IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

JOHN PAUL MURPHY Petitioner, v. KENNETH COLE PRODUCTIONS, INC. Opposing Party.	**Supreme Court** **Case No. S 140308** A107219 DIV. 1 and A108346 DIV. 1 San Francisco Superior Court Case No. CGC-03-423260

ANSWERING BRIEF SUBMITTED BY KENNETH COLE PRODUCTIONS, INC.

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STATEMENT OF ISSUES PRESENTED
Per Order of the Court

(1) Is a claim under Labor Code section 226.7 for the required payment of "one additional hour of pay at the employee's regular rate of compensation" for each day that an employer fails to provide mandatory meal or rest periods to an employee governed by the three-year statute of limitations for a claim for compensation (Code Civ. Proc., section 338) or the one-year statute of limitations for a claim for payment of a penalty (Code Civ. Proc., section 340)?

(2) When an employee obtains an award on such a wage claim in administrative proceedings and the employee seeks de novo review in superior court, can the employee pursue additional wage claims not presented in the administrative proceedings?

ARGUMENT

I. THE LIABILITY CREATED BY LABOR CODE § 226.7 IS A PENALTY, AND, THEREFORE, IT IS SUBJECT TO THE ONE-YEAR STATUTE OF LIMITATIONS

This brief will refer to the Answering Party, Kenneth Cole Productions, Inc., as "KCP." In reviewing the decision of the Court below, reported as *Murphy v. Kenneth Cole Productions, Inc.*, 134 Cal.App.4th 728 (2005), KCP assumes the Court will also consider the two opinions for which the Court has issued grant and hold orders: *National Steel and Shipbuilding v. Superior Court,* 135 Cal.App.4th 1072 (2006) (herein "*National Steel*"), and *Mills v. Superior Court (Bed, Bath & Beyond),* 135 Cal.App.4th 1547 (2006). This brief will also refer to those opinions.

A. The Legislature Did Not Employ Labor Code § 226.7 to Enact a Period of Limitations

Labor Code § 226.7 reads in full as follows:

> (a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
>
> (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

Subsection (b) creates a liability for violation of the meal or rest period requirements. Nothing in section 226.7 prescribes a period for commencement of an action to recover the liability. Since the Legislature did not employ section 226.7 to legislate with regard to a period of limitations, there is no legislative intent to be discovered, neither by looking at the words of the statute nor by finding an ambiguity in the words and then employing extrinsic aids.[1]

B. Whether the Liability Created by Labor Code § 226.7 Is or Is Not a Penalty Turns on its Effect: It Is a Penalty Because Its Effect is to Penalize a Wrong-Doer

The Code of Civil Procedure prescribes periods for the commencement of actions. CCP § 335. For an action upon a liability

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[1] The *National Steel* opinion correctly observed that "the Legislature did not address what limitations period applied" 135 Cal.App.4th at 1079, and that "the legislative history is bereft of any discussion of what statute of limitations period applies," 135 Cal.App.4th at 1082, but that court then, nevertheless, sought to discern a legislative intent in other ways, erring in particular in its discussion of the relationship between sections 226.7 and 558. *See infra,* subpart F. Subpart G, *infra,* discusses the legislative history of section 226.7, concluding that the legislators viewed the liability they created as a penalty, but it eschews any contention that that fact is controlling.

created by statute, as here, the period is one year, if the liability is a penalty, CCP § 340, or three years, if the liability is other than a penalty. CCP § 338. Whether a liability created by statute is or is not a penalty turns on the effect or operation of the liability. A penalty is a liability imposed "by way of punishment for the nonperformance of an act or for the performance of an unlawful act, and which, in the former case, stands in lieu of the act to be performed." *County of San Diego v. Milotz*, 46 Cal.2d 761, 766 (1956). "The statutory penalty is one which an individual is allowed to recover against a wrong-doer, as a satisfaction for the wrong and injury suffered, and without reference to the actual damage sustained." *County of Los Angeles v. Ballerino,* 99 Cal. 593, 596 (1893). Section 226.7 creates a liability by way of punishment for an employer's failure to allow a meal or rest period. The liability stands in lieu of the act. The liability is imposed without regard to the actual loss suffered. The liability is, therefore, a penalty. An action upon a liability that is a penalty must be commenced within one year of the employer's failure to act.

C. The Liability Created by Labor Code § 226.7 Is Not a Wage

The alternative to concluding that the liability created by section 226.7 is a penalty is to conclude, as proposed by Petitioner, that the liability is a wage. A liability for a wage would be a liability other than for a penalty. It would be subject to the three-year period of limitations of section 338. That alternative is foreclosed by Labor Code § 200. It defines "wages" as used in "this article," which includes section 226.7. Section 200 defines wages as including "all amounts *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.) Wages are "compensation for services rendered." *Ware v. Merrill Lynch, Pierce, Fenner & Smith,* 24 Cal.App.3d 35, 44 (1972).

The liability created by section 226.7 is not for the performance of labor. It is for the employer's failure to allow rest and/or meal periods. Rest periods are paid time, whether authorized and permitted or not. *See* section 11 of any IWC order. Meal periods must be compensated at the employee's applicable rate of pay, if they are worked. The liability created by section 226.7 is in addition to "amounts for labor performed." As the *Mills* opinion correctly concluded, 135 Cal.App.4th at 1554, the liability created by section 226.7 for missed breaks does not compensate for services rendered. It is a fixed figure that becomes due the moment a break period is missed, regardless of the amount of time wrongly worked during a break period. If even one 10-minute rest break is missed during a day, an entire hour's pay is due. If a 30-minute meal break is missed, an entire hour's pay is due. If all of the break periods in a day are missed, still only one hour's pay is due. In a 12-hour day, for example, an employee would be entitled to three rest periods and two meal periods, for a total of five breaks. If all of them are missed, only one hour's pay is due.[2] Conversely, the same one hour of pay is due if merely the first 5 minutes of a 30-minute meal period is not provided. The failure of section 226.7 to correlate the liability to any labor performed by an employee forecloses any argument that the payment is a wage. *See also, Calibre Bodyworks, Inc., v. Superior Court,* 134 Cal.App.4th 365, 380, n. 16 (2005):

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[2] Petitioner would contend one-hour's pay is due for the three missed rest breaks and one-hour's pay for the two missed meal breaks. KCP disagrees. The court of appeal declined to rule on that dispute. 134 Cal.App. at 754, n. 25. Regardless, the point is the same.

> [S]ection 226.7 ... is in the nature of a statutory penalty because it requires the employer to pay more than the value of the missed meal or rest period. The section 226.7 payment does not compensate the employee for any extra time worked but rather punishes the employer for its failure to provide the meal or rest period mandated by the IWC.

Section 226.7 focuses on the conduct of the employer, not on the labor performed by the employee.

D. Petitioner Erroneously Applies Caselaw

1. *Los Angeles v. Ballerino,* 99 Cal. 593, 596 (1983).

Petitioner acknowledges the rule of *Los Angeles v. Ballerino,* 99 Cal. 593, 596 (1893), that a penalty is a liability that "an individual is allowed to recover against a wrongdoer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained." Opening Brief, p. 27. While acknowledging this rule, Petitioner disputes, on two separate grounds, that the liability created by section 226.7 fits the rule.

a. Petitioner's First Erroneous Application of *Ballerino.*

First, Petitioner focuses on *Ballerino*'s use of the word "recover" ("the statutory penalty ... is one which an individual is allowed to *recover* against a wrong-doer"). Petitioner argues that the liability created by section 226.7 is not something an individual "recovers" because it is "automatically owed." Opening Brief, p. 27. According to Petitioner, the word "recover" means that "the employee or Labor Commissioner must take some action to enforce [the liability]." Opening Brief, p. 29. According to Petitioner, if it is not necessary to take some action to enforce a liability, then it is not a penalty. According to Petitioner, section 226.7

creates "an immediate obligation." Opening Brief, p. 28. Therefore, it is not a penalty.

The majority in *National Steel, supra,* followed the same approach. According to it, an employee does not "need ... to file an enforcement action" under section 226.7. 135 Cal.App.4th at 1081. Instead, an employer has "an affirmative obligation" to pay. *Id.* "The self-executing nature of the payment suggests it is not a penalty because the right to a penalty does not accrue until it has been enforced." *Id.*

Nothing in *Ballerino* suggests that distinction. This Court did not say that the essence of a penalty is that a claimant must go into court and recover it. The Court said that the essence of a penalty is that it is imposed on a wrongdoer for a wrong or injury without reference to the actual damage done.

There is no such difference as Petitioner and *National Steel* suggest between penalties and other liabilities. All liabilities must be enforced. None is "self-operational," Opening Brief, pp. 28, 29, or "self-executing." *National Steel*, p. 1081. When a statute creates a liability, either the wrongdoer pays it voluntarily or the wronged party must take steps to enforce it. Any liability requires a lawsuit to enforce it, absent voluntary compliance. If the liability created by section 226.7 were held to be compensation, but an employer failed to pay it, an employee would still have to sue to recover it. It still would not be "self-operational" or "self-executing." Even ordinary earned wages are not "self-operational" or "self-executing." If an employer fails to pay them, the employee can plead, pressure or prosecute. Conversely, there is no liability that is imposed *on condition that the claimant sue for it* and that is otherwise not owed. The distinction is false.

People v. Durbin, 64 Cal.2d 474 (1966), and *Anderson v. Byrnes,* 122 Cal.272 (1898), cited by Petitioner at Opening Brief, pp. 29-30, and by the *National Steel* majority at 1081, in support of this supposed distinction do not support it. Those cases have nothing to do with any principle of "self-operation" or "self-execution."

In each case, the Legislature had repealed or effectively eliminated a liability that had been created by an earlier statute. The new legislation became effective after the predicate events supporting the liability had occurred, but before the liability had been reduced to final judgment. This Court held that the legislative changes eliminated the debtor's right to recover.

In each case, the Court recognized that the Legislature may not eliminate a vested right and that some liabilities created by statute *vest* immediately upon occurrence of the predicate event. The Court held, however, that penalties do not vest upon the occurrence of the predicate event. The Court held that they do not vest until reduced to judgment and the judgment becomes final.

The *National Steel* majority erroneously equated *vesting* and *accrual*. It cited *People v. Durbin* and *Anderson v. Byrnes* as holding that "the right to a penalty does not *accrue* until it has been enforced." 135 Cal.App.4th at 1081 (emphasis added). That is not what they held. They held that the right to a penalty does not *vest* until it has been enforced. *Durbin* at 479; *Anderson* at 274. Vesting and accrual are not the same. Any liability created by statute, regardless of whether it is a penalty or not, *accrues* immediately upon occurrence of the predicate act. Absent voluntarily payment, it must be enforced. The *National Steel* majority's

statement is illogical. A penalty could not be enforced, if it had not accrued.

The rule that liabilities other than penalties *vest* immediately upon occurrence of the predicate, while penalties do not *vest* at that time, does not render liabilities other than penalties "self-executing." All liabilities created by statute *accrue* immediately upon occurrence of their predicate. They may all be enforced immediately. Absent voluntary payment, they must be enforced. They are not "self-executing." No such principle distinguishes a liability other than a penalty from a penalty.

The liability created by section 226.7 is one that "an individual is allowed to *recover* against a wrongdoer." *Los Angeles v. Ballerino, supra* (emphasis added). The individual "recovers" it either when, and if, the employer pays it voluntarily or by suing for it. Penalties are "recovered" just as other liabilities are "recovered." *Ballerino* did not distinguish between them on that basis.

b. Petitioner's Second Erroneous Application of *Ballerino*.

Petitioner's second ground for disputing that the liability created by section 226.7 is a penalty, within the meaning of *Los Angeles v. Ballerino, supra,* is as follows: *Ballerino* defines a penalty, in part, as a liability imposed "without reference to the actual damage sustained," 99 Cal. at 596, while, the "amount of the recovery [under section 226.7] is made in reference to the particular employee's rate of pay, and reflects a legislative judgment of the value of the loss caused by having to forego a break." Opening Brief, p. 27. According to Petitioner, the extra hour of pay compensates employees "for extra labor, inconvenience, lost opportunity and added fatigue." Opening Brief, p. 24.

Suppose, however, that one day an employer provides an employee no breaks, but allows the employee to go home an hour earlier, and so the employee engages in no extra labor. Suppose also that the employee is not inconvenienced by the lack of breaks, does not feel an opportunity has been lost, welcomes the opportunity to go home early that day, and feels refreshed, rather than fatigued, by the trade-off. The employer nevertheless has violated the mandate to allow breaks and must pay the penalty. Suppose, conversely, an employee who is denied a break becomes ill or suffers an injury as a result. An hour of pay would not compensate for those damages.

The liability created by section 226.7 is a fixed sum. It is imposed regardless of whether the meal or rest period violation is a matter of 5 minutes, 10 minutes, 30 minutes, an hour, or more. It does not compensate for damages. It punishes misconduct.

2. *Prudential Home Mortgage Co. v. Superior Court*, 66 Cal.App.4th 1236, 1243 (1998).

Prudential Home Mortgage held that a penalty is "an arbitrary sum in addition to and unrelated to actual damages." Focusing on the least important words in the quotation, "in addition to," Petitioner argues that the liability imposed by section 226.7 cannot be a penalty because "it provides the *sole* monetary remedy." Opening Brief, p. 28 (emphasis in original). *Prudential* did not mean that an arbitrary sum unrelated to damages is a penalty, if it is in addition to another liability, and is not a penalty, if it is the sole liability. It meant that a penalty is different, other than, damages.

3. Other Erroneously Applied Cases.

In *Huntington v. Attrill,* 146 U.S. 657 (1892), the U.S. Supreme Court held that states are not required by the Full Faith and Credit clause to enforce the "penal laws" of other states. "The test whether a law is penal … is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual." 146 U.S. at 668. *Huntington* has been followed in a number of cases, some cited by Petitioner's Opening Brief, p. 26, n. 18: *Hays v. Bank of America,* 71 Cal.App.2d 301 (1945) (liquidated damages under FLSA are not a "penalty" for purposes of CCP §§ 338, 340; relies on *Overnight Motor Transport v. Missell,* 316 U.S. 572 (1942), which in turn relies upon *Huntington*); *Rivera v. Anaya,* 726 F.2d 564 (9th Cir. 1984) ("statutory damages" under California Farm Labor Contractors Act are not a "penalty" for purposes of 338 and 340); *Stone Travelers Corp.,* 58 F.3d 434, 439 (9th Cir. 1995) (liability created by ERISA for an administrator's failure to comply with requests for information is not penalty under CCP § 340).[3]

In *Prudential Home Mortgage Co. v. Superior Court,* 66 Cal.App.4th 1236 (1998), which Petitioner acknowledges correctly states the law in California, Opening Brief, p. 28, the court held that *Ballerino* represents the correct standard for identifying a "penalty" under sections 338 and 340 and that case law based on *Huntington* is "on the wrong analytical path" and "analytically flawed." 66 Cal.App.4th at 1242-1243, 1245. *Prudential* observed that *Huntington* had "carefully distinguished … the use of the word 'penal' for purposes of barring enforcement in a foreign state … from its use in other contexts. *Prudential* cited, by way of example, a … case

[3] The footnote also cites *TWA, Inc., v. Thurston,* 469 U.S. 111, 128 (1985), but that case says nothing pertinent to the dispute.

that ... held the same statute [that was *not* penal for purposes of Full Faith and Credit] *to be* penal for purposes of a statute of limitations substantially similar to [CCP 338 and 340]." 66 Cal.App.4th at 1244 (emphasis added). *See also, People v. Laino,* 32 Cal.4th 878, 889 (2004) (*Huntington* "carefully distinguished the words 'penal' and 'penalty'").

E. The Liability Created By Labor Code § 226.7 Does Not Have A Dual Nature: It Is Not A Minimum Labor Standard; It Is Solely A Penalty

Recognizing, as he must, the controlling nature of case law holding that a penalty is a liability imposed by way of punishment for nonperformance of an act, *County of San Diego v. Milotz, supra,* and that it is imposed against a wrong-doer, *County of Los Angeles v. Ballerino, supra,* Petitioner argues that the liability created by section 226.7 has a *dual nature*, both as compensation and as a penalty. Opening Brief, pp. 16-21.

That approach is similar to the approach taken by the majority justices in *National Steel, supra,* 135 Cal.App.4th at 1078-1079, except that they concluded that the duality created an ambiguity in section 226.7, whereas Petitioner writes that "meal and rest pay *therefore* should be considered a 'liability created by statute,' governed by a three-year statute of limitations." Opening Brief, p. 20 (emphasis added).[4]

Petitioner confuses minimum labor standards with penalties for failure to provide minimum labor standards. Requiring an employer to provide a meal period each time an employee works in excess of 5 hours and a second meal period each time the employee works in excess of 10 hours is a minimum labor standard. Requiring an employer to authorize

[4] That it is a "liability created by statute" does not indicate that it is "governed by a three year statute of limitations." The question is, of course, whether that liability created by statute is or is not a penalty.

and permit an employee to take a 10-minute rest period approximately in the middle of each 4-hour period of work is a minimum labor standard. Requiring an employer to pay an additional hour of pay each workday that the employer violates those minimum labor standards, without regard to whether the violation consists of 5 minutes, 10 minutes, 30 minutes or an hour, is a penalty.[5]

Just because a payment is made directly to an employee does not mean it is compensation rather than a penalty. *See* for example, Labor Code § 203 (waiting-time penalty owed directly to aggrieved employee); Labor Code § 203.1 (penalty for bad check owed directly to aggrieved employee); Labor Code § 203.5 (penalty for bonding company's willful failure to pay owed directly to aggrieved employee); Labor Code § 226(f) (penalty for failure to allow inspection or copying of records owed directly to aggrieved employee); Labor Code § 4650(d) (increase in penalty for late payment of disability compensation owed directly to aggrieved employee without application for same). *See also,* CCP § 340 (period to commence an action for a penalty is one year "if the action is given to an individual").

Petitioner likens the liability created by section 226.7 to premium pay for overtime, because case law recites that requiring premium pay for overtime is the "primary device for enforcing limitation on the maximum number of hours of work...." *California Manufacturers Assn v. Industrial*

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[5] Petitioner cites U.S. District Judge Selna's opinion in *Tomlinson v. Indymac Bank, FSB,* 359 F.Supp.2d 891 (CD Cal. 2005), for the conclusion that section 226.7 creates a liability for compensation. Opening Brief, p. 24. Judge Selna's conclusion was rejected by two of his fellow jurists on the same bench, each ruling that the liability created by section 226.7 is a penalty. *Corder v. Houston's Restaurants, Inc.,* 424 F.Supp.2d 1205 (CD Cal., 2006), see Kenneth Cole Production's Motion For Judicial Notice filed herewith, Exhibit 1 (hereinafter "KCP's MJN, Exh.___"), and *Pulido v. Coca-Cola Enterprises, Inc.*, 2006 WL 1699328 (CD Cal. May 25, 2006), KCP's MJN, Exh. 2.

Welfare Commission, 109 Cal.App.3d 95, 111 (1963), quoted at Opening Brief, p. 18. California limitations on the maximum number of hours worked are not true limitations. An employer may exceed them by paying premium pay. They are at best goals that employers are encouraged to meet by the possible deterrent effect of the additional expense. Meal and rest periods are absolute requirements. "An employer *may not* employ an employee for a work period of more than five hours per day without providing a rest period." Labor Code § 512(a) (emphasis added). "*No employer shall* require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission." Labor Code § 226.7(a) (emphasis added). Paying the liability created by Labor Code § 226.7 does not privilege an employer to deny meal or rest periods. It punishes the employer for violating the requirement. *Compare* Labor Code § 510(a):

> Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday ... shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee.

Section 510 does not prohibit overtime work. Accordingly, it does not punish an employer for working an employee overtime. It merely imposes an additional expense. As Justice Mosk wrote, concurring in *Mills*, 135 Cal.App.4th at 1557:

> Labor Code section 226.7, subdivision (a), prohibits an employer from requiring an employee to work during mandated meal or rest periods. Labor Code section 226.7, subdivision (b), provides the consequence of a violation of subdivision (a). The employer does not have the option to require the employee to work during the meal or rest periods and pay the extra compensation. Labor Code section 226.7, subdivision (a), flatly prohibits such a

> requirement. A violation of that prohibition results in what can only be viewed as a penalty.

As well, a violation of that prohibition subjects an employer to prosecution under Labor Code § 1199:

> "Every employer or other person ... is guilty of a misdemeanor ... who ... (a) Requires or causes any employee to work ... under conditions of labor prohibited by an order of the [industrial welfare] commission" ... [or] (c) Violates or refuses or neglects to comply with any ... order or ruling of the commission."

Paying the additional hour of pay does not immunize an employer under section 1199.

F. Labor Code §§ 226.7 And 558 Do Not Establish *Two Penalties* For the Same Violation: Section 558 Does Not Apply To Meal/Rest Period Violations

Petitioner argues that a supposed complementary relationship between Labor Code § 226.7 and Labor Code § 558 supports the conclusion that the liability created by section 226.7 is compensation. Opening Brief, p. 26, n. 19. The majority in *National Steel* employed the same reasoning. 135 Cal.App.4th at 1082-1083. There, it is critical to the majority's holding. The *National Steel* majority concluded that section 226.7 is "ambiguous" with respect to a limitations period, *id.* at 1079, and that its legislative history was "of limited value," *id.*, at 1082, but that "harmonizing" the statutory scheme would lead to the conclusion that the liability created by section 226.7 was not a penalty. *Id.*, at 1083.

The *National Steel* majority and Petitioner "harmonize" sections 226.7 and 558 by concluding that section 226.7 requires employers to pay a "compensatory remedy" for violating meal/rest period requirements and that section 558 imposes a civil penalty on an employer that fails to pay that "compensatory remedy." Both conclude such harmonizing is appropriate

"because it is unlikely that the Legislature intended to establish *two penalties* on employers for meal and rest period violations." 135 Cal.App.4th at 1083 (emphasis added); Opening Brief, p. 26, n. 19.

Petitioner's and the *National Steel* majority's two-penalty reasoning is faulty. Section 558 does not impose a penalty on employers for meal and rest period violations.

Section 558 provides that an employer that violates (a) a section of the Labor Code chapter that include such requirements as overtime and meal periods, or (b) a provision of the Industrial Welfare Commission regulating hours and days of work, shall be subject to a civil penalty "for each period in which the employee was *underpaid* in addition to an amount sufficient to recover *underpaid* wages." (Emphasis added.) An employee unlawfully denied a meal or rest period has not been "underpaid." Section 558 does not create a liability for meal/rest period violations.

Section 226.7 was enacted *because* section 558 does *not* create a liability for meal/rest period violations. *See* Enrolled Bill Report, p. 9, submitted to Governor Gray Davis by Labor Commissioner Arthur Lujan and Department of Industrial Relations Chief Steve Smith, recommending that the Governor sign AB 2509:[6]

> Labor Code § 558 provides for the imposition of penalties against an employer who violates a section of the chapter containing § 512 [meal period requirements], however the penalties specified apply to the underpayment of wages and not to meal or rest violations.
>
> Adding a penalty component to the Labor Code will support the underlying purpose of meal periods by encouraging employers to comply with the meal period provisions. Without the proposed provisions there is no effective enforcement of current law.

[6] KCP's MJN, Exh. 3; *see also* Petitioner's Motion for Judicial Notice (hereafter "Petitioner's MJD)Petitioner's MJN, Exh. 19.

Section 558 did not create a penalty for violating meal or rest period requirements. Section 226.7 was enacted because the Labor Code included no penalty for meal/rest period violations, and it was felt there should be a penalty. Since section 558 did not establish a penalty on employers for meal and rest period violations, Petitioner's and *National Steel*'s harmonizing is not needed or appropriate.

G. Legislative History of Labor Code § 226.7

As observed at the outset, the Legislature did not employ section 226.7 to enact a period of limitations. Accordingly, that section's legislative history cannot aid in interpreting the Legislature's intent, with regard to a period of limitations, in enacting section 226.7. Identifying the correct statute of limitations requires interpreting and applying CCP § 338 and CCP § 340.

If the legislative history had indicated a choice between CCP §§ 338 and 340 (it does not), without legislation implementing that choice, it would not be effective. CCP sections 338 and 340 were enacted before Labor Code § 226.7. "The Legislature may define the meaning of statutory language by a present legislative enactment [but] it has no legislative authority simply to say what it did mean [in enacting earlier statutes]." *Del Costello v. State of California,* 135 Cal.App.3rd 887, 893, n. 8 (1982); *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1157-58, n. 6. What the Legislature cannot do in a present enactment, it also cannot do in the present enactment's legislative history.

Petitioner, nevertheless, has devoted a portion of his Opening Brief, at pp. 31-36, to arguing, based on the legislative history of section 226.7, that "meal and rest pay was <u>not</u> intended to be a penalty." *Ibid.,* at 36 (emphasis in original). The court below also supplemented its contrary

conclusion by finding that the "legislative history indicates that the Legislature also intended a penalty." 134 Cal.App.4th 751. Each of the opinions subject to this Court's grant and hold orders also examined the legislative history of section 226.7. The *National Steel* court observed that the legislative history was "bereft of any discussion of what statute of limitations applies to the payment required by section 226.7" and concluded it was "of limited value." 135 Cal.App.4th at 1082. The *Mills* court, on the other hand, found that section 226.7's legislative history "confirms our initial impression that the required payments were intended to be penalties." 135 Cal.App.4th at 1552. Five court of appeal justices, however, have concluded that the liability created by section 226.7 is a penalty – without reference to its legislative history. *See* Irion, J., dissenting in *National Steel,* 135 Cal.App.4th at 1086; Mosk, J., concurring in *Mills,* 135 Cal.App.4th at 1557, and the unanimous three-justice opinion in *Calibre Bodyworks, Inc., v. Superior Court,* 134 Cal.App.4th 365, 380, n. 16 (2005).

Lest this brief's failure to address the subject be taken as admission that the legislative history somehow favors Petitioner, some comment is in order. Albeit without any demonstrated thought for the statute of limitations, the Legislature that enacted section 226.7 clearly thought it was enacting a "penalty." As the court below correctly noted, 134 Cal.App.4th at 751-752 (emphasis added), the Assembly Bill Analysis reported that adoption of the language ultimately enacted as section 226.7(b) would "Delete [from an earlier version of the bill] the provisions related to *penalties* for an employer who fails to provide a meal or rest period, and instead codify the lower *penalty* amounts adopted by the Industrial Welfare

Commission (IWC)."[7] The court below also noted that both Enrolled Bill Reports, one submitted by the Department of Industrial Relations[8] and one submitted by the Department of Finance,[9] discussed the liability created by section 226.7 "in terms of imposing a monetary penalty." 134 Cal.App.4th at 752. As well, in adopting the provision on which section 226.7 was modeled, the court below observed, *id* at 751, that the IWC had considered whether it had authority to adopt a regulation imposing a "penalty." In ruling on the issue, the IWC's counsel stated that it did have the authority to adopt a regulation imposing a "penalty." "The IWC promptly voted to adopt the regulation."[10] *Id.*

The legislative history of section 226.7 refers to the new liability as a "penalty," because that is the effect the provision obviously has. In *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1077 (9th Cir. 2005), Judge Stephen Reinhardt and his colleagues looked at the provision and referred to it as a penalty as well, again because that is its effect. *See* KCP's MJN, Exh. 7.

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[7] AB 2509, Assembly Bill Analysis, Concurrence in Senate Amendments, August 25, 2000, p. 3, KCP's MJN, Exh. 4; *see also* Petitioner's MJN, Exh. 16.

[8] KCP's MJN, Exh. 3, p. 9. *See also* quotations above under heading F, "Labor Code §§ 226.7 and 558 Do Not Establish *Two Penalties* for the Same Violation."

[9] KCP's MJN, Exh. 5; *see also* Petitioner's MJN, Exh. 18.

[10] Transcript of IWC Public Hearing, June 30, 2000, p. 34, KCP's MJN, Exh. 6; *see also* Petitioner's MJN, Exh 4.

II. LABOR CODE § 98.2 DOES NOT VEST JURISDICTION IN THE SUPERIOR COURT OVER ADDITIONAL CLAIMS NOT PRESENTED OR CONSIDERED IN A BERMAN ADMINISTRATIVE PROCEEDING.

A. The Court of Appeal's Analysis Was Correct

As the court of appeal below wrote, 134 Cal.App.4th 728, 745-746 (2005), an employee seeking payment of wages has two options. The employee may file an ordinary civil action, or the employee may file a wage claim with the Labor Commissioner pursuant to Labor Code § 98 and thereby obtain a so-called Berman hearing. *Smith v. Rae-Venter Law Group,* 29 Cal.4th 345, 350 (2002). In the case of a Berman hearing, ten days after notice of an award is served, the parties may seek review by filing an appeal to the Superior Court, where the appeal is heard *de novo.* Labor Code § 98.2(a).[11] The court of appeal recognized that the appeal to the superior court results in a completely new trial, but saw no authority for allowing the introduction of entirely new and different claims at that level. 134 Cal.App. at 746.

The court of appeal was correct to ask whether section 98.2 allowed the introduction of entirely new and different claims at the superior court level, because, as Petitioner acknowledges, a Berman proceeding is a "unique statutory scheme." Opening Brief, p. 39. Barring special authority, a party pursuing a wage claim must commence a civil action in the conventional manner, that is, by filing a complaint in court. CCP §§ 30, 411.10. Petitioner did not file a complaint in court.

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[11] Labor Code § 98.2(a) reads in relevant part:

> Within 10 days after service of notice of an order, decision, or award the parties may seek review by filing an appeal to the superior court, where the appeal shall be heard de novo.

Petitioner is wrong to argue that "Nothing in the statutory language states a *de novo* court is absolutely barred from considering any claims other than those first raised in the administrative proceedings." Opening Brief, p. 42. The question is not whether anything in the statutory language bars consideration of such claims. The question is whether the statute *allows* consideration of such claims, either explicitly or by implication, absent compliance with CCP §§ 30 and 411.10. The burden is on the Petitioner to show that the Legislature authorized an exception to the general procedure set forth in the Code of Civil Procedure. Section 98.2 does not include an explicit exception for new claims. The question, then, is whether it may be implied.

Continuing, the court of appeal wrote that an interpretation of section 98.2(a) must be arrived at which, if possible, gives effect to both the term "review" as used in the statute and to the term "*de novo.*" The court of appeal found such an interpretation. It concluded that "*de novo*" means there will be a new trial with the possibility of new evidence and with the administrative decision given no weight and that "review" means the subject matter of the review must be the same as that submitted to the Labor Commissioner. In reaching that interpretation, the court of appeal cited *Collier & Wallis v. Astor,* 9 Cal.2d 202, 205 (1937), in which this Court held that an appeal *de novo* gives a party dissatisfied with the determination of the labor commissioner a hearing in the superior court "of the matter submitted to the labor commissioner." As well, trial *de novo* is a "trial anew." *Vos Post v. Palo/Haklar & Associates,* 23 Cal.4th 942, 947 (2000). "Anew" means once more or again. *See* any dictionary. It is not a trial for the first time.

The court of appeal was correct that an interpretation should be given to section 98.2(a) that gives effect to both the term "review" and to the term "*de novo*." "[C]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage." *Reno v. Baird*, 18 Cal. 4th 640, 658 (1998). Petitioner agrees. Opening Brief, p. 41 ("The statute should be interpreted to give[] effect to both the term 'review' and the term 'de novo.'"). Petitioner has two explanations of how to give effect to both terms.

First, Petitioner suggests that the first clause of section 98.2(a) ("the parties may seek *review* by filing an appeal to the superior court") "answers the question of *how* to seek review," and the second clause ("where the appeal shall be heard de novo") answers the question of *scope* of review." Opening Brief, p. 42 (emphasis in original). That suggestion does not give effect to the term "review." It identifies a procedure, i.e., filing the "review" in the superior court, but it does not give effect to the meaning of "review." To the contrary, it focuses full attention on the term "*de novo*" and reads "review" out of the statute.

If the Legislature had intended to authorize consideration in the superior court of any dispute between the parties, it would have written section 98.2 differently. In particular, it would not have used the word "review." The Legislature might have written:

> Within 10 days after service of an order, decision or award, the parties may commence proceedings in the superior court, where any dispute between them may be heard without regard to the proceedings had before the Labor Commissioner.

By contrast, section 98.2, in words and context, contemplates "review" of something that was before the Labor Commissioner and that preceded proceedings in court.

Second, Petitioner writes that "[r]eview is accorded not to the decision of the commissioner, but to the underlying facts." *Ibid.* That statement also does not illuminate the question of whether the superior court may "review" issues never presented to or considered by the Labor Commissioner, or whether the subject matter of the review must be the same as that submitted to the Labor Commissioner.

The above two efforts are the full extent of Petitioner's efforts to give effect to the term "review." They do *not* give effect to it. They render it surplusage. The court of appeal's explanation makes sense.

B. The Legislative History of the *De Novo* Review Language Refutes Petitioner's Argument

Petitioner's entire argument is premised on the *de novo* aspect of the "review" authorized by Labor Code § 98.2(a). Petitioner contends that *de novo* review means the superior court may consider any wage claim, regardless of whether it had or had not been presented to and/or considered by the Labor Commissioner.[12]

The legislative history of section 98.2 demonstrates that review was made *de novo* for unrelated reasons. Review was made *de novo* out of concern that any lesser "review" would violate the principle of separation of powers, that is, it would result in delegating judicial authority to an administrative agency. *See* Petitioner's MJD, Exhs. 20-40. (Exhibit 38 is a good example, although the print is light and hard to read).[13] The very need for review to be *de novo* shows that the "review" was of matters *previously* presented to and considered by the Labor Commissioner. A matter that had

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[12] Petitioner fails to explain what there is about section 98.2 that would authorize "wage claims," Opening Brief, pp. 37 *et seq*, but that would not authorize other claims not involving wages."

[13] *See also* KCP's MJN, Exh. 8.

not been presented to or considered by the Labor Commissioner could not result in an unconstitutional delegation of judicial authority to the Labor Commissioner. It would be a matter over which the agency had *not* exercised authority. The focus of the Legislature's concern was with matters over which the Labor Commissioner *had* exercised authority. The Legislature wanted to ensure that, when *those matters*, over which the Labor Commissioner *had* exercised authority, were reviewed in court, they were reviewed *de novo*.

The point is demonstrated by the originally enacted language of section 98.2(a). It read, 1976 Stats., ch. 1190, § 6 (emphasis added); KCP's MJN, Exh. 9:[14]

> Section 98.2 is added to the Labor Code to read:
>
> > 98.2. (a) Within 10 days after service of notice of an order, decision or award the parties may seek review by filing an appeal to the superior court where *the same* shall be heard de novo.

The "same" is the order, decision or award. *It* shall be heard *de novo*, not any claim never before presented to or heard by the Labor Commissioner.

The word "same" was changed to "appeal" as part of SB 240 enacted in 1990.[15] SB 240 added subsection (h) to Labor Code § 98 and subsections (e) and (i) to Labor Code § 98.2.[16] SB 240 was introduced on January 24, 1989, and passed the Senate on April 17, 1989.[17] It went to the Assembly, where, on June 18, 1990, the word "same" was changed to

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[14] *See also* Petitioner's MJN, Exh. 26.

[15] 1990 Stats., ch. 1040, § 2 (SB 240), KCP's MJN, Exh. 10; *see also* Petitioner's MJN, Exh. 41.

[16] KCP's MJN, Exh. 10.

[17] Senate Final History, California Legislature, 1989-1990 Regular Session, p. 195; KCP's MJN, Exh. 11.

"appeal."[18] Other minor amendments were made in the Assembly on August 20, 1990.[19] The bill then passed the Assembly on August 22, 1990 and was returned to the Senate, which concurred in the Assembly amendments on August 23, 1990, and the Governor signed it on September 18, 1990.[20]

SB 240, as introduced and as enacted, addressed two problems that had been raised in an oversight committee report of November 1986. The problems were explained in a report that accompanied the bill's third reading in the Senate, immediately prior to final passage. *See* KCP's MJN, Exh. 14.[21] One problem, according to the report, was that delays were occurring in the claim process. One of the primary causes of delay involved the identification of the employer's correct legal name. SB 240 permitted the Labor Commissioner to proceed with investigation and hearing and to amend the documentation when the correct information was received. *See* added subsection (h) to section 98. The second problem was that of judgment collection. The bill allowed the Labor Commissioner to furnish the judgment creditor with a form containing questions about the judgment creditor's assets. The employer had to return the form within 35 days, and the prevailing party could recover collection costs. *See* added subsections (e) and (i) to section 98.2. The purposes of the bill did not change over the legislative process. The Senate committee report issued

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[18] SB 240, Amended in Assembly on June 18, 1990; KCP's MJN, Exh. 12.

[19] SB 240, Amended in Assembly August 20, 1990; KCP's MJN, Exh. 13.

[20] KCP's MJN, Exh. 11.

[21] It is the only committee report this firm's librarian found.

immediately before final passage. It reflects the same purposes as the Legislation Counsel's Digest, which was part of the original bill.[22]

No mention is made anywhere in the legislative history of the change of the word "same" to "appeal." It appears to have been an effort by the Assembly committee to adopt language that was more colloquial and less like lawyers' jargon. It was not an effort to open up the proceedings in the superior court to any dispute between the parties, even if the matter had not previously been presented to or considered by the Labor Commissioner. Had such a dramatic change been intended, it would have been commented upon in the Senate report and elsewhere.

C. The Legislature's Preference for Informal Administrative Hearings, While Preserving the Rights of the Parties, Does not Support Superior Court Jurisdiction Over New Claims

Labor Code § 98 prescribes the procedure for Berman hearings, i.e, hearings before the Labor Commissioner. The second paragraph of subsection (a) recites that "It is the intent of the Legislature that hearings held pursuant to this section be conducted in an informal setting preserving the right [*sic*] of the parties." Petitioner's brief refers to the final phrase, "preserving the right of the parties," at least six times. Opening Brief, pp. 37, 39, 41, 47, 49, and 55. Presumably, Petitioner's argument is that the court of appeal's interpretation of section 98.2(a) fails to preserve a wage claimant's right to assert new claims in violation of either the words or the spirit of section 98(a)'s statement of intent. That argument is erroneous.

First, the court of appeal's interpretation of section 98.2(a) does not implicate section 98 at all. Section 98 governs hearings before the Labor Commissioner. By contrast, section 98.2 governs appeals *de novo* from the

[22] KCP's MJN, Exh. 15.

Labor Commissioner's decision. The rights of the parties, which the Legislature sought to preserve in section 98, have nothing to do with appeals *de novo* under section 98.2. The Legislature intended that hearings under section 98 be conducted informally. Informally means without application of formal rules of evidence, like the hearsay rule or rules governing the order of proceedings and examination of witnesses. Notwithstanding a preference for informal hearings, the Legislature added that such informality must not result in the parties being deprived of their rights. It virtually went without saying that the Legislature did not intend to deprive any party of its rights, but the Legislature wanted to make it extra clear that its preference for informal hearings was not to have that effect. The Legislature's statement of intent has no bearing on the rights of the parties in the appeal *de novo* process under section 98.2. It concerns the conduct of the informal administrative hearing.

Second, the court of appeal's interpretation of section 98.2 does not deprive Berman hearing claimants of *any* right. Nothing in the court's interpretation prevents a claimant faced with an appeal *de novo* and desirous of asserting new claims from doing so, either in court or with the Labor Commissioner. The right to present claims, however, is subject to the statute of limitations.[23] The court's interpretation of section 98.2(a) did not create the statute of limitations. It has always been there. Knowing they could be confronted by the statute of limitations, Murphy's attorneys sought to create a way around the statute through the unique Berman procedure. It was not a matter of *preserving* a right they had under the

[23] The statute of limitations does not bar filing a late claim. The bar of the statute of limitations is an affirmative defense. If the defendant does not invoke it, the suit proceeds.

hearing provisions of Labor Code 98. It was a matter of creating a new right under the appeal provisions of Labor Code § 98.2 that had never before been recognized.

D. The Superior Court's Lack of Jurisdiction Over New Claims Is Not Cured by Its Ability to Manage Its Caseload

1. Amendment of Pleadings.

Petitioner argues that trial courts have discretion to accept or reject amendments and to decide whether to apply the relation-back doctrine. What did Petitioner want to amend? To what did Petitioner want to relate-back? On appeal *de novo* in superior court from a Labor Commissioner award, there are no pleadings. The notice seeking review is not a pleading and provides no new information. *Rogers v. Municipal Court,* 197 Cal.App.3d 1314, 1318-1319 (1988). Petitioner wanted to amend the claim he prosecuted before the Labor Commissioner, but the superior court has no authority to amend proceedings before the Labor Commissioner.

Allowing the wage claimant in the superior court somehow to amend the claims presented to the Labor Commissioner, and then to litigate the new claims in the superior court, contradicts the very principle for which Petitioner argues. It would allow the new wage claim to by-pass the administrative proceeding that is supposed to provide a "speedy, informal, affordable forum," Opening Brief, p. 39,[24] and to go directly to court.[25] A

[24] "The process set up a preference for administrative resolution." Opening Brief, p. 40.

[25] Petitioner's new claims did not "flow from the same general set of facts." Opening Brief, p. 54. In the superior court, Petitioner claimed overtime violations, meal period violations, rest period violations, and itemized wage statement violations. The facts necessary to prove each violation were different. The facts pertinent to the overtime allegation were litigated in the Berman hearings. So were the facts pertinent to KCP's defense that

wage claimant may do that, but, when a wage claimant does, it is as a conventional lawsuit, not as part of the unique Berman proceeding. Allowing the wage claimant to assert new claims for the first time in the superior court would implicate none of the procedures or principles for which the Berman proceeding was created.

2. Discovery.

Per *Sales Dimensions v. Superior Court,* 90 Cal.App.3d 576 (1979), a superior court hearing an appeal *de novo* from a Labor Commissioner award has discretion to allow discovery or not to allow it in the interest of not prolonging a review emanating from a Labor Commissioner hearing. Petitioner offers that discretion as a means of managing the superior court's consideration of new claims. Why should discovery be subject to the exercise of that particular discretion? Discovery in the superior court with regard to new claims should be available, as a matter of law, on the same basis as it is in an ordinary lawsuit. Application of the *Sales Dimensions* rule to new claims, as Petitioner proposes, would prejudice the rights of *de novo* appellants confronted with new claims.

3. Attorney's Fees.

Awarding attorney's fees per Labor Code § 98.2(c) would also prejudice the rights of a *de novo* appellant confronted with new claims. Section 98.2(c) requires that a wage claimant be awarded attorney's fees if

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Petitioner was exempt. KCP disputed the separate facts necessary to prove each of the new alleged violations: meal periods, rest periods, and itemized wage statements. Those facts were not litigated before the Labor Commissioner. Even where there are court pleadings, an amendment is not allowed to state "a wholly different liability or obligation from that originally stated." *Klopstock v. Superior Court,* 17 Cal.2d 13, 20 (1941). "[T]he test is whether an attempt is made to state facts which give rise to a wholly distinct and different legal obligation against the defendant." *Id. See also, Branick v. Downey S & L Assn.,* slip op., p. 8 (No. S132433, Sup. Ct., July 24, 2006).

the wage claimant recovers any amount in an appeal *de novo*. Such an award would include attorney's fees for prosecuting the new claims, even if those claims, standing alone, do not carry the right to attorney's fees. Meal and rest period sanctions under Labor Code §226.7(b) are examples of claims that do not carry a right to attorney's fees. Attorney's fees were demanded and awarded in this case for meal and rest period violations, because the superior court assumed jurisdiction over Petitioner's new claims under Labor Code § 98.2. If Mr. Murphy had brought a new lawsuit claiming meal and rest period violations, he could not have recovered attorney's fees for prosecuting that claim. By bringing his new claims for meal and rest period violations as part of his appeal *de novo*, however, he was able to include them in his claim for attorney's fees under Labor Code § 98.2(c), and, on that basis, the trial court awarded them. That miscarriage of justice further illustrates that an appeal *de novo* from a Labor Commissioner award was never intended to authorize superior court jurisdiction over new claims.

4. Dual Filing Requirements.

Petitioner concludes by arguing that "allowing" trial courts to exercise discretion in determining whether to permit additional claims would enhance judicial economy. Petitioner argues that requiring a wage claimant to pursue an action in court simultaneously with filing with the Labor Commissioner would unduly burden wage claimants and the courts, because, like the workers' compensation system at issue in *Elkins v. Derby*, 12 Cal.3d 410, 413 (1974), a Berman proceeding "seeks to establish a non-technical means to recover" and "a dual filing requirement would presuppose a professional knowledge without which the worker would forfeit all right to recover." Opening Brief, pp. 54-55. The question,

however, of whether trial courts should be "allowed" to decide whether to hear new claims, as part of a Berman appeal *de novo*, is one that must be addressed to the Legislature, because the statute that gives superior courts jurisdiction over Berman appeals *de novo* does not authorize "review" of new claims.

Elkins' concern for a "dual filing requirement" was addressed by the Court in that decision. *Elkins* held, 12 Cal.3d at 414, that the running of the limitations period on a court action would have been "tolled" during the administrative proceedings, provided "the plaintiff had raised the issue at trial" and provided that the employee's pursuit of the administrative remedy "had been reasonable and in good faith." Petitioner does not assert tolling here. Tolling requires a "factual determination as to whether [plaintiffs] reasonably and in good faith pursued their [administrative] remedies,"[26] and "plaintiffs are barred from asserting the argument at this late stage of the proceedings." *Campbell v. Graham-Armstrong,* 9 Cal.3d 482, 490 (1973). *Elkins* did not authorize the trial court simply to ignore statutes granting it jurisdiction and to assume jurisdiction over an employee's claims anytime it suited the employee. Further, *Elkins* did not involve *new claims.* It was concerned solely with whether the statute of limitations was tolled on a court action while plaintiff pursued the *same claim* in an administrative hearing.

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[26] The court of appeal held "that Murphy was aware of the [meal and rest break] requirement, aware of the problem, and elected not to mention it when he filed his [labor commissioner] claim." 134 Cal.App. at 744. Without addressing that holding, Petitioner writes that the court of appeal's interpretation of section 98.2(a) bars him from pursuing "claims he did not know about." Opening Brief, p. 38.

E. Although the Superior Court's Lack of Jurisdiction Moots the Statute of Limitations Issue, the Supreme Court Should Decide It

The court of appeal was correct to rule that the superior court lacked jurisdiction over Petitioner's new claims as part of the appeal *de novo* under Labor Code § 98.2(a). The court of appeal went on to state that, "If the statute of limitations had not run on Murphy's new claims, he could have filed a civil complaint and sought consolidation with the appeal." 134 Cal.App.4th at 749. "Alternatively, he could have filed another timely complaint with the Labor Commissioner." *Ibid.* As of either the date KCP filed its request for appeal and/or the date Petitioner filed his "notice of claims and issues," the statute of limitations would have run, if it was one-year, and would not have run, if it was three years. On that basis, the court of appeal proceeded to consideration of the appropriate statute of limitations.[27] More properly, the matter should have ended. Whether Petitioner could have filed a new claim, and when, was irrelevant. He never did.

KCP recognizes, nevertheless, that the issue concerning the statute of limitations has become a matter of such substantial and continuing public interest that the Supreme Court should resolve it. It was briefed by the major employment organizations on both sides of the issue in the court of appeal, and it is anticipated that they will file *amicus curiae* briefs here too. It is raised in the two cases in which the Court has issued grant and hold orders, pending decision in this case, *National Steel* and *Mills, supra.* Petitioner has already briefed it here, and KCP must also brief it, because it might become relevant if this Court were to rule, over KCP's objections, that the superior court had jurisdiction over the new claims. (Although,

[27] *See,* 134 Cal.App.4th at 749, 754.

from what point in time the statute of limitations would run back, has not been addressed by any court or party.) Since it is so important and since it will already be briefed, it should be resolved. *Abbott Ford, Inc. v. Superior Court* 43 Cal.3d 858, 868-869 (1987) ("ample precedent for appellate resolution of important issues of substantial and continuing public interest which otherwise may have been rendered moot"); *Burch v. George,* 7 Cal.4th 246, 253 (1994) ("inherent power to retain a matter, even though it has been settled and is technically moot, where the issues are important and of continuing interest").

DATED: August 21, 2005

RESPECTFULLY SUBMITTED

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Certification of the Number of Words

I, Robert W. Tollen, appellate counsel for Opposing Party Kenneth Cole Productions, Inc., hereby certify that the number of words in this Answering Brief is 9,357 according to Microsoft Word, the word processing program used to prepare the brief.

Robert W. Tollen

Robert W. Tollen

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Seyfarth Shaw LLP, 560 Mission Street, Suite 3100, San Francisco, California 94105. On August 21, 2006, I served the within documents:

ANSWERING BRIEF SUBMITTED BY KENNETH COLE PRODUCTIONS, INC.;

KENNETH COLE PRODUCTION'S MOTION FOR JUDICIAL NOTICE IN SUPPORT OF OPPOSING PARTY'S ANSWERING BRIEF; MEMORANDUM OF POINTS AND AUTHORITIES; EXHIBITS

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, addressed as set forth below.

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than on day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 21, 2006, at San Francisco, California.

Kathy J. Truesdale