Court of Appeals No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANE DEAR and JOHN DUNN, individually and on behalf of herself and all others similarly situated,

Plaintiffs-Petitioners,

v.

DOE DEFENDANTS,

Defendants-Respondents.

On Petition for Interlocutory Review from the United States District Court for the Central District of California
CASE NO. _____

PETITION FOR PERMISSION TO APPEAL ORDER DENYING CLASS CERTIFICATION PURSUANT TO FED. R. CIV. P. 5 and 23(f)

INTRODUCTION

This case most certainly qualifies for interlocutory appeal under the criteria set forth in *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 958 (9th Cir. 2005). Though only one of the *Chamberlan* criteria for review need be present, review of the district court=s order is warranted here under all three: (1) denial of class certification is questionable and operates as a death knell requiring review at this juncture because, as a practical matter, the stakes are too small and the litigation costs too high for the individual plaintiff to go forward; (2) the denial of certification prior to the class proponent being accorded the right to present its full record supporting certification presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and to future class actions generally; and (3) the District Court's class certification decision is manifestly erroneous, as it was based on an incomplete record, an incorrect Rule 23 standard, the improper application of facts to the relevant law, and the erroneous conclusion that a Class is not ascertainable if some of the stated *sub-classes* are not administratively feasible and may be "fail safe" classes. *See, Chamberlan, supra*.

The order at issue constitutes a death knell for plaintiff and is based upon an erroneous denial of class certification. Plaintiff is left with one choice, proceed to final judgment on the merits of her individual claims, which without class certification, are worth far less than costs of litigation.

In addition, the procedure imposed by the District Court, of ruling on a motion for class certification without providing plaintiff the time and opportunity to investigate and challenge defendants' evidence (but then relying on that evidence), and to formulate a sufficient reply, presents an unsettled and fundamental issue of law in class actions. The District Court's exalting of speed over affording the Plaintiff an opportunity to fully present her certification motion should be addressed by this honorable Court.

Finally, the District Court's order is also manifestly erroneous for multiple reasons. First, the court incorrectly applied Rule 23 in preempting Plaintiff=s ability to present a certification motion with a full record, by denying her the opportunity to conduct discovery of Defendants' declarants. Second, the District Court applied the wrong standard in finding that questions of law or fact common to the members of the class do not predominate over any questions affecting only individual members, focusing on the evidence relating to the breaks that some class members were able to take and not, as is required, whether Defendants provided proper meal and rest breaks to their employees by relieving employees of all duty, relinquishing control over their activities, permitting them a reasonable opportunity to take an uninterrupted break, and not impeding or discouraging them from doing so, as is required by *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012).

Third, the District Court's ruling that individual issues predominated over

common ones was manifestly erroneous because it was based on the Court's incorrect commonality analysis and misapplication of *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013). Fourth, the District Court committed manifest error by holding that Plaintiff's Class was un-ascertainable simply on the grounds that two of her three *sub-classes* were not administratively feasible, without determining the ascertainability of her general Class and without permitting Plaintiff an opportunity to revise any deficient, or "fail safe," class definitions. *O'Connor v. Boeing North American, Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998); *In re AutoZone, Inc., Wage & Hour Employment Practices Litig.*, 289 F.R.D. 526, 546 (N.D.Cal.2012), citing, *Heffelfinger v. Elec. Data Sys. Corp.*, No. 07–101 MMM, 2008 WL 8128621, at *10 n. 57 (C.D.Cal. Jan. 7, 2008).

For all of foregoing reasons, interlocutory appeal is not only warranted under *Chamberlan*, it is also highly important to California class action cases and, in fact, to class actions nationwide.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the District Court's Order denying class certification under Fed. R. Civ. Proc. 23(f) and 28 U.S.C. § 1292(e). The Petition is timely because it within 14 days of the entry of the class certification order on October 25, 2013, attached hereto as Exhibit 1. *See* Fed. R. Civ. Proc. 23(f).

QUESTIONS PRESENTED

1. Whether the proponent of class certification must be permitted to investigate and respond to evidence presented in opposition to such a motion before being required to file a reply in support of the motion.

2. Whether the District Court committed manifest error in requiring Plaintiff to file her Reply to Defendants' Opposition to her Motion for Class Certification (which was supported by twenty-five declarations) in just seven days, and without permitting Plaintiff to take any discovery of Defendants' declarants, despite the fact that Defendants had more than *seven months* to file their Opposition and were able to take the depositions of fourteen of Plaintiff's declarants.

3. Whether the District Court committed manifest error by evaluating commonality as regards meal and rest break claims by considering only whether those breaks were taken by employees and not whether the employer had "provided" legally-compliant breaks by relieving employees of all duties, relinquishing control over their activities, permitting them a reasonable opportunity to take an uninterrupted break, and not impeding or discouraging them from doing so. *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012).

4. Whether the District Court's ruling that individual issues predominated over common ones was manifestly erroneous because it was based on the Court's incorrect commonality analysis and improper application of *Comcast Corp. v.*

Behrend, 133 S.Ct. 1426 (2013).

5. Whether the District Court committed manifest error by holding that Plaintiff's class was un-ascertainable simply on the grounds that two of her three *sub-classes* were not administratively feasible, and without permitting Plaintiff an opportunity to revise those "fail safe" class definitions.

STANDARD OF REVIEW

The District Court's denial of class certification is reviewed for abuse of discretion. *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 816 (9th Cir.1997). A two-step test is applied. *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir.2009). The first question is "whether the trial court identified and applied the correct legal rule to the relief requested and [the second question is] whether the trial court's resolution of the motion resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Id.*

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This proposed class action challenges Defendants' (1) failure to provide and pay for missed meal and rest periods (Labor Code §§ 512, 226.7); (2) failure to pay wages when due (Labor Code §§201-203); (3) failure to provide proper wage statements (Labor Code §226); and (6) violation of Bus. & Prof. Code (the Unfair Competition Law) §§17200-17208. The second and third causes of action are

derivative of the meal and rest period claims. Lastly, the sixth cause of action UCL claim is based on these same statutory violations. Specifically, Plaintiff contends that Defendants' nursing employees who worked 12 hour shifts were not provided proper meal periods and rest breaks in compliance with the California Labor Code, and the applicable statutes, regulations and wage orders promulgated thereunder.

On April 27, 2011, Plaintiff Jane Dear commenced this action in the Superior Court of the State of California.[1] On September 4, 2012, Defendants removed this action under CAFA and asserting federal question jurisdiction. Plaintiffs filed a Motion to remand, which was granted. Following remand of this action, Plaintiff filed her Motion for Class Certification on March 13, 2013. On March 14, 2013, the Parties agreed to a hearing date for that motion of October 7, 2013 and to a briefing schedule whereby the Opposition brief was to be filed no later than July 10, 2013, and the Reply brief was to be filed no later than September 27, 2013. The Parties subsequently agreed to extend this schedule in order to complete discovery of the declarants who submitted declarations in support of Plaintiff's Motion for Class Certification, such that Defendants would have had 146 days after filing of the Motion to file their Opposition and Plaintiff

1 On May 21, 2012, Plaintiffs filed their First Amended Complaint which added John Dunn as a named Plaintiff and on December 10, 2012, Jane Dear was dismissed as a named plaintiff.

would have had 91 days thereafter to file her Reply. Defendants then took the depositions of 13 of the individuals who had provided declarations in support of Plaintiff's Motion.

Defendants timely appealed the order of remand and this Court reviewed the matter, reversing and remanding the District Court's decision (Case No. 13-55771), in a mandate that issued on July 22, 2013. On July 25, 2013, the District Court entered an "Order Reopening Case And Ordering Defendants To Answer Or Otherwise Respond" wherein it ordered that Plaintiff's class-certification motion shall be filed on or before September 30 and heard no later than October 28, 2013.[2]

On September 20, 2013, the Parties stipulated to briefing deadlines and a revised hearing date regarding Plaintiff's Motion so as to give Defendant ample opportunity to complete discovery and prepare its Opposition and to give Plaintiff ample time to complete discovery of Defendants' declarants and to prepare her Reply. The Parties also advised the District Court that a mediation date had been set for early January and requested that the hearing be set following that mediation. The District Court denied the stipulation on September 23, 2013.

Two days later, on September 25, 2013, Plaintiff filed her Motion for Class Certification in federal court, noticed for hearing on October 28, 2013.

2 On August 12, 2013, Plaintiff filed a second motion to remand under the home-state controversy exception to CAFA, which was briefed and denied by the Court without oral argument on September 5, 2013.

Defendants took the deposition of Plaintiff's expert on September 27, 2013. Defendants filed their Opposition just before midnight on the last day to file, October 7, 2013, supported by twenty five declarations, eighty-nine objections to Plaintiff's putative class member declarations, and objections to the declaration of Plaintiff's expert and her counsel. Under Local Rules and the Judge's procedural orders, the Reply was due on October 11, 2013—just four days after the Opposition was filed—and was limited to 12 pages.

Plaintiff sought leave to exceed the 12 page limit and to move the hearing date from October 28, 2013 to December 16, 2013, which would have enabled her to take discovery of Defendants' declarants and prepare a Reply. On October 9, 2013, the District Court denied the request, stating that Plaintiff "is in no different place than any other litigant before this Court. The Central District of California's Local Rules dictate that reply brief shall be filed 14 day before the hearing date, which may be affected if there is a federal holiday. *See* C.D. Cal. L.R. 7-10." *See,* Exhibit 2. The District Court then ruled that "[i]n any event, the Court understands the difficulty [plaintiff] faces in responding to Defendants' voluminous materials submitted in opposing [plainitff's] certification motion.…The Court therefore will allow [plaintiff] to file her reply brief no later than Tuesday, October 15, 2013. But the Court will not continue the hearing date." The Court also denied the request to exceed the page limit. *Id.* As a result of

this "cookie cutter" approach by the District Court, Plaintiff had approximately 8 days, absolutely no opportunity to depose any of Defendants' declarants, and only 12 pages to respond to all of the material presented by Defendants.

On October 15, 2013, Plaintiff filed her Reply, her response to Defendants' objections to her evidence and declarations, and 158 pages of objections to the evidence Defendants submitted in Opposition. The District Court vacated the hearing on the Motion for Class Certification and, on October 25, 2013, issued the "Order Denying Plaintiff's Motion for Class Certification" holding that "the class is not presently ascertainable, there is no common issue that would resolve all class members' claims in one stroke, and individual issues would predominate over classwide determinations." *See*, Exhibit 1 at 2. As regards the evidentiary objections, it stated: "[t]o the extent that the Court relies upon evidence to which one or both parties have objected, the Court overrules those objections." *Id.*

REASONS WHY THIS PETITION SHOULD BE GRANTED

I. THE DENIAL OF CERTIFICATION CREATES A DEATH KNELL SITUATION FOR PLAINTIFF

Immediate review is warranted and necessary, where as here the denial of class certification is erroneous and also operates as a death knell because, as a practical matter, the stakes are too small and the litigation costs too high for the individual plaintiff to go forward. *Chamberlan*, 402 F3d at 958. Litigating the

merits of solely the representative Plaintiff's individual claims, without the class, is too small to justify the costs of litigation. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999).

The advisory committee's note to Rule 23(f) states that the Rule "provides a mechanism through which appellate courts, in the interests of fairness, can restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial." That mechanism is especially warranted based on the errors here by the District Court, which sound the death knell for litigation of the important class action issues raised in this action.

II. UNSETTLED AND FUNDAMENTAL ISSUES OF LAW REGARDING CLASS ACTIONS SUPPORT APPEAL OF THIS ORDER

This Order presents an unsettled and fundamental issue of law demanding guidance from the Ninth Circuit regarding class actions generally, and this matter specifically: whether it is permissible for a district court to rule on certification without providing plaintiff an opportunity to investigate and respond to the evidence presented by defendants in their opposition, particularly where the District Court relied upon that evidence in finding class certification was not proper.

The party s*eeking* class certification bears the burden of demonstrating that all the prerequisites of Rule 23(a) and (b) are satisfied. *Zinser v. Accufix Research Inst. Inc.*, 253 F3d 1180, 1188 (9th Cir. 2001). Here, the District Court's ruling

requiring Plaintiff to file her Reply just eight days following the filing of Defendants' Opposition deprived Plaintiff of any opportunity to fully support her Motion for Class Certification and to refute Defendants' evidence and arguments. The District Court's time limitations, imposed without consideration of the specific circumstances of this case, gave Plaintiff no time to notice or take depositions of Defendants' declarants or to otherwise challenge their evidence. Further, although Plaintiff had no opportunity to investigate and challenge Defendants' evidence, the District Court relied upon the evidence presented by Defendants in its Order denying class certification. *See*, Exhibit 1 at 3-5; 10-13.

Litigants are not cogs in the machinery of our legal system. It is incumbent upon a district court to exercise its discretion regarding such matters as scheduling, time limits, and length of briefs by taking into consideration the specific procedural and legal realities of a case. Although district courts have broad discretion to control the class certification process, and "[w]hether or not discovery will be permitted ... lies within the sound discretion of the trial court", "[t]he propriety of a class action cannot be determined in some cases without discovery," *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 209-210 (9th Cir.1975). As such, "the better and more advisable practice for a District Court to follow is to afford the litigants an opportunity to present evidence as to whether a class action was maintainable." *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1313 (9th Cir.1977).

Importantly, the general precedent regarding discovery does not address the specific issue of whether the proponent of a motion for class certification must be permitted time to respond to evidence presented in opposition. Indeed, although a related question was presented to this Court by *Vinole v. Countrywide Home Loans, Inc.*, this Court stated there that "Plaintiffs' real complaint is not that they were deprived of adequate time to complete discovery," and thus this Court did not address the specific issue presented by this Petition in that case. 571 F.3d 935, 943 (9th Cir. 2009). Further, in *Vinole*, plaintiffs had not requested a continuance or an extension of time, unlike here. *Id.* Accordingly, this Court should accept this appeal to resolve the important and unsettled question of whether a plaintiff must be permitted to vet and respond to evidence presented in opposition to a motion for class certification. Without appellate guidance, there can be no resolution to this important issue.

III. THE ORDER CONTAINS MULTIPLE MANIFEST ERRORS

The District Court committed numerous manifest errors. *See, Chamberlan*, 402 F.3d at 959. First, as detailed in section II, Rule 23 does not envision a district court to ruling on the merits of class certification based on the factual record presented by the class opponent, without providing the proponent the opportunity to respond. As such, in ruling on Plaintiff's Motion for Class Certification without permitting Plaintiff the opportunity to investigate and respond to evidence presented

by Defendants in their Opposition, while at the same time relying on that very evidence in making its ruling, the District Court committed manifest error.

Second, the District Court applied the wrong standard in finding that questions of law or fact common to the members of the class do not predominate over any questions affecting only individual members, focusing on the evidence relating to the breaks that class members were able to take and not whether Defendants provided legally-compliant meal and rest breaks to their employees by relieving employees of all duties, relinquishing control over their activities, permitting them a reasonable opportunity to take an uninterrupted break, and not impeding or discouraging them from doing so, as is required by *Brinker*.

Specifically, in evaluating commonality under Rule 23(a), the District Court focused on evidence presented by class member declarations (specifically those that Plaintiff was not given an opportunity to cross examine) regarding whether or not putative class members actually took two meal breaks and/or three rest breaks.[3] By way of example, the District Court's Order cites to putative class member declarations and concludes that Plaintiff has not "established any uniform policy or

3 Under Wage Order No. 5, nurses are entitled to two 30-minute meal periods on a 12-hour shift and three ten minute rest breaks per four hours worked or major fraction thereof, which "insofar as practicable shall be in the middle of each work period." *Id.* at §§ 11, 12. An employer is obligated to provide "off-duty" meal and rest periods, which are uninterrupted period, during which the employee is relieved of all duty. *Brinker*, 53 Cal.4th at 1035. Only "bona fide relief from duty and the relinquishing of control satisfies the employer's obligations." *Id.* at 1040-1041.

practice that rendered each putative class member **too busy or unable to take** statutorily mandated rest or meal breaks" and "[t]he fact that some putative class members had no issue taking proper breaks demonstrates that there will be no way to determine that [Defendant] has a uniform, classwide policy of rendering employees unable to take rest and meal periods in each instance." Exhibit 1 at 11.

Relying upon the unchallenged evidence from the Defendants, the District Court held that "many other nurses asserted that they were able to take their breaks by using the buddy system or being relieved by a charge nurse or recourse [sic] nurse". However, the District Court did not evaluate commonality from the perspective of whether Defendants nonetheless did (or did not) provide legally-compliant breaks under these circumstances as mandated by the California Supreme Court in *Brinker*. *Id.* Without further explanation, the District Court here concluded that "adjudication of these claims would require an individual determination of whether a particular nurse was too busy, had no coverage, or both for each rest and meal break to which she was entitled." *Id.* Disregarding the testimony of Plaintiff's expert witness, the District Court ultimately concluded that "there is no way to tell on a classwide basis whether [Defendants] invariably prevented all putative class members from taking meal and rest breaks. Indeed, several putative class members indicated that they were able to take proper

breaks—a factor counseling against a commonality determination." *Id.* at p. 12.[4]

If courts were to use this District Court's rationale in finding that common issues do not predominate because some employees were able to get the breaks to which they were entitled, despite the employer's failure to comply with the laws in that regard, wage and hour class actions would never be certified

That some putative class members actually took some breaks goes only to the issue of damages and not the propriety of certification. *Leyva v. Medline Industries Inc*., 716 F.3d 510, 513-14 (9th Cir. 2013); *see also*, *Brinker*, *supra* ("In almost every class action, factual determinations of damages to individual class members must be made. Still we know of no case where this has prevented a court from aiding the class to obtain its just restitution."); *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir.1975) ("[t]he amount of damages is invariably an individual question and does not defeat class action treatment."); *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1089 (9th Cir.2010) ("The potential existence of individualized damage assessments ... does not detract from the action's suitability for class certification."). In deciding otherwise, the district court abused its discretion by applying the wrong

4 In disregarding her testimony on this issue, the District Court appears to have held that Plaintiff's expert was not qualified to render an opinion under Fed. R. Evid. 207, because she did not review the acuity of the patients or census information and thus could not come to a reliable inference about Defendants' staffing. *Id.* at pp. 11-12. Importantly, however, plaintiff's expert testified that she was able to render an opinion even absent this information. *See,* Expert Depo. 26:22-23, 41:17-20, 112:1-9, 132:19-23, 135:1-3, 153:23-154:5, 163:15-23; Expert Decl. at ¶¶13, 16-17.

legal standard. *See*, *Hinkson,* 585 F.3d at 1263.[5] In addition to *Brinker,* California appellate law has clearly held that the fact that some class members received breaks has no impact on certification of an action challenging the practices of the employer in failing to provide legally compliant breaks. See, *Bradley v. Networkers Intn'l, LLC,* 211 Cal.App.4th 1129 (2012); *Faulkinbury v. Boyd & Assoc., Inc*., 216 Cal.App.4th 220 (2013).

Third, the above also demonstrates the order's factual errors that concern the manner in which the District Court applied facts to the law. Wage Order No. 5 requires that nurses working a 12-hour shift are entitled to three ten minute rest breaks per four hours worked **or major fraction thereof**, which "insofar as practicable shall be in the middle of each work period." Wage Order No. 5, §12A (emphasis added). Plaintiff asserts that Defendants violate the Labor Code because 1) HR Policy 504 omits the "major fraction thereof" language and 2) Defendants do not provide three rest breaks for employees working shifts of 12 hours or more. As regards Plaintiff's rest break allegations the District Court concluded that "there is no issue of the nurses potentially not having received a break at a fraction of four hours, as 12 hours evenly divides into three, four-hour periods—and thus three

5 The District Court also found commonality based on Defendants' common policy of requiring all employees to sign a meal waiver as a condition of employment lacking because "[Defendants] submitted evidence that at least 28 employees refused to sign the waiver." *Id.* at 13. As stated above, this ruling is in error because Plaintiff was not provided an opportunity to vet to this evidence.

mandated rest breaks" because Defendants' written rest break policy states that nurses working 12 hours would receive a rest break for every three hours. Exhibit 1 at 10. Ruling on the merits of Plaintiff's claim, based entirely on its own interpretation of HR Policy 504, and in disregard of the evidence to the contrary, the District Court held that "[t]here is simply no 'fraction thereof' issue—and thus no commonality stemming from HR Policy 504." *Id.*at pp. 10-11. It was a misapplication of the law for the District Court to conclude that the language of Defendants' rest break policy is not in violation of the Wage Order or *Brinker*. This also is an improper ruling on the merits of Plaintiff's claims that was not necessary to determining the issue of commonality. *See, Wal–Mart Stores, Inc. v. Dukes*, – U.S. –, 131 S.Ct. 2541 (2011).

Fourth, the District Court committed manifest error in evaluating predominance based on its erroneous commonality findings (as set forth above), and based on improper application of *Comcast v. Behrend*. Exhibit 1 at 13-15. In finding that common questions did not predominate, the District Court dismissed Plaintiff's argument that Defendants' records could be used to determine damages, stating that *Comcast* requires that "damages must be 'capable of measurement on a classwide basis' to establish predominance." *Id.* In *Comcast*, the Supreme Court did not break any new ground on the standards for certifying a class under Rule 23(b)(3). As the dissent there noted, "the decision should not be read to require, as a

prerequisite to certification, that damages attributable to a classwide injury be measurable 'on a class-wide basis.'" *Id.* at 1436.[6] The District Court thus erred in holding Plaintiff to this standard.

Finally, the Court reached the erroneous conclusion that a Class is not ascertainable if some of the stated *sub-classes* are not administratively feasible and may be "fail safe" classes. Exhibit 1 at 7-9. In its ruling, the District Court did not address the ascertainability of Plaintiff's class as a whole, or her terminated sub-class. *Id.* This was error. Further, in concluding that her meal and rest break sub-classes were not ascertainable, the District Court found that they would necessarily entail a legal inquiry. *Id.* In so ruling, the Court stated that "there would be no way to send out individual notices without first making a legal determination of whether [Defendants] provided each putative class member with proper…breaks" ignoring the argument that, if these were indeed "failsafe" classes, they could be re-written. *Id.*

In so ruling, the District Court erred because, if these definitions were

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6 Prior to *Comcast*, this Court (as with every other circuit) had held that the predominance requirement can be satisfied despite the need for individual damages calculations. *See, e.g., Yokoyama, supra*. Indeed, numerous post-*Comcast* decisions have recognized that it should not be read as creating a new requirement for Rule 23(b)(3) certification, as the District Court here implied. *See, e.g. Leyva,* 716 F.3d at 514; *In re High-Tech Employee Antitrust Litig.*, 289 F.R.D. 555, 582 (2013); *In re Motor Fuel Temperature Sales Practice Litig.*, _ F.Supp.2d _, 2013 WL 1397125, *18 (D. Kan. Apr. 5, 2013); *Harris v. comScore, Inc.*, _ F.Supp.2d _, 2013 WL 1339262, * 10 n.9 (N.D. Ill. Apr. 22, 2013).

re-written, they would no longer be failsafe classes and a legal determination would not need to be made to ascertain each sub-class's members. *See, In re AutoZone, Inc., Wage & Hour Employment Practices Litig.*, 289 F.R.D. 526, 546 (N.D.Cal.2012), *citing, Heffelfinger v. Elec. Data Sys. Corp.*, No. 07–101 MMM, 2008 WL 8128621, at *10 n. 57 (C.D.Cal. Jan. 7, 2008) (the Ninth Circuit does not seem to have "explicitly held that fail-safe classes are precluded."). Indeed, the Court would have discretion to redefine the subclass, or to request that Plaintiff do so, if it finds that it results in ascertainability problems. Thus, it was error for the Court to simply rule that the meal and rest break sub-classes were not ascertainable.

CONCLUSION

As set forth herein, the District Court's denial of class certification is questionable and operates as a death knell requiring review. In addition, the denial of the certification prior to Plaintiff being accorded the right to present her full record supporting certification presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and to future class actions generally. Finally, the District Court's class certification decision is manifestly erroneous, as it was based on an incomplete record, an incorrect Rule 23 standard, the improper application of facts to the relevant law, and the erroneous conclusion that a Class is not ascertainable if some of the stated *sub-classes* are not administratively feasible and may be "fail safe" classes. As such, Plaintiff

respectfully requests that this Honorable Court grant interlocutory appeal of the District Court's Order Denying Plaintiff's Motion for Class Certification.

Respectfully submitted,

Attorneys for Plaintiff/Petitioner