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May 30, 2018

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VIA HAND DELIVERY

Office of the Clerk
Supreme Court of California
350 McAllister Street
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Re: Certification Request in *Ward v. United Airlines, Inc.* (Ninth Circuit Case No. 16-16415); *Vidrio v. United Airlines, Inc.* (Ninth Circuit Case No. 17-55471); California Supreme Court Case No. S248702

To the Clerk and Honorable Justices of the Court:

Pursuant to California Rule of Court 8.548(e)(1), United Airlines, Inc. ("United") submits this letter opposing and seeking to modify the Ninth Circuit request for certification of two questions to this Court in the above-referenced matter. United submits this letter for three reasons. First, this Court's decisions in *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996) ("*Tidewater*") and *Sullivan v. Oracle*, 51 Cal. 4th 1191 (2011) ("*Sullivan*") are controlling and provide all the guidance the Ninth Circuit needs to answer the threshold question in these cases: whether California Labor Code Section 226 ("Section 226") may apply to employees who work primarily outside California without violating California's presumption against the extraterritorial application of its laws. The panel also misstates California law in discussing three allegedly controlling extraterritoriality principles. As explained in detail below, these principles are incorrect in light of *Tidewater* and *Sullivan*, which dictate how extraterritoriality should be assessed in the wage and hour context. For these reasons, United respectfully requests that this Court deny the panel's certification request.

Second, if this Court does grant certification, United urges the Court to reframe the order of the questions. Contrary to the panel's statement, the question of whether Section 226 applies to the class—not the Wage Order 9 question—is the "antecedent" issue because the Wage Order 9 question is moot if Section 226 does not apply to the class members. This Court should therefore answer the panel's second certified question first.

Third, United hereby corrects certain factual inaccuracies in the panel's request. Specifically, the certification request: (i) assumes that the class members in both cases receive their wages in California even though there is no support for this statement in the record; and (ii) states that "United pilots are generally paid by the hour" even though the undisputed record indicates that hourly pay constitutes only one of the four different methods of compensating pilots under the operative collective bargaining agreement.

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A. This Court Should Deny the Certification Request Because Existing Precedent Answers the Threshold Question in These Cases.

The parties agree the threshold question in these cases is whether Section 226 applies to United pilots and flight attendants who indisputably spend the vast majority of their time working outside California. The panel claims there is "no directly controlling precedent on the question whether California Labor Code § 226 applies to a California-resident employee who works for an out-of-state employer and does not work principally in California." (Certification Request ("Cert. Req.") at 11.) While no decision of this Court has addressed the precise factual scenario presented by these cases, that does not equate to a lack of controlling authority. The principles this Court articulated in *Tidewater*, and reaffirmed in *Sullivan*, dictate that employee job situs—as opposed to residence or other facts—determines whether California wage and hour law may apply to an employee who works in multiple states without violating the presumption against extraterritoriality. These cases therefore provide ample guidance for the Ninth Circuit to answer the threshold question before it.

In *Tidewater*, this Court held that California Wage Orders applied to California residents working on boats in the Santa Barbara channel because the channel waters were part of California territory, and thus the Industrial Welfare Commission ("IWC") regulations applied to them:

> If an employee resides in California, receives pay in California, ***and*** works exclusively, or principally, in California, then that employee is a "wage earner" of California and presumptively enjoys the protections of IWC regulations.

Id. at 578 (emphasis added). *Tidewater* instructs that exclusive or principal job situs in California is necessary for California wage and hour law to apply to an employee. As this Court noted, focus on employee job situs makes sense in light of the overarching purpose of the California Labor Code to "foster, promote, and develop the welfare of the ***wage earners of California***." *Id.* (citing Cal. Lab. Code § 50.5) (emphasis in original); *see also* Cal. Lab. Code § 1173 (tasking the Industrial Welfare Commission with ascertaining the wages, hours, and working conditions of employment for all employees "***in this state***") (emphasis added); Cal. Lab. Code § 1193.5 (authorizing the Division of Labor Standards Enforcement to investigate the wages, hours, and working conditions "of all employees employed in any occupation ***in the state***.") (emphasis added).

Fifteen years later, in *Sullivan*, this Court affirmed the importance of employee job situs in determining application of California wage and hour law. In *Sullivan*, this Court held that California's overtime law applied to out-of-state residents who worked in California for days and weeks at a time. *Sullivan*, 51 Cal. 4th at 1205. As the Ninth Circuit itself noted in applying this Court's decision in *Sullivan*, "California applies its Labor Code equally to work performed in California, whether that work is performed by California residents or by out-of-state residents." *Sullivan v. Oracle Corp.*, 662 F.3d 1265, 1271 (9th Cir. 2011). Notably, nothing in *Sullivan* establishes that courts should apply this precedent differently based on the wage and hour provision at issue.

This Court's existing precedent thus makes clear that the location of United pilot and flight attendant work is what determines whether California Labor Code Section 226 may apply without violating California's presumption against the extraterritorial application of its laws. Because *Tidewater* and *Sullivan* control the answer to that question, there is no need for this Court to accept the panel's certification request.

B. The Certification Request Misstates this Court's Extraterritoriality Jurisprudence.

The panel's certification request also discusses three extraterritoriality principles it incorrectly claims are rooted in California law. But these three principles improperly draw from extraterritoriality precedent in non-wage-and-hour contexts, or from dormant Commerce Clause precedent. These principles therefore should not inform the extraterritoriality determination in this case, especially in light of *Tidewater* and *Sullivan*'s instruction that job situs determines whether California law applies to employees who work in more than one state. United explains below why each of these three principles is unsupported in California law, and should not guide this Court's (or the Ninth Circuit's) assessment of the threshold question here.

First, the panel states that in determining whether Section 226 applies extraterritorially, it must "consider where the conduct that 'creates liability' under the statute occurs." (Cert. Req. at 12) (citing *Sullivan*, 51 Cal. 4th at 1208). *Sullivan* does not support this principle. The *Sullivan* Court discussed the "conduct that creates liability" standard in addressing whether California's Unfair Competition Law, Business & Professions Code § 17200 *et seq.*, could apply extraterritorially—not the Labor Code. *Sullivan*, 51 Cal. 4th at 1208. According to this Court, it was appropriate under the UCL to examine where the relevant conduct occurred because that statute by its terms "reaches any unlawful business act or practice committed in California." *Id.* (citing Bus. & Prof. Code § 17200). Nothing in the *Sullivan* Court's discussion, however, supports applying a similar "conduct that creates liability" standard in addressing extraterritorial application of the Labor Code. To the contrary, this Court's decision in *Sullivan* establishes that the key extraterritoriality inquiry vis-à-vis the Labor Code is where the employee works—not where business decisions were made, the employee's state of residence, or any other fact.

Second, the panel incorrectly claims that "the proper reach of Labor Code provisions can differ because the provisions regulate different conduct and implicate different state interests." (Cert. Req. at 12) (citing *Sullivan*, 51 Cal. 4th at 1201). As evidence for this, the panel cites to the *Sullivan* Court's statement that "California's interest in the content of an out-of-state business's pay stubs" may be weaker than its interest in the payment of overtime. (*Id.*) But this portion of the *Sullivan* opinion addressed the defendant's argument that applying California overtime law would unduly burden interstate commerce—a constitutional inquiry distinct from the state law question of whether California law is being applied extraterritorially. *See Sullivan*, 51 Cal. 4th at 1200-01. State interests, however, do not factor into the threshold question of whether a state wage and hour law may be applied outside the state's borders. *Sullivan* thus does not support adding a "state interest" requirement to the extraterritoriality calculus.

Third, the panel states that "courts must balance California's interest in applying its law with considerations of 'interstate comity,' in order to avoid unnecessary conflicts of state law." (Cert.

Req. at 13) (citing *Sullivan*, 51 Cal. 4th at 1201). To the extent the panel claims that state interests factor into the extraterritoriality analysis, as discussed immediately above, that claim is incorrectly premised on Commerce Clause principles, not state law extraterritoriality principles.

In sum, the only governing extraterritoriality principles are the ones this Court articulated in *Tidewater* and *Sullivan*. As explained in Section A above, those cases establish that employee job situs is a necessary—and here, determinative—factor in assessing whether application of a state wage and hour law would violate California's presumption against extraterritoriality.

C. If This Court Grants Certification, It Should Consider the Extraterritoriality Question First.

While United maintains that the certification request should be denied, if this Court grants the request it should consider the extraterritoriality question (the second certified question in the panel's request) first.

The panel's request sets forth two questions: (1) whether Wage Order 9's exemption for employees covered by collective bargaining agreements under the Railway Labor Act, 8 C.C.R. § 11090(1)(E), bars a wage statement claim under Section 226; and (2) whether Section 226 applies to the United pilots and flight attendants at issue in these cases. The second question implicates the extraterritoriality principles discussed above that are controlled by *Tidewater* and *Sullivan*. The first question addresses a potential conflict between Section 226 and Wage Order 9. Implicit in this question, however, is an assumption that both Wage Order 9 and Section 226 apply to the class members at issue in these cases. As discussed above, the applicability of Section 226 is the core issue in this case and should not form the basis of such an assumption. Moreover, if Section 226 does not apply to the class members, the Wage Order 9 question would be moot because there would be no conflict. The extraterritoriality question is therefore the more logical question to address first.

D. Correction of Factual Inaccuracies.

Finally, United corrects two factual inaccuracies in the panel's certification request.

First, the panel states that class members "receive their pay in California" because United mails paychecks to employees who do not receive direct deposit. (Cert. Req. at 7.) There is no evidence in the record to support this statement. While United mails paychecks to employees who choose to receive their wages through a paper check, this does not mean that all employees receive their pay in California. Pilots and flight attendants are highly-mobile employees who due to the multi-state nature of their work, may have bank accounts or residences in multiple states. There is absolutely ***no*** evidence in the record that class members receive their wages or wage statements in California. While Appellants and the panel appear to assume that mere California residency establishes this fact, Appellants have plainly failed to cite any evidence to support this assumption.

Second, the panel incorrectly states that "United pilots are generally paid by the hour." (Cert. Req. at 7.) In fact, United pilots receive a variety of forms of payment each month pursuant to

the collective bargaining agreement negotiated by their union, many of which ***are not*** based on hours worked. As explained by United's Director of Crew Technology, Anna White, a pilot's first monthly payment, called a Flight Advance, is an advance based on the pilot's expected volume of work for the bid period and is not based on hours actually worked. (*Ward* Excerpts of Record at ER-272 ¶ 4.) A pilot's second monthly payment is the highest of three separate calculations: Minimum Pay Guarantee ("MPG"), Line Pay Value ("LPV"), and for Lineholder Pilots, Protected Time Credit ("PTC"). (*Id.* ¶ 5.) Of these three calculations, only LPV is based on hours worked. (*Id.* ER-273 ¶¶ 6-8.) Thus, at most, a pilot receives hourly pay only once per month, and then only if the value of the pilot's LPV was higher than MPG or PTC. It is therefore inaccurate to state that pilots are generally paid by the hour. This distinction is important because pilots are only entitled to have their wage statements list "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate," Cal. Lab. Code § 226(a)(9), if they were paid by the hour for a given pay period.

If this Court grants the certification request, United respectfully asks the Court to note these factual inaccuracies and not assume that class members received their pay in California or that pilots are generally paid by the hour, as the record in this matter is silent as to the former and expressly disapproved the latter.

E. Conclusion.

This Court's precedent already provides controlling authority for the Ninth Circuit panel to answer the questions presented. United thus respectfully requests that this Court exercise its discretion pursuant to California Rule of Court 8.548(f)(1) to deny the panel's certification request. Should this Court grant the request, however, United asks the Court to consider the panel's second certified question first, and to decline to consider the two factual inaccuracies in the panel's request that are discussed above.

Respectfully submitted,

Adam P. KohSweeney
of O'MELVENY & MYERS LLP

PROOF OF SERVICE BY MAIL

I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is Two Embarcadero Center, 28th Floor, San Francisco, California 94111-3823. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence collected from me would be processed on the same day, with postage thereon fully prepaid and placed for deposit that day with the United States Postal Service. On May 30, 2018, I served the following:

LETTER RE: CERTIFICATION REQUEST IN *WARD V. UNITED AIRLINES* (NINTH CIRCUIT CASE NO. 16-16415) & *VIDRIO V. UNITED AIRLINES* (NINTH CIRCUIT CASE NO. 17-55471); CALIFORNIA SUPREME COURT CASE NO. S248702

by putting a true and correct copy thereof in a sealed envelope, with postage fully prepaid, and placing the envelope for collection and mailing today with the United States Postal Service in accordance with the firm's ordinary business practices, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 30, 2018, at San Francisco, California.

Maggie T. Vuong