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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MARK BARRUETA, Plaintiff and Appellant, v. RALPHS GROCERY COMPANY, Defendant and Respondent.	B233152 (Los Angeles County Super. Ct. No. BC379200)

APPEAL from an order of the Superior Court of Los Angeles County, Richard L. Fruin, Jr., Judge. Affirmed.

Law Offices of Joseph M. Herbert, Joseph M. Herbert; Law Offices of Louis H. Kreuzer II and Louis H. Kreuzer II for Plaintiff and Appellant.

Reed Smith, Margaret M. Grignon, Remy Kessler, and Anne M. Grignon for Defendant and Respondent.

Putative class representative Mark Barrueta is one of 250 off-duty or retired peace officers (ODO's) who entered into independent contractor engagement agreements with defendant International Protective Services, Inc., doing business as International Services, Inc. (ISI), a "private patrol operator" licensed by the State of California to furnish security guards. (Bus. & Prof. Code, § 7582.1, subd. (a).) ISI hired the ODO's specifically to work as armed security guards at various facilities of defendant Ralphs Grocery Company (Ralphs) during the "Southern California Supermarket Strike of 2003-2004" (strike), which lasted from October 2003 to February 2004.

The complaint alleged that ISI and Ralphs violated the unfair competition law (Bus. & Prof. Code, § 17200 (UCL)) by misclassifying the ODO's as independent contractors rather than employees and failing to pay statutorily required overtime wages. Barrueta moved to certify the proposed class of ODO's, but the trial court granted the motion only as to the claim against ISI. Based on the parties' conflicting evidence concerning Ralphs's liability as a joint employer, the trial court concluded that it was neither feasible nor desirable to litigate the claim against Ralphs on a classwide basis. In this appeal from the order denying class certification as to the claim against Ralphs, we affirm, finding no abuse of discretion or legal error.

BACKGROUND

On October 16, 2007, Barrueta filed a putative class action complaint alleging that ISI and Ralphs violated the UCL by misclassifying the ODO's as independent contractors rather than employees and failing to pay overtime wages in violation of Labor Code section 510 and Industrial Wage Commission (IWC) Wage Order No. 4-2001.[1] The

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[1] Unless otherwise indicated, all further statutory references are to the Labor Code. Section 510, subdivision (a) provides in relevant part: "Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less

(Fn. continued.)

complaint sought equitable and injunctive relief, the appointment of a receiver, attorney fees under section 1194,[2] prejudgment interest, penalties, and costs.

On April 27, 2009, ISI filed a chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Central District of California, Case No. 2:09-bk-19847-EC, which triggered an automatic stay of Barrueta's claim against ISI. After the bankruptcy court lifted the automatic stay, Barrueta moved to certify a proposed class consisting of "[t]hose persons who: 1.) held the same or equivalent position as Plaintiff Mark Barrueta; 2.) provided services to Ralphs Grocery Company through [ISI]; 3.) were paid hourly; 4.) were not in uniform; 5.) were armed; and 6.) performed these services during the 2003-2004 Southern California Grocery Workers Strike."

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than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee. Nothing in this section requires an employer to combine more than one rate of overtime compensation in order to calculate the amount to be paid to an employee for any hour of overtime work."

IWC Wage Order No. 4-2001 regulates the wages, hours, and working conditions in professional, technical, clerical, mechanical, and similar occupations, including security guards. It requires the payment of overtime wages of one and one-half times the employee's regular rate of pay for all hours worked in excess of eight hours up to and including 12 hours in any workday, and for the first eight hours worked on the seventh consecutive day of work in a workweek. It also requires the payment of double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight hours on the seventh consecutive day of work in a workweek.

[2] Section 1194, subdivision (a) provides: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

The trial court certified the proposed class as to the claim against ISI,[3] but not against Ralphs. Given that ISI had entered into independent contractor engagement agreements with the ODO's, the trial court found that as to ISI, there were common issues of fact and law: "(1) whether ISI's hiring of off-duty peace officers as independent contractors violates the Private Security Services Act (PSSA), Bus. & Professions Code section 7580 et seq.; (2) whether ISI exercised such control over the off-duty peace officers that they were misclassified as independent contractors rather than as ISI employees; and (3) whether the off-duty peace officers, if classified as employees, are entitled to overtime wages from ISI."[4]

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[3] The validity of the order granting class certification as to the claim against ISI is not at issue on appeal.

[4] The private security profession is regulated by the Director of Consumer Affairs under the Private Security Services Act (PSSA). (Bus. & Prof. Code, §§ 7580, 7580.1, 7580.2.) All businesses that are subject to regulation by the PSSA must be licensed. (*Id.* at § 7582.)

The PSSA contains the following definitions:

A "private patrol operator" or "operator of a private patrol service" is "a person, other than an armored contract carrier, who, for any consideration whatsoever: [¶] Agrees to furnish, or furnishes, a watchman, guard, patrolperson, or other person to protect persons or property or to prevent the theft, unlawful taking, loss, embezzlement, misappropriation, or concealment of any goods, wares, merchandise, money, bonds, stocks, notes, documents, papers, or property of any kind; or performs the service of a watchman, guard, patrolperson, or other person, for any of these purposes." (Bus. & Prof. Code, § 7582.1, subd. (a).)

A "security guard or security officer . . . is an employee of a private patrol operator, or an employee of a lawful business or public agency who is not exempted pursuant to Section 7582.2, who performs the functions as described in subdivision (a) on or about the premises owned or controlled by the customer of the private patrol operator or by the guard's employer or in the company of persons being protected." (Bus. & Prof. Code, § 7582.1, subd. (e.).)

An "employer" is "a person who employs an individual for wages or salary, lists the individual on the employer's payroll records, and withholds all legally required deductions and contributions." (Bus. & Prof. Code, § 7580.8.)

(Fn. continued.)

The trial court reached a different conclusion as to Ralphs, which had no direct employment relationship with ISI's ODO's. Barrueta alleged that Ralphs's liability for ISI's misclassification of the ODO's as independent contractors and nonpayment of overtime wages was premised on the joint employment relationship that arose from its control over their wages, hours, or working conditions. The trial court found, however, that because individual issues predominated over common issues as to Ralphs's exercise of control over wages, hours, or working conditions, a class action against Ralphs would be neither feasible nor manageable.

Barrueta contends on appeal that the joint employer issue "is amenable to class treatment because the evidence used to prove that Ralphs was an employer . . . is common to all" class members. In light of his contention, we will focus in the sections below on the evidence and findings relevant to the joint employer issue.

I. The Evidence Showed that Ralphs Did Not Supervise the ODO's in the Performance of Their Strike-Related Duties

Each ODO had some or all of the following strike-related duties: (1) deter strikers from interfering with or obstructing the Ralphs distribution centers in Compton, Glendale, and Riverside; (2) "drive personnel to different locations to view or respond to possible Strike activities"; and (3) provide security at "individual Ralphs stores throughout the greater metropolitan area to deter picketing that might block the store entrances or aisles."

The evidence submitted by the parties showed that Ralphs did not train, equip, or supervise the ODO's in the performance of their strike-related duties. According to the

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An "employee" is "an individual who works for an employer, is listed on the employer's payroll records, and is under the employer's direction and control." (Bus. & Prof. Code, § 7580.9.)

An "'employer-employee' relationship means a relationship in which an individual works for another, the individual's name appears on the payroll records of the employer, and the employee is under the direction and control of the employer." (Bus. & Prof. Code, § 7580.10.)

trial court's ruling, "[m]ost of the off-duty peace officers were assigned to individual Ralphs stores throughout the greater metropolitan area to deter picketing that might block the store entrances or aisles. These officers do not appear to have been given specific duties from ISI other than to provide visible security. Many of the off-duty officers were assigned to security duty at more than one Ralphs store, as well as at a distribution center, over the course of the Strike. The officers apparently drove to their assigned locations in their own vehicles. The off-duty peace officers, after some point in time, were told to check in and to check out with the store managers. The officers, however, submitted their time sheets (or telephonically reported their hours) to ISI."

II. There Was Evidence That Some Store Managers Allowed or Directed Some ODO's to Perform Nonsecurity Duties That Ralphs Did Not Authorize

The declarations submitted in connection with the class certification motion indicated that some but not all store managers had allowed or directed certain ODO's to perform nonsecurity duties that Ralphs did not authorize. The control exerted by the store managers over the ODO's performance of nonsecurity duties supplied the primary factual support for Barrueta's legal theory that Ralphs was a joint employer of ISI's ODO's and, therefore, was liable for ISI's nonpayment of overtime wages.

In his declaration, Barrueta stated that he was assigned to nonsecurity duties and monitored in his performance of those duties by Ralphs store managers: "While working at the stores, I performed work that was not related to the strike at the direction of Ralphs store management. This non-Strike work included picking up carts in the parking lot, stocking shelves, mopping up spills, bagging groceries, inventory stock, and performing loss prevention duties, especially in regard to high-dollar aisles like the meat, liquor, and cosmetics departments. At the Santa Barbara store, I was assigned to work on cases concerning forged checks; packed meat; sorted produce; and unloaded trucks. I also helped subdue a robber at the Van Nuys store."

The trial court found that Barrueta's declaration was "supported, in varying degree, by 15 other officers who were assigned store security duty." "These declarants

testify, almost identically, that they were directed to perform grocery store duties by the Ralphs store managers. These declarations also report, almost in unison: 'For example, the Ralphs store manager asked me to perform loss prevention duties and follow suspicious people when they came into the store, and observe for shoplifters.' [Internal record reference omitted.] The plaintiff's declarations also usually recite some variant of the following testimony: 'The Ralphs store manager also told me to collect grocery carts in the parking lot, bag groceries, stock shelves with grocery items, clean messes in the store including spills, inventory and count products unloaded from the trucks, and unload trucks.' [Internal record reference and fn. omitted.]"

The trial court found that other ODO's had different experiences, stating: "The eight declarations submitted by Ralphs from the off-duty peace officers who were assigned to store duty are more varied and paint a different picture. . . . The eight declarations report that the store manager did not assign duties to them and that they did not, at the manager's request, perform any grocery store duties. (Two declarants said they did on occasion collect grocery carts or, for a few minutes, bag groceries, but out of boredom or to socialize.) The store managers testify that Ralphs told them that the off-duty peace officers were not to perform grocery store duties. They said the off-duty officers were not needed for those tasks as their store was amply staffed during the Strike."

The trial court found that because the ODO's experiences were so varied, there was no single set of facts common to the entire class: "The heart of plaintiff's case is that Ralphs store managers exercised control over the off-duty peace officers assigned to store security duty. From the declarations, however, it appears that the off-duty peace officers had different experiences when assigned to individual Ralphs stores, depending on which stores and which shifts they had, that is, depending on which store managers they encountered. Some of the off-duty peace officers, according to their declarations, were requested to perform non-strike functions at some stores, while other officers report that such requests were not made to them. It [is] not disputed that Ralphs' management did not want the off-duty peace officers to perform non-security functions—they directed

store managers to not assign non-security tasks to the off-duty security officers. [Internal record reference omitted.] With respect to any off-duty peace officers who performed non-security functions, at the direction of a store manager, the total time they devoted to such tasks, as distinct from Strike security tasks, is not defined."

III. Finding That Common Issues Did Not Predominate on the Issue of Joint Employment, the Trial Court Concluded That a Class Action Against Ralphs Would Not be Manageable

The trial court found that although the declarations were "broadly in agreement as to the structure of the relationship among ISI, Ralphs and the off-duty peace officers during the Ralphs Strike," they were otherwise "not in agreement. The declarations are in conflict as to the degree of control that the Ralphs store directors exercised over the off-duty peace officers once they arrived for security duties at particular Ralphs stores."

In light of the conflicting evidence, the trial court found that common issues did not predominate "because the individual testimony of the putative class members would be required with respect to the degree of control that Ralphs exercised over the work performed by each of the off-duty peace officers." "To the extent that some off-duty peace officers performed non-security functions, the nature of those tasks and the time devoted to them would require individual testimony from the members of the putative class. This is a significant issue because the principles of employment law require a determination of the degree of control the putative employer exercises over the job performance of the putative employee."

The trial court concluded that because individualized "testimony from each officer as to his/her experience at each store (and maybe each shift at each store)" would be necessary, a class action against Ralphs would be "unmanageable." It therefore denied the motion to certify a class against Ralphs.

Barrueta timely appealed from the order denying class certification. (See *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 [denial of certification to an entire class is an appealable order].)

DISCUSSION

Barrueta states that according to *Martinez v. Combs* (2010) 49 Cal.4th 35 (*Martinez*), the term "employment" in state wage and hour cases means: "(a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship." (*Id.* at p. 64.) Applying *Martinez's* definition of employment to this case, Barrueta contends the denial of class certification was an abuse of discretion because Ralphs: (1) controlled the ODO's wages, hours, or working conditions; (2) suffered or permitted work by the ODO's; and (3) engaged the ODO's in a common law employment relationship. He also argues that: (4) the trial court applied an incorrect legal standard; (5) class resolution is a superior method; and (6) certain evidence was erroneously excluded. For the reasons that follow, we conclude the contentions lack merit.

I. Standard of Review

The California Supreme Court recently discussed the requirements for class certification in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021-1022, which we quote at length because of its applicability to this case:

"Originally creatures of equity, class actions have been statutorily embraced by the Legislature whenever 'the question [in a case] is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . .' (Code Civ. Proc., § 382; see *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1078; *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 458.) Drawing on the language of Code of Civil Procedure section 382 and federal precedent, we have articulated clear requirements for the certification of a class. The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives.

(Code Civ. Proc., § 382; *Fireside Bank*, at p. 1089; *Linder v. Thrifty Oil Co.*[, *supra*,] 23 Cal.4th [at p.] 435; *City of San Jose*, at p. 459.) 'In turn, the "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class."' (*Fireside Bank*, at p. 1089, quoting *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.)

"Here, only a single element of class suitability, and a single aspect of the trial court's certification decision, is in dispute: whether individual questions or questions of common or general interest predominate. The 'ultimate question' the element of predominance presents 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.' (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238; accord, *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) The answer hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.' (*Sav-On*, at p. 327.) A court must examine the allegations of the complaint and supporting declarations (*ibid.*) and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible. [Fn. omitted.] 'As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.' (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916; accord, *Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.)

"On review of a class certification order, an appellate court's inquiry is narrowly circumscribed. 'The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." [Citation.] A certification order

generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.]' (*Fireside Bank v. Superior Court*, *supra*, 40 Cal.4th at p. 1089; see also *Hamwi v. Citinational-Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462, 472 ['So long as [the trial] court applies proper criteria and its action is founded on a rational basis, its ruling must be upheld.'].)"

II. *Martinez's* Definition of Employment

Martinez is distinguishable because it arose from a summary judgment motion rather than a class certification motion. It is similar, however, in that it also involved the issue of joint employment. The dispute arose as a statutory wage and hour violation claim brought by seasonal agricultural workers against their bankrupt employer, defendant Munoz, and the defendant produce merchants who had ceased marketing Munoz's strawberries. Given that the produce merchants had no direct employment relationship with Munoz's workers, their liability for the workers' unpaid wages turned on the issue of joint employment. The produce merchants moved for summary judgment on the ground that the undisputed evidence showed, as a matter of law, that they did not jointly employ Munoz's workers. The trial court granted the produce merchants' motion for summary judgment and entered judgment in their favor, which was affirmed.

Prior to discussing the merits of the produce merchants' summary judgment motion, the Supreme Court analyzed the term "employment" for the first time in the context of California wage and hour violation cases. It explained that an employee's suit under section 1194 for unpaid minimum wages is actually a suit "to enforce the applicable wage order. This is because the 'legal minimum wage' recoverable under section 1194 *is* '[t]he minimum wage . . . fixed by the commission' (§ 1197) in the applicable wage order, even if that order merely incorporates the amount currently set by statute, and because employers and employees become subject to the minimum wage only through the applicable wage order and according to its terms (§ 1197 . . .)." (*Martinez*, *supra*, 49 Cal.4th at p. 64.) The IWC's definition of "employer" applies to

section 1194 cases and "incorporates the common law definition *as one alternative.* As defined in the wage orders, '"[e]mployer" means any person . . . who . . . *employs* or exercises control over the wages, hours, or working conditions of any person,' and '"[*e*]*mploy*" means to *engage*, suffer, or permit to work.' (Wage Order No. 14[-2001], Cal. Code Regs., tit. 8, § 11140, subd. 2(C), (F), italics added.) The verbs 'to suffer' and 'to permit,' as we have seen, are terms of art in employment law. [Citation.] In contrast, the verb 'to engage' has no other apparent meaning in the present context than its plain, ordinary sense of 'to employ,' that is, to create a common law employment relationship. [Fn. omitted.]" (*Martinez*, *supra*, at p. 64.)

Turning to the merits of the produce merchants' summary judgment motion, the Supreme Court evaluated the evidence in the context of the exercise of control and suffer or permit to work tests, and found no triable issues of material fact.

A. Exercise of Control

The Supreme Court explained that in a joint employer situation, the exercise of "control over how services are performed is an important, perhaps even the principal, test for the existence of an employment relationship." (*Martinez*, *supra*, 49 Cal.4th at p. 76.) It stated that "one of the reasons the IWC defined 'employer' in terms of exercising control was to reach situations in which multiple entities control different aspects of the employment relationship. This occurs, for example, when one entity (such as a temporary employment agency) hires and pays a worker, and another entity supervises the work. [Citation.] Supervision of the work, in the specific sense of exercising control over how services are performed, is properly viewed as one of the 'working conditions' mentioned in the wage order. To read the wage order in this way makes it consistent with other areas of the law, in which control over how services are performed is an important, perhaps even the principal, test for the existence of an employment relationship. [Citations.]" (*Ibid*.)

In applying the exercise of control test to the evidence, the Supreme Court found that the undisputed facts showed "that Munoz alone controlled plaintiffs' wages, hours

and working conditions." (*Martinez*, *supra*, 49 Cal.4th at p. 71.) Accordingly, the court held that the produce merchants were not liable, as a matter of law, as joint employers under the exercise of control test for the wages owed to Munoz's employees.

B. Suffer or Permit to Work

The Supreme Court explained that the "suffer or permit to work" test of employment rests "'upon principles wholly distinct from those relating to master and servant.'" (*Martinez, supra,* 49 Cal.4th at p. 69.) "[U]nder the 'suffer or permit' standard," the "basis of liability is the defendant's knowledge of and *failure to prevent* the work from occurring. [Citations.]" (*Id*. at p. 70.)

Historically, the phrase "to suffer or permit to work" comes from "the language of early 20th-century statutes prohibiting child labor. [Citation.] Statutes so phrased were generally understood to impose liability on the proprietor of a business who knew child labor was occurring in the enterprise but failed to prevent it, despite the absence of a common law employment relationship. As courts had explained, the language meant 'that [the proprietor] shall not *employ* by contract, nor shall he *permit* by acquiescence, nor *suffer* by a failure to hinder.' [Citation.] The language thus 'cast[] a duty upon the owner or proprietor to prevent the unlawful condition, and the liability rest[ed] upon principles wholly distinct from those relating to master and servant. *The basis of liability is the owner's failure to perform the duty of seeing to it that the prohibited condition does not exist.*' (*People v. Sheffield Farms-Slawson-Decker Co.* (N.Y.App.Div. 1917) 180 A.D. 615 [167 N.Y.S. 958, 961], italics added, affd. (1918) 225 N.Y. 25 [121 N.E. 474, 477] ['the omission to discover and prevent was a sufferance of the work'].)" (*Martinez, supra,* 49 Cal.4th at p. 69.)

The court explained that the "suffer or permit to work" standard prohibits proprietors from knowingly allowing persons to work for less than minimum wage, or failing to prevent such work while having the power to do so. As stated in *Martinez*: "We see no reason to refrain from giving the IWC's definition of 'employ' its historical meaning. That meaning was well established when the IWC first used the phrase 'suffer,

or permit' to define employment, and no reason exists to believe the IWC intended another. Furthermore, the historical meaning continues to be highly relevant today: A proprietor who knows that persons are working in his or her business without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, while having the power to do so." (49 Cal.4th at p. 69.) "[A]s we have explained, the basis of liability is the defendant's knowledge of and *failure to prevent* the work from occurring. [Citations.]" (*Id.* at p. 70.)

The produce workers in *Martinez* argued that the produce merchants were liable for their unpaid wages as joint employers because of their knowledge and failure to prevent the work from occurring. Based on the undisputed evidence, however, the Supreme Court found that the merchants did not suffer or permit plaintiffs to work because the merchants did not have "the power to prevent plaintiffs from working. Munoz and his foremen had the exclusive power to hire and fire his workers, to set their wages and hours, and to tell them when and where to report to work. Perhaps [the merchants], by ceasing to buy strawberries, might as a practical matter have forced Munoz to lay off workers or to divert their labor to other projects, such as harvesting berries for the other defendant, for Frozsun [fn. omitted], or for Ramirez Brothers. But any substantial purchaser of commodities might force similar choices on a supplier by withdrawing its business. Such a business relationship, standing alone, does not transform the purchaser into the employer of the supplier's workforce." (*Martinez, supra*, 49 Cal.4th at p. 70.) Accordingly, the court held that the produce merchants were not liable, as a matter of law, as joint employers under the suffer or permit to work test for the wages owed to Munoz's employees.

III. Barrueta Failed to Establish that Common Issues Predominate Concerning the Issue of Joint Employment

In this case, the trial court denied class certification because, given the diverse range of experiences of each ODO, individual testimony would be required from each ODO on the joint employment issue. The court stated that because individualized

"testimony from each officer as to his/her experience at each store (and maybe each shift at each store)" was required, a class action trial would be "unmanageable."

Barrueta argues on appeal that common issues predominate concerning Ralphs's exercise of control over wages, hours, or working conditions. We conclude, however, that the record supports the trial court's finding to the contrary.

In analyzing this contention, "'we must consider whether the record contains substantial evidence to support the trial court's predominance finding, as a certification ruling not supported by substantial evidence cannot stand.' (*Lockheed* [*Martin Corp. v. Superior Court* (2003)] 29 Cal.4th [1096,] 1106.) But, '[w]here a certification order turns on inferences to be drawn from the facts, "'the reviewing court has no authority to substitute its decision for that of the trial court.'"' (*Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1287; accord, *Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.)" (*Sav-On Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at p. 328.)

The appellate court may not reweigh the evidence, for even if "another trial judge considering the matter in the first instance would have allowed class treatment, . . . that does not merit reversal." (*Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1351.) Where the record presents facts on which reasonable minds may differ, there is no basis to find an abuse of discretion. (*People v. Moya* (1986) 184 Cal.App.3d 1307, 1313, fn. 2.)

A. Control Over Wages

Barrueta contends that because Ralphs controlled the wages paid by ISI, the trial court abused its discretion in concluding that common issues would not predominate over individual issues. The issue we must consider is whether the record contains substantial evidence to support the contrary finding of the trial court. If it does, there is no basis to find an abuse of discretion. (*People v. Moya*, *supra*, 184 Cal.App.3d at p. 1313, fn. 2.)

In an attempt to establish an abuse of discretion, Barrueta refers to evidence that "Ralphs Security Department began confirming that the ODOs were actually providing

the security for which ISI was charging Ralphs and for which Ralphs was paying." Based on this evidence, Barrueta concludes that "Ralphs paid for shifts or by the hour, and did not pay ISI as an aggregate contract," and "Ralphs paid the wages after assuring itself that the shifts were worked, but ran the paychecks through ISI."

The difficulty we perceive with the statement, "Ralphs paid for shifts or by the hour," is that it is based on speculation and therefore cannot amount to substantial evidence that common issues of fact will predominate in a class action trial. In order to establish a commonality of issues, the moving party must provide substantial evidence that common facts will predominate. Evidence that Ralphs was "confirming that the ODOs were actually providing the security for which ISI was charging and for which Ralphs was paying" does not amount to substantial evidence that common facts will predominate because Ralphs could have had any number of reasons to confirm that it was receiving the benefit of its bargain. The same holds true for the assertion that "Ralphs paid the wages . . . but ran the paychecks through ISI."

The most compelling support, in our view, for the trial court's determination that common issues of fact will not predominate is the lack of any evidence that Ralphs had the authority to negotiate and set the rate of pay. (See *Futrell v. Payday California*, *Inc.* (2010) 190 Cal.App.4th 1419, 1432 [control over wages exists where a person has power or authority to negotiate and set an employee's rate of pay].) This lack of evidence, coupled with the existence of evidence on which reasonable minds may differ, demonstrate there was no abuse of discretion as to this issue.

B. Control Over Hours

Barrueta contends that because Ralphs controlled the hours that the ODO's worked, the trial court abused its discretion in concluding that common issues do not predominate. In support of this assertion, he relies on the fact that "Ralphs informed ISI where and when it needed ODOs and it was up to ISI to arrange for ODOs to be present and available for work at the location where Ralphs determined it needed security." He

also relies on evidence that the ODO's were required to check in and out with Ralphs store directors.

In analyzing this contention, we note that Ralphs did not assign or monitor the hours worked by any individual ODO, but left it to ISI to assign the ODO's to specific locations and shifts in accordance with Ralphs's needs. This reasonably suggests that ISI, rather than Ralphs, controlled the ODO's hours.

Assuming there is some evidence from which we may infer that Ralphs controlled the ODO's hours, there is other evidence from which we may infer that ISI controlled the ODO's hours. Given that we may not reweigh the evidence and the record presents facts on which reasonable minds may differ, there is no basis to find an abuse of discretion. (*Ali v. U.S.A. Cab Ltd.*, *supra*, 176 Cal.App.4th at p. 1351; *People v. Moya*, *supra*, 184 Cal.App.3d at p. 1313, fn. 2.)

C. Control Over Working Conditions

Barrueta contends that because Ralphs controlled the ODO's working conditions, the trial court abused its discretion in concluding that common issues do not predominate. In support of this assertion, he states that "Ralphs had the Security Guards check in and out with store directors, telling some of the Security Guards where to specifically position themselves to observe the strikers, and had some of the Security Guards bag groceries and collect carts in the parking lot."

The trial court found, however, that "[t]he declarations are in conflict as to the degree of control that the Ralphs store directors exercised over the off-duty peace officers once they arrived for security duties at particular Ralphs stores." It stated, "To the extent that some off-duty peace officers performed non-security functions, the nature of those tasks and the time devoted to them would require individual testimony from the members of the putative class."

In light of the conflicting evidence on which reasonable minds may differ, we find no abuse of discretion as to this issue. (*Ali v. U.S.A. Cab Ltd.*, *supra*, 176 Cal.App.4th at p. 1351; *People v. Moya*, *supra*, 184 Cal.App.3d at p. 1313, fn. 2.)

D. Suffer or Permit to Work

As previously discussed, the "suffer or permit to work" definition of employment applies where a proprietor knowingly allows persons to work in his or her business for less than minimum wage or permits such "work by failing to prevent it, while having the power to do so." (*Martinez, supra*, 49 Cal.4th at p. 69.) "[T]he basis of liability is the defendant's knowledge of and *failure to prevent* the work from occurring. [Citations.]" (*Id.* at p. 70.)

Based on our review of the record, we conclude that the "suffer or permit to work" test of employment was not sufficiently developed to provide a ground for reversal on appeal. Although Barrueta mentioned the test below, he did so only in passing. He did not identify any specific evidence to show that common issues of fact would predominate under this test.

Although the record is far from clear, it is possible that Barrueta was advancing a theory of commonality based on the "suffer or permit to work" definition of employment when he argued that both ISI and Ralphs were responsible for complying with wage and hour laws. If that is true, we conclude that he offered no support for this theory of commonality other than his counsel's bare assertion that Ralphs was a joint employer. Counsel's unsupported assertion prompted the trial court to state, "Well, wait a minute, now. That's the assumption, that [Ralphs] employed them. [Ralphs] paid for the hours that they worked, or at least [Ralphs] paid I.S.I. to provide security personnel for particular stores for particular hours. But that doesn't mean [Ralphs] employed them. I mean, if you assume the conclusion, then, of course, you're right." The trial court's remark was followed by Barrueta's counsel's concession that he was assuming the conclusion: "Our position is [Ralphs] hired them, that they're their employee and they hired — and I'm, you know, assuming the conclusion again. But they — and for this motion . . . this can be determined on a class-wide basis because they gave them hours — they were paid on an hourly basis."

Barrueta argues on appeal that by hiring ISI's services, Ralphs became a joint employer under the "suffer or permit to work" definition of employment. He states: "There is no question that Ralphs suffered and/or permitted the Security Guards to work for it because Ralphs expressly sought the Security Guards to protect its personnel and property. Consequently, this issue can be answered on a class-wide basis and is not subject to individual determination."

Barrueta offers no legal support for his broad assertion that by hiring ISI's services, Ralphs became a joint employer and is therefore liable for ISI's statutory wage and hour violations. We have serious reservations as to whether the law imposes joint employer liability on the hirer of a security guard contractor in all circumstances.[5]

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[5] We note the complaint does not allege a claim for damages or other relief under section 2810, which took effect on January 1, 2004, while the strike was still in progress. Section 2810 allows the employees of a security guard contractor to sue the hiring party for knowingly contracting for labor or services without including in the contract sufficient funds to allow the contractor to comply with all applicable wage and hour laws. A possible unbriefed issue, which we need not address in order to resolve this appeal, is whether the Legislature by creating this remedy implicitly recognized that a person does not become a joint employer simply by entering into a contract for services with a security guard contractor.

Section 2810 states that "[a] person or entity may not enter into a contract or agreement for labor or services with a . . . security guard contractor, where the person or entity knows or should know that the contract or agreement does not include funds sufficient to allow the contractor to comply with all applicable local, state, and federal laws or regulations governing the labor or services to be provided." (§ 2810, subd. (a).)

Subdivision (b) of the statute creates a "rebuttable presumption affecting the burden of proof that there has been no violation of subdivision (a) where the contract or agreement" meets all of the requirements of subdivision (d). (§ 2810, subd. (b).)

Among subdivision (d)'s requirements are the following: (1) the contract must provide "[t]he total number of workers to be employed under the contract or agreement, the total amount of all wages to be paid, and the date or dates when those wages are to be paid" (§ 2810, subd. (d)(7)); and (2) the contract must provide "[t]he total number of persons who will be utilized under the contract or agreement as independent contractors, along with a list of the current local, state, and federal contractor license identification numbers that the independent contractors are required to have under local, state, or federal laws or regulations" (§ 2810, subd. (d)(9)).

(Fn. continued.)

In any event, the test under *Martinez* is not whether Ralphs contracted for security guard services from ISI, but whether it knowingly permitted or failed to prevent work in violation of statutory overtime wage laws when it had the ability to do so. In light of Barrueta's failure to provide any evidence on this point, he has failed to establish that the trial court abused its discretion in finding a lack of commonality.

E. To Engage in a Common Law Employment Relationship

The final test of employment is to engage, thereby creating a common law employment relationship. Barrueta contends that the "essence of the common law test of employment is in the 'control of details.' (*Futrell v. Payday California, Inc.*[, *supra*,] 190 Cal.App.4th [at p.] 1434.)" He argues on appeal that several factors of the common law test are susceptible to common proof, including: (1) whether Ralphs supplied the instrumentalities, tools, and place of work; (2) the length of time of services and method of payment; (3) whether the work is part of Ralphs's business; and (4) whether the ODO's were engaged in a distinct occupation or business.

Ralphs argues that Barrueta forfeited this issue on appeal by failing to raise it below. The record shows that Barrueta mentioned the common law test at the class certification hearing, but only in passing and with no explanation of its application on a classwide basis to a common set of facts. The record does not indicate that Barrueta made separate arguments of commonality under the primary test of employment based on control over wages, hours, and working conditions (*Martinez*, *supra*, 49 Cal.4th at p. 76),

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Subdivision (g) allows "[a]n employee aggrieved by a violation of subdivision (a) [to] file an action for damages to recover the greater of all of his or her actual damages or two hundred fifty dollars ($250) per employee per violation for an initial violation and one thousand dollars ($1,000) per employee for each subsequent violation, and, upon prevailing in an action brought pursuant to this section, may recover costs and reasonable attorney's fees. An action under this section may not be maintained unless it is pleaded and proved that an employee was injured as a result of a violation of a labor law or regulation in connection with the performance of the contract or agreement." (§ 2810, subd. (g)(1).)

and the common law test based on control of details (*Futrell v. Payday California, Inc.*, *supra*, 190 Cal.App.4th at p. 1434).

A trial court's "'"[d]iscretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power."' [Citations.]" (*Blue Cross of California, Inc. v. Superior Court* (2009) 180 Cal.App.4th 1237, 1258.) Given that the trial court was not asked to determine whether common issues would predominate under a common law theory of joint employment, we conclude that Barrueta is incapable of establishing an abuse of discretion.

IV. The Trial Court Did Not Apply an Erroneous Standard

Barrueta contends that the "trial court applied an incorrect standard concerning control" by referring to *Vernon v. State of California* (2004) 116 Cal.App.4th 114 (*Vernon*), which involved a suit for employment discrimination in violation of the Fair Employment and Housing Act. (Gov. Code, § 12900 et seq.) Referring to the order denying class certification, Barrueta states that "[t]he trial court noted with approval the holding in *Vernon* that '"[T]he control an organization asserts must be significant [citation], and there must be a 'sufficient indicia of an interrelationship . . . to justify the belief on the part of an aggrieved employee that the [alleged co-employer] is jointly responsible for the acts of the immediate employer.'"'"

We disagree that the trial court applied an erroneous standard. As we previously discussed, the trial court properly exercised its discretion in concluding that the evidence failed to establish a commonality of issues. The trial court's reference to *Vernon* does not undermine that finding. Regardless of *Vernon's* applicability to wage and hour cases, there was no abuse of discretion or legal error that would warrant a reversal of the denial of class certification. Regardless of *Vernon's* relevance or lack of relevance to wage and

hour cases, the trial court's factual finding of a lack of commonality of issues is supported by substantial evidence.

V. Superiority of Class Resolution

In evaluating whether a class action is superior to individual actions, the trial court considers the interest of each member in controlling his or her own case personally, the difficulties that are likely to be encountered in managing a class action, the nature and extent of any individual litigation already in progress, and the desirability of consolidating all claims in a single action. (*Basurco v. 21st Century Ins. Co.* (2003) 108 Cal.App.4th 110, 121.) In this case, the trial court concluded that a class action would not be superior to separate actions because individual testimony will be required to establish Ralphs's liability, if any, to each ODO as a joint employer. For all of the reasons previously discussed, we conclude that the trial court did not abuse its discretion in making this determination, which is supported by substantial evidence.

VI. Exclusion of Evidence

Ralphs objected to several types of statements that were commonly included in Barrueta's ODO declarations in support of the class certification motion: (1) the ODO believed he or she was working for Ralphs; (2) this belief was based on the directions given by Ralphs store managers; (3) Ralphs directed the ODO to report to his or her assignment, which was made by Ralphs; and (4) the ODO took directions from Ralphs employees. The trial court sustained Ralphs's objections to these types of statements on a number of grounds including lack of foundation, improper opinion, and lack of personal knowledge. Barrueta contends on appeal that the objections should not have been sustained on any of these grounds.

In considering this contention, we must bear in mind that the denial of class certification turned on the lack of common issues and not on the merits (or lack thereof) of the joint employer allegation. Even if we assume for the sake of argument that the disputed statements were admissible, Barrueta could not have been prejudiced by their

exclusion because the merits of his joint employer allegation were not being decided. The admission of the excluded statements would have added nothing to Barrueta's theory of commonality and subtracted nothing from the opposing party's evidence of a lack of commonality. "The erroneous exclusion of evidence is grounds for reversal if, in light of the entire record, it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. [Citation.]" (*Brown v. County of Los Angeles* (2012) 203 Cal.App.4th 1529, 1550.) We conclude that because Barrueta is incapable of establishing prejudice, the contention lacks merit.

DISPOSITION

The order denying class certification is affirmed. Ralphs is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.