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**ENDORSED
FILED
ALAMEDA COUNTY**

APR 28 2005

CLERK OF THE SUPERIOR COURT
By J. C. Arriola, Deputy

SUPERIOR COURT OF CALIFORNIA

ALAMEDA COUNTY – NORTHERN DIVISION

9
10 SAM DURAN, MATT FITZSIMMONS,
11 individually and on behalf of other members
12 of the general public similarly situated,

13 Plaintiffs,

14 vs.

15 U.S. BANK NATIONAL ASSOCIATION,
16 and DOES 1 through 50, inclusive,

17 Defendant.

) Case No.: 2001-035537

) **[CLASS ACTION]**

) **ORDER AFTER HEARING GRANTING
PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION AND DENYING
DEFENDANT'S SELF-STYLED
"MOTION TO DENY CLASS
CERTIFICATION"**
) **[CCP § 382; CRC 1854]**

) Date: March 16, 2005

) Time: 10:00 a.m.

) Dept: 20

Hon. Robert Freedman

Date Filed: December 26, 2001

Trial Date: None

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24 Plaintiffs' Motion for Class Certification and Defendant's "Motion to Deny Class
25 Certification" in the above-entitled matter came on for hearing before this Court on March 16,
26 2005 on the 10:00 a.m. calendar. Edward J. Wynne, Esq. and J.E. Pickett, Esq. of
27 Righetti ♦ Wynne, appearing for Plaintiffs, Timothy Freudenberger, Esq., Heather Sager, Esq.
28

1 and Natalie Beccia, Esq. of Carlton, DiSante & Freudenberger, LLP, appearing for Defendant.

2 After reviewing and considering the parties' respective memoranda of points and authorities, all
3 admissible evidence, and the oral argument of counsel, the Court makes the following findings
4 of fact and law:
5

6 Plaintiffs' motion for class certification is GRANTED. Defendant's motion to deny
7 class certification is DENIED.

8 1. Factual background

9
10 This is a purported class action brought by "small business bankers" and/or "business
11 banking officers" currently or formerly employed by U.S. Bank. Plaintiffs allege that they were
12 illegally misclassified by defendants as "exempt" employees, which misclassification deprived
13 them of overtime pay and other legal protections to which they were entitled under California
14 law.

15
16 Plaintiffs' second amended complaint¹ alleges causes of action for (1) Violations of
17 Labor Code, (2) Violation of Business and Professions Code Section 17200 and (3)
18 Conversion.

19 2. Legal Overview

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21 Class actions in California are governed by Code of Civil Procedure section 382,
22 authorizing such suits "when the question is one of a common or general interest, of many
23 persons, or when the parties are numerous, and it is impracticable to bring them all before the
24 court." Both the benefits and potential pitfalls of this procedure are well established:
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28 ¹ The court notes that in the course of reviewing the subject motions it came to the attention of the court that plaintiff had not filed the amended pleading authorized by the court on October 22, 2004. The court's Order Re Filing of Second Amended Complaint and Answer to Second Amended Complaint filed on March 11, 2005 is noted.

1 Courts long have acknowledged the importance of class actions as a means
2 to prevent a failure of justice in our judicial system....But because group
3 action also has the potential to create and justice, trial courts are required to
4 'carefully weigh respective benefits and burdens and to allow maintenance of
5 the class-action only were substantial benefits accrue both to litigants and
6 the court's.' *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.

7 Accordingly, a party seeking class certification has the burden of establishing "the existence of
8 both an ascertainable class and a well-defined community of interest among the class
9 members." *Id.* The latter factor, in turn, demands a three-pronged inquiry into the existence of
10 "(1) predominant common questions of law or fact; (2) class representatives with claims or
11 defenses typical of the class; and (3) class representatives who can adequately represent the
12 class." *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.

13 It is important to note at the outset that class certification is "essentially a procedural
14 [question] that does not ask whether an action is legally or factually meritorious." *Linder,*
15 *supra*, 23 Cal.4th at 439. Accordingly, "the focus in a certification dispute is on what type of
16 questions -- common or individual -- are likely to arise in the action, rather than on the merits
17 of the case[.]" *Sav-on Drug Stores Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327.
18 Specifically, the Court's charge on a motion for class certification is to assess "whether... the
19 issues which may be jointly tried, when compared with those requiring separate adjudication,
20 are so numerous or substantial that the maintenance of a class action would be advantageous to
21 the judicial process and to the litigants." *Collins v. Rocha* (1972) 7 Cal.3d 232, 238. Here, the
22 Court concludes that the plaintiffs' claims satisfy this test.

23 3. The Class Is Ascertainable and Numerous.

24 The class is defined as "all current and former California-based salaried nonexempt
25 employees with the title 'small-business banker' ("SBBs") and/or 'business banking officers'
26 ("BBOs") employed by defendant any time between December 26, 1997 and April 28, 2005."
27
28

1 The identity of all 242 class members has been ascertained during discovery. The requirements
2 of ascertainability and numerosity are both satisfied.

3
4 4. Common Questions of Law and Fact Predominate over Individual Legal or Factual
5 Disputes.

6 Defendant's protests to the contrary notwithstanding, the Court concludes that the record
7 contains evidence that substantial common questions of law and fact predominate over
8 individual questions of law and fact. Specifically, the record contains substantial evidence that
9 defendant treated BBOs and SBBs alike, regardless of whether such treatment was appropriate
10 under the law. Plaintiffs have substantial evidence that defendant classified all BBOs and SBBs
11 as exempt, and did so without any inquiry (let alone any individualized inquiry) as to any
12 particular employee's job duties, hours worked, performance or any other factor. This apparent
13 policy, defendant's apparent failure to train or monitor BBOs and SBBs to ensure that the
14 exemption requirements would be or were being satisfied, and the apparent standardization of
15 the BBO/SBB position all create substantial issues of fact and law that are common among
16 class members and that are likely to rest on "a common thread of evidence" class-wide. See
17 *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1349.
18
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21 As to defendant's assertion that exemptions other than the outside sales exemption also
22 shield the BBOs and SBBs, and these exemptions, too, turn on the precise nature of the
23 BBO/SBB position. The record contains sufficient evidence that the position is standardized
24 throughout the Bank and that therefore the same "common thread of evidence" will underlie the
25 resolution of this defense class-wide. In short, regardless of whether defendant relies on the
26 outside sales exemption, the administrative exemption, or the commissioned sales exemption,
27 the nature of the work performed by BBOs and SBBs is "the predominant common issue
28

1 determinative of liability to all class members." See *Classen v. Weller* (1983) 145 Cal.App.3d
2 27, 47. In light of the standardization of the SBB/BBO positions across defendant's operations,
3 this is an inquiry which is "susceptible of common proof." See *Sav-On, supra*, 34 Cal.4th at 337
4 ("considerations such as 'the employer's realistic expectations' and 'the actual overall
5 requirements of the job' are likely to prove susceptible of common proof.")
6

7 Defendant's protestations about "the plethora of [individualized] issues" showcasing
8 "the unmanageability of this case as a class action" are unpersuasive in the wake of *Sav-On*.
9 Indeed, virtually every such argument raised in defendant's brief was expressly rejected in *Sav-*
10 *On*:
11

12 "Defendant suggests this class action is likely to 'degenerate into a multitude
13 of mini-trials,' but... the evidence to the contrary is substantial. As alleged,
14 each class member's claim to unpaid overtime depends on whether he or she
15 worked for defendant during the relevant period in a position that was
16 misclassified ... as a consequence of defendant's class wide policies and
17 practices[.] That calculation of individual damages may at some point be
18 required does not foreclose the possibility of taking common evidence on the
19 misclassification questions." *Sav-On Drug Stores, Inc. v. Superior Court*
20 (2004) 34 Cal.4th 319, 332.

21 Thus, the *Sav-On* Court explicitly held that "neither variation in the mix of actual work
22 activities undertaken during the class period by individual [class members], nor differences in
23 the total unpaid overtime compensation owed each class member, bar class certification as a
24 matter of law." *Sav-On*, 34 Cal.4th at 335. Rather, the question before the court is whether --
25 individualized issues notwithstanding -- this case raises enough common questions to make the
26 class mechanism a superior means of fairly and efficiently litigating the dispute.

27 Defendant's arguments go to the weight of this evidence, which is simply not the
28 inquiry before the Court at this time. Rather, the inquiry is whether "plaintiffs [have]
established by a preponderance of the evidence that the class action proceeding is superior to

1 alternate means for a fair and efficient adjudication of the litigation" *Sav-On*, 34 Cal.4th 319,
2 332 (quoting trial court). Here, as discussed above, there exists a classwide "commonality of
3 interest" making class treatment a superior method of resolving this dispute.

4
5 5. The named plaintiffs' claims are typical of the class.

6 It is axiomatic that "a plaintiff seeking to maintain a class action must be a member of
7 the class he claims to represent," *La Sala v. American Sav. & Loan Assn* (1971) 5 Cal.3d 864,
8 875. The "typicality" requirement asks whether the named plaintiffs "are truly representative of
9 the absent, unnamed class members." *Bartlett v. Hawaiian Village, Inc.* (1978) 87 Cal.App.3d
10 435, 438. Here, the evidence is undisputed that the named plaintiffs were SBBs/BBOs during
11 the relevant time period and for a length of time consistent with the average class member.
12 Likewise, their claims both arise out of the same course of conduct and rely on the same legal
13 theory. Accordingly, the named plaintiffs are sufficiently "typical" of the class as a whole.

14
15 6. Both the named plaintiffs and class counsel satisfy the "adequacy of representation"
16 prong.

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18 "Adequacy of representation depends on whether the plaintiffs attorney is qualified to
19 conduct the proposed litigation and the plaintiffs interests are not antagonistic to the interests of
20 the class." *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450. There has been no
21 evidence or suggestion that plaintiffs' interests are "antagonistic to the interests of the class." As
22 to "whether the plaintiffs attorney is qualified to conduct the proposed litigation," the court is
23 loath to engage in a detailed analysis of the *ad hominem* attacks which have unfortunately
24 become a staple feature in this litigation. It suffices to say that the court finds the
25 Righetti ♦ Wynne firm is sufficiently experienced and qualified to adequately represent the
26 plaintiff class in this action.
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1 7. Evidentiary Objections:

2 The evidentiary objections of the parties are denied solely for the purpose of ruling on
3 these motions. Although individual objections (particularly to the hearsay content of certain
4 declarations) may be individually well taken the court has considered all declarations and
5 supporting material. Overruling of such objections shall not determine the admissibility of the
6 same material for any subsequent evidentiary purpose.
7

8 8. Conclusion

9 In light of the foregoing, the court need not address the procedural propriety of
10 defendant's self-styled "Motion to Deny Class Certification." except to deny the same by a
11 parity of reciprocal reasoning.
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13 For the reasons stated above, defendant's Motion to Deny Class Certification is
14 DENIED, and plaintiffs' Motion for Class Certification is GRANTED.
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16 9. Case Management Conference:

17 The court will conduct a further case management conference on April 29, 2005 at
18 10:00 am in Dept 20. Counsel shall meet and confer and advise the court in a case management
19 statement/status report (preferably joint) as to:
20

- 21 a. Class definition, if any changes are proposed to the definition set forth
22 above in conformity with CRC 1855;
23 b. Form of notice to the class in conformity with CRC 1856 including the
24 mechanism for notification.
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c. Any other issues, contemplated motions or matters requiring the court's attention.

Dated: April 28, 2005



Hon. Robert B. Freedman
Alameda County Superior Court
State of California

Approved as to form:

Carlton, DiSante & Freudenberger LLP
Attorneys for defendant
U.S. Bank N.A.

CLERK'S CERTIFICATE OF MAILING


I certify that the following is true and correct: I am the clerk of the court named below and not a party to this cause. I served this **Order After Hearing Granting Plaintiff's Motion for Class Certification and Denying Defendant's Self-Styled "Motion to Deny Class Certification"** by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

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Dated: April 29, 2005

Arthur Sims
Executive Officer, Clerk of the
Superior Court of California, County of Alameda

By 
Jhoanna C. Arriola, Deputy Clerk