# No. 18-55626

# IN THE
# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

**JACQUELINE F. IBARRA,**
*Plaintiff-Appellee,*

*v.*

**WELLS FARGO BANK, N.A.,**
*Defendant-Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
PERCY ANDERSON, DISTRICT JUDGE • CASE NO. 2:17-CV-04344-PA-AS

## AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT AND APPELLANT WELLS FARGO BANK, N.A.
**[All parties have consented. FRAP 29(a).]**

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## CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1, disclosure is hereby made by amicus curiae Chamber of Commerce of the United States of America of the following corporate interests:

a. Parent companies of the corporation or entity:

None.

b. Any publicly held company that owns ten percent or more of the corporation or entity:

None.

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## INTEREST OF AMICUS CURIAE

The U.S. Chamber of Commerce is the world's largest business federation. It represents 300,000 members and indirectly represents the interests of over 3 million businesses and professional organizations of every size, from every sector, and in every geographic region of the country. In particular, the U.S. Chamber has many members located in California and others who conduct substantial business in the state and have a significant interest in the sound and equitable development of California wage-and-hour law. The U.S. Chamber routinely advocates for

the interests of the business community in courts across the nation by filing amicus curiae briefs in cases involving issues of concern. In fulfilling that role, the U.S. Chamber has appeared many times before this Court.

## STATEMENT OF COMPLIANCE WITH RULE 29(a)

All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no other person except amicus curiae, their members, or their counsel contributed money to fund the preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

The district court granted summary judgment in favor of Plaintiffs and directed a $97 million judgment against Wells Fargo by fundamentally misreading a California wage-and-hour statute.

California Labor Code section 226.7 and the applicable wage order require employers to *provide* their employees with rest breaks, and impose a premium-pay remedy (one hour of pay per day) when an employer "*fails to provide*" an employee with a rest period. (Emphasis added.) Employers must pay employees during those authorized rest breaks, but as the

California Supreme Court has explained, "[n]onpayment of wages is not the gravamen of a section 226.7 violation. Instead, [the statute] defines a legal violation *solely* by reference to an employer's obligation to *provide* meal and rest breaks." *Kirby v. Immoos Fire Prot., Inc.*, 53 Cal. 4th 1244, 1256 (2012) (emphases added). To recover unpaid rest break wages, an employee must assert a claim under California's minimum wage law. *See Bluford v. Safeway Inc.*, 216 Cal. App. 4th 864, 872 (2013) (holding that an employer's failure to pay for rest periods is a minimum wage violation).

Plaintiffs concede they are not claiming that Wells Fargo failed to *provide* them with rest breaks. They claim only that Wells Fargo failed to *compensate* them for rest breaks. Based on Plaintiffs' binding stipulation, their sole claim for failure to provide rest breaks must be rejected because they did not plead any unpaid-wages claim.

The district court quickly brushed this entire issue to the side, pointing to other decisions that involved allegations of failure to *provide* rest breaks and concluding that "numerous courts have held that § 226.7 does provide a private right of action." (1 ER 24 (citation omitted).) But aside from one decision that apparently did not consider the issue, no appellate court has held, as the district court held here, that an employer

can be liable for potentially staggering premium-pay wages when it has undisputedly provided rest periods. That is not the law in California.

Even if plaintiffs had properly brought a claim for minimum wage violation, Wells Fargo should still prevail because it ensured that, separate and apart from commissions, its employees would be paid above minimum wage for every hour worked, including rest breaks. There is no dispute that those hourly wages were fully vested once paid and could not be recovered or deducted by Wells Fargo.

Finally, the district court's misreading of the statute and wage order illogically penalizes an employer for providing incentive pay over and above the fully vested hourly pay. Under Plaintiffs' theory, if Wells Fargo had eliminated its incentive pay and paid its employees far less money, Wells Fargo could have avoided the $97 million judgment entered in this case.

At bottom, the district court lost sight of what the statute and wage order were intended to achieve: ensuring that employees could rest during the work day. By penalizing an employer for seeking in good faith to reward employees with pay over and above what is required by the law, the district court's decision benefits neither employers nor employees.

## ARGUMENT

### I. The judgment should be reversed because Wells Fargo undisputedly provided rest breaks.

#### A. The claim that Plaintiffs brought—and the remedy they sought—was exclusively based on a duty to *provide* rest breaks, which Wells Fargo undisputedly did.

In exchange for Wells Fargo's agreeing to class certification, Plaintiffs trimmed their lawsuit to two claims: (1) a claim for failure to *provide* rest breaks under California Labor Code section 226.7 and Wage Order 4; and (2) a derivative Unfair Competition Law claim "based on the same allegation of failure to *provide* rest periods." (3 ER 314 (emphasis added).)

These claims must fail, however, because Plaintiffs offered no evidence (and certainly no undisputed evidence as required on summary judgment) that Wells Fargo denied rest breaks to its employees. To the contrary, Plaintiffs stipulated that "[t]here is no allegation in this lawsuit that [home mortgage consultants] were denied the opportunity to take 10 minute rest periods for every four hours worked or major fraction thereof." (3 ER 201.)

That should be the end of the matter. As is clear from the plain text, the statute and wage order require employers to *provide* rest breaks. *See*

Lab. Code § 226.7(b) ("An employer shall not require an employee to work during a . . . rest or recovery period mandated pursuant to an . . . order of the Industrial Welfare Commission . . . ."); *accord* Wage Order No. 4-2001 § 12(A); Cal. Code Regs. tit. 8, § 11040(12)(A) (2018) (requiring employers to "authorize and permit all employees to take [ten-minute] rest periods" during specified work intervals). The parties have stipulated that Wells Fargo fulfilled that duty, and that stipulation is conclusive. *See Christian Legal Soc. Chapter v. Martinez*, 561 U.S. 661, 677-78 (2010) (reasoning that joint stipulations, even when entered at the outset of litigation, are "binding and conclusive" and "have the effect of withdrawing a fact from issue" (citation omitted)).

Likewise, the premium-pay remedy that Plaintiffs sought—and then obtained—must be tethered to a failure to *provide* rest breaks. The wage order's remedy provision, which tracks the language of section 226.7, is clearly confined to failures to provide rest breaks: "If an employer fails to *provide* an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not *provided*." Wage Order No. 4-2001 § 12(B)

(emphases added); Cal. Code Regs. tit. 8, § 11040(12)(B); *accord* Lab. Code § 226.7(c) (providing the same premium-pay remedy for failure to "provide" a rest period).

Thus, because the parties' stipulation took any failure-to-provide allegation off the table, the premium-pay remedy was off the table as well.

### B. Failure to *pay* for rest breaks is a different claim arising under a different statute with a different remedy that was not sought by Plaintiffs here.

As section 226.7 acknowledges, rest break time is deemed to be work time that counts toward an employee's wages. *See* Lab. Code § 226.7(d) (observing that, in accordance with "existing law," rest periods required by state law are "counted as hours worked, for which there shall be no deduction from wages"); *see also* Wage Order No. 4-2001, § 12(A); Cal. Code Regs. tit. 8, § 11040(12)(A) ("Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages."). The remedy for unpaid rest break time is thus the same as the remedy for any other unpaid work time. *See, e.g.*, *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 590 (2000) (action for unpaid wages for time spent traveling to and from worksite on employer-provided buses).

The remedy for unpaid worktime is at most straight pay—not premium pay, which is reserved for failure to *provide* a meal or rest break. This distinction was illustrated in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012). In that case, the California Supreme Court recognized that an employer who fails to "afford an off-duty meal period" may be "liable for premium pay" under section 226.7 and the applicable wage order. *Id.* at 1039. On the other hand, if an employer affords an off-duty meal period but knows that employees are working through the meal period, "the employer will not be liable for premium pay." *Id.* at 1040 n.19. Instead, the employer "will [at most] be liable for straight pay." *Id.*

The same result follows here. Because it is undisputed that Wells Fargo afforded rest breaks to its home mortgage consultants, Wells Fargo should not be liable for premium pay, which is only owed "for each workday that [a] meal or rest or recovery period is not *provided*." Lab. Code § 226.7(c) (emphasis added).

To recoup wages for allegedly uncompensated rest breaks, plaintiffs could have brought an action for unpaid minimum wages or breach of contract. *See, e.g.*, Cal. Lab. Code § 1194(a) (providing a private right of action to recover "the unpaid balance of the full amount of . . . minimum

wage or overtime compensation"); *Bluford v. Safeway Inc.*, 216 Cal. App. 4th 864, 872 (2013) (holding that an employer's failure to pay for rest periods is a minimum wage violation); *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1127-28 (2013) ("If an employer fails to pay wages in the amount, time or manner required by contract or by statute, the employee . . . may seek judicial relief by filing an ordinary civil action against the employer for breach of contract and/or for the wages prescribed by statute." (citation omitted)).

But Plaintiffs did not assert such claims, choosing instead to pursue only a claim for failure to provide rest breaks. For that reason, the summary judgment in their favor should be reversed.

### C. The district court's order ignores the distinction between failure to *provide* and failure to *pay* for rest breaks.

The district court quickly dispensed with Wells Fargo's argument that "rest-break compensation may only be recovered in a claim for a minimum-wage violation, not directly under section 226.7," reasoning simply that "numerous courts have held that § 226.7 does provide a private right of action." (1 ER 24 (citation omitted) (quoting *Ovieda v. Sodexco Operations, LLC*, No. CV 12-1750-GHK (SSx), 2012 WL 12887083,

at *3 & n.4 (C.D. Cal. Aug. 9, 2012)).) But that misses the point. There is no dispute that section 226.7 creates a private right of action for failure to *provide* rest breaks. But it does not create a private right of action—or provide a premium-pay remedy—for failure to *compensate* for rest periods that were undisputedly provided. Those claims must be brought under California's minimum wage law. *See* Lab. Code § 1194; *Bluford*, 216 Cal. App. 4th at 871-72 (holding that although the wage order "presumes [employees] are paid for their rest periods," a failure to separately compensate for rest periods that are provided is a failure to "comply with California minimum wage law").

*Ovieda* does not suggest otherwise. The plaintiff in *Ovieda* alleged failure to *provide* rest breaks: she asserted that "she and her co-workers frequently were not *provided* 'full and uninterrupted' meal and rest periods 'because of [a] heavy work load and the work place being short-staffed.'" 2012 WL 12887083, at *1 (alteration in original) (emphasis added). The defendants moved to dismiss the plaintiff's claim for rest period premiums on the ground that section 226.7 did not provide a private right of action to recover such premiums, but the court disagreed, noting that the California Supreme Court has implicitly recognized that

such a private right of action exists. *Id.* at *1-3. *Ovieda* simply stands for the unremarkable proposition that a plaintiff may bring a cause of action under section 226.7 for an employer's failure to *provide* rest breaks. It does not stand for the proposition that section 226.7 authorizes a premium-pay cause of action for failure to *compensate* for rest periods.[1]

Nor is the district court's ruling supported by the wage order's statement that premium pay is owed when "an employer fails to provide an employee a rest period *in accordance with the applicable provisions of this order*." Wage Order No. 4-2001 § 12(B) (emphasis added); Cal. Code Regs. tit. 8, § 11040(12)(B). That language is not repeated in the last part of the same sentence—stating that premium pay is owed "for each workday that the rest period is not *provided*"—which clarifies that the premium pay remedy is indeed limited to failure to *provide* rest breaks,

[1] The district court noted that *Ovieda* "collect[ed] cases" on this issue (1 ER 24), but the cases cited in *Ovieda* likewise involved straightforward claims of failure to *provide* rest breaks. *See Mendez v. Bottomley Distrib. Co.*, No. C 07-1086 JF (RS), 2007 WL 1342641, at *1 (N.D. Cal. May 8, 2007) (denying motion to dismiss plaintiffs' "claim for failure to provide meal and rest breaks on the ground that there is no private right of action for such claim"); *Guess v. U.S. Bancorp*, No. C 06-7535 JF (RS), 2007 WL 1345194, at *1 (N.D. Cal. May 8, 2007) (rejecting same argument where plaintiff's claims "allege[d] that Defendants failed to provide class members with all required meal and rest breaks and [sought] one additional hour of pay for each such deprivation").

not failure to *pay wages* for rest breaks. *Id.* (emphasis added). Thus, the "applicable provisions of this order" referenced in the first part of the sentence are simply those provisions requiring employers to authorize and permit employees to take ten-minute rest breaks at specified intervals. *Id.*

### D. The district court's order conflicts with California Supreme Court precedent.

In *Kirby v. Immoos Fire Protection, Inc.*, 53 Cal. 4th 1244, 1248 (2012), the California Supreme Court addressed whether a section 226.7 action could be considered an "action brought for the nonpayment of wages" within the meaning of California Labor Code section 218.5's attorney's-fees provision. In holding that a section 226.7 claim does not qualify for fee shifting, the court explained that section 226.7 targets failure to *provide* rest breaks, not failure to *pay* wages:

> Section 226.7 is not aimed at protecting or providing employees' wages. Instead, the statute is primarily concerned with ensuring the health and welfare of employees by requiring that employers provide meal and rest periods . . . . When an employee sues for a violation of section 226.7, he or she is suing because an employer has allegedly "require[d] [the] employee to work during [a] meal or rest period mandated by an applicable order of the Industrial Welfare Commission." . . . In other words, a section 226.7 action is brought for the *nonprovision of meal and rest periods*, not for the "nonpayment of wages."

*Kirby*, 53 Cal. 4th at 1255 (alterations in original) (citation omitted); *see also id.* at 1256 ("[W]hen an employee sues on the ground that his or her employer has violated section 226.7, the basis for the lawsuit is the employer's nonprovision of statutorily required rest breaks or meal breaks.").

In short, "[n]onpayment of wages is not the gravamen of a section 226.7 violation. Instead, [the statute] defines a legal violation *solely* by reference to an employer's obligation to *provide* meal and rest breaks." *Id.* (emphases added).

Without addressing *Kirby*, the district court instead relied on lower court decisions holding that employers who pay employees on a piece-rate or commission basis must separately pay employees for rest breaks. (1 ER 23-24 (first citing *Vaquero v. Stoneledge Furniture LLC*, 9 Cal. App. 5th 98 (2017); then citing *Ontiveros v. Safelite Fulfillment, Inc.*, 231 F. Supp. 3d 531 (C.D. Cal.), *amended and superseded by* No. CV 15-7118-DMG (RAOx), 2017 WL 6261476 (C.D. Cal. Oct. 12, 2017); then citing *Bluford*, 216 Cal. App. 4th 864.) But none of those decisions support the district court's analysis.

To begin with, if the decisions cited by the district court were to have suggested that section 226.7 creates a premium-pay cause of action for failure to pay wages during rest breaks, they would be at odds with the statute's plain text (premium pay owed "for each workday that the meal or rest or recovery period is not *provided*") as well as the California Supreme Court's decision in *Kirby*. As the high court clearly explained, section 226.7 "defines a legal violation *solely* by reference to an employer's obligation to *provide* meal and rest breaks." *Kirby*, 53 Cal. 4th at 1256 (emphases added).

In any event, the cited decisions actually undermine the district court's conclusion. In *Bluford*, the plaintiff asserted that Safeway did not pay its truck drivers for rest breaks because its compensation system was based on miles driven and did not allow drivers to be paid for resting. 216 Cal. App. 4th at 870.[2] The court agreed with the plaintiff, but concluded that this was a *minimum wage violation*, not a section 226.7 violation entitling the plaintiff to premium pay. *Id.* at 872 (holding that "a piece-rate compensation formula that does not compensate separately for rest

[2] Unlike here, the employees in *Bluford* were paid on a pure piece-rate basis with no guaranteed, fully vested hourly pay for rest breaks.

periods does not comply with California minimum wage law"). In so holding, the court noted, *id.*, that it was following *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314, 317, 321-24 (2005), which held that an employer's failure to compensate employees for "nonproductive" time spent traveling and filling out paperwork likewise violated Labor Code section 1194, California's minimum wage law.

In *Ontiveros*, the plaintiff asserted separate claims for failure to pay for all hours worked (including for rest breaks) and for failure to pay premium compensation when workers were denied rest breaks. 2017 WL 6261476, at *1. The court granted partial summary judgment on the plaintiff's claim that her employer failed to pay minimum wage for rest periods but did not address her separate premium-pay claim under section 226.7. *Id.* at *4-5, *9.

Finally, in *Vaquero*, the court purported to apply *Bluford* and *Armenta*, but then without explanation departed from those decisions by concluding that the failure to separately compensate for rest breaks was a "violation of section 226.7." 9 Cal. App. 5th at 110-11, 117. Perhaps because the point was never raised by the parties, the court failed to address the difference between a minimum wage claim for failure to *pay*

for rest breaks and a section 226.7 claim for failure to *provide* rest breaks. *See id.* at 110-11. Nor did the court address whether the plaintiffs would be entitled to section 226.7(c)'s premium-pay remedy based on a failure to *pay* for rest breaks that were provided. *Id.* As such, *Vaquero* is not authority for those issues. *See United States v. Pepe*, 895 F.3d 679, 688 (9th Cir. 2018) ("[C]ases are not precedential for propositions not considered . . . ."); *Galam v. Carmel (In re Larry's Apartment, LLC)*, 249 F.3d 832, 839 (9th Cir. 2001) ("[Q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having [been] so decided . . . ." (citation omitted)).

In sum, the Chamber is not aware of any appellate decision holding that a failure to pay wages for authorized rest breaks gives rise to premium-pay liability, and *Bluford* held that such a failure is in fact a minimum wage violation. The district court's ruling is thus contrary to the statutory text and case law, and should be rejected.

## II. Even under the district court's incorrect view of the law and Plaintiffs' claim, Wells Fargo indisputably paid for rest breaks.

### A. Unlike in *Vaquero*, it is undisputed that the employees' rest break wages were fully vested and could never be recaptured by the employer.

Even if Plaintiffs had asserted a claim for failure to pay wages, their claim would still fail because Wells Fargo's compensation plan ensured that its home mortgage consultants would be paid above minimum wage for rest breaks. Relying on *Vaquero v. Stoneledge Furniture LLC*, 9 Cal. App. 5th 98 (2017), the district court rejected this argument. (1 ER 23.) But *Vaquero* is distinguishable.

After first concluding that employees paid on commission must be separately compensated for rest breaks, *Vaquero* considered whether the defendant's compensation agreement did so and concluded that it did not. 9 Cal. App. 5th at 114-17. The court reasoned that because the hourly compensation functioned as an advance that could be "clawed back" by deducting from future paychecks, those hourly-pay advances "were not compensation for rest periods because they were not compensation at all. At best they were interest-free loans." *Id.* at 115. Thus, by "taking back money paid to the employee," the employer "effectively reduce[d] either

rest period compensation or the contractual commission rate, both of which violate California law." *Id.*

Unlike the hourly pay component in *Vaquero*, which the court concluded was subject to recapture and thus essentially illusory, Wells Fargo's hourly pay component here is fully vested the moment it gets paid and thus cannot be recaptured by Wells Fargo under any circumstances. Once again, the parties' joint stipulation is on point. The parties stipulated that

> [e]ach of the Comp Plans in effect during the class period also included the following language in Section V-B: "The fact that hourly pay (Advances on Commissions) is taken into account in calculating net commissions/incentives under this Plan *shall not give Employer the right to recover any hourly pay back from any employee. Hourly pay is fully vested when received and is not subject to recapture by Employer under any circumstances.*"

(3 ER 196 (emphasis added).)

This explicit guarantee resolves the concerns raised in *Vaquero*. Because the minimum wage rest break wages are explicitly protected from recapture, there is no possibility, as in *Vaquero*, that Wells Fargo will "tak[e] back money paid to the employee," 9 Cal. App. 5th at 115, and thus no possibility that Wells Fargo will effectively pay employees for rest breaks below the agreed-upon rate. Nor is there any concern, as in

*Vaquero*, that Wells Fargo will "secretly pay a lower wage while purporting to pay the wage designated by statute or by contract," Cal. Lab. Code § 223, because Wells Fargo's compensation plan clearly spells out the formula for earning commissions and Wells Fargo undisputed followed that plan to the letter.

### B. California law permits reducing future contingent pay by accounting for amounts previously paid.

*Vaquero* appeared to be concerned about circumstances where paid rest break wages can be recovered by the employer, thus rendering it "impossible to determine whether the [employee] is compensated for rest periods and, if so, at what rate." 9 Cal. App. 5th at 116. Thus, *Vaquero* did not address the situation here in which a compensation plan includes a fully vested hourly wage that compensates for all hours worked, and on top of that provides for additional incentive payments.

Such a plan was upheld in *Prachasaisoradej v. Ralphs Grocery Co.*, 42 Cal. 4th 217 (2007). In that case, Ralphs offered its employees a "supplementary incentive compensation plan," under which employees received guaranteed base wages, and on top of those wages could receive incentive pay if the store performed well. *Id.* at 239. The employees sued Ralphs, claiming that the plan was unlawful because the formula to

determine incentive pay factored in store expenses, such as workers' compensation costs and damage or loss expenses beyond the employees' control. *Id.* at 230. To that extent, they claimed, the plan unlawfully reduced their wages. *Id.*

The California Supreme Court disagreed. The court explained that each store employee "was offered, promised, and paid, as full compensation for his or her individual work, an agreed and guaranteed dollar wage, which did not vary with the store's financial fortunes, and from which no unauthorized amounts were deducted, withheld, set off, or otherwise received or collected back by the employer." *Id.* at 228. That aspect of the plan distinguished other cases in which *all* of the employee's compensation, "whether regular or supplementary, was set, in essence, as a sales commission," and in which "[t]he set commission was then directly reduced by the full dollar value of merchandise and cash losses." *Id.* at 236.

The court further explained that "insofar as the law precludes the employer from using wages to shift business losses to employees, or to make employees the insurers of such losses, Ralphs did not do so here." *Id.* at 238. The employees did not become insurers of Ralphs's workers'

compensation costs, for example, "simply because the level of [those costs] might have the effect of raising or lowering the wages or earnings ultimately offered or promised to Plan participants." *Id.*

The same is true here. Plaintiffs' rest break wages were not reduced or eliminated simply because the amount of their hourly wages (including rest break wages) were factored into their incentive pay in accordance with Wells Fargo's compensation plan. Wells Fargo's incentive plan guarantees and pays a $12 wage for all hours worked, including rest breaks, and it guarantees and pays an additional commission in accordance with a formula that each employee "understood from the beginning"—even if the employee generates no commissions and is terminated after receiving hourly wages. *Id.* at 237. In short, it cannot be said "that such a supplementary incentive compensation system, beneficial to both employer and employees, contravenes the wage-protection policies of the Labor Code." *Id.* (citation omitted).

As in *Ralphs*, Plaintiffs' criticism of Wells Fargo's plan could be artificially resolved by altering the commission formula. Wells Fargo could, for example, exclude rest break wages from the formula and offset that change by lowering the point value for commissions across the board.

But there is "nothing in the wage-protection laws, or the policies they promote, that requires such meaningless figure-juggling." *Id.* at 241-42.

## III. The district court's ruling threatens incentive pay plans, which voluntarily provide benefits to employees over and above what the law requires.

Rewarding employees with incentives is good for both employers and employees. Incentive pay aligns the interests of employers and employees, improves productivity, allows employers to pay employees more, and gives employees the satisfaction that comes with knowing their additional efforts will be rewarded with additional pay.

The district court's rule threatens to reduce this economically beneficial—and entirely voluntary—practice. *See Koehl v. Verio, Inc.*, 142 Cal. App. 4th 1313, 1332 (2006) (noting that an employee's right to incentive pay in California is determined by the terms of the parties' contract). An overwhelming majority of companies across different industries rely on incentive pay to motivate and reward employees. Stephen Miller, *Employers Award a Wider Variety of Incentive Pay*, Soc'y for Hum. Resource Mgmt. (Mar. 21, 2014), https://goo.gl/Z7wjuS. But employers large and small could well look to this case and decide that creative forms of incentive pay are simply not worth the risk of crushing

legal liability. For many, the obvious takeaway from the district court's ruling is that Wells Fargo could have easily avoided a $97 million judgment by simply scrapping its incentive pay plan altogether and paying its employees far less money. California law does not mandate such an outcome.

## CONCLUSION

The district court's ruling is contrary to the plain statutory text and ultimately benefits neither employers nor employees. This Court should reverse the judgment below.

September 21, 2018

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## CERTIFICATE OF COMPLIANCE

This brief contains 4,586 words (as counted by the word-processing program used to prepare the brief), which is less than the 7,000-word limit established by Fed. R. App. P. 29(a)(5) and Circuit Rule 32-1(a). The format of this brief (including its type size and typeface) complies with the pertinent sections of the Fed. R. App. P. 32(a).

September 21, 2018 s/ Joshua C. McDaniel

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