Supreme Court Case No. S212704

IN THE SUPREME COURT OF CALIFORNIA

CPS SECURITY SOLUTIONS, INC.

Defendants/Cross-Complainants/Appellants/Petitioners

vs.

TIM MENDIOLA, *ET AL.*

Class Petitioners/Cross-Defendants/Respondents/Petitioners

After a Decision of the Court of Appeal

Second Appellate District, Division Four

Consolidated on Appeal with Case No.: B240519

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

Honorable Jane L. Johnson, Judge

SUPREME COURT
FILED
FEB - 4 2014
Frank A. McGuire Clerk
Deputy

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

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I. INTRODUCTION

This Reply Brief is submitted by Defendants and Appellants CPS Security Solutions, Inc. ("CPS") in reply to the Answering Brief on the Merits filed by Plaintiffs and Respondents, Tim Mendiola, *et al* ("Plaintiffs"). Many of the arguments raised by Plaintiffs in their Answering Brief have already been addressed by CPS in its Opening Brief on the Merits and/or in its Answering Brief. In this Reply Brief, CPS has attempted to avoid duplicating the arguments already made while fully responding to Plaintiffs' Answering Brief.

II. PLAINTIFFS' USE OF HYBERBOLE DEMONSTRATES THE WEAKNESS OF THEIR POSITION

Plaintiffs' Answering Brief opens with a seven page "Introduction" arguing that CPS's Trailer Guards are "free laborers" in name only and are more akin to "prisoners" or "enslaved" persons. (Ans. Brief, p. 6). Such vitriol is completely absent from the lower court decisions, even though the trial court ruled against CPS and the Court of Appeal affirmed in part and reversed in part. In leveling these attacks, Plaintiffs fail to point out to that these unskilled workers were able to earn average annual wages as high as $48,301 per year (for Class Representative Gonzaga) (Jt. App. 0087, Stip. Fact No. 70) as well receive low-cost living quarters for a small bi-weekly fee, deducted by agreement from the Trailer Guard's wages on a pre-tax basis to offset the cost of trailer maintenance and utilities.

The trailer homes provided by CPS, while modest, afford each Trailer Guard private living quarters provisioned with water, electricity, heat, air conditioning, bathroom and kitchen facilities and a

place to sleep. (Jt. App. 0080-81, Fact Nos. 20-25). CPS has always acknowledged that *not everyone is well suited to the job*, but for some people (such as students), these positions present lucrative alternatives to the back-breaking work otherwise available to most unskilled workers in the State of California. Plaintiffs' suggestion that the Trailer Guards "were required to spend night after night in a deserted, desolate environment utterly alone, with no companionship" (Ans. Br., p. 23) quite deliberately echoes their earlier "prisoner" analogy.

Plaintiffs argue that "CPS's attempt to frame the issue of whether this time is compensable with the use of the word 'voluntary' is misleading and deceptive." (Ans. Br., p. 7). But in advancing this argument, Plaintiffs ignore the fact that CPS Trailer Guards are completely free to leave the premises without notice or to remain in their trailer homes for at least 40 hours per week (generally between the hours of 7:00 a.m. and 3:00 p.m., Monday through Friday) (Jt. App. Vol. I, 0082, Stip. Fact No. 30). It is not disputed that Trailer Guards often choose to remain in their trailer homes during the day. But that inconvenient truth seriously undermines the Plaintiffs' "prisoner" analogy; it is difficult to imagine that a "prisoner" granted temporary parole would choose to "hang out" at the prison during such parole periods taking a nap or watching television. The only differences between these daytime non-patrol hours and the night time non-patrol hours when the workers remain on-call are (1) notice is required before leaving at night but not during the day; and (2) Trailer Guards who remain on site during nighttime hours may be required to respond to alarms, in which case they are paid for their time. Yet, while Plaintiffs

acknowledge that the daytime hours are not compensable hours worked, they insist that uninterrupted sleep time is compensable and that the agreements between CPS and the Trailer Guards constitute a prohibited contract to work for less than the minimum wage.

A Trailer Guard's choice to sleep in his or her trailer home during nighttime hours is not rendered "involuntary" simply because the arrangement also benefits CPS and a Trailer Guard's choice to remain on premises to respond to emergencies (and potentially earn additional wages or overtime wages in doing so) is no less "voluntary" than the choices made by the ambulance drivers in *Monzon v. Schaefer Ambulance Service, Inc.* (*Monzon*) (1990) 224 Cal.App.3d 16, the motel managers in *Brewer v. Patel* (1993) 20 Cal.App.4th 1017, or the apartment managers in *Isner v. Falkenberg/Gilliam & Associates, Inc.* (2008) 260 Cal.App.4th 1393. Although those cases arose under different wage orders, no wage order authorizes involuntary servitude.

Plaintiffs' argument that the arrangement between CPS and its Trailer Guards is not "voluntary" also fails to acknowledge this Court's frequent observation that the employment relationship is fundamentally contractual in nature. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 696; *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 336. Plaintiffs resort to name calling because their arguments are so flimsy. As the Court of Appeal observed in another case, **"[s]imply put, such desperate hyperbole only serves to demonstrate the weakness of [the litigant's] position."** *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 6 Cal. Rptr. 3d 58, 73, review granted and opinion

superseded sub nom. *People v. R.J. Reynolds Tobacco* (Cal. 2004) 83 P.3d 480 and aff'd in part, rev'd in part, (2005) 37 Cal. 4th 707.

III. PLAINTIFFS' ARGUMENTS ARE FLAWED BECAUSE THEY IGNORE OTHER IMPORTANT STIPULATED FACTS

Plaintiffs' Answering Brief, as well as their Opening Brief, steadfastly ignores one of the most important facts in this case - that the Trailer Guards can request to leave the job site during their on-call sleep time and, ***if commanded to stay***, they are paid from the moment of their request to leave until the end of their shift. This undisputed fact is reflected in Stipulated Fact No. 46, which states that: "If a Trailer Guard requests a reliever, CPS considers the time the Trailer Guard waits for the reliever to arrive or, if none is available, the balance of the On-Call time, to be 'hours worked' for which the Trailer Guard is paid." (Jt. App. Vol. I, 0084.) Stipulated Fact No. 46, in turn, is based on paragraph 2.c.5. of the Memorandum of Understanding between CPS and the Division of Labor Standards Enforcement settling their lawsuit, which provides that "CPS may require a Trailer Guard to remain at the site during all or any portion of his/her free time on any given occasion. In such event, the Trailer Guard shall be paid for such time." (Jt. App. Vol. I, 0084.)

Plaintiffs' refusal to recognize that the Trailer Guards are paid if they are not allowed to leave the job site forms the basis of their claim that the Trailer Guard's decision to remain on premises is involuntary. Plaintiffs have argued that if the Trailer Guards are not specifically allowed to leave by CPS, they *must stay at the*

construction site during the on-call hours." (Ans. Brief, p. 5) (emphasis in original) Plaintiffs then leap to the conclusion that because the Trailer Guards are required to stay at the job site unless allowed to leave, they are "enslaved" and are like "prisoners" who are assigned to work programs. Plaintiffs conveniently ignore that if slaves or prisoners request to leave, they are not then paid for the time they are then required to remain as slaves or prisoners.

Plaintiffs also argue, contrary to the stipulated facts, that the Trailer Guards "do what their employer tells them to do, and stay at the job site when the employer tells them to stay at the job site, voluntarily but with the understanding that [sic] likely price of disobeying the employer's directives will be loss of employment." (Ans. Brief, p. 6). There is simply no factual support in the record for this claim and it is directly ***contrary*** to Stipulated Fact No. 19, which provides that Trailer Guards "who do not agree to the terms and conditions of employment as a Trailer Guard are offered positions as Hourly Guards when available." (Jt. App. Vol. I, 0080.)[1]

By ignoring some facts and distorting others, Plaintiffs attempt to show that the Trailer Guards are not on the job site voluntarily. Plaintiffs obviously recognize that if this Court finds that they are on the job site voluntarily, then (under the reasoning of *Morillion v. Royal Packing Co.* (*Morillion*) (2000) 22 Cal.App.4th 575) the Trailer

[1] Hourly Guards are not provided with a trailer home and do not reside on the construction site. Rather, they work routine guard shifts, generally lasting from six to twelve hours, and are paid for all the hours they are assigned to be at the construction site. (Jt. App. Vol. 1, 0080.)

Guards are not under the control of CPS and their on-call sleep time is not compensable. Rather, as CPS has argued, the Trailer Guards would be (and are) like the plaintiffs in *Overton v. Walt Disney Co.* (2006) 136 Cal.App.4th 263 who were not under their employer's control when they voluntarily took a shuttle from the Disney parking lot to the employee entrance at Disneyland, and like the plaintiffs in *Vega v. Gasper* (5th Cir. 1994) 36 F.3d 417, who voluntarily took their employer's bus to the agricultural fields where they worked.

This Court should not be swayed by Plaintiffs' mischaracterization of the stipulated facts in this case.

IV. PLAINTIFFS HAVE MISAPPLIED THE *OWENS/GOMEZ* TEST FOR DETERMINING THE EXTENT OF EMPLOYER CONTROL OVER AN EMPLOYEE'S ON-CALL TIME

The Ninth Circuit Court of Appeals in *Owens v. Local No. 69* (*Owens*) (9th Cir. 1992) 971 F.2d 347 set forth a non-exclusive multi-factor test for determining whether an employee is subject to employer control during the employee's on-call time. This federal test was subsequently adopted by the Court of Appeal in *Gomez v. Lincare, Inc.* (*Gomez*) (2009) 173 Cal.App.4th 508, which recognized the substantial similarity between on-call time under federal and state law (both hold that the level of employer control determines whether on call time is compensable). The first *Gomez/Owens* factor is whether there is an on-premises living requirement. CPS pointed out in its Opening Brief (Opn. Brief, p. 22) that in *Taylor v. American Guard and Alert, Inc.* (9th Cir. 1998) 1998 U.S.App.LEXIS 26934, the Ninth Circuit clarified this factor stating that "the key question…is

not whether the [employees] had to *live* on site during their on-all time but whether they had to *remain* on site."

Plaintiffs' response to the Ninth Circuit's clarification of the first *Gomez/Owens* factor was, "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*." (Ans. Brief, p. 20.) Once again, Plaintiffs fail to acknowledge that if a Trailer Guard requests to leave the job site and is commanded to stay, the Trailer Guard is paid from the time of the request for the remainder of his/her on-call shift. This is because if a Trailer Guard requests to leave and is not permitted to do so, the Trailer Guard comes under CPS's control. Until then, a Trailer Guard is on-site in his or her trailer home voluntarily.

Plaintiffs also address another important *Owens/Gomez* factor, that is, the limitations on the types of personal activity that Trailer Guards can engage in during on-call hours. In this regard, Plaintiffs cite the finding of the Court of Appeal below that the Trailer Guards "do not enjoy the normal freedoms of a typical off-duty worker." (Ans. Brief, p. 23.) As federal courts have recognized in applying the *Owens* test, however, the degree to which an employee must be free to engage in personal activities so that on-call time is not compensable does not require that the "employee...have substantially the same flexibility or freedom as he would if not on call, or else all or almost all on-call time would be working time, a proposition that the settled case law and the administrative guidelines clearly reject." (*Owens*, 971 F.2d at 350-351, quoting *Bright v. Houston Northwest Medical*

Center Survivor, Inc. (5th Cir. 1991) 934 F.2d 671 *(en banc)*, cert. den. (1992) 502 U.S. 1036.)

The stipulated facts are that the Trailer Guards engage in sleeping, taking showers, cooking, eating, reading, watching television, listening to the radio, and surfing the Internet while on-call in their trailer homes. Nevertheless, Plaintiffs argue that the Trailer Guards are denied the ability to spend time with their family and friends or the "simple pleasure" of drinking alcohol while watching a baseball game on television. Plaintiffs, once again, conveniently ignore the fact that if a Trailer Guard wishes to spend time with his family and friends during nighttime hours, he or she can request to leave the job site and, if required to stay, is paid for the remainder of the shift.[2] With respect to alcohol, it is not uncommon (and likely typical) for on-call employees to be prohibited from consuming alcohol during their on-call time. Indeed, the plaintiffs in *Gomez, supra*, also were prohibited from consuming alcohol while on call. (173 Cal.App.4th at 512.)

Plaintiffs also argue that the Trailer Guards' on-call sleep time is not compensable because being on-call is primarily for CPS's benefit. It is true that some cases have looked to whether on-call time is spent primarily for the benefit of the employer in determining whether or not the time is compensable. This factor derives from federal law and was noted by the U.S. Supreme Court in *Armour &*

[2] As discussed above, Trailer Guards are unconditionally permitted to leave the job site, without notice to CPS, from 7:00 am to 3:00 pm, Monday through Friday. (Jt. App. Vol. I, 0082, Stip. Fact No. 30.)

Co. v. Wantock (*Armour*) (1944) 323 U.S. 126, 133. As recognized by the Court of Appeal in *Gomez*, "A determination of whether the on-call waiting time is spent predominantly for the employer's benefit depends on two considerations: (1) the parties' agreement and (2) the degree to which the employee is free to engage in personal activities." (173 Cal.App.4th at 522, citing *Owens*, *supra*.) In short, whether on-call waiting time is spent primarily for the benefit of the employer does not literally mean whether the on-call time benefits the employer more than the employee, but depends on various factors, most notably the degree to which the employee is free to engage in personal activities. Indeed, as Justice Kaus observed in his concurring opinion in *Madera Police Officers Assn. v. City of Madera* (1984) 36 Cal.App.3d 403, 414, "Given a reasonably sane employer, the two-step analysis [of examining the parties' agreement and the extent to which the employee is free to engage in personal activities] is 50 percent illusory: is it conceivable that employer-imposed restrictions on conduct during Code 7 [meal time] are not 'primarily directed toward the fulfillment of the employer's requirements and policies?"

Once again, the fact that the Trailer Guards remained at the job site voluntarily should be dispositive of the issue of control, regardless of what restrictions were imposed by CPS. The Court of Appeal's decision in *Vega v. Gasper* (5th Cir. 1994) 36 F.3d 417, which was cited with approval by this Court in *Morillion*, is instructive.[3] In

[3] In *Morillion*, this Court wrote that "We find *Vega*, *supra*, 36 F.3d 417, to be consistent with our opinion. In contrast to plaintiffs, the employees in *Vega* 'were not required to use [defendant] Gasper's buses to get to work in the morning. They chose...how to get to and

Vega, the employees used their own transportation from their homes, usually in Juarez, Mexico, to El Paso, Texas, where Gasper would meet them. The employees then could choose to take a bus provided by Gasper from El Paso to the agricultural fields where they worked. The bus trip to the fields lasted two to two-and-a-half hours. (*Id.* at 423.) During this time, the employees could not engage in any of the activities found by this court in *Morillion* as evidence of the employer's control, such as dropping off their children at school, stopping for breakfast, or running other errands requiring use of a car. (*Morillion*, 222 Cal.4th at 586.) In short, as this Court recognized, if an employee voluntarily submits to an employer's control, the fact that the employee is restricted in his or her personal activities is irrelevant in determining whether the hours spent by the employee are compensable. This jurisprudence is consistent with the Court's observation that the employment relationship is contractual in nature.

V. <u>**THE IWC'S FAILURE TO AMEND THE WAGE ORDERS AFTER THE COURT OF APPEAL'S DECISION IN *MONZON* DEMONSTRATES THE IWC'S INTENT TO INCORPORATE THE FEDERAL REGULATIONS INTO THE WAGE ORDERS**</u>

Plaintiffs argue that there "is not a scintilla of evidence" that the IWC believed that when *Monzon* was decided, it applied to employees other than ambulance drivers and attendants covered by Wage Orders 5 and 9, and that it was not until *Seymore v. Metzon Marine, Inc.* (*Seymore*) (2011) 194 Cal.App.4th 361 was decided in 2011 that any

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from work.... [W]e find the fact that the *Vega* employees were free to choose-rather than required-to ride their employer's buses to and from work, a dispositive, distinguishing fact." (22 Cal.4th at 589, n.5.)

court had held that *Monzon* applied to any employees other than ambulance drivers and attendants or that *Monzon* was a decision of general applicability. (Ans. Brief, p. 30.) This is simply untrue.

It is beyond dispute that the Court of Appeal in *Monzon* did not interpret any section of Wage Order 5 that was unique to Wage Order 5. Rather, the court construed the definition of "hours worked" under Section 2(H) of the wage order which, like all the other wage orders, defines "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so."[4] As the Court of Appeal in *Seymore* found, "recognizing that the DLSE's 'enforcement policy for sleep time closely resembles the federal policy,' the court [in *Monzon*] read into the state regulation defining compensable hours worked the provisions of the federal regulation, 29 Code of Federal Regulations part 785.22 (2010)," which provides that when an employee works 24 hours or more the employer and employee may agree to exclude a regularly scheduled sleeping period of not more than eight hours from compensable hours worked. (*Seymore*, 194 Cal.App.4th at 381.)[5]

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[4] Wage Orders 4 and 5, as pointed out in CPS's Answering Brief, has additional language regarding employees employed in the healthcare industry, and Wage Order 5 also contains other language for employees covered by the wage order who reside on the employer's premises.

[5] Plaintiffs argue that the Court of Appeal in *Monzon* did not refer to 29 C.F.R. Section 785.23, but only to 29 C.F.R. Section 785.22. Because the employees in *Monzon* did not reside on the employer's premises, 29 U.S.C. Section 785.23 would not have been applicable, so the *Monzon*

The Court of Appeal below also recognized that the court in *Monzon* was interpreting the definition of "hours worked" and expressly rejected the argument that *Monzon* was limited to Wage Order 9:

> A careful reading of the cases thus disposes of the Class's contention that the rule announced in *Monzon* and followed in *Seymore* was limited to employees governed by Wage Order No. 9. While that wage order contained a specific provision permitting an employer and employee to agree in writing to exclude sleep time from compensation, neither court relied on the provision to exclude the eight hours of sleep time. Instead, both courts looked to the wage orders definition of "hours worked" and found it comparable to the federal definition (footnote omitted). The court in *Monzon* explained that the exclusion for sleep time need not be written into the wage order because "the IWC's historical rule had been to permit the exclusion of sleep and meal periods"; thus, even without the specific exclusion applicable to ambulance drivers and attendants found in Wage Order No. 9, the agency recognized that parties could "agree that up to eight hours sleep time of a 24-hour shift might be excluded from compensable time."

(217 Cal.App.4th at 874.) The Court of Appeal further noted that "the court in *Monzon* found former Section 3(G) [now 3(K)] of Wage Order No. 9 related only to the 'relaxation of daily overtime requirements,' and 'did not affect the right of parties to agree that up to eight hours sleep time of a 24-hour shift might be excluded from compensable time.'" (*Id.* at 874 n. 31, quoting *Monzon, supra*, 224 Cal.App.3d at 44-45.)

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court's failure to discuss Section 785.23 is of no significance. The fact that the court in *Monzon* did not refer to 29 C.F.R. Section 785.23 does not mean that the court found that 29 C.F.R. Section 785.23 should never be used to interpret any of the wage orders.

In sum, there is no reason to believe that the IWC did not understand that the Court of Appeal in *Monzon* interpreted the definition of "hours worked" under Wage Order 9 and that the definition of "hours worked" in that wage order contained the same language as in the definition of "hours worked" in all of the other wage orders. This fact was readily apparent to the court in *Seymore* and to the Court of Appeal in this case below. It makes no sense to argue that it was not also apparent to the IWC. There is no basis to refuse to recognize the well-established principle of statutory construction that "when the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in a previous judicial construction" and that "reenacted portions of the statute or given the same construction they received before the amendment." (*Marina, Ltd. v. Wolfson* (*Marina, Ltd.*) (1982) 30 Cal.3d 721, 734.)

VI. IT IS NOT INAPPROPRIATE TO USE FEDERAL LAW TO INTERPRET STATE LAW ON-CALL REQUIREMENTS BECAUSE THE FEDERAL AND STATE LAW ARE SUBSTANTIALLY SIMILAR. SUCH AN INTERPRETATION ALSO WOULD NOT VIOLATE LABOR CODE SECTION 1194.

Plaintiffs also claim, as they did in their earlier briefs, that federal law should not be used to determine the compensability of the Trailer Guards' on-call sleep time because federal law provides less protection to the Trailer Guards than the protections provided under the Labor Code and wage orders. Citing *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 798, Plaintiffs argue that "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." (Ans. Brief, p. 26.) Plaintiff's argument is unavailing.

First, it should be undisputed that federal law and state law do not substantially differ—and are, in fact, substantially similar with respect to whether on-call sleep time is compensable. As pointed out by CPS in its Brief on the Merits, both the federal and state statutory schemes for on-call time turn on the level of control exercised by the employer during the on-call time. (*Cf. Morillion, supra*; *Owens v. Local No. 169* (9th Cir. 1992) 971 F.2d 347.) Indeed, as Plaintiffs have recognized, state courts have expressly adopted the federal *Owens* test to determine the compensability of on-call time in California. (See *Seymore*, relying on both *Owens* and *Berry v. County of Sonoma* (9th Cir. 1994) 30 F.3d 1174; *Ghazayan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1535 n.10, relying on *Berry, supra*; and *Gomez,* 173 Cal.App.4th at 522-523, adopting the *Owens* test.)[6]

In addition to federal and state law being substantially similar with respect to on-call time, the IWC has also evidenced its intent to incorporate the federal sleep time regulations into state law. This is because, as pointed out by CPS in its Answering Brief and above, the

[6] It is undisputed that CPS pays its Trailer Guards for all hours they are "suffered or permitted to work," so the only question here is whether the Trailer Guards are under CPS's "control" during the on-call hours when they are not interrupted.

IWC made no effort to amend the wage orders after the Court of Appeals' decision in *Monzon, supra,* in 1990. The IWC's failure to amend the wage orders after *Monzon* is particularly striking in light of the fact that the IWC has amended various wage orders since 1990, including Wage Order Nos. 4 and 9. It would have been very easy for the IWC, if it disagreed with the decision in *Monzon,* to undo the decision if it had wanted. The IWC's failure to overturn *Monzon* must be read as its acquiescence in the decision. (*Marina, Ltd.*, 37 Cal.3d at 734.)

In their Answering Brief, Plaintiffs mischaracterized CPS's position by asserting that CPS is asking this Court to adopt wholesale all DOL wage and hour regulations regarding "Hours Worked." (Ans. Brief, p. 10-11.) This is not, and has never been, the case. Rather, CPS is asking this Court to import only the sleep time regulations, which are found at 29 C.F.R. Sections 785.20 through 785.23 and to include 29 U.S.C. Section 785.23 (which applies to employees who are required to reside on the employer's premises) as well as 29 C.F.R. Section 785.22 (which applies to employees scheduled for 24-hour shifts). Although no Court of Appeal has addressed the applicability of Section 785.23 under state law, both *Monzon* and *Seymore*, as well as DLSE regulations, have held that an employer can exclude up to eight hours of on-call sleep time from employees who are scheduled for 24-hour shifts.[7]

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[7] Indeed, current Section 46.4 of the DLSE Enforcement Policies and Interpretations Manual (Revised) expressly states that "DLSE Enforcement Policy has historically allowed eight (8) hours to be

The exclusion of sleep time from compensable hours worked is a common law exclusion which pre-dates the DOL regulations, which were enacted in 1961. (26 Fed.Reg. 190 (Jan. 11, 1961).) In 1944, the U.S. Supreme Court decided *Armour* and *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, both of which addressed the compensability of waiting time. The general rule from these cases is that waiting time is compensable if an employee is *engaged to wait*, but not compensable if the employee is *waiting to be engaged.* Significantly, the Supreme Court in *Armour* held that the security guards in that case were "engaged to wait" during their on-call hours so as to make the waiting time "hours worked," but the Supreme Court also held that up to eight hours of sleep time in that case was not ***compensable*** hours worked. Thus, whether or not the on-call sleep time here is found to be hours worked under the *Owens/Gomez* test, CPS may exclude up to eight hours of sleep time from compensable hours worked in any event.

Finally, Plaintiffs argue that giving any weight to the agreements between CPS and the Trailer Guards would violate Labor Code Section 1194, which provides that any agreement between an employer and employee to work for "less than the legal minimum or legal overtime compensation applicable to the employee" is invalid. However, this section is inapposite here because, if the on-call sleep time is not considered compensable hours worked, then the employees have not agreed to waive their right to receive the minimum wage or

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deducted if an employee is scheduled for 24-hour work shifts and is required to remain on the employer's premises during the work shift and, in fact, receives eight (8) hours of uninterrupted sleep." (Defendant's Request for Judicial Notice, Exh. C.)

legal overtime compensation.[8] In any event, because the Trailer Guards are on the job site voluntarily until they request to leave, and then are paid from the moment of the request for the remainder of their shift if they are required to remain on premises, the Trailer Guards are compensated when they are under the "control" of CPS.

VII. CONCLUSION

For the reasons set forth above, and in CPS's Opening and Answering Briefs, this Court should (1) affirm the ruling of the Court of Appeal upholding the exclusion of eight hours of on-call sleep time from compensable hours worked for Trailer Guards who are scheduled for shifts of twenty-four hours or longer; and (2) reverse the ruling of the Court of Appeal that CPS cannot exclude on-call sleep time from compensable hours worked for Trailer Guards who work shifts less than twenty-four hours and who reside on the employer's premises.

Dated: January 10, 2014

BLANK ROME LLP

By: ______________________
HOWARD M. KNEE
Attorneys for Appellants CPS
SECURITY SOLUTIONS, INC. *et al.*

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[8] Indeed, if Plaintiffs' argument were correct, then both *Monzon* and *Seymore* would have been decided incorrectly because the Court of Appeals in both cases upheld agreements excluding eight hours of sleep time from compensable hour worked for employees who worked 24-hour shifts. For this Court to now overrule *Monzon* after nearly 25 years would wreak havoc with the employers who have adopted employment policies based on this established California law. Moreover, this Court would need to examine the fairness of the entire scheme by which the California legislature has delegated certain quasi-legislative functions to the now defunded IWC.

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

As counsel of record for Petitioners **CPS Security Solutions, Inc.,** ***et al.***, I hereby certify that Defendants/Cross-Complainants/Appellants/Petitioners' Reply Brief On The Merits, excluding the tables of contents and authorities, but including footnotes, contains 4,797 words, based on the word count program in Microsoft Word 10.

Dated: January 10, 2014

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On **February 3, 2014**, I served the foregoing document(s): **DEFENDANTS/CROSS-COMPLAINANTS/APPELLANTS/ PETITIONERS'REPLY BRIEF ON THE MERITS** on the interested parties in this action addressed and sent as follows:

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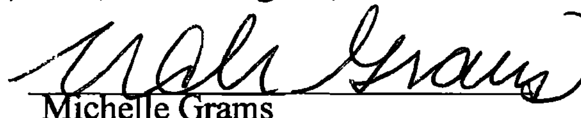
☒ **FEDERAL:** I declare that I am employed in the office of a member of the bar of this court at whose direction service was made.

Executed on **February 3, 2014**, at Los Angeles, California.



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