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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION FOUR

NIVIDIA LUBIN et al.,
Plaintiffs and Appellants,

v.

THE WACKENHUT CORPORATION,
Defendant and Respondent.

APPEAL FROM LOS ANGELES COUNTY SUPERIOR COURT
WILLIAM F. HIGHBERGER, JUDGE • CASE NO. JCCP4545 (BC326996, BC373415, 00180014)

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; NATIONAL ASSOCIATION OF SECURITY COMPANIES; AND CALIFORNIA ASSOCIATION OF LICENSED SECURITY AGENCIES IN SUPPORT OF DEFENDANT AND RESPONDENT THE WACKENHUT CORPORATION

HORVITZ & LEVY LLP
JOHN A. TAYLOR, JR. (BAR NO. 129333)
FELIX SHAFIR (BAR NO. 207372)
*ROBERT H. WRIGHT (BAR NO. 155489)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
jtaylor@horvitzlevy.com
fshafir@horvitzlevy.com
rwright@horvitzlevy.com

ATTORNEYS FOR AMICI CURIAE
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; NATIONAL ASSOCIATION OF SECURITY COMPANIES; AND CALIFORNIA ASSOCIATION OF LICENSED SECURITY AGENCIES

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Under California Rules of Court, rule 8.200(c), Chamber of Commerce of the United States of America (the Chamber); National Association of Security Companies (NASCO); and California Association of Licensed Security Agencies (CALSAGA) request permission to file the attached amici curiae brief in support of defendant and respondent the Wackenhut Corporation.[1]

[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary (continued...)

The 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 Chamber has many members located in California and others who conduct substantial business in the state. The 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.

Few litigation issues are of greater concern to American business than those involving class actions, and this case raises two class issues that are particularly pressing: class certification when the plaintiff challenges employment policies that are neither uniform nor consistently applied, and the use of statistical sampling to preclude the defendant from presenting defenses to the claims of individual class members.

Plaintiffs here alleged class claims that have become increasingly common—alleging that the defendant's employment policies violated the wage and hour laws. However, the trial court found that plaintiffs did not show the uniform application of a common employment policy. Certification would thus have required unmanageable individualized inquiries. In an attempt to evade

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(...continued)
contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

these inquiries necessary to establish the class members' right to recover, plaintiffs proposed using statistical sampling to establish class liability and to restrict the fundamental right of the defendant to defend itself. But if such use of statistical sampling were permitted here, it would likely lead in other cases to the violation the fundamental due process rights of the Chamber's members and all companies doing business in California by denying them the right to present their individualized defenses to liability and damages.

NASCO is the nation's largest contract security trade association, representing private security companies servicing every business sector that employ more than 250,000 of the nation's most highly trained security officers. 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.

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 therefore have a devastating in terrorem effect that forces the settlement of even the most frivolous claims. Accordingly, amici are deeply interested in ensuring that courts do not improperly certify cases for class treatment where, as here, doing so would impermissibly alter substantive law and violate the due process rights of the defendant.

Counsel for amici have reviewed the briefs on the merits filed in this case and believe this court will benefit from additional briefing regarding the dangers of permitting class certification when the plaintiff challenges employment policies that either are not uniform or are not consistently applied, and of permitting statistical sampling to preclude individual defenses to liability and damages.

Accordingly, amici request that this court accept and file the attached amici curiae brief.

February 18, 2014

HORVITZ & LEVY LLP
JOHN A. TAYLOR, JR.
FELIX SHAFIR
ROBERT H. WRIGHT

By: _____
Robert H. Wright

Attorneys for Amici Curiae
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; NATIONAL ASSOCIATION OF SECURITY COMPANIES; AND CALIFORNIA ASSOCIATION OF LICENSED SECURITY AGENCIES

AMICI CURIAE BRIEF

INTRODUCTION

When plaintiffs move to certify a class action challenging an employment policy, but cannot show that the policy is both uniform and consistently applied to the individual class members, the trial court properly denies certification because individualized issues predominate and the trial of such class claims would be unmanageable. Such individualized issues necessarily affect fundamental issues of liability, not just the calculation of damages, because the nature and application of the employment policies will determine whether individual class members have any right to recover at all.

To shortcut these individual issues, plaintiffs here and in many other cases have proposed using statistical sampling to establish both class liability and damages. But such uses of statistical sampling, if permitted, would violate the fundamental due process right of defendants to present all individualized defenses. Such a "Trial by Formula" would undermine the rights not just of the defendant in this case, but of amici, their members, and all companies doing business in California. (*Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. __ [131 S.Ct. 2541, 2561, 180 L.Ed.2d 374] (*Wal-Mart*).)

" ' "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the

resolution of the litigation." '" (*Lopez v. Brown* (2013) 217 Cal.App.4th 1114, 1128 (*Lopez*), quoting *Wal-Mart, supra,* 131 S.Ct. at p. 2551.) As the trial court recognized here, "[p]laintiffs' claims do not involve the kinds of common questions that can support class certification under *Wal-Mart*" and would not generate the common answers necessary to justify class certification. (13 JA 2941.)

"[A] common question predominates when 'determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.' " (*City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 501 (*City of San Diego*), quoting *Wal-Mart, supra,* 131 S.Ct. at p. 2551.) But there were no such issues here because plaintiffs challenged employment policies that were not uniform and not consistently applied to the class. As a result, plaintiffs could not have resolved the issues central to the validity of their claims in one stroke. Instead, the resolution of their claims on a classwide basis would have been unmanageable, necessitating inquiries regarding thousands of individual class members holding "many different positions, at numerous different worksites, and under vastly differen[t] circumstances." (13 JA 2952.) The absence of common questions, much less common answers to those questions, required decertification of the class.

As explained below, a handful of post-*Brinker* cases allowing class certification despite individuality in damages issues are immaterial in this case. The individuality regarding the right to recover that required decertification here is not a damages issue, but a liability issue. The California Supreme Court has repeatedly

held that individuality regarding the right to recover precludes class certification.

Plaintiffs' answer to the unmanageable individualized inquiries identified by the trial court was to propose the shortcut of statistical sampling. But statistical sampling must not be permitted to establish class liability when, as here, the defendant has presented evidence showing individualized liability issues and defenses to the claims of individual class members.

Both the United States and California Constitutions guarantee a litigant the due process right to a full opportunity to present every available defense to the claims against it. (U.S. Const., 14th Amend., § 1; Cal. Const., art I, §§ 7, 15.) That right applies fully in a class action. When the defendant has presented evidence showing a defense to the claims of at least some members of the class, statistical sampling that allows liability to be extrapolated from a mere sampling of the class—without considering the evidence of individual defenses—abrogates the defendant's right to prove it is not liable. Such misuse of statistical sampling violates the defendant's due process right to defend the claims against it.

Class actions in California are procedural devices that cannot be altered by courts to modify substantive law. On this basis, the United States Supreme Court has rejected the type of "Trial by Formula" that was threatened here. (*Wal-Mart, supra*, 131 S.Ct. at p. 2561; see also *Comcast Corp. v. Behrend* (2013) 569 U.S. __ [133 S.Ct. 1426, 1433, 185 L.Ed.2d 515] (*Comcast*) ["a model purporting to serve as evidence of damages in this class action must

measure only those damages attributable to that theory"].) The United States Supreme Court has held that "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims." (*Wal-Mart*, at p. 2561.) Such an approach would modify substantive law and, indeed, would jeopardize the defendant's due process rights. Likewise, the misuse of statistical sampling that was proposed here, and has been proposed in innumerable California cases, would have prevented the defendant from proving its individual defenses to liability, and must be rejected as an impermissible modification of the substantive law and an infringement of the defendant's constitutional rights.

Even a trial by formula ostensibly limited to damages would violate due process. To the extent that California courts have ever recognized a general "rule of thumb" that individualized damages issues do not preclude class certification—a general rule of thumb that does not apply to the right to recover here—that rule can no longer be considered viable in light of the intervening *Wal-Mart* and *Comcast* decisions. The United States Supreme Court's prohibition on the misuse of statistical sampling reflects limitations imposed by constitutional due process guarantees and any contrary state law rule must give way under the United States Constitution.

LEGAL ARGUMENT

I. CLASS CERTIFICATION IS IMPERMISSIBLE WHEN THE PLAINTIFF CHALLENGES EMPLOYMENT POLICIES THAT ARE NOT UNIFORM OR COMMON.

A. To establish the predominance of common issues required for class certification, plaintiffs must show the uniform application of a common policy.

Before a trial court can certify a class action, "[t]he party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).) To demonstrate "a well-defined community of interest," plaintiffs are required to show, among other things, " 'predominant common questions of law or fact.' " (*Ibid.*, quoting *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089 (*Fireside Bank*).) Here, the trial court correctly found that plaintiffs did not meet their burden of satisfying the prerequisites for class treatment because they could not show that questions of law or fact common to the class members predominated over the individual issues.

"The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when

compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' " (*Brinker*, *supra*, 53 Cal.4th at p. 1021.) " '[W]hat really matters to class certification' is 'not similarity at some unspecified level of generality but, rather, dissimilarity that has the capacity to undercut the prospects for joint resolution of class members' claims through a unified proceeding.' " (*Id.* at p. 1022, fn. 5.)

When a uniform employment policy that allegedly violates wage-and-hour laws is applied on a consistent, class-wide basis, that policy may support class certification because resolution of the policy's legality may show liability to the class. (See *Brinker*, *supra*, 53 Cal.4th at p. 1033 [courts "routinely" find suitable for class treatment "[c]laims alleging that a *uniform policy consistently applied* to a group of employees is in violation of the wage and hour laws" (emphasis added)].) But class certification is impermissible when the plaintiff challenges an employment policy that is either not uniform or is not applied on a consistent, class-wide basis, because such a policy cannot show that the class members' claims will be resolved through a unified proceeding in which common issues will predominate.

In *Brinker*, the central issue, as here, was predominance—"whether individual questions or questions of common or general interest predominate." (*Brinker*, *supra*, 53 Cal.4th at p. 1021.) Plaintiffs challenged their employer's rest break and off-the-clock policies. Their employer "conceded . . . the existence of, a *common, uniform rest break policy*." (*Id.* at p. 1033.) As a result, the

plaintiffs' first theory of liability—that the rest break policy violated the wage order requirements—presented a common question and the trial court properly exercised its discretion to certify a rest break subclass. (*Ibid.*)

However, the Supreme Court held that the trial court abused its discretion by certifying a subclass on plaintiffs' off-the-clock claim. (*Brinker, supra,* 53 Cal.4th at pp. 1051-1052.) Plaintiffs presented no evidence of a uniform or common off-the-clock policy: "Unlike for the rest period claim and subclass, for this claim neither a common policy nor a common method of proof is apparent." (*Id.* at p. 1051.) Certification was thus error: "[W]here no substantial evidence points to a uniform, companywide policy, proof of . . . liability would have had to continue in an employee-by-employee fashion . . . ." (*Id.* at p. 1052.)

Brinker thus establishes that lawsuits alleging violations of California's wage-and-hour laws are not susceptible to class treatment "in the absence of evidence of a uniform policy or practice." (*Brinker, supra,* 53 Cal.4th at p. 1052.) *Brinker* also confirms that mere evidence of a uniform policy—absent evidence of that policy's consistent *application* to employees—does not alone suffice to justify class treatment. The critical inquiry is whether the "uniform policy [was] consistently applied to a group of employees." (*Id.* at p. 1033.) Where the alleged violation of the wage-and-hour laws involves the non-uniform application of a uniform policy, "courts have routinely concluded an individualized inquiry is necessary" and defeats class certification. (*Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 153-154

(*Soderstedt*) [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].) Thus, unless a uniform policy is consistently *applied* on a class-wide basis, individual class members will be required to litigate their right to recover even following entry of a class judgment.

Brinker builds on a strong foundation of California Supreme Court authority. "Plaintiffs' burden on moving for class certification . . . is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues *predominate*. [Citation.] . . . '[T]his means "each member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment . . . ." ' " (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1108 (*Lockheed Martin*); see *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 463 (*City of San Jose*) ["Only in an extraordinary situation would a class action be justified where, subsequent to the class judgment, the members would be required to individually prove not only damages but also liability"].)

Following *Brinker*, the Courts of Appeal have repeatedly rebuffed attempts to certify classes when the challenged policies were not applied on a consistent, class-wide basis. "[T]he mere existence of a form contract is *insufficient* to determine that common issues predominate when the questions of breach and damage are essentially individual." (*Thompson v. Automobile Club*

of Southern California (2013) 217 Cal.App.4th 719, 732 (*Thompson*), emphasis added; see *Lopez, supra,* 217 Cal.App.4th at p. 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 precedent is in lockstep with *Brinker* and other state decisions on this point. In *In re Wells Fargo Home Mortg. Overtime Pay Lit.* (9th Cir. 2009) 571 F.3d 953, the plaintiffs challenged their employer's policy of treating all employees as exempt from overtime compensation requirements. (*Id.* at p. 955.) Because such a policy "has no . . . transformative power," the Ninth Circuit held that the district court erred by relying on that policy to the near exclusion of other factors in certifying the class. (*Id.* at p. 959.) "Whether such a policy is in place or not, courts must still ask where the individual employees actually spent their time." (*Ibid.*; see also *Abdullah v. U.S. Sec. Associates, Inc.* (9th Cir. 2013) 731 F.3d 952, 964 (*Abdullah*) ["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' "]; *Vinole v. Countrywide Home Loans, Inc.* (9th Cir. 2009) 571 F.3d 935, 946 ["a district court abuses its discretion in relying on an internal uniform exemption policy to the near exclusion of other factors relevant to the predominance inquiry"].)

These Ninth Circuit cases involving federal class procedure are informative, as California courts regularly look to federal class action decisions for guidance. (See *Brinker, supra,* 53 Cal.4th at p. 1021 ["Drawing on the language of Code of Civil Procedure section 382 and *federal precedent,* we have articulated clear requirements for the certification of a class" (emphasis added)]; *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 318 [the federal class action requirements "are analogous to the requirements for class certification under Code of Civil Procedure section 382"]; *Fireside Bank, supra,* 40 Cal.4th at p. 1090; *Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 844.)

B. In deciding commonality, the trial court properly considers not just allegations but evidence.

Certification must be grounded on more than just pleading allegations. In deciding the issue of predominance, "[a] court must examine the allegations of the complaint and *supporting declarations* [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible." (*Brinker, supra,* 53 Cal.4th at pp. 1021-1022, emphasis added.) "[P]leadings are

allegations, not evidence, and do not suffice to satisfy a party's evidentiary burden." (*Soderstedt, supra,* 197 Cal.App.4th at pp. 154, 158 [affirming order denying class certification].)

As the Seventh Circuit recently explained, "Mere *assertion* by class counsel that common issues predominate is not enough. That would be too facile. Certification would be virtually automatic." (*Parko v. Shell Oil Co.* (7th Cir. 2014) 739 F.3d 1083, 1085 (Posner, J.).) In *Parko*, the trial court "treated predominance as a pleading requirement," finding it sufficient that plaintiffs *intended* to rely on common evidence. (*Id.* at p. 1086.) "But if intentions (hopes, in other words) were enough, predominance, as a check on casting lawsuits in the class action mold, would be out the window. Nothing is simpler than to make an unsubstantiated allegation." (*Ibid.*)

To avoid the effect of defendant's evidence here, plaintiffs mistakenly rely on the general rule that merits issues should be resolved after class certification has been decided. (AOB 60-61.) But that rule does not prevent consideration of evidence showing the absence of predominance. The trial court "may 'consider[ ] how various claims and defenses relate and may affect the course of the litigation' even though such 'considerations . . . may overlap the case's merits.' " (*Brinker, supra,* 53 Cal.4th at pp. 1023-1024.)

Plaintiffs also attempt to sidestep the requirement of showing both a common policy and uniform application of that policy on the theory that the defendant has the burden to prove its affirmative defenses. (AOB 27.) But the burden of proof at trial is immaterial. The fact that an affirmative defense must be individually

adjudicated is part of the calculus in denying class certification. (*Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450 ["The affirmative defenses of the defendant must also be considered, because a defendant may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues"]; see *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 913; *Soderstedt, supra,* 197 Cal.App.4th at pp. 144, 151-152; *Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.)

While the defendant may "ultimately bear the burden of proving the merits of its" affirmative defenses, plaintiffs nonetheless bear the burden of showing at the class certification stage that this litigation—including the affirmative defenses at issue—"will be susceptible to generalized proof for all class members than any individualized issues." (*Myers v. Hertz Corp.* (2d Cir. 2010) 624 F.3d 537, 551; see *Wal-Mart, supra,* 131 S.Ct. at pp. 2560-2561 [reversing order granting class certification because reliance on statistical sampling to prove plaintiff's entitlement to relief could not be used to sidestep the impact of individual affirmative defenses on class treatment, notwithstanding that the defendant would have burden of proving its defenses at trial]; *Thorn v. Jefferson-Pilot Life Ins. Co.* (4th Cir. 2006) 445 F.3d 311, 321-322 [holding that plaintiffs bear the burden of proving the prerequisites for class certification even where the individual issues that would defeat class certification arise from an affirmative defense].)

C. The trial court correctly found that plaintiffs did not show the uniform application of a common policy and that common issues did not predominate.

In this appeal from a class certification ruling, the trial court's finding on the issue of whether "common issues predominate generally is reviewed for substantial evidence." (*Brinker*, *supra*, 53 Cal.4th at p. 1022.); see *Soderstedt*, *supra*, 197 Cal.App.4th at p. 144 ["We examine whether substantial evidence supported the trial court's finding on predominance and draw inferences from the evidence in favor of the order"].)

Here, the trial court found that because plaintiffs did not challenge a uniform application of a common policy, plaintiffs' theories of liability could not be answered with common proof and would create an unmanageable class.

Plaintiffs' meal period claim, for example, raised two issues: "whether Wackenhut provided on-duty meal periods, and, if so, whether such meal periods were permissible under the nature of the work exception." (13 JA 2942.) But these issues could not be answered with common proof.

As the trial court found, "the meal periods Wackenhut authorized were not necessarily 'on-duty' in all cases, even at worksites that were typically limited to on-duty meal periods." (13 JA 2943.) Instead, "the class as certified include[d] several worksites whose employees . . . undisputedly were provided with off-duty meal periods." (13 JA 2943, fn. 1.)

As a result, the first issue—whether Wackenhut provided on-duty meal periods—did not show the predominance of common issues. Instead, practices could "vary significantly from worksite to worksite" over "the hundreds of worksites and . . . millions of shifts." (13 JA 2944.) Because of the different experiences across the class, the issue would "require an individualized assessment of the nature of the meal periods Wackenhut actually provided to each class member." (*Ibid.*)

Likewise, the second issue—whether the nature of the work exception was satisfied—could not be answered on a class-wide basis. The trial court adopted the "multi-factor objective test" articulated by the Division of Labor Standards Enforcement for determining whether the "nature of the work" exception applies. (13 JA 2951.) This test includes context-specific factors such as "the type of work," "the availability of other employees to provide relief," and "the potential consequences to the employer if the employee is relieved of all duty." (*Id.* at p. 7.) This multi-factor test would have required individualized inquiries regarding "the facts and circumstances under which Wackenhut class members worked." (13 JA 2951.)

As the trial court found, "the duties and work environments differ[ed] dramatically amongst the class." (13 JA 2951.) Class members "hold many different positions, at numerous different worksites, and under vastly differen[t] circumstances." (13 JA 2952.) Further, the defense would require "an individualized assessment of the nature of the meal periods Wackenhut actually provided to each class member." (13 JA 2944.) As a result, the

nature of the work performed by Wackenhut employees could not be resolved on a class-wide basis. (13 JA 2951.)

As to plaintiffs' rest break claims, the trial court found "that class members at many Wackenhut worksites were provided with rest periods that lacked any restrictions and appear[ed] to be fully off-duty." (13 JA 2954.)[2] Further, the court did not find an employment policy requiring on-duty rest periods, but instead found that Wackenhut intended "certain restrictions on rest periods at some worksites." (*Ibid.*) Accordingly, the question "whether any restrictions placed on rest periods made them on-duty would require unmanageable individualized inquiries into the nature of the rest periods for each distinct worksite, shift, and security officer position." (*Ibid.*) Moreover, because Wackenhut's written policy addressed the requirements of the federal Fair Labor Standards Act and mandated that "each region . . . supplement this guidance with local requirements," the policy would not "obviate the need for individualized inquiries into the actual rest periods provided to each class member." (13 JA 2955-2956.)

These factual findings preclude class certification. The trial court properly found that the dissimilarity in the claims of the class members would prevent joint resolution through a unified proceeding. Much like the off-the-clock claims in *Brinker*, plaintiffs here did not establish a uniform and common companywide policy.

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[2] The issue of whether and under what circumstances any restrictions on a meal or rest period are permissible under the Labor Code and wage orders is outside the scope of this brief.

Instead, proof of liability could have proceeded only in an employee-by-employee fashion.

Plaintiffs' attacks on these factual findings essentially seek a reweighing on appeal of the same evidence already considered by the trial court in its comprehensive ruling. But in "determining whether the record contains substantial evidence supporting the ruling [on class certification], a reviewing court does not reweigh the evidence and must draw all reasonable inferences supporting the court's order." (*Dailey*, *supra*, 214 Cal.App.4th at p. 988; accord, e.g., *Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 918 [same].) Plaintiffs' attacks on the trial court's factual findings thus reflect a fundamental misunderstanding of California law.

II. INDIVIDUALIZED ISSUES CONCERNING THE RIGHT TO RECOVER PRECLUDE CLASS CERTIFICATION.

A. The right to recover is an issue of liability.

Plaintiffs rely on the general rule that individualized damages issues do not ordinarily bar class certification. (*Brinker*, *supra*, 53 Cal.4th at p. 1022; AOB 23.) But the *right to recover* is not a damages issue, it is an issue of *liability*.[3]

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[3] At any rate, as discussed below, this general rule concerning the impact of individualized damages issues can no longer be considered good law in light of recent United States Supreme Court decisions confirming a defendant's constitutional due process right to litigate its individual defenses. (At pp. 44-46, *post*.)

Individuality regarding the right to recover precludes class certification. "[A] class action cannot be maintained where each member's *right to recover* depends on facts peculiar to his case . . . . The rule exists because the community of interest requirement is not satisfied 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' determining issues common to the purported class." (*City of San Jose, supra,* 12 Cal.3d at p. 459, emphasis added; see *Fuhrman v. California Satellite Systems* (1986) 179 Cal.App.3d 408, 424 (*Fuhrman*), disapproved on another ground in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212-213 [where " 'each member of the class will be required to litigate numerous and substantial issues affecting his individual right to recover damages after the common questions have been determined, the requirement of community of interest is not satisfied' "].)

The California Supreme Court and Courts of Appeal have repeatedly reversed or vacated class certification orders when individuality regarding the right to recover prevented commonality. (See, e.g., *Lockheed Martin, supra,* 29 Cal.4th at p. 1111 ["The questions respecting each individual class member's right to recover that would remain following any class judgment appear so numerous and substantial as to render any efficiencies attainable through joint trial of common issues insufficient, as a matter of law, to make a class action certified on such a basis advantageous to the judicial process and the litigants"]; *City of San Jose, supra,* 12 Cal.3d at p. 463; *Thompson, supra,* 217 Cal.App.4th at p. 732

[individual issues predominated over common issues when some class members might have been better off under the challenged policy: "These are not merely issues relating to the measure of damages, but as to whether any possible recovery exists"]; *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 756 [rejecting plaintiff's argument that individuality concerned only damages; "the individual issues here go beyond mere calculation; they involve each class member's *entitlement* to damages"].)

Here, the individualized issues bore on substantive liability and had to be resolved for each individual class member before reaching the question of the amount of damages that any individual could recover. These were not damages issues. (*Morgan, supra,* 210 Cal.App.4th at p. 1369 [distinguishing between "determinations regarding the 'extent of liability,' " and "more fundamentally . . . *the fact* of liability"]; *Frieman v. San Rafael Rock Quarry, Inc.* (2004) 116 Cal.App.4th 29, 42 [contrasting right to recover and "mere variations in the measure of damages"].)

Consequently, the trial court did not abuse its discretion by rejecting plaintiffs' argument that the issues here concerned only individuality in damages. "If the nature of the work exception is satisfied, Wackenhut does not just owe a lower amount of damages, but instead is not liable at all to those class members who received on-duty meal periods under the exception." (13 AA 2948.)

B. Post-*Brinker* cases allowing class certification despite individuality in *damages* issues do not address individuality in the *liability* issues here.

Plaintiffs rely on a handful of post-*Brinker* cases allowing class certification despite individuality in *damages* issues, but even assuming those cases were decided correctly (see pp. 30-32, *post*), at a minimum, they do not address individuality in *liability* issues, such as the trial court found here.

Plaintiffs cite *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 224-225 (*Faulkinbury*), in which the Court of Appeal reversed an order denying certification on meal and rest period claims. (AOB 29-30.) But that case involved individuality in damages issues, not liability issues. There, defendant served discovery responses *denying* that its employees took any off-duty meal periods. (*Faulkinbury,* at pp. 234-235.) In short, the defendant conceded that it had an on-duty meal break policy that "was *uniformly and consistently applied* to all security guard employees." (*Id.* at p. 233, emphasis added.) Consequently, any individuality concerned only damages. (*Id.* at p. 237.) Because *Faulkinbury* addressed a uniform and common employment policy, it is not authority for class certification despite individuality in the liability issues here.

In *Abdullah,* the Ninth Circuit affirmed the district court's grant of class certification on meal period claims based on facts "strikingly similar" to those in *Faulkinbury.* (*Abdullah, supra,* 731 F.3d at p. 961.) Much like in *Faulkinbury,* the defendant's "person

most knowledgeable" testified to facts showing a uniform application of a common policy, including that he was not aware of "'any single post that has a lunch break.'" (*Id.* at p. 966.) Although the defendant submitted contrary declarations, "the district court found that nearly all of the evidence in the record . . . supports a finding that common questions would predominate." (*Id.* at p. 965.) The Ninth Circuit deferred to the trial court's exercise of discretion in resolving the evidentiary conflicts, and held that the trial court "did not abuse its discretion by finding, on the record before it, that common issues of law or fact would predominate." (*Id.* at p. 966.)

Despite these differences, plaintiffs argue that *Faulkinbury* and *Abdullah* are controlling because the defendants in those cases supposedly advanced the same legal arguments as the defendant here. (ARB 20.) But plaintiffs miss the point. What distinguishes *Faulkinbury* and *Abdullah* are not the legal arguments advanced, but the consistent application of uniform policies and the corresponding absence of individuality on liability issues.

Plaintiffs' reliance on *Williams v. Superior Court* (2013) 221 Cal.App.4th 1353 (*Williams*) and *Jones v. Farmers Ins. Exchange* (2013) 221 Cal.App.4th 986 is equally misplaced. (See ARB 4.) Both cases approved class certification based on uniform employment policies that denied compensation for pre-shift and post-shift work. In *Williams*, the plaintiffs were adjusters who traveled from site to site inspecting automobiles. (*Williams*, at p. 1356.) The employer acknowledged that its uniform policy was not to track the adjusters' time before the day's first inspection or

after the day's last inspection. (*Id.* at p. 1357.) As one of its officers testified, each adjuster's " 'day begins at the first stop.' " (*Ibid.*) In *Jones*, the court found that the employer's own writings and evidence likewise showed "the existence of a *uniform policy* denying compensation for preshift work." (*Jones*, at p. 996, emphasis added; see also *id.* at pp. 989-990.) Because the plaintiffs in both cases showed the uniform application of a common policy, the Courts of Appeal held that the individualized issues concerned only damages and that such damages issues did not preclude class certification. (*Williams*, at p. 1370 ["the existence of individuality as to damages does not defeat class certification"]; *Jones*, at p. 997 ["liability depends on the existence of such a uniform policy . . . , rather than individual damages determinations"].)

Martinez v. Joe's Crab Shack Holdings (2013) 221 Cal.App.4th 1148 also concerned individuality in damages issues. (See ARB 5.) The plaintiffs alleged they were misclassified as exempt employees and denied overtime pay. (*Martinez*, at pp. 1153-1154.) They showed that the defendant's "hiring and training *practices are uniform throughout the chain* . . . ." (*Id.* at p. 1153, emphasis added.) The trial court "acknowledged the existence of common questions of law and fact," but denied class certification because of disputes about the "amount of time spent by individual class members on particular tasks." (*Id.* at p. 1156.) The Court of Appeal reversed on the ground that the individuality in damages issues did not require denial of class certification. (*Id.* at p. 1161.) Indeed, the Court of Appeal did not direct that the class be certified, but instead instructed the trial court on remand to consider the very issues that

were the basis of the trial court's decertification order here: "the policies and practices of the employer and the effect those policies and practices have on the putative class." (*Id.* at p. 1165)

Plaintiffs also rely on *Jaimez v. Daiohs, USA, Inc.* (2010) 181 Cal.App.4th 1286, but that case is limited to the narrow circumstances in which "the plaintiffs produced substantial evidence of a *companywide employment policy* and the core liability issue was whether that policy was legal or not." (*Morgan, supra,* 210 Cal.App.4th at p. 1368, emphasis added; see AOB 28-29.) *Jaimez* is beside the point when, as here, the trial court finds that the plaintiffs have failed to show "an articulable companywide policy which could be used to establish classwide *liability*." (*Morgan,* at p. 1368, emphasis added.)

Other cases addressing individuality in damages issues are equally irrelevant. For example, *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701 and *Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129 both concerned an employer's uniform failure to authorize meal and rest breaks. (*Benton,* at p. 727 [declining to consider defendant's argument that "it did not uniformly lack a policy of authorizing and permitting meal and rest breaks . . . . [¶] because the trial court did not address or rely on these arguments"]; *Bradley,* at p. 1150 [defendant "did not present *any evidence* showing it had a formal or informal practice or policy of permitting the required breaks . . . or that some or all workers took these breaks"].)

In contrast to all these cases, the issue of liability here would have required unmanageable individualized inquiries because

plaintiffs did not show a uniform and consistent policy supporting their meal and rest period claims. The questions whether class members had a right to recover for any missed meal periods or rest breaks were inherently factual questions of liability rather than damages. (See, e.g., 13 JA 2948.)

It would be improper to extend the holdings of these cases beyond their facts to allow certification despite individualized issues concerning the right to recover. " 'It is axiomatic, of course, that a decision does not stand for a proposition not considered by the court.' " (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 332.) Indeed, any such extension would conflict with the California Supreme Court's opinions in *Lockheed Martin* and *City of San Jose* establishing that the right to recover is a liability issue and that individuality regarding that right bars class certification. (See *ante*, pp. 21-23.)

C. Plaintiffs misconstrue the post-*Brinker* authorities.

Plaintiffs argue that under "post-*Brinker* caselaw" the question of classwide liability depends on the existence of employment policies and "is not dependent on further individualized proof of the effects of those policies." (AOB 32-33.) But as *Brinker* itself holds, class certification is impermissible when liability must be established "employee-by-employee." (*Brinker*, *supra*, 53 Cal.4th at p. 1052.) As a result, the trial court properly denies class certification when "the trier of fact will have to look beyond the written policies to the practices of each manager." (*Morgan*, *supra*,

210 Cal.App.4th at p. 1364; see *ante*, pp. 10-15.) Consistent with this caselaw, the trial court here properly denied class certification because plaintiffs failed to show the uniform application of a common employment policy, and certification would have required unmanageable individualized inquiries. (13 JA 2944, 2954.)

Plaintiffs chastise the trial court for having "ignored Plaintiff's theory of recovery" (ARB 5) and for having instead "accepted Wackenhut's invitation to adopt speculative factual assertions" (AOB 55). But plaintiffs elsewhere acknowledge *Brinker*'s holding that the trial court in deciding class certification must consider not just allegations but evidence. (AOB 22-23; see *Brinker*, *supra*, 53 Cal.4th at pp. 1021-1022; *ante*, pp. 15-17.) Plaintiffs' criticism thus amounts to nothing more than a disagreement about the trial court's resolution of conflicts in the weight of the evidence—a matter reviewed under the highly deferential substantial evidence standard. (*Dailey*, *supra*, 214 Cal.App.4th at p. 997 ["In light of [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, the trial court was acting within its discretion in finding that plaintiff's theory of . . . liability was not susceptible of common proof at trial"]; see *ante*, p. 18.)

Plaintiffs also argue that whether class members actually receive meal or rest periods is an issue of damages that must be disregarded at class certification. (ARB 17.) But in doing so, they ignore the long-standing rule that the right to recover is an issue of liability, not damages. (See, e.g., *City of San Jose*, *supra*, 12 Cal.3d

at pp. 459-460; *ante*, pp. 21-23.) As discussed above, the authorities that plaintiffs cite have no bearing here because they address individualized damages issues rather than the right to recover. (*Ante* pp. 24-28.) In contrast to those cases, the question whether individual class members received meal or rest periods is one of substantive liability that must be resolved for each class member before reaching the question of the amount of any damages. (See *Brinker, supra*, 53 Cal.4th at p. 1050 [if a class includes individuals who were provided with meal periods under California law, then the class impermissibly "includes individuals with no possible claim"].)

D. Individuality in damages issues can also show the absence of commonality.

The general rule 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 the first California Supreme Court 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.)

Accordingly, 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, supra,* 179 Cal.App.3d at pp. 424-425.)

The general rule allowing individual proof of damages "has been applied most frequently where computation of individual damages is 'a relatively uncomplicated problem.' " (*Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 657, quoting *Collins v. Rocha* (1972) 7 Cal.3d 232, 238; see also *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"]; *Bell Atlantic Corp. v. AT&T Corp.* (5th Cir. 2003) 339 F.3d 294, 306-307; *Broussard v. Meineke Discount Muffler Shops, Inc.* (4th Cir. 1998) 155 F.3d 331, 342-343; *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)].)

Here, the computation of individual damages would be anything but uncomplicated. Plaintiffs proposed the use of statistical sampling to establish the recovery of individual class members. But as the trial court found, and plaintiffs conceded, "statistical sampling would lead to imprecise individual recoveries that do not accurately reflect the actual damages incurred by each class member, resulting in a windfall for some class members and leaving other class members under-compensated." (13 JA 2946.) Particularly when viewed in context with the individuality regarding the right to recover at all, the complicated and numerous individual damages issues preclude class certification.

III. IF THE CLASS WERE CERTIFIED BASED ON A TRIAL BY FORMULA, THE CLASS WOULD VIOLATE DEFENDANT'S DUE PROCESS RIGHTS.

A. Defendants have a due process right to be heard and to present every available defense to class actions.

The United States and California Constitutions guarantee the right to due process. (U.S. Const., 14th Amend., § 1 [no state shall "deprive any person of life, liberty, or property, without due process

of law"]; Cal. Const., art I, §§ 7, 15 [no person shall be "deprived of life, liberty, or property without due process of law"].)

Fundamental to the due process right " 'is the opportunity to be heard.' " (*Goldberg v. Kelly* (1970) 397 U.S. 254, 267 [90 S.Ct. 1011, 25 L.Ed.2d 287], quoting *Grannis v. Ordean* (1914) 234 U.S. 385, 394 [34 S.Ct. 779, 58 L.Ed. 1363].) Due process requires a "meaningful opportunity to be heard and to explain one's actions." (*People v. Coleman* (1975) 13 Cal.3d 867, 873.)

Before a defendant can be deprived of property, due process thus requires the defendant be afforded " 'an opportunity to present *every available defense.*' " (*Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353 [127 S.Ct. 1057, 166 L.Ed.2d 940], emphasis added, quoting *Lindsey v. Normet* (1972) 405 U.S. 56, 66 [92 S.Ct. 862, 31 L.Ed.2d 36] (*Lindsey*).) This principle has long been recognized. (See, e.g., *United States v. Armour & Co.* (1971) 402 U.S. 673, 682 [91 S.Ct. 1752, 29 L.Ed.2d 256] [the "right to litigate the issues raised [is] . . . guaranteed . . . by the Due Process Clause"]; *Nickey v. State of Mississippi* (1934) 292 U.S. 393, 396 [54 S.Ct. 743, 78 L.Ed. 1323] [due process satisfied when "all available defenses may be presented to a competent tribunal"].)

The California Supreme Court has described class actions under California law as strictly procedural devices. "Class actions are provided only as a means to enforce substantive law." (*City of San Jose, supra,* 12 Cal.3d at p. 462; *In re Tobacco II Cases, supra,* 46 Cal.4th at p. 313 [a class action "does not change . . . substantive law"]; accord, *Deposit Guaranty Nat. Bank, Etc. v. Roper* (1980) 445 U.S. 326, 332 [100 S.Ct. 1166, 63 L.Ed.2d 427] [the right to proceed

as a class is "a procedural right only, ancillary to the litigation of substantive claims"].)

Because a California class action is a purely procedural device, courts cannot use class treatment to alter the substance of a party's rights or liabilities. As the California Supreme Court held in *City of San Jose*, "Altering the substantive law to accommodate [class] procedure would be to confuse the means with the ends—to sacrifice the goal for the going." (*City of San Jose, supra*, 12 Cal.3d at p. 462; accord, *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"]; *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1014 ["Class certification does not serve to enlarge substantive rights or remedies"].)

Federal law is no different. The federal class-action device does no more than provide "the procedural means by which [a] remedy may be pursued." (*Shady Grove Orthopedic Associates, P.A. v. Allstate Ins.* (2010) 559 U.S. 393, 402 [130 S.Ct. 1431, 176 L.Ed.2d 311] (*Shady Grove*).) This device "leaves the parties' legal rights and duties intact and the rules of decision unchanged." (*Id.* at p. 408 (plur. opn. of Scalia, J.); see *Sikes v. Teleline, Inc.* (11th Cir. 2002) 281 F.3d 1350, 1365, abrogated on another ground in *Bridge v. Phoenix Bond & Indem. Co.* (2008) 553 U.S. 639 [128 S.Ct. 2131, 170 L.Ed.2d 1012] ["class treatment may not serve to lessen the plaintiffs' burden of proof"].)

Even if the class action device in California could be used by courts to alter substantive law, it certainly could not be used to deprive a litigant of constitutional protections. The due process right to present every available defense applies fully in a class-action lawsuit. Although "[s]tate courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes," it is well settled "that extreme applications" of this principle "may be inconsistent with a federal right that is 'fundamental in character.' " (*Richards v. Jefferson County, Ala.* (1996) 517 U.S. 793, 797 [116 S.Ct. 1761, 135 L.Ed.2d 76], quoting *Postal Telegraph Cable Co. v. City of Newport, K.Y.* (1918) 247 U.S. 464, 475 [38 S.Ct. 566, 62 L.Ed. 1215]; e.g., *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 16 [recognizing defendant's due process right in class action context].) Class actions may " 'achieve economies of time, effort, and expense,' " but only when those goals can be achieved " 'without sacrificing procedural fairness or bringing about other undesirable results.' " (*Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591, 615 [117 S.Ct. 2231, 138 L.Ed.2d 689], quoting Adv. Comm. Notes, 28 U.S.C.App., p. 697.)

When a state "abrogat[es] a well-established common-law protection," it creates "a presumption that its procedures violate the Due Process Clause." (*Honda Motor Co., Ltd. v. Oberg* (1994) 512 U.S. 415, 430 [114 S.Ct. 2331, 129 L.Ed.2d 336].) Of course, the due process right does not prohibit all changes to established procedure. (*Ibid.*) But the plaintiffs here proposed more than just a deviation from an established procedure. Instead, as the trial court

found, plaintiffs would have used statistical sampling to "establish liability" and "deprive Wackenhut of its defenses to individual claims." (13 JA 2946.) Any such use of statistical sampling would impermissibly alter the substantive law and abrogate defendant's right to present its defenses to liability because "Wackenhut would be limited to challenging Plaintiffs' statistical methods." (*Ibid.*) As the trial court properly found, the proposed use of statistical sampling here to deny the defendant its right to present individual defenses to liability presumptively shows the violation of its due process rights.

B. A class based on a trial by formula would violate due process and the fundamental requirement that class action procedure not alter the parties' substantive rights.

In *Wal-Mart*—cited with approval in other respects in *Brinker*—the United States Supreme Court relied on the core principles of a right to a defense in rejecting the type of "Trial by Formula" that plaintiffs proposed here. (*Wal-Mart, supra*, 131 S.Ct. at p. 2561; see *Brinker, supra*, 53 Cal.4th at p. 1023.) In that case, the Ninth Circuit affirmed the district court's class certification on the assumption that statistical sampling could be used to decide the defenses to individual claims. Thus, the claims of a sample set of class members were to be tried, and the results of those trials were to be applied to the remaining class without further individualized proceedings. (*Wal-Mart*, at p. 2561.) The Supreme Court

"*disapprove[d] that novel project*" because "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims." (*Ibid.*, emphasis added.)

Wal-Mart thus reversed class certification on the ground that a federal class action cannot " 'abridge, enlarge or modify any substantive right.' " (*Wal-Mart, supra*, 131 S.Ct. at p. 2561, quoting 28 U.S.C. § 2072(b).) *Wal-Mart* applies with equal force here, because under federal law, like under California law, class actions are procedural devices that cannot modify substantive rights. (See, e.g., *In re Tobacco II Cases, supra*, 46 Cal.4th at p. 313; *City of San Jose, supra*, 12 Cal.3d at p. 462 & fn. 9; *Shady Grove, supra*, 559 U.S. at pp. 408-409.)

When California and federal class procedures are similar, as they are on this point, federal authorities such as *Wal-Mart* are highly persuasive. (See *Southern California Edison Co. v. Superior Court* (1972) 7 Cal.3d 832, 839 [noting the court's reliance in the class action context on "federal case law, in the absence of controlling California authority"]; *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 872 ["we have previously suggested that trial courts, in the absence of controlling California authority, utilize the class action procedures of the federal rules"]; *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1119, fn. 4, quoting *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1264, fn. 4. [" ' "California courts may look to federal authority for guidance on matters involving class action procedures" ' "]; *Danzig v. Superior Court* (1978) 87 Cal.App.3d 604,

610 ["Where, as here, there is no controlling California authority in a class action and the California procedural rule involved is identical to the corresponding federal rule, federal cases construing the rule are particularly persuasive authority"].)

Indeed, not only is *Wal-Mart* persuasive authority here, state courts are *bound* by *Wal-Mart*'s disapproval of the misuse of Trials by Formula to sidestep a defendant's substantive right to litigate the individual issues arising in a class action. Although the *Wal-Mart* court centered its decision on the Rules Enabling Act (*Wal-Mart, supra,* 131 S.Ct. at p. 2561), such class action procedural "protections [are] grounded in due process" (*Taylor v. Sturgell* (2008) 553 U.S. 880, 901 [128 S.Ct. 2161, 171 L.Ed.2d 155]). This is why courts have found that, under *Wal-Mart*, "due process impels that a defendant have the opportunity to respond" to individualized issues in class actions. (*Jacob v. Duane Reade, Inc.* (S.D.N.Y. 2013) 293 F.R.D. 578, 589 (*Jacob*).) California law must comply with the due protections afforded by the United States Constitution. (See *Perry v. Thomas* (1987) 482 U.S. 483, 491 [107 S.Ct. 2520, 96 L.Ed.2d 426] [under United States Constitution's Supremacy Clause, California law must "give way"]; see also *City of Boerne v. Flores* (1997) 521 U.S. 507, 529 [117 S.Ct. 2157, 138 L.Ed.2d 624] [United States Constitution is the " 'superior paramount law' "].)

Notably, numerous courts have found due process violations on facts similar to those here. The Fifth Circuit applied due process principles when rejecting a class-action trial plan that, much like the proposed plan here, would have allowed the claims of all class members to be decided based on a trial of representative claims. (*In*

re Fibreboard Corp. (5th Cir. 1990) 893 F.2d 706, 711 (*In re Fibreboard*).) Under the trial plan in that case, the defendants were "exposed to liability not only in 41 cases actually tried with success to the jury, but in 2,990 additional cases whose claims [were] indexed to those tried." (*Ibid.*) The Fifth Circuit held this plan eliminated "the requirement that a plaintiff prove both causation and damage" and, by doing so, "inevitably restate[d] the dimensions of tort liability." (*Ibid.*)

Other decisions are in accord in recognizing that this fundamental due process right to present all defenses to liability cannot be impinged. (See, e.g., *Carrera v. Bayer Corp.* (3d Cir. 2013) 727 F.3d 300, 307 ["A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues"]; *McLaughlin v. American Tobacco Co.* (2d Cir. 2008) 522 F.3d 215, 232, quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith* (3d Cir. 2001) 259 F.3d 154, 191-192 (*Newton*) [" 'defendants have the right to raise individual defenses against each class member' "]; *In re Brooklyn Navy Yard Asbestos Litigation* (2d Cir. 1992) 971 F.2d 831, 853 ["The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation"]; *Western Elec. Co., Inc. v. Stern* (3d Cir. 1976) 544 F.2d 1196, 1199 [trial court abused its discretion by denying defendants the right to obtain discovery on the claims of the individual class members; "to deny [defendants] the right to

present a full defense on the issues would violate due process"]; *Stonebridge Life Ins. Co. v. Pitts* (Tex. 2007) 236 S.W.3d 201, 205 [due process requires that class actions not be used to diminish the substantive rights of any party to the litigation]; *Southwestern Refining Co., Inc. v. Bernal* (Tex. 2000) 22 S.W.3d 425, 437 (*Southwest Refining Co.*) ["basic to the right to a fair trial—indeed, basic to the very essence of the adversarial process—is that each party have the opportunity to adequately and vigorously present any material claims and defenses"].)

Here, the threatened due process violation was manifest. Wackenhut asserted the nature of the work exception as an affirmative defense to plaintiffs' meal period claims. (13 JA 2941-2942.) That defense required a written agreement regarding on-duty meal periods. (13 JA 2944.) Plaintiffs argued that some of those agreements were ineffective because they lacked language informing employees that they had the right to revoke the agreements. (13 JA 2945.) However, plaintiffs obtained in discovery only a small fraction of the total agreements and planned to use statistical sampling to establish the proportion of the agreements lacking revocation language and to "extrapolate the results across the entire class." (*Ibid.*) As the trial court found, plaintiffs' proposal "would violate Wackenhut's due process right to 'present every available defense' " and "impermissibly alter the substantive law." (13 JA 2946.)

"That a procedure is efficient and moves cases through the system is admirable, but even more important is for the courts to provide fair and accessible justice." (*Elkins v. Superior Court* (2007)

41 Cal.4th 1337, 1366.) Such fairness cannot be reconciled with the use of statistical sampling to preclude evidence showing defenses to the claims of individual class members. The businesses and organizations whose interests amici represent are frequently targets of class action lawsuits. Both fairness and due process dictate that they be afforded the right to defend the claims against them.

Whether viewed under federal or California law, the type of Trial by Formula proposed here and in *Wal-Mart* must fail. Plaintiffs proposed a standard that was substantively different from the one required by law because it would have allowed the use of statistical sampling to establish class liability after the defendant presented evidence supporting individual defenses to liability. The effect of plaintiffs' trial plan would have been "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]; see also *Comcast*, *supra*, 133 S.Ct. at p. 1433 [trial court erred by accepting damages model in class action that was not limited to the antitrust theory of anticompetitive impact at issue]; *Southwestern Refining Co.*, *supra*, 22 S.W.3d at p. 437 ["With the help of models, formulas, extrapolation, and damage brochures, plaintiffs may indeed be able to present their case in an expeditious manner. . . . But, while [defendant] may not be entitled to separate trials, it is entitled to challenge the credibility of and its responsibility for each personal injury claim individually"].)

In *Williams*, the Court of Appeal concluded that *Wal-Mart* could be limited to its procedural facts involving claims for alleged discrimination under Title VII and injunctive relief under Federal Rule of Civil Procedure 23(b)(2). (*Williams*, *supra*, 221 Cal.App.4th at pp. 1363-1364.) But the United States and California Supreme Courts have declined the invitation to so confine *Wal-Mart*. (*Comcast*, *supra*, 133 S.Ct. at p. 1433 [applying *Wal-Mart* in antitrust damages action under Rule 23(b)(3)]; *Brinker*, *supra*, 53 Cal.4th at p. 1023 [applying *Wal-Mart* in wage and hour damages action under state law]; see also, e.g., *City of San Diego*, *supra*, 207 Cal.App.4th at p. 501 [applying *Wal-Mart* in employee benefits declaratory relief action under state law]; *Wang v. Chinese Daily News, Inc.* (9th Cir. 2013) 737 F.3d 538, 542, 544-546 [applying *Wal-Mart* in Fair Labor Standards Act case under both Rules 23(b)(2) and (b)(3)]; *Gonzalez v. Millard Mall Services, Inc.* (S.D.Cal. 2012) 281 F.R.D. 455, 460-461 [applying *Wal-Mart* in wage and hour damages action under Rule 23(b)(3)].) On this point, *Williams* is simply mistaken.

The *Williams* court also misconstrued *Wal-Mart* as concerning only the *calculation* of damages and mistakenly stated that such calculations "have little, if any, relevance at the certification stage." (*Williams*, *supra*, 221 Cal.App.4th at p. 1365.) In fact, *Wal-Mart* condemned a Trial by Formula on the fundamental ground that it would deny the defendant its substantive right to presents its "defenses to [the plaintiffs'] individual claims." (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2561.) And as the trial court found here, plaintiffs' use of statistical sampling would have deprived Wackenhut of that

fundamental right. "Wackenhut will have no opportunity to present the affirmative defense—to which it is entitled under California law—that specific class members signed valid on-duty meal period agreements. Instead, Wackenhut would be limited to challenging Plaintiffs' statistical methods." (13 JA 2946.)

Additionally, *Williams* mistakenly suggests that California class action law differs in material respects from the federal class action law at issue in *Wal-Mart*. (*Williams*, *supra*, 221 Cal.App.4th at pp. 1361-1364.) *Wal-Mart* disapproved the misuse of statistical sampling in class actions because, under the Rules Enabling Act, a class device cannot abridge or otherwise modify a substantive right. (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2561.) The same is equally true under California class action law. (See *In re Tobacco II Cases*, *supra*, 46 Cal.4th at p. 313 ; *City of San Jose*, *supra*, 12 Cal.3d at p. 462.) Nor could California courts adopt a contrary rule as a matter of state law because, as previously explained, constitutional due process "prevents the use of class actions from abridging the substantive rights of any party." (*Sacred Heart Health v. Humana Military Healthcare* (11th Cir. 2010) 601 F.3d 1159, 1176; see *ante*, pp. 32-36.)

Moreover, the United States Supreme Court has applied *Wal-Mart* in assessing whether common issues predominate in federal class actions (see *Comcast*, *supra*, 133 S.Ct. at p. 1433), and the same predominance requirement applies with equal force under California law (see *Brinker*, *supra*, 53 Cal.4th at p. 1021). In fact, the requirements for class treatment under California law are "[d]raw[n]" from "federal precedent" and the California Supreme

Court has relied on *Wal-Mart* in assessing predominance. (*Id.* at p. 1023.) In short, there is no material difference between California law and the legal principles on which *Wal-Mart* relied to reject the improper use of a Trial by Formula.

Clearly, statistical sampling is not an appropriate means of managing the individual issues when, as the trial court found here, sampling would allow liability to be extrapolated in a way that would abrogate the defendant's right to prove it was not liable to at least some of the class members. Such use of statistical sampling allows class action procedure to alter the defendant's substantive right—and represents the very Trial by Formula *Wal-Mart* rejected.[4]

C. A trial by formula ostensibly limited to damages would also violate due process.

As the United States Supreme Court held in *Comcast*, "questions of individual *damage calculations*" may "overwhelm questions common to the class" and prevent a finding of

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[4] If anything, there is significant doubt about whether statistical sampling can *ever* be used to establish class liability without violating due process. (See *Dailey*, *supra*, 214 Cal.App.4th at p. 998, fn. 10.) "Whether the use of statistical sampling methodologies to prove liability" in a class action "consistent with due process is now before the California Supreme Court in *Duran v. U.S. Bank National Assn.* [review granted May 16, 2012, S200923]." (*Ibid.*) The California Supreme Court recently set oral argument in *Duran* for March 4, 2014. (See Oral Argument Calendar for March 4, 2014 <http://www.courts.ca.gov/documents/SMAR14A.pdf> (as of Feb. 15, 2014).)

predominance. (*Comcast*, *supra*, 133 S.Ct. at p. 1433, emphasis added.) Even beyond the liability issues here, such disparate treatment of individualized damages may also deprive parties of their due process rights. *Comcast*, understood in the context of *Wal-Mart*, "instructs courts that the 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*, *supra*, 293 F.R.D. at p. 592.)

Comcast and *Wal-Mart*, when read "together," set "due process implications for defendants" in damages class actions that "render the so-called 'trial by formula' approach, whereby representative testimony is utilized to determine damages for an entire class, inappropriate where individualized issues of proof overwhelm damages calculations." (*Jacob*, *supra*, 293 F.R.D. at p. 588; see also *Stone v. Advance America* (S.D.Cal. 2011) 278 F.R.D. 562, 566, fn. 1 [*Wal-Mart* "largely eliminates a 'trial by formula' approach to use statistics to extrapolate average damages for an entire class, at least when the statute contains an individualized defense"].)

These due process concerns, compelled by the individualized damages issues here, further support the trial court's decertification order.

To the extent that California courts, prior to *Wal-Mart* and *Comcast*, followed a general rule of thumb that did not ordinarily deem individualized damages issues to preclude class certification—

a general rule that at any rate does not apply here (*ante*, pp. 21-23)—that rule can no longer be considered viable in light of the intervening *Wal-Mart* and *Comcast* decisions. As previously noted, *Wal-Mart* and *Comcast*'s prohibition on the misuse of statistical sampling reflect limitations imposed by constitutional due process guarantees and any contrary state law rule must give way under the United States Constitution. (*Ante*, pp. 36-44.)

D. If allowed, a trial by formula would unfairly pressure defendants to settle class actions and burden the state's economy.

Even without the use of a Trial by Formula, 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*, *supra*, 259 F.3d at p. 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.)

This leverage will increase exponentially if statistical sampling is permitted to preclude the defendant from showing individual defenses to the claims of individual class members. Such a Trial by Formula would "inevitably restate[ ] the dimensions of tort liability." (*In re Fibreboard, supra,* 893 F.2d at p. 711.) By violating the defendant's fundamental right to present every defense (see *Lindsey, supra,* 405 U.S. at p. 66), the Trial by Formula would in most cases coerce the only rational alternative—settlement.

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.). Here, plaintiffs' plan would have multiplied liability by preventing the defendant from proving its defenses to the claims of numerous class members. The inflated costs of settling such claims would "get passed along to the public." (*Id.* at p. 453 (conc. opn. of Boudin, J.).) When confronted with such inflated costs, a company might pass some of the costs on to consumers in the form of higher prices. Or it might be forced to take some other action to offset those costs, such as

scaling back its operations. In either situation, the ultimate burden would be borne by the public.

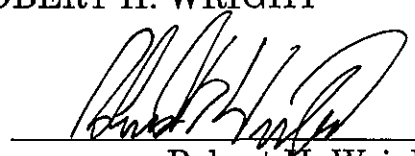
These serious policy implications all flow from the use of statistical sampling to preclude individual defenses to liability and underscore the importance of ensuring that every defendant is afforded the due process right to present a defense.

CONCLUSION

For the foregoing reasons, in addition to those set forth by defendant in the respondent's brief, amici curiae respectfully urge that the trial court's decertification order be affirmed.

February 18, 2014

HORVITZ & LEVY LLP
JOHN A. TAYLOR, JR.
FELIX SHAFIR
ROBERT H. WRIGHT

By: 
Robert H. Wright

Attorneys for Amici Curiae
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; NATIONAL ASSOCIATION OF SECURITY COMPANIES; AND CALIFORNIA ASSOCIATION OF LICENSED SECURITY AGENCIES

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

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Dated: February 18, 2014

Robert H. Wright

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 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On February 18, 2014, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; NATIONAL ASSOCIATION OF SECURITY COMPANIES; AND CALIFORNIA ASSOCIATION OF LICENSED SECURITY AGENCIES IN SUPPORT OF DEFENDANT AND RESPONDENT THE WACKENHUT CORPORATION** 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.

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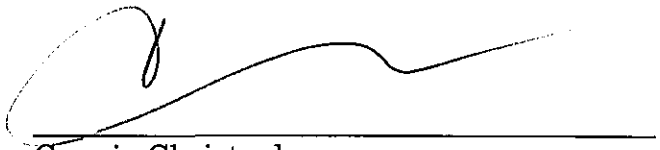
Executed on February 18, 2014, at Encino, California.



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Lubin et al. v. Wakenhut Corp.
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Howard Z. Rosen Jason Christophe Marsili Brianna M. Primozic Posner & Rosen LLP 3600 Wilshire Blvd., Suite 1800 Los Angeles, CA 90010	Attorneys for Plaintiff and Appellant Nividia Lubin
Emily Platt Rich Weinberg Roger & Rosenfeld 1001 Marina Village Parkway Suite 200 Alameda, CA 94501-1091	Attorneys for Plaintiff and Appellant Sylvia M. Maresca
James Ross Hawkins James R. Hawkins, APLC 9880 Research Dr., Suite 200 Irvine, CA 92618	Attorneys for Plaintiff and Appellant Kevin Denton
Mollie Michelle Thomas Stephen E. Ronk Gordon & Rees LLP 633 W 5th St. 52nd Floor Los Angeles, CA 90071	Attorneys for Defendant and Respondent Wackenhut Corp.
Theodore J. Boutrous Gibson Dunn & Crutcher 333 South Grand Avenue Los Angeles, CA 90071-3197	Attorneys for Defendant and Respondent Wackenhut Corp.
Hon. William F. Highberger Los Angeles Superior Court Central Civil West Courthouse 600 S. Commonwealth Ave. Dept. 307 Los Angeles, CA 90005	Trial Judge Case No. JCCP 4545 (Nos. BC326996, BC373415, 00180014)

Clerk,
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102

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Appellate Coordinator
Office of the Attorney General
Consumer Law Section
300 S. Spring Street
Los Angeles, CA 90013-1230

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Office of the District Attorney
320 W. Temple St. #540
Los Angeles, CA 90012

Contact Name: Appellate Division