Case No.: S200923

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

SAM DURAN, MATT FITZSIMMONS, individually and on behalf of other members of the general public similarly situated,

Plaintiffs and Respondents,

vs.

U.S. BANK NATIONAL ASSOCIATION,

Defendant and Appellant.

Review of a Decision of the Court of Appeal, First Appellate District, Division One, Case Nos. A125557 and A126827, Reversing Judgment and Decertifying Class in Case No. 2001-035537

Superior Court of the State of California, County of Alameda

Honorable Robert B. Freedman, Judge Presiding

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INTRODUCTION

This case is one of the only misclassification class actions that has been tried to judgment in California. As such, it is uniquely situated to reveal the dangers of forcing a procedural device that relies on common proof where the defense hinges on individualized issues. The trial court erroneously maintained class treatment despite an overwhelming predominance of individualized issues that rendered classwide liability and recovery determinations impossible. In doing so, the trial court trampled over U.S. Bank's due process rights. The trial court then "extrapolated" liability and recovery findings from an undersized and gerrymandered sample to absent class members while ignoring basic statistical principles and without *any* proof that the sample testimony was "representative," culminating in a constitutionally and statistically impermissible judgment.

To affirm any part of the trial court's judgment would require dramatically altering established substantive law solely to accommodate the class action device, a practice long prohibited by this Court. *City of San Jose v. Superior Court*, 12 Cal.3d. 447, 462 (1974). In light of the glaring statistical and due process errors infecting this case and the lack of any common proof on the key disputed liability issue, the Court of Appeal properly applied existing law and longstanding principles to reverse the judgment and decertify the class. The Court of Appeal's decision should be affirmed in all respects.

In their complaint, Plaintiffs alleged that U.S. Bank ("USB") misclassified all of its California Business Banking Officers ("BBOs") as exempt from overtime. BBOs are non-branch employees responsible for marketing and selling bank products to small business customers within their assigned geographic areas. They set their own marketing strategies, sales techniques, and working hours. USB asserted that BBOs were exempt from overtime requirements, relying primarily on the outside

salesperson exemption. At trial, Plaintiffs pursued only a claim under the Unfair Competition Law, Business and Professions Code Section 17200 *et seq.* ("UCL"), premised on "borrowed" alleged Labor Code violations. The principal disputed liability issue was where BBOs spent a majority of their work time: inside or outside of USB property. Approximately one-third of the 260 class members stated in declarations under penalty of perjury that they spent the majority of their work time outside USB property, rendering them exempt from overtime requirements, and four former class representatives similarly confirmed at deposition that they spent the majority of their work time outside USB property. However, USB was precluded from presenting any of this evidence at trial. Instead, the trial court devised a trial plan that limited the trial evidence to a 21-class member sample (the "Representative Witness Group" or "RWG"). The trial court excluded any evidence relating to all other 239 class members as "irrelevant."

Based on the RWG testimony, and without any expert support, the trial court "extrapolated" a blanket liability finding to the rest of the class and then identified an "average" amount of weekly overtime to apply to all class members. While both parties' experts agreed that there was no statistical basis for assuming that 100% of the class was misclassified and that the estimate of weekly overtime carried an astounding 43.3% margin of error, the trial court deemed its "classwide" liability finding uniformly applicable and determined that the inaccurate overtime estimate was acceptable. Although plaintiffs never proved misclassification nor overtime hours for every class member, the court awarded recovery to all class members, averaging over $57,000 per person. USB was never permitted to challenge any non-RWG claims, or present evidence from those known to have been properly classified.

Although the trial court nominally invoked "statistics" as a method to manage the class trial, it ignored statistical principles in practice. Unable to endorse the court's procedures, Plaintiffs' statistical expert presumed that the entire class was misclassified only because the court had so decreed, and conceded that the numerical estimate of "average" hours worked by the RWG and the attendant 43.3% margin of error were the best he could do *given* the imprecise findings of the trial court.

The results of the ill-conceived trial plan were striking. One class member, Nick Sternad, received an award of over $450,000 even though (1) he executed a declaration stating he was primarily engaged in exempt outside sales activities; (2) he testified at deposition that he spent approximately three years as a BBO primarily engaged in other exempt duties; and (3) the trial court prohibited USB from ever presenting evidence of Sternad's duties or from challenging his entitlement to recover. *See* 20CT5603-5627; Trial Exhibit ("TE") 1058, 1276. The judgment also awarded approximately $160,000 to the four former class representatives, who Plaintiffs' counsel removed after they affirmed their exempt status at deposition, and nearly $6 million to the approximately 70 declarants whose uncontroverted testimony was that they were properly classified. For over 90% of the class, the trial court never required any showing of entitlement to recover.

Presented with this record, the Court of Appeal unanimously reversed the judgment and decertified the class. The Court of Appeal was persuaded by the *Wells Fargo II* opinion, which could not locate any case in which a court permitted a plaintiff to establish non-exempt status of class members in an outside salesperson misclassification class action using representative testimony and statistical sampling, particularly where there was no companywide policy or procedure that dictated where class members were to spend their time. Slip.Op. 51, 72-74. The Court of

Appeal was dismayed not only by the trial court's unprecedented use of sampling to determine liability, but also by its failure to observe foundational statistical protocols and lack of adherence to any scientific methodology, as manifested by the "troubling" 43.3% margin of error associated with the classwide overtime recovery. Slip.Op. 45-47. The Court of Appeal concluded that the judgment had to be reversed because of the trial court's near-wholesale exclusion of probative relevant evidence in the interest of efficiency, which was a violation of USB's due process rights. This evidence, if admitted and believed, not only barred many class members from recovering but might have defeated classwide liability entirely. Slip.Op. 46-47. Finally, the Court of Appeal ruled that the trial court abused its discretion by denying USB's second decertification motion, which amply demonstrated that individual issues predominated the liability determination for each class member, rendering continued class treatment improper. Slip.Op. 71-74.

Although Plaintiffs suggest that the Court of Appeal created a new rule for class action trial procedures, longstanding class certification and due process principles alone required reversal and decertification. The Court of Appeal created no rule suggesting that a class action defendant *always* has a generalized right to present any defense against every class member. Rather, the Court of Appeal confirmed the fundamental principle that even in a class action, a court must manage individual issues, not ignore them.

Plaintiffs propose a model for how class actions "should" be tried, suggesting that a liability phase addressing a defendant's "practices" and "expectations" should generate a "classwide" liability presumption, followed by a "damages" phase, during which a defendant may challenge class members' entitlement to recover. Notably, Plaintiffs' hypothetical model bears no resemblance to the trial in this case, which consisted of a

Phase I classwide liability and average recovery finding based on a sample set and followed by a Phase II "battle of the experts" for the singular purpose of extrapolating the sample findings to the remainder of the class. The trial plan was always premised on reaching a classwide judgment and award without permitting USB to challenge individual entitlement to recovery at any point. The problem with this plan was that there were no common policies or practices capable of resolving classwide liability and no common evidence from which to calculate classwide recovery.

Plaintiffs posit ominous questions for this Court to resolve, claiming that the Court of Appeal's decision would severely limit or even end California wage and hour class actions. Plaintiffs grossly exaggerate. First, Plaintiffs made the unusual tactical decision to dismiss all legal claims for damages and penalties before trial and instead pursued the distinct and limited equitable remedies of restitution and injunctive relief provided under the UCL. Thus, this case's resolution need not have a controlling effect on Labor Code class actions. Furthermore, unlike the vast majority of class actions, this case was tried, rather than settled, and the trial record here demonstrated that no remotely workable method for determining liability was ever devised due to the specific factual dispute at issue. Most critically, whether or not a class action defendant has a due process right to raise a defense separately as to each class member *in a class action* is not a question raised by this case. The scope of a defendant's due process right to present a particular defense is determined by the substantive law and the facts of each case, *not* by the procedural vehicle utilized. Common issues capable of resolution in a single stroke through common evidence can be litigated on a common basis, and class actions are intended to resolve such issues. However, certifying a class does not convert an individualized issue into a common one, and Plaintiffs' insistence that they must be permitted to prove liability on a common basis *because* this is a class action misses the

mark. One of the questions the Court must answer on *this record* is whether, where USB's affirmative defense necessarily hinged on individualized facts and liability could not be proved by "common" evidence, USB had the right to present *that defense* on an individualized basis.

This case presents the rare instance where a trial court exercised its discretion to certify a class even though the primary issue to be tried–*where* individual employees spent their time–could not be proved on a common basis. The results of the first phase of trial showed that the statistical methods Plaintiffs hoped to rely upon failed miserably to support any classwide liability determination or recovery calculation. Because the first phase of trial revealed no evidence capable of rendering a common resolution and instead proved that individual issues were unmanageable, decertification was required. The trial court's decision to instead forge ahead with a trial plan designed to insulate the "classwide" liability finding from the voluminous contrary evidence proffered by USB was an abuse of discretion, and this Court should affirm the decision of the Court of Appeal in full.

STATEMENT OF THE ISSUES

Plaintiffs' presentation of the issues is misleading and, as a result, USB restates the actual issues before this Court as follows:

(1) *A defendant's right to raise affirmative defenses to individual claims in this UCL class action.*

The issue is *not* whether, "[i]n a wage and hour misclassification class action, does the defendant have a due process right to assert its affirmative defense against every class member?" Opening Brief ("OB") 1. Rather, in a wage and hour misclassification class action based on the

outside salesperson exemption brought as a violation of the UCL, where there is no common policy or practice requiring employees to spend a majority of time inside the employer's facilities and employees are given unfettered discretion to carry out their job activities in a manner and at locations of their choice, and where the employer has evidence that at least approximately one-third of the class was properly classified as exempt (including that of the first four class representatives), does the employer have a due process right to raise individualized defenses against class members' claims?

(2) *The propriety of class treatment here.*

The issue is *not* "can a plaintiff satisfy the requirements for class certification if a defendant has a due process right to assert its affirmative defense against every class member?" OB1. Instead, if the evidence shows that determining liability for each class member involves resolution of numerous factual issues and credibility determinations that vary for each class member, is class treatment appropriate?

(3) *The use of statistical sampling and representative evidence.*

The issue is *not* "can statistical sampling, surveys and other forms of representative evidence be used to prove classwide liability in a wage and hour misclassification case?" OB1. Instead, the true question is: were sampling and representative evidence permissible to prove classwide liability in this wage and hour misclassification case where there was no common corporate policy or practice that impacts the liability analysis for all class members?

(4) *Appellate review issues.*

This issue is *not* "[w]hen an appellate court reviews a class action judgment and an order denying class decertification, does the appellate court prejudicially err by (a) applying newly-announced legal standards to the facts and then reversing the judgment and the class order without providing for a new trial and/or (b) reweighing the evidence instead of reviewing the judgment and order under the substantial evidence standard of review?" OB1.

In reality, the correct issue is did the Court of Appeal apply the proper standard of review when it determined that (1) the *de novo* standard of review applied to determine whether the trial plan met constitutional due process standards; and (2) the trial court had abused its discretion in making erroneous legal assumptions and applying incorrect legal criteria that gave undue emphasis to USB's uniform classification of the job position, and assumed that liability determinations for the class could be based on the findings of the undersized, manipulated, and unrepresentative RWG sample group?

STATEMENT OF THE CASE

A. The BBO Position.[1]

The BBOs' primary duty is to create and execute sales strategies that maximize their ability to sell loans, lines of credit, and other financial products to small businesses. *See, e.g.*, TE6; 20RT568-569; 42RT2903, 2917-2918; 49RT3894; 61RT4974-4980. In that role BBOs are expected to meet with prospective and existing customers at their business locations,

[1] The position at issue was previously titled Small Business Banker ("SBB"). After a merger in 2001, the position was renamed "Business Banking Officer" ("BBO"). 42RT2940-2941; 61RT4974-4975.

network at community events, and develop relationships with referral sources – activities that require BBOs to work outside of USB's premises. *Id.*; 8CT2173, 2297-10CT2694; 21RT633-635; 22RT899, 913-918; TE1000-1001; 24RT1058; 29RT1503; 46RT3586. USB expects BBOs to spend 80% of their time on these "outside sales activities." TE6; 43RT2982; 60RT4895-4896; 62RT5030-5031.

Contrary to Plaintiffs' assertion, BBOs are not "branch employees" and nothing in the record suggests the otherwise. *See, e.g.*, 42RT2903-2904, 2912; 49RT3894-3896. USB has no common policy or practice that tied BBOs to any specific branch or required BBOs to spend a majority of their time inside USB's facilities. Rather, nearly every function of a BBO can be, and frequently is, performed outside USB facilities, which is evidenced by the fact that nearly one-third of the class confirmed that they spent over 50% of their time engaged in sales outside the Bank, rendering them properly exempt. TE1000-1001, 1006, 1017, 1025-1063, 1087, 1095-1137, 1184-1187, 1206-1278; 68CT20174-20188; 8CT2171-2181; 8CT2297-10CT2694.

Although USB presented evidence that it expected BBOs to spend the majority of their time outside Bank property, the trial court concluded that USB "did not care" where BBOs spent the majority of their time. 64RT5119-5122, 5132-5135; 71CT21009. Therefore, no common policy or practice exists to show how everyone in the class spent their time or to establish the realistic expectations defense with common proof. Rather, BBOs are incentivized to work autonomously to achieve their sales goals and desired levels of compensation because they are paid on a salaried basis with the ability to earn uncapped commissions on products they sell. *See* TE3, 9, 10, 14-16. BBOs work largely unsupervised, come and go as they please, and have the discretion to set their schedule to carry out their job activities in the manner of their choice. 8CT2173-2176; 8CT2178-2179;

8CT2297-10CT2694; 22RT803-804, 811-812; 25RT1151-1152; 27RT1244; 29RT1400-1401; 31RT1723, 1799-1800; 32RT1880; 33RT1977-1978; 36RT2255-2257; 38RT2429-2430; 44RT3171; 45RT3347-3348; 47RT3634; 49RT4049-4051; 52RT4371-4372.

The amount of time BBOs spend outside the Bank varies day-to-day, week-to-week, and at various points during each quarter. *See, e.g.*, 31CT8932-8935, 9011-9012, 9043-9045, 9069-9072; 32CT9223-9224; 62CT18405-18408; 40RT2611-2612, 2694-2696, 2714-2715; 38RT2424-2426; 20RT577; 30RT1673-1676; 33RT1960-1961; 46RT3463-3466, 3473-3474. The amount of time BBOs spent on outside sales also varied from quarter to quarter and year to year. *See, e.g.*, 46RT3463-3466; 31CT9084-9085; 36RT2244-2246. BBOs made differing and individual decisions regarding how much time to spend on various tasks, depending upon numerous factors. *See, e.g.*, 30RT1674-1675 (Anderson's duties varied daily in response to customer needs); 34RT2046, 2097, 2101-2102; 31CT9049-9056, 9059-9060 (Morales spent 1-10 hours per week on in-person cold calls, additional time at civic functions, and unspecified time traveling to/from client meetings out of the office); 53RT4481-4483 (Dampier expected 10-15 outside appointments per week); 31CT9079-9080 (Wheaton spent 90% of his time outside the branch on Tuesdays, Wednesdays, and Thursdays, spent over 60% of his time outside the branch on Fridays, and spent more of his time inside on Mondays); 31CT9032-9036 (Parker's hours worked and duties performed varied from day-to-day, depending on the number of branches she was covering, deals pending, what time in the quarter it was, and whether she was doing different product focus, meetings, or sales "blitzes"). Thus, while BBOs may perform the same broad job duties, there is tremendous variation in the amount of time that each BBO chooses to spend on individual tasks as well as where those tasks are performed, which largely depends on client needs,

as well as the BBO's personal preferences and sales approach. Within that context, at least one-third of the class members confirmed that they used their time in a way that rendered them properly exempt.

B. Certification Proceedings.

1. Plaintiffs' Counsel Cycled Through Four Uninjured Class Representatives.

Amina Rafiqzada filed this action in 2001, alleging that USB misclassified BBOs as exempt employees. 1CT1-16. Rafiqzada alleged (1) violations of the Labor Code for misclassification, failure to pay overtime, and associated penalties; (2) conversion; and (3) violation of the UCL. *Id.* One year later, Plaintiffs' counsel replaced Rafiqzada with three new class representatives (Vanessa Haven, Abby Karavani, Parham Shekarlab). 3CT529-545. Before moving for certification, Plaintiffs' counsel substituted in two new class representatives, Sam Duran and Matt Fitzsimmons. 16CT4447-4462. All four prior named plaintiffs, who were represented by Plaintiffs' counsel at deposition, testified that they spent a majority of their time outside of USB branches engaged in sales activities. 68CT20174-20188.

2. Initial Certification Briefing.

In January 2005, the parties filed simultaneous motions concerning class certification. 6CT1602-1629; 7CT1783-1821.[2] Requesting denial of class certification, USB submitted 83 declarations from putative class

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[2] On September 8, 2004, the court ordered that a curative notice be issued to putative class members due to Plaintiffs' counsel's unethical communications with putative class members. 3RT59-60, 90-95; 4CT1079-1080, 1087-1090; 5CT1123-1125 (BBO Kit Skelton declared that Plaintiff's counsel told her she could be entitled to $45,000 if she claimed to have been misclassified). However, the court never issued any such notice.

members who described their job duties. Of these declarants, 75 stated they regularly spent more than half their time outside of USB branches engaged in sales activities. 7CT1804; 8CT2172-2173; 8CT2297-10CT2694.

3. Four Of The Parties' Declarants Submitted Multiple, Inconsistent Declarations.

Four of the 75 individuals who executed declarations supporting USB's positions subsequently reversed their prior statements under penalty of perjury and submitted contradictory declarations for Plaintiffs. Plaintiffs argue, without any factual support, that the existence of conflicting declarations from these class members proved that USB's attorneys had obtained these declarations "under false pretenses." OB18. In fact, the credibility issues raised by these conflicting declarations were never resolved, either at the certification stage or at trial, providing illustrations of the myriad individual issues that the trial court ignored from certification through the entry of judgment.

For example, Angela Bates executed one declaration indicating that she was exempt and a subsequent one for Plaintiffs making contrary claims. The USB attorney who spoke with Bates informed her that the attorney represented USB and explained that Bates could make any changes she wished. 1CT(Supp)265-266. To the extent Bates' second declaration is believed at all, it irreparably undermines her credibility as to both declarations, since Bates asserts that she saw no need to carefully review a declaration to confirm its truth if she trusts the drafting attorney and believes that attorney represents the employees. 1CT(Supp)218-219.

Sylvia Bacalot likewise executed one declaration supporting USB's position and later executed a contrary declaration for Plaintiffs. Bacalot's second declaration carefully avoids ever stating that the contents of her first declaration differ from what she told USB's attorney. Instead, Bacalot merely states that her first declaration contradicts the information in her

second declaration and the information in her first declaration was "incorrect." 11CT3079-3080. Bacalot's second declaration changed her story to one more consistent with her financial interests in a recovery. 83CT24698. USB's attorney made clear that Bacalot could change her declaration, and Bacalot made revisions, initialed every page, and signed the declaration under penalty of perjury. 15CT4116. Bacalot's first declaration accurately sets forth what Bacalot told USB's attorney. 15CT4116-4122.[3]

Although Plaintiffs suggest that the court believed the later declarations submitted by Plaintiffs and disbelieved the earlier declarations submitted by USB, in fact the court admitted all the proffered evidence for the purpose of ruling on certification and declined to make any findings

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[3] Plaintiffs also reference Debra Schnell and Ken Rattay: Schnell contradicted her first declaration and submitted a second declaration alleging misconduct by an attorney with the firm representing USB. However, the USB attorney Schnell alleges she spoke with never contacted Schnell or any putative class members in this case. 1CT(Supp)293. Schnell's false allegations regarding an attorney she never spoke with irreparably damage her credibility. In Schnell's second declaration, she simply disavows her prior statements and asserts her financial interest in a recovery. There is no credible evidence USB engaged in any misconduct.

Rattay submitted two declarations, one confirming his exempt status and a second attempting to support his entitlement to recover a substantial sum of money. 83CT24702 (court awarded Rattay over $270,000). USB's attorney informed Rattay that he represented USB and made changes to an initial draft declaration at Rattay's request, and Rattay signed the declaration under penalty of perjury without seeking further revisions. 10CT2620-2626; 11CT3113-3114; 12CT3462-3463. Rattay later claimed that he provided the USB attorney with false information to complete the interview process more quickly, but could not explain how his allegedly false statements would have furthered that goal. 12CT3457-3460; 5CT1228.

with respect to the weight to be afforded to the parties' declarations or their reliability. 16CT4534.[4]

4. Initial Certification Order.

The court ultimately certified a class of "all employees who worked for [USB] in California as either a [BBO or SBB], at any time between December 26, 1997 and September 26, 2005." 16CT4474, 4521, 4652, 4654; 83CT24649. Although USB presented evidence indicating that BBOs' duties varied day-to-day and week-to-week, and that BBOs spent varying amounts of time inside/outside of USB's property, the court rejected USB's argument that a BBO's exempt status and entitlement to recovery required an individualized, fact-intensive analysis.

C. The Trial Court Summarily Dismissed The Administrative And Commission Sales Exemptions.

In September 2005, Plaintiffs filed a motion for summary adjudication ("MSA") on two of the three exemptions USB asserted: the administrative exemption and the commission sales exemption. 17CT4758-4769. The court granted Plaintiffs' motion on the commission sales exemption. With respect to the administrative exemption, the court permitted USB to depose 10 additional class members. 19CT5452-5457.

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[4] One of Plaintiffs' declarants, Nicole Raney, claimed that a USB attorney asked her to sign a declaration that she disagreed with and refused to sign, demonstrating that BBOs were free to decline to sign declarations for USB. Contrary to Raney's implausible descriptions, a USB attorney met with Raney, discussed her work in detail, prepared a declaration, and faxed it to Raney with a letter instructing Raney *to refrain* from signing the statement it if was not accurate and to request any necessary revisions. 1CT(Supp)275-290. A second USB attorney followed up and sent Raney another copy of the draft declaration. 1CT(Supp)273. When Raney indicated she did not want to take the time to go through revisions, the attorney ended the call. 1CT(Supp)273. Neither attorney pressured Raney in any way to sign a declaration. 1CT(Supp)273, 276-280.

Nine depositions were taken, and two of those deponents confirmed that they performed administratively exempt duties. 19CT5590-5593, 20CT5600-5671.[5] Nevertheless, the court granted Plaintiffs' motion on the administrative exemption on the ground that administratively exempt duties were atypical for BBOs. 20CT5845-5848. Four of the nine BBOs deposed in connection with the limited discovery permitted on the administrative exemption confirmed at deposition that they regularly spent a majority of their time outside bank property engaged in sales activities during some or all of their tenure as BBOs. 31CT9000-9001, 9011-9012, 9079-9080, 9084-9085. The trial court also ruled that California law does not permit "tacking" of exempt duties under multiple exemptions in order to meet the 50% threshold for exempt time, and that it was therefore unnecessary to consider whether any BBOs might have spent a majority of their time engaged in exempt duties if their total exempt time under multiple exemptions was considered. 19CT5454-5455; 20CT5843. Hence, even as to the 21 RWG members who testified at trial, USB was not permitted to fully challenge their exempt status because it was precluded from introducing testimony that they were properly classified under the administrative exemption, or a combination of the administrative and outside salesperson exemptions. 45CT13298; 79CT23514.

D. Pre-Trial Proceedings.

1. The Trial Court Formulated A Trial Plan Without Expert Endorsement.

The parties engaged in months of briefing and conferences regarding a trial plan. 8RT203-207; 20CT5852-22CT6289; 23CT6557-6613. USB proposed determining liability and damages through individual mini-trials

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[5] Plaintiffs appear to concede this point. OB29.

using special masters, a class action device specifically referenced in *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 340 n.12 (2004). 2CT(Supp)349-351; 20CT5896; 21CT5917-5929. Plaintiffs advocated using a survey and pilot study to determine an appropriate sample size, followed by trial of sample cases and then a "damages" phase. 20CT5853-5867; 21CT5917-5957.

In September 2006, the court declared its intent to use "representative testimony" at trial, requested briefing as to the appropriate sample size, and stated that a sample size larger than 50 "is too high." 21CT6163-6166; 10RT233-235. USB objected that the contemplated use of "representative testimony" was improper, but maintained, in response to the court's direction to propose a sample size, that any sample, if used at all, ought to contain *at least* 50 class members. 21CT6181-22CT6208; 22CT6228-6230. In October 2006, the court declared, without any expert endorsement, that the sample for trial would consist of 20 randomly selected class members and five alternates to determine classwide liability and damages, referring to them as the "RWG." 22CT6243, 6289; 2CT(Supp)397. The court later deemed Duran and Fitzsimmons part of the RWG and eliminated one randomly-selected RWG member who ignored a subpoena to appear at trial, resulting in a sample of 21. 83CT24626-24627.

As originally formulated, the court's trial management plan called for determining liability and alleged hours worked for each RWG, and an overtime average for the group in Phase I. Following these anticipated mini-trials for the RWG, the trial plan called for evidence during Phase II regarding the propriety of extrapolating the Phase I findings with respect to

liability and recovery to any non-RWG class members.[6] 23CT6615; 71CT20988; 77CT22983-22986.

2. Plaintiffs Dismissed All Legal Claims And Remedies.

Plaintiffs voluntarily dismissed their legal claims and proceeded only on the equitable UCL claim to avoid a jury trial. 2CT(Supp)390-394; 22CT6290-6293; 23CT6618. The Third Amended Complaint ("TAC")[7] filed November 30, 2006 dismissed the conversion claim, Labor Code claims, requests for punitive damages and statutory penalties. 23CT6619-6632. The court struck all references to "damages" and "disgorgement" because the only available remedies under the UCL are restitution and injunctive relief. 25CT7180-7182.

3. The Trial Court Altered The RWG Composition.

Following the dismissal of legal claims, the court ordered a second class notice allowing class members to opt out of the action despite USB's objection that a second opt-out period would compromise the randomness

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[6] Later, between Phase I and Phase II, the trial court indicated that it no longer intended to follow its original plan and instead made a "classwide" liability determination before hearing any expert testimony. 79CT23514. At that point, the trial court re-formulated the remaining phase of trial as intended to determine only extrapolation of "recovery" for individual class members. 83CT24623.

[7] The court permitted Plaintiffs to assert new meal/rest break claims in the TAC but denied certification of those claims five days before trial. 25CT7181-7182; 38CT11088-11098. In its Statement of Decision, the court applied the wrong standard to the named Plaintiffs' remaining individual meal/rest break claims by assessing whether USB "ensured" that Duran and Fitzsimmons took their breaks. 71CT21000-21001; 21RT664; 29RT1549-1556. *Brinker v. Super. Ct.*, 53 Cal.4th 1004, 1017 (2012). The court also erred by awarding Duran recovery for three violations per day on his meal/rest break claims. 83CT24636-24638; *UPS v. Super. Ct.*, 196 Cal.App.4th 57, 60 (2011).

of the RWG because individuals selected to testify might opt out to avoid participating in the trial. 12RT256; 23CT6571-6574, 6614-6616, 6633-6634; 25CT7341-7353. Nine additional class members opted out, including four of the initially-selected RWG members. 25CT7285-7290. Two of the four RWG members who opted out had previously testified that they spent a majority of their time engaged in sales activities outside of USB property, and Plaintiffs' counsel persuaded them to opt out, given their known testimony favorable to USB. 25CT7306-7314, 7322-7326, 7333-7340; TE1115; 31CT9000-9001, 9011-9012; 46RT3501-3509, 3562; 52RT4410-4411; 53RT4465. USB moved to have them reinstated as RWG witnesses, which the court denied. 25CT7298-7319; 26CT7430-7431. The court also eliminated one RWG member because Plaintiffs' counsel represented that he did not perform BBO job duties despite holding the BBO title. 18RT431-434; 38CT11124-11128; 45CT13297.

4. <u>USB's First Decertification Motion.</u>

USB filed a Motion to Decertify the Class in March 2007, arguing that the RWG and MSA depositions, coupled with approximately 70 class member declarations previously submitted, demonstrated that myriad individual issues (both as to liability and damages) predominated. 29CT8429-30CT8613, 8733-32CT9278. Before the decertification motion hearing, the Court of Appeal, in *Walsh v. IKON*, 148 Cal.App.4th 1440, 1448, 1462 (March 28, 2007), confirmed the impropriety of certifying a class of employees where the employer asserted the outside salesperson exemption and established that determination of liability turned on how each individual performed his job duties. 32CT9362-9379. The court denied the motion. 38CT11089-11098.

E. Phase I Trial.

Phase I of the trial began in May 2007. 45CT13215. The parties did not dispute that BBOs performed sales work, and the primary issue at trial was where each RWG member spent the majority of his/her work time each week, along with the hours each individual worked and the nature of USB's expectations for the BBO position. USB sought to call all individual class members in light of the individual nature of the primary issue on liability, but the court prohibited USB from calling any non-RWG class member unless that individual supervised an RWG member. 21CT5926; 38CT11164-11171; 44CT12975-12978; 45CT13194-13203, 13298. The court also prohibited USB from introducing any declarations signed by non-RWG class members. 18RT448-449; 48CT14258-14276; 55CT16129-16143, 16146, 16164-16165; 64RT5124-5128. The trial court denied USB's motion in limine seeking to require testimony from all originally selected RWG witnesses to remedy the non-random selection process utilized by the court. 43CT12550-12606; 45CT13286.

Plaintiffs called the RWG members as witnesses in Phase I. USB called 18 witnesses, consisting primarily of Sales Managers who supervised the RWGs, as well as impeachment witnesses, USB's Human Resources Manager Linda Allen, and Payroll Manager Timothy Bruzek. Phase I required 40 court days, concluding in September 2007. 48CT14245; 55CT16144.

1. RWG Testimony.

The trial evidence showed that each RWG member's entitlement to recover depended on numerous intricately detailed factual issues.

a. Several RWG Members Previously Admitted They Were Exempt.

(1) Chad Penza

Chad Penza signed two declarations under penalty of perjury stating that he spent a majority of his time outside of branch locations engaged in sales activities and confirmed the accuracy of those declarations at one point during trial. TE1000-1001; 22RT883-885, 887-888, 899-903; 23RT979-991. Penza told another USB employee that the secret to his success as a BBO was the significant amount of time he spent outside the Bank meeting with new customers and networking, and that he increased his efficiency by scheduling multiple appointments back to back when outside bank property. 44RT3186-3188; 46RT3493-3496; *see also* 60RT4906-4911, 4920-4922 (former sales manager Hector Zatarian corroborating Penza was mostly outside for at least his first five quarters).

Penza later changed his trial testimony, claiming to have spent the majority of his time inside the branch. 22RT893-895; 23RT983. Penza never testified that anyone at USB knew the contents of either declaration or requested Penza to sign them. Penza never recanted his admission that he spent at least the first two weeks as a BBO outside the branches and the trial court found he was properly classified during this time. 22RT849-850, 891-895; 71CT21005.

(2) Steven Bradley

Steven Bradley executed a declaration confirming that he spent the majority of his time outside the Bank engaged in sales activities. TE1087. Bradley agreed the information was true and accurate when he executed the declaration and admitted he signed it voluntarily, without any pressure. 40RT2671-2673. Bradley also admitted that he provided all the information contained in his declaration to an attorney representing USB,

that he was provided an opportunity to review the declaration for accuracy, and that he understood USB would use his declaration in this litigation. 40RT2674-2680. At his deposition three months before trial, Bradley testified his manager told him he needed to spend the majority of his time outside the Bank "in the market" engaged in sales. 40RT2685-2696. Bradley admitted he received the BBO job description, and that he spent the majority of his time outside the Bank, passing out fliers, meeting with customers, and conducting in-person cold calls. *Id.*; 42RT2834-2840; *see also* 47RT3671-3674 (corroborated by Regional Manager). At the time he was deposed, Bradley had rebuffed attempts by Plaintiffs' counsel to contact him. 42RT2855-2857.

At trial, Bradley's testimony completely changed. He denied being told of USB's expectations or receiving a job description. 40RT2685-2689. He further denied that he spent the majority of his time outside the Bank. The reason for this complete change of testimony was his alleged "faulty memory" that was "refreshed" by expense reimbursement records, which Bradley admitted do not reflect all of the outside sales activities he performed or the amount of time he spent outside the Bank. 40RT2689, 2706-2708, 2713-2717; 42RT2846-2855. When asked at trial to provide an estimate of the amount of time he spent outside the Bank, Bradley "candidly" replied that he could not provide an estimate and admitted that it was "an imprecise process." 40RT2713-2716.

(3) Nancy McCarthy

Nancy McCarthy started her employment with USB as a personal banker. She later became a SBB so that she would not be "tied to the office," and would have more flexibility to meet with customers outside the Bank. 29RT1622-1623, 1593-1594. McCarthy stopped working as a SBB over seven years prior to her testimony, yet claimed to have entirely new

"recollections" at trial that differed dramatically from her deposition testimony just several months before.

McCarthy's former manager Ashil Abhat informed McCarthy, both before and after she became an SBB, that the position required McCarthy to be out in the market, engaged in sales activities, 75-80% of the time. 29RT1620-1621; 62RT5043-5051, 5031-5033, 5035-5038.

At her deposition, McCarthy admitted that more often than not she spent more than half her time as a SBB outside the Bank engaged in sales activities. 29RT1635-1637. At trial, McCarthy inexplicably recanted her prior deposition testimony and "suddenly recalled" that she in fact never spent more than half of her time outside the Bank in any week. 29RT1610-1613, 1625-1637. McCarthy did not review any documents between her deposition and trial. The only intervening factor between her deposition and trial testimony was that McCarthy talked to Plaintiffs' counsel. 29RT1625. McCarthy provided no explanation why she affirmed, three different times during her deposition, that she spent the majority of her time outside the Bank in nearly half of her tenure as a SBB, and yet reversed her testimony at trial.

(4) <u>Adney Koga</u>

Adney Koga admitted prior to trial that he was properly classified as an exempt employee. Koga executed a declaration under oath affirming that he spent 55% of his time as a BBO engaged in sales activities outside the Bank. TE1017; 36RT2237-2238. Koga reviewed the declaration two weeks before signing it, and never requested any revisions. 36RT2225, 2238-2242. At trial, Koga tried to escape this binding admission by claiming (1) the percentage of time reflected in the declaration he signed is wrong; and (2) Koga knew it was wrong at the time he signed it, but felt "pressured" to execute the declaration. These reasons lacked any

evidentiary support. 36RT2267-2268. Specifically, Koga admitted that it was possible and even likely, that he provided the attorney who interviewed him with all of the substantive information in the declaration, and previously admitted that all of the information in his declaration was truthful and accurate, but attempted to recant only the percentage of time he spent outside the Bank. 36RT2221-2243, 2274-2277. Koga had no explanation for providing false information to the attorney and no explanation as to why he signed an inaccurate declaration.

There is no evidence anyone pressured, misled, or coerced Koga into signing the declaration. TE1016-1017; 35RT2203-2207; 36RT2225-2239; 49RT3949-3951. Other class members who signed declarations stating they spent the majority of time outside the Bank denied feeling any "pressure," and denied the belief that USB's attorneys represented them, as Koga contended. *See, e.g.*, 40RT2671-2673; 46RT3566-3568; 52RT4456-4460.

b. Several RWG Members Testified That They Did Not Work Over 8 Hours Per Day Or 40 Hours Per Week.

Several RWG members, including Lindeman, Bradley, and Gediman, testified they generally worked 8 hours a day and 40 hours a week, or less, and thus, have not been injured. 42RT2858-2860, 2883-2884; 26RT1219-1220, 1223-1224, 1236-1238; 33RT1978-1983.

c. Some RWG Members' Duties And Activities In Non-Class Positions Were Used To Find Liability And Calculate Recovery.

Petty performed the duties of a Business Banking Relationship Manager, managing existing customer relationships (rather than bringing in new business through outside sales), but was titled a "Business Banking Officer" due to a merger. 25RT1108-1109, 1127-1133; 26RT1171-1172;

48RT3839-3845, 3881-3884; 29CT8541-8542; TE1080; 25RT1096; 26RT1161; 42RT2940-2941; 48RT3837-3846, 3854; 56RT4674-4677; 61RT4972-4975, 4993-4995. Petty was also barred from recovery because he signed a release of all claims against USB. TE1081-1082. Nevertheless, the trial court ruled that Petty's duties (spending a majority of time inside, albeit performing a different job) and hours would be "extrapolated" to the class. 71CT21005-21006.

In his last three months as a BBO, Matt Gediman was an acting Sales Manager. Although his official title remained "BBO," his duties of supervising and managing a team of BBOs "took priority over anything else [he] did." 26RT1191, 1254-1260. Despite Gediman's exempt, non-BBO duties during this period, the court included Gediman's "overtime" hours as an acting Sales Manager (the only "overtime" Gediman ever worked) to compute the "average" for the RWG, which was then extrapolated to the class. 71CT21001.

d. Some RWG Claims Should Have Been Barred By Equitable Considerations.

USB presented evidence showing that certain class members should be precluded from recovering in this equitable action because they engaged in resume fraud, made false statements under oath, and knowingly failed to disclose their potential overtime claim in this action in bankruptcy proceedings.

Duran, in an employment application that he signed under penalty of perjury, described his position at USB as "outside financial sales" yet maintained at trial that he spent the majority of his time inside. TE1083; 29RT1528-1548, 1556-1562. On that same application, Duran willfully misrepresented the salary he earned as a BBO. 29RT1531-1540. Duran blamed this lie on advice allegedly received from David Vallecillo, his

headhunter. Vallecillo, a third-party witness, testified he never instructed Duran to lie. 52RT4378-4382.

Jonathan Vu admitted he lied on his employment application and resume submitted to USB, claiming to have a bachelor's degree, when he never obtained any college degree, and also admitted to material omissions in application documents designed to conceal prior terminations and poor performance in order to obtain higher pay. 32RT1847-1873; TE44, 1075G.

Pollard and Morales were aware of their potential overtime claims against USB at the time they filed their personal bankruptcy actions, but failed to disclose such claims as assets. TE37, 1003, 1013-1015, 1079; 25RT1076-1082; 34RT2052-2075. Morales was aware of her potential claim against USB because she filed another putative class action asserting claims similar to those raised here, but claimed the named plaintiff was another person sharing her name. When USB subpoenaed her former attorney to testify, Plaintiffs successfully quashed the subpoena based on the attorney-client privilege even though Morales testified she did not retain the attorney or file the action. 34RT2055-2059; 48CT14075-14076, 14182-14220, 14229.

2. Manager Testimony.

USB's witnesses confirmed that BBOs were expected to spend a majority of their time outside and that guidelines, including the 2002 job description, reflect that BBOs should be spending a majority of their time outside. TE6; 50RT4159-4160; 43RT2982; 46RT3584-3586; 60RT4894-4896, 4939-4940; 62RT5030-5031, 5047-5048; 42RT2917-2924; 43RT3117-3119; 44RT3151; 49RT3902-3914, 3941-3942, 3953-3954; 47RT3616, 3636-3647; 45RT3223-3225, 3230-3238; 52RT4359-4364, 4397-4398; 55RT4558-4559. The witnesses also testified to methods they devised for reinforcing the expectation, including Ted Biggs' "15-3-1-1"

model to explain that a BBO should make an average of 15 customer contacts per week (normally resulting in three applications, one loan approval, and one funded loan) and that following this model would lead to spending approximately 30 hours per week outside. 49RT3902-3914; 51RT4231-4232; 52RT4366-4367. Biggs testified that up until 2002 USB had only a 2% market share in California and that BBOs accordingly needed to be outside meeting mainly with potential new customers, both to generate new sales and to increase brand recognition in the marketplace. 49RT3897-3899, 3920-3927. The court precluded USB's witnesses from testifying regarding their application of the outside time expectation to any BBOs who were not RWG members. 49RT3934-3935, 4168-4169; 26RT1250-1251. USB's witnesses also testified to their percipient knowledge of RWG members performing the BBO job consistent with the outside time expectation. *See* Slip.Op. 22-25; *see, e.g.*, 50CT14770-14774. USB's witnesses confirmed that BBOs worked widely varying hours, and that no information existed permitting one to determine one BBO's hours based on someone else's experience.[8]

3. USB's Motion For Judgment And Due Process Motion.

After Plaintiffs rested their Phase I case-in-chief, USB filed a Motion for Judgment contending Plaintiffs failed to carry their burden of

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[8] Plaintiffs contend that trial evidence provides anecdotal evidence supporting the "damages" estimate. OB8. In fact, the cited testimony, from USB Sales Manager Pat Collins, was obviously limited since she supervised only a limited number of BBOs and stated only that some BBOs worked between 40-60 hours per week. 7CT1739-1741; *see also* 51RT4247-4250. However, even as characterized by Plaintiffs, Collins' testimony reflects huge variation, rather than uniformity, in individual BBOs' hours worked, and confirms that the "damages" estimate failed to provide any useful estimate at all. *See also* 50CT14774-14775.

establishing a UCL violation and failed to establish entitlement to restitution. 45CT13333-13351; 48CT14161-14179. Plaintiffs argued that they only needed to prove a rough estimate because the court could infer the amount of damages by "just and reasonable inference." 46CT13499. The court denied USB's motion. 48CT14242; 54CT15851-15855. USB also filed a Due Process Motion setting forth additional objections to the restrictive trial plan and exclusion of USB's evidence in Phase I, which the court denied. 48CT14256-14276; 55CT16129-16142, 16164-16165.

F. Phase I Statement Of Decision ("SOD").

The parties submitted post-trial briefs and at the post-trial hearing, the court indicated its intent to find classwide liability in Plaintiffs' favor, departing from its earlier stated intention of hearing testimony in Phase II regarding whether the Phase I findings as to liability and recovery could be extrapolated to the class. 50CT14776-14842; 51CT14955-15023; 55CT16173-16177; 64RT5124. The court directed Plaintiffs' counsel to prepare a proposed SOD. 55CT16241. The court heard argument regarding the contents of Plaintiffs' Proposed SOD, to which USB raised numerous objections. 56CT16520-16615; 58CT17139-17140, 17147-17175; 59CT17330-17386. Plaintiffs requested that the court include a finding indicating that the non-RWG declarations that had been excluded would not have been afforded any weight due to their "circumstances of preparation." The court explicitly refused to make that finding, and Plaintiffs conceded that their proposed finding had been "over-inclusive." 65RT5297-5302.[9] At no point did the trial court ever make any finding

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[9] Plaintiffs nevertheless falsely represented to the Court of Appeal and to this Court that the trial court did make the finding they initially requested. *See, e.g.*, OB9, 18 (falsely stating that finding in the Phase I SOD applied to declarations that were not even admitted at trial); *see also* Respondents' (Continued...)

with respect to the credibility of any of the 72 non-RWG class member declarations that USB sought to introduce.

The court acknowledged the likelihood that an outside time expectation existed at USB but suggested that it was not "consistently" communicated and expressed its conclusion that USB "did not care where the Class members spent their time...."[10] 64RT5118-5120. USB submitted proposed additional findings excluding non-work time from calculation of alleged overtime hours, most of which the court denied. 59CT17318-17328, 17566-17581.

On July 18, 2008, the court entered its Order re SOD for Phase I. 60CT17704-17738. USB filed objections thereto and pointed out that Plaintiffs' asserted "average" weekly overtime for the RWG had illogically *increased* from 11.29 to 11.87 hours per week after the court directed Plaintiffs to account for a small portion of class members' *non-work time*. 61CT18155-18175. Over USB's objections, the court adopted Plaintiffs' assertion that the RWG worked 11.87[11] overtime hours per week. 71CT21008, 21046-21049. Although no evidence was presented during Phase I as to the "representativeness" of the RWG, the court found the RWG members "typical and representative of the entire class and validates

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(...Continued)
Br., filed October 22, 2010 in Court of Appeal at 8-11, 19-20, 23, 45-47, 94, 99-100 (same); USB's Reply filed February 14, 2011 in Court of Appeal at 40-50. In fact, the trial court simply found that the circumstances of preparation were relevant in assigning weight to the declarations of *three* RWG members admitted at trial. 71CT20991.

[10] The court later explained that the "thrust" of its Phase I findings and the "*key to the case*, in the Court's view," was that the court believed "that it was *completely irrelevant* to the bank where [BBOs] spent their time as long as... market share was increased...." Slip.Op. 28 n.38; 65RT5307.

[11] Plaintiffs later recalculated their asserted average as 11.86 hours in Phase II, which the court adopted. 83CT24516.

[sic] the viability of the use of the [RWG] process as part of the trial of a wage and hour class action." 71CT20998-20999. The trial court denied injunctive relief (the primary remedy available under the UCL) and rejected Plaintiffs' requests to revisit the issue. *In Re Tobacco II Cases*, 46 Cal.4th 298, 319 (2009) ("*Tobacco II*") (injunctive relief is primary remedy under UCL; restitution is ancillary); 55CT16175-16176; 60CT17603-17604, 17737-17738; 71CT21018-21019[12].

G. The Trial Court Excluded Plaintiffs' Survey Evidence.

Since June 2006, Plaintiffs advocated using a survey as a trial management tool. 20CT5852-5857. The court expressed doubt about the usefulness of a survey and, by October 2006, indicated that using representative testimony would "obviate" the need for any survey. 10RT222-226; 11RT239-241. After Phase I, Plaintiffs' counsel conducted a survey of non-RWG class members without the knowledge or consent of USB or the court. The court subsequently permitted Plaintiffs to augment their expert disclosures to identify this new area of potential testimony, but cautioned that such efforts and expenses might be wasted since the proposed evidence violated the trial plan. 65RT5269-5270. Before Phase II, the court granted USB's Motion to Exclude the Survey Evidence.

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[12] During Phase I, the trial court ordered USB to produce branch alarm records and security logs and to produce a PMK to testify about those records. 46CT13484-13486; 49RT3956-4038. The trial court ultimately agreed that the alarm records and security logs "would likely not produce sufficient evidence probative of hours worked." 71CT21013; 65RT5339-5343. Although Plaintiffs suggest that the court drew an "adverse inference" based on USB's failure to maintain hours worked records for employees classified as exempt (OB17), nothing in the record indicates what inference was supposedly drawn based on that fact, and no adverse inference could be drawn since that inference would depend on assuming an obligation to maintain records for exempt employees based solely on the pendency of a misclassification suit. *See, e.g.*, *Sotelo v. Medianews Group*, 207 Cal.App.4th 639, 650 (2012) (rejecting attempt to "bootstrap" a requirement to maintain records based on pendency of suit).

60CT17622-17655; 61CT18136-18149, 18152; 71CT21053-21070; 78CT23228; 79CT23516.

H. USB's Second Decertification Motion.

USB filed a second Decertification Motion after Phase I. On September 30, 2008, the day before the beginning of Phase II, the court denied the motion based on the belief that the trial plan including extrapolation to all class members of an unrebuttable classwide liability finding based on Phase I eliminated the need for determining individual employees' actual activities, alleged hours worked, or eligibility to recover. 69RT5497-5499, 5501; 62CT18394-18440; 70CT20780-20814; 78CT23227-23228.

I. Phase II Trial.

The Phase II trial began October 1, 2008. 78CT23224-23225. USB again sought to call all individual class members, including the four former named plaintiffs and approximately 70 class member declarants, and also sought to introduce their deposition testimony and sworn declarations, but the court excluded this evidence. 71CT21031-21045; 73CT21500-21510; 75CT22259-22277; 79CT23516; 70RT5526-5528. The court granted Plaintiff's motion in limine No. 17 to prevent USB from referencing any evidence regarding liability other than the trial court's Phase I SOD. 79CT23514. The court also excluded evidence proffered by USB showing that some class members had actually held non-exempt positions during the class period on the basis that such evidence violated the trial plan. 72CT21270-21499; 70RT5519-5526. These class members nevertheless recovered additional "overtime" for periods when they were *already* classified as non-exempt and for which time records existed to show they either did not work overtime or were already paid for overtime worked. 81CT23920-23923; 84RT6620-6622.

Plaintiffs called statistician Richard Drogin and accountant Paul Regan to testify during Phase II. 78CT23224-23226, 23230-23234. USB called Payroll Manager Bruzek to testify regarding class member job history and compensation, its own statistical expert, Andrew Hildreth, Ph.D., and accountant, Joe Anastasi (to rebut Regan's testimony), to testify regarding the implications of the Phase I findings and the lack of any basis to extrapolate those findings to the class. 79CT23494-23495.

Drogin testified regarding the theoretical value of random sampling in predicting facts about a population. Drogin conceded that the court did not use his proposed trial plan and that he could not provide a statistical basis for the court's classwide liability finding. 72RT5642-5653. In fact, Drogin conceded that he could not offer an opinion on the validity of the court's classwide liability finding and that he relied on the Phase I SOD for that point. Drogin admitted that the sample was not random, but disagreed with USB's experts on the overall effect of the non-random sample, including the effect of allowing RWG members to select out of the sample through the second opt-out period. Drogin testified that he believed the "bolstering" factors identified in *Bell v. Farmers Ins. Exchange*, 115 Cal.App.4th 715, 756 (2004) ("*Bell III*"), were present. Drogin declined to endorse the results of the trial plan, including the margin of error, as sufficiently accurate, instead indicating that he believed that was for the court to decide. 74RT5809-5811; *see also* Slip.Op. 30-35 (summarizing Drogin's trial testimony).

Dr. Hildreth testified that determining liability and recovery through valid statistical methods was not workable on the facts of this case. *See, e.g.*, 71CT20948-20953; TE1295; 81RT6378-6400. Hildreth agreed with Drogin that the sample was not random, but disagreed with him regarding some of the effects of the non-random sample, including the impact of the second opt-out, which introduced sampling error. *See id.*; *see also*

81RT6334-6353. Hildreth agreed with Drogin that there was no statistical basis to conclude that 100% of the class was misclassified and that, even ignoring the sampling errors and assuming that all 21 members of the sample were misclassified, up to 13% - a substantial portion of the population - could still have been properly classified. *See, e.g.*, 72RT5633-5643; 71CT20941-20953; TE1295. However, sampling errors could not be ignored and 13% was actually *not* a valid assumption. Hildreth disagreed with Drogin that the "bolstering" factors from *Bell III* were present. *See* TE1295; 81RT6330-6366; 82RT6422-6439; 83RT6550-6558. In contrast to Drogin's refusal to endorse the results of the court's trial plan as sufficiently accurate, Hildreth testified that the results of the trial plan, particularly the 43.3% margin of error, were unacceptable from a statistical standpoint. 80RT6295-6300; *see also* Slip.Op. 36-38.

J. Phase II Statement Of Decision.

After the completion of testimony, the court ordered Plaintiffs to propose a Phase II SOD with their post-trial brief and ordered USB to file any objections thereto with its post-trial brief. 79CT23518; 80CT23794-23833; 81CT23940-24023, 24092-24122. After a hearing on the Phase II post-trial briefs, the court adopted, in virtually all respects, Plaintiffs' proposed SOD, including Plaintiffs' expert's admission that the estimate of weekly overtime for the class carried a 43.3% margin of error (+/- 5.14 hours). 81CT24172. Judgment was entered May 20, 2009, awarding Plaintiffs and the class over $8.9 million as "restitution" of unpaid overtime compensation and over $5.9 million in prejudgment interest at a rate of 10% per year. 83CT24650-24651. The recovering class members included the four prior named plaintiffs and the approximately 75 declarants who admitted they were properly classified as exempt.

USB moved for a new trial, arguing that the trial proceedings and the practical nature of the "damages" awarded (based on estimates) did not comport with the equitable nature of Plaintiffs' UCL claim, and that USB had been unconstitutionally denied a jury trial. 86CT25422-25440. The court denied USB's motion. 86CT25507-25508. USB timely filed its Notice of Appeal on July 17, 2009. 86CT25542-25543.

K. Court Of Appeal Decision.

On February 6, 2012, the Court of Appeal filed its unanimous published opinion, agreeing with USB that the trial plan was fatally flawed, reversing the judgment and decertifying the class. Slip.Op. 1. Nearly half of the Court of Appeal's 60-page opinion consists of a detailed description of the factual history of this case, including descriptions of the evidence that was admitted (and excluded) pursuant to the trial plan. Plaintiffs gloss over these important details in an attempt to present only policy arguments about the purported future of "all" class actions instead of addressing what actually occurred in *this* class action. However, the Court of Appeal carefully reviewed the extensive record in this case, which revealed numerous errors and a trial plan that "constituted a miscarriage of justice." Slip.Op. 74.

The Court of Appeal determined that the "innovative procedural tools" utilized by the trial court failed by neglecting to adhere to sound statistical principles and sacrificing USB's due process right in the name of expediency, and that the individual issues ultimately could not be managed on a classwide basis. Slip.Op. 40-41, 59-60, 73. The Court of Appeal concluded that the trial plan suffered from a litany of errors not present in *Bell III*, noting that the trial plan here failed to adhere to basic statistical principles and that the "troubling" 43.3% margin of error far exceeded the 32% margin of error rejected as unconstitutional in *Bell III*. The Court of

Appeal also concluded that the trial court "hobbled [USB] in its ability to prove its affirmative defense" by prohibiting USB's presentation of relevant evidence by limiting evidence to the RWG only, which barred USB from presenting evidence that "could have defeated plaintiffs' class action claim entirely." Slip.Op. 45-47.

The Court of Appeal's application of established case law led it to the unavoidable conclusion that representative sampling was inappropriate in this class action trial of the outside sales exemption where liability depends on an employee's individual circumstances. Slip.Op. 47-51. Applying the balancing test for identifying constitutional due process violations, articulated in *Connecticut v. Doehr*, 501 U.S. 1, 10 (1991), the Court of Appeal held that the trial in this case did not satisfy due process. The risk that USB was compelled to pay money to absent plaintiffs who were not entitled to recovery and the risk of a high margin of error outweighed any of the other applicable factors. "A trial in which one side is almost completely prevented from making its case does not comport with standards of due process." As such, the trial court erred by constructing a trial plan that unfairly prevented USB from defending itself in the name of expediency. Slip.Op. 59-60.

The Court of Appeal held that the trial court abused its discretion in denying USB's second motion to decertify, holding that the trial court erred in thinking that it could find classwide misclassification by extrapolating the RWG findings to the entire class. Slip.Op. 67-72. Plaintiffs' theory was that USB's expectation was solely that the employees would meet sales goals and had no expectation as to how the goals were to be met. The Court of Appeal reasoned that it is this very assertion that weighs against class certification. With discretion as to how to perform the job comes the likelihood of substantial differences in how and where each class member spent his or her time, which counsels against the idea of common proof.

Slip.Op. 73. Without reaching the issue of whether the trial court's earlier certification decisions were erroneous, the Court of Appeal determined that by the time USB presented its second motion to decertify, the trial court had *already attempted to manage the individual issues and failed.* In such a context, where the class action must "splinter into individual trials," class treatment is inappropriate. Slip.Op. 71-73. Accordingly, denying decertification after Phase I was an abuse of discretion, and the Court of Appeal decertified the class. Slip.Op. 73-74.

ARGUMENT

I. THE COURT OF APPEAL PROPERLY REVERSED THE DENIAL OF USB'S SECOND DECERTIFICATION MOTION.

A. Standard Of Review.

A ruling on a motion for decertification is reviewed for an abuse of discretion. *Walsh*, 148 Cal.App.4th at 1451. However, "[t]his deferential standard of review... is inapplicable if the trial court has evaluated class certification using improper criteria or an incorrect legal analysis." *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1530 (2008). A "trial court's ruling must be reversed if its findings are not supported by substantial evidence, if improper criteria were used, or if erroneous legal assumptions were made." *Dep't of Fish & Game v. Super. Ct.*, 197 Cal.App.4th 1323, 1333 (2011). "If the trial court failed to follow the correct legal analysis..., an appellate court is required to reverse... even though there may be substantial evidence to support the court's order." *Bartold v. Glendale Fed. Bank*, 81 Cal.App.4th 816, 828 (2000).

B. The Court Of Appeal Did Not Disturb The Trial Court's First Two Certification Rulings.

In the Court of Appeal, USB challenged the rulings on Plaintiffs' original certification motion, USB's pre-trial motion for decertification, and USB's

second decertification motion brought after Phase I. The Court of Appeal did not reach the first two rulings, but reversed the denial of USB's *second* decertification motion, rendered after months of trial confirmed the individualized nature of the liability inquiry. Contrary to Plaintiffs' argument, the Court of Appeal did not decertify solely due to the flawed trial plan, but rather because the record through the completion of Phase I still contained no evidence that liability was subject to common proof. Thus, even allowing the trial court the widest possible discretion by not reversing the earlier certification rulings, the Court of Appeal found that the trial court relied on improper indicia of commonality in maintaining class treatment when, even after months of trial, the record revealed no common method for addressing liability and "the only way to determine with certainty if an individual BBO spent more time inside or outside the office would be to question him or her individually." Slip.Op. 58, 71-72. Under these circumstances, decertification is proper. *See, e.g.*, *Walsh*, 148 Cal.App.4th at 1456; *Keller v. Tuesday Morning*, 179 Cal.App.4th 1389, 1391 (2009); *Marlo v. UPS*, 639 F.3d 942, 948 (9th Cir. 2011); *Cruz v. Dollar Tree Stores*, 2011 U.S.Dist. LEXIS 73938, *2 (N.D.Cal. 2011); *Brady v. Deloitte & Touche*, 2012 U.S.Dist. LEXIS 42118, *16-21 (N.D.Cal. 2012); *Whiteway v. FedEx Kinkos*, 2009 U.S.Dist. LEXIS 127360, *8-11 (N.D.Cal. 2009).

C. The Court Of Appeal Properly Reversed The Second Decertification Motion Ruling Because The Evidence Introduced And *Excluded* At Trial Demonstrated The Individual Nature Of The Exemption Inquiry.

1. Class Treatment Is Proper In Wage And Hour Cases Only Where Liability May Be Determined As To The Entire Class Based On A Uniformly Applicable Policy Or Practice That Violates The Law.

To support class treatment, Plaintiffs must prove that there is an ascertainable, *manageable* class and a well-defined community of interest among class members, such that class litigation is a superior method of resolving the dispute. *Walsh*, 148 Cal.App.4th at 1450. To do so, a plaintiff must prove, among other things, that common issues of law or fact predominate over issues unique to individual class members. *Id.* The court must consider the plaintiff's legal theory and the defendant's affirmative defenses, and certification is improper if an affirmative defense raises predominant individual issues. *Id.* "Among the issues central to the predominance inquiry is whether the case, if tried, would present intractable management problems." *Cruz*, 2011 U.S.Dist. LEXIS 73938 at *11.

Class actions are generally appropriate only "if the defendant's liability can be determined by facts common to all members of the class." *Brinker v. Super. Ct.*, 53 Cal.4th 1004, 1022 (2012). In the wage and hour context, this generally requires a "uniform policy consistently applied to a group of employees [that] is in violation of wage and hour laws." *Id.* at 1033, 1051-1052. Thus, *Brinker* found class treatment proper on a rest break claim because the employer's universally-applied policy facially violated California law. *Id.* at 1033. Certification was inappropriate on the plaintiffs' off-the-clock claim because there was no uniform companywide policy or "common method of proof" to establish liability, thus requiring

liability to be established in an "employee by employee fashion." *Id.* at 1051-1052; *see also Morgan v. Wet Seal, Inc.*, 210 Cal.App.4th 1341, 1364-1368 (2012) (class certification denied on expense reimbursement claim in absence of common policy or other common proof to establish liability).

The principles reiterated in *Brinker* are also consistent with *Wal-Mart Stores v. Dukes*, 131 S.Ct. 2541 (2011), which this Court cited with approval. *Dukes* explained that commonality "requires the plaintiff to demonstrate that the class members 'have suffered the same injury'" based on a "common contention" that is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 2551. *Dukes* further emphasized:

> What matters to class certification... is not the raising of common 'questions'—even in droves—but rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Id. (emphasis original) (citation omitted); *see also Brinker*, 53 Cal.4th at 1022 n.5. Even where a trial court initially certifies a class, if subsequent proceedings reveal unmanageable individual issues, the court should decertify. *Sav-On*, 34 Cal.4th at 335; *see also Walsh*, 148 Cal.App.4th at 1456 (decertifying class); *Keller*, 179 Cal.App.4th at 1391 (same); *Marlo*, 639 F.3d at 948 (same).

2. Courts Have Uniformly Found Outside Salesperson Misclassification Claims Revealing Varying Amounts Of Time Outside The Office Inappropriate For Class Treatment.

Under California law, an outside salesperson is one "who customarily and regularly works more than half the working time away from the employer's place of business" engaged in sales duties. IWC Wage Order No. 4-2001; 8 Cal. Code Regs §11040(2)(M).

> The reasons for excluding an outside salesman are fairly apparent. Such salesmen, to a great extent, work[] individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day. To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman.

Vinole v. Countrywide Home Loans, 571 F.3d 935, 945 n.10 (9th Cir. 2009); DLSE Op.Ltr. 1998.09.08 (outside salespersons generally "set their own time, and they're on the road, they call on their customers... [R]arely [does the employer] know what they're doing on an hour-to-hour basis."). The above rationale for the outside sales exemption squarely applies to BBOs.

Whether an employee qualifies for the outside sales exemption turns, "first and foremost," on "how the employee actually spends his or her time." *Ramirez v. Yosemite Water*, 20 Cal.4th 785, 802 (1999). *Ramirez* further recognized that an employee might try to evade an exemption through substandard performance and, accordingly, even if the employee spent most of his or her time inside the employer's place of business courts

must consider whether that practice diverged from the employer's realistic expectations of the job. *Id.*

Courts analyzing certification in outside salesperson cases where liability turned on how much time an employee spent outside the office have *uniformly* held that this individualized inquiry precluded class treatment in the absence of a common policy suggesting class members were required to spend the majority of their time inside. *See Walsh*, 148 Cal.App.4th at 1460-1461; *Mevorah v. Wells Fargo Home Mortg.*, 571 F.3d 953, 956-959 (9th. Cir. 2009) ("*Wells Fargo I*"); *In Re Wells Fargo Home Mortgage Overtime Pay Litig.*, 268 F.R.D. 604, 611-613 (N.D.Cal. 2010) ("*Wells Fargo II*"); *Vinole*, 571 F.3d at 946-947; *Maddock v. KB Homes*, 248 F.R.D. 229, 245-248 (C.D.Cal. 2007); *see also Brinker*, 53 Cal.4th at 1032, 1053-1054, n.2, 3 (citing *Walsh* with approval).

3. The Court Of Appeal Properly Held That The Trial Court Relied On Improper Indicia Of Commonality In Concluding A Classwide Liability Determination Was Possible.

In initially granting class certification, the court reasoned that the BBO position was "standardized" based on USB's uniform classification of the position and its alleged failure to train or monitor BBOs regarding the exemption requirements:

> [T]he record contains substantial evidence that defendant treated BBOs... alike, regardless of whether such treatment was appropriate under the law. Plaintiffs have substantial evidence that defendant classified all BBOs... as exempt, and did so without any inquiry (let alone any individualized inquiry) as to any particular employee's job duties, hours worked, performance or any other factor. This apparent policy, defendant's apparent failure to train or monitor BBOs... to ensure that the exemption requirements would be or were being satisfied, and the apparent standardization of the BBO… position all create substantial issues of fact and

> law that are common among class members and that are likely to rest on 'a common thread of evidence' class-wide.

16CT4619. Plaintiffs also alleged that USB had common hiring and training procedures, sales incentive plans, job descriptions, performance appraisal standards, and that BBOs shared similar general sales duties. 6CT1616-1621, 1626-1627. Nowhere did the trial court find that USB had a uniform policy (express or *de facto*) requiring BBOs to spend the majority of their work time inside the Bank, *nor did Plaintiffs even argue this* in moving for class certification. 6CT1604-1629; 13CT3556-3575.

In denying USB's first decertification motion prior to trial, the trial court reiterated its reasoning, relying on USB's uniform classification of BBOs as the "fundamental" evidence of the "standardization" of the position:

> As set forth in the original class certification order, *fundamental to Plaintiffs' overtime claims is the assertion that Defendant classified all BBOs as exempt*, and did so without any inquiry as to any particular employee's job duties, hours worked, performance or any other factors, and this assertion was supported by substantial evidence submitted by Plaintiffs in support of their original motion for class certification.

38CT11094 (emphasis added)[13]; *see also* 32CT9428. As with the original certification order, the trial court did not find that USB had a common policy requiring BBOs to spend the majority of their time inside, nor did Plaintiffs allege any such policy. 38CT11094; 32CT9422-9456.

While the policies relied upon by the trial court may constitute evidence of "commonality" in an abstract sense, they are not evidence of commonality that could facilitate a "common answer" on *where any or all*

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[13] All further emphases are added unless otherwise noted.

BBOs spent their work time, much less whether the entire class was misclassified. *See, e.g.*, *Wells Fargo II*, 268 F.R.D. at 611 (uniform classification and standard policies insufficient for certification because none relate to proving where class members spent their time); *Vinole*, 571 F.3d at 946 (same); *Soderstedt v. CBIZ S. California*, 197 Cal.App.4th 133, 153 (2011) ("[A]n individualized inquiry is necessary even where the alleged misclassification involves application of a uniform [classification] policy, because the policy may properly classify some employees as exempt, but not others."); *Walsh*, 148 Cal.App.4th at 1461; *Dunbar v. Albertson's*, 141 Cal.App.4th 1422, 1427 (2006); *Gales v. Winco Foods*, 2011 U.S.Dist. LEXIS 96125, at *27-*35 (N.D.Cal. 2011).

Wells Fargo II, another outside sales exemption case, is particularly instructive. There, the defendant uniformly classified the employees, and the class members had common job descriptions, uniform training, the same primary goal (selling mortgages), uniform job expectations, similar compensation plans, and standardized employee evaluation standards. 268 F.R.D. at 611. The court denied certification, reasoning that none of this common proof could provide a classwide answer on the pivotal liability issue—how much time class members spent outside the office. The court explained that the only conceivable type of policy that would replace the need for such an individualized analysis would be a common policy requiring the class members to spend most of their time inside the office. Absent such a policy, the court "would need to conduct 'inquiries into how much time each individual [employee] spent in or out of the office....'" *Id.* Accordingly, the court held that individual issues predominated and class treatment was inappropriate. *Id.*

Similarly, in *Vinole*, the court denied certification of a proposed class of loan consultants classified as exempt under the outside sales exemption. 571 F.3d at 946-947. Despite evidence of many commonly

applicable policies, including the uniform classification of the employees, individual inquiries to determine liability remained necessary because none of the policies, singularly or collectively, required the class members to spend the majority of their time in or out of the office, especially where the class members had discretion to determine how and where to perform their job duties. *Id.*; *see also Spainhower v. U.S. Bank Nat'l Assoc.*, 2010 U.S.Dist. LEXIS 46316, *11-*12 (C.D.Cal. 2010) (discretion on activities negated possibility of common proof on liability).

As in *Wells Fargo II* and *Vinole*, there was no evidence before the trial court that USB had a common policy requiring BBOs to spend the majority of their work time *inside*. Instead, BBOs had discretion to determine how and where to do their jobs and USB did not track how much time was spent inside versus outside. Not surprisingly, the evidence before the trial court showed substantial material variation among class members regarding their outside time.

At each stage of certification briefing, USB presented declarations of 75 BBOs and deposition testimony of the four prior named plaintiffs showing that these BBOs spent the majority of their work time outside the Bank on sales duties.[14] Former named plaintiff Haven testified that she spent 80% of her time "outside the branch knocking on doors trying to sign

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[14] With the exception of declarations by *three* RWG witnesses admitted at trial, no credibility finding was ever made as to the other BBO declarations. To the extent Plaintiffs speculate that USB's declarations should be discounted because current employees fear retaliation, that contention too is logically flawed. *See Wong v. AT&T*, 2011 U.S.Dist. LEXIS 125988, *16 n.12 (C.D.Cal. 2011) (court will not look with "jaundiced eye" at defense declarations of current employees, who are no more likely to "curry favor" or fear retaliation with employer than former employees are likely to have an "axe to grind" or "tainted by the possibility of monetary gain.")

people up." 68CT20180-20181. Similarly, Rafiqzada testified that she spent 60% of her time "performing [her] duties as a small business banker outside the branch." 68CT20176. Shekarlab testified unambiguously that he spent 80-90% of his time "outside the branch" and "in the field" calling on prospects. 68CT20184. Karavani testified that she spent 60-80% of her time "outside the branch selling" and "calling on businesses." 68CT20187. Plaintiffs effectively conceded these prior named plaintiffs were exempt, substituting in new named plaintiffs to replace the four uninjured representatives.[15] Nonetheless, they recovered $160,000 under the Judgment. Plaintiffs supplied 37 BBO declarations (less than half that presented by USB) stating these BBOs spent the majority of their time *inside* the Bank. 6CT1461-1462; 11CT3062; 13CT3648.

In support of its first decertification motion filed prior to trial, in addition to the evidence discussed above, USB submitted additional deposition testimony of RWG and non-RWG class members admitting that the time they spent outside the Bank materially varied from week to week, quarter to quarter, and year to year—and that some spent the majority of their time outside the Bank for some or all of their employment. *See* Statement of the Case above.

- RWG Bradley testified that on average he spent 60-65% of his time outside and that he spent more time outside at the beginning of each quarter and more time inside toward the end of each quarter. 31CT8933-8935.

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[15] Although Plaintiffs have argued that the testimony was ambiguous because USB provided no definition of the term "outside sales," even a cursory review of the actual testimony reveals that the deponents were not asked how much time they spent on allegedly ambiguous outside sales, but rather how much time they spent outside the branch. As such, there is nothing ambiguous about the testimony and it has never been refuted.

- RWG McCarthy testified that for over half her tenure she spent the majority of her time outside. 31CT9195, 9197-9198.
- RWG Penza stated that he initially spent "100%" of his time outside, but that this percentage decreased as he shifted from an in-person approach to an over-the-phone approach. 36CT10685-10690.
- Non-RWG Roberson admitted that in the first year of his employment, he spent most of his weekly work time outside the Bank, but that later he spent more time inside. 31CT9084-9085.
- Lewis and MacClelland (original RWG members who opted out at Plaintiffs' counsel's urging) both admitted that throughout their time as BBOs they spent the majority of their time outside. 31CT9000-9001, 9011-9012.

Indeed, Plaintiffs *admitted* in opposing USB's first decertification motion that certain class members spent more than half of their time outside the Bank during portions of their BBO employment. 32CT9430-9432 (acknowledging that Bradley was 80%-90% outside the majority of every quarter, Vanderheyd spent the majority of her time inside some weeks and outside others, Pham's outside time ranged from 50%-75%, and Wheaton was outside during all but his first six weeks as a BBO). Both Plaintiffs' admission, and the evidence USB submitted in support of the motion, directly disprove Plaintiffs' bold, unsupported statement that "every single" class member who was deposed confirmed they were "misclassified at some [ ] time during their employment and all but two were misclassified the entire time." OB29.

This was only a small subset of anecdotal evidence in the record demonstrating wide variance from BBO to BBO regarding time spent

outside, and alone precluded class treatment. Had USB been able to call all class members, the variation would be even more pronounced. *See Walsh*, 148 Cal.App.4th at 1455-1456 (declarations and deposition testimony revealing material variance in time spent outside office precluded class treatment in outside sales exemption case because each class member would need to be questioned regarding his/her outside time); *Morgan*, 210 Cal.App.4th at 1363-1364 (absent a company-wide unlawful policy, where plaintiffs instead rely on anecdotal evidence to demonstrate violations, the employer's contrary anecdotal evidence is equally relevant to show the absence of any common classwide proof of liability). The trial court nonetheless maintained class treatment, erroneously focusing on non-dispositive common policies to support a classwide liability determination. The trial court's misplaced focus was an abuse of discretion.

4. Contrary To Plaintiffs' Argument, The Trial Court Did Not Rely On "Substantial Evidence Of Widespread Misclassification," And Even If It Had, This Would Not Support The Use Of Representative Testimony Here.

Plaintiffs attempt to re-characterize the trial court's certification rulings, injecting reasoning Plaintiffs hope to be more defensible on review. Although the actual rulings contain no such language or reasoning, Plaintiffs describe the trial court's certification rulings as being based on "substantial evidence of widespread misclassification." This is simply false. The only "widespread" or "standardized" evidence cited by the trial court were USB's uniform classification and similar common policies having *nothing* to do with the amount of time BBOs spent inside or outside the Bank. 16CT4619-4621; 38CT11093-11094.

To the extent there was evidence before the trial court suggesting some class members were misclassified—by virtue of Plaintiffs' BBO declarations and deposition testimony—this evidence did not suggest that these BBOs' experiences resulted from any common policy requiring BBOs to spend the majority of their time inside, nor did it suggest that these BBOs were "representative" of other class members in terms of their outside time.

Thus, even if the trial court believed there was sufficient evidence of misclassification to support class treatment initially, that determination did not relieve the court of the duty to *manage* individual issues to account for properly classified BBOs (and to discern who those class members were). *Sav-On*, 34 Cal.4th at 335-337 (even if class treatment is deemed appropriate, individual issues must still be managed; disputes over how an employee spends his time tend to generate individualized issues); *Walsh*, 148 Cal.App.4th at 1462 (evidence of deliberate or de facto widespread misclassification does not preclude a finding that individual employees qualified for exemption).

Several courts have squarely rejected sampling and representative testimony to determine liability in outside sales cases where the dispute centers on how much time an employee spends away from the employer's property and there is no standard policy on this issue. *Wells Fargo II* specifically considered and rejected the plaintiff's argument that individual inquiries could be averted through random sampling to determine whether all or a portion of the class qualified for the outside sales exemption, and thereafter extrapolating the findings to the rest of the class:

> Assume that the court permitted proof through random sampling of class members, and that the data, in fact, indicated that one out of every ten [class members] is exempt. How would the finder of fact accurately separate the one exempt [class member] from the nine non-exempt [class

> members] without resorting to individual mini-trials? Plaintiff has not identified a single case in which a court certified an overbroad class that included both injured and uninjured parties... In fact, the court has been unable to locate any case in which a court permitted a plaintiff to establish the non-exempt status of class members, especially with respect to the outside sales exemption, through statistical evidence or representative testimony.

268 F.R.D. at 612.

Vinole also rejected the notion that individual inquiries could be avoided with sampling or representative testimony. "These arguments are not persuasive in light of our determination that Plaintiffs' claims require a fact-intensive, individual analysis of each employee's exempt status." *Vinole*, 571 F.3d at 947 ("Plaintiffs' claims will require inquiries into how much time each individual [employee] spent in or out of the office.")

Likewise, in *Dunbar*, the court explained the problem with trying to make classwide liability determinations based on non-dispositive common policies and despite evidence of material variation among class members on time spent on exempt duties:

> In this case, the Court cannot determine whether Defendant's policy of designating GMs as exempt is unlawful in the abstract. If the Court found that the policies were appropriate as applied to 70% of the GMs and inappropriate with respect to the remaining 30%, that finding would not permit the conclusion that the policies were unlawful. The hypothetical finding would indicate that the policies are applied to too many employees and lead the Court to visit the issue of ascertaining which employees are in the 70% that should be in the class and which are in the 30% that should not be in the class.

141 Cal.App.4th at 1428. Simply put, evidence that some class members may have been misclassified does not establish the existence of common proof that other, much less all, class members were also misclassified. Where no common policy or systematic practice requires class members to

spend the majority of their time inside, individual inquiries are unavoidable to determine how much time each employee spent inside versus outside, rendering representative forms of proof unhelpful. *See Morgan*, 210 Cal.App.4th at 1365-1369 (representative testimony, surveys or statistical analysis inappropriate where "the *fact* of liability," as opposed to the "extent of liability," depends on individualized evidence); *Marlo v. UPS*, 251 F.R.D. 476, 486 (2008) (decertifying class where plaintiff was unable "to provide common evidence to support extrapolation from individual experiences to a class wide judgment that is not merely speculative"); *Whiteway*, 2009 U.S.Dist. LEXIS 127360 at *10; *Spainhower*, 2010 U.S.Dist. LEXIS 46316 at *11-*12; *Beauperthuy v. 24 Hour Fitness*, 772 F.Supp.2d 1111, 1130-1131 (N.D.Cal. 2011) (representative testimony unhelpful where evidence "show[ed] that for every manager who says one thing about his or her job duties and responsibilities, another says the opposite"). Because this Court has never authorized sampling or representative evidence as a means of *concealing* individual issues, the trial plan's use of "representative" testimony was invalid and failed to justify continued class treatment, making decertification appropriate here.

5. USB's Second Decertification Motion Conclusively Confirmed USB Had No Common Policy Requiring BBOs To Spend The Majority Of Their Time Inside.

a. The Trial Court Expressly Found That There Was No Common Policy.

As in the pre-trial certification briefing, Plaintiffs failed at trial to provide any evidence of any common USB policy uniformly requiring BBOs to spend the majority of their work time inside the Bank. Instead, Phase I amounted to 21 mini-trials of BBOs testifying as to their individual work experiences. The trial court then made individual liability and

recovery determinations based on the respective facts applicable to the individual RWG member in question. No testifying BBO had knowledge regarding the work activities or hours of any other BBO, and no evidence demonstrated that one BBO was "representative" of any other.

Indeed, the trial court *expressly found* that USB did not have any uniform policy requiring class members to spend the majority of their time either inside or outside the Bank, determining that USB "did not care where the Class members spent their time," and "never had a policy or requirement for BBOs to be outside of bank locations more than half of their work time." 71CT21009-21010. The trial court believed that "it was completely irrelevant to [USB] where these folks spent their time" and viewed that fact as "the key to the case." 65RT5307; *see also* 71CT21013.

The trial court's findings underscore the fact that the central issue of liability in the case was not susceptible to common proof and, as a result, there was no valid basis for extrapolating RWG testimony as to time spent outside the Bank to absent class members. Slip.Op. 58, 71-73. However, the trial court erred when it found that the *lack* of a common policy necessarily resolved the case in Plaintiffs' favor classwide, and on that basis erroneously denied decertification.

b. The Trial Court Did Not And Could Not Find That The BBO Position Was Incapable of Being Performed In An Exempt Manner.

Contrary to the findings described above, Plaintiffs contend that the trial court found that the nature of the BBO position made it "unrealistic" for *any* BBO to spend the majority of his or her time outside the Bank. There are numerous problems with Plaintiffs' argument.

First and foremost, any purported finding regarding what all class members could or could not do must be severely discounted by the fact that the finding was based solely on the *limited* evidence allowed under the

myopic trial plan. The erroneously excluded evidence showing that a huge portion of the class did perform their jobs in an exempt manner undermines the validity of any finding that it was somehow "unrealistic" for BBOs to spend the majority of their time outside the Bank. 67CT19627, 19713-19881, 19928-68CT20188. In ruling on USB's second motion for decertification, the court made no finding that BBOs could not spend the majority of their time outside the Bank or that it was unrealistic for them to do so. 78CT23227-23228.

Second, the trial court did apparently believe, based on the severely restricted evidence it allowed at trial, that a *uniform expectation* for BBOs to spend the majority of their time outside the Bank was "unrealistic" based on the trial court's determination that most BBO duties "could be" performed inside the Bank and the fact that several BBOs testified that they regularly spent the majority of their time inside the Bank. *See* 71CT21015-21016. Thus, read in context, the trial court's finding on this point related only to the Bank's realistic expectations defense,[16] *not* to determining how all class members *actually* spent their time. However, neither the trial court's finding that USB did not *consistently* communicate its outside time expectation, nor its finding that a uniform outside time expectation was "unrealistic," can rationally be interpreted as a finding that all BBOs, or even all RWGs, actually spent a majority of their time inside. Indeed, the trial court's individualized findings as to the amount of time each of the 21 RWG spent outside the Bank would be inexplicable had the trial court

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[16] The trial court also found that USB failed to *consistently* communicate an outside time expectation to BBOs. 71CT21012; 64RT5120; 65RT5309-5310; *see* Section I.C.6.c, below.

actually found that the position was only capable of being performed by spending the majority of time inside the Bank.[17]

Third, had the trial court found that the BBO position was *incapable* of being performed in an exempt manner, presumably the court would have granted Plaintiffs' request for injunctive relief, the primary remedy under the UCL, and ordered USB to treat BBOs as non-exempt. The court instead denied injunctive relief, finding that it lacked evidence as to the ongoing treatment of BBOs, a finding that would make no sense if the court had found the position categorically incapable of being performed as an exempt outside sales position. 71CT21018-21019.

6. The Trial Evidence Confirmed The Individualized Nature Of The Exemption Inquiry.

As noted above, Phase I of the trial was essentially 21 mini-trials (each lasting approximately two days), along with testimony of USB management witnesses. OB41. Determining liability for each RWG member depended on numerous individual issues, including (1) admissions by class members that the amount of time they spent outside the Bank materially varied over time, (2) credibility issues stemming from prior inconsistent statements by class members regarding their outside time, (3) individualized issues relating to USB's realistic expectations defense, (4) individualized issues relating to whether certain BBOs, while technically holding the "BBO" title, actually performed different roles, and (5) individual issues arising from additional defenses applicable to specific

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[17] The trial court acknowledged that RWG Penza spent the majority of his time outside the Bank for at least a small portion of his employment, belying any argument that the trial court found that the position could only be performed by spending a majority of one's time inside the Bank. 71CT21005.

class members. Because no method was ever devised for even attempting to address these issues for over 90% of class members, class treatment was improper.

a. The Trial Yielded Evidence Of Material Variation In Time Spent Outside The Bank.

The trial revealed that the amount of time particular BBOs spent outside the Bank varied widely from week to week, suggesting that in some weeks they spent the majority of their time outside the Bank even if in other weeks they spent the majority of their time inside. For example, Bradley testified that his outside selling time varied from week to week based on the number of appointments he had and that he spent much more time in the beginning of the quarter out "beating the bushes" to make new sales. *See* 40RT2713-2716. Vanderheyd similarly admitted that her outside time "totally varied based upon the week" and that, some weeks she spent the majority of her time outside the Bank selling whereas other weeks she spent the majority of her time inside the Bank. *See* 38RT2422-2428; *see also* 30RT1673-1681 (Anderson's sales activities and outside time varied on a daily and weekly basis; some weeks he spent a majority of his time outside the Bank and others inside); 33RT1960-1962; 46RT3482-3491 (Lindeman's outside time varied over time; he initially spent too much time inside, but eventually heeded his supervisor's advice to increase his outside time).

Likewise, the amount of time Penza spent outside the Bank materially varied over time. Penza always admitted that he spent a majority of his time outside for at least two weeks of his employment but he provided estimates ranging from 75% *outside* to 80% *inside* in his various descriptions of the rest of his employment. TE1000-1001; 22RT838-839, 849-850, 883-909; 60RT4906-4923 (Penza's supervisor confirmed he spent

most of his time outside for at least the first year of employment but later increased his telemarketing and other inside sales activities).

The trial evidence also revealed that time spent outside the Bank varied substantially *by BBO*. Four RWG witnesses signed declarations prior to trial admitting that they customarily spent the majority of their weekly work time performing sales duties outside the Bank. TE1000-1001, 1006, 1017, 1087. At least two other RWG witnesses, McCarthy and Bradley, admitted at deposition that they spent the majority of their time outside the Bank most, if not all, weeks. 42RT2834-2840; 40RT2671-2673, 2694-2696, 2715-2718; 29RT1635-1637. Original RWG member MacClelland, testifying as a supervisor of certain RWGs after being removed from the RWG, stated that he too regularly spent the majority of his weekly work time as a BBO outside the Bank. TE1115; 52RT4419-4421, 4456-4460. The extreme variation (over time and by individual) in the amount of time RWG members spent outside, including variation as to whether the majority of that time was inside or outside, established that the liability inquiry was necessarily individualized and that the trial evidence provided no basis for determining whether any non-RWG BBO spent most of his/her time inside or outside.

b. The Trial Revealed Individualized Credibility Issues Bearing Directly On Liability.

The trial evidence reflected numerous credibility issues affecting the liability determination for individual BBOs. Individualized credibility issues affecting liability suggest that class treatment is inappropriate. *Walsh*, 148 Cal.App.4th at 1459 (inconsistent testimony by individual class members as to time spent on exempt duties "underscores the likelihood that adjudicating the outside salesperson exemption will be best accomplished on an individual basis"); *Jimenez v. Domino's Pizza, Inc.*, 238 F.R.D. 241,

251-252 (C.D.Cal. 2006) ("[T]hese determinations necessarily require inquiries into credibility relating to why certain managers spent more or less time on the various tasks. Because these questions and issues of proof are so individualized, the Court cannot say that the common question presented predominates.")

Four RWG members (Penza, Bradley, Koga, McCarthy) who testified at trial that they regularly spent the majority of the weekly work time inside the Bank were confronted with prior inconsistent declarations and/or deposition testimony where they admitted that they spent the majority of their weekly work time outside the Bank most, if not all, weeks. TE1000-1001; TE1087; TE1017. These witnesses provided differing, highly individualized explanations for contradicting their prior sworn statements. *See, e.g.*, 22RT838-839, 849-850, 881-909; 23RT977-991 (Penza said he signed the declarations because he was a "brand new" BBO and/or had a lot of outstanding commissions, though admitting he had been a BBO for eight months when he signed the first declaration and for two years when he signed the second, but admitted that no one threatened his commissions if he did not sign the declarations and he had no knowledge that anyone at USB even knew the contents of the declarations); 35RT2203-2215; 36RT2221, 2225-2228, 2230-2231, 2235-2242, 2244, 2274-2275 (Koga claimed he felt "pressured" to sign the declaration but failed to explain how anyone pressured him); 40RT2671-2706, 2713-2716, 2667-2670; 42RT2834-2857 (Bradley blamed his inconsistent admissions on "faulty" memory that was allegedly refreshed at trial by expense records that he admitted did not reflect all outside time); 29RT1613, 1625-1630, 1635-1637; 31RT1706-1711 (McCarthy failed to explain why she affirmed three different times during deposition that she spent most weeks outside, but claimed the opposite at trial).

The trial also revealed credibility issues stemming from RWG members' false statements on employment applications regarding the nature of the BBO position, and from supervisor testimony refuting individual RWGs' testimony as to the amount of time they spent outside the Bank. *See, e.g.*, TE1075A; 29RT1528-1531; 20RT580-583; 55RT4565-4579; *cf.* 39RT2558-2565.

The trial court confirmed the existence of these individualized credibility issues:

> The Court certainly concurs with the defendant's argument that substantial questions were raised as to the credibility of certain of the Representative Witness Group, RWG witnesses. The prevalence of false or misleading employment applications cannot be ignored. Likewise the conflict between trial testimony and declarations attained from RWG witnesses by defense counsel in pretrial stages [and] at deposition testimony complicate the fact-finding process.

71CT20991. As USB argued in its second decertification motion (*see* 62CT18410-18416), the existence of these credibility issues affecting the right of individual RWG members to recover confirmed that analogous issues would also need to be addressed for the class members falling outside the tiny portion of the class for whom the trial court allowed evidence at trial. As the *Walsh* court explained in decertifying a class based in part on credibility issues:

> [T]his apparent inconsistency in the witnesses' accounts... underscores the likelihood that adjudicating the outside salesperson exemption will be best accomplished on an individual basis. After all, the credibility of each witness and the weight to be given his or her testimony is a matter for the trier of fact, who would consider each witness's trial testimony, inconsistencies in prior testimony or declarations, and any explanation for the change in testimony. The fact that a jury might have to decide which of [the witness's] versions to believe does not suggest that questions of fact or law common to the class predominate over individualized issues.

148 Cal.App.4th at 1459. While the court's findings acknowledged that individual credibility issues were "substantial" and that such problems "cannot be ignored," the trial court did just that by determining liability on a classwide basis without addressing those issues for the vast majority of class members.

c. The Trial Evidence Confirmed The Need For Individualized Analysis Of USB's Reasonable Expectations Defense.

The realistic expectations defense, if proven, prevents an employee from prevailing on an overtime claim even though the employee did not spend his work time primarily engaged in exempt duties. *Ramirez*, 20 Cal.4th at 801-802. In assessing the defense, courts examine "whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job." *Id.*

The trial evidence, along with pre-trial evidence submitted in connection with certification and decertification briefing, revealed that at least 19 class members (including 3 RWG witnesses) admitted being told that USB expected them to spend the majority of their time on sales activities outside the Bank. 9CT2303, 2330, 2370-2371, 2382, 2423-2424, 2429, 2432, 2440, 2457, 2523, 2543, 2575, 2583; 10CT2616, 2666, 2676; *see also* 40RT2683-2689; 37RT2327-2330; 27RT1304-1305; 45RT3249, 3254-3267. The trial evidence further revealed that notwithstanding this expectation, certain class members failed to do so.

For example, Tobola, who was a personal banker prior to becoming a BBO, admitted at deposition that his supervisor, MacClelland, told him the BBO position was, unlike the personal banker position, not a desk job,

and that as a BBO he was expected to spend the majority of his time outside the Bank. 37RT2328-2329; 52RT4359-4360. After Tobola was hired, MacClelland met with Tobola regularly and reinforced USB's expectations, reminding him that to be successful he needed to spend his time primarily on outside sales activities. 52R4360-4368. Tobola failed to meet these expectations, and MacClelland placed him on a formal action plan requiring Tobola to conduct more outside sales meetings each week. 37RT2318, 2328-2330, 2341-2342; 49RT3946; 52RT4364-4367, 4393-4402. Tobola admitted he had failed to conduct the minimum number of outside sales meetings required under his action plan and failed to spend enough time outside the Bank "conjuring" up business. 37RT2336-2343. Tobola eventually conceded his failure as a BBO and transferred back to his former desk position as a personal banker. *See id.*

Machado, also a personal banker prior to becoming a BBO, testified that she was repeatedly told to spend a majority of her time on sales activities outside the Bank, but instead she spent the majority of her time as a BBO inside. 27RT1304-1305; 45RT3249, 3254-3267. As a reminder of the outside time expectation, Machado was required each week to participate in "Tigger Tuesdays," a day structured to model the recommended typical day of a BBO "bouncing" from outside appointment to appointment (20% inside the Bank and 80% outside the Bank). 45RT3232-3238. Machado failed to meet the expectation due to her personal preferences. Having been a personal banker, she was accustomed to spending all of her time *inside* the Bank, selling Bank products to existing customers. 45RT3218-3220, 3261-3263; 27RT1266. Machado also had a telemarketing/direct mail background and preferred focusing on these tactics rather than outside sales activities such as meetings at customer locations. 27RT1289, 1301. After one quarter, Machado

resigned, telling her supervisor that the BBO position was not the right job for her. 45RT3260-3268.

Notwithstanding this and USB's managers' testimony, the trial court rejected USB's realistic expectations defense as to *all* class members because the trial court believed USB's managers were "not consistent" in communicating to class members the expectation to spend the majority of their time outside. 71CT21009; 64RT5120; 65RT5309-5310. Thus, the trial court apparently concluded that the Bank's managers had to "consistently" communicate the outside sales expectation companywide in order for it to apply to any class member, notwithstanding the undisputed testimony that numerous managers did communicate the expectation[18] and that many BBOs were aware of the expectation. The trial court's view that the employer's expectation must be uniformly conveyed to *every* class member for the defense to apply to *any* class member is improper. Indeed, the court's finding that the expectation was inconsistently communicated underscores the need to examine the defense on an individualized basis.

As discussed above, to the extent the trial court also found that USB's expectation was "unrealistic," that finding was tainted by the fact that the trial court unconstitutionally precluded USB from presenting evidence as to how over 90% of the class spent their time, including evidence that many BBOs spent the majority of their time outside the Bank—demonstrating that it was indeed "realistic" for BBOs to do so.

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[18] The trial court found USB's managers "credible and, indeed, personable." 64RT5120.

d. The Trial Evidence Revealed Additional Individualized Issues Relating To Improper Membership In The Class And Unique Defenses Applicable To Certain Class Members.

The evidence revealed additional defenses to particular RWG members' claims. Petty was assigned the BBO job title, but actually performed the job of a Business Banking Relationship Manager. 25RT1108-1109, 1127-1133; 29CT8541-8542; TE1080. Gediman spent the last three months of his employment titled a BBO but performing the duties of an Acting Sales Manager—duties that were managerially exempt—and did not work overtime before assuming those duties. 26RT1191, 1204-1206, 1254-1260. Pollard and Morales both filed for personal bankruptcy and failed to disclose their potential claims in this case as assets, despite being aware of the claims at the time they filed for bankruptcy. TE37, 1003, 1013-1015, 1079; 25RT1076-1082; 34RT2052-2075; *see Jimenez*, 238 F.R.D. at 252 n.10 (bankruptcy issues presented individualized issues as to class member standing to sue, weighing against class certification). The existence of these individual issues further confirmed the need to manage analogous liability issues for the 239 non-RWG class members. The trial court never made any such effort and instead ignored these issues so as not to affect the RWG data "extrapolated" to the entire class and without any mechanism for evaluating defenses applicable to any non-RWG class member.

7. The Trial Court Should Have Granted USB's Second Decertification Motion.

The Court of Appeal ruled that, in denying USB's second decertification motion, the trial court abused its discretion by relying on improper indicia of commonality and erroneously assuming that a

determination of liability and restitution could properly be made by extrapolating findings from the RWG to the remaining 92% of the class. Slip.Op. 47-48, 57-58, 68-69, 72-73. The Court of Appeal was right.

At the time of USB's second motion for decertification, the trial court had all of the Phase I evidence before it. The fact that the court found that the 21 RWG, based on their individual mini-trials, spent the majority of *their* time inside the Bank did not negate the individualized nature of the inquiry or provide a lawful basis for extrapolating the experiences of those 21 class members to the rest of the class. The trial court abused its discretion in ruling that the flawed trial plan justified maintaining class treatment despite its express finding of the lack of a relevant common policy and the evidence, presented again in support of USB's second decertification motion, that, at minimum, nearly a third of the class was exempt, and that individualized issues affecting liability remained unaddressed for over 90% of the class.

Plaintiffs argue that the trial court relied on "substantial evidence of misclassification" in denying USB's second decertification motion. The trial court itself never said this, and the trial court's order simply referred back to its prior certification rulings and cited its SOD, which in turn likewise referred back to the prior certification rulings. 78CT23227-23228. Thus, the "commonality" underlying all of the trial court's certification orders was nothing more than USB's uniform classification of the position, uniform job descriptions, training, incentive plans, evaluation standards, and the fact that USB did not track how much time BBOs spent inside versus outside USB property. Even if the trial court believed, without stating, that there was "substantial" evidence of misclassification, that fact remained insufficient to justify continued class treatment because any such misclassification stemmed not from any uniform USB policy, but rather from individual class members' decisions as to how to perform their jobs.

Given the substantial evidence demonstrating that many BBOs in fact spent the majority of their time outside, there simply had to be a mechanism to individually assess liability. The trial plan utterly failed to do so, and absent any method for managing the individual liability issues, decertification was mandated. *See, e.g.*, *Walsh*, 148 Cal.App.4th at 1456; *Keller*, 179 Cal.App.4th at 1391; *Marlo*, 639 F.3d at 948; *Cruz*, 2011 U.S.Dist. LEXIS 73938 at *2; *Brady*, 2012 U.S.Dist. LEXIS 42118, at *16-21; *Whiteway*, 2009 U.S.Dist. LEXIS 127360 at *8-11.

This Court's opinion in *Sav-On* supports the Court of Appeal's decision. *Sav-On* held that class certification may be appropriate where there are common issues stemming from evidence of widespread deliberate or *de facto* misclassification. *Sav-On*, 34 Cal.4th at 329. Accordingly, the trial court in *Sav-On* did not abuse its discretion in granting class certification where there was evidence of several uniformly applicable employer policies and the primary disputed issue bearing on liability was classifying tasks as exempt or non-exempt, *not* determining how much time class members spent on exempt tasks. *Id.* at 329-331. The Court in *Sav-On* emphasized that even after certification, individual issues still must be managed and, if they prove unmanageable, the court should decertify. *Id.* at 335-337.

Here, with no common policy upon which classwide liability could be determined, the need for an individualized inquiry to determine liability is inescapable, and class treatment would be tantamount to 260 mini-trials. In these circumstances, continued class treatment is unmanageable and inferior to individual litigation. *See, e.g.*, *Brinker*, 53 Cal.4th at 1052 (Court of Appeal properly vacated certification where "no substantial evidence points to a uniform, companywide policy" and proof of liability "would have had to continue in an employee-by-employee fashion"); *Arenas v. El Torito Rests.*, 183 Cal.App.4th 723, 732 (2010) ("If a class

action 'will splinter into individual trials,'" class treatment is inappropriate); *Soderstedt*, 197 Cal.App.4th at 157 (class action unmanageable where necessary individual inquiries on the exemption issue could require 146 mini-trials). As Plaintiffs acknowledge, "at the rate it took to try the cases of the 21 RWGs—two days per RWG—it would take 520 days (roughly two years) to determine liability and damages for each of the 260 class members." Pet. for Review 23; OB41. This is not a manageable proceeding, nor is it superior to individual claims, particularly given the sizeable individual recovery (an average of over $57,000 per person)[19] at issue. *See Frahm v. Equitable Life Assur. Soc.*, 137 F.3d 955, 957 (7th Cir. 1998) ("Individual rather than class litigation is the best way to resolve person specific contentions when the stakes are large enough to justify individual suits."); *Soderstedt*, 197 Cal.App.4th at 157-58; *Reese v. Wal-Mart*, 73 Cal.App.4th 1225, 1232, 1238 (1999) (certification properly denied where "plaintiff will be fully compensated should he prevail..., with damages of no less than $1,000 as well as payment of his attorney fees.").

Plaintiffs' failure to provide any common method for proving liability therefore precludes class treatment, and the Court of Appeal properly decertified the class. Because decertification necessarily invalidates the class proceedings and judgment, this Court can affirm the Court of Appeal's disposition without any need to address the specific trial procedures adopted in this case.

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[19] $15 million judgment/260 class members = $57,692.31 avg. class member recovery.

II. THE COURT OF APPEAL PROPERLY DETERMINED THAT THE TRIAL PLAN WAS UNCONSTITUTIONAL, AND THAT THE COURT'S USE OF STATISTICAL SAMPLING AND REPRESENTATIVE EVIDENCE WAS IMPROPER.

A. The Due Process Implications Of The Trial Plan Are Reviewed *De Novo.*

The Court of Appeal properly applied *de novo* review in evaluating whether the trial plan complied with due process, noting that both parties agreed this is the proper standard. Slip.Op. 40. Although appellate courts review ordinary trial management decisions for abuse of discretion, questions of whether a procedure met with due process are reviewed *de novo*. *Hypertouch v. Superior Court*, 128 Cal.App.4th 1527, 1536-1537 (2005); *Bell III*, 115 Cal.App.4th at 751-758; *see also Ohio v. Barron*, 52 Cal.App.4th 62, 67 (1997); *Ornelas v. United States*, 517 U.S. 690, 691 (1996); *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 436 (2001). Plaintiffs' reliance on the "substantial evidence" standard is contradicted by their agreement at the Court of Appeal that the "*de novo*" standard of review was proper for evaluating whether the trial plan and resulting judgment complied with due process. Respondents' Br. 62. Here, *de novo* review involves considering all of the evidence presented in connection with the trial management plan, including evidence excluded by the trial court, which impacted the constitutionality of the procedure imposed.

B. Courts Interpreting California's Unique Misclassification Laws Have Uniformly Rejected Sampling And Representative Evidence To Determine Classwide Liability.

The Court of Appeal's rejection of sampling and representative evidence in this case is *not*, as Plaintiffs suggest, "at odds with the growing acceptance of scientific statistical methodology in judicial decisions and scholarship." OB33. Courts have uniformly disapproved class treatment in cases involving California's outside sales exemption where the dispute centered on whether class members spend a majority of time outside, rejecting representative evidence and sampling as ineffective tools for dealing with disputes about where and how individuals spent their time. *See, e.g.*, *Jimenez*, 238 F.R.D. at 252-253 ("[r]epresentative testimony will not avoid the problem that the inquiry needs to be individualized;" surveys and statistics not helpful because each employee's time use may differ, rendering class action trial unmanageable); *Walsh*, 148 Cal.App.4th at 1451-1452 ("individual hearings on both liability and damages are required for each" class member in outside sales exemption case); *Dunbar*, 141 Cal.App.4th at 1432 ("The court impliedly rejected... proposals [to use sampling, surveys or subclasses] in concluding that findings as to one grocery manager could not reasonably be extrapolated to others given the variation in their work.").

The district court in *Wells Fargo II* likewise rejected representative evidence and statistical sampling as a way to determine classwide liability when dealing with the outside sales exemption because there was no way to separate injured from uninjured class members and no "average" could be derived to determine liability. 268 F.R.D. at 612-613.

In *Vinole*, the Ninth Circuit likewise rejected the use of statistical or sampling evidence:

> Plaintiffs' claims will require inquiries into how much time each individual HLC spent in or out of the office and how the HLC performed his or her job; all of this where the HLC was granted almost unfettered autonomy to do his or her job.... Plaintiffs argue that these trial burdens could be mitigated through the use of "innovative procedural tools" such as questionnaires, statistical or sampling evidence, representative testimony, separate judicial or administrative mini-proceedings, expert testimony, etc... These arguments are not persuasive in light of our determination that Plaintiffs' claims require a fact-intensive, individual analysis of each employee's exempt status.

571 F.3d at 947.

While the use of statistical sampling to determine classwide *damages* has been approved in some cases (*e.g.*, *Bell III*), no California court has determined classwide *liability* in an *exemption* case using sampling. The trial court's unilateral decision to use a 21-person sample to determine classwide liability in this case without statistical authority was unprecedented. Such novel procedures are only acceptable if the proponent makes "a preliminary showing of general acceptance of the new technique in the relevant scientific community." *People v. Kelly*, 17 Cal.3d 24, 30-31 (1976); *People v. Leahy*, 8 Cal.4th 587, 604 (1994). The court adopted a novel and purportedly scientific methodology without any expert evidence supporting its validity, let alone its acceptance by any relevant scientific community, thus violating *Kelly*. Neither party ever suggested to the court that it could resolve classwide liability using a 21-person sample, nor did any expert endorse the sample size as likely to yield a statistically valid or accurate result.

Courts' acceptance of scientific methodologies is always dependent on whether the methodology can adequately address the questions presented, consistent with due process and the applicable substantive law. Notably, all of the law review articles cited by Plaintiffs focus on the use of

statistical sampling in mass tort cases. OB33. While exempt classification of employees under California law may be proper as to some and improper as to others, the mass tort cases discussed by Plaintiffs' articles involve alleged misconduct that constitutes a per se "bad act" as to all class members, *i.e.*, exposing class members to asbestos or misrepresenting the health impact of "light" cigarettes. The role of sampling in these mass tort cases is to determine the *degree of harm* suffered – not to determine whether the underlying conduct was unlawful in the first place. None of these articles address the situation presented by this case, where the exempt classification is not a per se "bad act" and the propriety of each employee's exempt classification turns on individualized evidence.[20]

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[20] Plaintiffs cite two additional legal articles, neither of which is relevant. OB36 n.4. In *Class Determinations of Overtime Exemptions: The False Dichotomy Posed by Sav-on and a Suggested Solution*, 21 The Labor Lawyer 257 (2006), two lawyers proposed a rudimentary random sampling plan for misclassification cases whereby a trier of fact could find classwide liability existed if at least 75% of the sample members were found to be misclassified. *Id.* at 272-273. The article suggests that if the plaintiffs win 75% of such mini-trials, that a court might somehow conclude "that each class member has a 75% chance of being nonexempt." *Id.* at 272. This proposal ignores the problem where potentially 25% of the class is properly classified. This poorly-reasoned article identifies no legal authority for ignoring an employer's constitutional rights and allowing uninjured persons a windfall recovery. Nor does it articulate any statistical support for the crude assumption that the "chances of being misclassified" are the same for the entire class regardless of the sample size.

Plaintiffs also cite to an article suggesting that employers can conduct internal audits using samples to assess their own classification compliance, an entirely different exercise from levying a multi-million dollar judgment. *How to Conduct a Wage and Hour Audit for Exemptions to Overtime Laws*, West HR Advisor, Vol. 11, No.2 at 1, 8 (2005). A company's desire to periodically evaluate itself internally is not subject to the same considerations, *i.e.*, due process, as court proceedings that seek to deprive a litigant of property.

1. *Sav-On* Addressed Only The Class Certification Phase And Did Not Discuss The Propriety Of Class Action Trial Procedures.

In *Sav-On*, this Court upheld class certification in a misclassification case because the predominant issue in dispute was "task classification" (*i.e.*, whether certain identical tasks are 'managerial' or 'non-managerial'), a legal interpretation that could resolve classwide liability. 34 Cal.4th at 329-331. Courts may consider representative evidence and "other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes *class certification* appropriate." *Id.* at 333. Where no centralized practice exists to resolve classwide liability, such evidence is unhelpful. *See Wells Fargo II*, 268 F.R.D. at 611. If individual issues prove unmanageable, the trial court retains the right to decertify. *Sav-On*, 34 Cal.4th at 335. *Sav-On* did not hold that the trial court could simply ignore individual issues at trial.

Sav-On does not support Plaintiffs' argument that a defendant has no right to assert its affirmative defense against every class member at trial. While *Sav-On* holds that a certification proponent in an overtime class action does not have to prove the entire class is nonexempt as a prerequisite to *certification*, it did not address, much less set, the standards for a class action trial. Slip.Op. 6-7 n.15. *Sav-On* dealt with and allowed for certification, so long as individual issues can be effectively managed. The trial court's trial plan here did not manage individual issues; it ignored them by barring USB from presenting scores of relevant evidence.

2. *Bell III* Is Limited To Estimating Classwide Damages And Provides No Support For The Trial Plan Adopted Here To Determine Classwide Liability.

Plaintiffs' reliance on *Bell III* is misplaced. Plaintiffs argue that *Bell III*'s endorsement of representative testimony to establish *damages* suggests that representative testimony may be used to establish liability here. Plaintiffs further suggest *Bell III* stands for the proposition that a defendant's interest in a misclassification case is only in its "total aggregate liability to the plaintiff class" for unpaid overtime and "not in which individuals are exempt or non-exempt." OB42.

The Court of Appeal (which also issued *Bell III*) rejected these arguments, explaining that "*Bell III* is manifestly inapposite." Slip.Op. 42. Plaintiffs' argument that the Court of Appeal misunderstood its own prior opinion cannot be credited. *Bell III* did not involve a trial of liability, which had already been established on summary judgment. The only issue was the amount of damages "and not whether the plaintiff employees had a right to recover damages in the first place." Slip.Op. 45. Furthermore, in *Bell III*, the sample was formulated with the participation of the parties and their experts to agree on an appropriate sample size and an acceptable margin of error[21] (+/- 1 hour, or just over 9%). 115 Cal.App.4th at 722-

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[21] Margin of error is a statistic expressing the amount of random sampling error in a sample. *See, e.g.*, 71CT20933-20935; TE1295. The larger the margin of error, the less faith one should have that the sample's reported results are close to the "true" figures for the entire population. *See, e.g.*, 71CT20934. Plus-or-minus ("+/-") the number of hours is referred to as the "absolute" margin of error. Margin of error is also expressed using a percentage, which is called the "relative" margin of error. 71CT20933-20935, 20960. The relative margin of error is determined by dividing the

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723. Here, the trial court chose a trial methodology not endorsed by either party or their experts, arbitrarily using a 21-person sample without any scientific basis, and without considering the desired level of accuracy. The trial court also introduced response bias and non-random elements, including by allowing testimony of the two named Plaintiffs to be extrapolated to the class. This led to a classwide judgment with a 43.3% margin of error, far exceeding the unconstitutional estimate for double-time damages in *Bell III*. 115 Cal.App.4th at 757.

The Court of Appeal rejected the trial plan here because it outright precluded USB from presenting evidence to prove its exemption defense whereas, in *Bell III*, the defendant had not been precluded from presenting evidence to contest damages. 115 Cal.App.4th at 757-758 ("We agree that the trial management plan would raise due process issues if it served to restrict [the employer's] right to present evidence against the claims...").[22]

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absolute margin of error by the estimated weekly hours as follows: 0.9/9.4=0.096. *Bell III*, 115 Cal.App.4th at 723-724; 73RT5734-5735.

[22] Plaintiffs cite to the fact that class certification was upheld in *Bell III* even though 9% of the class "did not claim overtime" (because they did not work overtime). OB28. *Bell III* simply held that class certification may still be appropriate even though class members may need to individually prove their damages (or the lack thereof). *Bell III*, 115 Cal.App.4th at 743-744. *Bell III* did not say that individual issues did not have to be managed simply because a class was certified. *Id.* Notably, in *Bell III* the 9% of uninjured class members did not recover. Here, by contrast, the trial plan provided no means for determining which class members were or were not misclassified and allowed uninjured members to recover substantial sums. This result is contrary to black letter class action law holding that if an individual would not be entitled to recover in an individual suit, the result should not differ simply because the individual pursues the same claim through a different mechanism. *Feitelberg*, 134 Cal.App.4th, 997, 1018 (2005); *Brinker*, 53 Cal.4th at 1050-1051 (reversing certification of class that by definition included individuals with no claim).

3. Plaintiffs' Reliance On Dicta Discussing The *Idea* Of Statistical And Representative Evidence Does Not Support The Trial Plan Here.

Plaintiffs rely on dicta and cases engaging in speculative discussion of the *idea* of representative evidence, including the non-binding and inapposite case, *Dilts v. Penske Logistics*, 267 F.R.D. 625 (S.D.Cal. 2010). *Dilts* involved a uniformly improper company policy, where the employer automatically deducted 30 minutes from total work hours every day, regardless of whether employees actually took meal breaks. *Dilts* is not a misclassification case and the *Dilts* court had no occasion to consider how statistical or representative testimony might adequately manage the question of how class members spent their time. The Court of Appeal properly distinguished *Dilts*, noting that it was a class certification phase case where the court merely allowed for the "possibility" that the plaintiffs might be able to come up with an acceptable trial plan involving representative testimony. Slip.Op. 60-61. *Dilts* was not tried and summary adjudication was subsequently granted for the defendant on liability in *Dilts*, obviating any need for a trial management plan.

Plaintiffs also rely on one selectively-quoted excerpt from Justice Werdegar's concurring opinion in *Brinker* encouraging "the use of a variety of methods to enable individual claims that might otherwise go unpursued to be vindicated" and suggesting that "[r]epresentative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability." 53 Cal.4th at 1054; OB35. Plaintiffs' reliance on this non-binding dicta is unfounded. This Court had no occasion to consider representative evidence or statistical sampling in *Brinker*, which involved meal and rest break claims at the class certification phase, not at trial.

Plaintiffs ignore Justices Werdegar's preceding comments, where she observed that "[i]n almost every class action, factual determinations [of damages]... to individual class members must be made." *Brinker*, 53 Cal.4th at 1054. However, "[f]or purposes of class action manageability, a defense that hinges liability *vel non* on consideration of numerous intricately detailed factual questions, *as is sometimes the case in misclassification suits*, is different from a defense that raises only one or a few questions and that operates not to extinguish the defendant's liability but only to diminish the amount of a given plaintiff's recovery." *Id.*

Furthermore, Plaintiffs conflate classwide liability and damages because the terms "extent of liability" and "aggregate liability," do *not* refer to determining whether a defendant has committed an unlawful act, *i.e.*, the *fact* of liability. *See Morgan*, 210 Cal.App.4th at 1368-1369.

Thus, Plaintiffs' bald assertion that "a trial court can use representative testimony to calculate the employer's aggregate liability to the class based on a determination of the percentage of the class that is non-exempt" is without *any* support. OB42. Plaintiffs' suggestion that a trial court can accurately determine "the percentage of the class that is non-exempt" without questioning each class member in a case like this is nonsensical. If Plaintiffs actually mean the percentage of the class that "might" be misclassified based on a sample *estimating* the portion of the class who was misclassified, this only underscores the problem with representative evidence in this case. "A principal reason for rejecting 'statistical sampling' for at least some purposes is that it forces an employer to attempt to defend against what an employee *probably* did (as 'revealed' by statistics) as opposed to being able to address or confront what he or she *actually* did, which is what it would be allowed to do were the case brought individually as opposed to as part of a class action." *Wong v. AT&T*, 2011

U.S.Dist. LEXIS 125988, n.18 (C.D.Cal. 2011) (applying California law) (emphasis in original).

4. The U.S. Supreme Court's Rejection Of "Trial By Formula" In *Wal-Mart v. Dukes* Is Applicable Here.

The U.S. Supreme Court's reasoning and rejection of a "Trial by Formula" in *Wal-Mart v. Dukes* is applicable here and confirms that this trial plan was improper. The U.S. Supreme Court ruled that plaintiffs seeking class treatment must not merely allege "common questions," but must identify issues with a common answer, that will "drive the resolution of the litigation." *Dukes*, 131 S.Ct. at 2551. The plaintiff's liability theory of gender discriminatory promotional practices, which was based upon a policy of de-centralized and discretionary decision-making, provided no common answer because "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." *Id.* at 2554. As a result, the defenses were necessarily individualized and a trial by a sample set of class members was improper because "a class cannot be certified on the premise that [the employer] will not be entitled to litigate its statutory defenses to individual claims." *Id.* at 2561.

Plaintiffs deny that *Dukes* impacts this case by focusing on immaterial distinctions.[23] OB43-44. The fundamental problem in *Dukes* is

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[23] Plaintiffs previously relied upon *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). The Court of Appeal correctly distinguished *Hilao*. *See* Slip.Op. 62-63. The U.S. Supreme Court's decision in *Dukes* effectively overruled *Hilao* by rejecting the "Trial by Formula" as an acceptable method for "managing" individualized issues. *See* 131 S.Ct. at 2550, 2561. Even if it remained good law, *Hilao* is a self-described outlier where the trial methodology was admittedly "unorthodox" but justified its holding based on the "extraordinarily unusual nature" of the case: egregious human rights violations involving claims for summary execution, torture and kidnapping by the Marcos regime. *Hilao*, 103 F.3d at 786. Even *Hilao*

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the same here: the company-wide policies alleged do nothing to answer the question of whether they resulted in violations as to individual class members. Accordingly, multiple courts, including the Court of Appeal, below, have held that *Dukes* is persuasive in evaluating class treatment of California misclassification claims. *See* Slip.Op. 52-54 & n.65; *Cruz*, 2011 U.S.Dist. LEXIS 73938 at *12; *Wong*, 2011 U.S.Dist. LEXIS 125988 at *13 ("Whereas the 'crucial question" in Wal-Mart Stores was 'Why was I disfavored?,' here the crucial question[] [is] 'Am I (or was I) exempt or non-exempt?'"). Here, Plaintiffs' theory of proffering USB's policies of exempt classification and BBO discretion does nothing to provide a common answer, *i.e.*, was the exempt classification proper as to each class member? No single proceeding can answer this critical question.

Plaintiffs' attempt at distinguishing *Dukes* because it dealt with certification of back pay claims under Rule 23(b)(2) similarly fails. California courts look to the standards prescribed by Rule 23 for guidance in whether to certify a class. *Soderstedt*, 197 Cal.App.4th at 147 n.2; *Janik v. Rudy, Exelrod & Zeiff*, 119 Cal.App.4th 930, 943 (2004); *Arias v. Superior Court*, 46 Cal.4th 969, 989 (2009) (Werdegar, J., concurring). California class action rules are analogous to Rule 23(b)(3) cases and each Rule 23 case is subject to Rule 23(a)(2)'s commonality requirement, which the Supreme Court clearly stated was the "crux" of *Dukes*, and from which the Supreme Court's commonality analysis flowed. *Dukes*, 131 S.Ct. at 2550-2551. Where a court finds insufficient commonality for Rule 23(a)(2) purposes, it must conclude, *a fortiori*, that common issues do not

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acknowledged that the defendant's "due process claim does raise serious questions" and that "at least one circuit has expressed 'profound disquiet' in somewhat similar circumstances." *Id.* at 785 (citing *In re Fibreboard Corp.*, 893 F.2d 706, 710 (5th Cir. 1990)).

predominate. *See Ostrof v. State Farm Mut. Auto. Ins. Co.*, 200 F.R.D. 521, 530 (D.Md. 2001); *Casida v. Sears Holdings Corp.*, 2012 U.S.Dist. LEXIS 111599, *36 (E.D.Cal. 2012) ("the Rule 23(a)(2) 'commonality' factor relies upon a more lenient standard than the related requirement under Rule 23(b)(3).").

5. FLSA Misclassification Claims Do Not Involve California's Uniquely Quantitative Exemption Analysis And Provide No Support For Sampling Or Representative Evidence Here.

FLSA cases discussing representative evidence do not support the trial plan here. California's "primarily engaged" test for exempt status differs from the federal "primary duty" test in that the California exemption is *quantitative* whereas the federal standard is *qualitative*. *See, e.g., Ruggles v. Wellpoint Inc.*, 272 F.R.D. 320, 343-344 (N.D.N.Y. 2011); *Tate-Small v. Saks Inc.*, 2012 U.S.Dist. LEXIS 76081, *9-*10 (S.D.N.Y. 2012). This Court expressly rejected the FLSA's application to California's outside sales exemption, confirming that the California exemption hinges on the highly individualized question of whether a particular employee is spending over 50% of his time engaged in exempt work in a given week. *Ramirez*, 20 Cal.4th at 797-801. The difference of 1% of an employee's work time can tilt the result entirely. In contrast, under the federal "primary duty" test, employees sharing a common job description and responsibilities will likely have the same "primary" or "most important" job duty, notwithstanding possible variations in the percentages of time spent on specific duties. Accordingly, FLSA misclassification cases do not provide a roadmap for making classwide liability determinations in California misclassification trials.

Furthermore, USB is unaware of *any* FLSA misclassification case where a defendant employer attempted to challenge individual claims at

trial, but was denied the right to do so, even in cases where "representative" evidence was approved as a means of evaluating employees' "primary duty." For example, Plaintiffs cite *Morgan v. Family Dollar Stores*, 551 F.3d 1233 (11th Cir. 2008), a collective action in which store managers sued for misclassification under the FLSA. In *Family Dollar*, the class members' primary duty was performing manual labor rather than exempt managerial duties and they had little discretion in their jobs. *Id.* at 1270-1273. Despite using representative testimony at trial, the *Family Dollar* court did *not* restrict the defendant's right to introduce evidence from other class members. *See id.* at 1277-1278 (the defendant did not pursue this option, however). Further, *Family Dollar* permitted the employer to take 250 depositions of class members and to serve interrogatories on *every* remaining class member. *Id.* at 1244.

In contrast, here, the trial court limited pre-trial discovery to the RWG and prohibited the introduction of any "non-RWG" evidence at trial, over USB's repeated objections and attempts to do so. While there may be cases where the employer wishes to challenge a much smaller group of class members for cost or other reasons, this is not such a case, given the substantive law, the evidentiary record, and USB's desire to defend itself against these significant individual claims. Here, USB has direct evidence to challenge the claims of nearly one-third of the class and a well-founded belief that cross-examination of the other non-RWG class members will reveal they too were properly classified.

Another important distinction from *Family Dollar* is that the employer kept "extensive payroll records that broke down, week-by-week, how many hours each of the 1,424 store managers worked," and therefore, "there was no need for such numerical approximation" as to damages. *Id.* at 1279. Classwide recovery was *not* calculated based on "representative" testimony, but was instead based on detailed time records for each class

member. Thus, *Family Dollar*'s application is limited, at most, to FLSA cases with similar factual circumstances. *See, e.g., In re Tyson Foods*, 694 F.Supp.2d 1372, 1380 (M.D.Ga. 2010).

FLSA misclassification collective actions are also distinguishable from California misclassification cases because: (a) they are "opt-in" class actions, meaning that all of the class members *affirmatively* elect to participate after hearing about the claims alleged; and (b) the court has to determine, at two separate stages, that the opt-in class members are "similarly situated," which involves a rigorous assessment of the similarities between class members' employment experiences and the potentially applicable defenses. *See Family Dollar*, 551 F.3d at 1260-1265. Regardless, even FLSA misclassification class actions are routinely decertified if, as here, individualized issues and defenses will render a class trial unmanageable. *Beauperthuy*, 772 F.Supp.2d 1111, 1132-1133 (N.D.Cal. 2011); *Aquilino v. Home Depot, U.S.A., Inc.*, 2011 U.S.Dist. LEXIS 15759, *28 (D.N.J. 2011); *Scott v. Raudin McCormick, Inc.*, 2010 U.S.Dist. LEXIS 130061, *15-*17 (D.Kan. 2010); *Johnson v. Big Lots Stores, Inc.*, 561 F.Supp.2d 567, 568 (E.D.La. 2008) (court decertified after trial due to lack of commonality).

C. The Trial Plan And Classwide Findings Were Statistically Invalid And Unconstitutional.

1. Plaintiffs' Own Expert Confirms The Trial Plan And Resulting Judgment Were Statistically Invalid.

Plaintiffs falsely assert that the trial court's plan was "modeled on plaintiffs' trial management plan." OB11-12. Plaintiffs' expert, Drogin, confirmed that his proposed trial plan "was not used in this case." 72RT5648-5653; TE1282. The trial plan's only common characteristic with Drogin's proposal was that it involved randomly selecting at least some members of the sample. 72RT5649-5653.

Plaintiffs also overstate Drogin's testimony as "supporting" the trial plan. Drogin merely used the data obtained in Phase I from the RWG to attempt to estimate "average" overtime hours for all 260 class members. Drogin testified his calculations were the "best estimate" that he could make based on the "available data." 71RT5613, 5619. Drogin deferred to the court's decision to use Phase I findings to calculate classwide recovery and acknowledged that his estimate was limited by the quality of the underlying data. *See id.* He avoided comparing the inaccurate process here to the scientifically rigorous and "statistically appropriate" process utilized in *Bell III*. 115 Cal.App.4th at 724. Drogin admitted that *Bell III* included detailed information regarding daily hours worked per week by the sample members and that daily "calendars were constructed" from their testimony. 74RT5796-5799.

Drogin also admitted that the court never sought his opinion as to the appropriate sample size needed to achieve a statistically acceptable level of accuracy. 74RT5771-5772. The desired level of accuracy is what ought to determine sample size, not convenience. 74RT5771-5776. Drogin admitted that pilot studies, like the one done in *Bell III*, and not done here, are "often performed in statistical sampling when it's necessary to get some idea about the variation in the population in order to accurately compute a sample size that would be appropriate for obtaining a predefined level of accuracy." 70RT5568.

The trial plan here was, from its inception, not remotely concerned with obtaining any particular level of accuracy. Drogin never testified that the 43.3% margin of error was a sufficiently accurate basis for a $15 million judgment. 74RT5809-5810. He never made any recommendation to the court concerning an appropriate margin of error. 73RT5734. He merely explained that the estimate was "reliable," meaning that the degree of inaccuracy was *repeatable*, so that if additional samples of 21 were

repeatedly drawn, 95% of the time, you would obtain a weekly overtime estimate somewhere within the wide chasm of 6.72 and 17 hours based on the +/-5.14 hour/43.3% margin of error. 71RT5621-5623; 70RT5554-5556; 74RT5812-5813.

Drogin admitted that a +/-5.14 hour margin of error is enormous in the context of this case: A "margin of error of 5.14 is fairly insignificant if you are estimating something that's in the millions. That would be a minuscule fraction of the value, whereas if it's something that is a lower type of value like here, then it's a higher percentage of the thing you're estimating." 70RT5557. In other words, Drogin testified that it is "accurate" to say that the estimate here had a 43.3% margin of error, but the estimate itself is not accurate at all. *See, e.g.*, 74RT5808-5810; 74RT5768. However, the court conflated the terms, erroneously assuming that a *reliable* process equates to a sufficiently *accurate* result.

Addressing whether the RWG sample was truly "representative" of the class, Drogin again hedged by avoiding stating whether the sample of 21 was adequately "representative." 72RT5677. Drogin tried to distance himself from his endorsement of the accurate sampling conducted in *Bell III*. 115 Cal.App.4th at 724. In *Bell III*, after obtaining a margin of error of +/–0.9 hours (a relative margin of error of just over 9%), Drogin testified: "The statistical theory of random sampling states that the resulting sampling is likely to be representative of all class members and therefore any estimates computed from the sample are likely to be close to the corresponding value for the entire population. Thus we have a high degree of confidence that the average overtime hours per week is very close to the value for all Class members." 74RT5807. Drogin never reached the same conclusion here and validated neither the trial plan, nor the resulting estimate upon which the erroneous trial court judgment was based.

2. The Classwide Liability Finding Was Improper Because There Was No Basis To Conclude That 100% Of The Class Was Misclassified.

Both parties' experts agree there was no statistical basis to conclude that "100% of the class was misclassified" and thus, there is no basis for the classwide liability finding. Drogin admitted he had "no idea what was in the court's mind" when the court issued its finding that all class members were misclassified. 72RT5645-5653. Drogin agreed with USB's expert, Dr. Hildreth, that, even assuming the sampling plan was designed and conducted perfectly, established statistical principles demonstrate that 13% of the class may have been properly classified.[24] In Drogin's own words:

> If you observe a random sample of 20 from a population of 260 and the random sample of 20 all have the same value for the characteristic you're measuring, which in this case they were misclassified, then you cannot say for certain that all – that all of the people in the class were misclassified... I noted in Dr. Hildreth's report a similar result... you can make the statement that you're 95 percent confident that the percentage of misclassified employees in the Class is at least 87 percent. In other words, 87 percent is a lower bound for the confidence interval associated with that result from the sample.

72RT5633-5634. Drogin thus confirmed that he could not provide any statistical basis – and that he had no factual or personal knowledge – to conclude that "100%" of the class was misclassified. 72RT5642. In other words, Drogin *agreed* that even if all 21 RWG members were determined

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[24] This calculation assumes classwide liability could be "estimated," and the existence of a properly gathered, random, and representative sample. Since those assumptions do not apply here, the 13% estimate is invalid and understates the actual uncertainty. 81RT6376-6377, 6386-6387; TE1295-1299.

to be misclassified, statistical principles (the "hyper-geometric distribution") indicate that up to 13% of the class (as many as 33 class members of the remaining 239) may nonetheless be properly classified. 71CT20948-20953. Further, USB disagrees that the 21 RWG were misclassified because it was improperly precluded from presenting evidence that they were exempt under the administrative exemption or by tacking the administrative and outside sales exemptions. 45CT13298; 79CT23514.

Plaintiffs crudely distort statistical terminology by asserting that "the margin of error was 13%, a figure equivalent to the margin of error in *Bell.*" OB47. This is extremely misleading. The 13% "margin of error" is not remotely related to damages and is not comparable to the approximately 9% margin of error achieved in *Bell III* in estimating average overtime hours, *i.e., damages.* Thus, the proper comparison between the approximately 9% margin of error in *Bell III* and the margin of error here is the 43.3% associated with Drogin's estimated "average" overtime hours worked by the RWG. To get anywhere near the 9% margin of error achieved in *Bell III* here, you would need to question the entire class (based on the variability of the responses just from the RWG). 71CT20961; TE1295. Moreover, the 13% "margin of error" is meaningless and untethered to reality since there was extensive specific defense evidence that *at least* one-third (or 33%) of the class was properly classified.

The "13% margin of error" referenced here applies to the attempts to "estimate" liability as a binary (exempt/non-exempt) proposition. This is entirely different from estimating average overtime hours, a "continuous" variable theoretically ranging from zero to 128 hours. Attempting to estimate exempt status as an all-or-nothing variable relies upon different statistical formulas than those used to estimate average overtime hours worked. 80RT6305-6306. Plaintiffs compare apples to oranges when they

conflate the conceded 13% margin of error[25] on their "classwide" *liability* finding with the 9% margin of error for the overtime hours *damages* estimate in *Bell III*.

Any attempt to use Drogin's testimony to support classwide liability relies on circular reasoning, since Drogin's testimony confirms that he relied on the trial court's classwide liability finding, as opposed to any statistical basis, and that he would offer no opinions concerning classwide liability. 72RT5644-5653; 74RT5830. Unlike *Bell III*, which permitted classwide *damages* to be approximated because classwide liability was already established, the question of which members of the class can or cannot establish a claim for liability in the first instance cannot be "approximated" or otherwise presumed when liability hinges on individual employees' actual activities. *See Wong*, 2011 U.S.Dist. LEXIS 125988 at *30-*31 n.18 (rejecting statistical sampling where it forces an employer to attempt to defend against what an employee probably did (as "revealed" by statistics) as opposed to what he/she actually did).

Unlike the trial court, Drogin believed the question of liability (exempt status) could only be determined on an individualized inquiry as to each class member and his only proposal on classwide liability involved obtaining information from *all* class members. 72RT5647-5653; TE1282. Dr. Hildreth's unrefuted testimony confirms that it was not possible to conclude, based on statistical sampling, that all absent class members were misclassified. *See, e.g.*, 81RT6378-6400; 71CT20948-20953; TE1295. Thus, there is no statistical basis for any classwide liability finding and the Court of Appeal properly reversed the trial court's judgment in its entirety.

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[25] See prior footnote.

3. "The Experience Of RWG Chad Penza" Confirms The Impropriety Of The Trial Plan And Classwide Liability Findings.

Attempting to salvage the unfounded classwide liability finding, Plaintiffs assert that "[t]he trial court found instructive the experience of RWG Chad Penza, the top-producing BBO in the entire company." OB50. Penza is neither typical nor "instructive" of how any other BBOs performed their jobs. Moreover, even Penza was found to be properly classified for at least a portion of his employment. Plaintiffs also ignore the fact that Penza signed two separate declarations, both confirming his exempt status. TE1000-1001; 23RT979-991. Thus, Penza exemplifies how absent class members might also have been properly classified.[26]

Penza's "experience" also confirms that significant individual credibility issues are critical in this case involving large individual claims. The trial court's erroneous judgment awards Penza well over $400,000. 83CT24698. While Penza first confirmed at trial the accuracy of his declarations, he later changed his trial testimony. 23RT983.[27] Penza attempted to distance himself from his prior declarations, claiming he was a "new BBO" when he signed his first declaration (although he had been a BBO for three quarters and was a top producer) and that he had a lot of commissions at stake two years later when he signed his second declaration

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[26] Penza also highlights the issue of the trial court's erroneous summary adjudication of the commission sales exemption raised by USB, but not reached, in the Court of Appeal. *See* Slip.Op. 6. There is evidence suggesting that Penza was exempt under the commissioned sales exemption during at least some quarters, since he earned high commissions, receiving some six-figure incentive payments in addition to a substantial base salary.

[27] Two USB management witnesses refuted Penza's testimony. 44RT3186-3188; 46RT3493-3496; 60RT4907-4912, 4919-4923.

(if believed, establishes his motivation to lie for financial gain). 23RT979-991. However, he never recanted his admission that he spent most of his time outside for at least his first two weeks as a BBO. 22RT849-850, 891-896; 71CT21005.

The trial court had no basis to conclude that Penza's experience was "typical" of any other BBO. Ironically, Plaintiffs argue that Penza's "example" as the top-producing BBO in the entire company somehow supports the conclusion that all class members spent the majority of their time inside the Bank. OB50. However, if Penza is such a good example, and is deemed to be "representative" of the class, then the logical inference is that some portion of the class was also properly classified for at least some portion of their employment, unraveling the erroneous finding that 100% of the class was misclassified. *See Dunbar*, 141 Cal.App.4th at 1431 (exemption determined on week-by-week basis). Instead, the court ignored this finding for extrapolation purposes and deemed "100% of the class" to be misclassified 100% of the time. 71CT21018; 83CT24516; 76RT5921-5922; *cf.* 71CT21005. This logical inconsistency underscores the fact that the week-by-week exemption analysis under California law prohibits any "extrapolation" of liability findings here from one individual to others. 81RT6393-6396; *Dunbar*, 141 Cal.App.4th at 1426-1427, 1431-1432.

4. The Gerrymandered, Non-Random RWG Sample Violated Basic Statistical Principles, Rendering *Any* Classwide Findings Improper.

Both parties' statisticians testified that non-randomly selected individuals cannot be included in a random sample. 81RT6382-6384; 70RT5561-5563; 74RT5815-5817. Additionally, the trial court allowed numerous improper eliminations and substitutions within the RWG. Dr. Hildreth demonstrated (and Drogin largely agreed) that the statistical implications of these various errors compromised any potential

"representativeness" that may have been present in the original, randomly selected RWG. *See, e.g.*, 71CT20941-20948; TE1295; *see also* 74RT5802-5806. Although the trial court relied upon *Bell III* as the purported basis for its sampling plan, "the procedures [ ] approved in *Bell III* are only superficially similar to the procedures utilized in the present case." Slip.Op. 45. The record confirms that "the trial court here did not follow established statistical procedures in adopting its RWG-based trial methodology." Slip.Op. 45.

Having recognized that the 43.3% margin of error renders the classwide recovery estimate unsalvageable, Plaintiffs now attempt to preserve only the classwide liability finding in hope of obtaining a remand order with a do-over limited only to (re)estimating "damages." OB62. Plaintiffs contend that "the existing sample need not be discarded, but can be supplemented by the testimony of additional randomly selected class members." *Id.* However, the RWG sample is neither random nor representative, and no classwide conclusions can properly be based upon the testimony or findings relating to this group of 21 class members.

a. The RWG Sample Was Not Random And Suffered From Haphazard Substitutions, Eliminations And Selection Bias.

The RWG was tainted by selection bias because the trial court's methodology caused the final sample to include only those who chose to participate. 71CT20943-47; TE1295; 81RT6334-6354. The originally selected trial witnesses had two choices: they could (1) participate in discovery and trial or (2) drop out of the case and avoid participation. These options differ from those of all other absent class members, whose opt-out decisions were unrelated to the prospect of mandatory participation in trial. 71CT20945; 81RT6334-6354. Notably, the opt-out rate from the originally selected RWG members was 20%, ten times higher than the opt-

out rate for all other absent class members (less than 2%). 71RT5624-5626; 71CT20944-20948; 81RT6334-6354.

Drogin suggested that it was acceptable to allow originally random witnesses to select themselves out of a sample, but was impeached by his own testimony in *Bell III*. 74RT5802-5804 ("Question: Isn't it a fact it's equally as important that sample members not be allowed to get in the sample as it is that they not be allowed to get out of the sample? Answer: That's correct."). Drogin's feeble explanation that the opt-outs from the sample can be ignored because they are "no longer a part of the population" is nonsensical, since their own choice to "leave the population" was tied to their decision of whether or not to participate as a trial witness. Drogin admitted that the composition of the originally drawn random sample was altered by opt-outs and he had no basis to assume the opt-outs were random. 71RT5624-5626. The astronomically high opt-out rate of the original RWG reveals that the remaining sample was not "representative" of the class. 81RT6342-6347, 6376-6382.

Further selection bias resulted when the court removed Smith from the RWG because his duties were apparently different from other BBOs'. 71CT20946; TE1295; 81RT6342-6353. The trial court failed to consider that Smith also provided data inferable to the remainder of the class, since his performance of differing duties suggests that other absent class members also performed differing duties. 71CT20946-20948. The court also ignored the fact that RWG member Petty signed a release preventing him from recovering in this case. 71CT21005-21006. Despite Drogin's testimony that random selection means the sample tends to be "representative" of the population, he provided no statistical basis for excluding Smith, or for selectively extrapolating Petty's claimed hours worked but ignoring his release. These errors undermined any usefulness

of the RWG data for extrapolation purposes. 71CT20941-20948; TE1295; 81RT6349-6366.

The trial court also included the two self-selected named Plaintiffs in the sample.[28] 71CT20998-20999. Drogin testified there was no statistical basis for including non-random data points (like Duran and Fitzsimmons) in the random sample. 70RT5561-5563; *see also* TE553; 74RT5815-5817 (Drogin conceded that a proper statistical sample uses an unbiased method for selecting the sample); 72RT5669-5678 (Drogin could not determine that Duran and Fitzsimmons were representative of the class). The trial court acknowledged it was acting contrary to established statistical principles but declared itself to be the "final arbiter of what is representative of the class" and claimed it was not bound by statistical principles because it could simply "deem" individuals to be "representative." 83CT24627; *see also* 81RT6366-6367. In so holding, the court abused its discretion.[29]

Finally, RWG member Bryant refused to appear at trial. This fact, statistically speaking, was a "non-response" and the trial court should have

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[28] Contrary to Plaintiffs' false characterization, the trial court was not *granting* any request by USB when it included Duran and Fitzsimons as non-random RWG members. In fact, USB requested that the court require testimony from *all* current and former class representatives as part of any attempt to use purportedly "representative" evidence at trial, but the court denied USB's request, refusing to permit testimony by the four prior named plaintiffs, all of whom previously testified that they were exempt. 11RT244-247; 22CT6201-6202. The court granted *Plaintiffs'* alternative request to include Duran and Fitzsimons *only* as non-random RWG members. 11RT245, 249.

[29] The trial court suggested that even though it was statistically improper to include Duran and Fitzsimmons, this error did not matter because removing them would cause the sample "average" amount of overtime to increase. 83CT24627. However, it was undisputed that exclusion of the two non-random named Plaintiffs from the sample would also increase the margin of error to at least 47%. 81CT23972; TE1297; 81RT6370-6373.

inferred that some proportion of the class, if called to establish entitlement to recovery, would also not show up to establish a claim. 81RT6353-6354; 71CT20941-20942, 21000; *see also* 73RT5756-5761 (Drogin admitted non-appearance was a non-response and could not explain disregarding its implications). However, the trial court selectively decided not to extrapolate Bryant's non-appearance, despite finding that the RWG was "representative" of the class.[30]

In summary, the trial court undermined the entire point of a "representative" sample by refusing to extrapolate any information from the RWG that was unfavorable to a finding of classwide liability. Because the RWG sample was not random, it cannot reasonably be considered "representative" of the class and any classwide findings premised on the RWG must be reversed, for both liability and recovery.

b. The RWG Sample Size Was Too Small To Generate Meaningful Estimates.

In addition to the RWG sample being an inadequate basis for any classwide liability determination, the sample size here was also too small to make any useful statistical inferences regarding hours worked. Two fundamental statistical principles–the Law of Large Numbers and the Central Limit Theorem for sample means–dictate that a sample size must generally be 30 or greater to provide a viable estimate for the underlying population unless the population data is known to be normally distributed (*i.e.*, follows a bell curve). 71CT20938-20939; TE1295; 80RT6312-6322. Drogin agreed with these principles and that the population data was not known to be normally distributed. 74RT5765-5771.

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[30] The judgment awards Bryant over $50,000. 83CT24699.

The sample of 21 was too small even to serve as a pilot study from which one could estimate the population standard deviation for determining average hours worked. *See Bell III*, 115 Cal.App.4th at 722-723 (Drogin proposed a pilot study of 50 individuals to determine appropriate sample size for full study); 80RT6309-6310, 6312-6322; 82RT6408-6415. Despite his contrary testimony and recommendations in *Bell III,* Drogin provided no justification for ignoring the same statistical principles here.

5. The Flawed Trial Plan Failed To Comply With *Bell III.*

The trial plan here bears no resemblance to the procedures employed in *Bell III*. *See* Slip.Op. 45-47. It bears repeating that a 43.3% margin of error reflects inaccuracy that reaches "constitutional dimension." *Bell III*, 115 Cal.App.4th at 756-757 (32% margin of error extremely inaccurate and unconstitutional).

The 43.3% (or +/- 5.14 hour) margin of error means that, with the same level of statistical probability, the estimated average number of overtime hours for the class (with another 21 person sample) could just as easily be 6.72 hours per week, instead of 11.86! Under *Bell III*, this outrageous level of inaccuracy is not acceptable in any context and cannot serve as the basis for a $15 million judgment against USB.

a. The Trial Court Improperly Relied On *Bell III*'s "Bolstering Factors."

The trial court attempted to justify its judgment and the extraordinary 43.3% margin of error by relying on a single line of dicta from *Bell III*: "The reliability of an estimate subject to a large margin of error might conceivably be bolstered by evidence of a high response rate, probable distribution within the margin of error, absence of measurement

error, or other matters." 115 Cal.App.4th at 756; 83CT24520-24525.[31] Of course, that phrase followed the *Bell III* court's rejection of a 32% margin of error as to the double-time calculation. *Id.* These "bolstering" factors were not present here and, even if they were, could not salvage a 43.3% margin of error.

The trial court erred in concluding that the response rate was an "extremely high" 95% because "21 out of 22 RWGs testified." 83CT24622, 24628. In fact, six of the original randomly selected 20 RWG members failed to testify. Thus, the actual response rate is 14 out of 20, or 70%. 22CT6289; 71CT20960-20961; TE1295; 70RT5559; 81RT6334-6353; 82RT6455-6456; 83RT6550-6558. As confirmed by a scientific text Drogin relied upon, "An important task for the investigator is to carefully and completely define the population before collecting a sample." TE552; 74RT5815-5817, 5826; 81RT6340-6347. Thus, removing individuals from the population *after* collecting the sample is improper. Here, the actual response rate of 70% is not high, Drogin's testimony contradicts his own definition of "response rate," and, even if the response rate *had* been 95%, it could not remedy a 43.3% margin of error.

Significant measurement error also infected the trial court's estimate of the "average" overtime hours. Drogin defined measurement error as "a

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[31] Seeking support in *Bell III* for its erroneous trial plan, the court also asserted that "Alternative Procedures Were Considered." 83CT24630-24631. However, the trial court refused to adopt USB's proposal to (1) decertify or (2) conduct mini-trials before special masters for all class members to account for the lack of common evidence to determine liability and recovery. *See, e.g.*, 20CT5896; 21CT5917-5929; 2CT(Supp)349-351; 69RT5495-5497. No other procedure *could* render a constitutionally or statistically acceptable outcome, and the purported *consideration* of alternative procedures does not justify the refusal to *adopt* any valid procedures.

kind of mistake or error that can occur in samplings or surveys where you mismeasure something in a systematic way." 70RT5560-5561. Measurement error occurs when "your device for measuring is too rough, it's too crude, or... [t]he process for determining the correct value for an element that is observed in a sample is done incorrectly." 73RT5742. Here, measurement error occurred when Drogin "interpreted" the data in the trial court's SOD, speculating about the "average" hours worked by RWG witnesses who gave only crude ranges of "average" hours worked per week. Admitting that the trial court's findings provided insufficient detail about the units being measured, Drogin used a speculative "midpoint assumption," applying the midpoint of any range of hours given by each RWG even though there was *no* evidence regarding the frequency that each RWG worked any particular number of hours within that range. 72RT5688-5692; 73RT5741-5744; 71RT5613, 5619. His arbitrary decision to use midpoints is "too rough" and "too crude" to estimate the correct value for average hours worked by each RWG.

While all trial plan issues are subject to a *de novo* standard of review, Drogin's midpoint assumption cannot even constitute "substantial evidence" since it is based on speculation and assumptions not supported by the record. *See Hongsathavij v. Queen of Angels Med. Ctr.*, 62 Cal.App.4th 1123, 1137 (1998); *PG&E v. Zuckerman*, 189 Cal.App.3d 1113, 1135 (1987). An expert's opinion testimony "cannot rise to the dignity of substantial evidence" where the expert bases his conclusion on speculative, remote or conjectural factors. *Leslie G. v. Perry*, 43 Cal.App.4th 472, 487 (1996); *Roddenberry v. Roddenberry*, 44 Cal.App.4th 634, 651 (1996). "Like a house built on sand, the expert's opinion is no better than the facts on which it is based." *People v. Gardeley*, 14 Cal.4th 605, 618 (1996).

Finally, the RWG data was highly skewed, meaning that individual members of the sample disproportionately impacted or "skewed" the calculation because of extreme values. This problem was expressly avoided in *Bell III* due to the sufficiently large sample of almost 300 individuals. 115 Cal.App.4th at 755 ("the elimination of the largest claimants, asserting claims for unpaid hours worked over 25 hours per week, would have a negligible impact on the average weekly figure.").

In contrast, Drogin admitted that here, extreme values significantly impacted the "average," including the average hours of Penza and Petty, which were, respectively, five and three times more than any other RWG member, skewing the distribution to create an estimated "average" that was 30% higher than it otherwise would be, dramatically inflating the total judgment. 82RT6444-6445. The statistical probability of another class member sharing the same hours-worked data as Penza is less than one in a billion, making his "representativeness" of other class members highly suspect. TE1292, 1297; 78RT6113-6116; 81RT6369-6374. Removing just Penza[32] from the calculation reduced the total recovery amount to the class by between 19% to 26%, or $2.2 million to $2.6 million, after the effect of prejudgment interest. 78RT6109-6131, 6153-6154; TE1292, pp. 4-9. Where one RWG had such an undue impact on the classwide "average," the sample was skewed and statistically improper.

Drogin downplayed this fact by repeating an abstract mantra on the benefits of random selection. *See, e.g.*, 74RT5812-5813, 5786-5789. However, Drogin's explanation of the term "skewed" data makes no sense: "Every person has at least some overtime, so in that sense the data is not

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[32] USB does not advocate that Penza or Petty should have been "removed" from the RWG sample. USB simply highlights Penza's undue impact on the sample "average" to illustrate the flaws of an undersized sample.

askew as it was in *Bell* for the double-time calculation." *Compare* 71RT5615-5616 *with* 74RT5783 (Drogin testifies that "skewed data" means "it's nonsymmetric with a large frequency on one side, either low or high."). 82RT6443-6446. The RWG data was skewed, but even the absence of such skew cannot salvage the 43.3% margin of error.

b. The Excluded Hearsay Survey Does Not Bolster The Unconstitutional 43.3% Margin Of Error.

Plaintiffs briefly reference Drogin's testimony that "he had relied on a survey by Dr. Jon Krosnick, an expert on surveys, whose calculation of overtime hours worked by class members was consistent, indeed higher, than Drogin's calculation." OB21. After Phase I ended, USB and the court learned that Plaintiffs had conducted an unauthorized survey of non-RWG class members. *See* 58CT17061-17072. USB brought multiple motions to exclude the survey evidence, all of which were granted. 65RT5267-5270; 67RT5439-5443; 60CT17622-17655; 61CT18136-18149, 18152; 71CT21053-21070; 78CT23228; 79CT23516. However, at trial, despite acknowledging that USB's "objection [to the survey evidence] is a fair objection," and that it would exclude all survey evidence, the court erroneously allowed Drogin to testify that he "relied upon" the excluded survey, thereby sneaking in unreliable and unproven non-RWG evidence in favor of Plaintiffs' arguments. 70RT5440-5548. The court then relied on the survey as purported evidence regarding the probable distribution of hours worked by non-RWG class members, despite excluding the survey as a violation of the trial plan. 83CT24628-24629. The court compounded this error by denying USB the right to conduct any discovery regarding the survey, including how it was designed, who participated, and the actual results, because it was "outside the trial plan" and thus not relevant. 61CT18144-18147; 69CT20306-20383; 67RT5439-5442; 68RT5465-5473,

5483-5485; 70RT5523-5525. The court applied the trial plan unevenly, using it to deny USB the right to discovery on Plaintiffs' survey yet relying on the same survey evidence to "bolster" the judgment. No evidence in the record supports any reliance on the survey, for any purpose.

Besides violating the trial plan, the survey was inadmissible hearsay proffered as evidence of the truth of the actual hours purportedly worked by non-RWG class members. Evid. Code §1200; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 116 Cal.App.4th 1253, 1269 (2004); *Luque v. McLean*, 8 Cal.3d 136, 147-48 (1972); *Korsak v. Atlas Hotels*, 2 Cal.App.4th 1516, 1525-26 (1992) (excluding hearsay survey because experts may not relate the out-of-court statements of the survey as independent proof of a fact); *People v. Coleman*, 38 Cal.3d 69, 92 (1985) ("while an expert may give reasons on direct examination for his opinions, including matters he considered in forming them, he may not under the guise of reasons bring before the jury incompetent hearsay evidence.") (*overruled on other grounds in People v. Riccardi*, 54 Cal.4th 758, 824 n.32 (2012)).

Expert witness testimony of "reliance" on inadmissible hearsay cannot be used to prove the truth of the hearsay statements. *In re Cheryl H.*, 153 Cal.App.3d 1098, 1120 (1984) (*overruled on other grounds in People v. Brown*, 8 Cal.4th 746, 763 (1994)); *Johnson v. Aetna Life Ins.*, 221 Cal.App.2d 247, 252 (1963); *Mosesian v. Pennwalt*, 191 Cal.App.3d 851, 860 (1987) (not proper to reveal the content of a consulting expert's hearsay opinion) (*overruled on other grounds in People v. Ault*, 33 Cal.4th 1250, 1272 (2004)); *Cont'l Airlines v. McDonnell-Douglas*, 216 Cal.App.3d 388, 414 (1989); *Whitfield v. Roth*, 10 Cal.3d 874, 894-895 (1974) (rule allowing experts to testify regarding the basis of their opinion is not intended to be a "channel" to introduce improper hearsay); *Grimshaw*

v. Ford Motor Co., 119 Cal.App.3d 757, 788-789 (1981); *People v. Catlin*, 26 Cal.4th 81, 137-138 (2001).[33]

Consequently, the court erred by permitting Drogin to testify regarding the contents and details of the excluded survey. *Whitfield*, 10 Cal.3d at 894-895; *People v. Campos*, 32 Cal.App.4th 304, 308 (1995). The excluded hearsay survey cannot bolster the 43.3% margin of error, nor can it be considered for any purpose.

6. The Trial Court's Finding That Plaintiffs' Experts Were "Credible And Persuasive" Is Not Germane To The Issues On Appeal.

Plaintiffs make much of the trial court's findings that Plaintiffs' experts were "credible and persuasive" and that USB's experts were not, in the trial court's view. OB48. These findings are not germane to the issues presented on appeal, particularly because Plaintiffs' experts agreed with USB's experts on critical issues. For example, Drogin agreed with Dr. Hildreth that there was no statistical basis to conclude that "100% of the class was misclassified" and that the restitution estimate resulted in (at least) a 43.3% margin of error.

Plaintiffs incorrectly contend that the Court of Appeal disregarded the substantial evidence rule. OB49. However, the Court of Appeal did not

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[33] The trial court also referenced other inadmissible "anecdotal" evidence to "bolster" the inaccurate result obtained, including testimony of three USB Sales Managers regarding the hours *they* worked as BBOs or the hours they believed their BBOs had worked. 83CT24629. This data was *not* contained in any of the Phase I findings, nor was it presented as evidence in Phase II. Moreover, the court's selective reference to these witnesses' testimony ignores the fact that the sales managers who worked as BBOs *also* attested that they spent the majority of their time *outside* the Bank as BBOs and were therefore properly classified, rendering their hours worked irrelevant. *See, e.g.*, TE1113, 1115; 46RT3440-3441; 52RT4455-4461.

"rely on" USB's defense expert testimony, but instead concluded that there was insufficient evidence of any kind to adequately support the trial plan and judgment, after evaluating whether the procedures imposed complied with due process. While the Court of Appeal included a detailed description of the evidence presented by both sides at trial, including expert evidence, it applied the proper standards of review throughout, including a proper *de novo* review of the constitutionality of the procedures and evidentiary restrictions imposed by the trial court (which were not proposed or endorsed by any expert).

D. The Trial Court's Exclusion Of USB's Exculpatory Evidence Was An Unconstitutional Due Process Violation.

1. Plaintiffs' Contradictory Contentions Ultimately Confirm The Court Of Appeal's Due Process Conclusions.

Plaintiffs make contradictory statements as to what it means for a defendant to have a due process right to challenge individual claims. Plaintiffs' position ultimately confirms that the Court of Appeal properly concluded that USB's due process rights were violated.

At the trial court and the Court of Appeal, Plaintiffs took a hardline position that USB had *no* right to challenge individual claims beyond the 21 RWG members at any point. Despite the evidence that certain class members were properly classified, Plaintiffs hid behind the trial plan, asserting that once a trial judge decides to proceed with representative evidence, no exculpatory evidence outside the sample group is allowed at trial.

Plaintiffs now assert that while a defendant's due process right to challenge individual claims may be limited "during the liability phase," "[t]o the extent the defendant seeks to litigate entitlement to relief (or extent of damages) for individual class members, that would occur in the remedial

phase of trial." OB38-39; *see also* OB5, 31, 36, 60-64. This statement makes no sense. A defendant's due process rights are not limited to a particular phase at trial. Furthermore, Plaintiffs are unsuccessfully attempting to fit this unprecedented and unconstitutional trial procedure into the context of "well-established class action procedure," even though this trial was the first of its kind in the misclassification context. OB58; *see also* OB32, 37. Nevertheless, Plaintiffs' statement indicates agreement that USB has a right to challenge individual class members' "entitlement to relief"–*i.e.*, the *fact of* liability–at least at some point in the trial proceedings. In acknowledging that "[t]he defendant has the burden of production and proof to establish that particular class members were exceptions to the classwide finding," Plaintiffs implicitly concede that USB must have a right to challenge individual claims. OB59. However, Plaintiffs immediately follow this concession by stating that "even then, a defendant in a misclassification case does not have an unlimited right to call each class member to testify." OB39.

Plaintiffs' contradictory assertions reach a critical conflict when Plaintiffs argue that "[a]t the remedial phase, the defendant may only contest entitlement for class members whom it can prove were exceptions to the illegal practice or for whom it has defenses not resolved at the liability stage of the action." OB63. Incredibly, Plaintiffs state that a defendant may do exactly what USB attempted to do here and was denied: "USB cannot merely assert a particular class member was exempt or demand that each class member individually establish his/her entitlement to relief ... [i]t will have the burden to produce evidence and prove, despite the trial court's findings that the BBO job was inherently a non-exempt inside sales job, that a specific class member was exempt because he performed the BBO duties predominantly outside." OB63-64. Plaintiffs'

argument thus confirms that USB had a right to present individualized defenses and evidence to refute individual claims.

The problem is that Plaintiffs circularly argue that the class action status dispenses with any obligation to resolve individual issues at trial. Plaintiffs present doomsday arguments about the purported dangers of the time required to cross-examination individual class members, as if such "inconveniences" justify compromising a defendant's due process rights. The law is clear that where liability depends on individual questions, the defendant's due process right extends to presenting evidence or challenging assertions for each class member. There is no legal authority limiting a defendant's due process right to a particular phase of trial or particular claims within a class.

2. Federal And State Authorities Overwhelmingly Confirm USB's Due Process Right To Challenge Individual Claims And Present Individual Defenses At Trial.

"The fundamental requisite of due process of law is the opportunity to be heard." *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950). The right is recognized whenever a defendant is required to pay money. *See, e.g.*, *Kobzoff v. L.A. County Harbor*, 19 Cal.4th 851, 857 (1998) (award of costs); *People v. Sandoval*, 206 Cal.App.3d 1544, 1550 (1989) (restitution in criminal action). There is no dispute that sworn admissions by class members that they performed exempt duties constitute admissible, highly relevant evidence in a misclassification case. The court's refusal to consider this voluminous evidence and refusal to allow USB to call non-RWG members at trial denied USB its right to be heard and to rebut individual claims. This due process violation requires reversal of the judgment. *Columbia-Geneva Steel v. Indus. Accident Comm'n*, 115 Cal.App.2d 862, 865 (1953); *Collins v. D.J. Plastering*, 81 Cal.App.4th

771, 777-778 (2000) (reversible error to deny defendant trial on all parts of claims against it).

Class actions "are provided only as a means to enforce substantive law" and do not change the law. *City of San Jose*, 12 Cal.3d at 462. The trial plan impermissibly sought to alter substantive law in the name of convenience and "manageability." As this Court observed, "[t]he superficial adjudications which class treatment here would entail could deprive either the defendant or the members of the class—or both—of a fair trial. Reason and the constitutional mandates of due process compel us to deny sanction to such a proceeding." *Id.*

In *Sav-On*, this Court also recognized that when parties aggregate individual claims into one action, the procedural vehicle for challenging those claims must still *manage*, not compromise, a defendant's rights:

> Individual issues do not render class certification inappropriate *so long as such issues may effectively be managed*.... And *if unanticipated or unmanageable individual issues do arise, the trial court retains the option of decertification.*

34 Cal.4th at 334-335 (2004) (citations omitted).

This Court again emphasized this right in *Johnson v. Ford Motor Co.*, 35 Cal.4th 1191, 1210 (2005), citing *Sav-On*, holding that "[i]n a class action, once the issues common to the class have been tried, and assuming some individual issues remain, *each plaintiff must still by some means prove up his or her claim, allowing the defendant an opportunity to contest each individual claim on any ground not resolved in the trial of common issues.*" *Id.* This Court expressed concern that "[h]ere, the Johnsons, as individual plaintiffs, proved only the facts of Ford's tortious transaction with them, yet they sought and obtained disgorgement of Ford's estimated earnings on a thousand or more other transactions without proof that each of the others was also tortious." 35 Cal.4th at 1210. The same problem is

presented here, where the court considered proof pertaining to only 21 class members' misclassification claims, and erroneously concluded that 239 other class members had been misclassified without a shred of evidence pertaining to their actual duties performed (or hours worked). Such an approach is contrary to law and is unconstitutional.

Due process requires that a defendant receive the opportunity to present defenses that depend upon individualized issues. *See, e.g., In re Fibreboard*, 893 F.2d 706, 711-712 (5th Cir. 1990) (trial plan of using 11 class representatives and 30 illustrative plaintiffs rejected, suggesting trial plan would alter substantive state law and impact defendant's due process rights); *In re Chevron*, 109 F.3d 1016, 1020-1021 (5th Cir. 1997) (citing due process concerns in rejecting trial plan calling for representative evidence to obviate need for individual determinations of liability and damages); *Kurihara v. Best Buy*, 2007 U.S.Dist. LEXIS 64224, *31 (N.D.Cal. 2007) ("[d]efendant's due process interests will be preserved by affording it an opportunity to defend the nature and legality of its company-wide policy, and through individualized analysis related to damages."); *Osuna v. Wal-Mart*, 2004 WL 3255430, *7-8 (Ariz. 2004) (denying defendant in wage and hour class action the "right to examine individual class members and to assert individual defenses, by using formulaic methodologies to establish liability and damages, would deny [the defendant] its rights to due process and a jury trial under the United States Constitution....").

Sampling cannot constitutionally determine liability in many class action contexts. *See, e.g., Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 489 n.21, 493 (E.D.Pa. 1997) (statistical evidence not appropriate to prove damages; also "the use of questionnaires to establish the elements of causation and injury – without cross-examination or rebuttal evidence – would violate defendants' due process rights."); *Sterling v. Velsicol Chem.*

Corp., 855 F.2d 1188, 1199-1200 (6th Cir. 1988) (criticizing shortcomings and due process flaws of sampling used to assess classwide liability and contingent damages questions). Plaintiffs ignore scores of authorities holding that sampling is particularly unsuited to employment cases which often present numerous individual defenses, as here. *See, e.g.*, *Basco v. Wal-Mart Stores*, 216 F.Supp.2d 592, 602 (E.D.La. 2002) ("there are a plethora of defenses that will be raised to explain or negate plaintiffs' allegations that they worked off-the-clock and can only be addressed on an individual basis... and [ ] any amount of damages defendants may be required to pay should be proved and considered on an individual basis."); *Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 344-345 (4th Cir. 1998) (defendant must be allowed "the benefit of deposing or cross-examining the disparate" individuals' claims); *Big Lots*, 561 F.Supp.2d at 587-588 (the "efficiency gains [of class treatment] however, cannot come at the expense of a defendant's ability to prove a statutory defense without raising serious concerns about due process. Big Lots cannot be expected to come up with 'representative' proof where the plaintiffs cannot reasonably be said to be representative of each other.").

Based on the above authority, USB had a right to defend itself in this action by challenging individual claims to liability and restitution. By precluding USB from asserting such defenses and evidence, the trial court violated USB's due process rights.

3. Plaintiffs Do Not Cite To *Any* Authority That Actually Supports Their Contention That USB Has No Due Process Right To Challenge Individual Misclassification Claims.

Plaintiffs fail to present any authority that prohibits a defendant from presenting individual defenses within a class action context, and instead rely on a handful of cases involving only the issue of individual challenges

to classwide *damages*, as opposed to individualized liability determinations, *i.e.*, "entitlement" to recovery. Regardless, even Plaintiffs' sparse authorities indicate that, at some point in any class trial proceeding, a defendant has the right to challenge individual entitlement and extent of recovery.

In *Bell III*, the issue of liability was decided in summary judgment and defendant was given the opportunity to present whatever evidence it needed to defend its position. Once liability was established, the case proceeded to the remedial phase where representative evidence was used to calculate *damages*. The Court of Appeal observed that the defendant employer "reserved the right to introduce testimony of class members outside the sample, but we find no indication that it pursued this option. It never included individual employees in its witness list or sought to offer their testimony at trial." 115 Cal.App.4th at 758. Consequently, the *Bell III* court found "nothing in the record that substantiates [the defendant's] claim that the trial management plan restricted its opportunities to contest the evidence of damages or to present rebuttal evidence relating to hours worked by individual employees." *Id.* Unlike the defendant in *Bell III*, USB repeatedly attempted to introduce testimony from class members outside of the sample to raise individual defenses in *both* trial phases, and the court repeatedly denied such requests. *See, e.g.*, 18RT445-453; 21CT5926-5927; 45CT13194-13203; 48CT14258-14276; 55CT16129-16142, 16164-16165; 71CT21031-21038; 75CT22259-22277; 79CT23516; 64RT5124-5129; 76RT5915-5916; 77RT6029-6033. Thus, the trial plan here plainly "restricted [USB's] opportunities to contest the evidence" of individual class members, both as to liability and alleged hours worked. *See Bell III*, 115 Cal.App.4th at 581. Implicit in *Bell III*'s holding is that this scenario violates due process.

Plaintiffs also cite *In re Simon II Litig.*, 211 F.R.D. 86, 153 (E.D.N.Y. 2002) ("*Simon II*") for the proposition that "[t]he interest of plaintiffs in avoiding the additional litigation costs that would arise if defendants were permitted to confront each possible plaintiff at trial is enormous." OB41. This statement alone does not address whether a defendant has a due process right, or whether it has been violated.[34] The *Simon II* court adequately considered the defendant's due process concerns and allowed the defendant to present adequate defenses. *Simon II* involved allegations of fraud against tobacco companies by consumers who were misled as to the lethal and addictive effects of smoking. In *Simon II*, the court did hold that the consumers' proposed use of statistical evidence to establish causation did not violate the manufacturers' due process rights. 211 F.R.D. at 154. However, as the Court of Appeal correctly observed, "*Simon II* is [ ] distinguishable, in part because it involved hundreds of thousands of potential plaintiffs. Further, the defendant in that case was not restricted to the sample group members in presenting its defense: 'In addition to statistical evidence, parties will be permitted to present to the jury relevant lay testimony, expert testimony, and documentary evidence—subject to the constraints of the Federal Rules of Evidence and the practical considerations of trial management.'" Slip.Op. 64 (citing *Simon II* at 153-154). The Court of Appeal further observed that "[i]n *Bell III*, we recited this passage in support of the general proposition that there is–little basis in the decisional law for a skepticism regarding the appropriateness of the scientific methodology of inferential statistics *as a technique for determining damages* in an appropriate case... [w]e did not cite to *Simon II*

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[34] Whatever the cost of asserting individualized defenses, it is a defendant's prerogative to choose whether to assert them, which the court should take into consideration when evaluating manageability.

in support of the proposition that *liability* determinations in class actions may be made by extrapolating from a random sample, particularly where the sampling methodology was derived without the benefit of expert statistical advice." Slip.Op. 64 (citing *Bell III*, 715 Cal.App.4th at 755).

In sum, Plaintiffs have no authority to support their position that USB has no right to present individual defenses, or that it has a right to present defenses at the remedial phase only. All applicable authorities confirm that, regardless of any trial plan, a defendant has a due process right to present individualized defenses where they depend upon individualized issues.

4. The Trial Court's Refusal Of USB's Requests To Call Absent Non-RWG Class Members And Exclusion Of USB's Contrary Declaration And Deposition Evidence Violated Due Process.

The trial court refused USB's efforts to: (1) introduce declarations signed by non-RWG class members as statements against interest; (2) introduce deposition testimony from non-RWG witnesses establishing that they were properly classified; (3) call all 239 of the other absent class members to the stand to confront them as to how they spent their time; (4) introduce evidence establishing that BBOs were exempt under other exemptions under California law; (5) allow managerial witnesses to testify about their own BBO experience; and (6) present evidence from managers or others regarding the activities of any non-RWG member.

Plaintiffs contend that this exclusion was proper because it was "a reasonable exercise of discretion that flowed from the court's decision to use a random sample of representative witnesses," and that allowing this evidence "would be unduly cumulative and time-consuming." OB52. In fact, the evidence was excluded on the ground that it was "irrelevant" because it did not comport with the court's trial plan. "Unfortunately,

relevancy was dictated by the court's trial plan rather than by the trial itself as it unfolded in the courtroom." Slip.Op. 54. Thus, the trial court "erred when, in the interest of expediency, it constructed a set of ground rules that unfairly prevented USB from defending itself." Slip.Op. 60. The trial court prejudicially erred by refusing to admit evidence that, if deemed persuasive, would have established that at least one-third of the class was properly classified. Instead, the judgment awarded these properly-classified declarants over $6 million. 83CT24698-24704.

Plaintiffs contend that the trial court's exclusion of USB's declaration evidence was "justified" because of their "inadmissibility, questionable veracity, and lack of weight" and because they "constituted inadmissible hearsay." OB52. First, the hearsay rule does not prevent the admission of statements made by a party opponent. Evid. Code §1220. Plaintiffs' other arguments go to the *weight* of the declarations, and not whether it was a due process violation to exclude them.

Finally, it is illogical for the Plaintiffs to claim the declarations were "cumulative" when they are probative as to whether each class member was properly classified. The "questionable veracity" of the few *conflicting* class member statements under oath merely raises the question of whether these declarants perjured themselves when signing false declarations or whether they would have testified falsely at trial, and there is no evidence to question the veracity of the vast majority of USB's declarations. Plaintiffs also fail to address the deposition testimony of the four prior named plaintiffs, who confirmed their proper exempt classification but still recovered $160,000 under the judgment. *See* 68CT20174-20188; 73CT21500-21510; TE1184-1187; 83CT24700-24703. Because the substantive law at issue turns on the actual duties performed by each employee each week, evidence on this issue for each individual cannot be

"cumulative": the analogous issue must be resolved to determine the exempt status of each class member.

Notably, the three RWG witnesses who signed declarations had wholly different excuses for contradicting their prior declarations. The trial court never made any findings regarding the several other declarants who repudiated their declarations at the class certification stage, and the differing reasons given by the three RWG's only underscored the fact that any other class member who attempted to retract his or her declaration should be called to explain any discrepancy in testimony given under oath. The trial court found that that "the weight to be given to these declarations must be adjusted because of their actual authorship, the circumstances of preparation and internal inconsistencies and ambiguities," but expressly limited this holding to the four declarations signed by the three RWG witnesses. 71CT20991; 64RT5122-5123; 65RT5297-5300.

Further, USB's due process rights were not limited to the declarations. The declarations demonstrate that at least 78 class members were properly classified, and that many others likely were as well. The due process right in question is to have each individual liability issue determined, with USB being permitted to present evidence and cross-examine each class member's claim of misclassification, regardless of whether the trier of fact ultimately accepts or rejects that evidence.

The unconstitutional error led to $13.9 million in recovery to class members whose claims USB was denied the right to challenge, despite USB's repeated requests to do so. *See, e.g.*, 21CT5926-5927; 76RT5915-5916; 77RT6029-6033; 55CT16164-16165; 64RT5124; 8CT2173; 8CT2297-10CT2694. The trial court's judgment would award individual absent class members substantial amounts of money (over $57,000 per person on average) even though USB possesses, and repeatedly sought to introduce, admissible evidence that would prevent, at a minimum,

approximately one-third of these individuals from any recovery. 83CT24698-24704. Even if class certification had been appropriate (it was not), USB was still entitled to present evidence refuting the claims of individual class members. The court's refusal to admit this highly probative evidence had an enormous impact on USB's overall liability.

However, USB's right to challenge individual claims was *not* limited to class members for whom USB possessed specific contrary evidence, *i.e.*, signed declarations or prior deposition testimony. Given the independent nature of the BBO position, the most critical method of challenging individual claims is through cross-examination at trial to challenge and probe each class member's contentions regarding their outside time. Thus, even if the trial court had allowed USB to call all declarants and deponents, it would still have been prejudicial error to preclude USB from calling all remaining class members to the stand at trial. In this case, however, the breadth of concrete evidence excluded by the trial plan is so staggering that the due process violation for the exclusion of declarant and deposition evidence alone is unquestionable.

By way of illustration, the Judgment would award the following amounts to individual class members despite denial of USB's request to introduce evidence of their sworn admissions refuting their claims for recovery: James Hrundas - $229,874 (TE1041); Cathy Baigent - $152,925 (TE1209); Frank Esposito - $228,506 (TE1034); Arthur Massey - $164,673 (TE1048); Kenneth Nordgren - $137,209 (TE1052); Kenneth Rattay - $270,593 (TE1055); Matthew Roberson - $209,392 (TE1268); Violet Mayle (Ao) - $247,603 (TE1255); Dennis Sarip - $297,147 (TE1270); Nicholas Sternad - $450,064 (TE1058). *See* 83CT24698-24704. Just these 10 non-RWG class members account for nearly $2.5 million of the judgment, whose recovery under the judgment was just as indefensible as the money awarded other USB declarants who confirmed their exempt

status (and who in the aggregate accounted for $6 million of the judgment) and the first four class representatives (who accounted for $160,000 of the judgment). 68CT20174-20188; TE1184-1187.

5. The Due Process Analysis In *Connecticut v. Doehr* Confirms That The Trial Plan Violated Due Process And That The Judgment Must Be Reversed.

The trial court's prejudicial denial of USB's due process right to challenge individual claims required reversal of the trial court's judgment. Courts evaluate whether a procedure violated due process based on three factors established in *Connecticut v. Doehr*, 501 U.S. 1, 10 (1991). *See, e.g.*, *Bell III*, 115 Cal.App.4th at 751-752. The Court of Appeal correctly applied *Doehr*, and concluded that "[t]he denial of due process that occurred here" does not withstand appellate scrutiny. Slip.Op. 59-60. The first factor, the private interest affected, is $15 million of USB's property, a considerable "private interest" by any standard. The second factor is most important here, as it looks at "the risk of erroneous deprivation... and the probable value of additional or alternative safeguards." *Doehr*, 501 U.S. at 11. Plaintiffs do not dispute that the risk of error here is unprecedented – a 43.3% margin of error. The procedure implemented by the trial court here failed to approach any result that can credibly be called "accurate," even if a "lenient" standard did apply to *restitution*, which it does not. Thus, the "risk of error" is certain, and enormous.

Regarding the third *Doehr* factor, the interest of the state, the Court of Appeal noted that, while "[c]lass action lawsuits are intended to conserve judicial resources and to avoid unnecessarily repetitive litigation," the trial plan here "prevented USB from submitting any relevant evidence in its defense as to 239 class members out of a total class of 260 plaintiffs." Slip.Op. 60. "Whether the trial court would have given credence to such

evidence is beside the point. A trial in which one side is almost completely prevented from making its case does not comport with standards of due process." Slip.Op. 60. Here, the due process balancing test confirms USB's right to challenge each class member's claim, given the average recovery of over $57,000 and many class members standing to recover many hundreds of thousands of dollars. Unlike a class action involving relatively "small" claims, this case presents dollar amounts of such significance that USB cannot reasonably be denied an opportunity to refute each claim. Thus, under the *Doehr* factors, the judgment reversal must be affirmed.

E. Plaintiffs' "Waiver" Argument Is Specious; USB Timely Objected To And Preserved All Challenges To The Trial Plan Before, During And After Trial.

Waiver occurs when a party fails to object or agrees to a procedure–*not* when it consistently objects to a procedure, as USB did here. Plaintiffs admit that USB objected to the trial plan before, during and after trial, based on various constitutional and statistical principles and contending that individualized determinations of both liability and recovery are necessary in this case. OB53-59; *see, e.g.*, 18RT445-453; 48CT14258-14276; 55CT16129-16143, 16146, 16164-16165; 64RT5124-5129; 79CT23516. Yet Plaintiffs now assert that USB "waived" its objections to the recovery component of the trial plan because USB "refused to agree to any procedures that would have reduced the margin of error, short of jettisoning the class liability findings and trying every class member's claim individually." OB54, 56. This position is untenable.

Plaintiffs misstate the trial court's purported efforts to "respond" to the 43% margin of error after Phase I. OB54-55. The trial court issued a tentative ruling denying USB's second decertification motion and, as an afterthought, mentioned potential "alternative procedures" to address the

margin of error. 80CT23776-23777. Addressing the margin of error was not, as Plaintiffs suggest, "the purpose of the hearing," and these comments did not even appear in the court's final order. 71CT20983-20984; 78CT23208, 23227-23228; 69RT5487-5497. At this hearing, the court briefly discussed the notion of "alternative trial procedures" in light of the horrendous margin of error. 83CT24630. In response, USB again proposed individualized mini-trials for each class member to determine both liability and restitution because "[i]t makes no sense just to deal with only restitution since none of those 239 [class members] have... been subjected to examination and have had their cases [tried] on liability" and if "they were properly classified as exempt, obviously they're not entitled to restitution." 69RT5496-5497. The trial court refused to consider any procedure that would question its classwide liability finding as to any class member and rejected USB's proposal. 69RT5498-5500. The trial court stated that it was "not willing to unilaterally impose an alternative procedure on the parties," which is nonsensical since all trial procedures in this case were unilaterally imposed by the court, over USB's strenuous objections. 83CT24630. Plaintiffs refused to propose any alternative procedure, and the court proceeded with imposing the trial plan as previously articulated. 69RT5499.

Plaintiffs concede that USB repeatedly proposed mini-trial procedures before special masters who could have resolved liability and recovery for each class member. OB56; 2CT(Supp)349-351; 20CT5896; 21CT5917-5929; 20CT5891-21CT5905; 21CT6167-22CT6208; 69RT5489-5500. While Plaintiffs correctly observe that USB did not agree to the trial court's proposed "alternatives," which denied USB the right to challenge individual liability determinations, USB did offer an alternative procedure. The trial court simply rejected USB's proposal. *See* 69RT5497-5499. USB's demand for mini-trials cannot be considered

"waiver" where they (1) were included as one of the "innovative procedures" suggested by this Court in *Sav-On*, 34 Cal.4th at 340 n.12; and (2) comport with due process by allowing USB to raise individual defenses.

Plaintiffs' "waiver" argument wrongly implies that litigants are obligated to "agree" with one another in disputed proceedings. While courts routinely and properly instruct parties to meet and confer to determine *whether* the parties can agree to resolve disputes or streamline proceedings, "agreement" is never *required.* That is why we have trials. Here, the parties could not agree on whether any "classwide" trial could proceed in a constitutional manner. Plaintiffs' "waiver" argument is particularly absurd here, since the purported requirement of "cooperation" over legitimately disputed constitutional due process would place litigants in an impossible catch-22. Had USB agreed to the "alternative" procedures proposed by the court, Plaintiffs would argue that USB's agreement likewise constituted a "waiver" of its objections to the trial plan. Fortunately, the law is clear that no waiver occurs when a party objects to a procedure, as USB did here.

Plaintiffs misstate the legal concept of "waiver," citing inapposite cases. In *Telles Transp., Inc. v. WCAB*, 92 Cal.App.4th 1159 (2001), a claimant's counsel strategically decided not to disclose relevant medical records at trial. The doctrine of waiver applied because the claimant's own conduct caused or induced the error. *Id.* at 1166-1167. USB did not "purposely exclude" relevant evidence but repeatedly attempted to introduce scores of relevant evidence that the trial court refused to consider. *See also Mesecher v. County of San Diego*, 9 Cal.App.4th 1677, 1685-1687 (1992) (appellant waived challenge to verdict form because it was drafted jointly by the parties, with the express knowledge that it created a potential inconsistency). USB did not "agree" to any of the procedures challenged on appeal. The trial court frequently commented that USB had "made an

excellent record" for appellate review with its numerous due process objections to the trial plan. *See, e.g.*, 64RT5135; 55CT16164-16165; *cf. Keener v. Jeld-Wen*, 46 Cal.4th 247, 265-266 & n.25, 270 (2009) (failure to timely object to complete polling of juror before jury was discharged caused defendant to forfeit right to object to error); *cf. People v. Simon*, 25 Cal.4th 1082, 1103-1104 (2001) (failure to timely object to venue in felony proceeding forfeits right to object to venue). USB did not "forfeit" a time-sensitive opportunity to object to a potential error that could have been easily corrected. Instead, USB steadfastly objected that a "representative" trial procedure was unconstitutional and unfair in this case, which the trial court overruled.

Norgart v. Upjohn Co., 21 Cal.4th 383 (1999) involved a "consent judgment" entered into only to "hasten its transfer from the trial court to the appellate court" as opposed to being entered to "settle their dispute fully and finally." 21 Cal.4th at 400-403. The Court held that no "waiver" or "invited error" had occurred given the clearly stated purpose of the stipulated order, explaining that the "doctrine of invited error" exists "to prevent a party from misleading the trial court and then profiting therefrom in the appellate court." *Id.* at 403. Here, USB did not "mislead the trial court," but repeatedly objected and implored the trial court to revise its trial procedure to render a constitutionally valid result.

Finally, Plaintiffs cite *Bell III*, where the defendant agreed to participate in crafting a statistical sampling procedure to estimate classwide damages and did not pursue the option to introduce testimony of class members outside the sample. *Bell III*, 115 Cal.App.4th at 758. Consequently, the *Bell III* court found nothing in the record to support the defendant's claim that the trial management plan restricted its opportunities to contest individual damages. *Id.* Here, as discussed above, USB repeatedly attempted to introduce testimony from each class member, and

the court repeatedly denied them. *See also* 76RT5915-5916; 77RT6029-6033. Thus, *Bell III* only confirms that USB preserved its objections to the trial procedures.

Accepting Plaintiffs' baseless "waiver" argument would create new law inviting serious abuse. Litigants would manufacture opportunities to demonstrate failed lack of "cooperation," and would then present an opponent's objections to a proposal as waiver. Plaintiffs' "waiver" argument essentially suggests that USB was required to agree to formulate its punishment (determining recovery amounts), despite objecting that it was innocent and not liable for any amount in the first place.

Litigants are required to comply with court orders, but they are not required to agree to any procedures imposed. Regardless of the parties' agreement or lack thereof, it is ultimately the trial court's job to fashion and implement a fair and constitutional trial procedure. If a procedure adopted by a trial court is inconsistent with law and is challenged on appeal, it is reversible. There is no waiver simply because one party did not agree to and/or propose another alternative that the trial court and opponent might have preferred.

III. STATISTICAL SAMPLING AND REPRESENTATIVE EVIDENCE ARE PARTICULARLY UNSUITABLE IN THIS UCL CLASS ACTION FOR RESTITUTION.

A. To Prove Classwide Liability Under The "Unlawful" Prong Of The UCL, Plaintiffs Must Prove Liability As To Each Class Member Under Applicable Labor Code Provisions.

Plaintiffs incorrectly assert that representative evidence is more suitable in UCL actions (OB44), ignoring the appropriate standards of proof for liability and restitution for "unlawful" UCL claims. When applying the correct standards of proof here, Plaintiffs have a greater

burden to prove their UCL claims than if they had tried their claims under California's Labor Code.

It is well established that very different standards of proof for liability apply in UCL actions, depending on whether the business practice alleged is unlawful, unfair, or fraudulent.[35] Here, Plaintiffs present their Labor Code claims under the "unlawful" prong. "By proscribing 'any unlawful' business practice, 'Section 17200 borrows violations' of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Cel-Tech Communications v. L.A. Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999) (citations omitted). Under the "unlawful" prong, a plaintiff must prove all of the elements of the underlying violation. *Aguilar v. Atlantic Richfield*, 25 Cal.4th 826 (2001) (in a UCL action the party seeking equitable relief bears the burden of proof). Thus, in this action, Plaintiffs must prove all elements of a Labor Code violation to establish their UCL claim.

By contrast, a "fraudulent" business practice is one in which "members of the public are likely to be deceived," usually by false marketing or advertising. *See Tobacco II*, 46 Cal.4th at 312. The fraudulent business practice prong is distinct from common law fraud and may authorize relief "without individualized proof of deception, reliance and injury" where a misrepresentation was material. *Id.* at 312, 327.

Plaintiffs assert that *Tobacco II* supports class treatment of their UCL claim. OB44-45. Plaintiffs misconstrue *Tobacco II's* holding, which was limited to post-Proposition 64 standing requirements under Section

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[35] Section 17200 of the Business & Professions Code provides in relevant part: "[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice...." Unless otherwise indicated, statutory references in this Section are to the UCL.

17204.[36] In *Tobacco II*, this Court clarified that, at the class certification stage, Section 17204's standing requirements apply only to class representatives and held that Proposition 64 did not change the law of class actions in any manner. 46 Cal.4th at 313, 315-316, 318. Moreover, *Tobacco II* "emphasized" that its discussion of causation was limited to UCL actions based on a fraud theory involving false advertising and misrepresentations to consumers. *Id.* at 326 n.17

Plaintiffs cite three additional UCL false advertising cases - *Fletcher*, *Bank of the West*, and *Committee on Children's TV*[37]–to support the finding of classwide liability.[38] These cases also involve misrepresentations to consumers, which are not comparable to "unlawful" employee misclassification cases. No analogous inference applies under the Labor Code, because even a uniform classification that is wrong as to some employees may be lawful as to others.

Post-*Tobacco II* decisions confirm that factual questions of reliance by class members, even in false representation cases, remain a proper criterion for examining commonality. *Tucker v. Pacific Bell Mobile Servs.*, 208 Cal.App.4th 201, 227-228 (2012) (citing *Cohen*, 178 Cal.App.4th at

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[36] Proposition 64 was an express directive by voters that not only must a plaintiff satisfy new individual standing requirements of Section 17204, but he or she must also satisfy the requirements of Code of Civil Procedure Section 382, which govern class actions. Thus, Proposition 64 placed UCL actions on the same footing as Code of Civil Procedure Section 382 class actions and did not create a lower standard of proof.

[37] *Fletcher v. Sec. Pac. Nat'l Bank*, 23 Cal.3d 442 (1979); *Bank of the West v. Super. Ct.*, 2 Cal.4th 1254 (1992); *Comm. on Children's Television v. Gen. Foods Corp.*, 35 Cal.3d 197 (1983).

[38] *Fletcher* and *Committee on Children's Television* were brought under Section 17500, known as the "false advertising law." A Section 17500 violation also constitutes a Section 17200 violation, and similar standards are applied to both sections.

981).[39] A class action for fraudulent business practice under the UCL still requires a defendant have "engaged in uniform conduct likely to mislead the entire class." *Id.* at 228. "[I]f the issue of materiality or reliance is a matter that would vary from consumer to consumer, the issue is not subject to common proof, and the action is properly not certified as a class action." *Id.* (citing *In Re*: *Vioxx Class Cases*, 180 Cal.App.4th 116, 129 (2009)). In other words, the "rule permitting an inference of common reliance where material misstatements have been made to a class of plaintiffs will not arise where the record will not permit it." *Id.* (citing *Massachusetts Mutual Ins. Life Co. v. Super. Ct.*, 97 Cal.App.4th 1282, 1294 (2002)).

A proper comparator to analyze this case is *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163 (2000), the leading authority where a defendant was found liable under the UCL for Labor Code violations.[40] In *Cortez*, a production worker successfully challenged her employer's universally-applicable alternative workweek schedule comprised of four 10-hour days. By proving that her employer failed to adopt the alternative workweek according to required Labor Code protocols, plaintiff showed that the employer's actions affected not only plaintiff, but all employees subject to the same alternative workweek schedule. Thus, all employees suffered the same injury and the trial court had common proof showing Labor Code violations. 23 Cal.4th at 169-171. Accordingly, the plaintiff met her burden to show liability to each class member. Although *Cortez*

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[39] *Tucker* found a UCL claim for restitution inappropriate for class treatment because some phone company customers were unaware of the allegedly fraudulent rounding practice or were unharmed by the practice because they did not exceed their allotted minutes. 208 Cal.App.4th at 228-229.

[40] *Cortez* was decided before Proposition 64 passed and therefore proceeded as a "representative" action.

establishes that UCL restitution may be available for nonpayment of wages, *Cortez's* result is inapplicable here, where there is no common proof of a Labor Code violation as to each class member.

Here, Plaintiffs cannot escape the fact that they must comply with the procedural requirements of Code of Civil Procedure Section 382. *See* §California Business and Professions Code Section 17203. Under the "unlawful" prong of the UCL, Plaintiffs must prove liability as to each class member under the applicable Labor Code provisions. Most critically here, Plaintiffs must establish that each class member is misclassified. Absent that showing no liability finding is possible.

B. Plaintiffs Are Not Entitled To An Award Of Restitution Under The UCL For Any Class Member Who Was Properly Classified.

Plaintiffs repeatedly refer to the amounts the trial court awarded to class members as "damages." In fact, Plaintiffs dismissed their Labor Code claims, which would have entitled them to seek damages, and instead proceeded on their UCL claim for restitution. Based on their mistaken notion that they were entitled to "damages," Plaintiffs claim that "representative testimony or sampling evidence may be used to determine damages." OB5. As discussed herein, the Plaintiffs' burden to prove restitution is very different, and much stricter, than proof required for damages, and representative testimony is particularly unsuitable to support a *restitution* award here.

As a threshold matter, UCL restitution is limited to *unlawful* acts. *See* §17203 (authorizing restitution only of money or property "to any person in interest that may have been acquired by means of such unfair competition"). USB cannot be liable for restitution under Section 17200 for those class members who were *lawfully* classified as exempt employees. Here, the evidence at trial focused entirely on the individual work

experiences of the 21 RWG members, and there was no evidence at trial as to whether the 239 absent class members were misclassified. Thus, the restitution award to the 239 absent class members was erroneous because there was no evidence that they were subject to an unlawful business practice.

Further, the trial court's restitution award was erroneous because there was affirmative (excluded) evidence that numerous class members were properly classified, and therefore *not* subject to an unlawful practice. 8CT2173, 2297-10CT2694; TE1000-1001, 1006, 1017, 1025-1063, 1087, 1095-1137, 1184-1187, 1206-1278.

Perhaps the most egregious example of this group was non-RWG member Nicholas Sternad, who testified that he performed exempt administrative and outside sales duties. 20CT5603-5627; TE1058. The court dismissed Sternad's experience as atypical and refused to consider his undisputed deposition testimony that he was exempt. 20CT5845-5846; 8RT196-203; Slip.Op. 57 n.70. The trial court nonetheless awarded Sternad nearly half a million dollars as "restitution." 83CT24703. Plaintiffs fail to explain how non-RWG members like Sternad, who provided sworn testimony that they were properly exempt, could validly receive a restitution award.

In summary, restitution under the UCL is available only to those class members who were misclassified. Awarding restitution to class members who were lawfully classified, or for whom there was no evidence of misclassification, directly contradicts the express provisions of Section 17203.

C. Plaintiffs Cannot Recover Restitution Under The UCL For Class Members Without Proof That They Worked Any Overtime.

Even upon a finding of unfair competition, in order to support a restitution award, Plaintiffs must prove that absent class members worked overtime. The goal of UCL restitution is to *restore* plaintiffs to the status quo ante. §17203. While the UCL is meant to protect consumers, primarily through injunctive relief, it intentionally limits the remedies available. *See Korea Supply Co.* v. *Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144-1146 (2003) ("While the scope of conduct covered by the UCL is broad, its remedies are limited.") Damages are not available under the UCL. *Id.* at 1146-1148. The legislative history and judicial interpretation confirms that Section 17203 "operates only to return to a person those *measurable* amounts which are *wrongfully taken* by means of an unfair business practice." *Day*, 63 Cal.App.4th at 338-339 (emphasis original). "[T]he notion of restoring something to a victim of unfair competition include two separate components. The offending party must have obtained something to which it was not entitled *and* the victim must have given up something which he or she was entitled to keep." *Id.* at 340 (emphasis original). Once an employee works hours without proper compensation, the employee's vested interest in unpaid wages may justify restitution under the UCL. *Cortez*, 23 Cal.4th at 177-178.

Restitution, unlike damages, allows a plaintiff to recover only money or property in which he has a vested ownership interest. *Californians for Disability Rights v. Mervyn's*, 39 Cal.4th 223, 232 (2006); *Korea Supply*, 29 Cal.4th at 1149 ("The object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest"); *Cortez*, 23 Cal.4th at 177 (2000) (A UCL action "is not an all-purpose substitute for a tort or contract action... [Damages] are not

available."); *AIU Ins. v. Super. Ct.*, 51 Cal.3d 807, 835 (1990) (whereas damages are given to a plaintiff to substitute for a suffered loss, "specific remedies [such as restitution] are not substitute remedies at all, but an attempt to give the plaintiff the very thing to which he was entitled.")

The UCL does not allow any non-restitutionary monetary awards. *Korea Supply*, 29 Cal.4th at 1148, 1152; *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663, 696-697 (2006). Instead, UCL restitution must be purely restorative. *See, e.g., Fletcher v. Sec. Pac. Nat'l Bank*, 23 Cal.3d 442, 452 (1979) (approved restitution of interest paid by borrowers who were charged undisclosed, higher rates); *Kraus v. Trinity Mgmt. Servs.*, 23 Cal.4th 116, 126-127, 137 (2000) (restitution of fees actually paid was proper; trial court has no authority to order defendant to surrender other profits); *Korea Supply*, 29 Cal.4th at 1149-1151 (UCL does not permit disgorgement of profits from one company to another); *Pineda v. Bank of Am.*, 50 Cal.4th 1389, 1401-1402 (N.D.Cal. 2010) (Labor Code penalties do not constitute restitution; penalties are punitive, not restorative); *Prata v. Super. Ct.*, 91 Cal.App.4th 1128, 1139 (2001) (representative plaintiff who refused to pay fees imposed by defendant could not recover restitution); *In Re: High-Tech Employee Anti-Trust Litigation*, 856 F.Supp.2d 1103, 1124 (N.D.Cal. 2012) (speculative higher wages is not a "vested interest" supporting UCL restitution). Here, any monetary award representing anything other than unpaid wages actually earned by class members constitutes non-restitutionary damages, which the UCL prohibits.

Ignoring the above authorities, Plaintiffs assert that restitution is available in a misclassification case without proof that individual class members have a vested interest in the funds awarded. Plaintiffs refer to language in Section 17203, which authorizes courts "to restore to any person in interest any money or property… *which may been acquired*" by

means of the unfair practice. OB45. Plaintiffs misinterpret this language, claiming that it allows them to obtain restitution for class members who may have not worked any overtime. Plaintiffs' interpretation contradicts all applicable authority. *See Cortez*, 23 Cal.4th at 172 (court may "only order restitution to persons from whom money or property has been unfairly or unlawfully obtained.")

In construing the "may have been acquired" language of Section 17203, Plaintiffs misinterpret false advertising cases, where courts have found misconduct by a defendant and likely deception before deciding to award restitution. *See Tobacco II*, 46 Cal.4th at 312. In these cases, if a defendant has made a material false representation about a product, the UCL permits a court to order the return of money obtained through the sale of the falsely advertised item, even when there is not individual proof of actual reliance by each class member. *Id.* at 327. Notwithstanding, restitution *always* requires proof that (1) the individual was subject to the unfair business practice, *i.e.*, exposed to the false advertisement; and (2) paid money for the product that was falsely advertised. *See, e.g.*, *Pfizer v. Sup.Ct.*, 182 Cal.App.4th 622, 632-633 (2010). In addition, restitution awarded is *always* limited to the amount the person initially paid for the product, or a portion thereof.

Thus, the "may have been acquired" standard does *not* eliminate the most fundamental element of restitution as a remedy, which is to *restore* funds, or in this case, unpaid wages, to the person who earned them. *See also Tourgeman v. Collins Fin. Servs.*, 2011 U.S.Dist. LEXIS 122422 (S.D.Cal. 2011) (where "there [is] absolutely no likelihood [plaintiffs] were deceived by the alleged false or misleading advertising or promotional campaign[,] [s]uch persons cannot meet the standard of [Section 17203] of having money restored to them because it 'may have been acquired by means of an unfair practice'") (citing *Pfizer*, 182 Cal.App.4th at 631 and

Sevidal v. Target Corp., 189 Cal.App.4th 905, 926 (2010)). For example, in *Cortez*, it was proven that non-exempt employees were subject to an unlawful alternative workweek, and time records showed the specific amount of time worked. Thus, individuals were awarded the amount of unpaid overtime earned. Here, assuming *arguendo* that an individual was misclassified, restitution is only available to that individual class member if there is proof that the employee worked overtime hours for which he/she was not paid. Otherwise, there is nothing to restore.

Plaintiffs cite to five "fraudulent" or "false advertising" cases for the premise that they do not need to show that absent class members worked overtime hours. OB45. None of the cases involve "unlawful" UCL actions based on Labor Code violations, and none analyzed the proof required for classwide restitution in a UCL action based on alleged nonpayment of overtime.

Fremont Life is the only opinion Plaintiffs cite that discusses an award of restitution ordered by the trial judge. The trial judge found that statements made by insurance agents in an annuity policy were "likely to deceive" elderly consumers as to the true terms of the annuity. *People ex. rel. Lockyer v. Fremont Life Ins. Co.*, 104 Cal.App.4th 508, 531-532 (2002). The trial court found the annuity policy misleading "as a whole" and ordered defendant to refund the current account value or the premium, whichever was more, to those customers who were subject to the fraudulent scheme and who purchased an annuity. *Id.* at 532. Thus, the award returned funds acquired by means of defendant's unfair business practice to those persons who paid or owned those funds. *Fremont Life* supports USB's position rather than Plaintiffs, because the restitution order was limited to identifiable, measurable amounts belonging to the plaintiffs.

Plaintiffs also rely upon *Tobacco II*, which addresses standing and did not discuss the evidence required for absent class members to collect a

monetary award in the event liability was eventually found. Under established principles, individual class members in *Tobacco II* would need to show that they purchased defendants' cigarettes before they could recover UCL restitution. As this Court noted, *Tobacco II*'s conclusion "has nothing to do with the" disallowal of non-restitutionary disgorgement in *Kraus*. 46 Cal.4th at 320 n.14. Nothing within *Tobacco II* supports the premise that restitution can be awarded to individual class members without evidence that the overtime pay belonged to each of them.

Contrary to Plaintiffs' position, all post-*Tobacco II* cases confirm that proof of monies wrongfully obtained from plaintiffs is required for any award of restitution. In *Cohen v. DirectTV, Inc.*, plaintiff subscribers sued DirectTV for allegedly falsely advertising that its HD package provided higher quality television service than its basic service. 178 Cal.App.4th 966, 968-969 (2009). The trial court denied class certification because not all class members had been exposed to the allegedly false advertisements. *Id.* at 973, 980-982 ("Even pre-Prop. 64 cases only allow inferred reliance where the misrepresentations were common to all class members. An inference of classwide reliance cannot be made where there is no showing that representations were made uniformly to all members of the class.") The Court of Appeal agreed, stating that "we do not understand the UCL to authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice." *Id.* at 980; *see also In Re: Vioxx Class Cases*, 180 Cal.App.4th at 129 (where no common proof of restitution exists, class treatment is improper); *Pfizer*, 182 Cal.App.4th at 632 ("*Tobacco II* does not stand for the proposition that a consumer who was never exposed to an alleged false or misleading advertising or promotional campaign is entitled to restitution."); *Tucker*, 208 Cal.App.4th at 228-229 (no restitution if class members not aware of deceptive practice or not injured by it).

In summary, Plaintiffs are mistaken that the UCL set a "lower" standard that allows a restitution award of overtime pay to absent class members without proof that they actually worked any overtime. Instead, the courts have never wavered from the standard that restitution in UCL cases is limited to restoring funds actually owed to individual plaintiffs where it is supported by substantive law and substantial evidence. Here, there was no evidence that 239 absent class members were misclassified or worked any overtime. None of the trial testimony provided any information about hours worked by non-RWG members. Additionally, the RWG testimony cannot support a restitution award for those RWG members who did not testify to working any quantifiable amount of overtime. *See* 42RT2881-2884 (Bradley); 26RT1219-1220, 1223-1224, 1236-1238 (Gediman); 33RT1978-1983 (Lindeman). As a matter of law and common sense, restoration of overtime wages cannot go to these individuals, and the Court of Appeal correctly reversed the judgment awarding restitution to them.

D. Plaintiffs Failed To Present Evidence Sufficient To Support The Amounts Of Restitution Awarded.

Plaintiffs had the burden at trial to prove by substantial evidence that class members were entitled to restitution under the UCL. *Aguilar*, 25 Cal.4th at 875; *see also Palo & Dodioni v. Oakland*, 79 Cal.App.2d 739, 748 (1947); *Colgan*, 135 Cal.App.4th at 672.[41] Because restitution is limited to restoring funds in which a plaintiff has a vested ownership

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[41] Plaintiffs incorrectly argue that "[i]t is the defendant's burden at the remedial phase to produce evidence and prove that... a particular class member was not subject to this [classwide] pattern and is therefore not entitled to relief." OB5. This misstates the applicable burden of proof *under the UCL*, which requires Plaintiffs to prove all elements of the "borrowed" misclassification claim.

interest, it must be quantifiable and measurable. *Cortez*, 23 Cal.4th at 178 ("restitutionary awards encompass quantifiable sums one person owes to another"); *Day v. AT&T*, 63 Cal.App.4th 325, 338 (1998) (§17203 "operates only to return to a person those *measurable amounts* which are *wrongfully taken* by means of an unfair business practice") (emphasis original); *Colgan*, 135 Cal.App.4th at 699.

Estimated losses do not constitute restitution within the meaning of the UCL. *See Colgan*, 135 Cal.App.4th at 672, 699-700. In *Colgan*, the class action plaintiffs claimed that the defendant's "Made in U.S.A." label violated the UCL's false advertising provision. The court awarded restitution calculated as 25% of defendant's gross receipts from the misrepresented products during the class period. *Id.* at 676-677. This amount was supposed to represent the difference in value "the consumer believed he or she was receiving at the time of purchase." The court admitted that it did "not attempt to trace exact monies paid by Class members," but instead "balanced the equities." *Id. Colgan* reversed the $13 million restitution award "because the trial court had no evidence to support its computation of the amount of restitution awarded. Whether or not restitution is an equitable remedy, that remedy still requires substantial evidence to support it." *Id.* at 672. "Although a trial court has broad discretion under [the UCL] to grant equitable relief, that discretion is not 'unlimited', and does not extend beyond the boundaries of the parties' evidentiary showing." *Id.* at 700.

Similarly, in *Johnson v. GMRI*, 2007 U.S.Dist. LEXIS 52062 (E.D.Cal. 2007), the plaintiffs attempted to use estimates of losses. The court granted the defendant's motion to strike plaintiffs' request for UCL restitution where Plaintiffs could only estimate restitution owed for alleged Labor Code violations. *Id.* at *10-14. The court reasoned that the sums allegedly owed were not "quantifiable" and hence could not be the subject

of a restitution award. *Id.* *Johnson* rejected arguments by plaintiffs that (1) disallowing restitution solely because the amounts are unquantifiable would be counter to the UCL's broad purposes; and (2) the defendant should bear the burden of quantifying the unpaid wages:

> Plaintiffs fail to establish how the Unfair Competition Law's broad policy relieves them [of the requirement] to quantify their restitution claims.... Here, plaintiffs' claims address, as they acknowledge, unquantifiable cash shortages.... Moreover, plaintiffs fail to justify their contention that defendants should bear the burden to quantify plaintiffs' alleged cash shortages.

Id. at *11-13.

Recently, in *In Re: High-Tech Employee Antitrust Litigation*, the plaintiffs filed a class action alleging that their employers agreed not to solicit employment of the employees from the other company. 856 F.Supp.2d at 1108-1109. The plaintiffs sought restitution under the UCL in the form of higher compensation that they would have received absent the alleged agreements. *Id.* at 1124-1125 The court dismissed the UCL claim, reasoning that "the salaries Plaintiffs may have been able to negotiate in the absence of the alleged conspiracy is an 'attenuated expectancy'- akin to 'lost business opportunity' or lost revenue- which cannot serve as the basis for restitution." *Id.*

Here, the trial court awarded restitution to each class member based on the "average" of the midpoint of the ranges of hours worked testified to by the 21 RWGs. The trial court relied on *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 687 (1946) and *Hernandez v. Mendoza*, 199 Cal.App.3d 721, 727 (1988), claiming that the awards to absent class members were based on a "just and reasonable inference." 71CT20997-20998. These cases apply to legal claims for *damages* for wage and hour violations under the FLSA and Labor Code. They do not apply to equitable

claims for restitution under the UCL. The trial court cited no authority that a crude estimate of overtime hours worked is sufficient to support an order of restitution. Here, there was no evidence (much less substantial evidence) at trial regarding overtime hours worked by 239 absent class members. None of these individuals are entitled to a restitution award.

Furthermore, those RWG members who claimed they worked overtime failed to provide substantial evidence of a specific, quantifiable and measurable amount of overtime worked to justify an award of restitution. No RWG member could quantify the actual amount of overtime hours they worked. *See* 20RT612-618; 21RT653-657 (Fitzsimmons); 28RT1436; 29RT1523-1526, 1549 (Duran); 23RT938-939 (Penza); 36RT2257-2262 (Koga); 21RT699-701; 22RT810-811 (Grady); 24RT999-1003, 1059 (Pollard); 27RT1325-1327 (Machado); 27RT1361-1363, 1405-1407, 1412-1413 (Jacobs); 29RT1598-1600; 31RT1734-1736 (McCarthy); 32RT1831-1836, 1903-1910; 40RT2594-2595, 2597-2601 (Vu); 34RT2038-2040, 2105-2109 (Morales); 39RT2466-2469, 2554-2558 (Rogers); 41RT2746-2748, 2785-2788, 2795-2796 (Haddow); 31RT1747-1751, 1763, 1804 (Freeman); 37RT2296-2301, 2333-2334, 2338, 2346-2348 (Tobola); 30RT1649, 1667, 1685-1687 (Anderson); 38RT2383-2384, 2430-2431, 2432-2434, 2445 (Vanderheyd); *see also* 20CT5615 (Non-RWG Sternad).

These estimates by RWG members demonstrate wide variation in overtime hours worked, if any, by individual class members. No one BBO worked the same amount of overtime as any other BBO on any given day and/or workweek, or consistently worked the same amount of hours each week. The RWG testimony further shows that non-RWG class members most likely worked less than the 11.86 weekly overtime hours awarded to them. In the Court of Appeal, Plaintiffs quibbled that USB had "cherry picked" RWG testimony, rather than relying upon findings of the court.

Regardless, Plaintiffs acknowledge that the restitution award to 239 absent class members was premised on an "average" of "estimated" overtime hours allegedly worked by the RWG members.

The court's use of an "average" necessarily results in many class members recovering for more overtime than they actually worked, and with no way of identifying those BBOs. The 43.3% margin of error also reflects that BBOs were awarded overtime to which they were not entitled. Whether or not rough approximations might suffice in estimating *damages*, no such crude guesswork has ever been allowed for restitution under the UCL. Accordingly, the court's restitution award of $8.9 million plus prejudgment interest, totaling approximately $15 million, violated the remedial limitations of the UCL. Far from supporting Plaintiffs' position, the unique nature of this pure UCL case confirms the validity of the Court of Appeal's decision.

IV. PLAINTIFFS' STRAINED "PUBLIC POLICY" ARGUMENT THAT THE COURT OF APPEAL'S DECISION WOULD EVISCERATE MOST CLASS ACTIONS IS AN EXAGGERATION THAT ATTEMPTS TO CHANGE THE SUBSTANTIVE LAW TO ACCOMMODATE A PROCEDURAL TOOL.

A. Representative Testimony In This Case Would Sacrifice Substantive Law In Favor Of The Class Action Device.

USB does not dispute that wage and hour class actions serve an important public policy to enforce California's labor laws. OB39. However, class actions also carry the potential to create injustice. *City of San Jose*, 12 Cal.3d at 458-459 (class actions may, in certain cases, "preclude a defendant from defending each individual claim to its fullest, and even deprive a litigant of a constitutional right."). As a result, the public policy favoring class actions must be balanced against the unjust deprivation of a defendant's constitutional right to due process. This right

to due process undergirds the foundation of our judicial system and must require something more than paying lip service to an abstract concept but in reality steamrolling over a litigant's every attempt to procure a fair trial. No California court has suggested that a trial court must certify every putative class action simply because there may be a broad public policy encouraging the use of class actions. Rather, trial courts are required to properly analyze whether each putative class action is suited for class treatment, and whether individual issues can be managed. A case does not become more appropriate for certification simply because it alleges overtime claims.

The Court of Appeal understood that class actions "are intended to conserve judicial resources and avoid unnecessarily repetitive litigation." Slip.Op. 60. Class actions may be superior where the claims would otherwise be too small to warrant individual litigation. OB34 (citing *Richmond v. Dart Indus.*, 29 Cal.3d 462, 469 (1981)). However, those circumstances are absent here. BBOs are educated and skilled bankers earning, on average, over $50,000 in base salary alone and can earn lucrative commissions potentially exceeding their base salaries.[42] *See, e.g.*,

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[42] As the U.S. Supreme Court recently noted in *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2173 (2012), the outside salesperson exemption

> ...is premised on the belief that exempt employees "typically earned salaries well above the minimum wage" and enjoyed other benefits that "se[t] them apart from the nonexempt workers entitled to overtime pay." It was also thought that exempt employees performed a kind of work that "was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by

(Continued...)

7CT1814; 8CT2040, 2120; 10CT2872-2884, 2886-11CT2901. The average recovery for each class member exceeded $57,000, and many class members stood to receive hundreds of thousands of dollars. 83CT24698-24704; Slip.Op. 54. Class members also could recover attorneys' fees and statutory penalties had Plaintiffs' counsel not chosen to dismiss their Labor Code claims to procure a bench trial. *See* Lab. Code §§1194(a),218.5, 203; *Soderstedt*, 197 Cal.App.4th at 157 (2011) (well-paid employees have sufficient monetary incentive to pursue individual claims, and unmangeability of individual issues defeated superiority requirement for class action); *Brinker*, 53 Cal.4th at 1054 (Werdegar, J., concurring) (statistical inference in class action proceedings offers means "to avoid windfalls to defendants that harm many in *small amounts* rather than a few in large amounts" without clogging courts). These are not the sort of "small" claimants the courts had in mind in seeking to craft collective procedures, since individual misclassification claims seeking such sums are filed as individual cases every day. It defies reason to say USB cannot challenge these substantial individual claims for over 90% of the class,

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(...Continued)

> the FLSA's time and-a-half overtime premium." Petitioners – each of whom earned an average of more than $70,000 per year and spent between 10 and 20 hours outside normal business hours each week performing work related to his assigned portfolio of drugs in his assigned sales territory–are hardly the kind of employees that the FLSA was intended to protect.

The same considerations apply to USB's BBOs, who earn base salaries well above the minimum wage and enjoy other benefits relating to both compensation and flexibility. The BBO position is likewise "hardly the kind of employee that" wage and hour laws were "intended to protect."

particularly where USB had specific and substantial evidence to challenge their claimed non-exempt status.

1. USB's Constitutional Due Process Right Cannot Be Eliminated Because It Is Time-Consuming Or Inconvenient.

Plaintiffs argue that "the required 'flexibility' and 'discretion' accorded to trial courts...would be destroyed by" the Court of Appeal's holding. OB39-40. Plaintiffs' argument that a constitutional right can be dispensed with because it is time-consuming or inconvenient is antithetical to our justice system. Due process may be "rigid" and cumbersome, but it is a necessary safeguard to prevent unjust deprivation of property. Were that not so, such protection would not be provided in our Constitution. "While innovation is to be encouraged, the rights of the parties may not be sacrificed for the sake of expediency."[43] Slip.Op. 40. To that end, the Court of Appeal did not articulate a new "due process rule," but applied well-settled constitutional due process principles, as explained in *Doehr*, and correctly concluded that USB had been hobbled in its defense where it was prohibited from submitting relevant evidence to defend itself. Slip.Op. 40-41, 47, 54-60.

2. Plaintiffs *Presume* That Class Treatment Is Proper Here With Fallacious, Circular Reasoning.

Plaintiffs' argument that a class action defendant does not have a due process right to litigate its exemption defense for each class member is a circular argument because they *presume that class treatment is proper here*,

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[43] Although Plaintiffs portray the trial plan here as "procedurally innovative," this Court never suggested that innovation could elevate "manageability" considerations above fundamental fairness. "Innovation" implies getting *better* results, not simply using "new" or "easy" methods without regard for the quality of the results.

i.e., that there are common "policies," "practices," or other evidence indicating a uniform way that BBOs performed their jobs that would obviate the need for individualized inquiries. *See* Richard Nagareda, *Class Certification in the Age of Aggregate Proof*,[44] 84 N.Y.U.L. Rev. 97, 103 (2009) ("...arguments for class certification premised on aggregate proof exhibit a deeply troubling circularity...such arguments amount to the justification of aggregation by reference to evidence that presupposes–at least as a matter of economic or statistical methodology–the aggregate unit whose legitimacy the court is to determine.")

If the class was properly certified (which it was not), then there should have been a common method of proof to resolve liability for all class members, and litigation of individual claims would be unnecessary. However, USB had no common policy or practice requiring BBOs to spend a majority of their time *inside* Bank premises. Slip.Op. 72-73. BBOs operated under minimal supervision and had virtually unfettered discretion to control how and where they spent their workdays.

The critical liability determination required an individual analysis, which varied from one BBO to the next. *See Walsh*, 148 Cal.App.4th at 1456, 1461; *Wells Fargo II*, 268 F.R.D. at 611-612. The trial court acknowledged these issues complicated the fact-finding process, but provided no method for dealing with them, other than by ignoring them. Against *this backdrop*, the Court of Appeal correctly held that USB should have been given an opportunity to challenge individual claims. Slip.Op. 54-60; *see also Hamwi v. Citinational-Buckeye Invest. Co.*, 72 Cal.App.3d 462, 471 (1977) ("[I]f a class action 'will splinter into individual trials,' common questions do not predominate and the litigation of the action in the

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[44] This article was cited favorably by the U.S. Supreme Court in *Dukes*, 131 S.Ct. at 2551, 2557.

class format is inappropriate.") To maintain class treatment in light of the necessarily individualistic nature of the liability finding would *require* a change in the substantive law solely to accommodate the class action device, which this Court has repeatedly prohibited. *See City of San Jose*, 12 Cal.3d at 462.

Plaintiffs presuppose that all wage and hour class actions are suitable for class treatment. This is not the case. *See Brinker*, 53 Cal.4th at 1033, 1051-1052 (reversal of trial court order on off-the-clock claims upheld because no common policy or method of proof existed; rest break claims certifiable based on employer's erroneous legal interpretation on timing of rest breaks uniformly affecting class members). In her concurring opinion, Justice Werdegar (who authored *Sav-On*), recognized that "consideration of numerous intricately detailed factual questions, as is sometimes the case in misclassification suits," may impact the manageability of class actions. *Id.* at 1053-1054 (Werdegar, J., concurring) (citing *Walsh*).

3. Plaintiffs Misapply The Use Of Statistical Sampling In "Pattern And Practice" Employment Discrimination Cases.

Plaintiffs also argue that because courts have used statistical evidence to establish liability in employment discrimination "pattern or practice" class actions brought under Title VII and California's Fair Employment and Housing Act ("FEHA"), that statistical evidence and "representative testimony" may be used to establish liability in this misclassification class action brought under California's UCL. OB37-39. There is *no* legal authority that "pattern and practice" evidence can be used to establish liability or damages in a misclassification class action for violation of California's Labor Code, or the UCL premised on a Labor Code violation. Indeed, no "pattern or practice" cause of action exists under the California Labor Code or the UCL. The use of statistical

evidence to establish proof of an employer's "pattern and practice" of discrimination is distinct from drawing an undersized and gerrymandered sample from a class and then using their testimony as a proxy for absent class members, as was done here.

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 337-338, 342 n.23 (1977), the government presented overwhelming statistical evidence that the employer, a national common carrier, hired virtually no African-American or Hispanic line drivers before the passage of Title VII, and after the passage of Title VII, hired them into allegedly less desirable positions in significantly lower rates than whites even in cities with a significant minority population. As one commentator noted, the employer's practices "so closely approached outright segregation that the inference of discriminatory intent was virtually inescapable." *Nagareda*, 84 N.Y.U.L. at 152; *see also Alch v. Sup. Ct.*, 122 Cal.App.4th 339, 382-383 (2004) (at *pleading* stage, plaintiffs' complaint alleged sufficient facts to proceed with claim for age discrimination class action based on FEHA due in part to employers hiring statistically significant lower numbers of older writers than would be expected given relevant qualified applicant pool). Plaintiffs' reference to *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 357-361 (2008) is inapposite as *Salvas* is not a pattern and practice case, nor does it address trial methodologies in wage and hour class action cases (trial court's decertification order reversed in action alleging missed/shortened meal and rest breaks and off-the-clock work in part because trial court erroneously excluded Plaintiff's expert testimony that analyzed Wal-Mart's own time records and other business records as basis for class certification).

In other words, the racial or age composition of an employer's workforce compared to the population may provide statistical proof of an intentionally discriminatory employment practice. It does not, however,

mean that where there are myriad independent factors that impact employment practices (here, exempt classification determinations), "trial by formula" may be used to establish classwide liability in the absence of any centralized policy or practice. *See Dukes*, 131 S.Ct. at 2561.

Plaintiffs' reliance on *Sav-On* only highlights its inapplicability here. In *Sav-On*, the predominant issue in evaluating the managerial exemption was *not* how much time the managers spent on non-exempt duties, but how to classify the "reasonably definite and finite" list of tasks performed by all class members, as either exempt or non-exempt, which is a legal question subject to classwide resolution. 34 Cal.4th at 330-331. There was no question regarding substandard performance and consequently no concern that individualized facts needed to resolve such questions would overwhelm common questions. *Id.* at 336. *Sav-On*, moreover, had an alleged policy that required managers to work more than 40 hours per week and, accordingly, there was no need to determine whether class members worked overtime. *Id.* at 327. In contrast here, the predominant liability dispute is the amount of time BBOs spent either inside or outside U.S. Bank premises.

This Court in *Sav-On* recognized that "[a]ny dispute over 'how the employee actually spends his or her time,' of course, has the potential to generate individual issues." 34 Cal.4th at 336-337. Most significantly, determining an employee's exempt status based on "'how the employee actually spends his or her time' did not create or imply a requirement that courts assess an employer's affirmative exemption defense against every class member's claim *before certifying an overtime class action.*" *Id.* at 337 (citation omitted). "California courts and others have in a wide variety of contexts considered pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a *defendant's centralized practices* in order to evaluate whether common behavior

towards similarly situated plaintiffs *makes class certification appropriate.*" *Id.* at 333. Plaintiffs notably omit these important qualifiers to *Sav-On* (*see* OB38), which limited its analysis to certification rulings and situations where the defendant had centralized practices that affected class member's exempt status in uniform fashion. *Sav-On* did not excuse courts from *ever* assessing individual defenses throughout the case. Rather, it instructed that "if unanticipated or unmanageable individual issues do arise, the trial court retains the option of decertification" (*Sav-On*, 34 Cal.4th at 335)–which was steadfastly ignored by the trial court.

B. Plaintiffs Exaggerate The Impact Of This Case.

1. Plaintiffs Offer No Evidence Supporting Their Speculation Of The Supposed Dangers Of Individualized Mini-Trials.

Plaintiffs speculate, without evidence, that allowing a defendant to challenge individual claims would expose current employees to "retaliation if their testimony displeased their employer." OB40. Plaintiffs likewise speculate that "[f]ormer employees would be difficult to locate, would live too far away, would be unable to take time off from their current job or would be too poor to travel to court...." *Id.*

Such arguments are not supported by the facts. Instead of retaliating, USB promoted several BBOs who were RWG members and who provided testimony adverse to the Bank. *See, e.g.*, Gediman (promoted to Sales Manager); Vanderheyd (promoted to Market Trainer). 26RT1191; 38RT2395. Further, virtually all of the testifying RWG were former employees, belying the supposed difficulties of either locating these individuals or having them come testify at trial. Only one RWG member, Borsay Bryant, refused to appear at trial and there is nothing in the record indicating why he failed to appear. Moreover, if someone stood to recover tens or hundreds of thousands of dollars, there is no reason he should not be

required to substantiate his claim and have that claim challenged by the party from whom he is seeking recovery.

2. Representative Testimony And Statistical Evidence, As Well As Other Trial Management Tools, Remain Viable In Appropriately Certified Class Actions.

The Court of Appeal did *not* hold that representative evidence could *never* be used in a wage and hour class action trial. Instead, the Court of Appeal specifically acknowledged representative evidence may be appropriate in some cases. Slip.Op. 61. Similarly, it does not follow from the idea that class actions arise out of the concept of "virtual representation" that statistical sampling and representative evidence are the only means to prove liability and damages in class actions or that these tools are appropriate in all cases.

For example, no statistical evidence is necessary in false advertising cases if the identical allegedly misleading statement was made to all class members or, in mass tort cases such as plane accidents or the toxic poisoning of a well, a single allegedly wrongful act caused injury to all class members similarly. Further, courts dealing with these types of cases also regularly deny class treatment when individual issues predominate and render the class action device unmanageable. *See City of San Jose*, 12 Cal.3d at 462 (certification order reversed in nuisance action brought by property owners against local airport given complexity of individual issues that affected each class member's potential recovery); *Silva v. Block*, 49 Cal.App.4th 345, 351-352 (1996) (class allegations dismissed in action against sheriff's department alleging policy of excessive force in use of police dogs because issue of reasonable force would vary based on individual circumstances).

Hence, Plaintiffs' argument that the Court of Appeal's ruling would "threaten class litigation in many other fields, including consumer, product liability and construction defect cases" is a gross exaggeration. The Court of Appeal rejected such hyperbole, stating "[w]e doubt the situation is quite this dire. *Bell III* itself was a class action involving wage and hour misclassification, suggesting that not all such cases are doomed to failure under current law." Slip.Op. 58-59.

Moreover, *Sav-On* listed many types of "innovative procedural tools" that a trial court may consider to manage class actions, such as bifurcation, subclasses, administrative processing, single-issue hearings, separate judicial or administrative mini-proceedings on individualized issues assigned to special masters, and surveys. 34 Cal.4th at 339-340 n.11 & 12. This Court's itemization of procedural tools for managing class actions means that there is no "one size fits all" procedure. Rather, a trial court must use its best judgment to determine the appropriate tool(s), including decertification where appropriate, to manage the individual issues given the particular facts of each case.

However, where the use of flawed statistics and sampling is used not to present evidence of a defendant's "centralized practice," but as a way to circumvent a defendant's ability to present relevant and probative evidence in its defense, statistics and sampling are improper. *See Wells Fargo II*, 268 F.R.D. at 611; *Vinole*, 571 F.3d at 947. This Court never suggested that these tools would be acceptable if they failed to properly manage individual issues or to comport with due process.

Based on the record here, class treatment was improper. This does not imply that other cases involving a different factual record would not be amenable to class treatment. Other misclassification cases might present more manageable issues, and other courts might better manage such issues using innovative procedures. Indeed, not every defendant in every class

action will have the type or breadth of evidence to challenge individual claims, nor will every defendant want to do so for cost or other reasons, depending on the amounts at stake and other considerations. However, on this record, given USB's desire to challenge the significant claims individually, maintaining class treatment was improper.

3. The Potential Impact Of This UCL Class Action On Other Labor Code Class Actions Is Limited.

Notwithstanding the Court of Appeal's express limitations of its holding to *this* case and cases where liability determinations require an individual analysis, Plaintiffs argue that the Court of Appeal's "purported limitation" is "no limitation at all" because "nearly every defendant in every class action claims that liability depends on the 'individual circumstances' of the class members." OB37. Plaintiffs' argument incorrectly frames the issue: it does not matter what defendants "claim," but what evidence plaintiffs (as the party bearing the burden of proof on certification elements) have submitted to prove a predominance of common issues among class members, and what evidence the defendant has submitted to show that a predominance of individual issues makes class treatment improper. Here, the record never contained any method for proving liability with common evidence, meaning liability hinged entirely on class members' "individual circumstances."

Plaintiffs also ignore that their strategic decision to try this case *only* as an equitable UCL class action severely limits its implications to other Labor Code class actions. A claim brought under the UCL is not a Labor Code claim with a different label; it is a distinct claim with limited remedies. *Korea Supply*, 26 Cal.4th at 1144-1148. The primary remedy afforded under the UCL is injunctive relief, and restitution is only an ancillary remedy. *Tobacco II*, 46 Cal.4th at 319. Here, the trial court denied Plaintiffs' repeated requests for injunctive relief, so Plaintiffs were

left with restitution only and did not even obtain the primary remedy afforded by the sole UCL claim. 55CT16175-16176; 60CT17603, 17737-17738; 71CT21018-21019.

The limited remedy of restitution will not be a factor in Labor Code claims seeking *damages*, further distinguishing this unusual case from other wage and hour class actions where the plaintiffs do not dismiss all legal claims and remedies for tactical reasons. Therefore, the potential reach of this decision is narrow and limited only to those unusual situations where a class action brought to pursue Labor Code violations is pursued only under the UCL, with a total abandonment of all legal relief for damages, penalties, and attorneys' fees otherwise available under the Labor Code.

V. IF THE COURT OF APPEAL'S UNANIMOUS OPINION IS NOT AFFIRMED, THEN THIS COURT SHOULD REMAND TO THE COURT OF APPEAL, NOT THE TRIAL COURT.

Plaintiffs' request that this case be remanded to the *trial court* for further trial proceedings must be rejected. Plaintiffs' remand request ignores the numerous appellate issues USB raised that the Court of Appeal did not reach. These issues include: (1) the trial court granted summary adjudication of the administrative and commission sales exemptions based on several legal errors, including its ruling that "tacking" of exempt time is not permitted under California law; (2) the trial court erroneously awarded compensatory damages in a UCL action where only restitution is available, not damages; (3) the trial court improperly converted the equitable UCL claim to a legal claim by awarding legal damages, yet denied USB a jury trial based on the supposedly equitable nature of the claim being tried; and (4) the trial erroneously allocated the burden of proof on Plaintiffs' UCL

claim.[45] Because each of these issues constitutes an independent basis for reversal of the trial court's judgment, if this Court departs from the Court of Appeal's disposition in any manner, the case must be remanded to the Court of Appeal for consideration of these additional appellate issues. Cal. Rules of Ct., R. 8.528(c).

Furthermore, Plaintiffs request remand to the trial court on the premise that the trial court should engage in further trial proceedings, but leave the "classwide" liability determination intact, with a "presumption" of liability when assessing the activities conducted by the non-RWG class members. *See, e.g.*, OB58-59, 62-63. No "presumption" of classwide liability can attach to the flawed sample because the trial court's classwide liability determination lacked any statistical, legal or evidentiary basis. Even the recovery awarded to the 21 RWG members must be reversed because USB was precluded from presenting evidence as to their exempt status under the administrative exemption or through tacking of the administrative and outside salesperson exemptions, and their recovery is not supported by evidence sufficient to support recovery of restitution (the sole remedy available).

Contrary to Plaintiffs' argument, the Court of Appeal was not required to remand the case to the trial court for further consideration of whether a newly formulated trial plan could somehow manage individual

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[45] USB also challenged the trial court's errors in (1) calculating prejudgment interest at an annual rate of 10%, rather than the applicable 7% rate and (2) including class members' non-work time in calculating the class recovery. The Court of Appeal would need to address these issues even if the trial court's estimate of recovery were upheld. However, Plaintiffs admit that the estimate of overtime worked "would not sustain the... judgment" and essentially concede that the trial court's estimate of recovery must be reversed. OB5.

issues, because sufficient commonality does not exist. *See, e.g.*, *City of San Jose*, 12 Cal.3d at 464 n.14 (reversing class certification and rejecting possible amendment of complaint, explaining that "because amendment could not cure the failure of sufficient community of interest, affording such opportunity would serve no useful function"); *Brinker*, 53 Cal.4th at 1051-1052 (affirming decertification of off-the-clock class claim and not requiring "reconsideration" of class certification because no common evidence existed to prove those claims). Plaintiffs have always maintained that classwide liability and recovery could be established through the trial court's woefully deficient "RWG" trial plan. At no point in this case have Plaintiffs even *proposed* a methodology to resolve individualized liability issues, nor could the trial court identify any such methodology. Even before this Court, Plaintiffs still have offered *no method* to resolve absent class members' claims that would not devolve into a multitude of mini-trials similar to the mini-trials conducted for the RWG. Thus, any remand is futile where the evidence repeatedly confirmed that liability for each BBO had to be resolved on an individual basis.

CONCLUSION

For the foregoing reasons, USB respectfully requests that this Court affirm each of the Court of Appeal's conclusions, including its reversal of the trial court's judgment in its entirety and its order decertifying the class. This Court should also reverse all amounts awarded to the RWG and class members because the record cannot support a finding of classwide liability or an award of classwide restitution under the UCL. If this Court departs from the Court of Appeal's holdings in any respect, the Court should remand this action to the Court of Appeal for further consideration of USB's appeal from the trial court pursuant to this Court's opinion, along with full consideration of the other appellate issues raised but not reached by the Court of Appeal in its prior decision.

Dated: Dec. 20, 2012 CAROTHERS DISANTE & FREUDENBERGER LLP

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court)

The text of this brief, excluding portions authorized to be excluded by the Rules of Court, consists of 40,856 words as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: December 20, 2012

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO.

I, the undersigned, declare that I am employed in the aforesaid County, State of California. I am over the age of 18 and not a party to the within action. My business address is 601 Montgomery Street, Suite 350, San Francisco, California 94111. On December 20, 2012, I served upon the interested party(ies) in this action the following document described as:

ANSWER BRIEF ON THE MERITS

By placing a true and correct copy thereof enclosed in sealed envelope(s) addressed as stated on the attached service list for processing by the following method:

[X] By placing such envelope(s) with postage thereon fully prepaid into Carothers DiSante & Freudenberger LLP's interoffice mail for collection and mailing pursuant to ordinary business practice. I am familiar with the office practice of Carothers DiSante & Freudenberger LLP for collecting and processing mail with the United States Postal Service, which practice is that when mail is deposited with the Carothers DiSante & Freudenberger LLP personnel responsible for depositing mail with the United States Postal Service, such mail is deposited that same day in a post box, mailbox, sub-post office, substation, mail chute, or other like facility regularly maintained by the United States Postal Service in San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 20, 2012, at San Francisco, California.

Marshall Gillespie
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(Signature)

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