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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

KIMBLYN CREESE et al.,

Plaintiffs and Appellants,

v.

WASHINGTON MUTUAL BANK,

Defendant and Respondent.

B193931

(Los Angeles County
Super. Ct. No. BC323376)

APPEAL from an order of the Superior Court of Los Angeles County.

Terry A. Green, Judge. Affirmed.

Initiative Legal Group, Mark Yablonovich, Marc Primo, Matthew Theriault,
Rebecca Labat and Linh Hua for Plaintiffs and Appellants.

Heller Ehrman, Jonathan P. Hayden, Andrew R. Livingston and Greg J.
Richardson for Defendant and Respondent.

Appellants Kimblynn Creese and Phyllis Parker (collectively Creese) appeal from an order denying class certification to a proposed class of underwriters in an action against respondent Washington Mutual Bank (Bank) for, inter alia, failing to pay them overtime, give them meal and rest breaks, and give them itemized wage statements. Creese alleged, in part, that Bank misclassified the underwriters as administrative employees exempt from the relevant labor laws when in fact they are nonexempt because they were employed in a production capacity, and they did not exercise discretion or independent judgment. The trial court determined that common questions did not predominate as to whether the underwriters exercised discretion and independent judgment, and that class certification would not be advantageous to the judicial process and the litigants. Creese contends that the trial court utilized improper legal criteria and erroneous legal assumptions, and that it misapplied the test articulated in *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805 (*Bell I*). As a result, Creese contends that the ruling was not supported by substantial evidence, and that the trial court prematurely ruled on the merits instead of determining whether she established the requisites for class certification.

We find no error and affirm.

FACTS¹

The complaint

Creese filed a class action complaint against Bank for: (1) violation of Labor Code sections 510 and 1198² [failure to pay overtime wages]; (2) violation of section 226, subdivision (a) [failure to provide itemized wage statements]; (3) violation of sections 201 and 202 [failure to pay all wages due upon termination of employment]; (4) conversion and theft of labor; (5) violation of Business and Professions Code section 17200 et seq. [unfair business practices]; and (6) violation of section 226.7, subdivision (a) [failure to provide meal and rest periods]. The action was brought on behalf of Bank's past and present underwriters.

The motion to certify the class

Creese moved to certify the proposed class. She argued that the underwriters are nonexempt because they were employed in a production capacity rather than an administrative capacity, and because their jobs did not require them to exercise discretion or independent judgment.

In opposition, Bank argued that Creese failed to identify common issues that would predominate. It pointed out that the approximately 600 underwriters in the proposed class worked in 40 different facilities. Then it claimed that class certification would be inappropriate unless the evidence showed that the underwriters did not exercise

¹ Our statement of facts is limited because Creese did not provide a statement of facts in her opening appellate brief. Instead, she provided an "Introduction" and "Statement of the Case" which mingled argument, procedural facts and references to evidence without record citations. (There were two footnotes, but one cites to the order denying class certification, and the other cites to a statement made by the trial court at the certification hearing.) Creese's brief violates the requirements set forth in California Rules of Court, rule 8.204(a)(1)(C) that a party "[s]upport any references to a matter in the record by a citation to the volume and page number of the record where the matter appears," and California Rules of Court, rule 8.204(a)(2)(C) that a party "[p]rovide a summary of the significant facts limited to matters in the record."

² All further statutory references are to the Labor Code unless otherwise indicated.

discretion and independent judgment while making credit decisions. According to Bank, that was unlikely.

The parties submitted supplemental briefs.

The trial court denied the motion. As a preface to its ruling, the trial court's minute order explained that "[Creese] is arguing [in her] Complaint and Moving papers [that the underwriters] were misclassified under the administrative exemption . . . in an effort, by [Bank], to save money on overtime, etc. Thus, [Creese's] primary issue at trial is whether [the] underwriters were, as a whole, misclassified. There are other ancillary Causes of Action [on which Creese] should provide proof of common evidence as well. However, in order to satisfy the commonality element, [Creese] would have to provide sufficient evidence that misclassification could be addressed at trial with common proof because the liability or lack thereof [of Bank] for misclassification directly impacts the remaining Causes of Action."

According to the trial court, "[Creese] provided the job manuals and boilerplate declarations [in] an effort to establish uniformity, a pattern, practice and/or commonality, at minimum[.] [Bank's] evidence wherein defense counsel actually questioned the declarants on particular paragraphs of their executed declarations refutes many of the claims of [Creese's] Motion. . . . As such, [Bank's] evidence undermined the persuasiveness of [Creese's] evidence. . . . Nothing in the law prevents the [trial court] from considering the totality of the evidence in [determining whether there is substantial evidence of the class requirements]. If this were not the rule, [Creese] would pick and choose among the facts to present to the [trial court], providing an incomplete picture of the litigable issues."

The trial court acknowledged that Creese was advancing two common issues of fact and law regarding whether the underwriters were misclassified. The first was whether the underwriters exercise the required level of discretion and independent judgment for the administrative exemption to be applicable to them, assuming that the underwriters must follow uniform and detailed procedures and guidelines. The second

was whether the underwriters primarily perform production as opposed to administrative work, such that they are nonexempt.

The trial court stated: “Factually, [Creese’s] first common question has been successfully refuted by [Bank’s] evidence. [The underwriters] as a whole are not necessarily following detailed, uniform procedures. ¶ The nature and type of ‘level of discretion’ and ‘independent judgment’ depends upon many factors, as set forth in [Bank’s] evidence. Such factors include the different products underwritten: Retail, wholesale, loans to ‘emerging markets’, custom construction, and Government loans. Variations also can be based on geography and, naturally, on individual competency. ¶ It is the [trial court’s] opinion that these differences and variations defeat commonality in this case, and, if this class were certified as proposed by [Creese], the trial would devolve into a series of complicated mini-trials needed to address the variations noted. In this respect, the nature and the variations are fundamentally different here than in [(*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On Drug*)), [w]here . . . ‘the only difference between [d]efendant’s declarations and plaintiff’s evidence is that the parties disagree on whether certain identical work tasks are ‘managerial’ or ‘non-managerial.’ . . . Further, unlike our case, the ultimate resolution of the ‘managerial’ vs. ‘non-managerial’ issue cannot be mechanically resolved, as in [*Sav-On Drug*], by assigning tasks to each side of the ‘ledger.’ ¶ The [trial court] further agrees with [two federal district cases] [that] the nature of the job of underwriting involves the clear exercise of discretion and judgment. ¶ Based upon the instant facts and evidence contained in the moving papers, it is difficult to say that if [Bank] were found liable to [one underwriter] then [Bank] would be liable to [a second underwriter] or [a third underwriter].”

Next, the trial court indicated that it “read and considered the supplemental briefing on the issue of the administrative/production dichotomy. [Creese] raises the issue of whether the [underwriters] here are administrative or production [workers], and, because the issue is raised and so framed, [whether the underwriters are] entitled to class certification. ¶ The [court] in [*Bell I*] recognized that ‘the administrative/production

worker dichotomy is a somewhat gross distinction that may not be dispositive in many cases.’ . . . [The dichotomy] is not helpful in this case, given the lack of commonality. Moreover, there is scant evidence in the record to support the conclusion that [the underwriters are production workers].”

Last, the trial court concluded that Creese did not “establish[] by a preponderance of the evidence[] that the class action proceeding is [s]uperior to alternat[ive] means for a fair and efficient adjudication.”

This timely appeal followed.

DISCUSSION

Creese assigns error on four grounds, namely: (1) The trial court applied an improper legal standard and erroneous legal assumptions when it determined that common questions do not predominate and class certification would not be advantageous; (2) the trial court improperly determined the merits of the dispute instead of deciding whether Creese had established the requisites for class certification; (3) the trial court erred when it denied class certification regarding the failure to provide itemized wage statements; and (4) the trial court erred when it denied class certification regarding whether Bank failed to provide meal and rest periods. As we discuss below, these assignments of error lack merit.

1. Class action law.

A class action is authorized “when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court.” (Code of Civ. Proc., § 382.) The plaintiff seeking certification is obliged to “establish the existence of both an ascertainable class and a well-defined community of interest among class members. [Citations.]” (*Sav-On Drug, supra*, 34 Cal.4th at p. 326.) When analyzing whether there the plaintiff has demonstrated a community of interest, courts examine three factors: “(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.” (*Ibid.*)

The procedural inquiry is this: Are the common issues so numerous or substantial that a class action would be advantageous to the judicial process and the parties? (*Ibid.*)

Regarding the first factor, a plaintiff must “place substantial evidence in the record that common issues predominate. [Citation.]” (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1108.) To do so, a plaintiff must show that each member of the class will not be required to individually litigate numerous and substantial questions in order to recover. And, for class certification to be advantageous to the judicial process and the litigants, the issues which may be jointly tried must be sufficiently numerous and substantial when compared to the issue requiring separate adjudication. (*Ibid.*)

Whether the plaintiff has presented substantial evidence of the elements necessary for the certification of a class is a discretionary determination. “Nothing in the law prevents the court from considering the totality of the evidence in making that determination. [Citation.] If this were not the rule, plaintiff could pick and choose among the facts to present to the court, providing an incomplete picture of the litigable issues, in order to ensure a certification.” (*Quacchia v. DaimlerChrysler Corp.* (2004) 122 Cal.App.4th 1442, 1448, fn. omitted.)

A trial court may consider both the plaintiff’s legal theory of liability and the defendant’s affirmative defense. A defendant “may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues. [Citations.]” (*Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450.) Still, the inquiry is procedural, and a trial court cannot inquire whether an action has merit. (*Sav-On Drugs, supra*, 34 Cal.4th at p. 326.)

An appellate court reviewing a ruling on class certification questions whether the trial court abused its discretion. (*Sav-On Drug, supra*, 34 Cal.4th at p. 326.) If a trial court’s ruling is supported by substantial evidence, the ruling will ordinarily be affirmed on appeal unless the trial court used improper criteria or made erroneous legal assumptions. (*Id.* at pp. 326–327.)

2. The administrative employee exemption.

According to Bank, the exemption at issue is governed by two substantially similar wage orders that cover the class period.³ They are Wage Order 4-2000 and Wage Order 4-2001. The latter was effective on January 1, 2001, and it was codified in California Code of Regulations, title 8, section 11040(1)(A). It provides that portions of Wage Order 4-2001—including provisions pertaining to overtime pay, meal and rest periods, and wage statements—do not apply “to persons employed in administrative, executive, or professional capacities.”⁴

For a worker to be classified as an exempt administrative employee under this regulation, the “employee must (1) perform ““office or non-manual work directly related to management policies or general business operations”” of the employer or its customers, (2) ““customarily and regularly exercise[] discretion and independent judgment,”” (3) ““perform[] under only general supervision work along specialized or technical lines requiring special training”” or ““execute[] under only general supervision special assignments and tasks,”” (4) “be engaged in the activities meeting the test for the exemption at least 50 percent of the time, and” (5) “earn twice the state’s minimum wage. Stated in the conjunctive, each of the five elements must be satisfied to find the employee exempt as an administrative employee.” (*Eicher v. Advanced Business Integrators, Inc.* (2007) 151 Cal.App.4th 1363, 1371, fn. omitted.)

3. Creese has not shown that the trial court misapplied *Bell I*.

Creese contends that the trial court misapplied the test in *Bell I* (and also *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715 (*Bell II*)) in determining whether the underwriters are exempt, and its ruling was not supported by substantial evidence. In her view, the trial court’s first step should have been to assess the existence and predominance of common questions regarding whether the underwriters were employed

³ Creese did not identify the wage order at issue.

⁴ Creese does not dispute that this wage order is applicable, or that its immediate predecessor was substantially similar.

in an administrative or production capacity. If they were employed in a production capacity, then they were nonexempt, common questions predominated, and there was no need for further inquiry. In other words, Creese avers that the trial court did not need to proceed to the second step, which was to ask whether the underwriters exercised discretion and independent judgment. But, Creese complains, the trial court improperly reversed the inquiry, deciding the matter based on the second step and ignoring the first step. In her opening brief, Creese states: “In altogether neglecting to address the administrative-production dichotomy, . . . [the trial court] evidently made the erroneous legal assumption that the exercise of discretion and independent judgment is, standing alone, both a necessary and a sufficient condition for a proper administrative exemption classification.”

We turn to these issues.

a. The *Bell I* criteria.

In a case where an administrative exemption is challenged, the initial inquiry is whether workers are employed in an administrative, executive or professional capacity, or whether workers are employed in a production capacity. (*Bell I, supra*, 87 Cal.App.4th at pp. 819–823.) If the worker is employed in a production capacity, he or she is nonexempt. (*Id.* at pp. 828–829.)

A court’s task is to scrutinize a worker’s role and duties in the employer’s business. (*Bell I, supra*, 87 Cal.App.4th at pp. 819–820.) A worker is employed in a production capacity if his or her primary duty is producing the commodities, whether goods or services, that the business exists to produce. (*Id.* at p. 820.) In contrast, an employee is employed in an administrative capacity if he or she performs work directly related to the management policies or general business operations of the employer or the employer’s customers. (*Id.* at pp. 820–821.)

But the court noted that “the administrative/production worker dichotomy is a somewhat gross distinction that may not be dispositive in many cases.” (*Bell I, supra*, 87 Cal.App.4th at p. 826.) Even though the *Bell I* court found that claims representatives were employed in a production capacity, the court recognized “that a careful analysis of

the employees' duties may be necessary to determine exempt or nonexempt status in other cases.” (*Id.* at p. 829.)

In *Bell II*, the court summarized its holding in *Bell I*, stating, in relevant part, that “we construed the [administrative employee] exemption as requiring an employer to prove *both* that an employee is employed in an ‘administrative capacity’ *and* that the employee is “‘engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment.’” [Citation.]” (*Bell II, supra*, 115 Cal.App.4th at p. 728.)

A review of *Bell I* and *Bell II* teaches that a generic inquiry into whether a worker is employed in an administrative or production capacity may not resolve the exemption issue in all cases. In some cases, the trier of fact may be called upon to analyze an employee's duties. Thus, we cannot say, as Creese urges, that there is a per se rule in connection with a class certification motion requiring that a trial court look first or only to whether workers were employed in an administrative or production capacity. To the degree Creese contends that the only issue below was the capacity the underwriters were employed in, we reject the contention. And because the exercise of discretion or independent judgment is a pertinent issue, as established in *Bell I* and *Bell II*, we cannot say that the trial court applied improper legal criteria. Also, it is impossible to say that, in the exercise of discretion, the trial court could not base its ruling on the second prong of the *Bell I* and *Bell II* test, particularly where, as here, it determined that the first prong was not dispositive and the second prong involved what it perceived as substantial variations and distinctions between what each of the underwriters was required to do on a daily basis. In any event, the trial court's minute order indicates that it did in fact examine the capacity the underwriters were employed in. The trial court concluded that the issue was not dispositive in the context of this case, and, regardless, there was scant evidence for it to consider. Essentially, the trial court identified the exercise of discretion and independent judgment as the most substantial issue, and that it would necessitate a series of mini-trials to resolve.

To recap, the trial court determined that the capacity the underwriters were employed in was not dispositive, the scant evidence did not establish capacity, and issues regarding the exercise of discretion and independent judgment were not common. At first blush, the trial court neither applied improper legal criteria nor made improper legal assumptions. And we presume that the record contains evidence to support the trial court's view of the case. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 (*Foreman & Clark*). Creese's task, therefore, is to demonstrate that the ruling below was not supported by substantial evidence. Only by doing so can she avoid our presumption that substantial evidence exists.

b. Creese's substantial evidence attack.

As to this pivotal issue, the existence of substantial evidence, Creese waived any argument she might desire to advance. Her opening brief contains only one citation to evidence offered below. Most of her factual averments are devoid of any support, and they are one-sided. Some are supported by footnotes, but the footnotes refer us to the trial court's rulings, or to the briefs submitted in connection with the motion for class certification, neither of which qualify as evidence. Briefs contain arguments, and "[i]t is axiomatic that argument is not evidence." [Citation.]" (*People v. Stanley* (2006) 39 Cal.4th 913, 961, fn. 10.)

The one citation to evidence appears on page 19 of the 20 page opening brief. In support of the contention that Creese submitted "ten declarations that posited a systematic policy and practice on the part of [Bank] that cause putative class members to be systematically deprived of meal and rest breaks," Creese provided footnote 22, which stated: "See Plaintiffs' Appendix of Declarations in Support of Plaintiffs' Motion for Class Certification (7 App. 401-427.)" This is insufficient to assist us in determining whether the underwriters were employed in an administrative or production capacity, or whether they exercised discretion and independent judgment. Furthermore, we are not required to comb through the record on our own in search of error. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246; *Foreman & Clark, supra*, 3 Cal.3d at p. 881 ["Defendants' contention herein 'requires defendants to demonstrate that there is *no*

substantial evidence to support the challenged findings.’ . . . [Citations.] A recitation of only defendants’ evidence is not the ‘demonstration’ contemplated under the above rule. [Citation.] Accordingly, if, as defendants here contend, ‘some particular issue of fact is not sustained, they are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed to be waived.’ . . . [Citations.]”)].)

There is a plethora of examples of Creese’s abandonment of her substantial evidence attack.

On page 3 of the opening brief, Creese states: “[T]he [trial court’s] analysis improperly reached the merits of [Creese’s] misclassification/overtime claim, in the manner of a summary judgment motion, as opposed to an analysis confined to the requisites for class certification. [Creese] presented uncontroverted evidence that she and other ‘underwriters’ never performed administrative work, and offered the common questions of law and fact by which the action could be adjudicated on a class-wide basis. Yet [the trial court] supported its denial of class certification solely with its analysis that the plainly non-administrative work could have entailed some amount of discretion and independent judgment. However, no amount of discretion and independent judgment is sufficient to render a job with no administrative aspect whatsoever eligible for the *administrative* exemption.”

Creese did not provide any record citations to establish that she presented uncontroverted evidence that she and other underwriters never performed administrative work. As a result, we are offered no evidence that, using criteria in Wage Order 4-2001, the underwriters do not perform office or nonmanual work directly related to management policies or general business operations of Bank or Bank’s customers; they do not customarily and regularly exercise discretion and independent judgment; they do not regularly and directly assist a proprietor, or an employee employed in a bona fide executive or administrative capacity; they do not perform work that is only generally supervised and which is specialized or technical along lines requiring special training, experience, or knowledge; they do not execute special assignments and tasks only under

general supervision; and they earn less than two times the state minimum wage for full-time employment.

On pages 3 and 4 of her opening brief, Creese admits that Bank “did offer evidence to support its contention that its underwriter employees classified as exempt under the administrative exemption exercised discretion and independent judgment” but avers that her “evidence that the work the employees performed was in no sense ‘administrative’ went entirely unrefuted by [Bank], and entirely unaddressed by [the trial court].” Not only did Creese fail to provide record citations, but she did not summarize Bank’s evidence.⁵ She therefore failed in her obligation to fairly state all the evidence. (*Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 832 (*Oliver*)). Modifying a quote from the *Oliver* court, we conclude that Creese’s “briefs constitute merely a challenge to [Bank] to set forth or this court to find the evidence supporting . . . the trial court’s [order]. Given this type of presentation the contention that the findings are not supported by substantial evidence may be deemed waived.” (*Ibid.*) This is a practice we cannot condone.

On page 6 of her opening brief, Creese contends that she is a former underwriter who was classified as exempt. Based on Creese’s opening brief, we do not know this to be true. We also do not know that there is evidence supporting the following statements: “[The underwriters] had no role whatsoever in the ‘administrative’ functions of [Bank’s] mortgage lending business”; “[B]ecause *all* of the evidence before the [trial court] affirmed the putative class members did not perform administrative work, there was not

⁵ Similarly, on page 9 of her opening brief, Creese stated: “There was a significant dispute between the parties as to whether the underwriters did or did not employ discretion and independent judgment in performing their job duties. There was indeed evidence presented that tended to suggest both the presence and absence of discretion and independent judgment.” Instead of summarizing this evidence or providing record citations, Creese averred that “the discretion and independent judgment question was incidental to [her] class certification motion, and not properly before the [trial court] on a motion for class certification. Whether the putative class members did in fact exercise discretion and independent judgment is, ultimately, and only potentially, a question on the merits.”

substantial evidence to support a ruling that necessarily requires a finding that common questions of law and fact do not predominate as to the determination of whether or not putative class members did or did not perform administrative work”; “Because [Bank] chose . . . to give nearly total emphasis to its argument that underwriters exercise discretion and independent [judgment], [Bank] has managed to posit only one underwriter job task that is even arguably administrative, and there is no evidence that the underwriters actually did even that one administrative task”; “[Creese’s] and [Bank’s] evidence, cumulatively, indicates that [Bank’s] underwriters performed absolutely no administrative tasks whatsoever.”

c. The trial court did not rule on the merits.

Although Creese contends that the trial court impermissibly ruled on the merits, this assertion was not followed by any analysis. We will not formulate Creese’s argument on her behalf. In any event, it should be pointed out that the trial court did not rule on the exemption issue. Instead, it looked at the totality of the evidence and concluded that common issues did not predominate regarding exemption, and class certification was not appropriate. At the June 26, 2006 hearing, the trial court even stated: “This is not a hearing on the merits.”

4. Wage statements.

Creese argues that a class should have been certified regarding the failure of Bank to provide wage statements that itemized the hours worked and hourly rates in effect during each pay period.

We disagree.

Section 226, subdivision (a) provides, in part, that “[e]very employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee’s wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing showing . . . (2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any

applicable order of the Industrial Welfare Commission . . . and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.”

If the underwriters were exempt, and their compensation was based on salary, then they were not entitled to an itemization of hours and an hourly rate. Thus, the issue of classification predominates, and the trial court was within its discretion to deny class certification on this cause of action.

In Creese’s view, the underwriters were entitled to an itemization of hours worked and hourly rates regardless of whether they were exempt because they were paid based on salary and bonuses. But Creese did not cite to any evidence that the underwriters were paid on that basis. Instead, she simply cited to the points and authorities in support of her motion for class certification. As we have stated previously in this opinion, argument does not qualify as evidence. And regardless, Creese has not offered any analysis of how section 226, subdivision (a)(2) should be interpreted. In other words, does the phrase “solely based on a salary” include or exclude compensation that is based on salary plus bonuses? We are not offered an answer by Creese and it “is not our responsibility to develop an appellant’s argument.” (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.) Suffice it to say, if compensation is not based on hours worked, and if an employee is exempt, there is no logical basis for requiring the itemizations Creese urges.

5. Meal and rest periods.

Under Wage Order 4-2001, only nonexempt employees are entitled to meal and rest periods. The classification issue predominates in the underwriters meal and rest period claim, and it was reasonable for the trial court to deny class certification on the same grounds as the other claims.⁶

⁶ Just prior to oral argument, Bank alerted us to *Combs v. Skyriver Communications, Inc.* (Jan. 17, 2008, D049884) ___ Cal.App.4th ___ [2008 Cal.App. Lexis 208]. In *Combs*, the court held that the application of the administrative versus production worker dichotomy is not mandatory in all administrative exemption cases. It found that a trial

DISPOSITION

The order denying class certification is affirmed.

Bank shall recover its costs on appeal.

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_____, J.
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We concur:

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court's decision not to apply the dichotomy was supported by substantial evidence. We need not consider *Combs*. But we do note that it is consistent with our opinion.