S259172

IN THE SUPREME COURT OF CALIFORNIA

JESSICA FERRA,

Plaintiff and Appellant,

v.

LOEWS HOLLYWOOD HOTEL, LLC,

Defendant and Respondent.

SECOND APPELLATE DISTRICT, DIVISION THREE, NO. B283218
LOS ANGELES COUNTY SUPERIOR COURT NO. BC586176

CONSOLIDATED ANSWER TO BRIEFS OF AMICI CURIAE IN SUPPORT OF APPELLANT

Service on Attorney General, Attention: Consumer Law Section,
and Los Angeles County District Attorney
Required by Bus. & Prof. Code, § 17209

BALLARD ROSENBERG GOLPER & SAVITT, LLP
RICHARD S. ROSENBERG, State Bar No. 77948
JOHN J. MANIER, State Bar No. 145701
DAVID FISHMAN, State Bar No. 217608
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436
TELEPHONE: 818-508-3700 | FACSIMILE: 818-506-4827

Attorneys for Defendant and Respondent
LOEWS HOLLYWOOD HOTEL, LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Lab. Code

Other Authorities

Assembly Bill

Cal. Code Regs., tit. 8

INTRODUCTION

The answer brief on the merits of Defendant and Respondent Loews Hollywood Hotel, LLC (Loews) demonstrated the correctness of the Court of Appeal's holding that the Legislature never intended the term "regular rate of compensation" in Labor Code section 226.7,[1] which requires employers to pay a wage premium if they fail to provide a legally-compliant meal period or rest break, to have the same meaning or require the same calculations as the term "regular rate of pay" in section 510(a), which requires employers to pay a wage premium for each overtime hour. Neither of the briefs filed on behalf of Plaintiff and Appellant Jessica Ferra by amici curiae—California Employment Lawyers Association (CELA) and Bet Tzedek—warrants a different conclusion.

Both amici make the same analytical error as Ferra and the Court of Appeal's concurring and dissenting opinion (dissent)—they rest on the assumption that "regular rate," in and of itself, is a term of art under California law, which undergirds their contention that the terms "compensation" and "pay" are interchangeable in this context. But Loews's brief explained otherwise, and neither amici overcomes this showing.

Both amici also echo the argument made by Ferra—but not the dissent—that construing an hourly employee's "regular rate of compensation" to mean their base hourly wage rate would frustrate the purpose of section 226.7 and the corresponding

---

[1] Undesignated statutory references are to the Labor Code.

wage orders of the Industrial Welfare Commission (IWC). But neither amici demonstrates how this might be so.

CELA provides no logical basis for contending the Court of Appeal's and Loews's construction of section 226.7 would invite employer manipulation or incite needless litigation. This construction would not produce "absurd" results or represent this Court superimposing its own policy judgments, as Bet Tzedek suggests. And CELA fails to refute Loews's showing that any holding that adopts Ferra's interpretation of the "regular rate of compensation" for break premiums should apply only prospectively.

LEGAL DISCUSSION

I. CELA AND BET TZEDEK BOTH RELY ON THE ERRONEOUS PROPOSITION THAT "REGULAR RATE," BY ITSELF, IS A TERM OF ART UNDER CALIFORNIA LAW.

CELA endorses the position of Ferra and the dissent that "the two-word term 'regular rate' is a term of art" and urges that it be interpreted the same as "in other wage-and-hour contexts." (CELA Br., p. 20.) Bet Tzedek also describes "regular rate" as a "term of art," and contends the Court of Appeal's construction renders it "meaningless surplussage [*sic*]." (BT Br., p. 12.)

But Loews's answer brief explained that "regular rate" is a term of art *only under federal overtime law*, not California wage-and-hour law generally. (Compare 29 U.S.C. § 207, subds. (a), (e) [defining "regular rate" only for purposes of that section, establishing federal overtime pay requirements] with Lab. Code, § 510, subd. (a), and Wage Order No. 5-2001, subd. 3(A) [state

overtime provisions, using term of art "regular rate of pay"]; see *Alvarado v. Dart Container Corp. of Cal.* (2018) 4 Cal.5th 542, 551, fn. 3 [using unmodified phrase "regular rate" only when quoting a federal overtime regulation]; *id.* at p. 563 [using "that regular rate" to refer to employer's calculation of "regular rate of pay"].) Like Ferra, neither CELA nor Bet Tzedek provides any authority suggesting "regular rate" has any specialized meaning under California law, or anywhere else outside the context of federal overtime law.

Both amici emphasize that California courts have construed "regular rate of pay" to have the identical meaning as the federal term of art "regular rate." But that does not mean "regular rate of pay" is synonymous with "regular rate of compensation," which—as amici tacitly concede—is not a term of art and has no specialized meaning.

Amici suggest the choices by the IWC and Legislature to use only the phrase "regular rate of compensation" for break premiums—rather than "regular rate of pay," which the IWC has used for overtime premiums for more than half a century—were meaningless happenstance. But that contradicts this Court's presumption that "different words or phrases are used in the same connection in different parts of a statute" were intended to have "a different meaning." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117 (*Briggs*).) That canon applies to IWC wage orders, which are "accorded the same dignity as statutes." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027 (*Brinker*).)

CELA's observation that section 226.7 "merely" uses the same language as the IWC only bolsters Loews's position, because *the IWC used different phrases in different parts of the same wage orders*—"regular rate of pay" for overtime premiums and "regular rate of compensation" only for break premiums. (Compare IWC Wage Order No. 5-2001 (Cal. Code Regs., tit. 8, § 11050) (Wage Order No. 5-2001), subds. 11(B), 12(B) [using "regular rate of compensation" for break premiums], with *id.*, subd. 3(A) [using "regular rate of pay" for overtime premiums].) Therefore, the phrases presumably have different meanings. (*Briggs*, at p. 1117.)

Amici conspicuously ignore a related but distinct canon discussed by the Court of Appeal and Loews—that "if the Legislature carefully employs a term in one statute and deletes it from another, it must be presumed to have acted deliberately."[2] (*Ferguson v. Workers' Comp. Appeals Bd.* (1995) 33 Cal.App.4th 1613, 1621 (*Ferguson*).) *The Legislature made just such a choice in the same session*: It carefully employed the IWC's long-standing phrase "regular rate of pay" when amending section 510 regarding overtime premium calculations (Assembly Bill No. 60 (1999-2000 Reg. Sess.) (AB 60)), but deleted that term of art in favor of "regular rate of compensation" in section 226.7 for break premiums (Assembly Bill No. 2509 (1999-2000 Reg. Sess.) (AB 2509)). The Legislature's choice—like the IWC's—is presumed to be deliberate. (*Ferguson*, at p. 1621; accord, *Murphy v. Kenneth*

---

[2] The Court of Appeal and Loews clearly did not rely solely on a "single canon," as CELA suggests. (CELA Br., p. 18.)

Cole Productions, Inc. (2007) 40 Cal.4th 1094, 1108 (*Murphy*) [Legislature's choice "to eliminate penalty language in section 226.7," while retaining it in other provisions of AB 2509, further evinces it "did not intend section 226.7 to constitute a penalty"].)

CELA, like the dissent, protests that even if "regular rate of compensation" is not synonymous with "regular rate of pay," this does not lead to the conclusion that it means the base hourly rate. But CELA ignores the dissent's acknowledgment that "the phrase "regular rate of compensation" *suggests only two possible meanings*—"either an hourly rate plus incentive/bonus pay or an hourly rate alone." (Dis. opn., p. 2.) Instead, CELA posits other hypothetical alternatives ("all forms of remuneration, whether non-discretionary or not," or other combinations of "non-discretionary income"), and baselessly construes the Legislature's and IWC's silence on these far-fetched formulations as a "strong indication" that "regular rate of compensation" was intended to be synonymous with the overtime "regular rate of pay." (CELA Br., pp. 19-20.) Not surprisingly, CELA cites *no authority* to support its chosen inference, so this Court should disregard the argument. (See *Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1407 [issues not supported by reasoned argument or citation to authority are deemed waived].)

CELA chooses to disregard Loews's representation that its payment of break premiums at the base hourly rate follows the settled, standard practice of tens of thousands of California employers, baselessly claiming it "is beyond implausible." (CELA Br., pp. 43-44.) But amici curiae California Employment Law

Counsel, Employers Group, and Chamber of Commerce (collectively CELC) confirm Loews's representation (see CELC Br., p. 33)—and amicus curiae Association of Southern California Defense Counsel (ASCDC) represents that the Division of Labor Standards Enforcement (DLSE) likewise has applied the base rate when calculating break premiums (ASCDC Br., p. 21). This further shows that construing "regular rate of compensation" to mean the base hourly rate is workable, reasonable, and comports with common sense (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1122), and refutes the notion that the Legislature barred this practice by implication (see *Steinhebel v. Los Angeles Times Communications, LLC* (2006) 126 Cal.App.4th 696, 709).

II. CELA MISCONSTRUES THE COURT OF APPEAL'S AND LOEWS'S RESPONSES TO FERRA'S RELIANCE ON DICTIONARY DEFINITIONS OF "PAY" AND "COMPENSATION."

CELA, like Ferra and the dissent, insists that the words "compensation" and "pay" are used interchangeably, and that the phrase "regular rate of compensation" is therefore synonymous with "regular rate of pay." CELA castigates the Court of Appeal's and Loews's references to an alternative definition of "compensation"—which includes "something, such as money, given or received as … reparation, as for a … loss"—that does not exist for "pay." (American Heritage Dict. (4th ed. 2000) p. 376, quoted in opn., p. 9, fn. 4, and Answer Br. on the Merits (ABM), pp. 44-45.)

But CELA disregards the fact that Loews responded specifically to *Ferra's* reliance on dictionary definitions to support her assertion that "regular rate of compensation" and "regular rate of pay" are synonymous. (See Opening Br. on the Merits, pp. 68-69.) Loews acknowledged that "compensation" also shares the definition of "pay" as "money [given] in return for goods or services rendered" (American Heritage Dict., *supra*, p. 1291, quoted in ABM, p. 44, and in *Murphy*, *supra*, 40 Cal.4th at p. 1104), and that the Legislature frequently uses both terms as synonyms for "wages." (*Murphy*, at p. 1104, fn. 6.) But the alternative definition for "compensation" refutes Ferra's suggestion that it is *invariably* synonymous with "pay."

CELA concedes that dictionary definitions, while sometimes useful in statutory interpretation, "are no substitute for analyzing the words used by the Legislature." (CELA Br., p. 26.) But Loews did not suggest otherwise by responding to Ferra's reliance on dictionary definitions.

CELA misconstrues the positions of the Court of Appeal and Loews, which do not assert that the Legislature or IWC specifically considered dictionary definitions when they used "regular rate of compensation" rather than "regular rate of pay" in connection with break premiums. Instead, the alternative definition of "compensation" is *fully consistent with the intent behind break premiums recognized by this Court*—to ensure "the health and welfare of employees by requiring that employers provide meal and rest periods as mandated by the IWC." (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1255

(*Kirby*).) "In other words, a section 226.7 action is brought for the *nonprovision of meal and rest periods*, not for the 'nonpayment of wages.'" (*Ibid*., original italics; *Murphy*, *supra*, 40 Cal.4th at p. 1104 [section 226.7 addresses loss of the "benefit" of being "free of the employer's control during the meal period"]; opn., p. 9, fn. 4.) This contrasts sharply with the "central purpose" behind the "regular rate of pay" for overtime premiums, which is "to compensate employees for their time" (*Murphy*, at p. 1109)—i.e., to "pay" them for "services rendered" (*id.* at p. 1104, quoting American Heritage Dict., *supra*, p. 1291).

The issue is not whether "the Legislature … meant 'pay' and 'compensation' to have different meanings" (CELA Br., p. 27), but whether the IWC and Legislature meant the phrase "regular rate of compensation" to have the identical meaning as "regular rate of pay." CELA's self-described "most persuasive evidence" of this is the IWC's purported "interchangeabl[e]" use of the phrases in its Statement as to the Basis for all wage order amendments made pursuant to AB 60. (CELA Br., p. 29.) But CELA ignores all the reasons why this is *not persuasive at all*, as discussed in Loews's brief:

- The IWC *explicitly distinguished* between "regular rate of compensation" and "regular rate of pay" in no fewer than 15 wage orders amended pursuant to AB 60,[3] which contradicts

---

[3] IWC Wage Order Nos. 1-2001 through 12-2001 15-2001, 16-2001, and 17-2001 each exclusively use "regular rate of compensation" in connection with break premiums, while using "regular rate of pay" in connection with overtime premiums and other contexts unconnected with break premiums. (See Cal. Code

the notion that the IWC intended the phrases to be used interchangeably. (See *Briggs*, *supra*, 19 Cal.4th at p. 1117.)

- Wage orders are "accorded the same dignity as statutes" (*Brinker*, *supra*, 53 Cal.4th at p. 1027), but no such deference is paid to a Statement of Basis, which "need only provide" a non-exhaustive explanation of "how and why the [IWC] did what it did." (*Small v. Superior Court* (2007) 148 Cal.App.4th 222, 232, citations and quotation marks omitted.)

- Nowhere in its 2000 Statement of Basis did the IWC declare, or even loosely suggest, that break premiums are to be calculated in the same manner as overtime premiums. To use CELA's own reasoning, if this had been the IWC's intent, "the Statement of Basis is where the IWC would have made that intent clear. But the IWC gave no indication of having such hidden intent." (CELA Br., p. 29.) CELA's attempt to infer such intent from the Statement's use of the phrase "regular rate of

---

Regs., tit. 8, § 11010, subds. 3(A), (B), (D), 5(A), (B), 11(D), 12(B); *id*., § 11020, subds. 3(A), (B), (D), 5(A), (B), 11(D), 12(B); *id*., § 11030, subds. 3(A), (B), (D), 5(A), (B), 11(D), 12(B); *id*., § 11040, subds. 3(A), (B), (E), 5(A), (B), 11(B), 12(B); id., § 11050, subds. 3(A), (B), (E), 5(A), (B), ; *id*., § 11060, subds. 3(A), (B), (D), 5(A), (B), 11(D), 12(B); *id*., § 11070, subds. 3(A), (B), (E), 5(A), (B), 11(D), 12(B); *id*., § 11080, subds. 3(A), (B), (D), 5(A), (B), 11(D), 12(B); *id*., § 11090, subds. 3(A), (B), (D), 5(A), (B), 11(D), 12(B); *id*., § 11100, subds. 3(A), (B), (D), (K), 5(A), (B), 11(D), 12(B); *id*., § 11110, subds. 3(A), (B), (D), 5(A), (B), 11(D), 12(B); *id*., § 11120, subds. 3(A), (B), (E), 5(A), (B), 11(C), 12(B); *id*., § 11150, subds. 3(A), (B), (C), (D), 5(A), (B), 11(B) 12(B), 11(D), 12(B); *id*., § 11160, subds. 3(A), (B), 5(A), (B), 10(F), 11(D); *id*., § 11170, subd. 4(A), (B), 5(A), (B), 9(C) [no provision for rest period premiums].)

pay" in places where the wage orders use "regular rate of compensation" blatantly violates the presumption that the IWC and Legislature do not "hide elephants in mouseholes." (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1171, citations and quotation marks omitted.)

III. CONTRARY TO AMICI'S ARGUMENTS, THE DISTINCT PURPOSES BEHIND BREAK PREMIUMS FURTHER SUPPORT THE COURT OF APPEAL'S HOLDING.

CELA suggests there is only a "supposed difference" in the purposes behind break premiums and overtime premiums, and that they are "somewhat different" at most. (CELA Br., p. 33.) But this blatantly contradicts this Court's statements that break premiums are intended to protect employees' "health and welfare" and compensate them for deprivation of their rights to meal and rest periods (*Kirby*, *supra*, 53 Cal.4th at p. 1255; *Murphy*, *supra*, 40 Cal.4th at p. 1104), while the "central purpose" behind overtime premiums is "to compensate employees for their time" (*Murphy*, at p. 1109; see pp. 12-13, *ante*).

CELA's attempt to elide these differences is disingenuous and unavailing. CELA would have this Court believe the Court of Appeal "recognized" that break premiums "are intended to deter employers from overworking their employees … while easing the burdens of extended worktime on those employees' health and welfare"—a supposed purpose "indistinguishable" from that underlying overtime premiums. (CELA Br., pp. 34-35.) But neither the portions cited by CELA nor any other portion of the Court of Appeal opinion say anything about deterring overwork.

(See opn., pp. 10-12.) This is not surprising, because while overtime premiums are explicitly intended to deter overwork (defined as more than eight hours of daily labor, see § 510, subd. (a)), non-overworked employees who work *significantly less than a full day* remain entitled to meal and rest breaks. (Compare IWC Wage Order No. 5-2001, subd. 3(A)(1) [daily overtime premiums required after 8 hours of work], with *id*., subds. 11(A) [first meal period generally required after 5 hours of work] and 12(A) [first rest period required after 3½ hours of work].)

CELA points to one genuine similarity between the premium provisions—they are intended "to compensate employees" while incentivizing employers "to comply with labor standards." (*Murphy*, *supra*, 40 Cal.4th at 1110.) But as recognized in *Murphy* and confirmed in *Kirby*, break premiums compensate employees for the deprivation of the benefit of required meal and rest periods, which are *non-working time* (*Kirby*, *supra*, 53 Cal.4th at p. 1255; *Murphy*, at p. 1104)[4]—not for nonpayment of *wages for time worked*, as is the case with overtime premiums (*Murphy*, at p. 1109). CELA strains to dismiss *Kirby* as making only "passing reference" to the purpose behind section 226.7 (CELA Br., pp. 35-36), but in fact that discussion was essential to this Court's holding that an action for section 226.7 premiums is *not* an action for nonpayment of wages

---

[4] Loews made this same point in its answer brief (ABM, p. 30, citing *Murphy*, at p. 1104), so it is frivolous for CELA to suggest Loews's position "turns on the notion" that break premiums are "not compensatory" (CELA Br., p. 35).

under the fee-shifting provisions of section 218.5. (See *Kirby*, at pp. 1255-1259.)

CELA also scoffs at Loews's showing that the rationale for overtime pay does not logically apply to break premiums, because overtime premiums are directly proportional to the amount of overtime work (see Lab. Code, § 510, subd. (a); Wage Order No. 5-2001, subd. 3(A)(1)(a)), while break premiums are *a fixed amount based on the employee's compensation rate*, with no connection to time worked beyond the low thresholds for entitlement to breaks. (*Brinker*, *supra*, 53 Cal.4th at p. 1029 [3½ hours for the first rest break]; *id.* at p. 1041 [5 hours for the first meal period].) But CELA only bolsters Loews's point by acknowledging that "the Legislature and IWC decided to assign a fixed value to the loss occasioned by a meal-or-rest-break violation *because of the difficulty in calculating such injuries*."[5] (CELA Br., pp. 36-37, italics added, citing *Murphy*, *supra*, 40 Cal.4th at p. 1112.)

This difficulty does not exist to the same degree in the overtime pay context, which is why overtime premiums directly correlate to time worked. Because break premiums lack such a correlation, there is *no logical reason* to include all the elements of the overtime "regular rate of pay" in calculation of break premiums. For example, a non-discretionary bonus is earned as a

---

[5] CELA argues this Court in *Murphy* "attributed no significance" to this lack of correlation (CELA Br., p. 36), but the issue before the Court was whether a break premium is a "penalty" for purposes of the statute of limitations, not how to calculate those premiums. (See *Murphy*, *supra*, 40 Cal.4th at pp. 1112-1114.)

consequence of *working time* (*Murphy*, *supra*, 40 Cal.4th at p. 1109), not non-working time such as rest and meal periods (*id.* at p. 1104). So while such bonuses are included in the overtime "regular rate of pay," including them in the calculation of break premiums would convert such premiums from a fixed amount tied to the base hourly rate to one that may fluctuate based on non-discretionary compensation having nothing to do with the missed breaks themselves. There is no logical reason for such a result.

Bet Tzedek acknowledges the distinct purpose behind break premiums, but claims the Court of Appeal's opinion would produce the "absurd" result of leaving "millions of employees"—particularly those paid on a non-hourly basis—"with a statutory right but no remedy," and would provide employers "no incentive to comply with California's labor standards." (BT Br., pp. 14-15.) However, Bet Tzedek ignores Loews's response to Ferra's similar argument on this point. Neither the trial court nor the Court of Appeal addressed issues pertaining to employees with no base hourly rate, because it was stipulated that Loews paid break premiums to Ferra and others at their base hourly rate. (CT 1:8.) Accordingly, this Court need not decide what the regular, normal, standard, or fixed rate of compensation would be for non-hourly employees, such as piece-rate employees. (See § 226.2, subd. (a)(3)(i) [specifying requirements for compensating piece-rate employees for rest and recovery periods, but not addressing premium wages]; ABM, pp. 58-59.) Moreover, neither Bet Tzedek nor Ferra have demonstrated that non-hourly employees have

somehow lacked a remedy for missed meal or rest periods in the 20 years since section 226.7 and the corresponding wage order subdivisions were promulgated—even though California employers generally have *no*t paid break premiums at the "regular rate of pay" (CELC Br., p. 33), and the DLSE has not had a practice of awarding break premiums at the overtime rate (ASCDC Br., p. 21).

IV. AMICI'S RELIANCE ON THE CANON OF LIBERAL CONSTRUCTION OF LABOR STATUTES IS UNAVAILING.

Both CELA and Bet Tzedek, like Ferra, invoke the principle that labor statutes and regulations are liberally construed to promote the protection of employees—which is particularly ironic in CELA's case, given its heavy reliance on this canon (CELA Br., pp. 29-30) while wrongly accusing the Court of Appeal and Loews of resting on a "single canon" (*id*. at p. 18). At any rate, amici ignore this Court's observation that the Labor Code's "general employee-protective thrust" does not compel courts to adopt statutory interpretations favored by employee-plaintiffs, particularly where legislative intent indicates otherwise. (*Mendoza v. Nordstrom, Inc*. (2017) 2 Cal.5th 1074, 1087 ["the Legislature intended to ensure employees, as conducive to their health and well-being, a day of rest each week, not to prevent them from ever working more than six consecutive days at any one time"]; *Kirby*, *supra*, 53 Cal.4th at p. 1250 [notwithstanding the principle favoring employee protection, a plaintiff who prevails on a section 226.7 claim is not entitled to attorney fees under section 1194].)

Amici also fail to refute the Court of Appeal's conclusion that its construction of "regular rate of compensation" results in "protection of employees" by calculating break premiums "at a full extra hour at the base hourly rate," consistent with the canon invoked by amici. (Opn., p. 17.) CELA ignores this point, while Bet Tzedek claims the Court of Appeal "betrays a contempt" for liberal construction but offers no basis for this assertion. (BT Br., p. 18.)

V. CELA UNPERSUASIVELY RELIES ON STATUTORY AND WAGE ORDER PROVISIONS NOT CITED IN THE COURT OF APPEAL.

CELA seizes on the fact that two Labor Code sections added pursuant to AB 60 include the phrase "regular hourly rate," while section 226.7 does not. One section renders chapter 1 of division 2, part 2 (§§ 500-558) inapplicable to employees covered by a valid collective bargaining agreement if, inter alia, the agreement "provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage." (§ 514.) The other section provides that a nonexempt, full-time salaried employee's "regular hourly rate shall be 1/40th of the employee's weekly salary" for purposes of computing the overtime rate. (§ 515, subd. (d).) CELA also cites to two provisions of Wage Order No. 5-2001—subdivision 3(B)(3), which precludes an employer from reducing "an employee's regular rate of hourly pay as a result of the adoption, repeal or nullification of an alternative workweek schedule," and

subdivision 3(L), which exempts employees covered by valid collective bargaining agreements which provide "a regular hourly rate of pay" of at least 30 percent above the state minimum wage.

But as CELA concedes, section 226.7 was added as part of AB 2509, not AB 60—the bill that added sections 514 and 515, and codified the requirements for daily overtime and meal breaks (§§ 510, 512), *but did not address break premiums at all*. The references to "regular hourly rate" in sections 514 and 515 clearly distinguishes those statutes from section 510, which was amended in the same bill (AB 60) and includes the overtime term of art "regular rate of pay." Likewise, the wage order phrases "regular rate of hourly pay" (IWC Wage Order No. 5, subd. 3(B)(3)) and "regular hourly rate of pay" (*id*., subd. 3(L)) unmistakably distinguish those provisions from the overtime "regular rate of pay" (*id*., subd. 3(A)).

By the same token, section 226.7 and subdivisions 11(B) and 12(B) of Wage Order No. 5-2001 eschew "regular rate of pay" in favor of "regular rate of compensation"—something the IWC and Legislature would not have done if they had intended break premiums to be calculated in the same manner as overtime premiums. It is inconsistent at best for CELA to ascribe great significance to the absence of phrases such as "regular hourly rate" from section 226.7 and the corresponding wage order subdivisions, *while denying any significance at all to the absence of the overtime term of art "regular rate of pay" from those provisions*.

Notably, sections 514 and 515 were not cited at all in the Court of Appeal—in the opinion, the dissent, the parties' briefs, *or even CELA's amicus brief*. And the only reference to subdivisions 3(B)(3) and 3(L) of Wage Order No. 5-2001 were in *footnote 2* of CELA's amicus brief in the Court of Appeal. This belies the notion that the language on which CELA now relies is germane to construction of the statutory and wage order provisions on break premiums.

VI. CELA'S STATED FEARS OF "EMPLOYER MANIPULATION" AND "UNNECESSARY LITIGATION" ARE UNFOUNDED.

CELA argues that under the Court of Appeal opinion, "unscrupulous employers … could easily immunize themselves" from break premiums by the so-called "simple expedient of converting all employees to a base-rate-plus compensation scheme, while allocating a substantial proportion of that pay to the 'plus' side—i.e., by keeping the total amount of compensation unchanged, but designating the minimum-wage portion as the employees' 'base rate' and the rest as a nondiscretionary weekly, bi-weekly, or monthly 'bonus.'" (CELA Br., pp. 37-38.) This is baseless and absurd speculation.

As previously discussed, the Court of Appeal's opinion is entirely consistent with how California employers generally have paid break premiums and how the DLSE has awarded them over the past two decades. (CELC Br., p. 33; ASCDC Br., p. 21; pp. 10-11, 18-19, *ante*.) CELA does not suggest that even the most "unscrupulous employers" have previously engaged in the type of subterfuge CELA imagines.

Moreover, an employer is obligated to pay break premiums *only if it violates the meal or rest period requirements*. Even if an employer were to drastically revise its compensation structure (a) based on the assumption that it will violate the break requirements and (b) for the sole purpose of potentially reducing break premium liability, the break violations themselves would expose the employer to penalties under the Private Attorneys General Act (§ 2699, et seq.).

It is particularly preposterous for CELA to describe such a compensation structure change as a "simple expedient." On its face, such a revision would be monumentally complicated, and would make it more burdensome for employers to comply with their overtime pay obligations—without reducing those obligations by a single penny, since the compensation would be included in the "regular rate of pay" no matter what.

Conversely, the result advocated by Ferra, her supporting amici, and the dissent would *frustrate* what CELA acknowledges was the intent that break premiums be "easily applied and understandable for all employers and workers." (CELA Br., pp. 14-15.) As explained in CELC's amicus brief, employers with incentive pay plans or nondiscretionary bonuses would be compelled to continually examine past payroll records in order to ensure break premiums reflect the overtime "regular rate of pay." This burden would interfere with the requirement that break premiums be paid "immediately" upon deprivation of the required break (see *Murphy*, *supra*, 40 Cal.4th at p. 1110), and could cause

smaller employers in particular to *eliminate* non-hourly forms of compensation. (See CELC Br., pp. 8-9, 29-31.)

CELA's argument is further undermined by its stated concern with "the large number of employees whose base hourly rate is routinely supplemented by a shift differential that entitles them to a higher rate for work at night or on weekends or under certain conditions." (CELA Br., p. 41.) As explained by CELC, using the overtime "regular rate of pay" may result in *reduced* break premiums depending on how much time an employee spends on lower-paid work. (CELC Br., pp. 8, 24-26.)

Equally spurious is CELA's suggestion that the Court of Appeal's opinion would result in an explosion of litigation over calculation of break premiums. Again, this is belied by the relative dearth of such litigation since break premiums were adopted in 2000. The Court of Appeal's opinion is the *only* published appellate decision on the subject in the last 20 years, accompanied by a modest number of federal district court decisions—the majority of which reached the same result as the Court of Appeal. (See ABM, pp. 53-58, and cases cited.) There is no logical reason to believe that litigation will suddenly spike upwards if this Court confirms that the DLSE and the majority of California employers have been accurately calculating break premiums for the past two decades.

VII. CELA FAILS TO PERSUASIVELY REBUT LOEWS'S SHOWING ON RETROACTIVITY.

Loews's answer brief presented several reasons why the ordinary rule of retroactivity should not apply in the event this

Court rules that break premiums must be calculated at the overtime "regular rate of pay." (ABM, pp. 60-63.) CELA's response to Loews's showing is unpersuasive.

As discussed above (pp. 9-10, ante), CELC confirms Loews's representation that the settled, standard practice of tens of thousands of California employers is to pay break premiums at the base hourly rate of hourly employees, rather than the overtime "regular rate of pay." (CELC Br., p. 33.) And ASCDC represents that the DLSE likewise has calculated break premiums at the base hourly rate. (ASCDC Br., p. 21.) *CELA—like Ferra—offers no representation or evidence to the contrary*.

CELA merely argues that any "prudent" employer who "carefully analyzed its legal obligations" would have concluded that break premiums must be calculated at the overtime premium rate, and that "California employers have been on notice [of this] at least since 2012," based on *an unpublished federal district court decision from that year*. (CELA Br., pp. 44-45, citing *Studley v. Alliance Healthcare Services* (C.D.Cal., July 26, 2012, SACV No. 10-000067-CJC) 2012 U.S. Dist. Lexis 190964 (*Studley*).) Neither assertion withstands analysis.

As Loews has shown, established canons of statutory construction compel the conclusion that the IWC and Legislature intended the phrase "regular rate of compensation" to have a different meaning than "regular rate of pay." (See, e.g., *Murphy*, *supra*, 40 Cal.4th at p. 1108; *Briggs*, *supra*, 19 Cal.4th at p. 1117; ABM, pp. 19-27; pp. 8-14, *ante*.) CELA's references to a 2003 DLSE opinion letter and the IWC's 2000 Statement of Basis—

neither of which prescribes a mode for calculating break premiums—hardly refute Loews's point.

CELA also provides no authority—and Loews knows of none—to suggest that California employers are somehow presumed to know of unpublished federal district court decisions such as *Studley*. Although state courts may consider such unpublished decisions "as persuasive" when they are "analytically sound," they are "not binding precedent" for a reason (*Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1432 & fn. 6), and California employers are not duty-bound to know of them.

In any event, *Studley* was found *unpersuasive* in multiple district court decisions which rejected its construction of "regular rate of compensation." (See *Chavez v. Smurfit Kappa North America LLC* (C.D.Cal., Oct. 3, 2019, No. 2:18-cv-05106-SVW-SK) 2019 U.S. Dist. Lexis 208570, pp. *20-*21; *Brum v. MarketSource, Inc.* (E.D.Cal., June 19, 2017, No. 2:17-cv-241-JAM-EFB) 2017 U.S. Dist. Lexis 94079, p. *14; *Wert v. United States Bancorp* (S.D.Cal., Dec. 18, 2014, No. 13-cv-3130-BAS) 2014 U.S. Dist. Lexis 175735, p. *6.) While CELA describes the district court decisions as "decidedly mixed," "the substantial weight" of authority has found "that 'regular rate of compensation' in § 226.7(c) differs from the meaning of 'regular rate of pay' in § 510(a)." (*Chavez v. Smurfit Kappa North America LLC* (C.D.Cal., Oct. 3, 2019, No. 2:18-cv-05106-SVW-SK) 2019 U.S. Dist. Lexis 208570, pp. *19-*20; accord, *Valdez v. Fairway Independent Mortgage Corp.* (S.D.Cal., July 26, 2019, No. 18-cv-

2748-CAB-KSC) 2019 U.S. Dist. Lexis 126013, pp. *15-*16; *Frausto v. Bank of America, N.A.* (N.D.Cal., Aug. 2, 2018, No. 18-cv-01983-MEJ) 2018 U.S. Dist. Lexis 130220, p. *14.)

CELA blanketly dismisses all of the "prospective-only cases cited by Loews," arguing that "all involved dramatic changes in the law that rejected previously settled principles set forth in one or more published Court of Appeal decisions." (CELA Br., p. 45.) That is not entirely true. In *Hoschler v. Sacramento City Unified School Dist*. (2007) 149 Cal.App.4th 258, the Court of Appeal held that a notice of non-reelection of a probationary teacher must be served personally rather than by certified mail, but gave its decision only limited retroactive effect—even though *no prior Court of Appeal decision* had held that certified mail service was sufficient. (*Id*. at pp. 270-271; see *id*. at pp. 264-265 [finding "no California teacher case directly on point," and rejecting district's reliance on decision which "had no occasion to consider whether service by mail was sufficient compliance"].)

CELA ignores Loews's showing that due process and fairness considerations counsel against retroactivity, given the dissent's conclusion that the phrase "regular rate of compensation" is ambiguous (dis. opn., p. 2), the unconstitutional vagueness and uncertainty that would inhere in a holding that this phrase means the same thing as the overtime "regular rate of pay" (see *Britt v. City of Pomona* (1990) 223 Cal.App.3d 265, 278), and the fact that the DLSE's *only endorsement* of Ferra's interpretation came in its January 16, 2020 letter supporting her petition for review. CELA also tacitly concedes that the proposed

rule change would have an immense substantive effect, by adding millions of dollars to employers' exposure in class actions for break premiums—particularly if this Court were to allow derivative penalties or attorney fees under sections 203 and 226 in such actions. (*Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th 444, 474, review granted & depublication den., Jan. 2, 2020, No. S258966.) And CELA does not contend that denying retroactive effect would negatively impact the administration of justice, or frustrate the purpose of the rule Ferra and her amici advocate. Accordingly, this case meets all of the standards for denying retroactive effect, in the event this Court holds that break premiums must be calculated at the overtime regular rate of pay. (*Claxton v. Waters* (2004) 34 Cal.4th 367, 378-379.)

CONCLUSION

Loews respectfully asks this Court to affirm the judgment of the Court of Appeal.

DATED: December 7, 2020 *Respectfully submitted*,

BALLARD ROSENBERG
GOLPER & SAVITT, LLP

By: 

John J. Manier
Attorneys for Defendant and Respondent LOEWS HOLLYWOOD HOTEL, LLC

CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies, pursuant to rule 8.520(c)(1) of the California Rules of Court, that this Answer Brief on the Merits is produced using 13-point Century Schoolbook type, including footnotes, and contains 5,744 words, which is fewer 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 *Respectfully submitted*,

BALLARD ROSENBERG
GOLPER & SAVITT, LLP

By: 

John J. Manier
Attorneys for Defendant and Respondent LOEWS HOLLYWOOD HOTEL, LLC

1423145.1

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 15760 Ventura Boulevard, Eighteenth Floor, Encino, CA 91436. On December 7, 2020, I served the following document described as**: CONSOLIDATED ANSWER TO BRIEFS OF AMICI CURIAE IN SUPPORT OF APPELLANT** as follows:

☒ **BY USING THE TRUE FILING, WEB-BASED, E-SERVICE AND E-FILING SYSTEM:** I caused to be served the foregoing document(s) on all interested parties listed on the TrueFiling e-service system with regard to the matter of *Ferra v. Loews Hollywood Hotel, LLC* matter, Supreme Court of California, case number S259172.

MOSS BOLLINGER LLP
Dennis F. Moss
Ari E. Moss
15300 Ventura Blvd., Ste 207
Sherman Oaks, CA 91403
dennis@mossbollinger.com
ari@mossbollinger.com

ALTSHULER BERZON LLP
Michael Rubin
Eileen Goldsmith
177 Post Street, #300
San Francisco, CA 94108
mrubin@altber.com
egoldsmith@altber.com

LAW OFFICES OF SAHAG MAJARIAN II
Sahag Majarian, II
18250 Ventura Boulevard
Tarzana, California 91356
sahag@majarianlaw.com

LATHROP GPM LLP
Laura Reathaford
2049 Century Park East, Suite 3500S
Los Angeles, CA 90067-1714
Laura.Reathaford@lathropgpm.com

CAPSTONE LAW APC
Melissa Grant
Ryan H. Wu
John E. Stobart
1875 Century Park East, Suite 1000
Los Angeles, CA 90067
Ryan.Wu@capstonelawyers.com
Melissa.Grant@capstonelawyers.com
John.Stobart@capstonelawyers.com

SEYFARTH SHAW LLP
Jeffrey A. Berman
Brian T. Ashe
Kiran A. Sheldon
2029 Century Park East, Suite 3500
Los Angeles CA 90067
jberman@seyfarth.com
bashe@seyfarth.com
ksheldon@seyfarth.com

☒ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List. I am "readily familiar" with Ballard Rosenberg Golper & Savitt, LLP's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelope(s) were placed for collection and mailing with postage thereon fully prepaid at Encino, California, on that same day following ordinary business practices.

Hon. Kenneth R. Freeman
Los Angeles County Superior Court
Spring Street Courthouse
Department 014
312 North Spring Street
Los Angeles, CA 90012

California Court of Appeal
Second Appellate District
Division Three
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 7, 2020, at Encino, California.

Narine Munn

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: **jmanier@brgslaw.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	FERRA Answer Response to Amicus Brief(1424519.1)

Service Recipients:

Person Served	Email Address	Type	Date / Time
Richard Rosenberg Ballard Rosenberg Golper & Savitt LLP	rrosenberg@brgslaw.com	e-Serve	12/7/2020 12:32:55 PM
Michael Rubin Altshuler Berzon LLP 80618	mrubin@altber.com	e-Serve	12/7/2020 12:32:55 PM
John Manier Ballard Rosenberg Golper & Savitt 145701	jmanier@brgslaw.com	e-Serve	12/7/2020 12:32:55 PM
Eileen Goldsmith Altshuler Berzon LLP 218029	egoldsmith@altber.com	e-Serve	12/7/2020 12:32:55 PM
Paul Stevens Stevens L.C.	pstevens@stevenslc.com	e-Serve	12/7/2020 12:32:55 PM
Narine Munn Ballard Rosenberg Golper & Savitt LLP	nmunn@brgslaw.com	e-Serve	12/7/2020 12:32:55 PM
Michael Rubin Altshuler Berzon LLP 80618	mrubin@altshulerberzon.com	e-Serve	12/7/2020 12:32:55 PM
David Balter DIR/Div Labor Stds Enf 136273	DBalter@dir.ca.gov	e-Serve	12/7/2020 12:32:55 PM
Jean Perley Altshuler Berzon LLP	jperley@altber.com	e-Serve	12/7/2020 12:32:55 PM
Sahag Majarian Law offices of Sahag Majarian II	sahag@majarianlaw.com	e-Serve	12/7/2020 12:32:55 PM
Kiran Seldon Seyfarth Shaw LLP 212803	kseldon@seyfarth.com	e-Serve	12/7/2020 12:32:55 PM

Dennis Moss Moss Bollinger LLP 77512	dennis@mossbollinger.com	e-Serve	12/7/2020 12:32:55 PM
Laura Reathaford Lathrop GPM LLP 254751	laura.reathaford@lathropgpm.com	e-Serve	12/7/2020 12:32:55 PM
Melissa Grant Capstone Law APC 205633	melissa.grant@capstonelawyers.com	e-Serve	12/7/2020 12:32:55 PM
Ari Moss Moss Bollinger LLP 238579	lea@dennismosslaw.com	e-Serve	12/7/2020 12:32:55 PM
Joshua Haffner Haffner Law PC 188652	jhh@haffnerlawyers.com	e-Serve	12/7/2020 12:32:55 PM
Laura Reathaford Lathrop GPM LLP 254751	Shar.Campbell@LathropGPM.com	e-Serve	12/7/2020 12:32:55 PM
Kiran Seldon Seyfarth Shaw LLP	kiranseldon@yahoo.com	e-Serve	12/7/2020 12:32:55 PM
Ryan H. Wu 222323	Ryan.Wu@capstonelawyers.com	e-Serve	12/7/2020 12:32:55 PM
John Stobart 248741	John.Stobart@capstonelawyers.com	e-Serve	12/7/2020 12:32:55 PM
Jeffrey A. Berman 50114	jberman@seyfarth.com	e-Serve	12/7/2020 12:32:55 PM
Brian T. Ashe	bashe@seyfarth.com	e-Serve	12/7/2020 12:32:55 PM
David Fishman	dfishman@brgslaw.com	e-Serve	12/7/2020 12:32:55 PM
LIsa Aguilar	laguilar@brgslaw.com	e-Serve	12/7/2020 12:32:55 PM
Sheryl Senet	ssenet@brgslaw.com	e-Serve	12/7/2020 12:32:55 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/Narine Munn

Signature

Manier, John (145701)

Last Name, First Name (PNum)

Ballard Rosenberg Golper & Savitt

Law Firm