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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CHAVOS & RAU, APLC,

Plaintiff and Appellant,

v.

PROCOURIER, INC.,

Defendant and Respondent.

G047526

(Super. Ct. No. 30-2010-00397235)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Steven L. Perk, Judge. Affirmed.

Law Offices of Michael Lee Gilmore and Michael Lee Gilmore for Plaintiff and Appellant.

Jones Day, Paul F. Rafferty, Ann T. Rossum; Law Office of Patrick J. D’Arcy and Patrick J. D’Arcy for Defendant and Respondent.

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Plaintiff Chavos & Rau, APLC (C&R) appeals from an order denying its motion to certify a class action against defendant ProCourier, Inc. (ProCourier) in this case alleging fraud in courier service contracting and billing. C&R places heavy emphasis on the fact that prior to the court’s certification ruling, ProCourier sent an opt-out notice to putative class members. According to C&R, sending out the notice means that ProCourier “admitted that this action is proper for class certification,” and ProCourier had, by the opt-out notice alone, established the elements necessary for class certification. As we will discuss below, ProCourier did no such thing, and even if they had, the trial court was not required to accept any such concession and automatically certify the class. Rather, the trial court was responsible for conducting its own analysis of the class certification requirements, and in doing so, it decided that class treatment was not appropriate. We agree the trial court appropriately exercised its discretion and therefore affirm.

## I FACTS

### *A. C&R Hires ProCourier*

ProCourier provides courier, delivery, service of process and filing services for California attorneys and law firms. In November 2008, C&R principals Anthony G. Chavos and Laurie D. Rau met with ProCourier representatives including sales/marketing coordinator Jerry Beasley, driver Robert Huerta, and executive director Chris Trindale. According to the complaint, the ProCourier representatives “made representations and agreed upon a monthly flat fee (\$50) for pickup and regular route filing at various courts . . . .” At the initial meeting, Beasley testified later, Chavos favorably compared ProCourier’s rates with the rates C&R’s current courier was charging for similar services.

C&R states they were provided with a credit account application and an On Demand Rate Sheet after this meeting, but according to ProCourier, they were also given a Court Services/Service of Process Rate Sheet (the Court Services Rate Sheet), which

was customized for C&R. Rau later stated she was never shown the Court Services Rate Sheet. The fees on the Court Services Rate Sheet (which are somewhat difficult to read from the copy in the record) apparently reflected the additional cost per filing of documents in different courts, with courts closer to C&R's offices costing less and those more distant costing more. The daily route pickups also had lower fees than special pickups. As opposed to the Court Services Rate Sheet, which addressed filing and service of process, the On Demand Rate Sheet reflected the cost of messenger services to various zip codes in Southern California.

The Court Services Rate Sheet and the On Demand Rate Sheet indicated 92707 as the originating zip code, which was the same zip code as C&R's offices, according to the caption of the complaint. According to the testimony of Terry Tomich, ProCourier's co-owner, the client's zip code is important because its rates are largely determined by distance from the origin to the final location. C&R was the only client in the 92707 zip code during the pertinent time period.

On November 22, 2008, C&R retained ProCourier, which started providing services in January 2009. According to the complaint, from January 2009 to March 2010, "Plaintiff paid Defendant Courier amounts billed," but according to both Tomich and Beasley, C&R's account was delinquent within a few months. Beasley testified that he repeatedly attempted to talk to C&R about its delinquency as early as May 8, 2009. As of November 2009, C&R was over \$32,000 in arrears, which Chavos and Rau promised, in a December 2009 meeting, to substantially reduce within 60 days. No payment was made, and Beasley again contacted C&R on March 5, 2010 about its balance which by then exceeded \$38,000. C&R once again made a promise to pay, but did not. In March 2010, ProCourier terminated its agreement with C&R. ProCourier sued C&R and won "certain amounts," apparently in small claims court.

According to the complaint, however, it was in January 2010 when C&R claims to have learned that a \$1,740 billing for service of process attempts was false. At

a mediation in another case, C&R was told by opposing counsel that the party had “been available at all times for service of process,” and thus, ProCourier’s due diligence declaration was false. This, according to C&R, caused them to review their past bills, apparently for the first time, and they discovered that ProCourier “charged higher rates for attorney services than those advertised and agreed upon.” The complaint referred to “tack-on” fees for items such as parking, fuel surcharges and court waiting times, which had never been disclosed. “In fact, representation had been to the contrary. That there was one flat fee, period.” The Court Services Rate Sheet states, at the bottom, “Additional charges may apply including (but not limited to) fuel surcharge, exclusive time, wait time, witness fees, parking, copies, fax, fedex and any miscellaneous charges . . . .” These “tack-on” fees, as the complaint calls them, were the basis for C&R’s lawsuit.

### *B. Pleadings*

C&R filed its initial complaint in August 2010 and a first amended complaint in October. The first amended complaint alleged fraud, breach of contract, and unfair business practices. Both complaints were filed by C&R, which purported to act as both class representative and class counsel. In December, ProCourier demurred, and the court sustained the demurrer with leave to amend.

The second amended complaint (the complaint) was filed in May 2011, and alleged causes of action for fraud, intentional misrepresentation, negligent misrepresentation, violations of the unfair competition law (Bus. & Prof. Code, § 17200, et seq.) (UCL), and three separate claims under the federal Racketeering Influenced Corrupt Organizations Act (18 U.S.C. § 1962) (RICO).

The complaint was filed on C&R’s behalf as putative class representatives by both C&R and its current counsel Michael Lee Gilmore. All of the causes of action were essentially based on the same facts, specifically, that ProCourier had billed for

services in excess of the contract and the rate schedule, and the Court Services Rate Sheet was never disclosed. C&R also alleged that ProCourier had inflated its charges by misrepresenting that individuals could not be served, when in fact they were available.

In the complaint, the class definition was set forth as: “All attorneys and law firms in the State of California who used the court and ancillary legal support services (including but not limited to service of process, messenger services court filings, etc.) of Defendants and were subjected to a ‘bait and switch’ of prices and/or incurred damages as a result of unjustified and improper charges for services from January 1, 2009 until resolution of this lawsuit.”

While ProCourier’s demurrer was pending, C&R was advised by the court on January 31, 2011, that it could not act as counsel based on California law prohibiting an attorney from acting as both class representative and class counsel. A new attorney, John Mulvana, was just substituting into the case at that time. On February 22, C&R appeared again, with an attorney “representing Chavos & Rau individually.” The court once again stated that there needed to be a substitution of attorneys, not an association, as C&R could not appear. Rather astonishingly, C&R appeared again at the next court date on April 16, 2012, once again purporting to represent C&R individually. The court, rather exasperated at this point, asked counsel if she did not understand the three prior rulings that had been made on that issue. The court instructed that “Chavos & Rau are to file a withdrawal. . . . Chavos & Rau are not the attorneys and cannot be the attorneys in this case.” Gilmore was, apparently, the sole attorney for C&R and the putative class from that point forward.<sup>1</sup>

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<sup>1</sup> This issue was not completely laid to rest, however, because although C&R was represented by counsel, service of case-related documents on their own attorney was apparently not sufficient. C&R demanded that they be included on proofs of service for documents served in the case. In a letter dated March 29, 2012 from Rau to ProCourier’s counsel, she stated: “We are beginning to think you are missing substantial chromosomes in your body and are unable to understand what we have reminded you about on numerous occasions.”

### *C. Class Certification*

In January 2012, ProCourier sent out a “Putative Class Action ‘Opt-Out’ Form” to those whom ProCourier believed might be in the class, based on the definition set forth in the complaint. The notice fairly summarized the allegations and gave instructions for opting out. According to Gilmore, “[he] received no notification that any putative class member ha[d] elected to opt out of the class.” According to ProCourier’s brief on appeal, a substantial number did, but ProCourier suspended that effort when the motion to certify the class was denied. It is fair to say there is no conclusive evidence on this point either way, but as we shall address shortly, it is ultimately irrelevant.

On June 22, 2012, C&R filed the instant motion, asserting that it met each of the requirements for class certification. C&R also changed the class definition significantly from the definition set forth in the complaint, seeking to define the class as: “All attorneys and law firms in the State of California, who filled out a Credit Account Application, and who were given an On Demand Rate Sheet and who received legal support services from Pro-Courier, Inc. from January 1, 2009 until resolution of this lawsuit.” (Italics omitted.)

C&R’s exhibits included documents obtained from ProCourier in discovery that purported to identify 113 attorneys or law firms who received services from ProCourier. These documents showed “tack-on” fees similar to the ones charged to C&R. Gilmore submitted a declaration authenticating these documents. His declaration said nothing about his own qualifications. C&R did not include any evidence from any of the putative class members that supported C&R’s claims.

ProCourier filed its opposition in August, arguing that none of the requirements for a class action had been met. It argued that its add-on fees were set forth in the Court Services Rate Sheet, and even if C&R alleged it had not received that document, it had no basis to contend every other class member also failed to receive it. It submitted a declaration from Beasley stating C&R had been provided with a copy of that

schedule and recounted his discussion of it with Chavos. Tomich's declaration stated that ProCourier had a "custom and practice" of providing each potential client with a copy of the rate sheet. In addition to other arguments, ProCourier also questioned the adequacy of Gilmore to represent the class, pointing out the lack of evidence offered in the motion to certify, and their own evidence that Gilmore had been sued for malpractice on multiple occasions. ProCourier also questioned the class definition as unascertainable and overbroad.

In their reply brief, which was filed several days late, C&R attempted to refute ProCourier's arguments, but essentially its brief repeated the same points offered in their initial motion. The only new evidence was Gilmore's declaration that asserted he was well-qualified to represent the class (in rather conclusory fashion). C&R objected to this declaration for introducing new matter in a reply brief without justification.

Prior to the hearing on August 17, 2012, a tentative ruling denying the motion to certify was apparently posted, but it does not appear to be included in the record. C&R had nothing to add at oral argument, and ProCourier also submitted on the tentative. On September 6, the court signed an order denying the motion. We will discuss the reasons for the court's decision as warranted below.

C&R timely filed the instant appeal. The appeal was dismissed twice for failure to comply with various procedural rules, but eventually was reinstated.

## II

### DISCUSSION

#### *A. Statutory Framework*

The requirements for certifying a class action are set forth in Code of Civil Procedure section 382. Class actions are permitted "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." (Code of Civ. Proc., § 382.)

“Drawing on the language of Code of Civil Procedure section 382 and federal precedent, we have articulated clear requirements for the certification of a class. The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. [Citations.]” (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*)). “In turn, the “community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.” [Citations.]” (*Ibid.*) Courts may also consider whether the class action procedure is “superior” to litigating claims individually. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 332.)

Finally, “because group action also has the potential to create injustice, trial courts are required to “carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts.” [Citations.]” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

### *B. Standard of Review*

A trial court is required to “examine the allegations of the complaint and supporting declarations [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible.” (*Brinker, supra*, 53 Cal.4th at pp. 1021-1022, fn. omitted.) But on appeal our review of orders denying class certification is “narrowly circumscribed.” (*Id.* at p. 1022.) “Our task on appeal is not to determine in the first instance whether the requested class is appropriate but rather whether the trial court has abused its discretion in denying certification.” (*Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 654.)

“The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: “Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.” [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.]’ [Citations.]” (*Brinker, supra*, 53 Cal.4th at p. 1022; see also *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311 [trial court accorded “great discretion” in certification decision].) “We must ‘[p]resum[e] in favor of the certification order . . . the existence of every fact the trial court could reasonably deduce from the record . . . .’ [Citation.]” (*Brinker, supra*, 53 Cal.4th at p. 1022.)

“Any valid, pertinent reason will be sufficient to uphold the trial court’s order. [Citation.]” (*Thompson v. Automobile Club of Southern California* (2013) 217 Cal.App.4th 719, 726.) It is not necessary that *all* the trial court’s reasons be valid. (*Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 844.)

### *C. The Legal Impact of the Precertification Opt-Out Notice*

It is difficult to overemphasize the importance C&R assigns to ProCourier’s precertification opt-out notice. To C&R, the notice is nothing short of a smoking gun. They claim the notice eliminated the need to conduct precertification discovery and essentially eliminated all questions of fact. For example, C&R argues that “if common questions of fact and law did not exist and the class was not ascertainable . . . Defendant would not have been able to determine who to send the pre certification Opt Out Notices to.” According to C&R, the trial court should have treated the opt-out notice as an “effective admission to class certification in this case.”

Unfortunately for C&R, they do not provide any authority whatsoever for this proposition. There is no question that ProCourier vigorously contested the certification motion, rendering any notion that the opt-out notice was an “admission” as simply untrue. Further, even if the notice might be helpful in determining certain factors (ascertainability being the most obvious), the notice was not conclusive. The opt-out notice might suggest the existence, for example, of common questions of law and fact, but it did not establish that such issues were *predominant*, which is the requirement for maintaining a class action. The opt-out notice was not at all probative on whether C&R’s claims were typical of the class, whether C&R and its counsel could adequately litigate the case on the class’s behalf, or whether a class action was a superior method of adjudicating the case.

Indeed, of the class action factors, the only one on which the opt-out notice was in any way helpful or probative was ascertainability, but C&R squandered that small advantage by choosing to redefine the class in its certification motion, which was filed several months after the opt-out notice was mailed. ProCourier had relied on the class definition in the complaint when choosing who to notify, but such notifications were no longer encompassed by the new definition of the class.

Further, even if ProCourier (or any defendant) explicitly admitted that all the requirements of a class action were met, the trial court would still have an independent duty to weigh the benefits and burdens of using the class action procedure and to permit a class action to continue only if substantial benefits would accrue to both the litigants and the courts. (*Linder v. Thrifty Oil Co.*, *supra*, 23 Cal.4th at p. 435.) While the parties’ agreement that a class action was proper would be probative, it would not be conclusive.

But no such concession is at issue here. ProCourier opposed the class certification motion, and contrary to C&R’s assertions to the contrary, the opt-out notice had little impact on the relevant legal issues. C&R, as the plaintiff seeking certification,

was required to establish through evidence that it met each of the requirements to maintain a class action.

*D. Ascertainability*

The trial court found that “C&R has failed to establish that the class is ascertainable. In fact, C&R admits that the class definition is overbroad and that not all putative class members were misled.”

Whether a class is “ascertainable” within the meaning of Code of Civil Procedure section 382 “is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members. [Citations.]” (*Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1271.) “A class representative has the burden to define an ascertainable class. [Citations.] Although the representative is not required to identify individual class members [citation], he or she must describe the proposed class by specific and objective criteria. [Citation.] Ascertainability is achieved “by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible . . . .” [Citations.] Thus, “[c]lass members are ‘ascertainable’ where they may be readily identified without unreasonable expense or time by reference to official [or business] records.” [Citations.]” (*Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 918-919.)

As noted above, in the complaint, the class definition was set forth as: “All attorneys and law firms in the State of California who used the court and ancillary legal support services (including but not limited to service of process, messenger services court filings, etc.) of Defendants and were subjected to a ‘bait and switch’ of prices and/or incurred damages as a result of unjustified and improper charges for services from January 1, 2009 until resolution of this lawsuit.”

In the certification motion, however, the class definition was changed: “All attorneys and law firms in the State of California, who filled out a Credit Account

Application, and who were given an On Demand Rate Sheet and who received legal support services from Pro-Courier, Inc. from January 1, 2009 until resolution of this lawsuit.” (Italics omitted.) This is also the definition it argues in favor of on appeal. We take C&R at its word that this was the class definition it intended to proceed with for the remainder of the case, and consider only whether this definition was adequate.

The new proposed class definition is deeply problematic. C&R’s claims are entirely premised on fraud, specifically, that customers were not provided with the Court Services Rate Sheet listing the “tack-on” charges, but were instead led to believe they had contracted for courier services at a flat rate of \$50 a month. The new class definition, however, does not focus on the alleged fraud, but instead on those who received certain forms not alleged to be fraudulent and “who received support services” from ProCourier. This definition has nothing to do with which customers of ProCourier were defrauded, and also stretches in time from January 1, 2009 to an indefinite date at some point in the future.

The proposed definition is entirely overbroad, encompassing ProCourier’s customers without regard to whether or not they were defrauded or injured. Under this definition, the class would include customers who received a Court Services Rate Sheet and were entirely aware of the “tack-on” charges that form the basis for C&R’s claims. In determining whether certification is appropriate, courts “may consider whether the class ‘definition is overbroad,’ and if plaintiffs have shown that ‘class members who have claims can be identified from those who should not be included in the class.’

[Citations.]” (*Marler v. E.M. Johansing, LLC* (2011) 199 Cal.App.4th 1450, 1460.)

“Courts have recognized that ‘class certification can be denied for lack of ascertainability when the proposed definition is overbroad and the plaintiff offers no means by which only those class members who have claims can be identified from those who should not be included in the class.’ [Citation.]” (*Sevidal v. Target Corp., supra*, 189 Cal.App.4th at p. 921.) C&R offered the trial court an overbroad definition with no means of

appropriately narrowing the class to only those members who were actually injured. Further, its definition stretches far into the future, and would potentially result in a changing class during the litigation itself. Therefore, the ascertainability issue alone was a sufficient basis on which to deny class certification, and we find the court did not abuse its discretion in so concluding.

Although the ascertainability issue is sufficient to uphold the court's order, we shall briefly address two further issues, whether common questions of law and particularly fact predominated, and whether C&R and its counsel could adequately represent the class.

#### *E. Predominance of Common Questions*

“The ‘ultimate question’ the element of predominance presents is whether ‘the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.’ [Citations.] The answer hinges on ‘whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.’ [Citation.] A court must examine the allegations of the complaint and supporting declarations [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible. ‘As a general rule if the defendant’s liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.’ [Citations.]” (*Brinker, supra*, 53 Cal.4th at pp. 1021-1022, fn. omitted.) “Predominance is a factual question; accordingly, the trial court’s finding that common issues predominate generally is reviewed for substantial evidence. [Citation.]” (*Id.* at p. 1022.) The trial court found that common issues did not predominate, and we conclude this decision was supported by substantial evidence.

In *Brinker*, the prospective class representatives sued their employer, alleging the employer's rest break policies violated California law. The employer acknowledged the policy's existence and uniform application to the prospective class members, but argued the policy was legal under state law. The California Supreme Court affirmed the trial court's decision certifying a class of all employees subject to the policy because "[t]he theory of liability—that [the employer] has a uniform policy, and that that policy, measured against wage order requirements, allegedly violates the law—is by its nature a common question eminently suited for class treatment." (*Brinker, supra*, 53 Cal.4th at p. 1033.)

Here, as opposed to the situation in *Brinker*, there are numerous factual issues that would be specific to each putative class member. For example, C&R offered no evidence whatsoever regarding what representations were made to any putative class member other than C&R. We cannot simply assume that because C&R alleges they did not receive the Court Services Rate Sheet, the same is uniformly true with respect to every other class member. (See *Davis-Miller v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 106 [class certification inappropriate when plaintiffs cannot establish the defendant engaged in uniform misconduct that misled entire class].) C&R also argued in its class certification motion that similar oral representations regarding the flat rate of \$50 per month were made to other class members, but again, no evidence of this is provided. Indeed, the only evidence on this point directly contradicts C&R's assertion, as Tomich testified that as a matter of practice, prospective clients receive a Court Services Rate Sheet and an On Demand Rate Sheet.

Class certification is an evidentiary motion, and accordingly, evidence is required. C&R has simply failed to produce any evidence that what was allegedly true for C&R was also true for one other single member of the class, much less all of them. Thus, it did not establish that common issues were predominant, and therefore, the trial court had substantial evidence to conclude that individual issues predominated.

### *F. Adequacy of Representation*

Another prong of the community of interest requirement is a class representative who can adequately represent the class. (*Brinker, supra*, 53 Cal.4th at p. 1021.) This prong also includes the issue of whether the plaintiff’s attorney is qualified to conduct the proposed litigation. (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) The court found that C&R had failed to establish it was an adequate representative and that there was no evidence its counsel had class action experience.

With respect to C&R, several acts call into question its ability to act in the best interests of the class. Its repeated attempts to continue to be involved as both class representative and as counsel indicate a profound lack of either understanding or respect for clear California law on the matter. Indeed, even after that issue was apparently settled, it seemed to continue to involve itself as counsel rather than party by continuing to insist on separate service of process for case-related documents. On another occasion in October 2011, long after this case was initiated, it sent what can only be characterized as a profane e-mail directly to ProCourier in response to an apparently automated e-mail intended for ProCourier clients.<sup>2</sup> Such conduct seems to be indicative of a grudge rather than a sincere belief of well-founded legal case, and could influence C&R’s acts and decisions as class representative.

With respect to Gilmore, ProCourier submitted evidence that Gilmore had been sued for malpractice on four occasions. Gilmore responded to ProCourier’s allegations in a late-filed reply declaration that referred to such statements as insulting and belittling, but did not address the issue of the malpractice cases at all. Further, while he set forth his own education and experience, he did not state that he had ever been involved in class action litigation before. The court was within its discretion to decide

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<sup>2</sup> ProCourier sent out an automated e-mail to all of its clients stating that its online ordering system was experiencing difficulties and being repaired. Chavos sent a reply that stated: “Moral of the story is don’t f. . . with Chavos & Rau.”

that class counsel with prior experience was necessary for the conduct of this case. We find no abuse of discretion.

### III

#### DISPOSITION

The order is affirmed. ProCourier is entitled to its costs on appeal.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.