IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DONALD SULLIVAN, et al.,
[redacted]
Plaintiffs and Appellants,
[redacted]

v.

ORACLE CORPORATION et al.,
[redacted]
Defendants and 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' REPLY BRIEF ON THE MERITS

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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

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I. INTRODUCTION

A theme running through all three questions the Ninth Circuit certified to this Court is the ability of California to regulate conduct occurring within its borders. One question asks if a business must pay overtime according to California law when it employs people to work overtime in California. Another asks if a California company that makes the decision in California to violate federal law is subject to California's unfair competition law if that decision resulted in non-residents being harmed. The answer to all these questions is plainly yes.

This case involves conduct occurring both inside and outside California. Oracle would have the Court focus on the conduct occurring outside the state to the exclusion of all else. Oracle argues that because the Plaintiffs lived and worked in other states, California's overtime law cannot apply to them – even for overtime work performed entirely in California. Similarly, Oracle argues that if an out-of-state employee is wrongly denied wages in violation of federal law, the employer cannot be subject to California's reach – even though the employer is located in California and made the decision to violate federal law in California.

Oracle's arguments are not persuasive. They rely on tortured logic, misapplication or outright denial of guiding legal principles, and purely speculative hypothetical problems that are not remotely raised in this case.

II. CALIFORNIA'S OVERTIME LAWS APPLY WHEN EMPLOYEES WORK OVERTIME IN CALIFORNIA

A. This Court's Decision in *Tidewater* is Consistent with a Holding that California's Overtime Laws Apply to Overtime Worked within California

Oracle makes a logically unsound argument that this Court's holding in *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996), which suggests California's overtime laws might apply to some employment of residents *outside* of California, means that the converse must be true and California law cannot apply to employment of non-residents *inside* California.

In *Tidewater*, this Court addressed part of the issue of whether California's overtime laws apply within California's boundaries. *Tidewater* involved California residents who worked as crew members on off-shore oil platforms located within California's state-law territorial boundaries but outside the state's federal law boundaries. *Id.* at 561. In holding that California has the power to regulate conduct outside its federal law boundaries, this Court explained, "California employment laws implicitly extend to employment occurring within California's *state law* boundaries." *Id.* at 565 (emphasis in original).

After resolving the issue of whether federal law precluded application of state law, the Court then addressed the issue of whether California's overtime laws were intended to apply to California residents working inside California's state law boundaries. The Court's reasoned:

> The Legislature may have . . . intended extraterritorial enforcement of IWC wage orders in limited circumstances, such as when California residents working for a California employer travel temporarily outside the state during the course of the normal workday but return to California at the end of the day. On the other hand, the Legislature may not have intended IWC wage orders to govern out-of-state businesses employing nonresidents, though the nonresident employees enter California temporarily during the course of the workday. Thus, we are not prepared, without more thorough briefing of the issues, to hold that IWC wage orders apply to *all* employment in California, and *never* to employment outside California.
>
> . . .
>
> 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 protection of IWC regulations. [Citation.]

Id. at 577-79 (emphasis in original throughout).

Since this Court's opinion in *Tidewater*, the Labor Code was amended to reflect, "All protections, rights, and remedies available under state 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)(emphasis added).

With section 1171.5, the California legislature made clear that *all* state law protections are available to *all* individuals employed in California, regardless of where they are from or whether they are working here illegally – in fact, such inquiry is irrelevant and prohibited. Cal. Lab. Code § 1171.5(a-c); *see also, Reyes v. Van Elk*

Ltd., 148 Cal. App. 4th 604 (2007)(holding federal law does not preempt section 1171.5.)

In *Tidewater*, this Court held people who work in California and live in California are *presumptively* covered by California's employment laws. What the Court explicitly did not address in *Tidewater* was whether California's overtime laws presumptively apply to *all* employment in California. That question has now been at least partially answered by the Legislature. California's overtime laws apply to all persons employed in this state and immigration status – where a person is legally a resident – cannot serve to deny protections under California law.

Illegal immigrant migrant workers who are legally residents of other countries and who enter California temporarily in harvest season (the quintessential "business travelers") to pick avocados in San Diego or strawberries in Oxnard are all undeniably covered by California's state law protections. *See Reyes*, *supra*, 148 Cal. App. 4th 604. Under Oracle's analysis, workers from Arizona are not. That position makes no sense and should be rejected.

If Oracle's reasoning were accepted, the entire purpose of Labor Code section 1171.5 would be thwarted. Businesses could hire illegal immigrants to work in California and deny them all protections of California law in flagrant disregard of 1171.5, claiming they were doing so not based on their "immigration status," but based on their status as "business travelers" who are here only temporarily.

The second way Oracle misinterprets *Tidewater* is by taking a statement in dicta – that California's overtime laws might extend to some work performed outside the state's boundaries – and making the

logically infirm argument that therefore the same must be true for the laws of all other states.

Oracle argues that just because California's overtime requirements might apply to off-shore oil rig crewmembers when they temporarily are outside California's state law boundaries, therefore Colorado's overtime law (and Arizona's lack of an overtime law) must apply when residents of those states come into California and work overtime here. The fallacy of this logic is readily apparent: the truth of the first statement has no bearing on the second.

California may have an interest in seeing its citizens are afforded California's protections when they are outside the state where greater protections are not to be found – like in the ocean outside the state's boundaries as alluded to by this Court in *Tidewater* and addressed squarely by the Ninth Circuit in *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F. 2d 1409 (9th Cir. 1990). But it does not follow that Colorado or Arizona have any interest whatsoever in seeing their laws (or lack thereof) applied to deny their residents California's greater protections when they work in California.

The other case cited by Oracle provides no support to Oracle's argument. In *Bostain v. Food Express, Inc.*, 153 P.3d 846, 849 (Wash. 2007), a truck driver who was employed in Washington to work for a California company's Washington operation sued under Washington state law for unpaid overtime wages, including for time worked outside the state in Oregon and Idaho. The Supreme Court of Washington analyzed the state statute in question and held that it facially required Washington employers to pay Washington-based employees overtime – regardless of where the work was performed.

Id. at 852. The Court in *Bostain* then engaged in a Commerce Clause analysis and held that because such application of the state law was facially non-discriminatory, and the local interest outweighed any burden imposed on interstate commerce, the law passed Constitutional muster. *Id.* at 856-7.

The *Bostain* court did not engage in an extensive conflict of law analysis, but noted that the defendant there failed to establish any irreconcilable obligations under other state laws, while the plaintiffs there made "a strong argument that if an employer is subject to the [Washington overtime law] for an employee's wages, that employer would not be required, under a choice of laws analysis, to comply with another state's wage and hour statutes as to that employee." *Id.* at 856. That conclusion is not surprising. The only states outside of Washington the plaintiff in *Bostain* worked in were Idaho and Oregon. *Id.* at 849. Idaho has no state overtime law and Oregon's state overtime law is less protective than Washington's. *See* Oregon Revised Statute § 653.261. So under a conflict of law analysis, the two states with less protective overtime laws would have no interest in seeing their laws (or lack thereof) applied to deny overtime wages under Washington law to Washington-based employees temporarily in their states.

B. The Restatement of Conflicts Does Not Apply To This Statutory Overtime Case.

Oracle next invokes the Restatement of Conflicts to argue that the employee's state of residence must provide the rule of decision regardless of where the work was performed. The singular problem with this argument is Oracle cites to the rule for resolving conflicts of

law in a *contract* setting. When two parties to a contract have not selected the applicable law to resolve disputes relating to the performance of their contract, the Restatement explains the principles that may be invoked to help resolve the issue.

This is not a contract case. This case does not involve a contractual dispute, so the Restatement's provisions for handling contract conflict issues do not apply. This is a case involving a state's power to regulate health and safety within its boundaries. The rules for resolving such a conflicts challenge were spelled out by this Court in the cases of *Hurtado v. Superior Court*, 11 Cal. 3d 574, 581 (1974), and *Washington Mutual Bank v. Superior Court*, 24 Cal. 4th 906, 919 (2001), and are very different than the rules for resolving a contract dispute cited in the Restatement. Applying the appropriate conflict resolution principles to this statutory health and safety regulation, the only conclusion that can be reached is California's overtime laws apply to the facts of this case.

In support of its argument that the conflict resolution rules applicable to contract disputes should be applied, Oracle distinguishes between regulations governing relationships and those governing a place. This distinction is neither supported in law, nor particularly helpful. California's overtime laws at issue do not regulate a relationship or a place; they regulate the conduct of employers. Labor Code section 510 requires employers to pay their employees for overtime work. It is the conduct of the employer that is regulated, not the relationship between the employer and the employee. The conduct in question here is Oracle's employment of the plaintiffs to

work overtime in California. California has the power to regulate that conduct irrespective of the locus of their contractual relationship.

C. California's Overtime Laws Facially Were Intended to Apply to Work Performed Inside California.

Oracle attempts to argue California's overtime laws do not facially apply to work performed in this state by non-residents. No such application can be read into the relevant statutes and regulations.

It is well settled that overtime laws are remedial and should be interpreted broadly while exceptions "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). The Industrial Welfare Commission's Wage Order 4-2001, applicable here, in its very first sentence states: "TAKE NOTICE: To employers and representatives of persons working in industries and occupations in the State of California...." The very next section begins, "This order shall apply to all persons . . .," and then goes on to list the *only* exemptions to the order. Wage Order 4-01, subdivisions (1)(A-E)(1-3). Notably absent from the exemptions are "business travelers" or "non-residents." The terms "employee," "employer," and "person" are all defined in sweepingly broad terms in the applicable Wager Order and Labor Code section. Wage Order 4-01(2)(F, H); Cal. Lab. Code § 18. Labor Code section 1194 provides that "any employee" can recover unpaid overtime in a civil action. Now, with the enactment of Labor Code section 1171.5, application of the overtime laws clearly are not limited to legal residents.

The Legislature wrote the overtime laws broadly to apply to the maximum extent of California's reach. That reach unquestionably includes at a minimum all places within California's borders. As this Court recognized in *Tidewater*, the laws facially could apply to any employment in the world. However, all of these statutes and regulations were promulgated against the backdrop of Government Code section 110, providing, "The sovereignty and jurisdiction of this State extends to all places within its boundaries as established by the Constitution," and the United States Supreme Court case of *De Canas v. Bica*, 424 U.S. 351, 356; 93 S.Ct. 933, 937 (1976), which holds, "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."

Given this framework, there is no basis to Oracle's argument that the Legislature never intended for California's overtime laws to apply to non-residents who were employed to work overtime in this state.

D. There Are No Practical Problems To Applying California's Overtime Laws to Employment Occurring Inside California.

Legal analysis – analyzing the facts of this case in terms of statutory construction, conflict of laws, or interaction with the Commerce Clause – requires a holding that Oracle is required to pay its employees overtime under California law when it employs them to work overtime in California. So, rather than engaging in a legal

analysis of the issues presented in this case, Oracle instead raises a host of speculative hypothetical problems that are either not actually at issue, or are not actually problems.

Applying fundamentally flawed logic, Oracle appears to make an "all or nothing" argument: either every single provision of the Labor Code and the Wage Orders must apply, or none of them can. This Court need not accept Oracle's invitation to stretch the facts of this case to such illogical extremes. This case presents the narrow issue of whether California's overtime requirements apply when a California-based company employs non-residents to work more than eight hours in a day inside California.

1. Issues of Exempt Status Pose No Practical Problems.

The first "problem" Oracle raises is the issue of exempt status. During the period relevant to this case Oracle classified its instructors as exempt under all state and federal laws and did not pay them overtime no matter where they worked. If California's overtime laws applied when these Plaintiffs worked overtime in California, then exemption may indeed be an issue in this case.[1]

Oracle argues that application of California's overtime law to overtime work performed in California would be problematic if an employee were properly classified as exempt under federal law for time spent working in other states, but did not qualify as exempt for time spent working in California. In support of this argument, Oracle

[1] There is absolutely no question that the Plaintiffs in this case do no qualify as exempt under California law. California's professional exemption for teachers only applies to those with a license, and Oracle's instructors are not licensed. But the issue of whether the instructors are exempt is not before this Court.

misstates the holding in *Counts v. South Carolina Electric & Gas Company*, 317 F.3d 453, 457 (4th Cir. 2003).

Oracle cites to *Counts* for the proposition that an overtime law "is 'untenable' if it requires periodic reevaluation of an employee's exempt status," (Oracle's Response Brief, p. 19), but the case does not support that proposition. The issue in Counts was not *whether* exemptions may be reviewed periodically, but rather, *what period should be used.* The court in *Counts* held that the federal administrative exemption's applicability is not determined on a week-by-week basis, but rather employees' duties are reviewed "holistically" to determine exemption, and "[a]ssessing employees' duties on the basis of one business cycle is a common sense means of determining the primary duties of those employees." *Id.* at 456-57. Periodic reassessment under federal law was a given in *Counts*; the only issue was how large a period to use.

In rejecting "day by day scrutiny" the court in Counts held nothing in the language of the exemption required such short periods of scrutiny and also noted there would be a significant regulatory burden imposed if, "employees who are not normally required to keep time sheets or punch time clocks would have to keep records on a daily or weekly basis of their time spent performing a given task." *Id.* at 457 (internal quotation and citation omitted).

Here, Oracle is already under an obligation to track the amount of time its employees spend working in California, so the concern in *Counts* about the burden of creating time records that would not otherwise have to be kept is absent. Oracle ignores that, completely aside from overtime laws, employers must already track the time their

employees spend in various states for purposes of reporting income for local taxes. *See Newman v. Franchise Tax Board*, 208 Cal. App. 3d 972, 977-78 (1989). In that case, actor Paul Newman was required to pay – and the employer was therefore required to report – California income taxes on just 30 days of intermittent work while in California filming "The Sting." *Id.* The exact records that would be required for purposes of complying with California's tax obligations – records of the amount of time spent working in the state – are the same records that would be used to comply with California's overtime payment obligation here.

Moreover, instructors' status as exempt or non-exempt under California law would *not* change on a week-by-week basis, as was the concern in *Counts*. Oracle – or any employer – would only be required to determine the exempt status under California law of its employees who work in California one time, and once properly determined that status under California law would not change as long as the employees perform the same duties. Employees may be non-exempt in California and at the same time exempt under federal law, but their status as exempt or non-exempt under either would not change so long as their duties did not change.

Next, Oracle's complaint that if it is required to pay overtime to its employees for time spent in California it will lose its entitlement to claim a federal exemption for the rest of their time because the employees would be paid on an hourly basis and not a salary, as required by federal law, is baseless. Neither California nor federal law requires non-exempt employees to be paid "hourly." The terms "hourly" and "salary" might be used in common vernacular

interchangeably with "non-exempt" and "exempt," respectively, but they are not the same thing. California and federal law both allow non-exempt employees to be paid on a salary basis; they just also require that an overtime premium be paid for overtime hours worked. *See* Cal. Lab. Code § 515(d) (explaining how to calculate overtime for a non-exempt *salaried* employee); *see also* 29 C.F.R. § 778.109 ("The Act does not require employers to compensate [non-exempt] employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission, or other basis").

2. The Other "Problems" Raised by Oracle Are Either Not Raised in This Case, or Are Not Problems.

The remaining characters in Oracle's parade of horribles are not remotely raised in this case. Plaintiffs in this case have not made claims to compensation for missed meal or rest periods. Were those claims raised, they would require the same simple conflict of law analysis applicable to overtime laws to determine whether any other state would have a greater interest in having its laws applied to work performed in California with regard to the provision of periodic rest breaks.

Similarly, California Labor Code Section 226, which requires employees to receive itemized pay stubs, is not at issue with this appeal. The Ninth Circuit asked this Court to answer whether the California Labor Code applies to *overtime* work performed in this state, not whether every single requirement of the Labor Code applies. The issue of the paycheck stub reporting requirements of Labor Code section 226 is very different from the issue of overtime. Overtime is a health and safety regulation. The state has clearly expressed interests

in the health and safety of employment occurring inside its boundaries, and has acted on those interests by regulating hours of work. No one has litigated what interest the state of California has in ensuring that non-residents who may not work entire pay-periods in this state have in receiving paycheck stubs that comply with California's requirements. What is clear, however, is that determination of whether Oracle is required to pay Plaintiffs under California law for their overtime worked in California will have little to no bearing on determination of whether Oracle or anyone else would also be required to comply with California's reporting requirements under Section 226.[2]

Oracle also attempts to use hypothetical companies and scenarios to illustrate other problems that in reality do not exist. Oracle first concocts an elaborate hypothetical involving a California-based company and a Kentucky-based company that both send identical twin non-resident employees to perform work in California. Oracle's second hypothetical involves two companies located in other states, but one employs a few people in California and one does not. For both, Oracle raises a straw-man argument never put forth by Plaintiffs that the two companies in each hypothetical would suffer different results – even though the employees were twins!

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[2] Oracle's footnoted argument on page 19, n. 5 of its brief that additional problems involving benefits companies provide to exempt versus non-exempt employees is even less availing. Company-provided benefits are a matter of company policy and contract, not statutory obligations. Companies can choose to give benefits to anyone they see fit, regardless of whether they are exempt under California law.

Both of Oracle's hypotheticals presuppose businesses that do not have offices in California would not be required to comply with California law. No one is arguing that here. Businesses that do not have offices in California might indeed be required to comply with California's overtime laws when they employee people to work overtime in California. It is possible, were a conflict of laws analysis and a commerce clause analysis to be performed given an employer that does not have its headquarters in California, the result would be the same and the non-California employer would also be subject to California's overtime regulations.

But those facts are not before this Court. Oracle is located in California. It has its headquarters here. It employs California residents to perform work in California and, presumably, pays them according to California law. Both of Oracle's hypotheticals miss the point of why it *does* matter that Oracle is located in California. Namely, a California employer such as Oracle does not have to change any accounting principles, buy any new software, implement any new policies or record-keeping practices, or do anything else it does not already do. It already has in place a means of complying with California law because it has offices here and has California-based employees. Any burden imposed by the requirement to comply with California law for its non-resident employees when they work here evaporates; there is no burden at all beyond paying the wage.

Out-of-state businesses might have a different burden. Whether their hypothetical burdens would result in a different outcome in a conflict of law analysis, or a dormant commerce clause analysis, is not before this Court. A quick thumbnail analysis reveals the result would

likely be the same. If a company in another state does business in California by employing people to work overtime in California, that employment would be subject to California's overtime laws. California has an interest in the health and safety of employees working overtime in this state, other states do not have an interest to deny their residents California's overtime benefits for work performed here, and the real burden on out-of-state employers is negligible (track the hours of the employees while in California and pay them). So it appears *likely* the result would be the same. But this Court need not reach that issue unless and until those facts are put to it.

The other flaw to Oracle's arguments about all the terrible things that might happen if California's laws were enforced inside California is the arguments are purely speculative and have no basis in the record. There is no evidence other companies do not already comply with California's laws when they send employees here. Oracle and its counsel feign ignorance of anyone else complying with the law, but if Oracle does not know of others complying with California law it is because Oracle did not look.

In their Reply brief to the Ninth Circuit, Plaintiffs gave Oracle a clear example of employment in California being subject to California's reach:

> Income taxation in California is analogous. California's Franchise Tax Board does not care how much time is worked in this state or whether the worker is a resident of this state or another. California income taxes are due from those non-residents who earn money in this state. *See* 18 Cal. Code. Regs. §§ 17951-1 *et seq.*; *see also Paul Newman v. Franchise Tax Board*, 208 Cal. App. 3d 972 (1989)(holding Paul Newman owed

California income taxes on wages earned during 30 days of intermittent work while he was here filming "The Sting.")

Companies choosing to do business in California should not be surprised that they must follow California law. Application of California law to govern work in California is sensible and far from arbitrary because that is the jurisdiction in which the individual is employed to work. The nonsense begins when workers in California are permitted to work under a hodge-podge of laws from other states and countries. Then, it becomes impossible to regulate local working conditions.

Oracle's argument that it cannot account for the jurisdictions to which it sends its employees is belied by the fact that Oracle already does so. Oracle currently uses web-based time sheets that require the employee to fill out the state in which the work was performed each day. Oracle already has in place the mechanism to account for various state and local regulations. Oracle has never produced any evidence that it cannot do what the law requires of it. Instead, Oracle only offers conjecture and rhetorical questions – hardly the sort of factual evidence that can be used to support a motion for summary judgment.

Appellants' Reply Brief in the United States Court of Appeal for the Ninth Circuit, Ninth Circuit Case No. 06-56649, p. 10.

Based on the facts actually presented by this case, resolution of the issue is fairly simple. Stripped of hyperbolic rhetoric and speculative problems – many of which simply do not exist – it is abundantly clear that California's overtime laws can be applied to employment occurring inside California's borders with little more required than simply paying the wages. Employers must determine

(once) whether its employees who travel to California are exempt under California state law, must track the amount of time its employees spend in California (which they are already required to do for taxation purposes and which can be accomplished simply by asking them), and must then pay them (which, in a worst-case scenario, might require a separate check to be cut.)[3] Those are not the insurmountable problems Oracle paints them to be.

E. Application of California's Overtime Laws to Overtime Worked in California Comports with the Commerce Clause.

Oracle next argues that application of California's overtime laws to overtime work performed in California would "arguably" violate the United States Constitution. The Ninth Circuit did not certify this case to the California Supreme Court to answer questions of United States Constitutional law. The federal appeals court is fully capable of answering federal Constitutional challenges – and categorically found they did not prevent application of California law. *Sullivan v. Oracle Corp.*, 547 F.3d 1177, 1186 (9th Cir. 2008)(withdrawn by *Sullivan v. Oracle Corp.*, 557 F.3d 979 (9th Cir. 2009)). The Ninth Circuit asked this Court to determine issues of California law.

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[3] Oracle's arguments concerning the method of calculating overtime pay in California have no merit at all. That other states and federal law may have different methods of calculating an overtime premium is completely immaterial. If overtime wages are owed in California, they must be calculated according to California law.

The only Constitutional argument raised by Oracle now is application of the dormant commerce clause implicit in Article 1, Section 8.

To determine whether a state law violates the dormant commerce clause, courts first look to whether the state law favors in-state interests over other states. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-79, 106 S.Ct. 2080, 90 (1986)). 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).

As the Washington Supreme Court case cited by Oracle stated, "If a legitimate local purpose is found, then the question becomes one of degree." *Bostain v. Food Express, Inc.*, 153 P.3d 846, 855 (Wash. 2007). When a law involving public safety is concerned, the law will be upheld unless the state law is of inconsequential value when compared to a national need to preserve commerce from serious impediments. *Waste Mgmt. of Alameda Cty., Inc. v. Biagini Waste Reduction Systems, Inc.*, 63 Cal. App. 4th 1488, 1498-99 (1998)(*citing Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524, 79 S.Ct. 962 (1959)); *see also Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443, 98 S.Ct. 787 (1978).

Here, there is no question the state law regulates even-handedly. Plaintiffs argue California's state overtime laws must apply to non-residents and residents alike when they work overtime in

California. No local interests are favored by such a reading, and Oracle concedes as much.

The question then turns to whether application of California's overtime law to overtime work performed in California is of inconsequential value and would cause serious impediments to interstate commerce. Clearly it is not.

1. California Has a Strong Interest in Regulating Working Conditions in this State.

California's own interest in regulating the health and safety of employees working in this state is both clear and express:

> It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards.
> Cal. Lab. Code § 90.5(a).

"From its earliest days, the [California Industrial Welfare Commission's] regulatory orders have contained numerous provisions aimed directly at preserving and promoting the health and safety of employees." *IWC v. Superior Court of Kern County*, 27 Cal. 3d 690, 720 (1980). Such regulations, including the right to overtime, enjoy the greatest presumption of validity. *Id.* at 731-32.

The state has a powerful interest in protecting workers in this state, even regardless of immigration status. *See* Cal. Lab. Code §

1171.5. Oracle has identified no burden on interstate commerce that could outweigh that interest.

2. Requiring Payment of Overtime Wages Under California Law for Overtime Worked in this State Imposes No Burden on Interstate Commerce.

The only burdens Oracle argues exist are the economic burdens of record-keeping and paying the overtime under state law. Oracle has not presented any evidence, however, of the even the existence of those burdens, let alone their extent. There is nothing in the record beyond pure speculation on the part of Oracle and its *amicus* that there would be any record-keeping burden imposed at all.

As discussed above, Oracle's argument that application of the overtime law would impose new economic record-keeping burdens is belied by the fact that all employers are already obligated to keep the exact records at issue. In order to comply with local state income tax reporting laws, such as the one in California, all employers must keep track of the amount of time their employees spend working in various states. *See, e.g.*, Title 18 Cal. Code Regs. § 17951-5(a)(explaining that gross income earned in the state is determined by the total volume of business the employee transacted "within and without the state"). Oracle is already obligated to track its employees' time spent in California, so it can establish no burden whatsoever in doing exactly that for purposes of paying overtime.

As discussed above, the overtime laws at issue in this case impose an obligation on the part of employers to do the following for its employees who work in California: determine whether the employees are exempt under state law (a one-time burden); keep track

of the amount of time employees work in California (a burden that already exists for taxation purposes); calculate the overtime; and pay it. Those burdens, even if they were as great as Oracle argues they are, do not outweigh the interest of protecting workers – a conclusion the Ninth Circuit already reached. This Court should follow suit.

F. Choice of Law Analysis Shows California's Overtime Laws Must Apply to These Facts.

The key flaw in Oracle's conflict of law analysis is Oracle completely focuses on the wrong interests. Conflict of law resolution requires a comparative analysis among the various states' interests to determine whose interest would be more impaired if its *conflicting law* were not applied. *Hurtado v. Super. Ct.*, 11 Cal. 3d 574, 581 (1974). "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 Mut. Bank v. Super. Ct.*, 24 Cal. 4th 906, 920 (2001)(internal quotations and citations omitted, emphasis added). The comparative analysis, therefore, must look at the interest the state has in having "those laws" - the purportedly *conflicting* laws - applied, not just *any* laws.

Here, Oracle cites only to cases showing some other states have an interest in having their *workers' compensation* laws applied extraterritorially. That they do is irrelevant. The comparative impairment analysis focuses on the states' interest in having their conflicting *overtime* laws applied. Here, Oracle has identified no

interest any other state might have in applying their overtime law to deny their workers protections under California law.

Similarly, Oracle focuses on California's interest in fostering business travel, but again, that is not the interest at issue in the comparative impairment analysis. California may have an interest in fostering business travel, but that does not negate, or even speak to, California's deeply held interest in protecting employees in this state. Under Oracle's analysis, California's laws prohibiting prostitution, gambling, and polygamy (and any other laws regulating "relationships") would fall to the interest in fostering business travel.

Oracle's misstatement of California's interest in protecting workers is summed up in Oracle's statement that "California's sole interest is supporting employee wages by penalizing (through higher wages) business travel." (Response, p. 43.) Application of California's law to non-residents who work overtime in California would not penalize anyone through higher wages – it would require equal wages for all employees in the state, regardless of immigration status or residence – just as the law requires.

Conflict of law analysis provides only one conclusion. California has a strong interest in having its overtime laws applied to protect the health and welfare of employees working overtime in this state, regardless of their residence status. Oracle has identified no other state that has any greater interest to see its laws (or lack thereof) applied to deny its residents equal protection with others working overtime in California. As such, California law must apply to the facts of this case, and this Court should affirmatively answer the Ninth Circuit's first question.

III. CALIFORNIA'S UNFAIR COMPETITION LAW APPLIES TO CLAIMS PREDICATED ON VIOLATION OF CALIFORNIA'S OVERTIME LAWS FOR OVERTIME WORKED IN CALIFORNIA.

With regard to the second question certified to this Court by the Ninth Circuit, the parties are fundamentally in agreement. The question asks only whether California's Unfair Competition Law (Cal. Bus. & Profs. Code § 17200 *et seq.* ("§17200"), applies to the facts of the first question – that is, for claims predicated on an underlying violation of California's overtime laws for work performed in California. Oracle argues only that § 17200 does not extend the Labor Code's reach, which tacitly admits that if the labor code covers these claims so does § 17200. Plaintiffs agree, and because California's overtime laws do apply, as discussed above, §17200 also applies to claims predicated on violations of California's overtime laws.

IV. CALIFORNIA'S UNFAIR COMPETITION LAW APPLIES TO ORACLE'S ILLEGAL CONDUCT IN CALIFORNIA.

The issue raised in the third question is whether businesses that break the law in California can be held accountable for their actions in California, even if the parties they injured live elsewhere.

Oracle makes two arguments for why § 17200 should not apply here. First, Oracle asserts that even if it did violate the federal Fair Labor Standards Act (29 U.S.C. § 201, *et seq.*, "FLSA"), it did

nothing wrong in California.[4] And second, Oracle argues that even if it did something wrong in California, this Court should overturn the well-developed body of case law that would apply § 17200 to that conduct.

A. Oracle's Challenged Conduct Occurred in California.

Oracle argues that § 17200 does not apply to the claims of the Plaintiffs predicated on violations of the FLSA for work performed in other states because, Oracle contends, it did not do anything wrong in California. Defendant wishes to frame the issue as one of extraterritorial application of California law, but that issue is simply not presented by these facts. Plaintiffs here do not seek to apply California law to any of Oracle's conduct occurring completely outside the state. Rather, Plaintiffs seek to apply California law to what Oracle did in this state.

There is a developed body of case law establishing beyond dispute that California's regulatory power with regard to unfair competition includes businesses in California that injure people in other states. *See Clothesrigger v. GTE Corp.*, 191 Cal. App. 3d 605, 613 (1987); *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

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[4] Oracle argues that if the FLSA was violated, the illegal act occurred when the Oracle failed to make the overtime payment "where [the employee] was paid." Response, pp. 56-57. There are no facts in the record to indicate where the employees in question were paid. It is possible the prohibited act of failing to pay also occurred in California. At this point in the case, it simply cannot be said the non-payment occurred in other states.

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").

The converse is also beyond dispute; California's regulatory power does not extend so far as to reach the claims of non-residents injured by conduct occurring *entirely* outside of California. *See Standfacts Credit Services v. Super. Ct.*, 405 F. Supp. 2d 1141, 1148 (C.D. Cal. 2005). California has no interest in conduct occurring entirely outside the state that is completely unrelated to California. Application of California law in such a case would be unconstitutionally arbitrary and unfair. *See Phillips Petroleum v. Shutts*, 472 U.S. 797, 821-22 (1985).

Oracle bases its entire argument that § 17200 should not apply extraterritorially on the premise that it did nothing wrong in California. Oracle argues its classification of its instructors as exempt, which it stipulated occurred primarily in California, is not, strictly speaking, illegal. It argues, therefore, that if the FLSA was violated, it was violated where the employees worked and were not paid.

Plaintiffs are not going to pretend that misclassifying employees as exempt *in a vacuum* is illegal. The FLSA prohibits employers from employing people to work more than 40 hours per week without paying them an overtime premium. 29 U.S.C. § 207(a)(1). The FLSA provides limited exemptions to the overtime requirements. *See* 29 U.S.C. § 213(a)(1). The FLSA provides it is

unlawful for an employer to violate "any of the provisions" requiring payment of overtime wages. 29 U.S.C. § 215(a)(2).

Here, Plaintiffs allege Oracle violated section 207 of the FLSA: Oracle employed the Plaintiffs to work overtime without overtime compensation. Oracle did this in two steps. First, Oracle made an affirmative decision not to pay the any of its instructors overtime. Second, when the Plaintiffs worked overtime, Oracle followed through with its classification decision and did not pay them. The non-payment of overtime wages was the direct and proximate result of Oracle's decision not to pay.

Oracle's decision to classify its instructors as exempt, and therefore to not pay them overtime wages, occurred primarily in California at Oracle's Redwood Shores headquarters.[5] Plaintiffs do not merely "contend" this, as Oracle suggests: it is a stipulated fact.

Had Oracle classified its instructors as exempt and then ignored its own decision and paid them for their overtime anyway, nothing illegal would have occurred. Plaintiffs would have had no claims because merely deciding to commit an unlawful act is not illegal. One has to at least take some affirmative action in furtherance of the criminal conduct before an act can be unlawful.

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[5] Oracle's argument that the decision to classify occurred anywhere but in California is purely speculative. Oracle never asserts the decision to classify as exempt occurred anywhere but in California. Rather, Oracle argues in vague terms that "in our global economy 'decisions' rarely have a single situs." Response, p. 56 n. 22. But there is no evidence that *this* decision occurred anywhere but in California.

Here, Oracle did follow through. After making the decision not to pay, it did not pay. It decided to employ people to work overtime without paying them and it did so. In such an instance, where the prohibited act is *a failure* to do something, the decision to violate the law and the violation merge and become one and the same once the violation is complete. In an instance where the employer is prohibited from employing a person *without paying them overtime*, the violation requires a failure to act – the non-payment – to be complete. But the violation *begins* with the affirmative decision.

In oral argument before the Ninth Circuit, Judge Fletcher posed a hypothetical to Oracle's counsel about a California company paying bribes in foreign countries and getting contracts as a result of those bribes.[6] Judge Fletcher asked, "Are you saying that the California Unfair Competition Law does not apply to that because the bribes are paid in foreign countries and not paid in CA?" When Oracle's counsel agreed § 17200 *could apply* to the hypothetical, Judge Fletcher continued:

> JUDGE FLETCHER: "So why doesn't it apply here? We're not paying bribes, but the issue is money either paid or not paid, and entirely paid or not paid outside of the state of California – in Arizona or whatever. The decision to pay or not pay the bribe is made in California; the bribe is paid outside the state. The decision to pay or not pay the overtime is made in California; the pay or not pay is being made outside California. So what's the difference between the two cases?"

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[6] The hypothetical is similar to the facts of *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134 (2003), in which a defendant was sued under §17200 for the illegal act of paying bribes in a foreign country.

> ORACLE'S COUNSEL: "... The decision to classify somebody as exempt or nonexempt is not an illegal act."
>
> JUDGE FLETCHER: "But even on your argument, you're saying the illegal act is not *complete* until the failure to pay is made. But I think the allegation is, and it's a perfectly plausible one, that the decision to classify is made in California, and the decision not to pay is made in California. The only act that is performed outside of California is the act of not paying."
>
> Oral Argument, May, 6, 2008, at approximately 38:10 to 40:40, available at http://www.ca9.uscourts.gov/datastore/media/2008/05/06/06-56649.wma (last accessed July 13, 2009)(emphasis added).

Because all of Oracle's arguments are based on the premise that California's § 17200 does not apply extraterritorially to conduct occurring entirely outside the state, it follows that if the illegal conduct occurred inside the state, §17200 does apply.

B. Due Process Is Satisfied Here.

It is important to recall this issue is one of due process. Due process principles provide that 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).

Here, Plaintiffs claims are based entirely on Oracle's conduct in California to classify them as exempt and ineligible for overtime payment. Without such a classification decision, there would be no violation. Or put the other way, it is the classification decision that directly and proximately caused the non-payment. And that classification decision occurred primarily in California.

Because it is well settled that it is neither arbitrary nor unfair to apply California law to claims of non-residents injured by a California business when "some or all" of the challenged conduct emanated from California, *see Wershba*, 91 Cal. App. 4th at 243, due process is satisfied.

C. Existing Case Law Should Not Be Overturned.

Next, Oracle argues this court should now overturn all the cases that came before in order to reach the absurd result Oracle desires. Oracle argues that *Clothesrigger*, *Norwest*, and *Wershba* should all be disapproved, even though those cases have stood as the rule of law since 1987, 1999, and 2001, respectively. Those cases involved careful scrutiny of the due process clause, and reached results consistent with it and require no clarification.

Oracle's citation to a trial court's decision in *In re Wells Fargo Home Mortgage Overtime Pay Litigation*, 2007 U.S. DIST. LEXIS 60551 (N.D. Cal. Aug. 13, 2007), for the proposition that courts are stretching California law too far, is totally unsupported by the actual facts and posture of that case. In *Wells Fargo*, the defendant filed what was captioned a motion to dismiss, but which was actually a motion for summary judgment (because it relied on facts outside the pleadings), to eliminate a 17200 cause of action on the grounds that

no illegal conduct occurred in California. Unlike here, there were no stipulated facts: the issue of where conduct occurred was hotly contested in *Wells Fargo*. In an opinion (that deemed the motion a Rule 23 motion that the cause of action could not be certified), the District Court allowed the case to proceed with class allegations based on the § 17200 cause of action. Because the Court ruled on Rule 23 grounds, that opinion merely allowed the § 17200 cause of action to continue through the class certification phase – it was not a finding that § 17200 applied. That question remains for the jury in that case to decide.

D. Class Certification Issues Are Not Presented.

Oracle also attempts to argue that the collective action provisions of the FLSA preclude a § 17200 claim predicated on the FLSA. Whether the FLSA's opt-in provisions under 29 U.S.C. § 216(b) preclude a class action for a § 17200 claim is not at issue here. No class certification motions have been brought in this case. Right now, this case involves only three individual plaintiffs. They may later seek class certification under California law. When and if they do so, issues regarding the co-existence of a class and collective action can be addressed. The issue now is whether these plaintiffs can bring a §17200 claim, not whether they can certify a class.

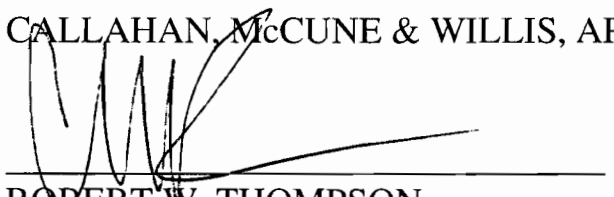
Because Oracle's challenged conduct occurred primarily in California, it is neither arbitrary nor unfair to apply California's § 17200 as the rule of decision in this case. This Court should answer the Ninth Circuit's question affirmatively: § 17200 does apply to these claims.

V. CONCLUSION

For all the foregoing reasons, this Court should answer all three of the Ninth Circuit's questions affirmatively. First, California's overtime laws do apply when non-residents work overtime in California for a California employer. Second, California's Unfair Competition Law does apply to claims predicated on violation of California's overtime laws. And third, California's Unfair Competition Law applies to the claims of non-residents injured by Oracle's illegal conduct occurring in California.

Respectfully submitted,

July 14, 2009 CALLAHAN, McCUNE & WILLIS, APLC



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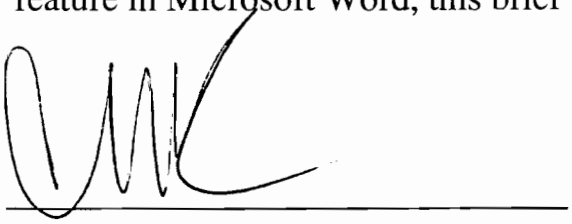
CERTIFICATE OF LENGTH

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 8,273 words.



July 14, 2009

Charles S. Russell

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, July 14, 2009, I served the foregoing:

PETITIONERS' REPLY 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.

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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. 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.

DONNA J. OSTROM

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Court : CALIFORNIA SUPREME COURT
Case No. : S170577

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