UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASE NO. 10-56755

RYAN DELODDER AND RICARDO MARQUES, individually and on behalf of all those similarly situated,

Plaintiffs-Appellants,
v.

AEROTEK, INC. and DOES 1-10

Defendants-Appellees.

On Appeal from the United States District Court
For the Central District of California
Hon. Dolly M. Gee, Case No. 2:08-cv-06044-DMG-AGR

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CERTIFICATE OF INTERESTED PERSONS

Case No. 10-56755, Ryan DeLodder, et al. v. Aerotek, Inc.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1. have an interest in the outcome of this case: Plaintiffs Ryan DeLodder and Ricardo Marques and the putative class of "all persons who have been employed in the State of California by Defendant Aerotek, Inc. from August 14, 2004 through the present as Recruiters."

These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

/s/
Guy B. Wallace

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REQUEST FOR ORAL ARGUMENT

This case raises novel and important questions about class certification standards under Federal Rule of Civil Procedure 23(b)(3) and the interpretation of California's administrative exemption to overtime requirements. Oral argument will assist the Court and allow the parties to fully articulate their positions on the complex issues presented.

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I. STATEMENT OF JURISDICTION

The district court had jurisdiction over this California overtime misclassification case on the basis of the Class Action Fairness Act of 2005, 28 U.S.C. § 1453, and diversity of citizenship pursuant to 28 U.S.C. § 1332(d).

On August 16, 2010, the district court denied Plaintiffs' motion for class certification pursuant to Federal Rules of Civil Procedure Rule 23 ("Rule 23") subsection (b)(3). On August 30, 2010, Plaintiffs filed with this Court a Petition for Permission to Appeal Order Denying Class Certification pursuant to Rule 23(f), which this Court granted on November 10, 2010. This Court has jurisdiction under Rule 23(f) and 28 U.S.C. § 1292(e).

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err by creating a novel "hierarchy of evidence" whereby it failed to accord "great weight" to the employer's common written policies and standardized training which "reflect the realities of the workplace" and therefore under this Court's precedent must "bear heavily" on the Rule 23(b)(3) predominance analysis?

2. Did the district court err in interpreting California's administrative exemption by relying upon the wrong federal regulations, which omit the applicable federal regulation's explanation that "personnel clerks" are non-exempt?

III. STATEMENT OF THE CASE

Plaintiffs allege that Defendant Aerotek, Inc. ("Aerotek"), a staffing company, erroneously misclassified them and other Recruiters in California on a group basis as exempt from California's overtime requirements. Plaintiffs sought class certification under Rule 23(b)(3), providing substantial evidence that Aerotek's administrative exemption defense raised predominant common issues

given Aerotek's common written policies and standardized training, which govern every aspect of Recruiters' jobs.

The district court found that Aerotek was highly centralized and that common training, policies and procedures, and supervision govern the actual work duties of Recruiters. Yet, the district court failed to accord these common policies and training the "great weight" required by this Court's controlling precedent. *See In re Wells Fargo Home Mortgage Overtime Pay Litig.*, 571 F.3d 953, 958 (9th Cir. 2009) ("[U]niform corporate policies will often bear heavily on questions of predominance and superiority . . . . comprehensive uniform policies detailing the job duties and responsibilities of employees carry great weight for certification purposes."); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009) (predominance inquiry focuses "on whether the employer exercised some level of centralized control in the form of standardized hierarchy, standardized corporate policies and procedures governing employees, uniform training programs, and other factors susceptible to common proof").

The district court instead created and applied a "hierarchy" of evidence in which it improperly elevated alleged variations in the performance of common job duties "to the near exclusion" of the common policies and standardized training that it found applied to all Recruiters' jobs. *Wells Fargo*, 571 F.3d at 959. The district court's error was compounded because it relied on federal regulations *that are not even part of California law* to determine the elements of California's administrative exemption and to determine whether common issues predominated on those elements.

This Court should thus reverse the district court and direct it to conduct its predominance analysis by properly weighting Aerotek's common written policies and standardized training which "reflect the realities of the workplace," *id.* at 959,

and by applying the correct California law to Aerotek's administrative exemption defense.

IV. PROCEEDINGS BELOW

A. Procedural History

Plaintiff Ryan DeLodder, a former Aerotek Recruiter, filed this class action complaint on August 14, 2008 in Los Angeles County Superior Court. EOR at 31, Order re Pls' Mot. Class Cert. 2:3-5, Aug. 16, 2010 ("Order"). Aerotek removed the case to the United States District Court of the Central District of California on September 16, 2008. EOR at 31-32, Order 2:11, 3:6. On June 17, 2009, Plaintiff DeLodder filed the First Amended Complaint, adding Ricardo Marques as a named Plaintiff. EOR at 31, Order 2:15-22. Plaintiffs allege that Aerotek misclassified them and other Recruiters as exempt from California Industrial Welfare Commission ("IWC") Wage Order #4-2001,[1] and thereby failed to provide overtime and benefits in violation of California Labor Code §§ 1194 and 1194.2, failed to provide meal periods under Labor Code § 226.7, and committed unfair business practices in violation of California Business & Professions Code § 17200. EOR at 2075, 1st Am. Comp. 1.

On March 1, 2010, Plaintiffs filed their motion for class certification pursuant to Rule 23(b)(3) on behalf of a class of "all persons who have been employed in the State of California by Defendant Aerotek, Inc. from August 14, 2004 through the present as Recruiters." EOR at 31-32, Order 2:27-3:1. The district court denied Plaintiffs' motion for class certification on August 16, 2010. EOR at 53-61, Order 24:24-32:9. On November 8, 2010, this Court granted

[1] Copies of this Wage Order and relevant sections of the Code of Federal Regulations are attached to the Addendum to this brief.

Plaintiffs' petition for review under Rule 23(f). EOR at 1, Order Grant'g Pet., Nov. 8, 2010.

B. The District Court's Order

1. The District Court Found That Plaintiffs Satisfied Rule 23(a) Standards.

The district court found that Plaintiffs satisfied the Rule 23(a) class certification requirements of numerosity, commonality, typicality, and adequacy of representation. EOR at 50-52, Order 22:6-24:13.

2. The District Court Found Common Policies, Training, and Close Supervision Suggested "Uniform Expectations" and "a Level of Commonality."

The district court made a number of factual findings of commonality. First, the court determined that Recruiters "are all identically classified employees of the same company, sharing the same job title and assigned roughly similar job responsibilities." EOR at 52, Order 23:2-4. "[A]ll Aerotek Recruiters perform office work designed to meet the staffing needs of Aerotek's customer companies." EOR at 56, Order 27:10-11; *see also* EOR at 56, Order 27:12 ("Personnel is what all Aerotek Recruiters recruit."). Likewise, the evidence showed that "job postings for Recruiters are roughly identical no matter what office or functional division the Recruiter is being hired into." EOR at 59-60, Order 30:28-31:2. Thus, "[w]hether ['Aerotek Recruiters perform office or non-manual work directly related to management policies or general business operations of the employer or its customers'] is a question common to the class." EOR at 56:12-13, Order at 27:12-13.

The district court also determined that "the record amply supports" "that Recruiters spend over 50% of their workday 'Sourcing' and 'Screening'" job candidates. EOR at 58, Order 29:26-27; *see also* EOR at 59, Order 30:6-7 ("all Recruiters spend at least half their time doing tasks that can be categorized as

sourcing and screening"); EOR at 59, Order 30:16-17 ("the simple fact that all Recruiters spend over 50% of their time sourcing and screening may be established by common proof . . ."). The district court's finding of commonality among Aerotek Recruiters also extended to training and close supervision. EOR at 59, Order 30:27-28 ("all Recruiters receive very similar training"); EOR at 58, Order 29:13-15 ("all Recruiters, regardless of their local office or functional division, are subject to close management in at least twice-daily Red Zone meetings and at least once-daily triangle meetings").

In sum, the district court concluded that Aerotek's common training and other common policies and procedures "suggest a uniform set of expectations for Recruiters on the part of Aerotek and a level of commonality across the putative class." EOR at 60, Order 31:4-6.

3. The District Court Found That Minor Variations in Daily Tasks Predominated over the Common Job Duties, Policies and Procedures, Training, and Blanket Exemption Classification.

Despite the district court's findings of extensive commonality within the proposed class, it held that common issues did not predominate over individual variations in how Recruiters performed some aspects of their jobs. The individual variations identified by the district court included: (1) whether Recruiters, in compiling lists of possible job candidates, used *internal Aerotek software and databases or networking*, EOR at 56-57, Order 27:26-28:8; (2) whether Recruiters interviewed candidates *by phone or in person*, *id.* at 28:8-17; (3) whether Recruiters when interviewing candidates used *predetermined questions or* "included *questions and lines of conversation developed independently*," *id.* at 28:8-12 (emphasis added); (4) whether in-person interviews were *short or longer*, *id.* at 28:14-15; (5) whether or not Recruiters *negotiated pay rates within a set pay*

range, *id.* at 28:21-22; and (6) whether or not Recruiters *recommended candidates* to customer companies, *id.* at 28:25-28.

V. STATEMENT OF FACTS

A. Aerotek's Centralized and Hierarchical Structure Ensures That All Recruiters Work Uncompensated Overtime, Under the Same Common Policies and Procedures.

Aerotek provides staffing services throughout the United States. EOR at 32, Order 3:6-7. Companies with temporary or permanent vacant staff positions hire Aerotek to find, screen, and recommend individuals for these positions. *Id.* at 3:12-13.

Aerotek maintains a centralized, hierarchical structure from which its policies and procedures regarding Recruiters are disseminated to all offices. Regardless of division or office, all Recruiters are subject to the same corporate policies, procedures, and training. *See*, *e.g.*, EOR at 1604-05, Flanigan Decl. ¶¶ 10-12 (Aerotek's VP for Training); EOR at 1671-72, Eubanks Dep. 34:12-35:25, Nov. 4, 2009, ECF No. 148-3 ("Eubanks Dep. II") (Aerotek's Rule 30(b)(6) witness for Recruiter job duties).

Aerotek is organized into eight divisions and has over 20 offices in California. EOR at 32, Order 3:7-18. Each California office is supervised by a Director of Business Operations ("DBO"). *Id.* at 3:19-20. The DBO supervises Account Managers ("AMs"), who in turn supervise Recruiters. *Id.* at 3:21-22. The DBO is responsible for managing the office,[2] and for hiring and firing decisions at

[2] EOR at 1603, Flanigan Decl. ¶ 8; EOR at 1627-30, Eubanks Decl. ¶¶ 1-8. The DBO has profit and loss responsibility for the office. EOR at 1606, Flanigan Decl. ¶ 16; EOR at 1656, Flanigan Dep. 97:3-9, May 26, 2009; EOR at 1638-39, Eubanks Dep. 101:11-102:8, June 9, 2009 ("Eubanks Dep. I").

the office, including the hiring and firing of Recruiters.[3] Aerotek's own training documents and its Rule 30(b)(6) testimony establish that Recruiters sit at the bottom of a pyramid-like structure called a "triangle."[4]

Consequently, Recruiters have no role nor any decision-making authority with respect to decisions that determine the direction of Aerotek's business, including: what products and services are offered at an office; profit and loss responsibility; or business development.[5] Recruiters do not have authority to hire, fire, or discipline any other Aerotek employees.[6] Nor do they supervise any Aerotek employees.[7]

It is undisputed that Aerotek has uniformly classified all Recruiters as exempt,[8] and that Recruiters regularly work more than eight hours per day and more than forty hours per week, without overtime pay.[9]

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[3] EOR at 1606, Flanigan Decl. ¶ 16; EOR at 1655, Flanigan Dep. 82:3-9; EOR at 1644, Eubanks Dep. I 221:2-25.

[4] EOR at 1606, Flanigan Decl. ¶ 14; EOR at 1629, Eubanks Decl. ¶ 5; EOR at 1467, Carey Decl. ¶ 37; EOR at 771-72, Aerotek Computer Training Module at AEROTEK008367-68 ("Module"); EOR at 1654-55, Flanigan Dep. 81:18-82:2; EOR at 1724, Fowler Dep. 107:24-25, Oct. 15, 2009; EOR at 1366, Thomas Decl. ¶¶ 5-6.

[5] EOR at 1606, Flanigan Decl. ¶16; EOR at 1655-56, Flanigan Dep. at 82:3-9, 97:3-9; EOR at 1638-39, 1644, Eubanks Dep. I 101:11-102:8, 221:2-25.

[6] EOR at 670-71, Whisnant Dep. 142:24-143:8, 143:19-21, May 26, 2010; EOR at 561, Torres Dep. 83:15-22, May 26, 2010; EOR at 433, McBride Dep. 80:5-15, May 27, 2010; EOR at 347, Marshall Dep. 39:19-40:1, May 25, 2010; EOR at 533, Ramos Dep. 141:16-25, May 27, 2010.

[7] EOR at 596, Torres Dep. 136:19-25; EOR at 433, McBride Dep. 80:11-15; EOR at 397, Marshall Dep. 120:11-23; EOR at 287-88, Kroesen Dep. 113:7-11, 114:2-5, June 2, 2010.

[8] EOR at 52, Order 23:2-4; EOR at 1605, Flanigan Dec. ¶ 12.

[9] EOR at 637, 653-54, Whisnant Dep. 52:2-24, 102:24-103:10; EOR at 588, 591-92, Torres Dep. 121:3-7, 131:23-132:2; EOR at 472-73, McBride Dep. 140:17-141:2; EOR at 517, 520-21, Ramos Dep. 87:15-20, 91:20-92:4; EOR at 362-63, Marshall Dep. 56:11-57:15; EOR at 305-06, Kroesen Dep. 135:12-136:2.

B. All Recruiters Perform the Same Job.

The job of all Recruiters consists of performing four key job duties described in detail in Aerotek's uniform training materials – sourcing, screening, selection, and performance monitoring. EOR at 785, Module at AEROTEK008382 ("The following map outlines each of your *four key responsibilities* . . . . They are presented to you . . . to . . . help you and Aerotek ensure a successful contractor placement and Perfect Fit each and every time."); *see also* EOR at 1046-50, Eubanks Dep. 83:11-85:8, 103:20-104:22, Nov. 4, 2009, ECF No. 169-6 ("Eubanks Dep. III").

Aerotek's uniform job descriptions for the Recruiter position confirm that Aerotek has the same set of expectations for each Recruiter. EOR at 52, 56-57, Order 23:2-4, 27:10-12, 30:28-31:2; EOR at 1612, Def.'s Resp. to Pl. Marques' 1st Set Req. for Admis. (Nos. 1-2). Aerotek's job descriptions and written job postings are virtually identical, making no distinctions in terms of job duties or responsibilities for Recruiters in different offices or divisions. EOR at 59, Order 30:28-31:2.

C. Aerotek's Standardized Training and Common Policies Control How Recruiters Actually Perform Their Jobs.

The district court confirmed that "all Recruiters receive very similar training."[10] EOR at 59, Order 30:27-28. Regardless of division or office, all Recruiters begin as "Recruiter Trainees" and must undergo and pass a standardized 13-week training before they become "Recruiters." EOR at 32, Order 3:23-25.[11]

[10] Plaintiffs include details regarding Aerotek's uniform Recruiter training program because the district court's fact finding was incomplete. The district court failed to recognize that the level of detail of the training directly impacts the commonality of the actual tasks performed by Recruiters.

[11] *See also* EOR at 1604, Flanigan Decl. ¶ 10 (Vice President for Recruiting testifying that Recruiter training consists of standardized computer training, in-

Aerotek trains all Recruiter Trainees with the same standard written training documents, including a "Recruiter I Handbook," a "Computer Training Module," and various checklists and forms. *Id.* *See generally*, EOR at 1170-1317, Aerotek Recruiter I Handbook at AEROTEK00000720-867 ("Handbook"); EOR at 680-943, Module at AEROTEK008277-540.[12] The Computer Training Modules contain numerous written checklists and forms that provide further specific instructions on the actual job duties of Recruiters. *Id*.

All of the Recruiters who proffered declarations regarding class certification confirmed that they were subject to the same standard corporate training including the Computer Training Modules and the Recruiter I Handbook.[13] Similarly, DBO Jerel Eubanks, whom Aerotek designated as its person most knowledgeable about Recruiter job duties in California, testified that the Recruiter Handbook I contained all the "fundamentals" of recruiting. EOR at 1672, Eubanks Dep. II 35:17-19.

(continued …)
person training (including role-playing and observing an active Recruiter), and the completion of a workbook containing exercises); EOR at 1671-72, Eubanks Dep. II 34:17-35:6 ("each recruiter goes through all of these [training] modules," including the Computer Training Modules and the Recruiter I Handbook); EOR at 1688-90, Fowler Dep. 15:22-17:8; EOR at 1804, DeLodder Dep. 128:11-18, Feb. 27, 2009; EOR at 1902, Marques Dep. 63:2-19, Oct. 13, 2009; EOR at 1385, Thomas Decl. ¶ 19.

[12] While Aerotek has argued that some Recruiters receive additional training that is specific to certain divisions, none of this training changes the detailed training on the "fundamental" job duties performed by Recruiters provided by the Recruiter I training. The Aerotek Recruiter I Handbook, Computer Training Modules, checklists, guidelines, and templates discussed above make no distinctions with respect to the division or office in which a Recruiter works. Moreover, Aerotek has not produced a single document containing division-specific training that is not also given to all Recruiters.

[13] *See*, *e.g.*, EOR at 1385, Thomas Decl. ¶ 19; EOR at 436-37, 439-41, McBride Dep. 83:3-13, 84:4-25, 87:9-89:22; EOR at 366-67, 371, Marshall Dep. 62:21-63:20, 68:13-15; EOR at 277-80, Kroesen Dep. 86:14-18, 87:23-88:12, 89:10-17; EOR at 506-08, Ramos Dep. 67:19-68:13, 69:19-21; EOR at 630-31, Whisnant Dep. 37:15-38:9; EOR at 544-46, Torres Dep. 42:20-44:25.

1. The Training Materials Specify the Actual Work Duties of Recruiters.

The training materials function as a blueprint or "reflection of Aerotek's standard recruiting process." EOR at 681, Module at AEROTEK008278; EOR at 1671-72, Eubanks Dep. II 34:12-35:25. As such, Recruiters use the Recruiter I Handbook that they receive during training as the workplace manual on how to perform their jobs. *See, e.g.*, EOR at 1175, Handbook at AEROTEK00000725 ("After completion of the Recruiter I course, this workbook will serve as a desk reference for you.").

Recruiters are not permitted to begin work until they have demonstrated their mastery of the job duties and tasks described in the uniform training materials. EOR at 1605, Flanigan Dec. ¶ 12 ("If a trainee satisfactorily completes their training they are promoted . . . to a . . . Recruiter [position]. If a trainee does not successfully complete training, their training period may be extended . . . or they may be *terminated*." (emphasis added)). Recruiters are therefore tested on whether they have mastered the material in each module as they go through the Recruiter I training. *See, e.g.*, EOR at 1176, Handbook at AEROTEK00000726 ("You are required to take the post-test for each module you complete.").

The training materials emphasize that the training specifies actual Recruiter work duties, stating:

> First and foremost, your 13 Week Evaluation is designed to assess your progress in *taking what you learned in this training program and applying it to the job*. . . . [Y]ou and your Salesperson will meet to document your status and progress in learning the fundamentals of the Recruiting job. *In order to advance past this initial training period, you will be required to demonstrate proficiency in the areas covered throughout this training program.*

EOR at 761, Handbook at AEROTEK008358 (emphasis added).

2. The Step-by-Step Procedures in Aerotek's Standardized Training Govern Each Part of the Recruiter Job.

Aerotek teaches trainees "a series of *sequenced stages and steps* that Aerotek Recruiters engage in from the time a client request for Contractors is received to when the Contractor is placed on the job and his or her performance is monitored." EOR at 778, Module at AEROTEK008375 (emphasis added); *see also* EOR at 783, Module at AEROTEK008380 (The training materials "detail[ ] from *start to finish* how Aerotek does business and presents client(s) with the most perfectly fitting candidates." (emphasis added)).

a. Step-by-Step Instructions for Recruiter "Sourcing."

Recruiters learn how to "source" or find job candidates that match the parameters designated by the customer company's job requirements. EOR at 66-67, Order 6:27-7:5. Aerotek's training materials explicitly set forth all of the steps for Sourcing. First, the materials explain that "taking a requirement" is done by using a "service requisition form called a Requirement (commonly referred to as a 'Req')." EOR at 798-99, Module at AEROTEK008395-96. The fields in the Req form are comprised of basic information about the client, including the client's name, job site, Aerotek contact with the client, primary job skill set for the position, and type and duration of the job. EOR at 800, Module at AEROTEK008397; EOR at 1217, Handbook at AEROTEK00000767. Recruiters are given specific training on how to collect the substantive information pertaining to each of these fields. *See, e.g.*, EOR at 802-05, Module at AEROTEK008399-402.

Once the Recruiter has a "Req," the next step in "sourcing" is the preparation of the "Candidate Search Game Plan." EOR at 809, Module at AEROTEK008406. The training materials again provide Recruiters with specific instructions to create a "game plan." *Id.*; EOR at 815-35, Module at

AEROTEK008412-32. There are seven sources for candidates: 1) current and former candidates; 2) prior submittals in Aerotek's system called RWS; 3) candidates in RWS who have already been met with and screened and are ready for placement; 4) candidate referrals; 5) network searching in RWS; 6) all candidate searches in RWS; and 7) networking. *Id*.

Aerotek's uniform training also provides Recruiters with an explanation of each type of sourcing method and their respective advantages. EOR at 816-35, Module at AEROTEK008413-32; EOR at 830, Module at AEROTEK008427 (explaining categories of "networking"). Aerotek even instructs Recruiters on how to network, from providing "flyer templates" created by Aerotek (*id*.) to instructing Recruiters on professional behavior, such as "sending thank you notes, using proper verbal and written speech and language, paying attention to detail, keeping appointments and meeting deadlines, as well as appropriate dress, modest drinking and eating at networking events or lunches." EOR at 827-35, Module at AEROTEK008424-32.

In sum, the manuals, Computer Training Modules, and additional written guidelines and checklists that Aerotek provides its Recruiters give them detailed guidance on how to source candidates. This level of detail is motivated by the core purpose of this comprehensive training – to ensure that all Recruiters perform their job duties uniformly according to Aerotek's "perfect fit program." *See, e.g.*, EOR at 719, Module at AEROTEK008316 ("[I]t is necessary [to] . . . *master every step* of the Aerotek Recruiting Process in order to source and recruit good candidates and . . . to *justify our distinctive Recruiting Process* to potential clients." (emphasis added)).

b. Step-by-Step Instructions for Recruiter "Screening."

Trainees are given detailed instructions for screening potential job candidates. The first step in screening is reviewing candidate resumes, and the

Recruiter training provides detailed guidance on how to review resumes the Aerotek way. Recruiters are taught to review resumes for "red flags," as specified in the training materials, and they are trained on techniques and resources for scanning resumes to identify candidates. EOR at 837-48, Module at AEROTEK008434-45. Aerotek emphasizes doing this "quickly" because "in most cases the client will be looking for a quick turnaround." EOR at 842, Module at AEROTEK008439.

Next, Aerotek trains Recruiters on "the five main procedures for screening, selecting and submitting your candidates." EOR at 851, Module at AEROTEK008448. These steps are: (1) Taking a G-2; (2) conducting an in-house interview; (3) completing reference checks; (4) locking down your candidate; and (5) selling your candidate. *Id*.

For the first step, "Taking a G-2," Aerotek trains Recruiters to fill out a detailed form that lays out the categories of information Aerotek wants regarding each potential job candidate and gives specific follow-up questions to ask. EOR at 859, Module at AEROTEK008456 (G2 Template); EOR at 876, Module at AEROTEK008473 ("A full G2 form is completed when the candidate is available to respond to all the questions that need to be answered."). Each step of taking a G2 is laid out in a series of training audios that are used. EOR at 862-72, Module at AEROTEK008459-69. For instance, if it is necessary to "uncover [ ] additional information" about a candidate, the Computer Training Modules provide guidance on that subject as well. EOR at 872-73, Module at AEROTEK008469-70. Aerotek's written checklists set forth almost all of the questions and subject areas that are covered by Recruiters in the interviews. EOR at 892, Module at AEROTEK008489.

For the second step, interviewing candidates, Aerotek also teaches trainees to screen job candidates using "routine, pre-determined [interview] questions to

determine whether the candidate fulfills certain basic minimum requirements, such as whether he or she is punctual and speaks any required languages." EOR at 36, Order 7:6-12. In addition, the Computer Training Modules provide Recruiters with "information to consider when planning an in-house interview" and "guidelines to follow when inviting a candidate for an in-house interview." EOR at 882-91, Module at AEROTEK008479-88. Aerotek trains Recruiters on the length of the interview and provided with a "sample agenda for an in-house interview." EOR at 891-93, Module at AEROTEK008488-90. Aerotek also provides Recruiters with "a list of questions you *need* to ask" during the interview. EOR at 894, 894-902, Module at AEROTEK008491, AEROTEK008491-99 (emphasis added).

Similarly, the Computer Training Modules provide Recruiters with specific instructions and details on how to conduct a reference check, the third step of the screening process. EOR at 904-23, Module at AEROTEK008501-20; EOR at 907, Module at AEROTEK008504 (checklist on reference checks). The fourth and final step of screening, "locking down your candidate" is also explicitly detailed in the Computer Training Modules.[14] EOR at 925-44, Module at AEROTEK008522-41. In this way, each step of the screening process is outlined and regimented.

c. Detailed Instructions for "Submitting."

Aerotek also instructs Recruiters that deciding who is ultimately hired and monitoring candidates' post-hire performance are generally handled by the AM. EOR at 36-37, Order 7:27-8:22. Recruiters are all taught in training that they do

[14] Recruiters are provided with a "lockdown checklist." EOR at 929, Module at AEROTEK008526. Examples of questions contained in the lockdown checklist are as follows: 1) "Make sure they (potential contractor) understand who Aerotek is and our service offerings," 2) "The mileage from home to the client location compared with their current commute (reliable transportation?)" and 3) "The Aerotek/Client interview process and specific schedule of interview availability." *Id*.

not have the authority to decide whether a candidate should be referred on to a customer company. EOR at 37, *id*. at 8:23-24; EOR at 720, Module at AEROTEK008317 ("Once you have successfully locked down your candidate you will find yourself in a position to present this individual to your [AM] for submittal to the client.").

Even so, Aerotek provides Recruiters with detailed instructions and checklists on pre-submitting a candidate to the AM who later handles submittal to the client. EOR at 722, Module at AEROTEK008319 ("Selling your candidate follows a two-step process. . . . First, you must create an initial Self Package known as a Pre-Submittal and forward it to your [AM] for review. After reviewing and completing the package, the [AM] then sends it to the client as a Submittal."). The Recruiter Pre-Submittal Checklist contains the questions Recruiters must ask prior to a candidate being passed along to the AM. EOR at 723-24, Module at AEROTEK008320-21 (instructing the Recruiter to ask: "Does the candidate have any offers pending?"; "Does the candidate know the client location?"; "Is the candidate aware that once agreed upon the salary is NON-NEGOTIABLE?"; "Is the candidate aware of the entire JOB REQUIREMENT?"; "Do you have any vacations or planned time off?"; and "Has the candidate reviewed the client website?"); EOR at 1296-97, Handbook at AEROTEK00846-47 ("Pre-Submittal/Submittal Checklist").

d. Detailed Instructions for "Performance Monitoring."

The Recruiters' final job duty is "Performance Monitoring." EOR at 736, Module at AEROTEK008333. Recruiters' activities in monitoring the performance of hired job candidates are also subject to strict common procedures as set forth by Aerotek. The Training Modules provide Recruiters with detailed instructions and checklists on "identify[ing] the steps and documentation necessary to put a Contractor to work and when a Contractor finishes a client assignment."

EOR at 737, Module at AEROTEK008334. The Training Modules instruct Recruiters on what forms to provide a Contractor. EOR at 739, Module at AEROTEK008336. The Recruiters are provided with an "Employee Start Form" to fill out within "24 hours of the Contractor start date." EOR at 739-40, Module at AEROTEK008336-37. Recruiters provide Contractors with a set of documents contained in a "hiring packet" including an employment agreement, I-9 Form, W-4 Form, State Tax form, employee biographic information form, and Aerotek employee benefits information. EOR at 742-47, Module at AEROTEK008339-44. The Computer Training Modules also provide Recruiters with specific instructions on how to maintain relationships with a Contractor including calling the Contractor, "within the first couple of days" of the Contractor's employment (referred to as the "48 Hour Rule") (EOR at 748, Module at AEROTEK008345), and collecting necessary paperwork to ensure that contractors are paid (EOR at 741, 750, Module at AEROTEK008338, 8347).

In sum, every step of the Recruiter job – sourcing, screening, pre-submitting, and performance monitoring – is scripted in Aerotek's training materials and expected to be followed when Recruiters perform their jobs.

D. Aerotek Closely Supervises All Recruiters.

To ensure that Recruiters follow Aerotek's common policies and procedures, Aerotek closely supervises all Recruiters in three ways.[15] First, during mandatory daily "Red Zone" meetings, all aspects of how Recruiters perform their jobs are closely supervised by AMs. All of the Recruiters who proffered testimony in this

[15] The district court found that "the record shows that all Recruiters, regardless of their local office or functional division, are subject to close management in at least twice-daily Red Zone meetings and at least once-daily triangle meetings." EOR at 58, Order 29:13-15. However, the district court did not elaborate on these forms of supervision. Plaintiffs therefore explain Aerotek's supervision more fully here.

case confirmed that they attend daily Red Zone meetings to monitor their work.[16] The Red Zone meetings are "one of the most powerful tools that Aerotek employs." EOR at 810, Module at AEROTEK008407. During the Red Zone meetings, AMs direct Recruiters on sourcing requirements and preparing game plans for filling positions during that business day. EOR at 811, Module at AEROTEK008408 ("Offices will frequently have *more than one Red Zone meeting each day*. . . . to *ensure that certain Req's are filled by the close of business* . . . [and] to gauge the level of progress and devise follow-up strategies.") (emphasis added)).

Second, the "Recruiter Lead" monitors whether the Recruiters are performing their job duties in conformance with the Recruiter training modules. EOR at 766, Module at AEROTEK008363 ("The focus of this [Recruiter Lead] visit will be on reviewing the *fundamentals* covered in this [training] program, and even more importantly, *applying* the content *directly* to the job." (emphasis in the original)).

Finally, how Recruiters do their jobs is closely supervised through the use of short-term performance measures. AMs set "daily and weekly goals [for Recruiters] around such measurable productivity as G2's and In-House interviews completed per week, client submittals, lunches, contacts, etc." EOR at 763, Module at AEROTEK008360. Recruiters are supervised on whether they are meeting these performance measures through meetings with their AMs. EOR at 760, Module at AEROTEK008357 ("Your [AM] and/or DBO will be required to *monitor and manage your performance* . . . . *regularly* along the following levels

[16] EOR at 636, Whisnant Dep. 49:4-11; EOR at 583, Torres Dep. 115:15-25; EOR at 504-05, 518, Ramos Dep. 61:19-62:16; 88:9-13; EOR at 463-64, McBride Dep. 131:21-132:2; EOR at 359-60, Marshall Dep. 52:20-53:1; EOR at 293, Kroesen Dep. 121:18-20.

of criteria: Your 13-Week Evaluation; Your Contribution to Expected Business Results; Your Attainment of Short-Term Goals; How you go about doing your job" (emphasis added)).

In short, how Recruiters perform their work is micromanaged through detailed written procedures, frequent supervisory meetings, and short-term performance goals.

VI. SUMMARY OF ARGUMENT

The district court's denial of class certification of Plaintiffs' overtime claims should be reversed because it ignored this Court's mandate to accord "great weight" in the Rule 23(b)(3) predominance analysis to an employer's common written policies and standardized training where they "reflect the realities of the workplace." *Wells Fargo*, 571 F.3d at 958-959; *Vinole*, 571 F.3d at 946.

The district court here correctly found that Aerotek was highly centralized and that common training, uniform policies and procedures, and close supervision govern the actual work duties of Recruiters. The district court erred, however, in failing to accord these common policies and training "great weight" by creating an unprecedented "hierarchy" of evidence in which any variation in how class members carry out their jobs defeats predominance – *whether or not the variations are relevant to the underlying overtime exemption criteria*. The district court's creation and application of this "hierarchy" violates this Court's mandate in *Vinole* and *Wells Fargo* that a district court should consider "all factors that militate in favor of, or against, class certification." The district court's "hierarchy" approach improperly elevates one factor to the "near exclusion" of other relevant factors in the predominance analysis, *Vinole*, 571 F.3d at 946, effectively creating an impermissible "bright-line presumption [against] class certification." *Id.* The district court's failure to give its own findings of commonality "great weight" in the predominance analysis should be reversed. *Wells Fargo*, 571 F.3d. at 958.

The district court's error was compounded because it got the underlying substantive law on the California administrative exemption wrong. The district court relied on federal regulations *that are not even part of California law*. The district court's reliance on and misreading of inapplicable federal regulations resulted in it: (1) failing to give proper weight to the applicable regulation which explained that personnel clerks who interview and screen but do not hire employees are *non-exempt*; (2) failing to consider whether any alleged exercise of discretion and independent judgment related to "matters of significance"; (3) erroneously conflating the "general supervision" prong of the administrative exemption with the "discretion and independent judgment" prong; and (4) failing to certify despite its finding that all Recruiters spend more than 50% of their time on the same "sourcing" and "screening" duties.

For these reasons, this Court should reverse the district court and direct it to conduct its predominance analysis by properly weighting Aerotek's common written policies and standardized training which "reflect the realities of the workplace," and by applying the correct California law on Aerotek's administrative exemption defense.

VII. ARGUMENT

A. Standard of Review

Class certification under Rule 23(b)(3) requires "questions of law or fact common to class members [to] predominate over any questions affecting only individual members, and that a class action [be] superior to other available methods for fairly and efficiently adjudicating the controversy." "[T]he main concern in the predominance inquiry . . . [is] the balance between individual and common issues." *Wells Fargo*, 571 F.3d at 959; *see also Vinole*, 571 F.3d at 944. The "predominance" requirement of Rule 23(b)(3) "tests whether proposed classes

are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

A district court's decision to certify a class under Rule 23 is reviewed for legal error or abuse of discretion. *Wells Fargo*, 571 F.3d at 957. "Abuse exists in three circumstances: (1) reliance on an improper factor, (2) omission of a substantial factor, or (3) a clear error of judgment in weighing the correct mix of factors." *Id*. The court's rulings on issues of law trigger *de novo* review and constitutes per se an abuse of discretion. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991); *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1092 (9th Cir. 2010). Here, the district court erred by: (1) elevating one factor to the "near exclusion" of common policies that "bear heavily" on predominance; and (2) applying the wrong legal standards for the administrative exemption under California law.

B. The District Court Erroneously Created a "Hierarchy" of Evidence in Which Any Minor Variation Overrides Evidence of Common Job Expectations and Actual Job Requirements.

1. The District Court Set Forth an Erroneous Predominance Standard.

In evaluating Rule 23(b)(3)'s predominance requirement, this Court has instructed district courts to "take[] into consideration *all factors* that militate in favor of, or against, class certification." *Vinole*, 571 F.3d at 946 (emphasis added); *Wells Fargo*, 571 F.3d at 957-59.[17] A district court must take care when

[17] In both cases, this Court was reacting to a line of district court cases that implied a presumption that class certification should be granted when an employer's internal exemption policies are applied uniformly to employees. *Wells Fargo*, 571 F.3d at 958; *Vinole*, 571 F.3d at 945-46. The Court's holdings were therefore limited to rejecting a per se rule requiring certification in cases of uniform misclassification or exemption cases, but allowing district courts to consider a uniform exemption policy as part of its predominance analysis. *Wells Fargo*, 571 F.3d at 957. *Wells Fargo* distinguished exemption polices from common policies

considering "all factors" to "balance between individual and common issues." *Vinole*, 571 F.3d at 946; *Wells Fargo*, 571 F.3d at 959. In the overtime exemption context, that means courts should "focus[] on whether the employer exercised some level of centralized control in the form of standardized hierarchy, standardized corporate policies and procedures governing employees, uniform training programs, and other factors susceptible to common proof." *Vinole*, 571 F.3d at 946; *see also Wells Fargo*, 571 F.3d at 958-59. Such factors must then be balanced against "'individualized' differences in job responsibilities" to determine whether common or individual issues predominate. *Wells Fargo*, 571 F.3d at 958 (quoting *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 160 (S.D.N.Y. 2008)); *Vinole*, 571 F.3d at 946 (same).

Instead of following this Court's admonition to consider and balance "all factors," the district court committed legal error by creating a "rough hierarchy" of evidence within which evidence of minor, individual variations formed the "touchstone," or overriding factor in its analysis. EOR at 54, 60, Order 25:3, 31:6. The district court's hierarchy ranked in terms of "useful[ness] to a predominance analysis": (1) tasks actually performed by individuals; (2) "comprehensive uniform policies detailing the job duties and responsibilities of employees"; and, "at bottom," (3) "company policies declaring that a certain job title is uniformly exempt or non-exempt." EOR at 54, *id*. at 25:3-23. Then, instead of weighing Plaintiffs' evidence of comprehensive uniform policies on Recruiters' job training, duties and responsibilities, and supervision of Recruiters against the alleged

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(continued …)
relating to employee job duties that "bear heavily" on predominance. *Id*. at 958, 959 (reasoning that a centralized work policy, unlike a blanket exemption policy, "facilitate[d] common proof on the otherwise individualized issues").

individual variations in tasks actually performed by individuals, the court found that alleged individual variation in daily tasks is the "touchstone" which defeats predominance. EOR at 60, *id*. at 31:6-7; EOR at 56-60, *id.* at 27-31 (finding testimony regarding individual variation in job tasks defeated predominance despite "uniform expectations for Recruiters on the part of Aerotek").

a. Ninth Circuit Authority Does Not Support the District Court's New "Hierarchy" of Evidence.

Nothing in *Vinole* and *Wells Fargo* supports this "hierarchy," and none of the certification cases cited with approval by either case create such a hierarchy. The central holdings of both cases are that predominance inquiries may not "rel[y] on [one factor] to the *near exclusion* of other factors relevant to the predominance inquiry." *Vinole*, 571 F.3d at 946 (emphasis added); *Wells Fargo*, 571 F.3d at 959. In *Vinole*, it was the *complete absence* of general policies that led to the finding of no predominance. 571 F.3d at 937-39, 947. In *Wells Fargo*, 571 F.3d at 959, this Court noted that the lack of a centralized policy governing where employees must work would require a court to determine where individual employees actually spent their time. Thus, there is no "hierarchy" of evidence; individual variations in daily tasks are not more important than common policies reflecting actual job duties. In fact, this Court emphasizes the importance of common policies, stating that they "will often *bear heavily* on questions of predominance and superiority." *Wells Fargo*, 571 F.3d at 958 (emphasis added).

Here, the district court found that Plaintiffs made a "comprehensive showing" of similar job duties, "very similar training," "roughly identical" job postings, close supervision, *and* a uniform exemption classification, which all "suggest a uniform set of expectations for Recruiters." EOR at 59-60, Order 30:27-31:5. However, instead of balancing these uniform expectations against any individual issues of how putative class members actually spend their time, the

district court found that how employees spend their time is *the* "touchstone of an exemption analysis" and therefore any alleged variation in how employees spend their time is the determinative factor in the predominance inquiry.[18] EOR at 60, *id.* at 31:6-10.

The district court's application of its "hierarchy" erroneously elevated one factor to the near exclusion of other relevant predominance factors. This is reversible error. *Wells Fargo*, 571 F.3d at 955; *see also Kelley v. Microsoft Corp.*, 395 F. App'x 431, 2010 WL 3556196, at *1 (9th Cir. 2010) (finding "reversible error" where district court relied exclusively on its conclusion that state consumer act claims required individualized proof without "consider[ing] or [] balanc[ing] against the issues requiring individualized proof, any questions of law or fact common to the . . . class members, despite identifying several such questions").

b. Substantive California Law Does Not Support a "Hierarchy" of Evidence.

The district court's citation to the California wage order stating that the determination of an exemption is dependent "first and foremost" on the "work actually performed" misses the mark. EOR at 55, Order 26:1 (quoting Wage Order #4-2001 § 1(A)(2)(f)). The language in the wage order comes from *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 802 (1999). "*Ramirez* was not a class action and did not even discuss certification standards." *Krzesniak v. Cendant Corp.*, No. C05-05156, 2007 WL 1795703, at *15 (N.D. Cal. June 20, 2007); *Sav-on Drug Stores v. Super. Ct.*, 34 Cal. 4th 319, 336 (2004).

[18] The district court pays lip service to the language in *Wells Fargo* that "comprehensive uniform policies" may "carry great weight for certification purposes." EOR at 54, Order 25:11-13. However, its "touchstone" analysis and its failure to explain why minor individual variations overcame Aerotek's comprehensive uniform policies demonstrate that the district court failed to follow *Wells Fargo*'s directive.

However, *Ramirez* is instructive because the California Supreme Court "counseled trial courts to avoid sole reliance," in evaluating an affirmative exemption defense, either on an employer's written job description or on the actual work duties of an employee. *Sav-on*, 34 Cal. 4th at 336. The California Supreme Court has stressed that in evaluating an employer's exemption defense to California's overtime requirements, courts should inquire into the *realistic* requirements of the job. *Ramirez*, 20 Cal. 4th at 802. In doing so, a court should "consider, first and foremost, how the employee actually spends his or her time . . . [and also] whether the employee's practice diverges from the employer's realistic expectations." *Id.*

In *Sav-on*, while the California Supreme Court acknowledged that individual issues of how each employee actually spends his or her time might arise, it found that "considerations such as 'the employer's *realistic expectations*' and 'the actual overall *requirements of the job*' are likely to prove *susceptible of common proof*." *Sav-on*, 34 Cal. 4th at 337 (emphasis added); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 487 (E.D. Cal. 2006). *Sav-on* further explained that an employer's actual expectations can be found "in its job descriptions and training materials and . . . whether such expectations [are] realistic" "may be addressed with common evidence" if the employer has common "policies and practices" and "operational standardization." 34 Cal. 4th at 337 n.8. The district court here found that all of these elements existed in this case. Thus, predominance should not have been defeated by the creation of a novel "hierarchy" in which commonality was overcome by minor variation in how employees spent their time.

As *Sav-on* emphasized, the "first and foremost" focus on how an employee actually spends his or her time does not increase the burden for the purposes of class certification. *Id.* at 337-40. The "first and foremost" language "did not create or imply a requirement that courts assess an employer's affirmative

exemption defense against every class member's claim before certifying an overtime class action." *Id.* at 337. *Sav-on* "specifically rejected the argument that *Ramirez* provides such authority regarding class action certifications, stating that there is no 'requirement that the courts assess an employer's affirmative exemption defense against every class members' claim before certifying an overtime class action.'" *Krzesniak*, 2007 WL 1795703, at *11 (quoting *Sav-on*, 34 Cal. 4th at 337); *see also Romero*, 235 F.R.D. at 487 ("defendant's invocation of [an overtime] exemption does not bar class certification.").

Thus, the predominance inquiry does not shift the employer's burden of proof on its affirmative exemption defense. *Sav-on*, 34 Cal. 4th at 338 ("Were we to require as a prerequisite to certification that plaintiffs demonstrate defendant's classification policy was . . . either 'right as to all members of the class or wrong as to all members of the class,' we effectively would reverse that burden."); *Romero*, 235 F.R.D. at 488 ("The Court will not relieve Defendant, merely because of the accident of the class action device, of its burden to prove the . . . exemption as an affirmative defense."); *see Alba v. Papa John's USA, Inc.*, No. CV 05-7487, 2007 WL 953849, at *10 (C.D. Cal. Feb. 7, 2007) (same).

The *Sav-on* analysis of exemptions in the class action context comports with the California Labor Code's "clear public policy . . . that is specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of workers." *Sav-on*, 34 Cal. 4th at 340, 342 (under California law, "[e]xemptions from statutory mandatory overtime provisions are narrowly construed.").

In sum, the district court's analysis conflicts with the California Labor Code, which allows exemption defenses to be tried on a class basis. Under California law, the common policies and procedures for Recruiters, which reflect Aerotek's expectations and the "actual requirements of the job," should have weighed heavily against the minor individual variations in daily tasks identified by the district court.

2. Application of This Court's Balancing Test for the Predominance Inquiry Mandates Certification.

A correct application of this Court's certification standards would have resulted in class certification in this case. Both *Vinole* and *Wells Fargo* direct district courts, in conducting their predominance inquiry, to "focus[ ] on whether the employer exercised some level of *centralized control* in the form of standardized hierarchy, standardized corporate policies and procedures governing employees, uniform training programs, and other factors susceptible to common proof." *Vinole*, 571 F.3d at 946; *see also Wells Fargo*, 571 F.3d at 958.

a. The District Court Found Centralized Control Sufficient to Satisfy the Predominance Inquiry.

The district court found substantial evidence on each of the factors this Court has recognized as showing predominant common issues. First, the district court found evidence of a "standardized hierarchy."[19] EOR at 33-34, Order 4:21-5:3. The district court next found evidence of "a uniform set of expectations for Recruiters on the part of Aerotek and a level of commonality across the putative class."[20] EOR at 60, *id.* at 31:4-6. Furthermore, the district court acknowledged that Plaintiffs made a "comprehensive showing that all Recruiters receive very similar training . . . and that job postings for Recruiters are roughly identical no matter what office or functional division the Recruiter is being hired into." EOR at

[19] Even where evidence of centralized policies is disputed, such factual disputes do not necessarily impede class certification. *Sav-on*, 34 Cal. 4th at 329 (affirming class certification even though evidence of defendant's policy and practice was "disputed"); *Damassia*, 250 F.R.D. at 161 ("Apparent inconsistencies in the record [we]re the result of overly aggressive lawyering" and did not foreclose finding of predominance).

[20] This finding was supported by voluminous training manuals, checklists, and other documents explicitly providing a step-by-step guide for each Recruiter job duty. *See* EOR at 1175-76, Handbook at AEROTEK00000725-26; EOR at 681, 719, 761, 778, 783, Module at AEROTEK008278, 8316, 8358, 8375, 8380; EOR at 1170-1317, Handbook at AEROTEK00000720-867; Section V.C., *supra*.

59-60, *id*. at 30:27-31:2. As detailed above, the Recruiter training specified each step of the Recruiter job in detail. *See* Section V.C., *supra*. In short, Aerotek's "highly standardized [] operation is designed to ensure that all [Recruiters] perform the same or substantially similar tasks in a similar manner." *Tierno v. Rite Aid Corp.*, No. C05-02520, 2006 WL 2535056, at *5 (N.D. Cal. Aug. 31, 2006); *Campbell v. PricewaterhouseCoopers, LLP*, 253 F.R.D. 586, 602 (E.D. Cal. 2008) ("based on the similarity of duties performed by [class members], class certification is appropriate" to adjudicate administrative exemption defense).

Such "uniform corporate policies will often bear heavily on questions of predominance" and "suggest a uniformity among employees that is susceptible to common proof." *Wells Fargo*, 571 F.3d at 958-59. The centralized control Aerotek exercised over its Recruiters is a far cry from the "unfettered autonomy" given to class members in *Vinole*.[21] 571 F.3d at 938-39, 947 (employer had "no control" and "no common scheme or policy that would diminish the need for individual inquiry"). "Where, as here, there is evidence that the duties of the job are largely defined by comprehensive corporate procedures and policies, district courts have routinely certified classes of employees challenging their classification as exempt, despite arguments about 'individualized' differences in job responsibilities." *Damassia*, 250 F.R.D. at 160.

Additionally, the evidence presented in this case should have been sufficient because "[a]t this stage in the litigation," "the Court need not weigh the persuasiveness of conflicting or competing evidence." *Kamar v. Radio Shack*

[21] The number of putative class members here is also much smaller than the number at stake in *Vinole* and *Wells Fargo*. Here, there are only approximately 727 class members, EOR at 1992, Def.'s Resp. to Pls. Marques' 1st Set Special Interrogs. (No. 4), whereas in *Vinole* and *Wells Fargo*, there were approximately 1,140 and 5,000 putative class members respectively. *Vinole*, 571 at 937; *Wells Fargo*, 571 F.3d at 955.

Corp., 254 F.R.D. 387, 395 (C.D. Cal. 2008) (citing *Staton v. Boeing Co.*, 327 F.3d 938, 954 (9th Cir. 2003)); *United Steel v. ConocoPhillips Co.*, 593 F.3d 802, 808 (9th Cir. 2010) (court lacks authority to conduct preliminary inquiry into merits in order to determine whether it may be maintained as class action); *Tierno*, 2006 WL 2535056, at *7 ("[A] class certification motion is not an occasion to 'advance to a decision on the merits.'"). In sum, if not for the district court's erroneous "hierarchy" construct which resulted in the negation of all of the above commonalities, Plaintiffs' proposed class would have been certified.[22]

b. Individual Variations Were Insignificant.

The district court also failed to balance the above common proof against the insignificant differences it identified and on which its opinion turns. For instance, the district court focused on such minor differences as whether or not recruiters: engaged in networking (EOR at 57, Order 28:3-7); "included questions and lines of conversation developed independently by the Recruiter" (*id.* at 28:11-12); and "steer[ed] the conversation" (*id.* at 28:16-17). From this alleged "broad diversity," the district court claimed that analysis of the exemption "require[d] an individualized factual inquiry." EOR at 58, Order 29:4, 8-9.

These are distinctions without a difference, however. All of the alleged distinctions were in fact controlled by Aerotek's common policies and detailed training program. For instance, in the vast majority of cases, the Recruiter's supervisor, not the Recruiter, sourced candidates for job positions. *See* Section V.C.2.a., *supra*. Further, Aerotek's Recruiter training materials and guidelines

[22] Aerotek also had a uniform exemption classification policy. "An internal policy that treats all employees alike for exemption purposes suggests that the employer believes some degree of homogeneity exists among the employees" and "is a permissible factor for consideration under Rule 23(b)(3)." *Wells Fargo*, 571 F.3d at 957.

detailed each one of the variations in sourcing, providing step-by-step checklists on how to network, review candidate referrals, and search through existing pools of job candidates. EOR at 799-805, 815-35, Module at AEROTEK008396-402, 8412-32; *see also* Section V.C.2.a., *supra*. Similarly, the common policies for screening candidates included step-by-step procedures and forms that Recruiters used to complete the interview process. EOR at 842-76, 894-902, Module at AEROTEK008439-73, 8491-99 (providing a "list of questions you *need to ask*" (emphasis added)); *see also* Section V.C.2.b., *supra*. The district court does not and cannot explain how any of the alleged variations it identifies affect any prong of the California administrative exemption analysis.

i. *Absolute Uniformity Is Not Required.*

Rule 23 predominance has never required absolute uniformity. *Kamar*, 254 F.R.D. at 399 ("the existence of certain individualized or deviating facts will not preclude certification"). None of the certification decisions cited with approval by *Vinole*, 571 F.3d at 946, required class members to be uniform or identical. *See, e.g.*, *Alba*, 2007 WL 953849, at *10 ("'[S]ome variation among the individual employees, as well as some potential difficulty in proof' do not defeat predominance." (quoting *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001))); *accord Tierno*, 2006 WL 2535056, at *5-10; *Damassia*, 250 F.R.D. at 152.

After all, "[i]f one zooms in close enough on anything, difference will abound." *Frank v. Gold'n Plump Poultry, Inc.*, No. 04-CV-1018, 2007 WL 2780504, at *4 (D. Minn. Sept. 24, 2007); *see also Damassia*, 250 F.R.D. at 161 ("[a]pparent inconsistencies in the record are the result of overly aggressive lawyering rather than credible testimony of [plaintiffs] or anyone else"). "[B]ecause the focus of the inquiry is on Defendant's conduct, the fact that the determination of whether an overtime exemption applies to an employee may be a

fact-intensive inquiry . . . does not defeat predominance." *Alba*, 2007 WL 953849, at *10. "[T]here is no 'requirement that the courts assess an employer's affirmative exemption defense against every class members' claim before certifying an overtime class action." *Krzesniak*, 2007 WL 1795703, at *17 (quoting *Sav-on*, 34 Cal. 4th at 336-37). Similar to *Tierno*, "[t]he evidence [here] does not indicate . . . that these types of variations render the [Recruiters] different from each other in any *fundamental* way." 2006 WL 2535056, at *6 (emphasis added). The district court therefore erred by relying on those minor variations without properly weighing the common policies, expectations, and training for Recruiter duties that "bear heavily" on predominance.

ii. *Individual Variations Do Not Negate Plaintiffs' Predominant Legal Theory.*

As a result of focusing on insignificant individual variations among a small number of Recruiters, the district court failed to account for the predominance of Plaintiffs' common legal theory of recovery. *See United Steel*, 593 F.3d at 808 (district court erred by "treat[ing] plaintiffs' actual legal theory as all but beside the point"); *Vathana v. EverBank*, No. C 09-02338, 2010 WL 934219, at *4 (N.D. Cal. Mar. 15, 2010) (predominance found because "legal theory of recovery . . . is one in which common issues of law and/or fact predominate"); *Jaimez v. DAIOHS USA, Inc.*, 181 Cal. App. 4th 1286, 1299 (2010) ("The trial court misapplied the criteria, focusing on the potential conflicting issues of fact or law on an individual basis, rather than evaluating 'whether the *theory of recovery* advanced by the plaintiff is likely to prove amenable to class treatment.'" (emphasis in original)).

In short, rather than focusing on minor variations among the putative class members in accordance with this Court's controlling precedent, the district court should have "focused on whether the employer exercised some level of centralized control in the form of standardized hierarchy, standardized corporate policies and

procedures governing employees, uniform training programs, and other factors susceptible to common proof." *Vinole*, 571 F.3d at 946. While the district court found that every single one of the important factors identified in *Vinole* were present in this case (*i.e.*, standardized hierarchy, standardized policies and procedures, uniform training program), it erred by failing to give them the "great weight" to which they are entitled in the predominance analysis. Due to these errors, the district court should be reversed, and this Court should instruct the district court to focus on these factors on remand.

C. The District Court Erred in Its Application of the Predominance Analysis to the Administrative Exemption.

The district court compounded its error by applying the incorrect underlying substantive legal criteria in analyzing whether Aerotek could prove its California administrative exemption defense on a class basis. California's administrative exemption applies only if *all* of the following five conditions are met. The employee must: (1) "perform[] office or non-manual work directly related to management policies or general business operations of his/her employer or his/her employer's customers; (2) "customarily and regularly exercise[] discretion and independent judgment"; (3) "perform[] under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge or "execute[] under only general supervision special assignments and tasks"; (4) be "primarily engaged in duties that meet the test of the exemption" at least 50 percent of the time; and (5) "earn a monthly salary equivalent to no less than two . . . times the state minimum wage for full-time employment." Wage Order #4-2001 § 1(A)(2); *Campbell v. PricewaterhouseCoopers, LLP*, 602 F. Supp. 2d. 1163, 1181-83 (E.D. Cal. 2009). The district court erred in its analysis of the first, second, third, and fourth requirements of the administrative exemption.

1. The District Court Erred by Failing to Certify on the First Administrative Exemption Condition.

The district court explicitly found that "[t]he first condition [] whether employees 'perform office or non-manual work directly related to management policies or general business operations of the employer or its customers'" "is a question common to the class." EOR at 56, Order 27:6-13. The class should have been certified on this ground alone because the entire administrative exemption defense fails if Aerotek fails to meet any one requirement.

This Court has held that, where appropriate, district courts should "separate" common issues and proceed with "class treatment of particular issues." *Arthur Young & Co. v. U.S. Dist. Ct.*, 549 F.2d 686, 692 (9th Cir. 1977); *see also Officers for Justice v. Civil Serv. Comm'n of the City & Cnty. of S.F.*, 688 F.2d 615, 635 n.20 (9th Cir. 1982) (same); *see also Kelley*, 2010 WL 3556196, at *1-2 (failure to "consider whether other elements of [plaintiffs'] claim present questions of law or fact common or individual to the class members, and what effect those questions, if any, have on the Rule 23(b)(3) predominance inquiry" is "reversible error"); *Tierno*, 2006 WL 2535056, at *5 ("If the common questions 'present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.'" (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998))).

2. The District Court Erred in Its Application of the "Discretion and Independent Judgment" Prong of the Administrative Exemption.

The district court committed legal error by misapplying the second administrative exemption requirement in two ways. First, it applied the wrong regulations, applying the 2004 federal regulations, when only the 2001 federal regulations have been incorporated into California law. Second, it failed to inquire

whether any purported differences in the exercise of "discretion and independent judgment" were with respect to "matters of significance."

a. The District Court Relied on the Wrong Regulations.

i. *The District Court Disregarded the 2001 Regulations Governing Personnel Clerks.*

The district court erroneously relied on language from the 2004 regulations.[23] Only the 2001 federal regulations have been incorporated into California law. *See* Wage Order #4-2001 § 1(A)(2)(f) ("The activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the . . . regulations under the Fair Labor Standards Act effective as of the date of this order [January 1, 2001] . . .").

The governing 2001 regulations contained a "personnel clerk" example directly relevant to the question of discretion and independent judgment in this case. The 2001 regulations identified the "'*screening' of applicants* by a personnel clerk" as a "type of situation where skill in the application of techniques and procedures is sometimes *confused with discretion and independent judgment*." 29 C.F.R. § 541.207(c)(5) (2001) (emphasis added).

The regulations elaborated that non-exempt personnel clerks "will *interview applicants and obtain from them data regarding their qualifications and fitness for employment*." *Id*. (emphasis added). Similar to Recruiters, the screening activities for non-exempt personnel clerks are regimented and defined by the employer. *Id.* (screening "data may be entered on a form specially prepared for the purpose. The 'screening' operation consists of rejecting all applicants who do not meet standards

[23] The district court purported to evaluate the "discretion and independent judgment" prong by following the 2001 federal regulations, but *the language it relied upon was from the 2004 federal regulations*. EOR at 48-49, Order 19:5-20:12 (taking language from 29 C.F.R. §§ 541.201 and 541.202 (2004)); EOR at 56, *id.* at 27:16-23 (taking language from 29 C.F.R. § 541.202 (2004)).

for the particular job or for employment by the company. The standards are usually set by the employee's superior or other company officials . . ."). Also similar to Recruiters, "the decision to hire from the group of applicants who do meet the standards is . . . made by other company officials." *Id.* Given these limited duties, "*such a personnel clerk does not exercise discretion and independent judgment* as required by the regulations." *Id.* (emphasis added).

"On the other hand an *exempt personnel manager* [similar to Aerotek's AMs] will often perform similar functions: that is, he will interview applicants to obtain the necessary data and eliminate applicants who are not qualified. The personnel manager *will then hire one of the qualified applicants*." *Id.* (emphasis added). This regulation is particularly significant because the standards set forth in the 2001 regulations determine whether the individual variations of class members actually matter with respect to the exemption inquiry. This "personnel clerk" example was omitted from the 2004 regulations.

Although the district court noted that the 2001 regulations contained the example of a non-exempt "personnel clerk," it minimized the example by paraphrasing it in a way that is not supported by the actual language of the regulation. Contrary to the district court's reading, there is nothing in the actual language of the regulation that requires screening be a non-exempt personnel clerk's "entire responsibility," that the clerk "us[e] pre-existing criteria to screen out unacceptable candidates from a list," or that the clerk "creat[e] a large pool of acceptable candidates." EOR at 49, Order 20:22-24. Nor is there anything in the regulation stating that "a clerk who both screens out unacceptable candidates from a list and selects which candidates from the acceptable pool are ultimately hired likely does use discretion and independent judgment and is probably exempt." *Id.* at 20:23-25.

In fact, the regulations are much more restrictive about the meaning of "discretion and independent judgment" than the district court allows. Under the 2001 regulations, a non-exempt personnel clerk could screen and select without performing the actual hiring. Thus, under the 2001 regulations, Aerotek's Recruiters, who interview and screen but do not hire applicants, are non-exempt personnel clerks as a matter of law. By failing to follow the operative 2001 regulations, the district court committed a reversible error of law. *Bell v. Farmers Ins. Exch.*, 87 Cal. App. 4th 805, 818 (2001) ("[T]he trial court erred in relying on federal authorities in construing the wage order [because] 'where the language or intent of state and federal labor laws substantially differ, reliance on federal regulations or interpretations to construe state regulations is misplaced.'").

ii. *The District Court Erroneously Applied the 2004 Regulations.*

The district court made a variety of other errors that show it was applying the wrong substantive legal criteria.[24] For instance, the district court cited a definition of "independent judgment" that does not appear in the 2001 regulations. *See* Order at 20:8-12 ("Independent judgment means that an employee has authority to make an independent choice, free from immediate direction or supervision, but not that this choice is not 'reviewed at a higher level.' 29 C.F.R. § 541.202(c) (2001). The power to make independent recommendations may suffice to meet the second condition. *Id.*."). In fact, the 2001 regulations never state, as the district court claimed, that "[t]he power to make independent recommendations may suffice to meet the discretion and independent judgment

[24] The district court extensively quoted the language about discretion and independent judgment from the regulation that does not exist in the 2001 version. *See* EOR at 49, Order 20:2-8 (purporting to quote 29 C.F.R. § 541.202(b) (2001)); EOR at 56, *id.* at 27:16-20 (same). *Compare* 29 C.F.R. § 541.207 (2001) *with* 29 C.F.R. § 541.202 (2004).

condition," Order at 20:10-12. *See* 29 C.F.R. § 541.207(d) (2001) ("discretion and independent judgment" "must be exercised with respect to matters of consequence"). Even the 2004 regulations never state that the ability to make "independent recommendations" alone will suffice; rather, the recommendations must be with respect to matters of significance. *See* 29 C.F.R. § 541.202(a) (2004) ("To qualify . . . the exercise of discretion and independent judgment [must be] *with respect to matters of significance*" (emphasis added)).

Further, the district court erroneously held that "whether an employee has authority to make an independent recommendation to his or her superiors or to the company's customers, not whether the recommendation is reviewed at a higher level,'" is the "central question" for determining whether employees "customarily and regularly exercised discretion and independent judgment." EOR at 56, Order 27:20-23 (purporting to quote 29 C.F.R. § 541.202(c) (2001)). This language never appears in the 2001 regulations, which instead specified that where "[t]he standards are usually set by the employee's superior or other company officials, and the decision to hire from the group of applicants who do meet the standards is similarly made by other company officials," the personnel clerk is not exempt. 29 C.F.R. § 541.207 (2001). The district court's reliance on the 2004 regulations is legal error warranting reversal.

iii. *Under the 2001 Regulations, Recruiters Did Not Exercise "Discretion and Independent Judgment."*

Given the factual record presented, Aerotek Recruiters did not exercise "discretion and independent judgment" within the meaning of the administrative exemption. As stated above, the "personnel clerk" example in the 2001 regulations is directly relevant and analogous to the Recruiter position, and, as such, Recruiters do not exercise discretion and independent judgment.

The 2001 regulations similarly counsel that "discretion and independent judgment" should not be confused with "the use of skill in applying techniques, procedures, or specific standards." 29 C.F.R. § 541.207(b) (2001). "Applying techniques, procedures, or specific standards," however, is exactly what Aerotek Recruiters do. The training manuals and procedure guides explicitly provide the techniques, procedures, and standards required for Recruiters to do their jobs. *See* Section V.C., *supra*.

The "variations" about which the district court was concerned, EOR at 56-58, Order 27:26-29:2, are minor differences, and Aerotek's *common policies address these differences*. *See* Section V.C., *supra*. For instance, the different methods of sourcing are explicitly outlined in the Recruiter training materials, which included specific step-by-step instructions for each type of sourcing. *See* Section V.C.2.a., *supra*. Similarly, the different methods of screening candidates are outlined and strictly regimented by Aerotek's written policies and procedures, which include step-by-step checklists, detailed forms, mandatory interview questions, interview agendas, and instructions for conducting reference checks. *See* Section V.C.2.b., *supra*. These detailed procedures that address the alleged "variations" in Recruiter duties show that any variation simply represented another iteration of "applying techniques, procedures, or specific standards," which does not constitute discretion and independent judgment. 29 C.F.R. § 541.207(b) (2001). Because these alleged variations are merely "skills gained and/or honed in their [Aerotek] training sessions" "exercised within severe limits imposed by" Aerotek, the district court erred as a matter of law by concluding that these differences – regardless of whether any one of these different activities constituted "discretion and independent judgment" – defeated predominance. *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 157 (2d Cir. 2010) (pharmaceutical sales

representatives who underwent an extensive training program and were given step-by-step training materials did not exercise discretion and independent judgment).

b. The District Court Failed to Analyze Whether Individual Variations Concerned "Matters of Significance."

The 2001 regulations specify "discretion and independent judgment" must concern "matters of significance." 29 C.F.R. § 541.207(a) (2001) ("exercise of discretion and independent judgment" "implies . . . the authority or power to make an independent choice, free from immediate direction or supervision and with respect to *matters of significance*" (emphasis added)); *see also* 29 C.F.R. § 541.207(d) (2001) ("[i]n one sense almost every employee is required to use some discretion and independent judgment," so "the discretion and independent judgment exercised must be *real and substantial*, that is, they must be exercised with respect to *matters of consequence*."); *Novartis*, 611 F.3d at 156 (requiring "a showing of a greater degree of discretion, and more authority to use independent judgment in matters of significance"); *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1129 (9th Cir. 2002) ("discretion and independent judgment" condition requires consideration of *both* the "extent to which [the employee] was permitted to make decisions" *and* "the importance of the decisions of which he had control"). Thus, the 2001 regulations and applicable case law counsel that individual variations are irrelevant unless they involve matters of significance.

The record in this case strongly suggests that any variations in sourcing and screening tasks did *not* involve matters of significance. The common policies which "bear heavily" on the predominance analysis show that Recruiters were given detailed, step-by-step instructions on each type of sourcing (including how to network), what interview questions to ask, what pay ranges were permitted, and how to submit candidates to their supervisors. *See* Section V.C., *supra*. Failure to consider or weigh these common policies and the district court's single-minded

focus on minor individual variations was error and warrants reversal. *See, e.g.*, *Kamar*, 254 F.R.D. at 400-01 ("purported issues simply do not affect . . . the predominance inquiry" because they are "not directly relevant to [Defendant's] legal obligation.").

Given the "matters of significance" standard, there are at least eight predominant common questions related to individual variations identified by the district court suitable for certification here, including whether any of the following tasks involved "matters of significance":

(1) "[w]hen compiling possible candidates at the 'Sourcing' stage," "eschew[ing] [internal Aerotek software and databases containing candidate lists]," EOR at 56, Order 27:26-28;

(2) using "networking" as a "method[ ] of sourcing," EOR at 57, *id*. at 28:3-5;

(3) "com[ing] up on their own with new and entrepreneurial ways to source candidates," *id*. at 28:6-8;

(4) coming up with interview "questions and lines of conversation," *id*. at 28:11-12;

(5) reliance "on the Recruiter's discretion in steering the [interview] conversation," *id.* at 28:15-17;

(6) "negotiat[ing] pay rates" within a set pay range, *id.* at 28:21;

(7) "mak[ing] recommendations to clients as to the pay rates clients proposed to offer," *id.* at 28:23-24; and

(8) "recommend[ing] candidates to customer companies," *id.* at 28:25-26.

These California exemption "issue[s] . . . can easily be resolved on a class-wide basis by assigning each task to one side of the 'ledger' and makes the manageability of the case not the daunting task [the court] has sought to portray." *Sav-on*, 34 Cal. 4th at 331. The district court erred by failing to explain why

common evidence could not be used to determine whether the "discretion and independent judgment" that allegedly differs is on "matters of significance" or "consequence." EOR at 56-58, Order 27:14-29:9. Because all of these questions are relevant to class members' claims, "[l]itigating the characterization of . . . tasks over and over again in individual actions would be impractical," and neither reasonable nor superior. *Romero*, 235 F.R.D. at 490.

3. The District Court Erred in Its Application of the Lack of "General Supervision" Requirement to the Facts.

The district court also committed multiple legal errors in analyzing the third condition of California's administrative exemption – whether employees perform "work along specialized or technical lines" or "special assignments and tasks" under "only general supervision." Wage Order #4-2001 § 1(A)(3).

a. The District Court Erroneously Elevated Minor Individual Variations over Common Policies of Close Supervision.

First, the district court erroneously applied its "hierarchy of evidence," thereby discounting evidence of common policies reflecting close supervision. *Wells Fargo* counseled that "centralized work polic[ies]" "will often bear heavily on questions of predominance." 571 F.3d at 958-59. Here, Plaintiffs presented just such "centralized work polic[ies]" of close supervision showing that Aerotek provided "close management" by requiring all Recruiters to attend daily meetings. Even the district court acknowledged that since "*all* Recruiters, regardless of their local office or functional division are subject to *close management* in at least twice-daily Red Zone meetings and at least once-daily triangle meetings whether the third condition is met will be informed by common proof." EOR at 58, Order 29:13-16 (emphasis added). Recruiters were further micromanaged through Recruiter Lead meetings and daily and weekly productivity goals. EOR at 763, 766, Module at AEROTEK008360, 8363; Section V.D., *supra*.

However, the court decided that the "general supervision" prong of the administrative exemption could not be tried with common evidence due to the possibility of minor variations in the "specificity of supervision." EOR at 58, Order 29:17-19 (stating a policy of "attendance at thrice-daily meetings is *not necessarily* enough to determine whether the third condition applies" and finding that because the "specificity of supervision varied," common questions of fact do not predominate over individual questions of fact (emphasis added)). The district court, in essence, treated possible individual variations in the *method* by which a manager *closely* supervised a Recruiter as presumptively precluding predominance on the "general supervision factor." *Id.* However, variation in the *specifics* of supervision does not matter for the "general supervision" prong of the exemption. Rather, it is the *degree* of supervision that is determinative, *i.e.*, is it "general" or is it "close"? The district court had already determined that Recruiters are subject to "close management" at thrice daily meetings. That is enough for class certification on the "general supervision" prong of the exemption (and likely for liability as well).

Moreover, neither *Wells Fargo* nor *Vinole* provides any basis for the district court to require that common policies of supervision "necessarily" resolve an exemption condition before such common policies may create predominance for class certification. By focusing upon whether a centralized work policy was "necessarily" conclusive about a particular exemption rather than whether this policy "facilitated" the resolution of this controlling issue, the district court erred. "[T]he mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendants' liability have been resolved does not dictate the conclusion that a class action is impermissible." *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 341 (C.D. Cal. 1998) (quoting *Sterling v. Velsico Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988)); *see also Brown v.*

Kelly, 609 F.3d 467, 483 (2d Cir. 2010) ("variations in the sources and application of a defense will not automatically foreclose class certification under Rule 23(b)(3)") (internal citations omitted); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 288, 296 (1st Cir. 2000) ("[T]he fact that a defense may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones."). Similarly, the district court erred by treating the variation in manner of supervision as a "touchstone" for the determination of predominance without analyzing whether the common work policies might facilitate common proof.

b. The District Court Erroneously Conflated "General Supervision" with "Discretion and Independent Judgment."

The district court additionally abused its discretion by failing to distinguish between the second and third administrative exemption conditions. "The 'general supervision' and 'discretion and independent judgment' elements of the administrative exemption are distinct" and must be analyzed separately. *Campbell*, 602 F. Supp. 2d at 1184. "Class members may exercise independent judgment in completing [certain tasks], but this possibility does not call into question the conclusion that whenever class members make decisions, those decisions are subject to supervision." *Id.*

The district court's discussion regarding "general supervision" (the third factor) focused upon the varying circumstances whereby Recruiters may exercise "discretion and independent judgment" (the second factor). The district court merely stated that this "discretion and independent judgment" discussion shows that the "specificity of supervision varied widely from Recruiter to Recruiter." EOR at 58, Order 29:18-19. This absence of "general supervision" analysis is erroneous because Recruiters may "regularly exercise discretion and independent judgment" (second factor), but *not* perform under "only general supervision" (third

factor). Failure to analyze each condition for the administrative exemption separately warrants reversal.

c. The District Court Failed to Analyze Whether Common Evidence Could Show Whether Work Performed Was "Along Specialized or Technical Lines."

The district court's faulty analysis of the general supervision requirement was compounded by its failure to analyze whether Aerotek could prove the second part of the requirement with common evidence – whether work performed was "along specialized or technical lines requiring special training, experience, or knowledge." IWC Order #4-2001 § 1(A)(2)(d). The district court already identified certain tasks common to all Recruiters, such as compiling lists of candidates, networking, and coming up with interview questions and lines of conversation. EOR at 56-57, Order 27-28. It is a common question of law as to whether such tasks could ever qualify as "specialized or technical" work "requiring special training, experience or knowledge."

Given the probability that such work does not qualify for the "general supervision" prong of the administrative exemption, the district court's failure to analyze or even acknowledge this aspect of the exemption is reversible legal error. *Compare Herrera v. F.H. Paschen*, No. D051369, 2008 WL 5207359, at *6 (Cal. App. Dec. 15, 2008) (unpublished) (finding project managers who prepared proposals and used a computer software program did not as a matter of law have the requisite special training, experience, or knowledge) *with Hodge v. Aon Ins. Servs.*, No. B217156, 2011 WL 653646, at *11 (Cal. App. Feb. 24, 2011) (finding claims adjusters who set reserves, negotiated settlements, managed outside litigation counsel and related litigation expenses, and appeared at court hearings had special training, experience or knowledge) *and Ho v. Ernst & Young LLP*, No. C 05-4867, 2008 WL 619029, at *1, 4 (N.D. Cal. Mar. 4, 2008) (unpublished)

(finding law school graduate with specialized training in tax law who reviewed and analyzed client data, identified and researched tax issues, responded to client questions, and developed client relationships had requisite training, experience, and knowledge).

4. The District Court Erred by Failing to Certify the Class Based on Whether Recruiters Spend More Than 50% of Their Time Performing Exempt Work.

To prove the fourth administrative exemption requirement, Aerotek would have to show that Recruiters spend more than 50% of their time performing exempt work. Thus, even if some of the *tasks* Recruiters perform are exempt, *Recruiters* must spend more than 50% of their time performing those tasks to qualify for exempt status. The question – whether the amount of time Recruiters spend on sourcing and screening (arguably non-exempt tasks) comprises at least 50% of their time – is a common question that should have been certified. EOR at 59, Order 30:16-17 (that "all Recruiters spend over 50% of their time sourcing and screening may be established by common proof").

However, the district court erroneously conflated this "50%" requirement with other administrative exemption requirements, finding that "the more salient question of whether a Recruiter is performing tasks meeting the test for exemption over 50% of the time will likely require resolving individual questions of fact." *Id.* at 30:17-19. However, "task classification is a mixed question of law and fact appropriate for a court to address *separately* from calculating the amount of time specific employees actually spend on specific tasks." *Sav-on*, 34 Cal. 4th at 330 (emphasis added); *see also Donovan v. Burger King Corp.*, 672 F.2d 221, 228 (1st Cir. 1982) (exemption factors must be analyzed separately).

In sum, "[t]he question whether [Plaintiffs] are 'exempt' is a common defense for Defendant[] in this case, which supports class adjudication." *Alba*,

2007 WL 953849, at *13; *see also Romero*, 235 F.R.D. at 490 ("the existence of the potential overtime exemption . . . counsels strongly in favor of class treatment . . ."). Failure to "consider whether other elements of [Plaintiffs'] claim present questions of law or fact common or individual to the class members, and what effect those questions, if any, have on the Rule 23(b)(3) predominance inquiry" is reversible error. *Kelley*, 2010 WL 3556196, at *2. "Here, the district court not only 'judge[d] the validity' of [Aerotek's exemption defense], it did so using a nearly insurmountable standard, concluding that merely because it was not *assured* that plaintiffs would prevail on [Aerotek's exemption theory], that theory was not the appropriate basis for "a predominance finding. *United Steel*, 593 F.3d at 809. The use of this erroneous and insurmountable standard is reversible error. *Id.*

Plaintiffs have shown that common questions predominated for all five conditions for the administrative exemption.[25] "[T]o the extent that the claim of each plaintiff depends upon proof concerning . . . common issues, it would serve no purpose to force multiple trials to hear the evidence and decide the same issues." *O'Connor*, 184 F.R.D. at 339-40 (quoting *Sterling*, 855 F.2d at 1197). "Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy." *Id*. (quoting *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996)). The district court erred by failing to certify these common questions.

D. The District Court Erred in Its Finding That a Class Action in This Case Would Not Be Superior.

Rule 23(b)(3) permits class actions when they are "superior to other available methods for fairly and efficiently adjudicating the controversy." "Typically, a class action is superior if the case presents a large volume of

[25] The fifth condition is not in dispute.

individual claims that could strain judicial resources if tried separately and if each potential plaintiffs' recovery may not justify the cost of individual litigation." *Alba*, 2007 WL 953849, at *15 (citing *Amchem Prods.*, 521 U.S. at 616-17). "Because[, as explained above,] common issues do predominate, a class action is the superior method of adjudicating this action." *Flood v. Dominguez*, 270 F.R.D. 413, 422 (N.D. Ind. 2010); *see also Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 389 (D. Colo. 1993) ("Relitigation or repetitive discovery of the same core issues would be grossly inefficient and wasteful of the resources of the parties and the courts."); *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 67 (S.D. Ohio 1991) (same). "If a class was not certified in this case, the alternative would be either numerous individual suits or the abandonment of individual claims." *Tierno*, 2006 WL 2535056, at *12. "The former would undoubtedly result in a great duplication of effort given the predominance of common questions of law and fact, while the latter would result in loss of access to the courts. *Id.*; *see also Krzesniak*, 2007 WL 1795703, at *11 (same).

Moreover, individual issues would not diminish efficiency because courts seeking to preserve efficiency and other benefits of class actions "may properly couple uniform findings on common issues regarding the proper classification of the position at issue with innovative procedural tools . . . includ[ing] administrative miniprocedings, special master hearings, and specially fashioned formulas or surveys." *Krzesniak*, 2007 WL 1795703, at *20 (quoting *Tierno*, 2006 WL 2535056, at *11); *Romero*, 235 F.R.D. at 487 (same). *See, e.g.*, *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 638 (S.D. Cal. 2010) (approving of statistical sampling); *O'Connor*, 184 F.R.D. at 327-28 ("excludable class members . . . determined by . . . questionnaire"); *Day v. NLO*, 851 F. Supp. 869, 876 (S.D. Ohio 1994) (special master assigned to individualized hearings); *Rodriguez v. McKinney*, 156 F.R.D. 118, 119 (E.D. Pa. 1994) (submission of simple

documentary evidence by class members). "[F]ailure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule." *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 148 (C.D. Cal. 2007) (quoting *Visa Check*, 280 F.3d at 140); *Dziennik v. Sealift, Inc.*, No. 05-CV-4659, 2007 WL 1580080, at *12 (E.D.N.Y. May 29, 2007) (same).

Here, there are multiple and predominant common questions that should be resolved on a class-wide basis. However, the district court did not even discuss the manageability of these common legal and factual questions; it instead assumed, based on its misunderstanding of class certification jurisprudence and California's administrative exemption, that prosecution of class claims would be unmanageable and therefore not superior. EOR at 61, Order 32:3-9. The court's failure to conduct such an analysis is reversible error. *United Steel*, 593 F.3d at 810 ("What a district court may not do is to assume, *arguendo*, that problems will arise, and decline to certify the class on the basis of a mere potentiality that may or may not be realized."). Litigating these issues together would be far superior to the multiple trials that denial of certification necessitates.

VIII. CONCLUSION

For the foregoing reasons, this Court should reverse the district court's denial of class certification and remand with instructions to conduct its predominance analysis by placing "great weight" on Aerotek's common policies and standardized training, as required by *Wells Fargo* and *Vinole*.

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Respectfully submitted,

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STATEMENT OF RELATED CASES

Case No. 10-56755, Ryan DeLodder, et al. v. Aerotek, Inc.

Attorneys for Plaintiffs-Appellants are not aware of any related cases pending in this Court, as defined in Ninth Circuit Rule 28-2.6.

Dated: March 9, 2011

/s/
Guy B. Wallace

Attorney of record for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(C) AND CIRCUIT RULE 32-1

This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(7)(B) because it contains 13,984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Word in 14-point font size and Times New Roman type style.

Dated: March 9, 2011

/s/
Guy B. Wallace

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2011, I electronically filed the foregoing with the Clerk of the Court for the Untied States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: March 9, 2011

By: /s/
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ADDENDUM OF FEDERAL AND CALIFORNIA REGULATIONS

Exh.	Description
1.	Industrial Welfare Commission Wage Order #4-2001
2.	29 C.F.R. § 541.202 (2001)*
3.	29 C.F.R. § 541.207 (2001)*
4.	29 C.F.R. § 541.201 (2004)
5.	29 C.F.R. § 541.202 (2004)

* Data from the July 1, 2001 edition of Title 29, Volume 2, Volume 3, and Volume 7, continues to carry the revision date of July 1, 1998 because no amendments were published in the Federal Register during the period of July 1, 1998 through July 1, 2001.