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8  
9 SUPERIOR COURT OF CALIFORNIA  
10 COUNTY OF SAN DIEGO

11 Coordination Proceeding  
Special Title (Rule 3.550)

Judicial Council Coordination Proceeding No.:  
JCCP No.: 4954

12 **BANKERS LIFE WAGE AND HOUR**  
13 **CASES**

ASSIGNED FOR ALL PURPOSES TO JUDGE  
RONALD FRAZIER, DEPT. N-29

14 Included actions:

**DEFENDANTS' OPPOSITION TO**  
**PLAINTIFFS' MOTION FOR CLASS**  
**CERTIFICATION**

15 *Mackey v. Bankers Life & Casualty, et al.*

16 *Hsueh v. Bankers Like & Casualty, et al.*  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

TABLE OF CONTENTS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Page

- I. INTRODUCTION ..... 8
  - A. This case is really about Plaintiffs’ choices, not Bankers’ purported control ..... 8
  - B. Plaintiffs’ fail to establish Bankers’ policies and practices were sufficiently common to control all agents ..... 10
- II. STATEMENT OF ALLEGATIONS AND PROCEDURAL BACKGROUND ..... 11
- III. PLAINTIFFS’ BURDEN OF PROOF AND LEGAL STANDARD ..... 12
  - A. Plaintiffs bear the burden of proof ..... 12
  - B. The legal standard plaintiffs must satisfy ..... 12
    - 1. The ascertainable class standard ..... 12
    - 2. The community of interest standard ..... 12
      - a. Common questions of fact or law standard ..... 13
      - b. The adequate class representative standard ..... 13
      - c. The substantial benefit standard ..... 14
- IV. PLAINTIFFS FAIL TO ESTABLISH THAT THE CLASS CAN BE CERTIFIED ..... 14
  - A. Bankers objects to Plaintiffs’ “evidence” to the extent that it is inadmissible ..... 14
  - B. Hsueh, Goldsmith and Pospichal are inadequate class representatives because they repeatedly fail to be truthful in this litigation ..... 16
    - 1. Hsueh’s declaration is contradicted by his deposition testimony ..... 16
    - 2. Pospichal lied under oath ..... 16
    - 3. Goldsmith’s testimony is contradicted by her own documents ..... 17
  - C. Plaintiffs are inadequate class representatives because they lack sufficient knowledge of Bankers’ policies and practices ..... 18
    - 1. Plaintiffs lack knowledge of compliance issues and training ..... 19
      - a. Legal compliance is central to this case ..... 19
      - b. Selling compliantly is required by law, and Plaintiffs’ attempt to separate “compliance” from “sales” must be rejected ..... 19
      - c. Bankers has no policy requiring cold calling, door knocking, or any other form of prospecting ..... 21

I.

**TABLE OF CONTENTS**  
(continued)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

	<b>Page</b>
d. Bankers’ documents discuss legal compliance and best practices, but do not evidence a right to control .....	23
e. Bankers does not require the use of scripts.....	24
f. Bankers has no policy requiring personal delivery of policies .....	25
g. Bankers has no policy requiring Fact Finders.....	25
h. Bankers only prohibited the use of its proprietary information to sell other insurer’s products if they are competitive.....	26
2. Plaintiffs lack knowledge of Bankers’ marketing and advertising policies .....	27
3. Plaintiffs lack knowledge of Bankers’ branch policies.....	27
a. Bankers has no dress code .....	27
b. Agents could and did work when and where they wanted.....	27
c. Agents were not required to use a mentor .....	28
d. Bankers gives feedback but does not supervise or evaluate agents .....	28
e. Agents were not required to contribute to the FSP .....	29
f. Bankers cared about the results achieved – sales performance .....	29
4. Plaintiffs lack knowledge of changes to Bankers’ policies over time .....	29
D. Plaintiffs fail to establish common control to support employment status.....	30
1. The legal standard for worker status determinations .....	30
2. No evidence of right to control by Bankers .....	31
3. Agents are in distinct, independent businesses separate from Bankers .....	31
4. Habashi’s alleged “control” does not necessary reflect Bankers policies and practices and itself was subject to variation among agents .....	32
E. Plaintiffs fail to establish common proof on the wage statement claim .....	33
V. THE SUBCLASS IS NEITHER ASCERTAINABLE NOR SUSCEPTIBLE TO COMMON PROOF AND THEREFORE MUST BE DENIED .....	34
A. Plaintiffs fail to establish that they are part of the Subclass .....	34

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
B. Commissions are not earned until premiums are paid, and thus it cannot be known whether there are earned wages at the time of separation without an individual inquiry into each agents' holdback, commissions, and advances.....	35
C. There mere existence of a holdback is insufficient to ascertain whether an agent is part of the proposed Subclass, which cannot be determined by common proof.....	35
1. The Subclass cannot be ascertained.....	35
2. The Subclass cannot be established by common proof .....	36
VI. CONCLUSION.....	36

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page**

**Cases**

*Ali v. U.S.A. Cab Ltd.*,  
176 Cal.App.4th 1333 (2009) .....31

*Arnold v. Mutual of Omaha Ins. Co.*,  
202 Cal.App.4th 580 (2011) ..... *passim*

*Barnhart v. N.Y. Life Ins. Co.*,  
141 F.3d 1310 (9th Cir. 1988) .....26

*Brinker Rest. Corp. v. Superior Ct.*,  
53 Cal.4th 1004 (2012) .....13

*Caro v. Procter & Gamble Co.*,  
18 Cal.App.4th 644 (1993) .....13

*DeLeon v. Verizon Wireless*,  
207 Cal.App.4th 800 (2012) .....35

*Desimone v. Allstate Ins. Co.*,  
2000 U.S. Dist. LEXIS 18097 (N.D. Cal. 2000) .....26

*Dynamex Operations West, Inc. v. Superior Ct.*,  
4 Cal.5th 903, 913-914 (2018) .....31

*Empire Star Mines Co. v. California Empl. Com’n*,  
28 Cal.2d 33 (1946) .....11

*Garcia v. Border Trans. Group*,  
LLC, Case No. D072521 (4th App. Dist., October 22, 2018) .....31

*Gattuso v. Harte-Hanks Shoppers, Inc.*,  
42 Cal.4th 554 (2007) .....34

*Hamwi v. Citi National Buckeye Inv. Co.*,  
72 Cal.App.3d 462 (1977) .....12, 15

*Harris v. Vector Marketing Corp.*,  
753 F.Supp.2d 996 (N.D. Cal. 2010) .....14, 18

*Marriage of Heggie*,  
99 Cal.App.4th 28 (2002) .....34

*Hennighan v. Insphere Ins. Solutions, Inc.*,  
38 F.Supp.3d 1083 (N.D. Cal. 2014) .....26

**TABLE OF AUTHORITIES**  
(continued)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page**

*Huong Que, Inc. v. Luu*,  
150 Cal. App. 4th 400 (2007) .....26

*Illinois Tri-Seal Products, Inc. v. United States*,  
353 F.2d 216 (Ct. Cl. 1965) .....32

*J.P. Morgan & Co., Inc. v. Superior Ct.*,  
13 Cal.App.4th 195 (2003) .....13

*Linder v. Thrifty Oil Co.*,  
23 Cal.4th 429 (2000) .....13, 14

*Linton v. Desoto Cab Co., Inc.*,  
15 Cal.App.5th 1208, 1223 (2017) .....11

*Maywalt v. Parker & Parsley Petroleum Co.*,  
67 F.3d 1072 (2d Cir. 1995).....13, 25

*McDonald v. Shell Oil Co.*,  
44 Cal.2d 785 (1955) .....31

*Mission Ins. Co. v. Workers Comp. Appeals Bd.*,  
123 Cal.App.3d 211 (1981) .....20

*Mora v. Big Lots Stores, Inc.*,  
194 Cal.App.4th 496 (2011) .....14, 18

*Norman v. Arcs Equities Corp.*,  
72 F.R.D. 502 (S.D.N.Y. 1976) .....17, 18

*Payton v. CSI Elec. Contractors, Inc.*,  
27 Cal.App.5th 832, 843 (2018) .....31, 33

*Quacchia v. Daimler Chrysler Corp.*,  
122 Cal.App.4th 1442 (2004) .....11, 12

*Reyes v. San Diego County Board of Supervisors*,  
196 Cal.App.3d 1263 (1987) .....12, 36

*Richmond v. Dart Industries, Inc.*,  
29 Cal.3d 462 (1981) .....13

*S.G. Borello & Sons, Inc. v. Department of Industrial Relations*,  
48 Cal.3d 341 (1989) .....30

*Save-On Drug Store* 34 Cal.4th 319, 326 (2004).....12

**TABLE OF AUTHORITIES**  
(continued)

		Page
1		
2		
3	<i>Sciborski v. Pacific Bell Directory,</i>	
4	205 Cal.App.4th 1152 (2012) .....	35, 36
5	<i>Sotelo v. MediaNews Group,</i>	
6	207 Cal.App.4th 639 (2012) .....	13, 33
7	<i>Steinhebel v. Los Angeles Times, LLC,</i>	
8	126 Cal.App.4th 696 (2005) .....	35
9	<i>Stuart v. RadioShack Corp.,</i>	
10	641 F.Supp.2d 901 (N.D. Cal. 2009) .....	34
11	<i>Vasquez v. Superior Court,</i>	
12	4 Cal.3d 800 (1971) .....	13
13	<i>Wal-Mart v. Dukes,</i>	
14	564 U.S. 338 (2011) .....	13, 34
15	<i>Walsh v. IKON Office Solutions, Inc.,</i>	
16	148 Cal.App.4th 1440 (2007) .....	13
17	<i>Washington Mut. Bank v. Super Ct.,</i>	
18	24 Cal.4th 906 (2001) .....	12, 13, 14, 36
19	<b>Statutes</b>	
20	Business and Professions Code § 17200 .....	11
21	Cal. Code Civ. Proc., § 382 .....	12
22	Cal. Code Civ. Proc., § 2025.540 .....	14
23	Cal. Code Regs., tit. 10, § 2547.4(a) .....	11
24	Cal. Evid. Code, § 400 .....	15
25	Cal. Evid. Code, § 403 .....	15
26	Cal. Evid. Code, § 410 .....	15
27	Cal. Evid. Code, § 780 .....	17
28	Cal. Evid. Code, § 803 .....	15
	Cal. Ins. Code, § 790.03 .....	11
	Cal. Ins. Code, § 1725.5 .....	11, 19

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
Cal. Ins. Code, § 1749 <i>et seq.</i> .....	20
Cal. Ins. Code, § 10113.71 .....	25
Cal. Ins. Code, § 10127.10 .....	25
Cal. Labor Code § 201 .....	11
Cal. Labor Code §§ 201-203 .....	35
Cal. Labor Code § 226 .....	11
Cal. Labor Code § 2699 .....	11
Cal. Labor Code § 2802 .....	11
<b>Other Authorities</b>	
16 C.F.R., § 310 .....	23
42 C.F.R. § 2268 .....	11



1 **I. INTRODUCTION**

2 **A. This case is really about Plaintiffs’ choices, not Bankers’ purported control.**

3 At the heart of this case is a simple question: are Plaintiffs’ allegations about Bankers’  
4 purported control or their own choices? A short example explains the answer. Say I go to the gym and  
5 tell the trainer that my goal is to lose 10 pounds. He tells me, “I’ve been doing this a long time and  
6 know from experience what is required to meet that goal. To lose 10 pounds requires discipline and  
7 hard work. You need to go on a diet, cut out dessert and sugar, get up early in the morning and perform  
8 cardio exercise for 30 minutes at least three times each week and lift weights at least two days each  
9 week. If you need help, have questions, or need motivation, I’m here for you on Monday and Thursday  
10 mornings, but you can reach out to me whenever you have questions. I want you to succeed. I will  
11 give you the resources, but the choice is up to you whether to use them and take advantage of my  
12 advice.” (See Weissman Decl., Ex. 20 [Habashi Depo., 342:17-344:19].)<sup>1</sup>

13 I leave the gym with two choices. I can choose to follow my trainer’s advice and have the  
14 opportunity to succeed in meeting my goal of losing 10 pounds, accepting help and advice along the  
15 way. My other choice is to complain that my trainer is “*requiring*” me to give up dessert, “*making*”  
16 me show up at the gym early in the morning, and “*reprimanding*” me when he follows up to see how  
17 I’m progressing or provides advice. What do I do when I think I know more than the trainer about how  
18 to lose 10 pounds but fail to meet my goal? I blame the trainer.

19 Bankers’ independent contractor agents had similar choices. They could choose to take  
20 advantage of the opportunities Bankers provided to maximize productivity and successfully sell in a  
21 compliant manner. Many agents saw value in these opportunities and seized them. As agent Segal put  
22 it: “I feel that [Bankers] is here to help me succeed, but I need to be proactive to take advantage of it.  
23 If you are not willing to take the help you are not going to succeed, at least for the majority. The one  
24 thing that has always been said is that if it was easy everyone would be doing it. There is a line between  
25 those who see it as help and those who see it as control on how to run your business. I see everything  
26 [Bankers] does as helping me. Without all the help, I would not have been able to make it on my own.”  
27 (Ex. 14 [Segal Decl., ¶¶ 17-18].) Agent High’s view was similar: “I can decide how much I want to

28 <sup>1</sup> Unless otherwise stated, all “Ex.” references are to the Declaration of William Hays Weissman.

1 work each week. I have my own goals, however, and know that I can't reach my goals without listening  
2 to best practices." (Ex. 9 [High Decl., ¶ 5].) As agent Abreau put it: "When you decide to do something  
3 100 percent you put in the effort." (Ex. 1 [Abreau Decl., ¶ 4].)

4 Bankers succeeds when agents succeed, so it provides opportunities for agents to receive  
5 training and use productivity resources designed for that purpose. (Richardson Decl., ¶¶ 21-22, 51-  
6 53.) Most agents want that too. As Habashi explained, most new agents were "looking for proper  
7 leadership, training, mentorship, help." (Ex. 20 [Habashi Depo., 48:8-19].)

8 She further explained why Bankers' managers hold what are referred to as Office Days or Call  
9 Days: "Official call day – and you could take the word official, I think, if that's what you are hung up  
10 on, it's what we said was official for us and when we could be there to help agents. They needed us.  
11 We didn't need them. We knew how to sell. We knew how to close. We know the products. We know  
12 the applications. They need us." (*Id.*, at 50:17-25.) Agent Bayer concurred: "I am not required to report  
13 my sales figures to Bankers Life, but I do touch base with Mia Watson and Chris DiRocco. They  
14 provide welcome encouragement which helps me stay focused on putting forth the effort to grow my  
15 business. ... Accountability helps me see what I am doing correctly and how I can change things to  
16 improve my business." (Ex. 3 [Bayer Decl., ¶¶ 9-10]; see also Richardson Decl., ¶¶ 16-17.)

17 Alternatively, agents could choose to believe there was little value in, and complain about, the  
18 opportunities Bankers offered – training, advice, mentoring, and productivity resources – and then do  
19 what they wanted. Plaintiffs made this choice. Hsueh scoffed at the opportunity to learn best practices  
20 at Bankers' trainings, claiming they were "a waste of time . . . because everything she's talking about  
21 I can learn by myself, I can do by myself." (Ex. 21 [Hsueh Depo., 194:15-195:3].) Rather than follow  
22 Bankers' best practices, Hsueh chose his own way of doing things, and acknowledged that Bankers  
23 "just let me do what I do." (*Id.*, at 148:23.)

24 Similarly, Pospichal made his own decisions about his training and prospecting, noting he  
25 decided it was a good idea to talk to other agents about strategies, and created advertising for a  
26 Medicare seminar he held with another agent. (Ex. 22 [Pospichal Depo., 101:13-102:4, 167:16-23].)

27 Goldsmith made the choice to put her family first, and worked part time as a result. She claims  
28 that when she would tell DiRocco she was leaving to get her kids, she felt anything he said was "more

1 kind of almost making me feel guilty.” (Ex. 23 [Goldsmith Depo., 77:2-25].) But when asked if she  
2 was written up or terminated for not making “Office Days” or for leaving early, she conceded she was  
3 not. (*Id.*, at 78:1-6; 132:15-133:7.) If Goldsmith felt guilty, was that really because of Bankers’ alleged  
4 control or because of her own choices?

5 **B. Plaintiffs’ fail to establish Bankers’ policies and practices were sufficiently**  
6 **common to control all agents.**

7 Plaintiffs were 100 percent commission based insurance sales agents who assert that they were  
8 misclassified as independent contractors. To establish misclassification, they must demonstrate that  
9 Bankers’ policies and practices were pervasive evidence of common control over the agents. Plaintiffs  
10 do not do this. Rather, they make assertions and cite to documents without connecting the analytic  
11 dots between their “evidence” and their allegations of Bankers’ right of control.

12 For example, Plaintiffs submit a 173-page procedures manual and 20-page compliance manual  
13 and make assertions about what they require without citing to the manuals themselves. Pl. Brf. 3:14-  
14 4:2 (See Renneisen Decl., Exs. D-E). They claim the procedures manual requires agents “to obtain  
15 approval from Bankers before using any advertising materials not prepared by Bankers,” while failing  
16 to cite the procedure manual’s actual language: “Please be aware that the Home Office must approve  
17 all advertising including telephone scripts. If the script mentions Medicare Supplement insurance it  
18 also needs to be filed with the state. Customer Acquisition in the Home Office is your contact for  
19 telephone script approvals.” Pl. Brf., 3:20-21 (Renneisen Decl., Ex. D [Manual, p. 27]; see also  
20 Renneisen Decl., Ex. E [Compliance Manual, p. 8].)<sup>2</sup>

21 The question Plaintiffs do not answer is *why* a policy requiring approval of all advertising  
22 constitutes evidence of common control. David Dennie, Bankers’ Manager, Field Compliance,  
23 Michael Catania, Director of Learning Management, and Erin Loniello, Director, Marketing Services  
24 – Bankers Life, all answer this question: the policy does not evidence control because Bankers must  
25 review and approve all advertising in order to comply with laws regulating insurance. (Dennie Decl.,

26 <sup>2</sup> Instead of citing the manuals, they only cite to Parente’s deposition and seek to imply that Parente was the sole PMK on  
27 Bankers’ policies. However, Bankers designed several PMKs, and Plaintiffs declined to depose any of them. Their failure  
28 to know much about Bankers’ policies is their own fault. (Weissman Decl., ¶¶ 26-37, Exs. 25-28.) Further, Parente  
explained that “compliance” “refers broadly to current California regulations relating to the sale of insurance” as well as  
past regulations and changes. (Ex. 24 [Parente Depo., 347:1-8].)

1 ¶¶ 8-10, 23-25; Catania Decl., ¶¶ 14-16, Exs. A-B; Loniello, ¶ 14); Cal. Ins. Code, §§ 790.03, 1725.5;  
2 Cal. Code Regs., tit. 10, § 2547.4(a); 42 C.F.R. § 2268.

3 Plaintiffs, concede that compliance with the law is not evidence of employer control. Pl Brf.  
4 18:21-25. *Linton v. Desoto Cab Co., Inc.*, 15 Cal.App.5th 1208, 1223 (2017) (“A putative employer  
5 does not exercise any degree of control merely by imposing requirements mandated by government  
6 regulation.”); *Empire Star Mines Co. v. California Empl. Com’n*, 28 Cal.2d 33, 40-41 (1946)  
7 (“Unquestionably the mining company ... was bound to see that there was complete compliance with  
8 safety orders of the Industrial Accident Commission.”). But Plaintiffs fail to mention the legal  
9 restrictions on advertising, how Bankers performs its advertising reviews, or that Bankers has no  
10 policy either prohibiting or requiring the use of advertising by agents. Plaintiffs do so either because  
11 they know little to nothing about these topics or because they want to twist statements out of context  
12 to provide this court with “an incomplete picture of the litigable issues.” *Quacchia v. Daimler Chrysler*  
13 *Corp.*, 122 Cal.App.4th 1442, 1448 (2004). (Dennie Decl., ¶ 12; Loniello, ¶¶ 5-14.)

14 Neither is sufficient to meet their burden of proof. What Plaintiffs’ evidence and moving papers  
15 show is that in blaming Bankers for their choice to do what they wanted, Plaintiffs are less than honest  
16 or knowledgeable about Bankers’ policies and practices. A fair view of all evidence demonstrates that  
17 Bankers’ concern is that agents sell compliantly, which is another way of saying Bankers cares about  
18 the results to be achieved, not the manner and means by which services were performed beyond legal  
19 compliance. Bankers gave agents an opportunity to be successful, but the choice of how to do so was  
20 theirs – not Bankers’ – to make. (Ex. 15 [Travaglino Decl., ¶ 18].)

## 21 II. STATEMENT OF ALLEGATIONS AND PROCEDURAL BACKGROUND

22 Plaintiff Hsueh filed an original complaint on July 23, 2014, asserting three individual causes  
23 of action and seeking to represent a class on five causes of action: (1) failure to pay wages timely in  
24 violation of California Labor Code section 201; (2) failure to provide accurate itemized wage  
25 statements in violation of California Labor Code section 226; (3) failure to reimburse for necessary  
26 business expenses in violation of California Labor Code section 2802; (4) unfair competition in  
27 violation of Business and Professions Code sections 17200 *et seq.*; and (5) private attorney general act  
28 penalties under Labor Code section 2699 (“PAGA”).

1 On April 23, 2018, the *Hsueh* matter added Plaintiffs Goldsmith and Pospichal to the Second  
2 Amended Complaint (“SAC”). Plaintiffs alleged the same five causes of action against Bankers in the  
3 SAC as in the original complaint, but changed the proposed class definition to include all insurance  
4 agents rather than agents in the positions of SNA I or SNA II.<sup>3</sup>

### 5 **III. PLAINTIFFS’ BURDEN OF PROOF AND LEGAL STANDARD**

#### 6 **A. Plaintiffs bear the burden of proof.**

7 Plaintiffs bear the burden of establishing each element of the test for class certification. *Save-*  
8 *On Drug Store*, 34 Cal.4th 319, 326 (2004). Plaintiffs cannot meet their burden with speculation or  
9 conclusory allegations, but must present “substantial proof” to support each element. *Hamwi v. Citi*  
10 *National Buckeye Inv. Co.* 72 Cal.App.3d 462, 471 (1977) (plaintiff’s burden “requires that the  
11 plaintiff establish more than a ‘reasonable possibility’ that class action treatment is appropriate.”). In  
12 determining whether a plaintiff has met his burden, courts consider the totality of the evidence, not  
13 just the facts plaintiff selectively presents to the court. *Quacchia, supra*, 122 Cal.App.4th at 1448.

#### 14 **B. The legal standard plaintiffs must satisfy.**

15 The Court must deny class certification unless Plaintiff proves: (1) the existence of an  
16 ascertainable class; (2) the existence of a “well defined community of interest among class members,”  
17 and (3) that class treatment “will provide substantial benefits to the court and the litigants.”  
18 *Washington Mut. Bank v. Super Ct.*, 24 Cal.4th 906, 913 (2001); Cal. C.C.P., § 382.

##### 19 **1. The ascertainable class standard.**

20 Whether a class is “ascertainable” is “determined by examining (1) the class definition; (2) the  
21 size of the class; and (3) the means available for identifying the class members.” *Reyes v. San Diego*  
22 *County Board of Supervisors*, 196 Cal.App.3d 1263, 1271 (1987).

##### 23 **2. The community of interest standard.**

24 The “community of interest” requirement embodies three separate factors: (1) predominant

25 \_\_\_\_\_  
26 <sup>3</sup> Plaintiffs fail to properly explain SNA I, claiming it is achieved when an agent sells 8 or 9 policies and \$3,000 in  
27 commissions. (E.g., *Hsueh* Decl., ¶ 21 (9 policies); *Goldsmith* Decl., ¶ 18 (8 policies).) Rather, SNA I is just a sales goal  
28 that is achieved if an agent sells 9 policies and earns \$3,000 in commissions within the first 90 days after the month in  
which the agent contracts, and not merely at any time. (Ex. 24 [Parente Depo., 46:14-47:23].) Other agents knew this.  
(E.g., Ex 15 [Travaglino Decl., ¶ 6].) The fact that Plaintiffs cannot properly explain even basic facts about Bankers  
demonstrates that they are inadequate class representatives.

1 common questions of law or fact; (2) class representatives whose claims or defenses are typical of the  
2 class; and (3) class representatives who can adequately represent the class. *Richmond v. Dart*  
3 *Industries, Inc.*, 29 Cal.3d 462, 470 (1981).

4 **a. Common questions of fact or law standard.**

5 “What matters to class certification is not the raising of common ‘questions’ – even in droves  
6 – but rather the key factor is “the capacity of a class-wide proceeding to generate common *answers*  
7 apt to drive the resolution of the litigation.” *Sotelo v. MediaNews Group*, 207 Cal.App.4th 639, 647  
8 (2012) (emphasis added); *Wal-Mart v. Dukes*, 564 U.S. 338, 390 (2011).<sup>4</sup> Even where common  
9 questions of law exist, certification must be denied if there are diverse factual issues that must be  
10 resolved. *Walsh v. IKON Office Solutions, Inc.*, 148 Cal.App.4th 1440, 1453-1455 (2007).

11 When determining whether common issues predominate, the court “must examine the  
12 plaintiff’s theory of recovery” and “assess the nature of the legal and factual disputes likely to be  
13 presented.” *Brinker Rest. Corp. v. Superior Ct.*, 53 Cal.4th 1004, 1025 (2012). A “predominant”  
14 common question is explained as “each member must not be required to individually litigate numerous  
15 and substantial questions to determine his [or her] right to recover following the class judgment.”  
16 *Washington Mutual Bank, supra*, 24 Cal.4th at 913-914.

17 **b. The adequate class representative standard.**

18 In order to obtain class certification, Plaintiffs must prove that they will adequately represent  
19 the class. *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 435 (2000). “In order to be deemed an adequate  
20 class representative, the class action proponent must show it has claims or defenses that are typical of  
21 the class, and it can adequately represent the class.” *J.P. Morgan & Co., Inc. v. Superior Ct.*, 13  
22 Cal.App.4th 195, 212 (2003). Further, “class certification may properly be denied where the class  
23 representatives have so little knowledge of and involvement in the class action that they would be  
24 unable or unwilling to protect the interests of the class against the possibly competing interests of the  
25 attorneys.” *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1077-1078 (2d Cir. 1995)  
26 (internal quotation omitted). In addition, the court has a duty to evaluate a class representative’s

27 \_\_\_\_\_  
28 <sup>4</sup> California Courts often look to federal authority on guidance for class-action matters. *Caro v. Procter & Gamble Co.*,  
18 Cal.App.4th 644, 657 (1993); *Vasquez v. Superior Court*, 4 Cal.3d 800, 820-821 (1971).

1 credibility to determine if he is adequate. *Mora v. Big Lots Stores, Inc.*, 194 Cal.App.4th 496, 505  
2 (2011); *Harris v. Vector Marketing Corp.*, 753 F.Supp.2d 996, 1015 (N.D. Cal. 2010) (“The honesty  
3 and credibility of a class representative is a relevant consideration when performing the adequacy  
4 inquiry because an untrustworthy plaintiff could reduce the likelihood of prevailing on the class  
5 claims.”) The court must make this determination with respect to each separate Plaintiff.

6 **c. The substantial benefit standard.**

7 A class should not be certified unless “substantial benefits accrue both to litigants and the  
8 courts.” *Linder, supra*, 23 Cal.4th at 435; *see also Washington Mut., supra*, 24 Cal. 4th at 914.

9 **IV. PLAINTIFFS FAIL TO ESTABLISH THAT THE CLASS CAN BE CERTIFIED**

10 Plaintiffs cannot meet their burden of establishing that the Class can be certified for three  
11 principal reasons: *first*, they are inadequate class representatives because they lack credibility and  
12 adequate knowledge of Bankers’ policies and practices; *second*, they fail to establish sufficiently  
13 common policies that evidence Bankers’ right to control that would allow the Court to try the matter  
14 with common proof; and *third*, to the extent that Habashi and her management team exercised any  
15 control, it varied significantly by agent and was not consistent with Bankers’ policies and practices.

16 **A. Bankers objects to Plaintiffs’ “evidence” to the extent that it is inadmissible.**

17 Concurrent with this opposition, Bankers files evidentiary objections to Plaintiffs’ evidence.  
18 Plaintiffs use unverified transcripts in violation of the rules of civil procedure. C.C.P., § 2025.540 (an  
19 unverified deposition transcript “may not be used, cited, or transcribed as the certified transcript of the  
20 deposition proceedings.”). They also cite evidence that is not in the record, such as portions of  
21 Parente’s deposition transcript that are not attached to Renneisen’s declaration. (*Compare* Pl. Brf.  
22 17:27 *with* Renneisen Decl., Ex. B [Parente deposition pages 418-422 excluded].)

23 Moreover, they rely primarily upon declarations that lack foundation and personal knowledge,  
24 which leads to impermissible opinions and speculation. For example, six of Plaintiffs’ seven  
25 declarations contain the following statement (or slight variation of it): “Although Habashi referred to  
26 these [monthly] meetings as ‘compliance meetings’ issues concerning compliance with laws or  
27 regulations relating to insurance products were seldom discussed.” (Frymark Decl., ¶ 14; *see also*  
28 Goldsmith Decl., ¶ 17; Hsueh Decl., ¶ 17; Pospichal Decl., ¶ 23; Reina Decl., ¶ 16; Stern Decl., ¶ 11.)

1 Not one declarant explains what constitutes “compliance,” how they know the difference between  
2 compliance and “sales” training or training that is not compliance training, or even describe the details  
3 of the training they received to support their conclusion. As such, their statements are not competent  
4 admissible evidence, but inadmissible speculation, improper opinions, and legal conclusions. Cal.  
5 Evid. Code, §§ 400, 403, 410, 803. More than a few conclusory, speculative and superficial statements  
6 are needed for Plaintiffs to meet their burden of proving that they are adequate class representatives  
7 with sufficient knowledge of Bankers’ policies and practices and are capable of trying this case with  
8 common proof. *Hamwi, supra*, 72 Cal.App.3d at. 471.

9 Furthermore, Plaintiffs rely on the deposition testimony of Paul Parente, Bankers’ Branch  
10 Sales Manager, as if he had been designated as its Person Most Knowledgeable (“PMK”) on all topics.  
11 However, Parente was not designated as a PMK on a number of topics including holdbacks and  
12 Bankers’ Field Support Program (“FSP”). (Weissman Decl., ¶¶ 26-37.) Over objection, Plaintiffs’  
13 counsel questioned Parente on these topics at deposition and referenced this testimony in support of  
14 the motion to certify the class. (*Id.*, at ¶ 33, Ex. 28.)

15 The Court should carefully consider whether Parente’s testimony that Plaintiffs rely on was  
16 given as a PMK, a partial PMK, or simply as an individual. The Court should certainly give less weight  
17 to those instances where Parente testified as an individual or a partial PMK because his testimony was  
18 not “on behalf” of Bankers as its sole corporate designated witness.

19 In addition, Plaintiffs’ counsel interrogated Parente at length over objection on topics beyond  
20 the scope of his designation. Bankers should not be prejudiced by the fact that Plaintiffs’ counsel chose  
21 not to conduct additional PMK depositions. Bankers did not refuse to identify a PMK or produce a  
22 PMK on the topics that Parente was not designated to be the PMK. (Weissman Decl., ¶¶ 26-32, Ex.  
23 26.) Plaintiffs should not be rewarded for their lack of due diligence by giving more weight to Parente’s  
24 testimony than is warranted under the circumstances.<sup>5</sup>

25  
26  
27 <sup>5</sup> Defendants have submitted several declarations from corporate personnel who would have be able to testify at a  
28 deposition about Bankers actual policies and practices. Their declarations, cited throughout this opposition, provide an  
accurate explanation of both Bankers’ policies and the law. If Parente made statements that are entirely accurate about  
subjects he was not a PMK for, Plaintiffs should bear the burden of those misstatements and the failure to prove their case.



1           **B. Hsueh, Goldsmith and Pospichal are inadequate class representatives because**  
2           **they repeatedly fail to be truthful in this litigation.**

3                   **1. Hsueh’s declaration is contradicted by his deposition testimony.**

4           Hsueh’s cookie cutter declaration contains numerous identical paragraphs to the other two  
5 plaintiffs and four agents declarations that support them.<sup>6</sup> But Hsueh’s deposition tells the real story.  
6 As noted in the Introduction, while he claims he was required to be in the office, Hsueh admits that he  
7 decided when to come into the office. (*Compare* Hsueh Decl., ¶ 8 *with* Ex. 21 [Hsueh Depo. 189:1-  
8 19].) Hsueh claims that he was ordered to make hundreds of cold calls, and that he was monitored by  
9 Dirocco, but testified that he told Bankers he did not want to make calls. Dirocco did not object. Hsueh  
10 further testified that Dirocco only sat with him once and told him that he was doing a great job.  
11 (*Compare* Hsueh Decl., ¶ 10 *with* Ex. 21 [Hsueh Depo., 119:3-121:9, 192:6-21].) Hsueh makes  
12 sweeping, general statements about purported control in his declaration, but honestly admitted in  
13 deposition “they just let me do what I do.” (Ex. 21 [Hsueh Depo., 148:23].)

14                   **2. Pospichal lied under oath.**

15           In deposition Pospichal claims he did not take any steps to form his company GoBike  
16 Insurance, which he claimed was a sole proprietorship, until after he left Bankers. (Ex. 22 [Pospichal  
17 Depo. 52:9-53:4, 54:17-55:2].) These statements were false. Pospichal registered GoBike Insurance  
18 Services, LLC as a limited liability company with the California Secretary of State on June 23, 2014,  
19 but did not separate from Bankers until August 6, 2014. (See SAC, ¶ 9; Ex. 31 [Secretary of State  
20 Filing]; Pospichal Decl., ¶ 39.) The kind of entity, its registration, and the date it was formed are all  
21 facts Pospichal knew. His false statements were deliberate and intended to hide his conduct from  
22 Bankers, suggesting he was doing something improper that he did not want Bankers to know about.<sup>7</sup>

23 \_\_\_\_\_  
24 <sup>6</sup> The Court should carefully scrutinize the Reina, States, and Stern declarations because of their obvious bias against  
25 Defendants. Reina admits Bankers terminated his contract for failing to attend compliance meetings in violation of  
26 California law, States admits his contract was terminated for poor production, while Stern admits Bankers terminated his  
27 contract because he was actively selling competing insurance products using Bankers’ proprietary information in violation  
28 of his contract. Each of these individuals has an axe to grind against Bankers and Habashi, and the Court should carefully  
consider their testimony in light of these facts.

<sup>7</sup> In fact, Pospichal downloaded from Bankers’ computer systems contract information for over 18,000 Bankers’ clients  
shortly before he left Bankers. (Ex. 22 [Pospichal Depo., 143:20-23].) There was no reason to do so unless he was trying  
to get that information to set up his new company. Since he did not know he would be terminated when he was, it is clear  
that Pospichal was intending to leave anyway and take Bankers’ proprietary information with him.

1 Pospichal answered “I do not recall” over a 170 times in his deposition, even to such basic  
2 questions as how long he attended college at CalPoly Pomona or whether had he sued anyone in small  
3 claims court other than Habashi. (Weissman Decl., ¶¶ 42-43, Ex. 33.)<sup>8</sup> Given how little he was able to  
4 recall during deposition, it is remarkable that he had recall for his declaration. Irrespective, someone  
5 who cannot truthfully answer questions in deposition is an inadequate class representative. *Norman v.*  
6 *Arcs Equities Corp.*, 72 F.R.D. 502, 506 (S.D.N.Y. 1976); Cal. Evid. Code, § 780.

7 **3. Goldsmith’s testimony is contradicted by her own documents.**

8 Goldsmith’s declaration is contracted not merely by her deposition testimony, but her own  
9 contemporaneous documentation. For example, Goldsmith claims “Bankers Managers required me  
10 and the other agents to work in the Office two days a week (‘Office Days’ or ‘Call Days’)” and that  
11 “Bankers Managers also required me and other agents to be in the office on Saturday mornings from  
12 9 to 12.” (Goldsmith Decl., ¶¶ 8, 11.) She then tries to claim that she “generally complied with  
13 Bankers’ work schedule. There were, however occasions when I came in late or was not able to attend  
14 an Office Day or Saturday morning because of personal reasons . . . .” (*Id.*, at ¶ 13; see also Ex. 23  
15 [Goldsmith Depo., 74:8-75:3].)

16 Goldsmith’s mileage log and calendars tell the real story. These records show that Goldsmith  
17 worked less than full time and took days off at random including her alleged “Call Days.” For example,  
18 her mileage log shows that between July 30 and November 6, 2014, her last day with Bankers, she  
19 worked a total of 50 days out of 99. Even backing out 28 days for weekends, including the Saturdays  
20 she was allegedly required to work, that still leaves 71 workdays. In other words, she took off 21 days  
21 or about 1.5 weekdays in addition to both weekend days (or 2.5 weekdays if she was working  
22 Saturdays). (Ex. 29 [HSU001894-HSU001908].) Thus, while new agents spent more time learning  
23 how be successful, ultimately they were free to do what they wanted. In Goldsmith’s case, that  
24 included working partial weeks as she saw fit shortly after she contracted with Bankers.<sup>9</sup>

25  
26 \_\_\_\_\_  
27 <sup>8</sup> Pospichal sued Habashi in small claims court, but had his case thrown out. (Ex. 22 [Pospichal Depo., 16:12-13, 26:20-  
28 30:20, Exs. 180-181].) Thus, he also has a clear bias against Bankers and Habashi that calls into question his veracity and  
motives in this lawsuit.

<sup>9</sup> While she also claimed that she was supposed to be in the office from 8 am to 7 pm, she admitted she left “99.9 percent”  
of the time by 5:30 pm. (Ex. 23 [Goldsmith Depo., 71:17-72:4, 93:9-13, 94:14-22].)

1 Goldsmith's decision to work part-time is further corroborated by her reported work hours to  
2 the EDD. In deposition Goldsmith stated that she was receiving unemployment benefits while an  
3 agent. She also stated that she reported her hours worked at Bankers to the EDD every two weeks, and  
4 she wrote those hours reported in her calendar. (Ex. 23 [Goldsmith Depo. 147:17-151:22; Ex. 164,  
5 165 (calendars [HSU554-601; HUS605-624])). Her own records show she worked as little as 11 hours  
6 the week of June 16, 2014. (*Id.* [HSU592-593; HSU609-610].) Assuming Goldsmith accurately  
7 reported her actual work hours to the EDD, and did not underreport her hours in an attempt to commit  
8 benefit fraud (which is a crime), then these documents show that she *chose* to work a limited schedule.  
9 Simply put, Goldsmith was not "required" to be in the office as stated in her declaration.

10 As another example, Goldsmith claims that Watson "required me to have a 'Daily Contact'  
11 with her" and that "Watson would hound me if I did not contact her as she required." (Goldsmith  
12 Decl., ¶ 25.) She also claimed that Dirocco repeatedly gave her various instructions or reprimanded  
13 her. (E.g., *Id.*, at ¶¶ 3, 12-15, 20, 23, 27.) However, Goldsmith wrote to Habashi to complain that "I  
14 can verify that Chris [Dirocco] did not hardly speak to me for the first several months that I was at  
15 Bankers." (Ex. 30 [HSU000887].) Further, she complained about Watson, from whom she sought  
16 advice, but Watson "did not call me all week." (*Id.*) Even when Goldsmith asked Dirocco to intervene  
17 and send Watson a text, "I still never heard from her." (*Id.*)

18 All three Plaintiffs submit nearly identical declarations in support of class certification, but the  
19 veracity of those declarations is highly questionable in light of their inconsistent deposition testimony  
20 and contemporaneous documentation. The Court should carefully weigh whether their lack of  
21 truthfulness makes them inadequate class representatives. *Mora, supra*, 194 Cal.App.4th at 505;  
22 *Harris, supra*, 753 F.Supp.2d at 1015; *Norman, supra*, 72 F.R.D. at 506.

23 **C. Plaintiffs are inadequate class representatives because they lack sufficient**  
24 **knowledge of Bankers' policies and practices.**

25 In addition to being less than truthful in their declarations, Plaintiffs either lied about the nature  
26 and extent of the purported control that exists, or simply lack sufficient knowledge of Bankers' policies  
27 and practices to adequately represent the class. Either is a basis to deny class certification.  
28

1                   **1. Plaintiffs lack knowledge of compliance issues and training.**

2                   **a. Legal compliance is central to this case.**

3                   As noted in Section I.B., compliance with the law is not evidence of employer control. To  
4 certify the class Plaintiffs must present substantive evidence of classwide policies and practices  
5 sufficient to establish that Bankers reserved a right to control the agents that can be met with common  
6 proof. Such evidence is missing here because Bankers lacks substantive policies reserving any right  
7 of control. Whatever limited control exists is to comply with the law. (Richardson Decl., ¶¶ 20-21.)

8                   Plaintiffs argue that any policies that exceed what is required by law can be tried on a classwide  
9 basis. Pl. Brf. 18:21-19:2. This argument misses the mark for two reasons. *First*, Plaintiffs have the  
10 burden of proving that Bankers’ policies exceed what is required by law. Plaintiffs have failed to do  
11 so; in fact, they fail to present any evidence about what is or is not required by law. In contrast, Bankers  
12 has repeatedly explained how its purported “rules” that Plaintiffs claim were “required” flow from  
13 California and federal law, such as the “requirement” that an agent introduce himself as an insurance  
14 agent for Bankers. (*Compare* Hsueh Decl., ¶ 26 *with* Dennie Decl., ¶ 41 [citing Cal. Ins. Code, §  
15 787.1(b)(2)].)

16                   *Second*, the argument actually seeks to vitiate the rule that compliance with the law is not  
17 evidence of employer control. Bankers is not obligated to try a case about facts that do not evidence  
18 control merely because such facts may be common. If California law requires an insurance agent to  
19 place a license number on a business card (Cal. Ins. Code, § 1725.5), then it is irrelevant whether  
20 Bankers requires an agent to put a license number on a business card for both the merits and class  
21 certification because it is not evidence of Bankers’ right to control the agent.

22                   **b. Selling compliantly is required by law, and Plaintiffs’ attempt to**  
23                   **separate “compliance” from “sales” must be rejected.**

24                   As discussed in detail in Section IV.A., Plaintiffs try to draw an artificial distinction between  
25 “compliance” training and “sales” training (or training that is not compliance training without really  
26 specifying what it is) by repeatedly asserting that meetings rarely discussed legal compliance. The  
27 Court should not be hoodwinked by this false dichotomy.

28                   California law requires agents to attend minimum hours of approved training that vary by kind

1 of insurance. E.g., Cal. Ins. Code, § 1749 *et seq.*; §§ 10509.914-10509.916. California law also  
2 imposes obligations on Bankers to “[e]stablish a supervision system that is reasonably designed to  
3 achieve the insurer’s and its insurance producers’ compliance” with the training requirements imposed  
4 by law. *Id.*, at 10509.914. (Beard Decl., ¶¶ 9-16.) As Michael Catania, Bankers’ Director of Learning  
5 Management, explains: “Bankers’ policy requires agents to sell in a compliant way. Nothing more and  
6 nothing less. There is no way to separate out compliance training from sales training; they are  
7 interwoven and inseparable.” (Catania Decl., ¶ 14; see also Richardson Decl., ¶ 21 [“to be successful,  
8 you have to know how to sell in a compliant manner.”].) Catania goes on to provide an example of  
9 what you cannot say when approaching a customer about Medicare, which is based on prohibitions  
10 imposed by federal law. (Catania Decl., ¶¶ 15-17, Exs. A-B.) If Bankers provides examples of what  
11 to say or not say in a roleplaying exercise about meeting a prospective customer to talk about Medicare  
12 supplements, is that compliance training, sales training, or both? Plaintiffs offer no answer because  
13 the only reasonable answer is that sales and compliance training are one and the same.

14 Agents understood that “without product knowledge an agent cannot excel.” (Ex. 1 [Abreau  
15 Decl., ¶ 5].) Agent Harris states: “I avail myself of every training opportunity so that I can be more  
16 successful. I am formerly an educator, and so I believe in education and believe you can always learn  
17 something from someone.” (Ex. 7 [Harris Decl., ¶ 8]; see also Ex. 10 [Lawrence Decl., ¶¶ 9-11]; Ex.  
18 4 [Cardona Decl., ¶¶ 10-11]; Ex. 6 [Galan Decl., ¶¶ 4, 7]; Ex. 12 [Mitchell Decl., ¶¶ 4, 8].) That  
19 insurers provide agents continuous training is just standard given the legal obligation to do so. *Arnold*,  
20 *supra*, 202 Cal.App.4th at 588 (“Training is generally not mandatory and is offered chiefly for the  
21 guidance of ‘new’ agents. Training is required only with respect to compliance with state law  
22 directives.”); *Mission Ins. Co. v. Workers Comp. Appeals Bd.*, 123 Cal.App.3d 211, 221 (1981) (“that  
23 the applicant on occasion attended lectures or classes concerning proper methods of installation and  
24 service was not evidence that Morse controlled the manner in which the desired result was to be  
25 achieved.”). Even the IRS acknowledges that product training is irrelevant to the determination of  
26 status. (Ex. 32 [IRS Training Guidelines, p. 2-15 (“the following types of training, which might be  
27 provided to either independent contractors or employees, should be disregarded: • orientation or  
28 information sessions about the business’s policies, new product line, or applicable statutes or

1 government regulations”)].) Plaintiffs fail to establish that Bankers reserved the right to control them  
2 through training by their inability to explain what training is or how it exceeds what the law requires.

3 **c. Bankers has no policy requiring cold calling, door knocking, or any**  
4 **other form of prospecting.**

5 As noted several times, Bankers cares about agents successfully selling compliantly, which in  
6 turn means prospecting compliantly. Prospecting is the process of generating “leads,” which just  
7 means a potential customer. (Richardson Decl., ¶ 26.) Bankers suggests cold calling and door knocking  
8 as methods for new agents to use when prospecting, but these are hardly the only way to do so. While  
9 Bankers had developed best practices from years of experience, there was no one best way to prospect  
10 because agents tended to gravitate to what they like and are good at doing. (*Id.*, at ¶¶ 26-38.) Hsueh  
11 recognized this and made a choice about what was the best way of prospecting for him:

12 Q. Did you tell Chris Dirocco that you think you have a better way of generating  
13 leads?

14 A. Yeah. I discussed that with him.

15 Q. So what did he say to that?

16 A. He supported it.

17 Q. Okay. Were you able to implement your methodology?

18 A. I did, yeah. I did some.

19 (Ex. 21 [Hsueh Depo. 98:18-25].)

20 Hsueh further testified that he told Dirocco that he did not want to make cold calls, and Dirocco  
21 agreed. Hsueh knew of other agents who did not make cold calls. (*Id.*, at 119:3-121:9.) Other agents  
22 also gravitated toward what they liked, and stayed away from what they did not. For example, agent  
23 Abreau said: “I did not do fairs, because I do not believe it produces results immediately. You are  
24 targeting a market, but not setting appointments.” (Ex. 1 [Abreau Decl., ¶ 9].) This contrasts with agent  
25 Trown: “I have attempted to schedule networking seminars myself, but haven’t been so successful. I  
26 hope to one day generate business from these seminars.” (Ex. 16 [Trown Decl., ¶ 5].)

27 Many agents recognize that insurance is in part a numbers game. Agent Segal explains: “If you  
28 make 100 phone calls you should reach five people and set one appointment,” adding that because of  
the Do-Not-Call Registry phone calls are “getting harder” and she chooses to door knock more. (Ex.  
14 [Segal Decl., ¶ 10]; see also Richardson Decl., ¶¶ 23, 28-37.) Similarly, Agent Herrera said “you  
should try to make between 150 and 200 calls per day. If you make that many calls you will likely talk

1 with between 10 and 20 people, and make between 5 and 7 appointments.” (Ex. 8 [Herrera Decl., ¶ 6];  
2 see also Ex. 15 [Travaglino Decl., ¶ 19 (“My experience is that [Bankers’] formula works.”)]; Ex. 19  
3 [White Decl., ¶¶ 10-12].) Making calls is about setting appointments, not calling just to call. The  
4 number of calls really does not matter. (Richardson Decl., ¶¶ 29-32.) Plaintiffs gripe about cold calling,  
5 but fail to explain how this best practice is anything other than a suggested way for agents to set  
6 appointments that can lead to making sales, which is the end result to be achieved.

7 Plaintiffs complain that they were “told” they should be out door knocking, but concede it was  
8 up to them. Goldsmith noted that when she first started, she lived in an apartment complex and decided  
9 to go around door knocking in the evenings. Bankers did not require her to do so. (Ex. 23 [Goldsmith  
10 Depo., 107:7-108:18].) Pospichal admits that door knocking was intended to help him succeed. (Ex.  
11 22 [Pospichal Depo., 102:18-21]; see also Richardson Decl., ¶ 37.)

12 Another best practice Bankers recommends to new agents is to use their family and friends as  
13 leads (Richardson Decl., ¶ 39), but agent Trown declined to do so: “I choose not to sell insurance to  
14 my family and friends because I do not want to force them to feel I have to sell a product, and nobody  
15 can pressure me to sell insurance to my family and friends, including Bankers. This is my personal  
16 choice.” (Ex. 16 [Trown Decl., ¶ 5].)

17 Yet another best practice Plaintiffs complain about is scheduling appointments. Goldsmith  
18 claims she was “instructed” to only schedule appointments at 9 am, 11 am, 1 pm, 3 pm and 5 pm. The  
19 reason for this best practice is simple: it is the best way to schedule five appointments in a single day.  
20 (Richardson Decl., ¶¶ 24-25.) Goldsmith admitted in deposition Bankers’ suggested this as a best  
21 practice. (Ex. 23 [Goldsmith Depo., 119:10-122:3, HSU000610-611, 613, 631, 561 (Goldsmith’s  
22 calendars showing appointments at other times)].) Pospichal also knew it was a best practice, and the  
23 first basis for scheduling was the client’s availability. (Ex. 22 [Pospichal Depo., 103:14-104:1].) Other  
24 agents also knew that they could schedule appointments whenever they wanted, as Goldsmith did.  
25 (Ex. 18 [Walsh Decl., ¶¶ 5-6]; Ex. 16 [Trown Decl., ¶ 4].)

26 Nate Richardson, who started as an agent in 1992 and rose to be the Senior Vice President of  
27 Sales and Distribution in 2018, is a perfect example of what can happen if an agent makes the choice  
28 to use Bankers’ best practices to succeed. (Richardson Decl., ¶¶ 3-16, 51-53.) As agents become more

1 seasoned and develop a customer base, they tend to prospect less and less. (Richardson Decl., ¶¶ 40-  
2 41.) Agent Abreau made this point: “Most of business now is through referrals and existing clients, I  
3 also work a lot of orphans because I am able to do the right job to assist existing clients with their  
4 needs in ways that new agents cannot.” (Ex. 1 [Abreau Decl., ¶ 10].) In other words, cold calling and  
5 door knocking help agents get started when they do not have warm leads to prospect, but how agents  
6 prospected was entirely their choice. (Richardson Decl., ¶¶ 39-41.)

7 **d. Bankers’ documents discuss legal compliance and best practices,**  
8 **but do not evidence a right to control.**

9 As discussed in detail in the Introduction, Plaintiffs attach large manuals without ever citing  
10 specific portions that purportedly evidence Bankers’ right of control. Take the Agent Compliance  
11 Guidelines (“Guidelines”). (See Renneisen Decl., Ex. E.) What about them evidences control? The  
12 Guidelines state that they provide “an overview of compliance and ethical expectations” for agents,  
13 who “must ensure that all sales activities comply with applicable laws and regulations ....” (Dennie  
14 Decl., ¶ 6, Ex. A [Guidelines, p. 4].) It contains statements such as “[a]dvertisements must be accurate  
15 and truthful. Advertisements containing any statement which is untrue, deceptive or misleading is an  
16 unfair trade practice. Special care must be taken when describing products, features, benefits, fees,  
17 limitations, and risks to avoid confusion or potential misrepresentations.” (*Id.*, at p. 6.) What about  
18 that statement evidences a right to control beyond what the law requires?

19 With respect to door knocking, the Guidelines state: “[T]he following guidelines must be  
20 considered” - it does not say required - and cautions that the federal government’s Centers  
21 for Medicare & Medicaid Services (“CMS”) “prohibits door-to-door solicitation of Medicare  
22 Advantage or Prescription Drug Plans. If the prospect brings them up, explain that CMS requires a  
23 separate appointment at least 48 hours later.” (*Id.*, at p. 7; see also Catania Decl., ¶¶ 15-16, Exs. A, B.)  
24 The Guidelines further discuss compliance with the federal Do-Not-Call Registry (see 16 C.F.R., §§  
25 310 *et seq.*), suitability and delivery of policies (discussed more in subsection f. below). (*Id.*, at pp. 7,  
26 10, 12; see also Beard Decl., ¶¶ 7-14.) All of these general discussions are framed around legal  
27 compliance. Irrespective, there is no evidence that anyone paid the Guidelines any attention; Hsueh  
28 admitted he did not follow them. (Ex. 21 [Hsueh Depo. 184:21-185:11; Ex. 134]).



1 Similarly, Goldsmith attached a copy of the PowerPoint presentation that she asserts was from  
2 her New Agent Training (Goldsmith Decl., ¶ 5, Ex. A). However, an examination of the PowerPoint  
3 fails to demonstrate what control Bankers is reserving. The entire presentation is a review of product  
4 details that California law require Bankers to provide to agents.

5 Plaintiffs also assert they were required to purchase E&O insurance through Bankers. (E.g.,  
6 Goldsmith Decl., ¶ 31.) This is incorrect, as the Agent Agreement clearly demonstrates that agents can  
7 purchase E&O insurance from anyone and must authorize deductions. (Thompson Decl., ¶¶ 2-4, Ex.  
8 A [Agreement, ¶ 18], Ex. B.) Further, E&O insurance is standard industry practice. Goldsmith, who  
9 continued to be an independent insurance agent after leaving Bankers, admitted that she continued to  
10 maintain and pay for her own E&O insurance. (Ex. 23 [Goldsmith Depo. 58:22-59:2].)

11 **e. Bankers does not require the use of scripts.**

12 Plaintiffs assert that Agents were required to use scripts. For example, Hsueh's declaration  
13 claims that Bankers provided scripts "that we were instructed to use" and that "Dirocco monitored me  
14 and the other agents to ensure we were properly making the calls." (Hsueh Decl., ¶ 10). However, in  
15 deposition when asked if he thought scripts were a good idea, Hsueh responded: "Everyone has their  
16 own style of talking. For people who have no knowledge or experience, maybe scripts will help them.  
17 So I can't say it's not useful. But to me, on my way of talking to people so I don't have to follow the  
18 script. Maybe sometimes I learn something, you know, from what they decide the scripts, but I don't  
19 to follow everything." (Ex. 21 [Hsueh Depo. 122:17-123:3].) When shown a script and asked if he  
20 recognized it, Hsueh responded: "I never used this. I know where this script comes from. But I've  
21 never read this before so I probably don't use it so I don't know." (*Id.*, at 123:4-14; Ex. 116.)

22 Numerous other agents reported similar experiences. Agent Lawrence explained that scripts  
23 were "a guideline for what to talk about with clients and how to pitch a product, but Bankers does not  
24 require that I use the script with every client or with any client." (Ex. 10 [Lawrence Decl., ¶ 14].) He  
25 went on to explain: "I never say the script verbatim and I always put my own personality into what I  
26 say to clients so that I don't sound like a robot. I stayed closer to the script when I first started because  
27 I didn't know what I was doing or what to say. Nobody has reprimanded, scolded, or punished me for  
28 not using the script." (*Id.*) Agent Cardona concurred: "Bankers provides a script so that you can get

1 the concept down of how to open up a conversation ... I know I don't have to use the script, and I  
2 have not used the script multiple times. Nobody has punished me for not using the script.” (Ex. 4  
3 [Cardona Decl., ¶ 18]; see also Ex 7 [Harris Decl., ¶ 18]; Ex. 9 [High Decl., ¶ 13]; Ex. 12 [Mitchell  
4 Decl., ¶ 9]; Ex. 18 [Walsh Decl., ¶ 11].) As many agents knew, Bankers does not have a policy that  
5 requires the use of scripts. (Catania Decl., ¶ 22.) Scripts are a best practice that many agents recognize  
6 helps them be more successful, but the choice to use scripts was theirs to make.

7 **f. Bankers has no policy requiring personal delivery of policies.**

8 Plaintiffs claim that Bankers required them to personally delivery policies. (E.g., Pospichal  
9 Decl., ¶ 29.) This is false. California law requires a policy to be delivered to the customer in order to  
10 start the revocation or cancellation period. Cal. Ins. Code, §§ 10127.10, 10113.71. Delivery may be  
11 executed by “(1) Registered or certified mail. (2) Personal delivery, with a signed, written receipt of  
12 delivery. (3) First-class mail, with a signed, written receipt of delivery.” *Id.*, at § 10113.6. Bankers has  
13 no corporate policy requiring personal delivery, but it is a best practice. As the Guidelines state:  
14 “Agents *should* personally deliver policies issued out for signature. This delivery is an opportunity to  
15 explain the changes and review the features and benefits.” (Emphasis added.) (Diffenderffer Decl., ¶  
16 7, Ex. A.) If an agent cannot personally deliver a policy, it can be mailed in compliance with California  
17 law. (*Id.*, at ¶ 8, Ex. B.)<sup>10</sup>

18 **g. Bankers has no policy requiring Fact Finders.**

19 Plaintiffs claim that they were required to submit a Fact Finder with each policy. (E.g., States  
20 Decl., ¶ 11.) This is also inaccurate. Bankers has no policy requiring agents to use a Fact Finder. (Beard  
21 Decl., ¶ 5; see also Ex. 24 [Parente Depo., 234:6-235:6].) Fact Finders are another best practice and  
22 productivity resource for agents. As Parente explained, a “Fact Finder” is “a series of questions  
23 intended for the purpose of gathering suitable client relations information.” (Ex. 24 [Parente Depo.  
24 234:6-9]; Ex. 11 [Lendero Decl., ¶ 3].) As Beard explained, “suitability” is a legal requirement that  
25 ensures an agent meets his fiduciary obligations to the customer. (Beard Decl., ¶¶ 5-13.)

26  
27 <sup>10</sup> This is yet another example of Plaintiffs making a statement that neither correctly states Bankers' actual policy nor  
28 informs the court of the obligations imposed by law upon delivery, and further demonstrates that Plaintiffs are inadequate  
class representatives. *Maywalt, supra*, 67 F.3d at 1077-1078.

1 The Fact Finder also protects agents. For example, a Fact Finder can be used to help  
2 demonstrate that an agent did not sell an unsuitable product to a customer based on the information  
3 obtained from the customer. (*Id.*, at ¶¶ 23-29, Exs. B-C.) In addition, as explained by Dennie, turning  
4 in Fact Finders is intended to meet the legal requirement that agents have “an information security  
5 program” to safeguard customers’ NPI. (Dennie Decl., ¶¶ 35-40 (citing Cal. Ins. Code, §§ 791-791.29;  
6 Cal. Code Regs., tit. 10, §§2689.1-2689.24).) Thus, even though Fact Finders are a best practice but  
7 not required by Bankers, their use is to effectuate legal compliance. If an agent participates in training  
8 about using a Fact Finder with a customer, that “sales” training is compliance training.

9 **h. Bankers only prohibited the use of its proprietary information to**  
10 **sell other insurer’s products if they are competitive.**

11 Plaintiffs claim that they were “captive agents” who could not sell other insurer’s products.  
12 Courts have repeatedly rejected the argument that being a captive insurance agent is itself somehow  
13 determinative of status. *Arnold v. Mutual of Omaha Ins. Co.*, 202 Cal.App.4th 580 (2011); *Hennighan*  
14 *v. Insphere Ins. Solutions, Inc.*, 38 F.Supp.3d 1083 (N.D. Cal. 2014); *Desimone v. Allstate Ins. Co.*,  
15 2000 U.S. Dist. LEXIS 18097, \*47-48 (N.D. Cal. 2000); *Barnhart v. N.Y. Life Ins. Co.*, 141 F.3d 1310,  
16 1313 (9th Cir. 1988). Irrespective, Plaintiff’s statement is again inaccurate. As the Agent Agreement  
17 expressly states: “The Agent agrees that if the Agent receives potential customer leads from Company,  
18 the Agent will not, during term of this Agreement and for 24 months thereafter, use those leads to  
19 solicit insurance for any other entity that provides products that are competitive, similar or equivalent  
20 with the products sold by the Company.” (Thompson Decl., Ex. A. [Agreement, ¶ 27]; see also  
21 Richardson Decl., ¶¶ 42-44.) The Agreement does not in any way restrict agents from selling other  
22 insurance products – it only restricts the use of Bankers’ proprietary information (*i.e.*, leads provided  
23 to agents) to do so if they are “competitive, similar or equivalent” to Bankers’ products. If the products  
24 being sold are different from Bankers’ products, then there is no restriction at all, even to using  
25 Bankers’ leads. This is evidenced by Hsueh, who sold Aflac products: “I ask Chris before I do this,  
26 okay? And Chris said as long as there’s no conflict of whatever Bankers product that’s fine. ... So  
27 Chris have no objection for me to do that.” (Ex. 21 [Hsueh Depo. 76:17-20, 77:2].) This clause merely  
28 effectuates the agents’ duty of loyalty. *Huong Que, Inc. v. Luu*, 150 Cal. App. 4th 400, 410-413 (2007).

1                   **2. Plaintiffs lack knowledge of Bankers’ marketing and advertising policies.**

2                   Plaintiffs claim that they had to use scripts and seek approval for use of advertising other than  
3 what Bankers provided. As already discussed, this misstates Bankers’ policies relating to advertising,  
4 which is all based on legal compliance concerns. (Thompson Decl., Ex. A [Agreement, ¶ 19].)  
5 Plaintiffs also complain they were required to use BSPN, which is wrong. (Dennie Decl., ¶¶ 14-25.)  
6 *Arnold, supra*, 202 Cal.App.4th at 588 (“[s]oftware is provided by Mutual as a ‘best practice’ to enable  
7 agents to sell its products more successfully.”) These claims demonstrate that Plaintiffs are either lying  
8 or simply lack actual knowledge of Bankers’ policies and practices.

9                   **3. Plaintiffs lack knowledge of Bankers’ branch policies.**

10                   **a. Bankers has no dress code.**

11                   Plaintiffs assert that Bankers controlled what agents wore. This is false. Bankers had no dress  
12 code, but did recommend dressing for success, which means dressing professionally. As Habashi  
13 replied when asked if Bankers had a dress code: “No, it’s what the United States of America considers  
14 to be professional dress code.” (Ex. 20 [Habashi Depo. 243:5-6]; see also Richardson Decl., ¶ 45.)  
15 Most agents apparently understood this: “No one ever told me what to wear when working. Clients do  
16 not take you seriously if you show up in a tee-shirt. You get to know what your clients want and I  
17 dress accordingly. I’ve never heard of a dress code, but it is looking professional and using common  
18 sense.” (Ex. 17 [Walburn Decl., ¶ 18]; see also Ex. 4 [Cardona Decl., ¶ 17]; Ex. 7 [Harris Decl., ¶ 15];  
19 Ex. 10 [Lawrence, ¶ 13]; Ex. 12 [Mitchell Decl., ¶ 7]; Ex. 18 [Walsh Decl., ¶ 10].)<sup>11</sup>

20                   **b. Agents could and did work when and where they wanted.**

21                   Plaintiffs focus on the “Call Days” or “Office Days.” Hsueh, Goldsmith and Pospichal all  
22 complained about them, and “100 Day Action Plan” that they claim was a “schedule.” But as already  
23 discussed in detail above, Goldsmith’s own contemporaneous records demonstrate that after only a  
24 few months at Bankers she was working about 3.5 days per week on average, while Hsueh said he  
25 decided when to come to the office. Many agents acknowledged that there was a schedule of when

26 \_\_\_\_\_  
27 <sup>11</sup> Goldsmith complains that she was “reprimanded” for wearing crocs, but does not explain what the reprimand was.  
28 (Goldsmith Decl., ¶ 16.) Even assuming Watson said something to her along the lines that it is not appropriate to wear  
crocs to a customer appointment, this single example of a common sense suggestion hardly rises to the level of control  
over how services are performed, but rather exemplifies the lack of real substance to Plaintiffs’ complaints.

1 managers were in the office, but that they were not required to be in the office on particular days. (Ex.  
2 1 [Abreau Decl., ¶ 16].) This is consistent with Habashi’s and Parente’s testimony, both of whom  
3 explained at length that managers held “Office Days” to ensure that they would be accessible to help  
4 agents. (Ex. 20 [Habashi Depo. 49:15-21, 50:17-25, 51:21-52:10, 56:25-58:4]; Ex. 24 [Parente Depo.,  
5 102:7-19, 102:25-103:14, 109:9-110:8]; see also Richardson Decl., ¶ 17.) Most other agents  
6 understood that it was encouraged but not required that agents come in for Office Days because those  
7 were days that managers would be around to help them, but nothing would happen if they did not show  
8 up. (Ex. 23 [Goldsmith Depo., 129:18-130:6, 132:25-133:7]; Ex. 4 [Cardona Decl., ¶ 5] (“Office days  
9 are days that everyone recommends that I be in the office since I’m new and still learning the business.  
10 If I am not here on an office day, however, I do not get in trouble.”); see also Ex. 11 [Lendero Decl.,  
11 ¶ 15]; Ex. 6 [Galan Decl., ¶¶ 5-7].)

12 **c. Agents were not required to use a mentor.**

13 As a best practice Bankers provides new agents with opportunities to learn from experienced  
14 agents and managers such as Unit Field Trainers (“UFTs”). Hsueh says he neither asked for a UFT  
15 nor was one assigned to him because he did not need one. (Ex. 21 [Hsueh Depo. 61:7-62:2].) That was  
16 his choice to make, and stands in contrast to agent Abreu’s choice: “I demanded a mentor. ... I made  
17 these demands because I wanted to achieve success, and not because anyone at [Bankers] told me what  
18 to do or required me to seek a mentor.” (Ex. 1 [Abreau Decl., ¶ 7].)

19 **d. Bankers gives feedback but does not supervise or evaluate agents.**

20 Pospichal and Goldsmith claim they reported to and were supervised by Bankers managers.  
21 (Pospichal Decl., ¶ 4; Goldsmith Decl., ¶ 3.) Other agents saw it differently. For example, agent Harris  
22 explained that if she was not making appointments “Maryam, Kevin, and/or Bassie may ask me why  
23 I haven’t made the appointments, but I don’t take that as a reprimand. I feel they are just trying to be  
24 helpful to me.” (Ex. 7 [Harris Decl., ¶ 14].) Agent Lawrence says: “Bankers has not provided me with  
25 a formal review, but I have sought informal feedback ....” (Ex. 10 [Lawrence Decl., ¶ 15].) Agent  
26 Cardona similarly explains: “Bankers has not provided me with a formal review, but I have sought  
27 informal reviews from seasoned agents. This is just for my own self-improvement.” (Ex. 4 [Cardona  
28 Decl., ¶ 19]; see also Ex. 16 [Trown Decl., ¶ 8].) Hsueh admitted that Dirocco sat with him only one

1 time while he was making phone call calls, and the only statement Dirocco made to Hsueh was “you’re  
2 doing great.” (Ex. 21 [Hsueh Depo. 192:6-21].) *Arnold, supra*, 202 Cal.App.4th at 588-589 (“Mutual  
3 mangers make themselves available to assist agents, as distinguished from supervising them. ...  
4 [Arnold’s] assistant general manager . . . did not evaluate her performance and did not monitor or  
5 supervise her work.”). For all the bluster about being constantly “reprimanded,” Plaintiffs fail to point  
6 to anything specific (other than their claim about not getting “leads”) or show that these “reprimands”  
7 had any actual negative consequences to them.

8 **e. Agents were not required to contribute to the FSP.**

9 Plaintiffs claim that they were required to contribute to the FSP, which was to pay for leads.  
10 (E.g., Pospichal Decl., ¶ 26.) This is incorrect. *First*, Bankers has no policy that requires agents to  
11 contribute to the FSP. As the FSP Guidelines state: “Full participation of all agents is encouraged, but  
12 not mandated.” (Koppensteiner Decl., ¶¶ 6, 8, Ex. A.) *Second*, the evidence shows that less than half  
13 of the agents in the San Diego branch participated in the FSP, including many experienced agents.  
14 (*Id.*, at ¶¶ 8-14, Ex. D.) *Third*, the FSP was not merely for leads, but a wide variety of marketing and  
15 advertising efforts, as explained in the FSP Guidelines. (*Id.*, at ¶¶ 5-7, Ex. A.)

16 **f. Bankers cared about the results achieved – sales performance.**

17 Plaintiffs take issue with having minimum performance standards, citing the procedure  
18 manual. Pl. Brf., 6:16-17. Tom States claims he was terminated for performance, but fails to state what  
19 his performance was. (States Decl., ¶ 17.) While Bankers proposed minimum sales goals, the failure  
20 to meet them did not have consequences. As both Parente and Habashi stated, agent contracts were  
21 not terminated for failure to meet any performance standard. (Ex. 24 [Parente Depo., 70:2-71:13]; Ex  
22 20 [Habashi Depo., 161:21-163:24].) Many agents failed to meet the recommended 15 appointments  
23 per week, and nothing happened to them. (Ex. 18 [Walsh Decl., ¶¶ 5-6]; Ex. 3 [Bayer Decl., ¶ 8]; Ex.  
24 2 [Arefieg Decl., ¶ 8]; Ex. 4 [Cardona Decl., ¶15].)

25 **4. Plaintiffs lack knowledge of changes to Bankers’ policies over time.**

26 The three named Plaintiffs all contracted with Bankers between approximately January 2013  
27 and November 2014. However, they seek to represent a class from July 23, 2010, to approximately  
28 September 2018. They lack knowledge of what occurred either prior or subsequent to their contractual

1 period, and make misrepresentations regarding Bankers’ policies as a result. For example, they cite to  
2 a version of the Agent Agreement that Bankers abandoned in May 2015, and seem unaware that all  
3 active agents with Bankers in May 2015 signed the new agreement even if they had been contracted  
4 under the old contract. (*Compare* Renneisen Decl., Ex. C with Thompson Decl., ¶¶ 3-4, Ex. A.)  
5 Plaintiffs fail to notify the Court that there are two agreements and that none of them were ever subject  
6 to the May 2015 Agreement.

7 Plaintiffs also make basic mistakes about Bankers’ policies. For example, they assert that they  
8 were required to use one of four “personal philosophies” since at least 2013 on their resume, but the  
9 document they cite actually only identifies three philosophies. (Renneisen Decl., Ex. M [2015 New  
10 Agent Welcome Kit].) They fail to point out that Bankers expanded the list from three to four in the  
11 2017 version of the Resume Guidelines. They also fail to fail to note that Bankers does not require a  
12 resume and that agents are free to draft their own philosophy if they want, as expressly stated in both  
13 versions of the Resume Guidelines. (Dennie Decl., ¶¶ 15, Ex. B, C.) Their lack of knowledge about  
14 periods other than the period they worked, and their inability to accurately explain policies that  
15 changed over time, demonstrates that they are inadequate class representatives.

16 **D. Plaintiffs fail to establish common control to support employment status.**

17 **1. The legal standard for worker status determinations.**

18 The legal standard for determining workers status was explained in *S.G. Borello & Sons, Inc.*  
19 *v. Department of Industrial Relations*, 48 Cal.3d 341 (1989), and further developed by its myriad  
20 progeny. Under *Borello*, the “principal test” is “whether the person to whom service is rendered had  
21 the right to control the manner and means of accomplishing the result desired.” *Id.* at 350. While  
22 conceding that this “control test” is the ‘most important’ or ‘most significant’ consideration, the  
23 *Borello* court identified a number of ‘secondary factors’ that must also be considered. *Id.*, at 351. The  
24 court cautioned that the secondary factors “cannot be applied mechanically as separate tests,” but  
25 rather “they are intertwined and their weight depends often on particular combinations.” *Id.*

26 Under this standard, it is well settled that “the right to exercise complete or authoritative control  
27 must be shown, rather than mere suggestion as to detail. A worker is an independent contractor when  
28 he or she follows the employer’s desires only in the result of the work, and not the means by which it

1 is achieved.” *Ali v. U.S.A. Cab Ltd.*, 176 Cal.App.4th 1333, 1347 (2009); see also *McDonald v. Shell*  
2 *Oil Co.*, 44 Cal.2d 785, 790 (1955) (a principal “may retain broad general powers of supervision and  
3 control over an independent contractor as to the results of the work performed, so as to insure  
4 satisfactory performance of the contract, including the right to inspect, to stop the work, to make  
5 suggestions or recommendations as to details, or to prescribe alterations or deviations in the work,  
6 without changing the relationship to that of master and servant.”) (internal citations omitted).<sup>12</sup>

7 **2. No evidence of right to control by Bankers.**

8 As discussed in detail with regard to Plaintiffs’ inadequacy as class representatives, most of  
9 Plaintiffs’ evidence of common Bankers’ policies or practices is either false or inaccurate. For the  
10 same reasons that they are inadequate class representatives – lack of knowledge of Bankers’ policies  
11 and practices – they fail to present evidence that the status issue can be tried with common proof.  
12 *Payton v. CSI Elec. Contractors, Inc.*, 27 Cal.App.5th 832, 843 (2018) (“The existence of *any* common  
13 policy is not sufficient to show that common issues predominate. The policy in question must be a  
14 means to establish liability on a classwide basis.”) (Emphasis in the original.)

15 **3. Agents are in distinct, independent businesses separate from Bankers.**

16 Agents sell insurance products. Bankers underwrites insurance. As the court in *Arnold*  
17 acknowledged, “Arnold was engaged in a distinct occupation requiring a DOI license, and was  
18 responsible for her own instrumentalities or tools with the exception of limited resources offered by  
19 Mutual to enhance their agents’ successful solicitation of Mutual’s products.” *Arnold, supra*, 202  
20 Cal.App.4th at 589. The same is true here. Agents chose how to run their business, the best ways to  
21 prospect, what advertising to use, how many hours to work, and how much training to take. Plaintiffs  
22 admit as much. (E.g., Pospichal Decl., ¶ 22 (he determined who to door knock); Ex. 23 [Goldsmith  
23 Depo., 71:17-72:4, 93:9-13, 94:14-22] (she determined when to leave the office); Ex. 21 [Hsueh Depo.

24  
25 <sup>12</sup> Plaintiffs seek to mislead this Court into believing the recently adopted “ABC” test is applicable to this case, and that  
26 the Supreme Court did not limit it to the wage orders. Pl. Brf., 12:23-24. That is false. The *Dynamex* Court was explicit in  
27 stating that the court “must decide what standard applies ... for purposes of California wage orders ....” *Dynamex*  
28 *Operations West, Inc. v. Superior Ct.*, 4 Cal.5th 903, 913-914 (2018) (emphasis in the original). That the ABC test is  
limited to only wage order claims was affirmed this week in *Garcia v. Border Trans. Group, LLC*, Case No. D072521 (4th  
App. Dist., October 22, 2018), at \*21-\*23. Plaintiffs have not asserted a single claim under any wage order, and thus  
*Dynamex* is irrelevant and the ABC test inapplicable.



1 98:18-25, 148:23] (he decided how to prospect.) Bankers did not control their choices about door  
2 knocking, scheduling, or prospecting; Plaintiffs did. *Id.* (“Arnold used her own judgment in  
3 determining whom she would solicit for applications for Mutual’s products, the time, place, and  
4 manner in which she would solicit, and the amount of time she spent soliciting for Mutual’s products.”)

5 Further, while not dispositive, Bankers and the agents intended to form an independent  
6 contractor relationship. (Ex. 22 [Pospichal Depo., 159:6-7].) *Arnold, supra*, 202 Cal.App.4th at 589-  
7 590; see also *Illinois Tri-Seal Products, Inc. v. United States*, 353 F.2d 216, 218 (Ct. Cl. 1965) (the  
8 contractual designation of the worker is “very significant in close cases.”). As independent businesses,  
9 agents incurred their own expenses, deciding whether, for example, to pay for entertaining customers  
10 or send out mailers. (Ex. 13 [Rukhman Decl., ¶ 5]; Ex. 16 [Trown Decl., ¶ 6].); *Arnold, supra*, 202  
11 Cal.App.4th at 589. They reported their expenses on their taxes as self-employed individuals. (Ex. 16  
12 [Trown Decl., ¶ 3]; Ex. 22 [Pospichal Depo., 149:17-21].)

13 In addition, Bankers is well aware that the agents are independent contractors. Bankers  
14 regularly communicated to the branch managers to be cognizant of any best practices seeming too  
15 much like requirements. (Richardson Decl., ¶¶ 47-50, Ex. B.)

16 **4. Habashi’s alleged “control” does not necessary reflect Bankers policies and**  
17 **practices and itself was subject to variation among agents.**

18 Plaintiffs will likely argue Habashi imposed requirements upon that agents that are sufficient  
19 to evidence common control irrespective of Bankers’ policies. This argument is problematic because  
20 different managers acted in different ways with different agents, such that there is no common control  
21 that exists. Agent Colitz, who was in the Laguna Hills branch until it was merged into San Diego in  
22 February 2017, and who spent time as a UFT and USM, explained: “From my experience in  
23 management and with the managers I’ve encountered throughout my time with Bankers, the managers  
24 run the offices differently. Sina Azari managed the Laguna Hills office much differently than Maryam  
25 Habashi.” (Ex. 5 [Colitz Decl., ¶ 4].) Agent Arefieg had a similar view. (Ex. 2 [Arefieg Decl., ¶ 7].)<sup>13</sup>

26 The agents similarly report different experiences even within the San Diego branch. As  
27

28 <sup>13</sup> Colitz and Arefieg are among the nearly three dozen agents that are in both the Mackey and Hsueh putative classes.

1 explained throughout this opposition, Plaintiffs make claims that other agents disavow. This  
2 divergence raises serious questions about whether managers treated all agents the same, and thus  
3 whether common proof can establish common answers to their claims. *Sotelo, supra*, 207 Cal.App.4th  
4 at 647; *Payton, supra*, 27 Cal.App.5th at 840-843. To get around this, Plaintiffs try to cherry pick  
5 phrases and use anecdotal evidence to claim control. For example, they rely heavily upon a single  
6 email from Habashi to her managers (not the agents) about the need to “micro-manage” new agents.  
7 But as Habashi explained in deposition, and plaintiffs fail to cite, Habashi explains that “[t]he message  
8 is purely to keep a close eye to help a newbie during the beginning of their work so that they can  
9 achieve success.” (Ex. 20 [Habashi Depo., 180:15-20; see also *ibid*, at 185:1-19].) This suggests an  
10 interest in the results to be achieved (*i.e.*, sales) rather than control. Further, to the extent it goes  
11 beyond suggestions, it is contrary to Bankers’ directives. (Richardson Decl., ¶¶ 47-50, Ex. B.)

12 More fundamentally, however, Plaintiffs fail to explain why Bankers would care about  
13 anything other than the results to be achieved; that is, the sale of insurance in a compliant manner. If,  
14 as Hsueh asserted, he had a “better way of generating leads” and it worked, why would Bankers want  
15 to stop him? Common sense says that while Bankers suggested agents use Bankers’ best practices,  
16 agents were free to do - and in fact did - what they wanted to generate sales.

17 **E. Plaintiffs fail to establish common proof on the wage statement claim.**

18 Plaintiffs assert that the issue of inadequate wage statements can be met with common proof.  
19 Pl. Brf. 26:3-15. The only evidence submitted is a declaration by Plaintiffs’ counsel Lewis stating that  
20 Bankers issued commission statements to Plaintiffs Hsueh, Pospichal, and Goldsmith during their  
21 “employment” and produced commission statements in the course of discovery. Lewis concludes that  
22 the commission statements are identical in form to excerpts that he attaches as Exhibit A to his  
23 declaration. (Lewis Decl., ¶ 2.) There are four defects in Plaintiffs’ position.

24 *First*, the commission statements attached by Lewis are incomplete. See Defendant’s  
25 Objections to ¶ 2 and Ex. A of Lewis Declaration. *Second*, the contention made by Lewis that the  
26 wage statements are identical to those produced by Bankers or that Bankers “represented” that it used  
27 the same “wage statements” for all agents lacks foundation, calls for speculation, and constitutes  
28 improper opinion testimony. Defendant’s Objections to ¶ 2 and Ex. A of Lewis Declaration. *Third*,

1 Lewis' conclusions that Hsueh, Pospichal, and Goldsmith were employees of Bankers and that their  
2 commission statements constitute "wage" statements is inadmissible argument by counsel, not  
3 evidence. *Id.*; *Marriage of Heggie*, 99 Cal.App.4th 28, 30 n.3 (2002) ("The proper place for argument  
4 is in the points and authorities, not declarations."). *Fourth*, none of the Plaintiffs provide any evidence  
5 in declarations or by reference to deposition testimony regarding what, if anything, they did or did not  
6 receive from Bankers that might constitute a "wage statement." While their attorney references  
7 "commission statements," Plaintiffs fail to present any evidence that this was the only statement  
8 Plaintiffs received from Bankers. As such, Plaintiffs fail to present any competent evidence that the  
9 wage statement issue could be tried on common proof.<sup>14</sup>

10 **V. THE SUBCLASS IS NEITHER ASCERTAINABLE NOR SUSCEPTIBLE TO**  
11 **COMMON PROOF AND THEREFORE MUST BE DENIED**

12 Plaintiffs seek to certify a Subclass composed of all agents who at the time of separation from  
13 Bankers had a holdback. They assert that any agent with a holdback is entitled to waiting time penalties  
14 because the holdback represents unpaid but earned wages. See SAC, ¶¶ 43-47; Not. Of Mot. 2:23-3:2,  
15 9:1-8. Plaintiffs fail to present evidence that they are part of the Subclass, which is neither readily  
16 ascertainable nor susceptible to common proof, even assuming for the sake of argument that it is  
17 comprised of employees (which Bankers does not concede).

18 **A. Plaintiffs fail to establish that they are part of the Subclass.**

19 Plaintiffs fail to present any evidence that they personally had a holdback at the time of their  
20 separation from Bankers, and thus that they are actually members of the Subclass they propose to  
21 represent. None of their declarations mention having a holdback at the time of separation, and no other  
22 evidence is in the record to prove they had holdbacks. Without such evidence, they cannot represent  
23 the Subclass. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011) ("a class representative  
24 must be part of the class and 'possess the same interest and suffer the same injury' as the class  
25 members.") On this basis alone the Subclass should be denied.

26 <sup>14</sup> Defendants acknowledge that with limited exceptions Bankers policies do not reimburse agents' business expenses, but  
27 contends that this issue cannot be litigated as a class because plaintiffs fail to establish that they are employees, fail to  
28 establish with common proof what expenses are ordinary or necessary, and fail to establish that agents provided Bankers  
with proof of such expenses. *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 575 (2007); *Stuart v. RadioShack Corp.*, 641 F.Supp.2d 901, 902 (N.D. Cal. 2009).

1           **B. Commissions are not earned until premiums are paid, and thus it cannot be**  
2           **known whether there are earned wages at the time of separation without an**  
3           **individual inquiry into each agents' holdback, commissions, and advances.**

4           Under the commission plans, commissions are only earned as premiums are paid. (See  
5           Renneisen Decl., Ex. M [Commission Schedule (BLC-005298)] (“Subject to the terms of the Agent  
6           Agreement, to which this schedule is attached ... the following commissions will be allowed *on*  
7           *premiums paid* for policies and riders approved and issued by the Company and accepted by the  
8           Applicant.”) (emphasis added); Buettner Decl., ¶ 5). Most premiums are paid monthly. (Buettner  
9           Decl., ¶ 8.) In order to benefit the agents and get them paid more quickly, Bankers generally pays  
10          agents 12 months of advanced commissions when a policy is issued, or in some cases, when new  
11          business is submitted. (*Id.*, at ¶¶ 4-9, Exs. A-B.)

12          At the time an agent separates from Bankers, if a commission had not been earned, it need not  
13          be paid by Bankers to the agent. Further, if an advance has been paid but the commission was not  
14          earned, it may be recouped. *Sciborski v. Pacific Bell Directory*, 205 Cal.App.4th 1152, 1166-1168  
15          (2012) (“[a]n employer may expressly condition an earned sales commission on the sale becoming  
16          final (e.g., no returns within a specified time or final payment received) or on the employee completing  
17          work in providing followup services to the customer.”); *DeLeon v. Verizon Wireless*, 207 Cal.App.4th  
18          800, 807 (2012); *Steinhebel v. Los Angeles Times, LLC*, 126 Cal.App.4th 696, 710-711 (2005).

19           **C. There mere existence of a holdback is insufficient to ascertain whether an agent is**  
20           **part of the proposed Subclass, which cannot be determined by common proof.**

21           **1. The Subclass cannot be ascertained.**

22          In order to ascertain the Subclass, it must be established that Plaintiffs had “earned” wages that  
23          were unpaid at the time of separation, such that the protections of Labor Code sections 201-203 apply.  
24          The mere existence of a holdback does not answer that question. Rather, the only way to know whether  
25          an agent has earned unpaid wages at the time of separation is to individually review every agent’s  
26          sales to determine (1) the amount of advances paid and when, and (2) the amount of premiums paid,  
27          and when. Doing so requires an individualized inquiry that cannot be proven with statistical sampling  
28          and common proof. (Buettner Decl., at ¶¶ 9-17.)

          For example, assume an agent sells a policy and is paid an advance of 12 months of

1 commissions in accordance with Bankers' PPSP. Then assume the agent separates four months later.  
2 At the time of separation the agent has been paid for twelve months, but only earned four months' of  
3 commissions because premiums are typically paid on a monthly basis. Under this example, there are  
4 no unpaid but earned wages due at the time of separation, because the customer has not yet paid 12  
5 months of premiums. As such, this agent would not be part of the Subclass. Simply saying the agent  
6 has a holdback at that time does not prove that there are unpaid wages due the agent at the time of  
7 separation, because the holdback may or may consist of earned wages. (*Id.*, at ¶¶ 9-12.)

8 Further assume that the following month the customer cancels the policy. At that point the  
9 agent has earned five months' commissions, but is subject to charge back for seven months of  
10 commissions advanced. Bankers is entitled to recoup such amounts from the holdback because those  
11 advances were never earned wages. As such, they cannot support a claim for waiting time penalties.  
12 (*Id.* at ¶ 13.) *Sciborski, supra*, 205 Cal.App.4th at 1166-1168. Accordingly, because it is impossible  
13 to know whether agents are part of the Subclass merely because they have a holdback, which may  
14 consist of unearned commissions, the Subclass cannot be readily ascertained from the mere existence  
15 of a holdback. *Reyes, supra*, 196 Cal.App.3d at 1271.

## 16 2. The Subclass cannot be established by common proof.

17 As explained above, because individualized inquiries are necessary to know whether an agent  
18 has any earned but unpaid commissions at the time of separation, even assuming a holdback exists,  
19 means that each potential class member would need to "individually litigate numerous and substantial  
20 questions to determine his [or her] right to recover following the class judgment." *Washington Mutual*  
21 *Bank, supra*, 24 Cal.4th at 913-914. As such, the Subclass is not susceptible to common proof and  
22 must be denied. *Brown, supra*, 151 Cal.App.3d at 988-989; *San Jose, supra*, 12 Cal.3d at 459.

## 23 VI. CONCLUSION

24 Bankers established best practices that were compliant with the pervasive legal requirements  
25 that permeate nearly every aspect of insurance sales. Bankers' managers were agents' loudest  
26 cheerleaders and wanted them to succeed. As agent Travaglino put it:

27 Maryam Habashi is a force of nature, and a strong personality. She knows this business,  
28 and she is one of the brightest people I have ever met. I would pay to see her speak,  
because I think she is that good. I see how she has developed success and I take that

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success in the context as it was presented to me, which was being told what I needed to do to be successful. Then it was up to me to either do it or not do it.

(Ex 15 [Travaglino Decl., ¶ 18].)

Whether agents chose to take advantage of Bankers’ best practices was up to them. Many, like agent Segal, noted that Bankers “has best practices. There are a lot of them. ... if you do not use best practices, you probably are not doing as well as you could, because the best practices are proven to work, which is why I use them myself.” (Ex 14 [Segal Decl., ¶ 11].)

But some agents, like Plaintiffs, chose their own path and had control over the choices they made about when and how much to work, how to prospect, how much training to undergo, whether to ask for help and how to dress. Having made their choices, Plaintiffs cannot now complain about them. Their lack of truthfulness and inadequate knowledge of Bankers policies and practices makes them incapable of representing other agents who had vastly different experiences based on different choices and a different “mindset.” (Ex. 19 [White Decl., ¶ 14].)

Accordingly, when all the admissible evidence in the record is considered, Plaintiffs fail to meet their burden of proof, and their motion for class certification should be denied.

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Respectfully submitted,

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