App.4th at 1494 (original emphasis). The court did not explain what it meant by "provide." The parties agreed that employers also must authorize and permit paid rest periods. The court found individual inquiry was "required to determine if [Chipotle] is liable for denying proper meal and rest breaks to each of its thousands of employees." *Id.* Without analysis of how the two policies precluding employee free choice functioned to establish liability, the court found individual issues "rendered classwide adjudication unmanageable because, even if an employee's time record indicated a break was missed, that in and of itself did not establish that Chipotle failed to provide, authorize or permit the employee to take a meal or rest break." *Id.* The court stated that class certification would be appropriate if the Supreme Court found employers must ensure employees take meal periods. *Id.* Inconsistent with that conclusion, the court also denied certification on the basis of a perceived conflict of interest among class members due to the fact that crew members occasionally were responsible for breaking other crew members, speculating that "some putative class members may accuse other putative class members of violating their meal and rest period rights." *Id.* at 1504.

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 ("provide") ruling was based upon an erroneous legal analysis." *Hernandez v Chipotle Mexican Grill, Inc.* (2010) 189 Cal.App.4th 751, 760

(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 760-763. The panel also confirmed the conflict of interest issue supported denial of certification.

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. The court declined plaintiffs' request for remand to the trial court for a reassessment of class certification evidence under the new *Brinker* standard and did not address plaintiffs' analysis of why Chipotle's "tap on the shoulder" policy made liability issues susceptible to classwide proof. Inexplicably, the court republished its now-superseded statutory analysis of the "provide" and "ensure" issue. With little more than perfunctory mention of *Brinke*r, 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, *Hernandez* should be depublished.

IV. ARGUMENT

A. *Hernandez* 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 there it all is again in *Hernandez*, including reliance on the rejected federal trial court cases and the standards they applied. Not content to take *Brinker's* analysis and

apply it to the record or to remand to the trial court, *Hernandez* 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:

> The trial court first held that California law requires that employers *provide*, but not *ensure*, employees take meal and rest breaks. Since we must ascertain if the trial court's ruling was based upon an erroneous legal analysis (*Linder*, supra, 23 Cal.4th at pp. 435-436), we turn to this legal issue.

Hernandez, 208 Cal.App.4th at 1496 (original emphasis).

As if *Brinker* had not already done so (and more thoroughly), *Hernandez* 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, telling us who the IWC is and that they gave us the wage orders, then defies this Court's edict that an employer's obligation with respect to meal periods carries greater burdens and differs from that applicable to rest periods, conflating "providing" a meal period as synonymous with "authorizing and permitting" a rest period:

> Hernandez admits employers must provide, i.e., authorize and permit, employees to take rest breaks, but contends a different standard applies to meal breaks and thus, the trial court's legal analysis was faulty. This contention is not persuasive.

Hernandez, 208 Cal.App.4th at 1496-1497.

Continuing, *Hernandez* 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.)

Hernandez, 208 Cal.App.4th 1497-1498.

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, *Hernandez* 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.)." *Hernandez*, 208 Cal.App.4th at 1498.

The *Hernandez* panel then projects its anachronistic error onto plaintiffs, accusing them of advancing an "ensure" standard as if they had not read *Brinker*: "Hernandez relies on *Cicairos v. Summit Logistics, Inc., supra*, 133 Cal.App.4th 949 (Cicairos) to argue employers must ensure meal breaks are taken." *Hernandez*, 208 Cal.App.4th at 1498. That statement may have been true when the Hernandez 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 a supplemental brief 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. 12. But the court declined and instead republished its prior decision and analysis, adding only perfunctory mention of Brinker.

Finally reaching *Brinker*, *Hernandez* states *Brinker* has "conclusively resolved" the "provide" or "ensure" issue "contrary to Hernandez's position." *Hernandez*, 208 Cal.App.4th at 1499. If the court concedes *Brinker* 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 Hernandez no longer was advancing an "ensure" position.

It is only at this point in the opinion that *Hernandez* 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" meals, *Hernandez* 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 *Hernandez* 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. *Hernandez* fails to meet the standards for publication in Rule of Court, Rule 8.1105(c)

If this Court finds *Brinker* and *Hernandez* consistent such that review is not warranted, *Hernandez* 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. *Hernandez* 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 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 *Hernandez* is not the exceptional case falling under its purview.

C. *Hernandez'* Discussion of Purported Conflicts of Interest Conflicts with *Richmond v. Dart*, Warranting Depublication

Hernandez concludes that where some class members may have responsibilities impacting wage and hour rights of other class members, a conflict arises supporting denial of class certification. This questionable ruling is contrary to a long line of authority beginning with *Richmond* cautioning against denying class certification on the basis of speculative conflicts of interest that may or may not arise in the future. See *Richmond,* 29 Cal.3d at 476 (Court "not prepared to deny class action status at this time upon the

prospect of a conflict which may or may not arise in the future [because to] rule otherwise would invite the kind of speculation that went on in the trial court below"); see, e.g., *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1334-35 (potential intra-class conflicts may be resolved through subclassing).

This single paragraph of uncritical analysis carries the potential for widespread impact if employers can avoid class exposure by merely imagining up speculative ways in which class members may influence rights of other class members. Further, the concern is illusory, as the employer, not other class members, carries responsibility for failing to provide legally mandated breaks. See *Martinez v. Combs* (2010) 49 Cal.4th 35, 75.

Consequently, depublication is warranted to prevent the incorrect assertion of illusory conflicts of interest as a basis for denial of class certification.

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

In affirming the trial court, *Hernandez* focuses with too sharp a lens on Chipotle's evidence of no "companywide" policy or practice denying breaks. *Hernandez,* 208 Cal.App.4th 1502. 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* (2004) 34 Cal.4th 319, 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 Hernandez 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 22, 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 22, 2012 at San Diego, California.

____

Michelle Gomez

SERVICE LIST

Hernandez v. Chipotle Mexican Grill Inc.

Case No. S205875

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