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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

TIMOTHY MCCLEERY et al., Plaintiffs and Appellants, v. ALLSTATE INSURANCE COMPANY et al., Defendants and Respondents.	B256374 (Los Angeles County Super. Ct. No. BC410865)

APPEAL from orders of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Reversed and remanded.

Shenoi Koes, Allan A. Shenoi, Daniel J. Koes; The Law Offices of Stephen M. Benardo, Stephen M. Benardo; Appell Shapiro, Barry Appell, Scott E. Shapiro for Plaintiffs and Appellants.

Seyfarth Shaw, Andrew M. Paley, James M. Harris, Sheryl L. Skibbe, Kiran Aftab Sheldon for Defendant and Respondent Allstate Insurance Company.

Epstein Becker & Green, Michael S. Kun, Aaron F. Olsen for Defendant and Respondent Farmers Group, Inc.

Robie & Matthai, Kyle Kveton, Ronald P. Funnell for Defendants and Respondents CIS Group, LLC and North American Compass Insurance Services Group, LLC.

Nelson Mullins Riley & Scarborough, Cory E. Manning, Paul T. Collins, Sarah T. Eibling for Defendant and Respondent Advanced Field Services, Inc.

Overview

In this class action four plaintiffs assert wage and hour claims on behalf of a putative class of approximately 1,550 insurance company property inspectors in California.[1] The plaintiffs allege causes of action seeking damages and other remedies (constructive trust, restitution for unjust enrichment) for the defendants' failure to pay minimum wages and overtime (Lab. Code, § 1194), failure to furnish timely and accurate wage statements (Lab. Code, § 226, subd. (e)), failure to reimburse employee expenses (Lab. Code, § 2802), and violation of the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200).

The defendants are two insurers for whom the plaintiffs provided inspection services, Allstate Insurance Company (Allstate) and Farmers Group, Inc. (Farmers); and three "vendors" that hire (or contract with) the inspectors to provide the insurers with inspection services: CIS Group LLC/North American Compass Insurance Services Group, LLC (CIS), Advanced Field Services, Inc. (AFS), and Capital Personnel Services, Inc. (PMG).

The basic facts underlying the plaintiffs' claims are essentially the same with respect to all members of the class: During the applicable period the plaintiffs performed property inspections for one or both of the insurer-defendants, while either employed by or engaged as independent contractors by one or more of the defendant vendors; whatever the identity of their hiring vendor, and whether they were classified by that vendor as employees or independent contractors, the inspectors were in fact and law employees, and were joint employees of both the hiring vendor and the insurer for which

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[1] This opinion's references to the plaintiffs' class and its members should be understood to refer to the uncertified putative class and its members, urged by the plaintiffs' certification motions.

they performed inspections; as employees, they were entitled to the benefits and protections of California labor laws that mandate benefits such as minimum wages, overtime, meal and rest breaks, reimbursement of expenses, and accurate wage statements; and as a matter of uniform policy, the defendant vendors and insurers did not provide them with the mandated benefits.

The trial court denied class action certification, concluding that plaintiffs did not meet their burden to show that common factual and legal questions would predominate over individual issues. Appellants seek reversal of the class certification denial and remand for reevaluation of that issue; they seek leave to amend their pleadings to restore meal break and rest break damage claims to the complaint, and restoration to the complaint of their claims for remedies under the UCL for the alleged meal and rest break violations; they seek rulings on evidentiary objections they interposed to the defendants' submissions in opposition to class certification; and they seek an order requiring transfer of the case to the superior court's complex case department.

Background

Overview of Claims

The plaintiffs' lawsuit was originally filed in April 2009. As amended, the suit alleges that during various periods since April 2005 (within a four-year statute of limitations), the defendant insurers and vendors hired the class members, classified either as direct employees or independent contractors of one of the defendant vendors, to perform property inspections for and at the direction of one or more of the defendant insurers. The plaintiffs contend that, whether they were classified as employees or independent contractors, they were in fact and law employees of the hiring vendor; and by virtue of various factors, including primarily the degree of control maintained by the defendant insurers over their work, the insurer or insurers for whom they performed inspection services were in fact and law their joint employers along with the hiring vendor. They contend that the defendants designed and implemented this system in order to deprive the inspectors of legally mandated employee wage and hour benefits, such as

payment for overtime and minimum wages, reimbursement for employee expenses, provision of accurate wage statements, and provision of meal and rest breaks, to which they were entitled by law. And they contend that they were deprived of some or all of these benefits.

Third Amended Complaint

The second amended complaint and earlier pleadings included causes of action alleging that the defendants failed to provide them with meal breaks and rest breaks as required by law. However, a published decision of the Third District Court of Appeal filed on July 27, 2010,[2] ruled that under Labor Code section 218.5 a defendant employer may recover attorney's fees and costs after successfully defending against a plaintiff employee's rest period clams. Soon afterward (before the Supreme Court granted review of the decision) the plaintiffs in this case acted to eliminate the risk of a fee award against the class representatives by filing a third amended complaint that deleted their claims for damages for meal and rest period violations.

Although the third amended complaint eliminated the claims for damages for meal and rest break violations, the pleading continued to allege the defendants' failure to provide legally required meal and rest breaks, and continued to include a cause of action alleging that these violations constituted unfair business practices, seeking restitution and disgorgement of profits under the UCL, Business and Professions Code sections 17200 through 17203.

Leave to file Fourth Amended Complaint and Order Striking Claims for Meal and Rest Break Violations

The Supreme Court granted review of the Court of Appeal's decision in *Kirby v. Immoos Fire Protection, Inc.* On April 30, 2012, the Supreme Court held (contrary to the vacated Court of Appeal decision) that in a suit for meal and rest break violations, neither party is entitled to recover attorney's fees under Labor Code section 218.5. (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244 (*Kirby*).)

[2] *Kirby v. Immoos Fire Protection, Inc*. (C062306, filed July 27, 2010) review subsequently granted.

On March 6, 2013, the plaintiffs sought leave to file a fourth amended complaint to (among other things) restore the earlier deleted damage claims for meal and rest break violations. The trial court denied leave to restore the deleted claims.[3] The court based its ruling on the plaintiffs' delay of more than 10 months after the Supreme Court's *Kirby* decision to seek restoration of the meal and rest break damage claims, and on its concern that the third amended complaint's elimination of those damage claims might have led the defendants to limit the depth of their subsequent discovery.[4] The plaintiffs filed their fourth amended complaint on April 12, 2013, leaving the third amended complaint's UCL cause of action for meal and rest break violations unchanged, in accordance with the trial court's ruling.

On May 17, 2013, Allstate and Farmers moved to strike the allegations of meal and rest break violations from the UCL cause of action, arguing that the Supreme Court's *Kirby* decision precludes the remedy of restitution under the UCL. The trial court granted the motion to strike on August 5, 2013.[5]

Fourth Amended Complaint

The fourth amended complaint, as amended by these rulings, alleges seven causes of action for damages and other relief for unpaid overtime compensation and failure to pay minimum wages (Lab. Code, § 1194), failure to furnish timely and accurate wage statements (Lab. Code, § 226, subd. (e)), failure to reimburse employee expenses (Lab. Code, § 2802), constructive trust, restitution for unjust enrichment, and unfair business practices (Bus. & Prof. Code, § 17200).

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[3] The court permitted the plaintiffs to file a fourth amended complaint to replace one of the plaintiffs' class representatives, and to remove allegations relating to certain previously stricken claims.

[4] This court denied the plaintiffs' writ petition (B252504) challenging this ruling. In this appeal the plaintiffs renew their request for review of this ruling.

[5] This court denied the plaintiffs' writ petition challenge (B250836), and the Supreme Court denied review (S213950).

The plaintiffs alleged that during various specified periods, they (and members of the class) provided property inspection services to one or the other of the defendant insurers, through one or more of the defendant vendors; that their inspection services were an integral and essential part of the defendants' business; that although they were at various times classified either as employees and or independent contractors, they were in fact and law actually employees of the hiring vendor; that the insurer for which they performed inspections was in fact and law their joint employer, along with the hiring vendor; and that they each have "wage and hour" claims, including for unpaid overtime, minimum wages, unreimbursed expenses, and denied meal and rest breaks. The plaintiffs contended that common issues of law and fact predominate for proof of liability to members of the plaintiffs' class. They all have the same basic claims against the defendant employers: they all had the same job duties; they were subject to the same employment policies; they were compensated in the same manner; and the defendants uniformly retained the right to control the manner in which they did their work.

The pleading alleges that the class of plaintiffs is ascertainable from the defendants' records, and is too numerous for adjudication of their claims to be managed other than as a class action. The plaintiffs' class is alleged to have a community of interest in questions of law and fact that they are determinable from proof that applies to the entire (or to various large segments of) the class, which proof will establish the defendants' liability, and which predominates over issues separately affecting individual class members. The plaintiffs' class is alleged to have various subclasses, comprised of inspectors who worked during various periods, for and through various of the defendants; and to have a "retaliation" subclass comprised of inspectors who suffered adverse employment actions (such as discharge) due to their refusal to sign an independent contractor agreement or their disclosure of their employment conditions in connection with the lawsuit. The pleading alleges that although the amount of damages or restitution to which individual members of the plaintiffs' class may be entitled may differ, the key issues with respect to the defendants' liability to the plaintiffs' class—the defendants' status as the plaintiffs' employers and joint employers, and the defendants' denial to the

inspectors of legally mandated wage and hour benefits—are determinable on a classwide basis from common evidence and formulas.

Class Certification Motions

On May 6, 2013, the plaintiffs filed five separate class certification motions, each one against one of the five defendants (Allstate, Farmers, CIS, AFS, and PMG).[6] Each motion identified between one and three (overlapping) proposed subclasses of inspectors.

Against CIS, the class certification motion proposed two subclasses:

(1) Inspectors hired by CIS, whether designated as employees or independent contractors, from December 1, 2005 to the present, who have wage and hour claims and/or were denied meal or rest breaks.

(2) Inspectors hired by CIS, whether designated as employees or independent contractors, from December 1, 2005 to the present, whose working relationships were adversely affected for refusing to sign an independent contractor agreement or disclosing information about their working conditions or participating in this lawsuit.

Against AFS, the class certification motion proposed a single subclass:

Inspectors hired by AFS, classified as independent contractors, from December 1, 2005 to October 1, 2008, who have wage and hour claims and/or were denied meal or rest breaks.

Against PMG, the class certification motion also proposed a single subclass:

Inspectors working for PMG, from April 1, 2005 to the present, who have wage and hour claims, and/or who were denied meal or rest breaks.

[6] The court apparently had instructed the plaintiffs to file separate certification motions against each of the defendants. Accompanying the motions the plaintiffs filed about 3,000 pages (approximately 13 volumes) of supporting exhibits, declarations, and transcripts. The defendant insurers and vendors (with the exception of PMG) opposed class certification, filing voluminous documents supporting their positions. We discuss the proposed subclasses only as they may be significant to the issues raised by this appeal.

Against Allstate, the class certification motion proposed three subclasses:

(1) Inspectors for Allstate hired by PMG, designated either as employees or independent contractors, from April 1, 2005 to December 1, 2005, who have "wage and hour claims" and/or who were denied meal and rest breaks.

(2) Inspectors for Allstate hired by CIS, designated either as employees or independent contractors, from December 1, 2005 to the present, who have "wage and hour claims" and/or who were denied meal and rest breaks.

(3) Inspectors for Allstate hired by CIS, designated either as employees or independent contractors, from December 1, 2005 to the present, whose working relationships were adversely affected for refusing to sign an independent contractor agreement or for disclosing information about their working conditions in connection with this lawsuit.

Against Farmers, the class certification motion proposed three subclasses:

(1) Inspectors for Farmers hired by AFS, designated as independent contractors, from April 1, 2005 to October 1, 2008, who have "wage and hour claims."

(2) Inspectors for Farmers hired by CIS, designated either as employees or independent contractors, from April 1, 2005 to the present, who have "wage and hour claims."

(3) Inspectors for Farmers hired by CIS, whether designated as employees or independent contractors, from April 1, 2005 to the present, whose working relationships were adversely affected for refusing to sign an independent contractor agreement or disclosing information about their working conditions or participating in this lawsuit.

The common issues that the plaintiffs contend establish the defendants' liability, and are determinable based on proof common to all the defendants and class members, are: (1) whether the inspectors were employees (rather than independent contractors) of the hiring vendor or vendors; (2) whether the insurer or insurers were the inspectors' joint employers, along with the hiring vendor or vendors; and (3) whether, as their employers, the defendants' uniform policies and practices denied them legally required overtime, minimum wages, expense reimbursements, and meal and rest breaks.

According to the plaintiffs, these core elements of the defendants' liability are amenable to classwide adjudication. "There is no evidence Respondents' policies and practices differed from one class member to another in any way that would affect whether or not a given Respondent is liable to individual class members who performed work for that Respondent."

Hearings on Class Certification

On successive days in early December 2013, the trial court heard argument on the plaintiffs' class certification motions, separately as to each defendant. The court tentatively concluded that the plaintiffs had demonstrated the requisite ascertainability and numerosity for a class certification (at least with respect to some major subclass categories).[7] It apparently also was generally satisfied with the experience and expertise of class counsel and the class representatives' diligence in pursuing the litigation, at least as to most portions of the plaintiffs' class. While the court expressed some concern whether the currently named representative plaintiffs (none of whom remained engaged by the defendants as inspectors) were adequately typical of currently serving inspectors, any such defect could easily be remedied by an appropriate substitution of representative plaintiffs. (See *Jones v. Farmers Ins. Exchange* (2013) 221 Cal.App.4th 986, 999 [lack of adequate class representative does not justify denial of class certification]; *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 872 [court must allow plaintiffs opportunity to amend complaint to name suitable class representative].)

The court also tentatively concluded that the plaintiffs' showings justified class action certification with respect to whether the vendors were the inspectors' employers, and whether the insurers were their joint employers. For example, the court stated its

[7] The court cited plaintiffs' ability to identify subclasses of about 900 inspectors for AFS, and a similar total for CIS, primarily performing inspections for Allstate. Plaintiffs proffered evidence confirming the defendants' production of records as to inspections by AFS and CIS inspectors for both Farmers and Allstate. Plaintiffs also showed that Allstate had delayed providing "merits-based" discovery and discovery identifying damages (e.g., overtime worked, etc.) until after discovery is completed on the issue "whether Plaintiffs were independent contractors or employees."

inclination "to divide the issues in discussion as independent contractor versus employee, joint employer, Labor Code violations, and retaliation. [¶] It appears to have been a company policy of the various defendants that property inspectors were retained as independent contractors rather than being hired as employees. Allstate [for example] has provided no evidence that property inspectors were treated in an individualized manner as regards being independent contractors and assigned properties. This appears to be an issue amenable to class treatment. [¶] The joint employer issues also appears amenable to class treatment. Although Allstate gave an extensive list of factors, it appears that there were policies and procedures which were followed regarding distribution of work from Allstate to the individual property inspectors. Allstate has provided no evidence that this was not the case." The court identified the common issues that it tentatively concluded involved the defendants' policies: "These are whether there were independent contractors or employees, whether Allstate and Farmers were jointly employers, whether potential class members were terminated for failure to sign an independent contractor contract, and whether they were terminated for cooperating with this litigation."

However, the court expressed its concern whether, even assuming these employment status issues could be established by common proof, there is sufficient commonality to justify class action certification with respect to proof of wage and hour violations affecting each class member. It questioned how the plaintiffs could establish commonality in the actual work performed, in light of the variations in the manner the inspectors performed their work: for example, whether they worked full-time or part-time, whether they worked long or short hours on any given day, whether they subcontracted with others to perform inspections, and whether they also had other employment.

The court tentatively concluded that the liability issues could be divided into four phases: Phase 1 would determine whether during a specified period the defendants had a policy of classifying all inspectors as independent contractors. If so, phase 2 would determine whether the insurers were actually the inspectors' employers, jointly with one or more of the defendant vendors. If in phases 1 and 2 the defendants were found to be

their inspectors' employers and joint employers, phase 3 would determine whether the plaintiffs had been deprived of legally mandated wage and hour benefits. And phase 4 would determine whether plaintiffs had suffered retaliation resulting from refusals to sign independent contractor agreements.[8]

Indicating its concerns about whether the plaintiffs could establish commonality in their proof as to the phase 3 and 4 issues, the court sought further responses from the plaintiffs limited to these issues, and scheduled further hearings for each of the five certification motions.[9] The plaintiffs' responses included a supplemental declaration setting forth their expert's plan to use established sampling methods to determine the variations within the population of inspectors, and scientifically designed and approved statistical analysis of the sampling data to produce accurate measurement of the extent of the variations in the inspectors' work.

Denial of Class Certification

At a March 24, 2014 hearing, the trial court denied the plaintiffs' class certification motions as to four of the five defendants: insurers Allstate and Farmers, and defendant vendors CIS and AFS.[10] Despite the plaintiffs' requests that the court rule on

[8] Although the certification motions initially sought a subclass of inspectors who had suffered retaliation or other adverse consequences for participation in this litigation, the plaintiffs later conceded its proposed retaliation subclass was limited to employees of CIS.

[9] The court articulated nine questions to be addressed by the parties, concerning how to apportion the class into inspectors who worked full-time or part-time; those who were assisted by subcontractors or others, or who performed inspections for more than one insurer; how the plaintiffs would prove the defendants' failure to provide pay statements or to pay overtime and minimum wages; how the plaintiffs would prove their mileage and other unreimbursed expenses; where are plaintiffs' retaliation claims pleaded; and how many potential plaintiffs suffered adverse consequences for failing to sign an independent contractor agreement, or for participating in this litigation.

[10] The court declined to rule on the motion against PMG, who had filed no opposition to class certification in the trial court. The record confirms that the plaintiffs filed a class-certification motion against PMG. Appellants' appendix contains a conformed copy of that motion, filed May 6, 2013; and the trial court register of actions

the many objections to the evidence filed by defendants in opposition to class certification, the court declined to provide specific rulings on any objection; its post-hearing minute order simply states that "plaintiffs' evidentiary objections are overruled."[11]

The Appeal

On May 15, 2014, the plaintiffs appealed from the class-certification denial, and from "all interim orders pertaining to the class," as an appealable judgment under the death-knell doctrine.[12]

Discussion

I. Standard of Review

Code of Civil Procedure section 382 authorizes a suit to be tried as 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.) Class action certification requires demonstration of an ascertainable and sufficiently numerous class, a well-defined community of interest, and the superiority of proceeding as a class rather than the alternatives. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).)

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reflects plaintiffs' filing on May 6, 2013, of "5 separate" class certification motions—referencing motions against each of the five defendants. PMG has not denied being served with the motion. However, the plaintiffs have not made the court's failure to rule on the certification motion against PMG an issue in this appeal.

[11] The plaintiffs' appeal does not address the merits of any specific evidentiary objection within the court's blanket denial of all objections.

[12] Respondents do not contest the appealability of the order denying class certification under the death-knell doctrine. (*Daar v. Yellow Cab Co*. (1967) 67 Cal.2d 695, 698-699; *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470 [denial of class certification is an appealable order].) The insurer defendants argue, however, that interim orders that preceded the class-certification denial are not appealable at this stage—an issue we address later in this opinion.

The "community of interest" requirement has 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. (*Brinker, supra*, 53 Cal.4th at p. 1021; *Ayala v. Antelope Valley Newspapers, Inc*. (2014) 59 Cal.4th 522, 529-530 (*Ayala*).) Generally, "'if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.'" (*Brinker, supra*, at p. 1022; *Cochran v. Schwan's Home Service, Inc*. (2014) 228 Cal.App.4th 1137, 1142 (*Cochran*).)

In reviewing the trial court's class certification denial we are concerned with "whether the operative legal principles, as applied to the facts of the case, render the claims susceptible of resolution on a common basis." (*Ayala, supra*, 59 Cal.4th at p. 530; *Brinker, supra*, 53 Cal.4th at pp. 1023-1025.) "'The certification question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious."'" (*Brinker, supra*, 53 Cal.4th at p. 1023.) The focus is instead on what type of questions—common or individual—are likely to arise, and whether proceeding as a class action, as compared to other forms of action, is a superior method of resolving these questions. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327, 339 & fn. 10 (*Sav-On*).) A class action may be certified even if it is unlikely that the plaintiffs' class will eventually prevail on the merits. Class certification in such a situation allows the defendants to obtain a favorable judgment that will bind all class members. "It is far better from a fairness perspective to determine class certification independent of threshold questions disposing of the merits, and thus permit defendants who prevail on those merits, equally with those who lose on the merits, to obtain the preclusive benefits of such victories against an entire class and not just a named plaintiff."[13] (*Brinker, supra*, 53 Cal.4th at p. 1034.)

[13] The trial court in this case expressly disclaimed having resolved any disputed factual or legal issues in its class certification ruling. We therefore intend nothing in this opinion to address the merits of the plaintiffs' claims or the defenses asserted by the defendants.

"We review the trial court's ruling for abuse of discretion and generally will not disturb it, '"unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions."'" If the trial court's "reasons for granting or denying certification . . . are erroneous, we must reverse, whether or not other reasons [could have been] relied upon [to] support[] the ruling." (*Ayala, supra*, 59 Cal.4th at p. 530; *Cochran, supra*, 228 Cal.App.4th at p. 1143.) "'[A]ppellate review of orders denying class certification differs from ordinary appellate review. Under ordinary appellate review, we do not address the trial court's reasoning and consider only whether the result was correct. [Citation.] But when denying class certification, the trial court must state its reasons, and we must review those reasons for correctness. [Citation.] We may only consider the reasons stated by the trial court and must ignore any unexpressed reason that might support the ruling.'" (*Cochran, supra,* 228 Cal.App.4th at p. 1143.) "In other words, we review only the reasons given by the trial court for denial of class certification, and ignore any other grounds that might support denial." (*Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 829.)

Because trial courts "'are ideally situated to evaluate the efficiencies and practicalities of permitting group action,'" they are "'afforded great discretion'" in evaluating the relevant factors and in ruling on a class certification motion. (*Sav-On, supra,* 34 Cal.4th at p. 326.) In determining whether the record contains substantial evidence supporting the ruling, a reviewing court does not reweigh the evidence and must draw all reasonable inferences supporting the court's order. (*Id*. at p. 328; *Brinker, supra,* 53 Cal.4th at p. 1022.)

II. Plaintiffs' Plan To Establish The Defendants' Liability Using Proof Common To The Class.

The plaintiffs' theory was that the parties' employee-employer status can be shown by factors common to the inspectors, vendors, and insurers, during various periods, primarily showing a high degree of control reserved and maintained by the

defendant insurers and the hiring vendors over the inspectors' work.[14] Whether that proof is sufficient to establish the insurers and vendors as the inspectors' employers is a mixed question of fact and law, determinable primarily from evidence common to all class members for each relevant time period; it therefore may be amenable to class action adjudication.

Once the inspectors' status as the defendants' employees is established, the plaintiffs contend that the fact that they were deprived of legally mandated employee benefits is also subject to common proof. Common proof would establish that the defendants uniformly denied inspectors required wage and hour benefits, such as compensation for overtime they incurred; compensation for time they were required to expend before and after inspections; reimbursement for mileage and other expenses; minimum wages; and legally mandated wage statements (as well as required meal and rest breaks). They contend the existence of these uniform policies is a factual question common to all class members, amenable to class treatment; and the rights of employee-inspectors to legally mandated employee benefits is a question of law common to all class members, therefore also amenable to class treatment. "Claims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment." (*Brinker*, *supra*, 53 Cal.4th at p. 1033.) And they contend that the resulting eligibility of individual class members for recovery for having been deprived of these employee benefits, while

[14] For example, AFS's master contract with Farmers specified that all its inspectors must sign the same independent contractor agreement, and are subject to the same recruiting requirements, qualifications, expectations, review criteria, whatever might be their classifications as employees or independent contractors. Independent contractor inspectors for Farmers were required to sign the same independent contractor agreement. AFS's standard independent contractor agreements with its inspectors (one for 2007, one for 2008), provided that inspectors require no specified skills, education, license, investment, or training (except as AFS might require), that inspectors cannot subcontract their duties, that inspectors must adhere to a dress code, that inspectors must obtain advance approval for vacations or leaves of absence, that inspectors would be disciplined (would not be paid) for inspections not completed within required times, and that inspectors would be paid on a per-inspection piece-rate basis.

varying in some degree from inspector to inspector, is subject to manageable proof using statistical methods and expert analysis. "A class . . . may establish liability by proving a uniform policy or practice by the employer that has the effect on the group of making it likely that group members will work overtime hours without overtime pay, or to miss rest/meal breaks." (*Sotelo* v. *Medianews Group, Inc*. (2012) 207 Cal.App.4th 639, 654 (*Sotelo*).) "California courts and others have in a wide variety of contexts considered pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate." (*Sav-On, supra*, 34 Cal.4th at p. 333.)

The defendants disputed the plaintiffs' ability to establish the vendors and insurers' liability on a classwide basis. They contended, and proffered evidence, that they had no such uniform policies, and that individual variations in the inspectors' working habits and conditions would render classwide adjudication of these issues impossible.

III. The Trial Court Abused Its Discretion By Failing To Evaluate The Relevance Or Amenability To Classwide Adjudication Of The Secondary Factors Regarding Employment On Which It Relied To Deny Class Certification.

The central question with respect to the existence of a community of interest for class certification 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.'" (*Brinker, supra*, 53 Cal.4th at p. 1021.) In conducting this analysis, a court must examine the plaintiffs' claims, 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." (*Id.* at pp. 1021-1022, 1025; *Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129, 1141-1142.)

The trial court concluded in this case that the following issues would be likely to arise: the plaintiffs' status as the vendors' employees rather than as independent

contractors; the insurers' joint employment of the inspectors that performed their inspections; whether the inspectors were actually entitled to and deprived of the claimed employment benefits; and the amounts owed by the defendants for any such breaches.[15] And it initially accepted the commonality of the proof of factual and legal issues underlying the vendors' and insurers' status as the inspectors' employers, based primarily on the existence of common evidence of the defendants' control over the inspectors' work.

However, in denying class certification the trial court revisited that tentative decision. It held, to the contrary, that individual proof would predominate over common issues with respect to the defendants' status as the inspectors' employers and joint employers. And it held that even if the plaintiffs were successful in establishing the inspectors' employee status, they nevertheless could not establish commonality for proof of the defendants' liability to any particular member or members of the plaintiffs' class.[16]

We find fundamental defects in these determinations: In reaching its conclusion that individualized proof of secondary factors might be required, the court listed possible secondary factors but did not evaluate or determine which (if any) of these factors might be of significant weight when compared with the common proof of control and other significant factors underlying the employment relationship; and it did so without evaluating the extent to which secondary factors might be amenable to common or otherwise manageable proof. And in concluding that the plaintiffs could not establish the defendants' liability without individualized proof that each inspector had actually been

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[15] The court recognized the desirability of resolving these claims in a single class action proceeding rather than in multiple individual actions. It heartily affirmed that having multiple trials to individually adjudicate the defendants' liability to multiple plaintiffs would not be beneficial to the court.

[16] Nowhere in its explanation of its denial of class certification did the trial court actually say that in this case individual proof would predominate over common issues, except in quoting that determination by other courts in various published decisions. (E.g., *Sotelo*, *supra*, 207 Cal.App.4th at p. 657; *Dunbar v. Albertson's Inc.* (2006) 141 Cal.App.4th 1422, 1431.)

deprived of each claimed employee benefit, the trial court declared that proof to be unmanageable without evaluating the plaintiffs' theory of proof might be sufficient, factually and legally, to render proof of liability manageable, and superior to adjudication of the claims in multiple individual actions.[17]

A. The court failed to evaluate the relevance, or amenability to common or manageable proof, of the secondary factors it identified with respect to proof of the employment issue.

The plaintiffs' theory for proof of the employment issue rests upon classwide proof that in conjunction with the vendors, and as an integral and essential part of the insurers' underwriting business, the defendants maintained a right to control almost every aspect of the inspectors' property inspection services. The insurers imposed and maintained the rules governing the manner in which inspections are performed; concerning the selection, training, supervision, review, and removal of inspectors; concerning the inspectors' territories and compensation; concerning the timing of inspections; concerning the inspectors' permissible dress and communications with the insurers' clients; and concerning the inspectors' right and ability to hire others to perform inspections assigned to them.

The trial court recognized the availability of common proof to show the extent to which the defendants had maintained control over these aspects of the inspectors' work—the "primary" factor indicating a common law employment relationship. (*S. G. Borello and Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350 (*S. G. Borello*).) But it nevertheless held that individual proof would predominate over common issues with respect to proof of the defendants' status as the inspectors' employers and

[17] We grant the plaintiffs' unopposed request for judicial notice of the trial court's July 10, 2015 minute order relating the case of *Jaime Lunde, et al. v. Farmers Group, Inc., et al.*, LASC No. BC543659, to this class action, and staying demurrers and motions to strike in the *Lunde* case pending the outcome of this appeal. The minute order identifies *Lunde*, filed shortly after the trial court's March 24, 2014 denial of class certification in this case, as a putative complex case brought by 106 plaintiffs against the respondents in this appeal, alleging claims "essentially similar" to those in this case, with a plaintiffs' trial estimate of 210 court days.

joint employers. It based this conclusion on the law's recognition that "secondary factors"—factors other than the defendants' right to control the inspectors' work—may in some instances be relevant to the existence or nonexistence of an employer-employee relationship. The court cited various factors that might be secondarily relevant to the issue of employment status, drawn from the *S. G. Borello* decision.

The trial court's list of potentially relevant secondary factors included whether the defendant maintained a right to discharge inspectors without cause; whether the inspectors serve in a distinct occupation requiring skill; whether the inspectors' service is usually performed by specialists without supervision; the degree of the inspectors' investment in their occupation; whether the work is an integral part of the defendants' business; whether the inspector is licensed as an independent business; whether the parties believe their relationship is that of employer and employee; and whether the independent contractor classification is a subterfuge to avoid the hirers' obligation to provide employee benefits. (*S. G. Borello, supra*, 48 Cal.3d at p. 350.) The court concluded that even if some of these factors can be determined on a classwide basis, some cannot. Commonality in the inspectors' work is lacking, it held, because some inspectors believed themselves to be independent contractors rather than employees; some inspectors hired others to assist them; some of the vendors did not treat their independent contractor inspectors in every respect the same as those they designated as their employees; and some inspectors arranged their inspections, and set their own geographic areas. Because "no two inspectors worked in the same way or under the same circumstances," the court held, proof of the vendors' and insurers' status as their inspectors' employers and joint employers might depend on proof of substantial and significant factual issues with respect to each individual class member.

The trial court acknowledged the Supreme Court's seminal ruling that the factor of primary relevance to show the existence of a common law employer-employee relationship is the degree to which a defendant maintains the right to control the details of the plaintiffs' performance. (*S. G. Borello, supra*, 48 Cal.3d at p. 350.) But it also relied upon the potential existence of secondary factors, without comparing their potential

relevance to that of the acknowledged primary factor, or evaluating which of the potentially relevant factors might or might not require individualized proof, and which might be amenable to classwide proof.

This was error. "In evaluating how a given secondary factor may affect class certification, a court must identify whether the factor will require individual inquiries or can be assessed on a classwide basis." (*Alaya*, *supra*, 59 Cal.4th at p. 538.) In this case, the plaintiffs' proposed to establish the status of one or more of the defendant vendors as its inspectors' employer by showing that during certain periods the vendors classified inspectors as employees and not as independent contractors.[18] And as in this case, where all the inspectors are alleged to performs the same tasks, "some factors will always be common,"—and therefore subject to common proof—"such as the kind of occupation and the skill it requires." (*Id.* at pp. 538-539; *Borello*, *supra*, 48 Cal.3d at p. 351.) Moreover, the plaintiffs' proposed use of contracts and other such documents would constitute relevant classwide evidence of strong indicators of control and employee status—foremost among them the defendants' right to discharge inspectors with or without cause. (*Alaya*, *supra*, 59 Cal.4th at pp. 538-539.)

But as the Supreme Court also held in *Alaya*, some secondary factors tend to be of lesser significance. For example, "'It is not determinative that the parties believe or disbelieve that the relation of master and servant exists, except insofar as such belief indicates an assumption of control by the one and submission to control by the other.'" (*Alaya*, *supra*, 59 Cal.4th at pp. 538-539; see *Bradley v. Networkers Internat., LLC*, *supra*, 211 Cal.App.4th at p. 1146 ["the label that the parties attach to the relationship 'is not dispositive and will be ignored if their actual conduct establishes a different relationship'"].) Thus even if the existence of common law employer-employee

[18] For example, according to the plaintiffs, from April until December 2005, PMG classified all its inspectors as employees; and from December 2005 until mid-2007, CIS classified all its inspectors (including the former PMG employees) as employees. Although during some period AFS hired some inspectors as employees and others as independent contractors, those classified as AFS employees are excluded from plaintiffs' class by definition.

relationships between the inspectors and their vendors and insurers were the only employment issue, the trial court failed to perform the required evaluation of the extent to which the various secondary factors would be of substantial relevance, as well as the extent to which they would require individual proof or may be assessed on a classwide basis.[19] As the Supreme Court put it in *Ayala*, "the trial court simply recited secondary factor variations it found without doing the necessary weighing or considering materiality. . . . On remand, any consideration of common and individual questions arising from the secondary factors should take into account the likely materiality of matters subject to common or individual proof." (*Alaya, supra*, 59 Cal.4th at p. 540.)

Finally, the court did not evaluate or determine whether *common law* employer-employee relationships are the only relevant relationships. The plaintiffs' theory of recovery rests in this case includes reliance on the alternative tests for the existence of employment relationships, as defined by the Labor Code and applicable Industrial Welfare Commission (IWC) wage orders. In *Martinez v. Combs* (2010) 49 Cal.4th 35 (*Martinez*), our Supreme Court held that in actions for unpaid wage benefits (minimum wages, overtime, etc.) under Labor Code section 1194, who may be liable as an employer is defined and governed by applicable IWC wage orders (*id.* at p. 51); and that under the wage orders' definition, an "employer" is one who "employs or exercises control over wages, hours, or working conditions of any person"; and the term "to employ" has three alternative definitions: "(a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a

[19] For example, the trial court cited as the most significant secondary factors the existence of evidence that some inspectors hired subcontractors, or had helpers; that some vendors did not treat independent contractor inspectors in every respect the same as employee inspectors; that some inspectors made the arrangements for their own inspections; and that "some inspectors believed themselves to be independent contractors and not employees"—the factor that the Supreme Court in *Ayala* identified as of at most limited relevance to the employment issue.

common law employment relationship." (*Martinez, supra*, 49 Cal.4th at p. 64; *Bradley v. Networkers Internat., LLC, supra*, 211 Cal.App.4th at p. 1146.)[20]

The trial court based its denial of class certification in part on its conclusion that secondary factors might require individualized adjudication of the employment issue, without evaluating which of these factors might be amenable to classwide or manageable adjudication, and without evaluating whether any such factors would be of either overriding or substantial relevance when compared to the available classwide proof as to control. These reasons require reversal of the class certification denial based on improper criteria, and remand of the certification question for redetermination using appropriate considerations. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436 [certification may not be denied based on improper criteria].)

B. The trial court abused its discretion by categorically denying class certification due to variations in the inspectors' performance, without evaluating which of the plaintiffs' claims can, and cannot, be established by common or manageable proof.

The trial court held that even if the plaintiffs were successful in establishing the inspectors' status as the defendants' employees, they nevertheless could not establish the defendants' liability without proof that each inspector had incurred, and had been deprived by his or her employer, of the claimed employee wage and hour benefits—proof that the inspector was deprived of required wage statements; had actually incurred but had not received minimum wages, overtime, or expense reimbursement; was actually required to perform uncompensated services; and actually suffered retaliation for refusing to sign an independent contractor agreement or participating in the lawsuit.

In some instances issues of this sort may not be amenable to classwide proof due to variations in the inspectors' performance. For example, although some inspectors

[20] We note that our Supreme Court has granted review of a case holding that the IWC wage order definitions of employer-employee relationships, rather than the common law definitions, govern claims brought under Labor Code section 1194. (*Dynamex Operations West, Inc. v. Superior Court*, B249546, Oct. 15, 2014.)

might often have become eligible for overtime by working more than eight hours in a day or 40 hours in a week, others undoubtedly did less so, or not at all. Although the plaintiffs claim that classwide proof would show that all inspectors were required by the defendants to devote time to non-inspection tasks, the result might have been various degrees of less-than-minimum wage compensation. And although the plaintiffs claim that most or all inspectors must have incurred at least some mileage or other unreimbursed expenses, the amounts of those expenses could vary widely.[21]

The plaintiffs plan for the adjudication of appropriate remedies recognized the potential for such variations, and provided evidence that proof to account for such variations among the inspectors would be manageable, scientifically based, and fair, in the form of presentations by Dr. Krosnick, an expert in survey polling and statistical analysis.[22] Dr. Krosnick's declaration includes detailed explanations of a methodology for the design and implement surveys taken from representative samples of the plaintiffs class, which would result in reliable and admissible evidence as to issues for which common proof is unavailable, such as wage-statement violations, amounts owed to compensate inspectors for earned and unpaid overtime, differences between earned wages and the minimum wage, compensation for mileage and other earned and unpaid work expenses, compensation for retaliation. According to Dr. Krosnick, the plan would use a "well-established methodology of random sampling . . . designed expressly to gauge the amount of variation in an attribute within a population, and well-established statistical procedures for analyzing randomly sampled data," thereby accurately measuring the degree to which variations in the inspectors' work affects the plaintiffs'

[21] In explaining its denial of class certification the trial court cited the plaintiffs' failure to address its questions about separating AFS's treatment of independent contractor inspectors from its employee inspectors, apparently unaware that for a period, the AFS subclass contained no inspectors classified by AFS as employees.

[22] Dr. Krosnick's declaration set forth his particular experience as a professor at Stanford University, and an expert witness in *Brinker* and more than 50 other cases involving employment issues.

entitlement to the various employee benefits, "no matter how much variation there is within the population."

Without evaluating Dr. Krosnick's qualifications or the merits of the plaintiffs' plan to use expert sampling and statistical analysis to manage this proof, the court concluded that the variations in the inspectors' work would require "particularized individual liability determinations." Quoting at length from various California decisions[23] (with few explanations concerning the circumstances of this case) the trial court concluded that the planned proof would not obviate individualized determinations as to each class member. Concluding that "[t]he class issues do not predominate over the individual issues," the court denied class certification.

We find fundamental defects in this determination as well. The conclusion that the plaintiffs could not establish the defendants' liability without individualized proof that each inspector was actually deprived of each claimed employee benefit—involving individualized proof of the actual hours, expenses, mileage, and the like, incurred by each individual inspector—implies a determination that such proof would be unmanageable. But the court arrived at that determination without evaluating the extent to which the plaintiffs' theory of proof might be sufficient, factually and legally, to render proof of some or all of these liability issues manageable. (See *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 55 (concurring opn. of Lui, J.) [need to manage individual issues "does not foreclose the use of sampling, representative testimony or other statistical methods to obtain relevant evidence in a class action trial on employee misclassification"].) And the court arrived at that determination without undertaking the essential evaluation, whether—even if some individualized adjudications are required—class action adjudication of the action might nevertheless be superior to adjudications (both of issues amenable to common proof, and those requiring more individualized adjudication) in multiple cases brought by dozens (or more) individual plaintiffs.

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[23] *Dailey v. Sears, Roebuck and Co.* (2013) 214 Cal.App.4th 974; *Sotelo, supra,* 207 Cal.App.4th 639; *Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286; *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524 (*Ghazaryan*).

Proof of an employee's "eligibility for recovery" does not present a distinct issue of liability, but rather depends on the same factual showing as the question of the amount of the employee's damages. (*Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 743-744.) "[M]ost class actions contemplate individual proof of damages, which necessarily entails the possibility that some class members will fail to prove damages. FIE cites no authority that class certification should be ordered only under circumstances promising universal recovery within the class." (*Id.* at p. 743.) The ultimate question is whether issues that may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that maintenance of class action would be advantageous. (*Sav-On, supra*, 34 Cal.4th 339.) "Individual issues do not render class certification inappropriate so long as such issues may effectively be managed." (*Ayala, supra*, 59 Cal.4th at p. 539; *Sav-On, supra*, 34 Cal.4th at p. 334; *Duran, supra*, 59 Cal.4th at p. 29.)

Nor is it essential that the plaintiffs' show that every misclassified inspector (for example) actually incurred mileage and other employee expenses that were unpaid by his or her employer, or was entitled to, but did not receive, wage statements. (*Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1207 [class certification is not rendered inappropriate "merely because each member at some point may be required to make an individual showing as to eligibility for recovery"]; *Bell v. Farmers Insurance Exchange, supra*, 115 Cal.App.4th at p. 744 [class certification is not unavailable because classwide proof of individual harm is not possible].) It is not even essential that the plaintiffs establish that all the potential members of the plaintiffs' class of inspectors were misclassified as independent contractors. (*Sav-On, supra*, 34 Cal.4th at pp. 333, 338 [plaintiffs' employee-misclassification theory need not be shown to be "either 'right as to all members of the class or wrong as to all members of the class'"].)[24]

[24] The allocation of an aggregate sum of damages among class members is an internal class accounting question that does not directly concern the defendants, and with respect to which the defendants lack standing. (*Bell v. Farmers Insurance Exchange, supra*, 115 Cal.App.4th at pp. 752, 759; see *Sanders v. City of Los Angeles* (1970) 3

If the defendants' employer status is established, so too would be the defendants' legal obligation to provide its inspectors with the benefits to which employees are entitled by law to receive from their employers, such as a minimum wage, overtime, reimbursement of expenses, meal and rest breaks, and accurate wage statements. And so also might be the availability of evidence of common policies and practices, or other manageable evidence of the defendants' uniform failure to provide such legally mandated benefits to their inspectors. "California courts and others have in a wide variety of contexts considered pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate." (*Sav-On, supra*, 34 Cal.4th at p. 333.) "A class . . . may establish liability by proving a uniform policy or practice by the employer that has the effect on the group of making it likely that group members will work overtime hours without overtime pay, or to miss rest/meal breaks." (*Sotelo, supra*, 207 Cal.App.4th 639, 654.) If it is established, for example, that the employee inspectors were encouraged to work long hours without overtime compensation, were required to provide their own equipment or to incur expenses without reimbursement, or were compensated on a per-inspection piece-rate basis, such proof might be sufficient to establish the defendant employers' liability for their failure to provide their inspectors with such benefits. (See *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 567-570 [law requires reimbursement of employee expenses]; *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 40-41, 45-46 [piece-rate compensation does not comply with minimum wage law unless it compensates separately for time spent on other required tasks]; *Bluford v. Safeway Inc.* (2013) 216 Cal.App.4th 864, 872 [piece-rate

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Cal.3d 252, 263 [defendant lacked standing to object to common fund attorney fee award]; *Hilao v. Estate of Marcos* (9th Cir. 1996) 103 F.3d 767, 786 [defendant's "interest is only in the total amount of damages for which it will be liable"]; *In re Agent Orange Product Liability Litigation* (E.D.N.Y. 1984) 597 F. Supp. 740, 839 [defendant has no valid objection so long as it is "liable for no more than the aggregate loss fairly attributable to its tortious conduct"].)

compensation that does not compensate separately for rest periods does not comply with minimum wage law].)[25]

Moreover, individualized adjudications would not necessarily be required to establish either the degree of variations among class members, or the impact of those variations on the defendants' liability, as the trial court concluded they would. A defendant's class action liability for relief may sometimes be established even without proof that any particular class member suffered individual damages. (*Safeway, Inc. v. Superior Court* (2015) 238 Cal.App.4th 1138, 1154-1156 (*Safeway*) [defendant's liability may be established by proof of classwide practice of failing to pay required wages], 1159 [defendant may be liable to class for restitution of deprived wages without proof of individual damages]; *Jones v. Farmers*, *supra*, 221 Cal.App.4th at p. 997 [uniform policy denying compensation is amenable to class treatment].) And proof that does not establish the liability of one defendant for particular damages may nevertheless be sufficient to establish liability as to another defendant.[26]

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[25] In *Cochran*, *supra*, 228 Cal.App.4th 1137, the trial court had held that proof of the defendant's liability to its employees for their cell-phone expenses would require examination of the phone plans and expenses for each member of the plaintiffs' class. Division Two of this court reversed the court's class certification denial, holding the trial court's concern to be unfounded. "If an employee is required to make work-related calls on a personal cell phone, then he or she is incurring an expense [for which the law requires reimbursement]." To show liability, "an employee need only show that he or she was required to use a personal cell phone to make work-related calls, and he or she was not reimbursed." (*Id.* at pp. 1144-1145.)

[26] For example, although Dr. Krosnick proposed expert analysis and testimony to determine the extent to which inspectors worked more than eight hours in a day or 40 hours in a week, Allstate argued that the proposed plan cannot establish its liability for overtime violations, because the date and time of Allstate inspections "cannot be determined from Allstate's records." Even if Allstate is correct, however, the proposed analysis and testimony might nevertheless be relevant to establish liability. Although the proposed evidence may not establish Allstate's liability to a particular inspector or inspectors for overtime pay, it might nevertheless provide other required proof, such as *the vendor's* liability for overtime pay, the vendors' and insurers' liability for minimum wage violations, or the fact that the inspector incurred unreimbursed expenses.

Substantial authority (some of it published since the trial court's ruling, for example, *Alaya*, *Duran*, and *Safeway*) supports use of proof resting on statistical sampling and analysis of the sort that the plaintiffs proposed, as a substitute for the particularized individual liability determinations that the trial court concluded would be unmanageably numerous. Statistical proof and expert analysis may also raise a presumption that the employers' uniform practice of withholding employee benefits resulted in significant labor law violations, thereby easing proof of liability without examination of an unwieldy number of individual issues. (*Safeway*, *supra*, 238 Cal.App.4th at pp. 1160, 1162.)

The variations among inspectors, on which the trial court relied in part, thus do not themselves provide a sufficient ground on which to deny class certification—at least not unless the plaintiffs' plan for proof of the impact of those variations on the defendants' liability is determined to be itself unmanageable or unfair. However the trial court's rejection of the plaintiffs' proffered plan was based on its categorical rejection of such expert survey and statistical analysis, without substantial evaluation of the plan's manageability with respect to the variations in the inspectors' circumstances in this case.

None of the cases on which the trial court relied for its rejection of the plaintiffs' plan for expert proof (see fn. 22, *ante*), hold expert sampling and statistical analysis to be categorically insufficient to establish liability issues. *Dailey v. Sears, Roebuck and Co.*, *supra*, 214 Cal.App.4th 974 (*Dailey*), affirmed a class certification denial, but only after expressly "assuming representative or statistical sampling may be used to prove liability on a classwide basis" in an appropriate case. (*Id.* at p. 998.) In that case, unlike here, the "core dispute" that could not be shown by classwide proof was whether the defendant had "acted in a uniform manner . . . resulting in [the plaintiffs'] widespread misclassification as exempt employees" (*id.* at pp. 978, 989, 990)—a liability theory on which the plaintiffs in *Dailey* had proffered no "*actual data*" to show that the defendant "conducts itself in a common way toward all the proposed class members, or that its policies and practices tend to have a widespread illegal effect" on their classification as exempt employees. (*Id.* at p. 999, original italics.) But here, unlike in *Dailey*, the plaintiffs'

proposed classwide proof would address the core issues underlying the defendants' alleged liability, leaving only the extent of that liability with respect to individual class members for determination using expert statistical analysis.

In *Jaimez*, *supra*, 181 Cal.App.4th 1286, as here, the court denied class certification as to liability for the defendant's allegedly deliberate misclassification of employees, based in part on evidence indicating lack of commonality because the claimed employee benefits had been provided to some class members. The Court of Appeal reversed, however, holding that liability can be established by proof that the employer's uniform policies or practices made it likely employees would be denied the required benefits. (*Id.* at pp. 1289, 1295.)

In *Sotelo*, *supra*, the plaintiffs sought class certification alleging the defendants' liability for labor law violations arising from misclassification of employees as independent contractors. Finding that the plaintiffs had not alleged the defendants' "uniform policy that requires putative class members to work overtime," the Court of Appeal affirmed the denial of class certification. (*Id*. at p. 654.) Here, however, the plaintiffs proffered evidence (which the trial court did not evaluate) that the defendants' uniform policies effectively denied them legally mandated employee benefits.[27]

[27] In *Ghazaryan*, *supra*, 169 Cal.App.4th 1524, the plaintiffs' class of limousine drivers alleged that their employer's policy of denying pay for on-call time between assignments violated applicable wage and hour laws and constituting unlawful business practices under the UCL. (*Id.* at p. 1529.) The defendant provided evidence of variations in the drivers' experience: some were paid for on-call time, some are not; and some drivers used the unpaid time for their own purposes (to eat, nap, work out, or shop), while some did not. The trial court found that these variations show lack of commonality as to liability (and damages). (*Id.* at p. 1534.) But the Court of Appeal rejected this analysis, holding that the legal question as to liability "is not an individual one." "[T]he common legal question remains the overall impact of [the defendant's] policies on [the class]," rather than whether any particular class member avoids those impacts by the manner in which the job duties are performed. The determination of neither the defendant's liability, nor the damages to which the class might be entitled, is rendered unascertainable by variations among the drivers in the amounts of gap time and their use of that time. (*Id.* at p. 1536.)

The authorities relied on by the trial court therefore render inappropriate the court's categorical rejection of the sufficiency of the plaintiffs' proffered plan for proof of liability, and do not support its denial of class action certification. "After *Duran* it is clear the outright rejection of statistical sampling as evidence to support a plaintiff's proof of liability is improper so long as the proposed sampling plan accords the employer an opportunity to prove its affirmative defenses." (*Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 383; *Duran*, *supra*, 59 Cal.4th at p. 40.) Along with the recent decision in *Safeway*, *supra*, these decisions show that expert statistical analysis—evidence of the sort underlying the plaintiffs' planned proof—may be relevant and admissible to establish the defendants' liability to the class, or to particular class (or subclass) members, with respect to both the fact and amount of the defendants' liability to the class. (*Duran*, *supra*, 59 Cal.4th at p. 13; *Safeway*, *supra*, 238 Cal.App.4th at pp. 1154-1156, 1159 [when developed with expert input and the defendant is afforded opportunity to show its liability is reduced, "[s]tatistical sampling may provide an appropriate means of proving liability and damages" in wage and hour class actions].)

IV. Issues Regarding Claims Arising From Alleged Meal And Rest Break Violations

The plaintiffs make two contentions with respect to their claims of meal and rest break violations. First, they contend that the trial court abused its discretion by denying their request to amend their pleading after the Supreme Court filed its decision in *Kirby*, *supra*, 53 Cal.4th 1244, in order to reassert claims for damages under Labor Code section 226.7 for the defendants' failure to provide legally mandated meal and rest breaks. Second, they contend that the trial court erroneously ruled that the Supreme Court's *Kirby* decision bars restitution under the UCL for meal and rest break violations, and that its dismissal of their claims for UCL relief for those same meal and rest break violations therefore constituted error.[28] The plaintiffs contend that this ruling represents an error of

[28] The plaintiffs had not earlier dismissed their UCL claims based on those alleged violations, because the Court of Appeal's *Kirby* decision had found only that claims for

law for which they are entitled to de novo review and reversal of the UCL claim dismissals. (*Id.* at p. 1250 [statute's meaning is reviewed as question of law].)

In addition to opposing these contentions on their merits, the defendants contend that the challenged orders are outside the scope of this appeal.

A. The interim rulings concerning plaintiffs' claims of meal and rest break violations are subject to review in this appeal.

Code of Civil Procedure section 904.1 contains what is known as the "one final judgment" rule, under which most interlocutory orders are not appealable except in an appeal following entry of a final judgment. Interlocutory orders are appealable, however, in an appeal from a final judgment under Code of Civil Procedure section 904.1: "Upon an appeal pursuant to Section 904.1 or 904.2, the reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party . . . ." (Code Civ. Proc., § 906.)

The appeal in this case from the order denying class action certification is not taken from the entry of a final judgment, but is governed by "the death knell doctrine," an exception to the final judgment rule. The death knell doctrine was adopted by our Supreme Court in 1967, in *Daar v. Yellow Cab Co.*, *supra*, 67 Cal.2d 695. Under it an order is appealable as a final judgment if it effectively terminates class action claims, while permitting the litigation of individual claims to continue. (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 758.) The doctrine's underlying justification is the concern that when classwide adjudication of claims becomes unavailable (as when class certification is denied, and in a few other circumstances), the case is over as to members of the putative class, but the named plaintiffs may lack incentive to pursue their individual claims to judgment—thereby rendering any appellate review of class issues forever unavailable. (*Lopez v. Brown* (2013) 217 Cal.App.4th 1114, 1133; *In re Baycol Cases I & II*, *supra*, 51 Cal.4th at p. 758.) That concern "is present in cases . . . where individual

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damages—not for remedies available under the UCL—would subject class representative plaintiffs to attorney fee award exposure.

claims persist but remain unresolved," and where review of class issues "otherwise would be foreclosed by the persistence of individual claims." (*In re Baycol Cases I & II*, *supra*, 51 Cal.4th at p. 758.) An order ending classwide claims but preserving individual claims for adjudication "amounts to a de facto final judgment for absent plaintiffs"—which therefore is appealable as a final judgment. (*Id.* at p. 759; *Daar v. Yellow Cab Co.*, *supra*, 67 Cal.2d at p. 699.)

The order denying class certification in this case is unquestionably within the death knell doctrine, and is appealable as a final judgment; respondents do not contend otherwise. That order ended the case as to all claims on behalf of putative class members, while permitting the named plaintiffs' individual claims to persist.

Because the class certification denial is treated under the death knell doctrine as equivalent to an appealable final judgment, the statutory rights of the parties and powers of the appellate court are those that apply to final judgments: "Upon an appeal pursuant to [Code of Civil Procedure] Section 904.1 . . . , the reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party, . . . and may affirm, reverse or modify any judgment or order appealed from and may direct the proper judgment or order to be entered . . . ." (Code Civ. Proc., § 906.)

The challenged orders refusing to reinstate the claims for damages for meal and rest break violations, and dismissing the claims for those violations under the UCL, are intermediate rulings that substantially affect the parties' rights with respect to class action adjudication of the claims. The rights of members of the putative plaintiffs' class were affected by the challenged rulings, and their rights are affected by whether they will be bound by those rulings upon remand of the matter for redetermination of the class certification issue. And just as the death knell doctrine is designed to preserve the rights of putative class members to meaningful appellate review that otherwise would be

unavailable, so too would the putative class members be denied any right to obtain review of the interim orders leading to the death-knell class-certification denial.[29]

The challenged orders are interim rulings that are not *themselves* appealable final judgments or their equivalents under the death knell doctrine, as the defendants contend. But as interim orders substantially affecting the parties' rights and the order appealed from, they are subject to review in this appeal from a death knell order as interlocutory orders, no less than such interlocutory orders would be reviewable in an appeal from a final judgment. (Code Civ. Proc., § 906.) Unless they are reviewed in this appeal, the right to review will be forever lost to the appealing plaintiffs. The challenged orders, refusing to reinstate the claims for damages for meal and rest break violations and dismissing the UCL claims based on those violations, are subject to review in this appeal.

B. The trial court erred in dismissing the plaintiffs' UCL claims based on alleged meal and rest break violations.

The UCL provides for the court to make such restitutionary orders "as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of . . . unfair competition." (Bus. & Prof. Code, § 17203.) The trial court erred in holding that it lacks power to grant relief for meal and rest break violations constituting unfair or unlawful business practices under the UCL, or that dismissal of the UCL claims based on alleged meal and rest break violations is required by the *Kirby* decision.

In *Cortez v. Purolator Air Filtration Products Co*. (2000) 23 Cal.4th 163 (*Cortez*), our Supreme Court held that "[a] UCL action is an equitable action by means of which a plaintiff may recover money or property obtained from the plaintiff or persons represented by the plaintiff through unfair or unlawful business practices." (*Id.* at p. 173.) "[E]arned wages that are due and payable pursuant to section 200 et seq. of the

[29] Another reason that appellate review of the challenged dismissal order is appropriate in this appeal is that the dismissal of the UCL meal and rest break claims on grounds relating to their viability as class action claims, and in close proximity with the order denying class certification, renders the dismissal order inextricably bound with, and in practical effect a part of, the appealable class certification denial.

Labor Code are as much the property of the employee who has given his or her labor to the employer in exchange for that property as is property a person surrenders through an unfair business practice." (*Id.* at p. 178.) Although the definition of "damages" might include unpaid wages recoverable in a civil action, wages owed also may be sought and recovered as restitution in a UCL action. (*Id.* at p. 172.) Unpaid wages, once earned, are property to which employees are entitled; and a failure to promptly pay those wages is unlawful, constituting an unfair business practice for which the UCL authorizes restoration as a remedy. (Bus. & Prof. Code, § 17203; *Cortez*, *supra*, at p. 172.) "An order that earned wages be paid is therefore a restitutionary remedy authorized by the UCL." (*Cortez*, *supra*, at p. 178.)

In the Supreme Court's *Kirby* decision, a defendant employer had sought an attorney fee recovery under the fee-shifting provisions of Labor Code section 218.5, from plaintiff employees who had sued unsuccessfully for claimed meal break violations under Labor Code section 226.7. Because Labor Code section 218.5 permits prevailing party fee awards only in actions "brought for the nonpayment of wages," the question before the court in *Kirby* was whether an action for meal break violations under section 226.7 constitutes an action "brought for the nonpayment of wages." In *Kirby*, the court held that it does not. While affirming its decision in *Murphy v. Kenneth Cole Productions, Inc*. (2007) 40 Cal.4th 1094, that a missed meal break payment is a "wage" for purposes of the statute of limitations,[30] the court in *Kirby* nevertheless held that a claim brought for a recovery under Labor Code section 226.7 is "an action brought for nonprovision of meal or rest breaks," and "is not an action brought for nonpayment of wages." (*Kirby*, *supra*, 53 Cal.4th at pp. 1256-1257.)

We conclude that the *Kirby* decision does not preclude class action adjudication of claims for unfair or unlawful business practices under the UCL, based on alleged

[30] *Murphy v. Kenneth Cole Productions, Inc*. held that payments for missed meal periods under Labor Code section 226.7 are "a premium wage to compensate employees," to which the three-year statute of limitations for "an action upon a liability created by statute, other than a penalty" applies. (*Murphy v. Kenneth Cole Productions, Inc*., *supra*, 40 Cal.4th at p. 1099.)

violations of Labor Code section 226.7. (See *Safeway*, *supra*, 238 Cal.App.4th at p. 1162 [claim for restitution for meal break violations under the UCL does not preclude class certification].) An unlawful failure to pay earned wages constitutes an unfair business practice under UCL. (Bus. & Prof. Code, § 17203; *Cortez*, *supra*, at p. 172.) The holding in *Kirby* that an action under Labor Code section 226.7 is not an "action brought for the nonpayment of wages" under Labor Code section 218.5 does not purport to change that result. (*Kirby*, *supra*, 53 Cal.4th at pp. 1256-1257, 1259.) The trial court therefore erred in ruling that the *Kirby* decision precludes any recovery for the plaintiffs' UCL claims based on alleged meal and rest break violations. Its dismissal of those claims was unjustified.

C. The trial court did not abuse its discretion by denying leave for the plaintiffs to reassert their voluntarily dismissed claims for damages for the alleged meal and rest break violations.

Denying the plaintiffs' request for leave to reinstate their voluntarily dismissed causes of action for damages arising from the defendants' alleged meal and rest break violations, the trial court noted the plaintiffs' long delay (over 10 months) following the Supreme Court's *Kirby* decision before seeking the claims' reinstatement. And it noted that even after the Supreme Court's decision in *Kirby*, the defendants had taken the four named plaintiffs' depositions without having been advised that the plaintiffs would later seek reinstatement of the dismissed meal and rest break damage claims. Relying expressly on its discretion to deny leave to amend after a long and unexcused delay, "where there is prejudice," the court denied the plaintiffs' request for leave to reinstate the claims.

The plaintiffs argued the absence of any prejudice resulting from their delay in seeking the claims' reinstatement, because the complaint still contained the same factual allegations of meal and rest break violations when the defendants took the plaintiffs' depositions, and it had still sought restitutionary and other relief under the UCL for those violations. The court nevertheless found prejudice, because by the time the class certification motions were heard it had dismissed the UCL claims for those alleged meal

and rest break violations, and the Supreme Court's *Kirby* decision might justify further discovery.

Notwithstanding the underwhelming weight of these factors, we conclude that the trial court acted within the broad discretion afforded it in ruling on belated requests to amend pleadings or to reinstate claims. "Courts must apply a policy of liberality in permitting amendments at any stage of the proceeding, including during trial, when no prejudice to the opposing party is shown. [Citation.] 'However, "'even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial.'"'" (*P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1345.)

V. Plaintiffs' request for assignment as a complex case is misplaced.

Citing their previous unsuccessful efforts to obtain the assignment of this action for adjudication as a complex case, and the long (and perhaps untenable) delays that have resulted from the calendar departments' inability to schedule timely proceedings to advance the litigation toward class certification and trial, the plaintiffs ask that we order its remand to such a department of the Los Angeles Superior Court. Missing, however, is any reason to conclude that this court has authority to grant such an order. Because we know of none, we deny the request.

Conclusion

We conclude in this appeal that reversal of the order denying class certification is required by the trial court's categorical rejection of the plaintiffs' proffered evidence of the defendants' liability for labor law violations, and its failure to evaluate the relative benefits and burdens to the plaintiffs, to the defendants, and to the court, of adjudicating the plaintiffs' claims in a class action setting, as compared with other potential means of adjudicating the claims. "A certification decision is reviewed for abuse of discretion, but when the supporting reasoning reveals the court based its decision on erroneous legal assumptions about the relevant questions, that decision cannot stand." (*Ayala*, *supra*, 59 Cal.4th at p. 537; *Brinker*, *supra*, 53 Cal.4th at p. 1022.) We conclude also that the trial

court erred in dismissing the UCL claims arising from alleged meal and rest break violations.

Disposition

The orders denying class certification, and dismissing UCL claims arising from alleged meal and rest break violations, are reversed. The matter is remanded to the superior court for further proceedings consistent with this decision. The parties shall have the opportunity to revise their submissions on the class certification issue to address the issues raised herein. Plaintiffs are entitled to recover their costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.