No. S200923

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

v.

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

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

OPENING BRIEF ON THE MERITS

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ISSUES FOR REVIEW

1. In a wage and hour misclassification class action, does the defendant have a due process right to assert its affirmative defense against every class member?

2. Can a plaintiff satisfy the requirements for class certification if a defendant has a due process right to assert its affirmative defense against every class member?

3. Can statistical sampling, surveys and other forms of representative evidence be used to prove classwide liability in a wage and hour misclassification case?

4. When an appellate court reviews a class action judgment and an order denying class decertification, does the appellate court prejudicially err by (a) applying newly-announced legal standards to the facts and then reversing the judgment and the class order without providing for a new trial and/or (b) reweighing the evidence instead of reviewing the judgment and order under the substantial evidence standard of review?

INTRODUCTION

This is a certified class action brought on behalf of U.S. Bank National Association's ("USB") California-based branch employees called "Small Business Banking Officers" and "Business Banking Officers" (collectively, "BBOs"). BBOs sell the Bank's basic products, such as loans, lines of credit, and checking/savings accounts to small businesses. Plaintiffs alleged that the BBOs were misclassified as exempt, in violation of the Unfair Competition Law, and the case was tried to the bench on defendant's affirmative defense of the outside sales exemption.

The trial court, having certified the class, faced the challenging question of how to manage the trial so as to take advantage of the efficiencies of group litigation while at the same time permitting defendant its due process right to make a defense. This challenge was made more daunting by defendant's refusal to agree to any procedure other than an unlimited right to try the liability and damages claims of each and every class member individually. The court found that liability, including determining defendant's realistic expectations for the job, could be resolved by common proof. One form of that proof, the court determined, was the use of a random sample of class members. This sample, in combination with expert and management testimony, company documents and an adverse inference arising from failure to maintain relevant records, formed

the basis for the court's liability and damages determinations.

The trial court's class certification decision was supported by substantial evidence. The court properly concluded at class certification, and in response to repeated motions to decertify, that common issues predominated over individual issues, and were susceptible to common proof. The class certification decision should be upheld even if this Court were to find the trial plan flawed.

Two fundamental questions are presented to this Court. First, is it permissible for a trial court to base liability determinations in part on a random sample of class members, or may a defendant insist that the court hear the testimony of every single class member? This Court and many others have held that a court may indeed rely on pattern, sampling and other forms of general proof in class trials, and that there is no requirement that class liability be based on the testimony of every class member.

Secondly, what due process right does a defendant have to offer evidence contesting liability and damages determinations? There is no question that a defendant, faced with a sampling plan, must be afforded broad latitude to challenge the size, methodology and credibility of the sampling plan and the expert testimony that supports it. Whether a defendant may insist on the testimony of class members outside of the sample depends on the stage of the proceedings, whether issues may be

resolved by common proof and whether further individual testimony from class members would be unduly cumulative.

At the liability stage of a class action, particularly a misclassification case under the Unfair Competition Law, the primary focus is on the employer's common policies and practices and its realistic expectations about how the job is performed, not on the individual application of those policies and practices to each employee. Accordingly, a trial court may, consistent with the sampling plan and Evidence Code §352, limit or exclude non-sampled class member testimony at the liability phase, particularly where, as here, the sample already includes some of the defendant's designated class members.

The court's trial plan for the liability phase of this case reasonably relied on a sample of class member testimony in addition to extensive other evidence. The random selection of the sample, its size and attendant margin of error (13%) were consistent with scientific standards and cases based on representative testimony. The court found that the testimony of each of the 21 sampled class members confirmed that the BBO position was *not* an outside sales position. Other evidence, including management testimony and corporate documents, corroborated this testimony. Defendant was permitted to offer unlimited management and expert testimony and to challenge, directly or through other witnesses, the testimony of every class

member in the sample. The court acted within its discretion in excluding defendant's proffered class member declarations.

At the remedial ("damages") phase of a class action trial, as the Court of Appeal agreed, it is well established that representative testimony or sampled evidence may be used to determine damages. Indeed, in wage and hour cases, courts have long relied upon representative evidence of a portion of the class, even when not randomly sampled, to determine damages for the rest of the class by "just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687-88. While a defendant may be able to challenge individual class member entitlement to relief and amount of damages at the damages phase, it may not re-litigate the class liability determination or insist that all class members establish their individual right to relief. It is the defendant's burden at the remedial phase to produce evidence and prove that, notwithstanding the finding of a classwide pattern or practice of illegal conduct (i.e., misclassification), a particular class member was not subject to this pattern and is therefore not entitled to relief.

In this case, the calculation of damages based on the class-member sample produced a 43% margin of error, unquestionably a high error rate. Standing alone, this error rate would not sustain the damages judgment. But here, aware of the 43% margin of error for the damages calculation, the

trial court offered the parties a range of alternatives that would have greatly reduced the error margin. These alternatives included: individual calculation of damages through a claims procedure, mini-trials, or special masters; the use of a survey; or "any other or additional alternatives offered by the parties." 83CT24630. While plaintiffs expressed their willingness to consider such alternative procedures, defendant rejected all of them, insisting on re-litigation, on an individual-by-individual basis, of both liability and damages. The court reasonably was not willing to reconsider classwide liability. Defendant's clear and unambiguous rejection of the alternatives offered should be treated as a waiver of its claims that the damages procedure and the 43% margin error were unconstitutional.

If this Court concludes that despite defendant's refusal to agree to alternatives, its rights were abridged by the 43% margin of error on damages, it should order a limited remand of the damages phase. Such further proceedings could supplement the existing trial record by increasing the sample size and/or permitting a survey of class members, or any other reasonable alternative procedure which would reduce the margin of error. In such proceedings, the defendant may be permitted to challenge relief to individual class members where it has met its remedial burden of production and proof. The trial court in the first instance should determine the trial plan on remand.

STATEMENT OF THE CASE[1]

The Complaint Alleged Misclassification and Failure to Pay Overtime. Plaintiffs Presented Extensive Evidence in Support of Class Certification.

The complaint alleged that defendant failed to pay overtime to its BBOs because it misclassified them all as exempt employees under the outside sales exemption. 1CT1-16; 42RT2939-2940; 6CT1682-1683. The outside sales exemption is met under California law only if employees customarily and regularly spend more than half their working time in sales activities away from the employer's place of employment. Cal. Code Regs., tit. 8, §11040(1)(C), (2)(M).

In support of their motion for class certification, plaintiffs filed declarations from 37 current and former BBOs. The declarations stated as follows. The BBO's job is to sell basic Bank products, such as loans, lines of credit and checking/savings accounts to small business customers. BBOs are branched-based employees who spend more than half their work time inside Bank properties. There are no significant differences among BBOs in terms of the Bank's expectations, the activities they perform, or the hours they work. 6CT1460-1601, 11CT3077-3083, 13CT3664-3672.

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[1] We set forth the facts consistent with the substantial evidence rule. The Court of Appeal disregarded that rule throughout its opinion. Plaintiffs raised this issue on rehearing.

Plaintiffs also submitted deposition excerpts from USB managers establishing the following: BBOs work 40-60 hours per week selling bank products. 7CT1739-1741; 6CT1664, 1668. USB has classified all BBOs as exempt. USB has standardized hiring, training, and evaluation procedures for BBOs (6CT1649-1654, 1678, 1680; 7CT1738) but has never tracked or kept records of how much time they work outside Bank property. 6CT1656, 1687-1689, 7CT1742-1743. BBOs are not evaluated, disciplined, or compensated based on *where* they spend their time but only on whether they meet or exceed their sales goals. 6CT1667, 7CT1729-1730, 1736, 1739, 1746-1747. USB's job descriptions for the BBO position have never stated that BBOs are expected to spend more than half their time outside Bank premises. 6CT1670-1671, 1674-1677, 7CT1757-1765.

In Opposition to Class Certification, Defendant Filed Declarations That Were Later Repudiated by the Signers and Discounted by the Court.

Defendant's opposition to certification included standardized declarations from numerous BBOs who claimed they regularly spent more than half their time performing sales activity outside the office. 9CT2302-10CT269. Four class members repudiated the defense declarations and submitted new declarations in support of plaintiffs. 9CT2325-2328; 9CT2308-2311; 10CT2649-2651; 10CT2620-2625. A fifth BBO

described how a Bank attorney attempted to get her to sign a false declaration. 13CT3664-3668. The trial court later concluded that "the weight to be given to these declarations must be adjusted because of their actual authorship, the circumstances of preparation and internal inconsistencies and ambiguities." 71CT20991.

The Trial Court Certified the Class, Finding Common Questions of Law and Fact Predominated.

After reviewing nearly 3400 pages of evidence and written argument and holding a lengthy hearing, the trial court granted plaintiffs' motion for class certification and denied defendant's opposing motion. The court found that the standards for class certification had been satisfied. 16CT4528-4535; 5RT115-153.

With respect to commonality, the court found that there was sufficient evidence that the BBO position was standardized throughout the Bank so that USB's realistic expectations and the actual requirements of the job were susceptible to common proof. The court found that USB classified all BBOs as exempt without individualized inquiry as to any employee's job duties or monitoring to ensure that exemption requirements were being satisfied. The court concluded, "[T]here exists a classwide commonality of interest making class treatment a superior method of resolving this dispute."

16CT4533. The class at that time contained approximately 282 members. 71CT20987.

The Trial Court Formulated a Trial Management Plan After Seeking USB's Input Without Success.

A year before the start of trial, the court began to develop a trial plan. It directed the parties to meet and confer and to submit proposals on trial management. 8RT204-207.

Plaintiffs' trial plan was based on the declaration of Dr. Richard Drogin, a noted statistician. Dr. Drogin proposed that the parties' experts jointly prepare a survey concerning where class members spent their time and how many hours they worked. Based on the results of the survey, a group of class members would be randomly selected for further discovery and testimony at trial. The court would determine the exemption status for each person in the random sample. The results of the testimony from the sample would be applied to the class as a whole. The procedure was designed to obtain an accurate estimate of the proportion of the class improperly classified as exempt and an accurate calculation of aggregate classwide damages. 20CT5853-5858, 5863-5875. This scientific methodology was modeled on the plan used in *Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, in which Dr. Drogin served as an expert witness. 20CT5865. Plaintiffs also submitted a declaration by Dr. Jon

Krosnick, a noted expert on surveys, on how to prepare a survey for this case. 21CT5930-5957.

USB steadfastly opposed any plan based on a survey or on representative testimony – or any plan that acknowledged that class certification had been granted. Defendant's only proposal was that the court appoint retired judges as special masters to hold individual trials of liability and damages for *all* class members, with the retired judge's decision final as to each class member. 2CTSupp.349-351; 20CT5891-21CT5906; 10RT230-231.

The court announced it was inclined to adopt a plan consistent with plaintiffs' proposal. The court ordered the parties to meet and confer concerning areas of agreement and disagreement on the trial plan. 21CT5911-5915. The parties met but remained in complete disagreement. Plaintiffs continued to espouse an expert sampling plan based on a survey plus representative testimony. Defendant objected to any plan that did not involve individual trials of liability and damages for each class member. 21CT5916-5929.

At a later hearing, the court proposed to randomly select a sample of perhaps 20 but no more than 50 class members to testify at trial, with the findings on liability and damages to be extrapolated to the rest of the class. 10RT221-238. The court's proposal was modeled on plaintiffs' trial

management plan. The court proposed to omit the survey because defendant "strenuously and vigorously" opposed it. 10RT225-226. Defendant strongly opposed random selection of witnesses and insisted that all class members testify. 10RT230-231. The court urged the parties again to meet and confer about many topics, including the possible use of a survey and the number of random witnesses. 10RT233-237; 21CT6163-6166.

The meet and confer process went nowhere because USB continued to insist on individual hearings on liability and damages for each class member. After reviewing the parties' responses, the court announced that 20 randomly chosen class members would testify in Phase I of the trial. Defendant demanded, over plaintiffs' objections, that all current and former named plaintiffs be non-randomly selected to testify as a part of the RWG along with the randomly selected trial witnesses. The court granted defendant's request as to the two current plaintiffs, adding them to the sample. 11RT244-249. Collectively, these witnesses were called the "Representative Witness Group" or "RWGs." 11RT240, 248-249; 22CT6241-6245. The court randomly selected 25 names (20 witnesses and 5 alternates) from among the class members. 12RT266-267; 22CT6289; 71CT20988-20989. Although the court indicated that it would not permit testimony from class members outside of the RWG for purposes

of determining class liability, it placed no limits on other witnesses whom the parties could call. 10RT231-232.

Plaintiffs Dismissed Their Legal Claims and Proceeded Only Under the UCL. Four RWGs Opted Out.

After plaintiffs announced their intention to dismiss their legal claims under the Labor Code and proceed to a bench trial on their equitable claim under the Unfair Competition Law (22CT6290-6317), the court allowed plaintiffs to file a third amended complaint but ordered that class members be notified and given a second opt-out opportunity. 23CT6614-6638. Nine class members opted out, including four RWGs, leaving a total of 261 class members. 25CT7285-7286, 7290, 12RT266-267. Two RWGs who opted out were current employees Michael Lewis and Sean MacClelland, who by then held USB management positions. 25CT7334, 7338. USB moved to reinstate Lewis and MacClelland as RWGs, claiming they opted out before they learned they were RWGs. 25CT7304-7318. Plaintiffs demonstrated that all RWGs, including Lewis and MacClelland, were immediately informed of their selection before being notified of their right to opt out. 25CT7376-7377, 7395, 7397. The court refused to reinstate Lewis and MacClelland as RWGs. 26CT7430-7431.

Defendant moved to decertify the class, arguing that Proposition 64, enacted three years earlier, required that all class members in a UCL case

show they had suffered actual damages and that such a requirement made class certification improper. The trial court denied the motion. It rejected USB's legal argument and found that the depositions of the 22 RWGs and the nine other class members whom USB had hand-picked to depose in connection with plaintiffs' motion for summary adjudication showed that the employees were non-exempt and supported the previous certification decision. 38CT11092-11094. By the time of trial the class contained 260 members. 71CT20989.

At Trial, All the RWGs Testified They Spent a Majority of Their Time Inside Bank Properties.

The liability phase of the trial (Phase I) lasted 41 trial days. Plaintiffs presented testimony from 21 of the 22 RWGs, who all testified they performed exclusively sales duties, worked more than 40 hours per week, and consistently spent more than 50% of their work time *inside* Bank property. (The 22nd RWG failed to respond to a subpoena and did not testify.) The RWGs all testified that the Bank had never informed them, orally or in writing, that the majority of their work should be outside the Bank. *E.g.*, 71CT20998-21012; 19RT539-540; 21RT711-712; 22RT861; 27RT1268, 1287-88; 28RT1425-27, 1434; 30RT1642-43, 1655-57; 31RT1741-42, 1756; 32RT1827-1831, 1842-43; 37RT2289, 2292-94, 2307;

38RT2390; 39RT2477; 40RT2611, 2622, 2628-9; 41RT2736-2737, 2758, 2802.

Three RWGs had signed declarations that USB had submitted in opposition to class certification. These RWGs, Chad Penza, Adney Koga and Steven Bradley, testified that the declarations submitted by defendant in their names contained statements that were not true and which they had not made and that they had signed the declarations out of fear for their jobs. 22RT878-880, 886; 23RT957-976; 36RT2231, 2237-2238, 2267-2268; 40RT2669, 2716-2718.

Much of the Defense Evidence at Trial Also Favored Plaintiffs.

The defense case consisted of testimony from 16 witnesses, almost all USB managers and supervisors. Much of the testimony was favorable to plaintiffs.

Ted Biggs, Western Regional Manager for Small Business, testified he was unaware of any mandatory policy that BBOs spend a majority of their time outside Bank property. 49RT4046-4047. Ross Carey, Division Manager for the Western States with responsibility for the Small Business Banking Organization, confirmed that USB does not track where BBOs spend their work time and that there is no compliance program to ensure they are outside most of the time. 43RT3022-3023, 3042. Linda Allen, Human Resources Manager, testified there was no ongoing audit program to ensure that BBOs

are properly classified as exempt. 58RT4810. Patricia Ann Farley, District Manager for the East Bay Area (45RT3217), stated that BBOs are evaluated and rewarded based on *whether*, not *where,* they meet their sales goals. 45RT3239, 3286-3289.

The Statement of Decision for Phase I Found the Class Was Non-Exempt.

The trial court's Statement of Decision for Phase I ["SOD"] found that the RWGs' testimony was credible and persuasive and was not rebutted by defense evidence. 71CT20998. It concluded that every RWG worked overtime hours and spent more than half of his/her work time *inside* Bank locations. 71CT21016. It also found that the RWGs were "typical and representative of the entire class" and their testimony validated the trial management plan. 71CT20998-20999. The SOD stated that defendant had failed to meet its burden of proving that the BBOs were covered by the outside sales exemption. 71CT21016-21017.

The SOD further found that the employees' practices did not diverge from USB's reasonable expectations because "the only expectation U.S. Bank had for its BBOs was that they hit their production goals." 71CT21008. "[A]s long [as] BBOs satisfy their sales production goals, they are meeting the Bank's expectations even if they spend little or no time out of the branch," the SOD declared. 71CT21009. "Defendant has never had a policy

or requirement for BBOs to be outside of bank locations more than half of their work time." 71CT21010.

Significantly, the SOD found that many aspects of the BBO job could only be performed inside bank facilities so it was not realistic for BBOs to spend more than half their work time outside bank locations. 71CT21015. The court specifically rejected USB's contention that BBOs seeking new customers should visit the potential clients at their place of business. It was "vastly more efficient and fruitful" to telephone potential clients from inside the bank "instead of wasting time walking around knocking on doors," the court found. The court also found that defendant encouraged BBOs to emulate Chad Penza, the most successful BBO in the nation, who made all his contacts by telephone from the office. *Ibid.*

The SOD observed that defendant failed to record the BBOs' hours and activities although it was "on notice as early as December 2001 [when the suit was filed] that such records would be relevant even though it had the ability, technology and processes in place to do so." 71CT21013. Being on notice since 2001 of the issues in the litigation and not maintaining the records caused the court to draw an inference adverse to defendant. *Ibid.* "[T]hey knew if they maintained those records[,] there would be even more concrete evidence that would support the plaintiffs' case," the court explained. 65RT5342.

The SOD concluded that the class was misclassified as exempt and was therefore owed overtime compensation in amounts to be determined in Phase II. The court found that, on average, the RWGs worked 11.87 overtime hours per week. 71CT21018; Exh. 527.

The court refused to admit Bank-drafted declarations and deposition excerpts from class members who were not RWGs, which were offered after defendant had rested its case. Such evidence would be inconsistent with the trial plan and constituted hearsay. Moreover, these were the very same declarations defendant had submitted in opposition to class certification and in support of decertification. Some declarants described the Bank-drafted declarations as, *inter alia*, "substantially false and misleading," "not at all accurate," and "presented ... under false pretenses." 13CT3666-67, 3670; 11CT3079. The SOD stated, "the weight to be given to these declarations must be adjusted because of their actual authorship, the circumstances of preparation and internal inconsistencies and ambiguities." 71CT20991.

The Trial Court Denied Defendant's Second Decertification Motion.

After the Phase I trial, USB filed a second decertification motion, contending that the evidence at trial and the declarations repeatedly submitted by the Bank in opposition to class certification showed variations among the class members that required individual determinations.

62CT18394-18440. By this time, all the RWGs had testified that they worked inside a majority of the time, demonstrating that they were non-exempt. The court denied the motion as an "effort to modify the findings and conclusions reached in the SOD." 78CT23227. The court found it was appropriate to apply the Phase I liability findings to the class as a whole and that doing so did not violate defendant's due process rights. 78CT23227-23228.

In Phase II, the Court Determined the Overtime Compensation Due to the Class After USB Rejected Alternative Procedures to Reduce the Margin of Error.

Phase II of the trial was to determine the overtime owed to absent class members. 83CT24623. Before the start of Phase II, USB complained that extrapolating the 11.87 average overtime figure from Phase I to absent class members would produce a 43% margin of error – meaning the average overtime hours per week could be 43% higher or lower. The trial court immediately addressed this contention by holding a hearing to discuss alternative procedural methods that would reduce the margin of error. The court proposed many alternatives, including requiring all class members to prove their overtime claims in mini-trials or a claims procedure; admitting survey evidence by the parties' experts; and permitting the parties, with their

experts, to design a joint protocol for gathering new data for overtime calculations. 83CT24630.

Insisting it was entitled to trials on both liability and damages for each class member, USB rejected all the alternatives and said it "will be prepared to proceed pursuant to the court's initial trial plan." 69RT5489-5497, 5499. Regarding USB's position as a waiver of its objections to Phase II of the trial plan, the trial court proceeded with Phase II as originally planned, with expert witnesses testifying about the data from Phase I. 69RT5498-5501.

Plaintiffs presented two expert witnesses, Dr. Drogin and Paul Regan, a certified public accountant. Dr. Drogin testified in detail that the statistical evidence presented in both phases of the trial was valid and reliable. On liability, he testified that the single best estimate was that 100% of the class was misclassified, with a margin of error of, at most, 13%. Dr. Drogin further stated that the 19 class members who were randomly selected were representative of the class; including the two plaintiffs did not prejudice USB because they reduced the aggregate overtime calculation; it was proper for the trial court to choose a sample size without first selecting a margin of error; and USB's other challenges to the randomness of the RWG group were statistically invalid. 70RT5562-5563; 72RT5634, 5655-5659; 73RT5750-5753, 5761-5763; 74RT5788, 5814-5815, 5825.

On restitution, Dr. Drogin testified the average weekly overtime for the RWGs was 11.87 hours and that figure could reliably be extrapolated to the entire class despite the 43% margin of error. This was so because the RWG group was randomly selected, there was a very high response rate among the RWGs, there was no measurement error, the data was supported by auxiliary and anecdotal evidence, the data was not highly skewed, the calculation was not an afterthought, and other procedures were considered. 70RT5549-5563, 71RT5613-5619; 72RT5633-5634. Dr. Drogin also testified he had relied on a survey by Dr. Jon Krosnick, an expert on surveys, whose calculation of overtime hours worked by class members was consistent, indeed higher, than Drogin's calculation. 70RT5543-9. Plaintiffs' accounting expert testified how he calculated the overtime due to each class member and to the class as a whole. 74CT5843-5848, 75RT5849-5874.

The trial court found plaintiffs' experts were both "credible and persuasive," and possessed "significant experience" in their respective fields and as testifying experts on wage and hour matters. 83CT24624. By contrast, the court stated defendant's experts were "not persuasive," their testimony was "not credible," they had "no relevant experience" as testifying expert witnesses, they were "unwilling and/or unable to offer any opinions on the critical issues," and their opinions were "irrelevant, based on faulty assumptions and misstatements of relevant fact and law, and consequently of

no appreciable value." *Ibid.* The court found non-expert testimony from the first stage of the case supported the damage estimate, including that of Sales Manager Pat Collins, designated by defendant as the Person Most Knowledgeable about BBOs' hours and activities, who testified that BBOs typically work 40-60 hours per week. 83CT24629; 51RT4249.

At the close of evidence in Phase II, the trial court again solicited a statement from the parties on whether, in light of the 43% margin of error, additional evidence should be gathered in the form of a supplemental survey on the average overtime hours worked by class members. Defendant rejected the court's proposal, did not offer an alternative procedure, and refused to propose an alternative overtime figure. 83CT24630-24631; 84RT6595-6596.

The Statement of Decision for Phase II found, with a 95% level of confidence, the class worked 11.86 overtime hours per week. 83CT24622. Although that calculation had a relative margin of error of 43%, the court found it reliable based on the factors to which Dr. Drogin testified. 83CT24626-24630. The Phase II SOD concluded that, given USB's rejection of alternative procedures, the trial methodology was "the best procedure available under the facts of this case taking into consideration manageability issues and the parties' due process rights." 83CT24631.

Judgment was entered for $8,953,832 in unpaid overtime compensation for plaintiffs and the class, plus an additional $5,966,097 in prejudgment interest. Plaintiffs Duran and Fitzsimmons were awarded compensation for USB's failure to give them meal and rest breaks. 83CT24650-24652.

The Court of Appeal Reversed the Judgment and Decertified the Class, Finding USB Had a Due Process Right to Present Its Defense Separately as to Each Class Member.

The Court of Appeal ruled the trial management plan was flawed. It held the trial court did not follow established statistical procedures in adopting the plan and deprived USB of its due process right to present evidence of its affirmative defense with regard to each of the 260 class members. The court also held statistical sampling and other representative evidence could not be used to prove liability on a classwide basis. The court reversed the judgment and ordered the case decertified as a class action on the ground that, by the time USB filed its second decertification motion, "the RWG procedures employed by the trial court had already severely impinged on USB's right to prove its exemption defense as to the 239 absent class members" who had not testified at trial. *Duran v. U.S. Bank Nat'l Ass'n*, slip op. 39. The Court of Appeal remanded the matter to the trial court solely to reconsider the two plaintiffs' meal and rest break claims in

light of the pending decision in *Brinker Restaurant Corp. v. Superior Court,* S166350. Plaintiffs' petition for rehearing was denied with minor changes.

ARGUMENT

I. THE COURT OF APPEAL ERRED IN DECERTIFYING THE CLASS BECAUSE THE TRIAL COURT'S CERTIFICATION RULINGS WERE WITHIN ITS DISCRETION AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

As this Court has repeatedly held, class certification decisions are entrusted to the broad discretion of the trial court. *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326-327. "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." "Any valid pertinent reason stated will be sufficient to uphold the order." *Id.* On review of a certification or decertification ruling, the appellate court's inquiry "is narrowly circumscribed." *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1022. It may reverse only for a "manifest abuse of discretion." *Id.* Such an abuse of discretion may be found only if the decision is not supported by substantial evidence or if it rests on improper criteria or erroneous legal assumptions. *Id.* at 1023. The reviewing court must "presum[e] in favor of the certification order ... the existence of every fact the trial court could reasonably deduce from the record." *Sav-On,* 34 Cal.4th at 329.

The trial court made three class certification decisions in this case: it certified the class and it denied USB's two motions for decertification. The

Court of Appeal did not question the original certification decision or the denial of the first decertification motion. Instead, the appellate court focused solely on the second decertification ruling, concluding that the class should have been decertified because it was based on "the erroneous legal assumption that a finding of liability due to misclassification could be determined by extrapolating the findings based on the RWG to the entire class." Slip op. at 72. In short, the Court of Appeal ordered decertification because it concluded the trial plan was flawed.

A. The Grant of Class Certification and the Denial of Decertification Were Supported By Substantial Evidence.[2]

1. The Class Certification Decision.

The evidence in support of the original class certification order was substantial. It included 37 class member declarations, deposition testimony from USB managers, defendant's responses to discovery, and corporate documents, all of which led the trial court to find that the BBO position was standardized throughout the Bank so that the actual requirements of the job and the Bank's realistic expectations would be susceptible to common proof. See *supra*, at 8-10.

Based on this evidence, the trial court made the appropriate findings

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[2] Even though the Court of Appeal only addressed the second decertification motion, we discuss all three certification rulings because USB challenges all three.

for class certification: "common questions of law and fact predominate over individual questions of law and fact," which makes "class treatment a superior method of resolving this dispute." 16CT4531-4533.[3] The court found that the BBO position is standardized throughout the class. 16CT4531. It was undisputed that USB has a uniform policy to classify all BBOs as exempt. The court concluded that the exemption's applicability would "turn on the precise nature of the BBO/SBB position," which could be established with common proof. *Ibid.*

There was no abuse of discretion in the court's findings or analysis. On review of class certification, "questions as to the weight and sufficiency of the evidence, the construction to be put upon it, the inferences to be drawn therefrom, the credibility of witnesses ... and the determination of [any] conflicts and inconsistency in their testimony are matters for the trial court to resolve." *Sav-On*, 34 Cal.4th at 334. The trial court was within its discretion to credit plaintiffs' evidence that the BBO position was standardized and that class members did their job in similar ways and to reject defendant's contrary evidence. From that finding, the court could reasonably conclude that the "nature of the work performed by BBOs and SBBs is the predominant common issue determinative of liability to all class

[3] On appeal, defendant did not dispute that the other criteria for class certification were met.

members" and that this inquiry would be "susceptible of common proof." 16CT4531-4532. The court was aware that many types of common proof could be used to establish classwide liability – "surveys, questionnaires, sampling and the like" (5RT138) – and explicitly took that information into account in ordering class certification. *Ibid.*

The court's reasoning was consistent with *Sav-On* and *Brinker*. *Sav-On* held a class could be certified where there was evidence of widespread de facto misclassification, with the result that "misclassification was the rule rather than the exception[.]" 34 Cal.4th at 329-330. Here there was substantial evidence of such widespread de facto misclassification. *Brinker* held that class certification was proper where there was a challenge to a corporate policy or where the elements necessary to establish liability were susceptible of common proof. 53 Cal.4th at 1033-34. As the trial court could find, both were present here. Moreover, class certification does not require proof that class member claims are identical or that the classification policy is "wrong as to all members of the class." *Sav-On,* 34 Cal.4th at 338; *see also Bell,* 115 Cal.4th at 743 (rejecting decertification where 9% of class did not claim overtime.)

2. The Two Denials of Decertification.

By the time of the decertification motions, the evidence in support of class certification had become even stronger than it was at certification.

In opposition to USB's first decertification motion, plaintiffs presented deposition testimony that every single RWG was misclassified at some time during their BBO employment and all but one were misclassified the entire time. 32CT9430-9431; 34CT10046-49, 10331. Plaintiffs also submitted deposition testimony from nine other currently employed class members whom the Bank had selected to depose in connection with another motion. The depositions revealed that every single one had been misclassified at some of time during their employment and all but two were misclassified the entire time. 32CT9431-32; 34CT10046-49. Thus, by the time of the first decertification motion, there was substantial testimony under oath that all the RWGs, as well as nine other class members hand-picked by USB, were non-exempt. The trial court reasonably concluded defendant had not shown any basis to change the commonality finding from its original certification ruling. 38CT11092-11094.

USB's second decertification motion was filed after the 41-day trial of liability during Phase I. By this time, the 21 RWGs had testified that they worked more than 50% of their time every week inside Bank properties. There was also substantial evidence that the nature of the BBO position made it unrealistic for BBOs to spend more than half their work time outside bank locations because, as the trial court found, nearly every function that a BBO was required to perform could be done *inside* the Bank, but most of the

functions could *not* be performed *outside* the Bank's facilities. 71CT21015. Based on the testimony and the absence of *any* corporate document stating an expectation that BBOs were to work primarily outside the Bank, the court found defendant "never had nor has ever communicated any expectation to BBOs that they are to spend more than half of their work time outside bank locations." 71CT21017. From all this evidence, the court reasonably concluded the class of BBOs was misclassified as exempt. 71CT21018.

Consistent with these findings and based on the extensive trial evidence, the court denied the second motion for decertification: "The instant motion does not persuade the Court that it should draw different conclusions as to whether the issues in this case are appropriate for class treatment than those expressed in the Court's earlier orders...." 78CT23227.

The trial court's findings about the predominance of common issues each time it considered class certification were all supported by substantial evidence. The Court of Appeal did not address this substantial evidence but stated that the trial court gave "excessive weight to its finding that USB classified all BBO's as exempt[.]" Slip op. at 72. The trial court did no such thing. Rather, it relied on substantial evidence of classwide misclassification, as shown by the declarations of class members at class certification, the deposition testimony of RWGs and others in opposition to

the first decertification motion, and the unanimous RWG testimony, corporate documents, and testimony of management witnesses at trial.

B. The Court of Appeal Erred in Ordering Decertification Even If, Arguendo, The Trial Plan Contained Flaws.

The Court of Appeal held, with little analysis, that the second decertification motion should have been granted because the statistical sampling methodology used to try liability "fell short" since it allegedly "denied USB the right to properly defend the claims against it." Slip op. at 73. The court ordered the case decertified as a class action, apparently precluding the trial court from conducting a new trial, refusing to speculate "as to whether a workable trial plan could have been devised..." Slip op. at 73-74.

This ruling was erroneous because the remedy for a defective trial plan is a new trial, not decertification of the class. Even if the trial plan for liability were found to be flawed (which it was not), the trial court's finding that the liability issues could be established by common proof remained valid. The trial on remand could simply modify the trial plan to provide adjustments to the sampling protocol and, if appropriate, take additional evidence.

Moreover, the class certification should be upheld even if there are individual class member issues, such as "eligibility for recovery or as to the amount of...damages" to be tried on Phase II. *Emp't Dev. Dept. v. Superior*

Court (1981) 30 Cal.3d 256, 260; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 815 (class treatment appropriate even if "matter[] bearing on the right to recovery require[s] separate proof for each class member"); *Sav-On,* 34 Cal.4th at 332-333. These individual issues do not mandate decertification, but simply the use of discretion in trial planning to effectively manage them. A variety of methods are available to the trial court to do so, including bifurcation, subclassing, the use of masters, and others. *Sav-On,* 34 Cal.4th at 339-340; *see also infra.*, Section V.

II. THE COURT OF APPEAL MADE TWO SERIOUS ERRORS IN ANALYZING LIABILITY.

Class actions are usually bifurcated into two phases, and this case was no exception. The first phase determines, on a classwide basis, whether there is liability. The second phase determines damages, either on a classwide basis (see, *e.g., Bell*, 115 Cal.App.4th at 746-756) or by individual proof. *Sav-On*, 34 Cal.4th at 332-334; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 709; *Emp't Dev. Dept.,* 30 Cal.3d at 266; *Capitol People First v. Dept. of Dev. Servs.* (2007) 155 Cal.App.4th 676, 695-696.

Adopting this two-phase approach, after a 41-day trial, the trial court found classwide liability. The Court of Appeal made two serious errors in reviewing that liability determination. First, it held that statistical sampling and other forms of representative evidence cannot be used to determine

classwide liability. Slip op. at 47-54. Second, it held that defendant had a due process right to assert its affirmative defense as to every potential class member. Slip op. at 47-49.

A. Statistical Sampling and Other Representative Evidence May Be Used to Determine Classwide Liability.

The Court of Appeal's contention that statistical sampling and other forms of representative evidence cannot be used to determine classwide liability is completely "at odds with the growing acceptance of scientific statistical methodology in judicial decisions and scholarship." *Bell,* 115 Cal.App.4th at 754; *see also International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, 339 (statistical proof has been "repeatedly approved" to establish liability); Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts* (1992) 44 Stan. L. Rev. 815, 851; Lauren Walker & John Monahan, *Sampling Evidence at the Crossroads* (2007) 80 S. Cal. L. Rev. 969, 974 ("... random sampling has, for the past sixty years, been a hallmark of the scientific method"); Alexandra Lahav, *The Case For "Trial By Formula"* (2012) 90 Tex. L. Rev. 571, 575.

The use of statistical sampling and other forms of representative evidence to establish class liability serves the public policy goals of class actions. California's public policy "encourages the use of the class action

device[.]" *Richmond v. Dart Indus., Inc.* (1981) 29 Cal. 3d 462, 473. "By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress...." *Id.* at 469. Accordingly, "rules promulgated by this court should reflect that policy." *Id.* at 473. This Court has repeatedly encouraged lower courts to be "procedurally innovative" in order to preserve the efficiencies of class adjudication and manage individual issues. *Sav-On*, 34 Cal.4th at 339; *State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 471; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 440.

This Court has made clear that statistical methods, including sampling, are appropriate in class action cases. In *Sav-On*, the Court declared:

> California courts and others have in a wide variety of contexts considered pattern and practice evidence, statistical evidence, *sampling evidence*, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate.

34 Cal.4th at 333 (emphasis added).

Sav-On cited approvingly to numerous state and federal cases in which representative evidence was used to satisfy the commonality element

in class certification or to prove classwide liability. *See id.* at 333 & n.6.

Bell is the leading California case on statistical sampling. Although it involved the use of statistics to prove *damages*, it cited with approval many cases endorsing statistical methodology to determine *liability*. *See Bell*, 115 Cal.App.4th at 752, 754-756. Both *Sav-On* and *Bell* held that statistical methods are *not* inherently less accurate or less precise than individual litigation. *Sav-On*, 34 Cal.4th at 333; *Bell*, 115 Cal.App.4th at 754; *see also*, 3 Conti & Newberg, Newberg on Class Actions (4th ed. 2002) §10.2 ("aggregate evidence of defendant's liability is more accurate and precise than would be with individual proofs of loss").

Justice Werdegar's concurring opinion in *Brinker* provides further support for the use of sampling and other representative evidence to determine liability in class actions. The concurrence specifically emphasized the Court's "historic endorsement of a variety of methods that render collective actions judicially manageable" *(Brinker,* 53 Cal.4th at 1052) and stated that such methods can be used to prove classwide liability:

> [W]e have encouraged the use of a variety of methods to enable individual claims that might otherwise go unpursued to be vindicated, and to avoid windfalls to defendants that harm many in small amounts rather than a few in large amounts. [Citations.] *Representative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability.*

Id. at 1054 (emphasis added), citing *Dilts v. Penske Logistics LLC* (S.D.Cal. 2010) 267 FRD 625, 638.

The Court of Appeal's decision thus represents a sharp departure from the widespread acceptance of statistical sampling and representative evidence to prove classwide liability.[4]

B. At the Liability Phase, a Class Action Defendant Does Not Have a Due Process Right to Litigate Its Exemption Defense for Each Class Member.

The Court of Appeal's second error was its holding that a defendant in a wage and hour class action has a due process right to assert its exemption defense as to every class member during the liability phase. Slip op. at 47-49, 57. Although the court purported to restrict that right to circumstances in which liability for unpaid overtime depends on an employee's "individual circumstances" (*id.* at 48), nearly every defendant in every class action claims that liability depends on the "individual circumstances" of the class members. *See, e.g., Sav-On,* 34 Cal.4th at 331. Thus, the purported limitation on the court's far-reaching ruling is no limitation at all.

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[4] Two articles support the use of representative testimony to make classwide liability determinations in misclassification cases. *Classwide Determinations of Overtime Exemptions: The False Dichotomy Posed by Sav-On and a Suggested Solution* (2006) 21 The Labor Lawyer 257; *How to Conduct a Wage and Hour Audit for Exemptions to Overtime Laws*, West HR Advisor (March/April 2005, Vol. 11, No. 2).

"'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria and Restaurant Workers Union, Local 473 v. Elroy* (1961) 367 U.S. 886, 895. Rather, due process is "flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge* (1976) 424 U.S. 319, 334; *see also Connecticut v. Doehr* (1991) 501 U.S. 1; *Bell*, 115 Cal.App.4th at 751-753. The Court of Appeal's due process analysis failed to take into account the "particular situation" presented here and the substantive claim at issue.

1. The Court of Appeal's Due Process Rule Is Inconsistent with Established Class Action Procedure.

The Court of Appeal's novel premise is inconsistent with the two-phase trial structure used in most class actions and in this case. The Court of Appeal held USB had a right to litigate the exemption status of each class member and "restricting the evidence that USB would be allowed to present [] effectively prevented USB from establishing its affirmative defense to class-wide liability." Slip op. at 57.

However, the basic issue in the classwide liability phase is whether there is a "pattern or practice" of illegal conduct affecting the class as a whole and whether that pattern or practice is "the company's standard operating procedure–the regular rather than the unusual practice."

Teamsters, 431 U.S. at 336[5]; *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 379 ("a class action is, by definition a pattern or practice claim"). The issue is not whether every class member was a victim of the illegal policy or practice. *Alch*, 122 Cal.App.4th at 380.

In this phase, both parties present evidence affecting the class as a whole – "pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices...." *Sav-On*, 34 Cal.4th at 333. The plaintiff presents such classwide evidence to try to establish a broad pattern of liability and the defendant seeks to rebut that evidence by challenging the credibility of the plaintiff's evidence or presenting common evidence of its own that tends to disprove liability. It would be inconsistent with the requirement of common evidence to permit the defendant during this phase to litigate its exemption defense individually against 200 class members. *Id.* at 332-337.

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[5] *Teamsters* was a pattern or practice Title VII case brought by the government. The Supreme Court held that the principles applicable to a pattern or practice suit apply in a class action case involving private parties. *Cooper v. Fed. Reserve Bank* (1984) 467 U.S. 867, 876 & n.9; *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S.___, 131 S.Ct. 2541, 2552 & n.7. The *Teamsters* pattern or practice model has been explicitly adopted in California cases. See *Alch*, 122 Cal.4th at 380-381; *Sav-On*, 34 Cal.4th at 333; *see also Salvas v. Wal-Mart Stores, Inc.* (2008) 452 Mass 337, 357, 893 N.E.2d 1187, 1205 (citing *Teamsters* regarding liability phase of wage and hour class action).

To the extent the defendant seeks to litigate entitlement to relief (or extent of damages) for individual class members, that would occur in the remedial phase of the trial. *Daar*, 67 Cal.2d at 709 ("individual interests become critical" "(o)nly at such final stage" "after the common issues have been resolved"). However, even then, a defendant in a misclassification case does not have an unlimited right to call each class member to testify. *See infra.* at Section V. The Court of Appeal's premise – that a class action defendant has a due process right to litigate its affirmative defense individually against all class members – reflects a fundamental misunderstanding of a class action trial and is thus erroneous.

2. The Court of Appeal's Rule Would Eviscerate Most Class Actions, Particularly in Overtime Cases.

The Court of Appeal's asserted due process right would sharply limit or preclude most class actions, particularly in overtime cases, where, as this Court has emphasized, class actions are crucial to ensure effective enforcement of state labor laws. *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 459-462 [class actions "needed to assure the effective enforcement of statutory polices"]; *Sav-On*, 34 Cal.4th at 340 [public policy encourages use of class actions in overtime cases].

If a defendant had a constitutional right to litigate liability for each individual class member, this would greatly reduce the value and efficacy of

class actions, which are predicated on the assumption that not every class member will testify and that common issues can be decided based on representative evidence. A plaintiff would be hard-pressed to establish that common questions of law or fact predominate and that a class action is superior to alternative means of adjudication if the employer could insist, on the basis of class member declarations drafted by its own attorneys, that some class members may be exempt and therefore liability for each class member must be separately determined. The required "flexibility" and "discretion" accorded to trial courts (*Sav-On*, 34 Cal.4th at 339) would be destroyed by the rigid due process rationale. Requiring individualized determinations for every class member would also threaten class litigation in many other fields, including consumer, product liability and construction defect cases.

Under the Court of Appeal's rule of individualized mini-trials, current employees would face the risk of retaliation if their testimony displeased their employer. Former employees would be difficult to locate, would live too far away, would be unable to take time off from their current job or would be too poor to travel to court, leading the employer to argue, as USB did in this case, that class members who did not testify had waived their right

to recover their unpaid overtime wages.[6] *Bell,* 115 Cal.App.4th at 745; *Gentry*, 42 Cal.4th at 457-462. As *Bell* stated, "[A]dversarial resolution of each class member's claim would pose insurmountable practical hurdles." 115 Cal.4th at 752; *see also In re Simon II Litig.* (E.D.N.Y. 2002) 211 F.R.D. 86, 153 ("The interest of plaintiffs in avoiding the additional litigation costs that would arise if defendants were permitted to confront each possible plaintiff at trial is enormous"). Under the Court of Appeal's theory, only the smallest classes would likely be manageable.

The State of California also has a strong interest in the use of streamlined class techniques, particularly in this time of budget cuts to the courts and the enforcement agencies. The length of judicial proceedings would be multiplied many-fold if the common issues – in this case, the nature of the BBO job and the employer's reasonable expectations – were re-tried 260 times. It took 41 days, approximately two days per RWG, to litigate liability in this case. At that rate, it would take 520 days or roughly two years to litigate the individual cases of the 260 class members. "The result would be a multiplicity of trials conducted at enormous expense to both the judicial system and the litigants. It would be neither efficient nor fair to anyone." *Sav-On*, 34 Cal.4th at 340. As the trial court told defense

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[6] USB contended that the one RWG who did not testify, Borsay Bryant, had waived his overtime claim. The trial court rejected that argument. 71CT21000.

counsel during a lengthy cross-examination of an RWG, "If you multiply this times 260, you can see why the Court became enthralled with the trial management plan we now have." 21RT750.

The appellate court's due process rule is flatly inconsistent with California authority. It assumes that a trial court has to determine whether each class member was properly classified in order to determine the employer's classwide liability. However, *Bell* held that an employer's interest in a misclassification case is only in "its total or aggregate liability to the plaintiff class" (115 Cal.App.4th at 752), not in which individuals are exempt or non-exempt. Thus, a trial court can use representative testimony to calculate the employer's aggregate liability to the class based on a determination of the percentage of the class that is non-exempt. The Court of Appeal also suggested that there cannot be a certified class if some class members cannot establish liability. In *Sav-On*, this Court specifically rejected the defense argument that class certification should be denied unless the plaintiff could prove that the entire class was non-exempt. 34 Cal.4th at 338.

3. No Persuasive Authority Supports the Court of Appeal's Due Process Rule.

The Court of Appeal cited no persuasive authority for its constitutional holding. Instead the Court based its due process

pronouncement on cases reviewing class certification/decertification decisions under the deferential abuse of discretion standard. Slip op. at 47-51 (citing *Walsh v. Ikon Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440; *Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422; *In re Wells Fargo Home Mortg. Overtime Pay Lit.* (9th Cir. 2009) 571 F.3d 953; *In re Wells Fargo Home Mortg. Overtime Pay Lit.* (N.D.Cal. 2010) 268 F.R.D. 604; and *Jimenez v. Domino's Pizza, Inc.* (C.D.Cal. 2006) 238 F.R.D. 241).

None of the cited cases holds that a defendant has a due process right to individualized determination of its affirmative defense for every class member. Rather the cases – particularly the California decisions, *Walsh* and *Dunbar* – emphasize the broad discretion afforded a trial court in deciding whether to certify or decertify a class. *Walsh* and *Dunbar* affirmed trial court rulings not to certify a class where the lower court found wide variation in the way class members performed their jobs. Here, by contrast, the trial court certified the class after finding that the BBO job was standardized.

The Court of Appeal's reliance on *Wal-Mart Stores, Inc. v. Dukes* was likewise misplaced. *Wal-Mart* considered the class certification of a proposed multi-million-member nationwide class in a Title VII discrimination case. *Wal-Mart*'s sarcastic condemnation of "Trial by Formula" was not based on due process considerations. Rather, the issue was whether back pay claims were properly certified under Federal Rule

23(b)(2), a provision with no analog in California class action rules. The United States Supreme Court reversed the class certification in part because the employer would be entitled to litigate its *statutory* defenses to individual claims of class members at the *remedial* phase of the action. *Wal-Mart*, 131 S.Ct. at 2561. Thus, *Wal-Mart* had no bearing on the due process issue raised in this case.

4. The Court of Appeal's Individualized Litigation Rule Is Particularly Inappropriate in This UCL Action.

The Court of Appeal's requirement of employee-by-employee litigation of liability is especially ill-suited to an action, like this one, brought under the Unfair Competition Law (UCL), Business and Professions Code section 17200 *et seq.* This Court has long interpreted the UCL to provide that a trial court can award restitution to absent class members without individualized proof from each class member. *See, e.g., Fletcher v. Sec. Pac. Nat'l Bank* (1979) 23 Cal.3d 442, 449; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267; *Comm. on Children's Television v. Gen. Foods Corp.* (1983) 35 Cal.3d 197, 211.

In *In re Tobacco II Cases* (2009) 46 Cal.4th 298, the Court considered whether Proposition 64, enacted in 2004, changed the law that class members in a UCL case do not have to present individualized proof of injury. Proposition 64 imposed a specific standing requirement that a "claimant"

must show he or she "has suffered injury in fact and has lost money or property as a result of such unfair competition." Cal. Bus. & Prof. Code §17204 (as amended in 2004).

This Court held the new requirement applied only to the named plaintiff. Class members were subject to Business and Professions Code §17203, which authorizes the trial court "to restore to any person in interest any money or property ... which *may have been acquired*" by means of the unfair practice. The "may have been acquired" language is "patently less stringent than the standing requirement for the class representative[,]" the high court held. *Tobacco Cases*, 46 Cal.4th at 320. The less stringent language of section 17203 "has led courts repeatedly and consistently to hold that *relief under the UCL is available without individualized proof of deception, reliance and injury.*" *Ibid.* (citing *Fletcher*, 23 Cal.3d at 452; *Bank of the West*, 2 Cal.4th at 1267; and *Comm. on Children's Television*, 35 Cal.3d at 211 (emphasis added); *see also People ex rel. Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 530-533, *rehearing denied* (2003) (order for restitution to non-injured class of consumers upheld although it might constitute "windfall").

III. THE TRIAL PLAN FOR LIABILITY WAS PROPER AND PRODUCED A FINDING OF CLASSWIDE LIABILITY SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Trial Plan for Liability and the Misclassification Finding Were Valid.

The issue in Phase I of the trial was whether the BBO job was properly classified as an exempt outside sales position. To address this issue, the Phase I trial plan provided for testimony by 20 randomly-selected RWGs, plus the two plaintiffs, about the nature of their work, where it was performed, and any expectations expressed by corporate managers or supervisors.[7] The trial plan allowed defendant to call an unlimited number of witnesses to rebut plaintiffs' evidence. The Bank could, and did, call top corporate officials to testify about the nature of the BBO position and the company's expectations, as well as managers and supervisors to rebut the testimony of the individual RWGs. Both parties called expert witnesses to testify about the validity of the statistical showing and whether the results of the RWG sample could be applied to the class as a whole.[8] The main limitation on the parties was that they could not present evidence about the work experience of non-RWG employees. 45CT13298.

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[7] They also testified about the amount of overtime hours they worked. This evidence was principally used in Phase II.

[8] The expert witnesses actually testified in Phase II but they were allowed to testify about the sufficiency of the Phase I trial plan involving the RWGs.

The trial plan's use of the RWG model was shown to be statistically valid and reliable through the testimony of Dr. Richard Drogin, a statistical expert who had helped to develop the *Bell* litigation plan and had testified at the *Bell* trial. *Bell,* 115 Cal.App.4th at 722-724 (describing Dr. Drogin's role). The Court of Appeal's assertion that there was "no statistical foundation" (Slip op. at 51) for the trial plan ignores Dr. Drogin's testimony which, although presented in Phase II, confirmed the plan's validity.

Dr. Drogin testified that the random selection of 20 RWGs was consistent with standard sampling methodology which permitted sample results to be applied to the rest of the class. 72RT5676-5677. He further testified that the data produced from the sample was reliable and the fact that some class members opted out of the class did not affect the statistical validity of the sampling protocol. 71RT5613, 5619; 74RT5814. The RWG testimony accurately demonstrated that "a very high percentage of the class is misclassified." 70RT5561-5564. Based on the RWG testimony, he opined, the single best estimate (the "point estimate") was that 100% of the class was misclassified. At a 95% confidence level, the margin of error was 13%, a figure equivalent to the margin of error in *Bell.* 70RT5553; 72RT5634; Exh. 527.

Dr. Drogin testified that the court acted properly in picking a sample without first selecting the desired margin of error, as was done in *Bell.* 74 RT

5825. The inclusion of testimony by the two plaintiffs, although they were not randomly selected, did not prejudice USB, he explained, because the two plaintiffs worked comparatively few hours so their inclusion reduced the average overtime and decreased defendant's liability. 70RT5562-5563. Moreover, the inclusion of the two plaintiffs in the RWG resulted from defendant's insistence. 11RT244-249. Dr. Drogin stated that the precise methodology used in *Bell,* which was based on cooperation between the parties, could not have been employed in this case, where such cooperation was lacking. 74RT5780-5781, 5829. "[W]hen you do sampling, you have to take into account practicalities and manageability." 74RT5781.[9]

The trial court found Dr. Drogin was "credible and persuasive" and was "impressed by the significance experience [he] demonstrated." 83CT24624. By contrast, the court found the defense experts were "not persuasive" and "provided testimony the Court finds not credible." The defense experts' opinions were "irrelevant, based on faulty assumptions and

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[9] The sampling plan used here conformed to scientific standards. It "use[d] a probability method for selecting the sample, ha[d] a high response rate and gather[ed] accurate information on the sample units. When these goals are met, the sample tends to be representative of the population. Data from the sample can be extrapolated to describe the characteristics of the population." Federal Judicial Center, *Reference Manual on Scientific Evidence* (3d ed. 2011) at 266. "Traditionally scientists adopt the 95% level of confidence," which means that if 100 samples of the same size were drawn, the confidence interval expected for at least 95 of the samples would include the true population value. *Id.* at 381.

misstatements of relevant fact and law, and consequently of no appreciable value," the trial court stated. *Ibid.* By relying on the discredited defense expert testimony, the Court of Appeal disregarded the substantial evidence rule.

The trial court based its determination of classwide misclassification on a broad array of evidence. 71CT21018. First and foremost was the unanimous testimony of the 21 RWG witnesses that they consistently worked primarily *inside* Bank properties. 71CT20999-21007. This testimony was corroborated by management and RWG testimony about the job functions of a BBO. 71CT21009-21016. This evidence led the court to conclude that it would be unrealistic for BBOs to spend more than half their work time outside Bank locations because, with the exception of one function (a 15-minute site inspection), all the BBOs' duties could be performed only or more efficiently inside Bank branches. 71CT21015-21016.

There was also substantial evidence that USB had no expectation that BBOs would work primarily outside the Bank. USB officials admitted the Bank *never* had a written policy that BBOs were expected to work outside the Bank the majority of their time. 47RT3716-3717; 49RT4046-4047;

60RT4946.[10] RWGs unanimously testified they were never told by a supervisor, trainer, or anyone else that they were expected to work outside of the Bank branches. 71CT21011-12. It was undisputed defendant did not monitor or audit the location of BBOs' work, did not evaluate BBOs based on where they worked and never disciplined or terminated BBOs for working too much inside. 71CT21008-21014.

The trial court found instructive the experience of RWG Chad Penza, the top-producing BBO in the entire company. Penza testified he worked exclusively *inside* his bank office, principally "cold-calling" potential customers. 22RT853-854, 859. USB was so pleased with his success that it installed a lock on his office door to keep him from being disturbed. 22RT861-862. Bank management asked Penza to speak to other BBOs about his methods. 71CT21016; 22RT857-859. Based in part on Penza's testimony, the court found, "BBOs are in fact actively encouraged, trained, and rewarded for spending more than half of their work time *inside* bank locations." 71CT21016, emphasis by the court. The court concluded, "Defendant has never had nor has ever communicated any expectation to

[10] After this action was filed, defendant created a new job description that vaguely asserted BBOs should spend 80% of their time on "outside sales activity." 6CT1670-1671, 1674-1677. RWGs testified "outside sales activity" meant seeking new customers. 26RT1202.

BBOs that they are to spend more than half of their work time outside bank locations." 71CT21017.

The finding of classwide liability was bolstered by a legal presumption and an inference from the evidence. Employees are presumed to be non-exempt and the employer has the burden of proof to show they are "plainly and unmistakably" exempt. *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794; *Nordquist v. McGraw-Hill Broad. Co.* (1995) 32 Cal.App.4th 555, 562. The trial court found, "Defendant utterly failed to negate Plaintiffs' evidence." 71CT21017.

Additionally, the trial court found the Bank was on notice since this action was filed that BBOs' hours and activities would be relevant to liability and damages, yet it never recorded those hours and activities "even though it had the ability, technology and processes in place to do so." 71CT21013. The court expressly found the reason the Bank did not keep such records was, "[T]hey knew if they maintained those records[,] there would be even more concrete evidence that would support the plaintiffs' case." 65RT5341-42. Accordingly, the court drew an inference adverse to USB. 71CT21013.

B. The Trial Court Reasonably Refused to Admit the Defense Declarations to Contest Class Liability.

The Court of Appeal focused its contention of a due process denial on the trial court's refusal to admit approximately 70 class-member declarations

drafted by USB's counsel in opposition to certification and offered *after* the defense had rested its case. 63RT5114; 65RT5296-97; Slip op. at 54-55. The declarations had already been filed three times before. Their exclusion at trial was not a denial of due process but a reasonable exercise of discretion that flowed from the court's decision to use a random sample of representative witnesses.

The trial court properly concluded such additional evidence would be unduly cumulative and time-consuming at the liability phase, where the focus was on classwide evidence. "A trial court acts within its discretion when excluding cumulative and time consuming evidence." *Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1038; Evid. Code §352. The trial court recognized the issues at the liability phase did not require declarations from scores of class members beyond the RWG. In fact, three of defendant's proposed declarants had testified as RWGs. 22RT830; 35RT2133; 40RT2607.

The court's exclusion of these declarations was also justified by their inadmissibility, questionable veracity, and lack of weight. The declarations would have constituted inadmissible hearsay (*see Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1354). 38 CT 1169-1170. The court was aware that a number of the declarants had repudiated their defense-prepared declarations. For example,

- "I was deceived and mislead into signing a declaration for U.S. Bank by their attorneys." 1CTSupp.219 (Angela Bates).

- The declaration "was not at all accurate," it "misrepresents what I had told" the attorney, and "leaves out much of what I told her." 13CT3670 (Debra Schnell).

- "The declaration was presented to me under false pretenses." 11CT3079 (Silvia Bacolot).

- "I was fearful of losing my job" and "being retaliated against if I didn't cooperate." 6CT1571-1572 (Ken Rattay).

- The Bank's draft declaration was "substantially false and misleading." 13CT3666-3667 (Nicole Raney).

After three RWGs, testifying at trial, likewise repudiated the Bank-drafted declarations, the trial court concluded, "[T]he weight to be given to these declarations must be adjusted because of their actual authorship, the circumstances of preparation and internal inconsistencies and ambiguities." 71CT20991; 64RT5123.

IV. DEFENDANT WAIVED OBJECTION TO THE DAMAGES PROCEDURE AND THE 43% MARGIN OF ERROR BY REJECTING ALTERNATIVE PROCEDURES.

Pursuant to the trial plan, the trial court employed statistical sampling to calculate overtime for absent class members. The use of representative testimony or evidence based on a statistical sample to calculate damages in a

wage and hour action is well established, particularly where, as here, a defendant fails to maintain required time records. *Mt. Clemens*, 328 U.S. at 687-688; *Bell*, 115 Cal.App.4th at 746-753.

Using expert testimony, the court determined the average amount of overtime worked by the 21 RWGs, and proposed to use that figure to determine the overtime worked by the absent class members. However, after the court learned this method produced a 43% margin of error, it promptly moved to address this. Defendant refused to agree to any procedures that would have reduced the margin of error, short of jettisoning the class liability findings and trying every class member's claim individually. Under well-established principles of waiver or invited error, defendant may not object to the procedure or the margin of error where it rejected the trial court's offer of alternative methods to calculate damages.

USB's refusal to consider alternative trial procedures directly contributed to the 43% margin of error in calculating damages. Before the start of Phase II, defendant complained that Dr. Drogin's recent declaration revealed that the average overtime of RWGs was 11.87 hours, which, when applied to the other class members, would produce a 43% margin of error. Exh. 527; 75CT22286, 22307. The trial court immediately responded by holding a hearing at which it offered a broad array of alternative procedures for Phase II, rather than the planned procedure of having expert testimony

about the data from Phase I. The alternative procedures included: (1) requiring all class members to prove up their overtime, through mini-trials, appointment of a special master, or by a claims procedure; (2) introducing survey evidence; or (3) "any other or additional alternatives offered by the parties." 83CT24630; 69RT5490-5499. Each of these alternatives would have significantly reduced the margin of error. Indeed, the first option would have dispensed with sampling altogether.

The court explicitly stated that the purpose of the hearing was for the parties to address "whether the trial management plan, as it relates to Phase II, is adequate; whether the defendant's due process rights, for that matter the class's due process rights, are adequately protected by the data collected in Phase I." 69RT5493. The court continually emphasized its openness to considering new procedures other than the proposed RWG-based trial plan.[11]

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[11] The court stated:

> If there is some appropriate medium between taking individual testimony from every class member and only proceeding by way of testimony from some class members, then that's the issue that we're attempting to address in part two of the Court's tentative ruling, and that is the portion that I invite comment about today. 69RT5495.
>
> We're either proceeding with Phase II tomorrow in its present mode or recessed to permit some other alternative method [of] data gathering for the purpose of providing evidence on the issue of restitution. 69RT5499.

Plaintiffs expressed willingness to consider the alternate procedures (69RT5499), but defendant declined all the options, insisting, as always, on individual hearings on both liability and damages for *all* 239 class members who were not RWGs. 69RT5491-5499. When informed that the court's classwide misclassification finding would not be reconsidered, USB's counsel announced that "defendant would reject the alternatives and will be prepared to proceed pursuant to the court's initial trial plan tomorrow." 69RT5499; 83CT24630.

At the close of evidence in Phase II, the trial court again solicited a statement from the parties on whether, in light of the 43% margin of error, additional evidence should be gathered in the form of a supplemental survey on the average overtime hours worked by class members. Defendant rejected the court's proposal, did not offer an alternative procedure, and refused to propose an alternative figure for restitution. 83CT24630-24631; 84RT6595-6596 (no alternative damage figure ("other than zero")); 71CT21008. USB again repeated that "defendant's proposal is the same as it's always been. And that is, there should be individual mini-trials before special masters...." 84RT6596; 83CT24630-24631. Consequently, the court found "the trial methodology employed by the Court was the best procedure available under the facts of this case taking into consideration manageability issues and the parties' due process rights." 83CT24631.

USB's repeated rejection of all the alternative procedures constitutes a waiver or invited error of its arguments that the 43% margin of error produced an unconstitutional overtime calculation. Under the doctrine of waiver, a party loses the right to appeal an issue caused by affirmative conduct or by failing to take the proper steps at trial to avoid or correct the error. *Telles Transp., Inc. v. Workers' Comp. App. Bd.* (2001) 92 Cal.App.4th 1159, 1167. Waiver can apply to the loss of constitutional rights. *Keener v. Jeld-Wen* (2009) 46 Cal.4th 247, 266 & n.25; *People v. Simon* (2001) 25 Cal.4th 1082, 1103. Under the doctrine of invited error, a party is estopped from asserting prejudicial error where his own conduct caused or induced the commission of the wrong. *Telles*, 92 Cal.App.4th at 1167; *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.

By insisting on proceeding with the damages trial plan unchanged if it was not allowed an individual trial of liability and damages for every class member, the Bank made a tactical choice. "[A]ppellate courts generally are unwilling to second guess the tactical choices made by counsel during trial. Thus where a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error." *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686; *see also Keener*, 46 Cal.4th at 262-266 & n.25 ("a party should not sit on his or her hands, but instead must speak up and

provide the court with an opportunity to address the alleged error at a time when it might be fixed").

Bell demonstrates that waiver principles apply in this very setting. In *Bell*, the defendant employer argued on appeal that, as a result of the trial court's adoption of a statistical trial plan, it was barred from using individual trials to contest the plaintiffs' proof of damages. The appellate court rejected the contention, stating that although the defendant had originally proposed individual trials to establish damages, it later "acquiesced" in statistical proof of damages. *Bell*, 115 Cal.4th at 757. The court found waiver in two other respects. First, the defendant had waived its right to impeach employee deponents at trial by failing to identify any witnesses. Second, it waived its right to offer testimony of class members outside the sample by not calling them. *Bell* stated that the defendant had pursued its "trial tactics" and could not complain that use of statistical sampling "led to rough or expedient justice...." *Id.* at 758.

USB cannot claim the trial court posed an unfair choice when it offered the alternative procedures for damages but refused to reconsider its classwide misclassification finding. Under well-established class action procedure, a classwide finding of liability in Phase I creates a presumption that each class member is entitled to relief. *Teamsters*, 431 U.S. at 362; *Alch*, 122 Cal.App.4th at 380-381. The defendant has the burden of

production and proof to establish that particular class members were exceptions to the classwide finding. But here, USB insisted that the liability phase determination did not apply at all to the 239 class members outside the RWG and that each of them "must be required to testify for a proper determination to be made as to his or her exempt status." 69RT5492, 5494 ("None of those people have had their cases tried and there can't legitimately be [a] liability determination with respect to any of them"). Thus, defendant demanded a de novo, across-the-board re-litigation of liability to which it was not entitled.

Nor can defendant contend that requiring it to agree to one of the alternative damage procedures offered by the court would have resulted in waiver of its due process claim. Defendant could certainly have made clear it was maintaining its general objection to any statistical sampling procedure while still opting for one of the damage-calculation alternatives proposed.

V. IF THE CASE IS REMANDED FOR A NEW DAMAGE CALCULATION, THE AWARD MAY BE BASED ON TESTIMONY BY A REPRESENTATIVE SAMPLE OF EMPLOYEES AND DEFENDANT HAS A LIMITED RIGHT TO CHALLENGE INDIVIDUAL CLASS MEMBER RELIEF.

A. In Wage Cases, Damage Calculations Need Not Be Precise.

If this Court orders a remand on damages, it is important to recognize the lenient standard for calculating back pay in a case, such as this, where the

employer has failed to maintain records of overtime worked. Cal. Code Regs. tit. 8, §11040(7)(A)(3), (5).

In *Mt. Clemens,* the Court held that employees may establish their right to recover unpaid wages under the Fair Labor Standards Act (FLSA), 29 U.S.C. §201 *et seq.*, through "just and reasonable inference" where their employer's failure to maintain required wage records has made it difficult to prove employees' losses with precision. 328 U.S. at 687. To prevent the employer from being unjustly enriched by its own violation of record-keeping requirements, an employee's threshold burden of proving loss is met in such cases,

> [I]f he produces sufficient evidence to show the amount and extent of [improperly compensated] work *as a matter of just and reasonable inference.* The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, *even though the result be only approximate.*

Id. at 687-688 (emphasis added).

Applying this standard, the Court held that the testimony of a small number of employees could be used to calculate back pay for all employees. *See id.* at 690-693 (discussing testimony of eight employees); *Reich v. S.*

New England Telecomms. Corp. (2d Cir. 1997) 121 F.3d 58, 68 (explaining *Mt. Clemens* relied on testimony of 2.7% of the class); *Morgan v. Family Dollar Stores, Inc.* (11th Cir. 2008) 551 F.3d 1233, 1278-79.

In numerous FLSA decisions, federal courts have applied *Mt. Clemens* to award back pay to non-testifying employees on the basis of a pattern or practice adduced from the testimony of other employees within their job category. "Courts have frequently granted back wages under the FLSA to non-testifying employees based upon the representative testimony of a small percentage of the employees. The requirement is only that the testimony be fairly representational." *Donovan v. Bel-Loc Diner, Inc.* (4th Cir. 1985) 780 F.2d 1113, 1116. These cases have recognized such awards need not be precise. "Just as some employees are overcompensated by the calculations, others are under compensated." *Reich v. Waldbaum, Inc.* (SD NY 1993) 833 F.Supp. 1037, 1049.

California courts have embraced the *Mt. Clemens* standard in wage cases brought under California law. *See e.g.*, *Bell*, 115 Cal.App.4th at 747-749; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727 (overtime); *Bell*, 115 Cal.App.4th at 748 (overtime); *Amaral v. Cintas Corp.* (2008) 163 Cal.App.4th 1157, 1188-1191 (premium pay under living wage ordinance); *Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121,

134-135 (same); *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 961-963 (meal and rest breaks).

Consequently, if there is a remand on damages, the trial court will have discretion to decide whether to proceed by random statistical sampling, representative testimony under *Mt. Clemens*, or one of the procedures which the trial court offered before the start of Phase II. Under any of these methods, the outcome need not be precise. In the words of *Bell*, "rough approximations and statistical estimates pass scrutiny[.]" *Bell*, 115 Cal.App.4th at 749. If the trial court elects to use a random sample to determine damages, the existing sample need not be discarded, but can be supplemented by the testimony of additional randomly selected class members.

B. At the Phase II Remedial Stage, Defendant's Right To Challenge an Award to Individual Class Members Is Limited by the Classwide Liability Findings from Phase I.

At the remedial Phase II stage, a defendant has a limited right to contest the entitlement and damages of individual class members. However that right is constrained by the liability findings from Phase I, which create a presumption that each class member is entitled to relief. *Teamsters*, 431 U.S. at 360-362 ("The force of that [liability] proof does not dissipate at the remedial stage of the trial"); *Franks v. Bowman* (1976) 424 U.S. 747, 772-773 & n.32; *Alch*, 122 Cal.App.4th at 381 ("Plaintiffs in a class action

need not prove each class plaintiff was a victim of discrimination; they must prove the existence of a discriminatory policy and, if they do so, they are entitled to classwide relief").

At the remedial phase, the defendant may only contest entitlement for class members whom it can prove were exceptions to the illegal practice or for whom it has defenses not resolved at the liability stage of the action.[12] *Teamsters*, 431 U.S. at 362. Moreover, in a misclassification case, the defendant has the burden of production and of proof, both because of the presumption flowing from the Phase I findings and because a defendant always has the burden of proving its exemption defense. *Ramirez*, 20 Cal.4th at 794; *Nordquist*, 32 Cal.App.4th at 562.

Therefore, if this case is remanded for retrial of the remedial phase, USB cannot merely assert a particular class member was exempt or demand that each class member individually establish his/her entitlement to relief. *Teamsters*, 431 U.S. at 361 (rejecting contention that all class members at remedial phase must come forward with specific evidence to establish their claims). It will have the burden to produce evidence and prove, despite the trial court's findings that the BBO job was inherently a non-exempt inside

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[12] For example, a defendant may be able to assert a particular class member waived or released his damage claim. *See* 71CT21005 (finding that RWG Troy Petty waived his wage claim).

sales job, that a specific class member was exempt because he performed the BBO duties predominantly outside. However, because the trial court made a finding that USB never had any expectation BBOs were to spend more than half their work time outside Bank locations (71 CT 21017), USB should not be allowed to challenge that expectation finding as to individual class members.

Finally, if on remand, the trial court exercises its discretion to calculate damages based on *Mt. Clemens* representative testimony or statistical sampling, USB cannot challenge the damage award to a specific class member unless it "come[s] forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Mt. Clemens*, 328 U.S. at 687-688. Below, defendant made no attempt to offer evidence of the "precise amount of work performed" by class members either in the aggregate or individually. Indeed, defendant steadfastly refused to suggest any alternative figure for damages, "other than zero." 84RT6595.

VI. CONCLUSION

This case offers the Court an opportunity to provide guidance to lower courts on how to achieve the efficiencies—and justice—promised by the class action device while balancing the rights of all parties. As this Court has recognized, a class action is not merely a procedural device, it often is the

only practical route to vindicate substantive rights. *Gentry*, 42 Cal.4th at 457-463.

Below, the trial court, after appropriately certifying the class, heeded this Court's repeated admonition to be "procedurally innovative" (*Sav-On*, 34 Cal.4th at 922-923) and devised a trial plan that incorporated statistical sampling. The trial court's task was made difficult by defendant's refusal to cooperate at any step of the planning. Even with sampling, trial of this matter was lengthy—41 days for the liability phase and 9 days for the damages phase. Without sampling, trying each of the 260 class members' cases individually would take several years.

If this Court determines that a remand is appropriate, the remand should be limited and endeavor to supplement, not set aside, the extensive record in this case. There is no reason to disturb class certification, the class liability finding, or the fully-litigated claims of the 21 plaintiffs and class members who comprised the RWG. If the Court concludes the damages phase sample was infirm, evidence from that sample should not be discarded, but may be supplemented in a variety of ways suggested by the trial court below. Finally, if the damages phase must be revisited, the defendant is entitled to challenge relief for an individual class member only if it produces evidence and proves the class member is an exception to the class-wide

liability finding or can produce a precise accounting demonstrating that the average overtime estimate is incorrect for that class member.

Dated: August 14, 2012

Respectfully submitted,

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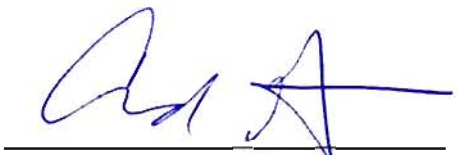
CERTIFICATE OF WORD COUNT

I certify that this Opening Brief on the Merits contains 14,000 words, as counted by Microsoft Word, the word-processing program used to prepare it.



Edward J. Wynne

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF MARIN.

I, the undersigned, declare that I am employed in the aforesaid County, State of California. I am over the age of 18 and not a party to the within action. My business address is 100 Drakes Landing Road, Suite 275, Greenbrae, CA 94904. On August 14, 2012, I served upon the interested parties in this action the following document described as:

OPENING BRIEF ON THE MERITS

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

☑ **BY OVERNIGHT DELIVERY**: I caused such envelope(s) to be delivered to an overnight delivery carrier with delivery fees provided for, addressed to the person(s) on whom it is to be served.

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

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

Executed on August 14, 2012, at Greenbrae, California.

Heidi Phillips

SERVICE LIST

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