S234969

IN THE SUPREME COURT OF CALIFORNIA

DOUGLAS TROESTER,
Plaintiff and Appellant,

v.

STARBUCKS CORPORATION,
Defendant and Respondent.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CASE NO. 14-55530

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF DEFENDANT AND RESPONDENT STARBUCKS CORPORATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Regulations

Miscellaneous

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT STARBUCKS CORPORATION

Pursuant to California Rules of Court, rule 8.520(f)(1), the Association of Southern California Defense Counsel (the Association) requests permission to file the attached amicus curiae brief in support of defendant and respondent Starbucks Corporation.[1]

[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

The Association is a preeminent regional organization of lawyers who specialize in defending civil actions. It is comprised of approximately 1,100 leading attorneys in California. The Association is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice. The Association is also actively engaged in assisting courts by appearing as amicus curiae in cases involving issues of vital significance to its members.

Among the clients represented by the Association's members are many California employers. The Association's members assist these businesses in complying with California's wage laws. The Association's members therefore benefit from clarity in the California rules governing employment law since this helps them to better assist their clients in complying with the law. This case is of significant interest to the Association because this appeal calls on this Court to decide a question of fundamental importance to every California employer: whether California law requires employers to pay employees for *de minimis* amounts of work time (i.e., a few seconds or minutes of work beyond the scheduled working hours) that cannot as a practical administrative matter be easily recorded for payroll purposes. The United States Supreme Court has long held that employees may not recover for such *de minimis* amounts of time in wage and hour cases brought under federal labor law, and courts have since applied that "*de minimis*" rule to wage claims arising under California law. Businesses that have relied on this rule might now face crushing financial liability if this Court reaches a contrary conclusion in this case.

The proposed amicus brief supplements the parties' briefs by examining authorities that support the application of the *de minimis* rule to California wage law, including the longstanding doctrine *de minimis non curat lex*, the Division of Labor Standards Enforcement's opinion letters adopting the *de minimis* rule as part of California law, and the Legislature's acquiescence in this long-standing administrative practice, all of which should guide this Court's analysis of the issue here. This amicus brief also provides a broader perspective on how the legal issues raised in this appeal will affect California employers, and offers information concerning how other jurisdictions have handled issues like those presented here.

Accordingly, the Association requests that this Court accept and file the attached amicus curiae brief.

April 13, 2017

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AMICUS CURIAE BRIEF

INTRODUCTION

Decades ago, the United States Supreme Court recognized a "*de minimis*" rule for cases where employees bring wage and hour claims that seek compensation for "negligible" amounts of time. (*Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 692 [66 S.Ct. 1187, 90 L.Ed. 1515] (*Anderson*).) Under this rule, employees generally "cannot recover for otherwise compensable time if it is *de minimis*." (*Lindow v. United States* (9th Cir. 1984) 738 F.2d 1057, 1062 (*Lindow*).)

Although the United States Supreme Court articulated this rule in a wage and hour case brought under the federal Fair Labor Standards Act (FLSA), the rule is not grounded in principles of federal law and both federal and state appellate courts have indicated that the rule applies to wage claims arising under California law. (See, e.g., *Corbin v. Time Warner Entertainment-Advance/Newhouse Partnership* (9th Cir. 2016) 821 F.3d 1069, 1081, fn. 11 (*Corbin*); *Gillings v. Time Warner Cable LLC* (9th Cir. 2014) 583 F.App'x. 712, 714 (*Gillings*); *Gomez v. Lincare, Inc.* (2009) 173 Cal.App.4th 508, 527-528 (*Gomez*).)

Plaintiff Douglas Troester argues that this Court should reach a contrary conclusion. But his argument rests upon an analysis which is flawed in several critical respects.

First, the *de minimis* rule is a generally applicable standard and not, as plaintiff contends, a "federal" doctrine that can be restricted to federal wage claims. When the United States Supreme

Court first recognized the rule in an FLSA lawsuit, it did so based not on any unique aspect of federal law but instead on the common sense proposition that where only a few seconds or minutes of work beyond the scheduled work hours are at issue, they can be disregarded as trivial. (*Anderson, supra,* 328 U.S. at p. 692.)

This rule is thus an application of the "doctrine *de minimis non curat lex* (the law does not take account of trifles)." (*Sandifer v. U.S. Steel Corp.* (2014) 571 U.S. __ [134 S.Ct. 870, 880, 187 L.Ed.2d 729] (*Sandifer*).) This doctrine has deep roots at common law, has been codified by the California Legislature, and has been applied by California courts in a broad range of contexts. Because the *de minimis* rule derives from a doctrine that ordinarily governs all enactments, including California laws, there is no reason this same rule does not apply with equal force to California wage claims. Indeed, plaintiff's contrary position is out of step not just with California and federal authorities but with numerous decisions in other states that have expressly applied the *de minimis* rule to wage claims.

Second, plaintiff's contention that the *de minimis* rule is "incompatible" (OBOM 35) with the Legislature's "clear intent expressed in the Labor Code's provisions" (OBOM 16) is erroneous. Courts have consistently applied the *de minimis* standard to wage claims under California law. Further, courts from many different jurisdictions have recognized that the *de minimis* rule applies to statutes not materially different from California's laws. Additionally, California's Division of Labor Standards Enforcement (DLSE)—"the state agency charged with administering and

enforcing the state's labor statutes and wage order regulations" (*Sumuel v. ADVO, Inc.* (2007) 155 Cal.App.4th 1099, 1109 (*Sumuel*))—has repeatedly issued opinion letters adopting the *de minimis* standard under California law. (See, e.g., Cal. Dept. of Industrial Relations, DLSE Opn. Letter No. 1994.02.03-3 (Feb. 3, 1994) p. 4 <http://goo.gl/HKTk1q> [as of Apr. 11, 2017] ["the Division has adopted the *de minimis* rule relied upon by the federal courts"].) The California Legislature's decision not to modify the statutory scheme to abrogate the *de minimis* rule in light of the DLSE's longstanding administrative practice adopting the rule is a strong reason for this Court to follow the DLSE's lead.

Plaintiff argues that California labor law's silence on this issue is dispositive. But the general applicability of the *de minimis* rule, combined with the Legislature's acquiescence in the decisions applying that rule to California wage claims, show that California labor law was never meant to prohibit its use. There is no reason to deviate from this widely accepted doctrine that repeatedly has been found to apply to wage claims not just under the law of this state but under federal law and the laws of other jurisdictions.

Third, contrary to plaintiff's contention, public policy weighs in favor of applying the *de minimis* rule to California wage and hour law. Because "it would be impracticable for [employers] to capture" (*Troester v. Starbucks Corp.* (C.D.Cal., Mar. 7, 2014, No. CV 12-7677 GAF (PJWx)) 2014 WL 1004098, at p. *4 (*Troester*) [nonpub. opn.]) "a few seconds or minutes of work beyond the scheduled working hours" of each employee (*Anderson, supra,* 328 U.S. at p. 692), requiring employers to calculate and compensate employees for

negligible time imposes a *substantial* burden on employers without creating a meaningful benefit to employees. Certainly, employee time must be respected, and in the limited circumstance when an employee is required to give up a "*substantial* measure of his time and effort," the employee must be appropriately compensated. (*Ibid.*, emphasis added.) But adopting a policy that would render all time-keeping systems unlawful based on mere minutes, seconds, or milliseconds is unworkable, as the United States Supreme Court recognized when it articulated the rule over 70 years ago.

Accordingly, this Court should confirm the continued vitality of the longstanding principle that "[t]he law disregards trifles" (Civ. Code, § 3533) and apply the *de minimis* rule to California wage claims.

LEGAL ARGUMENT

I. THE *DE MINIMIS* RULE IS NOT LIMITED TO FEDERAL CASES BUT INSTEAD REFLECTS THE LONGSTANDING, WIDELY-ADOPTED PRINCIPLE THAT THE LAW DISREGARDS TRIFLES.

A. The *de minimis* rule should be applied to California wage claims because it derives from the traditional common law doctrine *de minimis non curat lex*, which governs *all* enactments, including those in California.

The United States Supreme Court first recognized the *de minimis* rule for wage claims more than seven decades ago.

(*Anderson, supra*, 328 U.S. at p. 692.) Although the Court did so in a case construing the FLSA, the rule is by no means tied to that federal law. (See *ibid.*) As the Supreme Court explained, the *de minimis* rule embodies the common sense proposition that the law does not care about "negligible" trivialities: "in light of the realities of the industrial world," when the issue involves "only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded." (*Ibid.*; see also 29 C.F.R. § 785.47 [following *Anderson* to provide that "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded" due to "industrial realities"].)

The *de minimis* rule does not give employers license to freely avoid compensating their employees for work done in increments of time less than an hour. To the contrary, the "*de minimis* rule is concerned with the practical administrative difficulty of recording small amounts of time for payroll purposes" and employers must therefore "compensate employees for even small amounts of daily time *unless that time is so miniscule that it cannot, as an administrative matter, be recorded for payroll purposes.*" (*Lindow, supra*, 738 F.2d at pp. 1062-1063.) Consequently, courts have long "determin[ed] whether otherwise compensable time is *de minimis*" by considering three key guideposts that significantly narrow the *de minimis* rule's reach: "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work."

(*Id.* at p. 1063; accord, *Carlsen v. U.S.* (Fed.Cir. 2008) 521 F.3d 1371, 1380-1381 [adopting Ninth Circuit's *Lindow* test]; *De Asencio v. Tyson Foods, Inc.* (3d Cir. 2007) 500 F.3d 361, 374-375 [same]; *Reich v. Monfort, Inc.* (10th Cir. 1998) 144 F.3d 1329, 1333-1334 [same]; *Reich v. New York City Transit Authority* (2d Cir. 1995) 45 F.3d 646, 653 [same].) In short, *Anderson*'s *de minimis* rule "applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities." (29 C.F.R. § 785.47.)

The *de minimis* rule derives from the common law "doctrine *de minimis non curat lex* (the law does not take account of trifles)," whose "roots . . . stretch to ancient soil." (*Sandifer*, *supra*, 134 S.Ct. at p. 880; see *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 514 (*Gerawan*) [this doctrine "is a maxim of ancient origins"]; Nemerofsky, *What Is a "Trifle" Anyway?* (2002) 37 Gonz. L.Rev. 315, 316-321, 341 [tracing this maxim to the English Court of Chancery].) This common law doctrine has been applied in the United States for over 200 years, and in California for well over 100 years. (See *Davidson v. Devine* (1886) 70 Cal. 519, 521 ["the law disregards trifles [citation], and as only *one cent* is involved in the determination of the question at issue, the doctrine of *De minimis non curat lex* should be invoked, and the judgment of the court below should be affirmed"]; *Moffett v. Ayres* (1810) 3 N.J.L. 655 ["*De minimis non curat lex;* it is too, small a thing to take notice of"].)

The function of the doctrine *de minimis non curat lex* is to place "outside the scope of legal relief" the type of injuries,

"normally small and invariably difficult to measure, that must be accepted as the price of living in society." (Nemerofsky, *supra*, 37 Gonz. L.Rev. at p. 323, internal quotation marks omitted.) The maxim signifies "that mere trifles and technicalities must yield to practical common sense and substantial justice" (*Goulding v. Ferrell* (1908) 106 Minn. 44, 45 [117 N.W. 1046]) so as "to prevent expensive and mischievous litigation, which can result in no real benefit to complainant, but which may occasion delay and injury to other suitors" (*Schlichtman v. New Jersey Highway Authority* (N.J.Super.Ct. Law Div. 1990) 243 N.J.Super. 464, 472 [579 A.2d 1275] (*Schlichtman*); see also Veech & Moon, *De Minimis Non Curat Lex* (1947) 45 Mich. L.Rev. 537, 543-544 ["The function of the maxim is, therefore, as an interpretative tool to inject reason into technical rules of law and to round-off the sharp corners of our legal structure"]).

Because the doctrine *de minimis non curat lex* "is a maxim of ancient origins" (*Gerawan, supra*, 24 Cal.4th at p. 514), it is "part of the established background of legal principles against which *all* enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." (*Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.* (1992) 505 U.S. 214, 231 [112 S.Ct. 2447, 120 L.Ed.2d 174], emphasis added; see Manning, *Textualism and the Equity of the Statute* (2001) 101 Colum. L.Rev. 1, 114 ["all statutes are now enacted against the venerable maxim '*de minimis non curat lex*' " (emphasis added)].) Accordingly, since the *de minimis* rule derives from a common law doctrine that typically governs *all* enactments, including those in California, it is not a

"federal" standard that can be restricted to federal law. Rather, it is a generally applicable rule and must be applied to California wage claims.

B. California courts have long recognized that the maxim *de minimis non curat lex* is a fundamental part of California law and apply it in a broad range of contexts.

The maxim *de minimis non curat lex* is a bedrock component of California law and was codified in California Civil Code section 3533 in 1872. (See Civ. Code, § 3533 ["law disregards trifles"].) This maxim has influenced a broad range of California legal issues, including contract, tort, civil, and criminal matters. (Nemerofsky, *supra*, 37 Gonz. L.Rev. at p. 324.) The doctrine conserves judicial resources and forestalls expensive litigation of inconsequential matters. (*Ibid.*) Indeed, California case law demonstrates wide acceptance of the *de minimis* maxim. For example, in addition to the authorities cited by Starbucks (ABOM 18-19), California courts have applied the doctrine to:

- evidence not satisfying the substantial factor causation test (*People v. Caldwell* (1984) 36 Cal.3d 210, 220-221);
- a $16 discrepancy between the amount of a cost award in an order and the clerk's notice of that order, which the Court of Appeal held was *de minimis* and did not divest the trial court of jurisdiction or excuse payment (*People v. National American Ins. Co.* (1995) 32 Cal.App.4th 1176, 1182 ["The Legislature expressed

the concept in modern terms in 1872: 'The law disregards trifles' "], citing Civ. Code, § 3533);

- a 12/3650 share of retirement benefits that the parties and the court treated as a *de minimis* consideration (*In re Marriage of Ward* (1975) 50 Cal.App.3d 150, 154, fn. 1, citing Civ. Code, § 3533, disapproved of on other grounds by *In re Marriage of Brown* (1976) 15 Cal.3d 838);

- arguments on appeal that affected only $12.48 out of a $10,778.73 judgment (*Buffalo Arms, Inc. v. Remler Co.* (1960) 179 Cal.App.2d 700, 705 ["To endeavor to erect these minor discrepancies into triable issues of fact requiring reversal of the judgment . . . is to make a mockery of the summary judgment procedure. It is a maxim as old as our jurisprudence that 'the law disregards trifles.' "], quoting Civ. Code, § 3533);

- an adoption referral order that did not authorize a parental termination action but was construed as if it did "since the law disregards trifles" (*In re Eli F.* (1989) 212 Cal.App.3d 228, 236, citing Civ. Code, § 3533);

- a claim for material breach of a logging contract when only one tree snag was left standing (*Pfaff v. Fair-Hipsley, Inc.* (1965) 232 Cal.App.2d 274, 278 ["We think that the rule of 'de minimis' is applicable here"], quoting Civ. Code, § 3533);

- a $10 dispute over costs in a judicial sale involving $35,000 (*Barry v. Slattery* (1932) 119 Cal.App. 727, 730, citing Civ. Code, § 3533);

- an eight-cent difference in the calculation of accrued interest that the court considered "too trifling to be considered as

grounds for requiring a trial" (*Layport v. Rieder* (1939) 37 Cal.App.2d Supp. 742, 748, disapproved of on other grounds by *Heald v. Friis-Hansen* (1959) 52 Cal.2d 834);

- an award of 45 cents in court costs for the transmission of briefs (*Sime v. Hunter* (1921) 55 Cal.App. 157, 159-160, citing Civ. Code, § 3533);
- a boundary line that the trial court erroneously placed "a trifle to the north" (*McKenzie v. Nichelini* (1919) 43 Cal.App. 194, 197 ["the error is so small that we think it is a case for the application of the legal maxim 'The law disregards trifles' "], quoting Civ. Code, § 3533); and
- a challenge to only $17.70 out of a $1,000 judgment (*Brady v. Ranch Mining Co.* (1907) 7 Cal.App. 182, 185 [the contention that the judgment "should be reduced to the extent of $17.70 involves the maxim, '*De minimis*' "]).

These authorities confirm the doctrine *de minimis non curat lex* is a fundamental part of California law. Courts have long applied general maxims of statutory interpretation and other generally applicable maxims that are codified in California's Civil Code to California wage claims. (See, e.g., *Johnson v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal.App.4th 729, 736-739 [applying maxims of statutory construction to state claim for unpaid overtime wages]; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726, citing Civ. Code, § 3523 [applying legal maxim "for every wrong there is a remedy" to state claim for unpaid overtime wages]; *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 437 [relying on " 'maxim of statutory construction, *expressio unius est exclusio*

alterius' " to invalidate Wage Order section which exempted employees covered by qualifying collective bargaining agreements from meal period requirements]; *Gateway Community Charters v. Spiess* (2017) 9 Cal.App.5th 499, 504 ["to assist us in the interpretation of the phrase in [Labor Code section 220, subdivision (b)]—'other municipal corporation'—we turn to the related maxims of construction of *noscitur a sociis* ('literally, "it is known from its associates" ') and *ejusdem generis* ('literally, "of the same kind" ')"].) Because the *de minimis* rule derives from the foundational, generally applicable doctrine *de minimis non curat lex*, it is not a "federal" standard that can or should be restricted to federal law.

C. Courts nationwide apply the *de minimis* rule to state law claims, including state wage claims.

Courts in other states have recognized that the *de minimis* rule reflects a generally applicable standard that applies equally to state wage claims. (See, e.g., *Bartoszewski v. Village of Fox Lake* (1995) 269 Ill.App.3d 978, 985 [647 N.E.2d 591, 596] [applying the *de minimis* test to state wage claim for unpaid overtime where plaintiffs spent 10 minutes at roll call before each shift]; *England v. Advance Stores Co. Inc.* (W.D.Ky. 2009) 263 F.R.D. 423, 444-445 [applying the *de minimis* test to claim for unpaid overtime wages under the Kentucky Wages and Hours Act and holding *de minimis* rule is *not* "a creature of the FLSA" because "the principle of *de minimis non curat lex* has been recognized in the common law of Kentucky . . . for many years"]; *England*, at p. 444 ["[O]ne cannot say with any persuasive force that Kentucky courts do not recognize