Case No. S200923

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

Sam Duran et al.,

Plaintiffs and Respondents,

v.

U.S. Bank National Association,

Defendant and Appellant.

Court of Appeal of the State of California
Case Nos. A12557 and A12687
Superior Court of the State of California
County of Alameda
Hon. Robert B. Freedman, Judge Presiding
Civil Case No. 2001-035537

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT/APPELLANT U.S. BANK NAT. ASSN.

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to California Rule of Court 8.520(f), the California Chamber of Commerce requests permission to file the attached *amicus curiae* brief in support of Respondent U.S. Bank National Association.

The California Chamber of Commerce ("CalChamber") is a nonprofit business association with over 13,000 individual and corporate members, representing virtually every economic interest in California. For over 100 years, CalChamber has been the voice of California business, both large and small.[1]

CalChamber acts to improve the state's economic and jobs climate, by representing business on a broad range of legislative, regulatory and legal issues. CalChamber frequently advocates before the courts by filing *amicus curiae* briefs in cases involving issues of concern to the business community.

The instant case is of critical importance to California businesses because of its effect on the defense of class action litigation. The class action procedure can help courts and the public obtain justice more economically and efficiently. As this Court and others have recognized, however, class actions can cause great harm if misused.

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[1] Per Cal. R. Ct. 8.520(f)(4): no party or its counsel authored this brief in whole or in part. No party or its counsel, or any person or entity (other than amicus and its counsel), made any monetary contribution towards, or in support of, the preparation of this brief.

As counsel for *amicus curiae*, we have reviewed the briefs filed in this action. We believe that this Court would benefit from additional briefing on certain key issues and policy concerns underlying class actions, particularly in the area of wage-hour law. Therefore, on behalf of the CalChamber, the undersigned respectfully asks this Court to allow the filing of the attached brief.

Dated: May 3, 2013

Respectfully submitted,

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AMICUS CURIAE BRIEF

I.
INTRODUCTION

To paraphrase the Greek physicist Archimedes, a long enough lever can move the earth. Fortunately, Archimedes did not actually take on that task. Moving the earth could be disastrous if performed without adequate safeguards.

The class action device in the context of civil litigation is a powerful lever. The prospect of classwide liability may cause a defendant to fear an economic catastrophe analogous to unplanned earth movement. Class certification – the procedure of joining individuals who might never have filed a lawsuit – occurs before the fact-finder ever determines if the defendant violated any law. The aggregation of potential claimants multiplies potential financial exposure, often beyond business owners' risk tolerance. Most certified class actions settle before any finding of liability because the post-certification stakes are so high.

To allow statistical evidence to establish classwide liability in a wage-hour case, such as the one before this Court, moves the class action lever's fulcrum too far. Unlike many consumer class actions, each putative classmember's claim may involve tens of thousands of dollars. The substantive law in many wage-hour cases requires fact-intensive analysis. Using sampling, representative testimony and the like to determine classwide liability, combined with the class action's inherent leverage, deprives the defendant of a fair procedure to prove its case on the merits.

Class certification standards, appellate review of certification decisions, and the rules of civil procedure and evidence are bulwarks

against unfair application of the class action lever. Another check against the class action's power is the defendant's ability to introduce evidence that negates individual classmembers' right to recover. The plaintiff's proposed use of sampling to determine classwide *liability*, without providing the defendant a chance to prove a fact-intensive affirmative defense to liability, upsets the delicate balance this Court, and others, have struck.

The law does not require the defendant to pay overtime to *even one person* properly classified as "exempt." In this case, for example, admissible evidence that one or more of the defendant's employees *in fact* was "exempt" from overtime, despite the statistician's extrapolation, should have precluded the court from including that plaintiff among those claiming mis-classification. Moreover, such evidence not only is relevant in its own right, but also undermines the relevance and reliability of the expert's extrapolation.

The class action procedure is not so desirable that courts must change substantive law to better accommodate aggregated claims. As this Court said long ago: "Altering the substantive law to accommodate procedure would be to confuse the means with the ends -- to sacrifice the goal for the going." *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 462 (1974).

The trial plan in this case did exactly what this Court in *City of San Jose* said not to do. Permitting 21 people to generalize about how over 230 others spend their work time, workweek by workweek, unacceptably sacrificed due process for efficiency. The substantive affirmative defense to an overtime claim, exemption, is a fact-specific inquiry. By prohibiting the defendant from introducing relevant evidence as to whether the other putative class members

qualified for the exemption, the trial court unfairly hamstrung the defendant and deprived it of due process - a fair procedure.

The Court need not decide in this case whether statistical sampling can be used to determine liability in *all* cases. It may be that such proof can be appropriately used where discrete events cause small amounts of harm to large groups of people. For example, it is possible that properly validated sampling may be suited to a mass tort, or a business practice where liability does not depend on a host of fact-based variables. Even in a wage-hour case, a discrete decision or policy may give rise to liability that does not vary based on each plaintiff's workday and workweek. But "[e]ven assuming representative or statistical sampling may be used to prove liability on a classwide basis in an appropriate overtime-pay class action, this is not that action." *Dailey v. Sears, Roebuck & Co.*, 214 Cal. App. 4th 974, 998 (2013). And when such proof is allowed, the defendant should still be afforded a chance to contest liability as to individuals included within a class, consistent with the rules of evidence and procedure that apply to any other lawsuit.

For all of these reasons, this Court should affirm the Court of Appeal's judgment.

II.
DISCUSSION

A. LIABILITY BASED ON A SAMPLE OF POTENTIAL PLAINTIFFS IN OVERTIME CASES, OR OTHERS INVOLVING SIGNIFICANT FINANCIAL EXPOSURE, WILL COERCE VIRTUALLY ALL BUSINESSES TO SETTLE BEFORE THE COURT DETERMINES ANY WRONGDOING

1. This Court Properly Considers Whether Class Action Procedures Unfairly Coerce Defendants Into Settlement

"Despite this court's general support of class actions, it has not been unmindful of the accompanying dangers of injustice or of the limited scope within which these suits serve beneficial purposes." *City of San Jose*, 12 Cal. 3d at 459. This Court recognizes that "because group action also has the potential to create injustice, trial courts are required to 'carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts.'" *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000) (internal quotations and citations omitted).

The "dangers of injustice" necessarily include "forcing [] defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability . . . ." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (2-1 opinion). There, a Seventh Circuit panel issued a discretionary writ of mandamus overturning class action certification in a large class action brought against a drug manufacturer. (A later amendment to Federal Rule of Civil Procedure 23 permits appeal of class action certification orders in the court's discretion. *See* Fed. R. Civ. Pro. 23(f)). The Court of

Appeals, in its analysis of whether to issue the writ, considered that allowing the case to proceed would coerce settlement even though there were serious doubts about the case's legal merit.

A class action's power to force a defendant to settle is well understood. As Rule 23's Advisory Committee noted: "An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." *See* Advisory Committee Note to 1998 Amendment to Fed. R. Civ. Pro. Rule 23.

This concern is magnified in class actions that involve significant amounts of potential damages per class member, such as in the instant case.[2] When "the potential exposure is so large[,] the pressure to settle may become irresistible." *Starbucks Corp. v. Superior Court*, 168 Cal. App. 4th 1436, 1453 (2008). *See also Blair v. Equifax Check Servs.*, 181 F.3d 832, 834 (7th Cir. 1999) ("a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere.").

2. Existing Class Action Procedures All But Require Most Defendants to Settle High-Stakes Cases Before Courts Evaluate the Legal Merit of a Classwide Claim

The class action certification process is procedural; it involves only limited consideration of the dispute's merits. *See, e.g., Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1023 (2012) ("resolution of disputes over the merits of a case generally

[2] The instant case involved 260 members at the time of trial (*see* AOB at 14). The trial court awarded nearly $15 million in unpaid overtime and pre-judgment interest (*see id.* at 23).

must be postponed until after class certification has been decided."). "Enhancing the prospects for obtaining a settlement *on a basis other than the merits* is hardly a worthy legislative objective ... ." *Jones v. Lodge at Torrey Pines Partnership*, 42 Cal. 4th 1158, 1166 (2008) (emphasis added).

Therefore, this Court should find as a policy matter that, particularly where, as here, the case involves fact-intensive defenses and high-dollar individual claims, allowing sampling or other statistical proof to establish classwide liability tips the playing field too far in favor of class action plaintiffs. It is a fact that most class actions settle before the courts consider the case's merits. According to the Office of Administration of the Court's most recent study of class action filings and dispositions:[3]

- the "vast majority of cases in which a class is certified end in a classwide settlement disposition." *See* AOC Study at 23;
- "Eighty-nine percent of certified cases end in settlement, as compared with 15% of cases with no certification." *Id.*;
- Less than one percent of cases filed as class actions go to verdict. *Id.*;
- Courts grant a defendant's motion for summary judgment only two percent of the time when there is a certified class, and only four percent of the time when there is an uncertified class. *Id.*

[3] *See* Administrative Office of the Courts, "Class Certification in California: Second Interim Report etc." (Feb. 2010) (available on the internet at http://www.courts.ca.gov/documents/classaction-certification.pdf) (last accessed Apr. 28, 2013) ("AOC Study").

The AOC study revealed that when class certification was the result of a litigated motion, 69% of cases ended in settlement. *Id.* at 26. Perhaps granting class certification does not make settlement "inevitable," but settlement is more than two–thirds probable after a court grants a class certification motion. Again, the court's decision to grant certification does not mean the substantive claim has merit. It means only that the court can decide certain issues on a classwide basis, which will *determine* some or all of the case's merits.

The AOC study also found that 81% of the total settled cases included a motion for class certification as part of the settlement. *Id.* at 25. So, in 81% of the certified actions evaluated during the study period, the defendants agreed to settle even before litigating whether class certification was appropriate in the first place. The study's authors opined this statistic may mean that class certifications may not coerce defendants into settling. Another explanation, equally plausible, and *more* likely from a business prospective, is that *merely filing* a case as a class action prompts settlements via stipulated certification.

The financial stakes in overtime and other wage-hour class actions cannot be brushed aside as insignificant to the defendant's decision to settle. As stated, the instant case involved 260 members at the time of trial (*see supra* n.2). The trial court awarded nearly $15 million in unpaid overtime and pre-judgment interest. *See id.* That is an award of over $50,000 per class member, without consideration of possible penalties, costs, and attorney's fees.

The instant case actually involved a relatively small class, even for a wage-hour dispute. *See, e.g., Brinker*, 53 Cal.4th at 1019 n.4 (approximately 60,000 putative class members). Even if each plaintiff in a case the size of *Brinker* were entitled to just $1,000.00

in back pay, penalties, interest, and attorney's fees – a modest figure in wage-hour cases – the potential recovery would be $60,000,000.00.[4] In *Bell v. Farmers Ins. Exchange*, 115 Cal. App. 4th 715, 724 (2004), a jury awarded about $90,000,000 in overtime to 2402 class members, over $37,000 per plaintiff in overtime alone.

In sum, the stakes in wage-hour litigation typically involve far more than "the overpayment of a few cents for a taxi fare, or purchase of a bag of 'Frito' corn chips." *Spoon v. Superior Court*, 130 Cal. App. 3d 735, 746 (1982) (holding the defendant has a due process right to issue interrogatories to class members). If this Court approves the use of sampling to establish class-wide *liability*, without giving the defendant the chance to litigate affirmative defenses relevant to individual class members, the plaintiffs will gain unfair leverage, magnified further by the financial consequences of an adverse verdict.

Fearing the potential for catastrophic liability, almost all defendants will be compelled to settle claims before the trial court rules on certification, and even before the trial court can order sampling to determine liability. This Court should not permit class actions to work such an unjust result.

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[4] According to this Court's opinion in *Gentry v. Superior Court*, 42 Cal. 4th 443, 458 (2007), the Division of Labor Standards Enforcement reported the average award from its wage adjudication unit between 2000 and 2005 was $6,038.

B. THE DEFENDANT IS ENTITLED TO PRESENT INDIVIDUAL AFFIRMATIVE DEFENSES TO LIABILITY AS TO ANY INDIVIDUAL IN THE CLASS

1. *Wal-Mart v. Dukes* Requires the Court to Permit Litigation of Individual Affirmative Defenses Under Federal Rules of Civil Procedure 23

The Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011), described the sampling proposal at issue in that case, also involving the instant case's expert, Dr. Drogin, as follows:

> A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery--without further individualized proceedings.

Id., 132 S. Ct. at 2561.

The Court held "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Id.* The Court based its holding on Rule 23 and the Rules Enabling Act, which mandates that the Federal Rules of Civil Procedure "not abridge, enlarge or modify any substantive right." *See* 28 U.S.C. § 2072; *Dukes*, ____ U.S. ___, 131 S. Ct. at 2561 (quoting the statute). All nine justices joined Part III of the Court's opinion, which includes the above analysis. Dukes, ___ U.S. ____, 131 S. Ct. at 2546.

In the absence of California law on the subject, California courts rely on federal interpretations of Rule 23 as persuasive authority. *See, e.g.*, *Vasquez v. Superior Court*, 4 Cal. 3d 800, 821 (1971). California's class action rules, like Rule 23, are procedural and do not modify the substantive law. *See City of San Jose*, 12 Cal. 3d at 462 & n. 9. That restriction ensures defendants in class action cases are afforded the same due process–the right to present substantive defenses–as they would be entitled to in single-plaintiff litigation.

2. Post-*Dukes* Opinions Recognize the Defendant's Right to Present Evidence of Affirmative Defenses to Individual Claims

The plaintiffs in *George v. National Watermain Cleaning Co.*, 286 F.R.D. 168 (D. Mass. 2012), alleged a variety of wage-hour violations under Massachusetts law, such as failing to pay prevailing wage, unlawful alterations of time cards and miscalculation of overtime. *Id.* at 171. The employer asserted a host of arguments why individual issues precluded certification, such as the unreliability of some employees' time cards, that some employees performed tasks that did not require prevailing wage, and timecard fraud. *Id.* at 179.

The district court granted the plaintiffs' motion for class certification over the employer's objections. *Id.* at 181. The court rejected the employer's argument that individual defenses precluded *certification* of the class. However, the court recognized: "the Corporate Defendants will be entitled, as *due process requires*, later in these proceedings to show that they were in fact not liable to a particular plaintiff under the wage laws." *Id.* (emphasis added). After discussing *Dukes*, the district court noted: "the Named Plaintiffs

must prove actual liability by showing that certain types of alleged actions were violations of state law and by proving that these actions occurred. Moreover, *as required, the defendants are entitled to any additional proceedings required to ensure that their due process rights are protected. Id.* at 182 (emphasis added).

Similarly, the Court of Appeal in *Dailey v. Sears, Roebuck & Co.*, 214 Cal. App. 4th 974 (2013), citing *Dukes*, rejected the use of Dr. Drogin's proposal to substitute a statistical sample for individual proof of employees' exempt status. *Id.* There, a putative class of Sears Auto Center managers and assistant managers claimed mis-classification as exempt under Wage Order 7-2001's executive exemption. *See* Cal. Code Regs., tit. 8, art. 7, § 11070, subd. 1(A).

Opposing the plaintiff's motion for class certification, Sears presented evidence that "day-to-day tasks of Managers and Assistant Managers, rather than being uniformly dictated by these few policies and practices, vary greatly depending on a number of factors, ranging from the store's location to particular management styles and preferences." *Dailey*, 214 Cal. App. 4th at 996-97. Plaintiff Dailey argued that Dr. Drogin's sampling methodology would ameliorate the individual issues:

> Dr. Drogin described a procedure whereby a random, representative sample of proposed class members would be deposed regarding the duties they performed to determine whether they were properly classified as exempt. This information could then be projected to the proposed class as a whole, to determine Sears's liability, and thereafter, could be used to determine damages.

Id. at 998 n.9.

Affirming the trial court's denial of Dailey's motion for class certification, the Court of Appeal observed:

> We have found no case . . . where a court has deemed a mere proposal for statistical sampling to be an adequate evidentiary substitute for demonstrating the requisite commonality, or suggested that statistical sampling may be used to manufacture predominate common issues where the factual record indicates none exist. If the commonality requirement could be satisfied merely on the basis of a sampling methodology proposal such as the one before us, it is hard to imagine that any proposed class action would not be certified.

Id. at 998.

While the court decided *Dailey* in the context of class certification, the court's concern applies to the trial plan in the instant case. The proposal Dr. Drogin advanced in *Dailey* would in effect have removed Sears's ability to establish how those managers who were *not* deposed spent their time.

The trial plan in the instant case did just that. U.S. Bank National Association ("USB") was precluded from introducing testimony by any class member (outside the pre-selected group of "RWGs") about how the putative classmembers spent their time. A key issue in this outside sales exemption case was how each putative class member spent his or her time. The trial plan hobbled USB's effort to introduce evidence relevant to that fundamental issue. In fact, the trial court did not permit USB to present testimony from two RWGs who opted out because they were promoted to management positions. Pet. For Review at 11.

Finally, the concern over a defendant's due process rights is evident in *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743 (9th Cir. 2010), *vacated and remanded*, ___ U.S. ___, 132 S. Ct. 74 (2011). *Wang* involves a claim by newspaper reporters who claimed they were mis-classified as exempt under federal and California law. *Id.* at 750. The Supreme Court vacated the Ninth Circuit's original opinion because the class claims involved monetary relief and could not be certified under Rule 23(b)(2).[5]

On remand from the Supreme Court, the Court of Appeals decided that the district court's certification under Rule 23(b)(2) could not stand. *Wang v. Chinese Daily News*, 709 F.3d 829, 834-35 (9th Cir. 2013). The court sent the case back to the district court to consider, in light of *Dukes*, whether the class could be certified under Rule 23(b)(3).[6] The court instructed the district court:

> In Wal-Mart, the Supreme Court disapproved what it called "Trial by Formula," wherein damages are determined for a sample set of class members and then applied by extrapolation to the rest of the class "without further individualized proceedings." Wal-Mart, 131 S. Ct. at 2561. Employers are "entitled to individualized determinations of each

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[5] Fed. R. Civ. Pro. 23(b)(2) provides in pertinent part that a "class action may be maintained if * * * the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole . . . ."

[6] Fed. R. Civ. Pro. 23(b)(3) authorizes class certification if, in addition to finding certification appropriate under Rule 23(a), "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

> employee's eligibility" for monetary relief. Id. at 2560. *Employers are also entitled to litigate any individual affirmative defenses they may have to class members' claims*. Id. at 2561.

Wang, 709 F.3d at 836 (emphasis added).

Thus, the post-*Dukes* opinions recognize that defendants have a right to "litigate any individual affirmative defenses they may have to class members' claims." *Id.* That requirement applies not only to damages, but *also to liability*.

The dispute warranting this Court's review is not merely about whether defendants may introduce individualized proof regarding *damages*, such as the number of overtime hours worked. That issue has been litigated before. *See, e.g., Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 333 (2004) ("the use of statistical sampling in an overtime class action 'does not dispense with proof of damages but rather offers a different method of proof'"(citation omitted)). Similarly, this Court repeatedly has said that individual issues do not preclude certification when there are predominating common questions. *See id.* at 334 ("We long ago recognized 'that each class member might be required ultimately to justify an individual claim does not necessarily preclude maintenance of a class action.'").

Rather, this case is about extrapolating liability based on probabilities, in a case where the *individual facts* are critical, and the court will not consider those facts because it elevated statistics over reality. The above language from *Sav-On* includes the assumption that the defendant must have an opportunity to put on evidence, post-certification, that an individual claim is *not* "justified." That is

the evidence USB wanted to introduce. That is the evidence the trial court excluded in favor of a statistical shortcut.

This Court should ensure defendants have the right to prove their affirmative defenses as to any individual class member(s), subject to the Evidence Code's general provisions and limitations. Otherwise, this Court will unfairly elevate the "goal" over the "going."

III.
CONCLUSION

In sum, this Court should affirm the judgment of the Court of Appeal.

Dated: May 3, 2013

Respectfully submitted,

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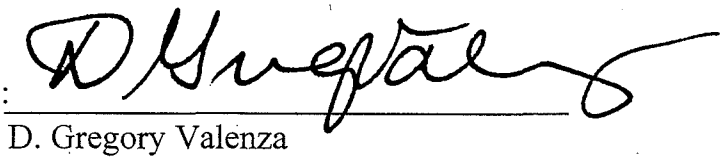
By: 

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CERTIFICATE OF WORD COUNT

Counsel for *amicus curiae* certifies that its Brief is 3758 words, based on the word count produced by the word processing software used to prepare the brief.

Date: May 3, 2013

D. Gregory Valenza

CERTIFICATE OF SERVICE

I, Carolyn Angel, declare that I am employed with the law firm of Shaw Valenza LLP, whose address is 300 Montgomery St., Ste. 788, San Francisco, California 94104; I am over the age of eighteen (18) years and am not a party to this action. On May 3, 2013, I served the attached APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT/APPELLANT U.S. BANK NAT. ASSN. in this action by placing a true and correct copy thereof, enclosed in sealed envelope(s) addressed as follows:

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I declare under penalty of perjury under the laws of the United States of America that the above is true and correct; executed on May 3, 2013, at San Francisco, California.

Carolyn Angel

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