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February 28, 2014

VIA MESSENGER & U.S. MAIL

The Honorable Chief Justice Tani G. Cantil-Sakauye
& Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: Duran v. U.S. Bank National Association - Case No. S200923

Dear Honorable Justices:

Defendant and Appellant U.S. Bank National Association (U.S. Bank) submits this letter in response to Plaintiff and Respondent Sam Duran's ("Plaintiff") supplemental letter brief to this Court filed on February 21, 2014.

Contrary to Plaintiff's assertion, none of the four cases cited in his February 21, 2014 letter demonstrate justification for class treatment here. Specifically, none of these cases deal with the fact-specific and quantitative analysis required by California's outside sales exemption, which is the necessarily individualized liability determination at issue in the present case. Rather, each of the four cited cases evaluate the propriety of class treatment of meal and rest break, overtime, and off-the-clock claims which are analytically distinct, including for purposes of the "predominance" analysis.[1]

Additionally, each of the four cases cited by Plaintiff deal with a common policy or practice not premised solely on Plaintiff's alleged theory of liability, but supported by evidence potentially susceptible to classwide proof, which is absent here. Each of the common policies or practices at issue in the cited cases were noncompliant, in and of themselves, with

[1] In three of the cited cases, *Benton*, *Jones*, and *Williams*, the class members were non-exempt employees. While *Bradley* involved technicians who had allegedly been improperly designated as independent contractors, the qualitative list of factors for evaluating independent contractor status is wholly irrelevant to the purely *quantitative* outside sales exemption analysis at issue here, which turns on the individualized inquiry as to where each class member spent the majority of his/her time.

California's wage and hour laws and thus constituted common evidence tending to demonstrate class wide liability. By contrast, here, the only policy that Plaintiff has pointed to is U.S. Bank's common policy of classifying BBOs as exempt. However, this policy, in and of itself, does not violate California law and does not tend to demonstrate that BBOs uniformly spent more time inside U.S. Bank's property than outside. *See, e.g.*, Walsh v. IKON Office Solutions, Inc., 148 Cal.App.4th 1440, 1461 (2007); Soderstedt v. CBIZ S. California, LLC, 197 Cal.App.4th 133, 152-53 (2011). This case is critically different from these authorities because Plaintiffs have presented no evidence of a uniform policy that violates California law, and thus there is no justification to credit their "uniform policy" theory for purposes of allowing class treatment.

Finally, all four of the cases cited by Plaintiff are distinguishable from this case because they dealt with the concept of class treatment in theoretical terms at the certification stage, but were never actually tried to judgment. With each of these four cases, it remains possible that they may be properly decertified at a later stage in the case if the record demonstrates that individualized issues have become unmanageable. *See Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 335-337 (2004) (even after certification, individual issues still must be managed and, if they prove unmanageable, the court should decertify). By contrast, the procedural posture and extensive trial record in this case has already exhaustively demonstrated that the individual issues for the class were unmanageable, further confirming that class treatment was improper.

1. **Jones v. Farmers Ins. Exch., 221 Cal.App.4th 986 (2013) (petition for rev. filed Jan. 2, 2014; Court extended time to grant or deny petition to April 2, 2014).**

In *Jones*, the plaintiffs were auto insurance claims adjusters who alleged that the defendant had a uniform policy requiring them to perform unpaid pre-shift work. This theory was supported by numerous declarations substantiating the employer's directives in a "Work Profile" memorandum issued to adjusters, specifically stating that certain work tasks were not compensable, such as "taking a few minutes to sync your computer, obtaining assignments/driving directions before getting in your car and driving to your first appointment." *Id.* at 990. The court explained that, in determining the propriety of class treatment, courts must examine the allegations of the complaint as well as the *evidence supporting such allegations* "and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible." *Id.* at 994-995.

While the Court of Appeal ultimately concluded that common issues predominated and reversed the order denying class certification, the opinion stands not for the proposition that plaintiffs may achieve class certification any time they *assert* a theory of a common policy or practice, but for the rule that courts evaluating class treatment must look at the evidence supporting a plaintiff's purported "common policy or practice" theory to determine

whether the plaintiff will be able to present common evidence that will determine class-wide liability.

The court further emphasized that "[p]redominance is a comparative concept," such that "the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." *Id.* at 994 (citations omitted). When the facts clearly show a common policy violating California's wage and hour laws, then the liability determination is more likely a common one. However, the situation is entirely different here, where the critical liability determination was whether or not BBOs spent the majority of their time working outside U.S. Bank premises and there was no evidence of a common policy or practice that might tend to resolve that question.

2. **Williams v. Superior Court, 221 Cal.App.4th 1353 (2013) (petition for rev. filed Jan. 15, 2014).**

Williams, like *Jones*, involves a class of auto insurance field adjusters who alleged they were owed wages because they were required to perform unpaid pre- and post-shift work (*e.g.*, logging onto computers, downloading assignments, traveling to their first and last appointments of the day). *Id.* at 1357-1358. While *Williams* did not involve a written policy specifically stating that certain required tasks were uncompensated, the plaintiff presented evidence of a common practice of pre- and post-shift unpaid work, including deposition testimony from one of the defendant's executives stating that the company's timekeeping system assumed an eight-hour workday, which began when the adjuster arrived at his first appointment and not before. *Id.* at 1357.

The court explained that "the question is whether [the defendant] had a practice of not paying adjusters for off-the-clock time. The answer to that question will apply to the entire class of adjusters." *Id.* at 1365. Because the plaintiff had shown that he was able to put forth a common answer to the critical liability question, *i.e.*, a common practice that required adjusters to perform work before their first appointment but at the same time did not compensate them for that work, that common answer was "the 'glue' that binds all the class members." *Id.* at 1365 (citing *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S.Ct. 2541, 2552 (2011)).

Accordingly, *Williams*, like *Jones*, stands for the proposition that courts evaluating class treatment must look at the evidence supporting a plaintiff's purported "common policy or practice" theory to determine whether the plaintiff will likely be able to prove that theory with common evidence. Thus, Plaintiff's further assertion that *Williams* rejects any attempt by an employer to litigate its defenses individually as to each class member is inaccurate. Plaintiff misconstrues the Court of Appeal's language that the unlawful practice may create

commonality "even if the practice affects class members differently," which only goes to the question of damages. *Id.* at 1370. A liability finding still requires the plaintiff to show that the issue of "whether the practice itself was unlawful is common to all." *Id.*

3. **Benton v. Telecom Network Specialists, Inc., 220 Cal.App.4th 701 (2013) (review denied (2014)).**

In *Benton*, the plaintiffs, non-exempt cell-phone tower technicians, brought class claims for alleged meal and rest break and overtime violations, relying on a theory that the defendant was liable to the class because it failed to adopt any meal and rest break or overtime policies. *Id.* at 705-707. Plaintiff here appears to attempt to use *Benton* to argue that the failure to adopt an affirmative policy creates common evidence of wage and hour violations. However, *Benton* cannot be interpreted so broadly. Rather, it rests its holding on *Brinker v. Superior Court*, 53 Cal.4th 1004 (2012), as it interprets the substantive requirements of California's meal and rest break laws. *Benton* is inapplicable because it does not address the substantive requirements of the outside sales exemption or any other exemption issues.

In interpreting *Brinker*, the *Benton* court held that an employer is required to authorize and permit meal and rest breaks in accordance with California law and that a failure to adopt a uniform policy permitting such meal and rest breaks may constitute common evidence of liability. *Id.* at 719-720. *Benton* explains that there is no need for individualized inquiries in such situations and rejects the reasoning that a defendant must be allowed to explore why each class member missed a break because "if a break is not authorized, an employee has no opportunity to decline to take it." *Id.* Similarly, the court determined that the plaintiff's overtime claim could be resolved on a class wide basis because the defendant had no policy or practice for making sure technicians received overtime pay when overtime hours were worked. *Id.* at 730-731. Thus, unlike *Benton*, where liability under the substantive law was determined to hinge on the existence or nonexistence of a common policy relating to the legally mandated provision of break periods for nonexempt employees, here the main liability question hinged on an entirely separate substantive legal standard that requires an individualized inquiry. The outside sales exemption requires a factual analysis of where an employee actually spends his or her time and no policy classifying BBOs as exempt can supplant the need for that fact-intensive analysis or demonstrate whether a BBO was properly subject to the exemption.

4. **Bradley v. Networkers Int'l, LLC, 211 Cal.App.4th 1129 (2012) (review denied (2013)).**

Like *Benton*, *Bradley* involved a class of technical telecommunications workers alleging meal and rest break and overtime violations, alleging that employees had been improperly designated as independent contractors. *Id.* at 1134-1135. While the Court of Appeal

considered whether this theory was amenable to class treatment, the defendant's argument that independent contractor status must be determined on an individualized basis failed because the individualized variations alleged by the defendant, such as varying job titles, skill levels, and pay grades, were not significant factors to the independent contractor analysis. *Id.* 1147. Rather, all of the evidence relevant to the factual question of whether class members were independent contractors was common: all class members signed a standard "Independent Contractor Agreement," engaged in a similar occupation, were required to work full time and be available during "on call" hours, were told when and where to perform jobs, were paid on an hourly basis, submitted timesheets, and were required to use a specific set of tools obtained from the defendant. *Id.* at 1146.

The *Bradley* court correctly identified the factors used by courts to assess whether a worker is an independent contractor or an employee. In evaluating independent contractor status, a distinctly *qualitative* exercise, the *Bradley* court concluded that the defendant's proffered evidence of differences among the workers (*e.g.* job titles, skill levels, type of repair or installation work performed) were not central to the employee/independent contractor analysis, because the key inquiry is the global nature of the relationship and who had the right to control the work. *Id.* at 1146-47. The *Bradley* court concluded that the undisputed evidence showed Networkers had consistent companywide policies applicable to all employees regarding work scheduling, payments, and work requirements and that the evidence likely to be relied upon by the parties to evaluate the employee versus independent contractor analysis would be largely uniform throughout the class to evaluate the degree of control over the workers exercised by the defendant. *Id.* Nonetheless, the *Bradley* court confirmed its prior holding in another independent contractor case where class certification was denied because of substantial and material variation over the key issues of control. *See Ali v. U.S.A. Cab, Ltd.*, 176 Cal.App.4th 1333, 1148 (2009) (material variations regarding whether taxi drivers used the defendant's dispatch service, selected and purchased their own tools and equipment, independently advertised, and/or had control over charged rates).

Bradley has no application here, where the individualized and quantitative liability question bearing directly on the applicability of the exemption must be answered for each class member, *i.e.*, where each BBO spent the majority of his or her time.

With regard to the meal and rest break and overtime claims at issue in *Bradley*, the analysis is essentially the same as that in *Benton*. The defendant in *Bradley* admitted that it did not pay overtime to class members and that it did not have any rest or meal break policies applicable to them. *Id.* at 1140. Similarly, the *undisputed* evidence showed that the class members regularly worked overtime. *Id.* at 1155. Accordingly, and for the same reasons articulated in *Benton*, the *Bradley* court determined that the lack of such policies constituted common evidence of class wide liability. *Id.* at 1149-1152, 1155.

Significantly, the *lack of* a compliant meal and rest break policy poses an entirely different analytical issue than the purported "lack of a compliant exemption policy" that Plaintiff appears to be advancing. There is no dispute that California meal and rest break laws impose affirmative obligations on employers with respect to their non-exempt employees, *i.e.*, to "provide" and "authorize and permit" certain breaks. Similarly, California law requires employers to maintain records of the hours worked by nonexempt employees and to pay overtime compensation. However, there is no analogous requirement in overtime exempt misclassification cases, because the question of compliance turns on whether the exemption is proper based on the actual duties performed each week by each employee.

Plaintiff's February 21, 2014 letter asserts that U.S. Bank's uniform policy of classifying all BBOs as exempt was somehow unlawful if U.S. Bank "failed to provide any mechanism to determine whether BBOs actually worked outside U.S. Bank premises more than 50% of the time." There is no legal requirement that employers conduct a weekly analysis of the duties performed by exempt employees to evaluate the continuing propriety of their exempt status. Thus, Plaintiff's assertion that a uniform classification policy that "failed to adopt a procedure to ensure that overtime was paid to non-exempt BBOs" likewise ignores California law and seeks to create non-existent obligations for employers. While the law presumes employees to be nonexempt, employers may classify employees as exempt and, in so doing, employers bear the risk that the exemption classification will be challenged and may expose them to liability for back wages, damages, penalties, and attorneys' fees if the exempt classification is proven improper based on the actual duties performed by each employee. "[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." *Ramirez v. Yosemite Water Co., Inc.*, 20 Cal. 4th 785, 794-95 (1999). The law does *not* require, as Plaintiff argues, that employers who classify certain employees as exempt must simultaneously adopt "monitoring" programs in order to render any classification policy "compliant." To do so would be contrary to the policy behind exempt status, which gives exempt employees independent judgment and discretion in how to perform their jobs. Plaintiff's invention of non-existent legal requirements surrounding exempt status is irrelevant to the cases cited, which found that the lack of a complaint policy on matters requiring employers to act affirmatively to sometimes support a finding of "commonality" for purposes of evaluating class treatment.

In summary, Plaintiff's cited cases do not present any support for the argument that class treatment was proper here. None of the cases had been tried to judgment where evidence presented at trial conclusively demonstrated the *lack* of any common policy or practice that implicated the key liability determination on a classwide basis, as occurred here. Moreover, the common policy or practice at issue in the cited cases reveal that the employer's policy violated California law, and whether each class member sustained damages would not bar class treatment. In contrast here, there was no common policy or practice that violated the law, and

liability *could only be determined on an individual-by-individual basis.* Accordingly, U.S. Bank contends that the Court of Appeal's decision was correct and should be affirmed in full.

Respectfully submitted,

CAROTHERS DISANTE & FREUDENBERGER LLP

By _____
Alison L. Tsao
Counsel for Defendant/Appellant
U.S. Bank National Association

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c))

The text of this letter brief consists of 2,778 words as counted by the Microsoft Word word-processing program used to generate the petition.

Dated: February 28, 2014

Alison L. Tsao

Counsel for Defendant/Appellant

U.S. BANK NATIONAL ASSOCIATION

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO.

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 601 Montgomery Street, Suite 350, San Francisco, California 94111. On February 28, 2014, I served upon the interested party(ies) in this action the following document described as:

DEFENDANT AND APPELLANT U.S. BANK NATIONAL ASSOCIATION'S RESPONSE TO PLAINTIFF'S LETTER BRIEF LISTING ADDITIONAL AUTHORITIES

By placing a true copy thereof enclosed in sealed envelope(s) addressed as stated below: for processing by the following method:

Edward J. Wynne, Esq.
J.E.B. Pickett, Esq.
THE WYNNE LAW FIRM
100 Drakes Landing Road, Suite 275
Greenbrae, CA 94904

[X] 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 601 Montgomery Street, Suite 350, San Francisco, California 94111. On February 28, 2014, I caused to be personally delivered sealed envelopes addressed as stated above which contained a true copy thereof of the document described above.

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

Executed on February 28, 2014, at San Francisco, California.

Anna Skaggs
(Type or print name)

(Signature)

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO.

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 601 Montgomery Street, Suite 350, San Francisco, California 94111. On February 28, 2014, I served upon the interested party(ies) in this action the following document described as:

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By placing a true copy thereof enclosed in sealed envelope(s) addressed as stated below: for processing by the following method:

Ellen Lake
Law Offices of Ellen Lake
4230 Lakeshore Avenue
Oakland, CA 94610

E-MAIL: elake@earthlink.net>

[X] 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 601 Montgomery Street, Suite 350, San Francisco, California 94111. On February 28, 2014, I caused the document described above to be sent to the persons at the electronic notification addresses listed above.

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Anna Skaggs
(Type or print name)

(Signature)