S234969

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DOUGLAS TROESTER,

Plaintiff and Appellant,

v.

STARBUCKS CORPORATION,

Defendant and Respondent.

ON A CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CASE NO. 14-55530

RESPONDENT'S CONSOLIDATED ANSWER TO BRIEFS OF AMICI CURIAE CONSUMER ATTORNEYS OF CALIFORNIA AND CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION; AND WOMEN'S EMPLOYMENT RIGHTS CLINIC OF GOLDEN GATE UNIVERSITY SCHOOL OF LAW, BET TZEDEK, CENTRO LEGAL DE LA RAZA, NATIONAL EMPLOYMENT LAW PROJECT, AND LEGAL AID AT WORK

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I. INTRODUCTION

In its Answer Brief, Starbucks demonstrated that the *de minimis* rule has long been a central component of California law (not simply an imported "federal" rule), the Court may look to *Anderson* and *Lindow* and other federal guidance because the *de minimis* rule does not conflict with California law, and the Legislature has effectively ratified the DLSE's longstanding approval of the rule. Starbucks also demonstrated that the *de minimis* rule equally applies to statutory claims (not just equitable claims), the rule is no less relevant today, and it will neither lead to employer abuse nor employee harm.

Now, amici curiae Consumer Attorneys of California *et al.* ("Consumer Attorneys") and Women's Employment Rights Clinic of Golden Gate University School of Law *et al.* ("Women's Employment") question these conclusions by arguing that the *de minimis* rule would "nullify" Labor Code or Wage Order requirements, that California legislative intent or history is somehow inconsistent with applying the *de minimis* rule to wage claims, or that the rule otherwise cannot be squared with California law. As explained below, none of their arguments can survive scrutiny, and many of them have already been addressed.

II. ARGUMENT

A. Applying The *De Minimis* Rule To California Wage Claims Would Not Nullify Statutory Obligations.

Consumer Attorneys argue that a maxim cannot be used to "vitiate" or otherwise nullify a statute. (Consumer Attorneys Br. at 5.) But that is not what the *de minimis* rule, as applied to wage and hour claims, seeks to do. Rather, as explained in Starbucks Answer Brief, the *de minimis* rule simply provides a realistic and practical means of determining "all" hours worked without giving effect to minor trifles or other "split-second absurdities." (*Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680,

692; Civ. Code, § 3533.) In other words, the rule merely "aids in the[] just application" of the Labor Code and Wage Order, and does not "qualify" a statute or regulation. (Civ. Code, § 3509 ("Intent and effect of maxims").)[1]

Thus, the issue is categorically different than the issues presented in Consumer Attorneys' cited cases, where application of a maxim was sought to avoid or defeat statutory requirements altogether, or where a maxim was simply inapplicable. (*People v. One 1940 Ford V-8 Coupe* (1950) 36 Cal.2d 471, 472-476 [despite maxim that the law does not "require[] idle acts," the relevant statute required the lienholder to conduct an investigation to secure its interest, and lienholder admittedly failed to conduct any investigation whatsoever]; *Roe v. Superior Court* (2015) 243 Cal.App.4th 138, 147-148 [maxim that "Legislature intended similar statutory language covering similar subjects to be similarly construed" not applicable where the language in the prior statute and the language in the subsequent statute "appear dissimilar"]; *Davcon, Inc. v. Roberts & Morgan* (2003) 110 Cal.App.4th 1355, 1365 [maxim that "a person cannot take advantage of his or her own wrong" not applicable where no "wrong" occurred, rather, plaintiffs simply exercised their "statutory right" to file a peremptory challenge]; *Lass v. Eliassen* (1928) 94 Cal.App. 175, 177-179 [maxim that "equity will consider that done which ought to have been done" not applicable where statute expressly requires court confirmation for sale to take effect, and such confirmation had not yet taken place]; *Moore Grocery*

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[1] *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, cited by Consumer Attorneys, supports Starbucks position. Consumer Attorneys and Women's Employment essentially urge a strict construction of the word "all" that accounts for every minute, second, or even millisecond of work, despite the fact that such time is admittedly impracticable to capture. (See, e.g., Women's Employment Br. at 11.) In *Bickel*, this Court expressly cautioned against such "literal construction" of a statute when it leads to unreasonable results. (*Bickel, supra*, 16 Cal.4th at p. 1048, fn. 4.)

Co. v. Los Angeles Nut House (1928) 90 Cal.App. 792, 793-795 [where statute specifically required that reporter's transcript be certified by the trial judge, requirement cannot be excused as "an idle act"].)

Consumer Attorneys' reliance on cases specifically involving the *de minimis* rule is equally misplaced. In *In re Garcia* (2014) 58 Cal.4th 440, the Court simply declined to decide whether the *de minimis* rule applied to the statutory language at issue. (*Id.* at pp. 456-457 ["we need not determine the validity of the parties' contentions with regard to the proper interpretation of [the statute]"].) And, as explained in Starbucks Answer Brief (at 29), *Knoke v. Swan* (1935) 2 Cal.2d 630, declined to apply the *de minimis* rule to a tax sale only because the Court's prior decisions precluded it from doing so, and the Court would not "hesitate" to apply it had the issue been "newly presented." (*Id.* at p. 631.)

Nor can the application of the *de minimis* rule to wage claims be fairly compared to this Court's refusal to apply the rule to water right claims, where characterizing the monetary damage as *de minimis* would ignore the fact that the improper water use "will ripen into an easement . . . caus[ing] plaintiff great and irreparable injury." (*Walker v. Emerson* (1891) 89 Cal. 456, 458-459.) Nor can it be compared to trespass claims, where "[d]amages, even though nominal, are considered necessary to support a judgment in a trespass tort action since it is essentially an action for damages." (*Costerisan v. Melendy* (1967) 255 Cal.App.2d 57, 60-61.) Thus, *Costerian* made clear that the *de minimis* rule could not be used to correct a judgment of "no damages" to read "nominal damages." (*Ibid.*) That situation does not exist here.

Consumer Attorneys also cite several cases for the proposition that legislative intent must prevail over maxims. (Br. at 5-6 [citing, e.g., *Moore v. Cal. State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1012].) But as explained in Section II.B below, neither Consumer Attorneys nor Women's

Employment can point to any legislative intent or history that precludes, or is inconsistent with, application of the *de minimis* rule.

B. Neither The Legislative, Regulatory, Nor Other Authorities Show That The *De Minimis* Rule Is Somehow Inapplicable to California Wage Claims.

Consumer Attorneys and Women's Employment go to great lengths to describe the history, enactment, and reenactment of various Labor Code sections and Wage Orders. (Consumer Attorneys Br. at 7-26; Women's Employment Br. at 6-20.) But the crux of their arguments essentially reveals only two things: (i) for years, California law, just like federal law, has required employers to record and pay for "any" and "all" time worked, and (ii) the Legislature and IWC simply remained silent in that they never expressly adopted or rejected the *de minimis* rule. (See generally *id.*; Starbucks Answer Br. at 20-21.) That does not preclude application of the *de minimis* rule. To the contrary, given the similarity between California and federal law on paying for "all" time worked, the Court may properly look to federal authorities, including the *Lindow* test, on what it means to do so. (See, e.g., *Building Material & Const. Teamsters Union, Local 216 v. Farrell* (1986) 41 Cal.3d 651, 658; Starbucks Answer Br. at 20-25 [citing additional authorities].)[2]

The fact that the IWC enacted a definition of "hours worked" (i.e., compensable time) to broadly include any time under the employer's "control," in response to the federal Portal-to-Portal Act's exclusion of certain activities from compensable time, does nothing to change this. (Consumer Attorneys Br. at 12-14; Women's Employment Br. 2, 6-9.) As

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[2] The "employee-protecti[ve] purpose" of California wage laws is not, as Consumers Attorneys and Women's Employment suggest, a reason to depart from federal authorities such as *Lindow*. (Consumer Attorneys Br. at 7; Women's Employment Br. at 1.) As explained in Starbucks Answer Brief, federal wage law is designed to protect employees too. (Starbucks Answer Br. at 23-24 & fn. 5.)

explained in Starbucks Answer Brief, the *de minimis* rule is not concerned with whether the time is *compensable*. Rather, the *de minimis* rule is concerned with whether short periods of compensable time must be paid. (Starbucks Answer Br. at 21, 24.) Stated differently, the *de minimis* test starts with the assumption that the time *does* comprise "hours worked," and then explores whether the time is too small and administratively difficult to capture. Thus, it is of no moment that the definition of "hours worked" may be broader under California law than it is under the federal Portal-to-Portal Act.[3]

Consumer Attorneys also argue that the IWC "wasted no time in signaling disagreement" with *Lindow* and the DLSE's adoption of the *de minimis* rule but, again, Consumer Attorneys point to no action except the simple fact that the IWC continued to include the word "all" in the Wage Orders. (Consumer Attorneys Br. at 17-18.) This hardly signals disagreement with the *de minimis* rule, especially when both California and federal law already required payment for "all" hours worked.

Nor can the DLSE be accused of disregarding this Court's decisions by adopting the *de minimis* rule because, as explained in Starbucks Answer Brief, the cited authorities are readily distinguishable, the DLSE's position is entitled to due consideration, and the Legislature has effectively ratified the position. (Starbucks Answer Br. at 20-28.) Consumer Attorneys' and

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[3] Consumer Attorneys' observation that the Wage Orders adopted the FLSA definition of "hours worked" for health care industry workers is misplaced for the same reason. (Consumer Attorneys' Br. at 18, 20.) Again, it has nothing to do with the *de minimis* rule, and Consumer Attorneys misstate the law when they argue (without any legal support) that the IWC expressly "adopt[ed]" the *de minimis* rule for the health care industry to the exclusion of all other industries. (*Ibid.*) As explained in Starbucks Answer Brief, the *de minimis* rule is not referenced in *any* of the wage orders—not surprisingly given its fundamental nature. (Starbucks Answer Br. at 24.)

Women's Employment's arguments to the contrary add nothing to these previously-briefed points. (See, e.g., Consumer Attorneys Br. at 19-21 & n.17 [arguing, for example, that the DLSE Manual comprises an "underground regulation"]; Women's Employment Br. at 17-22 [arguing, for example, that the *de minimis* rule violates *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, or other decisions of this Court].)

C. Applying The *De Minimis* Rule To California Wage Claims Is Entirely Consistent With Principles Of California Law.

Consumer Attorneys and Women's Employment raise a variety of arguments as to why the *de minimis* rule is inconsistent with California wage law. None withstands scrutiny.

First, citing *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, Consumer Attorneys argue that the obligation to record all hours worked falls on the employer, applying the *de minimis* rule would effectively shift this burden to employees, and an employer should not be permitted to take advantage of its own failure to records all hours worked. (Consumer Attorneys Br. at 26-28.) But *Hernandez* did not concern the *de minimis* rule. And more importantly, unlike *Hernandez*, this is not a case where the employer has purposefully "made up" false time records. (*Hernandez, supra,* 199 Cal.App.3d at pp. 725, 727.) Nor is it even a case where an employer failed to keep time records at all. Rather, the *de minimis* rule contemplates that employers should record and pay time to the fullest extent practicable. Thus, it simply cannot be said that the *de minimis* rule would somehow enable employers to take advantage of their own wrong.

Consumer Attorneys respond by arguing that "concerns of 'practicality'" can be read into wage obligations only where the impact on the employee is neutral and there is never any loss in pay. (Consumer

Attorneys Br. at 28-29.) But *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, cited by Consumer Attorneys and which approved of time rounding for practical purposes, was concerned with avoiding policies that "*systematically* undercompensate employees." (*Id.* at p. 902, emphasis added.) Thus, practical concerns are relevant even where an otherwise neutral practice results in a particular employee not receiving pay for very small amounts of time. (*Corbin v. Time Warner Entertainment-Advance Newhouse Partnership* (9th Cir. 2016) 821 F.3d 1069, 1079 [neutral rounding practice lawful regardless of impact on particular employee].)[4]

Consumer Attorneys also respond by arguing that it would be "just as 'practical' for the employer to pay for extra time" or to change its practices such that the time is easier to record. (Consumer Attorneys Br. at 30-31 & fn. 23.) But the former point ignores the fact that the amount of extra time would still be difficult to determine. And, the latter point simply bears on the *merits* of the *de minimis* defense in any given case (i.e., the administrative difficulty factor in *Lindow*), and not on whether the *Lindow* test may be utilized in California wage cases at all.

Second, citing *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, Consumer Attorneys argue that California law already requires payment for "short, hard-to-record working periods" such as the time employees spend waiting for, and riding in, employer-provided shuttle buses. (Consumer Attorneys Br. at 27, 31-32.) But *Morillion* did not address the *de minimis* rule. Nor did it even address whether any of the time was difficult to record. Rather, the issue in *Morillion* was whether the

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[4] Consumer Attorneys' reliance on *Martinez v. Combs* (2010) 49 Cal.4th 35, and *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314 , is likewise misplaced and, for reasons previously briefed, pose no obstacle to applying the *de minimis* rule to California wage claims. (Consumer Attorneys Br. at 29-30; Starbucks Answer Br. at 23-26.)

time was compensable in the first place. (*Id.* at p. 578.) Again, the *de minimis* test assumes the time is compensable. (Starbucks Answer Br. at 21, 24.)[5]

Third, Consumer Attorneys argue that the *de minimis* rule is subject to abuse because it allows employers to avoid payment for certain work activities simply by viewing each activity in isolation. (Consumer Attorneys Br. at 33-34.) This argument fails as well because it ignores the fact that, under the *Lindow* test, courts must still consider "the *aggregate* amount of compensable time." (*Lindow v. United States* (9th Cir. 1984) 738 F.2d 1057, 1063, emphasis added.)

Finally, Women's Employment, much like Troester in his opening brief, speculates that adopting the *de minimis* rule would "harm" employees who already face "significant" wage violations. (Women's Employment Br. at 23-24.) Again, as explained in Starbucks Answer Brief, these arguments ignore the protective nature of the *Lindow* test. (Starbucks Answer Br. at 33-35.)[6]

III. CONCLUSION

For all the foregoing reasons, and for the reasons previously explained in Starbucks Answer Brief, the *de minimis* test outlined in *Anderson* and *Lindow* equally applies to wage and hour claims under the

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[5] Consumer Attorneys' reliance on *See's* for the proposition that ten-minute periods of time before and after shifts would be compensable if the employees were working or under employer control (Consumer Attorneys Br. at 27, 32-33), is inapposite for similar reasons, namely, the court did not address whether the amount of work time, if any, would be difficult to determine. (*See's, supra,* 210 Cal.App.4th at p. 894 & fn. 2.)

[6] Nor is there any basis to Women's Employment's unsupported assertion that the *de minimis* test is somehow "obsolete," as already briefed and explained in Starbucks Answer Brief. (Women's Employment Br. at 16; Starbucks Answer Br. at 30-33.)

California Labor Code, and Consumer Attorneys and Women's Employment fail to state any compelling reason to the contrary.

Respectfully submitted,

Dated: July 10, 2017

AKIN GUMP STRAUSS HAUER & FELD LLP

By 

Rex S. Heinke

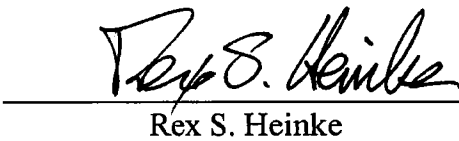
Attorneys for Defendant and Respondent Starbucks Corporation

CERTIFICATE OF COMPLIANCE

This brief consists of 2,555 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: July 10, 2017

AKIN GUMP STRAUSS HAUER & FELD LLP

By 

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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: 1999 Avenue of the Stars, Suite 600, Los Angeles, California 90067. On July 10, 2017, I served the foregoing document described as: **RESPONDENT'S CONSOLIDATED ANSWER TO BRIEFS OF AMICI CURIAE CONSUMER ATTORNEYS OF CALIFORNIA AND CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION; AND WOMEN'S EMPLOYMENT RIGHTS CLINIC OF GOLDEN GATE UNIVERSITY SCHOOL OF LAW, BET TZEDEK, CENTRO LEGAL DE LA RAZA, NATIONAL EMPLOYMENT LAW PROJECT, AND LEGAL AID AT WORK** on the interested parties below, using the following means:

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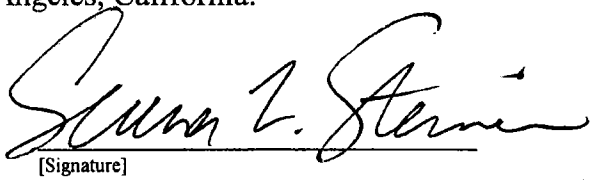
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