SUPERIOR COURT OF CALIFORNIA

COUNTY OF CONTRA COSTA

NATAHAN COZZITORTO, RENA COZZITORTO, AND MICHAEL COZZITORTO SR., individually and d/b/a COZZ'S AUTO BODY & SERVICE, INC.; on behalf of themselves and all others similarly situated; Plaintiffs, vs. AMERICAN AUTOMOBILE ASSOCIATION OF NORTHERN CALIFORNIA, NEVADA & UTAH, a California nonprofit mutual benefit corporation, f/k/a CALIFORNIA STATE AUTOMOBILE ASSOCIATION and DOES 1 through 50, Defendants.	Case No.: MSC13-02656 OPINION AND ORDER GRANTING CLASS CERTIFICATION

Plaintiffs Nathan, Rena, and Michael Cozzitorto, Sr., individually and d/b/a Cozz's Auto Body & Service, Inc., brought suit on behalf of themselves and all others similarly situated ("Plaintiffs" or the "Cozzitortos"). After substantial discovery, they moved for class certification (the "Motion"). The Motion is opposed by defendant Automobile Association of America of Northern California, Nevada, and Utah ("AAA NCNU"). This is the Court's ruling on the Motion.

I. The Case

The operative second amended complaint ("2AC") was filed by Plaintiffs on May 9, 2014. In it, Plaintiffs make, essentially, three sets of claims, described below. To assert those claims, they seek to represent three putative classes of individuals and business entities,

all of which play some role in providing emergency roadside service ("ERS") to AAA NCNU members.

ERS is defined with particularity by the relevant contract and its associated documents, but speaking very broadly, ERS consists of the services rendered to AAA NCNU members when they call AAA NCNU for roadside assistance. For example, if an AAA NCNU member runs out of fuel, gets a flat tire, needs his or her vehicle towed, or locks himself or herself out of his or her car, that member might call AAA NCNU for assistance; such a call would very likely result in the provision of ERS.

While AAA NCNU owns a small fleet of vehicles that provides ERS to AAA NCNU members (the parties call this the "Club Owned Fleet"), the majority of ERS is provided by service stations with which AAA NCNU has contracted to perform that work ("Contract Stations"). This case is brought on behalf of those who own and work at Contract Stations.

To summarize this complicated case very briefly, at bottom, this case concerns three core allegations.

First, the 2AC alleges that AAA NCNU had such a right to control the manner in which Plaintiffs provided ERS to AAA NCNU members that an employee-employer relationship between Plaintiffs and AAA NCNU was created. As a result, Plaintiffs allege that AAA NCNU misclassified them as independent contractors when they should have been treated as AAA NCNU's employees under California law. According to Plaintiffs, various damages resulted from that misclassification. (*E.g.*, 2AC ¶¶ 22, 23.)

Second, Plaintiffs allege that the principals/owners of the service stations that contracted with AAA NCNU to provide ERS incurred expenses associated with providing ERS to AAA NCNU members that are reimbursable under Labor Code § 2802, and that those expenses have not been reimbursed. (*E.g.*, 2AC ¶ 111.)

Finally, Plaintiffs allege that AAA NCNU has breached the ERS contract by underpaying Contract Stations for services rendered to AAA NCNU members in a variety of ways. (*E.g.*, 2AC ¶¶ 71-73.)

II. The Class Certification Motion

On March 4, 2016, Plaintiffs filed the Motion. On April 29, 2016, AAA NCNU

opposed the Motion ("Opposition"). Plaintiffs' reply was filed on June 6, 2016 ("Reply"), along with a trial plan ("Trial Plan").

On June 16, 2016, the Court heard extensive oral argument pertaining to the Motion. At the conclusion of the June 16 hearing, the Court invited AAA NCNU to submit a response to the Plaintiffs' proposed trial plan, and Plaintiffs to reply to AAA NCNU's response. On June 28, 2016, AAA NCNU filed its response to Plaintiffs' trial plan ("AAA NCNU Trial Plan Response"), and on July 12, 2016, Plaintiffs filed their supplemental trial plan ("Supplemental Trial Plan") and supplemental reply ("Supplemental Reply").

On September 8, 2016 the Court heard additional oral argument pertaining to the Motion and Plaintiffs' proposed trial plan. Following the September 8, 2016 hearing, the Motion was taken under submission.

The Court has considered all the material submitted in connection with this Motion and has given careful attention to the proposed trial plan and the criticism of it. Having studied all that material, it now grants the motion for class certification.

III. Applicable Legal Standards

Under Code of Civil Procedure ("CCP") § 382, a class plaintiff seeking certification must establish by a preponderance of the evidence that a class action is superior to alternative means for a fair and efficient adjudication of the litigation. (*Sav-On Drug Stores, Inc. v. Super. Ct.* (2004) 34 Cal.4th 319, 332.) The certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious. (*Id.* at p. 326; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440.) The party seeking class certification under CCP § 382 has the burden of establishing (1) the existence of an ascertainable class, (2) a well-defined community of interest among the class members, and (3) that substantial benefit to litigants and the court would result from class certification. (E.g., *City of San Jose v. Super. Ct.* (1974) 12 Cal.3d 447, 458.)

A. Ascertainable Class

Whether a class is "ascertainable" within the meaning of CCP § 382 is determined by examining (a) the class definition; (b) the size of the class; and (c) the means available for identifying class members. (*Reyes v. San Diego County Bd. of Supervisors* (1987) 196 Cal.App.3d 1263, 1271.)

1. *The class definition*: The class definition should identify a group of unnamed plaintiffs by objectively describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on that description. A class is not inappropriate merely because each member at some point may be required to make an individual showing as to eligibility for recovery. (*Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1334.)

2. *The size of the class*: The numerosity requirement is satisfied where the class members are so numerous that it is impracticable to bring them all before the court. CCP § 382. There is no predetermined minimum number of class members necessary as a matter of law for the maintenance of a class action. (See *Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030.)

3. *Identification of class members*: Although the class must be ascertainable, its members need not be identified to bind them by a class action judgment. (See *Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 138 [all persons who rented a car from Hertz in California during a 4-year period held an ascertainable class].)

B. Well Defined Community of Interest

Community of interest is comprised of three elements: (i) predominant common questions of law or fact; (ii) class representatives with claims or defenses typical of the class; and (iii) class representatives who can adequately represent the class. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470; *Brinker Restaurant Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, 1021.)

1. *Predominance of common questions:* This means that each class member must not be required to litigate individually numerous and substantial questions to determine his or her right to recover following the class judgment; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and the litigants. (*Washington Mut. Bank, FA v. Super. Ct.* (2001) 24 Cal.4th 906, 913-914.) "The 'ultimate question' for predominance 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." (*Duran v. U.S. Bank National Assoc.* (2014) 59 Cal.4th 1, 28.)

Here, the predominance question is the most crucial one, and the parties have sharply divergent views on it. Ultimately, the Court must consider whether "the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment." (*Sav-On Drug Stores, Inc., supra,* 34

Cal.4th at p. 327; *Jaimez v. DAIOHS, USA* (2010) 181 Cal.App.4th 1286, 1298.) The Court must "examine the plaintiff's theory of recovery" and "assess the nature of the legal and factual disputes likely to be presented." (*Brinker Restaurant Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, 1025.) In so doing, the Court should weigh the common issues against the individual issues, and taking into account available management tools, decide whether common issues predominate over individual issues. (*Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422, 1432.)

2. *Typicality of the Cozzitortos' Claim:* As stated above, the Cozzitortos' claim must be typical but not necessarily identical to the claims of other class members, and they must be similarly situated to other class members such that they will have the motivation to litigate on behalf of all class members. (*Classen, supra*, 145 Cal.App.3d at p. 45.)

3. *Adequacy of the Cozzitortos to Represent the Class:* To meet the adequacy requirement, the Cozzitortos must be capable, through qualified counsel, of vigorously and tenaciously protecting the interests of the class members. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846.)

C. Substantial Benefit to Litigants and the Court

The Court must "carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts." (*Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 133.) The Court should evaluate (1) the interest of each putative class member in controlling his or her case personally; (2) the potential difficulties in managing a class action; (3) the nature and extent of already pending litigation by individual class members involving the same controversy; and (4) desirability of consolidating all claims in a single action before one court. (*Id.*)

IV. Proposed Classes

Plaintiffs seek to certify three separate classes or subclasses, defined as follows:

A. The Independent Contractor Class (the "17200 Class")

Plaintiffs seek certification of a class defined as:

> All persons from December 13, 2009 up to and through the time of judgment (the "Class Period") who performed emergency road service (as a driver, dispatcher, fleet mechanic, administrator, or manager/supervisor) for AAA NCNU in the State of California for at least an average of 30 hours per week or more but who were not classified as employees by AAA NCNU. (Motion at 3:14-17.)

B. The Independent Contractor Subclass (the "Owner Subclass")

Plaintiffs define this class as:

> All persons from December 13, 2009 up to and through the time of judgment (the "Class Period") who own or owned a contract station which contracted with AAA NCNU to provide emergency road services, and who performed emergency road service (as a driver, dispatcher, fleet mechanic, administrator, or manager/supervisor) for AAA NCNU in the State of California for at least an average of 30 hours per week or more but who were not classified as employees by AAA NCNU. (Motion at 4:3-7.)

C. The Breach of Contract Class

Plaintiffs seek certification of a class defined as:

> All contract stations in the State of California which contracted with AAA NCNU to provide emergency road service from December 13, 2009 up to and through the time of judgment. (Motion at 4:12-14.)

At oral argument, it was made clear that the Independent Contractor Subclass (which the Court will refer to as the "Owner Subclass") is a subclass of the Independent Contractor Class (which the Court will refer to as the "17200 Class"). That is, no member of the Owner Subclass is not also a member of the 17200 Class, although there are members of the 17200 Class who are not also members of the Owner Subclass. As a result, the Court considers that it must perform the class certification analysis three times to determine if each of the putative classes warrants certification.

V. Independent Contractor Class (17200 Class)

A. Ascertainable Class

Mirroring the class definition set forth above, Plaintiffs say that a person is a member of the 17200 Class if that person served as a driver, dispatcher, fleet mechanic, administrative worker, or manager/supervisor who performed those functions for at least thirty hours per week. (Supplemental Reply 3:5-7.)

In opposition, AAA NCNU cites *Sotelo v. Media News Group, Inc.* (2012) 207 Cal.App.4th 639, 646, 648, 651 ("*Sotelo*") for the proposition that because Contract Stations may not have employment records for potential members of the 17200 Class, there is "no means of identifying" those individuals. (Opposition 30:1-9.)

There are several problems with AAA NCNU's position and its reliance on *Sotelo*.

First, in reply, the Cozzitortos say that AAA NCNU keeps extensive records concerning who

performs ERS, such that it already knows, or could easily ascertain from its own records, the identity of potential class members. (Reply 5:11-16.)[1] In addition, the Cozzitortos state that they have produced actual records that identify the employees and former employees who performed ERS, as well as providing interrogatory responses that contain this information. (Reply 5:19-23.)

Second, and more to the point, even if it were true that Contract Stations did not have the pertinent employment records, in focusing on whether class members can be "identified," AAA NCNU misapprehends the standard Plaintiffs must meet at the class certification stage.

Our Supreme Court observed "the necessity" of distinguishing between "establishing the existence of an ascertainable class" and "identifying the individual members of such a class as a prerequisite to a class suit." (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 706.) The former is required, the latter is not. (See, e.g., *Lazar, supra*, 143 Cal.App.3d at p. 138 [all persons who rented a car from Hertz in California during a 4-year period held an ascertainable class]; *Lee, supra,* 166 Cal.App.4th at p. 1334 [objective description of criteria that permits potential class member to determine membership in class all that is required]).

In addition, in discussing ascertainability, *Sotelo* was most concerned that potential class members who could not be identified at the certification stage would not receive notice of the action, and therefore would not have the ability to self-identify as class members. *Id.* at p. 649. But this analysis was discussed in *Aguirre v. Amscan Holdings, Inc.* (2015) 234 Cal.App.4th 1290 ("*Aguirre*"). *Aguirre* said:

> To the extent that *Sotelo* can be read as requiring a plaintiff to establish a means of providing personal notice of the action to prospective class members at the certification stage, we respectfully disagree. As previously discussed, we view any such requirement as inconsistent with the liberal notice provisions of California Rules of Court, rule 3.766. We likewise disagree with *Sotelo* to the extent it suggests that a class is not ascertainable where, as here, prospective class members must come forward and establish they are members of the class. It is well established that a class

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[1] AAA NCNU says it only has records of the identity of owners, drivers, dispatchers who passed a background check; not mechanics, administrative personnel or managers unless they also performed driving or dispatch duties. (Opposition pp. 29-30.) But that means it has records for most of the members of the class. As to the remainder, the Plaintiffs have shown that they maintain records and that it is likely that other station owners have as well. This case does not present the same problem as *Sotelo.*

> action is not inappropriate merely because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages. Indeed, the salient issue is whether there exist sufficient means for identifying class members at the remedial stage, not at the class certification or notice stage.

(*Aguirre* at p. 1305 (citing *Sav-On Drug Stores, Inc., supra,* 34 Cal.4th at p. 333; other citations, quotations, and emphasis omitted)).

Indeed, the First District Court of Appeal very recently confirmed this analytical framework for ascertainability and cited *Aguirre* with approval. (*Nicodemus v. St. Francis Mem. Hosp.* (2016) 3 Cal.App.5th 1200, 1212 ["[a]scertainability is achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary … [t]he goal in defining an ascertainable class is to use terminology that will convey sufficient meaning to enable persons hearing it to determine whether they are members of the class plaintiffs wish to represent … [t]he representative plaintiff is not obligated, however, to identify, much less locate, individual class members to establish the existence of an ascertainable class."].)

The Court reads *Nicodemus* (the latest decision from the First District Court of Appeal) and *Aguirre* to be in accord with the Supreme Court's decision in *Sav-On Drug Stores* and agrees that neither the Court nor Plaintiffs need to be able to identify all members of a class at the certification stage to warrant certification of that class. Indeed, a class that required self-identification was held to be ascertainable in a case similar to this one. (*Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 14.)

The Court finds the class definition provided by Plaintiffs to be ascertainable.

B. Well Defined Community of Interest

Standard Applicable to Misclassification

As set forth above, one of the core allegations in this case is Plaintiffs' allegation that class members were misclassified by AAA NCNU as independent contractors when in reality, AAA NCNU's legal right to control the provision of ERS created an employer-employee relationship. The Court is cognizant that in deciding whether to certify a class, it is not to decide merits questions unless absolutely necessary. Rather, it is to decide if the matters in dispute are amenable to collective resolution. (*Brinker, supra,* 53 Cal.4th at pp. 1023-1025.)

How an employer-employee relationship is created is defined primarily by the California Supreme Court's opinion in *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations* (1989) 48 Cal.3d 341 ("*Borello*"). More recently, our Supreme Court has examined misclassification and the *Borello* analysis through the lens of class certification in *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522 ("*Ayala*"). It is *Ayala* on which the Court principally relies here.

The *Ayala* opinion opens by providing guidance on the primary analysis a court must perform to determine if an employer-employee relationship exists, and how to apply that analysis in the class certification context. It is worth quoting at length:

> Whether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control how the end result is achieved … In turn, whether the hirer's right to control can be shown on a classwide basis will depend on the extent to which individual variations in the hirer's rights vis-à-vis each putative class member exist, and whether such variations, if any, are manageable. Because the trial court principally rejected certification based not on differences in [hirer's] right to control, but on variations in how that right was exercised, its decision cannot stand.

(*Ayala* at p. 528 (citation omitted).)

Later in its decision, the Supreme Court emphasized again that it is the hirer's right of control that is the relevant inquiry:

> [A]t the certification stage, the relevant inquiry is not what degree of control [hirer] retained over the manner and means of [achieving the end result]. It is, instead, a question one step further removed: Is [hirer's] right of control over its [hirees], whether great or small, sufficiently uniform to permit classwide assessment? That is, is there a common way to show [hirer] possessed essentially the same legal right of control with respect to each of its [hirees]?

(*Ayala* at p. 533.)

The Supreme Court was likewise very clear about what a trial court should not focus on in deciding whether to certify a class claiming it was misclassified. In *Ayala*, the trial court

> focused on the wrong legal question – whether and to what extent [hirer] exercised control over [the end result] … what matters is whether a hirer has the *legal right* to control the activities of the alleged agent and, more specifically, whether the extent of such legal right is commonly provable … the trial court considered only variations in the actual exercise of control and … erroneously treated them as the legal equivalent of variations in the right to control … the trial court mistakenly focused too much on the substantive issue of defendant's right to control … instead of whether that question could be decided using common proof.

(*Ayala* at pp. 535-537 (quotations and citations omitted).)

The *Ayala* opinion reduced the analysis to one crucial question: Notwithstanding the form contract entered into with all the purported employees, was the right to control each of them somehow different, thereby necessitating minitrials? (*Ayala* at p. 536.)

Here, Plaintiffs' theory of the case is that the ERS contract, which is uniform across all Contract Stations, provides AAA NCNU with a legal right of control as to how the members of the proposed 17200 Class and Owner Subclass provide ERS such that an employer-employee relationship has been created as a matter of law. There is no evidence that the *right* of control was different as to different class members, or that determining the right of control with respect to any specific class member would require a minitrial.

Most critical to this inquiry, Plaintiffs point out that the relevant contract, which is uniform across the proposed class, requires ERS to be rendered in accordance with the contract and its incorporated documents, as well as periodic updates provided by AAA NCNU. (Edling Decl. ISO Reply, ¶ 162, Ex. B.) The Reply then details how AAA NCNU exercises that control over each category of worker involved in providing ERS to AAA NCNU members. (Reply pp. 10-13.) AAA NCNU provides no compelling reason to conclude that its legal right of control over the provision of ERS varies meaningfully across the proposed class, or that "minitrials" would be necessary to determine the scope of its legal right of control.

Plaintiffs' theory of the case is that AAA NCNU's legal right of control flows from the ERS contract. The ERS contract is uniform across the class. Plaintiffs' trial plan identifies the common proof it will use to seek to prove the *Borello* factors.

As a result, either the material cited by Plaintiffs provides AAA NCNU with a legal right of control over the provision of ERS to AAA NCNU members or it does not, but no matter the answer, it is a common answer based on common proof.

C. Typicality and Adequacy

Typicality does not require that the class representative have identical interests with the class members. The class representative need only be similarly situated to the other class members. (*Classen, supra,* 145 Cal.App.3d at p. 46.) The class representative's interests must align with the interests of the class. It "refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." (*Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 375.)

It might be true that the Cozzitortos do not possess precisely the same claims as any particular individual class member, but as the cases cited above demonstrate, that is not the appropriate standard by which to measure typicality. The evidence before the Court demonstrates that the nature of the claims is substantially similar across the proposed class, and that the claims possessed by the Cozzitortos typify those claims.

Adequacy requires that the interests of the Cozzitortos, as named plaintiffs, not be antagonistic to the interests of the class, and that they will vigorously prosecute the action. (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 487.) AAA NCNU presents no evidence that the Cozzitortos are antagonistic to the interests of the class. The Cozzitortos have vigorously prosecuted this action thus far, and there is nothing before the Court that suggests they will not continue to do so.

AAA NCNU argues that class counsel is inadequate because, according to AAA NCNU, a conflict of interest exists. AAA NCNU contends that the Contract Stations jointly employed ERS providers. It follows, according to AAA NCNU, that if it misclassified providers of ERS, and as a result owes damages to class members, then the Contract Stations, as joint employers, also misclassified providers of ERS and owe some or all of those damages, as well. AAA NCNU contends that class counsel cannot simultaneously represent both Contract Stations/station owners and members of the 17200 Class in light of this. AAA NCNU relies on *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930 ("*Janik*") for this position.

But *Janik* actually defines the scope of the duty owed by class counsel to absent class members in a way that supports a finding of class counsel's adequacy in this case. *Janik* said:

> In the context of a class action, both the representative plaintiffs and the absent class members similarly are entitled to assume that their attorneys will consider and bring to the attention of at least the class representatives additional or greater claims that may exist arising out of the circumstances underlying the certified claims that class members will be unable to raise if not asserted in the pending action. The class members are entitled to assume that their attorneys are attempting to maximize their recovery for the conduct they are challenging and that they are not, without good reason, failing to assert those claims that will do so.

(*Id.* at pp. 941-942.)

In *Janik*, as well as *City of San Jose v. Super. Ct.* (1974) 12 Cal.3d 447 and *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, the two cases *Janik* relied upon, certification was inappropriate because by pursuing the class action litigation, potential claims of absent class

members were in danger of being forever lost.

For example, in *Janik*, the class sought to recover unpaid overtime wages, but only for the preceding three years, because the relevant Labor Code section had a three-year limitations period. *Janik* found that there potentially was a duty on the part of class counsel to have pursued a § 17200 claim against the same defendant with respect to that same conduct, because § 17200 has a four-year limitations period. The class could have potentially recovered more had the § 17200 claim (arising out of the same conduct by the same defendant) been pursued.

In *Hicks* and *City of San Jose*, the class omitted certain claims it may have had against the same defendants arising out of the precise same conduct to smooth the path to certification. In *City of San Jose,* the class consisted of property owners in the flight path of the airport. The class did not seek annoyance, inconvenience, or actual physical injury damages from the defendant city, although some class members may have been entitled to those damages. In *Hicks*, the class of homeowners sued the developer and the general contractor for defects in the foundations of their homes. The class limited the recovery sought to the repair cost, rather than pursuing all available damages. The Court of Appeal directed the trial court to certify a class that would ensure that class members would retain any claims they might have for additional damages. (*Id*. at pp. 924-926.)

Here, AAA NCNU does not argue that class members will be unable to raise joint employment claims against the Contract Stations if those claims are not raised in this litigation, and the Court can see no reason why a judgment in this litigation would bar those claims from being brought later.

Further, AAA NCNU presents no evidence that class counsel has done anything except attempt to maximize class members' recovery for the conduct they are challenging, *i.e.*, AAA NCNU's alleged misclassification and breach of contract. Even assuming there is a joint employer relationship (Plaintiffs dispute that) between AAA NCNU and the Contract Stations vis-à-vis some class members, that is not "the conduct [Plaintiffs] are challenging." (*Janik, supra,* 119 Cal.App.4th at p. 942.) Plaintiffs are challenging AAA NCNU's conduct. And there is no evidence before the Court that class counsel has not sought to maximize the recovery available to the class arising out of AAA NCNU's conduct.

Class counsel is adequate to represent the class.

D. Benefit to Court and Litigants

Again, the Court has weighed the factors taken from the *Aguiar* opinion and identified above, and finds that trying the claims of the independent contractor class, including the misclassification claim, collectively on common proof, in accordance with the trial plan presented to the Court by Plaintiffs, would result in substantial benefit to both the Court and the litigants in this case, such that class treatment of the claims is preferable to individually adjudicating the claims of the class members.

As to the 17200 Class, the Motion is granted.

VI. Independent Contractor Subclass (Owner Subclass)

A. Ascertainable Class

Again, in opposition, AAA NCNU cites *Sotelo* for the proposition that to be ascertainable, class members must be capable of ready identification without unreasonable expense or time. But again, that is not the standard the Court must apply.

For the reasons discussed above, the Court finds the definition proposed by the Plaintiffs to be ascertainable, in that it provides an objective description by which putative class members can readily determine their membership or non-membership in the class.

B. Well Defined Community of Interest

With respect to the Owner Subclass, the discussion above related to *Ayala* is applicable, since the Owner Subclass also alleges misclassification. The Court does not repeat that discussion here. However, there is one added issue the Court must address. The Owner Subclass claims it is entitled to reimbursement for expenses under Labor Code § 2802. AAA NCNU argues that resolution of the § 2802 claims cannot be done on common proof.

Put simply, § 2802 requires an employer to reimburse its employees for all expenses incurred in direct consequence of the discharge of the employee's duties, provided those expenses were both reasonable and necessary. (Labor Code § 2802(a), (c); see generally *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554.)

AAA NCNU contends that determining whether the expenses incurred by the putative members of the Owner Subclass were reasonable and necessary cannot be done on a classwide basis. (Opposition 23:15-22.) As just one example, AAA NCNU posits that the Cozzitortos artificially

inflated the amount of rent their business entity paid, on the advice of their accountant. Not only would this artificially-inflated rent payment not be reasonable or necessary, according to AAA NCNU, but it is an individual issue unique to the Cozzitortos. Other individualized inquiries may be required to determine if other Owner Subclass class members similarly paid expenses that were neither reasonable nor necessary.

The expenses Plaintiffs are seeking are identified on page 15 of their reply brief (vehicle costs, insurance, fuel, labor, and overhead). They also are listed on page 21 of their Supplemental Reply. Since the plan put forth by Plaintiffs limits the claims for which reimbursement is sought, it thereby avoids AAA NCNU's concerns that artificially-inflated costs would be charged. In addition, the trial plan provides a mechanism for establishing a classwide, uniform standard for reasonable and necessary expenses incurred in providing ERS to AAA NCNU members.

According to Plaintiffs, the first step in trying the § 2802 claim is a classwide determination concerning misclassification. (Trial Plan 1:15-17.) If there were a classwide determination that no misclassification occurred, then the inquiry stops; there can be no § 2802 reimbursement absent an employer-employee relationship.

The second step, assuming there were a finding of misclassification, is a classwide determination of whether the uniform ERS contract already provides indemnification for expenses incurred by Owner Subclass members in providing ERS. Plaintiffs contend the ERS contract does not provide such indemnification, and AAA NCNU appears to dispute that, but the Court concludes that irrespective of the answer, it is a collective answer.

Next, according to Plaintiffs, the per-call expenses of providing ERS to AAA NCNU members would be established for the Club Owned Fleet. These expenses – incurred by the fleet of vehicles AAA NCNU owns and manages to provide ERS to AAA NCNU members – would serve to set the level of expenses that are reasonable and necessary to provide ERS to AAA NCNU members on a per-call basis. If there is an issue with respect to the reasonableness of those costs, that can be determined in common.

Finally, in what Plaintiffs have referred to as "the special master phase," each class member would demonstrate the specific amount of expenses he/she/it incurred to provide ERS. No class member would be reimbursed for any expense exceeding the amount incurred by the Club Owned Fleet; thus, no class member would be reimbursed for any expense not reasonable or necessary to

provide ERS to AAA NCNU members. (See *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 [if defendant's liability can be established on common proof, it is acceptable for class members to individually prove their damages].)

The Court agrees with the Plaintiffs that the method of trying the § 2802 claim they have proposed, and outlined above, provides a manageable method of determining, through common, classwide proof: (i) whether members of the Owner Subclass were properly classified as independent contractors; (ii) whether the ERS contract already reimbursed class members for their expenses in providing ERS to AAA NCNU members; and (iii) what level of expenses is reasonable and necessary, on a per-call basis, to provide ERS to AAA NCNU members. When the putative class members have the same general duties with common types of incurred expenses, determining whether a type of expense is necessary to carry out those duties can be done on a classwide basis. (*Hopkins v. Stryker Sales Corp.* (N.D. Cal. May 14, 2012) No. 5:11-CV-02786-LHK, 2012 U.S. Dist. LEXIS 67101, at *22-23.)

The Court is required to analyze Plaintiffs' theory of recovery and assess the legal and factual disputes likely to be presented (*Brinker, supra,* 53 Cal.4th at p. 1025,) and then weigh the common issues against the individual issues. (*Dunbar, supra*, 141 Cal.App.4th at p. 1432.) This the Court has done, and the Court finds that the maintenance of a class action would be advantageous to both the litigants and the judicial process.

C. Typicality and Adequacy

It is not disputed that the Cozzitortos owned and operated a Contract Station for much of the class period. The Court finds that the Cozzitortos have claims typical of the Owner Subclass relative to expenses incurred to provide ERS to AAA NCNU members.

AAA NCNU contends that because Michael Cozzitorto and Rena Cozzitorto purportedly do not possess a great deal of knowledge concerning the expenses incurred by Cozz's to provide ERS to AAA NCNU members, they are not adequate class representatives. But as Plaintiffs observe in reply, "the threshold of knowledge required to qualify a class representative is low: a party must be familiar with the basic elements of her claim and will be deemed inadequate only if she is startlingly unfamiliar with the case." (*Richie v. Blue Shield of Cal.* (Dec. 9, 2014) No. C-13-2693 EMC, 2014 U.S. Dist. LEXIS 170446, at *58.) Indeed, the Cozzitortos must have only "a general understanding of the claims asserted." (*Id.*) In any event, the Court has reviewed the deposition transcripts of both

Michael Cozzitorto and Rena Cozzitorto and finds that they have knowledge of the claims being asserted adequate to enable them to pursue the claims vigorously on behalf of absent class members.

D. Benefit to Court and Litigants

Again, the Court has weighed the factors taken from the *Aguiar* opinion and identified above, and finds that trying the claims of the Owner Subclass, including the misclassification claim, collectively on common proof, in accordance with the trial plan presented to the Court by Plaintiffs, would result in substantial benefit to both the Court and the litigants in this case, such that class treatment of the claims is preferable to individually adjudicating the claims of the class members.

As to the Owner Subclass, the Motion is granted.

VII. Breach of Contract Class

A. Ascertainable Class

The Court finds membership in the breach of contract class is ascertainable by referring to the form ERS contracts executed by Contract Stations (on the one hand) and AAA NCNU (on the other). The criteria provided in the class definition set forth above are objective, and a putative class member could easily determine if it were a member of the Breach of Contract Class with reference to that definition. Plaintiffs point out that AAA NCNU already has produced records that identify the Contract Stations, although it is not clear that these records identify each and every Contract Station. *See* Edling Decl. ISO Motion, Ex. XX, documents bates-stamped D021185-R through D021198-R.

From its review of Exhibit XX to the Edling Declaration, among other things, the Court is likewise satisfied that the number of Contract Stations in the breach of contract class is sufficiently numerous that it would be impracticable to bring them all before the Court on an individual basis.

As alluded to above, although the Court is not aware of the identities of each and every Contract Station that might fall within the Breach of Contract Class definition, it appears this information is available readily to the parties. In any event, even were that not the case, it is not necessary that each and every member of the class be specifically identifiable at the class certification phase in order for the Court to certify a class.

B. Well Defined Community of Interest

Plaintiffs argue that common questions predominate in that the contracts between all of the various Contract Stations and AAA NCNU are identical, save the identifying information relevant to

each Contract Station. Plaintiffs state that resolving the breach of contract claims will entail answering only two discrete questions:

> (1) Did AAA NCNU breach the contract by failing to amend the rate endorsement when it changed the payment rates it paid to Contract Stations for performing ERS?
>
> (2) Did AAA NCNU breach the rate endorsement and/or the contract by paying certain calls in a certain way through their automated dispatching and payment processing system? (Supplemental Reply 30:12-15.)

With respect to the first question, Plaintiffs say that because the rate endorsement and the contract are uniform across Contract Stations, and AAA NCNU changed the rates for all Contract Stations, there is a classwide question: when AAA NCNU changed the rates, was that a breach of the contract, the rate endorsement, both, or neither? Given that the ERS contract and the rate endorsement appear to be uniform across the proposed class, and it appears that AAA NCNU changed the rates it paid with respect to all Contract Stations, the Court agrees that this issue is susceptible to common proof.

In opposition, AAA NCNU seems to contend that the rate endorsement is not part of the contract, and therefore, changing the rates paid for providing ERS was not a breach of the ERS contract. The Court need not resolve the merits of that particular argument now. For certification purposes, it suffices to observe that the resolution of AAA NCNU's argument appears to be one that will come from common, classwide proof. The contract is uniform, and so AAA NCNU's conduct either breached that contract for each class member, or not.

The second question presents a more intricate set of issues. Plaintiffs argue these breaches can be determined by an analysis of certain data maintained by AAA NCNU in its D2000 and D3 dispatch and payment systems. They contain dispatch and clearing codes that plaintiffs propose to use to prove liability and damages. (Plaintiffs' Supplemental Trial Plan, p. 7 *et seq*. and Supplemental Reply p. 27 *et seq*.)

Briefly, as the Court understands it, the system records both the dispatch codes and clearing codes that are assigned to each ERS call and that comprise AAA NCNU's automated payment system for each ERS call. It utilizes a uniform coding system that assigns codes to ERS calls at a minimum of two discrete points in time during an ERS call. First, what the parties call a "trouble code," which captures information related to what the AAA NCNU member has complained of and what initially dictates AAA NCNU's (and, ultimately, the Contract Station's) response to that call.

And, later, the clearing code is assigned at the completion of the call. The clearing code enables categorization of the call, and crucially, determines the rate at which AAA NCNU compensates the Contract Station for performing the ERS.

Plaintiffs claim three types of underpayments:

1. 1T

Plaintiffs say that a 1T clearing code appears when two trucks had to be sent for one ERS situation, but that AAA NCNU did not pay for the dispatch of two trucks. They contend that under the contract, two payments were required.

For example, if a member initially requested a "light service," such as reporting a dead battery, a light truck (incapable of towing) would be dispatched to render that service. However, if, ultimately, a tow was required, a second truck, capable of towing, would need to be dispatched.

Plaintiffs contend that AAA NCNU should have compensated them for providing two services, but uniformly did not. Plaintiffs' theory of the case is that the rate AAA NCNU paid when a 1T clearing code was assigned to an ERS call was uniform across the class and uniformly breached AAA NCNU's obligations under the ERS contract, the rate endorsement, or both. They say that the D2000/D3 system can be used to identify the instances in which such a breach occurred.

2. On-the-Go

According to Plaintiffs, AAA NCNU instituted a policy that ERS providers must make every effort to get a member "on the go;" that is, avoid the necessity of towing the member's vehicle. The problem with this, according to Plaintiffs, is the uniform, classwide practice of paying only the light service rate when the ERS provider is able to get the member on his/her way, and thus avoid the necessity of a tow. AAA NCNU's paying the light service rate is a breach of the contract because the initial trouble code, T-8, requires the dispatching of a tow truck, which, according to Plaintiffs, must be paid at a higher rate under the relevant contract. However, according to Plaintiffs, the On-the-Go clearing code results in AAA NCNU paying the lower light service rate. Plaintiffs say that the D2000/D3 system can be used to identify the instances in which such a breach occurred.

3. Multiple Services

Some ERS calls result in the provision of multiple services to the AAA NCNU member. Despite this, according to Plaintiffs, a Contract Station is paid for only one service, in violation of

the ERS contract and/or the rate endorsement. Plaintiffs indicate that these multiple services calls can be identified by referring to the relevant call log, which captures the service or services that were rendered on a particular ERS call.

The Court agrees that each of these presents questions susceptible of resolution on common proof. Namely, (i) what did the uniform ERS contract and/or rate endorsement require be paid for 1T, On-the-Go, and multiple service situations, and (ii) did AAA NCNU pay what was required?

AAA NCNU's argument in opposition is not persuasive. It takes the position that under the plain language of the ERS contract, it paid for 1T, On-The-Go, and multiple services ERS calls in exactly the way the contract and/or rate endorsement required it to. In effect, it says the uniform contract/rate endorsement provisions did not require that 1T, On-the-Go and multiple services as plaintiffs contend. That simply raises three questions of contract interpretation common to the class.

Nonetheless, AAA NCNU argues that to sustain its view that the contract/rate endorsement required certain payments, Plaintiffs must argue that the ERS contract was ambiguous, and then the Court must hear individualized evidence concerning each Contract Station's expectation and interpretation of the ERS contract, to determine if a breach occurred.

But what the Court must evaluate in deciding class certification is whether Plaintiffs' theory of the case is amenable to class treatment. *Brinker, supra,* 53 Cal.4th at p. 1025. Plaintiffs do not contend the contract is ambiguous, and their trial plan does not propose making that argument. They do not contend it is necessary to conduct – and do not propose to submit evidence of – any individualized inquiry into the subjective intent or expectation of each Contract Station to determine whether a breach of contract occurred.

Plaintiffs' theory of the case appears straightforward: AAA NCNU's conduct breached the contract. The contract is uniform, the rate endorsement is uniform, and there seems to be no real dispute concerning whether AAA NCNU's treatment of 1T and On-the-Go clearing codes, and multiple services calls, was uniform with respect to how AAA NCNU paid. Put simply, AAA NCNU's conduct either breached the relevant contract, or it did not, but either way, the answer will be uniform across the class. The Court finds that common questions predominate over individual questions with respect to the Breach of Contract Class.

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C. Typicality and Adequacy

With respect to the Breach of Contract Class, AAA NCNU does not challenge the adequacy of the Cozzitortos to represent the class. Rather, they challenge the adequacy of counsel to represent the class.

However, the argument presented (that Class Counsel cannot effectively represent the class because some class members may have expense reimbursement or other wage and hour claims against other class members) appears to the Court to be inapplicable to the Breach of Contract Class, and AAA NCNU does not explain why that argument applies to the Breach of Contract Class.

As to the Breach of Contract Class, counsel is adequate.

D. Substantial Benefit to the Court and Litigants

The Court has weighed the factors taken from the *Aguiar* opinion and identified above, and finds that trying the breach of contract claims collectively on common proof, in accordance with the trial plan presented to the Court by Plaintiffs, would result in substantial benefit to both the Court and the litigants in this case, such that class treatment of the breach of contract claim is preferable to individually adjudicating the claims of the class members.

As to the Breach of Contract Class, the Motion is granted.

VIII. AAA NCNU's Affirmative Defenses

In the AAA NCNU Trial Plan Response, AAA NCNU argues that its setoff defense, which relates to the Labor Code § 2802 claims, defeats class certification because it requires individualized evidence concerning the rates paid and expenses incurred by each Contract Station.

It is true that an affirmative defense bears on the class certification analysis and requires the Court to analyze whether the issues presented by the affirmative defense are capable of collective resolution. (*Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450.)

However, what AAA NCNU says in its brief belies its contention that individualized inquiry is necessary to resolve its affirmative defense of setoff. AAA NCNU argues that "[r]ates paid to Contract Stations were intended to, and it is AAA NCNU's position that they did, cover expenses." (AAA NCNU Trial Plan Response 7:7-8.) As described above, given that the ERS contract is uniform across the class, the matter of determining whether the rates paid to Contract Stations under the uniform ERS contract reimbursed them for expenses is a common question capable of classwide resolution. It is not in dispute that providing ERS requires a Contract Station to incur some expenses.

Thus, assuming Plaintiffs prevail on the contract interpretation issue, all that is left is a computation of damages. (If AAA NCNU prevails on the contract interpretation issue, there will be no damages to compute.)

AAA NCNU's affirmative defense of setoff does not present any individualized issues that would negate the conclusion that collective resolution of Plaintiffs' claims is superior to individualized resolution of each class member's claims.

AAA NCNU's failure to mitigate defense presents a question purely related to the amount of damages a class member will have suffered related to benefits. It does not present any issues incapable of collective resolution, and to the extent it does, the Court concludes those issues are manageable.

Finally, AAA NCNU argues that its unjust enrichment "defense" will require individualized evidence. In the first instance, the Court is not convinced that this "defense" is really an affirmative defense at all; it strikes the Court that what AAA NCNU describes on page 8 of the AAA NCNU Trial Plan Response is really subsumed in its cross-claim or is simply a species of set-off. In any event, the Court has considered this defense as described in the papers and finds that any individualized issues that arise will arise only *after* classwide findings concerning whether the Owner Subclass can recover expenses under Labor Code § 2802. As such, resolving the issues presented by the unjust enrichment defense will be expedited by threshold classwide findings. Any individualized issues will be manageable. The Court finds that trying the unjust enrichment defense as part of a collective action is superior to alternative forms of resolving that defense.

IX. AAA NCNU's Cross-Complaint

AAA NCNU has cross complained against the Cozzitortos and their business entity, Cozz's, Inc. for declaratory relief related to defense and indemnity obligations as well as Labor Code §§ 2860 and 2861, for contractual and equitable indemnity, for conversion, and for violations of Business & Professions Code § 17200.

Although AAA NCNU asserts that the trial of the causes of action in its cross-complaint would render a collective trial unmanageable, it concedes that most of its cross complaint will be tried to the Court, and the Court is confident that any individualized issues that arise can be managed effectively in the context of a bench trial to adjudicate those causes of action.

The exception appears to be AAA NCNU's conversion claim. It appears to the Court that adjudicating this claim may require individualized evidence. However, there are reasons to conclude that certifying the class first will make the trial of AAA NCNU's conversion claim more expedient

and efficient. A classwide determination concerning misclassification that precedes any trial on the conversion claim will eliminate the need for a multitude of mini-trials on that threshold issue. And the Court has management tools (including, but not limited to, severance under CCP § 1048(b)) available to it to render manageable any individualized issues that arise in the context of AAA NCNU's cross-complaint for conversion or any other cause of action asserted in AAA NCNU's cross-complaint.

X. Evidentiary Issues

AAA NCNU's requests for judicial notice (made with the Opposition) are granted, although the Court takes judicial notice of the existence of the Orozco Declaration and not the truth of its contents.

XI. Order

Plaintiffs' Motion is granted in its entirety. Three classes/subclasses are certified, as follows: The 17200 Class, defined as:

> All persons from December 13, 2009 up to and through the time of judgment (the "Class Period") who performed emergency road service (as a driver, dispatcher, fleet mechanic, administrator, or manager/supervisor) for AAA NCNU in the State of California for at least an average of 30 hours per week or more but who were not classified as employees by AAA NCNU.

The Owner Subclass, defined as:

> All persons from December 13, 2009 up to and through the time of judgment (the "Class Period") who own or owned a contract station which contracted with AAA NCNU to provide emergency road services, and who performed emergency road service (as a driver, dispatcher, fleet mechanic, administrator, or manager/supervisor) for AAA NCNU in the State of California for at least an average of 30 hours per week or more but who were not classified as employees by AAA NCNU.

And, the Breach of Contract Class, defined as:

> All contract stations in the State of California which contracted with AAA NCNU to provide emergency road service from December 13, 2009 up to and through the time of judgment.

Sher Edling LLP and Cotchett Pitre & McCarthy LLP are appointed jointly to represent the class.

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With respect to the Owner Subclass, Michael Cozzitorto, Sr. and Rena Cozzitorto are appointed class representatives. With respect to the Breach of Contract Class and the 17200 Class, Michael Cozzitorto, Sr., Nathan Cozzitorto, and Rena Cozzitorto are appointed class representatives.

Dated: November 22, 2016

Hon. Barry Goode
cn=Hon. Barry Goode, o, ou, email=cxlit@contracosta.courts.ca.gov, c=US
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Barry P. Goode
Superior Court Judge