No. 17-15673

In the United States Court of Appeals
for the Ninth Circuit

Guadalupe Salazar, et al.,
Plaintiffs-Appellants,

v.

McDonald's Corp., et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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INTRODUCTION

California law protects workers' fundamental statutory right to obtain full compensatory and injunctive relief for wage-and-hour violations, in part by broadly defining the term "employer" to include "any" person or entity with the ability to control, directly or indirectly, any significant term or condition of those workers' employment. *See Martinez v. Combs*, 49 Cal.4th 35, 63-64 (2010). By extending legal liability to each entity that shares responsibility and control, California law is sufficiently flexible to accommodate the changing nature and structure of the American workplace, where increasingly companies share the contractual and economic ability to co-determine key elements of workers' terms of employment. *See* David Weil, *The Fissured Workplace* 7-10, 17-18 (Harvard 2014).

The principal issue on appeal is whether plaintiffs, who are low-wage fast food workers employed in eight McDonald's-franchised Bay Area restaurants, presented sufficient evidence to establish a material factual dispute concerning whether defendants McDonald's Corp. and McDonald's U.S.A., LLC ("McDonald's") were, along with their franchisee, plaintiffs' "employer" under California wage-and-hour law.

The district court granted summary judgment to McDonald's after concluding that no reasonable juror could find that McDonald's was the plaintiff crew members' employer. That ruling was legally and factually erroneous.

Legally, the court misconstrued the three, disjunctive *Martinez* tests for "employer" status and ignored the California Supreme Court's admonition that these tests be applied "liberally," "in light of the [statutes'] remedial nature," and "with an eye to promoting [worker] protection," including when "multiple entities control different aspects of the employment relationship." 49 Cal.4th at 58-59, 61, 63, 73. Under *Martinez*, any entity that has the authority to exercise control over terms or conditions of employment (including indirectly through a contracting partner) or that suffers or permits a violation of wage-and-hour law may be deemed an employer, "even if it did not 'directly hire, fire or supervise' the employees." *Castaneda v. Ensign Grp., Inc.*, 229 Cal.App.4th 1015, 1019 (2014) (quoting *Guerrero v. Superior Court*, 213 Cal.App.4th 912, 950 (2013)).

Factually, the court improperly gave no weight to the *extensive* evidence showing that McDonald's controlled the very workplace conditions giving rise to plaintiffs' wage-and-hour claims *and* also exercised, and contractually reserved for itself the right to exercise, control over almost all other material elements of the crew members' wages, hours, and working conditions.

"Because determining joint employment is 'fact-intensive,' awards of summary judgment on this issue, although sometimes appropriate, are rare." *Greenawalt v. AT&T Mobility LLC*, 642 F.App'x 36, 37 (2d Cir. 2016) (applying less worker-protective FLSA standard). This is not one of those rare cases. The district court committed reversible error in awarding summary judgment to McDonald's.

The court independently committed reversible error by: concluding that McDonald's could not be liable even if its franchisee were McDonald's "ostensible agent"; granting summary judgment for McDonald's on plaintiffs' alternative theory that McDonald's acted negligently and in violation of its duty of care to plaintiffs; denying class certification; and striking as "unmanageable" plaintiffs' representative claims asserted on behalf of the State of California under California's Private Attorneys General Act (PAGA), Labor Code §§2698 et seq.

JURISDICTION

This is an appeal from a Rule 54(b) order of final judgment in favor of defendants McDonald's Corp. and McDonald's U.S.A., LLC. The district court had removal jurisdiction under 28 U.S.C. §§1441 and 1332(d) because there was diversity between parties, at least $5 million in controversy, and more than 100 putative class members. District Court Docket ("Dkt.") 1. This Court has

appellate jurisdiction under 28 U.S.C. §§1291, 1292(e), 2072(c), and Federal Rule of Civil Procedure 54(b).

The district court entered judgment in favor of McDonald's on March 10, 2017 (ER00003), and amended that judgment on March 28, 2017 (ER00002) and April 12, 2017 (ER00001). Plaintiffs filed a timely Notice of Appeal on April 7, 2017 (ER00057-00059), and a Revised Notice of Appeal on April 14, 2017 (ER00055-00056).

STATEMENT OF ISSUES

1. Whether the district court erred in concluding that no triable dispute of fact existed regarding McDonald's status as a joint "employer" of plaintiff crew members.

2. Whether the district court erred in concluding that joint-employer liability under California law cannot be based on ostensible agency.

3. Whether the district court erred in concluding that California's "new right-exclusive remedy" doctrine precludes plaintiffs' claim that McDonald's acted negligently.

4. Whether the district court erred in denying class certification and striking plaintiffs' representative PAGA claims as "unmanageable" under Rule 12(f).

Relevant statutory and regulatory authorities appear in the separate Addendum.

STATEMENT OF THE CASE

This lawsuit was filed in March 2014 by three fast-food workers on behalf of a class of more than 1,400 similarly situated crew members employed at eight Bay Area McDonald's restaurants.

Plaintiffs claimed that McDonald's and its franchisee, the Haynes Family Limited Partnership ("Haynes," which operated those restaurants pursuant to comprehensive Franchise Agreements with McDonald's),[1] violated California wage-and-hour law, including by: (1) failing to pay required overtime premiums (often as a result of McDonald's misconfiguration of its timekeeping system); (2) failing to provide meal and rest breaks required by California law (including because McDonald's directed Haynes not to provide breaks during busy periods and not to allow crew members to leave the premises for meal periods during overnight shifts) and *never* paying the required wage premium for a missed meal or rest break; and (3) failing to reimburse crew members for the time and expense required to maintain their McDonald's-mandated uniforms. *See* Dkt. 206/231-1 at 13-23. Plaintiffs contended that McDonald's was liable as a joint employer and on

[1] ER04060:1-2; ER02526:6-12, ER02545:4-02554:25; ER02614-02878 (agreements).

the basis of negligence, and also sought civil penalties under PAGA. *See* ER09116-09178.

In the spring of 2016, plaintiffs reached a tentative classwide settlement with Haynes (approved by the district court in September 2017, Dkt. 303) that provided limited injunctive and monetary relief to the class, reflecting Haynes' distressed financial condition and inability to provide complete relief. *See* Dkt. 295 at 5-7.

McDonald's moved for summary judgment in May 2016, contending that it had no control over plaintiffs' employment and owed them no duty of care. Plaintiffs responded by documenting McDonald's responsibility for many of the alleged violations and the pervasive control – both contractual and practical – that it exercised directly and through its franchisee. ER02103-08705; *see* ER08239 ¶8 (McDonald's exercises far more franchisee control than other franchisors).

The court ruled on summary judgment that McDonald's was not an employer because it "did not retain or exert direct or indirect control over plaintiffs' hiring, firing, wages, hours, or material working conditions" and did not "suffer or permit plaintiffs to work, [or] engage in an actual agency relationship" with the franchisee. ER00028-00029, ER00031, ER00036. The court also ruled that plaintiffs could not pursue their common-law negligence claims because those claims rested on the "the same factual basis" as plaintiffs' rejected Labor Code claims. ER00029, ER00052. However, the court – initially – allowed plaintiffs to

"proceed [against McDonald's] under an ostensible agency theory" based on evidence that McDonald's caused plaintiffs reasonably to believe that Haynes acted as McDonald's agent. ER00029, ER00049.

Soon thereafter, the court considered the parties' class certification cross-motions. Without deciding whether the crew members' substantive underlying claims were amenable to class treatment, the court denied certification on the ground that the sole remaining theory of McDonald's liability, ostensible agency, required individualized inquiries. ER00013-00023. In the same order, the court granted McDonald's Rule 12(f) motion to strike plaintiffs' representative PAGA claims on the ground that classwide adjudication of plaintiffs' ostensible-agency theory was "unmanageable." ER00023-00027.

McDonald's then filed a second motion for summary judgment, arguing that ostensible agency can never support employer liability for California wage-and-hour violations. The court granted that motion and entered judgment for McDonald's, concluding that the Wage Order's definition of "employer" – anyone who "directly or indirectly, or through an agent or any other person, employs or exercises control," Wage Order No. 5-2001, §2(H) – precluded ostensible agency liability. ER00007-00008.

The court entered judgment on March 10, 2017, and amended it on March 28, 2017 and again on April 12, 2017, to make Rule 54(b) findings. ER00001-00003.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *Animal Legal Def. Fund v. FDA*, 836 F.3d 987, 988 (9th Cir. 2016). All of plaintiffs' "evidence ... is to be believed, ... all justifiable inferences are to be drawn in [their] favor," and plaintiffs "need only present evidence from which a jury might return a verdict in [their] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 257 (1986).

A denial of class certification or Rule 12(f) order striking allegations is generally reviewed for abuse of discretion, *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010); *Nurse v. United States*, 226 F.3d 996, 1000 (9th Cir. 2000); except that where "the district court's determination was premised on a legal error," as here, that error constitutes "a per se abuse of discretion" requiring reversal. *Yokoyama*, 594 F.3d at 1091.

SUMMARY OF ARGUMENT

The district court erred in granting summary judgment to McDonald's based on its conclusion that no reasonable juror could find, on the evidence presented and with all inferences drawn in plaintiffs' favor, that McDonald's was an "employer"

of plaintiff fast-food workers. Under California law, McDonald's shares liability for the alleged violations if it, directly or indirectly, or through an agent or other person: (1) exercised control over plaintiffs' wages, hours, *or* working conditions, *or* (2) suffered or permitted work under unlawful conditions, *or* (3) retained the right to control plaintiffs' employment, creating a common law employment relationship. *Martinez*, 49 Cal.4th at 64. Plaintiffs' evidence raised material disputes under each of these tests.

The court erred initially by engrafting narrow tort law concepts from *Patterson v. Domino's Pizza, LLC*, 60 Cal.4th 474 (2014), onto the disjunctive wage-and-hour tests set forth in *Martinez*. *Patterson* focused exclusively on common-law *respondeat superior* principles that have no application to *Martinez*'s first two tests, which define "employer" far more broadly than the common law to encompass entities with the practical ability to determine workplace conditions. Even *Martinez*'s third, common-law test must be applied in the wage-and-hour context "liberally … with any eye to promoting [worker] protection." 49 Cal.4th at 61 (quotation marks omitted); *infra* 15-18.

The record contains considerable evidence of McDonald's control over plaintiff crew members' wages, hours, and working conditions, and indeed, its direct responsibility for many of the claimed violations. For example, the evidence shows that: (1) McDonald's caused overtime violations because its In-Store

Processor ("ISP") assigned time worked by crew members to days on which it was not actually worked (a practice that a state court recently held violates California's overtime laws); (2) McDonald's controlled the physical working conditions that resulted in plaintiffs' claims for unpaid time and expenses incurred cleaning their uniforms; and (3) McDonald's caused multiple meal-and-rest-break violations, by (a) instructing Haynes not to send crew members on breaks during busy periods and not to allow crew members to leave the restaurant during overnight meal periods, (b) creating crew schedules through its ISP that failed to account for California's break laws, (c) determining through its ISP which hours should be paid and unpaid, while not including missed break premium pay, and (d) assuming responsibility for training Haynes' managers how to provide meal and rest breaks and then grading their compliance. *Infra* 19-31.

Even if McDonald's had not itself been responsible for these particular violations, a jury could find McDonald's to be a joint employer based on evidence of McDonald's direct and indirect control over other aspects of plaintiffs' employment, including control over: job duties; the physical work environment; hours of work; restaurant staffing levels; and Haynes' personnel policies and practices (including by requiring Haynes to implement McDonald's "people" practices governing crew pay, scheduling, breaks, orientation, training, and notice

of workplace rights). Plaintiffs' objectively reasonable beliefs that they worked for McDonald's also constitute evidence of McDonald's control. *Infra* 31-40.

The district court gave no weight to this evidence because it found that Haynes' compliance with McDonald's comprehensive instructions, standards, and policies was entirely optional. But the evidence established – and certainly permitted a jury to find – that Haynes was contractually obligated to comply with all of McDonald's detailed standards, policies, and instructions. Indeed, McDonald's non-negotiable Franchise Agreements specifically required the franchisee to operate its restaurants "in conformity to the McDonald's System through *strict adherence* to McDonald's standards and policies" and to "every component" of the "McDonald's System," without limit. Franchise Agreement ER02683-02697 ("FA") §§1(d), 4, 12 (emphasis added); *infra* 41-43.

A jury could also find that McDonald's standards and directives were not optional as a practical matter, based on evidence that McDonald's insisted on compliance as part of its continued relationship with the franchisee (as confirmed by Haynes' own stated understanding that "we need to be compliant with [McDonald's] standard," ER03211), and based on testimony from a McDonald's California franchisee who explained how McDonald's requires strict adherence to its standards. *Infra* 43-46. While the court found that McDonald's did not require Haynes to use McDonald's technology systems for timekeeping and scheduling

(systems that caused wage-and-hour violations), the record shows that Haynes used McDonald's technology because it had no alternative given McDonald's operational requirements and standards. *Infra* 46-50.

A jury could independently find McDonald's liable under *Martinez*'s second-prong test, because it "suffered or permitted" the violations at issue, both by directly causing those violations and because McDonald's could have prevented or remedied them. The court largely discounted plaintiffs' suffer-or-permit evidence because it applied an incorrect legal standard that asked only whether McDonald's had the power to prevent plaintiffs from working at all. The basis for liability under the "suffer or permit" test, however, is "failure to perform the duty of seeing to it that the prohibited condition does not exist." *Martinez*, 49 Cal.4th at 69 (emphasis and quotation marks omitted). Whether McDonald's could fire crew members who were not paid required overtime has nothing to do with whether it "suffered or permitted" those violations. *Infra* 50-54.

A jury could also independently find McDonald's "employer" status under *Martinez*'s third, common-law test, which asks how much control McDonald's "retains the *right* to exercise." *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal.4th 522, 533 (2014) (emphasis in original). In addition to the evidence demonstrating that McDonald's exercised the right to control workplace conditions, McDonald's retained virtually unlimited contractual rights of control

over Haynes' operations pursuant to its Franchise Agreements. In stark contrast to the franchise agreement in *Patterson*, McDonald's Franchise Agreements do *not* delegate exclusive authority over employment matters to its franchisee, but retain for McDonald's more than enough authority over those matters for a jury to find a common-law employment relationship. *See People v. JTH Tax, Inc.*, 212 Cal.App.4th 1219, 1245-47 (2013); *infra* 54-58.

Although the court correctly ruled *initially* that disputes of material fact precluded summary judgment on plaintiffs' ostensible agency theory, it erred in later concluding that ostensible agency provides no basis for liability under California wage-and-hour law, which imposes employer liability on any person or entity who acts "through an agent." Wage Order No. 5-2001, §2(H). In California, "whatever the context, the rule remains that an agent acting within his ostensible authority binds his principal." *Pasadena Medi-Ctr. Assocs. v. Superior Court*, 9 Cal.3d 773, 781 (1973); *see* Civ. Code §§2300, 2330; *infra* 58-61.

The court also erroneously concluded that plaintiffs' negligence claim was precluded by California's "new right-exclusive remedy" doctrine. That doctrine should have no application to plaintiffs' common-law claim that McDonald's breached its non-statutory duty of care to the workers by failing properly to program its ISP software and to adequately train and supervise Haynes. *Infra* 62-63.

Finally, the court erred in denying class certification and striking plaintiffs' representative PAGA claims. These rulings were based solely on the ground that ostensible agency liability cannot be established on a classwide basis and that to try plaintiffs' ostensible-agency-based PAGA claims would therefore be "unmanageable." Plaintiffs should have been permitted to present to a jury the question of McDonald's liability under each *Martinez* test and for negligence, all of which present common legal and factual issues. There was also no legal basis, under Rule 12(f) or otherwise, for the court to strike plaintiffs' PAGA claims as "unmanageable." Accordingly, the order denying class certification and striking representative PAGA claims must be reversed as well. *See Menotti v. City of Seattle*, 409 F.3d 1113, 1119-20, 1148 & n.67 (9th Cir. 2005); *infra* 64-68.

ARGUMENT

I. Summary Judgment for McDonald's on Plaintiffs' Labor Code and Derivative Claims Must Be Reversed

The court erred in concluding as a matter of law that the factual record could not support plaintiffs' claim that McDonald's was their joint employer. A "joint employer" is simply an "employer," in circumstances where more than one person or entity meets the applicable legal standard. *See Martinez*, 49 Cal.4th at 50-51, 59; *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 916-18 (9th Cir. 2003) (federal law); *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 137 (4th Cir. 2017).

Under California wage-and-hour law, an "employer" is any person "who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person," and to "employ," means "to engage, suffer, or permit to work." Wage Order No. 5-2001, §2(E), (H). In *Martinez*, the California Supreme Court explained that these definitions, read together, mean that an employer is one who, directly or indirectly, or through an agent or any other person: (1) exercises control over a worker's wages, hours, or working conditions, *or* (2) suffers or permits work under unlawful conditions, *or* (3) engages a worker by retaining the right to control the manner in which the worker provides services. 49 Cal.4th at 63-64. Plaintiffs presented evidence sufficient to establish disputes of material fact under each of these separate tests. Any one such dispute requires reversal.

A. The District Court Erred by Applying *Patterson's* Narrow Common-Law Tort Concepts in the *Martinez* Wage-and-Hour Context

As a preliminary matter, the court committed error by concluding that in *Patterson*, the California Supreme Court had implicitly overruled (or narrowed) *Martinez* by holding that under the common-law master-servant standard for determining *respondeat superior* strict liability, the franchisor defendant was not liable for sexual harassment committed *by* an employee of a franchisee. The district court "look[ed] to *Patterson*'s analysis for guidance" in applying *Martinez*,

reasoning that *Patterson* "focuses on the idiosyncrasies of the franchising relationship, and denigrates reliance on … older decisions." ER00033, ER00035; ER00037 (applying "*Patterson's* gloss" on *Martinez*). Based on that "guidance," the court held that McDonald's could not be liable for wage-and-hour violations committed *against* employees of its franchisee unless McDonald's "'exhibit[ed] the traditionally understood characteristics of an "employer" or "principal [at common law];" i.e., it has retained or assumed *a general right of control* over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees.'" ER00033 (quoting *Patterson*, 60 Cal.4th at 477) (emphasis added). But there is no special franchisor exemption to the definition of "employer" under California's wage-and-hour laws, and *Patterson* did not create one.

Patterson applied common-law principles in determining whether, on the facts of that case, the franchisor was vicariously liable for sexual harassment committed by one of its franchisee's employees. *See* 60 Cal.4th at 503 (expressly restricting its holding to these narrow circumstances). The standard applied in *Patterson* was designed "to *limit* [an employer's] vicarious liability for the misconduct of a person rendering service to him," *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal.3d 341, 350, 352 (1989) (emphasis added), not to

evaluate the scope of an entity's duty to protect the workplace rights of persons rendering it services.

The common-law principles addressed in *Patterson* have no application to the first two *Martinez* tests, which were expressly designed to provide greater workplace protection than existed at common law. *See Martinez*, 49 Cal.4th at 50 & n.16. In the wage-and-hour context, moreover, even the common law standard (*Martinez*'s third test) must be applied "in light of the [statutes'] remedial nature … with an eye to promoting [worker] protection." *Id.* at 61 (quotation marks omitted); *cf. Borello*, 48 Cal.3d at 350-51, 354-55 (courts applying "common law" test under Workers Compensation Act are not limited to traditional principles and must consider all "logically pertinent" factors); *Laeng v. Workmen's Compensation Appeals Board*, 6 Cal.3d 771, 777 (1972).

Finally, *Patterson*'s discussion of how the franchise business model customarily operates *supports* plaintiffs, based on facts establishing McDonald's unique micromanaging of its franchisee's affairs and the extensive evidence that – in contrast to most franchising relationships – McDonald's retains a substantial degree of "contractual or operational control" and does *not* leave its franchisee with true "autonomy as a manager and employer." 60 Cal.4th at 478; *see* ER08239 ¶8. Nothing in *Patterson* requires courts to hold franchisors to a different standard

than other entities when determining their "employer" status for purposes of wage-and-hour law.[2]

B. Whether McDonald's Exercised Direct or Indirect Control Over Plaintiffs' Wages, Hours, or Working Conditions Presents Material Disputed Facts Precluding Summary Judgment

A jury applying the correct legal standards could find that McDonald's "*directly or indirectly, or through an agent or any other person* … exercise[d] control over [plaintiffs'] wages, hours, or working conditions," under the first *Martinez* test. 49 Cal.4th at 71 (emphasis in original; quotation marks omitted); *id.* at 59 ("entity that controls any one of these" is employer). While none of those elements of *Martinez*'s first test require a direct nexus between a defendant's control and the wage-and-hour violations at issue, there is overwhelming evidence that McDonald's itself controlled the working conditions that resulted in many of the violations alleged by plaintiffs.[3]

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[2] Even if the narrow *respondeat superior*-based tort rules discussed in *Patterson* could properly be applied to the wage-and-hour context, *Patterson* simply held that "imposition and enforcement of a uniform marketing and operational plan cannot *automatically* saddle [a] franchisor with responsibility for employees of the franchisee," and that the "traditional[]" standards for determining "employer" status apply. 60 Cal.4th at 478 (emphasis in original). Applying those standards, and viewing the evidence in the light most favorable to plaintiffs, a jury could conclude that McDonald's satisfies one or more of *Martinez*'s tests. *Infra* 19-58.

[3] A franchisor's control or right to control the particular instrumentality alleged to have caused the plaintiff harm is sufficient to establish liability under the

1. A Jury Could Find That McDonald's Exercised Control Over Wages, Hours, or Working Conditions Because McDonald's Caused, and Could Have Prevented, the Violations at Issue

Plaintiffs presented evidence that McDonald's was responsible for the specific working conditions that resulted in several alleged wage-and-hour violations, including violations of their right to overtime premiums, legally compliant meal and rest breaks (i.e., timely breaks free from all employer control), and compensation for the time and expense of maintaining work uniforms. This evidence was sufficient for a jury reasonably to find that McDonald's exercised control over plaintiffs' wages, hours, or working conditions, and was thus an "employer" under *Martinez*.

Overtime. The record is undisputed that: (1) McDonald's required Haynes to use certain technology, including McDonald's proprietary Point of Sale and ISP systems, to open and close each store's sales systems every day, ER05002:7-20, ER05014:1-13, ER05015:7-05016:18; and (2) Haynes in fact used McDonald's ISP for scheduling, timekeeping, and determining what crew member time would

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common law. *See JTH Tax*, 212 Cal.App.4th at 1247 (affirming deceptive advertising judgment against franchisor based on common law agency relationship: "[e]ven if Liberty's franchisees are not its agents for all purposes, they are its agents at a minimum for purposes of advertising").

be paid and at what rates (regular vs. overtime). ER03258:18-20, ER03265:12-03266:13, ER03267:5-03269:9; ER04946:23-04947:22, ER04948:8-20, ER04954:8-17; ER06982:9-10, ER06987:6-7. The McDonald's-programmed settings in that software failed to take California's unique wage-and-hour requirements into consideration, though, and thereby *directly caused* several categories of overtime violations. *See* ER09128-09165 ¶¶55-59, 148-62, 186-201; ER05002:7-20, ER05014:1-13, ER05015:7-05016:18; ER00913-00917 ¶¶19-29.

First, McDonald's ISP improperly calculated daily overtime by assigning *all* hours worked by a crew member on a shift to the date that shift *began*, even on overnight shifts, rather than attributing time to the date on which the work was actually performed. ER05044:9-05050:21, ER05053:7-21, ER05063:15-05064:18; ER04950:13-04952:7, ER04959:1-14; ER04982/ER09622 ("ISP wants the entire shift in the day where the 'IN' punch occurred"); ER00914-00916 ¶¶21-27. Haynes had *no ability* to change the ISP settings that allocated time to the first date and calculated overtime based on that allocation. ER05063:15-25; ER04982-04983/ER09622-09623. As a result, no overtime hours were identified, and no overtime premiums were paid, to many class members who worked more than eight hours in a 24-hour period by working an overnight shift followed by a day shift. ER00913-00916 ¶¶19-26.

This failure to base overtime calculations on a 24-hour workday and to pay overtime for work in excess of eight hours per day violated Labor Code §510(a). *See Sanchez v. McDonald's Restaurants of California, Inc.*, No. BC499888 (L.A. Superior Court, April 20, 2017) (granting summary adjudication to crew members in McDonald's corporate-owned California restaurants for overtime violations based on identical ISP functioning); *Jakosalem v. Air Serv Corp.*, 2014 WL 7146672, at *3 (N.D. Cal. Dec. 15, 2014).[4]

McDonald's responsibility for these daily overtime violations provides sufficient basis for a jury to find that McDonald's exercised control over plaintiffs' wages and working conditions. But plaintiffs also presented evidence that McDonald's pressured Haynes to keep its restaurants open overnight (which increased McDonald's percentage-of-gross-sales income),[5] while assuring Haynes that keeping restaurants open 24 hours would not lead to overtime violations. ER05869-05870 (McDonald's: "Myth[]" that 24-hour operations will "violat[e] Labor Laws"; employees will "get OT if they work more than 8 hours in 24 hour

[4] The *Sanchez v. McDonald's* ruling is attached to plaintiffs' Request for Judicial Notice.

[5] ER02687 §8 (franchisee rent based on gross sales); ER02703 §3.01, ER02715; ER08282-08285 (other franchisee fees).

cycle"); ER02536:16-02538:9; ER04837-04867; ER05348:9-19; *see also* FA §12(a) (McDonald's controls when stores must be open).

Second, plaintiffs presented evidence that McDonald's improper ISP settings caused overtime violations at the Haynes restaurant where the ISP's daily and weekly overtime thresholds were incorrectly set to 8:59 (rather than 8:00) hours and 50:00 (rather than 40:00) hours, with the result that crew members were not paid overtime premiums on days they worked between 8-9 hours or weeks they worked between 40-50 hours. ER02991:2-02994:7, ER03061; ER00916-00917 ¶¶28-29.

Although there was evidence that these particular ISP settings *could* be changed, the record shows – and the jury could thus find – that McDonald's instructed Haynes not to make such changes. ER05248, ER05174 ("No one should ever need to change the information in it! … We DO NOT recommend that any changes be made in the ISP."), ER05142 ("All applicable Labor Law parameters should be set to the standard settings."); ER07004; ER06961:8-9. Moreover, McDonald's never trained any Haynes personnel on how to change those ISP settings (ER02980:14-02981:4) and no Haynes personnel ever changed the ISP settings (including the erroneous overtime settings) at any restaurant, including the three restaurants that McDonald's *itself operated* immediately before franchising

them to Haynes. ER02975:12-19, ER02988:10-02989:18, ER02990:10-18, ER03002:20-03003:21; ER03257:18-ER03260:15, ER03261:5-03262:12.

These facts would enable a reasonable jury to conclude that McDonald's, though its ISP technology, engaged in "effective control over the [overtime] wages of [crew members]," *Guerrero*, 213 Cal.App.4th at 949, and that McDonald's had the ability to prevent or remedy those violations by changing its ISP settings or instructing Haynes to do so.

The court cited *Aleksick v. 7-Eleven, Inc.*, 205 Cal.App.4th 1176 (2012), and *Futrell v. Payday Cal., Inc.*, 190 Cal.App.4th 1419 (2010), in concluding that Haynes' use of McDonald's ISP could not alone establish McDonald's "employer" status. ER00042. But the payroll provider defendant in *Futrell* had no influence over its clients' employees' pay rates, hours, or working conditions; it was simply an independent third-party vendor to which the actual employer had "'outsourced' its payroll department" through an arms-length service contract. 190 Cal.App.4th at 1424. In *Aleksick*, not only did the plaintiff waive all of her Labor Code and Unfair Competition Law claims and "concede[] 'it is undisputed that 7-Eleven is *not* the employer of the class members,'" but the franchisor submitted *unrebutted* evidence that its franchisee had exclusive control over "overall store operations," pay rates, and employment matters, while the franchisor simply processed payroll checks. 205 Cal.App.4th at 1185, 1190 (emphasis in original). The evidence here

is starkly different. *Infra* 24-50. A jury could also find that McDonald's ISP had far greater impact on plaintiffs' Labor Code rights than the payroll providers had in *Aleksick* and *Futrell*, including because the ISP determined what rate (regular or overtime) to pay each hour and which hours should be unpaid, *supra* 19-20, and because McDonald's technology included scheduling and timekeeping functions affecting plaintiffs' hours, not just payroll. *Infra* 26-27, 38.

The court further noted that the franchisor in *Patterson* required franchisees to purchase and use its "'comprehensive sales and accounting program.'" ER00042-00043 (quoting 60 Cal.4th at 482 n.2). But McDonald's system went far beyond sales and accounting into the specific scheduling, break, and pay practices that caused the wage-and-hour violations at issue. *Supra* 19-23; *infra* 26-28. Finally, *Patterson* involved a sexual harassment claim as to which scheduling and pay practices were irrelevant, and did not even purport to apply *Martinez*. *Supra* 16-17.

Meal and rest breaks. Separate and apart from the evidence demonstrating McDonald's responsibility for the overtime violations (and thus its exercise of control, directly or indirectly, over plaintiffs' wages), a jury could independently find that McDonald's was responsible for many of the alleged meal-and-rest-break violations, which it could have prevented or remedied. The court concluded that "McDonald's is not involved" in "setting work schedules" or "determining when to

provide rest and meal breaks," ER00036, but the record contains considerable evidence to the contrary.

Direct instructions to deny compliant breaks. McDonald's *specifically instructed* Haynes not to send crew members on break during busy periods. ER03733 (McDonald's to Haynes: "[E]nsure you have the correct amount of people positioned in the correct place *with no breaks during peak periods*") (emphasis added); ER06779, ER06830 (manual for required McDonald's class instructs Haynes managers to "[v]erify that there are no breaks scheduled during lunch"); ER05131 ("As a rule," crew members "should Stay in Place" and "should not take breaks … during a peak period."); ER02286:2-22 (managers deny breaks when store busy); ER00917-00922 ¶¶30-51 (time records reflect tens of thousands of missed or untimely breaks).[6]

McDonald's also instructed Haynes not to let crew members leave the building on overnight shifts when the lobby was closed, which deprived crew members of meal periods free from employer control on such shifts. *See Brinker Rest. Corp. v. Superior Court*, 53 Cal.4th 1004, 1036-37 (2012) (meal period legally compliant only if workers are "free to leave the premises" and "free to

[6] *See also* ER03345:14-18, ER03776 (franchisee criticizing managers because "[m]eal breaks are being given during lock-down," i.e., "when it's normally busy").

come and go as they please"); ER07026 (McDonald's manual: "No one should enter or exit the restaurant after the dining room and lobby are closed."); ER07104 (McDonald's security manager: when lobby is closed "[a]t no time during their shift should any employee be outside the restaurant for any reason."); ER07108 (same); ER02589:11-20; ER02145:13-24; ER03343:2-9, ER03577; ER00918 ¶35. A jury could find these express directives sufficient, alone or in combination with other evidence, to establish McDonald's "employer" status.

Creating staffing schedules that fail to include California break time. Plaintiffs also presented evidence that McDonald's failed to take California break law into account when it programmed its crew-scheduling software, resulting in having an insufficient number of crew members to cover workstations when breaks were required, causing many breaks to be untimely delayed or entirely denied.[7] McDonald's ISP did not schedule *any* rest breaks or *any* required second meal periods. ER04955:23-04956:19, ER05074:6-13. And McDonald's scheduling

[7] Haynes used McDonald's scheduling software (included in the ISP and the newer McDonald's software called e*Restaurant, ER05272:4-05274:1) and McDonald's Dynamic Shift Positioning Tool ("DSPT") to determine its crew members' schedules. ER02590:3-5, ER02597:5-7, ER02598:22-02599:4; ER03275:2-03277:22, ER03384-03395; ER03041-03063. McDonald's designed these applications to "draw a [crew member work] schedule that perfectly matches labor needs" in 15-minute intervals, based on McDonald's "Variable Labor Hours" data tables and the program's Labor Law and other built-in settings. ER05145, ER05174; ER04960:2-9; ER04961:2-11; ER05291:14-05292:13, ER05353:17-05354:2.

software and projections of labor needs did not designate or block out time for required rest breaks under California law – which resulted in understaffing during busy periods and denial of timely rest breaks. ER05069:8-05071:4, ER05208-05238; ER04955:23-04956:19; ER04957:24-04958:17, ER04961:25-04962:5.

Further, the ISP settings that determined when meal periods were required for crew members at several restaurants were improperly set at 5:15, 5:30, or 6:00 hours rather than 5:00 hours as required by California law. ER03043, ER03054, ER03062, ER07242. McDonald's instructed Haynes not to change these settings, and Haynes made no such changes. *Supra* 22-23. Moreover, McDonald's technology *prevented* Haynes' managers from making any scheduling changes not expressly permitted by the ISP's programming. ER05132 ("Once the laws are set up, the ISP will NOT allow the scheduling manager to break these laws as the Crew Schedule is written[.]"); ER04953:14-22; ER05346:13-05347:25. Because the ISP settings did not comply with California break law, a reasonable jury could find that McDonald's scheduling software and directives were a cause of plaintiffs' meal-and-rest-break violations and that McDonald's exercise of control over those conditions made McDonald's an "employer" under *Martinez*.

Failing to pay missed break premium wages. Although McDonald's ISP purportedly tracked all meal-and-rest-break time, flagged missed (but not late, ER05060:22-05061:11) breaks, and generated the crew member work-time reports

used to make payroll, McDonald's failure to program the ISP to flag when crew members were owed an hour of premium pay for missed and late breaks resulted in no such premiums *ever* being paid. ER03267:5-03268:25; ER05029:17-ER05031:8, ER05176-05199; ER00917-00920 ¶¶33, 42. McDonald's control over flagging breaks owed and missed, coupled with its failure to flag when premium pay was owed, was yet another cause of plaintiffs' claimed Labor Code violations. *See Safeway, Inc. v. Superior Court*, 238 Cal.App.4th 1138, 1154, 1158-59 (2015) (claims challenging "'system-wide' practice of failing to pay meal break premium wages 'when required'").

Direct mandatory wage-and-hour training of crew members' managers and ongoing compliance monitoring. There was extensive evidence that McDonald's assumed responsibility for training and monitoring Haynes' managers on how and when to provide breaks. Consequently, McDonald's failure to provide correct training and monitoring was one cause of those meal-and-rest-break violations.

McDonald's required at least one shift manager with McDonald's-mandated training, including on wage-and-hour obligations and staffing practices, to be present in each Haynes store "at all times." ER04230.[8] *Compare Patterson*, 60

[8] *See* ER07415 (listing wage-and-hour classes taken by managers); ER03581, ER03586-03590; ER03639-03659; ER04071:9-17, ER04089:17-25; ER04548:17-04549:2; ER06768-06912; ER03273:6-03274:12, ER03281:13-03282:24, ER03284:14-03289:7; ER03315:10-03321:11, ER03442-03456;

Cal.4th at 501-02 (contract *did not allow* franchisor to establish sexual harassment training program, and franchisor provided no such training). McDonald's also graded Haynes' compliance with meal-and-rest-break law and the adequacy of its break coverage (ER04510-04511 (P1, P2); ER07349 (S6)), "require[d] franchisees to conduct anonymous employee surveys" (ER06532:8-10)[9] that asked crew members whether, "[a]t the McDonald's where I work, I am able to take my breaks" (ER03713), and required Haynes to create and post a "survey action plan" responding to issues identified.[10]

ER06677:19-24; *see also* ER07344 (P20), ER03193-03209 (McDonald's evaluated number of trained managers and managers' participation in training). The Franchise Agreements also required each store's general manager to take personnel and "Wage & Hour" courses at McDonald's "Hamburger University." FA §6; ER03605-03606.

[9] *See* ER04671; ER05622:5-13; ER06517:7-22, ER05795:5-05796:3, ER05809-05810 (seeking 100% survey participation); ER06633:1-15 (McDonald's instructed franchisee it "had no choice" but to use McDonald's survey); ER04081:15-04082:18 (McDonald's required surveys because it wanted "highly motivated, well-trained, … tenured employees in our restaurants"); ER02582:8-02584:22.

[10] ER05976 (McDonald's review: "Action plans" based on crew survey results "must be created, reviewed with restaurant managers and then communicated to the crew and posted in the crew room"); ER06056 (review of survey results); ER03735 (McDonald's: "Survey action plan needs to be posted"); ER05932:14-20; ER04113:9-17; ER04550:7-04552:19; ER04611:4-7, ER04615:12-24, ER04616:10-21, ER04680-04682.

Uniform cleaning time and expenses. A jury could also conclude that McDonald's controlled the working conditions that resulted in plaintiffs' claim to be compensated for time spent and expenses incurred while cleaning their required McDonald's work uniforms. *See* ER09129-09167 ¶¶60-61, 148-53, 202-10. Under California law, uniform maintenance time and expense must be compensated, particularly where the workplace results in heavy soiling from grease. Wage Order No. 5-2001, §9; IWC Statement, Uniforms (Dec. 8, 1977) (ER00901-00902). There is no dispute that McDonald's required plaintiffs to wear McDonald's uniforms following "specifications" of McDonald's choosing, FA §12(h); ER03341:23-03342:6, and to keep those work uniforms "clean and neat." ER06735; ER04215; ER07353 (C1); ER04166 (McDonald's inspections identify individual crew who are not "clean, well groomed and neatly dressed"); ER03226, ER03228. These "appearance requirements clearly constitute control" reflecting employer status. *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 989 (9th Cir. 2014).

Because McDonald's controlled the details of plaintiffs' physical work environment, *infra* 37-38, a jury could also find McDonald's responsible for plaintiffs' work uniforms becoming so greasy as to require special cleaning – which McDonald's could have prevented by designing the physical details of the workspace and equipment to better protect against excessive soiling. *See*

ER02171:5-02173:7 (layout of work stations results in grease getting on uniforms); ER02287:25-02288:10, ER02289:21-02290:3; ER02411:17-21.

2. A Jury Could Conclude That McDonald's Exercised Direct or Indirect Control Over Many Other Aspects of Plaintiffs' Wages, Hours, and Working Conditions

Even if McDonald's had not directly caused or contributed to any particular violation, a jury could still find McDonald's to be a joint "employer" under *Martinez*'s first test based on evidence that McDonald's control – direct and indirect – extended to many other aspects of plaintiffs' employment.

In particular, a jury could find that McDonald's exercised control over Haynes personnel policies and practices and plaintiffs' job duties, physical working conditions, hours, and scheduling through directives and standards that extended well beyond the brand-protective and non-personnel-related standards "inherent in franchising" (although that control also counts). *Cf. Patterson*, 60 Cal.4th at 498. Evidence of control affecting *any one* of these topics could establish joint-employer status under *Martinez*'s first test. Taken together, and coupled with plaintiffs' objectively reasonable beliefs that they worked for McDonald's, this evidence (plus reasonable inferences) is more than enough to support a jury finding of McDonald's employer status.

Personnel policies and practices. Evidence that McDonald's exercised control over personnel policies and practices that affected crew members was

extensive. For example, McDonald's dictated the content of plaintiffs' orientation packet (containing policies governing pay, medical leave, non-discrimination, and harassment),[11] training videos,[12] and the content and placement of labor postings.[13] McDonald's prohibited Haynes from hiring certain people, FA §14 (barring Haynes from hiring anyone who had worked for McDonald's or any other franchisee within past six months), and screened Haynes' job applicants through McDonald's "Hiring to Win" program, ER02577:17-02578:1, ER02580:22-25; ER04097:8-22, ER04229; ER05940:7-19, ER06055; ER04898.

Plaintiffs also presented evidence that McDonald's required Haynes to use McDonald's-created human resources practices, including "people migration tactics to recruit, train and retain an adequate number of qualified personnel," ER04719; ER04598:11-23; ER04671, in order to satisfy Haynes' obligation to

[11] ER03327:20-03329:9, ER03337:16-03338:6, ER03339:20-03340:2; ER03660-03705, ER03729-03731; ER06241:14-06242:6.

[12] ER03291:11-21; ER02162:12-02165:17; ER02273:4-02274:15; ER02920 (McDonald's requires "complete and current" McDonald's computer crew training system).

[13] ER02882 (McDonald's instruction: labor posters "old and need[] to be updated"); ER06552:24-06554:22, ER06600-06601 (McDonald's HR Director: Updated notices are necessary so "we can communicate all employment-related messages in a unified fashion"); ER02534:2-4; ER03323:10-03324:2, ER03325:24-03326:22.

employ "adequate personnel so as to operate the Restaurant at its maximum capacity and efficiency." FA §12(g). These required "people migration tactics" included "Provid[ing] COMPETITIVE PAY and REGULAR RAISES," "Schedul[ing] SUFFICIENT CREW for the workload and POSITION[ING] THEM effectively," and "Giv[ing] BREAKS per policy." ER06338-06342 ("8 Proven People Practices"), ER06243:25-06244:9, ER06253:6-06256:5; ER04606:5-04607:4, ER04677-04679, ER04869 ("Engaging Our Crew"); ER03779-03811; *see also* ER06691-06749 (McDonald's detailed personnel policies). McDonald's was actively involved in instructing and evaluating Haynes on its implementation of these practices. ER09455:5-09457:13, ER09430-09447; ER04229; ER07342 (P13), ER07347 (G-S23).

Plaintiffs also presented extensive evidence that McDonald's instructed Haynes on a range of employment issues, including on minimum wage changes, split-shift requirements, and workplace policies. ER06535:16-06537:13, ER06547:19-06549:24, ER06555:9-06556:8, ER06575-06607; ER02581:4-9; ER06299:24-06301:12, ER06408-06410 ("OHSA/Labor Dept Blitz"), ER06411-06413 (FMLA leave, I-9 forms, no solicitation and social media policies), ER06414-06432 (OSHA compliance), ER06433-06435 (J-1 visas). McDonald's lawyers also provided almost a dozen trainings on "employee engagement" and labor relations, which Haynes' owners and all eight stores' managers attended.

ER06533:10-06534:24, ER06574; ER06443, ER06459-06479; ER06263:23-06271:7, ER06272:16-06274:24, ER06276:7-06277:17, ER06278:3-23, ER06348-06390; ER06257:19-06259:6, ER06290:11-23, ER06344-06347, ER06394-06397 (McDonald's legal hotline for franchisees), ER06398-06407 (instructions to use McDonald's protocols). McDonald's extensive involvement in "human resources" activities thus also supports a finding of employer status. *Castaneda*, 229 Cal.App.4th at 1021 (emphasis omitted); *compare Patterson*, 60 Cal.4th at 487 (franchisor's standards "excluded … personnel matters" and franchisor's human resources department "offered no guidance to franchisees on handling personnel issues.").

Job duties. A jury could additionally find that McDonald's exercised control over plaintiffs' job duties, the tasks they performed, and the specific speed and manner in which they were required to perform these tasks. *See Martinez*, 49 Cal.4th at 76 ("control over how services are performed" is a "principal[] test for the existence of an employment relationship"); *Castaneda*, 229 Cal.App.4th at 1021-22 (reversing summary judgment based in part on evidence that defendant "controlled the employees' job functions" by requiring use of defendant's "forms and templates in the course of doing their jobs," "provid[ing] policy and training videos" shown to new employees, and sending "consultants" to "advise departments on how to perform their duties") (emphases omitted).

McDonald's designated the specific roles and job tasks that crew members and management were required to perform, including by dictating job stations, crew positioning, and use of detailed checklists of each task that must be performed at the stations.[14] McDonald's employees directly instructed crew members and evaluated their job performance, including in the franchisee owner's absence. ER02154:2-02157:9; ER01031:8-01032:12 (McDonald's business consultant "corrects" crew "about how they need to do things"); ER03006:22-03007:5, ER03020:6-8, ER03232-03233; ER03322:16-18, ER03353:12-03354:8, ER03891. McDonald's also set precise job-task timing requirements and graded employees' compliance. For example, McDonald's monitored the time between when an order arrived in and left the kitchen, separate from its monitoring of overall customer service time. ER03733; ER05289:22-05290:12; ER05627:8-05630:17.[15]

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[14] ER05668:5-05669:2; ER02579:3-6; ER03312:1-4, ER03313:5-03314:18, ER03624-03628 (example checklist); ER08673 ¶26; ER07340, ER07348 (P7, S4: grading Haynes' use of checklists and positioning tool); *e.g.*, ER09240, ER07006-07007/ER09340-09341 (McDonald's manual states "Franchisees must adhere" to instructions in chapters that assign "responsibility" for specific tasks to "lobby crew member" and other tasks to "prep person"); ER03854 (McDonald's to Haynes: "initiator needs to stay in place"); ER04187-04190, ER04260 (McDonald's grades crew positioning).

[15] To monitor these times, McDonald's required the installation of "bump bars" throughout each store that workers had to press upon completing a task. ER03351:24-03352:9, ER03872-03875; ER05003:19-05011:20, ER05067:8-

Even under the more restrictive common-law agency test, a franchisor is liable if – like McDonald's here – it exercises control beyond what "is *necessary* to protect and maintain its trademark, trade name and goodwill." *Cislaw v. Southland Corp.*, 4 Cal.App.4th 1284, 1295 (1992) (emphasis added); *Nichols v. Arthur Murray, Inc.*, 248 Cal.App.2d 610, 614 (1967). Plaintiffs' evidence of McDonald's control over the crew members' day-to-day tasks and duties extended to the manner of their work (not just, as the court found, to the "the adoption and monitoring of customer service metrics," ER00045). *See Carrillo v. Schneider Logistics Trans-Loading & Distribution, Inc.*, 2014 WL 183956, at *8 (C.D. Cal. Jan. 14, 2014) (denying summary judgment where defendant specified "procedures that governed [plaintiffs'] daily job functions" and "conducted audits of operations"); *Hammit v. Lumber Liquidators, Inc.*, 19 F.Supp.3d 989, 1003 (S.D. Cal. 2014) (denying summary judgment based on dispute over whether defendant's "store procedures and policies controlled [plaintiff's] day-to-day work"); *Miller v. McDonald's Corp.*, 150 Or.App. 274, 281 (1997) (fact dispute based on McDonald's requirement that franchisee must "use the precise methods

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05068:5; ER05289:22-05290:12; ER07350 (McDonald's 2013 review (S33): deducting points, crew "[n]ot bumping correctly"); ER07296-07297 ¶¶50-51.

that [McDonald's] established, both in the [Franchise] Agreement and in the detailed manuals that the Agreement incorporated").

Physical working conditions. Under *Martinez*, a putative "employer's" control over working conditions includes control over "safety and … sanitary conditions," 49 Cal.4th at 54, and other details of the physical workspace. A jury could find that McDonald's exercised control over those conditions because McDonald's was the actual owner of the restaurants and owned or was the primary leaseholder of the underlying land. ER06955:8-14; ER02535:7-02536:15; ER04534:2-04535:15; ER04057:12-17, ER04104:1-7; ER08240-08241 ¶11.[16] Although the district court found that McDonald's ownership of the land and restaurants did not *independently* establish employer status, ER00047, it is a relevant factor. *See Torres-Lopez v. May*, 111 F.3d 633, 640 (9th Cir. 1997); *Carrillo*, 2014 WL 183956, at *10, 15-16.

McDonald's also dictated the precise physical layout of each restaurant and its equipment. FA §12(a)-(d); ER02706 (Lease) §4.03; ER02571:20-02572:10, ER02910-02922 (McDonald's required compliance with National Restaurant Building and Equipment Standards ("NRBES")); ER06661:2-06662:25 (failure to

[16] Although McDonald's allowed Haynes to purchase one restaurant building (which sits on leased land), Haynes paid McDonald's the equivalent of monthly rent for that property. ER02530:4-21.

comply with NRBES violates Franchise Agreement); ER04684-04686, ER04718-04724; ER06214-06219. McDonald's standards specified the details of each crew members' physical work environment – including the precise layout of the kitchen, front counter, drive-thru, and lobby, and the exact location at which each crew member must stand to work, how crew are trained, and what notices must be posted in the crew rooms. *See* ER02883-02922 (NRBES examples).

Hours and scheduling. McDonald's directly or indirectly controlled plaintiffs' work hours and assignments by (1) requiring that each restaurant be open certain minimum hours, FA §12(g); (2) setting work schedules through its software that automatically staggered crew start times, ER05145, ER05172, and that assigned individual crew members to particular shifts based on station ratings, which in turn were based on workers' completion of McDonald's-required training, ER05582 (McDonald's instructs managers: "Do *not* change a crew member's station rating until they have completed required training …."); and (3) requiring Haynes to set the start of its workday to 4:00 a.m., ER02995:12-02997:7, ER03064-03077; ER05341:6-19, ER05506. Employer status can be established by "constrain[ing]" or influencing hours, as a jury could find McDonald's did here, even without "set[ting] specific working hours down to the last minute." *Alexander*, 765 F.3d at 989-90.

Staffing. McDonald's indirectly exercised control over plaintiffs' hours and working conditions by determining restaurant staffing levels. McDonald's repeatedly instructed Haynes to use its Staffing, Scheduling & Positioning ("SSP") system and to adjust staffing levels accordingly. ER05652:23-05653:5, ER05655:21-24, ER05656:20-22, ER05679:14-05680:20; ER05242 (SSP "means staffing the restaurants with the right number of managers and crew, scheduling crew at the right time and positioning them in the right place"); ER03034-03040 (managers required to attend SSP workshop); ER05506; ER04092:12-16; ER03278:3-03279:19, ER03281:1-9, ER03396-03441. For example, in 2014, McDonald's told Haynes that staffing had to be its "#1 priority" and the way to "fix" Haynes' under-performance on McDonald's "People" metric was to increase staffing with part-time employees. ER06169, ER06205, ER05950:23-05951:17, ER05952:5-05953:14; ER06209-06213, ER06208 (during business review, "we didn't talk very much about the business except people"); ER05158 (describing McDonald's "efforts to focus on part-time workers"); ER06629:5-24.[17] These

[17] The record contains many examples of McDonald's instructing Haynes to use SSP and to meet minimum staffing levels. *E.g.*, ER07411 (2012 review); ER07339 (2013 review); ER07408 (2014 review); ER05792:21-05794:3, ER05909-05915; ER08672 ¶23; ER04626:5-15; ER04904. McDonald's also tracked franchisee compliance with these instructions. ER03191; ER03910; ER03988-03989; ER04029-04034; ER06445, ER06452; ER06481, ER06486-06492, ER06498-06499; ER04649:25-04651:18.

examples of direct and indirect control would fully support a jury finding that McDonald's was plaintiffs' joint employer.

Employees' beliefs. A finding of control could also be based on plaintiffs' reasonable beliefs that they worked for McDonald's. "Evidence that an employee believes there is 'an employer-employee relationship' is a relevant factor" under *Martinez*'s first test. *Castaneda*, 229 Cal.App.4th at 1022; *see Martinez*, 49 Cal.4th at 76-77. In *Castaneda*, the court relied on evidence that plaintiffs believed they worked for defendant Ensign, as well as paychecks marked "Ensign" and signs and logos throughout the facility and on computers with "the Ensign logo," as "additional evidence from which a trier of fact could reasonably infer that Castaneda and others who worked at Cabrillo were Ensign employees." 229 Cal.App.4th at 1023. Plaintiffs presented similar evidence here. *See* ER00049-00052.[18]

[18] Plaintiffs reasonably believed they worked for McDonald's or Haynes was McDonald's agent. ER08680-08705 (¶2 of plaintiffs' declarations). McDonald's caused those beliefs through McDonald's-logoed job applications (ER03335:15-03336:19, ER03337:16-03338:6, ER01182-01186; ER01075:24-01076:10; ER02392:3-9, ER02397:4-6, ER02425); McDonald's orientation materials (ER03327:20-03329:9; ER03660-03670; ER03691, ER03693-03694, ER03702; ER03577; ER02200; ER02429); training modules (ER03291:16-21, ER01151:3-17, ER01152:6-13; ER02141:10-14, ER02162:12-02165:17; ER02273:4-02274:15; ER06241:14-06242:6); McDonald's-logoed paychecks, paystubs, time records, and work schedules (ER03346:2-03347:14, ER03778, ER01192; ER02255; ER02379; ER08689; ER03271:6-03272:2, ER03275:2-03276:7, ER03277:13-22, ER03304:6-11, ER01175-01181, ER03384-03395, ER03561-

3. Whether Compliance with McDonald's Express Instructions and Detailed Standards Was Purely "Optional" Presents Another Set of Disputed Material Facts

The court chose not to credit the evidence cited above, based on its apparent finding that all of McDonald's directives, standards, policies, manuals, and oversight were optional and that Haynes had no enforceable obligation to comply with McDonald's directives. ER00036, ER00044-00046. The court's conclusion that McDonald's at most "exerts pressure, like the merchants in *Martinez*," without directly or indirectly controlling any terms or conditions of plaintiffs' employment, ER00047, was error.

First, the Franchise Agreements by their plain terms required Haynes to operate its restaurants "in conformity to the McDonald's System through strict adherence to McDonald's standards and policies" and to "every component" of the "McDonald's System." FA §§1(d), 4, 12. Those Agreements then defined material breach as any failure to comply with "the standards prescribed by the McDonald's System," FA §18(a), without limiting in any way the kinds of

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03569); and ubiquitous McDonald's logos in the restaurants, on products, and on crew uniforms (ER03341:20-25, ER03342:11-14, ER03694, ER03698-03700, ER03703).

"standards and policies" McDonald's may prescribe (or designating any requirements as falling outside the "McDonald's System").[19]

McDonald's own witness acknowledged that the "McDonald's System" encompassed all aspects of Haynes' "involvement with McDonald's." ER04600:2-15; ER04672; ER04555:5-17. A reasonable jury could therefore find that Haynes was contractually obligated to comply with *all* of McDonald's standards, policies, and instructions, including, *inter alia*, McDonald's National Franchising Standards ("NFS"), NRBES (*supra* 37-38), and Operations and Training Manual, all of which McDonald's reserved the unlimited right to "apply, modify or eliminate as it deems appropriate." ER04667; *see* ER04666-04672 (NFS); ER02883-02922 (NRBES); ER06683-06749 (manual excerpt); ER07005-07007/ER09234-09427 (same); ER07008-07039 (same); ER04167-04333 (exemplars of McDonald's evaluation forms); ER04334-04514/ER09685-09709 (same); ER09449-09452 (additional standards); ER04093:5-04095:7, ER04350

[19] *See also* FA §4 (McDonald's retains unilateral authority to modify all policies, including all "required operations procedures; … business practices and policies; and … other management … policies"); FA §12(a) ("Franchisee shall comply with the *entire McDonald's System*, including, *but not limited to* … [o]perat[ing] the Restaurant ... in compliance with *prescribed standards* of Quality, Service, and Cleanliness; [and] comply[ing] with *all business policies, practices, and procedures imposed by McDonald's* ….") (emphases added); FA §1(c) ("essence of this Franchise is the adherence by Franchisee to *standards and policies* of McDonald's") (emphases added).

("A restaurant that does not meet McDonald's minimum standards … may be subject to … being placed in default"); ER04557:12-18.

Second, a reasonable jury could independently find, based on evidence that McDonald's imposed enormous compliance pressures on Haynes through a combination of economic threats and incentives, that as a practical matter Haynes had little choice but to comply with McDonald's comprehensive, written workplace standards – including its National Franchising Standards, which McDonald's concedes are "much more … all encompassing" than the express standards in the Franchise Agreements. ER01659:6-11. Two of the National Franchising Standards impose minimum standards for "People," including staffing and training requirements, and "Operations," including standards for staffing, scheduling, and crew member positioning. ER04666-04672; ER04078:1-04079:3; ER07280-07288 ¶¶23, 26-35. The Standards also incorporate McDonald's NRBES, which, as discussed *supra* at 37-38, impose exacting requirements for the physical workplace. ER02887-02922; ER03561-03569; ER04528:12-14, ER04529:18-25; ER06918-06919, ER06921-06923.

McDonald's regularly conducted "Business Reviews" and engaged in other monitoring of its franchisees to ensure compliance with each of these detailed standards, ER08244 ¶20, and issued specific action-memo directives when its monitors found evidence of non-compliance. *See* ER07336-07413 (extensive

examples of directives from McDonald's to Haynes); ER08669-08675 ¶¶9-11, 15-17, 19, 35; ER07302-07307 ¶¶60-69; ER08239-08248 ¶¶8, 20-32; ER03561-03569; ER04528:12-14, ER04529:18-25; ER04078:1-04079:3, ER04093:5-04095:7.

A franchisee's failure to comply with McDonald's National Franchising Standards made that franchisee ineligible for "growth and rewrite" – the critical ability to continue or expand its business by acquiring new locations (growth) or obtaining a renewal of the Franchise Agreement for an existing location (rewrite). A jury could reasonably conclude based on the evidence, including evidence that McDonald's denied growth opportunities to Haynes and other franchisees based on failure to meet the Standards, that McDonald's leveraged this threat to enforce compliance. *See* ER08669-08672 ¶¶10-11, 15-17, 19; ER08239-08248 ¶¶8, 26-32; ER07282-07307 ¶¶26-35, 60-69; ER04629:24-04630:6; ER04665; ER03255:8-12; ER02596:4-18; ER09450 (granting preference to franchisees that "Put[] the System first"); ER04557:12-18; ER06660:16-21; *cf.* ER02604-02613 (Haynes could not close underperforming store without McDonald's approval); ER02566:5-17, ER02568:17-25 (Bobby Haynes, Sr., regarding McDonald's finding that Haynes was non-compliant: "See how fast you can fall out of grace?").

As former California franchisee Kathryn Slater-Carter explained, "each instruction provided by McDonald's to its franchisees regarding the operation of

their restaurants … carries with it the threat that non-compliance will result in an adverse decision regarding eligibility for growth and rewrite, which in turn may lead to termination of the franchise, significant devaluation of the franchise, or both." ER08669 ¶9. Slater-Carter explained how pervasively McDonald's controls every aspect of its franchisees' operations, and how "McDonald's uses its regular operations reviews and Business Reviews, as well as visits and communications from McDonald's staff, to ensure that franchisees understand that complying with and implementing the McDonald's System is necessary if franchisees want to remain eligible for growth and rewrite and to be successful." ER08675 ¶35; ER08671-08672 ¶19 (describing need to comply with instructions and action items identified in Business Reviews); ER06623:21-06624:11.

The court relied on self-serving deposition testimony from the Haynes family in finding that McDonald's business consultants only provide "advice" and "do not have any authority in the Haynes business." ER00045 (brackets and quotation marks omitted). But a jury could find otherwise based on the unambiguous requirements of the Franchise Agreements and McDonald's Standards, Ms. Slater-Carter's testimony, and the extensive evidence of the parties' actual practices – including written documentation of Haynes' own understanding

that "*we need to be compliant* with [McDonald's] standard." ER03211 (emphasis added); *supra* at 19-45; *infra* at 46-50.[20]

4. Whether the Franchisee's Use of McDonald's Technology for Scheduling, Timekeeping, and Crew Pay Was "Optional" Presents a Dispute of Material Fact

The court similarly brushed away evidence that McDonald's ISP and e*Restaurant systems were a cause of many alleged violations and an instrument of McDonald's control over the workplace, by finding that "McDonald's does not require use of these programs for scheduling, timekeeping, or wage and hour functions." ER00041. Whether McDonald's required use of those programs, contractually or through focused economic pressure, is another disputed material fact.

[20] Haynes' statement that it needed to comply with McDonald's standards, made in an e-mail to all store managers, also reflects how its deposition testimony was skewed to remain in McDonald's good graces. Although Haynes' witnesses claimed the franchisee did *not* implement McDonald's "Restaurant Department Manager" ("RDM") standard, McDonald's documents show that Haynes not only changed its internal management structure and submitted its managers to McDonald's training to comply (*e.g.*, ER07377 (BE2), ER07410 (2014 review: Haynes "committed to using the [RDM trainings] to help improve RDM utilization throughout the organization"), ER07412 (restaurant "is currently participating in RDM"); ER03300:19-03301:6, ER03310:22-03311:16, ER0358-03623; ER07415; ER04603:8-21, ER04604:16-04605:4, ER04673-04676; ER04107:16-04110:18), but also that Bobby Haynes, Jr. told store managers that RDM was "the new McDonald's standard," and "we need to be compliant with that standard." ER03211.

First, plaintiffs presented evidence that Haynes had *no* available alternative software for scheduling or timekeeping, and that Haynes needed to use McDonald's software to satisfy McDonald's strict grading and evaluation requirements. ER02590:19-02591:7; ER03266:14-22; ER02975:2-9; ER08674 ¶30; *see* ER07290-07293 ¶¶39, 40, 43; ER04230 (McDonald's grades on use of "scheduling tools" and "positioning guides," with threat of ineligibility for growth and rewrite resulting from low grade). McDonald's ISP system is a comprehensive hardware and software suite with built-in applications for timekeeping, scheduling, payroll reports, discipline reports, and human resources records. ER05002:7-20, ER05014:9-13, ER05015:7-05016:18, ER05018:18-05019:20, ER05023:23-05030:2; ER05280:12-05281:1; ER02973:22-02974:7. When Haynes purchased its stores – including three that McDonald's had itself been operating, ER02531:11-02533:9 – the full programmed ISP was pre-installed. ER02975:12-19, ER02990:10-18; ER03261:5-03262:12; ER05020:11-05022:13. McDonald's knew that, just as it knew that Haynes could not reject any of McDonald's automatic updates to the ISP and e*Restaurant software. ER05295:1-14, ER05304:4-15, ER05305:2-05307:3, ER05324:14-05325:12, ER05335:24-05337:5, ER05445; ER02974:15-18, ER03029-03033. When McDonald's rolled out e*Restaurant as a replacement for the ISP's scheduling function beginning in 2015, it warned Haynes that without e*Restaurant Haynes would have "no

software for scheduling" at all. ER05719; ER05689:23-05694:12; ER05272:4-05274:1, ER05296:3-6, ER05316:15-05317:1; ER09468 ("Must do – ISP is Obsolete"). Upcoming e*Restaurant modules will also require Haynes to use e*Restaurant's scheduling function. ER05276:11-05277:7, ER05296:3-6, ER05308:12-05309:1. A jury could find that the lack of alternatives meant that use of McDonald's systems was "required" in practice.

Second, even if alternatives existed, McDonald's structured its financial relationship with Haynes to make use of other software economically infeasible. For example, McDonald's required Haynes to pay ongoing fees for McDonald's *entire* software suite (including the timekeeping and scheduling software) regardless of which functions Haynes used (ER07290-07291 ¶¶38-39; ER05002:7-21, ER05014:9-13, ER05032:4-17; ER05422 (e*Restaurant); ER05434-05435 (list of flat fees)), and provided financial incentives for Haynes to implement ISP and e*Restaurant changes sooner than required. ER03262:19-03264:5, ER03363-03370; ER05317:17-05321:14; ER05040:2-05041:25; ER07288-07291 ¶¶36-37, 39.

Third, a jury could reasonably conclude that McDonald's compelled Haynes to use McDonald's timekeeping and scheduling technology because McDonald's integrated that software into its franchisee audits. All of McDonald's analyses and metrics – in its agreements, manuals, graded visits, and policies – depend on how

"labor" is tracked and crew positioned. For example, the Franchise Agreements require Haynes to provide "adequate personnel so as to operate the Restaurant at its maximum capacity and efficiency," FA §12(g), and McDonald's graded Haynes on whether its staffing met McDonald's definition of adequate (determined pursuant to a McDonald's crew calculator), and whether staff were positioned according to McDonald's directives.[21] McDonald's also repeatedly instructed Haynes during graded visits and Business Reviews to use its scheduling technology. *See, e.g.*, ER07347-07348, ER07366-07367, ER07375, ER07387-07388, ER07400-07401. McDonald's scheduling and positioning software, and the staffing metrics evaluated by McDonald's, work *only* if the franchisee is using the ISP for timekeeping and scheduling. By evaluating Haynes on its use of this software, McDonald's necessarily expected and knew that Haynes was using its technologies.[22] Indeed, McDonald's could not have obtained the data it needed to

[21] *Supra* n.17 (McDonald's grading Haynes on crew size); ER05792:21-05794:3, ER05913-05915 (crew calculator); ER07412 (2012 review directing Haynes to use SSP and McDonald's Dynamic Shift Positioning Guide ("DSPG")), ER07337 (2013 review stated: "Teach the Man[a]gers to adjust the DSPG to reflect the correct crew size. Crew should be scheduled in [the] DSPG"), ER07348 (2013 review: marking Haynes down for not using DSPG); ER07377 (same), ER07388 (same); ER02948.

[22] McDonald's also trained Haynes managers on its various systems, including scheduling technology, crew positioning, and peak-hour staffing, *supra* n.8, training that would be pointless if Haynes did not use McDonald's ISP and scheduling system. *See, e.g.*, ER04177; ER03463-03465; ER07111-07157,

evaluate whether Haynes' stores were staffed efficiently and in accordance with McDonald's standards, *unless* Haynes used McDonald's technology.[23] A jury could reasonably find that Haynes would have failed McDonald's reviews and suffered adverse consequences if it had not used McDonald's systems. *See* ER07291 ¶40. Whether use of McDonald's technology was "optional" is therefore very much disputed.

C. A Jury Could Conclude That McDonald's "Suffered or Permitted" the Wage-and-Hour Violations at Issue

A jury could separately find joint-employer liability under *Martinez*'s second "suffer or permit" test. An entity is liable as a joint "employer" if it "*permit*[s] by acquiescence, []or *suffer*[s] by a failure to hinder" the alleged violations. *Martinez*, 49 Cal.4th at 69 (emphases in original; quotation marks omitted). The basis for liability under the suffer-or-permit test is "*failure to perform the duty of seeing to it that the prohibited condition does not exist*." *Id.* (emphasis in original; quotation marks omitted). Whether McDonald's had the

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ER07192-07232, ER07170; ER07415; ER03294:16-03295:14, ER03297:2-18, ER03303:10-19, ER03466-03543, ER03550-03560; ER05283:17-05285:12.

[23] *See* ER06963:14-06964:11; ER03234-03236, ER09710-09849 (examples of data McDonald's pulls from Haynes' ISP).

power to prevent or remediate any or all of the violations here presents disputed material facts.

The court mistakenly believed that *Martinez*'s suffer-or-permit test required proof that McDonald's had the "power to prevent [plaintiffs] from working" *at all*, rather than from working under unlawful conditions that McDonald's knew about and could prevent. ER00048. There is considerable evidence that McDonald's *did* retain contractual authority to determine the composition of Haynes' workforce. *Infra* 55-57. But the focus of the suffer-or-permit inquiry is not whether a party could stop an employee from *working*, but whether it could "prevent the *unlawful condition*" or "perform the duty of seeing to it that the *prohibited condition* does not exist." *Martinez*, 49 Cal.4th at 69 (adopting "historical meaning" of "suffer or permit") (emphases altered; quotation marks omitted).

For example, public agencies involved in the In-Home Supportive Services program can be "joint employers" under *Martinez* even though "they do not directly hire, fire or supervise providers" – and thus do not have the power to prevent providers from *working* – because "through their 'power of the purse' and quality control authority, [they] *have the ability to prevent recipients and providers from abusing IHSS authorizations* both as to the type of services performed and the hours worked." *Guerrero*, 213 Cal.App.4th at 950 (emphasis added); *see also Torres v. Air To Ground Services, Inc.*, 2014 WL 12564098, at *5-6 (C.D. Cal.

Oct. 2, 2014) (liability under suffer-or-permit test presented jury issue, despite defendant having no direct control over hiring, firing, and wages, because defendant could have taken action to correct subcontractor's failure to comply with wage law).

This approach is consistent with the historical origins of the suffer-or-permit test discussed in *Martinez*. In extending coverage of child labor laws to those who suffered or permitted work to be performed by an underage worker, the goal was to expand those laws' coverage beyond the subcontractors who directly hired, fired, or scheduled that worker, to "reach[] irregular working arrangements" that might otherwise be "disavow[ed] with impunity." *Martinez*, 49 Cal.4th at 58; *see, e.g.*, *Daly v. Swift & Co.*, 90 Mont. 52 (1931).

In an off-the-clock or child labor case, the work *itself* is unlawful. The basis of liability is thus "the defendant's knowledge of and failure to prevent the work from occurring." *Martinez*, 49 Cal.4th at 70 (emphasis omitted). Overtime, meal-and-rest-break, and expense reimbursement claims, however, involve the conditions under which work is performed, not the fact of its performance; the basis of liability is thus the failure to prevent those conditions.

The suffer-or-permit test would not serve its intended purpose if it captured only entities with the power to prevent any work at all (through hiring or firing), when the violation the law seeks to prevent involves workplace conditions. The

first *Martinez* test already covers entities with the power to hire or fire. *See* 49 Cal.4th at 76. The court's narrow construction of the suffer-or-permit test would thus make the suffer-or-permit test superfluous. *See id.* at 65 (rejecting interpretation of "employer" that would render Wage Order's definitions "effectively meaningless"); *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (suffer-or-permit standard of FLSA is "broadest definition [of 'employee']" in federal law).

Here, a jury could conclude that McDonald's "permitted" the alleged violations because it knew or should have known about them and created the conditions giving rise to them, *supra* 19-31,[24] and that McDonald's "suffered" those violations by failing to limit, prevent, or remedy them, despite having power to do so.

In addition to McDonald's power to modify its own practices and technology systems to avoid causing the violations in the first place, *supra* 19-31, McDonald's Franchise Agreements gave McDonald's unilateral authority to

[24] For example, Haynes received "Labor Violations" reports *from McDonald's* that identified shifts on which crew members should have received meal and rest breaks but did not. *E.g.*, ER03235-03236, ER09805-09806; ER06960:25. Further, only McDonald's – not Haynes – understood how the ISP improperly calculated overtime and how the break settings worked. *Supra* 20-23, 26-28.

terminate Haynes' franchise if Haynes failed to "comply with all federal, state, and local laws." FA §§12(k), 18(a). A jury could find that McDonald's could have used this authority to prevent or remedy every violation at issue, even if McDonald's had not been instrumental in creating them in the first place. *See Torres*, 2014 WL 12564098, at *6 (denying FedEx's motion for summary judgment because FedEx's contract "obligate[d] the [subcontractor] to comply with the [Living Wage Ordinance]," subcontractor told FedEx it did not believe the Ordinance applied, and thus "a jury could find that … FedEx should have known that an unlawful working condition existed and failed to prevent it.").

D. A Jury Could Conclude That McDonald's Is a Joint Employer Under *Martinez*'s Third, "Common Law" Test Because the Franchise Agreements Reserved to McDonald's the Right to Control Employment Matters

A jury could independently find McDonald's to be a joint employer under *Martinez*'s third, common-law test. 49 Cal.4th at 64. Under that test, what matters is not how much control McDonald's *exercises*, but how much control it "retains the *right* to exercise" over plaintiffs' work. *Ayala*, 59 Cal.4th at 533 (emphasis in original); *accord Alexander*, 765 F.3d at 988; *Borello*, 48 Cal.3d at 350; Restatement (Second) of Agency §220(1) (servant is one whose performance of services is "subject to" another's "control or right to control"); *id.* comment d ("right to control needed to establish the relation of master and servant [at common

law] may be very attenuated"). That retained right of control can by established either by the parties' course of conduct or by the contracts that govern their relationship – here, principally, the Franchise Agreements.

A "typical" franchise agreement grants franchisees significant contractual autotomy and independence. *Patterson*, 60 Cal.4th at 490. Not these agreements. As discussed *supra* at 41-42, McDonald's one-sided agreements required Haynes to operate its restaurants "in conformity to the McDonald's System through strict adherence to McDonald's standards and policies" (which McDonald's reserved the right to alter at any time), placing *no limit* on what "standards and policies" McDonald's could require. FA §§1(d), 18(a). The Agreements thus expressly reserved for McDonald's an expansive right to control personnel-related matters at franchised restaurants. The court's conclusion that "McDonalds did not directly or indirectly retain the right to control employment or personnel matters at the Haynes restaurants," ER00036, was not only an impermissible resolution of disputed facts regarding the parties' practices, but an erroneous interpretation of the relevant contracts. *See In re Bennett*, 298 F.3d 1059, 1064 (9th Cir. 2002) ("Under California law, the interpretation of a contract is a question of law which the court reviews *de novo*.").

It makes no difference that McDonald's Franchise Agreements purport to disclaim joint-employer liability. ER00036 (quoting FA §16). "California law is

clear that '[t]he label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.'" *Alexander*, 765 F.3d at 989 (quoting *Borello*, 48 Cal.3d at 349); *accord Castaneda*, 229 Cal.App.4th at 1021. "What matters is what the contract, in actual effect, *allows or requires*." *Alexander*, 765 F.3d at 989 (emphasis added). The contracts here reserved McDonald's broad rights to adopt and enforce whatever policies and standards it deemed appropriate.

The California Court of Appeal relied on materially indistinguishable facts in *JTH Tax* to affirm a judgment finding a common-law agency relationship, concluding that because the franchisor "reserved the right to unilaterally modify its operations manual at any time, while breaches of the franchise agreement or the operations manual could result in a franchisee's termination," the franchisor thereby reserved a "right of essentially complete control over franchisee operations" that "exceeded what [the franchisor] reasonably needed to protect its trademark and goodwill." 212 Cal.App.4th at 1245 (brackets and quotation marks omitted). The same reasoning requires reversal here. *See also Miller v. D.F. Zee's, Inc.*, 31 F.Supp.2d 792, 806-07 (D. Or. 1998) (fact that "franchise agreement requires adherence to comprehensive, detailed manuals for the operation of the restaurant" supported joint-employer status under right-of-control test).

McDonald's Agreements are materially different from the "typical" franchise agreements described in *Patterson*, which contractually "*allocate local personnel issues* almost exclusively to the franchisee." 60 Cal.4th at 490, 497 (emphasis added). The *Patterson* agreement expressly stated that the franchis*ee* was "'solely responsible' for 'recruiting [and] hiring' employees to operate its store," disclaimed "any right or duty [for the franchisor] to 'implement a training program for [franchisee's] employees,' or to 'instruct [them] about matters of safety and security in the Store or delivery service area,'" made the franchisee "'solely responsible' for implementing programs to train his employees," granted the franchisee control over "'scheduling for work, supervising[,] and paying' his employees," expressly disclaimed "any right or duty" of the franchisor "to 'operate the Store' or to 'direct [franchisee's] employees' in their jobs," and stated that the franchisor had "no rights, duties, or responsibilities" as to the employment of the franchisee's employees. 60 Cal.4th at 481, 483-84. The merchant-farmer contract in *Martinez* similarly provided that the *farmer* "would be 'solely responsible for the selection, hiring, firing, supervision, assignment, direction, setting of wages, hours, and working conditions' of his employees, among other things." 49 Cal.4th at 77.

Even in vicarious liability cases applying the narrowest possible version of the common-law test for purposes of determining *respondeat superior* strict

liability, courts have denied summary judgment to franchisors retaining contractual rights of control similar to those reserved by McDonald's. *See, e.g., Estate of Anderson v. Denny's Inc.*, 987 F.Supp.2d 1113, 1151-52, 1159 (D.N.M. 2013) (18 features of franchise agreement, all present here, precluded summary judgment); *Butler v. McDonald's Corp.*, 110 F.Supp.2d 62, 67 (D.R.I. 2000) (McDonald's "franchise agreement … 'required [franchisee] to use the precise methods [McDonald's] established [and McDonald's] enforced the use of those methods by regularly sending inspectors and by its retained power to cancel the [franchise agreement]'") (quoting *Miller*, 150 Or.App. at 281); *see also JTH Tax*, 212 Cal.App.4th at 1245-47; *Kuchta v. Allied Builders Corp.*, 21 Cal.App.3d 541, 547 (1971) (franchise agreement gave franchisor right to control standards of operation, inspect for compliance, and train franchisee's salesmen). The district court erred in not reaching the same result under *Martinez*'s third test.

E. The District Court Erred in Concluding That an Entity Cannot Be Liable for Its Ostensible Agent's Labor Code Violations

In its first summary judgment order, the court found disputed material facts regarding whether McDonald's is "a joint employer by virtue of an ostensible agency relationship." ER00049-00052.[25] Later, the court held that ostensible

[25] *Supra* n.18 (evidence that McDonald's caused plaintiffs reasonably to believe Haynes was McDonald's agent).

agency liability can *never* be established under the Labor Code, notwithstanding the express language of the applicable Wage Order (which holds entities liable as "employers" for actions taken "through an agent"). ER00004-00010.

Under California law, "agency is either actual or ostensible." Civ. Code §2298; *see Associated Creditors' Agency v. Davis*, 13 Cal.3d 374, 399 (1975). Ostensible agency exists when "a principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Civ. Code §2300.[26] Under California law, "[a]n agent represents his principal for all purposes within the scope of his actual *or ostensible* authority, and *all* the rights and *liabilities* which would accrue to the agent from transactions within such limit … accrue to the principal." Civ. Code §2330 (emphases added).[27]

The rules of principal-agent liability codified in §2330 and related Civil Code provisions "sweep across the civil law," such that "whatever the context, the

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[26] *See* Civ. Code §2317; *Ermoian v. Desert Hosp.*, 152 Cal.App.4th 475, 502 (2007) ("[I]f a principal by his acts has led others to believe that he has conferred authority upon an agent, he cannot be heard to assert, as against third parties who have relied thereon in good faith, that he did not intend to confer such power.") (quotation marks omitted).

[27] The statutory provisions codifying common law liability for the acts of ostensible agents have remained unmodified since their enactment in 1872. *See, e.g.*, Civ. Code §2330.

rule remains that an agent acting within his ostensible authority binds his principal." *Pasadena Medi-Ctr.*, 9 Cal.3d at 781. There is no justification for concluding, as the court did, that these rules apply with less force to employer liability under the Wage Orders and Labor Code, particularly where an employer is defined as any person or entity "who directly or indirectly, *or through an agent* or any other person, employs or exercises control over the wages, hours, or working conditions of any person." Wage Order No. 5-2001, §2(H) (emphasis added); *Martinez*, 49 Cal.4th at 60.[28]

California Wage Orders must be construed and applied in the manner that "best gives effect to the purpose of the Legislature and the IWC" – "the protection of employees." *Augustus v. ABM Sec. Servs., Inc.*, 2 Cal.5th 257, 262 (2016). Interpreting the language of the Wage Orders and the Civil Code to hold principals liable for the actions of their ostensible agents advances the Wage Orders' purpose to safeguard workers by "prevent[ing] evasion and subterfuge" of the Wage

[28] The court also concluded that *Martinez*'s emphasis on employer "control" precludes ostensible agency liability. ER00007-00008. But nothing in the Wage Order's definition abrogates long-standing agency principles; rather, the definition acknowledges that control may be exercised "through an agent" and that liability attaches to any entity that "employ[s]" a worker, including "through an agent or any other person." Wage Order No. 5-2001, §2(H); *see People v. Ceja*, 49 Cal.4th 1, 10 (2010) (requiring "clear[] and unequivocal[] disclos[ure] [of] an intention to depart from, alter, or abrogate the common law rule").

Orders' protections. *Martinez*, 49 Cal.4th at 61-62. Absent such potential liability, a large company could, among other things, induce unsuspecting workers to work at the company's restaurants, factories, or other locations for its benefit; deceive those workers into believing they were employed by that large company and that the smaller entity is the larger company's agent; and then disavow any liability for workplace violations by disclaiming the existence of any *actual* agency relationship – even though the principal company's acts were the cause of the workers' misunderstanding, and even where (as here) the principal has the ability to remedy many of the workplace violations. *Supra* 53-54.[29]

The California Supreme Court recognized ostensible agency as a common law basis for liability in the employment context more than a century ago. *See Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417, 421 (1897). Nothing in the language of the Wage Order suggests any intent to exclude such relationships from liability. *See Baker v. Baker*, 13 Cal. 87, 95 (1859) ("general rule … in all doubtful matters" is statutes must "receive such a construction as may be agreeable to the rules of the common law").

[29] Courts have recognized that ostensible (or apparent) agency provides a valid basis for liability under statutory employment laws. *See*, *e.g.*, *Ochoa v. McDonald's Corp.*, 133 F.Supp.3d 1228, 1239-40 (N.D. Cal. 2015); *Jackson v. W. Virginia Univ. Hospitals, Inc.*, 2011 WL 1485991, at *9 (N.D. W.Va. Apr. 19, 2011); *Miller*, 31 F.Supp.2d at 807-08.

II. The District Court Erred in Concluding That Plaintiffs' Negligence Claim Was Barred by the "New Right-Exclusive Remedy" Doctrine

In addition to plaintiffs' joint-employer-based claims, plaintiffs asserted an independent claim of negligence against McDonald's. ER09147-09168 ¶¶133-39, 211-15. Plaintiffs alleged that McDonald's breached its duty of care to crew members at the Haynes restaurants by failing to adequately train and supervise Haynes, and by causing or failing to prevent the injuries suffered by plaintiffs. The court erroneously ruled that even if plaintiffs could prove their underlying allegations, their negligence theory was precluded by California's "new right-exclusive remedy" doctrine, ER00052-00053 – a doctrine that prevents litigants from seeking non-statutory remedies for statutory violations. *See, e.g.*, *Carrillo v. Schneider Logistics, Inc.*, CV-11-8557 CAS (DTBx) (C.D. Cal. May 13, 2013) at 11-12 (ER06943-06944); *Brewer v. Premier Golf Properties*, 168 Cal.App.4th 1243, 1252 (2008) (doctrine precludes punitive damages against employer for Labor Code violations that have express statutory remedies).

Plaintiffs' negligence claim did not "duplicate the theories of liability they assert under the California Labor Code." ER00053 (brackets omitted). Rather, plaintiffs alleged that even if McDonald's were *not* their employer, it owed them a common-law duty of care that it breached, causing economic and other harms. ER09147-09168 ¶¶133-39, 211-15; *see Goonewardene v. ADP, LLC*, 5

Cal.App.5th 154, 179 (2016), *pet. for rev. granted*, 388 P.3d 818 (Feb. 15, 2017) (plaintiff could pursue negligence claim "predicated on allegations that ADP, as a payroll services provider, breached a duty of care owed to appellant, resulting in the underpayment of her compensation"); *Carrillo*, May 13, 2013 Order at 13-14 (ER06945-06946) (contractor had duty of care to subcontractor's employees).

Even if the "new right-exclusive remedy" doctrine were applicable, it still would not preclude plaintiffs' claims, because "where a statutory remedy is provided for a preexisting common law right, the newer remedy is generally considered to be cumulative, and the older remedy may be pursued at the plaintiff's election." *Rojo v. Kliger*, 52 Cal.3d 65, 79 (1990). The Labor Code provisions at issue do not create exclusive remedies, because "employees were entitled to recover unpaid wages and overtime compensation at common law." *Sims v. AT&T Mobility Servs. LLC*, 955 F.Supp.2d 1110, 1117 (E.D. Cal. 2013) (discussing cases); *see Cortez v. Purolator Air Filtration Prod. Co.*, 23 Cal.4th 163, 177 (2000) (recognizing restitutionary claim for unpaid wages); *Lu v. Hawaiian Gardens Casino, Inc.*, 50 Cal.4th 592, 603–04 (2010) (common-law claim for conversion may be available to employee seeking to recover tips from employer).[30]

[30] Although the court relied on *Brewer*'s conclusion that Labor Code claims constituted new rights, ER00053, *Brewer* did not consider the history of common-

III. The District Court Erred in Denying Class Certification and Striking Plaintiffs' Representative PAGA Claims as "Unmanageable"

A. The District Court's Sole Justification for Denying Class Certification and Striking Plaintiffs' Representative PAGA Claims Was Erroneous

After the court granted McDonald's summary judgment on all joint-employer theories except ostensible agency, it denied class certification and struck plaintiffs' representative PAGA claims on the ground that ostensible agency is not "amenable to classwide treatment" and that trying ostensible-agency-based PAGA claims would be "unmanageable." ER00030, ER00044. Because the joint-employer rulings in the court's first summary judgment order were erroneous, *supra* 14-58, its order denying class certification and striking PAGA claims (which depended on the non-viability of plaintiffs' other joint-employer theories) must also be reversed. *See Menotti*, 409 F.3d at 1119-20, 1148 & n.67 (reversing class certification denial premised on erroneous summary judgment order); *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1221 (9th Cir. 2015); *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1032 (9th Cir. 2012).

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law actions to recover unpaid wages because the parties "agreed that the Labor Code created new rights." *Sims*, 955 F.Supp.2d at 1117; *see also Helm v. Alderwoods Grp., Inc.*, 696 F.Supp.2d 1057, 1076 (N.D. Cal. 2009) (relying on *Brewer*); *Santiago v. Amdocs, Inc.*, 2011 WL 1303395, at *4 (N.D. Cal. Apr. 2, 2011) (same).

Whatever individualized inquiries might arise under plaintiffs' ostensible-agency theory, none are implicated by plaintiffs' other theories. Whether McDonald's is liable as a joint employer under *Martinez* (other than as an ostensible principal), and whether McDonald's negligently breached a duty to crew members causing them harm, can and should be resolved once for the entire class. *See Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016) ("common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof") (quotation marks omitted).

McDonald's conceded below that plaintiffs satisfied the numerosity, typicality, commonality, and adequacy requirements of Rule 23(a) for most claims, and that the underlying merits of plaintiffs' two overtime claims, miscalculated wage claim, and derivative claims turned on classwide inquiries. *See* Dkt. 206/231-1; ER00912-00917 ¶¶16-18, 21-29; ER01322-01327 ¶¶9-10, 12, 14; ER03060-03063; ER01446:14-16, ER03262:13-15, ER03265:12-03266:13; ER05044:9-05050:21, ER05053:7-21, ER05063:15-05064:18; ER04950:13-04952:8, ER04959:1-14, ER04982/ER09622); *see also Ochoa v. McDonald's Corp.*, 2016 WL 3648550, at *4 (N.D. Cal. July 7, 2016) (certifying identical claims).

Plaintiffs' remaining claims are also subject to classwide resolution. McDonald's did not dispute that common questions predominated on the claim that crew members were prohibited from leaving the restaurant during overnight meal periods. *Supra* 25-26. Plaintiffs' claims challenging defendants' policies of *never* paying missed break premium wages and *never* paying for the time and expense of uniform maintenance are clearly classwide as well. *See Safeway*, 238 Cal.App.4th at 1154 (claim for failure to pay premiums); *Ochoa*, 2016 WL 3648550, at *7-8 (uniform maintenance claims); ER00917-00920 ¶¶33, 42; ER01323-01325 ¶11; ER01164:11-01165:10, ER01188; ER01049:4-6; ER00962:19-00973:23; ER01029:17-21, ER01030:2-3; ER00996:21-01000:14; ER01248-01313. Plaintiffs also demonstrated that their meal-and-rest-break claims turned on classwide policies that placed responsibility for sending employees on breaks with managers, and that classwide records show when each break was taken or missed. ER03270:16-03272:2, ER03274:2-12, ER03276:16-03277:3, ER03348:3-25; ER00955:6-16, ER00956:6-8, ER00960:22-00961:5, ER00974:2-16; ER00995:2-23; ER01048:16-18; ER01248-01313; ER00910-00922 ¶¶7-15, 30-51. *See Alberts v. Aurora Behavioral Health Care*, 241 Cal.App.4th 388, 409-14 (2015) (policy prohibiting employees from taking rest and meal breaks unless relieved supported certification).

Because the court did not suggest that any individualized issues *other* than the ostensible-agency inquiry would preclude class certification or make the PAGA claims "unmanageable," the order denying certification and striking representative PAGA claims should be reversed.

B. There Is No Legal Basis for Striking Representative PAGA Claims as "Unmanageable"

The court independently erred in striking plaintiffs' representative PAGA claims as "unmanageable." Plaintiffs' PAGA claims are not "redundant, immaterial, impertinent, or scandalous," Fed. R. Civ. P. 12(f), and the court had no authority to strike them under Rule 12(f). *See Petrie v. Elec. Game Card, Inc.*, 761 F.3d 959, 967 (9th Cir. 2014); *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010); *Yamamoto v. Omiya*, 564 F.2d 1319, 1327 (9th Cir. 1977) ("Rule 12(f) is neither an authorized nor a proper way to procure the dismissal of all or a part of a complaint.") (quotation marks omitted). Nor did the court have inherent power to strike the representative PAGA claims. *See Atchison, Topeka & Santa Fe Ry. Co. v. Hercules Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998) (court's inherent power may not "nullify the procedural choices reserved to parties under the federal rules"); *Thompson v. Housing Auth.*, 782 F.2d 829, 831 (9th Cir. 1986) ("only ... extreme circumstances" warrant sanction of dismissal).

In striking plaintiffs' PAGA claims as "unmanageable," the court effectively applied the standard governing Rule 23 class actions. *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1127-28 (9th Cir. 2017) (addressing "manageability criterion" of Rule 23(b)(3)). Rule 23, however, does not apply to PAGA claims. *See Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 379 (2014) (PAGA action "is a representative action on behalf of the state"); *Arias v. Superior Court*, 46 Cal.4th 969, 981-87 (2009) (PAGA plaintiffs "need not satisfy class action requirements") (emphasis omitted); *see also Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1122-23 (9th Cir. 2014) (PAGA action is "fundamentally different than a class action").

There is no basis for striking properly pleaded PAGA claims as "unmanageable." "[T]he fact that proving [plaintiffs' PAGA] claim[s] may be difficult or even somewhat burdensome for [the parties] does not mean that [they] cannot bring [them] at all." *Zackaria v. Wal-Mart Stores, Inc.*, 142 F.Supp.3d 949, 959 (2015); *see Echavez v. Abercrombie & Fitch Co.*, 2013 WL 7162011, at *11 (C.D. Cal. Aug. 13, 2013). Even if plaintiffs were limited to pursuing ostensible-agency-based PAGA claims against McDonald's on behalf of identified aggrieved employees (*see* ER01248-01289 (declarations)), the court erred in denying plaintiffs that opportunity.

CONCLUSION

For the reasons discussed, the district court's orders granting summary judgment for McDonald's, denying class certification, and striking plaintiffs' representative PAGA claims should be reversed.

Respectfully submitted,

Dated: October 2, 2017

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Signature of Attorney or Unrepresented Litigant [s/Michael Rubin] Date [10/2/2017]

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Dated: October 2, 2017

/s/Michael Rubin
Michael Rubin

9th Circuit Case Number(s) 17-15673

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