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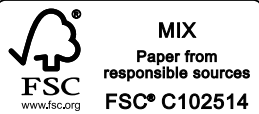
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DUKES AND COMMON PROOF IN CALIFORNIA CLASS ACTIONS

by Kimberly A. Kralowec*

The U.S. Supreme Court's opinion in *Wal-Mart Stores, Inc. v. Dukes*¹ has now had time to percolate in the lower courts, including those in California. Several decisions originating in California have addressed the extent to which statistical and survey evidence may be employed as a method of common proof in class litigation after *Dukes*. Some courts attempting to apply *Dukes* outside the context of Title VII,² however, have not read the opinion with adequate care. The prospect that *Dukes* might be misapplied is particularly disturbing in California state courts, where class litigation should be governed by Code of Civil Procedure section 382, as interpreted by the California Supreme Court, not Rule 23.

A careful reading of *Dukes* reveals that the disconnect in certain outlier decisions is likely to have resulted from an unfortunate—but clever—shorthand used in the *Dukes* majority opinion: “trial by formula.” Seizing on this catchphrase, some defense-side litigants have been arguing that any form of common proof relying on evidentiary extrapolations is barred by *Dukes* as “trial by formula.” A pair of lower court decisions in California have accepted this facile view. But *Dukes* does not stand for such a proposition—notwithstanding the glib “trial by formula” catchphrase—as other courts in California and elsewhere have recognized.

As discussed below, *Dukes* does not bar the use of statistical or survey evidence, or other forms of evidentiary extrapolations, in class litigation. Rather, the “trial by formula” catchphrase appears in a section of the opinion in which the Court was addressing procedures unique to Title VII cases. Thus, the catchphrase is irrelevant in other contexts. To lessen the risk of misinterpretation of the “trial by formula” language, plaintiff-side attorneys are well advised to devote extra time to careful briefing on *Dukes* when it is raised, especially in cases pending in California state courts.

A. *Dukes* and “Trial by Formula”

Dukes confirms that in a proper case, statistical and representative testimony *can be* used both to establish liability and to fix the amount of damages on a classwide basis under Rule 23. Whether such testimony will be sufficient to support certification in a particular case depends on the nature and strength of the evidentiary showing. Under *Dukes*, the showing must be “significant,” at least in a Title VII case.³

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1 131 S. Ct. 2541 (2011) (“*Dukes*”).

2 Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-1 *et seq.*

3 The term “significant” derives from *Falcon*, another Title VII case. *General Telephone Co. v. Falcon*, 457 U.S. 157, 159 n.15 (1982), *cited in Dukes*, 131 S. Ct. at 2553. The required showing can also be described as “substantial” proof (*Dukes*, 131 S. Ct. at 2556) or “convincing” proof (*id.* at 2554, 2556).

In *Dukes*, the U.S. Supreme Court explained that in a Title VII class action, the named plaintiffs must offer evidence to “bridge the gap” between claimed discrimination against an individual and the conclusion that a class of similarly situated individuals was similarly injured.⁴ One “manner of bridging the gap requires ‘significant proof’ that [the defendant] ‘operated under a general policy of discrimination.’”⁵

The *Dukes* plaintiffs “attempt[ed] to make that showing by means of statistical and anecdotal evidence, but their evidence [fell] well short” of “significant” proof.⁶ The statistical evidence consisted of expert regression analyses, which the Court found deficient in a number of respects, including the fact that the analyses did not purport to offer a common link between the defendant’s common practice (delegation of unfettered discretion to make promotional decisions) and the experienced common impact (statistically significant disparities in managers’ genders on a regional basis).⁷ Put another way, the expert statistical proof fell short of establishing an inference of a classwide discriminatory motive, which is an element of a Title VII disparate impact claim.⁸

Discarding the proffered statistical proof, the Court then turned to the anecdotal evidence. That evidence, the Court determined, was “too weak to raise any inference that all the individual, discretionary personnel decisions [were] discriminatory.”⁹ The Court compared the anecdotal evidence to the better-quality proof offered in *Teamsters*.¹⁰ In *Teamsters*, the Court observed, the plaintiff offered *both* “substantial statistical evidence” *and* “significant” anecdotal accounts from individual class members.¹¹ Taken together, this evidence raised the requisite inference of a link between the defendant’s common practice (which included a collectively bargained seniority system) and the common impact (fewer minority workers holding the relevant jobs).¹²

Notably, the “significant” anecdotal evidence in *Teamsters* was not *statistically* significant—*Teamsters* did not consider the evidence in that light and no expert statistical analysis was offered¹³—but rather carried the requisite level of *evidentiary* significance. The *Dukes* Court explicitly rejected the suggestion that its ruling meant “that a discrimination claim, if accompanied by anecdotes, must supply them in numbers proportionate to the size of the class.”¹⁴ The problem in *Dukes* was that the anecdotal evidence that the plaintiffs presented was not “significant” or “substantial” enough to “demonstrate that

4 *Dukes*, 131 S. Ct. at 2553.

5 *Id.* (quoting *Falcon*, 457 U.S. at 159 n.15).

6 *Id.* at 2555.

7 *Id.*

8 *See id.* Of course, nothing in *Dukes* holds that statistical analysis of any form is *required* in order to obtain class certification in a Title VII case. In many Title VII cases, evidence of the employer’s common, classwide testing procedures or other common policies can and will suffice, standing alone. Only in the absence of such evidence would turning to other forms of common proof (such as statistical extrapolation) be necessary.

9 *Id.* at 2556.

10 *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

11 *Dukes*, 131 S. Ct. at 2556.

12 *See id.*

13 *See Teamsters*, 431 U.S. at 338.

14 *Dukes*, 131 S. Ct. at 2556 n.9.

the entire company ‘operate[d] under a general policy of discrimination.’”¹⁵ That was particularly true because, once the Court rejected all the remaining evidence, the case had to stand or fall on the anecdotal evidence alone.¹⁶ That evidence was too insubstantial to carry the whole 1.5 million-member class action.

Thus, nothing in *Dukes* suggests that, in a proper case, expert statistical and representative testimony could not be “significant” enough to warrant class certification under Rule 23(b)(3). *Dukes* held only that the evidence in the case before it was not enough, given: (a) the particular elements of a Title VII claim; (b) the plaintiffs’ chosen theory—that because of the defendant’s “corporate culture” of gender bias, unfettered managerial discretion led to gender discrimination; and (c) the weaknesses in the evidence presented there. For the *Dukes* Court, *Teamsters* remains an example of a case in which anecdotal testimony, coupled with “significant” expert survey and statistical proof, was sufficient to support class certification.

Nor does the opinion’s “trial by formula” language, on which defense-side litigants tend to heavily rely, amount to a categorical rejection of expert survey and statistical proof in all class actions. That language appears in the opinion’s discussion of whether “claims for monetary relief”—namely, back pay under Title VII—may be certified under Rule 23(b)(2). The Court said no, “at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.”¹⁷

In so holding, *Dukes* observed that Title VII, as interpreted in *Teamsters*, generally requires a separate phase of trial, distinct from the case-in-chief, at which the defendant may attempt to “demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.”¹⁸ The need to conduct this second phase in order to adjudicate the back pay claim meant that the back pay component of the case was not “incidental” to the injunction component.¹⁹ For that reason, the class could not be certified under Rule 23(b)(2).²⁰

The district court in *Dukes* adopted (and the Ninth Circuit affirmed) a trial plan for this statutorily-mandated phase of the case, but the plan would have allowed the defendant *no* opportunity to defend itself by proving a lawful reason for its employment

15 *Id.* at 2556 (quoting *Falcon*, 457 U.S. at 159 n.15).

16 *See id.* at 2556–57.

17 *Id.* at 2557.

18 *Id.* at 2560–61 (citing 42 U.S.C. §2000e-5(g)(2)(A); quoting *Teamsters*, 431 U.S. at 361).

19 *Id.* at 2561 (“because the necessity of that litigation will prevent back pay from being ‘incidental’ to the classwide injunction, [the] class could not be certified [under Rule 23(b)(2)]”).

20 *See Driver v. AppleIllinois, LLC*, 2012 WL 689169, *3 (N.D. Ill. Mar. 2, 2012) (“What the Court rejected in [*Dukes*] was the plaintiffs’ effort to shoehorn the individual claims for money damages provided by Title VII into a Rule 23(b)(2) class, for which the relief is injunctive or declaratory.”).

decisions—either individually or classwide.²¹ This problem—which the Supreme Court derided as “trial by formula”—presented a statutory obstacle unique to Title VII cases.²²

The Court did *not* go on to hold that this phase of trial could *never* be adjudicated on a classwide basis in a *Rule 23(b)(3)* case, as many defendants claim. The opinion’s text says no such thing; rather, it says only that this phase of trial would not be “incidental” to the rest of the case. In fact, if the defense reading were correct, the dissenting Justices never would have joined this section of the opinion. *They* believed that the claims “*may be certifiable under Rule 23(b)(3)*” if a proper evidentiary showing of predominance were made.²³

Unlike Title VII, most statutory causes of action provide for no special phase of trial as in *Dukes*, and, indeed, no common-law claims do. The “trial by formula” problem in *Dukes*—which meant that this special phase of trial would not be “incidental” to the rest of the case under *Rule 23(b)(2)*—simply does not exist in most litigation.²⁴ Any other interpretation of *Dukes* is a “[m]isreading” of the decision.²⁵

Another common misreading of *Dukes* is that by using the term “trial by formula,” the Supreme Court somehow placed a constitutional due process limitation on the class action device generally, or of statistical extrapolations in class litigation particularly.²⁶ A careful reading of *Dukes* negates such an interpretation. Below, the defendant argued that the plaintiffs’ proposed second-phase trial plan was infirm for four separate reasons, only *one* of which was asserted violation of due process rights.²⁷ In *Dukes*, the Supreme Court accepted the defendant’s three *other* arguments, holding that *Rule 23* could not

21 *Dukes*, 131 S. Ct. at 2561; see *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 626 (9th Cir. 2010).

22 *Dukes*, 131 S. Ct. at 2561; see *Ross v. RBS Citizens, N.A.*, 667 F.3d 900, 908 n.7 (7th Cir. 2012) (affirming class certification of employee misclassification claims (under Illinois Minimum Wage Law and federal Fair Labor Standards Act) notwithstanding *Dukes* “trial by formula” language, finding *Dukes* inapplicable where defendant had no “statutory right” comparable to the Title VII statutory right addressed in *Dukes*).

23 *Dukes*, 131 S. Ct. at 2561 (Ginsburg, J., dissenting) (emphasis added).

24 See, e.g., *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2012 WL 253298, *5 (N.D. Cal. Jan. 26, 2012) (refusing to decertify state-law indirect-purchaser antitrust claims, observing that they are not “subject to a ‘detailed remedial scheme’ equivalent to that in Title VII” (quoting *Dukes*, 131 S. Ct. at 2560)); *Johnson v. General Mills, Inc.*, 276 F.R.D. 519, 524 (C.D. Cal. 2011) (correctly interpreting *Dukes* “trial by formula” language and denying motion to decertify claims under California Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code §§ 1750 *et seq.*, and Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200 *et seq.*); see also *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 281 F.R.D. 477, 486 (D. Kan. 2012) (granting class certification and noting that *Dukes* “focused . . . only on the remarkable procedure proposed by the Ninth Circuit for considering the plaintiffs’ claims for backpay” under Title VII); *Driver*, 2012 WL 689169 at *3 (denying motion to decertify predicated on “trial by formula” language).

25 *Ross*, 667 F.3d at 908 n.7.

26 E.g., Thomas Kaufman and Rishi Puri, *Saved From The Bell*, EMPLOYMENT LAW360, Jun. 29, 2011; see also, e.g., Order Granting Motion to Decertify Class at 7, *Wackenhut Wage and Hour Cases*, J.C.C.P. No. 4545 (Cal. Super. Aug. 1, 2012) (“to the extent that it is grounded in federal due process principles, *Wal-Mart* is controlling”).

27 *Dukes*, 603 F.3d at 624–25 (“*Wal-Mart*, supported by a number of business-related amici, contend that at least some aspects of this trial plan violate [1] their due process rights, as well as [2] section 706(g)(2) of Title VII [codified at 42 U.S.C. § 2000e-5(g)(2)], [3] the Rules Enabling Act [28 U.S.C. § 2072(b)], and [4] the Supreme Court’s decision in *Teamsters*.” (footnotes omitted)).

be interpreted, consistent with the Rules Enabling Act, to abridge the “additional proceedings” required by Title VII, as interpreted in *Teamsters*.²⁸

The Court did *not* reject the second-phase trial plan on due process grounds. The Due Process Clause is not mentioned anywhere in this part of the Court’s analysis.²⁹ It is therefore error to read *Dukes* either as resting on federal constitutional principles of any kind, or as binding on state courts for that reason. By its plain text, *Dukes* rests on Rule 23, the Rules Enabling Act, and Title VII.

B. Post-*Dukes* Decisions of Note: *Duran* and *Cruz*

In a case the California Supreme Court recently took up for review, the Court of Appeal recognized that *Dukes* is not binding, but nevertheless badly misconstrued the opinion.

In *Duran v. U.S. Bank National Association*,³⁰ plaintiff banking officers asserted that they had been misclassified as exempt from California’s overtime laws, and brought suit against their employer under California’s Unfair Competition Law (“UCL”)³¹ for various Labor Code violations.³² The employer’s primary affirmative defense was that the plaintiffs worked as outside salespersons and were properly classified as exempt.³³ After class certification was granted, the trial court adopted a trial management plan involving “a random sample” of twenty class members whose testimony would be used to extrapolate facts for the entire class.³⁴ To select the sample, the court clerk “drew from a batch of index cards containing the names of each class member and compiled a list of 20 class [members] and 5 alternates.”³⁵

As will be seen, the Court of Appeal viewed this procedure as the root cause of the ensuing judgment’s infirmity.

28 *Dukes*, 131 S. Ct. at 2560–61 (citing 28 U.S.C. § 2072(b); 42 U.S.C. § 2000e-5(g)(2); *Teamsters*, 431 U.S. at 361).

29 *Id.* at 2557–61 (mentioning due process only in context of describing the more limited notice and opt-out rights afforded in Rule 23(b)(2) class actions).

30 203 Cal. App. 4th 212 (2012), *review granted*, No. S200923 (Cal. May 16, 2012).

31 Cal. Bus. & Prof. Code §§ 17200 *et seq.*

32 *Duran*, 203 Cal. App. 4th at 216–18. The UCL “borrows” violations of other laws (here, the California Labor Code) and makes them independently actionable. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 180 (1999).

33 *Duran*, 203 Cal. App. 4th at 217, 249; *see* 8 Cal. Code Regs. § 11040(1)(C), (2)(M) (Cal. Industrial Welfare Commission Wage Order 4–2001) (outside sales personnel exemption from California overtime laws as applicable to bank employees).

34 *Duran*, 203 Cal. App. 4th at 221–22. Plaintiffs’ experts proposed a specific, scientifically-based methodology for selecting the sample. *See id.* at 220–21. The *Duran* opinion does not indicate why the trial court chose not to adopt this proposal. The petition for review, however, explained that at every stage of the case, the defendant steadfastly and vigorously objected to *any* trial plan other than individual trials, on both liability and damages, for each class member. Petition for Review at 10, 32, *Duran v. U.S. Bank Nat’l Assn.*, No. S200923 (Cal. Mar. 19, 2012). The defendant refused to propose any trial plan of its own that acknowledged that class certification had been granted. *See id.* By not employing plaintiffs’ proposed scientific methodology in selecting the sample, the trial court was actually acceding to the defendant’s own vehement objections to using such methodologies. *See id.*

35 *Duran*, 203 Cal. App. 4th at 222.

Nineteen of the twenty selected class members, plus two class representatives, testified during the first phase of the bench trial.³⁶ The defendant also presented evidence regarding the job of banking officer, including job duties and employer expectations, and it called some of the testifying class members' supervisors as witnesses.³⁷ But the court denied the defendant's request to introduce testimony from class members outside the selected group.³⁸ The court then issued a statement of decision finding that all class member witnesses who testified at trial had been misclassified, that they had all worked uncompensated overtime hours, and that their testimony was "typical and representative of the entire class."³⁹

During phase two, the court heard expert testimony on the average number of overtime hours worked by the twenty-one class members in the testifying sample, as well as classwide unpaid overtime extrapolated from those figures.⁴⁰ Defense experts challenged the sample selection method and the validity of any conclusions drawn from the sample.⁴¹ In its statement of decision, the court accepted plaintiffs' experts' testimony, and awarded nearly \$15 million in restitution.⁴²

The Court of Appeal reversed the judgment, including the class certification order, declining to approve a "trial management plan lacking in any expert input or principled statistical foundation."⁴³ In particular, the Court of Appeal deprecated the trial court's method of selecting the sample from which classwide conclusions were drawn. According to the Court of Appeal, the trial court "did not follow established statistical procedures" in selecting the sample, which is generally done "by expert statisticians based on surveys of class members and pilot studies" with due "consideration as to probable margin of

36 *Id.* at 225–31. Before trial, four of the twenty opted out and were replaced by alternates. *Id.* at 223, 242. The UCL claim brought in *Duran* carried no jury trial right, so the case was tried to the court. See *Hodge v. Superior Court*, 145 Cal. App. 4th 278, 284–85 (2006) (UCL claims are equitable and carry no right to a jury trial, even if predicated on Labor Code violations).

37 *Duran*, 203 Cal. App. 4th at 231–35

38 *Id.* at 236–37. The petition for review explained that the trial court did so because such evidence was not contemplated by the trial plan—a plan adopted in part due to the defendant's own recalcitrance in refusing to propose any procedure other than hundreds of individual trials. Petition for Review, *supra* note 34, at 14–15. The trial court also observed that the defendant had failed to timely proffer the evidence, and that the weight to be accorded to it was questionable. *Id.* According to the petition for review, the record indicated that some of the evidence may have been obtained by "fraudulent methods." *Id.* at 7–8, 12.

39 *Duran*, 203 Cal. App. 4th at 238–39.

40 *Id.* at 240–44.

41 *Id.* at 244–46.

42 *Id.* at 247.

43 *Id.* at 258.

error.”⁴⁴ Also, according to the panel, including the two named class representatives in the sample destroyed any randomization.⁴⁵ These failures led to a “statistically invalid result,”⁴⁶ which defeated not only the judgment, but also class certification.⁴⁷

In support of this conclusion, the Court of Appeal relied in part on the “trial by formula” language of *Dukes*.⁴⁸ Unfortunately, the discussion of *Dukes* badly misinterprets the opinion.

According to the *Duran* panel, *Dukes* “found [that] representative sampling studies did not justify certification.”⁴⁹ However, the panel failed to perceive that *Dukes* held only that the particular studies presented by the plaintiffs in *Dukes* itself were inadequate; as discussed above, nothing in *Dukes* held that such studies could never be adequate if prepared properly. The panel then construed *Dukes* as requiring individual proof of “any individual affirmative defense”—including the outside salesperson exemption under the Labor Code—and said that the trial procedure used in *Duran* was “the same type of ‘trial by formula’” disapproved in *Dukes*.⁵⁰ But in *Dukes*, the Supreme Court “disapproved” what it called “trial by formula” *only* as proposed to be used in the special phase of trial required by statute under Title VII and *Teamsters*, where the defendant would have had *no* opportunity to defend itself by proving a lawful reason for its employment decisions. The UCL and the Labor Code have no analog.⁵¹ And while *Duran* took pains to note that “this portion of [*Dukes*] was the expression of a unanimous court,”⁵² it is clear that broadly construing “this portion” of the opinion as precluding all statistical and survey evidence is error—or the dissenting Justices never would have joined it.

Put another way, *Duran* accepted (or may at least be construed by some as accepting) the notion that *Dukes* entitles defendants to insist on individualized determinations of any

44 *Id.* at 252–53; *see id.* at 257 (noting that the trial court “arrived at this procedure on its own, without reliance on precedent or the advice of expert witnesses” and that “there was no statistical foundation for the trial court’s initial assumption that 20 out of 240 is a sufficient size for a representative sample by which to extrapolate either liability or damages”). Again, however, the petition for review explained that the trial court rejected the plaintiffs’ proposed expert sampling methodology, which included a class member survey, precisely *because* the defendant had so vigorously objected to it. Petition for Review, *supra* note 34, at 10, 32. The petition for review further explained that plaintiffs’ expert testified during phase two that the sampling procedure the trial court used was, in fact, methodologically sound in every respect, notwithstanding the margin of error. *Id.* at 16.

45 *Duran*, 203 Cal. App. 4th at 252–53. As pointed out in the petition for review, however, plaintiffs’ expert testified during phase two that this did not destroy randomization; instead, it reduced the average amount of unpaid overtime, thereby lowering the defendant’s aggregate liability. Petition for Review, *supra* note 34, at 16.

46 *Duran*, 203 Cal. App. 4th at 248.

47 *Id.* at 270–74.

48 *Id.* at 258–59. *Duran* acknowledged that *Dukes*, a federal case, was “not dispositive,” but nonetheless said that it “agree[d] with” the “reasoning” of *Dukes*. *Id.*; *see Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2377–78 (2011) (state class certification procedures can and do differ widely from those of federal practice).

49 *Duran*, 203 Cal. App. 4th at 258 (citing *Dukes*, 131 S. Ct. at 2555).

50 *Id.* (citing *Dukes*, 131 S. Ct. at 2561) (*emphasis added*).

51 *Cf. Ross*, 667 F.3d at 908 n.7 (distinguishing *Dukes*; exemption defenses to misclassification under FLSA create no “statutory right” comparable to the Title VII statutory right construed in *Dukes*).

52 *Duran*, 203 Cal. App. 4th at 259.

defenses they may choose to assert. According to this view, *Dukes* establishes a general rule that defenses can be tried, consistent with due process and (in federal court) the Rules Enabling Act,⁵³ only through individualized proof. But a careful reading of *Dukes* shows that this is simply not so. The only thing a defendant is entitled to insist on in a Title VII case is an opportunity to defend itself in the separate phase of trial mandated by that statute as construed in *Teamsters*.

In short, the *Duran* panel simply misread *Dukes*. In so doing, the panel came perilously close to incorrectly elevating a principle unique to Title VII class actions to the level of a federal due process right. The California Supreme Court’s grant of review in *Duran* calls this reasoning into question, and also renders the *Duran* opinion uncitable as precedent.⁵⁴

In another widely-cited case, *Cruz v. Dollar Tree Stores, Inc.*,⁵⁵ a federal district court in California made the same error. In *Cruz*, also a misclassification case brought under the Labor Code, the court relied on *Dukes* in support of the notion that any “trial by formula” that could be characterized as depriving a defendant “of its right to assert statutory defenses to the individual claims of all class members” necessarily defeats certification.⁵⁶ As discussed above, this reading of *Dukes* is wrong. What is more, the key difference between *Cruz* and *Dukes* was that nothing in the *Cruz* trial plan would have precluded the defendant from presenting its defenses (the primary defense in that case being the executive exemption).⁵⁷

53 28 U.S.C. §§ 2071 *et seq.*

54 Cal. Rules of Ct., rule 8.1105(e)(1).

55 2011 WL 2682967 (N.D. Cal. Jul. 8, 2011).

56 *Id.* at *6.

57 See 8 Cal. Code Regs. § 11070(1)(A)(1)(a)-(f). In *Dukes*, the trial plan rejected for the second phase of trial would not have allowed the defendant to offer the testimony of any witnesses of its own. 131 S. Ct. at 2561; see *Dukes*, 603 F.3d at 626. There is no reason why the trial court in *Cruz* could not have permitted the defendant to rebut the plaintiffs’ showing, consistent with the limits of Federal Rule of Evidence 403. See also Cal. Evid. Code § 352. Possibly, the *Cruz* trial plan suffered from a deficiency not noted by the *Cruz* court—failure to employ scientifically sound statistical sampling techniques in selecting the sample (which plaintiffs proposed should consist of 5 out of 273 class members). *Cruz*, 2011 WL 2682967 at *2, *7. Of course, nothing in the law makes anecdotal or representative testimony inadmissible unless scientifically selected. In most cases, such evidence is presented to bolster other common evidence of the defendant’s uniform, classwide policies and practices. See, e.g., *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) (distinguishing *Dukes*).

C. *Gaston* and Other Decisions, Including *Brinker*

Happily, *Cruz* and *Duran* stand in the minority. Other federal courts in California, correctly reading *Dukes*, have had no difficulty granting class certification (or denying decertification) of wage and hour claims,⁵⁸ consumer fraud claims,⁵⁹ and antitrust claims.⁶⁰

Nor did the California Court of Appeal in another recent case find the “trial by formula” language of *Dukes* either relevant or dispositive. In *Gaston v. Schering-Plough Corp.*,⁶¹ a notable, but unpublished, California opinion, the Court of Appeal reversed an order denying class certification of claims under the UCL, California’s Consumers Legal Remedies Act (“CLRA”),⁶² and California common-law fraud. In support of the certification motion, the plaintiff presented the declaration of an expert who had conducted a survey “designed in accord with generally accepted scientific methodologies for survey research,” which revealed that the labeling on the defendants’ sunscreen was misleading to over 90% of the population surveyed.⁶³ The plaintiff also proffered similar expert survey evidence as a method of establishing the measure of restitution or damages to which class members would be entitled.⁶⁴

The Court of Appeal held that the trial court should have accepted this method of common proof.⁶⁵ “[T]he illegal nature of defendants’ conduct [was] a question common to all class members,” and for purposes of the UCL claim, every class member need not be shown to have relied on or been deceived by the misrepresentations.⁶⁶ As for the CLRA and common-law fraud claims, the Court of Appeal determined that the trial court should have applied the presumption of classwide reliance of the California Supreme Court’s *Vasquez* decision, which held that if “material misrepresentations were

58 See, e.g., *Delagarza v. Tesoro Refining and Marketing Co.*, 2011 WL 4017967 (N.D. Cal. Sept. 8, 2011); *Nguyen v. Baxter Healthcare Corp.*, 275 F.R.D. 596 (N.D. Cal. 2011); *Ugas v. H&R Block Enterprises, LLC*, 2011 WL 3439219 (C.D. Cal. Aug. 4, 2011); *Smith v. Ceva Logistics U.S., Inc.*, 2011 WL 3204682 (C.D. Cal. Jul. 25, 2011). *Accord Ramos v. SimplexGrinnell LP*, 796 F. Supp. 2d 346 (E.D. N.Y. 2011); *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625 (S.D. Cal. 2010).

59 See, e.g., *Montanez v. Gerber Childrenswear, LLC*, 2011 WL 6757875 (C.D. Cal. Dec. 15, 2011); *In re Ferrero Litigation*, 278 F.R.D. 552 (S.D. Cal. 2011); *O’Donovan v. CashCall, Inc.*, 278 F.R.D. 479 (N.D. Cal. 2011); *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524 (C.D. Cal. 2011); *Aho v. AmeriCredit Financial Services, Inc.*, 277 F.R.D. 609 (S.D. Cal. 2011); *Johnson*, 276 F.R.D. 519; *Berrien v. New Raintree Resorts Int’l, LLC*, 276 F.R.D. 355 (N.D. Cal. 2011); *Delarosa v. Boiron, Inc.*, 275 F.R.D. 582 (C.D. Cal. 2011).

60 See, e.g., *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2012 WL 253298 (N.D. Cal. Jan. 26, 2012); *In re Aftermarket Automotive Lighting Products Antitrust Litig.*, 276 F.R.D. 364 (C.D. Cal. 2011). *Accord Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 299–300 (3d Cir. 2011); *Behrend v. Comcast Corp.*, 655 F.3d 182, 203 n.12 (3d Cir. 2011) (*Dukes* “neither guides nor governs the dispute before us”), cert. granted on limited issue, No. 11–864 (U.S. Jun. 25, 2012).

61 2011 WL 3452398 (Cal. App. Aug. 9, 2011), review denied, No. S196050 (Cal. Nov. 2, 2011); see Cal. Rule of Court 8.1115 (unpublished California opinions not citable in California state court). Requests for publication of the opinion were denied. See *Gaston v. Schering-Plough Corp.*, No. B214935 (Cal. App. Sept. 1, 2011), No. S196050 (Cal. Nov. 2, 2011).

62 Cal. Civ. Code §§ 1750 *et seq.*

63 *Gaston*, 2011 WL 3452398 at *2–*3.

64 *Id.* at *9.

65 See *id.* at *8–*9.

66 *Id.* at *8.

made to the class members, at least an inference of reliance would arise as to the entire class.”⁶⁷ It found the testimony of class members who said they “did not read the label and considered other factors in their purchasing decisions” insufficient to warrant denial of class certification, and noted the plaintiff’s expert testimony that “the motivations of a few individuals are not a statistically reliable indicator of the motivations of the thousands of putative class members.”⁶⁸

Put another way, in *Gaston*, the Court of Appeal approved certification of a class consisting of purchasers who may not have read or relied on the defendant’s misrepresentations, and who therefore may have suffered no harm as a result of the misrepresentations. Certification was proper because the defendants’ misrepresentations were uniform, materiality could be assessed classwide, and aggregate damages calculations would exclude sales to purchasers not impacted by the fraud. Nothing in the certification order would preclude the defendants from presenting their defenses at trial—as by attempting to rebut the classwide presumption of reliance—even though the plaintiffs planned to rely on statistical extrapolations at trial. As in most cases, the trial in *Gaston* would be an ordinary trial not subject to the special statutory rules considered in *Dukes*.

Notably, the Court in *Gaston* explicitly rejected the defendant’s argument that the *Dukes* “trial by formula” language dictated a different result, holding instead that *Dukes* “does not affect our analysis in the case at bar where uniform misrepresentations were made and injury depends on the reasonable person standard and not on the reasons for particular purchasing decisions.”⁶⁹

The holding of *Gaston* is well-grounded in California law. As the California Supreme Court explained in *Sav-on*, “California courts and others have in a wide variety of contexts considered pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant’s centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate.”⁷⁰ The admissibility of such evidence has been recognized in myriad earlier

67 *Id.* at *11–*13 (citing *Vasquez v. Superior Court*, 4 Cal.3d 800, 814 (1971)).

68 *Id.* at *12. Of course, nothing in *Gaston* holds that a consumer survey is required in order to establish a UCL “fraudulent” prong claim. Such evidence may be relevant and admissible, but it not mandatory. Other methods of common proof may suffice. *See, e.g., Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1362 (2003) (rejecting argument that in UCL “fraudulent” prong case, “a plaintiff must produce consumer survey or similar extrinsic evidence,” holding instead that “[t]he falsity of . . . advertising claims may be established by testing, scientific literature, or anecdotal evidence” (citation omitted)); *Brockey v. Moore*, 107 Cal. App. 4th 86, 99–100 (2003) (“survey evidence” not required to prove UCL “fraudulent” prong violation); *see also Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 681–82 (2006) (same).

69 *Id.* at *14.

70 *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 333 (2004).

decisions such as *Lockheed Martin Corp. v. Superior Court*,⁷¹ *Bell v. Farmers Ins. Exchange*,⁷² *Reyes v. Board of Supervisors*,⁷³ and *Stephens v. Montgomery Ward & Co.*,⁷⁴ and confirmed in post-*Sav-on* decisions including *Alch v. Superior Court*,⁷⁵ *Capitol People First v. Department of Developmental Services*,⁷⁶ and *Estrada v. FedEx Ground Package System, Inc.*⁷⁷

The California Supreme Court recently reinforced these core principles. In *Brinker Restaurant Corp. v. Superior Court*,⁷⁸ Justice Werdegar, the author of *Sav-on*, confirmed that in class litigation, “[r]epresentative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability.”⁷⁹ Such tools “enable individual claims that might otherwise go unpursued to be vindicated,” and “avoid windfalls to defendants that harm many in small amounts rather than a few in large amounts.”⁸⁰ These are “settled principles.”⁸¹

Another settled principle reconfirmed in *Brinker* is that “[c]laims alleging that a uniform policy consistently applied to a group of [plaintiffs] is in violation of the [law] are of the sort routinely, and properly, found suitable for class treatment.”⁸² The classwide

71 29 Cal. 4th 1096 (2003).

72 115 Cal. App. 4th 715, 750 (2004). Defense-side litigants sometimes attempt to distinguish *Bell* (which was, like *Duran*, an employee misclassification case) by claiming that the Court of Appeal in *Bell* approved statistical extrapolation only for purposes of calculating damages, and not for establishing liability. See, e.g., *Duran*, 203 Cal. App. 4th at 221. This is a misreading of *Bell*. As the California Supreme Court has recognized, misclassification of an employee, standing alone, is not unlawful; rather, liability attaches when the employer fails to pay the employee earned overtime wages. *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1208 (2011). Hence, the statistical extrapolation in *Bell* was necessary and admissible to establish both liability and the amount of damages.

73 196 Cal. App. 3d 1263, 1279 (1987) (evidence in the form of “a *sampling* of representative cases” obviated the need for individualized proof (emphasis in original)).

74 193 Cal. App. 3d 411, 421 (1987) (“[Plaintiff] has come forward with statistical data and an analysis of the defendant’s corporate structure that supports her allegation of centralized control over employment decisions.”).

75 165 Cal. App. 4th 1412, 1428 (2008) (“[Plaintiffs] cannot prove their disparate impact claims without access to evidence from which they can perform a statistical analysis.”).

76 155 Cal. App. 4th 676, 695 (2007) (reversing denial of class certification because “use of sampling or statistical proof” had been improperly “restricted”; “the trial court turned its back on methods of proof commonly allowed in the class action context”).

77 154 Cal. App. 4th 1, 13–14 (2007) (affirming class certification based on representative testimony).

78 53 Cal. 4th 1004 (2012). The author of this article was lead appellate counsel for the workers in *Brinker*.

79 *Id.* at 1054 (Werdegar, J., concurring) (citing *Bell*, 115 Cal. App. 4th at 749–55; *Dilts*, 267 F.R.D. at 638). The citation of *Dilts* is notable, for that case held explicitly that “[a]s to liability, the use of statistical sampling, at least when paired with persuasive direct evidence, is an acceptable method of proof in a class action.” *Dilts*, 267 F.R.D. at 638 (emphasis added); see *supra* note 72 and accompanying text.

80 *Brinker*, 53 Cal. 4th at 1054 (Werdegar, J., concurring) (citing *Sav-on*, 34 Cal. 4th at 339–40; *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 714–15 (1967)).

81 *Id.* at 1055.

82 *Id.* at 1033 (majority opinion) (citing *Jaimez v. DAIOHS USA, Inc.*, 181 Cal. App. 4th 1286, 1299–1305 (2010); *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1533–38 (2008); *Bufl v. Dollar Financial Group, Inc.*, 162 Cal. App. 4th 1193, 1205–08 (2008)). Notably, in each of the three cited cases, the Court of Appeal *reversed* lower court orders denying class certification. Each opinion heavily relied on *Sav-on*.

process of adjudicating such claims may well be characterized as “formulaic,” yet as *Brinker* acknowledges, such processes are “routine” and “proper” in class litigation in California.⁸³

The Supreme Court was urged in supplemental briefing in *Brinker* to adopt a simplistic, *Duran*-like “trial by formula” analysis of *Dukes*.⁸⁴ It conspicuously declined to do so. *Brinker* cited *Dukes* only in support of the proposition, previously established in the Court’s own decisions, that “[w]hen evidence or legal issues germane to the certification question bear as well on aspects of the merits, a court may properly evaluate them,” although “[s]uch inquiries are closely circumscribed,” and “a court generally should eschew resolution of such issues unless necessary.”⁸⁵

Elsewhere in the opinion, the Supreme Court favorably cited three other decisions relying on evidentiary extrapolations for purposes of establishing classwide liability and damages, again disdaining reliance on *Dukes*.⁸⁶

In short, neither the Supreme Court in *Brinker* nor the Court of Appeal in *Gaston* allowed clever “trial by formula” language to overshadow the facts of *Dukes* or the case before it. Nor should other courts. Careful briefing by plaintiffs’ counsel should minimize the risk that *Dukes* will be similarly misconstrued in future cases. The Supreme Court’s forthcoming opinion in *Duran* may also provide guidance.⁸⁷

Conclusion

It is easy to latch on to the glib “trial by formula” catchphrase, and to substitute that catchphrase for reasoned analysis. But no catchphrase should serve as a stand-in for a careful reading of the *Dukes* opinion, or for an evaluation of the particular methods of common proof proposed in other cases on their own merits.

83 For example, *Brinker* cited pages from *Jaimez* where the Court of Appeal held that the necessity of formulaic calculations did not defeat class certification: “[Plaintiffs] could attest to the typical amount of overtime time they worked each day, even in the absence of time records. . . . The possible use of survey evidence or testimony from a random and representative sampling of class members can certainly be explored to facilitate the necessary calculations.” 181 Cal. App. 4th at 1302–03 (emphasis added), cited with approval in *Brinker*, 53 Cal. 4th at 1033; see also *Ghazaryan*, 169 Cal. App. 4th at 1534 (“Determining whether a sufficient community of interest exists to warrant class certification, however, depends not on the differences among individual [class members’] use of their gap time but on the reasonableness of [the defendant’s] policies as applied to [the class members] as a whole.”), cited with approval in *Brinker*, 53 Cal. 4th at 1033.

84 See *Brinker*’s Supplemental Brief re *Wal-Mart v. Dukes* and *Cruz v. Dollar Tree Stores* at 8, *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, No. S16635 (Cal. Jul. 26, 2011). This brief similarly urged the Supreme Court to rely on the *Cruz* court’s interpretation of *Dukes*. See *id.* Yet *Cruz* is nowhere cited in the *Brinker* opinion. See 53 Cal. 4th 1004, *passim*.

85 *Brinker*, 53 Cal. 4th at 1023–24, 1025 (citing *Dukes*, 131 S. Ct. at 2551; *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 443 (2000) (“issues affecting the merits of a case may be enmeshed with class action requirements”)); see also, e.g., *Marler v. E.M. Johansing, LLC*, 199 Cal. App. 4th 1450, 1458 (2011) (citing *Sav-on* and *Dukes* for same proposition).

86 *Brinker*, 53 Cal. 4th at 1051 (citing *Salvas v. Wal-Mart Stores, Inc.*, 893 N.E.2d 1187, 1210–11 (Mass. 2008); *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 220, 225–28 (Mo. App. 2007); *Iliadis v. Wal-Mart Stores, Inc.*, 922 A.2d 710, 715–16, 723–24 (N.J. 2007)). Again, it is notable that in all three cases, the Courts either affirmed certification or reversed orders denying certification.

87 Commentators have suggested that the Supreme Court may have granted review in *Duran* because it perceived the Court of Appeal opinion as inconsistent with the favorable class certification language in *Brinker*. E.g., Scott Graham, *High Court to Consider Use of Statistical Evidence in Wage-and-Hour Cases*, THE RECORDER, May 16, 2012.