CASE NO. S239254

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NIVIDA LUBIN, et al.,

Plaintiffs and Appellants,

v.

THE WACKENHUT CORPORATION

Defendant and Respondent.

AFTER DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FOUR
CASE NO. B244383

ON APPEAL FROM THE SUPERIOR COURT
FOR THE COUNTY OF LOS ANGELES
CASE NUMBER JCCP NO. 4545 (NOS. BC326996, BC373415, 00180014)
HONORABLE WILLIAM F. HIGHBERGER, PRESIDING

Service on the Attorney General required per
Business & Professions Code § 17200

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I. INTRODUCTION

Despite The Wackenhut Corporation's ("Wackenhut") alarming warning of splits among California Courts of Appeal and disagreements between state and federal interpretations of California law, the decision at issue, *Lubin v. The Wackenhut Corp.* (2016) 5 Cal.5th 926 ("*Lubin*"), presents no such conflicts.

In its Petition for Review ("PR") Wackenhut asserts that courts are divided over the proper evaluation of conflicting evidence when assessing predominance on class certification. Yet, each case Wackenhut specifies as evidencing this confusion or disagreement applies this Court's instruction in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 ("*Brinker*") in the same manner as the Court of Appeal in *Lubin*.

Wackenhut suggests that uncertainty exists over the proper approach to certification of cases involving meal period violations. In doing so, Wackenhut advances misclassification cases, inapposite to the "nature of the work" analysis here, wherein the predominance of individual issues precluded class certification. Yet, Wackenhut fails to mention the DLSE factors for determining the nature of the work exception nor explain why these factors require individual determinations here.

Wackenhut also concocts a dispute over the construction of Labor Code section 226's "suffering injury" language, and falsely asserts that the Court of Appeal found liability solely based on information missing from Wackenhut's wage stubs, when in fact the Court applied both prongs of the statutory inquiry.

Finally, Wackenhut objects that the Court of Appeal improperly imposed a "changed circumstances" standard derived from *Green v. Obledo* (1981) 29 Cal.3d 126 ("*Green*"), a standard Wackenhut now claims conflicts with *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1 ("*Duran*"). In fact, the Court of Appeal applied an abuse of discretion standard to each issue and did not reverse the decertification based on the lack of changed circumstances.

In essence, Wackenhut would like to have its cake and eat it too. The trial court itself had raised the "changed circumstances" issue in its decertification order, stating that "Wackenhut ha[d] satisfied the 'changed circumstances' standard because significant new case law—the U.S. Supreme Court's decision in *Wal-Mart*—exists." (13JA2937:12-13)[1] Having successfully urged the trial court to reconsider its certification of the class on the basis that *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338 ("*Wal-Mart*") entirely changed the legal landscape, Wackenhut now wants to treat the trial court's embrace of this analysis as if it were a mere coincidence, rather than the heart of the trial court's reasoning in its decertification order. The Court of Appeal correctly grasped that the trial court's erroneous interpretation of *Wal-Mart* led to its erroneous reevaluation of the evidence supporting class certification

II. STATEMENT OF THE CASE

Plaintiffs incorporate by reference the Factual and Procedural Summary set forth by the Court of Appeal as well as the findings of fact expounded throughout the decision. (See generally *Lubin v. Wackenhut Corp.* (2016) 5 Cal.App.5th 926.) In its Petition for Review, Wackenhut both colors and contradicts these facts in a strategic effort to frame the issues presented for review by this Court.[2] These distinctions, scattered throughout Wackenhut's Petition, seek to make a difference in this Court's consideration of review. When evaluated in light of the Court of Appeal's findings, the issues presented herein fail

[1] "JA" refers to the Joint Appendix, filed in the Court of Appeal; citations are to "volumeJApage:line."

[2] For example, Wackenhut now asserts that the trial court's decertification order expressly identified both *Wal–Mart* and *Brinker* as the significant new case law prompting the decision to decertify the class. (PFR at p. 7.) However, the trial court identified only *Wal-Mart* as "significant new case law" constituting changed circumstances and justifying reassessment of class certification. (*Lubin, supra*, 5 Cal.App.5th at 936; see also RB 18-19.) Additionally, Wackenhut asserts the original certification was only as to plaintiffs' claims "that Wackenhut failed to provide off-duty meal or rest breaks and provided inaccurate wage statements." (PFR at p. 6.) In fact, the certification order was not claim specific and the trial court certified the class generally as "all non-exempt Security Officers employed by Wackenhut in California during the Class Period of January 7, 2001 to the present." (*Id.*, at p. 933 (internal quotations omitted).)

to establish any appropriate basis for review.

III. DISCUSSION

A. THERE IS NO CONFLICT OVER THE RELEVANCE OF EVIDENCE DEMONSTRATING BREAKS ON THE CERTIFICATION QUESTION

Wackenhut asserts that a split of authority exists regarding the relevance of evidence showing legally compliant breaks on the certification question. (PR at p. 10.) There simply is not. Evidence of breaks—legally compliant or otherwise—is relevant to any court's determination on class certification. The effect that evidence has on the certification inquiry, however, is a different question that depends on many additional considerations including the facts particular to each case, the totality of evidence presented by both parties, the theories of recovery advanced, the defenses raised, and the substantive law. All figure into the appropriate analysis, which is governed by the standards set forth in *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal. 4th 1004 ("*Brinker*").

1. Wackenhut Misconstrues *Brinker*'s Guidance in Evaluating Predominance on Class Certification

This Court's instruction concerning the predominance inquiry on certification is clear:

> The "ultimate question" the element of predominance presents is whether "the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." [internal citation omitted]

(*Brinker*, 53 Cal. 4th at pp. 1021–22.) Thus, predominance is a comparative principle, requiring an evaluation of the issues that may be jointly tried versus those that require individual adjudication. The result of the relevant comparison, in turn, guides the court on the propriety of class treatment. Although this analysis invariably produces two different outcomes—common questions predominating or individual issues predominating—there are not two distinct approaches utilized by lower courts as

suggested by Wackenhut. (See PR at pp. 10-11 [identifying a "flawed approach" and the approach advocated by Wackenhut].)

Brinker itself is illustrative to this point. (See PR at pp. 12-13.) With respect to the predominance inquiry as to the rest break claim, this Court found a common policy applicable to all Brinker employees based upon the evidence presented the plaintiffs. (*Id.* at pp. 1032-1033.) Conversely, this Court reached the opposite conclusion with respect to the off-the-clock claim:

> Unlike for the rest period claim and subclass, for this claim neither a common policy nor a common method of proof is apparent. The rest period claim involved a uniform Brinker policy allegedly in conflict with the legal requirements of the Labor Code and the governing wage order. The only formal Brinker off-the-clock policy submitted disavows such work, consistent with state law. *Nor has Hohnbaum presented substantial evidence of a systematic company policy to pressure or require employees to work off-the-clock*, a distinction that differentiates this case from those he relies upon in which off-the-clock classes have been certified.

(*Id.* at 1051 (emphasis added).) As stated above, application of the same predominance analysis produced different outcomes.[3] This comparative principle has similarly guided lower courts assessing certification decisions as it did the Court of Appeal here.

2. Applying the Predominance Standard, the Court of Appeal Found that Common Questions Predominated Over Individual Issues

Assessing the propriety of the original certification order, the Court of Appeal noted that common proof established that Wackenhut failed to provide employees with off-duty meal periods and rest breaks. (*Lubin*, at pp. 938, 941, 951.) Plaintiffs' evidence included several Wackenhut managers' testimony that all new security officers were asked to sign on-duty meal agreements during initial orientation and that Wackenhut allowed its customers to determine whether the officers at their facilities would be

[3] Wackenhut contends, as it did before the Court of Appeal, that the distinguishing factor is the employer's concession of a "uniform, companywide policy." (PR at pp. 12-13.) This defies the factual record in *Brinker*. (*See* ARB 20-21, RAC 8-11.)

provided on-duty or off-duty meal periods. The overwhelming majority of customers chose on-duty meal periods.[4] (*Id.*) This evidence substantiated a widespread practice of depriving officers of off-duty meal periods—a practice Wackenhut had admitted to prior to its decertification motion. (*Lubin*, at p. 939 [on-duty meal periods per client preference].)

In assessing the propriety of the decertification order, the Court of Appeal acknowledged Wackenhut's submission of declarations by four employees, three stating they were permitted to leave the premises for a meal but needed to be available to respond in an emergency, and one stating she could leave the premises on occasion. (*Id.*, at p. 940.) As the Court of Appeal noted, even these declarations did not conclusively evidence fully off-duty meal periods. (*Id.*, at p. 940, fn. 6.), fn. 6.) However, even if they did, these declarations do not undermine or negate record evidence of Wackenhut's uniform *policy* of "requiring all employees to sign on-duty meal agreements and allowing client preference to dictate whether an employee had an off-duty or on-duty meal period, rather than itself determining, as the employer, whether the nature of the work at each site prevented its employees from having an off-duty meal period." (*Id.*, at p. 941.) Because these declarations did not undermine plaintiff's substantial evidence of the

[4] The trial court noted that plaintiffs' evidence "supported [only] the conclusion that as a general matter, Wackenhut managers intended to provide on-duty meal periods, at most, although not all, worksites." (*Lubin*, at p. 940.) The Court of Appeal noted, however, that had the trial court granted plaintiffs' proposed subclasses, those few sites *which chose to provide off-duty meal periods* would have been excluded from the class. (*Id.*, fn. 5.)

aforementioned policy, the Court of Appeal was not convinced that individual issues predominated.[5]

The Court of Appeal did not "simply dismiss" as irrelevant to class certification Wackenhut's evidence of purportedly compliant breaks as Wackenhut claims. (PR at pp. 10-15.) The Court of Appeal performed the appropriate predominance analysis and determined that common questions predominated. Wackenhut's "anecdotal evidence of a handful of individual instances" of arguably compliant breaks (see *Brinker, supra,* at p. 1052) did not constitute substantial evidence challenging plaintiffs' common proof of Wackenhut's violative policies.

3. The Court of Appeal's Analysis Does not Conflict with *Cruz, Koval,* or *Dailey*

Wackenhut misrepresents the holdings of *Cruz v. Sun World Internat., LLC* (2015) 243 Cal.App.4th 367, *Koval v. Pacific Bell Tel Co.* (2014) 232 Cal.App.4th 1050, and *Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974 to fabricate a non-existent split in authority. The decision here does not conflict with these cases wherein the defendant employers demonstrated that no widespread violative practice could be established. Contrary to Wackenhut's assertion, the courts in *Cruz*, *Koval*, and *Dailey* applied the same predominance analysis but reached a different outcome because the facts in those cases were dramatically different from the case at hand.

Wackenhut claims that *Cruz*, *Koval*, and *Dailey* conflict with the Court of Appeal decision because they gave weight to evidence showing that some employees received legally compliant breaks, but here the Court of Appeal dismissed similar evidence as

[5] Similarly, with regard to rest breaks, "plaintiffs presented deposition testimony from Wackenhut managers that the trial court credited as establishing that Wackenhut had a policy of not providing off-duty rest breaks. Wackenhut did not present evidence rebutting plaintiffs' evidence and has not shown that it had an informal policy or practice of authorizing and permitting employees to take 10-minute rest breaks." (*Lubin*, at p. 957, citing *Brinker*, *supra*, 53 Cal.4th at p. 1033 and *Bufil v. Dollar Financial Group, Inc.*, (2008) 162 Cal.App.4th 1193.) Again, Wackenhut's proffering testimony from three security officers stating that they had rest breaks that appeared to be fully off-duty, failed to persuade the Court of Appeal that plaintiffs' showing was not adequate for certification. (*Lubin.* at p. 955.)

irrelevant. This is not so. Each of Wackenhut's proffered cases—*Cruz*, *Koval*, and *Dailey*—affirmed the trial courts' findings that the cases did not satisfy the *Brinker* standard because the plaintiffs relied on allegations and anecdotal evidence that did not establish substantial evidence of a common policy or practice the legality of which could be resolved on a classwide basis. In contrast to the scant evidence supporting plaintiffs' theories of recovery, the defendants in *Cruz*, *Koval*, and *Dailey* set forth persuasive and comprehensive evidence that negated the inference of a common practice or policy. (*Cruz*, *supra*, at pp. 384-388, 392-393; *Dailey*, *supra*, at pp. 992-94, 996-997; *Koval*, *supra*, at p. 1062.)

Conversely, here, as in *Brinker*, *Bradley v. Networkers Internat. LLC* (2012) 211 Cal.App.4th 1129, *Faulkinbury v. Boyd & Assoc., Inc.* (2013) 216 Cal.App.4th 220, and *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.th 701, plaintiffs established a common policy a practice sufficient for classwide adjudication. The defendants' anecdotal evidence that some employees received some compliant breaks "at most establishe[d] individual issues of damages which would not preclude class certification." (*Lubin*, at p. 956, quoting *Faulkinbury*, 216 Cal.App.4th at p. 237.)

B. THERE EXISTS NO CONFUSION AS TO THE PROPER APPROACH TO CERTIFICATION OF MEAL PERIOD CLAIMS

1. The "Nature of the Work" Is an Exception to the Requirement of Providing Off-Duty Meal Periods, Not an Exemption from the Overtime Requirements

Wackenhut's second issue (actually comprising two distinct issues) runs far afield of the dictates of Rule 8.500(b) and provides no occasion for this Court to grant review. Wackenhut fails to demonstrate any legitimate split of authority or even confusion in the lower courts on this issue, and offers no showing that it amounts to a recurring, unsettled legal issue of statewide concern. (See Cal. R. Court 8.500.)

First, this case does not involve an exemption defense. It has never been disputed that plaintiffs and the putative class members are non-exempt, hourly employees.

Plaintiffs' claims have never been predicated on a misclassification theory, and Wackenhut has never asserted any "exemption to the wage and hour laws" as an affirmative defense in this case. Rather, Wackenhut has asserted that its on-duty meal periods were lawful pursuant to the narrow "nature of the work exception" included in the IWC Wage Order. This is a distinction with a difference.[6]

Each of the cases Wackenhut cites as creating this fictional split of authority is a misclassification case, wherein the trial court denied class certification (or upheld decertification), holding that the employer had presented substantial evidence that individual issues predominated. (See *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1453-54; *Arenas v. El Torito Restaurants, Inc.* (2010) 183 Cal.App.4th 723, 734-35; I*n re Wells Fargo Home Mortgage Overtime Pay Litigation* (9th Cir. 2009) 571 F.3d 953, 956; *Vinole v. Countrywide Home Loans, Inc.* (9th Cir. 2009) 571 F.3d 935, 947.)

These present no conflict with the decision here. Here the Court of Appeal determined that class decertification was inappropriate because Wackenhut had failed to provide substantial evidence that officers' "duties varied so that some posts would qualify for the 'nature of the work' exception, while others would not (*id.,* at p. 949), and had failed to substantiate that its uniform policy could not be established on a classwide basis (*id.*, at p. 941).

Wackenhut inexplicably fails even to acknowledge the most relevant—and even controlling—intervening case law developments that establish the appropriate framework for determination of the issues actually presented here. The Court of Appeal's decision

[6] The increased complications arising in class actions premised on misclassification theories is well-established. These complications are due to considerations under the applicable substantive law, because these exemption cases often are dependent on numerous individual issues for resolution. (See, e.g., *Duran, supra*, at 25, 30); *Brinker*, at 1054 & fn. 2 (Werdeger, J. concurring) ["a defense that hinges liability *vel non* on consideration of numerous intricately detailed factual questions, as is sometimes the case in misclassification suits, is different . . . ."]; *Abdullah, supra*, at p. 965 ["federal or state exemption classifications—which may sometimes be fact intensive—are not at issue here].

was correctly tethered to exactly these authorities, and the decision represents the appropriate application of this settled law to the record and issues before it, and a natural, logical extension of this line of jurisprudence.

2. *Lubin* is in Accord with *Faulkinbury*, *Abdullah*, and DLSE Guidance

Wackenhut claims review by this Court is necessary because the Court of Appeal's decision "deepens a split in authority" on "the proper approach to class certification in cases where an employer contends its employees fall within an exemption to the wage-and-hour-laws." (PR at pp. 15-16.) While it is not entirely clear what specific unsettled legal question Wackenhut is asking this Court to resolve, Wackenhut repeatedly complains that the Court of Appeal "mistakenly focused" too much on "how an employer decides to avail itself of an exemption to the wage-and-hour laws"—i.e., here, Wackenhut's proven common practice of deferring to its customers' stated staffing preferences resulting in Wackenhut's near-universal failure to provide off-duty meal periods, by default—which it contends is "irrelevant to determining whether the exemption applies."[7] (PR at pp. 15-16.)

Dissatisfied with the unfavorable result compelled by application of controlling law governing class treatment of plaintiffs' meal period claim, Wackenhut resorts to linguistic gymnastics to manufacture an illusory "split of authority"—conspicuously re-styling its nature of the work affirmative defense as a "defense of *exemption* from the wage and hour laws." This shift in labeling was designed to enable Wackenhut's to concoct a review-worthy split of authority by employing more employer-friendly case law under substantive law having no bearing on the issues present here.

Ignoring the bulk of Court of Appeal's carefully-reasoned—and extensive—analysis concerning the trial court's erroneous treatment of Wackenhut's "nature of the

[7] Neither a party's disagreement with application of well-settled law to given facts nor the correction of perceived "errors" in reaching an unfavorable result constitute appropriate basis for Supreme Court review. (See Cal. R. Court 8.500(b).)

work" affirmative defense at decertification, Wackenhut represents the Court of Appeal's final determination of this issue as follows: "[The court] first held . . . . that what matters to adjudicating the 'nature of the work' exception is the manner in which Wackenhut decided to invoke it, not whether the exception *actually applied* to the work class members performed." (PR at p. 3 [emphasis in original].) Of course, the court "held" no such thing.

Notwithstanding Wackenhut's fictional construction of lower courts being disarray on this "important and recurring question" (PR at p. 19), the Court of Appeal's decision is a straightforward application of the extensive guidance this Court has issued in recent years addressing the critical issues in this case. As to the nature of the work affirmative defense, specifically, the Court of Appeal's analysis and conclusions are perfectly aligned with the now-developing body of authority addressing the contours of the nature of the work affirmative defense to meal period claims under the substantive law, as well as in the class context.

Following the trial court's decertification of the class in this case, the Court of Appeal issued its opinion in *Faulkinbury v. Boyd & Assoc., Inc.* (2013) 216 Cal.App.4th 220 ("*Faulkinbury*"), reversing the denial of class certification of meal period, rest break, and overtime claims brought by a class of private security officers who, like Wackenhut's officers, were subject to a blanket requirement to sign on-duty meal period agreements at their time of hire and were generally provided on-duty meal periods at the various client sites to which they were assigned.[8]

The Ninth Circuit reached the same conclusion in *Abdullah v. U.S. Security Assoc., Inc.* (9th Cir. 2013) 731 F.3d 952 ("*Abdullah*"), looking to the reasoning of

[8] The Court of Appeal concluded on remand after *Brinker* that its original opinion affirming denial of class certification (*Faulkinbury v. Boyd & Assoc., Inc.* (2010) 112 Cal.Rptr.3d 72 ("*Boyd*") was erroneous in light of *Brinker*'s instructions on application of the criteria for class certification, and directed the trial court to enter a new order certifying all three of the officers' class claims.

Faulkinbury as well as *DLSE* and affirming class treatment of a meal period claim brought by a class of private security officers. The officers also signed on-duty meal period agreements when hired and were provided on-duty meals at their assigned client sites. Because the ability to adjudicate the nature-of-the-work defense on a classwide basis was the primary dispute in *Abdullah*, the Court engaged in an extensive review of California authority relating to meal period obligations and the nature-of-the-work defense, including extensive consideration of related DLSE Opinion Letters, and concluded that classwide adjudication was appropriate, despite the employer's insistence that evaluation of the defense could only be achieved through individual inquiries due to the vast differences between officers' work assignments.

The employers in *Faulkinbury* and *Abdullah* advanced the very arguments that Wackenhut relied upon in opposing continued class treatment of the class meal period claim here. While there was no dispute in those cases as to the validity of the on-duty meal period agreements the officers in those cases signed—all included explicit revocation language in their form agreements, satisfying the second prong of the nature-of-the-work defense—the operations of both private security companies were similar to Wackenhut's operations in that they represented substantial variation between the many different types of client sites at which individual officers could be assigned. (See *Boyd*, at 77, 87; *Faulkinbury*, at 234-235; *Abdullah*, at 954-955, 958, n.13, 963.) Thus, like Wackenhut, both security companies claimed that these differences precluded classwide adjudication because individual inquiries as to the specific circumstances of a given shift or post would be required to evaluate whether "the nature of the work" prevented officers from being relieved for off-duty meal periods on a case-by-case basis in order to establish liability, thus overwhelming any common issues. (See *Boyd*, at 87-88, 90; *Faulkinbury*, at 234-235; *Abdullah*, at 957, 962.) All of these strikingly familiar arguments were ultimately rejected as a bar to certification. The Court of Appeal reached the same conclusion here.

Notably, the Court in *Abdullah* acknowledged the employer's evidence showing a wide variety of work environments and "undoubtedly distinct" duties performed by its officers at different sites, but found that evidence of these distinctions was insufficient to show a lack of commonality and to defeat class certification, as "USSA had to demonstrate not just that its employees' duties varied, but that they varied to an extent that some posts would qualify for the 'nature of the work' exception, while others would not. It failed to do so."[9] (*Abdullah*, at 954-955, 962-963.) Adopting the same reasoning, the Court of Appeal here found that Wackenhut likewise failed to introduce any evidence indicating that resolution of the nature of the work defense in this case would depend on any individualized issues or proof that would defeat class certification. (*Lubin*, at 947-949.)

As with the Court of Appeal's well-reasoned opinion here, the uniformity of these decisions—the only published authority addressing the nature of the work affirmative defense—belies Wackenhut's attempt to manufacture a review-worthy split of authority on this very issue by reference to misclassification exemption defenses case law.[10]

3. The Court of Appeal's Analysis Regarding the Propriety of Sampling Is Consistent with *Duran* and *Tyson*

Wackenhut further suggests that "this Court should grant review [to] make clear that it meant what it said in *Duran*." (PR at p. 20.) However, the tenets of *Duran* remain clear, and the Court of Appeal decision—also supported by the United States Supreme

[9] Notably, the Ninth Circuit's careful attention to the proper construction of the substantive law as the starting point for framing the class certification analysis—and in particular, precise formulation of the relevant commonality and predominance inquiries by which to evaluate the record evidence at the certification stage—closely mirrors the same principles this Court set forth in *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522.

[10] Wackenhut's failure to address the Abdullah decision inexplicable given its contention that the Court of Appeal is in "direct conflict" with the Ninth Circuit. (PR 17). Nor does Wackenhut follow its assertion of a purported "conflict" with DLSE guidance with any acknowledgement of the most recent DLSE Opinion Letter addressing the defense—which explicitly relies on *Faulkinbury* and *Abdullah*. (DLSE Op. Ltr. 2013.11.15.)

Court in *Tyson Foods, Inc. v. Bouaphakeo* (2016) __ U.S. __, 136 S.Ct. 1036 ("*Tyson*")—does not muddle the appropriate considerations concerning the use of statistical sampling in class actions.

Wackenhut's premise on this point is rooted in mischaracterizations of *Duran* and the analysis by the Court of Appeal here. In *Duran*, this Court reaffirmed its openness "to the appropriate use of representative testimony, sampling, or other procedures employing statistical methodology." (*Duran, supra*, 59 Cal. 4th at p. 33, citing *Sav–On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 339-340.) Regarding the use of statistical sampling, this Court cautioned that "statistical proof cannot be used to bar the presentation of valid defenses to either liability or damages." (*Id.*, at p. 49.) Additionally, "some glue" must bind class members together apart from the statistical evidence. (*Id.*, at p. 31.)

Similarly, the United States Supreme Court affirmed the permissible use of sampling in *Tyson*, noting that "*Wal–Mart* does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability." (*Tyson, supra*, 136 S.Ct. at p. 1048.) The Court held that statistical sampling, "like all evidence, is a means to establish or defend against liability." (*Id.*, at p. 1046.) Its permissibility turns "on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." (*Ibid.*)

The Court of Appeal's analysis is consistent with *Duran* and *Tyson*. As the decision notes, Wackenhut did not challenge the accuracy or the reliability of the sample. (Lubin, 952.) The sample is only a secondary source of proof. (*Id.*, at pp. 951-952 ["[U]nlike *Wal–Mart,* where the use of statistical sampling was the only evidence establishing liability, here, the results of the statistical sampling (calculating an average percentage of meal agreements lacking revocation language for each year between 2001-2008) served as a manageability tool—an alternative to burdensome production."].) Moreover, the testimony of Wackenhut's managers and the agreements themselves

provide "some glue" binding the class members. (*Id.*, at p. 952.)

This analysis does not "violate Wackenhut's right to due process by improperly abridging its right to present its affirmative defenses." (PR at p. 20.) In fact, the Court of Appeal expressly stated in the decision that, notwithstanding the trial court's discretion regarding the propriety of statistical sampling, "Wackenhut can produce the meal period agreements or allow plaintiff to inspect them." (*Id.*, at p. 953.) Thus, the mere existence of statistical sampling does not, as Wackenhut claims, "replace individualized adjudication of a key aspect of Wackenhut's defense" nor preclude Wackenhut from producing the meal period agreement for each class member, which would constitute the individualized proof at issue. (See PR at p. 19-20.) Though perhaps less efficient, the individualized approach would not render a class action unmanageable. (*Lubin*, *supra*, at p. 950, internal quotation marks and citation omitted ["[A]lthough examining each agreement and determining whether it contained revocation language would be nothing more than a tedious and extensive audit that is not likely to result in many factual disputes."].)

This is, therefore, not a case in which plaintiffs sought to rely on a flawed statistical plan to ignore individual issues. (PR at p. 20.) Wackenhut's attempt to characterize it as such defies reality. (See *ibid.*) Most notably, plaintiffs did not "propose[] to avoid individual assessment of each agreement." (PR at p. 20.) The decision makes clear that plaintiffs tried twice in discovery and once again during the hearings on decertification to obtain and inspect each agreement. (*Lubin*, *supra*, at pp. 932-934, 950-951.) Yet, sampling was agreed to by the parties after the trial court's suggestion, as an alternative to the burdensome production Wackenhut sought to avoid. (*Lubin*, *supra*, at pp. 950-952.) Wackenhut did not challenge these factual findings in its Petition for Rehearing and cannot now attempt to recast sampling as a rogue ploy by plaintiffs in violation of *Duran*.

C. NO CASE HOLDS THAT THE MERE OMISSION OF ANY REQUIRED WAGE STATEMENT INFORMATION CAUSES INJURY FOR PURPOSES OF LABOR CODE § 226; WACKENHUT IS FABRICATING A DISPUTE

Labor Code § 226(a) was enacted "to provide transparency as to the calculation of wages" (DLSE Op. Ltr. 2006.07.06, p. 2, http://www.dir.ca.gov/dlse/opinions/2006-07-06.pdf.).[11] Under subsection (a), employers are required to provide nine categories of information on wage statements. Subsection (e) awards the greater of actual damages or statutory penalties to employees who have "suffered injury" as a result of an employer's knowing failure to provide the information in subsection (a).

Prior to its 2013 amendment, courts offered "contradictory and inconsistent interpretations of what constitutes 'suffering injury' under Labor Code § 226 in the various court cases that have been litigated in recent years...." (Senate Committee on Labor and Industrial Relations Analysis, Exh. 17 to 2nd RFJN, at 3-4 [citing *Phillips v. Huntington Memorial Hosp.* (Cal. Ct. App., Aug. 30, 2005, No. B167052) 2005 WL 2083299, at *6, *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, and *Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136.)[12] The California Legislature passed Senate Bill 1255 in response with the specific purpose "to provide further clarity on the issue for purposes of recovering damages under this code section." (*Id.*; see also Senate Rules Committee Analysis, Exh. 19 to 2nd RFJN, at 6; Senate Judiciary Committee Analysis, Exh. 18 to 2nd RFJN, at 1.)

The Legislature clarified that employees are deemed injured if a wage statement fails to provide the information required by subsection (a) *and* "the employee cannot promptly and easily determine from the wage statement alone" certain categories of information identified in subsection (e)(2)(B)(i-iv). These categories include, among

[11] This DLSE Opinion Letter was part of a request for judicial notice filed in the Court of Appeal on August 21, 2013, which was granted September 10, 2013.

[12] Plaintiffs requested judicial notice of this material and other legislative history from SB 1255 on February 4, 2014 and the Court of Appeal granted notice on March 3, 2014.

other things, the inclusive dates of the pay period and all applicable hourly rates of pay—i.e., items missing from the wage statements at issue here.

This is in direct conflict with the trial court's ruling that injury under § 226 requires evidence that Wackenhut's wage statements caused an actual harm to each class member. In reversing the trial court's decertification order, the Court of Appeal held an employee is deemed injured if " 'the employee cannot promptly and easily determine from the wage statement alone' the inclusive dates of the period for which the employee is paid or the applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee." (*Lubin*, at pp. 926, 958-59.)

1. The 2013 Amendment Clarified the Existing Law

Wackenhut attempts to undermine the decision by claiming that it is uncertain whether the 2013 amendment to § 226 clarified, rather than retroactively changed, existing law. (PR at pp. 23-25.) There is no controversy on this point. As the aforementioned legislative history shows, the California Legislature was explicit that SB 1255 was a clarification. Perhaps more tellingly, Wackenhut has not cited a single case finding that the 2013 amendment either was not a clarification or that it created a prospective right. (PR at pp. 23-25.) In fact, Wackenhut admits many federal courts have already found the 2013 amendment to be a clarification. (PR at pp. 23-25; see, e.g., *Brewer*, *supra*, 2015 WL 5072039, at *9 [relying on the legislative history of SB 1255 to hold that it clarified existing law]; *Garnett*, *supra*, 139 F.Supp.3d at p. 1131 [same]; *Varsam*, *supra*, 120 F.Supp.3d at 1180 [same].) The closest Wackenhut comes to supporting its claim of conflicting decisions is citing to cases *that do not address this issue*. (*Loud v. Eden Medical Center* (N.D. Cal., Aug. 28, 2013, No. C-12-02936 EDL) 2013 WL 4605856, at *12; *De La Torre v. American Red Cross* (C.D. Cal., Oct. 9, 2013, No. CV 13-04302 DDP JEMX) 2013 WL 5573101, at *5-6.) Because there is no dispute on this point, there is no need for the Court to address it.

2. Wackenhut's Argument that the Decision Makes a Violation of § 226(a) a Per Se Injury Ignores the Actual Language of the Decision and Statute

Wackenhut claims, "[t]his construction of the statute essentially renders subsection (e)'s 'suffering injury' language ... superfluous, as it collapses the injury inquiry into simply whether the wage statements at issue violated subdivision (a)." (PR at p. 21.) This is false. At no point did the Court of Appeal hold that a violation of subsection (a) alone established injury. Rather, pursuant to amended subsection (e), the Court of Appeal applied the aforementioned two step inquiry to determine if an employee is deemed injured as a matter of law. (*Lubin*, at p. 958.) Because the wage statements uniformly lacked the inclusive dates of the pay period, the regular rates of pay, the overtime rates of pay, and premium wages earned for missed meal and rest breaks, the Court of Appeal found that common questions prevailed and the § 226 claim was amenable to class treatment. (*Id.*, at pp. 959-60.)

3. There Is No Spilt of Authority and Wackenhut's Attempt to Portray the Decision as an Outlier Should Be Disregarded

Wackenhut tries to generate a controversy by arguing that the *Lubin* panel itself has issued inconsistent rulings. (PR at p. 22.) This is inadmissible argument as Wackenhut relies on the unpublished, and therefore uncitable, *Wright v. Menzies Aviation, Inc.* (Nov. 12, 2013, B244332) 2013 WL 5978628. (California Rules of Court, Rule 8.115(a).) The Court should therefore strike from the Petition for Review all reference to and all argument relying on *Wright*. (*Id.*)

Even if this argument is not stricken, it remains incorrect. The *Wright* decision found the proper standard to be whether an employee could promptly and easily determine the start date of the wage period given the other information provided on the wage statement. (*Wright*, at p. *10 & fn. 12.) In other words, the panel applied the law as written in subsection (e), but the outcome was different because the facts were different. Unlike the case at hand, the wage statement in *Wright* lacked *only the start date of the wage period* but contained all other required information including the wage

period's termination date and notice that the wage statement was issued bi-weekly. (*Id.*, at pp. *4, 10.) Because access to a calendar was all that was needed to derive the start date, the employee in *Wright* was not deemed injured under subsection (e)(2)(B).

Wackenhut's attempt to manufacture a split of authority with federal courts is no more persuasive. In a misleading understatement, Wackenhut admitted that "some federal courts" agreed with the Court of Appeal (PR at p. 23). More accurately, an overwhelming majority of federal courts agreed with the Court of Appeal as over a dozen federal decisions support the Court of Appeal's decision.[13]

Ignoring the aforementioned cases, Wackenhut relies on out-of-context quotations to claim a split of authority. Wackenhut cites to *Santos v. TWC Administration LLC* (C.D.Cal. Nov. 3, 2014) No. CV 13-04799 MMM (CWx), 2014 WL 12558274 holding that employees must "provide an accurate itemized wage statement *and* that she suffered an injury as a result of that failure" as evidence of split authority, but this holding does not differ from the decision at issue or the statute. (PR at p. 22 [citing *Santos*, 2014 WL 12558274 at p. *13] (italics original).) *Santos* is likewise of no aid to Wackenhut as the case never addressed whether the employee was actually harmed or could be deemed

[13] See e.g., *Novoa v. Charter Communications, LLC* (E.D. Cal. 2015) 100 F.Supp.3d 1013; *Willner v. Manpower Inc.* (N.D. Cal. 2014) 35 F.Supp.3d 1116; *Garnett v. ADT LLC* (E.D. Cal. 2015) 139 F.Supp.3d 1121; *Clemens v. Hair Club for Men, LLC* (N.D. Cal., Apr. 14, 2016, No. C 15-01431 WHA) 2016 WL 1461944, at *7-8; *Seckler v. Kindred Healthcare Operating Group, Inc.* (C.D. Cal., Mar. 5, 2013, No. SACV 10-01188 DDP) 2013 WL 812656, at *12; *Boyd v. Bank of America Corp.* (C.D. Cal. 2015) 109 F.Supp.3d 1273, 1307–08; *Robles v. Agreserves, Inc.* (E.D. Cal. 2016) 158 F.Supp.3d 952, 1004; *Derum v. Saks & Co.* (S.D. Cal. 2015) 95 F.Supp.3d 1221, 1229; *Ambriz v. Coca Cola Company* (N.D. Cal., Nov. 5, 2013, No. 13-CV-03539-JST) 2013 WL 5947010, at *6; *Brewer v. General Nutrition Corporation* (N.D. Cal., Aug. 27, 2015, No. 11-CV-3587 YGR) 2015 WL 5072039, at *12; *Rosas v. Hua Ping Chang* (N.D. Cal., Sept. 29, 2014, No. 5:13-CV-01800 HRL) 2014 WL 4925122, at *5, report and recommendation adopted (N.D. Cal., Dec. 18, 2014, No. 13-CV-01800-LHK) 2014 WL 7206838; *Fields v. West Marine Products Inc.* (N.D. Cal., Feb. 7, 2014, No. C 13-04916 WHA) 2014 WL 547502, at *8; *Escano v. Kindred Healthcare Operating Co., Inc.* (C.D. Cal., Mar. 5, 2013, No. CV 09-04778 DDP CTX) 2013 WL 816146, at *12; *Telles v. Li* (N.D. Cal., Sept. 16, 2013, No. 5:11-CV-01470-LHK) 2013 WL 5199811, at *8; *Varsam v. Laboratory Corp. of America* (S.D. Cal. 2015) 120 F.Supp.3d 1173, 1180; *Achal v. Gate Gourmet, Inc.* (N.D. Cal. 2015) 114 F.Supp.3d 781, 812; *Davenport v. Wendy's Co.* (E.D. Cal., July 28, 2014, No. 2:14-CV-00931 JAM) 2014 WL 3735611, at *7).

injured because the wage statements at issue were, in fact, sufficient and accurate. (*Santos*, 2014 WL 12558274 at p. *13.) *Quezada v. Con-Way Freight, Inc.* offers even less support for Wackenhut's position as the court dismissed the § 266 claim on the ground the plaintiff "ha[d] not submitted any evidence to show that he could not 'promptly and easily determine from the wage statement alone' the amount of wages he was paid during the pay period." ((N.D. Cal. Dec. 16, 2013) 2013 WL 11089798 p. *3, citing Cal. Lab.Code § 226(e).) The Ninth Circuit in *Milligan v. American Airlines, Inc.* (9th Cir. 2014) 577 Fed.Appx. 718 also performed the analysis required by subsection (e) when it found that although there was missing information, the plaintiff could promptly and easily determine it. (*Id.,* at p. 719; see also *Green v. Lawrence Service Co.* (C.D. Cal., July 23, 2013, No. LA CV12-06155 JAK) 2013 WL 3907506, [relying on testimony that it was "easy" to access the missing information to find the wage statements sufficient].)

The remaining two cases on which Wackenhut relies simply misapplied § 226(e). In *Silva v. AvalonBay Communities, Inc.* the court erroneously held that "[t]he failure to provide information regarding the hours Plaintiff worked is not sufficient to state a claim." ((C.D. Cal., *Oct.* 8, 2015, No. LACV1504157JAKPLAX) 2015 WL 11422302 at *10.) This directly conflicts with subsection (e)(2)(B)(1), and the *Silva* court simply got it wrong despite the statutory clarity. The *Sali v. Universal Health Services of Rancho Springs, Inc.* decision erred slightly differently because it held that violations of § 226 cannot be class claims unless there was *evidence* "that each class member was damaged by the claimed inaccuracy in the wage statement." ((C.D. Cal., June 3, 2015, No. CV 14-985 PSG (JPRX)) 2015 WL 12656937 at *9.) The error here lies in subsection (2)(C), which requires courts to interpret "promptly and easily determine" as an objective, rather than subjective, standard. (Cal. Lab. Code § 226(2)(C).) An individualized inquiry is not necessary because it is a common question to all employees who received similar wage statements whether "a reasonable person would be able to readily ascertain the

information without reference to other documents or information." (*Id.*; see, e.g., *Clemens v. Hair Club for Men, LLC* (N.D. Cal., Apr. 14, 2016, No. C 15-01431 WHA) 2016 WL 1461944, at *7-8 [holding that § 226(e) applies an objective standard subject to the common proof of the wage statements and the defendant's knowledge of its defective wage statements].)

Thus, Wackenhut's attempt to generate a split of authority relies on two unpublished and clearly erroneous district court decisions. In light of the almost two dozen cases (including *Wright*, *Sanatos*, *Quezada*, and *Milligan*) that uniformly interpret § 226(e) as the Court of Appeal did here, Wackenhut's claim of split authority must be disregarded.

D. NO CONFUSION EXISTS OVER THE PROPER STANDARD FOR CLASS DECERTIFICATION

Based on the Court of Appeal's solitary reference to *Green v. Obledo* in a preliminary discussion of legal principles (*Lubin*, at p. 935), Wackenhut claims that the Court of Appeal applied this Court's holding in *Green* that "a class should be decertified only where it is clear that there exist changed circumstances making continued class action treatment improper." (See *Green*, at p. 148, citations and quotation marks omitted.) Wackenhut further contends that the Court of Appeal "bound the trial court to the findings it made in the initial certification order, and imposed an improper burden on Wackenhut to justify the trial court's reassessment of the record instead of reviewing the trial court's decertification findings for substantial evidence." (PR at p. 26.) The Court of Appeal's decision is thus alleged to conflict with *Duran*'s statements that "[t]rial courts have the obligation to decertify a class action if individual issue prove unmanageable" and that "decertification must be ordered whenever a trial plan proves unworkable." (PR at pp. 25-26.) Despite Wackenhut's characterization of the Court of Appeal actions, there exists no uncertainty over the proper standard on decertification.

First, the Court of Appeal did not apply the *Green* standard, whether it is in tension with *Duran* or not. The Court of Appeal merely cited to *Green v. Obledo* (1981) 29 Cal.3d 126 once in the entire decision, and, there, it merely quoted *Green*'s statement that decertification should be based on changed circumstances.[14] (*Lubin*, at p. 935.) The Court of Appeal's inquiry throughout *Lubin* was not into whether the changed circumstances test had been met. Rather, the Court of Appeal evaluated the decertification order on its substance under an abuse of discretion standard. (*Id.*, citing *Brinker*, *supra*, 53 Cal.4th at p. 1022; *Sav-On*, *supra*, 34 Cal.4th at p. 326.) This inquiry was guided by this Court's holding in *Sav-On* that "[a] trial court ruling supported by substantial evidence generally will not be disturbed unless improper criteria were used or erroneous legal assumptions were made. (*Sav-On*, at pp. 326-27.)" (*Id.*) As the Court of Appeal explained, " 'If the trial court failed to conduct the correct legal analysis in deciding not to certify a class action, an appellate court is required to reverse an order denying class certification . . . even though there may be substantial evidence to support the court's order.' " (*Id.*, citing *Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 388, 399 [internal quotes and citations omitted].)

After *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338, Wackenhut had convinced the trial court both that 1) statistical sampling was an impermissible means of establishing classwide liability and 2) class action defendants such as Wackenhut have a constitutional due process right, derived from the Trial by Formula discussion in *Wal-Mart*, to rebut each class member's claim as to both liability and damages issues on an individual basis. The trial court had directly relied on *Wal-Mart* as presenting the "changed circumstances" required by *Green v. Obledo*, therefore permitting decertification.

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[14] It immediately thereafter cited to *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 335, pointing out that "if unanticipated or unmanageable individual issues do arise, the trial court retains the option of decertification." Oddly, Wackenhut claims that the mere quotation from *Green* constituted a "misinterpretation" of *Green*. (PR at p. 26.)

The Court of Appeal first reviewed the "changed circumstances" supposedly arising from *Wal-Mart*, and concluded that the court's "reliance on *Wal-Mart* to support decertification for each of plaintiffs' claims overextended holdings in that case." (*Lubin*, at p. 937 [discussing *Tyson Foods, Inc. v. Bousphakeo* (2016) __ U.S. __, ___ [136 S.Ct. 1036, 1048].) If the Court of Appeal had applied *Green v. Obledo* as Wackenhut claims, its analysis would have ended there: *Wal-Mart* did not change the applicable law, therefore decertification was not appropriate, end of opinion.

The Court of Appeal did not conclude its analysis there. It walked issue-by-issue through the plaintiffs' claims, applying the appropriate standard of review to each. Although the Court of Appeal referred to the original certification order several times in its decision, it did not "impose[] an improper burden on Wackenhut to justify the trial court's reassessment of the record" as Wackenhut claims.

The Court of Appeal based its analysis as to each issue on the trial court's having used improper criteria, employed incorrect legal assumptions, or on an absence of substantial evidence. For example, as to the meal period claim, the Court of Appeal held that the trial court had employed improper criteria in decertifying the class by focusing on whether individualized inquiries would be required to determine whether, in practice, officers *ever* received an off-duty meal period—rather than focusing on whether plaintiffs' theory of liability was susceptible to common proof. (*Lubin*, at p. 940-41.) The Court of Appeal also held that the trial court had employed erroneous legal assumptions in determining that *Wal-Mart* required individualized inquiries. (*Id.*, at p. 941-42.) Thus, the trial court had abused its discretion by applying a faulty analysis and not following *Brinker*.

As to the invalid meal period agreement component of the meal period claim, the Court of Appeal held it was an abuse of discretion to hold the plaintiffs' proposed statistical sampling precluded certification. (*Id.*, at p. 953.) Although the trial court based the decertification order on the fear that statistical sampling would lead to

"imprecise individual recoveries," the fact that statistical sampling may not be appropriate in this case did not preclude class certification because plaintiff's claims were not exclusively reliant on sampling. Rather, the parties agreed to statistical sampling via stipulation, and the meal period agreements could be produced and tediously audited if the trial court deemed it necessary. (*Id.,* at p. 952-53.) Because the calculation of precise individual recoveries was possible, decertification was an abuse of discretion. (*Id.,* at p. 953.)[15]

Finally, Wackenhut's suggestion that the Court of Appeal's decision conflicts with *Duran*'s statements that "[t]rial courts have the obligation to decertify a class action if individual issue prove unmanageable" and that "decertification must be ordered whenever a trial plan proves unworkable" is spurious. The Court of Appeal did not ignore the trial court's findings of unmanageability, but explained that they were based on incorrect legal assumptions. (See, e.g., *Lubin*, at pp. 955-956 [discussing trial court's misreading of *Wal-Mart*].) The Court also explained, quite specifically, how the trial plan could easily accommodate Wackenhut's professed desire to avoid the use of statistical evidence in determining how many guards signed defective meal period agreements and in adjudicating its claim that some guards received some legally compliant breaks by means of an examination of the employer's own records. (See *id.*, at pp. 950-951.)

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[15] See also *Lubin*, at p. 949 [regarding the nature of the work affirmative defense, trial court had conducted incorrect analysis: by permitting customers to decide nature of meal period Wackenhut had treated issue on a classwide basis and therefore individual issues did not predominate]; *Id.*, at p. 954-55 [regarding rest break claim, trial court had used improper criteria because it had required "plaintiffs to *conclusively* establish that Wackenhut had a policy of not providing rest breaks at *every* worksite."]; *Id.*, at p. 957 [as to establishing a uniform policy, no substantial evidence supporting Wackenhut's claim that "there were in fact California enhancements authorizing and permitting rest breaks."]; *Id.*, at pp. 958-59[decertification of wage statement claim improper because trial court had made erroneous legal assumption that "Plaintiffs must . . . prove that class members [each] suffered [actual] injury as a result of the [omitted information]," which could not be done on a classwide basis].

Wackenhut's call for the Court to use this case as a vehicle to address *Green*'s continued vitality is quixotic and does not justify review.

IV. CONCLUSION

For the foregoing reasons, Wackenhut's Petition for Review should be denied.

Dated: January 30, 2017

Weinberg, Roger & Rosenfeld
A Professional Corporation

By: _____
Emily P. Rich

Plaintiffs and Appellants NIVIDA LUBIN, SYLVIA MARESCA and KEVIN DENTON

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c)(1) of the California Rules of Court, counsel for the Plaintiffs and Appellants NIVIDA LUBIN, SYLVIA MARESCA and KEVIN DENTON certifies that this ANSWER TO PETITION FOR REVIEW contains **8,016** words in a proportionately-spaced 13-point Times New Roman type, exclusive of the tables of contents and authorities and certificate of service, and that the word processing system used in the preparation of this brief is Microsoft Word 2010.

Respectfully submitted this **30th** day of **January 2017.**

Weinberg, Roger & Rosenfeld
A Professional Corporation

Emily P. Rich

Plaintiffs and Appellants NIVIDA LUBIN,
SYLVIA MARASCA and
KEVIN DENTON