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,

v.

U.S. BANK NATIONAL ASSOCIATION,
Defendant and Appellant.

Review of a Decision of the Court of Appeal, First Appellate District, Division One, Case Nos. A12557 and A12687, Reversing Judgment and Decertifying Class in Case No. 2001-035537
Superior Court of Alameda County
Honorable Robert B. Freedman

REPLY BRIEF ON THE MERITS

ELLEN LAKE (SBN 47636)
Law Offices of Ellen Lake
4230 Lakeshore Avenue
Oakland, CA 94610
(510) 272-9393

EDWARD J. WYNNE (SBN 165819)
Wynne Law Firm
100 Drakes Landing Road, Suite 275
Greenbrae, CA 94904
(415) 461-6400

Attorneys for Plaintiffs and Respondents
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Wynne Law Firm
100 Drakes Landing Road, Suite 275
Greenbrae, CA 94904
(415) 461-6400

Attorneys for Plaintiffs and Respondents
SAM DURAN, MATT FITZSIMMONS

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INTRODUCTION AND SUMMARY OF RESPONSES TO DEFENDANT'S MAIN ARGUMENTS

In responding to defendant's Answer Brief ("AB"), it is helpful to start by reviewing what the actual issues are.

Under California law, all employees are presumed to be entitled to overtime pay. The employer has the burden of proving that an employee is "plainly and unmistakably" exempt from overtime pay. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794.)

The present class action challenges the policy and practice of defendant U.S. Bank National Association ("USB") of treating all of its Business Banking Officers ("BBOs") as exempt from overtime pay. USB claims an exemption that is available where employees are outside salespersons because they customarily spend more than half their working time in sales activity away from their employer's place of business. Wage Order 4-2001, subd. (1)(C),(2)(M); Cal. Code Regs., tit. 8, § 11040, subd. (1)(C),(2)(M). Here, USB automatically classified all its BBOs as outside salespeople without paying any attention to, or keeping any track of, how much time its BBOs spent on or off the Bank's premises. USB never even tried to obtain or record such information. Instead, it simply treated every one of its BBOs as outside salespersons to whom USB did not have to pay

compensation for their overtime work.

Three principal issues are here for review.

The First Issue - Class Certification.

The first legal issue involves the validity of the trial court's decision to certify a class of all BBOs and to deny USB's motions for decertification.

In granting certification, the trial court relied on substantial evidence that the BBO position was standardized throughout USB. Accordingly, the nature of the work performed by USB's BBOs was, in the court's words, the "predominant common issue determinative of liability to all class members." The trial court found this inquiry would be susceptible to common proof. (16 CT 4531-4532.)

In making these determinations, the court credited the declarations submitted by plaintiffs over those submitted by USB, as it had the right to do under the broad discretion trial courts have when ruling on class certification. The court subsequently denied USB's motions for decertification after continuing discovery and the 41-day trial had further established that (i) USB's BBOs did their jobs in the same way; (ii) the nature of the BBO duties required the position to be performed as a sales job from inside the Bank; and (iii) USB had no expectations that BBOs

worked primarily outside Bank premises.

The trial court found that USB had standardized corporate policies and procedures for its BBOs, including programs for hiring, training and evaluation which governed the BBO position. The trial court also found that USB's sales goals and sales methods were applicable to all BBOs and these caused all BBOs to spend most of their time engaged in sales from inside the USB premises. Further, a representative sample of class members selected at random testified at the trial. Every one of them confirmed that he or she spent more than half of their time inside USB's premises.

USB's legal position is that class certification is impermissible here as a matter of law because USB did not have a policy which explicitly required every BBO to spend the majority of their work time inside the bank while all were classified as outside salespersons.

This over-narrow interpretation of class certification standards would fly in the face of long-standing California law, particularly *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, which essentially rejected the very arguments USB makes here. USB's position is also at odds with this Court's recent decision in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.

The Second Issue – Statistical and Representative Evidence Can Be Used to Prove Classwide Liability.

The second legal issue is whether statistical sampling and representative evidence can be used to prove liability in a wage and hour misclassification class action.

Widespread decisional authority and legal commentaries have explained why such evidence is properly used for this purpose. USB seeks to have such evidence barred primarily because no California decision is directly on point. USB's arguments fail both in the abstract and when they are applied to the present facts.

The trial court here relied on a combination of evidence which included: (i) extensive evidence, including evidence from USB managers and supervisors, about the nature of the duties of USB's BBOs and what USB expected of them; (ii) detailed percipient testimony from a group of 21 representative class-member witnesses, 19 of whom were selected at random plus the two class representatives; (iii) expert testimony from a statistician who explained and validated the use of the testimony from the sample group of class members.

The trial court gave USB ample opportunity to rebut all of plaintiffs' evidence at the 41-day trial. The court then found that USB had failed to

satisfy its legal burden of proving that its BBO employees were actually outside salespersons whom USB did not have to compensate when they worked overtime.

The Third Issue - There Is No Due Process Right to a Separate Trial on Liability for Each Class Member.

USB claims that, notwithstanding certification of the class, it has a constitutional due process right to an individual trial on liability for each and every class member.

USB is just plain wrong. There is no constitutional prohibition against determining liability to a class without the testimony of every class member. On the contrary, under longstanding authority of this Court, the U.S. Supreme Court, and many other courts, the emphasis during the liability phase is on evidence applicable to the class.

Creating the "right" USB seeks would have devastating consequences. This new "right" would (i) destroy the purpose and benefits of a class action; (ii) force courts and class members to try and retry common issues on an individual basis; (iii) vastly increase the time and expense necessary to litigate a wage and hour misclassification case; and, (iv) impose enormous unnecessary and inappropriate burdens on the California court system.

It is therefore readily apparent why USB's position has no legal support outside of the present Court of Appeal decision.

Further, USB was able to cross-examine each of plaintiffs' witnesses and to present testimony from bank management and experts, along with other evidence, challenging plaintiffs' evidence. The trial court also gave USB ample opportunity to participate in developing the trial plan for liability. It is during the damages phase that a defendant in USB's position has the right to challenge relief to individual class members so long as there is a reasonable basis for doing so.

Defendant Misstates the Facts Throughout.

USB's mischaracterizations of the record rival its erroneous legal reasoning.

Throughout its brief, USB misstates the evidence, asserts that facts or expert opinions are "undisputed" or "admitted" when they are not, distorts the actions of the trial court, and violates the substantial evidence rule by slanting evidence in its favor.

As one of several examples, USB asserts that plaintiffs' statistical expert, Richard Drogin, Ph.D., "admitted" that the trial plan for liability was invalid. In fact, Dr. Drogin testified that the trial plan was valid and reliably showed that USB had misclassified 100% of the class. (See

detailed record references in Opening Brief on the Merits ("OBM") 47-48.)

USB also inaccurately claims that four former class representatives "affirmed their exempt status at deposition." (AB 3, 43-44.) In fact, each one testified that they spent more than half their work time outside their Bank *branch*. (AB 43-44.) Since all BBOs worked at several branches, this would not mean that any of them worked more than half their time outside all of USB's *premises*.

Further, USB portrays class member Nick Sternad as a poster boy for the "striking" results of the "ill-conceived trial plan." (AB 3.) The truth is quite different. Although Sternad signed a declaration, drafted by USB, stating he spent the majority of his working time "outside of the branch" (10 CT 2683), at his deposition he testified that he worked at several branches and that overall he spent the majority of his time working inside the Bank. (20 CT 5763-5764, 33 CT 9746-9749.) USB also contends that Sternad spent a period of time doing administrative, not BBO, duties so his damage award was allegedly too large. However, the award was based on information that USB provided, showing Sternad was an active BBO from 1997 to the time of trial. (Trial Exhibit ("TE") 537.) Thus USB is responsible for any errors in Sternad's recovery.

Our legal arguments below will expose other such factual

mischaracterizations.

USB Raises Many Irrelevant Issues.

Finally, USB's brief is filled with discussion of matters that have no bearing on the issues which are actually before the Court.

For example, USB repeatedly criticizes the 43% margin of error in the evidence on damages. (See, e.g., AB 2 ["astounding"]; AB 93 ["unconstitutional"]; AB 128 ["crude guesswork"].) Plaintiffs have acknowledged that the margin of error here cannot sustain the amount of the judgment. Accordingly, a new trial limited to damages would be appropriate if the Court does not accept plaintiffs' argument that USB waived this claim at trial. (OBM 5-6, 53-59.)

Similarly, plaintiffs have acknowledged that during the damages phase of a trial, USB has the right to challenge whether individual class members are entitled to recover damages, so long as there is a reasonable basis for USB to do this. (OBM 5-6, 62-64.) Accordingly, USB's arguments about the damage awards to individual class members should be ignored.

LEGAL ARGUMENT

I. THE TRIAL COURT PROPERLY CERTIFIED THE CLASS AND DENIED DEFENDANT'S MOTIONS FOR DECERTIFICATION.

The trial court's class certification decisions – granting certification and twice denying decertification – were well within its discretion. The court ordered class certification based on its finding that the "nature of the work performed by BBOs and SBBs is the predominant common issue determinative of liability to all class members" and that this inquiry would be "susceptible of common proof." (16 CT 4531-4532.) The court denied USB's two motions for decertification after additional discovery and a 41-day trial strongly reinforced the court's original findings in support of class certification. (OBM 25-32.)

A. USB Takes Language from *Brinker* Out of Context.

USB's attack on these certification decisions rests on a fundamental misstatement of the law. Taking phrases out of context from *Brinker Restaurant Corp. v. Superior Court, supra*, 53 Cal.4th 1004, defendant contends that commonality could be found in this case *only* if "USB had a uniform policy (express or *de facto*) requiring BBOs to spend the majority of their work time inside the Bank." (AB 41; see AB 5 ["common issues capable of resolution *in a single stroke* can be litigated on a common basis"

(ital. added)].) This argument is repeated throughout its brief. (See, e.g., AB 37, 43, 47-49, 50.)

This overly narrow standard of commonality is not supported by *Brinker* or by other California class action cases. Although *Brinker* stated that "[c]laims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly found suitable for class treatment" (53 Cal.4th at 1033), *Brinker* did not hold, as USB argues, that certification is proper *only* where a uniform employer policy is illegal on its face and affects all class members identically. Nor did *Brinker* hold that the off-the-clock subclass in that case could not be certified because the employer had no explicit illegal policy requiring such work. Rather, *Brinker* made clear that class certification determinations are *not* subject to any rigid formula, and that trial courts have broad discretion to determine whether to certify a class based on whether common questions predominate and whether individual issues can be managed. (*Id.* at 1024 [trial court "must determine whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence."].)

This point was emphasized in Justice Werdegar's concurring opinion

in *Brinker*. It stated that the Court's unanimous opinion did *not* endorse the defendant's argument that the question why a meal period was missed rendered meal period claims "*categorically* uncertifiable ... for such a per se bar would be inconsistent with the law governing reporting obligations and our historic endorsement of a variety of methods that render collective actions judicially manageable." (*Id.* at 1053, ital. by Werdegar, J.) Justice Werdegar continued:

> While individual issues arising from an affirmative defense can in some cases support denial of certification, they pose no per se bar. (Citations.) Instead, whether in a given case affirmative defenses should lead a court to approve or reject certification will hinge on the manageability of any individual issues. (Citations.) (*Id.* at 1053-1054, citing *Sav-On* and *Weinstat v. Dentsply Internal., Inc.* (2010) 180 Cal.App.4th 1213, 1235.[1])

"[I]t remains for the trial court to decide on remand, in the fullness of its discretion, whether in this case methods exist sufficient to render class treatment manageable," the opinion concluded. (*Id.* at 1055.)

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[1] In the cited portion of *Weinstat*, the Court of Appeal stated, "[T]he possibility that a defendant may be able to defeat the showing of an element of a cause of action as to a few individual class members does not transform the common question into a multitude of individual ones...." (180 Cal.App.4th at 1235, citation and internal quotations omitted.)

B. *Sav-On*, Which Affirmed Class Certification in a Misclassification Case, Is the Most Analogous Case Here.

Defendant has largely ignored the California class certification case that is most instructive here, *Sav-On Drugs Stores, Inc. v. Superior Court, supra*, 34 Cal.4th 319 ("*Sav-On*"). Like this case, *Sav-On* involved class certification in the context of a misclassification dispute.

In *Sav-On*, this Court held that class certification in a misclassification case could be supported by either of two theories: (1) the defendant deliberately misclassified its employees, or (2) owing in part to "operational standardization," classification based on job description alone resulted in widespread *de facto* misclassification. (*Id.* at 329.) If, under either scenario, the plaintiffs could prove that "misclassification was the rule rather than the exception," a trial court could reasonably conclude that a class action would be the "most efficient means of resolving class members' overtime claims." (*Id.* at 330.)

The *Sav-On* plaintiffs claimed their employer had violated the law by classifying all class members as exempt under the managerial exemption, when in fact they worked on non-managerial tasks more than 50% of the time. The *Sav-On* defendant opposed certification, claiming (like USB here) that the tasks actually performed by class members and the

amount of time spent on them varied significantly and could not be adjudicated on a class basis. The employer also contended (again, like USB) that it had a reasonable expectation that employees would be performing primarily exempt duties. (*Id.* at 331.)

This Court rejected the defendant's arguments and held the trial court's certification order was not an abuse of discretion. The Court found that the record contained substantial evidence that the predominant issue in dispute was whether to classify the various tasks performed by the employees as exempt or nonexempt. That issue could be resolved on a classwide basis using common evidence. Based on this predominant common issue, the class was properly certified, even though resolution of this common issue would not identify which class members were properly classified as exempt. The Court recognized that ultimately there might need to be further litigation to determine whether particular class members worked predominantly on exempt or nonexempt tasks. (*Sav-On* at 331, 333, 335.) Nonetheless, the existence of the common issue concerning classification of tasks, along with issues regarding defendant's policies and practices and operational standardization, were sufficient to support class certification despite the individualized issues that might arise later in the litigation. "[N]either variation in the mix of actual work activities

undertaken ... by individual AM's and OM's, nor differences in the total unpaid overtime compensation owed each class member, bars class certification as a matter of law," *Sav-On* proclaimed. (*Id.* at 335.)

Sav-On also explained why class certification was not barred by *Ramirez v. Yosemite Water Company, Inc., supra*, 20 Cal.4th 785, an individual outside sales misclassification decision that, USB claims, precludes certification here. In *Ramirez*, the Court held that in determining the number of hours an employee worked in sales-related activities, the trial court should inquire into the "realistic requirements of the job," considering first and foremost, "how the employee actually spends his or her time" and then considering "whether the employee's practice diverges from the employer's realistic expectations." (*Id.* at 802.)

The employer in *Sav-On* argued that *Ramirez* required that class certification be denied, claiming (as the Bank does here) that "how the employee actually spends his or her time" was an individual issue that would necessarily predominate over classwide issues. *Sav-On* rejected that argument, stating:

> *Ramirez* was not a class action and, to that extent, is not apposite. In *Ramirez*, we did not even discuss certification standards, let alone change them. Accordingly, *Ramirez* is no authority for constraining trial courts' great discretion in granting or denying certification. (34 Cal.4th at 336, citations and internal

quotations omitted.)

Sav-On held that *Ramirez* did not bar class certification even in a case with disputed issues about how employees actually spend their time:

> Presence in a particular overtime class action of the considerations reviewed in *Ramirez* does not necessarily preclude class certification. Any dispute over 'how the employee actually spends his or her time' (*Ramirez, supra*, 20 Cal.4th at p. 802), of course, has the potential to generate individual issues. But considerations such as 'the employer's realistic expectations' (*ibid.*) and 'the actual overall requirements of the job' (*ibid.*) are likely to prove susceptible of common proof. (*Id.* at pp. 336-337.)

Importantly, *Sav-On* rejected the contention (which USB advances) that the plaintiffs would have to demonstrate, as a prerequisite to certification, that a defendant's classification policy was either "right as to all members of the class or wrong as to all members of the class." (*Id.* at 338.) The Court stated:

> [O]ur observation in *Ramirez* that whether the employee is an outside salesperson depends 'first and foremost, [on] how the employee actually spends his or her time' (*Ramirez, supra*, at p. 802) 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.)

(See *Tierno v. Rite Aid Corp.* (N.D.Cal. 2006) 2006 WL 2535056 *10 [*Sav-*

On "squarely held ... that the analysis set forth in *Ramirez* does not preclude class certification" in misclassification cases].)[2]

C. The Misclassification Cases Cited by Defendant Are Distinguishable.

Defendant asserts this Court should follow lower California and federal decisions that rejected class certification in outside sales and other misclassification cases. (AB 39-40.) These cases imposed no per se bar on class certification and did not hold that the trial courts would have abused their discretion by certifying the class. (OBM 43.)

In USB's cases, the trial court had *denied* class certification based principally on the wide variation in duties among class members. The

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[2] *Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263 is another case which held that class certification may be granted even though class members may eventually have to prove both eligibility and damages and not all class members will be entitled to relief. The plaintiff in *Reyes* challenged a county's practice of denying welfare benefits to individuals who failed to comply with county work rules, without distinguishing between willful and nonwillful violators. The county contended that certification was properly denied because, for a class member to recover, that individual would have to establish not only damages but liability – that he/she was sanctioned for nonwillful conduct.

The Court of Appeal rejected the county's argument and reversed the denial of class certification. It held that certification was warranted based on the predominant common issue of whether the county's benefits determination system was valid, even though there would later need to be individual decisions about whether each class member was properly sanctioned. "Although we grant the likelihood that many within the presently defined class may have been properly sanctioned for willful

appellate court *affirmed the denial of certification*, relying heavily on the deferential abuse of discretion standard of review. (E.g., *Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422,1430-1431 ["significant variation" in duties; "We review the trial court's ruling for abuse of discretion"]; *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1452, 1458 ["circumstances of each class member's employment differs significantly"; "a reviewing court must abide by the well-established deference afforded a trial court's determination of commonality"; "We do not conclude that merely by raising the outside salesperson exemption, IKON *necessarily* insulated itself from class certification"]; *Arenas v. El Torito Restaurants, Inc.* (2010) 183 Cal.App.4th at 734 ["duties and time spent on individual tasks varied widely"; "this court cannot now substitute its own judgment"].)

By contrast, here the trial court *granted* class certification based on a finding that the BBO position was standardized and that the predominant common issue, the nature of the BBO position, could be tried on common proof. Consequently, in this case, the deferential abuse of discretion standard weighs strongly in favor of *affirming the order granting certification.*

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conduct, we do not believe such a likelihood precludes class certification for purposes of retroactive relief," the court declared. (*Id.* at 1278 fn. 9.)

To the extent that some of USB's cited decisions assumed that individual issues necessarily predominate in outside sales cases because each employee's proper classification would have to be determined (see AB 42), that assumption was rejected by *Sav-On*, which held that "the necessity for class members to individually establish eligibility and damages does *not* mean individual fact questions predominate." *(Sav-On, supra,* at 334, ital. added.) In outside sales cases, as in any other misclassification case, class certification is appropriate where the trial court finds that common issues predominate even though some individual determinations would have to be made in the remedial phase of the litigation. Moreover, in this case, a single variable – whether the BBO worked primarily inside or outside the Bank – determined whether each BBO was exempt or nonexempt, making this case simpler than many of the outside sales cases relied on by the Bank. (See, e.g., *Walsh, supra,* at 1454-1456 [variation not only in inside vs. outside time but also in whether outside time was devoted to sales].)

Defendant's contention that several of these cases "squarely rejected sampling and representative testimony to determine liability in outside sales cases" is inaccurate. (AB 47, citing *In re Wells Fargo Home Mortg. Overtime Pay Litigation* (N.D.Cal. 2010) 268 F.R.D. 604, *Vinole v. Countrywide Home Loans, Inc.* (9th Cir. 2009) 571 F.3d 935; and *Dunbar.*)

In *Wells Fargo*, the district court lamented the failure of the plaintiff's attorney to provide a statistical report in support of her class certification motion and said that, if she had, the court's "analysis [denying class certification] may have been different." (268 F.R.D. at 612 fn 2.) *Vinole* stated that the decision to use "innovative procedural tools," such as statistical or sampling evidence or representative testimony, "is within the discretion of the district court." (571 F.3d at 947.) In *Dunbar*, the appellate court also relied heavily on the abuse of discretion standard in affirming the denial of certification. (*Id.* at 1430-1431.) At any rate, sampling and representative evidence can be appropriate litigation tools in outside sales cases, as this case demonstrates. (OBM 33-36, 46-51.) The courts in *Wells Fargo* and *Vinole* recognized that a class action would be appropriate if the employer had centralized policies or practices that effectively governed how and where employees performed their jobs. (*Wells Fargo* at 611; *Vinole* at 946.) In this case, the trial court found that the predominantly inside nature of BBOs' duties made it "unrealistic" for them to be outside more than half their work time. (71 CT 21015.) Thus the nature of the duties served as a *de facto* centralized policy or practice. [3]

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[3] The Bank cites *Morgan v. Wet Seal, Inc.* (2012) 210 Cal.App.4th 1341, for the supposed proposition that "representative testimony, surveys or statistical analysis [are] inappropriate where 'the *fact* of liability,' as

Many courts have certified classes in outside sales and other California misclassification cases, rejecting the arguments made by USB that there was insufficient commonality because the class members allegedly did their jobs in different ways. (See, e.g., *Romero v. Producers Dairy Foods, Inc.* (E.D. Cal. 2006) 235 F.R.D. 474, 487 [outside sales]; *Campanelli v. Hershey Co.* (N.D. Cal. 2010) 2010 WL 3219501 [outside sales and administrative]; *Greko v. Diesel USA, Inc.* (N.D.Cal. 2011) 277 F.R.D. 419, 428 [executive]; *Alba v. Papa John's USA, Inc.*(C.D.Cal. 2007) 2007 WL 953849 [executive]; *Tierno v. Rite Aid Corp.* (N.D.Cal. 2006) 2006 WL 2535056 [executive]; *Campbell v. PricewaterhouseCoopers, LLP* (E.D. Cal. 2008) 253 F.R.D. 586, adhered to (E.D.Cal. 2009) 2012 WL 5989377 [professional, administrative, executive].)

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opposed to the 'extent of liability,' depends on individualized evidence." (AB 49, ital. in original.) The quotation is taken out of context.

In *Morgan*, the Court of Appeal reviewed the denial of class certification in a case where the plaintiffs had not presented any method of proving class liability. In their appellate reply brief, for the first time, the plaintiffs stated that "representative testimony, surveys, and statistical analysis all are available" to determine "the extent of liability." The court responded, "In this case, we are not concerned with determinations regarding the 'extent of liability,' but more fundamentally with *the fact* of liability." *(Id.* at 1369, ital. in original.) The court was not making a general comment regarding class litigation but was commenting on the plaintiffs' inept appellate argument.

D. There Was Substantial Evidence for the Trial Court's Certification of the Class Based on Its Finding That the BBO Position Was Standardized and That the Nature of the Job Was the Predominant Common Issue, Which Could be Established by Common Proof.

The trial court relied on *Sav-On*'s analysis to support class certification. Just as the predominant common issue in *Sav-On* was how the various tasks were classified, here the court found that the predominant common issue was "the nature of the work performed by BBOs and SBBs," which was "susceptible of common proof." (16 CT 4531-4532.) The trial court quoted from *Sav-On,* where this Court expressly noted that "considerations such as the employer's realistic expectations and *the actual overall requirements of the job* are likely to prove susceptible of common proof." (16 CT 4532, quoting *Sav-On* at p. 337, internal quotations omitted, ital. added.)

There was substantial evidence for the trial court's finding that the BBO position was standardized throughout the Bank and that the nature of the work performed by BBOs was the predominant common issue. In support of class certification, plaintiffs filed declarations from 37 BBOs, who stated they were branch-based sales employees who spent more than half of their work time inside Bank properties, which would make them nonexempt. The declarants testified that there were no significant

differences among BBOs in terms of the activities they performed or the Bank's expectations about their work. (OBM 7.)[4]

There was also extensive evidence in the form of deposition testimony from USB managers, responses to discovery, training materials, and other corporate documents showing that the BBO position was standardized throughout the Bank so that the actual requirements of the job and the Bank's realistic expectations would be susceptible to common proof. (OBM 8.) The evidence was undisputed that all BBOs were hired, trained and evaluated by uniform procedures and uniform materials. (6 CT 1649-1654, 1678-1680; 7 CT 1737-1738, 1753-1756.) The primary function of all BBOs was sales. (6 CT 1657, 1674.) Undisputed evidence showed that the BBO job description, which was applicable to all BBOs, had never stated that BBOs should spend more than half their time outside Bank premises. This indicated there was no corporate expectation that they were outside salespersons. (OBM 8-9; 6 CT 1670-1671, 1674; 7 CT 1757-1765.)

USB argues that certification was improper because it had submitted approximately 75 BBO declarations that claimed that BBOs worked

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[4] These 37 declarations, describing the work of the declarants and other BBOs, were the basis of the statement in our opening brief that "here there was substantial evidence of ... widespread de facto misclassification." (OBM 28.) Defendant's attack on that statement, which it misquotes and

predominantly outside the Bank. Many of these declarations used vague language, such as "outside sales activity," "outside the branch," or "outside of the office," which did not necessarily signify that the declarant worked primarily outside *any* Bank property, let alone *all* Bank properties.[5] The trial court was justified in believing plaintiffs' declarations over defendant's. "[Q]uestions as to the weight and sufficiency of the evidence, the construction to be put upon it, the inferences to be drawn therefrom, the credibility of witnesses ... and the determination of [any] conflicts and inconsistency in their testimony are matters for the trial court to resolve." *(Sav-On* at 334.)

Moreover, the trial court was aware that a number of USB's declarants had repudiated the declarations prepared by the Bank's attorneys because they were misled into signing statements that did not accurately reflect what they had told the attorneys. These declarants signed new declarations on behalf of plaintiffs, explaining that their Bank declaration was "not at all accurate," "misrepresent[ed] what I had told the attorney," "was presented to me under false pretenses," was "substantially false and

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mischaracterizes, is inaccurate and unwarranted. (AB 46.)

[5] E.g., 9 CT 2303, 2305 [Acuna]; 9 CT 2321 [Baldwin]; 9 CT 2330 [Bell]; 9 CT 2340 [Berti]; 9 CT 2345-2346 [Bradley]; 9 CT 2362 [Brown]; 9 CT 2382 [Coberly]; 9 CT 2391 [Corondibu-Felix]; 10 CT2625 [Rattay]; 10 CT 2645 [Sarip]. The term "outside sales" simply meant gaining a new

misleading." (OBM 53.) After three RWGs at trial likewise repudiated the Bank-drafted declarations, the trial court concluded 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." (*Ibid.*) The trial court's decision to discount the weight given to the Bank's employee declarations accords with applicable precedents. (See, e.g., *Morden v. T-Mobile USA, Inc.* (W.D.Wash. 2006) 2006 WL 2620320 *3-5 ["risk of bias and coercion inherent" in current employees' declarations]; *Belt v. Emcare, Inc.* (E.D.Tex. 2003) 299 F.Supp.2d 664, 668 ["heightened potential for coercion" in employer letter to current employees].)

Defendant is mistaken in contending that the depositions of four former class representatives showed that all four spent the majority of their work time outside the Bank and were thus exempt. (AB 3, 43-44.) As USB admits, the former class representatives testified that they spent more than half their work time "*outside the branch.*" (*Ibid.*) However, BBOs were assigned to several branch offices. (29 RT 1596 [McCarthy]; 30 RT 1645 [Anderson]; 31 RT 1744-1745 [Freeman]; 32 RT 1836-1837 [Vu]; 33 CT 9746-9749 [Sternad].) Consequently, testimony that they spent more

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customer for the Bank, regardless of where the BBO met with the customer. (29 RT 1560-1561.)

than half their work time "outside the branch" did not establish that they worked mostly outside all Bank properties. Defendant, which had the burden of proof on the exemption, failed to ask the former plaintiffs the proper questions to elicit relevant testimony. USB's assertion (without any citation to the record) that plaintiffs "effectively conceded that these prior named plaintiffs were exempt" (AB 44) is untrue.

By the time that USB filed its first motion for decertification, there was substantial additional evidence supporting certification. New deposition testimony showed that all the Representative Witness Group witnesses ("RWGs"), as well as nine other class members hand-picked by USB, were nonexempt and, therefore, were misclassified. (OBM 29.) The court acted within its discretion in concluding that defendant had not shown any reason to decertify the class. (*Ibid.*)

E. The Trial Court Reasonably Denied USB's Second Decertification Motion Based on Substantial Evidence That the BBO Position Was an Inside Sales Job and That USB Had No Contrary Expectations.

USB's claim that the second decertification motion should have been granted is based on its flawed contention that certification would be proper only if it had a uniform policy requiring all BBOs to spend the majority of their work time inside. (AB 49-50.) As discussed *supra*, that argument misstates the standard for class certification. Defendant's other assertions

also lack merit.

1. The Denial of the Second Decertification Motion Was Within the Trial Court's Discretion and Is Supported by Substantial Evidence.

By the time of the second decertification motion, the trial court had already completed the 41-day trial of liability, in which the uniform nature of the BBO position was confirmed, and the court had filed its 34-page Statement of Decision ("SOD"), finding that the class was misclassified. (71 CT 21018.) The order denying the second decertification motion referred back to the findings in the SOD. (78 CT 23227-23228.)

There was substantial evidence for the trial court's conclusion that the BBO position was standardized throughout the Bank, which justified the court's denial of decertification. At trial, 21 of the 22 RWGs – 19 of whom were randomly selected – testified. All the RWGs stated that they consistently spent more than 50% of their work time inside Bank properties. Three of the RWGs had signed declarations that USB submitted in opposition to class certification and in support of decertification. Each of the three testified at trial that the Bank declarations were untrue and contained statements they had not made to the Bank's attorneys. The trial court credited the witnesses' trial testimony. (71 CT 21016; OBM 15.)

The RWG testimony also demonstrated a broader pattern among the

class members. Many RWGs testified that they performed the same activities as their co-workers, thus producing evidence concerning other similarly-situated BBOs.[6] Other RWGs testified they were instructed to work inside by supervisors or shown by more experienced BBOs, whom they "shadowed," that working primarily inside was the expectation.[7] RWG Chad Penza testified that USB had him tell other BBOs about his successful sales methods, which involved spending 80% of his time inside his Bank office. (22 RT 839-841, 848-849, 856-862.) All this evidence supported the trial court's reasonable finding that "the RWGs are typical and representative of the entire class." (71 CT 20998.) This finding was further validated by Dr. Drogin's expert testimony. (OBM 46-49; *infra* at Section IV.B.)

The unanimous RWG testimony was strongly reinforced by evidence that most BBO tasks could be performed only – or far more efficiently – inside Bank facilities, thereby providing a uniform incentive for BBOs to work primarily inside.[8] As the trial court stated in its

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[6] E.g., 21 RT 712, 720 [Grady]; 24 RT 1014 [Pollard]; 29 RT 1613-1614 [McCarthy]; 31 RT 1757 [Freeman]; 38 RT 2390-2391 [Vanderheyd].

[7] E.g., 21 RT 695 [Grady]; 22 RT 835-836 [Penza]; 26 RT 1194-1195 [Gediman]; 32 RT 1828-1829 [Vu]; 35 RT 2143 [Morales]; 41 RT 2742 [Haddow].

[8] E.g., OBM 14-17; 21 RT 702 [Grady]; 22 RT 844, 23 RT 952-953 [Penza]; 27 RT 1300-1301 [Machado]; 31 RT 1753 [Freeman]; 36 RT 2270 [Koga]; 40 RT 2602 [Vu]. RWGs testified it was far more efficient to

Statement of Decision:

> The Court finds that it is not realistic for BBOs to spend more than half of their work time outside of bank locations because the credit or loan transaction cannot be consummated, nor the sales goal met, without substantial effort that does not or cannot be performed outside of bank locations. (71 CT 21015.)

The SOD listed 20 BBO tasks that were routinely performed inside Bank offices. The *only* task that had to be performed outside Bank property was the site visit to a customer's business, which took only 15 minutes. (*Ibid.*)[9]

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telephone potential customers from their bank office than to drop in on the businesses unannounced. 27 RT 1289 [Machado]; 22 RT 890-893 [Penza]; 40 RT 2708-2710 [Bradley].

[9] The trial court found:

> "In terms of merely prospecting for new business leads, the Court finds that it is vastly more efficient and fruitful to go through lead lists and cold call over the phone instead of wasting time walking around knocking on doors. BBO's engage in ... group telemarketing - at bank offices. After locating a prospect, BBOs 'profile' or 'prequalify' the customer over the phone, conduct meetings telephonically, and follow-up over the phone. In fact, some deals went through without the BBO ever meeting the customer. Face-to-face meetings can take place at the BBO's office or another branch. BBOs do research by utilizing the Internet or reviewing files from inside their office. At one point in time, BBOs folded, stuffed, labeled and mailed flyers from inside their offices. BBOs receive and respond to email, voice messages and correspondence from inside their offices. BBOs review customer account information through their computers in the office. BBOs review and analyze customer financial statements in their office. BBOs put together, review and analyze loan packets from inside the bank. BBOs utilize email, courier services, and faxes to send

The trial court also found that USB had no reasonable expectation that the BBO job was to be performed primarily outside. USB had never had any written policy stating that BBOs were to spend a majority of their time outside. Corporate witnesses admitted that they were unaware of any mandatory policy that BBOs work primarily outside. They testified that the company did not track or evaluate where BBOs spent their work time and had no audit program to ensure that BBOs are properly classified as exempt. (OBM 15-17.) USB training materials instructed all BBOs to seek new business by telemarketing and by reviewing lists of existing bank customers, both done from inside Bank offices. (TE 17 [New Banker Orientation Workbook, pp. 59, 67].) The trial court reasonably concluded that "BBOs are in fact actively encouraged, trained, and rewarded for

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> documents from their office. BBOs receive and respond to calls and inquiries from underwriting from inside the bank. Loans typically close in the branch because a notary is required. At their office, BBOs fill out administrative paperwork such as the pipeline report and the mileage expense forms. BBOs have discussions with branch personnel and their supervisor at the bank or over the telephone. BBOs attend one-on-one, weekly, monthly, quarterly and annual meetings in bank properties. BBOs are expected to visit the other branches they are assigned to cover in order to develop more leads. Some BBOs even have operational duties inside the branch. With the possible exception of a 15-minute site inspection where the BBOs visit a client's property to ensure that it exists, the Court finds there is nothing BBOs do to fulfill their duties and

spending more than half of their work time *inside* bank locations." (71 CT 21016, ital. by the court.)[10]

All this evidence, taken together, provided strong support for the trial court's decision that common issues predominated and that a class action would be superior to 260 individual trials "for a fair and efficient adjudication of this litigation." (16 CT 4532-4533, quoting *Sav-On* at 332.) It also provided strong support for the trial court's substantive liability finding that the class as a whole was misclassified as exempt. (71 CT 21018.) Even if, notwithstanding the uniform nature of the job, a small number of BBOs were arguably exempt, the trial court could reasonably find that class adjudication of the common issues would still be faster, more efficient, and more supportive of the public policy favoring the prompt payment of overtime compensation than requiring each class member to bring a separate suit in which common issues would be litigated again and again. As the trial court stated in granting class certification, "[T]his case raises enough common questions to make the class mechanism a superior

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responsibilities that cannot happen inside the office or branch." (71 CT 21015.)

[10] See, e.g., 49 RT 3887, 4046-4047 [Western Regional Manager unaware of any policy that BBOs spend majority of time outside]; 43 RT 3022-3023, 3042 [division manager testified USB does not track where BBOs spend time; no compliance program]; 58 RT 4810 [HR manager testified no ongoing audit program to ensure BBOs properly classified as

means of fairly and efficiently litigating the dispute." (16 CT 4532.)

2. Defendant's Arguments About Individualized Issues Lack Merit.

a. The RWGs Uniformly Testified They Spent the Majority of Their Work Time Inside.

USB's assertion that the time RWGs 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" (AB 53), is simply untrue. There was no variation among the RWGs on this critical issue. All the RWGs, including those specifically listed by USB (*id.*) – Steven Bradley, Nova Vanderheyd, William Anderson, Brett Lindeman, Chad Penza and Nancy McCarthy – testified that they consistently spent more than half their work time *inside* the Bank, and the trial court so found. (71 CT 20999-21007.)

For example, on his own initiative, Steven Bradley prepared an elaborate analysis, based on travel expense logs, which showed he spent only about 18% of his time outside the Bank. The logs had been unavailable when he gave his deposition. (40 RT 2628-2629; 2668-2669; 42 RT 2841-2843; TE 508.)[11] Nova Vanderheyd testified that as a BBO, she worked primarily inside, as her supervisor recommended, with the

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exempt]; 45 RT 3217, 3239 [District Manager testified BBOs evaluated based only on meeting sales goals].

[11] Contrary to defendant's claim, Bradley testified that he did *not* spend more than half his time outside even at the beginning of a quarter. (40 RT 2713-2715.)

possible exception of a single week. (38 RT 2390, 2424, 2441-2442.)[12] By the time of trial, Vanderheyd had become USB's trainer for BBOs. She testified that shortly before her testimony in this case, her supervisors told her *for the first time* that she must teach BBOs that they should spend the majority of time away from the Bank. She had never been ordered to tell BBOs that before. (38 RT 2396-2398.)

William Anderson stated that although every day was different, he never spent more than half his time outside; indeed, he worked inside 80% of the time. (30 RT1655-1656, 1674-1680, 1695.) Brett Lindeman testified, based on his mileage records, that he spent the majority of his time inside in all weeks. (33 RT 1999-2008, 2017-2019.)[13] Chad Penza, the most successful BBO in the country, testified that for the first two weeks of his employment, he drove around outside a lot, but he quickly realized that it was vastly more efficient to work from inside his office, telephoning potential customers. Thereafter, there was never a week in his nearly four years as a BBO when he spent more time outside. (22 RT 839-841, 848-

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[12] Defendant's contrary contention was based on deposition testimony which Vanderheyd corrected based on mileage records available for the first time at trial. (38 RT 2425.) She also testified that her inaccurate deposition testimony was based on time spent outside her primary office, not all her Bank offices. (38 RT 2441.)

[13] USB bases its statements that Lindeman was more efficient when he increased his outside time on the testimony of a former supervisor. (46

854.)

Nancy McCarthy testified that she spent 80% of her work time inside every week of her BBO employment and she believed that other BBOs did the same activities. She explained that her deposition testimony that she spent 50% of her time inside and 50% outside (which would still make her nonexempt) was a "guess," which she realized later had underestimated inside time. (29 RT 1612-1614.)[14]

b. The Trial Court Reasonably Resolved Any Credibility Issues.

USB argues that credibility issues relating to individual BBOs make class treatment inappropriate. (AB 54-57.) However, the trial court is the arbiter of credibility. (*Sav-On* at 331, 334.) The trial court found that the RWG testimony on the key issue – that they spent more than half their work time inside Bank locations – was "credible and persuasive." (71 CT 20998.) The court recognized and resolved any inconsistencies between the RWGs' trial testimony and prior declarations or depositions. (See 71 CT 21016 ["In assessing the credibility of Chad Penza (and other witnesses)

RT 3482-3491.) The trial court credited Lindeman's testimony that he consistently worked primarily inside. (71 CT 21003.)

[14] Defendant claims that Sean MacClelland, a former BBO who was a management witness for USB, testified he "regularly spent the majority of his weekly work time as a BBO outside the Bank." (AB 54.) In his deposition, MacClelland testified he spent half his time inside and half outside, which would make him nonexempt. (52 RT 4419-4420.)

the Court considered and took into account conflicting evidence contained in pretrial statements and declarations."]) What was remarkable about the RWGs' testimony was its uniformity and consistency that they worked more than half time inside Bank properties, which strongly supports the court's denial of decertification.[15]

Defendant contends that *Walsh v. IKON Office Solutions, Inc., supra,* 148 Cal.App.4th 1440 and *Jimenez v. Domino's Pizza, Inc.* (C.D. Cal. 2006) 238 F.R.D. 241 support its argument that the existence of "credibility issues" justifies denial of certification. These cases hold that credibility of witnesses is one factor that the trial court may consider in deciding whether to certify a class. (*Walsh* at 1459; *Jimenez* at 252.) But *Sav-On* teaches that "questions as to ... the credibility of witnesses ... and the determination of [any] conflicts and inconsistency in their testimony are matters for the trial court to resolve." (*Sav-On* at 334.) Indeed, *Sav-On* held that one credible declaration would support certification in the face of 52 contrary declarations. (*Id.* at 333-334.) The *Sav-On* Court stated that a reviewing court must presume in favor of the certification order "the existence of every fact the trial court could reasonably deduce from the

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[15] USB claims that the trial testimony of Penza, Bradley, Koga and McCarthy was inconsistent with their Bank-drafted declarations or with prior deposition testimony. This issue is discussed at OBM 15 and *supra,*

record." (*Id.* at 329.)

c. USB's Reasonable Expectations Defense Was Properly Decided on a Class Basis.

Sav-On held that an employer's expectations regarding how its employees were to perform their job was an issue particularly suitable for resolution on a class basis. It stated, "[C]onsiderations such as the employer's realistic expectations and the actual overall requirements of the job are likely to prove susceptible of common proof." (*Sav-On, supra*, at 337, quoting *Ramirez* at 802, citations and internal quotations omitted.) Other cases have agreed. (*Romero v. Producers Dairy Foods, Inc.* (E.D. Cal. 2006) 235 F.R.D. 474, 490 [granting certification based on common questions including employer's realistic expectations]; *Tierno v. Rite Aid Corp., supra*, 2006 WL 2535056 *10 [realistic expectation is common issue].)

Based on the 41-day trial of liability, the trial court found overwhelming evidence that USB had no expectation that BBOs would work primarily outside. The court stated:

> Here, the evidence shows that the RWGs' practice of spending most of their time inside does not diverge from Defendant's expectation because the only expectation U.S. Bank had for its BBOs was that they hit their production

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pp. 31-33. As to each, the trial court reasonably credited their trial testimony. (71 CT 20999-21000, 21002-21005, 21016.)

> goals.... [¶] The Court finds that as long [as] BBOs satisfy their sales production goals, they are meeting the Bank's expectations even if they spend little or no time out of the branch. (71 CT 21008-21009.)

The court based this finding on consistent RWG testimony that supervisors did not tell BBOs to work primarily outside[16]; on management testimony that the Bank cared more about meeting sales goals than where the work took place[17]; on evidence that *no* written policy, job description, training materials, or other document set forth such an expectation[18]; and on evidence that most BBO tasks could be performed only, or more efficiently, inside.[19]

Defendant ignores *Sav-On*'s teaching and this substantial evidence.

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[16] E.g., 21 RT 697-699 [Grady]; 22 RT 861 [Penza]; 24 RT 997-998 [Pollard]; 25 RT 1091-1092 [Petty]; 26 RT 1193-1194 [Gediman]; 27 RT 1267-1268 [Machado]; 27 RT 1357 [Jacobs]; 28 RT 1424-1427 [Duran]; 30 RT 1642-1643 [Anderson]; 31 RT 1741-1742 [Freeman]; 32 RT 1827 [Vu]; 33 RT 1919 [Lindeman]; 34 RT 2036 [Morales]; 35 RT 2136-2137 [Koga]; 37 RT 2308 [Tabolo]; 39 RT 2458 [Rogers]; 40 RT 2612-2613, 2622 [Bradley]; 41 RT 2736 [Haddow].

[17] E.g., 43 RT 3038 [Carey]; 44 RT 3211-3213, 45 RT 3352-3353 [Catton]; 45 RT 3286-3288 [Farley]; 46 RT3523-3524, 3528 [Lewis]; 47 RT 3686-3687 [Racusin]; 49 RT 4040, 4043-4044 [Biggs]; 51RT 4253-4254 [Collins].

[18] E.g., 21 RT 694 [Grady]; 24 RT 1015 [Pollard]; 25 RT 1092 [Petty]; 27 RT 1288 [Machado]; 28 RT 1425-1427 [Duran]; 30 RT 1657 [Anderson]; 31 RT 1741-1742 [Freeman]; 32 RT 1846 [Vu]; 33 RT 1919 [Lindeman]; 34 RT 2030 [Morales]; 35 RT 2136, 2151 [Koga]; 37 RT 2293 [Tobolo]; 39 RT 2458-2459 [Rogers]; 41 RT 2737 [Haddow].

It claims that individualized analysis of the expectations defense is necessary because *its own declarations* establish that "19 class members (including 3 RWG witnesses) admitted being told USB expected them to spend the majority of their time on sales activities outside the Bank." (AB 57.) The record does not support USB's contentions.

The statements about expectations in the 16 Bank-drafted declarations cited by USB do not have a proper foundation but are only conclusory assertions that "we were expected" to spend a majority of time outside. The three RWG witnesses whom USB identifies on AB 57 – Eugenio Tobolo, Angela Machado, and Steven Bradley – did *not* testify that USB told them to work primarily outside. They testified the exact opposite – they were *not* told to spend a majority of work time outside. (37 RT 2289, 2294-2295 [Tobolo]; 27 RT 1267-1268, 1288 [Machado]; 40 RT 2611, 2622, 2685 [Bradley].) Defendant's arguments are based on deposition excerpts taken out of context and on supervisor testimony that the trial court disbelieved.[20]

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[19] E.g., 21 RT 702 [Grady]; 22 RT 844, 890 [Penza]; 27 RT 1300-1301 [Machado]; 31 RT 1753 [Freeman]; 36 RT 2251, 2270 [Koga]; 40 RT 2602 [Vu].

[20] Defendant seriously misrepresents the testimony of Angela Machado. It states that Machado "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." (AB 58.) In the cited testimony (27 RT 1304-1305), Machado actually said only that her

USB also misstates the trial court's findings about the expectations defense. (AB 59.) The trial court stated that the Bank's witnesses were consistent in expressing the Bank's goals – to increase market share – but were not consistent in how that goal was to be achieved and "as to the specific question, the core of this case, as to where the Class members were to spend their time." (71 CT 21009.) Contrary to USB's assertion, the court was not stating that the employer's expectations must be uniformly conveyed to *every* class member for the defense to apply to *any* class member. (AB 59.) The court was simply saying it found insufficient evidence that the Bank expected BBOs to work predominantly outside Bank properties.[21]

d. The Trial Court Managed Issues Affecting Particular RWGs.

The trial court reasonably managed the so-called "individualized issues" that defendant raises as to particular RWGs. (AB 60.) There was no abuse of discretion in the court's ruling that such issues did not render the

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supervisor expected her to spend the majority of her time engaged in sales activity and to meet her "points goals." She specifically denied that her supervisor – or anyone else – told her to spend a majority of her time outside the Bank and testified she worked more than 50% of her time inside the Bank. (27 RT 1268, 1288, 1339.)

[21] Defendant's assertion that there was "undisputed testimony that numerous managers did communicate the expectation" (AB 59) is simply untrue. The RWGs uniformly testified that they were not told of any such expectation. (See, *supra,* fn.16.)

litigation so unmanageable that decertification was required.

Based on substantial evidence, the court found that Troy Petty was a BBO, not a Business Banking Relationship Manager, as defendant contends. (971 CT 21005-21006; 25 RT 1087, 1089, 1092-1096, 1117.)[22] The court found that Matthew Gediman worked full-time as a BBO after USB's lead counsel, Timothy Freudenberger, objected to any testimony about Gediman's brief part-time duties as an acting sales manager as "not relevant to the proceedings before this court." (71 CT 21001; 26 RT 1255, 27 RT 1263-1264.) The court ruled that the fact that Trinele Pollard and Valerie Morales filed for bankruptcy without disclosing as assets their potential claims against USB would not render the litigation unmanageable and thus was not a basis for decertifying the class. The bankruptcy issue was premature, the court held, and could be raised later, which defendant failed to do. (78 CT 23228.)

The trial court properly recognized that such so-called "individualized issues" relating to particular class members' eligibility or damages did not require decertification of the class. As the court suggested in relation to Pollard and Morales, these issues could be raised later in the

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[22] However, the court concluded that Petty was not eligible to recover any overtime because he had released all damage claims in an earlier settlement with USB. Consequently, Petty's data was used in the

litigation. The court would have permitted that to occur if USB had chosen one of the procedures the court offered before the start of Phase II, such as an individualized claims procedure. But USB refused all these alternatives or any other procedure, short of individual mini-trials of liability and damages for every class member, which is the basis for plaintiffs' waiver argument in Section V.[23]

e. *Wal-Mart v. Dukes'* Class Certification Analysis Does Not Apply Here.

Plaintiffs' opening brief explained why the U.S. Supreme Court's 5-4 decision in *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. __, 131 S.Ct. 2541 is distinguishable from the instant case. (OBM 43-44.) The *Wal-Mart* majority's reversal of class certification was predicated on the unique factual context: a nationwide class of 1.5 million members in countless job classifications, a challenged company policy that featured local discretion rather than company-wide uniformity, and a weak factual record. *Wal-Mart* interpreted federal authorities, Rule 23 of the Federal Rules of Civil Procedure and a federal statute, Title VII.

USB's claim that *Wal-Mart* requires reversal of class certification in

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classwide calculations but he was barred from any personal recovery. (71 CT 21005.)

[23] Defendant's various "policy" arguments about why a class action is unnecessary here (AB 129-130) were rejected by this Court in *Gentry v.*

this case is without merit. (AB 73-75.) This case involves a California-only class of 260 members in a single job classification and a uniform and specific employer policy. It is not governed by Federal Rule 23 or Title VII. This Court has said that California courts *may* look to Rule 23 for guidance "in the absence of controlling California authority." (*La Sala v. American Sav. & Loan Association* (1971) 5 Cal.3d 864, 872.) However, no case has suggested that California courts must follow Rule 23 if doing so would conflict with California law. Much of the *Wal-Mart* majority's analysis is contrary to California class action law.

- *Wal-Mart* requires "significant proof" of a "general pattern of discrimination" to justify class certification. *Sav-On* held that a single declaration can support class treatment. (*Id.* at 334.)

- *Wal-Mart* appears to engage in a *de novo* review of the lower court's certification decision, although it did not specify the standard of review. California cases hold that class certification orders are reviewed under the abuse of discretion standard of review. (*Sav-On* at 331.)

- *Wal-Mart* stated in dictum that *under the statutory provisions of Title VII*, an employer is entitled to individualized determinations about whether particular employees are eligible for backpay. Title VII is not

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Superior Court (2007) 42 Cal.4th 443, 458-459. Only one BBO has ever sued defendant for unpaid overtime. (5 RT 139; 21 CT 6109-6111.)

involved in this case.[24]

- *Wal-Mart* was a pre-trial review of class certification. By contrast, the instant case comes to this court after full litigation in the trial court, including a lengthy trial and two motions for class decertification. Thus, the trial court's reasonableness in certifying the class of BBOs can be evaluated against the complete trial record, with the benefit of the court's lengthy factual findings based on live testimony subject to extensive cross-examination and memorialized in the Statement of Decision.

Numerous decisions have distinguished *Wal-Mart* and have certified classes in cases similar to this one. (See, e.g., *Ross v. RBS Citizens, supra*, 667 F.3d at 908-910 [employer's unlawful policy denying overtime compensation "is the common answer that potentially drives the resolution of this litigation"]; *Ellis v. Costco Wholesale Corp.* (N.D. Cal. 2012) 285 F.R.D. 492, 503-531 [certified 700-person nationwide class in gender discrimination case, distinguishing *Wal-Mart*]; *Jimenez v. Allstate Insurance Co.* (C.D. Cal. 2012) 2012 WL 1366052 *14-15 [class certified in overtime case; *Wal-Mart* distinguished]; *Garvey v. Kmart Corp.* (N.D.

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[24] The *Wal-Mart* majority stated that Wal-Mart was entitled to "individualized determinations of each employee's eligibility for backpay" and it condemned a "Trial by Formula" approach. *Id.* at 2561. The majority made clear that the right to individual determinations flowed from Title VII's statutory requirements and was not based on due process.

Cal. 2012) 2012 WL 2945473 [class certified, *Wal-Mart* distinguished]; *Driver v. Appleillinois, LLC* (N.D.Ill. 2012) 2012 WL 3716482 [decertification motion in wage and hour case denied; *Wal-Mart* distinguished].)

For all the differences between this case and *Wal-Mart*, there is one important similarity, which supports plaintiffs here. *Wal-Mart* affirmed the ongoing validity of the two-stage pattern-and-practice analysis in *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, which provides for trial of liability based on common evidence, followed by a remedial stage in which the defendant may attempt to prove that particular class members were not subject to the classwide illegal pattern and are not entitled to relief. (*Wal-Mart* at 2561. See OBM 37-39, 62-64.) Implicit in this analysis is the recognition that a class may be certified even if some class members were not injured.

3. The Court of Appeal Erred in Ordering Decertification.

The Court of Appeal's order that the class be decertified, based on the alleged defects in the trial plan, was erroneous. Even if the trial plan had contained defects (which it did not), the proper remedy would have been a new trial and a new trial plan, not decertification of the class. (OBM 31.) The Court of Appeal's decertification order was based not on proper

standards for decertification (*Walsh, supra*, at 1451-1452) but on the court's flawed assertion that the trial plan denied USB its due process right to challenge every class member. (Slip Op.73.)

Ironically, USB contends that *Sav-On* supports the Court of Appeal's decertification order because, it claims, *Sav-On* involved evidence of "several uniformly applicable employer policies." (AB 62.) It never identifies those policies. In fact, the only "uniformly applicable employer policy" in *Sav-On* was the employer's policy of classifying all employees as exempt when most or all of the employees were arguably nonexempt. The same "uniformly applicable employer policy" exists in this case.

A recent Seventh Circuit case, *Ross v. RBS Citizens, N.A.* (7th Cir. 2012) 667 F.3d 900, brought under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), and Illinois wage law, affirmed class certification in a case similar to this one, rejecting arguments like those made by USB. The plaintiff, an assistant branch manager ("ABM") of the defendant bank, alleged that the bank illegally denied ABMs overtime pay by misclassifying their positions as exempt even though ABMs spend the majority of their time performing nonexempt work. The employer contended (as USB does here) that certification was improper because the factfinder would have to individually determine whether each class member performed primarily

nonexempt duties. The Seventh Circuit held that class certification was properly granted, stating:

> Although there again might be slight variations in the exact duties that each ABM performs from branch to branch, the ABMs maintain a common claim that unofficial company policy compelled them to perform duties for which they should have been entitled to collect overtime. Contrary to Charter One's assertion, an individualized assessment of each ABM's job duties is not relevant to a claim that an unlawful company-wide policy exists to deny ABMs overtime pay. *(Id.* at 909-910.)

The same principle applies here and supports the trial court's orders certifying the class and refusing to decertify it.

II. DEFENDANT HAS ADVANCED NO PERSUASIVE REASON TO BAR STATISTICAL AND REPRESENTATIVE EVIDENCE IN PROVING CLASSWIDE LIABILITY.

Numerous cases and commentators have approved the use of statistical evidence, surveys, pattern and practice and other forms of representative evidence in class action cases. (OBM 33-36.) Defendant's opposition to such evidence as part of the proof of classwide liability is largely based on the fact that no California appellate court has specifically done so before. That is hardly a valid justification.

California trial courts are increasingly facing wage and hour class actions involving hundreds and thousands of employees who claim they

were misclassified as exempt under a uniform policy of their employer. Under the reasoning of defendant and the Court of Appeal, such cases would be denied class certification or, although certified, would be tried employee-by-employee over many months or even years, consuming increasingly limited judicial resources. That outcome would run squarely against this Court's assertion that class actions are often necessary to enforce employees' unwaivable right to overtime pay and that courts must be "procedurally innovative" in certifying and managing them. (OBM 34; *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 459, cert. den. (2008) 128 S.Ct. 1743.)

In this section, we address general arguments regarding the use of such evidence in the proof of classwide liability.[25] In Sections III and IV, we discuss the trial plan for liability and liability findings in this case.

A. Statistical and Representative Methods Are Not Novel Techniques Requiring a *Kelly* Hearing.

This Court's decision in *Sav-On* squarely rebuts defendant's claim that statistical and representative proof methods are novel techniques that

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[25] In this case, as in most others, statistical or representative evidence was *only part* of the proof used to demonstrate classwide liability. There was also evidence of the nature of the BBO position, the lack of USB's reasonable expectation that the BBO position was an outside job, and the inference which the trial court drew from USB's failure to keep records of BBOs' inside-vs.-outside time that such information would have been adverse to defendant. (71 CT 21013.)

are not accepted in the "relevant scientific community." (AB 66, *People v. Kelly* (1976) 17 Cal.3d 24, 30-31.) *Sav-On* stated:

> 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. (*Sav-On* at 333.)

Justice Werdegar's concurrence in *Brinker* also emphasized the Court's "historic endorsement of a variety of methods that render collective actions judicially manageable," including "[r]epresentative testimony, surveys, and statistical analysis." (*Brinker* at 1052, 1054.)

Defendant argues that *Sav-On* limited its approval of such methods to the class certification stage. This contention is not supported by *Sav-On* itself and makes no sense. (AB 68.) *Sav-On* cited approvingly to cases which had endorsed such class techniques at all stages of the litigation. (*Id.* at 333, fn. 6; OBM 33, 37-38.) Inherent in the logic of class certification of a case is that it can be tried as a class action, using methodologies that were appropriately used to gain class certification.

B. *Bell*'s Analysis of Statistical and Representative Methodology Supports the Use of Such Methodology to Prove Liability.

Bell v. Farmers Ins. Exchange (2004) 115 Cal.App.4th 715 ("*Bell III*"), is the leading California case discussing the validity of statistical sampling and representative testimony. *Bell III* extensively canvassed the cases and literature showing that statistical sampling is inherently no less accurate or reliable than individual litigation. *Sav-On* cited *Bell III* with approval. (OBM 35.)

Defendant's attempts to distinguish *Bell III* are all unpersuasive. First, although *Bell III* specifically involved damages, its rationale – and the cases it cited – also apply to proof of liability. (OBM 35.) Second, USB argues that *Bell III* is inapposite because the parties and their experts there cooperated in developing a trial plan and agreeing on an acceptable margin of error, which they did not do here. (AB 69.) That distinction favors plaintiffs. USB should not be able to avoid *Bell III*'s persuasive reasoning by its refusal to cooperate in developing a trial plan in this case. Third, the Bank claims that, unlike in *Bell III*, here it was "outright precluded" from presenting evidence to establish its exemption defense. (AB 70.) To the contrary, defendant was allowed to present a wide range of evidence in support of its defense. (OBM 15-16, 49-50.)

C. *Brinker* and the Cases It Cites Support the Use of Statistical and Representative Evidence.

The *Brinker* concurrence by Justice Werdegar also emphasized the discretion of trial courts to use representative and statistical evidence to prove liability and the extent of liability. Justice Werdegar observed that the Court has "encouraged the use of a variety of methods to enable individual claims that might otherwise go unpursued to be vindicated and to avoid windfalls to defendants...." The opinion cited *Bell III* approvingly for the propriety of using "surveys and statistical analysis to measure a defendant's aggregate liability under the IWC's wage orders." (53 Cal.4th at 1054.) It cited *Dilts v. Penske Logistics* (S.D.Cal. 2010) 267 F.R.D. 625 approvingly for the principle that "liability could be established through employer records and representative testimony ...." (*Ibid.*)

Dilts endorsed the use of representative and statistical evidence to prove liability in a meal and rest break class action. One issue in *Dilts* was how the plaintiff could prove that the defendant employer failed to provide meal and rest breaks when its policies were only informal. The court noted that the majority of the plaintiff's evidence on this point was anecdotal but that, "to the extent that these policies were informal and enforced through 'ridicule' or 'reprimand,' they should be provable through common representative testimony." (*Id.* at 638.) The court stated it was "quite plain

to the Court that statistical evidence is appropriate in cases like this one" to prove liability, and certification would not be denied "simply because Plaintiffs anticipate using representative evidence at trial." (*Ibid.*) *Dilts* rejected the defendant's argument that using representative testimony violated its due process rights.

D. *Morgan v. Family Dollar Stores* Is an Example of an FLSA Case That Approved Use of Representative Testimony to Prove Liability.

Morgan v. Family Dollar Stores (11th Cir. 2008) 551 F.3d 1233 is a case under the Fair Labor Standards Act ("FLSA") in which representative testimony was part of the proof used to establish classwide misclassification. Because *Morgan* involves a case that went to trial, its reasoning should be persuasive here. The alleged distinctions cited by USB do not detract from its relevance on that issue. (Cf. AB 75-77.)

In *Morgan,* 1400 store managers sued for overtime pay, claiming they were misclassified as exempt executives. To claim the executive exemption under the FLSA, an employer must satisfy several factors, including that the employee's "primary" job is management. The amount of time spent on executive duties is an important, but not the sole, criterion of the "primary" duty factor. (*Id.* at 1266-1269.)

Morgan was tried based, in part, on representative testimony from

seven of the 1400 plaintiffs and resulted in a judgment for the plaintiffs. On appeal, the defendant challenged the use of representative evidence, arguing (like USB here) that the exemption defense is so individualized that the seven testifying plaintiffs (less than 1% of the 1400 plaintiffs) did not fairly represent those who did not testify. The appellate court rejected that argument and affirmed the judgment, stating:

> For the same reason that the court did not err in determining that the Plaintiffs were similarly situated enough to maintain a collective action, it did not err in determining that the Plaintiffs were similarly situated enough to testify as representatives of one another. (*Id.* at 1280.)

Referring to *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, which allowed representative testimony to prove backpay in FLSA cases, the court declared, "If anything, the *Mt. Clemens* line of cases affirms the general rule that not all employees have to testify to prove overtime violations." (*Id.* at 1279.)

III. DEFENDANT DID NOT HAVE A DUE PROCESS RIGHT TO INDIVIDUAL TRIALS ON LIABILITY AND DAMAGES FOR EVERY CLASS MEMBER.

The essence of defendant's due process argument is that, although this was a class action, it had a constitutional right to try liability and damages individually for each and every class member. The trial court properly rejected this contention.

A. Defendant's All-or-Nothing Position Was and Is Unreasonable.

It is important to clarify what is at issue here. The question is not whether a defendant may have a limited right in the remedial phase of the trial to challenge particular class members as to whom it has evidence that they were ineligible to recover backpay. A class action defendant may have such a right, subject to broad discretionary restrictions by the trial court, although it would bear the burden of production and proof to show that the particular class member was not subject to the classwide finding of liability. (OBM 5, 37-39, 62-64.)

What the Bank is demanding in this case, however, is an absolute, unbridled right to "call all 239 of the absent class members to the stand to confront them as to how they spent their time" as though the classwide finding of liability had never been made. (AB 104, see also AB 107 ["prejudicial error to preclude USB from calling all remaining class members to the stand at trial"].) That is not the law – and cannot be if class actions are to have any continuing viability in misclassification cases. (OBM 37-42.)[26]

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[26] The scope of the defendant's right in Phase II must be subject to the trial court's broad discretion to manage the proceedings, balancing the defendant's interest in an accurate determination of its liability against the interests of the class and the state in protecting the right of workers to receive compensation owed in reasonably efficient procedures. *Sav-On* at

It should be emphasized that the Bank never asked the trial court to be allowed to call a small number of class-member witnesses of its own choosing during the Phase I trial of classwide liability. The trial court might have been able to accommodate such a request (time permitting) within the structure of the lengthy 41-day class trial. However, USB submitted a witness list for Phase I containing the names of 121 witnesses, almost all class members. (45 CT 13194-13204.) Having failed to make a reasonable proposal before or during trial, USB cannot now demand a reversal of the classwide liability finding and a multi-month retrial of liability. Rather than recognizing that every trial (even a class action trial) is subject to limits because of the relative scarcity of judicial resources, the Bank has always insisted, unreasonably, that it be permitted to call every single class member during the class liability phase of the trial. The

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339; Code Civ. Proc. § 128(a)(3); Evid. Code §352; Cal. Rules of Court 3.767; *Connecticut v. Doehr* (1991) 501 U.S. 1.

For example, the trial court must have the power to define the threshold showing that a defendant must make before it can challenge a class member's entitlement. The court must be able to set reasonable time limits on the presentation of evidence, both in aggregate and as to individual class members. (The average testimonial time for RWGs, two days, is far too long.) The court must have the power to restrict the number of class members whom the defendant can challenge if the defendant's evidence becomes cumulative without producing proof that challenged class members are exempt. The extent of this discretion need not be fully resolved in this case, given that what USB demanded here was the unrestricted right to challenge *all* class members.

validity of its position must be judged based on the all-or-nothing stance it has consistently taken in this litigation.

B. Defendant's Authorities Do Not Support Its Due Process Argument and Generally Support Plaintiffs.

Numerous cases hold that allowing statistical sampling, representative evidence and other classwide techniques to be used in class actions is consistent with due process. (OBM 32-42; 59-64.) The authorities cited by USB are not to the contrary. Many of them contain only general language about due process. (E.g., *Mullane v. Central Hanover Bank* (1950) 339 U.S. 306 [sufficiency of notice by newspaper].) Others involve factual and procedural circumstances very different from this case.

The Bank cites *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, an Unfair Competition Law case, in which two plaintiffs sued Ford for concealing the repair history of their used car. In support of punitive damages, the plaintiffs presented evidence of Ford's widespread fraudulent practices. The jury awarded the plaintiffs compensatory restitution of $17,811 and disgorgement of $10 million in punitive damages, which supposedly constituted Ford's earnings on transactions with hundreds or thousands of anonymous fraud victims. However, because the case was not a class action, there was no evidence about any other transaction. This

Court reversed the $10 million punitive damages award because it was based on transactions as to which there was no evidence of any wrongdoing by Ford. [27]

This case is entirely different. It was tried as a class action and there was representative evidence and statistical evidence to support the conclusion that the entire class was misclassified. The instant judgment was also supported by evidence that the tasks of a BBO were predominantly performed inside, that USB had no expectations that the BBO job involved outside sales, and that USB had deliberately failed to keep data about where BBOs spent their time because they believed it would support plaintiffs' case. (OBM 17.)

In re Fibreboard Corp. (5th Cir. 1990) 893 F.2d 706, is also distinguishable. There the district court consolidated 3000 asbestos cases and decided that damages for all claimants would be determined on the basis of full trials for 11 plaintiffs and evidence from 30 other plaintiffs, none randomly selected. The appellate court reversed, holding that the proposed methodology would violate Texas products liability law, which

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[27] *Johnson* stated that in 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.* at 1210, ital. added.) This

required individualized proof of liability and damages. The court did not rule on due process grounds.

Many of the cases cited by the Bank actually support plaintiffs.

In *In re Chevron USA, Inc.* (5th Cir. 1990) 109 F.3d 1016, some 3000 plaintiffs and intervenors claimed damages allegedly caused by Chevron's toxic wastes. The district court approved a trial plan to determine liability by trying the claims of 30 plaintiffs, 15 chosen by each side. On Chevron's appeal, the Fifth Circuit held that the plan was constitutionally flawed because *the sample was not randomly chosen.* Due process required that where issues of general liability were to be decided by a sample of individual cases, "the sample must be one that is a randomly selected, statistically significant sample." (*Id.* at 1021.) *In re Chevron* was cited in *Bell III* for the principle that "[t]he applicability of inferential statistics have long been recognized by the courts." (*Bell III* at 754.)

In re Simon II Litig. (E.D.N.Y. 2002) 211 F.RD. 86 ("*Simon II*") concerned a massive class action against tobacco companies by consumers who claimed to have been misled about the lethal and addictive effects of smoking. As USB concedes (AB 103), the court held that the consumers' proposed use of statistical evidence to establish causation (part of liability)

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quotation does not help USB, which is seeking to retry common issues resolved in Phase I.

did not violate the defendants' due process rights. (*Id.* at 154.) *Simon II* declared:

> Plaintiff's use of aggregate proof does not violate defendants' Constitutional rights.... [S]tatistical proof combined with other evidence is a necessary, pragmatic and evidentiary approach that reflects full due process in this and many other massive tort cases. It is consistent with the defendants' Constitutional rights and legally available to support plaintiffs' state law claims. (*Id.* at 146-147.)

Simon II was cited with approval in *Bell III* at 754.

The decisions in *Bell v. Farmers Insurance Exchange* (2001) 87 Cal.App.4th 805 (*"Bell II"*) and *Bell v. Farmers Insurance Exch., supra* 115 Cal.App.4th 715 (*"Bell III"*) also favor plaintiffs. *Bell II* upheld summary adjudication of liability (nonexempt status) in favor of the class, which meant the defendant had no right to introduce evidence to contest liability for any employee. (*Bell II* at 829.) *Bell III* held that damages could be determined based on statistical sampling techniques, that such sampling methodology was constitutional under *Connecticut v. Doehr*, *supra* 501 U.S.1 unless it produced an excessive margin of error, and that the defendant did not have a due process right to present evidence as to every class member: (*Bell III* at 747-758.)

> In our view, it was within the discretion of the trial court to weigh the disadvantage of statistical inference – the calculation of average

> damages imperfectly tailored to the facts of particular employees – with the opportunity it afforded to vindicate an important statutory policy without unduly burdening the courts. (*Id.* at 750-751.)

Although *Bell III* stated that a defendant might in some circumstances have the right to introduce testimony of "employee witnesses outside the sample group" (*id.* at 758 fn. 36), what the court meant was that the defendant could present testimony from supervisors to rebut the testimony by employees who were within the sample group. That is precisely what the trial court allowed USB to do during Phase I of this case. (OBM 46.)

Thus, USB's claim that it had an absolute due process right to litigate liability and damages individually for all class members at any phase of the proceedings without any restrictions is without merit.

C. *Connecticut v. Doehr* Does Not Invalidate the Trial Plan for Liability.

USB's claim that the trial plan here failed to meet the balancing test of *Connecticut v. Doehr, supra*, 501 U.S.1 is erroneous. The argument is largely predicated on the 43% margin of error in the calculation of *damages*. (AB 108-109.) Plaintiffs have conceded that the 43% margin of error was too high to sustain the judgment. (OBM 5-6.) But that margin of error did not infect the trial plan and classwide finding regarding *liability*,

where the most accurate estimate was that 100% of the class was misclassified and the margin of error was, at most, 13%. (OBM 47-49; *infra,* at Section IV.B.1.)

Moreover, the finding of classwide misclassification did not rest only on representative and statistical evidence. It was also based on the extensive evidence that the BBO job could be done only – or far more efficiently – inside Bank offices; that USB had no reasonable expectations to the contrary, and that USB's failure to keep records of where BBOs worked warranted the inference that such records would have been unfavorable to defendant. (OBM 49-51.) Thus, defendant's assertion that "the 'risk of error' is certain, and enormous" (AB 108) simply does not apply to the trial plan and finding on liability. As to liability, the *Connecticut v. Doehr* balancing tips strongly in plaintiffs' favor because of their enormous interest in ensuring that class members recover their unpaid overtime compensation and the low risk that the classwide liability finding was erroneous.

As to damages, the exact procedure that will be used to calculate them in this case is, as yet, uncertain. Plaintiffs contend that, by refusing to accept one of the alternative procedures offered by the court, the Bank has waived its right to object to the damage award. (OBM 53-59.) If this

Court does not accept that argument, the procedure to determine damages, including USB's limited right to contest entitlement for individual class members, will be revisited by the trial court. (OBM 59-64.) Thus, USB's argument under *Connecticut v. Doehr* should be rejected as to liability and is premature as to damages.

D. The Trial Court's Evidentiary Rulings Were Within Its Discretion and Did Not Violate Due Process.

A trial court has broad discretion to exclude evidence that is inadmissible, irrelevant, cumulative or prejudicial and to provide for the orderly conduct of proceedings. (Evid. Code §352; Code Civ. Proc. § 128(a)(3); *People v. Williams* (1997) 16 Cal.4th 153, 196-197. *Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317.) USB challenges various evidentiary rulings (AB 104-106) but has not shown any abuse of discretion or due process violation. Moreover, defendant's failure to cite to the record to show that it attempted to introduce this evidence but was refused should, by itself, constitute a waiver of its arguments. (*Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 29; *Fox v. Erickson* (1950) 99 Cal.App.2d 740, 741-742.)

1. Declarations signed by non-RWG class members

The Bank contends that the approximately 75 "declarations signed by non-RWG class members" should have been admitted at trial. (AB 104.)

The declarations, which were drafted by Bank attorneys and signed by class members before they received any notice of this action, were properly excluded on several grounds. (OBM 51-53.)

First, the declarations were inadmissible hearsay under Evidence Code section 1200 because they were "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (OBM 52; *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1354 ["It is well established ... that declarations constitute hearsay and are inadmissible at trial"]; *Malatka v. Helm* (2010) 188 Cal.App.4th 1074, 1085 fn. 5 [declarations are "archetypal' hearsay].) The "party opponent" exception to the hearsay rule did not apply because absent class members are not parties. (*Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1434; see *Southern California Edison Co. v. Superior Court* (1972) 7 Cal.3d 832, 840-842 [defendant must subpoena class members for deposition and cannot demand by notice that plaintiffs produce them].)

Second, the trial court could reasonably conclude that live testimony by a random sample of representative witnesses would be far more probative than declarations drafted by counsel for the employer and signed by currently-employed employees. (OBM 52.) Because of the

fundamentally unequal power in the employer-employee relationship, employer-drafted declarations signed by current employees are inherently suspect. (See, e.g., *Morden v. T-Mobile USA, Inc.*, *supra*, 2006 WL 2620320 *3-5; *Belt v. Emcare, Inc., supra*, 299 F.Supp.2d at 668 see *Gentry v. Superior Court, supra* 42 Cal.4th 443, 459-460 ["the nature of the economic dependency involved in the employment relationship is inherently inhibiting"].) In this case, the trial court agreed, stating, "[T]he weight to be given to these declarations must be adjusted because of their actual authorship, the circumstances of preparation and internal inconsistencies and ambiguities." (71 CT 20991.)

Third, the Bank-drafted declarations, which the court had previously reviewed three times in connection with class certification and decertification motions, suffered from serious credibility problems. Many class members had repudiated the declarations in later declarations, depositions, or at trial. (OBM 51-53.) In fact, nearly every class member who signed a declaration for the Bank and who later testified (in deposition or at trial) stated that the majority of his or her work time was spent *inside* Bank properties. (OBM 14, 18, 51-53; 32 CT 9430-9431.)

This pattern of repudiating the Bank-drafted declarations continues among the BBOs listed by defendant on AB 107. Three of these BBOs

stated in later declarations or depositions that their declarations were incorrect and that they spent most of their time *inside* Bank properties. (Kenneth Rattay, 6 CT 1569-1572 [worked inside more than half his time; signed declaration because "fearful of losing my job [and] being retaliated against if I didn't cooperate"]; Violet Mayle Ao, 20 CT 5804-5806 [spent majority of time in the office; declaration statements "are not accurate"]; Nicholas Sternad, 20 CT 5763-5764; 33 CT 9746-9749 [spent most of time inside branches; did not tell Bank attorney spent majority outside].) A fourth employee listed on AB107 is James Hrundas, whom RWG Timothy Grady shadowed when Grady was a newly-hired BBO. Grady testified that while shadowing Hrundas, he spent the majority of his time inside the Bank. (21 RT 694-695.) Based on this pattern, it seems likely that if the other six individuals listed on AB 107 had testified, they too would have stated that the Bank-drafted declarations were inaccurate.

2. Deposition testimony by non-RWG witnesses

Defendant claims it should have been allowed to introduce "deposition testimony from non-RWG witnesses establishing they were properly classified," apparently referring to the depositions of the four former class representatives. (AB 104-105.) As discussed, *supra* at pages 7 and 24-25, their deposition testimony did *not* establish that they were

properly classified. Moreover, as the proponent of the deposition evidence, USB was required to show that the deponents were unavailable to testify at trial. (Evid. Code §1291, subd. (a); *Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal.App.4th 994, 1004-1005.) USB made no such showing.

3. Calling all 239 non-RWGs

Defendant argues the court should have allowed it to "call all 239 of the other absent class members to the stand to confront them as to how they spent their time." (AB 104.) This is the basic due process issue discussed, *supra,* and (OBM at 36-39, 62-64.) As shown, USB had no due process right to try liability and damages for all the non-RWG class members. The trial court reasonably concluded that testimony by each of the 239 non-RWG class members would be cumulative and extraordinarily time-consuming. (See, e.g., 21 RT 750 [Court: "If you multiply this by 260, you can see why the court became enthralled with the trial plan we have."].) USB never made an offer of proof explaining why any specific non-RWGs should be allowed to testify.

4. Evidence about other exemptions

USB contends that it was denied the right to introduce "evidence establishing that BBOs were exempt under other exemptions under California law." (AB 104.) The trial court properly barred such evidence

because it had granted plaintiffs' motion for summary adjudication of the two other exemptions that USB claimed. (19 CT 5452-5453; 20 CT 5843-5844; 18 RT 441.)

5. Managers' testimony about their BBO experiences

USB asserts it should have been allowed to have "managerial witnesses ... testify about their own BBO experience." (AB 104.) On many occasions, managerial witnesses did testify about their own experiences as BBOs. (See, e.g., 44 RT 3194; 52 RT 4348, 4352, 4414, 4417.) Defendant's failure to identify examples of when such testimony was barred constitutes a waiver.

6. Managers' testimony about activities of non-RWGs.

The Bank argues that the trial court refused USB's efforts to "present evidence from managers or others regarding the activities of any non-RWG member." (AB 104.) For the same reason USB did not have a right to call all the non-RWG class members, it did not have the right to present managers' testimony about all those class members. Furthermore, the court found the Bank supervisors who did testify about the activities of the RWGs lacked personal knowledge of where they spent their time. (71 CT 21017; 52 RT 4423.) Thus, the court could reasonably conclude that additional manager testimony would have had little probative value.

IV. THE TRIAL PLAN FOR LIABILITY WAS A PROPER EXERCISE OF DISCRETION AND RESULTED IN A FINDING OF CLASSWIDE LIABILITY SUPPORTED BY SUBSTANTIAL EVIDENCE.

The trial plan adopted by the trial court for the liability phase of trial was a reasonable exercise of judicial discretion. The trial court sought input from the parties, fashioned a workable trial plan, and then validated its procedure based on credible expert testimony. The plan permitted plaintiffs to present representative testimony from the 21 RWGs. It allowed defendant to call an unlimited number of witnesses to rebut plaintiffs' evidence and to present corporate and supervisory witnesses to testify about the nature of the BBO job and the company's expectations. It allowed both parties to present expert testimony about the validity of the statistical showing and whether the representative evidence could be applied to the class as a whole. (OBM 10-13, 46-51.)

USB's criticism of the trial plan and of the classwide liability finding is based on misstating the evidence and disregarding the substantial evidence rule.

A. The *De Novo* Standard of Review Applies Only to the Purely Legal Issue of the Constitutionality of the Trial Plan.

Defendant apparently contends that the existence of a constitutional question renders review of all evidence subject to *de novo* review. (AB 64.)

That argument is contrary to the cases it cites.

In *Hypertouch, Inc. v. Superior Court* (2005) 128 Cal.App.4th 1527, the appellate court applied the abuse of discretion standard to review the trial court's ruling regarding notice to class members but reserved the "independent review" standard for the "purely legal questions" about whether due process mandated that class members be required to opt-in, rather than opt-out. (128 Cal.App.4th at 1536.) Similarly, in *Bell III*, the court applied the abuse of discretion standard throughout most of the opinion, even though it ultimately considered – without mentioning any standard of review – whether statistical sampling violated the defendant's due process rights. (*Id.* at 751-758.) The other cases cited by USB also applied the *de novo* standard narrowly to the constitutional question. (AB 64.)[28]

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[28]Plaintiffs took the same position in the Court of Appeal, writing:

> "The overall standard of review of the trial plan is abuse of discretion.... Factual findings are reviewed under the substantial evidence standard. *For the purely legal issue of whether the trial plan violated due process, the standard of review is de novo. Hypertouch, Inc. v. Superior Court* (2005) 128 Cal.App.4th 1527, 1537." (RB 62, ital. added.)

B. Defendant Ignores the Substantial Evidence That Supports the Classwide Liability Finding and Relies Instead on Evidence the Trial Court Rejected.

The trial court's finding that the class as a whole was misclassified is supported by substantial evidence, which has been described, *supra,* at pages 26-31. (See also OBM 46-51.) USB's contrary argument is based on misstating the testimony of plaintiff's statistical expert, Dr. Richard Drogin, whom the trial court credited, and relying instead on the testimony of the defense experts, whom the court explicitly rejected.

1. The Liability Finding is Supported by Dr. Drogin's Expert Testimony, Which Defendant Misrepresents.

Dr. Drogin testified that the trial plan on liability was statistically valid and that the court acted properly in picking a sample without first selecting the desired margin of error. (71 CT 21018; OBM 20, 47-48.) He stated that the selection of 20 RWG witnesses at random was consistent with statistical sampling methods and produced "unbiased results," and that the randomly-chosen RWGs were representative of the class. (70 RT 5561-5562; 72 RT5676-5677.) Dr. Drogin testified that the single best estimate – the "point estimate"– was that 100% of the class was misclassified. (70 RT 5553, 72 RT 5633-5634.) At a 95% confidence level, this produced a margin of error of 13%. Overall, "a very high percentage of the class is

misclassified," he opined. (72 RT 5633-5634.)

Defendant consistently mischaracterizes Dr. Drogin's testimony. It claims that he "confirm[ed] the trial plan and resulting judgment were statistically invalid" (AB 77) and "agree[d] there was no statistical basis to conclude that '100% of the class was misclassified.'" (AB 80, 95.) Both statements are categorically untrue, as the preceding paragraph demonstrates. USB also omits key language and takes sentences out of context in discussing Dr. Drogin's testimony.

- At AB 80, defendant quotes Dr. Drogin's testimony but omits important sentences. At the first ellipsis, USB leaves out:

> However, what you can say statistically speaking is that with a very high level of confidence, 95 percent, that a very high percentage of the class is misclassified. (72 RT 5633-5634.)

At the end of the quotation, it deletes Dr. Drogin's summary:

> So your estimate is a hundred percent, the point estimate, but your confidence interval – 95 percent confidence interval is 87 to 100 percent. (72 RT 5634.)[29]

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[29] In the OBM, plaintiffs stated that the 13% margin of error on liability to which Dr. Drogin testified was "a figure equivalent to the margin of error in *Bell*." OBM 47. That statement is entirely accurate. The margin of error for straight overtime in *Bell III* was 10-13%. (TE 527, p. 6 ["margin of error in the *Bell* case [was] 10-13%"].) Defendant's attack on that statement as "crude[] distort[ion] and "extremely misleading" (AB 81) is unfounded.

- Dr. Drogin did not say that he "believed the question of liability (exempt status) could only be determined on an individualized inquiry as to each class member ...." (AB 82.) In deposition, he testified that his 2006 trial plan proposal provided a methodology to estimate the aggregate total damages but would not have determined *which* individual class members were properly classified. (72 RT 5650-5651 ["I'm not a lawyer. I'm not the Court. I can't determine which members are properly classified."].) At trial, Dr. Drogin opined that the court properly based its finding of classwide liability on the RWG testimony, which showed, "with a high degree of confidence," that "a very high proportion in the population ... would be misclassified." (72 RT 5634.)

- Dr. Drogin did not "admit" that he had "no idea what was in the court's mind" when the court issued its finding that all class members were misclassified. (AB 80.) In cross-examination, he was asked to speculate about the court's reasoning process and he responded, "I can't read the Court's mind" but, based on the language of the SOD, he inferred that the court considered the results of the testimony of the randomly selected RWGs. (72 RT 5645-5646.)

- Dr. Drogin did not "tr[y] to distance himself from his endorsement of the accurate sampling conducted in *Bell III.*" (AB 79.) He

offered a reasonable explanation for the difference in methodology between this case and *Bell III*: here the parties did not cooperate as they did in *Bell III*. In *Bell III*, "the facts were basically agreed upon by both parties when they came into court and there was a short two-week trial on damages just based on expert testimony." (74 RT 5781.) Dr. Drogin summed up the distinction between the two cases, saying: "So when you do sampling you have to take into account practicalities and manageability. So that's a big difference between the two situations." (*Ibid.*)

- Defendant's quotations from Dr. Drogin's testimony on AB pages 78-79 and its arguments on page 81 about the 43% margin of error both concern damages and are thus irrelevant to the validity of the Phase I trial plan and liability findings. The margin of error on liability was 13%. (72 RT 5633-5634.)

2. Defendant's Attacks on the Trial Plan Are Based on Defense Experts the Trial Court Found "Not Persuasive" and "Not Credible."

USB's criticisms of the trial plan methodology are based on the testimony of its own expert witness, Dr. Andrew Hildreth. The trial court flatly rejected Dr. Hildreth's testimony and that of defendant's other "expert," Joseph Anastasi, finding them "not persuasive" and "not credible." (83 CT 24624.) The opinions they did provide "were irrelevant,

based on faulty assumptions and misstatements of relevant fact and law, and consequently of no appreciable value." (*Ibid.* OBM 48-49.) Defendant's reliance on expert testimony rejected by the trial court violates the substantial evidence rule. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) USB's contentions that Hildreth's testimony was "unrefuted" (AB 82) and that Dr. Drogin "agreed" with Hildreth (AB 80, 84, 95) are untrue.

a. Defendant's Claims of Sampling Errors Is Based on Hildreth's Discredited Testimony.

The Bank's argument that the RWG sample was "tainted by selection bias" in various ways rests entirely on Hildreth's testimony. (AB 85-88.)

Citing Hildreth, defendant contends that class members might have opted out of the class because they did not want to participate as RWG witnesses, leaving only class members who were willing to testify. Dr. Drogin disagreed, testifying that while a sample would not be random if people could "volunteer" to participate, once they opted out, they were out of the target population and were irrelevant for purposes of statistical inferences. (71 RT 5624-5626; 74 RT 5802-5805.) Dr. Drogin testified that the sampling methodology used by the trial court was statistically

appropriate. (74 RT 5806.) [30]

Citing Hildreth, USB asserts there was selection bias when Brian Smith was removed as an RWG and an alternate (also randomly selected) was substituted. (AB 86.) Smith testified that he never held the BBO position. (39 CT 11431-11436.) Even the Bank concedes that Smith never performed the duties of a BBO. (18 RT 432-433 [Bank attorney: "he just didn't perform the same duties as the other BBO's"].) The decision to remove him was proper.[31]

Citing Hildreth, USB claims that RWG Troy Perry is another example of selection bias. (AB 86.) The court ruled that his testimony would be utilized in calculating the overtime average but he personally could not recover because he had previously signed a release. (71 CT 21005-21006.) The Bank argues that the court "ignored" the release (AB

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[30] Defendant claims that "selection bias" was responsible for the fact that the opt-out rate among RWGs was much higher than the rate for other class members. (AB 85-86.) The inference is unwarranted. Four of the original RWGs opted out. All were current USB employees and two were current USB managers (71 CT 20989), who presumably did not want to testify against their employer. The Bank attempted to reinstate the two current managers, Michael Lewis and Sean MacClelland, into the class, claiming they did not know they would be RWGs when they opted out. The court denied the motion after plaintiffs proved all RWGs were immediately notified of their selection, before they opted out. (25 CT 7356-7397; 26 CT 7430-7431; 71 CT 20989.)

[31] Hildreth testified that even if Brian Smith had been a janitor, it would have been improper to remove him from the RWG group. (81 RT

86) but the Statement of Decision disproves that contention. (71 CT 21005-21006.)

The Bank's argument that it was statistically improper to include plaintiffs Duran and Fitzsimmons as RWGs is also based on Hildreth's testimony. (AB 87.) Dr. Drogin and accountant Paul Regan testified that although the two plaintiffs were not randomly selected, the inclusion of their overtime hours in the RWG average calculation actually benefitted defendant. Because plaintiffs worked fewer overtime hours than many RWGs, their inclusion in the calculation of overtime reduced the overall weekly average, which saved defendant $411,000. (70 RT 5562-5563, 75 RT 5887, 5890.) Dr. Drogin testified that inclusion of plaintiffs' data "is more conservative and would favor in a sense the defendants." (70 RT 5563.) The court agreed that "keeping the named Plaintiffs' data points in the sample for extrapolation purposes is statistically sound and a reasonably conservative approach." (83 CT 24627.)

Defendant's final argument relates to the one RWG who did not appear at trial, Borsay Bryant. (AB 87-88.) Bryant's non-appearance constituted a "non-response" that Dr. Drogin took into account by not including any data from Bryant. (73 RT 5757-5758.) Dr. Drogin rejected

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6349-6350.) It is little wonder that the court found Hildreth's testimony "not persuasive" and "not credible."

Hildreth's speculative assertion that Bryant's failure to appear meant that some proportion of the class, if called to testify, would also not show up. (73 RT 5759-5960.) [32]

b. Defendant's Claim That the RWG Sample Size Was Too Small Is Also Based on the Rejected Testimony of Its Experts.

Defendant's argument that the sample size was too small also depends on the opinions of its discredited experts, Hildreth and Anastasi. In criticizing the statistical evidence, USB cites to their testimony and their reports. (AB 88-89.)

When the Bank does refer to Dr. Drogin's testimony, it misrepresents what he said. Dr. Drogin did *not* agree that a sample size must generally be 30 or greater to provide a viable estimate for the underlying population, nor did his textbook so state. (74 RT 5767-5769.) He testified that samples of less than 30 might be considered "not large samples" but that "details of what effect that might have on any analysis depend on the particular situation." (74 RT 5769.) Dr. Drogin's August 2008 declaration, which is in evidence, stated:

> Since these rulings [in SOD I] are based on a random sample, they can be reliably projected to the whole class, and used to estimate the

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[32] At any rate, the question of how many BBOs would show up to testify, if all were called, was not relevant to the issue before the trial court, which was what percentage of the class was misclassified.

> average hours of unpaid overtime per week worked by class members. This is a standard statistical procedure, based upon the theory of random sampling. (TE 527; 61 CT 18049.)

3. Defendant Attempts to Discredit the Testimony of RWG Penza, Which the Court Believed.

RWG Chad Penza's testimony provides strong support for the court's key liability findings. Penza testified that, after two weeks of employment, he realized that "cold-calling" potential new customers from inside the Bank was the most efficient way to bring in new business. Using that method, he became the top-producing BBO in the country for the next four years. USB was so pleased with his success that it installed a lock on his office door to keep him from being disturbed and had him give speeches to other BBOs about his successful "inside" methods. (OBM 50-51.)

The trial court found Penza's testimony was illustrative of the fact that it would be "unrealistic for BBOs to spend more than half of their work time outside of bank locations" because their tasks could be performed more efficiently inside and that "BBOs are in fact actively encouraged, trained, and rewarded for spending more than half of their work time *inside* bank locations." (71 CT 21015-21016; OBM 50-51, ital. by the court.)

Defendant argues that Penza's testimony was not credible because it was inconsistent with two declarations, drafted by USB attorneys, that he

had signed years earlier. Penza testified that the declarations were inaccurate and that he signed them under fear or pressure. (22 RT 878-880, 886.) The trial court stated it considered the declarations but found Penza's trial testimony "credible and persuasive." (71 CT 20998, 21005, 21016.)

V. DEFENDANT WAIVED OBJECTION TO THE DAMAGES PROCEDURE BY REFUSING ALTERNATIVE PROCEDURES OFFERED BY THE COURT.

USB waived its objections to the trial plan for damages because the trial court offered the parties many alternative procedures to calculate damages, which would have avoided a large margin of error, but defendant turned down them all down. (OBM 53-59.) Defendant's contrary arguments lack merit.

First, it quibbles about the hearing, held September 30, 2008, at which the court discussed the alternative procedures. Defendant says the hearing was principally about its second decertification motion and that the offer of alternative procedures was an "afterthought." (AB 109.) The transcript of the hearing shows that the decertification motion was quickly disposed of and most of the hearing concerned the alternative procedures. (69 RT 5489-5500.) The Statement of Decision for Phase II also describes the discussion of alternative procedures. (83 CT 24630.)

Second, USB argues there was no waiver because it made a counter-

proposal which the trial court rejected – namely, mini-trials on liability and damages for all class members. (AB 110-111.) The trial court properly rejected defendant's counter-proposal, which would have involved relitigating liability *de novo* for all class members.

The Bank also contends that plaintiffs' waiver argument would require litigants to agree with one another in disputed proceedings. (AB 111.) To the contrary, the waiver argument is based on the long-established principle that a party cannot complain about allegedly invalid procedures if it has been offered, and rejected, alternative procedures that would have cured the problem. That is what happened here. Waiver applies even to constitutional rights. (OBM 57.)

Finally, defendant argues that if USB had 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." (AB111.) The court reassured USB that "the record is quite adequate ... for the bank to seek appellate review of [the court's] findings." (69 RT 5490.) Moreover, defendant could have made clear its general objection to any statistical sampling procedure while agreeing to a damage-calculation alternative. (OBM 59.)

VI. THE UCL DOES NOT REQUIRE THAT RESTITUTION BE PROVED MORE PRECISELY THAN BACKPAY UNDER THE LABOR CODE.[33]

Because plaintiffs dismissed their Labor Code claims and proceeded under the Unfair Competition Law, Business and Professions Code § 17200 *et seq.*, the trial court awarded plaintiffs and the class members overtime pay in the form of restitution. (83 CT 24645 [judgment for "overtime restitution owed to the plaintiff class"].) Contrary to defendant's contention, restitution under the UCL does not require stricter, more individualized proof than backpay damages under the Labor Code. This Court's decisions suggest the UCL standard of proof is more flexible because the UCL does not require all class members to demonstrate they were injured by the defendant's unlawful practices. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298. OBM 44-45.)

A. If Anything, UCL Standards for Restitution Are Less Stringent Than Damage Standards Under the Labor Code.

Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal.4th 163 held that unpaid overtime compensation can be awarded as restitution under the UCL. In *Cortez*, this Court observed that Business and Professions Code section 17203 authorizes trial courts to issue "orders or

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[33] Although the Court did not grant review on this issue, defendant spent 15 pages of its Answer Brief on the topic so plaintiffs address it at

judgments ... *as may be necessary* to restore to any person in interest any money or property, real or personal, which *may have been acquired*" by unfair competition. (*Id.* at 176, ital. added.) The employer has "acquired" the money by means of unfair competition, and the employee is, "quite obviously, a 'person in interest' (§ 17203 Bus. & Prof.) to whom that money may be restored." (*Id.* at 177.)

Even before *Cortez*, the Court had interpreted the UCL to provide that a trial court could award restitution to absent class members without individualized proof of injury. In *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, the plaintiff brought a class action against a bank, challenging its practice of computing interest as an unfair trade practice under Business and Professions Code section 17535. The plaintiff sought restitution under the UCL or contract damages. While *Fletcher* was pending, this Court ruled in another case that the particular interest practice was unlawful but that a borrower who took the loan with knowledge of the practice was not misled and could not recover damages. The defendant in *Fletcher* then moved to dismiss the class allegations, arguing that each borrower's knowledge had to be determined separately, which would make the 50,000-member class action unmanageable.

This Court agreed with the defendant concerning the contract claim

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some length.

but held that the class allegations on the UCL claim should not be dismissed because the "broad and sweeping language" of Business and Professions Code section 17535 authorizes restitution not only of money which *has been* acquired by means of an unlawful practice but also money which "*may have been* acquired" through an unlawful practice. (23 Cal.3d at 450, 451, ital. by the Court.) This statutory language was "unquestionably broad enough" to permit a trial court to order restitution "without requiring the often impossible showing of the individual's lack of knowledge of the fraudulent practice in each transaction." (*Ibid.*) Requiring all class members to provide individual proof that they lacked knowledge of the illegal practice would, as a practical matter, insulate the defendant from liability for its wrongful conduct, the Court declared. (*Id.* at 452.)

Although *Fletcher* analyzed section 17535, the Court has applied the same reasoning to Business and Professions Code section 17203, the statute involved in *Cortez* and this case. Section 17203 is "nearly identical" to section 17535 in language and deterrent purpose. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267; *Committee on Children's Television v. General Foods Corp.* (1983) 35 Cal.3d 197, 211.)

Most recently, in *In re Tobacco II Cases, supra*, 46 Cal.4th 298, this

Court considered whether Proposition 64, enacted in 2004, changed the law that class members in a UCL case do not have to present individualized proof of injury to get restitution. The Court held such proof had to be shown by the plaintiff but not by absent class members, who were still covered by section 17203, which authorizes the trial court "to restore . . . any money or property, . . . which *may have been acquired*" by means of the unfair practice. (46 Cal.4th at 320) The less stringent language of section 17203 "has led courts repeatedly and consistently to hold that *relief under the UCL is available without individualized proof of* deception, reliance and *injury.*" (*Ibid.,* emphasis added.)

These cases demonstrate that class members in a UCL action do *not* necessarily need to make an individualized showing of injury in order to obtain restitution. They do *not* need to show that they "lost money or property as a result of the unfair competition." (Bus. & Prof. Code § 17204.) They are entitled to restitution so long as the trial court finds that the money to be restored "may have been acquired" by the defendant's unlawful practice. (See *People ex rel. Lockyer v. Fremont Life Insurance Co.* (2002) 104 Cal.App.4th 508, 530-533, rev. den. (2003) [order providing restitution to non-injured consumers upheld although it might constitute "windfall"].)

B. Defendant's UCL Arguments Lack Merit.

Defendant's UCL argument largely depends on a premise it never establishes. It asserts, "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." (AB 114.) USB never cites *any* authority for this proposition because there is none. Accordingly, its main argument, advanced in an attempt to distinguish the UCL cases discussed above, collapses.[34]

Defendant also contends that, because UCL restitution must be "quantifiable" and "measurable," estimates of any kind are impermissible and plaintiffs failed to meet their burden to prove the exact amount owed to each class member. (AB 124-128.) Indeed, defendant argues that even the RWGs failed to meet UCL standards of proof because "[n]o RWG member could quantify the actual amount of overtime hours they worked." (AB 127.) According to USB, an employee's necessarily imprecise estimates of the number of hours he or she worked would *never* be accurate enough to satisfy the UCL.

Defendant cites no authority for this draconian principle, which is

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[34] Defendant's reliance on *Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201 is misplaced. It confirmed that many cases had found class certification appropriate in UCL cases "based on an

wholly at odds with general damage principles and with the well-established lenient standard for calculating backpay where, as here, the employer has failed to maintain adequate time records. In such circumstances, employees may prove their losses "as a matter of just and reasonable inference." (OBM 59-62; *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687-688.)[35]

The UCL decisions cited by USB are all distinguishable.

Cortez v. Purolator Air Filtration Products holds that unpaid overtime wages *are* appropriately awarded as UCL restitution. Nothing in *Cortez*, including the passing use of the word "quantifiable" (*id.* at 178), suggests that this principle applies only when the unpaid overtime can be calculated to the penny. The "may have been acquired" terminology in Business and Professions Code section 17203 indicates a flexible standard.

Colgan v. Leatherman Tool Group, Inc. (2006) 135 Cal.App.4th 663 is also inapposite. There the defendant fraudulently advertised its products as "Made in the U.S.A." However, the record contained *no evidence* concerning the appropriate amount of restitution. Given the complete

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inference of common reliance" but that such a rule would not apply "where the record will not permit it." (*Id.* at 226, 228.)

[35] In *Bell III*, the Court of Appeal stated that one of the reasons that class actions are necessary in wage and hour cases is that "[e]mployees will seldom have detailed personal records of hours worked" and an individual

absence of evidence, the appellate court held the trial court erred in ordering $13 million in restitution. While a trial court has "very broad" discretion" to order restitution (*id.* at 695), there must be *some* evidentiary showing. (*Id.* at 700.)[36]

In *Pfizer Inc. v. Superior Court* (2010) 182 Cal.App.4th 622, a consumer alleged Pfizer placed a false and misleading label on its mouthwash products. The Court of Appeal ordered decertification, holding that the class (defined as all persons who purchased the mouthwash in California during a designated period) was "grossly overbroad" because the *undisputed evidence* showed that many, if not most, of the class members were never exposed to the alleged misrepresentation.

In *In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116, a putative class of consumers claimed they were misled into purchasing an ineffective prescription pain relief drug. The appellate court affirmed denial of certification, reasoning that physicians prescribe – and patients choose –

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case would rest on "the credibility of vague recollections." (115 Cal.App.4th at 745.)

[36] *Johnson v. GMRI* (E.D. Cal. 2007) 2007 WL 2009808 is also distinguishable. There two food servers sued the restaurant where they worked, claiming they were entitled to restitution because the restaurant was illegally making them pay for cash shortages. When the two plaintiffs admitted that their cash shortage claims were "not quantifiable," the district court granted the defendant's motion to strike the restitution claim. Plaintiffs here made no such admission.

medicines for individualized reasons. In *In re High-Tech Employee Antitrust Litigation* (N.D.Cal. 2012) 856 F.Supp.2d 1103, all restitution was denied because the only compensation sought by the class was an "attenuated expectancy" for speculative lost wages.

In sum, USB's UCL argument rests on a false premise and distinguishable cases. Rather than setting a very high bar for the award of restitution, the UCL sets a flexible and discretionary standard rooted in the public policy of deterring unlawful practices by requiring restitution of the money or property that "may have been acquired" thereby. The UCL standard is similar to that in *Anderson v. Mt. Clemens Pottery Co.,* which allows proof of backpay by representative evidence "as a matter of just and reasonable inference" where an employer has failed to keep records. (OBM 5.) In both situations, the law acts based on equitable principles and refuses to allow a wrongdoer to profit by its misconduct. USB's attempts to do so here must be rejected.

VII. IF THERE IS A REMAND, IT SHOULD BE TO THE TRIAL COURT FIRST.

We believe that this Court should decide that the classwide liability finding was proper, and that defendant waived any complaint about damages by refusing to consider any of the alternative procedures to calculate damages that were offered by the trial court and would have cured

the excessive margin of error. In that case, there should be no need to remand this case to the trial court and it can be sent back to the Court of Appeal to decide several issues that were briefed but not previously decided by the appellate court.

However, if this Court concludes that there must be a partial retrial on damages, the Court should remand the case first to the trial court so that any later appeal to the Court of Appeal will rest on a solid basis of factual findings reflecting the legal standards enunciated in this Court's decision. Moreover, the partial new trial might produce new or different legal issues to be resolved by the Court of Appeal. There is precedent in favor of the trial court acting first. (See, *Richards v. CH2M Hill* (2001) 26 Cal.4th 798, 824-825 [remanding case to trial court to apply new standard for determining a continuing violation, although other appellate issues remained to be decided by the Court of Appeal].)

CONCLUSION

The trial court summarized the important issues at stake in this case:

> The essence of [USB's] argument is that in a 17200 claim in a wage and hour case, at least one pertaining to the outside sales exemption, you can never certify a class. Or even if you could certify a class, you would have to take individual testimony as to each and every member. I don't think that is what the law mandates. (69 RT 5495.)

If this case could not be certified as a class action or if individual mini-trials on both liability and damages were required for each of the 260 class members, the case would take years to try, which would impose an unworkable burden on the judicial system and the parties. The trial court recognized this stark reality when it certified the class and employed representative and statistical evidence as part of the evidence in the case. This Court should hold that the trial court acted within its discretion, especially given USB's lack of cooperation, and that due process does not entitle a defendant to insist on litigation procedures that place unreasonable barriers in the path of employees seeking to vindicate their unwaivable rights.

Date: February 26, 2013

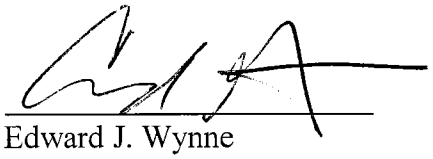
Respectfully submitted,

Law Offices of Ellen Lake
Wynne Law Firm

By: _____
Ellen Lake
Counsel For Plaintiffs and
Respondents

CERTIFICATE OF WORD COUNT

I certify that this Reply Brief on the Merits contains 19,616 words as counted by Microsoft Word, the word-processing program used to prepare it.



Edward J. Wynne

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF MARIN.

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 100 Drakes Landing Road, Suite 275, Greenbrae, CA 94904. On February 26, 2013, I served upon the interested parties in this action the following document described as:

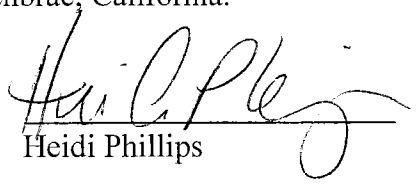
REPLY BRIEF ON THE MERITS

By placing a true and correct copy thereof enclosed in sealed envelopes addressed as stated on the attached service list for processing by the indicated method:

☑ **BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Greenbrae, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on February 26, 2013, at Greenbrae, California.



Heidi Phillips

SERVICE LIST

Timothy Freudenberger Alison Tsao Kent Sprinkle Carothers, DiSante & Freudenberger 601 Montgomery Street, Suite 350 San Francisco, CA 94111	Counsel for Defendants and Appellant, U.S. Bank National Association
Clerk, Alameda County Superior Court Rene C. Davidson Courthouse 1225 Fallon Street Oakland, CA 94612	Superior Court of California, County of Alameda
Clerk, California Court of Appeal First Appellate District, Division One 350 McAllister Street San Francisco, CA 94102	California Court of Appeal
Office of the Attorney General 455 Golden Gate, Suite 11000 San Francisco, CA 94102	Attorney General