Case No.: S200923

**IN THE SUPREME COURT**

**OF THE STATE OF CALIFORNIA**

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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.*

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Review of a Decision of the Court of Appeal, First Appellate District, Division One, Case Nos. A125557 and A126827, Reversing Judgment and Decertifying Class in Case No. 2001-035537

Superior Court of the State of California, County of Alameda

Honorable Robert B. Freedman, Judge Presiding

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# APPLICATION OF U.S. BANK NATIONAL ASSOCIATION TO FILE CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS IN EXCESS OF 14,000 WORDS

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## I. INTRODUCTION

Defendant and Appellant U.S. Bank National Association ("USB") hereby requests permission to file a Consolidated Answer To Amicus Curiae Briefs ("Consolidated Answer") in excess of 14,000 words pursuant to California Rule of Court 8.520(c)(4). As set forth below, good cause exists to grant this request. USB requests permission to file an overlong Consolidated Answer so that it can adequately respond to the three amicus curiae briefs filed in support of Plaintiffs and Respondents and consisting of 88 combined pages of briefing. The combined amicus briefs cover numerous and broad-ranging topics not yet briefed by USB before this Court. While USB has endeavored to make its brief as concise as possible, permission to exceed the standard 14,000 word limit is required in order to comprehensively address each of the issues presented by Plaintiffs' three amici in one consolidated response. Accordingly, USB requests permission to file an answer brief not to exceed 17,000 words.

## II. BACKGROUND

Three separate amicus briefs have been filed in support of Plaintiffs and Respondents, consisting of 88 combined pages of briefing. Instead of filing a response to each of these three amicus briefs, USB opted to respond to all three briefs in one consolidated response and filed a request regarding its Consolidated Answer on May 17, 2013. On May 22, 2013, this Court issued an order permitting USB to file a consolidated response to amicus

curiae briefs up to and including August 6, 2013.

## III. GOOD CAUSE EXISTS FOR AN OVERLONG CONSOLIDATED ANSWER

### A. USB Should Not Be Disadvantaged For Choosing To Conserve Court And Party Resources.

According to the California Rules of Court, a party may either file separate answers to individual amicus curiae briefs or a consolidated answer to multiple amicus curiae briefs. *See* Cal. R. Ct. 8.520(f)(7). Each amicus response brief may be up to 14,000 words long. Cal. R. Ct. 8.520(c)(1). However, in the interest of judicial economy and preservation of party resources, instead of responding separately to each of the three amicus briefs with a 14,000 word response, USB opted to file one Consolidated Answer. Because USB could have made use of 42,000 words of briefing had it opted to file a separate response to each of the three amicus briefs, but instead chose to conserve resources and streamline arguments by filing one consolidated brief, USB should not be limited to 14,000 words in its Consolidated Answer. Furthermore, the extension USB seeks is slight, consisting of less than 3,000 words.

Good cause exists to grant USB's request for a modest word extension in its Consolidated Answer. Because USB seeks less than half of the words it could have utilized had it opted to file separate responses, its request for permission to file a slightly overlong consolidated brief should

be granted.

**B. USB Requires Not More Than 17,000 Words To Respond To The Approximately 25,000 Words Submitted By Plaintiffs' Amici.**

USB does not know the number of words utilized by all three amici in their combined briefs because the brief submitted by California Employment Lawyers Association ("CELA") does not supply a word count. However, CELA's brief is 51 pages long, and therefore, likely consists of nearly 14,000 words. The brief supplied by Impact Fund appears to consist of 7,560 words and the brief supplied by Consumer Attorneys of California ("CAC") appears to consist of 3,161 words. Therefore, USB estimates that the combined briefing supplied by all three of Plaintiffs' amici is approximately 25,000 words. Since USB requests less than 70% of the words utilized by Plaintiffs' amici to respond to their arguments, and has attempted to streamline and consolidate responsive arguments wherever an overlap exists in Plaintiffs' amicis' briefing, USB's request is reasonable and should be granted.

**C. Plaintiffs' Amici Present Arguments On Topics That USB Has Not Yet Had An Opportunity To Brief Before This Court.**

In their approximately 25,000 words of briefing, Plaintiffs' amici present new issues that USB has not yet had an opportunity to brief before this Court, such as the nearly 22 pages of briefing submitted by CELA on

the purported history of class action jurisprudence. Because CELA's briefing on this topic presents a warped and misleading historical perspective, USB is compelled to present an alternative and more accurate historical narrative, which it has done in a restrained 10 pages of briefing. Similarly, Plaintiffs' amici dedicate at least 13 pages of briefing to their attempt to elevate the public policies protecting downtrodden low-wage workers above the substantive law at issue (CAC at 9-11; Impact Fund at 2-4, 20-26). This emphasis on irrelevant social ills attempts to distract this Court and play upon its emotions, and therefore demands a response, which USB has provided in a similar 10 pages of reasonable and succinct briefing.

Finally, Plaintiffs' amici present new arguments, some based on new case law, such as the progeny of *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), including *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013) and *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds,* 133 S.Ct. 1184 (2013), which USB has not yet had a chance to brief in this matter. Plaintiffs' amici assert that these cases are either inapplicable or even support the trial court's decision here. Because USB contends that these new cases bear directly upon this case and confirm the applicability of the *Dukes* decision here, the amicus briefing on these topics requires a full response, which USB has provided succinctly in its Consolidated Answer, but which requires more than 14,000 words when combined with the other arguments demanding a response.

## IV. CONCLUSION

For all of the reasons set forth herein, good cause exists to grant USB permission to file a brief in excess of 14,000 words. Good cause exists for this application and USB's request is reasonable in light of the fact that USB has already foregone the opportunity to present a total of 42,000 words of briefing in three separate amicus response briefs and instead decided to file a consolidated brief in order to conserve judicial and party resources. In their three amicus briefs, Plaintiffs' amici have presented approximately 88 pages, and likely about 25,000 words, of briefing that present new arguments regarding the history of class actions, public policy, and new case law, each of which warrant an extended response. USB will be unable to adequately and thoroughly address each of these critical issues without permission to file a brief that exceeds the standard 14,000 word limit. Because USB only requests a mere 3,000 additional words to adequately address the extensive amicus briefing, USB's request is reasonable and based on a showing of good cause. Accordingly, USB respectfully requests permission to file a Consolidated Answer not to exceed 17,000 words.

Dated: August 6, 2013 Respectfully submitted,

CAROTHERS DiSANTE & FREUDENBERGER LLP

By: _____

Alison L. Tsao
Attorneys for Defendant and 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 August 6, 2013, I served upon the interested party(ies) in this action the following document described as:

**APPLICATION OF U.S. BANK NATIONAL ASSOCIATION TO FILE CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS IN EXCESS OF 14,000 WORDS**

By placing a true copy thereof enclosed in sealed envelope(s) addressed as stated on the attached mailing list. for processing by the following method:

☒ By placing such envelope(s) with postage thereon fully prepaid into Carothers DiSante & Freudenberger LLP's interoffice mail for collection and mailing pursuant to ordinary business practice. I am familiar with the office practice of Carothers DiSante & Freudenberger LLP for collecting and processing mail with the United States Postal Service, which practice is that when mail is deposited with the Carothers DiSante & Freudenberger LLP personnel responsible for depositing mail with the United States Postal Service, such mail is deposited that same day in a post box, mailbox, sub-post office, substation, mail chute, or other like facility regularly maintained by the United States Postal Service in San Francisco, California.

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 San Francisco, California.

Anna Skaggs
(Type or print name)

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Superior Court of the State of California, County of Alameda

Honorable Robert B. Freedman, Judge Presiding

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# U.S. BANK NATIONAL ASSOCIATION'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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## INTRODUCTION

The most striking element of Plaintiffs' amici's briefs is what they *don't* say. They avoid the facts and issues actually presented by *this* case like the plague and instead present ominous predictions of what will purportedly occur if the Court of Appeal's decision is affirmed. They falsely suggest that this case presents the archetypal class action that will dictate the future of all wage and hour class actions when this case actually presents unique legal and factual issues that are highly unlikely to be repeated in any other class action, let alone all of them. Despite the acknowledged public policies favoring employee protections, not every case is proper for class treatment. California law retains established rules regarding the propriety of class treatment, and trial procedures must comport with due process and fundamental fairness. Notwithstanding the amici's broad platitudes and doomsday themes, they fail to present a single compelling reason to reverse the Court of Appeal's decision.

The Court of Appeal correctly decided that class treatment is inappropriate in this case involving Business Banking Officers ("BBOs") employed by U.S. Bank ("USB"). This case involves California's uniquely *quantitative* outside sales exemption and the evidence revealed no uniform policy or practice directing the BBOs to spend the majority of their time inside Bank property. USB's individualized defenses and the lack of any uniformly applicable policy rendered class treatment improper. Further, due process violations resulted from the trial court's attempt to "manage" the trial by using a sample set of class members as "representative" witnesses and steadfastly refusing to admit any evidence regarding class members outside the sample, including statements under oath and deposition testimony confirming class members' exempt status.

Each of the three amicus briefs submitted in support of Plaintiffs'

position dodges the actual case on review. Impact Fund argues that this Court should disregard the United States Supreme Court's decision in *Wal-Mart v. Dukes* and grossly mischaracterizes USB's due process arguments by falsely suggesting that all class action and wage and hour protections will be eviscerated if the proper result is reached. According to Impact Fund, "trial by formula" must be permitted in every wage and hour class action, regardless of whether the claims and defenses are well-suited to aggregate proof and regardless of the constitutional rights of defendants.

The California Employment Lawyers Association ("CELA") similarly argues that no due process right exists requiring individualized proof of any element of a claim or defense in wage and hour class actions. CELA claims that the "historical development of California's class action procedure" justifies modifying substantive law to accommodate class treatment while openly conceding that its "brief does not focus on the particular facts and circumstances of Mr. Duran's case...." CELA at 2.

Finally, the Consumer Attorneys of California ("CAC") makes three bold and erroneous proclamations. First, CAC openly encourages this Court to ignore the U.S. Supreme Court and the great weight of federal authority, urging California to go its own way by inviting unmanageable class actions into our courts. CAC ignores the distinction between the substantive law underlying federal versus state misclassification cases, urging this Court to follow FLSA and Title VII "aggregate proof" cases, while simultaneously asking this Court to ignore federal law on the threshold question of class treatment. Second, CAC presents unconvincing arguments that a trial court can ignore individualized issues to make a case more "manageable." Lastly, CAC contends that class actions are essential to encourage private enforcement of wage and hour claims "in light of the harsh economic trends," even though the filing of wage and hour class actions shows no signs of abating and they are not threatened by the Court

of Appeal's decision in this case, which only prohibits class treatment where it is patently improper.

Plaintiffs' amici appear hopeful that if they ignore the case presented, perhaps this Court will do the same. They present no arguments or authorities that credibly challenge the Court of Appeal's decision, and it should be affirmed in full consistent with this Court's prior jurisprudence.

## ARGUMENT

### I. THE COURT OF APPEAL'S DECISION IN THIS CASE IS CONSISTENT WITH THE HISTORY OF CLASS ACTION JURISPRUDENCE.

CELA provides a lengthy dissertation on the historical development of class action jurisprudence. CELA's history lesson purports to describe the importance of the class action device, but overstates and oversimplifies its historical use, suggesting that class actions have been applied in all cases where justified by equity and convenience. CELA ignores the fundamental premise of class action jurisprudence that the class device applies *only* in appropriate cases involving the common adjudication of common claims. CELA's commentary is unsupported and utterly fails to justify the methods used in the present case.

#### A. Class Action Jurisprudence Is Founded Upon The Common Adjudication Of Common Claims.

Long before *Von Schmidt v. Huntington*, 1 Cal. 55 (1850), and as early as the twelfth century, English law recognized that collective litigation was appropriate to facilitate common adjudication of common issues. The earliest example of group litigation is *Master Martin Rector of Barkway v. Parishioners of Nuthampstead* (circa 1199). *See* Stephen C. Yeazell, "*The Past and Future of Defendant and Settlement Classes in*

*Collective Litigation*," 39 Ariz. L. Rev. 687, 690 (1997). The case addressed a dispute between parishioners of the chapel of Nuthampstead and the rector of Barkway regarding whether the rector had to supply a chaplain for Nuthampstead every day or just three days a week. Viewed through a modern lens, the case was a religious consumer class action, where the class had one common right, one common interest, and ultimately, one common answer.

This concept of commonality remained steadfast as class action jurisprudence developed. In 1837, Joseph Story authored a treatise on the law regarding parties to suits in equity and proposed equitable rules concerning representation. J. Story's *Commentaries on Equity Pleadings* (1838).[1] Story articulated two leading principles in equity for determining proper parties to a suit. The first is that "the rights of no man [or entity] shall be finally decided in a court of justice, unless himself is present, or at least unless he has had a full opportunity to appear and vindicate his rights." Joseph Story, *Commentaries on Equity Pleadings* (2d ed. 1940)*Story*, §72. Thus, the concept of due process stood at the forefront of the courts of equity and applied equally to plaintiffs and defendants. *Id.* at §76c (the rule was founded "partly in the dictate of natural justice, that the rights of persons ought not to be affected in any suit, without giving them an opportunity to defend them.")

The other principle, was that "when a decision is made upon any particular subject-matter, the rights of all persons, whose interests are immediately connected with that decision, and affected by it, shall be provided for, as far as they reasonably may be." *Id.* This latter principle was articulated as the basis for the general rule that all persons legally or

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[1] The second edition of J. Story's *Commentaries on Equity Pleadings* was published in 1840 and is subsequently referred to throughout as "*Story.*"

beneficially interested in the subject-matter, or object, of a suit should be made parties to the suit. *Id.* *Story* reasoned that the most common exceptions to the general rule are:

> (1) where the question is one of a common or general interest, and one or more sue, or defend for the benefit of the whole; (2) where the parties form a voluntary association for public or private purposes, and those, who sue, or defend, may fairly be presumed to represent the rights and interests of the whole; (3) where the parties are very numerous, and though they have, or may have separate and distinct interests, yet it is impracticable to bring them all before the Court.

*Story*, §97.

*Story* recognized that, "[i]n all these classes of cases, it is apparent, that all the parties stand, or are supposed to stand, in the same situation, and have one common right, or one common interest, the operation and protection of which will be for the common benefit of all, and cannot be to the injury of any. It is under such circumstances, and with such objects, that the bill is permitted to be filed by a few, on behalf of themselves and all others...." *Id.* at §126; *see also* §120 (in all such cases, "there always exists a common interest, or a common right, which the bill seeks to establish and enforce....").[2]

Relying on *Story*, California's first class action, *Von Schmidt v. Huntington*, 1 Cal. 55 (1850), was decided. *Von Schmidt* concerned a bill

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[2] As explained in Cohelan, *On California Class Actions*, Foreword p. ix (2012), *Story* articulated possible justifications underlying modern class action theory. "Is the function of the class to consolidate suits that would otherwise be brought individually - and thus make the judiciary more efficient? Or is it to make it easier to bring suits that, because the stakes are too small, would not be brought individually - and thus serve substantive goals?"

filed for the dissolution of a joint association and the distribution of the company assets. It was argued that the bill should be dismissed for defect of parties. 1 Cal. at 66. The Court articulated several of *Story's* exceptions to the rule of mandatory joinder: (1) where a person is beyond the jurisdiction of the court, since certain shareholders were not within the state; (2) where the persons interested are numerous, and it would be impracticable to join them without almost interminable delays, and other inconveniences, which would obstruct and probably defeat the purposes of justice; and, (3) most importantly, "[w]here the question is one of common or general interest, and any attempt to unite them all in the suit would be, even if practicable, exceedingly inconvenient, and would subject the proceedings to the danger of perpetual abatements and other impediments, arising from intermediate deaths or other accidents or changes of interest." *Id.* at 66-67. The Court ultimately permitted class disposition since the matter concerned a "common interest in a common fund." *See Weaver v. Pasadena Tournament of Roses Ass'n*, 32 Cal.2d 833, 837 (1948) (discussing *Von Schmidt* and *Gorman v. Russell*, 14 Cal. 531 (1860)).

The strictures of the equity rules of compulsory joinder did not supply the only impetus to the development of the class suit. "Another antecedent of the device is the early bill of peace where, to prevent multiple actions, equity required parallel suits involving *common questions of law or fact to be tried together. . . .*" Note, "*Class Action and Interpleader: California Procedure and Federal Rule*," 6 Stan. L. Rev. 120, 121-122 (1953) (emphasis added). For example, bills of peace would be brought when a lord of the manor sought to appropriate some of the village common lands for his own purposes to the loss of the manorial tenants, or when a vicar quarreled with his parishioners about tithes. *See* Z. Chafee, *Some Problems of Equity*, p. 201 (1950) (hereinafter "*Chafee*"). "In such situations, each member of the multitude had the same interests at stake as

every other member, so that it was an obvious waste of time to try the common question of law and fact over and over in separate actions at law between the vicar and one parishioner after another, the lord and one tenant after another, and so on." *Chafee* at p. 201.

Against this backdrop, in 1872, California adopted Code of Civil Procedure section 382, which states: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and *when 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.*" (Emphasis added).

As explained in *Weaver*:

> The italicized portion of this statute is based upon the doctrine of virtual representation, which, as an exception to the general rule of compulsory joinder of all interested parties, 'rests upon considerations of necessity and paramount convenience, and was adopted to prevent a failure of justice.' Even before the cited statute, as plaintiffs note, this doctrine found expression in this state in such cases as *Von Schmidt v. Huntington,* 1 Cal. 55, and *Gorman v. Russell,* 14 Cal. 531...[Section 382] applies both to legal and to equitable causes of action, since no restriction or limitation is contained in its language. . . . ***But in any event and regardless of which of the alternative conditions of the statute is invoked as authorizing a class proceeding, it has been uniformly held that there must be a well-defined "community of interest" in the questions of law and fact involved as affecting the parties to be represented. . . . So the fact that 'numerous parties' have separate and distinct claims against the same person or persons will not alone suffice to sustain a representative suit where there is no community of interest.***

> ***To hold otherwise would nullify the equitable concept of section 382 of the Code of Civil Procedure as a procedural convenience for the maintenance of representative litigation.***

*Weaver*, 32 Cal.2d at 836-838, 841 (1948) (emphasis added) (internal citations omitted).[3]

Thus, the concepts of commonality, predominance and, ultimately, common answers form the basis of class action jurisprudence, not merely the overstated and oversimplified concepts of joinder, equity and convenience presented by CELA.[4]

### B. CELA's Self-Serving Interpretation Of The Historical Development Of Class Actions Is Flawed.

CELA contends that the concept of "managing" individual questions is rooted in *Von Schmidt*. CELA at 13. Yet, *Von Schmidt* had no occasion to address individual questions given the parties' common interests in a common fund. Further, this Court's holding in *Weaver*, while recognizing virtual representation in *Von Schmidt*, demonstrated that the doctrine is

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[3] *Accord Heffernan v. Bennett & Armour*, 110 Cal.App.2d 564, 590-591 (1952); *Parker v. Bowron*, 40 Cal.2d 344, 352 (1953); *California Gasoline Retailers v. Regal Petroleum*, 50 Cal.2d 844, 850 (1958); *Chance v. Superior Court*, 58 Cal.2d 275, 284 (1962); *see also Barber v. California Employment Stabilization Commission*, 130 Cal.App.2d 7 (1954) (court refused class treatment to a group of sailors seeking unemployment benefits).

[4] For example, in *Noroian v. Bennett*, 179 Cal. 806 (1919), the plaintiffs, like CELA, urged that equity jurisdiction should be exercised to prevent a multiplicity of suits where there is "merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body." *Id.* at 808. These contentions illustrated "the difficulty of stating a legal principle in abstract terms without a concrete illustration to show their application" where there was "no single fact or act, the determination of which will determine the rights of all the plaintiffs." *Id.* at 809.

properly applied *only* where there is a "well-defined community of interest in the questions of law and fact involved," and not where each individual's claims stand or fall upon facts applicable only to him or her. *Weaver*, 32 Cal.2d at 837. Nowhere does CELA demonstrate that individual questions can be ignored, as occurred here.

CELA also contends that equity principles favor class actions but fails to demonstrate that use of the class action device should come at the expense of all other rights. CELA at 14. CELA emphasizes the "court's goal of dispensing a complete decree that avoids further litigation," but this is not and cannot be the Court's singular objective. CELA at 6. What good are swift judgments and final dispensations if they are inaccurate, unfair, and oppressive? Expediency should not come at the expense of accuracy and fairness. *See City of San Jose v. Superior Court*, 12 Cal.3d 447, 462 (1974) ("Class actions are provided as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the end – to sacrifice the goal for the going.");[5] *Achem Prods. v. Windsor*, 521 U.S. 591, 615 (1997) (class actions may "achieve economies of time, effort and expense," but only when those goals can be achieved "without sacrificing procedural fairness or bringing about other undesirable results."); *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992) ("The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's – and defendant's – cause not be lost in the shadow of a towering mass litigation.")

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[5] "The federal law on class actions is in accord. Rule 23 was not intended to make a change in the substantive law; and the federal courts have been criticized where they have made such changes." *City of San Jose*, 12 Cal.3d at n.9.

CELA's argument that the practical effect of denying a class proceeding may be that claims are not pursued (CELA at 15) is belied by the facts of this case where BBOs are educated and skilled bankers who earn substantial base salaries and are eligible for lucrative commissions, and where the average recovery for each class member exceeded $57,000, providing ample incentive for any BBO who believes he was misclassified to pursue an individual claim. These are not the sort of "small claimants" the courts had in mind in crafting collective procedures.

### C. CELA's Contention That The Trial Court's Use Of Statistical And Representative Management Tools Has Historical Roots Is False.

CELA begins its discussion of the "deep roots" of manageability tools and contends that the *Duran* trial court's case management tools date back to early court decisions, but just the opposite is true. This trial involved an unprecedented method of curtailing a defendant's ability to present its defense. The trial court's unilateral decision to use a 21-person sample to determine classwide liability without statistical authority is not an ancient, time-tested tool, but, ironically, a novel thumbing of the nose at time-honored principles. *See People v. Kelly*, 17 Cal.3d 24, 30-31 (1976) (novel procedures are only acceptable if the proponent makes a "preliminary showing of general acceptance of the new technique in the relevant scientific community.") CELA's attempt at showing the "deep roots" of those novel management tools falls flat.

Further, CELA fails to demonstrate how any of the myriad individualized issues with respect to *liability* in this case were, or could have been, effectively managed. Rather, CELA refers to tools in determining the "extent of liability" as opposed to "the fact of liability." CELA at 17-18 (citing *Story* §96; *Hurlbutt v. Butentop*, 27 Cal. 50, 56 (1864); Note, 6 Stan. L. Rev. 120, 129-130; *Chance v. Super. Ct.*, 58 Cal.2d

275, 287 (1962) (all describing a form of post-judgment claims process requiring individual claimants to demonstrate extent of liability once the fact of liability has been established)); *see also Morgan v. Wet Seal*, 210 Cal.App.4th 1341, 1369 (2012) (distinguishing a determination of "the fact of liability" from "the extent of liability").

CELA equally misapplies *Daar v. Yellow Cab Co.*, 67 Cal.2d 695 (1967), which CELA contends stands for the proposition that during "trial" of class issues, evidentiary showings by class representatives would be applied and binding on the class. CELA at 17.[6] However, *Daar* concerned the sufficiency of class action allegations at the pleadings stage. It reiterated the long-standing principle that class action treatment requires an ascertainable class and a community of interest, and recognized that "the community of interest requirement is lacking...in those situations where each member of the class must establish his right to recover on the basis of facts peculiar to his own case." 67 Cal.2d at 704, 707. *Daar* simply held that plaintiffs sufficiently alleged an ascertainable class with definitive damages by alleging that, although the individual class members were not known to the named plaintiff, class members could be identified by reference to defendant's "books and records." *Id.* at 706, 714-17.[7]

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[6] CELA misapplies *Wheelock v. First Presbyterian Church*, 119 Cal. 477 (1897) for the same proposition. CELA at 17-18. *Wheelock* was an action in equity to enforce a trust against the First Presbyterian Church of Los Angeles in favor of the Central Presbyterian Church. Like *Daar*, *Wheelock* was decided on demurrer, and the portion of the case cited by CELA says nothing about the extrapolation of evidence at trial. 119 Cal. at 481.

[7] *See City of San Jose*, 12 Cal.3d at 460 (distinguishing *Daar* and *Vasquez v. Superior Court*, 4 Cal.3d 800, 810 (1971)) ("In those cases, the issue of defendant's liability to the class as a whole could be determined by facts common to all. Liability to the class could be established by evidence that defendant engaged in an illegal scheme to cheat or overcharge patrons, coupled with a showing from defendant's own books and records that defendant was successful in his scheme.").

In fact, the only tool mentioned by CELA remotely applicable to the instant case refers to the use of a special master. CELA at 18, n. 9. Because of the individualized nature of the liability determinations in this case, this very tool was requested by USB, and denied. 2CT(Supp)349-351; 20CT5896; 21CT5917-5929; 69RT5497-5499.

### D. The Tools Suggested By CELA Reflect Contemporary, Not Time-Revered, Methods Of Case Management, And Could Not Have Been Used Here.

The only authorities that come close to approving of novel management tools are recent (not historical) cases cited by CELA. However, the newer, more "streamlined procedures" described by CELA managed some issues in cases with vastly different facts, and are unlike the tools used here. CELA at 19. Here, there was no tool capable of managing all of the individualized issues.

For example, "subclassing" was proposed and rejected by this Court in *City of San Jose* for the same reasons such a tool was not, and could not have been, used here.[8] 12 Cal.3d at 462 ("even were we to allow a subclassification process here, the factors giving the uniqueness rule [of real property] vitality would serve to break down the alleged beneficial aspects which such a process might yield under these facts, making a class action here unmanageable."). Here, there was no "subclass" of BBOs that would have rendered "manageable" the individualized determinations of whether each BBO was properly classified as exempt, and Plaintiffs never attempted to prove otherwise.[9] The individualized inquiry required for each

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[8] The tool of "redefining the class" suffers from the same defects as "subclassing."

[9] Plaintiffs admitted at oral argument in the Court of Appeal that they never proposed any form of "subclassing" in this case.

BBO rendered the RWG, and indeed any subclass, a purely "superficial adjudication" violative of the "constitutional mandates of due process." *Id.* Similarly, the "use of claim forms" developed in response to the problem of damages distribution in consumer class actions where "each individual's recovery may be too small to make traditional methods of proof worthwhile is unhelpful." *State of California v. Levi Strauss & Co.*, 41 Cal.3d 460, 471-472 (1986). Claim forms, when appropriate, are used to establish individual recovery of classwide *damages*, but are not capable of managing individual *liability* determinations.

Finally, CELA hangs its hat on the claim that new tools should be allowed to "evolve," but the law rests on continuing interpretation of fundamental legal principles, not evolution for evolution's sake. *See In re Chevron*, 109 F.3d 1016, 1023 (5th Cir. 1997) (Jones, J., concurring) ("We are not authorized to legislate solutions to cases in pursuit of efficiency and expeditiousness."); *Mirkin v. Wasserman*, 5 Cal.4th 1082, 1103 (1993) ("there is little force in plaintiff's argument that we should reshape the law of deceit simply in order to remove an unnecessary pleading barrier to the effective utilization of class action procedures"); *Washington Mut. v. Super. Ct.*, 24 Cal.4th 906, 918 (2001) ("an otherwise enforceable choice-of-law agreement may not be disregarded merely because it may hinder the prosecution of a multi-state or nationwide class action"); Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, 103 (2009) ("arguments for class certification premised on aggregate proof exhibit a deeply troubling circularity...such arguments amount to the justification of aggregation by reference to evidence that presupposes – at least as a matter of economic or statistical methodology – the aggregate unit whose legitimacy the court is to determine.") The bald claim that evolution should be allowed does not support the use of improper and unfair tools that violate time-tested and binding precedent.

## II. PUBLIC POLICY DOES NOT TRUMP CLEAR RULES OF LAW AND SUBSTANTIVE RIGHTS, WHICH THE TRIAL COURT VIOLATED IN CERTIFYING AND TRYING THIS CASE.

### A. Unwarranted Certification Of Wage And Hour Claims Negatively Impacts Workers And Causes Broad Economic Harm.

Plaintiffs' amici spend considerable time laying out the genesis of California's wage and hour laws dating back to the industrial era and the Great Depression. *See* CAC at 9-10. CAC's emotional appeal that wage and hour laws were originally enacted to redress the perils of Depression-era workers has nothing to do with this case. USB does not dispute the historical motivations underlying the development of California's wage and hour laws or the laudable purposes they serve. However, comparing the educated and skilled *bankers* in this case to exploited women and children working in the industrial era is untenable and unwarranted.

CAC's argument that California's overtime laws have "great practical importance" in these "harsh economic" times similarly misses the mark. When interpreting California's outside sales exemption, state and federal courts have uniformly held that class treatment is improper where individual issues overwhelm the liability determination of where each person spent his time. *See, e.g.*, *Walsh v. IKON*, 148 Cal.App.4th 1440, 1460-61 (2007), *In re Wells Fargo Home Mortgage Overtime Pay Litigation*, 268 F.R.D. 604, 611-613 (N.D. Cal. 2010); *Vinole v. Countrywide Home Loans*, 571 F.3d 935, 945 (9th Cir. 2009). The economic climate does not justify changing the outside salesperson exemption or curtailing a defendant's due process rights.

Moreover, misapplying the law in order to generate windfall recoveries to employees who suffered no harm is surely a short-sighted and

unjust method of curing economic ills. As discussed in the Pacific Legal Foundation's amicus brief, overly permissive certification standards in California have facilitated an explosion of wage and hour class actions, taxing scarce judicial resources. PLF at 17. Additional collateral consequences include increased consumer costs, reduced wages, and limited workplace flexibility for employees. *See* PLF at 17-21.[10] It has also caused an exodus of companies leaving the state, taking much-needed jobs with them and contributing to California's record-level unemployment rates in the recent recession.[11] Overly permissive class certification has contributed to California's economic downward spiral.[12] The lenient interpretation of certification requirements requested by Plaintiffs' amici would only perpetuate this vicious cycle.

While Plaintiffs' amici argue that diminished funding for

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[10] *See also* Sanjay B. Varshney & Dennis H. Tootelian. "Cost of State Regulations on California Small Businesses Study." September 2009. (http://arc.asm.ca.gov/member/3/pdf/CostofRegulationStudyFinal.pdf).

[11] Tom Gray & Robert Scardamalia. "The Great California Exodus: A Closer Look." *Manhattan Institute for Public Policy Research.* Civic Report No. 71. September 2012. (http://www.manhattan-institute.org/html/cr_71.htm); Chris Rizo. "Brown: California is Over-Regulated." *Legal Newsline.* November 11, 2009. (http://legalnewsline.com/news/223961-brown-california-is-over-regulated); "Café Gratitude Closes Under Employee Lawsuits." *Huffington Post.* November 29, 2011. (small restaurant chain closes eight restaurants due to wage and hour lawsuits). (http://www.huffingtonpost.com/2011/11/29/cafe-gratitude-closes_n_1119452.html); Bureau of Labor Statistics. (2013). Unemployment Rates for States. (http://www.bls.gov/web/laus/laumstrk.htm); Bureau of Labor Statistics (2012). Unemployment Rates for States. (http://www.bls.gov/web/laus/laumstrk12.htm).

[12] Mike Patton. "The Most (and Least) Business Friendly States." *Forbes.* March 31, 2013. (http://www.forbes.com/fdc/welcome_mjx.shtml); Natasha Lindstrom. "California Mandates Hurting Small Businesses." *Daily Press.* January 14, 2010. (http:/www.vvdailypress.com/aricles/California-16719-natim-business.html).

government agencies and court access requires broader certification rules (Impact Fund at 3), they offer no evidence that private wage and hour lawsuits are in *any* danger of abating. *See* PLF at 17-18. The Labor Code provides a comprehensive remedial scheme well above customary damages, including civil and statutory penalties, waiting time penalties, and attorneys' fees, which incentivize the plaintiffs' bar to prosecute these cases. *See, e.g.*, Lab. Code §§ 1194(a), 218.5, 203, 2699; *Soderstedt v. CBIZ S. California*, 197 Cal.App.4th 133, 157 (2011) (class treatment denied where well-paid employees had sufficient monetary incentive to pursue individual claims). This has spawned a lucrative practice area – so much so that even some defense attorneys have decided to join the plaintiff's employment bar. *See, e.g.*, *Wage Wars*, M. Orey, BusinessWeek, Oct. 1, 2007 (available at: http://www.businessweek.com/magazine/content/07_40/b4052001.htm). Plaintiffs' amici fear that well-reasoned decisions restraining the *improper* use of class actions might thwart "private enforcement," but they put the cart before the horse: improper enforcement actions ought not to be protected.

### B. This Case Does Not Involve Independent Contractor Misclassification Claims, "Low Wage Workers," Or "Modern Day Slavery."

Plaintiffs' amici distract from the issues actually presented by discussing irrelevant legal claims and societal problems. This case was brought by highly paid bankers. It does not involve independent contractor classification issues or "low wage" workers and does not justify references to "modern-day slavery." Impact Fund at 20-21. Such hyperbole is particularly insulting given that human slavery is a growing and horrific criminal industry that has no connection to the bankers seeking additional but unwarranted compensation in this case. The continuing doomsday

themes from Plaintiffs' amici are nothing but a play on emotions that has no place in this case.

### 1. The Problems Associated With Independent Contractor Misclassification Are Irrelevant To This Case.

Plaintiffs' amici pursue irrelevant discussion of the purported harms caused by independent contractor misclassification. Impact Fund at 2-3, 20-23. They *concede* this case does not involve any independent contractor misclassification allegations, but persist in decrying the evils of this irrelevant type of violation. *Id.* at 2-3. Of course, this case involves highly paid *employees*, and there is no alleged failure to provide "workers' compensation coverage, Social Security and Medicare contributions, unemployment benefits, and other critical protections." *See id.* at 22. Nevertheless, Plaintiffs' amici opine that independent contractor misclassification has eroded enforcement of minimum labor standards, and that class certification of all wage claims "must be preserved and protected" in order to maintain "access to private enforcement mechanisms." Impact Fund at 20-22. Their claim that "inadequate enforcement" of independent contractor classification rules burden the government is likewise irrelevant and should not distract the Court from the issues actually presented.

### 2. This Case Involves Highly Paid Financial Professionals Who Are Not The Intended Beneficiaries Of Minimum Wage Legislation.

Plaintiffs' amici also reference policies and legislation aimed at protecting the working conditions of "low-wage workers" and "[w]orkers in low-skilled industries," ignoring the realities of the instant case and the bankers involved. Impact Fund at 21-23. BBOs are sophisticated businesspeople earning base salaries of over $50,000 who are eligible for uncapped incentive compensation, with many BBOs earning far more than

$100,000 per year. They enjoy flexibility in their schedules and the traveling nature of their work restricts USB's ability to track their hours. All these factors, and others described below, underscore the inapplicability of the arguments advanced by Plaintiffs' amici.

**a. BBO Duties Are Fundamentally Incompatible With Non-Exempt Status.**

> The reasons for excluding an outside salesman are fairly apparent. Such salesmen, to a great extent, works individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day. To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman.

*Jewel Tea Co. v. Williams*, 118 F.2d 202, 207-08 (10th Cir. 1941). BBOs fit this description in every respect, and the BBO position is precisely the type of job that confirms the rationale for the outside sales exemption. *See also Christopher v. SmithKline Beecham*, 132 S.Ct. 2156, 2173 (2012) ("Petitioners –each of whom earned an average of more than $70,000 per year and spent between 10 and 20 hours outside normal business hours each week performing work related to his assigned portfolio of drugs in his assigned sales territory–are hardly the kind of employees that the FLSA was intended to protect."); *Pippins v. KPMG LLP*, 2012 WL 6968332 (S.D. N.Y. 2012) (FLSA not intended to apply to "employees [who] typically earn well above the minimum wage and often perform types of work that

can neither be standardized into a time frame nor easily passed off to others if not completed within eight hours a day or forty hours a week (as contrasted with, say, a waiter or an assembly line worker....)").

BBOs consistently travel between client locations and attend business and networking events, making it difficult to track their hours. Plaintiffs do not dispute that the job entails outside sales duties, nor the fact that BBOs determine their own work schedules, including choosing what hours to work in light of their individual goals regarding incentive compensation. Accordingly, BBOs' activities are fundamentally incompatible with non-exempt status.[13]

**b. Highly Educated, Highly Compensated Professionals In The Financial Industry Are Not The Workers For Whom State And Federal Wage Laws Were Enacted To Protect.**

Plaintiffs' amici's references to authorities involving the lowest paid workers in the lowest skilled industries are way off base. Plaintiffs' amici ignore the glaring distinction that *this* overtime case was brought on behalf of highly compensated and educated bankers, not exploited laborers without bargaining power or control over their working conditions. BBOs are highly mobile, sophisticated financial professionals, the vast majority of whom hold a college degree and many of whom make in excess of $100,000 in annual compensation. For example, trial group witness Chad

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[13] While California law contains certain substantive differences compared to the FLSA (*e.g.*, California applies the unique , more individualized quantitative test for determining whether an employee is engaged in exempt duties a majority of time), California wage and hour laws were modeled after the FLSA. Accordingly, FLSA decisions provide guidance with respect to underlying goals and rationale for wage and hour laws. *See Nordquist v. McGraw-Hill Broad. Co.*, 32 Cal.App.4th 555, 562 (1995).

Penza earned enormous compensation, including over $160,000 in 2003 and over $225,000 in 2004. Numerous other class members routinely earned over six figures.[14]

Lawsuits like this, which seek to recover overtime for highly paid employees, bear no practical connection to the purpose of state and federal overtime laws. Congress' intent in enacting the FLSA, upon which other states, including California, model their wage laws, was not to benefit skilled, well-compensated employees but to protect the lowest paid workers, and are aimed at guaranteeing minimum subsistence. For example, in *Hogan v. Allstate Insurance*, 210 F.Supp.2d 1312 (M.D. Fla. 2002), the district court observed the following:

> The FLSA established minimum labor standards in order to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." ... *The Court doubts that Congress, when it enacted the FLSA to protect a "minimum standard of living," had in mind employees such as the [plaintiff insurance agents] that make an average of over $100,000 per year.*

*Id.* at 1315 (emphasis added). Though the district court's order was vacated and remanded on other grounds, the Eleventh Circuit echoed these policies, explaining that the FLSA "was designed to aid the unprotected, unorganized, and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Hogan v. Allstate Ins. Co.*, 361

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[14] Plaintiffs and their amici point out that class actions may be superior where the claims would otherwise be too small to warrant individual litigation. *See, e.g.*, OB at 34. However, this case presents the opposite situation, with an average individual recovery of over $57,000. Plaintiffs' amici's insistence that this case involves "small" claims appropriate for class treatment is not supported by the record.

F.3d 621, 625 (11th Cir. 2004) (emphasis added); *see also Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) ("The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being....").

BBOs are not limited with regard to other viable employment options nor do they have insufficient bargaining power. Indeed, some BBOs successfully negotiated $10,000 signing bonuses and increased base salaries. Nor are BBOs the proverbial "overworked manager" who receives a modest salary but is nonetheless strapped with endless responsibilities that necessarily entail long hours of labor. BBOs universally admitted that they have almost complete freedom to come and go as they please, to structure their activities and schedules as they see fit, and to work in a manner consistent with their personal, professional, and compensation goals. The fact that individual BBOs were able to *choose* when, and how much, to work[15] belies any suggestion that applying class action principles to preclude BBOs from seeking overtime in a class action will have *any* effect on low-wage workers.

This Court should not ignore the context of who is seeking what in this case – namely, well-compensated bankers who worked as much or as little as they pleased seeking yet more compensation as "overtime." USB doubts, as have several courts, that legislators and the People of the State of California would applaud the windfall and absurd application of the overtime laws sought here. Class certification jurisprudence should not be contorted to blindly certify a case simply because wage claims are alleged,

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[15] A number of the trial group witnesses (Matt Gediman, Brett Lindeman, Steven Bradley, Nova Vanderheyd) were successful in their positions without working any hours beyond a 40-hour workweek.

and the Court should not be swayed by the attempts of Plaintiffs and their amici to conjure a class of "disadvantaged" workers in a case where none exists.

### c. Plaintiffs' Amici Make Unconscionable Comparisons Between The Claims In This Overtime Case And "Modern Day Slavery."

Plaintiffs' amici make the highly inappropriate and insensitive comparison between the circumstances in this case and "modern day slavery." Impact Fund at 20-21. Citing cases involving supermarket janitors who received no overtime pay, indigent workers who delivered groceries for only tips, and garment workers in deplorable conditions, Plaintiffs' amici seek to stir up misdirected anger toward all employers facing wage and hour claims.

Given BBOs' high salaries and total freedom to structure their work efforts based on their desired level of incentive compensation, no reflection is required to recognize that BBOs are nothing like "slaves" -- "virtual," "modern day," or otherwise. Trying to compare BBOs to workers facing unsafe conditions and not earning enough to subsist insults the plight of truly downtrodden and disadvantaged workers. The fact that human trafficking is an *actual problem that plagues our society and is dealt with through the criminal justice system* reveals Plaintiffs' amici's arguments as insensitive and out of touch. *See, e.g., United States v. Dann*, 652 F.3d 1160 (9th Cir. 2011) (defendant kept alien housekeeper and nanny in forced labor without pay); *United States v. Veerapol*, 312 F.3d 1128 (9th Cir. 2002) (Thai restaurant workers kept in involuntary servitude). It is offensive to exploit the horrible plight of actual slaves in support of an argument that looser certification standards must be applied to a class of well-educated and highly compensated bankers alleging overtime violations. Nothing further should be said about the subject of slavery in

the context of this case.

### d. The Pursuit Of Fair Labor Practices And Wage And Hour Claims Does Not Come At The Expense Of All Other Substantive Rights.

Plaintiffs' amici suggest that the pursuit of wage enforcement actions is so great a public priority that established rules of class certification and substantive law are trumped entirely. On the contrary, this Court's caselaw sets forth a coherent jurisprudence governing class certification, and the fact that a case involves wage claims does not affect the propriety of class treatment. The fact that the FLSA does not "occupy the field" is similarly irrelevant because USB bases its position on established California jurisprudence, which is precisely what the Court of Appeal's decision confirmed. Even if the circumstances regarding low-wage workers as referenced by Plaintiffs' amici were somehow relevant here – which they are not – it would still not justify elevating public policy aims above substantive law as Plaintiffs' amici suggest. *See, e.g.*, CAC at 7-8. Deterrent policies cannot be accommodated at the expense of substantive rights and applicable rules of law, and the type of worker or industry involved cannot change this fundamental fact.

## III. *DUKES* PROVIDES DIRECTLY APPLICABLE GUIDANCE IN INTERPRETING CALIFORNIA CLASS ACTION PRINCIPLES.

Anxious to avoid the implications of the decision below on their theory that wage and hour class actions must be certified without regard for traditional class action principles, Plaintiffs' amici argue extensively that the U.S. Supreme Court's opinion in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), has no bearing on this case. This Court's caselaw directly rejects their position, as do numerous Court of Appeal decisions.

*Brinker v. Superior Court*, 53 Cal.4th 1104, 1023 (2012) (citing with approval *Dukes'* guidance regarding class certification principles); *see also Dailey v. Sears, Roebuck & Co.*, 214 Cal.App.4th 974, 999 n.10 (2013) (noting *Dukes'* disapproval of sampling to prove liability; rejecting proposal to prove liability and damages through sampling in wage and hour case); *Lopez v. Brown*, 217 Cal.App.4th 1114 (2013) (citing *Dukes* in finding lack of predominant common issues in damages suit by former prisoners); *City of San Diego v. Haas*, 207 Cal.App.4th 472, 500-01 (2012) (finding predominance based on *Brinker*, *Sav-On*, and *Dukes* where resolving common issues "would, and actually did, determine the status of defendants' retirement benefits 'in one stroke.'"); *Marler v. E.M. Johansing, LLC*, 199 Cal.App.4th 1450, 1458 (2011) (citing *Dukes* for guidance regarding overlap between merits and certification issues). Thus, this Court should reject, as it has in the past, CELA's invitation to ignore *Dukes* on the theory that California's "own law is so well developed." CELA at 35.

### A. *Dukes* Is Not Limited To Interpreting FRCP 23 And Instead Was Grounded Upon Fundamental Class Action And Due Process Principles.

Plaintiffs' amici also attempt to avoid the principles set forth in *Dukes* by suggesting those principles are limited to Federal Rule of Civil Procedure 23. *See* Impact Fund at 1, 3, 13-17; CELA at 35-45; CAC at 5. As more fully explained by Defendant's amici, that argument misconstrues *Dukes* and ignores the decision's grounding in class action principles and basic due process notions equally applicable in federal and California courts. Ass'n of Sec. Cos. ("ASC") at 16-21; California Employment Law Counsel ("CELC") at 15-17; U.S. Chamber of Commerce ("U.S. Chamber") at 11-16. Moreover, the sharp distinction that Plaintiffs' amici attempt to draw between FRCP 23 and California Code of Civil Procedure

Section 382 is not supported, since Section 382 draws its principles and requirements from its federal analog, and far from swallowing up Section 382 (as Plaintiffs' amici argue), *Dukes* clarifies the shared principles on which FRCP 23 and Section 382 rest. ASC at 14-15; CELC at 16-17; U.S. Chamber at 7-12. USB does not contend (as Plaintiffs' amici suggest) that FRCP 23 controls this action, but rather that this Court should continue to recognize the validity of the United States Supreme Court's guidance on class action principles shared by California and federal law.

Moreover, the U.S. Supreme Court's analysis in *Dukes* was in no way limited to interpretation of FRCP 23, but rather hinged on fundamental notions of fairness and due process, issues on which the Court's analysis is indisputably binding on state and federal courts. As explained by Defendant's amici, the *Dukes* decision was grounded on the Rules Enabling Act's embodiment of the fundamental due process norm precluding the use of procedural devices to abridge substantive legal rights, and on the undisputed due process requirement that a party must receive an opportunity to present every available defense. *See* ASC at 16-21; U.S. Chamber at 11-16 (and cases cited). Thus, *Dukes*, like this Court's caselaw and other federal authorities, precludes the trial court's decision to change substantive rights under the law through the adoption of a particular procedure – trial by formula – where it is not consistent with the substantive underlying legal analysis.

### B. *Dukes* Applies Beyond The Title VII Context.

Plaintiffs and their amici, relying largely on vacated decisions, argue that *Dukes* applies only to cases pursued under Title VII. *See, e.g, Wallace B. Broderick Revocable Living Trust v. XTO Energy, Inc.*, 281 F.R.D. 477, 486 (D. Kan. 2012), vacated largely based on *Dukes* in *XTO Energy, Inc.*, 2013 WL 3389469 (7th Cir. 2013); *Driver v. AppleIllinois, LLC*, 2012 WL

689169, at *3 (N.D. Ill. Mar. 2, 2012) (where commonality and predominance are satisfied, *Dukes* does not prohibit certification merely because of individualized damages). *Driver* relied heavily on *Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir. 2012), which was subsequently vacated by the U.S. Supreme Court, 133 S.Ct. 1722 (2013).

CELA also cites three district court decisions from courts within the Ninth Circuit. However, *Troy v. Kehe Food Distributors, Inc.*, 276 F.R.D. 642 (W.D. Wash. 2011), merely held that *Dukes* does not stand for the proposition that individualized damages issues necessarily preclude a finding that common issues predominate, a proposition not at issue here. *See* 276 F.R.D. at 657. *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2012 WL 253298, *5 (N.D. Cal. Jan. 26, 2012) held only that *Dukes* does not create a bar to the use of aggregate damages in antitrust cases and likewise did not purport to otherwise limit the reach of *Dukes'* reasoning. Finally, *Johnson v. General Mills, Inc.*, 276 F.R.D. 519, 522 (C.D. Cal. 2011), like the other cases cited by CELA, acknowledged that *Dukes* applied, but found that *Dukes* does not require *every issue* in a class action to be common as long as common issues predominate. Discussing *Dukes'* prohibition on trial by formula, the district court in *Johnson* determined that although individual damages proceedings *would* be necessary (*i.e.*, trial by formula *was* prohibited), that fact did not preclude class certification because, unlike in this case, the substantive law permitted establishing classwide liability through an inference of reliance. *Id.* at 524. In any case, the Ninth Circuit rejected CELA's argument that *Dukes'* prohibition on trial by formula is restricted to the Title VII context, and instead held that it applies equally to wage and hour class actions under California law. *Wang v. Chinese Daily News, Inc.*, 709 F.3d 829, 832-836 (9th Cir. 2013); *see also Cruz v. Dollar Tree Stores, Inc.*, 2011 WL 2682967 (N.D. Cal. Jul. 8, 2011) (decertifying wage and hour class action; trial by formula prohibition

applies in wage and hour cases); *see also Tracy v. NVR, Inc.*, __F.R.D.__ (W.D. N.Y. Apr. 29, 2013) 2013 WL 1800197, *6 (applying *Dukes* to class action involving federal outside sales exemption). CELA provides no basis for its argument that this Court should ignore the clear holding of the Ninth Circuit on this issue in favor of district court decisions that are either inapplicable and/or no longer good law, nor is there any coherent rationale for limiting any aspect of *Dukes* to the Title VII context.

Ironically, Plaintiffs attempt to dodge the implications of *Dukes* by describing it as a "Title VII" decision, while at the same time asking the Court to import Title VII substantive law in this case by allowing them to prove liability in wage and hour class actions based on some form of "adverse impact" or "pattern and practice" theory resulting in a classwide "liability presumption" (*see, e.g.*, OB at 5, 37-39, 58-59, 62-64; RB at 52; CELA at 17-18, 33-34) instead of applying substantive California exemption law, which Plaintiffs and their amici deem unfavorable to the class action device. This effort to pick and choose the characteristics of Title VII that might support certification in this case reveals again the fundamental defect of Plaintiffs' position: a request that this Court change the substantive law to further procedural goals. *See City of San Jose*, 12 Cal.3d at 462.

### C. The Prohibition On Using "Trial By Formula" To Justify Class Trials That Ignore Individualized Defenses Applies Directly To This Case.

Plaintiffs' amici also contend that the U.S. Supreme Court's condemnation of "Trial by Formula" should be limited to the facts of *Dukes*, suggesting the Court's unanimous analysis on that issue was nothing but a "catchphrase." As elaborated by Defendant's amici, the reasoning of *Dukes* applies squarely to the trial by formula that the trial court attempted here. ASC at 13-16; U.S. Chamber at 10-16; CELC at 25.

While Plaintiffs' amici suggest that *Dukes* is distinguishable because it involved the right to present statutory defenses under Title VII, here the analysis is the same: the statutory exemption defense hinges on the actual activities an employee performed, but the trial court attempted to use "representative evidence" to circumvent the fact that the defense could not be litigated on a class basis. That is precisely what *Dukes* rejected. 131 S.Ct. at 2546 ("a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims); *see also Wang*, 709 F.3d at 836 (noting that *Dukes* "disapproved... 'Trial by Formula,' wherein damages are determined for a sample set of class members and then applied by extrapolation to the rest of the class 'without further individualized proceedings.'"). Thus, Impact Fund's assertion that USB seeks a right to present individualized defenses to every type of claim fails. USB claims the right, recognized by *Dukes* and by this Court's caselaw, to present individualized defenses that hinge on individualized evidence, as the exemption defense does here. The trial court attempted to circumvent the nature of the evidence, effectively acknowledging that individual mini-trials were necessary to decide the merits of a class member's claim, but arbitrarily deciding that it would only conduct a small portion of such mini-trials and extrapolate the results to the rest of the class. Although no common evidence could actually resolve liability for absent class members, conducting only a small sample of mini-trials was deemed appropriate because it was *easier* than conducting them for all class members. *See, e.g.*, 21RT750 (compared to conducting individualized analyses, trial court "became enthralled with the trial management plan we now have."). That approach was indeed a "novel project" unsupported by law (*see* 131 S.Ct. at 2561), and this Court should not be the first to sanction such a drastic departure from fundamental notions of due process.

Plaintiffs' amici also claim that *Dukes* "strongly endorsed" the use

of statistical evidence, but this generalized argument does not advance Plaintiffs' position, since the question before this Court is whether the use of so-called "statistical evidence" here was valid. Plaintiffs have conceded it was not. OB 5, RB 8. Moreover, Plaintiffs admitted at oral argument in the Court of Appeal that they had *no proposal* for how this case could have been tried differently. Neither Plaintiffs nor their amici have provided any reason to endorse the use of representative evidence that actually occurred in this case, or to conclude that any valid representative trial plan could have been devised based on the overwhelming individualized issues that consumed trial.

### D. In Attempting To Avoid *Dukes*, Plaintiffs' Amici Actually Take Issue With The Substance Of California Law.

The necessity for individualized analysis of the exemption defense in this case stems not from any new procedural requirement imposed by the Court of Appeal, nor from any overbroad application of the *Dukes* prohibition on trial by formula, but from the application of the relevant substantive law – the California outside sales exemption – to the facts of the case, including the undisputed lack of any actual common proof on the exemption defense. As this Court has explained, that exemption depends, first and foremost, on the actual activities the employee performs. *Ramirez v. Yosemite Water Co.*, 20 Cal.4th 785, 802 (1999). Moreover, the Industrial Welfare Commission, acting at the authorization of the California Legislature, designed California's quantitative exemption analysis to be *more protective* of individual employees by making it a more individualized test, hinging on actual activities performed. *Id.* at 797-798.[16]

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[16] As the Industrial Welfare Commission has explained, under the 2001 amendments to the Wage Orders, the "California 'quantitative test' (Continued...)

By contrast, the more generalized "primary duty" analysis under the FLSA centers on factors such as the "relative importance of the exempt duties compared with other types of duties." 29 C.F.R. § 541.700(a).

The central complaint of Plaintiffs and their amici is that, in selecting the substantive test it believed would best protect individual employees, the Legislature chose an inquiry that is not sufficiently amenable to class certification. Unhappy with the Legislature's decision, and with the necessary result of that decision articulated by the Court of Appeal below, Plaintiffs and their amici ask this Court to apply a different exemption test in class actions in order to increase the chance of certification. *See, e.g.*, OB at 37-39; CELA at 7-8 (arguing that the Court should ignore the standard for the outside sales exemption articulated in *Ramirez* and should instead apply a substantive test more akin to the standards applicable under the FLSA or Title VII). Courts have indeed recognized that California's quantitative exemption test is more individualized, and accordingly, often less amenable to class certification, than the more generalized federal test. *See, e.g.*, *Ruggles v. Wellpoint, Inc.*, 272 F.R.D. 320, 343-344 (N.D. N.Y. 2011) (individualized nature of California's quantitative exemption analysis constitutes independent factor in favor of finding that individual issues predominate); *Tate-Small v. Saks Inc.*, 2012 WL 1957709 (S.D. N.Y. May 31, 2012) (noting differences between California and New York wage and hour class actions including

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(...Continued)

continues to be different from and more protective of employees than, the federal 'qualitative' or 'primary duty' test . . . . Under California law, *one must look to the actual tasks performed by an employee in order to determine whether that employee is exempt.*" Stmt. as to the Basis for 2001 Amendments to Wage Orders 1-13, 15 & 17, ¶ 1 (available at http://www.dir.ca.gov/iwc/wageorderindustriesprior.htm) (emphasis added).

fact that, under California's quantitative test for administrative exemption, the "[in]correctness of putative class members' designation as exempt can only be determined through individual inquiries investigating the amount of time each member spent on exempt activities...."); *see also* CELC at 34 (noting necessary procedural consequences of California's substantive choice of a unique quantitative test). But that choice was the Legislature's to make, and this Court should decline, as it has previously, to change the law to make certain cases more amenable to certification.

## IV. USE OF "AGGREGATE PROOF" IN OTHER CONTEXTS DOES NOT SUPPORT ITS USE HERE.

### A. The Use Of Representative Evidence In *Some* FLSA Cases Does Not Justify Its Use Here.

Finding no support for the trial plan under California law, Plaintiffs' amici argue that FLSA cases utilizing representative evidence justify the constitutionally infirm trial plan here. CELA at 9 n.2; Impact Fund at 6. This Court has decisively rejected the application of FLSA's *qualitative* analysis to California's unique, fact-intensive, and highly individualistic *quantitative* analysis underlying the outside salesperson exemption. *Ramirez*, 20 Cal.4th at 797-801; *see* AB at 75-77; CELC at 34 n.6. If the FLSA's looser "primary duty" analysis cannot be used to establish a *single individual*'s exempt status under *Ramirez*, it certainly cannot be used to establish the exempt status for hundreds of absent class members here.

Federal courts applying the federal outside salesperson exemption also reject representative testimony where liability turns on individualized factors. In *Tracy v. NVR, Inc.*, 2013 WL 1800197 at *2-5, the court prohibited a class of "Sales and Marketing Representatives" ("SMRs") from proving misclassification under the outside salesperson exemption by using an "exemplar" group of seven SMRs because liability for each SMR

was fact-intensive and turned on individual determinations of the amount of time spent outside the employer's office each week. Notwithstanding their identical job description and their employer's failure to track their working hours, the court found that SMRs were given "tremendous flexibility in terms of the manner in which they chose to allocate their time and resources to perform those activities, [resulting in] wide discrepancies . . . in terms of the average time each spent outside the office." *Id.* at *2-4. The court therefore refused to make "a blanket determination" on the exemption by extrapolating the experiences of exemplar SMRs to the opt-in plaintiffs. *Id.* at *4.

Even where FLSA cases allow representative evidence, they do so where the testimony is truly uniform – a circumstance absent here – or the defendant waives its right to present individual defenses. *See Reich v. Gateway Press*, 13 F.3d 685, 701-02 (3d Cir. 1994) (all employees gave virtually identical testimony; court nevertheless acknowledged employer's right to "rebut the existence of violations or to prove that individual employees are excepted from the pattern or practice"); *Donovan v. Burger King*, 672 F.2d 221, 224-25 (1st Cir. 1982) (defense counsel agreed to limitation of witnesses and further stipulated that 20 individuals would testify substantially similarly to three of Burger King's earlier witnesses). In *Grochowski v. Phoenix Construction*, 318 F.3d 80, 88-89 (2d Cir. 2003) (cited by CELA at 9 n.2), the Second Circuit upheld the trial court's directed verdict against the four non-testifying plaintiffs because they "failed to submit any evidence whatsoever" to prove their FLSA violations and could not rely on "bits of testimony from various co-plaintiffs." Thus, *Grochowski* actually supports USB's position here because there was "no evidence whatsoever" proving liability as to the 239 non-testifying witnesses, but only exculpatory evidence indicating proper classification as to at least one-third of them. *See also Secretary of Labor v. DeSisto*, 929

F.2d 789, 795-96 (1st Cir. 1991) (cited by Impact Fund at 6) (representative testimony from single employee insufficient to establish classwide violations where trial court arbitrarily limited presentation of probative evidence); *Proctor v. Allsups Convenience Stores*, 250 F.R.D. 278, 283-84 (N.D. Tex. 2008) (class decertified and representative testimony rejected in off-the-clock class with no consistently applied policy; employer entitled to present individualized defenses); *Zivali v. AT&T Mobility*, 784 F.Supp.2d 456, 468-69 (S.D. N.Y. 2011) (same).

### B. Use Of Aggregate Proof In Other Areas Of Law Hinging On Common Wrongful Acts And Generalized Harm Is Irrelevant.

Impact Fund cites a hodgepodge of cases across disparate areas of law, arguing that aggregate proof is *sometimes* utilized in *some* contexts. Impact Fund at 5-10. That premise is unremarkable, and none of these cases address the problems articulated here. To understand why the listed cases allowed statistical evidence, one must look at the substantive law underlying the claims. As the cases Impact Fund cites make clear, a plaintiff must show that common proof will predominate at trial with respect to each essential element of the plaintiff's claims. *See In re Neurontin Antitrust Litigation*, 2011 WL 286118, *6 (D. N.J. 2011) (citing *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 214 (E.D. Pa. 2001)). While certain substantive analyses naturally lend themselves to a singular determination, others must, by their very nature, be resolved by analyzing facts pertaining to individual class members. *Id.* at *5; *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) ("the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual.... That is, the court must consider the substantive elements of a plaintiff's claims and the type of proof that

plaintiff plans to proffer...to determine whether common issues predominate."). The cases cited merely show that, where the elements of the underlying claims lend themselves to a singular determination, statistical evidence may be appropriate. They say nothing about whether representative testimony was proper here, where the trial hinged upon the outside sales exemption's quantitative test.

In the antitrust cases cited by Impact Fund, the claimants had to show: (1) violation of the antitrust law; (2) individual injury (impact); and (3) measurable damages. *In re Neurontin*, 2011 WL 286118 at *6. The first element turns upon whether the defendant possessed monopoly power and willfully maintained it, not upon the conduct of individual class members, and is therefore amenable to a singular determination. *Id.*; *In re Bulk (Extruded) Graphite Prods. Antitrust Litig.*, 2006 WL 891362, *9 (D. N.J. 2006). On the "individual injury" element, once the plaintiff shows the alleged conspiracy was successful in raising prices, the substantive law acknowledges that common proof of impact is valid where it adequately demonstrates damage to each individual, and whether that is possible depends upon the circumstances of each case. *In re Bulk*, 2006 WL 891362 at *10 (citing *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir. 1977)). By contrast, the overriding inquiry here is how much time each BBO spent inside versus outside USB facilities, which necessarily turns on *where* each class member performed his or her sales activities and can only be established through individual testimony. *Tracy*, 2013 WL 1800197 at *3.

Plaintiffs' amici similarly posit that "formulas" should be allowed here as they are in securities cases. The cited securities cases are distinct because they involve *underlying law* allowing a presumption of reliance upon material misrepresentations. *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988). In the securities cases, to establish that the defendants

unlawfully manipulated stock prices, plaintiffs must show reliance. *Id.* at 224. However, because investors do not have face-to-face interactions with sellers when purchasing stocks through the medium of the public market, it is the market that transmits information to investors in the form of the "market price." *Id.* Accordingly, the Court adopted a presumption, created by a fraud-on-the-market theory, that persons who trade shares do so in reliance on the integrity of the price set by the market. *Id.* at 245. That theory renders individual proof of reliance unnecessary. By contrast, the outside sales exemption lacks any analogous presumption and requires a factual determination as to how an individual actually spent her time. *Ramirez*, 20 Cal.4th at 802.

Impact Fund's reliance on the consumer class action *Butler v. Sears, Roebuck*, 702 F.3d 359, 363 (7th Cir. 2012), is also misplaced, since the principal issue was defendant's conduct in designing and manufacturing an allegedly defective washing machine, a singular issue that can be resolved without any information from individual class members.

The cited trademark and Fair Debt Collection Practices Act (FDCPA) cases are similarly inapposite since the survey evidence in these cases is not used in a "representative" capacity. Rather, the elements that the survey evidence purports to prove are, by their very nature, concepts concerning the general public. In *Southland Sod Farms v. Stover Seed*, 108 F.3d 1134, 1139 (9th Cir. 1997), a trademark case addressing a false advertising claim (not a class action), the plaintiff had to show only that the allegedly false statement had a *tendency* to deceive a *substantial segment* of its audience. The survey evidence was probative of the effect the advertising *tended* to have upon viewers. *Id.* at 1142. This standard is qualitatively different from the one here, which concerns a determination of the *actual* exempt status of *each* class member.

In the FDCPA cases, the plaintiffs alleged that they were misled by a

debt statement they received from the defendant. Applicable law applies an "unsophisticated debtor" standard, requiring the statement to show the amount of the debt clearly enough that the recipient is unlikely to misunderstand it. *Taylor v. Cavalry Inv.*, 365 F.3d 572, 574 (7th Cir. 2004); *see also Marshall-Mosby v. Corporate Receivables*, 205 F.3d 323, 326 (7th Cir. 2000). Much like the "reasonable person" standard typically used in tort analysis, the plaintiff's *actual* misunderstanding is irrelevant when the court determines that even an unsophisticated debtor should have understood the statement. *Taylor*, 365 F.3d at 575. Thus, a plaintiff may choose to present survey evidence regarding the types of statements that confuse unsophisticated consumers. *Id.* Unlike the present case, where liability hinges upon what class members actually did, the FDCPA cases hinge upon what *the defendant did* and how a *hypothetical* unsophisticated debtor might interpret it.

Impact Fund cites *Capitol People First v. Department of Developmental Services*, 155 Cal.App.4th 696 (2007), for the premise that liability under the Lanterman Developmental Disabilities Act, Cal. Welf. & Inst. Code §§ 4400-4906, can be proven through "expert testimony, admissions, statistical proof," etc. Impact Fund fails to point out that plaintiffs, a putative class of disabled persons, were not seeking individual relief for class members but injunctive and declaratory relief. The Court of Appeal found class certification appropriate based on the relief sought since Plaintiffs' claims focused on systemic problems, *e.g.*, whether the defendant was developing, implementing and monitoring sufficient quality programs to meet the needs of putative class members, and providing sufficient funding and incentives to comply with program goals. Here, in stark contrast, plaintiffs seek individual restitution awards hinging on: (1) whether each individual was properly classified; and (2) the amount of overtime hours allegedly worked.

Impact Fund cites *People ex. rel. Lockyer v. R.J. Reynolds,* 116 Cal.App.4th 1253 (2004), a UCL false advertising case, claiming that "survey data was used to prove the defendant was targeting youth in its advertisement of tobacco products." Much like the trademark and FDCPA cases, false advertising cases only require that the advertisements are "likely to deceive" members of the public, and do not require individualized proof of actual deception, reliance or injury. AB at 114-117.

Impact Fund cites two cases for the premise that statistical sampling is used in Medicare fraud cases to calculate losses from fraudulent claims. Impact Fund at 10. In *United States v. Freitag*, 230 F.3d 1019, 1025 (7th Cir. 2000), a criminal action against an individual defendant, the government had to prove the "reasonable estimate of the loss," which was then used to determine defendant's prison sentence. The Seventh Circuit held that a sampling of patient records over a 15-month period was "reasonable." In *Ratanasen v. Cal. Dept. of Health Services*, 11 F.3d 1467 (9th Cir. 1993), a bankruptcy proceeding, the defendant physician failed to participate in the audit exit proceedings or appeal the audit findings, which operated as a waiver to challenge the statistical methodologies used to arrive at the assessment amount. In both *Freitag* and *Ratanasen* there was substantial evidence to establish the guilt of the individual defendants; actual patient billing records were used to properly estimate losses in compliance with the applicable laws. Neither *Freitag* nor *Ratanasen* provides any guidance in a class action where liability and restitution awards depend on complex individual determinations.

Impact Fund also erroneously relies on cases that do not discuss aggregate evidence. In both *In Re Monumental Life Ins.*, 365 F.3d 408 (5th Cir. 2004), a class action by African-Americans for racially based insurance practices, and *Smilow v. Southwestern Bell Mobile Systems*, 323 F.3d 32 (1st Cir. 2003), a class action by wireless telephone customers for charges

allegedly not allowable under the parties' contracts, the courts found class certification proper where liability turned on uniform contract terms, and where individual damages awards could be calculated through consumer records, *i.e.*, amounts paid for insurance policies and phone services. Here, liability could not be determined from proof of a common policy or practice, and restitution could not be derived from individual business records.

Finally, Impact Fund cites *Sav-On* and posits that aggregate proof plays a "particularly important role in the class action context." Impact Fund at 11-12. USB agrees that aggregate proof can assist in *some* cases. However, as Impact Fund acknowledges, *Sav-On* only approves of aggregate proof where the defendant's "centralized practices" are at issue. *Sav-On v. Superior Court*, 34 Cal.4th 319, 333 (2004). Here, there was no evidence of a centralized practice impacting any critical liability issues, but rather disparate testimony from individuals regarding how they independently chose to spend their time. Whatever the benefit to employees in bringing aggregate claims, class actions can also create injustice. *City of San Jose*, 12 Cal.3d at 458-59. Impact Fund drastically overstates the impact on employees that will result from the fair treatment that USB seeks, asserting that the alternative to class treatment "is no protection at all." Where the average class member stands to recover over $57,000, and many class members stand to recover hundreds of thousands of dollars, the alternative to class treatment is clearly individual suits, which BBOs would have sufficient incentive to pursue, were their claims meritorious.

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### C. Plaintiffs' Amici Misconstrue Cases Endorsing Theoretical "Case Management" Tools And Fail To Refute Evidence That The Trial Court *Ignored* Individualized Issues Here.

Plaintiffs' amici rely on cases permitting trial courts to certify class actions *if individualized issues are properly managed*, but ignore overwhelming evidence that the trial court *ignored* individualized issues altogether. AB at 43-50, 52-63. No court has ever sanctioned a trial court's utter failure to manage individualized issues by using "innovative" tools as a proxy for proof when no evidence exists that class members' experiences are in fact uniform or even common. Discussion of "trial management tools" (also discussed in AB at 133-134) in the abstract does not justify the actual flawed application of those "tools" *here*. *See Dailey*, 214 Cal.App.4th at 998 (mere proposal for statistical sampling is an inadequate substitute for demonstrating requisite commonality, and cannot be used to manufacture common issues not presented). Moreover, *Vasquez*, *Daar*, and *Fanucchi* (cited by CELA at 20-21) were all reversals of demurrer rulings where plaintiffs merely survived the pleadings stage and received the *opportunity* to later seek certification. *Vasquez v. Super. Ct.*, 4 Cal.3d 800, 815, 821 (1971); *Daar v. Yellow Cab*, 67 Cal.2d 695, 698, 717 (1967); *Fanucchi v. Coberly-West*, 151 Cal.App.2d 72, 74-75, 80, 83 (1957). These cases are manifestly inapposite on the propositions advanced.

As noted by CELA (at 24 n.14), *Kraus v. Trinity Management*, 23 Cal.4th 116, 137 (2000), was a pre-Proposition 64 UCL representative action that was never certified as a class action. This Court concluded that disgorgement into a fluid recovery was not an available remedy under the UCL, noting that "allowing fluid recovery in representative UCL actions might implicate the due process concerns raised by defendants." The Court

directed that on remand defendant should provide a refund (as restitution) to each former tenant from whom it unlawfully received funds as "liquidated damages" where each tenant was charged the identical (illegal) fee. Thus, *Kraus* did not address the mechanics involved in managing individualized issues in class actions, particularly where liability to class members turns on individualized facts.

CELA similarly misapplies *Granberry v. Islay Investments*, 9 Cal.4th 738, 749 (1995). *Granberry* involved a landlord's alleged improper failure to refund tenants' security deposits. Plaintiffs argued that the defendant should not be permitted to assert a setoff defense for unpaid rent, repairs, and cleaning because the defendant asserted that most of the 10,000 class members' claims would be subject to that defense. This Court rejected such justification for curtailing the defendant's substantive rights, reiterating that "it is inappropriate to deprive defendants of their substantive rights merely because those rights are inconvenient in light of the litigation posture plaintiffs have chosen." *Id.* While the Court reversed the portion of the judgment that refused to grant fluid recovery as a class remedy, it did so to allow the trial court to fashion an appropriate class remedy in light of its pronouncement that defendant was entitled to raise the setoff defense. *Id.* at 751. Like *Kraus*, the issue of the defendant's liability as to the entire class was proven on the defendant's uniform practice of charging tenants an additional $100 for the first month of rent, and there were no issues as to individual circumstances affecting liability.

CELA's citation to *Lockheed Martin v. Sup. Ct.*, 29 Cal.4th 1096 (2003), (at 24) actually supports USB's position and the Court of Appeal's ruling. *Lockheed* involved allegations that defendants discharged dangerous toxins that contaminated drinking water, necessitating the creation of a medical monitoring class designed to address the likelihood that residents would develop cancers and other illnesses. *Id.* at 1101-1102.

This Court *affirmed* the Court of Appeal's *reversal* of the trial court's class certification ruling because plaintiffs had failed to demonstrate that common issues predominated over individual causation and damages questions. *Id.* at 1111. Thus, notwithstanding the presence of undisputed common issues of duty and breach, the varying levels of toxins consumed by members of the proposed class and whether that translated to requisite levels of harm could not be established by common proof. *Id.* at 1106-1107, 1110-1111.

Hence, even in mass tort cases alleging one or more common wrongful acts, the degree and extent of exposure may be so varied as to defeat commonality. *Lockheed* therefore supports the Court of Appeal's determination that class treatment was improper here, where Plaintiffs have utterly failed to show how misclassification can be proven *en masse* for a class of individuals with virtually unfettered discretion to plan and execute their jobs in an endless variety of ways.

While USB does not dispute the general premise that class actions may be proper *if individual issues can be properly managed*, none of the cases cited by Plaintiffs' amici involved certified cases that were *tried* using proper case management tools to effectively manage individualized issues. *See Sav-On*, 34 Cal.4th at 334-35 (courts may consider representative evidence and "other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate"; if individual issues prove unmanageable, trial court retains right to decertify); *Brinker*, 53 Cal.4th at 1022, 1033, 1051-52 (class actions appropriate only "if the defendant's liability can be determined by facts common to all members of the class"; wage and hour context generally requires "uniform policy consistently applied to a group of employees [that] is in violation of wage and hour laws."); *Stephens v. Montgomery Ward*, 193 Cal.App.3d 411, 421

(1987) (evidence of gender discrimination in promotional policies and practices justified certification based on employer's use of company-wide performance appraisal system, standardized review process, standardized hiring criteria, centralized wage rate administration, and personnel information system to establish affirmative action goals rendering deviations at local store level "relatively insignificant"); *Jaimez v. Daiohs USA*, 181 Cal.App.4th 1286 (2010) (primary dispute centered on whether common duties performed qualified as sales duties given undisputed evidence putative class members spent majority of time outside the office; class certified and court suggested exploring "possible use of survey evidence" or "representative sampling" to determine *damages* calculations).

### D. USB Had No Obligation To Keep Time Records For Exempt Employees, And The Absence Of Time Records Does Not Justify Resorting To Aggregate Proof.

Plaintiffs' amici argue that because USB kept no time records for exempt employees, Plaintiffs should be allowed to present their liability claims on an "aggregate basis." Impact Fund at 23-26. California law imposes no duty on an employer to keep records of "hours worked" for employees classified as exempt. Lab. Code § 226(a)(2). While employees challenging the propriety of their classification may attempt to establish damages by proving their hours worked by "just and reasonable inference,"[17] there is *no authority* or logical basis to argue that a non-

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[17] None of the cases cited by Impact Fund concern exempt employees, for whom time records are *not* required. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (employer's compensation policy for *hourly* employees deducting minutes before/after punch in/out may have undercompensated employees, but employee still required to "prove[] that he has in fact performed work for which he was improperly compensated"; no discussion of aggregate evidence); *Hernandez v. Mendoza*, 199 Cal.App.3d 721, 727 (1988) (adopting *Mt. Clemens Pottery* standard re burden of proof on employer of *hourly* worker who failed to maintain

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existent duty to keep time records justifies the use of "aggregate proof" of liability or damages for an entire class. *Sotelo v. Medianews Grp.*, 207 Cal.App.4th 639, 650 (2012) (lack of records meaningless where obligation to track members of proposed class depends on merits of suit).

Here, where liability under the outside salesperson exemption turns on the *location* where the sales duties are performed, time records, had they been kept, would only reflect "hours worked" (and thus potential *damages*) but not *where* they were performed. Thus, their absence does not justify addressing liability through sampling or representative testimony, since time records would not affect the liability determination. *See also Tracy*, 2013 WL 1800197 at *3(lack of timekeeping for outside salespersons meant determination of the amount of time devoted to outside sales activities "must of necessity derive from testimony by individual SMRs").

Moreover, the logical consequence of Impact Fund's argument would be that employers must keep time records for *all* employees regardless of exempt status. In addition to the practical difficulty of requiring a group of salespersons to keep time records while they are out and about meeting with customers and referral sources, such a requirement would fundamentally conflict with proper exempt status since BBOs and other exempt employees should have discretion and freedom to perform their jobs with minimal supervision, not account for and report every

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accurate records of hours worked; no discussion of aggregate evidence); *Wolf v. Super. Ct.*, 107 Cal.App.4th 25, 36 (2003) (addressing contracting party's burden of proof regarding proper payment of contingent compensation in business contract based on exclusive control of financial records; no application to employment relationship and no discussion of aggregate evidence); *Monzon v. Schaefer Ambulance Serv., Inc.*, 224 Cal.App.3d 16, 46 (1990) (employer required to record sleep hours for hourly paid employees on 24-hour shifts to determine compensation for work performed during sleep interruptions; not a class action and no discussion of aggregate evidence).

minute of their workday.

### E. No Evidence Or Authority Supports Plaintiffs' Amici's Argument That Aggregate Evidence Provides The "Most Accurate And Efficient Method" Of Proving Liability And Damages For Labor Code Violations.

Plaintiffs' amici baldly assert, without any support, that aggregate evidence "provides the most accurate and efficient method of proving both liability and damages" in wage and hour cases, particularly misclassification cases. Impact Fund at 2, 25-26. Their superficial citations to general rules of evidence provide no support for the constitutionally flawed sampling process used here. *Id.* at 4-5. Impact Fund's reliance on *Bruno v. Super. Ct.*, 127 Cal.App.3d 120, 123, 129 n.4 (1981),[18] is unavailing. *Bruno* was primarily concerned with whether a fluid class recovery (a remedy unavailable in UCL actions such as this one, *Kraus*, 23 Cal.4th at 137) is available in antitrust class actions alleging price fixing. Because fluid class recovery arises only when damages are distributed, due process concerns are not implicated because certification standards, burdens of proof, standards of liability, and calculation of total damages remain unchanged. *Id.* at 128-129. The court was nevertheless careful to point out that fluid class recovery is not available in all class actions, and would depend on the "specific law under which the action is brought," reiterating this Court's ruling in *City of San Jose* that "class actions are provided only as a means to enforce substantive law." *Id.* at 130. Moreover, "antitrust laws...exhibit no requirement for such precision in compensation" due to the nature of the harm alleged, *i.e.*, forcing

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[18] The quote cited in Impact Fund at 4 is a footnote referencing a law review article regarding the general premise that one can calculate damages on a classwide basis in class actions, with no discussion of liability or how those damages should be calculated.

consumers to pay artificially inflated prices based on illegal collaboration by defendants. *Id.* at 133.

*Bruno* could be certified as a class and members allowed to recover because they were harmed by a single act and suffered the same loss: class members were all consumers subjected to the same milk prices unlawfully fixed by the defendant supermarkets. *Compare Collins v. Safeway Stores*, 187 Cal.App.3d 62, 70, 72 (1986) (class of purchasers of eggs could not be certified because not all products sold to class were defective). *Collins* cautioned against using "fluid recovery" as a "substitute for the elementary duty of a plaintiff to prove damage, an essential part of the cause of action." *Id.* at 74. Similarly here, "aggregate evidence" (Plaintiffs' amici's euphemism for statistical sampling and extrapolation) cannot be used as a *substitute* for Plaintiffs' elementary duty to prove that *all* class members were misclassified. Plaintiffs' amici are not interested in considering evidence in the "aggregate," but rather in artificially limiting the probative evidence to a distorted and inaccurate portion.

## V. THE INACCURATE METHODOLOGY FOR CALCULATING AGGREGATED DAMAGES FURTHER DEMONSTRATES THAT CLASS TREATMENT IS IMPROPER.

### A. *Comcast v. Behrend* Requires That Damages Methodologies Align With The Theory Of Liability.

Plaintiffs' amici attempt to downplay the U.S. Supreme Court's holding in *Comcast Corp. v. Behrend* that a model for calculating class damages must be consistent with the liability theory and must be capable of measuring only those damages attributable thereto. CELA at 46 (citing *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1433 (2013)). In *Comcast*, the plaintiffs brought a class action on behalf of Comcast subscribers, alleging federal antitrust violations premised upon four theories, only one of which,

the "overbuilder" theory, was certified. *Id.* at 1430-1431. Because the proposed method for calculating damages could not differentiate between damages caused by the "overbuilder" theory and the other three rejected theories, the model fell "far short of establishing that damages are capable of measurement on a class-wide basis." *Id.* at 1433. Accordingly, predominance could not be established and the class was decertified. *Id.* *Comcast* holds that the proposed methodology for assigning damages must be directly correlated to the allegedly unlawful conduct forming the basis for liability and must also be capable of resolution on a classwide basis.

This case is plagued by the same deficiency described in *Comcast.* Here, the trial plan allowed recovery by individual claimants against USB where liability as to those individuals could not be established. Moreover, the trial plan failed to present any methodology by which restitution awards could be accurately calculated as to each class member, given the varying ways that BBOs performed their jobs. USB presented evidence of numerous specific individuals who could not have recovered any restitution from USB had they sued separately, either because they were properly classified or worked no overtime hours, but who are entitled under the trial court's Judgment to collect substantial amounts of restitution through the fog of aggregation.

The rationale underlying *Comcast* is that the class certification requirements of commonality and predominance are not "arbitrary," and therefore, a party seeking certification cannot satisfy these requirements with arbitrary methods of proof or vague assurances regarding trial methodology. 133 S.Ct. at 1433-34. If courts allow class certification anytime a plaintiff assumes a method for measuring damages on a classwide basis exists, regardless of whether the method is accurate, the predominance and commonality requirements are reduced to a "nullity." *Id.* The sampling methodology applied here is precisely the sort of

arbitrary measurement rejected by *Comcast* because it failed to translate the legal theory of wrongful conduct (proportional liability for misclassification) into analysis of the impact of that event (whether each BBO was actually misclassified and, if so, during which workweeks). *See id.* at 1435; *see also Tracy*, 2013 WL 1800197 at *6 (applying *Comcast* in holding that class treatment was inappropriate where "the plaintiffs' [misclassification] claims pertain to different [putative class members] in different locations, under different managers, who performed duties outside of their offices to varying degrees and in different ways, the plaintiffs' claims—as well as any determinations to be made concerning damages—are too highly individualized to form the basis for a class action").

Finally, Plaintiffs' amici cite *Comcast* as affirming *Story Parchment's* holding that damages calculations "need not be exact," and on this basis assert that damages may be aggregated, without any consideration for accuracy. *See* CELA at 46-48. CELA's characterization of *Comcast* is wrong. What *Comcast* actually says is that while damages calculations need not be exact, *the proposed calculation methodology must measure only damages attributable to the theory of liability*. 133 S.Ct. at 1433. Because the trial plan's methodology for calculating restitution in the present case required USB to pay monies to BBOs where it was not and could not be determined that they were victims of the alleged wrong, the trial plan violates *Comcast*.

### B. *Amgen Inc. v. Connecticut Retirement Plans* Is Consistent With *Dukes* And Supports The Court Of Appeal's Decision Here.

Plaintiffs' amici also attempt to discredit *Dukes* by criticizing that the Court itself "has not been wholly consistent lately on federal class certification standards," citing *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S.Ct. 1184 (2013). CAC at 5. However, *Amgen*

specifically follows *Dukes* and the two cases are entirely consistent. In fact, *Amgen* actually supports the Court of Appeal's decision prohibiting class treatment here. Plaintiffs' amici cite *Amgen* as authority for what class certification does not require, but fail entirely to state what it *does* require, presenting *Amgen* as if it gives trial courts limitless discretion to certify and try class actions as they see fit. CELA at 48-49. This cannot be the case, given the black letter requirements for class certification (numerosity, well-defined community of interest, superiority, predominance, typicality, and adequacy of representation).

Plaintiffs' amici further cite *Amgen* for their wishful thinking that a party seeking class certification need only show common questions, with no thought as to whether the questions can be answered on a classwide basis. *See* CAC at 5. This argument finds no support in *Amgen*, since *Amgen* requires that common questions *with common answers*[19] must predominate, but that they need not be answered "in favor of the class." *Amgen*, 133 S.Ct. at 1191. *Amgen* considered whether the allegedly material misrepresentations at issue in that securities action "would be so equally for all investors composing the class." *Id.* The court allowed class treatment because the substantive securities law allows a presumption of reliance upon misrepresentations based on a "fraud-on-the-market" theory. *Id.* at 1192. Because the substantive law underlying the cause of action did not require proving actual reliance by individuals, the Court determined that "the class is entirely cohesive: It will prevail or fail in unison. In no event will the individual circumstances of particular class members bear on the inquiry." *Id.* at 1191. Thus, *Amgen* is consistent with *Dukes*, in that it

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[19] *Dukes* defined *what a common question is, i.e.*, one with a common *answer*, the truth or falsity of which is "central to the validity of each one of the claims in one stroke." 133 S.Ct. at 1191.

upheld class treatment where the predominating common question was susceptible to a common *answer*, based on the underlying substantive law.

By contrast, the substantive law of the outside sales exemption does not lend itself to resolution on a classwide basis where its resolution depends upon an individualized analysis of how each BBO spent his time. *Amgen* confirms that certification is inappropriate in the current action where the record "'exhibits some fatal dissimilarity' among class members that would make use of the class-action device inefficient or unfair." *Amgen*, 133 S.Ct. at 1197.

## VI. PLAINTIFFS' AMICI CANNOT REFUTE THE FACT THAT THE TRIAL COURT VIOLATED USB'S DUE PROCESS RIGHTS.

Plaintiffs' amici attempt to show that USB has suffered no due process violation, but fail to provide any facts or authority for their position. Plaintiffs' amici demonstrate their complete unfamiliarity with this case, generally citing the due process standard from *Connecticut v. Doehr*, 501 U.S. 1, 10 (1991), but relying on authorities which are either entirely inapplicable or actually *confirm* the clear due process violation here.

Plaintiffs' amici cite *Civil Service Employees Ins. Co. v. Superior Court*, 22 Cal.3d 362 (1978), where the defendant challenged the constitutionality of an order requiring it to bear the cost of class notice on the ground that due process prohibits requiring a defendant to "finance" a lawsuit against itself. *Id.* at 365-66. In reaching its decision, the Court analyzed the applicable law regarding imposition of costs, which has nothing to do with statistical sampling or representative evidence. *Id.* at 378. Since the defendant provided only cursory briefing regarding due process, the Court did not analyze the *Doehr* factors individually.

Plaintiffs' amici next misrepresent the Court's holding in *Kraus*.

CELA at 29-30. Contrary to CELA's assertion, the Court *did not* find the representative action to be constitutionally firm with regard to the defendant's due process arguments. Rather, the Court held that the remedy sought was *impermissible precisely because it would violate the defendant's due process right* by leaving it open to repeated litigation by nonparties not bound by the judgment. *Kraus*, 23 Cal.4th at 124, 127. To the extent that the defendant claimed to have already paid restitution to individual claimants, the Court confirmed that the defendant was allowed to introduce *individualized evidence of prior payment to that claimant. Id.* at 128. *Kraus* refutes CELA's premise and supports USB's position, establishing that a defendant's due process rights require the opportunity to present individualized defenses, the very protection that USB was denied here.

Finally, Plaintiffs' amici cite the due process analysis in *Bell v. Farmers Ins. Exch.*, 115 Cal.App.4th 715, 750 (2004). Viewed in context, *Bell* supports the Court of Appeal's finding of a due process violation here.[20] Unlike the trial plan below, which used statistical sampling and representative testimony to determine liability and restitution, *Bell* involved the use of scientifically constructed and applied statistical sampling at the damages phase only. While it is well accepted that damages may be awarded where the evidence is uncertain, liability may not similarly be found. *See Bruckman v. Parliament Escrow Corp.*, 190 Cal.App.3d 1051, 1061 (1987) ("Uncertainty of the fact whether any damages were sustained is fatal to recovery, but uncertainty as to the amount is not.")

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[20] Plaintiffs' amici fail to note that *Bell* was issued by the very same appellate division of the Court of Appeal that authored the appellate decision in this case. Plaintiffs' amici are unconvincing in their suggestion that the appellate division below misunderstood its own opinion when it explained that *Bell* is "manifestly inapposite" here.

While the *Bell* court acknowledged the limited use of statistical sampling as a method of proving damages, it confirmed that "the substantive rules of law may not be altered in the interests of efficient litigation." 115 Cal.App.4th at 750. In analyzing the first of *Doehr*'s due process factors, the private interest affected, the court confirmed that a defendant may object to statistical sampling on due process grounds to the extent that it "affect[s] its overall liability." *Id.* at 752. This is precisely the grounds upon which USB objects here. USB was subjected to a $15 million judgment based upon a liability finding infected by a 43.3% margin of error. The Court of Appeal held that this margin "has the potential to increase a defendant's aggregate liability by close to double that which would be warranted if the low end of the margin were applied." *Duran*, Slip.Op. at 65. Thus, *Bell*'s analysis supports the Court of Appeal's finding of an enormous private interest.

Addressing the second *Doehr* factor, the risk of erroneous deprivation as compared with the probable value of additional safeguards, Plaintiffs' amici concede, as if they have read none of the briefing in this case thus far, that a "serious constitutional issue" is presented "when the statistical and sampling methodologies proposed to be used are infirm." CELA at 31. Providing an example of such infirmity, the court in *Bell* struck down an award for double-time compensation where it was infected by a 32% margin of error. *Bell* at 757. Plaintiffs do not dispute that the 43.3% risk of error here is unprecedented, and they *concede* that the procedures were indeed infirm and that their amici are wrong to defend the methodologies used here. RB at 8.

With regard to the third *Doehr* factor, the interest of the party seeking the procedure as well as the state's, Plaintiffs' amici argue that individual class member claims would pose insurmountable practical hurdles and few class members would have a realistic capability of

pursuing their individual claims. CELA at 30-31 (citing *Bell*, 155 Cal.App.4th at 752). Because the average recovery in this case is over $57,000 per claimant, and many class members have standing to recover many hundreds of thousands of dollars, the argument that class members cannot pursue individual claims fails.

Finally, again revealing their complete unfamiliarity with the record in this case, Plaintiffs' amici argue that USB's due process rights were not violated because the trial plan "[w]ould raise due process issues *if* it served to restrict [the defendant's] right to present evidence against the claims." CELA at 33. On the record here, this is precisely the due process violation that USB suffered, and CELA's citation to *Bell* on this point directly *supports* finding a due process violation. As the Court of Appeal held, the trial plan "prevented USB from submitting any relevant evidence in its defense as to 239 class members out of a total class of 260 plaintiffs." *Duran*, Slip.Op. at 60. "Whether the trial court would have given credence to such evidence is beside the point. A trial in which one side is almost completely prevented from making its case does not comport with standards of due process." *Id.*

Thus, *Civil Service Employees*, *Kraus*, and *Bell* are all either entirely inapplicable, or actually *support* the Court of Appeal's finding of a due process violation. If Plaintiffs' amici's best authorities can only confirm the validity of USB's due process arguments, then there is no legitimate dispute that USB suffered a serious due process violation.

## VII. PLAINTIFFS' AMICI IGNORE APPLICABLE UCL LAW AND THE LACK OF EVIDENCE SUPPORTING THE RESTITUTION AWARDS IN THIS CASE.

Only the CAC amicus brief attempts to justify the monetary awards to class members under the Unfair Competition Law ("UCL"), the sole claim here. CAC at 7-8. Relying on outdated caselaw, CAC makes

sweeping statements that the UCL grants trial courts broad equitable powers and "significant leeway" to fashion remedies, and that the UCL's "central objective" is "to foreclose retention" of "ill-gotten gains" and "illicit profits." CAC at 2, 7-8. (citing *Fletcher v. Security Pacific Nat. Bank* 23 Cal.3d 442, 449 (1979) and *Bank of the West v. Superior Court,* 2 Cal.4th 1254, 1267 (1992).[21] These statements misstate current UCL law and do not support the trial court's judgment in this action.

This Court's precedents after *Fletcher* and *Bank of the West* make clear that "while the scope of conduct covered by the UCL is broad, its remedies are limited" to restitution and injunctive relief. Bus. & Prof. Code §17203; *Korea Supply* v. *Lockheed Martin*, 29 Cal.4th 1134, 1144-1146 (2003). Thus, a trial court's discretion is not unlimited and must be exercised within the confines of Section 17203. Furthermore, it is well-established that "ill-gotten gains" and "illicit profits" are not recoverable under the UCL unless they are restitutionary in nature. *Kraus*, 23 Cal.4th at 126-127, 137 (trial court has no authority to order defendant to surrender profits other than fees directly paid by plaintiffs); *Korea Supply*, 29 Cal.4th at 1149-1151 (UCL does not permit disgorgement of profits from one company to another); *cf. Californians for Disability Rights v. Mervyn's*, 39 Cal.4th 223, 232 (2006)(restitution must be comprised of identifiable funds in which a plaintiff has a vested interest); *Cortez v. Purolator Air Filtration Products*, 23 Cal.4th 163, 172 (2000)(earned, unpaid wages constitutes restitution). Thus, any notion that the trial court was justified in issuing its awards because they represent "ill-gotten profits" is not a proper basis for ordering restitution.

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[21] Impact Fund similarly argues that the award constitutes "ill-gotten gains" (Impact Fund at 24, n.12) and CELA states that "probable profits" may be estimated (CELA at 47).

CAC superficially dismisses the lack of evidence supporting the restitution awards to individual class members here, which carried with them an unprecedented, unconstitutional 43% margin of error, by stating that USB "is entitled to a fair trial and not a perfect one." The 43% margin of error is so removed from "scientific certainty" that CAC's argument entirely misses the mark. CAC at 8. CAC argues in favor of the propriety of representative evidence without any discussion of the standards for awarding restitution under the UCL. CAC at 8.

The UCL requires that "restitutionary awards encompass quantifiable sums one person owes to another" and that they are supported by substantial evidence. *Cortez*, 23 Cal.4th at 178 (2000)(restitution comprised of premium pay differential for overtime hours worked pursuant to uniform unlawful alternative workweek schedule); *Colgan v. Leatherman Tools*, 135 Cal.App.4th 663, 699, 672 (2006) ("restitution under [the UCL] must be of a measurable amount" and "requires substantial evidence to support it"); *see also Day v. AT&T*, 63 Cal.App.4th 325, 338 (1998)(Section 17203 "operates only to return to a person those *measurable amounts* which are *wrongfully taken* by means of an unfair business practice")(emphasis original). Here, the purported overtime amounts awarded to absent class members were not based on any evidence of actual overtime pay owed to these individuals, and even the RWG members' awards were based on vague recollections of overtime estimates, and did not constitute specific, quantifiable amounts of overtime actually worked.

Plaintiffs' amici also ignore UCL principles and caselaw, and instead focus on principles relating to monetary damage awards in non-UCL class actions. Impact Fund at 23-26; CELA at 46-48 (citing *Mt. Clemens Pottery,* 328 U.S. at 687 and *Story Parchment v. Paterson Parchment Paper*, 282 U.S. 555 (1931)). Such cases citing the "just and

reasonable" standard are irrelevant; they apply to legal claims for *damages* under federal labor laws or other non-UCL statutory schemes. These authorities do not apply to (or even mention) equitable claims for *restitution* under the UCL. Plaintiffs' amici seek to have the restitution award treated as damages, *i.e.*, remedial or punitive in nature, but fail to appreciate that damages and restitution are fundamentally different legal remedies that cannot be treated or analyzed in the same manner. *See AIU Ins. v. Superior Court*, 51 Cal.3d 807, 841 (1991) (damages are given to a plaintiff for a suffered loss, whereas restitution is to give back the very thing to which plaintiff is entitled).

## CONCLUSION

Plaintiffs' amici fail to present any authority or argument justifying reversal of the Court of Appeal's decision in *this* case. Instead, they urge this Court to ignore its own precedents, running afoul of established class action principles and due process jurisprudence primarily because this case concerns wage and hour claims. While Plaintiffs' amici warn of the purported demise of class actions, this Court need only confirm and enforce existing law to allow proper class actions to proceed while also protecting our courts and litigants from the serious harms caused by unclear and unfair class certification standards and patently unjust trial methodologies. The Court of Appeal properly reversed the trial court's trial methodology, and its denial of USB's second decertification motion. For all the reasons set forth herein and in USB's Answer Brief, this Court should affirm the Court of Appeal's decision in full.

Dated: August 5, 2013 Respectfully submitted,

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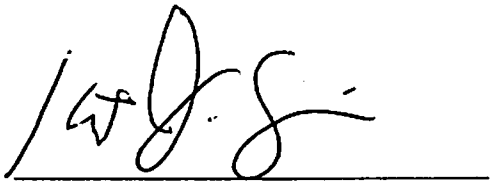
## CERTIFICATE OF WORD COUNT

(Cal. Rules of Court)

The text of this brief, excluding portions authorized to be excluded by the Rules of Court, consists of 16,838 words as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: August 5, 2013



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## 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 August 6, 2013, I served upon the interested party(ies) in this action the following document described as:

**U.S. BANK NATIONAL ASSOCIATION'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS**

By placing a true copy thereof enclosed in sealed envelope(s) addressed as stated on the attached mailing list. for processing by the following method:

☒ By placing such envelope(s) with postage thereon fully prepaid into Carothers DiSante & Freudenberger LLP's interoffice mail for collection and mailing pursuant to ordinary business practice. I am familiar with the office practice of Carothers DiSante & Freudenberger LLP for collecting and processing mail with the United States Postal Service, which practice is that when mail is deposited with the Carothers DiSante & Freudenberger LLP personnel responsible for depositing mail with the United States Postal Service, such mail is deposited that same day in a post box, mailbox, sub-post office, substation, mail chute, or other like facility regularly maintained by the United States Postal Service in San Francisco, California.

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 San Francisco, California.

Anna Skaggs
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