CASE NO. S253677

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

KENNEDY DONOHUE,
Plaintiff-Appellant and Petitioner,

v.

AMN SERVICES, LLC,
Defendant and Respondent

After a Published Decision by the Court of Appeal,
Fourth Appellate District, Division One, Case No. D071865
San Diego Superior Court Case No. 37-2014-00012605-CU-OE-CTL
Hon. Joel Pressman (Ret.)

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF ON THE MERITS

(Cal. Rules of Court, rule 8.520(d))

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I. INTRODUCTION

Under California Rules of Court, rule 8.520(d)(1), Plaintiff-Appellant Kennedy Donohue (Donohue) submits this supplemental brief to address three relevant post-briefing authorities.

First, in *Frlekin v. Apple, Inc.* (2020) 8 Cal.5th 1038 (*Frlekin*), this Court held that the employer must compensate employees for every minute that its loss prevention policy forced them to spend waiting for or undergoing exit searches of their personal. *Frlekin* establishes that Respondent AMN Services LLC (AMN) must pay employees all penalties and damages for every minute by which its time rounding practices shortened or delayed their meal periods.

Second, in *Barriga v. 99 Cents Only Stores LLC* (2020) 51 Cal.App.5th 299 (*Barriga*), the Fourth District Court of Appeal held that courts must closely scrutinize for possible coercion or abuse an employer's submission of the declarations of current employees to rebut wage and hour violations against it. *Barriga* discredits AMN's submission of unscrutinized declarations of nearly 40 current employees to rebut Donohue's evidence of meal period violations.

Finally, in *Kim v. Reins Int'l Cal., Inc.* (2020) 9 Cal.5th 73 (*Kim*), this Court held that payment of a *remedy* for a Labor Code

violation does not excuse the *fact* of the violation. *Kim* confirms that AMN's payment of statutory penalties for non-compliant meal periods does not excuse it from being held liable for such violations, including under California's Private Attorney General Act (PAGA).

For the reasons discussed, *Frlekin*, *Barriga*, and *Kim* further support reversal of the Court of Appeal's decision in this case.

II. ARGUMENT

A. *Frlekin* Underscores That Time Rounding Is Inconsistent With California's Mandate to Protect and Benefit Employees, Including By Construing The Scope of Their Compensable Activities Liberally and Broadly

Frlekin involved a class action challenge to defendant Apple, Inc.'s (Apple) practice of requiring its retail store employees to undergo security searches of their bags and personal devices after clocking out but before leaving the premises. (8 Cal.5th at pp. 1043–1044.) Employees spent between 5 and 20 minutes waiting in line for and undergoing these searches, but were not compensated for any of this time. (*Id*. at p. 1044.) After certifying a class of nonexempt employees subject to the mandatory bag search policy, the district court granted Apple summary judgment. (*Id*. at p. 1045.) The court found that the time employees spent undergoing the searches did not constitute "hours worked" under the applicable wage order

because employees could avoid being under their employer's control during the searches by not bringing bags or devices to work. (*Ibid.*)

In response to the Ninth Circuit's certification of the issue, this Court held that the time spent by employees related to exit searches for the employer's benefit constituted "hours worked" even if employees could "theoretically" avoid being searched. (*Id.* at pp. 1050–1051.) The Court reiterated that an "employee who *is subject to the control* of an employer does not have to be working during that time to be compensated under the applicable wage order." (*Id.* at p. 1046 (citations omitted; emphasis in original).)

It also rejected as impractical the claim that employees could avoid the searches by foregoing bags or devices at work given that Apple required employees to wear its apparel on premises but remove or cover it up before leaving, and regularly marketed personal devices as necessary and ubiquitous. (*Id.* at pp. 1046, 1049–1052.) And, because Apple conducted the searches to detect and deter theft primarily for *its* benefit, this Court found "far-fetched and untenable" the claim that the searches benefitted the employees by not prohibiting them from bringing bags and devices altogether. (*Id.* at p. 1051–1053.)

Like the employer in *Frlekin*, AMN here impermissibly subjected employees like Donohue to its control by using time rounding practices that regularly shortened or delayed their meal periods. Just like Apple violated relevant labor laws and wage orders when it did not pay its employees for time spent in exit searches resulting from its loss prevention policy, AMN too violated the law when it did not pay its employees the statutory penalty of one extra hour's pay for each non-compliant meal period resulting from its time rounding practices. (Labor Code, § 226.7, subd. (c).)

Further, though Apple minimized the time spent in exit searches by using better search technology or more search personnel, it still had to pay employees for every minute spent waiting for or undergoing searches to comply with the relevant wage order's mandate to pay employees for all hours worked. (*Frlekin*, 8 Cal.5th at pp. 1056–1057.) Similarly, though AMN minimized the time by which meal periods were shortened or delayed by rounding punch times to the nearest tenth of the hour, it must still pay the statutory penalty to comply with the relevant wage order's mandate to do so every time it failed to provide employees a full, 30-minute meal period before the end of their fifth hour of work.

The fact that employees could "theoretically" avoid AMN's time rounding practices by clocking in and out for their shifts and their meal periods exactly on the hour or each tenth of the hour does *not* render the shortened or delayed meal periods any less non-compliant under *Frlekin*. Further, because AMN rounded employee punch times solely for *its* administrative convenience, *Frlekin* undermines its claim that rounding ultimately benefitted employees.

Under *Frlekin*, AMN's time rounding of meal period punch times cannot be "neutral" just because non-compliant meal periods on some days were offset on other days by compensation for longer shifts than employees actually worked, or meal periods that started a few minutes earlier or lasted a few minutes longer. Rather, any such justification runs afoul of the overarching policy reiterated in *Frlekin*, that is, to construe California's wage and hour laws liberally and through a strictly employee-protective lens:

> We construe wage orders, like wage and hour laws, so as to promote employee protection. [Citations] Our prior decisions have made clear that "wage orders are the type of remedial legislation that *must be liberally construed* in a manner that serves its remedial purposes' of protecting and benefitting employees."

(*Id*. at 1045 (final citation omitted; emphasis added). Excusing AMN for even one non-compliant meal period would be inconsistent with a liberal construction of the relevant wage order's language and

purpose—that is, to allow employees to rest and recharge with a 30-minute meal period before the end of their fifth hour of work. (*Id.* at p. 1048 [refusing to limit the scope of compensable activities to avoid "a narrow interpretation at odds with the wage order's fundamental purpose of protecting and benefitting employees."].)

For the same reason, it makes no difference that the plaintiff in *Frlekin* sought to remedy Apple's failure to compensate employees for time spent under the employer's control, whereas Donohue seeks to remedy AMN's failure to pay statutory pay penalties plus PAGA penalties for shortened or delayed meal periods. *Frlekin's* key takeaway is that courts must require employers to remedy a violation of applicable labor laws and wage orders no matter how de minimis.

In other words, AMN must be required to remedy its violation of the relevant labor laws even if its time rounding practice only shortened or delayed employee meal periods by a few minutes. What is paramount under *Frlekin* is to effectuate the language and purpose of the applicable labor laws and wage orders with a remedy that protects and benefits employees, whether that means compensating employees for all hours worked or paying statutory pay penalties and PAGA penalties for non-compliant meal periods.

B. *Barriga* Undermines the Probative Value of Respondent's Evidentiary Submissions to Rebut Meal Period Violations

Barriga involved a putative class action on behalf of non-exempt employees who worked the graveyard shift at a retail store whose policy of locking the store required employees to wait as long as 15 minutes without compensation for a manager to let them out at the end of their shift or for meal periods. (51 Cal.App.5th at p. 306.) When plaintiff moved to certify two classes, defendant submitted hundreds of contrary declarations of its current employees in opposition, in which employees categorically stated that they did not have to wait to be let out of the store or were compensated for any time they did wait. (*Id.* at pp. 310–311.) The trial court then denied plaintiff's motion for class certification and her motion to strike the declarations of current employees submitted in opposition despite evidence that the employees had been coerced into testifying or did not know what they were signing. (*Id.* at pp. 307, 312–313, 319.)

The Court of Appeal reversed, finding that the trial court misunderstood its duty to carefully scrutinize, strike, and discount the declarations of all current employees for possible coercion or threatened abuse, including those who were not members of the putative classes. (*Id.* at pp. 308, 323–334, 338.) Notably, *Barriga* recognized that many courts are already especially sensitive to

possible coercion in unilateral communications between a class opponent and its current employees who are putative class members. (*Id.* at pp. 325–326 [discussing cases scrutinizing declarations of current employees submitted by defendant because of the inherently coercive nature of the employer-employee relationship].)

But the court further clarified the need for heightened scrutiny of such declarations given the "reality" of the "imbalance of power":

> Even if we were to disagree with the courts that have concluded a current employer-employee relationship between the class opponent and putative class members is *inherently* coercive, we cannot ignore the reality that such a relationship carries a heightened potential for coercion and abuse, and courts should be cognizant of the imbalance of power and interests when carefully reviewing employee statements.

(*Ibid.* (emphasis in original).)

Here, too, AMN submitted declarations of approximately 40 current employees in support of summary judgment, stating that, contrary to Donohue's allegations, they "always" or "usually" took uninterrupted lunches of at least 30 minutes. (Answer. Merits. Br. at p. 11.) AMN relied heavily on these declarations throughout the proceedings, including in briefing before this Court and despite Donohue's objections that they were inherently unreliable. (*See, e.g.*, Answer. Merits Br. at pp. 3, 8, 16, 27 & fn. 4; AOB at pp. 36–37.) To the extent this Court considers this evidence and AMN's related

arguments, and if it reverses and remands, these declarations should be subject to heightened scrutiny in recognition of the potential for abuse or coercion, and discounted or disregarded, as appropriate.

C. *Kim* Confirms That Donohue's PAGA Claims Should Not Have Been Summarily Adjudicated in AMN's Favor

Kim involved a plaintiff who, like Donohue, alleged individual, class, and PAGA claims for wage and hour violations. (9 Cal.5th at p. 82.) When plaintiff's putative class claims were dismissed after he settled his individual claims, the trial court summarily adjudicated his PAGA claim in the employer's favor for lack of standing, finding that plaintiff was no longer an "aggrieved employee" under PAGA. (*Id.* at pp. 82–83.) This Court reversed, holding that plaintiff's acceptance of a remedy for his individual claim "did not nullify" the fact that the employer violated the labor code, giving plaintiff standing to maintain the PAGA claim: "The *remedy* for a Labor Code violation, through settlement or other means, is distinct from the *fact* of the violation itself." (*Id.* at p. 84 (emphasis in original).)

To explain this point, the Court gave an example from the meal period context that is particularly relevant and instructive here:

> For example, employers can pay an additional hour of wages as a remedy for failing to provide meal and rest breaks. (§ 226.7, subd. (c).) But we have held that payment of this statutory remedy "does not excuse a

section 226.7 violation."

(*Ibid.* (citation omitted).) In other words, the remedy and the violation are distinct, and payment of the remedy does not excuse the fact of the violation. But contrary to *Kim's* teaching, AMN has relied heavily on its payment of meal period penalties to Donohue or other class members to excuse its failure to sometimes provide a 30-minute meal period at the end of the fifth hour of work. (Answer Merits Br. at p. 10, citing 8 AA 2074, 2170, 2209 ¶¶ 3, 15.) Far from constituting an excuse, these payments constitute an admission by AMN of the fact that it violated labor laws and wage orders, which, under *Kim*, subject it to additional civil penalties under PAGA.

III. CONCLUSION

Frlekin establishes that AMN's ostensibly "neutral" time rounding scheme is at odds with the clear mandate of California's protective labor laws and wage orders to both avoid encroaching on employees' right to full and timely meal periods **every day** and accurately pay **all** pay penalties for non-compliant meal periods. *Barriga* calls into question the reliability of AMN's evidence that, contrary to Donohue's declaration, deposition testimony, and other evidence, its current employees purported to receive compliant meal periods. *Kim* confirms that AMN's payment of statutory penalties for

non-compliant meal periods constitutes an admission that it violated labor laws and subjects it to civil penalties under PAGA.

Collectively, these cases further support reversal of summary judgment in AMN's favor, and a remand with instructions for judgment in Donohue's favor or a trial on the merits.

Dated: November 20, 2020 **SULLIVAN LAW GROUP, APC**

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Pursuant to rule 8.520(d)(2) of the California Rules of Court, I certify that the foregoing Plaintiff-Appellant's Supplemental Brief on the Merits was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief is 2,192 words.

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