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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MARSHE IVY et al.,

Plaintiffs and Appellants,

v.

JIFFY LUBE INTERNATIONAL, INC.,

Defendant and Respondent.

A129545

(Alameda County Super. Ct.  
No. RG9459032)

Marshe Ivy and Greg Alcantara, former store managers at Jiffy Lube International (JLI) service stations, filed a putative class action, on behalf of themselves and others similarly situated, alleging that defendant JLI had misclassified them as employees exempt from California’s overtime pay requirements and that, as a result of this misclassification, defendant was liable for violation of various provisions of the Labor Code and the Business and Professions Code. They appeal from the order of the trial court denying their motion for class certification and seek reversal of that order, contending that the court relied on improper legal criteria and failed to perform the necessary analysis in determining whether common questions were predominant in the case. We discern no error and affirm the order.

**BACKGROUND**

Defendant is based in Houston, Texas and has a nationwide network of over 2,000 automotive service outlets that provide an array of oil and filter services. Each retail outlet is managed by a store manager (SM). During the period in question, defendant operated approximately 114 company-owned outlets in California, though these outlets

have since been franchised. The California outlets varied in size, in the number of service bays, and in annual sales volume. Each SM supervised between 4 and 25 employees.

On June 22, 2009, Ivy filed a complaint on her behalf and others similarly situated, alleging that defendant had misclassified SMs as exempt employees. The complaint stated the following causes of action: (1) failure to pay overtime wages; (2) failure to provide meal and rest periods; (3) failure to provide accurate itemized wage statements; (4) failure to pay wages on termination; and (5) unfair business practices. The complaint identified the plaintiff class as: “All persons who were employed as a Store Manager by Jiffy Lube in one or more of its California store locations at any time on or after June 18, 2005.” Alcantara was later added as a representative plaintiff.

#### ***A. Evidence Before the Court for Class Certification***

Plaintiffs filed their motion for class certification on June 11, 2010. In support of their motion, plaintiffs submitted copies of defendant’s policies and manuals and the declarations of eight putative class members, which in similar language described the tasks they performed as SMs. Additionally, plaintiffs submitted the declaration of David Lewin, a professor at UCLA, who described himself as a specialist in human resource management and employment relations. Lewin stated his opinion that a random sample of SMs could be chosen for the purpose of testifying at trial.

Defendant opposed plaintiffs’ motion and submitted the declarations of two former SMs, a trainer responsible for training new SMs, and four defendant managers (a district manager, a regional manager, a safety manager, and a human resources manager). These declarations described differing individual experiences in the tasks that SMs performed and the amount of time spent on those tasks. Defendant also submitted transcripts of deposition testimony from plaintiffs’ declarants that were in some respects inconsistent with their prior declarations.<sup>1</sup> Included as well were the transcripts of the

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<sup>1</sup> The trial court permitted defendant to select two of plaintiffs’ declarants for deposition. Defendant selected Jarrod Rounsaville and Gilbert Quintos. The deposition testimony of both contradicted their declarations at certain points. For example,

deposition of Ivy, although she had not submitted a declaration on her own behalf, and of the depositions of two of defendant's own declarants. Defendant submitted a table detailing how the deposition testimony differed from the declarations that plaintiffs submitted.

In their memorandum of points and authorities, plaintiffs emphasized that all class claims share the same questions of law and maintained that defendant's centralized controls ensured conformity among the SMs. Plaintiffs also maintained that consideration of how much time managers spent on particular work tasks would be an impermissible inquiry for class certification purposes. In contrast to plaintiffs' position, defendant maintained that the evidence indicated wide variability from store to store in the duties that SMs performed and the time SMs spent performing each of these duties. Defendant contended that the individual questions about putative class members' duties would predominate over common questions and that, accordingly, the class should not be certified.

Plaintiffs also proposed a phased approach at trial. During phase I, various questions that plaintiffs identified as common issues would be tried, including which SM tasks are legally exempt under California law. During phase II, individual issues would be tried, including the amount of time that SMs spent on particular tasks. Plaintiffs suggested that the use of a special master or a survey would be useful.

### ***B. Hearing on the Motion for Class Certification***

Prior to the hearing on the motion for class certification, the court issued a tentative ruling that, considering the arguments made at the hearing, was substantially the same as its final order. Plaintiffs argued that the tentative ruling did not give enough attention to the common issues and that the only individual issue would be the amount of time each manager spent on the tasks that were common to them all. Plaintiffs argued that the trial plan they had proposed was a mechanism by which the court could manage

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Quintos's declaration stated: "Even though I had the title of Store Manager, I had few managerial duties and responsibilities." At his deposition, however, Quintos denied that there was anything he did at work that he did not personally regard as management work.

the individual issues. They also suggested that the tentative ruling reflected an impermissible merits analysis and that it required a level of precision on the part of plaintiffs that would be impossible to achieve.

Defendant stressed to the court its contention that plaintiffs had demonstrated no common evidence on the issues of the ability of SMs to hire and fire, the extent of their discretion in the exercise of their duties, and the amount of their time they spent performing exempt duties. Defendant supported the court's tentative ruling because, in its view, individual issues predominated over common issues.

### ***C. The Trial Court's Order on the Motion for Class Certification***

The trial court filed a 14-page order denying plaintiffs' motion for class certification, following which plaintiffs timely appealed. The court concluded that, while many of the conditions for class certification were met, common issues did not predominate and a class action was not the superior means of resolving the issues for the putative class.

Regarding commonality, the court first noted that there was "surprisingly little discussion in the parties' briefs about the claims, defenses and applicable law" and that the motion focused on defendant's defenses, "which will require it to demonstrate at trial that one or more of three potential exemptions—the executive, administrative and professional exemptions—apply to all SMs." From the arguments contained in the briefs, the court concluded that the following issues would be litigated at trial: "(1) whether SMs had the authority to hire or fire other employees and/or if their suggestions and recommendations regarding hiring, firing, promotion or any other change of employment status were given particular weight; [¶] (2) whether SMs, in the performance of their jobs, customarily and regularly exercised discretion and independent judgment; and [¶] (3) whether SMs were primarily engaged in duties which meet the test of the exemption." The court considered each of these issues in turn.

For the ability of SMs to hire and fire, the court found that plaintiffs had submitted both common and individualized evidence. The common evidence consisted of policies and manuals that were distributed to all SMs and to which defendant management

expected SMs to conform. However, these policies and manuals “permit (indeed, obligate) SMs to participate in the hiring process, including their ability to recruit and hire some (lower level) employees.” The individualized evidence consisted of the declarations from SMs contending that they did not have the power to hire, fire, promote, or change employee status. These declarations did not address the question of whether the SMs’ suggestions and recommendations regarding hiring, firing, promotions, and other changes in employment status were given particular weight. The court found that the declarations were “seriously undermined by the declarants’ deposition testimony, which shows that SMs were in fact permitted and encouraged to initiate and participate in many decisions concerning their subordinates’ employment status.” The court concluded that it “fail[ed] to see how plaintiffs could litigate this issue on a common basis” and that “if defendant management failed to permit SMs to participate in hiring decisions (here, an assumption, because there is no evidence in the record showing such a failure), it would not have been based upon a common policy or practice or other evidence reasonably extrapolated to the plaintiff class, but rather, an isolated occurrence based upon individual experience.”

As to the exercise of discretion and independent judgment, plaintiffs had contended that the defendant policies and operations manuals demonstrated that defendant so micromanaged SMs’ daily and weekly activities that they did not customarily or regularly exercise discretion and independent judgment. The court determined, however, that the policies and procedures “do not divest SMs of the exercise of discretion.” The court explained that the policies and procedures only addressed specific areas of defendant concern, but left SMs “significant leeway to determine how, when, and by whom defendant’s standards [were] met.” The court found that plaintiffs’ declarations that denied exercise of discretion or independent judgment were contradicted by the depositions, in which “these declarants admitted that they did in fact exercise judgment in ways that were outside of the policy and practice manuals, or even contrary to them.” The court concluded that plaintiffs had “offered no common evidence from which a finder of fact could draw conclusions about SMs’ degree of discretion” and that

“the deposition testimony suggests that SMs’ experience varied based upon individual circumstances.”

Finally, the court examined the issue of whether SMs primarily engaged in duties that meet the test of the exemption. Dealing with this issue at trial would involve an analysis of the tasks performed by SMs, classifying them as exempt or nonexempt, and an analysis of how much time SMs spent performing exempt versus nonexempt tasks. The court agreed with plaintiffs that the classification of tasks could be litigated with common evidence, but found that plaintiffs had “not adequately explained how the time allocation issue could be litigated with reference to common—as opposed to individualized—evidence.” The court continued: “[Plaintiffs] have not shown that defendant’s common policy and procedure documents dictate how and when SMs perform their jobs; they only set minimum standards and provided tools to achieve those standards. This is not sufficient to show how SMs actually allocated their time. [Citation.] Moreover, the only common evidence presented in connection with this Motion tends to show that defendant discouraged SMs from expending a significant amount of time on nonexempt tasks (such as working on cars). Plaintiffs have provided no common evidence showing that defendant management practices directed to the putative class as a whole compelled SMs to disobey defendant’s management directives.”

The court observed that plaintiffs had admitted that the issue of time allocation is not common, but that they contended that the amount of time spent on specific tasks could be established through a survey or extrapolation from sample evidence. The court found that “this proposal ignores the evidence in the record, most of which shows that SMs’ actual activities varied widely from store to store and were not predetermined by defendant’s policies or procedures. [Citation.] This suggests that the court could not fairly extrapolate a common SM experience from the testimony of individual class members.”

Summarizing its findings on the exemption issues that would be contested at trial, the court concluded that “all of the creditable evidence before the court strongly suggests a total absence of common evidence” on the question of misclassification. The evidence,

said the court, does not tend to show “any pattern or practice of misclassification by defendant. Even crediting plaintiff’s highly suspect declarations, the evidence does not suggest that any misclassification was more than an isolated, sporadic incident.”

As to whether common issues predominated, the court concluded that some common factual and legal issues were present, including defendant’s “realistic expectations” of SMs, whether defendant kept time records for SMs, and whether certain tasks are exempt or nonexempt. “However, predominance is a comparative concept. Some of the common issues are unlikely to be significant aspects of the trial. (For example, defendant has admitted in written discovery that it did not keep time records for SMs.) Taking into account both the number and nature of disputed issues in this litigation, common issues do not predominate over individualized ones.”

The plaintiffs had proposed a trial plan which they believed would make individualized issues manageable within a class action. The court termed this a “ ‘trial by survey’ procedure” and found that plaintiffs had not adequately explained how this would be done, consistent with due process. “Plaintiffs seem to admit that variances in data would affect the amount of time spent on various tasks, which goes to liability . . . . The trial by checklist approach could deprive defendant of due process unless the questionnaires were merely a prelude to an individualized hearing process. [Citation.] Alternately, the checklist process could devolve into a mini-trial of every class member’s time actually spent.”

The court also considered the Lewin declaration and plaintiffs’ proposal for “selecting random class members to provide representative testimony,” with variables among locations addressed by stratifying SMs. “While this proposal is theoretically workable, it appears to require subclasses. Plaintiffs have not proposed any subclasses, and given the number and nature of variables in play and the fact that some locations would possess multiple (variable) characteristics, the court is concerned that there would be ascertainability issues (as to subclasses), adequacy of representation/typicality issues, and/or superiority issues (i.e. that this process would engender further disputes rather than streamlining the litigation). Even if subclasses are not needed, plaintiffs do not

adequately explain how representative witnesses would be identified, how many witnesses would be required, and how, as a practical matter, the jury could reasonably extrapolate from representative witnesses to class members.” The court also noted that the Lewin opinion was based on incomplete information, which did not include “the declarations and the deposition transcripts of plaintiffs and putative class members,” and that “[g]iven the significant contradictions between these two forms of sworn testimony, the court is skeptical that questionnaires to this population would produce reliable evidence.”

Additionally, the court noted that an administrative remedy was available to plaintiffs and that “the apparent main effect of plaintiff’s proposal would be to substitute a court-supervised adversarial hearing procedure for the legislatively-created adversarial administrative procedure.”

## **DISCUSSION**

### ***I. Class Actions and Standard of Review***

Class actions in California are governed by Code of Civil Procedure section 382, authorizing such suits “when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . .”

“To obtain certification, a party must establish the existence of both an ascertainable class and a well-defined community of interest among the class members. [Citations.] The community of interest requirement involves three factors: ‘(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.’ [Citation.] Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing. [Citation.]” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 (*Linder*)). It is the plaintiff’s burden to support each of the above factors with a

factual showing. (*Hamwi v. Citinational-Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462, 471-472.)

“A trial court ruling on a certification motion determines ‘whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.’ [Citations.]” (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).

A trial court’s ruling on a motion for class certification is reviewed for abuse of discretion. (*Sav-On, supra*, 34 Cal.4th at p. 326.) When there is substantial evidence supporting a trial court’s ruling, it will not generally be disturbed unless the court employed improper criteria or made erroneous legal assumptions. (*Id.* at pp. 326-327.)

## **II. Exemptions from Wage and Hour Laws**

The trial court determined that in this case, the applicable wage order was Industrial Welfare Commission Order No. 7-2001 (wage order), regulating wages, hours and working conditions in the mercantile industry. (Cal. Code Regs., tit. 8, § 11070.) The wage order establishes three exemptions (executive, administrative, and professional) from the application of its provisions. (Cal. Code Regs., tit. 8, § 11070, subd. 1(A).) Defendant pled as a defense that putative class members were, during the class period, exempt employees under all three exemptions.

The professional exemption applies only to individuals who are: (1) “licensed or certified by the State of California and [are] primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting” or (2) “primarily engaged in an occupation commonly recognized as a learned or artistic profession.” (Cal. Code Regs., tit. 8, § 11070, subs. 1(A)(3)(a)-(b).) The trial court found that no evidence suggested that the professional exemption would apply to defendant SMs and therefore concentrated on the executive and administrative exemptions.

To establish that the executive exemption applies to an employee, an employer must prove six elements. (Cal. Code Regs., tit. 8, § 11070, subs. 1(A)(1)(a)-(f).) From

the parties briefing on the motion for class certification, the court determined that three of these elements would be at issue: (1) the employee “has the authority to hire or fire other employees or [the employee’s] suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight”; (2) the employee “customarily and regularly exercises discretion and independent judgment” and (3) the employee is “is primarily engaged in duties which meet the test of the exemption.” (Cal. Code Regs., tit. 8, § 11070, subds. 1(A)(1)(c)-(e).)

To establish that the administrative exemption applies to an employee, an employer must prove seven elements. (Cal. Code Regs., tit. 8, § 11070, subds. 1(A)(2)(a)-(g).) Here, the court determined that two of these elements would be at issue: (1) the employee “customarily and regularly exercises discretion and independent judgment” and (2) the employee “is primarily engaged in duties that meet the test of the exemption.” (Cal. Code Regs., tit. 8, § 11070, subds. 1(A)(2)(b), (f).)

Because the elements at issue for the administrative exemption match two of those at issue for the executive exemption, the court found that the relevant three elements for the executive exemption would be the focus of a liability determination at trial. The court recognized that although it was the employer’s burden to plead and prove the necessary facts to establish an exemption at trial, it was the plaintiff’s burden in a motion for class certification to show that common issues of law and fact predominate with respect to the elements of an exemption that would be at issue at trial. (See *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450 [“The affirmative defenses of the defendant must also be considered, because a defendant may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues”].)

### **III. *The Trial Court did not Rely on Improper Legal Criteria***

Plaintiffs do not contend that the court’s findings are unsupported by substantial evidence. Rather, they argue that the trial court relied on improper legal criteria by: (1)

conducting a merits-based analysis of defendant’s proposed defenses, reaching conclusions as to defendant’s ultimate liability; (2) failing to consider the use of subclasses as a means of achieving class certification; (3) requiring plaintiffs to present a full trial plan at the class certification stage; and (4) imposing non-existent exhaustion requirements on plaintiffs.

**A. *The Trial Court did not Conduct an Improper Merits Analysis***

Plaintiffs first argue that the trial court “erred when it opted to conduct a merits-based analysis of defendant’s proposed defenses, complete with a finding on defendant’s liability.” Plaintiffs contend that the court focused on whether plaintiffs had demonstrated that “common answers” existed with regard to putative class members instead of the proper inquiry into whether common questions were present. The trial court framed its analysis as an examination of “whether any or all of these elements [relating to the wage order exemptions] may be (dis)proven by common evidence.” In doing so, plaintiffs argue, the trial court abused its discretion “to the extent that its ruling was based on a resolution of the merits of a proposed defense.”

The question of class certification is “essentially a procedural one that does not ask whether an action is legally or factually meritorious.” (*Linder, supra*, 23 Cal.4th at pp. 439-440.) Nevertheless, “issues affecting the merits of a case may be enmeshed with class action requirements . . . .” (*Id.* at p. 443.) “[T]he trial court must evaluate whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment . . . .” (*Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1531.)

In *Sav-on, supra*, 34 Cal.4th 319, “the Supreme Court considered an order *granting* class certification in an action alleging . . . that salaried managers were misclassified as exempt from overtime wage laws based on their job descriptions without regard to their actual work. The Supreme Court identified the underlying merits of the case as concerning ‘whether or not plaintiffs and those similarly situated properly were classified and paid under th[e] exemption.’ [Citation.] With respect to the trial court’s predominance finding—a comparative concept—the Supreme Court held the standard of

review was whether the record contained substantial evidence. [Citation.] The court explained: ‘[A] reviewing court is not authorized to overturn a certification order merely because it finds the record evidence of predominance less than determinative or conclusive. The relevant question on review is whether such evidence is substantial.’ [Citation.] The court emphasized, ‘But, “[w]here a certification order turns on inferences to be drawn from the facts, ‘ “the reviewing court has no authority to substitute its decision for that of the trial court.” ’ ’ [Citations.]’ [Citation.] Turning to the evidence in the record, the Supreme Court found it was in conflict. The plaintiff had presented evidence deliberate misclassification was defendant’s policy and practice; and further, classification based on job description alone had resulted in widespread misclassification. The defendant’s evidence had shown there were wide variations in the types of activities and the amounts of time managers spent on those activities. The Supreme Court observed there was substantial albeit disputed evidence in support of two theories, either of which was amenable to class treatment: a deliberate misclassification policy and practice, or classification based on job description resulting in widespread de facto misclassification. [Citation.] The court held: ‘A reasonable court, even allowing for individualized damage determinations, could conclude that, to the extent plaintiffs are able to demonstrate pursuant to either scenario that misclassification was the rule rather than the exception, a class action would be the most efficient means of resolving class members’ overtime claims.’ [Citation.]’ (*Arenas v. El Torito Restaurants, Inc.* (2010) 183 Cal.App.4th 723, 733-734 (*Arenas*).

The key observation is that in *Sav-On*, the plaintiffs had presented substantial evidence supporting their theory of recovery, even though that evidence was disputed by defendants. In granting the plaintiffs’ motion for class certification, the trial court was not ruling on the merits of the plaintiffs’ case, but was simply recognizing that the plaintiffs had presented substantial evidence, sufficient to allow the action to proceed as on a class basis, that supported a viable theory of recovery.

Several recent cases have presented the question of how trial courts should treat putative class actions when the court does not find substantial evidence supporting plaintiff's theory of recovery.

In *Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422 (*Dunbar*), grocery managers claimed they had been misclassified as exempt from overtime wage laws. (*Dunbar*, at p. 1424.) The trial court denied the motion for class certification, concluding "that many of the conditions for class certification were met, but that common issues did not predominate, and that a class action was not the superior means of resolving the litigation." (*Id.* at p. 1426.) On review, the court affirmed the trial court's order, observing that "the presence of individual liability issues was only one factor, not the controlling factor in the court's decision. The most important consideration, in the court's view, was the significant variation in the grocery managers' work from store to store and week to week. In light of that variation, the court evidently believed that very particularized individual liability determinations would be necessary." (*Id.* at p. 1431.)

Although *Dunbar's* analysis was not framed as an inquiry into plaintiffs' theory of recovery and whether substantial common evidence had been presented to support it, the analysis could have been framed in those terms. As *Dunbar* observed, "the [trial] court's decision was not based on the mere presence of individual liability issues; it turned on the *nature* of those issues as shown by defendant's evidence." (*Dunbar, supra*, 141 Cal.App.4th at p. 1431.) In *Dunbar*, the plaintiffs' theory of recovery was not susceptible to common proof, but would have required an individualized inquiry into the actual work experience of each putative class member. (*Ibid.*)

In *Arenas*, restaurant managers filed a putative class action claiming that they were misclassified as exempt from overtime wage laws. (*Arenas, supra*, 183 Cal.App.4th at p. 726.) In considering plaintiffs' motion for class certification, the trial court found that "there appears to be differences in individual store operations and in the experience of different putative class members" and concluded that "[b]ased on the record presented, the plaintiffs have not demonstrated that resolution of the common issues of fact and law will be accomplished by common proof that can be extrapolated onto all class members."

(*Id.* at p. 730.) On review, and citing *Dunbar*, the court observed: “[H]aving credited defendants’ evidence over plaintiffs’, the trial court could reasonably conclude there was insufficient evidence of widespread misclassification, hence plaintiffs’ theory of recovery was not susceptible to common proof. [Citations.] In so concluding, the trial court did not improperly require plaintiffs to prove they could prevail on the merits of their claim. It simply considered whether plaintiffs’ theory of recovery . . . was, as an analytical matter, amenable to class treatment. [Citation.] Contrary to plaintiffs’ characterization of the trial court’s ruling, the court did not find predominance *must* be established by evidence the class as a whole was misclassified. The trial court could, without abusing its discretion, conclude the requisite predominance was missing where there was insufficient evidence misclassification was the rule rather than the exception.” (*Id.* at p. 734.)

In *Mora v. Big Lots Stores, Inc.* (2011) 194 Cal.App.4th 496 (*Mora*), store managers sought class certification, alleging that defendant misclassified members of the putative class as exempt employees. (*Id.* at p. 499.) “Relying on declarations from 44 putative class members, the putative class representatives argued the evidence demonstrated that the basic job duties of store managers in California are the same regardless of location and that Big Lots runs all its stores in the state in a uniform and standardized manner. Strict compliance with corporate manuals and action plans, which set forth statewide policies and procedures, is required and such compliance is ensured by district managers, who supervise all store managers. In addition, training of store managers is standardized, and their job performance is evaluated on the same basis and on the same form regardless of purported store-to-store differences.” (*Id.* at p. 500, fn. omitted.) Big Lots presented evidence that it contended showed that “a manager’s duties at each Big Lots store and his or her experience as a store manager vary widely, notwithstanding they all share a job title and the same general job description.” (*Id.* at p. 502.)

The trial court in *Mora*, denying plaintiffs’ motion for class certification, “concluded common questions do not predominate because Big Lots does not operate its

stores or supervise its managers in a uniform and standardized manner that would permit a determination of liability for misclassification of managers on a classwide basis.” (*Mora, supra*, 194 Cal.App.4th at p. 505.) On review, the court concluded that “the [trial] court employed the correct analysis and concluded the theory of recovery advanced—operational standardization imposed by Big Lots—was not supported by substantial evidence and thus not amenable to class treatment.” (*Id.* at p. 507.) The court considered its conclusion substantially the same as reached in *Arenas* and *Dunbar*. (*Mora*, at p. 509.)

*Dunbar*, *Arenas* and *Mora* are all similar to this case. All involve managers who claimed that their employers misclassified them as employees exempt from overtime wage laws. All involve the theory that the tasks that managers performed and the operations of individual stores, restaurants, or service stations were so standardized that the classification sub-issues (such as ability to hire and fire, exercise of discretion, and time spent on non-exempt tasks) could, in large part, be extrapolated to the class via representative testimony and other common evidence. Each case, including this case, involve defendants who challenged the predominance criterion with evidence that the operations of individual outlets, and the experience of individual managers, so vary because of a number of factors that the classification issue cannot be resolved for the class via common evidence.

Here, in concluding that “none of the evidence on any of the elements tends to show any pattern or practice of misclassification by defendant,” the trial court was not ruling on the merits, but was concluding that plaintiffs’ theory of recovery was not amenable to common proof. As *Sav-On* makes clear, this court cannot substitute its own judgment for the factual inferences that the trial court draws from the evidence. (*Sav-On, supra*, 34 Cal.4th at p. 328 [“But, ‘[w]here a certification order turns on inferences to be drawn from the facts, the reviewing court has no authority to substitute its decision for that of the trial court’ ”].) Based on its assessment of the evidence presented, the trial court here found that insufficient evidence supported the proposition that misclassification was widespread, as opposed to “an isolated, sporadic incident.” As in

*Arenas*, “[t]he trial court could, without abusing its discretion, conclude the requisite predominance was missing where there was insufficient evidence misclassification was the rule rather than the exception” without having embarked on an improper consideration of the merits. (*Arenas, supra*, 183 Cal.App.4th at p. 734.) When a trial court asks whether there has been a showing that common evidence provides support for plaintiff’s theory of recovery, there is no error when the court determines the “common answer” that it does not. (See *Mora, supra*, 194 Cal.App.4th at p. 507 [no legal error was committed when trial court found that plaintiffs’ theory of recovery was not supported by substantial evidence and thus not amenable to class treatment]; *Sotelo v. Medianews Group, Inc.* (2012) 207 Cal.App.4th 639, 655 [affirming the denial of a motion for class certification where defendants had failed to make “a factual showing that any such [uniform practice or] policy could be established by common evidence”].)

Plaintiffs contend not only that the court’s predominance finding was based on an improper merits analysis, but that the court also improperly considered the merits of each of the elements of the exemption that would be at issue in the case. Plaintiffs’ arguments in this regard have no merit because the trial court, in examining the issues of ability to hire and fire (or make recommendations that are given weight), exercise of discretion or independent judgment, and amount of time spent on exempt tasks, was simply examining whether plaintiff had satisfied its burden of showing that common evidence had been presented that could resolve these issues in plaintiffs’ favor. (See *Arenas, supra*, 183 Cal.App.4th at p. 730 [“ ‘[a] plaintiff must have common evidence to support a legal theory of misclassification’ ”].) Only by examining whether common evidence supports the individual elements at issue could the trial court here have determined whether, overall, common evidence supports plaintiffs’ legal theory.

**B. *The Trial Court did not Err by Inadequately Considering the Use of Subclasses***

A trial court “has an obligation to consider the use of subclasses and other innovative procedural tools proposed by a party to certify a manageable class.” (*Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 653.) Plaintiffs contend that by proposing to use selected class member testimony to stratify SMs to account for

variations across store locations, they were in effect proposing subclasses. The trial court observed of plaintiff's proposal: "While this proposal is theoretically workable, it appears to require subclasses. Plaintiffs have not proposed any subclasses, and given the number and nature of variables in play and the fact that some locations would possess multiple (variable) characteristics, the court is concerned that there would be ascertainability issues (as to subclasses), adequacy of representation/typicality issues, and/or superiority issues (i.e. that this process would engender further disputes rather than streamlining the litigation)."

We agree with the trial court that plaintiffs' proposal to stratify SM testimony to account for variations was not equivalent to a proposal for subclasses. Certification of a subclass has the same requirements as for the class at large and plaintiffs' briefs did not address the ascertainability or community of interest requirements in regard to the subclasses they now claim to have proposed. Because plaintiffs did not actually propose subclasses, we find no error in the trial court's treatment. (See *Block v. Major League Baseball* (1998) 65 Cal.App.4th 538, 545 ["the plaintiffs failed to provide the trial court with a concrete proposal describing how such subclasses would be defined, how they would be administered, or how they would help the court deal with the complexities inherent in the proposed class. We cannot conclude the trial court erred when it failed to consider something the plaintiffs never proposed"], fn. omitted.)

Plaintiffs cite federal authority for the proposition that a court of appeals may remand a denied motion for class certification to the trial court in order that subclasses may be considered, even if the plaintiffs had not previously proposed them. Plaintiffs could have found support for this proposition in California law. As an example, consider: "Because the complexities of the case on which the trial court relied to find class certification inappropriate can be addressed by the use of subclasses and, with those issues resolved, the requirements for class treatment are satisfied, we reverse the order denying certification and remand the matter with directions for the trial court to certify two subclasses of Cintas employees . . . ." (*Aguiar v. Cintas Corp. No. 2* (2007) 144 Cal.App.4th 121, 125.) We will not order the trial court to consider subclasses, however,

when plaintiffs fail, as they do here, to cite evidence in the record that establishes the possibility that a reasonable number of ascertainable subclasses could be constructed that satisfy the commonality requirement and manageably resolve the issues of individual evidence that the trial court identified. In the absence of such evidence, we find no abuse of discretion in the trial court's handling of the question of subclasses. (See *Osborne v. Subaru of America, Inc.*, *supra*, 198 Cal.App.3d at p. 658 [rejecting plaintiffs' suggestion that "creative formation of subclasses" would resolve issues of different rules of law because "[p]laintiffs have made no showing that subclasses would be feasible here"].)

### ***C. The Trial Court did not Err by Requiring a Detailed Trial Plan***

The trial court's order stated that plaintiffs' "'trial by survey' procedure" did "not adequately explain how plaintiffs intend to do so, consistent with due process." The order also noted that plaintiffs had proposed "selecting random class members to provide representative testimony, and suggest that the variables among locations can be addressed by stratifying the SMs." The court commented: "Plaintiffs do not adequately explain how representative witnesses would be identified, how many witnesses would be required, and how, as a practical matter, the jury could reasonably extrapolate from representative witnesses to class members." Plaintiffs contend that "[r]equiring such a detailed roadmap at class certification belies the legal reality that a full trial plan is not only unnecessary for class certification but also often impossible to develop. No authority calls for plaintiffs to present a full trial plan at the class certification stage, so the trial court's denial on this basis is reversible error."

"[T]he party seeking certification must demonstrate that the proposed class action is manageable which requires the trial court to 'carefully weigh the respective benefits and burdens of a class action and to permit its maintenance only where substantial benefits will be accrued by both litigants and the courts alike.'" (*Davis-Miller v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 106, 115, fn. 6, quoting *Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1275.) "It is not sufficient . . . simply to mention a procedural tool; the party seeking class certification must explain

how the procedure will effectively manage the issues in question . . . .” (*Dunbar, supra*, 141 Cal.App.4th at p. 1432.)

Because plaintiffs here bore the burden of demonstrating that proceeding on a class basis would be manageable, the trial court properly examined plaintiffs’ manageability proposals. The court determined that specific issues of manageability were not resolved by plaintiffs’ proposals. The most serious issue for the court was that plaintiffs had not explained how the jury could reasonably extrapolate from representative witnesses to the class as a whole, a concern that harkens back to the numerous individual factors that the court had already determined would affect liability. The court was also skeptical that surveys of SMs would produce reliable evidence because of the significant differences between the SM declarations and the SM testimony during deposition.

The trial court analyzed plaintiffs’ manageability proposals in a thoughtful and thorough manner and found them wanting. We discern no abuse of discretion in the trial court’s analysis. (See *Dunbar, supra*, 141 Cal.App.4th at p. 1432 [“the record does not establish that the court failed to consider the use of exemplar plaintiffs, survey results, subclassing, or the other means plaintiff mentioned of managing individual issues. The court impliedly rejected those proposals in concluding that findings as to one grocery manager could not reasonably be extrapolated to others given the variation in their work”].)

#### **D. The Trial Court Did not Err by Requiring Exhaustion**

The court’s concluding paragraph in the section titled “Superiority and Trial Management” was: “In addition, Labor Code section 98 provides hearings that are supposed to be a ‘speedy, informal, and affordable method of resolving wage claims.’ (*Post v. Palo/Haklar & Associates* (2000) 23 Cal.4th 942, 947 [(*Post*)].) The apparent main effect of plaintiffs’ proposal would be to substitute a court-supervised adversarial hearing procedure for the legislatively-created adversarial administrative procedure.” In a footnote to this paragraph, the court noted: “Plaintiffs cite *Wang v. Chinese Daily News* (C.D. 2005) 231 F.R.D. 602, contending that it rejected this factor as relevant; however,

that case is distinguishable as there is no evidence on the present record that defendant has attempted to stymie a DLSE investigation.” Plaintiffs argue that no authority suggests that they were required to pursue their claims through this administrative procedure and that its availability has no bearing on a motion for class certification.

“[I]n assessing the appropriateness of certification trial courts are charged with carefully weighing the respective benefits and burdens of class litigation to the end that maintenance of the class action will only be permitted where substantial benefits accrue to the litigants and the court. [Citation.] This obligation entails considering the role of the class action mechanism in deterring and redressing wrongdoing. [Citation.] Further, the substantial benefits analysis raises the question whether a class action is superior to individual lawsuits *and other alternative procedures* for resolving the controversy. [Citations.]” (*Capitol People First v. State Dept. of Developmental Services* (2007) 155 Cal.App.4th 676, 689, italics added.)

Because it is proper for a court to consider alternative procedures for resolving the controversy in determining whether a class action is the superior procedure, the court did not err by noting the existence of an administrative remedy. Nothing in the court’s language indicates that the court was requiring the exhaustion of administrative procedures. Rather, the court implied that a class action would not be superior to the administrative procedures, and given the court’s prior finding that common issues did not predominate over individual issues, we cannot fault that conclusion.

#### ***IV. The Court Employed the Proper Criteria for Evaluating Predominance***

Plaintiffs contend that the court erred in its predominance analysis by: (1) failing to consider relevant factors; (2) misapplying the factors it did consider; (3) overlooking “key *Ramirez* factors” (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785 (*Ramirez*)); (4) underweighting pivotal common evidence; and (5) improperly performing the superiority analysis.

##### ***A. The Court Did not Fail to Consider Relevant Factors***

Plaintiffs argue that “[t]he trial court does not even discuss the breadth of common facts that plaintiffs identify in their Motion (and which defendant does not dispute) such

as defendant’s highly standardized customer service requirements, its employee hierarchy, its orientation and training protocols, its tools and equipment, its job description, the limited products and services it sells and its picture-specific work environments which were **the same for all the SMs in California**. The trial court ignored myriad *undisputed evidence* that defendant strived for ‘a consistent store presentation’ at all of its company owned stores, micromanaged even the most mundane details of store operations, afforded the SMs’ extremely limited responsibility for day-to-day management of each store’s finances and enforced rigorous adherence to uniform environmental controls. . . . Instead, the trial court should have considered whether such common evidence can be used to determine whether defendant’s uniformly applied restraints on the SMs’ discretion and independent judgment categorically disqualify the SM position for coverage under the executive exemption.”

Plaintiff’s argument fails because the court clearly considered the common evidence that plaintiffs claim it ignored: “Plaintiffs contend that common evidence—the Pacesetter manual and other . . . policies and operations manuals—show that defendant micromanaged SMs to such an extent that SMs’ daily and weekly activities, and their response to every conceivable situation, was pre-determined. Plaintiffs contend on this basis that SMs did not customarily or regularly exercise discretion and independent judgment. Defendant’s policies and procedures do tend to show that Regional Managers were charged with closely monitoring many aspects of store operations and SMs’ compliance with procedure, but they do not divest SMs of the exercise of discretion. Defendant’s policies and procedures, on their face, only address specific concerns such as customer experience, and promulgated standards and procedures in selected areas, such as loss prevention and safety. These documents do not dictate every aspect of SM’s performance. Rather, they leave to SMs significant leeway to determine how, when, and by whom defendant’s standards are met. [Citations.] Even if you assume that SMs followed these operating procedures exactly, these documents do not constitute evidence of SMs’ actual work experience. [Citation.]”

## **B. The Court Did not Misapply the Factors It Did Consider**

Plaintiffs contend that “[T]he Order failed to ascribe sufficient weight to its own conclusions that (1) the employer’s ‘ “realistic expectations” of SMs could be proven by common evidence’ [citation] and (2) ‘the question of whether certain tasks are exempt or nonexempt is common as to all class members, and could be litigated by reference to common evidence.’ [Citation] Despite express findings that common evidence could be used to adjudicate a dispositive common issue—i.e., whether the exemption applies—on a classwide basis, the trial court opined that ‘predominance is a comparative concept. Some of the common issues are unlikely to be significant aspects of the trial.’ [Citation] Since common evidence can be used to adjudicate **two key common questions**, the Order should be reversed . . . .”

In the predominance analysis, “the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants.” (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 460 (*San Jose*), superseded by statute on other grounds, Gov. Code, § 905.1; accord, *Sav-On, supra*, 34 Cal.4th at p. 339.) Here, the trial court expressly acknowledged that there were some common issues, but determined that some were unlikely to be significant at trial, presumably because there would be little basis for dispute. The court concluded: “Taking into account both the number and nature of disputed issues in this litigation, common issues do not predominate over individualized ones.” The court properly considered the number and the “nature” of the common issues (i.e., whether they would be “substantial”) and we have no basis for concluding that the court gave improper weight to the common factors that plaintiffs have identified. (See *Dunbar, supra*, 141 Cal.App.4th at p. 1431 [“the court’s decision was not based on the mere presence of individual liability issues; it turned on the *nature* of those issues as shown by defendant’s evidence. The decision was thus on solid legal footing”].)

### ***C. The Trial Court Did not Overlook “Key Ramirez Issues”***

The work order’s executive and administrative exemptions require that an exempt employee be primarily engaged in performing exempt duties. (Cal. Code Regs., tit. 8, § 11070, subds. 1(A)(1)(e), (2)(f).) The provisions for both exemptions provide: “The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer’s realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.” (*Ibid.*)

Plaintiffs contend that the realistic expectations of the employer can be a dispositive issue because “if the employer’s expectations of a class of purportedly exempt employees are not realistic, the position is categorically nonexempt.” Because the court found that the realistic expectations of defendant could be proved by common evidence, plaintiffs argue that this “alone warrants class certification.”

Plaintiffs’ argument would have merit if they were correct in contending that if it were not realistic for defendant to expect that SMs would be primarily engaged in performing exempt duties, then SMs were misclassified. Their contention, however, flies in the face of the wage order, which specifies that the work actually performed by the employee during the course of the workweek must first be examined, and the court here determined that the actual work performed could not be proved by common evidence.

Plaintiffs cite only one case in support of their proposition, *Cruz v. Dollar Tree Stores, Inc.* (N.D.Cal. 2010) 270 F.R.D. 499, 503<sup>2</sup> (*Cruz*): “The employer must establish that it realistically expected managers to spend at least half their time on exempt tasks.” In support of this statement, *Cruz* cited *Ramirez, supra*, 20 Cal.4th at page 802, where we find: “A trial court, in determining whether the employee is an outside salesperson, must

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<sup>2</sup> The citation is to an order of the court granting in part and denying in part defendant’s motion to decertify a class of store managers who claimed to have been misclassified as exempt. (*Cruz, supra*, 270 F.R.D. at p. 500.) It bears noting that the court later decertified the class. (*Cruz v. Dollar Tree Stores, Inc.* (N.D.Cal. July 8, 2011, Nos. 07–2050 SC, 07–4012 SC) 2011 WL 2682967 at p. \*1.)

steer clear of these two pitfalls by inquiring into the realistic requirements of the job. In so doing, the court should consider, first and foremost, how the employee actually spends his or her time. But the trial court should also consider whether the employee’s practice diverges from the employer’s realistic expectations, whether there was any concrete expression of employer displeasure over an employee’s substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job.” *Ramirez* agrees with the language of the work order that the initial consideration is how the employee actually spends his or her time and does not support the conclusion that *Cruz* drew from it.

The Supreme Court has criticized the use of *Ramirez* as providing guidance in class actions: “*Ramirez* was not a class action and, to that extent, is not apposite. In *Ramirez*, we did not even discuss certification standards, let alone change them. Accordingly, *Ramirez* is no authority for constraining trial courts’ ‘great discretion in granting or denying certification’ [citation] or, more particularly as defendant asserts, for applying a particular set of ‘factors’ whenever plaintiffs in an overtime case seek class certification. The certification of a class is a discretionary decision that demands the weighing of many relevant considerations. [Citation.] And even as an overtime exemption case, *Ramirez* is not particularly apposite. Our analysis was tied to the ‘logic inherent in the IWC’s quantitative definition of outside salesperson’ [citation] and would not necessarily apply, or apply with the same force, in every exemption context. We expressed in *Ramirez*, for example, a concern that under a pure ‘actual activity’ test, an employee assigned to sell might ‘evade a valid [outside salesperson] exemption’ by his own ‘substandard performance’ in selling. [Citation.] No one suggests a similar concern applies here.” (*Sav-On, supra*, 34 Cal.4th at p. 336.)

We conclude that plaintiffs’ argument fails because it is grounded on a faulty legal assumption.

**D. *The Trial Court Did not Err by Underweighting Pivotal Common Evidence***

Plaintiffs contend that they “submitted sufficient common evidence to show that common questions can be addressed on a classwide basis. The trial court, however,

ascribed insufficient weight to its finding that ‘the question of whether certain tasks are exempt or nonexempt is *common as to all class members*, and could be litigated by reference to common evidence.’ ” Plaintiffs criticize the court for comparing the instant case to *Marlo v. United Parcel Service, Inc.* (C.D.Cal. 2008) 251 F.R.D. 476 (*Marlo*). They conclude: “Since the trial court has already found that common evidence can be used to adjudicate pivotal common questions, it could and should have concluded that common issues do in fact predominate over individualized inquiries.”

Plaintiffs argument has no merit because it fails to recognize that the predominance inquiry is a comparative one. (*Sav-On, supra*, 34 Cal.4th at p. 334.) Even if a court finds that some issues are common and can be proved by common evidence, “each member must not be required to individually litigate numerous and substantial questions to determine his right to recover following the class judgment; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants.” (*San Jose, supra*, 12 Cal.3d at p. 460.) Thus, even though the court found that the issue of classifying tasks as exempt or nonexempt could be litigated by reference to common evidence, that finding did not require the court to resolve the predominance question in plaintiffs’ favor.

As for the comparison to *Marlo*, the court wrote: “[This case] is more like *Marlo* in which the court found that the ‘declarations and deposition testimony of FTS submitted by the parties suggest variations in job duties that appear to be a product of employees working at different facilities, under different managers, and with different customer bases.’ ” (Quoting *Marlo, supra*, 251 F.R.D. at p. 486.) The court, in the preceding paragraph, had determined that the evidence tended to show that “SMs’ actual activities varied widely from store to store and were not predetermined by defendant’s policies or procedures.” Given that determination, we cannot say that the comparison to *Marlo* was inapt.

### ***E. The Trial Court Did not Improperly Apply the Superiority Analysis***

Plaintiffs first contend that the trial court “misapplied the superiority and trial management standards. The gravamen of authority holds that the class action device is indeed the superior mechanism by which to adjudicate wage and hour cases.” While California encourages the use of class actions in wage and hour cases (see *Sav-On, supra*, 34 Cal.4th at p. 340), this does not relieve plaintiffs’ in wage and hour cases from satisfying the requirements for class certification.

Plaintiffs’ arguments on this issue have no merit because they simply repeat their prior arguments or misinterpret the court’s order. For example, plaintiffs again criticize the court’s handling of their trial management plans and again bring up the “*Ramirez* issues.” In criticizing the court’s determination that “the checklist process could devolve into a mini-trial of every class member’s time actually spent,” plaintiffs contend that “any variation in total hours worked is a *damages* issue and subject to adjudication through expert analysis.” However, the “time actually spent” refers not to overtime hours, a damages issue nowhere addressed in the court’s order, but to the time actually spent performing exempt tasks, a liability issue firmly at the center of the court’s discussion.

Plaintiffs also contend that the court’s superiority analysis relies on inapposite case law and that the court misapplied the legal authorities upon which it relied. In particular, they object to the court’s use of *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191 (*Johnson*) and *Post, supra*, 23 Cal.4th 942.

The court employed a quote from *Johnson* to buttress its concern that the “trial by checklist approach could deprive defendant of due process unless the questionnaires were merely a prelude to an individualized hearing process.” The passage quoted from *Johnson* was: “In a class action, once the issues common to the class have been tried, and assuming some individual issues remain, each plaintiff must still by some means prove up his or her claim, allowing the defendant an opportunity to contest each individual claim on any ground not resolved in the trial of common issues.” (*Johnson, supra*, 35 Cal.4th at p. 1210.) The citation to *Johnson* was on point to the court’s due process concern. Plaintiffs contend that the court’s analysis was flawed because their

proposed trial plan does not call for individual proof of liability, apparently relying on the *Ramirez*-based argument that we discussed and rejected above. Accordingly, we find no fault in the court’s use of *Johnson*.

The court employed *Post* to describe the alternative of administrative hearings: “In addition, Labor Code section 98 provides hearings that are supposed to be a ‘speedy, informal, and affordable method of resolving wage claims.’ ” (Quoting *Post, supra*, 23 Cal.4th at p. 947.) Plaintiffs’ objection to the use of *Post* simply repeats their contention that the court was requiring administrative exhaustion—a contention that we have already found to have no merit.

**DISPOSITION**

The order of the trial court denying plaintiffs’ motion for class certification is affirmed.

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Lambden, J.

We concur:

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Kline, P.J.

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Richman, J.