No. 08-15355

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: WELLS FARGO HOME MORTGAGE
OVERTIME PAY LITIGATION,

Hon. Marilyn H. Patel, United States District Court Judge
For The Northern District of California in
Case No. CV-06-01770-MHP (MDL Case No. MDL-1770)

AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT WELLS FARGO HOME MORTGAGE BY CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN BANKERS ASSOCIATION, MORTGAGE BANKERS ASSOCIATION, CALIFORNIA CHAMBER OF COMMERCE, CALIFORNIA BUSINESS ROUNDTABLE, CALIFORNIA BANKERS ASSOCIATION, EMPLOYERS GROUP, CALIFORNIA EMPLOYMENT LAW COUNCIL, & HOUSING POLICY COUNCIL OF THE FINANCIAL SERVICES ROUNDTABLE

[All Parties Have Consented. FRAP 29(a)]

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CORPORATE DISCLOSURE STATEMENT

Amici state that the Chamber of Commerce of the United States of America, The American Bankers Association, Mortgage Bankers Association, California Chamber of Commerce, California Business Roundtable, California Bankers Association, Employers Group, California Employment Law Council, and Housing Policy Council Of The Financial Services Roundtable have no parent corporations and no publicly held corporation owns 10% or more of the stock of any of the *amici*.

DATED: June 13, 2008.

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I

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

This appeal illustrates misapplication of Rule 23(b)(3)'s class certification criteria in overtime exemption cases. Too often, district courts focus on a single aspect of the plaintiffs' claims that is "common" to the putative class, but fail to perform the more critical inquiry: Can the court conduct a classwide trial of the applicability of overtime exemptions on a representative basis or will inquiries regarding individual class members be required? After all, a representative trial, not coordinated case management, is Rule 23's aim. Yet, the failure to assess problems of proof that would plague a classwide trial usually evades scrutiny because most erroneously certified classes never reach trial, much less appeal. As business federations that bear the brunt of this type of error, *amici* have a keen interest in the issues presented and submit this brief to highlight the disconnect between the orders below and the controlling principles under Rule 23, the Fair Labor Standards Act (29 U.S.C. §§ 206 et seq. ("FLSA")) and California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 ("UCL")).[1]

Plaintiffs claim Wells Fargo Home Mortgage ("WFHM") misclassified its Home Mortgage Consultants ("HMCs") as exempt from overtime pay requirements. WFHM maintains it classified those employees correctly under the outside sales, administrative, commissioned sales and/or highly compensated exemptions. To determine whether any of these exemptions apply, the law requires an inquiry into what the employee actually did with

[1] All parties have consented to the filing of this brief. *See* FRAP 29(a).

his or her work time and the amount and breakdown of his or her compensation.

It is well settled that the elements of proof required to establish a claim do not change merely because a class is certified. As a result, unless the putative class members spent their work time in the same way or earned the same amounts, a trial court must conduct individualized inquiries to determine *which* class members, if any, might be entitled to recover. The court below recognized the necessity for individualized inquiry on these issues and opined that "it will be required to make a fact-intensive inquiry into each potential plaintiff's employment situation." (Nationwide Order at 14) The court held, however, that Rule 23(b)(3) classes, involving thousands of putative class members, may be certified because WFHM classified all employees in a given job category as exempt from overtime laws. As the court put it, because WFHM made a collective exemption decision, it is "disingenuous" for WFHM to contest predominance and superiority.

But there is nothing "disingenuous" about making an efficient group exemption decision and then later asserting the right to challenge each class member's claim in court, when *each* class member is asserting that he or she was misclassified and *each* is demanding damages. More to the Rule 23 point, that classification decision does nothing to answer the fundamental question regarding what inquiry must be conducted at trial to determine which persons may recover under the governing substantive law and whether that proof can be presented in a representative trial.

Other district courts have also obscured the proper focus in determining whether overtime exemption cases are amenable to class certification. This Court can signal the correct Rule 23 inquiry by holding just what the overtime laws provide: the employer's exemption decision is the beginning, not the end, of a misclassification claim. Since the classification does nothing to establish *misclassification*, class certification is improper where, as here, there is wide variation in how the putative class members spent their work time and how much each earned.

The district court also erred in holding that the FLSA claims of employees who live and work outside California and have no meaningful connection to California could be styled as an opt-out class claiming violations of California's UCL. This method of raising an FLSA claim—designed to secure a longer statute of limitations and avoid the FLSA's express "opt-in" requirement—is an improper extraterritorial application of the UCL and violates Congress's intent in requiring that every FLSA claimant must "give [his or her] consent in writing to become such a party." 29 U.S.C. § 216(b).

Given the substantial economic toll of wage and hour class actions, it is vital that the Court enforce Rule 23's requirements and the limits on the scope of the UCL and FLSA. Doing so ensures that the benefits of *proper* class action litigation are not diminished by the excesses that occurred below.

II
IDENTITY OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation and represents an

underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in court on issues of national concern.

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty states and the District of Columbia, include financial institutions of all sizes and types, both federally and state-chartered. ABA members hold a majority of the domestic assets of the banking industry in the United States.

The Mortgage Bankers Association ("MBA") is the national association representing the real estate finance industry, an industry that employs more than 500,000 people in virtually every community in the country. MBA invests in communities across the nation by ensuring the continued strength of the nation's residential and commercial real estate markets, expanding homeownership by extending access to affordable housing to all Americans and supporting financial literacy efforts. MBA advocates in the courts for legal rules that promote a vibrant real estate finance industry.

The California Chamber of Commerce ("California Chamber") is the largest, voluntary business association within the state of California, with 16,000 members, both individual and corporate, representing virtually every economic interest in the state. While the California Chamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. The California Chamber acts to

improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues.

The California Business Roundtable ("Roundtable") is a non-partisan association comprised of chief executive officers of the state's leading corporations. The Roundtable provides essential executive level leadership on high-priority public policy issues and advocates for a strong economy and a healthy business climate in California.

The California Bankers Association ("CBA"), founded in 1891, represents more than 300 banking entity members in the state, including commercial banks, industrial loan companies and savings institutions. CBA's members provide jobs to more than 100,000 Californians and financial security and opportunities to millions more. Its member banks hold more than $4.4 trillion in assets and loans in excess of $2.5 trillion. Their interests range from agri-business to consumer lending, to small business to international economic development.

The Financial Services Roundtable ("FSR") is a CEO-level association of 100 of the leading national integrated financial services companies that provide the majority of banking, insurance and investment products and services that touch the lives of virtually every American consumer every day. FSR is dedicated to assuring Americans have access to the widest variety of financing at the most competitive prices possible. FSR's Housing Policy Council's members are 23 of the major national mortgage lenders and mortgage insurers providing mortgage finance products to American consumers.

The Employers Group is the nation's oldest and largest human resources organization for employers. It represents nearly 3,500 California employers of all sizes and every industry, which collectively employ nearly 3 million employees. The Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, the Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships. The Employers Group also provides on-line, telephonic, and in-company human resources consulting services to its members.

Finally, the California Employment Law Council ("CELC") numbers among its membership a high percentage of California's largest and most significant employers and is dedicated to improving the general business climate for California employers. CELC seeks to eliminate unnecessary legal restrictions in the employment law area, while preserving a commitment to fair and equitable treatment of employees.

III
THE DISTRICT COURT VIOLATED RULE 23(b)(3) AND THE RULES ENABLING ACT WHEN IT IGNORED ITS FINDING THAT SUBSTANTIAL INDIVIDUAL INQUIRIES WERE NECESSARY TO DETERMINE EXEMPTION STATUS

As the district court found, and as WFHM demonstrates in its briefing, liability in overtime cases turns on actual, not presumed, compliance or non-compliance with the relevant statutory exemptions. For example, to determine whether any given employee is exempt from overtime pay

requirements as an "outside salesperson," a court must determine how much time that employee spent on sales activities outside the employer's place of business and on work incidental to such outside sales activities. *See* Nationwide Order at 14; *Trinh v. J. P. Morgan Chase & Co.*, 2008 WL 1860161 *4 & n.4 (No. 07-CV-1666 W(WMC)) (S.D.Cal., Apr. 22, 2008) (declining to conditionally certify FLSA collective action in case raising similar outside sales exemption issues); *Vinole v. Countrywide Home Loans, Inc.*, 246 F.R.D. 637, 640-42 (S.D. Cal. 2007) (same; granting motion to dismiss Rule 23 class).

By holding that WFHM's group exemption decision trumped those individual issues in the Rule 23 analysis, the district court missed the fundamental point of Rule 23(b)(3)'s predominance and superiority inquiries and violated the Rules Enabling Act.

1. Rule 23(b)(3)'s Predominance And Superiority Requirements Seek To Identify Cases In Which Class Treatment May Achieve Efficiencies *Without* Sacrificing Procedural Fairness

The 1966 addition of subdivision (b)(3) to Rule 23 was "the most adventuresome" innovation in class action jurisprudence. *See* Kaplan, A Prefatory Note, 10 B.C. Ind. & Com. L.Rev. 497, 497 (1969). That addition authorized class actions designed to secure liability and damages judgments that bind all class members save those who affirmatively elect to be excluded. *See* 7A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 1777, p. 517 (2d ed. 1986); *see also* Adv. Comm. Notes, 28 U.S.C.App., p. 695. Framed for situations in which "class-action treatment is not as clearly called for" as it is in Rule 23(b)(1) and (b)(2)

cases, Rule 23(b)(3) permits certification where a class suit "may nevertheless be convenient and desirable." Adv. Comm. Notes, 28 U.S.C.App., p. 697.

Recognizing that this "most adventuresome" foray required strict controls, the drafters of Rule 23(b)(3) added two requirements beyond the Rule 23(a) prerequisites: Common questions must "predominate over any questions affecting only individual members," and class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). In adding the "predominance" and "superiority" requirements, the Advisory Committee sought to cover cases "in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, *without sacrificing procedural fairness* or bringing about other undesirable results." *Ibid.* (emph. added). The Reporter for the 1966 amendments thus cautioned: "The new provision invites a close look at the case before it is accepted as a class action. . . ." *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 619 (1997).

2. The Rules Enabling Act Requires Courts To Rigorously Enforce The Rule 23(b)(3) Criteria And Forbids Use Of The Class Action Procedure To Alter The Parties' Substantive Rights

The United States Supreme Court has admonished that courts "must be mindful that [Rule 23(b)(3)] as now composed sets the requirements they are bound to enforce." *Id.* The Court likewise has directed courts to ensure compliance with the Rules Enabling Act, which provides that a court may not "abridge, enlarge, or modify any substantive right" in order to invoke a rule

of procedure. *Id.*; *see* 28 U.S.C. § 2072(b). This restriction precludes courts from modifying substantive rights in order to achieve the perceived benefits of the class action procedure. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999).

The Supreme Court thus has directed that the district court must conduct a "rigorous analysis" of whether Rule 23's requirements can be met. *Gen'l Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160-61 (1982); *see also Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1186 (9th Cir. 2000) (class certification analysis must be "rigorous" and "within the framework of Rule 23"); *accord Navellier v. Sletten*, 262 F.3d 923, 941 (9th Cir. 2001); *Valentino v. Carter-Wallace, Inc.*, 97 F. 3d 1227, 1233-34 (9th Cir. 1996).

The court must consider "what will have to be proved at trial and whether those matters can be presented by common proof or whether individual proof will be required." 7AA Wright, Miller & Kane, *Federal Practice and Procedure: Civil 3d* § 1785 (3d ed. 2005); *see also Hanon v. DataProducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992); *In re IPO Securities Litig.*, 471 F.3d 24, 41-42 (2006) (same).[2]

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2 The rule that a court does not decide the merits at the class certification stage does not relieve a district court of the duty to rigorously analyze what evidence will be necessary to decide the claims. *See Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1177 n. 2 (9th Cir. 2007) (explaining distinction between prohibited merits determination and the required rigorous analysis of the evidence pursuant to Rule 23); *In re IPO Securities Litig.*, 471 F.3d at 30-41 (same). The Rule 23 analysis of what evidence will be required at trial is not a merits determination—the court does not decide who will "win"—but is
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Where a trial of the class members' claims will be beset by individual inquiries because of the requirements imposed by the substantive law, common questions will not *predominate* at trial. *See McLaughlin v. American Tobacco*, 522 F.3d 215, 223 (2d Cir. 2008) (reversing class certification; common alleged misrepresentation did not establish predominance because individual inquiries would be required at trial to prove reliance); *In re St. Jude Medical, Inc. Silzone Heart Valve Products Liab. Litig.*, 522 F.3d 836, 840 (8th Cir. 2008) (reversing class certification; individual inquiries would be required at trial to satisfy substantive requirement of some causal link between alleged misrepresentation and claimed injury).

3. The District Court Violated Rule 23(b)(3) And The Rules Enabling Act Through Its Misplaced Focus On WFHM's Classification Decision Instead Of The Individual Inquiries Required To Determine The Applicability Of The Exemptions

The district court lost sight of these fundamental precepts when it based its ruling on WFHM's classification decision rather than the individualized questions that *it acknowledged* arose under the applicable substantive law. Although it may be intuitively appealing to focus on how the employer made the exemption decision, that decision does not ameliorate any of the individualized inquiries into how each class member spent his or her work time. And consistent with the Rules Enabling Act, those inquiries must be made before determining WFHM's liability for any of the claims. *See Walsh*

Continued from previous page

simply an evaluation of what evidence is required under the applicable substantive law and whether such evidence may feasibly or preferably be presented on a classwide basis.

v. Ikon Office Solutions, Inc., 148 Cal.App.4th 1440, 1454-56 (2007) (rejecting argument that employer's group classification decision permitted class certification); *Campbell v. PricewaterhouseCoopers, LLP*, 2008 WL 818617 (E.D.Cal., Mar. 25, 2008), *appeal pending*, (although it may seem "intuitively unfair" to permit an employer who made a group exemption decision to contest class certification, class certification was improper); *Vinole*, 246 F.R.D. at 642 (that employer made a uniform exemption decision has "minimal relevance" to propriety of class certification); *accord Dunbar v. Albertson's Inc.*, 141 Cal.App.4th 1422, 1427-1433 (2006).[3]

Nevertheless, there are aberrant cases, including the one below, that erroneously focus on how the employer made its classification decision—instead of zeroing in on what a classwide trial of exemption status would look like. *See Alba v. Papa John's USA, Inc.*, 2007 WL 953849 (C.D.Cal., Feb. 7, 2007); *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602 (C.D.Cal. 2005); *Krzesniak v. Cendant Corp.*, 2007 WL 1795703 (N.D. Cal. 2007); *Tierno v. Rite Aid Corp.*, 2006 WL 2535056 (N.D.Cal., Aug. 31, 2006). Each of these erroneous decisions has inspired the next. In other words, the

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3 In addition to these cases, many overtime cases correctly hold that a class or collective action is inappropriate where the evidence shows a variation in the putative class members' job activities that necessitates individual inquiries to determine the right to recover. *See* WFHM's Appellant's Opening Brief at 19-23; *see also Trinh*, 2008 WL 1860161 at *4-5; *Chemi v. Champion Mortgage*, No. 2:05cv01238-WHW-CCC, at 9 (D.N.J. June 19, 2006) (denying FLSA collective action certification in mortgage loan officer case and holding "any determination of whether an employee is properly exempted under the FLSA involves a fact-intensive inquiry into each putative class member's employment circumstances.").

mistaken notion that an employer's group exemption decision automatically warrants class certification is permitting class certification where Rule 23's requirements, rigorously applied, would foreclose it.[4] The result is a vast exception to the Rule's requirements that appears nowhere in its plain language.

The costs of this exception should not be underestimated. To be sure, class certification, in appropriate cases, can confer substantial benefits. By the same token, improper certification is unduly coercive, exposing the defendant to an unfair and unreliable collective determination that outstrips the liability it might face if the claims properly were adjudicated based on the facts of each class member's case. *See, e.g., Coopers & Lybrand v. Livesay,* 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Prado-Steinman ex rel. Prado v. Bush,* 221 F.3d 1266, 1274 (11th Cir. 2000)

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4 This is not to say that overtime law claims may never be prosecuted on a classwide basis. *Vinole*, for example, suggests one scenario in which class treatment may be appropriate: if an employer has "company-wide policies governing how employees spend their time" or if there is "uniformity in work duties and experiences that diminish the need for individualized inquiry." 246 F.R.D. at 640, *citing e.g., Wamboldt v. Safety-Kleen Sys.,* 2007 WL 2409200, *13-14 (N.D. Cal. 2007) (employees classified as exempt under "motor carrier" exemption all drove within a certain range of hours per day). Party stipulations may also facilitate a class action. *See Miller v. Farmers Ins. Exch.*, 481 F.3d 1119, 1126 (9th Cir. 2007) (parties made stipulations that facilitated simultaneous certification of state law opt-out classes and FLSA opt-in action; appeal concerned propriety of merits determination after bench trial and did not decide propriety of class certification).

("[E]ven ordinary class certification decisions by their very nature may radically reshape a lawsuit and significantly alter the risk-benefit calculation of the parties ....").

4. The District Court Erroneously Held The Problems With Classwide Proof Could Be Managed At Trial Through "Sampling" Despite The Due Process, Seventh Amendment And Rules Enabling Act Violations That Would Arise From Any Such "Sampling"

The decision below also displays another too common by-product of the failure to conduct a proper Rule 23 rigorous analysis. The district court in passing suggested that the required individual inquiries could be managed at trial by using a vaguely articulated "sampling" method. But had the court applied the rigor that Rule 23 demands, it would have been apparent that "sampling" will not solve the problem.

Under the Rules Enabling Act, "sampling" cannot be used to alter substantive rights. Thus, WFHM has a due process right to raise the same defenses in a classwide trial as the defenses it could raise in response to an individual claim. Any "sampling" that restricted WFHM's ability to show that particular class members spent their time or earned amounts in a way that rendered those particular class members exempt would violate due process and the Rules Enabling Act. *See, e.g., In re Chevron U.S.A., Inc.,* 109 F.3d 1016, 1020-21 (5th Cir. 1997) ("a procedure is inherently unfair when the substantive rights of ... the defendant are resolved in a manner that lacks the requisite level of confidence in the reliability of its result"); *Reich v. So. Md. Hosp., Inc.*, 43 F.3d 949, 952 (4th Cir. 1995) (testimony of 54 employees on behalf of 3,368 plaintiffs in an FLSA collective action was insufficient to

support a judgment for all because the plaintiffs were from "a variety of departments, positions, time periods, shifts and staffing needs"); *In re Fibreboard Corp.*, 893 F.2d 706, 710 (5th Cir.1990) (expressing "profound disquiet" at proposed plan for presenting representative proof); *Holt v. Rite Aid Corp.*, 333 F.Supp.2d 1265, 1272 (M.D. Ala. 2004) ("status as non-exempt cannot be litigated through representative proof").

If instead the district court recognizes, consistent with the Rules Enabling Act, that the individual issues must be adjudicated separately, it is hard to imagine how those inquiries could be conducted consistent with the Seventh Amendment right to have a single jury decide the disputed issues in each case. *See, e.g, Castano v. American Tobacco Co.*, 84 F.3d 734, 750 (5th Cir. 1996) (reversing class certification and discussing Seventh Amendment issues that would arise from proposed plan to manage individualized issues; "The Seventh Amendment entitles parties to have fact issues decided by one jury, and prohibits a second jury from reexamining those facts and issues"). Rule 23's superiority requirement obligated the district court to confront these issues *before* certifying the class. By instead deferring these questions with the hope that "sampling" might somehow alleviate them, the district court violated Rule 23(b)(3).

In sum, the district court's orders illustrate how some lower courts have sidestepped the required Rule 23 analysis in favor of a too-limited focus on an exemption decision that has little bearing on the proof relevant to recovery. Where the latter evidence is individual in nature, as it is here, Rule 23(b)(3)'s requirements of predominance and superiority cannot be met.

IV
THE CALIFORNIA LEGISLATURE HAS NEVER AUTHORIZED THE DISTRICT COURT'S NOVEL EXTRATERRITORIAL APPLICATION OF THE UCL

In *Campbell v. Arco Marine*, 42 Cal.App.4th 1850, 1859 (1996), the California Court of Appeal held a Washington resident could not sue for sex harassment under California's Fair Employment and Housing Act ("FEHA"). Noting Commerce Clause and other questions that arise from extraterritorial application, the court held "[w]ithout clearer evidence of legislative intent to do so than is contained in the language of the FEHA, we are unwilling to ascribe to that body a policy which would raise difficult issues of constitutional law by applying this state's employment-discrimination regime to nonresidents employed outside the state." *Id.* And, "the Legislature certainly did not intend to interfere with employment relationships between residents of other states performing wholly in other states." *Id.*

These points apply fully here. Given the constitutional issues that arise from extraterritorial application (*see* WFHM AOB at 36-47), there should be a clear indication that the Legislature intended the UCL to be applied to wage and hour claims of non-resident employees before the UCL is extended in that fashion. There is no such indication. Since the "Legislature certainly did not intend to interfere with employment relationships between residents of other states" [*Campbell*, 42 Cal.App.4th at 1859], it would no more have wanted the UCL to be applied to non-resident employees, than it would the FEHA. Indeed, because the non-residents can sue under the FLSA and any applicable state laws, and plaintiffs invoke the UCL solely to gain a longer statute of limitations and an "opt-out" class, there is no reason why the Legislature

would see *any* need to extend the reach of the UCL as was done below.

The case law that has applied the UCL extraterritorially, by contrast, typically involves practices by California-based businesses that take place in California but purportedly deceive consumers located outside of state. *See, e.g., Diamond Multimedia Systems, Inc. v. Super. Ct.*, 19 Cal.4th 1036, 1063-64 (1999), *cert. denied*, 527 U.S. 1003 (1999); *Norwest Mortgage, Inc. v. Super. Ct.*, 72 Cal.App.4th 214, 222 (1999); *Clothesrigger, Inc. v. GTE Corp.*, 191 Cal.App.3d 605, 613 (1987); *Wershba v. Apple Computer*, 91 Cal.App.4th 224, 242 (2001).[5] There is no indication in these cases, however, that the UCL's general purpose warrants intrusion into *employment* relationships in other states. *Compare Diamond*, 19 Cal. 4th at 1063-64 (Legislature's intent to deter unfair business practices occurring in California supported giving a UCL remedy to non-residents injured by conduct occurring in California), *with Norwest Mortgage, Inc.*, 72 Cal.App.4th at 222 (reversing certification of a class of non-California residents' claims).

Not only is there no reason to believe the California Legislature intended the UCL to apply to employment relationships in other states, but

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5 As WFHM explains, even under the standard in these consumer fraud cases, the UCL may not be extended to the non-California employees because their classification as exempt cannot be characterized as "wrongful conduct occurring in California." *See* WFHM AOB at 39-47. Since the classification is only the beginning of the inquiry into whether any given employee was misclassified, that a California in-house attorney gave WFHM legal advice on the classification cannot serve as a basis to apply the UCL to employees whose work outside the state determines whether they were misclassified. *See id.*

doing so risks imposing a burden on California that the Legislature would not have wanted either. Under the district court's reasoning, the UCL may be used to an employer's detriment any time a professional located in California advises on a company's relationship with employees who live and work in other states. The result provides a substantial incentive for businesses to refrain from relying on California advisors. The California Legislature likely did not intend to burden California-based advisors in this fashion. This is particularly so since there is no real need to apply the UCL—the non-residents may sue under the FLSA and any applicable state laws—and the plaintiffs invoked the UCL only to get a litigation advantage.

Indeed, it is generally presumed that the Legislature intended to avoid imposing undue burdens on interstate commerce. *See Campbell*, 42 Cal.App.4th at 1858-59 (Legislature presumably would have wanted to avoid Commerce Clause questions that would arise if California extended its anti-discrimination laws to employment relations in other states). That general presumption applies with particular force here because surely the *California* Legislature did not want to burden interstate commerce in a manner that inhibits the flow of business *to California* professional service providers.

The extension of the UCL on this "furnishing of advice" pretext also increases the likelihood that litigation will be concentrated in an inconvenient forum, distant from the employees and events in question. As the district court tacitly acknowledged, California is not the center of gravity of the thousands of cases imported here. Every relevant inquiry on the substance of those claims instead involves another state. Not only has the California Legislature never signaled any intent to impose such burdens on the parties

and courts, it has indicated exactly the opposite. The Legislature has codified the principle of *forum non conveniens* [Cal. Code Civ. Proc. § 410.30] and thereby has exhibited a desire to minimize the burdens imposed by litigation in inconvenient forums. This is another indication that the Legislature did not intend to authorize plaintiffs' creative use of the UCL here.

Amici have an acute interest in halting the burdens that this expansive UCL theory injects into wage and hour litigation. Recent UCL amendments have restricted its scope because the law's previously expansive reach proved too burdensome. *See Californians for Disability Rights v. Mervyn's LLC,* 39 Cal.4th 223, 228 (2006) (discussing purpose of Proposition 64 amendments to UCL). Since the Legislature has never manifested any intent to permit the burdensome use of the UCL that plaintiffs urge, this Court should instead presume the Legislature did not so intend.

V
THE DISTRICT COURT'S CERTIFICATION OF AN OPT-OUT CLASS VIOLATES CONGRESS'S CHOICE TO PERMIT ONLY OPT-IN COLLECTIVE ACTIONS UNDER THE FLSA

The popular and business press have described the recent proliferation of wage and hour class actions as an "explosion" or a "surge."[6] According to one article, wage-and-hour litigation "now is practically on fire. The number of FLSA cases filed in federal district courts more than tripled in the

6 *See, e.g.,* S. Roberts, "Explosion Of Class Action Lawsuits Focus On Wage And Hour Violations," *Business Insurance*, Nov. 5, 2007; D. Phelps, "Surge In Wage Suits Has Courts On Overtime," *Star Tribune*, Oct. 6, 2007.

past few years, from 1,920 cases in 2000 to 6,754 cases in 2006, with the biggest jump from 2004 to 2006, according to statistics compiled by the Administrative Office of the U.S. Courts." Panell, Susan, "Lawyers In Demand For Wage And Hour Suits," *Trial* (Dec. 1, 2007) (reprinted at www.encyclopedia.com [visited 6/03/08]).

If these comments have a familiar ring, it may be because Congress used similar terms over 60 years ago to explain why it was inserting an opt-in requirement into the FLSA. After Congress enacted the FLSA in 1938, a "vast flood of litigation" followed. *See De Asencio v. Tyson Foods*, 342 F. 3d 301, 306 (3d Cir. 2003) (quoting 93 Cong. Rec. 2,089 (1947)). To halt what Congress called a "dramatic influx" of FLSA cases, it passed the Portal-to-Portal Act in 1947, which sought "to define and limit the jurisdiction of the courts" and "to strike a balance to maintain employees' rights but curb the number of lawsuits." *See De Asencio*, 342 F. 3d at 306 (quoting 93 Cong. Rec. 2,087 (1947)).

Through the Portal-to-Portal Act, Congress amended the FLSA by mandating that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party...." *See Hoffman-LaRoche v. Sperling*, 493 U.S. 165, 173 (1989); 93 Cong. Rec. 2,182 (1947). This "opt-in" requirement reflected Congress's desire to "limit[] private FLSA plaintiffs to employees who asserted claims in their own right and free[] employers of the burden of representative actions." *Id.; accord Cameron-Grant v. Maxim Healthcare Servs.*, 347 F. 3d 1240, 1248 (11th Cir. 2003).

Although Congress has never amended the FLSA's opt-in requirement, the district court orders below effectively rewrote the statute.

1. The District Court Violated The FLSA Because Its Nationwide Opt-Out Class Entitles Plaintiffs To Bring *FLSA* Claims On Behalf Of Persons Who Have Not Consented In Writing To Become A Party

The district court used this syllogism to certify an opt-out nationwide class: (1) California's UCL allows a plaintiff to sue to redress the violation of any underlying law, including the FLSA, and (2) since the UCL permits opt-out class actions, plaintiffs could obtain certification of a nationwide opt-out UCL class premised solely on alleged FLSA violations. This creative use of the UCL unambiguously violates the FLSA's opt-in restriction.

Many cases have analyzed various efforts to join in a single suit an opt-out class action based on state substantive law with an FLSA opt-in action. The recent decisions reflect a growing consensus in favor of prohibiting such parallel classes to avoid undermining Congress's intent in imposing the FLSA's opt-in restriction.[7] This case presents a clearer

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7 *See, e.g.*, *Burkhart-Deal v. CitiFinancial, Inc.*, 2008 WL 2357735 *1-2 & n.3, W.D.Pa., June 05, 2008 (NO. 7-1747) (after some earlier decisions that permitted parallel state law opt-out claims and FLSA opt-in claims without "address[ing] the compatibility of the FLSA and Rule 23," the "position disallowing parallel claims appears to have gained some traction"); *Edwards v. City of Long Beach*, 467 F. Supp. 2d 986, 993 (C.D. Cal. 2006) (denying class certification of state claims because "allowing both a § 216(b) collective action and a Rule 23 class action to proceed would frustrate the purpose of requiring plaintiffs to affirmatively opt-in to § 216(b) collective actions"); *Leuthold v. Destination Am. Inc.*, 224 F.R.D. 462, 470 (N.D. Cal.

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question, however, because the order below contains an added wrinkle. The nationwide Rule 23 class here does not assert the violation of a state substantive law. Rather, that class merely uses the California UCL to sue based on *underlying violations of the FLSA*. This device unmistakably allows plaintiffs to assert *FLSA* claims on behalf of persons who did not "give [their] consent in writing to become such a party." 29 U.S.C. § 216(b). As such, the order violates the FLSA.

2. Insoluble Notice Problems Arise From The District Court's Erroneous Certification Of Simultaneous Opt-Out And Opt-In Classes

The district court's simultaneous certification of an "opt-in" FLSA collective action and an "opt-out" UCL class not only violates the FLSA's opt-in restriction, it also raises serious due process concerns in the giving of notice to the class. The FLSA class members cannot participate in or be bound by the FLSA action unless they "consent in writing" [29 U.S.C. § 216(b)], but the opt-out action requires notice to the same absent class

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2004) (denying certification of Rule 23 class under California UCL in part because "the policy behind requiring FLSA plaintiffs to opt-in to the class would largely 'be thwarted if a plaintiff were permitted to back door the shoehorning in of unnamed parties through the vehicle of calling upon similar state statutes that lack such an opt-in requirement.'" (cit. omitted)); *see also LaChapelle v. Owens-Ill., Inc.*, 513 F.2d 286, 288 (5th Cir.1975) (Rule 23(c) ("There is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA [section] 16(b)."); *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439 (W.D. Pa. 2007) (dismissing state claims that paralleled FLSA claims to achieve Congressional goals).

members that they shall be bound by this very same lawsuit unless they opt out. The two notice regimes are "inherently incompatible." *Herring v. Hewitt Assoc., Inc.*, Civ. No. 06-267, 2006 WL 2347875, at *2, 2006 U.S. Dist. LEXIS 56189, at *5 (D.N.J., Aug. 11, 2006); *accord Himmelman v. Cont'l Cas. Co.*, No. Civ. 06-166, 2006 WL 2347873, at *2, 2006 U.S. Dist. LEXIS 56187, at *5 (D.N.J., Aug. 11, 2006).

Because the members of the Rule 23 class can be bound by their failure to opt out, the notice to those class members must explain their rights in language that is plain and understandable to a lay person. *See Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

Although the district court should have analyzed the inherent difficulty in giving notice under such incompatible schemes *before* certifying the class, the court certified the class without discussing the notice problems. The district court has since sent the putative non-California class members a conflicting dual notice that tells the *same* class members they will not be bound on the one hand, unless they opt in affirmatively to the FLSA action, but on the other hand, they need not do anything and will be bound unless they opt out affirmatively from the Rule 23 action. These conflicting admonitions raise substantial potential due process issues, and there is no telling how the courts can resolve them going forward. *See, e.g., Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (to determine whether absent party may be

bound by representative suit, court must "examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes."). The conflicting notice sent to the putative non-California class illustrates how the simultaneous certification of Rule 23 and FLSA classes is a recipe for a due process disaster. This is another reason to strike the Rule 23 class.

In sum, the recent wave of wage and hour litigation highlights the need to enforce Congress's deliberate policy choice to prohibit opt-out actions under the FLSA. Given the competition that American employers face in today's global economy and the ever deepening economic conditions, there is an even greater need now to reduce undue burdens on our employers. Since Congress intended the FLSA's opt-in requirement to alleviate the burdens of opt-out FLSA actions, the Court should make clear that a court may not certify an opt-out class that is premised on purported FLSA violations.

VI

CONCLUSION

The district court's orders contain substantial errors that expose employers to impermissible or overly broad wage and hour class actions. *Amici* urge the Court to hold: (a) an employer's decision to classify a group of employees as exempt from the overtime laws cannot support Rule 23(b)(3) class certification where the record shows a wide variation in how the employees performed the duties on which the applicability of the exemption turns, (b) employees who live and work outside California cannot use the

UCL as a vehicle for bringing FLSA claims, and (c) a court may not certify an opt-out class action that is premised on underlying violations of the FLSA.

DATED: June 13, 2008.

Respectfully submitted,

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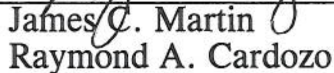
By 
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CERTIFICATION OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32-1 and FRAP 32(a)(7)(C), I certify that this *amicus curiae* brief is proportionally spaced in CG Times, has a typeface of 14 points, and is 6,258 words (excluding tables and this Certification), i.e., it is less than one-half the maximum permissible length of the brief it supports (WFHM's Appellant's Opening Brief).

DATED: June 13, 2008.

Raymond A. Cardozo

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served two true and correct copies of the foregoing ***Amici Curiae* Brief in Support of Appellant Wells Fargo Home Mortgage by Chamber of Commerce of The United States of America, The American Bankers Association, Mortgage Bankers Association, California Chamber of Commerce, California Business Roundtable, California Bankers Association, Employers Group, California Employment Law Council, & Housing Policy Council of the Financial Services Roundtable** and all accompanying papers this 13th day of June, 2008, by mailing two copies of the brief via First Class U.S. Mail, postage prepaid, to each of the following counsel of record:

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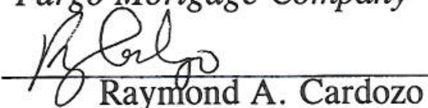

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