CASE NO. S275431

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

George Huerta, *Plaintiff and Petitioner,*

vs.

CSI Electrical Contractors, Inc., *Defendant and Respondent.*

On Certified Questions from the United States Court of Appeals for the Ninth Circuit
No. 21-16201

After an Appeal from the United States District Court
for the Northern District of California
Honorable Beth Labson Freeman, District Court Judge
Case Number 5:18-CV-06761-BLF

PETITIONER GEORGE HUERTA'S OPENING BRIEF ON THE MERITS

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I. QUESTIONS CERTIFIED FOR DECISION BY THIS COURT

Pursuant to California Rules of Court, Rule 8.520(b), Petitioner George Huerta sets forth below the questions this Court certified for its decision.

> (1) Is time spent on an employer's premises in a personal vehicle and waiting to scan an identification badge, have security guards peer into the vehicle, and then exit a Security Gate compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 16?
>
> (2) Is time spent on the employer's premises in a personal vehicle, driving between the Security Gate and the employee parking lots, while subject to certain rules from the employer, compensable as "hours worked" or as "employer-mandated travel" within the meaning of California Industrial Welfare Commission Wage Order No. 16?
>
> (3) Is time spent on the employer's premises, when workers are prohibited from leaving but not required to engage in employer-mandated activities, compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 16, or under California Labor Code Section 1194, when that time was designated as an unpaid "meal period" under a qualifying collective bargaining agreement?

(*Huerta v. CSI Electrical Contractors, Inc.* (9th Cir. 2022) 39 F.4th 1176, 1177.)

II. SUMMARY OF ARGUMENT

A. Is time spent on an employer's premises in a personal vehicle and waiting to scan an identification badge, have security guards peer into the vehicle, and then exit a Security Gate compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 16?

Yes. As this Court confirmed in *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038 [258 Cal.Rptr.3d 392, 406–407, 457 P.3d 526, 538] ("*Frlekin*"), under California law, the time spent by employees who are confined to the work premises and who wait for and undergo a mandatory exit security process constitutes "hours worked" under the "control" prong of

the Wage Order "hours worked" definition. Here, Huerta and CSI's workers were under CSI's control when they were confined to the secured construction site and were required to wait in line for and undergo the mandatory security exit process that could last up to 30 minutes or more before being allowed to leave ("Exit Security Time"). (4-ER-889-890; ¶ 62.) At a minimum, there was at least triable issue of fact whether the control exercised over the workers during the Exit Security Time was such to make the Exit Security Time compensable.

The Exit Security Time was also time that Huerta and the workers were "suffered or permitted to work" under the "suffered or permitted to work" prong of the Wage Order "hours worked" definition because the workers' activities constitute "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." (*Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123* (1944) 321 U.S. 590, 598 [64 S.Ct. 698, 703, 88 L.Ed. 949]).)

At a minimum, there was at least a triable issue of fact whether the workers were "suffered or permitted to work" during the Exit Security Time.

B. Is time spent on the employer's premises in a personal vehicle, driving between the Security Gate and the employee parking lots, while subject to certain rules from the employer, compensable as "hours worked" or as "employer-mandated travel" within the meaning of California Industrial Welfare Commission Wage Order No. 16?

Yes. With respect to Huerta's Wage Order 16 Paragraph 5(A) claim ("5(A) Claim"), Wage Order 16 required CSI to pay for "all employer-mandated travel that occurs after the first location where the employee's presence is required by the employer." Huerta

submitted unrebutted evidence that CSI instructed Huerta and the workers that the first location where their presence was required was at the Security Gate where the security process occurred and that they were thereafter required to travel between the Security Gate and the required designated parking lots on the Site to work. CSI presented no contradictory evidence in either its moving papers or in its reply papers. Moreover, CSI required its workers to travel between the Security Gate and the parking lots on the Site for them to work. This travel is therefore indisputably "employer-mandated." At a minimum, there was at least a triable issue of fact whether the Security Gate was the "first location where the employee's presence is required by the employer."

With respect to the "control" theory of Huerta's Drive Time claim, it is undisputed that after passing through the mandatory security entrance process at the Security Gate to enter the secured Site, Huerta and the other workers were subject to CSI's control and were required to travel up to 45 minutes or more on a specified private road to designated parking lots from where they were transported to their daily work locations on the Site and were required to engage in the reverse of this travel at the end of the workday. (4-ER-879, ¶ 10.) From the time they entered the secured Site through the Security Gate after undergoing the mandatory security entrance process at the beginning of the day through the time they left the Site through the Security Gate after undergoing the mandatory exit security process at the end of the day, they were under CSI's control because they were confined to the Site, were subject to numerous rules and restrictions, were strictly monitored for their compliance with such rules and restrictions, and could not effectively use this time for their

own personal purposes. Accordingly, just as the time spent by the workers in *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 (94 Cal.Rptr.2d 3, 995 P.2d 139), *as modified (May 10, 2000)* while they were confined to the employer's bus was time they were subject to the employer's control, the time spent by Huerta and the workers while they were confined to the Site was time they were subject to CSI's control and time they could not use for their personal purposes.

The Drive Time was also time that Huerta and the workers were "suffered or permitted to work" under the "suffered or permitted to work" prong of the Wage Order "hours worked" definition because CSI required the workers to drive between the Security Gate and the parking lots, which constitutes "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." (*Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123* (1944) 321 U.S. 590, 598 [64 S.Ct. 698, 703, 88 L.Ed. 949]).)

At a minimum, there was at least a triable issue of fact whether the workers were under CSI's control during the Drive Time or whether the required Drive Time on the Site between the Security Gate and the parking lots was time workers were "suffered or permitted to work."

C. Is time spent on the employer's premises, when workers are prohibited from leaving but not required to engage in employer-mandated activities, compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 16, or under California Labor Code Section 1194, when that time was designated as an unpaid "meal period" under a qualifying collective bargaining agreement?

Yes. With respect to the Meal Period Time, Huerta alleged that CSI constrained him and the other workers from leaving their daily work areas during their meal periods. (6-ER-1294; ¶ 37.) Because they were constrained from leaving their daily work areas during their meal periods, they were under CSI's control during the meal periods and that the time of their meal periods constituted "hours worked" under California law for which they were entitled to be paid pursuant to Labor Code Section 1194[1] and Paragraph 4 of Wage Order 16. (6-ER-1294; ¶ 39.) (*See Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 968–72 (38 Cal.Rptr.2d 549) *disapproved of on other grounds by Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557 (59 Cal.Rptr.2d 186, 927 P.2d 296) ("*Bono*").)

The fact that Huerta and the workers were subject to a collective bargaining agreement and that Section 512(e), which provides an exemption to California's meal period requirements if the employee is covered by a valid collective bargaining agreement, and Wage Order 16's provisions governing meal periods did not apply to them because

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

they were working under a CBA does not eviscerate their unwaivable right under California law to be paid for all "hours worked."

III. FACTUAL BACKGROUND

A. The Security Gate to the Site

The California Flats Solar Project ("Site") is located on the privately-owned Jack Ranch. There is only one entrance to the Site that the workers could use, which is a guarded security gate (the "Security Gate"). The Security Gate during Phase 1 of the Project was originally located on Turkey Flats Road ("Access Road") just after the intersection of the Access Road and Highway 41. Later, during Phase 2, when CSI was involved, it was moved from the original location closer to the parking lots.[2] (4-ER-878-79; ¶¶ 8-10.)

B. After passing through the Security Gate in the morning and until they exited the Site through the Security Gate, the workers were confined to the Site and could not use the time effectively for their own purposes.

After going through the mandatory security entrance process at the Security Gate in the morning and while driving on the Access Road to the parking lots and driving on the Access Road at the end of the day, the workers were confined to the Site and to the vehicle in which they rode and could not use the time effectively for their own purposes, such as running errands, getting something to eat, or doing other things that they could normally do outside the Site. The workers were not paid for all the time going through and traveling

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

on the Access Road between the Security Gate and the parking lots. (4-ER-888; ¶¶ 57-58; 4-ER-902; ¶¶ 49-50; 5-ER-931; ¶¶ 50-51; 4-ER-916; ¶¶ 55-56.)

C. Rules regarding entering the Site and the Access Road

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

1. Workers were monitored while on the Access Road.

CSI personnel monitored the workers while they were driving on the Access Road to their daily work areas. (4-ER-884; ¶ 36; 4-ER-897-98; ¶ 30; 5-ER-927; ¶ 31; 4-ER-912; ¶ 35.) From the time that the workers went through the Security Gate in the morning until they went out of the Security Gate at the end of the workday, they were subject to all the Site's rules and could be terminated at any time for violating them. (4-ER-884; ¶ 37; 4-ER-898; ¶ 31; 5-ER-927; ¶ 32; 4-ER-912; ¶ 36.) The workers were subject to having their bodies, personal property, and vehicles searched at any time that they were inside the Security Gate or on the Access Road. The workers were also subject to drug and alcohol

testing at any time that they were inside the Security Gate or on the Access Road. (4-ER-884; ¶ 39; 4-ER-898; ¶ 33; 5-ER-927; ¶ 34; 4-ER-912-13; ¶ 38.)

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

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

3. The specific rules of the Access Road

The workers were also told about specific "rules of the road" that applied to the Access Road. These rules were in addition to signs that were posted before and after the workers entered the Security Gate and in materials that they were given for the job Site. (4-ER-884; ¶ 38; 4-ER-898; ¶ 32; 5-ER-927; ¶ 33; 4-ER-912; ¶ 35.) The workers were suspended or terminated for things they did wrong on the Access Road, such as exceeding the speed limit. Some of these rules are described in detail below.

a) Speed limits

There were signs with low speed limits (5 to 20 mph) posted on the Access Road. CSI personnel monitored the workers' activities and the speeds of vehicles on the Access

Road. There were also speed radar machines and cameras installed along the Access Road, including digital signs that would show workers how fast they were going. If the workers violated the speed limits or "rules of the road" or other job Site rules, they would be suspended or terminated. (4-ER-885; ¶¶ 44-45; 4-ER-899; ¶ 38; 5-ER-928; ¶ 39; 4-ER-913-14; ¶¶ 43-44.)

b) Passing

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

c) Animals

The workers were not allowed to disturb the cattle or local wildlife in any way while driving on the Access Road. If they saw animals on or near the Access Road, they had to let them do whatever they needed to do and were not allowed to do anything to attempt to get them to move off the Access Road. They had to slow down or stop their vehicles and stay in their vehicles and wait for the animals to move away from the road. The workers were not allowed to touch or feed the local wildlife or cattle on the Site or along the Access Road. The workers were not supposed to honk their horns while driving on the Access Road because the horns could disturb the local wildlife and the cattle. The workers were not allowed to play loud music that could be heard outside the vehicle while they were on the Access Road because the noise from the music could also disturb the local wildlife and the cattle. (4-ER-886-87; ¶¶ 49-50; 4-ER-900-01; ¶¶ 42-43; 5-ER-929-30; ¶ 43-44; 4-ER-

914-15; ¶¶ 48-49.) The workers could not wear ear buds or ear pods while driving on the Access Road. (4-ER-887; ¶ 51.)

d) Staying on and stopping on the Access Road and traveling to designated parking lots

Once the workers were released to drive on the Access Road in the morning and at the end of the day, they were required to drive directly on the Access Road to their assigned parking lot in the morning and from their assigned parking lot back to the Security Gate at the end of the day and were required to stay on the Access Road. (4-ER-887; ¶ 54; 4-ER-901; ¶ 46; 5-ER-930-31; ¶ 47; 4-ER-916; ¶ 52.) The workers were required to strictly follow the "rules of the road" and keep the flow of traffic constantly moving on the Access Road. Except for emergencies, workers were not allowed to stop on the Access Road at any places that were not specifically designated. (4-ER-888; ¶ 55; 4-ER-901-02; ¶ 47; 5-ER-931; ¶ 48; 4-ER-916; ¶ 53.) If the workers had to get out of their vehicles for any reason, they were not allowed to go outside of the boundary fences, stakes, and ribbons that ran about 15 feet or so along the sides of the Access Road. If they had to get out of their vehicles along the Access Road for any reason, they could not disturb the environment, such as trampling or disturbing any plants. (4-ER-888; ¶ 56; 4-ER-902; ¶ 48; 5-ER-931; ¶ 49; 4-ER-916; ¶ 54.)

e) Smoking

The workers were not allowed to smoke either inside or outside of their vehicles while they were driving on the Access Road or inside or outside of their vehicles in the parking lot. (4-ER-887; ¶ 53; 4-ER-901; ¶ 45; 5-ER-930; ¶ 46; 4-ER-915; ¶ 51.)

D. The Mandatory Exit Security Process

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

If a worker did not have 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.)

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

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

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

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

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

CSI enforced this policy:

- "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 workers 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 workers 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 workers 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.)

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

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

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

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

IV. PROCEDURAL BACKGROUND

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

Huerta filed a motion for Class Certification, which the district court granted on March 12, 2021 as to the Unpaid Wages Class (Exit Security Time), Unpaid Wages Class (Controlled Travel Time), Unpaid Wages Class (Paragraph 5(A) Travel Time), Unpaid Wages Class (Meal Period Time), Termination Pay Subclass, and Wage Statement Subclass. (5-ER-975-76.)[3]

B. CSI's motions for partial summary judgment

CSI filed motions for partial summary judgment on various issues as to certain portions of the time Huerta claimed constituted "hours worked" under California law. (5-ER-978-1007; 3-ER-460-66.) CSI's Notice of Motion in its first motion for partial summary judgment was vague and ambiguous as to exactly what issues CSI sought to adjudicate, but it appeared to attack the time spent waiting for and going through the mandatory entrance security process, the time spent waiting for and going through the mandatory exit security process, and the time spent driving between the Security Entrance to the designated parking lots on the Site. In the same motion, CSI also attacked Huerta's "hours worked" claim with respect to the Meal Period time.

On April 28, 2021, the district court granted CSI's first motion for partial summary judgment. (1-ER-10-30.) During a subsequent case management conference, the district

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

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

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

Paragraph 4 of Wage Order 16 provides that employers shall pay to each employee certain minimum wages "for all hours worked." Paragraph 2(J) of Wage Order 16 defines "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so."

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

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)*, this 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 because they were controlled by Apple during this time. The Court held:

> . . . Apple employees are clearly under Apple's control while awaiting, and during, the exit searches. Apple controls its employees during this time in several ways. First, Apple requires its employees to comply with the bag-search policy under threat of discipline, up to and including termination. Second, Apple confines its employees to the premises as they wait for and undergo an exit search. Third, Apple

> compels its employees to perform specific and supervised tasks while awaiting and during the search. This includes locating a manager or security guard and waiting for that person to become available, unzipping and opening all bags and packages, moving around items within a bag or package, removing any personal Apple technology devices for inspection, and providing a personal technology card for device verification. (Emphasis added.)

Under *Frlekin*, the time CSI employees spent waiting 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 workers were confined to the Site and could not conduct any personal activities outside of the Site without undergoing the mandatory exit security process.

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

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

worked" under California law. With respect to the exit security time, the district court granted summary judgment for the plaintiffs, reasoning:

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

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

> Similar to the employer in Morillion, whose transportation policy prohibited its agricultural workers from using that time effectively for their own purposes, Abercrombie's bag check policy requires employees to remain in the store until they pass through an inspection—a wait that plaintiffs claim may last as long as long thirty minutes. . . . This is time that plaintiffs could not, for instance, buy a sandwich at a neighboring shop or attend to any personal activity that requires being outside of Abercrombie's store. In other words, the relevant facts in this case appear materially indistinguishable from those at issue in Morillion and permit only one reasonable conclusion: Plaintiffs were under Abercrombie's control during off-the-clock bag check waiting periods and the time is compensable.

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

(*See also Boone v. Amazon.com Services, LLC* (E.D. Cal. 2022) 562 F.Supp.3d 1103, 1113–1115 (employees required to undergo COVID-19 screening are subject to employer's control while waiting for and undergoing such screening and such time constitutes "hours worked" under California law).)

2. As with Apple's employees, CSI's workers 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 workers were required to perform specific tasks, such as waiting in line, driving their vehicles through the line, locating their badges, and showing them to the security personnel. They were also required to leave the line if they did not have their security badges and were required to allow their vehicles to be searched, some of which were.

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

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

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

There is no meaningful distinction between Apple confining its employees to an Apple store and requiring them to wait to have a bag searched or their personal technology checked for a few seconds before being allowed to leave as in *Frlekin* and CSI's workers being confined to the Site, waiting in line, and having to wait to have a badge scanned (which scanning took about a minute) before being allowed to leave. Moreover, there is no dispute that CSI's employees, as with Apple's employees, were under CSI's control while waiting to undergo the mandatory exit security process. Such time is therefore time that workers were under the CSI's control and for which they must therefore be paid.

3. As in *Frlekin*, the mandatory exit security process occurred on the Site and workers were confined to Site unless they underwent the exit security process.

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

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

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

Finally, onsite security procedures do not benefit the employee, but only the employer, which distinguishes such procedures from the employer's offering of optional transportation services to employees that benefit the employee. (*Id*., 1052-1053.) In this case, Huerta and CSI's other workers were not offered the option of choosing whether to undergo the exit security process. They were required to undergo the exit security process to leave the Site.

4. An employer's conduct does not have to be "intrusive" to constitute "control."

CSI argued below that the exit security process at the Security Gate was different than Apple's exit security process in *Frlekin* because there were no bag checks. (4-ER-763-767.) As discussed above, however, during the mandatory exit security process, security guards looked inside the workers' vehicles through the windows and inspected truck beds. They could also search trunks, and workers were subject to being searched whenever they were on the Site.

More importantly, an employer's control is not required to be physically "intrusive" for it to constitute sufficient control under the "control" prong of Wage Order 16's "hours worked" definition. In *Morillion*, for example, there was no intrusiveness element to the employer's control of its employees when it confined them to the employer's buses. In *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 841 [182 Cal.Rptr.3d 124, 130, 340 P.3d 355, 360], there was no intrusiveness element to the employer's control of its guards when the guards were required to "reside" in their trailers as a condition of

employment and spend on-call hours in their trailers or elsewhere at the worksite. (*Id*. at 841.)

Similarly, in *Bono*, the Court did not require the employer's conduct to be "intrusive" for the meal periods to be compensable "hours worked." There, workers had to remain on the work premises during their 30-minute lunch period unless they made prior arrangements. The workers were relieved of all work duties during the lunch period and an on-site cafeteria and relaxation area was available for them to use during the lunch period. (*Bono*, 32 Cal.App.4th at 972, 38 Cal.Rptr.2d 549.) The Court held that the lunch time was compensable "hours worked," reasoning that "(w)hen an employer directs, commands or restrains an employee from leaving the work place during his or her lunch hour and thus prevents the employee from using the time effectively for his or her own purposes, the employee remains subject to the employer's control," and therefore must be paid. (*Bono*, 32 Cal.App.4th at 975, 38 Cal.Rptr.2d 549.) This Court cited *Bono's* holding in *Morillion* (*Morillion* at 583) and in *Frlekin*. (*Frlekin* at 1050-1057.)

In *Ridgeway v. Walmart Inc* (9th Cir. 2020) 946 F.3d 1066 ("*Ridgeway*"), the Ninth Circuit affirmed certification and the award of damages to drivers who were not paid for all their "hours worked," including the time they were under Ridgeway's control. The plaintiffs asserted that Wal-Mart did not pay drivers for time spent under the company's control during layovers, *inter alia*. The district court eventually granted partial summary judgment to the drivers on the layover claim. In affirming the summary judgment, the Ninth

Circuit held that the district court had correctly determined that Wal-Mart's written policies constituted control as a matter of California law:

> Here, . . . Wal-Mart's layover policy imposed constraints on employee movement such that employees could not travel freely and avail themselves of the full privileges of a break. For instance, if Wal-Mart's policies were applied as written, drivers may have been free to take a shower or go to a movie while on layovers, but drivers were not free, without receiving permission, to go home to see a pet, to eat a meal at their kitchen table, or to watch television in their own living room. (*Id.* at 1079-1080 (emphasis added.)

The Court affirmed the finding of "control" even though there was no "intrusive" behavior by Wal-Mart.

Here, CSI controlled its workers by confining them to the Site unless and until they successfully underwent the mandatory exit security process.

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

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

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

The activities CSI required of its workers to perform as part of the mandatory exit security process before being allowed to leave the Site meet this plain-language definition of "work." They involve "exertion" or "effort" required by CSI, including complying with security personnel's directions, driving a vehicle in the security line, rolling down windows, locating and displaying identification badges, allowing their vehicles to be searched, and moving vehicles as directed by security personnel. The mandatory exit security process required "exertion to attain an end" by the workers, which end included confirming that workers had left the Site and had not taken any equipment or supplies. This clearly benefits CSI by deterring and preventing theft. Moreover, employees were indisputably controlled during the security checks. (*Frlekin*, at 1047.) These activities are therefore compensable "work."[4]

[4] At a minimum, whether the activities required to be performed by the workers during the security checks constitute "work" is an issue of fact, precluding summary judgment in CSI's favor.

VI. THE TIME IT TOOK HUERTA AND THE OTHER WORKERS TO TRAVEL BETWEEN THE SECURITY GATE AND THE DESIGNATED PARKING LOTS ON THE SITE WAS COMPENSABLE UNDER WAGE ORDER 16, PARAGRAPH 5(A).

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

A. The Security Gate was the first location where Huerta's and the workers' presence was required by CSI.

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

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

- When the mandatory entrance and exit security process occurred at the Phase 1 Security Gate, I was told by CSI management, by the security office, and by other management that the first place the other CSI workers and I were required to be at the beginning of the day in order to work was the Phase 1 Security Gate to line up, go through the mandatory security process and enter the Solar Site in order to begin the long drive on the Access Road to the parking lots of the Solar Site.
- To work on the Solar Site, the first place the other workers and I were required to be was at the Security Gate where the mandatory security process occurred where we were required to go through a security

process which required us to be security checked and scanned in with our security badges. (ER: 4-ER-879-80; ¶¶ 11, 17.)

- I was told by CSI management during my orientation for Phase 2 that the first place the other CSI workers and I were required to be at the beginning of the day in order to work was the Phase 2 Security Gate to line up and go through the mandatory entrance security process and drive on the Access Road to the parking lots of the Solar Site.
- To work at the Solar Site, the first place the other CSI workers and I were required to be at the beginning of the day in order to work was the Phase 2 Security Gate to line up and go through the mandatory entrance security process and drive on the Access Road to the parking lots of the Solar Site. (4-ER-894; ¶¶ 9, 14.)
- I was told by CSI management (including my foreman Daniel Jimenez), for Phase 2 that the first place the other CSI workers and I were required to be at the beginning of the day in order to work was the Phase 2 Security Gate to line up and go through the mandatory entrance security process and drive on the Access Road to the parking lots.
- To work at the Solar Site, the first place the other CSI workers and I were required to be at the beginning of the day was the Phase 2 Security Gate to line up and go through the mandatory entrance security process and drive on the Access Road to the parking lots of the Solar Site. The workers security badges that were part of the mandatory security entrance and exit process contained the picture and name of the workers and the company name on them. (5-ER-923-24 ¶¶ 9, 14.)
- I was told by CSI management during my orientation for Phase 2 that the first place the other CSI workers and I were required to be at the beginning of the day in order to work was the Phase 2 Security Gate to line up and go through the mandatory entrance security process and drive on the Access Road to the parking lots of the Solar Site.
- To work at the Solar Site, that the first place the other CSI workers and I were required to be at the beginning of the day was the Phase 2 Security Gate to line up and go through the mandatory entrance security process and drive on the Access Road to the parking lots of the Solar Site. (4-ER-908-09; ¶¶ 11, 16.)

CSI did not dispute these facts in its reply papers. (4-ER-758-778.)

Thus, the undisputed evidence established that CSI specifically instructed its workers that the first place they were required to physically be at the beginning of the day to work was the Security Gate, where they were required to undergo the mandatory entrance security process and thereafter drive on the Access Road to the designated parking lots of the Site. As the Ninth Circuit in this case observed:

> Huerta specifically contends the Security Gate was the "first location" the employer required him to be, and therefore the travel to and from that location was employer-mandated, not because he had to badge in but rather because managers told workers they had to go through the Gate before starting their shifts. It is true that there was at least a de facto required arrival time to be at the Gate for entry and exit: Workers had to sign in at the parking lots before their shift started; there was a strictly enforced speed limit on the only road between the Gate and parking lot; CSI knew how long the drive took; the Gate did not open until a certain time each morning; and CSI "gave workers a scheduled time when [they] could enter" the site, which sometimes was delayed; which taken together indicates CSI and the workers knew the Gate arrival time was de facto required for workers to begin or end their shifts on time. (*Huerta v. CSI Electrical Contractors, Inc.* (9th Cir. 2022) 39 F.4th 1176, 1184.)

There is nothing in Paragraph 5(A) that requires employees "report to work" at the first location where their presence is required for Paragraph 5(A) to apply. For example, if construction workers were required to be at a specific location at the beginning of the day that was not at an entrance to a specific property at which the employees worked, such as a gas station, parking lot, or the employer's office, and then travel to where they worked for the day and "report to work" there, they would still be entitled to compensation for all travel to and from that first location under Paragraph 5(A).

The district court improperly ignored Huerta's undisputed evidence and found that Paragraph 5(A) did not apply based on its improper and unsupported factual finding that the Security Gate was not "the first location where the employee's presence is required." (1-ER-17.)

The fact that no workers' meetings may have occurred at the Security Gate is irrelevant. Paragraph 5(A) does not require that meetings occur at the "first location where the employee's presence is required by the employer." In fact, it is silent as to what must occur at such location. There were no worker meetings in *Morillion*. There, the workers were required to meet at a designated departure point location, park their cars, and get on the bus. (*Morillion v. Royal Packing Co.* (Cal. Ct. App. 1998) 77 Cal.Rptr.2d 616, 618, *review granted and opinion superseded* (Cal. 1998) 80 Cal.Rptr.2d 752 [968 P.2d 463], *as modified (May 10, 2000)*, *rev'd* (2000) 22 Cal.4th 575 [94 Cal.Rptr.2d 3, 995 P.2d 139].) The fact that the workers did not engage at meetings at the location where they boarded the buses did not make the bus-ride time non-compensable.[5]

B. CSI required the workers to travel from the Security Gate to the designated parking lots to work.

Just as the employer in *Morillion* required its farm workers to travel to the fields to work, CSI required Huerta and the other CSI workers to travel from the Security Gate on

[5] At a minimum, based on the undisputed evidence cited by Huerta above, whether the Security Gate was the first location where CSI's employees' presence was required is at a minimum a triable issue of fact that precluded the granting of partial summary judgment in favor of CSI on this claim.

the Site to the designated parking lots to work. Unless they went through the security entrance process and traveled to the designated parking lots, they could not work on the Site. (ER: 4-ER-879-80; ¶¶ 11, 17; 4-ER-894; ¶¶ 9, 14; 5-ER-923-24 ¶¶ 9, 14; 4-ER-908-09; ¶¶ 11, 16.) Such travel was therefore "employer-mandated" under Paragraph 5(A).

Paragraph 5(A) does not require that to be "employer-mandated" travel, the travel must be "employer-provided." If construction workers working on a large housing development were required to undergo a mandatory entrance security process to access the Site and then use their own vehicles rather than employer-provided transportation to travel 30 minutes on the construction site to their daily work areas, they would still be entitled to be paid for the travel time between the entrance and their daily work areas.[6]

Wage and hour laws are "to be construed so as to promote employee protection." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340 [17 Cal.Rptr.3d 906, 923, 96 P.3d 194, 209]; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1026–1027 [139 Cal.Rptr.3d 315, 332, 273 P.3d 513, 527].) These principles apply equally to the construction of wage orders. (*Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 840 [182 Cal.Rptr.3d 124, 129, 340 P.3d 355, 359–360];

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[6] The hearing discussing the passage of Wage Order 16 explicitly referenced "protect[ing] worker[s] from being seesawed between job sites ... where they may be told to report to a particular job site, and then, after performing particular work there, being told to go to a secondary job site, and as a result, not being paid for the employer-controlled travel in between." (*Public Hearing, Department of Industrial Relations Industrial Welfare Commission*, Sept. 21, 2000 (statements of Scott Wetch and Jerry Haft), https://www.dir.ca.gov/iwc/PUBHRG9211.htm.)

Brinker, 53 Cal.4th at p. 1027.) Limiting the protection of Paragraph 5(A) to "employer-provided" transportation is contrary to the text and does not serve the protective purposes of Paragraph 5(A).

VII. THE DRIVE TIME ON THE SITE BETWEEN THE SECURITY GATE AND THE DESIGNATED PARKING LOTS CONSTITUTED "HOURS WORKED."

A. CSI controlled the workers during the Drive Time.

After the workers entered the Site through the Security Gate and while driving to and from the mandatory parking lots on the Access Road, they were under CSI's control and could not effectively use such time effectively for their own purposes such as running personal errands outside of the Site. CSI workers were required to stay on the Site during the entire workday from the beginning of the workday to the end of the workday. (4-ER-891; ¶ 67; 4-ER-904; ¶ 58; 5-ER-934; ¶ 60; 4-ER-919; ¶ 65.)

This time is compensable under this Court's reasoning in *Morillion*. In *Morillion*, plaintiff agricultural workers sued for compensation for time they spent waiting for employers' buses and riding those buses to and from the fields each day. (*Id*. at 579.) The Court held that the time spent waiting for and riding on buses to and from the fields each day as required by the employer constituted time over which the employer "controlled" the workers and that such "travel time is compensable" under the California Labor Code. (*Id*. at 585, 595.) The Court held that "an employee who is subject to an employer's control does not have to be working during that time to be compensated...." (*Id*., at 582.) The Court held that control was demonstrated by the fact that the workers could not use the time effectively for their own purposes, such as dropping off their children, stopping for

breakfast or running other errands. (*Id*. at 586.) The Court also held that the employer subjected its employees to its control by "determining when, where, and how they are to travel." (*Id*. at 588.)

Here, CSI determined ***when***, ***where*** and ***how*** employees were to travel between the Security Gate and the designated parking lots. Workers could only travel on the Site from sunrise to sunset and after the Access Road was cleared by biologists.

CSI also controlled exactly ***where*** its workers were required to travel to work – to the designated parking lots on the Site via the Access Road.

CSI also controlled "how" the workers were required to travel – they were limited in how fast they could go, whether they could stop, whether they could pass other vehicles, and other limitations discussed above. Most importantly, while on the Access Road, they could not use the time effectively for their own personal purposes.

The control CSI exercised 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, were subject to stringent controls over what they could do while on the Access Road and were required to drive to designated parking lots. 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. (*See Rutti v. Lojack Corp., Inc.* (9th Cir. 2010) 596 F.3d 1046, 1061–1062 (employee entitled to compensation under California law for drive time where employer required him to drive vehicle, forbade him from stopping off for personal errands, and required him to drive the vehicle directly from his home and back, *inter alia*).)

Although CSI has contended that employer-required travel on an employer's premises is not compensable under California law, there is no controlling law to support this contention. Here, the control CSI exercised over the workers occurred while the employees were "at work" – on the Site. The travel on the Access Road between the Security Gate and the designated parking lots is equivalent to the travel required by a warehouse employer who requires its employees to go through a mandatory security entrance process and then walk 30 unpaid minutes on a narrow, designated path to a time clock without being allowed to stop at a break room or locker room or run any personal errands and then requiring its employees walk 30 unpaid minutes after clocking out on a narrow, designated path to a mandatory exit security station 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.

B. The time Huerta and the workers were required to drive on the Site to the designated parking lots constituted "hours worked" under the "suffer or permit to work" test of Wage Order 16.

The workers' activity of undergoing the security entrance process and driving on the Access Road to the designated parting lots on the Site constitutes activity that CSI required. As discussed above, such activity is an "activity in which one exerts strength or faculties to do or perform something." (*Merriam-Webster's Collegiate Dictionary* (11th ed.).) It is also an "exertion to attain an end, especially as controlled by and for the benefit of an employer; labor." This is time during which the workers are necessarily required to be on the Site. Such time was under the complete control of CSI and was dependent solely upon the physical arrangements at the Site (the Security Gate and the designated parking lots). Without such mandated travel by the employees, CSI could not have provided the work it was providing to the general contractor on the Site. Moreover, the workers' convenience and necessity bore no relation whatsoever to this travel time – they traveled on the Site between the Security Gate and the designated parking lots only because they were compelled to do so by the necessities of CSI's business. Thus, the time spent in traveling on the Site involved "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." (*Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123* (1944) 321 U.S. 590, 598 [64 S.Ct. 698, 703, 88 L.Ed. 949]; *see also Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America* (1945) 325 U.S. 161, 165 [65 S.Ct. 1063, 1066, 89 L.Ed. 1534] (travel on employer's mine is "work" and compensable).)

In *Aguilar v. Zep Inc.* (N.D. Cal., Aug. 27, 2014, No. 13-CV-00563-WHO) 2014 WL 4245988, at *17, the court held that sales representatives were entitled to reimbursement for business expenses for the cost of their commute from their home to the first job site of the day, and from their last job site home. Although the *Aguilar* court largely focused on the "control" prong of the "hours worked" test, the reasoning is helpful to understand how California courts characterize "work." In *Aguilar*, the court reasoned that because the sales representatives traveled to the customer locations and performed work there, "they were engaged in business-necessary travel for the purpose of advancing [the employer's] commercial interests." (*Id.*)

Here, workers traveled from the Security Gate to their daily work sites and performed work there. They were therefore engaged in business-necessary travel for the purpose of advancing CSI's interests. The workers' travel from the Security Gate to the daily work sites was required, not tangential, to their occupation and clearly constituted "work."

VIII. AT A MINIMUM, WHETHER THE EXIT SECURITY TIME OR THE DRIVE TIME CONSTITUTED "HOURS WORKED" UNDER CALIFORNIA LAW IS AN ISSUE OF FACT FOR THE JURY.

Whether CSI sufficiently controlled its employees during the Exit Security Time and Travel Time on the Access Road to make such time compensable under California law is at a minimum an issue of fact. (*See Oliver v. Konica Minolta Business Solutions U.S.A., Inc.* (2020) 51 Cal.App.5th 1 [264 Cal.Rptr.3d 248, 51 Cal.App.5th 1].) In *Oliver*, service technicians who were required to drive their personal vehicles containing their employer's

tools and parts to customer Sites to make repairs to copiers and other machines filed a wage and hour class action against their employer seeking payment of wages for time spent commuting to the first work location of the day, home from their last appointment and mileage reimbursement. The Superior Court granted the employer's motion for summary judgment and the service technicians appealed. The Court of Appeal reversed, holding that genuine issues of material fact existed as to whether the employees were sufficiently under the employer's control that precluded summary judgment.

Here, CSI did not demonstrate that Huerta and the workers could use the time they were waiting for and going through the mandatory exit security process and driving on the Access Road while confined to the Site "effectively for their own purposes." Indeed, as in *Frlekin* and *Morillion*, there is no dispute that they could ***not*** do so.

Similarly, whether the Exit Security Time and Drive Time constitutes "hours worked" under the "suffer or permit to work" test is at a minimum an issue of fact.

IX. THE FACT THAT HUERTA WAS WORKING UNDER A COLLECTIVE BARGAINING AGREEMENT DOES NOT EVISCERATE HIS UNWAIVABLE RIGHT UNDER CALIFORNIA LAW TO BE PAID FOR ALL HOURS WORKED.

California law provides employees a non-waivable, non-negotiable right to compensation for all hours worked. (Cal. Labor Code § 1194.) Under California law, an employee is entitled to be paid for all "hours worked," which includes any hours where the employee is under the employer's control, whether or not the employee is "working."

A. Huerta's "hours worked" claim was based on CSI's control over him and the workers during their meal periods.

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

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

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

Where an employer restricts an employee's ability to leave the daily worksite during the employee's meal period, the employer controls the employee during the meal period and the time of the meal period therefore constitutes "hours worked" for which the employee must be paid. (*See Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th

968, 968–72 (38 Cal.Rptr.2d 549) *disapproved of on other grounds by Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557 (59 Cal.Rptr.2d 186, 927 P.2d 296) ("*Bono*").)

B. The fact that Huerta and CSI's other workers worked under a CBA does not mean that CSI was excused from paying them for all hours worked.

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

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

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

1. 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 paragraph 10 of Wage Order 16.

An employee's right to be paid minimum wages is provided for in Labor Code section 1194(a). Consistent with this Labor Code provision, section 4 of Wage Order 16 requires "[e]very employer" to pay a specified minimum wage to its employees "per hour for all hours worked ...." (Wage Order 16, ¶ 4.) Thus, an employee's right to be paid for all hours worked exists independently of any right to meal periods and is not derivative of the

employee's meal period rights. This right exists independent of any meal period laws, and neither the district court nor CSI cite to any authority holding otherwise.

CSI contended that Huerta was subject to a collective bargaining agreement and that CSI therefore did not have to pay Huerta for the time of Huerta's meal periods that constitutes "hours worked" under California law. Accepting CSI's argument, CSI could require Huerta and its other workers to work during the entire meal period and would not have to pay Huerta ***any*** wages for such "hours worked." This, of course, is nonsense and unsupported by any controlling authority. Under California law and Wage Order 16, Huerta is entitled to compensation for all "hours worked." The fact that the time of such "hours worked" occurred during a meal period does not insulate an employer working under a CBA from paying for such hours worked.

In *Gutierrez v. Brand Energy Services of California, Inc*. (2020) 50 Cal.App.5th 786, 796–797 [264 Cal.Rptr.3d 173, 179, 50 Cal.App.5th 786, 796–797], *as modified on denial of reh'g* (July 2, 2020), *review denied* (Sept. 9, 2020), the employee contended that he was entitled to be paid for mandatory travel time on employer-provided transportation to and from the work site. The employer contended that section 5(D) of Wage Order 16 permits union-represented employees and their employers to opt out of paying ***any compensation*** for travel time that would otherwise be compensable under *Morillion* and section 5(A). According to the employer, the language of section 5(D) supported its position that "employees whose employment is governed by a construction industry CBA

is not required to be paid for travel time at *any* rate, because the 'section' [5(A)] requiring compensation for such time 'does not apply' if a CBA expressly so provides." (*Id*., at 798.)

The Court of Appeal disagreed and reversed the trial court's granting of summary judgment for the employer, holding that there was no applicable statutory exception to pay for hours worked under these circumstances and that Wage Order 16's exception could not negate the employee's right to compensation for all hours worked. The Court reasoned:

> [W]e accept plaintiff's point that Wage Order 16 section 5 does not state that union-represented employees and employers can opt out of paying any compensation whatsoever for employer-mandated travel time. . . .
>
> Brand's interpretation of section 5(D) is unsupported by section 5's plain language, which limits its own scope to section 5 and says nothing about waiving the right to minimum wage. Brand's interpretation also directly conflicts with the express terms of Wage Order 16 sections 1 and 4. These sections, subject to exceptions not applicable here, expressly apply to "all persons employed in the on-Site occupations of construction" (Wage Order 16, § 1) and require payment of "not less than the applicable minimum wage for all hours worked in the payroll period" (*id*., § 4(B)). (*Id*. at 798-799, (emphasis added).)

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

Citing numerous case holdings that Labor Code section 1194(a) precludes employers from contracting with its employees for a rate of pay less than minimum wage

(*id*. at 799-800), the Court rejected the employer's reliance on some of the very cases cited by CSI in its motion for partial summary judgment, including *Araquistain v. Pacific Gas & Electric Co.* (2014) 229 Cal.App.4th 227, 238 [176 Cal.Rptr.3d 620, 628] and *Vranish v. Exxon Mobil Corp.* (2014) 223 Cal.App.4th 103, 111 [166 Cal.Rptr.3d 845, 849], holding that they were inapposite. (*Id*. at 801-802.)

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

> . . . Would the IWC have acted to override our Legislature's statutory grant of the right to at least minimum wage for all hours worked with the bare language in Wage Order 16 section 5(D) that "[t]his section"—meaning only section 5—"shall apply to any employees covered by a valid [CBA] unless the [CBA] expressly provides otherwise"? We decline to assume the IWC intended to override this important state right in the absence of actual evidence. (*Id*. at 802.)
>
> . . . In light of Wage Order 16's and the Labor Code's remedial purposes requiring liberal construction and their directives to compensate employees at a rate no less than minimum wage for all hours worked notwithstanding any agreement or customary arrangement to the contrary (Lab. Code, §§ 1194, 219; Wage Order 16, §§ 1, 4), we conclude section 5(D) provides no authority for employers and employees to waive all compensation for employer-mandated travel time. (*Id*. at 804.)

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

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

CSI has argued that because the meal period provisions of Paragraph 10(D) of Wage Order 16 do not apply to employees covered by a qualifying collective bargaining agreement, this means that an employer is not required to pay the employees for hours

worked during a meal period as required by Section 1194 and Section 4 of Wage Order 16. As discussed above, the identical argument with respect to employer-mandated travel time was flatly rejected by the Court in *Guiterrez*.

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

Paragraph 10(D) provides:

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

While paragraph 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, paragraph 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.)

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

CSI's argument is predicated on the manufactured and faulty premise that misconstrues Huerta's "hours worked" claim by claiming that Huerta is seeking compensation for CSI's violation of California's meal period laws. Huerta is not alleging that CSI violated its meal period obligations under Labor Code Section 512 or paragraph 10 of Wage Order 16, however, nor is he seeking meal period premiums for any such violations. To the contrary, Huerta is alleging that he has compensable unpaid hours worked during meal periods – which is a separate and different claim.

Moreover, contrary to CSI's contention, Huerta does not contend that the time of his meal break should be compensated "because he was not relieved of all duty." (5-ER-994; 11:3-8.) As discussed above, Huerta 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."

CSI contended in the district court that "The CBA Meal Period Exemption, as explained above, means that union employees working under qualifying CBAs are excluded entirely from section 512(a)—the source of the right to the one-hour of premium pay **and** unpaid wages for not being relieved of all duty during a meal period." (5-ER-996; 13:7-10 (emphasis added).) But neither section 512(a) nor Paragraph 10 of Wage Order 16, 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 Paragraph 4 of Wage Order 16. Huerta makes this clear in his First Amended Complaint:

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

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

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

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

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

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

Here, however, as discussed above, the "right at issue" is not the right to a meal period that qualifies under Section 512 or Paragraph 10 of Wage Order 16, but the right to

be paid for all hours worked, which is founded on Section 1194(a) and Section 4 of Wage Order 16 and exists independently of any meal period rights. Huerta would have this claim even if there were no meal period statute or wage order provisions regarding meal periods.

5. The *Bono* decision demonstrates that Huerta's "hours worked" theory of relief was based on Wage Order 16's requirement that employees be paid for all hours worked, not just on meal period laws.

In *Bono*, the Court held that the lunch time was compensable "hours worked" under section 4 of the applicable Wage Order, concluding that the language of Paragraph 4 of the Wage Order was "sufficiently clear to place employers on notice that an employee must be paid for all hours during which he or she is subject to the employer's control, including meal periods." (*Id*. at 979.)

6. The cases cited by CSI and relied upon by the district court 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 decision, 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 district 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.) It 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 and 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.

X. CONCLUSION

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

The Drive Time and Exit Security Time are 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 and CSI required its workers to travel between the Security Gate and the designated parking lots on the Site to work. The Drive Time that occurred on the Site after workers passed through the Security Gate was also compensable because employees were under CSI's control after entering the Site and while traveling between the Security Gate and the designated parking lots on the Site. Such Drive Time was also time the workers were "suffered or permitted to work." At a minimum, issues of fact existed which precluded partial summary judgment.

The Meal Period time is compensable as hours worked under California law because CSI controlled the workers by confining them to their daily work locations during their meal periods. The fact that the workers worked under a collective bargaining agreement does not eviscerate their unwaivable right to be paid for all hours worked.

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

Dated: September 16, 2022

/s Peter R. Dion-Kindem

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CERTIFICATE RE NUMBER OF WORDS OF BRIEF

I certify pursuant to Rule 8.204(c)(1) of the California Rules of Court that **PETITIONER GEORGE HUERTA'S OPENING BRIEF ON THE MERITS** contains 13,958, including footnotes. I rely on the word count of the Word computer program used to prepare this brief.

Dated: September 16, 2022

Respectfully submitted,

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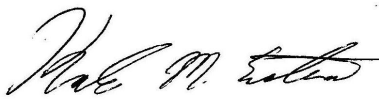

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