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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

SCARLET KESHISHZADEH and LISA  
ARCHER, as individuals, on behalf of  
themselves, and on behalf of all persons  
similarly situated,

Plaintiffs,

vs.

ARTHUR J. GALLAGHER SERVICE CO.,  
a Delaware Corporation

Defendants.

JAMES CAREY, on behalf of himself and all  
others similarly situated,

Plaintiffs,

vs.

ARTHUR J. GALLAGHER AND  
COMPANY, a Delaware Corporation, and  
GALLAGHER BASSETT SERVICES, INC.,  
a Delaware Corporation, inclusive,  
Defendants.

Case No. **09-cv-0168 LAB (RBB)**

**PLAINTIFFS' REPLY MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION TO CERTIFY  
CLASS ACTION**

Judge: Hon. Larry A. Burns  
Court No.: 9 (2<sup>nd</sup> Flr.)

Hearing Date: March 15, 2010  
Hearing Time: 11:15 a.m.

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1 **I. INTRODUCTION**

2 The Defendants' Opposition ('Def Opp") [Doc 69] is limited to the argument that Plaintiffs do  
3 not satisfy the Rule 23(b)(3) requirements of predominance and superiority. Def Opp at 17-22.  
4 Defendants therefore concede that the Plaintiffs have met the requirements of Rule 23(a) as to  
5 numerosity, the existence of common questions of law and fact and the typicality and adequacy of the  
6 class representatives.

7 In so doing, Defendants devote the remainder of their argument to the merits of Plaintiffs'  
8 claims contending that because Plaintiffs will not ultimately prevail on the merits, the case is not  
9 manageable and should not be certified. This argument puts the proverbial cart before the horse and  
10 such prejudging of the merits to deny certification has recently been soundly rejected by the Ninth  
11 Circuit as reversible error in *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. &*  
12 *Service Workers International Union*, 593 F.3d 802, 2010 WL 22701, at \*17 (9th Cir. Jan. 6, 2010).

13  
14 **II. COMMON QUESTIONS OF LAW AND FACT PREDOMINATE**

15 **A. Defendants Admit That There are Predominant Questions of Fact and Law**

16 Defendants' expert admits that "90% of GB claims representatives spend a majority (more than  
17 50%) of their time on the following seven duties: investigating claims, setting reserves, reviewing and  
18 evaluating medical treatment, preparing a plan of action, determining the settlement value of a claim,  
19 negotiating settlements and working with defense counsel." Declaration of E. Deborah Jay, PhD ("Jay  
20 Dec") [Doc 78] Exhibit A at 4. As a result of this expert analysis, Defendants concede that there exists  
21 predominant common questions requiring certification as to (1) whether these seven tasks are  
22 nonexempt tasks, (2) whether these seven tasks were being performed on the production side of  
23 Defendants' business, (3) whether a WC Claims Rep's performance of these seven tasks involved a  
24 matter of monetary insignificance to Defendants given that the claims are paid by Defendants' clients,  
25 and (4) whether the standardized format used by the WC Claims Reps to process WC claims in  
26 accordance with the WC Laws of California, the Client Instructions and Defendants' Best Practices  
27 Guide was so regimented and restrictive that these California-licensed WC Claims Reps could not  
28 exercise any independent judgment or discretion as to any matter of significance as to Defendants with

1 regard to these seven tasks.<sup>1</sup>

2 A more general statement of the primary tasks performed by the WC Claims Reps also appears  
3 in Def Opp at 3-11 wherein Defendants concede that Plaintiffs, 22 Declarants, and the results of the Jay  
4 Expert Survey all confirm that the WC Claims Reps all primarily perform the same tasks of  
5 "investigation, evaluation, disposition and settlement of claims" as set forth in the job descriptions for  
6 these WC Claims Reps. Def Opp at 3-4. Given these concessions by Defendants there is no doubt that  
7 the remaining four predominant common factual questions, all of which are task-based questions, must  
8 be decided here once and for all times on a class wide basis.

9  
10 **B. The Evidence Supports Plaintiff's Theory of the Case**

11 There really is no mystery about this case. To qualify for this job WC Claims Reps need no  
12 more than a high school education and a California WC Claims Rep license. At bottom, the WC Claims  
13 Reps all do the same work which is to process WC Claims, day in and day out. Each time a WC Claims  
14 Rep closes a claim file, Defendants give the WC Claims Rep one or more new files to process in order  
15 to keep each WC Claims Rep's closing to opening ratio at 1:1 or greater. WC Claims Reps are  
16 evaluated and promoted on the basis of their production of closed files. See Plaintiffs' Opening Brief  
17 ("Pl. Br.") [Doc. 88-1] at 10-11 (describing uniform "1 to 1" or better closing ratio requirement). This  
18 evidence supports Plaintiffs' claim that all 489 WC Claims Reps employed by Defendants during the  
19 Class Period were operating on the production line of Defendants' business of processing WC Claims  
20 under intense pressure to quickly process these WC Claims so as to adhere to the Defendants' 1 to 1  
21 opening to closing ratio requirement. *See Id; see also* Declaration of Miles Locker [Doc. No. 88- 3]

22  
23 <sup>1</sup> As to the other two predominant factual common questions, Defendants do not dispute that (a)  
24 all members of the Class were uniformly classified by Defendants as exempt from California overtime  
25 laws under the California administrative exemption, and that (b) all the WC Claims Reps performed  
26 the same seven tasks as their primary job responsibilities. In answering the remaining four (4)  
27 predominant factual common questions once and for all times here for all the members of the Class this  
28 Court can decide the overriding predominant legal question as to whether the Defendants erred in  
classifying the WC Claims Reps as exempt from California's overtime laws by application of the  
California administrative exemption. At bottom, the evidence will establish that WC Claims Reps are  
all nonexempt, white collar production line workers licensed by the State of California to process WC  
Claims pursuant to California law. Locker Decl., ¶ 24 ("the issue of whether these various tasks  
constitute "administrative" work or "production" work becomes a common question of law.").

1 (“Locker Dec.”), ¶ 22. The more WC Claims the WC Claims Reps process, the more fees Defendants  
 2 earn. Additional fees translate directly into additional profits for Defendants because the clients, not  
 3 Defendants, pay all the costs of the WC Claims.

4  
 5 **C. Merits Arguments are Irrelevant to Class Certification**

6 To avoid certification, Defendants argue the merits of the application of the administrative  
 7 exemption to the seven common tasks performed by all the WC Claims Reps. Def Opp. at 13-17. This  
 8 Court, however, cannot here decide as part of the certification process whether these predominant  
 9 common tasks are exempt or non-exempt tasks or whether the Class Members are production workers  
 10 or administrators of Defendants’ business operations. **Under the recent Ninth Circuit decision in**  
 11 ***United Steel, 593 F.3d 802, at \*17, this Court would be committing reversible error by denying***  
 12 **certification based on a “preliminary inquiry into the merits of a suit to determine whether it may**  
 13 **be maintained as a class action.”<sup>2</sup>** This merits decision for which Defendants have the burden of proof  
 14 as to this affirmative defense of the administrative exemption is simply not a part of the certification  
 15 analysis. *Id.*<sup>3</sup> See also *Jaimez v. DAIOHS USA, Inc.*, 181 Cal. App. 4th 1286, 1298-9 (Jan. 12, 2010).

16  
 17 **D. The Parties Agree on the Common Tasks Performed by all WC Claims Reps**

18 Plaintiffs characterize the tasks they perform of “investigation, evaluation, disposition and  
 19

20 <sup>2</sup> Emphasis added and internal citations omitted unless otherwise indicated.

21 <sup>3</sup> As recently stated in *Pellegrino v. Robert Half Intern., Inc.*, 181 Cal.App.4th 713 (2010):  
 22 In *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794-795, 85 Cal.Rptr.2d 844,  
 23 978 P.2d 2, the California Supreme Court explained: “In interpreting the scope of an  
 24 exemption from the state's overtime laws, we begin by reviewing certain basic principles.  
 25 First, ‘past decisions ... teach that in light of the remedial nature of the legislative  
 26 enactments authorizing the regulation of wages, hours and working conditions for the  
 27 protection and benefit of employees, the statutory provisions are to be liberally construed  
 28 with an eye to promoting such protection.’ [Citation.] Thus, under California law,  
 exemptions from statutory mandatory overtime provisions are narrowly construed.  
 [Citations.] Moreover, the assertion of an exemption from the overtime laws is  
 considered to be an affirmative defense, and therefore the employer bears the burden of  
 proving the employee's exemption. [Citations.]” (See also *Nordquist v. McGraw-Hill*  
*Broadcasting Co.* (1995) 32 Cal.App.4th 555, 562, 38 Cal.Rptr.2d 221 [“Exemptions are  
 narrowly construed against the employer and their application is limited to those  
 employees plainly and unmistakably within their terms”].)

1 settlement” of claims as set forth in their job descriptions as routine and repetitive data intake, data  
 2 entry and data communications. Pl. Br. at 4-19. Defendants characterize these same tasks as involving  
 3 independent judgment and discretion as to matters of significance. Def Opp. at 16-17. The fact that  
 4 both Plaintiffs and Defendants agree that the Class Members all perform the same tasks as their  
 5 primary job duties is all that is required for certification purposes. The decision as to whether these  
 6 tasks are administrative or production line tasks must await a ruling on the merits. In all events, the  
 7 parties agree that all WC Claims Reps are licensed to do the same thing – process WC Claims in  
 8 accordance with California law.

9  
 10 **E. Variation in the Amount of Time Spent on One or More of the Seven Common**  
 11 **Tasks Is Irrelevant to Class Certification**

12 Defendants next argue that the Class Members spend a variable amount of their time performing  
 13 one or more of the seven primary tasks and therefore individual issues arise as to how much time each  
 14 class member spends performing any one task. Def Opp at 17-21. Given the Defendants admission that  
 15 the Class Members spend a majority of their time performing the same seven common tasks there are  
 16 simply no individual issues involved in determining which, if any, of these seven tasks are exempt  
 17 tasks.<sup>4</sup> The amount of time each Class Member spends on any one of these seven tasks is irrelevant to  
 18 the determination of whether these seven tasks are production tasks performed in furtherance of  
 19 producing Defendants’ product of processing WC Claims for clients. Defendants present no evidence  
 20 that, in performing these production tasks, WC Claims Reps administer any part of the companies’  
 21 business. Further, Defendants’ own Rule 30(b)(6) corporate designees testified that WC Claims Reps

22  
 23 <sup>4</sup> **Indeed, the evidence from the Jay Report shows that the other work cited as being performed**  
 24 **was primarily clerical work that was part of performing these seven tasks.** See Jay Report [Doc.  
 25 No. 78-9], pg. 5 of 17 (“Constantly keyboarding every conversation. Keep recording the conversations  
 26 and returning phone calls, documenting them in the computer system.”); see also *Id.* at pg. 10 of 17  
 27 (“Documenting correspondence, answering phones, paying bills, and handling new claims. Would that  
 28 be the same thing?”); see also *Id.* at pg. 11 of 17 (“A lot of clerical duties, filing, and doing letters. /  
 Getting medical status and a lot of phone work. Investigations, and talking to anybody, lawyers,  
 doctors, nurses, the entire gamut.”). This evidence indicates that there are, in fact, only seven tasks  
 that the WC Class Reps perform along with the related clerical duties in connection with these seven  
 tasks, which together take up almost 100% of the time spent by WC Class Reps. The remainder of the  
 WC Claims Reps’ time is spent on the non-exempt tasks of training for and satisfying licensing  
 requirements.

1 are not involved in formulating the management or operating policies for Defendants. Pl. Br. at. 7-8.  
 2 In fact, these same witnesses further confirmed that the WC Claims Reps did not have the authority  
 3 to deviate from the management and operating policies established by Defendants. *Id.* As a result, the  
 4 case clearly should be certified under *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 329  
 5 (2004) because the Class Members all admittedly perform the same seven tasks and, therefore, the  
 6 exemption “can easily be resolved on a class wide basis by assigning each task to one side of the  
 7 ledger.” *Id.* at 329.

8  
 9 **F. Sav-On Is Controlling Law and Defendants’ Citations Are Inapposite**

10 **The California Supreme Court’s *Sav-On* decision provides the substantive California law**  
 11 **that must be applied by federal courts in motions to certify state overtime claims.** See *Yokoyama*  
 12 *v. Midland Nat. Life Ins. Co.*, --- F.3d ---, 2010 WL 424817, \*1 (9<sup>th</sup> Cir. Feb. 8, 2010) (reversing denial  
 13 of certification where district court failed to follow state supreme court’s interpretation of Hawaii state  
 14 law). Defendants are unable to distinguish *Sav-On*, *Jaimez*, or the other controlling cases cited in  
 15 Plaintiffs’ moving papers which mandate certification under the facts of this case. Instead, Defendants  
 16 rely on inapposite cases including *Sepulveda v. Wal-Mart Stores, Inc.*, 237 F.R.D. 229 (C.D.Cal 2006);  
 17 rev’d in part, aff’d in part, 275 Fed. Appx. 672 (9th Cir.2008); *Jimenez v. Domino's Pizza, Inc.*, 238  
 18 F.R.D. 241 (C.D. Cal 2006) and *Marlo v. United Parcel Service, Inc.*, 251 F.R.D. 476 (C.D.Cal. 2008).

19 In *Sepulveda*, there were approximately 2,750 potential class members working at over 160  
 20 Wal-Mart stores. 237 F.R.D. at 242. In *Sepulveda* there was "voluminous evidence that there actually  
 21 was a great deal of variance in AM [Assistant Manager] duties ... AM duties varied based on the  
 22 characteristics of the store, its workforce, and the surrounding community." 237 F.R.D. at 249. Here,  
 23 by contrast, the evidence is undisputed that each Class Member spent their time performing the same  
 24 seven common tasks. See Jay Dec. Exhibit A at 4; Def Opp at 3-5; see also *Cruz v. Dollar Tree Stores,*  
 25 *Inc.*, 2009 WL 1458032 (N.D. Cal. May 26, 2009) (distinguishing *Sepulveda* on grounds applicable to  
 26 this case); *Krzesniak v. Cendant Corp.*, 2007 WL 1795703, \*16 (N.D. Cal. Jun 20, 2007) (same).

27 *Cruz* also soundly distinguished *Jimenez* on the grounds that in that case there was standardized  
 28

1 policies and practices and held that certification should be granted in cases like this one where the  
2 duties of the job are defined by standardized procedures and policies:

3 **Where, as here, there is evidence that the duties of the job are defined by**  
4 **standardized procedures and policies, district courts have routinely certified**  
5 **classes of employees challenging their classification as exempt, despite arguments**  
6 **about individualized differences in job performance.**

7 *Cruz v. Dollar Tree Stores, Inc.*, 2009 WL 1458032 at \*10.

8 In *Marlo*, a class was initially certified but later decertified where plaintiffs' proof was limited  
9 to individual testimony that there was evidence of "variations in job duties that appear to be a product  
10 of employees working at different facilities, under different managers, and with a different customer  
11 base pursuant to which a single company policy could not support extrapolation from individual  
12 experiences to class-wide judgment..." 251 F.R.D. at 486.

13 Defendants reliance on *Dunbar v. Albertson's, Inc.*, 141 Cal. App. 4th 1422 (2006); *Walsh v.*  
14 *IKON Office Solutions, Inc.*, 148 Cal. App. 4th 1440 (2007); *Keller v. Tuesday Morning, Inc.*, 179  
15 Cal.App.4th 1389 (2009) and *Ali v. U.S.A. Cab Ltd*, 176 Cal.App.4th 1333 (2009) is also misplaced.  
16 *Dunbar* involved a class of 900 grocery store managers in 500 stores, where there was "significant  
17 variation in the grocery managers' work from store to store and week to week." *Id.*, at 1431. The  
18 court ruled that this variation precluded class certification. *Walsh* involved the outside sale exemption,  
19 which is distinct from the issues in this case. Moreover, the decision in *Walsh* relied entirely on the  
20 varying evidence regarding the tasks of a large class of sales employees. In contrast, here, there is no  
21 factual variance about Defendants' uniform classification or the seven primary tasks of the Class  
22 Members. Rather, the dispute here is about whether Defendants' policy complies with the law and  
23 whether the tasks performed by the Class Members are administrative or production tasks. This  
24 distinction merely affirms that this case fits squarely within the holding of *Sav-On Drug Stores*, and  
25 not *Walsh*.

26 In *Keller*, a class was decertified after extensive discovery based on evidence that the amount  
27 of time store managers spent performing exempt tasks varied significantly based on a "wide disparity  
28 in store location, size, configuration, management duties and styles" and that "the managers, who filed  
29 declarations for the class, were impeached by their deposition testimony." 179 Cal.App.4th at 1399.

1 *Ali* was not even an overtime class action but instead addressed the issue of whether taxi drivers were  
 2 independent contractors, which in that case, could not be resolved on a class-wide basis. 176  
 3 Cal.App.4th at 1352. Here, there is no such variation. Defendants admit that the WC Claims Reps  
 4 spend more than 50% of their time performing the same seven tasks. See Jay Dec. Exhibit A at 4.

5  
 6 **G. “Analyze” is Another Word for “Examine” or “Investigate”**

7 The fact that Defendants’ survey found that WC Claims Reps may “analyze” information when  
 8 performing these seven (7) common tasks does not diminish the predominance of common questions.  
 9 Instead, the statistic only serves to demonstrate the extremely high level of commonality that exists  
 10 between the tasks that are performed by all WC Claims Reps. See Jay Report, [Doc. No. 78-1] at pg.  
 11 5 (78-99% of WC Claims Reps “often” or “always” “analyze information” in performing common job  
 12 duties).

13 Given that the dictionary defines the term “analyze” as a synonym of the terms “examine” and  
 14 “investigate,” a common question for the trier of fact will be whether the term “analyze” includes the  
 15 WC Claims Reps’ acts of examining and investigating the facts of a WC Claims. See Dictionary  
 16 definitions of “analyze”, “examine” and “investigate” attached to Request for Judicial Notice (“RJN”)  
 17 as Exhibit 3. Defendants may argue that the Jay Dec shows that WC Claims Reps “analyze”  
 18 information or “make decisions” with respect to their investigations, however **the DOL has ruled time**  
 19 **and again that such investigation is clearly non-exempt work** by employees who are “merely  
 20 applying their knowledge in following prescribed procedures or determining which procedure to follow,  
 21 or determining whether standards are met.” See DOL Opinion Letter, FLSA2005-21, attached to the  
 22 RJN as Exhibit 4.

23  
 24 **H. The Administrative Exemption Does Not Apply To White Collar Production Line**  
 25 **Workers Because They Do Not Work in an Administrative Capacity**

26 The recent Second Circuit analysis of the applicability of the administrative exemption to white  
 27 collar production line workers in *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009) is  
 28

1 instructive.<sup>5</sup> In *Davis*, the employees were white collar underwriters who had discretion to analyze  
 2 loan applications in order to approve or disapprove customer loans. **The Second Circuit held that the**  
 3 **“underwriters work was not related to management polices or general business operations, but**  
 4 **rather concerns the 'production' of loans--the fundamental service provided by the bank.” 587**  
 5 **F.3d at 534. The Second Circuit relied on the Ninth Circuit’s decision in *Bratt v. County of Los***  
 6 ***Angeles*, 912 F.2d 1066, 1070 (9th Cir.1990) holding that the “essence” of an administrative job**  
 7 **is that an administrative employee participates in “the running of a business, and not merely ...**  
 8 **the day-to-day carrying out of its affairs.” *Davis*, 587 F.3d at 535.**

9 Here, the common evidence demonstrates that the WC Claims Reps do not participate in the  
 10 running of the business. See Pl. Br. at 7 (“at no time does the ‘role’ of the WC Claims Reps involve  
 11 formulating any management or operating policies for Defendants.”). Defendants simply do not contest  
 12 this common fact. Defendants’ only argument is that WC Claims Reps adjust claims for Defendants’  
 13 customers, rather than for Defendants, which Defendants argue distinguishes this case from the holding  
 14 of *Bell v. Farmers Ins. Exchange*, 115 Cal. App. 4th 715, 745-6 (2004) that claims representatives are  
 15 nonexempt white collar production line workers under California law. Def Opp at 24-25. Defendants’  
 16 failure to cite any authority for their argument that providing services directly to a customer is not white  
 17 collar production line work is unsurprising since the law is to the contrary. In *Eicher v. Advanced*  
 18 *Business Integrators, Inc.*, 151 Cal.App.4th 1363, (2007) the court addressed this very issue and held:

19 In *Bell*, supra, 87 Cal.App.4th 805, 105 Cal.Rptr.2d 59, claims representatives employed  
 20 by Farmers Insurance Exchange sued for overtime pay that they alleged had been  
 21 wrongfully denied them. The trial court ruled, on undisputed testimony, that the claims  
 22 representatives were production workers. In affirming that portion of the ruling the  
 23 Court of Appeal focused on the fact that the work engaged in by the claims  
 24 representatives was the core day-to-day business of Farmers Insurance Exchange—that  
 25 is, adjusting claims. **The court concluded: “Since the term ‘administrative capacity’**  
**imposes an independent requirement of the exemption, our conclusion that claims**  
**representatives do not work in an ‘administrative role’ within the [Farmers]**  
**business organization is dispositive and establishes their nonexempt status. We**  
 reach this conclusion through an analysis of the peculiar nature of [Farmers'] business

26 <sup>5</sup> See also DLSE Opinion Letters by Miles E. Locker, former Chief Counsel for the DLSE attached  
 27 to the Locker Decl. as Exhibits “E” & “F”, [Doc. No. 84-3], applying the same analysis to claims  
 28 adjuster and the Declaration of Miles E. Locker, applying the same analysis to the WC Claims Reps  
 in this case. Locker Decl. at ¶ 24. *Wren v. RGIS Inventory Specialists*, 256 F.R.D. 180, 206  
 (N.D.Cal.2009) (district court relied on DLSE opinion letter in concluding that wage claim liability  
 “will turn on the same issue for all” class members).

1 and the claims representatives' role in that business, while recognizing that a careful  
2 analysis of the employees' duties may be necessary to determine exempt or nonexempt  
status in other cases.” ( *Bell*, supra, 87 Cal.App.4th at p. 829, 105 Cal.Rptr.2d 59.)

3 Here, Eicher's duties were comparable to those of the claims representatives in *Bell*. He  
4 regularly engaged in the core day-to-day business of ABI-that is, implementing the ABI  
MasterMind product at customer venues and supporting the customers, whether at the  
5 customer venues or in the ABI office. While he was required to learn of the customers'  
6 management policies and business operations in the course of his work, in order to  
7 ensure that the product met the needs of the customers, he did so only to implement the  
software in the most beneficial way for the customers and not to participate in  
8 policy-making or alter the general operation of the business. Eicher's service in  
implementing the software merely automated processes the customer had previously  
9 handled manually.<sup>6</sup>

10 Plaintiffs expect that when this Court addresses the merits of this case, the Court will reach the  
11 same conclusion that the California courts reached in *Eicher* and *Bell*.<sup>7</sup> Moreover, the monetary value  
12 of the clients' funds handled by the WC Claims Reps is irrelevant to whether their position was an  
13 administrative or production position. Indeed, as noted in *Davis*:

14 a bank teller might deal with hundreds of thousands of dollars each month  
15 whereas a staffer in human resources never touches a dime of the bank's money,  
16 yet the bank teller is in production and the human resources staffer performs an  
17 administrative position

18 *Davis*, 587 F.3d at 533.

19 Therefore, for all of these reasons common issues predominate in the state law claims of the WC  
20 Claims Reps.

21 <sup>6</sup> Indeed, the evidence that this is a production line job is even more compelling here than in *Bell*.  
22 The WC Claims Reps here were not making any financial determination of how much Defendants  
23 should pay on a claim, as the insurance claims reps did in *Bell* because the WC Claims Reps were never  
24 risking Defendants' capital for the payment of any claim they processed.

25 <sup>7</sup> **Plaintiffs expect that this Court, upon a full analysis of the facts, will find that the WC Claims  
26 Reps in this case perform analogous duties to those performed by paralegals in California.** Both  
27 are licensed to perform their respective tasks of legal analysis, but neither is licensed to practice law.  
28 Both work with attorneys on client issues and have extensive client and attorney contact. Both apply  
particular skills and knowledge to the facts to provide their employers with answers to questions that  
may require research and analysis and the maintenance and creation of documents. Both make money  
for their employers by performing production line work for clients. Neither act in an administrative  
capacity for their employer. They are both therefore white collar production workers to whom the  
administrative exemption does not apply. See DOL Opinion Letters, FLSA 2005-54 & FLSA 2006-27,  
attached respectively as Exhibits 1 & 2 to the RJN (similar to the WC Claims Reps, paralegals are not  
properly classified as exempt administrators because they “do not formulate or implement management  
policies, utilize authority to waive or deviate from established policies, provide expert advice, or plan  
business objectives in accordance with the dictates of § 541.202(b).” )

1 **III ADJUDICATION OF PLAINTIFFS' AND THE CLASS MEMBERS' CLAIMS ON A**  
 2 **CLASS WIDE BASIS IS BOTH SUPERIOR AND MORE MANAGEABLE THAN**  
 3 **INDIVIDUAL LITIGATION OF THESE SAME CLAIMS**

4 **A. Litigation of this Case as a Class Action Will be Manageable**

5 Defendants next argue that certification is not appropriate because a class action is not superior  
 6 because a class-wide trial would not be manageable and the class members can pursue their own claims  
 7 because Plaintiffs will not prevail on the merits. Def Opp at 21-22. Again Defendants ask this Court  
 8 to do what this Court must not do which is to prejudge the merits of the Plaintiffs theory of the case.  
 9 *See United Steel*, 593 F.3d 802, at \*17. The Plaintiffs' theory of the case is that these seven tasks are  
 10 all nonexempt production tasks that involve no independent judgment or discretion as to matters of  
 11 significance and are performed by the licensed WC Class Reps on the production side of Defendants'  
 12 business in compliance with the dictates of the WC Laws of California, Client Service Instructions and  
 13 Claims Defendants' Best Practices Guide under the watchful eyes of Clam Supervisors, Assistant  
 14 Managers and Managers at each location. Under *United Steel* and *Jaimez* this Court must give  
 15 Plaintiffs' theory of the case due deference which renders the case most certainly manageable under  
 16 Plaintiffs' theory of the case. *United Steel*, 593 F.3d 802, at \*17; *Jaimez*, 181 Cal. App. 4th at 1299.

17 **B. Class Litigation is Superior to Piecemeal Litigation of the Class Members' Claims**

18 Defendants argue that class litigation is not superior because the claims could be litigated in  
 19 separate judicial or administrative procedures. Def Opp at 22. The idea that individual members of  
 20 the class would find an attorney willing to advance hundreds of thousands of dollars to take on a  
 21 multi-billion dollar corporation to prosecute a claim measured in the tens of thousands of dollars is  
 22 ludicrous. Pl. Br. at 29-30.

23 Moreover, the argument concerning the availability of administrative proceedings as an  
 24 alternative to class litigation has been repeatedly rejected by California Courts. See *Gentry v. Superior*  
 25 *Court*, 42 Cal. 4th 443, 455 (2007); *Bell*, 115 Cal. App. 4th at 745-6. As the Court in *Bell* noted, the  
 26 administrative proceedings have several disadvantages to employees and are subject to a "trial de novo  
 27 in superior court where the ruling of the hearing officer is entitled to no deference." *Id.*, at 746.  
 28 Therefore, Defendants' argument that these are available alternatives is contrary to settled precedent  
 and the decisions in *Bell* and *Gentry* are controlling on this issue.

1 Superiority is clearly satisfied here. See *Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 406  
2 (C.D.Cal. 2008) (“Employer practices and policies with regard to wages and hours often have an impact  
3 on large numbers of workers in ways that are sufficiently similar to make class-based resolution  
4 appropriate and efficient.”); *Tierno v. Rite-Aid*, 2006 WL 2535056 (N.D. Cal. 2006); *Jaimez*, 181 Cal.  
5 App. 4th at 1308 (class litigation superior because it “would further judicial economy by avoiding  
6 repetitious suits, would unify what would otherwise be a series of small claims so as to enhance the  
7 class members' access to redress, and would put to rest any current employee concerns about  
8 retaliation.”)

9 **In *Sav-On*, the California Supreme Court held that class litigation of wage and hour**  
10 **claims is clearly both manageable and superior as the best means to promote employee**  
11 **protection of the law and further judicial economy without regard to the size of each claim or the**  
12 **availability of other individual remedies.** 34 Cal.4th at 340. *Sav-On*'s holding that certification is  
13 superior in overtime cases was followed in *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524,  
14 1538 (2008):

15 But it is no accident that “wage and hour disputes (and others in the same general class)  
16 routinely proceed as class actions.”... There is no question class treatment constitutes  
the superior mode of resolving Ghazaryan's claims in this action.

17 As explained *Bufile, v. Dollar Financial Group, Inc.*, 162 Cal.App.4th 1193, 1208 (2008) in  
18 reversing denial of certification:

19 The trial court made a passing, perfunctory reference to superiority in its order denying  
20 class certification, finding that plaintiffs did not establish that the class action is a  
21 superior method for resolving the litigation. Courts regularly certify class actions to  
22 resolve wage and hour claims. [Citations]. In this arena the class action mechanism  
23 allows claims of many individuals to be resolved at the same time, eliminates the  
24 possibility of repetitious litigation and affords small claimants with a method of  
obtaining redress for claims which otherwise would be too insignificant to warrant  
individual litigation. (*Sav-On, supra*, 34 Cal.4th at p. 340.) Moreover, the issues slated  
for contest are primarily common issues involving common evidence. It would not be  
efficient or fair to relegate these complaints to multiple trials. To the extent the trial  
court independently ruled that the element of superiority was lacking, it erred.

25 Class litigation is also superior for the UCL claim. *Linder v. Thrifty Oil Co.*, 23 Cal. 4<sup>th</sup> 429,  
26 445 (2000). In this case, class certification is crucial and reasonable to effectuate complete  
27 disgorgement and to ensure that Defendants are not permitted to retain any portion of the wrongfully  
28 acquired funds. Complete disgorgement is vital under the UCL not only to deter unfair, unlawful and

1 deceptive business practices but also to aid legitimate businesses who do not engage in such prohibited  
 2 practices (in this case businesses that do not illegally underpay their workers) by curtailing the unfair  
 3 competition by violators like Defendants. *Linder*, 23 Cal. 4<sup>th</sup> at 445; *Fletcher v. Security Pacific Nat'l*  
 4 *Bank*, 23 Cal. 3d 442, 451-52 (1979). Therefore, adjudication of the UCL claim as a class claim is  
 5 clearly superior as a matter of law.

6  
 7 **IV. PREJUDGING THE MERITS OF PUTATIVE CLASS CLAIMS IS NOT**  
 8 **APPROPRIATE FOR A RULE 23 CERTIFICATION INQUIRY**

9 Defendants next ask this Court to prejudge the merits of the predominant common question as  
 10 to whether the class members do production work for the company. Def Opp at 22-25. An inquiry into  
 11 the merits of this common question is not appropriate for a Rule 23 certification inquiry. “A court can  
 12 never be assured that a plaintiff will prevail on a given legal theory prior to a dispositive ruling on the  
 13 merits, and a full inquiry into the merits of a putative class's legal claims is precisely what both the  
 14 Supreme Court and we have cautioned is not appropriate for a Rule 23 certification inquiry.” *United*  
 15 *Steel*, 593 F.3d 802, at \*18; see also *Jaimez*, 181 Cal. App. 4th at 1298-9. Indeed Defendants concede  
 16 in this argument that this predominant common question can be decided on a class wide basis as  
 17 Defendants make no attempt to parse the argument as being applicable to less than the entire class.

18 Defendants continue to argue the merits of the case by asserting that the California WC laws,  
 19 the Client Service Instructions, the Best Practices Guide and the company's chain of command do not  
 20 limit the WC Claims Reps exercise of independent judgment and discretion as to matters of significance.  
 21 See: Def Opp at pgs.25-32. Whether or not Plaintiffs or Defendants are correct in their analysis of the  
 22 effect of the California WC laws, the Client Services Instructions, the Best Practices Guide and the chain  
 23 of command is again a merits argument that cannot be decided here as part of the Rule 23 certification  
 24 inquiry. *United Steel*, 593 F.3d 802, at \*18. Importantly, Defendants' argument by being made herein  
 25 concedes that this predominant common question can be decided in this case on a class wide basis.

26 The report attached as Exhibit A to the Declaration of Professor Lavitt [Doc . No. 88-4] gives  
 27 a detailed analysis of the job duties and job structure of the WC Claims Reps working for Defendants.  
 28 After completing his exhaustive analysis, Professor Lavitt concludes that:

1 It is therefore not possible to conclude that Gallagher claims representatives are  
 2 discretionarily awarding workers compensation benefits, independently deciding how  
 3 to process information within the Gallagher claims processing structure, or spending the  
 4 majority of their duty-time pondering alternatives and making discretionary decisions  
 on matters of significance to Gallagher or its clients. In my opinion, to so conclude  
 would be to say that Gallagher claims representatives are in a position to jeopardize the  
 integrity of Gallagher's operations and undermine its stated mission.

5 To the contrary, instead of forming judgments from among a range of potentially correct  
 6 choices while processing a workers compensation claim, in my opinion the principal  
 7 function of Gallagher claims representatives is making sure that information pertinent  
 8 to determination of the amounts payable to an injured employee is properly input into  
 a computer program, properly communicated to others within the claims processing  
 structure, and properly documented in the standardized format required by the Risx-Facs  
 system and in the "claim file" that houses hard copies of letters, reports, invoices and  
 other information.

9 Based on the information I have reviewed to date, it is my further opinion that Gallagher  
 10 has made great efforts to produce a uniform and consistent product, and to make sure  
 11 that its product does not deviate from the prescribed specifications. The sums that are  
 12 owed must be paid, and paid timely. **Gallagher claims representatives are at the foot  
 of the Gallagher claim administration ladder, and their conduct is strictly  
 controlled to accomplish those ends.**

13 Lavitt Report at 19, [Doc. No. 88-4].

14 The Best Practices Guide, the California Workers' Compensation laws and the Client Service  
 15 Instructions provide a standardized procedure for reaching conclusions that the licensed WC Claims  
 16 Reps were required to follow in producing Workers' Compensation files. These standardized corporate  
 17 procedures, instructions and laws and regulations strictly dictate the conclusions reached by performing  
 18 tasks that are production tasks that are performed in accordance with the detailed specificity of the  
 19 California Labor Code, the Defendants' written procedures and standards including the Best Practices  
 20 Guide, as well as the Client Service Instructions.<sup>8</sup>

21

22 **V. THE EVIDENCE PRESENTED SATISFIES THE REQUIREMENTS OF *WELLS FARGO***  
 23 **AND *VINOLE* THAT THE CLASS MEMBERS WERE ALL PRIMARILY**  
**PERFORMING THE SAME TASKS**

24 Plaintiffs agree with Defendants as to their next argument that proof of a policy alone of classifying  
 25 employees as exempt is insufficient alone to grant certification but also requires proof that the class

26

27 <sup>8</sup> Indeed, the fact that the WC Claims Reps recommendations are "often" or "always" approved is  
 28 merely additional evidence that this is a production line white collar job where the product process is  
 preprogrammed to be a uniform and consistent product. Jay Dec. ¶ 2, Exhibit A at 3, 26 and 32.

1 members spent a majority of their time perform the same primary tasks. Def Opp at 33-34 and Pl. Br.  
2 at 21-23. Here, Defendants and their expert both agree that the WC Claims Reps all spend the majority  
3 of their time performing the same seven tasks. Therefore the requirements of *In re Wells Fargo Home*  
4 *Mortgage Overtime Litig., supra*, 571 F.3d 953 and *Vinole v. Countrywide Home Loans Inc.*, 571 F.3d  
5 935, 947 (9th Cir.2009) for granting certification are satisfied here.

6 In *In re Wells Fargo*, the Ninth Circuit held that while “an exemption policy is a permissible  
7 factor for consideration under Rule 23(b)(3)” the district court “abused its discretion in relying on that  
8 policy to the near exclusion of other factors relevant to the predominance inquiry.” 571 F.3d at 959.  
9 Importantly, the Court of Appeals confirmed that:

10 Of course, uniform corporate policies will often bear heavily on questions of  
11 predominance and superiority. Indeed, courts have long found that comprehensive  
12 uniform policies detailing the job duties and responsibilities of employees carry great  
13 weight for certification purposes.

14 *Id.* at 958.

15 As a result, the certification in this case complies fully with the decisions of the Ninth Circuit.  
16 Plaintiffs rely not only in part on the admitted uniform exemption policy of Defendants, but also on the  
17 complete uniformity in the primary tasks performed by the WC Claims Reps. As a result, the task  
18 adjudication will be the same for every member of the Class. The individual variations discussed in *In*  
19 *re Wells Fargo* are simply not present in this case. Therefore, with respect to the “main concern in the  
20 predominance inquiry: the balance between individual and common issues,” the scale tips entirely in  
21 favor of predominant common issues. Pl. Br. at 18.

## 22 **VI. THE PAGA CLAIM MAY PROCEED WITHOUT REGARD TO THE COURT'S 23 RULING ON CERTIFICATION**

24 Defendants’ argument that the PAGA claim can only proceed if a Rule 23 class is certified is  
25 also wrong as a matter of law. Def Opp at 34. Indeed, California law is very clear that a PAGA claim  
26 does not need to be certified to proceed as a group action. *Arias v. Superior Court*, 46 Cal.4th 969, 980  
27 (2009). *Machado v. M.A.T. & Sons Landscape, Inc.*, 2009 WL 2230788, \*3 (E.D.Cal Jul 23, 2009)  
28 (Under *Arias* “PAGA claims need not be brought as class actions”).

1 **VII. JOB PERFORMANCE DOES NOT ALTER THE EXISTENCE OF THE**  
2 **PREDOMINANT COMMON QUESTIONS**

3 Defendants also criticize the job performance of two of the three class reps and four of the five  
4 declarants. Def Opp at 12-13. Nowhere in the critique do the Defendants assert that the Plaintiffs as  
5 a result thereof are inadequate class representatives or that they did not perform the same tasks as the  
6 other members of the Class. The fact that they may have arguably performed these same tasks in a  
7 manner that was not otherwise acceptable to the Defendants does not take away from the fact that they  
8 all performed the same tasks.

9 Moreover, this same argument was rejected in *Campbell v. PricewaterhouseCoopers, LLP*, 253  
10 F.R.D. 586 (E.D. Cal. 2008) where the defendant asserted that the class representatives' claims were  
11 not typical of those of the other class members because of their poor job performance. As the District  
12 Court held, an employees job performance does not affect "whether or not they should have been  
13 classified as exempt." *Id.* at 595. n.4.

14 **VIII. CONCLUSION**

15 For the foregoing reasons, Plaintiffs respectfully submit that this case should be certified to  
16 proceed as a class action.

17 Dated: March 9, 2010

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