Supreme Court of California
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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 REPLY BRIEF

PETER R. DION-KINDEM (95267)
PETER R. DION-KINDEM, P.C.
2945 Townsgate Rd., Suite 200
Westlake Village, CA 91301
Telephone: (818) 883-4900
Email: peter@dion-kindemlaw.com

LONNIE C. BLANCHARD, III (93530)
THE BLANCHARD LAW GROUP, APC
5211 E. Washington Blvd., #2262
Commerce, CA 90040
Telephone: (213) 599-8255
Email: lonnieblanchard@gmail.com

Attorneys for Plaintiff and Appellant George Huerta

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I. THE UNPUBLISHED MEMORANDUM DECISION IN *GRIFFIN* HAS NO PRECEDENTIAL VALUE AND IS NOT BINDING ON PLAINTIFF IN THIS ACTION.

CSI's argument that the unpublished Memorandum decision in *Griffin v. Sachs Electric Company* (9th Cir. 2020) 831 Fed.Appx. 270, 271–272, which involved a ***different*** plaintiff and a ***different*** defendant during a ***different*** phase of the Project and was based on a completely ***different*** factual record is somehow binding on Huerta and bars Huerta's claims in this case is meritless. Circuit Rule 36-3(a) expressly states that "Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." Such decision is not the law of this case, nor is it relevant under any rules of claim or issue preclusion.

Res judicata, or claim preclusion, "provides that 'a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.'" (*In re Schimmels* (9th Cir. 1997) 127 F.3d 875, 881 (quoting *Montana v. U. S.* (1979) 440 U.S. 147, 153 [99 S.Ct. 970, 973, 59 L.Ed.2d 210].) The related doctrine of collateral estoppel, or issue preclusion, provides that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." (*Ashe v. Swenson* (1970) 397 U.S. 436, 443 [90 S.Ct. 1189, 1194, 25 L.Ed.2d 469].) Because Huerta was not a party in *Griffin*, the rules of claim preclusion or issue preclusion do not apply.

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

CSI's argument that Plaintiff's 5(A) claim fails as a matter of law rests entirely on its improper reliance on the unpublished Memorandum decision in *Griffin*. Not only is this decision not precedent, it was also based on an entirely different factual record.

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

The Court of Appeal in *Griffin* based its conclusion that ***Griffin's*** 5(A) claim failed because of a specific factual finding based on the evidentiary record in ***that*** case: "the record establishes that Griffin was first required to arrive at the parking lot, not the security gate." (*Id*. at 272.) The Court reasoned that "Griffin had to report to the parking lot by 8:00 a.m. for the buggy to pick him up and take him to his assigned jobsites. There was no designated time by which he had to be at or pass through the gate. Griffin's Drive Time is therefore not compensable under this theory either." (*Id.*)

In *Griffin*, however, the plaintiff did not present evidence that employees were told by the employer's personnel that the Security Gate where the badging occurred was the first location their presence was required. (See 2-ER-301-338; 3-ER-340-355; 3-ER-357-374; 3-ER-376-392; 3-ER-394-410; 3-ER-412-437.)

Huerta, on the other hand, presented substantial evidence in the form of declarations from CSI's employees that the first location where CSI required its workers' presence was at the Security Gate where the entrance security process occurred. (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. (ER: 4-ER-879 ¶ 11, *see also* 4-ER-880 ¶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. (4-ER-894 ¶ 9; *see also* ¶ 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. (5-ER-923 ¶ 9; *see also* 5-ER-924 ¶ 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. (4-ER-908 ¶ 11; *see also* 4-ER-909 ¶ 16.)

The fact that Huerta only had to present a badge to be scanned and was not required to leave his vehicle during the mandatory badging entrance process is irrelevant to whether the Security Gate was the first location where CSI's workers' presence was required, and CSI cites no law to the contrary. There is no language in Paragraph 5(A) that limits its effect to locations where a badging process occurs. If, for example, construction workers were required to be at a specific location at the beginning of the day, such as a gas station or the employer's office, and then travel to where they worked for the day, they would be entitled to compensation for all travel to and from that first location, regardless of whether there was any "badging" process at that first location.

In fact, Huerta has never contended that the requirement that Huerta "badge in" at the Security Gate each morning was the fact that obligated CSI to compensate Huerta for travel occurring after the Security Gate under Paragraph 5(A). Rather, Huerta contends that because the Security Gate was the location where his and the class members' presence was first required, he and the class members were entitled to be paid for travel occurring thereafter under the specific language of Paragraph 5(A). ***Huerta would have this 5(A) claim even if there was no badging process at the Security Gate***.

Moreover, in *Griffin*, Sachs had presented evidence that there was another location where workers' presence was first required to meet with other employees

and be transported by buggies to their daily work sites and that they were paid for the buggy ride. (2-ER-255 ¶¶ 3, 4.) There was no such evidence before the district court in this case, however. Indeed, in this case, CSI offered ***no*** evidence in support of its motions 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.)

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

The district court improperly ignored Huerta's unrebutted evidence and the lack of any contrary evidence presented by CSI thereby violating the fundamental rule that 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].) Based on Huerta's evidence, a jury could certainly find that the Security Gate where the badging occurred was the first location where CSI's employees' presence was required. The district court therefore erred in granting partial summary judgment in favor of CSI on this claim.

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

In its Opposition Brief, CSI once again improperly relies on the unpublished Memorandum decision in *Griffin* to oppose Huerta's hours worked claim based on

Huerta's "control" theory with respect to the time spent waiting for and undergoing the mandatory exit security process. Not only does the *Griffin* decision have no precedential value, it is based on an entirely different factual record.

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.

CSI's attempt to meaningfully distinguish the California Supreme Court's 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)* fails. In *Frlekin*, 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's employees spent waiting 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.

CSI does not dispute that CSI's employees were confined to the Site as they waited for and underwent the mandatory security exit process. Moreover, CSI does not dispute that while they were confined in the Site as they were waiting for and undergoing 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 undergoing a mandatory exit security process compensable.

CSI attempts to distinguish *Cervantez v. Celestica Corp.* (C.D. Cal. 2009) 618 F.Supp.2d 1208, 1216 and *Pelz v. Abercrombie and Fitch Stores, Inc.* (C.D. Cal., June 4, 2015, No. CV146327DSFJPRX) 2015 WL 12712298, which both held that time spent waiting for and undergoing a mandatory exit procedure was compensable, by arguing that "[b]oth of these cases predate *Frelkin* by several years, also involve time spent by employees undergoing security checks when leaving a facility, and are therefore distinguishable for the same reasons." (Opposition, 24, fn. 1.) The fact that these cases pre-date *Frlekin* does not make them distinguishable, however.

Similarly, the mandatory exit security process in this case is not meaningfully different than the exit process in those cases. The Site is equivalent to the buildings in those cases and to the Apple stores in *Frlekin*.

2. The record establishes that the security exit process was in fact a security process.

Without citing any evidence in the record, CSI contends that the security exit process in this case "is strictly for the purposes of ingress and egress. Like scanning a card, this interaction at the Badging Gate is for the purpose of exiting the workplace." (Opposition, 23.) Huerta's evidence, however, demonstrates that the mandatory exit process was in fact a security process. For example, the evidence submitted by Huerta establishes the following:

- The Security Gate was manned by security personnel and 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 a security identification badge at the time that the worker 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.)
- 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 (emphasis added.).)

- Huerta demonstrated through declarations that this policy was enforced:
  - "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.)
  - "I was told by CSI management at my orientation that as part of the security entrance and exit process, the security guards had the right to look inside and search any worker vehicle at any time. There was also a sign on the Solar Site that said any vehicle on their property is subject to search and seizure. We were told that we were subject to being searched if the security guards thought a worker might be stealing tools or supplies. . . . I have seen the security guards search a vehicle during the security process at the guard shack." (5-ER-926; ¶¶ 26, 27)
  - "I was told by CSI management that as part of the security entrance and exit process, the security guards had the right to look inside and search any worker vehicle at any time. . . . I drove a pick-up truck and I observed that the security guards would look at the bed of my truck to make sure there were no tools or anything else improper in there. . . . I was told by CSI management that the main reason that the Solar Site would search vehicles at the Security Gates during the exit security process was because they did not want workers to steal tools. I was also told that some people took kit foxes or endangered species home, so they were also checking for that as well. . . . At least once, I forgot my security identification badge during the entrance security process and, when I did, I had to stop at the security guard shack and sign in to get a temporary badge." (4-ER-882; ¶¶ 26-29.)

- "I was told by CSI management at my orientation that as part of the security entrance and exit process, the security guards had the right to look inside and search any worker vehicle at any time. There was also a sign on the Solar Site that said any vehicle on their property is subject to search and seizure. . . . I have seen the security guards search vehicles during the exit security process." (4-ER-911; ¶¶ 29, 30.)

Thus, the mandatory exit security process was in fact a security process and CSI employees were confined to the Site and not permitted to leave until they underwent such security process. Moreover, the vehicle searches in this case are no different than the bag searches in *Frlekin*. The district court erred in ignoring all of this evidence, all of which was not in the record in *Griffin*. (*See* 2-ER-301-338; 3-ER-340-355; 3-ER-357-374; 3-ER-376-392; 3-ER-394-410; 3-ER-412-437.)

3. 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.

In addition, 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. (*Frlekin,* at 1044.) Apple's requirement 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 was brief 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.) 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, being subjected to a vehicle search, and having to wait to have a badge scanned (which could last up to 20 minutes) before being allowed to leave. CSI's employees, as Apple's employees, were under CSI's control while waiting to undergo the mandatory exit security process and are entitled to be paid for all such time.

4. 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 contends that "[w]aiting in line to exit the employer's premises . . . does not warrant compensation." (Opposition, 24.) In *Frlekin*, however, the Court expressly held that employees required to wait in line to undergo an exit security process were entitled to be compensated for such waiting time:

> . . . it is clear that plaintiffs are subject to Apple's control ***while awaiting***, and during, Apple's exit searches. Apple's exit searches are required as a practical matter, occur at the workplace, involve a significant degree of control, are imposed primarily for Apple's benefit, and are enforced through threat of discipline. Thus, according to the "hours worked" control clause, plaintiffs "must be paid.". . . [Apple] must compensate those employees to whom the policy applies ***for the time spent waiting for and undergoing these searches***. (*Id*. at 1056–1057 (emphasis added).)

As in *Frlekin*, CSI's exit security process was required, occurred on the Site, involved a significant degree of control (confining employees to the Site without undergoing such process), and was imposed primarily for CSI's benefit. As the Court noted in *Frlekin*, 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, as in *Frlekin*, CSI's onsite security procedures do not benefit the employee, but only the employer. Moreover, CSI's employees were not 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.

CSI does not meaningfully address Plaintiff's contention that the activities CSI requires its employees to perform as part of the mandatory exit security process constitutes "work" under the "suffered or permitted to work" prong of the "hours worked" Wage Order definition. CSI attempts to distract this Court from the issue of whether the required activities constitute "work" by focusing on the issue of whether CSI was aware of such activities. CSI, however, does not and cannot dispute that it was aware that Huerta and its other employees were performing such mandatory activities associated with the exit security process after they are clocked out.

CSI's reliance on *Hernandez v. Pacific Bell Telephone Co.* (2018) 29 Cal.App.5th 131, 144 [239 Cal.Rptr.3d 852, 862, 29 Cal.App.5th 131, 144] is misplaced. In that case, the Court rejected the plaintiffs' contention that because premises technicians carry equipment and tools necessary to perform their jobs when they get to the worksites, their travel time should be compensable. (*Id*.) In *Hernandez*, the Court relied on a district court's opinion in *Taylor v. Cox Communs.*

Cal., LLC (C.D.Cal. 2017) 283 F.Supp.3d 881 in holding that merely transporting tools during an optional home start commuting program did not constitute work and that "[m]ere transportation of tools, which does not add time or exertion to a commute, does not meet this standard. (*Id.* at p. 890.)" (*Hernandez*, at 142.)

This case does not involve Plaintiff's transportation of equipment during a commute that does not "add time or exertion" to Plaintiff's commute. In fact, the undisputed evidence demonstrates that CSI's mandatory exit security process on the Site required employees to spend substantial unpaid time to wait for and undergo such mandatory exit security process.

CSI's argument that CSI's managers must subjectively recognize its employees' activities as "work" is unsupported by any reasoned analysis of controlling California law. CSI argues that "scanning a card at the Badging Gate to exit the premises is obviously not something anyone at CSI would recognize as 'work.'" (Opposition, 28.) CSI, of course, cites no evidentiary support for this baseless conclusion. Moreover, 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 the plain-language definition of "work."[1] They involve

[1] "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.*

"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. 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 that precludes summary judgment in CSI's favor.

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

CSI cannot meaningfully distinguish the control it exercised over Huerta and its other employees while traveling on the Site from the control exercised by the employer in *Morillion*. In *Morillion*, the Court held that the employer subjected its employees to its control by "determining when, where, and how they are to travel."

(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").)

(*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 588 [94 Cal.Rptr.2d 3, 995 P.2d 139], *as modified (May 10, 2000)*.) 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. 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*. Once they were on the Site, CSI's workers were confined to the Site, 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.

CSI contends that travel on the employer's premises is not compensable but cites no controlling law to support this contention. The control exercised by CSI was, in fact, while the employees were "at work" -- on the Site. The travel on the Access Road in this case is equivalent to a warehouse employer requiring its employees to travel from the warehouse entrance and walk 20 unpaid minutes on a designated yellow line to the employee's workstation without being able to stop at a break room or locker room. Clearly, such employee would be under the employer's control while "traveling" on the employer's premises and therefore be compensated for such time.

In any event, whether CSI sufficiently controlled its employees while they were confined to the Site and traveling 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].)

V. PLAINTIFF'S RIGHT TO BE PAID FOR ALL "HOURS WORKED," INCLUDING THOSE HOURS OF A CONTROLLED MEAL PERIOD, EXIST UNDER CALIFORNIA LAW INDEPENDENT OF ANY MEAL PERIOD RIGHTS, AND THE EXISTENCE OF A CBA DOES NOT ABROGATE SUCH RIGHT.

A. 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.

CSI's entire argument that Huerta's hours worked claim based on the control CSI exercised over the workers during their meal periods is based on the faulty premise that worker's right to be paid for all "hours worked," including those of a controlled meal period, is dependent on the meal period rights granted under the Labor Code and Section 10 of the Wage Order. Not so. An employee's right to be paid minimum wages is provided for in Labor Code section 1194(a). 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. CSI does not and cannot dispute that this right exists even if there were no meal period laws, and neither the district court nor CSI cited any authority holding otherwise.

CSI conflates the concept of being "on duty" with the concept of being free from the control of an employer during meal periods. Employees do not have to be "on duty" or working to be under an employer's control. If, for example, CSI required Huerta to remain on the Site after arriving at the Site until he left the Site through the Security Gate, it would be required to pay him for all such time because he was under CSI's control. The fact that this control also occurred during an

ostensible meal period does not eliminate Huerta's right to compensation for such time. As the Court held in *Morillion*, "an employee who is subject to an employer's control does not have to be working during that time to be compensated...." (*Morillion, supra,* 22 Cal.4th at 582.)

In *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833 [182 Cal.Rptr.3d 124, 129, 340 P.3d 355, 360], the Court explained that to qualify as "work," an activity need not involve active exertion. There, the Court held that time an employee was required to remain at the workplace constituted hours worked even if they were permitted to sleep during such time. (*Id*. at 849; *see also Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 30 (285 Cal.Rptr. 515) (time employee is required to remain at workplace is hours worked even if permitted to sleep); *Abdullah v. U.S. Security Associates, Inc.* (C.D. Cal., Mar. 24, 2011, No. CV 09-9554-GHK (EX)) 2011 WL 13239387, at *3, (where employee security guards were required to remain on the premises during their meal periods, such time was compensable under California law); *Ridgeway v. Walmart Inc* (9th Cir. 2020) 946 F.3d 1066, 1083 (where employer restricted drivers to the tractor cab for their layovers, they were subject to the employer's control during such layover and entitled to be paid for such time).)

CSI cites no controlling California case that holds that merely because protections of meal period laws do not apply to workers who work under a qualifying

CBA, the general protections of the right of those worker to be paid for all "hours worked," including those during meal periods, evaporates.

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

CSI argues 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 in Huerta's Opening Brief, the identical argument with respect to employer-mandated travel time was flatly rejected by the Court in *Gutierrez v. Brand Energy Services of California, Inc.* (2020) 50 Cal.App.5th 786 [264 Cal.Rptr.3d 173, 50 Cal.App.5th 786], *as modified on denial of reh'g (July 2, 2020), review denied (Sept. 9, 2020)*.

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 of 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.)

C. Huerta is not seeking compensation for CSI's violation of California's meal period laws because he was not relieved of all duty.

CSI argued that Huerta is contending that the time of his meal break should be compensated "because he was not relieved of all duty." (5-ER-994; 11:3-8.) Not so. As discussed above, Huerta contends 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." 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.

D. The cases cited by CSI 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.

E. Huerta's hours worked claim is not barred by Section 301 of the LMRA.

CSI's argument that Huerta's hours worked claim is pre-empted by the LMRA is meritless. Determining whether Section 301 completely pre-empts a state claim involves a two-step process. First, the Court must determine "whether the asserted cause of action involves a right conferred upon an employee by virtue of state law" or by the CBA. (*Burnside v. Kiewit Pacific Corp.* (9th Cir. 2007) 491 F.3d 1053, 1070.) Here, Huerta's hours worked claim is not based on a CBA, but on his right under California law to be paid for all hours worked.

In *Burnside*, the Court held that the hours worked claim for travel time was based on California law and therefore was not pre-empted by federal law. In *Garcia v. Statewide Traffic Safety and Signs, Inc.* (C.D. Cal., Nov. 26, 2018, No. SACV1801668JVSJDEX) 2018 WL 6242866, at *3–4, the district court rejected the very arguments CSI makes in this case. In *Garcia*, the plaintiff alleged that he was entitled to be paid for "hours worked" during meal periods under California law. The

district court rejected the employer's argument that such claim was pre-empted, noting that the plaintiff's claims were based on state law, not on any provision of a CBA. (*See also Livadas v. Bradshaw* (1994) 512 U.S. 107, 125 [114 S.Ct. 2068, 2079, 129 L.Ed.2d 93] (no LMRA pre-emption because the plaintiff's wage and hour claim raised "a question of state law, entirely independent of any understanding embodied in the collective-bargaining agreement between the union and the employer"); *Mauia v. Petrochem Insulation, Inc*. (N.D. Cal., July 3, 2018, No. 18-CV-01815-MEJ) 2018 WL 3241049, at *3 ("resolving whether Plaintiff should be compensated for those hours will not substantially depend upon interpreting the CBA. Instead, it will depend upon examining the level of control Defendant exerted upon Plaintiff during the time outside of his regular shifts.").)

CSI's reliance on *Marquez v. Toll Global Forwarding* (9th Cir. 2020) 804 Fed.Appx. 679 is completely misplaced because this case, unlike *Marquez*, does ***not*** involve claims for meal and rest period violations.

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

For the reasons stated in Huerta's Opening Brief, 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 referred to the California Supreme Court for decision.

The issues of whether Huerta's travel time is 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 and whether 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 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 requires application of California law that will be outcome-determinative, and this Court should therefore certify the issues to the California Supreme Court.

VII. CONCLUSION

The time spent traveling between the Security Gate and the daily work areas was 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. At a minimum, issues of fact existed which precluded partial summary judgment on the issue.

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 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 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: January 13, 2022 /s Peter R. Dion-Kindem

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

LONNIE C. BLANCHARD III
BLANCHARD LAW GROUP, APC

Attorneys for Plaintiff and Appellant George Huerta

CERTIFICATE RE NUMBER OF WORDS OF BRIEF

I certify pursuant to FRAP Rule 32(7)(C) that Appellant's Opening Brief contains 6,966 words, including footnotes. Counsel relies on the word count of the Word computer program used to prepare this brief.

Dated: January 13, 2022 /s Peter R. Dion-Kindem

PETER R. DION-KINDEM
PETER R. DION-KINDEM, P.C.
THE DION-KINDEM LAW FIRM

Attorneys for Plaintiff and Appellant George Huerta

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 January 13, 2022.

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: January 13, 2022 /s Kale Eaton

KALE EATON