No. S279397

In the Supreme Court
of the
State of California

GUSTAVO NARANJO, et al.
Plaintiffs and Appellants,

v.

SPECTRUM SECURITY SERVICES, INC.,
Defendant and Appellant.

ANSWER BRIEF ON THE MERITS

Review of a Decision from the Court of Appeal of the State of California
Second Appellate District, Division Four
Case No. B256232

Appeal from the Superior Court for the State of California,
County of Los Angeles, Case No. BC372146
The Honorable Barbara M. Scheper

DUANE MORRIS LLP
Robert D. Eassa (SBN 107970)
*Paul J. Killion (SBN 124550)
Eden E. Anderson (SBN 233464)
Sarah A. Gilbert (SBN 312865)
Spear Tower, One Market Plaza
Suite 2200
San Francisco, CA 94105-1127
Telephone: +1 415 957 3000
Facsimile: +1 415 957 3001
E-mail: rdeassa@duanemorris.com
pjkillion@duanemorris.com
eeanderson@duanemorris.com
sagilbert@duanemorris.com

TREMBLAY BECK LAW, APC
Dave Carothers (SBN 125536)
5330 Carroll Canyon Road
Suite 230
San Diego, CA 92121
Telephone: +1 858 792 7492
Facsimile: +1 858 792 7768
E-mail: dave@tremblaybecklaw.com

Attorneys for Defendant and Appellant
SPECTRUM SECURITY SERVICES, INC.

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I. Issue on Review

The issue as stated by plaintiff and appellant Gustavo Naranjo ("Naranjo"): "Does an employer's good faith belief that it complied with Labor Code section 226, subdivision (a) preclude a finding that its failure to report wages earned was 'knowing and intentional' as is necessary to recover penalties under Labor Code section 226, subdivision (e)(1)?"

II. Introduction and Argument Summary

The answer to the question is yes. A good faith dispute as to whether an employer was in compliance with the wage statement requirements of Labor Code section 226(a) precludes penalties under the statute. The Court of Appeal correctly reversed the trial court's award of Section 226 penalties and related attorney fees against defendant and appellant Spectrum Security Services, Inc. ("Spectrum").

First, the words of the statute support the result. Labor Code section 226 contains a clear scienter requirement, conditioning its statutory penalty on a showing there was a "knowing and intentional failure by [the] employer to comply" with the wage statement requirements in section 226(a).[1] Under the plain meaning of the phrase "knowing and intentional," which was first added to the statute in 1976, no penalty can be assessed without a showing that the employer both *knew* of facts triggering the statutory requirement and *intentionally* failed to

[1] All statutory references are to the Labor Code unless otherwise specified.

comply. Where the employer establishes a good faith belief it was in compliance, or raises a good faith dispute as to the law's application, or shows that the law was unclear or unsettled, there cannot be a *knowing and intentional* failure to *comply*.

Second, the legislative history behind the 1976 amendment confirms that the penalty provision was directed at employers that "knowingly and intentionally flaunt the law." (MFJN-243.) There is no indication the Legislature intended to penalize employers in genuine cases of uncertainty. To the contrary, the fact the Legislature conditioned 226's penalty on a showing of a knowing and intentional failure to comply points to an intent to penalize only those employers who lack a good reason for noncompliance. It is not, and was never intended to be, a strict liability statute.

Third, the phrase "knowing and intentional" was well known in California law when it was added to Section 226(e) in 1976, and it carried with it an accepted understanding that a good faith dispute would be a defense. In *In re Trombley* (1948) 31 Cal.2d 801 (*Trombley*), this Court used the term "knowing and intentional" to define "willful" in Labor Code section 216 (which makes it a misdemeanor to "willfully refuse[] to pay wages due and payable after demand"), concluding that 216 "makes it a crime for an employer having the ability to pay, knowingly and intentionally to refuse to pay wages which he knows are due." (*Id*. at 807-08.) Borrowing from cases applying "willful" as used in Labor Code section 203, the Court further held that the statute provides an employer a defense to liability under Section 216

where the employer "disputes in good faith an employee's claim for wages." (*Id*. at 808, citing *Davis v. Morris* (1940) 37 Cal.App.2d 269, 274 (*Davis*) [acknowledging good faith dispute defense under § 203].) Thus, *Trombley* recognized that "willful" and "knowing and intentional" are synonyms for the same concept, and that a good faith dispute will preclude liability.

Fourth, the term "willful," which defines the scienter requirement in Section 203, has long been interpreted to be subject to a good faith dispute defense. (See, e.g., *Davis,* 37 Cal.App.2d at 274-75; *Barnhill v. Robert Saunders & Co*. (1981) 125 Cal.App.3d 1, 7-8 (*Barnhill*); *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201 (*Amaral*).) Rather than create a different set of defenses for the two statutes—which are so frequently asserted in tandem in wage and hour disputes—it makes far more sense to harmonize Sections 203 and 226, given that both statutes are ultimately designed to incentivize compliance.

The Court of Appeal was correct in concluding that "an employer's good faith belief that it is not violating section 226 precludes a finding of a knowing and intentional violation." (*Naranjo v. Spectrum Security Services, Inc.* (2023) 88 Cal.App.5th 937, 949 (*Naranjo III*).) The ruling accords with the majority view of California district courts who have considered the issue (nearly two dozen to date, reflecting the opinion of twenty different judges). (See footnote 10 below)

In response, Naranjo raises arguments that misread the statutes, the record, and the Court of Appeal's decision.

Repeating the trial court's initial faulty analysis, Naranjo once again argues that "knowing and intentional" means simply "not inadvertent," based on language in Section 226(e)(3) stating that "a 'knowing and intentional failure' does not include an isolated and unintentional payroll error due to a clerical or inadvertent mistake." (Lab. Code § 226(e)(3).) But the "clerical or inadvertent mistake" language plainly provides only an example of what is "not include[ed];" it does not restrict the "knowing and intentional" requirement to only "not inadvertent." The decision in *Gola v. University of San Francisco* (2023) 90 Cal.App.5th 548 (*Gola*), on which Naranjo relies, repeats the same error. In addition, subdivision (e)(3) was added in 2012, long after the 2004-2007 class period at issue here ended. The 2012 amendment cannot be used to assess Spectrum's conduct retroactively, even if it operated in the manner in which Naranjo suggests (which it does not).

Naranjo also repeatedly argues that the Court of Appeal "held" that California Code of Regulations, title 8, section 13520 ("Regulation 13520"), which defines "willful" in Section 203, also governs Section 226. However, the Court of Appeal never made such a holding nor does Spectrum make that argument. Naranjo also incorrectly argues that the good faith dispute defense in Section 203 "springs solely" from Regulation 13520, when it quite clearly is based on a line of authority dating back to the 1940s, as explained in *Amaral,* 168 Cal.App.4th at 1201. Naranjo's related argument that Section 226.3 operates as a corollary to Regulation

13520, defining "knowing and intentional" in Section 226, is without support in the words of the statutes.

The Court of Appeal correctly reversed the Section 226 penalties because the trial court applied the wrong standard in determining whether Spectrum's failure to include missed meal period premium pay on officers' wage statements was "knowing and intentional." Where there is a good faith dispute whether the California Labor Code even applies (as there was here with regard to federal preemption and certain federal contractor defenses), or where the law as to the Section 226 wage statement requirements is uncertain or unsettled (as it was here until this Court's 2022 decision in this case), an employer cannot be held to have knowingly and intentionally failed to comply.

III. Background

A. Naranjo's Meal Period Claim, Spectrum's Affirmative Defenses, and Phases I and II of Trial.

Spectrum provides secure custodial services to federal agencies, including the U.S. Marshal's Service, ICE, DEA, FBI and the Bureau of Prisons. (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 102 (*Naranjo*); 9-JA-1979.) Pursuant to contracts with federal agencies, Spectrum employs "officers" who transport and guard federal prisoners and detainees who require medical attention or who have other appointments outside custodial facilities. (*Ibid.*) Additionally, Spectrum's officers work at detention locations where federal ICE agents supervise their work. (9-JA-1980.)

During the class period, June 4, 2004 through September 30, 2007, Spectrum maintained an on-duty meal period policy. (9-JA-1981.) It did so because the nature of its officers' work—guarding prisoners and detainees and ensuring public safety—did not allow officers to leave their guarded prisoners and detainees unattended. (*Ibid*.) Further, compliance with Spectrum's federal contracts required continuous custody of prisoners and detainees. (9-JA-1984.) Many of Spectrum's federal contracts expressly contain this requirement. (E.g., 14-JA-3008, 3046.)

If a Spectrum officer failed to follow the on-duty meal period policy, they were subject to termination of employment, as occurred with Naranjo. (*Naranjo,* 13 Cal.5th at 102.) It is undisputed that Spectrum paid officers for their on-duty meal periods and that pay, as well as all hours worked, was accurately reflected on officers' wage statements. (12-RT-5440; *Naranjo v. Spectrum Security Services, Inc*. (2019) 40 Cal.App.5th 444, 472, fn.10 (*Naranjo II*).)

In June 2007, Naranjo filed a putative class action on behalf of Spectrum officers, alleging violation of California meal and rest period requirements, as set forth in Labor Code section 226.7 and Industrial Welfare Commission Wage Order No. 4-2001 ("Wage Order 4"). (1-JA-1-11.)[2] As to the meal period claim, Naranjo alleged Spectrum owed officers an additional hour of "premium pay" for each shift worked in excess of six hours.

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[2] Only the meal period claim is at issue on review. (*Naranjo*, 13 Cal.5th at 103, fn.2.)

Naranjo contended that officers' acknowledgement of Spectrum's on-duty meal period policy was insufficient to meet the requirements of Wage Order 4, which requires that an agreement to an on-duty meal period be in a writing that advises employees of their right to revoke the agreement. (See *ibid.*; Wage Order 4-2001(11)(A).)

Naranjo's complaint also alleged two derivative Labor Code claims related to Spectrum's premium pay obligations: (1) failure to report (unpaid) premium pay on employees' wage statements, per Labor Code section 226 ("Section 226"); and (2) failure to timely provide the premium pay to employees upon their discharge or resignation, per Labor Code section 203 ("Section 203"). (*Naranjo,* 13 Cal.5th at 103; 1-JA-5-6.)

The trial court initially granted summary judgment in Spectrum's favor on federal preemption grounds, but the Court of Appeal reversed. (*Naranjo v. Spectrum Security Services, Inc.* (2009) 172 Cal.App.4th 654, 668-69 (*Naranjo I*).) On remand, the trial court certified a class for the meal period and related Section 203 waiting time and Section 226 wage statement penalty claims, then held a trial on the meal period claim in stages. (*Naranjo, supra*, 13 Cal.5th at 103.)

The first phase was a bench trial involving Spectrum's affirmative defenses. (*Naranjo II,* 40 Cal.App.5th at 455; 9-JA-1981-85.) Spectrum argued that California's Labor Code did not apply to its officers because, under its federal contracts, the officers were working at federal enclaves and/or performing federal functions and were supervised by federal employees such

that they should be treated as federal employees. (9-JA-1981-85.) After hearing witness and expert testimony, the trial court found that Spectrum "failed to carry its burden to establish any of these defenses." (9-JA-1981.)

In the second phase of trial, the meal period claim was tried to a jury. (*Naranjo II,* 40 Cal.App.5th at 455.) The trial court rejected Spectrum's argument that its written on-duty meal period policy, acknowledged by officers, was sufficient to meet the requirements of Wage Order 4-2001(11)(A). (*Ibid.*) It therefore directed a verdict for the class on the meal period claim as to the June 2004 to September 2007 class period. (*Ibid.*; 11-JA-2551.) But the jury found Spectrum not liable for the period beginning October 1, 2007, after Spectrum circulated and obtained written agreements from its employees to on-duty meal periods. (8-JA-1755-57; 11-JA-2551-52; *Naranjo II*, 40 Cal.App.5th at 455.)

B. Naranjo's Labor Code Sections 203 and 226 Claims and Phase III of Trial.

Naranjo's Sections 203 and 226 claims were addressed in phase three, in a bench trial. (*Naranjo II*, 40 Cal.App.5th at 456.) As to both claims, Spectrum argued that because premium pay was not an "earned wage" under Section 226(a), it did not need to be reported on a wage statement or paid at the time of separation of employment. (9-JA-1987.) Relying on *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094 (*Murphy*)—a decision that issued just two months before Naranjo filed his complaint—the trial court rejected this argument. (*Id.* at 1987-88.)

As to the Section 203 waiting time penalty claim, Spectrum additionally argued that Naranjo failed to meet his burden to

prove that Spectrum's violation was "willful," as required by Section 203(a). "A 'willful' failure to pay wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due." (Cal. Code Regs., tit. 8, § 13520; *Amaral,* 163 Cal.App.4th at 1201 ["The settled meaning of 'willful,' as used in section 203, is that the employer has intentionally failed or refused to perform an act which was required to be done."].) The trial court agreed with Spectrum that its failure to pay premium pay at separation of employment was not willful. Specifically, the court found that "Spectrum's defenses presented in the first phase of the trial…if successful, would have defeated plaintiffs' claims in their entirety. Although the court ultimately ruled against Spectrum, the court finds that *the defenses were presented in good faith and were not unreasonable or unsupported by the evidence*. Accordingly, no penalties will be awarded to plaintiffs pursuant to Section 203." (9-JA-1991, emphasis added.)

As to the Section 226 wage statement claim, Spectrum argued that Naranjo failed to satisfy his burden of establishing a "knowing and intentional failure . . . to comply" or that Spectrum's officers suffered injury, as required under the statute. The trial court disagreed, concluding that the failure of Spectrum's vice-president and personnel manager, John Oden ("Oden"), to read Wage Order 4 established that Spectrum's omission of premium pay from wage statements was "not inadvertent, but intentional." (9-JA-1989-1990.) Further, officers suffered injury "since they could not determine from the

wage statements the [amount of premium pay] to which they were entitled." (9-JA-1990.)

The trial court then entered judgment for the class on the meal period and wage statement claims, and awarded attorneys' fees under Section 226. (*Naranjo,* 13 Cal.5th at 104.)

C. The Appeal and this Court's 2022 Decision Holding that Premium Pay and Credited Hours Must Be Included on Wage Statements.

Both sides appealed. The Court of Appeal affirmed the trial court's determination that Spectrum violated Section 226.7's meal period requirements during the June 2004 to September 2007 class period, but reversed the court's holding that a failure to pay premium pay could support claims under Sections 203 and 226. (*Naranjo II,* 40 Cal.App.5th at 473-74.)

On review, this Court then addressed the Sections 203 and 226 issues; the Section 226.7 ruling was not appealed. Acknowledging "confusion in the Courts of Appeal as well as in federal courts," this Court held that "[m]issed-break premium pay is indeed wages subject to the Labor Code's timely payment and reporting requirements, and it can support section 203 waiting time penalties and section 226 wage statement penalties where relevant conditions for imposing penalties are met." (*Naranjo,* 13 Cal.5th at 104, 125.) The Court also held that the "credited hour" associated with premium pay must appear on wage statements. (*Id*. at 121.)

Because the Court of Appeal never considered the parties' arguments as to whether Spectrum's "state of mind" (*id*. at 103) met the conditions for imposition of penalties under the scienter

requirements in Sections 203 and 226, this Court remanded with directions to "address Naranjo's argument that the trial court erred in finding Spectrum had not acted willfully (which barred recovery under…§ 203)" and "Spectrum's argument that its failure to report missed-break premium pay on wage statements was not 'knowing and intentional'" under Section 226. (*Id*. at 125-26.)

D. On Remand, the Court of Appeal Affirmed the Section 203 Ruling and Reversed the Section 226 Ruling.

On remand, the Court of Appeal resolved the two issues. (*Naranjo III,* 88 Cal.App.5th 937.) The court first found that substantial evidence supported the trial court's conclusion that Spectrum's violation of Section 203 was not "willful." (*Id*. at 944-48.) In doing so, the court highlighted the trial testimony of the parties' experts as to whether the properties where Spectrum's officers worked were federally owned, and Oden's trial testimony that Spectrum's contracts are exclusively with federal agencies and that, pursuant to those contracts, Spectrum's officers have custody of prisoners and detainees from the moment they leave federal facilities until they return. (*Id*. at 947-48.) Although the trial court ultimately concluded that Spectrum failed to meet its burden to establish application of the federal enclave doctrine, the intergovernmental immunity doctrine, and the federal function defense for federal actors, the Court of Appeal concluded that substantial evidence supported the trial court's finding that these defenses were presented in good faith. (*Ibid*.) Accordingly, it found that the trial court properly denied recovery of Section

203 waiting time penalties based on the finding that Spectrum's violation was not "willful." (*Id.* at 948.)

The Court of Appeal next turned to Spectrum's argument that the trial court's finding of a "knowing and intentional failure…to comply" with Section 226 was not supported by substantial evidence. (*Id.* at 948-51.) The Court of Appeal concluded that the very same evidence that supported the trial court's conclusion that Spectrum's violation of Section 203 was not "willful" also precluded a finding of Spectrum's "knowing and intentional failure . . . to comply" with Section 226. (*Ibid.*) As the court explained, "willful" and "knowing and intentional" have the same meaning in this context. (*Id.* at 949.)

In support, the Court of Appeal relied upon: (1) *Trombley*, 31 Cal.2d at 807-08, wherein this Court explained that a "willful" violation of Labor Code section 216 occurs when an employer "knowingly and intentionally" refuses to pay wages, and provides such an employer a defense where the employer "disputes in good faith an employee's claim for wages"; (2) decisions of the Courts of Appeal in *Davis,* 37 Cal.App.2d at 274-75, *Barnhill*, 125 Cal.App.3d at 7-8 and *Amaral*, 163 Cal.App.4th at 1201 construing "willful" to mean "intentional" and recognizing a good faith dispute defense; and (3) the "majority view" of federal district courts to consider the issue. (*Naranjo III*, 88 Cal.App.5th at 949-50.) The court concluded that "consistent with California precedent linking the 'willfulness' standard to a 'knowing and intentional' standard, we agree with the weight of authority that a good faith dispute over whether an employer is in compliance

with section 226 precludes a finding of a knowing and intentional violation." (*Id*. at 951.)

The Court of Appeal acknowledged, but distinguished, *Kao v. Holiday* (2017) 12 Cal.App.5th 947 and *Furry v. East Bay Publishing, LLC* (2018) 30 Cal.App.5th 1072, wherein employers argued their ignorance of the law shielded them from liability for Section 226 penalties. As the Court of Appeal explained: "Spectrum's good faith dispute argument is that it presented its federal defenses during phase one of the trial in good faith, not that it was ignorant of the law. We therefore find neither [*Kao* nor *Furry*] applicable." (*Id*. at 951, n.7.)

In addition to Spectrum's good faith dispute based on the federal defenses, the Court of Appeal further noted that "there was a good faith dispute regarding whether premium pay constituted 'wages' that must be reported on wage statements," which "was not resolved until our Supreme Court's 2022 decision [in *Naranjo*]." (*Id*. at 951, fn.8.) Thus, it was unclear how Spectrum could have known back in 2004-2007 that the wage statements it issued to employees failed to comply with Section 226, and this uncertainly also supported reversal of the Section 226 penalties. (*Ibid*.)

Accordingly, the Court of Appeal affirmed the Section 203 ruling denying penalties, and reversed the award of penalties and

attorneys' fees under Section 226. (*Id*. at 952.)[3] Naranjo sought review only as to the Section 226 issue.

IV. Argument

A. Labor Code Section 226(e) and the "Knowing and Intentional Failure . . . to Comply" Requirement.

Labor Code section 226(a) requires employers to provide wage statements to employees with specific enumerated items of information, including gross and net "wages earned" and "total hours worked." (Lab. Code § 226(a).) The penalty for failing to comply is set forth in subdivision (e), which provides in pertinent part:

> (e) (1) An employee suffering injury as a result of a *knowing and intentional failure by an employer to comply with subdivision (a)* is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorney's fees.
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> * * *
>
> (3) For purposes of this subdivision, a "knowing and intentional failure" does not include an isolated and unintentional payroll error due to a clerical or inadvertent mistake. In reviewing for compliance with this section, the factfinder may consider as a relevant factor whether the employer, prior to an alleged

[3] Naranjo only sought attorney fees under Section 226. (*Naranjo III*, 88 Cal.App.5th at 951, fn.9; *Naranjo II*, 40 Cal.App.5th at 474, fn.12; see also *Naranjo*, 13 Cal.5th at 112.)

> violation, has adopted and is in compliance with a set of policies, procedures, and practices that fully comply with this section.

(Emphasis added.)

In Phase III, the trial court ruled that Spectrum's failure to reflect unpaid yet earned meal period premiums on its wage statements was a "knowing and intentional failure . . . to comply" under Section 226 (hereinafter "knowing and intentional failure to comply" standard), entitling plaintiffs to statutory penalties and attorney fees. (9-JA-1989.) In making that ruling, the trial court interpreted a "knowing and intentional failure to comply" to mean only "not inadvertent," and applied this erroneous legal standard to the facts, finding that because Spectrum believed it was in compliance and, therefore, did not pay any premiums, "the omission of the premium pay was not inadvertent but was intentional." (9-JA-1989-90.) Naranjo now repeats the trial court's erroneous interpretation, arguing that only "accidental omissions, isolated and unintentional payroll errors, or inadvertent clerical mistakes" are excused under Section 226. (OBM at 27-28.)

The Court of Appeal correctly rejected this interpretation, holding that "a good faith dispute over whether an employer is in compliance with section 226 precludes a finding of a knowing and intentional violation." (*Naranjo III*, 88 Cal.App.5th at 951.) As the court explained, the trial court erred "by awarding penalties under section 226 based on its conclusion that the omission of the premium pay on employees' wage statements was 'knowing and intentional' because it was 'not inadvertent.'" (*Ibid.*) Instead, "an

employer's good faith belief that it is not violating section 226" will also preclude a finding of a knowing and intentional failure to comply. (*Id.* at 949.)

The Court of Appeal's interpretation is correct based on the plain text of Section 226, and it accords with the long-accepted judicial interpretation of "knowing" and "intentional," as well as the statute's legislative history.

1. The Penalty Provision in Section 226(e) Was Added By the Legislature in 1976 to Penalize Employers that Knowingly and Intentionally Flaunt the Law.

Labor Code section 226, enacted in 1943, "was initially crafted to require only that employers provide written statements showing any deductions from employees' pay." (*Ward v. United Airlines, Inc.* (2020) 9 Cal.5th 732, 744-45, citing Stats. 1943, ch. 1027, § 1, p. 2965.) "The core purpose of section 226 is 'to ensure an employer 'document[s] the basis of the employee compensation payments' to assist the employee in determining whether he or she has been compensated properly.'" (*Id.* at 752, quoting *Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, 390.)

The original version of the statute contained no penalty for noncompliance nor the "knowing and intentional" scienter requirement that is the focus here. (*Id.* at 745, fn.3 [original text of statute].) In 1976, the legislature amended the statute to add, for the first time, a penalty for non-compliance. (*Id.* at 745, citing § 226, former subd. (b), as amended by Stats. 1976, ch. 832. § 1, p.1900; see also MFJN-160 [2012 report from Senate Jud. Com., providing history of § 226].)

The impetus for the 1976 amendment adding a civil remedy was to permit employees to "recoup their losses from an employer who knowingly and intentionally flaunts the law." (MFJN-243 [8/30/1976 letter to Gov. Edmund G. Brown from California Rural Legal Assistance Foundation (CRLAF) attorney Alex Saldamando]; see also MFJN-164.) As a leading sponsor of the legislation, the CRLAF explained what it intended to remedy:

> There are a number of employers, usually small growers, who systematically refuse to give wage stub information to their employees. A number simply pay in cash, or pay by check without furnishing itemized statements. One grower operating in Yuba County went as far as detaching the wage stub before giving the employee the paycheck. Serious consequences for employees can result.

(MFJN-243.)

The original bill (AB 3731), introduced by Assemblyman Bill Lockyer on March 15, 1976, conditioned the statutory penalty on a showing the employee suffered injury "as a result of a *knowing failure* by an employer to comply with subdivision (a)." (MFJN-213-214, emphasis added.) But two months later, the text emerged from committee with an even stronger scienter requirement, adding "intentional" in the conjunctive after "knowing," so it stated "as a result of a *knowing and intentional failure* by the employer to comply." (MFJN-215-216 [AB 3731 as amended 5/12/1976].)

While employer groups originally opposed the legislation, the opposition dropped away with the final version of the bill. (MFJN-238, 240.) Mr. Saldamando explained in his letter to Governor Brown, "[t]hough employer interests, at first, opposed

the bill, we persuaded them that an employer who *deliberately failed to provide wage information* should be liable for the consequences of his or her act to an employee who had labored in good faith, and they withdrew their opposition." (MFJN-243, emphasis added.) Assemblyman Lockyer similarly told Governor Brown in a September 2, 1976 letter that "I amended the bill at the committee hearing…to the[] satisfaction of [employer interests] and they withdrew their opposition." (MFJN-246.) Thus, the robust "knowing and intentional failure to comply" scienter requirement, aimed at employers "who *deliberately* failed to provide wage information," was apparently essential to enactment.

In 2012—well after the class period here—there was a further amendment to Section 226. The Legislature added several new subsections (with their own subparts) to subdivision (e) of Section 226, all effective January 1, 2013. (See 2012 Cal. Legis. Serv. Ch. 844 (SB 1255/AB 1744); MFJN-155-212.) The original subdivision (e) became (e)(1). New subdivisions (e)(2)(A), (B) & (C) were added addressing the "suffering injury" requirement in the first sentence of (now) (e)(1).[4]

And a new subdivision (e)(3) was added addressing the "knowing and intentional failure" wording:

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[4] Under the new injury provisions, if a wage statement is furnished but incomplete, the employee is now largely presumed to have suffered injury except not when there is a failure to include wages "earned" but unpaid, items which were carved out from the presumption. (Lab. Code § 226(e)(2)(B)(i); *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308, 1336-37.)

> For purposes of [subdivision (e)], a "knowing and intentional failure" does not include an isolated and unintentional payroll error due to a clerical or inadvertent mistake. In reviewing for compliance with this section, the factfinder may consider as a relevant factor whether the employer, prior to an alleged violation, has adopted and is in compliance with a set of policies, procedures, and practices that fully comply with this section.

The legislative history for the 2012 amendment focuses almost exclusively on the "injury" issue addressed in subdivisions (e)(2)(A)-(C), additions prompted by a series of cases finding no employer liability where employees had not suffered injury. (MFJN-193-202, 155-159.) Despite Naranjo's suggestion to the contrary (OBM at 36), there is *no* indication in the legislative history that the addition of the "clerical or inadvertent mistake" language in subsection (e)(3) was prompted by any similar caselaw concern. In fact, that portion of the amendment is hardly mentioned in the 2012 legislative materials. (MFJN-155-212.) Furthermore, the original intent behind the "knowing and intentional failure to comply" requirement was repeated verbatim in the 2012 legislative materials, which quote again the same purpose behind the legislation articulated 36 years prior in the CRLAF's 1976 letter to Governor Brown (i.e. allowing employees "to recoup their losses from an employer who knowingly and intentionally flaunts the law.") (MFJN-158, 164, 182, 194.)

In sum, the intent had not changed. As the legislative history makes clear, a "knowing and intentional failure to comply" under Section 226 occurs when an employer deliberately and knowingly flaunts the law.

2. Under the Plain Words of Section 226, No Penalty Can Be Assessed Without a Showing the Employer Knew the Wage Statement Requirement Was Triggered and Intentionally Failed to Comply.

The words used in Section 226(e) confirm that the Legislature intended to penalize only deliberate non-compliance with the statute. The words "knowing and intentional failure to comply" in Section 226(e) are not defined, except that it does *not* include a "clerical or inadvertent mistake," or instances where, in the factfinder's discretion, the employer "has adopted and is in compliance with a set of policies, procedures, and practices that fully comply with" Section 226. (Lab. Code § 226(e)(3).)

Under the plain meaning of the phrase "knowing and intentional failure to comply," Naranjo had to prove both that (1) Spectrum *knew* (during the class period) that meal period premiums were "wages earned" (or that associated credited hours were "hours worked") and that they must be listed on wage statements under Section 226(a)(1), (2) & (5); and (2) Spectrum *intentionally* failed *to comply* with these requirements.[5]

The accepted definitions of "knowing" and "intentional" do not comport with simply "not inadvertent," as Naranjo erroneously argues. Black's Law Dictionary defines "'knowing"

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[5] It is undisputed that Spectrum paid its officers for the hours they worked, including for their on-duty meal periods, and that all wages actually paid and hours actually worked were listed on the wage statements. (12-RT-5407, 5425, 5440.) The meal period premiums Spectrum did *not* pay, and the associated "credited" hour of time the officers did *not* actually work, were not listed.

as "[1.] Having or showing awareness or understanding; well-informed [2.]; deliberate; conscious." (*Black's Law Dictionary* (11th ed. 2019).) Similarly, "intentional" is defined as "[d]one with the aim of carrying out the act." (*Ibid.*) In *Lee v. Amazon.com, Inc.* (2022) 76 Cal.App.5th 200, the court addressed the meaning of the phrase "knowing and intentional," as used in Proposition 65, and held that while "[t]here is overlap in the dictionary definitions of the terms 'knowingly' and 'intentionally'… definitions of 'knowingly' tend to focus on awareness while definitions of 'intentionally' tend to focus on purpose." (*Id.* at 238-39.)

Thus, a "knowing and intentional failure to comply" in Section 226 means exactly what it says, namely, that the employer *intended* to omit information from a wage statement that it *knew* should be included. The district court summed it up in *Magadia v. Wal-Mart Associates, Inc.* (N.D. Cal. 2019) 384 F.Supp.3d 1058: "Knowingness and intentionality are scienter requirements. To adopt an interpretation that would essentially read out any scienter requirement from 'knowing and intentional' would create tension with the commonly-understood legal meanings of these words." (*Id.* at 1083, aff'd in part and rev'd in part (9th Cir. 2021) 999 F.3d 668.)[6]

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[6] See also *Boyd v. Bank of America Corp.* (C.D. Cal. 2015) 109 F.Supp.3d 1273, 1308-09 ("Penalizing employers who, in good faith but ultimately incorrectly, believe that their employees are exempt, and on this basis do not comply with § 226, is inconsistent with the requirement that a violation be 'knowing and intentional.'"); *Arroyo v. International Paper Company* (N.D.

Typically, in wage and hour cases, a wage statement claim is added as a derivative claim, flowing from some underlying violation, such as a failure to pay overtime or, as here, meal period premiums. While the employer may be found liable for the underlying violation, it may not have had actual or constructive *knowledge* of the fact that employees worked unpaid hours that went omitted on a wage statement. For example, unbeknownst to the employer, an employee may have worked off the clock, and hence earned additional wages. That such unpaid wages and associated hours worked were not included in a wage statement is not a violation, however, where the employer does not *know* those facts and did not *intentionally* fail *to comply* with Section 226(a). (E.g., *Williams v. J.B. Hunt Transportation, Inc.* (C.D. Cal. 2022) 2022 WL 714391, at *12 ["Plaintiffs provide no evidence to support a finding that Defendant was aware that Plaintiffs performed some work off the clock, and thus that Defendant knowingly and intentionally included inaccurate total hours on their wage statements."].)

Similarly, as occurs in misclassification cases—which are often very fact intensive, close cases—the employer may have had both a subjective and objectively reasonable belief that employees were exempt, and yet ultimately fail to establish that affirmative

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Cal. 2020) 611 F.Supp.3d 824, 841 ("[I]t appears to this Court that failing to consider the employer's good faith belief would read *out* of §226(e) the mental state implicated by the phrase "knowing and intentional."); *Oman v. Delta Air Lines, Inc.* (N.D. Cal. 2022) 610 F.Supp.3d 1257, 1274 (the best reading of the phrase "intentional failure . . . *to comply with*" is that a good faith belief in compliance precludes liability).

defense. It cannot be said in such circumstances, however, that the employer *knew* employees were entitled to overtime wages or meal or rest period premiums and *intentionally* failed to include such wages and hours worked on wage statements. (E.g., *Pedroza v. PetSmart, Inc.* (C.D. Cal. 2012) 2012 WL 9506073, *5 & fn.6 [though it raised triable issues, employer's exemption defense held objectively reasonable sufficient to preclude "knowing and intentional" failure to comply with Section 226].) In both instances, the employer issued wage statements that it in good faith believed were in compliance, and never intended to deliberately flaunt the law.

3. The "Clerical or Inadvertent Mistake" Language in Section 226(e)(3), First Added in 2012, Is Illustrative, Not Definitional, and In Any Event Does Not Apply Retroactively to Spectrum's 2004-2007 Conduct.

Like the trial court, Naranjo relies on the "clerical or inadvertent mistake" exception in Section 226(e)(3) to, in effect, replace "knowing and intentional failure to comply" in the statute. (OBM at 27-30.) But the exception provides only an example of what a knowing and intentional failure to comply "does not include." (Lab. Code § 226(e)(3).) It is not definitional or all inclusive.

Before addressing the problems with Naranjo's construction of subdivision (e)(3), there is a threshold problem with Naranjo's argument: it is premised on the assumption that the 2012 amendment adding subdivision (e)(3) applies retroactively. It does not. (See *Gola,* 90 Cal.App.5th at 560 ["The

Labor Code in particular contains a general statutory provision that counsels against retroactive application of its sections" and reflects "'the common understanding that legislative provisions are presumed to operate prospectively'" absent an express contrary intent], citing Labor Code § 4 ["No action or proceeding commenced before this code takes effect, and no right accrued, is affected by the provisions of this code . . . ."]; *Myers v. Phillip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841 [Unless "there is an 'express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature . . . must have intended a retroactive application.'"].)

The conduct here at issue occurred June 4, 2004 to September 30, 2007. (9-JA-1977-1981.) Thus, Spectrum's liability cannot be measured by statutory language first added in 2012. Instead, whether Spectrum knowingly and intentionally failed to comply with wage statement requirements must be evaluated based on the statute as it existed at the time of the alleged violations. "[T]he 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" (*Myers, supra*, 28 Cal.4th at 840-41, quoting *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 265.)

Naranjo's argument under the 2012 amended wording—that the "does not include" example limits "knowing and intentional" to mean only "not inadvertent"—is also incorrect as a matter of statutory construction. "'Includes' is 'ordinarily a term of enlargement rather than limitation.'…The 'statutory definition

of a thing as "including" certain things does not necessarily place thereon a meaning limited to the inclusions.'" (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 774; see also *Dan's City Used Cars, Inc. v. Pelkey* (2013) 569 U.S. 251, 264 ["Exceptions to a general rule, while sometimes a helpful interpretive guide, do not in themselves delineate the scope of the rule."].) As the Court of Appeal explained in *Durkin v. Durkin* (1955) 133 Cal.App.2d 283, which addressed a tax code dispute, using "does not include" is a "common device" whereby a general proposition is stated but then followed by an "illustration or two of what [the general proposition] does or does not include." (*Id.* at 287.) The court added, "[c]ertainly, no one would claim" that this "explanatory list[]" of exclusions "furnish the full measure and scope" of the statute. (*Ibid.*) Instead, it is "logical to read [the enumerated exclusions] as cautionary and illustrative, not narrowly restrictive and exclusionary . . . ." (*Ibid.*)

The Legislature did not, when it added Section 226(e)(3) in 2012, state that a clerical or inadvertent mistake was the only exception to liability under Section 226, nor did it eliminate Section 226's "knowing and intentional" scienter requirement. If the Legislature desired to make Section 226 a near strict liability statute save for clerical errors or inadvertent mistakes, it would have simply deleted the "knowing and intentional" language and stated that a clerical error or mistake was not a violation. It did not. Instead, the Legislature kept the wording, and repeated in the legislative materials the same guiding purpose for the 226 penalty provision that it originally expressed in 1976: that it was

intended to penalize employers that "deliberately flaunt the law." (MFJN-158, 164, 182, 194.)

There is a further reason a "knowing and intentional failure to comply" cannot mean simply "not inadvertent" under the statute. Section 226(e)(3) goes beyond mere reference to excluded clerical errors and inadvertent mistakes. It also explicitly gives "the factfinder" permission to "consider as a relevant factor" "[i]n reviewing for compliance with this section [i.e., with § 226]", "whether the employer, prior to an alleged violation, has adopted and is in compliance with a set of policies, procedures, and practices that fully comply with this section." (Lab. Code § 226(e)(3).) Thus, if the employer's policy, procedure, and practice is to issue wage statements that include all nine items specified in Section 226(a)—as was Spectrum's policy, procedure, and practice—such efforts reflect an *intent to comply*. Or if the employer's policies, procedures and practices reflect an intent to comply with wage statement requirements, yet the state of the law as to what constitutes "wages earned" is unclear—as was the case here with meal period premiums—then there also is no "knowing and intentional failure to comply."

B. A Good Faith Dispute as to Applicability of Section 226 or Its Requirements Will Preclude Imposition of the Penalty.

1. California Courts Have Long Held that a Good Faith Dispute Precludes a Finding of Both a "Knowing and Intentional" and a "Willful" Failure to Comply With a Law.

As a scienter requirement, the phrase "knowing and intentional failure to comply" in Section 226(e) serves the same

purpose as the word "willfully" in Labor Code section 203.[7] California courts have long held that a good faith dispute as to compliance will preclude a finding that a party has "knowingly and intentionally" or "willfully" failed to comply with a law.

In the leading case addressing "willful" in Section 203, *Davis,* 37 Cal.App.2d 269, the court defined the term to mean "that one intentionally fails or refuses to perform an act which is required to be done." (*Id*. at 274.) The court explained that a good faith dispute over whether any wages were due could be a defense to a claim for Section 203 penalties: "It was the sole province of the trial court to determine whether the defendants were in good faith in claiming that wages were not due because the plaintiff contributed his services as a member of the partnership." (*Ibid*.)

In 1948, this Court cited *Davis* as authority, along with other decisions, in a case involving Labor Code section 216, which makes it a misdemeanor to "willfully refuse[] to pay wages due and payable after demand." (*Trombley*, 31 Cal.2d at 807.)[8] The

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[7] Section 203 was enacted in 1937. (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1399.)

[8] Labor Code § 216(a) provides, in pertinent part, "any person, or an agent, manager, superintendent, or officer thereof is guilty of a misdemeanor, who: (a) Having the ability to pay, willfully refuses to pay wages due and payable after demand has been made." Just as this Court linked willful and knowing and intentional conduct in *Trombley*, so also did the Legislature when it enacted Penal Code section 487m in 2021. While Section 216(a) makes a willful failure to pay wages a misdemeanor, Penal Code section 487m elevates a failure to pay wages to a felony if

Court explained that a "willful" violation of Labor Code section 216 occurs when an employer "knowingly and intentionally [] refuse[s] to pay wages which he knows are due." (*Id*. at 807-08.) The Court further explained that "[a] similar construction was placed on section 203 of the Labor Code which imposes penalties where an employer 'wilfully fails to pay . . . wages of an employee who is discharged or who quits.' In interpreting that section, it was recognized that a dispute in good faith as to whether any wages were due would be a defense to an action for such penalties." (*Id*. at 808, citing *Davis*, 37 Cal.App.2d 269.)

Davis was again cited in *Barnhill,* 125 Cal.App.3d 1, where the Court of Appeal reversed an award of Section 203 penalties, concluding that the employer's violation was not "willful," within the meaning of the statute, because the employer had a good faith belief it was in compliance with the law at the time. (*Id*. at 8-9.) At issue in *Barnhill* was a dispute as to whether the employer could set off debts owed the employer by the employee from the final wage payment which, at the time, was an unsettled question. (*Ibid*.) As the court explained, "appellant should not be penalized for believing that setoff was proper and payment of wages not required. Accordingly, appellant's attempt to exercise a right to setoff was not willful nonpayment of wages within the

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the unpaid amount is more than $950 per employee and if the conduct is both intentional and knowing. (Penal Code § 487m(b) [defining "theft of wages" as the "intentional deprivation of wages . . . with the knowledge that the wages . . . is due to the employee under the law"].)

meaning of Labor Code section 203, and the imposition of penalties was inappropriate." (*Ibid.*)

In 1988, *Barnhill's* holding was memorialized in Regulation 13520, which recognizes that "willfully" in Section 203 does indeed permit a good faith dispute defense. (See *Amaral, supra,* 163 Cal.App.4th at 1201 ["*Barnhill's* holding was memorialized in California Code of Regulations, title 8, section 13520."].)[9]

Examining this line of authority, as well as the "majority view" among federal district courts, the Court of Appeal here concluded that "consistent with California precedent linking the 'willfulness' standard to a 'knowing and intentional' standard, we agree with the weight of authority that a good faith dispute over whether an employer is in compliance with section 226 precludes a finding of a knowing and intentional violation." (*Naranjo III*, 88 Cal.App.5th at 951.)

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[9] Regulation 13520 provides: "A willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203. (a) Good Faith Dispute. A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist. Defenses presented which, under all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a 'good faith dispute.'" (Cal. Code Regs., tit. 8, § 13520.)

2. A Majority of Courts Hold that a Good Faith Dispute Defense, Like that Governing Section 203, Is Consistent With Section 226's "Knowing and Intentional" Liability Standard.

As the Court of Appeal noted, a majority of federal decisions—now nearly two dozen in total, reflecting the opinions of twenty different judges—have held that a good faith dispute defense is consistent with Section 226's "knowing and intentional" liability standard.[10]

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[10] See, e.g., *Oman, supra,* 610 F.Supp.3d at 1274 (J. Orrick; agreeing "with the majority approach that claims for statutory damages based on violations of § 226(a) require a showing of willfulness" and that a good faith dispute about compliance is a defense); *Horowitz v. SkyWest Airlines, Inc.* (N.D. Cal. 2023) 2023 WL 3605980, at *6 (J. Chesney; "SkyWest is entitled to a good faith defense as to the wage statements here at issue" given the "unsettled state of the law" concerning application of the employer's dormant commerce clause defense]; *Williams, supra,* 2022 WL 714391, at *12 (J. Gutierrez; "Plaintiffs provide no evidence to support a finding that Defendant was aware that Plaintiffs performed some work off the clock, and thus that Defendant knowingly and intentionally included inaccurate total hours on their wage statements."); *Wellons v. PNS Stores, Inc.,* (S.D. Cal. 2022) 2022 WL 16902199, at *22 (J. Huie; no knowing and intentional failure to comply where employer in good faith believed the employees were exempt, a belief that was objectively reasonable); *Wilson v. SkyWest Airlines, Inc.* (N.D. Cal. 2021) 2021 WL 2913656, at *2 (J. Chhabria; "best reading" of § 226 finds a "good faith belief in compliance precludes liability," and wage statement claims require a showing of "willfulness."); *Ornelas v. Tapestry, Inc.* (N.D. Cal. 2021) 2021 WL 2778538, at *7 (J. Alsup; "This order adopts the majority view that a good faith dispute can preclude recovery by the plaintiff under both § 203 and § 226."); *Nicolas v. Uber Technologies, Inc.* (N.D. Cal.

2021) 2021 WL 2016161, at *11 (J. Hamilton; court agrees with defendant's reasoning that sufficient ground exists to infer its "good-faith belief" that plaintiffs do not qualify as employees is enough to dismiss § 226 claim); *Evans v. Wal-Mart Stores, Inc.* (C.D. Cal. 2020) 2020 WL 6253695, at *7-8 (J. Birotte; court took into account defendant's good faith defense to determine whether § 226 inaccuracies were "knowing and intentional"); *Arroyo, supra,* 611 F.Supp.3d at 839-40 (J. Freeman; given the similarity between the governing standards of § 203 and § 226, "it is only logical that the good faith defense would apply to both Sections"); *Magadia, supra,* 384 F.Supp.3d at 1081 (J. Koh; finding knowing and intentional requirement in § 226 is akin to willfulness requirement in § 203 and noting that "the majority of state appellate and federal trial courts have done the same."); *Utne v. Home Depot U.S.A., Inc.* (N.D. Cal. 2019) 2019 WL 3037514, at *5-6 (J. Seeborg; applying good faith dispute standard to § 226, explaining that "the 'knowing and intentional' standard applicable to § 226 is closely related to the 'willfulness' standard which governs § 203 [and] '[g]iven the similarity…it is only logical that the good faith defense would apply to both Sections, not merely to § 203."); *Bell v. Home Depot U.S.A., Inc.* (E.D. Cal. 2017) 2017 WL 6344323, at *1 (J. Mendez; granting defendant's MSJ, finding good faith dispute "preclude[d] the imposition of penalties under section[s] 203 and 226(e)."); *Saini v. Motion Recruitment Partners, LLC* (C.D. Cal. 2017) 2017 WL 1536276, at *12 (J. Selna; granting employer's summary judgment, finding good faith dispute whether wages were due precluded penalties under both § 203 and § 226); *Childs v. Maxim Healthcare Services, Inc.* (C.D. Cal. 2016) 2016 WL 11746003, at *9 (J. Staton; court agrees that when "an employer has a good faith belief it is not in violation of § 226" then any violation is "not knowing and intentional"); *Boyd, supra,* F.Supp.3d at 1309 (J. Carter; court found § 226 liability turned on whether defendants' belief that its employees were exempt was in good faith); *Woods v. Vector Marketing Corp.* (N.D. Cal. 2015) 2015 WL 2453202, at *3 (J. Chen; adopting good faith dispute standard for § 226, explaining "[t]he Labor Code itself treats 'willful' and 'knowing and intentional' violations with similar weight.

These decisions recognize the common sense approach that only by taking into account an employer's good faith belief or understanding regarding compliance, is meaning given to the entirety of the "knowing and intentional failure to comply" requirement in Section 226. (See, e.g., *Willner v. Manpower Inc.* (N.D. Cal. 2014) 35 F.Supp.3d 1116, 1130-31 ["[T]he phrase 'knowing and intentional' in Section 226(e)(1) must be read to

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Violations of §§ 203 and 226 both lead to civil penalties."); *Stafford v. Brink's, Inc.* (C.D. Cal. 2015) 2015 WL 12699459, at *9 (J. Fitzgerald; recognizing that "[t]he majority of courts" have taken the view that "the employer's good faith belief that it is not in violation of §226 precludes a finding of a knowing and intentional violation," but finding a triable issue of fact as to whether employer had raised a good faith dispute); *Apodaca v. Costco Wholesale Corp.* (C.D. Cal. 2014) 2014 WL 2533427 at *3 (J. Fischer; declining to find employer violated § 226, holding that when "an employer has a good faith belief that it is not in violation of §226, any violation is not knowing and intentional."); *Wright v. Adventures Rolling Cross Country, Inc.* (N.D. Cal. 2013) 2013 WL 1758815, at *9 (J. Chen; "There is no dispute by the parties that there is a comparable good faith defense for § 226 which, similar to § 203, requires knowing and intentional conduct."); *Pedroza, supra,* 2012 WL 9506073 at *5, fn.6 (J. King; "the 'good faith dispute' defense also applies with respect to Labor Code § 226(e)."); *Hurst v. Buczek Enterprises, LLC* (N.D. Cal. 2012) 870 F.Supp.2d 810, 829 (J. Chen; when employer makes a "good faith claim that a worker is an independent contractor, its failure to provide accurate wage statements it not knowing and intentional"); *Dalton v. Lee Publications, Inc.* (S.D. Cal. 2011) 2011 WL 1045107 at *5 (J. Morkowitz; "good faith dispute" precludes a finding that defendant's conduct was "knowing and intentional"). But see, e.g., *Novoa v. Charter Communications, Inc.* (E.D. Cal. 2015) 100 F.Supp.3d 1013, 1028-29 (J. Ishii; declining to recognize good faith dispute defense for § 226); *Cabardo v. Patacsil* (E.D. Cal. 2017) 248 F.Supp.3d 1002, 1010 (J. Nunley; same).

require something more than a violation of Section 226(a) alone."].) As one district court put it, "[u]nder the California Labor Code, failure to furnish an employee with an accurate wage statement is not a strict liability offense." (*Cleveland v. Groceryworks.com, LLC* (N.D. Cal. 2016) 200 F.Supp.3d 924, 957.)

A contrary reading ignores Section 226's requirements that a "failure . . . to comply" be both "knowing" and "intentional." Because the same type of analysis applies to Section 203 in determining whether a violation is willful, it logically follows that the interpretive guidance for "willfulness" instructs the "knowing and intentional" analysis as well. (*Willner, supra,* 35 F.Supp.3d at 1131 ["If the legislature had intended to allow an employee to recover damages for an employer's violation of Section 226(a) without having to make any showing beyond a showing of the Section 226(a) violation itself, then the legislature could simply have omitted the qualifier 'knowing and intentional' before the word 'failure.'"]; *Boyd, supra,* 109 F.Supp.3d at 1308–09 ["Penalizing employers who, in good faith but ultimately incorrectly, believe that their employees are exempt, and on this basis do not comply with § 226, is inconsistent with the requirement that a violation be 'knowing and intentional.'"].) "Where the reason is the same, the rule should be the same." (Civ. Code § 3511.)[11]

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[11] As one district court noted, "[i]t would seem ironic if the good faith dispute defense applied to Section 203, which involves failure to timely pay wages, but not to Section 226, which

The *Gola* decision stands alone in the California courts in holding that a "knowing and intentional failure to comply" can "only" occur where there is a clerical error or inadvertent mistake. (90 Cal.App.5th at 566.) The decisions in *Kao, supra,* 12 Cal.App.5th 947 and *Furry, supra,* 30 Cal.App.5th 1072, did not go that far. Neither *Kao* nor *Furry* defines "knowing and intentional failure to comply" or attempts to discern the meaning or intended usage of this phrase. Nor do these decisions carve out an exclusive exception for only "clerical error or inadvertent mistake." Rather, in both cases—and on facts very different from those here—the courts simply held that ignorance of the law was no defense to a Section 226 claim. (*Kao*, 12 Cal.App.5th at 961-962 [affirming § 226 penalties where employer failed to provide *any* wage statement for half the employment period, and then wage statements that did not itemize gross wages or hours worked for second half]; *Furry*, 30 Cal.App.5th at 1085 [employer failed to keep track of hours worked].) Spectrum agrees ignorance of the law is not a defense to either a Section 226 or Section 203 claim. But that is not the basis of Spectrum's good faith dispute here, as the Court of Appeal acknowledged. (See *Naranjo III*, 88 Cal.App.5th at 951 & fn.7.)

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involves inaccurate wage statements. If anything, failure to pay wages would seem to warrant lesser tolerance of defenses than failing to provide accurate wage statements." (*Woods, supra*, 2015 WL 2453202, at *4.)

The *Gola* court reached its conclusion without analyzing the full text of Section 226 or its legislative history, both of which, as noted above, serve to confirm the statute was intended to target employers who deliberately flaunt the law, i.e., who know they must comply with a certain provision and who intentionally fail to do so. There is simply no support in the legislative record for the *Gola* court's conclusion that "the Legislature intended to exclude *only* truly errant or mistaken violations from the reach of section 226's penalty provisions, not competing legal interpretations." (*Gola*, 90 Cal.App.5th at 566, emphasis added.)

In fact, borrowing the Ninth Circuit's observation as to "willful" in Section 203, the fact that Section 226 only punishes "knowing and intentional" conduct "suggests that the legislature only intended to impose penalties on employers who lack a good excuse" for failing to comply with wage statement requirements. (Cf. *Hill v. Walmart Inc.* (9th Cir. 2022) 32 F.4th 811, 816.) "An important rationale behind allowing a good faith defense in this context is to prevent employers from being 'penalized' in genuine cases of 'uncertainty.'" (*Id.* at 817.) Taken to its logical endpoint, the *Gola* court's limitation on "knowing and intentional" to mean only "not inadvertent" would indeed operate to penalize California employers even in cases of genuine uncertainty, an outcome clearly at odds with a statute presumably designed to achieve compliance with the law.

As to what it means for there to be a good faith dispute about compliance, the concept was examined in depth in *FEI Enterprises, Inc. v. Yoon* (2011) 194 Cal.App.4th 790, which

addressed a "good faith dispute" provision in a construction contract. The court looked at a number of types of legal disputes where the "good faith dispute" concept commonly arises, including under Section 203. (*Id*. at 801-02.) After examining all these circumstances, the court concluded that "[c]ertainly, a party who has no reasonable, objective justification for withholding payment under a construction contract, but 'believes,' by reason of delusion, ignorance, negligence of legal counsel or otherwise, that the money is not owed should not be able to avoid penalty interest on such ground." (*Id*. at 806.)

"It should not matter whether the dispute is characterized as 'honest,' 'legitimate,' 'bona fide' or as one asserted in 'good faith.' These terms all reflect the need for *objective* evidence demonstrating that there is a *reasonable basis* for the non-paying party's actions. If there is an objectively reasonable basis for the delay or denial of a promised progress payment, the statutory requirement of 'a good faith dispute' will have been satisfied and the actual subjective state of mind of the non-paying party will not be relevant except as a circumstance to be considered in the evaluation of the objective reasonableness of the non-paying party's actions." (*Id*. at 806, fn.11.) These same principles should govern application of Section 226's "knowing and intentional failure to comply" standard.

3. Naranjo's Statutory Arguments Against the Good Faith Dispute Defense Are Unavailing.

a. Naranjo's Regulation 13520 Argument Is a Straw Man; the Court of Appeal Never Held 13520 Governs Section 226.

Naranjo argues repeatedly that the Court of Appeal made a "*holding* that regulation 13520's 'good faith dispute' exception to section 203 applies equally to section 226." (OBM at 10, emphasis added; see also OBM at 15, 17-18, 23-24, 25-26.) This argument is central to Naranjo's entire merits brief. But it is a straw man. The Court of Appeal never made such a holding, nor has Spectrum made that argument.

On its face, Regulation 13520 plainly applies to Section 203. (§ 13520 ["A willful failure to pay wages within the meaning of [Section] 203 occurs when . . . ."].) Furthermore, the good faith dispute standard did not "spring solely" from 13520, as Naranjo incorrectly argues. (OBM at 16.) Instead, as the Court of Appeal explained, the good faith dispute exception stated in 13520 was based on long-standing California caselaw. (*Naranjo III*, 88 Cal.App.5th at 945-46, 949-50, citing *Trombley*, 31 Cal.2d at 807-08; *Davis, supra*, 37 Cal.App.2d at 274-75; *Barnhill*, *supra*, 125 Cal.App. at 7-8; *Amaral*, *supra*, 163 Cal.App.4th at 1201 ["*Barnhill*'s holding was memorialized in [§] 13520."].) Put another way, the good faith dispute standard would govern Section 203 whether or not Regulation 13520 had ever been adopted.

Naranjo's contention that the Court of Appeal's analysis is based entirely on 13520 thus ignores large portions of the court's decision, as well as its wording-based analysis rejecting Naranjo's attempt to restrict "knowing and intentional failure to comply" to "not inadvertent." (*Naranjo III*, 88 Cal.App.5th at 949-51.)

Having set up the straw man, Naranjo tries to knock it down by arguing that 13520 is limited to "administrative proceedings before the Labor Commission." (*Ibid*.) Putting aside the fact that, in the 34 years since the regulation was enacted, no court has ever adopted that view, the contention fails for several additional reasons.

First, as the Court of Appeal recognized, California courts, including this Court, have repeatedly relied on Regulation 13520 to define "willfully" in Section 203 in civil cases between private parties. (*Naranjo III*, 88 Cal.App.5th at 945-46, citing *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 353-54, fns.2-4 [quoting § 13520 as defining the § 203 standard]);[12] *Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 868-70 [same]; *Maldonado, supra,* 22 Cal.App.5th at 1331-34 [same]; *Amaral,* 163 Cal.App.4th at 1201-1204 [same]; *Choate v. Celite Corp*. (2013) 215 Cal.App.4th 1460, 1468 [same].)

Second, Naranjo's contention that Regulation 13520 is a rule of "practice and procedure" adopted for the limited purpose of administrative Berman hearings is without support. (OBM at

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[12] *Smith* has been partially superseded by statute on other grounds. (*Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, cert. granted, judgment vacated (2011) 565 U.S. 973.)

21-22.) Regulation 13520 was promulgated by the Division of Labor Standards Enforcement ("DLSE") in 1988 to interpret the meaning of "willful" in the context of Labor Code section 203, a statute that itself is not limited to Berman hearings or DLSE enforcement. (MFJN-640.) The regulation is well within the ambit of DLSE authority. (See *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 569-70 ["[R]ecognizing that enforcement requires some interpretation and that these interpretations should be uniform and available to the public, the Legislature empowered the DLSE to promulgate necessary 'regulations and rules of practice and procedure' (Lab. Code § 98.8.)"].) Nothing in the text of Regulation 13520 limits its applicability to administrative hearings and Naranjo cites no case law or authority supporting this narrow application.[13]

Finally, and in any event, agency interpretive regulations are entitled to deference and Naranjo makes no showing that

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[13] This Court rejected a similar argument in *Martinez v. Combs* (2010) 49 Cal.4th 35, 65-66, refusing to limit the definition of employment in civil actions to only the common law meaning, rather than the IWC's broader regulatory definition, because such an approach "would render the [labor] commission's definitions effectively meaningless." As this Court explained, quoting *Jones v. Gregory* (2006) 137 Cal.App.4th 798, 806, "'[t]he distinction [between judicial and administrative proceedings] may be an empty one, since Berman hearings are reviewed de novo in superior court at [the] request of either party[,]'" and in a superior court de novo trial, the common law would presumably apply, "leaving the IWC's definitions ultimately unenforceable even in proceedings that begin as Berman hearings." (*Martinez*, 49 Cal.4th at 65-66.)

Regulation 13520 is not deserving of that deference. (See *Yamaha Corp. of America v. State Board of Equalizatio*n (1998) 19 Cal.4th 1, 7.)

b. Section 226.3 Is Not a Corollary to Regulation 13520 and Does Not Define Section 226(e)'s "Knowing and Intentional" Standard.

Naranjo also argues that Section 226.3, which addresses availability of civil penalties for specified wage statement infractions, is a corollary of some sort to Regulation 13520 and informs the meaning of the "knowing and intentional" standard in Section 226(e). (OBM at 25-26.)[14] Naranjo then posits that, because the Labor Commissioner (or a court in a PAGA action) can supposedly only consider whether a clerical error or inadvertent mistake occurred in assessing civil penalties under Section 226.3 for a first violation of Section 226(a), this necessarily means that inadvertence is all a superior court can

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[14] Labor Code § 226.3 provides: "Any employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars ($250) per employee per violation in an initial citation and one thousand dollars ($1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the records required in subdivision (a) of Section 226. The civil penalties provided for in this section are in addition to any other penalty provided by law. In enforcing this section, the Labor Commissioner shall take into consideration whether the violation was inadvertent, and in his or her discretion, may decide not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake."

consider in assessing whether to impose statutory penalties under Section 226(e), such that a good faith dispute defense cannot apply. (OBM at 25-26.)

But contrary to Naranjo's argument, there is no wording in Section 226.3 stating that it defines the penalty provision in Section 226(e), like there is in Regulation 13520 linking it expressly to "willful" in 203. In fact, neither "knowing and intentional" nor subdivision (e) of Section 226 are even mentioned in Section 226.3, making Naranjo's argument untenable from the start. Section 226.3, added to the Labor Code in 1979 (per Stats. 1979, ch. 1050 § 3), references only 226(a), not 226(e).[15]

In addition, the conclusion Naranjo seeks to draw (that Section 226.3 operates to effectively change "knowing and intentional" in Section 226(e) to "not inadvertent") is without support when the statutory language of Sections 226(e) and 226.3 are compared. The two statutes reflect different language, applicable in different contexts, and govern different types of penalties. (See *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 679-80 [explaining the distinction between the statutory penalty in 226(e), and the civil penalty in 226.3, and noting that "226.3 clearly does not include the knowing and intentional requirement of section 226(e)."].)

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[15] The phrase "this section" in the statutory language from Section 226.3 that Naranjo block quotes at OBM pp. 25-26 (and repeats at OBM p. 37) is plainly a reference to Section 226.3 itself, *not* Section 226, despite the impression Naranjo tries to create in its introductory sentence. (See full text of statute in prior footnote, *supra*.)

Finally, Naranjo is wrong in his assertion that "only" clerical errors or inadvertent mistakes can excuse liability for civil penalties under Section 226.3. (OBM at 26.) As the court confirmed in *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal.App.4th 75, liability may also be excused even under Section 226.3 where the "legal requirements of the [wage statement] statute were unclear or unsettled" at the time of the violation. (*Id.* at 88; see also *Raines*, *supra*, 23 Cal.App.5th at 681 ["trial court has discretion in awarding civil penalties"].)

In sum, Sections 226(e) and 226.3 reflect different language applicable to different claims and remedies. The link Naranjo urges is without support in the statutory wording.

c. The Legislature Commonly Uses "Willful" and "Intentional" Interchangeably, as Synonyms.

Naranjo argues the phrase "knowing and intentional" must mean something different than the word "willful" and that a good faith dispute defense cannot apply because the Legislature used "knowing and intentional" only once in the Labor Code, yet the Labor Code makes repeated references to "willful" conduct. (OBM at 32.)[16] While it is true "willful" enjoys more common usage in the Labor Code, the Legislature uses a host of different scienter terms and phrases in the code, including: "willful or intentional" (§§ 210(a)(2), 225.5(b)), "willfully and knowingly" (§

[16] In fact, "knowingly and intentionally" is used in Labor Code § 226.6, which makes it a misdemeanor to violate § 226.

6311.5), "willingly and knowingly" (§ 1021.5), "knowingly and willfully" (§§ 1695.7(c)(3), 6396(c)), "knowingly or intentionally" (§ 6404.5(c)-(d)) and "intentional" or "intentionally" (e.g., §§ 432.7(c), 1197.1). And some statutes contain no scienter element at all (e.g., § 226.7). That the Legislature has used "knowing," "intentional" and "willful" interchangeably in the Labor Code serves to confirm that "knowing and intentional" and "willful" are effectively synonyms, just as the Court of Appeal here concluded. (*Naranjo III*, 88 Cal.App.5th at 950.)

Further, rather than adopt meanings for the scienter requirements in Sections 203 and 226 that are at odds with one another, California statutory rules point to adoption of "the construction that best harmonizes the statute internally and with related statutes." (*People v. Superior Court (Zamundio)* (2000) 23 Cal.4th 183, 192-93; see also *Oman, supra*, 610 F.Supp.3d at 1275 [applying the same principle and concluding that both §§ 203 and 226 include a good faith dispute defense].)

Spectrum acknowledges that *Gola* found the words "knowing and intentional failure to comply" to be "significantly different" than the words "willful failure," and held it precluded application of a good faith dispute defense. (*Gola,* 90 Cal.App.5th at 567 ["Unlike section 203, the Legislature did not use the word 'willful' in section 226, subdivision (e)(1); instead, it chose the words 'knowing and intentional,' indicating a different scienter

test."].) But *Gola*'s conclusion is difficult to reconcile with the accepted definitions of the words themselves.[17]

Sections 203 and 226(e) also were enacted four decades apart, undermining application of the statutory rule on which the *Gola* court sought to rely. (See *Busker v. Wabtec Corp*. (2021) 11 Cal.5th 1147, *973 [principle that different statutory words must indicate different intended meanings is only applicable to "contemporaneously enacted, adjoining subdivisions of a statute"].) Apparently recognizing the shaky ground for its conclusion, the *Gola* court went on to address the merits of the University's good faith dispute defense, noting the trial court found it unsupported by substantial evidence, which provided an alternative basis to affirm. (90 Cal.App.5th at 567.)

C. Naranjo Failed to Meet His Burden to Show Spectrum's Omission of Meal Period Premiums and "Credited" Hours Worked Was a "Knowing and Intentional" Failure to Comply with 226.

Naranjo failed to meet his burden to prove that Spectrum's omission of unpaid meal period premiums and "credited" hours worked on wage statements during the pre-October 2007 class period was a "knowing and intentional failure to comply" with Section 226. First, the evidence and procedural history of this case confirm that Spectrum did not know it had to pay meal period premiums to its officers until after a summary judgment win, an appeal, a trial, and a further appeal, all culminating in

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[17] Black's Law Dictionary explains that "[i]n common parlance, 'willful' is used in the sense of 'intentional.'" (*Black's Law Dictionary* (11th ed. 2019).)

2019, and therefore could not have intentionally failed to comply during the class period. Second, Spectrum also did not know until the 2022 *Naranjo* decision that an unpaid meal period premium was "wages earned" (or that the associated "credited hour of work" was actual "hours worked") that had to appear on wage statements.

The Court of Appeal found that both these reasons operated to defeat the Section 226 claim and therefore reinstated its original judgment on appeal. (*Naranjo III*, 88 Cal.App.5th at 951-52 and fn.8.) The Court of Appeal's analysis was correct legally, logically, and as a matter of basic fairness.

1. Spectrum Did Not Know It Was Required to Pay Meal Period Premiums Until Twelve Years After the Class Period Ended, Following Resolution of Its Defenses Over the Course of Two Appeals and a Trial.

Spectrum initially defeated Naranjo's meal period claim on federal preemption grounds. (*Naranjo I,* 172 Cal.App.4th at 660.) After that ruling was reversed on appeal in *Naranjo I*, Spectrum offered evidence at trial that: (a) it was not required to comply with California meal period requirements because it contracted exclusively with federal agencies to supply officers to work alongside federal correctional officers on federal land, or, alternatively, (b) its on-duty meal period policy, signed by officers, was substantially compliant with the requirements for a paid on-duty meal period agreement. It was only when the trial court rejected these arguments and that ruling was affirmed on

appeal in 2019 that Spectrum knew it owed officers meal period premiums. (9-JA-1981-1991; *Naranjo II*, 40 Cal.App.5th at 463.)

Spectrum acknowledges Oden's testimony that he never, prior to the lawsuit's filing, read Wage Order 4. (9-JA-1989-90.) But Wage Order 4 does not resolve the issue, even if he had read it, because it does not address whether the meal period premium was an "earned wage" that must appear on wage statements. That question was not settled until this Court's 2022 *Naranjo* decision.

Further, Oden testified he thought Spectrum was in compliance with applicable rules. (12-RT-5438-5439.) He explained it was industry practice to provide on-duty meal periods to officers given the nature of the work. (12-RT-5422-5427.) "We guard federal prisoners….Obviously, the nature of the work is such that [the officers] must take an on-duty meal period….They can't walk away." (12-RT-5435.) Further, Oden had neither received complaints from Spectrum's officers, nor contradictory feedback from the government agencies with which Spectrum contracted. (12-RT-5427; 5429; 5438-5439.)

The first time Oden was aware of any issue was when Naranjo's lawsuit was filed, at which time he read Wage Order 4. (12-RT-5431.) Because Spectrum's officers were not unarmed security guards protecting property, but instead performed work pursuant to federal contracts guarding federal prisoners and detainees, Oden did not agree that Wage Order 4 even applied to Spectrum's correctional services. (12-RT-5431-5434.) And, even if Wage Order 4 did apply, Oden perceived that Spectrum was in

compliance with the requirements for written and revocable on-duty meal period agreements, given that the nature of officers' work required continuous control over prisoners, that officers' were paid for their meal periods, and the fact that officers signed acknowledgements of Spectrum's on-duty meal period policy, which permitted officers' to refuse to work a shift if they did not want an on-duty meal period. (2-JA-370 [Wage Order 4]; 12-RT-5434-5438.)

Wage Order 4 also does not address the federal contractor issues, or whether premium pay is an earned wage that must be listed on wage statements, or whether "credited hours" must be listed on wage statements. While the trial court and the Court of Appeal ultimately found that Spectrum's pre-October 2007 employment documents did not constitute compliant on-duty meal period agreements (*Naranjo*, 40 Cal.App.5th at 463), Oden, in good faith, believed they did. (12-RT-5438-5439.)

Based on this evidence, it is clear that Spectrum did not know until after trial and the 2019 appeal that meal period premiums were owed, and that it did not intentionally fail to comply with the requirement to list all wages earned on wage statements. Rather, Oden believed Spectrum was in compliance with both meal period and wage statement requirements, beliefs which the procedural history of the case confirm were objectively reasonable. While Spectrum turned out to be wrong, its error results in liability for the unpaid meal period premiums, not for added wage statement penalties, which are only imposed when there is a "knowing and intentional failure to comply," together

with a resulting injury. (Lab. Code § 226(e); cf. *Amaral,* 163 Cal.App.4th at 1209 ["[T]he employer cannot be presumed to be aware that its continuing underpayment of employees is a 'violation' subject to penalties. However, after the employer has learned its conduct violates the Labor Code, the employer is on notice that any future violations will be punished just the same as violations that are willful or intentional…."].)[18]

The trial court found that Spectrum's federal defenses, while not ultimately successful, were nonetheless "presented in good faith and were not unreasonable or unsupported by the evidence." (9-JA-1991.) These defenses would have "defeated plaintiffs' claims in their entirety" (*ibid.*), including as to Labor Code sections 203, 226 and 226.7.

The Court of Appeal found in *Naranjo III* that Naranjo forfeited his substantial evidence challenge to the court's good faith finding by failing to attack any of the evidence in support. (88 Cal.App.5th at 946-47.) Additionally, and contrary to Naranjo's suggestion at OBM p.10, the court also independently reviewed the record from Phase I and confirmed there was substantial evidence supporting the good faith finding. (*Id*. at 947-48.) Spectrum's good faith dispute based on its Phase I defenses alone precludes both a "willfulness" finding under 203 and a "knowing and intentional" finding under 226.

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[18] After Naranjo's complaint put Spectrum on notice of potential deficiencies in its on-duty meal agreement, it revised its agreement effective October 1, 2007. (12-JA-2726 [Memo 33]; *Naranjo II*, 40 Cal.App.4th at 460-63.) The jury found this new agreement was compliant, a finding affirmed on appeal. (*Ibid*.)

2. Spectrum Also Did Not Know, Until *Naranjo* in 2022, that Unpaid Meal Period Premiums Were "Wages Earned," and Credited Hours Were "Hours Worked," Both of Which Had to Appear on Wage Statements.

In addition, Spectrum also could not possibly have both known and intentionally failed to comply with the requirement that an unpaid meal period premium appear on a wage statement during the class period because this requirement was not settled until this Court's *Naranjo* decision in 2022, long after the class period ended.

Both California and federal courts have recognized that, where the law is unsettled or uncertain, an employer's failure to comply is excused. (See *Barnhill*, *supra*, 125 Cal.App.3d at 8-9 [no "willful" failure under § 203 where law was uncertain as to whether employer could "set off" unpaid balance of employee's debt and employer made a good faith effort to arrive at a reasonable conclusion as to how the law should be applied]; *Amaral*, 163 Cal.App.4th at 1194-96, 1201-04 [interpreting §§ 203 and 226 as both containing "a 'willfulness' component" and affirming trial court finding that there was no willfulness where the legal obligation imposed on employers by city's living wage ordinance was "unclear" at time of violation]; *Diaz*, *supra*, 23 Cal.App.5th at 868 [employer's failure to pay under § 203 "is not willful if that failure is due to [] uncertainty in the law"]; *Vaquero v. Ashley Furniture Industries, Inc.* (C.D. Cal. 2017) 2017 WL 11635075, at **7-8 [good faith dispute recognized where "California law was not clearly settled on the issue of whether

non-sales tasks must be compensated separately from commissions"; §§ 203 and 226 penalties denied]; *Saini, supra,* 2017 WL 1536276, at *12 [granting employer summary judgment on § 226 claim where the "existence of conflicting case law" demonstrated that any such failure to provide accurate wage statements was not "knowing and intentional"].)

Here, the law regarding whether meal period premiums are "wages earned" to be included on wage statements was unsettled until 2022. Not only was there a split in the Courts of Appeal[19] and in the federal courts,[20] there were also mixed decisions from this Court. (Compare *Murphy,* 40 Cal.4th 1094, 1114 [§ 226.7 premium pay was a "form of wages," not a penalty, for purposes

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[19] See, e.g., *Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242, 1261 (that a meal period premium "is measured by an employee's hourly wage does not transmute the remedy into a wage"), disapproved in *Naranjo*, 13 Cal.5th at 113; *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 381 (meal and rest period premiums are "in the nature of a statutory penalty because it requires the employer to pay more than the value of the missed meal or rest period"), disapproved in *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 196 fn.8.

[20] See, e.g., *Jones v. Spherion Staffing LLC* (C.D. Cal. 2012) 2012 WL 3264081, **8-9 (legal violation underlying § 226.7 is not the non-payment of wages); *Singletary v. Teavana Corp*. (N.D. Cal. 2014) 2014 WL 1760884, *4 ("the wrong at issue in Section 226.7 is the non-provision of rest breaks, not a denial of wages"); *Pulido v. Coca-Cola Enterprises, Inc.* (C.D. Cal. 2006) 2006 WL 1699328, at *4 (meal and rest period premiums are a penalty, and not wages, consistent with the DLSE's position on this issue).

of statute of limitations];[21] with *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1251 ["[A] section 226.7 claim is not an action brought for nonpayment of wages" for purposes of fee shifting under Lab. Code § 218.5].) The DLSE, the state agency charged with enforcing the Labor Code, also took the position that a meal period premium was not a wage. (See *Hartwig v. Orchard Commercial, Inc.* (2005) (Cal. Div. Labor Stds. Enforcement, May 11, 2005, No. 12–56901RB) [as of November 21, 2005] [designated a DLSE "precedential decision," and finding Section 226.7 payment a penalty because its purpose is to enforce the meal and rest period requirements and deter noncompliance rather than to compensate the employee].)[22] It took this Court's decision in *Naranjo* in 2022 to finally resolve this "confusion." (13 Cal.5th at 104.)

Further, even if a wage, it was unclear until 2022 whether a meal period premium was "earned," and also unclear that an amount that was *not paid* would trigger the requirements of Section 226. On the contrary, one might naturally think that a wage statement that omits unpaid amounts *is accurate* and of use to an employee.

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[21] *Murphy* issued April 16, 2007, and became final May 16, 2007, only three weeks before Naranjo filed his complaint on June 4, 2007.

[22] The DLSE's attempt to designate the opinion "precedential" was subsequently ruled invalid in *Corrales v. Bradstreet* (2007) 153 Cal.App.4th 33, 51. (See also *Murphy*, 40 Cal.4th at 1106, fn.7 (discussing *Hartwig* and observing that "the DLSE's interpretation of section 226.7 has not been consistent").

The conduct at issue here during the June 4, 2004-September 30, 2007 class period occurred long before this Court's guidance on these issues. Spectrum could not have *known* that a meal period premium was an earned wage that, even if unpaid, had to appear on wage statements, and *intentionally fail to comply* with a requirement not yet articulated. That is what the right to due process protects. It is fundamentally unfair to charge Spectrum with knowledge of unclear law and an intentional failure to comply. (See *City of Ontario v. Superior Court* (1970) 2 Cal.3d 335, 345-46 [recognizing that an "honest and reasonable mistake of law" on an issue "complex and debatable" constitutes "good cause for relief from default under [Code Civ. Proc.] section 473"]; *McCormick v. Board of Supervisors* (1988) 198 Cal.App.3d 352, 362-63 [granting Code Civ. Proc. § 473 relief where statute was ambiguous; "where the law is not yet established attorneys cannot be expected to be omniscient."].)

This reasoning applies equally to Spectrum's omission of the associated "credited hour of work" from wage statements. In *Naranjo*, this Court found that Spectrum's wage statements suffered from two infirmities: (1) the omission of meal period premiums as "wages earned" on the statements; and (2) the failure to list the associated "credited hour of work" as "hours worked" on the statements. (*Naranjo*, 13 Cal.5th at 121; cf. Wage Order 4-2001(2)(K) [defining "hours worked"].)

This latter requirement—that employers must list "credited" hours as "hours worked"—was an entirely new concept

first articulated in 2022 in *Naranjo*. (13 Cal.5th at 121.) As such, Spectrum could not have known of this requirement and intentionally failed to comply.[23] Here, the actual time worked during the on-duty meal period—a half hour—was accurately reflected on Spectrum's wage statements even if the correct rate of pay—the 226.7 premium pay—was not.

In sum, Spectrum issued wage statements to officers that contained all items specified by Section 226(a). It even paid officers for their on-duty meal periods, time that was not compensable absent a valid on-duty meal period agreement (see Wage Order 4-2001(11)(A)), and it listed that pay and those hours worked on the wage statements. (12-RT-5440; *Naranjo II*, 40 Cal.App.5th at 472, fn.10.) What Spectrum did not do was comply with requirements articulated by this Court long after the conduct at issue. In effect, Naranjo's Section 226 claim is based not on failure to comply with existing law during the class period, but on failing to accurately predict how the unsettled law would ultimately be resolved by appellate courts. Such conduct cannot fairly be deemed a "knowing and intentional failure to comply" with Section 226.

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[23] Naranjo also never alleged the wage statements were inaccurate due to incorrect "hours worked," nor did the trial court make that finding. (9-JA-1989-1990.)

V. Conclusion

The Court of Appeal's decision reversing the trial court's Section 226 ruling and reinstating its original 2019 disposition should be affirmed.

Dated: September 8, 2023

DUANE MORRIS LLP

By: */s/ Paul J. Killion*
Robert D. Eassa
*Paul J. Killion
Eden E. Anderson
Sarah Gilbert

Attorneys for Defendant and Appellant

SPECTRUM SECURITY SERVICES, INC.

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Dated: September 8, 2023

/s/ Paul J. Killion
Paul J. Killion

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Jason Marsili Rosen Marsili Rapp LLP 233980	jmarsili@rmrllp.com	e-Serve	9/8/2023 12:47:58 PM
Rosemary Pereda Duane Morris	RPereda@duanemorris.com	e-Serve	9/8/2023 12:47:58 PM
Eden Anderson 233464	eeanderson@duanemorris.com	e-Serve	9/8/2023 12:47:58 PM
Sarah Gilbert	sagilbert@duanemorris.com	e-Serve	9/8/2023 12:47:58 PM
Howard Rosen 54442	hzrosen@rmrllp.com	e-Serve	9/8/2023 12:47:58 PM
Brianna Primozic	brapp@rmrllp.com	e-Serve	9/8/2023 12:47:58 PM

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Duane Morris

Law Firm