Case No. S258900

In the

Supreme Court

of the

State of California

GUSTAVO NARANJO,
on behalf of himself and all others similarly situated,
Plaintiff and Respondent,

v.

SPECTRUM SECURITY SERVICES, INC.,
Defendant and Appellant.

REVIEW OF A DECISION FROM THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FOUR, CASE NO. B256232

REPLY BRIEF ON THE MERITS

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INTRODUCTION

Despite Defendant and Appellant Spectrum Security Services, Inc.'s (hereinafter "Spectrum") metaphoric comparison to Greek mythology (ABM 53),[1] employers are not gods. Nor are the statutory requirements of Labor Code sections 201-203 and 226 burdensome complications stacked atop a tedious obligation to compensate mortal employees after denying them meal and rest periods. The statutory framework articulated by Division 2, Part 1, Chapter 1, Article 1 of the Labor Code establishes a clear, workable standard for the payment of wages, including Labor Code section 226.7 premium wages.[2] Accordingly, employers are statutorily obligated to regard premium wages as all other wages in accordance with sections 201-203 and 226.

Throughout its Answer Brief, Spectrum offers no alternative protocol for the appropriate treatment of section 226.7 premium wages, rather focusing on the imposition of penalties, contending that employees should be precluded from "piggy-backing" the statutory requirements of sections 201-203 and 226 when predicated on a failure to pay section 226.7 premium wages. To advance this argument, Spectrum obscures its wholesale failure to *ever* comply with the distinct statutory obligations of sections 226.7, 226, or 201-203, and instead prioritizes its subjective belief that its actions were lawful, hoping to influence this Court's consideration of issues of statutory interpretation and general applicability.

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[1] In its conclusion, Spectrum refers to the statutory obligations of, and potential penalties arising from, Labor Code sections 201-203 and 226 as "piling Pelion upon Ossa to destroy the gods," invoking both the idiom and the underlying Greek myth. (ABM 53.)

[2] Unless otherwise stated, all subsequent unlabeled statutory references are to the Labor Code.

As section 203 and section 226 each provides defenses to employers before penalties may be imposed, the appropriate focus is defining the statutory obligations with respect to payment of section 226.7 premium wages in the first place. For want of a statutory obligation, there is no need to discuss possible penalties or statutory excuses for noncompliance.

Because the reasons articulated by the Court of Appeal and now advanced by Spectrum arise from the mistaken belief that section 226.7 premium pay is not wages, this Court should not eliminate employers' statutory obligation to pay section 226.7 premium wages to employees upon separation of employment in accordance with sections 201-203. Nor should this Court eliminate employers' statutory obligation to record and inform employees of section 226.7 premium wages pursuant to section 226. The statutes' plain language, their respective legislative histories, and the overall statutory scheme all favor a construction that requires employers to treat section 226.7 premium wages as all other wages for purposes of sections 201-203 and 226. And when employers fail to pay wages under section 226.7 altogether, interest should accrue on those wages at ten percent per annum. As such, the opinion of the Court of Appeal must be reversed with respect to the Sections II and III.

ARGUMENT

I. THIS COURT SHOULD DECLINE TO ADOPT THE STATUTORY CONSTRUCTION SPECTRUM PROPOSES, AS IT DIMINISHES A CENTRAL PRECEPT OF THIS COURT'S JURISPRUDENCE

Spectrum summarizes Naranjo's position as follows: premium pay under section 226.7 is wages that employers must pay in the pay period during which the section 226.7 violation occurs and record such payment in

the employee's wage statement in accordance with section 226, with any outstanding premium wages paid on separation of employment pursuant to sections 201-203. (See ABM 43.) Naranjo does not challenge this summary, which aptly demonstrates the interplay of the statutory obligations set forth in sections 226.7, 226, and 201-203, the failure to satisfy any of which subjects an offending employer to each respective remedy. In short, if premium pay under section 226.7 is wages, employers should be statutorily obligated to treat them like all other wages.

Spectrum characterizes Naranjo's position as a "false wage/not wage dichotomy," and suggests throughout its brief that wages are not wages "for all purposes." (ABM 22, 31, 43, 46.) Yet, Spectrum fails to identify a single instance where compensation due to an employee and identified as a wage has been treated differently in another context. Instead, Spectrum doubles down on the Court of Appeal's rationale, clinging to the statutory text of section 200 and extending a misapprehension of the Court's analysis in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094 (*Murphy*).

A. This Court Should Reject Spectrum and the Court of Appeal's Restrictive Interpretation of *Murphy*

Murphy expressly states that section 226.7's "additional hour of pay" constitutes wages. (*Id.* at p. 1102 [Heading A].) As this Court stated of section 226.7:

> The statute's plain language, the administrative and legislative history, and the compensatory purpose of the remedy compel the conclusion that the 'additional hour of pay' is a premium wage intended to compensate employees, not a penalty.

(*Id.* at p. 1114 [citation omitted].) This central holding—that section 226.7's payment is a wage—was established by the Court *in order to* determine the applicable statute of limitations, not *on account of* its desire to enlarge the applicable statute of limitations. Since *Murphy*, that holding has served as a fundamental precept in the development of the State's wage and hour jurisprudence. (OBM 18-19; see also *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 84 (*Reins*) ["[E]mployers can pay an additional hour of wages as a remedy for failing to provide meal and rest breaks."].)

Spectrum nonetheless contends that "[p]remium pay is not an earned or unearned 'wage'" (ABM 21-22), and asserts that *Murphy* was decided solely "for purposes of allowing a plaintiff the benefit of a longer three-year statute of limitations for unpaid wages." (ABM 43.) This interpretation is categorically wrong, demeans the Court's analysis, and should be rejected.

Spectrum exploits the fact that premium wages under section 226.7 compensate employees for events *other than time spent working* to support the Court of Appeal's conclusion that section 226.7 premium pay is not really a wage. (ABM 21, 24, 31.) True, this Court stated in *Murphy* that the section 226.7 payment "uses the employee's rate of compensation as the measure of pay and compensates the employee for events other than time spent working" (*Murphy*, *supra*, 40 Cal.4th at p. 1113), but Spectrum ignores the context in which the Court addressed this characteristic—associating section 226.7 premium pay with overtime, double time, reporting-time, and split-shift premium pay—all forms of compensation that undisputedly implicate the statutory obligations of sections 226 and 201-203. (*Id.* at p. 1112-1113.)

To advance the misconception that section 226.7 premium pay is something other than wages, Spectrum ignores other distinctive hallmarks of the required payment such as employees' immediate entitlement to premium wages or that use of the term "pay" in section 226.7 conforms to the definition of "wages" in section 200. (OBM 11.) Spectrum also claims *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244 (*Kirby*), supports its interpretation, contending that this Court "rejected the idea that premium pay is a 'wage' for all purposes under the Labor Code," and asserting that, under *Kirby*, "premium pay is not a wage for purposes of section 218.5." (ABM 22.) This misinterpretation highlights the Court of Appeal's failure, as well as that of several district courts (see ABM 13, 28, 39), to comprehend this Court's analysis of section 218.5's statutory text.

The omission of the word "brought" in discussing section 218.5 is an object lesson in that failure. Spectrum states that the Court "specifically rejected the argument that a prevailing plaintiff in a meal break action can recover attorney fees under section 218.5, which provides an employee the ability to recover attorney fees in any action [brought] for the nonpayment of 'wages.'" (See ABM 44.) Although Spectrum's summary of the Court's determination in *Kirby* is inaccurate for more than one reason,[3] it is through omission of the word "brought" from section 218.5 that Spectrum attempts to recast the analysis and effect of *Kirby*.

B. Section 226.7's Remedy Is Not Liquidated Damages

Refusing to acknowledge section 226.7 premium pay as a wage, Spectrum—like the Court of Appeal—characterizes the "one additional hour of pay" in vague terms, referring to it hazily as a "statutory remedy."

[3] *Kirby* addressed, *inter alia*, application of a two-way fee shifting statute to a prevailing defendant. (Compare *Kirby*, *supra*, 53 Cal.4th 1244 with ABM 22, 44.)

(*Naranjo et al. v. Spectrum Sec. Services, Inc.* (2019) 40 Cal.App.5th 444, 474 (*Naranjo II*); ABM 10, 11, 23, 46.) This characterization does not assist Spectrum, because wages *is* a statutory remedy. So, Spectrum goes further, suggesting that the section 226.7 remedy is some obscure form of liquidated damages. (ABM 10, 21, 31, 53.) The Labor Code suggests otherwise.

The term "liquidated damages" and the Legislature's use of that remedy throughout the Labor Code is distinct from its use of the words *pay*, *compensation*, and *wage*.[4] One example of the Legislature's distinction between liquidated damages and section 226.7 premium pay is seen in section 226.2, subdivision (b), a safe harbor provision which states:

> [T]he employer and any other person shall have an affirmative defense to any claim or cause of action for recovery of wages, damages, liquidated damages, statutory penalties, or civil penalties, including liquidated damages pursuant to Section 1194.2, statutory penalties pursuant to Section 203, premium pay pursuant to Section 226.7, and actual damages or liquidated damages pursuant to subdivision (e) of Section 226 . . . .

(§ 226.2, subd. (7)(b) [repealed Jan. 1, 2021].) Enacted eight years after *Murphy* in 2015, section 226.2 enumerates discrete remedies recoverable by employees, drawing a clear distinction between, *inter alia*, liquidated damages and premium pay under section 226.7.[5]

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[4] The remedy of liquidated damages is used in thirteen statutes throughout the Labor Code. (See generally §§ 90.6; 98; 98.74; 218.7; 226.2; 248.5; 1194.2; 1197.1; 1197.5; 1742.1; 1771.2; 2673.1; 3702.9; 3717.)

[5] Section 226.2, subdivision (b) is one of only two provisions in the Labor Code enacted after *Murphy* to use the term "premium pay." (See also § 246, subd. (l)(2) [excluding "overtime premium pay" from the wages used to calculate paid sick time].) Conversely, the penal characteristics of liquidated damages are observed in reference to section 226, subdivision

The available remedies for minimum wage violations under section 1194 offer another example in which an employee shall recover the wage differential and liquidated damages in an equal amount. In section 1194.2, the Legislature draws a distinction between wages and liquidated damages, further specifying that liquidated damages are available only for minimum wage violations, and not for overtime premiums. (§ 1194.2, subd. (a).)

Notably, the Legislature sought to amend section 1194.2 in 2000 with Assembly Bill No. 2509 (1999-2000 Reg. Session) (Bill No. 2509), which also enacted section 226.7. As introduced, Bill No. 2509 contained an amendment to section 1194.2, clarifying the recovery of wages and an additional amount as liquidated damages. (MFJN 0305.) At the same time, the Legislature also sought to amend section 1197.1, adding a liquidated damages remedy. (MFJN 0305.) Although neither of the amendments was contained in the final version of Bill No. 2509, the Legislature's consideration of the liquidated damages remedy in other provisions of the Labor Code concurrent with its enactment of premium wages in section 226.7 is illustrative. Had the Legislature intended section 226.7's remedy to be liquidated damages it would have stated as much. It did not, and Spectrum's attempt to muddle these remedial concepts is duplicitous.

C. Spectrum Offers No Feasible Protocol for the Treatment of Section 226.7 Premium Wages

Spectrum acknowledges "three distinct remedies for three distinct wrongs" prescribed by sections 203, 226, and 226.7 (ABM 26, 42-43), but "does not offer a workable standard, and certainly not an employee-protective" method by which an employer satisfies its statutory obligation

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(e). (See § 226, subd. (e) [allowing recovery "not to exceed an aggregate penalty of four thousand dollars ($4,000)."])

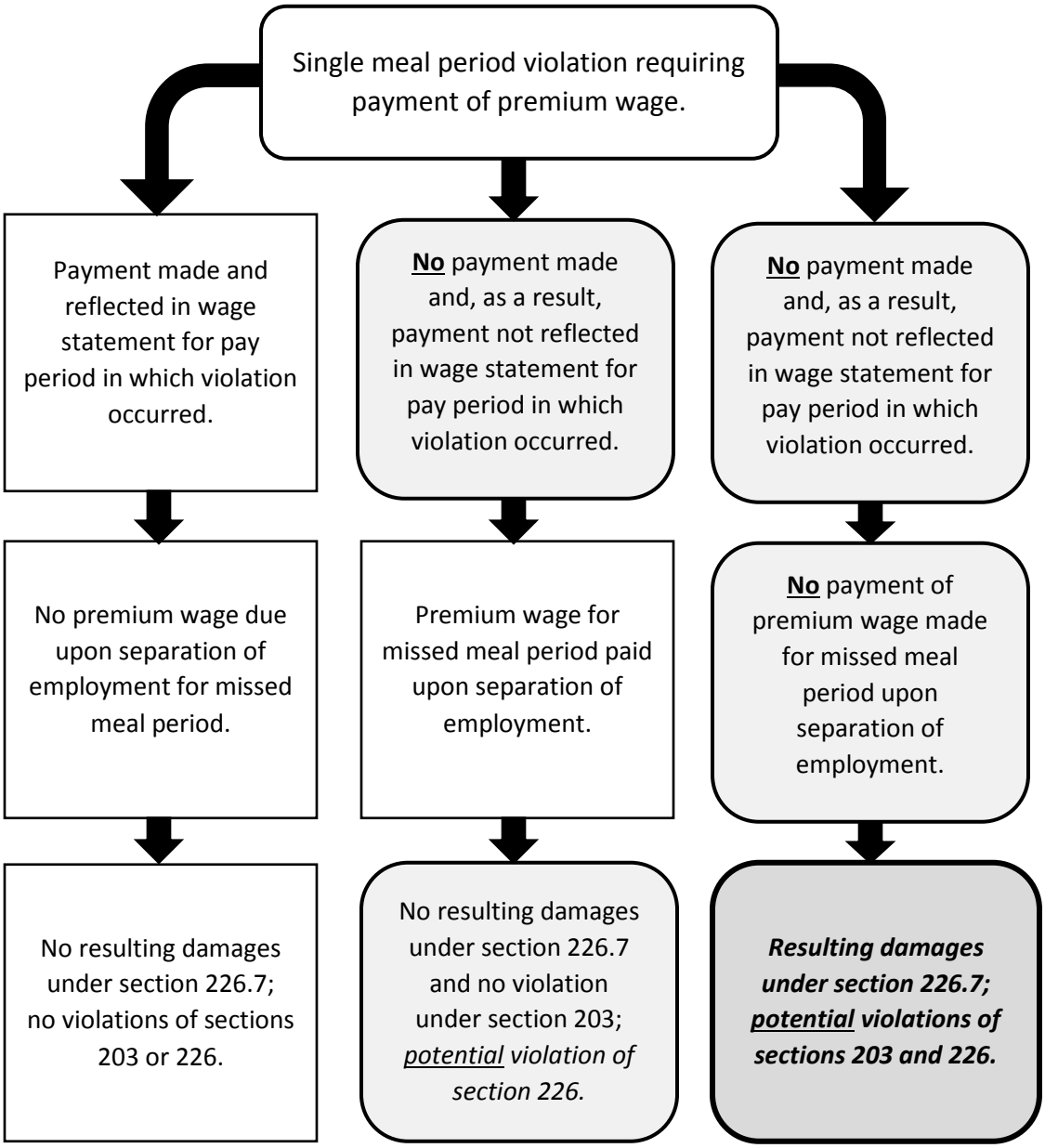
to pay section 226.7 premium wages during the course of employment or upon separation therefrom. (*Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1055 [discussing standards for determining compensable time].) Instead, Spectrum restates the issues for review, infusing factual qualifiers onto questions of statutory construction, and attempts to divert the Court's attention from the issues for which review was granted. (ABM 10.) Fortunately, the statutory framework established by the Labor Code creates a clear, workable standard for employers and employees with respect to the payment of premium wages under section 226.7. (PR 15-16; RTA 5-6; OBM 37-38.)

Under section 226.7, an employer must pay an employee one hour of pay if a meal or rest period is not provided. (§ 226.7, subd. (c).) At the time of each payment of wages under section 226, employers must furnish employees with an itemized wage statement delineating specific information. (§ 226, subd. (a).) Sections 201-203 require that an employer pay an employee all wages due if the employee is terminated or resigns. (*See* §§ 201-203.) The interaction of these statutory provisions creates several possible factual scenarios related to the payment or failure to pay premium wages under section 226.7. For example:

- After a failure to provide a meal or rest period, an employer pays its employee the premium wage and reflects the payment in the itemized wage statement following the violation of section 226.7.
- After a failure to provide a meal or rest period, an employer *fails* to pay the resulting premium wage and, as a result, no payment is reflected in the itemized wage statement for the pay period in which the violation occurred, but the employer nonetheless provides the premium pay to the employee upon separation of employment.

- After a failure to provide a meal or rest period, an employer *fails* to pay the resulting premium wage at any time and, as a result, no payment is reflected in the itemized wage statement for the pay period in which the violation occurred, and no payment is made upon separation of employment.

The flow chart below illustrates the interaction of these independent statutory obligations with respect to a single meal period violation:



Together, these provisions establish an effective and coherent statutory scheme that reflects the remedial protection framework and ensures the prompt payment of premium wages when a violation of section 226.7 occurs.[6] An example of the scheme's administration of meal period premium wages is seen in *Ferra v. Loews Hollywood Hotel, LLC* (2019) 40 Cal.App.5th 1239 (review granted Jan. 22, 2020, S259172). In *Ferra*, the employer paid the meal and rest premium wages at the time the break was not provided and reported the payment in the itemized wage statement for the pay period during which the section 226.7 violation occurred.[7] (*Ferra v. Loews Hollywood Hotel, LLC* (Apr. 29, 2020) 2020 WL 2200722 at *18 [Opening Brief on the Merits]; see also MFJN 0678-0724.) Loews's practice represents the path on the far left of the flow chart in which an employer pays the premium wage and evidences the payment during the course of employment, obviating the requirement to pay any owed premium wages upon separation of employment.

Conversely, Spectrum followed the path on the far right of the flow chart, by failing to ever pay, record, or acknowledge employees' premium wages required by section 226.7, or provide the payment to its employees at the time of termination or resignation. As a result, Spectrum asks this

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[6] The violations of sections 226 and 203 are appropriately highlighted as "potential" because there is no automatic entitlement to them as Spectrum suggests. (ABM 29, 44.) Each requires proof of intent to some degree. (See §§ 203, subd. (a) ["willful"]; 226, subd. (e) ["knowing and intentional"].) Accordingly, the trial court dedicated an entire phase of trial to these determinations. (9 JA 1987-1991; see also ABM 17-18.)

[7] Irrespective of the "regular rate" determination at issue in *Ferra*, the facts show that Loews (the employer) paid section 226.7 premium wages during the course of employment and evidenced that payment on the itemized wage statement. This demonstrates both the statutory scheme's incentive to limit liability and the feasibility of employer compliance.

Court to absolve it of potential liability for independent statutory obligations by interpreting the statutes in a manner that does not require employers to acknowledge and record section 226.7 premium wages during the course of employment or ensure that they are paid upon separation.

Spectrum rationalizes its wholesale failure to comply with these independent statutory obligations by postulating whether an employee can "piggy-back," "bootstrap," "stack," or "tack on" the additional statutory requirements of sections 203 and 226, when predicated on a failure to pay wages under section 226.7. (ABM 10, 11, 12, 30, 33, 40, 42-43.)

True, section 226.7 "provides the sole compensation for the employee's injuries, is measured by the employee's rate of pay rather than an arbitrary amount, and is not labeled a penalty." (*Murphy*, *supra*, 40 Cal.4th at p. 1107; *see* ABM 19, 21-22, 24.) But as employees have an immediate entitlement to the payment of premium wages upon denial of a meal or rest period (*Murphy*, *supra*, 40 Cal.4th at p. 1108), the question remains: *what then*? Are employers required to record payment of the premium wage in the employee's wage statement in accordance with section 226? Are employers required to pay any unpaid premium wages owed and due upon separation of employment pursuant to sections 201-203? At what rate does interest accrue when the employer does not pay the premium wages altogether? In answering these questions, this Court must not excuse the statutory obligations of employers with respect to the treatment of premium wages under section 226.7.

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II. THIS COURT SHOULD NOT ELIMINATE EMPLOYERS' STATUTORY OBLIGATION TO PAY PREMIUM WAGES UPON SEPARATION OF EMPLOYMENT

Spectrum's challenge to the application of sections 201-203 emanates from the central thesis that section 226.7 premium pay is not wages. (ABM 23-24.) In wholesale adoption of the Court of Appeal's reasoning (compare *Naranjo II*, *supra*, 40 Cal.App.5th at p. 473-474 with ABM 23), Spectrum states that section 203 applies only when employers fail to pay wages "earned for work performed."[8] (ABM 23.)

Based on the Court of Appeal's determination that section 226.7 premium pay is not wages, Spectrum asserts that the Legislature would have had to make some additional pronouncement applying section 226.7 to sections 201-203 in order for premium wages to be paid upon separation of employment. (ABM 24.) This position, advanced by Spectrum through a misreading of *Kirby* and a flawed analysis of section 203's legislative history, is not supportable. This Court should not jettison the statutory obligation of employers to pay all wages—including section 226.7 premium wages—to employees upon separation of employment.

A. Absence of the Term "Wages" in Section 226.7 Is Not Instructive

Spectrum attributes significance to the Legislature's use of "pay" in section 226.7 and "wages" in section 203 to support its interpretation, stating that "[t]his difference in terms is significant." (ABM 24.) No, it is

[8] Under the view shared by Spectrum and the Court of Appeal, employers would not be statutorily obligated to pay overtime premiums, double time premiums, reporting-time pay, or for split shift pay upon separation of employment. Each of these wages compensate employees for events other than work performed. (*Murphy*, *supra*, 40 Cal.4th at p. 1113.)

not. The Legislature frequently uses the words "pay" and "compensation" throughout the Labor Code as synonyms for "wages." (*Murphy*, *supra*, 40 Cal.4th at p. 1104, fn.6.)

A case in point is section 510, which provides the State standard for overtime compensation. The term "wages" appears nowhere in the text of section 510. (See generally § 510.) Yet, sections 226.7 and 510 utilize "pay" and "compensation" interchangeably. (§ 226.7, subd. (c) ["pay at . . . regular rate of compensation"]; § 510, subd. (a) ["compensate at . . . regular rate of pay"].) Spectrum's reliance on this distinction is misplaced.[9]

B. *Kirby* Does Not Support Spectrum's Position

Spectrum highlights this Court's discussion in *Kirby* contrasting sections 201-202 and section 226.7 (ABM 25), but again misses the point. The discussion of sections 201-202 and 226.7 highlighted by Spectrum focuses on the underlying basis for the legal violation, not the resulting remedy at issue here. (*Kirby*, *supra*, 53 Cal.4th pp. 1255-1256.) Further reading of *Kirby* shows that the Court acknowledged the conventional distinction "between the legal basis for a lawsuit and the remedy sought" and emphasized that payment of section 226.7 premium pay "is irrelevant to whether section 226.7 was violated." (*Id.* at pp. 1256-1257.) To the point:

> An employer's failure to provide an additional hour of pay does not form part of a section 226.7 violation, and an employer's provision of an additional hour of pay does not excuse a section 226.7 violation.

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[9] Accepting Spectrum's distinction would also require the exclusion of unpaid overtime premiums from wages employers are obligated to pay upon separation of employment, which is nonsense.

(*Id.* at p. 1256.) What follows is that an employer's failure to provide an additional hour of pay means the employee has wages due and payable. This does not transform the section 226.7 *violation* into an action brought for the nonpayment of wages, but failure to pay the statutorily required wages does serve as a condition precedent to an employer's obligation to pay them upon separation of employment.

To be clear, section 203 and 226.7 do not work in unison. (See ABM 25.) The flowchart makes this clear. (See, *infra*, p. 15.) If an employer pays section 226.7 premium wages during the course of employment, sections 201-203 are not implicated because no premium wages are due and payable. Thus, the imposition of section 203 penalties is not automatic upon a section 226.7 violation, as Spectrum suggests. (ABM 44.) It is the employer's failure to pay the premium wages that makes the wages due and payable in accordance with sections 201-202. And only if that failure is deemed *willful* will penalties be imposed under section 203.

C. The Legislature's Inaction Regarding Amending Section 203 Should Not Inform This Court's Analysis

Spectrum notes that the enactment of section 226.7 postdates sections 201-203 by several decades and asserts that "there is nothing in the legislative history concerning the adoption of the section 203 penalty that could tie the penalty to the much-later enacted meal period pay remedy." (ABM 27.) Not so. Although it bears repeating that the collective reference to "wages," "pay," and "compensation" in section 203 and section 226.7 evidence the statutory scheme's interplay, this Court's interpretation of the relevant statutes remains unaffected by the chronology of the sections' enactment and/or amendment.

When applying circumstances not contemplated by the Legislature at the time of an existing statute's enactment, the Court must inquire how the Legislature "would have handled the problem if it had anticipated it." (*Ward v. Tilly's, Inc.* (2019) 31 Cal.App.5th 1167, 1187 (*Tilly's*).) Although several judicial approaches have been used singly or in combination to determine legislative intent in such situations (see *Lewis v. Ryan* (1976) 64 Cal.App.3d 330, 333), this Court has previously looked to "the Legislature's purpose in enacting the statute" and "the statutory scheme as a whole" to determine application of circumstances not envisioned at the time of enactment. (See, e.g., *Apple Inc. v. Superior Court* (2013) 56 Cal.4th 128, 138-139 (*Apple*) [considering commercial transactions made possible by later technology not envisioned by the Legislature].)

It is fair to assume that the Legislature did not envision widespread employer noncompliance with the required provision of meal and rest periods or the need to compensate employees who had been denied them when section 203 was enacted (*Murphy*, *supra*, 40 Cal.4th at pp. 1105-1108), but had the Legislature anticipated the problem 63 years in the making, it would have—as it has—sought to ensure that unpaid premium wages due were paid to employees upon separation of employment. Several actions by the Legislature indicate this to be true.

First, the Legislature codified section 226.7 in the same chapter as section 203 (and section 226), which governs the payment of wages for general occupations. (OBM 31.) *Second*, amendments to section 226.7 during the legislative process removed the requirement of an enforcement action, "instead creating an affirmative obligation on the employer to pay the employee one hour of pay . . . immediately upon being forced to miss a rest or meal period." (*Murphy*, *supra*, 40 Cal.4th at p. 1108.) *Third*, the

legislative intents of sections 203 and 226.7—to address wrongs that injure employees and deprive them of incidental benefits stemming from their employment—are congruent. (OBM 28.) *Fourth*, meal periods, rest periods, and the prompt payment of wages have long been considered fundamental to California's remedial worker protection framework. (OBM 29.) These indicators assist in the interpretation of section 203 despite being enacted 63 years before section 226.7.

Spectrum's interpretation runs counter to this broader statutory consideration. (See *Reins*, *supra*, 9 Cal.5th at p. 87, citing *Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487.) No significance should be attributed to the Legislature's passivity in amending section 203 over the years to expressly incorporate section 226.7,[10] or to contradict the dicta in *Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242 (*Ling*) and the rationale of three district court decisions.[11] (ABM 28.) The United States Supreme Court recently cautioned against considering legislative inaction as a mechanism for statutory interpretation. Referring to the approach as a "canon of donut holes," Justice Gorsuch, writing for the majority, states:

> Nor is there any such thing as a 'canon of donut holes,' in which Congress's failure to speak

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[10] Section 203 also was not amended to expressly incorporate reporting-time pay, which was not added to the wage orders until the 1940s, after enactment of section 203. (See *Tilly's*, *supra*, 31 Cal.App.5th at pp. 1178, 1181.)

[11] The Legislature also did not amend section 226.7 during the seven years preceding *Murphy* in response to myriad state and federal decisions holding that section 226.7 created a penalty. (See *Murphy v. Kenneth Cole Productions, Inc.* (Nov. 17, 2006) 2006 WL 3908813 at *1 [Amicus Brief of Circuit City and Chevron].)

> directly to a specific case that falls within a more general statutory rule creates a tacit exception.

(*Bostock v. Clayton County, Georgia* (June 15, 2020) 560 U.S. ____, 140 S.Ct. 1731, 1747 [interpreting 42 U.S.C. § 2000e-2(a)(1)].) Such an approach is flawed because, *inter alia*, it fails to acknowledge the possibility that later Legislatures understood the relation of section 203 to section 226.7 as part of the larger statutory scheme, and did not think revision of section 203 was needed. (*Ibid.*) Rejecting the approach, Justice Gorsuch continues:

> All we can know for certain is that speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt.

(*Ibid.*) Drafters of every era know "that the rules they create will one day apply to all sorts of circumstances they could not possibly envision." (*Apple*, *supra*, 56 Cal.4th at p. 137.) As such, this Court should decline Spectrum's invitation to speculate regarding the Legislature's inaction concerning section 203.

D. Consideration of Good Faith Is Not Relevant to a Question of General Applicability

The Answer Brief strays into questions regarding Spectrum's subjective beliefs and its good faith defenses to the underlying action in an effort to color this Court's consideration of issues concerning statutory interpretation. In addition to restating the Issues Presented to introduce consideration of its subjective belief (ABM 10 ["where the employer believed it was in compliance"]), Spectrum also repeatedly refers to good faith defenses raised during litigation in an effort to evoke sympathy regarding the imposition of penalties (see, e.g., ABM 16, 17). This tactic is

both inappropriate and unpersuasive with respect to questions of statutory interpretation, especially when the statutory text of section 203 already accounts for employers' innocent mistakes.[12]

Section 203 imposes waiting time penalties only on an employer that willfully fails to pay. (§ 203, subd. (a).) "The settled meaning of 'willful,' as used in section 203, is that an employer has intentionally failed or refused to perform an act which was required to be done." (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201, citing *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7–8.) The trial court's consideration of section 203 accounted for *both* the legal availability and the imposition of penalties resulting from Spectrum's violations. As stated by the trial court:

> As discussed above, the court has concluded that Spectrum's failure to pay the premium pay triggers the penalty provisions of Section 203. However, the court finds that Spectrum did not act willfully and therefore plaintiffs are not entitled to the penalty.

(9 JA 1990.)

Naranjo appealed the trial court's determinations regarding the imposition of section 203 penalties, including the validity and application of California Code of Regulations, title 8, section 13520, which provides for good faith disputes (see RB/XAOB 70-77; XARB 22-32), but the Court of Appeal never reached those issues. Instead, it concluded its analysis at the legal availability of section 203, holding that "an employer's failure, *however*

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[12] Spectrum's subjective belief arose from its ignorance of the wage orders' existence. Spectrum had no knowledge of the requirements for on-duty meal periods and did not promulgate on-duty meal period agreements until after the filing of this action. Spectrum attempted to convince the trial court otherwise only after its "federal defenses" failed in Phase I of the trial. (See RB/XAOB 4-5, 26.)

willful, to pay section 226.7 statutory remedies does not trigger section 203's derivative penalty provisions for untimely wage payments." (*Naranjo II*, *supra*, 40 Cal.App.5th at p. 474, italics added.)

Although Spectrum acknowledges the irrelevance of its intent and subjective beliefs on the questions now before this Court (ABM 17-18 [fn. 4], 54 [fn. 15]), it nonetheless attempts to influence this Court's thinking by introducing factual qualifiers, for example:

> The Court of Appeal correctly determined that waiting time penalties and wage statement penalties do not apply to meal break violations *that the employer was not aware of prior to termination of employment and for which no premium pay was paid during the employment relationship.*

(ABM 11, italics added.)

The Court of Appeal gave no consideration to an employer's subjective belief, nor should this Court regarding matters of statutory interpretation and general applicability. Indeed, although lower courts would benefit from this Court's guidance regarding the standards for imposing penalties under section 203, subdivision (a), the statutory provision must be applicable in the first place, which the Court of Appeal concluded it was not. The statutory text of section 203, like section 226, accounts for employers' "innocence" in failing to pay wages due on separation, but that defense should not guide the questions of general applicability at issue here. As such, this Court should not be persuaded to confound its statutory interpretation with consideration of Spectrum's irrelevant references to its innocence.

III. THIS COURT SHOULD NOT ELIMINATE EMPLOYERS' STATUTORY OBLIGATION TO RECORD AND INFORM EMPLOYEES OF SECTION 226.7 PREMIUM WAGES

Spectrum misrepresents Naranjo's position regarding the application of section 226 to premium wage payments under section 226.7, inaccurately stating that he "argues that [an award of premium pay] also entitles the class to additional penalties for inaccurate wage statements under section 226(e)." (ABM 29.) Naranjo does not conflate the respective subdivisions of section 226 in such fashion, but rather asks this Court to first hold that section 226.7 premium wages constitute wages earned for purposes of section 226. (OBM 30.)

In fairness, Naranjo does seek ultimately to preserve the wage statement penalties and fees awarded by the trial court (OBM 13), but that requires application of section 226 to premium wages under section 226.7 as an initial matter, which the Court of Appeal denied. Rather, the Court of Appeal held that claims under section 226.7 do not even entitle employees to pursue derivative claims under section 226 because the "premium wage is a statutory remedy for an employer's conduct, not an amount 'earned' for 'labor, work, or service . . . performed personally by the [employee].'" (*Naranjo II*, *supra*, 40 Cal.App.5th at p. 474.) Consequently, the Court of Appeal's opinion eliminates application of section 226 *in its entirety* to section 226.7 premium pay, not just the penalties imposed under section 226, subdivision (e).

Spectrum nonetheless puts the cart before the horse, focusing its discussion on the penalties under section 226, subdivision (e), in order to obfuscate an otherwise straightforward analysis that starts with the employer's statutory obligations under subdivision (a), before even

considering the imposition of penalties resulting from an employer's knowing and intentional failure to comply with it. (§ 226, subd. (e).)

A. Section 226, Subdivision (a) Requires an Accurate Statement of Hours Worked and Wages Earned, Not Merely the Amounts *Paid* by the Employer

Spectrum rehashes several arguments against the inclusion of premium wages on itemized wage statements. These arguments have been discussed at length herein (ABM 31 [regarding the term "wages," see, *infra*, pp. 18-19]["liquidated damages," see, *infra*, pp. 11-13]["time spent working," see, *infra*, pp. 10, 18]) and do not support Spectrum's invitation to exclude section 226.7 premium pay from what has been described recently by this Court as "a single comprehensive statement of pay." (*Oman v. Delta Air Lines, Inc.* (June 29, 2020, S248726) __ Cal.5th __ (*Oman*) [Slip Op. at p. 7].)

Section 226 contemplates that the information supplied to employees will be comprehensive. (*Ward v. United Airlines, Inc.*, and *Vidrio v. United Airlines, Inc.* (June 29, 2020, S248702) ____ Cal.5th ____ (*Ward*) [Slip Op. at p. 9].) Spectrum nevertheless contends that because section 226.7 premium pay is not listed "as an item that must be included in a wage statement," this Court need not consider the issue further.[13] (ABM 31.) But subdivision (a) does not specifically identify any wages—overtime compensation, double time pay, reporting-time pay, split shift pay—as specific categories of information to be included on a wage statement. Yet, these various forms of compensation all are encompassed under the categories of "gross wages earned" and "net wages earned" for which the

[13] Spectrum's position must be viewed askance as it has started including premium pay for missed meal periods in the itemized wage statements it provides to its employees. (MFJN 0658.)

applicable hourly rates and the corresponding number of hours worked at each rate must be stated. (§ 226, subd. (a)(1), (5), (9).)

Subdivision (a) requires the employer to itemize "the constituent parts of the total amount *to be* paid to the employee." (*Soto*, *supra*, 4 Cal.App.5th at p. 392, italics added.) Yet, Spectrum contends that subdivision (a) requires employers to itemize only the amounts actually paid, not earned, during the pay period for which the wage statement is provided.[14] (ABM 32.) This reading of subdivision (a) is simply wrong; the statutory text states otherwise.[15]

B. This Court Should Not Weaken the Presumption of Injury Arising from an Employer's Failure to Provide Accurate and Complete Wage Information

Section 226, subdivision (e) provides a penalty to an "employee suffering injury as a result of the knowing and intentional failure by an employer to comply with subdivision (a)." (§ 226, subd. (e)(1).) Therefore, any discussion of subdivision (e) entails a finding that the employer first had an affirmative obligation to comply with subdivision (a), which is the issue presented to this Court. Although Spectrum does not seem to recognize this, its discussion of subdivision (e) must be viewed as

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[14] Spectrum tries to devalue the import of "to be" in a selected quote from *Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, by highlighting the term *paid* (see ABM 32), but it should not be ignored that "to be paid," as discussed in *Soto*, refers to the wages earned (*Soto*, *supra*, 4 Cal.App.5th at p. 392), not merely the amounts paid.

[15] Further, the rationale of *Soto* supports Naranjo's position. Unlike vacation pay, which does not become quantifiable until the employee separates from employment, premium wages under section 226.7 are immediately quantifiable when an employee is denied a meal or rest period. (Compare *Murphy*, *supra*, 40 Cal.4th at p. 1108 with *Soto*, *supra*, 4 Cal.App.5th at pp. 391-392 [citing 227.3].)

an argument in the alternative, because without a statutory obligation under subdivision (a) and a failure to comply, there is no basis to discuss the possible imposition of penalties under subdivision (e).

1. The general availability of wage statement penalties is distinct from the determination whether they should be levied in a given case

Spectrum relies on *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308 (*Maldonado*), to criticize "the piggy-backing of wage statement penalties for an unrelated and distinct Labor Code violation." (ABM 33.) Spectrum asserts that subdivision (e) "does not apply to amounts that were not paid during the pay period, such as the section 226.7 premium pay awarded in a later action for the non-provision of meal periods." (ABM 33.) This Court should not adopt *Maldonado*'s rationale or Spectrum's extension of it, both which negate the remedial purpose of section 226 to assist employees in determining whether they have been paid properly. (*Oman*, *supra*, ____ Cal.5th at p. ____ [p. 9]; *Ward*, *supra*, ____ Cal.5th at pp. ____ [pp. 21-22].)

In *Maldonado*, the court concluded that the plaintiffs had not satisfied the injury requirement under subdivision (e) because the wage statements accurately reflected the number of hours they had worked and the amount of wages they were *actually* paid for each of those hours, despite the fact that some of their hours should have been paid at the higher, overtime rate. (*Maldonado*, *supra*, 22 Cal.App.5th at pp. 1336-1337.) The court reasoned that only the absence of the total hours worked would give

rise to a presumption of injury, not an inaccurate statement of the wages earned.[16] (*Ibid.*)

Maldonado conflates the general availability of wage-statement penalties with the question of whether they may actually be awarded in any given case. The decision is based on the court's implicit finding that the employer had a good-faith basis for calculating overtime the way it did, even though that approach was unlawful. *Maldonado* thus confuses two separate questions and establishes a bright-line rule that wage-statement penalties are categorically unavailable so long as the proffered wage statements are an accurate reflection of the wages received, even if they are an inaccurate reflection of the wages actually owed.

As here the trial court imposed penalties under subdivision (e) for Spectrum's knowing and intentional failure to pay the premium pay (9 JA 1989), Spectrum asks the Court to approve and extend *Maldonado*'s conflation. But the statutory text already accommodates case-specific circumstances, allowing penalties only for knowing and intentional failures. (§ 226, subd. (e).)

To extend *Maldonado*'s rationale to the instant case would render subdivision (e) toothless. Spectrum's interpretation of *Maldonado*, in which the information contained in a wage statement need be only mathematically correct, rather than factually accurate, would limit redress to instances where an employer either failed to provide an entire category of information, or knowingly and intentionally itemized an underpayment. It

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[16] In reaching this conclusion, the court disregarded the presumption of injury under subdivision (a)(9), which requires "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee." (*Id.* at pp. 1335-1336; §§ 226, subd. (a)(9), (e)(2)(B)(i).)

is hard to imagine that the Legislature intended to rely on the existence of candid wage thieves who openly report their underpayments, or that it would not aim to incentivize accuracy in a statute intended to ensure employees can recognize and seek redress when they are shortchanged. Unsurprisingly, the decision stands at odds with the legislative history of section 226, which the *Maldonado* court did not consider.

2. Legislative history supports the presumption of injury where employees cannot determine proper payment as a result of incomplete information

"[T]he Legislature has repeatedly expanded the scope of both section 226's requirements and the remedies for noncompliance." (*Ward*, *supra*, ____ Cal.5th at p. ____ [p. 9].) When the 2012 amendments to section 226 were under consideration as a part of Senate Bill No. 1255 (2011-2012 Reg. Session) (Bill No. 1255), the changes proposed for subdivision (e) reflected a concern that the existing provisions were being interpreted too narrowly to protect employees. A co-sponsor of Bill No. 1255 explained the significance of subdivision (e) in a letter of support to the Governor:

> [S]ome courts have ignored the spirit and legislative intent of Section 226(e) and have erroneously interpreted the term 'suffering injury' under this section to strictly mean that workers must have suffered lost wages as a result of an incomplete wage statement in order [to] pursue a claim. Such an interpretation flouts the entire purpose of this provision, which is to ensure compliance so that workers can easily and adequately understand the breakdown and source of their pay. It also renders the provision unworkable and meaningless in many instances since workers with incomplete wage statements would not

> have the information necessary to even know that they were not being paid properly and bring a claim forward in the first place. In other words, what function does a law serve when non-compliance often makes it *harder* to bring a claim?

(MFJN 0164, emphasis in original.)

Consistent with this intent, the Legislature specifically itemized subdivision (a)(9) as a category of presumed injury, requiring "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee." (§§ 226, subd. (a)(9), (e)(2)(B)(i).) Yet, the court in *Maldonado* disregarded the Legislature's inclusion of that category finding it illogical, because it produces a double recovery such that "*any* failure to pay overtime at the appropriate rate *also* generates a wage statement injury justifying the imposition of wage statement penalties . . . ." (*Maldonado*, *supra*, 22 Cal.App.5th at p. 1336.) But this is exactly how section 226 was intended to operate. Section 226 created the mechanism by which employees should be able to determine if they have been paid properly. When they cannot because of the employer's failure to provide accurate *and* complete information, the presumption of injury must not be construed in a fashion that frustrates the Legislature's intent and employees' ability to seek redress.

C. Adjacent Statutory Provisions Support Naranjo's Analysis

Statutes are not to be construed in isolation, but rather read "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." (*Reins*, *supra*, 9 Cal.5th at p. 87, citing *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) "Section

226 is part of a matrix of laws intended to ensure workers are correctly and adequately compensated for their work." (*Ward*, *supra*, ____ Cal.5th at p. ____ [p. 22].) So too is section 226.2, which addresses the recording of rest and recovery periods for employees compensated on a piece-rate basis. As a result of two 2013 decisions—*Gonzalez v. Downtown LA Motors L.P.* (2013) 215 Cal.App.4th 36, and *Bluford v. Safeway* (2013) 216 Cal.App.4th 846—the Legislature clarified the manner in which employers of piece-rate workers must compensate them for non-productive time, including rest and recovery periods. (Assem. Com. on Lab. & Employment, Rep. on Bill No. 1513 (Sept. 11, 2015) pp. 4-5.) Noting that it was "keeping with prior legal decisions and statutes in California" (*id.* at p. 5), the Legislature enacted section 226.2 in 2016, which requires employers to itemize "the total hours of compensable rest and recovery periods, the rate of compensation, and the gross wages paid for those periods during the pay period." (§ 226.2, subd. (a)(2)(A).)

Notably, employees' entitlement to compensation as hours worked for rest and recovery periods arises from a subdivision of section 226.7 adjacent to the subdivision that provides for payment of premium wages resulting from employers' failure to provide such periods. (§§ 226.7, subd. (c), (d); see also Stats.2014, ch. 72, § 1.) As section 226.2 was enacted to address the anomalous relationship between piece-rate work and the requirement of compensation for non-productive time set forth in section 226.7, subdivision (d), it is implausible that the Legislature did not intend compensation paid pursuant to section 226.7, subdivision (c), also to be itemized and included in wage statements. If piece-rate employers are required to itemize workers' rest and recovery time pursuant to section 226.2, it stands to reason that the Legislature would not excuse all other

employers who fail to comply with the provision of meal, rest, or recovery periods from recording and reporting their payment of premium wages under section 226.

IV. HOLDING THAT WAGES OWED UNDER SECTION 226.7 ARE SUBJECT TO TEN PERCENT PREJUDGMENT INTEREST MAINTAINS UNIFORM AND CONSISTENT APPLICATON OF THE LABOR CODE

The trial court determined that section 226.7 premium wages are subject to ten percent prejudgment interest under Civil Code section 3289, subdivision (b), based on the rationale of *Bell v. Farmers Ins. Exchange* (2006) 135 Cal.App.4th 1138 (*Bell*). (9 JA 1986-1987.) Spectrum correctly states this in footnote 12 and then immediately contradicts the fact, contending that the trial court awarded prejudgement interest, citing section 218.6. (Compare ABM 46, fn. 12 with 48.) This is simply untrue; section 218.6 is not even cited in the Statement of Decision. (See generally 9 JA 1977-1991.) Yet, Spectrum continues a discussion of section 218.6, tackling its straw man, while claiming Naranjo conceded a point he did not make. (ABM 48.) Naranjo actually "requests that this Court consider the appropriate interest rate irrespective of section 218.6," and has taken no position on the application of section 218.6 to claims under section 226.7.[17] (OBM 41, fn. 18.)

Spectrum focuses on section 218.6 to distract attention from *Bell*'s holding, the rationale for which Spectrum cannot otherwise avoid. Spectrum states that "*Bell* is not applicable because *Bell* applied section

[17] Although the question is fairly encompassed by the second Issue Presented, Naranjo has neither requested its consideration nor conceded the point. (Cal. Rules of Court, rule 8.516.)

218.6 to an action for nonpayment of overtime wages." (ABM 49.) This statement is false.

In *Bell*, the employer moved to amend the judgment, reducing the award of prejudgment interest for the portion of the class period *before* section 218.6 went into effect. (*Bell*, *supra*, 135 Cal.App.4th at p. 1142.) Avoiding the issue of retroactivity, the court stated:

> If previous law called for application of the breach-of-contract interest rate, then the reference to Civil Code section 3289 would also apply to the accrual of prejudgment interest on all claims for unpaid wages without regard to the effective date of the statute.

(*Id.* at p. 1146.) Thus, the court decided the issue based on the law prior to enactment of section 218.6.

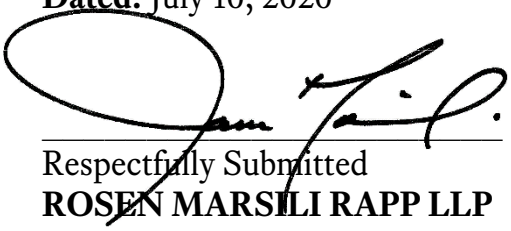
Despite Spectrum's efforts to distinguish *Bell*, the decision expresses the most logical extension of wage and hour jurisprudence as it relates to the accrual of prejudgment interest on section 226.7 premium wages. If section 226.7 premium pay is wages, and treated like wages, it makes little sense that they would accrue interest at a lower rate than all other forms of compensation owed to employees. To conclude otherwise would introduce discord to the harmony of Division 2, Part 1, Chapter 1, Article 1 of the Labor Code.

CONCLUSION

Premium payments owed to employees under section 226.7 are wages. Because the Court of Appeal failed to acknowledge this, its opinion must be reversed with respect to Sections II and III. This Court should hold that employers are required to treat section 226.7 premium wages in the same manner as all other wages with respect to sections 201-203 and 226 or be subject to the respective penalty provisions of those sections.

Further, this Court should hold that the applicable prejudgment interest rate for section 226.7 wages is ten percent in accordance with Civil Code section 3289, subdivision (b). The opinion of the Court of Appeal should be affirmed in all other respects.

Dated: July 10, 2020



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Pursuant to rule 8.204(c)(l) of the California Rules of Court, the undersigned counsel for Respondent and Cross-Appellant certifies that this opening brief contains **7,944** 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 10th day of June, 2020.

By: 

Jason C. Marsili

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STATE OF CALIFORNIA
Supreme Court of California

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

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