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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BRAULIO JUAREZ et al.,

Plaintiffs and Appellants, **A128164**

v. **(Contra Costa County Super. Ct. No. CIVMSC0602246)**

KMART CORPORATION,

Defendant and Respondent.

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Appellant Braulio Juarez and six other plaintiffs filed a class action complaint against the Kmart corporation and 17 companies that provided janitorial services at Kmart stores in California alleging they had not been paid overtime or provided with required meal or rest breaks. The trial court declined to certify the class, ruling it was not ascertainable, that common issues did not predominate, and that class treatment was not superior to individual lawsuits. Appellants now appeal contending the trial court erred when it declined to certify the class. We conclude the trial court did not abuse its discretion and will affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Kmart is a national retailer with approximately 140 stores located in California. Kmart's primary focus is retail sales and it contracts with service providers to perform tasks that are ancillary to that focus such as store landscaping and cleaning. Kmart's store cleaning procedures are at issue here.

From 2002 to 2005, Kmart's California stores were cleaned pursuant to contracts that were executed with 10 to 15 separate janitorial service providers. Some of those contracts were entered into at the store level with a single store manager contracting with a single janitorial service provider. Other contracts covered multiple stores and were negotiated by a Kmart district manager. Exemplar contracts that are in the record describe the janitorial service provider as an "independent contractor" who has "control over its employees" and is solely responsible the "payment of any wages[.]"

In 2005 Kmart, hoping to take advantage of its size in order to negotiate a better deal, moved from locally negotiated contracts to a national contract program. After a bidding process, Kmart awarded the contract to clean all of its California stores to Kellermeyer Building Services, a national janitorial service.

Up until that point, Kmart had preferred that its stores be cleaned overnight to avoid disrupting its paying customers. However, in 2007 and 2008, Kmart renegotiated most of its janitorial service contracts to provide that contractors must clean the stores in the early morning just before they open for business. The goal was to save the energy costs associated with lighting and heating a building overnight while a store was being cleaned.

In May 2006, a class action complaint was filed challenging Kmart's janitorial service arrangements. As amended, the complaint named 7 representative plaintiffs[1] and 18 defendants[2] and alleged that "KMART . . . and the individuals and/or entities with whom it purportedly contracted for janitorial and/or maintenance services . . . systematically violated wage and hours laws . . . ." Specifically, the complaint alleged

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[1] The named plaintiffs were Braulio Juarez, Pablo Lopez, Juan Cabrera, Gerardo Rojas, Trauvelio Ramos, Ricardo Ramirez, and Eva Martinez.

[2] The named defendants were Kmart, GC Maintenance, Kellermeyer Building Service, LLC, KBS Dissolution Company, LLC, E.C. Janitorial, Inc., Five Star Maintenance Corporation, ZA Services, Inc., Top Quality One, Precision Cleaning Services, Inc., Perfection Cleaning Industrial, Peerless Building Maintenance Company, Palomino Janitorial Services, Inc., Horizon National Contract Services, LLC, High Tek Systems, Inc., Crystal Clear Building Maintenance, O.D.P. Services, Inc., Bergensons Property Services, Inc., and S&S Building Services, Inc.

that "KMART and its janitorial and/or maintenance contractors have required their housekeepers and janitors to work in excess of eight . . . hours per week [sic] without overtime compensation", "work in excess of 5 hours in a workday and sometimes in excess of 10 hours in a workday without being provided the requisite meal periods as mandated by law", and that "janitors employed by KMART and its janitorial and/or maintenance contractors are not provided with the opportunity to take rest breaks as mandated by law." Based on those allegations, the complaint contained five causes of action: (1) failure to pay overtime compensation (Lab. Code, §§ 510, 1194, 1198), (2) failure to provide meal and rest periods (Lab. Code, §§ 226.7, 512), (3) failure to provide itemized wage statements (Lab. Code, § 226), (4) unlawful business practices (Bus. & Prof. Code, § 17200 et seq.), and (5) violation of Labor Code section 2699 et seq. The complaint sought to hold Kmart responsible for the acts of its janitorial service contractors, alleging that "KMART and its janitorial and/or maintenance contractors acted as employers or joint employers of the janitorial services personnel . . . . KMART exercised meaningful control over the work performed by the PLAINTIFFS and the other members of the CLASS."

After what appears to have been extensive discovery, in October 2009, appellants filed a motion for class certification against Kmart and three of its janitorial service providers, Kellermeyer Building Services (KBS), S&S Building Services, Inc. (S&S), and Horizon National Contract Services, LLC (Horizon).[3]

As to Kmart individually, appellants asked the court to certify five subclasses defined as follows:

"Subclass I: (Overtime)

[3] According to appellants, the other named defendants had either defaulted or had been dismissed. Appellants inform us in their opening brief on appeal that Horizon also settled subsequently. The record does not contain any evidence about the terms of any of those dismissals or settlements.

"All persons who performed janitorial work at any Kmart location in California from May 5, 2002 to the present, and who worked more than 8 hours in any workday and/or 40 hours in any workweek.

"Subclass II: (Meal Breaks)

"All persons who performed janitorial work at any Kmart location in California from May 5, 2002 to the present, and who worked more than five hours in any workday and who did not receive at least one meal period lasting at least 30 minutes.

"Subclass III: (Rest Breaks)

"All persons who performed janitorial work at any Kmart location in California from May 5, 2002 to the present, and who worked more than 3 [and] 1/2 hours in any workday and who did not receive at least one rest period lasting at least 10 minutes.

"Subclass IV: (Itemized Wage Statements) All persons who performed janitorial work at any Kmart location in California from May 5, 2002 to the present, and who did not receive an itemized statement indicating the hourly rate, the number of hours worked, the resulting gross and net wages earned, and the resulting deductions made.

"Subclass V: (Seven or More Consecutive Days of Work)

"All person who performed janitorial work at any Kmart location in California from May 5, 2002 to the present, and who . . . worked seven or more consecutive days without a day of rest."

As to Kmart/KBS, the motion asked the court to certify four subclasses:

"Subclass I: (Overtime)

"All persons who performed janitorial work at any Kmart location in California serviced by Kellermeyer Building Services, Inc. from May 5, 2002 to the present, and who worked more than 8 hours in any workday and/or 40 hours in any workweek.

"Subclass II: (Meal Breaks)

"All persons who performed janitorial work at any Kmart location in California serviced by Kellermeyer Building Services, Inc. from May 5, 2002 to the present, and who worked more than five hours in any workday and who did not receive at least one meal period lasting at least 30 minutes.

"Subclass III: (Rest Breaks)

"All persons who performed janitorial work at any Kmart location in California serviced by Kellermeyer Building Services, Inc. from May 5, 2002 to the present, and who worked more than 3 [and] 1/2 hours in any workday and who did not receive at least one rest period lasting at least 10 minutes.

"Subclass IV: (Seven or More Consecutive Days of Work)

"All persons who performed janitorial work at any Kmart location in California serviced by Kellermeyer Building Services, Inc., from May 5, 2002 to the present, and who worked seven or more consecutive days without a day of rest."

As to Kmart/S&S the motion asked the court to certify four subclasses:

"Subclass I: (Overtime)

"All persons who performed janitorial work at any Kmart location in California serviced by S&S Building Services, Inc. from May 5, 2002 to the present, and who worked more than 8 hours in any workday and/or 40 hours in any workweek.

"Subclass II: (Meal Breaks)

"All persons who performed janitorial work at any Kmart location in California serviced by S&S Building Services, Inc. from May 5, 2002 to the present, and who worked more than five hours in any workday and who did not receive at least one meal period lasting at least 30 minutes.

"Subclass III: (Rest Breaks)

"All persons who performed janitorial work at any Kmart location in California serviced by S&S Building Services, Inc. from May 5, 2002 to the present, and who worked more than 3 [and] 1/2 hours in any workday and who did not receive at least one rest period lasting at least 10 minutes.

"Subclass IV: (Seven or More Consecutive Days of Work)

"All persons who performed janitorial work at any Kmart location in California serviced by S&S Building Services, Inc., from May 5, 2002 to the present, and who worked seven or more consecutive days without a day of rest."

The motion to certify was supported by declarations from the named plaintiffs and one putative class member all of whom worked at Kmart stores in California for one or more of the named defendants. Some of those declarations stated that the employee in question "frequently" missed meal and rest breaks. Others stated they "[did] not recall" taking a meal or rest break. In addition, one of the named plaintiffs stated he "[did] not recall being paid overtime." The motion characterized the working conditions of those who cleaned Kmart's stores as onerous: "As the manager of the store began to close the store, the janitor arrived. The manager pointed out any specific areas to be cleaned, made sure that the store had enough cleaning products . . . for the janitor to use, and then left. As the manager left, he or she locked the janitor in the store, and the cleaning commenced. Eight or more hours later, a manager returned to the store, unlocked the door, checked the janitor[']s work, and then the janitor was finally able to leave."

Kmart, KBS, and S&S all opposed the motion to certify.[4] Kmart strongly disputed that it exercised any control over the janitors who cleaned its stores presenting evidence that it did not hire any of those persons, did not pay their wages, did not train them, and did not determine the staffing requirements for any of its stores. Kmart also noted specifically that it did not maintain employment records for any of the janitors who worked at its stores and that it had no way of identifying the janitors who had been hired by its various contractors or subcontractors.

KBS for its part, presented evidence that it was the policy of the company to comply with all overtime, meal break, and rest period laws. KBS also presented declarations from 23 janitors who had worked at Kmart stores. All of them stated they did not typically work overtime, but when they did, they were compensated at an overtime rate, that they "usually/always" took a 30 minute meal break whenever they worked more than five hours, and that they knew they were supposed to take a morning and afternoon break and that they were never told they should not do so.

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[4] Kmart and KBS filed formal briefs opposing the motion to certify. S&S joined in the arguments that Kmart had advanced.

The trial court considering this evidence rejected the motion to certify, ruling the classes that had been identified were not ascertainable, that common issues did not predominate, and that class treatment was not superior to individual lawsuits.

II. DISCUSSION

A. General Principles

Appellants contend the trial court erred when it denied their motion to certify the class.

"Under Code of Civil Procedure section 382, a class action is permitted 'when the question 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 . . . .' Class certification requires both an ascertainable class and a well-defined community of interest among class members. [Citations.]" (*Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 575.)

"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." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) In the absence of other error, a trial court ruling supported by substantial evidence generally will not be disturbed unless (1) improper criteria were used, or (2) erroneous legal assumptions were made. (*Id.* at pp. 435-436.) Under this standard, an order based upon improper criteria or incorrect assumptions must be reversed even though there may be substantial evidence to support the court's order. (*Id.* at p. 436.) Accordingly, we must examine the trial court's reasons for denying class certification. "'Any valid pertinent reason stated will be sufficient to uphold the order.'" (*Ibid.*, quoting *Caro Proctor & Gamble Co.* (1993) 18 Cal.App.4th 644, 656.)

"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court. [Citations.]" (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)

With these principles in mind, we turn to the specific arguments advanced.

B. Whether the Class Members were Ascertainable

Appellants contend the trial court erred when it ruled they had failed to demonstrate that the class was ascertainable.

Whether a class is ascertainable is determined by examining three factors: (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members. (*Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 849.) The party seeking certification has the burden to show that the class is ascertainable. (*Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-on*).)

We turn first to whether appellants carried their burden to show there was an ascertainable class with respect to the allegations they made against Kmart in its individual capacity. As we have noted, appellants asked the court to certify five subclasses against Kmart based on its alleged violations concerning overtime, meal breaks, rest breaks, itemized wage statements, and working seven or more consecutive days. In each instance, appellants defined the class as consisting of "[a]ll persons who performed janitorial work at any Kmart location in California from May 5, 2002 to the present . . . ."

We will assume for purposes of this appeal that appellants defined the class adequately and that they presented sufficient evidence to demonstrate the size of the class. However, appellants simply did not demonstrate that there were means available to identify the class. The only evidence appellants cite to support the conclusion that they carried their burden is part of a *question* that was posed during the deposition of Charlie Overmire, the Kmart employee who was the most knowledgeable about its janitorial contracting from 2002 until 2005. During that deposition, appellants' counsel asked the following:

"Q. . . . [¶] I want to show you what was previously marked as Exhibit 3 to the prior deposition. This is an attendance sheet that apparently the janitors used when they signed in, when they signed out of the store. And it's signed – it shows each day, when

they came in, when they left, that they worked, how many hours that they worked, and there's a manager[']s] signature on it.

"It says in Spanish here that the KMART manager was supposed to sign this document.

"Did you have the person who was responsible for opening the stores where you – when you were managing . . . ."

Counsel's truncated, incomplete *question* about attendance sheets, without any answer from Overmire the deponent, does not demonstrate that many years later, Kmart or anyone else has the ability to identify all the janitors who worked at all of its stores in California from 2002 to the present. Furthermore, as the trial court noted, appellants' argument on this point ignores evidence in the record that the attendance sheets in question were only kept on a short-term basis. We conclude appellants failed to demonstrate that the class was ascertainable.

Appellants contend the trial court "tacitly acknowledged" that plaintiffs could identify the members of the class against Kmart generally. They rely on a comment the court made that "[p]laintiffs may be correct in asserting that they can ascertain the identities of janitors who worked at Kmart stores during the class period by obtaining the employment records of the subcontractors who provided those janitors." However, the court's comment was nothing more than a statement about evidence that *might* exist. Appellants defined their class broadly to include all those persons who worked as janitors in California from 2002 to the present, and the evidence in the record indicates that 15 or more different companies provided janitorial services to Kmart during that period.[5] At the certification hearing, appellants focused on only three of those service providers: KBS, S&S, and Horizon. They virtually ignored the rest. Absent evidence that those *other* janitorial service providers ever collected or still had records that would allow the court to ascertain the identities of the persons who worked in Kmart stores during the

[5] Indeed, the operative complaint names 17 different companies as having provided services to Kmart.

class period, the court reasonably could conclude that appellants had failed to carry their burden of proving that the class against Kmart was ascertainable. (*Sav-on, supra*, 34 Cal.4th at p. 326.)

Appellants contend the certification ruling must be reversed because the court in effect, "required [them] to prove, at the class certification stage, that all members of each proposed subclass were actually entitled to that specific category of damages . . . ." Appellants argue that "[t]hrough this merits-focused analysis, the trial court employed incorrect criteria and made erroneous legal assumptions, which mandates reversal."

Appellants are correct that in *Linder v. Thrifty Oil Co., supra*, 23 Cal.4th at pages 439-443, our Supreme Court ruled that certification of a proposed class cannot be denied based on the trial court's preliminary assessment of the merits of the claims. But in *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, the court clarified that in *Linder* "we said only that a plaintiff need not establish a likelihood of success on the merits in order to obtain class certification. It does not follow that, in determining whether the criteria of Code of Civil Procedure section 382 are met, a trial or appellate court is precluded from considering how various claims and defenses relate and may affect the course of the litigation, considerations that may overlap the case's merits." (*Id.* at pp. 1091-1092.)

Here, the trial court did discuss some aspects of the subclasses that appellants had proposed.[6] However, it did so primarily to illustrate its conclusion that appellants had

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[6] The court explained its ruling on this point as follows:

"Whether a class is 'ascertainable' within the meaning of CCP § 382 is determined by examining (a) the class definition, (b) the size of the class, and (c) the means available for identifying the class members. [Citation.]

"In arguing that each member of each subclass can be readily identified, Plaintiffs cite testimony concerning sign-in, sign-out logs kept at Kmart stores. However, that testimony also appears to indicate these logs are only kept on a short term basis. [Citation.] Plaintiffs may be correct in asserting that they can ascertain the identities of janitors who worked at Kmart stores during the class period by obtaining the employment records of the subcontractors who provided those janitors. In addition, at least Defendant S&S has provided a class list.

"[failed] to show the means available for identifying members of the various subclasses." Thus, for example, the court noted appellants' theory was that "all" janitors had been forced to work overtime without payment, a premise that was not supported by the record. By highlighting this evidentiary gap, the court did not conduct an improper "merits focused analysis." Rather, the court simply noted that appellants had failed to demonstrate how members of the proposed overtime worker subclass could be determined.

Similarly, with respect to the meal-break subclass, the court noted that appellants claim was premised on the assumption that all the janitors had been unable to take meal breaks, a premise that was not supported by the evidence. The court did not, by pointing out this evidentiary gap, conduct an improper merits based analysis. It simply illustrated the fact that appellants had not provided any meaningful way to identify the members of the subclass they had proposed.

To the extent the court did discuss the merits of the claims appellants had made, it did nothing more than consider "how various claims and defenses relate and may affect the course of the litigation" something it was allowed to do. (See *Fireside Bank v. Superior Court, supra*, 40 Cal.4th at p. 1092.)

We conclude the trial court did not abuse its discretion when it ruled appellants had failed to show that their claims against Kmart in an individual capacity could be

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"However, Plaintiffs fail to show the means available for identifying members of the various subclasses. Plaintiffs' apparent theory is that 'all' janitors worked overtime and were paid on a weekly basis without overtime compensation, but this is not established by the cited evidence.

"Likewise, Plaintiffs contend that all janitors were unable to take meal breaks because they were locked inside the stores. Initially, however, case law cited by Plaintiffs fails to establish that inability to leave the premises constitutes a violation of Labor Code provisions relating to meal breaks. [Citation.] In addition, Plaintiffs ignore evidence indicating that the janitors were not required to clock out and back in for meal periods for the reason state law requires that they be paid due to the fact they could not leave the premises, and Plaintiffs otherwise fail to show that all janitors did not or were unable to take meal breaks while they were locked inside the stores."

addressed through an ascertainable class. Since the class was not ascertainable, the court correctly denied appellants' motion to certify those claims.

The claims appellants made against KBS and S&S, both individually and in their capacity as alleged joint employers with Kmart, require a different analysis. The record before the trial court showed that KBS and S&S both possessed and had produced to appellants a list of their employees who worked in various Kmart stores during the period in question. Thus, we will assume for purposes of this appeal, that the class members with respect to those claims were ascertainable. Therefore, we turn to the other reasons that were cited by the court when denying certification.

C. Whether Common Issues Predominate

As we have stated, class certification requires both an ascertainable class and a well-defined community of interest among class members. (*Gattuso v. Harte-Hanks Shoppers, Inc., supra*, 42 Cal.4th at p. 575.) The "'community of interest'" requirement itself embodies three factors: (1) predominant 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. (*Ibid.*)

A class may be certified when common questions of law and fact predominate over individualized questions. (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.) 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. (*Ibid.*) To determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged. (*Ibid.*) A class action "'will not be permitted . . . where there are diverse factual issues to be resolved, even though there may be many common questions of law.'" (*Block v. Major League Baseball* (1998) 65 Cal.App.4th 538, 542, quoting *Brown v. Regents of University of California* (1984) 151 Cal.App.3d 982, 988-989.) "'The burden is on the party seeking certification to establish the existence of . . . a well-defined community of interest among the class members.'"

(*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104, quoting *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 913.)

Here, the trial court rejected appellants' motion to certify the class ruling that common issues did not predominate. Appellants now contend the trial court erred when so ruling. Before addressing appellants' argument, we take a moment to clarify the precise claims involved.

We have already ruled the trial court correctly declined to certify the class with respect to the claims made against Kmart in its individual capacity because those class members could not be ascertained. Thus, the only claims that remain are those made against KBS individually and as joint employer with Kmart, and S&S individually and as joint employer with Kmart.[7] Appellants alleged four types of claims against Kmart/KBS and Kmart/S&S. In both instances they asked the court to certify classes based on alleged violations concerning overtime, meal breaks, rest breaks, and working seven or more consecutive days.

The trial court declined to certify a class with respect to working seven or more consecutive days because appellants' complaint did not include that allegation. Appellants do not challenge that ruling on appeal, so the issue is further narrowed to whether the trial court abused its discretion when it ruled that the causes of action alleged against Kmart/KBS and Kmart/S&S, based on alleged violations concerning overtime, meal breaks and rest breaks, were not suitable for class treatment because common issues did not predominate.[8]

Our analysis of this issue is guided by our Supreme Court's decision in *Sav-on, supra*, 34 Cal.4th 319. The *Sav-on* court considered an order granting class certification in an action alleging that salaried managers were misclassified as exempt from overtime

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[7] Again, appellants inform us that they have settled with Horizon, the other janitorial service provider against whom certification was sought.

[8] We note that our Supreme Court is currently considering whether class certification is proper for alleged meal break and rest period violations. (See *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25, review granted Oct. 22, 2008, S166350.)

wage. (*Id.* at p. 324.) The trial court ruled that common issues did predominate, and the issue on appeal was whether that ruling was supported by substantial evidence. (*Id.* at pp. 325, 334.) Our Supreme Court explained: "[A] reviewing court is not authorized to overturn a certification order merely because it finds the record evidence of predominance less than determinative or conclusive. The relevant question on review is whether such evidence is *substantial*." (*Id.* at p. 338, original italics.) The court emphasized that where 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. (*Id.* at p. 328.)

In this case, appellants presented some evidence to demonstrate common questions might exist with respects to the claims made against KBS/Kmart and S&S/Kmart with respect to overtime and meal and rest breaks. A few putative class members submitted declarations that stated they "frequently" missed meal and rest breaks. Others stated they "[did] not recall" taking a meal or rest break. In addition, one of the named plaintiffs stated he "[did] not recall being paid overtime." On the other hand, the defendants presented evidence that would support the conclusion that common questions did not predominate. For example, KBS presented evidence that it was the policy of the company to comply with all overtime, meal break, and rest period laws. KBS also presented declarations from 23 janitors who had worked at Kmart stores, all of whom stated they did not typically work overtime, but when they did, they were compensated at an overtime rate, that they "usually/always" took a 30 minute meal break whenever they work more than 5 hours, and that they knew they were supposed to take a morning and afternoon break and that were never told they should not do so. Based on this conflicting evidence, "[a] reasonable court . . . could conclude" (*Sav-On, supra,* 34 Cal.4th at p. 330), that common questions with respect to overtime, meal breaks, and rest breaks would not predominate. We conclude the trial court did not abuse its discretion.

None of the arguments appellants make on this point convince us the trial court erred.

First, appellants contend the trial court erred because it "never seriously considered issues of fact and law that *were* common." (Original italics.) According to appellants, the "predominance analysis . . . requires consideration of both sides of the equation . . . ." But the trial court here did consider "both sides of the equation." It specifically acknowledged the common issues of law and fact that appellants had identified. While the court did not discuss each of those issues individually and weigh them expressly, appellants have not cited any case that holds the court was required to do so.

Next, echoing the argument they advanced with respect to the question of whether the class identified with respects to Kmart was ascertainable, appellants argue the trial court erred because it conducted "an improper merits analysis." Appellants base this argument on a few isolated comments the court made when explaining its ruling. We simply disagree. When the court's decision is read as a whole, we think it is clear the court rejected the classes appellants had identified because common questions did not predominate.[9] To the extent the court verged into a discussion of the merits of the case, it

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[9] The court analyzed this issue as follows:

"Plaintiffs provide a list [of] purported common issues of law and fact [in] . . . their moving Ps and As. However, in regard to their overtime claim, Plaintiffs have shown at most only that a few janitors worked 7 days per week and that one of them does not recall being paid overtime, and fails to show any policy or practice on a class-wide basis to fail to pay janitors for overtime hours. Therefore, the determination of whether janitors worked overtime and did not receive overtime pay would require individual litigation of whether class members worked overtime and were not compensated for it.

"In regard to Plaintiffs' meal break claims, Plaintiffs assert that a common question of law or fact exists in that class members were prevented from taking meal and rest breaks as mandated by law and were deprived of compensation for missed meal and rest breaks in violation of law. However, Plaintiffs cite no evidence indicating the janitors were not paid for meal breaks, and in fact testimony indicates that at least some janitors were not required to clock out for meals when locked in because under state law they were paid for such breaks. To the extent Plaintiffs assert that putative class members were illegally denied meal breaks for the reasons they could not leave the premises, Plaintiffs have not shown this is a valid legal theory, as already noted.

did nothing more than consider how various claims and defenses relate and might affect the course of the litigation, something the trial court (and this court) are permitted to do. (*Fireside Bank v. Superior Court, supra,* 40 Cal.4th at pp. 1091-1092.)

Appellants argue that the trial court should have certified the class with respect to the claims they made against KBS individually because KBS tracked its employee actions electronically, and therefore the claims regarding overtime and meal breaks would be subject to common proof. While KBS did have an electronic monitoring system, the declarations KBS submitted indicated its employees sometimes neglected to use the system to record their arrivals and departures or their meal breaks. Given this record, "a reasonable court . . . could conclude" (*Sav-On, supra,* 34 Cal.4th at p. 330), that common questions with respect to overtime and meal breaks would not predominate.[10]

In sum, we conclude the trial court did not abuse its discretion when it ruled that common issues did not predominate. Since common issues did not predominate, the court could validly decline to certify the class.[11]

"Therefore, individualized inquiries as to why the janitors did not take their meal and rest breaks, and whether they were compensated for missed breaks, would be necessary."

[10] Appellants also contend the court should have found that common issues predominate as to S&S individually. However, they have advanced this argument summarily and the evidence they cite to support it (a proof of service and a single time sheet) are unconvincing. We reject the argument.

[11] Having reached this conclusion, we need not address whether the trial court correctly ruled that a class action would not be superior to individual lawsuits.

We also need not address an argument that appellants raised first in their reply brief: whether the standard for the admission of evidence at a class certification motion is lower than the standard for the admission of evidence at trial. The focus of appellants argument on this point is a document that Kmart allegedly produced during discovery that appellants submitted to support their certification motion. Nothing in the record indicates the court declined to consider that document. Therefore we need not address appellants' argument that the court should have applied a different, and lower standard when deciding whether to admit the evidence they offered.

III. DISPOSITION

The order denying class certification is affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.