No. S200923

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Plaintiffs and Respondents,

v.

U.S. BANK NATIONAL ASSOCIATION,

Defendant and Appellant.

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

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF SECURITY COMPANIES, CALIFORNIA ASSOCIATION OF LICENSED SECURITY AGENCIES, ABM SECURITY SERVICES INC., ALLIEDBARTON SECURITY SERVICES, G4S SECURE SOLUTIONS (USA) INC., AND SECURITAS SECURITY SERVICES USA, INC. IN SUPPORT OF APPELLANT U.S. BANK NATIONAL ASSOCIATION

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APPLICATION

Pursuant to California Rule of Court 8.520(f), the National Association of Security Companies ("NASCO"), California Association of Licensed Security Agencies ("CALSAGA"), ABM Security Services, Inc. ("ABM"), AlliedBarton Security Services ("AlliedBarton"), G4S Secure Solutions (USA) Inc. ("G4S"), and Securitas Security Services USA, Inc. ("Securitas") respectfully request leave to file an amici curiae brief in support of Defendant and Appellant U.S. Bank National Association ("U.S. Bank").

STATEMENT OF INTEREST

NASCO is the nation's largest contract security trade association, representing private security companies that employ more than 250,000 of the nation's most highly trained security officers servicing every business sector. NASCO is leading efforts to set meaningful standards for the private security industry and security officers by monitoring state and federal legislation and regulations affecting the quality and effectiveness of private security services. NASCO is dedicated to promoting higher standards, consistent regulations and ethical conduct for private security businesses, and increasing awareness and understanding among, policy-makers, the media and the general

public regarding the important role that private security plays in safeguarding people, property and assets and preventing crime and terrorism.

CALSAGA is a non-profit industry association that serves as the voice of the private security industry and the only association in California dedicated to advocating on behalf of contract and proprietary security organizations. CALSAGA has led efforts over the past several years to professionalize the industry and bring greater accountability in licensing, training, compliance and background screening standards that has made California a national leader in security standards. CALSAGA membership includes small firms to some of the largest private security companies in the world and major proprietary security operations and everything in between. Assisting its members with best practices regarding wage-hour-payroll compliance issues has been a key mission of CALSAGA for years, as has been tracking the explosive growth of wage and hour class action lawsuits against security employers.

ABM is one of the largest employers of security officers in the country, with 61 branch offices serving 40 states, including in Cali-

fornia, and ranks among the top 10 security companies in the United States.

AlliedBarton is the largest American-owned security officer services company. AlliedBarton has more than 55,000 employees and 120 regional and district offices located across the United States, including in California, from which it helps protect more than 3,300 customers.

G4S is a leading provider of integrated security solutions in the United States. G4S has 110 offices and approximately 40,000 employees across the country, including in California.

Securitas has over 650 local branch managers and more than 90,000 security officers who provide security solutions to meet the specific needs of thousands of businesses throughout the United States, including in California.

Amici directly or through their members employ thousands of people across California providing security services to a wide-range of businesses and government agencies. Like many California employers, companies in the security industry have been frequently targeted with wage and hour class actions in California, particularly over the past decade, and thus have a substantial interest in ensuring that

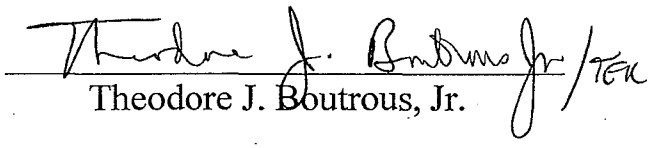
employers are allowed to adequately defend themselves in such actions. Amici are committed to fully complying with all applicable laws and regulations, and recognize the important role that class actions play in enforcing California's wage and hour laws. The class action trial in this case, however, impermissibly altered substantive law and violated the due process rights of Appellant U.S. Bank.

Amici believe this case raises issues of paramount importance to California employers and employees, as it presents this Court with an opportunity to clarify whether the use of statistical sampling and extrapolation is permissible in a class action trial in light of (1) the U.S. Supreme Court's unanimous rejection of "Trial by Formula" in *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541, and (2) the fact that the federal decisions relied upon by California courts in their limited endorsement of statistical sampling in prior class action cases have since been overruled.

For the above reasons, amici respectfully request leave to file the attached amici curiae brief.

Dated: April 3, 2013

Respectfully submitted,



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INTRODUCTION

The trial court below presided over a class action trial in which Plaintiffs were relieved of their burden to present actual evidence of liability and damages for each class member and were instead allowed to rely on speculative extrapolations based on a sample of evidence pertaining to only a handful of class members. This impermissible shortcut obscured differences among the class members, and resulted in the unwarranted conclusion that U.S. Bank had misclassified *every* class member, despite ample evidence proving that many class members were not in fact misclassified. Yet the trial court precluded U.S. Bank from introducing any of this evidence, and instead allowed it to contest *only* the claims of those class members in the sample and the statistical methodology of Plaintiffs' experts. As a result, it is indisputable that the procedure adopted by the trial court resulted in windfalls to uninjured class members and harmed the defendant as well as absent class members who may have been entitled to more than the "average" of the sample.

The U.S. Supreme Court in *Wal-Mart Stores, Inc. v. Dukes* (*Wal-Mart*) (2011) 131 S.Ct. 2541 unanimously condemned the very practice employed by the trial court in this case. (See *id.* at p. 2561.)

Labeling this "novel" approach to the adjudication of class actions "Trial by Formula," *Wal-Mart* rejected the use of sampling and extrapolation in class actions because this method of proof impermissibly alters substantive law and deprives a defendant of its ability to present individualized defenses. (*Ibid.*) And as the U.S. Supreme Court recently confirmed in *Comcast Corp. v. Behrend* (March 27, 2013, No. 11-864) ___ U.S. ____ [2013 WL 1222646, at p. *5], a class action, like this one, in which commonality and predominance are based on such an "arbitrary" method of proof, should never have been certified in the first place.

This Court should adopt the approach of the unanimous U.S. Supreme Court in *Wal-Mart* and affirm the decision of the Court of Appeal. To hold otherwise would not only violate the due process rights of defendants and absent class members, but it would also render California an outlier jurisdiction that continues to sanction adjudication of class actions using a flawed approach that has been rejected elsewhere, including by all nine Justices of the U.S. Supreme Court. Indeed, the California cases invoked by Plaintiffs and the trial court that had approved of the limited use of statistical sampling and extrapolation in class actions were based on federal precedents that are

no longer viable. And although *Wal-Mart*'s rejection of "Trial by Formula" was premised on the federal Rules Enabling Act, that statute is grounded in due process and reflects the fundamental notion that the class action procedural device must not alter substantive law.

As this Court recognized almost four decades ago, "class actions may create injustice" and "deprive a litigant of a constitutional right" if they "preclude a defendant from defending each individual claim to its fullest." (*City of San Jose v. Superior Court* (*City of San Jose*) (1974) 12 Cal.3d 447, 458.) By allowing statistical sampling to substitute for actual classwide proof, and severely limiting U.S. Bank's due process right to present "every available defense" (*Lindsey v. Normet* (*Lindsey*) (1972) 405 U.S. 56, 66), the trial court "[a]lter[ed] the substantive law to accommodate procedure," sacrificed "the goal for the going," and created the very injustice this Court warned of long ago. (*City of San Jose*, *supra*, at pp. 458, 462.)

ARGUMENT

I. THE TRIAL COURT'S ENDORSEMENT OF "TRIAL BY FORMULA" VIOLATED BOTH CALIFORNIA LAW AND DUE PROCESS.

The trial court departed from well-established norms of adjudication and endorsed the same "novel" procedure for trying class ac-

tions that the unanimous U.S. Supreme Court disapproved of in *Wal-Mart* as "Trial by Formula." In so doing, the trial court violated both California law and fundamental principles of due process.

A. The Trial in This Case Mirrored the "Trial by Formula" Unanimously Rejected by the U.S. Supreme Court in *Wal-Mart.*

In *Wal-Mart*, *supra*, 131 S.Ct. at p. 2561, the U.S. Supreme Court unanimously rejected the use of "Trial by Formula"—a procedure whereby liability would be determined based on an assessment of the claims of a sample of the class, with the results extrapolated across the remainder of the class. *Wal-Mart* involved federal sex discrimination claims brought on behalf of all female Wal-Mart employees nationwide. (*Id.* at p. 2547.) The district court certified the class, and a divided en banc panel of the Ninth Circuit affirmed. (*Dukes v. Wal-Mart Stores, Inc.* (*Dukes*) (9th Cir. 2010) 603 F.3d 571, 628 [en banc].)

The en banc majority of the Ninth Circuit dismissed the notion that individual determinations would render the class action unmanageable. Relying on a prior Ninth Circuit decision, *Hilao v. Estate of Marcos* (*Hilao*) (9th Cir. 1996) 103 F.3d 767, it reasoned that the trial court could randomly select a subset of claims, hold individualized

determinations as to those claims, and then extrapolate from the sample to calculate Wal-Mart's aggregate liability to the entire class, without assessing evidence relating to class members not within the sample. (See *Dukes*, 603 F.3d at pp. 625–626, citing *Hilao*, 103 F.3d at pp. 782–787.)

In the unanimous portion of its decision in *Wal-Mart*, the U.S. Supreme Court "disapprove[d]" this "novel project." (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2561.) The Court held that Wal-Mart had the "right to raise any individual affirmative defenses it may have" and to show that individual class members faced adverse employment actions for "lawful reasons," but the sampling procedure the Ninth Circuit had endorsed would infringe on these rights by precluding Wal-Mart from "litigat[ing] its statutory defenses to individual claims." (*Ibid.* [quotation marks and citation omitted].) Substituting statistical sampling for actual testimony would "'abridge, enlarge or modify'" the "'substantive right[s]'" of the parties in violation of the Rules Enabling Act. (*Ibid.*, quoting 28 U.S.C. § 2072(b).) The Court further concluded that a class action that could not be managed without resort to such a shortcut could not be certified at all. (*Ibid.* ["[A] class can-

not be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."].)

This case involves precisely the kind of "Trial by Formula" that the U.S. Supreme Court unanimously rejected in *Wal-Mart*. Eschewing U.S. Bank's proposed trial plan, which separated class members into groups of 20 to 30 in order to conduct individualized hearings, the trial court "on its own initiative, proposed the idea of taking a sample of 20 plaintiffs selected on a random basis to testify at trial." (*Duran v. U.S. Bank Nat. Assn.* (*Duran*) (Feb. 6, 2012, A125557 & A126827) slip op. at p. 7.) It prevented U.S. Bank from offering affirmative evidence regarding any class member who had not been selected for the sample. (*Id.* at p. 12.) After permitting troubling substitutions within the sample group (see Answering Br. at pp. 84–88), the trial court concluded that all 21 class members who actually testified had been misclassified and had all worked overtime hours (see *Duran*, *supra*, slip op. at p. 29). From this sample, the trial court extrapolated to hold U.S. Bank liable to every one of the other 239 class members (*id.* at p. 60), even though Plaintiffs had not presented evidence that *any* of the class members outside the sample were misclassified, and

U.S. Bank had been denied its right to introduce evidence that many or most were not. This is exactly what *Wal-Mart* rejected.

Had U.S. Bank been allowed to present evidence regarding class members outside the sample, the result of the trial would have been radically different. U.S. Bank sought to introduce sworn affidavits from class members rebutting the unfounded assumption that *every* class member had been misclassified—indeed, it offered ten such affidavits that refuted the claims for recovery on behalf of class members collectively awarded nearly $2.5 million in the judgment. (Answering Br. at p. 107; see also *id.* at pp. 107–108 [judgment included at least $6 million in awards to class members who had confirmed their exempt status].) It is hard to imagine a clearer "abridgment" or "modification" of U.S. Bank's substantive rights: The basis for the bulk of the trial court's damages award would have evaporated if Plaintiffs had been required to prove liability as to every class member and U.S. Bank had been allowed to present its individualized defenses.

B. *Wal-Mart*'s "Trial by Formula" Holding Applies Equally to All Types of Class Actions.

Because Plaintiffs cannot deny that the U.S. Supreme Court in *Wal-Mart* unanimously rejected the same procedures used in the trial below, they attempt to distinguish *Wal-Mart* and essentially limit it to its facts. But their cramped reading of *Wal-Mart* does not withstand scrutiny.

First, Plaintiffs assert, without explanation, that *Wal-Mart*'s rejection of "Trial by Formula" was limited to Title VII cases. (Reply Br. at pp. 41–42.) Yet numerous courts have rejected similar efforts to limit *Wal-Mart* to its facts, recognizing instead that the Supreme Court's decision embodied norms applicable in all types of class actions, regardless of the underlying substantive law. (See, e.g., *Comcast*, *supra*, 2013 WL 1222646, at pp. *4–5 [applying *Wal-Mart* in antitrust class action certified under Rule 23(b)(3)]; *Wang v. Chinese Daily News, Inc.* (*Wang*) (9th Cir. Mar. 4, 2013, Nos. 08-55483, 08-56740) ___ F.3d ____ [2013 WL 781715, at p. *6] [reversing class certification in wage and hour misclassification case, and instructing the district court to follow *Wal-Mart*'s "Trial by Formula" holding]; *Cruz v. Dollar Tree Stores, Inc.* (N.D. Cal. July 8, 2011, Nos. 07-2050

SC, 07-4012 SC) 2011 WL 2682967, at p. *6 [decertifying wage and hour misclassification class action and noting that "[*Wal-Mart*] rejected a 'Trial by Formula' approach to damages"].)

That courts have applied *Wal-Mart*'s "Trial by Formula" holding beyond the Title VII context is unsurprising. *Wal-Mart* was not merely interpreting the substantive law of Title VII, but rather was construing the generally applicable standards for class certification in light of the fundamental principle—codified in the Rules Enabling Act—that procedural mechanisms cannot be used to alter substantive law or deprive a litigant of its right to defend itself. (See *Wal-Mart, supra*, 131 S.Ct. at p. 2561 ["[A] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."]; see also *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.* (2010) 130 S.Ct. 1431, 1437 ["Rule 23 provides a one-size-fits-all formula for deciding the class-action question."].)

Second, Plaintiffs suggest that *Wal-Mart*'s rejection of "Trial by Formula" was limited to Rule 23(b)(2) class actions that have "no analog in California class action rules." (Opening Br. at p. 44.) But the Ninth Circuit's decision in *Wang*, which involved a class certified

under Rule 23(b)(3), confirms that "Trial by Formula" is equally impermissible in all types of class actions. (See *Wang*, *supra*, 2013 WL 781715, at p. *6.) Moreover, this Court in *Brinker* already relied on another aspect of *Wal-Mart* in interpreting California class action procedure, and Plaintiffs offer no reason why *Wal-Mart*'s guidance on other issues—including the propriety of "Trial by Formula"—is irrelevant here. (See *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1023 [citing and following *Wal-Mart*'s guidance that a trial court must often inquire into the merits of a dispute at the certification stage].)

Significantly, the Supreme Court recently vacated and remanded the key appellate case on which Plaintiffs rely to support their misguided attempt to limit *Wal-Mart* to its facts, *Ross v. RBS Citizens, N.A.* (*Ross*) (7th Cir. 2012) 667 F.3d 900. (See *RBS Citizens, N.A. v. Ross* (Apr. 1, 2013, No. 12-165) ___ U.S. ___ [2013 WL 1285303]; Reply Br. at pp. 42, 44–45.) Plaintiffs read *Ross* to suggest that, notwithstanding *Wal-Mart*, a court may certify a class of purportedly misclassified employees without "individually determin[ing] whether each class member performed primarily nonexempt duties," so long as an "unofficial company policy" compelled them to perform nonex-

empt work. (Reply Br. at pp. 44–45.) But the U.S. Supreme Court has firmly rejected such attempts to paper over differences among class members, and its decision vacating and remanding in *Ross*—a "case similar to this one" (*id.* at p. 44)—confirms that *Wal-Mart* applies here.

C. "Trial by Formula" Violates California Law and Due Process.

Although *Wal-Mart*'s "Trial by Formula" holding relied on the Rules Enabling Act's prohibition against interpreting procedural rules to "abridge, enlarge or modify any substantive right" (28 U.S.C. § 2072(b)), that principle reflects a fundamental due process norm that is binding on all courts. As the Supreme Court has repeatedly instructed, "'Due process requires that there be an opportunity to present every available defense.'" (*Lindsey*, *supra*, 405 U.S. at p. 66, quoting *Am. Surety Co. v. Baldwin* (1932) 287 U.S. 156, 168; see also *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353.) Indeed, federal class action procedure is "grounded in due process," and, as *Wal-Mart* reaffirmed, the procedural convenience of class treatment cannot displace the "deep-rooted historic tradition that everyone

should have his own day in court." (*Taylor v. Sturgell* (2008) 553 U.S. 880, 892–893, 901.)

Moreover, as a matter of California law, this Court has recognized that "[c]lass actions are provided only as a means to enforce substantive law" and thus "[a]ltering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going." (*City of San Jose*, *supra*, 12 Cal.3d at p. 462; see also *In re Tobacco II Cases* (*Tobacco II*) (2009) 46 Cal.4th 298, 313.) Yet relying on statistical sampling and extrapolation to facilitate the classwide adjudication of claims that depend on answering numerous individualized questions does precisely that. Where a proposed class action does not involve true common questions—those that have the capacity to generate "common *answers*" for all class members (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2551), the proper course is to deny certification, rather than pressing ahead at any cost.

Indeed, as the Court of Appeal recently noted in affirming the denial of class certification in a wage and hour misclassification case, statistical sampling cannot be used as "an adequate evidentiary *substitute* for demonstrating the requisite commonality" necessary to maintain a class action, or "to manufacture predominate common issues

where the factual record indicates none exist." (*Dailey v. Sears, Roebuck & Co.* (*Dailey*) (Mar. 20, 2013, D061055) ___ Cal.App.4th ____ [pp. 35–36].) As the court went on to explain, "[i]f 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.* at p. 36.)[1]

The U.S. Supreme Court also recently recognized this same principle in *Comcast Corp. v. Behrend*, holding that courts at the certification stage must "decide whether the methodology [for calculating damages is] a just and reasonable inference or speculative," rather than accepting "*any* method of measurement" that "can be applied classwide, no matter how arbitrary the measurements may be." (*Comcast*, 2013 WL 1222646, at p. *5 [quotation marks and citation omitted].) The sampling methodology applied in this case is precisely the sort of arbitrary measurement rejected in *Comcast* (and *Wal-Mart*)—one designed not to "translat[e] . . . the legal theory of the harmful event into an analysis of the . . . impact of that event" but in-

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[1] The sampling methodology proposed in *Dailey* was the same methodology that statistician Richard Drogin proposed to implement in *Wal-Mart* and was actually utilized at trial in this case. (*Dailey*, *supra*, at p. 35, fn. 10.)

stead to manufacture a manageable class at the expense of an accurate judgment. (*Id.* at p. *7 [emphasis omitted].) As *Comcast* makes clear, blind acceptance of such "expert" proposals, which purport to allow for classwide adjudication despite the presence of significant individualized issues, "would reduce [the] predominance requirement to a nullity." (*Id.* at p. *5.)

Even before *Wal-Mart* and *Comcast*, several federal appellate courts recognized that masking individualized issues with procedural shortcuts leads to distorted liability determinations. For example, in *McLaughlin v. American Tobacco Co.* (*McLaughlin*) (2d Cir. 2008) 522 F.3d 215, 231, the Second Circuit rejected a proposed damages calculation that extrapolated the "total amount of damages suffered" from an "initial estimate of the percentage of class members" to whom the defendant was liable. The court held that this plan "of-fend[ed] both the Rules Enabling Act *and the Due Process Clause*" because it was "likely to result in an astronomical damages figure that [did] not accurately reflect the number of plaintiffs actually injured by defendants" and would "inevitably alter defendants' substantive right to pay damages reflective of their actual liability." (*Ibid.* [emphasis added].)

Similarly, in *Broussard v. Meineke Discount Muffler Shops, Inc.* (*Broussard*) (4th Cir. 1998) 155 F.3d 331, 336, the Fourth Circuit decertified a class that had won a massive damages verdict predicated on sampling and extrapolation rather than actual evidence proving damages to every class member. The plaintiffs were franchisees alleging lost profits from purported violations of their franchise agreement; they sought to prove damages through expert testimony that showed "an average profit margin based on a sample of franchisees' financial data," but they could not establish "the damages that any individual franchisee" had suffered. (*Id.* at p. 343.) This "hypothetical or speculative evidence, divorced from any actual proof of damages" fell well short of the "proof of individual damages necessary" to affirm the verdict, and the court admonished that the fact "that this shortcut was necessary in order for th[e] suit to proceed as a class action should have been a caution signal to the district court." (*Ibid.* [quotation marks and citation omitted].)

By endorsing "Trial by Formula" in *Wal-Mart*, the Ninth Circuit set out on a different path than its sister courts of appeal—a path that the U.S. Supreme Court has since firmly, and unanimously, foreclosed. As it has done before, this Court should endorse the approach

of federal courts on class action procedure. (See, e.g., *Tobacco II*, *supra*, 46 Cal.4th at p. 318 ["[W]e look [to federal law] when seeking guidance on issues of class action procedure."]; *City of San Jose*, *supra*, 12 Cal.3d at pp. 453–454, 463 ["direct[ing]" California trial courts to Rule 23 and citing federal class action precedents].) After *Wal-Mart*, federal courts have now roundly rejected "Trial by Formula" and other procedural shortcuts that hamstring class action defendants from presenting individualized defenses—including the Ninth Circuit itself. (See *Wang*, *supra*, 2013 WL 781715, at p. *6, quoting *Wal-Mart*, *supra*, 131 S.Ct. at p. 2561 ["In *Wal-Mart*, the 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.' . . . If the district court again certifies a class under Rule 23(b)(3), it should calculate damages in light of the Supreme Court's admonitions in *Wal-Mart*."].)

II. *BELL* AND *SAV-ON* RELIED ON FEDERAL CASES THAT HAVE BEEN EFFECTIVELY OVERRULED.

Plaintiffs largely ignore *Wal-Mart*'s rejection of "Trial by Formula," and instead rely extensively on two California cases that sup-

posedly endorse substituting statistical "proof" for actual classwide evidence. (See, e.g., Opening Br. at p. 33, citing *Bell v. Farmers Ins. Exchange* (*Bell*) (2004) 115 Cal.App.4th 715, 754; Opening Br. at p. 34, citing *Sav-On Drug Stores, Inc. v. Superior Court* (*Sav-On*) (2004) 34 Cal.4th 319, 333.) Even if these cases actually condoned the type of trial conducted below—which they did not (see *Duran*, *supra*, slip op. at pp. 45–46; Answering Br. at pp. 65–70)—they relied on wrongly-decided federal cases that have since been effectively overruled by the U.S. Supreme Court in *Wal-Mart* and the Second Circuit in *McLaughlin*. This Court should not endorse a short-lived and now discredited experiment in federal class action procedure. Rather, the Court should clarify that to the extent *Bell* and *Sav-On* relied on repudiated federal authorities endorsing the use of statistical sampling and extrapolation to adjudicate class claims, they are no longer good law.

In *Bell*, *supra*, 115 Cal.App.4th at p. 724, the trial court in an unpaid overtime class action allowed experts to calculate damages by extrapolating from depositions of 295 class members to determine the total number of overtime hours worked by a class of 2,402 employees. On appeal, the defendant argued that "the use of statistical sampling and extrapolation violated its right to due process in the determination

of damages." (*Id.* at p. 751.) The Court of Appeal rejected this argument. "[L]ook[ing] to federal law" for guidance (*id.* at 747), it relied heavily on the Ninth Circuit's since-discredited decision in *Hilao v. Estate of Marcos*, *supra*, 103 F.3d at p. 786 (see 115 Cal.App.4th at pp. 752, 755), and a federal district court decision, *In re Simon II Litigation* (*Simon II*) (E.D.N.Y. 2002) 211 F.R.D. 86, 148–154 (see 115 Cal.App.4th at pp. 752–754). These federal cases, among others, convinced the Court of Appeal that the plaintiffs' "proof of aggregate damages for time-and-a-half overtime by statistical inference reflected a level of accuracy consistent with due process." (115 Cal.App.4th at p. 755.)

Neither of these federal precedents remains good law. *Hilao* was the decision that inspired the Ninth Circuit en banc majority in *Wal-Mart* to endorse statistical sampling and extrapolation to resolve class claims: It held that a trial procedure in which liability and damages were established as to a sample of 137 class members and then extrapolated across a class of nearly 10,000 did not violate the defendant's due process rights. (*Hilao*, *supra*, 103 F.3d at pp. 785–787.) But *Wal-Mart* expressly rejected "the approach the Ninth Circuit approved in *Hilao*," labeling it "Trial by Formula" and holding that it

violated the Rules Enabling Act. (*Wal-Mart, supra*, 131 S.Ct. at pp. 2550, 2561). *Hilao* has thus been overruled by *Wal-Mart*. (See *ibid.*; see also *Wang, supra*, 2013 WL 781715, at p. *6.)

Simon II is similarly infirm. There, Judge Weinstein of the Eastern District of New York certified a "punitive damages non-opt-out" class of current and former smokers who were suing major tobacco companies. (*Simon II, supra,* (E.D.N.Y. 2002) 211 F.R.D. 86, 99–100.) Rather than "requiring individual proof from each smoker," Judge Weinstein ordered a trial focused on "statistical models" supplemented by documentary and anecdotal evidence. (*Id.* at pp. 129, 147.) *Simon II* was reversed on other grounds by the Second Circuit. (*In re Simon II Litigation* (2d Cir. 2003) 407 F.3d 125, 140 ["[W]e need not address whether the district court's proposed statistical aggregation of proof . . . would have been appropriate for a class-wide approximation of compensatory liability."].) But in 2006, Judge Weinstein certified another class of tobacco plaintiffs, relying on the very same trial plan he had endorsed in *Simon II*—and in fact attaching the *Simon II* opinion as an appendix to his decision. (See *Schwab v. Philip Morris USA, Inc.* (E.D.N.Y. 2006) 449 F.Supp.2d 992, 1017, 1240–1248.)

On appeal, the Second Circuit firmly rejected Judge Weinstein's approach. (*McLaughlin*, *supra*, 522 F.3d at p. 231.) It observed that Judge Weinstein's plan to "roughly estimat[e] the gross damages to the class as a whole" would cause the defendants to "overpay[] in the aggregate" and "generate more leverage and pressure on defendants to settle." (*Id.* at pp. 231–232 [quotation marks and citation omitted].) *McLaughlin* conclusively repudiated the *Simon II* approach to class actions—the very approach adopted in *Bell*.

Plaintiffs and the trial court below also relied on this Court's decision in *Sav-On Drug Stores, Inc. v. Superior Court* (*Sav-On*) (2004) 34 Cal.4th 319, 333, but *Sav-On* merely adopted *Bell*'s reasoning without elaboration or any independent due process analysis. Moreover, *Sav-On* was decided before *Simon II* and *Hilao* had been effectively overruled.

This Court should not construct its class action jurisprudence from the scrap heap of federal law. *Bell* and *Sav-On* rightly looked to federal law for guidance on class action issues, but the cases they relied on reflected "novel" experiments in federal class action procedure that have since been discredited and rightly discarded. (*Wal-Mart*, *supra*, 131 S.Ct. at 2561.) Because the federal underpinnings of *Bell*

and *Sav-On* have been eroded, the Court should revisit these decisions in light of current federal law and reject the procedures they endorsed.

III. ENDORSING "TRIAL BY FORMULA" WOULD HARM ABSENT CLASS MEMBERS, AND INCREASE THE PRESSURE ON CALIFORNIA EMPLOYERS TO SETTLE MERITLESS CLASS ACTIONS.

By permitting statistical shortcuts to replace actual proof of class members' claims, despite the U.S. Supreme Court's unanimous disapproval of this very approach in *Wal-Mart*, California would fall out of step with the federal system, and would risk becoming a magnet for unmanageable class actions that other jurisdictions refuse to entertain. Indeed, with *Wal-Mart* and *Comcast*, the U.S. Supreme Court has sent a clear signal to lower courts to rein in class actions that can be adjudicated on a classwide basis *only* by relying on impermissible and arbitrary procedural shortcuts. Thus, if this Court rejects the federal approach and endorses "Trial by Formula," plaintiffs pursuing class claims will go to great lengths to avoid federal jurisdiction and file suits in California state courts. The result will be an influx of class actions that will swamp California's already overburdened and underfunded judiciary.

This consequence might be worthwhile if "Trial by Formula" were sound policy, but it is not. On the contrary, tolerating this kind

of "rough justice" harms both class action defendants and absent class members alike. (*Dukes v. Wal-Mart, Inc.* (9th Cir. 2007) 509 F.3d 1168, 1200 (dis. opn. of Kleinfeld, J.) [quotation marks omitted].)

By masking differences between individual class members, statistical sampling and extrapolation can result in awards of damages to uninjured class members who could not have prevailed in an individual suit solely by virtue of the class action device. (See *City of San Jose, supra*, 12 Cal.3d at p. 462.) Allowing these uninjured class members to remain in the class and receive a windfall harms those class members who have suffered actual injuries, because they are forced to share damages awards with others who have no entitlement to any recovery. As the vindicated dissent from the Ninth Circuit's initial *Wal-Mart* opinion recognized, "Trial by Formula" thus can dilute the recovery of the true victims (if any) within a class, leaving such class members potentially undercompensated. (*Dukes v. Wal-Mart, Inc., supra*, 509 F.3d at p. 1200 (dis. opn. of Kleinfeld, J.) ["The district court's formula approach . . . means that women injured by sex discrimination will have to share any recovery with women who were not. Women who were fired or not promoted for good reasons will take money from Wal-Mart they do not deserve."].)

Endorsing "Trial by Formula" would also further increase the pressure on California employers to settle class action lawsuits regardless of the underlying merits. (See *McLaughlin, supra*, 522 F.3d at p. 231 [altering "defendants' substantive right to pay damages reflective of their actual liability" is "likely to result in an astronomical damages figure that does not accurately reflect the number of plaintiffs actually injured" and thus "generate more leverage and pressure on defendants to settle"] [quotation marks and citation omitted].) Because this approach bars defendants from presenting individualized defenses at trial—even where, as here, a defendant has evidence that it is liable at most to some, but not all, class members—"Trial by Formula" magnifies the well-known "in terrorem" effect of class certification. (See, e.g., *Shady Grove, supra*, at p. 1465, fn. 3, quoting Fed. Rules Civ.Proc., rule 23, 28 U.S.C., Advisory Committee Notes to 1998 Amendments [Ginsburg, J., dissenting opn.] ["Even in the mine-run case, a class action can result in 'potentially ruinous liability.' . . . A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims."].) Class certification "can propel the stakes of a case into the stratosphere" and thus pressure a defendant to settle "even when the plaintiff's probability of

success on the merits is slight." (*Blair v. Equifax Check Servs., Inc.* (7th Cir. 1999) 181 F.3d 832, 834.) If defendants are not allowed to present a full defense on the merits, including by presenting individualized defenses, they will be further disinclined to take the substantial risk of proceeding to a class action trial and blackmail settlements will become the norm. Such settlements drive up the cost of doing business for California employers, which in turn raises prices for consumers and reduces job opportunities for workers in California.

Finally, "Trial by Formula" penalizes companies for their efforts to comply with the law. Because it bars individualized defenses and presumes liability as to the vast majority of a company's employees, it effectively precludes a company from presenting evidence of its significant compliance with the relevant law. Amici and the companies they represent expend considerable resources to provide employees with all legally mandated breaks and compensation. Yet when procedural rules make it impossible to differentiate between valid and invalid individual claims, these efforts are in vain. "Trial by Formula" thus creates a perverse incentive that discourages companies to invest in compliance measures and should not be sanctioned by the Court.

* * *

The trial court's decision to certify the class here—despite significant disparities among class members that could only be revealed through the examination of individualized evidence—left it with no choice but to conduct a "Trial by Formula" that masked those differences. Indeed, if the class members here had pursued individual actions, resolution of their claims would have looked nothing like the trial below. An individual plaintiff would not have relied on a sample group of *other* employees or an expert statistician to establish that she was a non-exempt employee; rather, the key evidence would have been the plaintiff's own testimony about her own unique experiences. And U.S. Bank would have been provided with an opportunity to present contrary evidence, such as evidence showing that the plaintiff had in fact worked a majority of time outside of bank branches. In each individual action, the fact and extent of liability would vary from plaintiff to plaintiff depending on the weighing of this individualized evidence.

Yet by replacing such individualized proceedings with the shortcut of "Trial by Formula," the trial court undercompensated the actually aggrieved to benefit the wholly undeserving, all while dra-

matically overestimating U.S. Bank's liability. As this case demonstrates, the class action mechanism "may be endangered by 'those who embrace [it] too enthusiastically just as [by] those who approach [it] with distaste.'" (*Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591, 629, quoting C. Wright, Law of Federal Courts (5th ed. 1994) p. 508.) The Court should reject the use of "Trial by Formula" in California.

CONCLUSION

The decision of the Court of Appeal should be affirmed.

Dated: April 3, 2013

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1), of the California Rules of Court, the undersigned hereby certifies that the foregoing amicus brief is in 14 point Times New Roman font and contains 5,857 words, according to the word count generated by the computer program used to produce the brief.

Dated: April 3, 2013

Theodore J. Boutrous, Jr.

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I, Thelma Dominguez, hereby certify as follows:

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on the interested parties in this action, by:

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