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SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

IRENE PARRY, individually and on behalf of all others similarly situated; JEANETTE O'SULLIVAN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

FARMERS INSURANCE EXCHANGE; TRUCK INSURANCE EXCHANGE; FIRE INSURANCE EXCHANGE.; FARMERS GROUP, INC.; and DOES 1-100,

Defendants.

Case No.: BC683856

Hon. Amy Hogue, SS Dept. 007

PLAINTIFFS' REPLY TO FARMERS GROUP, INC.'S OPPOSITION TO MOTION FOR CLASS CERTIFICATION

[Notice of Motion, Motion for Class Certification, Declaration of K. Baisch, (Proposed) Order, and Notice of Lodging, filed concurrently]

DATE: February 25, 2021
TIME: 10:00 a.m.
DEPT: SS 007
COMPLAINT FILED: November 16, 2017
Trial Date: Not Set

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I. Introduction and overview

The National Labor Relations Board has concluded—twice—that Farmers misclassified its agents as independent contractors, because "agents do not operate their own independent businesses, but perform functions that are an essential part of [Farmers'] normal operations" and Farmers retained control; if an "agent gets into disfavor," termination "can be the result." (*Farmers Ins. Group* (1971) 187 N.L.R.B. 844, 846; see also *Farmers Ins. Group* (1963) 143 N.L.R.B. 240, 244 [same].)[1] This case is about Farmers abusing the agents' classification yet again.

FGI boasts that Farmers' treatment of the agents has withstood a "half-century of judicial and regulatory scrutiny." (Opp. at p. 1.) It has not. There is no "regulatory scrutiny." No regulator approves the agents' classification under the Labor Code. The insurance regulations FGI cites have nothing to do with worker classification. (*Id.* at p. 1 fn. 5.) As for "judicial scrutiny," none of the cases FGI cites hold that the agents are independent contractors under *Borello*. (*Id.* at p. 1 fn. 4.) One expressly "decline[d] to consider the issue." (*UFAA, Inc. v. Farmers Group, Inc.* (2019) 32 Cal.App.5th 478, 497, fn. 15.)

The Court should grant certification to consider the issue here. Under *Borello*, if FGI retained the *right* to exercise "all necessary control" over the agents, they are employees. Defendants' form agent agreements, classwide policies reflecting their interpretation of their rights, and use of a hierarchy of managers to supervise the agents, establish that FGI's retained rights are sufficiently uniform to permit classwide assessment.

FGI never expressly disputes this. Instead, FGI focuses not on the rights it retained, but on those it exercised, to argue that the worker classification issue must be resolved on an agent-by-agent basis. The California Supreme Court squarely rejected FGI's argument in *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, however, holding that what matters for certification is whether the control Farmers retains the *right* to exercise is sufficiently uniform.

[1] Courtesy copies of N.L.R.B. decisions are at R.Ex. O & R.Ex. P. All "Reply Exhibit" cites ("R.Ex.") are to exhibits attached to the Declaration of Krista K. Baisch in Further Support of Plaintiffs' Motion for Class Certification and Plaintiffs' Motion to Strike, filed concurrently. "Ex." cites are to exhibits attached to the Declaration of Krista K. Baisch filed on October 16, 2020.

FGI also argues that agents oppose this case and do not want to be employees. But Plaintiffs have never sought to bar FGI from classifying the agents as independent contractors; Defendants argue that Plaintiffs "lack standing" to seek that relief even if they did. (Farmers' Opp. at p. 23.) Plaintiffs filed suit to stop FGI's abuse. As Plaintiff O'Sullivan explained, this case "is about treatment. If we are independent contractors treat us as such." (R.Ex. L at 122:2-4.)

None of FGI's agent declarants disagree. They just labor under the mistaken assumption that this case aims to reclassify them as employees. Moreover, as Plaintiffs' expert explains, FGI biased these agents' views, and the Court cannot accept them as representative of the class. (R.Ex. Y at ¶¶ 6-7, 43, 57.) That a "small number" of class members—0.85% here—may be antagonistic "should not be sufficient to defeat the motion for certification." (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 475 [that 6% of the class opposed insufficient].)

Defendants oppose this lawsuit and claim that it risks upsetting their business model. This plea found no sympathy in the Ninth Circuit, where the court explained, "[a]lthough our decision substantially unravels FedEx's business model, FedEx was not entitled to 'write around' the principles and mandates of California Labor Law," including § 2802, by classifying its drivers as independent contractors. (*Alexander v. FedEx Ground Package Sys.* (9th Cir. 2014) 765 F.3d 981, 998 [Trott, J., concurring].) The argument should find no sympathy here either. FGI can follow the law, like so many others do, and treat the agents consistent with their classification.

II. FGI's arguments against certifying the joint-employer claim fail as a matter of law.

The joint-employer question asks, after all necessary control over the workers under *Borello* is found, *who* is exercising that control, and *how*, regarding matters like firing, hiring, direction, supervision, or discipline. (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 478-479 [franchisor not an employer of franchisee's employee, because only "the *franchisee* made day-to-day decisions involving the hiring, supervision, and disciplining of his employees"]; *Vernon v. State of California* (2004) 116 Cal.App.4th 114, 127 [State not an employer of city's employee because "ultimate control" over matters like firing, discipline, and supervision "was

exercised separately and exclusively by the [city], not the State."].) FGI agrees that an entity's authority to hire, supervise, and discipline is "particularly instructive." (Opp. at p. 10.)

Plaintiffs' opening brief established how the Exchanges have no role in hiring, supervising, managing, training, or firing the agents. Among other things, FGI (1) drafts the agent agreements, (2) hires the agents, (3) trains the agents, (4) manages and supervises the agents, including hiring and supervising the agents' managers, (5) defines the rights and responsibilities of the agents' managers in written job descriptions and performance metrics, (6) promulgates policies applicable to the agents (e.g., Smart Office, Agency Growth Model, etc.), (7) determines whether agents are eligible for bonuses or severance, (8) determines whether an agent can "sell" so-called "commission and servicing rights," and (9) decides whether to terminate agents. (Pltffs Br. at pp. 3-14.) FGI receives billions of dollars in fees for managing the agents. (*Id.* at p. 4.)

Nonetheless, FGI argues that "individualized evidence predominates proof of the 'joint employer' claim" and certification "would deprive FGI of due process." (Opp. at p. 14.) FGI also criticizes Plaintiffs' trial plan for not contemplating "calling Plaintiffs" or "putative class members" to prove the joint-employer claim. (*Id.* at p. 3.) Yet FGI points to no evidence that its authority varies by agent. Nor does FGI try to explain how its rights cannot be established through FGI managers and documents, or why class member testimony is superior or necessary.

FGI addresses none of these issues because it is not really arguing about certification of the joint-employer question. It is arguing about the merits of the independent-contractor issue. For example, FGI argues that it is not a joint employer because agents purportedly "have been treated as independent contractors" (Opp at p. 11), and the agents allegedly "retained the freedom, autonomy, and right to control" (*id.* at p. 10). FGI then argues about evidence it claims a fact finder must consider under *Vernon* and *Patterson* to decide if agents "retained … the right to control." (*Id.* at p. 12.)

FGI's use of the *Patterson* joint-employer test to argue about the merits of the independent-contractor question is contrary to both statute and precedent. By statute, the agents' status as employees under § 2802 "shall be governed by *Borello*." (Lab. Code, § 2783, subd. (a).)

FGI cites no precedential case holding that *Patterson's* joint-employer test and *Borello's* independent-contractor test are identical, let alone a case applying *Patterson's* joint-employer test to determine a worker's status as an employee. As one court explained in an analogous context, "[t]hat lack of precedent is understandable because, at bottom, the independent-contractor and joint-employer tests ask different questions. The independent-contractor test considers who, if anyone, controls the worker other than the worker herself. [Citation.] The joint-employer test, by contrast, asks how many employers control individuals who are unquestionably superintended." (*Browning-Ferris Indus. of Cal. v. NLRB* (D.C. Cir. 2018) 911 F.3d 1195, 1214.) Thus, "using the independent-contractor test exclusively to answer the joint-employer question would be rather like using a hammer to drive in a screw: it only roughly assists the task because the hammer is designed for a different purpose." (*Id.* at p. 1215.) For the same reason, FGI cannot rely on the joint-employer test to answer the factually and legally distinct independent-contractor question.

FGI's argument also leads to absurd results. It contemplates a trier of fact concluding that the agents are "employees" under *Borello* for purposes of § 2802, but that FGI is not a joint employer because it "treated" the agents "as independent contractors." (Opp. at p. 11.)

FGI advances no argument disputing that if the trier of fact finds that the agents are employees under *Borello*, then the joint-employer question can also be answered on a classwide basis. The Court should certify the joint-employer issue.

III. Whether the agents are employees turns on common evidence.

A. Certification presents no due process issues.

FGI claims certification "would deprive [it] of due process" and inhibit its ability "to put-on a defense." (Opp. at p. 10) It would not. Plaintiffs' trial plan does not purport to limit the evidence FGI may rely on. Certification would not "abridge" FGI's "substantive rights" by "'[a]ltering the substantive law to accommodate procedure.'" (*Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 34 [citation omitted].)

Instead, it is Defendants who are altering substantive law to accommodate their opposition. Like Farmers, FGI (i) rewrites *Borello's* test as focusing on the *agents'* rights to

control, not Farmers' right, and (ii) assumes that its independent contractor classification is correct, and Farmers lacked a right to control under the agent agreement, all to argue that (iii) Plaintiffs must show common evidence that every agent did not retain his or her alleged right to control. (E.g., Opp. at p. 2, 10-11.) Like Farmers, FGI also argues that the agent declarations "will corroborate that the agents have retained … the right to control," and "that none of [Farmers'] 'policies' or alleged 'pressures' … have altered that contractual right."[2] (Opp. at p. 12.)

Plaintiffs' reply to Farmers' opposition explains why this is error. (Reply to Farmers' Opp. at Section II.) To summarize, a presumption of employment applies to actions brought under the Labor Code; *Borello* looks at the control FGI retains the *right* to exercise, not the control FGI exercises; thus, FGI asks "the wrong legal question" by focusing on variations in "whether and to what extent [the hiring party] exercised control," to oppose certification. (*Ayala, supra,* 59 Cal.4th at p. 535.) What matters "is not how much control a hirer *exercises*, but how much control the hirer retains the *right* to exercise." (*Id.* at p. 533 [emphasis in original].) "That a hirer chooses not to wield power does not prove it lacks power." (*Id.* at p. 535.) That is why "at the certification stage, the relevant inquiry is not what degree of control [the hiring party] retained…. It is, instead, a question one step further removed: Is [the hiring party's] right of control over its [workers], whether great or small, sufficiently uniform to permit classwide assessment?" (*Id.* at p. 533.)

FGI never argues that the rights *it* retained vary in any significant way (or at all) from one agent to the next, or that Defendants' relationship with its agents varied in any significant way (or at all). Just the opposite, FGI points to its form agent agreements as evidence that it properly classified *all* the putative class members. (Opp. at p. 11 [claiming evidence will "show that by each of the 10 versions of the individual Agent Appointment Agreement and 4 versions of the Corporate Agent Appointment Agreement … the agents have been treated as independent

[2] The Court allowed FGI to file a separate opposition "provided it in good faith presents arguments and evidence that are not cumulative of those submitted by the Exchange Defendants." (Nov. 16, 2020 Stipulated Order at p. 3.) FGI honored that provision in the breach by portraying its opposition to certification of the independent-contractor issue as an argument about the joint-employer issue.

contractors"]; *id.* at p. 12 [evidence "will corroborate that agents have retained, by contract and course of conduct, the right to control"].)

Nonetheless, FGI claims that while *it* can make classwide decisions about the agents' classification without individualized inquiry, for everyone else "individualized and unique evidence is critical to prove that FGI does not and has not retained the right to control," and "this inquiry must be made on a case-by-case basis," and "is not, by definition, susceptible to proof by common evidence." (Opp. at p. 13.) Courts are rightly skeptical of that claim since an "inherent tension" exists between the two positions. (*O'Connor v. Uber Techs.* (N.D.Cal. Sep. 1, 2015) 2015 U.S.Dist.LEXIS 116482, at *7-8.) "An internal policy that treats all employees alike for exemption purposes suggests that the employer believes some degree of homogeneity exists among the employees. This undercuts later arguments that the employees are too diverse for uniform treatment." (*Mevorah v. Wells Fargo Home Mortg.* (9th Cir. 2009) 571 F.3d 953, 957.)

Moreover, FGI cites no authority holding that independent contractor misclassification issues "by definition" present inherently uncertifiable issues. That is unsurprising. Courts regularly certify independent contractor misclassification cases, including claims under Labor Code § 2802. (See, e.g., *Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329; *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1; *Smith v. Cardinal Logistics Mgmt. Corp.* (N.D.Cal. Sep. 5, 2008), 2008 U.S.Dist.LEXIS 117047.)

FGI also applies the wrong legal standard when it argues that the "inquiry must be made on a case-by-case basis" in this case. Indeed, FGI argues that variation in FGI's *exercise* of control precludes certification when it claims a trier of fact must consider "the *nature* and *extent* of FGI's involvement, if any," in each agent's work. (Opp. at p. 10.) Not only did *Ayala* reject that argument, but FGI repeats the trial court's error in *Ayala* of paying "only cursory attention" to (i) the form agent agreements outlining FGI's rights, and (ii) FGI's numerous classwide policies reflecting FGI's interpretation of its rights under the agreements. (*Ayala, supra,* 59 Cal.4th at p. 534.) Indeed, FGI pays *no* attention to these key documents.

If anything, the FGI's agent declarations—even though biased and inadmissible for a slew of reasons—underscore how FGI's rights do not vary by agent. The declarants all work in Farmers' branded agencies. (See, e.g., R.Ex. Q.) All of them have standardized Farmers' websites hosted on a Farmers' domain and do business using Farmers' email addresses. (See, e.g., R.Ex. R.) No declarant disputes that Farmers can terminate them at will; that Farmers owns their Farmers' agencies; that Farmers can transfer polices from one agent to another; or that they lose their agencies upon termination. No declarant disputes that they work exclusively for Farmers. Agent Votaw calls it a "captive agent relationship." (Votaw Decl., ¶ 31.)

No declarant disputes that they are subject to Farmers' classwide performance management policies. They acknowledge being subject to Farmers' Smart Office requirements, and that Farmers "encouraged" them to comply by tying their compensation to compliance. (E.g., R. Votaw Decl., ¶ 16; Herzog Decl., ¶ 37; Huntamer Decl., ¶ 25; Hetherton, ¶ 6.) As for Farmers other classwide performance management policies—e.g., Agency Growth Model—FGI has the declarants say nothing at all.

No declarant states that they owned independently established insurance agencies when Farmers' hired them. No declarant disputes that a hierarchy of Farmers' managers whose sole job is to manage the agents sits above them; indeed, many acknowledge regular interaction with their district managers. (E.g., Huntamer Decl., ¶¶ 30-31; Votaw Decl., ¶ 21.) Some declarants mention using agency producers. (E.g., Votaw Decl., ¶ 14; Herzog Decl., ¶ 3.) Yet none dispute that Farmers controls whether they can hire an agency producer; it "'is NOT an agent entitlement.'" (Pltffs Br. at p. 9.) Declarants discuss how they can "buy" or "sell" the Farmers' agency or pass it along to a family member. (E.g., Votaw Decl., ¶ 32; Herzog Decl., ¶ 12; Huntamer Decl., ¶ 17.) Yet no declarant disputes that Farmers retains the sole right to deny a "sale" "for any reason or no reason." (Pltffs Br. at p. 6 [quoting Ex. 129-130, ¶ G].)

FGI also passes over how its retained rights allow it to coerce declarants, or other agents, without having to exercise them. FGI portrays agents like Votaw and Herzog as akin to successful business owners with million-dollar agencies. But FGI omits to mention how it can transfer

policies out of or into their agencies to make them smaller or larger at FGI's whim. (Pltffs Br. at pp. 5-6.) FGI can block agents from selling the Farmers' agency, or from buying another Farmers' agency. FGI can terminate them at any time for any reason, in which case Farmers keeps the million-dollar Farmers' agency, including all policyholder information and even the office phone numbers and Farmers' email address. In that case, neither agent can recover their "investment" in the Farmers' business; both must abide by a non-compete if they accept the severance package they depend on for retirement. (Pltffs Br. at p. 8.)

B. FGI's secondary factors raise no predominately individualized issues.

FGI argues that "elements and factors" it lists, but does not discuss, raise issues "individualized and unique" to each agent. (Opp. at pp. 12-13.) These factors appear to be FGI's rewriting of *Borello's* secondary factors. Whatever their source, they raise no predominately individualized issues. For example:

"Whether the agents own their agencies." (Opp. at 13.) No agent owns their Farmers' agency. Farmers owns the agencies. (Pltffs Br. at pp. 5-6.) That some agents mistakenly believe they "own" "their" Farmers' agency is irrelevant. This factor favors employee status. (*Estrada, supra,* 154 Cal.App.4th at p. 12 [that "customers are FedEx's customers, not the drivers' customers," favored employee status].)

"Whether agents' work is supervised." (Opp. at 13.) FGI supervises all agents' work through a hierarchy of managers and subjects all agents to Agency Growth Model, Smart Office, and other performance management processes. (Pltffs Br. at pp. 6-7; Ex. CWP; Professor Finkelman Decl., Ex. Y.) Farmers should not subject independent contractors to these types of performance management process. (Prof. Finkelman Decl., Ex. Y, ¶¶ 22-24.) This fact about FGI's uniform right to control favors certification and employee status.

"How and by whom agents are paid commissions and who determines how much they can earn." (Opp. at p. 13.) Farmers alone determines the commission rate and bonus structure for every agent. (Pltffs Br. at p. 9.) Farmers uses this right to control agent behavior by, for example, cutting agent commissions. (Pltffs Br. at pp. 9, 13; Finkelman Decl., ¶¶ 24-26.) Farmers also determines

the price for its insurance products, and it regularly raises rates (premiums). (Pltffs Br. at p. 11, fn. 7.) That the agents' opportunity to profit may be lost at Farmers' sole discretion is a classwide fact that favors employee status. (*Estrada, supra,* 154 Cal.App.4th at p. 12 [fact that "opportunity [for profit] may be lost at the [hiring party's] discretion" favored employee status].)

"The ability of agents to pass-on their agency to family members or sell it on the open market…." (Opp. at p. 13.) FGI retains the sole right to deny a sale or transfer of a Farmers' agency for any reason or no reason. (Pltffs Br. at pp. 5-6.) This classwide fact favors employee status.

"Agents' concurrent involvement in other business ventures that are separate and distinct from their insurance business." (Opp. at p.13.) FGI does not dispute that "Farmers' policy is it has the 'right to the undivided and efficient service of the agency force member,' and grounds for termination include an agent 'accepting or engaging in any activity, business or employment that would conflict with' Farmers' right." (Pltffs. Br. at p. 8 [quoting Ex. J at p.8].) Farmers alone decides if an agent's activity poses a conflict, and its decision is unreviewable.

C. The agent declarations are unreliable.

The Court should presume that the agent declarations are unreliable and give them no weight. "[A]n an ongoing business relationship between the class opponent and putative class members … is rife for abuse and coercion." (*Barriga v. 99 Cents Only Stores LLC* (2020) 51 Cal.App.5th 299, 308.) "[T]o ensure fairness in class actions," the Court must "carefully scruntinize[]," statements an employer obtains from its workers "for actual or threatened abuse." (*Ibid.*) "And, if the trial court concludes the statements were obtained under coercive or potentially abusive circumstances, it has discretion to either strike those statements entirely or discount the evidentiary weight to be given to them." (*Ibid.*) Thus, in *Smith, supra,* 2008 U.S.Dist.LEXIS 117047, at *21, the court concluded that declarations by current workers opposing certification were "entitled to less weight" because declarants had "an incomplete grasp of the nature of Plaintiffs' lawsuit"—they did not understand that plaintiffs' claimed "monetary damages" and did not seek to "outlaw" the independent contractor relationship." The same result should follow here.

The agent declarants had an incomplete grasp of this case, their rights, and the conflict that may exist between Defendants' interests and theirs. There is no evidence that Defendants advised declarants that (i) Defendants' interests were potentially adverse to declarants' interests; (ii) Plaintiffs seek monetary relief and do not seek to reclassify the declarants as employees; (iii) if the Court certifies the § 2802 claim, that Defendants could use the declarants' statements in a manner adverse to them to limit their relief, or (iv) if the Court grants certification it would likely appoint Plaintiffs' counsel to represent the class. (Baisch Decl. ¶¶ 5-19; R.Exs. A-H.) There is no evidence that Defendants provided declarants with copies of Plaintiffs' complaint or motion for class certification. (*Id.*) Most declarants (41 of 51) signed their declarations months before Plaintiffs filed their motion—some in 2019. (See, e.g., Vukovich Decl.; Nielsen Decl.) When Plaintiffs managed to talk with some declarants, it became clear that they understood neither this case nor the purpose of their declarations. One declarant stated that he did not understand what this lawsuit was about and, now that he does, he supports Plaintiffs' claims. (R.Ex. G, ¶¶ 3-6.)

There is evidence that Defendants' counsel told Defendants' managers that Farmers would prefer that declarants not talk with Plaintiffs' counsel—and that message was relayed to declarants. (R. Ex. A at FARMERS 268556.) Some communications with declarants even characterize Plaintiffs as "opposing counsel." (R.Ex. A at FARMERS 268534.) To turn their preference into action, Defendants then provided declarants with an attorney that Defendants pay for, and whose firm website lists Farmers as a client, to represent declarants and prevent Plaintiffs' counsel from talking with these agents. (Baisch Decl. ¶¶ 5-19; R.Exs. A-H.) Unsurprisingly, Defendants' hand-picked counsel has told Plaintiffs that they can obtain information from those declarants she purportedly represents at Defendants' behest and expense only by formal discovery. (R.Ex. F.)

There is also evidence of Defendants coercing the agents. Farmers does not dispute that it believes agents who challenge their independent contractor classification violate the agent agreement and forfeit their retirement—the "contract value" or severance. (Ex. CC.) Farmers calls this a "legal argument," not retaliation. (Opp. at p. 23 fn. 20.) But the aim of Farmers'

"legal argument" is to wipe out an agent's retirement for going against Defendants' interests. That is retaliation, and Farmers' public position corroborates the statement by a former Farmers manager, Craig Bass, that at least some declarants fear retribution if Farmers perceives them as disloyal for talking with Plaintiffs' counsel. (R.Ex. H, Bass Decl., ¶ 9.)

As in *Smith,* the Court should give no weight to Defendants' declarations. It should also order Defendants to (i) stop communicating with the putative class about the case; (ii) stop instructing putative class members not to talk with Plaintiffs' counsel; (3) stop paying attorneys to represent putative class members; and (4) issue corrective information about the true nature of the case. "'The Court has authority to regulate communications which jeopardize the fairness of the litigation even if those communications are made to future and potential putative class members.'" (*Barriga, supra,* 51 Cal.App.5th 299, 328 [citation omitted].) The Court should exercise that authority here to undo what Defendants have done.

IV. FGI's argument about Mid-Century and Farmers New World Life lacks merit.

There is no merit to FGI's new defense that the absence of either Mid-Century or Farmers New World Life as named parties is "fatal" to class certification.[3] (Opp. at p. 13.) Both entities are part of Farmers, agents sell the products under the Farmers' brand, and FGI benefits directly from those sales and manages the agents on behalf of both entities. (R.Ex. H, ¶ 22; R.Ex. S at 21:19-23:6, 25:16-26:19, 30:13-17, 34:23-35:23, 37:12-14, 130:7-15.)

FGI also omits facts about its ownership and control of both entities that show it would be liable as an "employer." The Exchanges own Mid-Century, and Mid-Century's headquarters is at the same address as both the Exchanges' and FGI's headquarters. (Ex. 110; Ex. 111; R.Ex. V.) FGI provides management services to Mid-Century for a fee. (R.Ex. S at 29:9-30:3; R.Ex. V.) FGI employees sit on Mid-Century's board of directors, and the president of Mid-Century is an FGI

[3] Plaintiffs' amended complaint alleged that FGI owns Farmers New World Life, and the Exchanges owned Mid-Century. (Amend. Compl., ¶ 12.) Plaintiffs also alleged that FGI was liable because it controls the sales goals and objectives of both Mid-Century and Farmers New World Life, and thus the sales goals and objectives of the captive agents, and owns the Farmers brand used to market the insurance. (*Id.*, ¶ 28.) FGI asserted no affirmative defense about Mid-Century or Farmers New World Life not being parties.

employee. (Ex. 110; R.Ex. M; R.Ex. V; R.Ex. W; R.Ex. X.) Finally, the Exchanges' and Mid-Century's finances are tightly intertwined—Defendant Farmers Insurance Exchange assumes business written by Mid-Century under a reinsurance agreement, and the Exchanges and Mid-Century file a consolidated tax return. (*Id.*)

FGI owns Farmers New World Life and FGI employees—including FGI's CEO (Jeffrey Dailey)—sit on Farmers New World Life's board of directors. (Ex. 110; Ex. 111; R. Ex. M; R.Ex. T; R.Ex. U.) FGI "performs legal, investment, and marketing services on behalf of [Farmers New World Life]," for a fee. (R.Ex. T at p. 40.) Farmers New World Life also pays substantial dividends to FGI—$172 million in 2019, and $190 million in 2018. (R.Ex. T at p. 4.) FGI and Farmers New World Life also file a consolidated tax return. (R.Ex. T at p. 19.9.) Farmers New World Life sells life insurance "through the Exchanges' network" of Famers agents in California—the putative class. (R.Ex. U at p. 2.)

Importantly for certification, FGI's status as an "employer" along with the Mid-Century and Farmers New World Life can "'be determined by facts common to all members of the class.' [Citation.]" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1022.) FGI points to no separate set of managers who supervise the agents on behalf of Mid-Century or Farmers New World Life, because there are none. (R.Ex. H, Bass Decl., ¶ 22.) As is the case with the Exchanges, Mid-Century and Farmers New World Life may be the contracting entities, but neither entity has any role (direct or indirect) in supervising or managing the agents. FGI alone hires, trains, and supervises the agents. (Bass, ¶ 22; *supra* at p. 3.) FGI also monitors agents' sales of Farmers New World Life and Mid-Century products. (R. Ex. H, Bass Decl., ¶ 22.) And FGI benefits financially for every policy an agent sells for either entity. FGI points to no evidence that its authority to do any of these things varies by agent, or that control was "exercised separately and exclusively by [the Exchanges, Mid-Century or Farmers New World Life], not [FGI]." (*Vernon, supra,* 116 Cal.App.4th at p. 127.)

In sum: (i) FGI controls both Mid-Century and Farmers New World Life; (ii) both entities sell their products under the Farmers' brand using Farmers' agents (the class) working in

Farmers branded agencies, all of whom are managed and supervised by FGI for a fee; and (iii) FGI hires, trains, and decides whether to terminate these agents' appointments with Mid-Century and Farmers New World Life. The collective weight of these facts squeezes all credibility out of FGI's argument that it and the Exchanges cannot "be held liable for any expenses related to" selling policies for Mid-Century or Farmers New World Life. (Opp. at p. 16.)

V. The alter ego issue relies on evidence common to all class members.

FGI starts its alter ego argument by complaining about the pleadings and how Plaintiffs purportedly never asserted this "claim" against FGI. (Opp. at p. 16-17.) The "alter ego theory[] is *not* itself a claim for substantive relief," however, but a "procedural" mechanism of imposing liability. (*Hennessey's Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal.App.3d 1351, 1358-1359.) Thus, Plaintiffs' pleading "need not use the words 'alter ego,'" as long as they put FGI on notice that they intended to hold it liable with the Exchanges. (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 415.) Plaintiffs did just that. They alleged that FGI was directly liable and pled facts about FGI's control and authority over all aspects of the Exchanges' business, including managing the agents. (E.g., Am. Compl., ¶¶ 15-16, 28-29, 36, 85c, 91-96.) FGI understood that Plaintiffs sought to hold it directly liable. Its affirmative defense claims that it "is not liable to Plaintiffs for the acts of its principal [the Exchanges]." (FGI Answer, ¶ 16.) There is no merit to FGI's contention that a "lack of connection" exists between the complaint and the class to be certified. (Opp. at p. 17.) In any case, the time for challenging the pleadings has long passed.

Turning to certification, FGI argues that "the equities" preclude certification of alter ego issues. (Opp. at 17-19.) But not only have California courts *certified* claims by a class seeking to hold FGI liable under an alter ego theory, but FGI has been *found liable* to a certified class as the alter ego of defendant Farmers Insurance Exchange. Specifically, in *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, the court held that "the trial court properly exercised its equitable discretion in finding FGI, FIE [Farmers Insurance Exchange], and Prematic [an FGI subsidiary] acted as a single enterprise and therefore FGI and FIE may both be liable to the class members for UCL restitution." (*Id.* at p. 1343.) Unable to distinguish *Troyk*, FGI discusses federal cases from

the Eleventh and Seventh circuits about certification of *unjust enrichment* claims under Florida and Wisconsin law, respectively. (Opp. at 18-19.) Those non-binding cases are irrelevant.

Troyk is relevant. The court in *Troyk* certified the alter ego issue because the merits turned on facts about the relationship between FGI and an Exchange that could not possibly vary by class member. (*Troyk, supra,* 171 Cal.App.4th at pp. 1342-1343.) The same is true here. FGI's only response is common evidence about the parties' relationship "is of no value" to prove alter ego. (Opp. at p. 20.) FGI is obviously wrong. (*Troyk,* at pp. 1342-1343.) Courts call it an "alter ego relationship" (*Leek, supra,* 194 Cal.App.4th at p. 414), because they consider "all the circumstances" of the parties' relationship "to determine whether the doctrine should be applied." (*Troyk,* at p. 1342 [citation omitted].) As in *Troyk*, none of the circumstances about the parties' relationship relevant to alter ego vary by class member.

Finally, FGI argues that since its Area Sales Manager (an FGI employee) purportedly told 12 new agents that they were independent contractors and he "could not tell them what to do," that "it would not be equitable for the Court to impose alter ego liability on FGI as to agents such as these" since "'no fraud' or 'inequitable result' would occur" if the Exchanges alone were liable. (Opp. at 19.) FGI has it backwards. The doctrine does not shield FGI from liability because another solvent entity exists. The doctrine imposes liability on FGI if it used "'the corporate form … [to] circumvent a statute, or accomplish some other wrongful or inequitable purpose…." (*Troyk, supra,* 171 Cal.App.4th at p. 1341.) If, as in *Troyk*, there is "a unity of interest and ownership between" FGI and the Exchanges for purposes of circumventing § 2802, then, as in *Troyk*, the only question left is will there be "an inequitable result if the acts in question are treated as those of the [Exchanges] alone." (*Troyk,* at p. 1341.) FGI thinks "no." Plaintiffs think FGI using corporate forms to violate the Labor Code and keep the financial benefits, while leaving the Exchanges alone holding the bag, defines the very inequities the alter ego doctrine prevents. Whatever the correct answer, as in *Troyk*, that answer cannot vary by class member.

VI. FGI is not entitled to dismissal of the Labor Code § 2753 claim.

FGI argues that Labor Code § 2753 is inapplicable, because FGI is not a "person" under the statute. (Opp. at p. 22.) The statute applies to "A person who … knowingly advises an employer to treat an individual as an independent contractor to avoid employee status…." (Lab. Code, § 2753, subd. (a).) A "person" includes a "corporation." (Lab. Code, § 18.) The legislature identified the two types of "person" that § 2753 does not apply to—a "person who provides advice to his or her employer," and an "attorney authorized to practice law … who provides legal advice in the course of the practice of law." (Lab. Code, § 2753, subd. (b).) FGI is neither of these. FGI is a "person" under Labor Code § 2753.

FGI argues that the Court should amend the definition of "person" to exempt agents, or attorneys-in-fact under the insurance code, because FGI believes that is what "the legislature intended." (Opp. at p. 22.) But the legislature already decided who is exempt from § 2753. It did not exempt persons like FGI who stand to make billions by advising the insurance companies they superintend to abuse the independent contractor classification. FGI may be unhappy with the legislature's decision, but "courts 'may not rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed.'" (*Jarman v. HCR ManorCare, Inc.* (2020) 10 Cal.5th 375 392 [citation omitted].)

FGI's argument for dismissal is also improper. It is an argument that should brought as a motion for summary adjudication, not as an opposition to class certification.

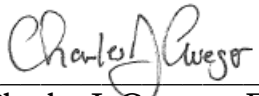
VII. Conclusion

For these reasons, the Court should grant the motion for class certification.

February 11, 2021

Respectfully submitted,

CRUEGER DICKINSON LLC



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