No. S200923

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

SAM DURAN, MATT FITZSIMMONS, individually and on behalf of other members of the general public similarly situated,

Plaintiffs and Respondents,

v.

U.S. BANK NATIONAL ASSOCIATION,

Defendant and Appellant.

Answer to Petition for 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 Alameda County Honorable Robert B. Freedman

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ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioners grossly mischaracterize and overstate the breadth of the *Duran* opinion in an effort to manufacture a basis for review by this Court. Contrary to Petitioners' spin, the court of appeal did not hold that a defendant has a due process right in every wage and hour class action to assert its affirmative defenses against every individual class member, or that sampling or other representative testimony may never be used to determine classwide liability. Instead, *Duran* held that *on the specific facts of the case*—where liability cannot be established through a uniform policy or other common proof--the trial court erred in allowing liability to be determined as to an entire class of 260 members based on "representative" testimony of just 21 members (less than 10% of the class).

This case involves the outside salesperson exemption, an exemption that turns on how much time an employee spends outside the employer's property. There no evidence of a uniform U.S. Bank ("USB") policy expressly or effectively requiring its Business Banking Officers ("BBOs") to spend a majority of their time *inside* USB property, such that liability might be established through this common evidence. There is also no dispute that class members' time outside USB property was spent on "sales" duties, such that classification of the duties could assist in classwide resolution of liability. Instead, class members here had complete discretion and control over where to perform their job duties and no uniform policy or practice dictated that the class members spend the majority of their time inside the Bank. Unsurprisingly, the amount of time spent inside/outside USB materially varied among BBOs, evidenced in part by the fact that one-third of the class (including the first four named plaintiffs) attested under oath they spent the majority of their work time outside USB property.

Every published California state and federal court decision interpreting California's outside salesperson exemption based on similar

facts has concluded that class certification is inappropriate because liability ultimately could not be resolved as to the entire class without the need for individualized inquiries as to where employees spent their work time. Here, the trial court disregarded all of this well-established law and certified a class, finding that any individual issues could somehow be managed. However, the trial court then unilaterally (without expert endorsement or agreement of the parties) adopted a trial plan that ignored individual issues. The trial court wholly precluded USB from offering any evidence that nearly one-third of the class may have been properly classified, and further barred any evidence as to how 239 of the 260 total class members (more than 90%) spent their work time. Nevertheless, the trial court found that USB had misclassified the entire class. Even worse, restitution to the class was then estimated with a 43.3% margin of error.

In light of the foregoing, the court of appeal properly determined the trial plan violated USB's due process rights and that the judgment had to be reversed. Furthermore, because the trial court's refusal to decertify was based on its erroneous assumption that its trial management plan was proper (as well as other incorrect legal criteria), the court of appeal properly ordered the class decertified.

Contrary to Petitioners' suggestion, *Duran* creates no split of authority with other published precedent on issues of class certification or the use of representative evidence. The decision is consistent with this Court's opinion in *Sav-On Drug Stores v. Super. Ct.*, 34 Cal.4th 319 (2004), and with the court of appeal's own prior opinion in *Bell v. Farmers Ins.*, 115 Cal.App.4th 715 (2004) (*Bell III*). Furthermore, the decision hardly sounds the death knell for wage and hour class actions in California. Rather, consistent with this Court's recent decision in *Brinker v. Super. Ct.*, __ Cal.4th __, 2012 Cal. LEXIS 3149 (2012), class actions will continue to be certified in wage and hour cases where liability is capable of joint

resolution based on uniform policies and practices, and courts may find that representative evidence is appropriate in such cases to determine liability. This simply is not one of those cases.

Duran represents nothing more than a proper application of well-established law regarding class actions, due process principles, and the outside salesperson exemption. As such, it is not necessary for the Supreme Court to "settle" any uncertain issue or to resolve any conflict among the courts. Review should be denied.

II. STATEMENT OF THE CASE

Plaintiffs/Petitioners are former BBOs employed by USB in California who claim they were misclassified by USB as exempt outside salespersons and denied overtime compensation. BBOs are responsible for developing and growing USB's small business banking relationships by trying to market and sell business banking products and financial services to existing and new business customers. TE 6; 21RT 691; 42RT 2903, 2917; 49RT 3894; 61RT 4974-80. BBO job duties include meeting with prospective and existing customers at their business locations, networking at community events and developing relationships with referral sources – activities that require BBOs to work outside of USB's premises. *Id.*; 8CT 2173, 2297-10CT 2694; 21RT 633-35; 20RT 568-69; 22RT 899, 913-18; 24RT 1058; 29RT 1503. USB's 2002 BBO job description specifically states that BBOs are expected to spend 80% of their time on these "outside sales activities." TE 6; 43RT 2982; 46RT 3586; 60RT 4895-96; 62RT 5030-31. BBOs work autonomously to achieve their sales goals and desired levels of compensation, are largely unsupervised, and come and go as they please. 8CT 2178-79, 2297-10CT 2694; 31RT 1723, 1799-1800; 33RT 1977-1978; 36RT 2256-57; 38RT 2429-30; 52RT 4371-4372.

Amina Rafiqzada filed this overtime action in 2001, alleging that USB misclassified her and a putative class of Small Business Bankers

("SBBs")[1] as exempt employees. 1CT 1-16. Rafiqzada, however, admitted at deposition that she spent the majority of her work time outside USB property on sales duties, thereby qualifying for the outside sales exemption. Plaintiffs' counsel then replaced Rafiqzada with three new class representatives who testified at their depositions they too spent a majority of their time outside USB property on sales activities. 3CT 530-545; 68CT 20174-20188. As a result, Plaintiffs' counsel went shopping again for an allegedly injured plaintiff and eventually substituted in two new class representatives, Sam Duran and Matt Fitzsimmons. 16CT 4447-4462.

In January 2005, the parties filed simultaneous motions concerning class certification. 6CT 1602-1629; 7CT 1783-1822. In opposition to class certification, USB submitted 75 declarations of putative class members (along with deposition testimony of the 4 prior named plaintiffs) all stating they regularly spent more than half their time outside USB engaged in sales. 7CT 1804; 8CT 2172-2173; 8CT 2297-10CT 2694; 11CT 3102-3105. Plaintiffs submitted 37 declarations of BBOs stating they spent the majority of their time on sales inside the Bank. Plaintiffs focused on USB's uniform classification of BBOs as exempt, standardized job descriptions, hiring and training practices, and evaluation procedures (none of which dictated that BBOs spend the majority of their time inside the Bank), and lack of evidence tracking how much time BBOs spent inside versus outside. (Petition, 7.)

Notwithstanding the absence of a uniform policy or systematic practice requiring BBOs to spend a majority of their time inside Bank property, the court rejected USB's argument that determination of liability

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[1] After USB merged with First Star in 2001, the position was subsequently renamed "Business Banking Officer." 42RT 2940-2941.

required an individualized analysis as to how much time each BBO spent outside the Bank. Relying primarily on USB's uniform classification of the position, the court granted class certification, defining the class as "all employees who worked for [USB] in ... California as either a Business Banking Officer or a Small Business Banking Officer, at any time between December 26, 1997 and September 26, 2005." 16CT 4528-4535; 4474, 4521, 4652, 4654; 83CT 24649. The class, therefore, included all of the individuals who testified at deposition and/or by way of declaration that they spent the majority of their work time outside USB.

Following class certification, the parties engaged in months of briefing and conferences regarding a trial plan. 8RT 203-207; 20CT 5852-22CT 6289; 23CT 6557-6581. USB proposed determining liability and damages through individual mini-trials using special masters. 2CT(Supp'l) 349-351; 20CT 5896; 21CT 5917-5929. Plaintiffs advocated using a survey and pilot study to determine an appropriate sample. 20CT 5853-5867; 21CT 5917-5957. USB objected to a survey on due process grounds. 21CT 6037-6134; 21CT 6167-22CT 6208; 22CT 6226-6239; 22CT 6268-6288; 23CT 6557-6581.

In September 2006, the court declared its intent to use "representative testimony" at trial and requested briefing as to the appropriate sample size, but stated that a sample size larger than 50 "is too high." 21CT 6163-6166; 10RT 233-235. USB objected that the contemplated use of "representative testimony" was improper. 21CT 6181-6199. In October 2006, the court (without any expert endorsement) declared that the sample would consist of just 20 randomly selected class members and 5 alternates to determine classwide liability and damages, referring to them as the "representative witness group" or "RWG." 22CT 6243, 6289; 2CT(Supp'l) 397. The court later deemed Duran and Fitzsimmons part of the RWG and eliminated one randomly-selected RWG

member, resulting in a sample of 21. 83CT 24626-24627.

Prior to trial, Plaintiffs voluntarily dismissed all of their legal claims and proceeded only on their equitable UCL claim to avoid a jury trial. 2CT(Supp'l) 390-94; 22CT 6290-93, 23CT 6618. When the court suggested this dismissal might require a second opt-out opportunity, USB objected that a second opt-out would compromise the randomness of the RWG because individuals selected to testify might opt out to avoid participating in the trial. 12RT 256; 23CT 6571-74. The court nonetheless ordered a second opt-out opportunity. 23CT 6614-6616, 6634. Nine class members opted out, including four of the initially-selected RWG members. 25CT 7285-7290.

Of the four RWG members who opted out, Michael Lewis and Sean MacClelland had previously testified that they spent the majority of their time on sales duties outside the Bank. 25CT 7305-7314, 7322-7327, 7333-7340; TE 1115; 53RT 4465. Plaintiffs' counsel persuaded them to opt out, given their known testimony favorable to USB. USB moved to have them reinstated as RWGs, which the court denied. 25CT 7298-7353; 26CT 7430-31.

Prior to trial, USB moved to decertify the class, arguing that RWG depositions, coupled with the pre-certification evidence, demonstrated that myriad individual issues (both as to liability and damages) predominated. 29CT 8429-30CT 8613, 8733-32CT 9278. The court denied the motion. 38CT 11089-11098; 32CT 9362-79.

Phase I of the trial began in May 2007. Over USB's repeated objections, the court prohibited USB from calling any non-RWG class member (38CT 1164-71; 44CT 12975-78; 45CT 13298) and also prohibited USB from introducing declaration/deposition testimony of non-RWG class members. 18RT 445-453; 48CT 14258-14276; 55CT 16129-16143, 16146, 16164-65; 64RT 5124-5128. Phase I required 40 court days, concluding in

September 2007. 45CT 13215, 48CT 14245; 55CT 16144.

Phase I produced no evidence of a uniform policy or practice mandating all BBOs to spend the majority of their time inside the Bank. Instead, Phase I was essentially 21 mini-trials regarding the individual circumstances (and defenses) applicable to the RWG. These mini-trials underscored USB's position that liability could not properly be determined on a classwide basis but required individualized inquiry as to each class member.

For example, serious individualized liability questions were raised by the fact that several RWGs admitted prior to trial that they (like many of the absent class members) spent the majority of their time outside the Bank, but then self-servingly changed their testimony at trial. *See* TE 1000-1001; 23RT 979-991 (Penza signed two declarations stating he spent majority of time outside the Bank which he attempted to retract at trial because he was "new" to USB and had a lot of commissions at stake, but admitted no one at USB asked him to sign either declaration or knew their contents); 29RT 1610-13, 1625-37 (McCarthy testified at deposition that more often than not she spent a majority of her time outside, but "suddenly recalled" at trial that she never did so, and the only intervening factor between her deposition and trial was that she spoke to Plaintiffs' counsel). Additional RWGs who provided trial testimony directly contradicting sworn pre-trial testimony on the pivotal issue of the amount of time they spent outside the Bank include Adney Koga and Steven Bradley. TE 1087; 40RT 2671-80; 2686-96; 42RT 2834-38; 40RT 2686-2689; 40RT 2689, 2707-08, 2713-17; 42RT 2846-55; TE 1017; 36RT 2237-42; 2267-2268; 36RT 2221-2243, 2274-2277; TE 1016-1017; 35RT 2203-2207; 36RT 2216, 2225-2228, 2231-2233, 2238-39; 49RT 3949-51.

Unique liability issues were also made apparent through testimony of RWGs revealing that they had no claim against USB for various

individualized reasons. For example, several RWGs admitted they did not work overtime, and thus had no right to any recovery. 42RT 2881-84 (Steven Bradley); 26RT 1219-20, 1223-24, 1236-1238 (Matt Gediman); 33RT 1978-83 (Brett Lindeman).

Individualized testimony by other RWG members revealed that, contrary to USB job titles and records suggesting they held the position of BBO, they did not actually perform BBO duties and thus should not have been part of the class. Troy Petty was mapped into the BBO job title due to a merger, but his job duties were actually those of a Business Banking Relationship Manager. 25RT 1108-09, 1127-33; 29CT 8541-8542; TE 1080; 26RT 1171-72; 48RT 3839-42; 3845, 3881-82; 42RT 2940-2941; 25RT 1096, 1109; 26RT 1161; 48RT 3837-3846, 3854; 56RT 4674-77; 61RT 4972-75, 4993-4995. At least one other class member is known to have performed the same job as Petty, rendering that class member and Petty inappropriate members of the class and not entitled to recovery. 48RT 3881-3884.

In addition to the foregoing, Phase I revealed USB's numerous unique defenses applicable to individual RWG members. USB presented evidence showing that certain RWG members should be precluded from recovering in this equitable action because they had signed releases of claims, engaged in resume fraud, made false statements under oath, and/or knowingly failed to disclose their potential overtime claim in this action in bankruptcy proceedings. TE 1081-82; 71 CT 21005-06; TE 1083; 29RT 1528-1548, 1556-1562; 29RT 1531-1540; 32RT 1870-73; TE 44, 1075G; 32RT 1847-1870; TE 37, 1003, 1013-1015, 1079; 25RT 1076-1082; 34RT 2052-75; 34RT 2055-2059; 48CT 14075-76, 14182-92, 14229.

Based on the trial evidence highlighting the need for individualized inquiries, coupled with all of the pre-trial evidence showing the lack of a uniformly applicable policy or practice as to where BBOs spent their work

time, USB filed a second decertification motion after Phase I. The court denied this motion as well, again relying on USB's uniform classification of the BBOs and uniform job descriptions and the like—none of which has any bearing on *where* BBOs performed their sales duties. The court also relied on its belief that liability as to entire class could be determined based on testimony of the RWG members without violating USB's due process rights. 62CT 18394-440; 78CT 23227-28.

On September 22, 2008, the court entered its Statement of Decision ("SOD") for Phase I, finding that the entire class had been misclassified and had worked overtime (including to the four prior named plaintiffs and 75 class members who admitted at deposition or in declarations to spending the majority of their weekly work time outside USB). 71CT 21008, 21046-49.

The Phase II trial began October 1, 2008. USB again sought to call as witnesses the four former named plaintiffs and approximately 75 favorable declarants, and alternatively sought to introduce their deposition testimony and sworn declarations. 73CT 21500-10. The court again precluded this evidence. 78CT 23516. Plaintiffs called statistician Richard Drogin and accountant Paul Regan to testify during Phase II. 78CT 23224-26, 23230-34. USB called its own statistical expert, Andrew Hildreth, and accountant, Joe Anastasi (to rebut Regan's testimony), to testify regarding the implications of the Phase I findings and the lack of any basis to extrapolate those findings to the class. 79CT 23494-23495.

The court ordered Plaintiffs to propose a Phase II SOD, which the court then adopted in virtually every respect, including Plaintiffs' expert's admission that the estimate of weekly overtime for the class carried a **43.3% margin of error** (+/- 5.14 hours). 79CT 23518; 80CT 23794-833; 81CT 23940-24023, 24092-24122, 24172. Judgment was entered May 20, 2009, awarding Plaintiffs and the class over $8.9 million as restitution of

unpaid overtime and over $5.9 million in prejudgment interest. 83CT 24650-51.

USB timely filed its Notice of Appeal. 86CT 25542-43. The court of appeal reversed the judgment, holding that the trial court's trial plan violated USB's due process rights by preventing USB from presenting any evidence to challenge the claims of 239 absent class members, and was also statistically unsound as evidenced by, among other things, the 43.3% margin of error in weekly overtime hours. *Duran v. U.S. Bank*, 203 Cal.App.4th 212, 252-64 (2012). The court reasoned that no known court had authorized the use of representative testimony to establish liability, as opposed to damages, in a misclassification case where liability turns on the issue of how much time class members spend performing exempt duties in the absence of a uniform policy making the answer to this question susceptible to common proof. *Id.* at 254-57. Furthermore, even if there had been evidence of such common proof, the trial court's representative trial formula was still fatally flawed because it was not statistically endorsed or sound, allowed non-random class member testimony to be extrapolated to the entire class, precluded USB from presenting evidence to defend against the claims, and allowed uninjured class members to recover. *Id.* at 252-53; 257-269. As a result, the court of appeal held that the trial plan violated USB's due process rights.

The court of appeal also reversed the trial court's denial of USB's second decertification motion after Phase I of the trial. The court held that the trial court's decision was based on the erroneous legal assumption that its trial management plan was a proper means of establishing liability as to the entire class. *Id.* at 270-75. The court also held the trial court erroneously focused on USB's uniform classification of BBOs and lack of a uniformly communicated expectation that BBOs spend the majority of their time outside the Bank as criteria suggesting sufficient commonality to

decide liability on a classwide basis without individual inquiry. *Id.* For these reasons, the court held the trial court had abused its discretion in refusing to decertify the class.

LEGAL DISCUSSION

III. THERE ARE NO GROUNDS FOR SUPREME COURT REVIEW

Review should be denied in this case because the statutory grounds for review are absent. Review is not "necessary" to "settle an important issue of law" or to "secure uniformity of decision." Cal. R. Ct. 8.500(b)(1). Petitioners suggest that review is necessary to settle whether: (1) a defendant in every wage and hour class action has a right to assert its affirmative defenses against every single class member; and (2) whether representative evidence may never be used to establish liability in a wage and hour class action. Petitioners attribute categorical holdings on both of these issues to the court of appeal in this case and suggest review is needed to make clear that representative evidence may be used and that defendants do not have the right to assert their affirmative defenses against every class member in every class action. The glaring flaw behind Petitioners' plea is that the court of appeal made no such sweeping statement on either issue in this case.

The court of appeal simply held that on the facts of this particular case, the trial court prejudicially erred in mandating a representative trial that failed to account for, or allow evidence of, individual differences. The court did not hold that representative evidence could never be used in a wage and hour class action trial. Instead, the court specifically acknowledged representative evidence *may be appropriate* in some cases:

> "While we do not disagree with the proposition that statistical sampling is a tool that *may* be utilized in appropriate cases, it does not follow

> that it was proper for the trial court *in this case* to limit presentation of USB's affirmative defense solely to the 21 members of the representative group."

Duran, 203 Cal.App.4th at 265 (emphasis added). The court similarly did not hold that in every wage and hour class action trial the defendant must be allowed to present its affirmative defenses against each individual class member. Instead, the court much more narrowly stated:

> "[*W*]*hen liability for unpaid overtime depends on an employee's individual circumstances*, employer defendants retain the right to assert the exemption defense as to every potential class member."

Id. at 255 (emphasis added). The court found that in this particular case, liability does turn on an inquiry into each individual employee's circumstances because "the only way to determine with certainty if an individual BBO spent more time inside or outside the office would be to question him or her individually." *Id.* at 262.

The court of appeal's decision is consistent with this Court's opinion in *Sav-On* and with the *Duran* court's own decision in *Bell III*. Because the *Duran* decision is consistent with all relevant authority, including this Court's recent decision in *Brinker*, review is not necessary to "settle" any issue of law or to resolve any conflict among the courts.

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IV. THE COURT OF APPEAL'S DECISION PROPERLY APPLIES WELL-ESTABLISHED LAW THE TRIAL COURT DISREGARDED

A. The Court Correctly Held That Where a Defendant's Affirmative Defense Turns on an Individualized Inquiry, the Defendant Must Be Able to Assert Individualized Defenses.

1. Well-established Class Action Principles

A class action is nothing more than a procedural tool that aggregates individual claims. Class action status does not alter the parties' underlying substantive rights. *City of San Jose v. Super. Ct.*, 12 Cal.3d 447, 462 (1974) ("Altering the substantive law to accommodate procedure would be to confuse the means with the ends – to sacrifice the goal for the going."); *Granberry v. Islay Invests., Inc.*, 9 Cal.4th 738, 749 (1995) ("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.") "If . . . relief is foreclosed to claimants as individuals, it remains unavailable to them even if they congregate into a class." *Feitelberg v. Credit Suisse First Boston, LLC*, 134 Cal.App.4th 997, 1018 (2006).

Most recently, in *Brinker*, this Court explained that a class action generally is only appropriate "if the defendant's liability can be determined by facts common to all members of the class." *Brinker*, 2012 Cal. LEXIS 3149, *19; *see also Wal-Mart v. Dukes*, 564 U.S. __, 131 S.Ct. 2541, 2551 (2011) ("What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.") The Court further explained that in the wage and hour context, this generally requires evidence of a "uniform policy consistently applied to a group of employees [that] is in violation of wage and hour laws." *Brinker,* 2012 Cal. LEXIS 3149 at *46, 91. Thus, in

Brinker, this Court held that a class properly could be maintained on the plaintiffs' rest break claim because there was evidence of a universally applied corporate policy that on its face allowed less rest time than required by California law. *Id.* at *46. In contrast, the Court held that class certification was not appropriate on the plaintiffs' off-the-clock claim because there was no "common policy nor a common method of proof" that would establish liability. *Id.* at *91.

2. Courts Have Uniformly Held That Outside Salesperson Misclassification Claims Are Not Susceptible to Class Treatment Because a Common Answer to Liability Cannot Be Generated.

California law defines an outside salesperson as a person "who customarily and regularly works more than half the working time away from the employer's place of business" engaged in sales duties.[2] IWC Wage Order No. 4-2001, Cal. Code Regs, tit. 8 § 11040, subd. 2(M). Interpreting this language, this Court has held that determining whether an employee qualifies for the outside sales exemption turns, "first and foremost," on an analysis of "how the employee actually spends his or her time." *Ramirez v. Yosemite Water*, 20 Cal.4th 785, 802 (1999).

Given the inherently individualized nature of the exemption, courts analyzing class certification in outside salesperson cases have uniformly held that the individualized inquiry required as to how each class member spent his or her time precluded class treatment. *See Walsh v. IKON*, 148 Cal.App.4th 1461 (2007); *In re Wells Fargo*, 571 F.3d 953 (9th Cir. 2009);

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[2] There is no dispute in this case that the BBOs spent the majority of their time performing sales duties. (Petition, pp. 6, 12.) Thus, the exemption issue was whether the duties were primarily performed inside or outside the Bank.

Vinole v. Countrywide, 571 F.3d 935 (9th Cir. 2009); *Maddock v. KB Homes*, 248 F.R.D. 229 (C.D. Cal. 2007).

3. The Trial Court Applied Improper Criteria in Denying Decertification.

The trial court's primary basis for finding sufficient commonality to support determining liability on a classwide basis was the fact that USB uniformly classified BBOs as exempt, had uniform job descriptions, evaluation forms and pay plans, did not track the time BBOs spent inside versus outside the Bank, and did not clearly and consistently communicate its policy that BBOs were expected to spend the majority of their work time outside. 16CT 4619-4621; 38CT 11094; 78CT 23227-28. While this may be common evidence, it is not evidence capable of generating a "common answer" on the critical inquiry of where BBOs spent the majority of their weekly work time. *See In re Wells Fargo*, 268 F.R.D. 604, 610-11 (N.D. Cal. 2010) ("*Wells Fargo II*"). It is undisputed that none of these policies or practices require BBOs to spend the majority of their time inside. *Duran,* 203 Cal.App.4th at 262, 274-75.

Wells Fargo II considered whether the type of common policies relied on by the trial court provided sufficient commonality to support class treatment in an outside salesperson misclassification case. The court acknowledged that Wells Fargo had uniformly classified the employees as exempt and that the class members had common job descriptions, uniform training, the same primary goal (selling mortgages), uniform job expectations, similar compensation plans, and standardized employee evaluation standards. *Wells Fargo II*, 268 F.R.D. at 611. However, the court held that this was not the type of common proof necessary to obviate the need for an individualized analysis as to how each class member actually spent his work time. The court explained that only a common policy requiring the class members to spend a specified amount of time in or out of the office would obviate the need for such an individualized analysis. *Id.*

Notably, *Wells Fargo* rejected the plaintiff's argument that individual inquiries could be avoided by using random sampling to determine whether all or a portion of the class qualified for exemption. The court reasoned:

> Assume that the court permitted proof through random sampling of class members, and that the data, in fact, indicated that one out of every ten [class members] is exempt. How would the finder of fact accurately separate the one exempt [class member] from the nine non-exempt [class members] without resorting to individual mini-trials? Plaintiff has not identified a single case in which a court certified an overbroad class that included both injured and uninjured parties. . . .In fact, **the court has been unable to locate any case in which a court permitted a plaintiff to establish the non-exempt status of class members, especially with respect to the outside sales exemption, through statistical evidence or representative testimony.**

Id. at 612 (emphasis added); *see also Vinole*, 571 F.3d at 946-47 (denying certification in outside sales case based on absence of uniform policy as to how much time class members spend in or out of the office; statistical sampling could not obviate need for individual inquiries).

Like *Wells Fargo II* and *Vinole*, there was no evidence in this case of a uniform or systematic policy requiring BBOs to spend the majority of their work time *inside*. Instead, the evidence revealed BBOs had discretion to determine how and where to do their jobs and USB did not track how much time was spent inside versus outside. Thus, it was not surprising that the trial court was presented with evidence of material variation among class members regarding the amount of time spent *outside* the Bank. This variation, coupled with the lack of any uniform policy, makes clear that liability determinations require an individualized, employee-by-employee inquiry. *See Walsh*, 148 Cal.App.4th at 1455-58.

Given the foregoing authorities making clear, on similar facts to those

here, that liability in an outside sales exemption case requires an individualized inquiry, the court of appeal in this case properly concluded that USB (not every defendant in a wage and hour class action) had a right to assert its exemption defense as to each individual class member. *Duran*, 203 Cal.App.4th at 255 ("[D]ue process principles require individualized inquiries *where the applicability of an exemption turns on the specific circumstances of each employee. . . .*")

B. Given the Need for Individualized Inquiries on Liability, the Court of Appeal Properly Ruled That the Trial Plan Violated Due Process.

1. Due Process Principles

As the court of appeal explained here, procedural due process refers to a "guarantee of fair procedure" in the adversarial hearing process, where affected individuals must be provided a "fundamentally fair chance to present [their] side of the story." *Duran*, 203 Cal.App.4th at 248-49 (citation omitted). The United States Supreme Court has set forth a balancing test for assessing a procedure by which a private party invokes state power to deprive another party of property: "First, consideration of the private interest that will be affected by the [procedure]; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, . . . principal attention to the interest of the party seeking the [procedure], with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections." *Id.* (citing *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991)).

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2. The Trial Plan Prevented USB From Presenting Its Defense and Carried a High Risk USB Would Be Erroneously Deprived of Substantial Property.

Notwithstanding the lack of a common policy dictating where class members spend the majority of their time and the resulting need for individualized inquiry on this pivotal issue, the trial court determined that liability as to the entire 260-member class would be determined based solely on testimony by a purportedly random sample of 20 class members. The court rejected numerous efforts by USB to introduce evidence outside the RWG (or even original RWG members), including evidence of the sworn declaration/deposition testimony of nearly one-third of the class attesting that they spent the majority of their time outside and were thereby likely properly classified.[3] The court's sole justification for excluding this substantial evidence was that it was "outside the trial plan." As the court of appeal observed, this evidence "potentially could have prevented, at a minimum, approximately one-third of [the class] from receiving any recovery" in a case where the average recovery totaled over $50,000 per class member. *Duran*, 203 Cal.App.4th at 259. Indeed, the four former named plaintiffs alone (who all admitted to spending the majority of their

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[3] Petitioners outrageously characterize USB's declarations as fraudulent and obtained through coercion. This charge is patently false, unsupported, and unethically leveled, as it is based on nothing more than the fact that 3 RWGs (out of some 75 declarants) self-servingly repudiated their sworn declarations at trial (but presented no evidence of fraud or coercion). (Petition, 8.) Furthermore, as the court of appeal correctly observed, challenges to the accuracy of the declarations go to the weight, not to their relevance or admissibility. *Duran*, 203 Cal.App.4th at 263. Additionally, Plaintiffs presented no evidence challenging the veracity of the deposition testimony of the four prior named plaintiffs, all of whom testified (like one-third of the class) that they spent the majority of their time outside. *Id.* at 259-61, 63.

time outside and were thereafter substituted out as named plaintiffs) were awarded over $160,000 by the trial court. 83 CT 24700-03; 68 CT 20174-20188; TE 1184-87. The amount awarded to the 78 class members whose testimony USB was prevented from introducing was over $6 million including interest. 83 CT 24698-704. This is a substantial amount of property which was likely erroneously taken from USB based on the court's refusal to allow introduction of evidence for no reason other than it being outside the court's self-created plan to efficiently try the case. As the court of appeal summarized:

> "Class action lawsuits are intended to conserve judicial resources and to avoid unnecessarily repetitive litigation. Efficiencies must be maintained, sometimes resulting in imperfect results. A certain amount of variability can be tolerated. However, the trial management plan followed here prevented USB from submitting any relevant evidence in its defense as to 239 class members out of a total class of 260 plaintiffs. 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."

Duran, 203 Cal.App.4th at 264; *see also Dukes*, 131 S.Ct. at 2561 (invalidating trial by formula); *City of San Jose*, 12 Cal.3d at 462 (parties' rights may not be sacrificed for sake of expediency).

The trial plan in *Duran* lacked any statistical support, further increasing the risk of erroneous deprivation of property. Neither party nor their experts proposed or endorsed the sampling formula employed by the trial court. The trial court unilaterally formulated the plan, including the undersized sample of 20 class members. USB never agreed to this or to any plan precluding introduction of evidence to establish its exemption defense as to each class member. Worse, the trial court's plan resulted in a

restitution award estimated with a 43.3% margin of error. *See Bell III*, 115 Cal.App.4th at 757 (double time award affected by 32% margin of error was unconstitutional). Furthermore, the sample approved by the trial court was not truly random because, among other things, it included the named Plaintiffs and excluded uninjured class members who were originally randomly selected but then mistakenly opted out and were precluded from opting back in. 83CT 24626-24627; 23CT 6614-6616, 6634; 25CT 7285-7290; 25CT 7305-7314, 7322-7327, 7333-7340; TE 1115; 53RT 4465; 25CT 7298-7353; 26CT 7430-31.

3. Neither *Sav-On*, *Bell III*, Nor Any Other Case Supports the Trial Plan.

Petitioners claim *Duran* is contrary to *Sav-On* and *Bell III* because both generally sanction the use of statistical sampling in wage and hour class actions and, according to Petitioners, thereby suggest that a defendant has no right to assert its affirmative defenses against each individual class member. Neither case so holds, and neither supports the flawed and unprecedented use of representative testimony in this case.

In *Sav-On*, the Court upheld class certification in a misclassification case where the plaintiff alleged a theory of uniform misclassification based on either a policy of deliberate misclassification or widespread de facto misclassification stemming from standardized operations precluding the exercise of independent judgment and discretion and requiring class members to perform the same tasks. *Sav-On,* 34 Cal.4th at 329-30. Significantly, the predominant issue in dispute was "task classification" as the trial court found that the only difference between the parties' evidence was that they disagreed on "whether certain identical work tasks are 'managerial' or 'non-managerial.'" *Id.* at 331. Because task classification could resolve classwide liability, the Court found the trial court's certification decision proper. *Id.* The Court further noted, to the extent

individual issues remained to be resolved, the trial court had discretion to consider innovative procedural tools, such as mini-trials, surveys, and the like, to manage them. *Id.* at 339-40 n.11-12. The Court stated that courts may consider "pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, *and other indicators of a defendant's centralized practices* in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate." *Id.* at 333 (emphasis added). Where no such centralized practice exists to resolve classwide liability, such evidence is unhelpful. *See Wells Fargo II*, 268 F.R.D. at 611. Finally, the Court cautioned that if individual issues proved unmanageable, the trial court retained the right to decertify. *Id.* *Sav-On* did not hold that the trial court could simply ignore individual issues at trial.

Petitioners seize on the following language in *Sav-On* as support for their argument that a defendant does not have a right to assert its affirmative defense against every class member: "[A] certification proponent in an overtime class action [does not have] to prove [as a prerequisite to certification] the entire class is nonexempt whenever a defendant raises the affirmative defense of exemption." *Id.* at 338. Petitioners interpret this as applying to the trial phase of a case, and to mean that the defendant never has the right to assert its affirmative defense against individual class members. *Sav-On* in no way says that. *Sav-On* does not even address, much less set, the standards for a class action *trial.* *Sav-On* instead dealt with the initial decision to certify a class, explaining that certification may be proper if common issues predominate, *so long as individual issues can be effectively managed.* The trial court's trial plan here did not manage individual issues; it ignored them by barring USB from presenting evidence to prove some or all of the 239 absent class members were properly classified and/or worked no overtime.

Petitioners' reliance on *Bell III* is similarly misplaced. Petitioners argue that because *Bell III* endorsed the use of representative testimony to establish damages, it follows that representative testimony may equally be used to establish liability here. Petitioners further suggest *Bell III* stands for the proposition that a defendant's interest in a misclassification case is only in its "total aggregate liability to the plaintiff class for unpaid overtime" and "not in which individuals are exempt or non-exempt." (Petition, 21.)

The court of appeal (which also issued *Bell III*) considered these same arguments by Petitioners and rejected them, explaining that "*Bell III* is manifestly inapposite." *Duran*, 203 Cal.App.4th at 250. Petitioners' argument that the court misunderstood its own prior opinion cannot be credited. As the court of appeal explained, *Bell III* did not involve a trial of liability, which had already been established on summary judgment and the court "did not have occasion to consider the use of a representative sample to determine class-wide liability." *Id.* at 252. The only issue was the amount of damages "and not whether the plaintiff employees had a right to recover damages in the first place." *Id.* Furthermore, in *Bell III*, the representative sample used to determine damages was formulated with the participation of the parties and their experts to agree on an appropriate sample size and an acceptable margin of error (+/- 1 hour, or approximately 10%). *Bell III*, 115 Cal.App.4th at 722-23. Here, the trial court chose a trial methodology not endorsed by either party or their experts, arbitrarily using a 20-person sample without any scientific or statistical basis, and without considering the desired level of accuracy. The trial court also introduced response bias and non-random elements, including by allowing testimony of the two named Plaintiffs to be extrapolated to the class. This led to a classwide judgment with a 43.3% margin of error, far exceeding the unconstitutional estimate in *Bell III*. 115 Cal.App.4th at 757.

The court of appeal rejected the trial plan here because it outright precluded USB from presenting evidence to prove its exemption defense whereas, in *Bell III*, the defendant had not been precluded from presenting evidence to contest damages. *Bell III*, 115 Cal.App.4th at 757-58 ("We agree that the trial management plan would raise due process issues if it served to restrict [the employer's] right to present evidence against the claims...."). Here, USB consistently attempted to introduce evidence to contest both liability and damages, but was precluded from doing so.[4]

As further support for their argument that *Duran* conflicts with other authorities addressing the use of representative evidence, Petitioners cite a non-binding federal case, *Dilts v. Penske Logistics*, 267 F.R.D. 625 (S.D. Cal. 2010). *Dilts* is inapposite. In *Dilts,* a class was certified on a claim alleging meal and rest break violations for non-exempt employees where

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[4] As further support for their argument that a class action defendant does not have a right to assert its exemption defense against every class member, Petitioners cite to the fact that class certification was upheld in *Bell III* even though 9% of the class was determined not to be entitled to overtime (because they did not work overtime). Petitioners' argument misses the mark. *Bell III* simply held that class certification may still be appropriate even though class members may need to individually prove their damages (or the lack thereof). *Bell III*, 115 Cal.App.4th at 743-44. *Bell III* did not say that individual issues did not have to be managed simply because a class was certified. *Id.* Notably, in *Bell III* the 9% of uninjured class members did not recover. Here, by contrast, the trial plan provided no means for determining which class members were injured or not injured and allowed uninjured members (including the four prior named plaintiffs) to recover substantial sums. This result is directly contrary to black letter class action law holding that if an individual would not be entitled to recover in an individual suit, the result should not differ simply because the individual pursues the same claim through a different procedural mechanism. *Feitelberg,* 134 Cal.App.4th at 1018; *Brinker*, 2012 Cal. LEXIS 3149, *90 (reversing certification of class that by definition included individuals with no claim).

their employer automatically deducted 30 minutes from their work hours every day, regardless of whether they actually took meal breaks. Thus, *Dilts* involved a uniformly improper company policy that rendered a classwide liability determination feasible. Unlike this case, *Dilts* is not a misclassification case dependent on individual inquiries regarding where class members spent their time. Thus, the *Dilts* court had no occasion to consider how statistical or representative testimony might adequately manage such issues. Finally, *Dilts* (like *Sav-On*) involved discussion at the class certification stage that the use of statistical evidence might be possible as a means to manage individual issues. *Dilts* was not tried, however, and therefore does not stand for the proposition that the trial plan in this case was proper.[5] Indeed, summary adjudication was subsequently granted for Defendant on liability in *Dilts*, obviating any need for a trial management plan.

In sum, Petitioners have not identified any case that demonstrates a "split of authority" with the court of appeal's opinion in *Duran*. *Duran* is consistent with every published California state or federal case addressing the outside sales exemption as well as fundamental class action principles.[6]

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[5] Petitioners also cite *Capitol People First v. Dep't of Devel. Servs.*, 155 Cal.App.4th 676 (2007), as support for the proposition that California courts endorse the use of sampling to establish liability. *Capitol People* is a disability rights case on behalf of individuals seeking injunctive and declaratory relief (not individual monetary recovery) against state agencies for engaging in a systemic practice of inadequately carrying out statutory duties aimed at protecting rights of the disabled and did not turn on any individual inquiry as to how an employee spends his time. *Dilts'* discussion of the use of statistical pattern and practice evidence has no bearing on the propriety of using such methods in this case.

[6] Petitioners' argument that the court of appeal applied incorrect standards of review is incorrect and, further, is not a ground for Supreme Court

C. The Court of Appeal Properly Decertified in Accordance With Well-Established Law.

Petitioners argue that the court of appeal went too far in decertifying the class and that it should have instead remanded to the trial court to try to fashion a new trial plan. Petitioners' argument is unsound and ignores well-established law followed by the court of appeal in ordering decertification.

Significantly, the court of appeal did not hold that the trial court's initial certification decision was an abuse of discretion, acknowledging that courts may properly certify a class even if there are individual issues, so long as those individual issues can be effectively managed. Instead, the court held that the trial court abused its discretion in denying USB's second decertification motion after Phase I. By then, the flawed trial management plan had clearly revealed that individual issues were not managed but were instead ignored. Because the decision to maintain class treatment at that point was based on the erroneous legal assumption that the trial plan was valid and that classwide liability properly could be determined based on the small sample, the decision was patently wrong.

Additionally, the trial court's insistence on maintaining class treatment was based on incorrect legal criteria as indicia of commonality. The "common" criteria relied upon by the trial court (uniform classification, standard job descriptions, evaluating BBOs based on sales rather than where they spent their time, etc.) do not support class treatment because they do not assist in common resolution of the crucial question of

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review. The court of appeal made clear that it reviewed the due process challenges to the trial plan *de novo* (which Plaintiffs agreed was appropriate), and that it reviewed the trial court's refusal to decertify for abuse of discretion. *Duran*, 203 Cal.App.4th at 248, 271.

where any class member actually spent his time. Absent a common policy or systematic practice requiring class members to spend the majority of their time inside the Bank, individual inquiries are unavoidable to answer this question. *See, e.g., In re Wells Fargo*, 268 F.R.D. at 611-12; *Vinole*, 571 F.3d at 947; *Walsh*, 148 Cal.App.4th at 1461-62. In such circumstances, "[i]f a class action will splinter into individual trials," common questions do not predominate and decertification is appropriate. *Arenas v. El Torito Restaurants, Inc.*, 183 Cal.App.4th 723, 732 (2010); *see also Sav-On*, 34 Cal.4th at 335 (trial court retains option of decertification if unmanageable individual issues arise); *Soderstedt v. CBIZ S. California*, 197 Cal.App.4th 133, 157 (2011) (individual inquiries necessary to the exemption question could result in as many as 146 mini-trials, making a class action unmanageable); *Keller v. Tuesday Morning*, 179 Cal.App.4th 1389, 1396 (2009) (same); *Cruz v. Dollar Tree Stores*, 2011 U.S. Dist. Lexis 73938 (N.D. Cal. 2011) (same).

Here, the trial of the sample group alone was essentially 21 mini-trials, with each RWG member testifying about his/her individual experience (not general practices) and entitlement to recovery of overtime, and the purported amount of recovery. There was no operation of official or *de facto* central policy resulting in misclassification. The trial court had to make liability and recovery determinations for each person, taking into account any prior inconsistent sworn testimony, contradictory manager testimony, issues regarding standing and other individualized defenses, and other impeachment evidence relating to witness' credibility.

Petitioners contend that "at the rate it took to try the cases of the 21 RWGs –two days per RWG—it would take 520 days (roughly two years) to determine liability and damages for each of the 260 class members." (Petition, 23.) By Petitioners' own calculation, this is not a manageable proceeding and is not superior to individual claims, particularly given the

sizeable individual recovery (an average of over $50,000 per class member) at issue. See *Soderstedt*, 197 Cal.App.4th at 157-58; *Reese v. Wal-Mart*, 73 Cal.App.4th 1225, 1232, 1238 (1999) (class certification properly denied where stakes high enough to justify individual suits).

Because the trial court's decision to maintain class treatment was based on incorrect legal assumptions and improper criteria, including a trial plan that failed to manage individual issues, decertification was proper. *See Walsh,* 148 Cal.App.4th at 1456 (ordering decertification); *Brinker*, 2012 Cal. LEXIS 3149, *90-91 (affirming appellate court's decertification of off the clock class).

Contrary to Petitioners' argument, the court of appeal was not required to remand to allow the trial court to try to fashion some new method of reigning in USB's due process rights, particularly in light of the vast weight of authority holding that unmanageable, individual mini-trials are unavoidable where liability cannot be determined without analyzing how each class member spent his time. Based on the foregoing, the court of appeal properly decertified the class.

CONCLUSION

Despite Petitioners' contrary argument, the court of appeal did not issue any "unprecedented ruling" that representative evidence may never be used in a wage and hour class action, nor that an employer defending such cases always has the right to assert its affirmative defenses against every class member. The fact that some commentators, largely attorney advocates, have put a self-serving spin on it does not transform the court's opinion into something it is not. The court of appeal did nothing more than apply well-established law that the trial court unfortunately disregarded. The decision creates no split of authority and presents no unresolved issue for this Court to settle in order to guide California courts.

To the extent Petitioners argue that review should be granted to

further the public policy behind California wage and hour laws, this similarly is not a proper ground for review. Regardless of the importance of the public policy served, class certification and other procedural tools cannot be used to abridge a party's due process rights—which is what the trial court did and the court of appeal properly reversed. Trial courts must properly analyze whether each putative class action is suited for class treatment, and whether individual issues are manageable. A case does not become more appropriate for certification simply because it alleges overtime claims, and no California case or "policy" allows a trial court to deem an entire class of persons "misclassified" without any evidence of the actual duties performed by over 90% of the class. Nothing in Duran restricts class treatment or the use of "representative" or statistical evidence in wage and hour cases where common policies or practices render such evidence capable of generating common answers to questions in dispute – *Duran* simply rejected a trial plan that invoked those terms to justify leaving individual issues entirely unaddressed. Review should be denied.

Dated: April 25, 2012

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CERTIFICATE OF WORD COUNT

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

The text of this Answer, excluding portions authorized to be excluded by the applicable Rule of Court, consists of 8,372 words as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: April 25, 2012

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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 February 14, 2011, I personally sealed the envelope(s) and caused to be served by the methods indicated, and addressed as stated on the attached service list which contained a true copy thereof of the following document described as:

ANSWER TO PETITION FOR REVIEW

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

Executed on April 25, 2012, at San Francisco, California.

Laarni I. Ponce
(Type or print name)

Laarni I. Ponce
(Signature)

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