Supreme Court Case No. S212704

IN THE SUPREME COURT OF CALIFORNIA

CPS SECURITY SOLUTIONS, INC.

Defendants/Cross-Complainants/Appellants/Petitioners

vs.

TIM MENDIOLA, *ET AL.*

Class Petitioners/Cross-Defendants/Respondents/Petitioners

After a Decision of the Court of Appeal

Second Appellate District, Division Four

Consolidated on Appeal with Case No.: B240519

Los Angeles County Superior Court Case Nos. BC388956, BC391669, JCCP 4605

Honorable Jane L. Johnson, Judge

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DEFENDANTS/CROSS-COMPLAINANTS/APPELLANTS/PETITIONERS' ANSWERING BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

INTRODUCTION 1
ARGUMENT 6

A. The DLSE Has Not Applied Varying Enforcement Policies
With Respect To The Legality Of The Current CPS Compensation Plan. 6

B. The Court Of Appeal Correctly Found That Federal RegulationsAnd Authority May Properly Be Consulted To Determine Whether Sleep Time May Be Excluded From Employees Who Are Scheduled For 24-Hour Shifts. 11

C. Plaintiffs' Claim That There Is No Indication That The IWC Intended To Permit The Importation of 29 U.S.C. Section 785.22 Into California Wage And Hour Law Is Simply Wrong 14

D. The Language of The IWC's Wage Orders Does Not Demonstrate That The IWC Intended to Preclude the Application of Federal Wage And Hour Law to CPS's On-Call Sleep Time Agreements 17

1. Ambulance Drivers And Attendants Under Wage Order 9 17

2. The Health care Industry Under Wage Order No. 4 and Wage Order No. 5 21

3. Actual Hours Worked Under Wage Order No. 5.23

E. The Court of Appeal's Public Policy Argument In Support of Deducting Eight Hours of Sleep Time From 24-Hour Employees is Consistent With DLSE Policies 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

CASES

Armour & Company v. Wantock
(1944) 323 U.S. 126 .... 8, 12

Bono Enterprises, Inc. v. Bradshaw
(1995) 32 Cal.App.4th 968 22

Bouchard v. Regional Governing Board of Region V Mental Retardation
(8th Cir. 1991) 935 F.2d 1325 8

Brewer v. Patel
(1993) 23 Cal.App.4th 1017 .... 24, 25

Gomez v. Lincare, Inc.
(2009) 173 Cal.App.4th 508 .... 12, 29

Isner v.Falkenberg/Gilliam & Associates, Inc.
(2008) 160 Cal.App.4th 1393 24

Keyes Motors, Inc. v. Division of Labor Standards Enforcement
(1987) 197 Cal. App.3d 557 .... 11, 20

Martinez v. Combs
(2010) 49 Cal.4th 35 16

Mendiola v. CPS Security Solutions, Inc.
(2013) 217 Cal.App.4th 851, 873 .... 1, 5, 11, 12, 26

Monzon v. Schaefer Ambulance Service, Inc.
(1990) 224 Cal.App.3d 16 .... 1, 2, 3, 4, 5, 14, 15, 16,
.... 18, 20, 23, 28, 29

Morillion v. Royal Packing Co.
(2000) 22 Cal.4th 575 .... 10, 11, 12, 26, 27

Overton v. Walt Disney Co. (Overton)
(2006) 136 Cal.App.4th 263 .... 10, 27

Owens v. Local No. 169
(9th Cir. 1992) 971 F.2d 347 .... 12, 13, 29

Seymore v. Metson Marine, Inc.
(2011) 194 Cal.App.4th 361 .... 1, 3, 4, 5, 15, 29

Vega v. Gasper
(5th Cir. 1994) 36 F.3d 417 10

STATUTES

Cal. Labor Code Section 1194 19

Labor Code Section 203 9

Labor Code Section 1194.2 9

OTHER AUTHORITIES

29 C.F.R. § 785 13

29 C.F.R. § 785.17 13

29 C.F.R. § 785.22 .... 1, 3, 4, 5, 6, 11, 13, 14, 15,
.... 18, 19, 21, 22, 23, 25, 28

29 C.F.R. § 785.23 8

Simmons, Wage and Hour Manual (15th ed. 2012) 23

Wage Order 4, § 11(D) 21

Wage Order 4, § 2(K) 21

Wage Order 4, § 2(K) 17

Wage Order No. 4 .... 2, 5, 15, 21, 22, 23, 29

Wage Order No. 5 .... 21, 22, 23, 25, 26, 29

Wage Order 5, § 11(C) 21, 22

Wage Order 5, § 11(D) 21, 22

Wage Order 5, § 2(K) 17, 21, 23

Wage Order 5, § 2(P) 23

Wage Order 5, § 3(C) 21

Wage Order 5, § 3(K) 17

Wage Order 9, § 2(A) 15

Wage Order 9, § 3(A) 15

Wage Order 9, § 3(G) 15

Wage Order 9, § 3(K) 2, 14, 15, 17, 18, 19

Wage Order No. 9 .... 1, 2, 4, 5, 14, 15, 16, 17, 19, 20, 29

Wage Order No. 9(A) 2

Wage Order No. 9, § 2(H) 15

INTRODUCTION

This brief is submitted by Defendants and Petitioners CPS Security Solutions, Inc., *et al.* ("CPS") answering the Opening Brief on the Merits submitted by Plaintiffs and Petitioners Tim Mendiola, *et al.* on behalf of himself and a certified class of Trailer Guards employed by CPS (the "Plaintiffs"). Plaintiffs' Opening Brief addresses the portion of the Court of Appeal's decision below holding that CPS and the Trailer Guards could lawfully agree to exclude eight hours of on-call sleep time from compensable hours worked on weekends when the Trailer Guards were scheduled for 24-hour shifts. In so holding, the Court of Appeal followed the decisions in *Monzon v. Schaefer Ambulance Service, Inc. (Monzon)* (1990) 224 Cal.App.3d 16 and *Seymore v. Metson Marine, Inc. (Seymore)* (2011) 194 Cal.App.4th 361, both of which held that 29 C.F.R. Section 785.22, the federal wage and hour regulation that applies to employees scheduled for 24-hour shifts, "may properly be consulted to determine whether sleep time may be excluded from 24-hour shifts" under California law. (*Mendiola v. CPS Security Solutions, Inc.* (*Mendiola*) (2013) 217 Cal.App.4th 851, 873).

The plaintiffs in *Monzon* were ambulance drivers who were scheduled for 24-hour shifts. The employer's policy was to pay the ambulance drivers for 16 of those hours, but not for eight hours of designated sleep time unless the drivers were called to respond to an emergency. The plaintiffs in *Monzon* were covered by Wage Order No. 9, which applies to employees in the transportation industry. Although the definition of "hours worked" in Wage Order No. 9 is the

same as in Wage Order No. 4 and most of the other wage orders, Wage Order No. 9 contains a unique provision regarding ambulance drivers and attendants who are scheduled for 24-hour shifts. Section 3(K) of Wage Order No. 9 provides that "the daily overtime provision of subsection (A) above shall not apply to ambulance drivers and attendants scheduled for 24-hour shifts of duty who have agreed in writing to exclude from daily time worked not more than three (3) meal periods of not more than one (1) hour each and a regularly scheduled uninterrupted sleeping period of not more than eight (8) hours," provided that the employer "provide adequate dormitory and kitchen facilities for employees on such a schedule."[1] Because the employer did not have written agreements with the ambulance drivers, the employees argued that the entire 24-hour shift was compensable hours worked.

The Court of Appeal disagreed. It found that although the definition of "hours worked" in the wage order is different from the Fair Labor Standards Act ("FLSA"), California's wage orders "are closely modeled after" the FLSA. (*Monzon, supra,* 224 Cal.App.3d at 38-39.) "Given the similar purpose behind FLSA and the wage orders, we conclude that although the definitions of 'hours worked' are not the same, they are parallel, and therefore federal precedent is

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[1] Subsection A of Wage Order No. 9, as the other wage orders, provides, in part, that employees shall not work more than eight hours in any workday unless they are compensated for such overtime at not less than one and one half times their regular rate of pay for all hours worked in excess of eight hours up to and including 12 hours in any workday, and double their regular rate of pay for all hours worked in excess of 12 hours in any workday.

entitled to some deference." (*Id.* at 46.) The court then recognized an implied sleep time exclusion in California law based on 29 C.F.R. §785.22, the federal regulation that authorizes agreements to exclude up to eight hours of sleep time from hours worked for employees working shifts of 24 hours or longer:

> Therefore, we hold that it is permissible for an employer and ambulance drivers and attendants to enter into an agreement, which need not be written, to exclude up to eight hours of sleep time from work or compensable time on twenty-four hour shifts if adequate sleeping facilities are provided by the employer and the employee has the opportunity to get at least five hours of uninterrupted sleep. If the employee does not get five hours of interrupted sleep, then the entire time must be considered hours worked.

(*Id.* at 46.)

Monzon was followed in 2011 in *Seymore.* The plaintiffs there worked 14 day "hitches" on ships used to clean oil spills off the California coast. Unlike the plaintiffs in *Monzon,* the *Seymore* plaintiffs were not scheduled to work 24-hour shifts. Rather, while on a hitch, employees were scheduled to work for 12-hours and to be "off-duty" for 12 hours each day. The off-duty time included eight hours of sleep time, three hours of meal time, and one hour of free time, during which the employees were on "stand by." If the ship was docked at port, the employees were permitted to leave the ship, but they were required to carry a cell phone and respond to emergency calls within 30-45 minutes. The employees did not reside on the ship between hitches, but they were required to sleep aboard the ship each night during the hitch, even if the ship remained in port.

The employees in *Seymore*, who were covered by Wage Order No. 9, alleged that they were subject to the control of the employer during their "off duty" time and were entitled to an additional 12 hours of pay each day at double time. The employer argued that the stand-by hours were not hours worked. Although the employees were scheduled to work 12 hours (plus an additional eight hours of sleep time) and not 24 hours a day, the *Seymore* court, relying on *Monzon* and 29 C.F.R. § 785.22, found that the eight hours of sleep time was not compensable hours worked. The court explained that the express exemption in Wage Order No. 9 for a sleep time exclusion from daily overtime for ambulance drivers and attendants, which requires a written agreement, is different from the exclusion of sleep time from compensable hours worked by 24-hour employees. Following *Monzon*, the court found that the exclusion of sleep time for 24-hour employees was not authorized by any explicit provision in the wage order, but rather is "implied from the terms" of 29 C.F.R. § 785.22. (*Seymore, supra*, 194 Cal. App.4th at 382.)

As the Court of Appeal here recognized, the *Seymore* court rejected the contention that *Monzon* applied only to ambulance drivers and attendants, holding that:

> Plaintiff are correct that Wage Order No. 9 provides an exemption for ambulance drivers and attendants who have agreed in writing to exclude from compensation eight hours of sleep in a 24-hour period. [Citation omitted.] Nonetheless, the [*Monzon*] court held that this exemption was not applicable in that case because there was no written agreement. [Citation omitted.] Instead, recognizing that the DLSE's "enforcement policy for sleep time closely resembles the federal policy," the court read into the state regulation defining compensable hours

> worked the provisions of the federal regulation, 29 Code of Federal Regulations Part 785.22…. In the 20 years since *Monzon* was decided, no judicial decision brought to our attention has disagreed with its ruling and neither the statute nor the regulations have been amended to modify the ruling."

(*Seymore, supra*, 194 Cal.App.4th at 381-382.)

The Court of Appeal below followed *Monzon* and *Seymore*. It held that:

> We agree with the courts in *Seymore* and *Monzon* that because the state and federal definitions of hours worked are comparable and have a similar purpose, federal regulations and authorities may properly be consulted to determine whether sleep time may be excluded from 24-hour shifts. Further, we find this determination to be applicable to all wage orders that include essentially the same definition of "hours worked" found in Wage Order No. 9, including Wage Order No. 4.

(*Mendiola, supra,* 217 Cal.App.4th at 873-874.) The Court of Appeal also found that there are sound reasons" for permitting an employer who engages an employee to work a 24-hour shift and compensates him for 16 of those hours to exclude the remaining eight hours for sleep time, as long as…the parties enter into an agreement covering the period:

> Most employees would be sleeping for a similar period every day, whether on duty or not, and the compensation provided for the other 16 hours, which should generally include considerable overtime, ensures that the employees receive an adequate wage.

(*Id.* at 874.)

Plaintiffs claim that the Court of Appeal's decision below was wrongly decided and that California wage and hour laws do not

permit employers and employees to enter into agreements to exclude on-call sleep time from compensable hours worked, even for employees who are scheduled to work 24-hour shifts. In support of this claim, Plaintiffs argue that (1) the Division of Labor Standards Enforcement's ("DLSE") approval of CPS's agreement with the Trailer Guards is not entitled to any deference because the DLSE "has wildly shifted back and forth" concerning the legality of CPS' compensation plan; (2) federal and state wage and hour law are not so substantially similar that federal regulations and authority can be consulted to determine the compensability of on-call sleep time; (3) there is no indication that the Industrial Welfare Commission ("IWC") intended to incorporate 29 C.F.R. Section 785.22 into California's wage orders; (4) the language of other wage orders demonstrates that the IWC intended to preclude application of federal wage and hours law to on-call sleep time for employees who are scheduled for 24-hour shifts; and (5) the Court of Appeal's policy reasons for enforcing CPS's agreement improperly intrude on the IWC's quasi-legislative authority. For the reasons set forth below, each of these claims is without merit.

ARGUMENT

A. The DLSE Has Not Applied Varying Enforcement Policies With Respect To The Legality Of The Current CPS Compensation Plan.

Beginning on page 39 of the Opening Brief, Plaintiffs outline in detail CPS's history with the DLSE. Plaintiffs first refer to the "Duncan Letter," which was issued in 1997 by John Duncan, who was at the time the Chief Deputy Director of the Department of Industrial

Relations and the Acting Labor Commissioner. The Duncan letter gave formal approval to CPS's then existing compensation plan. A copy of the Duncan Letter is attached as Exhibit H to the Joint Separate Statement of Undisputed Facts filed by the parties in support of their respective motions for summary judgment and summary adjudication of issues. In his letter, Mr. Duncan observed that:

> ...over the past 20 years, DLSE has adopted an enforcement policy excluding sleep time and other non-active duty hours of mini-storage managers under IWC order #9-90, mortuary attendants under IWC order #2-80, and private firefighters under IWC order #4-89 as being consistent with the IWC orders. The inclusion of these classifications in the excludability of sleep time acknowledged the common sense and fairness underlying the wage orders, and their proper interpretation in light of applicable federal law, with which the IWC was undoubtedly familiar when it adopted the language contained in the wage orders.

(Jt. App. Vol. 1, 0173.) Mr. Duncan concluded that "in light of the facts and after careful and thorough review of Construction Protective Services' compensation documents, we find it appropriate to extend this rule to the live-in security guards of your client." (Jt. App. Vol. 1, 0174.)

Plaintiffs then correctly point out that with the change of administrations in Sacramento, Marcy V. Saunders, the new Labor Commissioner, wrote a letter to CPS's counsel, dated August 12, 1999, in which she advised CPS that the Duncan letter was incorrect and urged CPS's counsel "to advise your client to immediately modify its compensation practices in order to comply with California wage and hour law." (Exh. A to Plaintiffs' Motion for Judicial Notice filed in support of its Opening Brief.) In support of her position, Ms.

Saunders cited *Armour & Company v. Wantock* (1944) 323 U.S. 126 for the principle that "a company's private firefighters were entitled to compensation for all hours during which they were restricted to the employer's premises and expected to respond to any emergencies, despite the fact that they were free to sleep or otherwise engage in private pursuits during those hours." In fact, the Supreme Court in *Wantock* affirmed the holding of the district court and Court of Appeal that "Usual hours for sleep and for eating ... would not be counted [as hours worked], but the remaining hours should." (*Id.* at 129.)[2] Ms. Saunders' letter was followed by a similar letter from Anne Steveson ("Steveson"), the Chief Counsel for the DLSE, dated September 16, 2002, in which Ms. Steveson also advised CPS that the conclusions reached by Mr. Duncan were "incorrect and in conflict with the established California law." (Exh. D to Plaintiffs' Motion for Judicial Notice in support of its Opening Brief.)

CPS responded to Ms. Steveson's letter by filing an action for Declaratory Relief against the State Labor Commissioner in Orange County Superior Court on November 18, 2002. (Jt. App. Vol. 1, 0086; Defendant's Request for Judicial Notice, Exh. A.) The Labor

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[2] Ms. Saunders also wrote that it did not "appear that the Trailer Guards resided on the employer's premises on a permanent basis or for extended periods of time" as required by 29 C.F.R. Section 785.23. Contrary to Ms. Saunders' assertion, case law is clear that employees who reside on their employer's premises five days a week or more are considered to reside there for extended periods of time within the meaning of 29 C.F.R. Section 785.23, even if they have another residence that they may regard as their principal residence. (*Bouchard v. Regional Governing Board of Region V Mental Retardation* (8th Cir. 1991) 935 F.2d 1325, 1329.)

Commissioner, in turn, filed a cross-complaint for unpaid wages, illegal deductions, penalties under Labor Code Section 203, liquidated damages under Labor Code Section 1194.2 and Injunctive Relief. (Defendant's Request for Judicial Notice, Exh. B.)

In settlement of CPS's complaint and the Labor Commissioner's cross-complaint, the parties entered into a Memorandum of Understanding Re: Mutual Dismissal ("MOU") (Jt. App. Vol. 1, 0086), a copy of which is attached as Exhibit I to the Joint Separate Statement of Undisputed Facts (Jt. App. Vol. 1, , 0175-0180.) As set forth in the MOU, CPS agreed to change its compensation plan. Prior to the MOU, Trailer Guards who wished to leave the job site at night had to request permission to leave at least 12 hours in advance and they were not paid if a reliever was unavailable. (Jt. App. Vol.1, 0085.) Under the revised policy contained in the MOU which is the subject of this lawsuit, Trailer Guards are free to leave the site at will during their sleep time (subject to certain conditions), except that "CPS may require a Trailer Guard to remain at the site during all or any portion of his/her free [sleep] time on any given occasion" and, in such event, "the Trailer Guard shall be paid for such time." (Jt. App. Vol. 1, 0177-0178.) With these changes, the Labor Commissioner and the DLSE agreed that CPS's policy complies with "all applicable IWC Wage Orders and related wage and hour laws and regulations." (Jt. App. Vol. 1, 0177.)

Based on the above, it is disingenuous for Plaintiffs to claim that the DLSE's decision to approve CPS's new policy was "inexplicable." (Opening Brief at p. 41.) To the contrary, the DSLE's

decision is easily explainable: the DLSE required CPS to change its compensation plan to permit Trailer Guards to leave at night and, if they were required to remain on the premises, to pay the Trailer Guards for their entire on-call shift. The DLSE clearly concurred with CPS's analysis, as set forth in its Opening Brief, that the Trailer Guards are not under CPS's control unless and until they request to leave the job site.[3] If CPS requires a Trailer Guard to remain on site, the guard then becomes subject to CPS's control and he or she is paid for the entire on-call period. In short, the Trailer Guards are paid for all of the time they are under CPS's control as required by this Court in *Morillion v. Royal Packing Co. (Morillion)* (2000) 22 Cal.4th 575. (*Cf. Overton v. Walt Disney Co. (Overton)* (2006) 136 Cal.App.4th 263, holding that employees were not under the control of the employer while riding the employer's bus from the Disney parking lot to their jobs at Disneyland, because their decision to take the employer shuttle was voluntary; and *Vega v. Gasper* (5th Cir. 1994) 36 F.3d 417, holding that time spent by employees traveling on the employer's buses from designated meeting points to the actual place of work was not compensable where employees were not required to use the employer's buses to get to work in the morning.)[4]

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[3] Significantly, Anne Steveson, the chief counsel for the DLSE who found CPS's prior compensation plan unlawful in her August 16, 2002 letter, signed the MOU on behalf of the DLSE and the Labor Commissioner finding the current compensation plan to "comply with all applicable current IWC Wage Orders and related wage and hour laws and regulations." (Jt. App. Vol. 1, 0180.)

[4] In *Morillion*, this Court held that *Vega* was "consistent with our opinion." This Court found "the fact that the Vega employees were free to choose — rather than required — to ride their employer's

The Labor Commissioner and DLSE's approval of CPS's compensation plan "is entitled to great weight and, unless it is clearly unreasonable, it will be upheld." (*Keyes Motors, Inc. v. Division of Labor Standards Enforcement (Keyes)* (1987) 197 Cal. App.3d 557.564.)

B. The Court Of Appeal Correctly Found That Federal Regulations And Authority May Properly Be Consulted To Determine Whether Sleep Time May Be Excluded From Employees Who Are Scheduled For 24-Hour Shifts.

Plaintiffs claim that the Court of Appeal erred by consulting 29 C.F.R. Section 785.22 in finding that an employer and employees who are scheduled to work 24-hour shifts can agree to exclude up to eight hours of sleep time from compensable hours worked. Although the Court of Appeal could have been more artful in its explanation, the Court of Appeal's conclusion that it is appropriate to consult federal law in determining whether on-call sleep time constitutes hours worked for employees who are scheduled for 24-hours shifts was correct.

The Court of Appeal found that because "the state and federal definitions of hours worked are comparable and have a similar purpose," federal regulations and authorities may be consulted to determine whether on-call sleep time may be excluded from 24-hour shifts. (*Mendiola*, 217 Cal.App.4th at 873.) Although this statement may be overly broad, the statement must be read in light of the Court of Appeal's more specific finding that "[b]ecause state and federal

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buses to and from work, a dispositive, distinguishing fact." (*Morillion*, *supra*, 22 Cal.4th at 589, n. 5.)

courts both rely on the factors set forth in *Gomez v. Lincare, Inc*...to determine whether on-call time is compensable, we may look to federal authorities for guidance." (*Mendiola*, 217 Cal.App.4th at 870, *n.* 25.)

This Court in *Morillion* held that federal law can inform the interpretation of state law when the federal and state statutory schemes are substantially similar. In making this determination, the Court advised that state courts must make a "comparative analysis" in determining how much weight to give federal authority in interpreting a California wage order. *Morillion*, 22 Cal.4th at 588. A comparative analysis of the compensability of on-call time under federal and state law shows that the federal and state statutory schemes both turn on the level of control exercised by the employer during the on-call time and are substantially similar.

It is undisputed that in determining whether on-call time is compensable, both state and federal law look to the degree of the employer's control over the employee during the on-call period. The U.S. Supreme Court famously phrased the issue as follows in *Armour & Co. v. Wantock, supra,* 323 U.S. at 133: whether the employee is *waiting to be engaged* (in which case the on-call time would not be compensable) or whether the employee is *engaged to wait* (in which case the on-call time would be compensable). As set forth in CPS's Opening Brief, the Court of Appeal in *Gomez v. Lincare, Inc. (Gomez)* (2009) 173 Cal.App.4th 508 expressly adopted the federal test established in *Owens v. Local No. 169 (Owens)* (9th Cir. 1992) 971 F.2d 347 in making this determination.

The *Owens* test, however, is not the beginning and end of the inquiry under federal law as to whether on-call time is compensable. Rather, the Department of Labor ("DOL") has adopted a serious of regulations regarding the compensability of on-call time. These regulations are set forth in 29 C.F.R. Part 785. The general rule regarding the compensability of on-call time is set forth in 29 C.F.R. Section 785.17, which provides that an employee who is required to remain on call on the employer's premises or so close to the employer's premises that he cannot use the time effectively for his own purpose is working while on-call. However, there is an exception to this general rule contained in 29 C.F.R. Section 785.22. This section provides that:

> (a) General. Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no express or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitutes hours worked. [Citations.]
>
> (b) Interruptions of Sleep. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisions have adopted the rule that if the employee cannot get at least five hours' sleep during the scheduled period, the entire time is working time. [Citations.]

In sum, the Court of Appeal did not err in consulting 29 U.S.C.

Section 785.22 for guidance in determining that, under state law, the on-call sleep time worked by Trailer Guards who are scheduled for 24-hour shifts is compensable.

C. Plaintiffs' Claim That There Is No Indication That The IWC Intended To Permit The Importation of 29 U.S.C. Section 785.22 Into California Wage And Hour Law Is Simply Wrong

Plaintiffs claim that there is no evidence of the IWC's intent to incorporate 29 C.F.R. Section 785.22 into California wage and hour law. This is incorrect. Most significantly, the IWC endorsed the Court of Appeal's decision in *Monzon* by failing to reverse or otherwise modify the decision from 1990 until the IWC was defunded in 2006. Significantly, the IWC amended various wage orders, including Wage Order No. 9, during that time.

The plaintiffs in *Monzon* were ambulance drivers who were scheduled to remain on premises for 24-hour shifts. The employer's policy was to pay the ambulance drivers for sixteen of these hours, but not for eight hours of sleep time unless the drivers were called to respond to an emergency. The employer did not have a written agreement with the plaintiffs.

The employees in *Monzon* were covered by Wage Order No. 9, which contains a unique provision, currently Section 3(K), that expressly permits employers to exclude sleep time and meal periods from the daily time worked of "ambulance drivers and attendants scheduled for 24-hour shifts of duty" who had signed written agreements. Because the ambulance drivers in *Monzon* had not signed written agreements, the employees argued that their entire 24-hour shift was compensable hours worked.

The court first found that Section 3(G) (now Section 3(K)) was an exception to the daily overtime requirement in Section 3(A), not an exception to the definition of "hours worked" contained in Section 2(A) (now 2(H)). That section defines hours worked as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." This, significantly, is the same definition of "hours worked" contained in Wage Order No. 4, the one applicable to this case.[5]

The court found that although this definition of hours worked is different from the FLSA, California's Wage Orders "are closely modeled after" the FLSA and "given the similar purpose behind FLSA and the wage orders, we conclude that although the definitions of 'hours worked' are not the same, they are parallel, and therefore federal precedent is entitled to some deference." *Monzon*, *supra*, 224 Cal.App.3d at 38, 46. The court then recognized an implied sleep time exclusion in California law based on the federal regulations governing sleep time, specifically 29 C.F.R. Section 785.22. Section 785.22 authorizes agreements to exclude up to eight hours of sleep time from hours worked for employees working shifts of 24 hours or longer:

> Therefore, we hold that it is permissible for an employer and ambulance drivers in attendance to enter into an agreement,

[5] The Court of Appeal in *Seymore*, like the Court of Appeal below, recognized that the *Monzon* exclusion for sleep time was not limited to ambulance drivers and attendants covered by Wage Order No. 9, but was "read into the state regulation defining compensable hours worked." (194 Cal.App.4th at 381.)

> which need not be written, to exclude up to eight hours of sleep time from work or compensable time on twenty four hour shifts if adequate sleeping facilities are provided b y the employer and the employee has the opportunity to get at least five hours of uninterrupted sleep. If the employee does not get five hours of uninterrupted sleep, then the entire time must be considered hours worked.

Id. at 46.

The soundness of the *Monzon* decision will be discussed *infra.* For now, it is sufficient to note that *Monzon* was decided in 1990 and that although the IWC has amended various wage orders since then (including Wage Order No. 9 in 2004), the IWC never indicated any intent to overturn *Monzon*. It is established that "when the Legislature amends a statute without altering portion of the provisions that have previously been judicially construed, the Legislature is presumed to have been aware of and have acquiesce in the previous judicial construction" and that "reenacted portions of the statute are given the same consideration they receive before the amendment." (*Marina, Ltd. v. Wolfson* (*Marina, Ltd.*) (1982) 30 Cal.3d 721, 734, "It is a well-established principle of statutory construction that when the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction" and that "reenacted portions of the statute are given the same construction they received before the amendment.") The IWC wage orders are construed in the same way as statutes. (*Martinez v. Combs* (2010) 49 Cal.4th 35, 58-60.)

D. The Language of The IWC's Wage Orders Does Not Demonstrate That The IWC Intended to Preclude the Application of Federal Wage And Hour Law to CPS's On-Call Sleep Time Agreements

Plaintiffs argue that the language of Wage Order Nos. 4, 5 and 9 demonstrate that the IWC intended to preclude the application of federal wage and hour law to CPS's on call sleep time agreements. Plaintiffs specifically refer to (1) the provision in Section 3(K) of Wage Order No. 9 permitting ambulance drivers and attendants who are scheduled for 24-hour shifts to agree in writing to exclude eight hours of sleep time from daily overtime requirements; (2) the provision in Section 2(K) of Wage Order No. 4 and Wage Order No. 5, providing that the definition of "hours worked" be determined in accordance with the FLSA for employees in the health care industry; and (3) the provision in Section 3(K) of Wage Order No. 5 providing that hours worked for employees who are required to reside on the employment premises only includes time actually worked. In fact, none of these provisions evince the IWC's intent to preclude application of federal law to CPS's on-call sleep time agreements.

1. Ambulance Drivers And Attendants Under Wage Order No. 9

Section 3(K) of Wage Order No. 9 contains an exemption from daily overtime requirements for ambulance drivers and attendants. It provides that daily overtime requirements "shall not apply to ambulance drivers and attendants scheduled for 24-hour shifts of duty who have agreed in writing to exclude from daily time worked not more than three (3) meal periods of not more than one (1) hour each and a regularly scheduled uninterrupted sleeping period of not more

than eight (8) hours. The employer shall provide adequate dormitory and kitchen facilities for employees on such a schedule."

Plaintiffs argue that if "the IWC really believed that [29 C.F.R. Section 785.22] applied, the adoption of the special provision for ambulance drivers and attendants would have served no purpose whatsoever." (Opening Brief at p. 35.) Plaintiffs reason that if the federal regulation did apply, "then *any* agreement, written or otherwise, between 24-hour shift ambulance drivers and their employers...would be sufficient to exclude 'sleep time' from otherwise compensable 'hours worked' for any purpose, not just for the purpose of calculating hours worked for daily overtime." (Opening Brief at p. 35.)

At the outset, it should be emphasized that the Court of Appeal below, as the court in *Monzon*, recognized that Section 3(K) of Wage Order No. 9 does not alter the definition of "hours worked." Rather, it permits sleep-time hours to be paid at straight time pursuant to written agreements, provided that certain conditions are met. As the Court of Appeal in *Monzon* found:

> "'The primary purpose of section 3[K] was to relieve the twenty- four (24) hour schedule from the daily overtime requirements. The purpose was not to regulate the meal and sleep periods. *The rules for meal and sleep periods were already set forth* in the U.S. Department of Labor's interpretive bulletin. See 29 C.F.R. §785.22, ... Thus, it was not necessary to cover this subject under Section 3[(K].' (Italics added.)"

(22 Cal.App.3d at 41.)

Plaintiffs' claim -- that the exemption from daily overtime requirements in Section 3(K) would not have been necessary if the

federal sleep time regulations had already been imported into California law -- is simply wrong. Section 3(K) serves several purposes. First, it permits ambulance drivers working 24-hour shifts to agree to be compensated at straight time rates rather than overtime rates of time and a half (for hours 8 to 12) and double time (for hours 12-24). Second, it provides employers and ambulance drivers who are scheduled for 24-hour shifts with different options on how to treat sleep time. Plaintiffs simply ignore the fact that both of these provisions (Section 3(K) and Section 785.22) require the formation of a written agreement between the employee and his or her employer as to how sleep time is to be compensated, if at all. It is easy to envision a situation where an employee would agree to be paid straight time for sleep time and meal periods but might not agree to exclude sleep time from compensable hours worked entirely. Thus Plaintiffs' assertion that Section 3(K) would serve no independent purpose if CPS's interpretation were correct is fallacious. When that pillar of their logical argument is removed, the rest of their arguments crumble.[6]

---

[6] Indeed, Plaintiffs' interpretation of Wage Order No. 9 is actually subject to the flaw they leveled against CPS and which was adopted by the trial court (but implicitly rejected by the Court of Appeal): that the wage order would trump the Labor Code Section's prohibition against agreements to work for less than the minimum wages. *See,* Cal. Labor Code Section 1194. If *all* Section 3(K) accomplished was to permit the exclusion of up to 8 hours of sleep time during 24-hour shifts, then ambulance drivers scheduled for 24-hour shifts would have to be paid time and a half during hours 8-12 and double time between hours 12-16).

Plaintiff also ignore the fact that "the IWC's historical rule has been to permit the exclusion of sleep and meal periods" from hours worked. (*Monzon*, 224 Cal.App.3d at 45.) Indeed, current Section 46.4 of the DLSE Enforcement Policies and Interpretations Manual (Revised) expressly states that "DLSE Enforcement Policy has historically allowed eight (8) hours to be deducted if an employee is scheduled for 24-hour work shifts and is required to remain on the employer's premises during the work shift and, in fact, receives eight (8) hours of uninterrupted sleep." Defendant's Request for Judicial Notice, Exh. C. The DLSE's interpretation, as the agency charged with enforcing the wage orders, "is entitled to great weight and, unless it is clearly unreasonable, it will be upheld." (*Keyes,* 197 Cal.App.3d at 564.)

Finally, Wage Order No. 9 was amended by the IWC effective July 1, 2004 (to provide meal and rest periods to public transit bus drivers, unless the drivers are covered by a collective bargaining agreement containing certain provisions. (Defendant's Request for Judicial Notice, Exh. D.) Significantly, the IWC let stand, and did not amend, the Court of Appeal's decision in *Monzon* As set forth above, "when the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and have acquiesced in the previous judicial construction" and "reenacted portions of the statute are given the same construction they received before the amendment." (*Marina, Ltd.,* 30 Cal.3d at 734.

2. The Health care Industry Under Wage Order No. 4 and Wage Order No. 5

Plaintiffs also argue that the provision in Sections 2(K) of Wage Order Nos. 4 and 5 regarding employees in the health care industry also evidence the IWC's intent not to follow 29 C.F.R. Section 785.22. Section 2(K) of both wage orders provide that, "[w]ithin the health care industry, the term 'hours worked' means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act." Once again, Plaintiffs have reached too far.

In 1993, the IWC substantially revised Wage Order Nos. 4 and 5 in response to requests from representatives of the health care industry for more flexibility with respect to work scheduling, managerial and administrative exemptions, and the definition of hours worked for compensation. In addition to amending Section 2(K), the IWC also amended Section 3(C) of Wage Order No. 5 to permit work periods in excess of 14 consecutive days, providing certain requirements are met, and Section 11(D) of Wage Order Nos. 4 and 5 permitting employees who worked shifts in excess of eight hours to voluntarily waive their right to a meal period. The IWC also added then Section 2(K) to Wage Order Nos. 4 and 5, which applied the less stringent "primary duty" test under federal law (rather than the 50% duties test under state law) to determine whether employees in the

health care industry are exempt employees.[7] Defendant's Request for Judicial Notice, Exs. E and F.

In short, the IWC in 1993 made across-the-board changes with respect to how health care employees are treated under Wage Order Nos. 4 and 5. The IWC changed the test for the administrative exemption to the "primary duty" test under federal law, permitted work periods of up to 14 consecutive days, permitted employees who work more than eight hours in a day to waive their right to a meal periods, and provided that federal law apply to determine hours worked. These sweeping changes in a single industry cannot be interpreted to mean that the IWC did not believe that 29 C.F.R. Section 785.22 applied to on-call sleep time for employees scheduled for 24-hour shifts.

The application of federal law to what constitutes hours worked also encompasses far more than merely sleep time or on-call time. For example, under state law, an employee's meal period counts as hours worked if the employee is not permitted to leave the work site. (*Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968.) This is not the case under federal law, where meal periods do not

[7] The 14 consecutive day work period and the primary duty test were subsequently deleted from the wage orders. The meal period provision, which was added as section 11(C) and is now 11(D), currently provides that employees in the health care industry who work shifts in excess of eight hours in a work day may voluntarily waive their right to one of their two meal periods, provided that the waiver is documented in a written agreement, is voluntarily signed by both the employee and the employer, and provides that the employee may revoke the waiver at any time by providing the employer at least one day's written notice.

count as hours worked even if an employee must stay on site. (see e.g., *Simmons*, Wage and Hour Manual (15th ed. 2012) § 7.6, p. 240, contrasting requirements under state and federal law.) In short, it is not reasonable to infer from the IWC's amendments to Wage Order Nos. 4 and 5 that the IWC intended to incorporate the provisions of Section 785.22 for certain employees in the health care industry **and also** intended to overrule *Monzon* to avoid following federal regulations for all other California workers (including other health care workers whose employment may be subject to other industry wage orders). If, as Plaintiffs suggest, that was the IWC's intent, the IWC would certainly have said so more clearly.

3. Actual Hours Worked Under Wage Order No. 5

Plaintiffs also argue that Wage Order No. 5's definition of "hours worked" for employees who reside on the employment premises also evidences the IWC's intent not to apply 29 C.F.R. Section 785.22 to employees who, although they reside on the employment premises, are not covered by Wage Order No. 5. This inference, too, lacks merit.

Wage Order No. 5 applies to employees in the public housekeeping industry, which is defined to mean "any industry, business, or establishment which provides meals, housing, or maintenance services whether operated as a primary business or when incidental to other operations in an establishment not covered by an industry order of the Commission...." Wage Order No. 5, Section 2(P). It includes, for example, restaurants, boarding houses, hotels, motels and apartment houses. *Id.* Section 2(K) defines hours worked

as "time spent carrying out assigned duties in the case of an employee who is required to reside on the employment premises." Case law has defined this to mean that such employees are only entitled to be paid for the hours they actually perform work duties. (*Brewer v. Patel* (1993) 23 Cal.App.4th 1017, holding motel clerk who is required to live on the premises, and expected to remain on the premises 24 hours a day, was entitled to be paid only for the time he was actually working and not for all the time he spent at the motel. See also, *Isner v.Falkenberg/Gilliam & Associates, Inc.* (2008) 160 Cal.App.4th 1393, holding same for resident apartment managers.)

The plaintiff in *Brewer* was an office clerk at a motel. His job was to answer the motel telephone and check guests in and out of their rooms. He also assisted with other tasks at the motel, such as cleaning the grounds, doing laundry and cleaning the rooms. The plaintiff's duties required, on average, less than five hours a day to perform. However, he was also required to keep the motel office open from 6 a.m. to 10:00 p.m., and he was generally expected to remain on the motel premises 24 hours a day. He could leave the motel if he wished, but had to let the owner know so that the owner or someone else could take his place. When the plaintiff was not actually working, he could relax in his apartment, watch television or attend to his own personal needs.

The plaintiff claimed that he was entitled to be compensated for the entire time he spent at the motel, while the hotel owner argued that the plaintiff was entitled to be paid only for the time he actually provided services, that is, less than five hours a day.

The Court of Appeal first found that the plaintiff was covered by Wage Order No. 5. It then concluded that under the wage order, the plaintiff was only entitled to be paid for the actual number of hours he worked:

> ....Under the clear language of the regulation, appellant was entitled to compensation only for "that time [he] spent carrying out assigned duties." Since appellant's "assigned duties" took less than five hours a day to perform, he was entitled to no additional wages. We conclude respondent's interpretation of the wage order is correct.
>
> The Labor Commissioner's interpretation is unconvincing for several reasons. First, by arguing that a resident employee must be paid for the entire time he spends on the premises less certain offsets, the Labor Commissioner simply reverts the first clause of the wage order which states an employee must be paid for "the time during which [he] is subject to the control of an employer." This interpretation fails to give any meaning to the second clause which states that resident employees must be paid only for "that time spent carrying out assigned duties." Indeed, at trial, the Labor Commissioner admitted his interpretation rendered the second clause of the wage order "redundant." We are required to avoid an interpretation which renders any language of the regulation mere surplusage. [Citation omitted]

(24 Cal.App. 4th at 1021-1022.)

It is clear that the scope of Wage Order No. 5 is far broader than the reach of 29 C.F.R. Section 785.22. Under Wage Order No. 5, the plaintiff in *Brewer* was entitled to be paid only for the approximately five hours a day he spent actually performing services. However, under Section 785.22, he would have been entitled to be paid for at least 13 hours (24 hours less up to eight hours of sleep time and up to three hours for meals). If the IWC intended for Section

785.22 to apply to in-residence employees employed pursuant to IWC Wage Order No. 5 and nothing more, it would not likely have reduced the compensable hours worked of such employees to only the time spent "carrying out assigned duties." This difference clearly refutes Plaintiffs' claim here that the definition of "hours worked" in Wage Order No. 5 is evidence of the IWC's intent to limit the application of the federal sleep time regulations to 24-hour employees and those residential employees who are covered by Wage Order No. 5.

E. The Court of Appeal's Public Policy Argument In Support of Deducting Eight Hours of Sleep Time From 24-Hour Employees is Consistent With DLSE Policies

In upholding CPS's agreements with Trailer Guards when they are scheduled for 24-hour shifts, the Court of Appeal found that there are "sound reasons" supporting this decision. Specifically, the Court of Appeal observed that:

> Most employees would be sleeping for a similar period every day, whether on duty or not, and the compensation provided for the other 16 hours [of the 24-hour shift], which should generally include considerable overtime, ensures that the employees receive an adequate wage.

(*Mendiola*, 217 Cal.App. 4th at 874.)

Plaintiffs argue that these policy considerations "strongly echo" the same considerations expressed by the Court of Appeal in *Morillion* and rejected by this Court. There, the Court of Appeal found that since the Aemployee's commute was something that would have had to occur regardless of whether it occurred on the employer's buses, it would not make sense as a matter of policy to compensate the employees for their commute time. This Court rejected that argument

primarily because the Court of Appeal failed "to distinguish between travel time that the employer specifically compels and controls, as in this case, and an ordinary commute that employees take on their own." This Court found that when an employer requires its employees to meet at designated places to take buses to work and prohibits them from taking their own transportation, the employees are 'subject to the control of an employer,' and their time spent traveling on buses is compensable as 'hours worked.'" (*Morillion,* 22 Cal.App.4th at 587.)

Plaintiffs' argument that the Trailer Guards are under the control of CPS during their sleep time, and therefore are like the employees in *Morillion*, is misplaced. As set forth in CPS's Opening Brief, the Trailer Guards are voluntarily in their residences on the job site until they request to leave. At that point, if a Trailer Guard is commanded to remain on site, he or she is paid from the moment of the request to leave until the end of his or her shift. Stated differently, the Trailer Guards are paid when they are no longer on the job site voluntarily, but are compelled by CPS to remain on the job site. In this way, the Trailer Guard are like the employees in *Overton*, who were held not to be under the control of the employer while riding the employer's bus from the Disney parking lot to their jobs at Disneyland because their decision to take the employer's shuttle was voluntary.

The Court of Appeal's policy argument is also consistent with the DLSE's policy with respect to out-of-town business travel, which provides that employees required to travel out-of town are not entitled

to be paid for sleep time. As set forth in the DLSE's Enforcement Policies and Interpretation's Manual:

> [I]f an employer requires an employee to attend an out-of-town business meeting, training session, or any other event, the employer cannot disclaim an obligation to pay for the employee's time in getting to and from the location of that event. Time spent driving, or as a passenger on an airplane, train, bus, taxicab or car, or other mode of transport, in traveling to and from this out-of-town event, and time spent waiting to purchase a ticket, check baggage, or get on board, is, under such circumstances, time spent carrying out the employer's directions, and thus, can only be characterized as time in which the employee is subject to the employer's control. Such compelled travel time therefore constitutes compensable "hours worked." On the other hand, time spent taking a break from travel in order to eat a meal, sleep, or engage in purely personal pursuits not connected with traveling...is not compensable.

Defendant's Request for Judicial Notice, Exh. C.

In sum, the Court of Appeal's observation that 24-hour employees would be sleeping in any event, and that the regular and overtime pay they earn for the 16 hours they actually work ensures they receive an adequate wage, is not fatal to its decision be

CONCLUSION

In 1990, the Court of Appeal decided *Monzon.* It held that there is an implied sleep time exclusion in California law, based on 29 C.F.R. Section 785.22, that authorizes agreements to exclude up to eight hours of sleep time from compensable hours worked for employees working shifts of 24 hours or longer, provided that adequate sleeping facilities are provided by the employer and the employee has the opportunity to get at least five hours of

uninterrupted sleep. This has been the law in California for nearly 24 years. CPS, like other employers, has relied on the *Monzon* decision (and the IWC's acquiescence in the decision) to pay and schedule employees who have agreed to exclude sleep time from compensable hours worked. It would be patently fair and destructive of employer-employee relationships for this Court to now change the rule.

Nor is there good reason for this Court to abandon the decision in *Monzon* (and later in *Seymore*). It is undisputed that state and federal law are substantially similar with respect to the compensability of on-call time. Both state and federal courts look to the degree of control the employer has over the employee to determine whether the employee's time can be used for personal pursuits, while recognizing that an employee need not have substantially the same flexibility or freedom as he would if not on call. Indeed, the Court of Appeal in *Gomez* expressly adopted the federal rule established in *Owens.*

Similarly, there is nothing in any of the wage orders evidencing the IWC's intent to preclude application of the federal sleep time rules to determine the compensability of on-call sleep time for employees who reside on their employer's premises. This includes the provision in Wage Order No. 9 permitting ambulance drivers and personal attendants to agree to exclude sleep time from daily overtime requirements, the provisions in Wage Order Nos. 4 and 5 providing that in the healthcare industry the definition of "hours worked" is to be determined by reference to the Fair Labor Standards Act, and the provision in Wage Order No. 5 providing that employees who reside on the employment premises (and are covered by the wage order) are

entitled to be paid only for the actual hours they work. In short, this Court should give deference to the Labor Commissioner's finding, expressly stated in the Memorandum of Understanding pursuant to which CPS's compensation plan was established, that CPS's policy complies "with all applicable current IWC Wage Orders and related wage and hour laws and regulations."

Dated: January 10, 2014

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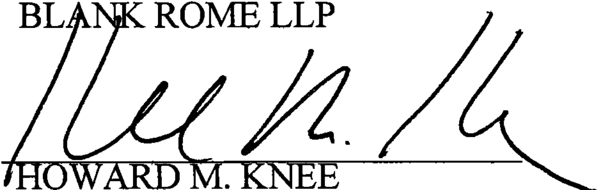
By: 

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CERTIFICATION PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.204(b)(11)(C)(1) (formerly Rule 14(C)(1)

As counsel of record for Petitioners **CPS Security Solutions, Inc.,** ***et al.***, I hereby certify that the Answer to Plaintiffs and Respondents Opening Brief on the Merits, et al., excluding the tables of contents and authorities, but including footnotes, contains 8,253 words, based on the word count program in Microsoft Word 10.

Dated: January 10, 2014

BLANK ROME LLP

By: ______________________

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is **BLANK ROME LLP**, 2029 Century Park East, 6th Floor, Los Angeles, California 90067.

On **January 10, 2014**, I served the foregoing document(s): **DEFENDANTS/CROSS-COMPLAINANTS/APPELLANTS/ PETITIONERS'ANSWERING BRIEF ON THE MERITS** on the interested parties in this action addressed and sent as follows:

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☒ **FEDERAL:** I declare that I am employed in the office of a member of the bar of this court at whose direction service was made.

Executed on **January 10, 2014**, at Los Angeles, California.

Michelle Grams

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