September 3, 2019

Jorge E. Navarrete
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Cole v. CRST Van Expedited*, No. S257220

Dear Mr. Navarrete:

Plaintiff-appellant James Cole submits this letter under California Rule of Court 8.548(e)(2) in reply to CRST's letter of August 22, 2019.

For many years, CRST ignored California's meal-and-rest-break laws, requiring its drivers to keep schedules that made taking the required breaks impossible and instructing them to instead take fewer and shorter breaks. But California law requires employers to *provide* breaks to their employees, meaning that an employer must relieve its employees of duty and relinquish control over their activities. CRST made no effort to meet that obligation.

CRST now gives two reasons why it thinks this Court should decline to answer the Ninth Circuit's certified questions concerning its liability under the break laws. *First*, CRST argues that the Court's involvement is not necessary because the questions are "easily answered" under existing precedent. (CRST Ltr. at p. 1.) That argument ignores the acknowledged split between federal and state courts on the standard of liability. The cases on which CRST relies only illustrate the depth of that split and highlight the need for this Court's intervention to ensure the break laws' continued effectiveness. And CRST makes no effort to deny that the issue presented is both important and frequently recurring. Indeed, the question whether mere inaction can result in compliance arises any time an employer maintains that it is not bound by the break rules—as CRST did here for many years and as is often the case, for example, when workers are misclassified as independent contractors.

Second, CRST claims that a decision by the Federal Motor Carrier Safety Administration "has rendered the appeal moot by preempting all further efforts to enforce California's meal and rest break rules" against trucking companies like CRST. (*Id.* at p. 2.) But the Ninth Circuit already denied CRST's motion to dismiss on that precise ground. The unlikely possibility that the court might reverse itself cannot render the case moot and is no reason for this Court to decline to clarify important and hotly contested issues of state law, the effects of which extend far beyond the trucking

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industry. This case, in short, presents both a live controversy and a suitable vehicle for providing much-needed guidance concerning liability under state employment law.

I.
This Court's resolution of the certified questions is required for continued effective enforcement of the meal-and-rest-break laws.

A. CRST argues that this Court should refuse to answer the Ninth Circuit's first certified question—whether an employer violates the meal-and-rest-break laws by failing to adopt a break policy—because the question can be "easily answered" by "simply applying" this Court's decision in *Brinker*. (CRST Ltr. at pp. 1–2.) According to CRST, *Brinker*'s "clear holding" is that "employers are only liable" under the break laws "for impeding or preventing" employees from taking breaks. (*Id.* at pp. 4, 6.) Importantly for CRST's purposes, its proposed standard is purely prohibitory—it would not impose any affirmative obligation to provide the breaks required by law. CRST is thus able to argue that it complied with the break laws despite its failure to adopt a policy authorizing such breaks or even to inform employees of the breaks to which they are entitled.

The "clear holding" that CRST reads into *Brinker*, however, finds no support in the language of this Court's decision. On the contrary, *Brinker* requires an employer to affirmatively "authorize and permit the amount of [meal and rest] break time called for under the wage order for its industry." (*Brinker Restaurant Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, 1033 *(Brinker)*.) Although the decision also says that an employer cannot "impede or discourage" employers from taking those breaks, that prohibition does not undermine the case's core holding that employers are required to authorize the breaks in the first place. (*Id.* at p. 1040.) On the contrary, the decision presumes that the employer has authorized breaks that could be impeded or discouraged.

CRST's claim that *Brinker* clearly forecloses Mr. Cole's claims depends on a misunderstanding not only of *Brinker*'s holding, but also of the arguments in the district court. According to CRST, Cole's theory of the case depended on a "pre-*Brinker* 'ensure' theory," under which he "claimed that employers had to ensure that employees took all breaks available to them." (CRST Ltr. at p. 2.) But Cole never advanced that position—his argument was not that CRST failed to *ensure* that employees took breaks, but that it failed to *provide* employees with those breaks in the first place. (Cole Br. at p. 21 (noting an employer's "affirmative obligation is to provide—but not police—meal periods and rest breaks").)

Nor did Cole base his claims on CRST's lack of a formal, written break policy. Rather, his claim was that "CRST's lack of any policy *or practice* of providing the breaks guaranteed by law, in addition to its restrictive break and scheduling policies, establish[ed] the company's liability to Cole." (Cole Br. at p. 36, italics added; see also, e.g., Cole Br. at p. 22 ("The company had no policy (written or otherwise) authorizing

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such breaks."); Cole Reply at p. 9 ("The company identifies nothing that it did—in the form of a policy or otherwise—to authorize its employees to take the required breaks.").)

CRST is liable under that theory because it lacked *any* policy or practice—formal or informal—of providing the breaks required by California law. The company had no policy, either written or otherwise, authorizing such breaks. (9th Cir. Excerpts of Record (ER) at pp. 112 ¶ 5, 247 ¶ 11.) It never paid a premium wage for missed breaks. (ER 40.) It did not inform drivers (at orientation, in its driver's handbook, or elsewhere) when and for how long they were entitled to take breaks under the law. And it did nothing to relieve its employees of duty, relinquish control over their activities, or permit them a reasonable opportunity to take an uninterrupted break. (ER 129–30 ¶¶ 17–19, 20, 23, 24.) To the contrary, the company's break policy called for only one fifteen-minute break every five hours—just a fraction of what California law provides. (ER 146.) And its scheduling policy required its drivers to maintain a minimum average speed of fifty miles per hour, which was "generally not possible to meet if all meal and rest breaks are taken." (ER 129 ¶ 14.)

All that CRST even claimed to have done to satisfy the break laws' requirements was to post a copy of the wage order. But CRST never argued that the posting was in a "conspicuous" or "frequented" location of the workplace, as the break laws require. (CRST Br. at pp. 12, 18–19, 35, 59; see Cal. Labor Code § 1183(d).) And the posting requirement, in any event, is just one section of the break laws. (See Cal. Labor Code § 1183(d); 8 C.C.R. § 11090(22).) CRST simply ignored all the other sections, including the language affirmatively requiring it to "provide" breaks. (See, e.g., Cal. Labor Code § 226.7.)

B. CRST is also wrong that the standard it advances has been "uniformly recognize[d]" by the courts. (CRST Ltr. at p. 4.) CRST identifies—for the first time here—a single published California decision that it claims supports its position: the Fourth District's decision in *Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 990. But CRST's reading of *Dailey* directly contradicts the Fourth District's earlier holding, in *Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129, 1150 (hereafter *Bradley*), that an employer's "*lack* of a rest and meal break policy" and its "*failure* to authorize employees to take statutorily required rest and meal breaks" were sufficient to support liability under *Brinker*. It is true, as CRST points out, that *Bradley* did not decide whether "a *written* meal or rest break policy" is required. (*Id.* at p. 1154, fn. 9.) But this Court need not decide that question in this case either because Mr. Cole's claims, like the plaintiffs' claims in *Bradley*, "concern the absence of *any* policy, not merely a written policy." (*Ibid.*, italics added.)

CRST's reading of *Dailey* is also contradicted by an unbroken line of subsequent appellate decisions—including by the Fourth District—holding that an employer is

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liable under the meal-and-rest-break laws if its "break policy, or *lack of policy*, [is] unlawful." (*Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 237, italics added; see also *Lubin v. Wackenhut Corp.* (2016) 5 Cal.App.5th 926, 957; *Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 388, 410; *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 729–30 *(Benton)*.) Those decisions hold, as the court put it in *Benton*, that an employer cannot "discharge its affirmative obligation to authorize and permit meal and rest breaks purely through inaction." (*Benton*, *supra*, 220 Cal.App.4th at p. 729.)

In the absence of California authority supporting its narrow reading of *Brinker*, CRST turns instead to a line of federal district court decisions, of which the decision below is a part. But those decisions have expressly recognized that their holdings "conflict[]" with the competing "line of California Court of Appeal cases," including *Bradley*. (*Cummings v. Starbucks Corp.* (C.D. Cal. Mar. 24, 2014, Civ. A. No. 12-06345-MWF) 2014 WL 1379119, p. *18–*20.) Far from settling the issue, those cases thus emphasize the urgent need for this Court's intervention. Without it, employers that fail to provide the breaks required by California law—whether intentionally or by mistake—could continue to remove employee suits under the Class Action Fairness Act to federal court and argue that they never expressly prohibited the breaks required by law. In that way, the employer in *Bradley* could have escaped liability for illegally classifying its employees as independent contractors to whom the break laws did not apply. (211 Cal.App.4th at p. 1149.) And CRST could likewise escape liability here for erroneously treating the break laws as preempted by federal regulations.

C. On the second certified question—whether an employer's failure to record breaks creates a presumption that it failed to provide those breaks—CRST argues that Justice Werdegar's concurrence to her own majority opinion in *Brinker* "demonstrates that the Court did not accept her theory." (CRST Ltr. at p. 8.) The *Brinker* majority, however, did not reach the merits of the meal-break issue, and thus could not have, even implicitly, rejected the presumption. Justice Werdegar's concurrence thus does not signal disagreement with her own majority opinion. Rather, it provides "guidance" on remand to the trial court on an issue left undecided by the Court. (*Brinker*, *supra*, 53 Cal.4th at p. 1052 (conc. opn. of Werdegar, J.).)

CRST identifies nothing in this Court's precedent suggesting that any member of the Court would have rejected the presumption that Justice Werdegar identified. Instead, it turns once again to federal decisions, which have declined to apply the presumption against employers who failed to meet their recordkeeping obligations. As Justice Werdegar recognized, however, such decisions "offer an employer an incentive to avoid its recording duty and a potential windfall from the failure to record meal periods." (*Id.* at p. 545, fn. 1.) This Court's guidance is needed to prevent that result and to ensure effective enforcement of the break laws.

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CRST also argues that—although the company made no effort to comply with the break laws' recordkeeping requirement—it nevertheless kept records of breaks in the form of the driver logs required by the federal hours-of-service rules governing truck drivers. The problem with CRST's reliance on those logs, however, is that the logs were not designed to satisfy California's recordkeeping requirement, and the rules are thus not strict about requiring drivers to record off-duty time. Although drivers in certain circumstances "*may* record meal and other routine stops ... as off-duty," they are not *required* to do so. (Hours of Service for Commercial Motor Vehicle Drivers; Regulatory Guidance Concerning Off-Duty Time, 78 Fed. Reg. 41852, 41853 (July 12, 2013), italics added.) As a result, CRST conceded in the district court that the logs "do not show whether drivers took or missed breaks on a particular day." (ER 258 ¶ 33.)

Given CRST's concession, the driver logs cannot satisfy the company's obligation to "keep *accurate* information" about the meal periods taken by its employees. (8 C.C.R. § 11090(7)(A), italics added).

II.
The Ninth Circuit has already rejected—and is unlikely to revisit—CRST's mootness argument, which is wrong in any event.

A. CRST next argues that Mr. Cole's case is moot given the FMCSA's decision to grant a trucking-industry petition to preempt California's meal-and-rest-break laws. The decision reversed the agency's longstanding interpretation of its preemption authority under 49 U.S.C. § 31141 to conclude that California "may no longer enforce" its meal-and-rest-break laws for the protection of truck drivers in the state. (California's Meal and Rest Break Rules for Commercial Motor Vehicle Drivers; Petition for Determination of Preemption, 83 Fed. Reg. 67,470, 67,480 (Dec. 28, 2018).) As CRST acknowledges, however, the Ninth Circuit has already rejected the company's motion to dismiss on that ground and issued its certified questions to this Court despite the FMCSA's decision. (CRST Ltr. at p. 13.) CRST's speculation that another Ninth Circuit decision might eventually require dismissal does not render this case moot.

Nor is it likely that the FMCSA's preemption decision will survive the Ninth Circuit's scrutiny. The decision is already the subject of several pending challenges—including one by the California Labor Commissioner. As the petitioners in those cases explain, the FMCSA for a decade has consistently adhered to its position that it "has no authority" to preempt California's generally applicable employee meal-and-rest-break rules because the rules are not directed at motor-vehicle safety but "are simply one part of California's comprehensive regulations governing wages, hours and working conditions." (Petition for Preemption of California Regulations on Meal Breaks and Rest Breaks, 73 Fed. Reg. 79,204, 79,206 (Dec. 24, 2008).) The agency rejected the "far-reaching argument" that § 31141 gives it the power to preempt such

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laws—an argument that it concluded lacks support in the "statutory language or legislative history" and would, if correct, expose "any number of State laws" to unintended preemption. (*Ibid.*)

The agency's about-face on those issues offers no new interpretation of the statutory text to justify its "dramatic change in position." (*Wyeth v. Levine* (2009) 555 U.S. 555, 579.) Nor can it be reconciled with the presumption, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated … in a field which the States have traditionally occupied,' … ' … the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (*Ibid.*, citations omitted.)

And even if the Ninth Circuit were to ultimately uphold the FMCSA's preemption decision, it would not moot cases, like Mr. Cole's, that were *already pending* when the decision was made. Consistent with the strong presumption against an agency's authority to promulgate retroactive rules, *Bowen v. Georgetown Univ. Hospital* (1988) 488 U.S. 204, 208, the FMCSA's decision does not purport to extend to cases that were already pending at the time it was issued—as an agency official explained, the "determination does not have retroactive effect." (FMCSA, Legal Opinion of the Office of the Chief Counsel (Mar. 22, 2019) pp. 1–2 <http://bit.ly/2MXg59T> [as of Sept. 3, 2019].) And although that same official—in a second about-face for the agency—reached the opposite conclusion a few weeks later (*ibid.*), that decision contravenes the law's "deeply rooted" presumption against retroactive legislation and, for that reason, is unlikely to survive scrutiny. (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 265.)

B. Finally, CRST is wrong that this Court should defer a decision in this case until the Ninth Circuit has ruled on the validity of the FMCSA's decision to preempt California's meal-and-rest-break laws as applied to the trucking industry. The importance of the certified questions here extends far beyond the context of trucking—the same break rules apply virtually identically across the whole spectrum of industries in California, collectively covering "all … nonexempt employees" in the state. (*Brinker*, *supra*, 53 Cal.4th at p. 1018, fn. 1; see Cal. Code Regs., tit. 8, §§ 11010-11170; *Dilts v. Penske Logistics* (9th Cir. 2014) 769 F.3d 637, 647 (noting that the wage orders establish the "normal background rules for almost *all* employers doing business in the state of California").)

For this Court to decline to answer the certified questions in this case would thus threaten to eviscerate the break laws not only for truck drivers like Mr. Cole, but for *all* California employees—allowing federal courts to continue applying their own cramped interpretation of *Brinker* and leaving employers free of the obligation to take *any* action to provide employees with the meal and rest breaks guaranteed by California law. Because enforcement of the state's breaks laws in principally achieved

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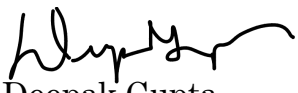
through class actions, and because such class actions are frequently removed to federal court, it is imperative that this Court decide the certified questions and ensure that California's longstanding worker protections are respected—in both state and federal court.

Respectfully submitted,



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