IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DONALD SULLIVAN, DEANNA EVICH, and RICHARD BURKOW, individually, and on behalf of other persons similarly situated and the general public,

Petitioners,

v.

ORACLE CORPORATION, a Delaware Corporation, ORACLE UNIVERSITY, form unknown, and DOES 1 through 10, inclusive

Respondents.

No. S170577

United State Court of Appeals for the Ninth Circuit Case No. 06-56649

United States District Court, C.D. CA Case No. CV-05-00392-AHS, Hon. Alicemarie H. Stotler

PETITIONERS' OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

The United States Court of Appeals for the Ninth Circuit certified three questions to this Court for answers. All three questions involve application of California state law to employees working overtime for a California company, but they raise very different issues.

The first question asks whether California's overtime laws apply when a California company employees non-residents of California to work overtime in California. This Court should answer affirmatively. Facially, California law applies to regulate employment occurring in this state. Under a conflict of law analysis, no other state has any interest to deny payment of overtime wages to their residents who come into this state to work overtime for a California company. Payment of overtime wages to non-residents who work overtime in California for a California company does not offend any provision of the United States Constitution, and raises no serious practical problems of implementation.

The second question is entirely dependent on the first. The second question simply asks, if California overtime laws do apply to non-residents who work overtime here, does California's Unfair Competition Law predicated on such a violation also apply? Again, the answer is yes.

Finally, the third question posed is totally distinct from the first two. The third question asks, if a California employer makes a decision in California not to pay overtime wages to its employees who work overtime in other states in violation of federal law, does the UCL apply to the claims of those non-resident employees who are

injured by the employer's conduct. Because California law properly applies to California companies whose illegal conduct in California harms non-residents, this Court should answer this question in the affirmative as well.

II. STATEMENT OF ISSUES

The United States Court of Appeals for the Ninth Circuit's Order Certifying Questions to the California Supreme Court, *Sullivan v. Oracle Corporation*, 557 F.3d 979, 983 (9th Cir. 2009), stated the issues presented as follows:

> First, does the California Labor Code apply to overtime work performed in California for a California-based employer by out-of-state plaintiffs in the circumstances of this case, such that overtime pay is required for work in excess of eight hours per day or in excess of forty hours per week?
>
> Second, does § 17200 apply to the overtime work described in question one?
>
> Third, does § 17200 apply to overtime work performed outside California for a California-based employer by out-of-state plaintiffs in the circumstances of this case if the employer failed to comply with the overtime provisions of the FLSA?

III. STATEMENT OF THE CASE

The three named plaintiffs in this putative nationwide class action worked as instructors for California-headquartered Oracle Corporation. They delivered training in the use of Oracle's software products in California and elsewhere in the United States. The plaintiffs are not residents of California.

For a period, Oracle classified its instructors as exempt from overtime pay requirements and therefore did not pay them overtime wages. Plaintiffs sued, alleging they worked overtime for which they should have been compensated under California and federal law, and asserted three claims.[1]

Plaintiffs' first claim alleges a violation of the California Labor Code. *See, e.g.*, Cal. Lab. Code § 510(a). The Ninth Circuit accurately summarized Plaintiffs' first claim as follows:

> Plaintiffs allege that Oracle failed to pay overtime for work performed in California to Instructors domiciled in other states who worked complete days and complete weeks in California. Plaintiffs seek to apply the Labor Code to a full day's work when that work was performed entirely in California, and to a full week's work when that work was performed entirely in California. They do not seek to apply the Labor Code to only a part of a day's work or part of a week's work that was performed in California.
> *Sullivan v. Oracle Corp.*, 557 F.3d 979, 982 (9th Cir. 2009)

The second claim alleges a violation of California's Unfair Competition Law ("UCL"). *See* Cal. Bus. & Prof. Code § 17200 *et seq.* The second claim is predicated entirely on the alleged violation in the first claim; that is, Oracle's failure to pay overtime wages to its instructors when they worked overtime within the state of California is a violation of California's Labor Code, and is therefore an illegal business practice in violation of the UCL.

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[1] A predecessor lawsuit, *Gabel & Sullivan v. Oracle*, Case No. SACV 03-348 AHS (MLGx) (C.D. Cal. Mar. 29, 2005), settled and released other claims. All the claims at issue here were specifically preserved as part of the settlement of *Sullivan I*.

The third claim is entirely separate and distinct from the first two. The third claim also alleges violation of California's UCL, but is predicated on underlying violations of the federal Fair Labor Standards Act ("FLSA"). *See* 29 U.C.S. § 201, *et seq*. Plaintiffs allege Oracle violated California's UCL when it made the decision in California at its Redwood Shores headquarters to classify its instructors as exempt and deny them payment of overtime wages in violation of the FLSA for work performed in other states.

In the District Court, Plaintiffs moved for summary adjudication of three issues: 1) that the Labor Code provided for damages for their unpaid overtime work in California; 2) that the UCL provided for restitution for their unpaid overtime work in California (under the Labor Code) and elsewhere in the United States (under the FLSA); and that private severance agreements between Oracle and some of its former employees did not settle claims for unpaid overtime wages.

Oracle simultaneously moved for summary judgment on all three of Plaintiffs' claims.

The District Court granted Oracle's motion and denied all of Plaintiffs' motions as moot. Plaintiffs timely appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed in part and affirmed in part. *Sullivan v. Oracle Corp.*, 547 F.3d 1177 (9th Cir. 2008)(withdrawn by *Sullivan v. Oracle Corp.*, 557 F.3d 979 (9th Cir. 2009)). The Ninth Circuit reversed on the first and second claims, holding California's Labor Code does apply to a California company that employs non-residents to work overtime entirely within the state of California, and that the UCL does apply to

such a claim. *Id.* at 1181-86. The Ninth Circuit affirmed on the third claim, holding the UCL does not apply to claims predicated on violations of the FLSA where the work was performed in other states. *Id.* at 1186-87.

Both sides petitioned for rehearing and in the alternative to certify issues to the California Supreme Court for resolution. On February 17, 2009, the Ninth Circuit withdrew its opinion and certified three questions to this Court for resolution. *Sullivan v. Oracle Corp.*, 557 F.3d 979 (9th Cir. 2009). On April 22, 2009, this Court accepted the Ninth Circuit's petition.

IV. STATEMENT OF FACTS

Material facts were stipulated by the parties and approved by the District Court. (A true and correct copy of the stipulated facts is attached hereto as an appendix.) Plaintiffs were employed by Oracle as instructors.[2] (Stipulation, ¶¶ 15, 45, 60.) During relevant periods Oracle "required its Instructors to travel to destinations within the United States away from their city of domicile for the purpose of performing work for Oracle." (*Id.* ¶ 12.)

Plaintiff Donald Sullivan worked as an instructor for Oracle from June 1998 to January 2004. (*Id.*¶ 15.) During this period, Sullivan resided in Colorado. (*Id.* ¶ 14.) During his tenure as an

[2] The Ninth Circuit's recitation of facts in its petition certifying the questions mistakenly suggests the Plaintiffs and/or class worked for Oracle Canada. In fact, they worked for Oracle Corporation. Facts pertaining to Oracle Canada included in the Stipulation relate to a planned motion Plaintiffs never filed.

instructor, Oracle employed Sullivan to work in California for 74 days. (*Id.* ¶¶ 19, 31, 36.)

Plaintiff Deanna Evich worked as an instructor Oracle Instructor from August 1999 to July 2004. (*Id.* ¶ 45.) During this period, Evich resided in Colorado. (*Id.* ¶ 42.) During her tenure as an instructor, Oracle employed Evich to work in California for 69 days. (*Id.* ¶¶ 46, 48, 51, 53, 55.)

Plaintiff Richard Burkow worked as an instructor for Oracle Instructor from March 1998 to April 2002. (*Id.* ¶ 60.) During this period, Burkow resided in Arizona. (*Id.* ¶ 58.) During his tenure as an instructor, Oracle employed Sullivan to work in California for 20 days. (*Id.* ¶¶ 62, 69.)

For a number of years, Oracle classified its instructors as exempt from the overtime provisions of California's Labor Code and the federal FLSA. (*Id.* ¶ 1-3.) Oracle made the decision to classify the Instructors exempt from the overtime provisions of the Labor Code and the FLSA primarily from its headquarters in Redwood Shores, California. (*Id.* ¶ 2). While classified as exempt, Oracle did not pay its instructors for any overtime they worked. (*Id.* ¶ 3).

Additionally, as the Ninth Circuit noted,

> In 2003, Oracle reclassified its California-based Instructors and began paying them overtime under the Labor Code. In 2004, Oracle reclassified all of its Instructors working in the United States and began paying them overtime under the FLSA.
>
> *Sullivan v. Oracle Corp.*, 557 F.3d 981 (9th Cir. 2009).

Moreover, Oracle has not paid the Plaintiffs or the putative class for the overtime worked prior to reclassification at issue in this case. *Id.*

V. SUMMARY OF ARGUMENT

First, the California Labor Code requires California employers to pay overtime wages when its employees work overtime in California, because California has validly exercised its police powers to regulate working conditions within its territory. Moreover, there is no conflicting Constitutional provision or foreign law that has displaced the California Labor Code as the rule of decision for claims arising from unpaid overtime worked in California.

Second, California's UCL applies where a California employer commits the illegal business practice of violating California's Labor Code by failing to pay overtime wages for work performed in California.

Third, California's UCL applies to the claims of non-resident employees who worked overtime in other states without being paid the overtime premium required by federal law where the California-employer's decision to withhold the payment of those overtime wages occurred in California.

VI. ARGUMENT

A. CALIFORNIA'S OVERTIME LAWS APPLY WHEN A CALIFORNIA COMPANY EMPLOYS NON-RESIDENTS TO WORK OVERTIME IN CALIFORNIA.

The first question the Ninth Circuit asked this Court to answer is whether California's overtime laws apply to non-residents who are employed by a California company to work more than eight hours per day or more than 40 hours per week entirely within California. First, California's overtime laws facially apply to persons employed to work

overtime in California. Second, conflict of law analysis reveals no other states have any greater interest to see their laws applied to deny their residents the protections afforded Californians when those non-residents work overtime inside California. And third, there are no Constitutional principles to prevent California from regulating overtime within its boundaries.

1. California's Overtime Laws Facially Apply to Work Performed in California.

California, like all states, has the power to protect all workers within its boundaries. *See De Canas v. Bica*, 424 U.S. 351, 356; 93 S.Ct. 933, 937 (1976)("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws are only a few examples").

The California legislature has made explicit that California's laws apply within California's borders. Cal. Gov. Code § 110 ("The sovereignty and jurisdiction of this State extends to all places within its boundaries as established by the Constitution"). California's overtime statute provides that "any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek" requires compensation at a premium rate." Cal. Lab. Code § 510(a). The Labor Code provides that "any employee receiving less than ... the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this ... overtime compensation, including interest

thereon, reasonable attorney's fees, and costs of suit." Cal. Lab. Code § 1194 (Emphasis added).

The Labor Code defines "employee" to include "every person, including aliens and minors, rendering service in any business for an employer...." Cal. Lab. Code § 350(b)(emphasis added). "Employer" is defined as "every person engaged in any business or enterprise in this state that has one or more persons in service...." Cal. Lab. Code § 350(a)(emphasis added).

The Labor Code provides for limited and specific exemptions to these overtime requirements. *See* Cal. Lab. Code § 515. It is black letter law that exemptions "are narrowly construed against the employer and their application is limited to those employees plainly and unmistakably within their terms." *See, e.g., Nordquist v. McGraw-Hill Broadcasting Co.*, 32 Cal. App. 4th 555, 562 (1995). There is no exemption for non-residents who travel into this state and work for a California employer.

In enacting the Labor Code, the California legislature explicitly stated its intent to regulate employment occurring inside the state. *See* Cal. Labor Code § 1173 ("It is the continuing duty of the Industrial Welfare Commission . . . to ascertain the wages paid to all employees in this state . . ."). Indeed, the California legislature expressed California's interest in protecting people employed in California, regardless of where they are from:

> The Legislature finds and declares the following: All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of

immigration status who have applied for employment, or who are or who have been employed, in this state.

Cal. Lab. Code § 1171.5(a).

This Court has also held that California's employment laws govern work performed within the state. *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 566 (1996)("Like the criminal laws ... California employment laws implicitly extend to employment occurring within California's state law boundaries"); *see also, Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 581(2000)("The Industrial Welfare Commission (IWC) is the state agency empowered to formulate regulations (known as wage orders) governing employment in the State of California")(internal quotation omitted).

Here, the Plaintiffs are non-residents who were employed by California-based Oracle to work more than eight hours per day or more than forty hours per week inside California. Plaintiffs seek recovery under California's overtime laws only when they worked overtime in California; that is, they do not seek recovery in instances where they might have worked less than eight hours in California in a given day but more than eight hours total. *See Sullivan v. Oracle Corp.*, 557 F.3d 979, 982 (9th Cir. 2009). There is no question, therefore, that California's overtime laws facially apply here to overtime worked entirely within California.

2. Conflict of Law Analysis Reveals No Other State Has a Greater Interest to Have Its Law Applied to Work Performed Entirely in California.

The next step in determining whether California's law should apply is a conflict of law analysis. The conflict analysis in California

begins with the presumption that the court can apply only California's law as the rule of decision unless the proponent of a foreign rule establishes the existence of an overriding foreign government interest to have its foreign rule of decision applied to the facts. *Hurtado v. Super. Ct.*, 11 Cal. 3d 574, 581 (1974); *see also Washington Mut. Bank v. Super. Ct.*, 24 Cal. 4th 906, 919 (2001). In order to overcome that presumption, the proponent of a foreign law has the burden of establishing the forum's law should be disregarded. *Washington Mut.*, 24 Cal. 4th at 920. To do so, the proponent must first identify the specific foreign rules and establish that they differ materially from a California rule. *Id.* at 920. Second, the proponent must establish that the foreign states have an interest in having their laws applied. *Id.* at 920. Third, the proponent must establish that the foreign states' interests would be more impaired were their laws were not applied. *Id.*

Here, the Plaintiffs lived in Arizona and Colorado. Neither state has a superior interest in having its laws applied to overtime worked in California.

a) Arizona Has No Overtime Law That Could Supplant California Law.

Mr. Burkow lived in Arizona. Under the *Hurtado* conflict of law analysis, the moving party must first identify a specific, conflicting foreign rule of law. Arizona does not have a state overtime law. Because Arizona does not have a conflicting overtime law, Arizona does not have a superior interest to deny its residents the overtime protections afforded to California residents when the

Arizona residents are employed by a California company to work overtime in California.

Moreover, even though the FLSA operates in Arizona, as it does in every state, no conflict arises between the FLSA and the California Labor Code, because the FLSA specifically provides that states may establish more protective employment laws than what is provided in the FLSA. 29 U.S.C. § 218.

Because there is no foreign overtime law in Arizona, there is no conflict of foreign overtime law with California overtime law, and the analysis ends there. *See, Washington Mutual*, 24 Cal.4th at 920.

Oracle nonetheless has argued that California's overtime law should not apply to Arizona residents who work overtime in California for a California employer because Arizona has expressed "a desire not to burden employers with the duty to comply with a second set of laws on the same subject." (Oracle's Petition for *En Banc* Rehearing, p. 8.) There is simply no authority that Arizona has any such interest. Moreover, this case has nothing to do with Arizona employers and can therefore have no effect on the burden imposed on Arizona employers. This case involves a California employer who employed an Arizona resident to work overtime in California.

The sole case Oracle has cited in the past as authority for the proposition that Arizona has an interest in denying overtime to its residents when they work overtime in California is *DiMuro v. Industrial Commission of Arizona*, 142 Ariz. 57 (1984). *DiMuro,* however, involved interpretation of an Arizona statute specifically granting limited extraterritorial workers' compensation insurance coverage for work-related injuries. *See,* Ariz. Rev. Stat. § 23-904.A.

This insurance coverage statute has nothing to do with wages or working hours. Arizona apparently does have an expressed interest in making sure that workers' compensation insurance coverage extends to some Arizona employees when they travel out of state, but it does not follow that Arizona has any interest in denying overtime wages to employees who work overtime entirely in California. If *DiMuro* has any relevant value at all, it could stand for the proposition that Arizona knows how to draft statutes for extraterritorial application of laws, and because it has not done so in the case of overtime laws, it did not intend for such a law to apply out of state – even if such a law existed.

b) Colorado Does Not Have a Superior Interest to Have its Overtime Law Applied to Deny Its Residents Overtime Pay When They Work Overtime in California for a California Employer.

Mr. Sullivan and Ms. Evich had residences in Colorado. It is undisputed Colorado does have a state overtime law, and it does differ from California's overtime laws. There is no evidence, however, of a Colorado government policy interest to enforce its overtime law as the rule of decision for work performed within California for a California employer. The mere existence of a difference in law does not create a conflict of policy even if there is a material difference in the law. *Hurtado*, 11 Cal. 3d at 580. As this court held in *Washington Mutual*:

> The trial court may properly find California law applicable without proceeding to the third step in the analysis if the foreign law proponent fails to identify any actual conflict or to establish the other state's interest in

> having its own law applied. Only if the trial court determines that the laws are materially different *and* that each state has an interest in having its own law applied, thus reflecting an actual conflict, must the court take the final step and select the law of the state whose interests would be "more impaired" if its law were not applied. In making this comparative impairment analysis, the trial court must determine "the relative commitment of the respective states to the laws involved" and consider "the history and current status of the states' laws" and "the function and purpose of those laws."
>
> *Washington Mutual*, 24 Cal. 4th at 920 (emphasis in original, internal citations omitted).

Here, there is no evidence that Colorado had any interest whatsoever to have its overtime law applied in California. Colorado's overtime law offers no protection outside Colorado. *See* Colo. Rev. Stat. §§ 8-6-101(1) & (2) and 1103.1(1)(both of which provide Colorado's wage and hour law "regulates wages, hours, working conditions and procedures for certain employers and employees for work performed within the boundaries of the state of Colorado.") (emphasis added).

Oracle has in the past cited to *Hathaway Lighting, Inc. v. Indust. Claim Appeals Office*, 143 P. 3d 1187 (Colo. Div. 4 2006), and *State Comp. Ins. Fund v. Howington*, 298 P.2d 963 (Colo. 1956) in arguing Colorado has an interest in denying its residents overtime pay for work performed in California. Both cases are inapposite because they deal with a specific Colorado statute extending Colorado's workers' compensation insurance benefits to specific out-of-state injuries. *See, Hathaway*, 143 P.3d at 1189 ("*Section 8-41-204* has been called the extraterritorial provision of the Workers' Compensation Act because it addresses entitlement to compensation

for injuries occurring outside Colorado" (citation omitted)). Just as is the case with Arizona, Colorado might have expressed a specific interest in extending its workers' compensation insurance coverage extraterritorially, but it has expressed no interest in having its overtime law cover overtime work performed entirely in California for a California employer.

As the Ninth Circuit stated in its initial opinion, "We fail to see any interest Colorado or Arizona have in ensuring that their residents are paid less when working in California than California residents who perform the same work." *Sullivan v. Oracle*, 547.F.3d 1177, 1185 (9th Cir. 2008)(withdrawn by *Sullivan v. Oracle Corp.*, 557 F.3d 979 (9th Cir. 2009)).

There is no logical argument that can be made as to why any other state would have an interest in seeing its residents receive less overtime pay when they work overtime for a California employer in California than California residents would receive for the same work.

Because no foreign state has any interest in having their laws applied to deny overtime wages to their residents when they worked overtime in California for a California employer, conflict of law principles require application of California law to these facts.

3. Application of the California Labor Code to Overtime Work Performed in California for a California Employer is Constitutional.

The final step in determining whether California's overtime law should apply to overtime work performed in California is to determine if such application comports with the United States Constitution. The

Ninth Circuit, in its now-withdrawn opinion, held such application raises no Constitutional issues. This Court should hold likewise.

Oracle has in the past challenged application of the California's overtime law to overtime worked in California by raising Dormant Commerce Clause arguments. *Pike v. Bruce Church* sets for the test for Dormant Commerce Clause issues: if a statute "regulates even-handedly to effectuate a legitimate public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142; 90 S.Ct. 844, 847; 25 L.Ed.2d 174 (1970).

In *Bibb v. Navajo Freight Lines*, the United States Supreme Court clarified the clearly excessive standard when a law involving public safety is concerned:

> [S]afety measures carry a strong presumption of validity when challenged in court. . . . Unless we can conclude on the whole record that the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it we must uphold the statute.
>
> *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 524; 3 L.Ed.2d 1003, 1007; 79 S.Ct. 962 (1959)(internal quotations, citations and footnote omitted).

The Ninth Circuit originally held that applying California's overtime law "equally to work performed in California, whether by California residents or by out-of-state residents" is not clearly excessive in relation to the public benefit. *Sullivan v. Oracle*, 547.F.3d 1177, 1186 (9th Cir. 2008))(withdrawn by *Sullivan v.*

Oracle Corp., 557 F.3d 979 (9th Cir. 2009)). The Ninth Circuit stated, "There is no plausible Dormant Commerce Clause argument when California has chosen to treat out-of-state residents equally with its own." *Id.*

It is apparent on its face that applying California's overtime law equally to residents and non-residents alike who work overtime in California for a California employer regulates even-handedly and has no protectionist implications. Indeed, it is only if Oracle's arguments were accepted that the law could fun afoul of the Dormant Commerce Clause, because under Oracle's argument only California residents would be entitled to the benefits of California law and non-residents would not be entitled to any of the benefits afforded to residents.

In addition to the discriminatory effect on commerce, Oracle's proposed rule raises a host of other practical problems. For example, under Oracle's proposed rule that California law does not apply to non-residents who work in California, no state would have jurisdiction to enforce its laws to ensure safe working conditions. California has established the Industrial Welfare Commission to ascertain wages paid in California and to ensure safe working conditions in this state, but under Oracle's rule, the IWC could not enter a workplace and uniformly enforce California laws because some of the employees might be non-residents who would not be subject to California law. Arizona and Colorado could also not enforce their laws because they have no jurisdiction in California. As long as the employees lives out of state, the employer could treat them with impunity, violating overtime, minimum wage, child labor – virtually any law – free from any oversight.

Because California's law applies equally to residents and non-residents alike who work overtime in California, the law is entitled to greatest deference under a Dormant Commerce Clause analysis and could only be struck down if evidence clearly showed its intended benefit were so slight as to not outweigh the interest in keeping interstate commerce free from interferences that seriously impede it. *Bibb*, 359 U.S. at 524. Such a finding would require presentation of actual evidence both that the laws intended positive effects were slight and that its actual effect on interstate commerce were a serious impediment. No such evidence is here. Oracle offered no evidence that the positive effect of the law is slight. California's overtime law has strong safety implications and California has a strong interest in protecting workers from harsh working conditions within its territorial boundaries.

There is no evidence of *any* harmful effect on interstate commerce equal application of California law on residents and non-residents alike for work performed in California for a California employer could possible have. Oracle has argued commerce would be affected, but none of those arguments is supported by evidence. Indeed, as discussed above, under scrutiny, Oracle's factually unsupported arguments fall apart. There can be no effect on interstate commerce of requiring a California employer to pay its non-resident employees the same way it pays its resident employees when they work side by side in California. California employers are well-equipped to comply with California's laws with regard to their non-resident employees because they already must comply with those laws with regard to their resident employees.

4. Application of California's Overtime Law When Non-Residents Work Overtime in California for a California Employer Creates No Practical Problems.

Oracle, both directly and through *amicus*, has also attempted to argue that California's overtime laws should not apply to the facts of this case by suggesting a myriad of practical problems would result. Oracle's arguments abandon all pretense of legal analysis, and are based on no evidence, faulty assumptions, and exaggerations.

As discussed above, conflict of law analysis requires application of California law to these facts. Absent any Constitutional impediments, there is no legal basis for California's rule of law, as the forum state where the work was performed, to be abandoned in favor of any other law. Even if all of Oracle's arguments about the hypothetical problems that may arise from the panel's opinion were true, that does not provide a legal basis for this Court to replace the forum state's law with a foreign law. If Oracle wants a new overtime exemption for "business travelers," it should take its arguments to the legislature.

Just as importantly, however, it is simply untrue that application of California law to the facts here will create any of the problems Oracle hypothesizes might occur. For example, the very first "problem" posited by Oracle to the Ninth Circuit below was the difficulty employers might face with regard to California's requirement of providing itemized pay stubs to employees who work in multiple states in one week. (Petition, p. 9.) California Labor Code, Section 226, which requires employees to receive itemized pay stubs, is not at issue with this appeal. No one has litigated whether

California has an interest in applying its pay stub law to employees from other states, or whether any other state has a greater interest in seeing its pay stub law applied to workers in California. The issue on appeal here is whether California's overtime laws apply when non-residents are employed by a California company to work overtime in California.

The reality is, requiring California companies to comply with California's overtime laws when it employs non-residents to work overtime in California creates no practical problems. California employers are already undisputedly required to comply with all of California's Labor Code provisions with respect to all of their employees who live and work in California. There is no new additional burden that will be placed on California employers if they also have to comply with California's Labor Code when they bring non-residents into the state to work alongside resident employees. No new software has to be written. No new accounting principles have to be put in place. No new training has to take place to ensure compliance. Even Oracle now tracks where its employees work. California employers are already set up to do business in California in compliance with California's laws. Even to the extent this case can be read as requiring California employers to treat their non-resident employees the same as their resident employees when both are working inside California, compliance is as simple as applying existing policies and procedures to all employees working in the state instead of just some.

It is only if Oracle's position were adopted that practical problems would be sure to arise. Oracle has posited that non-resident

"business travelers" should not be covered by California's overtime law, but Oracle never defines what it means by business traveler. Oracle never explains when an employee would switch from being a business traveler exempt from California's law to a non-resident employee who is covered. Would an employee have to work 25% of his or her time in California to be covered by California law? Thirty? Fifty? No matter the arbitrary cut-off, determination of what proportion of time will have been worked in California could never be determined until the employee's employment terminates.

In conclusion, there is no legal framework to justify disregarding California's overtime law when non-residents work overtime in California for a California employer. Conflict of laws principles require application of the forum state's law when there is no foreign state interest in having its law applied to deny its residents the overtime wages a California resident could earn. No provision of the United States Constitution is violated by application of California law to non-residents who work overtime in California for a California employer. Because there is no basis to usurp California's territorial sovereignty, this Court should answer the Ninth Circuit's first question affirmatively: Yes, California's overtime laws do apply to overtime worked in California for a California employer by non-resident employees.

B. CALIFORNIA'S UCL APPLIES TO THE CLAIMS OF PLAINTIFFS INJURED IN CALIFORNIA.

The second question the Ninth Circuit asked this Court to answer involves application of California's unfair competition law, codified at Business and Professions Code section 17200, et seq.

("UCL") and is largely derivative of the first. The Ninth Circuit framed the issue simply as, "does § 17200 apply to the overtime work described in question one?" As discussed in Plaintiffs letter in support of the Ninth Circuit's petition, this abbreviated statement of the issue gets to the heart of the matter, but perhaps misleadingly suggests the UCL's applicability hinges on the overtime work in question, when in fact it hinges on the illegality of the defendant's conduct, not the plaintiffs' work.

Section 17200 defines unfair competition as "any unlawful, unfair or fraudulent business act or practice," (Bus. & Profs. Code § 17200), provides that persons engaging in unfair competition may be ordered "to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition," (Id. at § 17203), and provides that an action for relief may be maintained "by any person who has suffered injury in fact and has lost money or property as a result of the unfair competition," (Id. at § 17204).

"Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1143 (2003). "Any business act or practice that violates [labor law] through failure to pay wages is, by definition, an unfair business practice." *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163, 178 (2000). Unlawfully withheld wages are the property of the employee and § 17200 authorizes recovery of such unpaid wages as restitution. *Id.*

Properly stated therefore, the question presented in Question 2 is: When non-California residents work in excess of eight hours in one workday or in excess of 40 hours in one workweek entirely within the State of California, does the California Labor Code require payment of overtime wages such that the employer's non-payment of overtime wages is an unlawful business act or practice in violation of the UCL?

Regardless of how the second issue is stated, determination of the first issue will dictate the outcome of the second issue. If California's Labor Code requires payment of overtime wages to non-residents when they work overtime entirely within California, then non-payment of those overtime wages is an unlawful business act in violation of the UCL.

Because California's overtime laws do apply when non-residents are employed to work overtime in California by a California employer, this Court should answer the Ninth Circuit's second question affirmatively. This Court should respond that the UCL does apply to claims of non-residents predicated on violations of California's overtime law for work performed in California.

C. CALIFORNIA'S UCL APPLIES TO THE ILLEGAL CONDUCT OF A CALIFORNIA-BASED EMPLOYER WHEN ITS ACTIONS IN CALIFORNIA INJURE NON-RESIDENT EMPLOYEES.

The third question the Ninth Circuit asked this Court to answer involves Plaintiffs' claims for violations of the UCL predicated on Oracle's alleged violation of the federal FLSA.

The relevant facts to the third cause of action are as follows. Oracle is located in California. Oracle made the decision to classify

its instructors as exempt and ineligible for overtime wages primarily at its headquarters in California. Because instructors were classified as exempt, they were not paid for any overtime hours they worked – regardless of where they lived or the work was performed.

Plaintiffs allege Oracle's failure to pay them overtime wages was in violation of the FLSA and was, therefore, an unlawful business act prohibited as unfair competition under California's UCL. The Plaintiffs sued for restitution under the UCL. There has been no determination as of yet as to whether Oracle's classification of instructors as exempt under the FLSA was correct. If instructors were properly classified as exempt, Oracle was not in violation of the FLSA and its actions could not be considered unlawful business acts under the UCL on that basis. If, on the other hand, Oracle's classification was incorrect, Oracle's resulting violation of the FLSA could form a basis for a UCL cause of action.

The issue presented here is: Assuming Oracle's decision to classify its instructors as exempt was not correct and the non-payment of overtime wages was in violation of the FLSA, does the fact that California-headquartered Oracle made its decision to classify instructors as exempt and ineligible for overtime primarily in California create sufficient contact between California and the claims of non-resident instructors such that application of the UCL to the Petitioners' claims is neither arbitrary nor unfair?

The focus of this analysis is not on where the Plaintiffs lived or where the overtime work was performed. The focus of this analysis is where Oracle's allegedly illegal conduct took place. California appellate court authority is uniform that the UCL applies to the claims

of non-residents who were injured outside of California by a California defendant when at least some of the defendant's challenged conduct occurred in California. *Norwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th. 224, 225 (1999)("state statutory remedies may be invoked by out-of-state parties when they are harmed by wrongful conduct occurring in California,"); *Wershba v. Apple Computer*, 91 Cal. App. 4th 224, 243 (2001), ("A California court may properly apply [the UCL] to non-California members of a nationwide class where the defendant is a California corporation and some or all of the challenged conduct emanates from California,"), *c.f. Churchill Village, L.L.C. v. General Electric*, 169 F. Supp. 2d 1119 (2000)(holding the UCL did not apply where the defendant was a New York corporation with its principal place of business in Connecticut, and where the alleged illegal business conduct took place entirely outside California); *see also, Standfacts Credit Services v. Super. Ct.*, 405 F. Supp. 2d 1141, 1148 (C.D. Cal. 2005).

Fundamentally, California's law applies to the claims of non-resident plaintiffs when California, as the forum, has sufficient contacts to the claims of the plaintiffs such that application of forum law to the claims is neither arbitrary nor unfair. *Phillips Petroleum v. Shutts*, 472 U.S. 797, 821-22 (1985). The contact with the forum state need only be sufficient to create a state interest in the claim, not the party. *Clothesrigger v. GTE Corp.*, 191 Cal. App. 3d 605, 613 (1987)(citing *Phillips Petroleum*, 472 U.S. at 821-22.) It is the state interest in the claim that permits application of California law. *Wershba v. Apple Computer*, 91 Cal. App. 4th 224, 241 (2001)(also citing and quoting *Phillips Petroleum*, 472 U.S. at 821-22).

The case most directly on point and that most clearly describes the correct California UCL analysis is *Norwest Mortgage v. Superior Court*. In *Norwest*, the defendant company engaged in alleged illegal business conduct in two of its business locations – one inside and one outside California, and its illegal practice injured two groups of people – one inside and one outside California. Norwest allegedly charged unfair insurance premiums to its customers. *Norwest*, 72 Cal. App. 4th at 217. The practice of imposing such fees on its customers, having the effect of generating kick-backs to itself, was deemed an unfair business practice. *Id.* at 219. During a 12-month portion of the statutory period in issue, Norwest's business decision to charge these illegal premiums emanated from its office in Riverside, California. *Id.* at 218. At all other times, the unfair business decisions arose from Norwest offices in other states. *Id.* at 218-19. As a result, three categories of injured plaintiffs were created: a first category comprised of California residents (whose claims were permissible regardless of Norwest's location at the time of the making of the unfair business decisions, because they were in California); a second category comprised of non-California residents whose claims were based on Norwest's decisions made from its Riverside, California office; and a third category comprised of non-California residents whose claims were based on Norwest's decisions from locations outside California. *Id.* at 222, 225.

In *Norwest*, the rule to be applied for analysis was straight forward: claims were properly subject to the California UCL when application of California's UCL to the claims was neither arbitrary nor unfair. Relying on *Clothesrigger v. GTE Corp.*, 191 Cal. App. 3d

605, 613 (1987) and *Phillips Petroleum v. Shutts*, 472 U.S. 797, 821-822 (1985), the *Norwest* court reasoned that application of California's UCL to claims were neither arbitrary nor unfair in two situations: 1) when injuries occurred in California, regardless of the defendant's location (Category 1); and when the defendant's injurious conduct took place in California and its customers were injured outside of California (Category 2). *Norwest*, 72 Cal. App. 4th at 222. The only situation in which Norwest had no UCL liability – when there actually was a due process problem – occurred when both the injury-causing conduct took place outside California and the defendant's customers were injured outside California (Category 3). *Id.* In that situation, application of California's UCL was deemed to be arbitrary or unfair because California had no connection to the claims whatsoever.

Here, the headquarters of Oracle is in Redwood City, California. Oracle concedes that its decision to classify all instructors as exempt was made primarily in its California corporate headquarters. Oracle further concedes that when all instructors were classified as exempt they did not receive overtime pay.

Hence, just as with *Norwest*'s Category 2 plaintiffs, application of the UCL to the Plaintiffs' claims here is neither arbitrary nor unfair because Oracle's business conduct to deny payment of their overtime wages occurred primarily in California.

No *Norwest* Category 3 claims exist here. No one in this case suggests the UCL should apply to conduct occurring entirely outside of California. To the contrary, the Plaintiffs here seek to apply the UCL to a California company based on that company's conduct inside

California. The claims of the non-resident Plaintiffs for overtime wages earned as a result of work performed in other states are grounded in the defendant's conduct that occurred inside this state: the decision to not pay them.

Similarly, in *Wershba v. Apple Computer*, 91 Cal.App. 4th at 224, the UCL claims of non-residents were permitted because Apple Computer's unlawful business decisions to terminate its previously promised software support emanated from Apple's offices in California. The court in *Wershba* clarified that not all of the illegal conduct must have been completed in California: "A California court may properly apply the same California statutes at issue here to non-California members of a nationwide class where the defendant is a California corporation and some or all of the challenged conduct emanates from California." *Id.*, at 243 (emphasis added).

Here, just as in *Wershba*, some of the challenged conduct occurred in California. Federal law requires payment of overtime wages for work in excess of 40 hours per week. *See* 29 U.S.C. § 216. Oracle decided in California not to pay its instructors overtime wages. That the criminal act might not have been completed until the instructors actually worked overtime and Oracle mailed checks to them containing no overtime pay is immaterial. As long as *some* of the challenged conduct occurred in California and the defendant is a California business, the UCL applies.

Confirming the rule, but noting that different facts required a different result, the court in *Churchill Village, L.L.C. v. General Electric*, 169 F.Supp. 2d 1119 (N.D. Cal. 2000), found the UCL did not apply where General Electric was a New York corporation, where

its principal place of business was in Connecticut, and where the essential illegal business conduct took place outside California. In that case, there was no California nexus between the UCL claim and the facts. Here, however, Oracle's headquarters is in California and the decision to deny payment of overtime wages was made in California. Because the business conduct occurred in California, the UCL applies.

Just as with the prior two questions, this Court should affirmatively answer the Ninth Circuit's third question by holding the UCL applies to the claims of non-resident employees who work overtime in other states where the employer is a California company that made the decision to classify the employees as exempt in California.

VII. CONCLUSION

The questions certified to this Court by the Ninth Circuit all require affirmative answers. Yes, California's overtime laws do apply to overtime work performed by non-residents entirely in California for a California employer. Yes, Plaintiffs may state a UCL claim predicated on the afore-mentioned Labor Code violation. And, yes, the UCL does apply to the claims of non-resident employees who were injured by Oracle's illegal conduct that occurred in California.

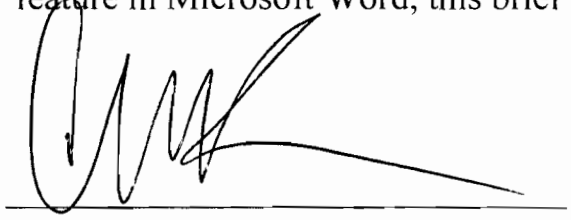
Respectfully submitted,

May 22, 2009 CALLAHAN, McCUNE & WILLIS, APLC

ROBERT W. THOMPSON
CHARLES S. RUSSELL
Attorneys for Petitioners/Plaintiffs

CERTIFICATE OF LENGTH

I hereby certify that this brief has been prepared using proportionately double-spaced 14-point Times New Roman typeface. According to the "Word Count" feature in Microsoft Word, this brief contains 7,500 words.



May 22, 2009

Charles S. Russell

APPENDIX

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and on behalf of other persons
similarly situated and the general public

SEND

LODGED

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

DONALD SULLIVAN, DEANNA EVICH, and RICHARD BURKOW, individually, and on behalf of other persons similarly situated and the general public,

Plaintiffs,

vs.

ORACLE CORPORATION, a Delaware Corporation, ORACLE UNIVERSITY, form unknown, and DOES 1 through 10, inclusive,

Case No.: SACV05-0392 AHS (MLGx)
JUDGE: ALICEMARIE H. STOTLER
Courtroom 10-A

CLASS ACTION

LODGMENT OF STIPULATION FOR APPROVAL BY THE COURT: ORDER APPROVING STIPULATED FACTS IN SUPPORT OF SUMMARY JUDGMENT MOTIONS

Pursuant to Local Rule 7-1, the Parties hereby submit the attached Stipulation for Approval by the Court.

64

DATED: June 11, 2006

CALLAHAN, McCUNE & WILLIS, APLC

By _____
ROBERT W. THOMPSON
Attorneys for Plaintiffs,
DONALD SULLIVAN, DEANNA EVICH and RICHARD BURKOW, individually, and on behalf of persons similarly situated and the general public

The Court hereby approves the attached Stipulation, and it will be filed with the records and filings in this action.

IT IS SO ORDERED.

DATED: OCT -2 2006

_____
Hon. Alicemarie H. Stotler
Judge, United States District Court

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and on behalf of other persons
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UNITED STATES DISTRICT COURT

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JUDGE: ALICEMARIE H. STOTLER
Courtroom 10-A

CLASS ACTION

STIPULATED FACTS IN SUPPORT OF SUMMARY JUDGMENT MOTIONS BY THE PARTIES

Discovery cut-off: August 11, 2006
MSJ cut-off: August 31, 2006
Final conference: November 6, 2006
Trial date: February 27, 2007

Date:
Time:
Dept:

The Parties, by and through their counsel of record, hereby stipulate that the following facts are true and correct, subject to the following conditions:

The Parties agree that this Stipulation is entered into for the sole purpose of

resolving legal and factual issues raised in the context of this Litigation only, and that this Stipulation will not be offered by them in any other litigation or for any other purpose but for the sole purpose of prosecuting or defending the claims raised in this Litigation.

1. The term "Instructors" as used herein means the positions of Instructor, Staff Instructor, Senior Instructor, Principal Instructor, and Senior Principal Instructor at issue in Plaintiffs' Second Amended Complaint.

2. Locus of decision-making processes regarding payment of overtime wages to Trainers.

   a. The decision-making process to classify Instructors as exempt from the requirement to be paid overtime wages under California law occurred primarily from within the headquarters offices of Oracle Corporation located in Redwood Shores, California.

   b. The decision-making process to classify Instructors as exempt from the requirement to be paid overtime wages under the FLSA occurred primarily from within the headquarters offices of Oracle Corporation located in Redwood Shores, California.

3. When Instructors were classified as exempt, they did not receive overtime pay.

4. During the time from April 7, 1999 through the present, Oracle Corporation utilized Instructors on a contract basis through its subsidiary, Oracle Corporation Canada, to perform work inside the United States.

5. During the time from April 7, 1999 through the present, Oracle Corporation utilized Instructors on a contract basis through its subsidiary, Oracle Corporation Canada, to perform work inside the State of California.

6. During the time from April 7, 1999 through the present, Oracle Corporation made representations to potential course enrollees

regarding the dates, times, duration and content of training sessions that were taught in the United States by contract Instructors obtained through its subsidiary, Oracle Corporation Canada.

7. During the time from April 7, 1999 through the present, Oracle Corporation made representations to potential course enrollees regarding the dates, times, duration and content of training sessions that were taught in California by contract Instructors obtained through its subsidiary, Oracle Corporation Canada.

8. During the time from April 7, 1999 through the present, Oracle Corporation provided the instructional materials that were utilized by contract Instructors obtained through its subsidiary, Oracle Corporation Canada, for work inside the United States.

9. During the time from April 7, 1999 through the present, Oracle Corporation provided the instructional materials that were utilized by contract Instructors obtained through its subsidiary, Oracle Corporation Canada, for work inside the State of California.

10. During the time from April 7, 1999, through the present, Oracle Corporation recognized revenue from work performed by contract Instructors obtained by Oracle Corporation through its subsidiary, Oracle Corporation Canada, for work performed inside the United States.

11. During the time from April 7, 1999, through the present, Oracle Corporation recognized revenue from work performed by contract Instructors obtained by Oracle Corporation through its subsidiary, Oracle Corporation Canada, for work performed inside the State of California.

12. During the time from April 7, 1999, through the present, Oracle Corporation required its Instructors to travel to destinations within the United States away from their city of domicile for the purpose of performing work for Oracle. In addition, when Oracle Corporation does not have sufficient Instructor resources to staff all classes in the United States, a request for assistance may be made to Oracle Corporation Canada. If an Oracle Corporation Canada Instructor is available, the Instructor will be assigned by Oracle Corporation Canada to travel to destinations within the United States away from

his/her city of domicile for the purpose of performing work for Oracle Corporation in the United States.

13. At times during the time period April 7, 1999, through the present, communications stating that the Oracle Corporation Code of Ethics and Business Conduct applies to employees of Oracle Corporation world-wide were sent from the headquarters of Oracle Corporation in Redwood City, California.

14. Mr. Sullivan was domiciled in and a resident of the State of Colorado during the period January 1, 1999, through May 1, 2006.

15. Sullivan began working for Oracle on June 1, 1998, and his employment as an Instructor within Oracle University ended in January 2004, when he transferred to a different position.

16. Sullivan did not meet in person in California with any representative of Oracle during the hiring process for his job with Oracle. He received his letter of employment offer in Colorado.

17. Sullivan was a Principal Instructor with Oracle from December 4, 1999, through August 31, 2000, and a Senior Principal Instructor from September 1, 2000, until January 2004.

18. In 2001, Sullivan performed work for Oracle in Colorado on at least 150 days.

19. In 2001, Sullivan performed work for Oracle in California on 32 days.

20. In 2001, Sullivan performed work for Oracle in Illinois on at least 11 days.

21. In 2001, Sullivan performed work for Oracle in Utah on at least eight days.

22. In 2001, Sullivan performed work for Oracle in Florida on at least five days.

23. In 2001, Sullivan performed work for Oracle in Washington on at least five days.

24. In 2001, Sullivan performed work for Oracle in Georgia on at least four days.

25. In 2001, Sullivan performed work for Oracle in Oregon on at least four days.

26. In 2001, Sullivan performed work for Oracle in Texas on at least four days.

27. In 2001, Sullivan performed work for Oracle in Maryland on at least five days.

28. In 2001, Sullivan performed work for Oracle in Massachusetts on at least three days.

29. In 2001, Sullivan performed work for Oracle in Virginia on at least three days.

30. In 2002, Sullivan performed work for Oracle in Colorado on at least 150 days.

31. In 2002, Sullivan performed work for Oracle in California on 12 days.

32. In 2002, Sullivan performed work for Oracle in Florida on at least eight days.

33. In 2002, Sullivan performed work for Oracle in Illinois on at least seven days.

34. In 2002, Sullivan performed work for Oracle in New York on at least five days.

35. In 2003, Sullivan performed work for Oracle in Colorado on at least 150 days.

36. In 2003, Sullivan performed work for Oracle in California on 30 days.

37. In 2003, Sullivan performed work for Oracle in Virginia on at least seven days.

38. In 2003, Sullivan performed work for Oracle in Illinois on at least six days.

39. In 2003, Sullivan performed work for Oracle in Massachusetts on at least three days.

40. In 2003, Sullivan performed work for Oracle in New York on at least three days.

41. During the time he was employed by Oracle, Sullivan did not pay California state income tax on any of his income from employment with Oracle.

42. Ms. Evich was domiciled in and a resident of the State of Colorado during the period August 1, 1999, through May 1, 2006.

43. Evich began working for Oracle on August 30, 1999, and her employment ended on July 6, 2004.

44. Evich received her offer for employment with Oracle in Colorado.

45. Evich was a Senior Instructor from February 25, 2000, until July 6, 2004.

46. In 2000, Evich did not perform any work for Oracle in California.

47. In 2001, Evich performed work for Oracle in Colorado on at least 150 days.

48. In 2001, Evich performed work for Oracle in California on 33 days.

49. In 2001, Evich performed work for Oracle in Illinois, Michigan and Texas on at least one day in each state.

50. In 2002, Evich performed work for Oracle in Colorado on approximately 30 days.

51. In 2002, Evich performed work for Oracle in California on 11 days.

52. In 2003, Evich performed work for Oracle in Colorado on approximately 30 days.

53. In 2003, Evich performed no work for Oracle in California.

54. In 2004, Evich performed work for Oracle in Colorado on at least 100 days.

55. In 2004, Evich performed work for Oracle in California on 36 days.

56. In 2004, Evich performed work for Oracle in Minnesota, Texas, Virginia and Washington on at least one day in each state.

57. During the time she was employed by Oracle, Evich did not pay California state income tax on any of her income from employment with Oracle.

58. During the period April 7, 1999 to the present, Mr. Burkow was a resident and domiciliary of the State of Arizona.

59. Burkow began working for Oracle on March 9, 1998, and continued as an employee of Oracle until April, 2002.

60. Burkow was a Senior Principal Instructor from March, 1998, through the end of his employment in April, 2002.

61. In 2001, Burkow worked for Oracle in Arizona on at least 100 days.

62. In 2001, Burkow performed work for Oracle in California on 15 days.

63. In 2001, Burkow performed work for Oracle in Illinois on at least 25 days.

64. In 2001, Burkow performed work for Oracle in Texas on at least 23 days.

65. In 2001, Burkow performed work for Oracle in Colorado on at least 10 days.

66. In 2001, Burkow performed work for Georgia on at least three days.

67. In 2001, Burkow performed work for Oracle in Alabama, Massachusetts, Maryland, Ohio, Oklahoma, Virginia and Washington on at least one day in each of these states.

68. In 2002, Burkow performed work for Oracle in Arizona on at least 60 days.

69. In 2002, Burkow worked for Oracle in California on five days.

70. In 2002, Burkow performed work for Oracle in Illinois on at least five days.

71. In 2002, Burkow performed work for Oracle in Minnesota on at least two days.

72. In 2002, Burkow performed work for Oracle in Indiana, Kansas, New Mexico, Ohio and Oklahoma on at least one day in each of these states.

73. During the period April 7, 1999 through the end of his employment with Oracle, Burkow did not pay California state income tax on any of his income from employment with Oracle.

DATED: June 6, 2006

PAUL, HASTINGS, JANOFSKY & WALKER, LLP

By _____

Stephen L. Berry, Esq.
Attorneys for Defendant,
Oracle Corporation

DATED: 6/7/06

CALLAHAN, McCUNE & WILLIS, APLC

By _____

Robert W. Thompson, Esq.
Attorneys for Plaintiffs,
Donald Sullivan, Deanna Evich, and Richard Burkow, individually, and on behalf of other persons similarly situated and the general public

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF ORANGE)

I am employed in the County of Orange, State of California, I am over the age of 18 years and not a party to the within action; my business address is 111 Fashion Lane, Tustin, California.

On this date, May 22, 2008, I served the foregoing document described as:

PETITIONERS' OPENING BRIEF ON THE MERITS

Said document was served on the interested party or parties in this action by placing a true copy thereof, enclosed in a sealed envelope, and addressed as noted below.

I am familiar with our firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Tustin, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one working day after the date of deposit for mailing in this declaration.

_**X**_ (By Mail) I deposited such envelope in the mail at Tustin, California. The envelope was mailed with postage thereon fully prepaid.

___ (By Facsimile) In addition to regular mail, I sent this document via facsimile to the number(s) as listed on the attached mailing list.

__ (By Personal Service) Such envelope was delivered by hand to the below addressee by DDS Legal Services

___X_ (By Overnight Mail) I arranged for such envelope to be delivered to the following addresses by overnight mail. (As to Oracle Canada, only)

Executed on May 22, 2009, at Tustin, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. I further declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

VERONICA GARCIA

SEE ATTACHED MAILING LIST

MAILING LIST

Case Name : SULLIVAN AND EVICH VS. ORACLE CORPORATION, et al
Court : UNITED STATES SUPERIOR COURT
Case No. : 05CC00007

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