No. S200923

IN THE
SUPREME COURT OF CALIFORNIA

SAM DURAN et al.,

Plaintiffs and Respondents,

vs.

U.S. BANK NATIONAL ASSOCIATION,

Defendant and Appellant.

On Review from Court of Appeal, First District, Division One
Nos. A125557 & A126827
Appeal from Alameda County Superior Court
The Honorable Robert B. Freedman
Super. Ct. No. 2001-035537

APPLICATION TO FILE AND AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA SUPPORTING PLAINTIFFS-RESPONDENTS

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Required by Bus. & Prof. Code, § 17209
(Cal. Rules of Court, rule 8.29(b))

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I. APPLICATION FOR PERMISSION TO FILE

Amicus curiae Consumer Attorneys of California (CAOC) respectfully seeks permission to file the accompanying brief as friend of the Court. (Cal. Rules of Court, rule 8.520(f)(1).)

Founded in 1962, CAOC is a voluntary non-profit membership organization of over 3,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to a variety of illegal business practices, including wage-and-hour violations. CAOC has taken a leading role in advancing and protecting the rights of consumers, employees and injured victims in both the civil justice system and the Legislature.

CAOC has participated as amicus curiae in precedent-setting decisions involving class action procedure and employee rights under California law. These include, most recently, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*). The Court has agreed with CAOC on the need to ensure "effectiveness of class actions as a means to provide relief in consumer protection cases" like this one. (*Pioneer Electronics (USA), Inc. v. Superior Court* (2008) 40 Cal.4th 360, 374.)

Here, CAOC is familiar with the detailed merits briefs and amici curiae submissions already on file. Given this extensive briefing, CAOC seeks to assist the Court "'by broadening its perspective'" on just a few – but crucial – points bearing on how this case should be decided. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177, citation omitted.)[1]

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[1] No party or its counsel authored any part of CAOC's amicus curiae brief and, except for CAOC and the undersigned counsel, no one made a monetary or other contribution to fund its preparation or submission. (Cal. Rules of Court, rule 8.520(f)(4).)

II. OVERVIEW AND ARGUMENT SUMMARY

The appeal here involves a large record from a long trial. Although there is a lot of factual minutiae, overarching legal principles undergird the outcome. In this amicus presentation, CAOC makes three observations that should not get lost in the shuffle.

First, recent U.S. Supreme Court decisions on class certification in the federal system do not impact the sovereign authority of states to apply their own class action rules. According to some observers, a few high court opinions of late have fundamentally transformed how class actions, in ***all*** courts, must be adjudicated. Fortunately for the stability of California law, this is not so. Fully considered, the recent U.S. Supreme Court decisions are a mixed bag and actually reaffirm that states need not march in lockstep. Established tenets guiding class certification in California remain sound and, to avoid any misunderstanding, should be reaffirmed in this case.

Second, representative evidence is proper in both the liability and remedial phases of a class action, but is analyzed differently when crafting classwide relief for proven illegal conduct. Once the defendant's liability is established, the trial court has significant leeway to impose an appropriate remedy to make the class whole. This is especially so under the Unfair Competition Law (UCL). (Bus. & Prof. Code, § 17200 et seq.)

Third, in light of harsh economic trends that show no signs of abating and increasing barriers to relief in federal court, state overtime laws have great practical importance for millions of California workers. States in fact were the first to provide these protections historically, decades before New Deal legislation. Particularly in the wage-and-hour realm, it would be damaging, based on evolving and non-binding federal authority, to curtail separate rights originating under California law – here, to band together in a class action in ***state*** court enforcing ***state*** overtime requirements.

III. DISCUSSION

A. Although the U.S. Supreme Court Is Increasingly Examining Class Actions, States Remain Free to Fashion Their Own Class Action Procedures

This case went sideways in the Court of Appeal because, among the analytical flaws, the intermediate panel misapprehended three words in a federal decision: "Trial by Formula." The only real overlap between *Wal-Mart Stores, Inc. v. Dukes* (2011) ___ U.S. ___, 131 S.Ct. 2541, 2561, 180 L.Ed.2d 374 (*Dukes*), where the phrase originates, and the suit here is class action status. Contrary to the Court of Appeal's assumption, the U.S. Supreme Court's vague incantation does not mandate wholly new approaches to California class action procedure.

As a class action, *Dukes* was quite atypical. The case drew widespread media attention solely due to its scale. It involved one of the world's largest private employers. As Justice Scalia stressed in the first sentence of his majority opinion: "We are presented with one of the most expansive class actions ever." (*Dukes*, *supra*, 131 S.Ct. at p. 2547.) The class consisted of "about one and a half million plaintiffs." (*Ibid.*) Class actions of this scope present substantial manageability challenges because it is difficult to adjudicate the claims of so many persons in "one stroke." (*Id.* at p. 2551.)

Dukes must be understood and applied with these unusual facts in mind, which do not remotely resemble those here. Most classes are much smaller and are easily managed. This case, with little more than 250 class members, is an example.

As authority, moreover, *Dukes* is at most persuasive, not binding, because it construed Federal Rule of Civil Procedure 23 and Title VII of the Civil Rights Act. Although defendant U.S. Bank (and, more aggressively, its amici curiae) urge the Court to follow the class certification analysis in *Dukes* – especially "Trial by Formula," whatever this means exactly –

California has its own class action jurisprudence. And its origins are distinct from federal law on class certification.

Class actions in the California courts stem from a statute. "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." (Code Civ. Proc., § 382.) Section 382 was enacted in 1872, long before federal procedural rules. The modern version of Federal Rule 23 was adopted around the same time this Court decided *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, the first in a seminal line of California Supreme Court precedents on class certification. Ever since, federal and state practice have developed on their own paths.

California has looked to federal law at times but to fill gaps, not reflexively. "In the event of a hiatus," Federal Rule 23 "prescribes procedural devices which a trial court may find useful." (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821.) After examining the federal approach on some class action issues, this Court has declined to follow it. (See, e.g., *Civil Service Employees Insurance Co. v. Superior Court* (1978) 22 Cal.3d 362, 375-376 [class notice costs].)

Under our national governmental design dating to the summer of 1787, this is not only permissible but as it should be. The strident effort here to wield a single turn of phrase in *Dukes* as a sword to reshape California law disregards "'Our Federalism.'" (*Younger v. Harris* (1971) 401 U.S. 37, 44.) As the U.S. Supreme Court has put the matter: "'The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.'" (*Saenz v. Roe* (1999) 526 U.S. 489, 504, fn. 17, quoting *United States Term Limits v. Thornton* (1995) 514 U.S. 779, 838 (conc. opn. of Kennedy, J.).) This applies to all three branches of government.

Other recent U.S. Supreme Court decisions demonstrate that the split-atom metaphor governs class actions in particular. States are not restricted to "Pavlovian responses to federal decisional law" on class certification requirements. (*Smith v. Bayer Corp.* (2011) ___ U.S. ___, 131 S.Ct. 2368, 2378, 180 L.Ed.2d 341, internal quotation marks omitted.) This is true of federal procedural law generally. (See, e.g., *McCurry v. Chevy Chase Bank, FSB* (Wash. 2010) 233 P.3d 861, 862-864 [declining to follow *Ashcroft v. Iqbal* (2009) 556 U.S. 662 and *Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544 on pleading standards].) Likewise, Federal Rule 23 enables class status in federal court even as to state-law rights that could ***not*** be pursued in a class action in state court. (See *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* (2010) 559 U.S. 393.)

Beyond these decisions, the U.S. Supreme Court has not been wholly consistent lately on federal class certification standards. Two years ago the high court, construing Federal Rule 23(a)'s commonality requirement, appeared to stress a need for not just common questions but "'common ***answers*** apt to drive the resolution of the litigation.'" (*Dukes*, *supra*, 131 S.Ct. at p. 2551, emphasis in original.) Yet earlier this year, construing Federal Rule 23(b)(3)'s predominance requirement – traditionally viewed as more stringent than commonality – the high court held that the movant need only show "***questions*** common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." (*Amgen Inc. v. Connecticut Retirement Plans and Trust Funds* (2013) ___ U.S. ___, 133 S.Ct. 1184, 1191, 185 L. Ed. 2d 308, emphasis in original.) The importance of common questions, rather than the answers, is then reiterated. (*Id.* at p. 1195 ["the focus of Rule 23(b)(3) is on the predominance of common ***questions***," emphasis in original]; *ibid.* [the "pivotal inquiry" is whether "***questions*** of law or fact common to the class will 'predominate over any questions affecting

only individual members' as the litigation progresses," emphasis in original and citation omitted].)

By contrast, this Court, often speaking unanimously on the subject, has "articulated clear requirements for the certification of a class." (*Brinker*, *supra*, 53 Cal.4th at p. 1021.) At any rate, on the "procedural" question of class certification (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439), the federal and state systems are distinct spheres with distinct bodies of law. Again, under the Framers' design, the duality more than two centuries later is functioning just as it should.

Apart from federal policy preferences, "'this state has a public policy which encourages the use of the class action device.'" (*Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340, quoting *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 473.) As plaintiffs and the Impact Fund et al. have discussed, to vindicate this state's policy, representative evidence is part and parcel of classwide adjudication in California (and in most jurisdictions). Nothing the U.S. Supreme Court has held in the past few years, or before, undermines this.

Defendant U.S. Bank and its amici acknowledge as much by attempting to transform *Dukes* into something it is not, a sweeping due process decision. But no matter how creatively described, the U.S. Supreme Court did not suddenly proclaim in *Dukes* a newfound right to call every class member as a witness. This rigid idea is contrary to the inherent flexibility of due process and could never be the law. If the notion were expanded "to the limit of its logic" as legal principles tend to do, then class treatment and its accompanying efficiencies would be destroyed. (Cardozo, Nature of the Judicial Process (1921) p. 51.)

Tellingly, no state appellate court in the country to date, except the Court of Appeal here, has embraced the "Trial by Formula" jargon from

Dukes. The Pennsylvania Supreme Court is currently considering a class certification appeal where the *Dukes* catchphrase is at issue. Underscoring the limited reach of *Dukes*, however, Wal-Mart itself is the class defendant. (See *Braun v. Wal-Mart Stores, Inc.* (Penn. 2012) 47 A.3d 1174.)

B. Once UCL Liability Is Proved, the Trial Court Has Vast Discretion to Fashion Appropriate Relief

Plaintiffs have explained how they methodically established – through diverse proof including representative testimony and statistical evidence – U.S. Bank's classwide liability at trial. CAOC next addresses the trial court's discretion on remedies. There is potential for misunderstanding on this point because the suit here is not just any class action, but a UCL class action.

This Court has repeatedly emphasized that "'consumer class actions and representative UCL actions serve important roles in the enforcement of consumers' rights" by "mak[ing] it economically feasible to sue when individual claims are too small to justify the expense of litigation . . . ." (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 313, quoting *Kraus v. Trinity Management Services* (2000) 23 Cal.4th 116, 126, footnote omitted.) To further this salutary purpose, the trial court "may make such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." (Bus. & Prof. Code, § 17203.) This statute provides "a grant of broad equitable power." (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 180.)

By focusing on the defendant's wrongdoing, the UCL's central objective is "to foreclose retention by the violator of its ill-gotten gains." (*Fletcher v. Security Pacific Nat. Bank* (1979) 23 Cal.3d 442, 449.) Deterrence is a companion goal. By the statutory language used, "the Legislature obviously intended to vest the trial court with broad authority to

fashion a remedy that would effectively 'prevent the use [of unfair business practices]' and deter the defendant, and similar entities from engaging in such practices in the future." (*Id.* at p. 450.) As stated in another seminal UCL decision, "[T]o permit the [retention of even] a portion of the illicit profits, would impair the full impact of the deterrent force that is essential if adequate enforcement [of the law] is to be achieved. One requirement of such enforcement is a basic policy that those who have engaged in proscribed conduct surrender all profits flowing therefrom." (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267, internal quotation marks omitted.)

These core tenets of UCL jurisprudence are a forceful rejoinder to the complaints of U.S. Bank and its amici that Phase II of the trial here was imperfect. As the adage goes, litigants are entitled to a fair trial, not a perfect one. Especially given the UCL's deterrent function, plaintiffs did not need to establish to a scientific certainty what each class member was owed in unpaid overtime.

Indeed, adjudication of misclassification suits dovetails with the settled UCL principles. As two justices of this Court observed last year, "we have encouraged the use of a variety of methods to enable individual claims that might otherwise go unpursued to be vindicated, and to avoid windfalls to defendants that harm many in small amounts rather than a few in large amounts." (*Brinker*, *supra*, 53 Cal.4th at p. 1054 (conc. opn. of Werdegar, J., joined by Liu, J.).) Among the widely recognized approaches, "[r]epresentative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability." (*Ibid.*) The trial court properly relied on those tools in this case.

C. State Class Actions Are Vital to Implement California's Protective Overtime Rules

Finally, the Court of Appeal here was cavalier in decertifying the class. This is so as a matter of procedural fairness (not providing plaintiffs any opportunity to make a renewed certification request) and effectively eviscerating the underlying cause of action (overtime claims routinely adjudicated classwide rather than individually). The Court of Appeal's heavy reliance on federal case law to decertify the class is ironic given the dual nature of overtime regulation. Not only does California have its own class action jurisprudence (which the intermediate panel disregarded) but also formidable wage-and-hour laws (which exist only to provide greater protection than federal overtime requirements).

It was the states that first sought to rectify the imbalance of bargaining power that characterized the industrial age workplace. A century ago, state legislatures began adopting laws to redress the "low wages, long hours and poor working conditions under which women and children often labored." (*Martinez v. Combs* (2010) 49 Cal.4th 35, 53.) By the Great Depression, states had authority to set the "rate of pay for overtime work" and "maximum hours of labor . . . ." (*Max Factor & Co. v. Kunsman* (1936) 5 Cal.2d 446, 460.) More recently, the U.S. Supreme Court noted what, except for a brief period, is beyond dispute: "[T]he establishment of labor standards falls within the traditional police power of the State." (*Fort Halifax Packing Co., Inc. v. Coyne* (1987) 482 U.S. 1, 21.)

When President Franklin Roosevelt took action on wage-and-hour regulation, there was no presumption that the federal government would occupy the field. The Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. § 201 et seq.) did not establish the exclusive means of relief for employees who are "misclassified" – the dry euphemism for an employer's illegal denial of

overtime pay. To the contrary, "not only does the FLSA leave 'room' for supplementary state regulation of overtime, the FLSA expressly indicates that it does not preempt this regulation." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 567.) Congress confirmed the power of states to continue to regulate overtime in the savings clause codified at 29 U.S.C. § 218(a).

Consistent with the equal dignity accorded state regulation, California has long provided employees independent wage protections under state law. The Industrial Welfare Commission was established in 1913, a quarter century before the New Deal. (See *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 700-702 [historical background].) The California Constitution expressly affirms the state's regulatory power: "The Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive, and judicial powers." (Cal. Const., art. XIV, § 1 (2013).)

All of this is relevant here because state overtime rules – what plaintiffs in this litigation have sought to enforce since 2001 – exist ***only*** to provide greater protection to workers. "[T]he purpose behind the FLSA is to establish a national ***floor*** under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA." (*Pacific Merchant Shipping Assn. v. Aubry* (9th Cir. 1990) 918 F.2d 1409, 1425, emphasis in original.)

The protective force of California's rules, and the need for class certification to give them real meaning, cannot be overstated. For decades, "both the Legislature and our courts have accorded to wages special considerations," and "the purpose in doing so is based on the welfare of the wage earner." (*Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 330.) This Court has added: "The duty to pay overtime

wages is a duty imposed by the state; it is not a matter left to the private discretion of the employer." (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 456, internal quotation marks omitted.) In sum, due to the relatively small amounts at stake individually, precluding the employees here from joining together as a class "would pose a serious obstacle to the enforcement of the state's overtime laws." (*Id.* at p. 450.) The Court of Appeal improperly brushed aside this consideration – thereby denying the class the benefit of California's robust overtime requirements.

IV. CONCLUSION

The Court of Appeal's judgment should be reversed.

DATED: May 2, 2013

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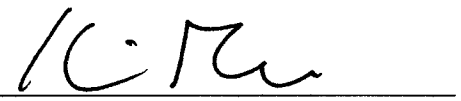

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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to rule 8.204(c)(1) of the California Rules of Court, the enclosed **APPLICATION TO FILE AND AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA SUPPORTING PLAINTIFFS-RESPONDENTS** is produced using 13-point Roman type, including footnotes, and contains approximately 3,161 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count provided by Microsoft Word word-processing software.

DATED: May 2, 2013

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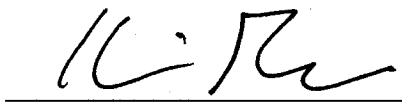

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DECLARATION OF SERVICE BY MAIL

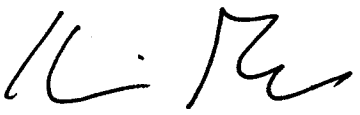
I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. That on May 2, 2013, declarant served the **APPLICATION TO FILE AND AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA SUPPORTING PLAINTIFFS-RESPONDENTS** by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this second day of May, 2013, at San Diego, California.



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