S275431

CASE NO. 21-16201

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE HUERTA,

Plaintiff and Appellant,

v.

CSI ELECTRICAL CONTRACTORS, INC.,

Defendant and Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
CASE NO. 5:18-CV-06761-BLF
BETH LABSON FREEMAN, UNITED STATES DISTRICT COURT JUDGE

PLAINTIFF-APPELLANT GEORGE HUERTA'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

Pursuant to Circuit Rule 28-2.2, Plaintiff and Appellant George Huerta ("Huerta") submits the following Statement of Jurisdiction.

A. The district court had subject matter jurisdiction.

The district court had original jurisdiction under the Class Action Fairness Act and 28 U.S.C. Section 1332. The district court also had supplemental jurisdiction over the state law claims because they are related to the claims in the action within such original jurisdiction and form part of the same case or controversy under Article III of the United States Constitution.

B. The Orders being appealed are appealable.

Huerta's First Amended Complaint alleged the following claims against CSI: (1) failure to pay compensation due, (2) failure to furnish itemized wage statements, (3) failure to timely pay all wages owing upon termination, (4) failure to indemnify for business expenses, (5) violation of California Business & Professions Code section 17203, and (6) recovery of penalties under the California Private Attorneys General Act (the "PAGA"). (6-ER-1285-1303.)

CSI filed a motion for partial summary judgment on March 4, 2021, which the district court granted on April 28, 2021. (1-ER-10-30.) CSI filed a second motion for partial summary judgment on June 8, 2021, which the district court granted on June 25, 2021. (1-ER-5-9.)

Because Huerta wanted to appeal from the partial summary judgment orders, Huerta and CSI stipulated for entry of judgment in Huerta's favor on the remaining individual claim. The district court entered judgment pursuant to the parties' stipulation on July 14, 2021. (1-ER-2-4.)

Huerta is appealing from the Order granting CSI's Motion for Partial Summary Judgment entered on April 28, 2021 (1-ER-10-30) and from the Order granting CSI's Second Motion for Partial Summary Judgment entered on June 25, 2021. (1-ER-5-9; 6-ER-1304.)

The Judgment is a "final decision" under 28 U.S.C.A. Section 1291. The orders granting partial summary judgment to CSI are also reviewable on appeal. "[A] party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." (*Digital Equipment Corp. v. Desktop Direct, Inc.* (1994) 511 U.S. 863, 868 [114 S.Ct. 1992, 1996, 128 L.Ed.2d 842].)

C. This appeal is timely.

The Judgment was filed on July 14, 2021. (1-ER-2-4.) Huerta filed a Notice of Appeal on July 19, 2021. (6-ER-1304-1306.) The appeal is therefore timely. (Federal Rules of Appellate Procedure Rule 4(a)(1).)

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the district court erred in ruling as a matter of law that the time spent by class members waiting for and undergoing the mandatory exit security process did not constitute "hours worked" under the "control" prong of the "hours worked" definition of Wage Order 16.

B. Whether the district court erred in ruling as a matter of law that the time spent by class members waiting for and undergoing the mandatory exit security process did not constitute "hours worked" under the "suffer or permit" prong of the "hours worked" definition of Wage Order 16.

C. Whether the district court erred in ruling as a matter of law that the Security Gate was not the first location where the class members' presence was required for purposes of Paragraph 5A of Wage Order 16.

D. Whether the district court erred in ruling as a matter of law that the time spent by class members traveling between the Security Gate and their daily work location did not constitute "hours worked" under California law because they were not under CSI's control during such time.

E. Whether the district court erred in ruling as a matter of law that class members were not entitled to be compensated under California law for the time of their meal periods when CSI confined them to their daily work site during their meal periods.

III. THE DISTRICT COURT'S DECISION TO GRANT PARTIAL SUMMARY JUDGMENT IS REVIEWED *DE NOVO*.

The district court's decision to grant CSI's partial summary judgment motions is reviewed *de novo*. (*Brunozzi v. Cable Communications, Inc.* (9th Cir. 2017) 851 F.3d 990, 995, *cert. denied* (2017) 138 S.Ct. 167 [199 L.Ed.2d 41]; *Jesinger v. Nevada Federal Credit Union* (9th Cir. 1994) 24 F.3d 1127, 1130.)

Summary judgment is only appropriate if the movant demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. (*Celotex Corp. v. Catrett* (1986) 477 U.S. 317, 327 [106 S.Ct. 2548, 91 L.Ed.2d 265].) The facts and inferences are viewed in the light most favorable to the non-moving party. (Fed.R.Civ.P. 56(c); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.* (1986) 475 U.S. 574, 586–590 [106 S.Ct. 1348, 1356–1357, 89 L.Ed.2d 538].) The moving party must carry the burden of establishing both the absence of a genuine issue of material fact and that such party is entitled to judgment as a matter of law. (*Id*.)

The reviewing court must determine whether, viewing the evidence in the light most favorable to the non-moving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. (*Ventura Packers, Inc. v. F/V JEANINE KATHLEEN* (9th Cir. 2002) 305 F.3d 913, 916; *Valdez v. Rosenbaum* (9th Cir. 2002) 302 F.3d 1039, 1043.) A fact issue is "genuine" when the evidence is such that "a reasonable jury could return a verdict for the nonmoving party." (*Villiarimo v. Aloha Island Air, Inc.* (9th Cir. 2002) 281 F.3d 1054, 1061.) As the Court stated in *Anderson v. American Auto. Ass'n* (9th Cir. 1972) 454 F.2d 1240, 1242:

> If under any reasonable construction of the evidence and any acceptable theory of law Anderson could be entitled to prevail, a summary judgment against him cannot be sustained.

(*See also Blankenship v. Hearst Corp.* (9th Cir. 1975) 519 F.2d 418, 424.)

IV. SUMMARY OF ARGUMENT

The district court erred in granting CSI's motions for partial summary judgment on Huerta's unpaid hours worked class claims (Security Time, 5(A) Travel Time, Drive Time, and Meal Period Time) and the claims derivative thereof.

With respect to Huerta's Security Time claim, the district court erred in ruling as a matter of law that Huerta and class members were not under CSI's control when they were confined to the secured premises and required to wait in line for and undergo the mandatory security exit process that lasted up to 30 minutes before being allowed to leave ("Security Time"). As the California Supreme Court confirmed in *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038 [258 Cal.Rptr.3d 392, 406–407, 457 P.3d 526, 538], under California law, the time spent waiting in line and going through a mandatory exit security process constitutes "hours worked" under the "control" prong of the "hours worked" definition in Wage Order 16. The district court also erred in dismissing the Security Time claim because there was at least triable issue of fact whether the control exercised over workers during the Security Time was such to make the Security Time compensable.

The district court also erred in dismissing the Security Time claim because such time was time that class members were "suffered or permitted to work" under the "suffered or permitted to work" prong of the "hours worked" definition in Wage

Order 16. The district court also erred in dismissing the Security Time claim because there was at least triable issue of fact whether the workers were "suffered or permitted to work" during the Security Time. In fact, the district court did not even discuss this theory of liability in its Order granting partial summary judgment to CSI. (1-ER-10-30.) The Court should also certify this issue to the California Supreme Court for resolution.

With respect to Huerta's Wage Order 16 Paragraph 5(A) claim ("5(A) Claim"), CSI was required to pay for "all employer-mandated travel that occurs after the first location where the employee's presence is required by the employer." Huerta submitted evidence in opposition to CSI's motions for partial summary judgment that class members were instructed by CSI that the first location where their presence was required was at the Security Gate where the security process occurred. ***CSI presented no contradictory evidence in either its moving papers or in its reply papers***. The evidence before the district court was sufficient to support a finding that it was, yet the district court completely ignored such evidence. At a minimum, there was a triable issue of fact whether the Security Gate was the "first location where the employee's presence is required by the employer."

The district court also erred in granting partial summary judgment for CSI on Huerta's Drive Time claim. After passing through the mandatory security entrance process at the Security Gate to enter the secured Site, Huerta and the other class

members were indisputably subject to CSI's control and were required to travel 45 minutes or more (each way) on a single private road to parking lots and were required to engage in the reverse of this travel at the end of the workday. From the time they entered the secured Site through the Security Gate after undergoing the mandatory security entrance process at the beginning of the day through the time they left the Site through Security Gate after undergoing the mandatory exit security process at the end of the day, they were subject to CSI's control and to numerous rules and restrictions and were strictly monitored for their compliance with such rules and restrictions and could not effectively use this time for their own purposes. The district court erred by ruling that, as a matter of law, none of the myriad elements of employer control that CSI exercised over Huerta and the class members during the Drive Time constituted sufficient control over the workers during the Drive Time to make it compensable under California law. The district court also erred in dismissing the Drive Time claim because there was at least triable issue of fact whether the workers were under CSI's control during the Drive Time.

With respect to the Meal Period Time, Huerta alleged that CSI constrained workers from leaving their daily work areas during their meal periods. (6-ER-1294; ¶ 37.) Huerta contended that because they were constrained from leaving their daily work areas during the meal periods, they were under CSI's control during the meal periods and that the time of their meal periods constituted "hours worked" under

California law for which they were entitled to be paid pursuant to Labor Code Section 1194[1] and Paragraph 4 of Wage Order 16. (6-ER-1294; ¶ 39.) (*See Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 968–72 (38 Cal.Rptr.2d 549) *disapproved of on other grounds by Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557 (59 Cal.Rptr.2d 186, 927 P.2d 296) ("*Bono*").) The district court erred in ruling as a matter of law that this "hours worked" claim was not compensable because class members were subject to a collective bargaining agreement and that such agreement overrode their right under California law to be paid for all "hours worked." The Court should certify this issue to the California Supreme Court for resolution.

This Court should therefore vacate the Orders granting CSI partial summary judgment and remand the case.

V. FACTUAL BACKGROUND

A. The Security Gate to the Site

The California Flats Solar Project ("Site") is located on the privately-owned Jack Ranch. There is only one entrance to the Site that workers could use, which is a guarded security gate (the "Security Gate"). The Security Gate during Phase 1 of

[1] Hereinafter, all statutory references are to the California Labor Code, unless otherwise indicated.

the Project was originally located on Turkey Flats Road ("Access Road") just after the intersection of the Access Road and Highway 41. Later, during Phase 2, when CSI was involved, it was moved from the original location closer to the parking lots.[2] (4-ER-878-79; ¶¶ 8-10.)

B. Rules regarding entering the Site and the Access Road

Workers could not enter the Site and drive on the Access Road until the Site was opened by the security guards. They were not allowed to enter the Site until the sun had come up and the biologists had cleared the Site to be opened. (4-ER-883; ¶ 32; 4-ER-897; ¶ 27; 5-ER-926; ¶ 29; 4-ER-911-12; ¶ 32.) Workers had to be off the Site by a certain time. (4-ER-889-90; ¶ 62; 4-ER-903; ¶ 54; 5-ER-932-33; ¶ 55; 4-ER-917-18; ¶ 60.) If they left too early, drove too fast, or arrived at the Security Gate too early at the end of the day, they could be suspended or terminated. (4-ER-890; ¶ 64; 4-ER-904; ¶ 56; 5-ER-933; ¶ 57; 4-ER-918; ¶ 62.)

1. Workers were monitored while on the Access Road.

CSI personnel monitored the workers while they were driving on the Access Road to their daily work areas. (4-ER-884; ¶ 36; 4-ER-897-98; ¶ 30; 5-ER-927; ¶ 31; 4-ER-912; ¶ 35.) From the time that workers went through the Security Gate in the morning until they went out of the Security Gate at the end of the workday, they

[2] Hereinafter, all references to the Security Gate will be to the Security Gate where the mandatory entrance and exit security processes occurred.

were subject to all the Site's rules and could be terminated at any time for violating them. (4-ER-884; ¶ 37; 4-ER-898; ¶ 31; 5-ER-927; ¶ 32; 4-ER-912; ¶ 36.) Workers were subject to having their bodies, personal property and vehicles searched at any time that they were inside the Security Gate or on the Access Road. Workers were also subject to drug and alcohol testing at any time that they were inside the Security Gate or on the Access Road. (4-ER-884; ¶ 39; 4-ER-898; ¶ 33; 5-ER-927; ¶ 34; 4-ER-912-13; ¶ 38.)

2. The rules of the Site were applied to the Access Road.

Workers were told that all the job site rules applied to the workers once they entered the Security Gate until they left the Security Gate. (4-ER-884; ¶ 37; 4-ER-898; ¶ 31; 5-ER-927; ¶ 32; 4-ER-912; ¶ 36.) These rules included, among other rules, safety and personal protective equipment rules, discrimination rules, anti-harassment rules, environmental rules, alcohol and drug policies, rules related to being subject to searches for alcohol, drugs and other things, no smoking, no practical jokes, no horseplay rules, no gambling rules, no photography, no loud music and other rules. (4-ER-884-85; ¶ 41.) Many of these rules were confirmed in an employee pamphlet for the Site. (4-ER-869-76.)

3. The specific rules of the Access Road

Workers were also told about specific "rules of the road" that applied to the Access Road. These rules were in addition to signs that were posted before and after

workers entered the Security Gate and in materials that they were given for the job Site. (4-ER-884; ¶ 38; 4-ER-898; ¶ 32; 5-ER-927; ¶ 33; 4-ER-912; ¶ 35.) Workers were suspended or terminated for things they did wrong on the Access Road, such as exceeding the speed limit. Some of these rules are described in detail below.

Speed limits. There were signs with low speed limits (5 to 20 mph) posted on the Access Road. CSI personnel monitored workers' activities and the speeds of vehicles on the Access Road. There were also speed radar machines and cameras installed along the Access Road, including digital signs that would show workers how fast they were going. If workers violated the speed limits or "rules of the road" or other job Site rules, they would be suspended or terminated. (4-ER-885; ¶¶ 44-45; 4-ER-899; ¶ 38; 5-ER-928; ¶ 39; 4-ER-913-14; ¶¶ 43-44.)

Passing. Workers were not allowed to pass another moving vehicle for any reason while on the Access Road except when a car had broken down or pulled over to the side of the road. (4-ER-886; ¶ 47; 4-ER-900; ¶ 40; 5-ER-929; ¶ 41; 4-ER-914; ¶ 46.)

Animals. Workers were not allowed to disturb the cattle or local wildlife in any way while driving on the Access Road. If they saw animals on or near the Access Road, they had to let them do whatever they needed to do and were not allowed to do anything to try to get them to move off the Access Road. They had to slow down or stop their vehicles and just stay in their vehicles and wait for the animals to move

away from the road. Workers were not allowed to touch or feed anything to the local wildlife or cattle on the Site or along the Access Road. Workers were not supposed to honk their horns while driving on the Access Road because the horns could disturb the local wildlife and the cattle. Workers were not allowed to play loud music that could be heard outside the vehicle while they were on the Access Road because the noise from the music could also disturb the local wildlife and the cattle. (4-ER-886-87; ¶¶ 49-50; 4-ER-900-01; ¶¶ 42-43; 5-ER-929-30; ¶ 43-44; 4-ER-914-15; ¶¶ 48-49.) Workers could not wear ear buds or ear pods while driving on the Access Road. (4-ER-887; ¶ 51.)

Smoking. Workers were told that they were not allowed to smoke either inside or outside of their vehicles while they were driving on the Access Road or inside or outside of their vehicles in the parking lot. They were told that they could only smoke in designated smoking areas. (4-ER-887; ¶ 53; 4-ER-901; ¶ 45; 5-ER-930; ¶ 46; 4-ER-915; ¶ 51.)

Staying on and Stopping on the Access Road. Once workers were released to drive on the Access Road in the morning and at the end of the day, they were required to drive directly on the Access Road to their assigned parking lot in the morning and from their assigned parking lot back to the Security Gate at the end of the day and were required to stay on the Access Road. (4-ER-887; ¶ 54; 4-ER-901; ¶ 46; 5-ER-930-31; ¶ 47; 4-ER-916; ¶ 52.) Workers were required to strictly follow

the "rules of the road" and keep the flow of traffic constantly moving on the Access Road. Except for emergencies, workers were not allowed to stop on the Access Road at any places that were not specifically designated. (4-ER-888; ¶ 55; 4-ER-901-02; ¶ 47; 5-ER-931; ¶ 48; 4-ER-916; ¶ 53.) If workers had to get out of their vehicles for any reason, they were not allowed to go outside of the boundary fences, stakes and ribbons that ran about 15 feet or so along the sides of the Access Road. If they had to get out of their vehicles along the Access Road for any reason, they could not disturb the environment, such as trampling or disturbing any plants. (4-ER-888; ¶ 56; 4-ER-902; ¶ 48; 5-ER-931; ¶ 49; 4-ER-916; ¶ 54.)

After going through mandatory security entrance process at the Security Gate in the morning and while driving on the Access Road to the parking lots and while driving on the Access Road at the end of the day, workers were confined to the Site and to the vehicle in which they rode and could not use the time effectively for their own purposes, such as running errands or getting something to eat or doing other things that they could normally do outside the Site. Workers were not paid for the time on the Access Road or between the Security Gate and the parking lots. (4-ER-888; ¶¶ 57-58; 4-ER-902; ¶¶ 49-50; 5-ER-931; ¶¶ 50-51; 4-ER-916; ¶¶ 55-56.)

C. The Mandatory Exit Security Process

To exit the Site, all workers had to drive to the Security Gate on the Access Road and wait for their turn to go through the exit security process at the Security

Gate. When they were traveling from the parking lots to the Security Gate at the end of the day, they could not pass other vehicles and had to wait in line for their turn to go through the exit security process, vehicle-by-vehicle, at the Security Gate. When a vehicle got to the front of the line at the Security Gates at the end of the day, the vehicle was required to stop at the Security Gate and wait until a security guard conducted the exit security process. Workers were required to roll down their windows and present their security identification badges for review and scanning by a security guard. All drivers and passengers in a vehicle had to do the same thing. The workers were not allowed to leave the Site until they completed the exit security process at the Security Gate and the security guards allowed them to pass through the Security Gate and leave the Site. (4-ER-888-89; ¶ 59; 4-ER-902-03; ¶ 51; 5-ER-931-32; ¶ 52; 4-ER-917; ¶ 57.)

If a worker did not have his or her security identification badge at the time that he or she wanted to exit the Site through the Security Gate, the worker had to pull out of line and go into the security guard shack at the Security Gate to be released before being allowed to exit the Site. (4-ER-889; ¶ 60; 4-ER-903; ¶ 52; 5-ER-932; ¶ 53; 4-ER-917; ¶ 58.)

During the mandatory exit security process, security guards looked inside the workers' vehicles through the windows. They also inspected the bed of any pickup trucks. When the vehicles had more than one person, security guards looked in the

vehicles to see how many people were in the vehicles and confirmed that the identification badges matched the people in the vehicles. (4-ER-889; ¶ 61; 4-ER-903; ¶ 53; 5-ER-932; ¶ 54; 4-ER-917; ¶ 59.)

It was the policy of the Site that the security guards were required to look in the vehicles and truck beds during the exit process. The California Flats Solar, LLC, Site Health & Safety Plan, Attachment D, Security Plan for the Site provides as follows:

> 2. Security Guards
>
> Vehicle Inspections - Security personnel will consistently inspect any vehicle that has entered the project Site upon exiting. Security is required to check back seats, back of trucks, and periodically to check trunks of cars. … (4-ER-864.)

CSI's designated 30(b)(6) witness confirmed in his deposition that the California Flats Solar, LLC, Site Health & Safety Plan was provided by First Solar to CSI for the project. (4-ER-859-861, 84:23-86:3.) This document was produced by First Solar in discovery in this litigation. (4-ER-863-65.) In addition, the contract between CSI and First Solar incorporates this Site Health and Safety Plan as an exhibit and requires that CSI comply with all aspects of that plan. (4-ER-867-68 ¶3.9.)

At the end of the day, the line waiting to get out of the Site at the Security Gate was even longer than the line to get into the Site at the Security Gate at the

beginning of the day. Hundreds of Site workers would be leaving at around the same time. The work stopping time for virtually all the CSI workers was the same and they were required to be off the Site by a certain time. Because of the number of vehicles leaving at once and because of the configuration of the Security Gate, it took workers 10 to 30 minutes or more to wait in line and go through the exit security process. Waiting in line to exit the Site was part of the exit security process every day. (4-ER-889-90; ¶ 62; 4-ER-903; ¶ 54; 5-ER-932-33; ¶ 55; 4-ER-917-18; ¶ 60.)

After the workers finished waiting in the long security exit line, it could take up to a minute or more per vehicle to go through the security exit process. (4-ER-890; ¶ 63; 4-ER-903-04; ¶ 55; 5-ER-933; ¶ 56; 4-ER-918; ¶ 61.)

It was CSI's policy that any workers who arrived at the Security Gate and attempted to exit the Site through the exit security process too early at the end of the workday could be disciplined or terminated. Some CSI workers did in fact arrive at the Security Gate at the end of the workday and attempted to exit the Security Gate too early and were terminated. (4-ER-890; ¶¶ 64-65; 4-ER-904; ¶ 56; 5-ER-933; ¶¶ 57-58; 4-ER-918; ¶¶ 62-63.)

While workers were waiting in line to exit the Site at the Security Gate and while undergoing the mandatory exit security process, workers were under CSI's control because they were confined to and could not leave the Site until they went through the exit security process and were required to follow the policies, processes

and rules required by CSI to exit through the Security Gate. After workers got in line to exit the Security Gate, there was nothing they could do other than wait in the vehicle in which they were riding to complete the security process and could not use the time effectively for their own purposes. For example, they could not: (a) pass any vehicles ahead of them; (b) leave the Site for any reason, including to get something to eat; (c) run any personal errands; (d) perform any personal activities outside of their vehicles; or (e) move their vehicle until the security guards had let vehicles ahead of them, vehicle-by-vehicle, exit the Site. (4-ER-890; ¶ 66; 4-ER-904; ¶ 57; 5-ER-933-34; ¶ 59; 4-ER-918-19; ¶ 64.)

VI. PROCEDURAL BACKGROUND

A. The district court certified the claims at issue in this appeal.

Huerta's Motion for Class Certification was granted on March 12, 2021 as to the Unpaid Wages Class (Security Time), Unpaid Wages Class (Controlled Travel Time), Unpaid Wages Class (Paragraph 5(A) Travel Time), Unpaid Wages Class (Meal Period Time), Termination Pay Subclass, and Wage Statement Subclass. (5-ER-975-76.)

This Order was modified pursuant to the parties' stipulation on March 18, 2021 (5-ER-935-42) and again on March 30, 2021. (4-ER-745-49.)

B. CSI's motions for partial summary judgment

CSI filed motions for partial summary judgment on various issues as to certain portions of such time which Huerta claimed constituted "hours worked" under California law. (5-ER-978-1007; 3-ER-460-66.) CSI's Notice of Motion in its first motion for partial summary judgment was vague and ambiguous as to exactly what issues CSI sought to adjudicate, but it appeared to attack the time spent waiting for and going through the mandatory entrance security process ("Entrance Security Time"), the time spent waiting for and going through the mandatory exit security process ("Exit Security Time"), and the time spent driving from the Security Entrance to the parking lots and back ("Drive Time"), which Huerta contended was compensable under Section 5(A) of Wage Order 16 and also under the "control" or "suffer or permit to work" prongs of the "hours worked" definition in the Wage Order. In this motion, CSI also attacked Huerta's "hours worked" claim with respect to the meal period time ("Meal Time").

On April 28, 2021, the district court granted CSI's first motion for partial summary judgment. (1-ER-10-30.) The same day, the Court directed the parties to inform the Court of the remaining claims in the case. (4-ER-744.) While CSI appeared to believe that no class claims remained, Huerta informed the Court that his Paragraph 5(A) class remained. (4-ER-735-43.) During a subsequent case

management conference, the district court permitted CSI to file a second summary judgment motion addressing the viability of this claim. (1-ER-5.)

On June 8, 2021, CSI filed its second motion for partial summary judgment as to the 5(A) claim. (3-ER-460-66). Huerta opposed it. (2-ER-40-43) The district court granted it on June 25, 2021. (1-ER-5-9.)

As Huerta discusses below, CSI offered no admissible evidence rebutting as a matter of law Huerta's allegations that the various times were compensable "hours worked" under California law or under paragraph 5(A) of the Wage Order. Moreover, there were, at a minimum, triable issues of material fact whether any of these times constituted "hours worked" under paragraph 5(A). This Court should therefore vacate the orders granting CSI's motions for partial summary judgment.

VII. UNDER CALIFORNIA LAW, HUERTA AND THE CLASS MEMBERS WERE ENTITLED TO BE PAID FOR ALL "HOURS WORKED."

Paragraph 4 of Wage Order No. 16 provides that employers shall pay to each employee certain minimum wages "for all hours worked." Paragraph 2(J) of Wage Order No. 16 defines "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so."

VIII. THE TIME SPENT BY HUERTA AND CLASS MEMBERS WAITING FOR AND UNDERGOING THE MANDATORY SECURITY EXIT PROCESS CONSTITUTES "HOURS WORKED" UNDER CALIFORNIA LAW.

Huerta alleged that all the time he and class members spent waiting for and undergoing the mandatory exit security process at the Security Gate at the end of the day constituted "hours worked" under California law. (6-ER-1292-94; ¶¶ 30-37.)

A. The Exit Security Time constitutes "hours worked" under the "control" prong of the "hours worked" definition in Wage Order 16 and the *Frlekin v. Apple* decision.

In *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1047 [258 Cal.Rptr.3d 392, 398–399, 457 P.3d 526, 531–532], *reh'g denied (May 13, 2020)*, the California Supreme Court held that Apple employees who were confined to the store and required to wait for and undergo a security exit process after they clocked out for the day were entitled to be paid for such time. The Court held:

> . . . Apple employees are clearly under Apple's control while awaiting, and during, the exit searches. Apple controls its employees during this time in several ways. First, Apple requires its employees to comply with the bag-search policy under threat of discipline, up to and including termination. ***Second, Apple confines its employees to the premises as they wait for and undergo an exit search***. ***Third, Apple compels its employees to perform specific and supervised tasks while awaiting and during the search***. This includes locating a manager or security guard and waiting for that person to become available, unzipping and opening all bags and packages, moving around items within a bag or package, ***removing any personal Apple technology devices for inspection, and providing a personal technology card for device verification***. (Emphasis added.)

Under *Frlekin*, the time CSI employees spent waiting in line for and undergoing the mandatory exit security process while they were confined to the Site was time they were clearly under CSI's control and time they could not use effectively for their own purposes and therefore constituted "hours worked" for which they were entitled to be paid.

1. As with Apple's employees, CSI's employees were confined to the Site and could not conduct any personal activities outside of the Site without undergoing the mandatory exit security process.

There is no dispute that CSI's employees were confined to the Site as they waited for and underwent the mandatory security exit process. Moreover, as discussed above, while confined in the Site as they were waiting in the exit security line and going through the exit security process, they were not free to conduct any personal business outside of the Site or use the time effectively for their own purposes. As the Supreme Court recognized in *Frlekin*, this is a clear element of control that makes time waiting for and going through a mandatory exit security process compensable.

Other California district courts have recognized the compensability of time waiting for and undergoing exit security checks. In *Cervantez v. Celestica Corp.* (C.D. Cal. 2009) 618 F.Supp.2d 1208, 1216, the district court held that time spent going through entrance and exit security screening constituted "hours worked" under

California law. With respect to the exit security time, the district court in *Cervantez* granted summary judgment for the plaintiffs, reasoning:

> As the Court stated in its July 30 Order, Huertas "have no choice about when to arrive at the security line at the end of the shift. Like the plaintiffs in *Morillion,* Huertas are under the control of their employers while in the security line at the end of the shift: they cannot choose to leave the premises without going through the line, nor can they choose to run a personal errand before going through the line. . . . (July 30 Order, 253 F.R.D. at 571–72.)
>
> . . .
>
> According to Celestica, the confines of a factory building allow the class members to engage in many more activities than would a moving shuttle, as in *Morillion.* (*Id.*) ***This slight difference where the employees are confined is unimportant; Defendants confine their employees to the Celestica facility and their activities are restricted as a result. In other words, the class members are under the control of their employer during this post-shift period***. (*Morillion,* 22 Cal.4th at 586, 94 Cal.Rptr.2d 3, 995 P.2d 139.) (Emphasis added.)

In *Pelz v. Abercrombie and Fitch Stores, Inc.* (C.D. Cal., June 4, 2015, No. CV146327DSFJPRX) 2015 WL 12712298, at *2, the district court also held that the time spent in a mandatory exit security process was compensable:

> Similar to the employer in Morillion, whose transportation policy prohibited its agricultural workers from using that time effectively for their own purposes, ***Abercrombie's bag check policy requires employees to remain in the store until they pass through an inspection—a wait that Huertas claim may last as long as long thirty minutes. . . . This is time that Huertas could not, for instance, buy a sandwich at a neighboring shop or attend to any personal activity that requires being outside of Abercrombie's store***. In other words, the relevant facts in this

> case appear materially indistinguishable from those at issue in Morillion and permit only one reasonable conclusion: ***Huertas were under Abercrombie's control during off-the-clock bag check waiting periods and the time is compensable***. (Emphasis added.)

2. As with Apple's employees, CSI's employees were required to perform specific tasks with respect to the exit security process.

As was the case with Apple's employees in *Frlekin*, CSI's employees were "controlled" by being required to perform the specific tasks of waiting in line, driving their vehicles through the line, and locating their badges and showing them to the exit security personnel. They were also required to leave the line if they did not have their security badges and were required to allow their vehicles to be searched, some of which were.

It is noteworthy that the security exit process in *Frlekin* included the requirement that employees, ***even if they had no bags to be searched***, were required to show any personal technology they were carrying to leave the store and have this verified against a personal technology log. Apple's guidelines instructed Apple managers to . . . "[a]sk the employee to remove any type of item that Apple may sell," and "[b]e sure to verify the serial number of the employee's personal technology against the personal technology log." (*Frlekin,* at 1044.)

The requirement by Apple that an employee locate and show his or her personal technology device and have it verified by exit security personnel against a

technology log is not meaningfully different than the requirement that CSI's employees roll down their windows, locate and show their badges, have them verified by security personnel, and go to the guard shack and get permission to leave if they could not locate their badge.

The fact that the actual security badging out process in this case lasted about a minute does not mean the time was not compensable. In *Frlekin,* for example, some employees testified that the actual bag search took mere seconds. (4-ER-811-24; Declarations filed in *Frlekin*.) The Court nonetheless held that such time was compensable.

There is no meaningful distinction between being confined to an employer's secured premises and having to wait to have a bag searched for a few seconds before being allowed to leave as in *Frlekin* and CSI's employees being confined to the Site and having to wait to have a badge scanned (which scanning took about a minute) before being allowed to leave. Such time is time that workers are indisputably under the employer's control.

Moreover, there is no dispute that CSI's employees, as Apple's employees, were under CSI's control while waiting to undergo the mandatory exit security process.

3. Because the security process occurred on the work site and employees were confined to the work site without going through the exit security process, they were under CSI's control during such process.

CSI has argued that the time spent by employees traveling on the Site from their daily work areas to the Security Gate at the end of the day, including the time spent driving on the Access Road and the time waiting for and undergoing the exit security process was part of the employees' normal "commute" and therefore non-compensable. In *Frlekin*, however, the Court distinguished between employer-mandated activities that occurred on the employer's premises and those that did not, noting that "there are inherent differences between cases involving time spent traveling to and from work, and time spent *at* work. (*Frlekin*, at 1051.) The Court reasoned that in the commute context, "an employer's interest generally is limited to the employee's timely arrival." (*Id*.) Where the employer-mandated security process occurs onsite, at the workplace, however, "the employer's interest . . . is inherently greater." (*Id*.) The Court observed:

> The exit searches are imposed mainly for Apple's benefit by serving to detect and deter theft. In fact, they are an integral part of Apple's internal theft policy and action plan. The exit searches burden Apple's employees by preventing them from leaving the premises with their personal belongings until they undergo an exit search — a process that can take five to 20 minutes to complete — and by compelling them to take specific movements and actions during the search. (*Id*., 1052-1053.)

Moreover, the employer's level of control over its employees is higher during an onsite security process, because, among other things, employees are "confined to the premises until they submit" to the security procedure. (*Id*.)

Finally, onsite security procedures do not benefit the employee, but only the employer, which distinguishes such procedures from the employer's offering of optional transportation services to employees that benefit the employee. (*Id*., 1052-1053.) In this case, employees are not being offered the ***option*** of choosing whether to undergo the exit security process.

B. The Exit Security Time constitutes "hours worked" under the "suffered or permitted to work" prong of the "hours worked" definition in Wage Order 16.

Wage Order 16 does not define "work." In common usage, "work" means any "activity in which one exerts strength or faculties to do or perform something." (*Merriam-Webster's Collegiate Dictionary* (11th ed.).) It also means "exertion to attain an end, especially as controlled by and for the benefit of an employer; labor." (*Black's Law Dictionary* (10th ed. 2014); *cf Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123* (1944) 321 U.S. 590, 598 [64 S.Ct. 698, 703, 88 L.Ed. 949] ("work" includes "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer").) "Work" as a verb means activities an employer may suffer or permit an employee to perform. (*Cleveland v. Groceryworks.com, LLC*

(N.D. Cal. 2016) 200 F.Supp.3d 924, 954.) (*See, e.g.*, *Betancourt v. Advantage Human Resourcing, Inc.* (N.D. Cal., Sept. 3, 2014, No. 14-CV-01788-JST) 2014 WL 4365074, at *7 (interviewing required by an employer is "work"); *Sullivan v. Kelly Services, Inc.* (N.D. Cal., Oct. 16, 2009, No. C 08-3893 CW) 2009 WL 3353300, at *6 ("Plaintiff was suffered or permitted to work during the time she interviewed with Defendant's customers").)

The activities CSI required of its workers for the mandatory exit security process they were required to undergo before being allowed to leave the Site meet this plain-language definition of "work." They involve "exertion" or "effort" required by CSI, including complying with security personnel's directions, driving a vehicle in the security line, rolling down windows, locating and displaying identification cards, allowing vehicles to be searched, and moving vehicles as directed by security personnel. The mandatory security checks "attain an end," including confirming that workers have left the Site and have not taken any equipment or supplies. This clearly benefits CSI by deterring and preventing theft. Moreover, employees were indisputably controlled during the security checks. (*Frlekin*, at 1047.) These activities are therefore compensable "work." At a minimum, whether the activities required to be performed by the workers during the security checks constitute "work" is an issue of fact, precluding summary judgment in CSI's favor.

IX. THE DRIVE TIME BETWEEN THE SECURITY GATE AND THE DAILY WORK AREAS CONSTITUTED "HOURS WORKED" BECAUSE CLASS MEMBERS WERE CONTROLLED DURING SUCH TIME.

After the workers entered the Site through the Security Gate and while driving to and from the parking lots on the Access Road, they were under CSI's control and could not effectively use such time effectively for their own purposes such as running personal errands outside of the Site. CSI workers were required to stay on the Site during the entire workday from the beginning of the workday to the end of the workday. (4-ER-891; ¶ 67; 4-ER-904; ¶ 58; 5-ER-934; ¶ 60; 4-ER-919; ¶ 65.) This time is compensable under Court's reasoning in *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 (94 Cal.Rptr.2d 3, 995 P.2d 139), *as modified (May 10, 2000)*. In *Morillion*, plaintiff agricultural workers sued for compensation for time they spent waiting for employers' buses and riding those buses to and from the fields each day. (*Id*. at 579.) The Court held that riding buses to and from the fields each day as required by the employer constituted time over which the employer "controlled" the workers and that such "travel time is compensable" under the California Labor Code. (*Id*. at 585, 595.) The Court held that "an employee who is subject to an employer's control does not have to be working during that time to be compensated...." (*Id*., at 582.) The Court held that control was demonstrated by the fact that the workers could not use the time effectively for their own purposes, such as dropping off their children, stopping for breakfast or running other errands. (*Id*. at 586.) The Court also

held that the employer subjected its employees to its control by "determining when, where, and how they are to travel." (*Id*. at 588.)

Here, CSI determined ***when***, ***where*** and ***how*** employees were to travel between the Security Gate and the parking lots. Workers could only travel on the Site from sunrise to sunset and after the Access Road was cleared by biologists. Workers could only travel on the Access Road. CSI controlled "how" the workers must travel – they are limited in how fast they could go, whether they could stop, whether they could pass other vehicles, and other limitations discussed above. Most importantly, while on the Access Road, they could not use the time effectively for their own personal purposes.

The control exercised by CSI over its workers is essentially the same as that exercised by the employer in *Morillion*. CSI's workers were confined to the Access Road just as the *Morillion* workers were confined to the buses. CSI's workers were also required to use a ***specific route*** on private land after entering the secured Site and were subject to stringent controls over what they could do while on the Access Road. Indeed, if the workers in *Morillion* were allowed to use their own personal transportation to travel to the fields where they worked but were confined to and required to follow only one specific route on the employer's property and were subjected to numerous rules in using such designated route and could not use the time on that route effectively for their personal purposes, there is no question that

they would be under their employer's control and therefore entitled to compensation for such travel time.

X. AT A MINIMUM, WHETHER THE SECURITY TIME OR THE DRIVE TIME WAS TIME DURING WHICH CSI "CONTROLLED" CLASS MEMBERS IS AN ISSUE OF FACT FOR THE JURY.

Whether CSI sufficiently controlled its employees during the Exit Security Time and Travel Time on the Access Road to make such time compensable under California law is at a minimum an issue of fact. (*See Oliver v. Konica Minolta Business Solutions U.S.A., Inc.* (2020) 51 Cal.App.5th 1 [264 Cal.Rptr.3d 248, 51 Cal.App.5th 1].) In *Oliver*, service technicians who were required to drive their personal vehicles containing their employer's tools and parts to customer Sites to make repairs to copiers and other machines filed a wage and hour class action against their employer seeking payment of wages for time spent commuting to the first work location of the day, home from their last appointment and mileage reimbursement. The Superior Court granted the employer's motion for summary judgment and the service technicians appealed. The Court of Appeal reversed, holding that genuine issues of material fact existed as to whether the employees were sufficiently under the employer's control that precluded summary judgment.

Here, CSI did not demonstrate as a matter of law that Huerta and class members could use the time they were waiting for and going through the mandatory exit security process and driving on the Access Road while confined to the Site

"effectively for their own purposes." Indeed, as in *Frlekin* and *Morillion*, there is no dispute that they could ***not*** do so.

XI. THE DISTRICT COURT ERRED IN RULING AS A MATTER OF LAW THAT HUERTA'S WAGE ORDER SECTION 5(A) CLAIM FAILS AS A MATTER OF LAW.

Paragraph 5(A) of Wage Order 16 provides: "(A) All employer-mandated travel that occurs ***after the first location where the employee's presence is required by the employer*** shall be compensated at the employee's regular rate of pay or, if applicable, the premium rate that may be required by the provisions of Labor Code Section 510 and Section 3, Hours and Days of Work, above."

A. Huerta's evidence established that the Security Gate was the first location where the class members' presence was required by CSI.

Huerta established in his opposition papers that the Security Gate where the mandatory entrance security process occurred was the first location where the employees' presence was required by CSI for them to enter and work at the Site. They were specifically instructed by CSI that the first place they were required to be at the beginning of the day to work was the Security Gate to line up and go through the mandatory entrance security process and drive on the Access Road to the parking lots of the Site. Unless they went through the security entrance process, they could not work on the Site. (ER: 4-ER-879-80; ¶¶ 11, 17; 4-ER-894; ¶¶ 9, 14; 5-ER-923-24 ¶¶ 9, 14; 4-ER-908-09; ¶¶ 11, 16.) Huerta's evidence demonstrated the complicated nature of how the Site was secured and how restricted the Security Gate

was at the beginning of the workday and clearly confirmed that it was the first location at which the workers' presence was required.

The fact that no worker meetings may have occurred at the Security Gate is irrelevant. The only thing the workers in *Morillion* were required to do was meet at a designated departure point location, park their cars, and get on the bus. (*Morillion v. Royal Packing Co.* (Cal. Ct. App. 1998) 77 Cal.Rptr.2d 616, 618, *review granted and opinion superseded* (Cal. 1998) 80 Cal.Rptr.2d 752 [968 P.2d 463], *as modified (May 10, 2000), rev'd* (2000) 22 Cal.4th 575 [94 Cal.Rptr.2d 3, 995 P.2d 139].)

In support of its motions, CSI offered ***no*** evidence as to any ***other*** location that the employees' presence was first required and thus failed to sustain its burden on its motions. (5-6-ER-1008-1240; 3-4-ER-495-727; *see* Arnold Decls.)

B. There was at least a triable issue of fact whether the Security Gate was the first location where class members' presence was required.

In opposition to CSI's motions, Huerta presented substantial evidence that the first location where CSI required its workers' presence was at the Security Gate where the entrance security process occurred, including numerous declarations from workers. (4-ER-877-91; 4-ER-892-905; 4-ER-906-19; 5-ER-921-34.) Specifically, these declarations state as follows:

- When the mandatory entrance and exit security process occurred at the Phase 1 Security Gate, I was told by CSI management, by the security office, and by other management that the first place

the other CSI workers and I were required to be at the beginning of the day in order to work was the Phase 1 Security Gate to line up, go through the mandatory security process and enter the Solar Site in order to begin the long drive on the Access Road to the parking lots of the Solar Site.

- To work on the Solar Site, the first place the other workers and I were required to be was at the Security Gate where the mandatory security process occurred where we were required to go through a security process which required us to be security checked and scanned in with our security badges. (ER: 4-ER-879-80; ¶¶ 11, 17.)
- I was told by CSI management during my orientation for Phase 2 that the first place the other CSI workers and I were required to be at the beginning of the day in order to work was the Phase 2 Security Gate to line up and go through the mandatory entrance security process and drive on the Access Road to the parking lots of the Solar Site.
- To work at the Solar Site, the first place the other CSI workers and I were required to be at the beginning of the day in order to work was the Phase 2 Security Gate to line up and go through the mandatory entrance security process and drive on the Access Road to the parking lots of the Solar Site. (4-ER-894; ¶¶ 9, 14.)
- I was told by CSI management (including my foreman Daniel Jimenez), for Phase 2 that the first place the other CSI workers and I were required to be at the beginning of the day in order to work was the Phase 2 Security Gate to line up and go through the mandatory entrance security process and drive on the Access Road to the parking lots.
- To work at the Solar Site, the first place the other CSI workers and I were required to be at the beginning of the day was the Phase 2 Security Gate to line up and go through the mandatory entrance security process and drive on the Access Road to the parking lots of the Solar Site. The worker security badges that were part of the mandatory security entrance and exit process contained the picture and name of the worker and the company name on them. (5-ER-923-24 ¶¶ 9, 14.)

- I was told by CSI management during my orientation for Phase 2 that the first place the other CSI workers and I were required to be at the beginning of the day in order to work was the Phase 2 Security Gate to line up and go through the mandatory entrance security process and drive on the Access Road to the parking lots of the Solar Site.
- To work at the Solar Site, that the first place the other CSI workers and I were required to be at the beginning of the day was the Phase 2 Security Gate to line up and go through the mandatory entrance security process and drive on the Access Road to the parking lots of the Solar Site. (4-ER-908-09; ¶¶ 11, 16.)

The district court improperly ignored such undisputed evidence and found, as a matter of law, that Paragraph 5(A) did not apply in this case because the Security Gate was not "the first location where the employee's presence is required." (4-ER-17.) At a minimum, however, based on the undisputed evidence cited by Huerta above, whether the Security Gate was the first location where CSI's employees' presence was required is clearly a triable issue of fact that precluded the granting of partial summary judgment in favor of CSI on this claim.

XII. THE DISTRICT COURT ERRED IN RULING THAT HUERTA'S "HOURS WORKED" CLAIM BASED ON THE CONTROLLED MEAL PERIODS FAILS AS A MATTER OF LAW BECAUSE HUERTA WAS WORKING UNDER A COLLECTIVE BARGAINING AGREEMENT.

A. Huerta's "hours worked" claim was based on CSI's control of the class members during their meal period.

In Huerta's First Amended Complaint, Huerta alleged that workers were restricted during meal periods from leaving their daily work Sites:

> 37. Plaintiff and class members were told that they were required to stay on the job Site during the entire workday from the beginning of the workday to the end of the workday. They were told that it would be a violation of the job Site rules if they reached the security entrance too early at the end of the workday and that they could be suspended or terminated if they violated that rule. They were told that they were required to eat their lunches at or near their daily Installation Sites and, except with special approval, they could not go back to their vehicles in the parking lots at any time during the workday. Defendants did not make the buggies available to Plaintiff or class members to take them to the parking lot during their meal periods.
>
> 38. Plaintiff and class members were never paid for the time that they were on meal breaks or when their meal breaks or rest breaks were interrupted. (6-ER-1294.)

Huerta contended that because class members were restricted from leaving their daily work areas during the meal periods, they were under CSI's control during the meal periods and that the time of their meal periods constituted "hours worked" under California law for which they were entitled to be paid. Huerta alleged that he was not paid for such time (6-ER-1293) and sought to recover such wages pursuant to Section 1194 and Paragraph 4 of Wage Order 16. (6-ER-1293.)

California law provides employees a non-waivable, non-negotiable right to compensation for all hours worked. (Cal. Labor Code § 1194.) Paragraph 2(J) of Wage Order 16 defines "hours worked" as follows:

> (J) "Hours worked" means the time ***during which an employee is subject to the control of an employer***, and includes all the time the employee is suffered or permitted to work, whether or not required to do so. (Emphasis added.)

Thus, under California law, an employee is entitled to be paid for all "hours worked," which includes any hours where the employee is under the employer's control, whether or not the employee is "working."

Where an employer restricts an employee's ability to leave the daily worksite during the employee's meal period, the employer controls the employee during the meal period and the time of the meal period therefore constitutes "hours worked" for which the employee must be paid. (*See Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 968–72 (38 Cal.Rptr.2d 549) *disapproved of on other grounds by Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557 (59 Cal.Rptr.2d 186, 927 P.2d 296) ("*Bono*").)

In *Bono*, the Court of Appeal considered a policy where workers had to remain on the work-Site premises during their 30–minute lunch period unless they made prior arrangements. The workers were relieved of all work duties during the lunch period and an on-site cafeteria and relaxation area was available for them to use during the lunch period. (*Bono*, 32 Cal.App.4th at 972, 38 Cal.Rptr.2d 549.) The Court held that the lunch time was compensable, reasoning that "(w)hen an employer directs, commands or restrains an employee from leaving the work place during his or her lunch hour and thus prevents the employee from using the time effectively for his or her own purposes, the employee remains subject to the employer's control," and therefore must be paid. (*Bono*, 32 Cal.App.4th at 975, 38 Cal.Rptr.2d 549.)

B. CSI's argument that class members were not entitled to be paid for hours worked because they worked under a CBA is meritless.

In CSI's motion for partial summary judgment on Huerta's meal period "hours worked" claim, CSI argued that such claim was barred because Huerta was working under a collective bargaining agreement. (5-ER-994-1005.) The district court accepted CSI's argument and granted partial summary judgment on this issue, ruling:

> . . . the Court GRANTS CSI's motion for partial summary judgment as to CSI's twelfth request and finds that Huerta's meal period hours worked claim fails as a matter of law because Plaintiff worked under a qualifying CBA. (1-ER-28.)

As discussed below, the district court erred in so holding because the provisions of a CBA cannot pre-empt an employee's right under California law to be paid for all hours worked.

C. Huerta's "hours worked" claim for meal period time is not derivative or dependent on the meal period provisions of Labor Code Section 310 or section 10 of Wage Order 16.

An employee's right to be paid minimum wages is provided for in Labor Code section 1194(a). Consistent with this Labor Code provision, section 4 of Wage Order 16 requires "[e]very employer" to pay a specified minimum wage to its employees "per hour for all hours worked ...." (Wage Order 16, § 4.) "Hours worked" for purposes of Wage Order 16 is defined as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is

suffered or permitted to work, whether or not required to do so." (Wage Order 16, § 2(J).) Thus, an employee's right to be paid for all hours worked exists independently of any right to meal periods and is not derivative of the employee's meal period rights. ***This right would exist even if there were no meal period laws and neither the district court nor CSI cited any authority holding otherwise***.

CSI contended that Huerta was subject to a collective bargaining agreement and that CSI therefore did not have to pay Huerta for the time of Huerta's meal periods that constitutes "hours worked" under California law. Thus, under CSI's argument, because there is a CBA under which Huerta worked, CSI could require Huerta to work during the entire meal period and would not have to pay Huerta any wages for such "hours worked." This, of course, is nonsense and unsupported by any controlling authority. Under California law and Wage Order 16, Huerta is entitled to compensation for all "hours worked," and CSI cited no statute or wage order provision that provides otherwise. The fact that the time of such "hours worked" occurred during a meal period does not insulate an employer from paying for such hours worked.

In *Gutierrez v. Brand Energy Services of California, Inc.* (2020) 50 Cal.App.5th 786, 796–797 [264 Cal.Rptr.3d 173, 179, 50 Cal.App.5th 786, 796–797], *as modified on denial of reh'g* (July 2, 2020), *review denied* (Sept. 9, 2020), the employee contended that he was entitled to be paid for mandatory travel time on

employer-provided transportation to and from the work site. The employer contended that section 5(D) of Wage Order 16 permits union-represented employees and their employers to opt out of paying ***any compensation*** for travel time that would otherwise be compensable under *Morillion* and section 5(A). According to the employer, the language of section 5(D) supported its position that "employees whose employment is governed by a construction industry CBA is not required to be paid for travel time at *any* rate, because the 'section' [5(A)] requiring compensation for such time 'does not apply' if a CBA expressly so provides." (*Id*., at 798.)

The Court of Appeal disagreed and reversed the trial court's granting of summary judgment for the employer, holding that there was no applicable statutory exception to pay for hours worked under these circumstances and that the Wage Order exception could not negate the employee's right to compensation for all hours worked. The Court reasoned:

> [W]e accept plaintiff's point that Wage Order 16 section 5 does not state that union-represented employees and employers can opt out of paying any compensation whatsoever for employer-mandated travel time. . . .
>
> Brand's interpretation of section 5(D) is unsupported by section 5's plain language, which limits its own scope to section 5 and says nothing about waiving the right to minimum wage. Brand's interpretation also directly conflicts with the express terms of Wage Order 16 sections 1 and 4. These sections, subject to exceptions not applicable here, expressly apply to "all persons employed in the on-Site occupations of construction" (Wage Order 16, § 1) and require payment of "not less than the

> applicable minimum wage for all hours worked in the payroll period" (*id*., § 4(B)). (*Id*. at 798-799, (emphasis added).)

Observing that "where a wage order conflicts with a Labor Code statute, the statute 'will prevail ....' (*Gerard v. Orange Coast Memorial Medical Center*, *supra*, 6 Cal.5th at p. 448, 240 Cal.Rptr.3d 757, 430 P.3d 1226.)" (*Id*. at 799), the Court held that accepting the employer's position would "undermine Labor Code section 1194, subdivision (a), the statute bestowing on California employees the right to minimum wage . . ." (*Id*.)

Citing numerous case holdings that Labor Code section 1194(a) precludes employers from contracting with its employees for a rate of pay less than minimum wage (*id*. at 799-800), the Court rejected the employer's reliance on some of the very cases cited by CSI in its motion for partial summary judgment, including *Araquistain v. Pacific Gas & Electric Co.* (2014) 229 Cal.App.4th 227, 238 [176 Cal.Rptr.3d 620, 628] and *Vranish v. Exxon Mobil Corp.* (2014) 223 Cal.App.4th 103, 111 [166 Cal.Rptr.3d 845, 849], holding that they were inapposite. (*Id*. at 801-802.)

The Court refused to assume that the IWC intended to override the Legislature's grant of the right of at least a minimum wage for all hours worked:

> . . . Would the IWC have acted to override our Legislature's statutory grant of the right to at least minimum wage for all hours worked with the bare language in Wage Order 16 section 5(D) that "[t]his section"—meaning only section 5—"shall apply to any employees covered by a valid [CBA] unless the [CBA] expressly provides otherwise"? We decline to assume the IWC

> intended to override this important state right in the absence of actual evidence. (*Id*. at 802.)
>
> . . . In light of Wage Order 16's and the Labor Code's remedial purposes requiring liberal construction and their directives to compensate employees at a rate no less than minimum wage for all hours worked notwithstanding any agreement or customary arrangement to the contrary (Lab. Code, §§ 1194, 219; Wage Order 16, §§ 1, 4), we conclude section 5(D) provides no authority for employers and employees to waive all compensation for employer-mandated travel time. (*Id*. at 804.)

The Court's reasoning in *Gutierrez* applies to CSI's arguments in this case.

D. Wage Order 16's meal period provisions do not expressly or impliedly waive an employee's right to compensation for all "hours worked."

CSI argued that because the meal period provisions of Section 10(D) of Wage Order 16 do not apply to an employee covered by a qualifying collective bargaining agreement, this means that an employer need not pay the employees for hours worked during a meal period as required by Section 1194 and Section 4 of the Wage Order. As discussed above, the identical argument with respect to employer-mandated travel time was flatly rejected by the Court in *Guiterrez*.

Contrary to CSI's contention, there is nothing in Wage Order 16 that contains an express exemption from the minimum wage requirements in Labor Code section 1194(a) and Wage Order 16 section 4 for all hours worked, and CSI presented no valid basis for inferring such an exemption based on the legal scheme as a whole.

Section 10(D) provides: "Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked. An 'on duty' meal period shall be permitted only when the nature of the work prevents employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to and complies with Labor Code Section 512." (Wage Order 16, Section 10(D).)

While subsection 10(E) provides that "Subsections (A), (B), and (D) of Section 10, Meal Periods" do not apply to any employee covered by a valid CBA, it does not expressly provide that the provisions Labor Code Section 1194 and Section 4 requiring the payment of a minimum wage for all "hours worked" do ***not*** apply if there is a CBA. By its express terms, subsection 10(E) only provides that the applicable meal period protections of those specified "meal period" subsections do not apply. As the Court noted in *Gutierrez*, ". . . the IWC has demonstrated that it understands how to draft CBA exemptions from specific Labor Code requirements, including Labor Code section 1194's minimum wage requirement, but it has not done so here. (E.g., Wage Order 16, §§ 3(H)(1) [CBA exemption from overtime pay requirements . . . 3(H)(2) [CBA exemption from make-up time requirements], 11(E) [CBA exemption from rest break rules].)" (*Gutierrez* at 802.)

E. Huerta is ***not*** seeking compensation for CSI's violation of California's meal period laws.

CSI's motion for partial summary judgment as to the Meal Period Time was predicated on the manufactured and faulty premise that intentionally misconstrued Huerta's "hours worked" claim. ***Huerta was not alleging that CSI violated its meal period obligations under Labor Code Section 512 or section 10 of the Wage Order nor was he seeking meal period premiums for any such violations.***

Moreover, contrary to CSI's contention, Huerta did not contend that the time of his meal break should be compensated "because he was not relieved of all duty." (5-ER-994; 11:3-8.) As discussed above, Huerta contended that the time of his meal periods constitutes "hours worked" because of the control CSI exercised over him during the meal periods, not that CSI failed to "relieve him of all duty."

CSI contended below that "The CBA Meal Period Exemption, as explained above, means that union employees working under qualifying CBAs are excluded entirely from section 512(a)—the source of the right to the one-hour of premium pay **and** unpaid wages for not being relieved of all duty during a meal period." (5-ER-996; 13:7-10 (emphasis added).) But neither section 512(a) nor Section 10 of the Wage order, which apply only to meal periods, is the "source" of the right to "unpaid wages" asserted by Huerta. Huerta's claim is therefore not "dependent on" or derivative of any meal period rights but exists independently based on Section 1194

and Section 4 of Wage Order 16. Huerta makes this clear in his First Amended Complaint:

> 39. In violation of Section 1197 and Paragraph 4 of the applicable Wage Order, Defendants did not pay class members the wages due them for all hours worked. (6-ER-1294.)

F. The district court's reliance on its faulty decision in *Durham* rests on the faulty premise that Huerta's right to be paid for "all hours worked" is "derivative" of Huerta's meal period rights.

In granting CSI's motion as to the Meal Period Time, the district court adopted its reasoning in *Durham v. Sachs Electric Company* (N.D. Cal., Dec. 23, 2020, No. 18-CV-04506-BLF) 2020 WL 7643125 on the "controlled hours worked" claim for meal period time, in which the district court attempted to distinguish the reasoning of the California Court of Appeal in *Gutierrez*:

> The reasoning in Gutierrez counsels that this Court should similarly distinguish Durham's claims where, as in Araquistain, there is an express statutory exemption ***for the particular right at issue***." (*Durham v. Sachs Electric Company* (N.D. Cal., Dec. 23, 2020, No. 18-CV-04506-BLF) 2020 WL 7643125, at *5 (emphasis added).)

In *Durham*, the district court had concluded that Durham's "hours worked" claim was "derivative" of the meal period laws:

> Upon careful review of the parties' arguments, the Court concludes that the express statutory exemption for CBA-covered employees who bargain for the terms of their meal periods extends to a ***derivative claim*** like this one. (*Id*. (emphasis added).)

Here, however, as discussed above, the "right at issue" is not the right to a meal period that qualifies under Section 512 or section 10 of the Wage Order, but the right to be paid for all hours worked, which is founded on Section 1194(a) and Section 4 of the Wage Order and exists independently of any meal period rights. Huerta would have this claim even if there were no meal period statute or wage order provision regarding meal periods.

G. The Court's decision in *Bono Enterprises, Inc. v. Bradshaw* demonstrates that Huerta's "hours worked" theory of relief was based on the wage order requirement that employees be paid for all hours worked, not just on meal period laws.

In *Bono*, the Court considered a policy where workers had to remain on the work-site premises during their 30–minute lunch period unless they made prior arrangements. The Court held that the lunch time was compensable "hours worked" under section 4 of the applicable Wage Order, concluding that the ***language of Section 4*** of the Wage Order was "sufficiently clear to place employers on notice that an employee must be paid for all hours during which he or she is subject to the employer's control, including meal periods." (*Id*. at 979.)

H. The cases cited by CSI and referred to by the district court in *Durham* are inapposite.

In *Araquistain v. Pacific Gas & Electric Co.* (2014) 229 Cal.App.4th 227, 238 [176 Cal.Rptr.3d 620, 628], which the district court cited to support its conclusion, the plaintiff only asserted a meal period claim. The defendant asserted the statutory

CBA defense under 512(e) re meal periods. (*Id*. at 231.) The Court identified the question before it as whether the CBA provisions were such to bring the exception of section 512(e) into effect. (*Id*. at 230.) The Court concluded that the CBA did provide for meal periods and that the section 512(e) exempted the employer from the wage order's meal period requirements. (*Id*. at 238.) The plaintiff was not asserting an "hours worked" claim, and, as the Court of Appeal held in *Gutierrez*, this case was inapposite to an "hours worked" claim. (*Gutierrez* at 801.)

Pyara v. Sysco Corporation (E.D. Cal., July 20, 2016, No. 215CV01208JAMKJN) 2016 WL 3916339, at *1 is also inapposite. In that case, the plaintiff had alleged numerous causes of action, including a first cause of action for "wage theft / time shaving" and separate claims for failure to pay overtime and failure to provide meal periods. The Court granted the defendant's motion for judgment on the pleadings as to the overtime meal period claims, finding that they were statutorily exempt based on the CBA exemptions. (*Id*. at *3-4.) The Court denied the motion as to the hours worked and rest period claims, holding that they were ***not pre-empted***. As to the hours worked claim, the Court held: "Even if the Court assumed that the rights to overtime, meal periods, and rest periods 'exist entirely as a result of the CBA,' the right to be paid for all of the hours one works exists independently of the CBA. See Cal. Lab. Code § 1194(a)." (*Id*. at *5.) The Court also recognized that, notwithstanding the exemption for overtime and meal

periods, the plaintiff could make a claim for unpaid wages for hours worked under 1194(a). (*Id*. at *5.)

In *Chavez v. Smurfit Kappa North America LLC* (C.D. Cal., Oct. 17, 2018, No. 2:18-CV-05106-SVW-SK) 2018 WL 8642837, a plaintiff subject to a CBA brought claims for unpaid overtime, unpaid meal period premiums, and wages not timely paid, *inter alia*. The Court found that Section 514 barred the overtime claim and that, because the unpaid minimum wage claim was based on the failure to pay overtime, it also failed. (*Id*. at *4.) There was no discussion at all about an "hours worked" claim like that asserted by Huerta in this action.

Perez v. Leprino Foods Company (E.D. Cal., Mar. 22, 2018, No. 117CV00686AWIBAM) 2018 WL 1426561 involved a union worker who sued for overtime. The defendant moved to dismiss the overtime claim based on the Section 514 exemption, which the Court granted. There was no discussion at all about an "hours worked" claim like that asserted by Huerta in this action.

In *Vranish v. Exxon Mobil Corp.* (2014) 223 Cal.App.4th 103 [166 Cal.Rptr.3d 845], the Court upheld a CBA exemption from the overtime pay requirements in Labor Code section 510 based on the language in Labor Code section 514. There was no discussion of a claim for "hours worked" like that asserted in this case. As the Court held in *Gutierrez*, this case was inapposite to an "hours worked" claim. (*Gutierrez* at 801.)

Finally, in *Andrade v. Rehrig Pacific Company* (C.D. Cal., Apr. 22, 2020, No. CV201448FMORAOX) 2020 WL 1934954, at *3, the district held that there may be a statutory exemption for overtime that does not abrogate plaintiff's rights under § 1194 and an employee is entitled to a minimum wage and overtime for all hours he was under the "control" of an employer.

XIII. THE QUESTIONS OF CALIFORNIA LAW PRESENTED IN THIS APPEAL SHOULD BE REFERRED TO THE CALIFORNIA SUPREME COURT FOR DECISION.

This Court may refer questions of state law to the California Supreme Court if the answers to those questions "could determine the outcome" of an appeal and there is "no controlling precedent." (Cal. Rules of Court, 8.548(a)(1)-(2).) This Court frequently refers, and the California Supreme Court regularly accepts, unresolved questions concerning the proper interpretation of California's Wage Orders and Labor Code. (*See*, e.g., *Frlekin, supra*; *Troester v. Starbucks Corporation* (9th Cir. 2016) 680 Fed.Appx. 511, 512, *as modified on denial of reh'g (Aug. 29, 2018), certified question answered* (2018) 5 Cal.5th 829 [235 Cal.Rptr.3d 820, 421 P.3d 1114] (referring question concerning whether federal *de minimis* doctrine applies to Labor Code claims); *Mendoza v. Nordstrom, Inc.* (9th Cir. 2015) 778 F.3d 834, *certified question answered* (2017) 2 Cal.5th 1074 [216 Cal.Rptr.3d 889, 393 P.3d 375] (referring questions on Labor Code's "one day's rest in seven" language); *Kilby v. CVS Pharmacy, Inc.* (9th Cir. 2013) 739 F.3d 1192, *certified question accepted (Mar. 12, 2014), certified question answered* (2016) 63 Cal.4th 1 [201 Cal.Rptr.3d

1, 368 P.3d 554] (referring questions on Wage Orders' "suitable seats" requirement); *Peabody v. Time Warner Cable, Inc.* (9th Cir. 2012) 689 F.3d 1134, *certified question answered* (2014) 59 Cal.4th 662 [174 Cal.Rptr.3d 287, 328 P.3d 1028] (referring questions on Wage Orders' commissions and minimum wage requirements); *Sullivan v. Oracle Corp.* (9th Cir. 2009) 557 F.3d 979, *certified question answered* (2011) 51 Cal.4th 1191 [127 Cal.Rptr.3d 185, 254 P.3d 237] (referring questions on Labor Code's overtime requirements).)

The issue of whether time spent by an employee going through a mandatory exit security process constitutes time that the employee is "suffered or permitted to work" should be so referred. The California Supreme Court expressly declined to decide this issue in *Frlekin*. (*Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1057 [258 Cal.Rptr.3d 392, 407, 457 P.3d 526, 538], *reh'g denied (May 13, 2020)*.)

The issues of whether mandatory travel on an employer's premises to which an employee is confined without undergoing a mandatory exit security process is compensable hours worked under a "control" theory (Huerta's Drive Time claim) or compensable under Section 5(A) of Wage Order 16 where the employer requires the employee's presence at the secured entrance to a work site before traveling to the daily work location are also issues that have not been decided by this Court or any California appellate court and should therefore be resolved by the California Supreme Court.

Finally, no California appellate court nor this Court has decided the issue of whether an "hours worked" claim for meal period time predicated on a "control" theory where the employer confines the employee to the daily work location during meal periods is foreclosed by the existence of a collective bargaining agreement.

The resolution of theses issues require application of California law that will be outcome-determinative, and this Court should therefore certify the issues to the California Supreme Court.

XIV. CONCLUSION

The Exit Security Time is compensable because class members were "controlled" during such time and/or such time was time class members were "suffered or permitted to work." At a minimum, issues of fact existed which precluded partial summary judgment on the issues.

The Drive Time and Exit Security Time were compensable under paragraph 5(A) of Wage Order 16 because it is undisputed that the Security Gate was the first location where the employees' presence was required. The Drive Time that occurred on the Site was also compensable because employees were under CSI's control after entering the Site and while traveling between the Security Gate and the daily work locations on the Site. At a minimum, issues of fact existed which precluded partial summary judgment on the issue.

The Meal Period time is compensable under California law because CSI controlled class members during their meal periods by confining them to the daily work locations. The district court erred in ruling that such time was not compensable because the class members worked under a collective bargaining agreement.

This Court should therefore vacate the orders granting CSI's motions for partial summary judgment and remand the case to the district court.

Dated: October 27, 2021

/s Peter R. Dion-Kindem

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STATEMENT RE RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellant states that Appellant is not aware of any related cases pending before this Court.

Dated: October 27, 2021 /s Peter R. Dion-Kindem

PETER R. DION-KINDEM
PETER R. DION-KINDEM, P.C.

CERTIFICATE RE NUMBER OF WORDS OF BRIEF

I certify pursuant to FRAP Rule 32(7)(C) that Appellant's Opening Brief contains 12,851 words, including footnotes. Counsel relies on the word count of the Word computer program used to prepare this brief.

Dated: October 27, 2021 /s Peter R. Dion-Kindem

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 27, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 27, 2021 /s Kale Eaton

KALE EATON