Case No. S212704

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

TIM MENDIOLA, et al.,

Plaintiffs and Respondents,

v.

CPS SECURITY SOLUTIONS, INC., et al.,

Defendants and Appellants.

After a Decision of the Court of Appeal, Case No. B240519,
Second Appellate District, Division Four

Appeal from the Superior Court of Los Angeles County,
Case Nos. BC388956, BC391669, JCCP 4605, Honorable Jane L. Johnson

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INTRODUCTION

Before addressing the legal arguments raised by CPS in its Opening Brief, we must first respond to CPS's distorted account of certain underlying facts. The central distortion is CPS's assertion that during the hours designated by CPS as "on-call hours," i.e., from 9 p.m. to 5 a.m. seven days a week, "the Trailer Guards are on the job site and in the trailers voluntarily" until such time as a Trailer Guard communicates a request to leave. (CPS Opening Brief, p. 14.) The reality is that under the "On-Call Agreements" between CPS and its Trailer Guards, any Trailer Guard wishing to leave during on-call hours must first notify CPS Dispatch that he or she wishes to leave the construction site, and must tell Dispatch where he or she will be, and how long he or she will be gone, *if allowed to leave*. If not specifically allowed to leave by CPS, the Trailer Guard *must stay at the construction site* during the on-call hours. "Trailer Guards who wish to leave the construction site during On-call hours are not allowed to depart until a reliever arrives before departing and would violate company policy if they were to depart before a reliever arrives." (Joint Separate Statement of Undisputed Facts ["JSF"] 31, 33-34, at Joint Appendix ["JA"] 0082.)

To say that the Trailer Guards are at the construction site *voluntarily* during their on-call hours is no more and no less true than to say that an

office worker required to be at work from 9 am to 5 pm, though allowed to ask a supervisor for permission to leave during workday, is *voluntarily* at work. In one sense, yes, neither the Trailer Guard nor the office worker has specifically requested permission to leave, so both are "voluntarily" at their respective job sites. But neither the Trailer Guard nor the office worker has the freedom to just get up and leave *without first asking for and obtaining the employer's permission to do so.* So for both the office worker and the Trailer Guard, the employee is at the job site because to leave the job site without specific permission from the employer during hours when the employee *must be on the job site absent such specific permission* is to invite discharge from employment.

CPS's use the phrase "voluntarily ... [at] the jobsite" is simply a red herring. Prisoners assigned to work programs are not "voluntarily" at work. Persons who are enslaved are not "voluntarily" at work. CPS Trailer Guards, like all other "free laborers," do what their employer tells them to do, and stay at the jobsite when the employer tells them to stay at the jobsite, voluntarily but with the understanding that likely price of disobeying the employer's directives will be loss of employment. The fact that CPS Trailer Guards, like any other "free laborers," voluntarily remain at their jobsites *to do exactly what they were hired to do during the hours*

their employer requires them to be at the job site (absent specific permission from the employer to leave the jobsite) does not make that time non-compensable. CPS's attempt to frame the issue of whether this time is compensable with the use of the word "voluntary" is misleading and deceptive.

Beyond that, CPS inaccurately asserts that when a Trailer Guard requests permission to leave the construction site during the night-time hours, "Dispatch must then identify a reliever to cover the site during the Trailer Guard's absence." (CPS Brief, p. 7.) The word "must" leads the reader to believe that CPS has no choice but to provide a reliever to allow the Trailer Guard to leave the job site. But there is no guarantee that a reliever will be found, and "if a reliever is not available ... the Trailer Guard will typically be ordered to remain on the premises." (JSF 38, at JA 0083.) "CPS has the right to order a Trailer Guard to remain on-site during the on-call hours, even if the Trailer Guard has an emergency." (JSF 39, at JA 0083.)

Indeed, CPS's mischaracterization of facts in this case goes to its very formulation of the issue that it asserts is before this Court. In the very first page of its Opening Brief, CPS proclaims: "The general question presented in this case is whether an employer whose employees reside on its

premises must compensate those employees for all hours when they are **requested** by the employer to remain on the premises and agree to do so, **even if they are not performing their regular duties?"** (Emphasis added.) CPS's Trailer Guards are not "requested" by CPS to remain at the construction site throughout the "on-call hours" of 9 p.m. to 5 a.m. each day of the week – they are *required by CPS to do so unless and until CPS gives them specific permission to leave.* And it is simply false to say that the Trailer Guards "are not performing their regular duties"when their regular duties, during these hours, consist of staying at the construction site, as required by CPS, to immediately respond to and investigate any alarms, noise, motion, disturbances or other activity. (JSF 51, at JA 0084.) This is the very essence of CPS's business model – the idea that "theft and vandalism during the night and weekend hours can be deterred effectively by the mere presence of a security guard in a residential trailer (JSF 9, at JA 0079) – not to mention the fact that the security guard's presence in the trailer means that he or she is on-site to investigate any potential security breaches during the night. This is why CPS contracts with its customers to provide security services throughout the nighttime hours, and why "the package of security services provided by CPS at a trailer site includes the presence of a security guard," and why CPS would be in breach of its

service contract if a CPS employee is not present at the customer's site during the contracted service hours. (JSF 11, 13-14, at JA 0079.)

CPS gets paid for providing these security guard services to its customers during these night-time hours. In its efforts to justify a compensation scheme that deprives payment to its Trailer Guards for their *required presence* at these construction sites during these night-time hours, CPS misapplies the multi-factor test for determining the extent to which on-call time is controlled (and hence, compensable). This misapplication is largely founded upon CPS's false assertion that its Trailer Guards were not required to remain on the premises during these on-call hours. CPS goes further astray from California law by improperly treating the existence of its agreements with the Trailer Guards to not pay for their on-call time as a factor justifying the legal characterization of that time as non-compensable. Application of California's multi-factor test to the actual facts of this case decisively establishes that CPS exerted a level of control over the Trailer Guards during their on-call time that compels a finding that these on-call hours are compensable.

CPS then relies on an *inapplicable* federal regulation, 29 C.F.R. part 785.23, to buttress its argument that because the Trailer Guards reside (pursuant to CPS's mandate) in the on-site trailers for extended periods of

time, sleep time should not be treated as work time. This *inapplicable* federal regulation has no counterpart in the California Labor Code, has never been adopted by the IWC, and has not been held applicable by any California court decision.

Next, CPS relies on a special provision that is contained in an *inapplicable* Industrial Welfare Commission ("IWC") wage order, IWC Order 5-2001, governing the definition of "hours worked" for certain employees employed under that Wage Order, though that provision is *not contained* in the wage order that is applicable to CPS and its Trailer Guards, IWC Order 4-2001. Central to this argument is CPS's theory that it was the IWC's intent to implicitly adopt every single regulation contained in the Code of Federal Regulations dealing with sleep time, so that when the IWC added some language re-defining "hours worked" for certain employees covered by Wage Order 5, that language should be read to apply to every single other wage order and to all employees covered by all other wage orders. This bizarre argument is premised on the CPS's assertion that the IWC agreed with the decision in *Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal.App.3d 16, that the IWC understood this decision to apply to workers working under all IWC orders, and that the importation of every single federal regulation dealing directly or indirectly with sleep time

flows from this decision (notwithstanding the fact that this decision only concerned a single federal regulation, 29 C.F.R. part 785.22). Not only is CPS's argument built on an exceedingly thin reed, it is flat out contradicted by the actual regulatory history that looks to what the IWC has done since *Monzon*.

Finally, CPS relies on the supposed approvals of its compensation practices by two administrative agencies - the United States Department of Labor (based on its conclusion that CPS is not in violation of the Fair Labor Standards Act, a federal statute that is *not at issue in this proceeding*, an action under the more protective provisions of state law) and the California Division of Labor Standards Enforcement ("DLSE"), an agency whose enforcement positions with regard to CPS are marked by dramatic shifts from one Administration to the next, suggesting that – as this Court found in other matters involving DLSE – that these wildly inconsistent enforcement policies, driven by political considerations, are entitled to little or no deference. (See, e.g., *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1105 fn. 7.)

ARGUMENT

I. APPLICATION OF CALIFORNIA'S MULTI-FACTOR TEST FOR DETERMINING THE EXTENT OF EMPLOYER CONTROL OVER ITS EMPLOYEES' ON-CALL TIME SUPPORTS THE LOWER COURT'S CONCLUSION THAT THE TRAILER GUARDS' ON-CALL TIME CONSTITUTED COMPENSABLE 'HOURS WORKED'

We start with the most basic of black letter law on the issue of the compensability of on-call or stand-by time:

> Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but to wait for something to happen. Refraining from other activity is often a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.

(*Armour & Co. v. Wantock* (1944) 323 U.S. 126, 133.)

More recent cases have set out a multi-factor test for determining whether on-call or stand-by time is compensable. (*Ghazaryan v. Diva Limousine, Inc.* (2008) 169 Cal.App.4th 1525; *Gomez v. Lincare, Inc.* (2009) 173 Cal.App.4th 508; *Seymore v. Metson Marine, Inc.* (2011) 194 Cal.App.4th 361.) All of these cases follow essentially the same test for determining whether the on-call or stand-by time at issue constitutes "hours worked" under California law. All time that constitutes "hours worked"

must be compensated at no less than the applicable minimum wage. (See IWC Order 4-2001, §4(B); *Armenta v. Osmose, Inc.* (2006) 135 Cal.App.4th 314.) The term "hours worked" is defined in IWC Order 4-2001 as "the time during which an employee is subject to the control of an employer, and includes all time the employee is suffered or permitted to work, whether or not required to do so." (IWC Order 4-2001, § 2(K).)[1] As this Court explained in *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 582, "[T]he two phrases – 'time during which an employee is subject to the control of an employer' and 'time the employee is suffered or permitted to work, whether or not required to do so' – can also be interpreted as independent factors, each of which defines whether certain time is compensable as 'hours worked.' Thus, an employee who is subject to an employer's control does not have to be working during that time to be compensated under [the applicable] Wage Order."

In reaching this conclusion, this Court gave its approval to prior cases that likewise concluded that time during which an employee is subject

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[1] The wage order contains a special definition for "hours worked" by health care industry employees: "Within the health care industry, the term 'hours worked' means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act." (IWC Order 4-2001, § 2(K). The wage order's general definition of "hours worked," in contrast, contains the "control prong" language, and does not adopt interpretations "in accordance with the provisions of the Fair Labor Standards Act."

to employer control, such as a restriction to the employment premises, constitutes "hours worked" even when the employee is free to engage in personal pursuits – eating, reading, watching television, or sleeping, during that time. For example, in *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, disapproved on other grounds in *Tidewater Marine Western v. Bradshaw* (1996) 14 Cal.4th 557, 573-574, the Court held that a lunch hour during which employees were not performing any tasks for their employer and were free to eat their meals, watch television, read, or otherwise relax in a company cafeteria, constituted "hours worked" because of the employer requirement restricting those employees to the employment premises during the lunch hour. And in *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 30, the court held that the "broad definition [of 'hours worked'] clearly includes time when an employee is required to be at the employer's premises and subject to the employer's control even though the employee was allowed to sleep."

The post-*Morillion* on-call time cases cited above proceed along two lines in determining whether the on-call time constitutes "hours worked." First, harkening back to *Wantock,* there is the analysis that "[o]n-call waiting time nay be compensable if it is spent primarily for the benefit of the employer and its business." (*Gomez v. Lincare, supra,* 173 Cal.App.4th

at 523, citing *Armour & Co. v. Wantock, supra,* 323 U.S. at 132.) Second, focusing more on the unique state law "control prong" in the definition of "hours worked," there is the analysis that it is the extent to which an employer exercises control over the employee that determines whether the time constitutes "hours worked." Thus, in *Ghazaryan v. Diva Limousine, supra,* 169 Cal.App.4th at 1535, the court, approvingly quoting a DLSE opinion letter on this subject, explained that "the bottom line consideration is the amount of 'control' exercised by the employer over the activities of the worker." Then, circling back to the "benefit of the employer" issue, the court observed; "[I]mmediate control by the employer which is for the benefit of the employer must be compensated." (*Id.*)

This dual focus on the extensiveness of employer control and the purpose of such control is not a new development. (See, e.g., *Madera Police Officers Assn v. City of Madera* (1984) 36 Cal.3d 403, 410, holding that 'Code 7' meal breaks for police officers can be counted as hours worked under a this two part analysis.) But recent California on-call time cases have further elucidated the test for determining whether employer control reaches the level of requiring that such time be treated as "hours worked." As explained in *Seymore v. Metson Marine, supra,* 194 Cal.App.4th at 374:

> Factors to consider in evaluating the level of control exerted by the employer include: '(1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employee's movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities; (6) whether use of a pager could ease restrictions; and (7) whether the employee had actually engaged in personal activities during call-in time.'

(citing *Gomez v. Lincare, supra,* 173 Cal.App.4th at 523; quoting *Owens v. Local No. 169, Ass'n of Western Pulp & Paper Workers* (9th Cir. 1992) 971 F.2d 347; see also *Berry v. County of Sonoma* (9th Cir. 1994) 30 F.3d 1174, 1183 ["Because no one factor is dispositive a court should balance the factors permitting personal pursuits against the factors restricting personal pursuits to determine whether the employee is so restricted that he is effectively engaged to wait."]

The state cases since *Morillion* are split on the issue of whether the parties' agreement as to whether the on-call time is or is not compensable is entitled to any weight in this analysis. *Ghazaryan* approvingly cited a DLSE opinion letter declining to give any consideration to this issue because under California law, "the existence of an 'agreement' regarding the understanding of the parties [as to the compensation policy] is of no importance. The ultimate consideration in applying the California law is determining the extent of the 'control' exercised." (*Ghazaryan v. Diva*

Limousine, supra, 169 Cal.App.3d at 1535 fn. 10.) Following that opinion letter, it does not appear the court gave any consideration to that factor. Likewise, the parties' agreement, the agreement's purported "reasonableness," and the agreement's alleged consistency with "industry standards" were given no consideration in *Seymore,* with the court noting that those factors "are not relevant to the determinative issue of control," and "at odds with the control test approved by the California Supreme Court in *Morillion.*" (*Seymore v. Metson Marine, supra,* 194 Cal.App.4th at 377.) In contrast, *Lincare* listed the parties' agreement as a factor that is to be considered in determining whether the on-call waiting time is spent predominantly for the employer's benefit – albeit without any analysis of how this factor would have any bearing on that issue, and whether this factor has any relevance to the determination of whether time constitutes "hours worked" under California law. Indeed, giving any weight whatsoever to the parties' agreement in determining whether on-call time constitutes "hours worked" would enable such an agreement to override the clear legislative mandate of Labor Code § 1194: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum or legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount

of this minimum wage or overtime compensation...." It is therefore not surprising that in both *Morillion* and *Madera Police Officers Association,* this Court reached its conclusions as to whether the time at issue constituted hours worked without any consideration of the agreements under which the employees worked. This is in stark contrast to federal court decisions in FLSA cases, where "[a]lthough the existence of an agreement may not be controlling in all cases, it is usually relevant to the compensability issue." (*Owens v. Local No. 169, supra,* 971 F.2d at 355.)

It is true that California courts have long recognized that many of California's wage laws are patterned after federal statutes and that authorities construing those federal statutes may provide persuasive guidance to state courts when interpreting comparable state wage and hour provisions. (*Building Material & Construction Teamsters Union v. Farrell* (1986) 41 Cal.3d 651, 658; *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 817.) However, state courts recognize an important qualification on the relevance of federal authorities in this area: the state is empowered to go beyond the federal statutes and regulations in adopting protective laws and regulations for the benefit of employees. "The federal authorities are of little assistance, if any, in construing state laws and regulations that provide greater protection to workers." (*Bell,* at pp. 817-

818.) Similarly, "where the language or intent of federal and state labor laws substantially differs, reliance on federal regulations or interpretations to construe state regulations is misplaced." (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 798.)

Here, the essential difference between state and federal on-call time law is the State's separate "control prong" within the IWC wage order definition of "hours worked." Just as *Morillion* rejected reliance on federal authorities because the "control prong" was determinative, under state law, as to whether "compulsory travel time" constitutes "hours worked," it would now be equally improper to rely on any federal authorities that are less protective than the "control prong" as the determining factor as to whether on-call time constitutes "hours worked." Federal case law that makes the parties' agreement a relevant factor in making this determination is less protective than the state's "control prong," and thus, reliance on those federal cases (to the extent they call for consideration of the parties' agreement as a factor in determining compensability of on-call time) is misplaced. "To the extent that federal cases apply a more restrictive definition of hours worked or rely on factors not relevant to the control test, those cases have little persuasive value in deciding whether the time periods in question here constitute hours worked." (*Seymore v. Metson Marine,*

supra, 194 Cal.App.4th at 379.)

Applying the facts of this case to the factors that are relevant to a determination of the extent of employer control under California law, there can be no conclusion other than the one that was reached by the Court of Appeal below – that the degree of control exercised by the employer was such that the Trailer Guards' on-call time constitutes "hours worked" under California law. The majority of these seven relevant factors "favors a finding that during the on-call period, the trailer guards are significantly limited in their ability to engage in personal activities." (Slip Op., at 21.)

Going through these factors one-by-one, we note:

(1) There was an on-premises living requirement. CPS requires the Trailer Guards to live on the construction site. In its Opening Brief, CPS cites to an unpublished federal court opinion, *Taylor v. American Guard and Alert, Inc.* (9th Cir. 1998) 162 F.3d 1169, for the proposition that "the key question ... is not whether the [employees] had to *live* on site during their on-call time, but whether they had to *remain* on site." So what? CPS's Trailer Guards *were required to remain on site throughout their on-call hours, unless and until CPS gave them specific permission to leave.*

(2) There were excessive geographic restrictions on the Trailer Guards' movements. They were prohibited from leaving the construction

site throughout the on-call hours, absent specific permission to leave. In other words, they were confined to a 150 to 200 square foot trailer and the barren surrounding construction site. They could not go to the house of a friend or family member, they could not go to a supermarket, restaurant, coffee shop, bar, movie theater, or for that matter, to the emergency room of a hospital, without CPS's specific approval, and without the arrival of a reliever to take over the *job that they were performing* (and that CPS's clients were paying for) during these night-time hours. And even when relieved for a specific period of time, they were required to take a pager or radio telephone so that they could be called back to the construction site, and they were prohibited from going anywhere that would take them more than 30 minutes to return if summoned back to the construction site.

(3) There was no evidence before the trial court as to the frequency of calls, alarms, noises, motion, and other disturbances which the Trailer Guards had to investigate during their on-call hours.

(4) While on-call, Trailer Guards were required to respond *immediately* to any calls, alarms, noises, motion and other disturbances.

(5) Trailer Guards could not easily trade their on-call duties. They could not make their own arrangements to have someone else cover for them. Instead, if a Trailer Guard wanted to leave the construction site

during on-call hours, he or she had to contact CPS Dispatch, inform Dispatch where the Guard wanted to go and how long the Guard wanted to be away from the construction site, and then hope that Dispatch would find a reliever, approve the request to leave the job site, and finally. wait for the reliever to appear before taking a break from his or her on-call duties.

(6) The use of a pager or radio telephone did not ease restrictions. While restricted to the construction site, the Trailer Guard had sole responsibility for responding to any alarms, sounds, disturbances, etc. If and when specifically allowed by CPS to leave the construction site during on-call hours, the Guard had to carry a pager or radio telephone and respond to any call-backs.

(7) There were severe limitations on the types of personal activities that the Trailer Guards could engage in during on-call hours. The most basic of all personal activities – the ability to spend time with family and friends at one's residence – was an activity that was denied to these Trailer Guards. Seven nights a week – week after week – these Trailer Guards could not enjoy the camaraderie and companionship of any other persons. The loneliness could not even be alleviated by a pet as a companion – no dog, no cat, no bird, nothing – no pets allowed on the construction site. The simple pleasure of drinking a glass of wine with dinner, or a bottle of beer

while watching a baseball game on television was denied to the Trailer Guards while they were on call. This is not a matter, as CPS suggests in its Opening Brief, of the Trailer Guards giving up some insignificant amount of flexibility and freedom. They were required to spend night after night in a deserted, desolate environment utterly alone, with no companionship. The Court of Appeal got it right, succinctly stating that while on-call, the Trailer Guards "do not enjoy the normal freedoms of a typical off-duty worker." (Slip Op., at 22.)

And lastly, returning to the question of whether these restrictions were imposed primarily for the benefit of the employer, CPS does not even bother to challenge that obvious fact. Restricting the Trailer Guards to the construction site so as to ensure their instant readiness to respond to any suspicious sound or alarm or other disturbance is the very essence of CPS's business model. As acknowledged by CPS, by their mere presence at the construction site, they deter theft and vandalism. That is their job, and it is a job they perform *every single minute throughout the night.*

II. THE FEDERAL REGULATIONS THAT CPS SEEKS TO IMPORT ARE INAPPLICABLE TO A DETERMINATION OF WHAT CONSTITUTES COMPENSABLE HOURS WORKED UNDER CALIFORNIA LAW AND WHETHER ANY SUCH HOURS CAN BE EXCLUDED BY AGREEMENT

CPS brazenly asserts that if this Court holds that California courts

may look to federal law for guidance in determining the compensability of on-call time, "then this Court must look to DOL regulations which are part and parcel of federal law. Specifically, this Court must look to 29 C.F.R. Part 785 in its entirety." This sweeping assertion is unsupported by any citation to authority. That is not surprising, as every case addressing this issue has flatly rejected employer efforts to import federal regulations that would undercut or provide less protection than the protections provided to employees by the express provisions of the California Labor Code and IWC orders.

29 C.F.R. part 785 deals with the subject of "hours worked" under the FLSA. It is attached, in its entirety, as Exhibit G to the Motion for Judicial Notice that was filed on December 2, 2013. Among its other provisions, parts 785.9, 785.24, 785.25, 785.34, and 785.50 deal with exemptions from hours worked under the Portal-to-Portal Act, a law that was passed by Congress in 1947 amending the FLSA. In rejecting any consideration of those regulations, this Court held: "The California Labor Code and IWC wage orders do not contain an express exemption for travel time similar to that of the Portal-to-Portal Act.... Accordingly, we do not agree ... that the thrusts of the federal and state statutory schemes are similar, for purposes of deciding whether plaintiffs' compulsory travel time

is compensable." (*Morillion v. Royal Packing supra,* 22 Cal.4th at 590-591.) So much for CPS's wholesale importation of Part 785 in its entirety.

But that's not all. Part 785.19 discusses whether meal periods constitute worktime under the FLSA. Some of the provisions in this federal regulation do come close to California's IWC requirements. For example, subsection (a) states, *inter alia,* "[t]he employee must be completely relieved from duty for the purpose of eating regular meals." But then subsection (b) goes on to state: "It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period." That certainly didn't get imported into California law, with this Court's approval of the holding in *Bono Enterprises, Inc. v. Bradshaw, supra,* that "employees who were required to remain on the work premises during their lunch hour had to be compensated for that time under the definition of 'hours worked," based "solely on the 'subject to the control of the employer' clause" found in the IWC orders but not in the FLSA or the federal regulations interpreting the FLSA. (*Morillion v. Royal Packing, supra,* 22 Cal.4th at 583.)

So this brings us, then, to the specific federal regulation that CPS believes was erroneously held to be inapplicable to California law by the Court of Appeal below – 29 C.F.R. part 785.23.

That federal regulation provides:

> An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. (MJN, Exhibit G.)

In rejecting CPS's request to import *this* regulation, the Court of Appeal wrote: "[A]s our Supreme Court has made clear, '[a]bsent convincing evidence of the IWC's intent to adopt the federal standard,' we must 'decline to import any federal standard, which expressly eliminates substantial protection to employees, by implication.' (*Morillion, supra,* 22 Cal.4th at p. 592.) Likewise, we may not use federal authorities and regulations to construe state regulations where the language or intent of state and federal law substantially differs, and the federal law would provide less protection to California employees. (*Ramirez v. Yosemite Water Company, supra,* 20 Cal.4th at p. 798.) CPS points to no provision of Wage Order No. 4 containing language that parallels that of 29 C.F.R. part 785.23, or to any evidence that the IWC intended to adopt the federal standard for security guards.... Accordingly, we conclude that applying part

785.23 to California employees in the manner CPS urges would substantially impair the protections provided by California law." (Slip Op., at 26-27.)

The Court of Appeal got this right. There is a provision in a different IWC wage order, 5-2001, that *does not apply to CPS and its Trailer Guards,* that specially defines "hours worked" for employees working under Wage Order 5-2001 who are required to reside on the employment premises.[2] Section 2(K) of Order 5-2001 states: "'Hours worked' means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so, **and in the case of an employee who is required to reside on the employment premises, that time spent carrying out assigned duties shall be counted as hours worked**." (Emphasis added.) The former clause, i.e., the general definition of hours worked, is found in every IWC wage order, including Order 4-2001. The later clause, i.e., the special provision for employees required to reside on the employment premises, is found in only one wage order, Order 5-2001.

This special provision encapsulates a portion of the more detailed

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[2] Wage Order 5-2001 is an industry-order that covers employers in the "public housekeeping industry," including, *inter alia,* hotels, motels, and apartment houses.

provisions of 29 C.F.R. part 785.23. Had the IWC intended to make this special provision applicable to Order 4-2001, it would have added this provision to Order 4-2001. The fact that it did not tells us all we need to know about the non-applicability of this provision to CPS's Trailer Guards. And the fact that Order 4-2001 (with the exception of the special language for the "health care industry" at section 2(K)) does not contain any provision adopting any federal regulation for the purpose of determining "hours worked," tells us that the IWC had no intent to incorporate 29 C.F.R. part 785.23 into the wage order's provisions.

As previously noted by this Court, in explaining why the FLSA regulations on hours worked do not apply to any employees outside the health care industry, "[W]here the IWC intended the FLSA to apply to wage orders, it has specifically so stated." (*Morillion v. Royal Packing, supra,* 22 Cal.4th at 592.)

Without 29 C.F.R. part 785.23, CPS gets no support from *Brigham v. Eugene Water & Electric Board* (9th Cir. 2004) 357 F.3d 931. The court's extensive discussion of that federal regulation is simply not relevant to a determination of whether the on-call time at issue in the case would constitute compensable "hours worked" under California law. What does remain relevant is the court's discussion of the issue prior to its

consideration of that federal regulation, a discussion that is found at pages 933 to 938 of the decision, culminating with the court's conclusion that "the *Owens* factors weigh narrowly in favor of the employees" – in a case where, unlike the situation faced by CPS's Trailer Guards, each employee's family could live with the employee in the employer-provided housing.

III. THE AMENDMENTS TO WAGE ORDERS SUBSEQUENT TO THE ISSUANCE OF *MONZON* DO NOT DEMONSTRATE ANY INTENT ON THE PART OF THE IWC TO INCORPORATE ANY FEDERAL REGULATIONS INTO THE IWC ORDERS OTHER THAN THOSE THAT HAVE BEEN EXPRESSLY ADOPTED

CPS truly engages in a flight of fancy when it asserts that the IWC's failure to announce its disagreement with *Monzon* or to take any action to reverse the decision indicates that it "agreed with the *Monzon* court's holding that California should follow federal law with respect to sleep time." (CPS Opening Brief, at p. 32.)

First, there is nothing in *Monzon* that suggests that 29 C.F.R, part 785.23 is to be imported into California law. Indeed, there is *not a single mention of part 785.23 in Monzon.*[3] Second, with respect to the discussion

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[3] In its Opening Brief, CPS, though unable to point to any mention of part 785.23 in *Monzon,* advances the ludicrous argument that had the *Monzon* court intended to limit its holding to part 785.22, it would have used the term "federal regulation" rather than "regulations." (CPS Opening Brief, p. 34 fn 7.) Alas, a careful reading of *Monzon* reveals that the plural form – "rules" – shows up only where the Court is discussing a memorandum from the California Ambulance Association, hardly a disinterested party. But when the court itself talks about the sleep time regulation at issue in that case, 29 C.F.R. part 785.22, it uses the terms "this federal rule," "this rule," "this regulation,"

in *Monzon* about part 785.22, there is not a scintilla of evidence that the IWC (or for that matter, the DLSE) believed at the time that *Monzon* was issued that it was applicable to any employees other than amubulance drivers and attendants covered by IWC Orders 5 and 9. It wasn't until *Seymore v. Metson Marine* was decided in 2011 that any court had held that *Monzon* applied to anyone other than ambulance drivers and attendants under those two wage orders, or that it was a decision of general applicability. (*Seymore v. Metson Marine, supra,* 194 Cal.App.4th at 381-382.)

Seven years after *Monzon*, this is what the Chief Deputy Director of the Department of Industrial Relations had to say about its lack of impact: "While the federal government has been far more liberal in the application of this rule [allowing for the exclusion of sleep time from hours worked] to various classifications of employees governed by the provisions of 29 CFR 785.22 and 785.23, the state rule has historically been more narrowly applied to a handful of occupations: ambulance drivers and their attendants covered under Industrial Welfare Commission (IWC) order 9-90, and any occupation in which the employee is required to reside on the premises of an employer subject to IWC order 5-89. The historical reason for limiting

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and "the regulation." (*Monzon v. Schaefer Ambulance Service* (1990) 224 Cal.App.3d at 630-631.)

the application of the general exclusionary rule to only these classifications was that these occupations are governed by the provisions of the IWC orders, which contain specific language that easily allows for this interpretation." (Letter from Chief Deputy Director John Duncan to Ted Huebner, dated April 24, 1997, at JA 0173-0174.) This letter went on to claim that "over the past 20 years, DLSE has adopted an enforcement policy excluding sleep time and other non-active duty hours of mini-storage managers under IWC Order 9-90, mortuary attendants under IWC Order 2-80, and private firefighters under IWC Order 4-89 as being consistent with the IWC orders." (*Id.*) The letter concluded by "extend[ing] this rule [sic] to the live-in security guards of your client [CPS]." Tellingly, there is not a word in this letter that says this conclusion is mandated by *Monzon,* or that pursuant to *Monzon,* 29 C.F.R. part 785.22 has been incorporated into state law as to all employees and all wage orders.

Likewise, two and a half years later (and nine years after *Monzon*), DLSE issued a second letter to Mr. Huebner, reversing the conclusions of the earlier letter as to the compensability of sleep time for CPS's security guards. This letter emphasized that "employees must be paid for all hours under the control of the employer absent an express exemption in the applicable IWC order." While acknowledging the existence of 29 C.F.R.

part 785.23, the letter cautioned, "whether or not the security guards have a claim for unpaid wages under federal law, the federal regulations governing compensable time are substantially different from the state's definition of hours worked,' under IWC Order 4, and thus, the federal rules cannot be used to interpret or limit California law, particularly where, as here, California law is more beneficial to workers." (Letter from State Labor Commissioner Marcy Saunders to Ted Huebner, dated August 12, 1999, at Exhibit A, MJN filed December 2, 2013.) Once again, it is noteworthy that this letter made absolutely no mention of *Monzon*, undoubtedly a reflection of DLSE's view, at that time, that *Monzon* had no applicability to workers other than ambulance drivers and attendants covered by Wage Orders 5 or 9.

Labor Code §1198.4 provides: "Upon request, the Chief of the Division of Labor Standards Enforcement shall make available to the public any enforcement policy statements or interpretations of orders of the Industrial Welfare Commission. Copies of such policy statements shall be furnished to the Industrial Welfare Commission." There is, of course, a presumption that an official duty has been regularly performed. (Evidence Code § 664.) Absent evidence to the contrary, we must assume that the IWC was provided with copies of these DLSE enforcement letters. It

stands to reason then, that the IWC, like DLSE, also believed that *Monzon*'s impact was narrow, that it did not import any federal regulation regarding sleep time or hours worked into state law (at least as to anyone other than ambulance drivers and attendants under Orders 5 and 9), and that it was not necessary to amend any wage order to limit its impact.

But we need not even speculate about this. In 1993, just three years after *Monzon* was issued, the IWC did amend IWC Order 4-89. Among other things, these amendments added the new definition for "hours worked" within the health care industry, eliminating the "control prong" and adding the phrase, "as interpreted in accordance with the provisions of the Fair Labor Standards Act." In its Statement as to the Basis of the 1993 Amendments to Order 4-89, the IWC explained:

Testimony suggested the current DLSE interpretations of 'hours worked' were 'unduly narrow' resulting in 'substantial confusion and serious technical problems,' and consistency with the Fair Labor Standards Act (FLSA) would eliminate this confusion.... On June 29, 1993, the IWC adopted language to assure 'hours worked' in the health care industry would be interpreted in accordance with the FLSA, the regulations interpreting the FLSA including, but not limited to, those contained in 29 CFR Part 785, and federal court decisions. The clarification confirms the IWC's intention

that issues related to working time will be resolved consistently under state and federal law." (Amendments to IWC Order 4-89 adopted June 29, 1993 and Statement as to Basis, attached hereto.)

So when the IWC amended Order 4-89 in 1993, it did nothing to change the definition of "hours worked" as to any workers other than those in the health care industry, while acknowledging that DLSE was interpreting the IWC's general definition in manner different from the way in which "hours worked" is interpreted under federal law. Indeed, DLSE's interpretation was adopted by this Court some seven years later in *Morillion.* Yet, in 1993, again in 1998, and again in 2000 and 2001 (after the issuance of *Morillion* on March 27, 2000*)* when amending its wage orders, the IWC did nothing to change its general definition of "hours worked" that was construed, first by DLSE and later by this Court, to provide more protection to employees than federal regulations. Despite this Court's directive, in *Morillion* , that federal regulations which are less protective than IWC requirements will not be imported into state law, and the necessary corollary that if the IWC wants to import such federal regulations into state law, it must expressly do so (as it did with the health care industry), the IWC has stood pat. This, more than anything else, tells us that under Wage Order 4, for employees outside the health care industry,

including CPS's Trailer Guards, the IWC's intent is that for the determination of what constitutes "hours worked," no consideration is to be given to any less protective federal regulation or to any decision enforcing those federal regulations.

CONCLUSION

For all of the reasons set forth above, Plaintiffs respectfully submit that this Court should affirm the conclusion reached by the Court of Appeal, below, that the 8 hours of on-call time worked by CPS's Trailer Guards from 9 p.m. to 5 a.m., seven days a week, constitutes compensable "hours worked" under California law, and that 29 C.F.R. part 785.23 is inapplicable and cannot be imported to construe the wage and hour requirements set out in California's IWC orders, and that the Trailer Guards are entitled to compensation for all on-call hours worked Monday to Friday, the days when they worked 16-hour shifts. However, this Court should reverse the Court of Appeal's decision to apply another federal regulation, 29 C.F.R. part 785.22 to allow for the enforcement of agreements to exclude of 8 hours of sleep time from otherwise compensable hours worked during 24 hour shifts, and should overrule prior state cases that have relied on this regulation to enforce such agreements. This Court should enforce the IWC orders as they are written, and deny enforcement to any agreement

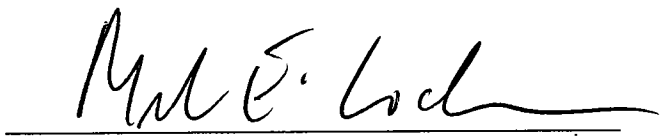
purporting to exclude otherwise compensable time from hours worked absent an express provision in the applicable wage order permitting such an agreement. Consequently, we ask that this Court hold that for every day of the week, including Saturdays and Sundays when the Trailer Guards were scheduled to work 24-hour shifts, CPS must provide compensation for the 8-hours of on-call time.

Dated: January 10, 2014

Cathe L. Caraway-Howard
Law Offices of Cathe L. Caraway-Howard

Miles E. Locker
Locker Folberg LLP

Caesar S. Natividad
Natividad Law Firm



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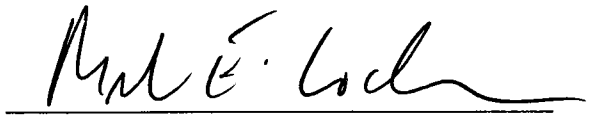
Attorneys for Tim Mendiola, et al.

CERTIFICATION OF WORD COUNT

The text of this Answer Brief on the Merits consists of 7,887 words as counted by the Corel Word Perfect X4 word processing program used to generate this document.

Date: January 10, 2014



Miles E. Locker
Attorney for Plaintiffs and Appellants

Amendments to
Secs. 2, 3, and 11
Order 4-89
Title 8 California Code of Regulations 11040
Effective August 21, 1993

Amendments to Sections 2, 3, and 11 of
INDUSTRIAL WELFARE COMMISSION ORDER NO. 4-89
REGULATING

PROFESSIONAL, TECHNICAL, CLERICAL, MECHANICAL AND SIMILAR OCCUPATIONS

These changes affect only the health care industry

OFFICIAL NOTICE

To employers and representatives of persons in occupations covered by IWC Order No. 4-89 who work in the **health care industry:**

The Industrial Welfare Commission (IWC) Of the State of California proceeded according its authority in the Labor Code and the Constitution of California, and concluded that Sections 2, 3, and 11 of its Order 4-89, regulating Professional, Technical, Clerical, Mechanical, and Similar Occupations, should be amended to affect persons who work in the health care industry. The IWC promulgated these amendments to Order 4-89, made pursuant to the special provisions of Labor Code Section 1182.7, on June 29, 1993. The amendments become effective on August 21, 1993. The amendments become effective on August 21, 1993.

All other provisions of Section 2, Definitions, Section 3, Hours and Days of Work, and Section 11, Meal Periods, and all other sections of Order 4-89 remain in full force and effect.

The amendments allow more flexibility with respect to work scheduling, managerial and administrative exemptions and the definition of hours worked for compensation. They apply only to persons covered by this order who work in the health care industry. This includes, but is not limited to, all employees who work for doctors' or dentists' offices, clinics medical laboratories, kidney dialysis clinics, home health care agencies, and other health/allied services.

The amendments printed in this mailer must be posted next to the calendar-style poster on which the entire Order 4-89 is printed, and which should already be posted where employees can read it.

The reasons for the changes accompany the amendments in the Statement as to the Basis, provided for you information. If you have any questions on interpreting the amendments or how they apply to you, please contact your nearest Division of Labor Standards Enforcement office, list below. If you need additional copies of this amendment, please write to:

Division of Labor Standards Enforcement,
P. O. Box 420603
San Francisco, CA 94142-0603

2. DEFINITIONS

(The following language is added to Section 2, *Definitions*, subsection (H).)

(H)...Within the health care industry, the term "hours worked" means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act.

(The following language is added to Section 2, *Definitions*, subsection (k).)

(K)...Within the health care industry, the term "primarily" as used in Section 1, Applicability, means (1) more than one-half the employee's work time as a rule of thumb or, (2) if the employee does not spend over 50 percent of the employee's time performing exempt duties, where other pertinent factors support the conclusion that management, managerial, and /or administrative duties represent the employee's primary duty. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, the employee's relative freedom from supervision, and the relationship between the employee's salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

3. HOURS AND DAYS OF WORK

(The following is added to Section 3, *Hours and Days of Work*, as subsection (J).)

(J) Employees in the health care industry may work on any days any number of hours a day up to twelve (12) without overtime, as long as the employer and at least two-thirds (2/3) of the affected employees in a work unit agree to this flexible work arrangement, in writing, in a secret ballot election before the performance of the work, provided:

(1) An employee who works beyond twelve (12) hours in a workday shall be compensated at

SEE NEXT PAGE

(3) Prior to the secret ballot vote, any employer who proposes to institute a flexible work arrangement shall make a disclosure in writing to the affected employees, including the effects of the proposed arrangement on the employees' wages, hours, and benefits. Such a disclosure shall include meeting(s), duly noticed, held at least fourteen (14) days prior to voting, for the specific purpose of discussing the effects of the flexible work arrangement. Failure to comply with this section shall make the election null and void;

(4) The same overtime standards shall apply to employees who are temporarily assigned to a work unit covered by this subsection;

(5) Any employer who institutes an arrangement pursuant to this subsection shall make a reasonable effort to find an alternative work assignment for any employee who participated in the secret ballot election and is unable or unwilling to comply with the agreement. An employer shall not be required to offer an alternative work assignment to an employee if an alternative assignment is not available or if the employee was hired after the adoption of the flexible work arrangement. There is no maximum number of employees whom an employer may voluntarily accommodate consistent with its desire and ability to do so;

(6) After a lapse of twelve (12) months and upon petition of a majority of the affected employees, a new secret ballot election shall be held and a two-thirds (2/3) vote of the affected employees shall be required to reverse the arrangement above. If the arrangement is revoked, the employer shall comply within sixty (60) days. Upon a proper showing by the employer of undue hardship, the

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double the employee's regular rage of pay for all hours in excess of twelve (12); (2) An employee who works in excess of forty (40) hours in a workweek shall be compensated at one and one-half (1 ½) times the employee's regular rate of pay for all hours over forty (40) hours in a workweek;	Division may grant an extension of time for compliance; (7) For purposes of this subsection, affected employees may include all employees in a readily identifiable work unit, such as a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision of any such work unit. A work unit may consist of an individual employee as long as the criteria for an identifiable work unit in this subsection are met	Lynnel Pollack. James rude Robert Hanna Donald Novey Dorothy Vuksic

Statement as to the Basis of Amendments to Sections 2, 3, and 11 of Industrial Welfare Commission Order No. 4-89

Labor Code Sec. 1182.7 requires Industrial Welfare Commission (IWC) to provide accelerated review of petitions filed by organizations recognized in the health care industry who request amendments to an IWC order directly affecting only the health care industry. Under this authority, the California Association of Hospitals and Health Systems (CAHHS) petitioned the IWC to amend and/or clarify certain sections of Order 4, solely for employers and employees in the health care industry. The IWC accepted the petition which proposed to redefine "primarily" and 'hours worked" to parallel federal law in Section 2, *Definitions;* to clarify and expand regulations regarding flexible schedules and overtime in Section 3, *Hours and Days of Work*; and to permit employees to waive meal periods in Section 11, *Meal Periods*. The IWC held three public hearings on its proposals in April 1993.

After deliberating on all the evidence presented with respect to its proposals, the IWC adopted amendments to Order 4 for the health care industry on June 29, 1993, and offers the following statement as to the basis for its actions:

2. DEFINITIONS

Testimony suggested the current DLSE interpretations of "hours worked" were "unduly narrow" resulting in "substantial confusion and serious technical problems," and consistency with the resulted in less than 51 percent of the time being devoted to exempt duties. On June 29, 1993, the IWC adopted language consistent with the FLSA, which promoted clarity and compliance while providing needed flexibility to allow exempt executive and administrative employees to perform nonexempt duties without losing their exempt status. In response to public comment suggesting the term "other pertinent factors" was unclear and confusing to employees, the IWC clarified the meaning of that item by listing some, but not all, examples of pertinent factors.

3. HOURS AND DAYS OF WORK

Testimony supported the petitioner's claims that DLSE's interpretations regarding the flexible scheduling rules adopted in 1986 and 1988 limited desirable options for employees and frustrated the IWC's intent of more, not less, flexibility. Many employees told the IWC they voluntarily worked 12-hour shifts at a "reduced rate of pay," with overtime after eight hours a day. Although this practice is permissible, it sometimes adversely affected their benefits and pensions-in order to cope

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Fair Labor Standards Act (FLSA) would eliminate this confusion. In response to testimony presented at the public hearings that the reference to "29 CFR Part 785" was unclear, the IWC amended that language and referred to "the Fair Labor Standards Act" instead, a term more easily understood by the public. On June 29, 1993, the IWC adopted language to assure "hours worked" in the health care industry would be interpreted in accordance with the FSLA, the regulations interpreting the FLSA including, but not limited to, those contained in 29 CFR Part 785, and federal court decisions. The clarification confirms the IWC's intention that issues related to working time will be resolved consistently under state and federal law.

With respect to redefining "primarily" for the health care industry, the IWC decided since it had examined the professional component of the administrative/executive/professional exemption and adopted language to exempt learned and artistic professions as recently as 1989, it was time to respond to demands for a more flexible application of the executive/ administrative exemption than the rigid 51 percent rule. Employees testified current regulations sometimes resulted in treating an employee as nonexempt under a rigid application of a 51 percent rule, such as where emergency or other conditions

with DLSE's overly "restrictive" policies. Other employees said they preferred to "mix days off" and working the same days each week was an "unrealistic" practice. The revised language clarifies the IWC's original intent to maximize flexibility in scheduling so that the days and hours of work can vary. While some employees argued part-time employees who have flexible work arrangements should be paid premium wages when asked to work beyond their normal part-time arrangements, by the end of the public hearings, most employees agreed requiring premium wages for part-time or temporary employees who work less than 12 hours a day or 40 hours a week is unfair to full-time workers in the same work unit who earn straight time pay for the same daily and weekly hours. While a few employees suggested the "secret ballot election process" allowed under the IWC orders was "flawed" due to "lack of oversight," the Labor Commissioner testified DLSE had received few, if any, complaints regarding the election process.

After evaluating all the evidence, on June 29, 1993, the

IWC adopted its proposal to amend flexible scheduling rules

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PROOF OF SERVICE

I, Miles E. Locker, hereby state and declare:

I am a partner with the law firm of Locker Folberg LLP, with a business address at 71 Stevenson Street, Suite 422, San Francisco, California 94105. I am not a party to the above-entitled action. I am an attorney licensed to practice law in the State of California.

On the date hereof, I caused to be served the foregoing ANSWER BRIEF ON THE MERITS on the interested parties, by depositing copies thereof in the mail at a U.S. Postal Service facility in San Francisco, California, with each said copy enclosed in a sealed envelope, with first class postage fully prepaid, addressed to the persons listed on the following Service List attached hereto.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 10th day of January, 2014 at San Francisco, California.

Miles E. Locker

SERVICE LIST
Appellate Court Case No. B240519
Tim Mendiola, et al. vs. CPS Security Solutions, Inc. et al.
LASC Case No. BC 388956 consolidated with
Floriano Acosta, et al. vs. Construction Protective Services, Inc., et al.
LASC Case No. BC 391669

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