Case No. 17-17510

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WELLS FARGO BANK, N.A.;

Appellant/Defendant,

v.

HUY NGUYEN, on behalf of himself and others similarly situated,

Appellee/Plaintiff.

On Appeal from the United States District Court
for the Northern District of California
Case No. 15-CV-05239 JCS
Hon. Joseph C. Spero

BRIEF OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE

Peter Rukin (SBN 178336)
RUKIN HYLAND & RIGGIN LLP
1939 Harrison Street, Suite 290
Oakland, CA 94612
Tel: (415) 421-1800

Counsel for Amicus Curiae
California Employment Lawyers Association

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), undersigned counsel for amicus makes the following disclosures:

The California Employment Lawyers Association (CELA) hereby certifies as follows: *amicus* has no parent corporations, has no stock, and hence, no public company owns 10% of more of its stock.

DATED: October 30, 2018 By: */s/ Peter Rukin*
Peter Rukin

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

TABLE OF AUTHORITIES (con't)

TABLE OF AUTHORITIES (con't)

INTEREST OF AMICUS CURIAE

The California Employment Lawyers Association (CELA) is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including individual, class, and representative actions enforcing California's wage and hour laws. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the public policies embodied in California employment laws. The organization has taken a leading role in advancing and protecting the rights of California workers, which has included submitting amicus briefs and letters and appearing before the California Supreme Court in employment rights cases such as *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007), *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012), *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), and *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522 (2014), and in cases before the Ninth Circuit.

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), amicus curiae submits this brief without an accompanying motion for leave to file or leave of court because all parties have consented to its filing.[1]

---

[1] No counsel for a party authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief, and no person other than *amicus curiae*, its members, or its counsel

SUMMARY OF ARGUMENT

California Labor Code Section 2802 ("LC Section 2802") embodies California's strong public policy in favor of indemnifying workers for expenses they incur in the performance of their duties. The statute expressly requires employers to reimburse workers for all "necessary expenditures," which includes all "reasonable costs" expended by an employee in the course and scope of her employment. Reasonableness is an objective standard, which can be determined by examining common evidence regarding an employer's work requirements and expectations.

Wells Fargo's challenge to the district court's class certification order rests upon a flawed interpretation of LC Section 2802. First, Wells Fargo asks the Court to disregard the plain language of LC Section 2802(c), which defines "necessary expenditures to include "all reasonable costs" incurred by the employee. Ignoring statutory language would be ill-advised in most contexts, but it is particularly wrong here, where the underlying statute is a remedial worker protection law that must be construed broadly in favor of coverage. Second, determining whether an expenditure is reasonable does not require an individualized inquiry into each employee's motivations for incurring (or not incurring) the expense, because the test is an objective one that can be answered using common proof regarding the

---

contributed money that was intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

employees' job duties and the employer's expectations. Courts regularly decide similar issues on a class-wide basis using predominantly common proof.

ARGUMENT

I. LC Section 2802 Embodies California's Strong Public Policy in Favor of Indemnifying Employees for Expenses.

California Labor Code Section 2802 reflects California's longstanding "strong public policy" in favor of indemnifying workers for costs arising from their employment. *Edwards v. Arthur Andersen*, 44 Cal. 4th 937, 952 (2008). LC Section 2802 "is designed to prevent employers from passing their operating expenses on to their employees." *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554, 562 (2007). The right to indemnification under LC Section 2802 is part of a broader California public policy "in favor of full and prompt payment of wages due an employee," *Kerr's Catering Serv. v. Department of Industrial Relations*, 57 Cal. 2d 319, 326 (1962). That right is directly impaired by an employer's practice of making "adjustments to"—i.e., deductions from—an employee's paycheck for expenses that the employer is legally responsible for bearing, just as Wells Fargo did here.

Appellant and its *amicus* say that Plaintiff's legal claims are an assault on the freedom to contract (*See, e.g.*, Business Roundtable Brief, *passim*), but such *laissez faire* principles have no role in construing LC Section 2802. An employee's right to indemnification from his employer for expenses incurred is fundamental and *non-*

waivable—it cannot be contracted around. *See* LC Section 2804; *Edwards,* 44 Cal. 4th at 953 (indemnity rights "are nonwaivable under Labor Code section 2802, and any agreement or release that attempts to waive those rights is unlawful").

II. LC Section 2802 Defines Necessary Expenditures to Include Reasonable Business Expenses.

LC Section 2802(a) provides that an employer shall indemnify its employee for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties." In turn, LC Section 2802(c) defines "necessary expenditures or losses" to include "all reasonable costs." Merriam Webster defines "cost" as "the amount or equivalent paid or charged for something," or "the outlay or expenditure (as of effort or sacrifice) made to achieve an object." "cost." Merriam-Webster Online Dictionary. 2018. https://www.merriam-webster.com/dictionary/cost (as of 28 October 2018). The straightforward operation of these two clear statutory provisions require an employer to reimburse an employee for all reasonable expenditures that the employee incurs in the discharge of his or her duties.

Wells Fargo contends that, notwithstanding the unambiguous language of LC Section 2802, the legislative history of LC Section 2802(c) suggests that the subsection only applies to attorney's fees incurred in enforcing rights under LC Section 2802. (Appellant's Br. at 20). There are two problems with this argument. First, where, as here, the language of a statute is clear, the Court should not delve

into its legislative history. *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (where the statutory text is plain and unambiguous, the court "must apply the statute according to its terms"). Thus, non-textual arguments about what the California legislature "intended" in passing Senate Bill 1305 (Appellant's Br. at 20) are beside the point. The Court should assume that the California legislature meant what it said and apply the law as written.

Second, even were LC Section 2802(c) ambiguous, the result would be the same, because canons of construction and LC Section 2802's overall purpose compel the conclusion that "necessary expenditures and losses" includes reasonable expenses that an employee incurs in the course and scope of employment. *Ileto v. Glock, Inc*., 565 F.3d 1126, 1133 (9th Cir. 2009) (court may use canons of construction and the statute's overall purpose to ascertain intent). As a fundamental worker protection law, LC Section 2802 must be construed broadly to effectuate its remedial purpose. *Noe v. Superior Court*, 237 Cal. App. 4th 316, 330 (2015) ("statutes governing conditions of employment are to be construed broadly in favor of protecting employees."); *Lieberman v. Hawkins (In re Lieberman)*, 245 F.3d 1090, 1092 (9th Cir. 2001) ("In interpreting [a state] statute, we apply California rules of construction."). And LC Section 2802's overall remedial purpose is served by construing "necessary expenditures" to include reasonable business expenses incurred by an employee in the course and scope of employment. *Cf. Espejo v. The Copley Press, Inc*., 13 Cal. App. 5th 329, 372

(2017) ("The remedial nature of section 2802 *requiring employee compensation for reasonable business expenses* . . . militates in favor of a reasonably expeditious methodology for calculating [mileage expenses]") (emphasis added).

III. The Reasonableness of a Business Expense Is Governed by an Objective Standard and Susceptible to Common Proof.

Whether business expenses like Wells Fargo's HMC website program and FASTMail tool are reasonable can be decided on common evidence because the operative test is an objective one that does not depend on each worker's individual reasons for using (or not using) the Wells Fargo marketing tools. California courts in a wide variety of contexts have found reasonableness to be an objective standard. *See, e.g., Aerojet-General Corp. v. Transport Indemnity Co.,* 17 Cal. 4th 38, 45, 62 (1997) (Whether an insured's site investigation expenses are "reasonable and necessary" must be determined under an objective standard); *Yanowitz v. L'Oreal*, Inc., 106 Cal. App. 4 1036, 1050 (2003) (whether employer's conduct constitutes adverse action under the California Fair Employment and Housing Act is determined by an "objective" test that asks whether the conduct is "reasonably likely to deter employees from engaging in protected activity."); *Lazar v. Hertz Corp*., 143 Cal. App. 3d 128, 141 (1983) (The duty of good faith and fair dealing is assessed under an objective standard under California law, which turns on parties'

"objectively reasonable conduct," making class certification appropriate).[2] Indeed, the very word "reasonable" incorporates an objective standard. *Ceja v. Rudolph & Sletten, Inc.*, 194 Cal. App. 4th 584, 601 (2011) ("Reasonableness . . . refers to an objective quality" and is governed by an objective standard).

A similar objective standard governs the reasonableness analysis under LC Section 2802. Whether Wells Fargo's HMC website program and FASTMail tool were reasonable expenses can be determined by looking at the plethora of common evidence in the record below, including (1) Wells Fargo's reimbursement policy, which specifically identified the HMC website and FASTMail as "ordinary and necessary" and "reasonable [and] appropriate" business expenses; (2) Wells Fargo's common promotional materials, which hyped the programs as "vital" and "valuable tools"; (3) Wells Fargo's survey reflecting that 90% of the respondents considered the marketing tools to be "valuable/very valuable/extremely valuable"; (4) the fact that all HMCs share the same job duties; (5) the fact that Wells Fargo gave HMCs the same promotional material regarding the individual HMC websites

[2] *See also Knass v. Blue Cross of California*, 228 Cal. App. 3d 390, 396 (1991) (in assessing whether appeal is frivolous, subjective standard looks to appellant's motives, while "the objective standard considers whether a reasonable person would agree that the appeal was completely without merit."); *Blue v. Office of Inspector General*, 23 Cal. App. 5th 138, 159-161 (2018) (test for applicability of Weingarten rights "is an objective one" which "turns on whether or not a reasonable person" would believe he is under investigation); *FEI Enterprises, Inc. v. Yoon*, 194 Cal. App. 4th 790, 800 (2011) (contrasting subjective test with "objective, i.e., reasonable person, test") (emphasis in original).

and FASTMail; and (6) the fact that HMCs worked under the same reimbursement policy.

Wells Fargo's contrary arguments (Appellant's Br. at 19-21) are unpersuasive. The fact that some HMCs did not use the marketing products—or believed that they did not need to use them—is immaterial because it does not tend to prove or disprove the relevant question for the trier of fact: whether the expenses, *when incurred*, constituted a reasonable cost. Because the test is objective, the relevant inquiry centers on *Wells Fargo's conduct*, not the individual motivations of HMCs in using the product. Courts facing similar "reasonableness" inquiries in different contexts have certified the claims for class treatment by focusing on the defendant's common conduct and centralized practices. *See, e.g., Sav-On Drug Stores, Inc. v. Superior Court,* 34 Cal. 4th 319, 333 (2004) (court may consider defendant's class-wide behavior, including its reasonable expectations regarding the job in question, to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate); *Bradach v. Pharmavite, LLC*, 735 F. App'x 251, 254-55 (9th Cir. 2018) (reversing denial of class certification; California Unfair Competition Law and Consumer Legal Remedies Act claims are governed by an objective standard in which individual beliefs of consumers are immaterial); *Ehret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884, 901-902 (N.D. Cal. 2015) (granting certification of California Consumer Legal Remedies Act claim; because test involves "objective reasonable person

standard, proof focuses on Uber's conduct which applied to the entire class and can be determined relative to the class as a whole").

Further, because the individual beliefs of class members are not material to the liability inquiry (whether the expenses are reasonable), the alleged differences Wells Fargo identifies—the fact that some HMCs did not use the company's marketing tools and hence did not suffer a wage deduction—are only relevant to damages. "But damages determinations are individual in nearly all wage-and-hour class actions" and do not warrant denial of class certification. *Leyva v. Medline Industries,* 716 F.3d 510, 513 (9th Cir. 2013) (reversing district court's denial of class certification as an abuse of discretion); *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167-1168 (9th Cir. 2014) (the proper focus of analysis is on the defendant's conduct, and "even an instance of injurious conduct satisfies Rule 23, *Dukes*, and due process") (internal citations omitted).

Finally, Wells Fargo's contention that "whether an employee reasonably understood the purchase at issue was necessary is a predominant individualized issue" (Appellant's Br. at 21) makes no sense. Wells Fargo fails to identify the sort of individualized evidence that would warrant a finding in favor of or against an employee under its theory of liability, let alone explain how such evidence would predominate over the array of common proof in the record. Wells Fargo fails to put any flesh on the bones of its primary argument against class certification because its necessary merits implication—that HMCs who used tools encouraged and made

available by Wells Fargo to do work for Wells Fargo must pay the cost of those tools out of their wages—is untenable, and the individual testimony of HMCs could not make it less so. *Amicus* are unaware of any California court decision holding that an employer may require an employee to pay the cost of tools provided by the employer and which the employer communicated were reasonable and necessary for the performance of the job. Such a ruling is fundamentally at odds with, and would gut, the protections of LC Section 2802.

CONCLUSION

For the reasons stated above, amicus curiae respectfully requests that the class certification order be affirmed.

DATED: October 30, 2018

Respectfully submitted,

RUKIN HYLAND & RIGGIN LLP

By: */s/ Peter Rukin*
Peter Rukin

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief uses a proportionally spaced Times New Roman typeface, 14-point, and that the text of the brief contains 2,407 words according to the word count provided by Microsoft Word, as required by Federal Rule of Appellate Procedure 32.

DATED: October 30, 2018

By: */s/ Peter Rukin*
Peter Rukin
RUKIN HYLAND & RIGGIN LLP
Attorney for Amicus Curiae
California Employment Lawyers Association

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 30, 2018. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: October 30, 2018

By: */s/ Peter Rukin*
Peter Rukin
RUKIN HYLAND & RIGGIN LLP
Attorney for Amicus Curiae
California Employment Lawyers Association