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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

NORTH AMERICAN TITLE COMPANY,

Petitioner,

v.

THE SUPERIOR COURT OF FRESNO  
COUNTY,

Respondent;

CAROLYN CORTINA et al.,

Real Parties in Interest.

F065900

(Fresno Sup. Ct. No.  
07CECG01169)

**OPINION**

ORIGINAL PROCEEDING; petition for writ of mandate. Jeffrey Y. Hamilton, Judge.

Littler Mendelson, Richard H. Harding, Margaret Hart Edwards, Michael E. Brewer, Gregory G. Iskander, Philip A. Simpkins; Baker, Manock & Jensen and James A. Ardaiz, for Petitioner.

No appearance for Respondent.

Law Offices of Wagner & Jones, Nicholas J. P. Wagner, Andrew B. Jones,  
Daniel M. Kopfman and Lawrence M. Artenian, for Real Parties in Interest.

-ooOoo-

Petitioner North American Title Company, seeks a writ from this court ordering respondent, the Superior Court of Fresno County, to vacate its order denying petitioner's motion to decertify the class in the wage and hour action brought by real parties in interest (RPIs), Carolyn Cortina, Judith Bates, Tina Texeira, Janet Doran, Kimberly Baker, Laurel Johnstone, Mary Weidmark, Cheryl Fuller, Melodie Benton, Catherine Bell, Teresa Spencer and Martha Dominguez, on behalf of themselves and all other escrow officers similarly situated. RPIs allege that petitioner had a uniform policy and practice throughout the State of California that pressured employees to skip breaks and work off the clock without regular or overtime compensation.

Petitioner argues this matter should not proceed as a class action because RPIs' proposed trial plan is dependent on constitutionally flawed methods of proof. According to petitioner, without this proof, RPIs are left without any common evidence that can be used to prove the claims on a class-wide basis.

However, the question of whether a class should be certified is essentially procedural. The court does not ask whether an action is legally or factually meritorious. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1023 (*Brinker*).) Rather, the plaintiff's burden on moving for class certification is to present substantial evidence that common issues that may be jointly tried predominate. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1108 (*Lockheed*).) Certification is not conditioned upon a showing that class claims for relief are likely to prevail. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 443.)

Through this proceeding, petitioner is requesting this court to make advanced rulings on the admissibility of certain types of evidence that RPIs have proposed to present at trial. However, at this stage, the issue is whether RPIs have demonstrated that

common issues predominate, not whether RPIs can prove their claims. A writ proceeding is not an appropriate vehicle for resolving the admissibility of evidence. Accordingly, the petition will be denied.

### **BACKGROUND**

Cortina filed the class action complaint in April 2007 alleging that petitioner violated the Labor Code and engaged in unfair business practices when it failed to provide meal and rest breaks and overtime pay to escrow officers it employed in the State of California. The complaint was amended twice, adding first four and then another seven representational plaintiffs.

RPIs moved for, and obtained, class certification. Respondent certified two classes, an exempt class and a non-exempt class. There are approximately 700 class members.

In October 2011, respondent ordered RPIs to submit a trial plan. RPIs' plan, filed in November 2011, proposed a single trial on liability and damages with two phases. The first phase would try the non-exempt class members' off the clock claims. The issues to be resolved in this phase are whether: non-exempt class members worked overtime off the clock hours; whether petitioner knew, or had reason to know the non-exempt class worked off the clock hours; and the number of hours worked off the clock. The second phase would resolve whether members of the exempt class were properly classified as exempt employees. RPIs proposed to prove their case with: testimony of class members who had already submitted declarations in the case; testimony from petitioner's representatives, supervisors and employees, called as adverse witnesses; random sampling evidence; and "expert witness testimony for the purpose of establishing both liability and damages."

Petitioner objected to RPIs' plan to introduce testimony from both selected and random class members along with expert statistical testimony as being a "trial by

formula” approach, a method that was rejected by the United States Supreme Court in *Wal-Mart Stores, Inc. v. Dukes* (2011) \_\_ U.S. \_\_ [131 S.Ct. 2541].

At the hearing on RPIs’ trial plan, respondent stated that, “in light of not having any other feasible alternative at this point,” it was inclined to allow statistical sampling, “subject to defense experts and proper objections,” but limit anecdotal testimony. Respondent further noted that the sampling issue was at “an infant stage” and that RPIs needed to begin formulating their statistical plan and experts, including methodology and proposed sampling size.

In response, RPIs refined their sampling plan. They explained that they had retained two experts, Dr. Richard Drogin and Dr. Mike O’Neil. RPIs stated that Dr. Drogin proposed a sampling plan from randomly selected class members on issues of liability and damages and that these randomly selected class members would testify at trial. Dr. O’Neil proposed a telephone survey of class members based on a recommended set of questions and then Dr. O’Neil would testify at trial about the survey results. Petitioner again objected to RPIs’ proposed plan arguing that it would violate petitioner’s due process rights.

Thereafter, petitioner filed the underlying motion to decertify the class. Petitioner argued that there were a number of changed circumstances that required decertification. According to petitioner, new case law, new discovery and expert analysis showing that no class-wide illegal practice existed, and the RPIs’ failure to establish that the case could be manageably tried as a class action mandated decertification.

In opposing petitioner’s decertification motion, RPIs modified their trial plan proposal. RPIs set forth this proposal in a declaration from Oliver W. Wanger. In their answer to the subject petition, RPIs have summarized this trial plan as follows:

“Plaintiffs will offer multifaceted evidence of Petitioner’s *de facto* policy of pressuring employees to work uncompensated overtime and to skip breaks to complete huge and relentless workloads. Expert testimony will show that company-produced computer log-in data for about 25

percent of class members demonstrates a median use of the company's computer network for more than eight hours per day. [Citation.] Non-random survey evidence that targeted the entire class will show an extensive practice of recording far less time than employees actually worked. [Citation.] Roughly 15 percent of the class will testify as to first-hand knowledge of [petitioner's] employment practices. An employment/labor practices expert will testify, evaluating time records, management practices and other data. A labor economist will testify, interpreting various data, including computer log-in, payroll records and survey evidence. Present and former managers, [persons most knowledgeable], and policy-makers will testify ....”

Respondent denied petitioner's decertification motion finding that the trial plan set forth by Wanger was “the mirror of what is required under case law to provide due process to [petitioner] as well as to provide adequate proof to win the case for the class.” The court noted that Wanger's declaration described a “mix of representative testimony and expert testimony, the [latter] to involve sampling and survey evidence. [Wanger's] plan is exactly what the law calls for.”

## **DISCUSSION**

Petitioner argues respondent abused its discretion in denying the decertification motion. According to petitioner, the ruling was based on erroneous conclusions of law and is not supported by substantial evidence.

### **1. *Class certification requirements.***

Class certification requires both an ascertainable class and a well-defined community of interest among class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On Drug*.) To satisfy the “community of interest” requirement, there must be “(1) predominant common question 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.” (*Ibid.*)

However, a class action certification motion is not a trial on the merits, nor does it function as a summary judgment motion. (*Carabini v. Superior Court* (1994) 26 Cal.App.4th 239, 245.) Rather, class certification is essentially a procedural question that

does not ask whether an action is legally or factually meritorious. (*Brinker, supra*, 53 Cal.4th at p. 1023.) Thus, the trial court does not engage in a free-floating inquiry into the validity of the plaintiffs' claims. For purposes of the certification motion, the trial court assumes the claims have merit. (*Ibid.*)

To answer whether a class should be certified, the court determines if the plaintiffs' theory of recovery is, as an analytical matter, likely to prove amenable to class treatment. (*Brinker, supra*, 53 Cal.4th at p. 1021.) The court must examine the allegations of the complaint and supporting declarations and consider the legal and factual issues they present to resolve this ultimate question, i.e., are the issues that may be jointly tried, when compared to those requiring separate adjudication, so numerous or substantial that a single class proceeding would be advantageous to the judicial process and to the litigants. (*Id.* at pp. 1021-1022; *Lockheed, supra*, 29 Cal.4th at pp. 1104-1105.) “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.” (*Brinker, supra*, 53 Cal.4th at p. 1022.)

## **2. *Standard of review.***

The appellate court's review of a class certification order is narrowly circumscribed. (*Brinker, supra*, 53 Cal.4th at p. 1022.) The decision to certify a class rests squarely within the trial court's discretion and that decision is afforded great deference on appeal. Trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action. Accordingly, a certification order will be reversed only for a manifest abuse of discretion, i.e., the order (1) is unsupported by substantial evidence; (2) rests on improper criteria; or (3) rests on erroneous legal assumptions. (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089; *Brinker, supra*, 53 Cal.4th at p. 1022.)

Whether common issues predominate is a factual question. (*Sav-On Drug, supra*, 34 Cal.4th at p. 328.) Therefore, the trial court's predominance finding is reviewed for

substantial evidence. The appellate court has no authority to substitute its decision for that of the trial court and must presume the existence of every fact in favor of the decision that the trial court could reasonably deduce from the record. (*Id.* at pp. 328-329.)

**3. *The trial court did not abuse its discretion in denying petitioner’s decertification motion.***

When respondent originally certified the class, its concern was whether the RPIs had raised a justiciable question applicable to all class members. (*Williams v. Superior Court* (2013) 221 Cal.App.4th 1353, 1365 (*Williams*)). As noted above, certification is procedural with the focus being on whether common issues of law or fact are likely to predominate. (*Sav-On Drug, supra*, 34 Cal.4th at p. 326.) Neither the trial court nor the appellate court decides the merits of the plaintiffs’ case. Accordingly, to uphold a certification order, the appellate court need not conclude that the plaintiffs’ evidence is compelling. (*Id.* at p. 331.)

Here, the question was whether petitioner had a *de facto* uniform policy of pressuring escrow officers to work uncompensated overtime and to skip breaks. The answer to that question applies to the entire class of escrow officers. (Cf. *Williams, supra*, 221 Cal.App.4th at p. 1365.) When the plaintiffs claim that the employer has a uniform policy that allegedly violates the law, their theory is, by its nature, a common question eminently suited for class treatment. (*Brinker, supra*, 53 Cal.4th at p. 1033.)

In seeking certification, the plaintiffs’ burden is to place substantial evidence in the record that common issues predominate. (*Lockheed, supra*, 29 Cal.4th at p. 1108.) Here, respondent concluded that RPIs met that burden. Respondent found that the RPIs had alleged, and produced evidence of, “a pattern of practice that was inconsistent with [petitioner’s] written manual, and of a widespread understanding by employees that despite manual provisions to the contrary, overtime could not generally be justified even if actually worked and would not be paid if not pre-approved.” Respondent further noted

that some employees had testified “that they understood that they would lose customers (and thus potentially their jobs) if they didn’t stay and get the work done, or work through lunch answering phones or meeting with customers despite their knowledge that they were entitled to a ‘duty-free meal’ and overtime pay for hours worked over 8 in a day.” RPIs “also offered evidence that [petitioner’s] management and supervisory personnel were aware that the time sheets that were certified by employees didn’t include missed meals and overtime hours actually worked.” The record supports respondent’s finding.

Approximately two years after certification, petitioner moved to decertify the class. Petitioner argued that RPIs could not prove their allegations class wide in a manner that afforded petitioner due process. According to petitioner, continuing the action as a class action and forcing petitioner to either undertake 700 mini-trials or defend against improper survey and sampling evidence as proposed by RPIs, would be a miscarriage of justice.

A class will not be decertified in the absence of new law or newly discovered evidence showing changed circumstances. (*Williams, supra*, 221 Cal.App.4th at p. 1361.) “A motion for decertification is not an opportunity for a disgruntled class defendant to seek a do-over of its previously unsuccessful opposition to certification.” (*Id.* at p. 1360.) “[A] class should be decertified ‘only where it is clear there exist changed circumstances making continued class action treatment improper.’” (*Green v. Obledo* (1981) 29 Cal.3d 126, 148.)

Petitioner contends that, in approving RPIs’ trial plan, respondent relied on two improper methods of proof by which RPIs could present evidence of class-wide liability, i.e., hearsay survey responses and anecdotal testimony given by a fraction of the class. Petitioner argues that, without these flawed methods of proof, RPIs are left without any common evidence to prove the claims on a class-wide basis and therefore respondent abused its discretion in refusing to decertify the classes.

However, neither respondent nor this court is deciding the merits of RPIs' case. (*Sav-On Drug, supra*, 34 Cal.4th at p. 331.) Rather, the court assumes RPIs' claims have merit. "Presented with a class certification motion, a trial court must examine the plaintiff's theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate." (*Brinker, supra*, 53 Cal.4th at p. 1025.) With this in mind, we will examine petitioner's specific claims.

***a. Survey evidence.***

Petitioner argues that respondent abused its discretion in ruling that RPIs could present survey evidence. According to petitioner, the survey evidence proposed by RPIs will consist of nothing more than inadmissible hearsay. RPIs' plan, as described by petitioner, is to "hire a 'survey expert' to conduct an *anonymous* telephone survey of every class member 'to determine the actual work practices of escrow agents working for [Petitioner] during the class period' and then 'testify at trial about the *results* of the survey.'" Petitioner contends that to permit the use of such evidence would violate its right to due process.

Survey evidence in general is permissible in a class action lawsuit. Petitioner does not argue otherwise. As noted by the court in *Sav-On Drug*, "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." (*Sav-On Drug, supra*, 34 Cal.4th at p. 333, fn. omitted.)

Regarding this particular survey evidence, any ruling would be speculative. At this point, it is unknown what evidence RPIs will in fact proffer. The survey and analysis have not been completed. At trial, respondent will be in a position to make the required evidentiary rulings.

Further, in addition to the actual evidence not being available to review, petitioner is asking this court to make a pretrial ruling on its admissibility. Ordinarily, a writ will not lie to resolve an issue as to the admissibility of evidence. (*Laurie S. v. Superior Court* (1994) 26 Cal.App.4th 195, 203.)

More importantly, the issue here is whether the class should be certified. Thus, the question is not whether RPIs can prove their claims but, rather, whether common issues predominate. As noted above, when, as here, the RPIs claim that the employer has a uniform policy that allegedly violates the law, their theory is, by its nature, a common question eminently suited for class treatment. (*Brinker, supra*, 53 Cal.4th at p. 1033.)

***b. Anecdotal testimony.***

Petitioner objects to RPIs' plan to use anecdotal testimony to prove petitioner's alleged pattern and practice of pressuring employees to work uncompensated overtime and to skip breaks and meal periods. According to petitioner, this permits RPIs to hand select a fraction of the class members to testify regarding their individual experiences. Thus, petitioner argues, this evidence would be neither representative nor indicative of actual class-wide policies or practices.

In finding that such anecdotal testimony could be used, respondent noted that neither side was likely to randomly pick employees and put them on the stand without knowing what those employees will say. Rather, "[RPIs] will have their representative witnesses – those representing [RPIs'] theory. And [petitioners] will have theirs." Petitioner asserts respondent abused its discretion in so ruling because respondent relied on distinguishable federal precedent and such evidence is prohibited by the *Brinker* decision.

First, *Brinker* does not prohibit the use of anecdotal testimony in a class action. *Brinker* was concerned with whether the plaintiffs had presented substantial evidence that common questions predominated with respect to one of the proposed subclasses, those class members who worked "off-the-clock." (*Brinker, supra*, 53 Cal.4th at p. 1051.) The

court concluded that neither a common policy nor a common method of proof was apparent. There was no substantial evidence of a systematic company policy to pressure or require employees to work off the clock. (*Ibid.*) Under these circumstances, the court held that the certification of this subclass had been properly vacated. The court noted that, “in the absence of evidence of a uniform policy or practice ... anecdotal evidence of a handful of individual instances in which employees worked off-the-clock” would require proof of off-the-clock liability to proceed “in an employee-by-employee fashion.” (*Id.* at p. 1052.) Such a procedure is inconsistent with a class action.

In contrast here, RPIs presented more than a “*handful* of individual instances” of working off the clock. Rather, RPIs filed numerous declarations from individuals who were employed by petitioner stating that they consistently worked off the clock hours and skipped meal periods and breaks.

Additionally, RPIs have outlined other types of evidence supporting their claim that common issues predominate, i.e., that petitioner had a uniform policy of pressuring escrow officers to work uncompensated overtime and to skip breaks. RPIs propose to present expert testimony showing that petitioner’s computer log-in data for about 25 percent of class members demonstrates a median use of petitioner’s computer network for more than eight hours per day. Further, RPIs will offer survey evidence, expert analysis of time records and other data, and testimony from certain of petitioner’s present and former managers and policymakers.

Again, the only issue at this stage is whether RPIs presented substantial evidence that common issues predominate. “We need not conclude that plaintiffs’ evidence is compelling, or even that the trial court would have abused its discretion if it had credited defendant’s evidence instead.” (*Sav-On Drug, supra*, 34 Cal.4th at p. 331.) Rather, for purposes of certification, we assume RPIs’ claims have merit. (*Brinker, supra*, 53 Cal.4th at p. 1023.)

Petitioner's argument that respondent misconstrued federal precedent concerning the use of anecdotal evidence as proof of an employer's "pattern and practice" is also unavailing. As discussed above, this writ proceeding is not an appropriate vehicle to resolve the admissibility of such evidence. Moreover, whether RPIs will ultimately be able to prove their wage and hour violation claims is irrelevant to class certification.

***c. Other claims.***

Petitioner makes several additional claims regarding respondent's allegedly erroneous reliance on certain evidence and case law.

Petitioner argues that respondent improperly relied on the declaration of Steve Gilliland as evidence of a common policy of requiring and/or refusing to pay for off the clock overtime. Gilliland stated that during the years 2003 to May 2005, he was employed by petitioner as the regional manager for Northern California and was the highest ranking employee in that area. According to Gilliland, he received a directive to "begin a crackdown on paying overtime compensation" to escrow officers and that he passed this directive to all of his county managers in Northern California. Thereafter, very little overtime pay was approved and, because of all the business that petitioner had at the time, many of the escrow officers had to continue working uncompensated overtime hours in order to get their workload completed.

Petitioner contends the Gilliland declaration cannot reasonably be considered to provide evidence of a class-wide policy because it is limited to Northern California during only two and one-half years of a 10-year class period. However, this declaration provides some evidence of a class-wide policy. To support certification, the plaintiffs' evidence need not be compelling. (*Sav-On Drug, supra*, 34 Cal.4th at p. 331.)

Petitioner further argues the Gilliland declaration contains inadmissible hearsay. As noted above, the admissibility of evidence is not an appropriate issue in a writ proceeding.

Petitioner also asserts that, in denying the decertification motion, respondent misconstrued case law and, consequently, relied on improper evidence. These claims merely restate petitioner's earlier evidence objections. As discussed above, these objections are not justiciable in this writ proceeding.

**DISPOSITION**

The writ petition is denied.

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LEVY, J.

WE CONCUR:

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HILL, P.J.

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CORNELL, J.