NOS. A116458, A116459, A116886

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

ANDREA SAVAGLIO, *et al.*,

Plaintiffs, Respondents and Cross-Appellants,

v.

WAL-MART STORES, INC., *et al.*,

Defendants, Appellants and Cross-Respondents.

On Appeal And Cross-Appeal
From the Superior Court of the State of California,
County of Alameda
(Superior Court Case No. GIC 835687)
The Honorable Ronald M. Sabraw

BRIEF AS *AMICUS CURIAE* FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS

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INTRODUCTION AND SUMMARY OF ARGUMENT

The size and nature of the class certified by the trial court in this case is staggering. The representative plaintiffs purport to represent almost 116,000 individuals who were employed during a period of four and a half years at 180 stores operated by Wal-Mart Stores, Inc. and Sam's West Inc. (together "Wal-Mart") spread throughout the entire State of California.

The class certification violated the procedural guarantees of federal due process both because it denied Wal-Mart its right to present a meaningful individualized defense on liability to the various claims asserted and because the certification irrationally affected the defense regarding the size of the monetary award. Also, the arbitrariness of the punitive damage award violated the substantive component of federal due process, and the combination of these constitutional errors created a runaway litigation in which hundreds of millions of dollars were awarded to an overbroad class without any evidence of actual harm to any class members.

The case thus raises legal questions of vital importance to the *amicus curiae* Chamber of Commerce of the United States of America ("the Chamber"), which is the world's largest business federation, and represents an underlying membership of more than three million companies and professional organizations nationwide. It regularly advocates the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber often submits briefs as *amicus curiae* in litigation raising issues of concern to the Nation's business community. This is such a case because the Chamber's members are often targets of class action litigation seeking multi-million dollar punitive damage awards.

I.

A. The Superior Court's certification of a class violated not only state law but also the federal constitutional guarantee of procedural due process because it denied Wal-Mart a meaningful opportunity to raise available state law affirmative defenses on an individual basis. The Supreme Court of the United States recently reaffirmed that the guarantee of procedural due process "prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" (*Philip Morris USA v. Williams* (2007) 549 U.S. ___ [127 S. Ct. 1057, 1063], quoting *Lindsey v. Normet* (1972) 405 U.S. 56, 66 [31 L.Ed.2d 36, 92 S.Ct. 862].)

The trial court nonetheless permitted this case to proceed on the theory that Wal-Mart received "due process in the aggregate," (AA11040), but such aggregation defeats the right to due process. It has long been settled that the rights created by the Due Process Clause "are . . . guaranteed to the individual. The rights established are personal rights." (*Shelley v.*

Kraemer (1948) 334 U.S. 1, 22 [92 L.Ed. 1161, 68 S.Ct. 836].) Even when multiple plaintiffs have similar claims, the Due Process Clause's guarantee of individualized justice prohibits the certification of class actions on questions of liability when issues of liability (including potential defenses to be raised by the defendant) are subject to individualized proof. Wal-Mart's liability to each class member was not adjudicated individually, nor could it have been under the class action framework imposed by the trial court.

B. Even apart from the particular claims and defenses that required individualized treatment in this case, the class certification violated the federal constitutional guarantee of due process because the certification of such an enormous class for recovery of premium payments under section 226.7 of the California Labor Code irrationally skews the adversarial process, enhances the risk of an incorrect jury verdict, and thus forces defendants to settle unmeritorious cases.

Certification of enormous class actions for recovery of section 226.7 premium payments creates unfair procedural advantages for plaintiffs that make such cases substantially more difficult to defend. These advantages not only make it more likely that plaintiffs will prevail (after controlling for all relevant factors), but also that plaintiffs will recover increased amounts of money.

Among the unwarranted advantages that plaintiffs obtain when litigating an enormous monetary class action is that the plaintiffs may present evidence regarding only the best, and often times least typical, class members. Moreover, even if there were a means to avoid paying unharmed plaintiffs, there is still a substantial risk of forcing defendants to overpay in the aggregate. And the certification of a monetary class posed a unique risk of an incorrect award by the jury in this particular case because the framework created by the trial court did not require the money that is awarded against the defendants, but is not distributed to a member of the plaintiff class because of lack of proof, be returned to the defendants. This type of overbroad class, which encompasses persons who have no entitlement to relief even under plaintiffs' theory of the case, unfairly burdens defendants with no benefit to the public or the class members.

Class certification also imposes substantially increased litigation costs on defendants that irrationally skew the settlement calculus. The risk of increased payments and costs that depend on the result of a *single trial* where the certified class is so large as to include 116,000 plaintiffs, can force settlement of unmeritorious claims. In other words, despite the fact that a class action includes unmeritorious claims, the risk of a single jury deciding 116,000 claims imposes enormous pressure to settle because a decision by the jury that is adverse to the company would threaten the company with financial ruin. This irrational skewing of the adversarial process cannot withstand federal due process scrutiny and requires reversal of class certification of the magnitude in this case. Otherwise, the certification will stand as precedent for further due process violations that will go unremedied because of forced settlements.

II.

The trial court's refusal to vacate the $115 million punitive damage award as "grossly excessive or arbitrary" in this wage and hour case violated the federal constitutional guarantee of substantive due process under *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 416 [155 L.Ed.2d 585, 123 S.Ct. 1513].

A. The kind of wage and hour violations here are not "reprehensible" in any federal constitutional sense, and thus punitive damages are not constitutionally sustainable at any level in this case under *State Farm*. This conclusion is consistent with the assessment of the California legislature, which did not expressly authorize punitive damages to be awarded for violations of section 226.7 of the Labor Code or other associated provisions regarding minimum wages, overtime, and related wage and hour violations. Moreover, the California legislature is in accord in this regard with Congress and the legislatures of the 49 other States. Based on leading treatises that have surveyed state wage and hour laws, it appears that no State statute expressly authorizes punitive damages for wage or hour claims.

B. The $115 million punitive damages award vastly exceeds the ratio between actual harm and punitive damages that is allowed under federal constitutional due process standards..

1. Contrary to the Superior Court's view, the $57.2 million in section 226.7 premium payments awarded to the plaintiff class members in this case is not a measure of actual harm suffered by the plaintiffs and, thus, cannot be used to determine whether the punitive damages are a permissible ratio by comparison under *State Farm*. The California Supreme Court's rationale in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094 [56 Cal.Rptr.3d 880, 155 P.3d 284], supports this conclusion.

Premium payments under section 226.7 of the Labor Code were designed not merely to compensate employees, but also to penalize employers. The statutory scheme is structured so that it overcompensates almost every employee who recovers section 226.7 premium payments. Statutorily prescribed meal periods need be only a half hour long and an employer need not pay the employee during the half hour. The section 226.7 premium payments provision requires, however, that an employer pay an employee for *sixty minutes* of his wages at his regular rate of pay if the employee misses *any portion* of a *thirty minute* meal period. Such a statutory multiplier is a typical way of imposing punishment. Moreover, even payment of an employee's wages for thirty minutes would be greater than the financial loss of not being forced to take a meal period that would have been without pay. The legislative history demonstrates that the legislature described the section 226.7 premium payments as a penalty and, although *Murphy* found that such legislative history was irrelevant in determining which of two statutes of limitations applied, it is relevant to determining that the premium payments are not compensatory but, instead, are punitive.

Furthermore, a true effort to measure actual harm to a member of the plaintiff class of not being forced to take an unpaid meal period would need to take into account the fact that (1) the particular class member chose to work rather than take the meal period; and (2) the particular class member was paid for the time he or she worked. The section 226.7 premium payments provision does not take these preferential and economic realities into account and thus cannot be the measure of actual harm against which the federal constitutionality of the punitive damages award is determined.

Indeed, the measure of *actual* harm experienced by the class in determining the constitutionality of the punitive damages award is $0, and an appropriate punitive damage award is thus also $0, not $115 million. This conclusion is consistent with the traditional common law rule, followed by the majority of States, that no punitive damages may be awarded when a fact finder fails to award compensatory damages.

2. Even assuming, *arguendo*, that the section 226.7 premium payments could be viewed as a measure of the actual harm experienced by plaintiffs, the two-to-one ratio of section 226.7 premium payments to punitive damages is constitutionally excessive because the $57.2 million premium payments award was so substantial.

The United States Supreme Court in *Exxon Shipping Co. v. Baker* (June 25, 2008, No. 07-219) 554 U.S. ___ [2008 WL 2511219], *twice* restated the holding of *State Farm* that the Due Process Clause itself imposes a one-to-one limit when a compensatory award is substantial. In that case, the Court explained that to determine whether a compensatory award is substantial, and thus permits no more than a one-to-one ratio, it is important to determine whether the opportunity to recover larger punitive damages is needed to induce legal action. The Court held that the opportunity for bringing a class action addresses that very same concern, and thus reduces the need for an individual class member to obtain a large punitive damages award. The availability of attorney's fees – such as the $25.7 million the trial court ordered Wal-Mart to pay plaintiffs' counsel – likewise negates any need for punitive damages exceeding a one-to-one ratio to compensatory damages because the availability of such fees can induce legal action.

The better reasoned court of appeal cases – such as *Jet Source Charter, Inc. v. Doherty* (2007) 148 Cal.App.4th 1 [55 Cal.Rptr.3d 176], and *Walker v. Farmers Insurance Exchange* (2007) 153 Cal.App.4th 965 [63 Cal.Rptr.3d 507] – have held that *State Farm* requires that, when substantial compensatory damages are awarded, a punitive damages award may not materially exceed the compensatory damages award. The better reasoned federal appellate court decisions have reached similar conclusions.

ARGUMENT

Amicus curiae Chamber of Commerce agrees with appellants and many of the other *amici curiae* filing in support of reversal that the Superior Court made multiple errors of California law when it certified the enormous class action in this case and sustained the jury's liability verdict and award of punitive damages. The Chamber focuses this brief, however, on federal constitutional flaws in the judgment. Assuming, *arguendo*, that the trial court abided by state law, the judgment must be vacated, nonetheless, because it was obtained in violation of the procedural and substantive components of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

I. THE TRIAL COURT'S "AGGREGATE" DUE PROCESS THEORY VIOLATED THE DEFENDANTS' FEDERAL DUE PROCESS RIGHT TO PRESENT THEIR DEFENSES TO INDIVIDUALIZED CLAIMS OF THE NEARLY 116,000 EMPLOYEES AT ISSUE AND UNDULY DISTORTED THE LITIGATION PROCESS BECAUSE OF THE MAGNITUDE OF MONEY AT STAKE

The class representatives brought this suit under section 226.7 of the California Labor Code, which the Superior Court incorrectly interpreted to say that an employer must "ensure" that each employee takes a thirty-minute meal period (after 5 hours of work). Plaintiffs claim that each class member did not receive at least one full meal period between January 2001 and May 2005. The size and nature of the class as certified by the Superior Court to recover money in this case is staggering. The representative plaintiffs purport to represent almost 116,000 employees, over a period of four and a half years, at 180 stores spread throughout the entire State of California.

A. Certification Of This Class Deprived Wal-Mart Of Its Federal Due Process Right To Put On Meaningful Defenses To Each Individual Class Member's Claim

The trial court rejected the defendants' due process challenge to class certification. The defendants had argued that some of the class members have no claim against defendants because some of them had affirmatively waived their right to a meal period or had ignored directions to take a meal period, or because other factual circumstances supported state law defenses on the merits. The trial court rejected these arguments, ruling that the plaintiff class could "take an aggregate approach" to liability, to section 226.7 premium payments, and to punitive damages and could "avoid the need to individually adjudicate the claims of each member of the class." (AA11043.) The trial court also determined that there did not need to be any hearings in which Wal-Mart could address individual issues on an individual basis. (AA11039.)

The court allowed this "aggregate" approach notwithstanding its recognition that *not* "every member of a class can assert and prevail on a common issue of liability." (AA11042.) The court reasoned that "the evidence that some members of the class waived some of their meal periods" (*i.e.*, establishing a defense on the merits for Wal-Mart) did not undermine its determination "that common issues of law and fact predominate on the meal period claims." (AA9273. See also AA11035-36 [trial court determined that "there were differences among the claims of the class members and the defenses applicable to each class member," but nonetheless found that the common issues predominated over the differences].)

The trial court's aggregate approach rulings violated California law, as appellants demonstrate, because that law makes clear that a class action can be certified only if a defendant is given "an opportunity to contest each individual claim on any ground not resolved in the trial of common issues." (*Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1210 [29 Cal.Rptr.3d 401, 113 P.3d 82].) Indeed, the California Supreme Court has consistently made clear that a party cannot be denied a substantive state law defense just because a case was brought as a class action. (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 749 [38 Cal.Rptr.2d 650, 889 P.2d 970] ["It is inappropriate to deprive defendants of their substantive rights merely because those rights are inconvenient in light of the litigation posture plaintiffs have chosen."], cert. den. (1995) 516 U.S. 866 [133 L.Ed.2d 121, 116 S.Ct. 183]; accord *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462 [115 Cal.Rptr. 797, 525 P.2d 701] ["Altering the substantive law to accommodate procedure would be to confuse the means with the ends - to sacrifice the goal for the going."]; *Washington Mut. Bank v. Superior Court* (2001) 24 Cal. 4th 906, 918 [103 Cal.Rptr.2d 320, 15 P.3d 1071] [same].)

The trial court's resolution of liability on a class-wide basis without allowing Wal-Mart a meaningful opportunity to raise state law affirmative defenses on an individual basis also violated federal constitutional guarantees of due process. The Fourteenth Amendment's guarantee that a person be afforded "due process of law" before deprivation of property requires that parties to a civil case be given "the opportunity to be heard at a meaningful time and in a meaningful manner. [Citation.]" (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333 [47 L.Ed.2d 18, 96 S.Ct. 893].) This right extends to defendants as well as plaintiffs. Indeed, the Supreme Court of the United States recently vacated an award of punitive damages because of a denial of procedural due process, explicitly reaffirming that federal due process "prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" (*Philip Morris USA v. Williams* (2007) 549 U.S. ___ [127 S. Ct. 1057, 1063], quoting *Lindsey v. Normet* (1972) 405 U.S. 56, 66 [31 L.Ed.2d 36, 92 S.Ct. 862].)

A defendant has a federal due process "right to present a full defense," which includes a right to present "any relevant rebuttal evidence," such as evidence that there was no violation "against one or more members of the class." (*Western Elec. Co. v. Stern* (3d Cir. 1976) 544 F.2d 1196, 1199.) The trial court in this case, however, reached the precisely opposite conclusion. The court erroneously declared that "there is no absolute due process right . . . that every individual issue can be resolved on an individual basis." (AA11039.) Instead, the court reasoned that Wal-Mart received "due process in the aggregate." (AA11040; see also AA11043 ["The claims in this case were susceptible to a combined aggregate determination of liability and damages."].)

The trial court's concept of "due process in the aggregate" is an oxymoron. The United States Supreme Court has long held that "[t]he rights created by the first section of the Fourteenth Amendment," including the Due Process Clause, "are . . . guaranteed to the individual. The rights established are personal rights." (*Shelley v. Kraemer* (1948) 334 U.S. 1, 22 [92 L.Ed. 1161, 68 S.Ct. 836].)

Even when multiple plaintiffs have similar claims, the Due Process Clause's guarantee of individualized justice prohibits the certification of class actions on questions of liability when issues of liability (including potential defenses to be raised by the defendant) are subject to individualized proof. The United States Court of Appeals for the Second Circuit recently reversed certification of a class on just such due process grounds. In *McLaughlin v. American Tobacco Co.* (2d Cir. 2008) 522 F.3d 215, the court explained that the defendant tobacco companies "have the right to raise individual defenses against each class member" in an action where plaintiffs were smokers of "light" cigarettes claiming fraud. (*Id.* at 232, quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (3d Cir. 2001) 259 F.3d 154, 191-192.) The Second Circuit made clear that when class certification or other procedural devices are used "to permit the mass aggregation of claims, the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation." (*Ibid.*)

Other courts have reached the same conclusion under the federal Due Process Clause. (See *Arch v. American Tobacco Co.* (E.D. Pa 1997) 175 F.R.D. 469, 489, fn. 21 [due process prohibits class certification when liability issues are subject to individualized proof], aff'd (3d Cir. 1998) 161 F.3d 127; see also *Todd-Stenberg v. Dalkon Shield Claimants* (1996) 48 Cal.App.4th 976, 980-981 [56 Cal.Rptr.2d 16] [holding that consolidation of multiple suits may violate party's due process rights by encouraging factfinder to not focus on individual cases and that such risk increases with the number of plaintiffs]; *In re St. Jude Med., Inc.* (8th Cir. 2008) 522 F.3d

836, 840-841 [reaching similar result although not expressly relying on due process; holding that even though the plaintiffs, as a matter of state law, were not required to submit individualized proof of reliance on certain representations, the defendant's right under state law to prove lack of reliance based on individual circumstances negated the appropriateness of certifying a class action].)

Whether Wal-Mart was liable to each class member was not adjudicated individually in this case as was required by this due process doctrine, nor could it have been under the class action framework imposed by the trial court. Under California law, in order for a plaintiff to establish liability, the plaintiff must show that he or she actually missed a meal period (and even the trial court recognized this). But the plaintiffs' only proof of missed meal periods in this case was time card data, and that data contained various errors and would have been impeached in individual cases, (AA7426), if appellants had been allowed a meaningful opportunity to present individualized defenses. For example, one flaw in the data arose because employees sometimes did not "clock out" when they went to lunch. Yet there was no opportunity for Wal-Mart to show that any of the members of the plaintiff class had, at least on occasion, made such an omission. The trial court again took an aggregate approach and did not allow such defenses because, according to the trial court, the data was reliable "overall" in reaching an "estimate" of meal periods not taken by class members. (AA11129-30.)

Even assuming that each member of the plaintiff class established that he or she missed meal periods, the circumstances under which each of them did so are infinitely varied in respects that are material to whether a violation of state law occurred. For example, some employees did not take full meal periods as a voluntary waiver of their right to a meal period. Other employees failed to follow directions to take such a break, and other employees may have had some other reasons. Also, whether each employee took almost all, some, or none of each meal period varied from person to person and occasion to occasion.

These factual circumstances are material under state law because they are relevant to Wal-Mart's affirmative defenses which require inquiry into the conduct and motives of individual members of the class. (See Appellants' Opening Br. 76-79 [discussing the Superior Court's recognition of state law affirmative defenses of waiver, failure to follow directions, and de minimis grace period].) Although the trial court purported to acknowledge that Wal-Mart "raised individualized affirmative defenses," (AA11036), that did not prevent the court from certifying the class which it expressly recognized meant that the jury would resolve "each of Wal-Mart's affirmative defenses on a classwide basis," rather than on an individual basis. (AA11044.) Thus, under the class action procedure imposed in this case, the jury reached the objectively implausible conclusion that not *one* of the nearly 116,000 employees in a four and a half year period *ever* voluntarily waived an unpaid meal period by choosing to work and get paid instead. This unrealistic finding confirms that the jury did not address the individual class member claims, but made decisions only in the aggregate, by some type of "close enough" or other reasoning that violated the defendants' federal constitutional right to due process.

Additional due process problems arise because the trial court certified the plaintiff class for section 226.7 premium payments and punitive damages purposes without allowance for hearings in which Wal-Mart could address individual issues of such payments and damages on an individual basis. (AA11039.) Whether each employee experienced actual harm from not taking a meal period (or part of a meal period) is a particularly individualized inquiry, relevant to determining whether punitive damages are appropriate, as discussed in Part II *infra*. In order to recover punitive damages, plaintiffs had to establish, at a minimum, that each class member experienced actual harm, but the trial court acknowledged that "Wal-Mart was not permitted to address whether each classmember [*sic*] had suffered injury and was entitled to punitive damages." (AA11045.) The trial court's class certification decision thus violated fundamental due process by constraining the ability of Wal-Mart (and, if sustained, other class action defendants in future cases) to present a full and meaningful defense at trial.

Unless the trial court's decision is reversed, Wal-Mart will be forced to pay section 226.7 premium payments to class members who have never proven that they (as opposed to other class members) have a valid claim, and without having the opportunity to contest the claims of individual class members based on one or more affirmative defenses. Such a procedure is clearly not one which affords Wal-Mart an "opportunity to be heard at a meaningful time and in a meaningful manner," (*Mathews, supra*, 424 U.S. at p. 333, citation omitted), and to "present every available defense" as is required by the federal constitutional guarantee of due process. (*Philip Morris USA*, 127 S.Ct. at p. 1063, citation omitted.)

B. Truly Enormous Class Actions, Such As This Case, That Are Certified For Monetary Recovery Irrationally Distort The Proper Operation Of The Civil Justice System

The certification of the enormous class in this case also violated federal due process because of the monetary relief under section 226.7 at issue in the case.

Certification of a class in any case where monetary relief is sought is not a favored practice, as compared to class certification in cases where only an injunction is at stake. That is because financial payments, by their very nature, generally require an individualized determination due to the fact that the existence and the degree of harm is individualized. Certification of enormous monetary class actions irrationally skews the adversarial process, enhances the risk of an incorrect jury verdict, and thus forces defendants to settle unmeritorious cases.

For example, the plaintiff class may present evidence regarding only the best, and often times least typical, class members. "[P]laintiffs enjoy[] the practical advantage of being able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced together for litigation." (*Broussard v. Meineke Discount Muffler Shops, Inc.* (4th Cir. 1998) 155 F.3d 331, 344.) The litigation then becomes focused on an imagined "typical" class member, rather than the actual members of the class and individualized damages. Such litigation is fundamentally unfair because, instead of probing weaknesses of damage claims by actual plaintiffs, defendants are forced to defend against a "fictional composite." (*Id.* at p. 345.) That was so in this case where the class put on testimony by only nine employees from among the approximately 116,000 members of the class and then the jury was allowed to guess, with virtually no guidance, what proportion of the class was similar in relevant respects to the few members who testified. This type of overbroad class, which encompasses persons who have no entitlement to relief even under plaintiffs' theory of the case, unfairly burdens defendants with no benefit to the public or the class members. (Cf. *Oshana v. Coca-Cola Co.* (7th Cir. 2006) 472 F.3d 506, 514 [when large number of class members would be unable to establish injury, class should not be certified], cert. den. (2007) 127 S.Ct. 2952 [168 L.Ed.2d 264].)

Moreover, even if there were a means to avoid paying unharmed plaintiffs, there would still be a substantial risk of forcing defendants to overpay. (See *McLaughlin, supra*, 522 F.3d at p. 232.) The certification of a monetary class in this case posed a unique risk of an incorrect monetary award by the jury because the framework created by the trial court did not require that the money that is awarded against the defendants as section 226.7 premium payments, but is not distributed to a member of the plaintiff class because of lack of proof, be returned to the defendants. (AA11176.) In this case, the undistributed money apparently goes to an as-yet-unidentified third party.

The large size of the class increases the likelihood that the amount of premium payments awarded will exceed that due to the actual members of the class. This is because empirical studies show that, as the number of plaintiffs in a case increases, juries become more likely to find fault and to impose larger monetary awards. (See *Castano v. American Tobacco Co.* (5th Cir. 1996) 84 F.3d 734, 746, citing Bordens & Horowitz, *Mass Tort*

Civil Litigation: The Impact of Procedural Changes on Jury Decisions (1989) 73 Judicature 22.)[1]

Class certification also imposes substantially increased litigation costs on defendants that irrationally skew the settlement calculus particularly in cases where there already is a large financial risk of a monetary remedy against the defendants. In this case, for example, in addition to the section 226.7 premium payments and punitive damages awarded to the class, the trial court ordered Wal-Mart to pay plaintiffs $25.7 million in "reasonable" attorneys' fees under California Labor Code section 218.5. It is only fair to assume that defendants expended a commensurate amount of attorney's fees defending this action.

The magnitude of the increased section 226.7 premium payments, punitive damages, and costs that are at risk depending on the result of a

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[1] This case does not involve the more typical class action suit under statutes such as the Unfair Competition Law that seek only disgorgement of money improperly obtained from third parties, some of whom cannot be identified. (See *Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, 760 [9 Cal.Rptr.3d 544] [noting distinction between disgorgement and payment of fixed statutory damages subject to precise calculation].) As noted below, there is no claim in this case that Wal-Mart improperly withheld wages from any member of the class and thus any money not distributed to a class member belongs to no one but Wal-Mart.

single trial when the certified class is so large as to include 116,000 plaintiffs, can force settlement of unmeritorious claims. In other words, despite the fact that a class action includes unmeritorious claims, the risk of a single jury deciding 116,000 claims imposes enormous pressure to settle where a verdict adverse to a company would threaten the company with financial ruin. (See *Coopers & Lybrand v. Livesay* (1978) 437 U.S. 463, 476 [57 L.Ed.2d 351, 98 S.Ct. 2454] ["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."].) For this reason, "almost all class actions settle, and the class obtains substantial settlement leverage from a favorable certification decision." (Bone & Evans, *Class Certification and the Substantive Merits* (2002) 51 Duke L.J. 1251, 1292.) It is only the few, very large business that may be able to survive such extensive liability who could exercise their right to go to trial, and many members of the *amicus* Chamber are not such businesses.

This irrational skewing of the adversarial process cannot withstand federal due process scrutiny and requires reversal of the class certification of the magnitude in this case. Otherwise, the certification will stand as precedent for further due process violations that will go unremedied because of forced settlements.

II. THE $115 MILLION PUNITIVE DAMAGE AWARD VIOLATES THE FEDERAL GUARANTEE OF DUE PROCESS BECAUSE THE DEFENDANTS' CONDUCT WAS NOT CONSTITUTIONALLY REPREHENSIBLE AND THE PLAINTIFF CLASS WAS ALREADY AWARDED SECTION 226.7 PREMIUM PAYMENTS OF $57.2 MILLION WITHOUT ANY PROOF OF ACTUAL HARM

The trial court's refusal to vacate the $115 million punitive damages award as "grossly excessive or arbitrary" in this wage and hour case violated the federal constitutional guarantee of substantive due process under *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 416 [155 L.Ed.2d 585, 123 S.Ct. 1513].

The federal constitutional limits on the amount of a punitive damages award flow from the aberrational nature of punitive damages which impose punishment on defendants without the procedural protections of the criminal law. (*State Farm, supra,* 538 U.S. at p. 416.) The disfavored nature of punitive damages is "universally recognized." (*Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n* (1987) 43 Cal.3d 1379, 1392 [241 Cal.Rptr. 67, 743 P.2d 1323].) Punitive damages "are not favored by the law and they should be granted with the greatest of caution [citations]." (*Henderson v. Security Nat'l Bank* (1977) 72 Cal.App.3d 764, 771 [140 Cal.Rptr. 388].) For this reason, the federal Constitution contains a general presumption against awarding punitive damages. The Supreme Court of the United States has held, as a matter of federal constitutional law, that "[i]t should be presumed [that] a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." (*State Farm, supra,* 538 U.S. at p. 419.)

Numerous state courts have recognized that it is in the public interest to award no punitive damages rather than to have them awarded in error:

> [J]ust as we agree that it is better to acquit a person guilty of a crime than to convict an innocent one, we cannot deny that, given that the injured party has been fully compensated, it is better to exonerate a wrongdoer from punitive damages, even though his wrong be gross or wicked, than to award them at the expense of one whose error was one that society can tolerate and who has already compensated the victim of his error.

(*Travelers Indem. Co. v. Armstrong* (Ind. 1982) 442 N.E.2d 349, 362.) As the Arizona Supreme Court proclaimed, "[w]hen punitive damages are loosely assessed, they become onerous not only to defendants but the public as a whole." (*Linthicum v. Nationwide Life Ins. Co.* (1986) 150 Ariz. 326, 332 [723 P.2d 675] (en banc).)

The Supreme Court of the United States has identified three factors that courts must examine to determine whether a punitive damages award is permissible under the federal Constitution: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*State Farm, supra*, 538 U.S. at p. 418; see also *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63] [interpreting federal due process guarantees and reiterating those standards].) As appellants demonstrate, all three factors show that no punitive damages, and certainly not the $115 million punitive damages awarded, are constitutionally permissible in this case. We focus our discussion below on the first and second factors that have the broadest national implications for the members of the *amicus* Chamber.

A. A Failure To Force Employees To Take Meal Periods, Which Are Offered But Refused, And Instead Paying Them For Working, Is Not Constitutionally Reprehensible Conduct

The "most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." (*State Farm, supra*, 538 U.S. at p. 419.) The trial court in this case failed completely, however, to even address the question of reprehensibility when it assessed the constitutionality of the punitive damages award. (AA11584.) An analysis of the issue readily demonstrates that the alleged conduct of Wal-Mart in this case does not rise to the level of constitutionally reprehensible conduct.

The trial court concluded that Wal-Mart could be liable for violation of state law as alleged if Wal-Mart had not ensured that employees actually took meal periods, even if Wal-Mart had made meal periods available to all its employees. This type of conduct is not reprehensible under the five factors identified by the California Supreme Court in the *Simon* case as determinative of whether conduct is reprehensible under federal due process and *State Farm*: (1) whether the harm was physical and not merely economic; (2) whether the conduct demonstrated an indifference or reckless disregard for the health or safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct was repeated or an isolated incident; and (5) whether the conduct was the result of intentional acts or mere accident. (*Simon, supra*, 35 Cal.4th at p. 1180, citing *State Farm, supra*, 538 U.S. at p. 419.)

The plaintiff class in this case did not establish at trial that Wal-Mart caused any physical harm to any class members. The class also did not establish that Wal-Mart's conduct demonstrated indifference or reckless disregard for the health or safety of employees, and the class's attempt to argue such on this appeal is without adequate record support. Nor did the plaintiff class establish that the class was financially vulnerable in any relevant sense. The fact that the conduct was purportedly repeated and was intentional cannot alone satisfy the reprehensibility standard, particularly where the conduct was based on a nonfrivolous interpretation of the state law without any contrary binding case precedent (AA8389), and where the conduct resulted in the employees being paid for work they chose to do instead of taking the unpaid meal period.

The California legislature's assessment supports this view. The legislature did not expressly authorize punitive damages for violations of section 226.7 of the Labor Code or other related provisions regarding minimum wages and wage and hour violations. Nor have plaintiffs identified any California appellate case that has permitted such punitive damages.

Moreover, the California legislature is in accord with Congress and the legislatures of the 49 other States on the inappropriateness of punitive damages for violations of such wage and hour laws. The federal Fair Labor Standards Act does not permit the award of punitive damages, and instead permits the recovery only of unpaid wages for violations of law, with an equal award of liquidated damages if the violation is "willful[]." (29 U.S.C. § 216(b).) Based on leading treatises that have surveyed state wage and hour laws, it appears that most States follow the federal remedial scheme and no State statute expressly authorizes punitive damages for a wage or hour claim. (See, e.g., American Bar Ass'n Section of Labor and Employment Law, Wage and Hour Laws: A State-by-State Survey (2004

& 2007 Supp.); Leader, Wages & Hours: Law and Practice (1990) ch. 13 [State Wage-Hour Laws and Wage Orders].)

This consistent legislative judgment weighs heavily in favor of a determination that such conduct is *not* constitutionally reprehensible and thus cannot support the disfavored remedy of punitive damages.

B. The $115 Million Punitive Damages Award Vastly Exceeds The Constitutionally Permissible Ratio Between Actual Harm And Punitive Damages

The Superior Court, in what constituted its entire discussion of the due process issue in this case, sustained the $115 million punitive damages award by noting that the Supreme Court observed in *State Farm* that "single digit multipliers of punitive damages to compensatory damages are more likely to comport with due process" and that "the multiplier of 2 to 1," *i.e.* the $115 million punitive award compared to the $57.2 million in section 226.7 premium payments, "is within reason." (AA11584.)

The trial court's sparse analysis contains two distinct errors. First, it is constitutional error to rely on the $57.2 million in section 226.7 premium payments awarded to the plaintiff class as a measure of actual harm suffered by the plaintiffs and, thus, it is not a "compensatory damages" award within the meaning of *State Farm* that can serve as a ratio comparison for determination of the constitutionality of the amount of punitive damages awarded. Second, even if the section 226.7 premium payments could be treated as a compensatory award that measured actual harm, the Superior Court misapplied *State Farm*, which imposes a one-to-one maximum ratio on punitive damages when the compensatory damages awarded are "substantial."

1. The amount of constitutionally permissible punitive damages cannot be determined in this case based on a comparison to the section 226.7 premium payments awarded because the premium payments are not a measure of constitutionally cognizable actual harm

The jury based its $57.2 million section 226.7 premium payments award on subdivision (b) of section 226.7 of the Labor Code, which provides that, if an employer fails to provide an employee an unpaid half-hour meal period, the employer "shall pay the employee *one additional hour of pay* at the employee's regular rate of compensation for each work day that the meal . . . period is not provided." (Lab. Code, § 226.7, subd. (b), italics added.) That statute, on its face, thus is designed to impose punishment, rather than merely compensate an employee, because it requires an employer to remedy a violation by paying the employee for a length of time, at a minimum, twice as long as the missed meal period. In fact, because failure to take even a fraction of a meal period triggers the section 226.7 premium payments, the premium pay multiple could in some instances be greater than 60 or even 100 times the meal period time not actually taken.

And plaintiffs proved nothing to the contrary, never establishing that the section 226.7 premium payments reflected any calculable compensation for actual harm. Rather, plaintiffs argued below that meal periods have "a definite and easily ascertainable value, namely *thirty minutes* of wages at their regular rate of pay," (AA9264, italics added), thereby precluding an argument that the statute's requirement of payment of *sixty minutes* of pay is somehow only compensatory. Indeed, this manner of statutory multiplication of what plaintiffs themselves describe as the definite value of the loss is a typical way of imposing punishment. (See *State Farm, supra*, 538 U.S. at p. 425 [noting a long history of legislation, "dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish"].)

The case of *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094 [56 Cal.Rptr.3d 880, 155 P.3d 284] is not to the contrary. That case involved only a question of statute of limitations and the court concluded that, for those purposes, the section 226.7 premium payments were not a "penalty" but instead were a "premium wage." (*Id.* at p. 1110.) The court did not purport to address the nature of the section 226.7 premium payments for purposes of constitutional analysis under the federal Due Process Clause. Moreover, significant parts of the reasoning in *Murphy* support the view that section 226.7 premium payments are not a measure of the actual harm experienced by the plaintiffs and are not designed merely to compensate employees but also are designed to penalize employers, confirming that such premium payments are not an appropriate comparator in judging the ratio of compensatory to punitive damages for due process purposes. First, *Murphy* recognized that a "one to one ratio does not exist between the economic injury caused by meal and rest period violations on the one hand and the remedy selected by the Legislature on the other." (*Id.* at p. 1112.) Second, *Murphy* noted that the legislature described the section 226.7 premium payments as a penalty. (*Id.* at pp. 1109-1110, 1111.) Although *Murphy* found that legislative history irrelevant in determining which of two statutes of limitations applied, it is particularly relevant to the determination that the section 226.7 premium payments are not compensatory, but, instead, are punitive.

The very fact that section 226.7 premium payments are fixed to 60 minutes of the employee's wage makes it difficult to see how that remedy relates to the amount of injury (economic or otherwise) experienced by that employee in not taking an unpaid 30 minute meal period. Even payment of an employee's wages for only 30 minutes would be greater than the financial loss of not being forced to take a meal period that would have been without pay. Any true effort to measure actual loss to a member of the plaintiff class of not being forced to take a meal period would need to take into account the fact that (1) the particular class member chose to work rather than take the unpaid meal period; and (2) the particular class member was paid for the time he or she worked. (AA9263, AA9680.) The section 226.7 premium payments provision does not take these preferential and economic realities into account and thus cannot, for constitutional purposes, be the measure of actual harm against which the permissive magnitude of a punitive damages award is measured.

As Wal-Mart shows, plaintiffs submitted no substantial evidence of actual harm due to the alleged violations of state law, much less an accurate assessment of the amount of actual harm experienced by each class member. (Appellants' Opening Br. 42-46; see also *Simon, supra*, 35 Cal.4th at p. 1173 [cannot rely on size of punitive damage award to "presume[]" amount of actual harm found by jury].) Therefore, the measure of actual harm *proven* by the class (as opposed to money recovered under the section 226.7 premium payments provision), which should be used to determine the constitutionality of the punitive damages award by comparison, is properly treated as $0 in this case. And a constitutionally permissible punitive damage award is thus also $0, not $115 million.

This conclusion is consistent with the traditional common law rule, followed by the majority of States, that punitive damages may not be awarded when a fact finder fails to award compensatory damages. (See Prosser, et al., Prosser and Keeton on Torts (5th ed. 1984), § 2, p. 14 [reciting this as majority rule]; 1 Kircher & Wiseman, Punitive Damages: Law and Practice (2d ed. 2000) § 5.21, p. 5-156 [same].) California case law is closely in accord, requiring an award of compensatory damages that reflects a finding of actual harm. (See *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 532 [61 Cal.Rptr.3d 304] ["an award of compensatory damages in some amount is a prerequisite to a punitive damage award"]; *Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164] ["any award of exemplary damages must be accompanied by an award of compensatory damages"]; cf. *Kluge v. O'Gara* (1964) 227 Cal.App.2d 207, 210 [38 Cal.Rptr. 607] [holding that punitive damages may be permitted upon award of nominal damages if the plaintiff proves "substantial actual damage"].)

The reasoning that supports the majority rule is that punitive damages are not appropriate in cases where a plaintiff has failed to demonstrate his or her actual harm even if he or she has established a violation of law. (See *People Helpers Found. v. City of Richmond, Va.* (4th Cir. 1993) 12 F.3d 1321, 1327, citing Ghiardi & Kircher, Punitive Damages: Law and Practice (1985 & 1993 Supp.) § 5.37.) This longstanding common law rule reinforces the determination that the punitive damages award in this case far exceeds constitutionally permissible limits. (See *Honda Motor Co. v. Oberg* (1994) 512 U.S. 415 [129 L.Ed.2d 336, 114 S.Ct. 2331].)

2. Even if the 226.7 premium payments were the appropriate comparison, the two-to-one ratio of punitive damages to premium payments is constitutionally excessive because the $57.2 million premium payments award was so substantial

Even assuming *arguendo* that the constitutionality of the $115 million in punitive damages awarded could be judged by comparison to the $57.2 million premium payments awarded under section 226.7, the punitive damages award still cannot pass scrutiny in this case. That comparison would yield a ratio of approximately two-to-one and the Superior Court misread the United States Supreme Court in *State Farm* to support that single-digit ratio here. The Superior Court disregarded the California Supreme Court's decision in *Simon*, which made clear that a single-digit ratio is *not* presumptively valid. (See *State Farm, supra*, 35 Cal.4th at p. 1182.)

The trial court cited the United States Supreme Court's decision in *State Farm* for the proposition that "single digit multipliers of punitive damages to compensatory damages are more likely to comport with due process." (AA11584.) But *State Farm* also held that even small single-digit ratios are constitutionally suspect when compensatory damages are "substantial," such as the $1 million awarded in that case. (*State Farm, supra,* 538 U.S. at p. 426.) "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." (*Id.* at p. 425; see *Simon, supra*, 35 Cal.4th at p. 1182 [smaller single-digit ratios can be unconstitutional "[e]specially when the compensatory damages are substantial or already contain a punitive element"].)

This holding reflects the fact that compensatory damages – especially when awarded in large amounts – can deter and punish as effectively as punitive damages. The necessity – and constitutional justification – for a large punitive damages award is therefore obviated where a substantial compensatory award already has been imposed. (See Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment* (1982) 56 S. Cal. L. Rev. 133, 137 [many decisions upholding punitive damages awards are "oblivious[ ] to the basic point that ordinary civil damages—in the course of providing compensation—concurrently function to deter"].)

The United States Supreme Court reaffirmed and clarified this holding of *State Farm* in *Exxon Shipping Co. v. Baker* (June 25, 2008, No. 07-219) 554 U.S. ___ [2008 WL 2511219]. That case involved the application of federal common law to punitive damages awarded to a class under federal maritime law for spilling millions of gallons of crude oil into Prince William Sound. (The propriety of the damages class certification was not at issue because the certification was done at the behest of Exxon. (*Id.* at p. *6).) In reviewing the size of the punitive damages award, the Court drew on its due process jurisprudence. The Court confirmed that the "relevance of the ratio between compensatory and punitive damages is indisputable, being a central feature in our due process analysis," (*id.* at p. *19), and *twice* restated the holding of *State Farm* that the Due Process Clause itself imposed a one-to-one limit when the compensatory award was substantial. (*Id.* at pp. *16, 21.) Indeed, after determining that federal common law limited the punitive damages award to a one-to-one ratio with the compensatory damages award, the Court stated that "the constitutional outer limits may well be 1:1" because of the "substantial" amount of compensatory damages. (*Id.* at p. *22, fn. 28.)

The Court explained that to determine whether a compensatory award is substantial, and thus permits no more than a one-to-one ratio, it is important to determine whether the opportunity to recover larger punitive damages is needed to "induce legal action," *i.e.*, whether other available remedies "may not be enough to encourage suit." (*Exxon, supra*, 2008 WL 2511219 at p. *22, fn. 28.; see also *id.* at p. *13 [larger punitive damages awards "have been thought to be justifiable" when there are "low incentives to sue"].) The Court held that the "opportunity for [bringing] a class action" addressed that very same concern, and thus reduced the need for an individual class member to obtain a large punitive damages award. (*Id.* at p. *22, fn. 28.) Although not expressly mentioned by the Court in *Exxon*, availability of attorney's fees – such as the $25.7 million the trial court ordered Wal-Mart to pay plaintiffs' counsel – likewise negates any need for punitive damages exceeding a one-to-one ratio to compensatory damages because the availability of such fees induces legal action.

Here, as we discuss above, it would be error to characterize the section 226.7 premium payments as compensatory damages. But even if they were, the trial court erred in sustaining a two-to-one ratio. Following *State Farm*'s instruction (and presaging *Exxon*'s holding), the better reasoned court of appeal cases have held that when substantial compensatory damages are awarded, a punitive damages award may not materially exceed the compensatory damages award. In *Jet Source Charter, Inc. v. Doherty* (2007) 148 Cal.App.4th 1 [55 Cal.Rptr.3d 176], the court of appeal reviewed the *State Farm* criteria and took special note that the Supreme Court had made clear that a one-to-one ratio is appropriate when "*compensatory damages are substantial.*" (*Id.* at p. 10, italics added by court of appeal.) In that case, the jury awarded $6.5 million in compensatory damages and prejudgment interest, which the court of appeal described as "to say the least, substantial." (*Id.* at p. 11.) The damages "were largely in the way of restitution" and lacked "a very large punitive element," unlike, for example, the emotional distress damages in *State Farm.* (*Ibid.*) Nonetheless, the court determined that the punitive damages award of $26 million, "representing four times the compensatory damages," was excessive and concluded that "a total punitive damage award in excess of the $6.5 million compensatory award is [not] appropriate." (*Ibid.*)

Similarly, in *Walker v. Farmers Insurance Exchange* (2007) 153 Cal.App.4th 965 [63 Cal.Rptr.3d 507], the court of appeal reduced a punitive damages award from $8.3 million to $1.5 million, equal to the compensatory award. The court of appeal explained that "this case appears to come within the description of a case . . . where compensatory damages are so substantial as to support only a 1 to 1 ratio." (*Id.* at 974, citing *Simon, supra*, 35 Cal.4th at p. 1159.) This was particularly true because virtually all of the $1.5 million in compensatory damages awarded was based on emotional distress, which contains a "punitive element." (*Ibid.*) The court of appeal rejected the claim that a one-to-one ratio would eliminate "the deterrent role of punitive damages." (*Ibid.*) To the contrary, the court held, for an insurance company to pay $1.5 million "over and above the nearly $1.7 million in compensatory damages and attorney fees cannot . . . be put down 'simply as just another cost of doing business.' Even in this day and age, $1.5 million is a substantial sum." (*Ibid.*)

The better reasoned federal appellate court decisions have reached similar conclusions. For example, in *Williams v. ConAgra Poultry Co.* (8th Cir. 2004) 378 F.3d 790, which was quoted and discussed with approval by the California Supreme Court in *Simon, supra*, 35 Cal.4th at page 1182, the United States Court of Appeals for the Eighth Circuit applied *State Farm* to reduce punitive damages for a racially discriminatory work environment from $6 million to $600,000, equal to the compensatory damages. The court explained that the plaintiff "received $600,000 to compensate him for his harassment" and that "is a lot of money." (*Williams, supra*, 378 F.3d at p. 799.) This "large compensatory award also militates against departing from the heartland of permissible exemplary damages" as reflected in the one-to-one requirement of *State Farm.* (*Ibid.*; see also *Boerner v. Brown & Williamson Tobacco Co.* (8th Cir. 2005) 394 F.3d 594, 603 [remitting punitive damages award against a tobacco company for a design defect claim to equal the compensatory damages, holding that absent "[f]actors that justify a higher ratio," "a ratio of approximately 1:1 would comport with the requirements of due process" given "the substantial compensatory damages award" of $4 million].)[2]

Again, as we discuss above, it would be error to characterize the section 226.7 premium payments as compensatory damages. But even if they were and even if the Due Process Clause did permit in extraordinary cases an exception to the one-to-one principle applied where there are substantial compensatory damages, this is not an extraordinary case that would support such an exception. As in *State Farm*, this is a case where the section 226.7 premium payments not only afforded the plaintiffs "complete compensation," (*State Farm, supra*, 538 U.S. at p. 426), but also included a "punitive element" (*ibid.*), by at least doubling, and often

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[2] Of course, even a one-to-one ratio of punitive damages to compensatory damages does not provide a safe harbor from a challenge of unconstitutional excessiveness. (See, e.g., *Watson v. E.S. Sutton, Inc.* (S.D.N.Y., Sept. 6, 2005, No. 02 Civ 2739) 2005 WL 2170659, *19 [reducing punitive damages award from $2.5 million to $717,000, which was approximately 50% of the compensatory damages award because "the amount is substantial enough to deter, while not being unduly burdensome"]; *Motorola Credit Corp. v. Uzan* (2d Cir. 2004) 388 F.3d 39, 63-64 [vacating judge-imposed punitive damages award of $2.1 billion, an amount equal to the compensatory damages award, for further consideration of, inter alia, "the extent to which a punitive award is needed to deter"], cert. den. (2005) 544 U.S. 1044 [161 L.Ed.2d 1080, 125 S. Ct. 2270].)

multiplying many times more, the amount of wages paid for the meal period.

CONCLUSION

For the foregoing reasons, the judgment should be vacated and the case remanded with instructions to decertify the class. Alternatively, the punitive damage award should be vacated in its entirety or a substantial remitter ordered.

Dated: July 16, 2008

By: ______________________

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c), I certify that the foregoing brief has 9,304 words as counted by Microsoft Word, excluding the table of contents and the table of authorities.

Dated: July 16, 2008

MORRISON & FOERSTER LLP

By: ________________________

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BRIEF AS *AMICUS CURIAE* FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at Washington, D.C., this 16th day of July, 2008.

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dc-529872