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

RESPONDENTS' ANSWER TO AMICUS CURIAE BRIEFS

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

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

Attorneys for Plaintiffs and Respondents
SAM DURAN, MATT FITZSIMMONS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Statutes, Rules & Regulations

Secondary Authorities

INTRODUCTION

This brief answers the seven amicus curiae briefs filed in support of defendant/appellant U.S. Bank National Association. They are referred to herein as "USB's amici."

Five of the briefs by USB's amici largely echo the unpersuasive arguments previously presented by USB itself. The other two briefs, filed by the California Chamber of Commerce and the Gallup Organization, present different, but equally meritless, arguments.

The California Chamber brief presents a familiar defense theme – that certification of a class exerts enormous and unfair settlement pressure on a defendant. The brief purports to base its argument on a 2010 statistical report, "Class Certification in California: Second Interim Report from the Study of California Class Action Litigation," published by the California Administrative Office of the Courts ("AOC"). However, the AOC report explicitly *rejects* the contention that class certification exerts strong pressure on a defendant to settle and thus the report seriously undercuts the California Chamber's brief.

The Gallup Organization's brief criticizes the statistical sampling methodology that it claims was used in this case. Its argument is flawed for two independent reasons. First, the brief relies on evidence that is not in the record, in violation of the principle that an amicus curiae takes the

record as it finds it. Second, the brief is filled with erroneous assertions about what happened at trial.

Rather than buttress defendant's position, USB's amici have demonstrated in stark terms the lack of merit to USB's arguments.

Three amicus curiae briefs were filed in support of plaintiffs – by the California Employment Lawyers Association ("CELA"), the Impact Fund and eight other organizations, and the Consumer Attorneys of California ("CAOC"). Each of these briefs contributes significantly to the case. The CELA brief includes a detailed and thorough history of California class action law since 1872, when California's class action statute was enacted. The Impact Fund brief surveys the widespread use of aggregate proof in many areas of the law. The CAOC brief demonstrates that U.S. Supreme Court decisions on class certification under the Federal Rules of Civil Procedure do not limit the authority of the states to apply their own class action rules and discusses the broad leeway that trial courts have to impose appropriate remedies for proven illegal conduct.

In this brief, plaintiffs highlight the amicus briefs of CELA, the Impact Fund, and CAOC in order to bring their thoughtful arguments to the attention of the Court. These briefs provide strong additional authority for affirmance of the trial court's judgment.

ARGUMENT

I. THE U.S. SUPREME COURT DECISIONS IN *WAL-MART* AND OTHER RULE 23 CASES ARE NOT BINDING, OR EVEN PERSUASIVE, IN THIS CALIFORNIA CLASS ACTION.

USB's amici try to shoe-horn this case into the restrictive class-action principles announced by the U.S. Supreme Court in *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. __, 131 S.Ct. 2541 and *Comcast Corp. v. Behrend* (2013) __ U.S. __, 133 S.Ct. 1426. They contend that *Wal-Mart* and *Comcast* bar class certification here and preclude the use of representative or statistical evidence as constituting "Trial by Formula."

Plaintiffs explained in their merits briefs why this case is not governed by *Wal-Mart.* (Opening Brief on the Merits ("OBM") 43-44; Reply Brief on the Merits ("RBM") 40-43.) Herein we explain why *Wal-Mart, Comcast* and a summary reconsideration order in *RBS Citizens, N.A. v. Ross* (2013) __ U.S. __, 133 S.Ct. 1722 have no application to this case. *Wal-Mart* and *Comcast,* both decided 5-4, have proved enormously controversial in their interpretation of Rule 23 of the Federal Rules of Civil

Procedure.[1] But whether or not they correctly interpret *federal* law, they are neither binding nor persuasive in this *California* class action. (For additional discussion of *Wal-Mart* and *Comcast*, see the amicus curiae briefs of California Employment Lawyers Association (CELA 35-48) and Impact Fund (IF 13-17).)

A. *Wal-Mart v. Dukes*

Factually, *Wal-Mart* is about as different from this case as it could possibly be. *Wal-Mart* involved a nationwide class of 1.5 million members in countless job classifications, a company policy characterized by local managerial discretion rather than employer-wide uniformity, and a weak factual record in which the plaintiffs' expert could not say whether gender-stereotyped thinking played a part in 0.5 percent or 95 percent of Wal-Mart's employment decisions. This factual setting, which led the majority to find insufficient commonality for class certification, is worlds away from the instant case, which involves a California-only class of 260 members, all in a single job classification and all subject to a single employer

---

[1] See Arthur R. Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure" (2013) 88 N.Y.U. Law Rev. 286, 319-320 [criticizing *Wal-Mart*'s new limitations on class certification, stating, "Nothing in the language of Rule 23 (a)(2), the provision's history, or prior jurisprudence justifies these limitations"]. Professor Miller was the Reporter to the Federal Rules Advisory Committee of the Judicial Conference of the United States.

classification policy imposed company-wide.

From a legal perspective as well, *Wal-Mart* is completely distinguishable. *Wal-Mart* interpreted Rule 23 of the Federal Rules of Civil Procedure, which has no application in California class actions. (*Smith v. Bayer Corp.* (2011) __ U.S. __, 131 S.Ct. 2368, 2377-2388 [state may interpret its class action rules independently of federal interpretation of federal rules even where state rules use same language as federal rules]; *Bruno v. Superior Court* (1981) 127 Cal.App.3d 120, 128 [rejecting interpretation of federal rules as "not persuasive" in California].) (See further discussion, *infra*, Section II.) Besides class certification, the other aspect of *Wal-Mart* that USB's amici seek to apply here is the statement by the *Wal-Mart* majority that the company was "entitled to individualized determinations of each employee's eligibility for backpay." (131 S.Ct. at 2560.) The majority criticized what it called the "Trial by Formula" approach advanced by the Ninth Circuit Court of Appeals, which suggested that backpay for the class could be determined without individualized proceedings by extrapolating from a sample set of class members. (*Wal-*

Mart at 2560, 2561.)[2]

However, the majority's discussion of "Trial by Formula" was tied to the unique *statutory* requirements of the underlying law, Title VII. Title VII's "detailed remedial scheme" (131 S.Ct at 2560) expressly entitles an employer to such individualized determinations. (§ 2000e-5(g)(2)(A).) The majority did *not* hold that individualized determinations were required by due process, although Wal-Mart so argued. (*Dukes v. Wal-Mart Stores, Inc.* (9th Cir. 2010) 603 F.3d 571, 624.) Consequently, the *Wal-Mart* criticism of "Trial by Formula" is not applicable in this case, where the underlying statute, the California Unfair Competition Law ("UCL," Bus. & Prof. Code §17200 *et seq.*) contains no requirement for individualized determinations for each class member. To the contrary, this Court has long interpreted the UCL to permit an award of restitution to class members without individualized proof. (See OBM 44-45.)

Significantly for this case, the *Wal-Mart* majority expressed strong

---

[2] The National Association of Security Companies' amicus brief repeatedly asserts that the Supreme Court in *Wal-Mart* "unanimously" rejected the procedure known as "Trial by Formula." (NASC 6, 7, 9, 10, 11, 13.) That contention is misleading. Justice Ginsberg's four-justice dissent never mentioned "Trial by Formula" because it focused on Part II of the majority decision, not Part III where "Trial by Formula" was discussed. The dissent's only discussion of Part III, at the beginning of the opinion, stated merely that Justice Ginsburg agreed with the majority that the class should not have been certified under rule 23(b)(2) because the plaintiffs sought monetary relief. (131 S.Ct. at 2561.)

continuing support for the use of statistical and representative evidence to prove liability in Title VII pattern and practice cases, which are the equivalent of class actions. (*Cooper v. Fed. Reserve Bank* (1984) 467 U.S. 867, 876 & n. 9.) Indeed, the *Wal-Mart* majority justified its reversal of class certification by comparing the weak evidentiary showing in *Wal-Mart* to the strong proof in *Teamsters v. United States* (1977) 431 U.S. 324, a pattern and practice case challenging racial discrimination. The evidence in *Teamsters* included not only "substantial statistical evidence of company-wide discrimination" but also "40 specific accounts of racial discrimination from particular individuals." (131 S.Ct. at 2556.) According to the *Wal-Mart* majority, the 40 witnesses' testimony in *Teamsters* was probative of company-wide discrimination because "[t]he 40 anecdotes thus represented roughly one account for every eight members of the class" and "came from individuals 'spread throughout' the company." (*Ibid.*) Thus, the *Wal-Mart* majority confirmed the continuing validity of statistical and representative evidence to prove liability in class action litigation. Amici ignore this telling aspect of the majority opinion.[3]

Many lower federal courts have refused to construe *Wal-Mart* as urged by USB's amici. These courts have granted certification in wage

[3] Amicus California Business Roundtable complains that in this case, each of the 21 testifying class members "effectively carried the weight of twelve absent class members." (CBR 6-7.) *Wal-Mart*'s discussion of the 40 witnesses in *Teamsters* demonstrates that such representative testimony is appropriate. Moreover, in this case, unlike in *Teamsters*, the RWG witnesses (with the exception of the plaintiffs) were randomly selected, which makes their representative nature even stronger.

and hour cases post-*Wal-Mart.* (See cases cited in RBM 42-43.) They have held that the *Wal-Mart* criticism of "Trial by Formula" has no relevance where the operative statute provides no explicit right to individualized proof. (*Gilmer v. Alameda-Contra Costa Transit Dist.* (N.D. Cal., Nov. 2, 2011, No. C08-05186CW) 2011 WL 5242977 at *7 [*Wal-Mart* "does not stand for the proposition that an employer is entitled to an individualized determination of an employee's claim for backpay in all instances in which a claim is brought as a collective or class action."] See also Impact Fund 16-17; CELA 41-42.[4])

B. *Comcast Corp. v. Behrend*

In *Comcast Corp v. Behrend,* 133 S.Ct. 1426, the *Wal-Mart* five-justice majority again reversed class certification for failure to satisfy Rule 23, this time in an anti-trust case. Delving deeply into the factual merits of the case by a close analysis of the plaintiffs' expert's opinion, the majority held that the plaintiffs' proposed model for calculating damages was faulty and thus the plaintiffs had not met the "predominance" requirement in Rule

[4] In *Wang v. Chinese Daily News, Inc.* (9th Cir. 2013) 709 F.3d 829, a Ninth Circuit panel interpreted *Wal-Mart*'s "Trial by Formula" language to mean that employers were "entitled to individualized determinations of each employee's eligibility" for monetary relief (*id.* at 836, quoting *Wal-Mart* at 2560) in a wage and hour class action. The *Wang* opinion did not recognize that *Wal-Mart*'s analysis on this point was limited to Title VII cases. (See CELA 41-43.) A petition for rehearing and rehearing en banc, pointing out this error, is pending in *Wang.*

23(b)(3). *Comcast* has no relevance to the instant case.

First, like *Wal-Mart*, *Comcast* was an interpretation of Federal Rule 23, which is not applicable in California courts.

Second, the majority's analysis was predicated on the assumption, uncontested by the parties, that to meet the "predominance" standard of Rule 23 (b)(3), damages must be capable of being calculated on a classwide basis through a common methodology. (*Comcast* at 1432-1433.) Whether or not this is an accurate statement of federal class action principles – the dissent argued that it was contrary to the "well nigh universal" "[r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3)" (*id.* at 1437) – it is clearly contrary to California class action law, which holds that the possible need to prove damages on an individual basis does *not* bar class certification. (See, e.g., *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 332 ["That calculation of individual damages may at some point be required does not foreclose the possibility of taking common evidence on the misclassification questions]."") Thus California case law rejects the uncontested central principle underlying the *Comcast* decision.

Contrary to the arguments of USB's amici, *Comcast* did not express disapproval of the use of statistical or representative evidence in class action litigation. After engaging in a "rigorous analysis" (*id.* at 1433), the

majority criticized the plaintiffs' expert because his methodology for proving damages supposedly did not match up with the theory on which liability was based. (The dissent disagreed and accused the majority of overturning factual findings made by the two lower courts. (*Id.* at 1439-1440).) At any rate, the majority's criticism of the *Comcast* expert has no relevance here.

Nor, in this case, did the trial court "blind[ly] accept ... 'expert' proposals," as amici contend. (NASC 19.) Rather, the court here carefully analyzed the conflicting testimony of both parties' experts, found plaintiffs' experts were "credible and persuasive," and rejected the opinions of defendant's experts as "not persuasive" and "irrelevant, based on faulty assumptions and misstatements of relevant fact and law, and consequently of no appreciable value." (OBM 21-22.)[5]

C. *RBS Citizens, N.A. v. Ross*

Amici also rely on the U.S. Supreme Court's summary order

---

[5] The *Comcast* majority's intensive evaluation of the underlying merits at the class certification stage is inconsistent with the approach of this Court. For example, in *Brinker Restaurant v. Superior Court* (2012) 53 Cal.4th 1004, this Court stated that inquiries into the merits "are closely circumscribed" and "a court generally should eschew resolution of such issues unless necessary." (*Id.* at 1024-1025; see also *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 438-443 [class certification decisions should not turn on the merits of the claim].) Under California law, moreover, factual findings underlying a class certification decision are subject only to review for substantial evidence. (*Sav-On* at 329.)

granting, vacating and remanding the Seventh Circuit's decision in *Ross v. RBS Citizens, N.A.* (7th Cir. 2012) 667 F.3d 900 for further consideration in light of *Comcast.* (*RBS Citizens, N.A. v. Ross, supra*, 133 S.Ct. 1426.) *Ross* involved class certification in a wage and hour case. The Seventh Circuit decision affirming class certification was discussed in plaintiffs' Reply Brief. (RBM 42, 44-45.)

Amici seem to assume that the Supreme Court's grant, vacate and remand ("GVR") order negates the persuasiveness of *Ross*, but that is not so. Such a summary reconsideration order "did not amount to a final determination on the merits." (*Henry v. City of Rock Hill* (1964) 376 U.S. 776, 777. "[T]he lower court is being told simply to reconsider the entire case in light of the intervening precedent – which may or may not compel a different result." (Stern, Gressman, et al. Supreme Court Practice (8th Ed. (2002) p. 319.); *Communities for Equity v. Michigan High Sch. Athletic Ass'n* (6th Cir. 2006) 459 F.3d 676, 680 ["a GVR order does not indicate, nor even suggest, that the lower court's decision was erroneous"]; *Gonzalez v. Justices of the Mun. Court* (1st Cir. 2005) 420 F.3d 5, 7-8 ["a GVR order is neither an outright reversal nor an invitation to reverse ...."].)

II. CALIFORNIA PUBLIC POLICY FAVORS CLASS ACTIONS AND ENCOURAGES THE USE OF INNOVATIVE PROCEDURES TO ENABLE SUCH ACTIONS TO PROCEED.

USB's amici disregard the long and independent development of California's class action jurisprudence. Our class action statute, Code of Civil Procedure section 382, was enacted in 1872, nearly seven decades before the adoption of Federal Rule 23.[6] This Court has not hesitated to interpret section 382 independently of the federal courts' construction of Rule 23 and to reject federal interpretations of Rule 23 that are inconsistent with California law or policy. Such variation between state and federal class action procedures is entirely permissible. (*Smith v. Bayer Corp., supra*, 131 S.Ct. at 2377-2378.)

The Court has said that California courts *may* look to Rule 23 for guidance "in the *absence* of controlling California authority." (*La Sala v. American Sav. & Loan Association* (1971) 5 Cal.3d 864, 872, emphasis added.) But it has never suggested that California courts should blindly

---

[6] Section 382 reads in pertinent part:

> "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

For a remarkably thorough discussion of the development of California class action law, see CELA Brief at 7-34.

follow federal interpretations of Rule 23 if such interpretations would conflict with California legal principles. (RBM 41; see *Southern Cal. Edison Co. v. Superior Court* (1972) 7 Cal.3d 832, 839 [Rule 23 cases considered as "constructional aids" "in the absence of controlling California authority"]; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821 ["in the event of a hiatus," trial court "may find useful" Rule 23 procedures]; *State of California v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 481 fn. 2 ["[t]hough not binding on this court, federal law concerning class action procedures has been applied where consistent with California law and policy." (Bird, C.J., concurring)].) Rather, California courts have rejected federal class action decisions that conflict with state law or policy.

For example, federal courts generally hold that fluid recovery, a method of distributing damages not claimed by class members, is not authorized in Rule 23 class actions. (*Eisen v. Carlisle & Jacquelin* (2d Cir. 1973) 479 F.2d 1005, 1018, vacated on other grounds (1974) 417 U.S. 156 ["the fluid recovery concept and practice [is] illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper."].)

But California courts have reached a different conclusion. In *Bruno v. Superior Court, supra*, 127 Cal.App.3d 120, the California Court of Appeal held that *Eisen* was "not persuasive" and refused to follow it,

stating, "Whatever the validity of their analysis of federal civil procedure, we find it inapposite to an interpretation of California's class action statute (Code Civ. Proc., § 382), which *Eisen* itself called 'very different in its phraseology from amended Rule 23.'" (*Id.* at 128.)

In *State of California v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, this Court agreed, approving fluid recovery in California class actions and rejecting the contrary federal precedents. Significantly, the Court emphasized that fluid recovery served the important policy of deterrence: "Without fluid recovery, defendants may be permitted to retain ill gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts." (*Id.* at 472.) Fluid recovery was, the Court said, consistent with its mandate that trial courts develop "pragmatic procedural devices" to simplify class action litigation while protecting the rights of all parties. (*Id.* at 471.)

Similarly, federal courts interpreting Rule 23 hold that plaintiffs, not defendants, must bear the cost of notifying the class of the pendency of a class action. (*Oppenheimer Fund, Inc. v. Sanders* (1978) 437 U.S. 340; *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156). By contrast, this Court has held that California trial courts may direct *either* plaintiffs or defendants to pay for such notification and that requiring the defendant to bear this cost does not violate its due process rights. (*Civil Service*

Employees Ins. Co. v. Superior Court (1978) 22 Cal.3d 362.) Once again, the Court's justification for this divergence from federal law was the strong state public interest advanced by class actions:

> In the absence of such a cost-shifting procedure, the class action mechanism might frequently be completely frustrated since the representative plaintiff, whose individual claim will ordinarily be relatively small, may often be unable to afford the initial cost of notifying all absent members .... (*Id.* at 377.)[7]

The cramped and narrow interpretation of federal class action law and procedure urged by USB and its amici is in sharp conflict with this Court's decisions about class actions under California law. This Court has repeatedly held that California public policy affirmatively *favors* class actions, particularly where, as here, "unwaivable" wage rights are at issue. (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 455, cert. den. (2008) 128 S.Ct. 1743.)

Thus, in *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, the Court stated that "this state has a public policy which encourages the use of the class action device" as well as "a clear public policy ... that is specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of workers." (*Id.* at 340,

---

[7] This principle was later codified in California Rule of Court 3.766(a), which allows the court to order either party to give notice (and pay for it).

quoting *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 473 and *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1429-1430.) Likewise, in *Gentry v. Superior Court*, the Court declared that "class actions play an important function in enforcing overtime laws by permitting employees who are subject to the same unlawful payment practices a relatively inexpensive way to resolve their disputes." (42 Cal.4th at 459.) "[C]lass actions may be needed to assure the effective enforcement of statutory policies even though some claims are large enough to provide an incentive for individual action." (*Id.* at 462, quoting *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 745.) And in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, the Court recently observed that "class actions have been statutorily embraced by the Legislature ...." [8]

Ignoring such strong statements of public policy, USB's amici fall back on dictum that "[c]lass actions are provided only as a means to enforce substantive law" and "[a]ltering the substantive law to accommodate procedure would be to confuse the means with the ends...." (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462; see also *Washington*

---

[8] *See also Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 374 [declining to adopt rule that "could make it more difficult to obtain class certification, thereby reducing the effectiveness of class actions as a means to provide relief in consumer protection cases"].

Mutual Bank v. Superior Court (2001) 24 Cal.4th 906, 918; *Granberry v. Islay Investments, Inc.* (1995) 9 Cal.4th 738, 749; *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1103.) These cases are readily distinguishable.[9]

Moreover, this language does not mean – as amici apparently contend – that a class action cannot be certified unless it will be tried using procedures identical to those available in an individual action. This Court's repeated assertion that trial courts must use "innovative procedures" in

---

[9] In *City of San Jose*, the Court held that the ancient common law principle that each parcel of land is unique precluded a group of property owners from bringing a class action for damages for airplane noise, dust and vibrations against a municipal airport.

In *Washington Mutual*, the Court addressed whether to certify a nation-wide class involving consumers who each had secured mortgages containing choice-of-law clauses. Because of the complexity of dealing with the law of many different states, the court of appeal had suggested that the choice-of-law agreements should be disregarded. The Court rejected that suggestion, stating that the substantive law of other states could not be altered to accommodate procedure.

In *Granberry*, the Court held that the plaintiff-tenants, having brought a class action against their former landlords for non-refunded security deposits, could not deprive the landlords of their statutory right to claim set-offs for unpaid rent, repairs and cleaning. The Court specifically noted that it might be possible to shape a remedy to resolve the setoff on a class basis and ordered the trial court to hold "an evidentiary hearing" on whether the landlords had sustained their statutory burden to claim the setoff.

In *Mirkin*, the Court ruled that the plaintiffs in a class action for common law securities fraud had to plead reliance on the misrepresentations and could not pursue a fraud-on-the-market theory, as would be available under federal and state securities law. The Court refused to alter substantive common law when the plaintiffs had several readily available statutory alternative remedies.

class actions underscores that obvious fact. In the wage and hour context, in particular, California courts have recognized that class actions employing such innovative procedures are often necessary to allow many workers to recover their full wages and to avoid the mere "random and fragmentary enforcement" of the State's wage laws. (*Bell* at 741.)

For example, in *Bell*, the court upheld a judgment using statistical methods to determine the aggregate amount of backpay owed by the defendant employer to the class. Rejecting the defendant's argument that such statistical methods were impermissible because "substantive rules of law may not be altered in the interests of efficient litigation" (*id.* at 750), the court declared:

> [S]tatistical sampling does not dispense with proof of damages but rather offers a different method of proof, substituting inference from membership in a class for an individual employee's testimony of hours worked for inadequate compensation. It calls for a particular form of expert testimony to carry the initial burden of proof, not a change in substantive law. (*Ibid.*)

This Court has expressly approved that language from *Bell*. (*Sav-On* at

333.)[10]

In this case, the trial court did not alter substantive rules of law by ruling that USB could not litigate liability and damages individually for each class member as it could have done in an action brought by a single employee. Here, as in *Bell*, the trial court offered "a different method of proof" in which the primary focus in the liability phase was on the employer's common policies and practices, the nature of the job duties, and the employer's realistic expectations about how the job is performed, not on the application of those policies and practices to each employee. This is the standard method of proof used to prove liability in a class action. It is only *after* the trial of classwide liability based on such common proof that a defendant may be permitted to present evidence of individual class members whom it claims are not subject to the classwide liability finding. (See OBM 37-39, 62-64; RBM 52-54.)

III. THE TRIAL COURT PROPERLY CERTIFIED THE CLASS AND REFUSED TO DECERTIFY IT.

USB's amici claim class certification was erroneous because the

---

[10] There is no merit to amicus National Association of Security Companies' claim (NASC 21-26) that *Bell* and *Sav-On* are no longer good law because they cited two federal decisions that have been disapproved by federal courts. *Bell* and *Sav-On* cited many federal, California, and out-of-state cases that remain good law today. Their continuing validity was demonstrated by the fact that *Brinker* cited *Sav-On* nine times and *Bell* once.

central issue in the case was the amount of time employees spend performing sales activity outside the employer's premises. That, they say, is an individualized question that will necessarily predominate. As the California Employment Law Council put it, "A *job* is not exempt or nonexempt; the exemption depends on how a particular person *performs* that job." (CELC 28, ital. in original.)

The trial court saw things differently, as it had a right to do. Based on evidence submitted by both parties, in the form of employee declarations, management depositions and corporate documents, the trial court found substantial evidence that the BBO position was standardized throughout the bank so that the actual requirements of the job would be susceptible to common proof. "[T]he nature of the work performed by BBOs and SBBs is 'the predominant common issue determinative of liability to all class members," the court found. "In light of the standardization of the SBB/BBO positions across defendant's operations, this is an inquiry which is 'susceptible of common proof.'" (16 CT 4531-4532.) The court thus rejected the contention, advanced by USB and its amici, that each class member did the job in a wholly individualistic manner. This conclusion was consistent with this Court's statement in *Sav-On,* affirming class certification:

> Any dispute over "how the employee actually

> spends his or her time" (*Ramirez, supra,* 20 Cal.4th at p.802), of course, has the potential to generate individual issues. But considerations such as "the employer's realistic expectations" (*ibid.*) and "the actual overall requirements of the job" (*ibid.*) are likely to prove susceptible of common proof. (*Id.* at 336-337.)[11]

Amici ignore this Court's many decisions holding that class certification is proper if there is a common question of law or fact, even if class members' entitlement to damages and the amount of damages they are owed will have to be determined in later proceedings. (*Sav-On* at 334; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 707-710.) They also ignore the Court's repeated holdings that class certification decisions are subject to deferential review under the abuse of discretion standard and that a class certification order should be affirmed unless "it would be irrational for a court to conclude that, tried on plaintiffs' theory, questions of law or fact predominate over the questions affecting the individual members...." (*Sav-On* at 329, quoting *Washington Mutual Bank v. Superior Court, supra,* 24 Cal.4th at 913, internal quotation marks omitted.) Since the evidence at trial showed that essentially 100 percent of the class members were

---

[11] USB's amici pay little or no attention to the important *Sav-On* case. Some, such as Pacific Legal Foundation and Gallup, never mention *Sav-On* at all. The California Employment Law Council asserts, in a classic understatement: "In *Sav-On*, this Court declined to announce a rule prohibiting certification in all exempt-status misclassification cases." (CELC 37.)

misclassified and that the duties of the BBO position were performed inside the Bank (RBM 26-30, 68), the trial court was certainly not irrational in concluding that common questions predominated over those affecting individual members.

Amici also largely disregard this Court's decision in *Brinker*. In *Brinker*, the plaintiff contended that the employer's rest break policy violated Wage Order 5 by failing to conform to the wage order's requirement that an employer authorize a rest break for employees who worked four hours or "a major fraction thereof." The trial court had certified a rest break subclass but the court of appeal reversed the certification, finding that individual issues would predominate. The appellate court ruled (in reasoning similar to amici's arguments herein) that because rest breaks can be waived, individualized proof would be necessary to determine whether the employer had violated the wage with respect to each class member and each individual break.

This Court reversed the court of appeal, stating that the plaintiff's theory of liability – *Brinker* had a uniform policy which violated the wage order – was by its nature a common question eminently suited for class treatment:

> Claims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the

> sort routinely, and properly, found suitable for class treatment....
>
> An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not ... it has violated the wage order and is liable. No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it. (*Id.* at 1033.)

Brinker's rationale was applied in a setting very similar to this case in *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, decided May 10, 2013, after the filing of the amicus briefs in this case. In *Faulkinbury*, the employer, a security guard company, had a meal break policy requiring *all* security guard employees to take on-duty meal breaks and to agree in writing that the nature of the work prevented the employee from being relieved of all duties during the meal period.

The trial court denied class certification. The court of appeal originally affirmed the denial of certification, holding that even if the employer's on-duty meal break policy was unlawful, the employer would be liable only when it actually failed to provide a required off-duty meal break, thus causing individual questions to predominate. This Court granted review and, after *Brinker,* transferred the case back to the court of appeal with directions to vacate its decision and reconsider in light of *Brinker.*

On remand post-*Brinker*, the court of appeal ordered class

certification. The court recognized that *Brinker* taught that a court must focus on the employer's policy and must address whether the legality of the policy can be resolved on a classwide basis. The court concluded that the legality of the uniform meal break policy could be resolved on a classwide basis. "By requiring blanket off-duty meal break waivers in advance from *all* security guard employees, regardless of the working conditions at a particular station, Boyd treated the off-duty meal break issue on a classwide basis," the court stated. (*Id.* at 234, emphasis by the court.) "In other words, the employer's liability arises by adopting a uniform policy that violates the wage and hour laws." (*Id.* at 235.) Although the employer's "nature of the work" defense might properly apply to *some* of the security guards, its uniform meal-break policy denied off-duty meal breaks to *all* the guards. Class certification was proper so that the validity of the employer's across-the-board policy could be decided for the class. The fact that the court might ultimately have to rule on whether particular class members were entitled to an off-duty meal break did not bar class certification.[12]

Faulkinbury's reasoning supports the grant of class certification in this case. Under Wage Order 4, USB was required to pay overtime to its

---

[12] The court also ordered certification of a rest break subclass, noting that the employer had no rest-break policy at all and provided rest breaks only on an informal, sporadic basis. The validity of the employer's lack of a rest break policy could be determined on a classwide basis, the court held.

non-exempt employees. USB failed to adopt a procedure for ensuring that overtime was paid to non-exempt BBOs. Instead it adopted a uniform policy that classified all BBOs as exempt and failed to provide any mechanism to determine whether BBOs actually worked outside Bank premises more than 50% of the time, as the outside sales exemption required. Thus, the company's uniform policy caused at least some BBOs to be denied the overtime to which they were entitled. Class certification was proper because the validity of defendant's across-the-board exemption policy could be determined on a classwide basis. The fact that the court might ultimately have to rule on whether particular class members were non-exempt did not bar class certification.[13]

At trial plaintiffs proved the facts underlying this theory of class

---

[13] In this case, the trial court's class certification order, issued in 2005, presaged the analysis in *Faulkinbury*:

> [T]he record contains substantial evidence that defendant treated all BBOs and SBBs alike, regardless of whether such treatment was appropriate under the law. Plaintiffs have substantial evidence that defendant classified all BBOs and SBBs as exempt, and did so without any inquiry (let alone any individualized inquiry) as to any particular employee's job duties, hours worked, performance or any other factor. This apparent policy, defendant's apparent failure to train or monitor BBOs and SBBs to ensure that the exemption requirements would be or were being satisfied and the apparent standardization of the BBO/SBB position all create substantial issues of fact and law that are common among class members and that are likely to rest on 'a common thread of evidence' class-wide. (16 CT 4531.)

certification without dispute. USB did not dispute that it had a uniform policy under which all BBOs were classified as exempt. USB's corporate managers testified that there was no mechanism to evaluate whether that policy was properly applied to all BBOs. Ross Carey, USB Division Manager for the Western States with responsibility for the Small Business Banking Organization, confirmed that USB did not track where BBOs spend their work time and there was no compliance program to ensure they were outside more than 50% of the time. (43 RT 3022-3023, 3042.) Linda Allen, USB Human Resources Manager, testified there was no ongoing audit program to ensure that BBOs were properly classified. (58 RT 4810.) Reflecting that testimony, the trial court found that USB "has no adequate compliance program in place to ensure that BBOs are properly classified as exempt. There have never been any monitoring, surveys, audits, studies or reviews of the BBO position." (16 CT 21013.) Indeed, the court found, "No one [at USB] has ever had the responsibility to ensure that BBOs are properly classified as exempt." (*Ibid.*)

In short, as a result of USB's uniform policy, all BBOs were treated as exempt and denied overtime compensation even though it was undisputed that many BBOs worked more than 50% inside Bank properties and, consequently, were non-exempt. This evidence was sufficient to support the trial court's decisions certifying the class and refusing to

decertify it.

Of course, plaintiffs' proof of liability went far beyond showing that "many" BBOs worked more than 50% inside. At trial, plaintiffs demonstrated that BBOs, as a class, were misclassified. This showing came from the following evidence: the RWGs' unanimous testimony that they and their fellow BBOs worked predominantly inside, the extrapolation of that testimony to the rest of the class based on the statistical analysis and testimony of Dr. Drogin, the evidence that the BBO job consisted of inherently "inside" duties, the fact that the BBO job description had never stated that BBOs should spend more than half their time outside Bank premises, and the proof that USB managers had no reasonable expectation that the BBO position was an outside sales position, as shown by the fact, among many, that the most successful BBO (Penza), who spent all his time inside, was held up as an example by USB management. (OBM 14-18, 29-30; RBM 26-30.) Based on this evidence, the trial court found that the class was misclassified as exempt. (71 CT 21018.) This pattern confirmed the correctness of the trial court's finding in its class certification order that the BBO position was standardized and was performed similarly by class members. (16 CT 4531-4532.) It also justified the court's refusal to

decertify the class.[14]

Amici cite a number of state and federal cases that denied class certification in misclassification cases but those cases are distinguishable, wrongly decided, or both. For example, *Walsh v. Ikon Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, *Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422 and *Mora v. Big Lots Stores, Inc.* (2011) 194 Cal.App.4th 496 affirmed trial court rulings *not* to certify a class where the lower court found wide variation in the way class members performed their jobs. (OBM 43.) The decisions stressed the trial court's broad discretion in certification decisions.

Dailey v. Sears, Roebuck and Co. (2013) 214 Cal.App.4th 974 largely followed *Dunbar* and *Walsh*. It affirmed the denial of class certification as within the trial court's discretion after the trial court credited the employer's evidence that the positions of manager and assistant manager were performed differently from store to store. The trial court also found that it was "not impracticable" to try each class member's individual

---

[14] Ironically, amicus California Business Roundtable claims that there are other ways besides statistical sampling to prove the predominance of common issues, including "an employer's uniform application of an exemption to employees," "whether the employer exercised some level of centralized control in the form of standardized hierarchy, standardized corporate policies and procedures governing employees, [and] uniform training programs...." (Cal. Bus. RT12.) Plaintiffs proved each of these factors in this case. (OBM 8.)

claim since the class involved only one or two managerial employees at each of 16 stores. (*Id.* at 985.)

The federal cases cited by amici are also distinguishable. In *Jimenez v. Domino's Pizza, Inc.* (C.D. Cal. 2006) 238 F.R.D. 241, the district court refused to certify the class because it found there was great variation in how the class members did their jobs. In *In re Wells Fargo Home Mortg. Overtime Pay Litig.* (N.D. Cal. 2010) 268 F.R.D. 604, the district court denied class certification because the plaintiff had failed to propose a satisfactory classwide mechanism by which liability could be tried. The court questioned whether representative testimony or statistical evidence were permissible methods to determine class liability, which is one of the issues posed by this case.

In *Marlo v. United Parcel Service* (C.D. Cal. 2008) 251 F.R.D. 476, aff'd (9th Cir. 2011) 639 F.3d 942, the district court certified a class of UPS supervisors but later decertified it, after concluding that the plaintiffs had no common evidence by which to prove classwide misclassification. Contrary to the position advanced by USB and its amici, *Marlo* ruled that permissible common proof could involve "individual employee testimony, expert testimony, generalized surveys, statistical analyses or some combination of all this evidence." (*Id.* at 485, n.7.) However, the plaintiff presented none of these, only a flawed and non-representative survey.

In *Espenscheid v. DirectSat USA, LLC* (7th Cir. 2013) 705 F.3d 770, the Seventh Circuit affirmed decertification of a class solely because of the alleged difficulty of calculating damages for the 2,341 putative class members. In doing so, the court ignored the U.S. Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, which held that employees may establish their 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 the employees' losses with precision. *Mt. Clemens* and subsequent cases from federal and state courts have held that the testimony of a small number of employees could be used to calculate back pay for all employees. (*Bell v. Farmers Ins. Exch., supra,* 115 Cal.App.4th at 747-749; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727; OBM 59-62.)[15]

[15] In *Espenscheid,* the Seventh Circuit rejected the plaintiffs' offer to prove class damages by extrapolating from the testimony of 42 class members because class counsel was unable to explain how the 42 witnesses were chosen. The court suggested that if the witnesses had been randomly selected, their testimony would have been acceptable. In this case, the class member RWGs *were* randomly chosen.

IV. DEFENDANT DID NOT HAVE A DUE PROCESS RIGHT TO INDIVIDUAL TRIALS OF LIABILITY FOR EACH CLASS MEMBER.

Plaintiffs have shown that the use of representative and statistical evidence in class actions is well accepted, that such evidence does not violate due process, and that a class action defendant does not have a constitutional right to litigate liability individually for each class member. (OBM 32-42, 59-64; RBM 48-65.)

Plaintiffs' amici – CELA, The Impact Fund, and CAOC – provide additional persuasive analysis on this issue. (CELA 28-34; IF 4-20; CAOC 6-7.) The bottom line, as CELA observes, is that "no published California opinion has found use of representative evidence, including statistical extrapolations from the testimony of a proper representative sample of class members, to be constitutionally infirm... There is simply no constitutional bar to the use of such evidence in a class action ...." (CELA 28.)

A. USB's Amici's Buzz-Word Quotations About Due Process Do Not Demonstrate a Constitutional Infirmity Here.

The due process arguments of USB's amici rely heavily on generalized language from cases that have nothing to do with this class action.

- They quote from *Lindsey v. Normet* (1972) 405 U.S. 56 that "[d]ue process requires that there be an opportunity to present every

available defense." (*Id.* at 66, quoted US Chamber 7; PLF 6; NASC 16.) But *Lindsey rejected* tenants' due process challenge to an Oregon statute that required a trial within six days after the service of an eviction action and limited the issues that tenants could raise in defense. The Court noted "there are available procedures" for tenants to litigate their other defenses against the landlord. (*Ibid.*)[16]

- They quote from *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191 that "[i]n a class action, once the issues common to the class have been tried, and assuming some individual issues remain, each plaintiff must still by some means prove up his or her claim, allowing the defendant an opportunity to contest each individual claim on any ground not resolved in the trial of common issues." (*Id.* at 1210; quoted in CELC 15.) But *Johnson* was an individual suit by car owners complaining that Ford had hidden the repair history of their used car. This Court reversed the plaintiffs' $10 million punitive damage award because it supposedly

[16] Other cases cited by defense amici for the same proposition are inapposite. (See US Chamber 7.) *Philip Morris USA v. Williams* (2007) 549 U.S. 346 involved punitive damages, which raise concerns not implicated here, and did not explain what "an opportunity to present" means. In *U.S. v. Armour & Co.* (1971) 402 U.S. 675, the Court said only that the defendant had waived its rights, without explaining what procedures would have satisfied due process. Likewise, *Nickey v. State of Mississippi* (1934) 292 U.S. 393 contains the quoted language but does not elaborate on what "presenting" available defenses means.

constituted Ford's earnings on transactions with thousands of anonymous other fraud victims, as to whom, because it was not a class action, there was *no* evidence of *any* wrongdoing by Ford. The authority that the Court cited for the above quote in *Johnson* was *Sav-On*'s discussion of why individual issues do *not* preclude class certification. (RBM 54-55.)

- They quote from *McLaughlin v. American Tobacco Co.* (2d Cir. 2008) 522 F.3d 215 concerning a defendant's "right to raise individual defenses against each class member." (*Id.* at 232, quoted by U.S. Chamber 12.) However, that quotation came in the context of the court's holding that fluid recovery would violate due process, a position rejected by California courts. (*Bruno, supra*, at 128; *State of California, supra,* at 472.)

- They quote from *In re Brooklyn Navy Yard Asbestos Litigation* (2d Cir. 1992) 971 F.2d 831 that "aggregate litigation must not be allowed to trump our dedication to individual justice." (*Id.* at 853, quoted U.S. Chamber 12.) That case involved a mass trial of 79 wrongful death and personal injury cases for asbestos exposure at the Brooklyn Navy Yard that resulted in a damage award to 64 plaintiffs. The Second Circuit largely *affirmed* the judgment, concluding that justice had been achieved as a result of the "unique procedures utilized in this case" and the 'innovative managerial skills" of the trial judge, Judge Weinstein. (*Id.* at 836 fn. 1.)

- They quote from *Western Elec. Co., Inc. v. Stern* (3d Cir. 1976)

544 F.2d 1196 that "to deny [the defendant] the right to present a full defense on the issues would violate due process." (*Id.* at 1199, quoted by U.S. Chamber 12.) The Third Circuit wrote these words when it held that a defendant in a Title VII action was entitled to demand detailed discovery from the plaintiff about each of 4000 class members before the class stage of the trial. However, a month later the court revised its ruling and held instead that the matter was vested in "the sound discretion of the district court." (*Western Elec. Co., Inc. v. Stern* (3d Cir. 1976) 551 F.2d 1, 2.) On remand, the district court ruled that the plaintiff had established she did not have the information sought and she was not required to obtain it from the class. (*Kyriazi v. Western Elec. Co.* (D.N.J. 1977) 74 F.R.D. 468.)

In short, USB's amici rely heavily on buzz-words about due process divorced from any showing that defendant USB was actually denied any constitutional right.[17]

Remarkably, among the seven briefs submitted by USB's amici, there is only one passing citation to *Connecticut v. Doehr* (1991) 501 U.S. 1, which discusses how to balance the interests involved where a defendant claims that a procedural device is depriving it of property without due

[17] Amici also cite to *City of San Jose*, *Washington Mutual*, *Granberry*, and *Mirkin*. But, as discussed *supra*, these cases are distinguishable and did not rest on due process principles.

process. (See PLF 6.) *Bell v. Farmers Insurance Exchange* analyzed these factors and found no due process violation in the use of a statistically reliable sample of class members to calculate damages in an overtime class action. (*Bell* at 751-77.) Amici's omission of any discussion of the *Doehr* balancing test reflects their failure to recognize that statistical sampling may properly be used in class actions without violating a defendant's right to assert its defenses. (See discussion of *Doehr* in OBM 37; RBM 53, 57-60; CELA 29-34.)[18]

B. The Trial Procedure Used Here to Determine Liability Was Valid and Did Not Deprive Defendant of Due Process.

The attacks on the trial procedure used in this case echo those of USB and are no more persuasive. Like USB, its amici ignore or misstate the facts in the record and disregard the Evidence Code and the standard of review.

Amici's principal argument is that USB was denied due process when, at the liability stage, the trial court refused to admit approximately 75 declarations from non-RWG class members stating that they worked principally outside bank properties. (E.g., US Chamber 13.) However, as

---

[18] This Court recently unanimously rejected a due process claim in *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197 at *7, emphasizing the "flexible" and "context[ual] requirements of due process.

plaintiffs have shown, the declarations were inadmissible hearsay, were far less probative than live testimony by the randomly selected witnesses, suffered from serious credibility and authorship problems, had been considered and discounted (if not rejected) by the trial court in previous motion practice, and had been repudiated by every class member who testified at deposition or at trial. (RBM 61-63.) Each of these reasons supports the trial court's discretionary decision to exclude the declarations. USB's amici have not rebutted any of them.[19]

Amici also argue that defendant should have been allowed to introduce the deposition testimony of four former plaintiffs, which they contend would show that each was correctly classified as exempt. (CELC 2; US Chamber 13.) Once again, amici disregard the record. These four witnesses testified in deposition that they worked predominantly outside their "branch." Since they, like every other BBO, worked at more than one bank branch, that testimony does not show that they worked predominantly outside bank property, as the outside sales exemption requires. Moreover, deposition testimony can be admitted at trial only if the proponent

[19] Indeed, the Pacific Legal Foundation provides authority for the trial court's exclusion of the defense declarations. It cited *In re Ford Motor Co. Vehicle Paint Litig.* (E.D. La. 1998) 182 F.R.D. 214, in which the court rejected a proposal to introduce affidavits at trial because they would deny the opposing party its right of cross-examination. (*Id.* at 221; PLF 7.)

establishes that the deponents were unavailable. Amici ignore the fact that USB made no such showing. (RBM 7, 24-25, 63-64.)

Amici further contend that the statistical evidence was flawed because the RWGs were not randomly selected. (CELC 44; PLF 3, 12-13; Gallup 6-19.) Much of their argument is based on the testimony of the defense experts, whom the trial court found to be "not credible" and "not persuasive." (OBM 21.) Amici claim that randomness was compromised in various ways, including the exclusion of two RWGs who opted out but then (encouraged by defendant) wanted to opt back in, the exclusion of one RWG because he had never served as a BBO, and the exclusion of the four former plaintiffs. Dr. Drogin testified that these claims of non-randomness were not statistically well-founded and that the RWGs were randomly selected. (70 RT 5562; 73 RT 5750-5753, 5758-5763, 74 RT 5825.) His testimony provides substantial evidence for the trial court's finding that the RWG sample met accepted statistical standards. (83 CT 24626-24627; RBM 71-75.) [20]

Amici's contrary contentions, particularly in the brief filed by the

[20] The Pacific Legal Foundation's contention that "[t]he trial court allowed the Plaintiffs to select 21 BBOs" who would testify at trial is completely mistaken. (PLF 3.) The RWGs were randomly selected and, at defendant's instance, over plaintiffs' objections, the trial court decided that the two plaintiffs would also testify. (12 RT 266-267; 22 CT 6289; 71 CT 20988-20989.)

Gallup Organization, disregard the substantial evidence standard of review. Gallup's entire brief constitutes an attempt to insert new statistical evidence into the record in violation of the rule that an amicus curiae "accepts the case as he finds it" and may not "launch a juridical expedition of its own unrelated to the actual appellate record." (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1047 fn. 12.)[21]

Amici also ignore the fact that USB was given broad latitude to participate in developing the trial plan, to litigate the trial plan's validity through expert testimony, to rebut the testimony of the RWGs, and to present its own common evidence concerning management practices and expectations. They also disregard the fact that USB had the opportunity which it waived (*Civil Service Employees, supra*, 22 Cal.3d at 371-374), to litigate class members' damages through individualized procedures. (OBM 53-59.) Not a single one of USB's amici mentions the waiver issue.

Under these circumstances, amici have not demonstrated that USB

---

[21] The Gallup brief falsely claims that class counsel encouraged the weakest RWGs to opt-out of the case. (Gallup 14-15 and fn.17.) This allegation was flatly denied by class counsel. Counsel's letter to each of the RWGs, informing them they had been randomly selected to testify in the case, disproved Lewis and MacClelland's claim that they opted out before learning that they had been chosen as RWGs. (25 CT 7376-7377, 7395, 7397.) By denying defendant's motion to reinstate Lewis and MacClelland as RWGs, the trial court impliedly rejected their charges. (26 CT 7430-7431.)

was denied the right to present a fair defense to plaintiffs' claims.

V. AMICI'S CONTENTION THAT CLASS CERTIFICATION FORCES A DEFENDANT TO SETTLE HAS BEEN DISPROVED.

The brief of amicus California Chamber of Commerce contends that the certification of a class exerts such pressure on a defendant that it makes settlement almost unavoidable. "Most certified class actions settle before any finding of liability because the post-certification stakes are so high," the Chamber writes. (*Id.* at 3.) Other amici also make this argument. (See, e.g., CELC 50-51; NASC 26, 28; U.S. Chamber 18-19.)

The California Chamber purports to base its argument on a 2010 report published by the California Administrative Office of the Courts, "Class Certification in California, Second Interim Report from the Study of California Class Action Litigation (Feb. 2010)," a thorough statistical analysis of filings of putative class actions and their dispositions in California state court[22]. However, the Chamber's summary of the AOC report is misleading. The AOC report actually *rejects* amici's pressure-to-settle premise.

The report reveals that class certification occurs in only a small percentage of the cases (22%) that are originally filed as class actions. (*Id.*

---

[22] Available at http://www.courts.ca.gov/documents/classaction-certification.pdf (as of July 17, 2013)

at 5.) Of that small number, the vast majority (73%) are certified as part of a settlement agreement, while only 22% are certified as a result of a litigated motion. (*Id.* at 11.) This strongly suggests that the process of settlement drives class certification, not vice versa.

The report explicitly rejects the contention that class certification exerts strong pressure on a defendant to settle. It notes that, of all cases disposed of by settlement with a certified class, 81% were certified as part of the settlement itself and only 14% were certified through a litigated motion that would introduce the possibility of settlement pressure. (*Id.* at 25.) Even among the cases settled after a litigated class certification motion, the median time between the granting of certification and a settlement disposition is 479 days, or 16 months, which would undercut the notion that the certification decision forces the settlement. (*Id.* at 28.) The report summarizes its finding on the pressure-to-settle issue as follows:

> In sum, California data show that very few cases could be included in a category in which the commonly discussed parameters that define settlement pressure from class certification may have been a factor in the decision to settle. Many cases circumvented the issue altogether by including class certification as an element of the settlement itself. In cases with a class certified through a court-granted motion for certification, neither the overall disposition composition nor the time-to-settlement analyses seem to suggest an automatic or immediate progression from certification through motion

> to settlement, which would allow the determination that pressure results in inevitable settlement. (*Id.* at 28.)

Thus, the Court should reject amici's contention that class actions generate such pressure to settle that class action procedures must be adjusted in favor of defendants. Amici's speculative hypothesis, long advanced by defendants and by some courts, has now been disproved, at least in California class action cases.[23]

CONCLUSION

The seven amici supporting U.S. Bank have presented no persuasive arguments. By contrast, the amici supporting plaintiffs – the California Employment Lawyers Association, The Impact Fund, and the Consumer Attorneys of California – have provided valuable research and analysis that demonstrate that the outcome in this case and the procedures utilized by the trial court were consistent with California law and policy and fair to USB.

---

[23] Significantly, the U.S. Supreme Court also recently rejected the pressure-to-settle argument in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds* (2013) __ U.S. __, 133 S.Ct. 1184, 1200-1201.

Dated: August 6, 2013

Respectfully submitted,

LAW OFFICES OF ELLEN LAKE
WYNNE LAW FIRM

By: _____
Ellen Lake
Counsel for Plaintiffs/Respondents
Sam Duran, Matt Fitzsimmons

CERTIFICATE OF WORD COUNT

I certify that this brief contains 9,507 words, as counted by Microsoft Word, the word-processing program used to prepare it.

Heidi A. Phillips

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 6, 2013, I served upon the interested parties in this action the following document described as:

RESPONDENTS' ANSWER TO AMICUS CURIAE BRIEFS

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

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

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

Executed on August 6, 2013, at Greenbrae, California.

Heidi Phillips

SERVICE LIST

Timothy Freudenberger Alison Tsao Kent Sprinkle Carothers, DiSante & Freudenberger 601 Montgomery Street, Suite 350 San Francisco, CA 94111	*Counsel for Defendants and Appellant, U.S. Bank National Association*
Judge Robert B. Freedman Dept. 20 1221 Oak Street Oakland, CA 94612	*Superior Court Trial Judge*
Clerk, California Court of Appeal First Appellate District, Division One 350 McAllister Street San Francisco, CA 94102	*California Court of Appeal*
Office of the Attorney General 455 Golden Gate, Suite 11000 San Francisco, CA 94102	*Pursuant to B&P Code § 17200, et seq.*
Nancy O'Malley Alameda County District Attorney 1225 Fallon Street, Room 900 Oakland, CA 94612	*Pursuant to B&P Code § 17200, et seq.*
Kevin K. Green Robbins Geller Rudman & Dowd LLP 655 West Broadway, Suite 1900 San Diego, CA 92101	*Attorneys for Amicus Curiae Consumer Attorneys of California*
Kimberly A. Kralowec The Kralowec Law Group 188 The Embarcadero, Suite 800 San Francisco, CA 94105	*Attorneys for Amicus Curiae California Employment Lawyers Association*

Michael D. Singer
Cohelan Khoury & Singer
605 "C" Street, Suite 200
San Diego, CA 92101

Attorneys for Amicus Curiae California Employment Lawyers Association

Bryan J. Schwartz
Bryn Schwartz Law
1330 Broadway, Suite 1630
Oakland, CA 94612

Attorneys for Amicus Curiae California Employment Lawyers Association

Steven G. Zieff
Rudy, Exelrod, Zieff & Lowe, LLP
351 California Street, Suite 700
San Francisco, CA 94101

Attorneys for Amicus Curiae California Employment Lawyers Association

D. Gregory Valenza
Shaw Valenza LLP
300 Montgomery Street, Suite 788
San Francisco, CA 94104

Attorneys for Amicus Curiae California Chamber of Commerce

Deborah J. La Fetra
Christina M. Martin
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814

Attorneys for Amicus Curiae Pacific Legal Foundation

Paul Grossman
Paul W. Cane, Jr.
Sean D. Unger
Rishi N. Sharma
Paul Hastings LLP
55 Second Street, 24th Floor
San Francisco, CA 94105

Attorneys for Amicus Curiae California Employment Law Council

Allan G. King
Julie A. Dunne
Margaret Hard Edwards
Littler Mendelson, P.C.
501 W. Broadway, Suite 900
San Diego, CA 92101-3577

Attorneys for Amicus Curiae The Gallup Organization

Fred J. Hiestand Counselor at Law 2001 P Street, Suite 110 Sacramento, CA 95114	*Attorneys for Amicus Curiae California Business Roundtable, Civil Justice Association of California, and California Bankers Association*
Miriam A. Vogel Janie F. Schulman M. Natalie Naugle Morrison & Foerster, LLP 425 Market Street San Francisco, CA 94105	*Attorneys for Amicus Curiae California Business Roundtable, Civil Justice Association of California, and California Bankers Association*
Jocelyn Larkin Della Barnett Michael Caesar 125 University Avenue, Suite 102 Berkeley, CA 94710	*Attorneys for Amicus Curiae Impact Fund, AARP, Asian Law Caucus, Asian Pacific American Legal Center, Disability Rights Education & Defense Fund, Disability Rights Legal Center, National Consumer Law Center, Public Citizen, Inc., and Public Justice, P.C.*
Theodore J. Boutrous, Jr. Theane Evangels Kapur Bradley J. Hamburger Gibson, Dunn & Crutcher LLP 333 South Grand Avenue Los Angeles, CA 90071-3197	*Attorneys for Amicus Curiae National Association of Security Companies, California Association of Licensed Security Agencies, ABM Security Services Inc., AlliedBarton Security Services, G4S Secure Solutions (USA) Inc., and Securitas Security Services USA, Inc.*
Jeremy B. Rosen Robert H. Wright Horvitz & Levy LLP 15760 Ventura Blvd., 18th Floor Encino, CA 91436-3000	*Attorneys for Amicus Curiae Chamber of Commerce of the United States of America and Retail Litigation Center, Inc.*