Case Number S185827

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

ANTHONY KIRBY et al.

Plaintiffs and Appellants,

vs.

IMMOOS FIRE PROTECTION, INC.,

Defendant and Respondent.

Petition for Review of a Decision of the Court of Appeal

Third Appellate District Case Number C062306

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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BACKGROUND

Appellants Anthony Kirby and Rick Leech, Jr. (collectively "Appellants"), filed an amended class action complaint in the Superior Court of the State of California, County of Sacramento alleging that Respondent Immoos Fire Protection, Inc. ("Immoos") and 750 unidentified persons, engaged in several unlawful business practices ("Complaint"). (1 JA 17-32). In their Sixth Cause of Action, Appellants alleged that Immoos failed to provide them with rest periods in violation of Labor Code section 226.7[1] and California Industrial Welfare Commission ("IWC") Wage Order No. 16-2001. Immoos generally denied the allegations made by Appellants in their Complaint and raised various affirmative defenses to each of the seven causes of action contained therein. (2 JA 201-206).

On January 13, 2009, the trial court entered an Order Denying Plaintiffs' Motion for Certification of Class Action. (Respondent's Appendix ("RA") 1-9.)

On February 27, 2009, Appellants filed and served a request for dismissal of the entire lawsuit with prejudice, which was entered by the clerk of the court on said date. (1 JA 62-63.)

On April 24, 2009, Immoos filed and served a motion for an award of attorney's fees. (1 JA 70 - 3 JA 347.) On May 11, 2009, Appellants filed and served their opposition to said motion. (3 JA 348-387, 393-394.) On May 14, 2009, Immoos filed and served its reply. (3 JA 395-404.)

On July 9, 2009, an Order Granting Immoos' Motion for an Award of Attorney's Fees was entered and served, granting the motion in part. (3 JA 417-424.) Judgment was entered and served on August 3, 2009 (3 JA

[1] All references to statutes will be to the California Labor Code unless otherwise stated.

425-426); and Notice of Entry of Judgment was served on or about August 11, 2009. (3 JA 427-429.)

On June 25, 2009, prior to entry of judgment, Appellants filed and served an appeal of the Order Granting Immoos' Motion for an Award of Attorney's Fees. (3 JA 415-416.)

On July 27, 2010, in a decision previously published at 186 Cal.App.4th 1361, the Court of Appeal for the Third Appellate District affirmed the award of attorney's fees to Immoos in connection with the Sixth Cause of Action. (Slip Op., Case No. C062306, pp. 21-26.)

On or about November 17, 2010, this Court granted review of the following two issues:

1. Does Labor Code section 1194 apply to a cause of action alleging meal and rest period violations (Lab. Code, § 226.7) or may attorney's fees be awarded under Labor Code section 218.5?
2. Is [the Court's] analysis affected by whether the claims for meal and rest periods are brought alone or are accompanied by claims for minimum wage and overtime?

(Order, Petition for Review Granted, Issues Limited.)

SUMMARY OF ARGUMENT

Section 1194 does not apply to a cause of action alleging meal and rest period violations, and attorney's fees may be awarded to a prevailing defendant for such actions under Section 218.5. To harmonize the legislative intent of both Sections 218.5 and 1194, Section 1194 must be read to bar employers from recovering attorney's fees only as to causes of action seeking to recover the unpaid balance of the "legal minimum wage' or "legal overtime compensation."

The legislative history behind Section 226.7 shows that the California State Legislature did not intend to include a unilateral attorney's

fee provision for that section. The legislative history behind Sections 218.5 and 1194 shows that the Legislature intended that an employee would be required to pay an employer's attorney's fees under section 218.5 when the employer was the prevailing party in an action brought for the nonpayment of any "wage" other than for the "legal minimum wage' or "legal overtime compensation."

As used in section 1194, the phrase "legal minimum wage" is a reference to the minimum hourly wage rate set by the IWC, and the phrase "legal overtime compensation" is a reference to a rate of pay required by law for work performed in excess of the period prescribed as a workday or workweek.

An action brought under Section 226.7 is neither an action to recover the "legal minimum wage," nor an action to recover "legal overtime compensation," subject to Section 1194. This Court should reject the expansive definition of these phrases urged by Appellants. In addition, the term "wages" in section 218.5 is not limited only to wages required by contract.

Finally, the Court's analysis is not affected by whether claims for meal and rest periods are brought alone or are accompanied by claims for the "legal minimum wage" and "legal overtime compensation." Appellants' proffered interpretation of the term "action" would force plaintiffs to choose between seeking attorney's fees or recovery of all wages owed, and would expand the scope of Section 218.5 to potentially every civil cause of action. The Legislature and this Court have already determined that the term "action" refers to a "right of action," not an entire lawsuit.

ARGUMENT

I. LABOR CODE SECTION 1194 DOES NOT APPLY TO CAUSES OF ACTION ALLEGING MEAL OR REST PERIOD VIOLATIONS AND ATTORNEY'S FEES MAY BE AWARDED FOR SUCH VIOLATIONS UNDER LABOR CODE SECTION 218.5.

A. To Harmonize Sections 218.5 and 1194 of the Labor Code, Section 1194 Must Be Read to Bar Employers From Recovering Attorney's Fees Pursuant to Section 218.5 Only as to Causes of Action Seeking to Recover the Unpaid Balance of the Legal Minimum Wage or Legal Overtime Compensation.

According to its plain terms, Section 1194 permits *an employee* to recover his or her attorney's fees in a civil action seeking the unpaid balance of the full amount of *the legal minimum wage* or *the legal overtime compensation* applicable to the employee. Section 218.5, according to its plain terms, permits *the prevailing party* to recover his or her attorney's fees in an action brought for the *nonpayment of wages* provided that the action is not one for which attorney's fees are recoverable *under Section 1194.* In its decision below, the Third Appellate District acknowledged that the goal of this case is to harmonize these two potentially conflicting Labor Code sections. (Slip Op., Case No. C062306, p. 14.) (See also *Industrial Welfare Commission v. Super. Ct. (Cal. Hotel and Motel Assn.)* (1980) 27 Cal.3d 690, 723 ("*CHMA*") ["A cardinal principle of statutory construction ... decrees that all related statutory provisions must be read together and harmonized, if possible."].) As discussed below, the proper harmony is that Section 218.5 applies to any wage claim unless the action concerns the hourly minimum wage rate set by the IWC, or the overtime compensation provided by Section 510.

B. The Legislative History Behind Section 226.7 Shows That the Legislature Did Not Intend to Include a Unilateral Attorney's Fee Provision for that Section.

Section 226.7, subdivision (b) provides, "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." An action brought under Section 226.7 is considered one for the nonpayment of "wages." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1114, 1120 ("*Murphy*").)

Appellants argue that the Legislature intended Section 1194 to apply to all legally-mandated wages. (AOB, pp. 7-35.) However, the question before the Court is not whether the Legislature intended Section 1194 to apply to all legally-mandated wages when that section was last amended in 1992, but rather the more appropriate question is whether the Legislature intended Section 226.7, enacted in 2000, to apply to Section 1194. As will be shown, the legislative history of Section 226.7 evidences that the Legislature did not consider the section subject to Section 1194, and that it rejected the inclusion of a unilateral attorney's fee provision into Section 226.7.

In *Murphy*, this Court determined that the additional hour of pay required by Section 226.7 was a "wage," not a "penalty," and in so doing, relied in part, on the fact that the Legislature considered, but rejected, an explicit penalty provision within the section. (*Murphy, supra,* 40 Cal.4th at pp. 1107, 1114, 1120.) It is well settled that "[t]he rejection of a specific provision contained in an act as originally introduced is 'most persuasive' that the act should not be interpreted to include what was left out. [Citation.] Indeed, the Legislature certainly knows how to impose a penalty

when it wants to, having established penalties in many Labor Code statutes...." (*Id.* at p. 1107.)

Section 226.7 was originally introduced on February 19, 1999 as part of an omnibus labor and employment bill, Assembly Bill 633 (1999) ("AB 633"). (Assem. Bill No. 633 (1999-2000 Reg. Sess.) [Respondent Immoos' Motion for Judicial Notice ("Respondent's RJN"), Ex. A] § 9.) In its original form, AB 633 included at Section 9 a proposed Section 226.7 that would have required a court to "grant a prevailing plaintiff reasonable attorney's fees and costs" in a civil action for missed meal or rest periods. (Assem. Bill No. 633 (1999-2000 Reg. Sess.) [Respondent's RJN, Ex. A] § 9 [proposed Section 226.7, subdivision (c)(2)].) During the legislative process, proposed Section 226.7 was later moved into a different omnibus labor and employment bill, Assembly Bill 1652 (1999) ("AB 1652"). (Sen. Amend. to Assem. Bill No. 1652 (1999-2000 Reg. Sess.) Sept. 3, 1999 [Respondent's RJN, Ex. B] § 5.) This version of Section 226.7 contained the same unilateral attorney's fee provision affording only prevailing plaintiffs attorney's fees awards. (Sen. Amend. to Assem. Bill No. 1652 (1999-2000 Reg. Sess.) Sept. 3, 1999 [Respondent's RJN, Ex. B] § 5.) However, on September 8, 1999, the unilateral attorney's fee provision was rejected and removed from AB 1652. (Sen. Amend. to Assem. Bill No. 1652 (1999-2000 Reg. Sess.) Sept. 8, 1999 [Respondent's RJN, Ex. C] § 4.)

The next year, on February 24, 2000, the Legislature again introduced Section 226.7 in labor and employment legislation in the form of Assembly Bill 2509 (2000) ("AB 2509"). (Assem. Bill No. 2509 (1999-2000 Reg. Sess.) [Respondent's RJN, Ex. D] § 12.) In Section 12 of AB 2509, a proposed new Section 226.7 appeared that again included a provision that would require a court in a civil action for missed meal or rest periods to "award a prevailing plaintiff in such an action reasonable attorney's fees." (Assem. Bill No. 2509 (1999-2000 Reg. Sess.)

[Respondent's RJN, Ex. D] § 12 [proposed Section 226.7, subdivision (c)(2)].)

On April 12, 2000, the Assembly Committee on Labor and Employment issued an analysis of AB 2509 specifically providing that "[i]t does not increase minimum wages or revise overtime requirements." (Assem. Com. on Lab. and Employment, Rep. on Assem. Bill No. 2509 (1999-2000 Reg. Sess.) Apr. 12, 2000 [Respondent's RJN, Ex. E], p. 5.) The Legislature provided a definitive statement that it did not consider Section 226.7, or any other provision within AB 2509, as providing for actions of "the legal minimum wage or legal overtime compensation."

In addition, on August 25, 2000, AB 2509 was amended and the new version of the bill eliminated the language from proposed Section 226.7 that had required the court to award a prevailing plaintiff reasonable attorney's fees in a civil action for missed meal or rest periods. (Sen. Amend. to Assem. Bill No. 2509 (1999-2000 Reg. Sess.) August 25, 2000 [Respondent's RJN, Ex. F] § 7.) In place of the language that had appeared in proposed Section 226.7, subdivision (c)(2), a new subdivision (b) was substituted and read, "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." (Sen. Amend. to Assem. Bill No. 2509 (1999-2000 Reg. Sess.) August 25, 2000 [Respondent's RJN, Ex. F] § 7.)

On September 28, 2000, AB 2509 was approved by the Governor and enacted into law as Statutes 2000, Chapter 876. (Stats. 2000, ch. 876 [Respondent's RJN, Ex. G].)

As referenced above, "[t]he rejection of a specific provision contained in an act as originally introduced is 'most persuasive' that the act

should not be interpreted to include what was left out." (*Murphy, supra,* 40 Cal.4th at p. 1107.) The Legislature's decision to *twice* abandon a unilateral attorney's fee provision in Section 226.7 that would have awarded attorney's fees only to a prevailing plaintiff "is most persuasive" that the act should not be interpreted to include such a provision. As demonstrated by the legislative history leading up to Section 227.6 becoming law, the Legislature knew how to include a unilateral attorney's fee provision in Section 226.7. In fact, the Legislature provided for awards of "reasonable attorney's fees" to various specified parties within the same enactment. (Stats. 2000, ch. 876 [Respondent's RJN, Ex. G], §§ 2, 6 [Section 2 regarding Labor Code section 98.2, subdivision (c) and (j), Section 6 regarding Labor Code section 226, subdivision (b)].)

In addition, the Legislature is presumed to have existing laws in mind when it enacts a new statute. (*In re Michael G.* (1988) 44 Cal.3d 283, 293.) The legislative history of AB 2509 demonstrates that the Legislature considered the private right of action and unilateral attorney's fee provision originally considered for Section 226.7 as creating a new disincentive against employers forcing their employees to work during their lunch and meal periods. (Cal. Dept. Industrial Relations, Enrolled Bill Rep. on Assem. Bill No. 2509 (1999-2000 Reg. Sess.) Sept. 13, 2000 [Respondent's RJN, Ex. H], p. 9 ["Currently, the means of enforcing meal period requirements consists of filing an action for injunctive relief...."]; see also Sen. Judiciary Com., Rep. on Assem. Bill No. 2509 (1999-2000 Reg. Sess.) Aug. 8, 2000 [Respondent's RJN, Ex. I], pp. 2, 6-7.) Therefore, the Legislature did not consider Section 226.7 as subject to the identical private right of action and unilateral attorney's fee provision found within Section 1194. (*Earley v. Super. Ct. (Washington Mutual Bank, F.A.)* (2000) 79 Cal.App.4th 1420, 1428-1429 ("*Earley*") [employing same legal analysis].)

C. The Legislative History Behind Section 218.5 Shows that the Legislature Intended That an Employee Would Be Required to Pay an Employer's Attorney's Fees Under Section 218.5 When the Employer was the Prevailing Party in an Action Brought for the Nonpayment of Wages.

In 1986, the Legislature enacted Section 218.5. (Stats. 1986, ch. 1211 [Respondent's RJN, Ex. J], § 1.) In 1986, the first sentence of Section 218.5 read the same as it does today, i.e., "In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action." (Stats. 1986, ch. 1211 [Respondent's RJN, Ex. J], § 1.) The legislative history of Senate Bill 2570 (1986), the enabling legislation for Section 218.5, illustrates the purposes behind that section.

First, the Senate Committee on Judiciary's analysis of Senate Bill 2570 framed one of the "key issues" presented by the bill as "Should attorney's fees be awarded to the prevailing party in any action for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions," (Sen. Com. on Judiciary, Rep. on Sen. Bill No. 2570 (1985-1986 Reg. Sess.) 1986 [Respondent's RJN, Ex. K], p. 1), and explained the "purpose" of the bill was "to provide that the burden of paying attorney's fees should in all fairness rest on the unsuccessful litigant in actions for nonpayment of wages....," (Sen. Com. on Judiciary, Rep. on Sen. Bill No. 2570 (1985-1986 Reg. Sess.) 1986 [Respondent's RJN, Ex. K], p. 2).

Second, the Assembly Committee on Judiciary's analysis of Senate Bill 2570 noted that "actions for nonpayment of wages" usually involve relatively small amounts of money and the expense of hiring an attorney often exceeds the value of the claim, and "further pointed out" that the bill

"protects employers from frivolous suits because it requires an unsuccessful employee-plaintiff to pay the employer's attorneys' fees." (Assem. Com. on Judiciary, Rep. on Sen. Bill No. 2570 (1985-1986 Reg. Sess.) July 8, 1986 [Respondent's RJN, Ex. L], p. 1.)

Third, the Senate Rules Committee, in setting forth the "Arguments In Support" of Section 218.5, stated that "actions for nonpayment of wages usually involve relatively small amounts of money," and the expense of hiring an attorney often exceeds the value of the claim; and added, "Conversely, employers will be protected from frivolous suits for nonpayment of wages since the employee will be required to pay the employer's legal fees when the employer is the prevailing party." (Sen. Rules Com., Rep. on Sen. Bill No. 2570 (1985-1986 Reg. Sess.) May 6, 1986 [Respondent's RJN, Ex. M], p. 2.)

Fourth, in the Department of Industrial Relation's Enrolled Bill Report to the Governor recommending that he sign SB 2570 into law, the "Recommendation" included a mention of a "side effect" of such legislation that would require a court to award attorney's fees to a prevailing party in an action subject to Section 218.5 as "increas[ing] the case load of the Division [of Labor Standards Enforcement] since claimants would be more likely to file with the Labor Commissioner in order to avoid the possibility of attorney's fees being awarded by a court." (Cal. Dept. Industrial Relations, Enrolled Bill Rep. on Sen. Bill No. 2570 (1985-1986 Reg. Sess.) Aug. 26, 1986 [Respondent's RJN, Ex. N], p. 2.)

Accordingly, the legislative history of Section 218.5 provides that the law's purpose is three-fold: 1) give employees a financial incentive to seek relief in meritorious wage actions with the prospect of the court awarding them attorney's fees; 2) discourage employees from filing unmeritorious wage actions with the prospect of the court issuing an attorney's fee award against them; and 3) encourage employees to file wage

actions with the Labor Commissioner, instead of civil court, where the prospect of a hostile attorney's fee award does not exist.

D. The Phrase "Legal Minimum Wage" as Used in Section 1194 Is a Reference to the Minimum Hourly Wage Rate Set by the IWC.

In 2000, the Legislature amended Section 218.5 by adding the following sentence: "This section does not apply to any action for which attorney's fees are recoverable under Section 1194." (Stats. 2000, ch. 876 [Respondent's RJN, Ex. G], § 4.) Section 1194, subdivision (a) states, "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit." (Lab. Code, § 1194, subd. (a).) Accordingly, a defendant-employer that prevails in any action for the nonpayment of wages, except for claims concerning "the legal minimum wage or the legal overtime compensation," is entitled to an award of attorney's fees.

The Labor Code does not provide a definition for the phrase "legal minimum wage," but its plain meaning compels an exclusive reference to the minimum hourly wage rate set by the Legislature and publicized by the IWC. "[T]he objective of statutory interpretation is to ascertain and effectuate legislative intent." (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340.) In doing so, a court "look[s] first to the language of the statute, giving effect to its 'plain meaning.' " (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562 ("*Burden*").) A statute's "plain meaning" is the "natural and customary import" of its language. (*Tiernan v. Trustees of Cal. State Univ. & Colleges* (1982) 33 Cal.3d 211, 218-219 ("*Tiernan*").) Only where the "plain meaning" of the text is ambiguous or appears repugnant to the general purview of the act, should the Court seek extrinsic aids to interpret

a statute's underlying legislative intent. (*Burden, supra*, at p. 562; *Tiernan, supra,* at pp. 218-219.)

The conclusion that the natural and customary import of the term "legal minimum wage" must be a reference only to the "minimum hourly wage" rate set by the IWC is illustrated by how the California Judicial Council and the IWC have employed said phrase. The California Judicial Council's CACI Jury Instruction No. 2701, "Nonpayment of Minimum Wage – Essential Factual Elements (Lab. Code, § 1194)" provides that the "legal minimum wage" is a minimum hourly wage rate required by law:

> [*Name of plaintiff*] claims that [*name of defendant*] owes [him/her] the difference between the wages paid by [*name of defendant*] and the wages [*name of plaintiff*] should have been paid according to the minimum wage rate required by state law. To establish this claim, [*name of plaintiff*] must prove all of the following:
>
> 1. That [*name of plaintiff*] performed work for [*name of defendant*];
> 2. That [*name of plaintiff*] was paid less than the minimum wage by [*name of defendant*] for some or all hours worked; and
> 3. The amount of wages owed.
>
> The minimum wage for labor performed from [*beginning date*] to [*ending date*] was [*minimum wage rate*] per hour.
>
> An employee is entitled to be paid the legal minimum wage rate even if he or she agrees to work for a lower wage.

(CACI No. 2701 (2011 ed.) [Respondent's RJN, Ex. O].)

Likewise, the IWC is the administrative agency charged with enforcing the minimum wage laws of California. (Lab. Code, §§ 1173, 1178.5; *Martinez v. Combs* (2010) 49 Cal.4th 35, 59 ("*Martinez*").) In the

exercise of this quasi-legislative power, the IWC has promulgated 17 wage orders that apply to separate industries or occupations. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 581; Cal. Code Regs., tit. 8, § 11000 et seq.) In the wage orders it promulgates, the IWC publishes the minimum hourly wage rate under the section entitled "Minimum Wages." (See, e.g., Cal. Code Regs., tit. 8, § 11160, subd. (4).) Other matters, however, including rest and meal period provisions, are found in entirely different sections of the regulation. (Cal. Code Regs., tit. 8, § 11160, subds. (10) [meal periods], (11) [rest periods]; see also *Murphy, supra,* 40 Cal.4th at p. 1106, fn. 8 [placement of provisions within wage order subsections indicative of IWC interpretation].)

In addition, the IWC makes available to employers in California an "Official Notice" regarding the "California Minimum Wage." Meal and rest periods are not mentioned in that publication. (Industrial Welfare Commission, MW-2007, January 1, 2007 [Respondent's RJN, Ex. P], Section 2 [entitled "Minimum Wages."].)

The legislative history of Section 1194 also evidences that the Legislature intended to limit the phrase "the legal minimum wage" to its plain meaning, i.e., the minimum hourly wage rate set by the IWC, and that such phrase was not a reference to "any legally-mandated wage," as urged by Appellants.

"A cardinal principle of statutory construction, of course, decrees that all related statutory provisions must be read together and harmonized, if possible." (*CHMA, supra,* 27 Cal.3d at p. 723.) The statute now codified as Section 1194 is the direct successor of a statute first enacted in 1913 (hereinafter "the 1913 Statute"). (Stats. 1913, ch. 324 [Respondent's RJN, Ex. Q], § 13; see also *Martinez, supra,* 49 Cal.4th at p. 52.) The 1913 Statute was an omnibus legislation entitled "An act regulating the employment of women and minors and establishing an industrial welfare

commission to investigate and deal with such employment, including a minimum wage; providing for an appropriation therefor [sic] and fixing a penalty for violations *of this act*." (Stats. 1913, ch. 324 [Respondent's RJN, Ex. Q; emphasis added].) To this end, Sections 1 and 2 of the legislation created the IWC. (Stats. 1913, ch. 324 [Respondent's RJN, Ex. Q], §§ 1-2.) Sections 3 through 6 then charged the IWC, among other action items, "to fix... [a] minimum wage to be paid to women and minors engaged in any occupation, trade or industry in this state...." (Stats. 1913, ch. 324 [Respondent's RJN, Ex. Q], §§ 3-6 [quotation found in Section 6].)

Next, Sections 11 and 12[2] declared that the minimum wage set by the IWC was the law all affected employers must follow, subject to legal challenge. (Stats. 1913, ch. 324 [Respondent's RJN, Ex. Q], §§ 11-12.) Sections 13 and 14 of the legislation then created the mechanisms for enforcing said law. (Stats. 1913, ch. 324 [Respondent's RJN, Ex. Q], §§ 13-14.)[3] Section 13 empowered an employee to file a minimum wage action in civil court, and Section 14 permitted an employee to file such a complaint with the IWC. (Stats. 1913, ch. 324 [Respondent's RJN, Ex. Q], §§ 13-14.)

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[2] Sections 7 through 10 concern the methods of amending the legal minimum wage and other wage orders once first fixed, exceptions to the minimum wage, the gathering of information for the IWC, and making it a criminal misdemeanor for employers to discharge, threaten discharge, or discriminate against any employee who aids the IWC in enforcement of its wage orders. (Stats. 1913, ch. 324 [Respondent's RJN, Ex. Q], §§ 7-10.)

[3] Thereafter, Sections 15 through 19 concern IWC reports to the Governor and Legislature, funding for the IWC, provisions regarding strikes and lockouts, a severability clause should a court determine that any section of the Act is unconstitutional, and defining which employees are covered by the legislation. (Stats. 1913, ch. 324 [Respondent's RJN, Ex. Q], §§ 15-19.)

Accordingly, as set forth in both the title and text of the legislation, the 1913 Statute in pertinent part 1) created the IWC; 2) empowered the IWC to set the minimum wage; 3) empowered the minimum wage set by the IWC with the force of law; and 4) created means to enforce the minimum wage "*of this act.*" (Stats. 1913, ch. 324 [Respondent's RJN, Ex. Q]; see also *Ex parte Kohler* (1887) 74 Cal. 38, 45; *Orange County Water Dist. v. Farnsworth*, 138 Cal.App.2d (1956) 518, 525 [courts may consider the title of an act for interpretation purposes].) The fact that the title of the statute limits its enforcement mechanisms to only violations "of this act" is particularly important because Article I, Section 24 of the California Constitution read in pertinent part at the time: "Every Act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an Act which shall not be expressed in its title, such Act shall be void only as to so much thereof as shall not be expressed in its title." (See Cal. Const., art. I, § 24, as enacted May 7, 1879 [Respondent's RJN, Ex. R].) As such, had the Legislature intended the term "legal minimum wage" to include all statutorily-mandatory wages, including those provided outside the 1913 Statute, such legislative intent is void because it was not expressed within the title of the legislation.

Finally, a review of contemporary publications evidences that the common, existing parlance at the time the 1913 Statute was enacted equated the term "legal minimum wage" with a law setting forth a consistent, minimum wage rate based upon a unit of time (typically a week). At the general time the 1913 Statute was enacted, several contemporary scholarly articles were published on the merits of legislation setting a minimum wage rate based upon units of time – these articles referenced such legislation as a "legal minimum wage." (See, e.g., Holcombe, "The Effects Of The Legal Minimum Wage For Women" (1917) [Respondent's RJN, Ex. S]; Consumers' League of New York State

and Consumers' League of the City of New York, "Women's Wages Today: One Reason For A Legal Minimum In New York State" (1920) [Respondent's RJN, Ex. T].)

The legislative intent behind the term "legal minimum wage," as enacted in the 1913 Statute, and as still used in Section 1194, is a reference to the minimum wage rate set by the Legislature and implemented by the IWC ($8.00 per hour as of January 1, 2008), and not to "all legally-mandated wages." (Lab. Code, § 1182.12.) Moreover, said legislative intent is consistent with the plain meaning of the phrase as exemplified by the common manner in which it has been currently employed by the California Judicial Council and IWC, and contemporaneously employed in articles published at the time of the 1913 Statute's enactment.

E. The Phrase "Legal Overtime Compensation" as Used in Section 1194 Is a Reference to a Rate of Pay Required by Law for Work Performed in Excess of the Period Prescribed as a Workday or Workweek.

As with the phrase "legal minimum wage," the phrase "legal overtime compensation" is not specifically defined in the Labor Code. The conclusion that the natural and customary import of the phrase "legal overtime compensation" exclusively references the "overtime rate" set by Section 510 is illustrated by how the phrase has been commonly used in California, including by the courts, the IWC and the California Judicial Council; and by how the phrase has also been used in the context of the federal wage and hour law.

Paralleling the purpose of "overtime" laws within the Federal Labor Standards Act ("FLSA"), the legislative intent behind the California Labor Code's "overtime" provisions is "to spread employment throughout the work force by putting financial pressure on the employer, and to compensate employees for the burden of overtime workweeks." (*Monzon v.*

Schaefer Ambulance Service (1990) 224 Cal.App.3d. 16, 39 [internal quotations and citations omitted] ("*Monzon*").) Premium pay for overtime is "the primary device for enforcing limitations on the maximum hours of work." (*Cal. Manufacturers Assn. v. Industrial Welfare Com.* (1980) 109 Cal.App.3d 95, 111.) Accordingly, the California legislative intent for the term "overtime" is parallel to the federal intent of the same term – a reference to work performed in excess of that period of time prescribed by law as a workday or workweek. Premium pay requirements are imposed upon employers to encourage the hiring of additional employees rather than requiring current employees to work overtime hours. The IWC is charged with determining the "maximum hours of work" in California. (Lab. Code, § 1198.) In doing so, the IWC adopted the American standard of an eight-hour day, 40-hour workweek – as codified by the Legislature in Labor Code section 510 – as the default measure. (See e.g., Cal. Code Regs., tit. 8, § 11160, subd. (3)(A) [entitled "Hours and Days of Work, Daily Overtime-General Provisions"]; Lab. Code, § 510.) Section 3(A) of the 17 IWC's wage orders spells out the "general provisions" pertaining to "overtime" that apply to different employees by industry or occupation.

The California Judicial Council's CACI Jury Instruction No. 2702, "Nonpayment of Overtime Compensation – Essential Factual Elements (Lab. Code, § 1194)" provides that "overtime pay" is an hourly wage rate required by state law for hours worked "longer" than the prescribed period:

> [*Name of plaintiff*] claims that [*name of defendant*] owes [him/her] overtime pay as required by state law. To establish this claim, [*name of plaintiff*] must prove all of the following:
>
> 1. That [*name of plaintiff*] performed work for [*name of defendant*];
> 2. That [*name of plaintiff*] worked overtime hours;

3. That [*name of plaintiff*] was [not paid/paid less than the overtime rate] for some or all of the overtime hours worked; and

4. The amount of overtime pay owed.

Overtime hours are the hours worked longer than [*insert applicable definition(s) of overtime hours*].

Overtime pay is [*insert applicable formula*].

An employee is entitled to be paid the legal overtime pay rate even if he or she agrees to work for a lower rate.

(CACI No. 2702 (2011 ed.) [Respondent's RJN, Ex. U].)

Accordingly, the plain meaning of the term "overtime compensation" is confined to a rate of pay required by law for work performed in excess of the period prescribed as a workday or workweek. Employing this literal interpretation of the term is consistent with the legislative intent of the overall implementing act. As discussed above, the original version of Section 1194 enacted within the 1913 Statute only provided for private rights of action regarding the legal minimum wage. (Stats. 1913, ch. 324 [Respondent's RJN, Ex. Q], § 13.) Nearly 50 years later, the Legislature made numerous changes to the Labor Code chapter where Section 1194 is found (hereinafter "the 1961 Amendment"). (Stats. 1961, ch. 408 [Respondent's RJN, Ex. V].) In pertinent part, Section 3 of the 1961 Amendment revised Section 1194 to include "overtime compensation" to the specific list of private actions an employee could bring for themselves in civil court. (Stats. 1961, ch. 408 [Respondent's RJN, Ex. V], § 3.) After this amendment, Section 1194 read in pertinent part, "Any woman or minor receiving less than the legal minimum wage or overtime compensation... is entitled to recover in a civil action...." (Stats. 1961, ch. 408 [Respondent's RJN, Ex. V], § 3.) Likewise, Section 2 of the 1961 Amendment newly enacted Labor Code section 1193.6 which

empowered the IWC to seek monetary damages in civil court to "recover unpaid minimum wages or unpaid overtime compensation." (Stats. 1961, ch. 408 [Respondent's RJN, Ex. V], § 2.)

However, in contrast, Section 4 of the same 1961 Amendment added Section 1194.5 to the Labor Code, providing an expansive right to the IWC to seek injunctive relief for any violation of law under its purview. (Stats. 1961, ch. 408 [Respondent's RJN, Ex. V], § 4.) At that time, Labor Code section 1194.5 read in pertinent part, "In any case in which a person employing a woman or minor has willfully violated any of the laws, regulations, or orders governing the wages, hours of work, or working conditions of women of minors, the division may seek, in a court of competent jurisdiction ... an injunction...." (Stats. 1961, ch. 408 [Respondent's RJN, Ex. V], § 4.) The section still reads so in substantive part today. (Lab. Code, § 1194.5.)

Again, "a cardinal principle of statutory construction...decrees that all related statutory provisions must be read together and harmonized, if possible." (*CHMA*, *supra*, 27 Cal.3d at p. 723.) Additionally, "[w]hen the Legislature uses materially different language in statutory provisions addressing the same subject or related subjects, the normal inference is that the Legislature intended a difference in meaning." (*People v. Trevino* (2001) 26 Cal.4th 237, 242.) To this end, in determining the scope of the IWC's power to seek injunctive relief under Section 4 of the 1961 Amendment, the Legislature expansively defined said scope as any violation of law concerning "wages, hours of work, or working conditions" – the same terminology the Legislature used in setting forth the scope of the IWC's regulatory powers 1) in the original 1913 Statute, 2) in the codification of said statute in 1937 (which was still in effect at the time of the 1961 Amendment), and 3) through today. (Stats. 1913, ch. 324 [Respondent's RJN, Ex. Q], § 3 [the 1913 Statute]; Stats. 1936, ch. 90, §

1173 [Respondent's RJN, Ex. W]; Lab. Code, § 1173.) However, in contrast to this expansive power, the Legislature limited the opportunity of both the IWC and employees to seek monetary damages in civil court actions only to recover unpaid minimum wages or overtime compensation. (Stats. 1961, ch. 408 [Respondent's RJN, Ex. V], §§ 2, 3.) As such, limiting the interpretation of "overtime compensation" to its plain meaning is not only consistent to the Legislature's intent to limit the scope of authorized civil wage actions under Section 1194 vis-à-vis injunctive actions under Labor Code section 1194.5, but also vital to maintaining said legislatively-prescribed balance.[4]

Additionally, in 1938, Congress enacted the Fair Labor Standards Act. ("FLSA") (52 Stat. 1063 [Respondent's RJN, Ex. X], § 7.) In 1949, Section 207 of the FLSA was amended and the phrase "overtime compensation" was used exclusively to define an elevated rate of pay required by law after an employee works in excess of the period prescribed as a workweek. (63 Stat. 446 [Respondent's RJN, Ex. Y], § 1). It still does so today. (See, e.g., 29 U.S.C. § 207, subd. (o)(7).) Courts have long recognized that California's wage laws are patterned on federal statutes,

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[4] Citing this Court's decision in *Martinez, supra,* 49 Cal.4th at pp. 56, 61-62, Appellants argue that "Section 1194's scope is at least coextensive with the IWC's delegated authority to set minimum labor standards for California." (AOB, pp. 32-33.) *Martinez* does not stand for such a contention. Rather, *Martinez* provides that the IWC may enact rules and regulations beyond merely setting a minimum wage to effectively enforce the minimum wage. (*Martinez, supra,* at pp. 56, 61-62.) Nowhere does *Martinez* analyze the scope of Section 1194 vis-à-vis the scope of IWC's regulatory powers. (See generally *id.*, at p. 35.) As discussed above, any contention that Section 1194's scope is coextensive with the IWC's delegated authority is belied by the different scopes provided by the Legislature within Labor Code sections 1193.6, 1194, and 1194.5. (Lab. Code, §§ 1193.6, 1194, 1194.5.)

and that federal law provides persuasive guidance for interpreting California's wage laws. (*Monzon, supra,* 224 Cal. App.3d at pp. 30-31.)

Finally, the Legislature amended Section 1194 in 1972 (hereinafter "the 1972 Amendment") (Stats. 1972, ch. 1122 [Respondent's RJN, Ex. Z], § 13.) In its effort to bring gender neutrality to Section 1194 regarding the minimum wage, the 1972 Amendment altered the language of the provision in pertinent part from "Any woman or minor receiving less than the legal minimum wage or overtime compensation....," to "Any employee receiving less than the legal minimum wage or any woman or minor receiving less than the legal overtime compensation...." (See Stats. 1961, ch. 408 [Respondent's RJN, Ex. V], § 13; Stats. 1972, ch. 1122 [Respondent's RJN Ex. Z], § 13.) This marks the first time that the term "legal overtime compensation" was used in Section 1194. However, nowhere in the legislative history of the 1972 Amendment is there any reference to the changed "legal overtime compensation" terminology, or any suggestion that the changed language was intended to have any substantive effect. Rather, the legislative history of the 1972 Amendment provides that the change was exclusively to expand the purview of California's minimum wage laws to include adult men. (Cal. Dept. Industrial Relations, Enrolled Bill Rep. on Assem. Bill No. 256 (1971-1972 Reg. Sess.) Aug. 14, 1972 [Respondent's RJN, Exhibit AA], pp. 1-2; Stats. 1972 (Reg. Sess.) Summary Dig., p. 159 [Respondent's RJN, Exhibit BB]; see also *People v. Super. Ct. (Lavi)* 4 Cal.4th 1164, 1177-78 [the Legislative Counsel's Digest is a source of legislative intent].)

Accordingly, the plain meaning of the term "overtime compensation" is confined to a rate of pay required by law for work performed in excess of the period prescribed as a workday or workweek.

F. An Action Brought Under Section 226.7 Is Neither an Action to Recover the "Legal Minimum Wage," Nor an Action to Recover "Legal Overtime Compensation" Under Section 1194.

An action for wages is only subject to Section 1194 if said action seeks 1) monetary damages for allegedly having been compensated at an hourly wage rate below the minimum wage rate set by the IWC, or 2) monetary damages for having been compensated at an hourly wage rate below that required by law for work performed beyond the period prescribed as a workday or workweek. In regards to the former, Section 226.7 entitles an employee to an additional hour of pay, at the employee's "regular rate of compensation," for each day an insufficient meal or rest period is provided. Thus, the compensation in question is not based on the minimum wage rate set by the IWC, but rather the employee's *regular contracted wage* rate. Section 226.7 also does not guarantee any specified minimum rate of pay to an employee. (Lab. Code, § 226.7.) By contrast, Section 1197 provides such a guaranteed minimum wage payment in an amount that is "fixed by the commission." (Lab. Code, § 1197.) The minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a wage less than the minimum so fixed is unlawful. (Lab. Code, § 1197.) An action under Section 226.7 does not seek damages for having been compensated at an hourly wage rate below the minimum wage rate set by the IWC, but rather, such an action seeks a second payment of wages based upon the employee's regular contracted-for wage rate. Such an action, therefore, is not one for the "legal minimum wage."

Second, in regard to an action seeking to recover "legal overtime compensation," IWC wage orders require an employer to authorize and permit an employee a take a ten-minute rest period for every four hours of work regardless of whether the employee has worked in excess of the

period prescribed by law as a "workday" or a "workweek." (See, e.g., Cal. Code Regs., tit. 8, § 11160, subd. (11).)[5] Neither the length, nor frequency, nor any other aspect of the law regarding rest periods change in connection with whether the employee is working "overtime." Likewise, the IWC wage orders require an employer to permit an employee to take a 30 minute meal period after five hours work regardless of whether the employee has worked in excess of the period prescribed by law as a "workday" or a "workweek." (See, e.g., Cal. Code Regs., tit. 8, § 11160, subd. (10).)[6] Neither the length, nor frequency, nor any other aspect of the meal periods change in connection with whether the employee is working overtime hours. (See, e.g., Cal. Code Regs., tit. 8, § 11160, subd. (10).) Accordingly, an employee's right to an additional hour of pay for missed meal and rest periods under Section 226.7 is entirely unrelated to whether said employee has worked in excess of the period prescribed by law as a "workday" or a "workweek," and is not one for "legal overtime compensation."

Since an action under Section 226.7 is not for the "the legal minimum wage or the legal overtime compensation," such an action is not subject to Section 1194. (Lab. Code, § 1194.) In turn, whereas a Section 226.7 action is not subject to Section 1194, and whereas the additional hour of a pay required by Section 226.7 is considered a "wage," a prevailing defendant in such matters is entitled to an award of attorney's fees under Section 218.5. (Lab. Code, § 218.5; *Murphy*, *supra,* 40 Cal.4th at 1114.)

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[5] The wage orders also include other provisions defining what constitutes a sufficient rest period which are not pertinent to the immediate questions before this Court. (See, e.g., Cal. Code Regs., tit. 8, § 11160, subd. (11).)

[6] The wage orders also include other provisions defining what constitutes a sufficient meal period which are not pertinent to the immediate questions before this Court. (See, e.g., Cal. Code Regs., tit. 8, § 11160, subd. (10).)

G. In *McGann v. United Postal Service, Inc.*, the Court of Appeal Misinterpreted Sections 218.5, 226.7 and 1194, Misapplied This Court's Holding in *Murphy*, and Overlooked the Legislative History Demonstrating That the Legislature Intended the Reciprocal Attorney Fee Provisions of Section 218.5 to Apply in an Action Brought Under Section 226.7.

After this Court granted Appellants' petition for review in this case, the Second District Court of Appeal, Division Eight, issued a published opinion denying an employer's motion for attorney's fees following its successful defense of a Section 226.7 claim and other actions that had been joined with a "legal overtime compensation" claim.[7] (*McGann v. United Postal Service, Inc.* (Feb. 24, 2011, B221709) __ Cal.App.4th __ [pp. 16-26] ("*McGann*") [Respondent's RJN, Ex. CC].) The *McGann* court ignored the teachings of this Court in *Murphy* that the hour of pay required by Section 226.7 was considered a "wage." The *McGann* court concluded that the payment was in fact a "penalty" for attorney's fees purposes because "the statutory remedy for breach of that [meal and rest period] obligation is not akin to the types of compensation that have traditionally been encompassed within the definition of 'wages.' ... The 2000 amendment providing a pay remedy bears sufficient hallmarks of a penalty designed to shape employer behavior, and is sufficiently distinct from the customary types of bargained-for wages recognized under the law, that we cannot conclude the Legislature intended a claim under Labor Code section 226.7 to be interpreted as a claim for 'nonpayment of wages'...." (*Id.* at pp. 23-

[7] The plaintiff in *McGann* was an employee who sued to recover statutory remedies for numerous alleged violations of the Labor Code, including on those statutes requiring payment of overtime, payment of compensation for missed meal and rest breaks, and failure to maintain time records. The plaintiff also sought recovery for conversion and the statutory remedy for violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) (*McGann, supra,* __ Cal.App.4th __ [p. 3].)

25.) From this premise, the *McGann* court asserted that it was its "duty to construe statutes regulating the conditions of employment liberally with an eye to protecting employees," and therefore interpreted Section 218.5 as only applying to contracted-for wages, and not to legally-required wages such as Section 226.7 which the court found to be more akin to "penalties." (*Id.* at pp. 20-26.)

The *McGann* court was incorrect on three points: 1) this Court determined that the payment required by Section 226.7 was a "wage" for all purposes; 2) the "duty" to protect employees leans in favor of finding that Section 218.5 applies to Section 226.7 and other legally-required wages, not against it; and 3) the legislative history suggests the Legislature meant the reciprocal fee recovery provisions of Section 218.5 to apply in an action for violation of the Section 226.7 mandate that employers provide meal and rest breaks for certain nonexempt employees.

1. In *Murphy*, this Court Determined that the Payment Required by Section 226.7 Was a "Wage" for All Purposes.

In *Murphy,* this Court stated, "We hold that section 226.7's plain language, the administrative and legislative history, and the compensatory purpose of the remedy compel the conclusion that the "additional hour of pay" is a premium wage, not a penalty." (*Murphy, supra,* 40 Cal.4th at pp. 1114, 1120.) In reaching its conclusion, this Court did not base its analysis on whether the question concerned the statute of limitations, attorney's fees, or other matters. (See generally *id.* at pp. 1102-1114.) Rather, this Court first determined whether the required payment was a "wage" or "penalty;" and from that determination, concluded which statute of limitations should apply. (*Ibid.*) The tail did not wag the dog. (*Ibid.*) Accordingly, *McGann*'s assertion that this Court in *Murphy* did not

determine that the payment of wages required by Section 226.7 is a "wage" for all purposes was in error.

McGann's assertion that "the statutory remedy for breach of that [meal and rest period] obligation is not akin to the types of compensation that have traditionally been encompassed within the definition of 'wages,'" directly conflicts with this Court's pronouncement in *Murphy* that "[A] payment owed pursuant to section 226.7 is akin to an employee's immediate entitlement to payment of wages or for overtime." (*Id.* at p. 1108.) Likewise, the argument in *McGann* that "[t]he 2000 amendment providing a pay remedy bears sufficient hallmarks of a penalty designed to shape employer behavior," was rejected by this Court in *Murphy* when it stated that "the administrative and legislative history of the statute indicates that, whatever incidental behavior-shaping purpose section 226.7 serves, the Legislature intended section 226.7 first and foremost to compensate employees for their injuries." (*Id.* at pp. 1110-1111.)

2. The "Duty" to Protect Employees Leans in Favor of Finding that Section 218.5 Applies to Section 226.7 and other Legally-Required Wages, Not Against It.

The *McGann* court interpreted Section 218.5 as not applying to actions brought for the nonpayment of legally-required wages, such as those brought pursuant to Section 226.7, because it believed that such would protect employees. (*McGann, supra,* __ Cal.App.4th __ [pp. 20-26].) An employee is not entitled to an award of attorney's fees under Section 1194 for prevailing in a Section 226.7 action because that type of action is not brought for the nonpayment of "the legal minimum wage or the legal overtime compensation." The only avenue open to a plaintiff to seek attorney's fees in connection with such claims is Section 218.5. However, if Section 218.5 does not apply to actions brought for legally-required wages, including Section 226.7 actions, then prevailing plaintiffs

are cut-off from this only recourse.[8] The *McGann* decision actually hurts employees, not protects them, because employees will no longer have the financial incentive to bring lawsuits to enforce Section 226.7 violations, and violations of other legally-required wages.

As demonstrated above, Section 218.5 was enacted because "actions for nonpayment of wages usually involve relatively small amounts of money...Due to the fact recoveries are often small, the expense of hiring an attorney to file and pursue a lawsuit often exceeds the value of the claim, with the employee forced to make this economical decision not to enforce his or her rights." (See, e.g., Sen. Com. on Judiciary, Rep. on Sen. Bill No. 2570 (1985-1986 Reg. Sess.) 1986 [Respondent's RJN, Exhibit K], pp. 2-3.) This purpose transcends both contracted-for wages and legally-required wages. When Section 218.5 was enacted in 1986, the same Article of the Labor Code within which Section 218.5 appears already included a legally-required "wage" regarding compensation for unused vacation time. (Lab. Code, § 227.3; Stats. 1972, ch. 1321 [Respondent's RJN, Ex. DD], § 1.) Nowhere in the legislative history of Section 218.5 is there any suggestion that the term "wages" did not include the legally-required "wage" set forth in Labor Code section 227.3 or any other law. (See, e.g., Sen. Com. on Judiciary, Rep. on Sen. Bill No. 2570 (1985-1986 Reg. Sess.) 1986 [Respondent's RJN, Exhibit K]; see also *Cal. Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 641-643 [absent evidence of inconsistency by the Legislature, a word or phrase, or its derivatives, accorded a particular meaning in one part or portion of a code, should be accorded the same meaning in other parts or portions of the code].)

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[8] For the same reasons, plaintiff employees could also not seek attorney's fees for pursing enforcement of "reporting time pay" (see, e.g., Cal. Code Regs., tit. 8, § 11160, subd. (5)), and other legally-required wages.

"[S]tatutes governing conditions of employment are to be construed broadly in favor of protecting employees," but with the caveat that such is consistent with the statute's underlying legislative intent. (*Murphy, supra,* 40 Cal.4th at p. 1103; *Cal. Grape & Tree Fruit League v. Industrial Welfare Commission* (1969) 268 Cal.App.2d 692, 698 ("*California Grape*").) Interpreting Section 218.5 as not applying to legally-required wages would not only run counter to that statute's legislative intent of providing economic incentive to employees to enforce their wage rights, but would also run counter to protecting employees as it would limit their ability to effectively protect themselves against employers who violate legally-required wage laws.

3. The Legislative History Behind Section 218.5 Shows that the Legislature Intended that the Reciprocal Attorney's Fee Provision Apply to Actions Alleging a Violation of Section 226.7.

In its decision, the *McGann* court stated, "Nothing in the legislative history suggests the Legislature meant the reciprocal fee recovery provisions of Labor Code section 218.5 to apply in an action for violation of the section 226.7 mandate that employers provide meal and rest breaks for certain nonexempt employees." (*McGann, supra,* __ Cal.App.4th __ [p. 24].) The premise on which the *McGann* court based its conclusion as such is incorrect.

a. The Legislative History of Section 226.7 Evidences that the Legislature Considered Section 226.7 Not Subject to Section 1194, and that It Twice Rejected the Inclusion of a Unilateral Attorney's Fee Provision into Section 226.7.

As demonstrated under Section I.B, *supra*, the legislative history of Section 226.7 shows that the Legislature considered Section 226.7 as not subject to Section 1194, and that it intentionally rejected the inclusion of a

unilateral attorney's fee provision into Section 226.7. In its original form, AB 633 included a proposed Section 226.7 that would have required a court to "grant a prevailing plaintiff reasonable attorney's fees and costs" in a civil action for missed meal or rest periods. (Assem. Bill No. 633 (1999-2000 Reg. Sess.) [Respondent Immoos' Motion for Judicial Notice ("Respondent's RJN")], Ex. A] § 9.) After the proposed Section 226.7 was moved to AB 1652, it was dropped entirely from the bill. (Sen. Amend. to Assem. Bill No. 1652 (1999-2000 Reg. Sess.) Sept. 8, 1999 [Respondent's RJN, Ex. C] § 4.) On February 24, 2000, AB 2509 was introduced and such legislation proposed a new Section 226.7 that included a provision requiring a court to "award a prevailing plaintiff in such an action reasonable attorney's fees." (Assem. Bill No. 2509 (1999-2000 Reg. Sess.) [Respondent's RJN, Ex. D] § 12.) On August 25, 2000, AB 2509 was amended and the new version eliminated the language that had required the court to award a prevailing plaintiff reasonable attorney's fees in a civil action for missed meal or rest periods. (Sen. Amend. to Assem. Bill No. 2509 (1999-2000 Reg. Sess.) August 25, 2000 [Respondent's RJN, Ex. F] § 7.) An Enrolled Bill Report on AB 2509 recommended the governor sign such legislation, and on September 28, 2000, AB 2509 was signed into law. (Stats. 2000, ch. 876 [Respondent's RJN, Ex. G].) Thus, the Legislature *twice* rejected a unilateral attorney's fee provision for Section 226.7.

b. The Legislature Intended that an Employee Would Be required to Pay an Employer's Attorney's Fees under Section 218.5 when the Employer was the Prevailing Party in an Action Brought for the Nonpayment of Wages.

As demonstrated under Section I.C., *supra*, the legislative history behind Section 218.5 shows the Legislature intended that an employee would be required to pay an employer's attorney's fees under section 218.5 when the employer was the prevailing party in an action brought for the

nonpayment of wages, other than an action for the "legal minimum wage" or "legal overtime compensation." The analysis of the Senate Committee on Judiciary explained that the "purpose" of the bill was "to provide that the burden of paying attorney's fees should in all fairness rest on the unsuccessful litigant in actions for nonpayment of wages...." (Sen. Com. on Judiciary, Rep. on Sen. Bill No. 2570 (1985-1986 Reg. Sess.) 1986 [Respondent's RJN, Ex. K], p. 2.) The analysis of the Assembly Committee on Judiciary pointed out that the bill "protects employers from frivolous suits because it requires an unsuccessful employee-plaintiff to pay the employer's attorneys' fees." (Assem. Com. on Judiciary, Rep. on Sen. Bill No. 2570 (1985-1986 Reg. Sess.) July 8, 1986 [Respondent's RJN, Ex. L], p. 1.) The Senate Rules Committee acknowledged that "employers will be protected from frivolous suits for nonpayment of wages since the employee will be required to pay the employer's legal fees when the employer is the prevailing party." (Sen. Rules Com., Rep. on Sen. Bill No. 2570 (1985-1986 Reg. Sess.) May 6, 1986 [Respondent's RJN, Ex. M], p. 2.) The Enrolled Bill Report to the governor referenced that claimants would be more likely to file with the Labor Commissioner "to avoid the possibility of attorney's fees being awarded by a court." (Cal. Dept. Industrial Relations, Enrolled Bill Rep. on Sen. Bill No. 2570 (1985-1986 Reg. Sess.) Aug. 26, 1986 [Respondent's RJN, Ex. N], p. 2.)

Therefore, the State Legislature intended for employers to receive their attorney's fees when prevailing in wage actions in order to support the public policies of discouraging unmeritorious lawsuits and encouraging employees to file complaints with the Labor Commissioner instead of civil court.

H. This Court Should Reject the Expansive Definition of the Phrase "Legal Minimum Wage" Urged by Appellants.

Appellants argue that this Court should adopt an expansive definition of the phrase "legal minimum wage" in Section 1194 to include "all legally-required wages," regardless of whether such wages are based on contractual rates, rates greater than the minimum wage rate, and wages not based on any rate. (AOB, pp. 7-16.) The Court should reject such an expansive reading of the phrase "legal minimum wage."

Appellants first rely on the maxim that "statutes governing conditions of employment are to be construed broadly in favor of protecting employees." (AOB, p. 9-13.) As first explained by the court in *California Grape, supra* 268 Cal.App.2d at p. 698, however, the maxim of liberality exists for the purpose of effectuating legislative intent where following the "letter of the law" may lead in a different direction to "absurd applications." The *California Grape* maxim is not designed for the purpose of disregarding legislative intent. One may not simply "ignore the actual words of the statute in an attempt to vindicate (our) perception of the Legislature's purpose in enacting the law (because) the court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 991, 993 [internal quotations omitted].)

Appellants next cite *Road Sprinkler Fitters Local Union No. 669 v. G&G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765 ("*Road Sprinkler*") which held that actions to collect "prevailing wages" are subject to Section 1194 because prevailing wages are a type of minimum wage. (AOB, pp. 13-16.) The *Road Sprinkler* court noted that California Labor Code section 1770 et. seq. sets various types of "minimum wage rates" for "public works" jobs. (*Road Sprinkler, supra*, 102 Cal.App.4th at p. 778.) Then finding that "prevailing wages," like overtime compensation, were legally-mandated wages serving a public purpose, the *Road Sprinkler* court concluded that "the prevailing wage law is a minimum wage law mandated

by statute and serves important public policy goals, (and) section 1194 provides an employee with a private statutory right to recover unpaid prevailing wages from an employer who fails to pay that minimum wage." (*Id.* at pp. 778-779). However, the *Road Sprinkler* court did not address the issue of whether prevailing wages were the type of minimum wage the Legislature intended to provide a private right of action to vindicate under Section 1194. In other words, the *Road Sprinkler* Court never analyzed the most fundamental principle of statutory interpretation – what did the Legislature intend. (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 208 [fundamental premise of statutory construction is ascertain and effectuate legislative intent].) As discussed above in Section I.D., the Legislature intended the term "legal minimum wage" as an exclusive reference to the minimum wage rate set by the IWC – the rate "of this act." (See, *supra*, Section I.D.) The Legislature did not intend the term "legal minimum wage" as used in Section 1194 to include simply any hourly wage rate set by any another act, nor by legal bodies other than the IWC. (See, *supra*, Section I.D.)

Finally, Appellants argue that the phrase "legal minimum wage" must reference something different than the phrase "minimum wage" because the Legislature's use of the additional term "legal" must be considered as having some significance. (AOB, pp. 13-16, 19-21.) As discussed above in Section I.D., the term "legal minimum wage" was the contemporary, common terminology used to indicate a minimum hourly wage rate set by law. (See, *supra*, Section I.D.) Appellants fail to discuss the legislative history or intent of any of the statutory provisions in question, but instead rely on current laymen's dictionaries and supposition to devise a definition contradictory to the historical context in which the phrase "legal minimum wage" obtains its true meaning. (AOB, pp. 13-16.)

As demonstrated above, the legislative history of Section 1194 exemplifies that the Legislature did not intend the phrase "legal minimum wage" to include "all legally-mandated wages." If the Legislature had intended the term "legal minimum wage" to include all legally-mandated wages, it would not have added the term "overtime compensation" to Section 1194 in 1961. (*Earley, supra,* 79 Cal.App.4th at p. 1428 [employing same logic].) The Legislature is presumed to have existing laws in mind when it enacts a new statute. (*In re Michael G., supra,* 44 Cal.3d at p. 293; *Earley, supra,* at p. 1428.) The legislative history of Statutes 1961, Chapter 408, as demonstrated in the Interdepartmental Communication from the Department of Industrial Relations for the 1961 amendment to the bill, shows that the phrase "overtime compensation" was added to Section 1194 to provide a new private right of action for such legally-mandated wages not previously in existence. (Cal. Dept. Industrial Relations, Rep. on Sen. Bill No. 548 (1961-1962 Reg. Sess.) May 11, 1961 [Respondent's RJN, Ex. EE], p. 1.) Thus, in enacting the 1961 Amendment, the Legislature demonstrated that it did not consider the term "legal minimum wage" within Section 1194 as providing a right of action for all legally-mandated wages. (*Earley, supra,* at p. 1428.)

Finally, Appellants argue that overtime payments are in fact "minimum wages," based upon two Senate Bill reports concerning a 1991 amendment to Section 1194 which provided attorney's fees to prevailing plaintiffs. (AOB, p. 32.) The bill reports asserted that the amendment would provide incentives for employees to bring minimum wage actions, but was silent on overtime claims. (AOB, p. 32.) Appellants allege that this silence evidences a legislative belief that the term "legal minimum wage" incorporates overtime claims and all other actions for legally-required wages. (AOB, p. 32.) However, a legislative report specifying how the legislation would affect minimum wage actions, but failing to also

do so for overtime actions, does not indicate that the Legislature viewed overtime actions as a type of "legal minimum wage" action. If the Legislature intended actions seeking to recover "overtime" to be included within the term "legal minimum wage," it would not have added the phrase "overtime compensation" to Section 1194 in 1961.

I. The Term "Overtime" Is a Reference to Work Performed in Excess of a Prescribed Period, Not Work Performed During a Special Period.

In addition to asking this Court to find that Section 226.7 is a "legal minimum wage" law, Appellants also ask this Court to find that Section 226.7 is a "legal overtime compensation" law. (AOB, pp. 16-19.) In doing so, however, Appellants concede that the term "overtime" references "time in *excess* of a prescribed period." (AOB, p. 18 [emphasis added].) Appellants then concede that the "prescribed period" of time at issue is the eight hour workday prescribed by Labor Code section 510 and the applicable IWC Wage Orders.[9] (AOB, p. 18; Lab. Code, § 510.) Despite making these admissions, however, Appellants then turn their own argument on its head by asserting that "[a]ny work performed *during* the *30-minute meal period or the two ten-minute rest periods* constitutes 'overtime'...." (AOB, p. 18 [emphasis added].) Such an argument is logically unsound and contrary to the authority of the Labor Code and applicable IWC Wage Orders.

Labor Code section 510 defines the prescribed period of time as "[e]ight hours of labor.... 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." (Lab. Code, § 510 [emphasis added].)

[9] If applicable, the "prescribed period" could also mean the forty-hour workweek, the six-day workweek, or the alternative workweeks set forth by Labor Code section 510. (Lab. Code, § 510.)

Likewise, the applicable IWC Wage Orders define the prescribed period of time as "employed more than eight (8) hours in any workday...." (See e.g., Cal. Code Regs., tit. 8, § 11160, subd. (3)(A)(1).) Labor Code section 512 and the applicable IWC Wage Orders provide that an employee is entitled to a 30-minute meal period once during the eight hours of labor prescribed by Labor Code section 510. (Lab. Code, § 512; see also, e.g., Cal. Code Regs., tit. 8, § 11160, subd. (10)(A).) If an employer authorizes an employee to take such a meal period "relieved of all duty," said employee is not credited with performing work during that time period. (See e.g., Cal. Code Regs., tit. 8, § 11160, subd. (10)(D).) On the other hand, if the employer does not relieve the employee of all duty during a meal period, that period of time is in fact counted as time worked. (See e.g., Cal. Code Regs., tit. 8, § 11160, subd. (10)(D).) Therefore, if an employee works for four (4) hours, is provided a sufficient thirty minute "off-duty" meal period, and then works another four (4) hours, said employee is considered to have "labored" for eight (8) hours even though eight (8) and one (1) half hours have elapsed between the beginning and end of the workday. (Lab. Code, § 510, Wage Order 16-2001, subd. (10)(D).) In the alternative, if that same employee simply works eight (8) hours straight without a sufficient "off-duty" meal period, said employee has still "labored" for only eight (8) hours, and has not exceeded the prescribed period of Labor Code section 510 and the applicable IWC Wage Orders. Neither the Labor Code, the applicable IWC Wage Orders, or any other law allow an employee to "double dip" their "hours of labor" performed during an insufficient meal period that would otherwise cause an employee to receive credit for more than "eight hours of labor" when in fact the employee has performed eight (8) hours or less.

Likewise, in regards to rest periods, the applicable IWC Wage Orders provide that an employee is entitled to a 10 (ten)-minute rest period

twice during their eight (8) hours of labor. (See e.g., Cal. Code Regs., tit. 8, § 11160, subd. (11)(A).) They also provide that if an employer authorizes an employee to take the required rest periods, said employee will be credited with having performed work during said time even though no actual labor has been performed. (See e.g., Cal. Code Regs., tit. 8, § 11160, subd. (11)(C) ["Authorized rest period time shall be counted as hours worked...."].) In contrast, however, the wage orders do not provide that an employee will be credited with working an additional 10 minutes they did not actually perform if a sufficient rest period is not authorized. (See, e.g., Cal. Code Regs., tit. 8, § 11160, subd. (11)(C).) Again, neither the Labor Code, the applicable wage orders, nor any other law allows an employee to "double dip" their "hours of labor" performed during an insufficient rest period, causing an employee to have performed more than "eight hours of labor" during a time period of eight (8) hours or less.

An employee not provided with a legally required meal and rest periods does not cause said employee to perform more than "eight hours of labor" where they otherwise would not have done so. An employer failing to provide sufficient meal or rest periods is not saved from having to hire additional workers and "spread employment throughout the workforce." For these reasons, employees are not entitled to the "overtime compensation" provided by Labor Code section 510 and the "Hours and Days of Work" portion of the applicable IWC wage orders when denied a meal or rest period. Rather, they must seek recourse from different provisions of the Labor Code and applicable IWC wage orders that regulate the performance of work *during* special periods, not in *excess* of prescribed periods. Indeed, the term "overtime compensation" is employed within Labor Code Section 510 and does not appear in Section 226.7.

Finally, Appellants argue that "legal overtime compensation" must mean something different than "overtime compensation" because the word

"legal" is included. (AOB, pp. 16-21.) However, as discussed above, the Legislature evidenced no intent of substantive change when it amended the term "overtime compensation" to "legal overtime compensation" in 1972. (See, *supra*, Section I.E.) Unlike the phrase "legal minimum wage," the phrase "legal overtime compensation" does not appear to have been a commonly used expression at the time of the 1972 Amendment. The Legislature did not intend the phrase "legal overtime compensation" as used in Section 1194 to include work performed during special periods such as meal and rest periods because 1) the term "overtime compensation" at the time of the 1961 Amendment was enacted referenced a rate of pay required by law after an employee worked in excess of the period prescribed as a workday or workweek as exemplified by the FLSA; 2) the plain meaning of the phrase, as exemplified by the California Judicial Council, IWC, and United States Supreme Court evidences that the phrase was limited accordingly; 3) the failure to provide a meal or rest period does not cause an employee to labor in excess of the period prescribed as a workday or workweek where otherwise said employee would not; and 4) the Legislature subsequently considered and rejected including a unilateral attorney's fee provision within Section 226.7. No authority exists for expanding the interpretation of the term "legal overtime compensation" as used in Section 1194 beyond that of the rate of pay required by law after an employee works in excess of the period prescribed as a workday or workweek.

J. The Term "Wages" in Section 218.5 Is Not Limited to Only Wages Required by Contract.

As discussed above, a prevailing plaintiff employee is not entitled to an award of attorney's fees under Section 1194 for actions brought pursuant to Section 226.7 because such actions are not brought for the nonpayment of "the legal minimum wage or the legal overtime compensation."

Appellants argue that the term "wages" in Section 218.5 does not apply to legally-required wages, but applies only to contracted-for wages. (AOB, p. 21-25.) As discussed above, Appellants' argument runs contrary to the legislative intent of Section 218.5 to provide plaintiff employees a financial incentive for pursuing meritorious wage actions, and a financial disincentive for pursuing unmeritorious ones.

When the Legislature amended Section 218.5 in 2000 to exclude actions subject to Section 1194, the statute enacting said amendment included a section stating: "The amendments to Section 218.5 of the Labor Code made by Section 4 of this act ... are intended to reflect the holding of the Court of Appeal in *Earley*...." (Stats. 2000, ch. 876 [Respondent's RJN, Ex. G].) Appellants contend that *Earley* held that the term "wages" in Section 218.5 does not refer to statutorily-required wages, but only contracted-for wages. (AOB, p. 21-25.)[10] It is well recognized, however, that the holding of a case "is the principle or rule which constitutes the ground of the decision, and it is this principle or rule which has the effect of a precedent. It is therefore necessary to read the language of an opinion in the light of its facts and the issues raised, to determine (a) which statements of law were necessary to the decision, and therefore binding precedents, and (b) which were arguments and general observations, unnecessary to the decision, i.e., dicta, with no force as precedents." (*Johnson v. Super. Ct.* (1989) 208 Cal.App.3d 1093, 1097 [quoting 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 783, pp. 753-754].)

In *Earley,* the court determined, "(1) if relevant provisions of the Labor Code allow for a successful defendant's recovery of attorney's fees in a case involving a claim for overtime compensation, and (2) whether

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[10] The *McGann* court adopted this part of *Earley*'s analysis, finding it "instructive;" but did not contend that it was part of the holding. (*McGann, supra,* __ Cal.App.4th __ [pp. 22-23].)

absent class members, who have failed to "opt out," may be held liable for a successful defendant's fees or costs. (*Earley*, *supra*, 79 Cal. App. 4th at p. 1424.) The *Earley* court "answer[ed] both of these questions in the negative...." (*Ibid.*) In coming to its conclusions, the *Earley* court stated:

> [O]ne-sided statutory and judicially mandated fee-shifting provisions serve a specific public policy which would be vitiated by the grant of reciprocity. [Citation.] ... [S]ection 1194, as the one-way fee-shifting statute made specifically applicable by the Legislature to overtime compensation claims, should be recognized as the sole statutory authority for the award of attorney's fees upon the successful prosecution of such claims. [Citation.]... [T]here is a clear public policy, embodied in section 1194 that is specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of workers. [Citation.] The only reasonable interpretation which would avoid nullification of section 1194 would be one which bars employers from relying on section 218.5 to recover fees in any action for minimum wages or overtime compensation.

(*Id.* at pp. 1429-1430.)

Accordingly, *Earley*'s holding is that a successful defendant cannot recover attorney's fees under Section 218.5 for claims involving overtime compensation because applying the general Section 218.5 provision to overtime actions would vitiate the public policy underlying the Section 1194 provision, which was enacted specifically for overtime matters. (*Ibid.*) Such were the grounds "necessary to the decision."

The *Earley* court then rebutted the defendant's accusation that this decision amounted to an implied repeal of Section 218.5 by stating:

> Section 218.5 would still be available for an action brought to recover nonpayment of contractually agreed-upon or bargained-for "wages, fringe benefits, or health and welfare or pension fund contributions." ... Such a harmonization of these two sections is fully justified. An employee's right to wages and overtime compensation clearly has different sources. Straight-time wages (above the minimum wage) are a matter of private contract between the employer and employee. Entitlement to overtime compensation, on the other hand, is mandated by statute and is based on an important public policy.

(*Id.* at pp. 1426-1427 [defendant's accusation of implied repeal]; 1430 [above-quotation].)

Relying on the above-cited language, Appellants contend that the *Earley* court necessarily determined that Section 218.5 does not apply to any legally-mandated wages, including actions under Section 226.7, and that such a finding was codified in Statutes 2000, Chapter 876. (AOB, pp. 21-25.) The above-cited language of the *Earley* decision, however, did not seek to determine whether all statutorily-required wages were no longer subject to Section 218.5. The *Earley* decision did not address the interplay between Section 218.5 and any legally-mandated wage other than Section 1194, and it certainly did not consider Section 226.7 specifically. (See generally *id.* at p. 142.) The above-cited language of the *Earley* opinion simply explained how Section 218.5 had not been entirely repealed by the decision. The court's comments concerning the remaining scope of Section 218.5 was one of a "general observation, unnecessary to the decision, e.g., dicta," and not part of the *Earley* holding that was codified in the statute.

Finally, Appellants attempt to buttress their argument by asserting that "the Courts of Appeal have...affirmed section 218.5 fees only when

they have been awarded to employees...in actions involving agreed-upon wages. (AOB, p. 27.) For this proposition, however, Appellants only cite *On-Line Power v. Mazur* (2007) 149 Cal.App.4th 1079, 1085-1086, in which the court reversed the denial of attorney's fees under Section 218.5; and *Kelly v. Stamps.com* (2004) 135 Cal.App.4th 1088, 1104 in which the court affirmed the denial of attorney's fees under Section 218.5 having determined that the party seeking such fees should not have been granted summary adjudication. (AOB, p. 27.) Neither case holds that a party was not entitled to attorney's fees under Section 218.5 because the wages at issue were statutorily-required.

K. Appellants' "Virtually Identical" and "Similar To" Argument Provides No Authority for Expanding the Scope of Section 1194.

Appellants ask this Court to look beyond the text and legislative history of Sections 218.5, 226.7 and 1194, and expand the scope of Section 1194 to include rest and meal period claims, because such actions are allegedly "virtually identical as regulatory devices" to overtime actions and "similar" to minimum wage claims. (AOB, pp. 28-35, 42-43.) Appellants argue that Section 1194 should include Section 226.7 claims because such would "be consistent with the overall worker protection regulatory framework that the Legislature intended." (AOB, pp. 33-34.) Clearly, this Court may not act in the role of the Legislature "for the good of worker safety" or any other reason. (*Murillo, supra,* 17 Cal.4th at p. 993 [court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed].) Moreover, as explained above, the Legislature has considered and rejected the inclusion of a unilateral attorney's fee provision for Section 226.7. Notwithstanding the Appellant's arguments to the contrary, the Legislature has never intended Section 1194 as a refuge for plaintiffs to bring any and all wage actions

without the possibility of a prevailing employer being awarded its attorney's fees.

II. THE COURT'S ANALYSIS IS NOT AFFECTED BY WHETHER THE CLAIMS FOR MEAL AND REST PERIODS ARE BROUGHT ALONE OR ARE ACCOMPANIED BY CLAIMS FOR THE "LEGAL MINIMUM WAGE" AND "LEGAL OVERTIME COMPENSATION"

Section 218.5 employs the term "action" several times within in its text. Appellants ask the Court to re-interpret the term "action" – but only in the last instance of its use – where Section 218.5 excludes from its province "any action for which attorney's fees are recoverable under Section 1194." (AOB, pp. 35-43.) Specifically, Appellants contend that the term "action" should mean "an entire lawsuit," rather than a single cause of action within a complaint (AOB, pp. 35-43). The interpretation of the term "action" in the last sentence of Section 218.5 as urged by Appellants is not supported by a plain reading of the statute, has been rejected by the courts, and would lead to absurd results.

A. Appellants' Proffered Interpretation Would Force Plaintiffs to Choose Between Seeking Attorney's Fees or Recovery of All Wages Owed.

First, as Appellants concede, Section 218.5 provides for an award of attorney's fees to the prevailing party in several types of contracted-for wage claims not included within Section 1194. (AOB, pp. 21, 24-25; see also *Earley, supra,* at 79 Cal.App. 4th at p. 1430; Lab. Code, §§ 218.5, 1194.) If, as Appellants claim, Section 218.5 does not apply to any lawsuit in which a claim for the legal minimum wage or overtime compensation is included, then prevailing plaintiffs will not have any avenue for recovering attorney's fees in contracted-for wage claims if they also include a legal minimum wage or overtime compensation claim within the same lawsuit. The legislative intent of both Sections 218.5 and 1194, in part, was to create financial incentives to plaintiffs for bringing meritorious wage actions. The

two sections should not be interpreted to nullify each other. (*Cal. Grape* , *supra*, 268 Cal.App.2d at p. 698 [statutes governing conditions of employment are to be construed broadly in favor of protecting employees when in furtherance of the Legislature's underlying intent].)

A fundamental canon of statutory interpretation is to avoid absurd results – even to the point of purposefully disregarding the plain meaning of a statutory text. (*Cal. School Employees Assn v. Governing Body* (1994) 8 Cal.4th 333, 340 ("*CSEA*").) As exemplified above, Appellants' proffered new interpretation of Section 218.5 would lead to the type of absurdity this Court has asserted it will avoid. Similarly, under Appellants' preferred interpretation of the word "action," an employee could defeat the prevailing defendant's right to recover fees under Section 218.5 simply by including one cause of action seeking overtime compensation. Such is not a reasonable interpretation that harmonizes the statutes in question and would lead to an absurd result.

B. Appellants' Proffered Construction of the Term "Action" Would Also Expand the Scope of Section 218.5 to Potentially Every Civil Cause of Action.

Second, a general rule of statutory construction is that "identical words used in different parts of the same act are intended to have the same meaning." (*People v. Roberge* (2003) 29 Cal. 4th 979, 987). Appellants' theory that the term "action" means an entire lawsuit would apply to the entirety of Section 218.5. Section 218.5 reads at its beginning, "In any action brought for the nonpayment of wages...the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action." (Lab. Code, § 218.5.) Therefore, applying Appellant's definition of "action," an unsuccessful employee who includes a contracted-for wage claim subject Section 218.5 within a complaint (but does not also include a

legal minimum wage or overtime compensation claim subject to Section 1194) would be liable for the attorney's fees associated with the contracted-for wage claim, and every other unsuccessful claim included in the underlying complaint. Expanding the scope of Section 218.5 to potentially every cause of action as long as a wage claim is included within the same lawsuit would be absurd.

C. The Legislature and This Court Have Already Determined that the Term "Action" Refers to a "Right of Action," Not an Entire Lawsuit.

Since 1872, the Legislature has defined the term action as "an ordinary proceeding in a court of justice, by which one party prosecutes another, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (Enacted Sen. Bill No. 363 (1871-1872 Reg. Sess.) [Respondent's RJN, Ex. FF], § 22 [original enactment of Code Civ. Proc., § 22]; Stats. 1933, ch. 742 [Respondent's RJN, Ex. GG], § 2 [adding "declaration" to types of prosecution, and making punctuation and spelling changes]; see also Code Civ. Proc., § 22.) In 1901, this Court rejected the argument that the term "action" referred to an entire lawsuit and explained that an "action" is the right to resolve the owed obligation, and that a "suit" is merely the vehicle by which the owed seeks to enforce their action.

> In applying the rule, some confusion has resulted from the neglect to define the terms, "cause of action" and "action"; to which, therefore, our attention must be first directed. [¶] The latter term is very commonly confounded with the *suit (litis)* in which the action is enforced. But this is not the technical meaning of the term, according to which an action is simply the right or power to enforce an obligation. "An action is nothing else than the right or power of prosecuting in a

> judicial proceeding *what is owed to one*," -- which is but to say, an *obligation*. (*Actio nihil aliud est quam jus persequendi in judicio quod sibi debitur*.) The action therefore springs from the obligation, and hence the "cause of action" is simply the obligation.

(*Frost v. Witter* (1901) 132 Cal. 421, 426 ("*Frost*").)

Accordingly, an "action" is not a legal filing where a plaintiff seeks to resolve several obligations within a single judicial proceeding. An "action" is the legal right to enforce a particular obligation, of which a plaintiff may assert several "actions" within the lawsuit. (See also Black's Law Dict. (6th ed. 1990) p. 1325, cols. 1-2 ["right of action"].) In 1933, the Legislature amended the definition of "action" to include "declaration" as a type of action. (Stats. 1933, ch. 742 [Respondent's RJN, Ex. GG at p. 1805].) Using this current definition of "action" found in section 22 of the Code of Civil Procedure the court in *Palmer v. Agee* (1978) 87 Cal.App.3d 377, 387 ("*Palmer*") again rejected the term "action" as denoting the lawsuit in which an obligation is enforced, and re-asserted the *Frost* interpretation. (*Id.* [quoting *Frost, supra,* 132 Cal. at p. 426].) This Court has held that where judicial construction of a statute has remained consistent and unchanging for a significant period of time, and where the Legislature has amended other facets of the section in the interim, the courts should not alter said definition. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone* (1999) 20 Cal.4th 163, 178.)

Appellants argue that continuing to use the definition of "action" that has been used for over one hundred years would lead to the "absurd" result that employees would be subject to awards of attorney's fees in wage actions other than claims for the legal minimum wage and overtime compensation. (AOB, pp. 39-42.) However, such is the exact intent of Section 218.5. As discussed above, Plaintiffs are provided with a financial

incentive to pursue *meritorious* wage claims, but a disincentive to pursue unmeritorious wage claims, in court if they elect not to simply file a complaint with the Office of the Labor Commissioner. The result is not "absurd," but rather is the exact intent of the Legislature.

CONCLUSION

For the reasons set forth above, this Court should affirm the Third District Court of Appeal's decision below.

DATED: March 21st, 2011.

Respectfully submitted,

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By _____
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CERTIFICATE OF WORD COUNT

[Cal. Rules of Court, Rule 8.520(c)(1)]

Counsel of Record hereby certifies, pursuant to Rule 8.520, subdivision (c)(1) of the California Rules of Court, that the enclosed "Respondent's Answer Brief on the Merits" is produced using 13-point Times-Roman type (including footnotes) and contains approximately 13,997 words (not including the tables required under California Rule of Court 8.204(a)(1), the cover information required under California Rule of Court 8.204(b)(10), this certificate required under California Rule of Court 8.520(c)(1), and any signature block) which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: March 21st, 2011.

REDIGER, McHUGH & OWENSBY, LLP

By _____
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CERTIFICATE OF SERVICE

I am a citizen of the United States of America and am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 555 Capitol Mall, Suite 1240, Sacramento, California 95814.

On March 21, 2011, I served the within **RESPONDENT'S ANSWER BRIEF ON THE MERITS** in *Anthony Kirby et al. v. Immoos Fire Protection, Inc*; California Supreme Court Case Number S185827 [Third Appellate District Court of Appeal Case Number C062306] by placing a true copy thereof enclosed in a sealed envelope, addressed as follows:

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XXXX by placing a true copy thereof in a Federal Express envelope/box for overnight delivery in the receptacle located at 555 Capitol Mall, Sacramento, California 95814.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 21st day of March 2011, at Sacramento, California.

LORRAINE L. RENFROE