S248702

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CHARLES E. WARD, ET AL.,
Plaintiffs and Appellants,

v.

UNITED AIRLINES, INC.,
Defendant and Respondent.

AFTER A DECISION BY THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT, CASE NO. 16-16415
MAGISTRATE JUDGE WILLIAM ALSUP, CASE NO. 3:15-CV-02309-WHA

REPLY BRIEF ON THE MERITS

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I. NOTHING UNITED ARGUES ESTABLISHES THAT THE APPLICATION OF LABOR CODE SECTION § 226 TO PLAINTIFFS' CLAIMS WOULD BE "EXTRATERRITORIAL," AS THE WAGE STATEMENTS FORMING THE BASIS FOR PLAINTIFFS' CLAIMS WERE ALL ISSUED IN CALIFORNIA TO PILOTS AND FLIGHT ATTENDANTS WHO RESIDE IN CALIFORNIA AND WHO PAY CALIFORNIA INCOME TAXES ON THE WAGES REFLECTED ON THEIR WAGE STATEMENTS.

As explained in the Opening Brief, since all the conduct giving rise to Plaintiffs' claims – the issuance of wage statements without the information Section 226 requires – occurred in California, the application of the correct standard focusing on the location of the wrongful conduct establishes that Plaintiffs' claims are not extraterritorial. Plaintiffs further explained this Court has held that, in determining whether a claim concerned extraterritorial conduct, courts must determine whether application of that statute would govern conduct occurring abroad.

Nothing United argues in its answer brief justifies the conclusion that, because the work performed by Plaintiffs took place both in California and elsewhere, the application of Section 226 to their claims would have extraterritorial effect. The central premise of United's argument is that claims under Section 226 must be treated identically to all other potential claims involving entirely discrete conduct that may be (but in this case are not) brought under California's Labor Code. As now explained, United is mistaken.

A. Whether A Law Has Extraterritorial Effect Is Based On Whether The Law Seeks To Regulate Out-Of-State Conduct. The Application Of Section 226 To Plaintiffs' Claims Regulates Purely California Conduct.

United asserts that Plaintiffs seek to draw an "artificial distinction" between potential claims under the California Labor Code for wage and hour violations and claims based on the manner in which the employer issues its pay statements. (AB 10, 25.) According to United, since the job situs test is properly applied to wage and hour claims, that same test necessarily must also apply to Plaintiffs' wage statement claims. Nothing United argues supports such a one-size-fits-all approach to determining extraterritoriality.

Initially, United makes the sweeping claim that the "overarching purpose of the California Labor Code is to promote the welfare of individuals who work in California." (AB 29.) United then extrapolates from this that each and every provision of that Code therefore is intended to apply only to the degree that it governs actual work performed in this state and that it is therefore not relevant whether the employee lives in California (and presumably whether the employee pays taxes here or receives a paycheck here).

Of course, what United ignores is that Plaintiffs are not seeking application of the California Labor Code in its entirety to their claims. Rather, Plaintiffs are seeking application of one particular statute in that Labor Code (Section 226) and therefore, to the extent the Legislature's intent is significant, the relevant inquiry is not what its intent was with respect to the Labor Code in its entirety. Rather, it is what the Legislature's intent was in enacting Section 226.

As explained in the opening brief and ignored by United: "The Legislature enacted section 226 to ensure an employer document[s] the basis of the employee compensation payments to assist the employee in determining whether he or she has been compensated properly. (*Gattuso*, supra, 42 Cal.4th at p. 574, 67 Cal.Rptr.3d 468, 169 P.3d 889; see *Morgan*, supra, 186 Cal.App.4th at p. 1145, 113 Cal.Rptr.3d 10.) Section 226 play[s] an important role in vindicating [the] fundamental public policy favoring full and prompt payment of an employee's earned wages." (*Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, 390 (internal quotation marks omitted).) The purpose of Section 226 is "to document the paid wages to ensure the employee is fully informed regarding the calculation of those wages. . . . 'The purpose of requiring greater wage stub information is to insure that employees are adequately informed of compensation received and are not shortchanged by their employers' (quoting Assem. Com. on Labor and Employment, Analysis of Sen. Bill No. 1255 (2011–2012 Reg. Sess., italics added).)" (*Id.* at p. 392.)

"'An employee is deemed to suffer injury [under section 226] when the employer fails to provide a wage statement or provides an incomplete wage statement from which 'the employee cannot promptly and easily determine' the required information. (Lab. Code, § 226, subd. (e)(2); *Lubin v. Wackenhut Corp.* (2016) 5 Cal.App.5th 926, 958–959, 210 Cal.Rptr.3d 215.)" (*Kao v. Holiday* (2017) 12 Cal.App.5th 947, 960; *Lubin v. The Wackenhut Corp.* (2016) 5 Cal.App.5th 926, 959 ["[T]he Legislature enacted Senate Bill No. 1255 to clarify what constitutes "suffering injury" for purposes of Labor Code Section 226. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1255 (2011-2012 Reg. Sess.) as amended Apr. 30, 2012, p. 1.)"].

Thus, the sole focus of a claim under Section 226 is on the wage document itself to determine whether that document contains the requisite

information. It is not the nature or the location of the work performed by the employee – whether in or out of California. Simply put, for purposes of liability under Section 226, the nature or location of the work performed by the employee is irrelevant.

Contrary to what United argues, Section 226 has a much broader purpose than to simply allow employees to ensure that they are being paid only those wages to which they are entitled under California law. As already explained, that section's purpose is to allow employees to determine whether they have been paid what they are owed, whether required under California law or not. Stated differently, this purpose is not dependent on peculiar aspects of California wage and hour law. It is to allow the employee to see whether he or she is being fully paid no matter what law applies. Yet, United creates an artificial distinction between hourly wages earned under provisions of the Labor Code and hourly wages earned pursuant to contract, apparently arguing that the requirements of Section 226 do not apply to contractual hourly wages. However, there is no such distinction in Labor Code Section 226(a)(9) between different types of hourly wages (e.g. Labor Code, contractual, or otherwise), as that section mandates that the hourly rate be accurately listed on the wage statement along with the number of hours worked at that hourly rate, regardless of the source of the hourly rate. In other words, the direct linkage between Section 226 and California wage and hour law on which United relies simply does not exist.

Accordingly, it is United and not Plaintiffs urging this Court to employ an arbitrary test that is not grounded in the basis for the extraterritoriality test. The mere fact that California has enacted separate statutory protections for employees and has compiled those statutory protections in its Labor Code does not mean that all statutes contained in

the Labor Code must be treated identically for purposes of determining whether their application would have extraterritorial effect.

Further, United's effort to equate claims under Section 226 with wage and hour claims confuses the issue rather than clarifies it. As repeated throughout the Opening Brief, a claim based on California's wage and hour laws is focused on the amount and the nature of the work the employee performs. In determining whether these claims have extraterritorial effect it may be necessary to evaluate where the employee was performing the work giving rise to the claim because it is that conduct on which the claim is based. Accordingly, the string cite of wage and hour cases United cites (AB 30-31) applying the work situs test adds little to the analysis here. Those cases are simply in accord with this Court's directions to evaluate extraterritoriality based on where the conduct giving rise to the claims occurs (in contrast to the location of the "background facts" for those claims).

United argues that these cases apply with equal force to the claims here based on the wage statements issued in California to employees headquartered in California, because supposedly none of those cases draw a distinction between claims based on conduct taking place in California and claims based on conduct elsewhere. (AB 32.) United argues that "there is **no** support for Appellants' argument that a 'conduct' test determines the applicability of any provision of the California Labor Code, including section 226." (AB 34. Original emphasis.) According to United, the Ninth Circuit's reliance on this Court's *Sullivan* decision to conclude that the question of extraterritoriality is based on where the governed conduct takes place, "misinterpreted this Court's extraterritoriality jurisprudence . . . and should not guide this Court's analysis." (AB 34.)

United ignores what this Court has repeatedly held. The standard for determining whether a state law has extraterritorial effect is based on where the conduct it seeks to regulate occurs. To repeat what United ignores:

> The presumption against extraterritoriality does not preclude the application of California law to conduct that occurs in California, even where that conduct involves non-California residents. (See *Diamond Multimedia Systems, Inc.*, *supra*, 19 Cal.4th at p. 1059, 80 Cal.Rptr.2d 828, 968 P.2d 539 [rejecting claim that presumption against extraterritorial effect precluded application of California law because "the conduct which gives rise to liability under [the relevant statute] occurs in California"]; accord *Norwest Mortgage, Inc. v. Superior Court* (1999) 72 Cal.App.4th 214, 224–225, 85 Cal.Rptr.2d 18 [concluding that non-California residents may be able to state claims of unfair competition arising from conduct occurring in California and stating, "The linchpin of [Diamond Multimedia Systems, Inc.'s] analysis is that state statutory remedies may be invoked by out-of-state parties when they are harmed by wrongful conduct occurring in California"].)

(People ex rel. DuFauchard v. U.S. Financial Management, Inc. (2009) 169 Cal.App.4th 1502, 1518.)

Regardless whether the cases discussing the extraterritorial effect of wage and hour statutes use the term "conduct" in deciding whether to employ the situs test, it is abundantly clear that is precisely what those courts are evaluating. Indeed, the very nature of the situs test United urges this Court to employ focuses on *conduct*, i.e., where the employee performs his or her work. The only possible rationale for the situs standard is that it seeks to determine the location of the conduct giving rise to the claim. When the claim is for the payment of wages, the conduct in question may be where the employee worked. The issue here is whether that same situs test should be applied to determine whether a state statute is extraterritorial in nature when applied to claims not based on the amount and nature of the work an employee performs. In other words, must this Court apply a test for determining extraterritoriality even though that test has no relationship

to the particular claims being brought? The obvious answer to this inquiry is "no."

United nevertheless asserts that under this Court's opinion in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, the application of Section 226 would be extraterritorial in effect. But a review of *Tidewater* leaves no doubt that this Court was not issuing a blanket ruling that any and all California labor laws apply only when the employee's "exclusive or principal job situs was in California."

In *Tidewater*, this Court was tasked with determining whether wage orders issued by the Industrial Welfare Commission (IWC) applied to maritime workers in the Santa Barbara Channel. In making this determination, the Court interpreted Labor Code section 50.5 which explains that one of the functions of the IWC is to "foster, promote and develop the welfare of wage earners in California." (*Id.* at 578.) It was in this context the Court concluded that "[i]f an employee resides in California, receives pay in California, and works exclusively, or principally, in California, then that employee is a 'wage earner of California' and presumptively enjoys the protection of IWC regulations." (*Ibid.*)

Of course, this case is concerned with the application of a California statute and not an administrative order issued by an agency that has a narrowly defined task under Labor Code section 50.5. Moreover, *Tidewater* concerned a wage issue (where the location of the work performed may be material) and not a pay statement issue such as involved here. And nowhere did the *Tidewater* Court hold that an employee was a "wage earner of California" if and only if the employee worked exclusively or principally in California. Thus, even in the context of the narrow and distinguishable circumstances involved in *Tidewater*, United's reading of that case is wrong.

Nor does this Court's opinion in *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, support United's position. In *Sullivan*, this Court stated: "Neither the language of the UCL nor its legislative history provides any basis for concluding the Legislature intended the UCL to operate extraterritorially. Accordingly, the presumption against extraterritoriality applies to the UCL in full force. . . . We thus proceed to consider whether plaintiffs' proposed application of the UCL would cause it to operate, impermissibly, with respect to occurrences outside the state." (*Id.* at p. 1207.)

In *Sullivan*, the Court concluded that the UCL did not apply to compensation with respect "to overtime work performed outside California for a California-based employer by out-of-state plaintiffs in the circumstances of this case based solely on the employer's failure to comply with the overtime provisions of the FLSA." (*Id.* at 1209.) *Sullivan* thus affirms what United ignores. The question of whether a state law has extraterritorial affect is not answered in a vacuum. Instead, the particular reach of the statute in question must be examined. If the statute relates to the conduct of an employee (such as the overtime work involved in *Sullivan*) then the question of extraterritoriality may turn on where that work is performed. However, if the claim is not dependent on work an employee has performed, but instead focuses on an employer's obligations, then the issue turns on where the employer was required to perform the obligation. Here, that obligation (the presentation of wage statements) was to be performed in California where the Plaintiff class resides and where they receive their pay statements.

United next asserts that "[e]ven assuming that the location of certain 'conduct' giving rise to plaintiff's claims is relevant, Appellants have not shown that the relevant 'conduct' here occurred in California." (AB 35.) United then launches into a fact-based argument (none of which is

supported by record references) as to where the pay documents were issued from and where they were received. (AB 35-36.) These fact based arguments of course are outside of the scope of the certified issues this Court accepted review to resolve. In any event, United is wrong in focusing on where the pay documents were issued from (even if there was anything in the record supporting its claim). The relevant fact is not where the pay documents originated from, it is where they were targeted. The fact that an employer issues a pay document out-of-state to a California worker does not mean that it is exempted from compliance with Section 226. If that was the case, then employers could avoid the requirements of that section simply by having their payroll operations in another state – regardless whether the employees perform all of their work in California. Even United would not expressly take such a position, but that is the net effect of their argument. In any event, United cannot seriously argue that the class members are not paid in California when it is undisputed that the class members pay California income tax on the wages reflected on their wage statements.

Next, United asserts that the state's interests do not factor into the extraterritoriality analysis, and that the Ninth Circuit's statement in its certification request that "'the proper reach of Labor Code provisions can differ because the provisions regulate different conduct and implicate different interests'" is mistaken. (AB 36.) This is simply a rehash of the argument already addressed. The determination of extraterritoriality is not one-size-fits all. Just because certain Labor Code statutes implicate extraterritoriality because they may regulate conduct occurring outside of California does not mean that all Labor Code statutes necessarily have the same effect. Rather, in determining extraterritoriality, it is necessary to look at the scope and intent of the particular statute in question.

United steadfastly seeks to avoid this truth because it knows that when that analysis is applied to Section 226, United loses. To repeat what United ignores: Section 226 on its face regulates only the composition of pay documents to serve the purpose of that section which is to provide employees with the information they need to determine whether they are receiving the pay to which they are entitled. Accordingly, when a pay document is issued to an employee who resides in California and who pays California income taxes on the wages reflected on the pay document, the application of Section 226 to that employee has no extraterritorial effect. The interest of California in enacting Section 226 is therefore absolutely relevant to the question whether that section has extraterritorial effect.

B. United's Attack On *Bernstein* Misses The Mark.

United next launches an attack on the *Bernstein v. Virgin America, Inc.* (N.D. Cal., Jan. 5, 2017, No. 15-CV-02277-JST) 2017 WL 57307. (AB 39.) According to United, *Bernstein* erroneously analyzed this Court's *Tidewater Marine W., Inc. v. Bradshaw*, *supra*, 14 Cal.4th 557, 577. United simply parrots the same language from *Tidewater* on which the defendant in *Bernstein* relied without mentioning the *Bernstein* Court's analysis as to why that position was an incorrect reading of *Tidewater*. This omission is understandable. As just explained, a review of *Tidewater* leaves no doubt that the Court was not issuing a blanket ruling that any and all California labor laws apply only when the employee's "exclusive or principal job situs was in California."

Likewise, United's attack on *Bernstein* based on *Sullivan v. Oracle Corp.*, *supra*, 51 Cal.4th 1191, is off base. As just explained, *Sullivan* affirms what United ignores. The question of whether a state law has extraterritorial affect is not answered in a vacuum. Instead, the particular

reach of the statute in question must be examined. If the statute relates to the conduct of an employee (such as the overtime work involved in *Sullivan*) then the question of extraterritoriality may turn on where that work is performed. However, if the claim is not dependent on work an employee has performed, but instead focuses on an employer's obligations, then the issue turns on where the employer was required to perform the obligation. Here, that obligation (the presentation of wage statements) was to be performed in California where the Plaintiff class resides and where they received their pay statements.

C. The Application Of Section 226 Would Not Result In An Absurdity.

United next argues that the application of Section 226 would lead to an absurdity. (AB 41.) This argument is just a repetition of the theme running throughout United's brief, using different words. The entire thrust of this argument is that that application of Section 226 would supposedly be absurd because other California Labor Code provisions would not apply to Plaintiffs. But that is not absurd at all. The California Legislature was entitled to conclude, as it did, that employees such as Plaintiffs who are based here, receive their pay statements here, pay taxes here and at least perform some of their work here, are entitled to have the information Section 226 requires on their pay statements. United must calculate the amount of pay each of its employees receives under the controlling wage law for that employee. United must do that regardless of the outcome of this appeal and United does not contend otherwise.

The application of Section 226 requires employers such as United to disclose certain information on pay documents so that their employees can determine whether they are being paid what they are owed. Employers

such as United already must have that information inasmuch as they are already calculating what the employee is owed. The simple disclosure of that information to the employee in compliance with California law is hardly burdensome for a multinational employer such as United that operates in all 50 states and who must routinely comply with the laws in each of the states it operates.

United's argument that different states have different rules for calculating overtime (AB 42) proves Plaintiffs' point. United must already calculate the overtime pay an employee is owed under the Collective Bargaining Agreement. Section 226 only requires United provide information to its employees residing in California, so that they can determine whether the overtime was correctly paid.

Simply put, the state where the employee performs the work that generates his or her wages has little if anything to do with the policy justification behind Section 226 which is an employee's right to know how his or her pay is being calculated. The application of Section 226 would thus not lead to an absurdity. Nothing in United's overheated rhetoric proves otherwise.

II. UNITED HAS NOT ESTABLISHED THAT PROVIDING ITS CALIFORNIA-RESIDENT PILOTS WITH PAY ADVICES COMPLYING WITH CALIFORNIA LAW IS A CLEARLY EXCESSIVE BURDEN ON INTERSTATE COMMERCE.

In their Opening Brief, Plaintiffs explained that the district court erred by concluding the application of Section 226 here would be preempted by the dormant Commerce Clause because Section 226 neither facially discriminates against interstate commerce nor poses a burden on interstate commerce that is clearly excessive in relation to the local

benefits. (OB 35-42.) In response, United notes that since this is a question of federal law, it is outside the scope of the issues that this Court has certified for review. United then goes on to address the issue on the merits. (AB 43, fn. 8.) Out of an abundance of caution, Plaintiffs will reply to those arguments in the event this Court concludes that this issue is within the scope of its order granting certification.

As explained in the Opening Brief, United's compliance with California's wage statement standards would render United in compliance with the 37 other states that have wage statement standards. (OB 41, 52.) In response, United agrees that Section 226 is not facially discriminatory, but United argues that application of Section 226 here would create a clearly excessive burden in relation to the local benefits of the law. (AB 44-45.) A significant part of United's argument is reliant on the false premise that determination of which state's wage statement form law applies is dependent on where the pilot or flight attendant performs his or her work. But that is not the case. Whether United must follow Section 226 is dependent on where the pilot or flight attendant resides and receives his or her wage statement, not where their work is performed. The transitory nature of the Plaintiffs' work is irrelevant in this case, as the determination of the governing state's wage statement law depends on where the Plaintiffs reside, a consideration that is inherently not transitory. Thus, for this reason, and for the others discussed below, nothing United argues establishes that application of Section 226 here would pose a burden on interstate commerce clearly excessive in relation to the local benefits.

United begins its argument by asking this Court to consider *Bibb v. Navajo Freight Lines, Inc.* (1959) 359 U.S. 520, a case where the Supreme Court concluded that a regulation requiring trucks and trailers to use a certain type of mudguard to protect their tires violated the dormant Commerce Clause. (AB 44.) The Court concluded that the regulation

would create a "massive" burden on interstate commerce because the trucks, which commonly traverse state lines, would be forced to comply with varying regulatory standards whenever driving through a different state. (Id. at pp. 526-28.)

United is apparently contending that mudguards are analogous to wage statements and that trucks are analogous to pilots or flight attendants. Obviously, they are nothing alike. Here, United would be required to comply with the wage statement law of the state in which the pilot or flight attendants reside, but the regulation at issue in *Bibb* would require the truck to comply with the regulation of the state it is currently driving through. While a truck may traverse through multiple states in a single day, thereby subjecting the truck to numerous states' regulations every day, a pilot or flight attendant will not likely reside in more than one or two states per year. If United sent its pilots or flight attendants different wage statements for each state the pilot works in, this may be a different situation, but United does not; United provides its pilots and flight attendants with a single wage statement, sent to them in the state where they reside, complying with the tax laws of the state where the pilot or flight attendant resides. Significantly, "the Supreme Court acknowledged that *Bibb* was an exceptional case because the state law obstructed the literal movement of goods between states by requiring trucks to alter their safety equipment upon entering Illinois." (*American Exp. Travel Related Services, Inc. v. Sidamon-Eristoff* (3rd Cir. 2012) 669 F.3d 359, 373, n. 8.) That United relies on a case so dissimilar to this case evinces the weakness of United's position and how inappropriate the district court's application of the dormant Commerce Clause was.

United notes that it would also have to ensure that it actually complied with the requirements of each of the states' wage statement laws. (AB 46.) That is potentially true, but that is not a "clearly excessive"

burden. United likely already follows each states' particular wage statement laws for its non-pilot/flight-attendants employees in each state. For example, United employs approximately 5,140 people in the Los Angeles area and 12,340 people in the San Francisco area. (*See* United – Newsroom – Airport Fact Sheets – https://hub.united.com/airport-fact-sheet-los-angeles-international-airport; https://hub.united.com/airport-fact-sheet-san-francisco-international-airport.) Accordingly, United would simply be required to bring the wage statements for its pilots and flight attendants up to the same standard as the wage statements for its over 17,000 other California employees. And further, United also has at least approximately 15,000 employees in Illinois, 6,080 in Colorado, 14,100 in Houston, 14,000 in the New York City area, and 5,900 in the Washington, D.C. area, so United presumably already complies with the wage statement laws of those states, and those are just the number of employees United has at airports it lists as its hubs—United surely has more employees at its non-hub airports in many other states. (United – Newsroom – Airport Fact Sheets, https://hub.united.com/corporate-fact-sheet.)

Therefore, any burden United would suffer from sending its California-based pilots and flight attendants wage statements in compliance with California law would be limited to having those wage statements comply with the same standards as its thousands of other California employees; this is obviously not a "clearly excessive" burden. Crucially, that United would be required to comply with various states' regulations is not sufficient to render Section 226 unconstitutional; Section 226 must impede interstate commerce, and United has made no showing that it would. (*SPGGC, LLC v. Blumenthal* (2nd Cir. 2007) 505 F.3d 183, 196 ["That SPGGC may not be able to sell its gift cards on exactly the same

terms to consumers in all states does not, in itself, demonstrate a regulatory conflict sufficient to establish that Connecticut's law is unconstitutional."])[1]

United next contends that "there is virtually ***no*** countervailing state interest where, as here, the work performed by the employees at issue occurs almost entirely outside of California." (AB 46.) But of course there is. California has an interest in ensuring that its residents have a method of determining whether they have been compensated properly: "Section 226 play[s] an important role in vindicating [the] fundamental public policy favoring full and prompt payment of an employee's earned wages." (*Soto*, 4 Cal.App. 5th at 390.) Section 226 provides no benefit to United employees who do not reside in California and provides no burden on the states in which those non-California resident employees reside.

Finally, in *Hirst v. Skywest, Inc.* (7th Circuit 2018) ___ F.3d __ [2018 WL 6519742, at *1], the Court recently summed up that the plaintiff flight attendants' wage claim under state law did not run afoul of the dormant Commerce Clause, explaining: "States possess authority to regulate the labor of their own citizens and companies, so we apply that doctrine sparingly to wage regulations. The dormant Commerce Clause does not preclude state regulation of flight attendant wages in this case, particularly when the FLSA itself reserves that authority to states and

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[1] United contends that "requiring United to issue a Section 226-compliant wage statement to each of its U.S.-based flight crew members would mean that California law controlled United's wage statements across the nation, an outcome that would directly violate the dormant Commerce Clause's limitation on the scope of a state's power." (AB 47.) This is a straw man argument. United would not have to issue a Section 226-compliant wage statement to each of its U.S.-based pilots; United would issue wage statements compliant with section 226 to its California-resident pilots, wage statements complaint with Illinois law to its Illinois-resident pilots, and wage statements compliant with New York law to its New York-resident pilots, etc.

localities. Accordingly, we reverse the dismissal of the state and local wage claims and remand for further proceedings." (*Ibid.*)

Precisely the same thing can be said here. Section 226 "does not directly regulate [wage statements issued] in other states or force [United] to conform its out-of-state practices to less favorable in-state conditions. Nothing prevents other states from regulating [wage statements] differently from the way California has chosen to do in [Section 226]." (*American Exp. Travel Related Services, Inc.*, 669 F.3d at 373; *see also Tennessee Scrap Recyclers Ass'n v. Bredesen* (6th Cir. 2009) 556 F.3d 442, 451, n. 2 ["The Supreme Court's decisions reveal that other laws are only relevant to the dormant commerce clause inquiry to the extent they demonstrate the burdensome effect *of the law at issue.* The Court has looked to other laws in cases only where a state law has the practical effect of regulating commerce wholly outside the state."].) As such, United cannot demonstrate that Section 226 poses a burden on interstate commerce that is clearly excessive in relation to the local benefits.

III. NOTHING UNITED ARGUES JUSTIFIES A "YES" ANSWER TO THE SECOND QUESTION THIS COURT HAS CERTIFIED. ANY EXEMPTION FROM COMPLIANCE WITH WAGE ORDER 9 DOES NOT EXTEND TO STATUTORY OBLIGATIONS THAT ARE NOT CONTAINED IN THAT WAGE ORDER.

United argues that (1) because Wage Order 9 contains certain information that must be contained in pay statements and (2) because Wage Order 9's RLA exemption renders that wage order inapplicable to United, it necessarily follows that United is exempted from complying with Section 226 in its entirety even though the information that Plaintiffs claim United

failed to include on their pay statements was not information required under Wage Order 9. Nothing United argues justifies exempting it entirely from Section 226 just because it is exempted from Wage Order 9.

Initially, United argues that "California law requires wage orders and the Labor Code to be read together." (AB 48.) Plaintiffs agree. But, as explained in the Opening Brief, reading Wage Order 9 and the Labor Code together does not mean that United is exempted from complying with a particular requirement in the Labor Code that is nowhere mentioned in the Wage Order 9.

United argues that "California courts have applied exemptions in the IWC's wage orders to claims under the Labor Code on multiple occasions, recognizing the need to create a singular regulatory scheme in the face of two overlapping sources of employment regulation." (AB 49.) This begs, rather than answers, the question at issue. *Collins v. Overnite Transp. Co.* (2003) 105 Cal.App.4th 171, 180-181, on which United primarily relies, simply stands for the general proposition that when there is a specific Wage Order exemption of certain requirements, and where that exemption is statutorily authorized, it controls over the Labor Code.

There, the Court concluded that the Wage Order exemption specifically applied to insulate the defendant-employer from liability under the Labor Code as to the manner overtime pay was calculated. The thrust of the Court's analysis was parsing the language of Labor Code Section 515. The Court explained: "We read the second sentence in section 515 subdivision (b)(2) as expressing a legislative intent to leave undisturbed the exemptions from "provisions regulating hours of work ... contained in any valid wage order in effect in 1997." The motor carrier exemption was one of the exemptions found in a valid 1997 wage order." (*Id.* at p. 180.)

Labor Code Section 515 expressly provides that "[t]he Industrial Welfare Commission may establish exemptions from the requirement that

an overtime rate of compensation be paid pursuant to Sections 510 and 511 [for the designated professions]." Thus, *Collins* was expressly linked to the language of Section 515 which authorized exemptions relating to the number of hours worked. Section 515 does not contain any authorization allowing an exemption from the statutory requirements relating to pay documents. Nor does United point to any such exemption. Rather, United relies on general statements as to the effect of IWC wage orders, such as what this Court stated in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027: "The IWC's wage orders are to be accorded the same dignity as statutes. They are "presumptively valid" legislative regulations of the employment relationship (*Martinez v. Combs*, supra, 49 Cal.4th at p. 65, 109 Cal.Rptr.3d 514, 231 P.3d 259), regulations that must be given " independent effect" separate and apart from any statutory enactments (id. at p. 68, 109 Cal.Rptr.3d 514, 231 P.3d 259). To the extent a wage order and a statute overlap, we will seek to harmonize them, as we would with any two statutes. (Cal. *Drive-in Restaurant Assn. v. Clark*, supra, 22 Cal.2d at pp. 292–293, 140 P.2d 657.)" (*Id.* at p. 1027.)

However, when a wage order and a statute are in direct conflict, the statute prevails. On this point, this Court recently stated: "But because the Legislature is the source of the IWC's authority, a provision of the Labor Code will prevail over a wage order if there is a conflict." (*Gerard v. Orange Coast Memorial Medical Center* (2018) ___Cal.5th __ [240 Cal.Rptr.3d 757, 760]; see *Lazarin v. Superior Court* (2010) 188 Cal.App.4th 1560, 1572–1573 ["The appellate court agreed, explaining the authority of an administrative agency like the IWC to adopt regulations is limited by the enabling legislation (*Bearden*, supra, 138 Cal.App.4th at p. 435, 41 Cal.Rptr.3d 482; see *California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 207-209; *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 321, 87 Cal.Rptr.2d 423, 981 P.2d 52)

and holding wage order 16, section 10(E), conflicts with section 512 by creating an exception to that statute's meal period requirements not authorized by the Legislature. (*Bearden*, at p. 437, 41 Cal.Rptr.3d 482; see id. at p. 435, 41 Cal.Rptr.3d 482 [describing § 512's authorization of a waiver of the second meal period by mutual consent and its exemptions for certain workers in the wholesale baking, motion picture and broadcasting industries]."]; *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 435–436 ["The authority of an administrative agency to adopt regulations is limited by the enabling legislation. "[A]n administrative regulation must 'be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.' (Gov.Code, § 11342.1.) 'Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.' (Gov.Code, § 11342.2.)" (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 321, 87 Cal.Rptr.2d 423, 981 P.2d 52 (Agnew).)"].)

Indeed, the fact that the Legislature has specifically authorized the IWC to create certain collective bargaining exemptions, but has not authorized an exemption as to wage statements is itself proof that the Legislature intended no such exemption. As this Court has explained: "[W]here exceptions to a general rule are specified by statute, other exceptions are not to be presumed unless a contrary legislative intent can be discerned." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 116.) Thus, "if exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary. [Citation.]" (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1230.) "Under the maxim of statutory construction,

expressio unius est exclusio alterius, if exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary. [Citation.]" (Id. at p. 1230.)

In any event, even if it were the case that the Legislature intended to authorize the IWC to create a collective bargaining exemption to Section 226's wage statement requirements, then that exemption should be read narrowly to what the IWC actually stated. (*Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 794 ["[P]ast decisions ... teach that in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection." (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702, 166 Cal.Rptr. 331, 613 P.2d 579.) *Thus, under California law, exemptions from statutory mandatory overtime provisions are narrowly construed.* (*Nordquist v. McGraw–Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 562, 38 Cal.Rptr.2d 221; see also *A H Phillips, Inc. v. Walling* (1945) 324 U.S. 490, 493, 65 S.Ct. 807, 89 L.Ed. 1095.)" Emphasis added.].)

Employing this analysis here, if there is an exemption as to Wage Order 9's wage statement requirements, then that exemption should be limited to the wage statement requirements that are actually contained in Wage Order 9, none of which are implicated in this action. In response, United argues that there is no reason why additional deference should be afforded to overtime requirements which are exempted by a Wage Order than is given to other requirements under the Labor Code. (AB 50.)

United misses the point. The point is not that there is something about overtime rules that makes it uniquely suited to being governed by a Wage Order. The point is that, before a Wage Order should be interpreted as exempting an employer from very specific requirements under the Labor

Code, there must at least be (1) a statutory authorization allowing that exemption and (2) a clear indication in the Wage Order reflecting a determination that the employer should be so exempted.

It was because the statutory wage requirement in *Collins, supra,* checked both of these boxes, that the Court concluded that they fell within the Wage Order exemption. And that is the reason why subsequent court's have restricted *Collins* to the wage statute directly discussed there. (*Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 957 ["[T]he trial court should not have looked beyond the appellate opinion in *Collins* to determine the scope of the holding. Having properly restricted our analysis of *Collins* as precedent, we conclude *Collins* is not authority for holding that the plaintiffs' meal period, rest break, and itemized wage statement contentions are without merit."].)

Since there is no statutory authorization allowing the IWC's enactment of exemption as to Section 226 pay statement requirements and since there is no clear indication that the IWC intended any such exemption especially as to statutory pay statement requirements that are not even mentioned in Wage Order 9, such an exemption should not be inferred here.

CONCLUSION

For the foregoing reasons and for the reasons explained in the Opening Brief, Plaintiffs respectfully request that this Court conclude:

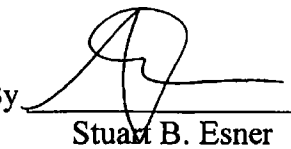
(1) California Labor Code Section 226 applies to wage statements provided by an out-of-state employer to an employee who resides in California, receives pay in California, and pays California income tax on her wages, but who does not work principally in California or any other state; and

(2) The RLA exemption in Wage Order 9 does not bar a wage statement claim brought under California Labor Code Section 226 by an employee who is covered by a CBA.

Dated: January 3, 2019

JACKSON HANSON, LLP

ESNER, CHANG & BOYER

By 

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CERTIFICATE OF WORD COUNT

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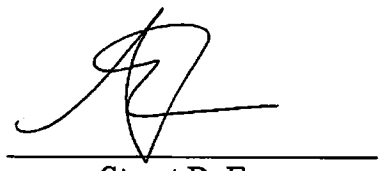

Stuart B. Esner

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 234 East Colorado Boulevard, Suite 975, Pasadena, CA 91101.

On the date set forth below, I served the foregoing document(s) described as follows: **REPLY BRIEF ON THE MERITS**, on the interested parties in this action by placing ___ the original/ X a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

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Based on a court order, I caused the above-entitled document(s) to be served through File & ServeXpress at https://www.truefiling.com addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the File & ServeXpress Filing Receipt Page/Confirmation will be filed, deposited, or maintained with the original document(s) in this office.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 3, 2019, at Pasadena, California.

Marina Maynez

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Magistrate Judge William Alsup UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA San Francisco Courthouse Courtroom 12 – 19th Floor 450 Golden Gate Avenue San Francisco, CA 94102	***Trial Court (Via Mail)***