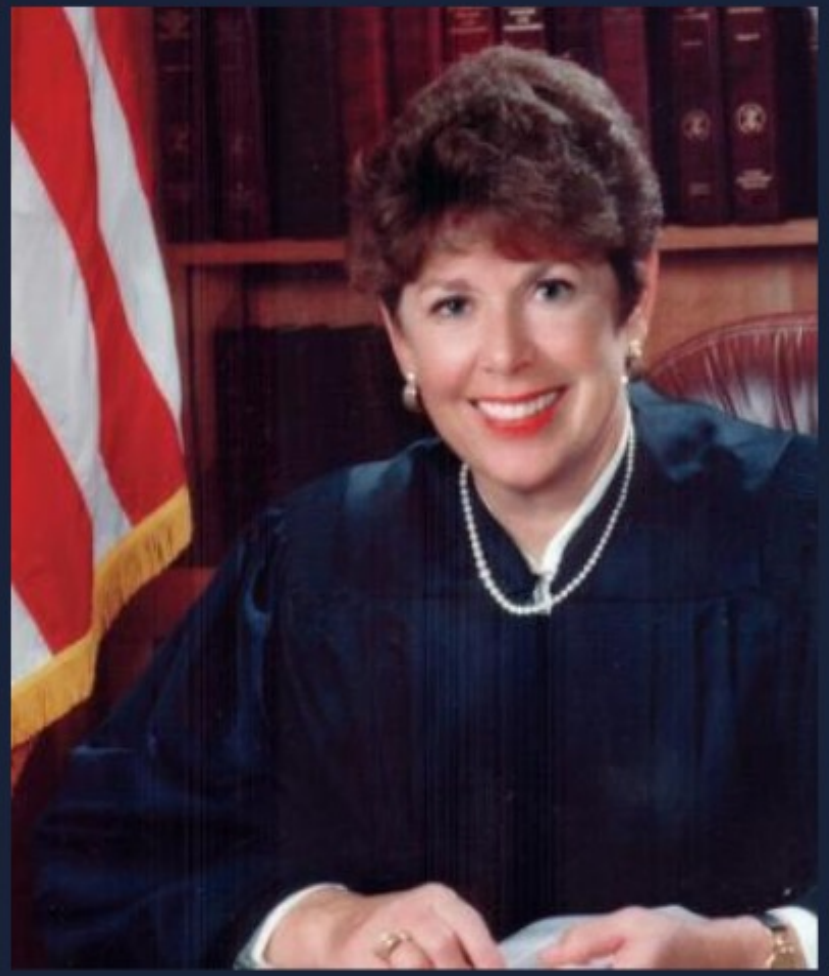


Federal Bar Association
San Diego Chapter

presents:

THE 18TH ANNUAL JUDITH N. KEEP FEDERAL CIVIL PRACTICE SEMINAR

September 29, 2022 | Westin Gaslamp Quarter | 1:00 p.m. – 6:00 p.m.

The Continuing Evolution of Class Action Practice

Hon. Anthony J. Battaglia, U.S. District Judge

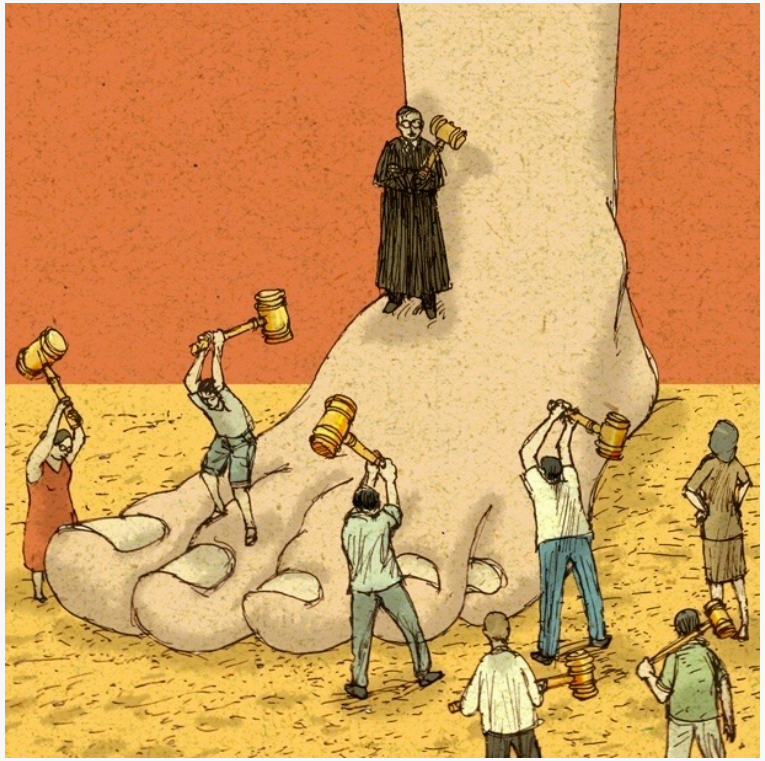
Hon. Cathy A. Bencivengo, U.S. District Judge

Hon. Dana M. Sabraw, U.S. District Judge

Samantha Itazawa, Moderator

The Class Action Generally

- The manner in which courts handle cases of common or general interest to many persons. Former Federal Equity Rule 38.
- An exception to the usual rule of litigation conducted by and on behalf of the named parties.
- Distinguished from mass tort claims joined under Rule 20.
- Since 1937, subject to Rule 23.



Federal Rule 23

- A Rule-Based Practice.
- From Prerequisites to Appeal.
- Compliance is critical.

Prerequisities Rule 23(a)(1-4)

(1) Numerosity

(2) Commonality (Q of fact or law)

(3) Typicality of the class representative

(4) Adequacy of the class representative

AND

Ascertainability

PLUS one of the 23(b) factors

Commonality (In Pleading and Proof)

- The common question must be of such a nature that it is capable of class wide resolution, which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Central Issue?

- The consideration begins with the elements of the underlying cause of action. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011).

Typicality

- Rule 23(a)(3)'s typicality requirement provides that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members."
- "[T]he typicality requirement is 'permissive' and requires only that the representative's claims are 'reasonably co-extensive with those of absent class members; they need not be substantially identical.'"
- This issue sometimes coincides with the predominance inquiry (Rule 23(b)(3)). The interests of the named representative must align with the interests of the class and predominate over individual issues.

Rule 23(b)(1-3)

(1) Risk that separate actions would create risk of inconsistent adjudications or impair or impede some members interests; or

(2) Injunctive relief claims; or

(3) Common questions of fact or law common to class ***predominate*** and class action is ***superior*** method.

Predominance

Tests the relationship between the common and individual issues.

- *E.g.*, *Wal-Mart v. Dukes*, individual claims of discrimination in multiple contexts not certifiable as a class. Contrast discrimination based on the same employer-based policy.

Often a question of demonstrating damages *capable* of measurement on a class wide basis. *Comcast v. Behrend*, 569 U.S. 27 (2013).

- Consistent with the theory of liability.
- Traceable to the same injurious course of conduct. *Owino v. Core Civic*, 36 F.4th 839, 848.
- But a fully formed damages model is not required. *Id.*

Bowerman v. Field Asset Services, Inc., 39 F.4th 652 (9th Cir. 2022)

- Two certification-defeating obstacles regarding damages:
  - Whether damages even exist, or
  - Even if damages exist, class certification is still improper if determination of individualized damages would be "excessively difficult."

  *Note the crossover here to the other issues of standing and typicality!

Superiority

(1) The interest of individuals within the class in controlling their own litigation;

(2) The extent and nature of any pending litigation commenced by or against the class involving the same issues;

(3) The convenience and desirability of concentrating the litigation in the particular forum; and

(4) The manageability of the class action.

Fed. R. Civ. P. 23(b)(3)(A)–(D); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615–16 (1997).

Burden of Proof for Certification

- Rests with the proponent of the class action.
- Preponderance of evidence is the standard. *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods, LLC*, 31 F. 4th 651, 665 (2022).
- Plaintiff must present evidentiary proof, even where such analysis may overlap with the merits of the underlying claim. *Comcast v. Behrend*, 569 U.S. 27 (2013).

Burden of Proof Cont'd

- Plaintiffs may use any available evidence that meets the usual requirements of admissibility. *Tyson Foods*, 577 U.S. 442, 454–55 (2016).
- Courts must make a rigorous analysis and may need to look beyond the pleadings. *Id.*

BUT

- Rule 23 does not grant a license to engage in a free-ranging merits inquiry at the certification stage. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013).

Daubert Issues (FRE 702)

Expert testimony often an issue in class certification relating to common questions.

Courts must weigh conflicting expert witness testimony, resolving expert disputes where necessary to ensure the Rule 23 requirements are met. *In re Hydrogen Peroxide*, 552 F.3d 305, 323.

Court needs to determine if the common question is *capable* of class wide resolution, not whether evidence establishes plaintiff would win at trial. *Wal-Mart,* 564 U.S. at 351.

Pleading

Jurisdiction (CAFA)

Plaintiffs must demonstrate that they satisfy three requirements:

- (1) they have suffered an "injury in fact," i.e., "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;"
- (2) the injury is "fairly traceable to the challenged action of the defendant;" and
- (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.
- *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)

Pleading Cont'd

- Adequacy
  - Rule 12(b)(6). Enough facts to support a plausible claim for relief, and with specificity if fraud alleged. (Rules 8 and 9, Iqbal/Twombly)
  - "A plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. 544, 545 (2007).
  - A pleading is sufficient under Rule 9(b) if it "state[s] the time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Misc. Serv. Workers, Drivers & Helpers v. Philco-Ford Corp.*, 661 F.2d 776, 782 (9th Cir. 1981)

Case Management

Court must determine at an “early practical time” whether to certify.

Case management orders focus on case setting up a certification hearing early on, however, there is no local rule or standard timing. Each case is considered on its individual circumstances.

Counsel need to address the issues and timing early on [Rule 26(f) conference] and in their Joint Discovery Plan. (Rule 26(f)(2)).

Key Takeaways from Two Cases Originating from Our District

- *Olean Wholesale Grocery Cooperative, Inc. et al. v. Bumble Bee Foods LLC, et al.*, 31 F.4th 651 (9th Cir. 2022)
- *Sylvester Owino, et al., v. CoreCivic, Inc.*, 36 F.4th 839 (9th Cir. 2022)

Olean Wholesale Grocery Cooperative, Inc. et al. v. Bumble Bee Foods LLC, et al., 31 F.4th 651 (9th Cir. 2022)

Olean - Commonality

- When assessing whether a common question exists, the test is whether evidence shows that the question is capable of class-wide resolution, not whether the evidence establishes that plaintiffs would prevail on that question at trial.
- Plaintiffs have the burden to prove by a preponderance of evidence that Rule 23's prerequisites are satisfied.

Olean – Commonality & Experts

- *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and Fed. R. Civ. P. 702 apply. The district court must resolve disputes between the parties' experts before addressing whether a common question exists that can be resolved class-wide.

Olean - Predominance & Damages

Rule 23 does not contain a per se bar foreclosing certification when a class potentially includes more than a de minimis number of uninjured persons. Whether individual questions about injury (or damages) will overwhelm common issues is a key part of the predominance inquiry under the Rule.

- The presence of individualized injury or damages issues does not necessarily preclude a court from certifying a class because "class-wide proof is not required on all issues[.]"

Olean - Standing

- Tuna suppliers' argument that the possible presence of a large number of uninjured class members (28%) raises an Article III standing issue was rejected because plaintiffs "demonstrated that all class members have standing[.]"
  - "Because antitrust impact—i.e., that the Tuna Suppliers' collusion had a common, supra-competitive impact on a class-wide basis—is sufficient to show an injury-in-fact traceable to the defendants and redressable by a favorable ruling, the Tuna Purchasers have adequately demonstrated Article III standing at the class certification stage for all class members, whether or not that was required."
  - The Supreme Court has expressly left open the question "whether every class member must demonstrate standing before a court certifies a class."

Sylvester Owino, et al., v. CoreCivic, Inc., 36 F.4th 839 (9th Cir. 2022)

Owino Commonality

The district court did not err in rejecting CoreCivic's argument that Plaintiffs failed to provide "significant proof" of the class-wide policy necessary to satisfy the commonality requirement.

"Commonality is necessarily established where there is a class-wide policy to which all class members are subjected."

- The mere existence of a facially defective written policy—without any evidence that it was implemented in an unlawful manner—does not constitute "significant proof" that a class of employees was subject to an unlawful practice.
- Plaintiffs, however, presented the company's written policies as well as testimony from the company's former employees and manager.

Owino - Predominance

- "The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."
  - "The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues."
  - Where one or more of the central issues are common to the class and can be said to predominate, an action may be considered proper under Rule 23(b)(3)——even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.

Owino - Statute of Limitations

- "The district court did not abuse its discretion in declining to narrow the class based on statute of limitations issues."
  - "The existence of a statute of limitations issue does not compel a finding that individual issues predominate over common ones."
  - "Although [Plaintiffs] may run into statute of limitations issues—some disputed and unproven—narrowing the class based on statute of limitations is not required at the certification stage."

Owino – Personal Jurisdiction

Based on case law published after the district court's ruling, the Ninth Circuit reversed the finding that CoreCivic waived its personal jurisdiction challenge against claims of non-California-facility class members by not raising the defense in its first responsive pleadings.

- The *Owino* court held that under *Moser v. Benefytt, Inc.*, 8 F.4th 872 (9th Cir. 2021), CoreCivic retains its personal jurisdiction defense.
- "Prior to class certification, a defendant does not have available a Rule 12(b)(2) personal jurisdiction defense to the claims of unnamed putative class members who were not yet parties to the case." *Owino*, 36 F.4th at 847 (quoting *Moser*, 8 F.4th at 877).

It, however, declined to vacate the district court's certification and remanded the personal jurisdiction question for consideration at the appropriate time.

Owino - Damages

- "Plaintiffs did not need to present a fully formed damages model when discovery was not yet complete and pertinent records may have been still within Defendant's control." Instead, "plaintiffs must show that damages are capable of measurement on a class-wide basis, in the sense that the whole class suffered damages traceable to the same injurious course of conduct underlying the plaintiffs' legal theory."

Class Action Settlement

Federal Rule of Civil Procedure 23(e)(2)

- If the proposal would bind class members, the Court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2)
- Rule 23(e)(2) assumes that a class action settlement is invalid. *Briseno v. Henderson*, 998 F.3d 1014, 1030 (9th Cir. 2021)
- There is no presumption that a settlement is fair and reasonable because it is the product of arms-length negotiations – a factor to be considered.

Duty to Scrutinize Settlement Agreements

- District Courts must scrutinize settlement agreements proposed in both pre-class and post-class certification cases for potentially unfair collusion in the distribution of funds between the class and their counsel.
- District Courts must show it has explored comprehensively all factors and provide a reasoned response to all non-frivolous objections.

Rule 23(e)(2) Factors

The class representatives and class counsel have adequately represented the class;

The proposal was negotiated at arm's length;

The relief provided for the class is adequate, taking into account:

- the costs, risks and delay of trial and appeal;
- the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
- the terms of any proposed award of attorney's fees, including timing of payment; and
- any agreement required to be identified under Rule 23 (e)(3) [identify any agreement made in connection with the proposal]; and

The proposal treats class members equitably relative to each other.

Value of the Settlement

- Over-valuing a settlement fund that is based on claims-made basis
  - Redemption rates in claims-made settlements are "notoriously low"
  - Reasonable estimate of the likely or actual claim rate instead of valuing the settlement as if every possible class member made a claim
  - Is there a gross disparity in distribution of funds between the class members and class counsel – "potential" value of the fund over-estimated to justify a large portion of the settlement fund to class counsel
- Coupon settlements
  - CAFA requires heightened scrutiny to settlements that award "coupons"
    - Consider whether the consumer must spend more to get value of the credit
    - Is it valid only for select product or services
    - How flexible is the credit – does it expire, is it freely transferable
  - Is the fee award based on an over-estimated "face value" rather than likely redemption value

Red Flags in Settlement Proposals

Will class counsel receive a disproportionate distribution of the settlement fund? Is the likely value of the payout to the class significantly less than the projected hypothetical value?

"Clear sailing" Agreements – defendant agrees not to challenge agreed-upon fees to class counsel

- Defendant's interest is in the total fund amount, has little interest in how it is allocated between the class members and class counsel
- Court has "heightened duty to scrutinize closely the relationship between uncontested fees and benefits to the class

"Reverter" Clause – if Court reduces the agreed-upon fee award, the funds go back to Defendant rather than to the benefit of the class

Value of Injunctive Relief

- District Court must either quantify and explain the value of injunctive relief or exclude it from calculations
- What evidence is there that relief afforded by the stipulated injunction brings any value to the class members?
- Is the value proposed for a stipulated injunction tethered to reality, is it verifiable?
- Only in the unusual instance where the value to individual class members of benefits derived from injunctive relief can be accurately ascertained may courts include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees. *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003).

Cy Pres Beneficiary

- Must be related to the case – "Benefit the Plaintiff Class"
- The doctrine allows a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the "next best class of beneficiaries"
- Factors to consider
  - whether the distributions account for the nature of the lawsuit
  - The objectives of the underlying statutes
  - The interests of the silent class members
- Approving settlement with only injunctive and cy pres payments when not feasible to identify class and beneficiary related to claim. *In re Google Inc. St. View Elec. Commc'ns Litig.*, 21 F.4th 1102 (9th Cir. 2021)

Awards to Subclasses & Class Representatives

- Settlement proposal should treat class members equitably relative to each other
- How are subclass members treated?
- Are there disproportionate awards to named plaintiffs?
  - Incentive awards are discretionary, generally when a person joins in bringing a class action, he disclaims any right to a preferred position in the settlement. Incentive awards must be evaluated individually using relevant factors including the amount of time and efforts the plaintiff expended in pursuing the litigation. *Staton v. Boeing Co.*, 327 F.3d 938, 976-77 (9th Cir 2003).
  - In some cases, incentive awards are proper but awarding them should not become routine practice. *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1163 (9th Cir 2013). "There is a serious question whether class representatives could be expected to fairly evaluate whether awards ranging from $26 to $750 is fair settlement when they would receive $5000 incentive awards." *Id.*
  - Private Securities Litigation Reform Act of 1995 prohibits incentive awards to class representatives. They may recover reasonable costs and expenses directly related to representation.

Questions?

Thank you!

Thank You for Supporting!

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT of CALIFORNIA
HON. DANA M. SABRAW, CHIEF JUDGE
JOHN MORRILL, CLERK OF COURT

Federal Bar Association
San Diego Chapter

Class Actions Under Federal Rule 23

By Anthony J. Battaglia, U.S. District Judge

February 17, 2022

In General:

Class actions are the "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)).

These cases differ from Mass Tort Claims which are "joined" in an action under Federal Rule 20, or coordinated and consolidated pretrial proceedings under Multi-District Litigation proceedings pursuant to 28 U.S.C. § 1407

To depart from this rule, the "class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (citation and internal quotation marks omitted). The proponent of class treatment, usually the plaintiff, bears the burden of demonstrating the propriety of class certification. *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1067 (9th Cir. 2014). This burden requires the plaintiff to provide sufficient facts to satisfy the four requirements of Rule 23(a) and at least one subsection of Rule 23(b) of the Federal Rules of Civil Procedure*. Zinser v. Accufix Res. Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

Under Rule 23(a), a case is appropriate for certification as a class action if:

"(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

These requirements are commonly referred to as numerosity, commonality,

typicality, and adequacy. “If the court finds the action meets the requirements of Rule 23(a), the court then considers whether the class is maintainable under Rule 23(b).” *Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 451 (S.D. Cal. 2014).

Under Rule 23(b) A class action may be maintained if Rule 23(a) is satisfied and if:

> 1) prosecuting separate actions by or against individual class members would create a risk of:
>
> > (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> >
> > (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> > (A) the class members’ interests in individually controlling the prosecution or defense of separate actions;
> >
> > (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> >
> > (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> >
> > (D) the likely difficulties in managing a class action.

Rule 23(a) Requirements

1. Ascertainability

As a preliminary matter, while not delineated in Rule 23, courts have generally required a party seeking class certification under Rule 23(b)(3) to demonstrate the putative class is ascertainable. See *McCrary v. Elations Co.,* No. EDCV 13-00242 JGB (OPx), 2014 WL 1779243, at *3 (C.D. Cal. Jan. 13, 2014). A class is ascertainable if it is "administratively feasible for the court to determine whether a particular individual is a member" using objective criteria. See *Keegan v. Am. Honda Motor Co*., 284 F.R.D. 504, 521 (C.D. Cal. 2012) (quoting O'Connor v. *Boeing N. Am., Inc.,* 184 F.R.D. 311, 319 (C.D. Cal. 1998)).

2. Numerosity

Under Rule 23(a)(1), a lawsuit may only proceed via a class if the "class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

3. Commonality

The commonality factor "requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" which "does not mean merely that they have all suffered a violation of the same provision of law." *Dukes*, 564 U.S. at 350 (quoting *Falcon*, 457 U.S. at 157). The "claims must depend on a common contention" and "[t]hat common contention . . . must be of such a nature that it is capable of classwide resolution . . ." *Id.* The commonality requirement of Rule 23(a)(2) is construed less rigorously, for example, than the "predominance" requirement of Rule 23(b)(3). *Id.* Indeed, for purposes of Rule 23(a)(2), even a single common question will suffice. *Id.* at 359.

4. Typicality

Rule 23(a)(3)'s typicality requirement provides that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Falcon*, 457 U.S. at 156 (quoting *E. Tex. Motor Freight Sys.*, 431 U.S. at 403) (internal quotation marks omitted). The purpose of the requirement is "to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). "[T]he typicality requirement is 'permissive' and requires only that the

representative's claims are 'reasonably co-extensive with those of absent class members; they need not be substantially identical.'" *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (internal citations omitted). However, a court should not certify a class if "there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." *Hanon*, 976 F.2d at 508 (internal quotation marks and citation omitted).

5. Adequacy

Rule 23(a)(4) requires the class representative to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In assessing this requirement, courts within the Ninth Circuit apply a two-part test, asking the following questions: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members? and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class? *See Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003).

Rule 23(b) Requirements

1. Predominance

"The predominance inquiry focuses on 'the relationship between the common and individual issues' and 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Vinole*, 571 F.3d at 944 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998)). The predominance inquiry also includes consideration of whether "adjudication of common issues will help achieve judicial economy." *Vinole*, 517 F.3d at 945 (quoting *Zinser*, 253 F.3d at 1189) (internal quotation marks omitted).

Under the predominance inquiry, plaintiffs must demonstrate that "damages are capable of measurement on a class wide basis." Comcast, 569 U.S. at 34. A damages model must be consistent with the theory of liability—that is, a damages model "purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory." Id. at 35. "Calculations need not be exact," id., nor is it necessary "to show that [the] method will work with certainty at this time." Khasin v. R.C. Bigelow, Inc., No. 12-cv-2204-WHO, 2016 WL 1213767, at *3 (N.D. Cal. Mar. 29, 2016) (citation omitted).

2. Superiority

Superiority requires consideration of the following: (1) the interest of individuals within the class in controlling their own litigation; (2) the extent and nature of any pending litigation commenced by or against the class involving the same issues; (3) the convenience and desirability of concentrating the litigation in the particular forum; and (4) the manageability of the class action. Fed. R. Civ. P. 23(b)(3)(A)–(D); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615–16 (1997).

Case Management Considerations

1. Article III standing and jurisdictional Requirements must be met.
2. Court must determine at an "early practical time" whether to certify.
3. Case management orders focus on case setting up a certification hearing early on.
4. The order certifying the class must:
    a. Define the class, issues and defenses;
    b. Appoint Class Counsel; and,
    c. Direct notice to the class.
5. The court of appeals may permit an appeal of a class cert decision if requested within 14 days of the order.
6. Settlement or dismissal requires court approval.

Settlement

Voluntary conciliation and settlement are the preferred means of dispute resolution in complex class action litigation." *Smith v. CRST Van Expedited, Inc.*, No. 10-CV-1116-IEG (WMC), 2013 WL 163293, at *2 (S.D. Cal. Jan. 14, 2013) (citing *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982)). "In a class action, however, any settlement must be approved by the court to ensure that class counsel and the named plaintiffs do not place their own interests above those of the absent class members." *Dennis v. Kellogg Co.*, 697 F.3d 858, 861 (9th Cir. 2012); *see also* Fed. R. Civ. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled . . . only with the court's approval.")

Historically, courts typically have a two-step process. Preliminary Approval, and then after notice to the class, a final approval hearing. Rule 23 was amended in 2018 to require the two-step approach. Rule 23(e) (1) and (2). Rule 23(e)(2)

refines the standards for approval of proposed class action settlements, but does not replace the multiple criteria for settlement approval developed under circuit law. See, e.g*., In re Elec. Books Antitrust Litig*.,639 F. App'x 724, 726 (2d Cir. 2016); *In re Cendant Corp. Litig*., 264 F.3d 201, 232 (3d Cir. 2001); see also *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 349 (6th Cir. 2009) (considering "(1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4)the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest") (citation omitted); *Bennett v. Behring Corp.,* 737 F.2d 982, 986(11th Cir. 1984) (reviewing "(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved").

"[P]reliminary approval and notice of the settlement terms to the proposed class are appropriate where '[1] the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class, and [4] falls with [sic] the range of possible approval . . . .'" *Eddings v. Health Net, Inc.*, No. CV 10–1744–JST (RZx), 2013 WL 169895, at *2 (C.D. Cal. Jan. 16, 2013) (quoting *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (internal quotation and citation omitted)) and (citing *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 386 (C.D. Cal. 2007) ("To determine whether preliminary approval is appropriate, the settlement need only be potentially fair, as the Court will make a final determination of its adequacy at the hearing on Final Approval, after such time as any party has had a chance to object and/or opt out.")).

If the settlement occurs before the class is formerly certified, the court must also find they class can be certified under Rule 23.

If approved preliminarily, and form of notice is satisfactory, the final hearing is set, a notice period set (90 days for CAFA) and a hearing date is set for hearing a Motion for Final Approval. The proposed Notice of Settlement of Certified Class Action includes the opportunity for a Class Member to object, as provided by Rule

23(e)(5)(A). The Motion for Final Approval must set forth Plaintiff's Counsel's request for fees and costs, with detailed records of hours, rates, and costs documented.

Rule 23. Class Actions

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) *Certification Order.*

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) CONDUCTING THE ACTION.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class*.

(A) *Information That Parties Must Provide to the Court*. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice*. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) *Approval of the Proposal*. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) *Identifying Agreements.* The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New Opportunity to Be Excluded*. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-Member Objections.*

(A) *In General*. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection*. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal*. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

Olean Wholesale Grocery Cooperative, Inc. et al. v. Bumble Bee Foods LLC, et al. ("*Olean*"), 31 F.4th 651 (9th Cir. 2022)

The primary suppliers of canned tuna in the United States were prosecuted by the Department of Justice and later admitted through a series of guilty pleas to engaging in a conspiracy to fix prices in violation of federal antitrust law. A number of tuna purchasers sued the tuna suppliers on behalf of three putative subclasses: (1) direct purchasers, like nationwide retailers and regional grocery stores; (2) indirect bulk purchasers; and (3) individual end purchasers. The purchasers alleged class-wide injury because of paying supra-competitive prices for tuna products as a result of the tuna suppliers' price-fixing conspiracy.

The purchasers sought class certification under F. R. Civ. P. 23(b)(3) (requiring that "questions of law or fact common to class members predominate over any questions affecting only individual members[.]"). The en banc court initially noted that, "[c]onsidering whether 'questions of law or fact common to the class members predominate' begins, of course, with the elements of the underlying cause of action." 31 F.4th at 24 (citing *Erica P. John Fund, Inc. v. Halliburton Co.,* 563 U.S. 804, 809 (2011)). The tuna purchasers alleged a federal antitrust violation under the Sherman Antitrust Act, 15 U.S.C. § 15, which contains three elements: (i) the existence of an antitrust violation (here undisputed); (ii) "antitrust injury" or "impact" flowing from that violation (i.e., the conspiracy); and (iii) measurable damages.

Each subclass proffered evidence from a different economist to show that the tuna suppliers' conspiracy (antitrust violation) resulted in an antitrust impact in the form of higher prices paid by each member of the class, which in turn led to measurable damages. The class certification litigation focused on the second element and whether antitrust injury or impact could be proved class-wide by common evidence.

The parties presented competing expert statistical evidence based on pooled regression models and other data to address the "antitrust injury" caused by the tuna suppliers' conspiracy. The en banc court concluded that the district court did not abuse its discretion in certifying each subclass, holding that (i) the element of

antitrust impact was capable of being established through common proof, and (ii) this common question predominated over individual questions.

Key Holdings:

1. When assessing whether a common question exists, the test is whether evidence shows that the question is *capable* of class-wide resolution, not whether the evidence *establishes* that plaintiffs would prevail on that question at trial.

2. Plaintiffs have the burden to prove by a preponderance of evidence that Rule 23's prerequisites are satisfied.

3. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) and F. R. Civ. P. 702 apply. The district court must resolve disputes between the parties' experts before addressing whether a common question exists that can be resolved class-wide.

4. Rule 23 does not contain a *per se* bar foreclosing certification when a class potentially includes more than a *de minimis* number of uninjured persons. Whether individual questions about injury (or damages) will overwhelm common issues is a key part of the predominance inquiry under the Rule.

    A. The presence of individualized injury or damages issues does not necessarily preclude a court from certifying a class because "class-wide proof is not required on all issues[.]"

    B. Tuna purchasers' evidence was capable of showing that class members suffered antitrust impact on a class-wide basis. The trier of fact would decide whether plaintiffs' evidence was persuasive and proved that element. Conversely, if the trier of fact found the tuna suppliers' evidence more persuasive, plaintiffs will have failed to prove antitrust impact on a class-wide basis. "In neither case would the litigation raise individualized questions regarding which members of the [sub]class suffered an injury."

C. Tuna suppliers' argument that the possible presence of a large number of uninjured class members (28%) raises an Article III standing issue, was rejected because plaintiffs "demonstrated that all class members have standing[.]"

(i) "Because antitrust impact—i.e., that the Tuna Suppliers' collusion had a common, supra-competitive impact on a class-wide basis—is sufficient to show an injury-in-fact traceable to the defendants and redressable by a favorable ruling, the Tuna Purchasers have adequately demonstrated Article III standing at the class certification stage for all class members, whether or not that was required."

(ii) The Supreme Court has expressly left open the question "whether every class member must demonstrate standing before a court certifies a class."

31 F.4th 651
United States Court of Appeals, Ninth Circuit.

OLEAN WHOLESALE GROCERY COOPERATIVE, INC., Beverly Youngblood, Pacific Groservice, Inc., DBA Pitco Foods, Capitol Hill Supermarket, Louise Ann Davis Matthews, James Walnum, Colin Moore, Jennifer A. Nelson, Elizabeth Davis-berg, Laura Childs; Nancy Stiller; Bonnie Vanderlaan; Kristin Millican; Trepco Imports and Distribution, Ltd.; Jinkyoung Moon; Corey Norris; Clarissa Simon; Amber Sartori; Nigel Warren; Amy Joseph; Michael Juetten; Carla Lown; Truyen Ton-Vuong, AKA David Ton; A-1 Diner; Dwayne Kennedy; Rick Musgrave; Dutch Village Restaurant; Lisa Burr; Larry Demonaco; Michael Buff; Ellen Pinto; Robby Reed; Blair Hysni; Dennis Yelvington; Kathy Durand Gore; Thomas E. Willoughby III; Robert Fragoso; Samuel Seidenburg; Janelle Albarello; Michael Coffey; Jason Wilson; Jade Canterbury; Nay Alidad; Galyna Andrusyshyn; Robert Benjamin; Barbara Buenning; Danielle Greenberg; Sheryl Haley; Lisa Hall; Tya Hughes; Marissa Jacobus; Gabrielle Kurdt; Erica Pruess; Seth Salenger; Harold Stafford; Carl Lesher; Sarah Metivier Schadt; Greg Stearns; Karren Fabian; Melissa Bowman; Vivek Dravid; Jody Cooper; Danielle Johnson; Herbert H. Kliegerman; Beth Milliner; Liza Milliner; Jeffrey Potvin; Stephanie Gipson; Barbara Lybarger; Scott A. Caldwell; Ramon Ruiz; Thyme Cafe & Market, Inc.; Harvesters Enterprises, LLC; Affiliated Foods, Inc.; Piggly Wiggly Alabama Distributing Co., Inc.; Elizabeth Twitchell; Tina Grant; John Trent; Brian Levy; Louise Adams; Marc Blumstein; Jessica Breitbach; Sally Crnkovich; Paul Berger; Sterling King; Evelyn Olive; Barbara Blumstein; Mary Hudson; Diana Mey; Associated Grocers of New England, Inc.; North Central Distributors, LLC; Cashwa Distributing Co. Of Kearney, Inc.; Urm Stores, Inc.; Western Family Foods, Inc.; Associated Food Stores, Inc.; Giant Eagle, Inc.; Mclane Company, Inc.; Meadowbrook Meat Company, Inc.; Associated Grocers, Inc.; Bilo Holding, LLC; WinnDixie Stores, Inc.; Janey Machin; Debra L. Damske; Ken Dunlap; Barbara E. Olson; John Peychal; Virginia Rakipi; Adam Buehrens; Casey Christensen; Scott Dennis; Brian Depperschmidt; Amy E. Waterman; Central Grocers, Inc.; Associated Grocers of Florida, Inc.; Benjamin Foods LLC; Albertsons Companies LLC; H.E. Butt Grocery Company; Hyvee, Inc.; The Kroger Co.; Lesgo Personal Chef LLC; Kathy Vangemert; Edy Yee; Sunde Daniels; Christopher Todd; Publix Super Markets, Inc.; Wakefern Food Corp.; Robert Skaff; Wegmans Food Markets, Inc.; Julie Wiese; Meijer Distribution, Inc.; Daniel Zwirlein; Meijer, Inc.; Supervalu Inc.; John Gross & Company; Super Store Industries; W Lee Flowers & Co Inc.; Family Dollar Services, LLC; Amy Jackson; Family Dollar Stores, Inc.; Katherine Mcmahon; Dollar Tree Distribution, Inc.; Jonathan Rizzo; Greenbrier International, Inc.; Joelyna A. San Agustin; Alex Lee, Inc.; Rebecca Lee Simoens; Big Y Foods, Inc.; David Ton; Kvat Food Stores, Inc., DBA Food City; Affiliated Foods Midwest Cooperative, Inc.; Merchants Distributors, LLC; Brookshire Brothers, Inc.; Schnuck Markets, Inc.; Brookshire Grocery Company; Kmart Corporation; Certco, Inc.; Rushin Gold, LLC, DBA The Gold Rush; Unified Grocers, Inc.; Target Corporation; Simon-Hindi, LLC; Fareway Stores, Inc.; Moran Foods, LLC, DBA Save-A-Lot; Woodman's Food Market, Inc.; Dollar General Corporation; Sam's East, Inc.; Dolgencorp, LLC; Sam's West, Inc.; Krasdale Foods, Inc.; Walmart Stores East, LLC; CVS Pharmacy, Inc.; Walmart Stores East, LP; Bashas' Inc.; Wal-mart Stores Texas, LLC; Marc Glassman, Inc.; Wal-mart Stores, Inc.; 99 Cents Only Stores; Jessica Bartling; Ahold U.S.A., Inc.; Gay Birnbaum; Delhaize America, LLC; Sally Bredberg; Associated Wholesale Grocers, Inc.; Kim Craig; Maquoketa Care Center; Gloria Emery; Erbert & Gerbert's, Inc.; Ana Gabriela Felix Garcia; Janet Machen; John Frick; Painted Plate Catering; Kathleen Garner; Robert Etten; Andrew Gorman; Groucho's Deli of Five Points, LLC; Edgardo Gutierrez; Groucho's Deli of Raleigh; Zenda Johnston; Sandee's Catering; Steven Kratky; Confetti's Ice Cream Shoppe; Kathy Lingnofski; End Payer Plaintiffs; Laura Montoya; Kirsten Peck; John Pels; Valerie Peters; Elizabeth Perron; Audra Rickman; Erica C. Rodriguez, Plaintiffs-Appellees,

and

Jessica Decker, Joseph A. Langston, Sandra Powers, Grand Supercenter, Inc., The Cherokee Nation, US Foods, Inc., Sysco Corporation, Gladys, LLC, Spartannash Company, Bryan Anthony Reo, Plaintiffs,

v.

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BUMBLE BEE FOODS LLC; StarKist Co.; Dongwon Industries Co., Ltd., Defendants-Appellants,

and

King Oscar, Inc.; Thai Union Frozen Products PCL; Del Monte Foods Company; Tri Marine International, Inc.; Dongwon Enterprises; Del Monte Corp.; Christopher D. Lischewski; Lion Capital (Americas), Inc.; Big Catch Cayman LP, AKA Lion/Big Catch Cayman LP; Francis T Enterprises; Glowfisch Hospitality; Thai Union North America, Inc., Defendants.

No. 19-56514

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Argued and Submitted En Banc September 22, 2021 Pasadena, California

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Filed April 8, 2022

Synopsis

Background: Direct and indirect purchasers of packaged and bulk-sized tuna products, along with individual end purchasers who bought tuna products for personal consumption, brought individual and putative class actions against tuna suppliers alleging price-fixing antitrust conspiracy in violation of Sherman Act and California's Cartwright Act. The United States District Court for the Southern District of California, Janis L. Sammartino, J., 332 F.R.D. 308, granted motions for class certification, after which the District Court, Dana M. Sabraw, J., Chief Judge, 2021 WL 5326517, denied motion for a set aside order. Suppliers appealed.

Holdings: On rehearing en banc, the Court of Appeals, Ikuta, Circuit Judge, held that:

as matter of first impression, the preponderance of evidence standard applied to proof of prerequisites for class certification;

sufficiency of expert evidence relating to common questions is to be evaluated on a case-by-case basis, disapproving *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918;

certification of class of direct purchasers was warranted on basis of predominance of common questions;

direct purchasers adequately demonstrated Article III standing at class certification stage for all class members;

Article III standing for all class members is not required when a court is certifying class seeking injunctive or other equitable relief, overruling *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581;

certification of class of indirect purchasers of bulk-sized tuna was warranted; and

certification of class of individual end purchasers was warranted.

Affirmed.

Lee, Circuit Judge, filed dissenting opinion in which Kleinfeld, Circuit Judge, joined.

Opinion, 993 F.3d 774, vacated.

Procedural Posture(s): Petition for Rehearing En Banc; On Appeal; Request or Application for Class Certification; Motion to Set Aside or Vacate.

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***660** Appeal from the United States District Court for the Southern District of California, Dana M. Sabraw, Chief District Judge, Presiding, D.C. No. 3:15-md-02670-DMS-MDD

Attorneys and Law Firms

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Before: Andrew J. Kleinfeld, Sidney R. Thomas, Susan P. Graber, William A. Fletcher, Ronald M. Gould, Richard A. Paez, Consuelo M. Callahan, Sandra S. Ikuta, Paul J. Watford, Michelle T. Friedland and Kenneth K. Lee, Circuit Judges.

Dissent by Judge Lee

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OPINION

IKUTA, Circuit Judge:

***661** The primary suppliers of packaged tuna in the United States appeal the district court's order certifying three classes of tuna purchasers who allege the suppliers violated federal and state antitrust laws. The main issue on appeal is whether the purchasers' statistical regression model, along with other expert evidence, is capable of showing that a price-fixing conspiracy caused class-wide antitrust impact, thus satisfying one of the prerequisites for bringing a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Because the district court did not abuse its discretion in concluding that Rule 23(b)(3) was satisfied, we affirm.

I

Bumble Bee, [1] StarKist, and Chicken of the Sea (COSI), and their parent companies are the largest suppliers of packaged tuna in the United States (referred to collectively as the "Tuna Suppliers"). Their products include packaged tuna sold to direct purchasers like Costco and Walmart, and food-service-size tuna products sold to various distributors for resale. Together, the Tuna Suppliers sell over 80 percent of the packaged tuna in the country.

In late 2015, the United States Department of Justice (DOJ) opened an investigation into the packaged tuna industry for violations of federal antitrust law. The DOJ investigation uncovered evidence of a price-fixing scheme among the Tuna Suppliers, which led the DOJ to enter multiple indictments alleging a criminal conspiracy to fix prices of canned tuna for the period from approximately November 2011 ***662** through December 2013. Bumble Bee, StarKist, and three tuna industry executives pleaded guilty to the conspiracy. Bumble Bee's former CEO was convicted by a jury of a conspiracy to fix prices. [2] COSI cooperated with the DOJ and admitted to price fixing in exchange for leniency.

A number of purchasers of the Tuna Suppliers' products (referred to collectively as the "Tuna Purchasers") filed putative class actions against the Tuna Suppliers alleging violations of various federal and state antitrust laws. The Tuna Purchasers alleged that the Tuna Suppliers engaged in a conspiracy from November 2010 through at least December 31, 2016 to fix prices of tuna, along with other collusive activities in furtherance of the price-fixing conspiracy. The Tuna Purchasers alleged that they were damaged by the conspiracy because they paid supra-competitive prices for the Tuna Suppliers' products. [3]

The Tuna Purchasers' actions were consolidated in a multidistrict litigation pretrial proceeding in the Southern District of California. The Tuna Purchasers consist of three putative subclasses: (i) direct purchasers of the Tuna Suppliers' products, such as nationwide retailers and regional grocery stores, who purchased packaged tuna between June 1, 2011 and July 1, 2015 (the "DPPs"); (ii) indirect purchasers of the Tuna Suppliers' products who bought bulk-sized tuna products between June 2011 and December 2016 for prepared food or resale (the "CFPs"); and (iii) individual end purchasers who bought the Tuna Suppliers' products between June 1, 2011 and July 1, 2015 for personal consumption (the "EPPs").

In 2018, the Tuna Purchasers moved to certify the three subclasses under Rule 23 of the Federal Rules of Civil Procedure to proceed as a class action. *See* Fed. R. Civ. P. 23(a), (b)(3). To demonstrate class-wide antitrust impact, each subclass proffered evidence from a different economist, each of whom employed substantially similar methodologies, to show that each member of the subclasses had paid an overcharge caused by the Tuna Suppliers' conspiracy. The Tuna Suppliers contested this expert evidence through their own economists. The district court held a three-day evidentiary hearing on the certification motion, and heard substantial testimony from each expert witness. In July 2019, the district court certified all three subclasses.

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The Tuna Suppliers timely appealed, and a panel of this court vacated the district court's order and remanded. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 794 (9th Cir. 2021), *reh'g en banc granted*, 5 F.4th 950 (9th Cir. 2021). We took the case en banc to consider whether the district court erred in finding that each subclass satisfied the requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

We have jurisdiction under 28 U.S.C. § 1292(e) and ***663** Rule 23(f) of the Federal Rules of Civil Procedure. We review the decision to certify a class and "any particular underlying Rule 23 determination involving a discretionary determination" for an abuse of discretion. *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010). We review the district court's determination of underlying legal questions de novo, *id.*, and its determination of underlying factual questions for clear error, *see Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1132 (9th Cir. 2016). The Supreme Court has indicated that a court's determination regarding what a statistical regression model may prove or is capable of proving is not a question of fact, even though there may be disputed issues of fact raised by "the data contained within an econometric model." *Comcast Corp. v. Behrend*, 569 U.S. 27, 36 n.5, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013). Accordingly, we review the district court's determination that a statistical regression model, along with other expert evidence, is capable of showing class-wide impact, thus satisfying one of the prerequisites of Rule 23(b)(3) of the Federal Rules of Civil Procedure, for an abuse of discretion. *See Yokoyama*, 594 F.3d at 1091.

II

A

Rule 23 provides a procedural mechanism for "a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010). As a claims-aggregating device, Rule 23 "leaves the parties' legal rights and duties intact and the rules of decision unchanged," *id.*, and it does not affect the substance of the claims or plaintiffs' burden of proof, *see* 28 U.S.C. § 2072(b).

To take advantage of Rule 23's procedure for aggregating claims, plaintiffs must make two showings. First, the plaintiffs must establish "there are questions of law or fact common to the class," as well as demonstrate numerosity, typicality and adequacy of representation. [4] Fed. R. Civ. P. 23(a). A common question "must be of such a nature that it is capable of classwide resolution —which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). By contrast, an individual question is one where members of a proposed class will need to present evidence that varies from member to member. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453, 136 S.Ct. 1036, 194 L.Ed.2d 124 (2016).

Second, the plaintiffs must show that the class fits into one of three categories. *See* Fed. R. Civ. P. 23(b). To qualify for the third category, Rule 23(b)(3), the district court must find that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods ***664** for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). [5] "The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods*, 577 U.S. at 453, 136 S.Ct. 1036 (cleaned up). The requirements of Rule 23(b)(3) overlap with the requirements of Rule 23(a): the plaintiffs must prove that there are "questions of law or fact common to class members" that can be determined in one stroke, *see Wal-Mart*, 564 U.S. at 349, 131 S.Ct. 2541, in order to prove that such common questions predominate over individualized ones, *see Tyson Foods*, 577 U.S. at 453–54, 136 S.Ct. 1036. Therefore, courts must consider cases examining both subsections in performing a Rule 23(b)(3) analysis.

B

Before it can certify a class, a district court must be "satisfied, after a rigorous analysis, that the prerequisites" of both Rule 23(a) and 23(b)(3) have been satisfied. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982); *Comcast*, 569 U.S. at 35, 133 S.Ct. 1426. "[P]laintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3)," and must carry their burden of proof "before class certification." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275–76, 134 S.Ct. 2398, 189 L.Ed.2d 339 (2014).

We have not yet prescribed the plaintiffs' burden for proving that the prerequisites of Rule 23 are satisfied. In the absence of direction from Congress or the Constitution, it is up to the court to prescribe the burden of proof. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 389–90, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983). To do so, we must consider both the allocation of "the risk of error between the litigants" and "the relative importance attached to the ultimate decision." *Id.* at 389, 103 S.Ct. 683 (quoting *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)). The preponderance of the evidence standard allows both parties to "share the risk of error in roughly equal fashion," *id.* at 390, 103 S.Ct. 683 (quoting *Addington*, 441 U.S. at 423, 99 S.Ct. 1804), while "[a]ny other standard expresses a preference for one side's interests," *id.* Therefore, the preponderance of the evidence standard is "generally applicable in civil actions." *Id.* By contrast, the Court has "required proof by clear and convincing evidence where particularly important individual interests or rights are at stake," such as termination of parental rights or involuntary commitment proceedings. *Id.* at 389, 103 S.Ct. 683.

Applying this test here, the balance of interests in this case favors prescribing the preponderance of the evidence standard. The Supreme Court has made clear that Rule 23 is consistent with the Rules Enabling Act and does not "abridge, enlarge or modify any substantive right." *Shady Grove*, 559 U.S. at 406–07, 130 S.Ct. 1431 (citing 28 U.S.C. § 2072(b)). Rule 23 does not "change plaintiffs' separate entitlements to relief nor abridge defendants' ***665** rights" and, instead, alters "only how the claims are processed." *Id.* at 408, 130 S.Ct. 1431. Therefore, the Supreme Court has concluded that the authorization of class actions is substantively neutral, even though it may expose defendants to the imposition of aggregate liability. *Id.* Because the application of Rule 23 to certify a class does not alter the defendants' rights or interests in a substantive way, there is no basis for applying a heightened standard of proof beyond the traditional preponderance standard. We therefore join our sister circuits in concluding that plaintiffs must prove the facts necessary to carry the burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence. [6]

In carrying the burden of proving facts necessary for certifying a class under Rule 23(b)(3), plaintiffs may use any admissible evidence. *See Tyson Foods*, 577 U.S. at 454–55, 136 S.Ct. 1036 (explaining that admissibility of evidence at certification must meet all the usual requirements of admissibility and citing to Rules 401, 403, and 702 of the Federal Rules of Evidence). Plaintiffs frequently offer expert evidence, including statistical evidence or class-wide averages, to prove that they meet the prerequisites of Rule 23(b)(3). *See id.* at 455, 136 S.Ct. 1036. Where, as here, a defendant did not raise a *Daubert* challenge to the expert evidence before the district court, [7] the defendant forfeits the ability to argue on appeal that the evidence was inadmissible, but may still argue that the evidence is not capable of answering a common question on a class-wide basis. *See Comcast*, 569 U.S. at 32 n.4, 133 S.Ct. 1426; *Tyson Foods*, 577 U.S. at 458–59, 136 S.Ct. 1036.

In order for the plaintiffs to carry their burden of proving that a common question predominates, they must show that the common question relates to a central issue in the plaintiffs' claim. *See Wal-Mart*, 564 U.S. at 349–50, 131 S.Ct. 2541. Therefore, "[c]onsidering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809, 131 S.Ct. 2179, 180 L.Ed.2d 24 (2011) (quoting Fed. R. Civ. P. 23(b)(3)).

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The claims at issue here are violations of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 15, and California's Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 *et seq.* [8] The elements of a claim ***666** for such antitrust action are (i) the existence of an antitrust violation; (ii) "antitrust injury" or "impact" flowing from that violation (i.e., the conspiracy); and (iii) measurable damages. *See Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1101–02 (9th Cir. 1999); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008), *as amended* (Jan. 16, 2009) (citing 15 U.S.C. § 15). "Antitrust injury" is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). Damages are measured only after each plaintiff has demonstrated that the defendant's conduct caused the plaintiff to suffer an antitrust injury. *See In re Hydrogen Peroxide*, 552 F.3d at 311.

Therefore, to prove there is a common question of law or fact that relates to a central issue in an antitrust class action, plaintiffs must establish that "essential elements of the cause of action," such as the existence of an antitrust violation or antitrust impact, are capable of being established through a common body of evidence, applicable to the whole class. *Id.* (cleaned up). Here, the Tuna Purchasers claim that they can establish the existence of antitrust impact through common proof.

C

In making the determinations necessary to find that the prerequisites of Rule 23(b)(3) are satisfied, the district court must proceed "just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit." *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006), *decision clarified on denial of reh'g*, 483 F.3d 70 (2d Cir. 2007). This means that the court must make a "rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the [class-wide] evidence to prove" the common question in one stroke. *In re Hydrogen Peroxide*, 552 F.3d at 312. In addition, the court must find that this common question (i.e., the "common, aggregation-enabling" issue) predominates over individual issues. *Tyson Foods*, 577 U.S. at 453, 136 S.Ct. 1036. The determination whether expert evidence is capable of resolving a class-wide question in one stroke may include "[w]eighing conflicting expert testimony" and "[r]esolving expert disputes," *In re Hydrogen Peroxide*, 552 F.3d at 323–24, where necessary to ensure that Rule 23(b)(3)'s requirements are met and the "common, aggregation-enabling" issue predominates over individual issues, *Tyson Foods*, 577 U.S. at 453, 136 S.Ct. 1036. [9]

In determining whether the "common question" prerequisite is met, a ***667** district court is limited to resolving whether the evidence establishes that a common question is *capable* of class-wide resolution, not whether the evidence in fact establishes that plaintiffs would win at trial. While such an analysis may "entail some overlap with the merits of the plaintiff's underlying claim," *Wal-Mart*, 564 U.S. at 351, 131 S.Ct. 2541, the "[m]erits questions may be considered [only] to the extent [ ] that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied," *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466, 133 S.Ct. 1184, 185 L.Ed.2d 308 (2013); *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011). "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen*, 568 U.S. at 466, 133 S.Ct. 1184.

A district court must also resolve disputes about historical facts if necessary to determine whether the plaintiffs' evidence is capable of resolving a common issue central to the plaintiffs' claims. [10] For instance, in a case in which a nationwide class of plaintiff employees alleged nationwide discrimination by their employer, we held that a district court had to resolve factual disputes at certification regarding whether decisions regarding promotions were made at the local level or by upper management. *See Ellis*, 657 F.3d at 983–84 & n.7. We reasoned that if such decisions were made only at the local level, plaintiffs "would face an exceedingly difficult challenge in proving that there are questions of fact and law common to the *nationwide* class." *Id.* at 983–84. Nevertheless, the district court was not required to resolve factual disputes regarding ultimate issues on the merits, such as "whether women were in fact discriminated against" or whether the defendant "does in fact have a culture of gender stereotyping and paternalism." *Id.* at 983; *see also id.* at 983 n.8. Resolving such issues would "put the cart before the horse" by requiring plaintiffs to show at certification that they will prevail on the merits. *Amgen*, 568 U.S. at 460, 133 S.Ct. 1184.

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Therefore, a district court cannot decline certification merely because it considers plaintiffs' evidence relating to the common question to be unpersuasive and unlikely to succeed in carrying the plaintiffs' burden of proof on that issue. *See id.* at 459–60, 133 S.Ct. 1184. Rather, *Tyson Foods* established the rule that if "each class member could have relied on [the plaintiffs' evidence] to establish liability if he or she had brought an individual action," and the evidence "could have sustained a reasonable jury finding" on the merits of a common question, *Tyson Foods*, 577 U.S. at 455, 136 S.Ct. 1036, then a district court may conclude that the plaintiffs have carried their burden of satisfying the Rule 23(b)(3) requirements as to that common question of law or fact. [11] ***668** In *Tyson Foods*, for instance, the Court held that if the class members had pursued individual lawsuits, each could have relied on the expert evidence purporting to show how long it took to don and doff protective equipment. *Tyson Foods*, 577 U.S. at 456–57, 136 S.Ct. 1036. Accordingly, the Court concluded that such expert evidence was capable of answering a common question for the entire class in one stroke, and could reasonably sustain a jury verdict in favor of the plaintiffs, even though a jury could still decide that the evidence was not persuasive. *Id.* at 459–60, 136 S.Ct. 1036; *see also id.* at 457, 136 S.Ct. 1036 (explaining that the question whether the expert's "study was unrepresentative or inaccurate" was "itself common to the claims made by all class members"). The rule that the evidence need merely be capable of resolving a common question on a class-wide basis holds true whether the common question concerns an element of plaintiffs' claim, *see Amgen*, 568 U.S. at 468–69, 133 S.Ct. 1184 (materiality in a Rule 10b-5 action), or a fact that must be determined to establish liability, *see Tyson Foods*, 577 U.S. at 450, 136 S.Ct. 1036 (time spent donning and doffing protective equipment per week).

Nor can a district court decline to certify a class that will require determination of some individualized questions at trial, so long as such questions do not predominate over the common questions. *See* Fed. R. Civ. P. 23(b)(3). "When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods*, 577 U.S. at 453, 136 S.Ct. 1036 (internal quotation marks omitted). Thus, *Halliburton* concluded that so long as plaintiffs could show that their evidence is capable of proving the prerequisites for invoking the presumption of reliance (a key element in a securities class action) on a class-wide basis, the fact that the defendants would have the opportunity at trial to rebut that presumption as to some of the plaintiffs did not raise individualized questions sufficient to defeat predominance. 573 U.S. at 276, 134 S.Ct. 2398. "That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." *Id.*

When individualized questions relate to the injury status of class members, Rule 23(b)(3) requires that the court determine whether individualized inquiries about such matters would predominate over common questions. *See Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019). [12] In an analogous context, we ***669** have held that a district court is not precluded from certifying a class even if plaintiffs may have to prove individualized damages at trial, a conclusion implicitly based on the determination that such individualized issues do not predominate over common ones. *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016); *see also Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 988 (9th Cir. 2015); *In re Urethane*, 768 F.3d 1245, 1255 (10th Cir. 2014) ("The presence of individualized damages issues" does not preclude a court from certifying a class because "[c]lass-wide proof is not required for all issues").

Therefore, we reject the dissent's argument that Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members. Dissent at 691–92. This position is inconsistent with Rule 23(b)(3), which requires only that the district court determine after rigorous analysis whether the common question predominates over any individual questions, including individualized questions about injury or entitlement to damages. *See* Fed. R. Civ. P. 23(b)(3). [13]

A district court is in the best position to determine whether individualized questions, including those regarding class members' injury, "will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3)." *Halliburton*, 573 U.S. at 276, 134 S.Ct. 2398; *see also Ruiz Torres*, 835 F.3d at 1137 (stating that "the district court is well situated to winnow out" a fortuitously non-injured subset of class members). We "uphold a district court's determination that falls within a broad range

of permissible conclusions." *Hung Lam v. City of San Jose*, 869 F.3d 1077, 1084 (9th Cir. 2017) (quoting *Kode v. Carlson*, 596 F.3d 608, 612 (9th Cir. 2010)). [14]

***670** III

We now turn to the Tuna Suppliers' arguments and consider them in light of this legal framework. We begin with the DPP class, which is the focus of the Tuna Suppliers' arguments. In order to prevail on their antitrust claim, the DPP class must prove that the Tuna Suppliers engaged in a conspiracy (an antitrust violation), which resulted in antitrust impact in the form of higher prices paid by each member of the class, which in turn led to measurable damages. The question whether each member of the DPP class suffered antitrust impact "is central to the validity of each one of the [DPP] claims." *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541. The central questions on appeal are whether the expert evidence presented by the DPPs is capable of resolving this issue "in one stroke," *id.*, and whether this common question predominates over any individualized inquiry. We conclude that the district court did not abuse its discretion in certifying the class.

A

The centerpiece of the DPPs' claim that each member of the class suffered antitrust impact is economist Dr. Russell Mangum's expert testimony and report. According to his testimony and report, Dr. Mangum reviewed a comprehensive range of available information to develop an understanding of the nature of the market at issue and the details of the Tuna Suppliers' price-fixing conspiracy. That information included court filings, the Tuna Suppliers' guilty pleas, discovery materials such as the Tuna Suppliers' business records concerning their sales of packaged tuna, deposition testimony, publicly available information regarding the tuna industry, and data regarding supply and demand factors that affect the manufacture, sale and consumption of packaged tuna such as raw material prices and details about customer preferences.

After examining the economic structure of the tuna market and the available record evidence concerning the Tuna Suppliers' behavior, Dr. Mangum determined that the packaged tuna market was conducive to price-fixing, given the Tuna Suppliers' dominance in the market, the attendant barriers to entry for competitors, the Tuna Suppliers' use of price lists for their products, and other characteristics of the packaged tuna industry. According to Dr. Mangum, these findings supported a baseline economic theory that the Tuna Suppliers' collusive behavior would affect the DPPs on a class-wide basis. Dr. Mangum then used a number of different econometric tools to evaluate whether quantitative ***671** evidence supported this theory. [15]

Dr. Mangum first performed a pricing correlation test, which demonstrated that the prices of the Tuna Suppliers' products moved up or down together regardless of product or customer type, and thus supported the proposition that the Tuna Suppliers' collusion had a common, supra-competitive impact on their prices. Based on this evidence, Dr. Mangum concluded that the Tuna Suppliers' collusion would result in higher prices that would affect direct purchasers on a class-wide basis, which was consistent with his original theory. This finding is also consistent with "the prevailing [economic] view [that] price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated." *In re Urethane*, 768 F.3d at 1254.

To further explore whether the DPPs were subject to an overcharge caused by the price-fixing conspiracy (rather than by other variables that could affect prices) on a class-wide basis, Dr. Mangum constructed a statistical model using a multiple regression analysis. Regression analyses are used to determine "the relationship between an unknown [dependent] variable [such as price] and one or more independent variables [e.g., transaction characteristics, and supply and demand factors] that are thought to impact the dependent variable." *Id.* at 1260 (quotation marks omitted) (citing Michael J. Saks, et al., *Reference Manual on Scientific Evidence* 179, 181 (2d ed. 2000)). If a regression model uses "appropriate independent [or explanatory] variables," it can test and isolate the extent to which the actual prices paid by plaintiffs are higher because of a defendant's collusive behavior.

Id. Assuming Dr. Mangum's regression model met this standard, it could provide further evidence that the DPPs were impacted by the Tuna Suppliers' collusion on a classwide basis.

In simple terms, Dr. Mangum first aggregated (or "pooled") the actual tuna sale transaction data for the Tuna Suppliers' sales to the DPPs during both the alleged conspiracy period and during benchmark periods before and after the conspiracy. Dr. Mangum then identified a number of variables (referred to as independent or explanatory variables) that could affect the price of tuna, including product characteristics, input costs, customer type, and variables related to consumer preference and demand, such as disposable income, seasonal effects, and geography. The model then isolated (or "controlled for") the effect of these explanatory variables on the prices paid by DPPs, which allowed the model to isolate the effect that the conspiracy by itself had on the prices paid by DPPs. When all the tuna sale transactions were aggregated, and the explanatory variables (other than the price-fixing conspiracy) were controlled for, the model showed that the DPPs paid 10.28 percent more for tuna during the conspiracy period than they did during the benchmark periods. Dr. Mangum labeled this 10.28 percent as the "overcharge," meaning the common amount paid by the DPPs resulting from the collusive behavior alone. This result was statistically significant, meaning that there was a less than five percent chance that the higher prices during the price-fixing conspiracy was a product of chance. Thus, by isolating the common overcharge amount, Dr. Mangum's regression model was further confirmation of his theory that ***672** the Tuna Suppliers' collusion had a class-wide effect. [16]

Dr. Mangum performed several tests (which he referred to as "robustness checks") to confirm that his regression model was an appropriate tool to be used by the entire DPP class to show common impact. These tests were used to confirm the reliability of the model, and, according to Dr. Mangum, the test results supported his ultimate conclusion that the model could be used to show class-wide injury. First, Dr. Mangum changed the model to evaluate the overcharge specific to each individual defendant. The results showed that prices were still elevated above competitive levels during the collusion period. Second, Dr. Mangum changed the model to evaluate the overcharge specific to certain products with different characteristics, such as fish type and package type. These tests showed that each type of product tested was impacted to a similar degree. Third, Dr. Mangum changed the model to evaluate the overcharge based on customer types. [17] This test showed that there were large, statistically significant overcharges for every customer type. These robustness checks confirmed Dr. Mangum's theory that the DPPs paid an overcharge during the conspiracy period. Finally, Dr. Mangum used the output of the pooled regression model to predict the but-for prices (i.e., what the price of tuna during the conspiracy period would have been without the overcharge caused by the conspiracy), and compared these predicted but-for prices to the actual prices paid by the DPP class. This comparison showed that 94.5 percent of the purchasers had at least one purchase above the predicted but-for price, which again provided further evidence that the conspiracy had a common impact on all or nearly all the members of the DPP class. [18] Dr. Mangum therefore concluded that his aggregated regression model provided econometric evidence that the conspiracy resulted in higher prices paid by all or nearly all DPPs. According to Dr. Mangum, the results were strong evidence ***673** of common, class-wide antitrust impact. [19]

In sum, Dr. Mangum's findings about the tuna market and the Tuna Suppliers' collusive behavior, his pricing correlation test, his regression model, and his robustness checks all confirmed his theory that the conspiracy resulted in substantial price impacts, and that the impact was common to the DPPs during the collusion period.

B

The Tuna Suppliers attacked Dr. Mangum's expert report on multiple fronts, but primarily relied on their rebuttal expert, economist Dr. John Johnson, who made multiple criticisms of Dr. Mangum's methodology. The essence of Dr. Johnson's critique was that it was not statistically appropriate to use a pooled regression model for transactions in the tuna market, given the multiple individualized differences among class members, such as disparities in negotiating tactics and bargaining power. Dr. Mangum's use of pooled data, Dr. Johnson alleged, masked these individual differences among class members. Thus, Dr. Johnson claimed, Dr. Mangum's conclusion that the conspiracy had a class-wide impact based on a uniform overcharge did not reflect the real world.

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Dr. Johnson supported this allegation on several grounds. First, Dr. Johnson claimed that a statistical tool called a Chow test [20] shows that the data relating to tuna transactions should not be pooled due to individual differences in each purchaser's transactions. Second, Dr. Johnson criticized Dr. Mangum's calculation that 94.5 percent of DPPs whose transactional data were included in the model had at least one purchase at a price above the predicted but-for price. According to Dr. Johnson, this calculation was misleading because it was premised on what Dr. Johnson characterized as the faulty assumption that all direct purchasers paid the same 10.28 percent overcharge throughout the proposed class period. Instead, Dr. Johnson performed his own test of Dr. Mangum's model. As part of this test, Dr. Johnson changed the model to evaluate overcharge based on each individual customer. According to Dr. Johnson, the test showed that of the 604 direct purchasers who bought from the Tuna Suppliers during the proposed class period, the model did not estimate a positive and statistically significant overcharge (attributable to the conspiracy) for 169 direct purchasers (or 28 percent). Therefore, Dr. Johnson argued that the plaintiffs could not rely on the model to demonstrate class-wide impact of the conspiracy. [21]

***674** Dr. Johnson made several additional critiques in arguing that Dr. Mangum's model was not capable of demonstrating class-wide impact. First, Dr. Johnson argued that Dr. Mangum's model showed false positives. According to Dr. Johnson, an application of Dr. Mangum's regression model showed that several DPP class members had paid an overcharge when they purchased tuna products from non-defendants, i.e., tuna suppliers who had not participated in the conspiracy. Second, Dr. Johnson attacked the reliability of Dr. Mangum's model because Dr. Mangum's model selected time periods that did not precisely match the class periods in the DPPs' complaint. Finally, Dr. Johnson criticized Dr. Mangum's use of a cost index (a calculated measure of costs for all the Tuna Suppliers) as one of the explanatory variables in his model, rather than using actual accounting cost data. According to Dr. Johnson, the use of a cost index inappropriately assumed that the Tuna Suppliers' costs responded in a like way to supply and demand factors.

In rebuttal, Dr. Mangum rejected Dr. Johnson's premise that a pooled, aggregated model was inappropriate to use in this case. Dr. Mangum explained that his technique was a well-known and well-accepted method for examining antitrust impact in markets with individualized differences among purchasers. According to Dr. Mangum, both of the bases for Dr. Johnson's challenges to the use of a pooled regression model failed. First, Dr. Mangum claimed that a Chow test should not be used in the manner employed by Dr. Johnson in his report. According to Dr. Mangum, Dr. Johnson's Chow test was "designed to fail," meaning that in this context, the test results would always show that the data relating to tuna transactions should not be pooled. Second, Dr. Mangum asserted that the record contained insufficient transaction data for Dr. Johnson's test of the regression model to yield meaningful results. For example, Dr. Mangum acknowledged that the model, as changed by Dr. Johnson to consider purchasers on an individual basis, could not estimate a positive and statistically significant overcharge for 169 direct purchasers. But according to Dr. Mangum, *no* regression model could yield a statistically significant estimate for many of those 169 direct purchasers on such an individual purchaser-by-purchaser basis, because 61 of those purchasers did not make any purchases during the benchmark periods, and many of the other purchasers had not undertaken a sufficient number of transactions during either the benchmark periods or collusion period to yield statistically significant results. And logically, Dr. Mangum asserted, given the evidence that the defendants were able to inflate prices generally through the conspiracy, that the tuna market was susceptible to collusion, and that the model showed a robust, statistically significant impact of the price-fixing scheme on the tuna market, even the DPP class members for whom Dr. Johnson's test did not yield a positive, statistically significant overcharge should be able to rely on the pooled regression model as evidence of impact. Therefore, according to Dr. Mangum, Dr. Johnson erred in concluding that the regression model had no relevance for that 28 percent of class members.

Dr. Mangum also rebutted Dr. Johnson's additional critiques. With respect to Dr. Johnson's claim that the regression model yielded false positives, Dr. Mangum explained that overcharges imposed by non-defendant tuna suppliers (who were ***675** not part of the conspiracy) were not false positives but were caused by the "umbrella effect." This term refers to an economic observation that when many suppliers engage in a conspiracy to raise prices, non-conspirators may raise their prices to supra-competitive levels because of the conspirator's dominant market power. *See* ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal & Economic Issues* 226 (2d ed. 2010). Dr. Mangum also argued that Dr. Johnson's claim of false positives was based on an erroneous analysis of the tuna market. According to Dr. Mangum, Dr. Johnson incorrectly claimed that two of the

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individual DPPs (Sysco and U.S. Foods) purchased tuna from non-defendant suppliers because both of those class members actually purchased tuna that was produced by the Tuna Suppliers and merely sold through a middleman. Dr. Mangum defended his selection of time periods relating to the model, claiming he narrowed the class period based on his analysis of the evidence in the case. Finally, Dr. Mangum rejected Dr. Johnson's critique of his use of cost indexes. Dr. Mangum asserted that costs indexes were statistically superior to using individual cost accounting data. He noted that one of the robustness tests he performed on the data showed that using defendant-specific cost structures confirmed the results of the pooled model. And he asserted that it was preferable to use his cost index for determining competitive market prices based on market supply and demand conditions, rather than relying on cost data derived from the Tuna Suppliers' individual approaches to cost accounting.

C

In considering whether the DPPs' evidence was capable of establishing antitrust impact for the class as a whole, the district court reviewed Dr. Mangum's expert testimony and report, the rebuttal testimony and report by Dr. Johnson, and Dr. Mangum's reply, and then addressed the parties' disputes. In doing so, the district court did not make any legal or factual error.

First, the district court considered Dr. Johnson's argument that Dr. Mangum's pooled regression model masked differences between purchasers, and that when the overcharge is determined for individual DPP class members the model did not show a positive, statistically significant impact for some 28 percent of the class. After reviewing each of the experts' analyses, the district court credited Dr. Mangum's rebuttal of Dr. Johnson's critique. Even if the model (when modified by Dr. Johnson to evaluate individual purchasers) did not yield a positive, statistically significant overcharge for some purchasers who had no or too few transactions during the pre-collusion benchmark period, the district court concluded that those purchasers could still rely on the pooled regression model as evidence of the conspiracy's impact on similarly situated class members. The court further noted that other evidence in the record, including the guilty pleas and market characteristics, showed that class members suffered a common impact.

The district court also considered Dr. Johnson's argument that the Chow test showed that Dr. Mangum's model cannot be applied to all defendants. The court acknowledged that failure of a statistical test used to determine whether a regression is appropriate should be taken seriously, and could lead a court to reject the model at the class certification stage as not capable of providing class-wide proof. But it also noted that most regressions models will fail one or more tests if enough are run, even if the model itself is statistically sound. Because there was a rational basis ***676** for Dr. Mangum's use of the pooled regression model to demonstrate class-wide impact, the court concluded the failure of the Chow test did not require the court to reject the model.

The district court rejected Dr. Johnson's additional arguments. With respect to Dr. Johnson's claim that the false positives in Dr. Mangum's model rendered the model unreliable, the court credited Dr. Mangum's explanation that the false positives could be explained by the umbrella effect and that Dr. Johnson had erroneously concluded that some tuna was supplied by non-defendants when in fact the tuna was supplied by defendants. The district court also addressed the dispute over Dr. Mangum's selection of the time period for the class, and concluded that Dr. Mangum's narrowing of the time frame bolstered the reliability of the model. Finally, the district court rejected Dr. Johnson's critique of Dr. Mangum's use of a cost index, rather than actual accounting cost data. The court credited Dr. Mangum's explanation as to why the use of such an index provided more reliable results than actual cost accounting data, and concluded that his use of a cost index did not undermine the reliability of his methodology or model.

After resolving each dispute between the experts, the district court acknowledged that the defendants' critique of Dr. Mangum's model could be persuasive to a jury at trial. But the district court recognized that at this stage of the proceedings, its task was to determine whether Dr. Mangum's evidence was capable of showing class-wide impact, not to reach a conclusion on the merits of the DPPs' claims. After weighing the evidence put forth by the DPPs, including the regression model, the correlation tests, the record evidence and the guilty pleas and admissions entered in this case, the district court concluded there was sufficient evidence to show common questions predominated as to common impact. Therefore, it ruled that this prerequisite to Rule 23(b)(3) was met.

We conclude that the district court did not abuse its discretion in reaching this conclusion. The court conducted a rigorous analysis of the expert evidence presented by the parties. The district court did not err legally or factually in concluding that Dr. Mangum's pooled regression model, along with other evidence, is capable of answering the question whether there was antitrust impact due to the collusion on a class-wide basis, thus satisfying this prerequisite of Rule 23(b)(3).

IV

We now turn to the Tuna Suppliers' claims that the district court abused its discretion in determining that the evidence presented by the DPPs proved: (1) that the element of antitrust impact is capable of being established class-wide through common proof, and (2) that this common question predominates over individual questions. [22]

A

The Tuna Suppliers' main argument is that the district court abused its discretion in determining that Dr. Mangum's model ***677** is capable of proving common impact for all class members. According to the Tuna Suppliers, Dr. Mangum's evidence is not a permissible method of proving class-wide liability because the regression model uses "averaging assumptions," meaning that the model assumes that all DPPs were overcharged by the same uniform percentage (10.28 percent). These averaging assumptions, according to the Tuna Suppliers, "paper over" individualized differences among class members. Because the tuna market is characterized by individualized negotiations and different bargaining power among the purchasers, the Tuna Suppliers claim it is fundamentally impossible to show common proof of injury. To support this argument, the Tuna Suppliers note that the DPPs who pursued their antitrust claims individually did not rely on a pooled regression model but used actual cost data and claimed an individualized overcharge rate. Given the nature of the tuna market, the Tuna Suppliers conclude, Dr. Mangum's model cannot meet the prerequisites of Rule 23(b)(3).

To the extent that the Tuna Suppliers argue that pooled regression models involve improper "averaging assumptions" and therefore are inherently unreliable when used to analyze complex markets, we disagree. In antitrust cases, regression models have been widely accepted as a generally reliable econometric technique to control for the effects of the differences among class members and isolate the impact of the alleged antitrust violations on the prices paid by class members. [23] *See, e.g., Econometrics* at 1. Further, *Tyson Foods* rejected any categorical exclusion of representative [24] or statistical evidence. 577 U.S. at 459–60, 136 S.Ct. 1036. Therefore, any categorical argument that a pooled regression model cannot control for variables relating to the individualized differences among class members must be rejected.

To the extent the Tuna Suppliers and the dissent raise the more focused argument that, in this case, the model's output (estimating that the Tuna Suppliers' conspiracy resulted in a 10.28 percent overcharge for the entire class) cannot plausibly serve as common evidence for all class members given the individualized differences among those class members, we again disagree. [25] It is not implausible to conclude that a conspiracy could have a ***678** class-wide impact, "even when the market involves diversity in products, marketing, and prices," especially "where, as here, there is evidence that the conspiracy artificially inflated the baseline for price negotiations." *In re Urethane*, 768 F.3d at 1254–55. As the Tenth Circuit explained, a district court could reasonably conclude "that price-fixing would have affected the entire market, raising the baseline prices for all buyers." *Id.* at 1255. In other words, it is both logical and plausible that the conspiracy could have raised the baseline prices for all members of the class by roughly ten percent. The district court did not abuse its discretion in so concluding.

The dissent argues that Dr. Mangum's expert opinion "flies against common sense and empirical evidence," because large retailers like Walmart likely would have used their bargaining power to negotiate lower prices, and thus may not have paid higher prices because of the Tuna Suppliers' collusion. Dissent at 689. But the district court is not free to prefer its own views

about the economics of the tuna market over the statistical evidence submitted by the plaintiffs, and here the regression model controlled for the variables identified by the dissent. Indeed, Dr. Mangum provided an individualized overcharge estimate for Walmart when he changed the model to evaluate the overcharge based on customer types. This test showed that Walmart paid statistically significant overcharges because of the conspiracy. Provided that the evidence is admissible and, after rigorous review, determined to be capable of establishing antitrust impact on a class-wide basis, it is for the jury, not the court, to decide the persuasiveness of Dr. Mangum's evidence in light of "common sense and empirical evidence."

The Tuna Suppliers rely on *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6 (1st Cir. 2008), for the proposition that a market involving individualized negotiations is inherently incompatible with common impact. This reliance is misplaced.[26] In *New Motor Vehicles*, plaintiffs raised a "novel and complex" theory of how consumers were injured by defendants' alleged horizontal conspiracy to discourage imports of lower-cost cars from Canada into the United States. *Id.* at 27. Plaintiffs' theory proceeded in two steps: (1) "but for the defendants' illegal stifling of competition," manufacturers would have set lower prices to compete with Canadian imports; and (2) because the manufacturers did not do so, consumers paid higher retail prices. *Id.* The First Circuit rejected this theory because plaintiffs failed to demonstrate they had an approach for proving either step. For the first step, plaintiffs had not shown how they would establish that but for the horizontal conspiracy, enough lower-priced Canadian cars would flood into the American market so as to cause manufacturers to decrease their prices. *Id.* As for the second step, the plaintiffs had not proved their damages model was capable of showing "which consumers were impacted by the alleged antitrust violation and which were not." *Id.* at 28. In this regard, the plaintiffs relied on an inference that "any upward pressure on national pricing would necessarily raise the prices actually paid by individual consumers." *Id.* at 29. But the First Circuit rejected this inference because "[t]oo many factors play into an individual negotiation to allow an assumption—*at least without further theoretical development*—that any price increase or ***679** decrease will always have the same magnitude of effect on the final price paid." *Id.* at 29 (emphasis added). The court contrasted the plaintiffs' unsupported inference with cases allowing "a presumption of class-wide impact in price-fixing cases when 'the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions.' " *Id.* (quoting *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 151 (3d Cir. 2002)). Despite rejecting the plaintiffs' theory at an early stage of the case, the court did not rule out certification of a class but instead concluded that "more work remained to be done in the building of plaintiffs' damages model and the filling out of all steps of plaintiffs' theory of impact." *Id.*

As this explanation of the case makes clear, *New Motor Vehicles*' analysis is not applicable here. First, the DPPs' price-fixing theory is not "novel" or "complex." *Id.* at 27. Rather than adopting a theory requiring multiple speculative steps, the DPPs have a simple one-step theory: the Tuna Suppliers conspired to raise tuna prices, resulting in higher prices for all buyers. Second, while the plaintiffs in *New Motor Vehicles* had not provided a thorough explanation or developed a model showing how they would establish their theory, *id.* at 29, the DPPs have already offered well-developed expert testimony and regression modeling supporting common impact. The other cases relied on by the Tuna Suppliers are equally inapposite. *See, e.g.*, *Blades v. Monsanto Co.*, 400 F.3d 562, 572 (8th Cir. 2005) (affirming denial of class certification because evidence of a conspiracy to raise prices, without more, could not demonstrate impact across highly localized and highly individualized markets for hundreds of seed varieties, and the plaintiffs had not offered a common method of showing injury); *Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 423 (5th Cir. 2004) (reversing class certification where the plaintiffs lacked a plausible theory of how the challenged conduct had consistently affected purchase prices).

The Tuna Suppliers also argue that because the individual plaintiffs pursuing their own antitrust claims showed overcharges both above and below the overcharge indicated by Dr. Mangum's model, a uniform 10.28 percent overcharge is implausible. We also reject this argument, because it improperly conflates the question whether evidence is capable of proving an issue on a class-wide basis with the question whether the evidence is persuasive. A lack of persuasiveness is not fatal at certification. *See Amgen*, 568 U.S. at 459–60, 133 S.Ct. 1184. For purposes of determining whether each member of the DPP class can rely on the model to prove antitrust impact, it is irrelevant whether actual sales data shows a specific class member was overcharged by more or less than 10.28 percent. Rather, the question is whether each member of the class can rely on Dr. Mangum's model to show antitrust impact of any amount. The district court did not abuse its discretion in finding that each member could. While

individualized differences among the overcharges imposed on each purchaser may require a court to determine *damages* on an individualized basis, *see supra* Section III.C, such a task would not undermine the regression model's ability to provide evidence of common *impact.* Accordingly, we reject the Tuna Suppliers' argument that the regression model could not sustain liability in individual proceedings. Rather, "each class member could have relied on [the model] to establish liability if he or she had brought an individual action." *See* ***680** *Tyson Foods*, 577 U.S. at 455, 136 S.Ct. 1036. We therefore conclude that the district court did not err legally or factually in concluding that Dr. Mangum's pooled regression model does not fail on any of the grounds raised by the Tuna Suppliers. [27]

B

The Tuna Suppliers and the dissent next contend that the district court erred by failing to resolve a dispute between the parties as to whether 28 percent of the class did not suffer antitrust impact. Instead of resolving the dispute between the parties' experts, the Tuna Suppliers claim, the district court improperly shifted the critical inquiry to the jury. In other words, the Tuna Suppliers argue that to satisfy Rule 23(b)(3)'s predominance requirement, plaintiffs must prove that all or nearly all class members were *in fact injured* by the alleged conspiracy, i.e., suffered antitrust impact. [28]

In raising this argument, the Tuna Suppliers focus on Dr. Johnson's critique of Dr. Mangum's model, which stated that when he tested Dr. Mangum's model by changing it to evaluate the overcharge specific to each individual member of the DPP class, the test showed that 28 percent of the DPPs could not rely on the model to show an overcharge attributable to the conspiracy. According to the Tuna Suppliers, this evidence indicated that 28 percent of the DPP class did not suffer antitrust impact. And in district court, the Tuna Suppliers argued that "28% of a class—nearly one-third—far exceeds the *de minimis* number of uninjured class members that some courts have permitted in certifying a class." Therefore, the Tuna Suppliers argue that the class should not have been certified. Further, the Tuna Suppliers argue that the existence of a large number of uninjured class members raises a question as to whether the class has Article III standing. The Tuna Suppliers contend that because the class cannot be certified (and there are Article III issues) if Dr. Johnson's analysis is correct, the district court abused its discretion in failing to resolve the dispute regarding whether Dr. Johnson's conclusions about Dr. Mangum's model were correct.

We disagree. First, the Tuna Suppliers and the dissent mischaracterize the import of Dr. Johnson's critique. Dr. Johnson did not make a factual finding that 28 percent of the DPP class or 169 class members were uninjured. Instead, Dr. Johnson's test was aimed at undermining confidence in Dr. Mangum's pooled regression model, because class members with no or limited transactions during the benchmark period could not rely on the model to show that they suffered overcharges. At most, this critique supports the more attenuated argument that Dr. Mangum's model is unreliable, or would be unpersuasive to a jury. But the district court considered and resolved this methodological dispute between the experts in favor of Dr. Mangum by crediting his rebuttal that even class members with limited transactions during the class period can rely on the pooled regression ***681** model as evidence of impact on similarly situated class members. In other words, the district court determined that Dr. Mangum's pooled regression model was *capable* of showing that the DPP class members suffered antitrust impact on a class-wide basis, *notwithstanding* Dr. Johnson's critique. This was all that was necessary at the certification stage. The DPP class did not have to "first establish that it will win the fray" in order to gain certification under Rule 23(b)(3). *Amgen*, 568 U.S. at 460, 133 S.Ct. 1184. Nor is this a case such as *Ellis*, in which the court had to resolve a dispute regarding an issue of historical fact in order to determine whether the challenged discriminatory conduct could affect a class as a whole. *See* 657 F.3d at 983. There is no factual dispute that the Tuna Suppliers engaged in a price-fixing scheme affecting the entire packaged tuna industry nation-wide.

The district court's conclusion that the Tuna Suppliers could present Dr. Johnson's critique at trial did not improperly shift the burden of determining whether the Rule 23(b)(3) prerequisites were met to the jury. [29] *See Amgen*, 568 U.S. at 459–60, 466, 133 S.Ct. 1184. The district court fulfilled its obligation to resolve the disputes raised by the parties in order to satisfy itself that the evidence proves the prerequisites for Rule 23(b)(3), which is that the evidence was capable of showing that the DPPs suffered antitrust impact on a class-wide basis. "Reasonable minds may differ as to whether the [overcharge Dr. Mangum] calculated is

probative" as to all purchasers in the class, but that is a question of persuasiveness for the jury once the evidence is sufficient to satisfy Rule 23. *See Tyson Foods*, 577 U.S. at 459, 136 S.Ct. 1036.

Neither Dr. Mangum's pooled regression model nor Dr. Johnson's critique required individualized inquiries into the class members' injuries. If the jury found that Dr. Mangum's model was reliable, then the DPPs would have succeeded in showing antitrust impact on a class-wide basis, an element of their antitrust claim. On the other hand, if the jury were persuaded by Dr. Johnson's critique, the jury could conclude that the DPPs had failed to prove antitrust impact on a class-wide basis. [30] In neither case would the litigation raise individualized questions regarding which members of the DPP class had suffered an injury. Although such issues would have to be addressed at the damages stage, the dissent's argument that the district court here erred by failing to determine whether questions of individualized damages predominate, Dissent at 690, misses the mark. As noted above, the Tuna Suppliers have not argued that the complexity of damages calculations would defeat predominance here, and as previously explained, there is no per se rule that a district court is precluded from certifying a class if plaintiffs may have to prove ***682** individualized damages at trial. [31]

We need not consider the Tuna Suppliers' argument that the possible presence of a large number of uninjured class members raises an Article III issue, because the Tuna Purchasers have demonstrated that all class members have standing here. [32] A plaintiff is required to establish the elements necessary to prove standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Here, the district court concluded that the DPPs' evidence was capable of establishing antitrust impact on a class-wide basis. Because antitrust impact—i.e., that the Tuna Suppliers' collusion had a common, supra-competitive impact on a class-wide basis—is sufficient to show an injury-in-fact traceable to the defendants and redressable by a favorable ruling, the Tuna Purchasers have adequately demonstrated Article III standing at the class certification stage for all class members, whether or not that was required. *See TransUnion*, 141 S.Ct. at 2208 n.4.

Accordingly, we affirm the district court's certification of the DPP class.

V

We next turn to the Tuna Suppliers' arguments that the district court abused its discretion in determining that the evidence presented by the CFPs and EPPs was capable of proving the element of antitrust impact under California's Cartwright Act, thus satisfying the prerequisites of Rule 23(b)(3).

A

The CFP subclass includes individuals and commercial entities who purchased bulk sized packaged tuna (packages of 40 ounces or more) from six companies (direct purchasers) which had purchased the tuna from the Tuna Suppliers. The CFPs' theory of antitrust impact proceeds in two steps. First, the CFPs claim that the Tuna Suppliers' conspiracy resulted in the direct ***683** purchasers paying an overcharge. Second, the CFPs claim that the overcharge was passed on from the direct purchasers to the CFPs.

The CFPs supported this theory with the expert testimony and report of economist Dr. Michael Williams, who employed a methodology substantially similar to that employed by Dr. Mangum. Dr. Williams first conducted a regression analysis to determine the overcharge the CFPs' suppliers (i.e., the six direct purchasers) incurred because of the Tuna Suppliers' collusion. Like Dr. Mangum's analysis, Dr. Williams's regression analysis controlled for the effect of other variables that affected price in order to isolate the effect of the Tuna Suppliers' collusion. Dr. Williams concluded that COSI overcharged the CFPs' direct purchasers by 16.6 percent, StarKist by 18.2 percent, and Bumble Bee by 15.3 percent.

Next, Dr. Williams performed a separate regression analysis to determine if those overcharges passed through to the CFPs, and determined that the direct purchasers passed through 92 to 113 percent of their overcharge to the CFPs. Dr. Williams then performed two tests to verify that his estimates applied class-wide, both of which confirmed his theory.

To rebut Dr. Williams's analysis, the Tuna Suppliers relied on a critique by economist Dr. Linda Haider. Dr. Haider asserted that Dr. Williams erroneously assumed that all CFPs paid a common overcharge and that the same overcharge was passed through to the individual CFPs. Dr. Haider also contended that some of the CFP class members, such as food preparers and distributors, were not impacted because they could have passed through their overcharges to other purchasers downstream. Finally, Dr. Haider claimed that Dr. Williams's model was unreliable because it failed to account for non-defendant tuna purchased by the CFPs' direct purchasers.

The district court reviewed Dr. Williams's report and testimony as well as Dr. Haider's critiques, and after resolving the parties' disputes, concluded that Dr. Williams's methodology was valid and capable of resolving the antitrust impact issue in a single stroke, even though the Tuna Suppliers could raise the same critiques at trial to persuade the jury.

On appeal, the Tuna Suppliers argue that the district court abused its discretion in concluding that Dr. Williams's methodology satisfied Rule 23(b)(3)'s requirement of common proof of antitrust impact, because Dr. Williams erred in assuming that all direct purchasers were overcharged by the same percentage and that each class member was subject to the same pass-through rate. We disagree. As explained in Section IV, *supra*, a district court does not abuse its discretion in concluding that a regression model such as the one used by Dr. Williams may be *capable* of showing class-wide antitrust impact, provided that the district court considers factors that may undercut the model's reliability (such as unsupported assumptions, erroneous inputs, or nonsensical outputs such as false positives) and resolves disputes raised by the parties. The district court did so in this case, and therefore did not abuse its discretion in concluding that Dr. Williams's methodology was reliable and capable of showing class-wide impact.

We also reject the Tuna Suppliers' argument based on Dr. Haider's contention that some CFP class members may have passed on their overcharges to downstream purchasers. Dr. Haider claimed that the CFPs' ability to prove common impact was problematic because the impact of overcharges on class members who ***684** passed on their overcharges would be different from the impact on members who did not pass on such overcharges. The district court did not abuse its discretion in rejecting this argument on the ground that the Tuna Suppliers had not shown that determining whether or not those class members had passed overcharges down the distribution chain would overwhelm the common issues and require an individualized analysis. Therefore, the district court could reasonably conclude that the common question of antitrust impact predominated over individualized questions concerning a passed-on overcharge.

B

The EPP subclass contains individual consumers who purchased the Tuna Suppliers' products for personal consumption. Thus, like the CFPs, the EPPs are indirect purchasers whose theory of antitrust impact depends on two separate overcharges: first, an overcharge by the Tuna Suppliers to the direct purchasers (i.e., retail stores), and then an overcharge passed on to the EPPs. To carry their burden of showing they could establish class-wide overcharges through common proof, the EPPs offered the testimony of economist Dr. David Sunding, who employed a methodology substantially similar to that employed by Dr. Mangum and Dr. Williams.

Like Drs. Mangum and Williams, Dr. Sunding first conducted a regression analysis to isolate the impact of the collusion on the direct purchasers, which he concluded was an 8.1 percent overcharge from COSI, 4.5 percent from StarKist, and 9.4 percent from Bumble Bee. He then determined that the overcharges passed through to the EPP class members ranged from 65.3 to 135 percent with an estimated pass-through rate of 100 percent for the entire class. Dr. Sunding provided qualitative, quantitative

and anecdotal evidence to support his assumption of a pass through rate for the entire class, including an examination of retail scanner data and the Tuna Suppliers' internal records.

Dr. Haider critiqued Dr. Sunding's methodology and findings on many of the same grounds as she criticized Dr. Williams's model and conclusions. She also made the additional criticisms that Dr. Sunding's methodology produced absurd results because it showed prices that made no economic sense, and that his model ignored, and therefore failed to control for, important factors like loss-leader and focal point pricing. The district court analyzed the evidence and the experts' disputes, and concluded that Dr. Sunding's report and testimony were capable of showing antitrust impact common to the class, for the same reasons explained in the court's analysis of Dr. Mangum's and Dr. Williams's models. The district court determined that Dr. Haider's additional critiques were based either on a misreading of Dr. Sunding's report, or her own miscalculations.

On appeal, the Tuna Suppliers argue only that Dr. Sunding's model and testimony was not capable of proving common impact for all class members because of its use of "averaging assumptions." This argument fails for the reasons explained above. *See supra* Section IV.A. Thus, the district court properly considered and rejected Dr. Haider's arguments, and determined that Dr. Sunding's methodology was capable of proving antitrust impact on a class-wide basis. That is enough to satisfy Rule 23(b)(3).

VI

In a complex market such as the one at issue here, where different purchasers with different bargaining power purchased a range of products at different prices from different suppliers, commentators have raised reasonable questions whether statistical models are capable of resolving the issue of antitrust impact with common ***685** proof. *See, e.g.*, Michelle M. Burtis & Darwin V. Neher, *Correlation and Regression Analysis in Antitrust Class Certification*, 77 Antitrust L.J. 495, 518 (2011). But such statistical models and other evidence have been accepted as probative in a range of litigation contexts, and the Supreme Court has made clear that the permissibility of statistical evidence "turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." *Tyson Foods*, 577 U.S. at 455, 136 S.Ct. 1036. Here the district court did not abuse its discretion in rigorously analyzing such statistical evidence, determining that it was not flawed in a manner that would make it incapable of providing class-wide proof, *see supra* Section III.C, concluding that the evidence was sufficient to sustain a jury verdict on the question of antitrust impact for the entire class, and preserving the defendants' ability to challenge the persuasiveness of such evidence at trial. We therefore affirm the district court's decision to certify the Tuna Purchasers' three subclasses under Rule 23(b)(3). Nevertheless, the Tuna Suppliers will have the opportunity to convince a jury that not all class members were overcharged due to their collusion.

AFFIRMED.

LEE, Circuit Judge, with whom KLEINFELD, Circuit Judge, joins, dissenting:

Over the past two decades, plaintiffs have notched over $103 *billion* in settlements from securities class actions alone. [1] If we include other types of class actions—wage and hour, consumer lawsuits, antitrust disputes, and many others—that settlement amount almost certainly swells up by tens of billions of dollars more. These settlement sums are staggering because class action cases rarely go to trial. If trials these days are rare, class action trials are almost extinct. [2] And it is no wonder why class actions settle so often: If a court certifies a class, the potential liability at trial becomes enormous, maybe even catastrophic, forcing companies to settle even if they have meritorious defenses.

That is why the Supreme Court has urged lower courts to "rigorous[ly]" scrutinize whether plaintiffs have met class certification requirements. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). The majority opinion, however, allows the district court to certify a class, even though potentially about one out of three class members

suffered no injury. But if defendants' econometrician expert is correct that almost a third of the class members may not have suffered injury, plaintiffs have not shown the predominance of common issues under Rule 23(b).

The district court acknowledged the dueling experts' differing opinions on this crucial question but held that it would leave that issue for another day—at trial—because it involves a merits issue that a jury should decide. *See* ***686** *In re Packaged Seafood Prods. Antitrust Litig.*, 332 F.R.D. 308, 325–28 (S.D. Cal. 2019). But as a practical matter, that day will likely never come to pass because class action cases almost always settle once a court certifies a class. A district court thus must serve as a gatekeeper to resolve key issues implicating Rule 23 requirements—including whether too many putative class members suffered no injury—at the class certification stage. *See Med. & Chiropractic Clinic, Inc. v. Oppenheim*, 981 F.3d 983, 992 (11th Cir. 2020) ("Rule 23 makes clear that the district court in which a class action is filed operates as a gatekeeper").

Punting this key question until later amounts to handing victory to plaintiffs because this case will likely settle without the court ever deciding that issue. The refusal to address this key dispute now is akin to the NFL declining to review a critical and close call fumble during the waning minutes of the game unless and until the game reaches overtime (which, of course, will likely never occur if it does not decide the disputed call). Such a practice is neither fair nor true to the rule.

I thus respectfully dissent.

* * * * *

The U.S. Department of Justice's investigation revealed that the three largest domestic producers of packaged tuna colluded to try to inflate the prices of their products. This class action lawsuit soon followed the criminal indictment. Among the plaintiffs include the direct purchasers of the tuna products, ranging from multibillion dollar chain retailers to small mom-and-pop stores. Not surprisingly, some plaintiffs (such as Walmart) wield substantial negotiating leverage: They can demand lower prices or extract additional promotional credits or rebates that defray the offered price. In contrast, an owner of a bodega likely cannot demand even an audience with the tuna producers, let alone ask for lower prices or more promotional credits.

Despite the varying negotiating power among the plaintiffs, their expert, Dr. Russell Mangum III, concluded that the tuna producers overcharged the direct purchasers by an average of 10.28%. He also suggested that about 5.5% of the class may not have suffered an injury because of this price-fixing. In contrast, the defendants' expert, Dr. John Johnson, offered an analysis showing that potentially about 28% of the class members suffered no injury.

Faced with this gaping difference between the two experts' conclusions, the district court acknowledged that Dr. Johnson's "criticisms are serious." *In re Packaged Seafood*, 332 F.R.D. at 328. But it held that this question should be left for trial because Dr. Mangum's method was reliable under *Daubert* and "*capable* of showing" class-wide impact. *Id.* The majority agrees with the district court, ruling that a class can be certified—even if potentially one out of three members suffered no injury—because Plaintiffs' expert offered a method "capable" of measuring class-wide impact and the district court can winnow out those uninjured members later at trial. But the majority opinion conflicts with Rule 23's text, common sense, and precedent from other circuits.

I. The district court did not "rigorously" scrutinize the dueling experts' opinions about uninjured class members.

While around 10,000 class action lawsuits are filed annually[3], class actions are ***687** "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)). Rule 23 thus establishes stringent requirements for certifying a class.

Among the Rule 23 requirements, the plaintiff must show that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. 23(b)(3). The word "common" means "belonging to or

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shared ... by all members of a group," while "predominate" means "to hold advantage in numbers or quantity."[4] Rule 23(b)(3) thus requires that questions of law or fact be shared by all or substantially all members of the class.

The Supreme Court has also reminded us that Rule 23 does not establish a "mere pleading standard." *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541. Rather, plaintiffs must prove by a preponderance of the evidence that they have met the Rule 23 requirements. *See id.*; Maj. Op. at 664–65. Rule 23 imposes a requirement on the trial court, too. A trial court can certify a class only after engaging in a "rigorous analysis" and determining that the plaintiff has satisfied Rule 23. *Wal-Mart*, 564 U.S. at 351, 131 S.Ct. 2541. And in conducting that "rigorous analysis," trial courts "[f]requently" must assess "the merits of the plaintiff's underlying claim" because the issues are often intertwined. *Id.*

Rule 23's "rigorous analysis" is different from "reliable" or "relevant." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982–84 (9th Cir. 2011). A trial court must do more than just consider one side's expert opinion as "reliable" and then kick the can down the road until trial. Rather, it must dig into the weeds and decide the battle of dueling experts if their dispute implicates Rule 23 requirements.

Here, the two experts' contentions centered on Rule 23(b)(3)'s predominance requirement—whether it has been met if the defendants' expert concludes that potentially a significant number of putative class members were uninjured. Plaintiffs' expert argued that only about one out of twenty class members likely did not suffer an injury, while defendants' expert maintained it was potentially more than one out of four. The district court held that the plaintiffs' expert's opinion passed muster under *Daubert* but admitted that the defendants' expert offered "serious" criticism, too. The district court admirably analyzed this difficult issue but ultimately did not resolve it, ruling that a jury should decide it at trial.

Despite the detailed analysis of the district court, I believe it abused its discretion in committing the same error that we cautioned against in *Costco.* There, the two dueling experts offered contrasting opinions on whether Costco's alleged discrimination was regional or nationwide, which touched upon Rule 23(a)'s commonality requirement (*i.e.*, whether all the putative class members nationwide suffered discrimination). The trial court held the plaintiffs' expert was reliable under *Daubert*, and declined to decide which experts' opinion should prevail at the class certification stage. It then certified a class and ruled that this "battle of the experts" issue could be decided at trial because Costco's criticisms of the expert report "attack the weight of the evidence and not its admissibility." *Id.* at 982 (quoting district court opinion).

***688** But because that dispute implicated Rule 23(a)'s commonality requirement, we reversed the district court's certification order and directed it to address it at the class certification stage. As we put it, the trial court "confused" the *Daubert* standard's "reliable" requirement with the "rigorous analysis" standard for Rule 23. *Id.* at 982 ("Instead of judging the persuasiveness of the evidence presented, the district court seemed to end its analysis of the plaintiffs' evidence after determining such evidence was merely admissible."). Rather than "examining the merits [of the dispute between experts] to decide this issue," the trial court "merely concluded that, because both Plaintiffs' and Costco's evidence was admissible, a finding of commonality was appropriate." *Id.* at 984. That was error.

And that is exactly what happened here. The district court found plaintiffs' expert to be reliable under *Daubert*, but it also conceded that the defendants' expert offered a "serious" critique of plaintiffs' expert opinion. The district court ultimately held that resolving this "battle of the experts" was a merits issue. But the dispute over the number of uninjured class members overlaps with Rule 23(b)(3)'s predominance requirement as well as Rule 23(a)'s lower threshold commonality requirement. Simply put, a plaintiff cannot prove that common issues predominate if one out of three putative class members suffered no harm. *Cf. Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 596 (9th Cir. 2012) ("[T]he relevant class must be defined in such a way as to include only members who were [harmed by being] exposed to advertising that is alleged to be materially misleading."). If a large number of class members "in fact suffered no injury," identifying those class members "will predominate." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53–54 (1st Cir. 2018). Thus, the district court had to "examin[e] the merits" of this dispute between the experts, and not "merely conclude[ ] that" both expert reports are reliable and admissible. *Costco*, 657 F.3d at 984.

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The majority holds that Dr. Mangum's estimate of a 10.2% "average" price inflation meets Rule 23's requirements because it shows a method "capable" of showing common antitrust impact. The majority appears to distinguish between (i) cases in which the class members "*logically*" could not have been harmed (because, for example, they were never exposed to the misleading advertisement) or there is insufficient evidence to support commonality, and (ii) cases like this one in which an expert holds that many class members *in reality* may not have suffered any harm, even if they theoretically could have. Maj. Op. 666–67, n.9. In the former scenario, the majority says that a class cannot be certified because logically there cannot be commonality under Rule 23; in the latter case, the majority appears to argue that it is a merits issue because a jury will need to assess the persuasiveness of the expert's opinion.

I believe that creates a false distinction. Nothing in our decision in *Costco* or the Supreme Court's opinion in *Wal-mart* creates such a difference. If the evidence presented implicates Rule 23—as it does here—then the district court must decide whether the plaintiffs have "prove[n] that there are *in fact* ... common questions of law or fact," even if it means assessing the persuasiveness of the expert opinions. *Wal-mart*, 564 U.S. at 350–51, 131 S.Ct. 2541 (emphasis in original). In *Costco*, we chastised the district court for not "judging the persuasiveness of the evidence presented" and "end[ing] its analysis of the plaintiffs' evidence after determining such evidence was merely admissible." 657 F.3d at 982. If we had to refrain from deciding the persuasiveness of an expert opinion ***689** used to show commonality, a plaintiff could prevail on class certification by merely offering a well-written and plausible expert opinion. *See West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (failure to resolve dueling experts "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert").

Admittedly, resolving a battle of dueling experts over highly technical issues may seem like a difficult job for a court. But that tough task is likely even more difficult and daunting for jurors. In the end, a "district judge may not duck hard questions by observing that each side has some support ... Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives." *Id.* After reviewing the evidence, a district court must make findings of fact necessary for determining whether Rule 23's requirements have been met.

And here, the expert opinion offered by Plaintiffs to show commonality (though admissible) is not persuasive. The majority contends that the expert's model is capable of measuring class-wide impact through an "averaging assumption" of 10.2% price inflation from the price-fixing conspiracy. Put another way, the model assumes that almost all class members suffered an injury because the price-fixing would elevate the list price of tuna for everyone, even if individual class members ultimately paid different prices for the tuna. But the expert's assumption flies against common sense and empirical evidence. Powerful retailers (like Walmart) are not passive or ill-informed consumers; they will not sit still when faced with a price increase. They will fiercely negotiate the list price down, or more likely, demand promotional credits or rebates that offset any price increase. *See* R. Pandey, et al., *Factors Influencing Organization Success: A Case Study of Walmart*, International Journal of Tourism & Hospitality in Asia Pasific, Vol. 4, No. 2, June 2021. *See also* Gary Rivlin, *Rigged: Supermarket Shelves for Sale*, Center for Science in the Public Interest, September 2016, available at cspinet.org/Rigged (last visited January 4, 2021).

Major retailers wield significant power over manufacturing and food companies because they represent the major channel to distribute the food products. If a major retail chain refuses to carry a company's product after a pricing dispute, it can significantly affect that company's bottom line. As one case study put it, "Walmart has huge bargaining power since ... it is one of the largest distributors for manufacturing [sic]. For instance, 17% of the total sales of P&G and 38.7% of the total sales of CCA Industries rely on Walmart stores. Without Walmart, these businesses would be unable to operate." Pandey, *supra* page 10, at 120.

Large retailers can also extract rebate or promotional concessions from the companies by threatening to place their products at the bottom of the shelves or less-visited aisles where consumers are less likely to notice them. All told, large retailers use this power to "collect more than $50 billion a year in trade fees and discounts from food and beverage companies." Rivlin, *supra* page 10, at ii. And "[f]ood manufacturers pay these fees ... because they have no choice. The stores are the gatekeepers." *Id.* at 21.

None of this is to say that Wal-Mart and other retailers achieved those price discounts and promotional credits or rebates here. We simply do not know because Plaintiffs' expert did not adequately consider ***690** it.[5] The only way we can find out if Wal-Mart and other major retailers suffered any injury (and if so, how much) would be if we conducted highly individualized analyses of each class member. But that would defeat the commonality requirement under Rule 23.

The majority seemingly waves away this difference in negotiating power between the class members by relying on our oft-quoted language that the "need for individualized findings as to amount of damages does not defeat class certification." Maj. Op. 668–69 (citing *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016)*; Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 988 (9th Cir. 2015)).

I believe our court has misconstrued that often-quoted language to create a sweeping rule that gives a free pass to the intractable problem of highly individualized damages analyses. And such a rule also conflicts with the Supreme Court's holding that a class action must be capable of being resolved in "one stroke." *Wal-mart*, 564 U.S. at 350, 131 S.Ct. 2541; *see also Comcast*, 569 U.S. at 35, 133 S.Ct. 1426 (requiring a "rigorous analysis" to confirm that the damages model is "consistent with its liability case").

We first stated that the "amount of damages is invariably an individual question and does not defeat class action treatment" in *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975). That was a securities fraud class action, and we recognized that "computing individual damages will be virtually a *mechanical task*" because "the amount of price inflation during the period can be charted." *Id.* (emphasis added). Put another way, damages can be easily calculated because it is a plug-and-play exercise: Look at the number of shares bought by each shareholder and the price of the share that day, and compare it to the price inflation caused by the misrepresentation. While each class member may have individualized damages, the damages can be easily calculated for the entire class in "one stroke." *See Wal-mart*, 564 U.S. at 350, 131 S.Ct. 2541.

Since *Barrack*, we have applied that concept mostly in employment and wage-and-hour cases. *See, e.g., Vaquero*, 824 F.3d at 1152 (suing for payment for unpaid hours on non-sales work); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (class action based on wage and hour claims in which defendant's "computerized payroll and time-keeping database would enable the court to accurately calculate damages"). Wage-and-hour cases present another mechanical application scenario: a class administrator can easily look at the employer's payroll records and calculate the number of hours or wages that each employee was underpaid. At times, however, we have quoted that language without determining whether damages could be calculated mechanically or if the court would have to engage in individualized mini-trials for damages. *See, e.g., Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010) (stating that individualized damages do not defeat class certification in case involving misleading statements in annuities promotional materials).

***691** But here, it will not be a "mechanical task" to calculate the damages for each class member. *Blackie*, 524 F.2d at 905. The district court will need to conduct individualized mini-trials to determine whether each class member suffered an injury, and if so, what the damages are for each member. That would upend Rule 23's commonality requirement. The majority opinion notes that commonality may still be met, even if a defendant "might attempt to pick off the occasional class member here or there." Maj. Op. 682, n. 31 (citing *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276, 134 S.Ct. 2398, 189 L.Ed.2d 339 (2014)). But our case does not involve a "pick off" of a few uninjured class members, but rather a massive grab bag of class members—perhaps almost a third of the class—who may not have suffered any harm. The district court thus will have to engage in individualized mini-trials to figure out who suffered an injury.

Finally, the majority suggests that an oversized class with unharmed class members does not pose a practical problem if a method can separate the uninjured from the injured at trial. No harm, no foul, the majority implies. But that cannot be so if a large number of class members (certainly, a third) suffered no injuries. Suppose that 80% of the putative class members suffered no harm. Could a district court still certify a class just because it could later winnow out the 80% who were uninjured? Would Rule 23(b)'s predominance of common issues be met even if only 20% of the putative members belong in the class? By definition, a class with 80% uninjured members cannot present a predominance of common issues because they have nothing in common with the remaining sliver of injured members.

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If we allow a court to certify a class in which a large number of putative class members have suffered no injury, we will allow plaintiffs to weaponize Rule 23 to impose an in terrorem effect on defendants. The "[c]ertification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 485, 133 S.Ct. 1184, 185 L.Ed.2d 308 (2013) (Scalia, J., dissenting). Indeed, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).

So if a court certifies a class with many uninjured class members, it dramatically expands the potential exposure and artificially jacks up the stakes. It matters little that the uninjured class members can be separated at trial because with "the stakes so large ... settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002). The opportunity at trial to jettison uninjured members from the certified class is a phantom solution because defendants will have little choice but to settle before then.

II. The majority's rejection of a *de minimis* rule creates a circuit split.

I believe the majority also errs in rejecting a *de minimis* rule. To be sure, a plaintiff need not show that every single putative class member has suffered an injury. But the number of uninjured class members should be *de minimis*—based on Rule 23's language, common sense, and precedent from other circuits.

***692** First, as noted above, the words "common" and "predominate" in Rule 23(b)(3) suggest that the class should include only (or mostly only) people who have suffered an injury. If one-third—or half or two-thirds—of the class members suffered no injury, it follows that "common" issues would not "predominate," as required under the text of Rule 23, because those uninjured class members have little in common with those who have been harmed. In short, Rule 23 allows a *de minimis* number of uninjured members but no more.

Second, allowing more than a *de minimis* number of uninjured class members tilts the playing field in favor of plaintiffs. By expressly rejecting a *de minimis* rule, the majority's opinion will invite plaintiffs to concoct oversized classes stuffed with uninjured class members—with little fear of having their class certification bids being denied for lack of "predominance" or "commonality." And in creating these grossly oversized classes, plaintiffs will inflate the potential liability (and ratchet up the attorney's fees based in part on that amount) to extract a settlement, even if the merits of their claims are questionable.

Finally, the majority opinion needlessly creates a split with other circuits that have endorsed a *de minimis* rule. The D.C. Circuit, for example, suggested that "5% to 6% constitutes the outer limits of a *de minimis* number." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624–25 (D.C. Cir. 2019) (cleaned up). The district court had found that the class of 16,065 members (12.7% of whom were uninjured) failed to meet the predominance requirement because more than a "*de minimis*" number were uninjured. *Id.* at 623–24. The D.C. Circuit on appeal affirmed, ruling that the plaintiffs' model "even if sufficiently reliable, does not prove classwide injury." *Id.* at 623. Put another way, "even assuming the model can reliably show injury and causation for 87.3 percent of the class, that still leaves the plaintiffs with no common proof of those essential elements of liability for the remaining 12.7 percent." *Id.* at 623–24

Likewise, the First Circuit suggested that "around 10%" of uninjured class members marks the *de minimis* border. *See In re Asacol*, 907 F.3d at 47, 51–58. The First Circuit was perhaps willing to look past "a very small absolute number of class members" who have suffered no injury because they "might be picked off in a manageable, individualized process at or before trial." *Id.* at 53. But if "there are apparently thousands who in fact suffered no injury ... [t]he need to identify those individuals will predominate." *Id.* at 53–54.

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While this case centers on the narrow issue of price-fixing of canned tuna, its implications extend beyond to a wide sea of class action cases. I fear that today's decision will unleash a tidal wave of monstrously oversized classes designed to pressure and extract settlements.

I respectfully dissent.

All Citations

31 F.4th 651, 2022-1 Trade Cases P 82,071, 22 Cal. Daily Op. Serv. 3609, 2022 Daily Journal D.A.R. 3433

Footnotes

1 As a result of Appellant Bumble Bee Foods LLC's bankruptcy proceeding, appellate proceedings against Bumble Bee Foods have been held in abeyance due to the automatic stay imposed by 11 U.S.C. § 362. Dkt. No. 51.

2 Plea Agreement, *United States v. Bumble Bee Foods LLC*, No. 3:17-cr-00249-EMC (N.D. Cal. Aug. 2, 2017), ECF No. 32; Plea Agreement, *United States v. Worsham*, No. 3:16-cr-00535-EMC (N.D. Cal. Mar. 15, 2017), ECF No. 14; Plea Agreement, *United States v. Cameron*, No. 3:16-cr-00501-EMC (N.D. Cal. Jan. 25, 2017), ECF No. 18; Plea Agreement, *United States v. Hodge*, No. 3:17-cr-00297-EMC (N.D. Cal. June 28, 2017), ECF No. 13; Plea Agreement, *United States v. StarKist Co.*, No. 3:18-cr-00513-EMC (N.D. Cal. Nov. 14, 2018), ECF No. 24.

3 Supra-competitive prices are those prices elevated "above competitive levels" by a market participant who "exercise[s] [its] market power" to do so. ABA Section of Antitrust Law, *Econometrics: Legal, Practical, and Technical Issues* 252 (2d ed. 2014) ("*Econometrics*").

4 Rule 23(a) provides:

> Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

5 Rule 23(b)(3) provides in pertinent part:

> A class action may be maintained if Rule 23(a) is satisfied and if ... (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

6 *See In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 191 (3d Cir. 2020); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 27 (1st Cir. 2015); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012); *Alaska Elec.*

Pension Fund v. Flowserve Corp., 572 F.3d 221, 228 (5th Cir. 2009); *Teamsters Loc. 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008).

7 In a class proceeding, defendants may challenge the reliability of an expert's evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and Rule 702 of the Federal Rules of Evidence. *See Tyson Foods*, 577 U.S. at 459, 136 S.Ct. 1036; *see also Comcast*, 569 U.S. at 32 n.4, 133 S.Ct. 1426.

8 The DPPs claim a violation of the Sherman Act, while the CFPs and the EPPs allege violations of California's antitrust law, the Cartwright Act, Cal. Bus. & Prof. Code, § 16700 *et seq.* The elements of a Cartwright Act claim are "(1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts." *Marsh v. Anesthesia Servs. Med. Grp., Inc.*, 200 Cal.App.4th 480, 132 Cal. Rptr. 3d 660, 670–71 (2011) (cleaned up). Because the analysis of a claim under the Cartwright Act "mirrors the analysis under federal [antitrust] law," we do not consider the Cartwright Act claims separately from the federal antitrust claims. *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001).

9 Not all expert evidence is capable of resolving a class-wide issue in one stroke. *Cf.* Dissent at 688–89. Courts have frequently found that expert evidence, while otherwise admissible under *Daubert*, was inadequate to satisfy the prerequisites of Rule 23. For instance, a class did not meet the prerequisites of Rule 23 where the expert evidence was inadequate to prove an element of the claim for the entire class, *see Wal-Mart*, 564 U.S. at 354, 356, 359, 131 S.Ct. 2541 (holding that class members failed to establish existence of common question with respect to Title VII claims because they "provide[d] no convincing proof of a companywide discriminatory pay and promotion policy"); where the damages evidence was not consistent with the plaintiffs' theory of liability, *see Comcast*, 569 U.S. at 35, 133 S.Ct. 1426 (holding that at the class certification stage, "any model supporting a plaintiff's damages case must be consistent with its liability case"); where the evidence contained unsupported assumptions, *see In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 29 (1st Cir. 2008) (criticizing the unsupported assumption that, absent the defendants' anti-competitive conduct, there would have been an influx of cars from Canada to United States sufficient to substantially decrease national prices); or where the evidence demonstrated nonsensical results such as false positives, i.e., injury to class members who could not logically have been injured by a defendant's conduct, *see In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869* (*Rail Freight I*), 725 F.3d 244, 252–55 (D.C. Cir. 2013) (vacating a certification order where the plaintiffs' expert evidence predicted that certain plaintiffs had been injured by a price-fixing conspiracy even though they operated under fixed-price contracts and were not exposed to overcharges caused by the conspiracy).

10 The district court's findings at the certification stage "do not bind the fact-finder on the merits." *In re Hydrogen Peroxide*, 552 F.3d at 318.

11 *Senne v. Kansas City Royals Baseball Corp.* referenced *Tyson Foods*'s rule that a district court may deny the use of admissible expert evidence to meet the requirements of Rule 23(b)(3) only if " 'no reasonable juror' could find it probative of whether an element of liability was met," and then stated in passing that "*Tyson* expressly cautioned that this rule should be read narrowly and not assumed to apply outside of the wage and hour context." 934 F.3d 918, 947 & n.27 (9th Cir. 2019) (citing *Tyson Foods*, 577 U.S. at 459–60, 136 S.Ct. 1036). But *Tyson Foods* contains no such limitation; rather, it declined to adopt "broad and categorical rules governing the use of representative and statistical evidence in class actions," and indicated that district courts should evaluate the sufficiency of plaintiffs' evidence on a case-by-case basis, depending on the purpose for which the expert evidence is being introduced and the underlying cause of action. 577 U.S. at 459–60, 136 S.Ct. 1036. Accordingly, we disapprove this dictum in *Senne*, 934 F.3d at 947 n.27.

12 Because the Supreme Court has clarified that "[e]very class member must have Article III standing in order to recover individual damages," *TransUnion LLC v. Ramirez*, —— U.S. ——, 141 S. Ct. 2190, 2208, 210 L.Ed.2d 568 (2021), Rule 23 also requires a district court to determine whether individualized inquiries into this standing issue would predominate over common questions, *see Cordoba*, 942 F.3d at 1277.

13 The dissent focuses on policy reasons why district courts should refrain from certifying classes that may include more than a de minimis number of uninjured class members. Dissent at 685–86, 690–91, 691–92. But we are bound to apply Rule 23(b)(3) as written, regardless of policy preferences. And contrary to the dissent's assertion, our conclusion that courts must apply Rule 23(b)(3) on a case-by-case basis, rather than rely on a per se rule that a class cannot be certified if it includes more than a de minimis number of uninjured class members, is consistent with the approach taken by our sister circuits. Dissent at 692. Neither of the two cases cited by the dissent, *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869* (*Rail Freight II*), 934 F.3d 619 (D.C. Cir. 2019) and *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018), adopted a per se rule. Rather, based on the particular facts of the cases before them, our sister circuits held that Rule 23(b)(3)'s predominance requirement is not satisfied when the need to identify uninjured class members "will predominate and render an adjudication unmanageable." *In re Asacol Antitrust Litig.*, 907 F.3d at 53–54; *see also Rail Freight II*, 934 F.3d at 625 (holding that a district court did not abuse its discretion in denying class certification where the plaintiffs "proposed no further way—short of full-blown, individual trials" to determine the common question of whether class members were injured).

14 Nevertheless, a court must consider whether the possible presence of uninjured class members means that the class definition is fatally overbroad. When "a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification." *Messner*, 669 F.3d at 824; *see also Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012) (holding that the class definition in a false advertising action was fatally overbroad where many members learned that the advertising was misleading before purchase or had never been exposed to the allegedly misleading advertisements); *In re Asacol*, 907 F.3d at 55–58 (holding that the class did not meet Rule 23(b)(3) requirements because the plaintiffs' evidence showed that thousands of plaintiffs who were loyal to brand-name drugs would not have purchased the generic drugs that were the subject of the price-fixing conspiracy). In such a case, the court may redefine the overbroad class to include only those members who can rely on the same body of common evidence to establish the common issue. *See, e.g., Mazza*, 666 F.3d at 596 (holding that false advertising "class must be defined in such a way as to include only members who were exposed to advertising that is alleged to be materially misleading"). A court may not, however, create a "fail safe" class that is defined to include only those individuals who were injured by the allegedly unlawful conduct. *See Ruiz Torres*, 835 F.3d at 1138 n.7 (internal quotation marks omitted). "Such a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Messner*, 669 F.3d at 825. But, ultimately, the problem of a potentially "over-inclusive" class "can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis." *Id.*

15 Econometrics is "the application of statistical methods to economic data ... to draw inferences about economic relationships from observed data on market outcomes [i.e., price], even when those outcome are the result of complex interactions among numerous economic forces." *Econometrics* at 1.

16 The dissent argues that Dr. Mangum's opinion is not persuasive because large retailers have bargaining power and can extract price discounts, promotional credits, and rebates. Dissent at 689–90. As the dissent concedes, Dissent at 690 & n. 5, Dr. Mangum took these issues into account (to the extent that the Tuna Suppliers provided relevant data). After doing so, Dr. Mangum ran the regression model using both gross and net prices and determined that his regression model continued to produce a statistically significant overcharge. Dr. Mangum therefore reasoned that discounts and promotions did not affect his pooled model or his conclusion of class-wide impact. Although the dissent argues that (in the dissent's view) Dr. Mangum did not consider price discounts, promotional credits, and rebates "adequately," Dissent at 690 & n. 5, the persuasiveness of Dr. Mangum's analysis is not at issue at this phase of the proceeding.

17 Direct purchasers were grouped into categories called customer types, which included Retail, Club, Special Market, Food Service, Mass Merchandise, Discount, and e-Commerce.

18 According to Dr. Mangum, the purpose of this robustness test was to demonstrate that his regression model was sound. Contrary to the dissent's assertion, Dissent at 686, Dr. Mangum did not "suggest" that 5.5 percent of the class were uninjured. Rather, Dr. Mangum concluded that each class member was injured by supra-competitive prices, and used a

different methodology for calculating damages for each member of the class. *See infra* at n.19. The Tuna Suppliers do not develop the argument that the results of this robustness test preclude certification of the class as currently defined. Therefore, we do not address this issue here. *See United States v. Sineneng-Smith*, —— U.S. ——, 140 S. Ct. 1575, 1578, 206 L.Ed.2d 866 (2020); *see also Tyson Foods*, 577 U.S. at 460, 136 S.Ct. 1036 (declining to reach a similar issue).

19 Although the regression model primarily served as evidence of class-wide antitrust impact, Dr. Mangum used the overcharge derived from the regression model to estimate class-wide damages. This estimate was developed by multiplying the overcharge estimate of 10.28 percent by the appropriate sales volume for the defendants, adjusted by several pertinent factors. Dr. Mangum used the same method to estimate damages for each of the class representatives identified in the complaint. The Tuna Suppliers do not challenge Dr. Mangum's damages methodology. Thus, the dissent's contention that the court has created a "sweeping rule that gives a free pass to the intractable problem of highly individualized damages analyses" misses the mark. Dissent at 690.

20 A Chow test is a statistical test designed to "determine whether it is appropriate to pool potential subgroups when estimating the average effect of the alleged conspiracy." *Econometrics* at 358.

21 Dr. Johnson's test attempted to show that Dr. Mangum's model was flawed because 169 direct purchasers could not rely on the model to show antitrust impact due to the fact (as Dr. Mangum subsequently explained) that some purchasers had no or too few transactions during the pre-collusion benchmark period to generate statistically significant results. Contrary to the dissent's claim, Dissent at 686, Dr. Johnson did not show that 28 percent of the class potentially suffered no injury. *See infra* Section IV.B.

22 The Tuna Suppliers do not challenge the district court's gatekeeping function under *Daubert*, to ensure that Dr. Mangum's evidence was not "statistically inadequate or based on implausible assumptions." *Tyson Foods*, 577 U.S. at 459, 136 S.Ct. 1036. And contrary to the dissent's argument, Dissent at 687–88, the district court did not merely determine that Dr. Mangum's evidence was admissible under *Daubert.* Rather, it subjected the evidence to a rigorous examination with full consideration of Dr. Johnson's critique. Therefore, the dissent's assertion that the district court committed the same error as the district court in *Ellis* is misplaced. Dissent at 687–88.

23 *See, e.g., Kleen Prod. LLC v. Int'l Paper Co.*, 831 F.3d 919, 929 (7th Cir. 2016); *In re Urethane*, 768 F.3d at 1263; *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 97, 107 (2d Cir. 2007); *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188–89 (9th Cir. 2002); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 153 (3d Cir. 2002).

24 Although the Tuna Suppliers refer to Dr. Mangum's regression model as "representative evidence," that term is imprecise. As explained in *Tyson Foods*, representative evidence generally refers to a sample that represents the class as a whole. *See* 577 U.S. at 454–55, 136 S.Ct. 1036. Thus, *Tyson Foods* concluded that each individual in a class could rely on exemplars of persons donning and doffing protective equipment to prove the amount of time each spent donning and doffing; this sample was claimed to be representative of all members of the class. *See id.* By contrast, a regression model analyzes available data to determine the degree to which a known variable, such as collusion, affected an unknown variable, such as price, while eliminating the effect of other variables.

25 To the extent the Tuna Suppliers challenged the model's inputs, the district court considered and rejected Dr. Johnson's critique that some of the model's inputs (i.e., the use of a cost index and Dr. Mangum's selection of time periods) rendered the model incapable of demonstrating class-wide impact. *Cf. In re Lamictal*, 957 F.3d at 194 (holding that the district court abused its discretion in certifying class because it failed to scrutinize each expert's data).

26 As a threshold matter, the First Circuit held in *New Motor Vehicles* that the district court lacked federal jurisdiction over the plaintiffs' claims, but went on to provide its thoughts on certification of the class in the event the district court exercised its discretion to exert supplemental jurisdiction over the state damages claims. 522 F.3d at 17.

27 The Tuna Suppliers do not "specifically and distinctly" raise the argument that the district court abused its discretion in resolving challenges to the inputs to the model which were raised below, such as Dr. Mangum's choice of benchmark

period and use of cost indexes, so that argument is deemed forfeited on appeal. *United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005).

28 Because the Tuna Suppliers' primary argument on appeal is that the DPPs failed to prove class-wide antitrust impact, we understand the Tuna Suppliers' reference to injury as referring to antitrust impact, an element of the class antitrust claims, not that the class members would not be able to prove that they suffered monetary damages.

29 The Tuna Suppliers do not "specifically and distinctly" develop the argument that the district court failed to resolve the parties' dispute as to whether the evidence generated false positives. *Kama*, 394 F.3d at 1238. In any event, as explained above, Dr. Mangum rebutted these critiques by reference to the umbrella effect, and by claiming that Dr. Johnson's analysis was itself flawed because Dr. Johnson thought DPP class members had purchased non-defendant tuna, when they actually purchased tuna supplied by defendants. The district court did not abuse its discretion in resolving this issue by crediting Dr. Mangum's rebuttal.

30 Although Dr. Johnson argued that Dr. Mangum's pooled regression model was unreliable and so could not sustain a jury finding of antitrust injury to the entire DPP class, the evidence adduced at trial may nevertheless sustain a jury finding of antitrust injury to all or part of the class.

31 In any event, Dr. Mangum's proposal for calculating damages is a straightforward process of applying the class-wide overcharge to the Tuna Purchasers' net sales records. *See supra* n.19. That proposal does not give rise to a concern about individualized mini-trials to determine each class member's damage award. "That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." *Halliburton*, 573 U.S. at 276, 134 S.Ct. 2398.

32 The Supreme Court expressly held open the question "whether every class member must demonstrate standing before a court certifies a class." *TransUnion*, 141 S.Ct. at 2208 n.4 (emphasis omitted). Outside the class action context, the Supreme Court has held that each plaintiff must demonstrate Article III standing in order to seek additional money damages and, therefore, a litigant must demonstrate Article III standing in order to intervene as a matter of right. *Town of Chester v. Laroe Ests., Inc.*, —— U.S. ——, 137 S.Ct. 1645, 1651, 198 L.Ed.2d 64 (2017). But the Supreme Court has long recognized that in cases seeking injunctive or declaratory relief, only one plaintiff need demonstrate standing to satisfy Article III. *See, e.g., Baggett v. Bullitt*, 377 U.S. 360, 366 n.5, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 52 n.2, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006); *Horne v. Flores*, 557 U.S. 433, 446–47, 129 S.Ct. 2579, 174 L.Ed.2d 406 (2009). We have likewise applied this rule where a class sought injunctive or equitable relief. *See Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc). We therefore overrule the statement in *Mazza* that "no class may be certified that contains members lacking Article III standing," 666 F.3d at 594, which does not apply when a court is certifying a class seeking injunctive or other equitable relief. We do not overrule *Mazza* as to any other holding which remain good law.

1 *See* Securities Class Action Settlements—2019 Review and Analysis, Harvard Law School Forum on Corporate Governance, available at https://corpgov.law.harvard.edu/2020/03/11/securities-class-action-settlements-2019-review-and-analysis/ (last visited Oct. 21, 2021).

2 *See, e.g.*, Securities Class Action Filings, 2020 Year in Review, Cornerstone Research, at 18, available at https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2020-Year-in-Review (last visited Oct. 21, 2021) (noting only 11 securities class action cases tried to verdict in the past quarter century and only one tried since 2014).

3 *Class Actions 2021*, Lexology, Jonathan D. Polkes and David J. Lender, eds., at 91 (2021).

4 "Common" and "predominance," *Merriam-Webster* Dictionary, available at *www.merriam-webster.com/dictionary* (last checked on Oct. 21, 2021).

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5 The majority cites the deposition testimony of Plaintiffs' expert to argue that he considered promotional credits and rebates. Maj. Op. 672, n.16. But the expert added the caveat that he did so only in instances that he "could reliably" calculate the data. He then conceded that he did not include "discount or promotional information" with much of the data but said that "I have done all that I could." He ultimately concluded that he could measure damages by relying on the average 10.2% "overcharge" analysis in his expert report.

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2022 WL 1815825
United States Court of Appeals, Ninth Circuit.

Sylvester OWINO; Jonathan Gomez, on behalf of themselves, and all others similarly situated, Plaintiffs-Appellees,
v.
CORECIVIC, INC., a Maryland corporation, Defendant-Appellant.

No. 21-55221
|
Argued and Submitted February 18, 2022 San Francisco, California
|
Filed June 3, 2022

Synopsis

Background: Individuals who were incarcerated in 24 different private immigration detention facilities owned and operated by for-profit corporation in 11 state filed putative class action against the corporation claiming they were forced to work with little or no pay cleaning and maintaining the detention facilities, in violation of Victims of Trafficking and Violence Protection Act (TVPA), California Trafficking Victims Protection Act (CTVPA), various provisions of the California Labor Code, and other state laws. The United States District Court for the Southern District of California, Janis L. Sammartino, J., 2020 WL 1550218, certified three classes, then denied reconsideration, 2021 WL 120874. For-profit corporation appealed.

Holdings: The Court of Appeals, McKeown, Circuit Judge, held that:

classes alleging TVPA and CTVPA violations met commonality requirement for certification;

class alleging TCPA and CTVPA violations met predominance requirement for certification;

narrowing CTVPA class based on statute of limitations was premature at the class certification stage; and

damages were capable of measurement on classwide basis with respect to claims for violation of California wage and hour law, despite variation in class members' individual damages.

Affirmed.

Procedural Posture(s): On Appeal; Request or Application for Class Certification.

Appeal from the United States District Court for the Southern District of California, Janis L. Sammartino, District Judge, Presiding, D.C. No. 3:17-cv-01112-JLS-NLS

Attorneys and Law Firms

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Before: M. Margaret McKeown and William A. Fletcher, Circuit Judges, and Richard D. Bennett, * District Judge.

OPINION

McKEOWN, Circuit Judge:

***2** This appeal arises from a class action filed by individuals who were incarcerated in private immigration detention facilities owned and operated by a for-profit corporation, CoreCivic, Inc. These individuals—detained solely due to their immigration status and neither charged with, nor convicted of, any crime—allege that the overseers of their private detention facilities forced them to perform labor against their will and without adequate compensation. Our inquiry on appeal concerns only whether the district court properly certified three classes of detainees. Considering the significant deference we owe to the district court when reviewing a class certification, as well as the district court's extensive and reasoned findings, we affirm the certification of all three classes.

BACKGROUND

In 2017, Sylvester Owino ("Owino") and Jonathan Gomez ("Gomez") (collectively "Owino") brought a class action suit against CoreCivic. Both men were previously held in a civil immigration detention facility operated by CoreCivic—Owino from 2005 to 2015, and Gomez from 2012 to 2013. They filed suit "on behalf of all civil immigration detainees who were incarcerated and forced to work by CoreCivic," seeking declaratory and injunctive relief and damages, among other remedies, for "forcing/coercing detainees to clean, maintain, and operate CoreCivic's detention facilities in violation of both federal and state human trafficking and labor laws." Specifically, Owino alleged violations of the Victims of Trafficking and Violence Protection Act of 2000, 18 U.S.C. § 1589 *et seq.* ("TVPA"), California Trafficking Victims Protection Act, Cal. Civ. Code § 52.5 ("CTVPA"), various provisions of the California Labor Code, and other state laws.

Pursuant to 8 U.S.C. § 1231(g), U.S. Immigration and Customs Enforcement ("ICE") contracts with CoreCivic to incarcerate detained immigrants in 24 facilities across 11 states. According to Owino, those incarcerated in these facilities "are detained based solely on their immigration status and have not been charged with a crime." Because of this, ICE states these detainees "shall not be required to work, except to do personal housekeeping." These housekeeping duties are delineated in ICE's Performance-Based National Detention Standards ("Standards"): "1. making their bunk beds daily; 2. stacking loose papers; 3. keeping the floor free of debris and dividers free of clutter; and 4. refraining from hanging/draping clothing, pictures, keepsakes, or other objects from beds, overhead lighting fixtures or other furniture." Performance-Based National Detention Standards 2011, at 406 (revised Dec. 2016), https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf. The Standards also require facilities to provide detainees with the "opportunity to participate in a voluntary work program" ("Work Program") for which they must be compensated at least $1 per day. *Id.* at 406, 407.

Despite these guidelines, Owino contends that, "as a matter of policy," CoreCivic compelled him and detainees across its facilities to work "as a virtually free labor force to complete 'essential' work duties at their facilities," including such "foundational tasks" as kitchen and laundry services. CoreCivic's written policies require "all" detainees to "maintain[ ] the common living area [i.e., not the bunk bed area] in a clean and sanitary manner." The policies further require "[d]etainee/inmate workers" to carry out a "daily cleaning routine," to remove trash, sweep, mop, clean toilets, clean sinks, clean showers, and clean furniture, and to undertake "[a]ny other tasks assigned by staff in order to maintain good sanitary conditions." Yet, according to Owino, CoreCivic generally paid ICE detainees either $1 per day or nothing at all. Owino further contends that CoreCivic paid ICE detainees between $.75 and $1.50 per day for work that it "misclassified" as "volunteer," thus failing to pay wages that approximated the minimum hourly wage required by California law.

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***3** On April 15, 2019, Owino filed a motion for class certification, seeking to certify five classes:

1. California Labor Law Class: All ICE detainees who (i) were detained at a CoreCivic facility located in California between May 31, 2013, and the present, and (ii) worked through CoreCivic's Voluntary Work Program during their period of detention in California.

2. California Forced Labor Class: All ICE detainees who (i) were detained at a CoreCivic facility located in California between January 1, 2006, and the present, (ii) cleaned areas of the facilities above and beyond the personal housekeeping tasks enumerated in the Standards, and (iii) performed such work under threat of discipline irrespective of whether the work was paid or unpaid.

3. National Forced Labor Class: All ICE detainees who (i) were detained at a CoreCivic facility between December 23, 2008, and the present, (ii) cleaned areas of the facilities above and beyond the personal housekeeping tasks enumerated in the Standards, and (iii) performed such work under threat of discipline irrespective of whether the work was paid or unpaid.

4. California Basic Necessities Class: All ICE detainees who (i) were detained at a CoreCivic facility located in California between January 1, 2006, and the present, (ii) worked through CoreCivic's Work Program, and (iii) purchased basic living necessities through CoreCivic's commissary during their period of detention in California.

5. National Basic Necessities Class: All ICE detainees who (i) were detained at a CoreCivic facility between December 23, 2008, and the present, (ii) worked through CoreCivic's Work Program, and (iii) purchased basic living necessities through CoreCivic's commissary during their period of detention.

A year later—following numerous filings, oral argument, and supplemental briefing—the district court certified three of the proposed five classes: (1) the California Labor Law Class, (2) the California Forced Labor Class, and (3) the National Forced Labor Class. In an extensive and thoughtful order, the district court found the following:

1. California Labor Law Class: Owino and Gomez "adequately have established that they were never paid a minimum wage through the [Work Program]," that they "never received wage statements," and that CoreCivic "failed to pay compensation upon termination" and "imposed unlawful terms and conditions of employment." There were sufficient "common, predominating questions" to certify the class.

2. California Forced Labor Class: Owino and Gomez "sufficiently have demonstrated" that CoreCivic facilities in California "implemented common sanitation and disciplinary policies that together may have coerced detainees to clean areas of [CoreCivic's California] facilities beyond the personal housekeeping tasks enumerated in the ICE [Standards]."

3 National Forced Labor Class: Owino and Gomez "sufficiently have demonstrated" the same regarding CoreCivic facilities nationwide.

Due to the vulnerability of the class members and the "risks, small recovery, and relatively high costs of litigation," the district court concluded that "class-wide litigation is superior" because "no viable alternative method of adjudication exists."

ANALYSIS

***4** We review the district court's class certification for "abuse of discretion." *B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957, 965 (9th Cir. 2019). As we set out at length in *Snyder*,

> An error of law is a per se abuse of discretion. Accordingly, we first review a class certification determination for legal error under a de novo standard, and if no legal error occurred, we will proceed

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> to review the decision for abuse of discretion. A district court applying the correct legal standard abuses its discretion only if it (1) relies on an improper factor, (2) omits a substantial factor, or (3) commits a clear error of judgment in weighing the correct mix of factors. Additionally, we review the district court's findings of fact under the clearly erroneous standard, meaning we will reverse them only if they are (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the record.

Id. at 965–66 (quoting *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1002 (9th Cir. 2018)). Notably, in "reviewing a grant of class certification, we accord the district court noticeably more deference than when we review a denial of class certification." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1171 (9th Cir. 2010).

In assessing whether to certify a class, the district court determines whether the requirements of Rule 23 are met. Rule 23 provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable ["numerosity"]; (2) there are questions of law or fact common to the class ["commonality"]; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ["typicality"]; and (4) the representative parties will fairly and adequately protect the interests of the class ["adequacy"].

Fed. R. Civ. P. 23(a). Additionally, a proposed class must satisfy one of the subdivisions of Rule 23(b). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013). Owino seeks to proceed under Rule 23(b)(3), which requires "the court find[ ] that the [common questions] predominate over any questions affecting only individual members ['predominance'], and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy ['superiority']." Fed R. Civ. P. 23(b)(3). The district court made both findings.

CoreCivic brings three challenges to each of the three certified classes. We review each of these challenges in turn.

I. CALIFORNIA FORCED LABOR CLASS

A. Class-wide Policy of Forced Labor

We first consider CoreCivic's assertion that Owino failed to present "[s]ignificant proof" of a class-wide policy of forced labor, thus defeating commonality. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 353, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). To support the California Forced Labor class, Owino provided the declarations of four detainees, all from one facility, but this was *not* the extent or the focus of Owino's "significant proof," nor was it the focus of the district court's decision. Rather, Owino centered his argument, and the district court centered its holding, on the text of CoreCivic's corporate policies. The sanitation policy requires detainees to remove trash, wash windows, sweep and mop, "thoroughly" scrub toilet bowls, sinks, and showers, and undertake sundry other cleaning responsibilities across the facility. On their face, these policies appear to go beyond those minimal tidying responsibilities laid out in the ICE Standards. The discipline policy further makes clear that detainees are subject to a range of punishments, including disciplinary segregation, for refusal to "clean assigned living area" or "obey a staff member/officer's order."

***5** The persuasive weight of the text of these policies is augmented by the statements of ICE detainees themselves, who declared that they were in fact required to clean common areas—without payment and under threat of punishment—in line with the policies. Further, one of CoreCivic's own senior managers testified that CoreCivic facilities do not have the ability to opt out of these company-wide, "standard policies."

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Commonality is necessarily established where there is a class-wide policy to which all class members are subjected. *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014). And while "the mere existence of a facially defective written policy—without any evidence that it was implemented in an unlawful manner—does not constitute '[s]ignificant proof' that a class of employees were [*sic*] subject to an unlawful practice," *Davidson v. O'Reilly Auto Enters., LLC*, 968 F.3d 955, 968 (9th Cir. 2020) (internal citation omitted), Owino relied on the written policies *as well as* the testimony of former ICE detainees and CoreCivic's own manager. Although the company "may wish to distance itself from [its employee's] statements," here the "admissions were material and [are] properly before us." *Abdullah v. U.S. Sec. Assocs.*, 731 F.3d 952, 966 (9th Cir. 2013).

In view of the highly deferential abuse of discretion standard and the full scope of evidence in the record, we reject CoreCivic's claim that Owino failed to provide "significant proof" of the class-wide policy necessary to satisfy the commonality requirement.

B. Predominance of Common Questions

We next consider CoreCivic's claim that Owino failed to establish that common questions predominate over individual ones, thus defeating predominance. The predominance inquiry tests "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453, 136 S.Ct. 1036, 194 L.Ed.2d 124 (2016) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997)). Here, they are.

As the district court noted, the California Forced Labor class members "share a large number of common attributes, including that they are immigrants who are or were involuntarily detained in [CoreCivic's] facilities and subjected to common sanitation and disciplinary policies." The claims of these class members all depend on common questions of law and fact—whether CoreCivic utilized threats of discipline to compel detainees to clean its California facilities in violation of state and federal human trafficking statutes. This is a quintessential "common question" as defined by the Supreme Court: "the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Tyson Foods*, 577 U.S. at 453, 136 S.Ct. 1036 (citation omitted).

In other words, the question is appropriate for class-wide resolution because either CoreCivic's company-wide policies and practices violated the law and the rights of the class members, or they didn't. *See Parsons*, 754 F.3d at 678 (holding that the "policies and practices to which all members of the class are subjected ... are the 'glue' that holds together the putative class ... either each of the policies and practices is unlawful as to every inmate or it is not"); *see also Gonzalez v. U.S. Immigr. & Customs Enf't*, 975 F.3d 788, 808 (9th Cir. 2020).

CoreCivic argues against predominance largely by attempting to reframe the inquiry, asserting that the district court should have asked whether each class member actually has a viable California TVPA claim. However, this is not the applicable test. In *Tyson Foods*, the Supreme Court instructs that

> ***6** [t]he predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.

577 U.S. at 453, 136 S.Ct. 1036 (internal citations and quotation marks omitted); *see also Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods*, 31 F.4th 651, 681–82 (9th Cir. 2022) (en banc).

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C. Statute of Limitations

Finally, we consider CoreCivic's argument that the district court should have narrowed the proposed California Forced Labor class based on the statute of limitations. While Owino seeks to include all ICE detainees held at a CoreCivic facility in California between January 1, 2006, and the present, CoreCivic argues that because the California TVPA has a seven-year statute of limitations, no detainee who was released before May 31, 2010, can bring a claim. *See* Cal. Civ. Code § 52.5(c). The district court ruled that such a finding was premature at the class certification stage: "If discovery indicates that the class period should be limited, the Court will entertain a motion to that effect; however, at this stage in the litigation and on the record before it, the Court is not inclined to narrow the class period."

We agree with the district court that narrowing the class based on statute of limitations is not required at the certification stage. Along with our sister circuits, we have held this in the context of the predominance inquiry. *See, e.g., Williams v. Sinclair*, 529 F.2d 1383, 1388 (9th Cir. 1975) ("The existence of a statute of limitations issue does not compel a finding that individual issues predominate over common ones."); *see also In re Monumental Life Ins. Co.*, 365 F.3d 408, 420–21 (5th Cir. 2004); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000). We now clarify that this principle is applicable to certification more broadly. After all, "[e]ven after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). CoreCivic cites no case law to the contrary. We therefore hold that the district court did not abuse its discretion in declining to narrow the California Forced Labor class.

II. NATIONAL FORCED LABOR CLASS

We can dispense with CoreCivic's first two challenges to the National Forced Labor class easily, as these challenges are virtually identical to those directed at the California Forced Labor class. For the same reasons discussed above, the district court did not abuse its discretion in concluding that Owino presented significant proof of a class-wide policy of forced labor. Likewise, the district court did not abuse its discretion in concluding that common questions predominate over individual ones. CoreCivic's argument that the TVPA necessitates a subjective, individualized inquiry fails due to contrary language in the statute, *see, e.g.*, 18 U.S.C. § 1589(c)(2) (defining "serious harm" as that which would compel a "reasonable person" to perform or continue performing labor to avoid incurring such harm), as well as the broader predominance test prescribed by precedent. *Tyson Foods*, 577 U.S. at 453, 136 S.Ct. 1036.

***7** However, CoreCivic's appeal with respect to personal jurisdiction is not resolved by what we wrote, above, with respect to the National Forced Labor class. *See Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, —— U.S. ——, 137 S. Ct. 1773, 198 L.Ed.2d 395 (2017). The district court ruled that CoreCivic had waived its personal jurisdiction challenge with respect to the claim of the non-California-facility class members, because it did not raise such a defense in its first responsive pleadings (which CoreCivic filed *after* the Supreme Court decided *Bristol-Myers Squibb*). After the district court's ruling and after CoreCivic filed its opening brief in this appeal, the Ninth Circuit squarely addressed this issue: prior to class certification, a defendant does "not have 'available' a Rule 12(b)(2) personal jurisdiction defense to the claims of unnamed putative class members who were not yet parties to the case." *Moser v. Benefytt, Inc.*, 8 F.4th 872, 877 (9th Cir. 2021).

Although Owino maintains that *Moser* was wrongly decided, we have no authority to ignore circuit precedent. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Owino's challenge to the merit of CoreCivic's personal jurisdiction defense is an issue for the district court to resolve. *See Moser*, 8 F.4th at 879.

We decline to vacate the certification of the National Forced Labor class, but we hold that CoreCivic retains its personal jurisdiction defense and remand the personal jurisdiction question to the district court for consideration at the appropriate time.

III. CALIFORNIA LABOR LAW CLASS

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A. Damages Capable of Class-wide Measurement

We first consider CoreCivic's arguments that the members of the California Labor Law class have not presented "a fully formed damages model" and thus cannot be certified. Owino claims that CoreCivic misclassified the detainees participating in the Work Program as "volunteers" rather than "employees" and thus failed to pay them the minimum wage required in California for "employees," in violation of California wage and hour law. The district court certified the class, holding that Owino had met the "evidentiary" burden of "present[ing] proof that damages are capable of being measured on a class-wide basis."

We agree with the district court that Owino did not need to present a fully formed damages model "when discovery was not yet complete and pertinent records may have been still within Defendant's control." Rather, "plaintiffs must show that 'damages are capable of measurement on a classwide basis,' in the sense that the whole class suffered damages traceable to the same injurious course of conduct underlying the plaintiffs' legal theory." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017) (quoting *Comcast*, 569 U.S. at 34, 133 S.Ct. 1426). In other words, "plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1154 (9th Cir. 2016) (citation omitted).

There is a clear line of causation between the alleged misclassification of detainee employees as "volunteers" and the deprivation of earnings they may have suffered as a consequence of the violation of California wage and hour laws. *See id.* at 1155 (holding that, "[i]n a wage and hour case ... the employer-defendant's actions *necessarily* caused the class members' injury"). According to evidence from a CoreCivic manager, spreadsheets of wages paid, and CoreCivic's corporate policy itself, ICE detainees participated in the Work Program across CoreCivic's facilities, for which they were almost never paid more than $1.50 per day. If CoreCivic did indeed misclassify these participants as "volunteers" (e.g., because the detainees should have been considered "employees"), CoreCivic would necessarily have failed to pay the minimum hourly wage required by California law. Thus, any damages that the class members are owed necessarily "stemmed from [CoreCivic's] actions." *Id.*

***8** Owino presented sufficient evidence to show that damages are *capable* of measurement on a class-wide basis. This evidence includes documentation of "typical" shift lengths, the days worked by ICE detainees, the wages paid, and the job assignments. Additional testimony and CoreCivic records can establish details about which detainees participated in the Work Program, *see Ridgeway v. Walmart Inc.*, 946 F.3d 1066, 1087 (9th Cir. 2020), and as the Supreme Court emphasized in *Tyson Foods*, sufficiently reliable representative or statistical evidence can be used to establish the hours that a class of employees had worked. 577 U.S. at 459, 136 S.Ct. 1036.

B. Narrowing the Class

In seeking certification of the California Labor Law class, Owino alleged that detainees' participation in the Program violated a variety of state labor law provisions, as well as California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.* CoreCivic notes, correctly: "Other than the California UCL claim [which has a four-year statute of limitations, *id.* § 17208], all other state law claims have a one-, two-, or three-year statute of limitations." CoreCivic thus argues that Owino is barred from representing this class at all, because his last day in the Work Program was May 22, 2013, which is more than four years before he filed the May 31, 2017, complaint. (Owino disputes this date, claiming he worked until his release on March 9, 2015.) CoreCivic further argues that Gomez is time-barred from pursuing non-UCL claims, because his last day in the Work Program was September 7, 2013.

The district court held that, for the purposes of the certification motion, even if the plaintiffs' claims under the California Labor Code are time-barred, they could still recover for the majority of the alleged violations under the UCL because the UCL prohibits unfair competition, defined as "any unlawful, unfair or fraudulent business act or practice," Cal. Bus. & Prof. Code § 17200, and naturally this includes such violations of California's wage and hour law. Under this characterization, the class period for all claims seeking remedies under the UCL begins May 31, 2013; the period for waiting-time and failure-to-pay claims begins May 31, 2014; and the period for claims as to the alleged failure to provide wage statements begins May 31, 2016 (for remedies pursuant to Cal. Code Civ. Proc. § 340), or May 31, 2014 (for remedies pursuant to Cal. Code Civ. Proc. § 338).

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As to the named plaintiffs, the district court ruled that neither Owino nor Gomez is typical of the members of the California Labor Law class seeking penalties under California Labor Code § 226 (which requires employers to provide wage statements to employees), and that Gomez is not typical of members of the California Labor Law Class seeking waiting-time penalties under California Labor Code § 203. Nonetheless, the court found that Owino is part of the California Labor Law class for the wage claims, for failure to pay compensation upon termination, and for waiting time penalties and actual damages for the failure to provide wage statements, while Gomez is part of the California Labor Law class for the wage claims. Due to CoreCivic's "belated assertion of ... factual disputes concerning whether Mr. Owino worked during the Class Period for the California Labor Law Class," the district court stated it was "disinclined to resolve this issue at the class certification stage ... particularly given that Mr. Gomez remains a viable class representative for the majority of the claims of the California Labor Law Class."

***9** Because plaintiffs can recover for almost all of the alleged violations under the UCL, the district court properly rejected CoreCivic's argument against certification as predicated on "a distinction without a difference." The district court appropriately exercised its discretion by declining to resolve a factual matter that CoreCivic raised for the first time in its post-hearing supplemental brief, and which the district court concluded was not dispositive of certification.

We agree with the district court that Owino and Gomez are typical of the class they are seeking to represent and their allegations, if true, fit within the statutes they invoke. Although they may run into statute of limitations issues—some disputed and unproven—narrowing the class based on statute of limitations is not required at the certification stage. *Cf. Int'l Woodworkers of Am. v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1270 (4th Cir. 1981) ("Courts passing upon motions for class certification have generally refused to consider the impact of such affirmative defenses as the statute of limitations on the potential representative's case.").

C. Failure-to-pay and Waiting-time Claim

Finally, CoreCivic argues that because Owino and Gomez "did not reference their failure-to-pay/waiting-time claim ([Cal. Labor Code] §§ 201–203)" in their motion for class certification, the district court should not have certified that claim as one common to the California Labor Law class. Because the claims are affirmatively interwoven in Owino's pleadings, the district court did not abuse its discretion in certifying this claim.

To begin, the complaint included California Labor Code §§ 201–03 among the causes of action for the California Labor Law class:

> Plaintiffs and Class Members incorporate the above allegations by reference.
>
> California Labor Code §§ 201 and 202 require CoreCivic to pay all compensation due and owing to Plaintiffs and Class Members immediately upon discharge or within seventy-two hours of their termination of employment. Cal. Labor Code § 203 provides that if an employer willfully fails to pay compensation promptly upon discharge or resignation, as required by §§ 201 and 202, then the employer is liable for such "waiting time" penalties in the form of continued compensation up to thirty workdays.
>
> CoreCivic willfully failed to pay Plaintiffs and Class Members who are no longer employed by CoreCivic compensation due upon termination as required by Cal. Labor Code §§ 201 and 202. As a result, CoreCivic is liable to Plaintiffs and former employee Class Members waiting time penalties provided under Cal. Labor Code § 203, plus reasonable attorneys' fees and costs of suit.

Owino asserted that CoreCivic violated a dozen provisions of the California Labor Code with respect to the members of the California Labor Law class. The motion for class certification then stated, "Plaintiffs' claims on behalf of the CA Labor Law Class for violations of the California Labor Code ... all turn on a common legal question: whether ICE detainees that worked through the [Work Program] at CoreCivic's facilities in California are employees of CoreCivic under California law ...." Owino then discussed this question in depth.

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CoreCivic has cited no precedent to suggest that Owino must specifically list the citation of each of the dozen provisions of the California Labor Code in the motion for class certification. Such an approach would exalt form over substance and ignore the fair notice Owino provided to CoreCivic throughout the certification proceeding. Rather, because Owino outlined these provisions substantively in the complaint, stated that "all" of the alleged violations of the Labor Code turn on a common question, and discussed the common question at length, Owino sufficiently referenced this matter before the district court.

Conclusion

***10** We affirm the district court's certification of all three classes. We hold that CoreCivic retains its personal jurisdiction defense and remand the personal jurisdiction question to the district court for consideration at the appropriate juncture.

AFFIRMED.

All Citations

--- F.4th ----, 2022 WL 1815825, 22 Cal. Daily Op. Serv. 5592

Footnotes

* The Honorable Richard D. Bennett, United States District Judge for the District of Maryland, sitting by designation.

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2022 WL 2433971
Only the Westlaw citation is currently available.
United States Court of Appeals, Ninth Circuit.

Fred BOWERMAN; Julia Bowerman, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees,
v.
FIELD ASSET SERVICES, INC.; Field Asset Services, LLC, n/k/a Xome Field Services, LLC, Defendants-Appellants.

Nos. 18-16303, 18-17275
|
Argued and Submitted July 20, 2021
|
Submission Vacated September 23, 2021
|
Resubmitted June 23, 2022 San Francisco, California
|
Filed July 5, 2022

Synopsis

Background: Sole proprietor of vendor brought putative class action against property repair services company for foreclosed and real-estate-owned properties, asserting claims for breach of contract, breach of covenant of good faith and fair dealings, and violation of state laws, based on allegations that company willfully misclassified plaintiffs as independent contractors rather than employees, resulting in failure to pay overtime compensation and to indemnify them for their business expenses. The United States District Court for the Northern District of California, William H. Orrick, J., 2015 WL 1321883, certified class action, 242 F.Supp.3d 910, granted partial summary judgment to class members as to liability, and, 2018 WL 5982436, issued an interim attorney fee award of more than five million dollars. Defendant appealed.

Holdings: The Court of Appeals, Bennett, Circuit Judge, held that:

[1] predominance requirement was not met for certification of class;

[2] California's common law test of an employment relationship applied when determining expense reimbursement claim;

[3] California's ABC test for employment relationship applied to overtime claims;

[4] whether plaintiffs were employees or independent contractors under California law was material fact issue precluding summary judgment on expense reimbursement claims;

[5] whether plaintiffs were free from control of defendant and were engaged in an independently established trade, occupation, or business were material fact issues precluding summary judgment on overtime compensation claims;

[6] sole proprietor performed work well within usual course of defendant's business, as would support finding that sole proprietor was an employee;

[7] whether business-to-business exception to California's ABC test applied was material fact issue; and

[8] as a matter of first impression, case presented extraordinary circumstances justifying Court of Appeals' exercise of pendent appellate jurisdiction over nonfinal, interim attorney fee award.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Certify Class; Motion for Summary Judgment; Motion for Attorney's Fees.

West Headnotes (30)

[1] **Labor and Employment** Nature, Creation, and Existence of Employment Relation

Labor and Employment Independent Contractors and Their Employees

Under California law, the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired; but even though the right to control work details is the most important or most significant consideration,

several secondary indicia of the nature of a service relationship also bear on the employee and independent contractor distinction.

[2] **Labor and Employment** Payment of wages in general

For purposes of the obligations imposed by California's wage orders, all workers are presumed to be employees, and workers are permitted to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity's business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

[3] **Federal Courts** Class actions

Court of Appeals reviews the class certification for an abuse of discretion.

[4] **Federal Courts** Summary judgment

Court of Appeals reviews the grant of summary judgment de novo.

[5] **Federal Courts** Costs and attorney fees

Court of Appeals reviews the award of attorney fees for an abuse of discretion.

[6] **Federal Civil Procedure** Employees

Class members failed to show that liability for alleged misclassification as independent contractors was subject to common proof or that damages could have been determined without excessive difficulty, and thus predominance requirement was not met for certification of class action against property repair services company, alleging willful misclassification resulting in failure to pay overtime compensation and to indemnify business expenses; uniform evidence that company would not pay overtime wages or reimburse business expenses if any were owed did not amount to evidence that company had a uniform policy that required class members to work overtime or incur reimbursable expenses, and liability would have implicated highly individualized inquiries on whether particular class member ever worked overtime or ever incurred any necessary business expense. Cal. Lab. Code § 2802(a); Fed. R. Civ. P. 23(b)(3).

[7] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

The presence of individualized damages cannot, by itself, defeat class certification. Fed. R. Civ. P. 23(b)(3).

[8] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

Individual differences in calculating the amount of damages will not defeat class certification where common issues otherwise predominate, but if the plaintiffs cannot prove that damages resulted from the defendant's conduct, then the plaintiffs cannot establish predominance. Fed. R. Civ. P. 23(b)(3).

[9] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

Predominance requirement permits the certification of a class that potentially includes more than a de minimis number of uninjured class members because it requires only that the district court determine after rigorous analysis whether the common question predominates over any individual questions,

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including individualized questions about injury or entitlement to damages. Fed. R. Civ. P. 23(b)(3).

[10] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

A district court is not precluded from certifying a class even if plaintiffs may have to prove individualized damages at trial, a conclusion implicitly based on the determination that such individualized issues do not predominate over common ones. Fed. R. Civ. P. 23(b)(3).

[11] **Federal Courts** Inferior courts

In the absence of controlling authority by the California Supreme Court, federal courts follow decisions of the California Court of Appeal unless there is convincing evidence that the California Supreme Court would hold otherwise.

[12] **Labor and Employment** Payment of wages in general

Class members' expense reimbursement claims were not based on, or rooted in, a California wage order relating to tools and equipment, but rather were based on California Labor Code, and thus common law test of an employment relationship, rather than test that applies for purposes of the obligations imposed by California's wage orders, applied when determining members' expense reimbursement claims relating to insurance, cellphone charges, dump fees, and mileage/fuel, even though class members belatedly invoked wage order in class certification briefing. Cal. Lab. Code § 2802.

[13] **Labor and Employment** Payment of wages in general

Labor and Employment Presumptions and burden of proof

Sole proprietor's overtime compensation claims, which were based on California's wage orders, were not joint employment claims, but rather were employee misclassification claims to which California's ABC test for employment relationship applied, which presumes the worker to be an employee and requires the secondary employer to disprove the worker's status as an employee; test's policy concerns applied to sole proprietors who had no other putative employer to pay their taxes or afford them legal protections under California wage orders.

[14] **Labor and Employment** Who is employer; multiple entities

Because the reasons for selecting the ABC test for determining employment relationships related to California wage orders, which presumes the worker to be an employee and requires the secondary employer to disprove the worker's status as an employee, are uniquely relevant to the issue of allegedly misclassified independent contractors, the ABC test does not extend to the joint employment context, where those concerns are no longer present.

[15] **Labor and Employment** Who is employer; multiple entities

In the joint employment context, the alleged employee is considered an employee of the primary employer, who is presumably paying taxes.

[16] **Labor and Employment** Who is employer; multiple entities

The policy purpose for presuming the worker to be an employee and requiring the secondary employer to disprove the worker's status as an employee under the ABC test for determining employment relationships related to California wages order is unnecessary in joint employment cases, in that taxes are being paid and the worker has employment protections.

[17] **Labor and Employment** Questions of law and fact as to employment status

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Under California law, existence of employment relationship is a question for trier of fact.

[18] **Labor and Employment** Questions of law and fact as to employment status

Under California law, existence of employment relationship can be decided by court as matter of law if evidence supports only one reasonable conclusion.

[19] **Labor and Employment** Nature, Creation, and Existence of Employment Relation

Control over how a result is achieved lies at the heart of the California common law test for employment.

[20] **Labor and Employment** Independent Contractors and Their Employees

California law is clear that if control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established.

[21] **Labor and Employment** Nature, Creation, and Existence of Employment Relation

In determining an employment relationship under California law, whether a hiring entity's control is results-oriented or means-oriented depends on how the factfinder, or the court on summary judgment, defines results. Fed. R. Civ. P. 56.

[22] **Federal Civil Procedure** Fair Labor Standards Act cases; wages and hours regulations

Genuine issue of material fact existed as to whether vendors who worked for property repair services company for foreclosed and real-estate-owned properties were employees or independent contractors under California law precluding summary judgment in favor of vendors on claims seeking expense reimbursement under California's common law test for employment relationship determinations.

[23] **Labor and Employment** Independent Contractors and Their Employees

Under California law relating to determination of the employment relationship, the right to control results is a broad one, encompassing the right to inspect, the right to make suggestions or recommendations as to details of the work, and the right to prescribe alterations or deviations in the work, none of which changes the relationship from that of owner and independent contractor.

[24] **Federal Civil Procedure** Fair Labor Standards Act cases; wages and hours regulations

Genuine issues of material fact existed as to whether vendors were free from control of property repair services company for foreclosed and real-estate-owned properties, and whether vendors were engaged in an independently established trade, occupation, or business, precluding summary judgment in favor of vendors on overtime compensation claims under California law pursuant to ABC test for determining employment relationship related to California wage orders, which presumes the worker to be an employee and requires the secondary employer to disprove the worker's status as an employee.

[25] **Labor and Employment** Payment of wages in general

Sole proprietor, who was pursuing overtime compensation claims against property repair services company for foreclosed and real-estate-owned properties, performed work well within usual course of contractor's business, as would support finding that sole proprietor was an employee under California's ABC test for determining employment relationship related to California wage orders, which presumes the worker to be an employee and requires the

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secondary employer to disprove the worker's status as an employee.

[26] **Federal Civil Procedure** Fair Labor Standards Act cases; wages and hours regulations

Genuine issue of material fact existed as to whether business-to-business exception to California's ABC test for determining employment relationship related to California wage orders, which presumes workers to be employees and requires secondary employer to disprove worker's status as an employee, applied to vendors and property repair services company for foreclosed and real-estate-owned properties, precluding summary judgment in favor of vendors on overtime compensation claims against company. Cal. Lab. Code § 2776.

[27] **Federal Courts** Costs and attorney fees

District court's interim attorney fee award was a nonfinal decision for purposes of Court of Appeals jurisdiction of appeal relating to overtime compensation and expense reimbursement class action claims; award did not dispose of underlying litigation and did not even dispose of issue of attorney fees, given that the district court reserved its decision on whether to apply a multiplier. 28 U.S.C.A. § 1291.

[28] **Federal Courts** On separate appeal from interlocutory judgment or order

Class action presented extraordinary circumstances justifying Court of Appeals' exercise of pendent appellate jurisdiction over nonfinal, interim attorney fee award relating to putative class action claims concerning overtime compensation and expense reimbursement; primary argument for vacating interim fee award was that district court erred by certifying class and granting summary judgment to plaintiffs which were identical with appeal of class certification and summary judgment orders. Fed. R. Civ. P. 56.

[29] **Federal Courts** Interlocutory, Collateral, and Supplementary Proceedings and Questions; Pendent Appellate Jurisdiction

Court of Appeals has the power to exercise pendent jurisdiction over claims raised in conjunction with other issues properly before the Court if the rulings are inextricably intertwined or if review of the pendent issue is necessary to ensure meaningful review of the independently reviewable issue.

[30] **Federal Courts** On appeal from final judgment

Court of Appeals can exercise pendent appellate jurisdiction over interim attorney fee orders that are inextricably intertwined with or necessary to ensure meaningful review of final orders on appeal.

Appeal from the United States District Court for the Northern District of California, William Horsley Orrick, District Judge, Presiding, D.C. No. 3:13-cv-00057-WHO

Attorneys and Law Firms

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Monique Olivier (argued), Olivier Schreiber & Chao LLP, San Francisco, California; Thomas E. Duckworth, Duckworth Peters LLP, San Francisco, California; James E. Miller, Shepherd Finkelman Miller & Shah LLP, Chester, Connecticut; for Plaintiffs-Appellees.

Before: William A. Fletcher, Mark J. Bennett, and Bridget S. Bade, Circuit Judges.

OPINION

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BENNETT, Circuit Judge:

Defendant-Appellant Field Asset Services, Inc. ("FAS")[1] appeals the certification of a class of 156 individuals who personally performed work for FAS, the Plaintiffs-Appellees. It also appeals the final judgment for eleven class members under Federal Rule of Civil Procedure 54(b), after the district court granted partial summary judgment to all the class members as to liability. Finally, FAS appeals the accompanying interim award of more than five million dollars in attorneys' fees. We have jurisdiction pursuant to 28 U.S.C. § 1291 and reverse and remand on all three issues.

I. FACTS AND PROCEDURAL HISTORY

A. FAS's Business Model

FAS is in the business of pre-foreclosure property preservation for the residential mortgage industry. But FAS, itself, does not perform pre-foreclosure property-preservation services for its clients. Rather, it contracts with vendors who perform those services. Some vendors are sole proprietorships; others are corporations. Vendors have varying numbers of employees, from at most a few to up to sixty-five. Some work almost exclusively for FAS; others perform work for multiple companies, including FAS's clients and competitors.

FAS exercises some control over the vendors' completion of their work. It requires that jobs be completed within seventy-two hours; provides detailed instructions for particular tasks; and imposes insurance, photo documentation, pricing, and invoicing requirements through its Vendor Qualification Packets ("VQPs") and work orders. It offers training, although the parties dispute whether the training is mandatory. And FAS monitors the vendors' job performance through vendor scorecards and Approved Vendor Quality Policies ("AVQPs"), which implement a discipline scale for vendor noncompliance with FAS's or FAS's clients' instructions. FAS classifies all its vendors as independent contractors.

B. The Initiation of the Lawsuit and Class Certification

***4** Named Plaintiffs Fred and Julia Bowerman[2] sued in 2013, seeking damages and injunctive relief. Fred Bowerman was the sole proprietor of BB Home Services, which contracted with FAS as a vendor. The operative complaint alleged that FAS willfully misclassified Bowerman and members of the putative class as independent contractors rather than employees, resulting in FAS's failure to pay overtime compensation and to indemnify them for their business expenses.

The complaint also sought class certification under Federal Rule of Civil Procedure 23(b)(3), which the district court granted for a class defined as:

> All persons who at any time from January 7, 2009 up to and through the time of judgment (the "Class Period") (1) were designated by FAS as independent contractors; (2) personally performed property preservation work in California pursuant to FAS work orders; and (3) while working for FAS during the Class Period, did not work for any other entity more than 30 percent of the time. The class excludes persons who primarily performed rehabilitation or remodel work for FAS.

The parties later agreed to fix the class period as beginning on January 7, 2009, and ending on December 20, 2016. FAS argued that the proposed class failed Rule 23(b)(3)'s predominance requirement because of the need for individualized damages hearings if liability were found. The district court rejected this argument, quoting our decision in *Leyva v. Medline Industries Inc.*, 716 F.3d 510 (9th Cir. 2013), for the proposition that "[t]he presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." *Id.* at 514.

C. Summary Judgment

[1] In March 2017, the district court granted partial summary judgment in favor of the class members, finding that they had been misclassified as independent contractors and that as a result, FAS was liable to them for failing to pay overtime

and business expenses. In making that determination, the district court relied on California's common law test for distinguishing between employees and independent contractors, as outlined in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399 (1989). Under *Borello*, "the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." *Id.* at 548, 769 P.2d at 404 (citation and alteration omitted). But even though "the right to control work details is the 'most important' or 'most significant' consideration, ... several 'secondary' indicia of the nature of a service relationship" also bear on the employee and independent contractor distinction. *Id.* For example, *Borello* noted that "strong evidence in support of an employment relationship is the right to discharge at will, without cause." *Id.* (citation and alteration omitted). It also listed the following as secondary indicia of an employment versus independent contractor relationship:

(a) whether the one performing services is engaged in a distinct occupation or business;

(b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;

(c) the skill required in the particular occupation;

(d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;

***5** (e) the length of time for which the services are to be performed;

(f) the method of payment, whether by the time or by the job;

(g) whether or not the work is a part of the regular business of the principal; and

(h) whether or not the parties believe they are creating the relationship of employer-employee.

Id. *Borello* explained that "[g]enerally, the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." *Id.* (citation and alteration omitted).

Applying this test, the district court granted partial summary judgment on the misclassification issue because it was "convinced that the overwhelming evidence on the most important factor of the [*Borello*] test"—that is, control—"tip[ped] the scales clearly in favor of finding an employee relationship." In particular, the district court found that "[n]o reasonable juror could review the Vendor Packets, the work orders, the trainings, the Vendor Profiles, the discipline, and the Vendor scorecards, and conclude [that] any of the Vendors are independent contractors."

Despite its conviction that the control factor supported the class, the district court's analysis of *Borello*'s secondary factors was materially different. The district court stated that if it "ignored the right to control analysis, and focused solely on the secondary factors, [it] would not grant summary judgment." In fact, the district court found that many of the secondary factors indicated independent contractor status, including the parties' intent to create an independent contractor relationship, the class members' opportunity for profit or loss, and the class members' employment of assistants. Several of the other secondary factors implicated genuine disputes of material fact. [3]

But the district court found that FAS's "right to control swamp[ed] [the secondary] factors in importance, and [some] secondary factors favor[ed] plaintiffs' argument that [they] are employees." Thus, the district court granted partial summary judgment to the class on the misclassification issue. The district court also granted partial summary judgment to the class on their overtime and expense reimbursement claims, which were derivative of the misclassification claim. In doing so, the district court relegated the issues of "whether a particular [class member] worked overtime on a specific day" (or ever), and "whether a specific expense" (or any) "was reasonable and necessary" to the damages phase of the trial, rather than the liability phase.

D. The Bellwether Jury Trial

In July 2017, the district court held a bellwether jury trial to determine damages for Named Plaintiff Fred Bowerman and ten of the 156 class members. [4] The trial lasted eight days,

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as the class members' damages were neither evident from any records detailing their overtime hours and reimbursable expenses, nor calculable by any common method. After the bellwether trial, FAS filed a second motion for class decertification, which the district court construed as a motion for leave to file a motion for reconsideration. Although the district court denied the motion, it acknowledged the difficulty of calculating every class member's damages on an individualized basis with no method for doing so other than the class members' individualized testimony, noting that "[t]he damages phase of this class action [will be] far messier than promised by plaintiffs' counsel when" the case was certified. [5]

E. Appeal and Stay of Proceedings After the California Supreme Court's Decision in *Dynamex*

***6** **[2]** Between the district court's summary judgment decision and FAS's first notice of appeal in July 2018, the California Supreme Court decided *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903, 232 Cal.Rptr.3d 1, 416 P.3d 1 (2018), which established a different test for distinguishing between employees and independent contractors in certain contexts, commonly known as "the ABC test." *Id.*, 232 Cal.Rptr.3d 1, 416 P.3d at 34. Unlike the *Borello* test, "[t]he ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies *each* of three conditions":

> (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and*
>
> (b) that the worker performs work that is outside the usual course of the hiring entity's business; *and*
>
> (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Id. We certified the issue of *Dynamex*'s retroactivity to the California Supreme Court in *Vazquez v. Jan-Pro Franchising International, Inc.*, 939 F.3d 1045 (9th Cir. 2019), and held FAS's appeal in abeyance. The California Supreme Court held that *Dynamex* does apply retroactively, *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 10 Cal.5th 944, 273 Cal.Rptr.3d 741, 478 P.3d 1207, 1208 (2021), and we affirmed that applying *Dynamex* retroactively comports with due process, *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 986 F.3d 1106, 1117–18 (9th Cir. 2021).

F. The Interim Award of Attorneys' Fees

In July 2018, class counsel moved in the district court for an award of attorneys' fees and related expenses, with no notice to the class members. In September 2018, the district court issued an interim order stating that the record was "not sufficient to tell whether all of the time plaintiffs [sought] to have compensated for 32 time-billers was reasonably incurred." Accordingly, the district court ordered an in-camera inspection of class counsel's contemporaneous time records. Although FAS sought access to those records, the district court never allowed that access.

In November 2018, the district court issued an interim fee award of $5,173,539.50. It did not "summarize the facts or posture of the case, except to say that it include[d] novel issues that the Ninth Circuit [would] address and that it was aggressively defended."

The district court thus began by awarding the lead counsel $3,381,540, which it justified with the following brief explanation:

> The hourly rates they seek ... are well within the reasonable range. The amount of time they billed in each of the categories is also reasonable, as lead counsel in small firms must not only coordinate all of the work in the case to ensure it is geared to effective advocacy at trial but must also bear the laboring oar on many aspects of the litigation.

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The district court then awarded non-lead counsel $1,792,138.50 (they sought $1,991,265). It justified that decision with another brief explanation:

> The contemporaneous records of plaintiffs' counsel show that the 28 timekeepers were performing substantive work with a minimum of overlap. However, it is inherently inefficient to have so many people working on a legal project. With such a large group, it is inevitable that information needs to be shared, common issues discussed, and overlapping tasks performed. I will reduce the sum requested for the 28 timekeepers, $1,991,265, by 10% for that inefficiency. *See* *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) ("[T]he district court can impose a small reduction, no greater than 10 percent—a 'haircut'—based on its exercise of discretion and without a more specific explanation.").

***7** The district court reserved decision on whether to apply a multiplier.

II. STANDARDS OF REVIEW

[3] **[4]** **[5]** We review the class certification for an abuse of discretion, *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009); the grant of summary judgment de novo, *Narayan v. EGL, Inc.*, 616 F.3d 895, 899 (9th Cir. 2010); and the award of attorneys' fees for an abuse of discretion, *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010).

III. DISCUSSION

FAS makes four arguments on appeal. It first maintains that the district court abused its discretion by certifying the class, despite the predominance of individualized questions over common ones. Second, FAS argues that *Borello*, not *Dynamex*, applies to all the class members' claims, because *Dynamex* does not apply to joint employment claims, or to claims that are not based on or rooted in one of California's wage orders. Third, it contends that the district court erred by granting summary judgment under *Borello*'s multifactor and fact-intensive inquiry, because, among other reasons, FAS does not control the manner and means of the class members' work. And fourth, FAS argues that the district court abused its discretion by awarding interim attorneys' fees without giving FAS access to the time records on which the award was based, without notifying class members of class counsel's fee motion, without finding the facts specially, and without providing a precise but clear explanation of its reasons for the award. [6] We address each argument in turn.

A. Class Certification

[6] Under the predominance requirement of Rule 23(b)(3), a district court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members" before certifying a class. Here, the class fails that requirement because it cannot establish by common evidence either FAS's liability, or damages stemming from that alleged liability, to individual class members.

FAS's opening brief states that "[a]ll agree that plaintiffs cannot prove, through common evidence, that class members worked overtime hours or that claimed expenses are reimbursable." The class members' answering brief does not contest that claim. [7] Accepting it as true, then, *see* *United States v. Baldon*, 956 F.3d 1115, 1126 (9th Cir. 2020), the class members cannot establish FAS's liability for failing to pay overtime wages or to reimburse business expenses by common evidence.

***8** We need not decide whether common evidence can prove that FAS has a uniform policy of misclassifying its vendors. FAS's *liability* to any class member for failing to pay them overtime wages or to reimburse their business expenses would implicate highly individualized inquiries on whether that particular class member *ever* worked overtime or *ever* incurred any "necessary" business expenses. Cal. Lab. Code § 2802(a). Under such circumstances, class certification is improper. *Cf.* *Sotelo v. MediaNews Grp., Inc.*, 207 Cal.App.4th 639, 143 Cal. Rptr. 3d 293, 303–06 (2012) (affirming denial of class certification because there was no common evidence that individual plaintiffs worked overtime), *disapproved of on other grounds by* *Noel v. Thrifty Payless, Inc.*, 7 Cal.5th 955, 250 Cal.Rptr.3d 234, 445 P.3d 626 (2019); *Wilson v. La Jolla Grp.*, 61 Cal.App.5th 897, 276 Cal. Rptr. 3d 118, 134–35 (2021) (affirming denial of class certification in part because there was no common

evidence that individual plaintiffs incurred reimbursable business expenses).

[7] The class members resist this conclusion by relying on the established principle that "the presence of individualized damages cannot, by itself, defeat class certification." *Leyva*, 716 F.3d at 514; *see also* *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1182 (9th Cir. 2017), *rev'd on other grounds*, —— U.S. ——, 139 S. Ct. 710, 203 L.Ed.2d 43 (2019); *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010); *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975). In doing so, they mischaracterize an issue of individualized *liability* as an issue of individualized *damages*.

[8] In *Castillo v. Bank of America, NA*, 980 F.3d 723 (9th Cir. 2020), the plaintiff also argued that Rule 23(b)(3) certification was proper because "all of the alleged individualized inquires [were] mere questions of damages (and not liability)." *Id.* at 731. We disagreed, distinguishing between the *calculation* of damages and the *existence* of damages in the first place. As we explained, "[t]he issue [was] not that [the plaintiff was] unable to prove the extent of the damages suffered by each individual plaintiff at this stage." *Id.* at 732. "Instead, it [was] that [the plaintiff had] been unable to provide a common method of proving the *fact* of injury and *any* liability." *Id.* (emphases added). We thus affirmed the district court's denial of class certification, holding that "[i]ndividual differences in *calculating* the amount of damages will not defeat class certification where common issues otherwise predominate ... , [but] if the plaintiffs cannot prove that damages *resulted* from the defendant's conduct, then the plaintiffs cannot establish predominance." *Id.* at 730 (emphases added) (quotation marks, citation, and brackets omitted). Because the same "general rule goes to the crux of the issue on appeal here," we reverse the class certification because the class members failed to demonstrate that FAS's liability is subject to common proof. *Id.*

[9] **[10]** Furthermore, even if the class members needed to prove only that they were misclassified as independent contractors to establish FAS's liability by common evidence, class certification would still be improper under Rule 23(b)(3) for yet another reason—the class members' failure to show "that 'damages are capable of measurement on a classwide basis,' in the sense that the whole class suffered damages traceable to the same injurious course of conduct underlying the plaintiffs' legal theory." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017) (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 34, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013)). We recently reaffirmed that Rule 23(b)(3) permits "the certification of a class that potentially includes more than a de minimis number of uninjured class members" because it "requires only that the district court determine after rigorous analysis whether the common question predominates over any individual questions, including individualized questions about injury or entitlement to damages." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (en banc). Thus, "a district court is not precluded from certifying a class even if plaintiffs may have to prove individualized damages at trial, a conclusion implicitly based on the determination that such individualized issues do not predominate over common ones." *Id.*

***9** Even under our narrow interpretation of *Comcast Corp. v. Behrend*, 569 U.S. 27, 133 S.Ct. 1426, 185 L.Ed.2d 515, the class members cannot establish predominance. As already explained, the class members cannot show by common evidence that individual class members would be entitled to overtime wages or to expense reimbursement if found to be employees. Thus, the class members cannot show that the whole class suffered damages traceable to their alleged misclassification as independent contractors.

Nor have the class members shown that damages can be determined without excessive difficulty. To the contrary, the district court conceded in its most recent order denying FAS's motion for class decertification that "[t]he damages phase of this class action [will be] far messier than promised by plaintiffs' counsel when" the case was certified. As the district court explained, "[b]ecause the documentary evidence maintained by the vendors ... [is] scant at best, ... [p]roof by the testimony of [individual] vendors is necessary." As it turns out, using the individual testimony of self-interested class members to calculate the overtime hours they worked and the business expenses they incurred isn't easy. Rather, such an approach has predictably caused the "excessive difficulty" that *Comcast* and our later decisions interpreting *Comcast* have sought to avoid. *Just Film, Inc.*,

847 F.3d at 1121. Already, it has taken eight days to determine damages for only eleven of the 156 class members.

Thus, because the class members have not necessarily suffered damages traceable to their alleged misclassification, and because they have not presented a method of calculating damages that is not excessively difficult, they have failed to satisfy *Comcast*'s simple command that the case be "susceptible to awarding damages on a class-wide basis." 569 U.S. at 32 n.4, 133 S.Ct. 1426. That failure provides an independent basis for reversing the class certification. [8]

B. The Proper Employment Test

1. Expense Reimbursement Claims

"*Dynamex* did not purport to replace the *Borello* standard in every instance where a worker must be classified as either an independent contractor or an employee for purposes of enforcing California's labor protections." *Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 959 n.4 (9th Cir. 2018). Rather, *Dynamex* was clear that it "address[ed] only" the issue of how to distinguish between employees and independent contractors "with regard to those claims that derive directly from the obligations imposed by [a] wage order." 232 Cal.Rptr.3d 1, 416 P.3d at 25. *Dynamex* further suggested that its holding should not extend beyond that context, by describing the ABC test as a "*distinct* standard that provides *broader* coverage of workers with regard to the very fundamental protections afforded by *wage and hour laws and wage orders*," given "the [Industrial Welfare Commission's] determination that it is appropriate to apply a *distinct and particularly expansive* definition of employment regarding obligations imposed *by a wage order*." [9] *Id.* at 29, 416 P.3d at 34 (emphases added).

***10** **[11]** The California Supreme Court's subsequent decision in *Vazquez v. Jan-Pro Franchising International, Inc.*, 10 Cal.5th 944, 273 Cal.Rptr.3d 741, 478 P.3d 1207 (2021), affirmed that "[i]n *Dynamex*, [the] court was faced with a question of first impression: What standard applies under California law in determining whether workers should be classified as employees or independent contractors *for purposes of the obligations imposed by California's wage orders*?" *Id.*, 273 Cal.Rptr.3d 741, 478 P.3d at 1208 (emphasis added). It also held that *Dynamex* "did not change a settled rule" like the *Borello* test, as applied *outside* the wage order context. *Id.*, 273 Cal.Rptr.3d 741, 478 P.3d at 1209. Consistent with that guidance, the California Court of Appeal has repeatedly limited *Dynamex*'s application to claims based on or "rooted in" California's wage orders. [10] *See Vendor Surveillance Corp. v. Henning*, 62 Cal.App.5th 59, 276 Cal. Rptr. 3d 458, 468–69 (2021); *Gonzales v. San Gabriel Transit, Inc.*, 40 Cal.App.5th 1131, 253 Cal. Rptr. 3d 681, 701–04 (2019); *Garcia v. Border Transp. Grp., LLC*, 28 Cal.App.5th 558, 239 Cal. Rptr. 3d 360, 370–71 (2018).

[12] Here, the class members' expense reimbursement claims are not based on a California wage order, but on California Labor Code § 2802. [11] Nor are they "rooted in" a California wage order, even though the class members belatedly invoked Wage Order 16-2001 in their class certification briefing. Wage Order 16-2001 does not "cover[ ] most of the [section 2802] violations alleged," and its provisions are not "equivalent or overlapping" with section 2802. *Gonzales*, 253 Cal. Rptr. 3d at 702, 704. Although section 2802 covers "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties," Cal. Lab. Code § 2802(a), Wage Order 16-2001 covers only "tools or equipment," Cal. Code Regs. tit. 8, § 11160. Indeed, many expenses for which class members sought and recovered reimbursement at trial, including insurance, cellphone charges, dump fees, and mileage/fuel, are covered *only* by section 2802—*not* by Wage Order 16-2001's "tools and equipment" provision. Thus, *Borello*, not *Dynamex*, applies to the expense reimbursement claims.

2. Overtime Claims

[13] Neither party disputes that the class members' overtime claims are based on California's wage orders. Still, FAS insists that *Borello* governs, because FAS believes the overtime claims are "joint employment" claims to which *Dynamex* does not apply.

FAS is correct that *Dynamex* does not apply to joint employment claims. The California Supreme Court created *Dynamex*'s ABC test to address "concerns ... regarding the disadvantages ... inherent in relying upon a multifactor, all the circumstances standard for distinguishing between employees and independent contractors." 232 Cal.Rptr.3d 1, 416 P.3d at 35. Those concerns include (1) "that a multifactor, 'all the circumstances' standard makes it difficult for both hiring businesses and workers to determine in advance how a particular category of workers will be classified, frequently leaving the ultimate employee or independent contractor determination to a subsequent and often considerably delayed judicial decision"; and (2) that it "affords a hiring business greater opportunity to evade its fundamental responsibilities under a wage and hour law by dividing its workforce into disparate categories and varying the working conditions of individual workers within such categories with an eye to the many circumstances that may be relevant." *Id.* at 33–34, 416 P.3d at 34.

***11** **[14]** **[15]** **[16]** Because these "reasons for selecting the 'ABC' test are uniquely relevant to the issue of allegedly misclassified independent contractors," the ABC test does not extend to the joint employment context, where those concerns are no longer present. *Curry v. Equilon Enters., LLC*, 23 Cal.App.5th 289, 233 Cal. Rptr. 3d 295, 313–14 (2018). Indeed, "[i]n the joint employment context, the alleged employee is already considered an employee of the primary employer," who "is presumably paying taxes." *Id.* at 313. Furthermore, "the employee is afforded legal protections due to being an employee of the primary employer." *Id.* As a result, the policy purpose behind *Dynamex*'s ABC test, i.e., "the policy purpose for presuming the worker to be an employee and requiring the secondary employer to disprove the worker's status as an employee[,] is unnecessary" in joint employment cases, "in that taxes are being paid and the worker has employment protections." *Id.* at 313–14; *see also* *Henderson v. Equilon Enters., LLC*, 40 Cal.App.5th 1111, 253 Cal. Rptr. 3d 738, 753–54 (2019) (holding that the ABC test also does not apply to joint employment claims because "parts B and C of the ABC test do not fit analytically with such claims," *id.* at 753).

But Bowerman's claims (and those of other sole proprietors) are not joint employment claims—they are employee misclassification claims, like those in *Dynamex*. FAS argues that the class members are "employees of their [own] self-owned businesses." *Dynamex*'s policy concerns are equally applicable for sole proprietors like Bowerman because they have no putative employer other than FAS to pay their taxes or afford them legal protections under the California wage orders. *See* *Ball v. Steadfast-BLK*, 196 Cal.App.4th 694, 126 Cal. Rptr. 3d 743, 747 (2011) ("[A] sole proprietorship is not a legal entity separate from its individual owner."). So *Dynamex* applies to Bowerman's overtime claims.

But FAS's joint employment argument would likely succeed were an actual *employee* of a vendor suing FAS, claiming that FAS was an employer. Notably, Plaintiffs-Appellees' counsel conceded at oral argument that at least some of the class members are employed by entities other than FAS. [12] Thus, some of the class members' theories of liability could depend on their ability to establish that FAS was a joint employer. On remand, the district court may consider the joint employment issue in the first instance for class members who own or operate LLCs or corporations, which are distinct legal entities. [13] *See* *Nw. Energetic Servs., LLC v. Cal. Franchise Tax Bd.*, 159 Cal.App.4th 841, 71 Cal. Rptr. 3d 642, 649 (2008) (LLCs); *Merco Constr. Eng'rs, Inc. v. Municipal Court*, 21 Cal.3d 724, 147 Cal.Rptr. 631, 581 P.2d 636, 639 (1978) (corporations).

C. Summary Judgment

1. Expense Reimbursement Claims

[17] **[18]** As explained above, *Borello* governs the class members' expense reimbursement claims. Under *Borello*, "[t]he existence of an employment relationship is a question for the trier of fact." *Angelotti v. Walt Disney Co.*, 192 Cal.App.4th 1394, 121 Cal. Rptr. 3d 863, 870 (2011). The existence of such a relationship "*can* be decided by the court as a matter of law *if* the evidence supports only one reasonable conclusion." *Id.* (emphases added). Such is not the case here. "At its heart, this case involves competing, if

not necessarily conflicting, evidence that must be weighed by a trier of fact." *Arzate v. Bridge Terminal Transp., Inc.*, 192 Cal.App.4th 419, 121 Cal. Rptr. 3d 400, 405 (2011). Thus, "the trial court erred in finding no triable issue of material fact." *Id.*

[19] "As the parties and trial court correctly recognized, control over *how a result is achieved* lies at the heart of the common law test for employment." *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal.4th 522, 173 Cal.Rptr.3d 332, 327 P.3d 165, 172 (2014) (emphasis added). The district court granted summary judgment because it was "convinced that the overwhelming evidence" of FAS's control "tip[ped] the scales clearly in favor of finding an employee relationship." Viewing the evidence in the light most favorable to FAS, that conclusion was incorrect.

***12** **[20]** **[21]** California law is clear that "[i]f control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established." *Millsap v. Fed. Express Corp.*, 227 Cal.App.3d 425, 277 Cal. Rptr. 807, 811 (1991) (citation omitted). Whether a hiring entity's control is results-oriented or means-oriented depends on how the factfinder, or the court on summary judgment, defines "results." For instance, in *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014), we determined that " 'results,' reasonably understood, refer[red] in [the] context [of package delivery services] to [the] timely and professional delivery of packages." *Id.* at 990. Thus, we rejected FedEx's argument that it was controlling only the results of its drivers' work by mandating a particular dress code from the drivers' "hats down to their shoes and socks"; by requiring them "to paint their vehicles a specific shade of white, [to] mark them with the distinctive FedEx logo, and to keep their vehicles 'clean and presentable [and] free of body damage and extraneous markings' "; and by dictating "the vehicles' dimensions, including the dimensions of their 'package shelves' and the materials from which the shelves [were] made." *Id.* at 989 (second alteration in original). We held that "no reasonable jury could find that the 'results' sought by FedEx include[d]" such detailed requirements, which bore no logical relation to the "timely and professional delivery of packages." *Id.* at 990.

[22] In contrast, whether FAS's control over the class members' work is means-or results-oriented should have been left to the jury. When viewed in the light most favorable to FAS, the instructions in FAS's VQPs and work orders—though detailed—are geared toward the satisfactory completion of the class members' job assignments. The same can be said for the training the class members received on following those instructions, the vendor scorecards that monitored whether they followed the instructions, and the AVQPs that disciplined those who did not.

The VQPs uniformly characterize the parties' relationship as vendor-vendee, not employer-employee. In fact, several VQPs explicitly designate or refer to the vendors as independent contractors. Consistent with that designation, the VQPs do not control *whether* a vendor accepts a particular job, *who* does the work on the vendor's behalf, *when* the work gets done, or *on what terms*. Rather, viewing the evidence in the light most favorable to FAS, the class members are free to decline FAS work orders, or to negotiate the terms of their acceptance. And if they do accept a work order, they are free to hire any employee or subcontractor who can pass a background screening to perform the work, and they are free to design their own schedule for completing the assignment within FAS's seventy-two-hour deadline. Although such a short deadline creates a tight turnaround, we reject the district court's conclusion that this turnaround renders "FAS's argument that it does not control when vendors perform work disingenuous" and "inconsequential." Requiring a worker to complete a task within a desired timeframe is a quintessential example of controlling the *result* of that worker's job performance.

As for the VQPs' detailed instructions for particular job assignments, FAS raises a genuine dispute of material fact as to whether they control the results, and not the manner and means, of the class members' work on those assignments. For example, one VQP's instructions for "Flooring" require vendors to "replace doorstops and install shoe molding" for vinyl flooring; "replace [the] pad" for carpet; "remove and replace [the tiles], add floor leveler, thin set[,] and grout" for ceramic tile; and "add floor float and install shoe mold" for laminate/wood floors. The same VQP's instructions for "Drywall/Paint/Wallpaper" require vendors to "match [the] existing finish," "re-textur[e] the walls," and use paint that is "a neutral color and of medium grade or better." And the VQP's instructions for "Roofing" require that the new roof "not overlay [the] existing roof" and that it "[b]e consistent with neighborhood/ ... HOA/ ... local requirements."

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[23] Unlike the requirements in *Alexander* as to the drivers' and their vehicles' appearance, these instructions are directed toward the desired results of the vendors' work, at least when read in the light most favorable to FAS. Indeed, the right to control results is a "broad" one, encompassing "the right to inspect, the right to make suggestions or recommendations as to details of the work, [and] the right to prescribe alterations or deviations in the work," none of which "chang[e] the relationship from that of owner and independent contractor." *Beaumont-Jacques v. Farmers Grp., Inc.*, 217 Cal.App.4th 1138, 159 Cal. Rptr. 3d 102, 106 (2013) (citations omitted). Thus, the district court erred by concluding that "[n]o reasonable juror could review the Vendor Packets, the work orders, the trainings, the Vendor Profiles, the discipline, and the Vendor scorecards, and conclude any of the Vendors are independent contractors." [14]

***13** Turning, then, to the secondary factors, many tip in favor of independent contractor status, including the parties' intent to create an independent contractor relationship, the class members' opportunity for profit or loss, and the class members' employment of assistants. The district court correctly found for FAS on all of these, and the class members dispute only the weight—not the merits—of those findings on appeal. Several of the other secondary factors were, and continue to be, subject to genuine dispute, including the exclusivity of the class members' relationship with FAS, whether their businesses are distinct from FAS's business, and whether FAS supplied their tools, instrumentalities, and place of work. Finally, the district court erred by finding that the VQPs contain at-will termination provisions, which are "strong evidence of a right to control." Many VQPs contain no termination provision, and the VQPs cited by the district court include a *mutual* termination provision, which "may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee." *Arnold v. Mut. of Omaha Ins. Co.*, 202 Cal.App.4th 580, 135 Cal. Rptr. 3d 213, 220 (2011); *see also Varisco v. Gateway Sci. & Eng'g, Inc.*, 166 Cal.App.4th 1099, 83 Cal. Rptr. 3d 393, 398–99 (2008). Thus, the district court was right to conclude that the secondary factors do not establish that the class members are FAS's employees as a matter of law, absent clear, uncontroverted evidence that FAS controls the manner and means of their work.

In short, the class members "exhibit[ ] classic evidence of both an independent contractor and employee" under the *Borello* test, which "evidence must be weighed by a trier of fact." *Jackson v. AEG Live, LLC*, 233 Cal.App.4th 1156, 183 Cal. Rptr. 3d 394, 416 (2015). Thus, summary judgment on the class members' expense reimbursement claims was inappropriate. [15]

2. Overtime Claims

As explained above, *Dynamex* adopted the ABC test to determine employee status for purposes of wage and hour claims like the class members' overtime claims. "The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies *each* of three conditions":

> (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work, and in fact; *and*
>
> (b) that the worker performs work that is outside the usual course of the hiring entity's business; *and*
>
> (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Dynamex, 232 Cal.Rptr.3d 1, 416 P.3d at 34.

[24] Here, summary judgment would not be proper under parts A or C of the test. Our discussion of *Borello* already explained that genuine disputes of material fact underlie the questions of (A) whether the vendors were free from FAS's control, and (C) whether the vendors were engaged in an independently established trade, occupation, or business. But summary judgment would be proper under part B of the test. Though FAS proclaimed itself the "premier Property Preservation, [Real Estate Owned Property] Maintenance, and Repair Services company," it still contends that its vendors—those who perform those premier property preservation, maintenance, and repair services—perform work that is outside the usual course of FAS's

business. Stating the proposition is alone enough to show its fatal shortcomings.

Still, FAS insists that it satisfies part B because it "does not itself perform preservation services," but "*coordinates* the completion of preservation services, an activity distinctly different from the business of property preservation." But FAS's own advertisements belie this contention:

> FAS offers a full range of professional services for our clients, with the goal of reducing the time and costs involved in recovering and maintaining properties. Using a single point of contact, our clients can engage us for a variety of needs inside and outside the property. These include, but are not limited to, the following examples of residential real estate services: property re-key, secure openings, debris removal, repairs, eviction lockouts, personal property removal, smoke detector installs, retrofit services, lawn maintenance, janitorial service, winterization, pool maintenance, rehabilitation/construction & repairs, [and] emergency maintenance[.]

***14** FAS's position has also been rejected by several courts considering analogous arguments by rideshare companies that they "are in the business solely of creating technological platforms, not of transporting passengers"—including the California Court of Appeal in *People v. Uber Technologies, Inc.*, 56 Cal.App.5th 266, 270 Cal. Rptr. 3d 290, 311 (2020). *See also* *id.* at 311–14 (collecting cases). In doing so, the California Court of Appeal considered that ridesharing companies market themselves as on-demand ride services, actively seek out customers for those services, make money only if those services are provided, monitor the quality of the services, and discipline drivers who deliver deficient services. *Id.* at 311–14. FAS markets itself as providing comprehensive property preservation services, advertises to clients needing such services, makes money only if those services are provided, monitors the quality of those services through vendor scorecards, and disciplines its vendors for deficient services through AVQPs. As in *Uber Technologies*, "[t]hese facts amply support the conclusion that" the vendors "perform services for [FAS] in the usual course of [FAS's] business[ ]." *Id.* at 313–14.

FAS resists this conclusion by analogizing to *Curry v. Equilon Enterprises, LLC*, 233 Cal. Rptr. 3d 295. The California Court of Appeal stated (in dicta) that under *Dynamex*, the managers of Shell stations were *not* the employees of Shell, which leased its service stations to third-party operators who in turn employed the managers. *Id.* at 314–15. The Court of Appeal accepted Shell's argument that it "was not in the business of operating fueling stations—it was in the business of owning real estate and fuel"—and thus concluded that "there [was] not a triable issue of fact as to the 'B' factor because managing a fuel station was not the type of business in which Shell was engaged." *Id.* at 314.

[25] The court in *Uber Technologies* found *Curry* "readily distinguishable," contrasting the "situation in which a putative joint employer leases facilities to a worker's direct employer and has no involvement in the worker's employment or compensation" with the situation in which a putative employer's "usual course of business involves the day-to-day task of matching riders and drivers each time a user requests a ride, arranging for riders' payments to be processed, and retaining a portion of the proceeds from each ride." *Uber Techs.*, 270 Cal. Rptr. 3d at 315. Like *Uber Technologies*, this is not a joint employment case but a misclassification case regarding sole proprietors like Bowerman, and the putative employer's business centers on the services the plaintiffs provide. Thus, the reasoning of *Uber Technologies* applies and dictates that Bowerman performed work well within the usual course of FAS's business under part B of the ABC test, which is alone dispositive of his employee status under *Dynamex*. *See* 232 Cal.Rptr.3d 1, 416 P.3d at 34.

But *Dynamex* is not the only new development in California employment law since the district court's summary judgment decision. California Labor Code § 2776 recently enacted a retroactive *business-to-business* exception to the ABC test. *See* Cal. Lab. Code § 2785(b). Under that exception, "the holding in *Dynamex* do[es] not apply to

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a bona fide business-to-business contracting relationship ... [i]f an individual acting as a sole proprietor, or a business entity formed as a partnership, limited liability company, limited liability partnership, or corporation ('business service provider') contracts to provide services to another such business." *Id.* § 2776(a). Instead, "the determination of employee or independent contractor status of the business services provider shall be governed by *Borello*, if the contracting business demonstrates that [each of twelve] criteria [is] satisfied." [16] *Id.*

***15** **[26]** Viewing those criteria, there is a genuine dispute of fact as to whether the exception applies to FAS and its vendors. For example, one criterion is that "[t]he business service provider [be] free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact." *Id.* § 2776(a)(1). Another is that "[t]he business service provider [be] customarily engaged in an independently established business of the same nature as that involved in the work performed." *Id.* § 2776(a)(6). As already explained at length, FAS's control of its vendors, as well as the independence of the vendors' businesses from FAS's business, are genuinely disputed factual issues. [17] Thus, because of the enactment of section 2776, summary judgment is no longer warranted on the class's overtime claims, even though summary judgment *would* be proper on those claims under *Dynamex* for sole proprietors like Bowerman.

3. All Claims

We hold above that there is a genuine dispute of material fact as to whether the class members are employees or independent contractors—under *Borello* for the expense reimbursement claims and under the business-to-business exception for the overtime claims. But there is also a genuine dispute of material fact as to whether the class members *ever* incurred reimbursable expenses or *ever* worked overtime. Thus, summary judgment was also improper for the very same reason that the class certification was: a putative employer cannot be liable to an entire class of putative employees for failing to reimburse their business expenses and pay them overtime unless the putative employer in fact failed to do so for each of them.

D. Attorneys' Fees

[27] Under 28 U.S.C. § 1291, we have jurisdiction over final district court decisions. The attorneys' fee award on appeal is an *interim* award. It "does not dispose of the underlying litigation" and "does not even dispose of the issue of attorney's fees," given that the district court reserved its decision on whether to apply a multiplier. *Rosenfeld v. United States*, 859 F.2d 717, 720 (9th Cir. 1988). Thus, we consider the order nonfinal for purposes of § 1291. *See id.*; *Hillery v. Rushen*, 702 F.2d 848, 848–49 (9th Cir. 1983) (same); *cf. Gates v. Rowland*, 39 F.3d 1439, 1450 (9th Cir. 1994) (treating an interim fee award as final when it "follow[ed] a final judgment on the merits" and "dispose[d] of the issue of attorneys' fees"); *Finnegan v. Dir., Off. of Workers' Comp. Programs*, 69 F.3d 1039, 1040–41 (9th Cir. 1995) (same).

[28] **[29]** Nevertheless, we hold that this case presents "extraordinary circumstances" justifying our exercise of pendent appellate jurisdiction over the interim fee award. *McCarter v. Ret. Plan for the Dist. Managers of the Am. Fam. Ins. Grp.*, 540 F.3d 649, 653 (7th Cir. 2008). We have the power to exercise pendent jurisdiction over claims "raised in conjunction with other issues properly before the court ... if the rulings [are] inextricably intertwined or if review of the pendent issue [is] necessary to ensure meaningful review of the independently reviewable issue." *United States v. Tillman*, 756 F.3d 1144, 1149 (9th Cir. 2014) (internal quotation marks omitted). That requirement is satisfied here because FAS's primary argument for vacating the interim fee award is that the district court erred by certifying the class and granting summary judgment to the plaintiffs—issues that are not just "inextricably intertwined" with FAS's appeal of the class certification and summary judgment orders; they are identical.

***16** **[30]** The plaintiffs argue that most courts "have found that interim fee awards are not immediately appealable under the doctrine of pendent jurisdiction," but that can be an oversimplification. In truth, most of the courts to have confronted the issue in this case—whether to exercise pendent appellate jurisdiction over an interim order that is inextricably intertwined with an independently appealable order—have concluded that the order *is* immediately appealable under the

doctrine of pendent jurisdiction, consistent with the Supreme Court's holding in *Swint v. Chambers County Commission*, 514 U.S. 35, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). *See id.* at 51, 115 S.Ct. 1203 (implying that appellate courts should not exercise pendent jurisdiction to review claims that are not "inextricably intertwined with" or "necessary to ensure meaningful review of" the final order on appeal); *see also, e.g.*, *Thornton v. Gen. Motors Corp.*, 136 F.3d 450, 454 (5th Cir. 1998) (per curiam); *Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake Cnty. Fla.*, 947 F.3d 1362, 1372 (11th Cir. 2020); *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 678–79 (D.C. Cir. 1996) (per curiam). *But see Home Builders Ass'n of Greater St. Louis v. L & L Exhibition Mgmt., Inc.*, 226 F.3d 944, 951 (8th Cir. 2000). Today we join the majority of our sister circuits, and hold as a matter of first impression, *see Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1187–88 (9th Cir. 2003), that we can—and here, will—exercise pendent appellate jurisdiction over interim fee orders that are inextricably intertwined with or necessary to ensure meaningful review of final orders on appeal.

The interim award of attorneys' fees must be vacated because the class certification and summary judgment orders were issued in error. *See Hopkins v. City of Sierra Vista*, 931 F.2d 524, 529 (9th Cir. 1991) ("Because we reverse and remand for further proceedings on the merits, there is no prevailing party and we must also reverse the district court's award of attorneys' fees.").

IV. CONCLUSION

Under the right circumstances, class certification and summary judgment are useful mechanisms for the speedy resolution of claims. But those circumstances are not present here. We therefore **REVERSE** the class certification order, **REVERSE** the summary judgment order, **VACATE** the interim award of attorneys' fees, and **REMAND** to the district court for proceedings consistent with this opinion, with costs awarded to FAS.

All Citations

--- F.4th ----, 2022 WL 2433971

Footnotes

1 The joint motion to amend case caption is **GRANTED**. FAS is now known as Xome Field Services, LLC.

2 The district court determined that Julia Bowerman did not fall within the class definition. That determination is not challenged on appeal.

3 For example, the district court was "not sure how to evaluate" whether FAS supplied the instrumentalities, tools, and place of work because "[b]oth parties present[ed] evidence supporting their positions."

4 After trial, FAS renewed its motion for judgment as a matter of law, arguing that the verdict as to five of the eleven claimants in their personal capacity was improper because "any expenses incurred in connection with the businesses of [those] Five Claimants were incurred by the corporate form, and not incurred personally by the claimant." The district court correctly denied the motion. Under California law, a plaintiff can incur expenses even without ultimately paying them. *See, e.g.*, *Cochran v. Schwan's Home Serv., Inc.*, 228 Cal.App.4th 1137, 176 Cal. Rptr. 3d 407, 412–13 (2014) ("If an employee is required to make work-related calls on a personal cell phone, then he or she is incurring an expense for purposes of [California Labor Code §] 2802. It does not matter whether the phone bill is paid for by a third person, or at all.").

5 As noted above, the judgment as to the bellwether trial was certified under Federal Rule of Civil Procedure 54(b). The district court was referencing the difficulties in the bellwether trial that would also be present

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(although obviously on a much greater scale) in the damages phase of the trial for the remaining class members.

6 FAS also argues that expenses recovered by five of the class members in the bellwether jury trial are not recoverable because they were paid by the class members' businesses rather than the class members in their personal capacities. But as explained above, *supra* p. ——— n.4, members of the class can still incur expenses for purposes of section 2802 even if their businesses ultimately pay the bill. *See* *Cochran*, 176 Cal. Rptr. 3d at 412–13.

7 Nor does the answering brief contest FAS's assertions that "[a]ll who testified [during the bellwether jury trial] relied on their unaided memories as the primary or sole evidence of their work schedules," and that "[n]one offered time-entry data or other contemporaneous records of hours worked," as confirmed by the trial record. The class argues only that "[u]niform, class-wide evidence establishes that FAS's policy and practice is not to pay overtime, and not to reimburse the Workers for any business expenses incurred." But uniform evidence that FAS *won't* pay overtime wages or reimburse business expenses *if* any are owed does not amount to evidence that FAS had a uniform policy that required the class to work overtime or incur reimbursable expenses. *See* *Sotelo v. MediaNews Grp., Inc.*, 207 Cal.App.4th 639, 143 Cal. Rptr. 3d 293, 305 (2012) (explaining that a class may establish liability by proving that an alleged employer has "a uniform policy that requires putative class members *to work* overtime" (emphasis added)).

8 In addition to Rule 23(b)(3)'s predominance requirement, Rule 23(b)(3)'s superiority requirement further requires "that a class action [be] superior to other available methods for fairly and efficiently adjudicating the controversy." FAS argues that a class action is not superior to other methods of resolving this case because the class members have interests in individually controlling their claims, *see* Fed. R. Civ. P. 23(b)(3)(A), given that they "stand to recover five-and even six-figure awards." Although the Supreme Court has explained that "the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high," it has also explained that "the Advisory Committee [for Rule 23(b)(3)] had dominantly in mind vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (internal quotation marks omitted). Thus, even though the large damages awards the class members stand to gain are not sufficient on their own to overcome Rule 23(b)(3) certification, they support doing so.

9 The California Supreme Court elaborated that its holding "[found] its justification in the fundamental purposes and necessity of the minimum wage and maximum hour legislation in which the standard has traditionally been embodied":

> Wage and hour statutes and wage orders were adopted in recognition of the fact that individual workers generally possess less bargaining power than a hiring business and that workers' fundamental need to earn income for their families' survival may lead them to accept work for substandard wages or working conditions. The basic objective of wage and hour legislation and wage orders is to ensure that such workers are provided at least the minimal wages and working conditions that are necessary to enable them to obtain a subsistence standard of living and to protect the workers' health and welfare. These critically important objectives support a very broad definition of the workers who fall within the reach of the wage orders.

Dynamex, 232 Cal.Rptr.3d 1, 416 P.3d at 31–32 (citations omitted).

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10 In the absence of controlling authority by the California Supreme Court, "we follow decisions of the California Court of Appeal unless there is convincing evidence that the California Supreme Court would hold otherwise." *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 889 (9th Cir. 2010).

11 Assembly Bill 5 codified "the ABC test and expanded its reach to apply to all claims under the Labor Code and the Unemployment Insurance Code." *People v. Superior Court*, 57 Cal.App.5th 619, 271 Cal. Rptr. 3d 570, 574 (2020); *see also* Cal. Lab. Code § 2775(b)(1). The ABC test's extension "was prospective, with an effective date of January 1, 2020." *Lawson v. Grubhub, Inc.*, 13 F.4th 908, 912 (9th Cir. 2021) (citing Cal. Lab. Code § 2785(c)). Because the claims at issue in this case arise from conduct that occurred before January 1, 2020, AB 5 does not decide the test applicable to the expense reimbursement claims.

12 This concession is perplexing given that class members, by definition, cannot "work for any other entity more than 30 percent of the time." But we credit it, nonetheless.

13 We also leave it to the district court to determine, in the first instance, whether any class members besides Bowerman remain parties to this litigation on remand. *Cf.* *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983).

14 In fact, in *McLeod v. Field Asset Services, LLC*, No. 15-00645, 2017 WL 338002 (S.D. Ala. Jan. 23, 2017), the district court granted summary judgment to FAS on whether it controls the manner and means, or only the results, of its vendors' work. *See id.* at *5 ("In Alabama, ... [t]he test for determining whether a person is an agent or employee of another, rather than an independent contractor, is whether that other person has reserved the right of control over the means and method by which the person's work will be performed, whether or not the right of control is actually exercised." (citation omitted)). The court explained that "FAS merely authorizing work, reviewing the quality of work, inspecting work, reviewing photographs of work, etc. performed by [its vendor], is not tantamount to *controlling* [the vendor's] work or *how* [the vendor] performed the work." *Id.* "Rather," the court held, "those aspects are more akin to checks on the quality of the work, not control over the manner in which such work was done." *Id.*

15 We do not foreclose summary judgment in favor of an individual class member (or FAS as to an individual class member), as the facts as to every class member are not before us.

16 The twelve criteria are as follows:

> 1) The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
>
> 2) The business service provider is providing services directly to the contracting business rather than to customers of the contracting business. This subparagraph does not apply if the business service provider's employees are solely performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses.
>
> 3) The contract with the business service provider is in writing and specifies the payment amount, including any applicable rate of pay, for services to be performed, as well as the due date of payment for such services.
>
> 4) If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has the required business license or business tax registration.

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5) The business service provider maintains a business location, which may include the business service provider's residence, that is separate from the business or work location of the contracting business.

6) The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.

7) The business service provider can contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity.

8) The business service provider advertises and holds itself out to the public as available to provide the same or similar services.

9) Consistent with the nature of the work, the business service provider provides its own tools, vehicles, and equipment to perform the services, not including any proprietary materials that may be necessary to perform the services under the contract.

10) The business service provider can negotiate its own rates.

11) Consistent with the nature of the work, the business service provider can set its own hours and location of work.

12) The business service provider is not performing the type of work for which a license from the Contractors' State License Board is required, pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

Cal. Lab. Code § 2776(a).

17 We reject plaintiffs' request that we rule, on appeal, that FAS, as a matter of law, cannot invoke the business-to-business exception as to *any* class member. We do not foreclose the district court from determining, on remand, that FAS may not rely on the business-to-business exception as to a particular class member, should the undisputed evidence as to that class member so warrant.

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