Case No. S258966

IN THE SUPREME COURT

of the

STATE OF CALIFORNIA

GUSTAVO NARANJO,

Plaintiff and Respondent;

v.

SPECTRUM SECURITY SERVICES, INC.,

Defendant and Appellant,

Review of a Decision of the California Court of Appeal

Second Appellate District, Division Four, Case No. B256232

DEFENDANT AND APPELLANT SPECTRUM SECURITY SERVICES, INC.'S CONSOLIDATED ANSWER TO AMICI CURIAE BRIEFS

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INTRODUCTION

Defendant and Appellant Spectrum Security Services, Inc. ("Spectrum") submits this Consolidated Answer to the amici curiae briefs filed in support of Plaintiff and Respondent Gustavo Naranjo ("Plaintiff") by Division of Labor Standards Enforcement ("DLSE"), California Employment Lawyers Association ("CELA"), Consumer Attorneys of California ("CAOC"), and California Rural Legal Assistance Foundation, et al. ("CRLAF") (collectively referred to herein as "Plaintiff's amici").

Like Plaintiff, Plaintiff's amici misinterpret and misapply the Labor Code and prior holdings of this Court in arguing that an employee who prevails in an action for failure to provide meal periods is entitled not only to the statutorily-prescribed remedy of one additional hour of pay per day, but also to additional bootstrapped penalties available under other Labor Code provisions that apply to an employer's failure to provide accurate wage statements (Labor Code section 226) and failure to pay all wages owed on termination of employment (Labor Code section 203). The plain language of the applicable statutes, and this Court's interpretation of them, refutes Plaintiff's amici's arguments.

In *Kirby v. Immoos Fire Protection, Inc.*, 53 Cal.4th 1244 (2012), this Court held that an action, like the present one, alleging a violation of Labor Code section 226.7, is not an action for unpaid wages, but instead is an action for non-provision of meal breaks. The Court explained that its earlier holding in *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094 (2007), that the one hour of pay remedy for a meal break violation is a "wage" for statute of limitations purposes, does not transform a violation of section 226.7 into a wage violation. Although the remedy for a meal break violation is quantified as an additional hour of pay, a lawsuit alleging meal break violations, and seeking the one hour pay remedy, remains a lawsuit alleging non-provision of breaks, not a lawsuit for unpaid wages.

Kirby forecloses the arguments of Plaintiff's amici that a prevailing meal break plaintiff is entitled to derivative waiting time penalties and wage statement penalties, in addition to the statutory remedy of an additional hour of pay for each violation. Under the express language of Labor Code section 203, waiting time penalties are tethered to an underlying claim for nonpayment of wages that were earned for labor performed by the employee. Because a meal break action is not an action for nonpayment of wages, and the meal period premium remedy does not compensate an employee for hours worked or labor performed, section 203 penalties simply do not apply.

Labor Code section 226 penalties for failure to provide accurate itemized wage statements also do not apply. Section 226 requires employers to accurately itemize an employee's pay and work hours each pay period. This Court made clear in *Ward v. United Airlines*, 9 Cal.5th 732, 752 (2020), that the purpose of section 226's itemized wage statement requirements is to enable employees to easily determine how much they have been paid and how that pay was calculated. An employer cannot itemize amounts that are NOT paid, such as the meal break premiums the court awarded as a legal remedy in this case. A later award of contested meal break payments does not render wage statements issued a decade earlier somehow "inaccurate." The wage statements *accurately* reflected the amounts actually paid to the employees (which did not include meal break premiums) at that time. Labor Code section 226 plainly does not apply.

Plaintiff's amici nonetheless urge the Court to broadly and liberally "interpret" the Labor Code provisions in a way that provides maximum recovery to employees. Plaintiff's amici urge that this is needed to deter employer abuse and non-compliance with wage and hour laws. To the contrary, the Legislature already has provided ample remedies to

employees who are unlawfully denied meal breaks, including, in addition to the one hour pay remedy, the potential for civil penalties and attorneys' fees on behalf of all aggrieved employees under the Private Attorneys General Act ("PAGA"). Stacking of multiple additional penalties on a bootstrapping theory is not necessary for deterrence purposes, and, in fact, would present serious questions of unconstitutionality. Amici's policy arguments are better addressed to the Legislature, not to this Court. The policy of liberal construction does not permit a court to disregard the plain language of the applicable statutes and effectively rewrite the laws under the guise of "policy" or "interpretation." That is precisely what Plaintiff and Plaintiff's amici are asking the Court to do in this case. Their request must be rejected.

ARGUMENT

A. A Meal Break Action Is Not an Action for Unpaid Wages.

Labor Code section 226.7(c) states that if an employer fails to provide an employee with a meal period in accordance with state law, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday the meal period was not provided. Thus, the statutorily-prescribed remedy for a meal break violation is one additional hour of pay per day. Even though this remedy is phrased in terms of "pay," and an action alleging a violation of section 226.7 seeks this "pay" as a remedy, this Court in *Kirby* unequivocally held that a meal break action is not an action for unpaid wages. Instead, it is an action for non-provision of meal breaks. *Kirby*, 53 Cal.4th at 1257. The Court acknowledged that it had previously held in *Murphy v. Kenneth Cole Production, Inc.*, 40 Cal.4th 1094, 1107 (2007), that a meal period premium is a "wage" (rather than a penalty) for purposes of determining which statute of limitations applies to a meal break claim (the one-year statute of limitations for penalties or the three-year statute of limitations for an

obligation created by statute). However, this did not alter the *Kirby* Court's determination that an action for meal or rest break premiums is not an action for unpaid wages. The Court explained that "[s]ection 226.7 is not aimed at protecting or providing employees' wages. Instead, the statute is primarily concerned with ensuring the health and welfare of employees by requiring that employers provide meal and rest periods. . . ." *Id.* at 1255. "The 'additional hour of pay' . . . is the legal remedy for a violation . . . but whether or not it has been paid is irrelevant to whether section 226.7 was violated." *Id.* at 1256-57. "An employer's failure to provide an additional hour of pay does not form part of a section 226.7 violation," rather, "[t]he failure to provide required meal and rest breaks is what triggers a violation of section 226.7. Accordingly, a section 226.7 claim is not an action brought for the nonpayment of wages; it is an action brought for the non-provision of meal or rest breaks." *Id.* at 1257.

Based on the Court's analysis, the Court concluded that a prevailing party in a meal or rest break action is not entitled to recover attorneys' fees pursuant to Labor Code section 218.5, which provides for prevailing party attorney fees in an action brought for the nonpayment of wages. *Kirby*, 53 Cal.4th at 1257.

B. Labor Code Section 203 Penalties Do Not Apply to Claims for Non-provision of Meal Periods.

All of Plaintiff's amici erroneously argue that because *Murphy* held that the one additional hour of pay for a missed meal break is a wage for statute of limitations purposes, a plaintiff who prevails in securing this remedy in a meal break action is also to an award of waiting time penalties under section 203. Plaintiff's amici are incorrect.

First, section 203(b) tethers the waiting time penalty to an underlying claim for unpaid wages. *See* Cal. Lab. Code § 203(b) (providing that suit may be filed for these penalties at any time before the

expiration of the statute of limitations on an action for the wages from which the penalties arise). A meal and rest break action, such as the present one, is not an action for unpaid wages. *Kirby*, 53 Cal.4th at 1257. Because an action for section 203 penalties is derivative of an "action for the wages from which the penalties arise," these penalties are not available in the absence of an action for unpaid wages. In an action for non-provision of meal breaks (as opposed to an action for unpaid wages), there can be no derivative claim for waiting time penalties. *See Ling v. PF Chang's China Bistro, Inc.*, 245 Cal.App.4th 1242, 1261 (2016).

Second, waiting time penalties under section 203 do not apply to unpaid meal period premiums. Section 203 penalties only apply to untimely payment of "wages" that were "earned" by the employee's labor, as defined by Labor Code section 200-202. Labor Code sections 200(a) defines "wages" as "amounts for 'labor' performed by employees." Labor Code section 200(b), in turn, defines "labor" to mean "labor, work, or services . . . if the labor is performed personally by the person demanding payment." Labor Code section 201 states that any wages "earned" by the employee that were not paid during employment are due on termination of employment. Section 203, in turn, provides for waiting time penalties to an employee whose earned wages are not timely paid on termination of employment. Thus, waiting time penalties under section 203 only apply to the obligation to timely pay amounts earned by the employee for "labor performed."

Meal break premiums are not payments earned by or made to an employee for work performed by the employee. Instead, they are a statutory remedy triggered by conduct on the part of the *employer* (failing to provide a compliant meal break) that "compensates the employee *for events other than time spent working*." *Murphy*, 40 Cal.4th at 1113 (emphasis added). Specifically, the one hour of additional pay is the

"remedy for a violation of the statutory obligation to provide the IWC-mandated meal and rest periods." *Kirby*, 53 Cal.4th at 1256. **"[S]ection 226.7 is not aimed at** protecting or **providing employees' wages**." *Id.* at 1255 (emphasis added). This is especially true for the section 226.7 premiums that were sought by Plaintiff in this case, because all of his meal breaks were *paid*. The "wages" referred to by section 203 are only those wages "earned and unpaid at the time of discharge" (Lab. Code § 201), *not* contingent and unliquidated amounts for statutory liability that *might* be due *if* a violation of section 226.7 were determined by to have occurred.

A hypothetical example further illustrates the point: supervisor tells employee to cut her lunch break short, providing her with only twenty-five minutes for lunch instead of the thirty minutes required by California Labor Code section 512. The employee works, and is paid for, the five minutes of her lunch break that she actually performed work. The time worked during her lunch break also causes her total work hours for the day to exceed eight. As such, she is also entitled to overtime. The "wages" for the "labor performed" by the employee in this hypothetical are the employee's hourly wages and overtime compensation. The one hour of additional pay the employee is owed for not being provided with a compliant meal break is not to compensate the employee for labor she performed; it is a legislative remedy to compensate her for being denied a lawful break, and it is owed irrespective of any labor performed by the employee. Indeed, amici DLSE itself acknowledges this by holding, in the content of employer overtime pay obligations, that meal and rest break premium pay is <u>not pay for hours worked or for performing a duty</u> by the employee and, therefore, need not be included in calculating the employee's "regular rate of pay" for overtime purposes. *See* DLSE Enforcement Policy and Interpretations Manual, § 49.1.2.4 (9); *see also* 29 CFR §§ 778.201, 778.202, 778.224 (describing same rule under Fair Labor Standards Act).

Also an indication that meal break premium pay is not compensation for labor performed is the fact that the remedy is the same without regard to how much labor the employee performs (*i.e.* if a lawful meal break is not provided, the remedy is one additional hour of pay per day, regardless of whether the meal break was shorted by two minutes, twenty-nine minutes, or completely denied, and regardless of whether the employee was denied one meal break or two meal breaks per day). *See* DLSE Enforcement Policy and Interpretations Manual, § 45.2.8. Because the remedy does not compensate for labor performed, it does not fall within the express definition of "wages" under Labor Code section 200, the denial of which triggers waiting time penalties under Labor Code section 203. Every published California state court decision addressing this issue has agreed with this reasoned conclusion. *Ling*, 245 Cal.App.4th at 1261; *Naranjo v. Spectrum Security Services, Inc.*, 40 Cal.App.5th 444, 474 (2019); *Betancourt v. OS Restaurant Services, LLC*, 49 Cal.App.5th 240, 248 (2020).

C. Labor Code Section 226 Penalties Do Not Apply to Unpaid Meal Break Premiums.

Plaintiff's amici's arguments for allowing a prevailing meal break plaintiff to recover penalties for inaccurate wage statements is based on the same flawed reasoning as their waiting time penalty argument, *i.e.* because *Murphy* holds that a meal break premium is a wage, it must be itemized on an employee's wage statement and the failure to do so entitles an employee to additional remedies under Labor Code section 226. This argument is refuted by the plain language of section 226.

Section 226 requires employers to furnish employees with itemized wage statements each pay period that include nine expressly enumerated categories of information, including, as pertinent here, "(1) gross wages earned, (2) total hours worked, . . . (5) net wages earned, [and] (6) the

inclusive dates of the period for which the employee is paid." The "core purpose" of the wage statement requirement is to "ensure an employer 'document(s) the basis of employee compensation payments to assist the employee in determining' whether he or she has been compensated properly." *Ward*, 9 Cal.5th at 752, quoting *Soto v. Motel 6 Operating, LP*, 4 Cal.App.5th 385, 390 (2016). Guidance published by amici DLSE is in accord. *See* DLSE Opinion Letter 2002.05.17 (section 226 "is designed to provide the employee with a record of hours worked, and to assist the employee in determining whether he or she has been compensated properly for all of his or her hours worked"). Consistent with this purpose, penalties are only available for a violation of section 226 if an employee "cannot promptly determine from the wage statement alone . . . the amount of the gross wages or net wages *paid* to the employee during the pay period." Cal. Lab. Code § 226(e)(2)(B) (emphasis added).

With the foregoing, it is readily apparent that section 226 does not apply to amounts that an employer did not pay to an employee. *See Maldonado v. Epsilon Plastics*, 22 Cal.App.5th 1308, 1336-37 (2018) (even though employee was paid the wrong hourly rate and, hence, underpaid, employee is not entitled to wage statement penalties because wage statements accurately reflected rate employee was actually paid). An employer obviously cannot itemize payment of amounts it did not pay, nor would the itemization of unpaid amounts assist an employee in determining whether they were correctly paid for all hours of work. The fact that a court or jury later determines that an employee was underpaid and is entitled to back wages does not automatically entitle the employee to additional penalties on a bootstrapped wage statement claim premised on the theory that the employer failed to accurately report all wages that were actually "earned" by the employee (as later determined by a court). *Id.* As the *Maldonado* court explained, "the absence of accurate wages *earned* will

be remedied by the violated wage and hour law itself," but the fact that the rate was incorrect "does not mandate that they also receive penalties for the wage statements which accurately reflected their compensation under the rates at which they had worked at the time." *Id.*

Plaintiff's amici, particularly DLSE and CRLAF, devote much attention to arguing that meal break premiums should be included on wage statements because this promotes "transparency." This focus is misplaced because the goal of transparency certainly is not served by trying to itemize amounts that were *not* paid (nor is doing so even feasible from a practical standpoint). As such, amici appear to be urging the Court in this case to more broadly hold that meal and rest break premiums that *are* paid must be itemized as "wages" on an employee's wage statements. That issue is not even properly before the Court, as this case deals only with meal break premiums that were *not* paid during employment but were awarded after the fact in a contested action for non-provision of meal breaks. The Court need not address an issue that is not before it.

To the extent the Court is inclined to address the broader question of whether meal break premiums that *are* paid to employees during employment must be included on the employees' wage statements, the answer is no. As explained above, section 226(a) is very specific in prescribing the specific categories of information that must be itemized on the wage statement. *Absent* from that list is meal and rest break premium pay provided for under section 226.7. Plaintiff's amici CELA, DLSE, CAOC, and CRLAF all argue that meal and rest break premiums are included within the category of "gross wages earned." This argument is incorrect because "wages," as defined by Labor Code section 200, do not include amounts that are not compensation for "labor performed" by the employee. As discussed at length above, the one hour of additional pay an employee is entitled to for being denied a meal break is <u>not</u> compensation

"earned" by an employee for labor performed. *Kirby*, 53 Cal.4th at 1255-56. Instead, it is a statutory remedy triggered by the *employer's* conduct in not providing a compliant meal or rest break. *Id.* at 1248. As such, under the plain language of sections 200 and 226, meal break premiums are not among the items required to be listed on an itemized wage statement.

D. Federal Court Decisions Do Not Alter the Analysis.

Plaintiff's amici CELA appears to urge the Court to disregard the opinions of California state courts and to instead defer to federal courts' interpretations of California state law, arguing that "the great weight of federal authority" holds that meal break premiums are "wages" that trigger both waiting time penalties and wage statement penalties. CELA's argument is misguided.

Federal courts defer to state courts on issues of interpretation of state law, not the other way around. *See Ryman v. Sears Roebuck & Co*., 505 F.3d 993, 995 (9th Cir. 2007). On the issues of law presently before this Court, every published state court decision agrees with Spectrum's position, not Plaintiff's position, and holds that wage statement penalties and waiting time penalties are not available as derivative, bootstrapped remedies in an action for failure to provide meal breaks. *Ling*, 245 Cal.App.4th at 1261; *Naranjo*, 40 Cal.App.5th at 474; *Betancourt,* 49 Cal.App.5th at 248. These decisions are correct and there is no reason to look to federal decisions for their analysis on a state law issue.

That said, it bears noting that CELA misrepresents the state of federal decisions on these issues. In canvassing federal court decisions on the issues, CELA omits several decisions that agree with the *Ling*, *Naranjo*, and *Betancourt* holdings that wage statement penalties and/or waiting time penalties are not recoverable in an action for failure to provide meal breaks. *See, e.g., Sanchez v. New York & Co. Stores, Inc*., 2020 WL 5498066, *3 (C.D. Cal. Jun. 29, 2020); *Garbyo v. Leonardo Bros*., 2020 WL 2765661,

*7-8 (E.D. Cal. May 28, 2020); *Mejia v. Illinois Tool Works, Inc*., 2019 WL 8135433, *12 (C.D. Cal. 2019); *Morales v. Paschen Management Corp*., 2019 WL 6354396, *9 (C.D. Cal. Sept. 27, 2019); *Parsittie v. Schneider Logistics*, 2019 WL 8163645, *7 (C.D. Cal. Oct. 29, 2019).

When all of the omitted decisions are added to the ledger, it is clear that there is no "great weight" of federal authority adopting Plaintiff's and Plaintiff's amici's views of the law. Instead, there is a fairly even split of authority and, unsurprisingly, the cases going Plaintiff's way rely on the same flawed reasoning of Plaintiff and Plaintiff's amici that because *Murphy* holds meal break premiums are "wages" for statute of limitations purposes, they must be "wages" that also give rise to waiting time penalties and wage statement penalties. *See, e.g., Avilez v. Pinkerton*, 286 F.R.D. 450 (C.D. Cal. 2012); *Brewer v. General Nutrition Corp*., 2015 WL 5072039 (N.D. Cal. Aug. 27, 2015); *Swanson v. USProtect Corp*., 2007 WL 1394485 (N.D. Cal. May 10, 2007). As explained in detail above, this is an overly simplistic and flawed analysis that fails to properly consider *Kirby's* clarification and limitation on *Murphy*, and fails to consider the actual definition of "wages" in Labor Code section 200.

The many competing federal court decisions that have agreed with California courts that waiting time penalties and wage statement penalties are not available in an action for failure to provide meal or rest breaks, have properly considered *Kirby* and the definition of "wages" in Labor Code section 200. *See, e.g, Jones v. Spherion Staffing*, 2012 WL 3264081 (C.D. Cal. Aug. 7, 2012); *Singletary v. Teavana Corp*., 2014 WL 1760884 (N.D. Cal. May 2, 2014); *Culley v. Lincare Inc*., 236 F.Supp.3d 1184 (E.D. Cal. 2017); *Frieri v. Sysco Corp*., 2016 WL 7188282 (S.D. Cal. Dec. 12, 2016); *Partida v. Stater Bros. Markets*, 2019 WL 1601387 (C.D. Cal. Feb. 19, 2019); *Pyara v. Sysco Corp*., 2016 WL 3916339 (E.D. Cal. July 20, 2016).

In short, there is no dispute that federal courts in California are split

on whether waiting time penalties and wage statement penalties are recoverable in an action for failure to provide meal breaks. However, there is no split among California state courts. Every published California appellate decision addressing this issue of state law consistently holds that these penalties are not available. CELA's effort to distract the Court from this fact by focusing on federal court decisions, is unavailing.

E. Policies of Liberal Construction and Deterrence May Not Be Used to Effectively Rewrite Statutes.

Plaintiff's amici DLSE, CRLAF et al., and CAOC all argue that the Labor Code provisions must be liberally construed in favor of maximum enforcement in order to incentivize employers to comply with the law and to effectively deter non-compliance. According to these amici, these policy goals favor an interpretation that allows an employee who is not provided compliant meal breaks to recover (1) meal break premiums of one additional hour of pay per day, (2) penalties for failure to provide accurate wage statements itemizing the meal break premiums that were "earned" but not paid, and (3) waiting time penalties of 30 days' wages for the employer's failure to pay the meal break premiums on termination of employment.

The fundamental problem with amici's argument is that this policy-driven result is inconsistent with the plain language of Labor Code section 226.7, which expressly prescribes the remedy for an employer's failure to provide compliant meal breaks: one additional hour of pay per day that a meal break is not provided. It is also inconsistent with the plain language of sections 200, 203, and 226(a), as discussed above. This Court has already held that the remedy provided by section 226.7 is the "*sole compensation* for the employee's injuries" stemming from a meal break violation. *Murphy*, 40 Cal.4th at 1107 (emphasis added). Allowing an employee to stack additional damages or penalties for this singular

violation is inconsistent with the legislature's purpose in enacting section 226.7 to specifically define the remedy for a meal break violation. Indeed, when section 226.7 was enacted in 2000, the Legislature considered adding an additional penalty to the premium pay remedy it had selected for the non-provision of meal breaks, but it ultimately deleted the ability of an employee to collect penalties in the final version of the bill. *See Murphy*, 40 Cal.4th at 1196 ("Although the original version of bill No. 2509 provided for both a penalty and a payment to the employees, it limited the employees' recovery to the payment, leaving collection of the penalty to the Labor Commissioner, as had been the typical practice").

It is also significant that the Legislature has not taken any action to amend Labor Code sections 226.7, 203, 226, or 218.5 since this Court held in *Kirby*, eight years ago, that a meal break claim is not a claim for nonpayment of wages, and other published decisions (including *Jones* in 2012 and *Ling* in 2016) began interpreting *Kirby* to preclude recovery of derivative waiting time penalties and wage statement penalties in an action for failure to provide meal or rest breaks. *See Jones*, 2012 WL 3264081 at *8-9; *Ling*, 245 Cal.App.4th at 1268. The Legislature is deemed to be aware of judicial decisions, and where the Legislature does not act to amend a statute in response to those decisions, the Legislature is presumed to agree with the interpretation adopted by the courts. *See People v. Scott*, 58 Cal.4th 1415, 1424 (2014); *People v. Tingcungco*, 237 Cal.App.4th 249, 257 (2015). Indeed, in direct response to *Kirby* drawing attention to the fact that Labor Code section 218.5 had a two-way fee-shifting provision equally allowing a prevailing employee *or employer* to recover attorney fees in an action for nonpayment of wages, the Legislature amended section 218.5 the following year for the specific purpose of making it more difficult for a prevailing employer to recover fees. *See* Stats. 2013, c. 142 (S.B. 462).

By contrast, despite the fact that every published decision by a California appellate court has held that waiting time penalties and wage statement penalties are not recoverable in a meal or rest break action, the Legislature has not acted to change those results through legislation. The Legislature's chosen inaction is telling.

Plaintiff's amici CAOC disputes Spectrum's characterization of "stacking" of penalties for the same offense, and argues that there are actually three independent violations (failure to provide meal breaks, failure to provide accurate wage statements, and failure to pay all wages owed on termination of employment) that justify three different remedies. This is disingenuous. The only "wrong" found in this case is the failure to provide compliant meal breaks. Absent this wrong, Plaintiff would not have a claim for waiting time penalties or wage statement penalties. This is not a case where the class was not paid for time they spent working through meal breaks. Their meal break time indisputably was paid (they had paid on-duty meal breaks due to the nature of their work in security services and the jury found that on-duty meal breaks were justified) and their waiting time penalty claim is not based on any allegedly unpaid compensation other than meal break premiums. Similarly, there is no dispute that the employees' wage statements accurately reflected the wages they actually were paid. The only alleged inaccuracy is that the wage statements did not list the meal period premiums the trial court awarded to Plaintiff in this case a decade after the wage statements at issue were presented. All of this makes clear that this case rests on a singular wrong—the failure to provide compliant meal breaks.

From this singular wrong, all of Plaintiff's amici urge the Court to permit the stacking of three different remedies, for purposes of "deterrence." Amici fail to acknowledge that there is already ample incentive for employers to comply with meal and rest break laws. An

employer who fails to comply is subject not only to the monetary remedy of one additional hour of pay (plus interest) per employee for each work day that a meal or rest break is not provided, but also to civil penalties of $50-$100 per pay period per employee, under Labor Code section 558. Those penalties can be enforced by the Labor Commissioner or by employees in a representative action under PAGA, as indicated in Labor Code sections 2699 and 2699.5. A PAGA action also provides for recovery of attorney fees to a prevailing employee.

The enormous number of meal and rest break actions being filed in California courts, the majority being styled as class actions or representative PAGA actions, belies the suggestion that the current legislative and administrative procedures are somehow insufficient to protect workers and deter flagrant abuses by employers. In this case, for example, the class was awarded almost $2.4 million in meal period premium pay and interest alone. That is hardly an amount that can be said to be so minimal as to encourage employers to flout compliance with meal break laws. Indeed, there is not an employer in the state who is not aware of the $90 million judgment in *Augustus v. ABM Security*, 2 Cal.5th 257 (2016), stemming solely from a rest break violation. Amici's arguments that *additional* penalties are needed to sufficiently incentivize compliance are unconvincing. There is no reason to believe that additional penalties will have any measurable impact on employers who are already greatly incentivized to comply.

If the stacking of penalties advocated by Plaintiff and his amici is adopted, it would result only in an unjustifiable (and likely unconstitutional) double, triple, or quadruple recovery for a single wrong. The following hypothetical offered by one court provides a realistic illustration of stacking of penalties in a meal break case, resulting in a remedy that is grossly disproportionate to the harm:

> [I]f any employee was forced to return from lunch one minute early and was not paid the meal period premium under Section 226.7(b), then under Plaintiff's theory, an employee who receives $10 per hour would be entitled to: (1) $10 (one hour of pay) under Section 226.7(b); (2) $2,400 (30 days' wages) under Section 203; and (3) $100 under PAGA. . . . In addition, under Plaintiff's theory, the employee could recover actual damages, or $50, whichever is greater, under Section 226(e) for the employer's failure to record the $10 in premium pay owed for the meal break violation on the employee's wage statement. Cal. Lab. Code § 226(e). Thus, instead of simply recovering the statutory remedy of one hour of pay under Section 226.7(b), which in this hypothetical is $10, if later the employee were terminated or resigned, the employee would be entitled to at least $2,560.

Jones, 2012 WL 3264081 at *9 (internal citations omitted) (rejecting argument that a meal or rest break violation under section 226.7 can form the basis for claims under section 203 or 226 because that would result in an "improper, multiple recovery").

The hypothetical posted by the *Jones* court that results in a penalty of *256 times* that contemplated by the Legislature for a meal or rest break violation is not an extreme or unrealistic one. Indeed, in most real world cases, the claims are brought as class or representative actions where the math in the *Jones*' court's example would be multiplied by the number of class members, resulting in astronomical figures. Yet there is nothing in section 226.7 (or its legislative history) that indicates the Legislature intended this sort of disproportionate, multiple recovery. To the contrary, the fact that the Legislature prescribed a specific remedy of one additional hour of pay as the "sole compensation" to redress an employee's injury from being denied a compliant break, forecloses amici's argument that employees should be permitted to stack additional penalties for this singular wrong.

It is no answer to invoke, as Plaintiff's amici do, the principle that

the wage hour laws are to be liberally construed to benefit employees. That principle cannot convert "interpretation" into legislation—although that is what amici are urging. Plaintiff's amici ask this Court to ignore the plain language of the statutes (sections 200, 203, 226, and 226.7) and instead rewrite those statutes to reach the result they desire. This is not "interpretation." A court does not have "authority to rewrite applicable legislation to conform to an appellant's view of what the law should be." *Soto*, 4 Cal.App.5th at 393; *see also California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.*, 14 Cal.4th 627, 633 (1997).

F. There Is No Authority Supporting a Ten Percent Prejudgment Interest Rate for a Section 226.7 Award.

Parroting the argument of Plaintiff, amici CAOC and CRLAF, et al. urge the Court that the prejudgment interest rate on a claim under section 226.7 "should be" the ten percent rate applicable to breach of contract actions, rather than the seven percent default rate for prejudgment interest. Plaintiff's amici argue that the higher rate promotes the policy of deterring employer non-compliance with meal and rest break law and that because the employment relationship is "contractual in nature," the ten percent rate is proper under Labor Code section 218.6. These arguments fail because section 218.6, which adopts the ten percent prejudgment interest rate set forth in Civil Code section 3289 for breach of contract actions, only applies in an "action brought for the nonpayment of wages." Cal. Lab. Code § 218.6. *Kirby* unequivocally held that a section 226.7 action for failure to provide meal or rest breaks is *not* an action brought for the nonpayment of wages. *Kirby*, 53 Cal.4th at 1255. As such, section 218.6 does not provide a basis for an award of prejudgment interest at the rate of ten percent in this case or in any meal or rest break action. Plaintiff concedes this in his Opening Brief (at page 41 n. 18).

Plaintiff's amici nonetheless argue that the ten percent rate

applicable to breach of contract actions still "should" apply to an award of meal break premiums in order to maximize the incentive on employers to comply with the law. Again, amici's policy argument is better addressed to the Legislature than to this Court. This Court cannot, under the guise of policy, effectively rewrite section 218.6 to apply to meal and rest break actions. No published decision holds that the ten percent prejudgment interest rate applicable to breach of contract actions applies to an action for non-provision of meal and rest breaks. This Court should not either. A meal and rest break action is not an action for breach of contract. It is an action for violation of a statutory obligation. *See In re Taco Bell Wage and Hour Cases*, 2016 WL 4087468 (E.D. Cal. 2016) (Civil Code section 3289's ten percent interest rate does not apply to an award of meal or rest break premiums).

Amici CRLAF, et al. also argue that a prejudgment interest rate of ten percent should be applied in order to promote consistency between awards of meal and rest break premiums, which are not covered by section 218.6, and awards of unpaid wages in actions brought for nonpayment of wages, which are covered by section 218.6. This argument ignores the fact that the Legislature has chosen *not* to treat meal and rest break claims the same as claims for nonpayment of wages. Thus, a prevailing plaintiff in an action for nonpayment of wages may recover attorneys' fees under section 218.5, whereas a prevailing party in an action for non-provision of meal or rest breaks is *not* entitled to an award of attorneys' fees. *Kirby*, 53 Cal.4th at 1170. Because it is clear that the Legislature purposefully chose to treat claims for non-provision of meal and rest breaks differently than claims for nonpayment of wages, amici's proffered policy of promoting consistency does not supply a valid justification for treating prejudgment interest the same for both types of claim. That result would contradict the plain meaning of the statutes.

Given the absence of any legislative adoption of a ten percent interest rate for a meal or rest break premium award, the Court of Appeal correctly ruled in this case that the default interest rate of seven percent applies. *Naranjo*, 40 Cal.App.5th at 475-76.

CONCLUSION

For all of the reasons discussed above, and in Spectrum's Answer Brief, the Court of Appeal correctly determined that the waiting time penalties and wage statement penalties provided for by sections 203 and 226(e) are not available in a meal break action, and that the prejudgment interest rate on an award of meal break premiums is seven percent. On these points, the Court of Appeal's decision should be affirmed.

Dated: September 28, 2020

CAROTHERS DiSANTE & FREUDENBERGER LLP

By: Dave Carothers
Attorneys for Defendant/Appellant
Spectrum Security Services, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(c) of the California Rules of Court, I certify that this brief 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 6,039 words, exclusive of the matters that may be omitted under subdivision (c)(3).

Dated: September 28, 2020

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO.

I, the undersigned, declare that I am employed in the aforesaid County, State of California. I am over the age of 18 and not a party to the within action. My business address is 4510 Executive Drive, Suite 300, San Diego, CA 92121. On September 28, 2020, I served upon the interested party(ies) in this action the following document described as: **SPECTRUM SECURITY SERVICES, INC.'S CONSOLIDATED ANSWER TO AMICI CURIAE BRIEFS**

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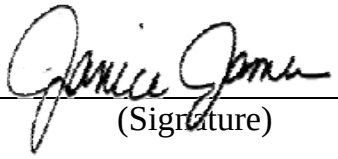
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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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9/28/2020

Date

/s/Dave Carothers

Signature

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