Case No.: S258966

IN THE SUPREME COURT

of the

STATE OF CALIFORNIA

GUSTAVO NARANJO,

Plaintiff and Respondent;

v.

SPECTRUM SECURITY SERVICES, INC.,

Defendant and Appellant,

Review Of A Decision From The California Court of Appeal

Second Appellate District, Division Four, Case No. B256232

ANSWER BRIEF ON THE MERITS

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RESTATEMENT OF ISSUES FOR REVIEW

1. In an action for failure to provide compliant meal breaks, where the employer believed it was in compliance but the employee prevails and recovers the prescribed statutory remedy of one additional hour of pay for each day a compliant meal break was not provided, is the employee entitled to piggy-back on this prescribed remedy and also recover waiting time penalties under Labor Code section 203 for the employer's alleged failure to timely pay all wages owed on termination of employment?

2. Where an employee's wage statements accurately reflect the non-payment of meal period premiums during employment (because the employer did not believe such premiums were owed), is an employee who subsequently prevails in an action for failure to provide compliant meal breaks entitled to relief under Labor Code section 226 based on a theory that the employer failed to provide accurate wage statements (i.e. by not including unpaid meal period premium pay on the wage statements)?

3. Is the applicable prejudgment interest rate on the liquidated damages remedy awarded in an action under Labor Code section 226.7 the constitutionally mandated seven percent or the ten percent applicable to breach of contract actions?

INTRODUCTION AND SUMMARY OF ARGUMENT

California has long required employers to provide employees the opportunity to take meal breaks during their workdays. In 2000, through Wage Orders of the Industrial Welfare Commission (IWC) and the enactment of Labor Code section 226.7[1], California adopted a specific

[1] Unless otherwise noted, later references to sections will be to sections of the Labor Code.

statutory remedy for an employer's failure to provide required meal breaks. This remedy is one additional hour of pay for each workday a meal break was not provided. This remedy has been dubbed "premium pay" by this Court.

In this case, plaintiff Gustavo Naranjo ("Naranjo") sued his former employer, defendant Spectrum Security Services, Inc. ("Spectrum"), alleging, among other things, that Spectrum's provision of paid on-duty meal breaks to its security officers violated California meal break law due to the lack of a written, on-duty meal period agreement. The trial court found in partial favor of Naranjo on his meal break claim and awarded Naranjo and the certified class he represents the prescribed statutory remedy of one additional hour of pay for each day that a compliant meal break was not provided during the statutory period.

On appeal, Naranjo argued that he also should have been awarded piggyback penalties under sections 203 and 226(e), based on Spectrum's failure to pay the meal break premium pay on termination of employment and its failure to include the meal break premium pay on itemized wage statements issued during employment. Naranjo's arguments are without merit. The Court of Appeal correctly determined that waiting time penalties and wage statement penalties do not apply to meal break violations that the employer was not aware of prior to termination of employment and for which no premium pay was paid during the employment relationship. The Court of Appeal's determinations of law were correct because there is no statutory basis for awarding section 203 and 226(e) penalties in an action under section 226.7 for the failure to provide meal periods.

Section 203 provides for penalties if an employee is not timely paid all wages for work performed that are owed on termination of employment. This Court has already held that meal period premium pay is not

compensation for work performed, but rather is a statutorily prescribed remedy for an employer's non-provision of meal periods. As such, it is not a wage the non-payment of which triggers waiting time penalties under section 203.

Section 226 penalties for an employer's failure to provide accurate wage statements similarly are inapplicable. Section 226 simply requires employers to provide itemized wage statements accurately informing employees of the wages they earned and were paid during the pay period and how the total pay was calculated. An employer cannot itemize payments that were not made, such as the meal period premiums Spectrum did not pay employees in this case because Spectrum believed its on-duty meal breaks complied with California law. The fact that the trial court later disagreed does not render Spectrum's wage statements inaccurate. The wage statements accurately reflected the wages actually paid during the pay periods in question, and there is no basis to now bootstrap liability under section 226. The Court of Appeal correctly rejected Naranjo's efforts to bootstrap liability for wage statement penalties and waiting time penalties and this Court should do the same.

Since the Court of Appeal issued its decision in this case, no published case has disagreed with the ruling that section 203 or 226(e) penalties are not available in a meal break claim. To the contrary, another Court of Appeal agreed in a newly published decision. (*Betancourt v. OS Restaurant Services, LLC* (April 30, 2020, ordered published May 21, 2020) 2020 WL 2122642 at *5 ["We agree with *Ling*[2] and *Naranjo* that a plaintiff is not entitled to recover penalties for waiting time and wage statement violations based on claims of nonprovision of rest or meal

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[2] *Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242.

periods, and likewise cannot obtain attorney fees based on those claims"].) Federal courts have also agreed with the Court of Appeal's decision in this case. (*See Mejia v. Illinois Tool Works, Inc.* (C.D.Cal 2019) 2019 WL 8135433 at *12; and *Garybo v. Bros.* (E.D.Cal 2020) 2020 WL 999762 at *7.)

Naranjo also seeks a ruling that an award of premium pay under section 226.7 bears prejudgment interest at ten percent under Civil Code section 3289(b), instead of seven percent as prescribed by the California Constitution. Naranjo is wrong for several reasons. First, Naranjo's prejudgment interest claim was brought under Civil Code section 3287 and not section 3289(b). Courts have uniformly interpreted section 3287 to provide for a seven percent prejudgment interest rate. Second, section 3289(b) does not apply to this action because that statute applies only to breach of contract actions, and this is not a breach of contract action. It is an action for failure to comply with a statutory obligation. As such, there is no support for a ten percent prejudgment interest rate, and the Court of Appeal correctly held that the prejudgment interest rate is seven percent.

As to the issues presented for review, the opinion of the Court of Appeal should be affirmed in its entirety.

STATEMENT OF FACTS

Throughout the class period (June 2004 to the date of the trial), Spectrum was in the business of contracting with federal agencies to provide private security and detention officers to guard individuals in the custody of the federal agencies, normally known as prisoners or detainees. (2 RT 26-27; 7 RT 3114-3117; 8 RT 3376-3377.)

Under the contracts with the federal agencies, the Spectrum Officers must maintain secure custody of the prisoners at all times. (8 RT 3365-3367; 3382-3383, 3391-3392, 3403, 3435-3437; 10 RT 4364. 4366-4369.) The prisoners are either moving or in the process of being moved. (2 RT

36-39, 307-308, 332-333; 8 RT 3377-3378.) As a result, the Spectrum Officers must follow the prisoners wherever they go. For example, if a prisoner is taken to a hospital for a doctor's appointment and surgery, the Spectrum Officer follows the prisoner through the hospital and even into the operating room, recovery room, and then back to the federal facility. (8 RT 3383-3391, 3400-3401; 9 RT 3971-3975.)

The nature of their work, namely, guarding federal prisoners who are moving, prevents the Spectrum Officers from taking 30-minute off-duty meal periods where they are relieved of all duty and are free to go wherever they please. (4 RT 1202-1207, 1265-1268, 1277; 8 RT 3438-3439 (Ex. 50, 12 JA 2726).) Accordingly, prior to their employment, all Spectrum Officers acknowledge and agree in writing that Spectrum will provide them paid on-duty meal periods. (2 RT 111-114, 117-119 (Ex. 3, 12 JA 2604, Ex. 4, 12 JA 2634, Ex. 23, 12 JA 2696, Ex. 45, 12 JA 2720); 4 RT 1202-1207; 8 RT 3379, 3409-3413 (Ex. 23, 12 JA 2696).) Despite the hundreds of Spectrum Officers guarding prisoners for thousands of shifts during the nine-year class period, there was no evidence that Spectrum ever failed to provide any Spectrum officer their paid on-duty meal periods. (8 RT 3443-3445; 9 RT 3932-3933; 10 RT 4276.)

At trial, Spectrum presented uncontroverted evidence that before September 30, 2007, the Officers acknowledged Spectrum's policy to provide on-duty meal periods. (10 RT 4251, 4276-4277; 11 RT 4524-4525.) As of September 30, 2007, all of Spectrum's pre-existing meal period policies were collected in one document: "Memorandum 33 - Meal and Rest Periods" ("Memo 33"). (8 RT 3437-3438 (Ex. 50, 12 JA 2726).) All of the Spectrum Officers signed Memo 33 acknowledging their agreement to Spectrum's on-duty meal period policies. (8 RT 3437; 10 RT 4276; 11 RT 4524-4525, 4550.) Memo 33 specifically provided that the nature of the work of the Spectrum Officers prevents them from taking off-

duty meal periods, the Officers agreed to paid on-duty meal periods, and the Officers could revoke the agreement at any time. (8 RT 3332-3333; 9 RT 3965-3966 (Ex. 50, 12 JA 2726).)

The Officers who worked for Spectrum before September 30, 2007, testified that Spectrum's on-duty meal period policy before September 30, 2007, was identical to the policy memorialized in Memo 33. (2 RT 329-331 (Ex. 50, 12 JA 2726); 9 RT 3944-3945, 3976, 4040; 11 RT 4524-4525, 4551.) Even Naranjo testified at trial that Spectrum's meal period policy before Memo 33 was not only the same as reflected in Memo 33, but was contained in a document he reviewed during his training to become a Spectrum Officer in December 2006.[3] (2 RT 127-129 (Ex. 66, 13 JA 2891); 9 RT 3921-3923.)

The evidence was also uncontroverted that during the class period, no other Spectrum Officer besides Naranjo complained to Spectrum about Spectrum's on-duty meal period policy. (8 RT 3619:13-16; 9 RT 4051:23-25; 10 RT 4375-4376.)

PROCEDURAL HISTORY

A. Pretrial Proceedings

On June 4, 2007, Naranjo filed a class action complaint against Spectrum for meal and rest break violations. (1 JA 1.) After review by the Court of Appeal of a pre-trial summary judgment ruling (*Naranjo v. Spectrum Securities, Inc.* (2009) 172 Cal.App.4th 654, 661 (*Naranjo I*)), the

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[3] Naranjo only worked for Spectrum from December 2006 to May 17, 2007. Despite Naranjo's mischaracterization in the Opening Brief (OB page 11, and page 21, fn. 6), Naranjo was not fired for taking a lunch break. He was fired for leaving his prisoner unguarded at a hospital when he left the hospital with another Officer to take a lunch break. (8 RT 3335-3336, 3342 (Ex. 52, 12 JA 2729), 3612-3613 (Ex. 93, 13 JA 2931), 3653 (Ex. 17, 12 JA 2693).)

case proceeded on causes of action under Labor Code sections 203, 226, and 226.7, predicated solely on the alleged failure to provide meal periods and rest breaks. The trial court denied Naranjo's motion to certify the class as to the rest break claims, but granted his motion to certify the meal period claim and penalty claims. (4 JA 802; RT for 2/3/2011 hearing, at 4 JA 765.)

B. Trial Proceedings

By agreement of the parties, the case was tried in three phases: (1) A bench trial on certain federal issues that Spectrum raised as defenses to the class wage and hour claims; (2) a jury trial on liability and premium pay damages for the meal period class claim; and (3) a bench trial on the penalties, if any, under Labor Code sections 203 and 226. (See Statement of Decision ("SOD") 9 JA 1977 at 1978.)

The first phase of the trial concerned Spectrum's defense that California meal period law did not apply to Spectrum based on Spectrum's and the Spectrum Officers' relationship with the federal agencies and the locations where the Officers worked. (7 JA 1248, 1286, 1318, 1402, 1425.) The trial court ruled against Spectrum on this defense. (SOD, 9 JA 1981 - 1985.) However, the trial court later held that Spectrum had a good faith belief that California meal break law did not apply and such a "good faith dispute" precluded an award of Labor Code section 203 penalties. (SOD, 9 JA 1977 at 1990-1991.)

The second phase was a jury trial, to determine whether Spectrum complied with Labor Code section 226.7 and the Wage Order, and, if not, the entitlement to and amount of premium pay damages. (SOD, 9 JA 1978.) Before the jury deliberated, the trial court granted Naranjo's motion for a directed verdict concerning the June 4, 2004 to September 30, 2007 class period on the basis that Spectrum did not have a written on-duty meal period agreement that complied with the Wage Order before Memo 33.

(SOD, 9 JA 1977 at 1985; 11 RT 4592-4601.)

The jury rendered a verdict in favor of Spectrum for the period of October 1, 2007 forward, finding that the nature of the work of the Spectrum Officers justified on-duty meal breaks and Spectrum had acceptable written on-duty meal break agreements with the Spectrum Officers. (8 JA 1755.) The acceptable on-duty meal break agreement was Memo 33 dated September 30, 2007, that all Officers signed. ("Memo 33," Trial Ex. 50, 12 JA 2726.)

The trial court ruled that the amount to be awarded under Section 226.7(b) for the meal period violations for the earlier time period from June 4, 2004, to September 30, 2007, was one hour of premium pay for every shift in excess of 6 hours worked by the Spectrum Officers during this period, in the aggregate amount of $1,393,314. (SOD, 9 JA 1986; 11 JA 4601; 9 JA 3989-4029.) The trial court also awarded $955,377 in prejudgment interest, calculated at the rate of ten percent. (SOD, 9 JA 1986-1989.)

In the third phase of the trial, the trial court determined whether class members were entitled to section 203 and 226(e) penalties stemming from the meal period violations the court found from June 4, 2004, to September 30, 2007. The trial court found against the class on its section 203 claim, determining that Spectrum's failure to pay the meal period premium pay was not "willful" because Spectrum had raised a "good faith dispute" that premium pay was not owed based on its federal law defense. (SOD, 9 JA 1990.)[4]

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[4] This ruling and the following one about Spectrum's intent are significant here only if the Court reverses the Court of Appeal's ruling on the section 203 or 226(e) penalties. If this Court holds that waiting time or wage statement penalties are proper, the issue of intent needs to be remanded to

However, the trial court found in favor of the class on its section 226(e) claim, determining, in irreconcilable conflict with its other ruling, that Spectrum's failure to include premium pay on Officers' wage statements rendered the wage statements non-compliant with Labor Code section 226 and was "knowing and intentional and not inadvertent." (9 JA 1989-1990.) The trial court awarded $399,950 in wage statement penalties. (*Id.*)

On November 18, 2013, the trial court issued its statement of decision, specifying the bases for its rulings. (9 JA 1977.) On January 31, 2014, judgment was entered. (9 JA 1993.)

C. Appellate Proceedings

Both parties appealed. Spectrum appealed the directed verdict, the award of premium pay, the ten percent interest rate, and the award of section 226(e) penalties and attorney's fees. Naranjo appealed the denial of the award of section 203 penalties, and the denial of class certification on the rest break claim.

As relevant to the issues under review, the Court of Appeal agreed with Spectrum and held that an employee prevailing on an action for failure to provide lawful meal breaks under section 226.7 is not entitled to recover additional penalties under sections 203 or 226(e). (*Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th 444, 474 (*Naranjo II).*) The Court of Appeal also held that the prejudgment interest rate applicable to an award of meal period premium pay is seven percent. (*Id.* at 476.)

ARGUMENT

I. Standard of Review

The issues presented by this appeal only involve the interpretation of

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the Court of Appeal to address on the merits.

statutes. As such, the standard of review is *de novo*. (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387-388.) As this Court recently explained: "'In construing a statute, our task is to ascertain the intent of the Legislature so as to effectuate the purpose of the enactment. [Citation.] We look first to the words of the statute, which are the most reliable indications of the Legislature's intent.'" (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 83 ("*Kim*"), citing *Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487.) "If the statutory language is clear and unambiguous our inquiry ends. "If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the language governs." (*Kirby v. Imoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244 (*Kirby*) (internal quotation marks omitted), 1163, citing *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal 4th 1094, 1103 (*Murphy*).)

The Court has also cautioned: "In construing a statute, we are careful not to add requirements to those already supplied by the Legislature. Where the words of the statute are clear, we may not add or alter them to accomplish a purpose that does not appear on the face of the statute or from the legislative history." (*Kim*, at 85 [Internal quotation marks and citation omitted] citing *Ennabe v. Monosa* (2014) 58 Cal.4th 697, 719, and *Vasquez v. State of California* (2008) 45 Cal.4th 243, 253.) "Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation." (*Kirby, supra,* 53 Cal.4th at 1164, quoting *Murphy*, supra, 40 Cal.4th at 1103.)

II. Naranjo's Claim Under Section 226.7 Is an Action for the Failure to Provide Meal Breaks With Premium Pay Being the Sole Remedy

Section 226.7, subdivision (b), states "[a]n employer shall not

require an employee to work during a meal … period mandated pursuant to an applicable statute, or applicable regulation, standard or order of the Industrial Welfare Commission…" Section 226.7, subdivision (c), states "[i]f an employer fails to provide an employee a meal … period" in accordance with law, "the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal … period is not provided."

In two prior cases, this Court explained the background and purpose for the statutory meal break requirement*;* that is, an action under section 226.7 is for the failure to provide meal breaks and the one-hour of premium pay is the remedy to compensate employees for the noneconomic injuries suffered as a result of the violation.

In *Murphy*, the Court explained that in 1916 and 1932, the IWC was "[c]oncerned with the health and welfare of employees," and issued wage orders mandating the provision of meal and rest periods. (*Murphy, supra*, 40 Cal.4th at 1105.) In 1999, the Legislature codified the meal and rest period requirement in section 512. (Stats. 1999, c.134 (A.B. 60).) However, before 2000, there was no financial remedy in Wage Orders or statutes for the failure to provide meal or rest periods; an injunction was the only remedy. (*Murphy* at 1105.) In 2000, the IWC "added a pay remedy to the wage orders, providing that employers who fail to provide a meal or rest period 'shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday' that the period is not provided." (*Id.* at 1106, citing Cal. Code Regs., tit. 8, §11070, subds. 11(D), 12(B.) Following the IWC's addition of the "pay remedy," in 2000 the Legislature enacted Section 226.7. (Stats. 2000, c. 876 (A.B. 2509).) Although the original version of the bill provided for a $50 penalty and a payment to the employee of twice the average hourly rate for each missed break, the Senate deleted the penalty and changed the amount of the remedy

to "one additional hour of pay" to "track the existing provisions in the IWC wage order." (*Murphy* at 1106-1107, citing Sen. Rules Com., Off. of Senate Floor Analyses, 3d. reading analysis of Bill. No. 2509, as amended Aug. 25, 2000, p. 4.)

This Court noted that "health and safety considerations (rather than purely economic injuries) are what motivated the IWC to adopt mandatory meal and rest periods in the first place," and the administrative and legislative history indicates that "whatever behavior-shaping purpose section 226.7 serves, the Legislature intended section 226.7 first and foremost to compensate employees for their injuries." (*Murphy*, *supra*, 40 Cal.4th at 1110-1111, 1113.) The Court further emphasized that the remedy in section 226.7 "compensates the employee for events other than time spent working." (*Id.* at 1113.)

The Court identified the "noneconomic injuries employees suffer from being forced to work through rest and meal periods," including the "greater risk of work-related accidents and increased stress, especially [for] low-wage workers who often perform manual labor," and the denial of "time free from employer control that is often needed to be able to accomplish important personal tasks." (*Murphy, supra*, 40 Cal.4th at 1113.) The Court explained that "[w]hile it may be difficult to assign a value to these noneconomic injuries … the Legislature has selected an amount of compensation it deems appropriate." (*Ibid.*) Significantly, the Court stated that section 226.7 "*provides the sole compensation* for the employee's injuries" and "is measured by the employee's rate of pay rather than an arbitrary amount." (*Id.* at 1107, italics added.)

Thus, the premium pay in section 226.7 is the sole remedy for an employee who is denied a meal break, and the premium pay represents the liquidated damages the IWC and Legislature determined is the appropriate amount to compensate the employee's noneconomic injuries. Premium pay

is not an earned or unearned "wage."

In *Kirby*, the Court confirmed this characterization, and further clarified what it said in *Murphy*. The Court stated that the one hour of premium pay is "the remedy for a violation of the statutory obligation to provide the IWC-mandated meal and rest periods." (*Kirby, supra,* 53 Cal.4th at 1256.) The Court noted that "we held in *Murphy* that this remedy is a 'wage' for purposes of determining what statute of limitations applies to section 226.7 claims." (*Ibid.*) However, "[s]ection 226.7 is not aimed at protecting or providing employees' wages. Instead, the statute is primarily concerned with ensuring the health and welfare of employees by requiring that employers provide meal and rest periods. . . ." (*Id.* at 1255.) "The failure to provide required meal and rest breaks is what triggers a violation of section 226.7. Accordingly, a section 226.7 claim is not an action brought for the nonpayment of wages; it is an action brought for the non-provision of meal or rest breaks." (*Id.* at 1257.) Accordingly, in *Kirby* the Court rejected the idea that premium pay is a "wage" for all purposes under the Labor Code. The Court specifically held that premium pay is not a wage for purposes of Labor Code section 218.5, which provides for recovery of attorney fees to a prevailing plaintiff in an action for nonpayment of "wages." The Court held that section 218.5 attorney fees are not available in an action for the failure to provide meal breaks because it is not an action for the nonpayment of wages, but rather an action for the non-provision of meal breaks. (*Ibid.*)

Thus, *Murphy* and *Kirby* together make clear that employees, like Naranjo, who pursue an action under section 226.7 are *not suing for unpaid wages*. To the contrary, they are bringing an action for the failure to provide meal periods, with premium pay being the sole remedy to compensate them for the noneconomic injuries they suffered as a result of the failure.

III. The Court Of Appeal Correctly Determined that Section 203 Penalties Are Not Recoverable in a Meal Break Action

Naranjo argues that section 226.7 premium pay for the failure to provide meal periods is a "wage," and since section 203 provides a penalty for the failure to timely pay "wages" to an employee who is discharged or quits, then the penalty is applicable to the failure to timely pay the premium pay. His argument misapprehends the nature of the premium pay remedy as previously elucidated by this Court, and misreads and misapplies the applicable statutes. Section 203 does not apply to an action under section 226.7 for the non-provision of meal breaks or the award of the premium pay remedy. Section 203 provides a remedy when the employer violates the Labor Code by not timely paying wages earned for work performed on termination of employment. Section 226.7, on the other hand, provides a statutory remedy when the employer violates the Labor Code and IWC orders by failing to provide meal breaks.

A. The Plain Language of the Statutes Compels the Conclusion That the Section 203 Penalty Does Not Apply to a Meal Break Claim

Section 203 provides that an employer who fails to timely pay "wages" to an employee who is discharged or quits must pay the employee a penalty of one day's pay until such wages are paid, up to a maximum of 30 days. "Wages," for purposes of section 203, are defined as "all amounts for 'labor' performed by employees." (Labor Code § 200(a).) "Labor," in turn, includes "labor, work, or services … if the labor is performed personally by the person demanding payment." (Labor Code § 200(b).) Thus, waiting time penalties under section 203 only apply to the obligation to timely pay amounts for "labor performed … personally" by the employee.

Nothing in section 203 says it relates to section 226.7. Although

section 203 says it provides a penalty for the failure to comply with six other Labor Code sections, section 226.7 is not among the one listed. Section 203 does not say anything about meal breaks or premium pay. Similarly, section 226.7 does not say anything about the untimely payment of wages.

Section 203 also does not include any reference to an employer's failure to pay any "remedy" an employee may recover for the "injuries" suffered from an employer's wrongful conduct. As shown above, section 226.7 provides the "sole compensation" for the employer's failure to provide meal or rest breaks. (*Murphy, supra*, 40 Cal.4th at 1107.) Since section 226.7 premium pay is the amount the Legislature determined would be the remedy to compensate an employee for "injuries" suffered as the result of the employer not providing a meal period, the premium pay does not fit the definition of "wages" that is incorporated into section 203. Since section 226.7 premium pay for non-provision of meal periods is compensation to the employee "for events other than time spent working" (*Murphy, supra*, 40 Cal.4th at 1113), the premium pay is not an "amount" awarded for "labor performed." By its terms, section 203 does not apply to the premium pay remedy in section 226.7.

In addition, while section 203 specifically uses the defined word "wages" in identifying the specific type of nonpayment that triggers the penalty, section 226.7 uses the term "pay," not "wages," when setting the amount of the remedy for the injuries arising from the non-provision of meal periods. This difference in terms is significant. It can be presumed that the Legislature was aware it could have characterized the meal period premium pay in section 226.7 as "wages" and could have stated that the failure to pay it would trigger a section 203 penalty, but the Legislature did not do so. The statutory language supports a conclusion that the Legislature did not intend for the section 226.7 remedy to trigger a section

203 penalty. Similarly, in *Murphy*, the Court reasoned that the section 226.7 premium pay was not a penalty subject to a one-year statute of limitations because "the Legislature indicated in section 203 that it was aware it could, if it so desired, trigger a one-year statute of limitations by labeling a remedy a penalty," but did not do so. (*Murphy, supra,* 40 Cal.4th at 1108-1109.)

In *Kirby*, the Court specifically addressed and contrasted the difference between an action for the failure to timely pay wages – which would include a claim for the penalty under section 203 -- and an action under section 226.7 for the non-provision of meal periods in which the remedy is premium pay. After confirming that "a section 226.7 action is brought for the *nonprovision of meal and rest periods*, not for the 'nonpayment of wages,'" the Court stated that "[s]ections 201 and 202 provide a useful contrast to section 226.7." (*Kirby*, *supra,* 53 Cal.4th at 1255-1256.) The Court explained that sections 201 and 202 specify when wages are due upon termination of employment, and "[w]hen an employee sues on the ground that his or her former employer has violated one of these provisions, the suit is an 'action brought for the nonpayment of wages.'" (*Ibid.*) Section 203 provides the statutory penalty to be awarded in an action for the nonpayment of wages under Sections 201 and 202. "By contrast, when an employee sues on the ground that his or her employer has violated section 226.7, the basis for the lawsuit is the employer's nonprovision of statutorily required rest breaks or meal breaks." (*Kirby* at 1256.)[5]

Sections 203 and 226.7 do not work in unison. Section 203 provides a penalty for the employer's failure to timely pay wages for labor

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[5] In neither *Murphy* nor *Kirby* did the Court say that meal period premium pay was a "wage" for purposes of awarding Section 203 or 226 penalties.

performed, while section 226.7 provides a premium pay remedy for injuries suffered by the employee as a result of the employer's failure to provide meal periods. Sections 203 and 226.7 provide different monetary remedies for different violations.

Since the express terms of the statutes do not support applying a section 203 penalty to a section 226.7 violation, the section 203 penalty is not available in an action under section 226.7.

B. The Legislative History Similarly Compels the Conclusion That the Section 203 Penalty Does Not Apply to a Meal Break Claim

There is nothing in the legislative history of section 203 that indicates the Legislature intended for the penalty to apply to claims under section 226.7 for the non-provision of meal periods. Even if the statutes were ambiguous and resort to extrinsic aids was permissible, in the absence of any expression of such intent, the Court should not find section 203 provides an additional penalty for a section 226.7 violation.

The Court discussed the legislative purpose and history of Section 203 in *Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1399-1400 (*Pineda*). As the Court explained, the penalty provision in section 203 has existed for over a century. The Legislature first enacted a civil penalty provision similar to Section 203 in 1915. (Stats. 1915, ch. 143, § 3, 299.) "Like section 203, the 1915 act provided that, when an employer failed to timely pay final wages, the employee's wages would continue as a penalty until paid, up to 30 days." (*Pineda* at 1399.) At that time, "the penalty provision was seen as an important tool in ensuring prompt wage payment." (*Ibid.*) The 1915 act was repealed and replaced in 1919 (Stats. 1919, ch. 202, §§ 1, 5 (A.B. 187)), and then the penalty provision was included in the Labor Code when it was enacted in 1937. (*Pineda* at 1399; Stats.1937, ch. 90, § 203, p. 197.) In light of the legislative history, the Court concluded

that "the Legislature adopted the penalty provision as a disincentive for employers to pay final wages late." (*Pineda* at 1340.)

The 1937 version of the Labor Code included sections 200, 201, 202, and 203 -- essentially in the same form as they exist today. (Stats. 1937, ch. 90, p. 197.) The definitions of "wages" and "labor" in section 200 have not changed. The timing of the payment of "wages" upon termination of employment in sections 201 and 202, as well as the section 203 penalty for the failure to pay wages in accordance with sections 201 and 202, are the same today. Thus, the statutes that created the obligation for timely payment of wages, and the penalty for a violation, predated by several decades the initial creation of the meal period premium pay remedy by the IWC and Legislature in 2000. As a result, there is nothing in the legislative history concerning the adoption of the section 203 penalty that could tie the penalty to the much-later enacted meal period premium pay remedy.

Moreover, in 2000, when section 226.7 was adopted, there was no amendment to section 203 to tie the penalty to section 226.7. (See Stats. 2000, ch. 134 (A.B. 60.) Section 203 was later amended four times, but it was never amended to apply the section 203 penalty to section 226.7. (Stats. 2008, ch. 169 (S.B. 940), § 2; Stats. 2014, ch. 210 (A.B. 2743) § 1; Stats. 2019, ch. 203 (S.B. 286); Stats. 2019, ch. 253 (S.B. 671).)[6] Section 226.7 has also been amended. (Stats. 2013, ch. 719 (S.B. 435), § 1; Stats. 2014, ch. 72 (S.B. 1360), § 1.) But section 226.7 was never amended to tie it to section 203.

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[6] These amendments added Labor Code sections specifying *when* certain categories of employees are to be paid, and added those section numbers to section 203. (2008: added section 201.3 re temporary services employees; 2014: added section 201.9 re violation of time limits in collective bargaining agreements; 2019: added sections 201.6 re print shoot employees and 201.8 re events employees.)

Although the Legislature has had several opportunities to establish as law that section 203 penalties are applicable to the failure to provide meal periods or to an award of meal period premium pay under section 226.7, the Legislature has never done so.

The fact that the Legislature has not done so is particularly significant in light of the numerous court decisions in California weighing in on the subject. The first published state court decision holding that "section 226.7 cannot support a section 203 penalty" was issued four years ago, in 2016. (*Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242, 1261 (*Ling*).) Before and after *Ling*, numerous federal courts also found that the section 203 penalty was not available in a section 226.7 action for the non-provision of meal periods. (See, e.g., *Jones v. Spherion Staffing LLC* (C.D.Cal. 2012) 2012 WL 3264081, at *8-9; *Singletary v. Teavana Corporation* (N.D.Cal. 2014) 2014 WL 1760884, at *4; *Guerrero v. Halliburton Energy Services, Inc.* (E.D.Cal. 2016) 2016 WL 6494296, at *8.)[7] However, the Legislature did not enact any legislation to contravene these holdings and provide that the section 203 penalty *is* available in an action under section 226.7.

In light of the lack of legislative direction to apply the section 203 penalty to a section 226.7 violation, the Court should refrain from doing so. As this Court cautioned, while being "mindful of this Court's limited role in the process of interpreting enactments from the political branches of our state government" … [i]t cannot be too often repeated that due respect for the political branches of our government requires us to interpret the laws in

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[7] There has been disagreement among the federal courts on this subject, as the Court of Appeal outlined in *Naranjo II.* (*Naranjo II, supra,* 40 Cal.App.5th at 469-471.) The Ninth Circuit also certified the question to this Court in *Stewart v. San Luis Ambulance, Inc.* (9th Cir. 2017) 878 F.3d. 883, 887-888; for which this Court dismissed as moot.

accordance with the expressed intention of the Legislature." As a result, "'[t]his court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.'" (*California Teachers Assn. v. Governing Bd. Of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633 [citations omitted].)

Particularly in the area of labor and employment legislation, where the Legislature is extremely active and balances the interests of numerous interested parties and groups, if the Legislature has not expressed a direction, this Court should not take the step the Legislature has not taken. (*Voris v. Lampert* (2019) 7 Cal.5th 1141, 1162 ["the history of wage-payment regulation in this state, beginning more than a century ago and continuing through the present day, shows us both that the Legislature has been attentive to the problem and that it is capable of studying the range of possible solutions and fashioning appropriately tailored relief"].) Such judicial restraint is certainly what the Legislature expects. (Code Civ. Pro. § 1858.)

Since there is no legislative history or pronouncement that would support applying a section 203 penalty to a section 226.7 violation, this Court should not do so.

IV. The Court Of Appeal Correctly Determined That Section 226 Penalties Are Not Recoverable in a Meal Break Action

In addition to arguing that an award of premium pay for missed meal breaks entitles the plaintiff to waiting time penalties under section 203, Naranjo argues that it also entitles the class to additional penalties for inaccurate wage statements under section 226(e). Naranjo's argument is wrong.

Section 226(e) does not apply to an action under section 226.7 for the non-provision of meal periods or the award of the premium pay remedy. These statutes create distinct obligations and provide separate penalties for

those distinct violations. Section 226(e) provides a remedy when the employer violates the Labor Code by not furnishing accurate wage statements showing the amounts "paid" during a pay period. Section 226.7 provides a remedy when the employer violates the Labor Code and Wage Orders by failing to provide meal periods. There is no valid basis for tacking on wage statement penalties under section 226(e) for a distinct and unrelated meal break violation that Section 226 was not designed to address.

A. The Language of Section 226 Does Not Support Applying the Section 226(e) Penalty to Claims for Violation of Section 226.7

Section 226, subdivision (a), requires an employer to furnish to an employee "an accurate itemized statement in writing showing" nine listed items. Subdivision (e) of the statute provides that "[a]n 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 a specified monetary amount for each violation. This statute cannot reasonably be interpreted as providing wage statement penalties for an unrelated meal break violation under section 226.7.

1. Section 226, Subdivision (a), Does Not Include Section 226.7 Unpaid Meal Period Premium Pay as an Item To Be Listed on Wage Statements

Section 226(a) does not state that all amounts owed or paid to an employee must be listed in wage statements. Subdivision (a) is very specific about what must be included. It requires employers to furnish to employees "semimonthly or at the time of each payment of wages" an "accurate itemized statement in writing" that is only required to contain nine specifically listed items. The four potentially relevant items include "(1) gross wages earned, (2) total hours worked, … (5) net wages earned, [and] (6) the inclusive dates of the period for which the employee is paid."

In addition to the fact that the list is limited, the items that are listed are specifically described, and subdivision (a) uses terms that are defined and qualified. For example, the Legislature used the term "wages" -- that is defined in section 200 as amounts for labor performed personally by the employee -- and qualified the gross and net "wages" to be listed in the wage statement with the word "earned." (§ 226, subd. (a), items (1) and (5).)

It is clear that section 226 does not apply to meal period premium pay awarded in a section 226.7 action for a number of reasons:

First, Section 226(a) does not list meal period premium pay as an item that must be included in a wage statement. Subdivision (a) does not refer to meal periods and does not mention meal period premium "pay." The fact that section 226(a) contains a specific list of enumerated items is significant, since the Legislature's choice of what to include or exclude in a statute is evidence that the Legislature intended the list to be limited, and not to be expanded by courts. (*Murphy, supra,* 40 Cal.4th at 1108.)

Second, since section 226.7 premium pay is a liquidated damage remedy to compensate for injuries suffered from the employer's failure to provide a meal period, premium pay clearly is not "wages" as that term is defined in section 200 and used in section 226(a). Contrary to Naranjo's assertions, this Court in *Murphy* did not rule that meal period premium pay constitutes "wages" for all purposes and did not address whether section 226(a) requires meal period premium pay to be included on wage statements or whether a plaintiff prevailing in a meal break action can recover wage statement penalties on top of the remedy of meal period premium pay—both for the singular meal break violation.

Third, section 226(a), requires the inclusion of wages "earned." (§ 226, subd. (a), items (1) and (5).) Since meal period premium pay is not for "time spent working" (*Murphy, supra,* 40 Cal.4th at 1113), such premium pay cannot be described as an amount of "wages" that are "earned."

Fourth, the language of section 226(a), shows that the only "wages" that are required to be included in the wage statement are the amounts actually "paid" during the pay period for which the wage statement is provided. There is no requirement for a wage statement to include amounts *not* paid during the pay period. As explained in *Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, 392:

> The reference to "gross wages earned" and "net wages earned" (§ 226, subd. (a)(1), (5)) must be read in connection with section 226, subdivision (a)'s directory language, which states that "at the time of each payment of wages," the employer must "furnish ... an accurate itemized statement" of these earned wages. … This mandate requires the employer to "itemize[ ]" the constituent parts of the total amount to be *paid* to the employee. (§ 226, subd. (a).)

(Emphasis added.)

Accordingly, the language of section 226(a), does not support a finding that meal period premium pay must be included on a wage statement, particularly where the premiums were not actually paid during employment and were only subsequently determined to be owed in post-employment litigation.

2. The Language Of Section 226, Subdivision (e), Precludes a Finding That the Penalty Applies To an Award of Section 226.7 Premium Pay

Section 226, subdivision (e)(1), provides a penalty for an "employee suffering injury as a result of the knowing and intentional failure by an employer to comply with subdivision (a)." That penalty is only available to an employee "suffering injury" from the inaccurate wage statement. An employee is deemed to suffer injury if the employee "cannot promptly and easily determine from the wage statement alone," among other items not relevant here, "the amount of the gross wages or net wages *paid to the employee during the pay period*…" (§ 226, subd. (e)(2)(B), italics added.)

The reference to the amount "paid" in the penalty section clarifies

that it is the employee's inability to determine the amount of the earned wages that were "*paid*" that is deemed to result in injury that is compensable by the penalty. The Legislature was concerned with the employee's ability to understand how the employer calculated the employee's pay for work performed during a particular pay period. Section 226(e) does *not* apply to amounts that were *not paid* during the pay period, such as the section 226.7 premium pay awarded in a later action for the non-provision of meal periods. (§ 226, subd. (e)(2)(B)(i).) In *Maldonado v. Epsilon Plastics* (2018) 22 Cal.App.5th 1308, 1336-1337, the court considered whether an employee who was underpaid (based on the employer's use of the wrong hourly rate) during employment was entitled to penalties for inaccurate wage statements. In holding that the answer is "no," the court reasoned the penalty does not apply when the wage statement accurately shows the wages actually *paid*. The court reasoned that "the absence of accurate *wages earned* will be remedied by the violated wage and hour law itself," but the fact that the rate was incorrect "does not mandate that they also receive penalties for the wage statements which accurately reflected their compensation under the rates at which they had worked at the time." (*Ibid.,* italics original.) *Maldonado* thus rejects the piggy-backing of wage statement penalties for an unrelated and distinct Labor Code violation.

Since section 226(e) expressly states that an employee is entitled to a penalty only if the employee suffers injury from not being able to easily determine the amount they were "*paid*," it does not support the assertion that an employee is entitled to a penalty for not being able to determine amounts they were *not paid.* The statute does not support Naranjo's assertion that an employee is entitled to a penalty for an employer's failure to include in a wage statement a section 226.7 meal period premium pay award that was *not paid* to the employee, and was only later awarded in an

action under section 226.7.

B. The Legislative History of Section 226 Does Not Support Assessing the Section 226 Penalty in an Action Under Section 226.7

There are three conclusions that should be drawn from the legislative history of section 226: (1) the Legislature was specific in listing in subdivision (a) what was required to be in a wage statement; (2) the Legislature did not require monetary amounts awarded in later actions, such as in an action under section 226.7 for the failure to provide meal periods, should be listed in wage statements; and (3) the penalty in subdivision (e) has nothing to do with the failure to provide meal breaks or the break premium pay remedy.

Section 226 and its wage statement requirement was initially added to the Labor Code in 1943, and the only requirement was to furnish a statement "semimonthly or at the time of each payment of wages" that showed "all deductions." (Stats. 1943, ch.1027.) A 1945 amendment provided the statement could be in a "detachable part of the check." (Stats. 1945, ch.1140.) A 1963 amendment added three items to be included in wage statements, so four items would be listed: (1) "all deductions;" (2) the pay period dates; (3) employee's name or social security number; and (4) employer's name. (Stats. 1963, ch. 1080.) A 1976 amendment added "gross wages earned" and "net wages earned" as items to be included, and, for the first time, added a new subsection (b) providing the statutory penalty for "[a]ny employee suffering injury as a result of a knowing and intentional failure by the employer to comply with subdivision (a)." (Stats. 1976, ch. 832 (A.B. 3731.) A 1978 amendment added the address of the employer as an item to be included. (Stats. 1978, ch. 1247.) A 1982 amendment added a new subsection (c) that provided for a fine for noncompliance. (Stats. 1982, ch. 327.) A 1984 amendment added the

"total hours worked" by hourly employees to be included in wage statements. (Stats 1984, ch. 486.)

Since it was not until 2000 that section 226.7 was enacted to add the premium pay remedy for the failure to provide meal or rest breaks, there is nothing in the legislative history of section 226 before 2000 that connected the wage statement requirement or the wage statement penalty to any remedies for failing to provide meal or rest periods.

In 2000, in the same bill that enacted section 226.7, the Legislature amended section 226. In that bill, section 226, subdivision (a), was amended (1) to exclude salaried exempt workers from the requirement to list "total hours;" (2) to add the number of piece rate units earned and applicable piece rate to the items to be included; and (3) to add all applicable hourly rates in effect during the pay period and the number of hours worked at each rate to the items to be included. (Stats. 2000, ch. 876 § 6.) Significantly, in 2000, the Legislature did *not* include in either section 226 or 226.7 any language tying the sections to each other, and did *not* require the meal or rest break premium pay remedy in section 226.7 to be included in wage statements.

Section 226 was further amended a number of times after 2000.[8] However, the Legislature did not take any of those opportunities to require

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[8] Stats. 2002, ch. 933 (A.B. 2412)[employer's recordkeeping]; Stats. 2003, ch. 329 (A.B. 276)[increasing the penalty amount]; Stats. 2004, ch. 860 (A.B. 1618)[only last four digits of employee's social security number]; Stats. 2005, ch. 103 (S.B. 101) [implement 2004 amendment by 2008]; Stats. 2011, ch. 671 (A.B. 243) [identify legal entity of employer who is a farm labor contractor]; Stats. 2012, ch. 842 (A.B. 2674), ch. 843 (S.B. 1255) and ch. 844 (A.B. 1744)[defining "deemed injury" for penalty (discussed *infra* in text), adding legal entity for each employer who hired temporary services employee as item to include, and records provisions]; 2016, ch. 77 (A.B. 2535) [changes for exempt employees]; and Stats. 2018, ch. 464 (S.B. 1252)[employee's copy of records].

that premium pay awarded in a section 226.7 action be included in wage statements, or to indicate that the section 226(e) penalty was related in any way to such an award.

Thus, there is nothing in the legislative history that supports the assertion that the penalty in section 226(e) is related in any way to the failure to provide meal breaks or the premium pay remedy in section 226.7. The legislative history indicates only that the wage statement penalty was designed to provide transparency to the employees about how they were *paid during the pay period*, not to itemize what they were *not* paid.

Section 226's "statutory purpose … is to document the *paid* wages to ensure the employee is fully informed regarding the calculation of those wages. … 'The purpose of requiring greater wage stub information is to insure that employees are adequately informed of *compensation received* and are not shortchanged by their employers.'" (*Soto, supra*, 4 Cal.App.5th at 392, italics added, quoting Assem. Com. on Labor and Employment, Analysis of Sen. Bill No. 1255 (2011–2012 Reg. Sess.) as amended May 15, 2012, p. 3; accord, *Morgan v. United Retail Inc.* (2010) 186 Cal.App.4th 1136, 1149 ["The wage statements thus provided the employees with the essential information for verifying that they were being properly *paid* for all hours worked," citing DLSE Opn. Letter No. 2006.07.06 (July 6, 2006), at p. 2, which said: "The purpose of the wage statement requirement is to provide transparency as to the calculation of wages. A complying wage statement accurately reports most of the information necessary for an employee to verify if he or she is being properly paid in accordance with the law...."]); *see also Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 574 ["Section 226, subdivision (a), requires the employer to document the basis of the employee compensation *payments*, including the gross wages earned, the hours worked, the number of piece-rate units earned, and each deduction

taken" (italics added)].)

When the Section 226(e) penalty was first added in 1976, the author of A.B. 3731, Assembly Member Bill Lockyer, explained to the Governor that the bill was sponsored by California Rural Legal Assistance Foundation (CRLAF). (Sept. 2, 1976 letter, Naranjo MFJN 0246.) The CRLAF explained in a letter to the Governor supporting the bill that a number of employers, "usually small growers … systematically refuse to give wage information to their employees," often simply paying in cash or checks without itemized statements. The letter explained the "[s]serious consequences" for the employees that result from the lack of wage statements:

> They [the employees] do not know whether deductions for state and local taxes, social security, and other authorized deductions are being made. Further, if it becomes necessary for these employees to prove their earnings record for unemployment, welfare, or other program purposes in El Centro, for example, they may not be able to do so without going back to the employer in Madera. Such delays in proving eligibility create severe hardships for worker and their families. The law should permit them to recoup their losses from an employer who knowingly and intentionally flaunts the law.

(Aug. 30, 1976 letter, Naranjo MFJN 0243.) Thus, the sponsor of the bill was concerned with the employees being damaged by the inability to obtain social programs because of the lack of documentation of their earnings.

The Enrolled Bill Report of the Agriculture & Services Agency of the Department of Industrial Relations pointed out that the current law required employers to provide information on payroll stubs, but did not provide for damages: "Such damages would be in the nature of loss of benefits under a health and welfare plan if the employee failed to make contributions or deductions and the employee was unaware of such failure due to lack of information on the payroll stub." (Enrolled Bill Report, Naranjo MFJN 0242.) Also, the Policy Committee Analysis of Lockyer's Assembly Committee on Labor Relations provided:

> The purpose of requiring greater wage stub information is to insure that employees are adequately informed of compensation received and are not shortchanged by their employers. Lack of wage information or improper information can also make it difficult for employees to establish eligibility for unemployment insurance.

(May 18, 1976 Report, Naranjo MFJN 0227.)

Accordingly, when the section 226 penalty was enacted in 1976, the Legislature was concerned with (1) employees being able to confirm they were properly paid and (2) employees suffering damages from not being able to document their pay so they could obtain the benefits of social programs.

In addition, in 2012, when the Legislature added subdivision (e)(2) of section 226 to clarify what it meant by the "injury" the employee suffers from inaccurate wages statements, the Legislature defined what failures are "deemed" to be "injury," and clarified that as to the "wages earned" item, the harm is the employee's inability to understand what he or she was "paid." (Stats. 2012, ch. 843, (S.B. 1255).) As explained in *Noori v. Countrywide Payroll & HR Solutions, Inc.* (2019) 43 Cal.App.5th 957, 968: "A Senate Judiciary Committee analysis described the need for the amendment: 'Recently, several court cases have resulted in differing standards for whether an employee has suffered injury from an employer's failure to provide required information on a wage statement. This bill is intended to respond to those decisions and clarify what constitutes 'suffering injury' by an employee.'" (*Id.*, quoting Sen. Judiciary Com. Analysis of Sen. Bill No. 1255 (2011-2012 Reg. Sess.) as amended April 30, 2012.)[9]

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[9] In this Senate Judiciary Committee Analysis, the concerns that the CRLAF voiced in 1976 (employees not being able to understand their pay or apply for public programs) were repeated. (*Id.* at 5; Naranjo MFJN 0160

As discussed above, the "deemed injury" provision in subdivision (e)(2)(B)(i) "clarifies" that the injury suffered from the failure to include gross or net wages in a wage statements arises from the employee's inability to easily determine "the amount of the gross wages or net wages *paid to the employee during the pay period*." (Italics added.) Thus, the 2012 amendment "clarified" that the injury does *not* arise from the employee's failure to determine what they were *not paid.*

The fact that the Legislature amended subdivision (e) in 2012 to clarify when an employee suffers "injury" because of the decisions in conflicting cases also illustrates why it is significant that the Legislature has not amended the sections to tie the section 226.7 premium pay remedy to the wage statement requirements or penalty in section 226. Like the situation with section 203, for several years – before and after 2012 – federal cases had ruled that the section 226 penalty is not available in a section 226.7 action.[10] However, the Legislature has not found it necessary

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at 0164.) Similarly, the California Employment Lawyers Association's (CELA) statement in support of the 2012 amendment said that in 1976, the Legislature understood that paystub information is important not only so worker can "determine whether they were being paid properly, but also so that they had the information needed for taxes, unemployment, welfare and other such purposes." (*Id.*; Naranjo MFJN 0164.)

[10] E.g., *Nguyen v. Baxter Healthcare Corp.* (C.D.Cal. 2011) 2011 WL 6018284, at *8 ["the plain language of Section 226(a) does not require that wage statements include an itemized listing of any premium payments owed … for missed meal periods."]; *Jones v. Spherion Staffing, LLC* (C.D.Cal. 2012) 2012 WL 3264081, at *8 ["Plaintiff cannot advance a claim for noncompliant wage statements pursuant to section 226(a) … based solely on alleged violations of section 226.7"]; *Pena v. Taylor Farms Pacific, Inc.* (E.D.Cal. 2014) 2014 WL 1665231, at *9 [premium pay under section 226.7 compensates employees "'for events other than time spent working,'" not 'wages earned'," and need not be itemized in wage statements]; and *Dawson v. Hitco Carbon Composites, Inc.* (C.D.Cal. 2017) 2017 WL 7806561, at *7 ["because the Court finds that missed meal and

to contravene these cases by amendment.

In short, there is nothing in the legislative history that suggests wage statements are required to include amounts owed and not paid to the employee for the failure to provide meal periods. To the contrary, the absence of any such language, despite the numerous opportunities for the Legislature to include it, and the "deemed injury" language added in 2012 that is inconsistent with requiring amounts owed and not "paid" to be included, shows the Legislature never intended to require amounts owed, and not paid, for meal period premium pay to be included in wage statements.

V. There Is No Policy Reason That Supports Adding Section 203 Or 226 Penalties To The Premium Pay Remedy for a Violation of Section 226.7

The purpose for, and function of, section 226.7 is to incentivize employers to provide meal and rest periods and to compensate employees for their noneconomic injury when the break periods are not provided. Despite the fact that this remedy was awarded in this action, Naranjo argues that public policy supports construing the Labor Code to allow a prevailing meal break plaintiff to also recover waiting time penalties and wage statement penalties for the singular underlying meal break violation. However, Naranjo fails to explain how the stacking of penalties for a single violation would have any actual impact on either the employer's provision of meal periods or the compensation of employees when meal periods are not provided. In addition, allowing the stacking of remedies would produce absurd results.

Section 512 and the IWC wage orders require employers to provide

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rest break premiums are not "wages earned" for purposes of § 226, Plaintiff cannot premise his § 226 claim on Defendant's failure to include those premiums on Plaintiff's wage statements"].

meal and rest breaks, and section 226.7 provides the legislated monetary remedy for not providing the breaks. If an employer fails to provide meal and rest breaks, the employer is also subject to civil penalties under section 558 (for a violation of section 512), which the Labor Commissioner can enforce under section 217 (for a violation of section 226.7), and which aggrieved employees can enforce in a PAGA action, as indicated in sections 2699 and 2699.5. As Naranjo's action proves, there is no impediment to an employee suing to recover the section 226.7 remedy, plus interest.

Therefore, there is no shortage of statutory provisions that incentivize employers to provide meal and rest periods, and there already is a remedy for employees that the Legislature determined is the appropriate amount to compensate employees when meal and rest periods are not provided.

Naranjo does not present any evidence or reasonable argument to support his assertions that *additional* penalties would have any effect on employers providing meal and rest periods or employees recovering premium pay. Significantly, when section 227.6 was enacted in 2000, the Legislature had the opportunity to add an additional penalty to the premium pay remedy it selected for the non-provision of meal and rest periods, and instead deleted the penalty in the final version of the bill. (*Murphy*, *supra*, 40 Cal.4th at 1196 ["Although the original version of bill No. 2509 provided for both a penalty and a payment to the employees, it limited the employees' recovery to the payment, leaving collection of the penalty to the Labor Commissioner, as had been the typical practice"].) Naranjo presents no practical reason why this Court should disregard the Legislature's advertent decision to omit an additional penalty on top of the premium pay remedy, and should instead engraft an additional penalty onto section 226.7.

Naranjo's argument that the failure to pay or document one remedy triggers the assessment of additional remedies is circular and leads to absurd results. He asserts that two additional remedies -- section 203 and 226 penalties -- should be assessed for Spectrum's failure to pay the section 226.7 premium pay remedy and include it on wage statements. One federal district court presented the following math as an illustration of the surprising consequences of the stacking of penalties when an employee loses one minute of a meal period:

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

(*Jones v. Spherion Staffing LLC, supra,* 2012 WL 3264081, at *9, record citations and internal quotes omitted ["a finding that section 226.7 violations can form the basis for claims under section 226 and section 203, would result in an improper, multiple recovery by the employee"].)

There is no rational basis upon which to read the statutes to conclude that any of them support assessing penalties for the failure to pay a remedy, or assessing penalties for the failure to include remedies in wage statements. To read the statutes that way would lead to the absurd result that penalties would be piled upon each other for no practical or remedial reason.

In sections 203, 226, and 226.7, the Legislature provided three

distinct remedies for three distinct wrongs, and expressly determined the amount of each remedy for each wrong. There is no basis to assess section 203 or 226 penalties for the failure to pay or document the section 226.7 remedy.

VI. Naranjo's Arguments for Stacking Section 203 and 226 Penalties in A Meal Break Action Are Without Merit

All of Naranjo's arguments are based upon his assertion that in *Murphy*, this Court ruled that meal period premium pay is a "wage." From this single premise, Naranjo argues that, because premium pay is a "wage," it must be included on wage statements, and it must be paid at termination, and the failure to do so subjects the employer to penalties under sections 203 and 226. He attempts to force the interpretation of these statutes into one dichotomy: whether or not the meal period premium pay remedy is a "wage." Naranjo asserts the Court of Appeal's decision is incorrect because it "is premised on the notion that premium payments made pursuant to section 226.7 are not, in fact, wages." (Opening Brief pp. 14-15.)

Naranjo's position is mistaken because in *Murphy*, this Court did not hold that premium pay is a "wage" for all purposes. The Court merely held that it was wage for purposes of allowing a plaintiff the benefit of a longer three-year statute of limitations for unpaid wages, as compared to the one-year statute of limitations applicable to an action for penalties. The Court did not address or decide whether section 203 or 226 penalties apply to meal break claims.[11] However, the Court in *Kirby* later made clear that just

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[11] As this Court has said many times, "a decision is not authority for what is said in the opinion but only for the points actually involved and actually decided." (*Childers v. Childers* (1946) 74 Cal.App.2d 56, 61, italics in original; *Trope v. Katz* (1995) 11 Cal.4th 274, 284.) And "[i]t is

because it earlier determined premium pay to be a wage for statute of limitations purposes, this does not mean that it entitles a plaintiff to recover remedies under other unrelated Labor Code provisions merely because those sections reference unpaid "wages." In *Kirby*, the Court specifically rejected the argument that a prevailing plaintiff in a meal break action can recover attorney fees under section 218.5, which provides an employee the ability to recover attorney fees in any action for the nonpayment of "wages." The Court reasoned that even though a meal break plaintiff recovers premium pay "wages" as a remedy, the action is not one for unpaid wages, but rather is one for non-provision of meal breaks. The same reasoned distinction applied by the Court in *Kirby*—one that focuses on the nature and purpose of distinct statutory obligations—applies equally here. Naranjo's argument ignores this analysis by erroneously suggesting that the status of premium pay as a "wage" means that a plaintiff recovering this remedy is automatically entitled to recover additional, unrelated wage statement and waiting time penalties simply because the statutes providing those penalties reference "wages."

Furthermore, contrary to Naranjo's argument, the Court of Appeal did not "premise" its ruling that the statutes do not apply to meal period premium pay on a determination that meal period premium pay is not a "wage." Instead, the Court of Appeal discussed this Court's opinions in *Murphy* and *Kirby* in detail and with care, explaining how these decisions interpreted section 226.7 in the limited contexts of the issues presented in those cases. The Court of Appeal then addressed the language and intent of section 226.7 in the context of sections 203 and 226.

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axiomatic that cases are not authority for propositions that are not considered." (*California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1043.)

The Court of Appeal recognized that in *Murphy*, the issue was which statute of limitations applied to an action under section 226.7. It was either the one-year limitation for an "action upon a statute for a penalty" or the three-year limitation for an "action upon a liability created by statute, other than a penalty." (Code Civ. Proc. §§ 340 subd. (a) or 338 subd. (a).) The Court of Appeal explained that in *Murphy*, this Court resolved the "wage-versus-penalty debate" by noting that "[a]lthough the premium wage for missed meal and rest breaks 'act[ed] as an incentive for employers to comply with labor standards,' the primary objective was 'to compensate employees,' suggesting the payment was more like a wage than a penalty." (*Naranjo II*, *supra*, 40 Cal.App.5th at 464-465, citing *Murphy*, *supra*, 40 Cal.4th at 1110.) The Court of Appeal correctly recognized that "*Murphy* determined that the additional hour of pay was a wage for statute of limitations purposes." (*Naranjo II*, at 465, citing *Murphy*, at 1102.)

The Court of Appeal recognized that in *Kirby*, the context was deciding whether Labor Code sections 1194 or 218.5 supported an award of attorney fees in an action under section 226.7. (*Naranjo II*, at 466.) The Court of Appeal explained that in *Kirby*, this Court reasoned that the "failure to provide meal and rest breaks is what triggers a violation of section 226.7," and the "additional hour of pay" in section 226.7 is the "legal remedy" for a violation of section 226.7. As a result, "a section 226.7 claim is not an action brought for nonpayment of wages; it is an action brought for nonprovision of meal periods." (*Naranjo II*, at 466-467, citing *Kirby* at 1256-1257.)

The Court of Appeal applied these principles from *Murphy* and *Kirby* in analyzing whether the penalties in sections 203 and 226 are available in a section 226.7 meal break action; ruling they are not available.

Recognizing that sections 203 and 226 use the defined term "wages," the Court of Appeal began by noting that under section 200,

"'wages' are defined only in terms of " 'labor performed by employees,'" while " '[l]abor,' in turn, means 'labor, work, or service…if the labor to be paid for is performed personally by the person demanding payment.'" The Court of Appeal explained that the section 203 penalty is "for the employer's recalcitrance" in not paying "wages" for "labor performed," and section 203 is not triggered by an employer's failure to pay "section 226.7 statutory remedies" for missed meal periods. (*Naranjo II*, at 473-474.)

The Court of Appeal also explained that section 226(e)(1) entitles an employee to penalties if the wage statement omits "wages earned," which does not apply to section 226.7 because "[s]ection 226.7's premium wage is a statutory remedy for an employer's conduct, not an amount 'earned' for 'labor, work, or services performed….'" (*Ibid.*)

Thus, the Court of Appeal did not accept Naranjo's argument that *Murphy* held premium pay is "wages" for all purposes and did not adopt Naranjo's false wage/not wage dichotomy as being determinative of the issues presented in this action. Instead, the Court of Appeal correctly analyzed and applied the language of the statutes, in light of the principles discussed in *Murphy* and *Kirby*.

VII. The Court of Appeal Correctly Determined the Prejudgment Interest Rate on An Award of Meal Period Premium Pay is Seven Percent, Not Ten Percent

After finding that Naranjo was entitled to prejudgment interest under Civil Code section 3287, the trial court awarded the class prejudgment interest at the ten percent interest rate in Civil Code section 3289.[12] The Court of Appeal reversed and held that the proper prejudgment interest rate

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[12] The trial court awarded Naranjo prejudgment interest at ten percent, citing Civil Code section 3289 and *Bell v. Farmers' Insurance Exchange* (2006) 135 Cal.App.4th 1138, 1146 ("*Bell*"). (SOD p. 11; 9 JA 1986-1989.)

is the seven percent default rate prescribed by the California Constitution. The Court of Appeal was correct.

A. The Appropriate Prejudgment Interest Rate for An Award of Section 226.7 Premium Pay is the Default Rate of Seven Percent

"In the absence of any legislative act to the contrary, the rate of prejudgment interest is 7 percent," as provided in Article XV, section 1 of the California Constitution. (*Pacific-Southern Mortgage Trust Co. v. Insurance Co. of North America* (1985) 166 Cal.App.3d 703, 761; accord, *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 434.) The seven percent rate is "a default rate of interest." (*Palomar Grading & Paving v. Wells Fargo Bank, N.A.* (2014) 230 Cal.App.4th 686, 689.) The Legislature has not set a prejudgment interest rate for an award of premium pay under section 226.7. Naranjo has not cited any statute that expressly provides a higher rate of prejudgment interest, and there is no such statute. Accordingly, the California Constitution limits the rate of prejudgment interest to seven percent.

B. Civil Code Section 3287(a) Only Supports A Seven Percent Rate

In the trial court, Naranjo sought prejudgment interest under Civil Code section 3287(a). Civil Code section 3287(a) provides that a person who is entitled to recover damages that are certain and "vested in the person upon a particular day, is entitled also to recover interest thereon from that day…" However, Civil Code section 3287(a) does not contain a specific rate of interest that is different from the seven percent prescribed in the California Constitution. As a result, prejudgment interest awarded pursuant to section 3287(a) is at the default rate of seven percent. (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 920 ["proper rate of prejudgment interest" under section 3287 is seven percent].)

The trial court nonetheless awarded prejudgment interest at the rate of ten percent, citing Labor Code section 218.6 and Civil Code section 3289. The Court of Appeal correctly reversed because neither of these statutes supplies a basis for applying a ten percent interest rate to the award of premium pay in this case.

C. Neither Labor Code Section 218.6 Nor Civil Code Section 3289 Support a Ten Percent Prejudgment Interest Rate in a Section 226.7 Action.

Section 218.6 provides that "in an action for the nonpayment of wages," the court shall award interest "on all due and unpaid wages" at the "rate of interest specified in subdivision (b) of Section 3289 of the Civil Code." Civil Code section 3289, in turn, provides that the rate of interest in a breach of contract action is ten percent.

The Court of Appeal correctly held that section 218.6 does *not* provide the prejudgment interest rate for an award of section 226.7 premium pay because section 218.6 only applies in a "action brought for the nonpayment of wages," and, under *Kirby*, Naranjo's "[s]ection 226.7 lawsuit *is not an action for nonpayment of wages.*" (*Naranjo II* at 475, italics added, citing *Kirby*, *supra*, 53 Cal.5th at 1255.)

On review, Naranjo concedes that section 218.6 does not apply to his meal break claim.[13] However, he nonetheless argues that a ten percent interest rate is still appropriate under Civil Code section 3289. Naranjo is wrong.

Civil Code section 3289, subdivision (a), provides that the interest rate is the amount "stipulated by a contract" and is "chargeable after a

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[13] In footnote 18 of his Opening Brief, Naranjo states: "To be clear, Plaintiff has not and is not requesting an award of prejudgment interest under section 218.6, nor asking this Court to consider supplication of section 218.6 to claims under section 226.7" (OB, p. 41.)

breach." Subdivision (b) provides that if the contract "does not stipulate a legal rate of interest," then the rate is "10 percent per annum after a breach." Civil Code section 3289 only governs the prejudgment interest rate in an action for *a breach of contract*.

Unsurprisingly, there is no published decision holding that section 3289's ten percent interest rate for breach of contract actions applies to an award of premium pay for missed meal breaks. One recent federal case ruled to the contrary, that section 3289 does *not* establish the prejudgment interest rate applicable to meal period claims. As explained in *In re Taco Bell Wage and Hour Cases* (E.D.Cal. 2016) 2016 WL 4087468, at *3:

> Plaintiffs have pointed to no case in which a court has awarded interest under section 3289 for statutory violations of section 226.7, nor does the Court find one. Under California law, an action for breach of contract requires proof of the existence of the contract; the plaintiff's performance or excuse for nonperformance; a breach of the contract by the defendant; and that the plaintiff suffered damages as a result of the breach. *Ehret v. Uber Technologies, Inc.*, 68 F.Supp.3d 1121, 1139 (N.D. Cal. 2014). In this action, the jury was not asked to make such findings. The Court finds no authority to award interest for failure to comply with California Labor law pursuant to section 3289 and since the violations alleged here violated statutory requirements the Court finds that section 3289 is inapplicable."

(*Id.* at *3.)

The only authority Naranjo cites that applies Civil Code section 3289 is the *Bell* case. However, *Bell* is not applicable because *Bell* applied section 218.6 to an action for nonpayment of overtime wages. Section 218.6 applied to that action because it was an action for nonpayment of wages. *Bell* did not hold that section 3289 applies to an award of meal period premium pay (which is not an action for nonpayment of wages). (*Bell, supra,* 135 Cal.App.4th at 1146, 1149.) Section 218.6 plainly has no applicability to this action.

Naranjo points to the discussion in *Bell* and other cases about the contractual nature of the employment relationship and argues that any wrongful conduct during the relationship amounts to a breach of contract. Naranjo then argues that the "breach of contract rate for prejudgment interest has long been 'the appropriate rate for unpaid wage claims because of the contractual nature of the employment relationship.'" (OB, p. 41, citing *Bell*, at 1142.) However, the fact that the employment relationship is contractual in nature does not lead to the conclusion that every claim arising during the employment relationship is a breach of contract, triggering a ten percent prejudgment interest under section 3289.

This Court confirmed the fallacy of such a conclusion in *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592. In *Lu*, the plaintiffs sued for violation of a Labor Code section 351, which provides that gratuities are property of employees and that employers cannot take them. In holding that there was no private right of action for recovery of gratuities under section 351, this Court also said "[w]e reject, however, plaintiff's contention that a violation of section 351 is a per se violation of an employment contract." (*Id.* at 604, fn. 9.)

None of the cases Naranjo cites supports his position that Civil Codes section 3289 provides a ten percent prejudgment interest rate in a meal break action. Naranjo relies on cases in which a breach of contract could be alleged. In *Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal.2d 481, 486, the court stated that the employment contract "must be held to have been made in light of, and to have incorporated, the provisions of existing law." However, in *Lockheed*, the court was determining whether there was a private right of action for violation of Labor Code section 1101, and the court concluded that "upon violation of the section, an employee has a right of action for damages for breach of his employment contract." (*Id.* at 486.)

Naranjo cites *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 969, footnote 5, for the proposition that "[a]ny action by a worker against a contractor for wages must necessarily be based on the worker's contractual relationship," and "[t]hus, a worker's action against an employer for statutorily required wages sounds in contract." However, in *Aubry*, the court was deciding whether the DLSE could pursue a claim for unpaid prevailing wages against a government entity under the Tort Claims Act (Gov. Code, § 815.6) and decided against the DLSE. (*Id.* at 968) The court said that the DLSE could amend its complaint to allege a breach of contract claim on behalf of the workers as third party beneficiaries of the public construction contract. (*Id.* at 971.)

Naranjo cites *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 335, for the proposition that the employment relationship is "fundamentally contractual." However, in *Guz* the issue was whether the plaintiff employee could sue the employer for breach of an implied contract to not terminate the employee except for good cause. (*Id.* at 336.)[14]

None of the cases cited by Naranjo hold that an action for violation of section 226.7 is a claim for breach of contract, and none of these cases apply a ten percent prejudgment interest rate to any non-breach of contract claims. At best, these cases cited by Naranjo simply show that an employee may be able to sue for breach of contract in certain

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[14] Naranjo also cites *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 912 for the proposition that employers bear numerous statutory responsibilities, including "complying with numerous state and federal statutes and regulations governing the wages, hours and working conditions of employers." However, there is nothing in *Dynamex* that addresses whether violations of such obligations give rise to a claim for breach of contract, and there is no mention of prejudgment interest for such violations.

circumstances. But Naranjo did not sue Spectrum for breach of contract, and did not recover on any breach of contract claim. Ironically and to the contrary, Naranjo's judgment is based solely on the *absence* of a contract; namely the absence of a written on-duty meal period agreement. Therefore, Naranjo cannot recover prejudgment interest at the ten percent breach of contract rate in section 3289.

D. Labor Code Section 98.1(c) Does Not Provide Any Support for Naranjo's Position

Section 98.1(c) provides that awards in administrative hearings (called *Berman* hearings) for "due and unpaid wages" accrue interest "at the same rate as prescribed in subdivision (b) of section 3289 of the Civil Code." Naranjo argues that applying the ten percent prejudgment interest in section 3289 to section 226.7 premium pay awards in civil actions would be consistent with the interest rate applied in administrative proceedings under Section 98.1(c). Naranjo is incorrect for two reasons.

First, section 98.1(c) is not applicable to Section 226.7 claims just as section 218.6 is not applicable. Section 98.1(c) was amended to incorporate the contract interest rate in Civil Code section 3289 in the same bill that added section 218.6 to the Labor Code to incorporate the contract interest rate in section 3289. (Stats. 2000, ch.. 876, §§ 2 and 9; Naranjo MFJN 363 at pp. 365, 370.) As expressed in the initial Summary by the Assembly Committee on Labor and Employment, the intent was for the two statutes to have identical scope, as they were enacted together to establish "the rate of interest at 10% in both administrative and court cases." (Summary, p. 5 item 2(d); Naranjo MFJN 308 at p. 312.) Both sections apply in actions for the nonpayment of wages: section 98.1 in administrative proceedings for "due and unpaid wages" and section 218.6 in civil actions for the "nonpayment of wages." As demonstrated above, since a Section 226.7 action "is not an action brought for nonpayment of

wages" (*Kirby, supra*, 53 Cal.4th at 1256-1257), section 218.6 does not provide the prejudgment interest rate for a section 226.7 civil action. Likewise, section 98.1, which is identical to section 218.6, would not provide the prejudgment interest rate in an administrative proceeding for section 226.7 meal break premium pay.

Second, section 98.1(c) does not purport to provide an interest rate for all administrative employment claims or remedies. Section 98 empowers the Labor Commissioner to conduct hearings on a number of different types of employee complaints and for different remedies, including unpaid wages, damages, and penalties. However, section 98.1(c) only provides an interest rate for "due and unpaid wages" awarded as a result of such a hearing. Section 98.1(c) does not provide an interest rate for "damages" or statutory penalties. As a result, even if the Labor Commissioner were to issue an award for the liquidated damages remedy in an administrative claim under section 226.7 for the nonprovision of meal periods, section 98.1(c) would not provide the interest rate.

Accordingly, the fact that the Legislature simultaneously enacted section 218.6 and amended section 98.1 to refer to Civil Code section 3289, and expressed the intention they were identical, shows that neither statute supports Naranjo's position that the ten percent interest rate in section 3289 applies to section 226.7 claims.

CONCLUSION

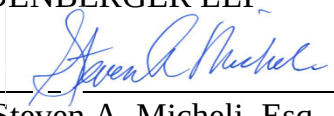
Like some latter-day giant piling Pelion upon Ossa to destroy the gods, Naranjo would pile section 203 and 226 penalties upon premium pay – the Legislature's liquidated damage remedy – of section 226.7 in order to destroy employers. Such a result was never intended by the Legislature. The expectation of the Legislature is codified in Code of Civil Procedure section 1858: "In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance

contained therein, not to insert what has been omitted, or to omit what has been inserted. …" Naranjo should be referred to Sacramento for the additional penalties he seeks.

The Court of Appeal correctly determined that the penalties in section 203 and 226(e) are not available in a meal break action, and the prejudgment interest rate is seven percent. Accordingly, on these points, the Court of Appeal's decision should be affirmed.[15]

Dated: June , 2020

CAROTHERS DiSANTE & FREUDENBERGER LLP



By: Steven A. Micheli, Esq.
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[15] However, if the Court determines that either of the penalties are available in meal break cases, then as to the applicable penalties, the matter should be remanded to the Court of Appeal to address the parties' appeals concerning Spectrum's alternative good faith defenses to these penalties.

CERTIFICATE OF COMPLIANCE.

Pursuant to rule 8.520(c) of the California Rules of Court, I certify that the foregoing Appellants' Answer Brief was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief is 13,433 words, exclusive of the matters that may be omitted under subdivision (c)(3).

Dated: June __, 2020

CAROTHERS DiSANTE & FREUDENBERGER LLP

By: Steven A. Micheli, Esq.
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PROOF OF SERVICE

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I, the undersigned, declare that I am employed in the aforesaid County, State of California. I am over the age of 18 and not a party to the within action. My business address is 4510 Executive Drive, Suite 300, San Diego, CA 92121. On June 2, 2020, I served upon the interested party(ies) in this action the following document described as: ANSWER BRIEF ON THE MERITS

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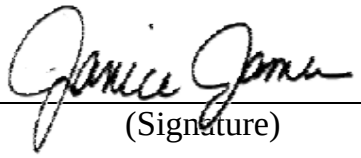
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Case Number: **S258966**
Lower Court Case Number: **B256232**

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