No. 07-80188

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON MEVORAH, GENARO PEREZ and PERRY DERRICK,

Plaintiffs and Respondents,

v.

WELLS FARGO HOME MORTGAGE,

Defendant and Petitioner

On Petition To Appeal From Orders Entered On October 18, 2007
By 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)

BRIEF OF 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, & HOUSING POLICY COUNCIL OF THE FINANCIAL SERVICES ROUNDTABLE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION OF WELLS FARGO HOME MORTGAGE FOR LEAVE TO APPEAL (FRCP 23(f))

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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: November 13, 2007.

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I. INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

Wells Fargo Home Mortgage's ("WFHM") petition challenges class certification orders that are of paramount concern to American employers. The district court acknowledged that the allegations of overtime law violations here raise significant individualized questions related to each putative class member's respective job activities. Those individualized questions, in turn, govern each putative class member's right to recover. The district court nevertheless held, however, that those individual questions may be ignored and substantial classes may be certified because WFHM decided to classify all employees in a given job category as exempt. As the court put it, because WFHM made a collective decision, it is estopped to contest whether plaintiffs can litigate the overtime claims as a class action.

Under this certification by estoppel reasoning, Rule 23's predominance, manageability and superiority requirements have significance only if WFHM determines the exempt status for each of the approximately 20,000 putative class members on a case-by-case basis. This troubling rationale would result in class certification of virtually all exemption misclassification claims, because employers do not, and realistically cannot, make exemption status determinations on a case-by-case basis. Aside from being out of step with business realities, this extraordinary legal principle cannot be reconciled with the requirements for class litigation set forth in Rule 23.

Amici therefore have a keen interest in cases like this one that formulate legal principles that improperly reduce the burden of proving that Rule 23's requirements for class certification have been satisfied. If employers are exposed to class action litigation every time they make an exemption classification applicable to a given job (as opposed to doing it on an employee-by-employee basis), the size and scope of wage and hour class

actions in this country would grow exponentially.[1] The direct and indirect costs associated with defending this proliferation of class action cases could be staggering.

Amici also are concerned by the district court's certification of "opt-out" class actions in lawsuits that are premised on violations of the Fair Labor Standards Act (FLSA). In Section 216(b) of that Act, Congress precluded the adjudication of alleged violations of the FLSA on behalf of any person who has not consented in writing to the lawsuit. Congress imposed this express "opt-in" requirement to limit the burdens on employers and minimize the massive liability potential that an opt-out class action creates. The district court's use of California's unfair competition law to certify an opt-out class premised on underlying FLSA violations is an impermissible end run on Congress's deliberate policy choice.

Finally, *amici* are equally concerned over the district court's conclusion that a state law opt-out unfair competition class of nationwide scope feasibly can be combined with an FLSA opt-in class. The district court did not make the required rigorous analysis of whether this would be a manageable or superior method for resolving the tens of thousands of claims made in this controversy. Nor did it explain how the class members could be notified of this opt-in versus opt-out dichotomy without invoking widespread confusion

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[1] Employers already are facing an unprecedented number of such cases. *See, e.g., Stephen Franklin, Workers Long for Overtime: Employers See More Suits Alleging They Failed To Pay For Extra Hours*, Hous. Chron., July 24, 2006 (experts say wage and hour cases are "the nation's fastest-growing legal battlefront"); Statistics Division, Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics Table C-2 (2001, 2006) (reporting that roughly 1,900 FLSA cases in 2000 increased to roughly 4,400 in 2006).

among the members. Yet, these class notice issues also are critical to whether a class can or should be certified in the first instance.

Class certification poses a unique risk of compensating too much or too many or of forcing settlement of unmeritorious claims. *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) ("[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 ....").

Every time a court relaxes the requirements of substantive law to facilitate class certification, the defendant bears the burden of substantially increased litigation costs and faces a Hobson's choice of settling or risking an all-or-nothing trial. Every unwarranted expansion of class certification requirements, in turn, encourages others to file class action lawsuits.

Erroneous class certification decisions, therefore, impose unique and unwarranted burdens on the litigants, other employers, the courts and society. *Amici*'s members and society bear these consequences, and an appeal from a final judgment cannot restore the public and private costs associated with litigating these complex and time-consuming cases. *Amici* therefore have a concrete and direct interest in rectifying the errors that facilitated certification of the factually and legally complex wage and hour classes before this Court. They urge the Court to allow the appeal.

II. WFHM'S PETITION PRESENTS QUESTIONS OF EXCEPTIONAL AND IMMEDIATE IMPORTANCE

A. Immediate Interlocutory Review Is Warranted Because The District Court's Improper Reliance On How WFHM Made Its Classification Decision Threatens An Unwarranted Expansion Of Wage And Hour Class Action Litigation

In overtime exemption cases, liability turns on actual, not presumed, compliance or non-compliance with the statutory exemptions. That is, any alleged liability here rests on a fact-specific evaluation of each employee's job activities. *See* WFHM Petition at 11-14. Where there is significant variation in the job duties or activities actually performed among employees, the need for an individualized determination of the applicability of a statutory exemption makes class treatment inappropriate. *Id.*

The district court correctly recognized that the record below demonstrates a substantial individual variation in job activities. CA Order at 11-17; Nationwide Order at 13-16. Inexplicably, however, the court held that the fact-specific inquiries that are required in light of that individual variation could be ignored because it supposedly was "disingenuous" for WFHM to classify its employees as a group, but then to argue that the exemption's availability must be established on a case-by-case basis. CA Order at 17; Nationwide Order at 16.

Since the district court recognized that resolution of the liability and damage issues will indeed require class member-by-member proof, it erred in holding that the need for such proof could be ignored in determining whether Rule 23's requirements were met. The class procedure can be relied on for resolving multiple claims only when Rule 23's requirements can be met. It does not, and cannot, alter the substantive requirements of the claim itself. *See Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 613 (1997) ("Rule

23's requirements must be interpreted in keeping with ... the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'") (quoting 28 U.S.C. § 2072(b)); *In re Hotel Tel. Charges*, 500 F.2d at 90 ("[E]nlargement or modification of substantive statutory rights by procedural devices [such as the class action] is clearly prohibited by the Enabling Act"); *Feitelberg v. Credit Suisse First Boston, LLC,* 134 Cal.App.4th 997, 1018 (2005) (A "class action status does not alter the parties' underlying substantive rights").

That is why California's appellate courts and other federal courts reject the notion that an employer's decision to classify employees based on a given job override a court's duty to determine if individualized issues predominate. *See Walsh v. IKON*, 148 Cal.App.4th 1440, 1461 (2007); *Dunbar v. Albertson's Inc.*, 141 Cal.App.4th 1422, 1427-1433 (2006); *Sepulveda v. Wal-Mart Stores*, 237 F.R.D. 229, 249 (C.D. Cal. 2006). The judge whose denial of class certification was affirmed in *Dunbar* explained this point well:

> [A]lthough Defendant has made a single policy decision to classify hundreds of GMs as exempt, that single policy decision may be improper as to some putative class members but proper as to others. . . .[¶¶] In this case, the Court cannot determine whether Defendant's policy of designating GMs is unlawful in the abstract. If the Court found that the policies were appropriate as applied to 70% of the GMs and inappropriate with respect to the remaining 30%, that finding would not permit the conclusion that the policies are unlawful. The hypothetical finding would indicate the policies are applied to too many employees and lead the Court to visit the issue of ascertaining which employees are in the 70% that should be in the class and which are in the 30% that

should not be in the class.[2] Therefore, Plaintiff cannot meet the commonality requirement by simply making reference to the common policy. *Dunbar*, 141 Cal.App.4th at 1427-28.

As this analysis cogently illustrates, the district court's refusal to credit the impact of individualized resolution on its class certification decision is a fundamental error warranting review. Since employers routinely make classification decisions applicable to all employees in a given job, the erroneous logic employed below can be replicated to certify a class on any misclassification claim—even if there is wide variation in job activities and therefore predominance of individualized issues. And since cases requiring individualized proof are not amenable to class certification, the district court's ruling creates a vast exception permitting classwide litigation where Rule 23's requirements, rigorously applied, would foreclose it.

WFHM has a due process right to insist on enforcement of the substantive law requirements that govern plaintiffs' claims. The district court's ruling compromises that right and sets the stage for an unconstitutional "sampling" trial that exposes WFHM to a group liability determination even though the record shows (and the district court found) a wide variation in how the employees perform their jobs. *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

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[2] The court appears to have inadvertently reversed the 70% and 30% categories in this sentence, but that immaterial discrepancy aside, its point is plain and well taken: variations in the job activities must be considered in a class certification analysis.

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"); *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").

Simply because the employer classifies all within a given job as exempt, the district court did not have the discretion to ignore these due process consequences and dispense with a rigorous application of Rule 23. *See Amchem Products, Inc.*, 521 U.S. at 613. The required rigorous analysis must be made—indeed, perhaps has its greatest significance—with respect to the elements of proof for the class members' claims. *See, e.g., General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982); *Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.)*, 471 F.3d 24, 51-52 (2d Cir. 2006).

The conflict between the district court's orders below and the decisions in *Walsh*, *Dunbar* and *Sepulveda*, moreover, highlight the quandary that employers, litigants and others face in trying to navigate this area of the law. Virtually identical circumstances are yielding diametrically opposed conclusions on the profoundly important and litigation-altering class certification determination. The need for more definitive guidance is manifest. *Amici* urge this Court to allow the appeal for this reason alone.

B. Immediate Interlocutory Review Is Warranted Because The District Court's Certification Of An Opt-Out Class Frustrates Congress's National Policy Choice To Permit Only Opt-In Class Actions Under The FLSA

Section 216(b) of the FLSA provides "[n]o employee shall be a party plaintiff. . . unless he gives his consent in writing to become such a party."

29 U.S.C. § 216(b). Because of this "opt-in" requirement, the FLSA "is a fundamentally different creature than the Rule 23 class action." *Cameron-Grant v. Maxim Healthcare Servs. Inc.*, 347 F.3d 1240, 1248-49 (11th Cir. 2003). The opt-in requirement represents a "crucial policy decision" by Congress. *DeAsencio v. Tyson Foods, Inc.*, 342 F.3d 301, 311 (3rd Cir. 2003). That decision ensures that "only those plaintiffs with a truly vested interest in the outcome of an overtime suit actually proceed with the action." *Wyman v. WM Fin. Servs., Inc.*, 2007 WL 1657392 *6 (D.N.J. Jun 7, 2007).

Although Congress made an unambiguous choice to prohibit opt-out actions under the FLSA, the district court permitted exactly such an action. It permitted employees across the country to bring an FLSA opt-out action using this syllogism: (1) California's unfair competition law (UCL) allows a plaintiff to sue to redress the violation of any underlying law, (2) plaintiffs could therefore sue under the UCL based on underlying violations of the FLSA, and (3) since the UCL permits opt-out class actions, plaintiffs could obtain certification of an opt-out UCL class premised solely on an alleged FLSA violation. This creative use of the UCL to certify an opt-out class action is impermissible because it allows persons suing to redress purported FLSA violations to do exactly what Congress prohibited: claim that WFHM violated the FLSA on behalf of persons who did not "give [their] consent in writing to become such a party." 29 U.S.C. § 216(b).[3]

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[3] This also highlights the error that is the subject of WFHM's earlier Rule 23(f) petition (No. 07-80138): if California's unfair competition law can be applied to adjudicate FLSA claims of workers who live and work entirely outside California and who have *not* consented in writing to the action, so too could any state's general unfair competition law be so used. The FLSA's opt-in requirement could thus be avoided wholesale in wage and hour litigation across the country, in violation of Congress's unambiguous intent.

Not only does the certification of an opt-out class impermissibly violate a core limitation in the FLSA, but such certification raises serious due process concerns in the giving of notice to the class. In a class action, notice serves the crucial due process function of advising the absent class members that they will be bound by the lawsuit's outcome unless they opt out of the action.

The nationwide order here, however, contemplates the simultaneous certification of an "opt-in" FLSA collective action and an "opt-out" UCL class. Thus, the absent class members presumably will be notified that they cannot participate in or be bound by this lawsuit unless they "consent in writing" [29 U.S.C. § 216(b)], yet will also be notified that they shall be bound by this very same lawsuit unless they opt out. That contradictory and confusing message is a recipe for prolonged litigation.

Any absent class member who is displeased by the outcome of this lawsuit might conceivably try to argue that he or she has a due process right to re-litigate the issues because the member received a notice that expressly stated that those who do not consent in writing to the lawsuit are not bound by it. Conversely, any class member who is pleased by the outcome could claim he or she has a right to participate by virtue of the "opt-out" notice. The district court thus has condemned WFHM to the substantial burden of litigating a massive class action, without an assurance of the fundamental corresponding benefit of the class action procedure: collective repose.

Cases that have considered the propriety of exercising supplemental jurisdiction over a state law opt out class in an FLSA action do not fully address the inherent difficulties in giving notice that arises when both types of classes are certified in a single action. *See Lindsay v. Gov't Employees Ins. Co.*, 448 F.3d 416 (D.C. Cir. 2006), *DeAsencio*, 342 F.3d at 311. The district court's orders here likewise do not address that point even though

Rule 23 requires such an analysis as a matter of due process and as part of the superiority and manageability requirements of Rule 23.

Once again, definitive guidance is needed on these important questions, yet the lack of Ninth Circuit authority is spawning inconsistent decisions among the district courts. *See* WFHM Petition at 19-20. The uncertainty as to the governing rule makes resolution of these cases more difficult and condemns the cases that follow the wrong line of authority to an appellate reversal. All of this points to the need to resolve this issue promptly by an interlocutory appeal.

III. CONCLUSION

The district court's order raises important and unsettled issues of law relating to class actions. *Amici* therefore urge the Court to allow the appeal.

DATED: November 13, 2007.

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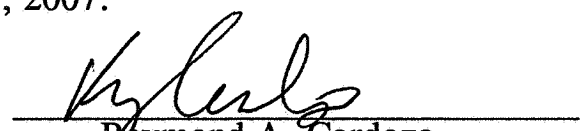
CERTIFICATION OF COMPLIANCE

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 less than 10 pages (excluding tables and this Certification); i.e. is less than one-half the maximum permissible length of the brief it supports (WFHM's Rule 23(f) petition).

DATED: November 13, 2007.



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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served two true and correct copies of the foregoing **Brief of the Chamber Of Commerce of the United States of America, the American 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 As Amicus Curiae in Support of the Petition of Wells Fargo Home Mortgage for Leave to Appeal (FRCP Rule 23(f))** and all accompanying papers this 13th day of November, 2007, by mailing same via First Class U.S. Mail, postage prepaid, upon each of the following counsel of record:

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