IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S200923

SAM DURAN and MATT FITZSIMMONS,

Plaintiffs and Respondents,

v.

U.S. BANK NATIONAL ASSOCIATION,

Defendant and Appellant.

After an Opinion by the Court of Appeal,
First Appellate District, Division One
(Case No. A125557)

On Appeal from the Superior Court of Alameda County
(Case No. 2001035537, Honorable Robert Freedman, Judge)

APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANT AND APPELLANT

DEBORAH J. LA FETRA, No. 148875
CHRISTINA M. MARTIN, *Of Counsel*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorneys for Amicus Curiae
Pacific Legal Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Statute

Rules of Court

Miscellaneous

Page

Page

APPLICATION TO FILE BRIEF AMICUS CURIAE

Pursuant to California Rule of Court 8.520(f),[1] Pacific Legal Foundation requests leave to file the attached brief amicus curiae in support of Defendant and Appellant U.S. Bank National Association. Amicus is familiar with the issues and scope of their presentation. Amicus believes the attached brief will aid the Court in its consideration of the questions presented in this case by arguing that reliance upon statistical sampling in a class action may violate due process rights. As the voice of the public interest, the proposed brief presents constitutional issues with an eye toward how the rule adopted may apply in other contexts, beyond the bank and employees directly affected by this case.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters

---

[1] Pursuant to California Rule of Court 8.520, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

nationwide. PLF is headquartered in Sacramento, California, and has offices in Bellevue, Washington; Stuart, Florida; and Honolulu, Hawaii.

In furtherance of its continuing mission to defend individual and economic liberties, PLF established its Free Enterprise Project. Through that project, the Foundation seeks to protect the free enterprise system from abusive regulation, a civil justice system that grants excessive liability awards, and barriers to the freedom of contract. To that end, PLF has participated in several cases before the U.S. Supreme Court and this Court on matters affecting the public interest, including issues of due process and class certification. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007); and *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004). PLF attorneys also have published on due process and related matters affecting entrepreneurs. *See, e.g.*, Timothy Sandefur, *The Right to Earn a Living* (2010). PLF believes its expertise in these areas will assist this Court in its consideration of the questions presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

Sam Duran and Matt Fitzsimmons brought a wage and hour class action under California's Unfair Competition Law on behalf of 260 "business banking officers" (BBOs) who claimed U.S. Bank misclassified them and denied them overtime pay in violation of the Labor Code. *Duran v. U.S. Bank*

Nat'l Ass'n, 203 Cal. App. 4th 212, 216, 219 (2012). The trial court allowed the Plaintiffs to select 21 BBOs from whom they would extrapolate the amount of time that all class members spent outside the office and the amount of overtime allegedly improperly withheld. *Id.* at 238. The court then refused to allow U.S. Bank to submit more than 70 declarations of BBOs swearing that they had *not* been misclassified. *Id.* at 219, 263. The court awarded $15 million to the class, and $18 million in attorneys' fees. *Id.* at 263; *Duran v. U.S. Bank Nat'l Ass'n*, No. 2001-035537, Order Granting in Part and Denying in Part at 32 (Alameda Sup. Ct. Dec. 16, 2010). The appellate court below reversed, finding that this trial process violated due process by denying U.S. Bank the right to mount a defense and by inappropriately certifying the class. *Id.* at 275.

The Plaintiffs sought review, arguing that this trial by formula was adequate, and that the efficiencies created by the statistical sampling override any right of the Defendant to assert individual defenses. *See* Pet'r Brief at 49-50. Ultimately, Plaintiffs ask this Court to approve procedural shortcuts in the name of judicial economy, no matter how inaccurate the results may prove. *Id.*

However attractive brevity may be, class actions do not relieve a plaintiff's burden to prove his right to recover, nor do they abrogate a defendant's right to mount a defense. States traditionally have considerable leeway in the rules they apply to class actions in their own state courts, but

sometimes these procedures cross the line to violate the United States Constitution's due process guarantee. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (Class actions may "achieve economies of time, effort, and expense," but only when those goals can be achieved "without sacrificing procedural fairness or bringing about other undesirable results."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (the "Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members."); *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense."). Such basic procedures are essential to ensuring an accurate and impartial judicial system. When a class action's judicial economy depends on abridgement of these time-honored rights, the procedure violates due process and cannot stand.

In addition to each individual party's due process rights, improper aggregation of claims leads to numerous systemic problems—some of which California has already glimpsed: uninjured plaintiffs piggybacking upon legitimate claims; absent plaintiffs with unusually strong claims whose rights get lost in the midst of the class action; a precipitous increase in the number of inappropriate class actions and thus an increase in costs to business born ultimately by the consumer. As this Court has acknowledged, "what really matters to class certification" is "not similarity at some unspecified level of

generality but, rather, dissimilarity that has the capacity to undercut the prospects for joint resolution of class members' claims through a unified proceeding." *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1022 n.5 (2012) (quoting Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131 (2009)).

For these reasons, the decision below should be affirmed.

ARGUMENT

I

DEFENDANTS HAVE A DUE PROCESS RIGHT TO MOUNT A DEFENSE

The purpose of the Due Process Clause is to protect individual rights, and, therefore, procedural fairness protects individual justice. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011) ("The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power."). Procedural fairness affirms individual autonomy and dignity, recognizing that every American has a right to his "own day in court." *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (quoting 18 Charles Alan Wright, et al., *Federal Practice and Procedure* § 4449 (1981)); *see, e.g.*, Sara B. Tosdal, *Preserving Dignity in Due Process*, 62 Hastings L.J. 1003, 1005 (2011); Judith Resnik, et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296, 306 (1996). Procedural fairness also affects the accuracy and fairness of the outcomes it

produces. *See, e.g.*, Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193, 201-02 (1992).

Though the conditions that satisfy due process vary depending upon the circumstances, courts have resolved that "[t]he chance to be heard, to present one's own side of the story, is a fundamental requirement of any fair procedural system." *D'Acquisto v. Washington*, 640 F. Supp. 594, 612 (N.D. Ill. 1986) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 546 (1985) ("The essential requirements of due process . . . are notice and an opportunity to respond.")); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Critically, "'[d]ue process requires that there be an opportunity to present *every* available defense.'" *Lindsey*, 405 U.S. at 66 (emphasis added) (quoting *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)).

In interpreting these basic rights, courts tailor due process concerns to the circumstances, considering the private interest at stake, the risk of erroneous deprivation, whether other safeguards would help, the interest of the party seeking the procedure, and the government's interests. *Matthews v. Eldridge*, 424 U.S. 319 (1976); *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991); *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 751-53 (2004). In the name of pragmatism, judicial economy, or efficiency, some courts have sacrificed defendant and plaintiff rights in class litigation. But the Due Process Clause, which inspired the content of the federal class action rules, and which

California rules generally echo, should be the polestar in any procedural class action inquiry. *See* Christopher Chorba, et al., *Other Due Process Challenges to the Class Device, in* A PRACTITIONER'S GUIDE TO CLASS ACTIONS 737, 739-41 (Marcy Hogan Greer ed. 2010) (explaining how due process considerations shaped the requirements of Rule 23 of the Federal Rules of Civil Procedure); *also see Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864 (1999) (Court invalidated a settlement class action for failure to satisfy Rule 23. However, its narrow reading of the rule was based, at least in part, on concern that certification might undermine procedural due process).

A. The Due Process Right To Defend Oneself Does Not End When a Class Is Certified

Rules that allow for class actions do not "abridge defendants' rights; they alter only how the claims are processed." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010). Certification of a class, no less than joinder, "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Id.* The plaintiff must prove, and the defendant must be given the opportunity to contest, every element of a claim. *See In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 221 (E.D. La. 1998) (plaintiffs' proposal to prove causation through individual affidavits submitted to special master rejected as "one-sided procedure [which] would amount to an end-run around defendant's right to cross-examine individual plaintiffs"). Otherwise, the class action device can "turn into a mechanism for

putting a defendant under a microscope and then putting that defendant on trial, rather than testing whether a particular plaintiff meets the elements of a cause of action and whether defenses to that cause of action exist in the context of a particular occurrence." John C. Massaro, *The Emerging Federal Class Action Brand*, 59 Clev. St. L. Rev. 645, 677 (2011).[2]

It is "inappropriate to deprive defendants of their substantive rights merely because those rights are inconvenient in light of the litigation posture plaintiffs have chosen." *Granberry v. Islay Invs.*, 9 Cal. 4th 738, 749 (1995). As the Second Circuit has emphasized, "The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation." *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992); *see also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191-92 (3d Cir. 2001) ("[A]ctual injury cannot be presumed, and defendants have the right to raise individual defenses against each class member."). By removing individual

---

[2] *Cf.* Cal. Evid. Code § 1101(a) ("[E]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."); Allan G. King, et al., *Social Framework Analysis As Inadmissible "Character" Evidence*, 32 Law & Psychol. Rev. 1, 1-3 (2008) (explaining how class actions often rely upon social science research to essentially put the character of a corporate defendant on trial).

considerations from the adversarial process, the judicial system is shorn of a valuable method for screening out marginal and unfounded claims. In this way, "[c]lass certification magnifies and strengthens the number of unmeritorious claims." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).[3] Class treatment increases the likelihood that uninjured plaintiffs will recover. When each plaintiff's claimed injuries are relatively inexpensive, the harm will be limited. However, as the average plaintiff's claim for injuries grows, the risks for the defendant grow exponentially, as plaintiff's claims are multiplied across the class. Class certification hides the weaknesses in the claims of individual plaintiffs because the plaintiffs collectively are "able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced together for litigation." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998). This affects jury behavior, as studies reveal that "aggregating claims increases both the likelihood that a defendant will be found liable and the amount that a jury will award." Peter A. Drucker, *Class Certification and Mass Torts: Are "Immature" Tort Claims Appropriate for Class Action Treatment?*, 29 Seton Hall L. Rev. 213, 220 (1998). This case, in which the trial court permitted selected plaintiffs to offer testimony while

---

[3] In most class action cases, defendants are pressured into settling because of the massive cost and risk presented by the behemoth task of defending against a class action lawsuit. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. at 1752 ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.").

prohibiting conflicting testimony from other members of the plaintiff class, demonstrates just such a creation of a "perfect plaintiff," disregarding any evidence that marred the picture.

B. Use of Statistical Sampling To Prove Liability in Class Actions Poses Serious Threats to Due Process

The key question about exempt status is "first and foremost, how the employee actually spends his or her time," and whether each individual spends more than half the time performing exempt duties. *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 802 (1999). Thus, exemption status "turns on a detailed, fact-specific determination." *Id.* at 790;[4] *Nordquist v. McGraw-Hill Broad. Co.*, 32 Cal. App. 4th 555, 565 (1995) ("whether an employee is exempt is a factual question, so prior decisions are of limited value because employees with the same job titles may be either exempt or nonexempt depending on their job functions"); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1226 (5th Cir. 1990) ("the inquiry into exempt status . . . remains intensely factbound and case specific").

Statistical sampling, offered as a means of proving liability, presents serious problems for due process, particularly in the highly individualized

---

[4] The question turns on the particular tasks performed by each employee; whether each of those tasks is exempt or nonexempt; and the amount of time each employee actually spends on each task; followed by a calculation of whether the exempt duties occupy more than half of the employee's time. *Ramirez*, 20 Cal. 4th at 803 n.5.

inquiries required in the employment law context: "First, how many allegedly injured employees constitute a sufficient sample size?" Saby Ghoshray, *Hijacked by Statistics, Rescued by Wal-Mart v. Dukes: Probing Commonality and Due Process Concerns in Modern Class Action Litigation*, 44 Loy. U. Chi. L.J. 467, 493 (2013); *see also Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977) ("Considerations such as small sample size may, of course, detract from the value of [statistical] evidence. . . ."); *Mayor of City of Philadelphia v. Educ. Equal. League*, 415 U.S. 605, 621 (1974) ("[T]he District Court's concern for the smallness of the sample presented by the 13-member Panel was . . . well founded."). Additionally, a grand total of 260 plaintiffs need not be sampled at all, because declarations could be obtained from all of them. *See, e.g., Brinker*, 53 Cal. 4th at 1020 (noting that Brinker submitted "hundreds of declarations" in opposition to class certification); *Bell*, 115 Cal. App. 4th at 727 (representative sample of 295 employees); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 977 (9th Cir. 2011) (defendant submitted 200 employee declarations to oppose class certification); *Wren v. RGIS Inventory Specialists*, 256 F.R.D. 180, 205 (N.D. Cal. 2009) (each side in Fair Labor Standards Act (FLSA) case filed "literally hundreds of declarations"). This is consistent with the general rules of joinder, in which some cases join hundreds of plaintiffs without using the class action device. *E.g., Nestle v. Santa Monica*, 6 Cal. 3d 920, 924 (1972) (over 700 named plaintiffs in a public

nuisance lawsuit); *Britt v. Superior Court*, 20 Cal. 3d 844 (1978) (936 named plaintiffs challenging airport's effect on their properties); *see also* Nicholas M. Pace, *Group and Aggregate Litigation in the United States*, 622 Annals 32, 33-34 (2009) (in addition to a class action, aggregation can take the form of mass joinder and mass consolidation of separate cases).[5]

Second, if a sample is used, it must be purely random if the evidence provided by the sample is to be extrapolated to the larger class.[6] As seen in this case (in common with many cases where plaintiffs control the sample), however, the sample is compromised through the use of preferred sample

---

[5] Despite large numbers of litigants, courts have held joinder to be appropriate. *See, e.g., Van Allen v. Circle K Corp.*, 58 F.R.D. 562, 564-65 (C.D. Cal. 1972) (joining 149 plaintiffs); *Minersville Coal Co. v. Anthracite Export Ass'n*, 55 F.R.D. 426, 428 (M.D. Pa. 1971) (330 plaintiffs); *Utah v. American Pipe & Constr. Co.*, 49 F.R.D. 17, 21 (C.D. Cal. 1969) (350 plaintiffs).

[6] The idea of extrapolation is based on a fundamental assumption that the causation associated with any plaintiff or a random sample does not vary within the population for which the sample in question is a part. In other words, causation applied to an individual does not change or vary from individual to individual. Therefore, extrapolation would satisfy the needs of justice for all such individuals once we identify a representative sample set.

Ghoshray, *supra*, at 479 n.59. *Chavez v. Ill. State Police*, 251 F.3d 612, 643 (7th Cir. 2001) ("non-random sample might undermine the reliability of the statistics"); *United States v. Johnson*, 185 F.3d 765, 769 (7th Cir. 1999) ("the samples themselves . . . are problematic [because] they were not selected randomly from a larger pool of subjects; thus, this was an instance of nonprobability sampling"); *Bush v. Commonwealth Edison Co.*, 990 F.2d 928, 932 (7th Cir. 1993) (the failure to examine a random sample of work records prevented the proffered statistics from demonstrating a pattern of racial discrimination).

litigants (e.g., the named plaintiffs) and other devices. Ghoshray, 44 Loy. U. Chi. L.J. at 493; *see Duran*, 203 Cal. App. 4th at 257-59. For example, in *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 2013 U.S. App. LEXIS 2409, **8-9 (7th Cir. 2013), an FLSA wage-and-hour case, the Seventh Circuit affirmed a decertification order where the plaintiffs failed to proved that its 42 "representative" employees were a random sample of the 2341-person workforce. The court pointedly explained that there was no explanation by class counsel as to whether the 42 employees "were volunteers, or perhaps selected by class counsel after extensive interviews and hand picked to magnify the damages sought by the class." *Id.* at *8. This was problematic, the court said, because "[t]o extrapolate from the experience of the 42 to that of the 2341 would require that all 2341 have done roughly the same amount of work, including the same amount of overtime work, and had been paid the same wage," and "[n]o one thinks there was such uniformity." *Id.* at *9. Moreover, the court noted that such an extrapolation would not properly account for the employee who underreported his time, not because of his employer's unlawful conduct, but because he wanted to impress his boss with his efficiency, in hopes of earning a promotion. *Id.* at *11. Finally the court contrasted *acceptable* means of inferring the amount of unreported time—reconstruction from memory; estimates based upon job particulars—with the

unacceptable means of extrapolating the "experience of a small, unrepresentative sample." *Id.* at *12.

Wong v. HSBC Mortg. Corp., 749 F. Supp. 2d 1009 (N.D. Cal. 2010), similarly involved the outside sales exemption classification. There, a plaintiff class of 124 employees sought summary judgment regarding their entitlement to relief for misclassification based on depositions from less than one-third of the class. *Id.* at 1016. The court acknowledged that the evidence was sufficient to prove that at least some of the class members were improperly classified as exempt. *Id.* at 1015. However, the court denied the plaintiffs' motion for summary judgment, because the plaintiffs had not offered any evidence "as to the work activities of a substantial majority of the plaintiffs" and it would be improper to infer liability for the whole class based solely on a sample's testimony. *Id.* at 1016. These cases demonstrate courts' general belief that flawed sampling so tilts the collection of evidence in favor of one party as to violate the other party's due process rights. Ghoshray, 44 Loy. U. Chi. L.J. at 493.

This is entirely consistent with the United States Supreme Court's decision in *Wal-Mart Stores Inc. v. Dukes* that would permit only limited use of statistical sampling in class actions, and decried a "trial by formula" that glossed over key individual components of the plaintiffs' claims. 131 S. Ct. at 2561. Rejecting plaintiffs' attempt to use a statistical sample to prove

employment discrimination against an entire class, the *Dukes* Court held that absent some clear corporate policy, employers are "entitled to individualized determinations of each employee's eligibility" for relief. *See id.* at 2560.

While plaintiffs would narrowly constrain *Dukes* to Title VII cases, *see* Pet'r Brief at 51-52, the Ninth Circuit recently applied *Dukes* to an employment exemption case very similar to this one. In *Wang v. Chinese Daily News, Inc.*, Nos. 08-55483 & 08-56740, 2013 U.S. App. LEXIS 4423 (9th Cir. Mar. 4, 2013), two reporters brought a class action against their employer, claiming violations of the federal Fair Labor Standards Act and California's Unfair Competition Law. The district court certified the class and granted summary judgment, finding the newspaper improperly categorized reporters as exempt employees. The district court permitted the plaintiffs to extrapolate injuries from a statistical sample and the newspaper appealed. The Ninth Circuit originally affirmed, 623 F.3d 743, 762 (9th Cir. 2010), but the United States Supreme Court granted the newspaper's petition for certiorari and remanded the case for reconsideration in light of *Dukes*. *Chinese Daily News, Inc. v. Wang*, 132 S. Ct. 74 (2012). In its decision on remand, the Ninth Circuit decertified the class, noting "potentially significant differences among the class members." *Wang*, 2013 U.S. App. LEXIS 4423, at *9. The court explained that it was inappropriate for the district court to determine that

common questions predominate based "largely in isolation" on the defendant's uniform policy of classifying reporters as exempt. *Id.* at **12-13.

The court cited *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 958-59 (9th Cir. 2009), and *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944-48 & n.14 (9th Cir. 2009), where the Ninth Circuit criticized the district court's very certification of the plaintiff class in *Wang*. *Wang*, 2013 U.S. App. LEXIS 4423, at **12-13. In both Ninth Circuit cases, the court rejected class certification in employee misclassification lawsuits, explaining that "a district court abuses its discretion in relying on an internal uniform exemption policy to the near exclusion of other factors relevant to the predominance inquiry," *Vinole*, 571 F.3d at 946, and that such a presumption "disregards the existence of other potential individual issues that may make class treatment difficult if not impossible." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d at 958. Relying on these precedents, the *Wang* court warned the district court on remand to avoid using a statistical sampling to determine damages, should it again decide to certify:

> 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 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, 2013 U.S. App. LEXIS 4423, at *15. The holdings of *Wang* and *Dukes* would require decertification of this employee-misclassification class action. In short, "[t]ime, and the United States Supreme Court, have overtaken this case." *Doe v. Abbott Labs.*, 571 F.3d 930, 933 (9th Cir. 2009).

II

OVERLY EXPANSIVE CLASS CERTIFICATION CAUSES ADVERSE PUBLIC POLICY CONSEQUENCES

Public policy does not favor class actions in the absence of predominance of common questions. The economies of scale associated with class actions disappear when "the ability of each member of the class to recover clearly depends on a separate set of facts applicable only to him." *Silva v. Block*, 49 Cal. App. 4th 345, 350 (1996). Although aggregation of large numbers of claims is intended to conserve judicial resources, the unintended consequence of overly permissive certification has been to generate much more of the same: The number and complexity of class action cases has exploded. *See* Douglas M. Towns, Note, *Merit-Based Class Action Certification: Old Wine in a New Bottle*, 78 Va. L. Rev. 1001, 1001 (1992). Wage and hour employment class actions, in particular, have grown precipitously since 2007, with California occupying a significantly large

portion of those cases. *See* Denise Martin, et al., *Trends in Wage and Hour Settlements: 2011 Update, NERA Economic Consulting* 2 (Mar. 22, 2012).[7]

From 2007 through 2011, $2.3 billion was paid in nonconfidential hour and wage class actions alone. Martin, *Trends in Wage*, at 2. While some may celebrate such settlements as workers triumphing over business owners, these class actions have significant collateral consequences, many of which ultimately adversely affect workers and consumers (and of course, every worker is also a consumer). These numbers are only increasing. Wage and hour litigation continues to lead among all types of workplace class actions, most of it centered in eight states, including California. Seyfarth Shaw LLP, *Annual Workplace Class Action Litigation Report: 2013 Edition* (Jan. 2013) at 2-3.[8] Litigation drives up the cost of doing business. *See* Steven B. Hantler, et al., *Access to Justice: Can Business Co-exist With the Civil Justice System?: Is the 'Crisis' in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121 (2005). Businesses can respond by passing these costs onto consumers, firing employees to reduce overall salary expenditures (the largest expenditure for most businesses), or adjusting hourly wages or other company policies that limit employees' options in terms of when, where, and how much

---

[7] *Available at* http://www.nera.com/nera-files/PUB_Wage_and_Hour_Settlements_0312.pdf (last visited Mar. 25, 2013).

[8] *Available at* http://www.seyfarth.com/dir_docs/publications/CAR2013preview.pdf (last visited Mar. 25, 2013).

they work. Some companies will simply go out of business. *See* Robert G. Bone, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1302 (2002); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 91-94 (class actions are "price-raisers" that ultimately increases costs to consumers; conversely, less expensive resolution techniques result in lower costs to consumers).

The impact of liberal versus strict interpretation of class certification requirements can be discerned by the experience of sister states. For example, at one time, Texas liberally interpreted the requirements for class action certification. During the 1980's and 1990's, Texas developed a reputation for being a pro-plaintiff, anti-business haven, with no limits on how high jury awards could go. In 1992 alone, Texas courts handed down four class action decisions each over $100 million, which significantly harmed Texas's business community. Russell T. Brown, Comment, *Class Dismissed: The Conservative Class Action Revolution of the Texas Supreme Court*, 32 St. Mary's L.J. 449, 464 (2001). The resulting increase in the numbers of class actions filed in state courts was the catalyst for passage of a bipartisan tort reform package. *Id.* at 465. Subsequently, the Texas Supreme Court construed the certification requirements to put teeth in the "predominant common issues" condition, which returned class actions to a more rational level. *See Ford Motor Co. v.*

Sheldon, 22 S.W.3d 444, 454-55 (Tex. 2000); *Sw. Refining Co., Inc. v. Bernal*, 22 S.W.3d 425, 428 (Tex. 2000); and *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398, 400 (Tex. 2000). The Texas Supreme Court's decision in *Bernal*, 22 S.W.3d at 428, specifically dealt with the issue of predominance of common issues of law and fact, and reversed the certification of a mass-tort class action.

Presented with the argument that it should brush aside concerns about whether certification was appropriate because the class could (theoretically) be decertified later, the Texas Supreme Court rejected a philosophy of "certify now and worry later." *Bernal*, 22 S.W.3d at 435. Instead, citing *Amchem Products*, 521 U.S. at 623, for the proposition that the predominance requirement is far more demanding than the commonality requirement, the court "vigorously" analyzed the predominance requirement. *Bernal*, 22 S.W.3d at 435. *Amchem* emphasized the importance of carefully scrutinizing the predominance requirement to ensure that "proposed classes are sufficiently cohesive to warrant adjudication by representation." 521 U.S. at 623. The court in *Bernal* further held that trial courts must perform a "rigorous analysis" of all class certification prerequisites and that "a cautious approach to class certification is essential." *Bernal*, 22 S.W.3d at 435. The court reasoned that trial courts cannot rely on assurances by plaintiffs' counsel that problems with predominance or superiority can be overcome. *Id.* Instead they must go beyond the pleadings in order to understand the claims, defenses, relevant

facts, and applicable substantive law to make a meaningful determination of the certification issues. *Id.*

According to a study by an independent research group, the class action doctrine espoused in *Bernal*, *Sheldon*, and *Beeson* saved $1,074 per consumer in Texas in the year 2000 alone. Ray Perryman, *The Impact of Judicial Reforms on Economic Activity in Texas*, Backgrounder 867 (Aug. 2000).[9] Of the $10.4 billion in estimated savings for the year, state tort reforms and related factors were responsible for saving Texas consumers and industry $7.63 billion. *Id.* About $2.542 billion of those savings directly benefited Texas consumers, including reduced prices for goods and services. *Id.* The reforms also translated into increased business development and more jobs. *Id.*

Employers looking at this case challenging the outside salesman exemption may respond by simply forbidding sales representatives from spending more than 50% of their working hours at the bank. While this may satisfy a regulator, to an employee such an outcome would likely be frustrating—changing nothing about compensation or the employer's expectations about work product (*i.e.*, meeting sales goals)—but merely limiting the employees' options of where they may work.

---

[9] *Available at* http://www.ncpa.org/sub/dpd/index.php?Article_ID=9629 (last visited Mar. 25, 2013).

CONCLUSION

The trial court's certification of the class based on plaintiffs' reliance upon statistical sampling violated U.S. Bank's individual due process rights by unfairly assuming that a unrepresentative, nonrandom sample of plaintiffs' work activities may be extrapolated to reflect the activities of the entire workforce. "The benefits of efficiency can never be purchased at the cost of fairness." *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993). However "efficient" the use of sampling may be, defendants have a constitutional right to mount a defense, and plaintiffs may not be excused from the need to prove every element of their claims.

DATED: March 27, 2013.

Respectfully submitted,

DEBORAH J. LA FETRA
CHRISTINA M. MARTIN

By _____
DEBORAH J. LA FETRA

Attorneys for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANT AND APPELLANT is proportionately spaced, has a typeface of 13 points or more, and contains 5,291 words.

DATED: March 27, 2013.

DEBORAH J. LA FETRA

DECLARATION OF SERVICE BY MAIL

I, Barbara A. Siebert, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On March 27, 2013, true copies of APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANT AND APPELLANT were placed in envelopes addressed to:

ELLEN LAKE
The Law Offices of Ellen Lake
4230 Lakeshore Avenue
Oakland, CA 94610-1136

EDWARD J. WYNNE
Wynne Law Firm
100 Drakes Landing Road
Suite 275
Greenbrae, CA 94904

BRAD S. SELIGMAN
Lewis, Feinberg, Lee, Renaker & Jackson P.C.
476 Ninth Street
Oakland, CA 94607
Counsel for Plaintiffs and Respondents

TIMOTHY M. FREUDENBERGER
ALISON L. TSAO
KENT J. SPRINKLE
Carothers DiSante & Freudenberger LLP
601 Montgomery Street
Suite 350
San Francisco, CA 94111
Counsel for Defendant and Respondent

MICHAEL D. SINGER
Cohelan Khoury & Singer
605 "C" Street
Suite 200
San Diego, CA 92101-5305
Counsel for Publication/Depublication Requestor
California Employment Lawyers Association

THE HONORABLE ROBERT FREEDMAN
Alameda County Superior Court
Administration Building
1221 Oak Street, 4th Floor
Oakland, CA 94612

which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 27th day of March, 2013, at Sacramento, California.

BARBARA A. SIEBERT