Case No. S279397

In the

Supreme Court

of the

State of California

GUSTAVO NARANJO et al.,
Plaintiffs and Appellants,

v.

SPECTRUM SECURITY SERVICES, INC.,
Defendant and Appellant.

REVIEW OF A DECISION FROM THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FOUR, CASE NO. B256232
LOS ANGELES SUPERIOR COURT · HON. BARBARA M. SCHEPER · NO. BC372146

REPLY BRIEF ON THE MERITS

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INTRODUCTION

The answering brief of Defendant and Appellant Spectrum Security Services, Inc. (Spectrum) recalls the children's game: "Telephone," during which a first child whispers a phrase into the ear of a second child, who, in turn, repeats the received message into the ear of a third, and the process continues, child-to-child, until the message reaches its final destination and the last child announces aloud the phrase heard after those considerable translations. Often, the rendered phrase is not even a close approximation of the original.

Like the last child down the telephone line, Spectrum portrays a narrative unlike the original facts of this case, which have precipitated 16 years of litigation, 15 appellate briefs, and three published decisions. With each passing year and every published decision, Spectrum has adjusted its account to address the issue then at hand, and now advances a new narrative on which it asks this Court to ratify the standard endorsed by the Court of Appeal, limiting the imposition of wage statement penalties under Labor Code section 226.[1]

Notwithstanding Spectrum's assertions, the record tells the original story and makes clear the facts and circumstances that led the trial court to direct a verdict in favor of Naranjo and the class. Spectrum's policies and practices expressly prohibited officers from taking any breaks, and its wage statements showed facially independent violations of section 226, subdivision (a), as well as outright failures to pay wages.

Against this backdrop, Spectrum now portrays itself as a scrupulous employer honestly trying to comply with the law. Seeking affirmance of the Court of Appeal's opinion, Spectrum sidesteps that court's misapplication

[1] All subsequent unlabeled statutory references are to the Labor Code.

of section 203's "good faith dispute" defense, but nonetheless asks this Court to ratify application of the same defense to section 226, subdivision (e)(1) by alternate means. Spectrum expands section 226's "knowing and intentional" standard so it excuses both ignorance of the law and mistakes of law (stated herein collectively for readability purposes only as "ignorance and mistakes of law"). Based on its proposed heightened standard of intentionality, Spectrum ultimately asserts that a "good faith dispute" should prevent the imposition of wage statement penalties here.

Whether by incorporation of an unrelated regulation or pursuant to the alternate legal path contrived by Spectrum, this Court should not incorporate a "good faith dispute" defense into section 226's knowing and intentional standard, which would constitute improper judicial legislation by either means. Courts must not read into statutory language exceptions that will nullify a clear provision or materially affect the statute's operation. The language of section 226 does not support incorporation of a "good faith dispute" defense. Nor does the attenuated case law Spectrum relies on. As such, this Court should reverse the opinion of the Court of Appeal.

ARGUMENT

According to Spectrum, when an "employer establishes a good faith belief it was in compliance, or raises a good faith dispute as to the law's application, or shows that the law was unclear or unsettled, there cannot be a knowing and intentional failure" for purposes of imposing wage statement penalties under Labor Code section 226, subdivision (e)(1). (ABM 12 [emphasis omitted]; see also ABM 15.) Spectrum asks this Court to ratify this standard, established by the Court of Appeal, which provides employers with a "new defense in employee lawsuits," as Spectrum has

publicly stated. (Romero, *Plain Meaning of 'Willful' Gives Employers New Defense*, L.A. Daily J. (Mar. 2, 2023) p. 2 [quoting Spectrum's counsel].) "Whereas before the employer did not have the defense of a good faith [dispute], they now have it" as a result of the Court of Appeal. (*Ibid.*)

Try as it might (now), Spectrum fails to establish that the "good faith dispute" defense applied to section 226 by the Court of Appeal is not new, but rather, Spectrum argues, the logical consequence of section 226's statutory text and legislative history, as well as long-accepted judicial interpretations of the terms "knowing" and "intentional." (ABM 12, 26.) In its attempt, Spectrum dodges the Court of Appeal's application of the "good faith dispute" defense delineated in California Code of Regulations, title 8, section 13520 (regulation 13520), and strains to develop and justify the contours of the same defense for section 226, subdivision (e)(1) by alternate means.

The opinion of the Court of Appeal presents this Court with a two-part inquiry: (1) does regulation 13520 apply to the "knowing and intentional" standard set forth in section 226, subdivision (e)(1); and (2) if not, what is the appropriate standard for determining whether a failure to comply with subdivision (a) is knowing and intentional. (OBM 17.) Spectrum's answering brief on the merits effectively answers the first question in the negative. Regulation 13520 does not apply to the knowing and intentional standard set forth in section 226, subdivision (e)(1). Per Spectrum, "[t]he Court of Appeal never made such a holding, nor has Spectrum made that argument." (ABM 47.) Naranjo accepts Spectrum's concession. Therefore, the following focuses on the latter inquiry: what is the appropriate standard for determining whether a failure to comply with section 226, subdivision (a) is knowing and intentional.

In its answering brief on the merits, Spectrum aggrandizes the knowing and intentional standard, advancing a plain meaning interpretation that excuses ignorance and mistakes of law. With this heightened standard of intentionality, Spectrum then asserts that a "good faith dispute" should preclude the imposition of wage statement penalties. This Court should not adopt the standard set forth by the Court of Appeal and advanced by Spectrum, which Spectrum publicly considers "a very significant finding that will change the landscape in this area of labor law [in favor of] California employers." (Romero, *supra*, L.A. Daily J., at p. 2.)

I. THIS COURT SHOULD NOT ADOPT A CONSTRUCTION OF KNOWING AND INTENTIONAL THAT EXCUSES BOTH IGNORANCE AND MISTAKES OF LAW

Although Spectrum agrees that ignorance of the law is no defense to a section 226 claim (ABM 44), it nonetheless asks this Court to adopt a plain meaning standard of "knowing and intentional" that would excuse both ignorance and mistakes of law. Under Spectrum's plain meaning construction, for penalties to be imposed under section 226, subdivision (e)(1), an employe would have to prove that the employer *knew* the law and *intentionally* failed to comply with it. (ABM 30, 31.) Such a standard would absolve from penalties under subdivision (e)(1) any employer that claims it did not know the law, and therefore, its failure to comply was not intentional. This defense would arise in cases of both mistake and ignorance, neither occasion being excusable under the statutory text or legislative history of section 226.

A. Spectrum Advances a Plain Meaning Standard that Excuses Ignorance and Mistakes of Law

Notably, Naranjo and Spectrum rely on the same dictionary definitions of the terms "knowing" and "intentional," to reach divergent constructions of the phrase "knowing and intentional." (Compare OBM 33 with ABM 31.) A side-by-side comparison of each party's construction highlights the distinguishing characteristic:

Naranjo	Spectrum
A knowing and intentional failure comprises a conscious act or omission done with awareness or understanding of its occurrence. (OBM 33.)	A knowing and intentional failure means the employer intended to omit information from a wage statement it knew should be included. (ABM 31.)

The key distinction between these two constructions lies in the employer's knowledge of the law. Whereas the construction advocated by Naranjo focuses on an employer's knowledge of the *facts* and understanding of its *actions*, Spectrum's construction requires an employer's knowledge of the *law* as a condition precedent to the employer's failure to comply with it.[2]

To disguise the conclusion that its standard would absolve both ignorance and mistakes of law, Spectrum highlights two examples of uncertainty to support its construction: (1) an off-the-clock case, and (2) a misclassification case. Yet, Spectrum's proffered rationale for its employer-protective framework does not justify a broad standard that would excuse all but those employers foolish enough to admit to flouting the law.

[2] At the conclusion of its answering brief, Spectrum asserts that Naranjo failed to satisfy his burden of proof regarding Spectrum's proposed standard because he had not proven that Spectrum knew the law and failed to comply with it. (See ABM 54-63.)

Regarding the off-the-clock example, Spectrum posits an employee working off-the-clock where the employer does not know about the hours worked. Spectrum claims, "[t]hat such unpaid wages and associated hours worked were not included in a wage statement is not a violation, however, where the employer does not know those facts and did not intentionally fail to comply with Section 226(a)." (ABM 32, citing *Williams v. J.B. Hunt Transportation, Inc.* (C.D. Cal. 2022) 2022 WL 714391 (*Williams*).)

Spectrum's example ignores the legal analysis in off-the clock cases, where "liability is contingent on proof [the employer] knew or should have known off-the-clock work was occurring." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1051–1052, citing *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585.) Where an employer does not know (and should not reasonably know) that such work occurred, the employee is not entitled to remuneration for that time. Thus, there is no additional wages to report on the wage statements in the first instance, as both claims—for failure to pay wages and an inaccurate wage statement—fail.[3] (See *Williams*, *supra*, 2022 WL 714391, at *10 ["the record does not support a finding that Defendant knew or should have known that Plaintiffs performed off-the-clock work"].)

With respect to the misclassification example where the employer believed that the employees at issue were exempt from overtime but failed to prove its affirmative defense, Spectrum contends that "[i]t cannot be said in such circumstances, however, that the employer *knew* employees were entitled to overtime wages or meal or rest period premiums and

[3] Conversely, if an employer knew or should have known that work was being performed off-the-clock (i.e., suffered or permitted), the employer would be obligated to pay wages for that time at the appropriate rate and record those wages earned in accordance with section 226, subdivision (a).

intentionally failed to include such wages and hours worked on wage statements." (ABM 33.) Here, the employer is operating under a mistake of law, which was addressed in both *Kao v. Holiday* (2017) 12 Cal.App.5th 947 (*Kao*) and *Furry v. East Bay Publishing, LLC* (2018) 30 Cal.App.5th 1072 (*Furry*).

In *Kao*, the court found a knowing and intentional violation when the employer knew it had provided wage statements that did not contain hours worked or the rate of pay. (12 Cal.App.5th at p. 961.) "Liability is established even if [the employer] believed, in good faith, that [the plaintiff] was a nonemployee trainee outside wage statement requirements *or an exempt employee* with lesser wage statement requirements. Such a belief amounts to a mistake of law that is not excused under the statute mandating itemized wage statements." (*Id.* at p. 962 [emphasis added], citing *Novoa v. Charter Communications, LLC* (E.D. Cal. 2015) 100 F.Supp.3d 1013, 1028-1029.) Similarly, in *Furry*, the court concluded that the employer's good faith belief that the employee was exempt from overtime did not constitute a viable defense to the employee's claim under section 226. "The employee is not required to demonstrate that the employer knew its conduct was unlawful." (*Id.* at p. 1085, citing *Cabardo v. Patacsil* (E.D.Cal. 2017) 248 F.Supp.3d 1002, 1010.) The employer need be aware only of the factual predicate underlying the violations. (*Ibid.*)

Spectrum, like the Court of Appeal, attempts to distinguish *Kao* and *Furry*, asserting that neither case is applicable because Spectrum had not argued at trial "that it was ignorant of the law." (*Naranjo v. Spectrum Security Services, Inc.* (2023) 88 Cal.App.5th 937, 951, fn. 7 (*Naranjo III*); ABM 23, 44.) But neither did the employers in *Kao* or *Furry*. (*Kao*, *supra*, 12 Cal.App.5th at p. 961 [asserting that the plaintiff was a nonemployee

trainee]; *Furry*, *supra*, 30 Cal.App.5th at 1079 [asserting that the plaintiff was exempt from overtime].) In fact, it is hard to imagine any employer would make such an argument in defiance of the well-settled legal maxim: "'ignorance of the law will not excuse any person, either civilly or criminally.'" (*Furry*, *supra*, 30 Cal.App.5th at 1085.) Both *Kao* and *Furry* stand for the proposition that there is *no* good faith dispute defense to a violation of section 226, although both Spectrum and the Court of Appeal fail to acknowledge and grapple with that fact. (See *Kao*, *supra*, 12 Cal.App.5th at p. 962 [good faith belief that employee was exempt amounts to a mistake of law that is not excused under section 226]; *Furry*, *supra*, 30 Cal.App.5th at 1085 [good faith belief that employee was exempt is not a viable defense to section 226].) Each would rather mischaracterize these California cases than admit they are advocating for the reversal of their holdings.

Recently, the tenets of *Kao* and *Furry* were affirmed in *Gola v. University of San Francisco* (2023) 90 Cal.App.5th 548, where the court affirmed a judgment finding the employer liable for wage statement penalties because it "knew that facts existed bringing its actions or omissions within the provisions of section 226." (*Id.* at p. 557.) The court expounded "if the employer knew facts existed that triggered its obligation to issue a wage statement, then its failure to comply was knowing and intentional within the meaning of section 226, subdivision (e)(1) regardless of whether it believed it had to comply or whether its belief was reasonable." (*Id.* at p. 566, citing *Furry*, *supra*, 30 Cal.App.5th at p. 1085; *Kao*, *supra*, 12 Cal.App.5th at pp. 961–962.) In an effort to distinguish this case from the facts and circumstances of *Kao* and *Furry*, which Spectrum contends are "facts very different from those here" (ABM 44), Spectrum

depicts itself throughout the answering brief in a manner unsupported by the record.

B. Section 226 Was Enacted to Regulate and Penalize Employers Like Spectrum

In portraying itself as a scrupulous employer, Spectrum recites that section 226 was intended to penalize only employers that "knowingly and intentionally flaunt the law."[4] (ABM 12, 26, 27, 29, 33, 36, 45.) Ironically, Spectrum misrepresents the legislative history to support its argument that the "knowing and intentional" standard is so broad that it includes a good faith dispute defense.

Discussing the enactment of section 226's penalty provision in 1976 and the amendments to Assembly Bill No. 3731 (1975-1976 Reg. Sess.) (Bill No. 3731) that occurred during the legislative process, Spectrum asserts that "the robust[5] 'knowing and intentional failure to comply' scienter requirement, aimed at employers 'who deliberately failed to provide wage information,' was *apparently* essential to enactment." (ABM 28 [emphasis added].) It was not, and the legislative history makes that clear.

As introduced, Bill No. 3731 provided recovery to employees suffering injury as a result of a *knowing* failure by an employer. (MFJN 0213-0214.) On May 12, 1976, the relevant phrase was amended by Assemblymember Lockyer to state a *knowing and intentional* failure. (MFJN

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[4] Although documents within the legislative history of section 226 utilize both terms "flaunt" and "flout" (compare MFJN 0164, 0182, 0188, 0194, 0207, 0211, 0243 with 0158, 0164, 0175, 0182, and 0203), Naranjo prefers "flout" as the term for contemptuous disregard.

[5] Spectrum's use of the word "robust" is ambiguous in this context. Including a defense excusing ignorant or mistaken employers from penalty may be deemed to robustly favor wayward employers, it is not, however, a robust protection for their employees.

0213-0217, 0225-0226.) The notes of the Senate Industrial Relations Committee show that, as of May 21, 1976, the following employer groups still opposed Bill No. 3731 even after this language change: California Manufacturers Association, Construction Industry Legislative Council, and the California Conference of Employers Association. (MFJN 0238.) The addition of the word "intentional" did not cause these employers to withdraw their objections.

These employer interests were not satisfied until the hearing before the Senate Industrial Relations Committee on or about August 20, 1976. (MFJN 0221-0222, 0226.) A chronological review of Bill No. 3731's versions indicates that the employer groups were concerned with how deductions were identified on wage statements and wanted the option to aggregate deductions and show them as one item. (Compare MFJN 0213-0214 with 0221-0222.) Although omitted from the quote provided in Spectrum's answering brief (ABM 28), Assemblymember Lockyer made clear to Governor Brown that the amendment which resulted in the withdrawal of employer groups' opposition occurred at the Senate Industrial Relations Committee, three months *after* the phrase "knowing and intentional" had been inserted. (MFJN 0246.)

Spectrum's loose portrayal of section 226's legislative history is indicative of its larger attempt to recast the record and draft a new narrative against which this Court should consider the standard for imposing wage statement penalties for knowing and intentional failures. But this is not a genuine case of uncertainty and the attendant facts and circumstances are easily summarized below:

- Prior to the filing of this lawsuit, Spectrum was ignorant of the law and had not complied with it. John Oden (Oden) was unaware that wage orders existed and had no knowledge of the requirements

regarding meal periods set forth in Section 11.[6] (RB/XAOB 4-5, 26; 12 RT 5430:1-19, 5442:5-16, 5447:21-25; 9 JA 1862-1863.)

- After the lawsuit was filed, Spectrum familiarized itself with the law and issued Memorandum 33 to comply with it. (RB/XAOB 4-5, 26; 12 RT 5448:11-18; 5449:8-5450:4; 9 JA 1906.)
- Ever since (for 16 years and counting), Spectrum has argued that California law should not apply to it.

IWC Wage Order 4 has been in effect since January 1, 2001. (See generally Cal. Code Regs., tit. 8, § 11040.) The pertinent portion of section 226.7 has been unchanged since 2000. (*Naranjo et al. v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th 444, 458 (*Naranjo II*).) Both requirements existed long before the start of the class period. Spectrum's refusal to acknowledge its compliance failure before October 2007 is not the result of uncertainty, and although Spectrum tries to refashion the record, it cannot change its actual contents.

1. During the class period, Spectrum's policies and practices denied employees meal and rest breaks

Spectrum claims that it had an on-duty meal period policy during the class period. (ABM 16, 17, 18, 55, 57.) It did not. Spectrum prohibited officers from taking any meal and rest periods. Its policy stated: **"This job does not allow for breaks other than using the hallway bathrooms for [a] few minutes."** (2 JA 0221-0223, 0254-0256.) Spectrum had no knowledge of the requirements regarding off-duty and on-duty meal periods, or duty-free rest periods. (12 RT 5430:1-19, 5442:5-16, 5447:21-25; 9 JA 1862:23-1863:5, 1989:17-1990:2.) As a result, Spectrum did not provide officers with 30-minute off-duty meal periods or 10-minute duty-

[6] John Oden was Spectrum's Personnel Manager, Risk Manager, Director, Vice-President, and corporate designee most knowledgeable during the applicable period. (RB/XAOB 2, 26, 84.)

free rest breaks. (8 JA 1756; 8 RT 3307, 3652-3653.) It now attempts to depict its policy denying breaks as an "on-duty meal period policy."

Spectrum also asserts that officers acknowledged Spectrum's on-duty meal period policy. They did not. What Spectrum refers to as an "acknowledgment" of this policy were the documents Spectrum previously argued comprised the pre-October 2007 meal period agreement. (RB/XAOB 35-36.) The acknowledgment Spectrum refers to is that officers could revoke their on-duty meal period by quitting. (RB/XAOB 35-36; 8 JA 1589, 1603:9-15, 1633; 10 JA 2116.)

Based upon the foregoing, the trial court granted a directed verdict in favor of the pre-Memorandum 33 meal break subclass, which was affirmed by the Court of Appeal.[7] (*Naranjo II*, *supra*, 40 Cal.App.5th at p. 460-463.) The Court of Appeal stated that Spectrum's arguments were nothing more than "an effort to deflect attention from the uncontroverted fact that, regardless of the number of documents involved, none included a compliant written meal period break policy before the issuance of Memorandum 33." (*Id.* at p. 460.) Spectrum is now attempting to resell this nonsense to this Court as an "acknowledgement."

2. Although it claims otherwise, Spectrum's policies, procedures, and practices never complied with the requirements of section 226

In assessing liability for penalties, Section 226, subdivision (e)(3) considers whether an employer "has adopted and is in compliance with a

[7] Directed verdicts occur only after a finder of fact indulges "every legitimate inference which may be drawn from the evidence in favor of the party against whom the verdict is directed," and still no evidence of substance exists to support a verdict in that party's favor. (*Newing v. Cheatham* (1975) 15 Cal.3d 351, 358.)

set of policies, procedures, and practices that fully comply with" section 226. (§ 226, subd. (e)(3).) Again playing the upstanding employer, Spectrum declares without support that it maintained such policies, procedures, and practices.[8] (ABM 36.) The record indicates the opposite.

For example, Spectrum's timekeeping policy and practice required officers to fill in and maintain possession of their own time sheets. (12 JA 2714.) Yet, Spectrum did not collect officers' time sheets, nor pay officers based on the hours recorded on them. Spectrum paid officers based on its duty rosters, which represent officers' *scheduled* hours. (12 JA 2714; 12 RT 5417:5-15, 5418:6-16.) When officers were paid, if they noticed a discrepancy on their wage statement, they could submit a copy of their time sheet to Spectrum for review, but Spectrum would not research the validity of an employee's claim for further compensation, which it considered a time-consuming process. (12 JA 2714.)

This policy and practice *does not* comply with section 226, subdivision (e)(2)(C), which precludes an employee from having to refer to other documents or information in order to determine whether they were paid properly. (§ 226, subd. (e)(2)(C).) Spectrum's policy, practice, and procedure, which require officers to compare their personal time sheets to Spectrum's duty rosters to ascertain proper payment, is not in accordance with the express intent or purpose of section 226.

Moreover, Spectrum's policies and practices show facially independent violations of section 226, as well as outright failures to pay wages. Spectrum's payroll policy does not acknowledge daily overtime in accordance with section 510 or section 3 of Wage Order 4. (12 JA 2715.)

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[8] Additionally, the policies, procedures, and practices referenced by subdivision (e)(3) concern section 226 in its entirety, not only the enumerated items in subdivision (a), as Spectrum suggests. (See ABM 36.)

Rather, overtime is defined as hours worked over 40 in a week. (12 JA 2715.) Even under its errant policy, Spectrum failed to compensate overtime correctly.

Naranjo's wage statement covering a two-week period from May 1-15, 2007, shows 84.00 hours of work (identified presumably as "Qty") paid at his regular hourly rate. (12 JA 2741.) Even based on an overtime policy defined as hours worked over 40 per week, Naranjo should have been paid overtime for those four (4) additional hours. It does appear that he was and, if so, it cannot be properly and easily determined from that wage statement consistent with subdivision (e)(2)(B).

Additionally, Naranjo underwent basic training during a two-week period from April 1-15, 2007, for which he was not paid properly. The Certificate of Completion indicates 58 hours of training completed during this two-week period. (13 JA 2891; 2 RT 128:18-129:23.) The corresponding wage statement shows that Naranjo was paid only for 26.00 training hours at $8.00/hour. (12 JA 2738.) In the next pay period, however, Spectrum paid Naranjo an "adjustment" for training, which indicates a "Qty" of 1.00 at a rate of $80.00/hour. Whether Spectrum was paying Naranjo for an additional 10.00 training hours at $8.00/hour or for one (1) additional training hour at $80.00/hour is not clear. Either way, the total remuneration still did not compensate him for 58 hours of training at $8.00/hour.

The trial court acknowledged that Spectrum could not have made proper compliance assessments because it was unaware of the existence of Wage Order 4, which also instructs employers regarding the record keeping and wage statement requirements in Section 7. (Cal. Code Regs., tit. 8, § 11040(7); 9 JA 1989; 12 RT 5430:1-19, 5442:5-16, 5447:21-25.) Spectrum's

ignorance of the wage orders necessarily precluded it from adopting a set of policies, procedures, and practices that complied with the proper payment of premium pay—overtime or meal period. Oden acknowledged that Spectrum did not consult with anyone regarding its compliance with the law (12 RT 5446:14-19) and this Court should disregard its assertions that it did.

3. Spectrum downplays its ignorance of the law

Spectrum acknowledges that it was unaware that the wage orders existed but attempts to legitimize its ignorance by feigning confusion regarding Wage Order 4's application to Spectrum. (ABM 56-57.) This stratagem was not persuasive to the trial court and, despite Spectrum's effort to alter the narrative, it remains disingenuous.

The wage orders are drafted in plain language so that they can be read easily by employees. (Cal. Code Regs., tit. 8, § 11040(22).) Oden testified that Spectrum's officers are security guards. (2 RT 95:6-16; 12 RT 5441:24-25.) The list of professional, technical, clerical, mechanical, and similar occupations covered by Wage Order 4 includes guards.[9] (Cal. Code Regs., tit. 8, § 11040(2)(O)). Oden acknowledged that Wage Order 4 identifies guards as a covered occupation. (12 RT 5432:14-20, 5442:17-20.) Consequently, after this case was filed, Spectrum issued Memorandum 33 to comply with Wage Order 4. Its application to Spectrum is irrefutable and any purported belief to the contrary—genuine or otherwise—constitutes a mistake of law, at best.

[9] Spectrum tries to create a distinction in its brief by using the term "officers." (See ABM 15 ["Spectrum employs 'officers' . . .].)

4. Spectrum continues to conceal the facts and circumstances underlying its liability

Even to this day, before this Court, Spectrum continues to twist the facts to avoid culpability. Spectrum contends that it did not know it was required to pay meal period premiums until 2019 (ABM 55-56), and "could not possibly have both known and intentionally failed to comply with the requirement that an unpaid meal period premium appear on a wage statement" because the requirement was not settled until this Court's decision in 2022 (ABM 59; see also ABM 62). Yet, Spectrum was engaging in both practices—paying meal period premiums and reporting them on wage statements—no later than 2016, three years *before* the appellate court decision in *Naranjo II*.

The evidence that Spectrum understood its obligation to pay and record premium pay is appreciable. In opposition to a motion for class certification in a subsequent class action alleging similar claims as here, Spectrum lodged exhibits to the trial court including two wage statements showing missed meal breaks and premium pay. (MFJN 0657-0658.) As identified in the notice of lodgment:

EXHIBIT NO.	DESCRIPTION
13	2016 exemplar Duty Roster and two Paystubs showing missed meal break and premium pay

This representation to a trial court belies its assertion of confusion here. Whereas Spectrum opposed a motion for class certification, in part, on evidence that it paid meal period premiums and documented such payments in wage statements, it feigns ignorance of the same to this Court.

C. Spectrum Challenges the Retroactivity of the 2012 Amendments to Section 226 for the First Time in 10 Years

Apropos of Spectrum and its litany of arguments raised at various times over the course of three presidential administrations, Spectrum asserts for the *first time*, after 10 years, that Senate Bill No. 1255 (2011-2012 Reg. Sess.) (Bill No. 1255) does not apply retroactively. (ABM 33.) Notably, Spectrum did not make this argument to the trial court in 2013, or to the Court of Appeal in 2015, or even in response to Naranjo's express recognition that it had failed to do so. (See RB/XAOB 65, fn. 23.)

Although Spectrum rightfully recognized then what it now scorns, a legislative "amendment which merely clarifies existing law may be given retroactive effect even without an expression of legislative intent for retroactivity." (*Negrette v. California State Lottery Com.* (1994) 21 Cal.App.4th 1739, 1744, citing *Bowen v. Board of Retirement* (1986) 42 Cal.3d 572, 575; *Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 828, fn. 8; *Arcadia Redevelopment Agency v. Ikemoto* (1993) 16 Cal.App.4th 444, 457.) The legislative history makes clear that Bill No. 1255 clarified existing law.[10] (MFJN 0160, 0166, 0174, 0178, 0184.)

Additionally, judicial decisions apply retroactively. (*Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 878 (*Ferra*), citing *Vazquez v. Jan-Pro Franchising Internat., Inc.* (2021) 10 Cal.5th 944, 951 (*Vasquez*).) When interpreting statutes as is the case here, "'[a] judicial construction of a statute is an authoritative statement of what the statute meant before as

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[10] Spectrum's attempt to distinguish the legislature's focus on the phrase "suffering injury" over a "knowing and intentional failure" is unavailing. (See ABM 29.) The legislature clarified both phrases in adjacent subdivisions—(e)(2) and (e)(3)—which derived from the same sentence in preceding subdivision (e)(1).

well as after the decision of the case giving rise to that construction.'" (*Ibid.*, citing *Vazquez*, *supra*, 10 Cal.5th at p. 951.) Unlike Spectrum's decision to argue retroactivity for the first time, section 226, subdivisions (e)(2) and (e)(3) are not "new." (ABM 28, fn. 4.) Nor can Spectrum shield its actions from being measured against the statutory language resulting from Bill No. 1255. (ABM 34.)

II. THIS COURT SHOULD NOT INCORPORATE A "GOOD FAITH DISPUTE" DEFENSE INTO THE KNOWING AND INTENTIONAL STANDARD

As part of and/or in addition to the standard it advocates for knowing and intentional failures, Spectrum also argues that this Court should incorporate a good faith dispute defense into section 226 as a matter of fairness. (ABM 55.) Although Spectrum claims the good faith dispute defense it promotes is detached from the contours of regulation 13520, this Court should consider it no differently when assessing its applicability to section 226. Neither the statutory text nor the cited cases support incorporation of a good faith dispute defense into section 226. To conclude otherwise would constitute judicial legislation and deprive all the other compensation statutes of section 226's function and benefit.

A. Spectrum and Naranjo Agree that Regulation 13520 Does Not Apply to Section 226

Spectrum accuses Naranjo of creating a straw man fallacy and asserts that the Court of Appeal did not apply the "good faith dispute" exception delineated in regulation 13520 to limit the imposition of wage statement penalties under section 226. (ABM 14, 47.) Spectrum's contention aside, the considerations of the Court of Appeal with respect to regulation 13520 and section 226 are clear:

> The issue here therefore *turns on* whether the "willful" standard in section 203 is the same as the "knowing and intentional" standard in section 226, *such that* a "good faith dispute" defense should apply to claims for penalties under both sections. For the reasons discussed below, we conclude an employer's good faith belief that it is not violating section 226 precludes a finding of a knowing and intentional violation.

(*Naranjo III*, *supra*, 88 Cal.App.5th at pp. 949 [emphasis added].) Notably, the Court of Appeal offset the term *good faith dispute* in quotations, just as regulation 13520 does. Regulation 13520 is the only authority in the Labor Code and DLSE regulations that similarly highlights *good faith dispute* in quotations as a defined term clarifying an express exception precluding the imposition of waiting time penalties under section 203, the contours of which are explained in subdivision (a) of the regulation. (See Cal. Code Regs., tit. 8, § 13520(a) ["A 'good faith dispute' that any wages are due occurs when . . ."].)

However, as Naranjo and Spectrum agree that the "good faith dispute" exception in regulation 13520 does not apply to section 226 (see ABM 47), the point need not be belabored further than to note that many of the federal district court decisions highlighted by Spectrum do, in fact, apply the "good faith dispute" exception in regulation 13520 to limit the imposition of wage statement penalties under section 226.[11] As such, they too should be disregarded by this Court.

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[11] See, e.g., *Wellons v. PNS Stores, Inc.* (S.D. Cal. 2022) 2022 WL 16902199, at *22 (courts have extended the "good faith dispute" rule used in section 203 to section 226, even though section 226 contains a "knowing and intentional" standard rather than the "willfully" standard of section 203); *Wilson v. SkyWest Airlines, Inc.* (N.D. Cal. 2021) 2021 WL 2913656, at *3

B. Even in the Absence of Regulation 13520, Incorporating a Good Faith Dispute Defense into Section 226 Still Constitutes Improper Judicial Legislation

Attempting to create a good faith dispute defense to preclude the imposition of wage statement penalties under section 226 by alternate means, Spectrum starts from the premise "that the good faith dispute standard would govern Section 203 whether or not Regulation 13520 had ever been adopted." (ABM 47.) From there, Spectrum contends that, because the good faith dispute standard is based on long-standing California caselaw (see ABM 47), the standard can be extended and incorporated to section 226 based on: (1) the decision of this Court in *In re Trombley* (1948) 31 Cal.2d 801 (*Trombley*); (2) three lower appellate court decisions in *Davis v. Morris* (1940) 37 Cal.App.2d 269 (*Davis*), *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1 (*Barnhill*), and *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157 (*Amaral*); and (3) the majority view of federal

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(citing and relying on regulation 13520 in consideration of wage statement penalties); *Ornelas v. Tapestry, Inc.* (N.D. Cal. 2021) 2021 WL 2778538, at *7 (a "good faith dispute" can preclude recovery by the plaintiff under both § 203 and § 226); *Arroyo v. International Paper Co.* (N.D.Cal. 2020) 611 F.Supp.3d 824, 841 (reading a good faith defense into § 226(e)); *Magadia v. Wal-Mart Associates, Inc.* (N.D. Cal. 2019) 384 F.Supp.3d 1058, 1084-1085 (surveying decisions that rely on § 203's "good faith dispute" defense to interpret § 226); *Woods v. Vector Marketing Corp.* (N.D. Cal. 2015) 2015 WL 2453202, at *3 (*Woods*)(acknowledging that "good faith dispute" rule has been extended by courts to apply to section 226 wage statement penalties, even though section 226 contains a "knowing and intentional" standard rather than the "willfully" standard of section 203); *Pedroza v. PetSmart, Inc.* (C.D. Cal. 2012) 2012 WL 9506073, at *5, fn.6 ("Although § 13520 only expressly refers to California Labor Code § 203, the "good faith dispute" defense also applies with respect to Labor Code § 226(e).").

district courts that reach the same conclusion regarding section 226 without expressly applying regulation 13520. (ABM 22.) Despite Spectrum's best effort to justify the Court of Appeal's incorporation of the good faith dispute defense *while denying* its implicit and improper integration of regulation 13520, the result Spectrum urges still would constitute improper judicial legislation.

Courts have "no power to rewrite [a] 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.) Under the rules of statutory construction, courts should undertake none of the following:

> [A] court should not rewrite the law, add to it what has been omitted, omit from it what has been inserted, give it an effect beyond that gathered from the plain and direct import of the terms used, or read into it an exception, qualification, or modification that will nullify a clear provision or materially affect its operation so as to make it conform to a presumed intention not expressed or otherwise apparent in the law.

(*Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, 393 (*Soto*), citing *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 334 [internal quotations omitted.) The language of section 226 is clear and none of Spectrum's cases justify a departure from the ordinary rules of statutory construction.

1. The language of section 226 does not support incorporation of a good faith dispute defense

Beyond its advancement of a plain meaning standard of "knowing and intentional," Spectrum gives short shrift to the fundamental task before

this Court, which focuses on ascertaining legislative intent, first through the words of the statute. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103 (*Murphy*).) Rather, Spectrum concludes without more "[t]hat the Legislature has used 'knowing, 'intentional' and 'willful' interchangeably in the Labor Code serves to confirm that "knowing and intentional" and "willful" are effectively synonyms." (ABM 53.) Not so.

Although Spectrum is correct in noting that *willful* enjoys common usage in the Labor Code (ABM 52), it fails to acknowledge that the Legislature does not use the term consistently throughout. Cases in point are sections 203 and 1197.2, both addressing the same conduct—the payment of wages upon separation of employment. Whereas both sections utilize the phrase "willfully fails to pay," they do not define willfully in the same manner. Section 203's definition of willful is not defined in the statute itself (but only in regulation 13520). Section 1197.2, conversely, defines "willfully" in the statute to carry the same meaning as that provided in Section 7 of the Penal Code.[12] (Lab. Code, § 1197.2, subd. (b).) Same conduct. Same word. Different statutes. Different definitions.

Similarly, the term "knowing" is also sometimes defined by the Legislature, sometimes not. For example, in section 1019.2, "knowing" is defined by Section 274a.1(l) of Title 8 of the Code of Federal Regulations. (Lab. Code, § 1019.2, subd. (e).) In other statutes, the term "knowing" is

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[12] Pursuant to Section 7 of the Penal Code, "'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." Section 7 also defines *knowingly* as follows: "The word 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission." (See Pen. Code, § 7, (1), (5).)

left undefined. (See Lab. Code § 4628, subds. (f), (h) [knowing failure to comply].) Consequently, it is not sufficient for Spectrum, like the Court of Appeal, to hastily conclude that "knowing and intentional" and "willful" are effectively synonyms when the Legislature is not even internally consistent using each term.

Neither Spectrum nor the Court of Appeal acknowledges the distinct use of the phrase "knowing and intentional," despite the plethora of adjacent statutes concerning the same subject matter that use only the term "willfully." (Compare § 226, subd. (e)(1) with §§ 203, 203.5, 206, 216, 222, 226.8, 227, 230, 230.1, 230.3, 230.5, 230.8, 247.) Under these circumstances, it must be presumed that the Legislature's use of the distinct phrase was intended. (*Rashidi v. Moser* (2014) 60 Cal.4th 718, 725 (internal quotations and citations omitted).) The cases cited by Spectrum do not rebut this presumption, which is further supported by section 226's particular function in the overall statutory scheme.

2. Attenuated case law does not support incorporation of a good faith dispute defense

Like the statutory language, Spectrum's case law does not establish a good faith dispute defense that would or should apply to section 226. The willful standard set forth in *Davis* is more similar to *Kao*'s and *Furry*'s construction of "knowing and intentional" than the construction Spectrum now advocates. (*Davis*, *supra*, 37 Cal.App.2d at p. 247 [Willful "amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent."].) *Barnhill* did not discuss wage statements or section 226. (See generally *Barnhill*, *supra*, 125 Cal.App.3d at pp. 1-9.) *Amaral* acknowledged the difference between "willfully" in section 203 and "knowing and intentional" in section 226 and did not

address section 226 in its discussion of regulation 13520. (*Amaral*, *supra*, 163 Cal.App.4th at pp. 1195, 1201-1202.) Lastly, the assertions of Spectrum, the Court of Appeal, and many federal district courts that this Court in *Trombley* linked the "knowing and intentional" standard to the "willfulness" standard is attenuated at best, given that this Court decided *Trombley* nearly 30 years before the Legislature used "knowing and intentional" in section 226. (See Stats.1976, ch. 832, § 1; MFJN 0213-0215; OBM 31.) The two sections are functionally different.

C. Section 226 Performs a Singular Function in California's Employee Compensation Scheme and Its Enforcement Should Not Be Made Uniform with Section 203's

Spectrum asserts that because sections 203 and 226 "are so frequently asserted in tandem in wage and hour disputes," this Court should match their respective standards for penalties rather than recognize each statute's distinct language, history, and objectives. (ABM 13.) Spectrum's focus on litigation tendencies as a rationale for this Court's judicial construction of section 226 is imprudent and disregards 226's separate objectives, which are more comprehensive than section 203's.

Although Spectrum is correct that both sections 203 and 226 are designed, at least in part, "to incentivize compliance" (ABM 13), that is where the similarities end. The purpose of section 203 is "to incentivize employers to pay end-of-employment compensation when it is due, rather than forcing employees to seek administrative relief or to go to court." (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 110 (*Naranjo*), citing *McLean v. State of California* (2016) 1 Cal.5th 615, 626; *Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1400; *Smith v. Superior Court* (2006) 39 Cal.4th 77, 82.) The purpose of section 226 is "to

enable employees to verify they have been compensated properly, without shortchanging or improper deduction." (*Naranjo*, *supra*, 13 Cal.5th at p. 119, citing *Ward v. United Airlines, Inc.* (2020) 9 Cal.5th 732, 752 (*Ward*).) Consequently, section 226 is a comprehensive statute that contains detailed wage statement requirements, recordkeeping requirements, inspection requirements, and remedies and penalties for noncompliance. (*Ward*, *supra*, 9 Cal.5th at p. 745.)

In *Ward*, this Court examined section 226's "aims and its role in the surrounding statutory scheme," acknowledging that its core purpose is "'to ensure an employer document[s] the basis of the employee compensation payments to assist the employee in determining whether he or she has been compensated properly.'" (*Id.* at p. 752, citing *Soto*, *supra*, 4 Cal.App.5th at p. 390.) As such, section 226's function in the "matrix of laws intended to ensure workers are correctly and adequately compensated for their work" is unique. (*Id.* at p. 753.)

Review of the surrounding statutory scheme—both first chapters of Part 1 (Compensation) and Part 2 (Working Hours) of Division 2 (Employment Regulation and Supervision)—shows three general categories of statutes that govern employee compensation. (See generally Lab. Code, §§ 200-273, 500-558.1.) Along with the DLSE's wage orders, the first category of statutes grants substantive rights concerning employees' entitlement to various types of compensation and benefits.[13] A second general grouping establishes procedures and processes to be followed with

[13] See, e.g., Lab. Code §§ 201 [payment upon discharge], 202 [payment upon resignation], 226.7 [break premiums], 246 [sick leave], 510 [overtime], 512 [meal periods]; see also Cal. Code Regs., tit. 8, §§ 11040, (3) [overtime], (4) [minimum wages and split shift], (5) [reporting time pay], (11) [meal periods], (12) [rest periods].

respect to the payment of compensation and benefits.[14] The third category of statutes sets forth various exemptions from compliance or penalties for noncompliance despite many of the substantive and procedural statutes also containing internal exemptions and penalty provisions.[15]

Unique among these three general categories is section 226, which is the only statutory provision that is functionally tethered to the first two categories of statues that either identify the compensation and benefits to be paid or establish the procedure by which remuneration occurs.[16] Stated another way, the accurate wage statement required by section 226 is the only mechanism in the statutory scheme that substantiates an employer's compliance or noncompliance. As a result, section 226 is the keystone statute on which all the other associated compensation statutes depend.

This Court recognized as much in *Ward*, acknowledging that section 226 "does not dictate what the employee is paid for any given period of time, but instead how the pay will be documented, requiring that certain information be provided to the employee each pay period." (*Ward*, *supra*, 9 Cal.5th at p. 753.) The import of section 226's function is illustrated by *Ferra*, *supra*, 11 Cal.5th at p. 858. In *Ferra*, Loews paid employees an additional hour of pay when compliant meal or rest periods were not

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[14] See, e.g., Lab. Code §§ 204 [designating paydays], 207 [posting requirements], 212 [payment instruments], 227.3 [vested vacation pay], 246 [sick leave], 511 [alternative workweeks]; see also Cal. Code Regs., tit. 8, §§ 11040, (3) [alternative workweek elections], (10) [meal and lodging protocols], (11) [on-duty meal period agreements].

[15] See, e.g., Lab. Code §§ 203 [waiting time penalties], 218.5 [attorney's fees and costs], 514 [exempt employees], 558 [civil penalties], 558.1 [individual liability]; see also Cal. Code Regs., tit. 8, §§ 11040, (1) [applicability of order], (17) [exemptions].

[16] Section 226.2 adds extra requirements to section 226 for employees who are compensated on a piece rate basis. (See Lab. Code § 226.2.)

provided, but paid employees at their base hourly rate (excluding nondiscretionary payments) when calculating the premium pay owed under section 226.7, subdivision (c). (*Id.* at p. 864.) As a result, the question litigated was whether the phrase "regular rate of compensation" in section 226.7, subdivision (c) carried the same functional meaning as the "regular rate of pay" in section 510, subdivision (a), such that the calculation of premium pay also must include other remuneration paid for work performed by the employee. (*Id.* at p. 863.)

Simply stated, the issue in *Ferra* does not arise *but for* section 226's requirements. The wage statements are the only means by which an employee can determine that the regular rate of pay used to calculate overtime is not the same amount as the regular rate of compensation used to pay break premiums, even when such payments are made in the same pay period. (See generally MFJN 0678-0724.) The wage statements are the only way to determine whether the issue was an isolated event that happened during one pay period, or possibly affecting only one employee, or rather the result of a systemic practice affecting an entire workforce. The wage statements are the only enforcement mechanism to substantiate the dispute in a fashion that presents a clean question of law for this Court and the lower courts to consider.

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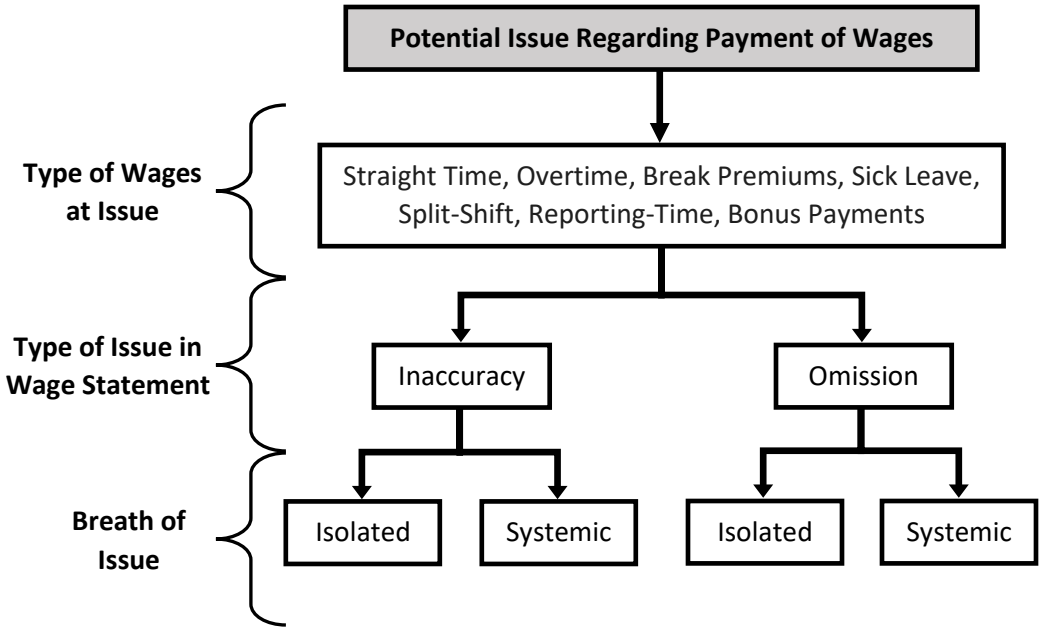
Depicted graphically, the flow chart below demonstrates all that section 226 enables a reviewer of wage statements to ascertain:



The utility of section 226 to identify the type, breadth, and basis for any potential issue regarding the payment of wages is not limited to break premiums. While *Ferra* represented a systemic inaccuracy related to bonus payments and break premiums, accurate itemized wage statements in accordance with section 226 are intended to identify any potential compensation issue and allow the reviewer to ask the appropriate questions to determine compliance or noncompliance. It explains how this author could review wage statements issued more than 16 years ago and see that an employee may not have been paid properly for four (4) hours of overtime or for 58 hours of training. (12 JA 2738-2739, 2741; 13 JA 2891; 2 RT 128:18-129:23.) With review of some additional wage statements, one could further determine whether the payment issue was isolated or systemic. Section 226 is the statutory provision that tells the story through which compliance is demonstrated or violations are challenged. That is why the Legislature

limited the defenses available to employers in subdivision (e)(3): **all other remunerative sections of the labor code and wage orders depend on it.**

As this Court has recognized previously, enforcement mechanisms are often just as important as the underlying statutory obligation (if not more so) to ensure employer compliance. (See *Murphy*, supra, 40 Cal.4th at pp. 1105-1106 [discussing the pay remedies introduced to enforce section 226.7].) Subdivision (e)(1) was added to section 226 to ensure that employers provide complete and accurate information to their employees by penalizing a knowing and intentional failure to do so. The purpose of section 226 is not served by incorporating administrative regulation 13520 or any judicially created "good faith dispute" defense, which would excuse noncompliance based on an employer's belief that the wage statements reported all the wages the employer believed it owed. A statement that conceals amounts earned is not an accurate statement. (*Naranjo*, *supra*, 13 Cal.5th at p. 119.) Similarly, an employer's incorrect belief that it did not have to pay wages in the first instance should not preclude a finding that the wage statement omitting the required information was "knowing and intentional." Allowing such an argument to be made "impedes employees' ability to verify they have been paid properly and," undermines "administrative enforcement of wage and hour protections." (*Ibid.*)

Despite these clear pronouncements, Spectrum remains defiant or unwilling to defer. It states "one might naturally think that a wage statement that omits unpaid amounts is *accurate* and of use to an employee." (ABM 61 [emphasis in original].) It is not. Nor is it ironic that a "good faith dispute" defense would *not* apply to the sole statute intended to identify and evidence compliance with all other compensation statutes. (ABM 43-44, fn. 11 [citing *Woods*, *supra*, 2015 WL 2453202, at *4, fn. 3].)

Rejecting that defense is appropriate. The "knowing and intentional" standard in subdivision (e)(1) should be construed in a manner that thoroughly incentivizes employers' proficiency of the employee compensation scheme and promotes the highest degree of compliance because, without such a standard, undisclosed compensation violations would remain undetected and consequently unremedied.

CONCLUSION

Courts in their interpretative capacity may not impose a construction that is inconsistent with the Legislature's expressed intention. Rather, courts must ascertain the Legislature's intent by engaging in well-established methods of statutory interpretation and construction, which the Court of Appeal and Spectrum did not do. Accordingly, the opinion of the Court of Appeal must be reversed.

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Labor Code section 226 provides both the standard for imposing wage statement penalties and instruction for an adjudicator to determine whether such penalties are warranted. This Court should hold that the standard for determining a "knowing and intentional failure" consists of a conscious act or omission done with awareness or understanding of its occurrence. The statutory language, legislative history, and objectives to be achieved by the statute all support a construction that imposes penalties for conscious acts done with awareness or understanding, while excusing clerical errors and inadvertent mistakes.

Dated: October 12, 2023

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Pursuant to rule 8.204(c)(l) of the California Rules of Court, the undersigned counsel for Plaintiffs and Appellants certifies that this reply brief contains **8,395** words in proportionately-spaced, 13-point Equity B type, exclusive of tables of contents and certificate of service, as determined by the word processing system used in the preparation of this brief, Microsoft Word 2013.

Respectfully submitted this 12th day of October, 2023.

By: 
Jason C. Marsili

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