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September 20, 2012

VIA HAND DELIVERY

The Chief Justice of the State of California
and the Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Re: *Harris v. Superior Court,* Court of Appeal Case No. B195121
Request for Review, Depublication, or Grant-and-Transfer

May it please the Court:

The California Employment Law Council ("CELC")[1] respectfully requests that this Court accept review and reverse the case attached to this letter, order the decision depublished, or issue a summary grant-and-transfer order. The court of appeal simply did not adhere to this Court's mandate in *Harris v. Superior Court*, 53 Cal. 4th 170 (2011) (*Harris II*).[2]

In that case, this Court clarified the first prong of the administrative exemption in several respects. It expressly held that the court of appeal had erred by ruling that the administrative exemption applies only to work performed "at the level of policy or general operations." Despite this express holding, the court of appeal, on remand, *again* concluded that the first prong of the exemption applies only to work performed "at the level of policy or general operations."

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[1] The CELC is a voluntary, nonprofit organization that works to foster reasonable, equitable, and progressive rules of employment law. CELC's membership comprises more than 50 private sector employers, including representatives from many different sectors of the economy (aerospace, automotive, banking, technology, construction, energy, manufacturing, telecommunications, and others). CELC's members include some of the nation's most prominent companies, and collectively, they employ in excess of half a million Californians. This Court granted CELC leave to file an *amicus curiae* brief in *Harris II*, as well as many of California's leading employment cases, such as *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988); *Cassista v. Community Foods, Inc.*, 5 Cal. 4th 1050 (1993); *Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238 (1994); *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 17 Cal. 4th 93 (1998); *White v. Ultramar, Inc.*, 21 Cal. 4th 563 (1999); *Armendariz v. Foundation Health Psychcare Servs.*, 24 Cal. 4th 83 (2000); and *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163 (2000).

[2] For clarity and ease of reference, this Court's decision, *Harris v. Superior Court*, 53 Cal. 4th 170 (2011), is referred to as "*Harris II.*" The court of appeal's original decision, *Harris v. Superior Court*, 64 Cal. Rptr. 3d 547 (2007), is referred to as "*Harris I.*" The court of appeal's decision on remand, *Harris v. Superior Court*, 207 Cal. App. 4th 1225 (2012), is referred to as "*Harris III.*"

Review and reversal, depublication, or a grant-and-transfer order is essential to correct the court of appeal's error and the consequent confusion regarding the proper scope of the administrative exemption. The CELC explains below.

In 2011, This Court Reversed the Court of Appeal's Holding that Work Must be Performed "At the Level of Policy or General Operations."

The first prong of the administrative exemption applies only to those employees who perform "work directly related to management policies or general business operations."[3] In *Harris II*, this Court held that this prong has two components. First, it has a qualitative component, under which courts are to determine whether the employee's work is administrative in nature. Second, it has a quantitative component, under which courts are to determine whether the work is of substantial importance to the management or operations of the business.[4]

The qualitative inquiry, this Court explained, is guided by 29 C.F.R 541.205(b)(2000), which provides a non-exhaustive list of types of work that are qualitatively administrative:

> "The administrative operations of the business include the work performed by so-called white-collar employees engaged in 'servicing' a business as, for, example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control. An employee performing such work is engaged in activities relating to the administrative operations of the business notwithstanding that he is employed as an administrative assistant to an executive in the production department of the business."

Harris II, 53 Cal. 4th at 181 (quoting 29 C.F.R 541.205(b)(2000)).

This Court in *Harris II* explained that the court of appeal in *Harris I* did not adequately consider section 205(b). Instead, the court of appeal focused on section 541.205(a), which provides that work meets the "directly related" prong only if it is related to "the administrative operations of a business as distinguished from production, or in a retail or service establishment, sales work." By reading section 205(a) in isolation – and disregarding the list of exempt work in 205(b) – the court of appeal concluded that "only work performed at the level of *policy* or *general* operations can qualify as 'directly related to management policies or general business operations.'" *Harris I*, 64 Cal. Rptr. 3d at 556 (emphasis in original).

[3] The exemption is articulated in Cal. Code Reg. tit. 8, § 11040, ¶ 2(1)(A)(2)(a)(i) (Cal. Wage Order No. 4-2001). This Court's decision did not reach to the other elements of the administrative exemption – the requirement that an employee must be paid at a certain level, the requirement that his or her primary duties involve administrative work, and the requirement that he or she discharge those primary duties by regularly exercising independent judgment and discretion.

[4] As the *Harris* plaintiffs did not pursue the quantitative component of the test, this Court focused exclusively on the qualitative component.

This Court unanimously rejected the "level of policy" requirement:

> [The court of appeal] erred when it relied on distinguishable authority to create a rigid rule, an outcome even the *Bell* cases cautioned against. . . .
>
> The majority below focused on Federal Regulations former part 541.205(a), concluding that "only work performed at the level of *policy* or *general* operations can qualify as 'directly related to management policies or general business operations.' In contrast, work that merely carries out the particular day-to-day operations of the business is production, not administrative, work. That is the administrative/production worker dichotomy, properly understood. [Fn. omitted.]"
>
> The majority below provided its own gloss to the administrative/production worker dichotomy and used it, rather than applying the language of the relevant wage order and regulations. Such an approach fails to recognize that the dichotomy is a judicially created creature of the common law which has been effectively superseded in this context by the more specific and detailed statutory and regulatory enactments. . . .
>
> It [the "directly related to" prong] is not so narrowly limited as the majority below declared.

Harris II, 53 Cal. 4th at 187-88 (emphasis in original).

The Court of Appeal, on Remand, Adopted the Same Legal Standard that this Court Expressly Rejected.

On remand, the court of appeal re-asserted the same rule that this Court expressly rejected. It held: "only duties performed at the level of *policy* or *general* operations can satisfy the qualitative component of the 'directly related' requirement." *Harris III*, 207 Cal. App. 4th at 1238 (emphasis in original). The table on the following page displays the court of appeal's election not to follow the rule that this Court announced.

COURT OF APPEAL, IN *HARRIS I* (2007)	SUPREME COURT, IN *HARRIS II* (2011)	COURT OF APPEAL, IN *HARRIS III* (2012)
"**[O]nly work performed at the level of *policy* or *general* operations can qualify as 'directly related to management policies or general business operations.' In contrast, work that merely carries out the particular, day-to-day operations of the business is production, not administrative, work.** That is the administrative/ production worker dichotomy, properly understood. We are aware of no other plausible interpretation of the "directly related" requirement as it relates to the *type* of work performed . . . ."	"The majority below focused on Federal Regulations former part 541.205(a), concluding that '**only work performed at the level of *policy* or *general* operations can qualify as "directly related to management policies or general business operations." In contrast, work that merely carries out the particular day-to-day operations of the business is production, not administrative, work.** That is the administrative/ production worker dichotomy, properly understood. [Fn. omitted.]' The majority below provided its own gloss to the administrative/ production worker dichotomy and used it, rather than applying the language of the relevant wage order and regulations. Such an approach fails to recognize that the dichotomy is a judicially created creature of the common law which has been effectively superseded in this context by the more specific and detailed statutory and regulatory enactments. . . . It [the 'directly related' prong] is not so narrowly limited as the majority below declared."	"**[O]nly duties performed at the level of *policy* or *general* operations can satisfy the qualitative component of the 'directly related' requirement. In contrast, work duties that merely carry out the particular, day-to-day operations of the business are production, not administrative, work.** We are aware of no other plausible interpretation of the qualitative component of the 'directly related' requirement . . . ."

The court of appeal changed its holding in only one respect – finding that the qualitative component, not the "directly related" prong as a whole, imposes the "level of policy" requirement. With all respect, this makes no sense. This Court held that the "directly related" prong does *not* include a "level of policy" requirement. Its sub-part – the qualitative component – then, cannot include any such requirement either.

To support its conclusion, the court of appeal necessarily had to ignore this Court's guidance on the persuasiveness of several cases. For example, in its first decision, the court of appeal cited *Bratt v. County of Los Angeles*, 912 F.2d 1066 (9th Cir. 1990), as a basis for its "level of policy" requirement. This Court, however, found *Bratt* unpersuasive and declined to follow it:

> Applying *Bratt* to this case, the majority below reasoned that "although advising management *about the formulation of policy* is exempt administrative work, advising management *about the settlement of an individual claim* is not." The majority held that plaintiffs' duties here are "not carried on at the level of policy or general operations."

> *Bratt's persuasiveness is in doubt.* The Ninth Circuit has subsequently held that under more recent applicable federal regulations, claims adjusters are exempt from the Fair Labor Standards Act of 1938's overtime requirements "if they perform activities such as interviewing witnesses, making recommendations regarding coverage and value of claims, determining fault and negotiating settlements." (*Miller v. Farmers Ins. Exch.* (*In Re Farmers Ins. Exch.*) (9th Cir. 2007) 481 F.3d 1119.)

Harris II, 53 Cal. 4th at 189 (emphasis in first paragraph in original; emphasis in second paragraph supplied).

On remand, the court of appeal substituted a cite to *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120 (9th Cir. 2002) for its earlier citation to *Bratt*. *Bothell* held that the administrative exemption applies only to employees engaged in "running the business itself or determining its overall course or policies," not just in "the day-to-day carrying out of the business's affairs." 299 F.3d at 1125. However, the source of the *Bothell* holding is *Bratt*. Indeed, it is the *only* case cited by *Bothell* for the proposition. *See Bothell*, 299 F.3d at 1127, 1128.

Moreover, the court of appeal ignored this Court's guidance, and did not cite *Miller v. Farmers Ins. Exch.* once. The court of appeal likewise ignored two federal cases that this Court described as instructive, both of which found that claims adjusters perform work directly related to management policies or general business operations. *See id.* at 189 n.8 (describing, *inter alia*, *Smith v. Gov't Employees Ins. Co.*, 590 F.3d 886, 897 (D.C. Cir. 2010), and *McAllister v. Transamerica Occidental Life Ins. Co.*, 325 F.3d 997 (8th Cir. 2003), as "instructive").

* * *

The court of appeal's opinion failed to follow this Court's articulation of the administrative exemption, relied on cases that this Court found unpersuasive, and disregarded this Court's reference to instructive cases. This Court has three options for correcting the court of appeal's error: (1) it may grant review and reverse the court of appeal's opinion; (2) it may depublish its opinion; or (3) it may issue a grant-and-transfer under California Rule of Court 8.528(d), to a *different* California court of appeal.[5]

[5] California Rule of Court 8.528(d) authorizes this Court to "transfer the cause to *a* Court of Appeal." The indefinite article "a" indicates that transfer to *any* California court of appeal is permissible. In contrast, when the Rules refer to a particular court of appeal, they employ the definite article "the." *See* Cal. R. Ct. 8.528(e) ("After transferring to itself, before decision, a cause pending in *the* Court of Appeal, the Supreme Court may retransfer the cause to *a* Court of Appeal without decision.") (emphasis supplied). Transfer back to the Second Appellate District, Division One (which decided *Harris I* and *Harris III*) would appear to be an exercise in futility, given that Division One now has essentially issued the same opinion twice.

Respectfully submitted,

PAUL HASTINGS LLP

By: _____
Jeffrey P. Michalowski

For *Amicus Curiae*
CALIFORNIA EMPLOYMENT LAW COUNCIL

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FRANCES HARRIS et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; LIBERTY MUTUAL INSURANCE COMPANY et al., Real Parties in Interest. LIBERTY MUTUAL INSURANCE COMPANY et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; FRANCES HARRIS et al., Real Parties in Interest.

No. B195121 consolidated with No. B195370, No. B195370 consolidated with No. B195121

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

207 Cal. App. 4th 1225*; *144 Cal. Rptr. 3d 289*; *2012 Cal. App. LEXIS 830*; *162 Lab. Cas. (CCH) P61,276

July 23, 2012, Opinion Filed

PRIOR HISTORY: [***1]

Superior Court Nos. BC246139 & BC246140, Carolyn B. Kuhl, Judge. JCCP No. 4234--Liberty Mutual Overtime Cases.

Harris v. Superior Court, 53 Cal. 4th 170, 135 Cal. Rptr. 3d 247, 266 P.3d 953, 2011 Cal. LEXIS 13237 (2011)

DISPOSITION: Petition in No. B195121 granted; petition in No. B195370 denied.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

Insurance adjusters sued their employers, seeking damages based on overtime work for which they alleged they were not properly paid. The trial court certified a proposed class but later decertified claims arising after October 1, 2000. (Superior Court of Los Angeles County, Nos. BC246139 and BC246140, Carolyn B. Kuhl, Judge.) The Court of Appeal granted writ review for the adjusters, and the Supreme Court reversed and remanded for reconsideration.

The Court of Appeal granted the adjusters' petition for writ of mandate with directions and denied the employers' petition for writ of mandate. The employers' motion for class decertification should have been denied in its entirety and the adjusters' motion for summary adjudication should have been granted because there was a predominant common issue under both Industrial Welfare Commission wage order No. 4-1998 (applying to claims arising before Oct. 1, 2000) and Industrial Welfare Commission wage order No. 4-2001 (applying to claims arising thereafter), with regard to the qualitative component of the "directly related" requirement for the administrative exemption from overtime requirements. The adjusters' work duties did not satisfy the qualitative component, and the adjusters were not exempt administrative employees, because their duties were not carried on at the level of policy or general business operations. A few examples of potentially administrative work were dwarfed by the mountain of evidence that the adjusters were primarily engaged in the day-to-day tasks of adjusting individual claims, such as investigating, making coverage determinations, setting reserves, and negotiating settlements. The fact that the class was heterogeneous in some respects [*1226] did not undermine the conclusion there was no evidence of class members engaging primarily in work at the level of management policy or general business operations. (Opinion by Mallano, P. J., with Johnson, J., concurring. Concurring and dissenting opinion by Rothschild, J. (see p. 1249).)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Labor § 11--Overtime--Administrative Exemption--Scope--Burden of Proof.--Both Industrial Welfare Commission wage order No. 4-1998, applying to claims arising before October 1, 2000, and Industrial Welfare

Commission wage order No. 4-2001, applying to claims arising thereafter, provide for certain exemptions from the overtime compensation requirements. The exemptions are affirmative defenses, so an employer bears the burden of proving that an employee is exempt. Wage order No. 4-1998 made persons employed in administrative, executive, or professional capacities exempt from overtime compensation requirements (wage order No. 4-1998, subd. 1(A)). Wage order No. 4-1998 did not articulate the precise scope of the administrative exemption. It did, however, limit the exemption to employees engaged in work that is primarily intellectual, managerial, or creative, and that requires exercise of discretion and independent judgment, and for which the remuneration is not less than $1150.00 per month (wage order No. 4-1998, subd. 1(A)(1)).

(2) Labor § 11--Overtime--Administrative Exemption--Scope.--*Lab. Code, § 510*, provides that a California employee is entitled to overtime pay for work in excess of eight hours in one workday or 40 hours in one week. (*Lab. Code, § 510, subd. (a)*). However, *Lab. Code, § 515, subd. (a)*, added by the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999, exempts from overtime compensation executive, administrative, and professional employees whose primary duties meet the test of the exemption, who regularly exercise discretion and independent judgment in performing those duties and who earn a monthly salary at least twice the state minimum wage for full-time employees (*Lab. Code, § 515, subd. (a)*). Under the statute, to qualify as administrative, employees must (1) be paid at a certain level, (2) their work must be administrative, (3) their primary duties must involve that administrative work, and (4) they must discharge those primary duties by regularly exercising independent judgment and discretion. These statutory standards are further understood in light of the applicable wage order. [*1227]

(3) Labor § 11--Overtime--Administrative Exemption--Interpretation.--Industrial Welfare Commission wage order No. 4-2001, subd. 1(A)(2)(f), provides that the terms "exempt" and "non-exempt" are to be construed under certain incorporated regulations listed in the federal Fair Labor Standards Act of 1938 (*29 U.S.C.S. § 201 et seq.*) then in effect. So, just as *Lab. Code, § 515*, is understood in light of the wage order, the wage order is construed in light of the incorporated federal regulations. California's Industrial Welfare Commission deems only those federal regulations specifically cited in its wage orders, and in effect at the time of promulgation of these wage orders, to apply in defining exempt duties under California law. Accordingly, wage order No. 4-2001 specifically directs that whether work is exempt or nonexempt shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: *29 C.F.R. §§ 541.201-205*, 541.207-208, 541.210, and 541.215. (wage order No. 4-2001, subd. 1(A)(2)(f)).

(4) Labor § 11--Overtime--Administrative Exemption--Directly Related--Qualitative Component.--Industrial Welfare Commission wage order No. 4-2001 exempts from overtime requirements persons employed in administrative, executive, or professional capacities (wage order No. 4-2001, subd. 1(A)). Subdivision 1(A)(2) describes the administrative exemption in some detail. It provides, in part, that persons are employed in an administrative capacity if their duties and responsibilities involve office or nonmanual work directly related to management policies or general business operations of their employer or the employer's customers (wage order No. 4-2001, subd. 1(A)(2)(a)(i)). It is the "directly related" phrase that distinguishes between administrative operations and production or sales work (29 C.F.R. § 541.205(a) (2000)). 29 C.F.R. former part 541.205(b) (2000) discusses the qualitative requirement that the work must be administrative in nature. It explains that administrative operations include work done by white collar employees engaged in servicing a business. Such servicing may include advising management, planning, negotiating, and representing the company. 29 C.F.R. former part 541.205(c) (2000) relates to the quantitative component that tests whether work is of substantial importance to management policy or general business operations.

(5) Labor § 11--Overtime--Administrative Exemption--Interpretation.--The same federal regulations that are incorporated into Industrial Welfare Commission wage order No. 4-2001 must be used as a guide to interpreting Industrial Welfare Commission wage order No. 4-1998, and the analysis of the administrative exemption should be the same under both wage orders. [*1228]

(6) Labor § 11--Overtime--Administrative Exemption--Qualitative Requirement--Interpretation.--To qualify for the administrative exemption to overtime requirements under either Industrial Welfare Commission wage order No. 4-1998 or Industrial Welfare Commission wage order No. 4-2001, an employee must be primarily engaged in work that qualitatively is directly related to management policies or general business operations (wage order No. 4-2001, subd. 1(A)(2)(a)(i)). In one sense, every type of work directly relates to management policy, because every employee does work that carries out, or is governed by, management policy. California's wage and hour regulations, however, are liberally construed in furtherance of their remedial purpose, and

exemptions to the regulations are therefore narrowly construed. The same interpretive principles apply to the Fair Labor Standards Act of 1938 (*29 U.S.C. § 201 et seq.*) and its exemptions. Any interpretation that would mean that all types of work meet the qualitative component of the directly related requirement is consequently untenable.

(7) Labor § 11--Overtime--Administrative Exemption--Directly Related--Qualitative Component--Primarily Engaged.--The qualitative component of the "directly related" requirement for the administrative exemption to overtime regulations provides that an employee's work duties meet the test of the exemption only if they relate to the administrative operations of a business as distinguished from production or, in a retail or service establishment, sales work (29 C.F.R. § 541.205(a) (2000)). Only duties performed at the level of policy or general operations can satisfy the qualitative component of the "directly related" requirement. In contrast, work duties that merely carry out the particular, day-to-day operations of the business are production, not administrative, work. An employee doing exempt administrative work is engaged in running the business itself or determining its overall course or policies, not just in the day-to-day carrying out of the business affairs. The qualitative component is determinative for any employees whose work falls squarely on the production side of the line. An exempt administrative employee be primarily engaged in work that is directly related to management policies or general business operations (29 C.F.R. § 541.205(a) (2000)). An employee who is primarily (namely, more than half of his or her work time (*Cal. Code Regs., tit. 8, § 11040, subd. (2)(N)*)) engaged in work that does not satisfy the qualitative component therefore is not primarily engaged in work that is directly related to management policies or general business operations. Such an employee thus cannot be an exempt administrative employee.

(8) Labor § 11--Overtime--Administrative Exemption--Directly Related--Qualitative Component--Insurance Adjusters--Primarily Engaged.--The work of insurance adjusters was not administrative for [*1229] purposes of an exemption from overtime requirements under Industrial Welfare Commission wage order No. 4-1998, applying to claims arising before October 1, 2000, and Industrial Welfare Commission wage order No. 4-2001, applying to claims arising thereafter because a few examples of potentially administrative work were dwarfed by the mountain of evidence that the adjusters were primarily engaged in the day-to-day tasks of adjusting individual claims, such as investigating, making coverage determinations, setting reserves, and negotiating settlements.

[*Cal. Forms of Pleading and Practice (2012) ch. 250, Employment Law: Wage And Hour Disputes, § 250.14.*]

(9) Labor § 11--Overtime--Administrative Exemption--Servicing--Scope.--29 C.F.R. part 541.205(b) (2000) explains that administrative operations, for purposes of the administrative exemption to overtime regulations, include work done by white collar employees engaged in servicing a business and that such servicing may include advising management, planning, negotiating, and representing the company. Thus, planning, negotiating, and the like are part of the administrative operations of the business (namely, they satisfy the qualitative component of the "directly related" requirement for the administrative exemption) only insofar as they constitute servicing the business within the meaning of the regulation. And the court's use of the word "may" at least allows for the possibility that not all planning, negotiating, and the like constitutes such servicing. Some planning, negotiating, and the like satisfies the qualitative component of the directly related requirement for the administrative exemption to overtime regulations, but some does not. Consequently, some dividing line is necessary.

(10) Labor § 11--Overtime--Administrative Exemption--Production.--Workers who do not produce their employer's product can still do work that fails to satisfy the qualitative component of the directly related requirement for the administrative exemption to overtime regulations. The qualitative component of the "directly related" requirement distinguishes between kinds of office or nonmanual work; it does not classify all office work as administrative.

(11) Courts § 40--Stare Decisis--Opinions of Lower Federal Courts.--The California Court of Appeal is not bound by decisions of the lower federal courts on issues of federal law. [*1230]

(12) Labor § 11--Overtime--Administrative Exemption--Job Titles--Case-specific Analysis.--Job titles by themselves determine nothing with regard to the qualitative component of the directly related requirement for the administrative exemption to overtime regulations (*29 C.F.R. § 541.201(b)(1) (2000)*); *Cal. Code Regs., tit. 8, § 11040, subd. (1)(A)(2)(f)* (incorporating *29 C.F.R. § 541.201 (2000)* into Industrial Welfare Commission wage order No. 4-2001)). In every case, the exempt or nonexempt status of any particular employee must be determined on the basis of whether his or her duties, responsibilities, and salary meet all the requirements of the exemption at issue (*29 C.F.R. § 541.201(b)(2) (2000)*). In resolving whether work qualifies as administrative,

courts must consider the particular facts before them and apply the language of the statutes and wage orders at issue. Application of the administrative exemption thus requires case-specific factual analysis of the work duties actually performed by the particular employees involved.

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Sidley Austin, Douglas R. Hart, Geoffrey D. DeBoskey; Sheppard Mullin Richter & Hampton, Robert J. Stumpf, Jr., and Karin Dougan Vogel for Petitioners and for Real Parties in Interest Liberty Mutual Insurance Company and Golden Eagle Insurance Corporation.

Hud Collins as Amicus Curiae on behalf of Petitioners and Real Parties in Interest Frances Harris, Dwayne Garner, Marion Brenish-Smith, Steven Brickman, Kelly Gray, Adell Butler-Mitchell and Lisa McCauley.

No appearance for Respondent.

JUDGES: Opinion by Mallano, P. J., with Johnson, J., concurring. Concurring and dissenting opinion by Rothschild, J. [***2]

OPINION BY: Mallano

OPINION

[**291] **MALLANO, P. J.**--These writ proceedings are before us on remand from the Supreme Court following the court's decision in *Harris v. Superior Court* [*1231] *(2011) 53 Cal.4th 170 [135 Cal.* [**292] *Rptr. 3d 247, 266 P.3d 953]* (*Harris*). The court reversed our previous decision in this case, concluding that we had "misapplied the substantive law." (*Id. at p. 175.*) The court remanded for us to reconsider the matter in light of the correct legal standard.

Defendants are insurance companies, the employers of plaintiffs, the companies' claims adjusters, who seek damages based on overtime work for which they allege they were not properly paid (Employers and Adjusters, respectively). Adjusters' claims are governed by two different California regulations promulgated by California's Industrial Welfare Commission (IWC): wage order No. 4-98 (Wage Order 4-1998), applying to claims arising before October 1, 2000, and wage order No. 4-2001 (Wage Order 4-2001), applying to claims arising thereafter.

Employers claim that the administrative exemption to the overtime compensation requirements applies to claims adjusters. Adjusters claim that the exemption does not apply. In addition, Adjusters contend [***3] that the issue of whether their work duties are of the kind required for application of the administrative exemption is a predominant issue common to the claims of all putative class members, warranting class certification. The trial court initially agreed and certified Adjusters' proposed class. Later, however, the court revisited the issue and decertified the class for all claims arising after October 1, 2000, on the ground that under Wage Order 4-2001, but *not* under Wage Order 4-1998, the work duties issue is neither dispositive nor a predominant issue that would justify class treatment of Adjusters' claims.

Both sides petitioned for writ review. Employers seek decertification of the portion of the class that remains certified. Adjusters seek recertification of the decertified portion of the class and also challenge the trial court's denial of their motion for summary adjudication of Employers' affirmative defense based on the administrative exemption. We grant Adjusters' petition and deny Employers' petition because Adjusters' primary work duties are the day-to-day tasks of adjusting individual claims not directly relating to management policies or general business operations.

BACKGROUND

As [***4] stated in *Harris*: "[Adjusters are] claims adjusters employed by Liberty Mutual Insurance Company and Golden Eagle Insurance Corporation (collectively [Employers]). [Adjusters] filed four class action lawsuits alleging [Employers] erroneously classified them as exempt 'administrative' employees and seeking damages based on unpaid overtime work. The four actions were coordinated into one proceeding. [Adjusters] also moved for class certification. The trial court certified a class of 'all non-management California employees classified as exempt by Liberty Mutual and Golden Eagle who [*1232] were employed as claims handlers and/or performed claims-handling activities.'" (*Harris, supra, 53 Cal.4th at p. 175.*)

Adjusters and Employers subsequently filed cross-motions for summary adjudication of Employers' affirmative defense that Adjusters are exempt administrative employees and thus not entitled to overtime compensation. Employers simultaneously moved, in the alternative, to decertify the class, and they later withdrew their motion for summary adjudication.

"The trial court decertified the class in part, depending on whether [Adjusters'] claims arose before or after

October 1, 2000, the date the IWC [***5] replaced an earlier version of Wage Order 4. The court afforded [**293] the disparate treatment because it felt bound by the authority of *Bell v. Farmers Ins. Exchange (2001) 87 Cal.App.4th 805 [105 Cal. Rptr. 2d 59]* (*Bell II*) and *Bell v. Farmers Ins. Exchange (2004) 115 Cal.App.4th 715 [9 Cal. Rptr. 3d 544]* (*Bell III*) (collectively *Bell* cases).

"For claims arising before October 1, 2000, the trial court decided that the *Bell* cases compelled a ruling that [Adjusters] were nonexempt 'production workers' under the version of Wage Order 4 adjudicated in those cases. (See *Bell II, supra, 87 Cal.App.4th at p. 826.*) The court decertified the class as to all claims arising after October 1, 2000, the effective date of a new Wage Order 4. The court did not believe the *Bell* cases applied to the revised version of Wage Order 4 because those cases did not consider the new wage order, nor did they apply the federal regulations specifically incorporated into it. Recognizing that the law was unsettled, the court suggested the parties seek interlocutory review by the Court of Appeal.

"Both parties did so. [Adjusters] sought review of the order partially decertifying the class and denying their motion for summary adjudication. [Employers] sought review [***6] of the trial court's partial denial of their motion to decertify the class." (*Harris, supra, 53 Cal.4th at pp. 175-176.*)

We issued an order to show cause, ordered that the petitions be consolidated and, in a published opinion, granted Adjusters' petition and denied Employers' petition. We directed the trial court to grant Adjusters' motion for summary adjudication and to deny in its entirety Employers' motion to decertify the class. (See *Harris, supra, 53 Cal.4th at p. 176.*)

The Supreme Court granted review and reversed. The court identified certain errors in our reasoning and clarified certain points concerning the governing law. The court reversed our judgment and remanded to this court to reconsider the matter in light of "the appropriate legal standard set out herein." (*Harris, supra, 53 Cal.4th at p. 191.*) The court directed us on [*1233] remand to "review the trial court's denial of the summary adjudication motion" but did not expressly direct us to review the class certification issue as well. (*Ibid.*) The court did indicate, however, that the parties remained "free to raise the issue on remand" (*id. at p. 190, fn. 9*), and the parties have done so in their supplemental briefing in this [***7] court.

STANDARD OF REVIEW

We review the trial court's order denying a motion for summary adjudication de novo. (*Certain Underwriters at Lloyd's of London v. Superior Court (2001) 24 Cal.4th 945, 972 [103 Cal. Rptr. 2d 672, 16 P.3d 94].*) We review the trial court's rulings on class certification for abuse of discretion, but a ruling based upon a legal error constitutes an abuse of discretion. (*Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 326-327 [17 Cal. Rptr. 3d 906, 96 P.3d 194]*; see *Horsford v. Board of Trustees of California State University (2005) 132 Cal.App.4th 359, 393 [33 Cal. Rptr. 3d 644]* [legal error constitutes abuse of discretion].) We review the trial court's interpretation of statutes and regulations de novo. (*People ex rel. Lockyer v. Shamrock Foods Co. (2000) 24 Cal.4th 415, 432 [101 Cal. Rptr. 2d 200, 11 P.3d 956]* [statutes]; *Ramirez v. Yosemite Water Co. (1999) 20 Cal.4th 785, 794 [85 Cal. Rptr. 2d 844, 978 P.2d 2]* [regulations].)

[**294] DISCUSSION

I. *Overview of the California and the Federal Regulations*

Labor Code section 1173 grants the IWC a broad mandate to regulate the working conditions of employees in California, including the setting of standards for minimum wages and maximum hours. (See *Industrial Welfare Com. v. Superior Court (1980) 27 Cal.3d 690, 701-702 [166 Cal. Rptr. 331, 613 P.2d 579]*; see also *Bell v. Farmers Ins. Exchange, supra, 87 Cal.App.4th at p. 810* [***8] (*Bell II*).) To that end, the IWC has promulgated 17 different "wage orders" applying to distinct groups of employees. (See *Cal. Code Regs., tit. 8, §§ 11010-11170.*) At issue in this case are Wage Order 4-1998 and Wage Order 4-2001, which govern the wages and hours of employees in "Professional, Technical, Clerical, Mechanical, and Similar Occupations." (*Cal. Code Regs., tit. 8, § 11040* (*Regs. § 11040*).) "For our purposes, [Wage Order 4-1998] covers claims arising before October 1, 2000, and [Wage Order 4-2001] applies to claims arising thereafter." (*Harris, supra, 53 Cal.4th at p. 177.*) More precisely, the IWC first replaced Wage Order 4-1998 with wage order No. 4-2000, which took effect on October 1, 2000, and then replaced wage order No. 4-2000 with Wage Order 4-2001, which took effect on January 1, 2001. For purposes of this case, there are no relevant differences [*1234] between wage order No. 4-2000 and Wage Order 4-2001, so "we consider Wage Order 4-2001 as applying after October 1, 2000." (*Harris, supra, 53 Cal.4th at p. 177, fn. 1.*)

(1) Both wage orders provide for certain exemptions from the overtime compensation requirements. The exemptions are affirmative defenses, so an employer bears [***9] the burden of proving that an employee is exempt. (*Ramirez v. Yosemite Water Co., supra, 20 Cal.4th at pp. 794-795.*)

As explained by *Harris*: "Wage Order 4-1998 made 'persons employed in administrative, executive, or pro-

fessional capacities' exempt from overtime compensation requirements. (Wage Order 4-1998, subd. 1(A).) Wage Order 4-1998 did not articulate the precise scope of the administrative exemption. It did, however, limit the exemption to employees 'engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $1150.00 per month ....' (Wage Order 4-1998, subd. 1(A)(1).)

(2) "The practical effect of Wage Order 4-1998, and other orders issued by the IWC during that year, was that about eight million workers lost their right to overtime pay because the orders 'deleted the requirement to pay premium wages after eight hours of work a day.' (Stats. 1999, ch. 134, § 2(f), p. 1820, enacting Assem. Bill No. 60 (1999-2000 Reg. Sess.).) In response, the Legislature passed the 'Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999.' (Stats. 1999, ch. 134, [***10] § 1, p. 1820, adding and amending provisions of *Lab. Code, § 500 et seq.*) The act amended *Labor Code section 510*, which provides that a California employee is entitled to overtime pay for work in excess of eight hours in one workday or 40 hours in one week. (*Lab. Code, § 510, subd. (a).*) However, *Labor Code section 515, subdivision (a)*, added by the act, exempts from overtime compensation 'executive, administrative, and professional employees' whose primary duties[1] 'meet the [**295] test of the exemption,' who 'regularly exercise[] discretion and independent judgment in performing those duties' and who earn a monthly salary at least twice the state minimum wage for full-time employees. (*Lab. Code, § 515, subd. (a).*)

> 1 In a footnote at this point, the Supreme Court stated: "Wage Order 4-1998 and Wage Order 4-2001 define 'primarily' as 'more than one-half the employee's work time.' (*Regs., § 11040, subd. 2(N).*) Thus, in order to be covered by the administrative exemption under either order, employees must spend over one-half of their work time doing work that fits the test of the exemption."

"Under the statute then, to qualify as 'administrative,' employees must (1) be paid at a certain level, [***11] (2) their work must be administrative, (3) their primary duties must involve that administrative work, and (4) they must [*1235] discharge those primary duties by regularly exercising independent judgment and discretion. The narrow question here involves the second point, whether [Adjusters'] work is administrative. That is, whether it meets the test of the exemption. These statutory standards are further understood in light of the applicable wage order.

"*Labor Code section 515, subdivision (a)* directs the IWC to conduct a review of the duties that meet the test of the exemption and, if necessary, modify the regulations. After review, the Commission issued Wage Order 4-2001.

(3) "A comparison of Wage Order 4-1998 and Wage Order 4-2001 reveals that the latter contains a much more specific and detailed description of work that is properly described as administrative. Whereas Wage Order 4-1998 contains only a single sentence relative to an employee involved in administrative work, Wage Order 4-2001 discusses the scope of the administrative exemption in seven fairly extensive and interrelated subdivisions. (Compare Wage Order 4-1998, subd. 1(A)(1) with Wage Order 4-2001, subd. 1(A)(2)(a)-(g).) Specifically, [***12] Wage Order 4-2001, subdivision 1(A)(2)(f) provides that the terms 'exempt' and 'non-exempt' are to be construed under certain incorporated regulations listed in the federal Fair Labor Standards Act of 1938 (*29 U.S.C. § 201 et seq.*) then in effect. So, just as the statute is understood in light of the wage order, the wage order is construed in light of the incorporated federal regulations. [¶] ... [¶]

"As part of its function, the IWC issues 'Statements As To The Basis' (hereafter, Statement or Commission Statement) explaining 'how and why the commission did what it did.' (*California Hotel & Motel Assn. v. Industrial Welfare Com. (1979) 25 Cal.3d 200, 213 [157 Cal. Rptr. 840, 599 P.2d 31].*) With respect to Wage Order 4-2001, the Commission Statement notes, 'The IWC intends the regulations in these wage orders to provide clarity regarding the federal regulations that can be used [to] describe the duties that meet the test of the exemption under California law, as well as to promote uniformity of enforcement. The IWC deems *only* those federal regulations *specifically* cited in its wage orders, and in effect at the time of promulgation of these wage orders, to apply in defining exempt duties under California law.' (Italics [***13] added.)

"Accordingly, Wage Order 4-2001 specifically directs that whether work is exempt or nonexempt 'shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act [*1236] effective as of the date of this order: *29 C.F.R. Sections 541.201-205*, 541.207-208, 541.210, and 541.215.'[2] (Wage Order 4-2001, subd. 1(A)(2)(f).)

> 2 In a footnote at this point, the Supreme Court stated: "Regulations appearing in title 29 of the Code of Federal Regulations are hereafter referred to as 'Federal Regulations.' Citations to the Federal Regulations are as they existed on January 1, 2001, the effective date of Wage Order 4-2001. (Current regulations are found in *Fed. Regs. § 541.203 (2011).*)"

[**296] **(4)** "Like its predecessor, Wage Order 4-2001 exempts 'persons employed in administrative, executive, or professional capacities.' (Wage Order 4-2001, subd. 1(A).) Unlike its predecessor, subdivision 1(A)(2) of the new wage order describes the administrative exemption in some detail. It provides, in part, that persons are employed in an administrative capacity if their duties and responsibilities involve office or nonmanual work '*directly related to management policies* [***14] *or general business operations of* [*their*] *employer or* [*the*] *employer's customers.*' (Wage Order 4-2001, subd. 1(A)(2)(a)(i), italics added.)

"Federal Regulations former part 541.205 (2000) is one of the regulations incorporated in Wage Order 4-2001, subdivision 1(A)(2)(f). That regulation defined the italicized phrase above. It is this 'directly related' phrase that distinguishes between 'administrative operations' and 'production' or 'sales' work. (Fed. Regs. § 541.205(a) (2000).)

"Parsing the language of the regulation reveals that work qualifies as 'administrative' when it is '*directly related*' to management policies or general business operations. Work qualifies as 'directly related' if it satisfies two components. First, it must be *qualitatively* administrative. Second, *quantitatively*, it must be of substantial importance to the management or operations of the business. Both components must be satisfied before work can be considered 'directly related' to management policies or general business operations in order to meet the test of the exemption. (Fed. Regs. § 541.205(a) (2000).)

"The regulation goes on to further explicate both components. Federal Regulations former part 541.205(b) [***15] (2000) discusses the qualitative requirement that the work must be administrative in nature. It explains that administrative operations include work done by 'white collar' employees engaged in servicing a business. Such servicing may include, as potentially relevant here, advising management, planning, negotiating, and representing the company. Federal Regulations former part 541.205(c) (2000) relates to the quantitative component that tests whether work is of 'substantial importance' to management policy or general business operations." (*Harris, supra, 53 Cal.4th at pp. 177-182 & fns. 3, 5, fns. 2, 4 & 6 omitted.*) [*1237]

Only the qualitative component of the "directly related" requirement is at issue in this case. (*Harris, supra, 53 Cal.4th at p. 182.*)

II. *Wage Order 4-1998 and the Federal Regulations*

As *Harris* noted, "Wage Order 4-1998 did not articulate the precise scope of the administrative exemption," stating only that the exemption is limited "to employees 'engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $1150.00 per month ... .' (Wage Order 4-1998, [***16] subd. 1(A)(1).)" (*Harris, supra, 53 Cal.4th at p. 177.*) Because Wage Order 4-1998 provides so little useful guidance concerning application of the exemption, we conclude that it is "appropriate to reach out to other sources" to inform our determination of the exemption's scope. (*Harris, supra, 53* [**297] *Cal.4th at p. 190.*)

Such a helpful source is readily at hand, namely, the federal regulations that were expressly incorporated in Wage Order 4-2001, which already existed when Wage Order 4-1998 was in effect and which define the scope of the administrative exemption under the Fair Labor Standards Act of 1938 (*29 U.S.C. § 201 et seq.*). The parties do not deny that the federal regulations should guide our interpretation of Wage Order 4-1998 and, on the contrary, base their arguments under both Wage Order 4-1998 and Wage Order 4-2001 on the same federal regulations.

(5) Accordingly, because we conclude that the same federal regulations that are incorporated into Wage Order 4-2001 must be used as a guide to interpreting Wage Order 4-1998, we agree with the parties that the analysis of the administrative exemption should be the same under both wage orders.

III. *The Qualitative Component of the "Directly Related" Requirement*

(6) To [***17] qualify for the administrative exemption under either wage order, an employee must be primarily engaged in work that qualitatively is "directly related to management policies or general business operations." (Wage Order 4-2001, subd. 1(A)(2)(a)(i).) That requirement obviously stands in need of interpretation. In one sense, *every* type of work directly relates to management policy, because every employee does work that carries out, or is governed by, management policy. California's wage and hour regulations, however, are liberally construed in furtherance of their remedial purpose, and exemptions to the regulations are therefore narrowly construed. (*Ramirez v. Yosemite Water Co., supra, 20 Cal.4th at p. 794.*) The same interpretive principles apply to the *Fair Labor Standards Act of 1938* and its exemptions. (See, e.g., *Klem v. County of Santa Clara (9th Cir. 2000) 208 F.3d 1085,* [*1238] *1089.*) Any interpretation that would mean that *all* types of work meet the qualitative component of the "directly related" requirement is consequently untenable.

(7) Under the Code of Federal Regulations, the qualitative component of the "directly related" requirement provides that an employee's work duties [***18] meet

the test of the exemption only if they "relat[e] to the administrative operations of a business as distinguished from 'production' or, in a retail or service establishment, 'sales' work" (29 C.F.R. § 541.205(a) (2000)), but the import of that statement is not perfectly clear. We take it to mean that only duties performed at the level of *policy* or *general* operations can satisfy the qualitative component of the "directly related" requirement. In contrast, work duties that merely carry out the particular, day-to-day operations of the business are production, not administrative, work.

We are aware of no other plausible interpretation of the qualitative component of the "directly related" requirement, and our interpretation finds support in the federal case law. An employee doing exempt administrative work is "engage[d] in 'running the business itself or determining its overall course or policies,' not just in the day-to-day carrying out of the business' affairs." (*Bothell v. Phase Metrics, Inc. (9th Cir. 2002) 299 F.3d 1120, 1125*; see *Martin v. Cooper Electric Supply Co. (3d Cir. 1991) 940 F.2d 896, 904-905* (*Martin*) [plaintiffs' work of promoting sales did not satisfy the qualitative [***19] component of the "directly related" requirement because it "focused simply on particular sales transactions" rather than on increasing "customer sales *generally*"]; *Reich v. American Internat. Adjustment Co., Inc. (D.Conn. 1994) 902 F.Supp. 321, 325* [**298] [the work of automobile damage appraisers fails to satisfy the qualitative component of the "directly related" requirement because "[r]ather than administratively running the business, they carry out the daily affairs of" their employer].)

We recognize that even so interpreted, the qualitative component of the "directly related" requirement remains a somewhat rough distinction that may be difficult to apply in certain cases. But, as Employers concede, the qualitative component is determinative for any employees whose "work falls 'squarely on the "production" side of the line ... .' " (*Bothell v. Phase Metrics, Inc., supra, 299 F.3d at p. 1127.*) The qualitative component is part of the requirement that an exempt administrative employee be primarily engaged in work that is "'directly related to management policies or general business operations.'" (29 C.F.R. § 541.205(a) (2000).) An employee who is primarily (namely, more than half of his or her [***20] worktime (*Regs. § 11040, subd. 2(N)*)) engaged in work that does not satisfy the qualitative component therefore is not primarily engaged in work that is "directly related to management policies or general business operations." Such an employee thus cannot be an exempt administrative employee. [*1239]

IV. *Application of the Qualitative Component of the "Directly Related" Requirement*

The undisputed facts show that Adjusters are primarily engaged in work that fails to satisfy the qualitative component of the "directly related" requirement because their primary duties are the day-to-day tasks involved in adjusting individual claims. They investigate and estimate claims, make coverage determinations, set reserves, negotiate settlements, make settlement recommendations for claims beyond their settlement authority, identify potential fraud, and the like.

To take just one example, Liberty Mutual submitted a declaration from an employee who had supervised "seven claims adjusters who handled bodily injury claims" under "Personal Market auto and homeowner policies." The Adjusters were "responsible for determining coverage, setting and updating reserves, determining liability, evaluating a claim for [***21] settlement, and negotiating settlement of claims," as well as "recognizing potential subrogation on claims and forwarding such claims to the Subrogation Unit" and "recognizing indicators of potential fraud on claims and forwarding such claims to the Special Investigations Unit." The settlement authority of the Adjusters under the declarant's supervision ranged from $6,000 to $40,000, and their expense authority ranged from $5,000 to $20,000. The declarant estimated that 85 percent of the Adjusters' claims were settled within their settlement authority; for claims exceeding their authority, he "generally expect[ed] them to provide [him] with a recommendation of settlement as well as a thorough analysis of their reasoning." Other declarations described other Adjusters who had lower or higher settlement authority (some as high as $100,000), but all of them performed similar duties.

None of that work, or the similar work of the other class members, is carried on at the level of management policy or general operations. Rather, it is all part of the day-to-day operation of Employers' business.

We acknowledge, however, that Employers did introduce evidence that *some* Adjusters might do *some* [***22] work at the level of policy or general operations. A declaration from a Golden Eagle vice-president states that "Golden Eagle's Underwriters may consult with Golden Eagle's claims [**299] examiners regarding whether the Company should issue certain types of policies." A declaration from another Golden Eagle employee states that "[o]ne of our [special investigations unit] Investigators was on a committee to develop an integrated [special investigations unit] Task force that is shaping the policies and procedures of Golden Eagle." Another Golden Eagle employee's declaration states that "[t]he claims examiners also serve on various committees that determine how to better run our business." [*1240]

(8) The work described in the foregoing quotations might well satisfy the qualitative component of the "directly related" requirement. But it is still insufficient to carry Employers' burden in opposition to Adjusters' motion for summary adjudication because no evidence shows that even a single Adjuster *primarily* engages in such work. (See *Regs. § 11040, subd. 2(N)* [defining "primarily" to mean "more than one-half the employee's work time"].) Rather, these few examples of potentially administrative work are dwarfed [***23] by the mountain of evidence, introduced by Employers themselves, that Adjusters are primarily engaged in the day-to-day tasks of adjusting individual claims, such as investigating, making coverage determinations, setting reserves, and negotiating settlements.

On the other hand, some of the work described in the foregoing quotations might not satisfy the qualitative component of the "directly related" requirement. For example, if a Golden Eagle underwriter consults with a Golden Eagle claims examiner regarding whether the company should issue certain types of policies *to a particular customer*, the claims examiner is not giving advice about management policies or general operations. But if Golden Eagle's underwriters consult with Golden Eagle's claims examiners regarding whether the company should offer certain types of policies *in general* (namely, whether such policies should be included in Golden Eagle's line of products), the claims examiners are giving advice about management policies or general operations.

The undisputed facts show that Adjusters are primarily engaged in work that fails to satisfy the qualitative component of the "directly related" requirement. Adjusters therefore [***24] are not primarily engaged in work that is "directly related to management policies or general business operations." Accordingly, Adjusters cannot be exempt administrative employees under either Wage Order 4-1998 or Wage Order 4-2001.

V. *Application of 29 Code of Federal Regulations Part 541.205(b) (2000)*

Employers rely heavily upon the following language in 29 Code of Federal Regulations part 541.205(b) (2000): "The administrative operations of the business include the work performed by so-called white-collar employees engaged in 'servicing' a business as, for ... example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control." Employers then argue that Adjusters advise management, plan, negotiate, and represent the company. For example, Adjusters advise management "by making recommendations to their supervisors about the settlement of claims in excess of their authority." They also advise management about "whether an attorney or an outside investigator [is] needed, as well as whether there [are] any potential subrogation or fraud [*1241] issues." Adjusters are responsible for planning "the processing of a claim from beginning [***25] to end." "They negotiate with claimants or their attorneys to settle [**300] claims." And they represent the company when they settle claims, thereby binding their employers to the terms of the settlements. Employers conclude that, because Adjusters perform the kinds of work listed in Code of Federal Regulations part 541.205(b) (2000), they must be doing exempt administrative work, namely, work that satisfies the qualitative component of the [*1242] "directly related" requirement. The Supreme Court likewise called attention to the potential significance of this regulatory provision. (See *Harris, supra, 53 Cal.4th at pp. 187-188.*) We conclude that Employers' argument fails because not all activities that involve advising management, planning, negotiating, and representing the company satisfy the qualitative component of the "directly related" requirement.

Our analysis begins with the text of the regulatory provision, quoted in full *ante*. The regulation does not unambiguously state that *all* planning, negotiating, representing the company, and the like constitutes work that satisfies the qualitative component of the "directly related" requirement. Nor are we aware of any cases expressly holding that [***26] the regulation means that *all* planning, negotiating, representing the company, and the like constitutes work that satisfies the qualitative component of the "directly related" requirement. Employers cite none.

(9) And the Supreme Court did not hold that the regulation means that *all* planning, negotiating, representing the company, and the like constitutes work that satisfies the qualitative component of the "directly related" requirement. On the contrary, the court stated that Code of Federal Regulations part 541.205(b) (2000) "explains that administrative operations include work done by 'white collar' employees engaged in servicing a business" and that "[s]uch servicing *may* include, as potentially relevant here, advising management, planning, negotiating, and representing the company." (*Harris, supra, 53 Cal.4th at p. 182*, italics added.) Thus, under the court's interpretation of the regulation, planning, negotiating, and the like are part of the administrative operations of the business (namely, they satisfy the qualitative component) only insofar as they constitute "servicing" the business within the meaning of the regulation. And the court's use of the word "may" at least allows for [***27] the possibility that not all planning, negotiating, and the like constitutes such servicing.

For further guidance, we turn to federal case law interpreting Code of Federal Regulations part 541.205(b) (2000). *Martin, supra, 940 F.2d 896*, held that although

wholesale salespersons negotiated prices and terms, represented the company, and purchased noninventory products that customers requested, none of those activities satisfied the qualitative component of the "directly related" requirement, *even though negotiating, representing the company, and purchasing are all listed in Code of Federal Regulations part 541.205(b) (2000).* (*Martin, at pp. 904-905.*) Rather, those work duties performed by the wholesale salespersons were "only routine aspects of sales *production* within the context of" the employer's wholesaling business and therefore did not constitute "administrative-type 'servicing' of [the employer's] wholesale business within the meaning of [Code of Federal Regulations part 541.205(b) (2000)]." (*Martin, supra, 940 F.2d at p. 905.*) That is, negotiating, representing the company, purchasing, and the like satisfy only the qualitative component of the "directly related" requirement insofar [***28] as they constitute "administrative-type 'servicing'" (*ibid.*) of a business within the meaning of [**301] the regulation. The case therefore unequivocally holds that *not* all negotiating, representing the company, purchasing, and the like satisfies the qualitative component of the "directly related" requirement.

That holding in itself is sufficient to dispose of Employers' argument. They argue that because Adjusters advise management, plan, negotiate, and represent the company, and because advising management, planning, negotiating, and representing the company are all listed in Code of Federal Regulations part 541.205(b) (2000), it follows that Adjusters' work of advising management, planning, negotiating, and representing the company must satisfy the qualitative component of the "directly related" requirement. That inference is invalid--*some* advising of management, planning, negotiating, and representing the company satisfies the qualitative component of the "directly related" requirement, but *some* does not. Because Employers make no attempt to specify where the line should be drawn, let alone to show that Adjusters' work falls on the proper side, their argument fails.

The holding of *Martin*, that [***29] *not* all negotiating, representing the company, purchasing, and the like satisfies the qualitative component of the "directly related" requirement, makes sense. An example will illustrate the point. Secretaries at law firms regularly engage in planning--they must plan the preparation and execution of court filings, for example, and also plan the performance of their work, prioritizing certain tasks or assignments over others for a given day, week, or month. Legal secretaries also negotiate with legal messengers concerning the filing and service of legal documents, and the secretaries thereby represent their employers, binding them to pay the messengers for services rendered. Legal secretaries also advise management about various matters--for example, a secretary might advise a partner that a particular filing should not be planned for a particular day because there are already several other major filings scheduled for that day. But, for reasons that are independent of the work's importance (namely, independent of the *quantitative* component of the "directly related" requirement), it is difficult to see how any of that secretarial work could constitute work that is "directly [*1243] related to [***30] management policies or general business operations." The secretaries' work is presumably *governed* by management policies, but *all* work is presumably so governed, and we cannot interpret the qualitative component of the "directly related" requirement in such a way that *all* work of every kind satisfies it--the exemptions to the overtime compensation laws are narrowly construed. (*Ramirez v. Yosemite Water Co., supra, 20 Cal.4th at p. 794*; *Klem v. County of Santa Clara, supra, 208 F.3d at p. 1089.*) Apart from being *governed* by management policies, the secretarial work described above appears to have nothing to do with management *policies* or *general* business operations. And if that is correct, then *Martin's* holding is sound--not *all* planning, negotiating, and the like satisfies the qualitative component of the "directly related" requirement.

Consequently, some dividing line is necessary: *Some* planning, negotiating, and the like satisfies the qualitative component of the "directly related" requirement, but *some* does not. Our interpretation of the qualitative component (see *ante*, pt. III.) provides such a dividing line. But Employers' argument fails regardless of whether our identification [***31] of the dividing line is correct. As long as *some* dividing line is necessary (see *Martin, supra, 940 F.2d at pp. 904-905*) and Employers' argument does not provide one, the argument [**302] cannot succeed in showing that Adjusters' work satisfies the qualitative component of the "directly related" requirement.

One final point should be noted: The Supreme Court observed that "the one element of the administrative exemption" that is at issue in these proceedings concerns "the character of [Adjusters'] duties" (*Harris, supra, 53 Cal.4th at p. 182*), and the court pointed out that the analysis in the *Bell* cases (*Bell II, supra, 87 Cal.App.4th 805*; *Bell v. Farmers Ins. Exchange, supra, 115 Cal.App.4th 715*) was based on the plaintiffs' *role* in their employer's business and consequently did not address the character of those plaintiffs' *duties* (*Harris, supra, 53 Cal.4th at pp. 183-186*). Nowhere in this opinion do we in any way rely upon the *Bell* cases, and our discussion of Employers' argument concerning Code of Federal Regulations part 541.205(b) (2000) concerns only Adjusters' duties and is entirely independent of Adjusters' role in Employers' business. The phrase "advising man-

agement," for example, [***32] can refer to any number of different work duties: Advising management about the formulation of policy is not the same duty as advising management that next Tuesday would be a bad day to file a summary judgment motion, regardless of the role that the advisor plays in the employer's business overall. (Either duty might be performed by a partner or by a secretary.) The holding of *Martin*, which we follow, is that some of the duties that can be described as "advising management," "planning," and the like satisfy the qualitative component of the "directly related" requirement, and some do not. The employee's role in the employer's business has no bearing on that holding or on its application to this case. [*1244]

VI. *Producing the Employer's Product*

Employers argue that Adjusters do not produce Employers' product because Employers' product is the transference of risk, not claims adjusting. On that basis, Employers conclude that Adjusters' work must not be production work but rather is administrative and consequently satisfies the qualitative component of the "directly related" requirement.

The argument fails for two reasons. First, as Employers' own evidence shows, adjusting claims is an important [***33] and essential part of transferring risk. If Employers never paid any claims, then they would not be transferring any risk; they would just be transferring their customers' premium payments to themselves. But Employers cannot pay any claims without first adjusting those claims, namely, making coverage determinations, assessing the value of the covered portions of claims, and paying the covered amount. Thus, by adjusting claims, Adjusters directly engage in transferring risk. It is unsurprising, then, that the declaration of one of Liberty Mutual's own executives states that (1) "Liberty Mutual's principal function is the acceptance of risks transferred to it by others ... ," and (2) "[t]hat task is accomplished in a number of ways, including but not limited to ... claims adjustment ... ." Consequently, assuming the truth of Employers' contention that their product is the transference of risk, we would still have to reject their contention that Adjusters do not produce Employers' product.

(10) Second, Employers' argument is unsound for an independent reason, namely, that workers who do not produce their employer's product can still do work that fails to satisfy the qualitative component of [***34] the "directly related" requirement. Were that not so, the work of *every* office worker employed by a manufacturing enterprise [**303] would satisfy the qualitative component of the "directly related" requirement. That result, however, would violate the rule that the exemptions must be narrowly construed. (*Ramirez v. Yosemite Water Co., supra, 20 Cal.4th at p. 794*; *Klem v. County of Santa Clara, supra, 208 F.3d at p. 1089.*) The qualitative component of the "directly related" requirement distinguishes between *kinds* of office or nonmanual work; it does not classify *all* office work as administrative.

And this point--that workers who do not produce their employer's product can still do work that fails to satisfy the qualitative component of the "directly related" requirement--applies with equal force to nonmanufacturing enterprises. Again, consider a secretary at a law firm. The firm's product is legal advice and legal representation, not secretarial services. A secretary at the firm therefore does not produce the firm's product; indeed, to do so would be to engage in the unauthorized practice of law, assuming the secretary is not a member of the bar. But, as discussed in part V., *ante*, [***35] the work of the [*1245] secretary would seem to be paradigmatically nonexempt work that fails to satisfy the qualitative component of the "directly related" requirement. For reasons unrelated to the importance of the secretary's work, the work seems to have nothing to do with management *policy* or *general* operations (except in the sense that, like every employee's work, it is *governed* by policy). Rather, the secretary's work relates entirely to the day-to-day carrying on of the firm's affairs.

Thus, because workers who do not produce their employer's product can still do work that fails to satisfy the qualitative component of the "directly related" requirement, Employers' argument would be unsound even if they were right that Adjusters do not produce Employers' product. That is, even if Adjusters did not produce Employers' product, it would not follow that Adjusters' work satisfies the qualitative component of the "directly related" requirement.

We note also that Employers' argument seems to depend entirely on Adjusters' alleged *role* in Employers' business: According to Employers, Adjusters' work satisfies the qualitative component of the "directly related" requirement because Adjusters do not [***36] play the role of producing Employers' product. The argument consequently appears to run afoul of the Supreme Court's holding that only "the character of [Adjusters'] duties," not their role, is at issue here. (*Harris, supra, 53 Cal.4th at p. 182.*) For this additional reason, we conclude that Employers' argument must be rejected.

VII. *The Effect of Code of Federal Regulations Part 541.205(c)(5) (2000)*

Employers argue that they should prevail under Code of Federal Regulations part 541.205(c)(5) (2000), which provides that "[t]he test of 'directly related to management policies or general business operations' is also met by many persons employed as advisory specialists and consultants of various kinds, credit managers,

safety directors, *claim agents and adjusters*, ... and many others." (Italics added.) The argument fails because the Supreme Court has rejected it. The only element of the administrative exemption that is at issue in these proceedings is the qualitative component of the "directly related" requirement. (*Harris, supra, 53 Cal.4th at p. 182.*) Code of Federal Regulations part 541.205(c) (2000) relates only to the quantitative component. (*Harris, at p. 182.*)

[**304] VIII. *The Agency Opinion* [***37] *Letters and the Federal Case Law*

Employers urge us to defer to a 2002 opinion letter issued by the federal Department of Labor, which concludes that claims adjusters are exempt administrative employees. Adjusters urge us instead to rely on opinion letters [*1246] issued in 1998 and 2003 by the Division of Labor Standards Enforcement, the California agency charged with enforcing IWC wage orders, which support Adjusters' contention that they are not exempt. The Supreme Court instructs, however, that "it is ultimately the judiciary's role to construe the language" of the applicable statutes and regulations. (*Harris, supra, 53 Cal.4th at p. 190.*) We therefore do not rely upon any of the agency opinion letters.

(11) In addition, we recognize that a number of federal circuit and district court cases have concluded that claims adjusters do work that is "directly related to management policies or general business operations." We are not, however, bound by decisions of the lower federal courts on issues of federal law. (*Choate v. County of Orange (2000) 86 Cal.App.4th 312, 327-328 [103 Cal. Rptr. 2d 339].*) We find none of the federal cases involving claims adjusters persuasive.

For example, cases relying on evidence that claims adjusters [***38] plan, advise, negotiate, and represent the company (*Roe-Midgett v. CC Services, Inc. (S.D.Ill., Mar. 29, 2006, No. 04 CV 4051 DRH) 2006 WL 839443, p. *14*, affd. *(7th Cir. 2008) 512 F.3d 865*; *Jastremski v. Safeco Ins. Cos. (N.D.Ohio 2003) 243 F.Supp.2d 743, 751*; *Palacio v. Progressive Ins. Co. (C.D.Cal. 2002) 244 F.Supp.2d 1040, 1047*; *Blue v. The Chubb Group* (N.D.Ill., July 13, 2005, No. 03 C 6692) 2005 WL 1667794, p. *11) all fail to recognize *Martin*'s holding that not all such work satisfies the qualitative component of the "directly [**305] related" requirement. (*Martin, supra, 940 F.2d at pp. 904-905.*) We find *Martin* persuasive on that point, and we see no reason not to apply its analysis to suits by claims adjusters.

Other cases rely on the reference to "claim agents and adjusters" in Code of Federal Regulations part 541.205(c)(5) (2000). (*Roe-Midgett v. CC Services, Inc., supra, 2006 WL 839443 at p. *14*; *Jastremski v. Safeco Ins. Cos., supra, 243 F.Supp.2d at p. 751*; *Blue v. The Chubb Group, supra*, 2005 WL 1667794 at p. *10; *McLaughlin v. Nationwide Mutual Ins. Co.* (D.Or., Aug. 18, 2004, No. Civ. 02-6205-TC) 2004 WL 1857112, p. *5; [***39] *Munizza v. State Farm Mutual Automobile Ins. Co.* (W.D.Wn., May 12, 1995, No. C94-5345RJB) 1995 WL 17170492, p. *5, affd. (9th Cir., Nov. 7, 1996, No. 95-35794) 1996 WL 711563; *Marting v. Crawford & Co.* (N.D.Ill., Mar. 14, 2006, No. 00 C 7132) 2006 WL 681060, pp. *5-*6; *Murray v. Ohio Casualty Corp. (S.D.Ohio, Sept. 27, 2005, No. 2:04-CV-539) 2005 WL 2373857, pp. *5-*6.*) Those cases are unpersuasive because the Supreme Court concluded that Code of Federal Regulations part 541.205(c) (2000) concerns only the quantitative component of the "directly related" requirement, not the qualitative component, which is at issue here. [*1247]

Some cases rely upon the proposition that claims adjusters employed by insurance companies do not produce their employers' product, namely, insurance policies. (*Cheatham v. Allstate Ins. Co. (5th Cir. 2006) 465 F.3d 578, 585*; *Palacio v. Progressive Ins. Co., supra, 244 F.Supp.2d at p. 1050*; *Jastremski v. Safeco Ins. Cos., supra, 243 F.Supp.2d at p. 753*; *McLaughlin v. Nationwide Mutual Ins. Co., supra*, 2004 WL 1857112 at p. *5.) That analysis is based on the mistaken assumption that workers who do not produce their employer's product must automatically satisfy the qualitative component of the "directly related" requirement. As discussed in part VI., *ante*, that assumption cannot [***40] be correct because otherwise *every* office worker employed by a manufacturing enterprise would be doing work that satisfies the qualitative component of the "directly related" requirement. Such a reading of the regulation is impermissible--both the California and the federal exemptions *must* be narrowly construed. (*Ramirez v. Yosemite Water Co., supra, 20 Cal.4th at p. 794*; *Klem v. County of Santa Clara, supra, 208 F.3d at p. 1089.*) And the analysis in these cases relies on the adjusters' role in their employers' business, so it contravenes the Supreme Court's determination that the qualitative component of the "directly related" requirement concerns workers' duties, not their role. (*Harris, supra, 53 Cal.4th at p. 182.*)

In sum, we do not rely upon the agency opinion letters, and we conclude that the federal cases involving claims adjusters are not persuasive.

IX. *The Alleged Heterogeneity of the Class*

Employers present one argument we have not yet addressed. According to them, the qualitative component of the "directly related" requirement cannot be dispositive, and class treatment cannot be appropriate because the certified class is so heterogeneous. In support of this argument, [***41] Employers point out that the class

includes claims adjusters "from multiple companies, three different business lines, and 39 different broad job classifications. ... [D]ifferent team managers impose different limitations on what the claims adjusters they supervise may do without either obtaining approval or notifying the team manager. Some adjusters work closely with attorneys toward the resolution of claims, while others do not. The settlement authority of Liberty Mutual claims handlers also varies widely." (Citations omitted.) Employers' argument fails because the fact that the class is heterogeneous in certain respects does not undermine our conclusion that no evidence shows that any class members primarily engage in work at the level of management policy or general business operations. Thus, no evidence shows that any class members primarily engage in work that satisfies the qualitative component of the [*1248] "directly related" requirement. That conclusion disposes of Employers' affirmative defense based on the administrative exemption, and it is a predominant issue that is common to the claims of all class members.

Finally, we address Employers' assertion that the question presented [***42] in these proceedings is whether "every insurance adjuster in California, without exception, from the most senior to the most junior, and *regardless of the adjuster's duties*" is nonexempt. (Italics added.) The assertion is mistaken.

(12) Job titles by themselves determine nothing. (*29 C.F.R. § 541.201(b)(1)* (2000) ["A title alone is of little or no assistance in determining the true importance of an employee to the employer or his exempt or nonexempt status ... ."]; *Regs. § 11040, subd. (1)(A)(2)(f)* [incorporating *29 C.F.R. § 541.201* (2000) into Wage Order 4-2001].) In every case, "the exempt or nonexempt status of any particular employee must be determined on the basis of whether his duties, responsibilities, and salary meet all the requirements of" the exemption at issue. (*29 C.F.R. § 541.201(b)(2)* (2000).) The Supreme Court likewise held that "in resolving whether work qualifies as administrative, courts must consider the particular facts before them and apply the language of the [**306] statutes and wage orders at issue." (*Harris, supra, 53 Cal.4th at p. 190.*) Application of the administrative exemption thus requires case-specific factual analysis of the work duties actually performed by [***43] the particular employees involved. We have provided that analysis in part IV., *ante.* Reliance on a job title like "claims adjuster" is no substitute.

X. *Conclusion*

The parties do not disagree as to Adjusters' work duties. Indeed, the evidence is essentially undisputed as to what those duties are. We hold that, with the few exceptions we have noted, Adjusters' work duties do not satisfy the qualitative component of the "directly related" requirement because they are not carried on at the level of policy or general business operations. Adjusters therefore are not primarily engaged in work that is "'directly related to management policies or general business operations.'" (29 C.F.R. § 541.205(a) (2000).) It follows that Adjusters are not exempt administrative employees under either Wage Order 4-1998 or Wage Order 4-2001. Accordingly, Adjusters' motion for summary adjudication should have been granted, and, because the qualitative component of the "directly related" requirement is a predominant common issue under both wage orders, Employers' motion for class decertification should have been denied in its entirety.

DISPOSITION

Plaintiffs' petition for writ of mandate (B195121) is granted. We [***44] direct the trial court to vacate its October 18, 2006 order (1) denying plaintiffs' motion [*1249] for summary adjudication and (2) partially granting defendants' motion to decertify the class, and to enter a new and different order (1) granting plaintiffs' motion for summary adjudication of defendants' affirmative defense based on the administrative exemption and (2) denying in its entirety defendants' motion to decertify the class. Defendants' petition for writ of mandate (B195370) is denied. Plaintiffs shall recover their costs on both writ proceedings.

Johnson, J., concurred.

CONCUR BY: Rothschild

DISSENT BY: Rothschild

DISSENT

ROTHSCHILD, J., Concurring and Dissenting.--I would deny both petitions, and I would deny defendants' petition on narrower grounds than those expressed in the majority opinion. I therefore concur in the judgment in part and in part VII. of the majority's discussion, but I respectfully dissent from the remainder of the majority opinion.

Both plaintiffs' motion for summary adjudication and plaintiffs' opposition to defendants' motion to decertify the class were based on the proposition that the administrative/production worker dichotomy is a dispositive test under both Industrial Welfare Commission wage order No. 4-98 (Wage Order 4-1998) and Industrial Welfare Commission wage order No. [***45] 4-2001 (Wage Order 4-2001). In *Harris v. Superior Court (2011) 53 Cal.4th 170 [135 Cal. Rptr. 3d 247, 266 P.3d 953]* (*Harris*), however, the Supreme Court held that under Wage Order 4-2001, the dichotomy is not a dispositive test, but rather is merely "an analytical tool" that

might or might not be useful in certain cases. (*Harris, supra, 53 Cal.4th at p. 190.*) Because the administrative/production worker dichotomy is not a dispositive test under Wage Order 4-2001, plaintiffs' motion for summary adjudication was properly denied, and plaintiffs have failed to show that the trial court abused its discretion by partially decertifying the class (i.e., by decertifying it for all claims governed by Wage Order 4-2001).

[**307] I would likewise reject defendants' challenge to the trial court's refusal to decertify the class as to claims arising before October 1, 2000, because defendants have failed to show that the ruling constituted an abuse of discretion.

The arguments on this point in defendants' petition relied primarily on the contention that *Bell v. Farmers Ins. Exchange (2001) 87 Cal.App.4th 805 [105 Cal. Rptr. 2d 59]* (*Bell II*) and *Bell v. Farmers Ins. Exchange (2004) 115 Cal.App.4th 715 [9 Cal. Rptr. 3d 544]* (*Bell III*) improperly made use of the administrative/production worker [***46] dichotomy and were wrongly decided. The Supreme Court, however, considered but did not accept defendants' contentions. The court indicated that "because Wage Order 4-1998 did not provide [*1250] sufficient guidance," the *Bell II* court did not proceed improperly when it "looked beyond the language of the wage order and employed the administrative/production worker dichotomy as an analytical tool." (*Harris, supra, 53 Cal.4th at p. 187*; see *id. at p. 190* [if "the particular facts" and "the language of the statutes and wage orders at issue ... fail to provide adequate guidance," then it is "appropriate to reach out to other sources"].) Moreover, the court expressly declined to hold "that the administrative/production worker dichotomy was misapplied to the *Bell II* plaintiffs, based on the record in that case, or that the dichotomy can never be used as an analytical tool." (*Harris, supra, 53 Cal.4th at p. 190.*) Given the Supreme Court's treatment of *Bell II* and *Bell III*, I cannot conclude that defendants' arguments concerning those cases, which failed to persuade the court, show that the trial court abused its discretion by refusing to decertify the entire class.

Another argument in defendants' [***47] petition relied on 29 Code of Federal Regulations part 541.205(c)(5) (2000). I agree with the majority that the Supreme Court rejected this argument by holding that 29 Code of Federal Regulations part 541.205(c) (2000) relates only to the quantitative component of the "directly related" requirement. (*Harris, supra, 53 Cal.4th at p. 182.*)

Finally, defendants' argument in their briefing on remand from the Supreme Court is similarly unpersuasive. Defendants contend that "the Supreme Court made no distinction in the application of the administrative exemption under Wage Order 4-1998 and [Wage Order] 4-2001." (Underscoring omitted.) On that basis, defendants conclude that "the Supreme Court has now held that the dichotomy is not dispositive for any portion of the class period," so the entire class should be decertified. I disagree.

The Supreme Court explained that "because Wage Order 4-1998 did not provide sufficient guidance," the *Bell II* court "looked beyond the language of the wage order and employed the administrative/production worker dichotomy as an analytical tool." (*Harris, supra, 53 Cal.4th at p. 187.*) The court added, "[b]y comparison, Wage Order 4-2001, *the operative order here*, along with the incorporated federal regulations, [***48] set out detailed guidance on the question." (*Ibid.*, italics added.) Moreover, the phrase I have italicized indicates that the court's subsequent discussion--including its holding that the administrative/production worker dichotomy is not a dispositive test but may, when appropriate, be used as an analytical tool--relates only to Wage Order 4-2001, not to Wage Order 4-1998. (After the quoted passage, the court's opinion never again refers to Wage Order 4-1998.) The court thus made clear that because of the textual [**308] differences between Wage Order 4-1998 and Wage Order 4-2001, both the scope of the administrative exemption and the role of the administrative/production worker dichotomy might be [*1251] different under the two wage orders. Defendants' argument that the court "made no distinction in the application of the administrative exemption under Wage Order 4-1998 and [Wage Order] 4-2001" is consequently unsound.

For all of the foregoing reasons, I would deny both petitions.

PROOF OF SERVICE

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 55 Second Street, Twenty-Fourth Floor, San Francisco, California 94105-3441. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On September 20, 2012, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document:

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