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| Mata, Maribel, California Superior Court-Los Angeles County- CCW Courthouse- Wiley (311) | 4/13/2016 4:35 PM PDT | The motion is granted | <p>SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES DEPARTMENT 311 Williams v. Allstate Insurance Company, BC382577 File and Serve Express Motion to decertify the class</p> <p>The motion is granted. Christopher Williams sued Allstate Insurance Company on the allegations that, first, Allstate made him work off the clock but did not pay him for his overtime, and, second, Allstate gave Williams wage statements lacking data the law required. The overtime class has 284 members, while the wage statement class numbers 2376. The court certified these classes. Allstate has moved to decertify them, correctly arguing Williams has repeatedly failed to offer a reliable trial plan that complies with Duran v. U.S. Bank National Association (2014) 59 Cal.4th 1.</p> <p>The Duran decision insisted upon statistical reliability in class actions. The opinion held statistical analyses in class action trials must have "sufficient rigor." (Duran, supra, 59 Cal.4th 1, 31.) Before trial, parties must now be thoughtful about the statistical logic they plan to urge at trial, because a trial premised on invalid logic is doomed to be an expensive waste of time, just as a house built on a poor foundation will be an enduring source of grief. The Duran case showed how poor logic creates massive waste. The statistical sample in Duran was too small and biased. (See Duran, supra, 59 Cal.4th 1, 38-49.) These basic problems meant the trial result was "profoundly flawed." (Duran, supra, 59 Cal.4th 1, 13.) Garbage in, garbage out. Considerable human effort was lost because the trial court did not develop and follow a statistically valid trial plan.</p> <p>The first issue is sample size. "How big should the sample be? There is no easy answer to this sensible question." (Kaye and Freedman, Reference Guide on Statistics in Federal Judicial Center (3rd ed. 2011) Reference Manual on Scientific Evidence pages 246.) But answering this sensible question must be the first order of business. When you are called for jury duty, your first question is always "How long will this take?" The number of trial witnesses is important to all concerned.</p> <p>To calculate sample size, Williams retained statistician Brian Kriegler, who submits a 21-page declaration. Kriegler is not</p> |

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Williams's first statistician. Last year Williams submitted a different trial plan that was the brainchild of a different statistician, who recommended a sample size of 30. (Drogin reply declaration page 3 paragraphs 7 & 8.) The court rejected that trial plan. Williams's current effort is a do-over with the new statistician Kriegler. Kriegler opines that "a sample size of 30 would not suffice." (Kriegler declaration 13:4-5.) Williams's second expert thus condemns the recommendation of Williams's first expert.

Kriegler proposes a sample size of 142 for the overtime damages trial and 243 for the wage statement class. (Kriegler declaration 13:12 and 17:22.)

Kriegler's proposal is unreliable for three reasons.

First, Kriegler proposes a sample of 142 without disclosing his method or calculations. (Kriegler declaration paragraph 38 (proposing sample sizes of 142 as well as 76).) Kriegler's declaration does not explain the basis or origin of this recommended sample size of 142. Kriegler sets forth his proposal at paragraphs 33 to 44 of his declaration. In this discussion Kriegler does not cite the statistics literature for his formula, nor does he reveal what his formula might be. He does not show his work. So far as Kriegler chooses to explain, his result is ex cathedra rather than a reliable analysis rooted in the standard literature as applied to this case. This approach detracts from Kriegler's reliability because Kriegler has made it impossible for readers to validate his method or check his arithmetic.

It may be that Kriegler uses the same formula for the overtime class as did Allstate's statistician Daniel J. Slottje, whose declaration is in the record. Kriegler notes Slottje "provides the formula" in the Slottje declaration (Kriegler declaration 3:16-17) and that "the formula that Dr. Slottje uses to calculate the sample size is appropriate to use." (Kriegler declaration 3:27; see also id. 4 footnote 6 ("this is the correct formula to use"), 17:9-12, and 19:16-18 and footnote 40.)

Slottje's formula, however, yielded a sample size of 164 for the overtime class. (Slottje declaration paragraph 10.) Slottje's 164 is different than Kriegler's 142. Why? Kriegler does not explain.

Kriegler apparently agrees with Slottje's method yet reaches a different result: one more favorable to his client. Kriegler's failure to explain this disparity undermines his reliability.

In oral argument, Williams did not attempt to explain this disparity.

Second, Kriegler's embrace of an 84% confidence interval (see, e.g., Kriegler declaration 14:16) is unprecedented in the statistics literature, so far as Kriegler explains or this court can discover. A 95% confidence interval is the common convention. (See, e.g. Duran v. U.S. Bank National Association, supra, 59 Cal.4th 1, page 20 & footnote 13, page 22 footnote 15, page 46 ("Statisticians typically calculate margin of error using a 95 percent confidence interval, which is the interval of values above and below the estimate within which one can be 95 percent certain of capturing the 'true' result."); Bell v. Farmers Insurance Exchange (2004) 115 Cal.App.4th 715, 722, 724, 753; Kaye and Freedman, Reference Guide on Statistics in Federal Judicial Center (3rd ed. 2011) Reference Manual on Scientific Evidence pages 248 and 284-285; Levy and Lemeshow (3rd ed. 1999) Sampling of Populations: Methods and Applications 61-62.)

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| | | | <p>Kriegler concedes "95 percent is a commonly used confidence level" (Kriegler declaration 6:15-16; see also id. 17:18-19.) Yet Kriegler, for insubstantial reasons, advocates a different confidence level. Kriegler suggests 84% "is well above the 'more likely than not' threshold." (Kriegler declaration 14:17-18.) This passing remark implies courts generally do or should accept statistical analyses satisfying a 51% confidence interval. This implication is arresting, novel, and unsupported. Not even Kriegler seems to accept it, for he proposes 84% rather than 51%. Why? His declaration does not say.</p> <p>No case cites an 84% confidence interval, so far as this briefing shows. Kriegler does not attribute the figure to any scholarly source or to any source at all. The 84% confidence interval is unconventional and arbitrary, apparently selected not for objective validity but because it is helpful for the client.</p> <p>In oral argument, Williams did not identify any legal or statistical authority recommending either an 84% or a 51% confidence interval.</p> <p>Third, for baffling reasons Kriegler advocates a one-tailed test. (Kriegler declaration paragraphs 18, 40, and 48 and pages 8:12-15, 12:16-17 and footnote 25, 13:1-2, 14:15-16.)</p> <p>"Judgment should inform whether a one- or a two-tailed hypothesis is more appropriate for the analysis being conducted." (Charles Wheelan, <i>Naked Statistics: Stripping the Dread from the Data</i> (2013) 168.) Wheelan illustrates the point by supposing a statistician is testing the hypothesis that male professional basketball players are taller on average than other men. A one-tailed test is appropriate for this inquiry because our background information is that pro basketball players are not shorter than the general population. When the hypothesis is that basketball players are taller than other men, a one-tailed test is appropriate. (Id. 166.) But a two-tailed test is appropriate if variations from the estimated quantity are possible in either direction. (Id. 167; see also Kriegler declaration paragraph 18.)</p> <p>Williams's first statistician opined that, "for the determination of aggregate classwide damages awarded to the Off The Clock Class, if liability is found, a two-tailed confidence interval will be appropriate. In other words, it will be necessary to obtain an accurate estimate of the damages, in order to avoid awarding damages that are too low or too high." (Drogin reply declaration page 4 paragraph 11 (emphasis in original).) William's first expert has a Ph.D in statistics from the University of California at Berkeley. (Id. 1 paragraph 1.)</p> <p>The reasons Kriegler gives for recommending a one-tailed test are not cogent. In paragraph 40, Kriegler states he proposes "using a one-tailed confidence interval because, as I understand it, Plaintiffs have the burden to show the extent of damages." Plaintiffs do bear that burden, but this fact does not justify a one-tailed test. It remains important "to avoid awarding damages that are too low or too high." (Drogin reply declaration page 4 paragraph 11.)</p> <p>Kriegler continues by asserting "the upper bound to a two-tailed confidence interval is far less relevant." Kriegler declaration 15:21-22.) Apparently Kriegler is saying that no one is interested in how high damages might be in this case. That is incorrect. Both parties are interested in that question.</p> <p>Kriegler repeats this specious logic in his paragraph 48, but</p> |

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| | | | <p>repetition does not strengthen the analysis. (See also Kriegler declaration 12 footnote 25 (offering a mystifying restatement of the same point).) Both Williams and Allstate would like to discover the proper upper bound for damages. Neither Williams's briefing nor statistical convention supports a contrary suggestion. As far as this record shows, a two-tailed test is appropriate for this case "to avoid awarding damages that are too low or too high." (Drogin reply declaration page 4 paragraph 11.) We have no basis for concentrating only on the "possibility of the relationship in one direction and completely disregarding the possibility of a relationship in the other direction." (UCLA Statistical Consulting Group, "FAQ: What are the differences between one-tailed and two-tailed tests?"</p> <p>http://www.ats.ucla.edu/stat/mult_pkg/faq/general/tail_tests.htm (as of 4-13-16); see also GraphPad Statistics Guide, "When is it appropriate to use a one-sided P value?"</p> <p>http://www.graphpad.com/guides/prism/6/statistics/index.htm?one-tail_vs_two-tail_p_values.htm (as of 4-13-16) ("A one-tailed test is appropriate when previous data, physical limitations, or common sense tells you that the difference, if any, can only go in one direction. You should only choose a one-tail P value when both of the following are true. [1] You predicted which group will have the larger mean (or proportion) before you collected any data. [2] If the other group had ended up with the larger mean – even if it is quite a bit larger – you would have attributed that difference to chance and called the difference 'not statistically significant'. . . . The issue in choosing between one- and two-tailed P values is not whether or not you expect a difference to exist. If you already knew whether or not there was a difference, there is no reason to collect the data. Rather, the issue is whether the direction of a difference (if there is one) can only go one way. You should only use a one-tailed P value when you can state with certainty (and before collecting any data) that in the overall populations there either is no difference or there is a difference in a specified direction. If your data end up showing a difference in the 'wrong' direction, you should be willing to attribute that difference to random sampling without even considering the notion that the measured difference might reflect a true difference in the overall populations. If a difference in the 'wrong' direction would intrigue you (even a little), you should calculate a two-tailed P value.")</p> <p>Kriegler gives no good reason for adopting a one-tailed test in this case. "Choosing a one-tailed test for the sole purpose of attaining significance is not appropriate. Choosing a one-tailed test after running a two-tailed test that failed to reject the null hypothesis is not appropriate, no matter how 'close' to significant the two-tailed test was. Using statistical tests inappropriately can lead to invalid results that are not replicable and highly questionable--a steep price to pay for a significance star in your results table!" ((UCLA Statistical Consulting Group, "FAQ: What are the differences between one-tailed and two-tailed tests?"</p> <p>http://www.ats.ucla.edu/stat/mult_pkg/faq/general/tail_tests.htm (as of 4-13-16).)</p> <p>In sum, Kriegler departs from professional analytical conventions without cogent justification. Kriegler strains to reach results favorable to his client. Under Sargon Enterprises, Inc. v. University of Southern California (2012) 55 Cal.4th 747, 772, the</p> |

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| | | | <p>court entirely rejects Krieglger's clearly invalid and unreliable opinion.</p> <p>Williams cites Tyson Foods, Inc. v. Bouaphakeo (U.S. Supreme Ct. 2016) 2016 WL 109241, which is not pertinent. The Tyson Food Court held that representative proof can be used in a certified class action if the proof is reliable. (See id. *7 (no Daubert objection); *8 ("A representative or statistical sample, like all evidence, is a means to establish or defend against liability. Its permissibility turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action. See Fed. Rules Evid. 401, 403, and 702."); and *11 ("This is not to say that all inferences drawn from representative evidence . . . are 'just and reasonable.' . . . Representative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked."))</p> <p>The Tyson Food opinion condemns the use of statistically inadequate evidence, as did the Duran Court. Federal and state authorities agree that trials should avoid unsound logic. Slottje's opinion on sample size was that the overtime class required 164 while the wage statement class required 331. This analysis has not been impeached on this record. Slottje's figures sum to 495, which is a staggering number of witnesses for one trial. Conceivably, overlap would reduce this total, but that possibility is speculative on this record. No one has performed this analysis.</p> <p>Consider the dimensions involved. In civil trials it is unusual for a witness to spend less than an hour testifying. Every witness usually takes longer. The more formulaic the direct testimony, the more incentive for the cross-examiner to show how this individual's uniqueness belies the formula, which triggers a sporting redirect. So, conservatively, assume an hour per witness. At an hour apiece, a trial with 495 witnesses implies a trial of five or six months. (Cf. Duran v. U.S. Bank National Assn., supra, 59 Cal.4th 1, 17 (40 court days for a sample size of 21 witnesses) (liability phase alone) (bench trial) (one class, not two).) A trial lasting months will be costly to the parties and the court. Being engaged in one task delays other work, so a long trial imposes costs on every other case on the court's docket. When looming costs are steep, the court must ensure the undertaking will not be a waste of time. The foundation must be sound.</p> <p>Williams does not have a reliable plan for managing a trial with 495 potential witnesses. The court must decertify his class. (See Duran v. U.S. Bank National Association, supra, 59 Cal.4th 1, 29 (trial courts are obligated to decertify a class action if individual issues prove unmanageable); 31-32 ("If statistical evidence will comprise part of the proof on class action claims, the court should consider AT THE CERTIFICATION STAGE whether a trial plan has been developed to address its use. . . . Rather than accepting assurances that a statistical plan will eventually be developed, trial courts would be well advised to obtain such a plan before deciding to certify a class action. In any event, decertification must be ordered whenever a trial plan proves unworkable.") (emphasis in original).)</p> <p>The court does not refer to or rely upon the reply declaration of</p> |

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Michael Buchanan. This ruling incorporates the points and authorities from oral argument, which was transcribed.