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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ALAMEDA

ANGELA BATES, et al.

Plaintiffs

v.

KB HOME, et al.

Defendants

) RG08-384954

)

) ORDER (1) GRANTING MOTION TO  
CERTIFY ESCROW CLASS; (2)

) GRANTING MOTION TO CERTIFY

) CONTRACT COORDINATION FEE

) SUB-CLASS; AND (3) DENYING

) MOTION TO CERTIFY INTEREST SUB-  
CLASS.

)

) Date: December 10, 2009

) Time: 9:00 am

) Dept.: 17

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The motion of Plaintiff for class certification came on for hearing on December 10, 2009, in Department 17 of this Court, the Steven A. Brick presiding. The Court permitted post-hearing submissions regarding the proposed Interest sub-class. After consideration of the briefing and the argument, IT IS ORDERED: The motion of Plaintiff to certify the Escrow class is GRANTED. The motion of Plaintiff to certify the proposed Contract Coordination Fee subclass is GRANTED. The motion of Plaintiff to certify the proposed Interest Subclass is DENIED.

1 **FACTUAL BACKGROUND**

2 KB Home builds and sells homes on specification. In 1999 KB Home formed  
3 Homesafe Escrow Company to provide escrow and closing services to KB Home buyers.  
4 In 2000 KB Home sold 5% of Homesafe Escrow to First American Title Insurance  
5 Company. From 1999 through February 8, 2001, Homesafe Escrow had escrow licenses  
6 and provided escrow services.  
7

8 On February 9, 2001, KB Home rearranged its relationship with Homesafe  
9 Escrow and First American. Homesafe escrow relinquished its escrow licenses, ceased  
10 providing escrow services and instead began providing “contract coordination services.”  
11 Homesafe employees were paid by KB Home but were physically located in First  
12 American’s offices. Homesafe provided administrative services and acted as a financial  
13 conduit between KB Home, buyers, and First American.  
14

15 On September 24, 2003, KB Home formed Homesafe Company. Homesafe has  
16 never had any escrow licenses. Homesafe received earnest money deposit checks and  
17 provided contract coordination services. Homesafe employees were paid by KB Home  
18 but were physically located in the offices of First American, which provided escrow and  
19 title insurances services.  
20

21 KB Home was organized into divisions, which in turn built communities. Each  
22 community had a preferred escrow holder. (DX 33, Chew Decl. para 16.) First  
23 American was the preferred escrow holder in communities representing approximately  
24 85% of KB Home's residences. (DX 34, Silver Dec., para 24) In those communities, the  
25 KB Home salespeople recommended that buyers write deposit checks to Homesafe and  
26 use First American as the escrow company. (PX A, Silver Depo at 27-28; 36-37.)  
27

1           When a buyer decided to buy a home from KB Home in a community where First  
2 American was the preferred escrow holder, the buyer would meet with a KB Home  
3 salesperson, fill out "Purchase Agreement and Escrow Instructions," and pay an earnest  
4 money deposit to Homesafe. (DX Exh 1-21.) In those communities, the KB Home  
5 salespeople followed a script under which they asked the buyers to pay the deposit of 3%  
6 to Homesafe. (PX Exh O, Chew Depo.) The buyers were not required to pay the deposit  
7 to Homesafe and were only asked to pay the deposit to Homesafe. (OE 38-41.) The KB  
8 Home Purchase Agreement states at para 2 that "the Deposit shall be delivered to the  
9 Escrow Holder." (PX Q, KB003144.) The "Release of Deposit" authorized the Escrow  
10 Holder to deliver the buyer's deposit to KB Home. (PX Q, KB003153.) Under this  
11 arrangement, buyers made out checks to Homesafe and Homesafe regularly transferred  
12 deposits to KB Home. (DX 34, Silver Decl. ¶ 27.) The Purchase Agreement and Release  
13 of Deposit never mention Homesafe by name but the Affiliate Business Arrangement  
14 ("ABA") document discloses that KB Home and Homesafe are affiliated entities. (PX Q,  
15 KB003154)

16           The KB Home Purchase Agreement authorizes KB Home to use a "contract  
17 coordinator" and states that the buyer will pay the fee for such service. The ABA  
18 document states that Homesafe provides contract coordination services and that the  
19 estimated charge to be paid to Homesafe is \$275. Homesafe always charged \$275. In  
20 KB Home communities where First American was not the preferred provider the buyers  
21 were typically not charged any contract coordination fee, but the escrow fee charged was  
22 often higher than the fee charged by First American. (Condon Dec. ¶¶ 27-29.) In sales  
23 involving VA or FHA financing, Homesafe did not charge a contract coordination fee  
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1 because neither HUD nor the VA allowed such fees. In the communities where First  
2 American was not the preferred provider KB Home is unaware of any buyer who used a  
3 contract coordinator other than Homesafe. (PX H, Response to SI # 20.)

4 In March 2006 the U. S. Department of Housing and Urban Development  
5 investigated the relationship between KB Home, Homesafe, and First American for  
6 compliance with the Real Estate Settlement Practices Act of 1974 (RESPA). In reaction  
7 to that investigation, First American notified KB Home that it would terminate the  
8 agreement to use Homesafe employees to provide contract coordination services.  
9 Effective March 1, 2007, all Homesafe employees were terminated from KB Home.  
10 Most Homesafe employees were then hired by First American.  
11

#### 12 13 **CLAIMS ASSERTED**

14  
15 Plaintiff alleges generally that Homesafe was effectively a controlled escrow  
16 company, that KB Home effectively required buyers to use Homesafe as an escrow  
17 company, and that KB Home must return the \$275 that Homesafe collected for what were  
18 effectively escrow services. In addition, Plaintiff alleges that under paragraph 17 of her  
19 "Purchase Agreement and Escrow Instructions" she and persons with similar contracts  
20 must be paid interest on funds in escrow.  
21

22 The First Amended Complaint filed October 24, 2008, alleges four causes of  
23 action: (1) Civil Code § 2995; (2) Business and Professions Code § 17200 et seq, (the  
24 UCL) based on unlawful, unfair, and fraudulent business practices; (3) breach of  
25 contract; and (4) breach of fiduciary duty. Class certification is determined with  
26 reference to each claim asserted, and must take into account whether a class is  
27

1 appropriate for each claim. *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal. App.  
2 4th 908, 916 fn 22.

3  
4 **LEGAL STANDARD**

5 Class certification under C.C.P. § 382 is determined under well established  
6 standards. *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 435. The Court is vested  
7 with discretion in weighing the concerns that affect class certification. *Sav-on Drug*  
8 *Stores Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 and 336. The merits of a  
9 lawsuit are usually not considered on motions for class certification. *Linder, supra*, 23  
10 Cal. 4th at 440 and 443. Following *Linder*, the Court will require KB Home to make its  
11 merits arguments in separate motions directed to the merits of the case.  
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15 **PRACTICALITY OF BRINGING ALL CLASS MEMBERS BEFORE THE**  
16 **COURT (NUMERIOSITY)**

17 Escrow Class and Contract Coordination Fee Subclass. There are approximately  
18 25,000 persons in the Escrow Class and approximately 15,000 persons in the Contract  
19 Coordination Fee Subclass. KB Home does not contest numerosity. The Court finds that  
20 the proposed class and subclass are numerous.  
21

22 Interest Subclass. There is no evidence of the number of persons in the Interest  
23 Subclass. Out of the 25,000 persons in the Escrow Class, KB Home sampled 36 files and  
24 found 2 that included contracts identified persons who would be in the Interest Subclass,  
25 and both persons bought homes from the same KB Home division. Fredman Dec., ¶ 7.  
26 There is, however, no sound statistical basis to extrapolate from that limited sample to  
27

1 either the entire class or to the persons in the division where the 2 contracts were located.  
2 Plaintiff had the burden of presenting evidence that the proposed Interest Subclass was  
3 numerous and she has not met that burden.  
4

5 **ASCERTAINABILITY**

6 Legal standard. “[Ascertainability] goes to the heart of the question of class  
7 certification, which requires a class definition that is 'precise, objective and presently  
8 ascertainable.' Otherwise, it is not possible to give adequate notice to class members or  
9 to determine after the litigation has concluded who is barred from relitigating.” *Global*  
10 *Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal. App. 4th 836, 858. See also  
11 *Cohen v. DirecTV* (2009) 178 Cal.App.4th 966, 976 (“The defined class of all HD  
12 Package subscribers is precise, with objective characteristics and transactional  
13 parameters, and can be determined by DIRECTV's own account records.”).  
14

15 Class Definition. Plaintiff proposes the following class definition for the Escrow  
16 class:  
17

18 All persons, excluding governmental entities, Defendants, and subsidiaries  
19 and affiliates of Defendants, who purchased residential property in  
20 California from Defendant KB Home and/or its subsidiaries during the  
21 period commencing September 24, 2003, through the date of judgment in  
22 this action and paid their initial deposit monies to Homesafe Escrow  
23 Company and/or Homesafe Company at the time of contracting.

24 The Court will modify Plaintiff’s proposed class definitions somewhat because (1) there  
25 is no evidence or implication that the Defendant corporate entities ever purchased  
26 residential real estate and (2) the class definition must have a temporal limitation to  
27 ensure that all class member have an opportunity to receive notice and opt-out. *Hicks*, 89

1 Cal.App.4<sup>th</sup> at 916, fn18 (Court can redefine class). The Court will redefine the Escrow  
2 class as follows:

3 All persons, excluding governmental entities, who purchased residential  
4 property in California from Defendant KB Home and/or its subsidiaries  
5 during the period commencing September 24, 2003, through December  
6 31, 2009, and paid their initial deposit monies to Homesafe Escrow  
7 Company and/or Homesafe Company at the time of contracting.

8 Sub-class Definition. The Court finds that Plaintiffs' proposed Contract  
9 Coordination Fee subclass definition is adequate.

## 10 **COMMONALITY.**

### 11 Predominant common questions of law or fact.

12 "Plaintiffs' burden on moving for class certification ... is not merely to show that  
13 some common issues exist, but, rather, to place substantial evidence in the record that  
14 some common issues *predominate*." *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.  
15 4th 1096, 1108. It is not, however, necessary that the allegedly unlawful practice  
16 affected every member of the proposed class in the same way or that the practice had a  
17 consistent effect on all members of the class.

18 The Court can certify a class based on a demonstration of partial commonality.  
19 *Sav-On, supra*, addresses this in several places, stating, "Predominance is a comparative  
20 concept," 34 Cal. 4<sup>th</sup> at 334, that the community of interest requirement does not mandate  
21 that class members' claims be uniform or identical, 34 Cal.4<sup>th</sup> at 338, that the "logic of  
22 predominance" does not require a plaintiff to prove that a defendant's policy was "either  
23 right as to all members of the class or wrong as to all members of the class," 34 Cal. 4th  
24 at 338, and "the established legal standard for commonality ... is comparative," 34  
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1 Cal.4<sup>th</sup> at 339. *Bell v. Farmers Ins. Exchange* (2004) 115 Cal. App. 4th 715, 750 (*Bell*  
2 *III*), holds that a class trial can be proper even if (1) some individual members of the class  
3 cannot, or do not, prove that they were damaged, 115 Cal.App.4<sup>th</sup> at 744; and (2) an  
4 award of aggregate damages results in overcompensating some class members and under  
5 compensating others, 115 Cal.App.4<sup>th</sup> at 750-751. *Stephens v. Montgomery Ward* (1987)  
6 193 Cal.App.3d 411, 416 fn1, suggests that it can be appropriate to certify a class of  
7 women to pursue claims for sex discrimination where an employer has a pattern of  
8 denying promotions to women even though not all women were denied promotions.  
9

10 An inevitable consequence of the need to define an objectively ascertainable class  
11 is that the Court's evaluation of commonality is based on whether common factual and  
12 legal issues *predominate* rather than on whether all factual and legal issues are *identical*.  
13 *Cohen v. DirecTV* (2009) 178 Cal.App.4<sup>th</sup> 966, 975-978 (discussing interaction between  
14 ascertainability and commonality). The determination of how much commonality is  
15 enough to warrant use of the class mechanism requires a fact specific evaluation of the  
16 claims, the common evidence, and the anticipated conduct of the trial.  
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19 Civil Code § 2995 Claim and UCL unlawful claim (Escrow Class and Contract  
20 Coordination Fee subclass).  
21

22 Common factual and legal issues predominate regarding the Civil Code § 2995  
23 claim and the UCL unlawful claim. The central factual and legal issues are (1) whether  
24 Homesafe provided “escrow services” to the members of the class; (2) whether KB Home  
25 required the members of the class to use Homesafe’s services; and (3) the amount  
26 charged for the escrow services.  
27

1 Plaintiff has presented substantial evidence that KB Home and Homesafe  
2 provided substantially similar services to the members of the class during the class  
3 period. There will be a common issue whether those services were and are “escrow  
4 services” within the meaning of Civil Code § 2995 and Financial Code § 17003.

5 Plaintiff has presented substantial evidence that KB Home had common practices  
6 and procedures that effectively caused the members of the class to use Homesafe’s  
7 services. KB Home had common training for its salespeople and common "sales  
8 transmittal sheets," so the trier of fact could infer that KB Home's sales people would  
9 have common communications with home buyers. Fredman Dec., Exh O (Chew Depo),  
10 Exh P, Q (internal forms). The internal "sales transmittal sheets" used by KB Home's  
11 sales people are a common document and state "Original Deposit Check made payable to  
12 Homesafe." (PX P and Q.) The Supplemental Addendum that permitted buyers to  
13 designate an escrow holder other than First American is a common document and there  
14 will be common fact issues whether KB Home regularly presented the Supplemental  
15 Addendum to buyers and whether it provided buyers with a real option given that sales  
16 agents could not countersign the document. (DX 33, Chew Dec., Exh 1.) Given the  
17 evidence that salespeople used common forms and procedures in the communities where  
18 First American was a preferred provider, there are common issues of whether KB Home  
19 (expressly or impliedly) required class members to use Homesafe in those communities.  
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22 KB Home has presented testimony by its sales people that each buyer and each  
23 transaction was different. (DX 1-21.) Given that sales people worked with common  
24 forms and checklists in the relevant KB Home communities, the individual issues related  
25 to each transaction do not defeat class certification. There is no evidence that any  
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1 significant number or percentage of buyers opted out and elected to pay their deposits to  
2 an entity other than Homesafe or to use an escrow provider other than First American.  
3 *MacManus v. A.E. Realty Partners* (1987) 195 Cal.App.3d 1106 (reversing trial court and  
4 ordering grant of class certification where escrow company was not specifically named in  
5 the real estate documents but 99% of buyers used the suggested escrow company).

6         The evidence of common forms and common internal practices designed to  
7 produce a common result and evidence that the actual result was common might support  
8 a class wide inference that KB Home required the use of Homesafe. *Mass. Mutual Life*  
9 *Ins. Co. v. Superior Court* (2002) 97 Cal. App. 4th 1282, 1292-93 (common practice of  
10 withholding allegedly material information from customers can support common  
11 inference of reliance and causation); *Discover Bank v. Superior Court* (2005) 36 Cal. 4th  
12 148, 157 ("[C]ontroversies involving widely used contracts of adhesion present ideal  
13 cases for class adjudication"). This is not a factual finding that KB Home required the use  
14 of Homesafe. This is a procedural determination that the issue can be decided on a  
15 common basis.  
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18         Plaintiff has presented substantial evidence that the amount charged for  
19 Homesafe's services was common (\$275). As a result, there will be few individual issues  
20 regarding the amount of damages or restitution.  
21

22         UCL unfair claim (Escrow Class and Contract Coordination Fee subclass).

23         Common factual and legal issues predominate regarding the UCL unfair claim.  
24 This claim is in part substantially similar to the UCL unlawful claim that borrows from  
25 Civil Code § 2995 and is in part similar to a "tying" claim under the Cartwright Act.  
26 *MacManus v. A.E. Realty Partners* (1987) 195 Cal.App.3d 1106 (alleging claims under  
27

1 Civil Code § 2995 and the Cartwright Act). In certifying the UCL unfair claim, the  
2 Court takes no position on the standard that the Court will employ in determining  
3 whether the practices of KB Home and Homesafe were "unfair" under the UCL. *Davis v.*  
4 *Ford Motor Credit Co.* (2009) 179 Cal.App.4<sup>th</sup> 581 (discussing three different definitions  
5 of "unfair" under the UCL).

6 UCL fraudulent claim (Escrow Class and Contract Coordination Fee subclass).

7  
8 Common factual and legal issues predominate regarding the UCL fraudulent  
9 claim. The alleged fraud is that Defendants had an obligation to disclose and failed to  
10 disclose the relationship between KB Home and Homesafe. The use of common form  
11 documents and common procedures when communicating with buyers supports class  
12 certification of the fraud claim.

13  
14 There is some ambiguity in *In re Tobacco II Cases* (2009) 46 Cal. 4<sup>th</sup> 298, 320,  
15 regarding whether in post-Proposition 64 UCL fraudulent claims by private parties the  
16 Court may grant relief "without individualized proof of deception, reliance and injury" or  
17 whether the plaintiffs must prove reliance and causation. The Court assumes in this order  
18 that Plaintiffs must prove class wide reliance and causation to obtain monetary relief.  
19 *Mass. Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal. App. 4<sup>th</sup> 1282, 1292-1293  
20 (proof that a defendant misstated or omitted material information can support a class  
21 wide inference of reliance and causation). The distinction might be between what a  
22 private plaintiff must prove to obtain non-monetary injunctive relief and what a private  
23 plaintiff or plaintiff class must prove to obtain monetary relief.

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1           Breach of Fiduciary Duty (Escrow Class and Contract Coordination Fee  
2 subclass).

3           Common factual and legal issues predominate regarding the breach of fiduciary  
4 duty claim. The alleged breach of fiduciary duty is that Homesafe failed to disclose its  
5 relationship with First American. The existence of a fiduciary duty is a common legal  
6 and factual issue. The alleged breaches of fiduciary are based on actions involving  
7 standardized forms and established procedures.  
8

9           UCL Unlawful, unfair and fraudulent, Breach of Contract, Breach of Fiduciary  
10 Duty (the Interest Subclass).

11           Assuming numerosity, common factual and legal issues would predominate  
12 regarding the claims for unpaid interest. The alleged breach of contract is that some  
13 contracts required Homesafe to pay interest and that Homesafe failed to pay interest. The  
14 UCL and breach of fiduciary duty claims are based on the same failure to pay interest  
15 when required. Plaintiffs have presented evidence of common standardized contracts that  
16 required Homesafe to pay interest. (Bates Dec, Exh B, para 17.) The damages for each  
17 class member might be different due to different amounts of deposits and different  
18 lengths that the money was on deposit, but individualized issues regarding the amount of  
19 damages will not defeat class certification. *Bell III*, 115 Cal. App. 4th at 742-43.  
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23 **TYPICALITY AND ADEQUACY.**

24           Plaintiff Bates is typical of purchasers of residential homes from KB Home in the  
25 relevant time period. A named plaintiff can be typical of the class members even if the  
26 named plaintiff's specific factual situation is not the same as the specific factual situation  
27

1 of all the other class members. *Daniels v. Centennial Group, Inc.* (1993) 16 Cal. App.  
2 4th 467, 473; *Wershba v. Apple Computer* (2001) 91 Cal. App. 4th 224, 238. The named  
3 plaintiff is an adequate class representatives because she has selected counsel qualified to  
4 conduct the litigation and she has no interests antagonistic to the interests of the class.  
5 *Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 141-142.

6 KB Home argues that Plaintiff Bates is not an adequate or typical class member  
7 because she will not be able to prove her claim. This is beside the point. At class  
8 certification the issue is not whether Plaintiff Bates can prove her claims but whether her  
9 claims are typical of those of the members of the putative class and whether she can  
10 adequately represent the putative class.  
11

#### 12 13 14 **DETECTING AND REDRESSING THE ALLEGED WRONGDOING.**

15 Trial courts have an obligation to consider the role of the class action in deterring  
16 and redressing wrongdoing. *Linder*, 23 Cal.4<sup>th</sup> at 446. The U. S. Department of Housing  
17 and Urban Development investigated the practices of KB Home, Homesafe and First  
18 American for compliance with RESPA. That investigation did not address the violations  
19 of California law at issue in this case and there is no indication that it resulted in any  
20 monetary recovery for the members of the class. Compare *Caro v. Procter & Gamble*  
21 *Co.* (1993) 18 Cal. App. 4th 644, 660 (defendant had already entered in to consent  
22 decrees with public law enforcement entities).  
23

#### 24 25 **ALTERNATIVE PROCEDURES FOR HANDLING THE CONTROVERSY.**

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1 The Court cannot identify any effective alternate procedures to resolve the  
2 controversy. Requiring individual purchasers of residential homes from KB Home to file  
3 individual claims for approximately \$275 in small claims court would not be effective for  
4 the buyers and would not be an efficient use of Court resources. If the Court required  
5 individual claims, then the Court would give KB Home and Homesafe practical  
6 immunity from liability given that the vast majority of consumers would probably not  
7 elect to file claims. *Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148, 157-161;  
8 *Szetela v. Discover Bank* (2002) 97 Cal. App. 4th 1094, 1101.

10  
11 **CONCLUSION.**

12 The motion of Plaintiff to certify the Escrow class is GRANTED. The motion of  
13 Plaintiff to certify the proposed Contract Coordination Fee subclass is GRANTED. The  
14 motion of Plaintiff to certify the proposed Interest Subclass is DENIED. The class  
15 definitions are as stated in the ascertainability section above. The Court directs Plaintiff  
16 to prepare and provide an order that sets out the class and subclass definitions.  
17

18 The Court has continuing jurisdiction to redefine the class. If Plaintiff and KB  
19 Home develop and present evidence that identifies which divisions did not use "sales  
20 transmittal sheets" or other forms that directed sales people to ask buyers to make  
21 deposits payable to Homesafe and/or evidence that identifies which communities did not  
22 use First American as a preferred escrow provider, then the Court will consider the  
23 creation of subclasses and/or a modification of the class definition. C.R.C. 3.764(a)(2)  
24 and (3).  
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3 **FURTHER PROCEEDINGS**

4 The Court sets a case management conference for January 21, 2010, at 10:00 am  
5 in Dept 17. The parties must file CMC statements on or before January 14, 2010.

6 The CMC statements must address and make specific proposals regarding (1) the  
7 content and distribution of class notice, (2) payment of the cost of class notice, and (3)  
8 when class notice should be sent. C.R.C. 3.766. The Court anticipates issuing an order  
9 on class notice following the next CMC. The Court also anticipates discussing (4) how  
10 much additional discovery is necessary to prepare for trial, (5) motion practice, (6) trial  
11 scheduling, and (7) trial structure. Counsel should meet and confer on all these issues  
12 before filing their CMC statements.  
13

14  
15 The Court orders that 90 days before trial Plaintiff must present a trial plan that  
16 demonstrates that there can be an effective class trial of common issues and any  
17 individualized issues that will provide due process to the absent class members and  
18 Defendants while respecting the time of the jury. The trial plan must identify the  
19 common factual and legal issues and identify the specific documents and witnesses that  
20 Plaintiffs will present to prove the common factual issues. For each witness, Plaintiff  
21 must describe their testimony in 3-4 sentences and estimate the hours of direct testimony.  
22 See *Tate v. Kaiser*, RG07-318416, Order of 4/28/09; Workman Dec filed 6/25/09.  
23

24 The trial plan is not a substitute for Local Rule 3.35 and will not tie the Plaintiff  
25 to the precise witnesses and documents that she can present at trial. The trial plan must,  
26 however, give the Court a factual basis for determining whether the trial will be  
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1 manageable and for determining the length of the trial. The trial plan will serve as the  
2 basis for any defense motion to de-certify the class based on manageability concerns.

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5 Dated: December \_\_, 2009

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6 Steven A. Brick  
7 Judge of the Superior Court  
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