S259172

IN THE SUPREME COURT OF CALIFORNIA

JESSICA FERRA,

Plaintiff / Appellant

vs.

LOEWS HOLLYWOOD HOTEL, LLC

Defendant / Respondent

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT CASE NO. B283218
APPEAL From the Superior Court of Los Angeles County. Hon. Kenneth R. Freeman (Los Angeles Super. Ct. Case No. BC586176)

APPELLANT'S OPENING BRIEF ON THE MERITS

(Service on Attorney General and District Attorney required by Bus. & Prof. Code §§ 17209, 17536.5)

MOSS BOLLINGER LLP
Dennis Moss (SBN 77512)
Ari Moss (SBN 238579)
15300 Ventura Blvd., Suite 207
Sherman Oaks, CA 91403
Tel: (310) 982-2984
Fax: (818) 963-5954

LAW OFFICES OF SAHAG MAJARIAN II
(SBN 7146621)
18250 Ventura Boulevard
Tarzana, CA 91356
Tel: (818) 609-0807
Fax: (818) 609-0892

ATTORNEYS FOR PLAINTIFF & APPELLANT
JESSICA FERRA

CERTIFICATE OF INTERESTED PARTIES OR PERSONS

Pursuant to California Rules of Court, rule 8.208(e)(2), the following list of entities or persons have an interest in the outcome in the proceeding:

Name of Interested Person or Entity	Nature of Interest
Jessica Ferra	Appellant/ Plaintiff
Loews Hollywood Hotel, LLC	Respondent/ Defendant

Dated: April 29, 2020

MOSS BOLLINGER, LLP
LAW OFFICES OF SAHAG MAJARIAN, II

By: _____
Dennis F. Moss, Esq.
Attorneys for Petitioner
Jessica Ferra

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Regulations

Other Authorities

I. ISSUE PRESENTED

Did the Legislature intend the term "regular rate of compensation" in Labor Code section 226.7, which requires employers to pay a wage premium if they fail to provide a legally compliant meal period or rest break, to have the same meaning and require the same calculations as the term "regular rate of pay" under Labor Code section 510(a), which requires employers to pay a wage premium for each overtime hour? (Order Granting Petition for Review January 22, 2020.)[1]

---

[1] Labor Code section 226.7 (c) provides: "If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, …, the employer shall pay the employee *one additional hour of pay at the employee's regular rate of compensation* for each work day that the meal or rest period is not provided." (Italics added.) (As originally enacted, this subsection was subsection (b), and did not reference recovery periods).

Labor Code section 510(a)provides in relevant part that work that qualifies for overtime premiums shall be paid at either one and one-half times or twice *"the regular rate of pay"*. (Italics added.)

II. INTRODUCTION

"Regular rate" is a phrase common to premium payments owing for overtime work and to premium payments owing for meal and rest break violations. Labor Code §§ 510(a), 226.7.[2]

An hour of wages at the "regular rate" has a well-established meaning in federal wage-and-hour law that for decades has been universally applied to California's use of the expression "regular rate of pay" in overtime premium requirements. It includes hourly wages and other non-discretionary wages, such as non-discretionary bonuses. *See* 29 USC § 207(e); 29 CFR 778.211; *Walling v. Harnischfeger Corp.* (1945) 325 U.S. 421; 2002 Update of The DLSE Enforcement Policies and Interpretations Manual ("2002 DLSE Manual") §§ 35.7, 49.2-49.2.4.3; *Alvarado v. Dart Container Corp.* (2018) 4 Cal.5th 542, 562.

That established meaning does not depend on whether the term "regular rate" is followed by "of pay" (as it does in Labor Code section 510), "of compensation" (as it does in Labor Code

[2] Unless otherwise indicated, all Code section references are to the California Labor Code.

section 226.7), or by neither "of compensation" nor "of pay" (as it does in the Fair Labor Standards Act ("FLSA") at 29 USC § 207(a), and § 207(e)). "Regular rate" is the operative phrase that determines how premium pay must be calculated.

Ignoring almost all of the textual and legislative history analysis in Presiding Justice Edmon's 14-page dissenting opinion, the majority affirmed the trial court's ruling that "regular rate of compensation" means base hourly rate, relying almost entirely on a canon of statutory construction that "where different words or phrases are used in the same connection in different parts of a statute, it is **presumed** the Legislature intended a different meaning." *Ferra v. Loews Hollywood Hotel, LLC* (2019) 40 Cal. App. 5th 1239, 1247 (emphasis added). While acknowledging that both statutes used the same core phrase, "regular rate," the majority found determinative that Section 226.7 referred to the "regular rate of compensation" while Section 510 referred to the "regular rate of pay." That different choice of language, according to the majority, necessarily reflects a different intended meaning. Because it is well-settled that "regular rate of pay" under state and federal law means *all* non-discretionary income, the majority leaps to the conclusion that "regular rate of compensation" must

mean "base hourly wages only" – even though nothing in the word "compensation" itself connotes anything different, or lesser, than "pay." *Ferra, supra,* 40 Cal. App. 5th at 1247-1248.

The majority opinion exalted the significance of the word "compensation" and in the process completely ignored that in the employment context the "plain meaning" of "compensation" is "pay," just as it ignored the Legislature's deliberate use in Sections 226.7 and 510 of the term of art "regular rate" which has enjoyed a settled definition for more than 80 years. In staking out its position, the majority never explains how "of compensation" transforms "regular rate" into "base hourly rate," nor why or how its construction of Section 226.7 would apply in the case of the many categories of California workers who are paid by the piece, by commission, or who otherwise have no base hourly rate.

Justice Edmon's comprehensive dissent not only points out the logical flaws in the majority's approach, but carefully analyzes the legislative and regulatory history, purpose, and text of Section 226.7 – as well as the parallel language in Section 510 – in drawing the inevitable conclusion that the Legislature intended "*regular rate* of compensation" and "*regular rate* of pay" to be synonymous, just as those terms were used synonymously

and interchangeably by the Industrial Wage Commission ("IWC") in its Wage Orders and the relevant Statement of Basis, by state and federal courts throughout the country (*including* by this Court and the United States Supreme Court), and by the Division of Labor Standards Enforcement ("DLSE").

Justice Edmon cited extensive evidence from the historical record and statutory text to support her dissenting analysis, including:

- The seven-decade history of "regular rate" as a term of art with a fixed meaning in federal and California wage-and-hour laws and regulations, *Ferra,* 40 Cal. App. 5th at 1258-1261 (Edmon, J., dissenting);
- The development of "regular rate" jurisprudence in California in the overtime context, *id.,* at 1260-1264;
- The DLSE's adoption of the federal "regular rate" definition, *id.,* at 1260;
- The IWC's Statement of Basis explanation of "regular rate of compensation" as "regular rate of pay"', *id.,* at 1262;
- The Legislative History of Sections 510 and 226.7, *id.,* at 1262-1263;
- The interchangeable use of the terms "regular rate of pay"

and "regular rate of compensation" by courts and legislative bodies, *id.,* at 1266-1268, and fn. 4; and

- The synonymous nature of "compensation" and "pay", *id.,* at 1266.

Based on this analysis, Justice Edmon concluded that "when the Legislature used the phrase "regular rate" in Section 226.7, it necessarily intended the phrase to mean what it has always meant: guaranteed hourly wages *plus* "bonuses [that] are a normal and regular part of [an employee's] income." *Ferra,* 40 Cal. App. 5th at 1269 (Edmon, J., dissenting) (citing *Walling v. Harnischfeger Corp.* (1945) 325 U.S. 427, 432).

The California Labor Commissioner has fully embraced Justice Edmon's analysis, rather than the majority's canon-confined construction. As explained in the Labor Commissioner's January 16, 2020 *Amicus* Curiae Letter in Support of Petition For Review ("DLSE Amicus"):

> [B]ased on the legislative history of section 226.7 it is reasonable to conclude that "compensation" and "pay" have no material impact on the key phrase "regular rate," because those terms are so closely married in

> meaning that their usage in the Labor Code is stylistic rather than substantive. …
>
> [T]he *Ferra* majority places minimal, if any weight, on the Legislature's specific choice of the phrase "regular rate," even though that expression has long been part of the "labor code lexicon" and evolved into a "term of art," meaning an employee's hourly rate plus non-discretionary compensation. If the Legislature had meant for 226.7 to compensate an employee at a "base hourly pay" why did it choose *not* to use that specific phrase, or similar terminology in the statute and instead use "regular rate," which has a distinct and different meaning from "base hourly pay." The *Ferra* majority is markedly silent on this critical aspect of statutory analysis.

DLSE Amicus, at p. 4 (citations omitted).

Ultimately, this case boils down to whether a *presumption* in one canon of statutory construction, as applied to Section 226.7, is more indicative of legislative intent than an overwhelming combination of indicators of legislative intent

buttressed by precedent and by compelling legislative and regulatory history.

In this war fought by Loews with one canon, the fodder of which is a presumption unsupported by "plain meaning" or legislative history, the Plaintiff-Appellant Ferra has the far superior argument in a context where, as here,

> [I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection.

Ramirez v. Yosemite Water Co. (1999) 20 Cal.4th 785, 794, quoting *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702.

III. STATEMENT OF CASE AND PROCEEDINGS BELOW

A. RELEVANT FACTS

Plaintiff-Appellant Jessica Ferra ("Ferra" or "Plaintiff") was employed by Defendant-Appellee Loews Hollywood Hotel, LLC ("Loews"), a 628-room luxury hotel located in the heart of Hollywood, California, as a bartender from June 16, 2012 to May

12, 2014. Clerk's Transcript, ("CT") Vol. 1: 8, 4:871, 960, 5:980-984, 1031, 1135.

As referenced in the Court of Appeal decision, the parties stipulated for purposes of a motion for summary adjudication that Loews paid (and continues to pay) meal and rest period premiums to hourly employees at their base rate of compensation without including an additional amount based on incentive compensation such as nondiscretionary bonuses. *Ferra, supra,* 40 Cal. App. 5th at 1243. The stipulation the parties entered into was more specific than the Court of Appeal indicated, providing in relevant part:

> 2. During the class period, Loews paid (and continues to pay) meal and rest period premiums to its hourly paid employees at their base rate of compensation earned at the time their meal or rest period was allegedly not provided. Thus, for example, if Plaintiff earned a base rate of $15.69 per hour at the time she was not provided a meal break, she would have been paid a $15.69 premium.
>
> 3. When Defendant pays meal and rest premium pay, Defendant does not include an additional amount

based on incentive compensation (i.e. non-discretionary quarterly bonuses).

CT Vol. 1: 8, 16.

Plaintiff-Appellant alleged that Loews' failure to factor her non-discretionary quarterly bonuses into its calculation of her "regular rate" for purposes of calculating break violation premium pay violated Labor Code section 226.7.

As a practical matter, this factoring is easily accomplished. If, for example an employee received a non-discretionary bonus of $500 at the end of a quarter based on having met all productivity goals throughout the quarter, and if that employee worked 500 hours during the quarter, the "regular rate" principles that have existed for decades in the state and federal law overtime context require her "regular rate" to one dollar per hour more than her base hourly rate ($500.00 divided by 500 hours = $1.00 per hour). For meal or rest period violations no less than overtime, every hour of wage premiums owed would be calculated by adding one dollar to the base hourly rate so, for example, if that employee experienced 10 break violations during the quarter, she would be entitled to ten additional dollars of break violation premium

payable at the time the bonus total is determined.[3]

B. PROCEEDINGS IN THE TRIAL COURT

The operative complaint in this matter alleges on behalf of a class, among other claims, that Loews improperly calculated premium payments owed pursuant to Section 226.7 on account of its failure to factor non-discretionary quarterly bonuses into the required one hour of wages at the "regular rate of compensation" for each break violation that occurred during the quarter. *Ferra, supra,* 40 Cal. App. 5th at 1243. Plaintiff sought for herself and the class the difference between what they were paid for break violations and what they were owed on account of Loews' failure to factor non-discretionary bonuses into the violation premium payments. The complaint also contained a claim for unpaid work time on account of rounding practices.

Loews' Motion for Summary Adjudication argued that Section 226.7 only requires payment of one hour of pay at an hourly employee's base hourly rate, regardless of any other

---

[3] Retroactive adjustments are regularly made to properly pay overtime premiums once bonuses are determined. See Reference to 29 CFR 778.209 and related cases, below in Section D 5. The same types of adjustments can be made and are made by employers in connection with meal and rest break premiums.

compensation earned during that work period. *Id.*, at 1243-1244. The trial court agreed, finding:

> [T]he terms "regular rate of compensation" and "regular rate of pay" are not interchangeable.... [R]est and meal period premiums under § 226.7 need only be paid at the base hourly rate. As is consistent with the legislative history of §§ 226.7 and 510, it is apparent that the terms in both statutes are different, and have different purposes....

Id., at 1244-1245.

Loews, in a later motion, convinced the trial court of its position on the remaining issues (e.g., rounding) and on May 19, 2017, the court granted Summary Judgment for Loews, and Judgment in its favor was entered. *Id.,* at 1245.

C. PROCEEDINGS ON APPEAL

Plaintiff timely appealed. In a 2-1 decision, over a forceful dissent by Presiding Justice Edmon, the panel majority (Egerton, J. and Lavin, J), agreed with the trial Court. *Id.,* at 1246.

IV. STANDARD OF REVIEW

The interpretation of a statute is a question of law; therefore, the standard of review is *de novo*. *Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal. App. 4th 322, 360.

V. DISCUSSION

A. THE GOAL OF STATUTORY CONSTRUCTION IS ASCERTAINMENT OF LEGISLATIVE INTENT.

This Court's most recent discussion of the principles of statutory construction in an employment law matter reiterated the well-settled standard applied to all statutory construction disputes. "In construing a statute, our task is to ascertain the intent of the Legislature so as to effectuate the purpose of the enactment." *Kim v. Reins Int'l.* (March 13, 2020) 259 Cal. Rptr. 769, 775.

Here, that task, as demonstrated below, is facilitated, *inter alia*, by the plain meaning doctrine, the deference to be given to the settled meaning of terms of art such as "regular rate," the failure of the legislature to define "regular rate of compensation," the interchangeable use of "regular rate of pay" and "regular rate of compensation," and the absurd consequences of adopting the majority's interpretation.

B. THE SINGLE CANON RELIED ON BY THE MAJORITY IS NOT A RELIABLE INDICATOR OF LEGISLATIVE INTENT IN THE ENACTMENT OF LABOR CODE 226.7

The majority's conclusion that "regular rate of compensation" means an employee's base hourly rate is grounded entirely on a single canon of statutory construction—that "where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning. *Ferra*, *supra*, 40 Cal. App. 5th at 1247, citing *Briggs v. Eden Council for Hope & Opportunity* (1991) 19 Cal.4th 1106, 1117. Ignored in the majority's analysis is the parallel tenet that when the legislature uses the same words and phrases in different statutes and those words or phrases are terms of art, such as "regular rate," it is presumed that such words or phrases are intended to retain their settled meaning. *F.A.A. v. Cooper* (2012) 566 U.S. 284, 292; *Texas Commerce Bank v. Garamendi* (1992) 11 Cal. App. 4th 460, 475.

The majority turned the single canon it cited into an irrebuttable presumption that the Legislature must have attributed different meanings to the term of art "regular rate," depending on whether the expression was followed by "of

compensation" or "of pay." *Ferra*, *supra*, 40 Cal. App. 5th at 1247.

The majority was unable to support its position by pointing to any meaningful distinction between the terms "pay" and "compensation" (let alone one where "compensation" is necessarily limited to just one form of compensation), to legislative history that explains why the Legislature was merely following the IWC in using two different descriptors (knowing that IWC used them interchangeably), or to the settled meaning of "regular rate" (which is the operative term of art).

Further, the majority ignored the principal tenet of statutory construction, that in analyzing the text of a statute, unless otherwise defined, words like "compensation" will be interpreted consistent with their ordinary meaning. *De Vries v. Regents of University of California* (2016) 6 Cal. App. 5th 574, 590-591.

To be sure, legislatures often use different words when they intend to express different meanings. *See Rashidi v. Moser* (2014) 60 Cal.4th 718, 725. But it is equally common for legislatures to use synonyms when they intend statutory language to have similar meaning.

No single canon of statutory construction is an infallible guide to correct interpretation in all circumstances, especially when, as here, other indicators of legislative intent clearly expose the fallibility of the majority's reliance on a single canon. *City of Palo Alto v. Public Emp. Relations Bd.* (2016) 5 Cal. App. 5th 1271, 1294.

Canons of interpretation are merely tools to aid in the statutory construction inquiry, "not mandatory rules." *Chickasaw Nation v. United States* (2001) 534 U.S. 84, 94; *see also Stone v. Superior Court* (1982) 31 Cal.3d 503, 521 n.10; *City of Palo Alto, supra* (2016) 5 Cal. App. 5th at 1294 ("[The canons] are tools to assist in interpretation, not the formula that always determines it.") (brackets in original; citations omitted); *Xilinx, Inc. v. Comm'r of Internal Revenue* (9th Cir. 2010) 598 F.3d 1191, 1196.

Where the Legislature uses synonymous language in two similar statutes without providing clear indication that it intends that language to have different meanings, it becomes the courts' function to scrutinize the statutes' text, structure, history, and underlying purposes to construe that language. For example, in *City of Palo Alto*, *supra*, 5 Cal. App. 5th at 1293-94, the California Court of Appeal held that the duty of an employer under the

Myers-Milias-Brown Act to "meet and confer in good faith" and to "consult[] … in good faith" were equivalent, rejecting the employer's argument that certain canons of statutory interpretation required the court to find that "different words … have different meanings." *See also U.S. v. Gonzales* (9th Cir. 2007) 506 F.3d 940, 944-45 (en banc) (construing "term of imprisonment" and "sentence of imprisonment" in the Sentencing Guidelines as "interchangeable," rejecting dissent's argument that the phrases must be construed differently); *In re Miller* (10th Cir. BAP 2014) 519 B.R. 819, 823-24 (citing *Wachovia Bank v. Schmidt* (2006) 546 U.S. 303, 314) ("Congress's use of two different terms in a statute does not preclude the courts assigning the terms the same meaning … ."); *id.,* 519 B.R. at 823 n.22 ("Congress certainly does use synonyms in its drafting, and courts should not strain to interpret words differently when their ordinary meaning is synonymous.").

Justice Edmon's dissent cited other cases for the same proposition. "Although courts sometimes attach significance to the Legislature's use of different words or phrases in related statutes, where statutes appear to use synonymous words or phrases interchangeably, courts have not hesitated to attribute

the same meanings to them." *Ferra,* 40 Cal. App. 5th at 1266 (Edmon, J., dissenting), citing *People v. Frahs* (2018) 27 Cal. App. 5th 784, 793, fn.3, review granted Dec. 27, 2018; *Vector Resources, Inc. v. Baker* (2015) 237 Cal. App. 4th 46, 55; *Alcala v. City of Corcoran* (2007) 147 Cal. App. 4th 666, 672; and *International Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal. App. 3d 959, 976; *Midstate Theatres, Inc. v. County of Stanislaus* (1976) 55 Cal. App. 3d 864, 872.

Although the majority acknowledges that the remedial provisions of Sections 510 and 226.7 that use the core phrase "regular rate" (*id.* at 1245) establish a right to premium pay (*id.* at 1245-1246, 1249), and that the terms *pay* and *compensation* have historically been used interchangeably by courts *and* by the IWC and the Legislature (*id.* at 1249), it essentially ignored those considerations – which completely undercut its conclusion. Indeed, the majority went so far as to acknowledge that, at least in the overtime context, the meaning of "regular rate" is the same under both federal and state law (*id.,* at 1247)—yet it inexplicably failed to grasp the significance of that acknowledgement in its own statutory construction analysis.

The majority concludes Plaintiff-Appellant's position renders *meaningless* the difference between the words "pay" and "compensation"—which is only true if the Legislature *intended* there to be a difference. However, it can equally be said that the majority rendered *meaningless* the Legislature's deliberate consistent use of the identical words "regular rate" in Sections 510 and 226.7. As further demonstrated by the analysis forth below, "regular rate of compensation" as used in Section 226.7 was intended to have the same meaning as every other "regular rate" statute including those that refer to "regular rate of pay."

C. *MURPHY v. KENNETH COLE, INC.* (2007) 40 CAL.4TH 1094 SUPPORTS THE CONCLUSION THAT "REGULAR RATE OF COMPENSATION" "AND REGULAR RATE OF PAY" ARE SYNONYMOUS AND INTERCHANGEABLE.

The majority opinion contains a section entitled "*Legislative history does not compel the 'conclusion' that 'regular rate of compensation' and 'regular rate of pay' are synonymous and interchangeable." Ferra, supra* 40 Cal. App. 5th at 1248-1249.

The title is misleading because what the majority opinion actually asserts in the above referenced section is that *Murphy v. Kenneth Cole, supra* 40 Cal. 4th 1094 stands for the proposition

that "overtime" premiums and "break" premiums are dissimilar, and that the dissimilarity explains the difference between "regular rate of pay" used in the "overtime" context and "regular rate of compensation" used in the break context. *Ferra, supra* 40 Cal. App. 5th at 1248-1249.

The majority thus completely misreads *Murphy*, claiming that *Murphy* "differentiates" between overtime and break premiums, *Id*, at 1248-1249, when in fact the complete opposite is true. See *Murphy, supra* 40 Cal. 4th at 1102-1114.

In reaching the conclusion that break premiums are not penalties but are "wages" for statute of limitations purposes, this Court, in *Murphy* repeatedly invoked similarities between break premiums and overtime premiums, emphasizing that both types of premiums are characterized at times and for some purposes as "penalties" and at other times and other purposes as "wages":

> Under the amended version of section 226.7, an employee is entitled to the additional hour of pay immediately upon being forced to miss a rest or meal period. In that way, a payment owed pursuant to

> section 226.7 is akin to an employee's immediate entitlement to payment of wages or for overtime.

Murphy, supra 40 Cal.4th at 1108 (emphasis added)

The Court in acknowledging that overtime and break premiums are referred to both as penalties and wages stated:

> [A]s explained below, statements made by IWC commissioners during hearings discussing the "hour of pay" remedy for meal and rest period violations leave no doubt that the remedy was being adopted as a "penalty" in the same way that overtime pay is a "penalty"…

Id. 40 Cal.4th at 1109 (emphasis added)

This court continues in *Murphy, supra*, with a description of how the IWC used the "meal and rest period remedy" in the same sense that the IWC used overtime pay as a "penalty" and as "premium pay—with the central purpose of guaranteeing compensation to employees and a "secondary function" of shaping employer conduct. *Id*, 40 Cal.4th at 1109-1110, citing testimony of IWC Commissioner Barry Broad likening break premium pay to overtime premium pay.

Notwithstanding this Court's equating of overtime and break premium pay, the majority construed *Murphy* as requiring consideration of different factors in determining the purpose of a statutory "overtime premium" compared to a statutory "break premium."

The majority notes the statement in *Murphy* that the purpose of 226.7 is to compensate employees and shape employer behavior, *Ferra, supra* 40 Cal. App. 4th at 1249, without explaining how that conclusion informs the meaning of "regular rate of compensation." The majority also fails to recognize that in reiterating the similarities between overtime premiums and break premiums, the Supreme Court in *Murphy*, supra 40 Cal. 4th at 1111, explained that overtime premiums , just like break premiums, provide a "dual purpose remedy that is primarily intended to compensate employees, but also has a corollary purpose of shaping employer conduct."

One section of *Murphy*, *supra* makes clear that at the time that opinion was written, this Court did not perceive any distinction between "regular rate of pay" and "regular rate of compensation'.

The Court's decision in *Murphy* used the term ***"rate of***

compensation" in describing the various formulas used for different types of premiums, including overtime premiums, notwithstanding the use of "regular rate of pay" in section 510 and Wage Orders. After describing overtime compensation as "one-and one-half the regular rate of pay for each hour of labor over eight hours," "reporting-time pay" as "up to four hours of pay," and split shift pay as an "additional hour of wages," the Court explained that each of those premiums were based on "rates of compensation":

> Each of these forms of compensation, **like the section 226.7 payment**, uses the **employee's rate of compensation as the measure of pay and compensates the employee for events other than time spent working.**

Id., at 1112-1113 (emphasis added).

Obviously, this Court in its use of "rate of compensation" as the measure of pay for overtime did not attribute any special meaning to "compensation" that differentiated it from "pay."

How the majority derives from *Murphy, supra* the illogical conclusion that "regular rate of compensation" means something different than "regular rate of pay" and instead means "base

hourly rate" is never explained by the majority, nor could it be. *Murphy* does nothing to support the conclusion of the majority, instead supporting the conclusion that "regular rate of compensation" and "regular rate of pay" were intended in this context to be synonymous.

In addition to misreading *Murphy*, the majority failed to consider the many compelling reasons supporting plaintiff's, and Justice Edmon's, conclusion that the Legislature intended "regular rate of compensation" to include all forms of non-discretionary wages paid for an hour of work, not just base hourly wages—a striking omission given the clarity and comprehensiveness of the analysis that the majority simply ignored.

D. "REGULAR RATE" IS A TERM OF ART

1. *Terms of Art and Their Place in Statutory Construction.*

The majority's focus on what it assumed to be the unstated meaning of the word "compensation" is significant in part because it completely overlooks that "compensation" in Section 226.7, and "pay" in 510, are both coupled with the term of art, "regular rate." By ignoring the established meaning of that term, the majority cast aside the principle that when legislatures use

terms of art, absent a demonstrated intent to modify their technical meanings, legislatures are presumed to be using the terms of art consistent with those meanings.

"Terms of art are words having specific, precise meaning in a given specialty." *People v. Gonzales* (2017) 2 Cal.5th 858, 871, fn. 12. *See also Morissette v. United States* (1952) 342 U.S. 246, 263 (1952); *Molzof v. U.S.* (1992) 502 U.S. 301, 307; *People v. Miramon* (1983) 140 Cal. App. 3d 118, 130.

"Regular rate" clearly qualifies as a "term of art," the legal meaning of which must be honored in every wage and hour context where it is utilized. That term has enjoyed a decades long "specific precise meaning" that originated with United States Supreme Court opinions interpreting "regular rate" over 70 years ago, continued with an amendment to the FLSA in 1949 that provided an "all remuneration" definition that did not exclude non-discretionary bonuses, followed by the Department of Labor's express inclusion of non-discretionary bonuses in the regular rate, the IWC's inclusion of the term in California's Wage Orders for over 50 years (albeit as *regular rate* of pay), and the DLSE's express interpretation of the Wage Orders' use of "regular rate of pay" as consistent with "regular rate" and "regular rate of

compensation" as they appear in the FLSA and long-standing federal precedent.

California courts, as demonstrated below, including this Court in *Alvarado, supra,* 4 Cal.5th 542, have further confirmed and enhanced the "term of art" status of "regular rate" in California by applying federal "regular rate" jurisprudence in interpretation and application of "regular rate of pay" in overtime contexts.

> [I]t is a "cardinal rule of statutory construction" that, when Congress employs a term of art, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken."

F.A.A. v. Cooper (2012) 566 U.S. 284, 292 (citation omitted).

> California precedent is in accord with the above authority: It is an accepted principle of statutory construction that words employed in a statute dealing with legal or commercial matters are presumed to be used in their established legal or technical meanings **unless otherwise clearly indicated by the statute**.

Texas Commerce Bank v. Garamendi (1992) 11 Cal. App. 4th 460,

475 (emphasis added). *See also Professional Engineers in California Government v. Brown* (2014) 229 Cal. App. 4th 861.

Nowhere does the majority even mention, let alone rebut, that "regular rate" enjoyed the status of a "term of art" with a legal, technical and settled meaning when Sections 226.7 and 510 were enacted, a meaning that includes non-discretionary bonuses of the type paid by Loews.

Significantly, neither Section 226.7 nor the history of its enactment indicate a legislative intent, clearly or otherwise, to deviate from the historical, technical term of art meaning that "regular rate" has enjoyed and limit the meaning to "base hourly rate." As *Texas Commerce Bank, supra,* 11 Cal. App. 4th at 474 teaches, attributing an alternative definition to a "term of art" without any such legislative indication runs afoul of "accepted principle[s] of statutory construction."

2. The Term of Art Meaning of "Regular Rate" is Informed by Parallel Federal Law that Uses the Same Expression.

The IWC adopted "regular rate" language in Wage Orders addressing overtime rights long before the Legislature enacted Sections 510 and 226.7. In doing so, the IWC patterned its use of "regular rate" after the FLSA. There was a slight variation in

word use. The IWC used the phrase "regular rate of pay" rather than Congress's "regular rate" to describe the premium pay owed for overtime work.

California courts and the DLSE, in their explication of "regular rate" in California law, have followed the rule that when expressions in California law are patterned on federal statutes, those statutes, and federal cases and regulations interpreting those federal statutes, serve as persuasive guidance for interpreting California law.

In *Building Material & Construction Teamsters' Union v. Farrell (*1986) 41 Cal.3d 651, this Court provided:

> Federal decisions have frequently guided our interpretation of state labor provisions the language of which parallels that of federal statutes. (*Ibid; Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382, 391.)

Id. at 658. In *Building Material,* this Court looked to federal precedent where the terminology at issue was, like "regular rate" in this case, "taken directly from" federal law".

In *Alcala v. Western Ag Enterprises,* 182 Cal. App. 3d 546 (1986), the issue was application of federal FLSA "regular rate"

precedent to California's "regular rate of pay" language as it appeared in the overtime section of Wage Orders (in that case, Wage Order 14). The court, citing *Building Material,* applied federal FLSA precedent, finding that California's overtime wage order provisions were "closely modeled after (although they do not duplicate), section 29 U.S.C. 207(a)(1) of the Fair Labor Standards Act of 1938." *Alcala,* 182 Cal. App. 3d at 550.

Fifteen years ago, consistent with *Alcala,* in *Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal. App. 4th 893, the Court of Appeal expressly adopted the DLSE position that specifically relied on the federal definition of "regular rate" in interpreting and applying the expression "regular rate of pay" utilized by the IWC:

> As the DLSE has stated in several advice letters: "[The] DLSE takes the position that the **failure of the [IWC] to define the term 'regular rate'** [in the expression "regular rate of pay"] indicates the Commission's intent that in determining what payments are to be included in or excluded from the calculation of the regular rate of pay, California will adhere to the standards adopted by the U.S.

> Department of Labor to the extent that those standards are consistent with California law."

Id., at 902-903.

The logic of the above analysis, if applied to the IWC's use of the expression "regular rate of compensation" in connection with break violation premiums, leads to the conclusion that the failure of the IWC to define the term "regular rate" in "regular rate of compensation" " indicates the Commission's intent to adhere to the Ffderal standards that define what is to be included or excluded from the "regular rate."

Advanced-Tech Security Services v. Superior Court (2008) 163 Cal. App. 4th 700, also informs the use of "regular rate" in California law. *Id*, at 707. The court in *Advanced-Tech Security Services* exclusively relied on the federal definition of "regular rate" for purposes of determining that "regular rate of pay" under California law does not include premium holiday pay. *Id*.

Two years ago this Court addressed the meaning of "regular rate of pay" finding (consistent with the FLSA, federal regulations and federal case law that address the FLSA's meaning of "regular rate," *not regular rate of pay* or *of compensation*) that the **plain meaning** of "regular rate of pay"

under California overtime law, section 510, includes non-discretionary bonus pay such as the bonuses paid by Loews.

> Regular rate of pay, which can change from pay period to pay period, includes adjustments to the straight time rate, reflecting, among other things, shift differentials and the per-hour value of any nonhourly compensation the employee has earned.

Alvarado, *supra* 4 Cal.5th at 554.

Later in the Opinion, the Court specifically found that non-discretionary bonuses *must* be factored into the regular rate of pay. In so holding, the Court found that the inclusion of the bonus

> finds support in the **plain meaning of** the phrase "regular rate of pay." **… [T]he word "regular" in this context does not mean "constant."**

Id, 4 Cal.5th at 562. See also *Kao v. Holiday* (2017) 12 Cal. App. 5th[h] 947 at fn. 5.

This Court's finding that "regular rate of pay" has a "plain meaning" that includes non-hourly *compensation* such as non-discretionary bonuses is consistent with *Alcala, Huntington Memorial,* and *Advanced-Tech,* all of which expressly

acknowledge that California's "regular rate of pay" is patterned after federal law's "regular rate."

The above-referenced "plain meaning" holding is a testament to the *term of art* status of "regular rate." With "pay" having an ordinary meaning that is consistent among all dictionaries, this Court's elevation of "regular rate" from a "term of art" to an expression that has a "plain meaning" blends two significant tenets of statutory construction, the "plain meaning rule" and the rule that requires deference to be paid to the technical meaning of terms of art. This Court's "plain meaning" determination is, at a minimum, indicative of an understanding that "regular rate" is a firmly embedded term of art in California employment law.

The position of the majority that the meaning of "regular rate" can be radically *altered* by substituting "pay" with its synonym "compensation" is not supportable. There is nothing in the ordinary definition of "compensation." in the legislative history of 226.7, or in IWC regulatory history which compels such a drastic transformation of "regular rate" by the use of the word "compensation."

3. The 1938 FLSA Origin Story of "Regular Rate's" Transformation into a Term of Art.

As early as 1938, with enactment by Congress of the FLSA, "regular rate," not "regular rate of pay" or "regular rate of compensation," has been core element of wage calculation under federal wage-and-hour law. The FLSA provides, and has provided since 1938, that an employee must receive "**compensation**" for all work over forty hours in a week "at a rate not less than one and one-half times the **regular rate** at which he is employed." 29 USC § 207(a)(2) (emphasis added).

4. The United States Supreme Court Determined that Non-Discretionary Bonuses are to be Factored into "Regular Rate" 75 Years Ago.

The FLSA initially did not define "regular rate," and litigation over the meaning of the phrase ensued almost immediately. In 1944, the Supreme Court held that "'regular rate'…mean[s] the hourly rate *actually paid* for the normal, non-overtime workweek." *Walling v. Helmerich & Payne, Inc.* (1944) 323 U.S. 37, 40, italics added; *see also Walling v. Youngerman-Reynolds Hardwood Co.* (1945) 325 U.S. 419, 424–425.

The following year, the Court held, that "regular rate" necessarily includes not only the base hourly rate, but also

nondiscretionary bonuses. It explained:

> **Those who receive incentive bonuses in addition to their guaranteed base pay clearly receive a greater regular rate than the minimum base rate....** The conclusion that only the minimum hourly rate constitutes the regular rate opens an easy path for evading the plain design of § 7(a). We cannot sanction such a patent disregard of statutory duties.

Walling v. Harnischfeger Corp., supra, 325 U.S. at 431–432 (emphasis added). The foregoing Supreme Court decisions, cited by Justice Edmon, *Ferra*, 40 Cal. App. 5th at 1258 (Edmon, J., dissenting), remain good law to this day. (See for example *Alvarado, supra* 4 Cal.5th at 562)

The passage of seventy-five years since the Supreme Court included bonus pay with hourly pay in the determination of "regular rate" should suffice to secure the status of "regular rate" as a term of art whose meaning is understood. However, the "term of art" status of "regular rate" is not limited to that precedent. Building on the Supreme Court precedent, the FLSA was amended in 1949. The amendment contained an express definition of "regular rate":

> "Regular rate" defined. As used in this section, the "regular rate" at which an employee is employed shall be deemed to include all remuneration paid to, or on behalf of, the employee, but shall not be deemed to include [items numbered 1-8 not applicable here].

29 USC § 207(e).

Importantly, given the relationship between the federal definition of "regular rate" and California's use of that definition in the overtime context, 29 USC § 207(e) excludes, among other exclusions from regular rate, discretionary bonuses (29 USC § 207 (e) (3)), but does not exclude non-discretionary quarterly bonuses of the type Loews pays its employees.

Substantial authority under both federal and state law draws a distinction between *non-discretionary bonuses* that must be included in the regular rate and *discretionary bonuses* that are excluded.[4] Significantly, Loews has not claimed that the bonuses at issue are discretionary.

---

[4] *See* 29 CFR § 778.211(c); March 6, 1991 DLSE Op. Letter; *Walling v. Garlock Packing Co.* (2d Cir. 1947) 159 F.2d 44, 44-46 (finding that quarterly bonuses that were regularly paid to employees had to be included in regular rate even though management could

5. Regulations of the Department of Labor Build upon the FLSA Definition Of "Regular Rate," Adding to its Term of Art Status.

The Department of Labor enacted regulations in the wake of Congress's codification of the "all remuneration" definition of "regular rate." These regulations, when one considers how California ultimately adopted the expression "regular rate" in Wage Orders and the law, form a further foundation of the *term of art* meaning of "regular rate" in California.

The FLSA's implementing regulations confirm that to calculate an employee's "regular rate," the employee's "total remuneration for employment" during the applicable time period, including non-discretionary bonuses (29 CFR § 778.211(c)), should be divided by the number of hours worked during that period to determine the employee's actual "regular rate." 29 C.F.R. § 778.109; *see also* 29 C.F.R. § 778.107.

29 CFR § 778.108 points out that:

.... Section 7(e) of the Act [29 USC § 207(e)] requires inclusion in the "regular rate" of **"all remuneration**

---

theoretically discontinue or decline to pay them at any time); *Walling v. Harnischfeger Corp.,* 325 U.S. 427.

> **for employment paid to, or on behalf of, the employee**" except payments specifically excluded by paragraphs (1) through (7) of that subsection....

29 CFR § 778.108 (emphasis added).

29 CFR § 778.208 expressly explains that non-discretionary bonuses, such as the quarterly bonuses received by Loews' employees, must be included in the "regular rate":

> Section 7(e) of the Act requires the inclusion in the regular rate of all remuneration for employment except eight specified types of payments. Among these excludable payments are *discretionary* bonuses.... **Bonuses which do not qualify for exclusion from the regular rate as one of these types must be totaled in with other earnings to determine the regular rate on which overtime pay must be based...**

29 CFR § 778.208 (emphasis added).

29 CFR § 778.209, anticipating in the overtime context situations like the quarterly incentive wages paid to Ferra, describes the means to retroactively factor in non-discretionary incentives earned over several pay periods:

> (a) General rules.... **When the amount of the bonus can be ascertained, it must be apportioned back over the workweeks of the period during which it may be said to have been earned.** The employee must then receive an additional amount of compensation for each workweek that he worked overtime during the period equal to one-half of the hourly rate of pay allocable to the bonus for that week multiplied by the number of statutory overtime hours worked during the week. [5]

29 CFR § 778.209 (emphasis added).

Subsequent case law and the DLSE have applied this same 29 CFR 778.209 methodology. *See*, *Reich v. Interstate Brands* (7th Cir. 1995) 57 F3d 574,575-576, *O'Brien v. Town of Agawam* (1st Cir. 2003) 350 F.3d 279, 295-29; DLSE Opinion Letter 1988.07.14; 2002 DLSE Manual at 49.2.4.2 (calculation of overtime owing on an end-of-season bonus).

[5] Significantly, the regulations speak in terms of regular rate, not regular rate of pay or compensation.

The above retroactive adjustment methodology applied to overtime pay when a quarterly bonus is determined can just as easily be applied to break premium pay once a quarterly bonus or other non-discretionary compensation amount is determined.

6. The Term of Art Meaning of "Regular Rate" is Also Informed by Federal Court Precedent that Post-Dates Enactment of 29 USC § 207(e)

The Supreme Court decisions from the 1940's were not anomalies that should be disregarded in ascertaining the "term of art" definition of "regular rate." Although the FLSA has been amended many times, federal courts have continued to define "regular rate" as "all remuneration for employment paid to, or on behalf of the employee," subject to exceptions not relevant here. 29 U.S.C. § 207, subds. (a)(1), (e) ; e.g., *Local 246 Utility Workers Union of America v. Southern California Edison Co*. (9th Cir. 1996) 83 F.3d 292 (supplemental payments to disabled workers were part of the employees' "regular rate"); *Featsent v. City of Youngstown* (6th Cir. 1995) 70 F.3d 900, 904 (shift differentials and hazardous duty pay may not be excluded from the "regular rate"); *Reich v. Interstate Brands Corp*. (7th Cir. 1995) 57 F.3d 574, 577 (bonus must be included in the "regular rate" unless it is

entirely discretionary with the employer).

7. At the Time the IWC And Legislature Enacted the Break Violation Remedy In 2000, "Regular Rate" Had Been Part of the IWC's Regulatory Scheme and DLSE Interpretations for Many Years.

After the passage of the FLSA and its amendment defining "regular rate," and after the United States Supreme Court addressed the "meaning of "regular rate," the IWC started using the words "regular rate" in its Wage Orders when describing overtime under California law as multiples of an employee's "regular rate of pay."[6]

The term of art status of "regular rate" is clearly enhanced by the length of time "regular rate" has been part of IWC overtime Wage Orders. By at least 1968, the IWC described overtime premiums in terms of a multiple of an employee's "*regular rate of pay*." *Rivera v. Division of Industrial Welfare* (1968) 265 Cal. App. 2d 576, 598, fn. 35, italics added. In the

[6] The IWC's Wage Orders are to be accorded the same dignity as statutes. They are "presumptively valid" legislative regulations of the employment relationship that must be given independent effect separate and apart from any statutory enactments. *Brinker v. Superior Court* (2012) 53 Cal. 4th 1004, 1027.

decades that followed, "regular rate" remained a mainstay of the IWC's overtime Wage Order provisions. *See Lujan v. Southern California Gas Co.* (2002) 96 Cal. App. 4th 1200, 1204 (referencing 1989 Wage Order language); *Hernandez v. Mendoza* (1988) 199 Cal. App. 3d 721, 726 (referencing the 1980 Wage Order language); *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal. App. 3d 239, 244, disapproved in part in *Tidewater Marine v. Bradshaw* (1996) 14 Cal. 4th 557 (referencing 1976's Wage Order language.)

Throughout the decades that "regular rate" has continuously remained part of California's Wage Orders, the IWC never expressly defined "regular rate" nor "regular rate of pay." The DLSE and California courts expressly relied on the federal definition of "regular rate."

When the IWC issued new wage orders after the *Alcala* decision in 1986, and when the Legislature enacted Section 226.7 in 2001, they did so with knowledge of *Alcala* and DLSE materials that explained that California overtime law was informed by the federal law's use of the expression "regular rate."

When the Legislature enacted Sections 226.7 and 510, the Legislature was not only deemed to have been aware of existing

laws, and judicial decisions, as well as the impact of language in parallel federal law, it was also deemed to be aware of administrative construction of wage orders by the DLSE in effect at the time the legislation was enacted. *People v. Overstreet* (1986) 42 Cal.3d 891, 897.

This Court recently held in connection with DLSE interpretations:

> [W]e may take into consideration the DLSE's expertise and special competence, as well as the fact that the DLSE Manual is a formal compilation that evidences considerable deliberation at the highest policymaking level of the agency.

Alvarado, supra, 4 Cal. 5th at 581.

The DLSE has repeatedly credited the FLSA as the foundation of the IWC's use of the words "regular rate." As referenced above, in the citation to *Huntington Memorial Hosp., supra,* 131 Cal. App. 4th at 902-903, DLSE opinion letters state that because the IWC has not defined "regular rate of pay," California adheres to the standards adopted by the U.S. Department of Labor to the extent those standards are consistent with California law. *See*, *e.g.*, DLSE Opn. Letter No. 2003.01.29

(2003) p. 2, fns. 2 and 3;[7] *see also* DLSE Opn. Letter No. 1991.03.06 and DLSE Opn. Letter No. 1993.02.22-1 (written before enactment of Sections 226.7 and 510 and referenced in *Huntington Memorial*).

Significantly, the DLSE Manual that preceded the current 2002 DLSE Manual and that was in effect when Sections 226.7 and 510 were enacted references the FLSA basis of California's use of the expression "regular rate":

> Since the Industrial Welfare Commission has not defined the term "regular rate of pay." DLSE has determined that the IWC intended to adopt the definition of "regular rate of pay" set out in the Fair Labor Standards Act. ("FLSA") 29 USC Sec. 207(e): "... the 'regular rate' at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of the employee..." (29 USC Sec. 207(e).)

---

[7] Opinion letters are not underground regulations. Courts regularly look to them in interpreting and applying California labor law. *Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575, 584.

Division of Labor Standards Enforcement, Enforcement Policies and Interpretations Manual, October 1998. Sec. 33.1.2 pg. 84.

With "regular rate" appearing in both Sections 226.7 and 510, and having a distinct term of art technical meaning that includes non-discretionary bonuses, the next logical step in ascertaining Legislative intent is to look at the remaining words in the remedy provisions of 226.7 and 510: "compensation" and "pay."

E. THE INTERCHANGEABLE USE BY COURTS, ADMINISTRATIVE AGENCIES AND THE LEGISLATURE OF "REGULAR RATE OF PAY" AND "REGULAR RATE OF COMPENSATION" BUTTRESSES THE REALITY THAT THE TWO EXPRESSIONS SHARE THE SAME MEANING

1. Precedent Addressing the Meaning and Application of "Regular Rate" Have Used "Regular Rate Of Pay" and "Regular Rate Of Compensation" Interchangeably

The United States Supreme Court and other federal courts have used "regular rate of compensation" and "regular rate of pay" interchangeably in cases addressing the meaning of "regular rate." Importantly, none of the cases attach any significance to the word "pay" or "compensation" that would distinguish one from the other.

The use of the expression "regular rate of compensation" to mean "regular rate" in the context of federal courts interpreting overtime rights and obligations under FLSA began with the United States Supreme Court. *Walling v. Youngerman-Reynolds Hardwood Co., supra*, 325 U.S. at 424 ("The keystone of § 7(a) is *the regular rate of compensation*. On that depends the amount of overtime payments which are necessary to effectuate the statutory purposes," italics added); *Walling v. Harnischfeger Corp., supra,* 325 U.S. at 430 (in determining whether employer properly calculated overtime pay under FLSA, "[o]ur attention here is focused upon a determination of the *regular rate of compensation* at which the incentive workers are employed," italics added).

A few years later, in *Bay Ridge Operating Co., Inc. v. Aaron* (1948) 334 U.S. 446, the same Court switched to the expression "regular rate of pay" using it over forty times in its analysis of "regular rate" overtime rights under 29 USC § 207, while citing with approval *Walling v. Youngerman-Reynolds Hardwood Co.,* which, as set forth above, describes "regular rate" in terms of "regular rate of compensation." 325 U.S. at 424. The Court did not remark on the change in verbiage, or otherwise attach any

significance to it.

In the decades that followed, lower federal courts followed suit in cases dealing with the application of "regular rate" under federal law, using "regular rate of compensation" in some instances and "regular rate of pay" in others without attributing, any significance to the choice of words.

Examples of the use of "of compensation" include *United States Department of Labor v. Fire & Safety Investigation Consulting Services, LLC* (4th Cir. 2019) 915 F.3d 277, 280–281 ("To determine whether [employer's] payment scheme violated the FLSA [overtime provisions], we must first decide what constitutes **the 'regular rate' of compensation** actually paid to the Consultants, as that rate establishes the proper overtime compensation due"(emphasis added)); *Local 246 Utility Workers Union of America v. Southern California Edison Co*. (9th Cir. 1996) 83 F.3d 292, 295 ("Employees working overtime must be compensated at not less than one-and-one-half times **the regular rate of compensation.** 29 U.S.C. § 207(a)(1)" (emphasis added)); and *Walling v. Garlock Packing Co.* (2d Cir. 1947) 159 F.2d 44, 46 ("It is urged upon us ... that there is no relationship between the **[quarterly] bonus or premium** paid

and the amount produced or the time worked by the employee, and therefore that the bonus is not part of the **regular rate of compensation.** But this argument is not convincing" (emphasis added))."

Examples of the use of "of pay" in describing "regular rate include *Parth v. Pomona Valley Hosp*. (9th Cir. 2010) 630 F.3d 794, 799 ("The FLSA requires hospitals on the 8/80 plan to pay employees, who work more than 8 hours in a day or 80 hours in a two-week period, one and a half times the employees' 'regular rate' of pay. 29 U.S.C. § 207(j). The Supreme Court interprets 'regular rate' to mean 'the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed.' *Walling v. Youngerman–Reynolds Hardwood Co., Inc.,* 325 U.S. 419, 424 (1945)").

In *Walling v. Wall Wire Co*. (6th Cir. 1947) 161 F.2d 470, 473, 475 the court, when interpreting the expression "regular rate", uses both the terms "regular rate of pay" and " 'regular rate' of compensation" without attributing any differences to the expressions. Similarly, in *Haber v. Americana* (9th Cir. 1967) 378 F.2d 834, where "regular rate of pay" was repeatedly used, without delineating between "pay "and "compensation," the court

also referred to the "regular rate" as "regular rate of appellants' compensation." *Id*. at 856.

The Ninth Circuit, in *Local 246 Utility Workers Union of America, supra,* also used both *pay* and *compensation* in addressing "regular rate" within the same opinion without referencing any possible difference in meaning attributable to those words. 83 F. 3d at 295. As the court ultimately held, *pay* is *compensation*:

> The key point is that **the pay or salary is compensation for work, and the regular rate therefore must be calculated by dividing all compensation paid for a particular week by the number of hours worked in that week**. Thus, it makes no difference whether the supplemental payments are tied to a regular weekly wage or regular hourly wage.

Id., 83 F. 3d at 295 (emphasis added).

2. The Legislature Has Treated "Pay" and "Compensation" Interchangeably in Break and Overtime Legislation

The majority stated in its decision:

If the Legislature had intended meal and rest break

> premiums to be calculated the same way as overtime premiums, it would not have used "regular rate of compensation" when setting premiums for missed meal and rest breaks, and "regular rate of pay" when setting premiums for overtime work. We assume the Legislature intended different meanings when it did not simply use "regular rate," but added different qualifiers in the statutes and wage orders establishing premiums for overtime and for missed meal and rest periods.

Ferra, supra 40 Cal. App. 5th at 1247

This definitive assertion misapprehends the reality that, as spelled out, at Section V B, above, legislatures often use synonyms interchangeably in related legislation.

Importantly, the California Legislature has specifically used "regular rate of pay" and "regular rate of "compensation" interchangeably in break and overtime premium legislation.

For example, Section 226.7(c) requires an employer to "*pay*" an employee an additional hour of pay at the employee's "regular *rate of compensation*" for a failure to provide a proper break. (Italics added.) The very next section, enacted recently, sets out a

limited alternative to this requirement for nonexempt employees holding safety-sensitive positions at a petroleum facility—namely, that if such an employee is required to interrupt his or her rest period to address an emergency, an additional rest period shall be provided or the employer shall pay the employee "one hour of pay at the employee's **regular *rate of pay.***" Lab. Code § 226.75, subd. (b) (italics added). Had the Legislature intended the meal and rest break premium for employees at petroleum facilities to be calculated differently than other meal and rest break premiums, it would have said so explicitly, and not employed a synonym for "compensation" without comment.

Similarly, with regard to overtime, Section 510 provides that employees who work more than eight hours per day shall be "*compensated*" at the rate of one and one-half times "the regular *rate of pay*." Lab. Code § 510, subd. (a) (italics added). The sections that immediately follow provide that in some circumstances employees may work alternative workweek schedules (four 10-hour days) without being entitled to "payment ... of an overtime *rate of compensation*," and that the IWC "may establish exemptions from the requirement that an overtime *rate of compensation* be paid" for certain categories of employees. Lab.

Code §§ 511, subd. (a), 515, subd. (a) (italics added).

Section 204.3 provides that, as an alternative to *overtime pay,* an employee may receive compensating time off at a rate either of not less than one and one-half hours for each hour of employment for which overtime compensation is required or, if an hour of employment "would otherwise be compensable at a rate of more than one and one-half times the employee's *regular rate of compensation*, then the employee may receive compensating time off commensurate with the higher rate." Lab. Code § 204.3, subd. (a); *see also* § 751.8, subds. (a)–(b) (smelters and other underground workers may work more than eight hours in a 24-hour period "if the employee is paid at the overtime *rate of pay* for hours worked in excess of that employee's regularly scheduled shift," but all work performed in any workday in excess of the scheduled hours established by an agreement in excess of 40 hours in a workweek shall be compensated "at one and one-half times the employee's *regular rate of compensation*") (italics added).

The Legislature, in enacting Section 226.7 was presumed to have been aware of previously enacted legislation. *Estate of McDill* (1975) 14 Cal. 3d 831, 837 and *Arthur Andersen, LLP v.*

*Superior Court (*1998) 67 Cal. App. 4th 1481, 1500. Sections 204.3 and 751.8, with their use of "regular rate of compensation" in lieu of "regular rate of pay" in overtime contexts, were both enacted before section 226.7 and section 510, in 1993 and 1995, respectively.

The above examples clearly indicate that the California legislature use synonymous expressions interchangeably, and did so in break and overtime legislation. Although Justice Edmon, clearly explained this in her dissent, *Ferra, supra* 40 Cal. App. 4th at 1267-1268, the majority simply ignores it, asserting without any supporting legislative history or logical explanation of different policy objectives that that the Legislature "must" have intended different meanings. This assertion by the majority is belied by historical context, set forth above, that establishes the Legislature's interchangeable use of "regular rate of compensation" and "regular rate of pay."

3. "Regular Rate of Pay" and "Regular Rate of Compensation" are Used Interchangeably by the DLSE.

The DLSE, the agency tasked with interpreting and enforcing the IWC Wage Orders and the Labor Code has repeatedly used the expressions "regular rate of pay" and

"regular rate of compensation" interchangeably in addressing break premiums.

In an Opinion letter dated October 17, 2003 addressing break premiums, the DLSE stated:

> … The **"regular rate of compensation"** is an hourly, non-overtime rate. It does not matter how many hours the employee works in a day—the amount that is due for this additional hour of pay for a violation of the right to a meal period, whether the employee worked more or less than eight hours in the day, **is one hour at the employee's regular rate of pay**.

See DLSE Opn. Letter 2003.10.17 (2003) at pp. 6-7 (emphasis added).

The DLSE Manual also evidences the DLSE's interchangeable use of the operative "regular rate" phrases. For example, at Section 45.2.7 the Manual states the remedy for a break violation is "one (1) hour of pay at the **employee's *regular rate of compensation.*"** However, in the next section, 45.2.8, describing how employees can only receive one such remedy per day, the Manual says: "[I]f an employer employed an employee

for twelve hours in one day without any meal period, the penalty would be only one hour at the **employee's *regular rate of pay***." (Emphasis added.)

On its website, in the DLSE's Frequently Asked Questions ("FAQ's") section, the DLSE uses both "regular rate of pay" and "regular rate of compensation" to explain the same remedy under Labor Code section 226.7. The "Meal Periods" "FAQs" page, at www.dir.ca.gov/FAQ_MealPeriods references the premium for meal break violations twice as "regular rate of pay" and twice as "regular rate of "compensation". For example:

> If an employer fails to provide an employee a meal period in accordance with an applicable IWC Order, the employer must pay one additional hour of pay at the **employee's regular rate of pay** for each workday that the meal period is not provided. IWC Orders and Labor Code Sect. 226.7...
>
> ***

> If your employer fails to provide the required meal period, you are to be paid one hour of pay at your **regular rate of compensation.**[8]

The majority is as dismissive of the interchangeable use of the expressions "regular rate of pay" and "regular rate of compensation" by the DLSE as it is of the interchangeable use of those same expressions by the California Legislature and the United States Supreme Court. The majority states:

> Ferra and amicus California Employment Lawyers Association point out a few occasions on which the Division of Labor Standards Enforcement used the phrases interchangeably, but the Legislature and the statutes did not, and it is the Legislature's choice of different descriptions of the premiums that governs our analysis.

Ferra, supra 40 Cal. App. 5th at 1249

The most glaring flaw in the majority's position is its unwillingness to recognize that the DLSE's interchangeable use

[8] The DLSE similarly used "regular rate of pay" and "regular rate of compensation" interchangeably in describing the remedy for rest break premiums, at www.dir.ca.gov/FAQ_Restbreaks.

of the expressions "regular rate of pay" and "regular rate of compensation" was fully consistent with, and supplements, the many other indicia of legislative intent set forth herein. Standing alone, the DLSE's interchangeable use of the expressions "regular rate of pay" and "regular rate of compensation" would be significant. When considered with the other indicia of legislative intent referenced herein, such conduct takes on added significance, suggesting that institutionally, the DLSE understands that "regular rate" is a term of art, that "pay" and "compensation" share the same ordinary meaning, and that California has embraced this particular aspect of the federal "regular rate" calculation methodology. Had there been such profound difference between "regular rate of pay" and "regular rate of compensation" as the majority proposes, the DLSE never would have used the expressions interchangeably.

F. "COMPENSATION" AND "PAY" SHARE THE SAME PLAIN MEANING

Neither *pay* nor *compensation* are defined in sections 226. 7 and 510. When a term such as *compensation* or *pay* is undefined in a statute, the first rule of construction is to apply the ordinary meaning to the term. While conceding that "pay" and

"compensation" are "in common parlance sometimes used interchangeably." *Ferra, supra* 40 Cal. App. 5th at 1249, the majority did not follow the "ordinary meaning" rule of construction to "pay and "compensation." The rule is stated as follows:

"'When a term goes undefined in a statute, we give the term its ordinary meaning' (*Taniguchi v. Kan Pacific Saipan, Ltd.* (2012) 566 U.S. 560)…" *De Vries v. Regents of University of California* (2016) 6 Cal. App. 5th 574, 590-591; *Crawford v. Metropolitan Government of Nashville and Davidson Cty*. (2009) 555 U.S. 271, 276; *People v. Barros* (2012) 209 Cal. App. 4th 1581, 1593; *Arnall v. Superior Court* (2010) 190 Cal. App. 4th 360, 369.

As stated in *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601:

> The plain meaning of words in a statute may be disregarded only when that meaning is repugnant to the general purview of the act, or for some other compelling reason ....

See also Trope v. Katz (1995) 11 Cal.4th 274, 280 (citations omitted).

Loews cannot point to anything that makes the plain meaning of *compensation* and *pay* "repugnant to the general purview of [section 226.7 and 510]," nor can it otherwise provide a "compelling reason" to disregard the plain meaning.

1. *In the Employer-Employee Context, the Plain Meanings Of "Pay" and "Compensation" are the Same.*

As this Court has recognized, the Legislature "has frequently used the words 'pay' or 'compensation' in the Labor Code as synonyms." *Murphy*, *supra*, 40 Cal.4th at 1103–1104 & fn.6. This is not surprising, as "pay" and "compensation" are synonyms as a matter of common parlance:

> In divining a term's "ordinary meaning," courts regularly turn to general and legal dictionaries. (*See, e.g.*, *Freeman v. Quicken Loans, Inc.* (2012) 566 U.S. 624; *Taniguchi*, *supra*, 566 U.S. 560; … see also *Outfitter Properties, LLC v. Wildlife Conservation Bd.* (2012) 207 Cal. App. 4th 237, 244, … *Stamm Theatres, Inc. v. Hartford Casualty Ins. Co.* (2001) 93 Cal. App. 4th 531, 539.

DeVries, supra 6 Cal. App. 5th at 591 (2016)

The parallels between the definitions of *compensation* and *pay* cannot be understated. Webster's dictionary defines *compensation* as "payment, *remuneration*" (Merriam-Webster's 11th Collegiate Dict. (2008) p. 253, col. 1 [emphasis added]),[9] and it defines *pay* as "something paid for a purpose and esp. as a salary or wage; *remuneration*" (*id*., p. 910, col. 2 [emphasis added]). "Pay," "compensate," and "remunerate" are identified as synonyms. *Id*. at p. 910, col. 2.

The term "compensation" (as a noun) is defined by the American Heritage Dictionary as: "something, such as money, given or received as payment or reparation, as for a service or loss." American Heritage Dictionary 5th Ed. (2016) p.376. The similarity of that definition to the definition of "pay" is apparent from the definition of "pay" set forth in *Murphy, supra,* 40 Cal.4th at 1104:

> "Pay" is defined as "money [given] in return for goods or services rendered." (Am. Heritage Dict. (4th ed.2000) p. 1291.)

[9] 29 USC § 207(e) defines regular rate in terms of "all remuneration"

The "compensation" / "pay" Loews' hotel workers receive in exchange for the "service" they perform include an hourly pay element, a quarterly bonus element, as well as overtime and break premium elements.

Dictionaries and *Murphy* are not the only sources that establish the shared "plain meaning" of *pay* and *compensation*. Roget's International Thesaurus, Fifth Edition, provides in Synonym Section 624.4, in bold: **"pay, payment, remuneration, compensation."**

The majority fails to apply the plain meaning rule to the expressions "pay" and "compensation," to recognize that "pay" and "compensation" are synonyms, and to apprehend the significance of the fact that they are both appended in sections 226.7 and 510 to "regular rate."

G. REGULATORY AND LEGISLATIVE HISTORY REFLECT AN INTENT TO TREAT "REGULAR RATE OF COMPENSATION" AS SYNONYMOUS WITH "REGULAR RATE OF PAY."

Regulatory and legislative history further support the conclusion that in enacting Sections 226.7 and 510 the Legislature intended the expressions "regular rate of pay" and "regular rate of compensation" to have the same meaning.

Although Justice Edmon raises this history in support of her dissenting analysis, 40 Cal. App. 5th at 1262 (Edmon, J., dissenting), as with so many indicators of legislative intent referenced in the dissent, the majority simply ignores it.

In 2000, before Section 226.7 became law, the *"regular rate* of compensation" remedy for break violations that appears in section 226.7 was enacted by the IWC. *Murphy, supra,* 40 Cal. 4th at 1107. It was the first time the IWC utilized "regular rate" in a wage premium context other than overtime premiums. In contrast, for decades "regular rate" had been and remained a part of the Wage Orders' measurement of overtime premiums as multiples of the "regular rate of pay." Before the passage of Section 510, the Wage Orders had been the only source of standard overtime rights and obligations under California law.

The legislative history of Section 226.7, recounted in *Murphy* offers no explanation for the use of the word "compensation" in Section 226.7. However, *Murphy* points out that the Legislature adopted the "one additional hour of pay at the employee's regular rate of compensation" to track the Wage Order remedy language adopted earlier in the year by the IWC. *Murphy, supra,* 40 Cal. 4th at 1107-1108.

Because of the Legislature's decision to adopt the remedy enacted by the IWC, understanding the regulatory history of the Wage Order language provides an important supplement to the other indicators of legislative intent set forth herein. The IWC's "Statement of Basis" is a primary source of that history.

When the IWC enacts Wage Orders, it is required to prepare a Statement of Basis. Lab. Code § 1177(b). A central function of an IWC Statement of Basis "is to facilitate judicial review of agency action." *California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 211-212; *see also Small v. Superior Court* (2007) 148 Cal. App. 4th 222, 230. Here, the "agency action" subject to judicial review is the IWC's use of the expression "regular rate of compensation."

With the Statement of Basis, a statutorily mandated construction by the IWC of the language it enacted, the statements contained therein are entitled to great weight and courts should not depart from such construction unless it is clearly erroneous or unauthorized. *Intoximeters, Inc. v. Younger* (1975) 53 Cal. App. 3d 262, 271.

Justice Edmon's dissent accurately points out how the "Statement of Basis" prepared by the IWC, when explaining the

break violation premium pay provisions it had adopted, used "***regular rate of pay"*** as descriptive of the "**regular rate of compensation"** remedy set forth in its Wage Orders. The Statement of Basis provides, in relevant part:

> The IWC [given the lack of consequences for break violations in the past], therefore…added a provision to this section that requires an employer to pay an employee one additional hour of pay at **the employee's *regular rate of pay* for each work day that a meal period is not provided.**

Statement of Basis, found at https://perma.cc/CN6U-HF8P (emphasis added); *Ferra,* 40 Cal. App. 5th at 1262 (Edmon, J., dissenting). The same language was used in the Statement of Basis in connection with rest breaks. *Id*.

With the IWC describing in the Statement of Basis that the remedy it adopted for break violations "is one hour of pay at the employee's *regular rate of pay,*" it reinforced the common plain meaning of "pay" and "compensation," the interchangeability of the words *pay* and *compensation* evidenced by decades of federal cases and state statutes, as well as the treatment of "pay" *and* "compensation" as synonyms in dictionaries and in *Murphy,*

supra, 40 Cal. 4th at 1103-1104 and n. 6.

The IWC's use of "regular rate of pay" to describe "regular rate of compensation" compels the conclusion that the IWC did not intend the words "of compensation" to transform the meaning of "regular rate." Had the IWC intended such a transformation, given the purpose of a Statement of Basis, it would have explained its intent, and avoided the expression "regular rate of pay" as descriptive of "regular rate of compensation."

Neither the majority nor Loews established that the contemporaneous interpretation of the operative words by the IWC was wrong. The majority did not point to anything from the IWC's hearings on break violation premium pay or from the IWC's records to support the conclusion that the IWC did not know what it was speaking of in the Statement of Basis when it equated "regular rate of compensation" with "regular rate of pay."

With the Legislature ultimately adopting the remedy first adopted by the IWC after it held hearings that floated other remedy ideas, absent proof to the contrary, the Legislature also adopted the meaning the IWC ascribed to its use of language. In the face of the Statement of Basis and its purpose, had the Legislature intended another meaning for "regular rate of

compensation", it would not have adopted the IWC's remedy.

H. THE CONSTRUCTION OF THE LAW ADOPTED BY THE MAJORITY WILL LEAVE COUNTLESS CALIFORNIANS WITHOUT A REMEDY

Smith v. Superior Court (2006) 39 Cal. 4th 77, 83, invoking a settled tenet of statutory construction, cautions against statutory constructions that can lead to absurd consequences. Here, the majority's conclusion that "regular rate of compensation" means "base hourly rate" will, absent reversal, have absurd consequences. It leaves a huge gap in practical application of the law when it comes to millions of California employees who are not paid a "base hourly rate." Such employees are left with a right without any statutory remedy under the majority's construction.

The genius of the IWC and the Legislature's embrace of "regular rate" in Labor Code section 226.7, if properly construed, is that, in addition to devising a break violation remedy applicable to employees paid by the hour, it provides a remedy, on account of the "all remuneration" aspect of "regular rate," for employees whose compensation schemes do not include base hourly rates. Many in California's workforce – such as employees who are paid on a piece work basis, employees paid exclusively on

a commission basis, employees who receive non-discretionary bonuses in conjunction with other non-hourly pay, non-exempt salaried employees, and drivers paid by the trip, mile, or, as in *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, by delivery or the number of items delivered – do not have base hourly wages. The wages they earn frequently change by the hour, week and month.[10]

For over 70 years, the "all remuneration" aspect of "regular rate" jurisprudence has employed a mechanism that converts non-hourly wages to hourly rates for purposes of calculating overtime by dividing such wages earned for a week's or pay period's work by either the non-overtime hours worked during the week or pay period, or the actual hours worked during the week or pay period (e.g. in the case of a production bonus). *See Alvarado, supra*, 4 Cal.5th at passim. Applying the same calculation methodology to break violation premiums makes the remedy promised by Section 226.7 available to employees whose

[10] See, for example, *Vaquero v. Stoneledge Furniture, LLC* (2017) 9 Cal. App. 5th 98 (commissioned based employees), *Bluford v. Safeway Stores Inc.* (2013) 216 Cal. App. 4th 864 (drivers paid not by the hour, but by activity), and *Gonzalez v. Downtown LA Motors, LLP* (2013) 215 Cal. App. 4th 36 (piece workers).

wages do not include base hourly rates. Application of the majority's "base hourly" rate creates an absurd consequence, leaving those employees without a remedy for breach of their employer's obligation to provide the timely breaks required by the law and Wage Orders.

The majority, in adopting an absurd construction of Section 226.7, eschews the requirement of statutory construction that statutes must be construed with reference to the entire scheme of the law — a scheme in this case that cannot rationally be read to provide a remedy that works only for those employees whose pay includes base hourly wages.

I. THE SUPREME COURT RECOGNIZED A RISK IN THE OVERTIME CONTEXT THAT ABSENT REVERSAL SIMILARLY THREATENS THE BREAK CONTEXT.

The dissent herein points out that the U.S. Supreme Court's inclusion of other than base hourly wages in the "regular rate" prevented employers from evading the intent of overtime provisions by thwarting schemes that minimize base hourly wages while maximizing other forms of wages. *Ferra,* 40 Cal. App. 5th at 1258 (Edmon, J., dissenting) citing *Walling v. Harnischfeger Corp*., *supra*, 325 U.S. at 431–432.

In *Harnischfeger Corp., supra* the Supreme Court was alluding to potential wage schemes where employers depressed base hourly wages and increased incentive wages to limit overtime payments. If "regular rate" were limited to base hourly wages, employers who worked their employees for long hours would be incentivized to keep hourly wages depressed and increase non-hourly elements such as piece work payments or bonuses to reduce overtime obligations.

Absent reversal here, the practice eliminated in *Harnischfeger* by the all remuneration aspect of "regular rate" can manifest in the break context. Employers who habitually feel a need to work their employees through rest or meal breaks on account of understaffing, or for other reasons, would be able to depress base hourly wages while increasing wage elements like piece work earnings, commissions, shift premiums, and non-discretionary bonuses, to reduce the cost of break violation premiums.[11] Just as the United States Supreme Court recognized

[11] Absent reversal, employers could, for example, reduce the base hourly rate for employees to far below the minimum wage (e.g., $7.00 per hour) while making sure compensation packages meet minimum wage requirements through monthly bonuses or piece

the potential of such tactics when it ruled that "regular rate"/"regular rate of compensation" includes bonuses in the overtime context, this Court should do the same in the break premium context. The only difference here being that presently decades of authority support that decision.

VI. CONCLUSION

Reversal of the Court of Appeal majority opinion in *Ferra v. Loews Hollywood Hotel* (2019) 40 Cal. App. 5th 1239 is required if legislative intent and the rights of California working men and women are to be vindicated. The conclusion that the Legislature intended "regular rate of compensation" in section 226.7 to share the meaning that "regular rate" and "regular rate of pay" have had for decades is irrefutable. The intertwined indicia of legislative intent cited by Justice Edmon in her dissent, which plaintiff elaborated and expanded upon above, compel the conclusion that the majority erred. The majority rested its entire analysis on a single canon of construction that is phrased in terms of a "presumption." That presumption, given the

---

work earnings, and use the depressed hourly rate when paying meal violation premium wages.

countervailing tenets, rules and canons of statutory construction applicable here, does not come close to holding up. A "regular rate of compensation," as "regular rate of pay" and "regular rate" includes all forms of non-discretionary wages, including the quarterly bonuses paid by Loews.

Dated: April 29, 2020

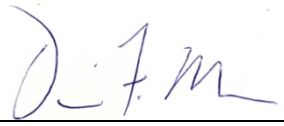
Respectfully Submitted,

DENNIS F. MOSS,
MOSS BOLLINGER, LLP
Attorneys for Plaintiff, Appellant
Jessica Ferra

RULE 14 CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.260(b)(1) of the California Rules of Court, the enclosed brief of Appellant is produced using 13-point Century Schoolbook type including footnotes and contains approximately 12,523 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: April 29, 2020



Dennis F. Moss

PROOF OF SERVICE

1, the undersigned, declare:

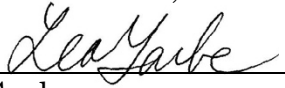
1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 15300 Ventura Boulevard, Suite 207, Sherman Oaks, California 91403.
2. That on April 29, 2020 declarant served **APPELLANT'S OPENING BRIEF ON THE MERITS** by VIA TrueFiling.

Service List

Rosenberg, Richard	Ballard Rosenberg Golper & Savitt LLP	rrosenberg@brgslaw.com
Rubin, Michael	Altshuler Berzon LLP	mrubin@altber.com
Manier, John	Ballard Rosenberg Golper & Savitt	jmanier@brgslaw.com
Goldsmith, Eileen	Altshuler Berzon LLP	egoldsmith@altber.com
Rubin, Michael	Altshuler Berzon LLP	mrubin@altshulerberzon.com
Balter, David	DIR/Div Labor Stds Enf	DBalter@dir.ca.gov
Perley, Jean	Altshuler Berzon LLP	jperley@altber.com
Majarian, Sahag	Law offices of Sahag Majarian II	sahag@majarianlaw.com
Reathaford, Laura	Lathrop GPM LLP	Shar.Campbell@LathropGPM.com

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of April, 2020 at Sherman Oaks, California.



Lea Garbe

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **FERRA v. LOEWS HOLLYWOOD HOTEL**
Case Number: **S259172**
Lower Court Case Number: **B283218**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **lea@dennismosslaw.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Appellant's Opening Brief

Service Recipients:

Person Served	Email Address	Type	Date / Time
Richard Rosenberg Ballard Rosenberg Golper & Savitt LLP	rrosenberg@brgslaw.com	e-Serve	4/29/2020 11:03:02 AM
Michael Rubin Altshuler Berzon LLP 80618	mrubin@altber.com	e-Serve	4/29/2020 11:03:02 AM
John Manier Ballard Rosenberg Golper & Savitt 145701	jmanier@brgslaw.com	e-Serve	4/29/2020 11:03:02 AM
Eileen Goldsmith Altshuler Berzon LLP 218029	egoldsmith@altber.com	e-Serve	4/29/2020 11:03:02 AM
Michael Rubin Altshuler Berzon LLP 80618	mrubin@altshulerberzon.com	e-Serve	4/29/2020 11:03:02 AM
David Balter DIR/Div Labor Stds Enf 136273	DBalter@dir.ca.gov	e-Serve	4/29/2020 11:03:02 AM
Jean Perley Altshuler Berzon LLP	jperley@altber.com	e-Serve	4/29/2020 11:03:02 AM
Sahag Majarian Law offices of Sahag Majarian II	sahag@majarianlaw.com	e-Serve	4/29/2020 11:03:02 AM
Dennis Moss Moss Bollinger LLP 77512	dennis@mossbollinger.com	e-Serve	4/29/2020 11:03:02 AM
Ari Moss Moss Bollinger LLP 238579	lea@dennismosslaw.com	e-Serve	4/29/2020 11:03:02 AM
Laura Reathaford	Shar.Campbell@LathropGPM.com	e-	4/29/2020 11:03:02

Lathrop GPM LLP 254751		Serve	AM
Jeremy Bollinger 240132	jeremy@mossbollinger.com	e-Serve	4/29/2020 11:03:02 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

4/29/2020

Date

/s/Lea Garbe

Signature

Moss, Ari (238579)

Last Name, First Name (PNum)

Moss Bollinger LLP

Law Firm