INTRODUCTION

Pursuant to the Court's October 24, 2006 Order, Plaintiff/Respondent John Paul Murphy ("Murphy") submits this consolidated reply to the *amicus curiae* briefs filed in this matter.[1]

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[1] The Court accepted ten *amicus curiae* briefs, five in support of Murphy, and five in support of Defendant/Appellant Kenneth Cole Productions, Inc. ("KCP"). Murphy identifies these briefs by a short name, followed by "(Murphy)" or "(KCP)," to indicate the party the brief is intended to support. The ten *amicus curiae* are (1) The California Employment Lawyers Association ("CELA (Murphy)"); (2) The Alameda County Central Labor Council, et al. ("ACCLC (Murphy)"); (3) The Asian Pacific American Legal Center of Southern California, et al. ("Low Wage Worker Brief (Murphy)"); (4) The California Teamsters Public Affairs Council and California Conference Board of the Amalgamated Transit Union ("Teamsters (Murphy)"); (5) Jennifer Augustus ("Augustus (Murphy)"); (6) The Employers Group, et al. ("EG (KCP)"); (7) The California Employment Law Council, et al. ("CELC (KCP)"); (8) Circuit City Stores, Inc. and Chevron USA, Inc. ("Circuit City (KCP)"); (9) The Yankee Candle Company, Inc. ("Yankee (KCP)"); and (10) California Association of Health Facilities ("CAHF (KCP)").

All ten briefs addressed issues relating to Labor Code §226.7. Only one brief (Low Wage Worker Brief (Murphy)) advanced arguments (with which Murphy agrees) relating to Labor Code §98.2.

One entire brief, (CAHF (KCP)), and portions of two others, (CELC (KCP) at 4-8; Yankee (KCP) at 4-6), go well beyond the question of whether the one hour of pay provided by §226.7 constitutes compensation or a penalty for purposes of the statute of limitations. In granting permission to file the CAHF brief, the Court stated it was not "expand[ing] the issues on review beyond those specified in its order of February 22, 2006, or request[ing] the parties to brief any issues other than those previously specified." (Nov. 22, 2006 Order.) In light of this Order, and given that none of these newly raised issues currently are before the Court, Murphy does not address them here. Murphy requests notification and the opportunity to provide briefing should the Court later deem any of the issues to be part of this proceeding.

Employer *Amici* share a common approach. Without exception, they sidestep the well-established standards for statutory interpretation, and circumvent the basic requirements of examining §226.7's plain language, and harmonizing it within the greater statutory context.

Murphy's approach follows the rules. The plain language of §226.7, which uses the words "pay" and "compensation," dictates that meal and rest payments are a form of wages. The Legislature's overt consideration of the word "penalty," and subsequent *rejection* of that term, indicates that §226.7 payments were not intended to be penalties. This is further corroborated by the fact that lawmakers chose to use "penalty" in two other statutes created with §226.7 as part of the same legislative act.

When harmonized within the larger context of the Labor Code and IWC Wage Orders, the result becomes stronger and clearer. Meal and rest pay functions *in all key respects* like other forms of premium pay. Viewed within the regulatory framework, overtime and double time pay, reporting time pay, split shift pay, and meal and rest pay *all* serve the dual function of compensating employees while simultaneously encouraging employer compliance with minimum labor standards. All are owed automatically by the employer to the employee, rather than being "subject to" enforcement. Employer *Amici* do not acknowledge, much less examine, these contextual underpinnings in any detail. They ignore the parallels to reporting time pay and split shift pay. By so doing, they can point to differences between

overtime pay and meal/rest pay, without having to concede that there are differences among *all* forms of premium pay. But when viewed alongside each other, these differences in legislative design do not detract from their overall characterization as wages. Meal and rest pay falls squarely in line with these premium pay devices.

Employer *Amici* bypass the statutory interpretation rules for a reason, for they can only make certain arguments if they first sever §226.7 from its contextual moorings. First, they argue that meal and rest pay does not compensate for harm, since workers are paid for the time they spend working, and therefore suffer no uncompensated harm when they labor through a break. This view would not ring true for workers who must toil in fields, or behind machines or computers, or on their feet, without the benefit of their statutory right to breaks. The fact that full, timely, uninterrupted breaks are regulated at all indicates that it is unhealthy and damaging for employees to work without them. Just like the other forms of premium pay, meal and rest pay compensates employees for these intangible losses.

Employer *Amici* offer charts, tables and mathematical descriptions to argue that meal and rest pay is "disproportionate" to the harm for which it is intended to compensate, and therefore must be a penalty. Again, once viewed in context, these arguments fall away. When compared to analogous forms of pay, meal and rest pay operates well within the range of

proportionality expressed through California wage designs. It is an appropriate device reasonably aimed at compensating employees for losses that are difficult to value. It is also a modest amount, tied directly to the individual employee's rate of pay, and payable only on days when the employer fails to provide statutory breaks.

Employer *Amici's* argument that §226.7 payments are penalties because it is "illegal" for employers not to provide breaks may sound catchy, but lacks substance. The argument confuses *liability* with *remedy*. Many behaviors, including employer behaviors governed by California's wage and hour laws, are illegal. Their illegality does not transform the remedy into a penalty. It is illegal to provide less than the minimum wage. The remedy of unpaid wages is still wages, not penalties.

Most ironically, Employer *Amici* insist that this Court look first and foremost to the "functional test," derived from more than one hundred years of jurisprudence regarding whether a statute contains a penalty. The irony flows from the fact that Employer *Amici* staunchly *refuse* to examine the functionality of §226.7 within the Labor Code. Applying the functional test, it is clear that §226.7 does not function as a penalty.

The extrinsic sources also confirm that §226.7 payments are wages. Employer *Amici* agree that the Legislature's original iteration involved a true penalty scheme. That scheme assessed a flat penalty unrelated to an employee's rate of pay, in addition to compensation to the employee, and

enforceable through legal action. Employer *Amici* also all agree that the Legislature subsequently dropped this penalty scheme, and adopted the design created by the IWC. The key question then becomes "what did the IWC create?" The regulatory history demonstrates that meal and rest pay was intended to be premium pay. The author of the IWC amendment noted the need to create a compensatory remedy for employees where none had before existed. He expressly invoked the parallel to the overtime pay device, and described how the courts refer to overtime as a "penalty," because of its dual function of encouraging employer compliance while compensating employees. The IWC's compensation mechanism was "one hour of pay at the employee's regular rate of compensation," payable directly to the employee, without the need for a lawsuit or wage claim. The Legislature thus *rejected* the creation of a penalty, and adopted the IWC's design, which functions exactly like the other premium pay devices. The Legislature went on to enact two statutes that use the word "penalty" as part of the same legislative act.

The sole dissonant note in the overall interpretation of §226.7 comes from the Division of Labor Standards Enforcement ("DLSE"). It first opined that meal and rest payments are premiums, and not penalties. It subsequently changed its position 180 degrees, expressing the view that they are penalties. It is difficult to imagine an agency scenario less worthy of deference. For in this instance, the DLSE argued the position that meal

and rest payments constituted pay *as counsel of record before the trial court in this very case.* Only later, after a change of administration, and with no change at all in the statute or wage orders, did the DLSE make its complete about-face. The case law is clear that such vacillating, inconsistent positions should be afforded no weight.

Contrary to Employer *Amici*'s circumnavigation of the rules, Murphy adheres to the established holistic approach. Whether examining plain language, context, functionality, or extrinsic sources, the result comes back the same. Section 226.7 payments fall squarely in line with other California premium pay devices. Section 226.7 meal and rest payments are not penalties, but are liabilities created by statute -- in form, substance, and function. They are subject to Code of Civil Procedure §338's three-year statute of limitations.

ARGUMENT

I. The Plain Statutory Language, Harmonized Within the Context of the Labor Code, Establishes that §226.7 Payments Are Statutory Liabilities, Not Penalties, and Are Subject to Code of Civ. Proc. §338's Three-Year Statute of Limitations

The judicial approach to interpreting statutes is well-settled. The Court begins with the statutory language, giving words their usual and ordinary meaning. The language must be construed in the context of the statute as a whole and the overall statutory scheme, with reference to the entire scheme of law of which it is part so that the whole may be

harmonized. (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83 (interpreting Labor Code §§201 and 203).)[2]

In addition, given the remedial nature of the "legislative enactments authorizing the regulation of wages, hours and working conditions," §226.7 is to be "liberally construed with an eye to promoting (worker) protection." (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794, quoting *IWC v. Superior Ct.* (1980) 27 Cal.3d 690, 702; *Sav-On Drug Stores, Inc. v. Superior Ct.* (2004) 34 Cal.4th 319, 340; see also discussion in ACCLC (Murphy) at 1-2; Low Wage Worker Brief (Murphy) at 6-7; CELA (Murphy) at 27-29).)

Although the Court routinely follows these established methods of interpretation, Employer *Amici* act as if the tenets do not exist.[3] They

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[2] If the language is ambiguous, the Court then examines extrinsic sources, including the objects to be achieved and the legislative history, choosing the construction that comports most closely with the Legislature's apparent intent, endeavoring to promote rather than defeat the statute's general purpose, and avoiding a construction that would lead to absurd consequences. (*Id.*)

As Employer *Amici* agree, (EG (KCP) Application for Permission to File Brief at 5), given the clarity of the statutory language within its context, there is no need to resort to extrinsic sources. Nevertheless, Murphy replies to *Amici's* characterizations of the regulatory and legislative history *infra* at 59-66.

[3] None of the Employer *Amici* set forth the statutory interpretation standards. One *Amicus* group offers the bare, unsupported statement that the "liberal construction" rule does not apply to determining whether §226.7 is or is not a penalty for purposes of the statute of limitations. (CELC (KCP) at 17-18.) Case law dictates otherwise. (See, e.g., *Yanowitz*

either bury discussion of the statutory language and context deep within their briefs, or avoid it altogether.[4] This less-than-straightforward presentation is hardly surprising. Employer *Amici* have no effective rejoinder to the result achieved through a routine application of the rules; namely, that §226.7 payments are wages, not penalties.

A. The Plain Language of §226.7 Indicates that Meal and Rest Payments Are "Pay," and Not a "Penalty"

Employer *Amici* say little about the fact that both §226.7 and Wage Order §§11 and 12 plainly use the words "pay" and "compensation," and not the word "penalty." (See Murphy's Opening Brief ("OB") at 13-15; see also *Abbe v. City of San Diego* (S.D. Cal. Oct. 19, 2006) 2006 U.S. Dist. LEXIS 79010, *15 (use of the words "pay" and "compensation" indicates §226.7 "clearly regulates the substance of employment compensation" for purposes of constitutional home rule provisions).) *Amici* ignore the significant fact that legislators considered, then *rejected* the word "penalty" in §226.7, at the same time they *adopted* the word "penalty" in two statutes

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v. L'Oreal (2005) 36 Cal.4th 1028, 1054, fn. 14, 1058, fn. 17 (applying liberal construction rule to limitations period question involving worker protection statute); see also *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 435 (applying liberal construction rule to interpret provisions regarding meal periods).)

[4] Thus, Employer *Amici* immediately warn the Court away from "overly-parsed language," and begin instead with general case law regarding penalties, none of which address statutes within the context of the Labor Code. (See, e.g., EG (KCP) at 1.) These cases also support that §226.7 payments are not penalties. (See *infra* at 45-51.)

enacted in the same bill, AB 2509. (See OB at 13, 32-36.)[5] Instead, they charge that any reliance by the Court on the word "pay" would be "misfocused," and that since §226.7 payments "quack like a penalty," this Court should ignore the Legislature's "label," and find that the payments are penalties.[6]

To begin with, paying careful attention to the actual statutory language is hardly "misfocused;" it is required by long-standing jurisprudence. Moreover, §226.7 payments do not "quack like a penalty." As set forth in detail *infra*, meal and rest payments function *in all key respects* like similar kinds of employee premium compensation. Through these premium pay devices, lawmakers expressed a statutory right, and attached a price to that right, in order to compensate employees while shaping employer behavior to be consistent with minimum labor standards.

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[5] As set forth in the Opening Brief, and *infra* at 63-66, in AB 2509, the Legislature first contemplated a penalty scheme, enforceable through a lawsuit or administrative wage claim, that would subject employers to a civil "penalty" of $50 per violation, in addition to an amount to compensate the employee. The Legislature subsequently *rejected* this penalty scheme, in favor of the "one hour of pay" design that it adopted. In the meantime, the Legislature enacted two other provisions in AB 2509 (§203.1 and an amendment to §226) that specifically use the word "penalty."

[6] See, e.g., CELC (KCP) at 37-41; EG (KCP) at 15-18.

Although in certain circumstances language may fail to capture statutory intent,[7] such is not the case with §226.7. Lawmakers crafted §226.7 within the context of an existing statutory scheme that makes regular use of the words "pay," "compensation," and "penalty." Section 226.7 was created through a legislative act that included two other "penalty" provisions, but wherein lawmakers purposefully refused to use the word "penalty" in §226.7. The legislative design for meal and rest payments parallels the design of similar California wages. In short, §226.7's "one hour of pay at the employee's regular rate of compensation" constitutes pay, in both form and substance. (See OB at 13-16, 32-36.)

Employer *Amici* retort that while §226.7 does not use the word "penalty," it also does not include the word "wages," although the word appears in 198 other Labor Code statutes. (EG (KCP) at 16, fn. 5.) This glib accounting does little to advance the analysis. Section 226.7 contains the words "compensation" and "pay," as does §510, which sets overtime "pay" rates. Like §226.7, §510 *does not use the word "wage,"* yet there is

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[7] For example, in *Hansen v. Vallejo Electric Light & Power Co.* (1920) 182 Cal. 492, 495-496, the Court found that assessment of the modern equivalent of $1000 plus $100 per day, where there concededly was *no actual damage*, constituted a penalty, even though denoted as "liquidated damages" in the statute. Similarly, in *Anderson v. Byrnes* (1898) 122 Cal. 272, 275-276, the Court found that a statute was penal, and did not provide for "liquidated damages," where a stockholder with a single share could recover the modern equivalent of $20,000 for the company's failure to post balance sheets. (See also ACCLC (Murphy) at 3-5; 16-17.)

no disagreement that overtime pay constitutes earned wages. (See EG (KCP) at 25 (overtime premium is compensation to the employee for the exact amount of time worked); CELC (KCP) at 43 (overtime is a state-imposed benefit for extra work performed); Circuit City (KCP) at 19 (overtime premium pay is compensatory); see also *Cortez v. Purolator Air Filtration Prod. Co.* (2000) 23 Cal.4th 163, 178 (nonpayment of overtime pay constitutes unpaid earned wages that are subject to the restitutionary remedy authorized by the Unfair Competition Law).)

Despite strong textual and contextual indicators that §226.7 payments are wages, Employer *Amici* insist on the clarity of their position. Yet, if §226.7 so clearly "quacks like a penalty," why didn't the Legislature just *call* it a penalty, especially under these circumstances? If the payments were intended to be treated as penalties, why did the Legislature consider, then *reject* use of the word "penalty" in §226.7?

B. Viewed in Context, §226.7 Payments Are Part of California's Regulatory Framework of Compensation Policies

Following the prescribed method for statutory interpretation, Murphy set forth the greater regulatory context in order to harmonize §226.7 and Wage Order §§11 and 12 within that setting. The Labor Code and IWC Wage Orders embody a complex framework that regulates the employee-employer relationship with respect to wages, hours, and conditions of work. This framework creates minimum labor standards that

define the boundaries of acceptable employer behavior, and which are inextricably intertwined with economic consequences for the employer. In this way, employee protections – for example, the eight-hour day, the ability to rely on pre-announced work schedules, the ability to have reasonable shift schedules, and the right to take meal and rest breaks -- are expressed through statutory and/or regulatory policies. These policies are enforced through legislative designs that compensate employees, while concurrently encouraging employer compliance with those rights – for example, overtime and double time pay, reporting time pay, split shift pay, and meal and rest pay. (See OB at 16-26.)

When viewed in context, meal and rest pay falls exactly in line with these other kinds of wages. (See *Abbe*, *supra*, 2006 U.S. Dist. LEXIS 79010 at *16, fn. 5 (comparing approaches taken by *Murphy* and *NASSCO* decisions currently pending before this Court, and finding "persuasive" that "'Section 226.7 has the dual function of deterring employers from requiring their employees to work through mandated meal and rest periods and compensating employees required to work through these periods,'" quoting *National Steel and Shipbuilding Co. v. Superior Court*, previously reported at (2006) 135 Cal.App.4th 1072); *Rivera v. Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 599 ("imposition of a premium rate for overtime work discourages overtime employment by making it more expensive for the employer").)

Again, Employer *Amici* choose either to ignore the question of context, or hide it deep in their briefs, providing minimal analysis before veering off on tangents.[8] Many of their tangential arguments are best addressed through a thorough understanding of the California wages that are analogous to meal and rest pay. These are the very analogies that *Amici* and KCP studiously ignore. For this reason, Murphy revisits them.

1. Meal and Rest Payments Function Exactly Like Other Forms of Wages that Compensate Employees, While Encouraging Employer Compliance with Minimum Labor Standards

This Court has recognized that overtime pay, split shift pay, and reporting time pay all "have in common the fact that they 'affect the wage'… and are for the purpose of prohibiting or discouraging working conditions prejudicial to the welfare" of workers. *(Kerr's Catering Service v. DIR* (1962) 57 Cal.2d 319, 324-325 (describing the "requirement of time and one-half the regular rate of pay for overtime, one dollar per day extra for split shift workers, and two dollars for reporting for work if work is not available"); see also *California Grape and Tree Fruit League v. IWC* (1969) 268 Cal.App.2d 692, 706 (same; quoting *Kerr's*).)

Meal and rest pay falls in the same category.

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[8] See, e.g., EG (KCP) at 25, 29; CELC (KCP) at 45.

a. Overtime and Double Time Pay

Overtime premium pay is the "primary device for enforcing limitation on the maximum number of hours of work," and is intended to "regulate maximum hours consistent with the health and welfare of employees." (See OB at 18-19 and cases cited therein; see also *California Grape & Tree Fruit League*, 268 Cal.App.2d at 703 (double time pay requirements had effect of essentially eliminating employers' imposition of twelve hour days in certain industries).)

At the same time, overtime pay is intended to compensate employees for the fact that it is harder to work long hours. (See, e.g., *Bay Ridge Operating Co., Inc. v. Aaron* (1948) 334 U.S. 446, 460, 471 (purpose of requiring extra pay for overtime "was to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work…;" "a major purpose of the statute was to compensate an employee by extra pay for work done in excess of the statutory maximum hours. Thus the burdens of overly long hours are balanced by the pay of time and a half for the excess hours."); *Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal.App.3d 16, 29-30 (overtime premium is a "means of furnishing extra money to enable the employee to pay for services the employee would otherwise perform;" quoting *California Mfrs. Ass'n v. IWC* (1980) 109 Cal.App.3d 95, 111); Eight Hour Day Restoration and Workplace Flexibility Act of 1999, Stats. 1999, ch.134, §2(d)

("Numerous studies have linked long work hours to increased rates of accident and injury").)

Although interchangeably referred to as "penalty," "premium," and "pay," even by this Court (see OB at 21), overtime pay indisputably is a form of wages. [9] (See quotations from Employer *Amici* briefs, *supra* at 11; *Cortez, supra,* 23 Cal.4th at 178 (overtime pay constitutes earned wages).) The overtime "penalty" or "premium" serves the dual function of compliance and compensation, and an action for recovery of overtime wages is subject to a three-year statute of limitations for a liability created by statute. (*Aubry v. Goldhor* (1988) 201 Cal.App.3d 399, 404.)

With respect to legislative design, the Legislature established the work standard that "eight hours of labor constitutes a day's work." (Lab. Code, §510.) The overtime premium compensates employees by paying them 50% more for hours worked beyond the standard work day, or beyond forty hours in one workweek, and for the first eight hours on the seventh consecutive day. The double time premium compensates employees by doubling their rate of pay for hours worked beyond twelve in one day, and after eight hours on the seventh consecutive day. The overtime and double

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[9] In fact, Employer *Amici* agree that, although sometimes called a "penalty," overtime premium pay is compensatory, not punitive. (Circuit City (KCP) at 19, fn. 17.)

time premiums are tied to the employee's regular rate of compensation. (*Id.*)[10]

b. Reporting Time Pay

Ignored by both KCP and its *Amici*,[11] reporting time pay is another example of wages that compensate the employee while enforcing employer compliance with appropriate scheduling behavior. (See OB at 19-20; 23-26.)

IWC Wage Order §5, entitled "Reporting Time Pay," provides, with certain exceptions, that "[e]ach workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage." (See, e.g., 8 Code

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[10] *Amici* make much of the fact that, unlike meal and rest pay, overtime pay is tied directly to actual time worked. The legislative design for overtime differs in this way from meal/rest pay, *as well as* reporting time pay and split shift pay. The differences in design do not change the fact that they are all forms of compensation. *Amici's* argument is addressed *infra* at 38-43.

[11] Throughout the hundreds of pages of briefing submitted by KCP and its *Amici*, Murphy found only one reference to reporting time pay. In a footnote, and without any authority, CELC asserts that reporting time pay "is very susceptible to being regarded as a civil penalty." (CELC (KCP) at 44, fn. 20.) This bald assertion runs contrary to the unequivocal characterization by the courts, the IWC, and the Division of Labor Standards Enforcement ("DLSE"), that reporting time pay is "pay."

Regs., §11070, subd. (5)(A).) If an employee is required to report for work a second time in a workday, and receives less than two hours of work, the employee "shall be paid for two (2) hours at the employee's regular rate of pay." (*Id.*, subd. (5)(B).)

Reporting time pay has been an element of the California Wage Orders since 1942. In its 64 years of existence, no case indicates that a party has argued that reporting time pay is something other than a form of wages. The provision consistently has provided for additional pay, at the regular rate of pay through several iterations of the Wage Orders. Originally the reporting time pay requirement was included in §3(d) of the Orders, entitled "Minimum Wages" and provided that an employer "pay" the employee not less than four hours at $.50 per hour.[12] (See I.W.C. Order No. 1, Manufacturing Industry, Effective June 29, 1942; Murphy's Supplemental Motion for Judicial Notice ("SMJN"), Exh. 2.) Prior to 1967, the provision was removed from the minimum wages section, placed into a separate section and revised to require payment of "half the usual day's work" at the employee's "regular rate of pay," but in no event less than 2 hours of pay. (See Proposed Revisions of Industrial Commission Orders, SMJN Exh. 3 at 18.) In 1967 the IWC conducted a comprehensive

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[12] The minimum wage at that time, for most hours worked, was $.50 per hour.

review of the Wage Orders and implemented revisions which modified the reporting time pay provisions, clarifying (for most orders) that the right and amount of pay was to be measured by the regular "or scheduled" day's work. (*Id.* at 19.)

Despite repeated reviews, there was never any concern that the requirement that additional wages be paid was not linked to any actual work time. The purpose of the mandate was not to provide wages based on time worked, or even for the specific time lost by the employee. As the IWC noted in 1980 when these provisions were extended to agricultural workers: "The requirement for reporting time pay historically has been included in the Commission's orders on the basis that it is necessary to employees' welfare that they be notified in advance when changes in their starting time must be made. It has deemed a maximum of four hours' pay adequate to encourage proper notice and scheduling." (See Statement as to the Basis Upon Which Industrial Welfare Commission Order No. 14-80 Regulating Wages, Hours, and Working Conditions in the Agricultural Occupations, Is Predicated, section 5; SMJN Exh. 4.)

Like overtime, reporting time pay was created to secure employer obedience with proper scheduling practices, while compensating employees for associated loss. (See, e.g., *California Mfrs. Ass'n, supra,* 109 Cal.App.3d at 112 (purpose of reporting time pay is to encourage proper notice and scheduling, which is related to employee welfare; it is "an

appropriate device for enforcing proper scheduling consistent with maximum hours and minimum pay requirements"); *California Hotel and Motel Ass'n v. IWC* (1979) 25 Cal.3d 200, 205, fn. 7 (summarizing the reporting time pay device, and stating that "[a]n employee is to receive a specified minimum *compensation* when he is required to report to work but is not provided half the normal day's work, subject to exceptions." [emphasis added.].)

According to the author of the Employers Group *Amicus Curiae* brief, California provides for reporting time pay, or "show-up pay," "in order to encourage proper scheduling and notice to employees when changes in hours are necessary, [and] to *compensate* nonexempt employees for certain unworked but regularly scheduled time." (Simmons, Wage and Hour Manual for California Employers (Castle Pub. 11th ed. 2005) §7.15, at 251 (emphasis added); SMJN Exh. 7); see also *Monzon, supra*, 224 Cal.App.3d at 34 (citing Simmons, Wage and Hour Manual for California Employers).)

The DLSE also treats reporting time pay as wages. As set forth in a January 29, 2003 DLSE opinion letter, "[t]he Reporting Time *wage* which must be paid is a minimum requirement for being called into work. Thus, under California law, … the employer is still required to *compensate* the

employee [when sent home after less than half a day's work."] (EG (KCP) Request for Judicial Notice, Exh. I, at 2 (emphasis added).)[13]

Similarly, the DLSE Enforcement Manual expressly recognizes the dual purpose of the "reporting time premium": "[the] requirement is designed to discourage employers from having employees report unless there is work available at the time of the reporting and is further designed to reimburse employees for expenses incurred in such situations."[14] (DLSE Enforcement Manual §45.1.2.1, revised March 2006, SMJN Exh. 6.)

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[13] Administrative agency opinion letters, though not adopted through Administrative Procedures Act ("APA") rulemaking, may nonetheless be entitled to varying degrees of judicial deference. In *Yamaha Corp. v. State Bd. of Educ.* (1998) 19 Cal.4th 1, 7-8, the Court explained that "[a]n agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts; however ... the binding power of an agency's interpretation of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation…Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth." (See also *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 815 (court considers and gives deference to two DLSE opinion letters.) In this case, the opinion in question expresses a "long-standing" view that the DLSE "has consistently maintained." *Yamaha*, 19 Cal.4th at 12-13.

Given that Employer *Amici* submitted this opinion letter for judicial notice, Murphy assumes they have no objection to Murphy's citation of it.

[14] In *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571-577, the Court held that certain portions of the then-current DLSE Operations and Procedures Manual that purported to interpret IWC wage orders were invalid for failure to comply with the rulemaking provisions of the APA, to the extent those portions were not restatements or summaries of statutes, duly promulgated regulations, court decisions, case-specific administrative adjudications, or previously issued opinion letters. After

As to legislative design, unlike overtime pay, reporting time pay is *not* directly pegged to actual time worked. An employee who reports to work when scheduled, but is given no work, or any work up to half a day's regular schedule, is entitled to be paid half a day's regularly scheduled work at his or her regular rate of pay. This amount must be at least two, but no more than four hours of pay. For example, if an employee regularly works an eight hour day, reports to work, and is sent home, that employee is entitled to be paid four hours of pay, even though the employee performed no labor.

Thus, reporting time pay encourages employers to schedule appropriately, while compensating employees for the inconvenience and missed opportunities caused when an employee comes to work as scheduled, only to find that there is little or no work available.

Tidewater, the DLSE issued a newer version of its Enforcement Manual, and courts have considered provisions from that Manual. (See, e.g., *Koehl v. Verio, Inc.* (2006) 142 Cal.App.4th 1313, 1334 (citing DLSE Enforcement Manual §34.3.1 with approval); *Lujan v. So. Cal. Gas Co.* (2002) 96 Cal.App.4th 1200, 1212 (citing DLSE Enforcement Manual §10.85 with approval); *Wang v. Chinese Daily News* (C.D. Cal. 2006) 435 F.Supp.2d 1042, 1055, 1059 (citing three provisions of DLSE Enforcement Manual).)

The provisions of the DLSE Enforcement Manual cited in this brief are consistent with all other interpretations, and are entitled to deference.

c. Split Shift Pay

KCP and its *Amici* completely ignore Murphy's discussion of split shift pay. (See OB 23-24.)

IWC Wage Order §4, entitled "Minimum Wages," provides that "[w]hen an employee works a split shift, one (1) hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment." (See, e.g., 8 Code Regs., §11070, subd. (4)(C); see also *California Hotel and Motel Ass'n, supra*, 25 Cal.3d at 205, fn. 7 (summarizing the minimum wage section of the Wage Order by stating "[t]he minimum wage is $2.50 per hour. The learners' rate is $2.15 for the first 160 hours in training. Minors are paid $2.15 an hour when not more than 25 percent of the employer's work force is made up of minors, except during school vacation. An additional $2.50 is payable to any employee who works a split shift. The minimum wage provisions do not apply to apprentices.").) A split shift is defined as "a work schedule which, is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods." (See, e.g., 8 Code Regs., §11070, subd. (2)(L).)

In 1947 the split shift provision was added as subsection (f) to the minimum wage provision of Order 1 and mandated that "On any day in which an employee works a split shift, sixty-five cents (65¢) per day shall

be paid in addition to the minimum wage."[15] (See IWC Wage Order No 1R, Effective June 1, 1947; SMJN Exh. 5.) The provision was subsequently revised to exclude situations where the employee lived at the place of employment and ultimately extended to most Orders. When the IWC considered the provision in connection with the amendment of the Agricultural Occupation Order, it noted that "The Commission continued the split-shift provision on the basis that a minimum wage worker's income should not be eroded by the additional expense involved in working a split-shift." (See Statement as to the Basis Upon Which Industrial Welfare Commission Order No. 14-80 Regulating Wages, Hours, and Working Conditions in the Agricultural Occupations Is Predicated, section 4; SMJN Exh. 4.)

Although the split shift premium has received little judicial attention, the few cases that refer to split shift pay also consider it to be a form of wages. As with reporting time pay, no case has challenged split shift pay to be something other than wages throughout its nearly fifty years of existence. (See, e.g., *Leighton v. Old Heidelberg Ltd.* (1990) 219 Cal.App.3d 1062 (repeatedly referring to split shift pay as "premium," and "pay"); *Kerr's Catering Serv., supra*, 57 Cal.2d at 324-325 (describing

[15] At the time the minimum wage for most workers was $.65 per hour, however learners and minors, who could be paid at the rate of $.50 per hour, were still entitled to split shift pay at the rate of $.65 per hour.

overtime, split shift, and reporting time pay together as elements of pay that "affect the wage"); Simmons, Wage and Hour Manual for California Employers, §1.4(j) at 13-14 and §6.9 at 224-225, SMJN Exh. 7 (discussing "split-shift premium").)[16]

As to legislative design, an employee who works a split shift (such as a waitperson who is scheduled to work a lunch shift until 2:00 p.m., then goes home, and is scheduled to return to work at 6:00 p.m. for a dinner shift),[17] is entitled to "one hour's pay at the minimum wage." (See, e.g., 8 Code of Regulations §11070, subd. (4)(C).) Thus, split shift compensation has been set at one unchanging value, and does not fluctuate based on hours worked. In fact, an employee receives split shift pay precisely because of a period of *non-work* in the middle of a day.

d. Meal and Rest Pay

As described in the Opening Brief, the right to meal and rest breaks developed out of the "obvious" and "basic" demands of an employee's health and welfare. (OB at 10-13.) In 2000, in order to "address a lack of employer compliance" with the existing meal and rest requirements, the

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[16] "The very definition of 'split shift' implies the arrangement is for the benefit of the employer: 'Split shift' means a work schedule which is interrupted by nonpaid nonworking periods established by the employer, other than bona fide rest or meal periods.' (Cal. Reg. Notice Register 84, No. 23, p.773.)" (*Leighton, supra,* 219 Cal.App.3d at 1077, fn. 2 (Johnson, J., dissenting).)

[17] See, e.g., *Leighton, supra*, 219 Cal.App.3d at 1065.

IWC amended the wage orders to provide compensation for workers, and at the same time add a financial disincentive for employers, by requiring that employers pay employees "one hour of pay at the employee's regular rate of compensation" if employers did not provide the mandated meal or rest breaks. (See OB at 10-13 and authorities cited therein.) Thus, IWC Commissioner Broad, who introduced the meal and rest payments, focused on the need for remediation, noting that without the meal/rest pay provisions, "the only remedy is an injunction against the employer." [18] (IWC Hearing Transcript, June 30, 2000, Murphy's Motion for Judicial Notice ("MJN") Exh. 4 at 25.) Commissioner Broad then drew a specific parallel between the functionality of meal/rest pay and overtime pay:

> And, of course, the courts have long construed overtime as a penalty, in effect on employers for working people more than full – you know, that is how it's been construed, as more than the – the normal daily workday. It is viewed as a penalty and a disincentive in order to encourage employers not to. So it is in the same authority that we provide overtime pay that we provide this extra hour of pay [for a missed meal or break period].

(*Id.* at 30.)

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[18] Despite Commissioner Broad's express concern about the lack of employee remedy, Employer *Amici* boldly assert "*There is not the slightest inkling that the legislative purpose was to provide damages compensation in any respect.*" (CELC (KCP) at 46; emphasis in original.) This is a gross overstatement. The regulatory and legislative history of meal and rest payments expresses concern for the lack of remedies (other than injunctions) for employees who fail to receive the benefit of required breaks. This is set forth *infra* at 59-66. (See also OB at 32-36; CELA (Murphy) at 7, 8-12.)

With respect to legislative design, the amount of meal/rest pay (like overtime pay and reporting time pay) is tied to the individual employee's regular rate of compensation. Like split shift pay, meal/rest pay is set at a specific amount of time (one hour), that does not vary by situation. Like reporting time pay and split shift pay, an employee does not receive higher meal/rest pay by working more hours. Each of the premiums is the *only* compensation an employee receives for the intangible losses incurred (extra fatigue, inconvenience, lost opportunity, etc.) when an employer does not honor the minimum labor standard that the premium is aimed at enforcing.

These forms of premium pay also parallel each other in that they embody statutory rights, combined with compensation for not receiving the benefit of those rights. Employers are then subject to penalties for violation of these rights. For example, violations of the overtime, reporting time, split shift, or meal and rest pay provisions that result in an underpayment of wages trigger §558, and subject an employer to civil penalties payable to the State. (See also OB at 26, fn. 19; CELA (Murphy) at 22-26.)

All four forms of premium pay also share the characteristic that they are not included in counting the number of hours worked for purposes of determining when an employee qualifies for overtime pay. This makes perfect sense. All of the premiums are intended to compensate employees for intangible loss, not to count as additional hours worked in the standard eight-hour day toward eligibility for overtime or double time pay. For

example, an employee who works nine hours is paid for nine and a half hours (eight hours at regular pay, and one hour at time and a half pay). That employee must work an additional three hours (not two and a half) on that same day to qualify for the double time premium. This is because counting the overtime premium as time worked would result in an unfair "pyramiding" effect. (See, e.g., *Bay Ridge*, *supra*, 334 U.S. at 464 (overtime premium is excluded from calculation to prevent pyramiding problem); *Monzon, supra*, 224 Cal.App.3d at 33-34 (same); CELA (Murphy) at 11-12.)

The DLSE Enforcement Manual takes a similar view, even referring to meal/rest payments as "meal and rest period premium pay:"

> 46.7.3 "Reporting time pay, split shift differential, meal period premium pay, and rest period premium pay, although paid to employees in hourly increments as required under Wage Orders, do not constitute 'hours worked' for purposes of calculating whether overtime is owed.")

(DLSE Enforcement Manual §46.7.3, SMJN Exh. 6.)

Employer *Amici* make a somewhat confusing argument on this point, but in the end, their point supports the interpretation that §226.7 payments are wages. Employer *Amici* cite to the IWC Statement of Basis, which states that "an employer shall not count the additional hour of pay as 'hours worked' for purposes of calculating overtime pay." (EG (KCP) at 30-31.) As discussed above, this makes sense, and is completely in line with the treatment of overtime, reporting time, and split shift premiums. *Amici* then

use this IWC statement, which discusses the determination of hours worked for purposes of overtime *eligibility*, as the springboard for an argument about the "regular rate of pay," which is a different but related concept. The "regular rate of pay" is the basis for the computation of the overtime *rate*. Overtime, reporting time, and split-shift premiums are not included in the regular rate of pay. It would stand to reason that meal and rest premiums should also be excluded from the regular rate of pay calculation, for the same reasons all of these "premiums" are not included in the determination of overtime *eligibility*. (DLSE Enforcement Manual §49.1.2.4, subds. (5) and (6); §49.1.3, SMJN Exh. 6.)

Most importantly, the portion of the IWC Statement of the Basis quoted by Employer *Amici* presents further evidence that the IWC considered meal and rest payments to be pay, not penalties. If the IWC intended the payments to be penalties, there would have been no need to discuss whether or not they should be included in the calculations for overtime pay entitlement, or as part of an employee's regular rate of pay.

In sum, meal and rest payments fall squarely within the category of premium pay devices. Although all four types of premium pay achieve their ends through slightly different legislative designs, all share the dual function of compensating employees for intangible loss, while encouraging employer compliance with basic labor standards. By circumventing the tenets of statutory construction, Employer *Amici* skirt the analysis of meal

and rest pay within this overall context. They downplay these important parallels by refusing to talk about them.

2. Like Other Forms of Pay, §226.7 Payments Compensate Employees when They Do Not Receive the Benefit of a Statutory Right, and Are Therefore Subject to Code of Civil Procedure §338's Three-Year Statute of Limitations for Statutory Liabilities

Employer *Amici* argue that if meal and rest payments serve the dual function of compliance and compensation, they cannot be governed by the three-year statute of limitations, which applies to liabilities created by statute, *other than* penalties. (See CELC (KCP) at 46; EG (KCP) at 29.) In other words, Employer *Amici* claim that a statutory payment must be purely compensatory in order to be something "other than a penalty" for purposes of Code of Civil Procedure §338, subd.(a). [19] This is incorrect. For example, even though overtime premiums are also described as "penalties" due to their dual function of compliance and compensation, they nevertheless are considered wages, subject to §338's three-year limitations period. (See *Cortez, supra,* 23 Cal.4th at 178 (overtime pay constitutes earned wages); *Aubry, supra,* 201 Cal.App.3d at 404 (applying §338 to overtime claims).)

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[19] The only authority Employer *Amici* offer for this proposition is a footnote in *Corder v. Houston's Restaurants, Inc.* (C.D. Cal. 2006) 424 F. Supp.2d 1205, 1210, fn. 3. *Corder,* in turn, does not analyze the issue, and only cites Code of Civ. Proc.§338(a).

In holding that overtime claims were subject to the three-year limitation period, the *Aubry* court applied a long-standing test for identifying "liabilities created by statute" for purposes of Code Civ. Proc. §338:

> An obligation is created by statute if the liability would not exist but for the statute, and the obligation is created by law in the absence of an agreement. [Citations omitted.] Under this definition plaintiff's cause of action to recover overtime compensation is based on a liability created by statute. At common law there is a presumption that an employee volunteers extra services performed within the scope of his employment or that his salary is intended to compensate him also for the extra work. [Citation omitted.] Accordingly, where an employee rendering extra services receives a regular salary and such services are similar to his regular duties, the employer has no obligation to pay him for the additional services absent an express contract to that effect. [Citations omitted.] Under the Labor Code, on the contrary, absent an explicit wage agreement a fixed salary does not serve to compensate an employee for the number of hours worked in excess of the wage order standard. [Citation omitted.] Thus, an employer's obligation to pay overtime compensation to his employee would not exist but for the Labor Code. An action to enforce that obligation therefore is governed by the three-year statute of limitations.

(*Aubry*, 201 Cal.App.3d at 404 (citations omitted).)

Similarly, the right to breaks, and the right to be paid for missed breaks, are pure creatures of statute and regulation. The employer's obligation to pay meal and rest premiums to his employee would not exist but for the Labor Code and Wage Orders. None of these rights existed at common law. Accordingly, an action to enforce the meal and rest pay obligation is governed by §338's three-year statute of limitations. (See also *Lorenzetti v. American Trust Co.* (N.D. Cal. 1942) 45 F. Supp. 128, 139,

rev'd on other grounds sub nom. *Rosenberg v. Semeria* (9th Cir. 1943) 137 F.2d 742 (rejecting argument that Fair Labor Standards Act ("FLSA") liquidated damages provision was a penalty subject to one-year limitations period; §338 applied to FLSA claims for overtime and liquidated damages, which are liabilities created by statute that would not exist but for the statute); *Abram v. San Joaquin Cotton Oil Co.* (S.D. Cal. 1942) 46 F.Supp. 969, 975 (same).)[20]

To resolve the statute of limitations question presented in this case, the Court need not specifically decide that §226.7 payments are wages. It need only decide whether or not they are penalties for purposes of Code of Civ. Proc. §340. Given the language of §226.7, as well as the context in which it exists, §226.7 payments are wages, and also more generally, are liabilities created by statute subject to Code of Civ. Proc. §338.[21]

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[20] At the time *Lorenzetti* and *Abram* were decided, the FLSA did not contain its own statute of limitations for these claims, and therefore courts looked to state law to identify the appropriate limitations period. *Abram*, 46 F.Supp. at 975. The FLSA subsequently was amended to include a statute of limitations provision. (29 U.S.C. §255.)

[21] Should this Court decide that §226.7 payments are *not* wages, but are rather a type of liquidated damage award, they should not necessarily be characterized as penalties for purposes of the statute of limitations, because they are not penal in nature. (See, e.g., *Lorenzetti* and *Abram, supra;* Murphy's Reply Brief ("RB") at 6, fn. 3; ACCLC (Murphy) at 12-17.)

3. Employer *Amici's* Arguments Are Based on Misconceptions

Employer *Amici* offer several arguments in support of their desired conclusion that meal and rest payments are penalties. As previously explained, these arguments do not take into account the full context within which meal and rest payments function, resulting in a number of misconceptions.

a. The Misconception that Employees Suffer No Damage when Their Employers Fail to Provide Full, Timely Break Periods

As is true for the other premium wages discussed *supra*, meal and rest pay is the *only* compensation an employee receives for the losses incurred when working outside an established minimum labor standard – in this case, the losses associated with failure to receive the benefit of the statutory right to a break. Employer *Amici* do not point to any sum of money (outside of §226.7 payments) that compensates employees for these intangible losses.

Instead, Employer *Amici* argue that if a worker gets paid for the actual time spent working instead of eating, the worker is fully compensated; since the employee is already compensated, meal/rest pay is "in addition" to payment for time worked, and therefore must be a penalty. (See, e.g., (EG (KCP) at 10-11; 23-25; Yankee (KCP) at 7-8; Circuit City (KCP) at 15-16.) This statement amounts to saying: "Ms. Farm Worker, I

realize you just labored for eight hours without any of the breaks to which you are entitled by law, but since I am paying you for all the time you actually worked, I don't see that you've lost anything." In this manner, Employer *Amici* resolutely refuse to acknowledge that workers experience a loss when they can't reliably take a timely break to rest, eat or take care of personal business – a break that is their statutory right. Employer *Amici's* denial of harm would hold no meaning for workers who must continue to labor in the sun or behind a machine, or at a computer, who are not allowed to stop to eat a snack, stretch, or call home to check on a sick child. Simply getting paid for time worked does not amount to receiving compensation for these kinds of losses.

Another example helps illustrate the point. A California employee is entitled to two compensated ten-minute rest periods per eight-hour day. (See, e.g., 8 Code Regs., §11070, subd. (12).) Thus, an employer must pay an employee eight hours of pay for seven hours and forty minutes of work. Consider two people performing the same job at the same rate of pay; one receives the benefit of his statutory right to breaks, the other does not. At the end of the day, since the employer must pay for rest periods, both workers are paid *the exact same amount*. But one suffered a loss – working through breaks and not getting a chance to rest. That worker is entitled to a meal and rest payment to compensate for that loss; there is no *other* compensation for that loss.

Employer *Amici* do not challenge the long-established fact that California's break requirements are necessary for healthy and safe work environments.[22] If Employer *Amici* are correct that employees suffer no harm when they cannot take timely breaks, then why are breaks regulated at all?[23] The provision of breaks during the workday meets the "obvious" and "most basic demands of an employee's health and welfare." (*California Mfrs. Ass'n, supra,* 109 Cal.App.3d at 115.) The very fact that lawmakers created workplace regulations with respect to breaks *highlights* that workers suffer losses when they cannot rely on employers to provide breaks voluntarily. There are short term and long term costs associated with the failure to provide work breaks. (See Low Wage Worker Brief (Murphy) at 21-23; ACCLC (Murphy) at 5-7.) As with the other kinds of premium pay, since the associated losses are difficult to quantify, the Legislature and/or IWC affixed the measure of compensation through different designs – in

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[22] The Wage Orders have required that employers provide regular meal and rest periods since 1916 and 1932, respectively. (*California Mfrs. Ass'n, supra,* 109 Cal.App.3d at 114-115; *IWC, supra,* 27 Cal.3d at 715, 724 (meal and rest breaks are part of the remedial worker protection structure); *Bono Enter., Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 975 (duty-free meals are necessary for employee welfare), disapproved on other grounds, *Tidewater Marine Western, supra,* 14 Cal.4th at 574.)

[23] Employer *Amici* admit that the failure to provide meal and rest breaks is a "public wrong." (CELC (KCP) at 29.) This "public wrong" translates into individual harm.

the case of §226.7, with an hour of pay at the employee's regular rate of compensation.

Employer *Amici* argue that if meal and rest pay were truly compensatory, it would vary depending on how much the individual employee "suffered." (See, e.g., EG (KCP) at 27-28; CELC (KCP) at 28.) This argument is off-track, since no form of California employment compensation functions in such a manner. Overtime, double time, reporting time and split shift pay all compensate according to uniform formulae, despite individual variations in experience. Workers do not have to prove individualized levels of wear and tear in order to set the amount of overtime premium.

Murphy cited a body of cases illustrating that where the Legislature assigned a compensatory amount because actual damages are difficult to calculate, such amounts are not penalties for purposes of the statute of limitations. (See OB at 26, fn. 18, citing *Stone v. Travelers Corp.* (9th Cir. 1995) 58 F.3d 434, 439 (ERISA remedy of $100 per day for failure to provide benefits documentation is not a penalty under Code Civ. Proc., §340); *Rivera v. Anaya* (9th Cir. 1984) 726 F.2d 564, 568-569 (statutory remedy of actual damages or $500 for farm labor contractor registration laws is not penalty, since damages may be difficult to calculate, but instead is statutory remedy subject to Code Civ. Proc., §338); *Overnight Motor Transp. Co. v. Missel* (1942) 316 U.S. 572, 583-584 (FLSA liquidated

damages for failure to pay overtime is compensation, not penalty; "the retention of a workman's pay may well result in damages too obscure and difficult of proof"), superseded by statute on other grounds, *TWA, Inc. v. Thurston* (1985) 469 U.S. 111, 128; *Hays v. Bank of America* (1945) 71 Cal.App.2d 301, 304-305 (same).)

Employer *Amici* do not attack the point directly, presumably because it is a straightforward, common-sense proposition. Instead, Employer *Amici* take aim at the underpinnings of these cases, claiming that they rest upon a shaky foundation. (CELC (KCP) at 21-25.) This argument contradicts portions of Employer *Amici's* own presentation.

For example, Employer *Amici* attack *Rivera*, claiming it was based on cases that determined whether a statute was "penal in nature" for purposes of enforcement of the federal Full Faith and Credit Clause. Employer *Amici* cry foul, claiming "this legal doctrine has *no bearing at all* on the meaning of statutory 'penalty' as used in Code of Civil Procedure section 340, subd. (1) or other legal contexts potentially relevant to the present case," citing the Court to *Moss v. Smith* (1916) 171 Cal. 777, 784. (CELC (KCP) at 21; emphasis in original.) Interestingly, ten pages earlier, Employer *Amici* cite *Moss*, and indeed, devote an entire section inviting the Court to consider "penalty" cases outside the context of the statute of

limitations. (CELC (KCP) at 11-13.) This undifferentiated "mix and match" citation style exemplifies Employer *Amici's* approach.[24]

As noted by ACCLC *Amici*, "the key question that has come up in many contexts besides the narrow question of which of California's statutes of limitations applies to a given cause of action is whether the remedy is designed primarily to punish the wrongdoer or to compensate the party injured by the wrongdoing." (ACCLC (Murphy) at 10-11.) For example, the question of whether a statute is "penal in nature" arises with respect to the Full Faith and Credit Clause, (see, e.g., *Huntington v. Attrill* (1892) 146 U.S. 657, 673-674 (test of whether something is a penalty is whether it is, "in its essential character and effect, a punishment against the public, or a grant of a civil right to a private person"); *Chavarria v. Superior Court* (1974) 40 Cal.App.3d 1073, 1077 (question is not whether statute is "penal in some sense…. The purpose must be, not reparation to one aggrieved, but vindication of the public justice …"); and public entity immunity from "punitive" statutes. (See, e.g., *California Ass'n of Health Facilities v.*

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[24] Although Murphy has taken pains to indicate to the Court where cases discuss penalties outside the context of the statute of limitations (see, e.g., OB at 23, fn. 15), Employer *Amici* do not always make this clear. For example, Employer *Amici* cite *Garrett v. Coast & Southern Federal Savings & Loan Assn.* (1973) 9 Cal.3d 731, *Starving Students, Inc. v. DIR* (2005) 125 Cal.App.4th 1357, and *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, all for various propositions, and without indicating to the Court in any way that these cases construe whether a statute is "penal" in nature for purposes *other than* the statute of limitations. (See EG (KCP) at 2, 5, 12-13.)

Department of Health Serv. (1997) 16 Cal.4th 284, 294-295 (Long Term Care Health, Safety and Security Act not "essentially penal in nature but remedial" and "preventative").)

While it is not necessary for this Court to reconcile the disparate uses of the term "penalty," Murphy agrees with the ACCLC *Amici* that "the better view is that a statutory remedy constitutes a 'penalty' under Code of Civil Procedure section 340 *only* when it is essentially 'penal' in nature…." (ACCLC (Murphy) at 11; emphasis in original.)

b. The Misconception of "Disproportionality"

Next, Employer *Amici* declaim that meal and rest pay cannot be a wage because it lacks "proportionality" to the "damage sustained."[25] They submit charts and tables, and describe various mathematical outcomes in an effort to illustrate their point. (See, e.g., EG (KCP) at 5-9; CELC (KCP) at 26-29; Circuit City (KCP) at 5-8; Yankee (KCP) at 7-9.) When boiled down, the charts and tables state the obvious: unlike overtime pay, meal and rest pay is not directly tied to the amount of time an employee works. Employer *Amici* thus argue that if payments do not function exactly like overtime in this respect, then those payments cannot be wages. No such rule exists. Moreover, Employer *Amici's* argument ignores the different

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[25] See, e.g., EG (KCP) at 5-9; Circuit City (KCP) at 5-7. Employer *Amici* cite *County of Los Angeles v. Ballerino* (1893) 99 Cal. 593, 596 to support this argument, which Murphy discusses at 45-51, *infra*.

legislative designs within the context of the Labor Code and IWC Wage Orders, in which premiums do not vary directly with time worked, and yet still are wages.

For example, reporting time pay functions very differently from overtime. If an employee usually works an eight hour shift, reports to work as regularly scheduled, and is sent home without working, that employee is entitled to four hours of pay at his or her regular rate of compensation. (See, e.g., 8 Code of Regulations §11070, subd. (5)(A).) Thus, the worker receives four hours of pay for *performing no work at all*. The disconnection between reporting time pay received and time worked is far greater than any of the meal and rest illustrations offered by *Amici*, but makes sense in light of the underlying twin goals of compensation and compliance.

Split shift pay provides another example of a premium that bears no relation whatsoever to time worked. In fact, employees earn split shift pay when they experience periods of unpaid *non-work* in the middle of two shifts on the same day. The split shift pay is a fixed sum, and does not change if the employee must wait 45 minutes, two hours, or four hours between shifts scheduled on the same day.[26]

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[26] Similarly, §226.7 pay is set at one hour of pay per day, if the employee does not receive one or both breaks.

Thus, reporting time pay and split shift pay bear even less relation to time worked than meal and rest pay.[27] Reporting time, split shift, meal/rest, and even overtime pay may not embody a perfect fit between the amount of compensation paid and the loss incurred, but they are a *reasonable* fit for losses that are hard to measure. All are forms of premium pay.

Employer *Amici's* focus on percentages and multiples provides more drama than illumination. Because meal/rest pay is a relatively modest sum, (one hour of pay), it can never be wildly disproportionate in actual amount to the loss an employee incurs.[28] A worker who earns $9.50 per hour and is

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[27] This helps explain why Employer *Amici* are virtually silent with respect to reporting time pay and split shift pay, since these analogies lay bare the weaknesses of their showcase argument. It is also worth pointing out that many types of wages do not bear relation to "actual time worked," including salary, piecework, and commissions.

[28] Employer *Amici* exaggerate their "proportionality"argument by erroneously claiming that employees may receive no more than one hour of meal/rest pay per day, even if an employer completely refuses to provide all meal and all rest breaks. (See EG (KCP) at 7, fn. 4, 28-29; CAHF (KCP) at 7-8; Yankee (KCP) at 7.) After analyzing the statutory and regulatory language, the trial court held that employees are entitled to receive up to one hour of rest pay (for missing one or two breaks), and one hour of meal pay, per day. This interpretation is consistent with the language of the statute and wage order; moreover, "a limit of one premium per day would create a perverse incentive for employers who were inclined not to provide meal periods to fail to provide rest periods as well, since they would not be subject to greater liability." (CT 538.) Thus, an employee who received no rest or meal breaks on a given day (as was often the case for Murphy), would be entitled to receive a maximum of two hours of premium pay for that day. *Amicus Curiae* Circuit City, et al., agree with this interpretation. (Circuit City (KCP) at 7 (see chart).) The Court of Appeal did not reach the

not given one or both breaks on a particular day will receive an additional $9.50 in his paycheck for that day. (See also ACCLC (Murphy) at 5-9.) Making employers pay an extra hour of pay when they do not provide employees with statutory breaks is reasonable compensation, well within the range of the comparable legislative designs. It also helps secure employer compliance with the break laws. In this way, meal and rest pay functions *exactly* like other forms of California premium pay, and is not the arbitrary, dramatically disproportionate penalty that Employer *Amici* try to portray through their charts.

Employer *Amici* also attempt to gain traction by pointing out that an employee receives a break premium even if (1) the employer shorts the employee by providing a seven rather than ten minute break, or (2) the employer provides a meal period, but it is an hour late. (EG (KCP) at 7-9; CELC (KCP) at 26-29; Circuit City (KCP) at 7.) As explained by the Low Wage Worker *Amici*, (Low Wage Worker Brief (Murphy) at 19-21; ACCLC (Murphy) at 5-7), this misses the point. The IWC regulated not only the right to meal and rest breaks, but their length and timing as well. All of those factors are important; an employer who fails to follow any one of the factors also fails to provide employees with their full statutory rights.

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issue. (*Murphy v. Kenneth Cole Prod., Inc.*, previously reported at (2005) 134 Cal.App.4th 728, 754, fn. 25.)

The Wage Orders are written in a way to provide timely, full, and dependable breaks to employees. When an employer shorts the employee by even two or three minutes,[29] it might make the difference in having adequate time to walk two blocks to the ATM machine and back, or wash the pesticide off one's hands before eating a quick snack, or for a food processor to have time to take off protective clothing and put it back on before rejoining the line. When an employer provides a meal period, but it is untimely, the worker may have missed a scheduled opportunity to pay a visit to a child in a childcare center, or to be on time for a phone call with a school official, or to talk to a health care provider.

Although it may be easy for those of us who labor in workplaces with chairs, phones, and sufficient job flexibility to take such things for granted, many workers rely on regulated opportunities to rest, or take care of non-work related tasks. Some of these tasks can only be accomplished during the workday. Employer *Amici's* charts and tables simply illustrate the many ways in which employers may fail to provide employees with their legal rights.

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[29] Of course, if the short break was an isolated and negligible occurrence, it is possible that it would be not compensable under the *de minimis* doctrine, an issue not presented in this case. (See *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 692, superseded by statute on other grounds as stated in *IBP, Inc. v. Alvarez* (2005) 546 U.S. 21.) In this case, Murphy *never* received rest breaks, and only rarely received meal breaks. (CT 536.)

More broadly speaking, there are many examples of California wages whose amounts do not necessarily bear a relation to "actual service performed" or "actual detriment suffered." (Yankee (KCP) at 7.) These include insurance premiums, payments to the unemployment insurance fund, and payments to a health and welfare fund. All are considered "wages" under Labor Code §200(a)'s broad definition. (See OB at 30-31; EG (KCP) at 18-19, fn. 7; see also discussion *infra* at 57-59.) The logical extension of Employer *Amici*'s argument is that any employee compensation that is not "proportional" to the "actual service performed" or "actual detriment suffered" cannot be a wage. This is not how California wages function, nor is it how they are defined.

As set forth *supra*, the legislative design for all four types of premium pay is slightly different. Yet all are the same in that they represent the Legislature's price tag for losses that cannot easily be valued. Like reporting time, overtime and double time pay, meal/rest pay bears relation to the loss incurred in that it is calculated at that specific employee's regular rate of pay, and represents modest and reasonable compensation for loss of the right to breaks.

c. The Misconception Regarding "Illegality"

Employer *Amici* also argue that scheduling employees to work overtime is permissive, but failure to provide breaks is not; therefore

§226.7 payments (unlike overtime payments) must be penalties. (See, e.g., EG (KCP) at 21-22; CELC (KCP) at 3-4, 41-42; Yankee (KCP) at 8-9.)

To begin with, as explained by Low Wage Worker *Amici*, Employer *Amici's* sweeping statement that scheduling overtime is always permissive rather than illegal is flatly wrong. The overtime statutes and regulations are worded to completely prohibit the imposition of overtime in certain circumstances, the violation of which is illegal, and potentially criminal. (See Low Wage Worker Brief (Murphy) at 10-13, discussing Labor Code §§510, 552-554, and 8 Code of Regulations, §11070, subd. (3)(A)(1)(a) and (b).) Nevertheless, employees are always entitled to overtime *pay*; the overtime does not transform into a penalty for purposes of the statute of limitations if it arises from illegal employer scheduling practices.

More generally, Employer *Amici's* argument has surface appeal, but ultimately lacks basis. It confuses *remedy* with *liability*. Liability occurs when one engages in unlawful action. But the remedy for the unlawful action is not necessarily a penalty. It is unlawful to discriminate against a member of a protected class in his or her compensation. (Gov't Code, §12940(a).) But the remedy – backpay – is wages, not a penalty. Specifically in the context of California wage and hour law, an employer's "failure to promptly pay [overtime wages is] unlawful." (*Cortez v. Purolator Air Filtration Prod. Co., supra*, 23 Cal.4th at 168.) The remedy under Bus. & Prof. Code §17203, disgorgement of the wages, constitutes

restitution, not damages or penalties. (*Id.* at 173-179.) Paying less than minimum wage is "unlawful." (§1197; Wage Order §4 ("Every employer shall pay [no less than the minimum wage].") But the remedy, the unpaid balance, is a wage and not a penalty. (§1194(a); see also OB at 20-21, fn. 14.)[30]

d. The Misconception that Murphy's Interpretation Does Not Comport with Case Law

Employer *Amici* uniformly seize upon a statement from *County of Los Angeles v. Ballerino, supra*, 99 Cal. at 596, that describes a penalty, for purposes of the statute of limitations, as "one which an individual is allowed to recover against a wrong-doer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained."

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[30] In his Opening Brief, Murphy cited *Parker v. Otis* (1900) 130 Cal. 322, aff'd *sub nom. Otis v. Parker* (1903) 187 U.S. 606, which addressed this question, and refused to apply the one-year statute of limitations for penalties, stating "If the constitution, in effect, makes the margin sales of stock unlawful, it does not follow that the action given to recover the money paid for the purchase of such stock is a penal action, or is for the recovery of a penalty." 130 Cal. at 333. In essence, the Court made the common sense ruling that just because something is illegal does not make the remedy a penalty. Employer *Amici*'s attempt to distinguish this case does not address the heart of this holding. (See EG (KCP) at 22, fn. 9.)

In support of its "illegality" argument, CELC quotes Justice Mosk's concurring opinion in *Mills v. Superior Court*, previously reported at (2006) 135 Cal.App.4th 1547, 1557 (CELC (KCP) at 3-4.) The one paragraph quote is the entire sum of Justice Mosk's opinion; it does not appear that he was presented with, considered, or analyzed any of the points raised by Murphy in reaching his conclusion.

Describing this as the "functional test" for penalties, Employer *Amici* rely on *Ballerino* and other cases to support their position that §226.7 payments "function" like a penalty. (See, e.g., EG (KCP) at 1-2, 5-6; CELC (KCP) at 8-9, 19; Circuit City (KCP) at 5-6; Yankee (KCP) at 6-7.)

Employer *Amici's* reliance on the "functional test" is ironic. As noted *supra*, Employer *Amici* all refuse to engage in any analysis of how §226.7 payments *actually function* within the context of California's compensation framework. In fact, they go to some length to distract the Court from performing the functional analysis that inevitably occurs through a routine application of the rules of statutory interpretation. Instead, they isolate statements from disparate cases, and piece them together in an attempt to serve their ends. In actuality, a finding that §226.7 payments are *not* penalties for purposes of the statute of limitations is completely consistent with this body of cases. (See also ACCLC (Murphy) at 2-5, 9-11; Low Wage Worker Brief (Murphy) at 16-18.)

The first catch-phrase offered by Employer *Amici* is *Ballerino's* statement that a penalty is "without reference to the actual damage sustained." Employer *Amici* make no real attempt to explain what this statement means, or how it has been interpreted. Instead, they turn it into a springboard for their arguments that "employees suffer no damage when they work through breaks" and "meal and rest payments have no proportionality to time worked," discussed *supra*.

As ably set forth by the ACCLC *Amici*, the Court revisited the *Ballerino* statement in *Hansen v. Vallejo Electric Light & Power Co.*, *supra*, 182 Cal. 492. In *Hansen*, the Court clarified that an amount is "without reference to the actual damage sustained" when the amount is levied even if damage *did not exist.* The statute in *Hansen* required a power company to pay the modern day equivalent of roughly $1000, plus a continuing $100 per day fine, to homeowners who requested a hook-up to the main power line. This amount was owed, even "though it be conceded that there was no actual damage whatever." 182 Cal. at 495 (see also ACCLC (Murphy) at 3-5.)[31] By contrast, meal and rest breaks are regulated precisely *because* it is harmful to employees not to have them. Section 226.7 payments are the Legislature's device for compensating employees for the intangible losses associated with working through their

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[31] This situation also describes *County of San Diego v. Milotz* (1956) 46 Cal.2d 761, construing a statute that required a court reporter to forfeit 50% of the transcript fee if the reporter did not submit the transcript within ten days of the hearing. This "arbitrary forfeiture of 50 per cent" made "without any reference whatever to the question of damages" constituted a penalty or forfeiture for purposes of the statute of limitations. (*Id.* at 766-767; see also *Goehring v. Chapman Univ.* (2004) 121 Cal.App.4th 353, 387 (statute providing for return of entire tuition for law school's failure to disclose accreditation status constitutes a penalty statute; no actual damage shown); *Anderson v. Byrnes*, *supra*, 122 Cal. at 276 (not a statute of limitations case; court finds provision is "penal in nature" where it required $1000 payment to stockholders, even those who held only one share, for failure of company to post balance sheets; "it is thus apparent that compensation for the actual damage done to the stockholder was not intended to be given by the act.")

guaranteed breaks. They are calculated based on the individual employee's rate of compensation, and an employee only receives meal/rest pay on days he or she does not receive statutory breaks. (See *supra* at 32-43.) As such, meal and rest payments *do* refer to actual damage sustained. To borrow *Hansen's* standard and apply it to §226.7, meal and rest payments are not penalties, because they *are* "fairly construed as an attempt on the part of the legislature to merely establish a rule as to the measure of *actual damages* in such cases." 182 Cal. at 496 (emphasis in original.)

Employer *Amici's* next catch-phrase is that an amount is a penalty when it is intended to "secure obedience" or "compliance" to a public policy. (See, e.g., EG (KCP) at 12-15; CELC (KCP) at 9, 26, 29-30.) Here, Employer *Amici* focus on only half the story. They correctly recognize the strong public policies behind meal and rest breaks as a worker protection measure, and they agree that §226.7 payments foster compliance with that protection. But they argue in a vacuum, ignoring the function of meal and rest payments within the larger context. Employer *Amici* do not acknowledge that California wages – including the minimum wage, prevailing wages, overtime, reporting time, or meal and rest pay – *all* have an aspect of compliance. Within the greater regulatory framework, all of these wages necessarily have the dual function of compliance *and* compensation, for the "regulat[ion of] employment conditions… almost inevitably impose some economic burden upon employers." (*IWC, supra*,

27 Cal.3d at 732; see also OB at 16-26; discussion *supra* at 11-29.) This compliance function does not turn the compensation into penalties. Here, as with overtime and other premium pay, the gravamen of §226.7 is to compensate the employee while enforcing employer compliance with labor standards. (See, e.g., *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22-23; *People v. Triplett* (1996) 48 Cal.App.4th 233, 249, 251-252 (following *Hensler*, finding that gravamen of amount in question was to compel compliance with statute, and therefore was not a penalty.) As such, §226.7 is *not* a penalty for purposes of the statute of limitations.

The rest of Employer *Amici's* citations present statutory schemes that are readily distinguishable from §226.7. For example, in *G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, the court construed a statutory scheme that included a provision for actual damages, plus another for treble damages. The *G.H.I.I.* court held that the claims under the actual damages provision were governed by §338's three-year limitations period, while the treble damages provision constituted a penalty. (*Id.* at 277-280.) Similarly, *Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal. App. 4th 1236, 1243, construed a statutory scheme that included a provision for a flat fee of $300. Since this amount was *in addition* to all actual damages, the court found it to be a penalty. (See also *Menefee v. Ostawari* (1991) 228 Cal.App.3d 239, 243-244 (following *G.H.I.I.* rule that statutes providing for mandatory recovery of damages additional to actual damages incurred, such

as treble damages, are governed by §340); *Munoz v. Kaiser Steel Corp.* (1984) 156 Cal.App.3d 965, 979 (statute provides for double the amount of actual damages).)[32]

By contrast, §226.7 payments are the *only* compensation that employees receive for the intangible losses they incur when employers do not honor their statutory right to breaks. Employer *Amici* point to *no other* compensation, other than the pay that employees already have a right to receive for labor performed during the time the employee was entitled to take a break. Section 226.7 pay *is* the compensation; it is not "in addition" to the compensation.[33]

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[32] Employer *Amici* also discuss *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, which was not a statute of limitations case, but rather discussed whether the Unruh Act prohibited sex-based price discounts. *Koire* states in dictum that the section of the Unruh Act that provides for damages "aside from any actual damages incurred by the plaintiff" is "penal in nature." (*Id.* at 33-34.) This general concept is consistent with the kind of scheme described in *G.H.I.I.* that provides for double or treble damages *in addition* to actual damages. As such, it is readily distinguishable from §226.7. (See also *Hale v. Morgan* (1978) 22 Cal.3d 388 (not a statute of limitations case; discusses statute that permits cumulative $100 fine per day, *in addition* to actual damages.)

[33] Employer *Amici* cite to *Koire* and *Hansen*, claiming they support the proposition that courts have found payments to be penalties "where the payment in question was the *only* payment authorized by the statute." (CELC (KCP) at 19.) *Amici* are incorrect. *Koire* discussed the Unruh Act, which provides for actual damage *plus* up to three times actual damage. (Civ. Code, §52(a).) As explained *supra* at 47, the statute at issue in *Hansen* provided a flat fee, plus a running fee that would be added to the total each day, even though there was *no damage.* These statutes are thus fundamentally different from §226.7.

In sum, applying the common law "functional test" to determine whether §226.7 payments are penalties for purposes of the statute of limitations, the result is that §226.7 payments are *not* penalties because:

(1) They compensate employees for actual loss, and they are the *only* compensation that employees receive on a given day for the intangible loss of working through statutorily guaranteed breaks;

(2) They are set at the specific employee's rate of compensation;

(3) They can be fairly construed as the Legislature's attempt to set a reasonable measure of damages;

(4) They can never amount to more than one hour of pay per day for missed breaks, and one hour of pay for missed meals, and are well within the acceptable range of "proportionality" expressed through other kinds of California compensation for services rendered or damage incurred; and

(5) Like other forms of California compensation, they are intended to secure obedience, *as well as* to compensate employees when they do not receive their statutory right to breaks.

e. Employer *Amici's* Misconceived "Analogies"

Ignoring the similarities between meal/rest pay and other forms of premium pay, Employer *Amici* instead offer up three other Labor Code statutes. First, Employer *Amici* point to Labor Code §§4650 and 972 to support that statutes can contain penalties, even when they do not use the

word "penalty." (CELC (KCP) at 17; Circuit City (KCP) at 6.) This is beside the point. Murphy does not argue that a statute *must* include the word "penalty" in order to be construed as a penalty statute. Murphy *does* argue, however, that in order to determine intent, the plain language of the statute must be analyzed, as well as harmonized within the statutory scheme as a whole. Here, §226.7 contains the words "pay" and "compensation," not "penalty," a word that the Legislature specifically considered and *rejected.* Section 226.7 regulates, and compensates for working conditions. It functions in all key respects like other forms of California premium pay.

By contrast, §4650 arises under the Workers' Compensation provisions -- an entirely different statutory scheme. Section 4650 governs the timing of disability payments. Its structure, function and purpose are fundamentally different from §226.7's, and thus does not aid in its interpretation. Employer *Amici's*' reliance on §972 is similarly unhelpful, as it is also quite different from §226.7. Section 972 involves a remedy for fraudulent misrepresentation. It provides for double damages in a civil action resulting from a violation of §970, which prohibits "influenc[ing], persuad[ing] or engag[ing] any person to change from one place to another … through or by means of knowingly false representations.…" (§970.)

Employer *Amici* also offer §233(d) as an example of a supposed "penalty" statute that does not include the word "penalty," and that uses the employee's wages, ("actual damages or one day's pay, whichever is

greater"), as a "short hand for measuring the amount of a penalty." (CELC (KCP) at 17, 38; §233(d).) Although *Amici* assert that "the statutory payment of 'one day's pay' in this section is *unquestionably* a penalty," (CELC (KCP) at 38; emphasis added), it provides no supporting authority.[34] Obviously, the Court is not presented here with the question of whether §233(d) is a penalty provision. But it may well not be one. Section 233 provides that where employers offer sick leave, employees are allowed to use accrued sick leave to care for an ill family member; subdivision (d) provides that employees deprived of the right to use sick leave for family care are entitled to reinstatement, actual damages or one day's pay whichever is greater, and appropriate equitable relief.[35] Thus, "one day's pay" in §233(d) appears to be a set minimum damage amount, should actual damages be too difficult to prove.

Finally, Employer *Amici* argue that the placement of §226.7 among "penalty" statutes indicates that it is also a penalty statute. (EG (KCP) at 12, 33-34.) While it is true that a court "may consider the overall scheme

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[34] Indeed, there are no reported cases interpreting §233(d).

[35] *Amici* also analogize §233(d) to the remedy in §226(e), which allows employees who do not receive properly itemized paychecks to recover the greater of actual damages, or $50 for the first violation and $100 for each subsequent violation, up to an aggregate penalty of $4,000. Again, *Amici* do not cite any authority for the proposition that §226(e)'s remedy is a penalty. Moreover, *Amici* fail to mention that, unlike §233(d), §226(e) actually contains the word "penalty." (CELC (KCP) at 38.)

[such as divisions, chapters, articles and titles] in which an ambiguous statute is included in order to ascertain its intended meaning (*Medical Bd. v. Superior Court* (2003) 111 Cal.App.4th 163, 175), the maxim presupposes two conditions not present here. First, a court only considers placement in a division or chapter if the statute in question is *ambiguous*. That is not the case here. Second, the placement of a statute only aids meaning if some meaning can, in fact, be ascertained. The Labor Code's structure is not a model of logic or organization, and yields no interpretive value. Division 2 of the Labor Code is entitled "Employment Regulation and Supervision." Chapter 1 within that Division covers §§200-300, and includes all the provisions cited by Employer *Amici*. Chapter 1 is entitled "Payment of Wages."

Indeed, with regard to the section titles, Employer *Amici's* argument runs counter to its position. They cite to §§226, 226.3, 226.4, 226.5, 226.6 and 227 as composing a "string of penalty provisions." (EG (KCP) at 12.) Three of these six section headings (§§226, 226.3, 226.5) explicitly use the word "penalty" in their respective section titles. The other three section titles refer to "citation," "fine," and "punishment" – terms closely related to "penalty." By contrast, §226.7 is simply entitled "Meal or Rest Period." Most significant of all, unlike other statutes in its immediate proximity, §226.7 does not contain the word "penalty," because the Legislature specifically considered, then rejected use of the term. (See *supra* at 8-9;

OB at 13, 32-36.)

4. Like Other Forms of Pay, Meal and Rest Pay Is Owed Immediately by the Employer to the Employee, Rather than Being "Subject to" Enforcement, Like a Penalty

Like other forms of California employment compensation, the legislative device for meal and rest pay makes the hour of pay automatically due and payable to an employee who does not receive the benefit of a meal or rest break. The pay vests immediately, and is not "subject to enforcement," like penalties. (OB at 28-30; RB at 10-11.) Indeed, the Legislature initially considered a true penalty scheme that would be subject to enforcement through a civil suit or administrative wage claim. Lawmakers subsequently dropped this scheme, and adopted the compensation scheme designed by the IWC. (CELA (Murphy) at 3-16; discussion *infra* at 59-66.)

In an effort to downplay the significance of §226.7's self-enforcement mechanism as a characteristic of California wages,[36] Employer *Amici* claim that two penalty statutes – Labor Code §§203 and 4650(d) -- are similarly self-executing. (CELC (KCP) at 49; Circuit City (KCP) at 16.)

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[36] Minimum wages, overtime, split-shift premiums, reporting time pay, as well as meal and rest pay are due and payable immediately and unlike penalties do not require the employee to bring an enforcement action unless the employer unlawfully withholds these payments. (OB at 28.)

First, §203 "waiting time penalties"[37] are *not* self-executing. An employer does not automatically owe an employee §203 penalties. In fact, an employer may raise a "good faith" defense to the nonpayment of wages, which, if accepted by the Labor Commissioner or the court, acts as a bar to the imposition of penalties. (See, e.g., *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7 (finding good faith defense, barring imposition of §203 penalties); *Road Sprinkler Fitters Local Union No. 669 v. G. G. Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 782 (imposing §203 penalties where employer's misclassification of employee was not made in good faith).)

Employer *Amici* also cite §4650, arguing that because this penalty provision is self-enforcing, §226.7 must also be a penalty. (CELC (KCP) at 49.) As already set forth *supra* at 52, the statutes are not analogous. Moreover, §4650 arises under the Workers' Compensation scheme which covers employees who have sustained injuries while working. Disability payments under the Workers' Compensation Act are not wages, but are compensation for the injury to the worker. (*Pollock v Industrial Accident Comm.* (1936) 5 Cal. 2d 205, 209 ("obviously an award for injury under the

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[37] Section 203 provides for up to thirty days of penalties if an employer willfully fails to pay an employee all wages due at separation from employment. (§203.) Interestingly, as a penalty, §203 normally would be subject to §340's one-year statute of limitations; however, the Legislature saw fit to extend this time period by linking the statute of limitations to that which applies to the underlying wages owed. (See OB at 14, fn. 12.)

act is not paid to the employee as wages, but as compensation for the injury"); see also CELA (Murphy) at 14, fn. 7.)

5. Meal and Rest Pay Falls Within California's Broad Definition of "Wages" in Labor Code §200

Employer *Amici* argue §226.7 payments do not fall within §200's broad definition of wages because they are not paid "for labor performed." (*See* EG (KCP) at 19; CELC (KCP) at 41.) This argument does not take into account the expansive language of §200 itself, as well as the case law which construes a wide variety of types of compensation provided to employees to be wages. [38]

Section 200(a) defines "wages" as "all amounts owed for labor performed by employees of every description, *whether the amount is fixed* or ascertained by the standard of time, task, piece, commission basis or other method of calculation." (Emphasis added.) Thus, the statute itself does not require a proportional correlation between labor performed and amount paid. Ignoring this, Employer *Amici* state that meal and rest payments are not amounts owed for "labor performed." (EG (KCP) at 18-20.) But it is precisely the *employee's labor performed* during the time that

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[38] See, e.g., *Estate of Hollingsworth* (1940) 37 Cal.App.2d 432, 436 ("in its legal sense, the word [wage] has been given a broad, general definition so as to include compensation for services rendered without regard to the manner in which such compensation is computed"); *Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1972) 24 Cal.App.3d. 35, 44 (same).

meal or rest breaks should have been provided that triggers §226.7 compensation. Employer *Amici* acknowledge as much. (See EG (KCP) at 18 ("employee seeks penalties for the time he claims he was *unable to cease performing labor*" (emphasis added.).)

Courts have long construed that all compensation paid to employees in connection with their working conditions are wages.[39] Employer *Amici* try to distinguish this well-established, expansive definition of wages by claiming that the case law simply recognizes that wages are those parts of the "compensation package . . . offered in exchange for an employee's labor." (EG (KCP) at 19.) While there is no dispute that "fringe benefits"

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[39] See, e.g., *Suastez v. Plastic Dress-Up, Co.* (1982) 31 Cal.3d 774 (accrued vacation is a wage); *Hunter v. Ryan* (1930) 109 Cal.App. 736, 738 (bonus offered as incentive to attract employees held to be compensation); *Hunter v. Sparling* (1948) 87 Cal.App.2d 711, 725 (pension plan benefits are deferred compensation); *DIR v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1091-1092 (reimbursements for cost of uniforms are wages, since employees' wages are increased "by the amount that in the absence of the regulation they would have to pay toward the cost of their uniforms"); *People v. Alves* (1957) 155 Cal.App.2d Supp. 870, 872 (employer's health and welfare fund payments are wages); *Foremost Dairies, Inc. v. Indus. Acc. Comm.* (1965) 237 Cal.App.2d 560, 580 (employer-paid insurance premiums are wages.) Moreover, Employer *Amici* fail to address the federal cases that have held that §226.7 payments fall within §200's definition of wages. *See Wang v. Chinese Daily News, Inc., supra,* 435 F.Supp.2d at 1058-1059 and *Tomlinson v. Indymac Bank, F.S.B.* (C.D. Cal. 2005) 359 F.Supp. 891, 896.

are wages,[40] non-bargained-for compensation has also been held to be wages. (See, e.g., *People v. Dennis* (1967) 253 Cal.App.2d Supp. 1075, 1077 (mandatory unemployment insurance fund payments viewed as "taxes" by department of employment; "to the worker they clearly are his wages"); see also discussion *supra* at 16-24 re: reporting time pay and split shift pay, which employer must pay to employees when no labor performed).) Meal and rest payments may not be part of the bargained-for exchange, but, like employer-mandated payments to the unemployment insurance fund, insurance premiums, and reimbursement for the cost of uniforms, §226.7 payments fall within the Labor Code's definition of wages.

II. The Regulatory and Legislative History Supports that Meal and Rest Payments Are Compensation, Not Penalties

Employer *Amici* repeatedly urge this Court to reject "labels," ignore statutory language, overlook the words "pay" and "compensation" in §226.7, and discount the fact that lawmakers expressly rejected use of the word "penalty" in §226.7, while using the word elsewhere in the same legislation. (See, e.g., EG (KCP) at 15-16; CELC (KCP) at 37-39.) However, they abruptly change course when discussing extrinsic sources. There, Employer *Amici* seize on every use of the word "penalty" in the

[40] See *Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607 (in addition to periodic monetary earnings, wages include all the benefits to which employee is entitled as part of compensation.)

regulatory and legislative history. This double standard amounts to superficial word play, not a meaningful effort to discern overall intent.

A proper analysis indicates that the IWC was concerned with both the fact that employers were not complying with break requirements, and that employees had no meaningful remedy for being deprived of guaranteed breaks. The IWC implemented the "one hour of pay" remedy in order to meet both of these concerns, expressly invoking the analogy of overtime "premium," or "penalty" pay. To the extent lawmakers used the word "penalty," they did so in the same vein that it is used to describe premium or penalty pay as a means of enforcing employer compliance. As conceded by Employer *Amici*, the Legislature began by contemplating a true penalty scheme, before dropping it in favor of *adopting* the IWC's "one hour of pay" design. (See, e.g., EG (KCP) at 4-5; CELC (KCP) at 34-35.) By adopting the IWC's formulation, the Legislature codified meal and rest pay as a compensation device that falls squarely within the pattern of similar legislative designs that both compensate employees while enforcing employer compliance.

A. The IWC Created a Design Intended to Address both the Lack of Employer Compliance with Break Requirements, as well as the Lack of Remedies for Employees Who Were Not Provided with Breaks

In May 2000, a month prior to IWC Commissioner Broad's formal introduction of the amendment to add meal and rest payments to the wage

orders, the IWC heard testimony about the need for an "effective remedy" for employers' failure to provide breaks. Commissioner Broad raised the possibility at that time of requiring "premium pay" as both an employee remedy, as well as a "financial disincentive" for employers. Given the DLSE's limited resources for enforcement, this "remedy" would be "self-enforcing," in that it would take the form of "one hour of pay at [the employee's] regular rate of pay." In this way, the remedy would be far more effective and immediate, and far less expensive to obtain, than prospective injunctive relief:

> COMMISSIONER BROAD: So, we have a situation then, where this maybe a statute that, when it's breached, there's no real effective remedy or regulation when it's breached. *There's no effective remedy.*
>
> MR. LOCKER (DLSE Staff Counsel): *The remedy, as I say, would be – it's an expensive thing to bring about that remedy. And then, of course, the remedy, if we were to get the injunctive relief, the remedy would be basically a court order telling the employer, "You can't do this ever again." It's prospective.*
>
> COMMISSIONER BROAD: Well, I guess what we could do – I'm not asking you to comment on this – but as a general comment to my fellow commissioners, I guess what we could do is require the payment of *premium pay* for the time that was not given, or *require that any employer that doesn't give rest periods or a meal period in accordance with our rules would have to, say, pay the employee one hour of pay at their regular rate of pay,* in addition to all hours worked on that day, or something so that there would be an *economic disincentive* to violate the rule, and that it would be more *self-enforced.*

(IWC Hearing Transcript, May 5, 2000 CELA (Murphy) MJN, Exh. 7 at 75-76; emphasis added.)

The following month, Commissioner Broad made the amendment to add meal and rest pay to the wage orders. In discussing the "one hour of pay" remedy, Commissioner Broad again invoked the need for both an employee remedy and an employer compliance incentive, and the analogy of overtime pay:

> COMMISSIONER BROAD: . . . This is rather – a relatively small issue, but I think a significant one, and that is we received testimony that despite the fact that employees are entitled to a meal period or rest period, that *there really is no incentive as we establish it, for example, in overtime or other areas, for employers to ensure that people are given their rights to a meal period and rest period. At this point, if they are not giving a meal period or rest period, the only remedy is an injunction against the employer or – saying they must give them.*
>
> And what I wanted to do, and I'd to sort of amend the language that's in there to make it clearer, that what it would require is *on any day that an employer does not provide a meal period or rest period in accordance with our regulations, that it shall pay the employee one hour – one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided.*
>
> I believe that this will ensure that people do get proper meal periods and rest periods.

(IWC Hearing Transcript, June 30, 2000, Murphy MJN, Exh. 4 at 25-26, emphasis added.)

As quoted in full *supra* at 25, Commissioner Broad again drew a specific parallel between meal/rest pay and overtime pay, explaining that "courts have long construed overtime pay as a *penalty*, in that it is a "disincentive in order to encourage employers" not to work people more

than the "normal daily workday." Commissioner Broad made clear that meal and rest pay was analogous to overtime pay, stating *"it is in the same authority that we provide overtime pay that we provide this extra hour of pay [for a missed meal or break period]."* (*Id.* at 30; emphasis added.)

Thus, the IWC created an employee remedy that also functioned as an employer disincentive, just like the overtime "penalty." As admitted by Employer *Amici*, this is precisely the compensation device that ultimately was adopted by the Legislature. (See EG (KCP) at 4-5; see also *Corder v. Houston's Rest., Inc.* (C.D. Cal. 2006) 424 F.Supp.2d 1205, 1208 (purpose of the Senate amendment was "to make the statute consistent with the existing provisions of the IWC wage order regarding meal and rest breaks.")

B. The Legislature Began with a True Penalty Scheme, but Ultimately Dropped It in Favor of Adopting the IWC Scheme

The legislative history of §226.7 through the passage of AB 2509 has been discussed at length in prior briefs. (See, e.g., OB at 32-36; RB at 3, fn. 1; CELA (Murphy) at 3-12, 23-26.) Employer *Amici* insist that appearance of the word "penalty" in documents within the legislative history is conclusive proof that lawmakers intended §226.7 payments to be considered penalties for purposes of the statute of limitations. Murphy revisits the legislative history in order to explain, once again, how the word "penalty" was invoked *only* in the same sense that the IWC used the term –

as an analogy to the overtime "penalty." The colloquial use of the term was an occasional linguistic shorthand, not a legally controlling statutory characterization.

Legislative efforts began in February 2000, predating the IWC's June 2000 amendment of the wage orders by several months. (See Feb. 24, 2000, Introduction of AB 2509, Murphy MJN Exh. 5.) At that time, and for many months to follow, the proposed legislation involved a true penalty scheme. It called for a "civil penalty" of $50 per employee per violation, *in addition to* a damage amount payable to the aggrieved employee. It also gave aggrieved employees the choice of enforcing the provision through the administrative wage claim process, or through a civil action. (*Id.* at 12.)

On August 25, 2000, *after* the IWC had amended the wage orders to add the "one hour of pay" device, the "critical moment" occurred in the legislative history of AB 2509. (See CELA (Murphy) at 3-7.) At that time, the Legislature decided to abandon its original "penalty plus damages, with outside enforcement" scheme, and instead adopt the IWC's design, which provided for automatic payment to employees of "an hour of pay at the employee's regular rate of compensation" on any day an employer failed to provide that employee with breaks. (See Aug. 25, 2000, Amendment in Senate, Murphy MJN Exh. 9 at 3, 11-12.)

Lawmakers expressly described this action as "delet[ing] the provisions related to penalties for an employer who fails to provide a meal

or rest period, and instead codify[ing] the lower penalty amounts adopted by the Industrial Welfare Commission (IWC)." (Aug. 25, 2000 Concurrence in Senate Amendments, Murphy MJN Exh. 16 at 2.) The legislative history also refers to these IWC amounts as "wages:" "Places into statute the existing provisions of the Industrial Welfare Commission… Failure to provide such meal and rest periods would subject an employer to paying the worker one hour of wages for each work day when rest periods were not offered." (Aug. 28, 2000, Senate Rules Committee Third Reading, Murphy MJN Exh. 17 at 4.)

Referring to the IWC amounts as both "penalties" and "wages" makes sense, in light of the IWC's intentions when it enacted the "one hour of pay" design. As noted *supra*, Commissioner Broad specifically discussed the analogy of the overtime premium as "penalty," in the sense that it created a disincentive for employers, at the same time it provided a remedy for employees. For that reason, it is unsurprising that the legislative history contains references to the word "penalty." Following the Legislature's August 25, 2000, adoption of the IWC's design, *every* use of the word "penalty" in the legislative history is in reference to the IWC's "penalty."[41] But the IWC's "penalty" is a form of compensation, not a

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[41] Employer *Amici* repeatedly cite to a letter sent by the bill's author, Assemblymember Steinberg to then-Governor Davis, urging him to sign the bill. (See, e.g., EG (KCP) at 32-33, CELC (KCP) at 31-32.) Again, in the

penalty in the sense of an arbitrary sum subject to a one-year statute of limitations.

Employer *Amici* claim that subsequent legislation is particularly relevant to the determination of §226.7's legislative intent, because the Legislative Counsel's Digest descriptions of existing law in SB 1538, AB 3018 and AB 755 include the word "penalties."[42] (CELC (KCP) at 33.) However, California courts have frequently noted that while subsequent legislation "may be considered as evidence of the Legislature's understanding of the unamended, existing statute," (*Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 832), "legislative expression of the intent of the earlier act is not binding on

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letter, Assemblymember Steinberg invokes the word "penalty" *only* in reference to the IWC's "penalty." It is worth noting that the lawmaker also highlights the remedial purpose of meal and rest pay, stating that the measure "*provid[es] a remedy for a violation of the law (previously where there was none)....*" (See EG (KCP) MJN Exh. H; emphasis added.)

Employer *Amici* also make unsupported allusions to the IWC's "lack of authority" to enact a penalty. (See EG (KCP) at 4; CELC (KCP) at 32, fn. 12.) This argues against KCP's position. If the IWC did not adopt a penalty because it lacked authority to do so, then the Legislature did not enact a penalty when it expressly adopted the IWC's design.

[42] The bills did not seek to amend §226.7 with regard to payment to employees for missed meal and rest breaks; rather, they sought to codify how the "rate of pay" for missed breaks would be established for certain workers for whom the protection of full compensation for rest breaks had been denied, specifically piece rate workers and transportation industry workers under a collective bargaining agreement. (CELC (KCP) RJN Exhs. 17, 26, 29.) While the bills were approved by the Legislature, each was vetoed by the Governor. (CELC (KCP) RJN Exhs. 24, 28, 29.)

the courts in their construction of the prior act." (*Eu v. Chacon* (1976) 16 Cal.3d 465, 470.) The subsequent legislature's interpretation may be considered, but interpretation of the statute is a judicial task. (*City of Sacramento v. Public Employees' Retirement System* (1994) 22 Cal.App.4th 786, 798.)

The limited value of the subsequent legislation becomes apparent by comparing the description of existing law in the Legislative Counsel's Digests relied upon by Employer *Amici*, with the Legislative Counsel's Digest description in the chaptered version of AB 2509, the bill through which §226.7 was enacted. (See AB 2509, as chaptered, Sept. 29, 2000, Murphy MJN Exh. 11 at 2.) The Legislative Counsel's Digest of AB 2509 as chaptered, describes §226.7 by stating that "Existing law authorizes the Industrial Welfare Commission to adopt orders respecting wages, hours, and working conditions. This bill would require any employer that requires any employee to work during a meal or rest period mandated by an order of the commission to pay the employee one hour's pay for each workday that the meal or rest period is not provided." By contrast, the Legislative Counsel's Digests of SB 1538, AB 3018, and AB 755 are identical, and each describes §226.7 by stating: "Existing law prohibits an employer from requiring an employee to work during any meal or rest period mandated by an order of the Industrial Welfare Commission and establishes penalties for an employer's failure to provide a mandated meal or rest period." (CELC

(KCP) RJN Exhs. 17, 18, 19, 22, 26, 29). There is no explanation for the difference in the Legislative Counsel's Digest descriptions between the original bill and the subsequent legislation. Insofar as a Legislative Counsel's Digest conflicts with a statute, the digest must be disregarded. (*Kern River Public Access Comm. v. City of Bakersfield* (1985) 170 Cal.App.3d 1205, 1222.) Neither AB 2509 nor §226.7 includes the word "penalties;" accordingly the Legislative Counsel's Digest in the subsequent legislation should be disregarded.

To the extent the Court considers the subsequent unenacted legislation, a full reading of the Legislative Counsel's Digest in AB 755 reveals that meal and rest pay is also described as *"wages:"* "Under existing law, the wages earned and unpaid at the time an employee quits or is discharged continue as a penalty to the employer at the same wage rate from the due date until paid or until an action therefore is commenced for up to 30 days. This bill would provide that these penalties shall not apply to an employer failing to pay required *wages for rest periods* unless the employer has failed to do so more than 5 times in a 12-month period." (CELC (KCP) RJN Exh. 29 at 101, 103 (emphasis added).)

Employer *Amici* also place weight on a rejected amendment to SB 1538 which would have called the meal and rest payment "premium pay." (CELC (KCP) at 33, fn. 14.) However, "very limited guidance [] can generally be drawn from the fact that the Legislature has not enacted a

particular proposed amendment to an existing statutory scheme." (*Grupe Development Co. v. Superior Ct.* (1993) 4 Cal.4th 911, 922-23; see also *Cuadra v. Millan* (1998) 17 Cal.4th 855, 870, fn. 15 (bills the legislature failed to enact regarding the commencement date for calculating back pay "are of little if any value in determining legislative intent"); *People v. Escobar* (1992) 3 Cal.4th 740, 751 ("'weak reed upon which to lean'"); *Snyder v. Michael's Stores, Inc*. (1997) 16 Cal.4th 991, 1003, fn. 4 (vetoed statute overturning prior decision "provided no guidance"); *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 181, fn. 10 ("legislative history tea leaves," denying judicial notice of unenacted legislation).) Accordingly, the subsequent legislation sheds no light on the legislative intent of the earlier act and should be given no weight.

III. The DLSE Flatly Contradicted Itself as Counsel in this Case, and Its Vacillating Characterization of §226.7 Payments Is Not Entitled to Deference

This case presents a particularly illustrative example of why courts give no weight to a government agency's vacillating position.[43] In fact, it is difficult to imagine an agency interpretation that is less deserving of deference.

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[43] None of the Employer *Amici* acknowledges the unique factual circumstances presented by the DLSE's actual involvement as plaintiff's counsel in the *Murphy v. Kenneth Cole Prod., Inc.* litigation. (See, e.g, EG (KCP) at 38-39; CELC (KCP) at 34-36; Circuit City (KCP) at 11-12; Yankee (KCP) at 11-12.)

The DLSE served as co-counsel in this matter before the trial court. In Murphy's Trial Brief, on which DLSE appears as counsel for both Murphy and the Labor Commissioner (see CT 126-193), Murphy's counsel relied upon the DLSE's then-unequivocal position that meal and rest pay constituted compensation, not a penalty. (See CT 140, 177-180.) Counsel cited the DLSE's June 11, 2003, Opinion Letter, which was devoted entirely to setting forth "the view of the DLSE, [that] the premium required by Labor Code §226.7 is … a premium wage, not a penalty." (CT 177.) The DLSE Opinion Letter explains at length how meal and rest payments function similarly to overtime premiums. It describes the long history of courts referring to overtime pay interchangeably as "premiums" and "penalties," explaining that the latter is "simply a way of describing the effect of a premium wage requirement." (CT 178.) The DLSE repeatedly championed this position before the trial court on behalf of Murphy. (See, e.g., CT 211, 215-216; CT 368, 372-374.)

By the time this case reached the Court of Appeal, California had elected a new Governor. Although *nothing had changed* either in Wage Order §§11 and 12, or in §226.7, the new administration began its complete about-face with respect to the characterization of meal and rest periods. On June 17, 2005, the DLSE adopted an internal "Precedential Decision" which opined, in two paragraphs, that meal and rest payments were penalties. (See EG (KCP) MJN Exh. N at 6-7.)

As noted *supra*, *Yamaha Corp. of America*, *supra*, 19 Cal.4th 1, 12, discusses the "fundamentally situational" approach to determining the deference to be given to an agency when it is interpreting a statute. "Because an interpretation is an agency's *legal opinion*, however 'expert,' rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference." (*Id.* at 11 (emphasis in original).) "A vacillating position … is entitled to no deference." (*Id.* at 13, quoting Cal. Law Revision Comm.) The weight will also depend on "*its consistency with earlier and later pronouncements*." (*Id*. at 14 (emphasis in original); see also *Henning v. IWC* (1988) 46 Cal.3d 1262, 1278 (when agency construction is not a "'contemporaneous interpretation' of the relevant statute and in fact 'flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the … statute,' it cannot command significant deference"); *Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1125 (no deference given to opinion letter that represented a "significant change of direction by the DLSE").)

Applying *Yamaha*, in light of the DLSE's complete about-face in its interpretation of §226.7 during the course of this very case, the agency's opinion is not entitled to deference in this instance. Given the political waffling of the agency on the characterization of §226.7 payments, it is particularly important to note that "[t]he court, not the agency, has 'final

responsibility for the interpretation of the law.'" (*Yamaha,* 19 Cal.4th at 11, fn. 4; *Bonnell v. Medical Bd. Of California* (2003) 31 Cal.4th 1255, 1264 ("courts must, in short, independently judge the text of a statute"); *Church v. Jamison* (2006) 143 Cal.App.4th 1568, 1579, petition for review filed Dec. 4, 2006 (rejecting deference to DLSE opinion, noting that "the DLSE's expertise does not extend to provisions in the Code of Civil Procedure that control the application of statutes of limitation.")[44]

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[44] Employer *Amici* overstate the deference to be afforded to an agency's precedential decision. (CELC (KCP) at 34-35; EG (KCP) at 38-39; Yankee (KCP) at 12, all citing DLSE's precedential decision in *Hartwig v. Orchard Commercial, Inc.* Case No. 12-56901RB.) Precedential decisions are an agency's interpretation of applicable statutes and regulations, and a court can reject the agency's construction where, as here, it is contrary to legislative intent. (*American Federation of Labor, etc. v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1027.) Moreover, the *Hartwig* opinion itself is not particularly persuasive in that it presents a summary argument and does not attempt any deep analysis of the question presented. It presents yet another instance of the DLSE's vacillating opinion regarding §226.7, and deserves no deference. (*Yamaha,* 19 Cal.4th at 13.)

CONCLUSION

Section 226.7 plays an important role in California's compensation and worker protection framework. Murphy has demonstrated that in all respects, meal and rest payments were intended to be wages. A judicial finding that §226.7 payments are liabilities created by statute, and not penalties for purposes of the statute of limitations will fulfill the statute's remedial purpose.

Dated: December 19, 2006

Respectfully submitted,

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