SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

JERRY TRAHAN, Plaintiff, v. U.S. BANK NATIONAL ASSOCIATION and DOES 1-15, inclusive, Defendants.	No. RG09 454803 ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION Date: July 24 and July 31, 2012 Time: 9:00 a.m. Dept.: 17

On July 24, 2012, in Department 17 of the above-entitled court, the Honorable Steven A. Brick presiding, the Motion of Plaintiff Jerry Trahan ("Plaintiff") for Class Certification came on regularly for hearing. Plaintiff appeared by Edward J. Wynne and J.E.B. Pickett of the Wynne Law Firm. Defendant U.S. Bank National Association ("Defendant" or "U.S. Bank") appeared by Timothy Freudenberger, Alison Tsao and Kent Sprinkle of Carothers DiSante & Freudenberger, LLP. The Court provided a tentative ruling before the hearing inviting the parties to appear and present complete arguments on all relevant issues, and highlighted particular questions of interest to the Court. During the hearing, the Court granted a short continuance to July 31, solely for Defendant to submit revised evidentiary objections. On July 31, 2012, the Court took this motion under submission.

The Court has considered all of the papers filed in connection with the matter, the arguments of counsel, and, good cause appearing, HEREBY GRANTS the motion, for the reasons set forth below.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant owns and operates retail banks, including in California, under the name U.S. Bank. Plaintiff worked during the relevant period as a salaried employee in the position of Business Banking Officer ("BBO") and seeks to represent other BBOs on a class basis. BBOs sell Defendant's banking products, specifically loans and lines of credit on commercial real estate, practice financing loans, equipment financing, business checking and savings accounts, and money management tools such as merchant card and payroll services.

Plaintiff alleges that BBOs were misclassified as "exempt" employees and deprived of various protections for non-exempt employees under the California Labor Code and applicable wage orders. The operative, First Amended Complaint sets forth four causes of action, for overtime (Lab. C. § 1194), for restitution of unpaid overtime under the unfair competition law (Bus. & Prof. C. § 17203), for injunctive and declaratory relief of Defendant's allegedly unfair, unlawful and fraudulent conduct under section 17203; and for waiting time penalties (Lab. C. § 203). (See First Am. Complaint ("Complaint") filed 9/15/10.)

This is not the first case to address these issues with U.S. Bank. On May 20, 2009, judgment was entered against Defendant in a certified class action titled *Duran v. U.S. Bank National Association* (Ala. Co. No. 2001-035537) after bifurcated trials on liability and damages. In *Duran*, the plaintiff alleged the same claims on behalf of, *inter alia*, BBOs employed in California during the period December 26, 1997 to September 26, 2005. After judgment for plaintiff and the class, Defendant appealed, and did not reclassify BBOs.

Only one week after that judgment was entered, Plaintiff Trahan filed this action seeking relief on behalf of a class of BBOs employed from September 27, 2005 forward. (See Compl. filed 5/28/09 at ¶ 16.) After the judgment, Defendant initiated changes in BBOs' work

environment that were designed to ensure that BBOs could - and did - spend more time outside U.S. Bank property engaged in outside sales activity; around this time, Defendant also clarified that BBOs must spend at least half of their work hours "outside," engaged sales activity.[1]

In light of these changes, Plaintiff temporally narrowed his proposed class to a "subclass" of BBOs who were employed by Defendant at any time between September 27, 2005 and June 30, 2009, thus excluding the period after these changes went into effect.[2] On reply, Plaintiff conceded that no injunctive relief is available for the Subclass, but has not formally dropped the injunctive relief claim. (See also discussion re post-subclass claims, *infra* at § VII.)

Plaintiff filed this motion on January 13, 2012. The opposition was filed April 4, 2012; the reply on June 25, 2012; and a surreply (ultimately, with the Court's permission) on July 3, 2012. In the interim, on February 6, the Court of Appeal reversed the trial court judgment and

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[1] As described in more detail, below, many BBOs were provided with the 2005 BBO job description but did not understand it to require them to work physically outside of U.S. Bank property for any specific amount of their worktime. For a significant part of the Subclass period, there was widespread confusion about, and conflicting interpretations of, the "outside sales" requirement. (M. Gediman Decl. ¶ 3.)

In July 2009, however, Defendant circulated a revised BBO job description which included an addendum expressly clarifying that BBOs were required to spend most of their work time physically outside of bank premises, engaged in sales activity. (See, Wynne Decl. Ex. 10 (July 2009 job description]; C. Wheaton ¶ 5 ["in recent years," Defendant revised the job description to further emphasize the outside time expectation]; Birnbryer Dep. at 60-61 ["all areas" of management first communicated the outside time requirement to BBOs in mid-2009]; B. Biggs Decl. ¶ 4 [BBO, hired early in 2009, first received a job description in March 2009 and a revised job description in July 2009 which explained the outside time requirement].) Then, in January 2010, Defendant started requiring BBOs to sign quarterly certifications that they were complying with outside time policy]. (B. Biggs Decl. ¶ 16)

Also, in late 2009 and early 2010, Defendant provided additional technology tools to enable remote access to client documents. (T. Biggs Decl. ¶¶ 26-27; Birnbryer Dep. at 60 [all BBOs were given air cards at the end of 2009 so they could remotely access Defendant's network].) This was important because one of BBOs' tasks was to analyze, prepare and submit loan applications to underwriting, which was difficult, if not impossible, to do outside of bank property without this access, (See, *e.g.*, Feinner Decl. ¶ 15 [did not have remote access to intranet]; Jackson Decl. ¶ 12 [needed a secure internet connection and a printer to perform job duties]; Kramer ¶ 12 [same]; Otto Decl. ¶ 11 [same].)

[2] Although the Court does not view this class as a "subclass" for the reasons discussed in section VII, *infra*, it adopts Plaintiff's term here to refer to the temporally narrowed class.

rulings re decertification in *Duran* and, on May 16, the California Supreme Court granted review. (See *Duran v. U.S. Bank Nat. Assoc.* (2012) 203 Cal.App.4th 212, as modified on denial of reh'g (Mar. 6, 2012), review granted and opinion superseded, 140 Cal.Rptr.3d 795 (Cal. 2012).) Additional procedural and evidentiary issues are resolved in Appendix A, attached.

II. COLLATERAL ESTOPPEL

As a preliminary matter, Defendant argued in its opposition that Plaintiff is collaterally estopped from obtaining class certification by the *Duran* case. Collateral estoppel does not impact class certification in this case because *Duran* (including the class certification decision in that case) is not yet "final and on the merits." (See, *e.g., Alvarez et al. v. May Dept. Stores Co.* (2007) 143 Cal.App.4th 1223, 1233, citing *Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 481.) This Court will evaluate all evidence and argument independently, based upon the proposed subclass period, and will not rely upon the analysis or conclusions of any other trial court, whether in *Duran* or another arguably analogous case.[3]

III. CLASS CERTIFICATION STANDARDS

"To obtain certification, a party must establish the existence of both an ascertainable class and a well-defined community of interest among the class-members." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435, citing *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462.) This requires an inquiry into numerosity, ascertainability, whether common questions of law or fact predominate, whether the class representatives have claims or defenses typical of the class, and whether the class representatives can represent the class adequately. (See *id.*; see also *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1022.) Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing. (*Linder, supra*, at 435.)

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[3] On surreply, Defendant exhorted the Court not to ignore the *Duran* opinion, which had been depublished well before the hearing on this matter. That is a clear violation of C.R.C. 8.115(a).

"[T]he focus in a certification dispute is on what type of questions -- common or individual -- are likely to arise in the action, rather than on the merits of the case[.]" (See *Sav-On Drug Stores Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327; see also *Brinker, supra,* at 1022.) Analysis of class certification criteria may come close to examining the merits, because facts relevant to the merits may be and are often enmeshed with class certification criteria, such as commonality; but it is not a merits decision. (See *Linder, supra,* at 432.)

It is Plaintiff's burden to support each of the above factors with a factual showing. (See *Hamwi v. Citinational-Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462.) The Court is vested with discretion in weighing the concerns that affect class certification. (See *Sav-On, supra,* at 336; *Brinker, supra,* at 1022.) This includes "questions as to the weight and sufficiency of the evidence, the construction to be put upon it, the inferences to be drawn therefrom, the credibility of witnesses ... and the determination of [any] conflicts and inconsistency in their testimony." (*Sav-On* at 334, quoting *Thompson v. City of Long Beach* (1953) 41 Cal.2d 235, 246.)

IV. ASCERTAINABILITY, NUMEROSITY, TYPICALITY AND ADEQUACY

Defendant concedes both ascertainability and numerosity. (See Hildreth Decl. ¶ 24 [Defendant has identified 124 persons in subclass]. See also Def's Opp. Mem. at 1, citing T. Biggs Decl. and Sippola Decl.) However, Defendant does challenge the adequacy of Plaintiff Trahan and the typicality of this claims. "Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450; *Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 141-142.) A representative plaintiff must actively participate in the litigation of the case. (See *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1434; *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal. App. 4th 1253, 1572.)

Here, Plaintiff's counsel avers under oath that Mr. Trahan is aware of, and has accepted, his fiduciary obligations to the putative class, and that he has discharged those obligations

already by actively assisting with the investigation and litigation of this case. (Wynn Decl. ISO Mot. for Class Cert. ¶ 9.) While this may not be as robust a showing as sworn testimony from the Plaintiff himself, it is sufficient to make a *prima facie* case of adequacy. The Court will not infer that "Plaintiff has not shown that he accepts the obligations of a class representative" (Opp. at 23) from the testimony cited by Defendant, which consists solely of Plaintiff's admission that he now lives in Texas which "makes it more difficult to attend court proceedings in California". (Trahan Dep. at 26, 201.) Defendant has not suggested that Plaintiff was unable to come to California for his deposition, only that it may have been "more difficult"; this fact supports, rather than undercuts, Plaintiff's dedication to this case.[4] Nor does the fact that Plaintiff may not know how other BBOs spent their time render him inadequate to serve as a representative.

Defendant also suggests that Mr. Trahan's interests conflict with those of other BBOs who worked during the Subclass period. This contention lacks support, particularly in light of Plaintiff's concession that injunctive relief is not available to the Subclass. (See *Richmond, supra,* 29 Cal.3d at 470, 473 [to defeat representative status, conflicts must "go[]to the very subject matter of the litigation"].)

As to typicality, Plaintiff held the same job title, performed the same duties, was evaluated and paid in the same manner, and asserts the same claims as other BBOs. Defendant has not identified any defense that is unique to Plaintiff Trahan that will be a major focus of the litigation. (Compare *Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 99.) The fact, if true, that Plaintiff was terminated for poor performance would not impact his exempt status unless there is evidence that he, unlike other class members, fell below the 50% threshold due to his own substandard performance, and not for other reasons that are common to

[4] *Soderstedt v. CBIZ Southern California, LLC* (2012) 197 Cal.App.4th 133, 155 affirmed a trial court's finding that a class representative was not adequate as within the trial court's broad discretion, particularly when the finding was based upon inferences from evidence; it does not compel a different result here. *Earley v. Superior Court* (2000) 79 Cal.App.4th 420, 1434 did not decide, or even discuss, the adequacy of a class representative.

the class. (See *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 802; *Sav-On, supra,* 34 Cal.4th at 337.) There is no such evidence. Thus, typicality is satisfied.

V. WHETHER COMMON ISSUES OF LAW AND FACT PREDOMINATE

Defendant primarily disputes whether individual questions or questions of common or general interest predominate. "Plaintiffs' burden on moving for class certification … is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues predominate." (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1108; *Brinker, supra*, 53 Cal.4th at 1021.) The inquiry focuses on whether the defendant had an institutional practice affecting all of the potential class members. (*Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1299.)

The determination of how much commonality is enough to warrant use of the class mechanism requires a fact-specific evaluation of the claims, the common evidence, and the anticipated conduct of the trial. California courts 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." (*Sav-On, supra,* at 333, fn. omitted.)

Commonality is determined with respect to the claims and defenses as pleaded. (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908 at 916 n.22.) The Court must also consider Defendant's affirmative defenses, because Defendant may defeat class certification by showing that a defense would raise individualized issues that predominate over common issues. (See *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 913; *Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 811.)

Defendant's Opposition focused almost exclusively on its affirmative defenses - primarily, the outside sales exemption. However, the Court observes at the outset that the factual issues related to Plaintiff's *prima facie* case are uniform: Defendant does not dispute that BBOs have always been classified as exempt; that all receive a salary and are eligible for incentive pay

and have been paid under the same compensation system; and that none has ever been paid for any overtime worked. As to these elements, the legal and factual issues are common.[5]

A. Outside Sales Exemption

Outside sales persons are exempt from overtime. (See Lab. C. § 1171; Wage Order § (1)(C).) An outside salesperson is one who "customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities." (*Id.* § (2)(M).)

Under the plain language of this provision and governing precedent, only time actually spent physically off-site and selling - and driving time proportionally related to actual sales activity - count towards this exemption. (See *id.* § 2(M); *Pablo v. ServiceMaster Global Holdings, Inc.* (N.D. Cal. June 20, 2011) C 08-03894 SI, 2011 WL 2470093 at *7 & n.13, motion to certify appeal denied (N.D. Cal. Aug. 22, 2011) C 08-03894 SI, 2011 WL 3678824 [discussing sales versus non-sales activity]; *Ramirez, supra,* 20 Cal.4th at 801 [driving time to a destination where sales activity occurs is only counted in the same proportion that the time spent at the destination was actually spent on sales]; *Walsh v. IKON Office Solutions, Inc.* (2007)148 Cal.App.4th 1440, 1456 [same].)[6]

"[I]n contrast to federal law, California law 'takes a purely quantitative approach,' looking to the amount of time a person is 'engaged in sales activities outside the workplace' rather than looking to 'the primary function for which the person is employed.'" (*Pablo, supra,* at *5, citing *Ramirez,* 20 Cal.4th at 789, 797.) To qualify, the salesperson must spend at least 50% of time outside of the workplace engaged in sales activities. (*Maddock v. KB Homes, Inc.* (C.D. Cal. 2007) 248 F.R.D. 229, 240.) As Defendant correctly argued at the hearing, the federal

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[5] Defendant's arguments regarding damages and restitution are addressed in section V.E., below.

[6] Under federal law, work at the salesperson's home or other fixed site used by a sales person (as a headquarters or for telephonic solicitation of sales) is not outside exempt work. (29 C.F.R. § 541.502; see also *Wong v. HSBC Mortg. Corp. (USA)* (N.D. Cal. 2010) 749 F.Supp.2d 1009, 1012-13.) However, as these federal regulations are not incorporated by the Wage Order, under California law work at "home" may be considered "outside" if the time is spent selling.

"incidental sales work" rule does not apply in California. (*Ramirez, supra,* at 797; DLSE Op. Letter 7.14.94. [salesman's time stocking truck with goods for sale, as opposed to demonstration pieces or free samples, does not count towards outside sales activity].)

In this inquiry, the primary consideration is how employees actually spend their time. Also relevant are "whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job." (*Ramirez, supra*, at 802; *Wong, supra,* 749 F.Supp.2d 1009, 1015 [considering what managers told their sales persons about where they should spend their time].) The Court may also consider any other relevant facts or circumstances.[7]

Thus, trial on the merits would involve the following questions:

(1) The proportion of time BBOs spent outside of Defendant's branches (at their homes, on the road, at client locations) working on actual sales activity as opposed to time spent working at bank branches or, regardless of location, performing distinct, non-sales tasks.

(2) Defendant's expectations regarding where and how BBOs spent their work time, and whether and how these expectations were communicated to BBOs, including whether BBOs were counseled or disciplined for failing to spend adequate time outside of bank premises on actual sales activities.

(3) Whether Defendant's expectations were realistic, given the requirements of the job and the resources that Defendant provided to BBOs to accomplish their job duties.

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[7] As stated in *Sav-On, supra*, the Supreme Court "did not in *Ramirez* purport to limit the types of evidence or methods of proof that parties to overtime disputes may bring to bear." (34 Cal.4th at 335.) "*Ramirez* is no authority for constraining trial courts' great discretion in granting or denying certification or, more particularly as defendant asserts, for applying a particular set of 'factors' whenever plaintiffs in an overtime case seek class certification. The certification of a class is a discretionary decision that demands the weighing of many relevant considerations." (*Id*. at 336, internal citations and quotations omitted.)

1. Plaintiff's BBO Declarants

Plaintiff submitted the declarations of eleven BBOs who described their duties and work experiences as BBOs. Two (Thanh Dao and Christoher Otto), were only employed as BBOs for the last few months of the class period, so their testimony is accorded little weight.[8]

Plaintiff's declarants reported, uniformly, that they spent almost all of their time engaged in efforts to market and sell bank products and doing related work, such as preparing reports and loan applications, and that most of their work time accomplishing these tasks was spent on bank premises. Each supported this conclusion with specific details, such as their average weekly hours worked (generally from 40-70, but the majority in the 45-50 hours per week range); a description of the frequency and duration of offsite client meetings (ranging approximately 2-20 hours per week, but usually less than 10 hours per week); and a description of other common tasks, how often and where those tasks were performed.

These BBOs also declared that they were not told by anyone, during training or when they worked during the Subclass period, that at least 50% of their work hours must be spent working outside of bank premises. Some reported being encouraged to engage in networking at events and street canvassing, but denied that they were told about any time requirement. Some testified that they were directed by their managers to focus their efforts on specific tasks, such as cold calling, on bank property.[9] Others testified that their managers actively pressured them to be in the office for a certain amount of time each week or day.[10] They denied having been

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[8] Ms. Dao's manager declared that during the Subclass period, Ms. Dao was in training, paid hourly, and not compensated based upon sales. (See Shih Decl.)

[9] BBO Olberding claims that he was told by both of his supervisors that "windshield time" was wasteful. (Olberding Decl. ¶ 11.) BBO Watkins was told to stay inside and "dial for dollars" and would only allow BBOs to leave the office for an outside meeting unless the BBO had a preliminary loan package in hand. (Watkins Decl. ¶¶ 4-5.) Their managers dispute this.

[10] Two BBOs declared that their manager, Ms. Chan, required them to log in to their computers while they were in the office so that she could ensure that they were working enough time. (See Kramer, Klingman declarations.) One claims that his supervisor, Mr. Zatarain, knew that he was working most of the week in the branch because Mr. Zatarain was there with him, and because he prohibited the BBO from working from home during business hours. (Neal Decl. ¶ 8.) BBO

disciplined for, or evaluated based upon, their time spent on bank property. Generally, they agreed that canvassing was not as productive as cold calling from the office; and because they were compensated and evaluated solely based upon sales, they focused on productive activities.

Plaintiff's declarants also explained that they could not succeed without spending a majority of their time on bank premises because (1) client meetings were difficult to get[11]; (2) in-person meetings were often less efficient than phone meetings; (3) BBOs received many referrals through bank branches, which they got by spending time physically in the branches or on the telephone with branch employees; (4) BBOs could not work on deals in public, because they were not permitted to discuss their customer's sensitive financial information in public; (5) BBOs were prohibited by bank policy from using clients' financial documents outside of the branches and could not access them remotely via computer, and thus could not assemble loan applications or review client's financial documents outside of the branches; and (6) in order to prepare, submit and supplement loan applications, BBOs needed consistent access to fax, email, and/or UPS delivery, which they only had at the branches.

Defendant deposed six declarants Dao, Feinner, Jackson, Klingman, Trahan, and Watkins. Their deposition testimony did not materially differ from their declarations on these key issues.[12]

Watkins testified that one of his supervisors monitored his whereabouts; and his other supervisor knew that he worked primarily at the office because they discussed that fact and the supervisor did not did not object, so long as he produced sales. (Watkins Decl. ¶ 5.)

[11] One BBO testified that her manager estimated that it takes 200 cold calls to get a single lead.

[12] Mr. Feinner received the job description when he was hired, but he did not understand it to require him to spend most of his time working physically out of the office. (Feinner Dep. at 86-87, 91.) He repeatedly denied that he was ever told about any outside time requirement until U.S. Bank started requiring certifications. (*Id.* at 52.) He believed that cold-calling from the office was more productive, that's what he did, and he was not disciplined for that. (*Id*. at 67.) He rarely foot canvassed. (*Id*. at 78.) Most of his networking was done through phone or email. (*Id.* at 118.) He spent very little time on site inspections and in-person meetings out of the office. (*Id.* at 93-96.) As far as working from home, he had a laptop and internet, but no access to the bank intranet. (*Id*. at 81, 110.) He did not receive an air card until March 2010. (*Id*. at 60.)

Mr. Klingman submitted two declarations, one on behalf of Defendant (dated 10/27/09) and one for Plaintiff (10/1/11). He was also deposed. There are credibility issues with both of his declarations, but the issues in Plaintiff's declaration are peripheral[13] while the inaccuracies in Defendant's declaration go to core issues.[14] Because of the manner in which defense counsel procured its declarations and the fact that Mr. Klingman testified that because he trusted Defendant, he did not read his defense declaration before signing it, the Court relies primarily upon his deposition testimony and his 10/1/11 declaration, both of which are consistent with the testimony of other BBOs.

As for Mr. Trahan, there is little dispute that he was terminated for performance reasons, that he failed to disclose that fact and lied about his production figures to potential employers in

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BBO Jackson also received the job description but likewise understood "outside sales" to mean "bringing in new business," not to refer to physical location where the work was performed. (Jackson Decl. at 95-96, 100.) He generally worked on bank premises. (*Id*. at 106-07, 109-10.) He did some canvassing, but could not do as much as management wanted. (*Id*. at 112, 115, 129.) At some point, Matt Gediman issued a "mandate" to spend a certain amount of time outside of the office, at which point Jackson increased the amount of time spent canvassing *and working at other branches*, which he needed to keep up with phone calls, emails and loan package preparation. (*Id.* at 146-47, 150-51.)

BBO Watkins' deposition testimony was likewise consistent with his declaration. (See Watkins Dep. at 107-110, 121 [how he understood job description, performed duties].)

[13] Mr. Klingman worked as a BBO in California in 2006 and transferred to Las Vegas, Nevada in October 2007. (10/1/11 Klingman Decl. ¶ 3-4.) He averred that in Sacramento, he spent most of his working time on bank premises and that his work did not change after his transfer. (*Id*. ¶¶ 7, 13, 20, 21, 23-29.) At deposition, he testified that his work *did* change after transferring, because he had to spend more time outside, familiarizing himself with a new market. (Klingman Dep. at 225.) His plaintiff declaration (¶ 36) and deposition testimony were also inconsistent on the issue of whether he had provided Defendant with a declaration (Klingman Dep. at 183-84).

[14] Mr. Klingman's defense declaration states that he spent more than 60% of his working time away from bank property (10/27/09 Klingman Decl. ¶ 5, 11) but he testified at deposition that he spent more time *on bank property*, doing deals through branches and telemarketing (Klingman Dep. at 80-81). He declared that he understood that he should not spend too much time in the office on paperwork (10/27/09 Klingman Decl. ¶ 9) but testified at deposition that this "never happened" and repeatedly affirmed that he spent most of his work time on bank premises (Klingman Dep. at 316). Klingman also testified at deposition that his manager never told him he needed to spend more time outside of the office, including more than half his time outside of bank premises (*Id*. at 317.)

order to get a job, and posted false statements on his LinkedIn profile online. The Court will not discredit his testimony, however, because it is corroborated by the testimony of other BBOs.[15] This includes BBOs who, unlike Mr. Trahan, regularly hit sales goals and even achieved "pinnacle" status. (See Birnbryer Dep. at 67; Brandt Dep. at 79; Klingman Decl. ¶ 23; Watkins Decl. ¶ 9 [Watkins was a top-five producer nationally, even though he spent virtually all of his time on bank premises].) The putative Subclass also includes persons that Defendant contends, like Trahan, failed to "produce." (See Lim Decl. ¶ 6 [BBO Olberding was a poor performer].)

In sum, Plaintiff's BBO declarants demonstrate common facts regarding where BBOs spent most of their work time and the underlying reasons they did so. The lack of variation appears to stem not from individual performance issues, but from facts common to all BBOs: how Defendant communicated the outside time requirement to BBOs, how the job was structured to incentivize certain (productive) behavior, what resources Defendant provided to BBOs, and what limitations Defendant placed on sales work that BBOs could perform off site during the Subclass period.

2. Defendant's BBO Declarants

Defendant submitted declarations by 37 BBOs who worked during the Subclass period. Eleven of these, which were prepared for *Duran*, were executed before the Subclass period and are irrelevant and inadmissible. The persuasiveness of the remaining 26 declarations[16] is doubtful. Four were clearly refuted by the declarants at their depositions.[17] Mr. Tamblyn's

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[15] See, *e.g.*, Trahan Dep. at 78 [he was not told about an outside time requirement; he understood "outside sales" to refer to bringing in new business]; 97-98 [mentor BBO only advised him to send out mailers and make cold calls]; 136-37, 144, 148 [in-person cold calling did not work well, was less efficient than phone calls, and cut into time for preparing loan paperwork]; 145-46 [the only work he could do from home was stuffing mailers]; 207-09 [he spent most of this time working inside branches, including when on his mobile phone].

[16] One of these 26, one was provided by Mr. Klingman. (See pp. 12-13, *supra*.)

[17] These include BBOs Birnbryer, Brandt, Klingman, and Reed. BBO Birnbeyer's defense declaration states that he spent more than half his time away from U.S. Bank branch offices "on sales and sales related activities" but he refuted that at deposition. (Birnbryer Dep. at 60-62 [prior to mind-2009, when he first learned of outside physical time requirement, he spent more

deposition testimony demonstrates that none of his testimony - either in his declaration or at deposition, is trustworthy. It is doubtful whether BBOs provided these declarations voluntarily and with full understanding of the implications and consequences.[18]

Even assuming that they are credible, Defendant's declarations are so vague and ambiguous as to time that the Court can draw few conclusions about Defendant's expectations of BBOs or the work BBOs actually performed during the Subclass period. These declarants do not clearly state when or how the "outside time" requirement was communicated to them or specify the time period during which they complied with the requirement.[19] Also, because eleven of the 21 declarants only worked for Defendant during the last few months of the Subclass period, they had worked equal time inside and outside of the Subclass period at the time they provided their declarations, further exacerbating the ambiguity problem.[20]

Only Kamalkit (Kam) Kaur's declaration expressly addressed the Subclass period. This is because he was only employed as a BBO during the Subclass period, having since been

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time working on bank property].) He also testified that his defense declaration used "hyperbole" and used words that "skewed [it] towards [Defendant's] argument." (*Id*. at 75.) He was not sure whether the defense declaration "was referring to [his] activities and duties that [he was] performing as a BBO" at the time of signature, or earlier, because the attorney was "vague" covered his entire employment at the interview. (*Id*. at 76.)

BBO Brandt's November 2009 declaration says that she "[is] expected to spend a majority of time outside generating sales and that she "regularly spend[s] more than 50% of [her] time outside of the office in sales or sales-related activity." (Brandt Decl. ¶¶ 12, 16.) At deposition, however, she testified to the contrary. (See Brandt Dep. at 21-24, 139-140 [no expectations communicated to her about outside appointments or where she had to spend her time]; 24-26, 74-75 [this only changed sometime in 2009, after Matt Ashworth, Regional Manager, advised BBOs via conference call that they should be in the office no more than 20 hours a week, and BBOs began to sign quarterly certification forms]; 35, 47, 54, 63 [breaking down her time spent at her home office, at branch offices, at home, and her time spent at off-site sales meetings].)

[18] This is not just because of the way that Defendant solicited these declarations but also because the requests came in mid-2009, following on the heels of management's emphatic clarification of the outside time requirement.

[19] The BBOs' statements that they *currently* work more than 50% of their time outside of the office are irrelevant. These statements, on their face, include the period after the Subclass period when Defendant initiated significant changes facilitate outside sales work.

[20] These include BBOs B. Biggs, Carreon, Doughty, Jeske, John, Maier, Pizarroso, Pokuta-Ramirez, Racusin, Summers, and Weimer.

promoted. Mr. Kaur is still employed by Defendant, and has some incentive to testify in Defendant's favor. Even so, he admitted that he could not recall his Sales Manager specifically communicating any "outside time" expectation. He also averred that he spent more than half of his work time engaged in sales activities physically outside of Defendant's premises; while this conflicts with the weight of Plaintiff's BBO testimony, his lone declaration is not sufficient to show substantial variation across the class.[21]

3. Defendant's Management Declarants

Defendant also submitted the testimony of several Sales Managers and other managers. Most of their testimony regarding the outside sales exemption issues was, like Defendant's BBOs, vague as to time. The exceptions were Sales Managers Sing Lim, Charles Wheaton and Matt Gediman (who was also deposed). Others' testimony was inadmissible or unhelpful.[22]

Mr. Lim was a Sales Manager early in the Subclass period. He supervised BBO Mike Olberding, as well as Danny Pham, who later promoted to Sales Manager and then supervised Mr. Olberding. Mr. Lim denied that he ever told Mr. Olberding to focus on phone work and avoid "windshield time," and further averred that he believed and expected that his BBOs were required to spend the "vast majority of their time outside U.S. Bank premises." (Lim Decl. ¶ 3.) He explained that, in order to succeed, BBOs had to be "physically outside of U.S. Bank branches to meet with clients, prospects, and referral sources in their communities" but did not identify any specific communication, or setting, in which he or other bank management told

[21] Defendant also submitted the deposition testimony of (1) a current BBO, P. Aghajanian, who appears to have been hired after the Subclass period and (2) James Boyce for whom no foundation regarding his employment dates was supplied (and, in any event, his testimony does not demonstrate any individual issues).

[22] The deposition testimony of Jeffrey Good is not relevant because he did not become a Sales Manager at U.S. Bank until after the Subclass Period; before then, he worked at Pacific National Bank. (See Good Dep. at 22.) Sean Maclelland testified that he does not manage BBOs directly. The deposition testimony of Janice Coonley, a human resources manager, was generally problematic. She testified in legal conclusions despite plainly not grasping the exemptions at issue, and was not competent to testify on many pertinent issues.

BBOs that they were required to spend a specific proportion of their work time outside of bank premises. This declaration is not inconsistent with the testimony of many BBOs who understood that they were required to spend 80% of their time on "outside sales" but did not understand this to include a specific physical location requirement.[23]

Mr. Wheaton supervised Plaintiff Trahan and 18 other BBOs (including declarants Feinner, Richards, and Watkins). His primary mode of communication with most BBOs was via phone, with some face-to-face meetings with BBOs who worked at or visited the Glendora location. He also visited the branches where other BBOs worked. He submitted two declarations, one specifically directed to Plaintiff. They are both vague as to time on key issues (*e.g.* when certain technological tools and sales assistants were provided to BBOs) and rely heavily on the more recent clarifications and emphasis of the outside sales requirement.

In both declarations, Mr. Wheaton stated that he understands that U.S. Bank has "always" required BBOs to spend more of their work time outside, and that "throughout [his] time as Sales Manager at U.S. Bank, [his] communications of U.S. Bank's expectations that BBOs spend most of their time engaged in outside sales activities have been very clear…." The communications he identifies, however, are the 2005 BBO job description and Small Business Roles documents which are common to all BBOs (and not necessarily inconsistent with BBOs' testimony about how they understood the outside sales requirement). He also stated that he told BBOs that to succeed, they needed to spend more time outside, but did not testify that any specific time requirement was communicated until "recent years" when a 19-hour rule of thumb was instituted. He also admitted that the job description was clarified in 2009, and quarterly certifications instituted in 2010, to make the time requirement "more explicit."

With respect to how and where Plaintiff Trahan spent his time, Mr. Wheaton (who did not work at the same location as Plaintiff) bases his conclusions on phone conversations with

[23] Mr. Olberding attributed the "windshield time" statement to both Danny Pham, who did not contradict it.

Trahan that occurred 3-5 times a week, in which he often heard background noise suggesting that Plaintiff was at his home. It supports the conclusion that Trahan spent some portion of each day at home but not that Plaintiff spent a specific amount of time outside, let alone that he spent "most of his workday" at home. Mr. Wheaton also concludes, based solely on Plaintiff's deal volume, that Plaintiff had no need to work at the branch, but this fails to account for other "inside" tasks described by Plaintiff in his declaration. Equally without foundation is Mr. Wheaton's speculative claim that Plaintiff never worked overtime.

Mr. Wheaton used similarly dubious methods to estimate the amount of time spent "outside" by BBOs Feinner [who "enjoyed being out meeting people" and was "difficult to locate"] and Richards [who "always called me on his cell phone" and was difficult to reach] and to conclude that these BBOs did not work overtime [they used loan brokers, had "work hard, play hard" lifestyles]. He admitted that he could not formulate any opinion on these issues as to BBO Watkins. Thus, his declarations do not reveal any individualized issues.

Matt Gediman was a Sales Manager from 2007-2009.[24] He stated that he "consistently" emphasized to BBOs that they were expected to spend more time outside of bank property engaged in sales activities, but in the same declaration admitted that he did not realize that "outside" referred to physical location (as opposed to sales to new customers) until mid-2007. (Gediman Decl. ¶¶ 3, 11.) He does not explain how he came to this realization or whether this information was shared with other Sales Managers. Prior to that time, not only did Mr. Gediman fail to appreciate that BBOs were subject to a "physical location" requirement, but other bank employees similarly subjected the "outside sales" requirement to "ambiguous and contrary interpretations." (*Id.*) In 2007, he instituted his "shoe leather campaign," telling his BBOs that it was critically important for them to spend the majority of their working time outside of bank

[24] Like the other managerial declarants, Matt Gediman's declaration contains many statements that are drafted in the present tense and thus likely (or in some cases, plainly) refer to events that occurred after the Subclass period. The following discussion is limited to the statements that expressly pertain to the Subclass period.

properties engaged in sales activities. (*Id.* ¶¶ 3-4.) He told BBOs - including Mr. Jackson - that they "needed" to be outside *in order to succeed*; but he did not testify that he told them they were subject to any specific outside time requirement, other than his guideline (not expressed as a rule, and only implemented in mid-2007) that BBOs should canvass during prime business hours.[25] (*Id.* ¶ 7.) All of this is consistent with other BBOs' testimony.

4. Other Evidence

Both parties provided the May 2005 and July 2009 BBO job descriptions, and defense witnesses referred to the Small Business Roles document (also provided). In addition, the parties refer to documents concerning processes that were standardized for all BBOs, such as performance evaluation forms and compensation plans, resources guides, orientation and training materials. These documents were generally provided to putative Subclass members, making the question of whether and how they conveyed Defendant's outside sales expectation a common one. Defendant's policies and procedures and training curriculum are likewise common evidence regarding Defendant's expectations of all BBOs.[26]

5. Common Issues Predominate on the Outside Sales Exemption

As described above, there are no material variances across the putative Subclass with respect to the factual questions that pertain to the outside sales exemption. This includes written communications by Defendant's management regarding the outside sales requirement and BBO and managerial testimony about whether and how this expectation was understood. The duties and demands placed on BBOs during the Subclass period, their method of compensation and

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[25] Mr. Gediman does not state whether any other Sales Managers changed their management methods during the Subclass period and he does not mention any new steps or communications taken by upper management until mid-2009 and 2010. (*Id.* ¶¶ 8-10.)

[26] Defendant relies upon its own interrogatory responses, including one listing numerous instances in which Defendant contends that management disciplined or counseled BBOs for spending too much time working on bank premises. (See Def's Ex. 96.) This evidence, even if it were admissible, does not appear to create individualized issues because it does not clearly say what expectation was communicated to each BBO; the documents identified in the response were not provided with the Opposition.

criteria for evaluation were common, thus incentivizing similar conduct for all BBOs. In addition, even if deal flow varied, BBOs had the same responsibilities, performed the same tasks and had the same resources.

Even if different BBOs performed different tasks on different days, they repeatedly performed the same finite set of tasks, such as client sales meetings; cold calling; preparing flyers and engaging in other marketing activities; pipeline management; analysis of client documents; preparation of loan applications; communicating with underwriting; *etc*.[27] The question of whether each task is a "sales" activity is a legal question that will be common to all BBOs.[28]

Defendant also argued that BBOs performed these tasks in different locations and for different durations, and thus there is significant variation among BBOs, some of whom met the 50% time threshold, and some of whom may not have. The record belies this contention; the overwhelming testimony of BBOs, which Defendant has not effectively rebutted, is that BBOs spent significantly more time on bank property (cold calling, managing pipelines, preparing marketing materials, analyzing client documents, preparing loan applications, and engaging in other "housekeeping" duties) than they did working elsewhere. (See *Walsh, supra,* 148 Cal.App.4th at 1456 n.10 [variation in the work actually performed does not itself preclude class certification; it is only when the variation is *material*, in that it affects whether the amount of exempt work performed exceeds 50 percent, that certification is not appropriate].) The record reveals that Defendant had common policies, provided the same resources to BBOs, and generally implemented, or failed to implement, the 2005 job description's "outside sales" requirement in the same fashion as to all BBOs. (Compare *In re Wells Fargo Home Mortg. Overtime Pay Litig.* (N.D. Cal. 2010) 268 F.R.D. 604, 611 [common issues are likely to

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[27] At deposition, Sales Manager Gediman testified that he has no reason to believe that BBOs' activities changed significantly from week to week. (Gediman Dep. at 99.)

[28] The question of whether a BBO's subjective intent can transform a non-sales activity into a sales activity (see, *e.g., Pablo, supra,* 2011 WL 2470093 at *7) is also a common legal question.

predominate where there are common policies and procedures].) With the level of commonality demonstrated here, it may not be unfair to extrapolate from representative witness testimony and/or rely upon survey evidence to determine liability for the Subclass as a whole. (See *Wong, supra*, 749 F.Supp.2d at 1016 [representative testimony is permissible so long as record supports extrapolation; finding that plaintiff failed to meet that burden].)

B. Administrative Exemption

Defendant also asserts the administrative exemption as an affirmative defense. Defendant admits that no BBO testified to spending more than half of his or her work time on administrative work; thus, this exemption would only come into play if (1) BBOs were found to spend a significant amount, but less than half, of their time performing outside sales work, *and* (2) the Court determines that California law permits "tacking" (which is discussed in section C, below).

To be administratively exempt, 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." (*Harris v. Superior Court* (2011) 53 Cal.4th 170, 178.) They must also work "under only general supervision" while performing either "special assignments and tasks" or "specialized" or "technical" work." (8 C.C.R. § 11040 [wage order] § 1(A)(2)(d),(e); *Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 148 [discussing level of general supervision]; *Campbell v. PricewaterhouseCoopers, LLP* (9th Cir. 2011) 642 F.3d 820, 831.)

1. Pay Threshold

Defendant does not contest that the pay threshold question will be common. This is supported by the Hinrichsen Declaration.

2. What Work is "Administrative"?

To determine whether work qualifies as administratively exempt time, the Court must determine whether it is "directly related" to management policies or general business operations

of either the employer, or the employer's customer.[29] It does so "if it satisfies two components: First, it must be qualitatively administrative." (*Harris, supra*, 53 Cal.4th at 181-82.) Generally, this includes "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." (*Id*. at 182, citing 29 C.F.R. § 541.205(b) (2000).) However, "only duties performed at the level of *policy* or *general* operations" satisfy this component; "work duties that carry out the particular, day-to-day operations of the business are production, not administrative, work." (*Harris v. Superior Court* (2012) 207 Cal.App.4th 1225, __, 144 Cal. Rptr. 3d 289, 297, emphasis in original.)[30]

"Second, quantitatively, [the work] must be of substantial importance to the management or operations of the business." (*Harris,* 53 Cal.4th at 181-82.) The quantitative element is restricted to persons whose work "affects policy or whose responsibility it is to execute or carry it out" or "persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business." (29 C.F.R. § 541.205(c).) Even the use of highly specialized knowledge does not qualify the work as administrative unless the knowledge impacts overall company policy or guides big-picture operational decisions. (*Id.* subd. (c)(3).) Thus, the issue at trial will be whether any work

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[29] There is no dispute that work performed on behalf of the employer's customers or clients may qualify for the administrative exemption. (See, *e.g.*, *Soderstedt, supra*, 197 Cal.App.4th at 148.)

[30] In *Harris*, the Court of Appeal (after remand from the Supreme Court) cited various authorities to illustrate the concept that this component is "determinative for any employees whose work falls squarely on the production side of the line." This includes *Martin v. Cooper Elec. Supply Co.* (3d Cir. 1991) 940 F.2d 896, 904-05, in which the Third Circuit held that promoting sales did not satisfy the qualitative component of the "directly related" requirement because it "focused simply on particular sales transactions" rather than on increasing "customer sales generally." (*Id*.) In *Harris*, the court acknowledged that insurance adjusters performed some work at the level of policy or general operations, including advising the company on whether it should issue certain types of policies, in general, or serving on committees to determine how to better run the business, but not a sufficient amount to be "primary." (144 Cal.Rptr.3d at 299.)

performed by BBOs is used to guide or set Defendant's policy or general operations, in which case it counts as administratively exempt time, or whether their work constitutes only the "day-to-day operations" of Defendant. (See *Harris, supra*, 144 Cal.Rptr.3d at 297.)

The Court finds that this issue can be tried based upon common evidence. There is no dispute that BBOs were told that their "primary job" was to sell Defendant's financial products and that their activities were geared towards individual sales. Most BBOs spent substantially all of their time (whether inside or outside) pursuing individual sales. None testified that they advise Defendant's management on policy issues or Defendant's policies or conducted work that implemented policies on an operational level, and Plaintiff's BBOs flatly denied ever having done so.[31] None testified that they could bind Defendant to a contract (for example, a purchasing contract) or negotiate on its behalf (except to sell a limited set of financial products to outsiders subject to certain limitations and underwriting approval) and Plaintiff's BBOs denied having or exercising such authority. There is no evidentiary basis for finding substantial variance across the Subclass. Given the nature of BBOs' work, whether it was of substantial importance to Defendant's overall operations or influenced policy will be common questions of fact.

To the extent that Defendant may argue at trial that BBOs' day-to-day sales work substantially impacted or involved implementation of the policy or operations of the bank's *customers*, that too will present common issues. While a few BBOs may have voluntarily "consulted" with prospects regarding their own operations, none were required to do so, paid to do so, or evaluated on that basis. All BBOs were encouraged to understand their clients' business practices and identify their financial goals *so they could sell appropriate US Bank products to*

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[31] Defendant's Senior V.P. Ted Biggs testified that BBOs are encouraged to communicate with management to "help create and influence bank policy", through either informal channels (making suggestions through the existing management structure) or participation in Defendant's "Innovator Group." (T. Biggs Decl. ¶¶ 18-19 [this group has vetted marketing materials, provided suggestions on the loan application process and customer service, advised management regarding competitors' loan terms, and suggested the purchase of equipment that resulted in internal cost savings].) However, no one identified a single Subclass BBO who has served in the Innovator Group or provided evidence of the amount of time spent working for the Group.

those clients and they were evaluated and compensated based upon sales. (See, *e.g.*, Watkins Dep. at 111-12 [job was not to consult but to provide an appropriate line of credit, loan, equipment financing from Defendant's line of products]; Lufti Decl. ¶ 15 [spent time with individual customers to get to know their business, build rapport, and consummate sales].) None testified to negotiating contracts on behalf of a bank client. While the parties dispute how to characterize these facts, the facts themselves are common to all BBOs.

3. Exercise of Discretion or Independent Judgment on Matters of Significance

In performing the administrative work, the exempt employee must customarily and regularly exercise discretion and independent judgment on matters of significance. (See, *e.g.*, *Combs v. Skyriver Communications, Inc.* (2008) 159 Cal.App.4th 1242, 1254, discussing wage order.) "In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." (*Id*., quoting 29 C.F.R. § 541.202(a), incorporated by Wage Order 4-2001 at § 1(A)(2)(f).) It should not be conflated with the exercise of a skill as to routine matters; judgment or independent judgment must be applied to "matters of significance." (*Combs* at 1257, citing 29 C.F.R. § 541.202(e).) There is no bright-line rule, but rather this element involves the examination of all relevant facts and circumstances.[32]

Whether and how BBOs exercised independent judgment and discretion on matters of operational significance likewise will be common. BBOs' testimony, and that of their managers, is consistent: their primary responsibility was sales. Whether an individual sale constitutes a "matter of significance" for Defendant will present a common legal issue at trial. BBOs exercised some discretion in terms of developing leads/prospects, marketing plans, *etc*., and the terms of each sale or loan, but even this discretion was uniformly limited.[33] While terms of each

[32] See 29 C.F.R. § 541.202(b) for illustrations.

[33] For example, BBOs were free to focus on market niches of their choice but marketing materials (such as flyers) and plans were subject to approval by Sales Managers. (See, *e.g.*, Klingman Dep. at 312; Feinner Decl. ¶ 21; Jackson Decl. ¶ 8; Trahan Decl. ¶ 20.)

sale were flexible (whether by business sector or size of loan), it was only within limits set by management and deals were subject to approval by underwriting.[34] The applications submitted by BBOs included the same types of documents and information about the prospect's profitability, cash flow, expenses, *etc*. Thus, there little variation as to matters on which BBOs exercised discretion or the degree or nature of discretion exercised.

To the extent that Defendant may argue that BBOs exercised discretion and independent judgment on matters of significance for *the customers to whom BBOs were selling*, that will likewise present common legal and factual issues, as all BBOs occupied the same position vis-à-vis Defendant's prospects and clients, and provided them with the same set of products.

4. Whether BBOs Perform Specialized Tasks Under Only General Supervision

The parties have not discussed the meaning of the phrases (1) "special assignments and tasks" or (2) "work along specialized or technical lines" that requires "specialized training, experience or knowledge." All subclass BBO declarations support a conclusion that BBOs generally employed the same types of skills to market and negotiate the sale of Defendant's products, and to evaluate, compile and submit loan applications.[35] BBOs' orientation and training was standardized, as was the job description. Thus, the Court finds that the question of whether BBOs performed "special assignments and tasks" or "work along specialized or technical lines" turns on common evidence.

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[34] For example, Defendant required a minimum spread for loans; a proposed loan below that spread would be rejected by; BBOs were free to attempt to negotiate a higher spread, which would increase Defendant's profits. BBOs have discretion to grant (or perhaps, request) fee waivers, but because waivers impact BBOs' incentive pay, they are unlikely to do so unless the proposed spread was high (See Pizarroso Decl.; see also T. Biggs Dep. at 212.)

[35] The most difficult task identified by Defendant is the collection and analysis of prospects' financial information to support a loan application. All BBOs performed this task and the nature of this task did not vary substantially. Defendant's most senior manager declarant testified that BBOs did not spend a majority of their time on this task. (T. Biggs Decl. ¶ 16.) BBO declarants confirmed that this task generally took about one hour per loan.

There is little to guide the Court on the meaning of "only general supervision."[36] The parties do not dispute that, generally, evidence showing the degree and nature of supervision exercised over BBOs by Defendant's managers and/or customers, while the BBOs were executing "specialized" tasks, will be relevant at trial. As discussed above, on the critical issues, substantially all BBOs exercised discretion within the same, pre-set bounds.

5. Whether BBOs were "Primarily Engaged" in Exempt Duties

In the wage order, the term "primarily" [as in "primarily engaged in duties that meet the test of the exemption"] "is defined to mean 'more than one-half the employee's work time." (*Combs, supra,* 159 Cal.App.4th at 1254, citing Wage Order § 2(N).) At the hearing Defendant conceded that the record on this motion contains no evidence that any BBO spent more than half of his or her working time performing "administrative" tasks. To the contrary, the record shows that BBOs spent substantially all of their time devoted to obtaining individual sales, which is not administrative work. Hence, the administrative exemption can only become relevant if California law permits "tacking."

C. Tacking Different Types of Exempt Time

Defendant also raises the issue of tacking, *i.e.* adding up exempt time under different exemptions having 50% time thresholds (here, the outside sales exemption and the administrative exemption) to determine whether the employee spends 50% or more of his or her time on "exempt" duties. There is considerable uncertainty as to whether California law (as opposed to federal law) permits tacking. There is no published California authority on point. Federal cases only state that tacking is "apparently" permitted under state law based upon a DLSE Opinion Letter. (See DLSE Op. Letter 2003.05.23, citing 29 C.F.R. § 541.600.) However, the current wage order does not incorporate section 541.600 or any other regulation

[36] See *Campbell, supra,* 642 F.3d at 832 [trial court erred in disposing of this issue on motion for summary judgment, given paucity of guiding precedent and number of factual disputes].

permitting tacking, and section 541.600 is no longer relied upon by the DLSE. The current DLSE Manual states:

> The portions [of the federal regulations] which are not applicable [under California law] are in strikeout and those which are utilized for enforcement without direction are in italics. The inapplicable sections are reproduced here simply as a guide and aid to enforcement staff in explaining the differences between the federal interpretations and those allowed under California law.

(DLSE Manual p. 273, Addendum II (June 2002 ed., Rev. March 2006) emphasis in original.) The old federal tacking provision (29 C.F.R. § 541.600) is set forth in strikethrough text. Thus, the persuasiveness of the DLSE letter relied upon by federal courts is in doubt. On the other hand, there may be compelling policy arguments in favor of tacking. In any event, the Court need not resolve this issue at this stage, as the issue clearly presents a common legal issue as to all BBOs.

Even if tacking is permitted under California law, as discussed above, the record suggests that tacking would have an impact on the time threshold analysis for few, if any, BBOs.

D. Commission Sales Exemption

Defendant also relies upon the commission sales exemption. To an employee to qualify for this exemption, the Defendant must show that the employee's earnings exceed one and one-half times the minimum wage and more than half of his or her compensation represents "commissions." (See 8 C.C.R. § 11040 [wage order] § 3.D.) Unlike the prior two exemptions, there is no 50% time threshold requirement for this exemption; it is determined solely based upon the employee's earnings.

With respect to the commissions requirement, Plaintiff contends that commissions must be paid once per month as a regular payday and that they must be "based proportionately upon the amount or value" of amount paid in the "sale of the employer's property or services." (See Labor C. § 204.1; *Ramirez*, 20 Cal.4th at 804.) Defendant responds that commissions need only be paid once they are earned (not monthly) and that proportionality is more broadly defined.

(See *Areso v. Carmax, Inc.* (2011) 195 Cal.App.4th 996, 1006-07.) These are common legal issues which need not be resolved at this stage. [37]

The factual issues relevant to this exemption are likewise common. Although the incentive pay plan for BBOs was modified from year to year, all of the BBOS were on the same plan at any given time during the subclass period. (Compare *Maddock v. KB Homes, Inc.* (C.D. Cal. 2007) 248 F.R.D. 229, 246 [commission sales exemption cannot be decided based upon common evidence because salespersons in different regions worked for different subsidiaries and had very different compensation agreements].) This is common evidence.

Defendant has also demonstrated that the question of whether BBOs' commissions exceed base pay can be determined through a review of payroll records. (See Opp. Mem. at 7 [Defendant has identified 19 Subclass BBOs who earned more in commissions than base pay in certain quarters].) The fact that this relatively straightforward review must be performed for each employee does not defeat certification. (Compare *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 460 [class certification is inappropriate where each class member would have to litigate "numerous and substantial" individual issues]; *Hicks, supra,* 89 Cal.App.4th at 917, 925 [contrasting claims requiring proof of individual property damage, which "would require taking and analyzing core samples from the foundations of all class members' homes" (individual issues defeated commonality) with other cases where "proving individual claims for unpaid welfare benefits or overcharged taxi rides where the amount of the claims can be mathematically calculated based on the defendant's own records" (sufficient commonality)], footnotes omitted.)

Finally, the issue of whether each class members earns 1.5 times the minimum wage will not present individualized issues. At the hearing, Defendant argued that Plaintiff had suggested some question regarding what constitutes "one and one-half times the minimum wage."

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[37] The Court need not, and thus should not, resolve these issues for the purposes of class certification. (See *Brinker, supra,* 53 Cal.4th at 1025-26.)

Defendant argued that if minimum wage is calculated based upon hours actually worked (as opposed to a standard 40-hour workweek), this element will present individualized inquiries. The proper construction of this element is another legal issue that will apply equally to all class members.

Even assuming *arguendo* that this requirement is based upon individual hours worked (as opposed to a standard 40-hour workweek), Defendant states that BBOs' salaries (exclusive of incentive pay, which was earned 46% of the time) averaged from $53,323.36 up to $61,285.57. Hinrichsen Decl. ¶ 5.) Assuming that BBOs worked 80 hours per week (well above the averages testified to by Subclass BBOs) for 52 weeks per year, or a total of 4,160 hours per year, BBOs' average hourly wages would exceed 150% of California's minimum wage by a substantial margin, as set forth in the graph below.

YEAR	HOURLY WAGE	CA MIN. WAGE[38]	150% MIN. WAGE
2005	$12.99	$6.75	$10.12
2006	$12.81	$6.75	$10.12
2007	$13.61	$7.50	$11.25
2008	$14.32	$8.00	$12.00
2009	$14.73	$8.00	$12.00

Thus, whether the "minimum wage" is computed based upon a standard 40-hour workweek or hours actually worked by each BBO, it appears that all or substantially all BBOs would satisfy the "minimum wage" prong. There is no material variance in the Subclass.[39]

E. Damages and Restitution

Defendant also argues that damages and restitution present individualized issues. (See Opp. Mem. at 20, 23.) It contends that because BBOs worked different hours each week, and different hours from each other, the amount of overtime worked by each BBO (if any) cannot be

[38] See http://www.dir.ca.gov/iwc/MinimumWageHistory.htm/.

[39] Given that a resolution of this affirmative defense in Defendant's favor would obviate the need to examine Defendant's other two exemption defenses, and that one of the two elements of this defense cannot reasonably be contested, the parties should consider having a bifurcated trial on the commission sales exemption before any other issues are tried.

determined without individualized inquiries. This, alone, however, is not a basis for denying certification. (See *Sav-On*, 34 Cal.4th at 334-35 [variation in mix of work activities and differences in actual amount of overtime worked did not bar certification so long as common issues predominate]; *Brinker, supra*, 53 Cal.4th at 1022 ["As a general rule, if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages"].) Plaintiff will still be required to devise a plan for proving damages that is manageable and comports with due process.

As to restitution, Defendant argues that UCL restitution is limited to "quantifiable" amounts of unpaid overtime. This is a common legal issue facing all of the class, since it is undisputed that Defendant did not track any BBOs' working hours. However, none of Defendant's authorities hold that certification is limited to cases where there is no dispute about the amount of restitution. *Fairbanks v. Farmers New World Life Ins.* (2011) 197 Cal.App.4th 544 was a false advertising case in which the Court of Appeal held that there was no commonality on key liability issues, such as what representations were received by customers and whether those representations were material, and did not discuss the issue of "quantifiability." *Day v. AT&T Corp.* (1998) 63 Cal.App.4th 325 involved a demurrer, not a class certification motion; did not involve claims for wages; and held that restitution was barred by the filed rate doctrine because any order of restitution would constitute a rebate. *Colgan v. Leatherman Tool Grp.* (2006) 135 Cal.App.4th 663 was another false advertising case, which merely held that an award of restitution must be supported by substantial evidence and found that there was no evidence at all to support a finding of restitution in that case. In *Cortez v. Purolator Air Filtration Prods.* (2000) 23 Cal.4th 544, which did involve overtime claims, but focused on the distinction between restitution and damages; the Court did not have occasion to discuss whether overtime was quantifiable, probably because overtime allegedly resulted from a standardized alternative workweek schedule.

When the employer of a nonexempt plaintiff fails to discharge its obligation of keeping accurate records of all hours worked, the employee is permitted to prove wages owed with his or her best estimate ("as a matter of just and reasonable inference"), shifting the burden to the employer to "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." (See *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726-27.) Proceeding in such a fashion would ensure that findings and awards are based upon "substantial evidence."

F. Common Issues Predominate

Based upon the foregoing, the Court finds that common issues of fact and law predominate over potentially individualized issues, if any, such that the a class action device would be "advantageous to the judicial process and to the litigants.'" (*Lockheed Martin Corp.*, *supra*, 29 Cal.4th at 1108.)

VI. SUPERIORITY AND MANAGEABILITY

The relevant policy considerations heavily favor certification of Plaintiff's claims. The first question involves a weighing of the costs and benefits of adjudicating Plaintiffs' claims together, on one hand, versus proceeding by numerous separate actions, on the other. (*Sav-On*, *supra*, at 1347.) Given the numerous common issues, and the likelihood that any individualized issues can be resolved through the use of appropriate management techniques, the benefits of trying these claims on a class basis is high. Doing so would obviate the far greater burden that many individual trials on substantially the same issues would impose on the State (either in state court or before the DLSE).

A related factor is whether class members would pursue their claims, individually, if a class were not certified. While BBOs are well compensated, they are unlikely to be able to match the resources that Defendant has dedicated to defending this case. In addition, the law recognizes that current, and even former, employees may be hesitant to file individual suits against their (former) employer based upon fears regarding job security, prospects for promotion,

or adverse job references. (See *Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, 807.) Whether or not the record supports such a finding here, there is no dispute that no other individual claims have been filed.

Another relevant factor is the recognized need to effectuate the public policy embodied in California labor laws, including the prospect of random and fragmentary enforcement of employers' legal obligations with respect to employees who are non-exempt. (See *Bell, supra,* at 745, quoting *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 807.) A class action would provide a single resolution for all parties involved, and thus - where underlying factual issues are common - could provide more uniform guidance regarding enforcement. (See, *e.g.*, *Sav-On, supra,* at 333-35 [common issues need only predominate over individualized ones; court retains option of decertification where appropriate]; *McReynolds v. Merrill Lynch* (7th Cir. 2012) 672 F.3d 482, 491 [permitting partial certification].)

"Individual issues do not render class certification inappropriate so long as such issues may effectively be managed." (See *Bomersheim v. Los Angeles Gay and Lesbian Center* (2010) 184 Cal.App.4th 1471, 1487-88, citing *Sav-On*, 34 Cal.4th at 334.) At this juncture, few if any individualized issues exist. Although Plaintiff has not yet provided a detailed trial plan with proposals for managing those issues, the Court is satisfied that this can be done by using one or more of the "innovative tools" that have been approved by California Courts. As set forth below, Plaintiff will be required to provide a satisfactory plan well in advance of trial.

VII. CLASS CERTIFICATION AND REMAINING, UNCERTIFIED CLAIMS

For the foregoing reasons, the Court GRANTS the Motion, and CERTIFIES the following class as to all claims pleaded:

> All current and former California-based employees of U.S. Bank N.A. who were employed as a "Business Banking Officer" at any time from September 27, 2005 through June 30, 2009.

At the hearing, the Court inquired regarding Plaintiff's intentions with respect to the claims pleaded on behalf of BBOs who worked after June 30, 2009, and whether Plaintiff will

dismiss such claims if a motion for class certification is granted as to the Subclass. Plaintiff's counsel stated that doing so would be premature. While there is ample authority permitting successive motions for de-certification, the Court is not inclined to allow, without substantial justification, *seriatim* certification motions. (See *Safaie v. Jacuzzi Whirlpool Bath, Inc.* (2011) 92 Cal.App.4th 1160, 1171-72 and authorities cited therein, review denied (Apr. 27, 2011), reh'g denied (Feb. 22, 2011).) Plaintiff has not identified any reason to postpone consideration of the disposition of any claims that may have accrued after the certified class period. (See C.R.C. 3.764 [class certification motions should be filed when practicable].) Successive motions, particularly later in this case after notice has been issued and a trial date has been set, could have serious implications for case management. Thus, the Court is inclined to DISMISS all such claims WITHOUT PREJUDICE, but to require that the class notice in this case explain why the class period ends on June 30, 2009 and that the notice be given to all current and former employees employed by Defendant as BBOs at any time after September 29, 2005.

Defendant may file a noticed motion seeking such dismissal.

VIII. FURTHER PROCEEDINGS

A. Proposed Class Notice

Plaintiff has not submitted a proposed notice. The notice should be drafted and formatted in a consumer-friendly format, such as the question and answer format used by the FJC. (See, *e.g.*, The Federal Judicial Center's "Illustrative" Forms of Class Action Notices at http://www.fjc.gov/.[40]) It should comply with the standards in the S.E.C.'s plain English rules. (17 C.F.R. § 230.421.) Information should be conveyed in the simplest possible terms. The notice should contain a prominent non-retaliation statement.

[40] The FJC form notices include important information about how class actions work, as well as explanations of the choices class members may have and their consequences. One of the model notices is formatted for trial (as opposed to settlement) purposes.

B. Trial Plan

No trial date has been set. The parties should meet and confer regarding their mutual availability for trial and shall be prepared to propose appropriate dates at the September 11, 2012 CCMC. One hundred twenty days before trial, Plaintiff shall file a trial plan that demonstrates that there can be an effective class trial of common issues that will provide due process to the absent class members and Defendant while respecting the time of the Court and/or jury. The trial plan must identify the common factual and legal issues and identify the specific documents and witnesses that Plaintiff will present to prove the common factual issues. For each witness, Plaintiff must describe their testimony in 3 - 4 sentences and estimate the hours of direct testimony. (See *Tate v. Kaiser* (RG07 318416) 4/28/09 Order; Workman Decl. filed 6/25/09.) It should also proposes specific methods to manage any individualized issues.

The trial plan is not a substitute for Local Rule 3.35 and will not bind the Plaintiff to the precise witnesses and documents that he can present at trial. The trial plan must, however, give the Court a factual basis for confirming that the trial will be manageable and for determining the length of the trial.

C. Next CCMC

The Court has continued the Case Management Conference set for September 22, 2012 to September 28, 2012 at 3:00 p.m. to consider the proposed class notice and to set a trial date or dates. (See n.39, *supra*.) On or before September 18, 2012, Plaintiff shall file a proposed notice, submit a courtesy copy directly to Department 17 via electronic mail (PDF) and hand delivery (hard copy), and serve it on Defendant at the time of filing. The parties shall consider any changes proposed by Defendant and report on their agreement, or respective positions, in their joint CCMC statement, to be filed (and a courtesy copy hand-delivered directly to Department 17) by September 21, 2012.

The parties are strongly encouraged to consent to electronic service (see C.R.C. 2.251(a)) so that, going forward, all documents may be served on the parties in that manner.

Dated: August __, 2012

/s/
Steven A. Brick
Judge of the Superior Court

APPENDIX A - PROCEDURAL AND EVIDENTIARY ISSUES

A. Plaintiff's Objections to Evidence

Summary Declarations of Counsel: SUSTAINED. The Court will not admit defense counsel's "summary declarations" as admissible evidence. They consist of hearsay, conclusory statements, and legal argument and impermissibly attempt to extend page limitations.

Declarants who repudiated their declarations at deposition: OVERRULED. The Court will not strike the declarations of declarants who repudiated their declarations (or portions of them) at deposition, but has afforded portions of the declarations little weight, on a case-by-case basis, when appropriate, after consideration of each declarant's deposition testimony. The Court has also borne in mind the admissible evidence showing how each declaration was obtained, by whom, and under what circumstances.[41]

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[41] Plaintiffs objected that Defendant obtained BBO declarations in violation of Rule of Professional Conduct 3-600, which requires an employer's counsel, in dealing with its employees, to "explain the identity of the client for whom the [attorney] acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the [attorney] is dealing." (C.P.R.C. 3-600.)

Defendant responded with two legal arguments. First, it argued that the rule does not apply to BBOs, who are "nonparties," citing *Bridgeford v. Pac. Health Corp.* (2012) 202 Cal.App.4th 1034, 1044. *Bridgeford* held that absent class members who were not the named plaintiffs in a prior, similar case in which class certification was denied were not collaterally estopped by that ruling. It does not involve rule 3-600 or hold that it only applies when employees are parties, either representative plaintiffs or after a class is certified. Defendant also argues that rule 3-600 is somehow inconsistent with case law affording a corporate defendant the right to communicate with putative class members, so long as such communications are not misleading. It is not.

Alternatively, Defendant contended that it in fact complied with the ethical rule in all respects. The deposition testimony, however, suggests a significant level of coercion. Whether or not counsel was complicit in the way Defendant arranged for these interviews, the primary question here is the reliability of the declarations. Some employee-deponents were directed to meet with counsel by their managers, and only after they had driven some distance to the meeting were they advised that the meeting was voluntary. Some testified that, although they understood that the interviewing attorney did not represent their interests, they felt compelled to cooperate to stay in the good graces of their employer. (Birnbryer Dep. Dep. at 70; Brandt Dep. at 93.) The only record of the BBOs having been advised of their rights and potential conflicts of interest are the assertions in the declarations themselves, which were drafted by Defense counsel and in some cases presented for signature several months after the interviews took place.

A more reliable record would have been a written advisement signed and dated by the BBO at the time of the meeting. (See Vapnek, Tuft, Peck and Weiner, California Practice Guide: Professional Responsibility (The Rutter Group 2011) at ¶¶ 4:91 [suggesting that corporate counsel "[i]nform the individuals involved *in writing* that your professional responsibility and allegiance are owed to the corporate entity—not to them individually" and "[a]dvise them to seek independent counsel to protect their potentially adverse interests."], emphasis added.) (Compare

Objections "B" and "H": OVERRULED. Plaintiffs objected to many declarations on a variety of grounds (hearsay, vague and ambiguous, lay opinion, *etc*.). These objections were not provided in a format that enables the Court to review and rule on them easily. (See, *e.g.,* CRC 3.1354(b), (c).) The Court is capable of independently identifying vague and ambiguous statements and conclusory/opinion statements of lay witnesses and will afford them little if any weight.[42] The objection that declarations address merits issues which are not the subject of class certification is likewise OVERRULED; the Court can distinguish between the two and, in any event must often examine merits evidence to evaluate commonality and predominance.[43] Consistent with the parties' agreement that the Court may independently evaluate the evidence, the Court provides the following additional observations and rulings:

As to Defendant's 26 BBO declarations that addressed the Subclass period, there are several issues. First, all but one of these declarants describe their job duties and tasks generally without specifying the time frame to which they pertain. Under some circumstances, it might be fair to interpret the declarations to refer to the entire time that each declarant worked as a BBO for Defendant. However, these declarations were signed 3-5 months (and in five instances, far longer) after Defendant stepped up enforcement of the outside time requirement, but refer to all conduct in the present tense without referring specifically to the Subclass period.

As noted above, of Defendant's 21 Subclass BBO declarants who did not refute their declarations, 11 only started working as BBOs in early 2009. By the time they signed their vague declarations attesting to their work practices, these BBOs had worked equal amounts of time during the Subclass period and afterwards.[44]

Similar issues affect the weight, and in some cases, admissibility, of many of Defendant's *manager* declarations.[45] These were signed this year, and describe Defendant's expectations and BBOs' practices *in the present tense*, without any reference to whether the described conduct took place during the Subclass period. (See, *e.g.*, Decls. of T. Biggs, Catton, Dampier, Shih,

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Birnbryer Dep. at 72 [attorney probably provided advisement about his legal rights, but he cannot recall because, when they first met, she "was speaking very fast…very, very quickly."].)

[42] In its tentative ruling, the Court invited Plaintiff's counsel to identify the most important and/or representative statements to which he objects, and on which he desires rulings, and make objections orally, at the hearing. Plaintiff's counsel declined, stating that he preferred to rely upon the Court's judgment in this respect.

[43] At the hearing, Plaintiff specifically objected to the portions of BBOs' declarations describing what was said to them by Defendant when they were hired and by defense counsel when they were interviewed as hearsay. These objections are OVERRULED; such statements are not offered for the truth of the matter asserted but for the purpose of showing that the statements were made.

[44] This same issue affects the deposition testimony of T. Pham. Defendant did not supply any foundational testimony regarding his employment dates as a BBO. He worked for Mr. Ure and therefore was likely hired at the end of, or after, the Subclass period.

[45] As noted above, the exceptions are the declarations of Managers Gediman, Lim and Wheaton.

Ure.[46]) Although they are "vague and ambiguous as to time," the Court will not strike these declarations in their entirety, but rather has afforded each statement appropriate weight, if any.

Some managers offer testimony that is clearly irrelevant and inadmissible. Manager Daniel Rukhman offers testimony regarding his management policies after April 2010. Michael Shih started as a Sales Manager late in the class period, admits that he had not assembled a full team of BBOs until September 2009, after the Subclass period, and says that during the Subclass period he only supervised one BBO who was in training (a "BBOT") and thus, not engaged in, or paid on the basis of, outsides sales.[47] Timothy Epton was not employed by Defendant until March 2010. Frank Esposito supervised BBOs during the Subclass period in Nevada, not California. The Court will not consider the testimony of these managers.

Declarations of Relatives of Senior Management: OVERRULED. The Court declines to strike the declaration of Brent Biggs based upon bias, simply because he is the son of a senior manager. The Court declines to strike the declaration of Eric Racusin for the same reason.

BBO Declarations Obtained Prior to Class Period: SUSTAINED. Plaintiff objected to declarations concerning BBOs' work experience prior to September 2005 and after July 2009 as irrelevant. In its tentative ruling, the Court invited counsel to discuss, at the hearing, the relevance and reliability of BBO declarations obtained before 2005. Plaintiff argued that, if admissible, such declarations should carry no weight. Defendant's written response argued that it would be reasonable to *presume* that these declarants, who continued to work as BBOs after they gave their declarations and into the class period, "continued to perform their jobs after September 2005 in the same way" - *i.e.* that they spent "a majority of time outside U.S. Bank properties" - and that Plaintiff has provided no evidence to the contrary. (Def's Responses to Evid. Objs. at 10:25-28.) This presumption is undermined by Defendant's argument that "the time spent outside the Bank…varied significantly for each BBO from week to week due to a number of factors…." (Opp. at 14) and its interrogatory response describing changes impacting the BBO position and outside time requirement since 2005 (Pltf's Ex. 13).

BBOs who began working after June 30, 2009: SUSTAINED. The declarations of BBOs who began working as BBOs after June 30, 2009 are - in light of the undisputed evidence that Defendant made significant changes to its enforcement regime for the outside salesperson exemption in 2009 and also changed BBOs' work conditions (including technology and sales assistance) - irrelevant to show variation in BBO work conditions prior to June 30, 2009 (the main issue in this motion) and inadmissible for the purpose.

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[46] Timothy Ure, who was hired in February 2009, does not clearly state when he actually began supervising BBOs or, critically, when he communicated the 2009 Job Description to those BBOs.

[47] Other BBOs testified that while they were BBOTs, they were told to take lunch breaks and not to work more than 40 hours per week, and were paid hourly. One testified that she was a BBOT for about five months. (Brandt Decl. ¶¶ 3-4.)

Quarterly certifications from 2010 forward: SUSTAINED. These quarterly certifications, which were used starting in the first quarter of 2010, are not relevant to show what BBOs understood, or how BBOs spent their time, during the Subclass period.

Party's Use of its Own Discovery Responses: SUSTAINED. Defendant may not use its own responses to requests for admission when those responses were denials, not "admissions." (C.C.P. § 2033.410). Nor may it rely upon its own responses to interrogatories at trial "or any other hearing in the action." (C.C.P. § 2030.410.)

Hildreth Declaration: OVERRULED. Plaintiff objected generally to the declaration of Defendant's expert Dr. Andrew Hildreth. Defendant submitted written responses to Plaintiff's objections, which the Court has considered. In the tentative ruling, the Court pointed out that although there were obvious admissibility issues with important portions of the declaration, the Court was not inclined to strike the entire declaration, and invited Plaintiff to identify specific inadmissible paragraphs at the hearing. Plaintiff instead elected to describe, generally, recurring types of inadmissible statements ("themes") and to rely upon the Court to strike any statements falling within those themes. Defendant did not object or provide any additional argument on this topic at the hearing.

Dr. Hildreth's recitations of his qualifications and discussion of statistical principles are admissible. His conclusions, however, rest on faulty assumptions and legal argument. For example, in discussing liability, Dr. Hildreth determines, for a given sample size (here either Plaintiff's 11 or Defendant's 27 declarants), the margin of error and confidence interval if these declarants' conclusions about their exempt status were extrapolated to the entire class. He concludes that these sample sizes are too small to "accurately" extrapolate to the class of 124. However, his analysis assumes that each declarant is reliable, credible and ultimately correct in his or her legal conclusions about his or her own exempt status. At class certification, credibility is for the Court to decide and, although exempt status is not yet at issue, it is apparent from reviewing Defendant's BBO declarations that many do not provide sufficient foundation to draw any conclusion about exempt status.[48] It also assumes a required level of accuracy which, as Plaintiff objected, is a legal conclusion.

Dr. Hildreth's discussion of how much, if any, overtime class members worked, is also irrelevant. While there is unquestionably variation in the number of hours that BBOs claim to have worked during the subclass period, BBOs uniformly testified that they worked at least 41 hours per week. The variation identified by Dr. Hildreth is immaterial for liability purposes. At best, it suggests challenges in determining damages and/or restitution on a class basis; this, however, is not a basis for denying class certification. (See, *e.g.*, *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1022; *Sav-On Drug Stores Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334; *Bell v. Farmers Ins. Exch*. (2004) 115 Cal.App.4th 715, 742-43 and authorities cited therein.)

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[48] See *In re Cipro Cases I and II* (2004) 121 Cal.App.4th 402, 412 [expert opinion "constitutes substantial evidence to support a class certification order if it is based on relevant, probative facts, as opposed to mere guesswork, surmise, or conjecture"].

Dr. Hildreth's discussion of, and reliance upon, the *Duran* opinion constitutes inadmissible legal conclusion. Reliance upon the opinion in *Duran* is even more dubious because there, the Court of Appeal relied upon Dr. Hildreth's own expert testimony and, in any event, *Duran* has since been depublished.

The Court is familiar with principles of statistical analysis and is cognizant of the need for a representative sample when such an analysis is utilized. However, Plaintiff has not proposed a trial plan in which proof of liability will turn on statistical tools. Plaintiff relies upon the evidentiary record, which the Court evaluates at class certification to determine (1) whether the individuals in the class had common or individualized experiences with respect each issue relevant to the asserted exemption and (2) whether there is other relevant evidence that is by its very nature "common" (such as communications by the employer to multiple class members about its expectations, policies and procedures, job descriptions, *etc*.). If the evidence demonstrates sufficient commonality across the class, a class trial is appropriate. Dr. Hildreth's testimony does not aid in making such a determination; thus, the Court OVERRULES Plaintiff's objections but has afforded his declaration little weight.

B. Defendant's Objections to Evidence

As the tentative ruling advised, Defendant's written evidentiary objections, submitted in advance of the hearing, were abusive. The Court cited Defendant to *Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, 578 at n.6 [questioning whether the practice of filing "blunderbuss objections to virtually every item of evidence submitted" constitutes effective advocacy]; *Reid v. Google, Inc.* (2010) 50 Cal. 4th 512, 532-33 ["litigants should focus on the objections that really count" and, at the hearing, should "specify the evidentiary objections they consider important, so that the court can focus its rulings on evidentiary matters that are critical in resolving the … motion"]; and *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 764 n.6 ["We believe that where a trial court is confronted on summary judgment with a large number of nebulous evidentiary objections, a fair sample of which appear to be meritless, the court can properly overrule, and a reviewing court ignore, all of the objections on the ground that they constitute oppression of the opposing party and an imposition on the resources of the court."].) The Court described particular types of objections it viewed as frivolous, overruled all of Defendant's written objections, and invited counsel to exercise its best judgment in raising any meritorious objections orally at the hearing. Defendant instead sought leave to file revised written objections. Over Plaintiff's objection, the Court granted that request. Defendant's original objections are OVERRULED in their entirety, and its Defendant's Revised Objections are ruled upon as follows:

No. 1: OVERRULED. This document was produced by Defendant in discovery; the Court does not see how the document (as distinguished from Plaintiff's argument) can be "[m]isleading, argumentative, lack[] foundation" or "irrelevant."

Nos. 2-4: OVERRULED. Defendant misconstrues the Court's basis for upholding objections to other evidence dated after the Subclass period. The other evidence this Court found to be irrelevant consisted of declarations by declarants who did not work as BBOs during the Subclass period, but which Defendant nonetheless offered to prove variations during the subclass period. The email at issue here (Wynn Decl. Ex. 30) is not offered to show what

happened during the Subclass period. It is offered show that Defendant enforced its outside sales policy later, in April 2010. The same rationale applies to Exhibits 31 and 32.

Nos. 5-16: OVERRULED. Some of these objections are overbroad (addressing statements that contain both admissible and potentially inadmissible material). Some constitute argument, not objections to admissibility.[49] The objection that declarants' opinions about where they spent most of their working hours is "improper legal opinion" likewise lacks merit. (See Evid. C. § 800 [permitting lay witness testimony that is "rationally based upon the perception of the witness" and helps to a clear understanding of their testimony].)

Nos. 9, 17-42: OVERRULED. The cases cited by Defendant do not concern admissibility. They hold, in the context of summary judgment, that declaration testimony cannot create triable issues of fact when contradicted by the declarant's own deposition testimony. (See *D'Amico v. Bd. of Med. Examiners* (1974) 11 Cal.3d 1, 21; *Thompson v. Williams* (1989) 211 Cal.App.3d 566, 573.) Defendant's additional citation to *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1459 highlights the true purpose of these objections - to provide additional argument that the testimony shows variation across the class. This is not the purpose of evidentiary objections.[50] Defendant's objections that declarant's testimony about how they performed their jobs and what tasks they engaged in "lacks foundation," "lacks personal knowledge," and constitutes "improper legal opinion" are frivolous.

Nos. 43-48: Generally, these objections lack merit for the same reasons discussed above. However, the Court SUSTAINS Objection nos. 45 [lacks personal knowledge] and 46 [speculation]. Nos. 43, 44, 47, 48 are OVERRULED.

Nos. 49-57: OVERRULED. The declarants testify to admissible facts regarding their interactions and communications with their managers concerning their activities and their whereabouts, from which they conclude that their managers were aware of their activities.

Nos. 58-66: OVERRULED. The quoted statements of managers are not offered for the truth of the matter asserted, but rather to show that the statements were in fact communicated to the declarants. The foundation objections are frivolous.

No. 67: OVERULED. This argument goes to credibility, not admissibility.

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[49] Defendant's objections misconstrued the cited provision of *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 801, which does not concern incidental work performed at the employer's premises, and refers to driving time, which is clearly performed outside. As for the argument about inside time and other exemptions, "inside" work may only count towards a different exemption, *e.g.*, the administrative exemption, if the work meets all of the exemption's other requirements. Defendant essentially argues inadmissibility because the declarations do not clearly establish that the other requirements are not met. This is not a valid basis for objection.

[50] It is also constitutes another attempted end-run around page limitations on briefing and an unauthorized *second* surreply.

No. 68: OVERRULED. The objected-to passage includes both admissible and inadmissible testimony. (The Court recognizes inadmissible argument and will not consider it.)

Counsel for Defendant is ADMONISHED for twice submitting improper and abusive objections. Further violations of Court procedures, rules and/or orders will result in the imposition of monetary sanctions.

C. Defendant's Request for Judicial Notice

To the extent that Defendant offers evidence, argument, rulings, or orders from the *Duran* action or other actions for the purpose of showing what occurred during the narrowed class period with respect to US Bank BBOs, or to demonstrate that the claims of BBOs in this action, during the narrowed subclass period, should not be certified, the RJN is DENIED.

D. Admissibility at Trial

The Court's consideration of the evidence is limited to the motion for class certification and should not be construed as an indication of admissibility in future motions or at trial.

E. Defendant's *Ex Parte* Application for Leave to File a Surreply

The Court GRANTS IN PART Defendant's *ex parte* application to file a surreply to address *Brinker, supra,* and to address the deposition testimony of 4 defense declarants (Birnbeyer, Brandt, Reed and Tamblyn) who were deposed by Plaintiff after Defendant's opposition was due. The application is DENIED to the extent it went further, as follows:

(1) The Surreply included a detailed discussion of the outside sales exemption which was not, in fact, in response to any new law or facts raised on reply. (See Surreply at p. 5-6.)

(2) It provided and relied upon Mr. Rukhman's supplemental declaration, which was intended to amplify his initial declaration (provided by Defendant on opposition) that he guided BBOs - including in a specific email - to spend time outside of the office. This was improper for several reasons. Although included in the surreply memorandum, it was not mentioned in the Application. Also, the Rukhman email was actually referred to in Rukhman's opposition declaration. In any event, the supplemental Rukhman declaration clarifies that the guidance was supplied in April 2010 and thus, is irrelevant to show what BBOs did during the subclass period or Defendant's communicated expectations during that time.

(3) It supplied and discussed a supplemental declaration of Mr. Ure. The supplemental declaration was not referenced in the Application. Moreover, the supplemental declaration addresses two reply exhibits (Exhibits 31-32, communications by Ure produced by Defendant in this litigation) which were properly submitted as rebuttal to the opposition Ure declaration.[51]

Defendant also used the Surreply to object to Plaintiff's use, on reply, of the deposition transcript of Mr. Birnbryer. Defendant complained that Mr. Birnbryer, who supplied a

[51] In any event, these exhibits do not weigh heavily in the Court's analysis on the merits.

declaration in support of Defendant's Opposition, ended his deposition before Defendant could ask any questions. (Surreply at 13-14.) There is no evidence in the record that Plaintiff controlled the deponent or somehow procured his unavailability. Defendant did not make an *ex parte* application or motion to resume questioning or raise this issue at the hearing. Under these circumstances, the Court will not strike Mr. Birnbryer's reply deposition testimony.[52]

[52] Defendant similarly complains that Plaintiff noticed the deposition of Ms. Carreon, another defense declarant, but never scheduled or took the deposition. (Surreply at 13 n.8.) The Court fails to grasp the point of this objection, other than perhaps an *ad hominem* attack.