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.

Petition for Review of a Decision of the Court of Appeal, First Appellate District, Division One, Case Nos. A12557 and A126827, Reversing Judgment and Decertifying Class in Case No. 2001-035537
Superior Court of Alameda County
Honorable Robert B. Freedman

PETITION FOR REVIEW

ELLEN LAKE (SBN 47636)
Law Offices of Ellen Lake
4230 Lakeshore Avenue
Oakland, CA 94610-1136
(510) 272-9393
Appellate Counsel

EDWARD J. WYNNE (SBN 165819)
J.E.B. PICKETT (SBN 154294)
Wynne Law Firm
100 Drakes Landing Road, Suite 275
Greenbrae, CA 94904
(415) 461-6400

Attorneys for Plaintiffs and Respondents
SAM DURAN, MATT FITZSIMMONS

Table of Authorities

Cases

Other Authorities

ISSUES FOR REVIEW

This case presents the following 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?

These issues – or variations on them – are now pending before this Court in *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25, review granted October 22, 2008 (S166350). Review in this case is sought on both a grant-and-hold and a plenary basis.

INTRODUCTION

In the course of disapproving the trial plan for this class action, the court of appeal reached two unprecedented conclusions. First and fundamentally, it concluded that a defendant had a due process right, in a class case, to insist on an individualized determination of its exemption defense for every class member. Second, it found that class liability may rarely, if ever, be based on statistical sampling or other forms of representative evidence. While theoretically a new trial plan might address these issues ("we need not speculate as to whether a workable trial plan could have been devised to account for these individual inquiries....it is doubtful that such a plan could be successfully implemented" (slip opinion ["slip op."], p. 73)), the court elevated its trial plan holding to a black-letter constitutional and class certification doctrine: "The trial court's denial of the second motion to decertify 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 [random witness group] to the entire class." Slip op., p. 72

There is no basis under California law for either of the conclusions reached by the court of appeal. Instead, relying primarily on dicta from federal class action cases and a substantive law holding in a federal Title VII employment discrimination class action, the court imposed an

extraordinarily heavy class certification and trial burden on plaintiffs in California class actions. Instead of focusing on the common issues that might be proved in a class case, subject to a deferential abuse of discretion standard of review, the court's new due process right to individualized defenses would make individual issues paramount, precluding class adjudication in most cases. For the fortunate rare case that could meet this new class certification standard, trial would likely be an unmanageable succession of repetitive mini-trials of each class member's claim. In this case, plaintiffs showed that such mini-trials would likely take two years for the 260-member class.

While the court of appeal could have written a narrow decision limited to the perceived errors in developing the trial plan, it did not. It went further, indicating not only that any trial in this case would likely fail its due process and sampling tests, but also decertifying the class as well. The court did not rule on whether a new trial and new class certification decision were even permissible in this case although those issues were raised in a petition for rehearing. Moreover, its analysis of the alleged defects in the trial plan was infected by its reweighing of the evidence and its failure to apply the required substantial evidence standard of review in reviewing the factual findings of the trial court.

The court of appeal's decision creates a split of authority with many

of this Court's decisions, but particularly with *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319. *Sav-On* emphasized the trial court's broad discretion to certify a class action based on its findings regarding common issues, and specifically rejected the contention that a defendant employer's claim that some class members may be exempt would necessarily prevent class certification. *Sav-On* also enthusiastically embraced the use of statistical sampling and other representative techniques as valid methods of proof of both liability and damages in class cases. Above all, *Sav-On* urged trial courts to be "procedurally innovative" in certifying and managing class actions. *Id.* at 339. Trial courts "must be accorded the flexibility to adopt innovative procedures" in class actions, *Sav-On* teaches. *Ibid.*

The impact of the court of appeal's decision in this case has been swift and widespread, with lower courts and the defense bar seizing upon its perceived implications. In *Puchalski v. Taco Bell Corp.*, a certified wage and hour class action that was in its second week of trial when the *Duran* decision issued, the Court of Appeal for the Fourth District, Division 1, responding to a writ, ordered the trial court to "consider *Duran* ... and exercise its discretion whether to reconfigure or decertify the class." *Taco Bell Corp. v. Superior Court*, No. D061344 (Feb. 8, 2012). Trial courts around the state are being asked to decide, based on *Duran,* whether class

certification should be denied or reversed or whether a particular trial plan denies due process. See, e.g., *Martinez v. JATCO, Inc.*, Alameda Sup Ct. No. RG08-397316 (Dec'n Feb. 22, 2012); *Nilsson v. Longs Drug Stores, Inc.*, Santa Barbara Sup. Ct. No. 1304153 (Def't's Proposed Lit. Plan), filed March 2, 2012; *Kairy v. Supershuttle International, Inc.*, N. D. Cal. No. 3:08-CV-02993-JSW(BZ), Jt. Case Mgt. Statement, filed March 2, 2012.

Defense commentators have called *Duran* a "game-changer for California class actions" (*Duran v. US Bank: Aftershocks of Wal-Mart v. Dukes* (2/24/2012) www.law360.com/articles/308271/print?section=classaction) and have opined that the decision "is likely to influence every phase of wage and hour class litigation." Cotter, *Pivotal new ruling on management of class actions* (2/14/2012) SF Daily Journal, p. 3. One management-side attorney predicted that under *Duran*, class certifications would drop by 95 percent. Sumers, *Appellate ruling could dampen employment class actions* (2/8/01) SF Daily Journal, p. 4.

This Court should grant review to decide these crucial issues, which are being addressed every day in courts around the state, as wage and hour litigation continues to grow and expand. The lower courts and litigants need guidance on whether *Duran* is indeed a "game-changer for California class actions" or whether its broadly-phrased principles are inconsistent with existing California class action law.

STATEMENT OF THE CASE

In this factual statement, we set forth the facts consistent with the substantial evidence rule, resolving credibility disputes and inferences in favor of plaintiffs, the prevailing parties below. The court of appeal disregarded the trial court's findings, often accepting defense evidence the trial court had rejected and rejecting evidence the trial court had credited. Plaintiffs raised this issue in a petition for rehearing, which was denied without relevant modification.

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 Business Banking Officers ["BBOs"], who were misclassified as exempt employees under the outside sales exemption, which 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. 1 CT 1-16;42 RT 2939-2940; 6 CT 1682-1683; 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 that BBOs spend the vast majority of their time engaged in sales activities, spend more than half their work time inside Bank properties and work more

than 40 hours per week. 6 CT 1460-1601, 11 CT 3077-3083, 13 CT 3664-3672.

Plaintiffs also submitted deposition excerpts from USB managers, which established the following: BBOs work 40-60 hours per week, selling bank products. 7 CT 1739-1741;6 CT 1664, 1668. USB has always classified BBOs as exempt. USB has standardized hiring, training, and evaluation procedures for BBOs (6 CT 1649-1654, 1678, 1680; 7 CT 1738) but has never tracked or kept records of how much time they work outside Bank property. 6 CT 1656, 1687-1689, 7 CT 1742-1743. BBOs are not evaluated, disciplined, or compensated based on *where* they spend their work time but only on whether they meet or exceed their sales goals. 6 CT 1667, 7 CT 1729-1730, 1736, 1739, 1746-1747. USB's job descriptions for the BBO position have never stated that they are expected to spend more than 50% of their working time outside Bank premises. 6 CT 1670-1671, 1674-1677, 7 CT 1757-1765.

In Opposition to Class Certification, Defendant Filed Declarations Obtained by Fraud.

Defendant's opposition to certification included standardized declarations from numerous BBOs, who claimed they regularly spend more than half their time performing sales activity outside the office. 9 CT 2302-10 CT 2694. There was evidence that the Bank used fraudulent methods to

solicit and draft many BBO declarations. Four class members repudiated the declarations that defendant had filed in their names and submitted new declarations in support of plaintiffs. 9 CT 2325-2328, 9 CT 2308-2311, 10 CT 2649-2651, 10 CT 2620-2625. A fifth BBO's declaration described how a Bank attorney had attempted to get her to file a false declaration, which she refused to do. 13 CT 3664-3668.

The Trial Court Certified the Class, Finding That 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: (1) the class was ascertainable and numerous; (2) common questions of law and fact predominated over individual questions; (3) the named plaintiffs' claims were typical of the class; and (4) the named plaintiffs and class counsel would adequately represent the class. 16 CT 4528-4535, 5 RT 115-153.

On the commonality issue, 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 would be susceptible to common proof. The court also found that USB classified all BBOs as exempt without any individualized inquiry as to any

employee's job duties or monitoring to ensure that exemption requirements were being satisfied. The court concluded "there exists a classwide commonality of interest making class treatment a superior method of resolving this dispute." 16 CT 4533, internal quotations omitted.

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. 8 RT 204-207.

Relying on the declaration of Dr. Richard Drogin, a noted statistician, plaintiffs proposed that the parties' experts jointly prepare a survey to be administered to class members concerning where they spent their time and how many hours they worked. After the survey, a random group of witnesses would be selected for further discovery and testimony. The results of the testimony from the random sample would be applied to the class as a whole. 20 CT 5853-5858, 5863-5875. The proposal was modeled after the approach used in *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715.

Defendant's only proposal was that the court appoint special masters to hold individual trials of liability and damages for *all* class members. USB steadfastly opposed any plan based on a survey or on representative testimony. 2 CT Supp. 349-351; 20 CT 5891-21 CT 5906.

The court announced that it was preliminarily inclined to adopt a

trial plan consistent with plaintiffs' proposal. The court ordered the parties to meet and confer and to file a joint statement concerning areas of agreement and disagreement on the trial plan before the next conference, to be held in September 2006. 21 CT 5911-5915. The parties' joint statement revealed complete disagreement. Plaintiffs continued to espouse a 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. 21 CT 5916-5929.

At a hearing a month later, the court proposed to select a random number of class members – perhaps 20 – to testify at trial, with the findings on liability and damages to be extrapolated to the rest of the class. 10 RT 221-238. The court's proposal was modeled on plaintiffs' trial management plan. The only reason the court proposed to omit the survey was that defendant "strenuously and vigorously" opposed it. 10 RT 222, 225. Before finalizing the plan, the court urged the parties to meet and confer about many topics, including possible use of a survey and the number of random witnesses. 10 RT 234-237; 21 CT 6163-6166.

The meet and confer 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 class members, randomly chosen, along with the two plaintiffs, would testify in Phase I of the trial. These witnesses were called the Representative Witness Group or "RWGs." 11 RT 240, 248-249; 22 CT 6241-6245. The

court randomly selected 25 names (20 witnesses and 5 alternates) from among all the class members. 12 RT 266-267; 22 CT 6289; 71 CT 20988-20989.

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 (22 CT 6290-6317), the court allowed plaintiffs to file a third amended complaint (23 CT 6618-6632) but ordered that class members be notified and given a second opt-out opportunity. 23 CT 6614-6616, 6633-6638. Nine class members opted out, including four RWGs, leaving a total of 261 class members. 25 CT 7285-7286, 7290, 12 RT 266-267. Two RWGs who opted out were Michael Lewis and Sean MacClelland, who by then held USB management positions. 25 CT 7334, 7338. USB moved to reinstate Lewis and MacClelland as RWGs, claiming they opted out before they learned they were RWGs. 25 CT 7304-7318. Plaintiffs demonstrated that Lewis and MacClelland and all other RWGs were immediately informed of their selection. 25 CT 7376-7377, 7395, 7397. The court refused to reinstate Lewis and MacClelland as RWGs. 26 CT 7430-7431.

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

Phase I of the trial lasted 41 trial days. Plaintiffs presented testimony from 21 of the 22 RWGs, who all testified they performed exclusively sales duties (22 RT 790; 27 RT 1353-1354), worked more than 40 hours per week, and spent more than 50% of their work time *inside* Bank property. 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., 71 CT 20998-21007; 19 RT 517, 539-540; 21 RT 699, 711; 22 RT 839, 848-849; 28 RT 1434-1437; 30 RT 1649, 1656; 31 RT 1749, 1752-1754; 32 RT 1827-1831; 40 RT 2611, 2622, 2628-9, 2668-2669; 41 RT 2736-2737, 2752, 2758-2759, 2802.[1]

The RWG testimony provided additional evidence that USB had submitted false employee declarations in opposition to class certification. Chad Penza, Adney Koga and Steven Bradley testified that the USB declarations submitted in their names were filled with untrue statements which they had not made and they had signed the declarations out of fear for their jobs. 22 RT 878-880, 886; 23 RT 957-976; 36 RT 2231, 2237-2238, 2267-2268; 40 RT 2669, 2716-2718.

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[1] In pre-trial depositions, a few RWGs had testified that they spent most of their work time *outside* the Bank. At trial, all the RWGs testified they worked a majority of time *inside*. In explaining the change, some RWGs noted that they now had access to travel reimbursement records that provided clarity about their activities. 33 RT 2017-2020; 38 RT 2389-2390, 2441-2442; 40 RT 2667-2669, 2714-2715, 42 RT 2841-2843. Other RWGs testified that after being deposed, they had thought about their work

Much of the Defense Evidence Favored Plaintiffs.

The defense case consisted of testimony from 18 witnesses, almost all USB managers. Much of it 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. 49 RT 4046-4047. 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. 43 RT 3022-3023, 3042. Linda Allen, Human Resources Manager, testified there was no ongoing audit program to ensure that BBOs are properly classified as exempt. 58 RT 4810. Patricia Ann Farley, District Manager for the East Bay Area (45 RT 3217), stated that BBOs are evaluated and rewarded based on *whether*, not *where,* they meet their sales goals. 45 RT 3239, 3286-3289.

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

The trial court's Statement of Decision ["SOD"] found that the RWGs' testimony was credible and persuasive and was not rebutted by defense evidence. 71 CT 20998. It concluded that every RWG worked overtime hours and spent more than half of his/ her work time *inside* Bank locations. 71 CT 21016. It also found that the RWGs were "typical and

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experiences more carefully. 29 RT 1612-1613, 31 RT 1710-1711, 1734.

representative of the entire class" and their testimony validated the trial management plan. 71 CT 20998-20999. The SOD stated that defendant had failed to meet its burden of proving that the BBOs were within the outside sales exemption. 71 CT 21016-21017.

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." 71 CT 21008. "[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. 71 CT 21009. "Defendant has never had a policy or requirement for BBOs to be outside of bank locations more than half of their work time." 71 CT 21010. Significantly, the SOD found that it was not realistic for BBOs to spend more than half their work time outside bank locations because many aspects of the job could only be performed inside bank facilities. 71 CT 21008-21016.

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. 71 CT 21018.

The SOD refused to admit Bank-drafted declarations and deposition excerpts from class members who were not RWGs. 71 CT 20991. The court 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." The evidence was not offered until after defendant had rested its case and the evidence would be inconsistent with the trial plan and rulings on motions in limine.

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 BBO declarations showed variations among the class members that required individual determinations. 62 CT 18394-18440. The court denied the motion as an "effort to modify the findings and conclusions reached in the SOD." 78 CT 23227. It 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. 78 CT 23227-23228.

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. 83 CT 24623. 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 percent margin of error. The trial court immediately addressed this contention by holding a hearing to discuss alternative procedural methods that would avoid the large 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. 83 CT 24630. USB rejected all the alternatives and proposed no other procedures, insisting – as always – that it was entitled to trials on both liability and damages for each class member. 69 RT 5489-5497. With this waiver by USB, Phase II proceeded as originally planned, with expert witnesses testifying about the data from Phase I.

Plaintiffs presented two expert witnesses, Dr. Drogin, and Paul Regan, a certified public accountant. Dr. Drogin testified in detail that both phases of the trial management plan were valid. He stated that the 20 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; and USB's other challenges to the randomness of the RWG group were statistically invalid. He opined that the average weekly overtime finding from Phase I 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 (21 out of the 22 testified), 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. 70 RT 5549-5563, 71 RT 5613-5619, 72 RT 5633-5634. Paul Regan testified how he calculated

the overtime due to each class member and to the class as a whole. 74 CT 5843-5848, 75 RT 5849-5874.

The trial court found that plaintiffs' experts were both "credible and persuasive," and possessed "significant experience" in their respective fields and as testifying experts on wage and hour matters. 83 CT 24624. By contrast, the court stated that defendant's experts were "not persuasive," they provided testimony that 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.* Accordingly, the Statement of Decision for Phase II largely utilized the evidence presented by plaintiffs' experts. 83 CT 24621-24645.

The SOD found, with a 95% level of confidence, that the class worked 11.86 overtime hours per week, an adjustment of .01 hours from the earlier calculation. 83 CT 24626. 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. 83 CT24626-24630. The SOD concluded that 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." 83 CT 24631.

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 additional compensation for failure to receive meal and rest breaks. 83 CT 24650-24652.

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 that the trial management plan was fatally flawed. The court held that the trial court did not follow established statistical procedures in adopting the plan and, more fundamentally, 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 that statistical sampling and other representative evidence cannot 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. It remanded the matter to the trial court to reconsider the two plaintiffs' meal and rest break claims.

Plaintiffs petitioned for rehearing. They argued that the case should be remanded for a new trial and a new hearing on class certification; the court of appeal had improperly reweighed the evidence in violation of the

substantial evidence rule; and the appellate court had failed to make any ruling regarding the overtime judgments of the two plaintiffs and the other RWGs. The court modified its opinion to direct the trial court to rule on the overtime judgments of the plaintiffs and RWGs but otherwise denied rehearing.

ARGUMENT

I. REVIEW SHOULD BE GRANTED TO ADDRESS THE COURT OF APPEAL'S UNPRECEDENTED RULING THAT A CLASS ACTION DEFENDANT HAS A DUE PROCESS RIGHT TO DEMAND AN INDIVIDUALIZED DETERMINATION OF ITS EXEMPTION DEFENSE FOR EVERY CLASS MEMBER, A RULING THAT WOULD EVISCERATE MANY CLASS ACTIONS.

This case warrants review to address the unprecedented rule announced by the court of appeal – that a defendant in a class action has a due process right to assert its affirmative defense as to every potential class member. Slip op. 48-49. Although the court purported to restrict that right to circumstances in which liability for unpaid overtime depends on an employee's "individual circumstances" (*id.*), every defendant in a class action claims that liability depends on the "individual circumstances" of the class members. See, e.g., *Sav-On Drug Stores, Inc., supra*, 34 Cal.4th at 331 [employer asserted that "actual tasks performed by class members and the amount of time spent on those tasks vary significantly from manager to manager and cannot be adjudicated on a class-wide basis."]. Thus, the

purported limitation on the court's far-reaching ruling is no limitation at all.

No California case has ever before held that such a due process right exists, and the court of appeal cited no persuasive authority for its constitutional holding. Instead, the court purported to base its due process rule on California and federal cases involving the denial of class certification or the decertification of a class under an abuse of discretion standard. E.g., *Jimenez v. Domino's Pizza, Inc.* (C.D. Cal. 2006) 238 F.R.D. 241; *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. None of the cited cases held there was a due process right to individualized determination of the defendant's affirmative defense. Rather they – and particularly the California decisions, *Walsh* and *Dunbar* – were anchored in the broad discretion afforded a trial court in deciding whether to certify or decertify a class.

The other authority cited by the court of appeal for a due process right to litigate against each class member was *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. __ [180 L.Ed.2d 374, 131 S.Ct. 2541], which involved a challenge to the certification of a multi-million-member nationwide class in a Title VII discrimination case. The U.S. Supreme

Court reversed the class certification in part because the employer would be entitled to litigate its *statutory* defenses to individual claims. The Supreme Court's condemnation of a "Trial by Formula" approach to litigating Title VII discrimination cases was based on a specific provision of the Title VII statute, not on a constitutional mandate, although Wal-Mart had advanced a broad due process argument. Thus, *Wal-Mart* also fails to support the existence of a due process right to litigate the employer's affirmative defense against each class member.

The court of appeal opinion paid no attention to the well-established principle, recognized in its own decision in *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, that an employer's interest in a misclassification case is only in "its total or aggregate liability to the plaintiff class for unpaid overtime compensation" *(id.* at 752), *not* in which individuals are exempt or non-exempt. This means, contrary to the assumption underlying the court's due process analysis, that a trial court does *not* have to determine whether each class member was properly classified in order to calculate the employer's classwide liability. Rather, using representative testimony, the court can calculate the employer's aggregate liability to the class based on a determination of the *percentage* of the class that is non-exempt and the overtime compensation owed to the non-exempt class members. See Section II, *infra.*

The court of appeal's newly-created due process right would spell doom for 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, supra*, 34 Cal.4th at 340 [California public policy encourages use of class action device in overtime cases]; see *Bell, supra*, 115 Cal.App.4th at 745 [class actions justified if alternatives offer only "random and fragmentary enforcement" of wage laws].

If a defendant has 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 when the employer can 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, supra*, at 339) would be

destroyed by the rigid due process rationale. Requiring individualized determinations for every class member would also threaten the validity of class litigation in many other fields, including consumer, product liability and construction defect cases

Even in cases where, somehow, the trial court did certify a class, under the due-process analysis of the court of appeal, the proceedings would bog down into hundreds or thousands of mini-trials in which the employer sought to disprove liability for each of the class members. This case demonstrates the practical consequences of the due process holding. Even after class certification, defendant USB steadfastly maintained that it was entitled to litigate liability and damages separately for each of the 260 class members. Plaintiffs pointed out that, at the rate it took to try the cases of the 21 RWGs – two days per RWG – it would take *520* days (roughly two years) to determine liability and damages for each of the 260 class members. The court of appeal blithely responded, "[W]e have never advocated that the expediency afforded by class action litigation should take precedence over a defendant's right to substantive and procedural due process." Slip op., p. 59.[2]

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[2] To illustrate the potential consequences of the *Duran* decision, in *Puchalski v. Taco Bell, supra*, the class action currently under way, the defendant is contending that *Duran* allows it to call all 375 absent class members to testify by means of a notice to appear served on plaintiffs'

The court of appeal's apparent rule that there cannot be a certified class where some class members may be unable to establish liability is flatly inconsistent with California authority. In *Sav-On*, this Court specifically rejected the defendant's argument that class certification should be denied unless the plaintiff could prove that the entire class was non-exempt. Noting that the employer bears the burden of proving its affirmative defense that an employee is exempt, the Court stated:

> "Were we to require as a prerequisite to certification that plaintiffs demonstrate defendant's classification policy was, as the Court of Appeal put it, either 'right as to all members of the class or wrong as to all members of the class,' we effectively would reverse that burden."

34 Cal.4th at 338. Likewise in *Richmond v. Dart Industries* (1981) 29 Cal.3d 462, the Court held that class treatment was appropriate despite opposition to the case by about 10 percent of the putative class. And in *Bell, supra,* 115 Cal.App.4th 715, the fact that 9 percent of the class had no claim for overtime did not preclude the court of appeal from affirming the validity of class certification.

The appellate court's decision in this case creates a dangerous precedent that threatens to undercut California's well-developed class action principles and the wage and hour protections which depend on those

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counsel, with the penalty of dismissal for any who fail to appear.

principles. Review should be granted to address this new precedent.

II. REVIEW SHOULD BE GRANTED TO DECIDE IF CLASS LIABILITY MAY BE BASED ON STATISTICAL SAMPLING AND OTHER REPRESENTATIVE FORMS OF EVIDENCE.

The court of appeal strongly suggested that statistical sampling and other forms of representative evidence could not be used to determine classwide liability and that such evidence was permissible, if at all, only at the damages stage. The court stated:

> "As we have shown above, courts are generally skeptical of the use of representative sampling to determine liability, even in cases in which plaintiffs have proposed using expert testimony and statistical calculations as the foundations for setting the sample size." Slip op., p. 52.

See also *id.*, p. 62 ["use of this sampling procedure to determine both liability and monetary recovery appears to be entirely unprecedented"]; *id.*, p. 61 fn. 72 [quoting law review article: "[U]nder current law sampling is a practical option only at the damages stage."]

This view is contrary to *Sav-On,* which approved the use of expert statistical and other representative evidence as a method of classwide proof:

> "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. *Sav-On* cited numerous other state and federal cases in which representative evidence was used to satisfy the commonality element in class certification or to establish classwide liability and damages. *Id.* at 333 and fn. 6. The cited cases, which covered many different topics, included *International Brotherhood of Teamsters v. United* States (1977) 431 U.S. 324, 337-340 [statistics bolstered by specific incidents are "competent in proving employment discrimination"]; *Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1279 [class certification was erroneously denied in welfare benefits case where county's illegal procedure could be proven by, inter alia, "a sampling of representative cases"]; *Stephens v. Montgomery Ward* (1987) 193 Cal.App.3d 411, 421 [class certification was supported by statistical data in employment case]; *In re Simon II Litig.* (E.D. N.Y. 2002) 211 F.R.D. 86, 146-151 [tobacco case held that aggregate proof is "consistent with the defendants' Constitutional rights and legally available to support plaintiffs' state law claims"].

In the eight years since *Sav-On,* many other courts have held that statistical methods can be used to prove classwide liability. In *Capitol People First v. Department of Developmental Services* (2007) 155 Cal.App.4th 676, the court of appeal reversed the trial court's denial of

certification and ruled that the "use of sampling or statistical proof" had been improperly "restricted." *Id.* at 313. By "discarding out of hand appellants' pattern and practice evidence, the trial court turned its back on methods of proof commonly allowed in the class action context," the court stated. "Over the years, numerous courts have approved the use of statistics, sampling, policies, administrative practices, anecdotal evidence, deposition testimony and the like to prove classwide behavior on the part of defendants." *Id.* at 316.

Likewise, in *Dilts v. Penske Logistics LLC* (S.D. CA 2010) 267 F.R.D. 625, a California federal court granted class certification in a California wage and hour case, reasoning that statistical sampling and representative testimony were acceptable methods to prove liability and damages in a class action. "[I]t is quite plain to the Court that statistical sampling is appropriate in cases like this one" and is an "acceptable method" to prove liability in a class action, the *Dilts* court stated, citing *Sav-On* and *Bell*. *Id.* at 638.[3]

Two recent legal articles by management lawyers strongly support

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[3] The court of appeal criticized plaintiffs' reliance on *Dilts*, noting that *Dilts* stated that the use of statistical sampling was an acceptable method of proof "*at least when paired with persuasive direct evidence.*" Slip op., p. 638, ital. in slip op. Contrary to the court's implication, there was a substantial amount of "persuasive direct evidence" presented in this case and discussed in the Statement of Decision I. See 71 CT 21008-21017.

the use of representative testimony to make classwide liability determinations in misclassification cases without individualized liability determinations for each class member. The articles were filed with the Court of Appeal but are not mentioned in its opinion.

In *Classwide Determinations of Overtime Exemptions: The False Dichotomy Posed by Sav-On and a Suggested Solution* (2006) 21 The Labor Lawyer 257, two attorneys from the management firm Littler Mendelson proposed a model for litigating cases in which, as here, the class members' exempt or non-exempt status turned on *how* they performed their job. The model is very similar to the trial plan in this case. The authors suggested that the court hold mini-trials involving a randomly-selected sample of class members, determine the proper classification status for each sampled class member and determine the amount of overtime regularly worked for each sampled employee found to be non-exempt. *Id.* at 269-270. The sampled class members would be awarded overtime based on the results of their individual mini-trials. Compensation for the absent class members would be determined by extrapolating the average overtime worked by the randomly selected class members who are found to be non-exempt. See also *How to Conduct a Wage and Hour Audit for Exemptions to Overtime Laws*, published in West HR Advisor (March/April 2005, Vol. 11, No. 2.) [employers can conduct classification audits by taking a

"random sample of the job incumbent population" and then generalizing the results to the rest of the employees].

The court of appeal's decision thus is a sharp retrenchment from the general use and acceptance of statistical sampling and other forms of representative evidence to prove classwide liability. Review should be granted to address this split in authority.

III. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEAL'S OPINION REVEALS A NEED FOR MORE GUIDANCE AS TO THE STANDARDS OF APPELLATE REVIEW.

The court of appeal's opinion contravenes this Court's precedents concerning appellate review in two important ways.

First, the opinion, after reversing the judgment and decertifying the class, appears to preclude a new trial and a new hearing on class certification in this case. The disposition section of the opinion is silent on this point, specifying a limited remand to deal with a few individual issues. The court refused to clarify this ambiguity when it was presented in plaintiffs' petition for rehearing. Refusal to permit a new trial, with a new certification decision, would be error.

Under *Washington Mutual Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, when an appellate court reverses a class certification order based on erroneous legal assumptions, it must remand to the trial court to

"consider afresh" whether class certification should be granted under the correct legal assumptions. 24 Cal.4th at 928. "These are all determinations that the trial court should make in the first instance." *Ibid.* Remand is required because it is the trial court that retains broad discretion to weigh the class certification factors and to make factual findings and draw inferences on which the certification decision depends. *Sav-On, supra,* at 326-332.

Moreover, as a general rule, an unqualified reversal of a judgment vacates the appealed judgment, places the case in the same procedural posture as if the judgment had never been entered, and leaves all issues to be readjudicated anew. *Weisenburg v. Cragholm* (1971) 5 Cal.3d 892, 896. "Retrial [is] ordinarily required" unless the appellate opinion establishes a contrary intention. Eisenberg et al., Cal. Prac. Guide: Civil Appeals & Writs (The Rutter Gp. 2011) ¶ 11:65. Retrial is the default outcome even if the appellate court does *not* expressly state that the matter is remanded for retrial. *Ibid.*

Nothing in the opinion's legal analysis should logically preclude a new trial or a new class certification determination. The court of appeal reversed the judgment because the trial court allegedly "resort[ed] to an unproven statistical sampling methodology that denied USB the right to properly defend the claims against it." Slip op., p. 73. The court did not

state that such an error would recur in the event of a new trial. Indeed, it refused to speculate "as to whether a workable trial plan could have been devised ...." *Ibid.* Consequently, plaintiffs should be given the chance to retry the case, with a new class certification decision, under whatever legal standards apply on remand.

The second issue relates to the standard of review which the court of appeal utilized as it described the facts. The court largely reweighed the evidence, in violation of the substantial evidence rule, without any acknowledgment that it was doing so. This was most evident in its discussion of the expert statistical testimony. The trial court had found that plaintiffs' experts, Drogin and Regan, were "credible and persuasive" and "possessed significant experience" in their respective fields and as experts in wage and hour cases while USB's experts, Hildreth and Anastasi, were "not persuasive" and "not credible" and provided opinions based on "faulty assumptions and misstatements of relevant fact and law, and consequently of no appreciable value." 83 CT 24624. Nevertheless, the court of appeal credited the opinions of the defense experts over those of the plaintiffs' experts on important issues, such as whether the RWGs were randomly selected. It described Hildreth as "an expert in the area of inferential

statistics." Slip op., p. 11.[4]

Moreover, the trial court found that its trial methodology was "the best procedure available under the facts of this case taking into consideration manageability issues and the parties' due process rights" (83 CT 24631), noting that USB failed to propose a trial plan for Phase I or II other than mini-hearings for every class member. The trial court modeled its trial plan on plaintiffs' proposal, which was supported by Dr. Drogin's declaration, but omitted a survey because USB "strenuously and vigorously" opposed it. 10 RT 222, 225. This type of weighing is appropriately reserved to the trial court. *Sav-On, supra*, 34 Cal.4th at 339-340. The court of appeal, however, excused – indeed, lauded – USB's uncooperative litigation tactics and thus improperly overrode the trial court's findings and discretionary decisions. Slip op., pp. 45-47.[5]

Review should be granted to provide guidance to ensure that

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[4] For example, the opinion concluded that the statistical sampling was not random because "a comparatively high number of RWG members opted out before trial." Slip op., p. 46. That was Hildreth's opinion, whereas Drogin testified that the randomness of a sample is not affected by opt-outs. 73 RT5751-5754. The opinion found there was measurement error because several RWG witnesses testified to a range of hours. Slip op., p. 66. Drogin and Regan testified that it was statistically proper to use the midpoint of the range. 71 RT 5579, 5683-5684; 75 RT 5883-5884.

[5] "[W]e do not agree USB waived its objection to specific aspects of the plan by its 'total opposition to statistical methodology. Nor does it follow, even if USB did resist efforts to cooperate, that the trial court was compelled to use the methodology it ultimately selected." Slip Op., p. 47.

appellate courts comply with *Washington Mutual* regarding disposition after reversal and with *Sav-On* regarding the deference due to the trial court under the substantial evidence and abuse of discretion standards.

CONCLUSION

For the reasons discussed herein, plaintiffs respectfully request the Court to grant review in this case to promote the strong state public policies which favor the right to receive overtime pay and the use of class actions to enforce that right. *Gentry, supra*, 42 Cal.4th at 456, 462; *Sav-On, supra*, 34 Cal.4th at 340. Both public policies are seriously undermined by the court of appeal's opinion.

Dated: March 19, 2012

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 petition for review contains 7,516 words, as counted by Microsoft Word, the word-processing program used to prepare it.

Heidi 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 March 19, 2012, I served upon the interested parties in this action the following document described as:

PETITION FOR REVIEW

By placing a true and correct copy thereof enclosed in sealed envelopes addressed as stated on the attached service list for processing by the following 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 March 19, 2012, at Greenbrae, California.

Heidi Phillips

SERVICE LIST

By U.S. Mail Timothy Freudenberger Alison Tsao Kent Sprinkle Carothers, DiSante & Freudenberger 601 Montgomery Street, Suite 350 San Francisco, CA 94111-2603	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 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 94102-7004	Attorney General