No. S200923

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SAM DURAN

Plaintiffs and Respondents,

v.

U.S. BANK NATIONAL ASSOCIATION,

Defendant and Appellant.

Review of a decision of the First Appellate District, Division One, Case Nos. A125557 and A126827)

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF OF AMICI CURIAE CALIFORNIA BUSINESS ROUNDTABLE, CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, AND CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF U.S. BANK

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Pursuant to rule 8.520(f) of the California Rules of Court, California Business Roundtable, Civil Justice Association of California, and California Bankers Association request permission to file the accompanying amici curiae brief in support of Appellant U.S. Bank National Association.[1]

The issues on this appeal — the certification of class actions in wage and hour misclassification litigation and the use of representative testimony and statistical evidence at trial of such a class action — are of significant interest to these amici and their members, who are often sued in similar class actions.

Amici believe they are particularly well-situated to address the negative consequences to California's business and economy that would follow from a decision by this Court endorsing the trial court's flawed and unconstitutional trial plan that, more than anything, elevated form over substance (which is why the Court of Appeal reversed).

The ***California Business Roundtable*** (CBR) is a nonpartisan organization comprised of the senior executive leadership of the major employers throughout the state — with a combined workforce of over half a million Californians. The Roundtable identifies issues critical to a healthy business climate and provides the leadership needed to strengthen California's economy.

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[1] All rule references are to the California Rules of Court.

The ***Civil Justice Association of California*** (CJAC) is a 35-year old non-profit organization. CJAC's principal purpose is to educate the public and government about ways to make more fair, economic and certain laws for determining who pays, how much, and to whom when conduct by some is claimed to occasion harm to or invade the protected interests of others. Toward this end, CJAC often petitions the judiciary for legal clarification on the scope and application of such laws.

The ***California Bankers Association*** (CBA), founded in 1891, now represents more than 300 members in the state, including commercial banks, industrial loan companies and savings institutions serving as an incubator for new business ventures. California's banking industry provides jobs to more than 100,000 Californians and financial security and opportunities to millions more. CBA member banks hold more than $4.4 trillion in assets and loans in excess of $2.5 trillion. Their interests range from agribusiness to consumer lending, from small business to international economic development. CBA's mission is to provide its members with unparalleled resources to help them prosper in California's dynamic marketplace by staying ahead of new banking.

No party or counsel for a party has authored the following proposed amici brief in whole or in part. No party, counsel for a party, person, or entity has made a monetary contribution to fund the preparation or submission of the brief other than the amici curiae, its members, and its counsel in the pending appeal. (Cal. Rules of Court, rule 8.520(f)(4).)

For these reasons, CBR, CJAC and CBA respectfully request leave to file the accompanying Brief of Amici Curiae.

Dated: April 2, 2013

LAW OFFICES OF FRED J. HIESTAND
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- and –

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I.
INTRODUCTION

The answers to the two principal issues on this appeal — (1) whether class action defendants have a due process right to defend themselves against the claims of individual class members and, if so, (2) whether that right can be abridged by allowing plaintiffs to rely on representative testimony and statistical evidence as a substitute for common proof of classwide liability — will determine whether procedural efficiency trumps the substantive rights of California's class action defendants.

In this wage and hour class action employment case that resulted in a $15 million judgment, the Court of Appeal held that one-third of the absent class members were properly classified by U.S. Bank (USB) as exempt from eligibility for overtime and, hence, have no claim. For that reason, the Court of Appeal reversed the trial court's order, recognizing that the class action device cannot best substantive law or confer on uninjured persons a right to recover where none otherwise exists. This Court should affirm the Court of Appeal.

The vice of the trial court's "plan" is that it prevented U.S. Bank from litigating its individual defenses as to each class member, and relied on sampling and extrapolations to the stars to determine classwide liability. Amici, on behalf of the significant portion of businesses, professional associations and local government groups in California, explain in this brief why the trial court was wrong and the Court of Appeal's judgment of reversal should be affirmed.

II.
LEGAL ARGUMENT

A. Class action defendants have a due process right to defend against individual class members' claims.

The Court of Appeal held that "at least one-third of the class was properly classified" by U.S. Bank as exempt from overtime payments. (Slip opn. 55.) It follows ineluctably that those class members have no claim, and that USB has a due process right to assert its affirmative defense — that individual class members were correctly classified.

Plaintiffs disagree. They contend that a class action defendant has no due process right "to litigate its affirmative defense[s] individually against all class members" (OBM 39)[2], and (without any authority) that the Court of Appeal's contrary premise, grounded in due process, is "flatly inconsistent with California authority." (OBM 39-42.) According to plaintiffs, due process must take a back seat because a rule affording that right to class action defendants would "greatly reduce the value and efficacy of class actions." (OBM 39-40.) Who cares about a class action defendant's rights? Certainly not plaintiffs, who explain that if defendants in wage and hour class actions figure out they have a due process right to defend themselves, that "would also threaten class litigation in many other fields, including consumer, product liability, and construction defect cases." (OBM 40.)

There is no class action exception to due process. A defendant in any case has a due process right to assert its defenses. As the United States Supreme Court put it, "a class cannot be certified on the premise that [the

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[2] Our references to "OBM" are to Plaintiffs' Opening Brief on the Merits, and our references to "ABM" are to the Bank's Answer Brief on the Merits.

defendant] will not be entitled to litigate its ... defenses to individual claims." (*Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541, 2561.)[3]

1. This Court has already made it clear that a class action defendant's rights cannot be sacrificed simply to enable a case to proceed as a class action.

This Court addressed this issue in *Granberry v. Islay Investments, Inc.* (1995) 9 Cal.4th 738, when it had to decide whether a class action could abridge a defendant's affirmative defense of "setoff." The plaintiffs' class in *Granberry* was comprised of former tenants suing the owner of 1,500 residential rental units for the owner's alleged failure to fully refund security deposits within three weeks after the tenants moved out (or to furnish a written accounting of amounts withheld) as required by Civil Code section 1950.5. (*Granberry*, *supra*, 9 Cal.4th at p. 742.) For its part,

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[3] A leading scholar had this to say about the meaning of the *Wal-Mart* opinion:

> In moving away from the long held practice of evaluating common questions to address commonality, the Court fashioned procedural rules indexed upon evaluating common answers. This contraction is neither an abrogation of rights nor an attempt to impose hurdles on the path toward justice. Rather, the Supreme Court acted as referee to correct asymmetric influences in class actions. The elegance of statistical modeling may have generated a false sense of precision, while in the process losing the substantive concept of due process. For too long, class certifications mushroomed under the simplified methodology, failing to realize that interpreting statistics to generate a desired outcome is neither legally permissible nor ethically desired. (Ghoshray, *Hijacked by Statistics, Rescued by Wal-Mart v. Dukes: Probing Commonality and Due Process Concerns in Modern Class Action Litigation* (2013) 44 LOY. U. CHI. L.J. 467, 509.)

the owner had setoff claims against a significant number of individual tenants for unpaid rent, repairs, or cleaning, all of which could have been asserted had those tenants sued individually. (*Id.* at p. 743.)

After holding that a landlord's common law setoff right was not forfeited by its failure to comply with the security deposit statute (*Granberry*, *supra*, 9 Cal.4th at pp. 747-748), this Court went on to reject the tenants' claim that allowing a setoff "would be inappropriate" because of "numerous practical difficulties" in entertaining individual defenses. (*Id.* at p. 749.) As this Court explained, it "is inappropriate to deprive defendants of their substantive rights merely because those rights are inconvenient in light of the litigation posture plaintiffs have chosen." (*Ibid.*) *Granberry* reversed, finding that the lower courts' decisions had impermissibly failed to allow not only the owner's setoff defense, but also its other affirmative defenses, "including laches, unclean hands, and estoppel." (*Id.* at p. 750.)

In addition to *Granberry* (which is directly on point vis-à-vis affirmative defenses), this Court routinely refuses to allow the class action device to override other substantive rights. This case should not be the first to stray from that correct and unbroken line.

In *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, this Court rejected an order certifying a class of residential property owners who wanted the City to reimburse them for the diminution in value of their property following the construction of a municipal airport. (*Id.* at pp. 452-453.) The class action plaintiffs wanted to deprive San Jose of its right to rely on the "fundamental maxim that each parcel of land is unique." (*Id.* at p. 461.) This Court rejected that approach, refusing "to alter this rule of substantive law to make class actions more available. Class actions are

provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends — to sacrifice the goal for the going." (*Id.* at pp. 462, 458.)

Similarly, in *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, plaintiffs sought class action damages for deceit by asking this Court to relax the element of "reliance" — an inherently individual determination. This Court again refused to exalt form over substance, explaining "there is little force in plaintiffs' argument that we should reshape the law of deceit simply in order to remove an unnecessary pleading barrier to the effective utilization of class action procedures." (*Id.* at p. 1103.)

Further, in *Washington Mutual Bank, F.A. v. Superior Court* (2001) 24 Cal.4th 906, this Court held that "an otherwise enforceable choice-of-law agreement may not be disregarded merely because it may hinder the prosecution of a multi-state or nationwide class action or result in the exclusion of nonresident consumers from a California-based class action." (*Id.* at p. 918.)

2. Plaintiffs' affection for class actions cannot trump this Court's jurisprudence or defendants' rights.

Not so fast, say plaintiffs, the whole point of class actions is that "not every class member will testify," and the "value" and "efficacy of class actions" permit common issues to be "decided based on representative evidence." (OBM 39-40.) But not even plaintiffs deny that if the absent class members who had been *properly* classified as Business Banking Officers (BBOs) had sued individually, all would lose.

Class actions are not an excuse to turn individual losers into collective winners. In fact, the notion advanced by plaintiffs is antithetical to class actions — if relief "is foreclosed to claimants as individuals, it

remains unavailable to them even if they congregate into a class." (*Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1018; and see *Frieman v. San Rafael Rock Quarry, Inc.* (2004) 116 Cal.App.4th 29, 38 [declining to order "certification of a class for the sole reason that the proposed class members desire a remedy that they would not be entitled to as individuals"].)

It is no answer to contend, as do plaintiffs, that individual liability defenses can wait until "the remedial phase of trial." (OBM 39.) By then, liability will have been determined and an aggregate judgment will have been entered. At that point, the pressure on USB to settle will be enormous because the judgment of liability will have been inflated by leveraging the claims of "fictional" class members whose actual, real-life counterparts have no legal right to recover.

In the trial court, USB offered declarations and deposition testimony confirming that time spent working outside the Bank varied drastically among class members and that a significant portion of the class was in fact properly classified as exempt. (ABM 19-26, 43-44.) As a result, individual inquiries are necessary to determine whether USB is liable to any particular class member. Given the individual issues raised by USB's exemption defense, the Court of Appeal properly rejected the use of sampling and representative testimony as a shortcut to proving classwide liability.

Furthermore, in the trial below, plaintiffs assembled their liability case by multiplication — each of the 21 testifying class members effectively carried the weight of twelve absent class members.[4] Having

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[4] There were 21 so-called sampled BBOs, in a class of approximately 260 persons, so that each sampled class member whose

(Footnote continued on following page.)

been forced to defend itself in the liability phase of trial in which plaintiffs enjoyed a 12-to-1 multiplier, USB would be forced in Phase II to prove individual instances of exemption by old-fashioned "subtraction" — one BBO at a time.[5] That is hardly due process; it is a stacked deck.

Finally, this is not a new issue. As this Court said in *City of San Jose*, *supra*, 12 Cal.3d at p. 463, individual issues that may arise concerning the *amount of damages* are not necessarily fatal to class certification, but that circumstance is reserved for the exceptional case in which plaintiff has already "established the basic issue of liability to the class." Only in an "extraordinary situation would a class action be justified where, subsequent to the class judgment, the members would be required to individually prove not only damages but also liability." (*Ibid.*)

The Court of Appeal properly held that USB had a constitutional right to assert its defenses against individual members of the class. That is the right decision. This Court should affirm.

B. Statistical sampling cannot substitute for common proof of classwide liability where liability turns on inherently individual adjudications.

Plaintiffs contend the trial court's Trial Plan, which allowed for statistical sampling from 21 sampled BBOs and extrapolation from those results to the larger population of 260, was perfectly proper. (OBM 46-51.)

(Footnote continued from previous page.)

testimony was extrapolated into the larger population, had a leverage factor of more than 12-to-1.

[5] Even then, the trial court prohibited USB from offering real evidence that deviated from the court's preferred statistical model. In Phase II, it "prohibited USB from presenting evidence showing that some class members had been classified in nonexempt positions during their tenure with USB." (Slip opn. 35.)

They insist there is widespread acceptance of statistical sampling and representative evidence to prove classwide liability. They are wrong.

As this Court held, the outside sales exemption turns, "first and foremost," on "how the employee actually spends his or her time." (*Ramirez v. Yosemite Water* (1999) 20 Cal.4th 785, 802.) Statistical evidence cannot answer "how the employee actually spends his or her time." As the Court of Appeal noted, "the only way to determine with certainty if an individual BBO spent more time inside or outside the office would be to question him or her individually." (Slip opn. 58.)

The question of liability to which *Ramirez* demands an answer — how the employee *actually* spends his or her time — is an inherently individual determination varying from employee to employee that cannot be answered by statistics. At most, statistics might tell us how an *average* BBO spends his or her time, or tell us the odds that a randomly-selected class member might spend his or her time; but it cannot tell us how an individual employee "actually" spends his or her time.

To illustrate the point, imagine that instead of an employment case this had been a car accident case where the question was fault. Imagine further that instead of hearing testimony from both drivers, third-party witnesses, and examining the physical evidence, the trial court had excluded all of that and considered only accident statistics compiled by the National Transportation Safety Board, then determined fault by extrapolating to this incident from other accidents of a similar nature. The resulting judgment would be reversed in a heartbeat; it would be exactly the opposite of how fact-finding is supposed to work in a fair trial.

In *Wal-Mart, supra*, 131 S.Ct. at p. 2551, the Supreme Court put it this way: "What matters ... is not the raising of common 'questions' —

even in droves — but rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." There, common answers were lacking because Wal-Mart was entitled to show that it took action against employees for reasons other than discrimination. In rejecting statistical sampling, the United States Supreme Court could have been writing about this case when it explained:

> The Court of Appeals believed that it was possible to replace such proceedings[6] with Trial by Formula. A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery — without further individualized proceedings. . . . We disapprove that novel project.... [A] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims. (*Wal-Mart, supra*, 131 S.Ct. at pp. 2560-2561.)

Where liability in an employment class action turns on the determination of facts specific to each individual class member, all courts — California and federal — reject the use of statistical inferences.

Thus, in *Dailey v. Sears, Roebuck and Co.* (Mar. 20, 2013, No. D061055) __ Cal.App.4th __, 2013 Cal. App. LEXIS 219, the Court of Appeal affirmed the trial court's order denying class certification in an employment class action where the central question of liability turned on

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[6] "Such proceedings" refers to the prior paragraph of the opinion where the Court noted that the defendant would "have the right to raise any individual affirmative defenses that it may have, and to 'demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.'" (*Wal-Mart, supra*, 131 S. Ct. at p. 2561, citation omitted.)

whether "Automotive Managers" and "Assistant Managers" were properly classified as exempt. Plaintiffs engaged the services of the same statistician as in this case, Dr. Richard Drogin, who devised a sampling methodology to determine the putative class members' work duties and the hours they worked for purposes of proving liability and, thereafter, to prove damages. (*Id.*, *12-13, *51.) The Fourth District noted that while "[t]he latter use generally has found wide acceptance" (*id.*, *51), using "random sampling to prove liability is more controversial." (*Ibid.*) After surveying the cases, the Fourth District concluded that statistical sampling cannot supply evidence of "predominance of common issues" that is otherwise lacking:

> We have found no case, and Dailey has cited none, where a court has deemed a mere proposal for statistical sampling to be an adequate evidentiary *substitute* for demonstrating the requisite commonality, or suggested that statistical sampling may be used to manufacture predominate common issues where the factual record indicates none exist. If the commonality requirement could be satisfied merely on the basis of a sampling methodology proposal such as the one before us, it is hard to imagine that any proposed class action would *not* be certified. (*Id.*, *53.)

In *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, the Court of Appeal upheld an order decertifying a subclass of account managers in a wage and hour class action in which, like this case, liability turned on whether the employer had misclassified employees under the "outside salesperson" exemption. The employer presented evidence that performance of the managers' primary functions varied significantly, depending upon territory, number of customers and job orders, support from customer service representatives, and the personal approach of each manager. (*Id.* at pp. 1454-1455.) The trial court granted the motion to decertify and the appellate court affirmed. (*Id.* at p. 1456.)

In *Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422, a class action involving the "executive" exemption, the evidence (declarations and depositions) showed "the work performed by the [general managers] varied significantly from store to store and week to week," requiring individualized inquiries of each class member to establish liability. (*Id.* at pp. 1429-1430, 1431-1434.) The court concluded that "findings as to one grocery manager could not reasonably be extrapolated to others given the variation in their work." (*Id.* at p. 1432; accord, *Mora v. Big Lot Stores, Inc.* (2011) 194 Cal.App.4th 496, 501, 509-510 [rejecting argument that trial court erred in failing to consider survey methodology proposed by plaintiffs' expert to measure the amount of time employees spent on exempt versus nonexempt tasks, in light of that court's reasonable conclusion that common questions of fact or law did not predominate over individual ones].)

Turning to federal cases, the Ninth Circuit in *Vinole v. Countrywide Home Loans, Inc.* (9th Cir. 2009) 571 F.3d 935, 946-947, rejected statistical sampling and representative testimony where "[p]laintiffs' claims will require inquiries into how much time each individual [employee] spent in or out of the office." And in *In re Wells Fargo Home Mortgage Overtime Pay Litigation* (N.D. Cal. 2010) 268 F.R.D 604, 608, the district court rejected random sampling and statistical extrapolations in a case arising from facts very much like this case:

> Assume that the court permitted proof through random sampling of class members, and that the data, in fact, indicated that one out of every ten HMCs [class members] is exempt. ***How would the finder of fact accurately separate the one exempt HMC from the nine nonexempt HMCs without resorting to individual mini-trials?*** Plaintiff has not identified a single case in which a court certified an overbroad class that included both injured and uninjured

> parties.... In fact, the court has been unable to locate any case in which a court permitted a plaintiff to establish the non-exempt status of class members...through statistical evidence or representative testimony.

(*In re Wells Fargo, supra,* 268 F.R.D. at p. 612, emphasis added; see also *Wong v. AT&T Mobility Services LLC* (C.D. Cal. Oct. 29, 2011, No. CV 10-8869-GW (FMOx)) 2011 U.S. Dist. LEXIS 125988, *20-21, fn. 14, *29-31, fn. 18 (*Wong*) [rejecting class certification based on statistical sampling because "outcome-determinative" issues required individual proof of what an individual actually did];[7] *Jimenez v. Domino's Pizza, Inc.* (C.D. Cal. 2006) 238 F.R.D. 241, 253 ["Representative testimony will not avoid the problem that the inquiry needs to be individualized"].)

The sky will not fall if this Court affirms. There are other ways to prove the predominance of common issues. As the Ninth Circuit observed in *Vinole, supra,* 571 F.3d at p. 946, an employer's uniform application of an exemption to employees is one such factor, and so is whether the employer exercised some level of centralized control in the form of standardized hierarchy, standardized corporate policies and procedures governing employees, uniform training programs, and other factors susceptible to common proof.

The rule that statistical sampling cannot be used where liability turns on the determination of facts specific to each individual class member is not

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[7] *Wong* held: "A principal reason for rejecting 'statistical sampling' for at least some purposes is that it forces an employer to attempt to defend against what an employee *probably* did (as 'revealed' by statistics) as opposed to being able to address or confront what he or she *actually* did, which is what it would be allowed to do were the case brought individually as opposed to as part of a class action. Cf. *Wal-Mart*, 131 S. Ct. at 2561." (*Wong, supra*, 2011 U.S. Dist. LEXIS 125988, *29-31, fn. 18.)

confined to employment cases. *Thorn v. Jefferson-Pilot Life Ins. Co.* (4th Cir. 2006) 445 F.3d 311, for example, was a racial discrimination class action brought by African-American policyholders challenging defendant's practice since 1973 of charging them higher premiums than it charged whites for similar policies. The Fourth Circuit affirmed the district court's denial of class certification because proof of an affirmative defense — "delayed discovery" for statute of limitations purposes —was "not readily susceptible to class-wide determination." "Examination of whether a particular plaintiff possessed sufficient information such that he knew or should have known about his cause of action will generally require individual examination of testimony from each particular plaintiff to determine what he knew and when he knew it." (*Thorn, supra*, 445 F.3d at p. 320; *Broussard v. Meineke Disc. Muffler Shops, Inc.* (4th Cir. 1998) 155 F.3d 331, 342.) The Third and Fifth Circuits concur.[8]

Likewise, courts in consumer class actions reject statistical sampling to prove an element of plaintiffs' case where the result is inherently fact-specific to each individual consumer. Thus, in *McLaughlin v. American Tobacco Co.* (2d Cir. 2008) 522 F.3d 215, plaintiffs alleged that manufacturers of "light" cigarettes deceived smokers by promoting them as more healthful than "full-flavored" cigarettes. The district court allowed

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[8] See *Barnes v. Am. Tobacco Co.* (3d Cir. 1998) 161 F.3d 127, 149 (because accrual of each plaintiff's cause of action depended upon how much and how long each individual plaintiff had smoked, the statute of limitations defense raised individual issues); *Greenhaw v. Lubbock County Beverage* (5th Cir. 1983) 721 F.2d 1019, 1029-1030 (proof of each class member's due diligence and discovery of antitrust conspiracy will degenerate into a series of individual trials), overruled on other grounds *Internat. Woodworkers of Am. v. Champion Internat. Corp.* (5th Cir. 1996) 790 F.2d 1174.

"statistical sampling" to prove classwide damages, using methodology similar to that adopted by the trial court here. The Second Circuit reversed:

> The distribution method at issue would involve an initial estimate of the percentage of class members who were defrauded (and who therefore have valid claims). The total amount of damages suffered would then be calculated based on this estimate (and, presumably, on an estimate of the average loss for each plaintiff). ***But such an aggregate determination is likely to result in an astronomical damages figure that does not accurately reflect the number of plaintiffs actually injured by defendants and that bears little or no relationship to the amount of economic harm actually caused by defendants. [Class actions] cannot be used to "abridge, enlarge, or modify any substantive right."*** (Citations omitted.)
>
> Roughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability.

(522 F.3d at p. 231, emphasis added; see also *In re Neurontin Marketing Sales Practices & Products Liability Litigation* (D. Mass. 2009) 257 F.R.D. 315, 323, 328-329 [declining to certify a class using statistics because individual inquiries would still be necessary to "identify *which* prescriptions were the result of fraud and which were not"].)

The outcome below betrays the folly of allowing statistical sampling as a substitute for common proof of liability. The judgment awarded damages to class members who admitted in sworn testimony that they had no claim against USB. (Slip opn. 54-55.) Nicholas Sternad, for example, was awarded $450,064 despite his undisputed admission that he performed exempt administrative and outside sales duties. (*Id.* 57, fn. 70.)

By awarding money on behalf of persons who have no legal right to recover, the judgment below was the product of an overbroad class. That

violates this Court's holding in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*). There, the proposed class included "individuals who ... have no claim against Brinker." (*Id.* at p. 1050.) A similarly "overbroad" class prompted this Court in *Brinker* to reject certification and remand the case to determine whether plaintiffs could objectively and narrowly define the class to include only those individuals with viable claims. (*Id.* at pp. 1050-1051.)[9]

Plaintiffs cite a number of cases for the use of statistical sampling, but none supports the approach adopted by the trial court. Plaintiffs misconstrue *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319 (*Sav-On*). Citing dicta, they claim that this Court endorsed the use of statistical sampling at trial in lieu of common proof of classwide liability. (AOB 34-35.) But as the Fourth District recently observed, that "cannot be what the Supreme Court envisioned in *Sav-On* when it urged courts to consider the use of 'innovative procedural tools' to manage any individual issues." (*Dailey, supra*, 2013 Cal. App. LEXIS 219, *36.

Sav-On neither did, nor said, anything of the sort. Rather, the Court simply noted that statistical sampling and other representative evidence may be used "to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate." (*Sav-On*, *supra*,

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[9] Accord, *Pfizer Inc. v. Superior Court* (2010) 182 Cal.App.4th 622, 632-633 (class definition, which included individuals who had no claim against Pfizer, was impermissibly overbroad); see also *Mazza v. Am. Honda Motor Co., Inc.* (9th Cir. 2012) 666 F.3d 581, 596 (class definition overbroad because it included members who were not exposed to Honda's allegedly misleading advertising); *In re Wells Fargo, supra*, 268 F.R.D. at p. 612 ("Plaintiff has not identified a single case in which a court certified an overbroad class that included both injured and uninjured parties.").

34 Cal.4th at p. 333.)[10] This Court was clearly speaking about evidence of *common behavior toward all class members* — precisely what is lacking in this case.[11] Here, plaintiffs seek to use statistical sampling not to prove the *existence* of common behavior toward *all* class members — but as a way *around* having to make that showing because they lack any other common evidence.

Plaintiffs' reliance on Justice Werdegar's concurring opinion in *Brinker* is equally misplaced. In dicta, the concurring opinion noted that, in theory, statistics and representative testimony might be used as "tools to render manageable determinations of the *extent of liability.*" (*Brinker*, *supra*, 53 Cal.4th at p. 1054, italics added.) But this says nothing about substituting statistics for common proof where the *fact* of liability, as opposed to the "*extent* of liability," is at issue.

Plaintiffs' other cases offer no support for the trial court's use of statistical sampling and extrapolations as a substitute for common proof of liability.[12] As demonstrated above, courts have consistently recognized that

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[10] *Sav-On* recognizes that any such "innovative procedural tool" must not prevent defendants from defending themselves, including by raising individual affirmative defenses. (*Sav-On*, *supra*, 34 Cal.4th at pp. 339-340.) That is exactly the mischief that plaintiffs' plan would create.

[11] See also *Wong*, 2011 U.S. Dist. LEXIS 125988, *26 ("*Sav-on*, of course, apart from being decided under California law certification principles (and reviewed under an abuse of discretion standard), pre-dated *Vinole, In re Wells Fargo* and, perhaps most importantly, *Wal-Mart Stores*. *Vinole* is the only reported Ninth Circuit decision to have even cited *Sav-on.*").

[12] *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 746-747, 754-755 (allowing "statistically significant and reliable" sampling and extrapolation to prove *damages*, not *liability*); *Internat. Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, 337-338, 340 (a non-class

(Footnote continued on following page.)

such an approach only serves to *ignore* individual differences among class members, not *manage* them.

The Court of Appeal was correct. Statistical sampling cannot substitute for common proof where the defendant's liability to any particular class member hinges on the resolution of individual, fact-specific inquiries.

III.
CONCLUSION

For all of the foregoing reasons, this Court should affirm the decision of the Court of Appeal.

(Footnote continued from previous page.)

action case that allowed comparative statistics, not representative sampling and extrapolation, to demonstrate employment discrimination in hiring practices); *In re Simon II Litigation* (E.D.N.Y. 2002) 211 F.R.D. 86 (pre-*Wal-Mart*; reasoning subsequently rejected by the Second Circuit because of due process concerns in *In re Simon II Litigation* (2d Cir. 2005) 407 F.3d 125); see also *In re Simon II Litigation* (E.D.N.Y. 2006) 233 F.R.D. 123 (dismissing class claims on remand from Second Circuit).

Dated: April 2, 2013

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court)

I hereby certify that this brief conforms to the 14,000-word limit imposed by California Appellate Rules of Court and that this brief contains 4,857 words, as shown by the word-count function of the computer program used to prepare this brief.

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DECLARATION OF SERVICE

I, Brenda J. Fuller, declare as follows:

I am employed with Morrison & Foerster LLP. I am readily familiar with the business practices of this office for collection and processing of correspondence. I am over the age of eighteen years and not a party to this action.

On April 2, 2013, I served:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF OF AMICI CURIAE OF CALIFORNIA BUSINESS ROUNDTABLE, CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, AND CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF U.S. BANK

on the parties listed on the attached Service List in this action by placing true copies thereof in sealed envelopes, addressed as shown, for collection and delivery by regular mail to the parties indicated.

Executed on April 2, 2013 in San Francisco, California.

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