INTRODUCTION

In his Opening Brief, Respondent John Paul Murphy examined the characterization of §226.7 payments from all perspectives: what the plain language of the statute says, how the statute operates within the greater context of the Labor Code, how §226.7 payments function in comparison to other Labor Code compensation, whether the payments fall within §200's broad definition of "wages," and what the regulatory and legislative history reveals regarding lawmakers' intent. Investigated from all angles, Murphy's inquiries return the same answer. Section 226.7 payments are compensation, not penalties, and thus are subject to the three-year statute of limitations.

By contrast, KCP invites a myopic examination. It asks the Court to wholly disregard statutory language and context. It avoids looking at how §226.7 payments operate within the Labor Code, and as compared to other compensation that functions similarly. It repeatedly foregoes authority in favor of conclusory statements. It devotes pages of its brief to attacking positions that Murphy does not take, contributing confusion rather than clarity. While KCP's myopia distorts, Murphy's fuller, more detailed view illuminates and confirms that §226.7 payments are compensation, not penalties.

With respect to the scope of §98.2 *de novo* trials, KCP again ignores the whole, drawing the Court's focus to small pieces, viewed out of context. KCP glosses over the substantial body of existing Supreme Court and other jurisprudence regarding California's unique Berman scheme. These cases uniformly agree that unlike a conventional appeal, a §226.7 *de novo* trial is a fresh trial, subject to the inherent power of the superior court to do what it already knows how to do: exercise discretion to protect the rights of all parties. The court's power includes the discretion to decide whether to hear new claims, using existing doctrines such as relation back, amendment of claims, and application of the statute of limitations.

In addition to falling in line with existing case law, Murphy's interpretation comports with the statutory language and legislative history. It also gives full effect to the Legislature's express intent, and the well-established public policies served by the Berman scheme.

In this Reply Brief, Murphy addresses the issues in the same order presented in his Opening Brief, with reference citations to his initial brief ("OB"), as well as KCP's Answering Brief ("KCP").

ARGUMENT

I. SECTION 226.7 PAYMENTS ARE GOVERNED BY A THREE-YEAR LIMITATIONS PERIOD

A. The Statutory Language

Murphy's interpretation finds support in §226.7's plain language; the Labor Code's dichotomy between "pay," "wages," and "compensation," versus "penalties;" and the Legislature's decision to *reject* the word "penalty" in §226.7, but adopt it in two other statutes enacted in the same bill. (OB 10-15, 32-36.)

KCP sidesteps §226.7's intent altogether.[1] It states that since §226.7 does not include a limitations period, this Court should not examine §226.7's intent in determining which limitations period applies. (KCP 2.) This is contradicted by cases cited by KCP, where courts used statutory intent to decide the limitations period for statutes that did not themselves

---

[1] Thus, KCP ignores the "plain language" principle, and that the court must "harmonize language within its statutory context." KCP also turns a blind eye to the principle that remedial worker protection statutes must be construed toward promoting employee protection. (OB 9-10.)

Covering its bets, KCP offers a selective account of §226.7's legislative history. (KCP 17-18.) Instead of providing a contextualized account (see OB 32-36), KCP pulls out instances where the word "penalty" appears. This is misleading, since these cites refer to the IWC proceedings, which used "penalty" to describe meal and rest payments "in the same authority that we provide overtime pay." (MJN Exh. 4 at p.30; OB 31-32.) Overtime wages have long been referred to interchangeably as "penalty or premium pay," due to their dual purpose of compensating employees with a

contain one. (See, e.g., *County of San Diego v. Milotz* (1956) 46 Cal.2d 761, 765-767 (determining statute of limitations by examining statutory language and intent); *Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236, 1241-1242 (same; examining statutory language and legislative history); see also *Coachella Valley Mosquito & Vector Control Dist. v. California PERB* (2005) 35 Cal.4th 1072, 1087-1090 (determining limitations period "requires construction of the relevant statutes;" "we construe every statute with reference to the whole system of law of which it is a part….").)

KCP later suggests that statutory language *does* matter. It argues that §226.7 requires employers to provide breaks; since breaks are "absolute requirements," the failure to provide breaks is unlawful, and break payments must therefore be penalties. (KCP 13.)

This confuses liability with remedy. Liability occurs when one engages in unlawful action. But the remedy for the unlawful action is not necessarily a penalty. For example, an employer's "failure to promptly pay [overtime wages is] unlawful." (*Cortez v. Purolator Air Filtration Prod. Co.* (2000) 23 Cal.4th 163, 168.) The remedy under Bus. & Prof. Code §17203, disgorgement of the wages, constitutes restitution, not damages or penalties. (*Id.* at 173-179.) Similarly, paying less than minimum wage is

---

premium, and taxing or penalizing employers who choose to employ workers beyond an eight-hour day. (OB 21.)

"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).)[2]

B. The Function of §226.7 Compensation as Compared to Similar Compensation Within the Greater Statutory Context

KCP states that the question of whether §226.7 payments are penalties turns on the "operation or effect of the liability." (KCP 3.) But KCP itself shuns this approach, refusing to examine how §226.7 operates in context. Murphy described how the Labor Code and IWC Wage Orders embody a framework that regulates the employer-employee relationship. Murphy explained how meal/rest payments function like overtime pay, minimum wage, reporting time pay, and split shift pay: All of these wages compensate employees while prodding employer behavior toward compliance with minimum labor standards. (OB 16-23.) By failing to examine the "operation or effect" of §226.7 payments within context, KCP avoids a central truth -- that §226.7 payments

---

[2] See also OB 20-21 fn.14. KCP's argument based on §1199 criminal liability does not stand up to scrutiny. (KCP 14.) Section 1199 does not apply to violations of §226.7, since §1199 only covers violations of provisions within the same chapter, and §226.7 resides elsewhere. It appears under the Wage Orders that an employer incurs no liability if it requires an employee to work through breaks, but pays the hour of pay. (See Wage Order §§11 and 12.) More importantly, even if it were a criminal violation, that would not turn the remedy into a penalty. For example, it is also a misdemeanor violation of §1199 not to pay minimum wage. But the unpaid wages due are not penalties. (§1194(a).)

operate just like other legislative designs that provide employees an added wage in order to establish a desired employer behavior.[3]

C. The Value and Compensatory Effect of §226.7 Pay and Other Pay

Murphy explained how, just like overtime, reporting time, and split-shift pay, meal/rest pay reflects a legislative desire to compensate employees for aspects of their labor that go beyond the simple payment for "time worked." This includes fatigue, inconvenience, and the loss of time during the workday to use as one needs, free from employer control. (OB 23-26.) Again, KCP is virtually silent.[4] KCP also ignores that meal/rest payments are the *only* compensation that employees receive when they are

---

[3] KCP agrees that if meal/rest payments aren't penalties, they must be wages. (KCP 3.) However, in order to decide the statute of limitations issue presented here, this Court need not decide that §226.7 payments are wages. It need only decide whether or not the payments are penalties. If they are not penalties, they are not governed by Code Civ. Proc. §340(a), but rather by Code Civ. Proc. §338(a) as a "liability created by statute, other than a penalty."

[4] KCP's sole response is that since each employee experiences inconvenience, fatigue, and lost opportunity differently, and §226.7 payments compensate each employee uniformly, they must not constitute pay. (KCP 8-9.) But overtime, reporting time, and split-shift pay compensate according to uniform formulae, despite individual variations in experience, yet these mandated payments are clearly wages. (OB 23-24.)

required to work through a break, and thus should not be characterized as penalties. (OB 26-28.)[5]

Instead, KCP relies on two flawed assumptions. First, without support, KCP bases its position on a narrow, literal interpretation of §200's definition of "wages" as "amounts for labor performed." (KCP 4-5.) As discussed at OB 30-31, §200 "wages" have been interpreted broadly by courts to encompass payments that are far less directly connected to "labor performed" than meal and rest payments. (See also *Wang v. Chinese Daily News, Inc.* (C.D. Cal. 2006) 435 F.Supp.2d 1042, 1058-1059 ("characterizing [§226.7 payments] as wages is consistent with the definition of wages found in the California Labor Code….").) KCP does not address, much less distinguish, that body of cases.

Next, KCP asserts that in order to qualify as compensation, the amount of meal/rest payments must fluctuate, bearing a correlation to the

---

[5] KCP does respond to Murphy's argument that the availability of §558 civil penalties for missed meal and rest periods makes it unlikely that §226.7 is a second penalty for the same behavior. (KCP 14-16; OB 26 fn.19.) Section 558 imposes civil penalties for "underpaid" wages. At the time §558 was enacted in 1999, §226.7 payments did not exist. Therefore, at that time, there was no such thing as "underpaid wages" if an employee missed a break. Once §226.7 was enacted, §558 civil penalties became available where employers failed to pay employees the one hour of pay for missed breaks, thereby creating "unpaid wages." The legislative document cited by KCP *supports* that §226.7 payments are compensation, not penalties. (OB 34.)

exact time missed in a break. (KCP 4.)[6] This is untrue. A wage can be a fixed sum, unconnected to time worked. For example, employees receive up to four hours of reporting time pay, even if they perform no work on the scheduled day. Workers receive one hour's pay at the minimum wage, for non-working time, if they work a split-shift. (OB 23-24.) Insurance premiums, unemployment insurance fund payments, and uniform costs obviously do not correlate to time worked. But all are California wages, and none are dependent upon the amount of employee labor performed. (OB 30-31.)

Section 226.7 payments reflect the price tag affixed to an element of compensation that is difficult to value.[7] Legislators made this price easy

---

[6] Here, KCP inappropriately makes one of many references to the depublished *Mills* and *NASSCO* court of appeal decisions. KCP also leans on *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 380 fn.16, which is not only dicta, but relies solely on the DLSE's vacillating interpretation, which is entitled to no deference. (See OB 8 fn.5, 36 fn.26.) Finally, KCP inappropriately ascribes meaning to *Valles v. Ivy Hill Corp.* (9th Cir. 2005) 410 F.3d 1071, which did not decide whether §226.7 is a wage or penalty. (KCP 18.)

Two more federal courts recently issued conflicting decisions regarding §226.7. (Compare *Wang*, 435 F.Supp.2d at 1058-1059 (§226.7 payments are wages) with *Pulido v. Coca-Cola Enterprises* (C.D. Cal. May 25, 2006) 2006 U.S. Dist. LEXIS 43765 (§226.7 payments are penalties).)

[7] Murphy cited cases supporting that when legislators assign a dollar amount to compensate for something that is difficult to value, that amount is not a penalty. (OB 25-26 and fn.18.) Instead of critiquing this principle, KCP launches a roundabout attack on *Huntington v. Attrill* (1892) 146 U.S. 657, a case which Murphy does not cite, but which is cited in some of Murphy's authorities. (KCP 10-11.) KCP notes that *Huntington* discusses

for employers to calculate (one hour of pay at the employee's regular rate of compensation), just as they did with the price for overtime (time and a half at the employee's rate), reporting time (between two and four hours at the employee's rate), and split-shift pay (one hour at the minimum wage rate). All of these are wages. (OB 23-24.)

For these reasons, it is unconvincing when KCP argues that §226.7 payments must be penalties because they are "made without reference to actual damage sustained" under the *Ballerino* test. (KCP 8-9; OB 23-27.) Moreover, §226.7 payments make reference to actual compensation because they are tailored to *that particular employee's* rate of pay. Unlike many penalties, they are not an arbitrary "one-size-fits-all" sum. (See, e.g., §1033 ($100 civil penalty for lactation accommodation violations); §1403 ($500 penalty for failure to provide notice of mass layoff).)

Attacking Murphy's interpretation of *Prudential Home Mortgage Co. v. Superior Court, supra*, 66 Cal.App.4th 1236, KCP renders its holding nearly meaningless: "a penalty is different, other than, damages." (KCP 9.) In actuality, *Prudential* endorsed "the settled rule…that statutes which provide for recovery of damages additional to actual losses incurred, *such as double or treble damages*, are considered penal in nature…." (*Id.* at 1242 (emphasis added).) This description fits statutes fundamentally

---

whether a statute is "penal" for purposes of enforceability under the full faith and credit clause. That is why Murphy did not rely upon *Huntington*.

different from §226.7. (See, e.g., *Prudential*, 66 Cal.App.4th at 1241-1242 ("all damages" plus $300); *Menefee v. Ostawari* (1991) 228 Cal.App.3d 239, 243 (actual damages plus treble damages); *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33-34 (damages plus $250).) Section 226.7's "one hour of pay" reflects the value of lost breaks in a workday. The statute compensates the employee, but goes no further, and thus is not penal.

D. The Difference Between Earned Wages, Versus Penalties Which Are "Subject to" Enforcement

Murphy explained that, as with other compensation, §226.7 creates an immediate obligation on the employer to pay the hour of pay, and an immediate ownership interest by the employee in that hour of pay. Murphy contrasted this with penalty statutes, which are worded so that employers are "subject to" penalties which must then be enforced. (OB 28-30.) KCP refuses to discuss this difference.

Instead, KCP offers confusing word games. (KCP 5-8.) It claims that "nothing is self-operational or self-executing," because if an employer fails to pay wages, the employee would have to take action to recover them. This misses the point. An employee owns wages (and the employer automatically owes them) as soon as the wages are earned and payable. (See, e.g., *Cortez*, 23 Cal.4th at 178 ("earned wages that are due and payable pursuant to section 200 et seq. of the Labor Code are.…the property of the employee…."); OB 29.) By contrast, a person does not have a vested

property right in a penalty until the penalty is enforced. (OB 29-30.)[8] Section 226.7, as with other compensation statutes, is worded so that employers owe the hour of pay (and employees own it) as soon as the break is missed. Section 226.7 does not make the employer "subject to" a penalty that an employee must enforce.[9] (See also *Wang*, 435 F.Supp.2d at 1059 (§226.7 creates "affirmative duty on the employer to provide one hour's pay;" since "the employee is immediately entitled to the Section 226.7 payment," the payments are wages, not penalties.).)[10]

II. A §98.2 APPEAL VESTS JURISDICTION IN THE SUPERIOR COURT, TRIGGERING A COMPLETE NEW TRIAL IN WHICH THE COURT MAY EXERCISE ITS INHERENT DISCRETION TO HEAR NEW CLAIMS

A. The Statutory Language and Context

KCP asserts that "[t]he question is not whether anything in [§98.2] bars consideration [of new wage claims, but] whether the statute *allows*

---

[8] KCP also states that "vesting and accrual are not the same." (KCP 7.) KCP offers no citations, definitions, or reasons to believe that the definitions result in a meaningful difference here.

[9] The original proposed bill (1) called for a "penalty," (2) assigned the arbitrary, fixed sum of $50 in addition to damages, and (3) required employees to take action to enforce these sums. This penalty scheme was *rejected*, and replaced by the current language. (OB 32-36.)

[10] KCP argues that "just because a payment is made directly to an employee does not mean it is compensation rather than a penalty." (KCP 12.) Again, this misses the point. Murphy agrees that some penalties can be enforced (and be payable to) employees rather than the State. But such penalties do not become the property of the employee until they are enforced and judgment is rendered.

consideration of such claims, either explicitly or by implication." (KCP 20.) The Court has already answered KCP's question affirmatively. In *Vos Post v. Palo/Haklar & Assoc.* (2000) 23 Cal.4th 942, the Court found the Berman statutes silent as to whether the Labor Commissioner could summarily dismiss a claim following an administrative hearing in a manner that would cut off the right to seek §98.2 review. (*Id.* at 949.) In holding the dismissal could be appealed under §98.2, the Court noted that the Labor Code does not "place any restriction on the authority of the reviewing court, in a hearing de novo, to address a disputed question concerning any issue of law or fact, . . . or to determine its jurisdiction over a matter." (*Id.* at 949-950.)

KCP asserts that the Legislature's express intent that hearings be held "in an informal setting preserving the rights of the parties," speaks only to §98 administrative hearings, and has no bearing on §98.2 *de novo* appeals. (§98(a); KCP 25-26.) KCP's unsupported assertion ignores this Court's consistent analysis of §98.2 as part of the overall "Berman hearing procedure." (*Smith v. Rae-Venter* (2002) 29 Cal.4th 345, 356, 358-359 (construing §98.2(c) fee provision within context of Berman scheme); see, e.g., *Cuadra v. Millan* (1998) 17 Cal.4th 855, 858-859 (explaining "Berman hearing process," which is "codified in sections 98 to 98.8"); *Vos Post*, 23 Cal.4th at 947-948 (examining entire Berman process in deciding claimant's entitlement to §98.2 trial); see also OB 39-41.) When describing the

Berman scheme in smaller segments, §98 and §98.2 are bound together. (See, e.g., *Smith*, 29 Cal.4th at 355 ("administrative hearing" governed by "§§98-98.2"); *Vos Post*, 23 Cal.4th at 946 (same).)

KCP and the Court of Appeal focus on the term "review" as limiting a §98.2 *de novo* trial to claims raised before the Labor Commissioner. (KCP 20-22; *Murphy v. Kenneth Cole Productions, Inc.* (2005) 134 Cal.App.4th 728, 748.) This overlooks existing §98.2 jurisprudence. (OB 41-44.) It confuses the concept of "review" as used in conventional appeals, with "[a]n appeal from a decision of the Labor Commissioner[, which] differs significantly from a conventional appeal." (*Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831, 835.)

This Court has distinguished §98.2 appeals from traditional appeals (OB 43): "Although denoted an 'appeal,' unlike a conventional appeal in a civil action, hearing under the Labor Code is de novo…. 'A hearing de novo ….literally means a new hearing, 'that is, a new trial.'" (*Smith*, 29 Cal.4th at 356 (citations omitted).) "By contrast, in a conventional appeal the appellate court is limited to a review of the proceedings below. It may not retry the case." (*Pressler*, 32 Cal.3d at 835.)

Filing a timely §98.2 appeal terminates the Labor Commissioner's jurisdiction, vesting it in the Superior Court. (*Vos Post*, 23 Cal.4th at 947.) Unlike a conventional appeal, where an appellate court reviews the proceedings below for legal error or insufficiency of evidence, "the

decision of the Commissioner, is entitled to no weight whatsoever, and the proceedings are truly 'a trial anew in the fullest sense.'" (*Smith*, 29 Cal.4th at 357, quoting *Sales Dimensions v. Superior Ct.* (1979) 90 Cal.App.3d 757, 763; see also *Collier & Wallis v. Astor* (1937) 9 Cal.2d 202, 205 ("[t]he court hears the matter, not as an appellate court, but as a court of original jurisdiction, with full power to hear and determine it *as if it had never been before the labor commissioner*" (emphasis added).)

Interpreting the term "review," the *Sales Dimensions* court noted the Berman process had "no provision for preparing an administrative record for submission to the superior court," that "[n]either party is limited to the evidence presented at the administrative hearing…," and that the *de novo* appeal entitles the parties to a "full new trial in the superior court according to the rules and procedures applicable." (90 Cal.App.3d at 762 (citation omitted).)

B. The Legislative History

KCP argues that the Legislature's constitutional concern, which led to provision of a *de novo* appeal, "shows that the 'review' was of matter *previously* presented to and considered by the Labor Commissioner." (KCP 22-23.) In truth, nothing in the history indicates consideration of the specific question of new claims.[11] However, the history *does* demonstrate

[11] As KCP notes, claims not presented to the Labor Commissioner do not result in an unconstitutional delegation of judicial authority. (KCP 22-

the Legislature's intent to invoke judicial power and discretion in §98.2 appeals. (OB 44-47.) The Legislature amended §98.2 to provide *de novo* trials, rather than conventional appeals, to avoid constitutional concerns regarding the exercise of judicial power by an administrative agency. (AB 1522 (Jan.5, 1976), MJN Exh. 21 at 5; Sept. 14, 1976, Legal Affairs Enrolled Bill Report, MJN Exh. 38 at 1-2; OB 45-46.)[12]

C. The Underlying Public Policies

KCP claims its interpretation of §98.2 doesn't deprive wage claimants of any rights. (KCP 26.) This overlooks the reality faced by Murphy, as well as the many unrepresented low-wage workers who seek to recover wages through the "speedy, informal, and affordable" Berman process. (OB 39-41, 47-49.)

23.) Similarly, the court's exercise of discretion in deciding whether to hear new claims is unproblematic, since appeals after a *de novo* trial are "subject to a conventional appeal to an appropriate appellate court." (*Smith*, 29 Cal.4th at 357.)

[12] KCP attacks an argument Murphy does not make. Examining the 1990 amendment of §98.2 that changed the word "same" to "appeal," KCP declaims the amendment "was not an effort to open up the proceedings in the superior court to any dispute between the parties." (KCP 23-25.) Murphy never made such an assertion (OB 45 fn.25), and agrees that it was probably a simple housekeeping amendment.

KCP also argues that the word "same" in the 1976 legislation "is the order, decision or award," thereby limiting the scope of a §98.2 appeal to claims covered in the ODA. (KCP 23.) This cannot be true, since once an appeal is filed, the ODA evaporates. (*Smith*, 29 Cal.4th at 357.)

Murphy filed a wage claim because KCP misclassified him as an exempt employee. The DLSE did not help Murphy identify all the ways the misclassification violated his rights.[13] Nor did the DLSE inform him that failure to raise claims could result in losing them, through a combination of agency delays and the running of statutes of limitations. Following KCP's §98.2 appeal, Murphy obtained counsel, then learned of the additional consequences of KCP's misclassification. The trial court specifically found that Murphy's new claims related back to those raised before the Labor Commissioner because they "flowed from the same general set of facts." (OB 4-7, 47-49, 53-54; CT 525-544.)[14]

Under KCP's interpretation, the trial court would be stripped of the opportunity to rule on the relation-back question, KCP would evade the full

---

[13] KCP elevates the Court of Appeal's unsupported statement "that Murphy was aware of the [meal and rest break] requirements" when he filed his claim, to a holding. (KCP 30 fn.26.) However, the trial court specifically found Murphy did not know he could seek meal/rest wages when he filed his claim. (CT 535.)

[14] KCP disregards the trial court's specific findings regarding the applicable statute of limitation, and suggests that this Court "resolve it." (KCP 31-32; CT 538.) KCP also argues that Murphy's new claims "did not flow from the same general set of facts" (KCP 27 fn.25), again contrary to the court's specific findings. (CT 538.) KCP failed to appeal the relation-back or statute of limitations findings, thereby waiving the right to challenge them.

Murphy's analysis does not "create a way around the statute [of limitations.]" (KCP 26.) If Murphy's new claims were not related to those raised in the administrative process, the trial court could have so held, and then applied the statute of limitations bar. (OB 50, 53-54.)

consequences of its misclassification, and Murphy would be deprived of rights through no fault or delay of his own. (OB 47-49.) This would also create an unfair double standard, since employers can simply not appear in the administrative process without losing the right to present defenses in a §98.2 trial *de novo.* (*Jones v. Basich* (1986) 176 Cal.App.3d 513, 519.)

KCP also argues that allowing Murphy to pursue the related new claims would result in "by-pass[ing] the … speedy, informal, affordable forum …. and go[ing] directly to court." (KCP 27.) The irony in this argument is that Murphy ended up in court because *his employer* appealed his successful wage claim.[15] Murphy did exactly as the Legislature intended, choosing the preferred (but not mandatory) administrative forum (OB 39-41), yet was brought into court by KCP's appeal.[16]

---

[15] Indeed, KCP misstates the second Question Presented, framing it as an *employee* rather than *employer*-initiated §98.2 appeal. (KCP 1; 2/23/06 Court Order.)

[16] Given that employees may choose between the administrative and superior court arenas for resolution of their wage claims, no employer may claim prejudice by having to defend in a §98.2 appeal the same breadth of claims the employee could have pursued in superior court. (See also OB 48-49, 54-55.)

D. The Court's Inherent Power to Exercise Discretion to Safeguard the Parties' Interests

KCP argues that the superior court cannot exercise discretion to hear new claims in a §98.2 proceeding because it lacks "special authority" to implement procedures not explicitly contained in the Code of Civil Procedure. (KCP 19, 27.) This disregards the court's "'inherent power….to adopt any suitable method of practice….if the procedure is not specified by statute or by rules adopted by the Judicial Council.'" (*Citizens Util. Co. of California v. Superior Ct.* (1963) 59 Cal.2d 805, 812-813; see also *Buchwald v. Katz* (1972) 8 Cal.3d 493, 502-503; OB 50-54.) Similarly, in *Sales Dimensions,* 90 Cal.App.3d 757, 763-764, the court noted that while §98.2 does not address consolidation of actions or discovery rights, once jurisdiction is vested in the court, "proceedings are subject to the rules usually applicable to superior court actions," and the court has authority "to establish an appropriate procedure on discovery [and consolidation] in each case."

Assuming new claims are allowed, KCP argues discovery should not be subject to the court's discretion but "should be available as a matter of law." (KCP 28.) This is a question for another day, since KCP never sought discovery on the new claims in this case. (OB 6.)

KCP now claims prejudice through exposure to attorneys' fees liability on new claims that may not be subject to §98.2(c)'s prevailing

party standard. (KCP 28-29.) KCP never claimed such prejudice before the trial court, and thus waived this argument. More generally, raising new claims in a *de novo* trial will not result in prejudice with respect to fees. Trial courts are well-equipped to analyze and decide fee petitions which present multiple bases for entitlement to attorneys' fees. (See, e.g., *Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231.)

Finally, KCP argues that its interpretation of §98.2 would not lead to a burdensome and duplicative process by encouraging employees to file lawsuits in order to preserve all claims. (KCP 29-30.) However, this Court disfavors creating such a system. (*Cuadra*, 17 Cal.4th at 869-870 ("to require claimants to commence an action in superior court in order to toll the statute of limitations would defeat the statutory objective of providing claimants with an informal process of resolving their claims for unpaid wages"); OB 54-55.)[17]

Dated: October 10, 2006 HASTINGS CIVIL JUSTICE CLINIC

By:_____
Donna M. Ryu, SBN 124923

By:_____
Nancy Stuart, SBN 172896

[17] See also *Elkins v. Derby* (1974) 12 Cal.3d 410; OB 54-55. KCP attempts to distinguish *Elkins* by saying it involved tolling. (KCP 30.) *Elkins* recognized the relation-back doctrine as the "functional equivalent" of tolling. (12 Cal.3d at 418.)