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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 THE FARMERS DEFENDANTS' OPPOSITION TO CLASS CERTIFICATION

[Declaration of K. Baisch, 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

Farmers wants this Court to lose sight of the key question for certification: Are the rights Farmers retained in relation to its agents, whatever their scope, sufficiently uniform to permit classwide assessment? Because the answer as "yes," Farmers argues a different question—do potential variations in Farmers' *exercise* of its rights preclude certification?

Farmers' problem: the California Supreme Court has shot down its argument. Because *Borello* looks at the control the hiring party retains the *right* to exercise, not the control a hirer exercises, a court errs by focusing on variations in the *exercise* of control to deny certification. (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 534.) That Farmers may have varied how it exercised its rights "does not answer whether there were variations in [Farmers'] underlying *right* to exercise that control that could not be managed by the trial court." (*Ibid.*)

Farmers attempts to solve its *Ayala* problem by creating an argument about what Plaintiffs must prove under *Borello* that breaks ranks with *Borello* and *Ayala* and that no court has adopted. Farmers rewrites *Borello's* test to focus on the *agents'* rights to control, not Farmers' right. Farmers then argues that the Court should presume that its independent contractor classification is correct and Farmers lacked a right to control the agents, claiming Plaintiffs conceded this in discovery. Therefore, per Farmers, to certify the class under *Ayala*, Plaintiffs must show common evidence that each agent "surrendered control" because of Farmers' conduct to become employees. (Opp. at p. 1.) The agent declarations, according to Farmers, are evidence of agents not ceding their right to control and proof that determining which agents gave up their rights as independent contractors can only be made on a case-by-case basis.

Binding authority rejects this subterfuge. *Borello's* test focuses on the hiring party's right to control—not whether the worker "surrendered" control. A presumption of employment applies, and it is Farmers' burden to prove that the agents are independent contractors. Plus, under *Borello*, the Court cannot assume that the agents are independent contractors because a contract labels them as such. And Plaintiffs *never conceded* that Farmers lacked any *right* to control and they are independent contractors under the agreement. Just the opposite, Plaintiffs *cite* the agent agreements as the source of Farmers' rights to control that make the agents employees. The

testimony Farmers cites is Plaintiffs stating that they were aware of the independent contractor clause, wanted to be treated as independent contractors, and explaining how Farmers initially refrained from exercising control, but then flipped a switch to exercise its rights to control. Evidence that Farmers initially refrained from *exercising* pervasive control in no way proves that Farmers lacked the *right* to control. "That a hirer chooses not to wield power does not prove it lacks power." (*Ayala, supra,* 59 Cal.4th at 535.)

Plaintiffs present the type of § 2802 reimbursement claim by workers claiming misclassification as independent contractors that courts routinely certify. (E.g., *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 13-14.) Stripping away the confusion Farmers creates by applying the wrong legal standard makes clear that the Court should grant Plaintiffs' motion for class certification.

II. Common issues of fact and law under *Borello* predominate.

Plaintiffs' opening brief established that Farmers' rights and its relationship with the agents are uniform across the class and defined by form agent agreements and policies Farmers applies to all agents—e.g., Field Management Guide, Smart Office, Agency Growth Model—that reflect Farmers' interpretation of its rights. Farmers' rights are the same for one agent as for all agents. Farmers cannot fire some agents at will, but not others. Farmers does not own the Farmers' agency of some agents, but not others. As in *Estrada,* "it is clear that common issues—whether the [agents] were employees and, if so, which expenses would be reimbursable—predominate[]." (*Estrada, supra,* 154 Cal.App.4th at 13-14.)

Farmers claims that the agent declarations it submitted raise individualized issues, but that argument boomerangs on Farmers—assuming the Court considers these declarations. No declarant contends that Farmers' rights in relation to him or her are unique or differ from Farmers' rights vis-à-vis any other agent. None of them dispute Plaintiffs' evidence showing how Farmers rights, and the agents' role as part of Farmers' business, are sufficiently uniform. None of them dispute—or state that they have reviewed— Farmers' interpretation of its rights in internal documents like the Field Management Guide. None of them dispute Farmers' testimony that its job descriptions, management performance metrics, and policies applied company-wide in

California. It is this uniformity which allows a trier of fact to assess the classification of all agents without delving into the circumstance of any agent.

All this goes over Farmers' head, however, because it rejects the premise that *Borello's* independent contractor test asks whether *Farmers* retained all necessary control over the agents. Instead, Farmers presses a theory to argue about due process and individualized issues that breaks with binding authority, making it thoroughly unpersuasive.

A. The Court cannot assume the agents are independent contractors.

Farmers argues that the Court should presume that the agents are independent contractors under the agent agreement and, therefore, Plaintiffs must prove each agent is an employee because he or she "surrendered control." (Opp. at p. 1.) No California court has embraced Farmers' *Lochner*-era "freedom to surrender" argument aimed at undercutting worker rights and protective legislation. Instead, because "employees ordinarily are no match for the enterprise that hires them" (*Epic Sys. Corp. v. Lewis* (2018) 138 S.Ct. 1612, 1640 [Ginsburg, J., dissenting]), a presumption of employment applies to actions brought under Labor Code and places the burden on Farmers to prove that the agents are independent contractors. (Pltffs Br. at p. 15; Pltffs' Trial Plan at pp. 1-2.) This conflict between Farmers' argument and the presumption of employment is fatal to Farmers' argument. Yet Farmers never acknowledges it.

Farmers does acknowledge that *Borello's* "control of the details" factor looks to the "'hirer's right to control.'" (Opp. at p. 1 [quoting (*Ayala, supra,* 59 Cal.4th at p. 528.) But it promptly ignores that too and flips *Borello* on its head, arguing that Plaintiffs must prove the *agents* retained control and did not "surrender control" to Farmers. (Opp. at p. 1; see also *id.* at p. 2 [issue is whether agents "retained autonomy"]; at p. 9 ["Testimony from individual agents about whether they in fact retained control … [is] the most probative evidence"]; at p. 11 [jury must "evaluate if [Farmers'] 'policies' and 'pressure' caused Plaintiffs to surrender control"]; at p. 11 [issue is "whether Plaintiffs retained control" and "whether each individual agent retained the right to control"]; at p. 12 [issue is did "individual agents retain the right to control"].) FGI makes the same argument. (FGI Opp. at p. 12 ["agents have retained, by contract and course of conduct, the right to control"].)

Farmers cites no authority for its rewriting of *Borello*. The authority Farmers quotes—*Ayala*—holds that "[w]hat matters is whether the *hirer* 'retains all *necessary* control' over its operations." (*Ayala,* at p. 531 [citing *Borello*; emphasis added].) Thus, it "is not how much control a hirer *exercises*, but how much control the hirer retains the *right* to exercise." (*Ayala,* at p. 533.) *Borello* requires the trier of fact to consider the *hiring party's* "control of details and other potentially relevant factors identified in prior California and out-of-state cases in order to determine which classification (employee or independent contractor) best effectuates the underlying legislative intent and objective of the statutory scheme at issue." (*Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 934.) Thus, in *Borello*, the Court determined that the hiring party was an employer because it "retains all *necessary* control over" its operations. (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 357.) *Borello* made that finding even though the workers had not "surrendered control." "[I]n *Borello* itself the agricultural workers were found to be employees rather than independent contractors even though the workers controlled the manner and details of their work, including the hours that they worked." (*Vazquez v. Jan-Pro Franchising International, Inc.* (2021) 10 Cal.5th 944, 955.) *Borello* and California Supreme Court cases interpreting *Borello* "are binding" and "must be followed." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Farmers also cites no authority permitting the Court to assume that the agent agreement properly classified the agents as independent contractors. That is unsurprising. "The label placed by the parties on their relationship is not dispositive…." (*Borello, supra,* 48 Cal.3d at p. 349.) Lacking authority, Farmers claims that "Plaintiffs admit that they were independent contractors prior to 2013," and "have conceded that the Appointment Agreements and any 'policies' in effect prior to 2013 did not make them employees." (Opp. at p. 1, 10.) That is wishful thinking. Plaintiffs *cite* the agent agreements as the source of Farmers' rights to control, including (a) Farmers ownership rights over the agents' book of business; (b) the right to the agents' exclusive services; (c) the right to fire the agents at will; (d) the right to unilaterally change the agents' pay; and (e) the right to control the agents' office location—to name but a few. The testimony Farmers cites provides no support for Farmers either. Plaintiffs testified that they were aware of the

independent contractor clause and wanted to be treated as independent contractors. (R.Ex. I at 146:1-2 ["At the time, I believed it was going to be a true statement."]; R.Ex. K at 18:19-21 ["I liked what I signed up for as an independent contractor, what I was told I was going to be, and to be treated that way."].)[1] Plaintiff Parry explained how Farmers initially refrained from exercising its right to control, but then "it was like a switch was flipped," and "now we were treated like employees." (R.Ex. J at 94:19-25.) The "absence of evidence a hirer 'exercised any particular control over the details' of the work does not show the hirer lacked the right to do so." (*Ayala, supra,* 59 Cal.4th at p. 535.) Plaintiffs never conceded that Farmers lacked the right to control. *Ahn v. Kumho Tire U.S.A., Inc.* (2014) 223 Cal.App.4th 133, 145 [discovery concessions must be "clear and unequivocal"].)

B. *Ayala* rejected Farmers' analysis.

Farmers presses its untenable argument to obscure how *Ayala* has already rejected the same arguments it raises here. *Ayala* involved newspaper carriers who signed form contracts classifying them as independent contractors but claimed they were treated as employees under California law, including § 2802. Like Farmers, the publisher submitted "many declarations" from its carriers to argue that "individual variations in how carriers performed their work" precluded certification. (*Ayala, supra,* 59 Cal.4th at pp. 529, 534.) The trial court agreed, finding that resolving the right to control question "would require 'heavily individualized inquiries' into [the hiring party's] control over the carriers' work." (*Id.* at p. 529.)

The Court reversed because the trial court erred in "the questions asked." (*Ayala, supra,* 59 Cal.4th at p. 535.) First, the trial court asked "the wrong legal question" by focusing on variations in "whether and to what extent [the hiring party] exercised control…." (*Ibid.*) 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].) "'The existence of such right of control, and not the extent of its exercise, gives rise to the employer-employee relationship.'" (*Ibid.* [citation

[1] "R.Ex." cites 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.

omitted].) The trial court also erred by denying certification because the hiring party's control was not "pervasive." (*Ayala, supra,* 59 Cal.4th at p. 534.) "[A]t 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.)

Like the trial court in *Ayala*, Farmers has lost sight of the relevant questions for certification. Farmers is talking about variations in Farmers' *exercise* of control when it argues about the "varying impact of [Farmers'] alleged 'policies' and 'pressure' on each agent's right to control," to claim that "individualized questions" exist. (Opp. at p. 1; see also e.g., at p. 2 [agent declarations "attest to circumstances, interactions, communications and courses of conduct vastly different than what Plaintiffs claim to have experienced"]; at p. 12 ["Declarations of other agents and district managers demonstrate variations across the alleged class."].)

Ayala forecloses Farmers' argument that its evidence (cherry-picked declarations) can defeat certification because they show variations in Farmers' *exercise* of control or even a purported absence of interference. "'It is not a question of interference, or non-interference, not a question of whether there have been suggestions, or even orders, as to the conduct of the work; but a question of the [hiring party's] right to act, as distinguished from the act itself or the failure to act.'" (*Ayala, supra,* 59 Cal.4th at p. 533 [citation omitted].) That Farmers "may monitor one [agent] closely and another less so … does not necessarily demonstrate that [Farmers] could not, if it chose, monitor or control the work of all its [agents] equally." (*Id.* at p. 535-536.) It "'is not essential that the right of control be exercised or that there be actual supervision of the work of the agent.'" (*Id.* at p. 535 [citation omitted].) Hence *Ayala's* holding that by focusing on declarations and "finding such variations [in the exercise of control] sufficient to defeat certification," the trial court "erroneously treated them as the legal equivalent of variations in the right to control." (*Id.* at 536.) Farmers repeats that error here.

Farmers urges the Court to set aside *Ayala* and instead follow a federal case denying certification because "Plaintiffs do not provide evidence sufficient to demonstrate that their respective experiences are consistent with … putative class members." (Opp. at p. 14 [quoting

Comparetto v. Allstate Ins. Co. (C.D.Cal. Nov. 20, 2013) 2013 U.S.Dist.LEXIS 179617, at *18].) *Comparetto* pre-dates *Ayala*, however, making it unpersuasive as well as non-binding. Other post-*Ayala* cases granting certification of § 2802 claims have rejected arguments identical to what Farmers presses here:

> They [defendants] cite several declarations that describe the varying ways in which [defendant] exercises control over the Drivers. [Citations to declarations omitted.] *Borello*, however, does not require an individual determination how an employer exercises individual control but rather "how much control the hirer retains the *right* to exercise." *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522, 533, 173 Cal. Rptr. 3d 332, 327 P.3d 165 (2014). As explained above, the Contract establishes the bounds of [defendant's] right to control the Drivers—even if it does not always exercise that full right.

(*Canava v. Rail Delivery Serv.* (C.D.Cal. Feb. 27, 2020) 2020 U.S.Dist.LEXIS 87217, at *27-28.)

Farmers also argues that "Plaintiffs' reliance on alleged 'policies' and 'pressure' at odds with the contract raises individual questions." (Opp. at p. 10.) Farmers' point is unclear. To the extent Farmers contends that the classwide performance management policies it developed and authorized are "at odds with" the agent agreements, that is further evidence that Farmers disregards the independent contractor classification to retain employee-like control over all agents. That supports certification.

Perhaps what Farmers means is if the agents' experiences with Farmers' exercise of control varied, then this is evidence that Farmers' right to control varied by agent. It is not. *Ayala* rejected the argument that variations in the exercise of control are proof of variations in the right to control. (*Ayala, supra,* 59 Cal.4th at p. 535-536.) Courts applying *Ayala* have also rejected this argument. (*Canava, supra,* 2020 U.S.Dist.LEXIS 87217, at *31-32 [workers "setting their own hours and picking and choosing which loads they wanted," suggest "variations in [defendant's] exercise of control … but it still retained the same rights to control their work pursuant to the contract. The conduct, therefore, is not 'at odds' with the Contract."].)

Farmers also cites *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, to argue that courts routinely conclude that individual issues preclude certification of independent contractor misclassification claims. (See e.g., Opp. at pp. 8, 9.) *Duran* never mentions *Borello*, however, or discusses certification of independent contractor misclassification claims. The "misclassification" issue in *Duran* related to employees classified as exempt from overtime requirements because they "spend more than 50 percent of the workday engaged in sales activities outside the office." (*Duran*, at p. 12.) In that context, the Court said in "a misclassification case, whether a given employee is properly classified depends in large part on the employee's individual circumstances" (*id.* at p. 36), and "[l]iability to one employee is in no way excused or established by the employer's classification of other employees" (*id.* at p. 37). Those statements make sense in the context of *Duran*—particularly since the original plaintiffs testified that they spent over 50% of their time on outside sales. (*Id.* at p. 14.) Farmers stretches these quotes beyond the scope of *Duran*, however, by misapplying them to the certification of claims under *Borello's* test for an "employee."

Duran is also inapplicable because Plaintiffs do not rely upon statistical sampling to establish a classwide policy. Rather, Plaintiffs have established Farmers' classwide policies applicable to all agents through Farmers' documents and corporate testimony.

Farmers also claims that *Mies v. Sephora U.S.A.*, Inc. (2015) 234 Cal.App.4th 967, precludes certification "'even where the alleged misclassification involves application of a uniform policy.'" (Opp. at p. 11 [quoting *Mies*, at p. 983-984].) Like *Duran,* the *Mies* court was not considering employment classification under *Borello*, but a challenge to employee classification as exempt from paid overtime. (*Id.* at pp. 971 & 977.) And *Koval v. Pac. Bell Tele.* (2014) 232 Cal.App.4th 1050, involved employees claiming that their employer required them to work during meal and rest breaks. (*Id.* at pp. 1053-1054.) These cases are irrelevant to the certification question under *Borello*, the test for which the California Supreme Court set forth in *Ayala*.

C. Farmers' merits disputes raise no predominately individualized issues.

Farmers argues that Plaintiffs' common evidence does not establish Farmers' right to control. (Opp. at pp. 15-18.) Certification "does not depend upon deciding the actual scope of a

hirer's right of control over its hirees." (*Ayala, supra,* 59 Cal.4th at p. 537.) The Court assumes that Plaintiffs' "claims have merit" and puts off merits' disputes until "after class certification has been decided…." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1023.) Moreover, Farmers misstate the facts.

For example, Farmers argues that agents "cannot be terminated at will." (Opp. at p. 16.) Farmers can terminate an agent at any time "without cause." (Pltffs Br. at 7, 18.) That is the definition of at-will employment: "'An at-will employment may be ended by either party 'at any time without cause,' for any or no reason, and subject to no procedure except the statutory requirement of notice.' [Citation.]" (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 392.) This fact supports certification and establishes Farmers' right to control. "'Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so.'" (*Ayala, supra,* 59 Cal.4th at p. 539.)

Farmers claims that its classwide agent management policies like Smart Office or Agency Growth Model are "optional." (Opp. at p. 16.) But agents cannot opt out. (Pltffs Br. at p. 13-14.) Farmers also claims that these mandatory programs just "set and track production goals." (Opp. at 15.) Farmers ties agent compensation to compliance. (Pltffs Br. at p. 13-14.) Plus, Farmers never disputes Professor Finkelman's opinion that these are "tried and true employee management techniques," or that using them with agents is "inconsistent with the independent contractor classification," because their purpose is "to change, influence and control employee behavior." (Prof. Finkelman Decl., Ex. Y, ¶¶ 22, 25.)[2]

Farmers also argues that the agents "are not exclusive to Farmers." (Opp. at p. 17.) By contract, the agents sell exclusively for Farmers in Farmers' agencies. (Pltffs Br. at p. 7-8.) FGI tells investors that the agents are Farmers' "exclusive sales force" in an "exclusive agency model." (Ex. 452 at pp. 11, 21.) Farmers' regulatory filings call the agents "a captive agency

[2] Farmers' purported expert does not mention Professor Finkelman or expressly contest his conclusion that Farmers uses employee performance management systems to manage the agents. While Farmers argues that Professor Finkelman's opinion "is contrary to the cited case law" (Opp. at p. 16, fn. 17), none of the cases it cites support Farmers' statement or contradict Professor Finkelman.

force" and "exclusive agents." (R.Ex. M at p. 4.) Farmers' policy is that it has the "right to the undivided and efficient service of the agency force member." (Ex. J at p.8.)[3]

D. *Borello's* secondary factors turn on facts common to all class members.

Farmers claims that the "secondary *Borello* factors raise more individual questions." (Opp. at p. 18.) Farmers' first example, the intent of the parties, proves otherwise. Farmers' form contract labels all agents independent contractors and agents *want* Farmers to treat them consistent with that designation. Farmers abuses that designation for its own substantial financial benefit. Farmers' abuse is why "subterfuges are not countenanced." (*Borello, supra,* 48 Cal.3d at p. 349.) Other *Borello* factors also raise no predominantly individualized issues. To illustrate:

Whether the one performing services is engaged in a distinct occupation or business: Farmers does not hire established agents to be Farmers' captive agents. (Pltffs' Br. at pp. 4-5.) Farmers does not dispute this; the agent declarations Farmers submitted support it. (See e.g., Richard Votaw Decl., ¶ 7 [no prior experience or agency].)

Farmers suggests that agents own their Farmers' agencies. (Opp. at 18-19.) That is contradicted both by the agent agreement and Farmers' PMQ witness, who confirmed that Farmers owns the agency. (Pltffs Br. at pp. 5-6.) Farmers also states that agents have a "right" to sell "commission and servicing rights." (Opp. at 19.) Agents lack "rights" to sell anything. Farmers can block a sale for any reason or no reason at all. (Pltffs Br. at p. 6.) These facts support employee status. "'The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer, and when the worker, relative to the employer, does not furnish an independent business or professional service.'" (*Borello, supra,* 48 Cal.3d at p. 357 [citation omitted].)[4]

Whether the work is usually done under the direction of the principal or by a specialist without supervision: There is no dispute that Defendants employ a hierarchy of managers whose sole job is

[3] Farmers claims that "Plaintiffs cite no authority" for their argument that Farmers' company-wide classification policy undercuts Defendants' claim that individual issues preclude uniform treatment. (Opp. at p. 8 fn. 8.) Plaintiffs quote supporting cases. (Pltffs Br. at p. 18.)

[4] Farmers implies that the "agency" is the office, not the agent's Farmers business. The agent agreement states that the "business conducted by the Agent is … the 'Agency.'" (Ex. 129.)

closely supervising the agents to drive agent production. (Pltffs' Br. at pp. 6-7.) Farmers has these managers use "performance management techniques" with the agents "designed to facilitate and control behavior change in employees, aligning employees' behavior to the company's desired results." (Prof. Finkelman Decl., Ex. Y, ¶¶ 23, 26.) These classwide facts favors employee status. Allstate classified *all* its captive insurance agents as employees because they "were required to run individual agencies under Allstate's supervision." (*Romero v. Allstate Ins. Co.* (E.D. Pa. 2014), 1 F. Supp. 3d 319, 337.)

Farmers claims that "agents exercised independent judgment and professional skill." (Opp. at 18.) Even if true, the definition of "employee" is not limited to the servile. That "a degree of freedom is permitted to a worker, or is inherent in the nature of the work involved, does not automatically lead to the conclusion that a worker is an independent contractor." (*Linton v. DeSoto Cab Co., Inc.* (2017) 15 Cal.App.5th 1208, 1222.) "Workers with high levels of discretion can be considered employees as long as the employer has the discretion to direct their behavior." (Robert Wood, Legal Guide to Independent Contractor Status, ¶ 4.1[A] (Tax Institute, 2010).)

The skill required: Farmers does not dispute that it requires no prior experience to be hired as a Farmers agent, or that Defendants provide the training necessary to run a Farmers' insurance agency, sell insurance, and service customers. (Pltffs' Br. at pp. 4-5, 8.) "[I]f the individual requires substantial training and supervision, an employee/employer status is more likely." (*Worth v. Tyer* (7th Cir. 2001) 276 F.3d 249, 263.)

Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work: Farmers' agent agreement makes the agents pay the expenses of running the Farmers' agency. (Pltffs Br. at p. 10.) Farmers' investment in the agents' business—website, email, print and television advertising, smart-phone apps, Farmers University to train agents—dwarfs that of any agent and supports employee status. (*Keller v. Miri Microsystems LLC* (6th Cir. 2015) 781 F.3d 799, 810 ["courts must compare the worker's investment in the equipment to perform his job with the company's total investment"].)

The length of time for which the services are to be performed: Farmers does not dispute that "agent" is a career position at Farmers. (Pltffs' Br. at p. 10.) "The more permanent the

relationship, the more likely the worker is to be an employee." (*Schultz v. Capital Int'l Sec., Inc.* (4th Cir. 2006) 466 F.3d 298, 309.)

The method of payment, whether by the time or by the job: Farmers does not dispute that agents are paid a mix of commission and bonuses, or that Farmers has a unilateral right to cut the agents' commission. Nor is there any dispute that Farmers provides agents with employee-like benefits. (Pltffs' Br. at pp. 9, 10.)

Whether the work is a part of the regular business of the principal: Farmers' business is selling insurance, the agents' customers are Famers' customers, and the agents are integrated into Farmers' sales force. (Pltffs' Br. at pp. 4-7.) This "permanent integration" into Farmers' business "is a strong indicator" of employee status. (*Borello, supra,* 48 Cal.3d at p. 357.)

In sum, an application of the *correct* legal standard under *Borello* to the record undercuts Farmers' varied arguments that "the evidence pertaining to the declarants' individual claims is substantially different than the evidence about Plaintiffs." (Opp. at 19.)

III. That damages vary by agent is, as a matter of law, no bar to certification.

There is no merit to Farmers' statement that finding the agents are employees "does not establish a violation of section 2802 nor entitle the misclassified person to any relief." (Opp. at pp. 19-20.) Farmers makes class members pay the expenses of the Farmers' branded agency. Farmers does not reimburse the agents. "To show liability under section 2802, an employee need only show that he or she was required to [incur work-related expenses], and he or she was not reimbursed." (*Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137, 1145.)

Farmers also argues that certification is improper because damages require individual determinations. (Opp. at pp. 20-21.) This "is not a proper basis on which to deny certification." (*Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 388, 408.) "'[I]f the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.' [Citations.]" (*Brinker, supra,* 53 Cal.4th at p. 1022.) "It is no bar to certification 'that individual class members may ultimately need to itemize their damages.' [Citation.]" (*Alberts*, at p. 408-409.)

Farmers claims that "Plaintiffs do not define what expenses they propose to recover." (Opp. at p. 20.) Farmers must not have read Plaintiffs' trial plan. It lays out categories of expenses and Famers' classwide policies—e.g., Smart Office and Farmers-approved marketing programs—that Farmers expected agents to spend money on. (Pltffs' Trial Plan at pp. 9-10.) Farmers' arguments that it has no idea what expenses agents incur lacks credibility. Farmers trains agents on running Farmers agencies and has "sample budgets and income statements identifying the categories of expenses it expected agents to incur." (*Id.* [citing exhibits].)

In the end, Farmers' various arguments go to the same point: there should be a process by which Farmers can challenge the amount of any claimed expense as reasonably necessary. But Farmers does not dispute that determining amounts owed is factual work or that restitution under the UCL is tried to the Court, not a jury. It also does not dispute that this Court may appoint a referee without Farmers' consent to address questions of fact (Code Civ Proc § 639, subd. (a)(1)), and then "adopt the referee's recommendations, in whole or in part," based on its independent review of those findings and any objections.[5] (Code Civ Proc § 644, subd. (b)). Nor does Farmers dispute that the court in *Estrada* used this very process to resolve damages owed to class members for their § 2802 claim. (*Estrada, supra,* 154 Cal.App.4th at p. 20 fn. 18.) Instead, Farmers claims that even after this process "countless factual disputes would remain unresolved." (Opp. at 22.) No disputes would remain, however, because as in *Estrada* the case would be at an end.

Farmers also claims a right to challenge expenses "associated with the sale of non-Farmers insurance" that purportedly are "unrelated" to running the Farmers agency. This too represents factual work for a referee. Farmers also overstates the issue. The expenses agents incur are to work in Farmers' branded agencies selling Farmers' insurance and servicing Farmers' customers. And Farmers has pointed to no evidence of agents incurring substantial expenses to sell non-Farmers products. Indeed, Farmers has the right to prohibit agents from advertising for another

[5] If damages are tried to a jury, a referee can conduct pre-trial fact discovery on amounts owed to significantly narrow issues for trial. (Pltffs' Trial Plan at pp. 11-12.) Farmers does not disagree; it just promises to be obstinate by making any trial on damages as inefficient as possible. Whatever the merits of that argument, it is not a reason to deny certification. (*Brinker, supra,* 53 Cal.4th at p. 1022.)

insurance carrier and deems "unacceptable" advertising not intended to sell Farmers' products. (Pltffs Br. at p. 8.)

IV. No conflicts exist between Plaintiffs and the putative class.

Farmers claims that certain class members oppose this lawsuit, and thus "irreconcilable conflicts of interest" exist. (Opp. at 23) Courts regularly reject this self-serving argument:

> Defendant argues that because several of the class members prefer the freedom of being an independent contractor, those named plaintiffs who are no longer employed by Defendant are not adequate representatives. But merely because some class members do not want to pursue these claims does not mean the class should not be certified. [Citation]…. There will always be some class members who are satisfied with the status quo, especially in employment cases. However, classes are routinely certified in the employment context. [Citations].

(*Dalton v. Lee Publ'ns, Inc* (S.D.Cal. 2010) 270 F.R.D. 555, 560.) The cases Farmers cite are not misclassification cases and do not hold otherwise. (*Valley Drug Co. v. Geneva Pharms., Inc.* (11th Cir. 2003) 350 F.3d 1181, 1190 [antitrust case where over half the class benefited from defendants' pricing]; *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group L.P.* (C.D.Cal. 2007) 247 F.R.D. 156, 177 [antitrust case where conduct benefited many hospitals]; *Alberghetti v. Corbis Corp.* (C.D.Cal. 2010) 263 F.R.D. 571, 579 [website used class member images; conflicts existed between named plaintiffs and their attorneys on class definition and relief].)

Farmers also claims that agents "are alarmed by this litigation" because they do not want to be employees. (Opp. at p. 24.) Plaintiffs do not seek reclassification. Courts have also rejected this argument in the context of § 2802 claims, observing how:

> Plaintiffs, however, are not seeking to outlaw the employment relationship of an independent contractor. Rather, Plaintiffs are alleging that the current system, as operated by Cardinal, violates California law by attempting to label Cardinal delivery drivers as independent contractors when such drivers are employees as a matter of law. Even if Plaintiffs were to eventually prevail on this claim, there

would be nothing to stop Cardinal … from employing actual independent contractors, so long as such an arrangement complied with California law.

(*Smith v. Cardinal Logistics Mgmt. Corp.* (N.D.Cal. Sep. 5, 2008) 2008 U.S.Dist.LEXIS 117047, at *21.) Further, "courts must be mindful" that the California labor laws "'have a public purpose beyond the private interests of the workers themselves,'" and it "would be antithetical to this underlying purpose" to allow a few agents with "an incomplete understanding of the rights Plaintiffs are seeking to invoke" to "frustrate the attempt by others to assert rights under California labor law solely because these three are satisfied with their current jobs." (*Id.* at pp. at *22-23 [quoting *Borello, supra,* 48 Cal. 3d at p. 358].)

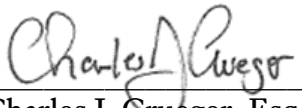
Plaintiff O'Sullivan put all this into simpler terms: the case "is about treatment. If we are independent contractors treat us as such."[6] (Ex. L at 122:2-4.)

V. Conclusion

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

February 11, 2021

Respectfully submitted,



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[6] Farmers also promises to visit a parade of horribles upon the agents should Plaintiffs prevail. (Opp. at pp. 23-25.) It is a truism that threats are a sign of weakness.

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