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Via Federal Express

Honorable Tani Cantil-Sakauye, Chief Justice
and Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, California 94102-4797

Re: ***Lubin v. The Wackenhut Corporation***
Court of Appeal No. B244383
Supreme Court No. S239254

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Chamber of Commerce of the United States of America (U.S. Chamber), the National Association of Security Companies (NASCO), the California Association of Licensed Security Agencies (CALSAGA), and the California Hotel & Lodging Association (Hotel Association) (collectively, amici) respectfully urge this Court to grant defendant The Wackenhut Corporation's petition for review in this wage-and-hour class action.[1]

"[C]lass actions may create injustice" because they can "preclude a defendant from defending each individual claim to its fullest, and even deprive a litigant of a constitutional right." (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 458 (*San Jose*).) Given the "dangers of injustice" and "the limited scope within which these suits serve beneficial purposes," this Court has imposed carefully formulated limits on

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[1] No party or party's counsel authored this letter in support of review in whole or in part or made a monetary contribution intended to fund the preparation or submission of the letter. Other than the amici curiae, their members, or their counsel, no person or entity made a monetary contribution intended to fund the preparation or submission of the letter.

the grounds for certifying a lawsuit as a class action and admonished lower courts to observe those limits. (*Id.* at p. 459.) It is imperative that lower courts abide by these limitations to avoid the "potential for misuse of the class action mechanism" (*Deposit Guaranty Nat. Bank, etc. v. Roper* (1980) 445 U.S. 326, 339 [100 S.Ct. 1166, 63 L.Ed.2d 427]), which can deprive defendants of a fair trial and impose insurmountable pressure on them to settle meritless claims.

The Court of Appeal decision in this case deepens a conflict among appellate decisions concerning this Court's standards for class certification in meal and rest break cases, erodes this Court's limits on class certification, and invites the sort of abuse of the class action mechanism that this Court has warned against. Specifically, the Court of Appeal improperly treated critical individualized liability issues concerning whether each class member actually received lawful meal periods as nothing more than damages questions purportedly irrelevant to the class certification inquiry. Moreover, the Court of Appeal embraced a "trial by formula" approach to manage the trial despite the individualized nature of each class member's claim to recover—an approach that will permit recovery on behalf of class members who were never injured.

This Court's review is warranted to clarify that, in deciding whether to certify class treatment of claims regarding an employer's meal or rest break policy, the question whether class members actually missed any meals or rest breaks to which they were entitled is a *liability* issue, *not* a damages issue. Further, this Court should clarify that even if the right to recover for missed meals or rest breaks is properly characterized as a "damages" issue, class treatment is inappropriate where that issue does not lend itself to a common resolution. This Court's review is further warranted to resolve the question left open by this Court's decision in *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 38-39 *(Duran)*: when, if ever, a "trial by formula" approach is consistent with a defendant's due process rights.

This case presents an excellent opportunity for this Court to address these issues, because it solidifies a division among the Courts of Appeal, showing the Supreme Court's immediate attention is required. The size of the class, the broad scope of industries affected, and the square manner in which the issues are presented by the Court of Appeal's decision, all make this case an ideal vehicle for the Court to address and resolve several important conflicts in California law governing class certification in meal and rest break cases.

INTEREST OF AMICI CURIAE

The U.S. Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and professional organizations of every size. The U.S. Chamber has many members located in California and others who conduct substantial business in the state. 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 implicating issues of vital concern to the nation's business community.

The question of whether courts must adhere to the stringent requirements for class certification in class action lawsuits is of exceptional importance to the business community. Because the " 'grant of class status can propel the stakes of a case into the stratosphere' " (*Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1453), improper certification of class actions can have a devastating in terrorem effect that forces businesses to settle even the most frivolous claims. Accordingly, the U.S. Chamber is deeply interested in ensuring that courts do not improperly certify cases for class treatment.

NASCO is the nation's largest contract security trade association, representing private security companies servicing every business sector and that employ more than 400,000 highly-trained security officers across the nation, including tens of thousands in California. NASCO is leading efforts to set meaningful standards for the private security industry and security officers by monitoring legislation, regulations, and legal developments affecting the quality and effectiveness of private security services. NASCO is dedicated to promoting higher standards, consistent regulations, and ethical conduct for private security businesses, and to increasing awareness and understanding among policy-makers, the media, and the general public regarding the important role that private security plays in safeguarding people, property, and assets.

CALSAGA is a non-profit industry association that serves as the voice of the private security industry in California. It is the only association in California dedicated to advocating on behalf of contract and proprietary security organizations. CALSAGA has led efforts to professionalize the industry and to bring greater accountability in licensing, training, compliance, and background screening. These efforts have helped make California a national leader in security standards. CALSAGA members range from small firms to some of the world's largest private security companies and include everything in between. For years, CALSAGA's key missions have included assisting members with best practices regarding wage-hour-

payroll compliance issues, and tracking the explosive growth of wage and hour class action lawsuits against security employers.

Amici NASCO and CALSAGA directly or through their members employ thousands of people across California providing security services to a wide-range of businesses and government agencies. Like many California employers, companies in the security industry have been frequently targeted with wage-and-hour class actions, particularly over the past decade, and thus have a substantial interest in ensuring that employers are allowed to adequately defend themselves in such actions.

The Hotel Association is the nation's largest and most influential state hotel and lodging association, having been founded in 1893 to represent the unique interests of all segments of the hotel and lodging industry. Its mission is to be the indispensable resource for protecting the rights and interests of the California lodging industry, providing educational training for all segments of the industry, and supporting strategic alliances to promote the value of California tourism and travel. The California lodging industry encompasses over 6,000 properties representing approximately 550,000 guest rooms, providing employment for 575,000 people, and accounting for $66.3 billion in guest spending.

The issues presented in this case, particularly those concerning the availability of class treatment for meal and rest break claims absent evidence the challenged policy applies uniformly to all class members, are of great interest to the Hotel Association and its members. The Hotel Association's members regularly contend with meal and rest period class actions under the California Labor Code. The Hotel Association filed an amicus brief in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*) concerning its members' meal and rest break obligations and seeks further guidance from the Court here.

WHY REVIEW SHOULD BE GRANTED

A. Review is necessary to protect the integrity of this Court's standards for class certification.

1. This Court should clarify that *the right to recover* for missed meals and rest breaks is a liability issue, and that class treatment is therefore improper where, as here, highly individualized inquiries are necessary to determine each class member's right to recover under meal and rest break law.

"[T]he party seeking [class] certification must show that issues of law or fact common to the class predominate." (*Duran*, *supra*, 59 Cal.4th at p. 28.)

In the context of wage-and-hour class actions, this Court's decision in *Brinker*, *supra*, 53 Cal.4th 1004, establishes that, "in the absence of evidence of a uniform policy or practice," lawsuits alleging violations of California's wage-and-hour laws cannot satisfy the predominance requirement and are therefore not susceptible to class treatment. (*Id.* at p. 1052.) *Brinker* further confirms that evidence of a uniform policy—while necessary—is not alone sufficient to justify class treatment. The critical inquiry is whether the "uniform policy [was] *consistently applied* to a group of employees." (*Id.* at p. 1033, emphasis added.)

Accordingly, wage-and-hour claims, including meal and rest break claims like those at issue in this lawsuit, cannot be certified for class treatment where the plaintiff fails to demonstrate a uniform policy that was consistently applied to the class. Where the alleged violation of the wage-and-hour laws involves the *non*-uniform *application* of a uniform policy, "courts have routinely concluded that an individualized inquiry is necessary" and defeats class certification. (*Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 153-154 [affirming denial of class certification because, although defendant "maintained uniform internal policies," evidence "showed that the manner in which those policies and standards were implemented" varied]; see also, e.g., *Koval v. Pacific Bell Telephone Co.* (2014) 232 Cal.App.4th 1050, 1061-1063 (*Koval*) [refusing to assess propriety of class certification based exclusively on existence of uniform meal and rest break policies and instead concluding class treatment was inappropriate since the policies were not consistently applied]; *Lopez v. Brown* (2013) 217 Cal.App.4th 1114, 1127 [trial court properly denied class certification where evidence did not show "a specific policy or practice that uniformly was applied"]; *Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 997 (*Dailey*) [trial court properly

denied class certification based on defendant's "substantial evidence disputing the uniform application of its business policies and practices, and showing a wide variation in proposed class members' job duties"]; *Morgan v. Wet Seal, Inc.* (2012) 210 Cal.App.4th 1341, 1364 (*Morgan*) [trial court properly denied class certification because, " 'in order to answer the central questions on liability, one has to look beyond the written policy to the practices employed by each manager at each of the 74 retail stores' "].)

Ninth Circuit and federal district court decisions are in accord. (See, e.g., *In re Wells Fargo Home Mortg. Overtime Pay Lit.* (9th Cir. 2009) 571 F.3d 953, 955, 959 [reversing certification order where plaintiffs challenged their employer's policy of treating all employees as exempt from overtime compensation requirements because "[w]hether such a policy is in place or not, courts must still ask where the individual employees actually spent their time"]; see also, e.g., *Abdullah v. U.S. Sec. Associates, Inc.* (9th Cir. 2013) 731 F.3d 952, 964 ["it is an abuse of discretion for the district court to rely on uniform policies 'to the near exclusion of other relevant factors touching on predominance' "]; *Ramirez v. United Rentals, Inc.* (N.D.Cal., June 12, 2013, No. 5:10-cv-04374 EJD) 2013 WL 2646648, at pp. *4-*6 [nonpub. opn.] [where defendant left meal break compliance up to its branch managers, who employed different strategies to track wages owed with varying degrees of success, plaintiff could not show common issues predominated]; *Norris-Wilson v. Delta-T Group, Inc.* (S.D.Cal. 2010) 270 F.R.D. 596, 609 [common issues did not predominate where healthcare professionals claiming to have improperly missed meal periods were "employed at a range of client sites, performing a range of duties, under a range of circumstances"]; *Brown v. Federal Express Corp.* (C.D.Cal. 2008) 249 F.R.D. 580, 586 [common issues did not predominate where variations among FedEx drivers could make determining whether they "may take required breaks . . . a highly individualized inquiry"]; *Blackwell v. SkyWest Airlines, Inc.* (S.D.Cal. 2007) 245 F.R.D. 453, 467 [determining "which employees were not provided a timely 30-minute meal period requires a highly individualized factual inquiry" where "many stations did not require employees to clock in-and-out for meal periods during the majority of the class period, and there are incomplete records to determine whether meal periods were taken, and, if so, for how long"].)

The Court of Appeal's opinion in this case is at odds with this precedent. The court's opinion holds that the plaintiffs satisfied their burden of establishing predominance merely by showing that the defendant had a policy requiring all of its security guards to sign on-duty meal agreements (in alleged violation of a requirement that such meal periods be permitted only when required by the nature of the work). As discussed in the petition for review, the putative class consisted of thousands of

security guards employed at hundreds of worksites with profound differences among the worksites and even between different positions at the same worksite. (PFR 4-5.) Yet the Court of Appeal discounted as irrelevant the individualized factual inquiries that necessarily would be required to determine whether (1) any of the security guards in the proposed class actually had on-duty meal periods in practice, and (2) whether the varying nature of the work that the security guards performed would permit on-duty meal periods. (Typed opn. 16-18.)

The appellate courts are thus in conflict over whether a class can be certified in cases involving the *non*-uniform application of what may be found to be a uniform policy. This conflict arises because some courts, including the Court of Appeal here, treat issues concerning the *application* of the policy to individual class members as "damages" issues. Relying on *Brinker* for the general proposition that " 'if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages,' " (*Brinker, supra,* 53 Cal.4th at p. 1022), these courts then hold that such "individualized" damages issues do not preclude class certification. (See typed opn. 18-19, 24; see also *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 238 ["*Eligibility for recovery* and damages, if any, would have to be shown on an individual basis, but that would not preclude class certification" (emphasis added)].)

The distinction between liability and damages is "important" to class certification and "decisions about the *fact* of liability" should not be "reframed as questions about the *extent* of liability." (*Duran, supra,* 59 Cal.4th at pp. 30, 37.) Courts must therefore avoid "conflat[ing] liability and damages." (*Id.* at p. 37.) "[C]lass treatment is not appropriate 'if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the "class judgment" ' on common issues." (*Id.* at p. 28.)

Here, whether an allegedly unlawful meal break policy was in fact applied to deprive each putative class member of an off-duty meal break goes to the heart of whether the employee has *a right to recover* in the first place, which is a *liability* issue, *not* a damages issue. As explained in *Brinker*, an employer "satisfies [its meal break] obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break." (*Brinker, supra,* 53 Cal.4th at p. 1040.) *Brinker* then confirms that the question of whether an employer complied with this obligation is an issue of liability: "Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby

place the employer in violation of its obligations and create liability for premium pay . . . ." (*Id.* at pp. 1040-1041.) Thus, in this case, liability could be established only by evidence demonstrating class members did not receive uninterrupted meal periods because the employer failed to satisfy its obligation to relieve employees of all duty, relinquish control over their activities, and permit them a reasonable opportunity to take an uninterrupted break. It is not enough to present evidence that some or all class members "did not regularly take uninterrupted meal periods," because this evidence alone does not establish that the employer "*requires* them to be available for work during those periods." (*Dailey, supra,* 214 Cal.App.4th at p. 1001.) For the same reason, it would not be sufficient to present evidence of employees who voluntarily "*choose* to make themselves available during break periods . . . ." (*Ibid.*)

Simply put, "liability does not rest on proof of a companywide policy." (*Morgan, supra,* 210 Cal.App.4th at p. 1365; accord, e.g., *Koval, supra,* 232 Cal.App.4th at p. 1062 ["the existence of a uniform policy is not the sole deciding factor in a certification analysis"].) This is why, when courts assess whether a lawsuit alleging violations of meal break law can be certified for class treatment, the key question in deciding whether plaintiffs can demonstrate an employer is liable on classwide basis through common proof is whether plaintiffs have shown the employer had a "uniform policy or widespread practice" that, *when applied* to its employees, required on duty meal periods. (*Dailey, supra,* 214 Cal.App.4th at pp. 1000-1002.) As one court aptly put it, this is an "individual question" of "liability" and not a "question of damages, as it goes to the heart of the liability inquiry: whether each employee was required to work through breaks at all, rather than to how much additional compensation any given employee is entitled." (*Villa v. United Site Services of California, Inc.* (N.D.Cal., Nov. 13, 2012, No. 5:12-CV-00318-LHK) 2012 WL 5503550, at p. *9 [nonpub. opn.].) When appellate courts like the one here conflate *the right to recover* for missed meal periods with the *extent* of damages each class member may have suffered for missed meal periods, they are ignoring this Court's careful and important distinction between the types of cases that are, and are not, amenable to class treatment. Once the trial court here determined that some class members in fact received off-duty meal periods, it became clear the proposed class's meal period claims were not susceptible of common resolution; highly individualized inquiries would have been required, precluding class certification.

The same analysis applies to missed rest breaks. Plaintiffs could not prove their allegations on a classwide basis because, as the trial court found, class members at many worksites received compliant rest breaks. (See, e.g., *Dailey, supra,* 214 Cal.App.4th at pp. 1000-1002; PFR 6.)

Likewise, the defendant's affirmative defense that individual employees were not entitled to off-duty meal periods and rest breaks in light of the " 'nature of the work' " they performed goes to liability. (See, e.g., *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1203-1204 [whether circumstances "come within the 'nature of the work' exception" is "a legal question concerning the liability of [the employer] to each putative class member"].) Thus, the defendant's reliance on the "nature of the work" exception—which depends on a multi-factor analysis including the type of work, the availability of other security guards to relieve their counterparts, and the potential consequences to the client of providing an entirely off-duty meal period or rest break—depended on individualized issues concerning the security needs of the defendant's individual clients. (See typed opn. 26-32 & fn. 9; PFR 16-17.) Such liability issues are not amenable to classwide proof; they must be determined on an employee-by-employee basis. As *Brinker* itself holds, class certification is impermissible when liability must be established "employee-by-employee." (*Brinker*, *supra*, 53 Cal.4th at p. 1052.)

By relying on the Court of Appeal's characterization of a class member's right to recover as merely a damages issue irrelevant to whether common issues predominate, plaintiffs will be able to evade this Court's carefully set limits for class certification, leading to more unmanageable wage-and-hour class actions. And many cases will be certified for class treatment despite that certification will abridge the employer's right to litigate individualized affirmative defenses to liability—precisely what this Court has characterized as a denial of due process. (See *Duran*, *supra*, 59 Cal.4th at p. 35 [under both due process and class action principles, lower courts may "not abridge [the defendant's] presentation of an exemption defense simply because that defense was cumbersome to litigate in a class action"]; *ibid.* ["Under Code of Civil Procedure section 382, just as under the federal rules, 'a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims' " due to "principles deriv[ing] from both class action rules and principles of due process"]; see also *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338, 366-367 [131 S.Ct. 2541, 180 L.Ed.2d 374] (*Wal-Mart*).)

2. This Court should further clarify that individuality in damages issues may indeed preclude class certification where the variation among class members' damages claims means individual issues will predominate.

Even if the individualized issues in this case were properly considered damages issues, those issues would require an array of individualized factual inquiries that

would overwhelm any advantage of class treatment. As the United States Supreme Court has held, "questions of individual *damage calculations*" may "overwhelm questions common to the class" and prevent a finding of predominance. (*Comcast Corp. v. Behrend* (2013) 569 U.S. __ [133 S.Ct. 1426, 1433, 185 L.Ed.2d 515] (*Comcast*); see also *Wal-Mart, supra*, 564 U.S. at pp. 360-361 [employee claims for back pay were too individualized to support classwide relief; class certification inappropriate "when each class member would be entitled to an individualized award of monetary damages"].)

The Court of Appeal here relied on *Brinker* for the general proposition that " 'if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.' " (*Brinker, supra*, 53 Cal.4th at p. 1022; typed opn. 19.) From this statement, the Court of Appeal mistakenly concluded that factual disputes about whether employees actually had a valid meal or rest break on any given day could not preclude class certification because they merely raised "a question of damages." (Typed opn. 19, 24.)

The general rule stated in *Brinker* and relied on by the Court of Appeal here—that individualized damages issues do not ordinarily bar class certification—is simply another way of stating the unremarkable proposition that such issues do not bar class certification where other common issues predominate over those individual issues. (See *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334-335 [although individualized proof of damages "is not per se an obstacle to class treatment," such proof can present an obstacle if those issues cannot "effectively be managed"].) Indeed, in one of this Court's first opinions to examine the interplay between individualized damages issues and class certification, the Court emphasized that "[t]he fact that each individual ultimately must prove his separate claim to a portion of any recovery by the class" is a "factor to be considered in determining whether a class action is proper"—albeit only "one factor." (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713.)

The Courts of Appeal have long recognized that "the determination of each class member's damages can be so diverse that there does not exist a community of interest in common questions of law and fact." (*Altman v. Manhattan Savings Bank* (1978) 83 Cal.App.3d 761, 766.) California courts have therefore held that class treatment is sometimes inappropriate where individualized damages issues predominate over questions common to the class. (See, e.g., *id.* at pp. 766-769; *Fuhrman v. California Satellite Systems* (1986) 179 Cal.App.3d 408, 423-424, disapproved on other grounds by *Silberg v. Anderson* (1990) 50 Cal.3d 205.)

Federal courts are in accord. (See, e.g., *Bell Atlantic Corp. v. AT&T Corp.* (5th Cir. 2003) 339 F.3d 294, 306-307 [where there were "vast differences" among class members' damages claims and "[a]ny reasonable approximation of the damages actually suffered by the various class members would . . . require a much tighter inquiry into the nature of the class member businesses," individual issues predominated]; *Broussard v. Meineke Discount Muffler Shops, Inc.* (4th Cir. 1998) 155 F.3d 331, 342-343 ["[E]ach putative class member's claim for lost profits damages was inherently individualized and thus not easily amenable to class treatment. We have previously recognized that the need for individual proof of damages bars class certification in some . . . cases."]; *Windham v. American Brands, Inc.* (4th Cir. 1977) 565 F.2d 59, 68 ["where the issue of damages and impact does not lend itself to . . . a mechanical calculation, but requires 'separate "mini-trial"[s]' of an overwhelming large number of individual claims, courts have found that the 'staggering problems of logistics' thus created 'make the damage aspect of [the] case predominate,' and render the case unmanageable as a class action" (fns. omitted)]; see also *Stiller v. Costco Wholesale Corp.* (S.D.Cal. 2014) 298 F.R.D. 611, 627-630 ["At the outset, the Court rejects Moro's assertion that individualized damages issues cannot defeat predominance. The Supreme Court's decision in *Comcast* makes clear that individualized damages determinations can defeat Rule 23(b)(3)'s predominance requirement."]; *Steering Committee v. Exxon Mobil Corp.* (5th Cir. 2006) 461 F.3d 598, 602 ["where individual damages cannot be determined by reference to a mathematical or formulaic calculation, the damages issue may predominate over any common issues shared by the class"].)

Here, the Court of Appeal's opinion is inconsistent with this authority, as it misconstrues *Brinker* as meaning individualized issues concerning damages are *irrelevant* to the inquiry of whether common issues predominate. That is incorrect: "[T]he method by which . . . damages are calculated may not serve as an afterthought in the class certification analysis, as whenever damages calculations require significant degrees of individualized proof, defendants are entitled to respond to and address such variances—in fact, due process requires it." (*Jacob v. Duane Reade, Inc.* (S.D.N.Y. 2013) 293 F.R.D. 578, 592.)

This Court should grant review to clarify that individualized damages issues may indeed preclude class certification. Courts must consider whether individualized damages issues render the class action mechanism a disfavored way of litigating a case just as they consider other issues concerning commonality; if they do not, there is a significant risk that many classes will be certified in cases where class action treatment is inappropriate and unworkable. Where, as here, the trial court determines

that variation among employee damage claims threatens to render trial unmanageable, it should be authorized to deny class certification or decertify an existing class. This Court should not endorse a rule that requires trial courts to turn a blind eye to factual disputes that will inevitably render class treatment unmanageable.

B. Review is necessary to resolve whether the certification of a class based on an anticipated "trial by formula" violates the defendant's due process rights.

To make this case manageable as a class action despite the individualized nature of each proposed class members' claims, the Court of Appeal approved a " 'Trial by Formula' " approach. Specifically, the plaintiffs claimed that the defendant's " 'nature of the work' " affirmative defense did not apply to those class members who allegedly signed agreements for on-duty meal periods that omitted a required revocation clause. (Typed opn. 32-33.) The Court of Appeal held that plaintiffs could prove how many members of the proposed class signed such invalid on-duty meal agreements by looking at a subset of employees and extrapolating from the sample to the class the total number of employees who signed improper agreements. (Typed opn. 12-13, 33-36.)

The Court of Appeal's opinion is inconsistent with this Court's and the United States Supreme Court's precedent.

In *Duran*, *supra,* 59 Cal.4th at pages 38-39, 41-42, this Court recognized that there is no California case allowing sampling to prove the *existence* of employer liability; at most, such evidence is relevant to prove the *extent* of liability, but only if the statistical evidence is itself reliable. *Duran* is clear, however, that "convenience alone cannot justify procedures that substantially curtail the parties' ability to litigate their case." (*Id.* at p. 42.) Thus, a "trial by formula" approach is permissible only if it does not impede a defendant's right to litigate its defenses. (*Id.* at p. 35.)

In *Wal-Mart*, *supra*, 564 U.S. at page 367, the Supreme Court disapproved of the plaintiffs' proposal to select a sample set of class members, determine the defendant's liability for sex discrimination and back pay as to that sample set, and then extrapolate from the sample set to the entire class. Such an approach unduly compromised Wal-Mart's due process right to defend against individual claims and risked allowing the class action mechanism to enlarge the plaintiffs' substantive rights by enabling some class members to recover even when they would have no individual right to recover. (See *ibid.*)

Thus, neither this Court nor the U.S. Supreme Court have endorsed a "trial by formula" to prove *liability*, especially where, as here, the defendant contends not all class members were injured.

In nonetheless approving use of a "trial by formula" here, the Court of Appeal mistakenly relied on the discussion in *Duran* and the Supreme Court's more recent decision in *Tyson Foods, Inc. v. Bouaphakeo* (2016) 577 U.S. __ [136 S.Ct. 1036, 194 L.Ed.2d 124] (*Tyson*) regarding use of statistical sampling under some circumstances to prove *damages*. (Typed opn. 13, 36, 38.) But the Court of Appeal misapplied and misconstrued these authorities.

In *Tyson*, the Supreme Court approved the use of statistical sampling to calculate *the amount of damages* each class member suffered in the absence of time records that the employer was obligated to keep by federal statute and would have allowed each class member's damages to be ascertained with certainty on an individual basis. (*Tyson*, *supra*, 136 S.Ct. at pp. 1043-1045, 1047.) The Supreme Court reasoned that statistical evidence can be admitted when, as in *Tyson*, "each class member could have relied on that sample to establish liability if he or she had brought an individual action." (*Id.* at p. 1046; accord, *id.* at p. 1051 (conc. opn. of Roberts, C.J.) ["when representative evidence would suffice to prove a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought as a part of a class action"].) Nothing in *Tyson* limits *Wal-Mart*'s holding that sampling evidence is *not* admissible for the purpose of determining *who in the class was injured*. Indeed, the Supreme Court explained in *Tyson* that it "need not, and does not, address" the issue of "whether a class may be certified if it contains 'members who were not injured and have no legal right to any damages.' " (*Id.* at p. 1049.) And *Tyson* reaffirmed *Wal-Mart*'s holding that a statistical sampling approach is not permissible where it would enable uninjured class members to recover: "[I]f the employees [in *Wal-Mart*] had brought 1½ million individual suits, there would be little or no role for representative evidence. Permitting the use of that sample in a class action, therefore, would have violated the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." (*Id.* at p. 1048.)

It is obvious that if all class members in this case were to litigate their claims individually, they each would be required to prove their claim using the actual meal agreement they individually signed. Statistical sampling could not establish liability for their individual claims any more than evidence of a third party's claims could substitute as evidence of the plaintiff's claims. (See, e.g., *People v. Louie* (1984) 158

Cal.App.3d Supp. 28, 47 [" 'If the inference of the existence or nonexistence of a disputed fact which is to be drawn from proffered evidence is based on speculation, conjecture, or surmise, the proffered evidence cannot be considered relevant evidence' " (emphasis omitted)], quoting 1 Jefferson, Cal. Evidence Benchbook (2d ed. 1983), § 21.3, p. 502.) Thus, using sampling to establish *whether a class member signed an appropriate meal agreement*, as the Court of Appeal allowed here, is doing exactly what *Wal-Mart* disapproved, and not what *Tyson* approved.

The result of the Court of Appeal's overbroad misapplication of *Tyson* is "that individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action." (*Philip Morris USA Inc. v. Scott* (2010) 561 U.S. ___ [131 S.Ct. 1, 4, 177 L.Ed.2d 1040].) That means the class action mechanism is being used to enlarge the plaintiffs' substantive rights—something this Court has expressly and properly disapproved. (See *San Jose, supra*, 12 Cal.3d at p. 462 ["Altering the substantive law to accommodate [class] procedure would be to confuse the means with the ends—to sacrifice the goal for the going"]; *Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 749 ["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"]; see also *Wal-Mart, supra*, 564 U.S. at p. 367 [class action mechanism should not be used to enlarge substantive rights].)

In *Duran*, this Court recognized that "whether statistical sampling can legitimately be used to prove a defendant's *liability* to absent class members" is a "hotly contested" issue with many unresolved questions. (*Duran, supra*, 59 Cal.4th at p. 39, emphasis added.) Even the Court of Appeal here acknowledged that whether statistical sampling may be used where it would result in under or over recovery is an unresolved issue. (Typed opn. 38.) This case presents the opportunity for this Court to resolve when statistical sampling may—and may not—be used.

Importantly, the 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." (*Coopers & Lybrand v. Livesay* (1978) 437 U.S. 463, 476 [98 S.Ct. 2454, 57 L.Ed.2d 351].) The very fact of certification gives a class-action plaintiff enormous leverage in settlement negotiations; lower courts have variously described the pressure on defendants to settle in the wake of certification decisions as "inordinate," "hydraulic," and "intense." (See *Newton v. Merrill Lynch, Pierce, Fenner & Smith* (3d Cir. 2001) 259 F.3d 154, 164; *Matter of Rhone-Poulenc Rorer Inc.* (7th Cir. 1995) 51 F.3d 1293, 1298; see also Nagareda,

Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA (2006) 106 Colum. L.Rev. 1872, 1875 ["Whatever their partisan stakes in a given litigation, all sides recognize that the overwhelming majority of actions certified to proceed on a class-wide basis (and not otherwise resolved by dispositive motion) result in settlements"].) Judge Friendly aptly labeled "settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.' " (*Rhone-Poulenc*, at p. 1298, quoting Friendly, Federal Jurisdiction: A General View (1973) p. 120.)

If statistical sampling is permitted to preclude the defendant from showing individual defenses to the claims of individual class members, this leverage will increase exponentially. Such a "trial by formula" approach would "inevitably restate[ ] the dimensions of tort liability." (*In re Fibreboard Corp.* (5th Cir. 1990) 893 F.2d 706, 711.) By violating the defendant's fundamental right to present every defense (see *Lindsey v. Normet* (1972) 405 U.S. 56, 66 [92 S.Ct. 862, 31 L.Ed.2d 36]), the "trial by formula" approach would in most cases coerce the only rational alternative—settlement. And the costs of settling such actions would not fall exclusively on individual defendants; they would impose a drag on this state's economy. "No one sophisticated about markets believes that multiplying liability is free of cost." (*S.E.C. v. Tambone* (1st Cir. 2010) 597 F.3d 436, 452 (conc. opn. of Boudin, J.).)

This Court should grant review to consider the serious due process and policy implications of the type of "trial by formula" method approved by the Court of Appeal.

Respectfully submitted,

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cc: See attached Proof of Service.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is Business Arts Plaza, 3601 West Olive Avenue, 8th Floor, Burbank, California 91505-4681.

On January 30, 2017, I served true copies of the following document(s) described as **LETTER TO CALIFORNIA SUPREME COURT JUSTICES SUPPORTING REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on January 30, 2017, at Burbank, California.

Robyn Whelan

Robyn Whelan

SERVICE LIST

Lubin v. The Wackenhut Corporation
California Supreme Court No. S239254

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