S259172

IN THE SUPREME COURT OF CALIFORNIA

JESSICA FERRA,

Plaintiff / Appellant

vs.

LOEWS HOLLYWOOD HOTEL, LLC

Defendant / Respondent

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT CASE NO. B283218
Appeal from the Superior Court of Los Angeles County. Hon. Kenneth R. Freeman (Los Angeles Super. Ct. Case No. BC586176)

APPELLANT'S ANSWER TO AMICUS BRIEFS

(Service on Attorney General and District Attorney required by Bus. & Prof. Code §§ 17209, 17536.5)

MOSS BOLLINGER LLP
Dennis Moss (SBN 77512)
Ari Moss (SBN 238579)
15300 Ventura Blvd., Suite 207
Sherman Oaks, CA 91403
Tel: (310) 982-2984
Fax: (818) 963-5954

LAW OFFICES OF SAHAG MAJARIAN II
(SBN 7146621)
18250 Ventura Boulevard
Tarzana, CA 91356
Tel: (818) 609-0807
Fax: (818) 609-0892

ATTORNEYS FOR PLAINTIFF & APPELLANT
JESSICA FERRA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

The amicus briefs filed in support of Plaintiff Ferra – from the California Employment Lawyers Association ("CELA") and Bet Tzedek – provide several additional reasons why this Court should reverse the Court of Appeal's decision below.

First, Plaintiff's amici provide additional reasons why the statutory language, legislative and regulatory history, and evident purposes of Labor Code section 226.7 (c) and Wage Order 5-2001 sections 11(B) and 12(B) require employers to calculate break violation premiums on the basis of "all remuneration" earned, i.e., the "regular rate" not a "base hourly rate," just as those employers currently calculate overtime premiums under Labor Code section 510(a). (*See* Plaintiff's Opening Brief ("AOB") 20-34; Plaintiff's Reply Brief ("RB") 6-9, 11-21; CELA Br. 12-36; Bet Tzedek Br. 9-11). "Regular rate of compensation" in the Wage Orders and Labor Code section 226.7 has the same intended meaning as "regular rate of pay" in Labor Code section 510(a) and Wage Order 5-2001 section 3(A)(1)(a).

As Justice Edmon recognized, the term of art "regular rate," coupled with the "plain meaning" of "compensation" and several guiding principles of statutory construction, compels the

conclusion that the IWC and Legislature intended the words "compensation" and "pay," and the phrases "pay . . . at the employee's regular rate of compensation" and "be compensated at . . . the regular rate of pay for an employee," to mean the same thing in Labor Code sections 226.7 and in 510(a), and in their Wage Order counterparts. (*Ferra v Loews Hollywood Hotel* (2019) 40 Cal.App.5th at 1256, 1264 (dissent); *see also* CELA Br. 14.)

CELA and Bet Tzedek also made the salient point that even if "regular rate of compensation" meant something different than "regular rate of pay," there would still be no basis for the panel majority's conclusion that "regular rate of compensation" must necessarily mean "base hourly rate" rather than "all attributable discretionary *plus* all non-discretionary income" or some other formulation. (CELA Br. 19-20; Bet Tzedek Br. 14-26; *see also Ferra*, 40 Cal.App.5th at 1268 (dissent).)

CELA also refutes Loew's illogical argument that the word "compensation" rather than "pay" was used in Section 226.7 because it more accurately reflects the intended concept of remuneration for loss. (*See* CELA Br. 25-29.).

The 226.7(c) remedy is irrefutably tied into one hour of wages, not an illogical one hour of pay at the regular rate for "remuneration for a loss."

California overtime law and meal-and-rest-break law are intended to further the health and welfare of employees. The premium pay remedies adopted by the IWC and Legislature are designed not only to provide compensation but also to deter employer behavior that is detrimental to those goals. (CELA Br. 33-37).

CELA also points out that to adopt the majority's construction of Section 226.7 would inevitably result in considerable litigation in the courts and before the Labor Commissioner over what constitutes "base hourly rate" under the various wage scenarios that exist in California. (CELA Br. 15-16, 37-42.)

The Bet Tzedek Brief makes several additional arguments supporting Plaintiff's construction as well. For example, it demonstrates that because the term "regular rate" has a settled meaning, the panel majority's construction renders "regular rate" as used in Labor Code section 226.7 mere surplusage, in violation of the rule of statutory construction that courts construing

statutes should avoid constructions that render words "meaningless." (Bet Tzedek Br. 11-14.)

Bet Tzedek also demonstrates how the panel majority usurped the Legislature's prerogative by basing its construction of section 226.7 on its own policy judgments. (Bet Tzedek Br. 17-18.)

Amicus briefs in support of Loews were submitted by the California Employment Law Counsel, Employers Group, and Chamber of Commerce of the United States (collectively "the Chamber"), and by the Association of Southern California Defense Counsel ("ASCDC"). These briefs largely repeat the arguments made by Loews and offer little additional analysis.

The Chamber's principal argument reiterates the canon relied upon by the panel majority, Chamber Br. 9-24, ignoring how the IWC and Legislature used "pay" and "compensation" synonymously in the employment context, the term-of-art meaning of "regular rate," the role the IWC played in the evolution of Labor Code section 226.7(c)'s remedial language, and the significance of the IWC's Statement of Basis as indicating IWC's intent *not* to distinguish between "regular rate of compensation" and "regular rate of pay."

The Chamber mostly asserts "public policy" and "practical" arguments to support its proposed construction, although those arguments are easily refuted and, in any event, are inconsistent with the plain language and legislative and regulatory purposes. (*See* Chamber Br. 24-36.)

Critically, the Chamber fails to consider the consequences of the panel majority's construction on the large number of California employees who have no "base rate" at all, such as those who are principally, or exclusively, paid on a piece-work, commission, or activity basis. The practical-implications section of the Chamber's brief also fails to take into account the perverse incentive its construction would create for employers to lower hourly wages while increasing other forms of non-discretionary income as a mechanism for avoiding the deterrent effect of Section 226.7 penalties.

ASCDC makes two arguments – that Labor Code Sections 226.7 and 510(a) have different purposes that warrant different construction, ASDC Br. 10-21, and that DLSE has never formally stated that non-discretionary payments should be considered in calculating break violation premium wages, ASCDC Br. pgs. 21-24.

ASCDC's discussion of legislative purposes largely overlooks the substantial public health and welfare purposes of California overtime *and* break law, as set forth *Murphy v. Kenneth Cole, Inc.* (2007) 40 Cal.4th 1094. Its discussion of the DLSE ignores that although the DLSE Manual does not include a section explaining how to calculate meal-and-rest break violation pay (as ASDC acknowledges, ASDC Br. 21-23), DLSE *has* taken the position in this case that "regular rate of compensation" was meant to be synonymous with "regular rate of pay." (*See* Labor Commissioner's January 16, 2020 Amicus Curiae Letter in Support of Petition For Review; See also the Brief cites to the DLSE Manual and DLSE FAQ's that establish the DLSE's interchangeable use of "regular rate of pay" and "regular rate of compensation" AOB 61-64, RB 24-25).

ARGUMENT

I. "REGULAR RATE OF COMPENSATION" UNDER LABOR CODE SECTION 226.7 (c) HAS THE SAME MEANING AS "REGULAR RATE OF PAY" UNDER LABOR CODE SECTION 510(a)

A. Applicable Principles of Statutory Construction Require Reversal of the Panel Majority Opinion

The Chamber begins by asserting that the Legislature made a "deliberate word choice" that the courts are bound to accept. (*See* Chamber Br. 9.) That may be true, but it does not explain what those deliberately chosen words were intended to mean. No one disputes the principles of statutory construction set forth in the Chamber's brief:

> Courts 'must look first to the words of the statute, because they generally provide the most reliable indicator of legislative intent.' *Kirby v. Immoos Fire Prot., Inc.* 53 Cal.4th 1244, 1250 (2012); *Anderson Union High Sch. Dist. v. Shasta Secondary Home Sch.*, 4 Cal. App. 5th 262, 278 (2016) ('courts should first look to the plain dictionary meaning of the word unless it has a specific legal definition.').

Chamber Br. 9-10. But those principles state, rather than resolve, the inquiry.

Certainly, the words of Labor Code section 226.7(c) are a "reliable indicator" of the Legislature's (and IWC's) intent. The "specific legal definition/ term of art status" of the words "regular rate" and the "plain dictionary meaning" of the word "compensation" in the employer-employee context reliably indicate Legislative intent.

As Justice Edmon, Plaintiff, and Plaintiff's amici have demonstrated, the term "regular rate" as used in Section 226.7

(and in Section 510(a) and in the parallel Wage Order provisions) is a term of art with a long-established meaning in state and federal wage-and-hour law. (*Ferra*, 40 Cal.App.5th at 1258-61 (dissent); AOB 33-52; RB 11-18.) This Court should presume that the Legislature and IWC intended that term to have the same meaning in Section 226.7 (c) of the Labor Code and in Sections 11(B) and 12(B) of the Wage Orders as those terms have always had in other wage-and-hour contexts. (*See Ferra*, 40 Cal.App.5th at 1257 (dissent), citing *Estate of Griswold* (2001) 25 Cal.4th 904, 915–916, and *Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 785).

Where legislation has been judicially construed, and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, it should be presumed that the Legislature intended the same construction – unless a contrary intent clearly appears.

This presumption was completely ignored by Loews' amici who have not pointed to any evidence demonstrating any intent by the IWC or Legislature to deviate from not only the consistent judicial construction of "regular rate," but also from the consistent Congressional and administrative constructions of the

words "regular rate." Loews' amici essentially ignore that when the Legislature uses "substantially similar" language in a subsequent statute, courts should "presume that the Legislature intended the same construction" of that language. *Moran, supra* 40 Cal. 4th at 785.

As Plaintiff previously explained, the term "regular rate" had its origins in the Fair Labor Standards Act ("FLSA"). The United States Supreme Court construed that term shortly after enactment of the FLSA to include "all remuneration," not just whatever base hourly rate a particular employee may have had. (AOB 42-45; RB 15-16; CELA Br. 21; *Ferra*, 40 Cal.App.5th at 1258-1259 (dissent)).

Loews' amici do not disagree, and they have no answer for the fact that the United States Supreme Court and all lower federal courts have for many decades used "regular rate of compensation" and "regular rate of pay" interchangeably to describe "regular rate," a fact that supports Plaintiff's showing that "regular rate of pay" and "regular rate of compensation" were intended to be synonymous. (*See* AOB 55-57.)

One of the FLSA cases that used "pay" and "compensation" interchangeably references the reality that should animate the decision herein:

> The key point is that the *pay or salary is compensation for work, and the regular rate therefore must be calculated by dividing all compensation paid for a particular week by the number of hours worked in that week.*

Local 246 Utility Workers Union of America v. Southern California Edison Co. (9th Cir. 1996) 83 F.3d 292, 295

After the IWC adopted the expression "regular rate," California courts and the DLSE followed suit, construing "regular rate" to have the same "all remuneration" definition that the United States Supreme Court had applied. *See Alcala v. Western Ag Enterprises* (1986) 182 Cal.App.3d 546, 550; *Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal. App.4th 893, 902-03 (and DLSE advice letters cited therein; 1998 DLSE Manual Section 33.1.2 at 84 (quoted in AOB 52-53).)

By the time the IWC adopted the "regular rate" remedy for meal-and-rest-break violations, not only had federal and state courts and the DLSE consistently construed "regular rate" to include non-discretionary wages, but so had Congress and the

Department of Labor. (29 USC section 207(e), 29 CFR sections 778.200, 778.211(c).)

Loews' amici provide no basis for overcoming the presumption that when the Legislature and IWC used the term "regular rate" in connection with the meal-and-rest break violation premium remedy, they "intended the same construction" of "regular rate" that had long and consistently been used by the courts and regulatory agencies. Loews' amici fail to point to *any* evidence of the IWC's or Legislature's contrary intent, let alone a "clear intention" to dispense with the settled historical meaning.

The Chamber, like Loews and the panel majority below, attributes a transformative effect on the term "regular rate" by the IWC's and Legislature's use of the clause "pay . . . at the employee's regular rate of compensation" under Section 226.7 versus "be compensated at . . . the regular rate of pay for an employee" under Section 510(a) and their Wage Order counterparts. Chamber Br. 10. Plaintiff and her amici have thoroughly rebutted that argument in their prior briefs. (*See, e.g.,* AOB 23-28; RB 30-36; CELA Br. passim.)

The Chamber argues that "courts should first look to the plain dictionary meaning of the word unless it has a specific legal

definition," but then ignores the lesson it cites. (Chamber Br. 10.) Not only does every dictionary treat "pay" and "compensation" as synonyms, *Murphy*, 40 Cal.4th at 1103–04 & n.6, but the term "regular rate" *does* have a "specific legal definition" and that definition necessarily informs the intended meaning of Labor Code section 226.7(c). (*See People v. Gonzales* (2017) 2 Cal.5th 858, 871 ["[W]hen the Legislature uses a term of art, a court construing that use must assume that the Legislature was aware of the ramifications of its choice of language."].)

Loews' amici make no effort to refute the "synonym role" in statutory construction cited by Justice Edmon and Plaintiff, which explains how legislatures often use synonyms of words used in previous legislation to express the same meaning in subsequent legislation. (*Ferra*, 40 Cal.App.5th at 1266 (dissent); AOB 25-27, CELA Br. 28 & n. 9).

The Chamber's reliance on the word-change canon also completely undermines the significance of the historic term-of-art meaning of "regular rate." The Chamber's position is especially unwarranted when, as in this case, nowhere in the legislative or regulatory history of the operative language is there any inkling that "regular rate of compensation" means "base hourly rate."

None of the cases cited by the Chamber arose in the context of synonymous language or where application of the different-words canon would require abandonment of the settled meaning of a term of art. (*See Rashidi v. Moser* (2014*)* 60 Cal.4th 718, 724-725; *Campbell v. Zolin* (1995) 33 Cal.App.4th 489,497; *Anderson Union High School Dist. v. Shasta Secondary Home Sch.* (2016) 5 Cal.App.5th 262, 277-278.) In the employment context, the synonyms "pay" and "compensation" do not share the definition differences that distinguished "losses" from "damages" in *Rashidi,* "the" from "any" in *Campbell,* or "site" from "school site" in *Anderson Union*.

B. Use of "Compensation" As a Synonym for "Pay" in the Wage-and-Hour Context Is Further Supported by this Court's Recent Usage in *Oman v. Delta Airlines* (2020) 9 Cal.5th 762.

Plaintiff's (and her amici's) prior briefing demonstrated that the IWC and Legislature used "pay" and "compensation" synonymously in the employment context, consistent with those words' dictionary definitions, and that this Court in *Murphy* like many federal courts similarly used "pay," "compensation, "regular rate of pay," and "regular rate of compensation" interchangeably.

In particular, Plaintiff's prior briefs cited laws enacted before and after enactment of Section 226.7 that used "regular rate of pay" and "regular rate of compensation" to mean the same thing, the DLSE's interchangeable use of the terms, and this Court's use of the expression "regular rate of compensation" in the overtime context in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal. 4th 725, 730 n.1. (*See* AOB 57-65; RB 22; CELA Br. 27-28).

The most recent employment law decision from this Court, *Oman v. Delta Airlines* (2020) 9 Cal. 5th 762 provides one more example of "pay" and "compensation" meaning the same thing. Take the following extended quotation from the Court's *Oman* decision.

> *Compensation* may be calculated on a variety of bases: Although nonexempt employee *pay* is often by the hour, state law expressly authorizes employers to calculate *compensation* by the task or piece, by the sale, or by any other convenient standard. (See Lab. Code, § 200, subd. (a) [*compensation* may be "fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation"]; Wage Order No. 9, § 4(B) [*compensation* may be "measured by time, piece, commission, or otherwise"].) In many employment agreements, such as the one at issue in *Armenta*, the unit of time or activity by which an employer promises to *pay* an employee is easily ascertainable. (See *Armenta*, *supra*, 135 Cal.App.4th at p. 317, 37 Cal.Rptr.3d 460 ["Under the terms of the parties' collective bargaining agreement, respondents were *paid* hourly wages

> ....”].) In other cases, the employer may *compensate* employees based on a combination of methods. (See, e.g., *Vaquero*, *supra*, 9 Cal.App.5th at p. 103, 214 Cal.Rptr.3d 661 [*compensation* determined by the greater of sales commission or hourly minimum *pay*]; *Gonzalez*, *supra*, 215 Cal.App.4th at p. 41, 155 Cal.Rptr.3d 18 [*compensation* determined by greater of repair tasks completed or minimum hourly *pay*].) Consistent with general contract interpretation principles, the unit for which *pay* is promised should be determined based on the “mutual intention of the parties as it existed at the time of contracting.” (Civ. Code, § 1636.).

*Oman,*9 Cal.5th at 781-82 (emphasis added). Note that if every reference to “pay” were changed to “compensation,” and if every reference to “compensation” were changed to “pay,” in the above excerpt from *Oman, supra* the meaning of the quoted passage would not change in the slightest.

In short, other than reciting the hoary canon that when legislatures use different words, they often intend different meanings, the Chamber’s brief offers no support for Loews’ position – and it certainly adds nothing new. The Chamber offers no evidence that the IWC and Legislature intended to jettison the long-understood meaning of “regular rate,” or to treat “pay” and “compensation” as anything other than synonyms, or to intend the clause “pay . . . at the employee’s regular rate of compensation” to mean anything different than “be compensated

at . . . the regular rate of pay for an employee."

C. The Chamber Misreads *Alvarado v. Dart* (2018) 4 Cal.5th 542

The Chamber next contends that *Alvarado,* 4 Cal. 5th at 564 somehow "confirmed" that "regular rate of pay" under California law has a different meaning than "regular rate" as used in federal wage-and-hour law. (Chamber Br. 15-16). This Court held in *Alvarado* that in calculating the "regular rate" for overtime premiums under California law, the courts should include non-discretionary income such as non-discretionary bonuses, just as under federal law:

> Regular rate of pay, which can change from pay period to pay period, includes adjustments to the straight time rate, reflecting, among other things, shift differentials and the per-hour value of any nonhourly compensation the employee has earned.

(Alvarado, 4 Cal.5th at 554.) In holding that non-discretionary bonuses must be factored into the regular rate of pay, the Court noted that its conclusion "finds support in the *plain meaning of* the phrase "regular rate of pay." . . . [*T*]*he word "regular" in this context does not mean "constant."* (*Id.* at 562 [Emphasis added].)

The difference between California and federal law addressed in *Alvarado* had nothing to do with the types of wage

payments that factor into the "regular rate," which is the issue in this case. Rather, the difference had to do with the method of calculating overtime once all includable remuneration is determined, given California's adoption of daily overtime. (*Id.* at 561-66).

D. The Chamber's Conclusion That "Regular Rate of Compensation" Means "Ordinary Hourly Rate" Would be Unworkable for Countless Californians.

The Chamber states that the "plain meaning of "regular rate of compensation" is an employee's "ordinary hourly rate." (Chamber Br. 17.) In addition to all of the arguments set forth above and in Plaintiff's prior briefs, this argument fails because it attributes an illogical intent to the IWC and Legislature. Amicus CELA has pointed out why it is unlikely those law-making bodies would have used such a subtle mechanism – i.e., switching the order of "compensate" and pay" in Sections 226.7 and 510(a) – if the goal were to require a completely different method of calculating wage premiums for the narrow category of California employees who earn a base rate plus an additional amount of non-discretionary income. (*See* CELA Br. 15-16.) It is even more unlikely that the IWC and Legislature would have required the

wage premium under Section 226.7 to be calculated differently than under Section 510(a) given the enormous difficulty if not impossibility, employers, employees, *and courts* would face in trying to determine (under the Chamber's and Loews' construction) what constitutes many employees' "base" hourly rate given the variety of pay schemes that there are in California.

It cannot be emphasized enough that irrespective of compensation schemes, the Legislature devised one remedy for all non-exempt employees. Because of that, the Chamber's construction of 226.7 begs a number of questions since not all workers have "ordinary hourly rates" as part of their compensation packages. Simple examples are illustrative:

--Assume an employee is paid a daily salary, and the amount of time she works each day varies. Mathematically the amount she earns per hour varies. Definitionally, she does not have an "ordinary hourly rate," nor a "base hourly rate."

--Assume an employee is paid on a commission basis, and her sales vary from hour to hour, week to week, day to day. She too, lacks both an "ordinary hourly rate," or a "base hourly rate."

--Assume an employee is paid by the rotation, and there are four possible pay formulas that could apply to a rotation, *Oman,*

supra (2020) 9 Cal. 5th 762. Although the average pay is always above the minimum wage, given the multi-formula pay scheme, it cannot be concluded that employees subject to the scheme have either an "ordinary hourly rate," or a "base hourly rate.

--Assume an employee's compensation package contains a commission element with a guarantee per hour should the employee's commission earnings fall below a contractual floor. Assume the guarantee is $16.00 per hour, and in her ten-year period of employment, the employee never was paid on the basis of the hourly rate or seldom paid on the basis of the hourly rate, and earned various amounts per week that worked out to between $30.00 per hour to $50.00 per hour, a hypothetical not unlike the facts in *Ibarra v. Wells Fargo Bank, N.A.* (C.D. Cal., May 8, 2018) 2018 WL 2146380. Clearly this hypothetical employee does not have an "ordinary hourly rate," nor a "base hourly rate."

--Assume an employee is paid on an activity basis that results in different actual amounts of earnings per hour and per day. *Ramirez v. Yosemite Water* (1999) 20 Cal.4th 785, 792; *Bluford v. Safeway* (2013) 216 Cal. App. 4th 864; and *Gonzalez v. Downtown LA Motors* (2013) 215 Cal. App. 4th 36. Such

employees do not have "ordinary hourly rates," or "base hourly rates."

-- Assume an employee works a job that pays one hourly rate for certain times of day, and another hourly rate for other times of day, and in a day the employee works during both periods. Assume the same employee also has different rates for different assignments he receives during his time at work. Such an employee does not have either an "ordinary hourly rate," or a "base hourly rate."

--Assume an employee has a piecework job, with the pieces completed varying from day to day that works out to an hourly equivalent each day between $19.00 and $25.00 per hour. Someone paid pursuant to that compensation program clearly lacks either an "ordinary hourly rate" or a "base hourly rate."

Like the panel majority, and Loews, the Chamber did not comprehend the ramifications of a conclusion, unsupported by the language of the statute, or legislative history, that concludes "regular rate of compensation" means either "base hourly rate," or "ordinary hourly rate"

///

///

II. THE LEGISLATIVE HISTORY SUPPORTS THE CONCLUSION THAT "REGULAR RATE OF PAY" AND "REGULAR RATE OF COMPENSATION" HAVE SHARED MEANINGS

The Chamber next argues that the legislative history of Section 226.7 supports its "base hourly rate" construction. (Chamber Br. 19-22.) This conclusion is insupportable. The Chamber refers to several versions of bills that were proposed but not adopted prior to the enactment of Section 226.7 that used variations of the term "hourly rate" in their remedy formulations. (Chamber Br. 19-20.) But of course, the Legislature ultimately *rejected* that language in favor of the long-understood term of art, "regular rate."

The Chamber does not, and cannot, dispute that the Legislature choice of words in Section 226.7 tracked the IWC's recently adopted word choices in the comparable Wage Order provision. (*See Murphy,* 40 Cal.4th at 1107-08.) The IWC's intended meaning therefore necessarily informs the Legislature's.

There is ample evidence that the five-member IWC intended "regular rate of compensation" to have the identical meaning of "regular rate of pay," because it used the words "pay" and "compensation" interchangeably in its Statement of Basis

explaining what it had done and why. As the IWC explained, its new "regular rate of compensation" remedy for break violations "requires an employer to pay an employee one additional hour of pay at the employee's *regular rate of pay."* (Statement of Basis, found at https://perma.cc/CN6U-HF8P (emphasis added); *see also Ferra,* 40 Cal.App.5th at 1262 (dissent).)

The power of the above-referenced Statement of Basis language cannot be understated. From a statutory construction perspective, it is the equivalent of every member of both houses of the Legislature and the Governor signing an official document explaining the precise meaning of a law upon enactment.

That the Legislature and the IWC used the phrase, "pay . . . at the employee's regular rate of compensation" (rather than the overtime law formulation, "be compensated at . . . the regular rate of pay for an employee") demonstrates that the two formulations are substantively identical. "Pay" and "compensation" are synonyms. There is no difference between the amount owed by an employer paying at the regular rate of compensation than the amount received by an employee that is compensated at the regular rate of pay (other than the latter provision also requiring a premium of 1.5 hours rather than 1.0

hours wen overtime is worked). Both rest on the critical term of art, "regular rate." And neither use the term "hourly rate" or "base rate." As IWC stated in its Statement of Basis, an employee's "regular rate of compensation" *is* the employee's "regular rate of pay."

III. OVERTIME PREMIUMS AND BREAK VIOLATION PREMIUMS SHARE A STATUTORY PURPOSE.

The Chamber also contends that break premiums and overtime premiums further different purposes, which require different constructions of "regular rate" based on whether the words are followed by "of pay" or "of compensation." (Chamber Br. 22-24.) ASDC makes the same argument. (ASDC Br. 10-12.) But as Plaintiff, Justice Edmon, and CELA have previously shown, the premium-pay remedy for meal-and-rest-break violations serves the same purpose as the premium-pay remedy for overtime violations. As this Court explained in *Murphy,* "[t]he IWC intended that, like overtime pay provisions, payment for missed meal and rest periods be enacted as a premium wage to compensate employees, while also acting as an incentive for employers to comply with labor standards." *Murphy,* 40 Cal.4th at 1110.

IV. THE PUBLIC POLICIES SUPPORTING THE LEGISLATURE'S CHOICE OF REMEDY ARE BEST ACCOMPLISHED BY CONSTRUING "REGULAR RATE OF COMPENSATION" AS SYNONYMOUS WITH "REGULAR RATE OF PAY"

The Chamber asserts that public policy considerations support the panel majority's construction of "regular rate of compensation." (Chamber Br. 24-29.) They do not.

In *Murphy*, this Court concluded that the IWC and Legislature adopted the premium-wage penalty provisions in part for deterrence purposes, to discourage violations by requiring employers to pay a premium wage to employees who suffer an overtime or meal-or-rest-break violation. That deterrent function is strengthened rather than undermined by Plaintiffs' construction of Section 226.7.

The Chamber does not disagree, but suggests that there is something untoward about the fact that under Plaintiffs' construction, the amount of the premium for break violations is not as closely correlated to the employee's loss as the premium for overtime violations. That proves nothing, because the same is true under Loews' construction. Whether the "regular rate" premium is calculated using the so-called "base" rate alone

(Loews' construction) or the base rate plus other non-discretionary pay attributable to that time period (Plaintiffs' construction), the fact remains that the *amount* of the one-hour wage premium under Section 226.7 is the same regardless of whether the employer violated California break law by providing only a partial break, an untimely break, or no break at all. That Section 226.7(c) requires a one-size-fits-all wage premium regardless of the severity or extent of the employer's violation (i.e., the same remedy for cutting short a meal break before 30 minutes as for not providing any break at all or for providing a full break but not until more than five hours of work) has nothing to do with how that one-hour wage should be calculated.

Moreover, it is equally true, under Loews' construction no less than Plaintiff's, that the more an employee is paid "per hour," the more the resulting wage premium will be. The difference is that under Loews' construction, if the "base" hourly rate is only a *portion* of the employee's actual "regular rate," the wage premium for that employee would correlate even *less* with the actual amount earned per hour.

Chamber contends that it is somehow "arbitrary" to allow workers with different earnings receiving different amounts in

premiums. (Chamber Br. 26-27.) But again, that is a criticism of the one-hour wage penalty itself, not how it is calculated.

Given the reality that the language of 226.7(c) requires higher paid employees to receive greater premiums than lower paid employees, it would be arbitrary to pay $15.00 for a break violation to an employee who actually earns $25.00 - $40.00 per hour in piece work earnings each pay period because of a declared *base hourly rate* in his pay scheme that he is rarely paid, while a co-worker with a different job who earns actual earnings of $16.00 per hour receives more for a break violation. Yet this result is a logical extension of the majority opinion.

The Chamber's final two arguments in Section II of its brief are similarly without merit. (Chamber Br. 27-29.) First, the Chamber decries the administrative burdens of having to calculate the "regular rate" for employees who are paid non-discretionary amounts in addition to an hourly rate. But employers make those calculations all the time under Labor Code section 510(a), which all parties agree requires those amounts to be factored in when calculating the regular rate for purposes of statutory overtime pay.

Second, the Chamber recklessly speculates that employers throughout the state will abandon existing compensation systems based on employee incentives if the panel decision is reversed. Perhaps there are some employers in the State that (1) currently pay employees a base rate plus certain non-discretionary amounts and (2) that also engage in such frequent and widespread violations of California meal-and-rest-break law that they would find it more economically beneficial to abandon the non-discretionary supplemental pay component of their current pay practices than to continue providing pay incentives to their most productive employees; and (3) that would not lose their most productive employees if the employer eliminated that non-discretionary pay. But the Chamber certainly has not identified any such employer. Nor is it likely that the IWC and Legislature, in formulating the one-hour wage premium provision, had the intent of benefitting such serial violators of California's meal-and-rest-break laws.

The far more likely scenario, if Plaintiffs' construction is accepted, is that most California employers would continue to comply with their legal obligations and would pay the one-hour penalty when they fail to do so, for whatever reason.

The most likely scenario, under *Loew's* construction, is that serial violators would shift employee income from the hourly pay component to the non-hourly, non-discretionary component, reducing their potential liability but at the same time reducing the statute's intended deterrent effect.

The treatment of overtime premiums by the United States Court provides a useful guide to determining which of the parties' conflicting assessments of public policy is likely to be what the Legislature intended. All parties agree that overtime premiums, like break violation premiums, were designed to further the health and welfare needs of workers by compensating workers and shaping employer behavior. The employees in the leading Supreme Court cases of the 1940's, such as *Walling v. Helmerich & Payne, Inc.* (1944) 323 U.S. 37, 40; *Walling v. Youngerman-Reynolds Hardwood Co.* (1945) 325 U.S. 419, 424–25; and *Walling v. Harnischfeger Corp.* (1945) 325 U.S. 427, 431–32, were each paid a combination of hourly pay plus other pay. In those cases, the employers argued (as Loews does here) that the "regular rate" for determination of overtime premiums should be limited to the hourly component of the employees' pay only. The Supreme Court rejected this construction, concluding that

Congress intended the "regular rate" to include bonus payments, piecework earnings, etc. not only because that was the best reading of the text, but also as a policy matter because that construction furthered Congress' policy of deterring wrongdoing. Limiting the "regular rate" to just one component of an employee's compensation, as Loews and its amici urge, would not have that intended effect.

V. PRACTICAL CONSIDERATIONS FAVOR REVERSAL

The Chamber next argues that the Legislature could not have intended to include non-discretionary components of an employee's pay package in the calculation of the break violation premium because the amount of that payment would not be immediately known when each break violation occurs. (Chamber Br. 29-31.) But that is how overtime premiums are calculated, and there is no reason to believe – and certainly no evidence presented to support a belief – that the IWC and Legislature intended anything different under Section 226.7.

The Chamber's second argument is that for employees who have a "base rate" but earn most of their income through commissions, Plaintiff's construction of Section 226.7 would

result in a penalty that could be many times the employee's base rate, a result the IWC and Legislature could not have intended. (Chamber Br. 30.) But that is *precisely* what they intended, just as they intended that same result for calculating overtime premiums. After all, without that result the employee would not be paid an extra hour based on what that employee actually earned, and the employer would not be deterred from committing meal-and-rest-break violations.

Plaintiff's construction of 226.7 is practical, logical, and fair. It provides a remedy for workers entitled to breaks who do not have "base hourly rates." It provides a remedy that can be easily implemented using existing calculation mechanisms established in the overtime premium context. And it eliminates the incentive employers would otherwise have to reduce "base hourly wages" and increase other forms of remuneration.

VI. THERE IS NO REASON TO DEPART FROM THE USUAL RULE GIVING JUDICIAL DECISIONS RETROACTIOVE EFFECT

The Chamber tries to supplement Loews' arguments on retroactivity by presenting assumptions not supported by the record. The Chamber asserts *without any evidence or citation to case law, studies, data, or analysis*, that employers throughout

the State have been promptly paying an extra hour of pay at their employee's "base" hourly rate whenever the employer fails to provide a legally compliant meal or rest break, and that adopting Plaintiffs' construction of Section 226.7(c) would mean that every formerly law-abiding employer would face litigation to recover the difference between the "base" rate previously paid and the "regular rate" required by law if the Court's decision were not retroactive. Chamber Br. 33-35.

There is simply no evidence in the record, or available in any public source, to support this speculative assertion. The Chamber has failed to demonstrate how many employers or employees would potentially be affected by the Court's ruling. The Chamber has also failed to demonstrate how many employers: (1) commit meal or rest break violations with any regularity; (2) or pays employees at the base rate only when it does. Speculative assertions are not a legitimate basis for overcoming the strong presumption favoring application of judicial decisions to all non-final pending cases.

It "is basic in our legal tradition" that "judicial decisions are given retroactive effect." *Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 978. Although the Court has "recognized

the potential for allowing narrow exceptions to the general rule of retroactivity when considerations of fairness and public policy are so compelling in a particular case that on balance, they outweigh the considerations that underlie the basic rule," *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 509, those considerations do not exist in this case. Construing "regular rate" under Section 226.7 to mean the same thing as "regular rate" under Section 510(a) and the FLSA will not change any previously settled rules. While it might resolve some existing uncertainties, that happens whenever this Court resolves a disputed issue.

California employers have known for at least nine years, since the decision in *Studley v. Alliance Health Services, Inc.* (C.D. Cal. 2012) 2012 U.S. Dist. Lexis 19094, that Section 226.7(c) could be (as it was in that case) construed as Plaintiff urges. (*See Ferra*, 40 Cal.App.5th at 1250-52). No California employer had a vested reliance interest in the construction advocated by Loews' – what they knew was that the proper standard was a matter of considerable dispute, that might one day have to be resolved by this Court. During those years, any employer that failed to comply with Section 226.7 did so at their

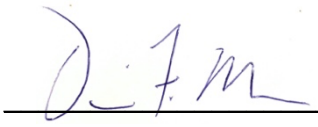
own risk. *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 25 is instructive (giving retroactive effect to a decision that "was a clarification of the law as it existed"). *See also* RB 41-44.)

CONCLUSION

For the reasons stated above, in Plaintiffs' prior briefs, and in the amici briefs filed in support of Plaintiff, the Court of Appeal's decision should be reversed.

Dated: December 7, 2020

Respectfully submitted,

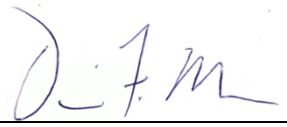


DENNIS F. MOSS,
MOSS BOLLINGER, LLP
Attorneys for Plaintiff, Appellant
Jessica Ferra

RULE 14 CERTIFICATE OF COMPLIANCE

Dennis Moss Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.260(b)(1) of the California Rules of Court, the enclosed brief was produced using 13-point Century Schoolbook type including footnotes and contains approximately 6,283 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 7, 2020



Dennis F. Moss

PROOF OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 15300 Ventura Boulevard, Suite 207, Sherman Oaks, California 91403.
2. That on December 7, 2020 declarant served APPELLANT'S ANSWER TO AMICUS BRIEFS via TrueFiling.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed this 7th day of December 2020 at Sherman Oaks, California.

Lea Garbe

Lea Garbe

SERVICE LIST

Rosenberg, Richard	Ballard Rosenberg Golper & Savitt LLP	rrosenberg@brgslaw.com
Rubin, Michael	Altshuler Berzon LLP	mrubin@altber.com
Manier, John	Ballard Rosenberg Golper & Savitt	jmanier@brgslaw.com
Goldsmith, Eileen	Altshuler Berzon LLP	egoldsmith@altber.com
Stevens, Paul	Stevens L.C.	pstevens@stevenslc.com
Munn, Narine	Ballard Rosenberg Golper & Savitt LLP	nmunn@brgslaw.com
Rubin, Michael	Altshuler Berzon LLP	mrubin@altshulerberzon.com
Balter, David	DIR/Div Labor Stds Enf	DBalter@dir.ca.gov
Perley, Jean	Altshuler Berzon LLP	jperley@altber.com
Majarian, Sahag	Law offices of Sahag Majarian II	sahag@majarianlaw.com
Seldon, Kiran	Seyfarth Shaw LLP	kseldon@seyfarth.com
Moss, Dennis	Moss Bollinger LLP	dennis@mossbollinger.com
Reathaford, Laura	Lathrop GPM LLP	laura.reathaford@lathropgpm.com
Grant, Melissa	Capstone Law APC	melissa.grant@capstonelawyers.com
Haffner, Joshua	Haffner Law PC	jhh@haffnerlawyers.com

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **FERRA v. LOEWS HOLLYWOOD HOTEL**
Case Number: **S259172**
Lower Court Case Number: **B283218**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **lea@dennismosslaw.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Appellant's Answer to Amicus Briefs

Service Recipients:

Person Served	Email Address	Type	Date / Time
Richard Rosenberg Ballard Rosenberg Golper & Savitt LLP	rrosenberg@brgslaw.com	e-Serve	12/7/2020 3:08:11 PM
Michael Rubin Altshuler Berzon LLP 80618	mrubin@altber.com	e-Serve	12/7/2020 3:08:11 PM
John Manier Ballard Rosenberg Golper & Savitt 145701	jmanier@brgslaw.com	e-Serve	12/7/2020 3:08:11 PM
Eileen Goldsmith Altshuler Berzon LLP 218029	egoldsmith@altber.com	e-Serve	12/7/2020 3:08:11 PM
Paul Stevens Stevens L.C.	pstevens@stevenslc.com	e-Serve	12/7/2020 3:08:11 PM
Narine Munn Ballard Rosenberg Golper & Savitt LLP	nmunn@brgslaw.com	e-Serve	12/7/2020 3:08:11 PM
Michael Rubin Altshuler Berzon LLP 80618	mrubin@altshulerberzon.com	e-Serve	12/7/2020 3:08:11 PM
David Balter DIR/Div Labor Stds Enf 136273	DBalter@dir.ca.gov	e-Serve	12/7/2020 3:08:11 PM
Jean Perley Altshuler Berzon LLP	jperley@altber.com	e-Serve	12/7/2020 3:08:11 PM
Sahag Majarian Law offices of Sahag Majarian II	sahag@majarianlaw.com	e-Serve	12/7/2020 3:08:11 PM
Kiran Seldon Seyfarth Shaw LLP 212803	kseldon@seyfarth.com	e-Serve	12/7/2020 3:08:11 PM

Dennis Moss Moss Bollinger LLP 77512	dennis@mossbollinger.com	e-Serve	12/7/2020 3:08:11 PM
Laura Reathaford Lathrop GPM LLP 254751	laura.reathaford@lathropgpm.com	e-Serve	12/7/2020 3:08:11 PM
Melissa Grant Capstone Law APC 205633	melissa.grant@capstonelawyers.com	e-Serve	12/7/2020 3:08:11 PM
Ari Moss Moss Bollinger LLP 238579	lea@dennismosslaw.com	e-Serve	12/7/2020 3:08:11 PM
Joshua Haffner Haffner Law PC 188652	jhh@haffnerlawyers.com	e-Serve	12/7/2020 3:08:11 PM
Laura Reathaford Lathrop GPM LLP 254751	Shar.Campbell@LathropGPM.com	e-Serve	12/7/2020 3:08:11 PM
Kiran Seldon Seyfarth Shaw LLP	kiranseldon@yahoo.com	e-Serve	12/7/2020 3:08:11 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

12/7/2020

Date

/s/Lea Garbe

Signature

Moss, Ari (238579)

Last Name, First Name (PNum)

Moss Bollinger LLP

Law Firm