CASE NO. S238941

IN THE SUPREME COURT OF CALIFORNIA

SHARMALEE GOONEWARDENE, AN INDIVIDUAL,

PLAINTIFF AND APPELLANT

v.

ADP, LLC et al;

DEFENDANTS AND RESPONDENTS

Second Appellate District Division Four B267010
Los Angeles Superior Court Case No. TC 026406
Hon. William Barry, Presiding

RESPONDENT'S OPPOSITION TO OPENING BRIEF

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INTRODUCTION

Plaintiff's allegations against the Petitioner, payroll-service provider ADP, are aptly summarized at *Goonewardene v. ADP, LLC (2016) 5 Cal.App.5th 154, 164-165*. In a careful and well-reasoned decision three court of appeals' justices unanimously held that Plaintiff employee can under the circumstances of the case maintain causes of action against the payroll-service provider ADP, for negligence, negligent misrepresentation, and on a third party beneficiary theory. ADP's allegation that lines of responsibility are somehow blurred by holding, essentially, that ADP & other payroll service providers are not immune for their negligent conduct, stems from Defendants' failure to comprehend the interrelationships between the applicable legal principles. In a unanimous decision the court of appeal implicitly rejected Defendants' claim that the Labor Code provides the exclusive remedy for all claims that in some way relate to the payment of wages. According to its own terms, the Labor Code only provides exclusive remedies in the area of workers' compensation. Defendants' unwillingness to accept this conclusion has resulted in a brief containing dozens of references to the Labor Code, where contract and tort law principles are at issue.

Appellate Opinion/The Factual Basis For The Third-Party Beneficiary Claim

The Court of Appeal held that "When an employer enters into a contract with a service provider by which the provider is to take over the employer's payroll

tasks, including the preparation of the payrolls themselves, the employees constitute third party creditor beneficiaries of the contract between the employer and service provider" *Goonewardene v. ADP, LLC (2016) 5 Cal.App.5th 154, 173.*

Applying this statement of the law to the facts, the court accurately noted, "The gravamen of its allegations is that Altour engaged ADP to discharge Altour's wage-related legal duties to its employees, that is, Altour's obligations under the Labor Code and applicable wage orders to accurately calculate employees' wages, fully distribute those wages in a timely manner, and provide employees with accurate earnings statements", *Id.*

The 6AC alleges that ADP, in its advertising, "expressly offers to partner with employers for their mutual benefit and for the benefit of employees." The 6AC further alleges that "Altour and ADP entered into an unwritten contract whereby ADP provided payroll calculation, records maintenance, legal advice and a host of related services to Altour for the benefit of Altour and its employees in the general area of employee wages and benefits." In this regard, the 6AC contains specific allegations that ADP provided services directly to Altour employees. The 6AC alleges that under the agreement, ADP added the hours on appellant's time cards, calculated her earnings, and provided her with earnings statements in connection with her compensation. Additionally, ADP allegedly was responsible for determining whether appellant was to receive overtime or double time in

accordance with applicable labor laws. The 6AC thus alleges that Altour employees such as appellant are, at a minimum, third party creditor beneficiaries of the unwritten agreement.", *Id.*

"The 6AC further alleges that ADP breached its contractual obligations relating to Altour's wage-related duties to appellant, and that appellant suffered damages as a result...the 6AC asserts that appellant was denied full compensation because ADP repeatedly failed to determine that she was owed overtime or double time pay, and otherwise provided inadequate earnings statements. Regarding these matters, the 6AC expressly attributes some of that alleged misconduct to ADP's own errors and misapplication of the applicable wage orders, rather than to mistakes in earnings data transmitted by Altour. Appellant has thus stated a breach of contract claim against ADP as a third party creditor beneficiary", *Id at 174.*

PLAINTIFF'S THIRD-PARTY BENEFICIARY CLAIMS

1. Supreme Court Treatment of Third-Party Beneficiary Claims in Similar Context

In *Martinez v. Combs (2010) 49 Cal.4th 35, 77* the Court simply found that the third-party beneficiary claim asserted had "no factual basis", and that "[n]othing in the rules of law concerning third party beneficiaries permits us to rewrite the contract to impose on Apio [the promisor] an obligation to pay wages

that it never undertook." The Court did not find that such claims were barred as a matter of law.

2. Donee and Creditor Beneficiaries

In California third party beneficiaries are categorized as either creditor beneficiaries or donee beneficiaries. *Unite Here Local 30 v. Department of Parks & Recreation,194 Cal.App.4th 1200 (2011)* [citing *Martinez v. Socoma Companies, Inc. (1974) 11 Cal.3d 394, 400*] The court of appeal found that Plaintiff was a creditor beneficiary. As ADP's payment would "discharge some form of legal duty owed to the beneficiary [employee] by the promisee [Altour], the categorization is obviously correct.

The effect of such a designation, it seems, is to make it more likely that a third-party beneficiary claim is valid. While the intention to benefit a donee beneficiary may not be evident from a recitation of the promisor's obligations, it is more likely that, where the promisee seeks to discharge an obligation to a creditor, the promisor will be aware of that intention. See *Isbrandtsen Co. v. Local 1291 of International Longshoremen's Ass'n (1953) 204 F.2d 495*: "Williston, Corbin, and the Restatement make a distinction between donee and creditor beneficiaries in this regard; 'intent to benefit' should be an operative factor only in the case of donee beneficiaries. Restatement, Contracts, § 133; Williston, op. cit. supra, § 356A; Corbin, op. cit. supra, §§ 776-777."

3. 'Intent' in Third-Party Beneficiary Claims

Martinez v. Combs, supra at 77, a case with somewhat similar facts, cites *Hess v. Ford Motor Co. (2002) 27 Cal.4th 516, 524* and Civ.Code, § 1559 for guidance regarding the intent analysis. *Hess* however involves the interpretation of a written agreement and reiterates rules for interpreting written agreements.

The standard test for a third-party beneficiary was stated in *Spinks v. Equity Residential Briarwood Apartments (2009) 171 Cal.App.4th 1004* as follows: [T]o be an express third party beneficiary, a person "'need not be named or identified individually,'" as it is sufficient that the contract shows he or she "'is a member of a class of persons for whose benefit it was made.'"

Given that the parties are presumed to intend the consequences of the performance of the contract, *Johnson v. Holmes Tuttle Lincoln–Merc. (1958) 160 Cal.App.2d 290, 297,* it is clear that the intent in this case includes providing Plaintiff and her co-workers with the benefit of accurate wage statements and properly calculated pay. While the agreement was oral, no such agreement could be articulated without specific reference to employees as comprising the class of beneficiaries. While there is always room for artful phrasing and argument as to 'the consequences' of performance, a natural and obviously correct phrasing here is that 'the consequences include Altour's relief from performing payroll tasks and the employees' receipt of earnings statements and wages.' An equally useful test

appears in *Chung Kee v. Davidson, (1887) 73 Cal. 522, 525-526*, "It is not necessary that the parties for whose benefit the contract has been made should be named in the contract. It must appear, however, *by the direct terms* of the contract, that it was made *for the benefit* of such parties" (emphases added). Any agreement between ADP and Altour must involve preparing earnings statements *for employees*. The emphasis on 'direct terms' seems apt, as it will be the rare case that an incidental beneficiary is identified in the terms of the agreement.

ADP counsel typically refers to the intent of the parties generally, though the only legally relevant question is *Altour's* intent. "Corbin states: "In third party cases, the right of such party does not depend upon the purpose, motive, or intent of the promisor." (9 Corbin on Contracts (2002) § 776, p. 14.)", *Souza v. Westlands Water Dist. (2006) 135 Cal.App.4th 879*. "Insofar as intent to benefit a third person is important in determining his right to bring an action under a contract, it is sufficient that the promisor must have understood that the promisee had such intent," *Lucas v. Hamm, 56 Cal.2d 583, 591 (1961), [*citing Rest., Contracts, 133, subds. 1(a) and 1(b); 4 Corbin on Contracts (1951) pp. 16-18; 2 Williston on Contracts (3d ed. 1959) pp. 836-839].

ADP is not suitably positioned to make arguments regarding Altour's intent, particularly on demurrer and in violation of well-established rules for evaluating a pleading, though in any event it is Plaintiff's impression from discovery

propounded to Altour that in making the agreement Altour to provide a benefit to Altour employees, and that Altour faulted ADP for failing to provide such a benefit. Moreover, ADP of course realizes that Altour is required by law to compensate employees for their labor, and to provide earnings statements. There are always many ways to describe an intention, in varying degrees of detail and scope. Though even accepting arguendo a contrived phrasing that 'Altour only intended to benefit itself', any company benefits from paying its employees in a manner required by law and the intention necessarily includes providing benefits to employees.

Even under the Restatement Second of Contracts, "which is not binding", *Lake Almanor Associates LP v. Huffman-Broadway Group, Inc., 178 Cal. App. 4th 1194, fn. 2; fn.3* a third party will qualify as an intended beneficiary where "the circumstances indicate that the promisee…intends to give the beneficiary the benefit of the promised performance." *Spinks. supra at 1023, citing Rest.2d., supra, § 302(1)(b), p. 440.*

The court of appeal correctly, perhaps even obviously, correctly applied the law as it pertains to third-party beneficiaries.

The same result can also be reached from an analysis of the concept of intent, "`Intent, in its legal sense, is quite distinct from motive. It is defined as the purpose to use a particular means to effect a certain result. Motive is the reason

which leads the mind to desire that result.'" *Hamill v. Maryland Cas. Co., 209 F.2d 338 (1954).* Altour employed ADP to provide earnings statements and wage calculations for Altour employees; therefore Altour intended that its employees would received this benefit.

Defendants' critique rests in part on the validity of the Third-Party Beneficiary Doctrine itself: "The problem thus becomes one of line-drawing" OB p. 22; "The First Restatement's "donee" and "creditor" classifications became "the subject of severe criticism primarily for being misleading because of the overlap and difficulty in classification in many cases", OB p. 24. This is not such a case, and it not necessary to re-write the law of third-party beneficiaries to reach the correct result in this case, as Plaintiff is a third-party beneficiary by any of the common statements of the law.

Defendants cite a 25 year old essay, M.A. Eisenberg, Third-Party Beneficiaries (1992) 92 Colum. L. Rev. 1358, 1378, for the proposition that "some cases *impose a requirement* that an intent to benefit the third party be "clear," "express," or "definite," and some require that an intent to benefit the third party be found in the language of the contract itself", OB p. 26 (emphasis added).

The Eisenberg essay reviews approximately a dozen California cases, none more recent than 1983, dealing with wills, government contracts, construction

contracts, public utilities, HUD tenants, Federal Economic Opportunity claimants, and life insurance. Not a single case relates to the payment of wages.

The cases cited above demonstrate third-party beneficiary law does not require an express intent to benefit in California. There is a difference between a court 'imposing a requirement', and providing a reason for its holding and Plaintiff doubts the characterization is accurate at all. Though this is a tangential point; what is important is that California has no such requirement, having sensibly replaced such formalisms in favor of contextualized analyses.

ADP counsel admits that "ascertaining intent requires not only close scrutiny of contract terms but consideration of surrounding circumstances and course of performance", page 34, simultaneously criticizing the established judicial standards while acknowledging the need for them.

In violation of an agreement between counsel the ADP Defendants refused to produce any documents in the discovery that occurred while the demurrer was pending, though refer to the allegations of the 6th AC--incorporated by the court of appeal into its analysis and sufficiently detailed to warrant the holding--as "glib, nonspecific allegations of an unwritten contract", OB p. 27.

New Right/New Remedies

Conflating the new rights/new remedies doctrine with the economic loss doctrine, ADP counsel avers, "A breach of the statutory obligation is a breach of

contract that will not support tort damages beyond those contained in the statute", OB p. 15. The principles applicable to tort recovery in a contract setting are discussed below. The new rights/exclusive remedy doctrine traces back at least as far as *Russell v. Pacific Ry. Co. (1896) 113 Cal. 258*. The doctrine has undergone slight modifications since that time; a recent and Plaintiff believes accurate expression by the California Supreme Court, slightly weakening the rule may be found in *Rojo v. Kliger (1990) 52 Cal.3d 65, 79*: "As a general rule, where a statute creates a right that did not exist at common law and provides a comprehensive and detailed remedial scheme for its enforcement, the statutory remedy is exclusive." The court in *Brewer v. Premier Golf Properties (2008) 168 Cal.App.4th 1243* stated the rule as 'the remedy provided in the statute 'is exclusive of all others unless the statutory remedy is inadequate.' In *Orloff v. Los Angeles Turf Club (1947) 30 Cal.2d 110, 112–113,* the Court analyzed the rule as follows: "The only basis for holding that such an exclusion was intended, would be an assumption by this court that other remedies are excluded, or the drawing of an inference to that effect by reason of some rule of statutory construction. The rule of statutory interpretation here invoked is a corollary of, a consequence flowing from, or a specific application of, the general common-law rule of statutory construction that statutes in derogation of the common law will be strictly construed." There are of course competing rules of construction.

Here the new rights question can be approached two ways: 1) did the legislature intend that Labor Code 226 would provide the exclusive remedy for all misstatements of an employee's wage and hour calculations, or 2) would a cause for negligent misrepresentation have arisen at common law against an employer or payroll contractor for misstating information relating to rate of pay and hours worked?

As regards the first question, the Court "must harmonize the various parts of the enactments by considering them in the context of the statutory framework as a whole", *People v. Cole (2006) 38 Cal.4th 964, 974-975*. Taking the Labor Code as a whole as comprising the relevant enactments, it is beyond question that the legislature wrote an exclusive remedies provision in the Labor Code only with regard to worker's compensation actions.

As regards the second question, the court of appeal answered the question of whether liability for misstatements and inaccurate pay would result in ADP liability at common law by providing an analysis relying on common law tort principles. There is also no question but that the right to receive accurate pay predates the Labor Code, and that the Labor Code does not provide the exclusive remedies for unpaid wages, *Cortez v. Purolator Air Filtration Prods. Co., 23 Cal.4th 163 (2000)*. Defendant mischaracterizes the holding of *Grodensky v. Artichoke Joe's Casino (2009) 171 Cal.App.4th 1399* as "Labor Code provides

exclusive remedy for wage-and-hour violations" *OB p. 20.* In *Grodensky* the court merely stated "While we are not aware of any California cases on point, federal courts have held that the Labor Code provides a comprehensive and detailed remedial scheme that provides an exclusive statutory remedy." The statement is in any event incorrect and in Plaintiff's view part of a pattern of the erroneous application of California labor law principles in federal court. *Grodensky* was rejected by *Lu v. Hawaiian Gardens Casino, Inc. 2010 50 Cal.4th 592, 603-604*, in which the Court stated, in a circumstance where the statute did not provide a private cause of action, "we see no apparent reason why other remedies, such as a common law action for conversion, may not be available *under appropriate circumstances*. [citations] (*emphasis added*). The general assumption should be that the legislature does not write legislation with a goal of eliminating common law remedies.

Cortez is clear that a right of action for unpaid wages has its origins in common law An action to receive an accurate accounting rests on a corollary right. In California the tort of negligent misrepresentation dates back at least to 1931, *Washington Lumber and Millwork Co. v. McGuire, 213 Cal. 13*, 6 years before the enactment of the Labor Code. ADP's cite to *Brewer* is not on point; whether the Labor Code created new meal and rest break rights has nothing to do with a right to accurate wage payment.

ADP's Other Arguments Point by Point

1. ADP argues that ADP cannot 'discharge' Altour's obligations, and therefore Plaintiff cannot be a creditor beneficiary, OB p. 28. The most common definition of 'discharge' is to remove a burden, and, had ADP acted responsibly, it would have relieved Altour of the burden of the obligation, as a matter of fact, if not any legal obligation. ADP's overly technical argument also assumes that, if Plaintiff cannot be categorized as a donee or creditor beneficiary, she cannot be a third-party beneficiary at all--even where there the requisite intention is shown. See David M. Summers, Third Party Beneficiaries and the Restatement (Second) of Contracts, 67 Cornell L. Rev. 880, 884 (1982) ("The inadequacies of the categorical approach prompted a varied judicial response. Some courts interpreted the categories restrictively; other courts allowed third party recovery despite the categories, oftentimes to achieve an equitable result"). Even were ADP correct, the Court could simply be to treat Plaintiff as a donee beneficiary, or adopt the second Restatement view and focus directly on intent in all cases.

2. ADP asserts, "The 6AC alleges that ADP provides "services" that assist Altour with wage payments and statements", and that the "allegations are *not* that ADP discharges, or renders substitute fulfillment, of Altour's wage-and-hour duties", OB p. 29. The concept of 'substitute fulfillment' is a product of Defendants' own judicial philosophy, unsupported by case law. The argument should be regarded as

forfeited for **lack of *any* citation to legal authority**; see *In re S.C. (2006) 138 Cal.App.4th 396, 408; Atchley v. City of Fresno (1984) 151 Cal.App.3d 635, 647* ; see also *Kensington Rock Island L.P. v. American Eagle Historic Partners, 921 F.2d 122, 124-25 (7th Cir. 1990)* (referring to argument made in a 'perfunctory and underdeveloped' manner). Though in either event further amendment adding a claim that ADP agreed to discharge Altour's obligations in fact, would cure any such pleading defect.

3. In an attempt to fix a misleading picture in the minds of the Court, on six separate occasions Defendants assure the court that ADP does nothing more than perform 'a ministerial task' in providing payroll services; OB pp. 7, 30, 32, 45, 47, 51. The actual quote from *Futrell v. Payday California, Inc., (2010) 190 Cal.App.4th 1419, 1432,* is "The preparation of payroll is largely a ministerial task, albeit a complex task in today's marketplace", along with a reference to "ministerial tasks of calculating pay and tax withholding". The question in Futrell was whether the Defendant had enough responsibility for wages to be held liable as an employer or on a principal-agent theory. Holding a Payroll-Service Provider ("PSP"), even one performing 'ministerial tasks', liable on a third-party beneficiary theory is entirely compatible with Futrell.

Moreover, the statement 'preparation of payroll' perhaps suggests nothing more than addition, multiplication, and check-printing. Plaintiff does not believe,

and did not allege, that ADP's duties are so limited. Calculating pay under the FLSA and Labor Code requires an understanding of overtime rules under various IWC orders, as well as regular rate under the FLSA and CFR. The task is so difficult that, in Plaintiff's view, the rules of calculation are stated inaccurately more often than not. See, e.g., US DOL/Wage & Hour Division Fact Sheet #54 https://www.dol.gov/whd/regs/compliance/whdfs54.htm: "A common error in calculating overtime pay by health care employers involve the failure to include bonuses, shift differentials and other types of compensation in the regular rate of pay." To the extent that it is obliged to perform regular rate calculations by the workweek (which it by all evidence has never done) ADP's role is more accurately described as practicing law, and poorly, without a license.

4. ADP finds it relevant that in third-party beneficiary cases noted by the court of appeal, "the contracts addressed discrete transactions over which the promisor took control", OB p. 30. There is no legal authority offered for the distinction drawn, and no reason to assume that a Defendant cannot be liable for actions within its sphere of responsibility, however defined.

The argument that payroll service providers provide services similar to "payroll department employees" and thus should not be liable is undercut to some degree by the recent enactment of Labor Code § 558.1, making at least some corporate personnel liable for Labor Code violations, in part by the absurdity of

equating a PSP such as ADP with payroll department employees, particularly given ADP's representations. Perhaps more to the point, there is no rule excepting a PSP from liability as a third-party beneficiary where the legal tests are met.

Beyond that, Defendants' parade of horribles argument, i.e. that "lawyers, accountants, banks and others" might be liable on similar grounds is speculative, unsupported by the language employed by the court of appeal, and contrary to the case law method. ADP counsel may as well state that he is opposed to the application of norms utilized everywhere else as to what constitutes decent or responsible behavior, and also opposed to ensuring that employees are accurately paid, even though prompt and accurate payment of wages is a high priority in the state.

5. Defendant's claim that "A third-party beneficiary relationship does not exist as to service providers unless the *principal purpose* of the promisee (employer) in hiring the promisor (service provider) is to benefit the third party (employee) instead of the promisee (employer)", OB p. 30, is unsupported by case law and Plaintiff has found no contract case outside of the legal malpractice arena, with its sharply circumscribed rules for liability, stating that liability does not attach where the purpose is, say, prominent and important though not 'primary', and a few cases directly contradicting this ADP-made rule; see *Stanton v. Santa Ana Sugar Company, 84 Cal. App. 206, 209; Miles v. Miles, (1926) 77 Cal. App. 219, 228.*

The argument should also be disregarded for **lack of *any* citation to legal authority**; see *In re S.C., supra; Atchley v. City of Fresno, supra*; see also *Kensington Rock Island L.P. v. American Eagle Historic Partners, supra,* (referring to argument made in a 'perfunctory and underdeveloped' manner).

Moreover, the characterization is unsupported by the complaint and, while a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts, *Hale v. Morgan (1978) 22 Cal.3d 388, 394*, this is hardly such a case[1].

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[1] ADP's blatant disregard for this well-established rule, as well as the rule that the court is to assume the truth of the complaint's factual allegations, *Aluma Systems Concrete Construction Of California v. Nibbi Bros. Inc., 2 Cal.App.5th 620 (2016)* is evident in its Opening Brief at fn.19, in its statement that its *written* service contracts affirmatively disclaim any intent to create third-party enforcement rights (without an acknowledgment that the promisor's intent is irrelevant), its characterization of its role as "dependent on data generated by others to perform its work", and in Defendants' statement that "The breadth and diversity of the payroll-processing service industry is described in the many letters submitted to this Court in support of granting review" OB, fn. 7. These are of course letters from interested parties, unfamiliar with the legal issues in the case, free to characterize their businesses in a favorable light without cross-examination, in a circumstance where it isn't reasonable to expect that the other

set of interested parties, aggrieved plaintiffs, are going to participate. Trying to litigate the demurrer on its own facts, ADP asserts that "ADP cannot generate accurate paychecks or wage statements if it is supplied with incomplete or erroneous data about work hours and breaks", OB p. 30.

ADP counsel also rather deceptively insists that ADP only performs 'ministerial acts', as though establishing an important legal fact. Futrell characterizes "the tasks of calculating pay and tax withholding" and "the preparation of payroll" as "ministerial". The court of appeal agreed with the characterization, though defining "ministerial" as "the doing of a thing unqualifiedly required", a definition that traces back to *Ham v. Los Angeles County (1920) 46 Cal.App. 148.* Though Plaintiff does not describe ADP's tasks in these terms in the complaint, and the gravamen of the complaint is that that ADP exercised judgment regarding the rules of calculation, (or *essentially practiced law*) and thereby necessarily determined the amount of Plaintiff's wages. Moreover, *Ham* also defines as a ministerial act "one which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment", *Ham, supra at 163.* Insofar as historically finding an act 'ministerial' as opposed to 'discretionary' in accord with this definition *supports* liability under the government claims act, *Johnson v. State of California (1968) 69 Cal.2d 782,* an analysis that is in any event somewhat confused, a "semantic thicket" *id. at 788.*, it does not appear the characterization helps ADP.

Finally, ADP's characterization of principal purpose seems inaccurate or at least arbitrary. ADP cannot speak for the promisee's intent, and the proposition that Altour sought to benefit itself rather than its employees is perhaps contradictory where the interests of the two are not, as in a union dispute, diametrically opposed. In Plaintiff's view Altour's interests here are legally indistinguishable from the employees' interests, as Altour must meet its obligations under the Labor Code.

6. Citing a line of cases that preclude an individual from being held liable for contracts to which he or she is not a party, ADP argues that its liability is foreclosed by Civil Code §2343, which applies to an individual who "assumes to act as an agent." In the 6th AC Plaintiff did not characterize ADP as an agent of Altour. In its opinion the court of appeal did not characterize ADP as an agent of Altour. ADP does not in any event appear to be an agent of Altour in the legal sense. See *Ford v. Cournale, 36 Cal. App. 3d 172 (1973)*: "In acting for his principal an agent is bound to the same standards of conduct of undivided service and loyalty of integrity and good faith as a trustee. As a matter of law the relationship binds the agent to the utmost good faith not only in form but also in substance". ADP merely contracted with Altour to provide a service. See also *Channel Lumber Co., Inc. v. Simon, (2000) 78 Cal.App.4th 1222*:

"The essence of an agency relationship is the delegation of authority from the principal to the agent which permits the agent to act "not only for, but in the place of, his principal" in dealings with third parties, *People v. Treadwell (1886) 69 Cal. 226, 236*. The distinguishing features of an agency are representative character and derivative authority", *Lovetro v. Steers (1965) 234 Cal.App.2d 461, 474*. There are limitations upon the establishment of an agency relationship. "An agent may be authorized to do any acts which the principal might do, except those to which the latter is bound to give his personal attention." (Civ. Code, § 2304) In other words, a principal may not assign non-delegable duties to an agent and may not employ an agent to do that which the principal cannot do personally. Accordingly, if a principal wishes to accomplish an end that it cannot personally accomplish, it must do so, if at all, through a mechanism other than an agency relationship"

As California law does not equate the rights of fiduciaries and beneficiaries, *Borissoff v.Taylor & Faust (2004) 33 Cal.4th 523, 530,* and as ADP is not an agent of Altour's in the agent/principal sense, ADP's argument fails.

7. ADP argues that "policy considerations strongly disfavor" finding PSP's have obligations to employees, OB, p. 36. The case law is generally clear that the third-party beneficiary analysis should focus exclusively on intent; see *Schauer v. Mandarin Gems of Cal. (2005) 125 Cal.App.4th 949, 957–958; Prouty v. Gores*

Technology Group (2004) 121 Cal.App.4th 1225. By ADP's logic, even where a PSP and employer expressly indicated that their agreement was designed to benefit employees, policy considerations could override that intention in favor of finding PSP immunity.

Moreover, ADP's recitation of the harms that might arise from refusing to immunize PSP's is entirely speculative, and, glaring omission, does not even attempt to speak to the primary issues, i.e., how often PSP's are actually the cause of employee underpayment, and the economic effects of holding PSP's liable. Guessing as to the effects of refusing to immunize PSP's and selectively deciding which effects to address, an absurd legal strategy, ADP assures the court that "such outcomes do not advance public policy", OB p. 37, without specifying the policies that might be affected. Any attempt to enumerate the relevant policies should begin with the history of abusive and unfair working conditions in California. The IWC Orders were enacted to curb abusive employers, *Murphy v. Kenneth Cole Productions, Inc., (2007)40 Cal.4th 1094, 1105-1106*. The operative concept is 'remedial', in the Court's words "the evils to be remedied", *Id.*. The crucial statistic here is not the incidence of claims, but the incidence of accurate wage payments, and accurate wage statements. As the court of appeal observed in its negligence analysis, "recognizing a duty of care encourages accurate payment of wages" *Goonewardene, supra at 182* and that 'it has long been recognized that ... because

of the economic position of the average worker ..., it is essential to public welfare that he receive his pay when it is due.' *Id., citing In re Trombley (1948) 31 Cal.2d 801, 809–810.*

As no such statistics are before the Court, these considerations should not affect an evaluation of the sufficiency of a complaint, and should perhaps be left to the legislature.

Holding PSP's legally responsible will probably result in an increased incidence of accurate wage payments statewide. ADP argues that "Creating third-party beneficiary liability would be redundant to the liability provided by the wage-and-hour laws. It would confer no benefit on employees", OB, p. 37, is clearly mistaken as a broad generalization. In the case at bar Altour defended against a wrongful termination claim (termination in response to an employee attempting to verify she was paid accurately) by taking the position that it in fact delegated payroll responsibilities to ADP--essentially, that it knew nothing--and thus could not have terminated Plaintiff to conceal knowing underpayment. If immune, ADP and other PSPs have no disincentive to contest that characterization. At trial and in discovery, a PSP will inevitably defer to an employer's account in the absence of any direct liability. Merely being subject to suit creates a disincentive, and the PSP in fact will be the only viable Defendant where an employer is financially troubled.

Moreover, ADP ignores the possibility that the liability of the promisor PSP is not fixed or controlled by the Labor Code; a PSP may be contractually liable to the third-party beneficiary employee beyond any requirement of the Labor Code, and a third party beneficiary may enforce the contract not only as to the expressly delineated benefits but also in an appropriate case may enforce the implied covenants as well, *Signal Companies Inc. v. Harbor Insurance Co., 27 Cal. 3d 359 (1980).*

Moreover, Altour may have reasoned, (correctly it seems, in the case at bar) that it would profit more by employing a PSP that routinely erred in its favor than it would ever pay out in litigation.

8. ADP repeatedly asserts (six times) that Plaintiff seeks to blur employer obligations, that the result reached blurs and dilutes employer obligations, and that the remedy 'blurs and dilutes the public policies'; OB pp. 1, 8, 15, 38, 41. No employer in California would think, upon hearing an accurate statement of the law; i.e., that it cannot escape liability to the employee by delegating its responsibilities to a PSP, that its potential liability to the employee is decreased simply because PSP's might also be liable. Moreover, the law has always permitted the employer to cross-complain against the PSP for breach of contract, or under the UCL & FAL, though, remarkably, such suits appear to be rare and the suspicion of

collusion is unavoidable. (For one exception, at least, see *JSB Industries, Inc. v. Nexus Payroll Services, Inc.(2006) 463 F.Supp.2d 103*).

More importantly, one of the ultimate goals of the Labor Code, and of the wage policies that prompted its creation, are the prompt and accurate payment of wages. Even were an employer's obligations somehow blurred, that result would be preferable to a clear policy that was, all in all, worse for the employees.

9. While the Second Restatement of Contracts, Section 302, is not controlling, ADP admits that third-party beneficiary status is accorded to one who benefits from performance that "will satisfy an obligation of the beneficiary to pay money to the beneficiary....", and which thus avoids ADP's tortured analysis of 'discharging' an obligation.

10. Revisiting public policy considerations, ADP urges the court to decide what is in the law a question of intent, and involves a private right, on the basis of public policy. ADP cites no case for the proposition that public policy questions are relevant to this question. Defendant asserts that a payroll service provider will have an indemnity or subrogation right back against the employer for any judgment against it *for improper payment of wages*, though again provides **no legal authority** for the claim, involves issues not before the court, and as above should be disregarded; the question involves questions of equity and good conscience, and thus may involve more than 'the payment of wages', *Shaffer v. McCloskey, 101*

Cal. 576 (1894); Estate of Kemmerrer, 114 Cal.App.2d 810, 814 (1952) and an analysis of equitable contribution seems more apt. Though in any event the point is not briefed at all.

Relevant policy considerations here included those set forth in Civil Code Section 1714(a) "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care...", the similar maxim set forth in Civil Code 3543, "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer"; Civil Code 3520, "No one should suffer by the act of another"; and Civil Code 3521, "he who takes the benefit must bear the burden"--all well-established socially vital considerations ADP would have the court ignore in favor of blanket immunity.

The court of appeal rejected all of Plaintiff's Labor Code claims against ADP and in that regard ADP's 50+ references to the Labor Code are misplaced. The relevant fact regarding the Labor Code is that it incorporates remedial statutes designed to protect workers, and that these are to be given liberal effect to promote the general object sought to be accomplished; see *Van Wagener v. MacFarland, (2004) 58 Cal.App. 115, 118-119.*

To the extent ADP's duty is characterized as wage-related, the most important policy the Court should consider pre-dates the Labor Code, and is found

in the common law right to sue for non-payment of wages,. See, e.g. *Barbosa v. IMPCO Technologies, Inc. (2009) 179 Cal.App.4th 1116* ("[t]he common law recognizes the right of an at-will employee to bring an action in tort against his employer for termination of employment that violates a fundamental public policy", and "[t]he duty to pay overtime wages is a well-established fundamental public policy affecting the broad public interest" *Earley v. Superior Court (2000) 79 Cal.App.4th 1420, 1429-1430* [recognizing the "clear public policy" embodied in Labor Code section 1194 "that is specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of workers"], *Smith v. Superior Court (2006) 39 Cal.4th 77, 82* ("California has long regarded the timely payment of employee wage claims as indispensable to the public welfare", *Pineda v. Bank of America, N.A. (2010) 50 Cal.4th 1389, 1400.* ("Delay of payment or loss of wages results in deprivation of the necessities of life, suffering inability to meet just obligations to others, and, in many cases may make the wage-earner a charge upon the public", [quoting *Kerr's Catering Service v. Department of Industrial Relations (1962) 57 Cal.2d 319, 326.*]).

Against such considerations ADP cites PSPs' costs to defend suits, without a word as to whether these providers have met their responsibilities. The PSP either erred in performing its obligations or it did not, and these providers are candidates for breach of contract suits from the employers as it is. Permitting 3rd party claims

should not amount to any serious expansion of liability in theory, and the fact that PSP's perceive the ruling as a serious new threat demonstrates an overly cozy relationship between PSPs and employers, employers all too willing to forgive errors in the employer's favor.

NEGLIGENCE

11. ADP argues that 'the court of appeal found a duty because it erroneously viewed Plaintiff as a third-party creditor beneficiary of the Altour-ADP payroll-processing contract', OB p. 43.

The court found ADP had a duty for 3 reasons, *Goonewardene, supra, at 181*, the presence of a third-party beneficiary relationship, the application of the [non-exhaustive] factors set forth in *Biakanja v. Irving (1958) 49 Cal.2d 647,* and the absence of factors set forth in *Bily v. Arthur Young & Co. (1992) 3 Cal.4th 370, 408–415.* In *Biakanja*, supra at 650, the court stated "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy

of preventing future harm", incorporating some of the policy considerations Plaintiff identified in the third-party beneficiary analysis.

The analysis under *Biakanja* is straightforward and obvious, even setting aside any question of Altour's intent to benefit the employee; the court of appeal noted "harm to them [employees] was manifestly foreseeable upon ADP's alleged failure to determine their wages in accordance with applicable law...appellant's injuries were certain and closely connected with ADP's alleged conduct...[plaintiff's] failure to receive the compensation owed her was attributable to ADP's own alleged errors. See also *Vasquez v. Franklin Management Real Estate Fund, Inc. (2013) 222 Cal.App.4th 819*, in which the court, citing cases, acknowledged that "underpayment must be regarded as significant, as "it has long been recognized that ... because of the economic position of the average worker ... it is essential to public welfare that he receive his pay when it is due" and that "recognizing a duty of care encourages accurate payment of wages." Failure to permit a negligence claim against ADP would require ignoring the *Biakanja* test entirely.

12. ADP complains that "the decision perversely exposes payroll service providers, because of the differences between tort and contract damage measures, to potentially greater liability than the employers, OB p. 4. ADP cites no legal authority for the proposition that the extent of a defendant's liability in tort can be a

factor in determining whether that defendant is to be held liable at all. This is hardly the absurd result ADP claims, and owes any force it has to general principles of tort and contract recovery, which ADP does not ask the court to re-write. Without regard to the agreement between ADP and Altour, ADP is in approximately the position of any tortfeasor who negligently interferes with contractual relations or prospective economic advantage, liable in tort instead of contract; see *e.g. Finke v. Walt Disney Co., (2003) 110 Cal.App.4th 1210.* In fact, insofar as ADP interfered with Plaintiff's ability to obtain the benefits of her economic relationship with Altour, a theory of negligent interference should be available and serve Plaintiff's interests just as well in this case.

13. Opposing a claim for *professional* negligence, ADP argues that "no statute, regulation or rule requires that payroll service providers have particular skills. There are no state licensing requirements like those governing traditional professions" OB, p. 45. Perhaps these facts explain how it is that ADP was able to process hundreds of paychecks for Plaintiff without paying her double time, where such payments were obviously required, and never calculated her regular rate by workweek. ADP's self-characterization strays from any fact in the complaint and is contradicted by its claims of expertise at its website, https://www.adp.com/solutions/services/payroll-services.aspx, not simply regarding multiplication and addition, but also Affordable Care Act compliance

issues, 'tax and compliance matters', and 'doing payroll better'. Success in arguing it lacks expertise here should expose ADP to widespread liability under the UCL and FAL. ADP's statement that is need not abide by any statutes or regulations, where they take on the responsibility of calculating regular rate, should shock the court, and provides convincing evidence of the need for judicial controls. In any event Plaintiff is neutral as to whether ADP is liable for negligence or professional negligence; in Plaintiff's view the duty analysis is the same either way.

14. ADP argues that there "was no foreseeability of harm to Plaintiff...since Plaintiff has remedies against her employer", OB p. 46, though of course the notion of a seeking a remedy implies one has already been harmed. ADP counsel argues, frivolously, that "there is no certainty that Plaintiff would suffer any injury from any action by ADP", OB p. 46, where such harm was close to inevitable. ADP counsel's assertion that no moral blame can attach to mere negligence, OB p. 46, is bizarre though telling. Plaintiff has suffered significant harm as a result of ADP's conduct. Moreover, at least some of this harm occurred more than 4 years ago and is only compensable if a court of appeal accepts Plaintiff's argument that her pleading of equitable estoppel and tolling should not have been stricken.

15. ADP argues that "a service provider who makes mistakes could be expected to be replaced by one of its many marketplace competitors", OB p. 46. Of course the

opposite is true where, as here, the PSP routinely makes mistakes in the employer's favor, and/or where, as here, the mistakes are not easily spotted.

Moreover, Altour paid Plaintiff twice monthly where the applicable wage order mandates calculations by the workweek, and rolled some overtime pay over to the following pay period. Plaintiff was unable to verify the accuracy of her pay for even a single pay period, and the superior court judge presiding over the case has appropriately described the calculation of Plaintiff's wages in this case as 'an administrative nightmare'.

16. Neither Altour nor ADP produced a written agreement with Altour in discovery. Plaintiff noted this in her Oppositions to ADP's demurrers, and provided facts supporting its claim that ADP breached an agreement to produce these documents while the demurrer was pending. Altour's PMK Joseph Oppold described ADP's responsibilities without identifying any supporting writing. Against this background and ignoring the rule that a demurrer can be used only to challenge defects that appear on the face of the pleading, *Blank v. Kirwan (1985) 39 Cal. 3d 311, 318,* ADP counsel argues that any plaintiff can alleged "fictionalized, unwritten payroll service contracts in order to multiply the number of defendants and get past a demurrer", OB p.47. One would think that ADP would have wanted to place any written agreement in the hands of opposing counsel immediately, if only to lay the groundwork for a CCP 128.7 motion.

17. Defendant avers, "If Plaintiff is the third-party beneficiary of the contract between her employer and ADP, then her sole remedy is an action on that contract. Tort claims are barred", OB p. 48. The crucial assertion comes without citation to authority, and it is simply incorrect. The rule developed by the Court is that "conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law" *Erlich v. Menezes, 21 Cal.4th 543, 551 (1999)*, (endorsing the term 'contorts'). While the cases contain a variety of confusing statements, the rule from *Menezes* can perhaps be recast as follows: "Ignore the defendants' contractual obligations and the contract setting. Does the defendant owe a duty to the plaintiff according to tort law principles?" The alternative would permit a Defendant to reduce its risks by entering into contracts where it anticipates it will be liable for tortious conduct. ADP argues that a tort duty must be 'completely independent' of any contractual obligation, OB p. 47, and appears to assume that the facts cited in finding a tort duty must be mutually exclusive of the facts cited in any 3rd party beneficiary analysis: "The 6AC's allegations of professional negligence and breach of a third-party beneficiary contract are *coextensive and related*", OB p. 48.

Though in any event, considering that any statement of criteria is somewhat arbitrary and can be re-cast in another form, such a reading is untenable, and in any event is there any place in the law where there is a formal requirement that duties

must rely on exclusive criteria? Any requirement of independence must mean that, e.g., one of the steps in finding a tort duty is not that one must first find a 3rd party beneficiary relationship, or vice-versa--that each analysis proceeds according to its own set of rules. There is no danger that tort and contract will dissolve into each other, *Robinson Helicopter Co., Inc. v. Dana Corp. (2004) 34 Cal.4th 979, 988*, as one will always need to perform the tort analysis to justify a tort cause of action. In the absence of contractual consent or assumption of the risk, the presence of a contract should not decrease exposure to tort liability, nor will the presence of a contract in most cases militate towards finding tort liability.

The relationship between these causes of action in the case at bar is more analogous to the relationship between claims for intentional and negligent misrepresentation. The elements overlap, the proof presumably overlaps, though the claims are distinct and 'independent'. (*Menezes* in fact refers to an independent duty on several occasions, and only when characterizing other case holdings uses the phrase 'completely independent').

Finding a 3rd party beneficiary obligation may provide a hint as to the result one will reach under *Biakanja*, as 3rd party beneficiary analyses sometimes consider policy, though the questions are analytically distinct and ADP's claim to the contrary is confused.

ADP cites *Robinson Helicopter, supra at 993* for the proposition that its tort liability is limited to cases where a plaintiff suffers "personal damages independent of the plaintiff's economic loss", OB p. 49. Robinson concerns the sale of goods, and the analysis concerns the economic expectations of purchasers.

In permitting a misrepresentation claim in the contract setting, the *Robinson* Court believed that it was expanding liability, though not opening the floodgates to future litigation, *Id.* However based on *Menezes* and *Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal.4th 85,* another case cited by the *Robinson* Court, the principles permitting tort remedies were already in place.

Most of the cases involving the economic loss rule deal with warranties and the sale of goods and thus involve an entirely different set of considerations than is present in employment law. Evaluating the rule from Robinson in the employment law context is perhaps unnecessary; while ADP seriously mischaracterizes the 6AC, representing that the 6AC seeks "only economic damages" OB p. 49. The 6AC negligent misrepresentation claim (14th cause of action) alleges that Plaintiff "suffered harm." Plaintiff spent dozens of hours trying to understand her wage calculations, was terminated for seeking accurate wages and can show that her damages in this case go beyond economic losses and include, at the very least, the emotional distress and frustration suffered by a highly vexed employee.

Moreover, here, as above, ADP would be liable on a negligent interference with prospective economic advantage theory, as Plaintiff can allege "an economic relationship that probably would have resulted in a future economic benefit to Plaintiff" as well as the other elements, CACI 2204. In *J'Aire Corp. v. Gregory (1979) 24 Cal.3d 799, 807*, the Court stated, "This court has repeatedly eschewed overly rigid common law formulations of duty in favor of allowing compensation for foreseeable injuries caused by a defendant's want of ordinary care". As in *J'Aire, supra at 807*, "the critical factor of foreseeability" warranted the imposition of liability.

That Plaintiff could also make such a negligent interference claim is one indicator that the court of appeal's holding in this case is in accord with general principles in California case law. Though the point is technically not necessary for a finding of a duty under *Biakanja*.

18. Given the Court's clear statement of the appropriate duty analysis in *Erlich v. Menezes,* ADP's discussion of privity is outdated and irrelevant. Privity of contract is not necessary to for the imposition of a duty, and has not been since at least 1958 when *Biakanja v. Irving, 49 Cal. 2d 647* was decided; see *Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 58* [citing Biakanja] though *Biakanja* also cites several California cases dating back to 1928; *Biakanja, supra at 649-650*. Thus when the Court stated that "Privity of contract is no longer

necessary to recognition of a duty in the business context and public policy may dictate the existence of a duty to third parties", *Quelimane, supra, at 58*, it was acknowledging a trend that was already decades old.

NEGLIGENT MISREPRESENTATION

19. After insisting that ADP does not provide professional services, ADP accepts the characterization of ADP as a party to "a professional services contract", and maintains such a status precludes recovery, OB p. 49/fn. 25 [citing only federal cases]. Without citation to any specific authority, and without analysis, ADP counsel asserts that Plaintiff 'is barred from asserting a negligent misrepresentation claim under "this Court's precedent" restricting tort remedies, OB, p. 49-50.

Though ADP did not cite 'this Court's precedents' at all. Of the federal cases cited by ADP, only JMP contains a cause of action for negligent misrepresentation and any discussion of economic loss rule. *Multifamily Captive Group, LLC v. Assurance Risk Managers, Inc. United States District Court, E.D. California.May 27, 2009629 F.Supp.2d 1135, and Intelligraphics, Inc. v. Marvell Semiconductor, 2009 WL 330259 (N.D.Cal. 2009)* offer limited discussion of the economic loss rule in fraud cases, are primarily concerned with circumstances where a party that failed to meet its contractual obligations is charged with fraud. None of the cases mentioned involve employment law, and Plaintiff can only guess at the arguments that Defendant might offer in the Reply Brief to establish the thesis.

Erlich v. Menezes, supra at 551, states the rule plainly; a cause of action arises where the court finds a tort duty independent of the contract. Again on the assumption that the 3rd party beneficiary analysis and a tort duty analysis must be completely independent with regard to the reasons or facts considered in the analysis, ADP argues that "the negligent misrepresentation cause of action necessarily fails because the court of appeal relied on its third-party creditor beneficiary classification to justify tort liability". This is an obvious non sequitur, as giving one legally unsupported reason has no bearing on the effect of other reasons given. The court gave additional reasons that warrant liability independent of the third-party beneficiary analysis.

20. As regards the economic loss doctrine as a bar to recovery more generally, the law is clear that "Where a special relationship exists between the parties, a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity" *J'Aire, supra at 804.* See also the court of appeal opinion at fn. 11 [citing cases]. ADP does not analyze the special relationship doctrine and should be deemed to have waived any challenge to that aspect of the court's ruling. Though there are solid grounds for finding a special relationship in this context, in that ADP did not merely increase the risk of harm to Plaintiff, *cf Adam v. City of Fremont, 69 Cal.App.4th 105 (1998)*, it had a significant or perhaps exclusive role in causing

the harm, and the courts have acknowledged that "the wages an employer owes its employees are accorded "a special status" under California law", *Davis v. Farmers Ins. Exchange, (2016) 245 Cal.App.4th 1302.*

21. After insisting ADP does not provide professional services, ADP counsel argues that the court of appeal failed to apply recognized limitations applicable to claims against professionals such as auditors, attorneys, architects, engineers and title insurers, who generally provide reports or opinions...", OB p. 50.

Wage statements, designed to allow employees to verify they were paid properly for the work they perform, are not reports or opinions, though more crucially, the concerns properly motivating the Court in *Bily* are not present. In *Bily, supra at 398,* the Court stated, "Even when foreseeability was present, we have on several recent occasions declined to allow recovery on a negligence theory when damage awards threatened to impose liability out of proportion to fault or to promote virtually unlimited responsibility for intangible injury." ADP is neither being held liable out of proportion to fault or in a position to have 'virtually unlimited liability'. The limits in this case are quite clear; ADP, paid to provide accurate wage statements and apply wage law correctly, bears potential liability to the employees for whom it prepares wage statements in California. ADP's cite to Restatement (Second) of Torts §552(2) supports Plaintiff's position; employees are not in the 'much larger class who might reasonably be expected sooner or later to

have access to the information'. ADP evidently doesn't disagree, as it recites the section in its entirety without applying it to the facts.

CONCLUSION

All in all Defendants' tort analysis is unfair and carefully avoids addressing the primary issue: What special features of wage law suggest that underpayment and misrepresentations relating to pay are appropriate candidates for the imposition of tort remedies? The question has nothing to do with the application of the economic loss doctrine pertaining to construction defects or the economic expectations of purchasers, areas which have occupied the Court's attention in the past. ADP's treatment of the special relationship requirement in the economic loss analysis consists of nothing more than a recitation of the appellate court's reasoning. That omission is telling; ADP evidently believes that the less attention to the truly relevant aspects of wage law the better. (As it failed to develop any such argument in its Opening Brief, any challenge to that language in the opinion should be deemed waived.)

The Opening Brief is replete with ad hominems, bandwagon arguments, inconsistencies and repetition. Additional detail in the 6AC, permitting decision-making in a more detailed factual context is 'embellished', OB p. 9. After refusing to produce any documents pertaining to any Altour/ADP agreement in discovery, ADP insinuates Plaintiff's account of the oral agreement is 'fictionalized', OB p. 47.

Though ADP's proposals are *extremely* unreasonable. ADP asks the court to endorse a rule that third-party beneficiary claims lie only "if the contracting parties' agreement "indicate[s], *at a minimum*, that outside rights will be available to certain parties", substituting this bit of formalism for an analysis of intent, perhaps as often as not overriding the wishes of the promisee in the process. Interpreting the subtlety required for many third party beneficiary analyses as 'confusion', ADP laughably asserts that the current rule is 'largely meaningless'; evidently the idea is that judges applying third-party beneficiary law do so with little or nothing in mind. ADP even goes so far as to suggest that "the 6AC's allegations of an intent to benefit Altour employees...should be disregarded...because even an incidental beneficiary is an intended recipient of contract benefits."

In addition to seeking a re-write of 3rd party beneficiary law and tort and contract remedies, ADP counsel seeks new formal restrictions for pleading, simply because they would aid PSP's and other defendants: "Required allegations should address the factual basis upon which a plaintiff claims that the contracting parties intended to benefit plaintiff and authorized plaintiff to sue"--even where one party represents the agreement is oral, amounts to a set of actions more than a set of words, and the context provides sufficient or perhaps even overwhelming evidence of intent.

In the face of powerful statements regarding the importance of prompt and accurate wage payments, and in a circumstance where the state of tort law flows rather directly from policy considerations, Defendants urge the court to adopt rules, for nothing that would count as a set of decent reasons and to the detriment of California workers, immunizing PSP's from liability.

Plaintiff's failure to received the compensation owed her was attributable to ADP's own alleged errors. The appellate decision carefully applies long-standing legal principles related to negligence, negligent misrepresentation, and third-party beneficiary claims to the facts of the case to find that Plaintiff can maintain these causes of action, and that decision should be upheld.

May 12, 2017

Glen Broemer

Attorney for Plaintiff Sharmalee Goonewardene

CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the attached brief is proportionately spaced, uses Microsoft Word 2016, has a typeface of 14 points, and contains 9877 words.

Dated: May 12, 2017

Glen Broemer

Attorney for Plaintiff Sharmalee Goonewardene

PROOF OF SERVICE

SUPREME COURT OF THE STATE OF CALIFORNIA

Re: Sharmalee Goonewardene v. ADP, Inc. B267010

I declare that I am over the age of eighteen (18) years and not a party to this action.

My address is 135 W. 225th St. Apt. F Bronx NY 10463

On the date specified below I served the documents listed below

RESPONDENT'S
ANSWER TO OPENING BRIEF

By electronic service and fed/ex overnight to

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

Glen Broome

May 10 2017 at Bronx, NY

CASE NO. S238941

IN THE SUPREME COURT OF CALIFORNIA

SHARMALEE GOONEWARDENE, AN INDIVIDUAL,

PLAINTIFF AND APPELLANT

v.

ADP, LLC et al;

DEFENDANTS AND RESPONDENTS

Second Appellate District Division Four B267010
Los Angeles Superior Court Case No. TC 026406
Hon. William Barry, Presiding

RESPONDENT'S OPPOSITION TO OPENING BRIEF

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