Docket No. 09-16370

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON CAMPBELL and SARAH SOBEK, *et al.*, Plaintiffs-Appellees,

v.

PRICEWATERHOUSECOOPERS LLP, Defendant-Appellant.

Appeal From The United States District Court
For The Eastern District Of California
The Honorable Lawrence Karlton
No. 06 CV-02376-LKK-GGH

BRIEF FOR DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel of record for Defendant-Appellant PricewaterhouseCoopers LLP ("PwC") certifies that PwC has no parent corporation and, as PwC is a limited liability partnership, no publicly held corporation owns stock in PwC.

Dated: October 29, 2009

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INTRODUCTION

In this wage-and-hour class action, the District Court entered summary adjudication against Defendant-Appellant PricewaterhouseCoopers LLP ("PwC"), and in favor of the plaintiff class of unlicensed accountants working as "Attest Associates" at PwC -- holding as a matter of law that the Attest Associates are ineligible for exemption from the California Labor Code's overtime provisions. The District Court's Order ("Order") rests on two unprecedented and unsupported interpretations of California Wage Order 4-2001 ("Wage Order"), which governs the payment of overtime to "all persons employed in professional, technical, clerical, mechanical and similar occupations." This appeal concerns the proper interpretation of two sections of the Wage Order, the Professional Exemption and the Administrative Exemption, both of which exempt qualifying employees from overtime.

The Professional Exemption: The first of the two exemptions at issue on this appeal, the Professional Exemption, is available to "any employee" who satisfies the requirements set forth in the Wage Order. In broad terms, the Professional Exemption can be satisfied in either of two ways. For employees who are "licensed or certified by the State of California" in one of the eight professions listed in subsection (a), an employer need only make an abbreviated threshold showing that the employees are so licensed and that they are "primarily engaged in

the practice" of the enumerated profession in which they are licensed, *i.e.*, law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting. Employers of professionals who are not licensed or certified by the State of California in one of the eight enumerated professions must make a different and more extensive threshold showing than is required to establish the exempt status of employees who are licensed in one of those professions. Specifically, under subsection (b), the employer must establish that the employee's profession is "commonly recognized as a learned or artistic profession," and that the nature of her work meets the requirements set forth in subsections (b)(i) through (b)(iii) of the Professional Exemption. Regardless of whether an employee is licensed or unlicensed, an employee must be shown to exercise discretion and independent judgment in the performance of her duties and earn a monthly salary not less than two times the state minimum wage to be exempt. These requirements are not at issue on this appeal.

In the proceedings below, PwC asserted that the class of Attest Associates qualified for the Professional Exemption under subsection (b). To support this assertion, PwC proffered evidence showing that accounting is commonly recognized as a "learned profession" and that Attest Associates are primarily engaged in the performance of work that meets the additional requirements of subsection (b). Because none of the class members holds a Certified Public

Accountant ("CPA") license, subsection (a) does not apply to them, and PwC did not argue otherwise.

The District Court took no issue with PwC's factual showing as to the nature of the work performed by Attest Associates. The District Court did, however, conclude that because Attest Associates in the class do not possess a professional license, they are categorically ineligible to be considered exempt from the Wage Order's overtime requirements under subsection (b) -- even though subsection (b) has no licensure requirement. That conclusion is wrong as a matter of law, and thus summary adjudication on the applicability of the Professional Exemption must be reversed.

The Administrative Exemption: The Administrative Exemption applies to employees who are "employed in an administrative capacity." Among the requirements of the Administrative Exemption is that the employee be "primarily engaged" in work that is performed "under only general supervision." The District Court ruled that the class of Attest Associates could not satisfy the "under only general supervision" requirement, based on its finding that because the class members are unlicensed, both professional rules and PwC's own policies mandate that the "results and conclusions" documented in their work be reviewed by licensed CPAs. Without further explanation, the District Court found that such a

relationship between the unlicensed Attest Associates and the CPAs who review their work product constitutes more than "only general supervision."

The District Court's focus on review of the results and conclusions of unlicensed accountants was misplaced. The language of the Administrative Exemption makes clear that the relevant factual inquiry concerns the level of supervision during the ***performance of an employee's work***. Because the level of supervision during the performance of an employee's work cannot be ascertained from the level of scrutiny applied to the results and conclusions reached by the employee, the District Court's ruling was based on an erroneous interpretation of the Wage Order.

The effect of the District Court's two unprecedented legal rulings is to make a CPA license the *sine qua non* of both the Professional Exemption and the Administrative Exemption for accountants employed in California, regardless of the nature of their job responsibilities and the manner in which they perform their work -- the very factors that govern exemption status. No plausible reading of Wage Order 4-2001 would permit either of the District Court's conclusions, and indeed no prior decision of any court supports the District Court's rewriting of the Wage Order to make unlicensed accountants *per se* ineligible to be professionally or administratively exempt.

STATEMENT OF JURISDICTION

The District Court has subject matter jurisdiction over the claims of Plaintiffs-Appellees Jason Campbell and Sarah Sobek and the class of Attest Associates they represent ("Plaintiffs") under 28 U.S.C. section 1332, as modified by the Class Action Fairness Act of 2005 ("CAFA"). Diversity jurisdiction over this matter exists pursuant to 28 U.S.C. section 1332(d)(2) because the matter in controversy (1) exceeds the sum of $5,000,000, exclusive of interest and costs; and (2) is a class action in which Plaintiffs are citizens of the State of California, and, for purposes of jurisdiction under CAFA, Defendant-Appellant PricewaterhouseCoopers LLP is a citizen of the states of Delaware and New York.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. section 1292(b). In an Order entered March 11, 2009, the District Court granted summary adjudication in favor of Plaintiffs and certified its ruling for interlocutory appeal pursuant to 28 U.S.C. section 1292(b). On March 25, 2009, PwC timely filed a petition for permission to appeal the District Court's Order. On June 30, 2009, this Court granted PwC's petition.

ISSUES ON APPEAL

1. Whether the District Court erred in finding as a matter of law that ***unlicensed*** accountants are ineligible for exemption under subsection (b) of the Professional Exemption, which applies to employees in a "learned profession" and contains no licensure requirement?

2. Whether the District Court erred in finding as a matter of law that unlicensed accountants do not work "***under only general supervision***," as required to qualify for the Administrative Exemption, because their work is subject to review after being completed and documented?

STATEMENT OF THE CASE

Plaintiffs filed this action on October 27, 2006, alleging that PwC misclassified them as exempt from overtime wages under California law, and asserting related claims for violations of California Labor Code provisions governing entitlement to meal breaks, rest breaks and accurate wage statements. Plaintiffs sought to represent all "non-licensed associate accountants" working for PwC in California from October 27, 2002. *See* Defendant-Appellant's Excerpts of Record ("ER") 323 (Second Amended Complaint ¶ 16).

In its Answer, PwC asserted various affirmative defenses, including that class members are properly classified as exempt from California overtime requirements. *See* ER 314 (PwC's Answer to Plaintiffs' Second Amended

Complaint ("Answer") at 9). Relevant to this appeal, PwC asserted affirmative defenses under the Professional Exemption and the Administrative Exemption set forth in the Wage Order (*see* Statement of Facts, *infra*).[1]

On October 24, 2007, Plaintiffs moved to certify a class of PwC employees who: (i) did not have a CPA license; (ii) assisted CPAs in the practice of public accountancy as provided for in California Business and Professions ("B&P") Code sections 5051 and 5053; and (iii) worked as Associates or Senior Associates in PwC's Assurance and Tax Lines of Service. PwC opposed Plaintiffs' class certification motion on the basis that exemption under the Wage Order required employee-specific evidence regarding the job duties of the Attest Associates in the plaintiff class.

On March 25, 2008, the District Court granted Plaintiffs' motion for class certification. However, the District Court did so only with respect to a class of unlicensed accountants working in the position of Attest Associate, the same position in which Plaintiffs worked. The District Court found, among other things,

[1] As set forth more fully in the Statement of Facts, *infra*, the Wage Order, promulgated by the California Industrial Welfare Commission ("IWC"), governs the wages, hours and working conditions in professional, technical, clerical, mechanical and similar occupations in California. *See* Cal. Code Regs. tit. 8, § 11040(1); *see also* ER 69-79. The IWC promulgated the Wage Order under authority conferred to it by the California legislature. Specifically, Labor Code Section 515(a) authorizes the creation of exemptions from California overtime requirements for administrative, executive and professional employees.

that class members' duties as Attest Associates were sufficiently similar to warrant class treatment as to both the Professional and Administrative Exemptions.

On September 22, 2008, Plaintiffs moved for summary adjudication, claiming that PwC was precluded as a matter of law from relying on its affirmative defenses of exemption. Plaintiffs' motion relied entirely on statutory construction arguments to support the claim that all unlicensed accountants are categorically precluded from the Professional Exemption. As to the Administrative Exemption, Plaintiffs' motion relied largely on statutory provisions and auditing standards, as well as declarations and PwC documents reflecting the Firm's policies on the documentation and review of work completed by Attest Associates.

PwC opposed Plaintiffs' motion, and, on October 27, 2008, moved for summary judgment or, in the alternative, summary adjudication. In support of its opposition and cross-motion, PwC submitted substantial evidence, including declarations from class members, PwC partners and other PwC personnel regarding Attest Associates' job duties and PwC policies and procedures, expert declarations, internal PwC documents and other documents reflecting Attest Associates' job duties and the level of supervision under which they work.

The District Court's Order, dated March 10, 2009 (entered March 11, 2009), granted Plaintiffs' motion for summary adjudication on the issue of PwC's affirmative defense of exemption, and denied PwC's cross-motion for summary

judgment on that issue.[2] The District Court stated that its "determination regarding exemption" satisfied the criteria for interlocutory appeal and *sua sponte* certified the Order for interlocutory appeal pursuant to 28 U.S.C. section 1292. *See* ER 43-44 (Order 43:24-44:4).

On March 23, 2009, the District Court continued all further proceedings in the case pending: (a) this Court's denial of PwC's petition for permission to appeal the District Court's Order pursuant to 28 U.S.C. section 1292(b); or (b) this Court's decision on PwC's appeal. On March 25, 2009, PwC filed a timely petition for permission to appeal the District Court's Order pursuant to 28 U.S.C. section 1292(b). On June 30, 2009, this Court granted PwC's petition. On July 15, 2009, PwC timely perfected this appeal.

STATEMENT OF FACTS

A. The Professional And Administrative Exemptions.

The Wage Order governs the payment of overtime to all persons employed in professional, technical, clerical, mechanical, and similar occupations, by: (i) establishing overtime provisions, minimum wages and other related requirements (collectively, "overtime provisions"); (ii) exempting from the overtime provisions "persons employed in administrative, executive, or

[2] On the issues of waiting time penalties and punitive damages, the District Court granted PwC's cross-motion for summary adjudication. *See* ER 43 (Order 43:17-23).

professional capacities;" and (iii) delineating the requirements to be used "in determining whether an employee's duties meet the test to qualify for an exemption" from overtime provisions. *See* Cal. Code Regs. tit. 8, § 11040(1).

For the Professional Exemption, the Wage Order has a threshold requirement that an employee either: (a) be licensed or certified by the State of California and primarily engaged in one of eight enumerated professions; ***or*** (b) perform work that is sufficiently "intellectual," "advanced" and "varied" in a recognized "learned" or "artistic" profession:

> (3) **Professional Exemption**. A person employed in a professional capacity means ***any employee*** who meets all of the following requirements:
>
> (a) Who is licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; ***or***
>
> (b) Who is primarily engaged in an occupation commonly recognized as a learned or artistic profession….[involving]
>
> > (i) Work requiring knowledge of an advanced type in a field or science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or work that is an essential part of or necessarily incident to any of the above work;
> >
> > … [and]

> > (iii) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.
>
> (c) Who customarily and regularly exercises discretion and independent judgment in the performance of duties set forth in subparagraphs (a) and (b).
>
> (d) Who earns a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code Section 515(c) as 40 hours per week.
>
> (e) Subparagraph (b) above is intended to be construed in accordance with the following provisions of federal law as they existed as of the date of this wage order: 29 C.F.R. Sections 541.207, 541.301(a)-(d), 541.302, 541.306, 541.307, 541.308, and 541.310.

Cal. Code Regs. tit. 8, § 11040(1)(A)(3) (emphasis added).[3]

For the Administrative Exemption, the Wage Order provides, in relevant part, that a person employed in an administrative capacity means any employee:

> (a) Whose duties and responsibilities involve…
>
> > (I) the performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his employer's customers;…

[3] All references herein to the Federal Regulations incorporated by Wage Order 4-2001, effective January 1, 2001 as amended, are to those regulations in existence as of that date, as specified in subparagraph (e) of the Professional Exemption. *See* ER 69-70 (Wage Order).

> (d) Who ***performs under only general supervision*** work along specialized or technical lines requiring special training, experience, or knowledge; or
>
> (e) Who ***executes under only general supervision*** special assignments and tasks; and
>
> (f) Who is primarily engaged in duties that meet the test of the exemption.

Cal. Code Regs. tit. 8, § 11040(1)(A)(2) (emphasis added). The Administrative Exemption has the same functional and salary criteria as the Professional Exemption. To qualify as exempt, the employee must "customarily and regularly exercise discretion and independent judgment," and earn a monthly salary "equivalent to no less than two (2) times the state minimum wage for full-time employment." *Id.*

B. PwC.

1. PwC's Attest Practice.

PwC's Attest practice provides independent opinions and reports that give assurance to clients regarding the financial reporting of their businesses and the effectiveness of their internal controls over financial reporting. *See* ER 155 (PwC's Statement of Additional Facts Precluding Plaintiffs' Motion for Summary Judgment or Adjudication, at Additional Material Fact ("AMF") 1). Attest services include financial statement and internal controls audits, evaluations of management controls, business processes assurance, risk management solutions, benefit plan audits, and business and performance reporting. *See* ER 156 (AMF 2).

2. Attest Associates.

PwC's Attest Associates perform work integral to the financial statement and internal control attest services PwC provides to its clients. For financial statement audits, Attest Associates perform a wide range of services, including gathering, reviewing and analyzing evidence supporting the material balances and disclosures in the financial statements, and performing analytical procedures on audit evidence to determine and investigate unusual variances. *See* ER 162-64, 166 (AMFs 57, 60, 61, 65-66, 82, 83). In doing so, Attest Associates may identify material misstatements resulting from error or fraud, or areas of the client's financial statements that are not in conformity with Generally Accepted Accounting Principles ("GAAP"). *See* ER 166 (AMF 83). Such errors are then raised with the client so that the client can independently determine whether to make adjustments in its financial statements. *See* ER 166 (AMF 85). Attest Associates also perform procedures designed to evaluate whether the client's financial statements agree with its books and records, and to determine whether particular client transactions are in compliance with laws, regulations, and GAAP. *See* ER 163, 167 (AMFs 63, 86).

On internal controls audits, Attest Associates perform a variety of duties in order to assess a client's internal controls over financial reporting. In particular, Attest Associates gather evidence regarding the client's internal controls, obtain an

understanding of them, assess the risk that material weaknesses exist, test and evaluate their design and operating effectiveness, and recommend changes for their improvement. *See* ER 164, 166, 168 (AMFs 66, 81, 89-91). Performing these services requires Attest Associates to have knowledge of Generally Accepted Auditing Standards ("GAAS"), as well as PwC audit methodologies and policies. *See* ER 162 (AMF 54). In performing their work, Attest Associates help formulate some of the conclusions reached by PwC, and, in turn, the opinions and reports that PwC provides to its clients. *See* ER 168-69 (AMFs 92-97). The failure of an Attest Associate to perform tasks adequately can therefore have significant consequences for PwC's clients. *See* ER 166, 174 (AMFs 84, 120-123).

C. Plaintiffs' Motion For Summary Adjudication.

Plaintiffs' motion for summary adjudication primarily asserted legal arguments in support of Plaintiffs' claim that PwC is precluded from relying on its affirmative defenses of exemption. Regarding the Professional Exemption, Plaintiffs argued for a construction of the Wage Order that focused on the profession, not the employee. Although the Professional Exemption pertains to, and exempts, "any employee" who meets certain requirements, and subsection (a) applies only to an employee "[w]ho is licensed or certified by the State of California . . . ," Plaintiffs argued in the District Court that:

> Once it is established that Attest associates primarily work in the recognized profession of accounting, then subdivision (a),

> by its terms, applies to them. This, in turn, means that the license requirement must be satisfied to meet the test for Professional Exemption.

See ER 275 (Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment on Defendant's Affirmative Defense of Exemption ("Plaintiffs' MSJ") 11:19-21). In arguing that subsection (a) applies to the unlicensed class of Attest Associates, Plaintiffs put great weight on a novel interpretation of the Wage Order's use of the word "or" separating subsections (a) and (b). According to Plaintiffs, "or" in this context signifies two mutually exclusive alternatives, and PwC did not have the option to pick which subsection applied to Attest Associates -- it could only rely upon subsection (a). ER 278 (Plaintiffs' MSJ 14:15-18 ("[B]ecause Attest Associates are primarily engaged in the recognized profession of accounting, they cannot be primarily engaged in a learned or artistic profession and must, therefore, satisfy the license requirement to qualify as exempt professionals.")).

Plaintiffs' arguments regarding the Administrative Exemption were limited to subsection (a)(i) of the exemption, which requires that an employee's duties be "directly related to management policies or general business operations" of her employer or her employer's clients. Plaintiffs' several arguments in that regard focused primarily on an assertion that an employee of a firm such as PwC could only be administratively exempt if she directly advises the firm's clients, which

Plaintiffs claimed Attest Associates do not do. *See* ER 279-86 (Plaintiffs' MSJ 15-22).

D. PwC's Opposition.

In its opposition to Plaintiffs' motion, PwC relied upon the plain language of the Wage Order. With respect to the Professional Exemption, PwC focused, as the Wage Order reads, on the employee. PwC argued that nothing in the plain language of the Wage Order precludes employees working in any of the "enumerated" professions of subsection (a) from being exempt "learned professionals" under subsection (b). *See* ER 99-101 (PwC's Opposition to Plaintiffs' Motion for Summary Judgment on Defendant's Affirmative Defense of Exemption ("PwC Opp.") 14-16). As to the Administrative Exemption, PwC again relied upon the plain language of the Wage Order to refute Plaintiffs' claim that only individuals who directly advise PwC's clients may qualify as exempt under subsection (a)(i). *See* ER 106-110 (PwC Opp. 21-25).

In addition, PwC put forth evidence of class members' job duties and responsibilities, including class member declarations, PwC documents and expert declarations. For example, PwC set forth substantial evidence that class members satisfy subsection (a)(i) of the Administrative Exemption. *See, e.g.*, ER 165-66, 168-69, 174 (AMFs 76-78, 836-88, 91-97, 120-23); *see also* ER 116-52 (PwC's

Response to Plaintiffs' Statement of Undisputed Material Facts in Support of Motion for Summary Judgment on Affirmative Defense of Exemption).

PwC also demonstrated, at a minimum, the existence of triable issues under other key criteria of the Professional and Administrative Exemptions, many of which are traditional battlegrounds for these exemptions. For example, PwC set forth evidence showing that class members' educational backgrounds and training satisfy the requirements of subsection (b) of the Professional Exemption and subsection (d) of the Administrative Exemption. *See, e.g.*, ER 157-59, 162 (AMFs 14-28, 54-55). PwC also submitted a substantial record of evidence demonstrating that Attest Associates' job duties are specialized, predominantly intellectual, and varied in nature, also as required to qualify under subsection (b) of the Professional Exemption and subsection (d) of the Administrative Exemption. *See, e.g.*, ER 162-66, 168 (AMFs 54-55, 60-67, 70-74, 81-83, 85, 89-91, 100-102). And PwC set forth evidence creating triable issues over whether class members meet perhaps the most frequently litigated of the relevant exemption criteria -- the requirement, set forth in subsection (c) of the Professional Exemption and subsection (b) of the Administrative Exemption, that employees customarily and regularly exercise

discretion and independent judgment in the performance of their job duties.[4] *See, e.g.*, ER 162-64 (AMFs 53, 56-71).

Finally, PwC submitted evidence regarding the lone factual issue addressed by the District Court in its Order: whether class members work "under only general supervision," as required in subsection (d) of the Administrative Exemption. Specifically, PwC submitted numerous declarations of Attest Associates and the employees who supervised them. These declarations establish that Attest Associates perform their assigned audit responsibilities independently and without direct supervision, and that they are expected to take ownership of their audit work. *See, e.g.*, ER 248 (¶ 6); ER 219-20 (¶¶ 38-40). They further establish that Attest Associates who do not work independently in this regard fail to meet PwC's expectations. *See id*. These declarations also establish that Attest Associates spend a significant amount of their time supervising others, including, on occasion, serving as the most senior PwC employee at client work sites. *See, e.g.*, ER 248-50 (¶¶ 6-10); ER 224 (¶ 6).

Significantly, Plaintiffs did not attempt to contradict this evidence with evidence of their own showing that class members work under more than general supervision at PwC. In fact, Plaintiffs did not separately address the general

[4] *See, e.g., Heffelfinger v. Elec. Data Sys. Corp.*, 580 F. Supp. 2d 933, 962-66 (C.D. Cal. 2008) (finding defendant's employees exercised discretion and independent judgment in support of overtime exemption); *Combs v. Skyriver Commc'ns, Inc.*, 159 Cal. App. 4th 1242, 1266-68 (2008) (finding same).

supervision requirement in their motion, and did not seek to show that class members fail to satisfy that requirement.

E. The District Court's Order.

In granting Plaintiffs' motion for summary adjudication, the District Court neither followed the plain language of the Wage Order, nor adopted Plaintiffs' arguments as to why the language of the Wage Order precluded Attest Associates from exemption. Instead, the court fashioned its own construction of the Wage Order centered entirely around the fact that all members of the class are unlicensed accountants.

1. Professional Exemption.

With respect to the Professional Exemption, the District Court initially rejected Plaintiffs' argument that the language of the Wage Order precludes any overlap between subsections (a) and (b), its "enumerated" and "learned" prongs. To the contrary, the District Court recognized that the enumerated and learned profession subsections are disjunctive, and thus alternatives to each other. As the court noted:

> The question is whether "or" separating (a) from (b), indicates a disjunction. It would be absurd to conclude that, to be an exempt professional, an employee must both be licensed in a [sic] enumerated profession and engaged in a learned or artistic profession…. Instead, the professional exemption applies to any employee who satisfies one of (a) or (b), and all of (c) through (i).

See ER 18-19 (Order 18:22-19:3).[5] Thus the court expressly found that the Professional Exemption applies to "***any employee***" who satisfies "***one of (a) or (b)***…." ER 19 (Order 19:1-3 (emphasis added)).

In addition to determining that subsections (a) and (b) are alternatives, the District Court acknowledged that the language of the Wage Order does not preclude employees in an enumerated profession, such as accounting, from establishing that they work in a "learned profession":

> Nothing in the text of the regulation itself suggests that the enumerated professions cannot also be learned professions. If the court could interpret this text alone, it might interpret the learned professions provision in the way the [Division of Labor Standards Enforcement] interpreted the former 'primarily intellectual' provision; i.e., as setting an overlapping, but generally stricter, set of criteria.

See ER 31-32 (Order 31:18-32:4). Notwithstanding its finding that subsections (a) and (b) were alternatives to each other, the District Court turned to two inapposite canons of statutory construction -- (i) construing ambiguous employment statutes in favor of employees; and (ii) avoiding surplusage constructions -- to circumvent the plain language of the exemption. Specifically, the District Court found that subsection (b) must not be available to employees working in the enumerated

[5] While it is not accurate to say an employee must satisfy one of (a) or (b) "and all of (c) through (i)" -- subsection (e), for example, applies only to employees under subsection (b), subsection (f) applies only to pharmacists and registered nurses, and subsections (h) and (i) apply only to certain employees in the computer software field -- the District Court correctly found that the Wage Order requires an employee to satisfy "one of (a) or (b)," and "all" applicable provisions thereafter. Cal. Code Regs. tit. 8, §11040(1)(A)(3).

professions of subsection (a) because, if it were, then subsection (a) would be rendered "surplusage," in that it would not exempt any individuals that were not otherwise exempt under (b). *See, e.g.*, ER 31 (Order 31:3-11). Thus, the District Court held that Attest Associates are precluded from exemption under the learned profession prong of subsection (b) for the sole reason that their occupation is one of the eight professions identified in subsection (a). *See* ER 32-33 (Order 32:17-33:4).

2. Administrative Exemption.

Addressing the Administrative Exemption, the District Court held that Attest Associates are precluded from being exempt by devising an entirely new test for exemption. In doing so, the District Court focused solely on its requirement that employees perform their work "under only general supervision" in order to be exempt. *See* ER 37-41 (Order 37:24-41:2).

In analyzing the "general supervision" prong of the exemption, the District Court relied on job titles listed in the Division of Labor Standards Enforcement ("DLSE") Enforcement Policies and Interpretations Manual ("Manual"), as well as its own "common sense" understanding of the term, to conclude that general supervision means "supervision in the form of review or approval of overall results and conclusions." *See* ER 38-39 (Order 38:14-39:4). Using this definition, the District Court held that Attest Associates were subject to more than general

supervision based on its finding that (1) professional standards, including California Business & Professions Code section 5053 and Professional Standards promulgated by the American Institute of Certified Public Accountants ("AICPA"), require that Attest Associates be "control[led] and supervise[d]" by CPAs, and that their work be reviewed; and (2) PwC policies and procedures subject class members to review of, "and thereby supervision over, all the predicate steps and processes involved in their work." *See* ER 39 (Order 39:4-18). The critical fact underlying the District Court's analysis is that the class members are not licensed CPAs. *See* ER 39, 28-29 (Order 39:4-41:2; 28-29 n.8) (the court acknowledging its conclusion "that the statutorily mandated supervision of unlicensed accountants precludes their qualification for the administrative exception"). Because of the significance that the District Court afforded to the undisputed fact that the Attest Associates in the class are not licensed CPAs, the court did not address the findings of PwC's experts, the declarations of class members, or other documentation reflecting that class members worked "under only general supervision."

SUMMARY OF ARGUMENT

The District Court's ruling that as a matter of law unlicensed accountants cannot qualify under the Wage Order's Professional Exemption cannot be reconciled with the plain language of the Wage Order. While the court properly

rejected Plaintiffs' arguments that the wording of the Wage Order imposed a *per se* requirement that accountants must be licensed by the State of California in order to be professionally exempt from overtime requirements, it erred in reaching the exact same result through the misuse of canons of construction to trump unambiguous statutory wording. It was also error for the District Court to refuse to construe the Professional Exemption in accordance with federal regulations designated in the text of the Wage Order, as mandated by subsection (e) of the Professional Exemption.

The District Court further erred in ruling that because of their unlicensed status, PwC's Attest Associates cannot qualify under the Administrative Exemption. The District Court created out of whole cloth a test for the requirement that administratively exempt employees perform "under only general supervision" that is not found in the Wage Order and is inconsistent with the text of the Administrative Exemption. And in applying that test, the District Court failed to consider Attest Associates' actual duties and level of supervision, as it was required to do under California law. In fact, PwC offered sufficient evidence, at a minimum, to present a genuine issue of material fact that its Attest Associates work under only general supervision. Thus, the District Court's grant of summary adjudication was error and must be vacated.

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed *de novo*. *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004). On appeal, "review is governed by the same standard used by the trial court pursuant to Fed. R. Civ. P. 56(c); therefore, on review, [the court] must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Kliff v. Hewlett Packard Co., Inc.*, 318 Fed. Appx. 472, 474 (9th Cir. 2008) (citing *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004)).

ARGUMENT

I. THE SUMMARY ADJUDICATION ORDER MUST BE VACATED BECAUSE THE DISTRICT COURT ERRED IN RULING THAT, AS A MATTER OF LAW, UNLICENSED ACCOUNTANTS CANNOT BE EXEMPT FROM THE WAGE ORDER UNDER THE PROFESSIONAL EXEMPTION.

In California, statutory interpretation begins with the plain language of a statute: if the meaning is clear, the interpretive inquiry ends.[6] *See Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1103 (2007) ("If the statutory

[6] As the District Court noted, "[t]he California Courts of Appeal have concluded that wage orders are 'quasi-legislative regulations,' and as such, are to be 'construed in accordance with the ordinary principles of statutory interpretation.'" ER 15 (Order 15:17-20 (quoting *Singh v. Superior Court*, 140 Cal. App. 4th 387, 393 (2006) and citing *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 801 (1999))).

language is clear and unambiguous our inquiry ends."); *see also Hughes v. Bd. of Architectural Exam'rs*, 17 Cal. 4th 763, 775 (1998) ("Ordinarily, if the statutory language is clear and unambiguous, there is no need for judicial construction."). The District Court erred by rejecting the plain language of subsection (b) of the Professional Exemption to find that unlicensed accountants (and, by extension, unlicensed employees in the other seven professions identified in subsection (a)) are categorically ineligible for exemption.

A. Under The Plain Language Of The Wage Order, Unlicensed Accountants Are Eligible For Professional Exemption If They Are Shown To Meet The Work-Related Tests Of Subsection (b).

1. Subsection (b) Contains No Licensure Requirement and Is Not Limited by Profession.

The plain meaning of the Wage Order is that there are two, alternative paths to qualify for professional exemption: subsection (a), the "enumerated professions" provision, and subsection (b), the "learned profession" provision. Cal. Code Regs. tit. 8, § 11040(1)(A)(3)(a)-(b). The Wage Order states that a professionally exempt employee is one who is "licensed or certified by the State of California" in one of eight enumerated professions; "***or***" who is "primarily engaged" in a learned profession involving work of a specified type. *Id*. (emphasis added). Thus, these paths are separate and distinct: an employee must satisfy one of either (a) "or" (b) to be professionally exempt. Because by its terms, subsection (a) applies exclusively to employees who are "licensed or certified" in certain

enumerated fields, it has no possible application to the unlicensed Attest Associates who comprise the certified class.

Subsection (b) is an alternative to subsection (a) that does not require licensure or certification. Instead, subsection (b) exempts from overtime provisions "***any employee***" primarily engaged in a "learned profession." Cal. Code Regs. tit. 8, § 11040(1)(A)(3)(a)-(b) (emphasis added). "Learned profession," in turn, is defined as a profession involving "[w]ork requiring knowledge of an advanced type in a field or science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study," or work that is "predominantly intellectual and varied in character." *Id*. Thus, in the plain text of the statute, "any employee" whose work meets this definition is eligible for exemption under subsection (b). An employee who is not licensed or certified in a profession enumerated under subsection (a) may thus qualify for the Professional Exemption if she satisfies the alternate criteria of subsection (b). *See Nguyen v. BDO Seidman, LLP*, No. SACV 07-01352-JVS, slip op. at 13 n.21 (C.D. Cal. July 6, 2009) ("because the first two provisions [of the Professional Exemption] are disjunctive, the plain language of this exemption indicates that an employee may qualify as a professional even without a license" under subsection (b)). Accordingly, PwC was entitled to rely on subsection (b) of the Professional Exemption in asserting its affirmative defense of exemption.

The District Court did not find that the ***language*** of subsection (b) was ambiguous, and it did not accept Plaintiffs' argument that the plain language and structure of the Professional Exemption made subsection (b) unavailable to employees in those professions listed in subsection (a), including accounting. Indeed, in looking at the language and structure of the Wage Order, the District Court held precisely the contrary -- that the Professional Exemption applies to any employee who satisfies "one of (a) or (b)" and that "[t]he enumerated professions are not explicitly excluded from the learned professions."[7] *See* ER 19, 20 (Order 19:1-3; 20:5-6). Nevertheless, the District Court elected not to apply the clear language of subsection (b) as it appears in the Wage Order. Thus, despite having found that the language of subsection (b) was not limited so as to exclude employees in any learned profession, the court chose to create just such an unwritten limitation on subsection (b)'s availability. As justification, the court observed that a "[l]iteral construction" of the Wage Order "should not prevail if it is contrary to the legislative intent," *see* ER 16 (Order 16:14-15), and it suggested that the wording of the Wage Order was not an accurate reflection of the IWC's

[7] Notwithstanding the "any employee" language of the Wage Order, there are certain employees that the IWC intended to be covered by overtime provisions, and thus ineligible for exemption, and the Wage Order expressly identifies those employees. Specifically, subsection (f) of the Professional Exemption provides: "[n]otwithstanding the provisions of this subparagraph, pharmacists … and registered nurses … shall not be considered exempt professional employees." Cal. Code Regs. tit. 8, § 11040(1)(A)(3)(f). No such exclusion related to accountants appears in the Wage Order. *See also, infra* at Section I.B.1.

intent. *See* ER 31-32 (Order 31:18-32:16). To the contrary, unambiguous statutory language is always the best indicator of legislative intent. *See Reynolds v. Bement*, 36 Cal. 4th 1075, 1086 (2005) ("[t]he best indicator of [] intent is the language of the provision itself.").

2. The District Court Erred in Failing to Look to Applicable Federal Regulations, as Required by Subsection (e) of the Professional Exemption.

If there is any question that unlicensed accountants are eligible for exemption under subsection (b), federal regulations expressly incorporated into the Wage Order make clear that they are. Subsection (e) of the Wage Order states:

> Subparagraph (b) above is intended to be construed in accordance with the following provisions of federal law as they existed as of the date of this wage order: 29 C.F.R. Sections 541.207, 541.301(a)-(d), 541.302, 541.306, 541.307, 541.308, and 541.310.

Cal. Code Regs. tit. 8, § 11040(1)(A)(3)(e). Thus, "the present order's text … explicitly refers to sections of the former regulation for use as interpretive authority." *See* ER 25 (Order 25:21-23 (citation omitted)). The District Court was aware of the directive in subsection (e), recognized that it would lead to a conclusion at odds with the court's decision, and expressly chose to ignore it. *See* ER 25-26 (Order 25:21-26:20).

Under the referenced federal regulations, the presence or absence of licensure in any particular field is relevant but not dispositive to exemption. Whether any employee, licensed or unlicensed, qualifies as an exempt learned

professional depends on her actual duties and qualifications. As former 29 C.F.R. section 541.308(a) states:

> It has been the Divisions' experience that some employers erroneously believe that anyone employed in the field of accountancy, engineering, or other professional fields, will qualify for exemption as a professional employee by virtue of such employment. While there are many exempt employees in these fields, ***the exemption of individual [sic] depends upon his duties and other qualifications***.

See Defendant-Appellant's Request for Judicial Notice ("RJN"), Ex. A (emphasis added). Thus, the learned Professional Exemption of an "accountancy, engineering, or other professional" employee in the federal framework depends upon the individual's actual duties and qualifications. *Id*. Employment in the profession is not sufficient, but licensure is not required under the incorporated federal regulations.[8] As the District Court recognized, by "emulating and referring to the federal regulations" in the Wage Order, "the IWC … indicated that in general, the learned professions refer to the same type of work as the enumerated professions." *See* ER 25 (Order 25:24-26 (citation omitted)). Thus, the relevant exemption inquiry is addressed to the work actually performed by the employee.

The District Court gave no weight to the incorporated federal authorities that confirm the meaning already plain in the text. Noting that the "federal scheme

[8] PwC has not taken, and on this appeal does not take, the position that all accountants are exempt learned professionals. It is for this very reason that PwC has put in such a volume of evidence as to what PwC's Attest Associates ***actually*** do in the performance of their jobs, demonstrating their duties and qualifications.

lacks an analogous 'enumerated professions' provision" to the one in the Wage Order, and that "rather than copying the federal scheme entirely, the IWC chose to preserve a separate enumerated professional exemption," the District Court concluded that the federal regulations were of no use in interpreting subsection (b), and completely disregarded them. *See* ER 26, 12-14 (Order 25:26-26:2, 12-14). This rejection of the express mandate of subsection (e) cannot be justified legally or logically. That the IWC did not copy the federal statute exactly, and that the federal scheme does not include a separate enumerated professions provision, is plainly immaterial in the face of the unequivocal statutory mandate of subsection (e) that "[s]ubparagraph (b) above is intended to be construed in accordance with the following provisions of federal law…." Had the court followed the plain language of the Wage Order, construing subsection (b) on its face and as informed by subsection (e), as it was compelled to do, the District Court ***could not*** have concluded that unlicensed professionals are ineligible for Professional Exemption as a matter of law.

B. It Was Fundamental Error To Employ Canons Of Statutory Construction To Alter The Plain Meaning Of Subsection (b).

1. The Use of Canons of Construction to Judicially Limit Statutory Language Is Not Proper Absent Ambiguity.

While it cannot be disputed that wage-related statutes should, as a general matter, be construed broadly in favor of employees, that principle is not intended to

override legislative intent as reflected in the plain language of a statute. *See, e.g.*, *Erichs v. Venator Group, Inc.*, 128 F. Supp. 2d 1255, 1261, 1264 (N.D. Cal. 2001) (noting that although wage and hour law deserved a "liberal construction," the plain language of the wage order "speak[s] for itself" and defendant-employer's commission plan complied with the wage order as written). Similarly, the adage against surplusage constructions is not absolute, and should not override plain statutory language. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004) ("[The] preference for avoiding surplusage constructions is not absolute."). Indeed, statutory construction should not proceed past the language of the statute unless the statute is ambiguous. *See, e.g., Katz v. Los Gatos-Saratoga Joint Union High Sch. Dist.*, 117 Cal. App. 4th 47, 54 (2004) (quoting *Lungren v. Deukmejian*, 45 Cal. 3d 727, 735 (1988)) ("'If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature.'"). Here both the language of subsection (b), and the fact that subsection (b) is an alternative to subsection (a), are entirely clear on the face of the statute. Under such circumstances, "[t]here is nothing to 'interpret' or 'construe.'" *Katz*, 117 Cal. App. 4th at 61 (quoting *Halbert's Lumber, Inc. v. Lucky Stores, Inc.*, 6 Cal. App. 4th 1233, 1239 (1992)).

Remarkably, the court's stated basis for turning to canons of construction was that "the language of the wage order ***is ambiguous as to the meaning of the***

enumerated professions provision," *i.e.*, subsection ***(a)*** -- which is not the subsection PwC advanced as the basis for exemption. ER 31 (Order 31:13-15 (emphasis added)). On its face, the District Court's statement is wholly without basis, as subsection (a) states in its entirety that the threshold requirement for employment in a professional capacity is met by any employee: "Who is licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting." Cal. Code Regs. tit. 8, § 11040(1)(A)(3)(a). There is no reasonable basis upon which to assert ambiguity in the face of such textual clarity. Indeed, the District Court's Order demonstrates that the court did not find more than one plausible reading of the text of subsection (a), but rather that the purported ambiguity stemmed from the court's uncertainty as to "why, when the IWC rewrote the wage order by borrowing language from the federal regulations, the IWC deliberately preserved the enumerated professions provision." ER 32 (Order 32:10-13).

The District Court's discussion in this regard is telling. At bottom, the court acknowledged that it did not understand why the IWC chose to fashion the statute as it did. That question, however, is not an appropriate source of ambiguity upon which the court was entitled to disregard the language and structure of the Wage Order. Regardless of its reasons, the IWC did not exclude from exemption under

subsection (b) unlicensed employees engaged in the eight professions specified in subsection (a). In addition to the obvious reality that the words of the Wage Order contain no such limitation, the IWC's intent is reflected by the manner in which the IWC chose to limit the Professional Exemption to employees in the profession of teaching -- one of the eight enumerated professions. Subsection (2)(R) of the Wage Order states: "'[t]eaching' means, for the purpose of Section 1 of this order, the profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing or teaching in an accredited college or university." Cal. Code Regs. tit. 8, § 11040(2)(R). Thus, the IWC makes clear in the Wage Order that unlicensed teachers (other than those teaching in an accredited college or university) are excluded from the Professional Exemption because those teachers have been defined out of the ranks of professionals for purposes of exemption from overtime provisions. *Id.* There would have been no need for the IWC to make such a distinction among employees in the profession of teaching if unlicensed employees in the enumerated professions of subsection (a) were categorically excluded from the Professional Exemption, as the District Court held in this case.[9]

[9] In its Order, the District Court referenced the unique manner in which the profession of teaching is addressed in the Wage Order and acknowledged that the Wage Order contains no such special provision regarding accountants. ER 29 (Order 29:3-16, 16-18 ("The wage order does not similarly define accounting, and thus, does not express an analogously forceful intent to limit the availability of exemptions for accountants.")). The court made no attempt to reconcile that

In summary, the District Court's knowing refusal to interpret the Wage Order as it is written constitutes reversible error. The court's specific conclusion here that unlicensed accountants were *per se* ineligible to be professionally exempt under subsection (b) violates the fundamental precept that "[t]he statute's plain meaning controls the court's interpretation unless its words are ambiguous." *People v. Arias*, 45 Cal. 4th 169, 177 (2008).

2. The District Court's Surplusage Analysis Is Flawed.

The District Court further erred in applying a fundamentally flawed surplusage construction to the Wage Order. As the court noted, a statutory provision is "surplusage" when it is "redundant" or "does not add meaning." *See* ER 29 (Order 29:22-23 (citing Black's Law Dictionary, 8th Edition, 1484)). Thus, the District Court reasoned, unless subsection (a) "excludes some employees as non-exempt who would otherwise be exempt," it does not affect the application of the Wage Order, and is therefore surplusage. *See* ER 31 (Order 31:8-11). The District Court presumed without basis that "all licensed enumerated professionals also satisfy the requirements of the learned Professional Exemption." *See* ER 31 (Order 31:3-5). To the contrary, a licensed employee working in her field of licensure who is exempt under subsection (a) might ***not*** qualify for exemption under subsection (b), because she is not performing work "requiring knowledge of

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observation with its purported reliance on the IWC's intent regarding unlicensed professionals.

an advanced type" or work that is "predominantly intellectual and varied," or work that produces output that "cannot be standardized in relation to a given period of time," as required by (b)(i) and (b)(iii). *See* 29 C.F.R. § 541.308(a), Ex. A to RJN. For example, a CPA who spends much of her time bookkeeping, a licensed architect who spends much of her time drafting, or a member of the bar who spends much of her time performing paralegal work, would likely not satisfy the requirements set forth in subsection (b).

The fact that subsection (a) and subsection (b) may overlap as to some employees does not make either provision "surplusage," and does not justify rewriting subsection (b) to be unavailable to employees in professions such as accounting, which is commonly recognized as a "learned profession." The plain text of the Wage Order describes subsections (a) and (b) as alternative means of qualifying for the Professional Exemption, and there is no rule of construction that related provisions cannot impose, respectively, a streamlined and a more involved set of requirements. That is the case here. In effect, subsection (a) utilizes licensure in particular fields as a proxy for the multi-faceted showing required by subsection (b), even though some licensed professionals might not have been able to satisfy subsection (b)'s requirements. That subsection (b) may also encompass employees who qualify under subsection (a) does not make subsection (a) surplusage. Giving the words of the Professional Exemption their plain and

ordinary meaning, the Wage Order simply credits a state-conferred license in specified fields as strong evidence an employee is doing exempt work; absent a license, a more elaborate showing is required.

Ultimately, whether subsection (a) is rendered surplusage if subsection (b) can exempt unlicensed members of an enumerated profession is immaterial given the clarity of the statutory language. As the Supreme Court observed in *Lamie*, 540 U.S. at 536 (2004), "[the] preference for avoiding surplusage constructions is not absolute." Likewise, the California Supreme Court has stated that the "rule against surplusage will be applied only if it results in a reasonable reading of the legislation … [and] consideration must be given to the consequences that will flow from a particular interpretation." *Santa Clara County Local Transp. Auth. v. Guardino*, 11 Cal. 4th 220, 234-36 (1995). In this case, the court's application of the surplusage doctrine to render unlicensed members of the enumerated professions ineligible for the Professional Exemption ***as a matter of law*** contradicts the plain meaning of the statute. The preference for avoiding surplusage constructions provides no proper basis for rewriting the unambiguous language of the Wage Order.

II. THE SUMMARY ADJUDICATION ORDER MUST BE VACATED BECAUSE THE DISTRICT COURT ERRED IN RULING, AS A MATTER OF LAW, THAT PWC ATTEST ASSOCIATES CANNOT SATISFY THE "GENERAL SUPERVISION" REQUIREMENT OF THE ADMINISTRATIVE EXEMPTION.

The District Court's decision rejecting application of the Administrative Exemption to Attest Associates provides an independent basis for reversal. The court erred in finding as a matter of law that PwC's Attest Associates could not qualify under the Wage Order's Administrative Exemption. The District Court's error was two-fold. First, the court created a narrow definition of "under only general supervision" at odds with the text of the Wage Order. Second, the court erroneously relied on policies and standards to describe the work of Attest Associates, instead of looking to the evidence introduced to show the actual duties and level of supervision under which Attest Associates work, as it was required to do under California law. Viewing the Wage Order properly, PwC offered evidence sufficient to establish that its Attest Associates work "under only general supervision."

A. The District Court Improperly Interpreted The "General Supervision" Requirement.

For Attest Associates to be administratively exempt, PwC has the burden to show, *inter alia*, that those employees perform work or execute assignments and tasks "under only general supervision." *See* Cal. Code Regs. tit. 8, § 11040(1)(A)(2)(d)-(e). The Wage Order does not define "general supervision,"

nor has any court before the District Court attempted to articulate a more precise standard for this element of the Administrative Exemption. Instead, the inquiry is plainly one of ordinary experience, properly reserved for the jury.

Neither party requested the District Court to define the requirement that to be exempt an employee must perform her work "under only general supervision." Nevertheless, the court chose to formulate such a definition, and determined as a matter of law that "general supervision" means "supervision in the form of review or approval of overall results and conclusions." *See* ER 38-39 (Order 38:26-39:4). There is no support for this definition in the Wage Order or in case law.[10] The very concept of "results and conclusions" does not appear anywhere in the text of the Administrative Exemption, and does not address the requirement as it appears in the text of the exemption.

First. The Wage Order states that an administratively exempt employee is one "who ***performs*** under only general supervision work along specialized or technical lines," or "who ***executes*** under only general supervision special assignments and tasks." *See* Cal. Code Regs. tit. 8, § 11040(1)(A)(2)(d)-(e). The Wage Order thus uses present-tense, active verbs to describe a fact-specific, temporal inquiry: how closely are employees supervised ***while they work***? The

[10] The District Court correctly acknowledged that "the general supervision requirement has received relatively little interpretation." *See* ER 38 (Order 38:14-16). Thus it is not surprising that the court's opinion cites no case authority supporting its definition.

District Court's definition of "general supervision" fails entirely to address supervision at the time work is performed, and thus is not consonant with the text of the Wage Order. The level of supervision ***while*** working cannot be determined retrospectively from the fact that documented work is subject to review after the work is completed.[11]

Second. The court's standard finds no support in the DLSE Manual referenced by the court. For reasons not entirely clear, the District Court focused the whole of its attempt to define "general supervision" on a section of the 2002 DLSE Manual -- a list of the typical job titles of employees who satisfy subsections (d) and (e) of the Administrative Exemption. *See* ER 38-39 (Order 38:14-39:4). Citing from the list, the court observed that subsection (d) has been satisfied by "tax experts, insurance experts, wage-rate analysts, foreign exchange consultants, and statisticians," and subsection (e) by "buyers, field representatives, … location managers for motion picture companies, … customers' brokers in stock exchange firms and so-called 'account executives' in advertising firms." *See* ER 38 (Order 38:16-23 (internal citations omitted)). The court noted, correctly:

[11] While "review or approval of overall results and conclusions" would not disqualify an employee from being administratively exempt, the court's ruling suggests that any other or additional supervision would have that effect. That is contrary to the plain language of the exemption, which allows exemption of employees who are supervised in any aspect of their work, provided the supervision is "only general supervision."

"These examples merely repeat without explanation the phrase 'under general supervision.'" *See* ER 38 (Order 38:23-24).

Citing nothing more than these job titles, the District Court concluded: "To the extent that the DLSE's examples illustrate the meaning of 'general' supervision, they suggest supervision in the form of review or approval of overall results and conclusions." *See* ER 38-39 (Order 38:26-39:2). But the DLSE's examples ***do not illustrate to any extent*** the meaning of "general supervision," or suggest a definition of the statutory language. Indeed, as the court itself accurately noted, "[t]hese examples merely repeat without explanation the phrase 'under general supervision.'" *See* ER 38 (Order 38:23-24). The District Court left unexplained how the job titles "wage rate analysts," "location managers for motion picture companies" or "so-called 'account executives' in advertising firms" suggest that working "under only general supervision" means working under "supervision in the form of review or approval of overall results and conclusions." A series of examples that "repeat without explanation the phrase 'under general supervision,'" (ER 38 (Order 38:23-24)), adds nothing to the proper analysis of the exemption.[12]

[12] The DLSE Manual itself anticipated the unhelpful nature of its job title list, stating in a section called "Job Titles Are Not Determinative," that "job titles reflecting administrative classifications alone may not reflect actual job duties, and therefore, are of no assistance in determining exempt or non-exempt status." ER 66 (DLSE Manual (2002) § 52.3.1).

B. The District Court Erred In Relying On Policies And Standards Instead Of Actual Work Experiences To Rule That PwC's Unlicensed Accountants Work Under More Than "Only General Supervision."

In applying its definition of "general supervision," the District Court purported to determine the level of supervision PwC provides to its Attest Associates by reference to the California Business and Professions Code, AICPA standards and PwC policies. That exercise was destined to fail: In California, exemption decisions cannot be made without reference to the actual work responsibilities of an employee. Although PwC proffered evidence concerning the job responsibilities of the class members, the District Court treated that evidence as immaterial to its ruling that, as unlicensed accountants, the class members necessarily work under more than "only general supervision."

1. The District Court Erred in Relying Upon the B&P Code and AICPA Standards to Determine the Level of Supervision of Attest Associates.

The court erred in relying on the B&P Code and the AICPA standards to resolve a factual question as to the extent to which PwC Attest Associates are supervised. In a section entitled "What Do Attest Associates Do?" the court observed:

> Class members' supervision is mandated by two sets of standards. The first is California Business and Professions Code § 5053, which requires "control and supervision" of unlicensed employees. The second is the professional standards set by the American institute of Certified Public Accountants, which contains a similar directive.

> PwC's internal policies confirm that PwC complies with these standards.

See ER 5-6 (Order 5:25-6:5). The court referred to general guidance, not PwC-specific facts, as its basis for understanding "What … Attest Associates Do." *Id*. Indeed, having devised its "review or approval of overall results and conclusions" test, (ER 38-39 (Order 38:26-39:2)), the court revisited the B&P Code and AICPA standards:

> Class members are subject to closer supervision than this [review or approval of overall results and conclusions]. Unlike the various employees given in the DLSE examples, class members are subject to statutorily mandated "control and supervision [by] a certified public accountant." Cal. Bus. & Prof. Code § 5053. Professional rules similarly mandate supervision of class members. *See, e.g.*, American Institute of Professional Accountants Professional Standards § 311.12 … [and] § 311.13 ….

ER 39 (Order 39:4-15). Clearly, the court's ensuing conclusion that, "the evidence of PwC's supervision of class members … does not raise a triable question as to whether class members are subject to only general supervision in performing the steps of an audit" was based in part on the court's view of the significance of the supervision mandated by the B&P Code and AICPA standards. ER 40 (Order 40:17-20). This was error.

"Supervision" of an employee does not disqualify the employee from being administratively exempt. The issue is one of degree: "general supervision" is permissible for administratively exempt employees; more than general supervision

is not. The District Court clearly misused the B&P Code and AICPA standards as evidence of more than general supervision because neither the B&P Code nor the standards specifies a level of supervision for unlicensed accountants generally, much less the level of supervision of PwC Attest Associates specifically. B&P Code section 5053, as the court noted, requires unlicensed accountants to be under the "control and supervision" of a CPA. Cal. Bus. & Prof. Code § 5053. AICPA standards 311.12 and 311.13 require that "significant accounting and auditing questions raised during the audit" be brought to a supervisor's attention, and that the work performed by all assistants (including CPAs) be reviewed.[13] ER 303-04 (AICPA Professional Standards §§ 311.12-13). Thus, neither B&P Code section 5053 nor the cited AICPA standards mandates any particular ***level*** of supervision, much less a level that would preclude a jury from finding that Attest Associates perform their duties "under only general supervision." In fact, AICPA standard 311.11 expressly notes that "[t]he extent of supervision appropriate in a given instance depends on many factors, including the complexity of the subject matter and the qualifications of persons performing the work." ER 303 (AICPA Professional Standards § 311.11). Accordingly, there is no B&P- or AICPA-

[13] The AICPA standards cited herein reflect the numbering and contents of the regulations in effect in June, 2006. Subsequent changes to the numbering and contents of these regulations are not material to this appeal.

mandated level of supervision, much less one that as a matter of law constitutes more than "only general supervision."[14]

2. The District Court Erred to the Extent it Relied on Internal PwC Policies to Determine the Level of Supervision of Attest Associates.

Of the scores of evidentiary documents and pleadings in the record, the court alluded to two inapposite PwC policies to support its finding that class members work under more than "only general supervision" as a matter of law. *See* ER 39 (Order 39:15-21 (citing Kershaw Decl. II, Ex. 7, PWC 010230, and Ex. 6, PWC 02770 (*see* ER 58, 56))). The court's observation that "PwC's own training documents state that 'all of the work that associates document will be reviewed by the team manager for that area'" is the extent of the court's observable

[14] The B&P Code and AICPA standards are general, independent regulations relating to the accounting profession, but not directed at the "general supervision" requirement of the Administrative Exemption. That fact alone has led one court to dismiss the B&P Code from its exemption analysis. *See Ruiz v. PricewaterhouseCoopers LLP*, No. BC287920, at 5 (Cal. Super. Ct. L.A. County 2003) ("Section 5053 is not part of the Labor Code or the Wage Orders, which regulate overtime and work conditions. Plaintiff's illogical leap between two completely unrelated statutory schemes ignores established substantive law on overtime exemptions.").

consideration of the evidentiary record in its "general supervision" analysis.[15] *Id*. The training documents singled out by the court do not explain the degree of supervision of Attest Associates.

The first of the two cited documents (PwC 10230) is entitled "Documenting Your Work in the MyClient File – Review (of Work Done and Documentation) by Interview," and sets forth PwC's policy that Attest Associates communicate that their audit work is complete by marking steps complete, Team Managers review this work, and the review process takes place in a question-and-answer format. ER 58. The second PwC document relied upon by the court (PwC 2770) is entitled "Team Member," and in pertinent part indicates that team members work on lower risk areas that require only one level of review, team members are coached, and team members work on higher risk areas that may require two levels of review. ER 56.

Together, these cited documents establish that 1) Attest Associates' work is reviewed and 2) team members are coached. Such facts neither prove nor refute

[15] At the outset of its Order, the District Court cited to PwC 670, PwC 938, and selected deposition testimony for the proposition that class members cannot "sign[] documents communicating substantive opinions, conclusions or determinations to clients," in compliance with Business and Professions Code and AICPA standards. ER 6 (Order 6:4-11). Neither PwC 670, PwC 938, nor the selected deposition testimony was discussed or cited by the court in the context of its analysis of the Administrative Exemption. In any event, the question of whether an Attest Associate can or cannot sign enumerated documents on behalf of PwC has no relevance to the extent to which associates are supervised.

that class members are subject to "only general supervision." The court's conclusion that "PwC's own policies … subject class members to review of, ***and thereby supervision over***, all the predicate steps and processes involved in their work," conflates review of work documentation with supervision of the employee while she performed the later-reviewed work. *See* ER 39 (Order 39:15-18 (emphasis added)). The cited policies do not reflect under what level of supervision Attest Associates perform, and certainly do not establish as a matter of law that they perform under more than "only general supervision."

C. PwC Proffered Sufficient Evidence To Raise A Triable Issue Of Fact As To Whether Attest Associates Work "Under Only General Supervision."

In California, exemption determinations are fact-specific inquiries, focusing on actual work experiences, not merely formal job descriptions or employer policies. *See Dunbar v. Albertson's Inc.*, 141 Cal. App. 4th 1422, 1428 (2006) (exemption analysis hinges on fact-specific inquiry focusing on actual work experiences, not formal job descriptions or policies) (citing *Ramirez*, 20 Cal. 4th 785 at 802); *see also Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 947 (9th Cir. 2009) (in upholding denial of class certification, noting that plaintiffs' misclassification claims "require inquiries into how much time each individual [proposed class member] spent in or out of the office and how the [proposed class member] performed his or her job"); *Ho v. Ernst & Young LLP*, No. C 05-4867 JF,

2009 WL 111729, at *4-5 (N.D. Cal. Jan. 15, 2009) (looking to plaintiff's deposition testimony and declarations describing actual work experiences to find that whether plaintiff worked under general supervision was a triable issue of fact).

The evidence offered by PwC regarding the level of supervision provided to its Attest Associates was sufficient to raise a triable issue of fact. PwC submitted declarations from class members and the individuals who supervised them describing the level of supervision over Attest Associates at PwC. These declarations constitute direct evidence that Attest Associates' time is actually spent engaged in exempt activities under "only general supervision." It was error for the District Court to disregard this record.

The declaration of Denise McCurry provides an instructive example of how an Attest Associate "actually spends his or her time." *Ramirez*, 20 Cal. 4th at 802. Ms. McCurry, who supervised Attest Associates at PwC, notes that Attest Associates should be able to work "independently," and that "Associates who require continued and pervasive micromanagement are not meeting [PwC's] expectations." *See* ER 220 (¶ 39). Ms. McCurry further notes that Attest Associates should use their knowledge and judgment in executing their audit responsibilities, and that they are expected to execute their assigned audit areas "without direct Manager or Partner involvement." *See id.*

In addition to declarations commenting directly on the level of supervision over Attest Associates, such as Ms. McCurry's, PwC submitted many other declarations describing the actual work experiences of Attest Associates that demonstrate that they perform their work "under only general supervision." For example, PwC submitted class member declarations establishing that Attest Associates often serve as the "in-charge" on audit engagements, responsible for managing all of the "day-to-day" aspects of the audits. *See, e.g.*, ER 189-90 (¶¶ 13-14); ER 243 (¶ 10); ER 224 (¶ 6). PwC also submitted declarations of class members establishing that Attest Associates supervise, coach and review the work of others, including for up to 60% of their time; take ownership of their portions of the audit, including performing all testing and documentation for those portions with an understanding of their purpose and inherent risks; develop their own conclusions as they perform their audit work; act as the primary client contacts, field client questions and otherwise interact with clients on their own; and set their own schedules. *See, e.g.*, ER 196-97 (¶ 9); ER 248-51 (¶¶ 6, 8-10, 16); ER 224, 226 (¶¶ 6, 12). Finally, PwC submitted many class member declarations establishing that the work of Attest Associates is typically reviewed after it has been completed, not as it is being performed -- the proper reference point under the wording of the Wage Order. *See, e.g.*, ER 232-33 (¶ 12); ER 214 (¶ 21); ER 241-43 (¶¶ 6, 9, 11); ER 257-58 (¶¶ 17-18).

Considered in the light most favorable to PwC, these declarations show that Attest Associates are not subject to more than general supervision as they perform their work. From this factual evidence, it is clear that the issue of whether class members work "under only general supervision" could not properly be decided against PwC by summary adjudication.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's order of summary adjudication and remand for further proceedings under the correct legal standards.

Dated: October 29, 2009

Respectfully submitted,

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STATEMENT OF RELATED CASES

Defendant-Appellant is not aware of any related cases pending before the Court.

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 11,187 words.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 29, 2009.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Lucia Ruiz
Lucia Ruiz

Docket No. 09-16370

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON CAMPBELL AND SARAH SOBEK, *et al.*, Plaintiffs-Appellees,

v.

PRICEWATERHOUSECOOPERS LLP, Defendant-Appellant.

Appeal From The United States District Court
For The Eastern District Of California
The Honorable Lawrence Karlton
No. 06 CV-02376-LKK-GGH

DEFENDANT-APPELLANT'S APPENDIX OF UNPUBLISHED AUTHORITIES

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Attached are true and correct copies of unpublished decisions cited in the Brief for Defendant-Appellant, filed concurrently herewith:

1. *Nguyen v. BDO Seideman, LLP*, No. SACV 07-01352-JVS (C.D. Cal. July 6, 2009);

2. *Ruiz v. PricewaterhouseCoopers LLP*, No. BC287920 (Cal. Super. Ct. L.A. County 2003).

Dated: October 29, 2009

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EXHIBIT 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 07-01352-JVS (MLGx) Date July 6, 2009

Title Nam Nguyen v. BDO Seidman, LLP, et al.

Present: The Honorable	James V. Selna	
	Nancy K. Boehme	Jane Sutton
	Deputy Clerk	Court Reporter
	Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
	Not Present	Not Present

Proceedings: Plaintiff's Motion for Class Certification (filed 03/17/09)

The Court, having been informed by the parties in this action that they submit on the Court's tentative ruling, hereby DENIES Plaintiff's Motion and rules in accordance with the tentative ruling as follows:

Plaintiff Nam Nguyen ("Nguyen") seeks class certification under Federal Rule of Civil Procedure 23. Defendant BDO Seidman, LLP ("BDO") opposes. The motion is DENIED.

I. Background

Nguyen alleges, individually and on behalf of a proposed class, that BDO has a uniform and unvarying policy and practice of treating all proposed class members as exempt from California wage and hour laws. Nguyen seeks certification of the following class:

> All persons employed by BDO Seidman, LLP in California, from November 15, 2003 until the time when class notice may be given, who: (1) assisted certified public accountants in the practice of public accountancy, as provided for in California Business and Professions Code sections 5051 and 5053, (2) worked as associates or senior associates in the assurance or tax lines of service, (3) were not licensed by the State of California as certified public accountants during some or all of this time period, and (4) were classified as exempt employees.

EXHIBIT 1

(Compl. ¶ 16.)[1] The Complaint alleges that BDO is violating California law by failing to pay overtime, to provide meal periods and rest breaks, to provide accurate itemized statements, and to pay wages due when a proposed class member is discharged or resigns.

II. Legal Standard

A motion for class certification involves a two-part analysis. First, Nguyen must demonstrate that the proposed class satisfies the requirements of Rule 23(a): (1) the members of the proposed class must be so numerous that joinder would be impracticable; (2) there must be questions of law and fact common to the class; (3) the claims or defenses of the representative party must be typical of the claims or defenses of absent class members; and (4) the representative party must fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

Second, the proposed class must meet the requirements of at least one of the subsections of Rule 23(b). Here, Nguyen contends that the class qualifies under Rule 23(b)(3), under which a class may be maintained where common questions of law and fact predominate over questions affecting individual members, and where a class action is a superior method of adjudication. Fed. R. Civ. P. 23(b)(3).

Nguyen must offer facts sufficient to satisfy the requirements of Rule 23(a) and (b). Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1308-09 (9th Cir. 1977). In turn, this Court must conduct a rigorous analysis to determine whether the prerequisites of Rule 23 have been met. Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982). While the Court's analysis must be rigorous, Rule 23 confers "broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court." Armstrong v. Davis, 275 F.3d 849, 872 n.28 (9th Cir. 2001).

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[1] The Court relies on the class definition included in the Complaint insofar as that definition differs from the one in the moving papers. Ortiz v. McNeil-PPC, Inc., Nos. 07cv678-MMA(CAB), 08cv536-MMA(CAB), 2009 WL 1322962, at *2 (S.D. Cal. May 8, 2009); Stuart v. Radioshack Corp., No. C-07-4499 EMC, 2009 WL 281941, at *2 (N.D. Cal. Feb. 5, 2009); Berlowitz v. Nob Hill Masonic Mgmt., Inc., No. C-96-01241 MHP, 1996 WL 724776, at *2 (N.D. Cal. Dec. 6, 1996). In any event, any such discrepancies are negligible. (Compare Compl. ¶ 16, with Mot. Br. 1.)

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In Falcon, the Supreme Court reiterated the well-recognized precept that "'the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" Falcon, 457 U.S. at 160 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978)). Nevertheless, there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

III. Discussion

Nguyen seeks certification under Rule 23(b)(3). "'Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" Kamm v. Cal. City Dev. Co., 509 F.2d 205, 211 (9th Cir. 1975) (quoting Committee notes). A class may be certified under this subdivision where common questions of law and fact predominate over questions affecting individual members, and where a class action is superior to other means to adjudicate the controversy.

Because the Court finds the analysis under Rule 23(b)(3) dispositive, it does not address the prerequisites of Rule 23(a).[2]

A. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997) (citation omitted). The Court must rest its examination on the legal or factual questions of the individual class members. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022 (9th Cir. 1998). "To determine whether common issues predominate, this Court must first examine the substantive issues raised by [Nguyen] and second inquire into the proof relevant to each issue." Jimenez v. Domino's Pizza, Inc., 238 F.R.D. 241, 251 (C.D. Cal. 2006) (citation omitted).

[2] It would appear, however, that the requirements of Rule 23(a) could be met here.

Here, Nguyen alleges violations of various provisions of the California Labor Code,[3] as well as California's Unfair Competition Law (the "UCL"), Cal. Bus. & Prof. Code § 17200 et seq. Because these claims are only available to those putative class members who are found to be nonexempt,[4] and because the issue of exemption is not subject to common proof in this case, as set forth below, Nguyen cannot show that common issues predominate.

Thus, the threshold issue is exemption. There is no dispute that California wage and hour laws do "not apply to persons employed in administrative, executive, or professional capacities." Cal. Code Regs. tit. 8, § 11040(1)(A).[5] Nguyen contends that "[t]he question of whether BDO has misclassified all of its unlicensed associates as exempt employees is a common and predominating question that justifies class treatment." (Mot. Br. 2.) The Court disagrees. Because Nguyen does not address the executive exemption in the moving papers, the Court limits its discussion to the administrative and professional exemptions.[6]

At the outset, before addressing these two exemptions, the Court notes that Nguyen mistakenly contends that "if just one element of each exemption can be adjudicated through common evidence on a class wide basis, the court should certify the class." (Mot. Br. 2, emphasis in original; see also id. at 21.) Notably, Nguyen offers no case law

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[3] Cal. Labor Code §§ 510 & 1194 (failure to pay overtime); id. §§ 512 & 226.7 (failure to provide meal periods and rest breaks); id. §§ 226 & 1174 (failure to provide accurate itemized statements); id. § 203 (waiting time penalties).

[4] See Cal. Code Regs. tit. 8, § 11040(1)(A) (California wage and hour laws shall not apply to exempt employees). Further, "a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203." Cal. Code Regs. tit. 8, § 13520. Finally, the UCL claim "stand[s] or fall[s] depending on the fate of the antecedent substantive causes of action." Krantz v. BT Visual Images, L.L.C., 89 Cal. App. 4th 164, 178 (2001).

[5] This provision is also referred to as Wage Order 4-2001(1)(A).

[6] BDO also so limits its discussion, without waiving its right to assert the applicability of the executive exemption. (Opp'n Br. 14 n.7.) Nguyen later challenges the applicability of this exemption (Reply Br. 11), but the Court declines to pass on the issue at this time.

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to support this proposition, which runs counter to the predominance inquiry itself[7]: The question is not whether the putative class has at least one issue in common, but whether common "questions of law or fact . . . predominate over any questions affecting only individual members."[8] Fed. R. Civ. P. 23(b)(3) (emphasis supplied). A number of courts have therefore denied class certification in misclassification cases where an inquiry into each employee's duties and responsibilities was required to determine the applicability of California exemptions. See, e.g., Jimenez v. Domino's Pizza, Inc., 238 F.R.D. 241, 251 (C.D. Cal. 2006) ("[T]o determine which employees are entitled to overtime because of improper classification is an 'individual, fact-specific analysis' of each general manager's performance of the managerial and non-managerial tasks."); Sepulveda v. Wal-Mart Stores, Inc., 237 F.R.D. 229, 249 (C.D. Cal. 2006), rev'd in part on other grounds, 275 Fed. Appx. 672 (9th Cir. 2008) ("[I]ndividual questions predominate over common issues. . . . By far the bulk of the evidence would pertain to individualized questions, including the work performed by each individual [assistant manager].").

The Court finds Nguyen's reliance on Tierno v. Rite Aid Corp., No. C 05-02520 TEH, 2006 WL 253056 (N.D. Cal. Aug. 31, 2006), and Wang v. Chinese Daily News, Inc., 231 F.R.D. 602 (C.D. Cal. 2005), unpersuasive. Nguyen relies on these authorities for the proposition that class certification should necessarily be granted where an employer treated all employees in a particular job title or category as exempt. (Mot. Br.

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[7] In the Reply, Nguyen does cite Wiegele v. Fedex Ground Package Sys., Inc., No. 06cv1330, 2008 WL 410691 (S.D. Cal. Feb. 12, 2008), as "survey[ing] and rel[ying] on a large number of California cases where district courts have found that misclassification [cases] should be certified under Rule 23(b)(3)." (Reply Br. 1.) But such reliance is misplaced insofar as Wiegele relies on cases like Tierno, infra, and Wang, infra, where common questions were found to predominate largely because of standardized practices enforced from a central authority. 2008 WL 410691, at *7-11. The Court also rejects as flawed Wiegele's reliance on the Wang rationale that an employer's common classification alone is dispositive in a predominance inquiry. Id. at *9. The compelling factor here, as set forth below, is that this case is more analogous to cases like Jimenez, rather than Tierno and Wang.

[8] Nguyen cites Romero v. Producers Dairy Foods, Inc., 235 F.R.D. 474, 490 (E.D. Cal. 2006), for the proposition that, "[w]here a central common defense may bar each of plaintiff's claims, class action treatment is particularly apt." But, as the Romero court explains, "[t]his is because if the defense succeeds, the entire litigation is disposed of." Id. (internal quotations marks and brackets omitted). Here, the administrative and professional exemptions are common defenses, but their resolution turns on individual questions, as set forth below, such that these defenses may succeed as to some employees but not as to others. Thus, the rationale in Romero does not apply here.

22-23.) While the Court acknowledges that these cases have some force, and agrees that an employer's attempt to assert individual questions may seem disingenuous in some cases where the employer had a policy of classifying all relevant employees as exempt, this policy alone cannot be dispositive, particularly where the employer may have erred in treating all relevant employees as exempt in the first instance.

By Nguyen's logic, as BDO points out, "an employer need only use the same job title for more than one employee to guarantee that a plaintiff could certify a class." (Opp'n Br. 13.) Indeed, this was not the logic endorsed by Tierno, where common questions of law and fact were found to predominate in large part because of the presence of standardized practices enforced from a central authority. And, to the extent this logic was embraced by Wang,[9] the Court finds Wang in conflict with other, subsequent authority. See Jimenez, 238 F.R.D. at 251-52 (finding no predominance because the question of how much time employees spent on exempt work, and their amount of discretion, required an "individual, fact-specific analysis"); see also Vinole v. Countrywide Home Loans, Inc., 246 F.R.D. 637, 642 (S.D. Cal. 2007) ("The principal factor in determining whether common issues of fact predominate is whether the uniform classification, right or wrong, eases the burden of the individual inquiry."); Morisky v. Pub. Serv. Elec. and Gas Co., 111 F. Supp. 2d 493, 500 (D.N.J. 2000) ("[T]he question of whether defendant improperly classified employees as exempt is unique to each employee and his or her particular job responsibilities."). Moreover, as set forth below, this case is more analogous to Jimenez and other related cases, where no standardized procedures had been put in place, thereby undermining the claim that common questions predominated.

In his Reply, Nguyen relies on Campbell v. PricewaterhouseCoopers, LLP, 253 F.R.D. 586 (E.D. Cal. 2008), and Campbell v. PricewaterhouseCoopers, LLP, 602 F. Supp. 2d 1163 (E.D. Cal. 2009). According to Nguyen, "[t]he Campbell certification and summary judgment orders provide a concrete demonstration of how the misclassification question for unlicensed associates can be fairly and efficiently litigated by means of common proof." (Reply Br. 1.) Nguyen contends that "[t]his case is no different and is equally deserving of class treatment." (Id.) The Court disagrees.

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[9] However, the court in Wang did stress the possibility of "centralized oversight and supervision" as a factor weighing in favor of predominance. 231 F.R.D. at 613 (emphasis supplied).

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In Campbell, the court granted in part the plaintiffs' motion for class certification, certifying a class of individuals who worked as unlicensed associates in PricewaterhouseCoopers's ("PwC's") attest division during the class period and were classified as exempt employees. 253 F.R.D. at 605-06. PwC had three lines of service: assurance, tax, and advisory. Plaintiffs initially had sought to certify a class that would encompass two of these service lines, assurance and tax, along with a class of employees with both associate and senior associate job titles. But the court declined to certify a class outside the attest division of the assurance line of service. Based on the record, the court found "significant differences in the work performed between divisions and between lines of service." Id. at 604. The court noted that plaintiffs had submitted virtually no evidence of the job duties performed by employees outside their own division, whereas defendant's evidence indicated that job duties varied across division and line of service, and also varied between associates and senior associates. Because of these differences in job duties, the Campbell court found that plaintiffs had failed to show that a common question of law or fact predominated under Rule 23(b)(3). Id. at 596.

While the class certification issue here is similar to the one in Campbell in many respects – not the least of which is that Nguyen, a former employee in BDO's tax line of service, seeks to certify a class of associates and senior associates in the assurance and tax lines of service – there are several important distinctions that counsel against class certification in this case. Indeed, insofar as there are similarities between these cases, Campbell weighs against certifying the proposed class, which includes assurance-line employees. BDO's evidence indicates that job duties vary across the assurance and tax lines of service (CJ Dep. 12, 55-56.),[10] and that Nguyen was never permanently employed in the assurance line. Thus, even if the Court were inclined to grant certification, the class should be limited, at a minimum, to the tax line of service.[11]

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[10] "CJ Dep." refers to the Deposition of Cindy Jeanne Janikowski. For excerpts from Janikowski's deposition, see Exhibit 1 to BDO's "Compendium of Deposition Testimony."

[11] Despite a brief, three-week rotation in BDO's assurance line of service, Nguyen was never permanently employed there. Notably, Nguyen does not know what assurance employees do; nor could he identify a single person in BDO's assurance division by name. (Nguyen Dep. 184-85.)

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Moreover, unlike in Campbell, BDO's evidence indicates not only that job duties varied between associates and senior associates, but also that these duties varied even among associates of the same division and service line. (See, e.g., CJ Dep. 42, 51-52.) Nguyen not only submitted virtually no evidence of the job duties performed by employees outside his division, but the record also shows he did not know what other tax associates and seniors in his own office do. (Nguyen Dep. 73, 185, 189-90.)[12] Nguyen was not even aware that associates and seniors in his office did tax provision work (id. 73; CJ Dep. 51-52), and, despite his belief that all such employees do tax returns, the record shows that other putative class members within the tax group spend no time whatsoever preparing tax returns (See, e.g., Dexheimer Decl. ¶ 2).[13] To the extent this Court is presented with evidence that job duties vary widely even within the same division and service line, other examples of which are cited below, the record in this case is distinguishable from that in Campbell. By extending the reasoning in Campbell, this Court is therefore persuaded that seemingly "significant differences between the work performed" by tax employees at BDO preclude class certification.[14] Campbell, 253 F.R.D. at 604.

With this background, the Court now turns to the question of whether the applicability of the administrative and professional exemptions is subject to common proof.

1. Administrative Exemption

The Court first considers the applicability of the administrative exemption.

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[12] For excerpts from Nguyen's deposition, see Exhibit 2 to the compendium.

[13] For declarations, see the exhibits attached to BDO's "Compendium of Declarations." Along with Dexheimer's declaration, BDO also cites paragraph 4 of Huynh's declaration. But no such declaration appears in the compendium.

[14] As in Campbell, the Court notes that "whether the[se] differences . . . are material is a difficult issue, and not without uncertainty." 253 F.R.D. at 604. But these differences have the potential to be material under the administrative and professional exemptions, as set forth below.

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An employee is considered administratively exempt under California wage and hour laws when he (a) performs non-manual work directly related to management policies or general business operations; (b) customarily and regularly exercises discretion and independent judgment; (c) regularly assists an employee employed in a bona fide executive or administrative capacity; (d) works along specialized or technical lines requiring special training, experience, or knowledge; (e) executes under only general supervision special assignments and tasks; (f) is primarily engaged in duties that meet the test of exemption; and (g) earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Cal. Code Regs. tit. 8, § 11040(1)(A)(2).

BDO contends that the applicability of this exemption requires individualized questions as to disputed elements. The Court agrees.

Performs non-manual work directly related to management policies or general business operations. BDO cites Ho v. Ernst & Young LLP ("Ho I"), No. C 05-04867 JF, 2008 WL 619029 (N.D. Cal. Mar. 4, 2008),[15] which held that a tax associate who researched, reviewed, and analyzed tax issues, and who translated "complex tax issues into plain English for clients[,] . . . was engaged in duties that are 'directly related' to 'management policies' or 'general business operations.'" 2008 WL 619029, at *3. As in Ho I, some putative class members in this case develop recommendations for high-level, expert tax advise. (Seddigh Decl. ¶¶ 4-7; Kelfer Decl. ¶ 4; Dexheimer Decl. ¶¶ 3-7.) Others do provision work for clients' SEC filings. (McChesney Decl. ¶ 4; Zhong Decl. ¶ 7; Ma Decl. ¶ 8.) Still others audit clients' books and internal processes, and develop recommendations. (Stetler Decl. ¶ 3; Cox Decl. ¶ 4; Wong Decl. ¶ 6.)[16]

[15] Significantly, the record in Ho I indicates that the plaintiff was an unlicensed tax employee in an "above entry-level position [that] requires the employee to review and analyze client data, identify and research tax issues arising from client situations, conduct legal research and analysis, respond to client questions, and develop client relationships." Ho I, 2008 WL 619029, at *1. His starting salary was $75,000, with a bonus of $10,000. Id. The Court found that he met all the requirements of the administrative exemption. Id. at *5.

[16] Nguyen selectively cites Bell v. Farmers Insurance Exchange, 87 Cal. App. 4th 805, 828 (2001), for the proposition that, where employees are "expected to bring information to the attention of supervisors, who would instruct them what to do," they are not, "as a matter of law, . . . employed in

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Customarily and regularly exercises discretion and independent judgment. Discretion and independent judgment involve "the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered." 29 C.F.R. § 541.207(a); see Cal. Code Regs. tit. 8, § 11040(1)(A)(2)(f) (incorporating by reference 29 C.F.R. §§ 541.201-205, 541.207-208, 541.210, and 541.215). This "'does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review.'" Kennedy v. Commonwealth Edison Co., 410 F.3d 365, 375 (7th Cir. 2005) (quoting 29 C.F.R. § 541.207(e)). "'The fact that an employee's decisions may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment.'" Palacio v. Progressive Ins. Co., 244 F. Supp. 2d 1040, 1048 (C.D. Cal. 2002) (quoting 29 C.F.R. § 541.207(e)). Even Nguyen's own expert conceded this point. (Ueltzen Dep. 174; see also id. 99-100 (unlicensed professional can and do exercise some discretion in performance of their work).) [17] Here, putative class members are expected to evaluate "grey areas" when preparing tax returns (CJ Dep. 67-68; McChesney Decl. ¶ 8; Fong Decl. ¶ 8; Wong Decl. ¶ 5), use their judgment and discretion when researching and analyzing tax issues for clients (Seddigh Decl. ¶ 4; Dexheimer Decl. ¶ 3; Low Decl. ¶ 3; Cox Decl. ¶ 6; Stetler Decl. ¶ 4), and assume additional responsibility based on a number of factors (Dick Decl. ¶ 5; Clemente Decl. ¶ 5). Even Nguyen admitted that being a "good decision maker" was a necessary qualification for his job. (Nguyen Dep. 128-29.)

Regularly assists an employee employed in a bona fide executive or administrative capacity. Here, Nguyen seeks to certify a class of BDO employees who "assisted certified public accountants in the practice of public accountancy." There is no dispute

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'administrative capacities.'" (Reply Br. 9.) But the court in Bell declined to apply the administrative exemption in large part because, "[o]n matters of relatively greater importance, [plaintiffs were] engaged only in conveying information to their supervisors – again primarily a 'routine and unimportant' role." Id. By contrast, the record here indicates that at least some tax associates and seniors were engaged in more significant work, as referenced above.

[17] For excerpts from Ueltzen's deposition, see Exhibits 3 and 4 to the "Compendium of Deposition Testimony."

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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that these certified public accountants are bona fide executive or administrative employees. Even if Nguyen disputed this fact, any resolution of this issue would require an individualized inquiry. And further individual inquiry would be required to determine the extent to which putative class members regularly and directly assisted those executive and administrative employees.

Works along specialized or technical lines requiring special training, experience, or knowledge. There is no dispute as to this element.

Executes under only general supervision special assignments and tasks. In Ho v. Ernst & Young LLP ("Ho II"), No. C 05-4867 JF (HRL), 2009 WL 111729, at *5 (N.D. Cal. Jan. 15, 2009),[18] the same court that had previously held that supervision did not preclude an employee from qualifying for the administrative exemption, Ho I, 2008 WL 619029, at *4, later found a triable issue, inter alia, as to "the amount of supervision given" to a particular associate. According to BDO, "[t]he fact that the same court found that two tax professionals employed by the same public accounting firm could be subject to varying levels of supervision that potentially affected their exempt status, plainly illustrates the need for an individual inquiry as to the level of supervision over each putative class member." (Opp'n Br. 17, also citing Ueltzen Dep. 134-35.)[19] The Court agrees. Here, BDO offers evidence that the amount of supervision given to putative class members in this case varies widely depending on factors such as the particular engagement, the partner or manager in charge, and the individual employee's capabilities. (Nguyen Dep. 82-85; Zong Decl. ¶ 4; Barry Decl. ¶ 8; Clemente Decl. ¶ 6; Dexheimer Decl. ¶ 8.)

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[18] The plaintiff in Ho II was also an unlicensed employee, and "primarily assist[ed] in performing audits of financial statements [and] provid[ed] other assurance services that include[d]: reviews, compilations, special reports, SEC compliance, debt compliance, comfort letters, reviews of interim data, internal control reviews, and regulatory and other compliance reporting." 2009 WL 111729, at *1. Her starting salary was above $40,000. Id. The Court found that there were genuine issues as to whether she met the requirements of the administrative exemption, and denied summary judgment on this ground. Id. at *6.

[19] Significantly, Nguyen's expert conceded that the supervision determination under 5053 "really does come down to a fact-and-circumstances analysis."

UNITED STATES DISTRICT COURT
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Primarily engaged in duties that meet the test of exemption. According to the Division of Labor Standards Enforcement Policies and Interpretations Manual (the "DLSE Manual"), the term "primarily engaged in" means that more than one half of the employee's work time must be spent engaged in exempt work. (Opp'n Br., Ex. J, DLSE Manual 51.5, ISA.)[20] Here, putative class members' time was allocated differently depending on many factors, including the client or engagement; their training, education, and expertise; and the amount of supervision they received. (McChesney Decl. ¶ 6; Seddigh Decl. ¶¶ 4-7; Kelfer Decl. ¶ 4; Zhong Decl. ¶¶ 5-7; Ma Decl. ¶ 10; Fong Decl. ¶ 11; Clemente Decl. ¶ 4; Low Decl. ¶¶ 3, 8.)

Earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. There is no dispute as to this element.

Accordingly, common issues do not predominate over individual questions as to the disputed elements above.

2. Professional Exemption

There is likewise no predominance of common issues with respect to the professional exemption, which, in pertinent part, applies to employees:

> (a) Who is licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; or
>
> (b) Who is primarily engaged in an occupation commonly recognized as a learned or artistic profession. For the purposes of this subsection, "learned or artistic profession" means an employee who is primarily engaged in the performance of:

[20] The Court may rely on the DLSE Manual as persuasive authority. See Morillion v. Royal Packing Co., 22 Cal. 4th 575, 584 (2000).

UNITED STATES DISTRICT COURT
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> (I) Work requiring knowledge of an advanced type in a field or science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or work that is an essential part of or necessarily incident to any of the above work . . . .

Cal. Code Regs. tit. 8, § 11040(1)(A)(3) (emphases supplied).[21] Additionally, the employee must "customarily and regularly exercises discretion and independent judgment in the performance of duties set forth in subparagraphs (a) and (b)." Id. § 11040(1)(A)(3)(c)(emphasis supplied).

A number of elements were discussed above, but the Court briefly notes that, as with the administrative exemption, individual questions predominate over common issues with respect to the professional exemption as well. BDO correctly points out that a number of courts have found that an academic degree requirement for entry into the field can be sufficient to qualify for the professional exemption. Piscione v. Ernst & Young, L.L.P., 171 F.3d 527, 545 (7th Cir. 1999) (Despite Piscione's "obtain[ing] the level of associate designation [but not] obtain[ing] the level of enrolled actuary . . . [,] we agree with the district court's conclusion that Piscione's employment required some level of specialized knowledge."); Medepalli v. Maximus, Inc., No. CIV. S-06-2774 FCD EFB,

[21] Nguyen incorrectly claims that "resolution of the professional exemption will turn on whether a license is required for the recognized profession of accounting and does not raise any individual issues." (Reply Br. 4, emphasis supplied.) But, because the first two provisions are disjunctive, the plain language of this exemption indicates that an employee may qualify as a professional even without a license. Hence, the resolution of this issue need not turn on whether a license is required to "practice" accounting in a strict sense. Moreover, although the Campbell court focused on the common question of whether putative "class members are primarily engaged in an occupation commonly recognized as a learned or artistic profession," 253 F.R.D. 597 (internal quotation marks omitted), this Court takes a more comprehensive view, recognizing other elements of the professional exemption, such as the individual question of whether putative class members had "knowledge of an advanced type" in the field of accounting. This individual question undermines Nguyen's argument that the applicability of the professional exemption must necessarily turn on common proof where there is evidence, as set forth above, that job skills and experience varied widely among BDO's tax associates and seniors.

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2008 WL 958045, at *5 (E.D. Cal. Apr. 8, 2008) (holding that a bachelor's degree plus additional work experience met the "advanced knowledge" requirements). Here, because the putative class members have a wide variety of advanced degrees, certificates, and training that they use in the performance of their tax and audit job duties, the Court agrees with BDO that individual questions predominate over common issues. (Zhong Decl. ¶ 2; Ma Decl. ¶ 2; Fond Decl. ¶¶ 3, 8; Seddigh Decl. ¶¶ 2, 4, 7; Kelfer Decl. ¶ 2; Clemente Decl. ¶ 2; Cox Decl. ¶ 3; Chu Decl. ¶ 3.)

Accordingly, Nguyen has not satisfied the predominance inquiry test. Class certification is therefore not warranted.

B. Superiority

The Court next considers whether a class action is superior to individual suits. Amchem, 521 U.S. at 615. "A class action is the superior method for managing litigation if no realistic alternative exists." Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234-35 (9th Cir. 1996). This superiority inquiry requires a comparative evaluation of alternative mechanisms of dispute resolution. Hanlon, 150 F.3d at 1023. Rule 23(b)(3) provides a non-exhaustive list of factors relevant to the superiority analysis that includes "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3).

"Where damages suffered by each putative class member are [] large, this factor weighs [against] certifying a class action." See Zinser v. Accufix Research Inst., Inc. 253 F.3d 1180, 1190 (9th Cir. 2001). Here, Nguyen and the putative class he seeks to represent are well-paid employees who are seeking years worth of overtime back-pay, penalties, and attorney fees. This weighs heavily against class certification here, as the putative class members have sufficient monetary incentive to pursue their own claims. (See Opp'n Br., Ex. A.)

Moreover, this class action would be unmanageable given the predominance of the individual issues necessary to establish BDO's liability for each of the putative class members. Because the adjudication of claims on a classwide basis would amount to the adjudication of each of the claims on an individual basis, effectively, the Court finds that the class action would be unmanageable.

UNITED STATES DISTRICT COURT
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Accordingly, the Court finds that class treatment is not superior to individual suits as a means to adjudicate this dispute.

IV. Conclusion

For the foregoing reasons, the Court DENIES Nguyen's motion for class certification.

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EXHIBIT 2

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

Ruiz vs. PriceWaterhouseCoopers LLP; **Ruiz vs. KPMG LLP;** Ruiz vs. Deloitte & Touche, LLP; Ruiz vs. Ernst & Young LLP, et al.	CASE NOS.: BC 287 920 **BC 287 921** BC 287 998 BC 287 922
	RULING ON DEFENDANTS' DEMURRERS AND MOTION TO STRIKE

Hearing date: 11/19/03
Ruling date: 12/8/03

After considering the moving, opposing, and reply papers and the arguments of counsel at the hearing, the court now rules as follows:

Defendants' Demurrers are SUSTAINED without leave to amend. Ernst & Young's motion to strike is GRANTED.

EXHIBIT 2

A trio of nearly identical lawsuits against accounting firms PriceWaterhouseCoopers LLP, KPMG LLP, and Deloitte & Touche, LLP (Defendants) are brought by plaintiff Anthony Ronald Ruiz. A similar lawsuit, initially filed by Ruiz, is brought against defendant Ernst & Young LLP by plaintiff Elizabeth Stanton. Ruiz, who has no relationship or factual connection with any of the Defendants, purports to bring representative actions under Business and Professions Code section 17200 challenging Defendants' wage practices. Each of Ruiz's complaints purport to represent all accountants employed by Defendants in the past four years who performed accounting functions while working toward acquiring their certified public accountants (CPA) licenses. Ruiz contends that these "junior accountants" were improperly categorized as exempt professionals, and should have been eligible to receive overtime pay. Ruiz alleges that Business and Professions Code section 5053, which requires that such "junior accountants" work under the supervision of a CPA, precludes Defendants from asserting the professional exemption as a matter of law.

As discussed below, each of Ruiz's actions are dismissed with prejudice because (1) Ruiz is not a competent representative; (2) this is not an appropriate representative action, as the overtime exemptions in question will require a fact-specific inquiry into the circumstances surrounding each employee; and (3) the nature of Ruiz's lawsuits raises serious due process concerns on behalf of both defendants and their employees.

I. Ruiz Is Not a Competent Representative

In a UCL action, the plaintiff bears the "burden to show that its individual claim should be afforded private attorney general status." (*South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 891.) "[B]ecause a UCL action is one in equity, in any case in which a defendant can demonstrate a potential for harm or show that the action is not one brought by a competent plaintiff for the benefit of injured parties, the court may decline to entertain the action as a representative suit. (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 138.)

Ruiz claims to be acting as a representative of the general public. However, the general public has not been harmed here—the only alleged harm is to a remarkably vaguely defined group of employees under a newly-minted legal theory. Ruiz is an unharmed plaintiff with no connection to Defendants or their employees, cannot identify those he seeks to represent and has no personal knowledge of Defendants' labor practices. As such, Ruiz cannot proceed in this action on behalf of the general public. (See *Rosenbluth International, Inc. v. Superior Court* (2002) 101 Cal.App.4th 1073, 1077 ["a UCL action based on a contract is not appropriate where the public in general is not harmed by the defendant's alleged unlawful practices"]; *South Bay Chevrolet v. GMAC*, *supra*, 72 Cal.App.4th 861, 888-890 [no showing members of the public were likely to be deceived by wholesale security agreement between lender and automotive dealers]; *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1143 ["We agree with the distinction drawn in *South Bay Chevrolet* between actions brought to vindicate the rights of individual consumers under section 17200, such as the one before us, and actions such as the one in *South Bay Chevrolet*, which involve sophisticated business finance issues"].)

The California Supreme Court has authorized current or former *employees* affected by an employer's failure to pay overtime to bring representative UCL actions. (See *Cortez v. Purolator Air Filtration Prods Co.* (2000) 23 Cal.4th 163, 172.) However, here, plaintiff's attempt to insinuate himself into the employment relationship between the junior accountants and defendants carries a clear potential for harm. Ruiz's "effort to act as the self-appointed representative of these alleged victims not only raises significant logistical and constitutional issues, it may well leave the victims worse off than they would be if they filed individual actions...." (*Rosenbluth*, *supra*, 101 Cal.App.4th at p. 1078.) That is because, as the *Rosenbluth* court noted, that

> By purporting to act as their self-appointed representative and asserting claims on their behalf in a UCL action, Serrano could in fact deprive Rosenbluth's alleged victims of the individual opportunity to seek remedies far more extensive than those available under the UCL, which limits the plaintiffs to injunctive relief and restitution.

(*Id.* at p. 1079.) Here, Ruiz would deprive the alleged victims of remedies under the Labor Code such as waiting time penalties and attorneys' fees.

Moreover, "a representative action to which the alleged victims are not parties raise serious fundamental due process considerations." (*Id.* at p. 1079; see *post*, Part III.) For these reasons, Ruiz is not a competent plaintiff, and in the absence of a competent representative, this court declines to entertain his suit as a representative action. (*Kraus v. Trinity Management Services, Inc.*, *supra*, 23 Cal.4th at p. 138.)

Finally, another case filed by this plaintiff, *Ruiz v. Ernst & Young LLP*, Los Angeles Superior Court Case No. BC 287922 demonstrates that Ruiz is a professional plaintiff serving as a placeholder in these lawsuits until plaintiff's counsel finds a suitable class representative plaintiff. In the *Ernst & Young* action, plaintiff's counsel located a former employee of Ernst & Young and filed an "amended complaint" which substituted Elizabeth Stanton, the former employee, for Ruiz. Ruiz was dropped entirely from the "amended" pleading. His name no longer even appears on the caption. Once plaintiff's counsel located an appropriate plaintiff, Ruiz became disposable. If Ruiz can be discarded without explanation in the Ernst & Young case, he certainly does not play an important role in the claims of junior accountants in these cases.

"The term professional plaintiff generally is used to refer to a plaintiff who is either a frequent filer ... or a 'hired gun' (one who allows an attorney to sue in his name in exchange for a fee), or both." (*In re Telxon Corp. Secs. Litig.* (N.D.Ohio 1999) 67 F. Supp. 2d 803, 813.) Courts frown upon the use of professional plaintiffs—in the class action context, a finding that a class representative is a professional plaintiff is sufficient to deny class certification. (*Howard Gunty Profit Sharing Plan v. Superior Court* (2001) 88 Cal. App. 4th 572, 579-580.) The fact that Ruiz appears to be a placeholder in these lawsuits until a suitable plaintiff can be located militates against allowing him to proceed in these actions.

II. Determining Exempt Status Involves an Individualized Inquiry

Ruiz contends that this case will not require an individualized inquiry into the facts surrounding each employee because a "bright-line" test demonstrates that the junior accountants are entitled to overtime compensation. The administrative and professional exemptions from California's overtime laws require that employees "customarily and regularly exercise[] discretion and independent judgment" in the performance of their duties. (Cal. Code Regs, tit. 8, §§ 11040 (1)(A)(1)(d), (1)(A)(2)(b), (1)(A)(3)(c).) Business and Professions Code section 5053 requires that accountants who perform accounting functions while working toward acquiring their certified public accountants licenses must work "under the control and supervision of a certified public accountant." Ruiz argues that these provisions are mutually exclusive—that is, an accountant working under the control and supervision of a CPA cannot, as a matter of law, exercise discretion and independent judgment.

Business and Professions Code section 5053 is part of the Accountancy Act, which regulates the licensing and practice of accountants. Section 5053 is not part of the Labor Code or the Wage Orders, which regulate overtime and work conditions. Plaintiff's illogical leap between two completely unrelated statutory schemes ignores established substantive law on overtime exemptions.

First, the determination of an employee's exemption from California's overtime laws requires that the court make a factual inquiry "into the realistic requirements of the job. In so doing, the court should consider, first and foremost, how the employee actually spends his or her time." (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 802; Cal. Code Regs, tit. 8, § 11040 ¶¶ 1(A)(1)(e), 1(A)(2)(f).)

Second, possession of a license is not the sole prerequisite for possession of the exemption. Rather, the exemption may also be determined on the basis of an individual's duties and other qualifications. (DLSE Manual (June 2002) § 54.10.6.3; 29 C.F.R. § 541.08.)

Finally, as a matter of common sense, exercising discretion and independent judgment is not incompatible with being under the control and supervision of someone else. (*Palacio v. Progressive Ins. Co.* (C.D.Cal. 2002) 244 F.Supp.2d 1040, 1048 ["The fact that an employee's decisions may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment"]; 29 C.F.R. § 541.207(e)(1).) If this were the law, no employee with a supervisor could be exempt from California's overtime provisions. Junior associates at law firms who are under the control and supervision of partners would not be exempt. Even the highest-ranking officers of a company are under the control and supervision of a board of directors or shareholders.

Because plaintiff's "bright-line test" fails, allowing this case to proceed as a representative action would require numerous mini-trials in order to determine whether each junior accountant employee of Defendants is exempt from California's overtime laws. (*Ramirez v. Yosemite Water Co.*, *supra*, 20 Cal.4th at p. 802.) Therefore, this case will not result in the "streamlined" procedure envisioned by the Legislature and cannot proceed as a representative action. (*South Bay Chevrolet*, *supra*, 72 Cal.App.4th at p. 896, fn. 26; *Bronco Wine Co. v. Frank A. Logoluso Farms* (1898) 214 Cal.App.3d 699, 715-721.)

III. Due Process Concerns

As noted in Part I, *ante*, proceeding with "a representative action to which the alleged victims are not parties raise serious fundamental due process considerations." (*Rosenbluth*, *supra*, 101 Cal.App.4th at p. 1079.) Because liability for overtime pay in this action can only be established through an individual analysis of the circumstances surrounding each junior accountant (see Part II, *ante*), Defendants have a due process right to a hearing or opportunity to be heard as to each individual. (See *Richards v. Jefferson County, Alabama* (1996) 517 U.S. 793, 797, fn. 4.) Even the junior accountants Ruiz seeks to represent will have no notice or opportunity to be heard, and will have no

opportunity to present their claims by counsel of their own choice. (*Bronco Wine*, *supra*, 214 Cal.App.3d at pp. 718-720.) As a result, the employees Ruiz seeks to represent may be worse off than they would be if they filed individual actions against Defendants. (See *Rosenbluth*, *supra*, 101 Cal.App.4th at p. 1078.)

Finally, there exists a fatal conflict of interest between Ruiz and the junior accountants. Ruiz is a stranger to both Defendants and their employees. His only interest in this lawsuit is to obtain a fee for acting as the section 17200 representative plaintiff. The interest of the junior accountants is to obtain the greatest possible recovery from Defendants. However, only restitution and injunctive relief are available under the UCL. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144.) Ruiz's desire to obtain a fee under the UCL deprives the junior accountants of damages, waiting time penalties and attorneys' fees that would otherwise be available under the Labor Code. This conflict of interest prevents Ruiz from pursuing this action on a representative basis.

In conclusion, allowing Ruiz, who has no stake in the outcome of this lawsuit, to litigate the claims of Defendants' employees constitutes an abuse of the UCL that this court will not permit. Defendants' demurrers are sustained without leave to amend.

IV. Stanton's Lawsuit Against Ernst & Young

Defendant Ernst & Young LLP demurs to and moves to strike plaintiff Elizabeth Stanton's entire First Amended Class Action Complaint. Defendant demurs on the grounds that each cause of action fails to state facts sufficient to state a cause of action and is uncertain. Defendant moves to strike the complaint in its entirety, and specifically allegations asserting claims extending back to December 31, 1998, and plaintiff's requests for waiting time penalties, prejudgment interest, attorneys' fees and a reasonable plaintiff's fee.

Anthony Ronald Ruiz filed this lawsuit in December 2002, alleging that Defendant Ernst & Young (E&Y) failed to pay overtime wages to employees who were allegedly

misclassified as exempt. Ruiz was not one of these employees—rather, he alleged that he was acting as a representative of the general public under Business and Professions Code section 17200. E&Y demurred in April 2003. Before the demurrer was heard, Ruiz's attorneys filed an amended complaint. The amended complaint is not an amended pleading filed on behalf of Ruiz, a party, but a new pleading filed on behalf of a new plaintiff and nonparty, Elizabeth Stanton. Ruiz is named nowhere in the new complaint, including the caption.

Stanton alleges that E&Y improperly classified a group of its employees as exempt and failed to pay those employees overtime wages. Instead of alleging causes of action under the Labor Code, Stanton bases the three causes of action in the complaint on section 17200. (Complaint, ¶¶ 36-46.) Stanton's claims are asserted on behalf of herself, the general public and a proposed class. (Complaint, ¶ 25.) The class is alleged to consist of salaried California employees who, since December 31, 1998, have worked as a "junior accountant" prior to being licensed as certified public accountant. (Complaint, ¶¶ 3, 25.) The complaint also seeks waiting time compensation pursuant to Labor Code section 203, prejudgment interest on waiting time compensation, attorneys' fees, and a reasonable fee to plaintiff for services in bringing this action. (Complaint, ¶¶ 2, 10, Relief Demanded.)

"Any pleading may be amended once by the party of course, and without costs, at any time before the answer or demurrer is filed...." (Code Civ. Proc., § 472.) Stanton was not a party to the original complaint, and thus has no right to amend of course. Therefore, Stanton's First Amended Complaint is stricken in its entirety.

The filing of the first amended complaint which omitted Ruiz as a party effected a dismissal of Ruiz from the action. (*Kuperman v. Great Republic Life Ins. Co.* (1987) 195 Cal.App.3d 943, 947.) Because Ruiz's lawsuit against Ernst & Young suffers from the same procedural and legal infirmities as its companion lawsuits (see Parts I, II and III, *ante*), the dismissal is with prejudice.

In sum:

Defendants' Demurrers are SUSTAINED without leave to amend. Ernst & Young's motion to strike is GRANTED.

IT IS SO ORDERED.

Dated: 12/8/03

Victoria Gerrard Chaney

Judge

I certify that this is a true and correct copy of the original on file in this office consisting of 4 pages. JOHN A. CLARKE, Executive Officer/Clerk of the Superior Court of California, County of Los Angeles.

Date: APR 07 2008 By: Deputy

PATRICIA JOHNSON

Docket No. 09-16370

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON CAMPBELL AND SARAH SOBEK, *et al*., Plaintiffs-Appellees,

v.

PRICEWATERHOUSECOOPERS LLP, Defendant-Appellant.

Appeal From The United States District Court
For The Eastern District Of California
The Honorable Lawrence Karlton
No. 06 CV-02376-LKK-GGH

CERTIFICATE OF SERVICE OF DEFENDANT-APPELLANT'S EXCERPTS OF RECORD, VOLUMES 1-3

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CERTIFICATE OF SERVICE BY MAIL

I certify that on October 29, 2009, I served the following document(s):

DEFENDANT-APPELLANT'S EXCERPTS OF RECORD, VOLUMES 1-3

on the interested parties in this action by placing true and correct copies thereof in sealed envelope(s) addressed as follows:

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I deposited such envelope(s) with postage thereon fully prepaid in the United States mail at a facility regularly maintained by the United States Postal Service at Sacramento, California on the date indicated above.

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

Executed on October 29, 2009, at Sacramento, California.

s/ Lucia Ruiz
Lucia Ruiz