

**Docket No. 09-16370**

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*In the*  
**United States Court of Appeals**  
*For the*  
**Ninth Circuit**

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JASON CAMPBELL and SARAH SOBEK,

*Plaintiffs-Appellees,*

v.

PRICEWATERHOUSECOOPERS, LLP,

*Defendant-Appellant.*

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*Appeal from a Decision of the United States District Court for the Eastern District of California,  
No. 06-CV-02376 · Honorable Lawrence K. Karlton*

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**AMICUS CURIAE BRIEF OF AMERICAN INSTITUTE  
OF CERTIFIED PUBLIC ACCOUNTANTS IN SUPPORT OF  
APPELLANT FOR REVERSAL**

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## **CORPORATE DISCLOSURE STATEMENT**

The American Institute of Certified Public Accountants has no parent corporation and no publicly held corporation owns 10% or more of its stock. The American Institute of Certified Public Accountants is a professional membership society. It has no shareholders.

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**CONSENT TO FILING OF BRIEF OF AMICUS CURIAE**

Pursuant to Federal Rule of Appellate Procedure 29(a) and Ninth Circuit Rule 29-2(a), all parties have consented to the filing of this Amicus Curiae Brief. This Brief is submitted by the American Institute of Certified Public Accountants in support of Defendant-Appellant PricewaterhouseCoopers LLP. In particular, the Institute joins the substantive positions advanced by PricewaterhouseCoopers LLP in its Opening Brief with respect to both the Professional and Administrative Exemptions.

## I. STATEMENT OF INTEREST

The American Institute of Certified Public Accountants (“AICPA” or the “Institute”) is the national organization of the certified public accounting profession, all of whose more than 340,000 members are certified public accountants. The AICPA’s service spans more than one hundred years and extends to certified public accountants in academia, government and business as well as those who provide accounting services through firms of all sizes, including solo practitioners.

Chief among the AICPA’s purposes is the promotion and maintenance of high professional standards of practice. In pursuit of these ends, the AICPA, through its Auditing Standards Board, has issued auditing, attestation, and quality control standards applicable to the performance and issuance of audit and attestation reports in accordance with the Institute’s Bylaws and the *Code of Professional Conduct*. In the State of California, the AICPA’s auditing standards are accepted as governing by the California Board of Accountancy, which is the governmental entity responsible for the regulation of the practice of public accountancy in California.

Here, the District Court ruled that a class of unlicensed accounting professionals employed by Defendant-Appellant PricewaterhouseCoopers LLP (“PwC”) are precluded, *as a matter of law*, from exemption from California

overtime requirements under the Professional Exemption and the Administrative Exemption set forth in California Wage Order 4-2001 ("Wage Order"). In light of the District Court's ruling in this regard, the AICPA has a special interest in this matter. A significant portion of the Institute's membership are employed by or are partners at firms similar to PwC. Consequently, the AICPA has an interest in ensuring that the Wage Order is properly applied pursuant to its plain language, which the District Court failed to do.

The AICPA also has a special interest in this matter because the District Court, in determining that the PwC class members cannot meet the requirements of the Administrative Exemption as a matter of law, expressly relied upon certain AICPA Auditing Standards<sup>1</sup> to support its conclusion. The AICPA respectfully submits that the District Court erred in its reading and application of the applicable Auditing Standards, and its Administrative Exemption ruling cannot stand. The Institute respectfully submits that its interpretation of its own standards should be recognized by the Court.

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<sup>1</sup> The record in this case contains AU § 310 and § 311 of the AICPA's June 1, 2006 Auditing Standards (ER 296-304). These standards have been subsequently revised, and § 310 has been incorporated into the revised § 311. Section 311 of the current AICPA Auditing Standards is available here: <http://www.aicpa.org/download/members/div/auditstd/AU-00311.PDF>. None of the revisions to these standards are material to the issues set forth herein."

For these and the reasons set forth more fully below, the AICPA has a strong interest in this matter and respectfully requests that the ruling of the District Court be reversed.

## II. SUMMARY OF ARGUMENT

The District Court's Order found that class members cannot establish themselves as exempt under California's Administrative Exemption because, *inter alia*, the AICPA's Auditing Standards "mandate supervision" in excess of mere "general supervision." Not so. The relevant AICPA Standards establish no specific rule of supervision whatsoever; rather, what constitutes appropriate supervision in any given audit can only be assessed on an individualized basis, which is precisely what the standards express.

Moreover, in finding that some kind of "bright line" requirement exists, the Order is both internally inconsistent and inconsistent with previous findings made by the District Court. In particular, in its Order granting class certification, the District Court found that the AICPA Auditing Standards "*envision . . . that the amount of supervision that is appropriate varies on an individual basis.*" This finding, which the AICPA views as correct and which is consonant with California law, simply cannot be reconciled with the District Court's subsequent finding that some specific and inflexible level of supervision has been entrenched by the standards.

In addition, the District Court erred in holding that unlicensed accountants cannot be exempt under subsection (b) of the Professional Exemption—the Learned Professions Exemption—merely because “accounting” is one of the eight enumerated professions. The District Court conceded that “[n]othing in the text of the regulation itself suggests that the enumerated professions cannot also be learned professions.” Therefore, the District Court’s subsequent expedition into questions of statutory interpretation and legislative intent was improper. The plain words of the pertinent regulation allow enumerated professionals to become exempt as learned professionals; the inquiry therefore stops.

### **III. ARGUMENT**

#### **A. The District Court Erred In Its Application Of The AICPA’s Auditing Standards.**

In analyzing the Administrative Exemption, the District Court found that “class members would need to satisfy subsection (d) or (e) [of Cal. Code Regs. tit 8 § 11040(1)(A)(2)], both of which require that employees work only under ‘general supervision’” (ER 38; Order at 38:11-13). From this basic premise, the District Court concluded that, “although some degree of supervision is not fatal to exemption” (ER 38; Order at 38:25-26), here “class members are subject to closer supervision” than the “review or approval of overall results and conclusions” (ER 39; Order at 39:2-5).

The Court justifies its conclusion by citing to three items: first, Cal. Bus. & Prof. Code § 5053; second, §§ 311.12-13 of the “Professional Standards” of the “American Institute of Professional Accountants;”<sup>2</sup> and third, “PwC’s own policies,” which are “no doubt informed by these requirements” (ER 39; Order at 39:5-16). Here, the AICPA is particularly concerned with the District Court’s reliance on its Auditing Standards as somehow establishing that class members, *in every instance*, are subject to something more than “general supervision.” An across the board generalization of this sort runs directly *contrary* to the terms of the relevant AICPA Auditing Standards.

**1. The Auditing Standards Assert No Particular Level Of Required Supervision.**

The District Court’s conclusion cannot be correct because the Auditing Standards do not contemplate any particular level of supervision. To the contrary, the standards expressly recognize that proper auditing procedure is inherently fact intensive and can only be determined on a case-by-case basis:

Audit planning involves developing an overall audit strategy for the expected conduct and scope of the audit. The nature, extent and timing of planning vary with the size and complexity of the entity, and with the auditor's experience with the entity, and knowledge of the entity’s business.

AU § 311.03 (ER 300).

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<sup>2</sup> The Order contains a typographical error referring to the name of the AICPA as well as the name of the AICPA’s Auditing Standards.

In planning the audit, the auditor should consider the nature, extent, and timing of work to be performed and should prepare a written audit program (or set of written audit programs) for every audit. The audit program should set forth in reasonable detail the audit procedures that the auditor believes are necessary to accomplish the objectives of the audit. The form of the audit program and the extent of its detail will vary with the circumstances. In developing the program, the auditor should be guided by the results of the planning considerations and procedures. As the audit progresses, changed conditions may make it necessary to modify planned audit procedures.

AU § 311.05 (ER 301).

Supervision involves directing the efforts of assistants who are involved in accomplishing the objectives of the audit and determining whether those objectives were accomplished. Elements of supervision include instructing assistants, keeping informed of significant issues encountered, reviewing the work performed, and dealing with differences of opinion among firm personnel. **The extent of supervision appropriate in a given instance depends on many factors, including the complexity of the subject matter and the qualifications of persons performing the work, including knowledge of the client's business and industry.**

AU § 311.1 (ER 303) (emphasis added).

Indeed, the current AICPA Auditing Standards make clear that each audit requires a specific audit strategy, and each strategy should include the following determination:

How such resources are to be managed, directed, and supervised, such as when team briefing and debriefing meetings are expected to be held, how the auditor with final responsibility and manager reviews are expected to take place (for example, on-site or off-site), and whether to complete engagement quality control reviews.

*See* AU § 311.15 (current).

Based on the foregoing, it is clear that the appropriate level of supervision is directly tied to the nuances of the specific engagement and the professional judgment of the reviewer therefore cannot be ascertained in advance. It simply is impossible to derive a single rule of supervision from the Auditing Standards as a whole. Because the Auditing Standards do not announce any generally applicable supervision requirement, they cannot possibly support the District Court's ruling.

**2. The Specific Auditing Standards Cited By The District Court Support The Conclusion Urged By PwC And The AICPA.**

Nor are the specific examples cited by the District Court persuasive.

The Order focuses on two subsections of § 311:

[Section] 311.12 (Assistants should bring to the supervisor's attention "significant accounting and auditing questions raised during the audit so that he may assess their significance."), [and] § 311.13 ("The work performed by each assistant should be reviewed to determine whether it was adequately performed.")

ER 39; Order at 39:10-15.

But neither subsection cited by the District Court discusses any particular level of supervision. Indeed, with respect to AU § 311.12, the unlicensed accountants, like licensed accountants, are afforded the discretion and independent professional judgment to individually assess what questions, if any, are sufficiently “significant” to warrant notification and review. This discretion and independent judgment, implicitly recognized by the standard, cannot be divorced from the question of supervision. And because the ability to determine significance is, in the first instance, given to class members, AU § 311.12 actually supports the contention that only “general supervision” is required.

The second standard relied upon by the District court, AU § 311.13, is nothing more than an assertion that work should be reviewed, which, if anything, is completely consistent with the notion of “general supervision.” In fact, as discussed above, the Order itself finds that the “review or approval of overall results and conclusions” (ER 39; Order at 39:2) is *consistent* with establishing the Administrative Exemption.

Given the its specific reliance on AU § 311.12 and § 311.13, it appears as though the District Court concluded that some quantum of supervision more than “general supervision” is required by the Auditing Standards simply because an individual other than an unlicensed accountant has final responsibility

for the audit. Yet this ultimate decision-making authority says nothing about the underlying level of supervision required.

Many employees work with a high degree of autonomy (and hence only under general supervision) and yet lack the authority to render final decisions regarding their work product. *E.g.*, Former 29 C.F.R. § 541.207(e)(1) (“The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment . . .”). More importantly, the District Court previously *held* in this case that “the fact that the work of PwC associates and senior associate is subject to review is **not** sufficient to prove that they are performing non-exempt work.” *Campbell v. Pricewaterhousecoopers*, 253 F.R.D. 586, 602 (E.D. Cal. 2008) (emphasis added). At bottom, the applicable regulations simply do not require that administratively exempt employees have some “final say” regarding their work. To the extent that the District Court may ultimately have relied on such a requirement, it is error.

**3. The Auditing Standards Are In Harmony With California Law; Neither Imposes Any Rigid Supervision Requirement.**

In addition to its reliance on the Auditing Standards, the District Court also pointed to Cal. Bus. & Prof. Code § 5053 as somehow establishing a substantive supervision benchmark. This too was error. In relevant part, § 5053 provides as follows:

Nothing contained in this chapter precludes a person who is not a certified public accountant or public accountant from serving as an employee of, or an assistant to, a certified public accountant or public accountant or partnership or a corporation composed of certified public accountants or public accountants holding a permit to practice pursuant to this chapter if the employee or assistant works under the control and supervision of a certified public accountant, or a public accountant authorized to practice public accountancy pursuant to this chapter and if the employee or assistant does not issue any statement over his or her name.

Cal. Bus. & Prof. Code § 5053.

But like the Auditing Standards, nowhere does § 5053 impose any substantive supervision requirement. Rather, the statute requires “control and supervision” of certain “employees or assistants” and, in turn, the AICPA Accounting Standards explain that the degree of oversight required must be determined on a case-by-case basis. Section 5053 by itself simply does not state any substantive supervision requirement.

**4. The Order Directly Contradicts Previous Findings Made By The District Court.**

In determining that the Auditing Standards establish a type of uniform supervision standard, the District Court contradicted findings it made during the class certification process:

[The] pertinent professional rules promulgated by AICPA address generally the supervision of unlicensed accounting employees. Davila Decl., Ex. I (AICPA § 311.11) (“Supervision involves directing the efforts of

assistants who are involved in accomplishing the objectives of the audit and determining whether those objectives were accomplished."). **These rules envision, however, that the amount of supervision that is appropriate varies on an individual basis.** "The nature and extent of supervision and review must necessarily reflect wide variances in practice. The auditor charged with final responsibility for the engagement must exercise seasoned judgment in varying degrees of his supervision and review of the work done and judgment exercised by his subordinates." *Id.*, Ex. G (AICPA § 210.03). The factors to be taken into consideration include the complexity of the project and the qualifications of the employee. *Id.*, Ex. I (AICPA § 311.11).

*Campbell*, 253 F.R.D. at 601 (emphasis added).<sup>3</sup> Based upon its own prior findings, the District Court's Order is untenable. *See also Mishkin v. Peat, Marwick, Mitchell & Co.*, 744 F. Supp. 531, 542 (S.D.N.Y. 1990) ("As stated in the American Institute of Certified Public Accountants ('AICPA') manual, Section 1110, 'The nature and extent of supervision and review must necessarily reflect wide variances in practice.'").

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<sup>3</sup> Indeed, this finding should have lead the District Court to deny class certification because of the individualized factual determinations that would need to be made with respect to each class member's level of supervision. *See* Fed. R. Civ. Pro. 23(e). *See also Jimenez v. Domino's Pizza*, 238 F.R.D. 241, 251 (C.D. Cal. 2006) (recognizing certification is inappropriate where individualized determinations are required to assess exemption status); *Dunbar v. Albertson's, Inc.*, 141 Cal. App. 4th 1422, 1431 (2006) (denying certification because variations in work performed meant that exemption findings as to one manager could not be extrapolated to another).

**B. The District Court Erred In Finding That The “Enumerated Professions” Exemption And The “Learned Professions” Exemption Are Mutually Exclusive.**

With respect to the Professional Exemption, Cal. Code Regs. tit 8 § 11040(1)(A)(3), the District Court determined that unlicensed accountants cannot be exempt under the Learned Professions Exemption because “accounting” is one of the enumerated professions (ER 14; Order at 14:1-13). The result of this finding is both inescapable and incorrect—*i.e.*, that *as a matter of law* no unlicensed or uncertified person working in the fields of law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting can *ever* qualify under the Learned Professions Exemption. But nothing in the text of the regulation mandates this astounding conclusion, which the District Court *concedes*: “Nothing in the text of the regulation itself suggests that the enumerated professions cannot also be learned professions” (ER 31; Order at 31:18-19).

Notwithstanding this finding, to support its decision the District Court asserted that “the regulatory text itself is ambiguous as to whether unlicensed employees engaged in an enumerated profession may be exempt under the learned professions exemption” (ER 14; Order at 14:16-19). But the District Court never identified any ambiguity. Nor is there one. Subsection (a), by its plain language, applies to licensed individuals—not unlicensed individuals—working in one of the enumerated professions. And subsection (b), by its plain language, applies to any

employee who meets its requirements, *regardless of profession*. Thus, the Wage Order plainly permits unlicensed employees working in the enumerated professions to qualify as exempt under subsection (b), provided they meet its requirements. Subsection (a) and subsection (b) are simply independent avenues to establish the Professional Exemption.

The subsections are “ambiguous” *only* if one incorrectly assumes that each subsection of the regulation must explain its relationship to the other subsections. But the jurisprudence of statutory construction requires exactly the opposite. If the words of a regulation are “clear and unambiguous [the Court’s] inquiry ends. There is no need for judicial construction and a court may not indulge in it.” *Diamond Multimedia Systems, Inc. v. Superior Court*, 19 Cal. 4th 1036, 1047 (1999). Rather, the Court should “presume the Legislature meant what it said and the plain meaning of the statute governs.” *Id.* Here, as the District Court conceded, the plain language of the regulations allow for exemption under either subsection. No further analysis is warranted.

Nor is the District Court’s argument regarding “surplusage” correct (ER 30; Order at 30:8-17). Subsection (a) grants exemption to certain licensed or certified individuals working in “recognized professions”; subsection (b) grants exemption to a broader class of unlicensed or uncertified individuals. *See* Cal.

Code Regs. tit 8 § 11040(1)(A)(3)(b). It simply is not surplus to allow multiple tracks to the same exemption.

#### **IV. CONCLUSION**

For the foregoing reasons and for the reasons stated in the Brief for Defendant-Appellant PricewaterhouseCoopers LLP, this Court should reverse the District Court's Order of partial summary judgment and remand for further proceedings under the correct legal standard.

Date: November 9, 2009      Respectfully submitted,

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#### **CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 3,038 words.

**CERTIFICATE OF SERVICE**

I hereby certify that on November 9, 2009, 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.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Elizabeth Hong