No. S200923

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

SAM DURAN and MATT FITZSIMMONS,

Plaintiffs and Respondents,

vs.

U.S. BANK, NATIONAL ASSOCIATION,

Defendant and Appellant.

Court of Appeal, First Appellate District, Division One
Nos. A12557 and A12687
Alameda County Superior Court, No. 2001-035537
Honorable Robert B. Freedman

BRIEF FOR *AMICI CURIAE* CALIFORNIA EMPLOYMENT LAW COUNCIL AND EMPLOYERS GROUP IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. INTEREST OF *AMICI* 5

III. THE TRIAL COURT'S TRIAL PLAN VIOLATED DUE PROCESS BECAUSE IT DISTORTED SUBSTANTIVE LAW TO JAM THE CASE INTO THE CLASS ACTION DEVICE 8

A. The Trial Court Disposed Of The Claims Of 260 Persons Based On Evidence Pertaining To Just 21 9

1. The trial court certified a class of individuals who claimed they were misclassified as exempt under the outside-sales exemption 9

2. The outside-sales exemption depends on a quantitative test 9

3. The trial court's "trial plan" selected 20 names from a hat and extrapolated the findings as to those 20 to the class as a whole 11

4. The trial court excluded all testimony relating to class members' job duties and work hours, except for the two remaining named plaintiffs and members of the 20-person sample 12

5. In Phase II, the trial court awarded monetary relief to individual class members based on testimony in Phase I about aggregate average of overtime hours 14

B. Courts May Not Sacrifice Substantive Rights In The Name Of Procedural Efficiency 14

C. The Trial Plan Here Violated Due Process By Discarding U.S. Bank's Substantive Defense — Exemption — In The Name Of Procedural Efficiency 19

1. The individual questions presented here are not manageable on a class basis 19

2. Statistical evidence does not dispense with the necessary showing of predominance 22

TABLE OF CONTENTS
(continued)

Page

IV. A MORE-RIGOROUS CERTIFICATION AND DECERTIFICATION ANALYSIS WOULD HAVE AVOIDED AN UNNECESSARY AND FLAWED TRIAL 27

A. The Trial Court Should Have Insisted At The Outset On A Trial Plan To Address The Obvious Individualized Issues 28

1. Exemption cases often present individualized questions 28

2. Requiring a trial plan at the outset ensures a proper evaluation of manageability 35

3. Rather than proceeding to trial, the trial court should have decertified when there was no viable plan to try the plaintiffs' claims on an aggregate basis 36

a. Decertification is appropriate when individual issues come to predominate, or the plaintiff is unable to prove classwide violations consistent with due process 37

b. The trial court here should have decertified rather than proceeded to trial once it was clear that individual issues predominated, and that there was no valid trial plan 41

B. Plaintiffs' "Solution" Does Not Comport With Due Process 43

1. Determining the fact and extent of liability requires unmanageable individual inquiries 43

2. Plaintiffs' proposed approach, like the trial court's trial plan, continues to ignore individual issues rather than manage them 46

C. This Court Should Be Mindful Of The Practical Effect Of Its Ruling 49

V. CONCLUSION 52

CERTIFICATE OF COMPLIANCE 54

TABLE OF AUTHORITIES

Page(s)

CASES

Arenas v. El Torito Rests., Inc.,
183 Cal. App. 4th 723 (2010) 32

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 51

Bell v. Farmers Insurance Exchange,
115 Cal. App. 4th 715 (2004) 21, 22

Block v. Major League Baseball,
65 Cal. App. 4th 538 (1998) 19

Comcast Corp. v. Behrend,
___ U.S. ___, 2013 U.S. LEXIS 2544 (U.S. Mar. 27, 2013) 27, 49

Dailey v. Sears, Roebuck & Co.,
214 Cal. App. 4th 974 (2013) 23, 36

Dunbar v. Albertson's, Inc.,
141 Cal. App. 4th 1422 (2006) 23, 29, 32, 49

Espenscheid v. DirectSat USA, LLC,
705 F.3d 770 (7th Cir. 2013) 25, 26, 45, 50

In re BCBG Overtime Cases,
163 Cal. App. 4th 1293 (2008) 32

In re Chevron U.S.A., Inc.,
109 F.3d 1016 (5th Cir. 1997) 16

In re Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995) 51

In re Wells Fargo Home Mortg. Overtime Litig.,
571 F.3d 953 (9th Cir. 2009) 33

In re Wells Fargo Home Mortg. Overtime Pay Litig.,
268 F.R.D. 604 (N.D. Cal. 2010) 24, 50

TABLE OF AUTHORITIES
(continued)

Page(s)

International Brotherhood of Teamsters v. United States,
431 U.S. 324 (1977) 46, 47, 49

Jimenez v. Domino's Pizza, Inc.,
238 F.R.D. 241 (C.D. Cal. 2006) 25, 31, 33

Johnson v. Ford Motor Co.,
35 Cal. 4th 1191 (2005) 15

Keller v. Tuesday Morning, Inc.,
179 Cal. App. 4th 1389 (2009) 32, 41

Knapp v. AT&T Wireless Servs., Inc.,
195 Cal. App. 4th 932 (2011) 19

Linder v. Thrifty Oil Co.,
23 Cal. 4th 429 (2000) 15

Marlo v. United Parcel Service,
251 F.R.D. 476 (C.D. Cal. 2008), *aff'd*, 639 F.3d 942
(9th Cir. 2011) 38, 39, 40, 48

Martin v. Citizens Financial Group, Inc.,
2013 U.S. Dist. LEXIS 43084 (E.D. Pa. Mar. 27, 2013) 24, 25, 31

Mora v. Big Lots Stores, Inc.,
194 Cal. App. 4th 496 (2011) 32, 50

Morgan v. Wet Seal, Inc.,
210 Cal. App. 4th 1341 (2012) 49

Nordquist v. McGraw-Hill Broad. Co.,
32 Cal. App. 4th 555 (1995) 28

Ramirez v. Yosemite Water Co.,
20 Cal. 4th 785 (1999) 1, 2, 10, 28, 34

Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs.,
601 F.3d 1159 (11th Cir. 2010) 16

TABLE OF AUTHORITIES
(continued)

Page(s)

Sav-on Drug Stores, Inc. v. Superior Court,
34 Cal. 4th 319 (2004) 14, 15, 20, 37, 38

Soderstedt v. CBIZ S. Cal., LLC,
197 Cal. App. 4th 133 (2011) 19, 20, 32

Vinole v. Countrywide Home Loans, Inc.,
571 F.3d 935 (9th Cir. 2009) 32, 33

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 15, 25, 45, 46

Walsh v IKON Office Solutions, Inc.,
148 Cal. App. 4th 1440 (2007) 18, 31, 32, 41

Wang v. Chinese Daily News,
___ F.3d ___, 2013 U.S. App. LEXIS 4423 (9th Cir. Mar. 4, 2013) 18, 33, 41, 45

Washington Mutual Bank, F.A. v. Superior Court,
24 Cal. 4th 906 (2001) 35, 36

Weigele v. FedEx Ground Package Sys., Inc.,
267 F.R.D. 614 (S.D. Cal. 2010) 33

STATUTES, RULES AND REGULATIONS

29 C.F.R. § 541.700(a) 34

28 U.S.C. § 2072(b) 15

CAL. BUS. & PROF. CODE § 17200 *et seq* 11

CAL. CIV. PROC. CODE § 382 ..... 16, 17

8 CAL. CODE REGS. § 11040(2)(M) 1

CAL. LAB. CODE
§ 515(a) 10
§ 1171 8

TABLE OF AUTHORITIES
(continued)

Page(s)

Fed. R. Civ. P.
23 ..... 15, 41, 43
23(f) 51

ARTICLES

Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlement in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) 51

I. INTRODUCTION

The question in this case is whether so-called "procedural innovations" in a putative class action can trump a party's substantive rights. The answer is "no." If substantive rights must be sacrificed, the "innovation" offends due process.

This case involves the "outside sales" exemption from overtime. The critical issue under the law is whether the salesperson spends more (or less) than half the time outside the office, making sales. *See* Wage Order 4-2001 § 2(M), 8 Cal. Code Regs. § 11040(2)(M); *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 790, 802-03 (1999). If the salesperson spends 49.9% of the time (or less) outside the office, he or she is nonexempt and entitled to overtime. If the salesperson spends 50.1% (or more), he or she can be exempt. It all depends on how the particular person performs the job. Two persons with the exact same job title and responsibilities may fall on differing sides of the exemption line, depending on exactly what they do, and exactly how — and how much — they do it.

A single page from the court of appeal opinion demonstrates why the trial procedure here offended due process:

- "[F]our former named plaintiffs . . . testified at their depositions that they spent more than half their time outside the office . . . ." 203 Cal. App. 4th 212, 259 (2012).

- "[T]he trial court excluded their testimony at trial on the ground that it was 'irrelevant' because it did not comport with the court's trial plan." *Id.* at 259-60.

- That "trial plan" rested on the assumption that all individuals' claims would rise or fall together, based on the circumstances of 20 preselected members of the putative class. *See id.*

- The admissions of the four former named plaintiffs, however, showed that (whatever might be the circumstances of others) *they themselves* were not entitled under the law to recover. *See id.* at 259.

- U.S. Bank offered evidence that (in addition to the four former named plaintiffs), at least one-third of the putative class also worked more than half the time outside the office. *Id.* at 260.

- Yet the judgment "awards an average of over $50,000 to each absent class member" — including each and every person not entitled to anything.

The unfairness of awarding $15,000,000 to class members — a substantial portion (at least) of whom are owed nothing, because they were properly classified as exempt — is manifest. Due process forbids ordering a party to pay money to someone that it did not injure.

To get to this point, the trial court distorted — ignored, actually — the substantive law to jam the case into the class action device. That was incorrect. The *procedural mechanism* of the class action device (if used at all) must conform to the *substantive law* covering the claims and defenses at issue, not the other way around. The trial court here committed a fundamental error by sacrificing U.S. Bank's ability to litigate the substantive defense of exemption in the name of procedural expediency. The trial court (reciting official-sounding terms like "sampling evidence" and "procedural innovation") imposed liability *en masse*, without regard to who might actually have a valid legal claim.

The trial court made that error because, otherwise, it would have been clear that the case was not *manageable* for trial on a class basis. Numerous cases from this Court, the court of appeal, and federal courts

applying the analogous provisions of the Federal Rules of Civil Procedure, have made clear that the court must be satisfied at every stage that common questions predominate, and that their adjudication on an aggregate basis is manageable. This is the rule when the trial court confronts a certification motion in the first instance, on succeeding motions for decertification, and at trial as the evidence develops and latent questions of substantive law become more obvious. Here, however, the trial court's preferred trial plan — one-size-fits-all adjudication — assumed that (rather than evaluated critically whether) common proof existed and classwide adjudication was possible.

The classwide judgment ran roughshod over the substantive law. The court of appeal correctly reversed the judgment.

The court of appeal also correctly ordered decertification. In so doing, the court of appeal did not eviscerate the class action device in general, or in wage-hour cases in particular. Nothing prohibits bona fide "procedural innovation," such as (in an appropriate case) statistical or survey evidence. Methods of proof will vary from case to case, depending on the applicable substantive law at issue, and each side's factual proffer. To resolve *this* case, however, all this Court need do is hold that:

- the applicable substantive law cannot be ignored or distorted to make a case triable on a class basis; and

- where a defendant can prove that a chunk of the class *was not wronged*, it offends due process to award money to that chunk, just because some others may have valid claims.

II. INTEREST OF *AMICI*

Amicus California Employment Law Council is a voluntary, non-profit organization that promotes the common interests of employers and the general public in fostering the development in California of reasonable, equitable, and progressive rules of employment law. CELC's membership includes over 50 private sector employers in the State of California who collectively employ well in excess of a half-million Californians.

CELC has been granted leave to participate as *amicus curiae* in many of California's leading employment cases, including *Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2013); *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012); *Harris v. Superior Court*, 53 Cal. 4th 170 (2011); *Chavez v. City of Los Angeles*, 47 Cal. 4th 970 (2010); *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272 (2009); *Jones v. Lodge at Torrey Pines Partnership*, 42 Cal. 4th 1158 (2008); *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007); *Green v. State of*

California, 42 Cal. 4th 254 (2007); *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798 (2001); *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317 (2000); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000); *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163 (2000); *Asmus v. Pacific Bell*, 23 Cal. 4th 1 (2000); *White v. Ultramar, Inc.*, 21 Cal. 4th 563 (1999); *Cotran v. Rollins Hudig Hall International, Inc.*, 17 Cal. 4th 93 (1998); *Cassista v. Community Foods, Inc.*, 5 Cal. 4th 1050 (1993); and *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988).

Amicus Employers Group is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,800 California employers of all sizes and every industry, which collectively employ nearly 3,000,000 employees. The Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, the Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships.

Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, the Employers Group is uniquely able to assess both the impact and implications of the legal issues presented in employment cases

such as this one. The Employers Group has been involved as *amicus* in many significant employment cases, including: *Reid v. Google Inc.*, 50 Cal. 4th 512 (2010); *McCarther v. Pacific Telesis Group*, 48 Cal. 4th 104 (2010); *Chavez v. City of Los Angeles*, 47 Cal. 4th 970 (2010); *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272 (2009); *Arias v. Superior Court*, 46 Cal. 4th 969 (2009); *Amalgamated Transit Union v. Superior Court*, 46 Cal. 4th 993 (2009); *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008); *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007); *Prachasaisoradej v. Ralphs Grocery Co.*, 42 Cal. 4th 217 (2007); *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007); *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360 (2007); *Smith v. Superior Court (L'Oreal USA, Inc.)*, 39 Cal. 4th 77 (2006); *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028 (2005); *Lyle v. Warner Bros. Television Productions*, 38 Cal. 4th 264 (2006); *Reynolds v. Bement*, 36 Cal. 4th 1075 (2005); *Grafton Partners L.P. v. Superior Court*, 36 Cal. 4th 944 (2005); *Miller v. Department of Corrections*, 36 Cal. 4th 446 (2005); *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004); *State Department of Health Services v. Superior Court*, 31 Cal. 4th 1026 (2003); *Colmenares v. Braemar Country Club, Inc.*, 29 Cal. 4th 1019 (2003); *Konig v. Fair Employment & Housing Comm'n*, 28 Cal. 4th 743 (2002); *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317 (2000); *Armendariz v. Foundation Health Psychcare Services*, 24 Cal. 4th 83 (2000); *Cortez v. Purolator Air*

Filtration Products Co., 23 Cal. 4th 163 (2000); *Carrisales v. Department of Corrections*, 21 Cal. 4th 1132 (1999); *White v. Ultramar, Inc.*, 21 Cal. 4th 563 (1999); *Green v. Ralee Engineering Co.*, 19 Cal. 4th 66 (1998); *City of Moorpark v. Superior Court*, 18 Cal. 4th 1143 (1998); *Reno v. Baird*, 18 Cal. 4th 640 (1998); *Jennings v. Marralle*, 8 Cal. 4th 121 (1994); *Hunter v. Up-Right, Inc.*, 6 Cal. 4th 1174 (1993); *Gantt v. Sentry Insurance*, 1 Cal. 4th 1083 (1992); *Rojo v. Kliger*, 52 Cal. 3d 65 (1990); *Shoemaker v. Myers*, 52 Cal. 3d 1 (1990); and *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988).

III. THE TRIAL COURT'S TRIAL PLAN VIOLATED DUE PROCESS BECAUSE IT DISTORTED SUBSTANTIVE LAW TO JAM THE CASE INTO THE CLASS ACTION DEVICE

This case involves California's outside-sales exemption contained in California Labor Code section 1171 and further defined in Wage Order 4-2001, section 2(M). Plaintiffs claimed that U.S. Bank misclassified them and a class of business banking officers and small-business bankers as exempt from the state's overtime laws. 203 Cal. App. 4th at 216-17, 219.

As shown below, the trial court sacrificed the substantive law to adjudicate the case on a class basis.

A. The Trial Court Disposed Of The Claims Of 260 Persons Based On Evidence Pertaining To Just 21.

The trial court entered judgment based on a formula generated by sample. The trial court excluded all evidence showing that the formula was wrong and the sample unrepresentative.

1. The trial court certified a class of individuals who claimed they were misclassified as exempt under the outside-sales exemption.

The trial court certified the class based on a conflicting factual record. Plaintiffs offered 34 declarations from current and former employees who averred that they spent *less* than half their work time engaged in sales-related activities outside the employer's place of business. U.S. Bank offered 83 declarants, of whom 75 averred the opposite, *i.e.*, they spent *more* than half their worktime engaged in sales-related activities outside the employer's place of business. *Id.* at 218-19.

2. The outside-sales exemption depends on a quantitative test.

The amount of time spent away from the employer's business was critical because of the substantive law of California's outside-sales exemption: An individual can be exempt if he or she "customarily and

regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities." Wage Order 4-2001 § 2(M); *Ramirez*, 20 Cal. 4th at 790, 802-03.

The quantitative feature of the outside-sales exemption applies equally to the "primary duty" test under the state's executive, administrative, and professional exemptions. *See Ramirez*, 20 Cal. 4th at 798 n.4 (noting California's "unique" quantitative test); CAL. LAB. CODE § 515(a) (providing for executive, administrative, and professional exemptions "if the employee is primarily engaged in the duties that meet the test of the exemption"); *id.* at § 515(e) ("For purposes of this section, 'primarily' means more than one-half of the employee's worktime."). *See also* Wage Order 4-2001 § 1(A)(1)(e) (executive exemption), (2)(f) (administrative exemption), (3)(a), (b) (professional exemption); § 2(N) (defining "primarily" as "more than one-half the employee's work time").

3. The trial court's "trial plan" selected 20 names from a hat and extrapolated the findings as to those 20 to the class as a whole.

As trial approached, the trial court implemented its own trial plan of "taking a sample of 20 plaintiffs selected on a random basis to testify at trial." 203 Cal. App. at 221. Over U.S. Bank's objections, the trial court

> confirmed its intent to use a random sample of 20 class members to testify as representatives for the class. To choose the representatives, the court proposed putting the names of all the potential class members into a "hat" and drawing 20 names, along with five additional names to serve as alternates in case any of the initially selected plaintiffs were unavailable.

Id. at 221-22. The court clerk then "drew from a batch of index cards containing the names of each class member and compiled a list of 20 class representatives and five alternates." *Id.* at 222.

Meanwhile, plaintiffs elected to dismiss their legal claims and proceed solely under California Business and Professions Code section 17200 *et seq.* Plaintiffs amended the complaint to state a single cause of action under the unfair competition law. The trial court ordered that a second opt-out notice be sent to class members. *Id.* at 222.

Four members of the 20-person sample opted out. U.S. Bank protested that the four individuals "had decided to opt out because they felt they were properly classified as exempt employees, and because plaintiffs' counsel allegedly encouraged them to avoid involvement in the lawsuit." *Id.* at 223. U.S. Bank moved to restore the four individuals to the sample. The trial court denied the motion. *Id.* at 224. "Alternates" apparently replaced the four. *See id.* at 223, 225-26.

4. The trial court excluded all testimony relating to class members' job duties and work hours, except for the two remaining named plaintiffs and members of the 20-person sample.

During Phase I of the trial, 19 of the 20 persons in the sample testified regarding their job duties, as did remaining named plaintiffs Sam Duran and Matt Fitzsimmons. *Id.* at 225-31.[1] (The remaining member of

[1] The claim originally was filed by a single plaintiff, Amina Rafiqzada, on December 26, 2001; however, with the filing of the first amended complaint on February 26, 2003, Ms. Rafiqzada was replaced by three new plaintiffs: Vanessa Haven, Abby Karavani, and Parham Shekarlab. *Id.* at 218. The March 14, 2005, second amended complaint, in turn, substituted Sam Duran and Matt Fitzsimmons in place of those plaintiffs, and Duran and Fitzsimmons have remained plaintiffs for the duration. *Id.* at 219.

the sample failed to appear.) The trial court excluded the testimony of any individual who was not a member of the designated sample. *Id.* at 225. The trial court similarly excluded any reference to testimony from the four former named plaintiffs' depositions, or declarations U.S. Bank had gathered from class members outside the sample. *Id.* at 236. In its statement of decision for Phase I, the trial court noted that introduction of evidence from individuals outside the 20-person sample "would be inconsistent with the court's trial plan" and the motions *in limine* that enforced it. *Id.* at 238.

U.S. Bank was not allowed to present testimony about class members who were not part of the 20-person sample, or even its managers' own experiences holding the relevant jobs earlier in their careers. *See id.* at 231-35.

On the basis of the 19 individuals and the two remaining named plaintiffs, the trial court concluded that the class as a whole — all 260 members of it — were misclassified as exempt and entitled to overtime pay. *Id.* at 238-39.

5. In Phase II, the trial court awarded monetary relief to individual class members based on testimony in Phase I about aggregate average of overtime hours.

In Phase II of the trial, dueling experts relied on the testimony from Phase I regarding hours worked to develop damages models. The trial court again excluded any evidence related to individuals outside the 20-person sample and the two remaining named plaintiffs. *Id.* at 239-40. In its statement of decision for Phase II, the trial court concluded that class members worked, on average, 11.86 overtime hours per week.

Based on these conclusions, the trial court awarded a total of $14,959,565, as of May 15, 2009, on the assumption that *every* class member was nonexempt, and that *every* class member was entitled to 11.86 hours of overtime per week. *Id.*

B. Courts May Not Sacrifice Substantive Rights In The Name Of Procedural Efficiency.

Plaintiffs in this case have contended that "this court has urged trial courts to be procedurally innovative in managing class actions, and the trial court has an obligation to consider the use of innovative procedural tools proposed by a party to certify a manageable class." *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 339 (2004) (internal footnote,

quotation marks, citations, and alterations omitted); *see Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 440 (2000).

What plaintiffs overlook, however, is that any such *procedural* innovation cannot sacrifice a party's *substantive* rights. Indeed, this Court observed in *Sav-on* (immediately after the above-quoted passage) that any such devices still must "permit defendants to present their opposition, and to raise certain affirmative defenses." 34 Cal. 4th at 339-40 (internal quotation marks omitted); *accord Johnson v. Ford Motor Co.*, 35 Cal. 4th 1191, 1210 (2005) ("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."), *citing Sav-on*, 34 Cal. 4th at 334-35.

Under federal law, the Rules Enabling Act compels that result. The Federal Rules of Civil Procedure, including Rule 23, "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *see, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (ordering decertified a case that could be tried on a class basis only by dispensing with substantive defenses). But the principle is a broader one, rooted in due process. "The Rules Enabling Act, 28 U.S.C. § 2072 — *and due process* — prevents the use of class actions from abridging the

substantive rights of any party. Yet, from the record before us, an abridgment of the defendant's rights seems the most likely result of class treatment." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs.*, 601 F.3d 1159, 1176 (11th Cir. 2010) (emphasis added); *accord In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1023 (5th Cir. 1997) (Jones, J., concurring) (rejecting the trial court's plan to draw inferences binding on the universe of 3,000 plaintiffs from so-called "bellwether" trials of just 30; "We are not authorized by the Constitution or statutes to legislate solutions to cases in pursuit of efficiency and expeditiousness. Essential to due process for litigants . . . is their right to the opportunity for an individual assessment of liability and damages in each case.").

California state law is the same. In *City of San Jose v. Superior Court*, this Court discussed California Code of Civil Procedure section 382, its origins, and the role of the class action device. 12 Cal. 3d 447, 458 (1974). The Court made clear that the *procedural* mechanism of the class action device could not be used to modify the applicable *substantive* law: "We decline to alter [a] 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 462 (emphasis added).

The trial court here accepted this Court's invitation to consider "innovative procedural tools" for case management, but the trial court did not heed the foregoing admonition to preserve parties' substantive rights. In other words, the trial court did what *City of San Jose* forbade: it "sacrifice[d] the goal for the going." Whether the resulting trial was "efficient" is dubious.[2] Moreover, any "efficiency" sacrificed U.S. Bank's substantive right to present any individualized evidence that might well have negated liability to (at a minimum) a substantial portion of the class.

Due process forbids it. *City of San Jose* explained that, "while [section 382] was designed to foster justice, class actions may create injustice. The class action may deprive an absent class member of the opportunity to independently press his claim, preclude a defendant from defending each individual claim to its fullest, and even deprive a litigant of a constitutional right." 12 Cal. 3d at 458; *see also id.* at 459 ("[T]his court[] . . . has not been unmindful of the accompanying dangers of injustice . . . .").

The solution requires strict adherence to the community-of-interest analysis so that class actions do not eviscerate the substantive rights of the

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[2] Phase I went for 41 days, or about two days for each member of the sample group, followed by expert testimony in Phase II about the meaning of the testimony in Phase I.

parties. A procedural mechanism that subverts substantive rights in the name of efficiency not only sacrifices the goal for the going, it deprives a litigant of due process where it forecloses the presentation of a meritorious defense. *See Wang v. Chinese Daily News*, ___ F.3d ___, 2013 U.S. App. LEXIS 4423, at *15 (9th Cir. Mar. 4, 2013) (Fletcher, J.) ("[T]he Supreme Court disapproved what it called 'Trial by Formula,' wherein damages are determined for a sample set of class members and then applied by extrapolation to the rest of the class 'without further individualized proceedings.' Employers are 'entitled to individualized determinations of each employee's eligibility' for monetary relief. Employers are also entitled to litigate any individual affirmative defenses they may have to class members' claims.") (internal citations omitted).

It is no wonder, then, that the courts of appeal have rejected class certification — to say nothing of class-wide *liability* — where proceeding on an aggregate basis would require the court to ignore defenses, like the 50% test, that necessarily are proven with individualized evidence. *See, e.g., Walsh v IKON Office Solutions, Inc.*, 148 Cal. App. 4th 1440, 1450 (2007) ("In examining whether common issues of law or fact predominate, the court must consider the plaintiff's legal theory of liability. The affirmative defenses of the defendant must also be considered, because a defendant may defeat class certification by showing that an affirmative

defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues.") (internal citation omitted); *Knapp v. AT&T Wireless Servs., Inc.*, 195 Cal. App. 4th 932, 941 (2011) (same); *Soderstedt v. CBIZ S. Cal., LLC*, 197 Cal. App. 4th 133, 151 (2011) (same). *See also Block v. Major League Baseball*, 65 Cal. App. 4th 538, 544 (1998) ("The fact that the trial court would be obligated to evaluate each of these defenses for each member of the class, weighed heavily against certification.").

C. The Trial Plan Here Violated Due Process By Discarding U.S. Bank's Substantive Defense — Exemption — In The Name Of Procedural Efficiency.

A possible defense to a claim does not necessarily preclude class certification; rather, it means that the trial court must have a trial plan that preserves the opportunity to prove the defense. If such a trial plan exists, a class action may well proceed. If the trial plan sacrifices the defense, the trial plan offends due process.

1. The individual questions presented here are not manageable on a class basis.

If individual issues make a case unmanageable, then class certification is inappropriate in the first instance; if they become

unmanageable later, the trial court then should decertify. *See City of San Jose*, 12 Cal. 3d at 459 ("The rule exists because the community of interest requirement is not satisfied if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the 'class judgment' determining issues common to the purported class."); *see also Sav-on*, 34 Cal. 4th at 327 ("As the focus in a certification dispute is on what type of questions — common or individual — are likely to arise in the action, . . . in determining whether there is substantial evidence to support a trial court's certification order, we consider whether the theory of recovery [is] likely to prove amenable to class treatment."); *id.* at 335 ("[I]f unanticipated or unmanageable individual issues do arise, the trial court retains the option of decertification.").

Here, the trial court had no answer to the individual affirmative defenses U.S. Bank sought to litigate. The novel trial plan called for proof pertaining to a sample of 20 selected class members, five alternates, and two of the six named plaintiffs. *See* 203 Cal. App. 4th at 221-25. The trial court then extrapolated from the sample its conclusion about the exempt status of the class of 260 as a whole. *See id.* at 238-39, 247. The trial court prohibited U.S. Bank from presenting any evidence related to class members outside the limited sample. *Id.* at 225, 239-40. The court even

prohibited U.S. Bank from presenting evidence about the four former named plaintiffs. *See id.* at 246.

Thus, as noted at the outset, the trial court barred U.S. Bank from proving that the four former named plaintiffs had *admitted in deposition* that they satisfied the key criterion for the outside-sales exemption. The court also barred U.S. Bank from proving (either through the sworn declarations U.S. Bank had obtained, or by calling live witnesses to prove comparable content) that at least one-third of the putative class was similarly exempt.

The trial court cited *Bell v. Farmers Insurance Exchange*, 115 Cal. App. 4th 715 (2004) ("*Bell III*"), in support of the concept of trial-by-sample. That case, however, does not address, let alone resolve, the manageability and predominance problems posed here.

First, the *Bell III* defendant waived the due process issue. *Id.* at 747. Thus, the court was not called upon to consider the validity of that evidence on appeal as must be done here.

Second, *Bell III* was a *damages* case; the class-wide *liability* determination already had been made. The court did not employ a procedural tool that attempted to adjudicate liability to absent class members based on a selected sample; the court only set damages after the

trial court had resolved liability. Statistical evidence (when properly elicited) may help prove damages following a proper finding of liability because class members already have been adjudicated to have suffered harm. *See id.* at 750 ("[The defendant] notes, and we agree, that substantive rules of law may not be altered in the interest of efficient litigation. However, statistical sampling does not dispense with proof of damages but rather offers a different method of proof, substituting inference from membership in a class for an individual employee's testimony of hours worked for inadequate compensation. It calls for a particular form of expert testimony to carry the initial burden of proof, not a change in substantive law.") (internal citations omitted).

Nothing in *Bell III* justifies the short-order justice dispensed here.

2. Statistical evidence does not dispense with the necessary showing of predominance.

Here, the trial court attempted to paper over the individual issues with statistics. But statistical evidence is appropriate only where sufficient commonality exists. Otherwise (as here), the use of statistical evidence masks individual issues.

State and federal courts have rejected the use of statistical evidence where individualized differences germane to liability exist; extrapolation

only works if the underlying issues are sufficiently homogenous to justify drawing a conclusion about the whole from a part. "We have found no case, and [the plaintiff] 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." *Dailey v. Sears, Roebuck & Co.*, 214 Cal. App. 4th 974, 998 (2013) (emphasis deleted).

In *Dunbar v. Albertson's, Inc.*, 141 Cal. App. 4th 1422 (2006), for example, the court of appeal affirmed the trial court's determination that individual questions predominated in an overtime case because the duties performed by individual class members varied so widely. *Id.* at 1431-32. The named plaintiff had asserted that such individualized evidence could be managed by "the use of exemplar plaintiffs, survey results, subclassing, or . . . other means." *Id.* at 1432. The court of appeal rejected this assertion because individual rather than common questions predominated: A "finding[] as to one [class member] could not reasonably be extrapolated to others given the variation in their work." *Id.* "Statistics" did not convert an individualized inquiry into a common one.

Federal courts have reached the same conclusion. Judge Marilyn Hall Patel, for example, observed this problem in denying certification to an outside salesperson class:

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

In re Wells Fargo Home Mortg. Overtime Pay Litig., 268 F.R.D. 604, 612 (N.D. Cal. 2010).

Judge Patel is not alone. Just weeks before this brief was filed, the court in *Martin v. Citizens Financial Group, Inc.*, 2013 U.S. Dist. LEXIS 43084 (E.D. Pa. Mar. 27, 2013), decertified a Fair Labor Standards Act collective action of bank employees. The court became concerned that the case would have to test the individual circumstances of all of the class members. Plaintiffs proposed essentially the approach taken by the trial court here: a trial of a "representative sampling" of plaintiffs. The trial court rejected the proposal: "Given the multitude of differences in the factual and employment settings of the Plaintiffs . . . and concerns of

individualized defenses, we find that fairness and procedural considerations also require us to decertify the collective action." *Id.* at *23.

Other cases are to the same effect. *See, e.g., Jimenez v. Domino's Pizza, Inc.*, 238 F.R.D. 241, 253 (C.D. Cal. 2006) ("Representative testimony will not avoid the problem that the inquiry needs to be individualized. In other words, because the issues presented are to be determined based on an individual's experience, testimony will vary from employee to employee. Similarly, surveys and statistics . . . will not be helpful in determining whether each general manager himself was wrongly classified or not. . . . Because each general manager's experience and time spent on various tasks may differ, the Court agrees that a class action trial will be unmanageable."); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) ("The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula . . . . We disapprove that novel project. . . . [A] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defense to individual claims.").

U.S. Court of Appeals for the Seventh Circuit very recently demonstrated how injustice can occur in the class- and collective-action context. *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013). Plaintiffs' trial plan was to use 42 "representatives," from which the court could extrapolate liability to a proposed class of 2,341. *Id.* at 774. On the

issue germane to the lawsuit — the number of hours spent on various tasks — the court noted individualized differences. *Id.* Even assuming that plaintiffs' sample was representative, "this would not enable the damages of any members of the class other than the 42 to be calculated." *Id.* "To extrapolate from the experience of the 42 to that of the 2341 would require that all 2341 have done roughly the same amount of work, including the same amount of overtime work, and had been paid the same wage." *Id.* Otherwise, the formula would grossly undercompensate some class members, but overcompensate others. *Id.* ("And if for example the average number of overtime hours per class member per week was 5, then awarding 5 x 1.5 x hourly wage to a class member who had only 1 hour of overtime would confer a windfall on him, while awarding the same amount of damages to a class member who had 10 hours of overtime would (assuming the same hourly wage) undercompensate him by half."). In other words, the use of statistical evidence, while convenient, "managed" individualized issues only by ignoring them.

The trial court here similarly created a "manageable" trial by eliminating the cumbersome but necessary task of applying the substantive law to the claims asserted. The court simply ignored evidence that individual class members may not be similarly situated for purposes of the exemption analysis, and then imposed classwide liability based upon the

illusion of uniformity that the statistics conjured up. That will not do. As the U.S. Supreme Court recently observed, reversing class certification in an antitrust case, "The Court of Appeals simply concluded that respondents 'provided a method to measure and quantify damages on a classwide basis,' finding it unnecessary to decide 'whether the methodology [was] a just and reasonable inference or speculative.'" *Comcast Corp. v. Behrend*, ___ U.S. ___, 2013 U.S. LEXIS 2544, at *16 (U.S. Mar. 27, 2013) (citations omitted; alteration in original). That was improper because, "[u]nder that logic, at the class-certification stage *any* method of measurement is acceptable . . . , no matter how arbitrary the measurements may be." *Id.* (emphasis in original). Class certification law requires more.

IV. A MORE-RIGOROUS CERTIFICATION AND DECERTIFICATION ANALYSIS WOULD HAVE AVOIDED AN UNNECESSARY AND FLAWED TRIAL

The court of appeal correctly reversed the judgment, but it never should have come to that. Rather than attempting to pave over individual issues by statistical extrapolation, the trial court should not have conducted a class trial in the first place. The entire problem would have been avoided if the trial court had correctly approached class certification, either in the first instance or on U.S. Bank's subsequent motions for decertification.

A. The Trial Court Should Have Insisted At The Outset On A Trial Plan To Address The Obvious Individualized Issues.

The trial court's initial certification decision was wrong because the court did not analyze how the affirmative defense of exemption would — or could — be proven on a class basis.

1. Exemption cases often present individualized questions.

The central issue in this case — as it is in almost every outside-sales exemption case — is the amount of time employees perform sales or sales-related activity outside the employer's premises. *See Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 790, 798 n.4, 802-03 (1999) (explaining California's "unique" quantitative test and distinguishing it from the qualitative test under federal law). Because of this test, the affirmative defense of exemption looks in the first instance at the actual work a particular employee performs. *See id.* at 801-02.

A *job* is not exempt or nonexempt; the exemption depends on how a particular person *performs* that job. Two persons holding the exact same position might be classified differently, based on differences in what they do. *See, e.g., Nordquist v. McGraw-Hill Broad. Co.*, 32 Cal. App. 4th 555,

569 (1995) (comparing incumbent with his predecessor in the same job; one was exempt, the other not).[3]

Where, as to a particular person, the relevant facts are disputed (as often is the case), trial of exempt status turns on specific factual testimony applicable to the individual employee at issue, including testimony related to credibility. This trial here was no exception. The trial court spent 41 days in Phase I of the trial hearing testimony regarding the job duties of 21 class members. Plaintiffs also estimated it would two days of trial for every class member whose claim was examined. *See* 203 Cal. App. 4th at 263 ("Plaintiffs also claim it would take 520 days to complete a trial of all 260 class members' claims[.]").

One can see why that might be the case. The class member testifies (as he or she is prone to do, when his or her recovery is measured in the tens or hundreds of thousands of dollars) that he or she spent a majority of time *inside* the office. The employer presents opposing evidence — maybe even a prior written admission, such as a performance self-evaluation, or a

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[3] Further complicating the inquiry, the law assesses the employee's exempt status on a *week-by-week* basis. Wage Order 7-2001 § 1(A)(1)(e). Thus, an employee may be exempt one week if his or her job duties keep him or her engaged in exempt job duties a majority of the time, but non-exempt in another week when the same employee is spending a majority of time in the office. *See Dunbar*, 141 Cal. App. 4th at 1431 (affirming denial of class certification on showing that work duties varied week to week).

deposition admission — that the individual employee actually spent a majority of time making sales *outside* the office. The employer's evidence also might include testimony of co-workers, supervisors, and even clients who testify to where they saw the employee; route records or contemporaneous notes of where the employee spent his or her time during the day; mileage and reimbursement records showing miles (and, by proxy, time) driven outside the office pursuing sales; and maybe even expert testimony about the time amount of time it takes to travel between known locations, based on driving distance and prevailing traffic patterns. When the court finishes with one witness, it moves on to the next.

Embedded in proceeding in this way are two additional inquiries: (1) credibility determinations, necessary because of the varying accounts of how he or she performs his or her job; and (2) the additional complexity caused by the need to examine individual workweeks, *see supra* note 3.

Credibility determinations are not susceptible to common proof:

> [T]his apparent inconsistency in the witness' accounts . . . underscores the likelihood that adjudicating the outside salesperson exemption will be best accomplished on an individual basis. After all, the credibility of each witness and the weight to be given his or her testimony is a matter for the trier of fact, who would consider each witness's trial testimony, inconsistencies in prior testimony or declarations, and any explanation for the change

> in testimony. The fact that a jury might have to decide which of the [the witness'] versions to believe does not suggest that questions of fact or law common to the class predominate over individualized issues.

Walsh v. IKON Office Solutions, Inc., 148 Cal. App. 4th 1440, 1459 (2007). *See also Jimenez*, 238 F.R.D. at 251-52 ("[T]hese determinations necessarily require inquiries into credibility relating to why certain managers spent more or less time on the various tasks. Because these questions and issues of proof are so individualized, the Court cannot say that the common question presented predominates."); *accord Martin*, 2013 U.S. Dist. LEXIS 43084, at *19 (decertifying a class of bank employees who alleged wage-hour claims under the Fair Labor Standards Act; no class trial was possible because of the need for individual mini-trials; among other things, "In order to resolve the question of liability, a fact-finder would need to determine whether the employee or the manager was being truthful. However, Defendants correctly note that resolving this question with regard to one manager and one employee would not accomplish the task for any of the others.").

Because the legal test looks to how individuals spend their time, a long string of recent cases denies certification or decertifies because the individual issues presented by the exemption analysis (and its 50% test) overwhelm any common questions presented by the employer's uniform

policies or practices. *E.g.*, *Walsh*, 148 Cal. App. 4th at 1456 (affirming decertification of outside-salesperson class; noting variations in the time class members spent outside the office); *Mora v. Big Lots Stores, Inc.*, 194 Cal. App. 4th 496, 512 (2011) ("The trial court, having examined all the evidence and considered the objections and criticisms voiced by the putative class representatives, could properly conclude there was insufficient evidence of a uniform corporate policy requiring store managers to engage primarily in nonmanagerial duties and, therefore, the theory of recovery was not amenable to common proof.").[4]

Federal cases are similar. The Ninth Circuit in *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935 (9th Cir. 2009), for example, reversed certification of a state-law outside-salesperson exemption case because the predominant issue was how individual employees spent their

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[4] *See also Soderstedt v. CBIZ S. Cal., LLC*, 197 Cal. App. 4th 133, 146-49 (2011) (affirming denial of class certification); *Arenas v. El Torito Rests., Inc.*, 183 Cal. App. 4th 723, 734-35 (2010) (same); *Keller v. Tuesday Morning, Inc.*, 179 Cal. App. 4th 1389, 1396, 1399 (2009) (affirming decertification order that concluded "the time spent in a managerial duty is an individual inquiry"); *In re BCBG Overtime Cases*, 163 Cal. App. 4th 1293, 1301-02 (2008) (affirming order striking class allegations); *Dunbar v. Albertson's, Inc.*, 141 Cal. App. 4th 1422, 1431, 1435 (2006) (affirming denial of class certification).

time, not the company's uniform expectations: "Under California law, a court evaluating the applicability of the outside salesperson exemption must conduct an individualized analysis of the way each employee actually spends his or her time, and not simply review the employer's job description." *Id.* at 944-45.[5] U.S. district courts have reached the same conclusion: "[T]he question presented to this Court is how much time the general managers spent on their various tasks. In other words, to determine which employees are entitled to overtime because of improper classification is an individual, fact-specific analysis of each general manager's performance of the managerial and non-managerial tasks." *Jimenez*, 238 F.R.D. at 251 (internal quotation marks omitted); *see also Weigele v. FedEx Ground Package Sys., Inc.*, 267 F.R.D. 614, 622 (S.D. Cal. 2010) (decertifying; variability in time spent on tasks is an individualized inquiry).

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[5] *See also Wang v. Chinese Daily News*, ___ F.3d ___, 2013 U.S. App. LEXIS 4423, at *12-14 (9th Cir. Mar. 4, 2013) (vacating class certification order that rested on uniform classification policy without considering individual issues regarding exemption); *In re Wells Fargo Home Mortg. Overtime Litig.*, 571 F.3d 953, 959 (9th Cir. 2009) (reversing certification in an outside-salesperson case; "But Wells Fargo's blanket application of exemption status, whether right or wrong, is not such a rule. In contrast to centralized work policies, the blanket exemption policy does nothing to facilitate common proof on the otherwise individualized issues.").

The California Legislature *could* have created (or now could create) a test for exemption that would make classes easy to certify. For example, the Legislature could change the exemption test to be: "Any person who earns less than $100,000 per year shall be treated as nonexempt, and eligible for overtime for hours worked more than 8 in a day or 40 in a week." If that were the law, there rarely would be a dispute about the propriety of class certification. Instead, however, California has chosen a "unique" quantitative test. *Ramirez*, 20 Cal. 4th at 798 n.4. That substantive choice has procedural consequences. Adjudication of claims must permit proof that corresponds to the legal test that California has chosen.[6]

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[6] The quantitative element of the California exemption analysis differs from that under the Fair Labor Standards Act. The "primary duty" test under federal law is qualitative, focusing on what the main thrust of the job is rather than how the individual employee performs it. As such, FLSA cases sometimes are more susceptible to common questions and answers, such as "the relative importance of the exempt duties as compared with other types of duties" and "the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee." 29 C.F.R. § 541.700(a) (explaining "[t]he term 'primary duty' means the principal, main, major or most important duty that the employee performs"; "Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.").

2. Requiring a trial plan at the outset ensures a proper evaluation of manageability.

The only way for a trial court to assess the propriety of class certification is to insist on a constitutionally valid trial plan to evaluate whether individual questions render a case unmanageable.

This Court already has held that when individual questions raise a question about manageability, the court should insist on a trial plan. In *Washington Mutual Bank, F.A. v. Superior Court*, 24 Cal. 4th 906, 911-13 (2001), the Court rejected a certification order, where the class members potentially were subject to the laws of various jurisdictions and various contractual terms for their home-mortgage loans. *See id.* at 922 ("Although the involvement of more than one state's law does not make a class action per se unmanageable, any variances among state laws must be examined to determine whether common questions will predominate over individual issues and whether litigation of a nationwide class may be managed fairly and efficiently.").

The burden rests on the proponent of certification: "In California it is settled that the class action proponent bears the burden of establishing the propriety of class certification," including "predominance and manageability," this Court explained. *Id.* This Court adopted the standard

that federal courts apply: "[T]he presentation must be sufficient to permit the district court, at the time of certification, to make a detailed assessment of how the difficulties posed by the variations in state law will be managed at trial." *Id.* at 923. *See also Dailey*, 214 Cal. App. 4th at 989 ("For class certification purposes, then, Dailey was required to present substantial evidence that proving *both* the existence of Sears's uniform policies and practices *and* the alleged illegal effects of Sears's conduct could be accomplished efficiently and manageably within a class setting.") (italics in original).

In other words, the proponent of class certification must show how individual issues will be adequately managed for trial, as part of his or her showing that certification is appropriate in the first instance.

3. Rather than proceeding to trial, the trial court should have decertified when there was no viable plan to try the plaintiffs' claims on an aggregate basis.

Some cases may appear to warrant certification at the outset, but later developments will augur toward decertification. To that end, decertification must remain a viable option when the evidence, as it

develops, presents insurmountable individual issues. Otherwise, no constitutionally valid trial is possible.

a. Decertification is appropriate when individual issues come to predominate, or the plaintiff is unable to prove classwide violations consistent with due process.

In *Sav-on*, this Court declined to announce a rule prohibiting certification in all exempt-status misclassification cases. The Court concluded that such cases sometimes could be amenable to class treatment. The Court pointed to the evidence in that case of deliberate misclassification, as well as evidence of widespread *de facto* misclassification:

> The record contains substantial, if disputed, evidence that deliberate misclassification was defendant's policy and practice. The record also contains substantial evidence that, owing in part to operational standardization and perhaps contrary to what defendant expected, classification based on job descriptions alone resulted in widespread de facto misclassification.

34 Cal. 4th at 329. The Court also pointed to "a reasonably definite and finite list" of tasks that both parties contended class members performed, and then described the nature of the parties' dispute to be whether those

tasks fell on the exempt or non-exempt side of the ledger. *Id.* at 331. "A reasonable court could conclude that issues respecting the proper legal classification of [class members'] actual activities, along with issues respecting defendant's policies and practices and issues respecting operational standardization, are likely to predominate in a class proceeding over any individualized calculations of actual overtime hours that might ultimately prove necessary." *Id.* This Court recognized, however, "if unanticipated or unmanageable individual issues do arise, the trial court retains the option of decertification." 34 Cal. 4th at 335.

Marlo v. United Parcel Service, 251 F.R.D. 476 (C.D. Cal. 2008), *aff'd*, 639 F.3d 942 (9th Cir. 2011), provides a useful case study. Plaintiff sued, claiming to represent all UPS Full-Time Supervisors in California. Plaintiff asserted that UPS improperly classified him and other supervisors as exempt from the overtime and meal-and-rest period requirements of California law. Judge Pregerson certified the class. *See* 251 F.R.D. at 479. In doing so, "the Court accepted Plaintiff's representation that common proof of misclassification would be offered to determine the class-wide applicability of the exemption." *Id.* at 480 (quoting order granting class certification; "[P]laintiff asserts that the manner in which [supervisors] spend their time can be determined without individualized proof.") (alteration in original).

Judge Pregerson thereafter presided over multiple case-management conferences and entertained briefing on trial-management issues. The court considered numerous alternatives for trying the case as a class. With each hearing, Judge Pregerson began to express more concern that, given the evidence the plaintiff had compiled, individualized issues might predominate:

> The Court has continued to struggle with these concerns while meeting with the parties in an effort to resolve a number of issues to manage a trial in this action. Plaintiff's counsel have not adequately explained how they intend to try this case, [and] have not supported their assertion to having representative evidence, ... Ultimately, these meetings with counsel have further confirmed the need to reevaluate the initial certification decision.

Id. at 480.

Judge Pregerson said that he had come to believe that, to give UPS a fair opportunity to defend itself, UPS would have to "call each and every employee" to test the circumstances of each. Plaintiff's counsel responded: "That's fine." But Judge Pregerson replied: "I might as well just try each and every case, if you say that's fine. That's not fine."

Judge Pregerson ultimately decertified the class, holding that predominance did not exist, because the evidence provided "no basis to

adjudicate class-wide misclassification." *Id.* at 485. Judge Pregerson found that the plaintiff's evidence primarily consisted of individual testimony. *Id.* at 486. He did not see how this evidence could present the overtime exemption as "a common issue for class-wide adjudication," and thought there was "a significant risk" of "mini-trials" on the individual witnesses. *Id.* Specifically, the plaintiff's evidence failed to address the "primarily engaged" element of the exemption test. *Id.* at 486-87 ("Moreover, none of this evidence addresses the 'primarily engaged' prong of the exemption.").

The Ninth Circuit affirmed. Like Judge Pregerson, the court found plaintiff's evidence and trial plan insufficient to adjudicate class-wide liability. "[The plaintiff] contends that he satisfied his burden of establishing predominance by submitting evidence of UPS's centralized control, and uniform policies and procedures. But a blanket exemption policy does not eliminate the need to make a factual determination as to whether class members are actually performing similar duties. Specifically, the existence of a policy classifying [class members] as exempt from overtime-pay requirements does not necessarily establish that [they] were misclassified, because the policy may have accurately classified some employees and misclassified others." 639 F.3d at 948 (citation and internal quotation marks omitted).

Other appellate courts similarly have found decertification appropriate when individual issues came to predominate. *See, e.g.*, *Keller*, 179 Cal. App. 4th at 1399 (affirming decertification order; individualized evidence and credibility issues made individual issues predominate); *Walsh*, 148 Cal. App. 4th at 1454-56 (affirming decertification order; trial court identified variations in how class members performed the job; individual questions therefore predominated); *Wang*, 2013 U.S. App. LEXIS 4423, at *15 (remanding to allow trial court to reconsider class certification; "Rule 23 provides district courts with broad authority at various stages in the litigation to revisit class certification determinations and to redefine or decertify classes as appropriate.").

b. The trial court here should have decertified rather than proceeded to trial once it was clear that individual issues predominated, and that there was no valid trial plan.

The trial court elected not to decertify, despite U.S. Bank's successive motions, and instead proceeded to try plaintiffs' classwide claims and enter judgment on the basis of the sample it selected. For all the reasons discussed above, the trial court erred in holding a classwide trial that abridged U.S. Bank's substantive defenses. The real error, though, was

certifying the class in the first place, or at least not decertifying the case earlier, because of the person-by-person differences in proof.

First, there is no common pattern in the deposition, declaration, or trial testimony of class members. U.S. Bank sought to introduce declarations from approximately one-third of class members who testified that they spent more than 50% of their time outside of the office, plus the deposition testimony of the four former named plaintiffs to the same effect. That evidence showed that, whatever may be the circumstances of anyone else, at least one-third of the class (and two-thirds even of the named plaintiffs) *were exempt*. The trial court excluded all of this evidence, and instead purported to extrapolate classwide liability from the 20-person sample. The court created an illusion of uniformity by excluding evidence showing a *lack* of uniformity, and then pronounced judgment in favor of hundreds — including those whose testimony showed that they had no valid claim.

Second, the trial court ignored the significance of conflicting proof even among the same witness. For example, plaintiffs offered the testimony of Chad Penza, a member of the 20-person sample. Mr. Penza claimed during trial that he was in the office at least 80 percent for most of his employment, and worked between 10.5 and 13 hours per weekday, plus 10 hours over the weekend at least three times per month. 203 Cal. App.

4th at 227. Mr. Penza, however, previously had signed a sworn declaration that the spent 75 percent of his time *outside* the office, and he reaffirmed that declaration in a later sworn statement. *Id.* Credibility is an inherently individualized inquiry because there is no way for the trial court to determine on a classwide basis whether Mr. Penza (or others like him) was "lying then or lying now."

Due process required the trial court to manage individualized issues in a manner consistent with due process, or to decertify. Instead, the trial court simply chose to hold a trial-by-sample, ascribing to the class as a whole the conclusions it reached as to the sample.

B. Plaintiffs' "Solution" Does Not Comport With Due Process.

1. Determining the fact and extent of liability requires unmanageable individual inquiries.

Plaintiffs now seem to concede that the damages award, with its vast margin for error (addressed in the briefs of others), does not survive constitutional scrutiny; they persist, however, in arguing that the liability finding as to the class as a whole is sound. (*See* Reply Brief at 8.) They are wrong, and their proposed procedural approach is unsound.

First, there is no basis to conclude that the 21 persons tested at trial were representative or probative of exempt status for the class as a whole. The testimony focused on the specific circumstances of those individuals, without any basis in law, fact, or statistics to conclude that the trial court's finding as to the 21 could be extrapolated to the remainder of the class. Having drawn a sample, the trial court simply *assumed* it was representative. What the trial court *should* have done is determine whether the class was sufficiently homogenous to justify the use of *any* sample.

Second, the trial court excluded any evidence that was inconsistent with its assumption. The trial court declared irrelevant any evidence showing that a substantial portion of the class was properly classified as exempt — whether in the form of class member declarations, proof as to the four former named plaintiffs, or proof about the four original members of the sample who were excluded when they opted out. Adding just the four former named plaintiffs and the four opt-outs to the sample likely would have painted a very different picture. A trial that included proof replicating U.S. Bank's declarants would have shown that at least one-third of the class spent more than 50% of its time in outside sales, rendering those individuals properly exempt. This was Judge Patel's point in *Wells Fargo Home Mortgage*, discussed at page 24-25 above: How does the trier

of fact determine, based on a showing that individuals' circumstances fall on both sides of the line, who is and who is not an injured party?

Third, where (as here) both the fact and extent of recovery depends on the amount of time an individual spends on varying duties, it is impossible to apportion damages across the class. Here, the trial court *assumed* that every class member worked 11.86 overtime hours. U.S. Bank was prepared to demonstrate (but was prohibited from demonstrating) that at least a large segment of the class was properly classified as exempt and entitled to nothing. Presumably others were improperly classified and worked overtime hours well in excess of 11.86 per week. As such, the trial court's plan is obviously flawed because of the total windfall to *properly* classified class members, and the injustice of trial-by-formula to an *improperly* classified class member who worked, say, double the trial court's assumed average. It is this kind of mismatch in the fact and extent of liability on the one hand, and recovery on the other, that offended the Seventh Circuit in *Espenscheid*, and that led the U.S. Supreme Court in *Dukes* and the Ninth Circuit in *Wang* to reject trials by formula.

2. Plaintiffs' proposed approach, like the trial court's trial plan, continues to ignore individual issues rather than manage them.

Plaintiffs draw a misplaced analogy to *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and propose a two-phased trial. The two-phase approach in this context continues to deny the defendant due process.

Teamsters was a discrimination case, involving race-based disparate treatment. Discriminatory intent was the issue. In Phase I of a *Teamsters* class trial, the factfinder decides whether a pattern or practice of intentional discrimination exists. *See id.* at 360-62. In Phase II, the defendant may contend (and shoulder the burden of proving) that, notwithstanding such a practice of discrimination, any particular individual would not have been selected (for, say, hiring or promotion) for nondiscriminatory reasons unique to himself or herself. *See id.* at 362; *see also Dukes*, 131 S. Ct. at 2561 ("[A] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."; the class action device cannot be used if, to maintain manageability, the trial court eliminates the employer's right to present individual defenses in favor of class-wide liability).

The analogy does not fit a misclassification case like this one. The *employer's intent* is irrelevant here; what matters is what *each employee does*. In a discrimination case, Phase I properly focuses on a single question: Does the employer practice discrimination? In a wage-hour case, by contrast, there is no single issue, but rather issues as numerous as there are class members. How does class member *A* do her job? How does class member *B* does his job? How about *C*? *D*? And so on.[7]

The *Teamsters* analogy collapses when one considers what Phase II of a class trial would look like. In Phase II, the employer could challenge any individual's entitlement to relief, as plaintiffs concede. (Reply Brief at 39.) If that means that the employer may litigate for each class member whether each in fact is exempt, then the two-phase trial plan accomplishes exactly nothing, because the so-called "Phase II" will comprise mini-trials of the circumstances of every member of the class. At the end of Phase I, the trier of fact would be no better situated than had Phase I not been conducted at all, because the court still will be required to determine the amount of time individual class members spent on qualifying exempt

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[7] Plaintiffs trumpet the trial court's statement that U.S. Bank "never had any expectation" that class members "were to spend more than half their work time outside Bank locations." (Opening Brief at 64.) That, however, does not establish liability. If an individual *in fact* worked more than half the time outside the office, the exemption applies no matter what the employer intended.

duties. As Judge Pregerson put it in *Marlo*, "That's not fine" — because the case then is not a class action at all, but rather an aggregation of individual lawsuits.

Plaintiffs evidently recognize that, and they therefore propose a Phase II that does not comport with due process. According to plaintiffs, in the remedial phase the employer could not raise any defense in support of exempt status; that question (supposedly) was conclusively resolved against it in Phase I. The employer is bound by the classwide finding of liability and is limited to defenses that were not already "adjudicated," like the defenses of waiver and release, or evidence that negates the inference of a formulistic damages award. (*See* Opening Brief at 62-64.)

That proposal is as defective as the trial court's plan here. If Phase I is limited to the binary question of "Is the class properly classified?," and the answer binds every member of the class, then all of the due-process flaws shown above manifest themselves. Persons who actually are exempt (like the one-third of the class here, and four of the six named plaintiffs) will be labeled nonexempt and eligible for overtime, based on proof of the circumstances of others. In other words, under plaintiffs' proposal the trial court again would sacrifice the employer's legitimate defense in the name of procedural efficiency, and ignore individual issues rather than manage them.

Here, the question is how 260 individual employees spent their days in every workweek they were classified as exempt. Because the trial court managed the individual questions presented in this situation by depriving U.S. Bank of the chance to present any evidence on them, the trial plan was invalid. The *Teamsters* framework simply does not fit here, given the applicable substantive law.

C. This Court Should Be Mindful Of The Practical Effect Of Its Ruling.

The Court may be interested in our perspective from the trenches. Two phenomena recur.

First, it is commonplace at the certification stage for the party seeking certification to seek to put off into the future consideration of difficult issues of manageability. *See, e.g.*, *Morgan v. Wet Seal, Inc.*, 210 Cal. App. 4th 1341, 1369 (2012) ("[A]ppellants do not explain how their list of procedural tools can be used to effectively manage a class action in this case."); *Dunbar*, 141 Cal. App. 4th at 1432 ("It is not sufficient, in any event, simply to *mention* a procedural tool; the party seeking class certification must explain how the procedure will effectively manage the issues in question, and plaintiff has failed to do so here.") (emphasis added); *cf. Comcast Corp. v. Behrend*, ___ U.S. ___, 2013 U.S. LEXIS

2544, at *19 (U.S. Mar. 27, 2013) (rejecting class certification; plaintiffs "'assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations'"; "such assurance" is no substitute for a demonstrated methodology) (citation omitted).[8]

Second, the consequences are profound when a court defers, until later, consideration of intractable issues of manageability. Once certified, a class action imposes enormous pressure to settle: "[Plaintiffs] must think that like most class action suits this one would not be tried — that if we ordered a class or classes certified, DirectSat would settle. That may be a realistic conjecture, but class counsel cannot be permitted to force settlement by refusing to agree to a reasonable method of trial should settlement negotiations fail." *Espenscheid v. DirectSat USA, LLC*, 705

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[8] *See also Mora*, 194 Cal. App. 4th at 509-10 ("As of the time of the hearing . . . , [plaintiff's expert] had not yet conducted a survey, and his declaration describing the proper method for designing and implementing a scientific survey did nothing to refute the evidence presented by Big Lots that it did not operate its stores or supervise its managers in a uniform and standardized manner."); *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 268 F.R.D. at 612 n.2, 623 (denying certification; plaintiffs did not present a viable trial plan showing that the trial of individual issues was manageable).

F.3d 770, 776 (7th Cir. 2013).[9] Indeed, Rule 23(f) of the Federal Rules of Civil Procedure — authorizing in some circumstances interlocutory appeals of certification orders — was added precisely to help avoid bludgeoned settlements following class-certification orders. *See* FED. R. CIV. P. 23(f) Advisory Committee note to 1998 amendments ("An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

Insisting on a trial plan at the time of certification thus serves two objectives. First, where the trial plan exposes the need for individualized proof, certification should be denied. Second, if the case is certified, the trial plan at least provides the parties with a road map to trial, and the defendant with the assurance that its substantive defenses have not been abridged in order to jam the case into the class action device.

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[9] *See also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-59 (2007) (the pendency of a class action creates *in terrorem* effect to settle); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (noting the potentially devastating impact of class certification and the resulting compulsion to settle). *See generally* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlement in Securities Class Actions*, 43 STAN. L. REV. 497, 566-68 (1991) (analyzing securities class actions and concluding that the cases almost invariably settle after certification, regardless of their merits).

The facts of this case — a $15 million judgment, where at least one-third of the recipients are not entitled even to a dime — present a chilling picture of what happens otherwise.

V. CONCLUSION

This case does not portend the end of class action litigation. Rather, it presents an opportunity for the Court to clarify the obligation of the trial court and the proponent of certification to ensure that the historic innovation of the class device remains true to its purpose. *Procedural* innovation of course should be considered, but only where claims may be accurately adjudicated without sacrificing the parties' *substantive* rights or obligations.

The trial court here erred because it subordinated U.S. Bank's substantive right — the ability to prove that, as to any particular person, it committed no wrong — in the name of procedural expediency.

The court of appeal's decision here was correct, and this Court should say so.

Dated: May 1, 2013

Respectfully submitted,

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By: Paul W Cane Jr.
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CERTIFICATE OF COMPLIANCE

In accordance with California Rule of Court 8.520(c)(1), counsel for Respondent hereby certifies that the **BRIEF FOR *AMICI CURIAE* CALIFORNIA EMPLOYMENT LAW COUNCIL AND EMPLOYERS GROUP IN SUPPORT OF APPELLANT** is proportionately spaced, uses Times New Roman 13-point typeface, and contains 11,203 words, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, as determined by our law firm's word processing system used to prepare this brief.

Dated: May 1, 2013

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned, state: I am employed in the City and County of San Francisco, State of California. I am over the age of 18 years, and not a party to the within action. My business address is Paul Hastings LLP, 55 Second Street, Twenty-Fourth Floor, San Francisco, California 94105. On May 1, 2013, I served the foregoing document titled:

BRIEF FOR *AMICI CURIAE* CALIFORNIA EMPLOYMENT LAW COUNCIL AND EMPLOYERS GROUP IN SUPPORT OF APPELLANT

on the interested parties by placing a true and correct copy thereof in envelopes addressed as follows:

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☒ **VIA U.S. MAIL:** The envelopes were then sealed. I am readily familiar with the Firm's practice of collection and processing correspondence for mailing. Under that practice the sealed envelopes would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid 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. I also declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on May 1, 2013, at San Francisco, California.

_____

Alice F. Brown