S258966

SUPREME COURT

of the

STATE OF CALIFORNIA

GUSTAVO NARANJO,

on behalf of himself and all others similarly situated

Plaintiff, Respondent and Cross-Appellant,

v.

SPECTRUM SECURITY SERVICES, INC.,

Defendant, Appellant and Cross-Respondent

REVIEW OF A DECISION BY THE COURT OF APPEAL

SECOND APPELLATE DISTRICT COURT – CASE NO. B256232

SUPERIOR COURT OF LOS ANGELES – HON. BARBARA M. SCHEPER

Case No. BC 372146

SPECTRUM SECURITY SERVICES, INC.'S ANSWER TO NARANJO'S PETITION FOR REVIEW

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Defendant, Appellant, and Cross-Respondent Spectrum Security Services, Inc. ("Spectrum") submits the following Answer to Plaintiff, Respondent, and Cross-Appellant Gustavo Naranjo's ("Naranjo") Petition for Review.

I. INTRODUCTION

This is a class action meal break case where the class prevailed on a portion of its case and was awarded meal period premium pay plus prejudgment interest, which was affirmed in part and reversed in part on appeal. Naranjo seeks review of selected rulings of the Court of Appeal that reduced the class's recovery. The two issues raised in Naranjo's Petition do not, however, arise from a current conflict in state decisions or present an important question of law that needs to be resolved.

The primary issue is whether an employee who is denied compliant meal breaks can piggy-back on the statutory remedy of one hour of premium pay for each day a meal break was not provided, by also claiming that the same violation supports an award of statutory penalties for allegedly inaccurate wage statements (that did not reflect payment of premium pay that was not paid, but which the employee claims should have been paid) and statutory waiting time penalties (because the disputed meal period premium wages were not paid at the time of termination of employment).[1] Interpreting the applicable statutes, the Court of Appeal correctly determined that the Labor Code does not provide for wage statement penalties (under Section 226(e)(1)) or waiting time penalties (under Section 203) on top of the premium pay required under Section 226.7 for meal period violations.

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[1] This case does not involve any claim under the Private Attorney General Act ("PAGA"), Labor Code sections 2698 et. seq.

The secondary issue is the rate of prejudgment interest that applies to an award of meal period premium pay. The Court of Appeal ruled that the interest rate is seven percent under Civil Code section 3287(a), and not the ten percent Naranjo argues should have been awarded under Civil Code section 3289.

Neither of these issues raise questions that are appropriate for review. First, there is no split of authority among California courts on these issues. No published state case has found that the statutory penalties under Labor Code sections 203 or 226 are available for meal period violations on top of the premium pay under Labor Code Section 226.7. Indeed, all published state court decisions are *consistent* with that of the Court of Appeal in this case in holding that this sort of piggy-backing of statutory penalties is not permissible.[2] Similarly, no published state case conflicts with the Court of Appeal's determination that the rate of prejudgment interest on an award of meal period premium pay is ten percent. As such, there is no need to grant review to secure uniformity on these issues.

Second, these issues do not present an important question of law that needs to be settled. Naranjo argues that if piggy-back statutory penalties are not permitted, employers will lack incentive to provide breaks or to timely pay premium pay. This policy argument is not well-taken and does not support a grant of review. The law already clearly requires employers to provide meal breaks and to pay premium pay, which can amount to

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[2] Naranjo tries to manufacture a "conflict" by arguing that the Court of Appeal's ruling on this issue conflicts with this Court's holding in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1104 [*Murphy*] but that argument is not well taken. *Murphy* simply held that premium pay is a "wage" and not a "penalty" for purposes of the statute of limitations. The Court of Appeal's ruling in no way conflicts with this.

significant damages, if breaks are not provided. (Section 226.7.) Additionally, there are already substantial civil penalties available under PAGA for employees whose rights are violated. Thus, contrary to Naranjo's assertions, *additional* statutory penalties are not needed to incentivize employers to comply with meal break law.

The Petition for Review should be denied.

II. STATEMENT OF THE CASE AND PROCEDURAL SUMMARY

Spectrum contracted with Federal Agencies to provide officers to take custody of and guard Federal prisoners and detainees, normally outside of Federal facilities. (Opinion 2-3.) Naranjo was one of those officers who worked for a short time in 2007. (Opinion 4.)[3] Naranjo pursued this class action claiming Spectrum failed to provide compliant meal periods and rest breaks.[4]

There is no dispute that Spectrum legally provided paid on-duty meal breaks to the officers, as the "nature of the work" of the officers – guarding prisoners outside of Federal facilities – prevented them from taking off-duty meal breaks, and after September 2007, Spectrum and the officers entered into written on-duty meal period agreements. In fact, the post-September 2007 meal period claim was tried and the jury found in Spectrum's favor, and that decision was not appealed. (Spectrum AOB 20-21; 8 JA 1755; 9 JA 1993.) In contrast, for the period of June 2004 to September 2007, although Spectrum provided on-duty meal periods to the officers, Naranjo prevailed on a directed verdict on the sole ground that

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[3] Naranjo was fired for leaving his prisoner unguarded to go offsite to have lunch. (Spectrum's AOB p. 17, fn. 2.)

[4] The trial court denied certification of the rest break class, which the Court of Appeal reversed, ordering the trial court upon remand to certify the class. (Opinion 42-51.)

Spectrum and the officers did not have a written on-duty meal period agreement that complied with Wage Order No. 4. (Opinion 6-7.) The trial court awarded premium pay plus prejudgment interest at ten percent. (Opinion 8.)

The trial court denied statutory penalties under Section 203 for Spectrum's failure to pay the premium pay upon termination of employment; finding that the failure to pay was not "willful" and Spectrum had a "good faith defense" to paying the premium pay. (9 JA 1977 at 1990.) Despite the fact that the evidence was the same, the trial court awarded statutory penalties under Section 226(e)(1) for the failure to include the meal period premium pay – that was owed but not paid – on wage statements; finding that Spectrum's failure was "knowing and intentional." (9 JA 1977 at 1989-1990.) Based on the award of Section 226(e)(1) penalties, the Court also awarded attorney's fees under Section 226(e)(1). (11 JA 2543.)

On appeal, the Court of Appeal affirmed the directed verdict on the pre-September 2007 meal period claim and the award of premium pay, but held that the applicable prejudgment interest rate is seven percent, not ten percent. The Court of Appeal reduced the prejudgment interest rate accordingly. The Court of Appeal also reversed the trial court's award of Section 226(e)(1) penalties (and related attorney's fees) and affirmed the denial of Section 203 penalties, on the ground that neither statutory penalty is available for meal period violations.

III. ARGUMENT

Review of a Court of Appeal decision is appropriate "[w]hen necessary to secure uniformity of decision or to settle an important question of law." CRC §8.500(b)(1).) Neither of these circumstances exist here. In addition, the Court of Appeal's reading of the applicable statutes was

correct, so no review is necessary.

A. There Is No Need to Grant Review to Secure Uniformity of Decision.

The primary question posed by this Petition is whether Naranjo is entitled to recover statutory penalties under Labor Code Sections 203 and 226 for meal period violations in addition to the one hour of premium pay available in Section 226.7. To date, there have not been any published state court decisions holding that these statutory penalties are available in addition to the premium pay. On the contrary, all state court decisions are consistent and hold, like the Court of Appeal did here, that statutory penalties are not available. See *Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242, 1261; *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308, 1337.

More specifically, in *Ling*, the court found that Section 203 penalties are not available for a Section 226.7 meal period violation. Noting that this Court in *Kirby v Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1255 [Kirby] ruled that "a section 226.7 action is sought for the non-provision of meal and rest periods, not for the 'non-payment of wages,'" the *Ling* Court concluded that "section 226.7 cannot support a section 203 penalty because section 203, subdivision (b), tethers the waiting time penalty to a separate action for wages." (*Ling,* 245 Cal.App.4th at 1261.) (Discussed in Opinion at 29-30.)

In *Maldonado*, the plaintiffs prevailed on their claim that they were not properly paid overtime because an Alternative Workweek Schedule (AWS) was not adopted in accordance with Labor Code sections 510-511. (*Maldonado,* 22 Cal.App.5th at 1314-1315). Based solely on finding that the plaintiffs were not paid overtime, the trial court also awarded wage statement penalties under section 226(e), and the Court of Appeal reversed this award. (*Id.* at 1334-1337). As the court explained: "The purpose of

section 226 is to *document* the *paid wages* to ensure the employee is fully informed regarding the calculation of those wages." (*Id.* at 1337, quoting *Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, 392; emphasis in original.) When a wage statement accurately describes what the employee was actually ***paid***, the wage statement is "accurate," and there is no violation of section 226 if the wage statement omits amounts that were ***owed and not paid***. "That the 10/2 AWS ultimately turned out to be invalid mandates that the employees receive unpaid overtime, interest and attorney's fees. Labor Code § 1194, subdivision (a).) It does not mandate that they also receive penalties for the wage statements which accurately reflected their compensation under the rates at which they worked at the time." (*Maldonado* at 1337).

Since Naranjo sued for premium pay that was "owed and not paid," the rationale in *Maldonado* and *Ling* leads to the conclusions that Naranjo cannot recover Section 226(e)(1) penalties simply because the wage statements failed to list a premium pay that was "owed and not paid," and Naranjo cannot recover waiting time penalties for non-payment of meal period premiums (as opposed to minimum wage or overtime) on termination of employment.[5]

Consistent with *Maldonado* and *Ling*, the Court of Appeal in this

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[5] There is no requirement that the employer include in the wage statement all "obligations owed." For example, an employer may agree with an employee to provide a vehicle for the employee to use as part of his compensation, or to provide vacation pay, but Section 226(a) does not require a wage statement to list the vehicle or the amount of vested vacation. *Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, 392-393 [vested vacation pay not required on wage statement]. The amount of accrued paid sick leave does not have to be listed on wage statements, and can be on a separate document. Labor Code § 246(h).

case ruled that based on the language of Sections 203 and 226, those statutory penalties are not available for a meal period violation under Section 226.7. As the Court of Appeal stated:

> Section 203 penalizes an employer that willfully fails "to pay . . . any wages" owed to a fired or voluntarily separating employee. The penalty is paid to the employee, not for "labor, work, or service . . . performed personally by the [employee]" ([Labor Code] § 200 sub. (b)), but for the employer's recalcitrance. Read this way, an employer's failure, however willful, to pay section 226.7 statutory remedies does not trigger section 203's derivative penalty provisions for untimely wage payments.
>
> The result is the same for section 226. Section 226, subdivision (e)(1) entitles an employee to minimum fixed penalties ... if the itemized statement omits gross and net "wages earned." Section 226.7's premium wage is a statutory remedy for an employer's conduct, not an amount "earned" for "labor, work, or service . . .performed personally by the [employee]." (§ 200, subd. (b).)

(Opinion 38.)

Thus, the Court of Appeal's reasoning and conclusions are wholly consistent with the other published state cases on these issues.

As noted in the Court of Appeal's Opinion, earlier federal district courts differed in their analysis as to whether the Sections 203 and 226(e) statutory penalties are available for a Labor Code Section 226.7 violation, with some coming to the same conclusion as the Court of Appeal in this case. (E.g., *Jones v. Spherion Staffing LLC* (C.D.Cal. 2012) 2012 WL 3264081 at *8-9; *Singletary v. Teavana Corporation* (N.D.Cal. 2014) 2014 WL 1760884 at *4.) (Discussed in Opinion at 31-34.) Notably, the federal court decisions cited by the Court of Appeal that came to contrary

conclusions did so in preliminary rulings.[6] In addition, the federal courts were simply attempting to apply California law, and in light of the Court of Appeal's published ruling in this case, coupled with those in *Ling* and *Maldonado*, there is no reason for the federal courts to be in disagreement in the future. (*Vestar Dev. II, LLC v. Gen. Dynamics Corp.* (9th Cir. 2001) 249 F.3d 958, 960 [absent "convincing evidence that the state supreme court would decide differently, a federal court is obligated to follow the decisions of the state's intermediate appellate courts," quoting *Lewis v. Tel. Employees Credit Union* (9th Cir. 1996) 87 F.3d 1537, 1545].)

Since no reported California state case allows Section 203 or 226(e) penalties for the failure to pay premium pay for meal period violations under Section 226.7, there is no decisional conflict with the Court of Appeal's decision in this case, and no conflict for this Court to resolve.

Further, as to the Court of Appeal ruling setting the seven percent prejudgment interest rate on the award of premium pay for meal period violations, Naranjo does not present any other case with a conflicting opinion and Spectrum is not aware of any. The only case Naranjo cites in connection with this question is *Bell v. Farmers Ins. Exchange* (2006) 135 Cal.App.4th 1138, which did not involve meal period violations at all.[7]

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[6] *Finder v. Leprino Foods Co.* (E.D.Cal. 2015) 2015 WL 1137151 at *5 [motion for judgment on the pleadings]; *Parson v. Golden State FC, LLC* (N.D.Cal. 2016 2016 WL 1734010 at *4-5 [motion to dismiss]; *Abad v. Gen. Nutrition Ctrs, Inc.* (C.D.Cal. 2013) 2013 WL 4038617 at *7 [denial of summary judgment]; *Pena v. Taylor Farms Pac., Inc.* (E.D.Cal. 2014) 2013 WL 4459852 at *8-10 [class certification motion]; and *Dawson v. Hitco Carbon Composites, Inc.* (C.D.Cal. 2017) 2017 WL 7806561 at *6 [motion to dismiss].

[7] Naranjo argues, based on *Bell*, that the 10 percent breach of contract interest rate in Civil Code section 3289 should be applied because the employment relationship is inherently contractual, but ignores the facts that

B. This Case Does Not Present An Important Question of Law That Needs To Be Settled.

1. Review Is Not Necessary to Clarify *Murphy*.

Naranjo argues that review should be granted to settle the "irregular" decisions from the lower courts on the issue of whether statutory wage statement and waiting time penalties are available in missed meal break cases. As discussed above, the current California cases, including this one, are consistent that Sections 203 and 226(e) penalties are not available in addition to the premium pay for Section 226.7 break violations. So currently there is no conflict to resolve.

Naranjo also argues review should be granted because he believes the Court of Appeal's Opinion is inconsistent with this Court's holding in *Murphy* that Section 226.7 meal break premium pay is a "wage" for purposes of the statute of limitations. This argument shows a lack of appreciation of this Court's analysis in *Murphy*. In *Murphy*, this Court analyzed which statute of limitations applied to a claim for premium pay for missed breaks; the three-year period for a "liability created by statute" or the one-year period for a claim for a "penalty." (*Murphy,* at 1102-1103, comparing CCP §§338(a) and 340(a).) The Court discussed whether the premium pay was a wage, to which the three-year limitation would apply,

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(a) the premium pay in Section 226.7 is a creation of statute, not contract, and (b) the premium pay in this case was awarded solely because of the *absence* of a contract; namely, the on-duty meal period agreement. The fact that the *Bell* court approved a ten percent interest rate on an award of unpaid overtime wages does not mean that the ten percent interest rate applies to an award of meal period premium pay. *Bell* did not hold that, nor has any other published state court case.

or a penalty, to which the one-year limitation would apply. (*Id.* at 1103.) The Court reviewed the language of Section 226.7 and concluded that it could be interpreted as ether a wage or a penalty. (*Id.* at 1104 ff.) The Court then analyzed legislative history, public policy, and other indicators to help in the interpretation. (*Id.*) The Court concluded that in the context of applying the statute of limitations and based on these sources concerning the interpretation of Section 226.7, the "additional hour of pay" in Section 226.7 is "a premium wage intended to compensate employees, not a penalty." (*Id.* at 1114.) Significantly, this Court said that the premium pay "compensates the employee for events other than time spent working." (*Id.* at 1113.)

Later, in *Kirby,* this Court addressed whether attorney's fees are available under Labor Code section 218.5 (which provides for recovery of fees by a prevailing party in an action for nonpayment of wages) in an action for missed meal or rest breaks brought under Section 226.7. The Court concluded fees were not available, stating:

> Section 226.7 is not 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. [Citations.] When an employee sues for a violation of section 226.7, he or she is suing because an employer has allegedly "require[d] [the] employee to work during [a] meal or rest period mandated by an applicable order of the Industrial Welfare Commission." (§ 226.7, subd. (a).) In other words, a section 226.7 action is brought for the nonprovision of meal and rest periods, not for the "nonpayment of wages."

(*Kirby* at 1255.)

Both *Murphy* and *Kirby* focused on the meaning and application of Section 226.7 in the context of the issues presented. Neither of these cases analyzed the language of Labor Code sections 203 or 226 to determine if

their statutory penalties were available in an action under the language of Section 226.7. In contrast, the Court of Appeal in this case did so. The Court of Appeal applied the "clear and unambiguous" language of Sections 200, 203 and 226 and concluded that Sections 203 and 226 were not triggered by the failure to pay premium pay for not providing meal breaks. (Opinion at 38-39.)

The Court of Appeal's decision is not inconsistent with *Murphy*. Accordingly, review is not necessary to clarify any purported inconsistency.

2. Review Is Not Necessary to Incentivize Employers.

Naranjo asserts that in the absence of review by this Court, the Court of Appeal Opinion will stand, and employers will not be required to pay the premium pay when employees resign. In addition, Naranjo asserts the Opinion "eliminates any practical mechanism by which payment of these wages would ever be made during the course of employment." (Petition 16.) These assertions are untenable, since Section 226.7 requires the employer to pay premium pay when appropriate and "an employee is entitled to the additional hour of pay immediately upon being forced to miss a rest or meal period." (*Murphy* at 1108.) The law clearly requires employers to provide meal periods and to pay premium pay if they are not provided; which the Court of Appeal affirmed in affirming the award of premium pay.

There are incentives and mechanisms in place to enforce Section 226.7 in the absence of statutory penalties for unrelated violations. An employee clearly has legal remedies to recover unpaid premium pay, as this case demonstrates. In addition, the state, or an aggrieved employee, can sue under PAGA for civil penalties. (Labor Code §2699.5.)

The dual purposes of the meal break law are to incentivize

employers to provide breaks, and compensate employees when breaks are not provided. (*Murphy* at 1104-105). Those purposes are not thwarted by the Court of Appeal's rulings.

C. The Procedural Posture of This Case Does Not Support Review.

Naranjo asserts that this case is a good one for this Court to review because there are "no open questions of fact or law." This assertion is not accurate, nor is this a proper ground for review in the first instance. If review is granted, the two issues presented will not resolve whether the class in this case will recover any penalties, since penalties under Sections 203 and 226 are not automatic.

Section 203 requires that the failure to pay wages on termination be "willful," and a "good faith defense" defeats the penalty. (*Smith v. Rae-Venter Law Group,* (2002) 29 Cal.4th 345, 354, n.3; *Road Sprinkler Fitters Local Union No. 669 v. G&G Fire Sprinklers, Inc.*, (2002) 102 Cal. App. 4th 765, 782 ["good faith mistaken belief that wages are not owed may negate a finding of willfulness"]; 8 CCR §13520.) In fact, the trial court denied Section 203 penalties because it found Spectrum was not "willful" and had a good faith defense. Section 226(e) requires a finding that the failure to comply was "knowing and intentional" and that the plaintiff suffered "injury." Despite the evidence being the same as on the Section 203 inquiry, in awarding Section 226 penalties, the trial court found Spectrum was "knowing and intentional." (9 JA 1977 at 1989-1990.)

Since both sides appealed the trial court's additional legal and factual determinations on the penalty issues, these issues would revive if this Court accepts review and reverses the Court of Appeal's rulings on the two issues presented in the Petition. Thus, this is not a case where there are no "open questions of fact or law." A review and reversal would simply result in the continuation of the dispute on the penalties issues.

IV. CONCLUSION

This is not an appropriate case for review. There is no split of authority and no unsettled but important issue of law needing this Court's attention. Accordingly, the Petition should be denied.

Dated: November 21, 2019

CAROTHERS DiSANTE & FREUDENBERGER LLP

By: Steven A. Micheli, Esq.
Attorneys for Defendant, Appellant and Cross-Respondent, Spectrum Security Services, Inc.

V. CERTIFICATE OF COMPLIANCE.

Pursuant to rule 8.204(c) of the California Rules of Court, the undersigned counsel for Appellant and Cross-Respondent certifies that the foregoing Answer Brief was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief is 3,350 words, exclusive of the matters that may be omitted under subdivision (c)(3).

Dated: November 21, 2019

Steven A. Micheli, Esq.

DECLARATION OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I, the undersigned, declare that I am employed in the aforesaid County, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 4510 Executive Drive, Suite 300, San Diego, CA 92121. On November 21, 2019, I served on the interested parties in this action the document(s) entitled

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