S259172

IN THE SUPREME COURT OF CALIFORNIA

JESSICA FERRA,

Plaintiff / Appellant

vs.

LOEWS HOLLYWOOD HOTEL, LLC

Defendant / Respondent

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT CASE NO. B283218
APPEAL From the Superior Court of Los Angeles County. Hon. Kenneth R. Freeman (Los Angeles Super. Ct. Case No. BC586176)

APPELLANT'S REPLY BRIEF

(Service on Attorney General and District Attorney required by Bus. & Prof. Code §§ 17209, 17536.5)

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I. INTRODUCTION

Jessica Ferra ("Ferra") alleges that Loews Hollywood Hotel, LLC ("Loews") violated Labor Code §226.7(c)[1]–which requires employers who fail to provide a legally required meal period or rest break to "*pay* the employee one additional *hour of pay* at the employee's *regular rate of compensation*" (emphasis added)—by calculating that wage premium on the basis of just one component of the employee's actual wages earned (a fixed per hour straight time amount) and not all components of the employee's regular earnings: here, a pro rata portion of Ferra's non-discretionary bonus. Clerk's Transcript Vol. 1:8,16.

Loews *acknowledges* that, in calculating overtime premiums for employees like Ferra under Labor Code §510(a)–which requires the employee to "be *compensated* at the rate of no less than one and one-half times the *regular rate of pay*" (emphasis added)–it must include all components of those employees' regular earnings. However, Loews contends that

[1] Unless otherwise indicated, all Code section references are to the California Labor Code.

because the Legislature (and IWC) used the phrase "pay . . . at the . . . regular rate of compensation" in Section 226.7(c) rather than "be compensated . . . at the regular rate of pay" as in Section 510(a), the Legislature must have intended to limit the Section 226.7(c) wage premium to the employee's "base hourly rate" only (at least for those employees who have a base hourly rate, and are not paid by the piece, by commission, or other common compensation schemes).

Loews' practice of calculating meal-and-rest-break premiums *under* Section 226.7(c) works as follows for employees like Ferra who have a contractual right to a fixed hourly base rate *plus* a non-discretionary periodic bonus:

Assume the employee works 500 straight-time hours during a quarter, that the fixed hourly element of her wages is $15.00 per hour ($7,500 for the quarter), and that her performance bonus for that quarter is $3,000, the equivalent of an additional $6.00 per hour. That employee's actual total earnings for the quarter would therefore be $10,500—or $21.00 per hour worked. If that employee worked one overtime hour, she would be entitled to an overtime premium of 1-1/2 times $21, or

$31.50.[2] If Loews required that same employee to work through her meal period that same day, it would only pay her a wage premium of $15.00, on the theory that the Legislature intended "pay . . . at the . . . regular rate of compensation" to mean something different than "compensated . . . at the regular rate of pay."

The dispute in this case affects only a narrow category of California employees: those like *Ferra* whose compensation is based on an hourly rate *plus* one or more non-discretionary components. For employees who are paid a fixed hourly rate only, both parties agree that their regular rate is that fixed hourly rate. For employees who receive activity-based pay without a base hourly wage (e.g., piece-rate, commission, etc.), both parties agree that their regular rate is based on their average hourly income from all sources. *See* Loews' Answering Brief ("Answering Br.") 57. The question before this Court is whether the Legislature (and the IWC, whose language the

[2] In practice, when bonuses are calculated and paid at the end of a quarter or other period, employers are permitted to make retroactive adjustments to the amount of overtime premiums paid. *See* Reference to 29 CFR 778.209, related case law and the DLSE references at AOB p.47.

Legislature adopted) intended the phrase "pay . . . at the . . . regular rate of compensation" in Section 226.7(c) (and Wage Order 5-2001 §11(B)) to mean something other than "be compensated . . . at the regular rate of pay" as in Section 510(a) (and Wage Order 5-2001 §3(A)(1)(a)) *for this particular category of hourly-rate-plus employees*, without having given any indication of any such intent in the statutory language or legislative history.

Loews strains to establish that the Legislature had such a secret intent. Even though "regular rate" is an established term of art that has historically referred to *all* forms of remuneration, and even though "pay" and "compensation" have for many decades been used interchangeably in the Labor Code, IWC Wage Orders, DLSE's Opinion Letters, and decisions of this Court and the United States Supreme Court, Loews contends that the Legislature must have intended "regular rate of pay" under Section 510(a) to mean "all remuneration" and "regular rate of compensation" under Section 226.7(c) to mean "base hourly rate only" (for employees who have a base hourly rate, even when they also have other forms of non-discretionary remuneration), because the meal-and-rest break premium law and the overtime

premium law have different purposes: the former supposedly focused on restoration for loss and the latter focused on compensation and deterrence. Answering Br.44-45.

In fact, both statutory premiums further the purpose of compensation and deterrence. *See infra* at II. F. Far more important, though, is the fact that the Legislature used *both* words in the operative sentences in *both* statutes; it just used them in a different order ("pay . . . at the regular rate of compensation" versus "be compensated [at the] regular rate of pay"). There is *no* indication that, for this particular sliver of the California workforce, the Legislature intended the components of an employee's "regular rate" to depend on whether the employer is required to "pay the employee one additional hour of pay at the employee's regular rate of compensation" under Section 226.7(c) or to ensure that the employee "shall be compensated . . . at no less than [1-1/2] times the [employee's] regular rate of pay" under Section 510(a). Both sentences use both words, as well as the established term of art, "regular rate."

Loews and the Court of Appeal majority try to distinguish the synonyms "pay" and "compensation" by reading them in a vacuum without regard to their statutory context. By contrast,

Justice Edmon got it right in her dissent by focusing on the statutes as a whole and how those words were used in the clauses, sentences, and statutes in which they appear. If the Legislature had intended to limit the Section 226.7(c) premium to "base hourly rate" only (for those employees, like Ferra, who are entitled to base hourly pay plus other non-discretionary remuneration), it could easily have said so, as it did in Labor Code § 204.11. *Ferra,* 40 Cal.App.5th at 1268 n. 9 (Edmon, J., dissenting) Instead, the Legislature used those synonyms either to begin and end, or to end and begin, parallel sentences whose critical focus was the term of art, "regular rate." Given the grammatical construction of those statutes and their legislative and administrative history, Justice Edmon's construction of the statutory language is the *only* permissible construction, and the panel's contrary decision must therefore be reversed.

II. ARGUMENT

A. THE TERM OF ART STATUS OF "REGULAR RATE" AND THE PLAIN SHARED MEANING IN THE WAGE AND HOUR CONTEXT OF "PAY" AND "COMPENSATION" COMPEL REVERSAL

Loews acknowledges that in determining a statute's meaning, courts first examine its language in the context of the

statute as a whole as the most reliable indicator of legislative intent. (Answering Br. 19). Application of this principle makes clear that the Court of Appeal erred in asserting that the Legislature intended "regular rate of pay" in Section 226.7(c) to have a different meaning than "regular rate of compensation" in Section 510.

Any assessment of the Legislature's intent in drafting these sections requires consideration of three expressions: "regular rate," "pay," and "compensation" in premium wage contexts.

The expression "regular rate" in the text of Section 226.7(c) is central to the analysis, especially given that "pay" and "compensation" have historically shared, synonymous meanings in the wage context. *See infra* at 13-15, Opening Br. 65-69.[3]

The term "tegular rate" has always included any base hourly wages plus any other guaranteed forms of remuneration that comprise an employee's pay for an hour of work. *See* 29

[3] The Court's framing of the issue with references to overtime payments and meal-and-rest break violation payments as "premium wages" reflects the Legislature's intention to treat premium payments under Sections 226.7(c) and 510(a) as "wages" within the meaning of Section 200 as payments for labor performed.

U.S.C. § 207(e); 29 C.F.R. 778.211; *Walling v. Harnischfeger Corp.* (1945) 325 U.S. 421; *see also* California's embrace of the federal definition of "regular rate" before and after enactment of Sections 510 and 226.7 in the 2002 Update of The DLSE Enforcement Policies and Interpretations Manual ("2002 DLSE Manual") §§ 35.7, 49.2-49.2.4.3; *Alvarado v. Dart Container Corp.* (2018) 4 Cal.5th 542, 562; *Alcala v. Western Ag Enterprises,* 182 Cal. App. 3d 546 (1986); DLSE Opn. Letter No. 1991.03.06; DLSE Opn. Letter No. 1993.02.22-1.

That established meaning does not depend on whether the term "regular rate" is followed by "of pay" (as it does in Labor Code § 510), "of compensation" (as it does in Labor Code § 226.7), or neither "of compensation" nor "of pay" (as it does in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207(a), (e)). "Regular rate" is the operative phrase that determines how premium pay must be calculated.

Loews' effort to distance itself from the fact that "regular rate" is a term of art falls short. Without supporting authority, Loews contends that "regular rate" has never been a term of art in California, only under the federal system (Answering Br. 11, 12, 25, 26, 41, 42), and that the term "regular rate of

compensation" in Section 226.7(c) does not qualify as a term of art in California either. (*Id.* 26.)

Terms of art "are words having specific, precise meaning in a given specialty." (Opening Br. 34 (citations omitted)). Given that definition, "regular rate" is a term of art under both federal and state wage law, with or without "pay" or "compensation" appended to it. A quasi-legislative body like the IWC, when borrowing a term like "regular rate" that has established meaning under parallel federal law, is presumed to be aware of and to intend that meaning, absence evidence to the contrary. *F.A.A. v. Cooper* (2012) 566 U.S. 284, 292; *Texas Commerce Bank v. Garamendi* (1992) 11 Cal.App.4th 460, 475.

Loews cannot point anything in the statutory language or legislative history that comes close to establishing an intent on the part of the IWC or Legislature to reject the settled meaning of "regular rate." Moreover, Loews' proposed interpretation would effect a radical alteration of that term's meaning, urging the "base hourly rate" definition that the United States Supreme Court rejected over 70 years ago and creating enormous confusion for the millions of California employees who do not have a fixed base hourly rate. *See, e.g.,* the pay scheme in *Ibarra v. Wells*

Fargo Bank N.A. (C.D.Cal., May 8, 2018, CV No. 17-4344-PA) 2018 U.S. Dist. Lexis 78513 where hourly rates were, if paid, an advance on commissions, and the hourly rate "did not actually determine the compensation received by most of the class members." *Ferra,* 40 Cal.App.5th at 1251; Answering Br. 56-57.

The U.S. Supreme Court first construed "regular rate" under 29 U.S.C. § 207(e) as encompassing "all remuneration" in 1945 in *Walling,* 325 U.S. 421. California adopted that same construction, as pointed out in in *Alcala,* 82 Cal.App.3d at 550 [finding that California's overtime laws are "closely modeled" after the FLSA]; and DLSE Opn. Letter No. 1991.03.06 [including bonuses in the "regular rate" after noting that California "regular rate" requirements are patterned after Federal law.]

Significantly, the DLSE Manual that preceded the current DLSE Manual, written two years before the enactment of 226.7 and 510 provides:

> Since the Industrial Welfare Commission has not defined the term "regular rate of pay," DLSE has determined that the IWC intended to adopt the definition of "regular rate of pay" set out in the Fair Labor Standards Act. ("FLSA") 29 USC Sec. 207(e) [which defines the term "regular rate" not "regular rate of pay]: "... the 'regular rate' at which an employee is employed shall be deemed to include all

> remuneration for employment paid to, or on behalf of the employee..." (29 USC Sec. 207(e).)

Division of Labor Standards Enforcement, Enforcement Policies and Interpretations Manual, October 1998. Sec. 33.1.2 pg. 84.

This Court adopted that construction as well. *See Alvarado v. Dart* (2018) 4 Cal.5th 542, 554, 562 [concluding that the "plain meaning" of "regular rate of pay," consistent with the FLSA's definition of "regular rate," includes fixed per hour wages and other guaranteed remuneration such as non-discretionary bonuses].

While Loews' suggests that the appended words "of pay" made all the difference in *Alvarado* and that the use of the term "regular rate" made none, that argument assumes that *without* the addition of the words "of pay," the borrowed term of art "regular rate" would either by itself mean "base hourly rate" or would, at a minimum, be stripped of any meaning. That is an argument driven by desired result, not logic.

Loews asserts: "Nowhere in *Murphy* (or *Kirby*) did this Court indicate that payment of anything other than one hour at the base hourly rate was required [in applying Section 226.7(c)]." (Answering Br. 31). Of course, if this Court in a prior case had expressly and definitively decided the issue presented, there

would have been no dispute warranting further review. The apparent reason this Court had no need in prior cases to definitively address this issue was because of the accepted understanding of the term of art "regular rate," coupled with the fact that the only category of employees who could be affected by the current dispute are those, like Ferra, whose compensation schemes include a base hourly rate and other forms of non-discretionary payments attributable to each hour worked.

In *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103-1104 & n. 6, this Court recognized that "pay" and "compensation" are synonymous with "wages" (and with each other). With "wages" defined in Section 200 as the amount paid for the labor performed by an employee, the plain meaning definition of "compensation," as relevant to this matter, must be payment for labor performed in the course of the employee-employer relationship.

Loews acknowledges that the "Legislature [like the courts] frequently uses both 'pay' and 'compensation' as synonyms for 'wages'," and that this Court in *Murphy* has similarly held that the words are synonyms. (Answering Br. 12). Nonetheless, Loews contends that while "pay" is used to express economic

consideration for services rendered (i.e. labor), "compensation" (at least as used in Section 226.7) was intended to apply only to *reparation/remuneration for a loss*—such as deprivation of a legally-required meal break or rest period—and therefore means something less than pay for services rendered (at least in cases like this, even though not for employees paid only a base hourly rate or no base hourly rate, for whom "regular rate of compensation" and "regular rate of pay" mean the same thing). (Answering Br. 12, 44-48). Nothing in the Legislature's and IWC's usage of those terms in Section 226.7(c) suggests that difference of meaning, though, and as Justice Edmon pointed out in dissent, even if the two words were not synonymous (either in a vacuum or in context), that still "does not lead logically to the conclusion that 'regular rate of compensation' means straight hourly rate." *Ferra,* 40 Cal. App. 5th at 1268 (Edmon, J., dissenting).

With this Court having held that overtime premiums and missed break premiums are "wages," whether paid for the burden of working long overtime hours or for working without receiving timely meal and rest breaks, the premium pay under Sections 226.7(c) and 510(a) must both be calculated on the basis of the

definition of Wages under Section 200, defined as "amounts for labor performed," a definition that coincides with dictionary definitions of the same terms in the employment context. (Opening Br. 67-69) *Ferra,* 40 Cal.App.5th at 1258-61 (Edmon, J., dissenting).

With "regular rate" including "all remuneration," and "pay" and "compensation" both meaning "wages," Section 226.7(c)'s " one additional hour of pay at the employee's regular rate of compensation**"** is not limited to one form of the wages paid to an employee whose "remuneration" for an hour of work includes several forms of compensation. An employee who receives fixed hourly amounts and other wages for an hour of work is entitled to one hour of break violation premium pay that accounts for all forms of earned wages attributable to the day of the violation.

B. THE INTERCHANGEABLE USES OF "PAY" AND "COMPENSATION" IN SECTIONS 226.7(c) AND 510 UNDERMINE LOEWS' POSITION.

Labor Code § 226.7(c) provides that for a meal or rest break violation, "[T]he employer shall *pay* the employee one additional hour *of pay* at the employee's regular rate of *compensation* for each workday that the meal or rest period is not provided." (Emphasis added.)

Labor Code § 510(a) provides that the different work hours that trigger entitlement to overtime "*shall be compensated* at the rate of no less than one and one-half times [or twice] the *regular rate of pay* for an employee." (Emphasis added.) Section 510(a) also includes the interchangeable-term caveat that "Nothing in this section requires an employer to combine more than *one rate of overtime compensation* in order to calculate the amount to be *paid* to an employee for any hour of overtime work." (Emphasis added.)

Both of these statutory provisions, like the IWC sections that preceded them, use "compensation" and "pay" interchangeably. Loews' entire case relies on a presumed difference in meaning between "pay" and "compensation," but as is apparent from the text of each of the code sections, the Legislature's and IWC's choice of language, word, order, and active/passive voice in these two statutes make perfect sense and are substantively identical.

In Section 226.7(c), the Legislature declared that employers shall "*pay*" *one hour of "pay"* at the employee's regular rate of "*compensation*." In Section 510(a), the Legislature declared that overtime shall be "*compensated*" at multiples of regular rates of

"*pay*." Both sections use the same two terms, just in a different order, thus collapsing any supposed distinction between the two sections' word choice.

This same interchangeability is also demonstrated by the last sentence of Section 510(a), in which the Legislature uses "*rate of overtime compensation*" in referencing "amount to be paid," despite the use of "*rate of pay"* throughout the other parts of 510(a). If the Legislature had intended different meanings to be attributable to "regular rate of pay" and "regular rate of compensation," it would not have used "rate of pay" when declaring multiples of the "regular rate of pay" for purposes of calculating overtime, while concluding with a caveat explaining how that section does not require employers to combine more than "one rate of overtime compensation."

C. THE HISTORICALLY SYNONYMOUS USE OF "REGULAR RATE OF PAY" AND "REGULAR RATE OF COMPENSATION" INFORMS "PLAIN MEANING" ANALYSIS.

1. Interchangeable Use of the Expressions "Regular Rate of Pay" And "Regular Rate of Compensation" in Judicial Opinions Reflect Acceptance by the Courts of the Shared Plain Meaning of those Expressions.

We previously demonstrated that the term of art "regular

rate," as used in the FLSA and as construed by the U.S. Supreme Court, has historically meant "all remuneration" (Opening Br. 40-44), and that the Supreme Court's FLSA cases use the expressions "regular rate of pay" and "regular rate of compensation" interchangeably. (Opening Br. 53-54, citing *Walling v. Youngerman-Reynolds Hardwood Co.* (1945) 325 U.S. 419, 424; *Walling v. Harnischfeger Corp.* (1945) 325 U.S. 427, 430, and *Bay Ridge Operating Co., Inc. v. Aaron* (1948) 334 U.S. 446.) Loews does not even attempt to explain away the Supreme Court's treatment of "regular rate of pay" and "regular rate of compensation" as interchangeable expressions used by the court in defining "regular rate," or the codification of that definition in 29 U.S.C. § 207(e).

In subsequent years, lower federal courts similarly treated the expressions as synonymous, using "regular rate of pay," "regular rate of compensation," or both, without ever distinguishing between the two. (Opening Br. 55-57, citing cases). *See also Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal. 4th 725, 730 n.1 [describing the overtime premium required by Section 510(a) as "time and one half the regular rate of compensation"].

This Court's use of the term "regular rate of compensation" when explaining the requirements of "regular rate of pay" under Section 510(a) makes complete sense because of the shared meaning of "pay" and "compensation." When California borrowed the federal "regular rate" definition from the FLSA, it did so without defining "regular rate," "of pay," or "of compensation." Loews does not point to anything that suggests that the IWC, in using the expression "regular rate" in enacting the Wage Order break premium, intended anything less than the "all remuneration" meaning attributed to "regular rate" in federal law. Further, nothing in the Wage Orders suggests that, but for "of pay," the settled meaning of "regular rate" would not apply in wage premium contexts in California where the words "regular rate" are used.

With decades of federal court jurists using "regular rate of compensation" and "regular rate of pay" interchangeably, and "regular rate" enjoying a settled meaning, there is no basis for concluding, without *any* indication in the legislative history or Statement of Basis, that the Legislature and IWC sought to abandon the historic meaning of "regular rate" in the context of "break" premium pay.

2. The Interchangeable Use of "Regular Rate of Pay" and "Regular Rate of Compensation" By the DLSE Further Supports the Shared Meaning Conclusion.

Loews seeks to minimize the relevance of the letter filed by the Division of Labor Standards Enforcement ("DLSE") in support of review in this case by claiming that the DLSE "had said nothing consistent with Ferra's position for nearly two decades. (Answering Br. 11, 37-40.) That is not accurate. Although the somewhat unique factual scenario giving rise to this dispute did not squarely present itself to DLSE earlier, DLSE's pronouncements regarding meal-and-rest-break premium pay over the past 17 years have consistently used the terms "pay" and "compensation" interchangeably.

For example, DLSE stated in a 2003 Opinion Letter addressing meal-and-rest break premiums:

> … The "*regular rate of compensation*" is an hourly, non-overtime rate.... [T]he amount that is due for this additional hour of pay for a violation of the right to a meal period, … *is one hour at the employee's regular rate of pay*.

See DLSE Opn. Letter 2003.10.17 (2003) at 6-7 (emphasis added).

Similarly, since at least 2012, the DLSE's Webpage FAQs have referenced the meal-and-rest break premium remedy as

both one hour of pay at the "employee's regular rate of pay" and as "one hour of pay at your regular rate of compensation" (*see* Opening Br. 63-64; Answering Br. 39-40), again without distinguishing between the two expressions.

The DLSE Manual also uses both phrases. Section 45.2.7 of the Manual states the remedy for a break violation is "one (1) hour of pay at the *employee's regular rate of compensation."* (Emphasis added.) The next section, 45.2.8, states that the remedy in terms of "one hour at the *employee's regular rate of pay."* (Emphasis added.) DLSE's recent analysis of the issue presented in this case is entirely consistent with almost two decades of prior administrative understanding that the regular rate is calculated the same for purposes of Section 226.7(c) as for Section 510(a).

D. LEGISLATIVE AND ADMINISTRATIVE HISTORY SUPPORT THE CONCLUSION THAT "REGULAR RATE OF PAY" AND "REGULAR RATE OF COMPENSATION" ARE SYNONYMOUS

Loews purports to draw on legislative history to support its "base hourly rate" conclusion, despite the absence of any reference to "base hourly rate" in Section 226.7(c), the IWC Wage

Orders, or any of the legislative materials cited by Loews. (Answering Br. 34-37).

The relevant history of Section 226.7(c) turns on the Legislature's express choice to track the language of the earlier enacted provisions in the IWC Wage Orders. *Murphy,* 40 Cal.4th at 1107-08. The Senate Committee Report referenced in *Murphy*, upon deferring to the IWC's language, stated that "'[f]ailure to provide such meal and rest periods would subject an employer to *paying the worker one hour of wages* for each work day when rest periods were not offered' (*ibid.,* thereby indicating that it *considered the 'additional hour of pay' a wage…)*" *Id.,* at 1108 (emphasis added). Conspicuously absent from this statement is Loews' implied modifier, "at the employee's *base hourly* rate."

With the Legislature deliberately adopting the IWC's language, any consideration of the Legislature's intent must start with what the *IWC* intended when it provided in Wage Order 5-2001 §11(B): "If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this Order, *the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation* for each work day that the meal period is not provided."

Loews does not dispute that at the time the IWC created the break premium, it had been using the term of art "regular rate" for decades. Included in the IWC's periodically enacted Wage Order that used the term "regular rate" were Wage Orders that it adopted before the enactment of Sections 226.7 and 510 but after the DLSE in its Opinion Letters and the Court of Appeal in *Alcala,* 182 Cal.App.3d 546, had concluded that the IWC's use of the expression "regular rate" derived from the FLSA definition.

Notably, although the IWC expressly defined 22 separate terms in the applicable Wage Order, it found no apparent need to define the terms "regular rate," "compensation," "pay," or for that matter the expression "*one additional hour of pay at the employee's regular rate of compensation." See* Section 2 of Wage Order 5, Cal. Code of Regs., tit 8 Section 11050.

Had the IWC intended the meaning of "regular rate" to lose its settled meaning when used in the context of meal-and-rest break premiums, or had it intended "compensation" and "pay" to have a new and different specialized meaning, it is reasonable to infer that the IWC would have included the terms "regular rate," "pay," and "compensation" in its lengthy list of defined terms. It

is not unreasonable to conclude that if the IWC intended "regular rate of compensation" to mean "base hourly rate only," it would have made that intent clear in the "Definitions" section of the Wage Orders, especially given the modification of the historical meaning of "regular rate" that such an intention would require.[4]

A central aspect of the IWC history that Loews cannot explain away is IWC's choice of words in its Statement of Basis to describe the meal-and-rest-break violation penalty provision:

> The IWC [given the lack of consequences for break violations in the past], therefore . . . added a provision to this section that requires an employer to pay an employee one additional hour of pay at *the employee's regular rate of pay for each work day that a meal period is not provided.*

(Statement of Basis, found at https://perma.cc/CN6U-HF8P cited in *Ferra*, 40 Cal.App.5th at 1262 (Edmon, J., dissenting) (emphasis added).

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[4] On the issue of definitions, Loews makes the point that when laws like the Wage Orders contain express definitions of some terms, undefined terms contain no specialized legal meaning. (Answering Br. 26-27). Here, with "regular rate" in no need of definition because of its decades-long term-of-art status, the failure to include "compensation" among the specially defined terms in the Wage Order belies any intention to give that work a special meaning that is *not* synonymous with "pay."

If, as Loews contends, paying the "regular rate of compensation" under Section 11(B) of the Wage Order was intended to mean paying the *base hourly rate*, while compensating at the "regular rate of pay" under Section 3(A)(1) of the Wage Order was intended to mean compensating for all remuneration, the Court must conclude that the five members of the Industrial Welfare Commission who were required to vote on the Statement of Basis (Section 1177(b)) were so careless as to make no reference to that intent (even for the small number of persons who would be affected, if that were their intent), and so sloppy as to describe that provision in the Statement of Basis as requiring payment at the "regular rate of pay" when they actually intended a materially different term, "base hourly rate" (or actually intended to use the term "regular rate of compensation" as a proxy for "base hourly rate").

Loews position is based on wishful thinking. If the IWC had intended "regular rate of pay" and "regular rate of compensation" to have different meanings, it would have said so in the Statement of Basis and not have used the phrases interchangeably.

Loews purports to derive significance from the fact that Legislative committee reports referring to "hourly rate of pay," "average hourly rate" and "hour of wages" never use the expression "regular rate." (Answering Br. 36.) There is no reason why they would have. Because each of those phrases can reasonably apply to an employee's *actual* earnings for an hour of work ("regular rate"), far more noteworthy is the fact that neither the Legislature nor the IWC ever used the expression *base hourly rate,* and that the IWC and Legislature instead adopted language for break premiums that included the term of art "regular rate."

E. THE CANONS OF STATUTORY CONSTRUCTION DO NOT SUPPORT LOEWS' POSITION.

Loews presents several guides to statutory construction in support of its position. Upon analysis, most cut in the opposite direction.

1. "Common Sense" Does Not Support the "Base Hourly Rate" Interpretation of Section 226.7(c)

Loews is correct that courts should apply *common sense* to interpret statutes to make them workable and reasonable, and thus avoid arbitrary, unjust, and absurd results. (Answering Br.

20, citing *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1122.)

Loews' "base hourly rate" interpretation is neither *workable* nor *reasonable* and it defies *common sense*. It also leads to the absurd result of leaving Californians whose compensation includes several components (e.g. base rate plus commission or non-discretionary bonuses) with break violation premium pay that is significantly less than their actual earnings for each hour of work, while compensating those who are exclusively paid on the basis of a fixed hourly rate and those who have no fixed hourly rate at a rate that matches their actual earnings for an hour of work.

The IWC Wage Orders provide a single set of rules for meal-and-rest-break premium calculations, whether for employees paid exclusively on a fixed amount per hour basis, employees paid on an activity, commission, salary, piecework or a combination basis, or employees paid on a fixed hourly wage plus non-discretionary bonus basis.[5] The remedy of an hour's pay

[5] The variety of pay schemes in which an employee's actual hourly earnings are not limited to a fixed per hour wage rate include pay schemes like those in *Ramirez v. Yosemite Water* (1999) 20 Cal.4th 785, 792 (pay per bottle delivered plus

under Section 226.7(c) and Wage Order 5-2001 §11(B) does not distinguish between employees exclusively paid by the hour and those paid by other methods. Yet Loews' analysis draws artificial, made-up distinctions that serve no legitimate purpose and are untethered to the statutory language.

The consequence of Loews' position is best illustrated by a hypothetical:

Assume that three companies manufacture chairs, with each offering a different compensation package.

1. The first company pays its employees a base hourly wage of $13.00 per hour plus a quarterly productivity bonus based on work throughout the quarter.
2. The second company pays its employees a base hourly wage of $13.00 per hour plus $35.00 per chair completed.

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commissions with a minimum monthly guarantee); *Oman v. Delta Airlines* (2020) 9 Cal.5th 762 (activity based payment scheme with "rotation" earnings and their hourly equivalents varying by rotation); *Vaquero v. Stoneledge Furniture* (2017) 9 Cal. App. 5th 98,103 (commission pay); *Bluford v. Safeway* (2013) 216 Cal. App. 4th 864 (pay per mile driven and other activity factors); and *Gonzalez v. Downtown LA Motors* (2013) 215 Cal. App. 4th 36 (primarily piecework earnings per type of task completed).

3. The third company pays its employees $25.00 per hour with no possibility of piecework, bonus or other form of incentive pay.

Suppose each company has an employee who was required to work, at times, through meal periods. Also suppose that at the two companies where employees received a fixed amount per hour and piecework or bonus pay for each hour worked, the employees who missed meal breaks each averaged $25.00 per hour in *actual* earnings during the days they missed meal breaks.

Under Loews' "base hourly rate" position, the employee who received a quarterly bonus and the employee who earned piecework wages would receive $13.00 for a break violation despite actual earnings of $25.00 per hour because each had a $13.00 per hour base hourly rate. The employee who was paid strictly on an hourly basis of $25.00 per hour would receive $25.00 for each missed break, at least $12.00 per hour more than the other employees whose actual hourly earnings were also $25.00 per hour.

Loews' position would require the Court to infer that the Legislature silently intended to have employers pay less than one hour of actual earnings in break premium pay to that small

group of Californians who receive both hourly and other pay for their work, simply because their daily pay included a pro rata payment obligation on top of the fixed hourly rate. Such an assumption is clearly unwarranted given the language of Section 226.7(c) and that statute's applicability to all categories of non-exempt employees, regardless of how they are paid.

2. The Canon of Construction Relied upon by Loews Cannot be Outcome Determinative.

The Court of Appeal majority, like Loews, mostly relies on the canon that:

> Where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning.

(*See, e.g., Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117; Answering Br. 21). While it is true that legislatures *sometimes* use different words or phrases for the purpose of conveying different meanings, it is equally true that legislatures frequently use synonyms without intending to draw any distinctions (Opening Br. 26-27 citing cases; *Ferra,* 40 Cal.App.5th at 1266 (Edmon, J., dissenting), and that when a legislature uses the same terms of art in different statutes (e.g.

"regular rate" in Sections 510 and 226.7 (c)), it intends those words to convey their settled meaning. See Section 1, supra.

The panel majority turned this single canon into an irrebuttable presumption that the Legislature must have attributed different meanings to the term of art "regular rate," depending on whether the expression was followed by "of compensation" or "of pay." *Ferra*, 40 Cal.App.5th at 1247.

A single canon of statutory construction is never an infallible guide to correct interpretation in all circumstances, especially when, as here, other substantial indicators of legislative intent clearly dictate a different result. Canons of interpretation are merely tools to aid in the statutory construction inquiry, not mandatory rules (Opening Br. 25).

What matters here is that the Legislature and IWC used the term of art "regular rate" in both laws and treat "pay" and "compensation" synonymously in both as well. There is no basis for inferring that they intended completely different meanings of the term "regular rate" by requiring employers to "pay employees . . . at the . . . regular rate of compensation" under Section 226.7(c) and by requiring employees to "be compensated [by their employer] . . . at [a multiple of] the regular rate of pay" under

Section 510(a)–let alone a basis to infer that the former necessarily means "pay at the base hourly rate only." As pointed out by Justice Edmon, even if "compensation" and "pay" have different meanings, that conclusion does not transform an hour of pay at a "regular rate of compensation" to "base hourly rate." *Ferra,* 40 Cal.App.5th at 1268 (Edmon, J., dissenting).

F. LOEWS POLICY ARGUMENT DISREGARDS THAT THE REMEDIES CONTEMPLATED BY 510 AND 226.7 ARE BOTH INTENDED TO SHAPE EMPLOYER BEHAVIOR AND COMPENSATE EMPLOYEES.

Loews asserts that the policy objectives of Sections 510 and 226.7 are different and require the conclusion that "regular rate of compensation" in 226.7 (c) means "base hourly rate" because the remedy contemplated by Section 226.7(c) is reparation for a loss, not a wage. (Answering Br. 10-12, 21, 25, 27-34, 44-45.)

That argument runs directly contrary to *Murphy,* 40 Cal.4th 1094, which concluded that the payments required by Sections 510 and 226.7(c) were "premium wages," with "wages" defined under Section 200 as "amounts for labor performed by employees." As this Court explained, premium pay for overtime violations serve the same purposes as premium pay for meal-and-rest-break violations because both are designed to deter wrongful

employer behavior and to compensate employees who are subjected to similarly harms: unduly long hours in the case of Section 510, and consecutive hours without timely or sufficiently long breaks in the case of Section 226.7. (*Murphy*, 40 Cal.4th at 1102-14; Opening Br. 28-33).

As to the shared policy objectives of Sections 226.7(c) and 510(a), this Court could not have been clearer:

> The IWC intended that, like overtime pay provisions, payment for missed meal and rest periods be enacted as a premium wage to compensate employees, while also acting as an incentive for employers to comply with labor standards.

Murphy, 40 Cal.4th at 1110

Murphy describes how the IWC used the "meal and rest period remedy" in the same sense that the IWC used overtime pay as a "penalty" and as "premium pay—with the central purpose of guaranteeing compensation to employees and a 'secondary function' of shaping employer conduct." 40 Cal.4th at 1109-11.

The Court of Appeal below recognized that the purpose of Section 226.7(c), as described in *Murphy*, is to compensate employees and discourage law-violating employer behavior, *Ferra,* 40 Cal.App.4th at 1249; *Murphy*, 40 Cal.4th at 1111.

Nonetheless, the panel majority concluded that the true purposes of that statute was to provide reparation for loss.

Loews, too, attributes this reparation purpose to Section 226.7(c), notwithstanding *Murphy* and the fact that "regular rate of pay" under Section 510(a) and the "regular rate of compensation" under Section 226.7(c) yield exactly the same amount for every employee *except* those who happen to be compensated on a base-rate-plus-non-discretionary-bonus basis. Surely the Legislature did not intend to single out that small segment of the California workforce as the *only* workers whose regular rate for overtime purposes would be different than their regular rate for meal-and-rest-break purposes based on an unstated, purported purpose that has no peculiar application except to that narrow segment.

Loews also cites *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, but that case neither contradicts *Murphy's* conclusion that the Section 226.7(c) *remedy* of an hour of pay at the "regular rate of compensation" is a wage, nor *Murphy's* pronouncement that Sections 226.7 and 510 share the same two principal purposes. *Kirby's* holding that an action for violation of Section 226.7 "is brought for the *nonprovision of meal*

and rest periods, not for the 'nonpayment of wages'," 57 Cal.4th at 1255 (italics in original), does not detract from the reality that the Section 226.7(c) *remedy* is an hour of "pay," a wage, just like the Section 510 remedy is a "wage."

Loews argues that its interpretation of "regular rate of compensation" is somehow enhanced by the fact that the premium wages for working employees overtime is proportional to the loss (as it increases with each overtime hour worked), while the premium pay in 226.7(c) is not proportional to the loss (Answering Br. 11, 29-30. But *neither* one hour at a base hourly rate (Loews' contention) nor one hour at the regular rate would be proportional to the "loss" under Section 226.7(c). Noting that the remedy in Section 226.7(c) is not proportional to the loss does not provide any insight into the intended construction of the statute's premium pay language.

Loews does not dispute that Sections 510 and 226.7 address workplace problems that adversely impact employee health and safety: unduly long hours, and unduly long shifts without a break. The Legislature addressed both sets of problems by requiring the employer to pay, or the employee to be compensated, in an amount based on that employee's regular rate

of remuneration. Characterizing the premium wage required for a meal-and-rest-break violation as "reparation for a loss of breaks" does not change the "wage" status of the remedy, any more than characterizing the premium wage required for an overtime violation as "reparation for the loss of leisure time" would change the status of overtime premiums as "wages."

G. THE RATIONALE ADOPTED BY THE SUPREME COURT FOR THE "ALL REMUNERATION" DEFINITION OF "REGULAR RATE" APPLIES WITH EQUAL FORCE IN THE BREAK VIOLATION CONTEXT.

The United States Supreme Court explained in *Walling v. Harnischfeger Corp.* (1945) 325 U.S. 427, 434, that limiting the "regular rate" to base hourly wages would impermissibly incentivize employers to depress base hourly wages and raise other components of wages to limit the amount of overtime premium wages they would have to pay.

So too would Loews' "base hourly rate" position create a perverse incentive for employers—at least those that commit frequent break violations—to depress base hourly wages while increasing other components of wages, to minimize their potential liability for Section 226.7(c) wage premiums.

Loews tries to confuse the issue by asserting that "regular rate of pay" as applied to overtime already eliminates the incentive employers would otherwise have to lower base hourly wages. (Answering Br. 11.) Loews' argument does not hold up. The Legislature's elimination through the "regular rate" of an incentive to reduce hourly rates to limit overtime premiums has no impact on the separate need to eliminate an employer incentive to limit the dollar amount employers must pay for break violations, especially in industries where employees rarely work overtime and break violations are frequent.

H. LOEWS' RETROACTIVITY POSITION IS NOT SUPPORTED BY APPLICABLE AUTHORITY.

Loews asserts that if this Court reverses, its decision should only apply prospectively. (Answering Br. 60-63). Loews contends that tens of thousands of California employers have been paying break premiums on the basis of their employees' base hourly rate only, and that for "two decades" California employers have followed Loews' interpretation of Section 226.7(c). (*Id.* 10, 61).

Loews cites no evidence to support those assertions and makes no attempt to quantify the number of employees whose

pay, like Ferra's, is based on a base hourly rate plus a non-discretionary bonus—the only employees whose rights are at issue in this case. Nor does Loews offer any reason to believe that *those* workers' employers failed to comply with their legal obligations under the plain language of Section 226.7(c) to calculate "regular rate" the same way under that statute as they are required to do under Section 510(a).

This Court was recently called upon to address a similar retroactivity argument in *Alvarado,* 4 Cal.5th at 572-73. The Court did not make its ruling prospective-only in that case, because its ruling did not change a previously *settled* rule of law upon which the parties reasonably and justifiably relied. *See also Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, 1282.

Construing "regular rate" under Section 226.7 to mean the same thing as "regular rate" under Section 510(a) and the FLSA will not change any previously settled rules. While it might resolve some existing uncertainties, that happens whenever this Court resolves a disputed issue.

As far back as 2012, the court in *Studley v. Alliance Health Services, Inc.* (C.D. Cal. 2012) 2012 U.S. Dist. Lexis 19094 held

that Section 226.7 required the same "regular rate" calculation as the "regular rate" under the FLSA. Since then at least seven federal district courts have weighed in on the issue, without reaching any firm consensus. *See Ferra,* 40 Cal.App.5th at 1250-52. The only certainty that employers have had was the knowledge that the issue would ultimately have to be decided by this Court.

The weakness of Loews' statutory construction analysis underscores the inappropriateness of having this Court's rejection of that analysis be prospective only. The overwhelming history of the interchangeable use of the expressions "regular rate of pay" and "regular rate of compensation," beginning with the United States Supreme Court over 70 years ago and continuing in the pronouncements of several administrative and legislative bodies since then, belies the notion that the terms are not synonymous. Further, Loews' disregard for the term-of-art status of "regular rate," the synonymous nature of "pay" and "compensation" as reinforced by *Murphy*, and a review of those words in the context of the statutes as a whole, completely undermines Loew's assertion that the presumption of retroactivity has been overcome. Particularly given the language

of the relevant sentences in Sections 226.7(c) and 510(a) read as a whole, no California employer can be said to have reasonably relied upon any "settled rule" that "pay . . . at the . . . regular rate of compensation" means something materially different than "compensated . . . at the regular rate of pay."

III. CONCLUSION

For the reasons stated above and in Ferra's Opening Brief, the Court of Appeal's decision should be reversed.

Dated: August 31, 2020

Respectfully submitted,

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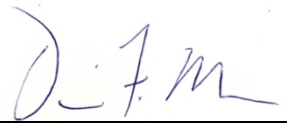
Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.260(b)(1) of the California Rules of Court, the enclosed brief of Appellant is produced using 13-point Century Schoolbook type including footnotes and contains approximately 7,531 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: August 31, 2020



Dennis F. Moss

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1, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 15300 Ventura Boulevard, Suite 207, Sherman Oaks, California 91403.
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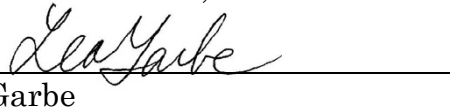
Executed this 31st day of August, 2020 at Sherman Oaks, California.



Lea Garbe

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Supreme Court of California

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8/31/2020

Date

/s/Lea Garbe

Signature

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