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November 27, 2018

VIA ELECTRONIC FILING

The Honorable Tani Cantil Sakauye, Chief Justice
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *In re Certified Tire and Service Centers Wage and Hour Cases* ("Certified Tire") (2018) 28 Cal.App.5th 1 (Case No. D072265; Case No. S252517)
***Amicus Curiae* Letter in Support for Review of Appeal Opinion filed
September 18, 2018**

Dear Honorable Justices:

California Employment Lawyers Association ("CELA"), as *amicus curiae*, respectfully requests that this Court grant the pending Petition for Review of the published decision *In Re Certified Tire and Service Centers Wage and Hour Cases* ("Certified Tire"), (2018) 28 Cal.App.5th 1 (Case No. S252517), to resolve the issue of whether wages can be averaged in order to meet an employer's minimum wage obligations, including the requirement that employers provide paid rest periods from which no deduction of wages shall occur, in light of conflicting opinions from appellate courts.

1. Statements of Interest

CELA is an organization of California attorneys who primarily represent employees in a wide range of employment cases, including wage and hour actions similar to *Certified Tire*. CELA has a substantial interest in protecting the rights of California workers and ensuring the vindication of public policies set forth in the California Labor Code. CELA has taken a leading role in advancing and protecting the rights of California employees by, among other things, submitting amicus briefs and letters to the Court on issues affecting those rights, including recent amicus briefs in *Lawson v. Z.B. N.A. and Zions Bancorporation*, Case No. S2297828 (2018) currently pending before the Court, as well as *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1 and *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, among others.

2. Summary of Reasons Why this Court Should grant review of *Certified Tire*

CELA urges the Court to review *Certified Tire* because the case runs contrary to a steady stream of appellate decisions holding that wages cannot be averaged in order to meet an employer's minimum wage obligations. As a result, it poses a serious risk of creating confusion over the standards applicable to the provision of paid rest periods and piece rate payment schemes. The opinion encourages employers to implement pay plans which circumvent the requirements of paying minimum wage for each hour worked, of providing for paid rest periods from which no deduction of wages should occur and of complying with Cal. Labor Code section 226.2. The analysis and holding in *Certified Tire* starkly departs from several appellate courts' construction of the requirements for paid rest periods and payment for all hours worked in *Armenta v. Osmose* (2005) 135 Cal.App. 4th 314 ("*Armenta*"); *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal. App. 4th 36 ("*Downtown LA*"); *Bluford v. Safeway Inc.* (2013) 216 Cal. App. 4th 864 ("*Bluford*"); and *Vaquero v. Stoneledge Furniture, LLC* (2017) 9 Cal. App. 5th 98 ("*Vaquero*"). Moreover, the precise issue incorrectly decided in *Certified Tire* is before this Court on Review in the pending *Oman v. Delta Air Lines Inc.* matter, Case No. S248726, further supporting review so that the Court can provide clarity during the Court's deliberation of *Oman* and other cases raising Cal. Labor Code section 226.2 and related issues as to whether a pay formula provides at least minimum wage payment for all hours on duty.

3. Summary of the Decision

In *Certified Tire*, the Plaintiffs were automotive technicians, tasked with diagnosing and repairing customer vehicles. Plaintiffs were subject to a pay plan in which they were paid an agreed-upon minimum hourly rate. Plaintiff and other employees had the opportunity to increase the minimum hourly rate based upon a complex formula which allegedly operated to reward the technician for work billed, i.e. "billable time," to the customer by Certified Tire, as follows:

Under the formula, each billed dollar of labor charged to a customer as a result of the technician's work during the pay period is referred to as the technician's "production dollars." Certified Tire applies the formula by multiplying the technician's production dollars by 95 percent, multiplying that amount by a fixed "tech rate" assigned to the technician depending on experience and qualifications, and then dividing by the total hours worked by the technician during the pay period. By applying this formula, Certified Tire determines the technician's "base hourly rate" for the pay period. If the base hourly rate exceeds the technician's guaranteed minimum hourly rate,

the technician is paid the base hourly rate for all time worked during the pay period. If the guaranteed minimum hourly rate is higher than the base hourly rate, the technician is paid the guaranteed minimum hourly rate for all time worked during the pay period.

(In re Certified Tire & Auto Service Center Wage & Hour Cases (2018) 28 Cal.App.5th 1, 4.)

Plaintiffs contend that as a result of this pay formula, when the Plaintiffs received a higher rate, Defendant was not paying anything for non-billable time, including rest period time. That is, Defendant essentially averaged the higher-rate pay across all hours in order to meet its minimum wage obligations. Wages earned during billable time were averaged across all hours, including non-billable time and rest periods, in order to meet its minimum wage obligations for the non-billable time. In reality, Defendant was not even paying minimum wage for rest periods and other non-productive time when Plaintiffs were subject to a higher-rate pay.

The Court of Appeal rejected Plaintiffs' position and affirmed the trial court's decision holding that the pay policy did not violate California law requiring paid rest periods. The court agreed with the Defendant's fictional interpretation that the payment plan was not a piece-rate system, but rather an "hourly-rate system" that actually compensates the employees for all hours worked. *Id.* at 13. It further emphasized that, looking at various hypothetical scenarios, the employees were being paid at least minimum wage for all hours regardless of the type of work involved, though failing to comprehend that it was endorsing an averaging scheme in direct violation of a long line of established case law prohibiting such mathematical subterfuge. See *Id.*

The trial court's decision and affirmance by the Court of Appeal in a now published decision is provoking confusion regarding the requirement to provide paid rest periods and prohibition against averaging hours to meet the minimum wage obligations. The reclassification of the payment scheme from a "piece-rate" to an "hourly-rate" places risk that employers will seize this opportunity to circumvent the law which requires that each employee working in California be paid at least minimum wage for all hours worked, as well as the express requirements of Cal. Labor Code section 226.2. That conclusion is evident in Delta Air Lines, Inc.'s reliance on the *Certified Tire* decision in support of its Answer Brief at pp. 64, 65 in *Oman v. Delta Air Lines Inc.*, Case No. S248726.

4. Argument

Certified Tire runs contrary to a number of appellate decisions which require payment of at least minimum wage for *each* hour worked with no averaging of aggregate daily or weekly pay to meet that obligation, and which require paid rest periods. California IWC Wage Orders, Section 4(A) currently provides: “Every employer shall pay to each employee wages not less than ... [\$ 11.00] per hour *for all hours worked*.” (Italics added.) IWC Wage Order, section 4(B) further provides: “Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage *for all hours worked* in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.” (Italics added.) This phrase has been interpreted to mean that employees must be compensated at the minimum wage for “*each*” hour worked and wages earned cannot be averaged to meet the minimum wage requirements. *Armenta*, 135 Cal.App. 4th at 323.

With respect to piece-rate payment plans, cases have interpreted California’s minimum wage law to require an employer to pay a separate hourly minimum wage for time spent during their shift waiting for customers, waiting for work or performing other non-billable/non-productive tasks directed by the employer. *Gonzalez*, 215 Cal.App.4th at 40. A piece-rate compensation formula that does not compensate separately for rest periods does not comply with California minimum wage law. *Bluford*, 216 Cal.App.4th at 872. The minimum wage obligations require an employer to compensate employees for rest periods if an employer’s compensation plan does not already include minimum hourly wage for such time. *Vaquero*, 9 Cal. App. 5th at 110. Indeed, payment plans which account for rest periods indirectly by negotiating a purportedly higher piece rate have been squarely rejected as unlawful. *Vaquero*, 9 Cal. App. 5th at 110; *Bluford*, 216 Cal.App.4th at 872.

The reasoning that requires separately paid wages for rest periods and non-productive time extends beyond just piece-rate formulas. The wage order specifically requires minimum wage for all hours worked, regardless of “whether the remuneration is measured by time, piece, commission, or otherwise.” IWC Wage Order, Section 4(B). Although the bevy of decisions Plaintiffs rely on in *Certified Tire* involve piece rate formulas, the underlying requirement with respect to payment for each hour worked cannot be distinguished by whether the payment is an “hourly-rate” system or a “piece-rate system.” The fundamental analysis holds that an employer cannot abrogate its responsibility of paying at least minimum wage for each hour worked by simply re-naming its payment plan. Indirect compensation for rest periods was flatly recognized and rejected in *Vaquero* and *Bluford*.

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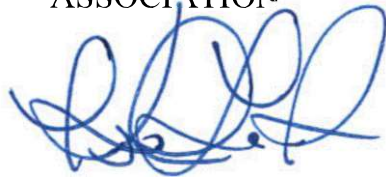
The decision in *Certified Tire* runs contrary to the series of cases which requires separate payment for non-productive time and rest periods and which precludes the use of averaging to indirectly meet its obligations. It encourages subterfuge by allowing an employer to combine pay to cover its minimum wage obligations instead of paying a direct and separate hourly minimum wage pay.

Certified Tire also contains analysis of a minimum wage implicated in another matter currently on Review before this Court, *Oman v Delta Airlines*. The Defendant's reliance on *Certified Tire* in its arguments to this Court further underscores the necessity of granting review of the matter, so that the decisions in *Delta* and this matter, should the Court grant Review, will govern all proceedings raising the minimum wage issue as to pay formulas such as that presented here without further decisions from Courts of Appeal creating judicial confusion in the interim.

This case presents the Court an opportunity to emphasize the important obligation California labor law places on employers to pay minimum wage for each hour work, and to provide guidance to employers, district courts and California courts of appeal as to the requirements to provide paid rest periods.

For all these reasons, we urge the Court to order that *Certified Tire* be granted review. Thank you for your consideration of this request.

Very truly yours,
COHELAN KHOURY & SINGER and
CALIFORNIA EMPLOYMENT LAWYERS
ASSOCIATION

A handwritten signature in blue ink, appearing to be 'Kristina De La Rosa', written over the printed name.

Kristina De La Rosa, Esq.
Michael D. Singer, Esq.

cc: all counsel (see attached proof of service)

PROOF OF SERVICE
In re Certified Tire and Service Centers Wage and Hour Cases
Court of Appeal Case No. D072265
Supreme Court Case No. S252517

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is Cohelan Khoury & Singer, 605 C Street, Suite 200, San Diego, California 92101.

On November 27, 2018, I served the foregoing document(s) described as **CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION'S AMICUS LETTER IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:


SEE ATTACHED SERVICE LIST

I then served each document in the manner described below:

- [XX] BY MAIL:** I placed each for deposit in the United States Postal Service this same day, at my business address shown above, following ordinary business practices.
- [] BY FAX:** I transmitted the foregoing document(s) by facsimile to the party identified above by using the facsimile number indicated. Said transmission(s) were verified as complete and without error.
- [] BY UNITED PARCEL SERVICE:** I placed each envelope for deposit in the nearest United Parcel Service drop box for pick up this same day and for "next day air" delivery.

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

Executed November 27, 2018 at San Diego, California.



Amber Worden

SERVICE LIST

In re Certified Tire and Service Centers Wage and Hour Cases

Court of Appeal Case No. D072265

Supreme Court Case No. S252517

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