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January 29, 2008

Via Overnight Mail

Chief Justice Ronald M. George
Associate Justices Baxter, Chin,
Kennard, Werdeger, Moreno
& Corrigan
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303

Re: Letter in Support of Review
Home Depot Overtime Cases, S159596
E040215, Fourth Appellate District, Division Two

Dear Honorable Justices:

This letter is submitted by California Employment Lawyers Association (CELA) as amicus curiae supporting the pending Petition for Review in the matter of *Home Depot Overtime Cases* (S159596), Court of Appeal, Fourth Appellate District, Division Two [*Home Depot*].

NATURE OF CELA'S INTEREST AND REASONS IT SUPPORTS REVIEW

CELA is a statewide organization of attorneys who represent employees in employment termination, discrimination, and wage and hour cases. CELA submits amicus briefs and letters on issues affecting statewide employee rights, including recent Supreme Court amicus briefs in *Murphy v. Kenneth Cole Productions, Inc.* and *Gentry v. Superior Court.*

This case presents an issue necessitating Review by this Court: **Under what circumstances may a trial court ruling on class certification refuse to consider expert statistical proof of pattern and practice offered to establish classwide liability and damages?**

In decertifying the class, the trial court completely renounced any procedure for utilizing statistical proof to determine whether a group of employees performed predominately exempt or non-exempt work based on studies of pattern and practice among Home Depot's employees. It did so based on its unqualified statistical opinion that *all* such evidence, in *all* cases, lacks merit. The Court of Appeal affirmed this decision as an appropriate exercise of trial court discretion, notwithstanding the fact it was completely lacking in scientific support.

The trial court's outright rejection of statistical evidence, even though experts from *both* sides were in unanimous agreement that statistical proof would reveal reliable results, either directly contravenes this Court's decision in *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319 [*Sav-On*] or raises a compelling issue left open by *Sav-On*. The decision by the trial court, affirmed by the Court of Appeal, also disregards established case law fully analyzing and approving the use of statistical proof of damages in wage cases in *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715 [9 Cal. Rptr. 3d 544] [*Bell*], widely used by courts throughout the state in class action litigation.

Decades of authority nationwide and in California approve class action trial methodology utilizing statistical and representative evidence. Survey, statistical, and representative testimony are an accepted methodology to assist the trier of fact in establishing liability and damages. Footnote 6 of *Sav-On* presents a long citation of cases this Court finds as supportive of statistical and representative testimony. (*Sav-On*, 34 Cal.4th at p. 333, n.6 ["See, e.g., *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 337-340 (1977) [52 L. Ed. 2d 396, 97 S. Ct. 1843] (statistics bolstered by specific incidents "are equally competent in proving employment discrimination"); *Lockheed, supra*, 29 Cal.4th at pages 1106-1108 ("well sampling and other hydrological data" about "the pattern and degree of contamination" could, but was insufficient to, support "a theory that a defendant's negligence has necessitated increased or different monitoring for all, or nearly all, exposed individuals"); *Reyes v. Board of Supervisors*, 196 Cal. App. 3d 1263, 1279 (1987) [242 Cal. Rptr. 339] (certification of class action for wrongfully denied welfare benefits proper because "whether the County applied an unlawful sanctioning process" to deny eligibility "can be proved by reviewing the County's regulations, ... the standard practices followed in making sanctioning decisions, as well as a sampling of representative cases"); *Stephens v. Montgomery Ward*, 193 Cal. App. 3d 411, 421 (1987)[238 Cal. Rptr. 602] (certification proponent satisfied commonality requirement with statistical data and analysis of retail chain's corporate structure supporting allegations respecting centralized control over employment decisions); see also *In re Simon II Litig.*, 211 F.R.D. 86, 146-151 (E.D.N.Y. 2002) (tobacco case listing state, high court, other federal, and secondary authorities concluding aggregate proof is "consistent with the defendants' Constitutional rights and

legally available to support plaintiffs' state law claims")"]; see, also *Capitol People First v. Department of Developmental Services* (2007) 156 Cal.App.4th 676, ["Over the years, numerous courts have approved the use of statistics, sampling, policies, administrative practices, anecdotal evidence, deposition testimony and the like to prove classwide behavior on the part of defendants]; *Employment Development Dept. v. Superior Court* (1981) 30 Cal.3d 256, 265-266; *Alch v. Superior Court* (2004) 122 Cal.App.4th 339 [noting that in employment discrimination class actions, plaintiffs " 'normally seek to establish a pattern or practice of discriminatory intent by combining statistical and nonstatistical evidence, the latter most commonly consisting of anecdotal evidence of individual instances of discriminatory treatment' "]; *Bell,* 115 Cal.App.4th at 750 [referring to statistical sampling as "a different method of proof" and "a particular form of expert testimony"]; *Reyes v. Board of Supervisors, supra*, 196 Cal.App.3d at p. 1279; *Stephens v. Montgomery Ward, supra*, 193 Cal.App.3d at p. 421 [commonality requirement satisfied with statistical data and analysis].)

Recent out-of-state wage cases also confirm the propriety of such testimony, implicitly confirming its reliability and explicitly rejecting due process challenges. For example, in *Iliadis v. Wal-Mart Stores, Inc.*, 922 A.2d 710, 2007 WL 1557209 (N.J. Sup.Ct. May 31, 2007), the New Jersey Supreme Court reversed an order denying class certification of claims for missed meal periods and rest breaks and for off-the-clock work, holding that the claims should have been certified for class treatment. The Court also pointedly rejected Wal-Mart's argument that plaintiffs' proposal to rely on expert testimony and "statistical extrapolation" to establish their claims would violate its due process rights and prevent it from presenting its affirmative defenses. (*Iliadis*, 922 A.2d at 717, 724-25.) In the Court's words:

> In finding that common questions predominate . . . , we do not limit Wal-Mart's defenses nor diminish its procedural safeguards and rights. Rather, in defending itself, Wal-Mart may argue that employees voluntarily worked through rest or meal breaks for myriad personal reasons, may contend that the conclusions of [plaintiffs' statistical experts] are flawed, may question the credibility of [its] internal audit, and may advance any other relevant contentions. We are confident that, on remand, the trial court and parties' counsel can resolve the practical challenges presented by this litigation's individualized questions of law or fact.

(*Id.* at 724-25.) The New Jersey Supreme Court concluded it was "confident that the [trial court] will properly employ its broad, equitable authority and sound discretion to manage the instant litigation and appropriately address the important concerns of both parties in respect of the permissible uses of statistical extrapolation, evidentiary redundancy, and any other

procedural, administrative, and evidentiary issues that may arise." (*Iliadis*, 922 A.2d at 728; see *Sav-On*, 34 Cal.4th at 339 (trial courts have an "obligation to consider the use of ... innovative procedural tools proposed by a party to certify a manageable class").)

In *Hale v. Wal-Mart Stores, Inc.*, ___ S.W.3d ___, 2007 WL 1672261 (Mo. App. W.D. June 12, 2007), Wal-Mart argued that the use of statistical evidence "to prove the claims and damages" would "violate its due process" rights, and that "[as] a consequence of the named plaintiffs using statistical evidence, Wal-Mart ... will be prevented from presenting the individualized proof on each individual class member's claim and to cross-examine those claimants that seek recovery against it." (*Id.* at *5, *7-9.)

The Court flatly rejected these arguments, holding that Wal-Mart would have more than sufficient opportunity to challenge plaintiffs' proof and to present its defenses:

> Because Wal-Mart will have the opportunity to discredit the experts and their methodologies, to challenge the accuracy of its own records, and to cross-examine the class representatives and present defenses to their claims at trial, we believe that the circuit court did not abuse its discretion in finding that the " plaintiffs' claims raise broad common questions of law and fact" that are " focused on the corporate-level staffing requirements and policies and on the corporate-level oversight and supervision of daily payroll and staffing[.]"
>
> Moreover, all these individual issues relate to damages that can be handled in a random sampling of the class. Such a random sampling and statistical analysis will not violate Wal-Mart's due process rights. First, there is no absolute right to individualized determinations of damages. Second, a statistical model accounts for individual issues including injury in fact and proximate cause. Finally, Wal-Mart would have the opportunity to contest the proofs of aggregate methods.

(*Id.* at *8 (citing *Long v. Trans World Airlines, Inc.*, 761 F.Supp. 1320, 1324-27 (N.D.Ill.1991)).)

On a related note, representative evidence to establish liability has long been used in FLSA actions. (See *Reich v. Gateway Press, Inc.*, 13 F.3d 685 (3d Cir. 1994) [court determined on classwide basis that reporters were misclassified as exempt based on testimony of 22 of 70 employees]; *Brock v. Norman's Country Market, Inc.*, 835 F.2d 823 (11th Cir. 1988) [court determined on classwide basis that eight employees misclassified without the testimony of all eight employees]; *Donovan v. Burger King Corp.*, 672 F.2d 221,

224-225 (1st Cir. 1982) [court determined classwide liability for 246 assistant managers in 44 different restaurants based on testimony regarding overtime exemption from witnesses at six stores]; *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 88 (2d Cir. 2003) [not all employees need testify in order to prove FLSA violations provided sufficient evidence provided for jury to make reasonable inference as to non-testifying employees]; *Jankowski v. Castaldi,* 2006 WL 118973 (E.D.N.Y. Jan. 13, 2006) [plaintiffs need only present testimony of representative sample of employees as part of proof of prima facie case under FLSA]; *Alvarez v. IBP, Inc.*, 2001 WL 34897841, *6 (E.D. Wash. Sept. 14, 2001) ["the use of representative evidence is well accepted for determining liability in FLSA cases"].)

Representative evidence is also used to establish a pattern and practice of labor violations. (See, e.g., *Bell,* 115 Cal.App.4th at 746-750 [representative testimony calculating uncompensated overtime hours]; *Thiebes v. Wal-Mart Stores*, 2004 WL 1688544 (D. Or. July 26, 2004) [representative testimony regarding Wal-Mart's alleged practice of suffering or permitting off-the-clock work]; *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946) [same].)

As the Court is undoubtedly well aware, *Bell*, cited with approval in *Sav-On* and *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 464, set the standard for using survey and statistical evidence to prove aggregate class-wide damages with expert and representative testimony in wage and hour class action cases. In *Bell,* insurance adjustors sought unpaid overtime claiming their employer misclassified them as exempt from overtime. The employer did not maintain records of hours, and statistical and representative evidence was used to calculate back wages owed. *Bell* affirmed the trial plan in which the jury heard expert testimony calculating extrapolated aggregate classwide damages based on representative testimony provided in depositions establishing the number of overtime hours at issue:

> However, statistical sampling does not dispense with proof of damages but rather offers a different method of proof, substituting inference from membership in a class for an individual employee's testimony of hours worked for inadequate compensation. It calls for a particular form of expert testimony to carry the initial burden of proof, not a change in substantive law. We note that the use of statistical sampling in the present case is analogous to FLSA precedents that allow back pay to nontestifying claimants. By basing relief on evidence of a pattern or practice, these decisions have also relieved some employees of the procedural necessity of making individual proof.
>
> Forty years ago, the courts indeed displayed some reluctance to admit survey data, 31 but today "[s]tatistical assessments are prominent in many kinds of

> cases, ranging from antitrust to voting rights." 32 Citing varied uses of statistics, the court in In re Chevron U.S.A., Inc., supra, 109 F.3d 1016, 1020, observes, "The applicability of inferential statistics have long been recognized by the courts." Underlying the contemporary reliance on the methodology of inferential statistics is a recognition that "[e]xperts have developed appropriate modeling techniques for reaching statistically significant and reliable conclusions." (*In re Simon II Litigation, supra*, 211 F.R.D. 86, 153; see also *Ratanasen v. California Dept. of Health Services* (9th Cir. 1993) 11 F.3d 1467, 1469–1472; *Michigan Dept. of Educ. v. U.S. Dept. of Educ.* (6th Cir. 1989) 875 F.2d 1196, 1205–1206; *Pfizer, Inc. v. Lord* (2d Cir. 1971) 449 F.2d 119; *Blue Cross & Blue Shield of N.J. v. Philip Morris, supra*, 178 F. Supp. 2d 198, 247–248; *Long v. Trans World Airlines, Inc.* (N.D.Ill. 1991) 761 F. Supp. 1320, 1327; *In re Antibiotic Antitrust Actions* (S.D.N.Y. 1971) 333 F. Supp. 278, 289, mandamus denied sub nom.; *Avery v. State Farm Mut. Auto. Ins. Co.* (2001) 321 Ill. App. 3d 269 [746 N.E.2d 1242, 1260–1261, 254 Ill. Dec. 194]; *Tomlin v. Department of Social Services* (1986) 154 Mich. App. 675 [398 N.W.2d 490, 497].)We find little basis in the decisional law for a skepticism regarding the appropriateness of the scientific methodology of inferential statistics as a technique for determining damages in an appropriate case.
>
> We conclude that the proof of aggregate damages for time-and-a-half overtime by statistical inference reflected a level of accuracy consistent with due process under the Doehr balancing test. This conclusion is supported by persuasive authority. (*In re Chevron U.S.A., Inc., supra*, 109 F.3d 1016, 1020; *Hilao v. Estate of Marcos, supra,* 103 F.3d 767, 786–787; *Yorktown Medical Laboratory, Inc. v. Perales* (2d Cir. 1991) 948 F.2d 84, 89–90; *Blue Cross & Blue Shield of N.J. v. Philip Morris, supra,* 178 F.Supp. 2d 198, 249; *Long v. Trans World Airlines, Inc., supra,* 761 F.Supp. 1320, 1327; *In re Sugar Industry Antitrust Litigation* (E.D.Pa. 1976) 73 F.R.D. 322, 351–355; *In re Bailey* (1989) 64 Ohio App. 3d 291 [581 N.E.2d 577, 579–580]; see generally 3 Conte & Newberg, Newberg on Class Actions, supra, § 10:5, p. 483.)

(*Bell, supra*, 115 Cal.App.4th at pp. 750, 754-55.)

The long line of cases cited in these passages from *Bell* is included to demonstrate that the trial court's broadly dismissive attitude toward statistical evidence is highly inappropriate are contrary to a multitude of well-reasoned cases in which such evidence supported final class judgments. Indeed, representative evidence in class employment cases is the rule, rather than the exception. *Home Depot's* contravention of the standards set forth in this long line

of authority confirm the necessity of Review and further elucidation on this important issue by this Court.

Thank you for your consideration of this request.

Very truly yours,
CALIFORNIA EMPLOYMENT
LAWYERS ASSOCIATION

COHELAN & KHOURY
Michael D. Singer

/MDS
cc: Service List on All Counsel
California Employment Lawyers Association

PROOF OF SERVICE
Case No. S159596

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, 605 "C" Street, Suite 200, San Diego, California 92101-5305.

On January 29, 2008, I served the foregoing documents described as **CELA LETTER IN SUPPORT OF REVIEW DATED JANUARY 29, 2008** 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 January 29, 2008 at San Diego, California.

Amber Worden

Amber Worden

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