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

ANSWER TO PETITION FOR REVIEW

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

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Statutes

Rules and Regulations

INTRODUCTION

There is no necessity to review either of the issues presented in the instant petition in order to secure uniformity of decision or settle important questions of law. To the contrary, the Court of Appeal's opinion settled the first issue as a matter of California appellate law, confirmed uniformity of decision as to the second, and decided both issues correctly.

The first issue is whether the "regular rate of *compensation*" for calculating premiums for missed meal and rest periods (Lab. Code, § 226.7, subd. (c), italics added) means an employee's base hourly wage, or whether it is the same as the "regular rate of *pay*" for calculating overtime premiums (*id.*, § 510, subd. (a), italics added; all undesignated section references are to the Labor Code). Defendant and Respondent Loews Hollywood Hotel, LLC ("Loews" or the "Hotel") follows the settled, standard practice of tens of thousands of California employers by paying meal and rest period premiums at employees' base hourly rate. Plaintiff and Appellant Jessica Ferra argues that California employers instead must pay these premiums at employees' "regular rate of pay," a well-established legal term of art from California overtime pay law that incorporates multiple possible forms of pay beyond the base hourly rate (e.g., commissions, non-discretionary bonuses).

In the first and only published appellate decision to address the issue, the Court of Appeal rejected Ferra's theory. It held the statutes' plain language unambiguously differentiate the phrases "regular rate of compensation" from "regular rate of pay," and

that legislative history does not compel the conclusion that the two phrases have the same meaning. The Court of Appeal also was persuaded by the majority of federal district courts which have reached the same conclusion. This result is consistent with the differences in policy objectives between the meal and rest period premium requirements and the overtime pay laws, as well as other published decisions by this Court and the Courts of Appeal which have addressed related issues—including one recent opinion which is not addressed in Ferra's petition. (See *Naranjo v. Spectrum Security Services, Inc*. (2019) 40 Cal.App.5th 444 (*Naranjo*), petn. for review filed Nov. 4, 2019, No. S258966.) Ferra relies largely on Justice Edmon's concurring and dissenting opinion, but this is not a sufficient basis for granting review.

The second issue is whether an employer's practice of automatically "rounding" employees' timeclock entries *up or down* to the nearest quarter hour for purposes of calculating wages results in a failure to pay all wages. Consistent with every reported appellate decision to address the issue, the Court of Appeal unanimously held the Hotel's rounding practice complies with California law. The court concluded that the Hotel's practice is facially neutral and does not systematically undercompensate employees over time.

Ferra does not challenge these fact-based conclusions, but instead makes a sweeping argument she did not timely raise below—that such a rounding policy inevitably violates California law, despite complying with federal law, because she claims it will result in many employees not being paid for all hours

worked. Ferra relies on *Troester v. Starbucks Corp*. (2018) 5 Cal.5th 829 (*Troester*), which was decided after Ferra filed her opening brief in the Court of Appeal—but before she filed her reply brief, in which she cited *Troester* while refraining from the broad condemnation of rounding she now makes in her petition. This Court should adhere to its policy of not considering issues that were not timely raised in the Court of Appeal. (Cal. Rules of Court, rule 8.500(c)(1).)

In any event, *Troester* does not substantively support Ferra's petition. This Court was not asked to, and did not, decide the legality of rounding in *Troester*, but it did state its assumption that rounding is lawful if the policy is facially fair and neutral and does not fail to properly compensate employees over time. That is precisely what the Court of Appeal found with respect to the Hotel's rounding practice.

Ferra offers no valid or persuasive reason—much less any necessity—for this Court to review either issue she presents. Her petition should be denied.

BACKGROUND

Ferra filed this putative class action on June 30, 2015. (CT 1:4-5.) She asserted causes of action for failure to pay minimum wages (Lab. Code, § 1197), failure to pay all wages due during each pay period (*id*., §§ 204, 226.7), failure to pay overtime wages (*id*., §§ 510, 1194), violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200, et seq.), failure to pay all wages owed upon termination (Lab. Code, §§ 201-203, 510, 1194), and failure to furnish accurate wage statements (*id*., § 226). (CT 5:1014-1028.)

Based on stipulated undisputed facts (see Code Civ. Proc., § 437c(t)), Loews moved for summary adjudication of issues on October 5, 2016, including whether meal and rest period premium payments pursuant to section 226.7 "must be paid at employees' 'regular rate of compensation,' i.e. their regular hourly wage, or at their 'regular rate of pay.'" (CT 1:16, 29-137.) In an order dated February 6, 2017, the trial court summarily adjudicated this issue in favor of Loews. (CT 5:1092-1107).

Meanwhile, on January 20, 2017, Loews moved for summary judgment or adjudication of issues, and argued primarily that all of Ferra's causes of action failed because the Hotel's rounding policy and practice is lawful. (CT 4:870-976, 5:977-1090.) The trial court agreed with Loews and granted summary judgment in an order dated April 24, 2017. (CT 6:1425-1446.)

Ferra appealed from the ensuing judgment. (CT 6:1447-1448, 1450-1457, 1461.) The Court of Appeal affirmed in an opinion issued October 9, 2019. Justice Edmon dissented only on the manner of calculating meal and rest break premium payments, but concurred on the rounding issue.

ARGUMENT

I. THERE IS NO NECESSITY FOR REVIEW OF THE COURT OF APPEAL'S DECISION AS TO CALCULATION OF MEAL AND REST BREAK PREMIUM PAYMENTS.

A. There Is No Split of Appellate Authority on This Issue.

Section 226.7(b) precludes an employer from requiring an employee "to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order ...." If an employer fails to provide an employee a meal, rest, or recovery period as required by state law, it "shall pay the employee one additional hour of pay at the employee's *regular rate of compensation* for each workday that the meal or rest or recovery period is not provided." (Lab. Code, § 226.7, subd. (c), italics added; accord, IWC Wage Order No. 5-2001, §§ 11(B), 12(B).)

Before this case, no published California authority had addressed the meaning of "regular rate of compensation." But several federal district courts had—and most adopted the Hotel's position that this phrase means an employee's base hourly rate, not the "regular rate of pay" used to calculate overtime premiums. (See opn., pp. 12-17, and cases cited therein.) The Court of Appeal agreed, holding "that the statutory terms 'regular rate of pay' and 'regular rate of compensation' are not synonymous, and the premium for missed meal and rest periods is the employee's base hourly wage." (*Id*. at pp. 6-7.)

Contrary to Ferra's assertion, state courts are not "hopelessly divided" on this issue. (Petn., p. 6.) The Court of

Appeal's decision is the only appellate precedent on the issue, and is binding on lower state courts in the absence of contrary state appellate authority. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) And every one of the federal district court decisions which sided with Ferra on this issue were decided *before* the Court of Appeal published its opinion.[1] (See petn., pp. 10-11.)

B. The Concurring and Dissenting Opinion Does Not Support Granting Review.

Ferra's primary basis for seeking review on this issue is that, in her view, Justice Edmon's concurring and dissenting opinion is correct, and the majority opinion is wrong. But this is a far cry from demonstrating that review is "necessary to secure uniformity of decision or to settle an important question of law."

---

[1] At least one of those decisions (*Ibarra v. Wells Fargo Bank, N.A.* (C.D. Cal. 2018) 2018 U.S. Dist. LEXIS 78513) is on appeal to the Ninth Circuit. That court sent a notice on August 25, 2019, scheduling oral argument for November 7, 2019. (9th Cir. No. 18-55626, dock. no. 58.) Before argument, both parties to the appeal sent letters to the court advising them of the Court of Appeal's October 9, 2019 decision in the instant case. (*Id.*, dock. nos. 64, 65.) The Ninth Circuit heard argument as scheduled, but five days later withdrew its submission pending further updates on the status of this case, without any intervening request from the parties. (*Id.*, dock. nos. 70-72.) Ferra provides no reasoned basis for suggesting that the Ninth Circuit's action somehow supports her petition for review. Notably, most class members in *Ibarra* worked under a plan in which their "normal compensation" included overtime premiums and incentive pay on top of base hourly pay. (*Ibarra v. Wells Fargo Bank, N.A.*, at p. *7.) Ferra tacitly concedes the Hotel's compensation system is not similar to the one in *Ibarra*.

(Cal. Rules of Court, rule 8.500(b)(1).) In any event, the majority opinion correctly settles this issue as a matter of California appellate precedent.

Most of Justice Edmon's opinion is devoted to a discussion of "longstanding federal law that defined overtime pay in terms of an employee's '*regular rate*,' and existing state law that defined overtime pay in terms of an employee's '*regular rate of pay*.'" (Conc. & dis. opn., pp. 4-18, italics in original.) Justice Edmon agreed with Ferra that the term "regular rate" in section 226.7 indicates the Legislature's intent to calculate meal and rest break premiums in the same manner as overtime premiums, and that the words "pay" and "compensation" are interchangeable. (Conc. & dis. opn., pp. 16-17.)

But the majority countered that this interpretation "would render meaningless the Legislature's choice to use 'of compensation' in one statute and 'of pay' in the other"—something the Legislature would not have done had it intended to calculate meal and rest break premiums under section 226.7 the same way as overtime premiums under section 510. (Opn., p. 8.) The majority assumed "the Legislature intended different meanings when it did not simply use 'regular rate,' but added different qualifiers in the statutes and wage orders establishing premiums for overtime and for missed meal and rest periods." (*Id*. at pp. 8-9.)

Justice Edmon responded to this point by noting that the rule against construing statutory language as meaningless surplusage is not absolute, and that "attributing controlling

significance to the modifier 'of compensation' leads to an entirely *unreasonable* conclusion—namely, that the Legislature used the phrase 'regular rate' in section 226.7 without intending the meaning 'regular rate' had acquired over the course of more than 60 years." (Conc. & dis. opn., pp. 16-17.) But as Justice Edmon's own analysis shows, the acquired meaning of "regular rate" in isolation exists *solely as a creature of federal law*, and specifically the section of the Fair Labor Standards Act ("FLSA") which sets maximum weekly hours of work and requires premium pay for overtime work. (29 U.S.C. § 207(a), (e).) There is no federal law governing meal and rest periods.

By comparison, California's statutory and wage order provisions regarding overtime premiums use the term of art "regular rate of pay," *not* "regular rate" by itself. (See Lab. Code, § 510, subd. (a).) Although California courts have construed "regular rate of pay" under state overtime pay law to have the same meaning as the FLSA overtime pay term "regular rate" (see conc. & dis. opn., pp. 15-16), neither Justice Edmon nor Ferra cite to any authority—and Loews is aware of none—which suggests that the unmodified phrase "regular rate" ever has had any specialized meaning under California law, much less any such meaning *outside the overtime pay context* on which Justice Edmon so heavily relies.

The majority reasoned that the fact that sections 226.7 and 510 both were added in the same legislative session "works against Ferra's argument that the words do not matter, because surely the Legislature meant something different when it used

different language in two statutes enacted at the same time." (Opn., p. 9; see *id.* at p. 9, fn. 4 [explaining the different purposes of overtime pay laws and meal and rest break requirements]; pp. 15-19, *post*.) Justice Edmon's contrary assertion is tethered to her misplaced reliance on "regular rate" as a term of art separate and apart from the words "compensation" or "pay," which accurately reflects federal overtime law but not California law on any topic. (Conc. & dis. opn., pp. 17-18.)

As the majority explained, "if the Legislature carefully employs a term in one statute and deletes it from another, it must be presumed to have acted deliberately." (*Ferguson v. Workers' Comp. Appeals Bd.* (1995) 33 Cal.App.4th 1613, 1621, quoted in opn., p. 9.) This Court has used similar reasoning when construing section 226.7. (See *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1108 (*Murphy*) ["That the Legislature chose to eliminate penalty language in section 226.7 while retaining the use of the word in other provisions of [Assem.] Bill No. 2509 is further evidence that the Legislature did not intend section 226.7 to constitute a penalty."].)

Significantly, Justice Edmon disregarded this principle, and instead suggested that the use of different terms were "mouseholes" in which the Legislature tends not to hide "elephants." (Conc. & dis. opn., p. 17.) But Justice Edmon ignored the proverbial elephant in the room—employers have justifiably ascribed significance to the difference in language between sections 226.7 and 510, without any contrary legislative, administrative, or appellate guidance for the past two decades.

Justice Edmon herself emphasized "mouseholes" that were not even discussed in Ferra's appellate briefs—a single isolated reference to "*regular rate of pay*" in the Industrial Welfare Commission's ("IWC's") Statement as to the Basis (conc. & dis. opn., p. 12, italics in original) and legislative committee report descriptions of meal and rest break premiums "in terms of rates of *pay* or *wages*" (*id.*, pp. 13-14, italics in original). But as the majority discussed, the final bill that added section 226.7 never used the phrase "regular rate of pay," while the final bill that added section 510 used that phrase at least eight times and never mentioned "regular rate of compensation." (Opn., p. 12, fn. 6.) While Justice Edmon found nothing in legislative history to suggest the phrases "regular rate of pay" and "regular rate of compensation" have different meanings (conc. & dis. opn., p. 13), like the majority, she also identified nothing in that history to compel the conclusion that the phrases have the same legal meaning (*ibid.*; see opn., p. 10).

Justice Edmon opined that the majority's analysis "might suggest that 'regular rate of compensation' does not mean the same thing as 'regular rate of pay'—but it does not lead logically to the conclusion that 'regular rate of compensation' means straight hourly rate." (Conc. & dis. opn., pp. 22-23.) But Justice Edmon's opinion itself acknowledged only two alternative definitions of "regular rate of compensation"—it "could mean *either* an hourly rate plus incentive/bonus pay *or* an hourly rate alone." (*Id.* at p. 2, italics in original.) Based on Justice Edmon's own reasoning, if "regular rate of compensation" is not merely

synonymous with "regular rate of pay," *it can only mean* "an hourly rate alone" (*ibid.*), as the majority correctly held.

Justice Edmon relies on the maxim that labor statutes are to be liberally construed. (Conc. & dis. opn., pp. 3-4.) However, this principle does not authorize courts "to rewrite applicable legislation to '"conform to [an] appellant's view of what [the law] should be."' [Citations.]" (*Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, 393.) In particular, courts should not add to a law what has been omitted *or omit what has been added*, or give a statute an effect that goes beyond its plain language. (*Ibid.*) Justice Edmon's interpretation of section 226.7, like Ferra's, essentially omits the term "of compensation" in order to conform to federal and state laws on a different subject—overtime pay. The majority correctly rejected that analysis, and there is no necessity for this Court to grant review.

C. The Majority Opinion is Consistent with Precedents of this Court and the Courts of Appeal, and Reflects the Distinct Policy Objectives of the Meal and Rest Break Requirements.

This Court and the Court of Appeal have consistently described meal and rest period premiums as one "additional hour of pay," without indicating that payment at any increased rate beyond the base hourly rate is required. (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1256-1257, 1259 (*Kirby*); *Murphy*, *supra*, 40 Cal.4th at pp. 1099, 1102, 1104, 1107-1108, 1111-1114; *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1134 [referring to "additional hour

of pay for missed meal and rest periods provided by section 226.7"]; *United Parcel Services v. Superior Court* (2011) 196 Cal.App.4th 57, 66 [employees "may recover up to two additional hours of pay on a single work day for meal period and rest period violations"].)

This is consistent with the different purposes behind sections 226.7 and 510. The concept of "regular rate of pay" is calculated to serve the overtime pay law's "central purpose," which "is to compensate employees for their time" (*Murphy*, at p. 1109) and ensure they are neither overworked nor underpaid (*Parth v. Pomona Valley Hospital Medical Center* (9th Cir. 2010) 630 F.3d 794, 801). Section 510 disincentivizes employers from circumventing overtime laws by means such as paying large nondiscretionary bonuses but low hourly rates.

By comparison, as the majority opinion notes, an employee forced to forgo a required meal period "loses a benefit to which the law entitles him or her. While the employee is paid for the 30 minutes of work, the employee has been deprived of the right to be free of the employer's control during the meal period. [Citation.]" (*Murphy*, at p. 1104, quoted in opn., p. 9, fn. 4.) Section 226.7 "provides the only compensation for these injuries," but that compensation is not "in exchange for work done" (*ibid.*), nor is it "aimed at protecting or providing employees' wages. Instead, the statute is primarily concerned with ensuring the health and welfare of employees by requiring that employers provide meal and rest periods as mandated by the IWC." (*Kirby*, at p. 1255.)

In addition, overtime premiums must be paid in direct proportion to the amount of overtime work performed. But meal and rest period premiums do not vary according to the specific nature of the violation, nor are they connected to time worked (beyond the minimum thresholds for entitlement to meal and rest periods). For example, an employee who is provided no meal period at all is entitled to the same premium as an employee who is provided a 24-minute meal period but not the required 30 minutes, or an employee whose full 30-minute meal period is provided later than required. (See *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1041.) Meanwhile, the employer still must separately compensate the employee for any time worked in lieu of all or part of the meal period, including any overtime premiums that might apply. (See *Murphy*, at p. 1104.) Accordingly, the policy rationale for defining "regular rate of pay" for overtime premiums to include more than the base rate of pay is inapplicable to meal and rest period premiums.

The policy behind section 226.7 was recently explored in *Naranjo*, *supra*, 40 Cal.App.5th 444, a case published shortly before the instant Court of Appeal opinion. The court in *Naranjo* held that entitlement to premium wages under section 226.7 *does not*, in and of itself, give rise to derivative wage-related remedies pursuant to sections 203 ("waiting time" penalties) or 226 (itemized wage statement penalties). (*Naranjo*, at p. 463.) The court explained that while the section 226.7 premium constitutes a "wage" rather than a "penalty" for statute of limitations purposes (*Naranjo*, at p. 465, citing *Murphy*, at pp. 1102-1103), a

section 226.7 action is not an "action brought for the nonpayment of wages" within the meaning of section 218.5's attorney fee provision, or for which fees are available under section 1194 (*Naranjo*, at pp. 466, quoting *Kirby*, *supra*, 53 Cal.4th at pp. 1256-1257).

Causes of action under sections 203 and 226 "generally are referred to as derivative of an employee's right to the wages themselves: An employee's right to wages accrues at the time work is performed, but '[t]he right to a penalty … does not vest until someone has taken action to enforce it.' (*Murphy*, ... at p. 1108.)" (*Naranjo*, at p. 468.) By comparison, causes of action under section 226.7 do not seek collection of unpaid wages due. (*Ibid*., citing *Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 684.) Most courts thus have held that section 203 and 226 penalties are not derivative of a section 226.7 claim. (*Id*. at pp. 469-470, citing, inter alia, *Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242, 1261.)

The *Naranjo* court further explained that since 1937, the Labor Code has defined "wages" exclusively "in terms of 'labor performed by employees[]'" and "labor" as " 'labor, work, or service ... performed ....'" (*Naranjo*, at p. 473, quoting Lab. Code, § 200, subds. (a), (b).) The Legislature did not expand the definition of "wages" after *Murphy* "to include the payment of a remedy rather than simply the payment for labor." (*Ibid*.) Nor did the Legislature amend section 218.5 after *Kirby* to allow the prevailing party in a section 226.7 action to recover attorney fees—even though it *did* amend section 218.5 to make it more

difficult for a prevailing employer to recover fees. (*Ibid.*) Courts deem the Legislature to be aware of judicial decisions, and assume its decision not to amend a statute in response to a judicial decision to be "a considered one. [Citation.]" (*Ibid.*)

Section 203 penalizes an employer for its willful recalcitrance in paying "wages" earned by a separated employee, and section 226 allows recovery of "minimum fixed penalties or 'actual damages' ' not to exceed ... $4,000,' plus attorney fees, if [an] itemized statement omits gross and net 'wages earned.'" (*Naranjo*, at pp. 473-474.) But section 226.7's premium wage is a remedy for failure to provide a meal or rest period, "not an amount 'earned' for 'labor, work, or service ... performed personally by the employee.' (§ 200, subd. (b).)" (*Naranjo*, at p. 474.) Based on the clear statutory language, the court held that an employee in a section 226.7 action is not entitled to recover derivative penalties under sections 203 or 226. (*Ibid.*)

Naranjo's discussion of the purpose and policy behind section 226.7 further supports the majority's conclusion in the instant case that section 226.7's phrase "regular rate of compensation" for calculating meal and rest period premiums means an employee's base hourly rate, rather than the "regular rate of pay" used for calculating overtime wages under section 510. Review is not necessary to secure uniformity of decision or settle the law, or for any other reason.

II. THERE IS NO NECESSITY FOR REVIEW OF THE UNANIMOUS DECISION AS TO ROUNDING.

A. There Is No Split of Appellate Authority on This Issue.

The Court of Appeal unanimously held that the Hotel's "facially neutral rounding policy does not systematically undercompensate Loews employees," and therefore complies with California law. (Opn., p. 2; conc. & dis. opn., p. 1.) This holding is consistent with every published appellate decision to address rounding. (See *AHMC Healthcare, Inc. v. Superior Court* (2018) 24 Cal.App.5th 1014, 1027 (*AHMC*) [payroll system which rounded all employee time to the nearest quarter-hour, and was both "neutral on its face" and "neutral in practice," complied with California law]; *Silva v. See's Candy Shops, Inc.* (2016) 7 Cal.App.5th 235, 252 (*See's II*) [affirming summary adjudication for employer on rounding and grace-period claims]; *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 903 (*See's I*) [rounding is lawful if it favors neither overpayment nor underpayment on average, and does not systematically undercompensate employees]; accord, *Corbin v. Time Warner Entertainment-Advance/Newhouse Partnership* (9th Cir. 2016) 821 F.3d 1069, 1077 (*Corbin*) [neutral rounding policy is lawful if it "is meant to average out *in the long-term*" to fully compensate employees for all hours worked] [italics in original].)

Ferra's depiction of "hopelessly divided" courts (petn., p. 6) makes even less sense on rounding than in connection with the "regular rate of compensation" issue. The appellate decisions on rounding are uniform and settled. There is no need for review.

B. *Troester* Does Not Support Ferra's Sweeping Condemnation of Rounding, Which She Failed to Raise Below.

Although Ferra appealed the trial court's grant of summary judgment on the rounding issue, she did not dispute that California law permits a fair and neutral rounding policy that does not systematically undercompensate employees. Ferra's briefs variously cited to *See's I* and *II*, *Corbin*, and *AHMC*, without suggesting any of them were wrongly decided; instead, she sought to factually distinguish those cases. (See AOB 44-50; ARB 31-36.)

Ferra's reply brief cited to *Troester*, *supra*, 5 Cal.5th 829 (decided after her opening brief was filed), but stated only that *Troester* "made a number of especially salient points which call into question the applicability of Federal rounding doctrine under California law *as to employees who habitually lose money on account of rounding*." (ARB 36, italics added.) This description sounds similar to the systematic undercompensation that would render rounding unlawful under existing precedent, and which the Court of Appeal unanimously found not to exist here. (See opn., pp. 17-21.)

In her petition, however, Ferra quotes this Court's holding that "California's wage and hour statutes [and] regulations" have not "adopted the de minimis doctrine found in the [FLSA]" (*Troester*, at p. 835), and urges this Court to decide whether California's statutes and regulations have adopted the FLSA's rounding doctrine. (Petn., pp. 32-33.) According to Ferra, "[t]here is no indication in the 'text or history' of the relevant statutes and

IWC wage orders of adoption of the federal rounding regulation." (Petn., p. 33.)

This Court should decline Ferra's invitation to review the rounding issue. She offers no reason for not challenging the legality of a fair and neutral rounding policy in the Court of Appeal. To the contrary, she refrained from such an attack in her reply brief, even after this Court decided *Troester*—the case on which she so heavily relies in her petition. This Court should follow its policy of "normally ... not consider[ing] an issue that the petitioner failed to timely raise in the Court of Appeal." (Cal. Rules of Court, rule 8.500(c)(1).)

At any rate, contrary to Ferra's contention, the discussion of rounding in *Troester* does not support her petition, and instead explicitly assumes the legality of "a fair rounding policy" like the one upheld in *See's I*. (*Troester*, at p. 848.) This Court quoted *See's I*'s holding that a rounding policy is valid if it "is fair and neutral on its face and 'it is used in such a manner that it will not result, *over a period of time*, in failure to compensate the employees properly for all the time they have actually worked.'" (*See's I*, *supra*, 210 Cal.App.4th at p. 907, italics added.) This Court recognized that *See's I* upheld rounding because it "was consistent with the core statutory and regulatory purpose that employees be paid for all time worked." (*Troester*, at p. 847.) The Court further noted that *See's I* was consistent with both federal law and the directive of the Division of Labor Standards Enforcement, under which rounding is valid only if it is facially neutral and does not, over time, fail to compensate employees

properly for all time worked. (*Ibid*.) The Court concluded that because "it may be possible to reasonably estimate worktime," including through "a fair rounding policy" as *See's I* suggested, it would not adopt the federal de minimis rule "that would require the employee to bear the entire burden of any difficulty in recording regularly occurring worktime." (*Troester*, at p. 848.)

The conditions under which this Court in *Troester* assumed rounding to be legal are precisely the same as those that were presented by the undisputed facts in this case, as well as by the records in *AHMC*, *See's I* and *II*, and *Corbin*. Ferra fails to identify any aspect of the Court of Appeal's opinion that is inconsistent with *Troester* or other applicable precedent. Instead, the opinion confirms uniformity of settled law on rounding, and should not be reviewed.

CONCLUSION

The petition for review should be denied.

DATED: December 9, 2019 *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 8.504(d)(1) of the California Rules of Court, that this Answer to Petition for Review is produced using 13-point Roman type, including footnotes, and contains 4,770 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 9, 2019 *Respectfully submitted*,

BALLARD ROSENBERG
GOLPER & SAVITT, LLP

By: 

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

739717.1

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 9, 2019, I served the following document described as: **ANSWER TO PETITION FOR REVIEW** 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.

☒ **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.

☒ **BY OVERNIGHT DELIVERY:** I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List below. I deposited such document(s) in a box or other facility regularly maintained by the overnight service carrier, or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier with delivery fees paid or provided for, addressed to the person(s) being served.

MOSS BOLLINGER LLP
Dennis F. Moss
Ari E. Moss
15300 Ventura Blvd., Ste 207
Sherman Oaks, CA 91403
Telephone: (310) 982-2984
Facsimile: (818) 963-5954
dennis@mossbollinger.com
ari@mossbollinger.com

Honorable Kenneth R. Freeman
Los Angeles County Superior Court
Spring Street Courthouse
Department 310
312 North Spring Street
Los Angeles, CA 90012

REGULAR U.S. MAIL

LAW OFFICES OF SAHAG MAJARIAN II
Sahag Majarian, II
18250 Ventura Boulevard
Tarzana, California 91356
Telephone: (818) 609-0807
Facsimile: (818) 609-0892
sahag@majarianlaw.com

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

REGULAR U.S. MAIL

Michael Rubin
Eileen Goldsmith
Altshuler Berzon LLP
177 Post Street, #300
San Francisco, CA 94108

Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102-4797

OVERNIGHT DELIVERY

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 9, 2019, at Encino, California.

Jeanette Tucci Kerr

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
ANSWER TO PETITION FOR REVIEW (WITH ONE TIME RESPONSIVE FILING FEE)	FERRA---Answer to Petition for Review Cal S Ct - FINAL

Service Recipients:

Person Served	Email Address	Type	Date / Time
John Manier Ballard Rosenberg Golper & Savitt 145701	jmanier@brgslaw.com	e-Serve	12/9/2019 2:13:48 PM
Richard Rosenberg Ballard Rosenberg Golper & Savitt LLP	rrosenberg@brgslaw.com	e-Serve	12/9/2019 2:13:48 PM
Michael Rubin Altshuler Berzon LLP 80618	mrubin@altber.com	e-Serve	12/9/2019 2:13:48 PM
Michael Rubin Altshuler Berzon LLP 80618	mrubin@altshulerberzon.com	e-Serve	12/9/2019 2:13:48 PM
Sahag Majarian Law offices of Sahag Majarian II	sahag@majarianlaw.com	e-Serve	12/9/2019 2:13:48 PM
Dennis Moss Moss Bollinger LLP 77512	dennis@mossbollinger.com	e-Serve	12/9/2019 2:13:48 PM
Ari Moss Moss Bollinger LLP 238579	lea@dennismosslaw.com	e-Serve	12/9/2019 2:13:48 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.

12/9/2019
Date

/s/Jeanett Kerr

Signature

Manier, John (145701)

Last Name, First Name (PNum)

Ballard Rosenberg Golper & Savitt

Law Firm