No. _____

# IN THE SUPREME COURT OF CALIFORNIA

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**APPLE INC.**,

*Petitioner*,

v.

**THE SUPERIOR COURT OF SAN DIEGO COUNTY**,

*Respondent*,

**BRANDON FELCZER, RYAN GOLDMAN, RAMSEY HAWKINS, and JOSEPH LANE CARCO**,

*Real Parties in Interest.*

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After a Decision of the Court of Appeal of the State of California,
Fourth Appellate District, Division One, Case No. D066625

The Superior Court of San Diego County, The Honorable Ronald S. Prager
Case No. 37-2011-00102593 CU-OE-CTL

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## PETITION FOR REVIEW

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JULIE A. DUNNE (SBN 160544)
LITTLER MENDELSON, P.C.
501 W. Broadway, Suite 900
San Diego, CA 92101-3577
Tel: (619) 232-0441
Fax: (619) 232-4302

*THEODORE J. BOUTROUS, JR. (SBN 132099)
RACHEL S. BRASS (SBN 219301)
THEANE EVANGELIS (SBN 243570)
BRADLEY J. HAMBURGER (SBN 266916)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Ave.
Los Angeles, CA 90071
Tel: (213) 229-7000
Fax: (213) 229-7520
tboutrous@gibsondunn.com

*Attorneys for Petitioner Apple Inc.*


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## ISSUES PRESENTED FOR REVIEW

In this high-profile wage-and-hour case involving Apple's entire non-exempt California workforce, the trial court acknowledged that the "mountain of evidence" in the record established that Apple had a "strong argument that in practice there really weren't many meal violations," but nonetheless granted class certification after concluding that "compl[iance] with the law" is "not something that is going to defeat class certification." (Ex. 68, Vol. 40, pp. 10343, 10353, 10358.) The trial court also ruled that class adjudication would be manageable because trial will consist "exclusively" of an assessment of Apple's "records" and supposed "policies," and the presentation of an unspecified "survey." (Ex. 69, Vol. 40, p. 10412.)

The issues presented for review are:

1. Under *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*), does the mere *allegation* by a plaintiff that an employer has uniform and consistently applied policies that violate the wage-and-hour laws require a trial court to grant class certification and disregard *evidence* demonstrating that the employer, as a matter of policy and practice, in reality actually complies with the law, and that any violations are individual anomalies?

2. Under *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1 (*Duran*), may a trial court grant class certification despite intractable manageability problems by depriving the defendant of its due process right to present individualized defenses?

## WHY REVIEW SHOULD BE GRANTED

The Court should grant this petition and review the merits, or order the Court of Appeal to do so, because this case presents exceptionally important issues that, notwithstanding *Brinker* and *Duran*, continue to vex the lower courts throughout the State in the ever-expanding area of wage-and-hour class actions.

The sweeping class certified here includes multiple claims, covers a nearly five-year period, and encompasses more than 18,000 employees in over 900 different corporate departments and 50 retail stores in scores of different positions, including forklift drivers, receptionists, quality assurance engineers, retail store managers, and cafeteria workers. Plaintiffs allege that Apple had uniform policies that it consistently applied to deny each and every one of those 18,000 employees timely meal breaks, the required number of rest breaks, and timely final paychecks.

In certifying the class, the trial court relied solely on those *allegations*, and expressly disregarded a "mountain of evidence" (Ex. 68, Vol. 40, p. 10343)—including Plaintiffs' own testimony—indisputably showing that, in reality, Apple in good faith complied with its obligations under California law and that any alleged violations were the exception, not the rule. In other words, the trial court viewed this Court's decisions as implicitly creating an irrebuttable presumption in favor of the certification of wage-and-hour class actions—no matter how ridden with individualized issues—wherever a plaintiff merely alleges the existence of an unlawful policy. That is not, and cannot be, the law. Yet a divided panel of the Court of Appeal summarily denied Apple's writ petition seeking review of the class certification order.

Appellate review by this Court or the Court of Appeal is needed *now* to ensure that *Brinker* and *Duran* are properly and consistently applied—before the parties and the trial court in this case embark on a costly trial that will violate Apple's due process rights and before other trial courts follow suit in the flood of wage-and-hour cases deluging California's courts.

The trial court believed *Brinker* "makes it easy for the poor trial court judges" considering whether to certify a class, as it does not matter whether "the vast majority of the time people got their meal breaks on time" because "if the rule makes it look like you don't get a meal break until the fifth hour, that's enough for class certification." (Ex. 68, Vol. 40, pp. 10343, 10352.) While some Court of Appeal decisions, like those relied upon by Plaintiffs and the trial court (e.g., *Jones v. Farmers Insurance Exchange* (2013) 221 Cal.App.4th 986), arguably have adopted this misinterpretation of *Brinker*, other decisions have correctly read *Brinker* to mandate a robust analysis of the evidence, the governing substantive law, and the class certification requirements (e.g., *Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974). This Court should resolve the confusion and conflict among the lower courts in the wake of *Brinker*.

The trial court's order further warrants review because it endorsed Plaintiffs' novel legal theory that California law cares not whether an employer actually provided its employees with breaks, but instead looks only to whether an employer's written guidance describes in exacting detail all the requirements of the law. This "gotcha" approach—under which any mistake or omission in an employer's written documents results in strict liability and automatic class certification—directly conflicts with *Brinker* and has been expressly rejected by other courts, but nonetheless was a key justification for class certification here.

In addition to misinterpreting *Brinker*, the trial court dismissed *Duran* as an irrelevant "critique of a statistical methodology that was a nightmare." (Ex. 68, Vol. 40, pp. 10388–10389.) This misreading of *Duran* led the trial court to endorse Plaintiffs' flawed view that this case—despite the remarkable breadth of the certified class and the significant differences within Apple's highly diverse non-exempt workforce—can be manageably tried as a class action "exclusively" through an analysis of Apple's supposed "policies" and "records." (Ex. 69, Vol. 40, p. 10412.) But the alleged "policies" do not reflect what happened in reality, and "records" on their own cannot establish liability for the over 18,000 employees within the class because, as the Second Appellate District recognized in *In re Walgreen Co. Overtime Cases* (Oct. 23, 2014, B230191) ___ Cal.App.4th ___ [2014 WL 5863193] (*Walgreen*), they do not show "*why* the worker missed the break." (*Id.* at p. *2.) Limiting the trial here "exclusively" to such evidence will strip Apple of its right to call and cross-examine witnesses to defend itself, in flat violation of *Duran* and due process.

As the trial court's decision in this case demonstrates, the lower courts in many instances have veered far off the path prescribed by this Court in *Brinker* and *Duran* and need more guidance. And whether the trial court's reasoning and result is correct matters far beyond this case. Indeed, this is a closely watched class action that has garnered significant national media attention.[1] Given this case's notoriety, if this ruling stands, it may

[1] (See, e.g., Steven Greenhouse, *Apple Case Over Labor Code Is Granted Class-Action Status*, N.Y. Times (July 22, 2014) <http://www.nytimes.com/2014/07/23/technology/apple-case-over-labor-code-is-granted-class-action-status.html>; Edvard Pettersson, *Apple's California Workers Can Sue as Group Over Breaks*, Bloomberg (July 22, 2014) <http://www.bloomberg.com/news/2014-07-23/apple-s-california-workers-can-sue-as-group-over-breaks.html>.)

well serve as a blueprint for other expansive wage-and-hour class actions against California employers, and thus infect the decisions of courts across the State, recreating the very problems that this Court sought to fix in *Brinker* and *Duran*.

Accordingly, the Court should grant the petition and review the merits of the trial court's order, or, at a minimum, grant the petition and transfer this case to the Court of Appeal with directions to issue an order to show cause, as the dissenting justice would have done.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Apple's California Operations

Apple is a multinational corporation headquartered in Cupertino, California that designs, develops, and sells computer electronics, personal computers, software, and online services. Apple has two distinct and diversified divisions—corporate and retail. (Ex. 21, Vol. 9, p. 2349; Ex. 22, Vol. 10, p. 2539.)

The corporate division manages the design, development, and distribution of products and services, and provides customer support. (Ex. 21, Vol. 9, p. 2349.) Over the course of the entire class period, Apple's corporate division employed thousands of non-exempt employees in more than 900 departments spread throughout office buildings in Northern California. (Ex. 21, Vol. 9, pp. 2349–2350.) These employees perform a wide range of duties and tasks, from collecting, processing, and delivering mail in the shipping and receiving department, to fulfilling online orders for the Apple Online Store, to the staffing of cafes and snack bars. (Ex. 21, Vol. 9, pp. 2349–2350.) Some employees, such as customer

service representatives, have substantial interaction with customers; others, such as non-exempt engineers, do not. (Ex. 21, Vol. 9, pp. 2349–2350.)

The retail division sells Apple products to the public, and includes employees in Apple's retail stores throughout the State, as well as employees in Apple's corporate offices who provide support to Apple's retail stores. (Ex. 22, Vol. 10, p. 2539.) As of November 2013, Apple's retail division employed more than 5,550 non-exempt employees in 52 retail stores and at its corporate offices. (Ex. 22, Vol. 10, p. 2539.) Some employees in Apple's retail stores assist customers; others manage inventory for the stores and generally have minimal customer interaction. (Ex. 22, Vol. 10, p. 2539.)

### B. Apple's Efforts to Ensure That Its Employees Are Provided All Required Meal and Rest Breaks

Apple's policy, governing "every business decision in every area of the company worldwide," is to "conduct[] business ethically, honestly, and in full compliance with all laws and regulations." (Ex. 21, Vol. 9, p. 2502; Ex. 22, Vol. 10, p. 2800.) To that end, Apple regularly reminds managers about meal and rest break requirements, and instructs them to communicate the requirements to their non-exempt employees. (Ex. 21, Vol. 9, p. 2352; Ex. 22, Vol. 10, p. 2543.) Depending on their work location, Apple's non-exempt employees may receive up to five daily communications regarding their rights to take meal and rest breaks: (1) a daily work schedule indicating when breaks should be taken; (2) a "Daily Download" communication reminding employees that they are expected to take breaks; (3) verbal reminders from managers that it is time to take a break; (4) electronic reminders that it is time to take a break; and (5) a pop-up message in the timekeeping system asking non-exempt employees to

confirm that they were provided with breaks. (Ex. 20, Vol. 7, p. 2025; Ex. 20, Vol. 8, p. 2071; Ex. 21, Vol. 9, pp. 2352–2354, 2406–2424.)

Apple also has issued written guidance to managers and employees on its intranet sites regarding California's meal and rest break requirements. (Ex. 21, Vol. 9, pp. 2351, 2360–2405; Ex. 22, Vol. 10, pp. 2541, 2551–2671.) Throughout the entire class period, Apple's written guidance to managers regarding meal breaks for its corporate employees stated that employees are entitled to a 30-minute meal break if they work more than five hours, and directed managers that the break must be provided within the first five hours of work. (Ex. 21, Vol. 9, pp. 2351, 2360–2363, 2367–2370, 2374–2377, 2381–2385, 2389–2394, 2399–2405; Ex. 22, Vol. 10, pp. 2541, 2551–2554, 2558–2561, 2565–2568, 2572–2576, 2580–2585, 2590–2596.)

Also throughout the entire class period, Apple's written guidance regarding meal breaks for retail store employees stated that employees are entitled to a 30-minute meal break when they are scheduled to work more than five hours and a 60-minute meal break when they are scheduled to work eight or more hours. (Ex. 22, Vol. 10, pp. 2541, 2597–2671.) Additionally, Apple published articles on its intranet for retail employees informing them that a meal break must be taken within the first five hours. (Ex. 22, Vol. 10, pp. 2542, 2700–2718, 2720.)

From July 27, 2007 to August 2012, Apple's written guidance regarding rest breaks stated that employees were entitled to a 10-minute rest break for every four hours worked and directed that employees should take their breaks two hours into the shift or as close to the middle of the shift as possible. (Ex. 21, Vol. 9, pp. 2351, 2360–2385; Ex. 22, Vol. 10, pp. 2541, 2551–2576.) In August 2012, Apple clarified this written guidance to track

the language used in *Brinker*. (Ex. 21, Vol. 9, pp. 2351–2352, 2386–2405; Ex. 22, Vol. 10, pp. 2577–2596.)

### C. Evidence Showing Apple Provided Compliant Breaks and Timely Final Paychecks

The basis for Plaintiffs' class certification motion was their *allegation* that Apple had uniform and consistently applied policies that failed to comply with the wage-and-hour laws. Substantial evidence in the record—including the testimony of the named Plaintiffs and their own witnesses and experts—proved not only that there were no such uniform and consistently applied unlawful policies, but that Apple's employees were provided with exactly what the law requires.

***Meal Breaks.*** Plaintiffs alleged that Apple had a policy that did not comply with Labor Code section 512, subdivision (a)'s requirement to provide "a first meal period no later than the end of an employee's fifth hour of work." (*Brinker*, *supra*, 53 Cal.4th at p. 1041; see Ex. 3, Vol. 1, p. 45.) Yet Plaintiff Hawkins, a former Apple retail store manager, admitted at his deposition that his "understanding was that everyone should receive their lunch break . . . no more than . . . the fifth hour into their shift." (Ex. 30, Vol. 21, p. 5289.) Moreover, all but one of Plaintiffs' deposed meal break witnesses admitted upon examination that Apple either scheduled meal breaks within the first five hours, or that they could not recall an instance where Apple scheduled a meal break after the first five hours. (Ex. 30, Vol. 20, p. 4902.)

Apple's witnesses confirmed what Plaintiffs' witnesses admitted—they were provided timely meal breaks:

- "I understood that I had to take my lunch break within the first five hours of my work day." (Ex. 20, Vol. 7, p. 2000.)

- "Apple requires us to take meal breaks within the first five hours of work and my meal break has always been scheduled within this time frame." (Ex. 20, Vol. 8, p. 2205.)

- "I have always been provided the opportunity to take my meal break within the first five hours of work." (Ex. 20, Vol. 8, p. 2197.)

Plaintiffs' own expert also reviewed a portion of Apple's time records and found that an untimely first meal break was recorded for only 8.39% of meal break eligible shifts for corporate employees; for retail employees the percentage was only 15.67%. (Ex. 10, Vol. 2, pp. 570, 572.) Compliance was the rule, not the exception.

***Rest Breaks.*** Plaintiffs alleged that Apple had a policy that did not comply with the Wage Order's requirement to provide a second 10-minute rest break "for shifts of more than six hours up to 10 hours." (*Brinker*, *supra*, 53 Cal.4th at p. 1029; see Ex. 3, Vol. 1, p. 46.) Yet the evidence proved the opposite: Plaintiff Felczer testified that "if you worked . . . less than six, you only had one" and "more than six, you had two" rest breaks. (Ex. 23, Vol. 11, p. 2921.) Similarly, Plaintiff Goldman testified that when he worked at Apple, he understood he was "eligible for a second rest break if [he] worked more than 6 hours." (Ex. 23, Vol. 11, p. 2993.) Significantly, Plaintiffs Felczer and Goldman both ended their employment at Apple *before Brinker* was issued in April 2012 (Ex. 1, Vol. 1, p. 5), confirming that Apple's rest break practices—which fully complied with the law—did not change after *Brinker* was decided. In addition, Plaintiffs Carco and Hawkins admitted they worked eight-hour shifts and were provided with the appropriate two rest breaks. (Ex. 30, Vol. 20, p. 5077; Ex. 30, Vol. 21, p. 5284.)

Plaintiffs' admissions are consistent with the deposition admissions of their *own* hand-picked Apple employees: 87% of Plaintiffs' deponents who claimed in declarations that they missed rest breaks later admitted either that Apple provided them the required number of rest breaks, or that they had no knowledge that Apple failed to provide them with the required number of rest breaks. (Ex. 30, Vol. 20, pp. 4925–4926.)

***Final Paychecks*.** Plaintiffs alleged that Apple had a policy not to comply with Labor Code section 202, subdivision (a)'s requirement to provide final paychecks on the last workday when an employee gives 72-hours' notice of his or her intention to quit, or within 72 hours where an employee has not given notice. (Ex. 3, Vol. 1, p. 48.) But Plaintiff Hawkins admitted at his deposition that he was immediately given his final paycheck at the same meeting at which he was told he was terminated (Ex. 23, Vol. 11, p. 2969), and Plaintiff Felczer conceded that Apple paid him the required "waiting time" penalty when it paid his final paycheck two days after his last workday. (Ex. 23, Vol. 11, p. 2900.) Similarly, many of Plaintiffs' witnesses admitted, when deposed, that they received their final pay on time (Ex. 30, Vol. 20, p. 4947; Ex. 30, Vol. 21, pp. 5189–5192; Ex. 30, Vol. 22, pp. 5668–5669), or received all applicable penalties (Ex. 30, Vol. 20, pp. 4947–4948).

### D. The Trial Court's Class Certification Ruling

Plaintiffs moved to certify a class of all current and former non-exempt Apple employees who had worked for Apple in California since December 16, 2007. (Ex. 1, Vol. 1, pp. 7–8; Ex. 3, Vol. 1, pp. 33–34.) Apple concurrently filed a motion to deny class certification. (Ex. 16, Vol. 7, p. 1922.)

At the hearing on these motions, the trial court repeatedly expressed its view that *Brinker* "makes it easy for the poor trial court judges" faced with a "mountain of evidence" because "if the [employer's] rule makes it look like you don't get a meal break until the fifth hour, that's enough for class certification." (Ex. 68, Vol. 40, pp. 10343, 10352.) Even after acknowledging Apple's "strong argument that in practice there really weren't many meal violations" (Ex. 68, Vol. 40, p. 10353), the trial court nonetheless stated that "compl[iance] with the law" is "not something that is going to defeat class certification" (Ex. 68, Vol. 40, p. 10358). According to the trial court, "the *Brinker* decision . . . says that you may have some really good arguments that . . . there's some evidence of individualized behavior or there was evidence that actual behavior complied with the law, people taking their rest breaks before five, but that's damages, that's not class certification." (Ex. 68, Vol. 40, p. 10340.)

The trial court also dismissed *Duran*, which was decided after the parties had submitted their class certification briefing, as "mainly a critique of a statistical methodology that was a nightmare." (Ex. 68, Vol. 40, pp. 10388–10389.) Regarding how the case would be tried, the court said "we'll have to deal with that in the next phase of the case" and suggested that "[m]aybe we can use statistical evidence." (Ex. 68, Vol. 40, p. 10386.)

In a July 21, 2014 written order, the trial court granted Plaintiffs' motion for class certification and denied Apple's motion to deny class certification. (Ex. 69, Vol. 40, pp. 10404–10417.) Consistent with its statements at the hearing, the trial court reasoned that "evidence of application of the polic[ies]" was relevant only to "issues of *damages, which would not preclude certification*" because "Plaintiffs' theory of the case is premised on the illegality of uniform policies that were in place during the class period." (Ex. 69, Vol. 40, p. 10410.)

Despite evidence that Apple made significant efforts to inform its employees of their rights to take meal and rest breaks, the trial court ruled that Apple had a duty to expressly inform its employees in a formal written policy of their rights, and that the failure to do so was a violation of the law regardless of whether Apple made employees aware of their rights to take breaks through other means. (Ex. 69, Vol. 40, p. 10410.) And although many of Apple's non-exempt employees do not even interact with customers, the court found that certification was warranted because "non-exempt employees would have to wait until they were done helping each particular customer before they could go on a break" and that "had a domino effect on the next non-exempt employee's scheduled breaks." (Ex. 69, Vol. 40, p. 10411.)

As for the final paycheck claim, the trial court accepted Plaintiffs' allegation that Apple had uniform policies and practices resulting in late final paychecks. (Ex. 69, Vol. 40, p. 10412.) The trial court also certified Plaintiffs' derivative final pay and wage statement claims. (Ex. 69, Vol. 40, pp. 10412–10413.)

The trial court's discussion of manageability was limited to a single paragraph in which it stated that this "case can be resolved relying *exclusively* upon Defendant's unlawful corporate policies and corporate records" and that "the rest period violation damages can be addressed through a survey." (Ex. 69, Vol. 40, p. 10412, italics added.) The trial court did not cite *Duran* anywhere in its order, or provide any details about how "a survey" could be used in this case without violating Apple's due process right to defend itself against individual claims, nor did it require Plaintiffs to submit any trial plan.

### E. The Court of Appeal's Two-to-One Order Summarily Denying Apple's Writ Petition

On September 17, 2014, Apple filed a petition for a peremptory writ of mandate or other extraordinary relief asking the Court of Appeal to vacate the trial court's class certification ruling. Plaintiffs filed an informal response at the Court of Appeal's request, and Apple filed a reply. On November 26, 2014, the Court of Appeal summarily denied Apple's writ petition, with one justice voting to issue an order to show cause.

## DISCUSSION

## I. The Class Certification Order Violates *Brinker*

### A. *Brinker* Does Not Authorize Courts to Disregard Evidence of Compliance with the Law at the Class Certification Stage

The trial court believed *Brinker* prohibited it from considering the "mountain of evidence" in the record (Ex. 68, Vol. 40, p. 10343), and instead required it to grant class certification even if this evidence—including admissions by Plaintiffs and their own witnesses—refuted Plaintiffs' allegation that Apple had uniform and consistently applied unlawful policies. Nothing in *Brinker* supports this flawed conception of the class certification inquiry.

#### 1. Class Certification Must Be Based on Substantial Evidence, Not Unsubstantiated Allegations

Contrary to the trial court's view, unsubstantiated allegations—let alone the refuted allegations in this case—are not enough to support class certification. Plaintiffs must present "substantial evidence" proving that the requirements for certification are satisfied. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327–328 (*Sav-On*); see also *Wal-Mart Stores, Inc. v. Dukes* (2011) ___ U.S. ___ [131 S.Ct. 2541, 2551]

[plaintiffs "must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."].)

In the Court of Appeal, Plaintiffs attempted to defend the trial court's ruling by claiming that their allegation that Apple had uniform and consistently applied unlawful policies was enough, without more, to satisfy their burden of proof and obtain class certification. (Pls.' Resp. to Writ Pet. at pp. 18, 24–25.) Relying on *Jones v. Farmers Insurance Exchange* (2013) 221 Cal.App.4th 986, 997—which held that a trial court erred in denying class certification "based on its evaluation of the merits of Plaintiffs' claim as to the existence of . . . a uniform policy"—Plaintiffs claimed that whether such policies existed was itself a question justifying class certification. (Pls.' Resp. to Writ Pet. at pp. 18, 24–25.)

Plaintiffs' reliance on *Jones* only confirms the need for review. *Jones* plainly conflicts with *Brinker*, which held that the Court of Appeal had "properly vacated certification" of a subclass covering off-the-clock claims because the plaintiff had presented "no substantial evidence point[ing] to a uniform, companywide policy" requiring off-the-clock work. (*Brinker*, *supra*, at p. 1052.) As this Court explained, without evidence of a classwide policy, "proof of off-the-clock liability would have had to continue in an employee-by-employee fashion." (*Ibid*.)

*Jones* also conflicts with *Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974 (*Dailey*), which held—consistent with *Brinker*—that "evidence disputing the uniform application of [an employer's] business policies and practices" was properly considered by a trial court and that it demonstrated that a policy-based theory of liability "was not susceptible of common proof at trial." (*Id.* at p. 997.) Nor can *Jones* be reconciled with well-established principles of California class certification law, which hold

that class certification rulings must be based on "substantial evidence" (*Sav-On*, *supra*, 34 Cal.4th at pp. 327–328), and that "[t]o the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them" (*Brinker*, *supra*, 53 Cal.4th at p. 1025).

### 2. Evidence of Compliance with the Law Cannot Be Disregarded as Merely a "Damages" Issue

In granting certification, the trial court held that evidence showing compliance with the law as "to specific employees would, at most, establish individual issues *of damages*, *which would not preclude certification*." (Ex. 69, Vol. 40, p. 10410.) Not so. Evidence establishing compliance with the law is the very definition of a liability issue. If an employer proves that it provided an employee with compliant breaks and a timely final paycheck that can mean only one thing—that there can be *no liability* to that employee because the employer *complied with the law*. Of course, this evidence also shows the employer owes no damages to that employee, as there obviously cannot be any entitlement to damages when the employer is not liable in the first place. But it does not follow that proving compliance with the law goes *only* to damages.

In concluding otherwise, the trial court cited several post-*Brinker* Court of Appeal decisions—*Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129 (*Bradley*), *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220 (*Faulkinbury*), *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701 (*Benton*). These decisions, however, simply held that where the record is clear that an employer had adopted and *consistently applied* a *uniform* policy (or a *uniform* lack of a policy) that allegedly violates the wage-and-hour laws, an assessment of the legality of the policy itself can establish liability on a classwide basis,

without the need for further individualized inquiries (other than to determine the amount of damages).[2] But to the extent these decisions endorsed the trial court's view that evidence establishing an employer's compliance with the law must be disregarded at the class certification stage because it relates *only* to damages, they cannot be reconciled with *Brinker*.

The trial court also relied on this Court's approval of the certification of the rest break subclass in *Brinker* (Ex. 69, Vol. 40, p. 10410), ignoring the fact that "Brinker *conceded* at the class certification hearing" and the plaintiff "presented substantial evidence" proving "the existence of[] a common, uniform rest break policy" applied across the class (*Brinker*, *supra*, 53 Cal.4th at p. 1033, italics added). *Brinker*'s discussion of the rest break subclass thus stands only for the proposition that certification of a wage-and-hour claim under a policy-based theory of liability is appropriate where the record establishes that the company maintained an allegedly illegal policy and that the policy was *in fact* uniform and consistently applied to all members of the putative class. It did not hold that trial courts must don blinders and ignore what actually occurred in practice on the

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[2] (See *Bradley*, *supra*, 211 Cal.App.4th at p. 1150 [finding that an "employer engaged in uniform companywide conduct that allegedly violated state law" where it "did not present *any evidence* showing it had a formal or informal practice or policy of permitting the required breaks or that any worker believed he or she was entitled to take a legally-required rest or meal break, or that some or all workers took these breaks"]; *Faulkinbury*, *supra*, 216 Cal.App.4th at p. 233 ["The evidence presented in connection with the motion for class certification established Boyd's on-duty meal break policy was *uniformly* and *consistently applied* to all security guard employees"], italics added; *Benton*, *supra*, 220 Cal.App.4th at pp. 727, 731 [remanding for trial court to consider whether the employer "*uniformly* lack[ed] a policy of authorizing and permitting meal and rest periods"], italics added.)

theory that any evidence showing compliance with the law *always* goes only to "damages" and is thus irrelevant to the class certification calculus.

On the contrary, as this Court later explained in *Duran*, "[i]n wage and hour cases where a party seeks class certification based on allegations that the employer consistently imposed a uniform policy or de facto practice on class members, the party must still demonstrate that the *illegal effects* of [that] conduct can be proven efficiently and manageably within a class setting." (*Duran*, *supra*, 59 Cal.4th at p. 29, italics added.) Yet without *evidence* of a classwide policy or practice *consistently affecting* all class members, a plaintiff cannot satisfy his burden to show that the "illegal effects" of the employer's conduct could be established in a classwide proceeding. (*Ibid.*; see also, e.g., *Cummings v. Starbucks Corp.* (C.D. Cal. Mar. 24, 2014, No. CV 12-06345-MWF) 2014 WL 1379119, at p. *21 [denying certification where "evidence in the record [did] not indicate that Starbucks's facially defective rest period policy was consistently applied to deprive class members of a second rest period"].)

### B. *Brinker* Did Not Create a New "Formal Written Policy" Cause of Action for California Wage-and-Hour Laws

The trial court also interpreted *Brinker* as requiring employers to affirmatively adopt and disseminate formal written policies precisely setting forth every single detail regarding employees' rights to take meal and rest breaks, and that any deviation from this obligation could result in classwide liability regardless of whether Apple actually provided compliant breaks to its employees. (Ex. 69, Vol. 40, p. 10410.) This is clear error on a significant legal issue that impacts every employer across the State.

The trial court's "formal written policy" requirement plainly conflicts with this Court's guidance in *Brinker*. There, the plaintiff

contended that an employer had a duty to "*ensure* that employees do no work" during their breaks. (*Brinker*, *supra*, at p. 1038, italics added.) *Brinker* unanimously rejected this "you-must-take-a-break" theory, and held that an employer must only "relieve[] its employees of all duty, relinquish[] control over their activities and permit[] them a reasonable opportunity to take an uninterrupted 30-minute break, and . . . not impede or discourage them from doing so." (*Id.* at p. 1040.)

The trial court's ruling would engraft onto the *Brinker* framework a treacherous and exacting "formal written policy" requirement that this Court—much less the California legislature—never contemplated, let alone endorsed, and that "lacks any textual basis in the wage order or [the Labor Code]." (*Brinker*, *supra*, 53 Cal.4th at p. 1038.) It would subject employers to *strict liability* even though they have in fact provided their employees "a reasonable opportunity" to take compliant meal and rest breaks. (*Id.* at p. 1040.) And it would allow trial courts to grant class certification, and potentially impose massive classwide liability, even when overwhelming evidence proves that the employer in good faith complied with California law.

The trial court's decision conflicts with those of other courts that have, after *Brinker*, flatly refused to exalt form over substance by penalizing an employer who provides adequate meal and rest breaks consistent with the language and purpose of the Labor Code and the Wage Orders, but somehow falls short of articulating its policies in a perfect written formula. For example, *Dailey* held that "the absence of a formal written policy explaining [employees'] rights to meal and rest periods does not necessarily imply the existence of a uniform policy or widespread practice of either depriving these employees of meal and rest periods or requiring them to work during those periods." (*Dailey*, *supra*,

214 Cal.App.4th at p. 1002; see also, e.g., *Green v. Lawrence Service Co.* (C.D. Cal. July 22, 2013, No. LA CV12-06155) 2013 WL 3907506, at p. *8 ["under California law, the absence of a formal written policy does not constitute a violation of the meal and rest period laws"].)

Rather than defend the trial court's "formal written policy" ruling, Plaintiffs argued in the Court of Appeal that "an employer cannot defeat certification by contesting the merits of the plaintiffs' theory that it had a duty to adopt policies notifying employees of their" right to take meal and rest breaks. (Pls.' Resp. to Writ Pet. at p. 26.) But the "threshold task for determining whether a class action is appropriate in a particular case is to inquire whether the substantive law governing the plaintiffs' claims renders those claims amenable to class treatment." (*Duran*, *supra*, 59 Cal.4th at p. 51, concurring opn. of Liu, J.) And if there is a dispute as to the governing substantive law, it must be resolved at the class certification stage, regardless of any overlap with the merits, because the propriety of class certification can *only* be determined once the governing law is settled. (*Brinker*, *supra*, 53 Cal.4th at p. 1025.)

Here, the acceptance of Plaintiffs' "formal written policy" requirement was crucial to the trial court's decision to grant class certification. This flawed interpretation of the governing substantive law led the trial court to focus myopically on the text of a handful of Apple documents containing guidance regarding meal and rest breaks, while ignoring as irrelevant evidence in the record regarding Apple's actual practices. Accordingly, whether a "formal written policy" requirement exists under California law is properly resolved at this stage of the litigation. (*Brinker*, *supra*, 53 Cal.4th at p. 1025.)

* * *

If the trial court's distorted interpretation of *Brinker* takes hold, as increasingly appears to be occurring in the lower courts, certification of wage-and-hour class actions will become virtually automatic—no matter what actually occurred in practice, the requirements of the governing substantive law, or the impossibility of holding a class trial. The Court should grant review to make clear that this is not what it intended in *Brinker*.

## II. The Class Certification Order Violates *Duran*

### A. Certification Hinges on the Denial of Apple's Due Process Right to Present Every Available Defense

This Court in *Duran* provided critical guidance—relevant to all class actions—regarding (a) the due process rights of class action defendants to present individualized defenses, (b) the importance of the manageability of individual issues, and (c) the need for plaintiffs who propose using statistical sampling to develop a trial plan that accommodates individualized issues, including defenses.

*Duran* holds that "the class action procedural device may not be used to abridge a party's substantive rights." (*Duran*, *supra*, 59 Cal.4th at p. 34.) A trial court cannot "abridge" the presentation of a "defense simply because that defense [is] cumbersome to litigate in a class action." (*Id.* at p. 35.) This "principle[] derive[s] from both class action rules and principles of due process." (*Ibid.*, citing *Lindsey v. Normet* (1972) 405 U.S. 56, 66 (*Lindsey*); *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353.) Indeed, "[d]ue process requires that there be an opportunity to present every available defense." (*Lindsey*, *supra*, 405 U.S. at p. 66, quotation marks and citation omitted.)

Because trial courts cannot simply eliminate defenses in service of the class action device, they "must consider not just whether common questions exist, but also whether it will be feasible to try the case as a class action." (*Duran*, *supra*, 59 Cal.4th at p. 27.) Accordingly, "the manageability of individual issues is just as important as the existence of common questions uniting the proposed class," and "[i]n certifying a class action, the court must also conclude that litigation of individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently." (*Id.* at p. 29.) For those reasons, *Duran* further instructed that where "statistical evidence will comprise part of the proof on class action claims, the court should consider *at the certification stage* whether a trial plan has been developed to address its use." (*Id.* at p. 31.)

The trial court here cast aside each of these holdings and instead erroneously dismissed *Duran* as "mainly a critique of a statistical methodology that was a nightmare." (Ex. 68, Vol. 40, pp. 10388–10389.) As a result, the trial court gave (at best) short shrift to the manageability inquiry. In a single, cursory paragraph, the trial court decided that this case will be tried "exclusively" based on Apple's supposed "policies" and through an assessment of "records," and that some sort of "survey" will be used with regard to the rest break claim. (Ex. 69, Vol. 40, p. 10412.)

It is difficult to imagine a manageability ruling more at odds with *Duran*. Trial will be limited to a review of a handful of cherry-picked documents that do not accurately reflect Apple's actual policies and practices, employee records that, standing alone, cannot possibly establish liability, and a hypothetical survey apparently designed to compensate for the fact that rest breaks are not reflected in time records. That is a trial in name only. Apple has a due process right to put on testimony and cross-examine witnesses to demonstrate its actual policies and practices, its

compliance with the law, and the experiences of individual employees—none of which are permitted in the proceeding the trial court contemplated.

Significantly, Apple's "corporate records" do nothing to manage the tens of thousands of individualized issues that Plaintiffs' claims present: Apple has no obligation to record rest breaks, and thus there are no such records; meal break records do not show *why* an untimely break was recorded, and thus cannot be used to determine whether an employee was provided with but *voluntarily* chose not to take a timely break, in which case Apple would not be liable (*Brinker*, *supra*, 53 Cal.4th at pp. 1040–1041); and records alone cannot establish if a final paycheck was untimely because to determine when it was actually due requires an individualized inquiry into whether notice was required, whether it was provided, and when it was provided.

The proposal to adjudicate Plaintiffs' rest break claims "through a survey" is even worse. (Ex. 69, Vol. 40, p. 10412.) Plaintiffs' cursory, non-specific sampling proposal consisted of nothing more than telephone surveys of an unspecified number of absent class members to ask about the rest breaks that Apple provided to them. (Ex. 9, Vol. 2, pp. 565–566.) In clear violation of *Duran*, this proposal did not provide Apple with *any* opportunity to contest the survey results with individualized evidence. Yet the trial court accepted what little Plaintiffs offered, thus effectively relieving them of their obligation to develop a workable trial plan that preserves rather than eliminates Apple's defenses. (*Duran*, *supra*, 59 Cal.4th at p. 31.)

Apple thus will proceed to trial with its hands tied behind its back and without any opportunity to exercise its due process right to defend itself by calling witnesses to contest liability as to specific class members (such

as their co-workers or managers) across the starkly varying positions, departments, and stores, by cross-examining the survey respondents or Plaintiffs' other witnesses, or by presenting the "mountain of evidence" establishing that Apple in good faith complied with its obligations to provide class members with compliant breaks and timely final paychecks. The trial court simply lost sight of the fact that due process requires that "any procedure to determine the defendant's liability to the class must still permit the defendant to introduce its own evidence." (*Duran*, *supra*, 59 Cal.4th at p. 38.)

The trial court is not alone in misinterpreting *Duran*. In *Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362 (*Martinez*), a decision published after a grant-and-hold-remand from this Court with directions to reconsider in light of *Duran*, Division Seven of the Second Appellate District read *Duran* as holding that "classwide relief remains the preferred method of resolving wage and hour claims, even those in which the facts appear to present difficult issues of proof" and thus did not alter its prior decision reversing an order that denied class certification. (*Id.* at p. 384.) According to *Martinez*, courts must "avoid focusing on the inevitable variations inherent in tracing the actions of individuals" in a class action. (*Id.* at p. 380.)[3]

Neither *Martinez* nor the trial court's ruling in this case can be reconciled with *Duran*, which clearly instructed courts to "determine the level of variability in the class" and emphasized that "[i]f the variability is

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[3] Even *Martinez* did not go as far as the trial court here, as it recognized that, after *Duran*, plaintiffs proposing to use sampling must develop a trial plan that "accords the employer an opportunity to prove its affirmative defenses." (*Martinez*, *supra*, 231 Cal.App.4th at p. 383.)

too great, individual issues are more likely to swamp common ones and render the class action unmanageable." (*Duran*, *supra*, 59 Cal.4th at p. 33.) This Court should intervene now to make clear to the lower courts that *Duran*'s teachings must be followed.

### B. Plaintiffs' Sweeping Claims Cannot Be Manageably Tried on a Classwide Basis

Had the trial court applied *Duran*, the unmanageable individualized issues and defenses here would have precluded a class trial.

Determining which employees were provided with timely meal periods and thus do not have any claim against Apple would require an employee-specific analysis. After *Brinker*, "computerized time records" are not sufficient to establish meal break liability because if "the worker was free to take the break and simply chose to skip or delay it, there is no violation and no employer liability" and thus "you additionally must ask *why* the worker missed the break before you can determine whether the employer is liable." (*Walgreen*, *supra*, 2014 WL 5863193, at p. *2.) And here that critical question can only be answered through employee-by-employee, and potentially shift-by-shift, adjudication. For example, Plaintiff Felczer himself admitted that on some days he would voluntarily decline to take a timely meal period, such as when he "was not hungry yet" or when he was "having too much fun" because Apple had just launched a new product. (Ex. 23, Vol. 11, pp. 2913–2914.)

The same individualized analysis is necessary to resolve Plaintiffs' rest break claim. Adjudicating whether employees were provided with the required number of breaks would entail asking all employees (and their co-workers and supervisors) how many rest breaks they were permitted to take. This questioning is essential, as the depositions of Plaintiffs and their

own employee witnesses revealed that—contrary to their assertions in sworn declarations—they were provided with the proper number of breaks. There is simply no way to determine on a classwide basis how many employees would admit, upon examination, that Apple provided two rest breaks for shifts over six hours, as Plaintiffs Felczer and Goldman have already done. (Ex. 23, Vol. 11, pp. 2921, 2993.)

And while Plaintiffs also allege that Apple "made taking meal and rest breaks extremely difficult" because "non-exempt employees would have to wait until they were done helping each particular customer before they could go on a break" (Ex. 69, Vol. 40, p. 10411), this "customer interaction" theory simply compounds the reasons why this case cannot be manageably adjudicated in a classwide proceeding. Many class members, such as quality assurance engineers, corporate administrative assistants, and machine operators, never have *any* customer interactions whatsoever. And for those employees who did interact with customers, determining whether those interactions led to a missed break would require an employee-by-employee and shift-by-shift analysis incompatible with a class proceeding.

Plaintiffs' final paycheck claim is similarly fraught with individualized issues. For example, if an employee does not give notice, final pay is due "not later than 72 hours" after the employee quits. (Lab. Code., § 202, subd. (a).) But if an employee gives at least 72-hours' notice, then final pay is due "at the time of quitting." (*Ibid.*) Even setting aside these threshold inquiries, there is no way to tell which employees would admit they received timely final paychecks, as Plaintiff Hawkins did at his deposition. (Ex. 23, Vol. 11, p. 2969.)

Exacerbating each of these employee-specific inquiries is the elephantine nature of the class, which indiscriminately lumps together more

than 18,000 employees performing jobs that could hardly be more distinct—from cafeteria workers to retail store managers to forklift drivers—across hundreds of different departments (many with their own unique scheduling and break management practices), in scores of locations, over a nearly five-year period. Much smaller and more homogenous classes have presented intractable manageability issues, as *Duran* itself proves with its 260-person class of employees all holding the same position. (*Duran*, *supra*, 59 Cal.4th at pp. 12–13.) Given the vast breadth of the certified class, the manageability issues in this case are necessarily orders of magnitude more complex. The trial court's failure to recognize any of these manageability issues—let alone grapple with them—cannot be squared with *Duran*.

## III. Appellate Review Is Warranted Now

Although the Court of Appeal summarily denied Apple's writ petition, the Court can and should grant the petition and review the merits of the trial court's ruling. (E.g., *Apple Inc. v. Superior Court* (2013) 56 Cal.4th 128, 134–135.) At a minimum, the Court should direct the Court of Appeal to consider Apple's petition on the merits. (E.g., *Washington Mutual Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, 913.)

Immediate appellate review of the trial court's class certification order is warranted because it will prevent the needless and significant waste of judicial and party resources in litigating this case to a final judgment that is destined to be reversed. (E.g., *American Honda Motor Co. v. Superior Court* (2011) 199 Cal.App.4th 1367, 1370–1371 [granting review because all "parties and the court" would be harmed if the court "delayed review until final judgment" after trial]; *City of Glendale v. Superior Court* (1993) 18 Cal.App.4th 1768, 1776 [granting review "to prevent an expensive trial

and ultimate reversal"].) There is simply no reason to follow the same flawed path as *Duran* by proceeding with an unnecessary and unconstitutional class trial. (*Duran*, *supra*, 59 Cal.4th at p. 33 [criticizing trial court for "forc[ing] the case through trial with a flawed statistical plan that did not manage but instead ignored individual issues"].)

Moreover, this case implicates substantial issues of widespread importance, which further supports immediate review. (E.g., *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 453 [granting writ petition and vacating order granting class certification where the "issues raised [were] substantial"]; *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273.) The proper interpretation and application of *Brinker* and *Duran* are issues that arise time and again in countless other wage-and-hour class actions. And whether California law imposes a strict "formal written policy" requirement is a legal issue that impacts every employer in the State. Review is particularly warranted in light of the trend in the lower courts—of which this case is a prime example—to grant certification based on unsubstantiated allegations of purportedly uniform, companywide unlawful policies.

In short, all parties, and the judicial system as whole, would benefit from appellate review of these issues at this critical juncture.

## CONCLUSION

The Court should grant the petition and review the merits of the trial court's order or, at a minimum, grant the petition and transfer this case to the Court of Appeal with directions to issue an order to show cause.

DATED: December 8, 2014

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: Ted Boutrous /EL
Theodore J. Boutrous, Jr.

Attorneys for Petitioner Apple Inc.

## CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.504(d)(1), the undersigned certifies that this Petition for Review contains 7,820 words as counted by the word count feature of the Microsoft Word program used to generate this brief, not including the tables of contents and authorities, the court of appeal's order, the cover information, the signature block, and this certificate.

DATED: December 8, 2014 By: Ted Boutrous /EL

Theodore J. Boutrous, Jr.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

| | |
|---|---|
| APPLE INC.,<br><br>Petitioner,<br><br>v.<br><br>THE SUPERIOR COURT OF SAN DIEGO COUNTY,<br><br>Respondent; | D066625<br><br>(San Diego County Super. Ct. No. 37-2011-00102593-CU-OE-CTL) |
| BRANDON FELCZER, et al.,<br><br>Real Parties in Interest. | |



THE COURT:

The petition for writ of mandate, informal response and reply have been read and considered by Justices Nares, McDonald and O'Rourke. The petition is denied. Justice Nares would have issued an order to show cause.

NARES

NARES, Acting P. J.

Copies to: All parties

## CERTIFICATE OF SERVICE

I, Alma Y. Banuelos, declare as follows:

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, CA 90071-3197, in said County and State.

On December 8, 2014, I served the following document(s):

**PETITION FOR REVIEW**

on the parties stated below, by the following means of service:

**SEE ATTACHED SERVICE LIST**

Unless otherwise noted on the attached Service List, **BY MAIL:** I placed a true copy in a sealed envelope or package addressed as indicated above, on the above-mentioned date, and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited with the U.S. Postal Service in the ordinary course of business in a sealed envelope with postage fully prepaid. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing set forth in this declaration.

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

Executed on December 8, 2014, at Los Angeles, California.

Alma Banuelos /EL

Alma Y. Banuelos

**SERVICE LIST**

| | |
|---|---|
| Jeffrey L. Hogue (SBN 234557)<br>Tyler J. Belong (SBN 234543)<br>Bryce A. Dodds (SBN 283491)<br>Hogue & Belong<br>430 Nutmeg Street, Second Floor<br>San Diego, CA 92103<br>Tel: (619) 238-4720<br>Fax: (619) 270-9856 | *Counsel for*<br>*Real Parties in Interest* |
| Martin N. Buchanan (SBN 124193)<br>Law Offices of Martin N. Buchanan<br>655 West Broadway, Suite 1700<br>San Diego, CA 92101<br>Tel: (619) 238-2426 | *Counsel for*<br>*Real Parties in Interest* |
| Hon. Ronald S. Prager<br>San Diego Superior Court<br>Hall of Justice, Fifth Floor<br>330 W. Broadway<br>San Diego, CA 92101 | *Respondent* |
| Court of Appeal<br>Fourth Appellate District, Division One<br>Office of the Clerk<br>750 B Street, Suite 300<br>San Diego, CA 92101 | |
| Appellate Coordinator<br>Office of the Attorney General<br>Consumer Law Section<br>300 S. Spring Street<br>Los Angeles, CA 90013-1230 | Electronic copy submitted to the Office of the Attorney General at https://oag.ca.gov/services-info/17209-brief/add. |