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December 28, 2016

E-FILE

Administrative Presiding Justice Judith McConnell
and Associate Justices
California Court of Appeal
Fourth Appellate District, Division One
San Diego, California 92101-8196

Re: ***Silva v. See's Candy Shops, Inc.***
Case Number: D068136
Date of Opinion: 12/09/2016
Request for Publication (Cal. Rules of Court, rule 8.1120)

Dear Presiding Justice McConnell and Associate Justices:

Pursuant to California Rules of Court, rule 8.1120(a), the Chamber of Commerce of the United States of America and the California Chamber of Commerce (collectively, amici) request that this court publish its December 9, 2016 opinion (the Opinion) in this case.

In *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889 (*See's Candy*), this court resolved an important novel issue of wage and hour law by holding that California law permits the rounding of time entries when employees clock in and out of work. But that decision was made in the procedural context of a summary judgment in favor of the plaintiff *employee* who contended that California law did not permit such rounding. In *See's Candy*, this court had no occasion to consider whether the *employer* was entitled to summary judgment based on its own submitted evidence. (Typed opn. 5.) The Opinion now considers that question, and in the process provides vital guidance to litigants and courts regarding what factual circumstances satisfy the standards for lawful rounding. Thus, for the reasons explained in more detail below, the Opinion meets the criteria for publication under the California Rules of Court, rule 8.1105(c)(2), (3), (6) and (8).

I. Interest of amici curiae

The Chamber of Commerce of the United States of America (U.S. Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, from every sector, and in every geographic region of the country. Thousands of the U.S. Chamber's members are California businesses, and thousands more conduct substantial business in the State. The U.S. Chamber therefore has a significant interest in the sound and equitable development of California employment law.

The California Chamber of Commerce (CalChamber) is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the State of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, 75 percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory, and legal issues.

The U.S. Chamber and CalChamber often advocate before the state and federal courts by filing amicus curiae briefs and letters in cases, like this one, involving issues of paramount concern to the business community.

Amici's members have long enjoyed regulatory approval for the practice of calculating when their employees begin and end their work shifts by rounding their time entries, sometimes to the nearest five minutes or to the nearest one-tenth or even quarter of an hour. (See, e.g., 26 Fed.Reg. 195 (Jan. 10, 1961); accord, *See's Candy*, *supra*, 210 Cal.App.4th at p. 903 ["the rounding practice has long been adopted by employers through the country"].)

These long-standing rounding practices are widespread throughout American industry. (See, e.g., *Wilson v. Pioneer Concepts, Inc.* (N.D.Ill., Sept. 1, 2011, No. 11-cv-2353) 2011 WL 3950892, at p. *1 [nonpub. opn.] [provider of health care facilities]; *Smith v. Safety-Kleen Systems, Inc.* (N.D.Ill., Apr. 14, 2011, No. 1066574) 2011 WL 1429203, at p. *1 [nonpub. opn.] [operator of chemical recycling facilities and seller of cleaning materials and chemicals]; *Shockey v. Huhtamaki, Inc.* (D.Kan. 2010) 730 F.Supp.2d 1298, 1301, 1305 [operator of plants that manufacture paper products]; *Russell v. Illinois Bell Telephone Co., Inc.* (N.D.Ill. 2010) 721 F.Supp.2d 804, 807, 819-

820 [telephone company]; *Longcrier v. HL-A Co., Inc.* (S.D.Ala. 2008) 595 F.Supp.2d 1218, 1220-1221, 1235 [operator of automobile parts manufacturing facility]; *Anderson v. Wackenhut Corp.* (S.D.Miss., Nov. 19, 2008, No. 5:07CV137-DCB-JMR) 2008 WL 4999160, at pp. *1, *3 [nonpub. opn.] [business that hires, trains, supervises, and administers security guards]; *Adair v. Wisconsin Bell, Inc.* (E.D.Wis., Sept. 11, 2008, No. 08-C-280) 2008 WL 4224360, at pp. *1, *10-*11 [nonpub. opn.] [provider of communications services and products]; *Gonzalez v. Farmington Foods, Inc.* (N.D.Ill. 2003) 296 F.Supp.2d 912, 914, 919-922, 932-933 [operator of meat processing plant]; *East v. Bullock's Inc.* (D.Ariz. 1998) 34 F.Supp.2d 1176, 1178, 1184 [department store].)

Employers who use rounding benefit from being able to efficiently calculate hours worked without imposing any burden on their employees, who in turn can more easily keep track of their own time to calculate or estimate the wages they expect to earn. (See *See's Candy*, *supra*, 210 Cal.App.4th at p. 903 ["time-rounding is a practical method for calculating worktime" and where "a rounding-over-time policy is neutral," the policy's "net effect is to permit employers to efficiently calculate hours worked without imposing any burden on employees"]; accord, *Corbin v. Time Warner Entertainment-Advance/Newhouse Partnership* (2016) 821 F.3d 1069, 1077 (*Corbin*) ["Employers use rounding policies to calculate wages efficiently; sometimes, in any given pay period, employees come out ahead and sometimes they come out behind, but the policy is meant to average out *in the long-term*"].)

Nonetheless, employers who use rounding are frequently the targets of litigation based on their rounding policies. (See, e.g., Badoux, *Trends in Wage and Hour Litigation Over Unpaid Work Time and the Precautions Employers Should Take* (2011) ADP 3-4 <https://www.adp.com/workforce-management/docs/whitepaper/trendsinwageandhourlitigation.pdf> [as of Dec. 28, 2016] [describing the recent increase in cases alleging "improper rounding"].) Decisions addressing when California employers are entitled to summary judgment in such cases provide important benchmarks for the parties and for the courts charged with adjudicating rounding claims. And for California employers facing class actions involving rounding claims, whether a rounding defense forecloses liability or merely creates a triable issue of fact to be resolved after class certification can literally be a multi-million dollar question.

II. Why the opinion should be certified for publication

Rule 8.1105(c) of the California Rules of Court provides that an "opinion of a Court of Appeal . . . *should* be certified for publication in the Official Reports" if the opinion falls within any *one* of nine categories. (Emphasis added.) Here, the Opinion

satisfies not just one but at least four of the enumerated criteria. It would be the first published California decision addressing what facts entitle an employer to summary judgment based on a rounding defense, and would explain the rule of law set forth in *See's Candy* in a significantly different procedural and factual context. (See Cal. Rules of Court, rule 8.1105(c)(2) & (3).) Moreover, due to the significant volume of wage and hour litigation in which the rounding defense arises, the type of evidence that suffices to establish that defense as a matter of law is a legal issue of continuing public interest. (See *id.* rule 8.1105(c)(6).) Finally, the Opinion provides helpful guidance meeting the criteria for publication regarding summary adjudication procedures. (See *id.* rule 8.1105(c)(8).)

This court's *See's Candy* decision was the first—and remains the only—published California decision addressing when California law permits employers to round their employees' time entries in order to calculate the hours worked by the employees. But the holding in *See's Candy*, because of the procedural context in which the case was decided, was limited to when an employer's rounding defense raises a triable issue of material fact precluding summary adjudication in favor of the employee on that defense. (Typed opn. 5.) As an unpublished California decision has expressly noted, *See's Candy* "did not explain how to determine whether a policy is neutral over a period of time and did not require any specific method of calculation for determining whether rounding has resulted in undercompensating employees." (*El Monte Rents, Inc. v. Aequitas Law Group* (May 17, 2016, No. B256665) 2016 WL 2944239, at p. *9 (*El Monte*) [nonpub. opn.].)[1] This opinion provides that important guidance.

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[1] Although rule 8.1115(a) of the California Rules of Court forbids a party from citing or relying on unpublished California Court of Appeal opinions, "[t]he message from the Supreme Court seems to be that unpublished opinions may be cited if they are not 'relied on.' " (*Conrad v. Ball Corp*. (1994) 24 Cal.App.4th 439, 443-444, fn. 2; see *People v. Saunders* (1993) 5 Cal.4th 580, 607 (dis. opn. of Kennard, J.) [citing unpublished opinions to show a conflict among appellate opinions].) We cite the *El Monte* decision not in reliance on it as authority but only to show the extent to which *See's Candy* has left unresolved the circumstances under which summary judgment in favor of an employer is proper under its holding. (See generally *Williams v. Chino Valley Independent Fire Dist*. (2015) 61 Cal.4th 97, 113 [appellant properly cited unpublished opinion to demonstrate situation in which ordinary costs in FEHA case were substantial].)

Since *See's Candy*, several federal district courts have attempted to apply its holding in diversity cases involving wage and hour claims arising under California law. The results have been mixed, with courts reaching differing conclusions about when the facts justify rejection of a rounding claim as a matter of law (see *Waine-Golston v. Time Warner Entertainment-Advance/New House Partnership* (S.D.Cal., Mar. 27, 2013, No. 11CV1057-GPB (RBB)) 2013 WL 1285535, at p. *11 [nonpub. opn.] [granting summary judgment where "rounding policy, on its face and in practice, was neutral"], affd. *sub nom*., *Corbin*, *supra*, 821 F.3d at pp.1075-1079; *Cummings v. Starbucks Corp.* (C.D.Cal., May 14, 2013, No. CV 12-06345-MWF (FFMx)) 2013 WL 2096435, at pp. *2-*3 [nonpub. opn.] [granting summary judgment where the "rounding policy [was] facially neutral" and plaintiff was actually overcompensated under it]), and when the defense merely raises a triable issue that must be resolved by a trier of fact (see *Tapia v. Zale Delaware Inc.* (S.D.Cal., Apr. 6, 2016, No. 13-CV-1565-BAS (PCL)) 2016 WL 1385181, at pp.*3-*4 [nonpub. opn.] [rejecting employer's opposition to class certification based on "the affirmative defense that its 'rounding' practice is legal" under *See's Candy*, and finding "it is a question of fact whether an employer's method of rounding 'on average, favors neither overpayment nor underpayment' "]; *Rojas-Cifuentes v. ACX Pacific Northwest Inc.* (E.D.Cal., Oct. 25, 2016, No. 2:14-cv-00697-JAM-CKD) 2016 WL 6217060, at p. *5 [nonpub. opn.] [rejecting defendants' opposition to amendment of complaint to add time-rounding allegations "because time-rounding policies are lawful" under *See's Candy*, and finding that plaintiffs' proposed "allegations meet the plausibility standard and survive a motion to dismiss"]).

Likewise, an unpublished Ninth Circuit decision initially sent mixed signals about when summary judgment in favor of an employer on a rounding claim is appropriate after *See's Candy*, confusingly assessing a rounding policy's neutrality "in the aggregate" by examining its "net impact" on the plaintiff employees while simultaneously discussing whether the employer "failed to credit" employees for all the hours they "actually worked." (*Gillings v. Time Warner Cable LLC* (9th Cir. 2014) 583 Fed. Appx. 712, 715-716.) Fortunately, a subsequent published Ninth Circuit decision cleared up any confusion in the federal courts by applying *See's Candy* to affirm a grant of summary judgment in favor of the employer because its rounding policy was neutral over time without favoring the employer or employee—holding that employees need not "gain or break even over *every* pay period" for a rounding policy to be sufficiently neutral. (*Corbin*, *supra*, 821 F.3d at pp. 1075-1079.)

Although the Ninth Circuit's decision in *Corbin* clarified when an employer is entitled to summary judgment on a rounding claim *in federal court*, *Corbin* does not bind California courts on that recurring issue. (See *Finley v. Superior Court* (2000) 80

Cal.App.4th 1152, 1160.) The only rounding decision that *does* bind California's trial courts—*See's Candy*—addresses a different procedural context (see *El Monte*, *supra*, 2016 WL 2944239, at p. *9), leaving California's lower courts with the challenging task of reverse engineering *See's Candy* to figure out when it compels summary judgment in favor of the employer. The Opinion, with its analysis of the circumstances under which rounding is lawful and when the facts establish such proper rounding as a matter of law, would help clarify when a defendant is entitled to summary judgment in state court because its rounding policy comports with California law.

The Opinion should also be ordered published because it provides helpful guidance in another important respect. The Opinion affirmed the grant of summary judgment on claims that alleged the employer had an unlawful grace period policy because employees were allegedly under the employer's control during the grace period and were not compensated for this time. (Typed opn. 26-29, 34-36.) The Opinion explains that an employer is entitled to summary judgment on such a claim where the employer has a policy of prohibiting employees from working during the grace period, and there is undisputed evidence that employees engaged only in personal activities during the grace period and were neither working nor under the employer's control during that time. (Typed opn. 27-28.)

Apart from this court's decision in *See's Candy*, it does not appear that any published California appellate decision has articulated the circumstances under which a grace period policy is lawful. Like *See's Candy*, one federal district court has addressed when a triable issue on a grace period claim requires determination by a factfinder. (See *Forrand v. Federal Exp. Corp*. (C.D.Cal., Apr. 25, 2013, No. CV 08-1360 DSF (PJWx)) 2013 WL 1793951, at pp. *2-*5 [nonpub. opn.] [denying class certification of grace period claim that would require determination on an individual basis regarding whether the employee was working or under the employer's control during the grace period].) But no published California decision has addressed what facts entitle a defendant employer to summary judgment on a grace period claim, and the Opinion would provide such guidance.

Finally, the Opinion provides useful direction to courts and litigants regarding summary adjudication procedures. As the Opinion notes, "generally a summary adjudication motion 'shall be granted only if it completely disposes of a *cause of action*, an affirmative defense, a claim for damages, or an issue of duty.' " (Typed opn. 33.) Although that principle is widely known, many trial courts and practitioners may be unaware that summary adjudication may be granted on a *portion* of a cause of action when a subset of allegations states a separate theory of liability.

The Opinion relies on *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848 for the proposition that for purposes of summary adjudication, separate wrongful acts give rise to separate causes of action whether they are pleaded in the same or single counts. *Lilienthal* has been cited with approval on that point in treatises and subsequent decisions. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2016) ¶¶ 10:39 to 10:39.2, pp. 10-8 to 10-9.) But one isolated decision, *Bagley v. TRW, Inc.* (1999) 73 Cal.App.4th 1092, 1094, fn. 2 has questioned "whether *Lillienthal* properly construed subdivision (f)(1) of [Code of Civil Procedure] section 437c." The Opinion's application of *Lillienthal* and its reasoning would add to the greater weight of authority on the issue, bringing further clarity to the scope of Code of Civil Procedure section 437c, subdivision (f)(1).

Catalano v. Superior Court (2000) 82 Cal.App.4th 91, also relied upon in the Opinion, has not been cited for almost two decades in support of the proposition that a group of related paragraphs can be treated as a separate theory of liability for summary adjudication purposes. And treatises have cited *Catalono* primarily for its application to the context of punitive damages. (See, e.g., Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 10:41, p. 10-12 [citing *Catalano* for proposition that "[s]ummary adjudication may also be granted as to *a claim for punitive damages* even though it does not dispose of an entire cause of action" (emphasis added)]; 2 Cal. Judges Benchbook: Civil Proceedings Before Trial (CJER 2008) Summary Judgment and Summary Adjudication Motions, § 13.8, pp. 127-128 [under *Catalano*, a "judge may grant summary adjudication of *a punitive damages claim* only if the order granting summary adjudication eliminates the entire claim" (emphasis added)].) The Opinion therefore merits publication regarding its application of *Catalano*'s holding because it "invokes a previously overlooked rule of law" and "reaffirms a principle of law not applied in a recently reported decision," while also advancing a construction of the summary adjudication statute in a new procedural context. (See Cal. Rules of Court, rule 8.1105(c)(4), (8).)

III. Conclusion

For the reasons explained above, the Opinion easily meets the criteria for publication under rule 8.1105(c) of the California Rules of Court, and therefore "should" be published. Accordingly, amici urge this court to order publication of the Opinion.

Respectfully submitted,

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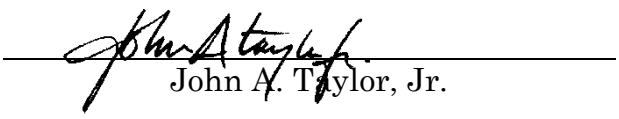
By: 
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cc: See attached Proof of Service

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 3601 West Olive Avenue, 8th Floor, Burbank, California 91505-4681.

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

Executed on December 28, 2016, at Burbank, California.

Raeann Diamond

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