CASE NO. S253677

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KENNEDY DONOHUE,

Plaintiff and Appellant,

v.

AMN SERVICES, LLC,

Defendant and Respondent.

After a Published Decision of the Court of Appeal,
Fourth Appellate District, Division One, Case No. D071865

San Diego Superior Court, The Honorable Joel Pressman, Judge (Ret.)
Case No. 37-2014-00012605-CU-OE-CTL

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Plaintiff offers no good reason why the court of appeal's judgment should be overturned. The undisputed facts show that AMN did not use rounding to excuse meal period violations. There is no evidence of uncompensated meal period violations at all. Plaintiff instead complains that AMN's computerized timekeeping system provided a drop-down menu inquiring about the reason for a non-compliant meal period when, for example, the clocked-out time had been rounded down to 20 minutes, but not when it had been rounded up to 30 minutes. But contrary to plaintiff's argument, AMN's use of that system does not violate any law. In fact, AMN did not need to provide any such drop-down menu to comply with the laws governing meal periods in the first place. The undisputed facts show that AMN complied with these laws, as interpreted by this Court in *Brinker Restaurant Corp. v. Superior Court,* 53 Cal. 4th 1004, 1040 (2012), 273 P.3d 513, 536-537 (2012).

Plaintiff's appeal, at bottom, is an invitation for this Court to overrule *Brinker*. This invitation should be declined. In the world envisioned by Plaintiff, any employee time record reflecting a missed, late or short meal period *ipso facto* establishes a violation of the California meal period statutes. Plaintiff clings to this view even where the overwhelming weight of the evidence indicates that the non-compliant meal period was entirely the employee's own choice and the employee was compensated properly for all time worked. But Plaintiff's interpretation of the California Labor Code contradicts the well settled law of this state.

That is why, in order to prevail on her claim for meal period premiums, Plaintiff needs this Court to reverse its previous holding in *Brinker* concerning the nature of an employer's duty with respect to meal

periods. *See* 53 Cal. 4th 1040 (stating that an employer has an "obligation to provide a meal period to its employees;" however, "the employer is not obligated to police meal breaks and ensure no work thereafter is performed"). California courts—along with employers across California—have relied upon the majority opinion in *Brinker*, which stated that "[p]roof an employer had knowledge of employees working through meal periods will not alone subject the employer to liability for premium pay[.]" *Brinker*, 53 Cal. 4th at 1040. *See also Esparza v. Safeway, Inc.*, 36 Cal. App. 5th 42, 49, 247 Cal. Rptr. 3d 875, 881 (2019), *as modified on denial of reh'g* (June 28, 2019), *review denied* (Sept. 25, 2019) (plaintiffs could not obtain premiums for "every short, missed, or late meal period reflected in [the employer's] time punch data ... absent proof of actual violations of the meal period statute"); *Serrano v. Aerotek, Inc.*, 21 Cal. App. 5th, 773, 781 (2018) (company need not investigate potential meal violations appearing in time records absent evidence that workers were prevented from taking breaks).

Where, as here, the employer puts forth uncontroverted evidence that workers were provided the opportunity to take meal periods, and received premium payments whenever they reported that such opportunity was not provided, no Labor Code violation exists. Under *Brinker*, this is true regardless of what the time records say. The judgment should be affirmed.

ISSUES PRESENTED

In her Opening Brief, Plaintiff couches her sweeping requests in two primary asserted issues, both of which rest upon false premises.

Plaintiff's stated Issue No. 1 asks whether the rounding of recorded work time can excuse an employer's failure to provide a full and timely meal period. Op. Br. at 1, 15-16. But AMN never made such an argument,

and the correctness of the judgment does not depend on the straw-man position Plaintiff is challenging. In suggesting otherwise, Plaintiff improperly conflates two distinct questions that the court of appeal separately decided. The first was whether an employer may use a neutral time rounding policy to compensate employees for all time worked. In answering this question "Yes," the court of appeal applied *See's Candy*'s accepted principles of neutral time rounding to the context of this case. *See's Candy Shops, Inc. v. Super. Ct.*, 210 Cal. App. 4th 889, 907 (2010), *reh'g denied* (Nov. 26, 2012), *review denied* (Feb. 13, 2013). The second question was whether AMN improperly denied meal periods under *Brinker* without paying the statutory penalty. In answering this question "No," the court of appeal relied on the undisputed facts, including admissions by the Plaintiff, dozens of class member declarations averring to the opportunity to take timely meal periods, and biweekly employee certifications from the class showing that no meal period violations occurred for which premiums were not paid. The core premise of Plaintiff's Issue No. 1 is therefore flawed and the court of appeals' judgment need not be disturbed.

In her stated Issue No. 2, Plaintiff maintains that the court of appeal decision conflicts with other cases regarding the purported use of a "rebuttable presumption" to establish meal period *liability* on the basis of time records alone. Op. Br. at 1, 45-54. As shown below, no such conflict exists. Rather, *Donohue* is consistent both with Justice Werdegar's *Brinker* concurrence that introduced the rebuttable presumption concept in the context of class certification, and with subsequent court of appeal decisions applying that presumption to cases in the same posture. Accordingly, this Court should decline Plaintiff's invitation to create an entirely new framework of crushing liability.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

AMN is a healthcare services and staffing company that recruits nurses for temporary contract assignments in healthcare settings. *See* 8 AA 2194 ¶ 2. With rare exceptions, AMN's California Recruiters all work in the Company's San Diego offices, where each Recruiter has an assigned desktop computer. 8 AA 1996, 2196. Plaintiff was employed there as a Recruiter from September 2012 to February 2014. 8 AA 2194 ¶ 2. Recruiters did not have predetermined shift times. 8 AA 2195 ¶ 5. Rather, pursuant to Company policy and trainings, they were generally expected to work eight hours per workday during regular business hours, to take at least a 30-minute meal period commencing before the end of their fifth hour of work, and to take at least a 10-minute rest break for each four-hour increment of work time or major fraction thereof. 1 AA 235-64, 10 AA 2772 (policies and trainings).

A. AMN Complied with the California Labor Code by Providing Plaintiff and the Recruiter Class with the Opportunity to Take Meal Periods.

California law mandates that nonexempt workers be afforded the opportunity to take an uninterrupted 30-minute unpaid meal period, starting before the end of the fifth hour of work in a workday. Cal. Lab. Code §§ 226.7(b)-(c), 512; IWC Wage Order No. 4 ¶¶ 11-12. Employees are owed an additional hour of pay at the regular rate of compensation for each instance when a compliant meal period is not allowed (also referred to as a "penalty" or "premium"). Cal. Lab. Code § 226.7(c). AMN's meal and rest period policies generally restate both the Labor Code and the applicable IWC Wage Order, and therefore facially comply with the law. 1 AA 235-64, 10 AA 2772 (policies and trainings). Indeed, those policies actually

allow class members to take a meal period of up to one full hour—more than what the law requires. 10 AA 2772. AMN also maintains an in-house cafeteria and seating areas on the first floor of the building to provide employees with a variety of food options and a space to take meal and rest breaks away from their desks. 1 AA 137, 8 AA 2070 (Plaintiff's deposition: "Q. And when you say that you were downstairs, what would you be doing downstairs? A. There were conference rooms. There's a little café. There are restrooms. There's a seating area. So that -- Q. So you may have taken a break down there? A. Yeah. May have been a break and/or lunch period[.]").

The record contains unrefuted evidence that Plaintiff Donohue and the rest of the certified class were regularly relieved of all duty and took their meal periods in accordance with AMN policy. A December 12, 2013, email exchange between Plaintiff and two other class members, lasting from 9:31 a.m. to 10:10 a.m., is typical of lunch arrangements made by Plaintiff and her coworkers:

Plaintiff:	Wanna all do lunch today out of the office somewhere?
Ashlie B.:	Let's go somewhere.. [sic] would love to get out of the office for a little while today.
Plaintiff:	Cool. Where we wanna go? Same area so we can have options; which which, jamba, panda, rubio's, etc. [sic]
Andrea C.:	Or Oggis [sic] too. I am open to whatever.
Plaintiff:	Me too. I'd be down for some pizza. You guys decide. And what time?

Andrea C.:	I need to get a salad today… Ive [sic] eaten a lot this week!!! Arhhhhhhgggg! [sic]
Plaintiff:	Doesn't a salad come w/ the pizza @ Oggi's?
Ashlie B.:	Works for me. I can be flex with the time.
Andrea C.:	Ya [sic] I can get a salad at Oggis [sic]. Lets [sic] just go there. There are options for everyone.
Plaintiff:	OK, what time?
Andrea C.:	It doesn't matter to me.
Plaintiff:	11:45?

1 AA 204-06.

The record also demonstrates that Plaintiff used her meal periods to run personal errands, 1 AA 197; 8 AA 2050-52, 2057, and to go home—sometimes with others, and sometimes alone to visit her dog, Roscoe. 1 AA 120, 202, 215; 8 AA 2053 ("Q. Did you sometimes take your lunch break at home? A. Yes. Q. And did you sometimes take people with you to your house for lunch? A. Yes."), 2056, 2057 ("Q. In addition to taking lunch and letting your dog out at lunchtime, you also sometimes used your lunch hour for other personal reasons; correct? A. That is correct.").

The record further establishes that class members took advantage of the flexibility AMN allowed them to choose when, where, how, and whether to take their meals. For example, on January 21, 2014, Plaintiff had the following email exchange in which she asked her supervisor if she could skip lunch in order to get more overtime:

> **From:** Kennedy Donohue
> **Sent:** Tuesday, January 21, 2014 9:18 AM
> **To:** Jill [S.]

Subject: RE: Power Hour

Can I skip lunch today to get in some extra OT? LMK! THX ☺

From: Jill [S.]
Sent: Tuesday, January 21, 2014 9:22 AM
To: Kennedy Donohue
Subject: RE: Power Hour

Yes, that would be great ☺

From: Kennedy.Donohue@americanmobile.com
Sent: Tuesday, January 21, 2014 9:33 AM
To: Andrea.[C]@americanmobile.com
Subject: RE: Power Hour

See below. Ask Emily if you can "skip" lunch too…

1 AA 210. *See also* 1 AA 180 (Plaintiff coordinating lunch with a co-worker); 1 AA 181 (same); 1 AA 183 (same).

Such is the "office culture" that Plaintiff claims regularly deprived her of the opportunity to take her lunches. Op. Br. at 10.

At summary judgment, Plaintiff's vague and conclusory claim that she and the other class members experienced "pressure" to forego or shorten their meal periods, 11 AA 2962-63, was simply not enough to overcome this undisputed evidence. 13 AA 3483 (superior court order). On the contrary, the uncontroverted evidence produced by AMN in this case indicates that the class members by and large took full and timely meal periods in accordance with AMN's lawful policy. Indeed, the average class member meal period during the limitations period, as recorded in the timekeeping records supplied to both parties and based on the minute-by-

minute time punches, was approximately 45.6 minutes long. 8 AA 2169 ¶ 31.[1]

In a voluntary survey conducted before class certification, 30 of 39 Recruiters to offer testimony as to meal period frequency stated under oath that they "always" or "usually" took uninterrupted lunches of at least 30 minutes on workdays at AMN. *See* 5 AA 1288–7 AA 1899, Tabs 1-40, ¶¶ 19-20. Some Recruiters stated that they only "sometimes" took their meals or breaks, but that it was their choice to do so. *Id.* ¶ 21. A few said they had sometimes performed work during lunches without their supervisors' knowledge. 5 AA 1296.[2] Plaintiff cites these facts in her

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[1] Plaintiff's Opening Brief is flatly incorrect as to how this calculation was derived: she claims that "[b]y using the rounded numbers, AMN's expert made it impossible for the 'average' meal period to be anything but longer than 30 minutes." Op. Br. at 35. This assertion misquotes the testimony in the very paragraph Plaintiff cites, where Dr. Thompson expressly states that "[b]ased on Nurse Recruiters' *actual* punch times, the average length of a Nurse Recruiter meal period ... was 45.6 minutes." 8 AA 2169 ¶ 31 (emphasis in original). Moreover, even if Dr. Thompson *had* used only rounded times to determine the "average" meal period length, it would hardly be "impossible" for the Recruiters' average meal period to appear as under 30 minutes: for example, if the rounded times showed that a Recruiter took a meal from 12:00 to 12:10 on Monday (10 minutes), from 12:00 to 12:20 on Tuesday (20 minutes), and from 12:00 to 12:30 on Wednesday (30 minutes), then the "average" length of those three meal periods would be 20 minutes. Plaintiff's aspersions against Dr. Thompson's analysis are contradicted by the facts and by simple arithmetic.

[2] AMN offered 40 Recruiter declarations into evidence. 5AA 1288 – 7 AA 1899. One of the declarants indicated that he did not take an uninterrupted 30-minute meal period "every day" that he worked at AMN, but that on the days when he did not take a 30-minute non-working meal period, it was because he chose not to take it or waived it with AMN's consent. 5 AA 1312. However, he wrote that he "prefer[red] not to guess" how many times this had occurred. 5 AA 1313. In four of the declarations (Tabs 2, 24, 27, and 32), the relevant meal period testimony is ordered slightly differently but still appears in Paragraphs 19-25. 5 AA 1312-13; 6 AA 1646-47; 7 AA 1697-98, 1771-72.

Opening Brief for the apparent proposition that AMN has somehow admitted to meal period violations. Op. Br. at 11. But Plaintiff fails to mention that—as AMN pointed out in its court of appeal brief—*no declarant said that a supervisor had ever tried to prevent them from taking a meal period or rest break.* *See* 5 AA 1288–7 AA 1899, Tabs 1-40, ¶¶ 19-21.

This is consistent with Plaintiff Donohue's own testimony at her deposition:

> Q. Did any supervisor ever say you can't take a meal period today?
>
> A. I don't remember.
>
> Q. Did anybody ever tell you that you had to cut a meal period short so that it was less than thirty minutes?
>
> A. No.

8 AA 2066-67. It is also consistent with the above-referenced evidence that Donohue set her own meal times and sometimes chose to work through her meal periods to earn additional compensation.

B. Class Members Used AMN's Timekeeping System, "Team Time," to Record Their Hours Worked and to Report Compliance with AMN's Lawful Meal Period Policies.

During and after Plaintiff's employment, AMN used a timekeeping system known as "Team Time," which allowed employees to punch in and out via the Team Time program on their individual computer desktops. 8 AA 1973, 2206 ¶ 3. For purposes of calculating employee work time and compensation, Team Time rounded employees' punch times to the nearest ten-minute increment. 8 AA 2207 ¶ 5. For example, if a Recruiter punched in for the day at 8:04 a.m., Team Time would record the actual login time and then round it to 8:00 a.m. The Recruiter would thus "gain" four

minutes of recorded time for which he or she was paid. If the Recruiter punched out for a meal period at 12:04 p.m., Team Time would record the actual punch time and then round the logout time to 12:00 p.m. In that instance, the Recruiter would "lose" four minutes. Here, the rounding practice benefited Plaintiff overall, resulting in payment for more hours than she actually worked during the statutory period. 8 AA 2164 ¶ 8 (expert analysis showing overpayment). AMN's expert analysis submitted at summary judgment confirmed that in the aggregate, the class of Recruiters were overcompensated relative to their actual time worked as well. *Id.* at ¶ 7. Notably, this overcompensation was observed both when all four daily punches were analyzed, and also when the analysis was restricted to the two punches surrounding a meal period. 10 AA 2751 ¶¶ 7-18.

Team Time's primary function was the tracking and recording of compensable work time based on employee punch data. But AMN also took the additional—but not required—step of programming Team Time to flag potentially non-compliant meal periods using that same punch data, in order to assist the Company with the enforcement of its meal period policies and obligations. To that end, before September 17, 2012, when the Team Time records showed that a Recruiter did not punch out to take a meal period before the end of the fifth hour of work, or if the meal period was recorded as shorter than 30 minutes, Team Time simply assumed a Labor Code violation. 8 AA 2209 ¶ 15. The Recruiter was then automatically paid a one-hour meal period penalty per the statute. *Id.* AMN records indicate that one such meal period penalty was triggered and paid to Plaintiff on September 10, 2012. 8 AA 2074, 2170 ¶ 37. In total,

AMN paid more than 1,600 meal period premiums under this automatic payment protocol. 8 AA 2168 ¶ 26.

On or about September 17, 2012, just after Plaintiff joined AMN, and shortly after this Court issued its opinion in *Brinker*, Team Time was modified so that whenever the system registered a non-compliant meal period, a drop-down menu appeared on the Recruiter's electronic timesheet beneath the punch times for the date in question. 1 AA 245; 8 AA 2072-2073, 2209 ¶ 15. The Recruiter could not submit his or her final electronic timesheet at the end of the pay period until he or she selected one of the three following options with respect to each missed, late or short meal period:

> (1) I was provided an opportunity to take a 30 min break before the end of my 5th hour of work but chose not to[.];
>
> (2) I was provided an opportunity to take a 30 min break before the end of my 5th hour of work but chose to take a shorter/later break[.];
>
> (3) I was not provided an opportunity to take a 30 min break before the end of my 5th hour of work[.]

1 AA 232, ¶ 4; 1 AA 236-37; 1 AA 245.

When a Recruiter checked the third option (*i.e.*, that a meal period was "not provided"), a meal period penalty payment, consistent with that afforded under Labor Code Section 226.7(c), was automatically triggered for the Recruiter's next pay period, no questions asked. 8 AA 2209 ¶ 15. This protocol remained in effect through Plaintiff's resignation date. *See id.*

AMN records indicate that Plaintiff *never* selected the "not provided" option during her employment with AMN despite taking several meal periods lasting fewer than 30 minutes. 8 AA 2195 ¶ 5, 2165 ¶ 10. By

contrast, she used the drop-down menu to indicate that a short or delayed meal period had been her own choice on 31 occasions. 8 AA 2165 ¶ 10. This is consistent with Plaintiff's testimony that she has no recollection of being denied a meal period or told to cut one short. 8 AA 2066-67. Plaintiff suggests that it was improper for Team Time to use rounded punches rather than actual punches when activating the drop-down menu that enabled employees to state the basis for missed, late or short meal periods. But given *Brinker's* "no policing" rule, AMN was not obligated to prompt individuals to report meal period violations at all.

In any event, though also not required by *Brinker*, AMN had a fail-safe mechanism to identify meal period violations. With each biweekly timesheet, each Recruiter was prompted to certify either that he or she had been provided the opportunity to take all meal periods during the pay period, or that the Recruiter had reported being denied such opportunity.[3] *See* 1 AA 248; 8 AA 2075-77, 2195-96 ¶ 9. The employee certification stated, in pertinent part:

> I was provided with the opportunity to take all meal breaks to which I was entitled, **or, if not, I have reported on this timesheet that I was not provided the opportunity to take all such meal breaks[.]**

1 AA 248 (emphasis added). Plaintiff checked the box on her timesheet next to this certification for every biweekly pay period she worked at AMN, and there is no record of her ever reporting that she had been denied the opportunity to take a full and timely meal period. 8 AA 2195 ¶ 5.[4]

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[3] Team Time's electronic timesheets included a text box where the class member could make notes of any anomalies—such as missed meal periods or rest breaks—before submitting his or her time. 2 AA 279.

[4] Plaintiff tells this Court that "she signed the bi-weekly certification because she could not submit her timecard or get paid otherwise, and not to

On appeal, Plaintiff's description of Team Time is flawed in multiple respects—both as to the certified class and as to Plaintiff herself. First, Plaintiff accuses AMN of "redacting" and "overriding" the Recruiters' punch times via Team Time. Op. Br. at 6. But the undisputed evidence indicates only that Team Time rounded the punch times to the nearest ten-minute increment.

Second, Plaintiff's brief repeatedly states that Team Time's rounding system "led to" or "resulted in" non-compliant meal periods that began after the end of the fifth hour of work or were shorter than 30 minutes. *See, e.g.,* Op. Br. at 2, 6. But Plaintiff cites no evidence that Team Time's rounding protocol actually "led to," "resulted in," or otherwise *caused* any non-compliant meal periods. There is none. As described above, neither Team Time nor the rounding protocol exerted any day-to-day control over when or for how long the class members took their meal periods. Rather, Team Time simply recorded and rounded the class members' contemporaneous punches, along with any punches they entered manually.

Plaintiff's description of AMN's manual punch process is also misleading. Plaintiff admits that she "occasionally" requested to correct missed or incorrect punches by entering her time manually into Team Time, Op. Br. at 10, but states that the "overriding office culture" was not to seek such manual adjustments. The undisputed evidence indicates otherwise. In fact, AMN's expert calculated that *thirty percent* of Donohue's total shifts while at AMN reflected such punch adjustments—adjustments that only

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'certify' that she always received compliant meal and rest breaks." Op. Br. at 32-33. Not true. As shown above, the certification expressly allowed AMN employees to report if they had not been provided the opportunity to take a compliant lunch period when submitting their time to payroll. The bottom line is that Plaintiff never made such a report. 8 AA 2195 ¶ 5, 9.

Plaintiff herself could make. 8 AA 2169-70 ¶ 33. She did so by having her supervisor "green out" her timesheets (*i.e.*, enable manual adjustments), as indicated in the following emails from Donohue to her supervisor:

- August 16, 2013, at 2:36 pm.:

> Can you green out my time card for Wednesday, 8/14? I clocked in/out, but forgot to do so for lunch.

8 AA 2141.

- December 19, 2013, at 12:47 p.m.:

> I've been really bad about my time card this pay period. Sorry! Please green out all missed punches, so I can fix today, instead of tomorrow.

8 AA 2143.

- January 10, 2014, at 12:34 p.m.:

> Please green out all week when you get a chance.

8 AA 2145. Donohue was not alone in taking advantage of the ability to construct her own timesheet. Thirty-four of 40 Recruiter declarants (85%) said that they had likewise adjusted their own time. 5 AA 1288–7 AA 1899, ¶¶ 16, 17. The record thus refutes Plaintiff's after-the-fact descriptions of "office culture," as well as her attempts to downplay the level of control that she and the class members exerted over their meal periods, their timesheets, and their reported hours.

In April 2015, AMN phased out Team Time and shifted its timekeeping system to outside vendor Ultipro. 8 AA 2206 ¶ 3. In the Ultipro system, time entries are not rounded to the nearest ten-minute increment; instead, employee punch-in and punch-out times are expressed to the minute. 8 AA 2207 ¶ 6; 12 AA 3008-10.

II. Procedural Background

A. Plaintiff Brings Suit and Certifies Most of Her Claims.

Plaintiff filed her original complaint on April 23, 2014, alleging an array of wage and hour claims. 13 AA 3534. She later amended her complaint twice. 1 AA 6 (Plaintiff's Second Amended Complaint) ("SAC"). Two of Plaintiff's seven thinly-pleaded causes of action are relevant to this appeal. Plaintiff's first cause of action for meal and rest period violations under California Labor Code §§ 226.7 and 512, claimed that AMN "failed to possess compliant meal and rest period policies" and that "[t]his failure ... resulted in meal period violations, in that Plaintiff and all other class members were not provided with an initial meal period no later than the start of their sixth hour of work or a second meal period no later than the start of an their eleventh hour of work in a day." 1 AA 13 ¶ 29. Nothing in this section of the SAC made any mention of rounding or connected the practice to any denial of meal periods. By contrast, Plaintiff's second cause of action for failure to pay overtime and minimum wages in violation of California Labor Code §§ 510 and 1197, 1 AA 14, alleged that AMN had an unlawful "time shaving" (*i.e.*, rounding) practice that led to the underpayment of wages. 1 AA 14 ¶ 35. In other words, while the SAC claimed that Plaintiff and the putative class had been undercompensated in wages as a result of rounding, nothing in the SAC alleged that rounding had led to meal period violations.

That theory emerged later in the lawsuit, after significant written and electronic discovery, AMN's deposition of Plaintiff, and Plaintiff's deposition of three PMK witnesses from AMN, when Plaintiff moved to certify her lawsuit for class treatment in August 2015. 2 AA 383-550 (Plaintiff's motion for class certification and supporting papers). In seeking

certification, Plaintiff represented to the court that individual issues would not predominate on her meal period claim; rather, she argued, liability would be determined for the class on the basis of a "single expert report." 2 AA 414-415 ¶ 10, 21, 16. On October 13, 2015, the superior court certified five of six "Recruiter" classes proposed by Plaintiff, including "the Overtime class" and "the Meal Period class." 4 AA 1013-1019.

B. The Trial Court Grants Complete Summary Judgment to AMN, Including Summary Adjudication on Plaintiff's Meal Period Claim.

In September 2016, the parties filed cross-motions for summary judgment and/or summary adjudication. 7 AA 1955, 9 AA 2277. AMN sought summary judgment on Plaintiff's complaint in its entirety or, in the alternative, summary adjudication as to each discrete theory of liability advanced by Plaintiff in support of her causes of action (whether class-certified or maintained in an individual or representative capacity). 7 AA 1955-60; 8 AA 1968-92; 9 AA 2415-18. Plaintiff in turn sought summary adjudication with respect to (a) her meal period claim and (b) AMN's "affirmative defense" of makeup time under Labor Code Section 513. 9 AA 2280-2304.

To support summary judgment, AMN submitted and/or relied upon numerous written AMN policies (8 AA 2198-2204),[5] declarations from AMN managers regarding AMN personnel and payroll procedures (8 AA 2193-97, 2205-11), expert testimony analyzing timekeeping data for Plaintiff herself and the class as a whole (8 AA 2162-72), the declaration of the president of the American Payroll Association (5 AA 1151-56), 40 voluntary declarations from putative class members (most of whom became

[5] Supplied at 1 AA 235-66; 2 AA 276-311.

class members following certification) (8 AA 2217-19),[6] Plaintiff's complete timekeeping records (8 AA 2034 ¶ 6, 2129-2139), and dozens of pages of her deposition (8 AA 2034 ¶ 2, 2037-2112). By contrast, Plaintiff relied entirely upon documents and data produced to her by AMN, along with her expert's declaration and her own declaration which contradicted her deposition testimony in several respects. *See* 10 AA 2651-53; 13 AA 3349-56. Plaintiff never introduced testimony from any class member other than herself. *See* 9 AA 2323-2413; 10 AA 2529-2653 (all evidence submitted by Plaintiff in support of summary adjudication and/or opposition to summary judgment).

In November 2016, the superior court granted AMN's motion for summary judgment in its entirety, separately granted summary adjudication on each of the eight distinct issues proposed by AMN, 13 AA 3480-85, and denied Plaintiff's motion for summary adjudication on her meal period claim. 13 AA 3480.

C. The Court of Appeal Affirms Summary Judgment for AMN, Including Summary Adjudication of Plaintiff's Meal Period Claim.

Plaintiff appealed the judgment in February 2017, asking the court of appeal to reverse summary adjudication as to each of the eight issues. 13 AA 3544, at No. 290. After the parties' initial briefing was completed in January 2018, the court of appeal twice requested supplemental briefing from the parties, including letter briefs addressing the impact of this Court's decision in *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018), *as modified on denial of reh'g* (Aug. 29, 2018), and regarding a jurisdictional issue related to the trial court's denial of a request for reconsideration. Following

[6] Supplied at 5 AA 1288–7 AA 1899, Tabs 1-40.

oral argument, the court issued its opinion on November 21, 2018, affirming summary judgment and summary adjudication for AMN on all issues. The court of appeal ordered the opinion published on December 10, 2018. On March 27, 2019, this Court granted Plaintiff's Petition for Review.

ARGUMENT

I. Plaintiff Erroneously Conflates the Issue of Time Rounding—A Recognized, Lawful Employment Practice—with Meal Period Violations.

As a threshold matter, the court of appeal noted in its decision that Plaintiff never raised her meal period-rounding claim in the complaint. *Donohue v. AMN Serv., LLC*, 29 Cal. App. 5th 1068, 1086 (2018). That omission alone provided a sufficient basis for the trial court's rejection of the claim, and thus for an affirmance. *Heritage Marketing and Insurance Services, Inc. v. Chrustawka*, 160 Cal. App. 4th 754, 764 (2008) ("The pleadings frame the issues on a motion for summary adjudication and a party cannot successfully resist such a motion based on allegations that are not contained in the complaint."). As shown below, the claim also fails on the merits.

A. Plaintiff Wrongly Criticizes the Court of Appeal for "Importing" Rounding Standards into the Meal Period Arena.

Plaintiff's Opening Brief spends much time expounding on the distinctions between an employee's entitlement to compensation for all hours worked on the one hand, and his or her entitlement to be relieved of duty for a non-working meal period on the other. AMN agrees that these are distinct rights. That is why AMN has repeatedly argued that the relevant inquiry on Plaintiff's claim for penalties under Section 226.7 is not

whether the Recruiters' time punches were rounded, but whether AMN maintained a lawful meal period policy and actually provided the Recruiters the opportunity to take their meal periods. 3 AA 571-74 (AMN's opposition to Plaintiff's motion for class certification, discussing Plaintiff's meal period claim); 8 AA 1982-87 (AMN's motion for summary judgment, discussing same); 10 AA 2690-99 (AMN's opposition to Plaintiff's motion for summary adjudication, discussing same); 11 AA 2990-92 (AMN's reply in support of its motion for summary judgment, discussing same).

It was *Plaintiff* who, at summary adjudication, attempted to use the rounding of meal period punches to cobble together a hybridized cause of action by which she purported to seek allegedly unpaid *compensation* via the summary adjudication of her meal period claim. 9 AA 2278 (Plaintiff's "Noticed Issue One: Violation of Meal Period Laws ('Short'/'Delayed' Meal Periods, No Compensation)"). Specifically, Plaintiff argued that the *See's Candy* neutrality analysis should not apply to the punches surrounding a meal period and that she could therefore claim unpaid *wages* for each and every minute of compensable work time that an employee "lost" as a result of the rounding of meal period punches—without having to offset those losses from minutes that the employee *gained* when the rounding of those punches benefitted an employee. Indeed, the expert declaration on which Plaintiff relies purported to aggregate not only the number of meal periods Plaintiff claimed penalty payments for, but also the number of hours of lost *compensation* that she alleged resulted from the rounding of meal period punches. 9 AA 2406-08.[7] The court of appeal

[7] Plaintiff's brief on her motion for summary adjudication sought 2,631.583 "lost" "hours of recorded time that occurred as a result of 'short' and 'delayed' meal periods." 9 AA 2295. In response, AMN submitted a

rejected such evidence. *See Donohue*, 29 Cal. App. 5th at 1085 (finding that trial court correctly ruled that Plaintiff created no triable issue because her expert "only considered the recruiters' uncompensated time as a result of 'Short Lunches' and 'Delayed Lunches.'" He did not "consider evidence that Plaintiffs may have *gained* (and, in fact, did gain) compensable work time by the rounding policy." (Internal quotations omitted).

Conspicuously, Plaintiff's Opening Brief now makes no mention of this hybrid theory of liability. The court of appeal nevertheless had to confront Plaintiff's argument that the adjudication of her meal period cause of action also entitled her to "lost" wages. In addressing that claim, the court of appeal held that there was no reason to treat meal period punches separately from all other punches under *See's Candy* for purposes of a claim of lost compensation. Even if the meal period punches *were* examined in isolation, AMN's rounding system was mathematically neutral and in fact overcompensated the Recruiters for the time they actually worked. 10 AA 2751 ¶¶ 7-18.

On appeal to this Court, Plaintiff seems to have abandoned this half of her meal period claim—lost wages attributable to rounding—which the evidence could not support anyway. Instead, she quotes selectively from the arguments that AMN and the court of appeal made to refute that

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declaration from its expert demonstrating that when the hours that class members allegedly "lost" from the rounding of meal period punches alone were offset by the instances where class members *gained* from the rounding of their meal periods, then the class actually was overcompensated by approximately 85 hours with respect to those punches alone. 10 AA 2751 ¶¶ 7, 17. Later, in her first brief to the intermediate appellate court, Plaintiff addressed her "lost meal period wages" claim in the apparent context of her overtime cause of action, and re-dubbed it her "Failure to Pay Employees for All Time Worked" claim. Brief of Appellant at 48-54.

particular theory. *E.g.*, Op. Br. at 12, 36. She then cites these passages as evidence that the court of appeal failed to understand the "fundamentally different rationales behind overtime and meal period laws." Op. Br. at 31. But these rationales appear nowhere in the briefing Plaintiff submitted in opposition to AMN's motion for summary judgment as to her meal period claim. 3 AA 2436-40. The court of appeal's failure to anticipate theories and arguments that Plaintiff never put before it provide no basis for reversal. In any case, the meal period theory she presses in this appeal is unsound as a matter of both law and undisputed fact.

B. Plaintiff Provides No Legal Authority for the Proposition That Time Punches Surrounding a Meal Period Cannot Be Rounded.

Plaintiff's entire appeal is based on the false premise that rounding was used to avoid meal period penalties.[8] In her Petition, Plaintiff argued that "[u]ntil now, there has been a bright-line rule regarding two meal period guarantees – (i) employers must provide employees with meal periods of 'not less than 30 minutes' . . . *and* (ii) meal periods must start

[8] Plaintiff seems to quarrel with that portion of the court of appeal's opinion which states: "We reject Donohue's suggestion that the court blindly apply Section 512, subdivision (a), and title 8, section 11040, subdivision 11(A) [meal period laws], without consideration of rounding ...." *Donohue*, 29 Cal. App. 5th at 1087. But reading further on, it is apparent that this statement is not the entirety of the court's rationale for its finding that no meal period violations were proved. In particular, the court of appeal found that Plaintiff failed to respond "to the undisputed evidence that AMN had in place an effective complaint procedure for an employee to inform the employer of any potential violation, but Donohue failed to inform AMN of any such violation." Id. at 1091. The court also cited to the weekly certifications Donohue and the class members submitted with each timesheet, which read: "I was provided the opportunity to take all meal breaks to which I was entitled, or, if not, I have reported on this timesheet that I was not provided the opportunity to take all such meal breaks." Id. (emphasis in decision).

'no later than the end of an employee's fifth hour of work[.]'" Petition at 10, citing *Brinker*, 53 Cal. 4th at 1041 (emphasis in original). She further suggests that "the Court of Appeal erred by failing to interpret the meal period statutes and wage orders as plainly written, and by reading in an unstated rounding exception to an employee's entitlement to a 30-minute meal period no later than the end of five hours of work." Op. Br. at 20.[9]

Contrary to Plaintiff's argument, the court of appeal correctly held that rounding could be applied to meal period time punches to calculate the total time worked for purposes of wage compensation. Meanwhile, the other undisputed evidence in the record—wholly independent of the use of rounding—supports the judgment on the claim of meal period violations. For one thing, there is nothing in the "plain language" of the meal period statutes or wage orders that prohibits the use of rounding to record the times that an employee punches out and in for a meal period—as long as the employee is actually provided the opportunity to take a timely and uninterrupted 30-minute meal period. For that reason, in reviewing the parties' competing cross-motions for summary adjudication, the court of appeal found that "there is no basis on which to deny application of AMN's California-compliant rounding policy to a recruiter's meal period." *Donohue*, 29 Cal. App. 5th at 1089. Indeed, *Donohue* is not the first court of appeal decision to uphold a rounding system under *See's Candy* while acknowledging that the system rounded the start- and stop-times of meal

[9] The "bright-line" rule is actually not so bright line. Labor Code Section 512(a) specifically allows those who work no more than six hours to waive their right to a meal period; Section 512(b)(1) authorizes the Industrial Welfare Commission to permit meal periods after six hours of work if consistent with the welfare of the workers. In any event, the rounding of time has no bearing on the provision of timely meal periods under the Labor Code.

periods. In *AHMC Healthcare, Inc. v. Superior Court.*, the court of appeal applied *See's Candy* in a published decision to uphold a rounding system where "meal breaks that last between 23 and 37 minutes are rounded to 30 minutes," and held that the system was fair and neutral because it "rounds all employee time punches to the nearest quarter-hour without an eye towards whether the employer or the employee is benefitting from the rounding." 24 Cal. App. 5th 1014, 1018, 1022 (2018), *review denied* (Oct. 10, 2018). *AHMC* was cited in the *Donohue* decision; Plaintiff does not mention it in her Opening Brief. *Donohue*, 29 Cal. App. 5th at 1083.

In any case, as argued below, there is nothing at all to suggest that time rounding as authorized in *See's Candy* contains an unstated exception for the time punches surrounding a meal period. In fact, such an exception would undermine the rule altogether, making rounding all but impossible as certain punches at certain times of day could be rounded, while others could not. *Cf. Corbin v. Time Warner Entm't-Advance/Newhouse P'ship*, 821 F.3d 1069, 1077 (9th Cir. 2016) (rejecting a rounding rule proposed by plaintiff that "if accepted, would undercut the purpose and would gut the effectiveness of a rounding policy").

C. There Is No Evidence That Rounding Ever Interfered with Any Employee's Entitlement to a Meal Period.

The court of appeal in *Donohue* ruled that no meal period violation occurred where the employer provided workers with the opportunity to take a compliant meal period at a time of their choosing, and employees made no report of a missed meal. *Donohue*, 29 Cal. App. 5th at 1091-92 ("AMN has a complete defense to Donohue's claim of meal period violations," citing the Company's undisputed evidence that it "had in place an effective complaint procedure for an employee to inform the employer of any

potential violation, but Donohue failed to inform AMN of any such violation.").

As stated by the superior court, "[t]he relevant AMN policies allow for meal and rest periods exactly as provided in Labor Code Section 226.7 and 512, and IWC Wage Order No. 4 . . . . Nor is there a uniform practice that is tantamount to a policy denying meal breaks." Superior Court Minute Order, 13 AA 3472. That court also correctly observed, "Don[o]hue, the class representative[,] was unable to identify a single occasion when she was denied a compliant meal period. . . .

> Q. Did any supervisor ever say you can't take a meal period today?
>
> A. I don't remember.
>
> Q. Did anybody ever tell you that you had to cut a meal period short so that it was less than thirty minutes?
>
> A. No."

Superior Court Minute Order, 13 AA 3473 (citations omitted). Plaintiff's testimony is consistent with the sworn statements of 30 out of 39 Nurse Recruiters who reported that they 'always' or 'usually' take uninterrupted lunches of at least 30 minutes on workdays at AMN. *None said that a supervisor had ever tried to prevent them from taking a meal period.* 11 AA 2991.

Further, Plaintiff certified each pay period on her timesheet that:

> "I was provided the opportunity to take all meal breaks to which I was entitled, *or, if not, I have reported on this timesheet that I was not provided the opportunity to take all such meal breaks[.]"*

Donohue, 29 Cal App. 5th at 1091 (emphasis in decision). Plaintiff now suggests that this certification improperly "shifts the burden" onto

employees to self-report any denial of their meal periods and rest breaks. Op. Br. at 33. But Plaintiff has provided no evidence or testimony that such a practice imposes a "burden" at all. On the contrary, as shown above, Plaintiff routinely *requested* to manually self-report entire weeks' worth of compensable time on her timesheet after the fact, including overtime. In other words, Plaintiff expected AMN to take her word for it, no questions asked, when she freely self-reported the hours she claimed to have worked on her timesheet after forgetting to clock in or out for days or weeks at a time. But she now suggests that it was unreasonable for AMN to believe her when she used the same timesheet to inform the Company that she had in fact had the opportunity to take all her meal periods.

In the end, AMN fully complied with the Labor Code, the wage orders, and this Court's teachings in *Brinker*. The court of appeal thus ruled that there was no violation of California's meal period law, and that rounded punch times "do not establish (or imply) non-compliant meal periods for which Donohue did not receive an appropriate penalty payment." *Donohue*, 29 Cal. App. 5th at 1091; *see also Brinker*, 53 Cal. 4th at 1040 (holding that employers must provide, not ensure, meal periods). There is no legal error in this ruling.

Plaintiff's brief also incorrectly suggests that the decision below somehow endorsed the notion that the gain of a few minutes of time on some meal breaks as a result of rounding supplanted the need for a penalty where an employee may actually have been denied a full and timely meal period. *See* Op. Br. at 24, 32-34. The court of appeal asserted no such "new judicial remedy" as asserted by Plaintiff. Petition at 24. Nor did the superior court apply any *de minimis* time analysis. Op. Br. at 29. The court of appeal instead held that no penalty was owed absent a violation, and that

in this case, Plaintiff failed to create a triable factual issue that any violation had occurred. *Donohue*, 29 Cal. App. 5th at 1087 (rejecting Plaintiff's argument that "any meal period of less than 30 actual minutes is a per se violation of law") and 1092 (finding that AMN had "a complete defense to Donohue's claim of meal period violations").

The court of appeal's judgment does not depend on Plaintiff's straw-man argument that rounding of time worked eliminates the Labor Code requirement for an employer to provide meal periods consistent with the strict mandates of California law. Rather, the judgment is fully supported by the facts that (a) rounding for purposes of determining compensable time is lawful when an employee is paid for all time worked and (b) on the undisputed facts, including admissions by the Plaintiff, no meal period violations occurred for which premiums were not paid.

And contrary to Plaintiff's assertions—which rely on no record evidence—no one in *Donohue* ever suggested that meal time be averaged out across workdays to achieve compliance with California Labor Code. Op. Br. at 35, 36. That is a phantom argument that makes no appearance in the trial court or appellate records. Rather, as demonstrated above, record evidence showed that across a five-year period, workers overall benefited from rounding with respect to *payment for time worked. Donohue*, 29 Cal. App. 5th at 1084 (citing to AMN's expert analysis showing that over a five-year period, "rounding punch times to the nearest 10-minute increment resulted over in 'a *net surplus* of 1,929 work hours in paid time for the Nurse Recruiter class as a whole'"). Separately, the evidence showed that the company's policies and practices were fully compliant with California law, and that meal premiums were regularly paid—including to Plaintiff—where appropriate. *Donohue*, 29 Cal. App. 5th at 1073 n. 4; 8 AA 2168 at

¶¶ 25-26. Thus, the court of appeal held that AMN had met its burden to show the absence of a triable issue of fact on Plaintiff's meal period claim.

Indeed, even if any "presumption" of violations existed at summary judgment based on the timekeeping records alone (which AMN disputes), AMN provided voluminous evidence to rebut that presumption, including, *inter alia*, compliant written policies, 40 class member declarations to which no evidentiary objections were raised, reams of data showing compliant meal periods being taken and meal premiums being paid, regular compliance certifications that the class members themselves provided in Team Time, and Plaintiff's own testimony. *See* 1 AA 235-64; 10 AA 2772; 5 AA 1288-7 AA 1899, Tabs 1-40 at ¶¶ 19-20; 8 AA 2162-71 at ¶¶ 17, 25-26, 28-29, 31; 8 AA 2066-67. *Donohue* therefore was decided entirely consistent with this Court's teachings in *Brinker*, as well as other court of appeal decisions in *See's Candy* and other cases. *E.g.*, *Silva v. See's Candy Shops, Inc.*, 7 Cal. App. 5th 235, 254 (2016), *review denied* (Mar. 22, 2017) ("*Silva*") (affirming summary judgment for employer and stating that "even if there exists a presumption here that all See's Candy employees were working during the grace period, See's Candy proffered admissible evidence rebutting the presumption and showing that the employees did not in fact work during the grace period"); *Esparza,* 36 Cal. App. 5th at 49 (plaintiffs could not obtain premiums for "every short, missed, or late meal period reflected in [the employer's] time punch data ... absent proof of actual violations of the meal period statute"); *Serrano*, 21 Cal. App. 5th at 781 (company need not investigate potential meal violations appearing in time records absent evidence that workers were prevented from taking breaks); *Manigo v. Time Warner Cable, Inc.*, No. CV16-06722-JFW (PLA), 2017 WL 5054368, at *4 (C.D. Cal. Oct. 17, 2017) (granting

summary judgment for employer because "although Plaintiffs provide vague and conclusory testimony that they were generally forced to take meal breaks later than scheduled because of work flow issues, they have failed to identify a single specific instance in which they lacked the opportunity to take a scheduled break").

D. The Court Should Not Allow Plaintiff to Use this Case To Obtain A Back-Door Ban on Rounding.

Plaintiff appears to be aware that prohibiting the rounding of meal period punches would effectively outlaw time punch rounding altogether in California. Indeed, in her Opening Brief, she suddenly appears to affirmatively advocate for that outcome. Plaintiff now argues against "obsolete rounding practices" that purportedly harm employees, citing to no record evidence but instead to law review articles and other sources she has never introduced before in this litigation. Op. Br. at 39-44. Indeed, many of her assertions in this section—such as the claims that rounding is "inconvenient," "inefficient" and provides "no administrative ease"—have no citation to evidence whatsoever. Op. Br. at 41.

Implicitly acknowledging the factual deficiencies of these statements, Plaintiff continues that, "[s]ubject to proof at future trial, plaintiff is seeking to develop evidence that the widespread use of rounding is highly profitable for employers by cutting costs and circumventing basic labor protections across various industries." Op. Br. at 41.

Plaintiff's position is untenable and, in all events, too late. Plaintiff obtained class certification in this case by promising that her claims could be proved via a "single expert report" analyzing AMN's own time records. 2 AA 414-415 ¶ 10, 21, 16. Consistent with that representation, she moved for summary adjudication on the theory that those time records were all she

needed to create automatic liability for any late or short meal that had failed to trigger the drop-down menu as a result of rounding—case closed. Now, five and a half years into this litigation, she promises that there is some as-yet-uncovered aspect of AMN's rounding system that she will reveal at "future trial." Op. Br. at 41. But the time to produce such evidence was at summary judgment. None was offered.

And, even if Plaintiff is correct that an employer could theoretically misuse a rounding protocol to deprive employees of compensable time, California law has already devised a test to deal with that possibility: the *See's Candy* test, which requires that a rounding practice be fair and neutral on its face and not operate over time to deny employees compensation for all time they have actually worked. 210 Cal. App. 4th at 907. Indeed, this Court cited *See's Candy* favorably only last year in *Troester*. 5 Cal. 5th at 847 (distinguishing rounding from *de minimis* defense and noting that the court of appeal in *See's Candy* had found that the "rounding policy was consistent with the core statutory and regulatory purpose that employees be paid for all time worked"). Here, at summary judgment, AMN used the *See's Candy* rubric and showed that none of the parade of horribles Plaintiff attributes to rounding were present in this case. In fact, as a result of rounding, AMN overcompensated the class members relative to the time they had actually worked.

Plaintiff's preferred outcome—the judicial elimination of all time rounding—would potentially create crushing liability for employers across the state that have implemented fair and neutral rounding systems for nearly ten years in good-faith reliance upon *See's Candy*. In any event, Plaintiff did not raise and preserve this issue for appeal and it is not properly presented here.

II. The "Rebuttable Presumption" As Plaintiff Proposes it—Derived from a Concurrence in a Class Certification Opinion—Would Eviscerate *Brinker*'s "No Policing" Rule.

To state her meal period claim below, Plaintiff leaned heavily on a concurring opinion by Justice Werdegar in *Brinker* that discussed a "rebuttable presumption" of meal period violations where "an employer's records show *no meal period* for a given shift over five hours." *Brinker*, 53 Cal. 4th at 1053 (emphasis added). But that is not the scenario at issue here. Plaintiff is not seeking premiums for shifts where AMN's records "show no meal period for a given shift"—here, in all such instances where a meal period was completely skipped, the drop-down menu was triggered and the class member either claimed a premium payment or disavowed one. Instead, Plaintiff is seeking premiums where AMN's records—which she implicitly concedes to be accurate—simply show that the meal period was shortened or delayed but the drop-down menu was not triggered. That is not the fact pattern contemplated by Justice Werdegar's *Brinker* concurrence.

In any case, the claimed "presumption" (a) is rebuttable,[10] (b) appears in a concurring opinion joined by one other Justice, and (c) was rendered in the context of determining whether a class might be properly certified, not whether liability should be imposed. *See Brinker*, 53 Cal. 4th at 1052-53. But as recognized in *Donohue*, and stated by this Court's majority in *Brinker*:

> "[T]he certification question is 'essentially a procedural one that does not ask whether an action is

[10] As a threshold matter, the court of appeal clearly stated that "AMN has a complete defense to Donohue's claim of meal period violations" such that any applicable presumption was, in fact, rebutted. *Donohue*, 29 Cal. App. 5th at 1091-92.

> legally or factually meritorious' . . . . '[T]he question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of [class certification] are met.'"

53 Cal. 4th at 1023 (citations omitted).

Now, Plaintiff attempts to export the *Brinker* concurrence to force the lower courts to reach her preferred decision on the merits. But the weight of post-*Brinker* case law has, like *Donohue*, rejected the premise that time records showing potentially non-compliant meal periods can either establish liability at the summary judgment stage, or bar summary judgment for the defendant employer where the plaintiff has failed to present any other triable issue of meal period violations. *See, e.g., Serrano*, 21 Cal. App. 5th at 781 (court disagreed "that Aerotek should have investigated potential violations as revealed in the time records, noting that Aerotek did nothing to prevent Serrano from taking breaks and she never complained about not receiving them"); *see also Silva*, 7 Cal. App. 5th at 254 (noting that time-record presumption was relevant to deciding whether class could be certified but did not necessarily apply at liability stage). Plaintiff contends that there is "confusion" about this proposition because "six days after deciding *Donohue*, the Court of Appeal in a different published case approved using the presumption at trial." Op. Br. at 50, citing *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 527 (2018). She thus argues that the so-called "time-record presumption" has caused a "lack of consistency and confusion" in the lower courts. Op. Br. at 50.

There is no such "judicial confusion." In *Carrington*, referenced by Plaintiff, the court found that there was "substantial evidence supporting the trial court's conclusion that Starbucks did not provide Carrington meal

breaks as required by law[.]" *Carrington*, 30 Cal. App. 5th at 521 (citation omitted). In particular, the plaintiff in *Carrington* testified that when the store was busy, she would be required to work beyond the end of her scheduled 5-hour shift without taking a meal period. *Id.* at 523. She further testified that she was not permitted to start her break until she received approval from her supervisor. *Id.* "This testimony, *coupled with Carrington's time records* . . . is substantial evidence to support the Trial Court's conclusion that Starbucks did not provide Carrington with a meal break or the required premium . . . ." *Id.* at 523-24. (Emphasis added). *Carrington* in no way supports a finding of liability based on meal punches alone. In fact, because the plaintiff had established the existence of unlawful meal period practices in the first instance, the *Carrington* court expressly "decline[d] to determine the nature or effect of any rebuttable presumption that might be created by such time records." *Id.* at 527.

Plaintiff also misunderstands *Safeway v. Superior Court*, 238 Cal. App. 4th 1138, 1159-60 (2015), which she claims posited that "[a]n 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" but is instead an "affirmative defense," thus supporting the notion that there is a judicial split over whether to apply the presumption at the merits stage. Op. Br. at 49.

But *Safeway*, again, was an opinion about whether a class should be *certified* on the basis of time records, and expressly declined to opine as to the merits of the plaintiffs' meal period claims. *Safeway*, 238 Cal. App. 4th at 1159-60. Moreover, the ultimate outcome of the *Safeway* case—which Plaintiff does not mention in her brief—supports limiting the presumption

to class certification. In *Safeway*, consistent with Justice Werdegar's concurrence, the court of appeal initially held that a class could be certified because employees "could use time punch data and an evidentiary presumption to attempt to establish that Safeway's error in ignoring the premium wage statute *was sufficiently deep and system-wide* to deny all class members the statutory guarantee." *Esparza*, 36 Cal. App. 5th at 54 (emphasis added). But when the case returned to the superior court and reached summary judgment, no such "presumption" excused the plaintiffs from having to prove that the class members were actually owed the premiums they sought. On the case's second appeal, the court affirmed summary judgment for the employer, explaining that while Plaintiffs "effectively sought premium wages for every short, missed, or late meal period reflected in Safeway's time punch data, ... the class members' interest in premium wages could not vest, *absent proof of actual violations of the meal period statute*." *Esparza*, 36 Cal. App. 5th at 49 (emphasis added). In so holding, the court noted, "appellants had eschew[ed] the individualized inquiries necessary to such proof in order to obtain class certification." *Id.* (internal quotation marks omitted). Summary judgment for the employer was therefore proper.

Such is the case here: Plaintiff obtained certification on her meal period claim by eschewing individualized inquiries in favor of a theory that relied upon a presumption of liability. Now, she seeks to use that presumption, as applied to AMN's time records, to claim vast sums in premium wages without ever having to prove that there was a class-wide policy or practice to deny meal periods. That is not the law. Thus, the court of appeal correctly declined Plaintiff's invitation to essentially create automatic liability where, say, an employee delayed her meal period a few

minutes over the five-hour mark so that she could go to lunch with a co-worker, or clocked back in from her meal period a minute early because traffic coming back from her favorite lunch spot was lighter than usual. Rather than muddying the waters, *Donohue* falls directly in line with the majority opinion in *Brinker*, and subsequent appellate court decisions.

And it is the majority opinion in *Brinker* that is really at issue here. It is one thing to apply a "time-record presumption" to certify a class at a stage when no proof of liability is required. But it is quite another for employers to face a presumption of liability at summary judgment or at trial. If records alone can make a case, then the "no-policing" rule articulated in *Brinker* will be gutted. California employers will have to scope for meal period violations every day and every shift to avoid a presumption of liability in a future lawsuit. Cottage industries and new departments will spring up to chase down every skipped, late, and short meal. Alternatively, employers will be forced to eliminate policies that allow nonexempt workers the freedom to choose the timing and length of their meal period in the first instance—as Plaintiff enjoyed at AMN. These policies will be replaced by rigid scheduling for meal periods, accompanied by punitive discipline for workers who attempt to vary from their predetermined meal times—lest the "time-record presumption" be used against the employer down the road for any voluntarily shortened or delayed meals. This is the precisely the opposite of what *Brinker* contemplated.

A good policy and the ability to take a compliant meal period are and should remain enough in California.

CONCLUSION

The court of appeal's judgment should be affirmed.

Dated: October 14, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, counsel hereby certifies that the enclosed brief contains 10,457 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: October 14, 2019

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I am over 18 years of age and not a party to this action. I am employed in the County of San Diego, State of California. My business address is DLA Piper LLP (US), 4365 Executive Drive, Suite 1100, San Diego, CA 92121.

On October 14, 2019, I served a true and correct copy of the within document described as:

ANSWER BRIEF ON THE MERITS

(BY UPS OVERNIGHT MAIL) by third-party commercial carrier for next business day delivery to the following person(s) at the address(es) set forth below:

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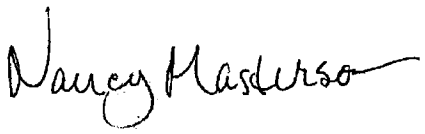
I further declare that this same day the original and thirteen (13) copies have been filed by a third party commercial carrier for next business day delivery to:

SUPREME COURT OF CALIFORNIA
350 McAllister Street, Room 1295
San Francisco, California 94102-4797

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on October 14, 2019 at San Diego, California.



Nancy Masterson