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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| REGINA KING,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>THE JOHN STEWART COMPANY,<br><br>Defendant and Respondent. | B260871<br><br>(Los Angeles County<br>Super. Ct. No. BC522059) |

APPEAL from an order of the Superior Court of Los Angeles County, Amy D. Hogue, Judge. Affirmed.

RGLawyers, Solomon E. Gresen and Robert C. Hayden; Marlin & Saltzman, Stanley D. Saltzman and Marcus J. Bradley, for Plaintiff and Appellant.

Littler Mendelson, Eugene Ryu, Richard Rahm, and K. Kayvan Iradjpanah, for Defendant and Respondent.

Plaintiff and proposed class representative Regina King (plaintiff) worked for approximately three months as a property manager for defendant John Stewart Company (JSC), which provides personnel to manage apartments and other residential and commercial properties. After plaintiff left JSC, she filed a putative class action against the company alleging it misclassified its property managers as exempt employees, resulting in violations of state labor laws governing wages, overtime pay, and provision of meal and rest periods. She moved to certify a plaintiff class of approximately 366 current and former JSC property managers. The trial court denied certification because there was insufficient commonality among class members given the wide variation among the properties JSC managed and because plaintiff had no viable plan for managing the individual issues that would arise in litigating liability. We are asked to decide whether the trial court's certification decision was an abuse of its discretion.

## I. BACKGROUND

### *A. Statutory and Regulatory Background*

California law requires employers to pay their employees at least "one and one-half times the regular rate of pay" for work performed "in excess of eight hours in one workday" or "40 hours in any one workweek." (Lab. Code,[1] § 510.) The Legislature, however, authorized the Industrial Welfare Commission to "establish exemptions from the requirement that an overtime rate of compensation be paid . . . for executive, administrative, and professional employees, if the employee is primarily engaged in the duties that meet the test of the exemption, customarily and regularly exercises discretion and independent judgment in performing those duties, and earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment." (§ 515, subd. (a).)

Industrial Welfare Commission Wage Order 5-2001 (the Wage Order) applies to employers in the public housekeeping industry, including businesses like JSC that

[1] Undesignated statutory references that follow are to the Labor Code.

provide housing and facilities-maintenance services. (Cal. Code Regs., tit. 8, § 11050, subd. 2(P).) With respect to employees who function in an executive, administrative, or professional capacity under the Labor Code and related regulations, the Wage Order exempts their employers from a number of requirements to which they would otherwise be subject, including paying overtime, furnishing meal and rest periods, and maintaining time records that show both daily hours worked and meal periods. (Cal. Code Regs., tit. 8, § 11050, subd. 1(B).)

To qualify for the "executive exemption" under the Wage Order, an employee must (1) be involved in "management of the enterprise . . . or of a customarily recognized department or subdivision thereof," (2) "customarily and regularly direct[ ] the work of two or more other employees therein," (3) possess "the authority to hire or fire" or to make recommendations on hiring or firing that "will be given particular weight," (4) "customarily and regularly exercise[ ] discretion and independent judgment," (5) be "primarily engaged in duties which meet the test of the exemption,"[2] and (6) "earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment." (Cal. Code Regs., tit. 8, § 11050, subd. 1(B)(1)(a)-(f).)

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[2] Exempt executive duties are defined by reference to Fair Labor Standards Act regulations set forth at 29 C.F.R. sections 541.102, 541.104-541.111, and 541.115-541.116, as of January 1, 2001. (Cal. Code Regs., tit. 8, § 11050, subd. 1(B)(1)(e).) Duties that qualify for the executive exemption include interviewing, choosing, and training employees; establishing their pay and work schedule; directing employee work; evaluating productivity for the purpose of promotions and other personnel decisions; handling employee grievances; disciplining employees; planning and apportioning work; and providing for worker and workplace safety. (29 C.F.R. § 541.102, subd. (b).) Exempt work also includes "all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions." (Cal. Code Regs., tit. 8, § 11050, subd. 1(B)(1)(e); see also 29 C.F.R. § 541.108, subd. (a).) In some cases, the activity of a manager may be considered exempt even though the same activity performed by a more specialized employee would not be considered exempt. (See 29 C.F.R. §§ 541.108-541.109.) But a "working supervisor" who performs a substantial amount of nonexempt work unrelated to his or her supervisory function does not qualify for the executive exemption. (See 29 C.F.R. § 541.115.)

The "administrative exemption" applies to an employee who, in relevant part, (1) performs "office or non-manual work directly related to management policies or general business operations" of the employer or the employer's customers, (2) "customarily and regularly exercises discretion and independent judgment," (3) "performs only under general supervision work along specialized . . . lines requiring special training, experience, or knowledge," (4) is "primarily engaged in duties that meet the test of the exemption,"[3] and (5) "earn[s] a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment." (Cal. Code Regs., tit. 8, § 11050, subds. 1(B)(2)(a)(i), (b), (d), (f) & (g).)

Determining whether an employee is exempt requires examining the "work actually performed by the employee during the course of the workweek . . . and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job . . . ." (Cal. Code Regs., tit. 8, § 11050, subd. 1(B)(1)(e).)

*B. Facts Concerning JSC's Business and Plaintiff's Employment*

JSC is a "full-service housing management, development, and consulting organization" that manages approximately 400 properties from San Diego to Sacramento.

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[3] Exempt administrative duties are also construed pursuant to the Fair Labor Standards Act regulations. (Cal. Code Regs., tit. 8, § 11050, subd. 1(B)(2)(f).) Exempt administrative employees must either exercise discretion and independent judgment or perform tasks that have "a direct and close relationship to the performance of the more important duties." (29 C.F.R. § 541.202, subds. (a) & (b).) Their exercise of discretion and independent judgment must relate to "matters of significance" which is not the case where the employee simply "applies his knowledge in following prescribed procedures or determining which procedure to follow, or determines whether specified standards are met . . . ." (29 C.F.R. § 541.207, subds. (a) & (c)(1).) An employee who lacks authority to make final decisions may qualify for the exemption if he or she uses discretion and independent judgment to make recommendations to the decision-maker. (29 C.F.R. § 541.207 subd. (e)(1).) As with the executive exemption, "work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions" qualifies as exempt. (Cal. Code Regs., tit. 8, § 11050, subd. 1(B)(2)(e); see also 29 C.F.R. § 541.208, subd. (a).)

The properties are primarily comprised of leased residential units, but some incorporate other uses like commercial facilities. Most of the properties JSC employees manage are owned by separate third parties, and the type and size of the properties in JSC's portfolio vary, ranging from buildings with 4 units to buildings with 1171 units. The number of JSC personnel assigned to each property can be as few as one or as many as 18, and the composition of those assigned (e.g., property managers, assistant property managers, maintenance technicians, etcetera) also varies. Some property managers employed by JSC are responsible for only one property while others are assigned to manage multiple locations.

Most properties managed by JSC are governed by regulatory agreements with governmental agencies, partly owing to the fact that many of the residential units are subsidized for occupancy by those who have low incomes. Many properties are subject to multiple, sometimes overlapping, regulatory agreements. Other properties have only market-rate, unsubsidized units or a mix of both market-rate and subsidized. In addition to serving low-income residents, many of JSC's properties are home to seniors, people with disabilities, and people transitioning from homelessness.

JSC hired plaintiff as an exempt property manager on March 11, 2013. Plaintiff initially managed the 140-unit Vermont Senior Apartments, where she supervised three employees. In May 2013, JSC transferred plaintiff to Owensmouth Gardens, a larger 281-unit property where plaintiff supervised six employees. Plaintiffs ceased working for JSC on June 27, 2013.

At the time plaintiff moved for certification, JSC employed roughly 270 property managers, about 70 percent of whom were categorized as exempt. JSC designated the remainder of the property managers as nonexempt solely because those managers do not earn enough to merit exemption under the Wage Order. All other property managers are deemed to fall within the executive and/or administrative exemption. Property managers report to regional managers.

*C. Plaintiff's Complaint*

Plaintiff filed her initial class action complaint against JSC in September 2013. It alleged causes of action under the Labor Code and the Wage Order for (1) failure to pay wages due and owing, (2) failure to pay overtime wages, and (3) failure to provide meal and rest periods. It also alleged a fourth cause of action for unfair competition under Business and Professions Code section 17200. Just over a year later, plaintiff filed a First Amended Complaint adding a cause of action for violation of the Private Attorneys General Act of 2004 (§§ 2698 et seq.).

The class action allegations in the operative First Amended Complaint state "[c]ommon questions of law, in fact, exist as to all members of the Plaintiff Class and predominate over any questions affecting solely individual members of the Plaintiff Class." Among "the questions of law and fact" plaintiff identified as relevant to adjudication of class claims was the question of "[w]hether Defendants mis-classified Plaintiff and the Plaintiff Class as exempt employees, under prevailing California Law." The First Amended Complaint did not further describe how employees had been misclassified or the theory on which plaintiff would proceed to demonstrate misclassification had occurred.

*D. Certification Proceedings*

Roughly six months after filing her First Amended Complaint, in May 2014, plaintiff moved for certification of the proposed class. In support of certification, plaintiff offered a declaration of counsel, deposition testimony of plaintiff and six putative class members, deposition testimony of JSC's two designated persons most knowledgeable, and copies of plaintiff's employment offer, employment terms and conditions, and job description, as well as the "template" property manager job description that JSC used to prepare property manager job descriptions.

Plaintiff's certification motion argued that JSC's method for classifying property managers as exempt violated the Wage Order, and that if JSC had performed a proper analysis, it would have discovered that a property manager's typical day consisted of

performing "mostly" nonexempt duties. Plaintiff asserted, based on initial discovery, that "randomly selected" property managers spent more than 50% of each work day on three broad categories of work (checking messages and answering the phone, data entry, and property inspections) and she argued these were nonexempt activities that were performed by JSC's hourly employees. In addition, plaintiff contended property managers—unlike their regional manager supervisors, in whom real authority resided—possessed only trivial discretion over their work: being able to choose when to begin their workday, to decide in what order to perform their tasks, and to delegate duties to subordinates, but making few if any decisions of consequence. In sum, plaintiff argued that her case was "a classic *Sav-On* . . . scenario," referring to *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319 (*Sav-on*), in which our Supreme Court held a trial court did not abuse its discretion when it certified a class of drug store managers who argued they were misclassified as exempt.

JSC opposed certification, arguing (1) plaintiff could not demonstrate a predominance of common issues over individual issues, (2) plaintiff proposed no plan to manage the issues concerning individual class members certain to arise in litigation, and (3) plaintiff was not an adequate class representative. On the issue of commonality, JSC attacked plaintiff's assertion that property managers had only three categories of similar nonexempt duties. Relying on declarations of counsel and 34 of JSC's employees, 33 of whom were current property managers, JSC explained that its "properties vary substantially in almost every respect, which directly impacts (1) the actual day-to-day duties performed by a [property manager] and (2) the varying amounts of time a [property manager] spends on those duties such that [JSC's] liability to any particular PM cannot be determined on a class-wide basis." JSC specifically pointed to variances in property type, size, use, condition, staffing, resident demographics, and regulatory standards, claiming these variances resulted in substantial differences in job performance manifested in how project managers handled personnel, property maintenance, safety issues, resident interaction, expenditures, and compliance with government regulations.

JSC also contended that certification must be denied even if there was sufficient commonality among the class. Relying on the then-recent decision in *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1 (*Duran*), JSC stated it would have a right to raise affirmative defenses at trial based on the variances among its properties and property managers, and that raising such defenses in the context of a numerous class would make proceeding by way of a class action infeasible—particularly because plaintiff had submitted no plan to describe how these individual issues would be managed.

In a reply brief filed nearly five months later, to allow plaintiff to depose the property managers whose declarations had been proffered by JSC, plaintiff continued to contend all property managers' duties, time spent thereon, latitude to exercise discretion, and overtime hours were similar, which would result in a manageable presentation of common evidence at trial. According to plaintiff, the new evidence obtained by deposing the declarants referenced in JSC's opposition established the property managers "spent the majority of their time working on nonexempt tasks, in excess of 10 hours per day." Thus, plaintiff reasoned, "[e]ven if the entire remainder of their workdays were filled with exempt tasks, far more than 50% of the average work day . . . would still have been consumed with nonexempt job duties."

The trial court held a certification hearing on October 24, 2014, the day after posting a tentative order denying certification. Having read the court's tentative ruling, which identified the predominant issue in dispute as "not how various tasks should be classified but rather how much time" individual project managers spent on various activities, plaintiff's counsel began by attempting to depart from the theory he advanced in the moving papers, namely, that property managers were "mostly" engaged in nonexempt work or spending "a majority of their time" on nonexempt tasks. Instead, counsel said he wanted to "frame the issue a little bit differently" and claimed it was "more accurate to say that our claim is 100 percent of each workday was spent on no

more than 16 common tasks, all of which are nonexempt."[4] Thus, according to counsel, determining JSC's liability would require no consideration of how much time property managers spent on any particular activity; rather, plaintiff would seek to prove that *all* tasks performed by property managers did not require the exercise of any discretion and were nonexempt.

The court questioned whether identifying the nature of property manager duties as exempt or not would require individualized evidence. Taking the example of a task category mentioned by plaintiff's counsel, communications with tenants, the court asked, "How could I know if [such duties] require[d] no discretion unless I knew exactly what everybody was doing?"

With concerns about the manageability of a class action and whether common questions of fact and law would predominate over individual issues, the court noted that plaintiff had not submitted a trial plan as required by *Duran*. Plaintiff's counsel attempted to describe orally how he would proceed if the class were certified. First, he stated, evidence would be presented regarding whether or not the property managers' duties were exempt. Plaintiff would put on a random sampling of witnesses to establish "that the mechanics of the duties [are] identical," that is, that all of the property managers similarly performed all of the tasks in the 16 categories counsel identified. Second, JSC would then put on five or six witnesses and under cross-examination plaintiff would be able to establish whether their duties are the same. In the end, the trier of fact would receive a list of the common tasks and determine whether each was exempt or not. Only if the trier of fact decided that some tasks qualified as exempt—which plaintiff did not anticipate on her theory—might the proceedings then turn to individual issues.

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[4] The 16 task categories identified by plaintiff were bill payment, budget preparation, communication with the public, communication with the property owner/board, communication with government agencies, communication with subordinates, communication with supervisors, communication with tenants, communication with vendors, opening and closing the office, performance evaluations, property inspections, property tours, rent processing, reporting, and timekeeping.

The court questioned how it could limit JSC to calling only five or six witnesses. More broadly, the trial court continued to express concerns that the use of representative testimony would be inadequate to establish whether all class members were engaged in exempt duties or not:

> [Plaintiff's Counsel]: Now, if your honor wants, you can pick any one of those duties, and I can tell you [the] factual issue that needs to be decided by the trier of fact.
>
> The Court: It's very hard for me to look at these duties and agree with you that they are—that I can assume that on the merits they're nonexempt.
>
> [Plaintiff's Counsel]: But you don't have to. You don't have to assume they're nonexempt or exempt. We have to have a trial on that issue. Under *Sav-on*, I'm entitled—
>
> The Court: How would I know if communications with subordinates are exempt or nonexempt unless I hear from 260 people about their conversations with subordinates?[5]

The exchange between the trial court and plaintiff's counsel continued:

> The Court: My concern is common proof. And in other words, this is not a cookie-cutter operation like *Sav-on*, where we have identical stores, identical merchandise all over the state, and a very systematic way of stocking items and so on.
>
> [Plaintiff's Counsel]: May I suggest that it is—
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> The Court: This is a much different business model, where each of the premises is different. Each of the owners is different, and each of the businesses is different.
>
> [Plaintiff's Counsel]: But they all do the same tasks.
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> The Court: You can always categorize tasks in a certain way to say they all do the same task. But my problem is that I think I need to hear, to reach the conclusions on the merits you want me to make, the defendants are going to put on 100 witnesses.

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[5] In her briefing in this court, plaintiff repeatedly points to one of the trial court's statements during this exchange ("It's very hard for me to look at these duties and agree with you that they are—that I can assume that on the merits they're nonexempt") and asserts it is evidence the trial court denied certification by improperly considering the merits of the lawsuit rather than factors, like commonality, that properly bear on whether a proposed class should be certified.

After this colloquy, the court heard from JSC's attorney who argued the proposed class was too "disparate and different" to be tried with common proof: "Because every property is different, because every property manager does the job differently, with different combinations of duties, in a different manner, for a different amount of time, [JSC] would have to put on every single putative class member for both the liability and damages phase." JSC also contested plaintiff's categorization of common duties. For example, JSC's template job description included not 16 but 41 different task categories, and plaintiff's own summary of the deposition testimony revealed project managers performed different duties, for different amounts of time. Counsel argued that the great time discrepancies, i.e., one manager spending one minute and 30 seconds on rent processing and another spending six hours, constituted evidence that the nature of the tasks must in fact differ from property to property. JSC further argued that certification must be denied, in any event, because plaintiff failed to submit a trial plan to manage the individualized issues that would necessarily arise.

The trial court heard further argument from plaintiff's counsel. He argued the hearing was "focusing too hard on the merits" and "jumping the gun" because there had been no determination as to whether a given duty was exempt or not exempt. The court responded that it was trying to determine "what are the common duties?" The court explained there was no agreement between the parties, as there was in *Sav-on*, about the common duties in which property managers engaged, and the court found the duties described by plaintiff's counsel to be "very vague and general communications" by property managers that "could be highly exempt, or it could be 'isn't it a lovely day?'" When plaintiff's counsel asked why the decision had to be made at the certification stage, the court responded that it was "looking for commonality[ ] and if there's no commonality about even the duties, where do we begin?"

Sensing the trial court remained inclined to deny certification, plaintiff's counsel asked the court to consider at least certifying a subclass of property managers who supervised fewer than two employees because liability for that subclass would be more amenable to common proof. There was no evidence before the court concerning how

numerous such a subclass would be, however, and JSC argued that the proposed subclass suffered from the same problems as the overall class: no trial plan, no commonality, different job functions.

After hearing argument from the parties, the trial court said it intended to adopt its tentative ruling denying certification as the order of the court. In its written ruling, the court found that "[i]n light of the differences in the types of properties managed by [property managers] and in the amount of time spent by [property managers] on different activities, Plaintiff fails to show that common questions of law or fact predominate and that proceeding as a class action is the superior form of adjudication." The court found there were significant variances among property managers' responsibilities, including "administration and compliance (e.g. managing . . . administration of the property office), personnel management (e.g. interviewing, training, and evaluating staff), marketing and lease up (e.g. marketing units, maintaining occupancy, and obtaining appropriate documentation), resident management, and maintenance of the property."

The court also distinguished plaintiff's theory of recovery from the theory of recovery established by the evidence in *Sav-on*. That case involved "'substantial evidence suggesting that the predominant issue in dispute [was] how the various tasks in which [managers] actually engaged should be classified—as exempt or nonexempt.' [Citation.]" By contrast, "[i]n this case, the evidence suggests that the predominant issue in dispute is not how various tasks should be classified, but rather, how much time individual plaintiffs spent on various tasks." Unlike the managers in *Sav-on*, who worked "in identical retail stores with similar products," the court found the property managers in this case "oversaw different types of properties (some exclusively residential and others with commercial space), different size properties (ranging from a few units to over a thousand), and different size staffs (ranging from 1 to 17)." The court concluded that distinctions among how putative class members "spent their time and what their responsibilities were . . . would likely require each member of the class to 'litigate numerous and substantial questions determining his individual right to recover.'"

The trial court also ruled that plaintiff "failed to show how the individual questions posed in this case can be managed by an effective trial plan." The court found that evidence showing substantial variation in the work property managers performed undermined plaintiff's argument that all property managers performed similar nonexempt duties. In light of that variation, plaintiff failed to demonstrate "how the affirmative defenses that [JSC] will likely raise on behalf of individual [property managers] would be managed, much less why a class action is the best method of adjudication in this case."

In conclusion, the court wrote: "Plaintiff paints a picture of a class of [property managers] with similar duties who all spent over 50% of their time on nonexempt duties. But the record reveals a much more complex picture of [property managers] who managed different types of properties and did not spend their time in a uniform matter. Thus, Plaintiff's proposed class would be predominated by individualized questions concerning how each [property manager] spent his or her time and on whether activities performed by each [property manager] were indeed nonexempt activities. Plaintiff also fails to provide a trial plan showing how the class action mechanism would be a superior means of pursuing relief for the class members."

Plaintiff later moved the court to reconsider its order denying certification. The court held a hearing on the reconsideration motion, and plaintiff began by pointing to a sentence in the court's order denying certification (quoted above), which stated the primary issue was not whether tasks were exempt but rather what tasks different property managers performed and for how much time. The court looked at the sentence in question and stated it "would phrase it a little differently now that I read it in isolation because I think the issue is whether . . . the tasks are susceptible to class proof might be a better way to put it," but the court suggested counsel continue with his argument for why the court should reconsider its ruling. The parties then largely reprised the prior arguments they made for and against certification, and the court expressed the same concerns regarding commonality and manageability that it had previously: "[T]he problem I have here is that there is such a variation in the circumstances of each of the property managers that I don't think it is amenable to class treatment unlike the fairly

standardized workplace in [*Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362 (*Martinez*)] or for that matter in *Sav-on* . . . ." The court accordingly denied plaintiff's request for reconsideration, both on the merits and for being untimely.

## II. DISCUSSION

Plaintiff contends that the trial court improperly reached the merits of her case in order to deny certification. She posits that in order to find common questions of fact and law do not predominate, the court prematurely decided that property managers did some exempt work, thereby rejecting plaintiff's theory, offered during the certification hearing, that property managers exclusively performed nonexempt tasks. According to plaintiff, the court should have limited its analysis to the question of "whether the classification of tasks as being either exempt or nonexempt could be decided at trial using common proof." As additional assignments of error, plaintiff maintains the trial court was wrong to require a trial plan, the court should have continued the certification proceedings to allow her to submit a if required, and the court should have certified a proposed subclass of property managers who supervised fewer than two employees.

We hold the trial court did not abuse its discretion in declining to certify the proposed class. As it was required to do, the court weighed the evidence presented by the parties, in conjunction with plaintiff's theory of liability and JSC's affirmative defenses, to evaluate whether common factual and legal questions predominated over individual issues and whether proceeding by way of a class action would be manageable. In doing so, the trial court did not improperly base its certification ruling on an evaluation of the merits of plaintiff's case. Rather, the trial court evaluated "whether the classification of tasks as being either exempt or nonexempt could be decided at trial using common proof." We cannot say the court abused its discretion in deciding the answer to that question was "no" because there is substantial evidence to support the court's determination. Although plaintiff made efforts to aggregate property manager duties into a set of finite task categories, the trial court found the factual picture was more complicated and would require more granular proof from many witnesses to decide

whether, as plaintiff contends, every task performed by property managers was nonexempt work—a process that the court found inappropriate for class-wide resolution. That plaintiff presented no adequate trial plan to establish how individualized questions would be managed at trial reinforces our conclusion that there is no basis on this record to reverse the trial court's determination.

*A. Standard of Review*

*1. General Class Certification Principles*

Plaintiffs may proceed by way of a class action "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court. . . . " (Code Civ. Proc., § 382.) Our Supreme Court has "articulated clear requirements for the certification of a class. The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. . . . '[T]he "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class."' [Citation.]" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).)

The "'ultimate question'" for the trial court is whether "'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.] The answer hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.' [Citation.]" (*Id.* at p. 1021; see also *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338, 349, 350 (*Dukes*) [because "'[a]ny competently crafted class complaint literally raises common "questions"' [citation]," the evidence must show that "'a classwide proceeding [will] generate common *answers* apt

to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers'"], italics in original.)

So long as common issues predominate, individual issues may be considered "at trial when those issues legitimately touch upon relevant aspects of the case being litigated." (*Duran, supra,* 59 Cal.4th at p. 28.) Certification should be denied, however, "'if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the "class judgment"' on common issues. [Citation.]" (*Ibid.*) Individual issues presented at trial must be effectively managed. (*Id.* at p. 29.)

In order to rule on certification, "[a] court must examine the allegations of the complaint and supporting declarations [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible." (*Brinker, supra,* 53 Cal.4th at pp. 1021-1022, fn. omitted.) While trial courts should not resolve liability in this process, "'issues affecting the merits of a case may be enmeshed with class action requirements. . . . ' [Citations.] When evidence or legal issues germane to the certification question bear as well on aspects of the merits, a court may properly evaluate them. [Citations.] The rule is that a court may 'consider[ ] how various claims and defenses relate and may affect the course of the litigation' even though such 'considerations . . . may overlap the case's merits.' [Citations.]" (*Id.* at pp. 1023-1024.)

"On review of a class certification order, an appellate court's inquiry is narrowly circumscribed. 'The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.]' [Citations.]" (*Brinker, supra,* 53 Cal.4th at p. 1022.) We examine the trial court's

reasons for denying certification, and any valid pertinent reason is sufficient to uphold the order. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436.)

*2. Sav-on*

Deciding whether to certify a class action alleging misclassification of exempt employees can be a complicated undertaking. "Employers often treat all workers within a job position as either exempt or nonexempt. In actuality, however, Labor Code exemptions frequently depend on how individual employees perform their jobs. When an exemption defense turns on such individualized issues, questions about how, or whether, the case can proceed as a class action become particularly thorny." (*Duran, supra*, 59 Cal.4th at p. 25.)

The parties focus much of their attention on our Supreme Court's decision in *Sav-on* and how it is like or unlike the circumstances presented here. We, too, will address that question, but we pause now to highlight the Supreme Court's approach to review of the trial court's ruling in *Sav-on* because it informs, and largely drives, the result we reach here.

The plaintiffs in *Sav-on* argued certification was appropriate because "defendant treated its [exempt managers] uniformly and assigned them to standardized store operations" that effectively prevented the managers from spending sufficient time on exempt tasks. (*Sav-on, supra*, 34 Cal.4th at pp. 327-328.) The trial court found common issues predominated based on its review of the evidence and it certified the class. (*Id*. at pp. 325, 327). The Court of Appeal then issued a writ directing the trial court to vacate that order and to deny certification. (*Id*. at p. 326.) Our Supreme Court granted review and reversed the Court of Appeal. The basis for that reversal turned on the Supreme Court's discussion and application of the appropriate standard of review for a trial court's certification decision—which it emphasized must be deferential: "'[W]here a certification order turns on inferences to be drawn from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' [Citations.]" (*Id*. at

p. 328.) "[A] reviewing court is not authorized to overturn a certification order merely because it finds the record evidence of predominance less than determinative or conclusive. The relevant question on review is whether such evidence is *substantial*." (*Id*. at p. 338, italics in original.)

In the *Sav-on* record, the Supreme Court found "substantial, if disputed, evidence" to support classification. (*Sav-on*, *supra*, 34 Cal.4th at p. 329.) Although Sav-on maintained there were variations among its stores and managers that could not be adjudicated on a class-wide basis (*id.* at p. 325), the trial court credited plaintiff's evidence to the contrary. (*Id.* at pp. 330-331 [work tasks discussed in evidentiary submissions from plaintiffs and Sav-on were a "reasonably definite and finite list" where the only dispute was whether the identical tasks were managerial or non-managerial].) Thus, "[t]he record contain[ed] substantial evidence suggesting that the predominant issue in dispute [was] how the various tasks in which [managers] actually engaged should be classified—as exempt or nonexempt," an issue that was "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." (*Id*. at p. 330.) In reaching this conclusion, the Supreme Court emphasized it was not deciding the merits of plaintiff's case nor was it holding that the trial court would have erred by reaching a contrary conclusion and denying certification of the class. (*Id.* at p. 331.) Instead, the court's holding rested on its conclusion that it could not "say it would be irrational for a court to conclude that, tried on plaintiffs' theory, 'questions of law or fact common to the class predominate over the questions affecting the individual members' [citation]." (*Id.* at p. 329; see also *Duran*, *supra*, 59 Cal.4th at p. 25 ["Under deferential [ ] review for abuse of discretion," trial court decisions both granting and denying certification in misclassification cases have been upheld].)

With the deferential standard of review articulated by our Supreme Court in mind, we turn to our analysis of the certification question in this case.

*B. Analysis*

The trial court rested its decision in this case on plaintiff's failure to demonstrate both a predominance of common issues and the superiority of proceeding as a class action. The two bases are intertwined and both are supported by the record: there is substantial evidence that deciding liability (including JSC's affirmative defenses) would require litigating numerous individualized questions, and plaintiff failed to present a viable plan for managing those individual issues.

*1. Commonality and manageability*

In determining whether common questions of fact and law predominate among putative class members, a court begins by identifying the principal issues presented and the applicable law. The purpose is not to resolve issues in dispute but to assess "whether the operative legal principles, as applied to the facts of the case, render the claims susceptible to resolution on a common basis." (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 530; see also *Duran*, *supra*, 59 Cal.4th at p. 51 (conc. opn. of Liu, J.) ["[I]t is important that courts employ a proper understanding of the substantive governing law to inform the class certification decision, and not the other way around"].)

The fundamental issue in this case is whether JSC's exempt property managers were properly so classified. All issues of liability and damages flow from that question. Its resolution requires considering property managers' job requirements, JSC's realistic expectations of how property managers should fulfill those requirements, and how property managers actually spend their time. (Cal. Code Regs., tit. 8, § 11050, subds. 1(B)(1)(e) & 1(B)(2)(f); see also *Heyen v. Safeway Inc.* (2013) 216 Cal.App.4th 795, 808, 828 [in determining whether employee is properly classified as exempt, trier of fact must consider "'how the employee actually spends his or her time[,] . . . whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job'"].) That JSC classified its property managers solely on

the basis of their earnings, without examining each employee individually, does not by itself establish liability. (*Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1461 [employer's uniform policy categorizing employees as exempt "without regard to the law or investigating what work they do" is not misclassification "if the employees were, in fact, subject to the exemption"].)

Here, the parties advanced conflicting interpretations of the evidence regarding property managers' job requirements, expectations, and actual day-to-day work. In deciding against certification, the court credited JSC's position on the evidence, finding that property managers' activities "differed depending on the type of property or properties a [property manager] was responsible for" and concluding that "variation in how [property managers] spent their time and what their responsibilities were" prevented plaintiff's claims from being susceptible to common proof. Thus, the court did not merely rely on distinctions in the amount of time project managers spent on various tasks but also found substantive variation affecting *how* project managers performed those tasks—variation relevant to whether the work was exempt. Substantial evidence, which we will summarize, supports such findings; whether we, as the reviewing court, might reach a different conclusion if weighing the evidence on a blank slate has no bearing on appeal. (*Sav-on, supra*, 34 Cal.4th at p. 331; see also *Dailey v. Sears, Roebuck and Co.* (2013) 214 Cal.App.4th 974, 992 (*Dailey*) ["we do not ask on this appeal whether [plaintiff's] evidence may have been sufficient to support class certification, but confine our analysis to whether the record contains substantial evidence supporting the trial court's conclusion . . . ."].)

In support of the court's denial of certification, for instance, was evidence that JSC's job requirements were not uniform. Even though job descriptions were compiled through the use of a common template, property managers received different descriptions tailored to the needs and nature of the particular property. A number of property managers reported that their duties went beyond those listed in the template description, while others performed fewer tasks. Thus, to the extent that the template job description

was intended to evidence project managers' expected responsibilities, the court had an evidentiary basis to find disparities precluded its effective use as common proof.

Also before the trial court was substantial evidence demonstrating variation in how property managers performed their job functions. At least some of that evidence established that differences in job activities were attributable to the managers' non-standardized work environments, leading to a reasonable inference that a conclusion drawn regarding a particular property manager's realistic job requirements in one such environment could not be extrapolated to prove the same result in a different environment.

There was substantial evidence, for example, that resident demographics and property use affected how managers dealt with resident issues. Managers of properties housing specialized communities such as seniors, people with physical or mental disabilities, or residents transitioning from homelessness frequently monitored tenant behavior and worked with social services personnel to provide support. For other managers, the bulk of tenant interaction involved dealing with rent payments, complaints about maintenance, and resident conflicts. The manager of a co-op property in which the shareholder residents annually elected their board of directors ran the election and regularly met with board members. A property manager of condominium units in the process of being sold was expected to administer the homeowner's association once the sales were concluded. Staff size and makeup also played a role in how managers handled resident issues. There was evidence that managers with smaller staffs handled most of all tenant issues regardless of their nature, whereas managers with larger staffs delegated certain tenant issues to more junior or specialized employees.[6]

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[6] In addition to distinctions in how managers performed tenant-related work, there was evidence that mangers spent different amounts of time dealing with resident issues. Some dedicated more than half their time to resident concerns, others spent just four or five hours per week, and one reported spending just "10-15 minutes per day." Similar differences in time spent on other tasks were also explored and documented during plaintiff's deposition of the property manger declarants, but these differences are not the basis of our holding. At most, in cases of wide discrepancies among property managers,

With this sort of variance, if a jury heard only from a select group of these managers and was asked to a make a finding as to whether "communication with tenants" or "communication with property owner/board" were exempt or nonexempt task categories, the trial court could rightly believe the jury's finding would be an unreliable basis to establish liability (or not) class-wide. (*Duran, supra*, 59 Cal.4th at pp. 12, 32 [observing "[w]ide variation among class members is a fact or informing whether the exemption question can be resolved by a simple 'yes' or 'no' answer for the entire class" and reversing liability determination for class of 260 plaintiffs based on representative testimony from only 21 individuals with no opportunity for the defendants to introduce contrary evidence].)

There was also evidence before the trial court that that the size and constitution of a property manager's supporting staff affected the property manager's duties. One manager (Ortiz) supervised a single janitor who worked one hour per day. As a result, he handled almost every issue relating to the property's operation: administrative work, tenant and vendor relations, maintenance and repairs, and security. Another property manager with two employees who had lost the services of an assistant (Gregory) took on the duties she previously delegated to her assistant: "[a]nswering the phone, first contact with anyone that comes into the office, coordinating anniversary parties and a little bit of activities, tenant relations, acting as a receptionist and typing up letters . . . ." On the other hand, managers who supervised multiple employees frequently delegated a significant proportion of their duties and also spent considerable time meeting with, advising, and training staff. A property manager with 14 staff members (Johnson) delegated most resident contact, property inspections, property tours, and rent processing to her subordinates. Property managers who supervised between eight and 14 employees (Antunes, Lokshina, Reed) estimated spending roughly three hours or more every day

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the differences in time spent may have some relevance to what is the central issue, namely, whether the nature of the tasks performed by different managers were sufficiently similar such that they could be established as exempt or nonexempt through common proof.

communicating with and providing directions to their subordinates. Significantly, the evidence also indicated the number of staff did not necessarily correlate to the amount of supervision. A property manager with a staff of three (Delaney) did not engage in a great deal of personnel management activity, while a manager who supervised only four employees (Yray) estimated a far greater portion of his duties involved communicating with them in some respect.

Again, these differences are relevant to the "'ultimate question for predominance,'" namely, whether the common issues are so numerous or substantial when compared with those requiring separate adjudication such that there are advantages to proceeding by way of a class action. (*Duran*, *supra*, 59 Cal.4th at p. 28.) If a jury heard only from property managers Ortiz and Gregory and was asked to decide whether "communication with subordinates," for instance, is an exempt or nonexempt task category, the jury may well come to a different conclusion than if it heard only from those managers who, like Johnson, supervised a large staff and provided substantial "instruction," as she put it, to them each day. (See *Heyen v. Safeway Inc.*, *supra*, 216 Cal.App.4th at p. 822 ["Understanding the manager's purpose in engaging in such tasks, or a task's role in the work of the organization, is critical to the task's proper categorization"].) This well illustrates the trial court's concern with certification: the class action form would not drive resolution of the case because the factual issues were insufficiently common, causing plaintiff and JSC (in presenting its affirmative defenses) to "put on 100 witnesses" in litigating liability.

Regulatory compliance is another area where the evidence showed variation in how property managers performed their duties. Managers of market-rate properties had minimal compliance obligations. Managers of regulated properties, on the other hand, described performing a variety of different activities. There was evidence that some regulatory programs were more complicated than others, suggesting variability in the nature of maintaining compliance. Some property managers analyzed applicable

regulations to ensure compliance.[7] Plaintiff's own deposition illustrated the complexity that could be involved in managing properties subject to regulatory contracts. She described how distinctions among government programs, and between regulated and non-regulated properties, affected how a manager handled verifying tenant income, obtaining rental history, and marketing vacancies. Plaintiff's testimony also suggested that understanding and complying with the various requirements necessitated considerable training and/or experience. By contrast, there was evidence that other property managers took a more passive approach to compliance. One, for example, described his role in government inspections as simply making units and documents available to auditors; his role in composing government reports was limited to transferring information from computer files. Another property manager's compliance duties consisted of no more than inspecting units annually.

The evidence before the trial court revealed other distinctions among regulated and market-rate properties. For example, managers of subsidized housing had limited discretion to negotiate lease terms because government agencies dictated many of the rental conditions. For managers of market-rate and commercial properties, however, setting and negotiating lease terms, within guidelines, was apparently part of the job. Managers of newer and market-rate buildings typically had greater marketing responsibilities than managers of subsidized properties, which often had low turnover and long waitlists. Marketing activities ranged from independently creating ads and purchasing space in magazines, to networking and giving presentations, to merely posting largely formulaic ads on Craigslist.

In addition, there was evidence of variation among property managers' level of discretion generally. For example, some property managers reported substantial and close supervision by their regional managers (Arroyo and Gregory, early in her career),

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[7] One property manager evaluated the respective subsidies for a property subject to four regulatory agreements to determine which program would be most beneficial to tenants and the property owner. The same property manager convinced the property owner to raise rents consistent with the tax credit program because doing so would "help us if we need to refinance a loan or we get audited or anything like that."

whereas others, e.g., Antunes, testified to having significant independent authority or regional managers that were markedly less involved. Managers exercised different levels of authority over hiring, preparing the property budget, and authorizing expenditures.

With this and other evidence before it, the trial court was also legitimately concerned with the manageability of a class action even if some or even many issues *could* be determined by common proof. The *Duran* decision emphasizes a class action defendant has a right to present affirmative defenses in a misclassification case, most commonly a defense that issues unique to each proposed class member render some members exempt under applicable regulations even if others are not. (*Duran, supra*, 59 Cal.4th at pp. 33-34.) Here, the trial court was accordingly within its discretion to deny certification on the related but still distinct ground that plaintiff had essentially no plan to manage the individual issues that would arise with exemption defenses JSC would certainly raise. (*Id.* at p. 32 ["Thus, USB's exemption defense raised a host of individual issues. While common issues among class members may have been sufficient to satisfy the predominance prong for certification, the trial court also had to determine that these individual issues could be effectively managed in the ensuing litigation"].)

*Duran* holds that a plaintiff seeking certification must put forward "an appropriate trial plan" to manage individual questions arising in a misclassification case. (*Duran*, 59 Cal.4th at p. 27; see also *id.* at p. 25 ["[A] class action trial management plan must permit the litigation of relevant affirmative defenses, even when these defenses turn on individual questions"].) Plaintiff had sufficient opportunity to prepare such a plan here; although *Duran* was decided shortly after plaintiff moved for certification, the certification hearing did not take place until almost five months later and both the court and JSC raised the necessity of an adequate trial plan under *Duran* well before then. Nevertheless, no such plan was submitted.[8]

[8] Plaintiff argues it was error for the court to decline to grant a continuance to allow her to submit a trial plan. Plaintiff, however, did not request a continuance to submit one at any time prior to the court's order denying certification. The offer made by counsel

At the certification hearing, when confronted with the failure to submit a plan for managing individual issues, plaintiff's counsel attempted to chart a plan on the fly, explaining he would call a random sample of class members who would be expected to testify that the mechanics of their duties as property managers were identical. When the trial court asked what happens "when the baton passes to the defendant," counsel stated "[JSC] will call their five or six witnesses" to testify and the fact-finder will be able to establish whether the duties are the same or not. The court, however, questioned on what basis it could limit JSC to only five or six witnesses and counsel responded only with the observation that "at some point the witnesses become cumulative." This was inadequate. "While class action defendants may not have an unfettered right to present individualized evidence in support of a defense" (*Duran*, *supra*, 59 Cal.4th at p. 34), the due process considerations identified by our Supreme Court combined with the wide variation among proposed class members here required a plan that was more well developed than the court saying, "I've heard enough," at some point during trial, which is what counsel suggested when arguing the reconsideration motion.

Plaintiff counters, however, that no trial plan was needed here because *Duran* requires submission of a trial plan only where "statistical evidence" is used. This reads *Duran* too narrowly. Our Supreme Court held a trial management plan is necessary to manage individual questions that may arise in a class action proceeding, including through use of statistical evidence. (*Duran*, *supra*, 59 Cal.4th at pp. 27, 31.) Consistent with its broader focus on requiring a plan to manage individual issues and not merely the testimony or calculations of a statistician, the *Duran* opinion expressly uses the term "statistical evidence" to include representative testimony evidence in a misclassification case, that is, evidence from a small number of class members that would be extrapolated to the whole to establish liability. (*Id.* at p. 35 ["While representative testimony and sampling may sometimes be appropriate tools for managing individual issues in a class action, these statistical methods cannot so completely undermine a defendant's right to

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later at the hearing on the motion for reconsideration to prepare and submit a trial plan was untimely and appropriately denied.

present relevant evidence"]; see also *id.* at pp. 12-13, 33.) Of course, that sort of representative testimony is precisely what plaintiff proposed to use to establish liability at trial. Plaintiff's failure to put forward a viable plan to manage the individualized defense issues that would arise if such testimony were used deprived the trial court of a basis on which it could conclude a class action proceeding would be manageable.

In sum, substantial evidence supports the trial court's commonality and manageability findings, findings that justify its denial of class certification. We do not dispute, as the court observed in *Martinez, supra*, 231 Cal.App.4th at p. 384, that class-wide relief is the generally preferred method for resolving wage and hour claims, nor do we hold the record lacked *any* evidence indicating there were some issues and facts common among the proposed class members. But what the trial court found missing here, which was present in *Sav-on* and *Martinez,* is agreement by the parties on a finite task list for jobs that are "highly standardized." (*Sav-on, supra,* 34 Cal.4th at pp. 330-331; *Martinez, supra*, 231 Cal.App.4th at p. 380.) The court accordingly assessed the evidence submitted by the parties and determined that variations in project managers' work environments, job functions, and day-to-day activities would make use of common proof to establish liability and management of affirmative defenses difficult if not impossible. As *Sav-on* itself counsels, we may not substitute our judgment for the trial court's "respecting this or any other conflict in the evidence." (*Sav-on, supra,* 34 Cal.4th at p. 331.)

*2. The certification decision did not impermissibly determine the merits*

In a related vein, we add a few words to directly address plaintiff's claim, which we find unpersuasive, that the trial court decided against certifying the class solely because it prematurely and improperly rejected the theory of recovery she urged at the certification hearing (all property manager tasks are nonexempt) on the merits. It was the court's responsibility to "identify the common and individual issues"; "consider the manageability of those issues"; and "taking into account the available management tools, weigh the common against the individual issues to determine which of them

predominate." (*Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422, 1432.) In doing so, the court was permitted to compare the parties' evidence of common and individual issues, even where "evidence . . . germane to the certification question [bore] as well on aspects of the merits." (*Brinker*, *supra*, 53 Cal.4th 1004 at p. 1023; see also *Dailey*, *supra*, 214 Cal.App.4th at p. 991 ["if the parties' evidence is conflicting on the issue of whether common or individual questions predominate . . . the trial court is permitted to credit one party's evidence over the other's in determining whether the requirements for class certification have been met—and doing so is not . . . an improper evaluation of the merits of the case"].)

Indeed, the sentence uttered by the court during the hearing upon which plaintiff so heavily relies ("It's very hard for me to look at these duties and agree with you that they are—that I can assume that on the merits they're nonexempt") is not in fact an indication the court used an evaluation of the merits to decide certification but rather of its effort to avoid doing so. The trial court made the statement in question in response to plaintiff's argument that the actual task categories in which a given property manager engaged would be irrelevant if he proved all of the categories were nonexempt. The court believed this argument amounted to an assertion that the court must certify the class because it must assume plaintiff *would* prove all of the 16 task categories it identified were nonexempt. Plaintiff disclaimed making such an argument and asserted that the court need not assume the duties were exempt because that would be the issue resolved at trial. The discussion then turned to how plaintiff would go about proving her case, with the court wondering, for instance, "how would I know if communications with subordinates are exempt or nonexempt unless I hear from 260 people about their conversations with subordinates?" In its proper context, the trial court's statement reveals that it did not resolve the merits against plaintiff, but merely resisted any argument by plaintiff that it must certify the class because it must assume all property manager duties are exempt. The court was appropriately focused on *how* plaintiff would go about proving the merits of her case.

We also reject plaintiff's contention that the trial court's observations regarding differences in how much time property managers spent on given tasks is an indication that it disregarded her theory of recovery.[9] A certification decision must take into account the applicable substantive law, which when involving exempt and nonexempt classifications, includes whether the employee is "primarily engaged in duties which meet the test of the exemption." (§ 515, subd. (a); Cal. Code Regs., tit. 8, § 11050, subds. 1(B)(1)(e) & 1(B)(2)(f).) That the trial court's certification decision here makes reference to issues involving how property managers spent their time is therefore unremarkable, particularly when plaintiff's theory of recovery as briefed in both her moving and reply papers on certification argued a property manager's typical day consisted of performing "mostly" nonexempt duties. The court cannot be faulted for making reference to all issues framed by the parties, namely plaintiff's theory of recovery based on "mostly" nonexempt work as well as her theory, offered for the first time during the hearing, that 100% of the work performed by property managers was nonexempt.

In any event, the core of the trial court's rationale for denying certification applied fully to plaintiff's 100% exempt theory of recovery, as the court itself would later observe during the hearing on plaintiff's reconsideration motion. (See, *ante*, at p. 13.) And that rationale was the conclusion there were substantial individualized issues concerning "what [project managers'] responsibilities were," that were not amenable to common proof or manageable when raised in connection with affirmative defenses, a proper finding on which to deny certification. (*Dunbar v. Albertson's, Inc.*, *supra*, 141 Cal.App.4th at p. 1431.)

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[9] The court's order denying certification, for instance, states: "Plaintiff paints a picture of a class of [property managers] with similar duties who all spent over 50% of their time on nonexempt duties. But the record reveals a much more complex picture of [property managers] who managed different types of properties and who did not spend their time in a uniform manner. Thus, Plaintiff's proposed class would be predominated by individualized questions concerning how each [property manager] spent his or her time and on whether the activities performed by each [property manager] were indeed non-exempt activities."

*3. Proposed Subclass*

Although it was absent in her certification motion and mentioned instead for the first time in reply, plaintiff asked the trial court to certify a proposed subclass of project managers who supervised fewer than two employees in the event it denied certification as to the larger proposed class. The court's refusal to do so was not an abuse of discretion on the record before it. To be sure, the executive exemption would not apply to the members of the proposed subclass, but the administrative exemption—which does not require supervision of a certain number of subordinates—remained relevant. (8 Cal. Code Regs., tit. 8, § 11070, subd. (1)(A)(2).)

Apart from a statement at the certification hearing that the proposed subclass was "susceptible to common proof because how many people they supervised is based upon documents," plaintiff provided no basis for certifying the subclass. There was also no evidence before the court that established how large, or small, the proposed subclass would be. (Code Civ. Proc., § 382; *Brinker, supra*, 53 Cal.4th at p. 1021 [party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class].) We therefore find no error in the refusal to certify the proposed subclass. (See, e.g., *Block v. Major League Baseball* (1998) 65 Cal.App.4th 538, 545 [court not obligated to consider subclasses where plaintiff "failed to provide the trial court with a concrete proposal describing how such subclasses would be defined, how they would be administered, or how they would help the court deal with the complexities inherent in the proposed class"].)

DISPOSITION

The order denying certification is affirmed. Respondent is to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KUMAR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.