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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

JACK BRANNING et al.,

Plaintiffs and Appellants,

v.

APPLE INC.,

Defendant and Respondent.

H036343

(Santa Clara County

Super. Ct. No. 1-05-CV-045719)

Plaintiffs Jack Branning, James Seybert, Stacey Blevins, Robert Allen, Domingo Vazquez, and Kurt Bruneman appeal from the trial court’s October 4, 2010 order decertifying a limited class of consumers in plaintiffs’ action against defendant Apple Inc. and from the trial court’s December 2, 2010 order denying certification of a narrowed class. Plaintiffs contend that the October 4, 2010 order was procedurally improper and that both orders “reflected erroneous analysis, improper legal assumptions, and factual determinations that were neither supported by the record nor permitted in deciding class issues.” We reject these contentions and affirm both orders.

**I. Background**

Plaintiffs are consumers who bought Apple hardware products. Such products come with a one-year limited warranty that requires Apple to repair or replace the

product or refund the purchase price if the customer encounters a defect and presents a valid claim within the warranty period. The warranty period is “ONE (1) year from the date of retail purchase by the original end-user purchaser . . . .” The warranty states that “Apple may require that you furnish proof of purchase details and/or comply with registration requirements before receiving warranty service.”

Apple separately sells extended service contracts called AppleCare Protection Plans. These require Apple to provide support and service for a defined period (two or three years, depending on the product covered) measured from the date of initial retail purchase of the product. AppleCare plans can be purchased at the same time as the covered product or at any time before the one-year limited warranty on the product expires. Because there are different AppleCare plans at different prices for different products, a customer must purchase the plan appropriate for the product he or she wants covered.

Customers who purchase AppleCare contracts are advised to “enroll” (or register) their plans with Apple. Some customers do so promptly but others wait until they need repair service. Customers who successfully enroll their plans receive a Plan Confirmation Certificate (also known as a proof of coverage document). The certificates state, “Keep this certificate and the original sales receipts for your Apple product(s) and the AppleCare Protection Plan. . . . Proof of purchase may be required if there is any question as to your product’s eligibility for . . . coverage.” The certificates also tell customers to “review the covered Apple product information” and contact Apple “[i]f corrections are necessary.” Each certificate shows a “Coverage End Date . . . .”

Apple’s internal systems reflect either a provisional or a validated warranty start date for each serialized product sold.<sup>1</sup> A provisional warranty start date (referred to as an

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<sup>1</sup> A serialized product is a product with an individual serial number.

estimated purchase date in Apple's internal systems) is assigned to each serialized product when Apple ships the product.

Provisional warranty start dates in Apple's internal systems are replaced with "validated" warranty start dates once Apple interacts with the customers who purchase those products. Validation occurs in a variety of situations. When a customer buys a product directly from Apple (from its online store or from an Apple retail store), Apple knows when the sale occurred and its internal systems reflect the actual date of sale as the validated warranty start date. When a customer buys a product from a reseller, by contrast, Apple does not immediately know when that sale occurred. But Apple does not require every such customer to submit proof of purchase to establish eligibility for warranty coverage. The company has designed policies to minimize those occasions when customers who buy their products indirectly will be asked to provide proof of purchase. Thus, if a customer registers a product within a certain grace period, Apple treats the registration date as a validated warranty start date. Similarly, if a customer tells an Apple call center agent that he or she purchased a product on a date that is within the grace period, Apple accepts that date as the validated warranty start date. Likewise, if a customer who enrolls an AppleCare contract states that he or she purchased the covered product within the grace period, Apple treats the date the customer provides as a validated warranty start date. Customers who provide purchase dates outside the grace period are asked to submit proofs of purchase to establish eligibility for warranty coverage. The practical result of these policies is that a number of customers enjoy warranty periods that are in fact longer than one year from the actual dates on which they purchased their products.

### **A. The Lawsuit**

Plaintiffs sued Apple in 2005 on behalf of two groups, a consumer group and a reseller group. The reseller group's separate appeal from the trial court's denial of their

motion for class certification is pending in the related case of *Siechert & Synn dba Techsource v. Apple Inc.* (H036402). This appeal concerns the consumer group.<sup>2</sup>

Plaintiffs filed their eighth amended complaint in 2009. As relevant here, it alleges that Apple “improperly calculated the time period of [plaintiffs’] express warranties and their AppleCare service contracts, such that said warranties and service contracts expire prematurely.” Plaintiffs referred to this alleged practice as “shorting.”

Plaintiffs premised their “shorting” claims on Apple’s use of provisional warranty start dates (which plaintiffs labeled “estimated purchase date[s]”) in its internal systems. They alleged that Apple calculated warranty and AppleCare contract periods using estimated purchase dates as opposed to actual purchase dates. Plaintiffs maintained that the estimated purchase dates were always earlier than the actual purchase dates and thus caused their warranty and AppleCare coverage to expire prematurely. They claimed to have been “wrongfully refused repair service . . . under the one-year limited warranty and/or the AppleCare extended service contract” as a result of the alleged shorting. Their complaint asserted seven causes of action: (1) violation of the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 et seq.), (2) violation of the Consumers Legal Remedies Act (CLRA; Civ. Code, § 1750 et seq.), (3) fraud and deceit, (4) conversion, (5) breach of contract, (6) violation of the False Advertising Law (FAL; Bus. & Prof. Code § 17500 et seq.), and (7) violation of the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.). Plaintiffs sought to represent two subclasses of consumers. Only Class A (comprising consumers whose warranties and/or AppleCare contracts were allegedly shorted) is relevant here.

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<sup>2</sup> On December 14, 2010, the trial court issued an order staying the entire case pending resolution of plaintiffs’ two appeals.

## **B. Plaintiffs' Discovery Admissions**

The parties engaged in extensive discovery. In depositions, each named plaintiff admitted that he or she never had a repair or service denied on any Apple product, never paid for any repair or service on any Apple product, and never refrained from seeking any repair or service on a belief that the warranty or AppleCare coverage on a product had expired.

## **C. Summary Adjudication of Two Named Plaintiffs' Shorting Claims**

In July 2008, Apple moved for summary adjudication of the shorting claims asserted by plaintiffs Allen and Blevins. Relying on these plaintiffs' admissions, Apple argued that they lacked standing because each of their shorting causes of action required them to establish actual injury resulting from Apple's allegedly wrongful conduct. The trial court granted both motions on November 10, 2008. The court found that undisputed evidence established that "for all products at issue, Blevins and Allen never had a repair denied, never paid for any repair, service or support, never refrained from making a service or support call to Apple because of a belief that their warranty was shorter than it should have been, and were never denied support under an [AppleCare Protection Plan]. [¶] . . . Clearly, they suffered no injury for service or repair work covered under the contracts. The fact that the assignment of an [estimated purchase date] did not deter them from seeking service or support because of the belief that their warranty was shorter than it should have been, establishes that the contracts remained in force for the full coverage period."

Allen and Blevins petitioned for a writ of mandate overturning the order. This court summarily denied the petition. (*Blevins, et al. v. Superior Court (Apple Inc.)* (Dec. 17, 2008, H033611).)

#### **D. The October 2009 Certification Order**

Apple's summary adjudication motions were pending in August 2008 when plaintiffs filed a motion to certify a class comprising "[a]ll persons in the United States who purchased an Apple serialized product from and after January 1, 1998 (hereinafter, the 'Class Period') to which Apple, at any time, assigned an Estimated Purchase Date . . . ." The motion asserted that plaintiffs' shorting claims presented common issues of law and fact because "*for every class member*, Apple used 'estimated purchase dates' . . . instead of actual purchase dates" to determine when warranty and service contract coverage began and ended. Plaintiffs claimed that this practice "*systematically* shorted warranty and/or AppleCare coverage for the members of Class A." The motion was supported by declarations from plaintiffs' counsel, from their litigation consultant Thomas Santos (a former Apple authorized reseller who was pursuing an individual lawsuit against Apple), and from their statistics expert Francisco Samaniego, Ph.D. Plaintiffs asserted that their shorting claims were typical of the class claims because "each of the plaintiffs had a warranty and/or AppleCare shorted or [not enrolled at all] as a result of Apple's [estimated purchase date] practices." Plaintiffs relied heavily on their "scientific random sample" of mailed-in AppleCare enrollment cards to support their argument that their claims could be established by common proof.

The sampling was performed by plaintiffs' litigation counsel and Santos. Santos created a spreadsheet that included fields for the product serial numbers, for the purchase dates that customers had handwritten on the cards, and for the warranty start date information that Santos obtained from the database program that Apple authorized service providers use to process repairs. Samaniego analyzed the spreadsheet and concluded that the estimated purchase dates for a percentage of the products in plaintiffs' sample were earlier than the purchase dates that Santos had recorded on his spreadsheet. Samaniego also concluded that the AppleCare coverage end dates for a percentage of the products in the sample were earlier than three years after the purchase dates that Santos

had recorded on his spreadsheet. Samaniego also concluded that Apple's internal systems did not reflect AppleCare coverage at all for a percentage of the cards in the sample.

Apple opposed plaintiffs' motion for class certification, arguing among other things that plaintiffs' shorting claims were not amenable to classwide proof or typical of the class claims since none of the named plaintiffs had ever had a warranty or AppleCare claim shorted. Apple also argued that plaintiffs' "scientific random sample" was neither scientific nor random. "The sample was not random; it was drawn from the wrong population; it was performed by advocates rather than experts; it was not documented either before or while it was drawn; it is infected with errors and data that Santos admits he made up; and, even on its own flawed terms, it shows a lack of common interest in the assignment of [estimated purchase dates] to serialized products." Apple also argued that the sample rested on a series of erroneous assumptions about the information taken from the mailed-in AppleCare enrollment cards. "For example, plaintiffs wrongly assume that the purchase date entered on the card by each customer is the actual date on which the customer bought the product. In reality, it is nothing more than the date when the customer *says* the product was purchased. Objective evidence shows that the purchase dates entered by customers on enrollment cards are often wildly inaccurate." (Boldface omitted.)

The trial court granted plaintiffs' motion in part on October 28, 2009, certifying Class A with respect to plaintiffs' causes of action for violation of the UCL, the FAL, and the CLRA. The court declined to certify the remaining claims, finding among other things that individual questions of fact and law would predominate over common questions. This court summarily denied Apple's writ petition challenging the certification order. (*Apple Inc. v. Superior Court* (Apr. 16, 2010, H035093).) Class notice was never given.

### **E. Summary Adjudication of the Remaining Named Plaintiffs' Shorting Claims**

In mid-2009, Apple moved for summary adjudication of the shorting claims asserted by plaintiffs Branning, Vazquez, Seybert, Bruneman, and Cassin. The trial court granted the motions by separate orders issued between December 31, 2009 and January 25, 2010. The orders rejected plaintiffs' contention that the mere assignment of a provisional warranty start date caused injury at the time of purchase by shortening the warranty period. "[T]he undisputed material facts show that the assignment of a premature [estimated purchase date] does not shorten the warranty period because the contracts provide that the warranty period is measured from the actual date of purchase . . . . The warranty will not, in fact, be shortened unless Apple subsequently uses the premature [estimated purchase date] to deny a valid claim for service, repairs or support under a warranty." The court emphasized that plaintiffs failed to produce any evidence that Apple had denied any valid claims for warranty or AppleCare coverage. The court concluded that the named plaintiffs lacked standing to pursue their shorting claims because none of them suffered injury or damage as a result of the alleged shorting.

Plaintiffs have not amended their complaint to name new class representatives.

### **F. Apple's Motion for Decertification**

In March 2010, Apple filed a motion to decertify Class A on the ground that the summary adjudication rulings left the class without a proper class representative with claims typical of the class. Apple asserted as a separate ground for decertification that individual issues would predominate over common ones given the trial court's ruling that there could be no recovery for shorting without a showing that Apple's use of provisional warranty start dates resulted in the denial of valid warranty or AppleCare claims. Apple argued that its motion was procedurally sound because the court's determination that all of the named plaintiffs lacked standing constituted "'changed circumstances making continued class treatment improper.'"

### **G. Plaintiffs' New Trial Motions**

Branning filed a motion to vacate the order summarily adjudicating his shorting claims and for a new trial. He contended that two of his five AppleCare certificates stated premature coverage end dates and thus raised triable issues of fact as to whether he was harmed at the time of purchase by not receiving the AppleCare contracts he paid for. Branning argued that he was shorted not only by Apple's use of provisional warranty start dates but by the AppleCare certificates themselves.

On April 5, 2010, the trial court ruled that "the portions of the order granting Apple's motion for summary adjudication as to Branning's shorting claims for these two products is contrary to law. Accordingly, Branning's motion for new trial is granted as to these portions of the order."

On April 16, 2010, named plaintiffs Vazquez, Seybert, Bruneman, Blevins, and Allen filed a joint motion for a new trial on the ground that eight of their AppleCare certificates stated premature coverage end dates. Bruneman and Vazquez asserted as an additional ground for a new trial that two of their AppleCare plans were not enrolled in AppleCare at all. The trial court denied the motions because (unlike the situation with Branning) there were no judgments or appealable orders on which new trial orders could be based.

The court then modified the orders on its own motion. The court ruled that the summary adjudication orders "do not apply as to any products for which Apple generated a Plan Certificate stating a premature Coverage End Date . . . [or] to any claims of nonenrollment in AppleCare." These two theories were thereafter referred to as "misenrollment" and "nonenrollment."

### **H. Apple's Revised Motion for Decertification**

Apple revised its decertification motion to address plaintiffs' misenrollment and nonenrollment theories. The revised motion was filed in May 2010. Apple argued that

misenrollment and nonenrollment were new theories that plaintiffs had not pleaded or argued in the previous five years of litigation. Apple contended that the orders modifying the summary adjudication orders constituted “‘changed circumstances making continued class treatment improper’” for three reasons: (1) plaintiffs could not properly represent the class because they lacked standing; (2) even if plaintiffs had standing, they could not adequately represent the class because their claims were not typical of class claims; and (3) individualized issues would predominate in any trial of plaintiffs’ misenrollment and nonenrollment claims.

Plaintiffs opposed the motion as a “rehash” of Apple’s previous arguments. They disputed Apple’s characterization of the modification orders, asserting that the legal effect of those orders was “simply that Apple’s summary adjudication motions are denied.”

### **I. The October 4, 2010 Decertification Order**

The trial court granted Apple’s motion for decertification on October 4, 2010. The court expressly found that “[t]he rulings and determinations on Apple’s summary adjudication motions and Plaintiffs’ motions for new trial and reconsideration constitute changed circumstances which justify the reconsideration of the class certification of all three causes of action.” The court explained that “[r]ather than attempt to resolve all of the standing issues in the ruling on the certification motion, the Court allowed the parties to address the standing issues via the summary adjudication motions. In this context, the Court believes it was reasonably clear to both sides that the Court might reconsider its certification ruling if Apple demonstrated . . . that none of the Named Plaintiffs has standing . . . . [T]he Court gave Plaintiffs’ counsel a means of contacting customers who complained to Apple about shorting so that they would have a fair opportunity to search for additional consumer class representatives, in case it was ultimately determined that none of the Named Plaintiffs has standing.”

The order emphasized that the court was “struck” by the fact that none of the named plaintiffs could prove injury. “Further, despite litigating this action for several years and engaging in exhaustive discovery, including contact with persons who complained to Apple about shorting, Plaintiffs’ counsel still has not been able to present a member of Class A who, in fact, suffered an injury and lost money or property as a result of Apple’s assignment of an [estimated purchase date] . . . .”

The court distinguished plaintiffs provisional warranty start date shorting claims from their AppleCare misenrollment and nonenrollment claims, ruling that “[n]one of the [class representatives] has standing to assert a claim for shorting of the limited warranty based upon the assignment of an [estimated purchase date] at the time of purchase . . . .” Instead, “[t]he standing of Named Plaintiffs is limited to claims of misenrollment and nonenrollment of AppleCare.”

The court found the class definition with respect to plaintiffs’ AppleCare claims “grossly overbroad” because many if not most of the class members did not purchase AppleCare and thus could not possibly have been subjected to misenrollment or nonenrollment. The court acknowledged that the overbreadth could be remedied by modifying the class definition but it rejected that option, finding that “the evidence in the record shows that there is an insufficient community of interest regarding claims of misenrollment or nonenrollment of AppleCare. Individual issues concerning the source and validity of the [coverage end date] printed on every individual AppleCare Plan Certificate would predominate.”

As a separate basis for decertification, the court found that plaintiffs had not shown that a class action would be a superior method of trying their claims of misenrollment or nonenrollment of AppleCare.

### **J. Plaintiffs' Motions for Reconsideration and to Certify an AppleCare Class**

Relying on two documents that Apple had recently produced, plaintiffs moved for reconsideration of the decertification order to the extent it refused to certify an AppleCare-only class. They filed a separate motion to certify an AppleCare class comprising “[a]ll persons in the United States who purchased an AppleCare Protection Plan (APP) on or after January 1, 2000, for any Apple product that at any time was assigned an estimated purchase date, other than an iPhone.” (Italics omitted.)

Apple argued in opposition that neither of the documents on which plaintiffs relied supported reconsideration. One pertained to pre-launch testing of the original iPhone. It was irrelevant because plaintiffs’ definition of their proposed AppleCare class specifically excluded iPhones. The second document (which plaintiffs called the “Heads-Up Form”) outlined a suggestion about a specific and very narrow scenario. The document did not demonstrate a systematic issue affecting AppleCare purchasers generally.

### **K. The December 2, 2010 Order Denying Certification of an AppleCare Class**

On December 2, 2010, the trial court issued a single order granting reconsideration and denying plaintiffs’ motion to certify an AppleCare class. The court found that plaintiffs failed to meet their burden of showing that common questions of law or fact would predominate. Instead, “individual issues would predominate as to both liability and damages.” The court also concluded that the proposed AppleCare class was “substantially overbroad” because there was “no evidence that a substantial majority of the putative class [was] subject to the alleged [coverage end date] shorting or nonenrollment.”

## II. Discussion

### A. Class Certification Standards

“The certification question is ‘essentially a procedural one that does not ask whether an action is legally or factually meritorious.’” (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1023 (*Brinker*)). “[A] trial court must examine the plaintiff’s theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate. To the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them. Out of respect for the problems arising from one-way intervention, however, a court generally should eschew resolution of such issues unless necessary.” (*Id.* at p. 1025.)

Code of Civil Procedure section 382 sets forth the requirements for certifying class actions in California. (Code Civ. Proc., § 382; *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 308, 312-314 (*Tobacco II*)). “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.] ‘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.’” (*Brinker, supra*, 53 Cal.4th at p. 1021.)

“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.’ . . . 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. [Fn. omitted.] ‘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.’” (*Brinker, supra*, 53 Cal.4th at pp. 1021-1022.) “[The court] must determine whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence.” (*Brinker*, at p. 1024.)

“[T]he CLRA sets forth a slightly different standard” for certifying class actions. (*Thompson v. Automobile Club of Southern California* (2013) 217 Cal.App.4th 719, 727 (*Thompson*)). “The CLRA enables a consumer to bring a class action on behalf of himself or herself and other consumers similarly situated if the consumer has suffered ‘any damage’ from the use of any of 23 enumerated acts or practices. (Civ. Code, §§ 1780, subd. (a); see *id.*, 1781, subd. (a).) The CLRA has its own class action requirements pursuant to Civil Code section 1781, subdivision (b): (1) the impracticability of bringing all members of the class before the court; (2) questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members; (3) the claims of the class representative are typical of the class; (4) the class representatives will fairly and adequately protect the interests of the class. (Civ. Code, § 1781, subd. (b).)” (*Thompson*, at pp. 727-728.)

“The statutory requirements [of Code of Civil Procedure section 382 and the CLRA] are substantial similar. Each requires the potential class to be sufficiently numerous as to make individual adjudication impractical, although the CLRA does not explicitly require an ascertainable class. Code of Civil Procedure section 382’s ‘well-defined community of interest’ requirements are, for all practical purposes, the same as the CLRA’s final three requirements: the predominance of common issues of law or fact, the typicality of the class representative’s claims, and the adequacy of the class representative.” (*Thompson, supra*, 217 Cal.App.4th at p. 728, fn. omitted.)

## **B. Standard of Review**

“The decision [whether] 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.] Predominance is a factual question; accordingly, the trial court’s finding that common issues predominate generally is reviewed for substantial evidence. [Citation.] 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 . . . .’” (*Brinker, supra*, 53 Cal.4th at p. 1022.)

“The appeal of an order denying class certification presents an exception to the general rule that a reviewing court will look to the trial court’s result, not its rationale. If the trial court failed to follow the correct legal analysis when deciding whether to certify a class action, ‘an appellate court is required to reverse an order denying class certification . . . , “even though there may be substantial evidence to support the court’s order.”’ [Citations.] In other words, we review only the reasons given by the trial court for denial of class certification, and ignore any other grounds that might support denial.” (*Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828-829.)

## **C. Claimed Absence of “Changed Circumstances”**

Plaintiffs contend that the order decertifying the class was procedurally incorrect “because there were no ‘changed circumstances making continued class treatment improper.’” They argue that the court ignored *Weinstat v. Dentsply Internat., Inc.* (2010)

180 Cal.App.4th 1213 (*Weinstat*) and misread *Green v. Obledo* (1981) 29 Cal.3d 126 (*Green*) in concluding otherwise. We disagree.

“[C]ourts should retain flexibility in the trial of a class action, for ‘even after an initial determination of the propriety of such an action the trial court may discover subsequently that it is not appropriate.’” (*Occidental Land, Inc. v. Superior Court of Orange County* (1976) 18 Cal.3d 355, 360 (*Occidental Land*)). Trial courts “retain the option of decertification” even after a decision on the merits, “providing there has been a showing of changed circumstances or newly available evidence making continued class action treatment improper.” (*Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 335 (*Sav-On*); *Grogan-Beall v. Ferdinand Roten Galleries, Inc.* (1982) 133 Cal.App.3d 969, 977 (*Grogan-Beall*)). “Changed circumstances” include changes in the plaintiffs’ claims or theories. (See *Danzig v. Grynberg & Associates* (1984) 161 Cal.App.3d 1128, 1135-1137 (*Danzig*)). “Where the trial court applies proper criteria in decertifying the class and its action is founded on a rational basis, its ruling will be upheld. [Citation.]” (*Grogan-Beall*, at p. 975.)

Both *Weinstat* and *Green* applied the changed circumstances rule. *Weinstat* did so in the context of a decertification motion brought before judgment and *Green* did so in the context of a motion brought after judgment. (*Weinstat, supra*, 180 Cal.App.4th at p. 1226; *Green, supra*, 29 Cal.3d at p. 148 & fn. 17.) Here, the record establishes that the trial court was familiar with both cases and well aware of the rule. Contrary to plaintiffs’ assertion, the trial court did not ignore *Weinstat*. Indeed, it cited *Weinstat* in the section of the order headed “No Decertification Absent a Showing of Changed Circumstances.” (Underscore omitted.) The order expressly recognized that “[b]oth before judgment and after a decision on the merits, a class should be decertified only where changed circumstances make continued class treatment improper.” The record shows that the court examined whether changed circumstances existed and concluded that they did. The court plainly applied the proper criteria.

Plaintiffs challenge the trial court's finding of changed circumstances. They argue that the only change that the court identified was its own realization that plaintiffs' shorting claims were not limited to the assignment of provisional warranty start dates (which plaintiffs had referred to as estimated purchase dates) but also included the alleged shorting of their AppleCare claims. Plaintiffs argue that the change the court described was not a changed circumstance because their case "had always included claims of shorted AppleCare contracts and nonenrollment." We find no error.

The record supports the trial court's finding of changed circumstances. The trial court's determination that none of the named plaintiffs had standing was a dramatic change in circumstance. That change was made even more dramatic by plaintiffs' apparent inability to identify any class member who suffered injury or lost money or property as a result of Apple's use of provisional warranty start dates—even, as the trial court noted, after "years" spent engaging in "exhaustive" discovery that included contact with persons who complained to Apple about shorting.

Plaintiffs' assertion of new theories of liability was yet another changed circumstance. (See *Danzig, supra*, 161 Cal.App.3d at pp. 1135-1137.) On the facts of this case, we reject plaintiffs' assertion that their misenrollment and nonenrollment theories cannot be considered new. A fair reading of the 68-page complaint as a whole discloses that plaintiffs' shorting claims were based on Apple's use of provisional warranty start dates that allegedly denied plaintiffs repairs, service, and support under their limited warranties and/or AppleCare extended service contracts. It is not at all clear from the record before us that plaintiffs' claims were also based on a theory that incorrect coverage end dates printed on some AppleCare Plan Confirmation certificates created contracts that by their express terms allegedly provided less than what Apple promised. Plaintiffs did not call attention to their AppleCare misenrollment and nonenrollment theories until after the trial court initially certified the class. As the trial court observed at the 2010 hearing on Branning's new trial motion, "while maybe one could design

[plaintiffs' new] approach from the previous multiple motions, et cetera, that I've heard, it doesn't exactly jump out at you." The court told plaintiffs' counsel, "when I read your motion for new trial, I said, that's something I hadn't heard before." "[I]t's not one that I've heard all the while I've been handling this case." On this record, we conclude that substantial evidence supported the trial court's finding that plaintiffs' misenrollment and nonenrollment theories constituted "changed circumstances" that justified revisiting the order granting certification. (See *Danzig, supra*, 161 Cal.App.3d at pp. 1135-1137.)

Plaintiffs argue that the trial court's finding of changed circumstances does not comport with *Green*. They assert that "Apple essentially engaged in the conduct" that the *Green* court condemned. They maintain that the trial court erred in concluding otherwise. We disagree.

In *Green*, our high court applied the rule that "procedural class-action issues—including the composition of the class—must ordinarily be resolved before a decision on the merits is reached." (*Green, supra*, 29 Cal.3d at p. 146.) That did not happen in *Green*. The defendants did not contest the initial certification motion. (*Green*, at p. 148.) They moved for decertification only after the trial court granted summary judgment on the merits in the plaintiffs' favor. (*Id.* at p. 145.) The California Supreme Court reversed the trial court's order partially decertifying the class. (*Id.* at p. 148.) The high court held that "[b]y failing to contest plaintiffs' motion for class certification when it was filed, and by waiting until after a determination on the merits before acting, defendants in effect waived any right to move for decertification." (*Ibid.*)

The conduct that the *Green* court condemned was the "no-lose litigation strategy" that the defendants in that case employed. (*Green, supra*, 29 Cal.3d at p. 147.) The court explained the rationale for the rule prohibiting such conduct: "[U]nless a decision on the merits is postponed until after the class [certification] issues are decided, a defendant is subject to "one-way intervention," which would allow potential class members to elect whether to join in the action depending upon the outcome of the decision on the merits.'" "

(*Id.* at p. 146.) “A similar rationale warrants the protection of plaintiffs against the abuse of a delayed motion to decertify by defendants. Without the requirement that class issues be resolved prior to a decision on the merits, a defendant could take advantage of decertification by a strategy similar to that of ‘one-way intervention.’ Thus, he could appear to acquiesce in the plaintiff’s motion to certify the class, holding back his evidence and arguments on the issue. If the judgment on the merits then goes in his favor, it will bind all members of the class who were notified and bar further lawsuits against him on the same cause of action by all such unnamed class members; indeed, the larger the class, the more he will be insulated from such litigation. Yet if instead he loses on the merits, he can undo most of the damage by bringing out his evidence and arguments and mounting a belated attack on the certification order.” (*Green*, at p. 147, fn. omitted.)

We agree with the trial court that *Green* is easily distinguished. The record supports the trial court’s finding that Apple did not engage in the evil the *Green* court condemned. As the trial court properly concluded, “[b]y no stretch of the imagination can Apple be deemed to have acquiesced in the motion to certify either of the proposed consumer classes. On the contrary, Apple vigorously opposed the motion to certify in its entirety. Apple convinced the Court to deny the motion to certify Class B and filed a writ of mandate challenging the order certifying Class A.” “If Apple were engaging in the improper strategy outlined in *Green*, then it would not be bringing a motion to decertify Class A. According to *Green*, a class action defendant who wins on the merits would not want to decertify the class because it would want the ruling to be binding on the entire class. The evil condemned in *Green* is when a class action defendant acquiesces [in] a motion to certify and brings a motion to decertify after losing on the merits. Clearly, Apple did not engage in this strategy.”

Indeed, there was no decision on the merits here. As the trial court correctly observed, “[w]hen *Green* talks about a decision on the merits, it is talking about a

decision on the merits as to the class and not as to the class representative.” (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1074 (*Fireside Bank*) [citing *Green* for the proposition that “[a] largely settled feature of state and federal procedure is that trial courts in class action proceedings should decide whether a class is proper and, if so, order class notice before ruling on the substantive merits of the action.”].) (*Fireside Bank*, at p. 1074.) Here, the trial court expressly found that Apple “never sought any rulings on the merits of the UCL, CLRA and [FAL] causes of action as to Class A.” Nothing in the record contradicts that finding. Instead, the record supports the court’s finding that Apple “challenged the standing of Named Plaintiffs to assert the UCL, CLRA and [FAL] causes of action on behalf of Class A.” *Green* does not prohibit this strategy. Plaintiffs’ reliance on *Green* is misplaced.

#### **D. Claimed Improper Bases for Decertification**

Plaintiffs contend that the trial court improperly based its decertification order on the summary adjudication rulings. They argue that the court (1) improperly conflated the typicality requirement with standing, (2) improperly relied on the merits of plaintiffs’ claims, (3) improperly relied on “*vacated*” summary adjudication rulings, and (4) applied a legally erroneous standing analysis.

##### **1. Typicality**

Plaintiffs argue that the trial court misapplied the typicality requirement. We disagree.

“Certification requires a showing that the class representative has claims or defenses typical of the class.” (*Fireside Bank, supra*, 40 Cal.4th at p. 1090.) “It is the fact that the class plaintiff’s claims are typical and his representation of the class adequate which gives legitimacy to permitting him to bind class members who have notice of the action.” (*Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 664 (*Caro*)). A proposed class representative who lacks standing to pursue the same claims as the class is

not an adequate class representative. (*Pfizer Inc. v. Superior Court* (2010) 182 Cal.App.4th 622, 633-634 (*Pfizer*)). Accordingly, where a court concludes that summary judgment is appropriate against a plaintiff on her individual claim because she suffered no damage, “the class action count alleging a similar claim must be dismissed for want of a proper representative.” (*Chern v. Bank of America* (1976) 15 Cal.3d 866, 874-875 (*Chern*)).

*Chern* is controlling here. Because plaintiffs’ provisional warranty start date shorting claims were summarily adjudicated against them, their class claims failed for lack of a proper class representative. (*Chern, supra*, 15 Cal.3d at pp. 874-875.) The trial court did not conflate typicality and standing. It properly applied the typicality requirement .

The cases that plaintiffs rely on do not compel a different conclusion. All are easily distinguished. Unlike the named plaintiffs here, the proposed class representatives in *Fireside Bank, Classen v. Weller* (1983) 145 Cal.App.3d 27 (*Classen*), and *Wershba v. Apple Computer* (2001) 91 Cal.App.4th 224 (*Wershba*) had standing to assert their claims, which were typical of the class claims they sought to assert. (*Fireside Bank, supra*, 40 Cal.4th at p. 1090; *Classen*, at p. 46; *Wershba*, at pp. 238-239.)

## **2. Claimed Improper Reliance on the Merits**

Relying on *Hewlett-Packard Co. v. Superior Court* (2008) 167 Cal.App.4th 87 (*HP*), plaintiffs argue that trial court’s standing rulings were “rulings on the merits” that the court was “forbidden to take into account on a motion regarding certification.” In *HP*, this court quoted the general rule that the question of class certification is “‘essentially . . . procedural . . . [and] does not ask whether an action is legally or factually meritorious.’” (*HP*, at p. 95, italics omitted.) *HP* does not advance plaintiffs’ position.

The defendant in *HP* petitioned for a writ of mandate directing the trial court to vacate its order certifying a class. (*HP, supra*, 167 Cal.App.4th at p. 92.) The primary

issue on appeal was whether the trial court abused its discretion in concluding that common issues predominated. (*Id.* at p. 94.) *HP* did not address the typicality of the class representative’s claims, nor did it address whether he was an adequate representative. (*Ibid.*) *HP* says nothing about whether a class action can proceed after the class representatives’ claims are summarily adjudicated against them. “Obviously, cases are not authority for propositions not considered therein.” (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372.)

### **3. Claimed Improper Reliance on “Vacated” Summary Adjudication Rulings**

Plaintiffs argue that once the trial court ruled that their AppleCare misenrollment and nonenrollment claims presented triable issues, “there was no surviving summary adjudication ruling . . . on their shorting claims.” They rely on the rule that a motion for summary adjudication can be granted only if it completely disposes of a cause of action or defense. (Code Civ.Proc., § 437c, subd. (f)(1).) They contend that their warranty-shortening claims did not constitute a separate cause of action because those claims were “related to” their AppleCare claims, and “[s]ummary adjudication is not permitted on aspects of a cause of action that are related to each other.” We reject the argument.

“A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.” (Code Civ. Proc. § 437c, subd. (f)(1).) Whether a complaint in fact asserts one or more causes of action “depends on whether it alleges invasion of one or more primary rights.” (*Hindin v. Rust* (2004) 118 Cal.App.4th 1247, 1257 (*Hindin*).)

“‘California defines a “cause of action” in accord with Pomeroy’s “primary right” theory. [Citation.]’” (*Skrbina v. Fleming Companies* (1996) 45 Cal.App.4th 1353, 1364 (*Skrbina*).) “It provides that a “cause of action” is comprised of a “primary right” of the plaintiff, a corresponding “primary duty” of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise

to but a single cause of action. [Citation.] . . . [¶] As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: "Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." [Citation.] The primary right must also be distinguished from the *remedy* sought: "The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other." [Citation.]" (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 904.) "Thus, if a plaintiff states several purported causes of action which allege an invasion of the same primary right he has actually stated only one cause of action. On the other hand, if a plaintiff alleges that the defendant's single wrongful act invaded two different primary rights, he has stated two causes of action, and this is so even though the two invasions are pleaded in a single count of the complaint. [Citations.]" (*Skrbina*, at p. 1364.) "The manner in which a plaintiff elects to organize his or her claims within the body of the complaint is irrelevant to determining the number of causes of action alleged under the primary right theory." (*Hindin, supra*, 118 Cal.App.4th at p. 1258.) "Accordingly, . . . under subdivision (f) of [California Code of Civil Procedure] section 437c, a party may present a motion for summary adjudication challenging a separate and distinct wrongful act even though combined with other wrongful acts alleged in the same cause of action." (*Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854-1855 (*Lilienthal*).

Application of these principles here compels the conclusion that plaintiffs' warranty and AppleCare-shortening claims involve two different primary rights: the right to be free from shortening of the one-year limited warranty and the right to be free from misenrollment or nonenrollment in AppleCare. Both primary rights are contractual. (See *Holmes v. Bricker, Inc.* (1969) 70 Cal.2d 786, 790.) Here, they were conferred by two

different types of contracts. The right to be free from warranty shorting was conferred by the one-year limited warranty included with every Apple hardware product. The right to be free from misenrollment or nonenrollment in AppleCare was conferred by an entirely different contract that was sold separately. Shorting of the one-year limited warranty thus invaded a different right and constituted a “separate and distinct wrongful act” than shorting of AppleCare by misenrollment or nonenrollment. (*Lilienthal, supra*, 12 Cal.App.4th at pp. 1854-1855.) The trial court’s carve-out of plaintiffs’ AppleCare shorting claims did not preclude it from summarily adjudicating their warranty shorting claims. (*Ibid.*)

Plaintiffs’ reliance on *Catalano v. Superior Court* (2000) 82 Cal.App.4th 91 (*Catalano*) is misplaced. That case addressed a question of first impression, that is, whether a motion for summary judgment is properly granted on a “claim” for punitive damages when the determination adjudicates only some of the asserted facts relating to the claim but does not dispose of the entire claim for punitive damages. (*Id.* at p. 92.) The court held that summary adjudication is not properly granted as a piecemeal disposition of some of the asserted facts within a claim for punitive damages, but may only be granted when the entire claim is eliminated. (*Id.* at pp. 92, 97.)

Plaintiffs cite *Catalano* for the proposition that “wrongful acts that are related to each other *are not* separate ‘causes of action’ under § 437(c)(f).” The problem with this argument is that *Catalano* says nothing about what constitutes a cause of action. Indeed, “there is no separate cause of action for punitive damages.” (*McLaughlin v. National Union Fire Inc. Co.* (1994) 23 Cal.App.4th 1132, 1163.) “‘Punitive damages are merely incident to a cause of action, and can never constitute the basis thereof.’” (*Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 391.) The standards for summarily adjudicating a claim for punitive damages do not apply here. *Catalano* is inapposite.

#### 4. *Kwikset*<sup>3</sup>

Plaintiffs argue that the trial court's determination that their lack of standing rendered their claims atypical was "legally erroneous" under *Kwikset, supra*, 51 Cal.4th 310. They argue that their "allegation that the information Apple withheld was *material*, in that disclosure of Apple's practices would have affected their purchase decisions," conferred standing under *Kwikset* for their warranty-shortening and AppleCare claims. Apple counters that plaintiffs forfeited this argument by failing to raise it in opposition to Apple's decertification motion and that it lacks merit in any event. We agree with Apple.

Even if we assume that plaintiffs preserved their *Kwikset* argument, it lacks merit. *Kwikset* was a representative lawsuit alleging that the defendant company violated the UCL and the FAL by falsely marketing and selling locksets labeled "'Made in U.S.A.'" when the locksets in fact contained foreign-made parts or involved foreign manufacture. (*Kwikset, supra*, 51 Cal.4th at p. 317.) The trial court entered judgment for the plaintiff after a bench trial and both sides appealed. (*Ibid.*) While the appeal was pending, the electorate enacted Proposition 64, which tightened the standing requirements for private UCL plaintiffs. (*Ibid.*; former Bus. & Prof. Code, § 17204, amended by Initiative Measure (Prop. 64, § 3, approved Nov. 2, 2004); Bus. & Prof. Code, § 17535, amended by Prop. 64, § 5.) The Court of Appeal vacated the judgment in light of questions about the plaintiff's standing and remanded the case to allow him to allege and prove facts satisfying Proposition 64's requirements. (*Kwikset*, at pp. 318-319.) He obtained leave to add several new plaintiffs and filed an amended complaint alleging that the plaintiffs were "'induced to purchase and did purchase [Kwikset] locksets due to the false representation that they were 'Made in U.S.A.' and would not have purchased them if they had not been so misrepresented.'" (*Id.* at p. 319.)

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<sup>3</sup> *Kwikset Corporation v. Superior Court* (2011) 51 Cal.4th 310 (*Kwikset*).

The issue before the high court was whether plaintiffs sufficiently alleged both “injury in fact” and that they had “‘lost money or property as a result of’” the alleged misrepresentation. (*Kwikset, supra*, 51 Cal.4th at pp. 319-320; Bus. & Prof. Code, §§ 17204, 17535.) The court explained that “injury in fact is ‘an invasion of a legally protected interest which is (a) concrete and particularized, [citations]; and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical,’” [citations].’ [Citations.] ‘Particularized’ in this context means simply that ‘the injury must affect the plaintiff in a personal and individual way.’ [Citation.]” (*Kwikset*, at pp. 322-323.) The court noted that because the injury in fact requirement is easier to satisfy than the lost money or property requirement, “a party who has lost money or property generally *has* suffered injury in fact.” (*Id.* at p. 322.) But the converse is not necessarily true. (*Id.* at p. 325, fn. 8 [“Nowhere do we suggest the converse: that proof of injury in fact will necessarily satisfy the element of lost money or property.”].) The court found the plaintiffs’ standing allegations sufficient. (*Id.* at p. 330.) It held that “plaintiffs who can truthfully allege that they were deceived by a product’s label into spending money to purchase the product, and would not have purchased it otherwise, have ‘lost money or property’ within the meaning of Proposition 64 and have standing to sue.” (*Kwikset*, at p. 317.)

*Kwikset* does not help plaintiffs because they cannot meet this standard. *Kwikset* was before the court on demurrer. (*Kwikset, supra*, 51 Cal.4th at pp. 319, 328, fn. 11.) In refusing to consider *Kwikset*’s argument that the plaintiffs’ allegations were untrue, the court expressly noted that it was required at the demurrer stage to accept them as true. (*Id.* at p. 328, fn. 11.) Not so here. This case is past the demurrer stage, and no such constraint applies. Thus, even if it could be said that plaintiffs adequately alleged a loss of money or property under *Kwikset*, the summary adjudication rulings established that none of them in fact lost money or property as a result of Apple’s use of estimated purchase dates. Plaintiffs admitted that they never had a warranty or AppleCare claim denied and never paid for service or support that should have been covered under a

warranty or AppleCare contract. Each plaintiff further admitted that he or she was never dissuaded from seeking service or support because of a belief that the warranty or AppleCare coverage had expired. Unlike in *Kwikset*, plaintiffs neither alleged nor testified that they would not have purchased their Apple products had they known that their warranty and/or AppleCare coverage would (allegedly) be shorted. Nor did they testify that they would not have paid as much for their products or that they would have purchased a service plan elsewhere had they known of the alleged shorting. Instead, Branning and Bruneman each vaguely declared in opposition to summary adjudication that had he known about the alleged shorting, “[i]t would have” in some unexplained way “affected [his] decision to purchase and the price I would be willing to pay for Apple products and AppleCare.” The trial court properly dismissed these assertions as speculative. *Kwikset* does not help plaintiffs.

### **E. Claimed Error in Refusing to Certify an AppleCare Class**

Plaintiffs contend that the trial court’s refusal to certify a narrowed class of AppleCare purchasers was based on improper legal criteria. Specifically, they argue that the trial court (1) ignored public policy, which “[r]equired” it to certify an AppleCare class; (2) “erroneously assumed” that a trial of plaintiffs’ claims would require individualized proof from each class member; (3) failed to apply “[m]andated” standards for class proof; (4) improperly considered individual harm and damages issues; and (5) improperly considered the merits of plaintiffs’ claims. We reject these contentions.

#### **1. Public Policy**

Plaintiffs assert that California’s public policy encouraging the use of class actions in consumer cases imposed a “duty” upon the trial court “to use class redefinition, narrowing the class or other procedural mechanisms to ensure that the class device was employed.” We disagree. We are aware of no authority supporting plaintiffs’ contention.

Their interpretation of public policy would render the statutory requirements for certifying class actions meaningless.

None of the cases that plaintiffs cite suggests that public policy requires trial courts to “ensure” that every putative class action proceeds as a class action. The California Supreme Court has expressed its “‘general support of class actions.’” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385 (*Blue Chip*), quoting *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 459.) But the court has also recognized the “‘accompanying dangers of injustice’” and has “‘urged that the same procedures facilitating proper class actions be used to prevent class suits where they prove nonbeneficial.’” (*Blue Chip*, at p. 385.)

To the extent plaintiffs contend that the trial court had a sua sponte “duty” to redefine the class, we reject that contention as well. Plaintiffs cite no authority to support the existence of any such “duty” and we are aware of none. Trial courts have discretion to “redefine a proffered class where the evidence shows the redefined class would provide a manageable alternative.” (*Cohen v DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, 979.) In *Cohen*, the court concluded that redefinition would not have been a fruitful exercise given the trial court’s parallel finding that common issues of fact were lacking. (*Ibid.*) Redefinition would be equally fruitless here, where (as we will discuss, *post*) substantial evidence supported the trial court’s finding that even if the class were narrowed, individual issues would predominate as to both liability and damages.

## **2. Claimed Improper Focus on Individual Issues**

Plaintiffs contend that the trial court incorrectly focused on individual issues in declining to certify their proposed AppleCare class. They argue that trial courts are “obligated” in class trials and particularly in class trials involving UCL claims to focus on the defendant’s conduct. Not so.

Plaintiffs’ reliance on *Capitol People First v. State Dept. of Developmental Services* (2007) 155 Cal.App.4th 676 (*Capitol People*) and *Tobacco II* is misplaced.

Neither case supports their position. The plaintiffs in *Capitol People* challenged a “systemic failure” by state agencies to provide community services to persons with developmental disabilities, alleging that the agencies’ failure to do so deprived class members of their constitutional and statutory rights. (*Capitol People*, at pp. 681, 685, fn. 8, 702.) The Court of Appeal held that class issues predominated because the plaintiffs sought “only systemic relief, and not individual solutions to individual problems.” (*Capitol People*, at p. 690.) That “‘systemic relief’” (specifically, a single injunction compelling the agencies to put in place procedures, practices, and an infrastructure to ensure their ability to satisfy their obligations to class members) “‘could not be obtained on a case-by-case basis.’” (*Id.* at p. 694.)

*Capitol People* cannot be read to require trial courts deciding class certification motions to focus solely or even primarily on the defendant’s conduct. Nowhere does the decision state or suggest that trial courts must ignore individual issues. The fact that a focus on the defendant’s conduct was found suitable “where only declaratory and injunctive relief is sought to remedy allegedly illegal practices and policies” does not mean that a similar focus would be appropriate here, where plaintiffs seek restitution and disgorgement in addition to injunctive relief for alleged UCL and FAL violations and compensatory and punitive damages for alleged CLRA violations. (*Capitol People*, *supra*, 155 Cal.App.4th at p. 695.) *Capitol People* does not advance plaintiffs’ position.

Nor does *Tobacco II* help plaintiffs. The plaintiffs in that case brought a putative class action asserting UCL, FAL, and CLRA claims arising out of the defendants’ “decades-long campaign of deceptive advertising and misleading statements about the addictive nature of nicotine and the relationship between tobacco use and disease.” (*Tobacco II*, *supra*, 46 Cal.4th at p. 306.) The trial court certified the UCL claim as a class action. (*Ibid.*) After the passage of Proposition 64, the court granted the defendants’ motion to decertify the class. (*Ibid.*) The court found that individual issues would predominate because each class member would have to prove that he or she had

“‘suffered injury in fact and . . . lost money or property as a result of [the alleged] unfair competition.’” (*Tobacco II*, at p. 306.) The California Supreme Court reversed, holding that Proposition 64’s narrowed standing requirement applied to the class representatives only, not to all absent class members. (*Tobacco II*, at pp. 306, 323-324.)

*Tobacco II* cannot be read to require trial courts deciding class certification motions to focus solely or even primarily on the defendant’s conduct. *Tobacco II* was a standing case. We agree with the other courts of appeal that have distinguished it on that basis. (E.g., *Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 945 (*Knapp*)). “[T]he issue of “standing” simply is not the same thing as the issue of “commonality.” Standing, generally speaking, is a matter addressed to the trial court’s jurisdiction because a plaintiff who lacks standing cannot state a valid cause of action. [Citations.] Commonality, on the other hand, . . . is a matter addressed to the practicalities and utilities of litigating a class action in the trial court. We see no language in *Tobacco II* that suggests to us that the Supreme Court intended our state’s trial courts to dispatch with an examination of commonality when addressing a motion for class certification. On the contrary, the Supreme Court reiterated the requirements for maintenance of a class action, including (1) an ascertainable class and (2) a “‘community of interest’” shared by the class members. [Citation.]’ [Citation.]” (*Knapp*, at p. 945.) In sum, neither *Capitol People* nor *Tobacco II* supports plaintiffs’ position that trial courts deciding class certification motions are “obligated” in all cases to focus on the defendant’s conduct.

The standard that trial courts must apply is settled. “[T]he focus in a certification dispute is on what type of questions—common or individual—are likely to arise in the action.” (*Sav-On, supra*, 34 Cal.4th at p. 327.) The appropriate inquiry is “whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment. [Citations.]” (*Ibid.*) That is precisely the standard that the trial court applied here.

Plaintiffs maintain that “the circumstances and transactions of individual class members are *completely irrelevant*” in UCL class actions because a plaintiff need only show that an alleged fraudulent business practice is likely to deceive the public. Plaintiffs are incorrect. Class certification is properly denied in UCL cases where a significant number of the proposed class members were never exposed to the alleged fraudulent business practice. (E.g., *Thompson, supra*, 217 Cal.App.4th at pp. 731-732; *Knapp, supra*, 195 Cal.App.4th at p. 935.) The circumstances of individual class members are not irrelevant in UCL class actions.

### **3. Claimed Failure to Apply “Mandated” Standards**

Relying heavily on *Capitol People*, plaintiffs argue that the trial court failed to apply “[m]andated” standards for class proof. They maintain that “[i]n California, class claims are proved by *collective evidence* of defendant’s practices, not individual instances.” Their argument is simply another iteration of their arguments that trial courts have a “duty” to “ensure” that all putative class actions proceed as class actions and that the trial court had an “obligation” here to focus on Apple’s conduct. We have already rejected those arguments.

### **4. Claimed Improper Consideration of Harm and Damages Issues**

Plaintiffs contend that the trial court “erred in assuming it would be necessary to examine individual harm or damages and using that as a reason not to certify an AppleCare class.” This contention mischaracterizes the trial court’s order and misconstrues the law.

Contrary to plaintiffs’ suggestion, the trial court’s refusal to certify an AppleCare class was not based solely on individual damages issues.<sup>4</sup> The court ruled that individual

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<sup>4</sup> Since the trial court did not deny certification based on damage computation issues, plaintiffs’ reliance on cases stating the general rule that it is not a bar to certification that individual class members may ultimately need to itemize their damages is misplaced. (E.g., *Sav-On, supra*, 34 Cal.4th at p. 334; *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 397.) The snippets that plaintiffs

issues would predominate with respect to “both liability and damages” such that “it would not even be appropriate to certify the class solely for determination of liability issues.” The court’s order listed the many individual questions that would arise. All of those questions are relevant to determining liability in this case.

That some of the questions the trial court identified may also be relevant to determining damages does not mean the court erred in considering them at the certification stage. (See *Brinker, supra*, 53 Cal.4th at p. 1025.) Although differences in the amount of each class members’ damages will not ordinarily defeat certification, “differences in the actual existence of damages or in the manner of incurring damages are appropriate considerations” in determining whether to certify a class. (*Caro, supra*, 18 Cal.App.4th at p. 665.) Individual causation and damages issues were fatal to class certification in *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096 (*Lockheed*) because those issues would have to be litigated individually even if the plaintiffs’ toxic tort action were tried as a class action. (*Id.* at p. 1111.) Individualized damage issues raised by the plaintiffs’ action seeking removal and replacement of allegedly defective shower pans made class certification inappropriate in *Evans v. Lasco Bathware, Inc.* (2009) 178 Cal.App.4th 1417, 1427-1430.) Certification was inappropriate in *Newell v. State Farm General Ins. Co.* (2004) 118 Cal.App.4th 1094 because each class member’s right to recover for the defendant insurer’s failure to pay earthquake claims depended on facts peculiar to his or her case. (*Id.* at p. 1104.) Here, it was entirely proper for the trial court to consider whether individualized issues of liability and the fact (as opposed to the measure) of damages made class certification inappropriate in this case.

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selectively quote from various other cases do not advance their position either. None of those cases holds or suggests that it is improper for a court to consider issues relating to the fact of damages when deciding a motion for class certification.

## 5. Claimed Improper Consideration of the Merits

Plaintiffs argue that the trial court's rejection of their statistics expert Samaniego's evidence was an improper determination of the merits of the case. We disagree.

“As a general rule, class certification should not be ‘conditioned upon a showing that class claims for relief are likely to prevail.’ [Citation.] ‘The certification question is “essentially a procedural one that does not ask whether an action is legally or factually meritorious.” [Citation.]’ [Citation.]” (*Morgan v. Wet Seal, Inc.* (2012) 210 Cal.App.4th 1341, 1358.) But the general rule does not preclude a trial court “from scrutinizing a proposed class cause of action to determine whether, assuming its merit, it is suitable for resolution on a classwide basis.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 443 (*Linder*)). “[I]ssues affecting the merits of a case may be enmeshed with class action requirements, such as whether substantially similar questions are common to the class and predominate over individual questions or whether the claims or defenses of the representative plaintiffs are typical of class claims or defenses.” (*Ibid.*)

Contrary to plaintiffs' suggestion, no rule prohibits a trial court from evaluating the expert evidence that a proponent of class certification submits. (See *Lockheed, supra*, 29 Cal.4th at pp. 1109-1111 [concluding that plaintiffs' medical experts' testimony was “too qualified, tentative and conclusionary to constitute substantial evidence that plaintiffs . . . will be able to prove causation and damages by common evidence”].) Indeed, courts must do so. “‘When the trial court determines the propriety of class action treatment, “the issue of community of interest is determined on the merits and the plaintiff must establish the community as a matter of fact.” [Citation.]’” (*Department of Fish & Game v. Superior Court* (2011) 197 Cal.App.4th 1323, 1350-1351 (*Fish & Game*)). “In considering the expert evidence a plaintiff proposes to offer, the basis of the expert's opinions must be examined to determine if it is supported by the record. ‘[A]n expert's opinion is no better than the facts upon which it is based.’ [Citation.] ‘An expert's opinion which rests upon guess, surmise or conjecture, rather than relevant,

probative facts, cannot constitute substantial evidence.’ [Citation.] In assessing the plaintiff’s expert evidence, the court should consider all the evidence, including that of the defendant’s experts, in order to determine if the plaintiff’s evidence establishes the predominance of common issues on the merits of the case. Were it otherwise, a ‘plaintiff could pick and choose among the facts to present to the court, providing an incomplete picture of the litigable issues, in order to ensure a certification.’ [Citation.]” (*Fish & Game*, at p. 1351.)

Here, plaintiffs told the trial court that Samaniego’s declarations exemplified the type of evidence that they would present at trial. The trial court properly evaluated Samaniego’s declarations in determining whether to certify the proposed AppleCare class. (*Fish & Game*, *supra*, 197 Cal.App.4th at pp. 1350-1351.)

Plaintiffs argue that the trial court’s rejection of Samaniego’s testimony was not only improper but also “unfounded.” We disagree. Substantial evidence supported the trial court’s conclusion that Samaniego’s analysis rested on “unwarranted” assumptions, including the assumption that the purchase dates customers wrote on their mailed-in AppleCare enrollment cards were always correct. Apple’s statistics expert Delores Conway demonstrated that the assumption was unsupported. Conway examined the subset of cards in plaintiffs’ survey that customers had mailed in to register products that they bought directly from Apple. The purchase dates in Apple’s systems for those products were known to be accurate because they were automatically recorded on the date of sale. Conway compared those dates to the purchase dates reported by the customers on their AppleCare enrollment cards. She found a large percentage of the customer-reported dates to be incorrect. Substantial evidence thus supported the trial court’s conclusion that the purchase dates written on the enrollment cards were not reliable indicators of the actual purchase dates. Because they were not reliable indicators of the actual purchase dates, any comparison of those dates to the dates in Apple’s internal systems was meaningless. The trial court properly so found.

## **F. Claimed Insufficiency of the Evidence**

### **1. Predominance of Individual Issues**

Plaintiffs argue that there was not substantial evidence to support the trial court's finding that individual issues would predominate at a trial of their AppleCare claims. We disagree.

Apple submitted evidence that it offers different AppleCare contracts for different products and that a customer must purchase the appropriate AppleCare plan. It submitted evidence that AppleCare plan confirmation certificates are issued to customers who successfully enroll their plans and that each certificate states a coverage end date calculated from the warranty start date in Apple's systems. It submitted evidence that Apple's systems will not issue a plan confirmation certificate without a validated warranty start date.<sup>5</sup> It submitted evidence that coverage end dates are calculated from *validated* rather than provisional warranty start dates.

The evidence showed that validated dates are obtained in a variety of ways, all involving interactions with customer. Some purchase dates are automatically recorded, and Apple treats those dates as validated. Some validated dates are the purchase dates that customers provide when they register their products, speak with an Apple telephone agent, or enroll their AppleCare plans. Some are based on the purchase dates that resellers like Santos provide when they register products or enroll AppleCare plans as a service to their customers.

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<sup>5</sup> Plaintiffs challenge Apple's evidence on this point, arguing that it was "carefully framed only in the *present tense* and did not discuss Apple's practices prior to 2008." The argument lacks merit. Plaintiffs criticize the declaration of a single employee and ignore the many other declarations that Apple submitted. The trial court could reasonably infer from Apple's supporting declarations that Apple's practice is and has been to enroll AppleCare coverage only if its systems contain a validated purchase date, and to calculate the coverage end date from a validated date.

Apple submitted evidence that customers who for any reason do not successfully enroll their AppleCare plans are not denied AppleCare coverage if they show proof of purchase and otherwise meet the conditions for coverage. There was evidence that when Blevins sought a repair after the coverage end date on her AppleCare certificate, Apple did not deny her claim but instead asked her to submit proof of purchase. She did so, and Apple updated its records and covered the repair. All of this evidence amply supported the trial court's conclusion that establishing a class member's right to recover for misenrollment or nonenrollment would require individualized inquiry into (1) whether the class member purchased the AppleCare contract corresponding to the product for which coverage was sought, (2) whether he or she did so before the one-year limited warranty expired, (3) whether he or she enrolled the contract, (4) whether he or she received a plan certificate, and (5) whether the coverage end date on the certificate reflected an apparent shorting of coverage.

Ample evidence supported the trial court's additional conclusion that establishing each class member's right to recover for misenrollment or nonenrollment would require individualized inquiry into whether the apparent misenrollment or nonenrollment "resulted from something Apple did or something the class member did (such as by providing Apple with an erroneous purchase date in the product enrollment process and/or the [AppleCare] enrollment process)." Apple presented evidence that a number of plaintiffs' nonenrollment claims were attributable to their own errors. Branning, for example, alleged that Apple refused to honor an AppleCare plan that he purchased for a PowerBook G4 and a cinema display. Apple submitted evidence that it offers those who purchase certain computers an opportunity to enroll an Apple display at no additional cost in the same AppleCare protection plan that covers the computer, but only if the computer and the display are purchased at the same time. There was evidence that Branning's display was not eligible for AppleCare coverage because it was not purchased at the same time as the computer that his AppleCare plan covered.

Bruneman claimed that Apple failed to enroll an AppleCare plan that he purchased for a PowerBook computer. Apple submitted evidence that the plan was not enrolled because Santos's employee mistakenly sold Bruneman (and enrolled for him) an AppleCare plan for an iBook instead of for a Powerbook.

Blevins alleged that Apple failed to enroll AppleCare coverage on one of two iPods that she purchased in 2003. Apple submitted evidence that Santos transposed two digits of the iPod's serial number when he attempted to enroll the product in AppleCare for her. Santos's mistake caused Apple to enroll a *different* iPod in AppleCare. Blevins ultimately dismissed her nonenrollment claim for the iPod that she alleged Apple failed to enroll in AppleCare.

All of the foregoing evidence more than supported the trial court's finding that individual liability and damages issues would predominate. The trial court properly denied certification on that ground. (*Lockheed, supra*, 29 Cal.4th at p. 1111.)

## **2. Overbreadth**

Plaintiffs argue for the first time in their reply brief that the trial court's finding that their proposed AppleCare class was overbroad was "unsupported." Appellate courts ordinarily do not consider new issues raised for the first time in an appellant's reply brief because to do so "'would deprive the respondent of an opportunity to counter the argument.' [Citations.]" (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764-765.) "[T]he court may properly consider them as waived . . . ." (*Ibid.*)

Even if we assume that plaintiffs preserved the argument, we need not address it. "'Any valid pertinent reason stated will be sufficient to uphold the [trial court's] order [granting or denying a class certification motion].' [Citation.]" (*Linder, supra*, 23 Cal.4th at pp. 434-436.) We have already determined that the trial court properly denied certification of plaintiffs' proposed AppleCare class because individual issues would predominate. (E.g., *Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 1002, fn. 13 ["Given our conclusion here that Dailey failed to make the necessary showing of

commonality . . . , it is not necessary for us to address the trial court’s additional stated reasons for denying class certification . . . .”].)

### **G. Superiority Determination**

Plaintiffs contend that the trial court erroneously concluded that a class action would not be superior to individual actions. We need not address this argument because even if plaintiffs could establish superiority, that would not excuse their failure to meet the other requirements for certification under Code of Civil Procedure section 382. (*Thompson, supra*, 217 Cal.App.4th at p. 733 [“Superiority alone is insufficient, and the court therefore properly exercised its discretion when it denied class certification.”].)

### **H. Claimed Error in Refusing to Certify Plaintiffs’ Fraud Claim**

At the end of their brief, plaintiffs challenge the trial court’s 2009 certification order to the extent it denied certification of their fraud claim. They first complain that the trial court did not “elaborate” on its “unspecific ruling” that individualized issues would predominate. The argument lacks merit. The order stated the reason for denying certification of the fraud claim: because individual issues would predominate. The court was not required to “elaborate” in the absence of a request for findings of fact and conclusions of law. (*Stephens v. Montgomery Ward* (1987) 193 Cal.App.3d 411, 418.) Plaintiffs made no such request here.

Without citation to the record, plaintiffs assert that “the only argument specific to the fraud claim that Apple asserted below was that individual issues of *reliance* would predominate.” Plaintiffs imply that the trial court refused to certify their fraud claim on that basis alone. They contend that this was error because “a classwide *presumption or inference of reliance* arises and supports certification” in cases like this one. We reject the argument.

Plaintiffs' assertion that Apple raised only reliance issues below mischaracterizes the record. Apple argued that plaintiffs had not provided and could not provide substantial evidence regarding how they would establish *any* of the required elements of fraud through common proof. There is thus no support in the record for plaintiffs' assumption that the trial court denied certification of their fraud claim on reliance grounds alone. Even if there were, we would reject plaintiff's contention that the court should have presumed reliance in this case and certified plaintiffs' fraud claim.

Reliance is a necessary element of a claim for fraud or deceit. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239; *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1091-1093 ["California courts have always required plaintiffs in actions for deceit to plead and prove the common law element of actual reliance"] (*Mirkin*).) In rare situations, "*when the same material misrepresentations have actually been communicated to each member of a class, an inference of reliance arises as to the entire class.*" (*Mirkin*, at p. 1095, citing *Vasquez v. Superior Court* (1971) 4 Cal.3d 800 (*Vasquez*) and *Occidental Land, supra*, 18 Cal.3d 355.)

In *Vasquez*, "salesmen employed by [the defendant] memorized a standard statement containing the [alleged misrepresentations] (which in turn were based on a printed narrative and sales manual) and . . . this statement was recited by rote to every member of the class." (*Vasquez, supra*, 4 Cal.3d at pp. 811-812.) In *Occidental Land*, the alleged misrepresentations were contained in a public report and "[e]ach purchaser was obligated to read the report and state in writing that he had done so." (*Occidental Land, supra*, 18 Cal.3d at pp. 358, 361.) Nothing like that occurred in this case. Plaintiffs assert that "Apple's representations were uniform and in writing." But the evidence they cite (a page that their counsel printed in 2008 from the Apple online store's Web site and a page from the "AppleCare FAQs" on Apple's Web site) does not support the assertion. It cannot be concluded from these Web site pages that all prospective class members or even all of the named plaintiffs visited Apple's Web site before they

purchased their products or that those who did visit the Web site before they purchased their products read the particular statements that plaintiffs rely on. The *Vasquez/Occidental Land* inference of reliance plainly does not apply. Plaintiffs do not challenge the trial court's refusal to certify their fraud claim on any other ground. We conclude that the trial court did not err in refusing to certify plaintiffs' fraud claim in 2009.

### **III. Disposition**

The October 4, 2010 and December 2, 2010 orders are affirmed.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Grover, J.