CASE NO. S238941

IN THE SUPREME COURT OF CALIFORNIA

SHARMALEE GOONEWARDENE, AN INDIVIDUAL,

PLAINTIFF AND APPELLANT

v.

ADP, LLC et al;

DEFENDANTS AND RESPONDENTS

SUPREME COURT
FILED

MAY 16 2017

Jorge Navarrete Clerk

Deputy

Second Appellate District Division Four B267010
Los Angeles Superior Court Case No. TC 026406
Hon. William Barry, Presiding

RESPONDENT'S OPPOSITION TO OPENING BRIEF

Glen Broemer, SBN 165457
135 W. 225th St. Apt. F Bronx NY 10463
Fax 877-571-6997 Office 805-351-9857
glenbroemer@gmail.com
Attorney for Sharmalee Goonewardene

CASE NO. S238941

IN THE SUPREME COURT OF CALIFORNIA

SHARMALEE GOONEWARDENE, AN INDIVIDUAL,
PLAINTIFF AND APPELLANT

v.

ADP, LLC et al;
DEFENDANTS AND RESPONDENTS

Second Appellate District Division Four B267010
Los Angeles Superior Court Case No. TC 026406
Hon. William Barry, Presiding

RESPONDENT'S OPPOSITION TO OPENING BRIEF

Glen Broemer, SBN 165457
135 W. 225th St. Apt. F Bronx NY 10463
Fax 877-571-6997 Office 805-351-9857
glenbroemer@gmail.com
Attorney for Sharmalee Goonewardene

TABLE OF CONTENTS

Introduction P.2
Appellate Opinion/The Factual Basis .... P. 2
Plaintiff's Third-Party Beneficiary Claims P.4
Supreme Court Treatment Of Third-Party Beneficiary Claims...............P.4
Donee And Creditor Beneficiaries P.5
'Intent' In Third-Party Beneficiary Claims ....P. 6
New Right/New Remedies .... P. 10
ADP's Other Arguments Point By Point .... P. 14
Conclusion P.40

TABLE OF CASES

Adam v. City of Fremont, 69 Cal.App.4th 105 (1998) P.39
Atchley v. City of Fresno.....................P. 15,18
Barbosa v. IMPCO Technologies (2009) 179 Cal.App.4th 1116 ....P.27
Biakanja v. Irving (1958) 49 Cal.2d 647.....................P.28, 29, 34, 36
Bily v. Arthur Young & Co. (1992) 3 Cal.4th 370, ...P.28
Blank v. Kirwan (1985) 39 Cal. 3d 311.....................P.32
Borissoff v. Taylor & Faust (2004) 33 Cal.4th 523.....................P.21
Brewer v. Premier Golf Properties (2008) 168 Cal.App.4th 1243 ....P.11
Channel Lumber v. Simon, (2000) 78 Cal.App.4th 1222.....................P.20
Chung Kee v. Davidson, (1887) 73 Cal. 522.....................P.7
Cortez v. Purolator 23 Cal.4th 163 (2000).....................P.12
Davis v. Farmers Ins. (2016) 245 Cal.App.4th 1302.....................P.39
Earley v. Superior Court (2000) 79 Cal.App.4th 1420.....................P.27
Erlich v. Menezes, 21 Cal.4th 543, 551 (1999) P.33
Estate of Kemmerrer, 114 Cal.App.2d 810, 814 (1952) P.26

Estate of Signal Companies v. Harbor Insurance 27 Cal. 3d 359 (1980)
....................P.24

Finke v. Walt Disney Co., (2003) 110 Cal.App.4th 1210....................P.30

Ford v. Cournale, 36 Cal. App. 3d 172 (1973)....................P.20

Freeman & Mills v. Belcher Oil Co. (1995) 11 Cal.4th 85....................P.35

Futrell v. Payday California (2010) 190 Cal.App.4th 1419....................P.15

Goonewardene v. ADP, LLC (2016) 5 Cal.App.5th 154.................... passim

Grodensky v. Artichoke Joe's (2009) 171 Cal.App.4th 1399 ....P.13

Hale v. Morgan (1978) 22 Cal.3d 388....................P.18

Hamill v. Maryland Cas. Co., 209 F.2d 338 (1954) P.9

Hess v. Ford Motor Co. (2002) 27 Cal.4th 516 ....P.6

In re S.C. (2006) 138 Cal.App.4th 396....................P.15

In re Trombley (1948) 31 Cal.2d 801 ....P.23

Intelligraphics v. Marvell Semiconductor 2009 WL 330259 (N.D.Cal. 2009)
....................P.37

Isbrandtsen Co. v. Local 1291 (1953) 204 F.2d 495....................P.5

J'Aire Corp. v. Gregory (1979) 24 Cal.3d 799....................P.36, 38

Johnson v. Holmes Tuttle (1958) 160 Cal.App.2d 290....................P.6

JSB Industries, Inc. v. Nexus Payroll (2006) 463 F.Supp.2d 103) P.25

Kensington v. American Eagle 921 F.2d 122 (7th Cir. 1990) P.15, 18

Kerr's Catering Service v. DIR (1962) 57 Cal.2d 319....................P.28

Lake Almanor v. Huffman-Broadway 178 Cal. App. 4th 1194....................P.8

Lovetro v. Steers (1965) 234 Cal.App.2d 461, ...P.21

Lu v. Hawaiian Gardens Casino, Inc. 2010 50 Cal.4th 592....................P.13

Lucas v. Hamm, 56 Cal.2d 583 (1961) P.7

Martinez v. Combs (2010) 49 Cal.4th 35....................P.4

Martinez v. Socoma Companies, Inc. (1974) 11 Cal.3d 394....................P.5

Miles v. Miles, (1926) 77 Cal. App. 219.....................P.18

Multifamily Captive Group v. Assurance Risk Managers 2009 629 F.Supp.2d 1135.....................P.37

Murphy v. Kenneth Cole (2007) 40 Cal.4th 1094 ....P.22

Orloff v. Los Angeles Turf Club (1947) 30 Cal.2d 110.....................P.11

People v. Cole (2006) 38 Cal.4th 964.....................P.12

People v. Treadwell (1886) 69 Cal. 226.....................P.21

Pineda v. Bank of America, N.A. (2010) 50 Cal.4th 1389.....................P.28

Prouty v. Gores Technology (2004) 121 Cal.App.4th 1225 ....P.22

Quelimane Co. v. Stewart Title (1998) 19 Cal.4th 26.....................P.36

Robinson Helicopter v. Dana Corp. (2004) 34 Cal.4th 979.....................P.35

Rojo v. Kliger (1990) 52 Cal.3d 65.....................P.11

Russell v. Pacific Ry. Co. (1896) 113 Cal. 258.....................P.11

Schauer v. Mandarin Gems of Cal. (2005) 125 Cal.App.4th 949.....................P.22

Shaffer v. McCloskey, 101 Cal. 576 (1894) P.26

Smith v. Superior Court (2006) 39 Cal.4th 77.....................P.28

Souza v. Westlands Water Dist. (2006) 135 Cal.App.4th 879.....................P.7

Spinks v. Equity Residential (2009) 171 Cal.App.4th 1004.....................P.6

Stanton v. Santa Ana Sugar Company, 84 Cal. App. 206.....................P.16

Unite Here Local 30 v. Department of Parks & Recreation, (2011) 194 Cal.App.4th 1200 ....P.5

Van Wagener v. MacFarland, (2004) 58 Cal.App. 115.....................P.26

Vasquez v. Franklin Management (2013) 222 Cal.App.4th 819.....................P.29

Washington Lumber and Millwork Co. v. McGuire, 213 Cal. 13.....................P.13

TABLE OF STATUTES

Civ.Code § 1559 ....P.6

Civil Code § 1714....................P.26

Civil Code §2343....................P.20

Civil Code §3543....................P.26

Civil Code §3520....................P.26

Civil Code § 3521....................P.26

Labor Code 226....................P.12

Labor Code § 558.1....................P.16

Labor Code §1194....................P.28

OTHER AUTHORITIES

4 Corbin on Contracts (1951) pp. 16-18....................P.7

9 Corbin on Contracts (2002) § 776, p. 14. ....P.7

Restatement, Contracts, § 133....................P.5, 7

Restatement (Second) Of Contracts *§ 302*....................P.8

Restatement (Second) of Torts §552(2) P.40

Third-Party Beneficiaries (1992) M.A. Eisenberg, 92 Colum. L. Rev. 1358

....................P.9

Third Party Beneficiaries and the Restatement (Second) of Contracts, David M. Summers, 67 Cornell L. Rev. 880, 884 (1982) P.14

2 Williston on Contracts, § 357 (Rev. ed. 1936) 356A....................P.5

2 Williston on Contracts (3d ed. 1959) pp. 836-839....................P. 5, 7

INTRODUCTION

Plaintiff's allegations against the Petitioner, payroll-service provider ADP, are aptly summarized at *Goonewardene v. ADP, LLC (2016) 5 Cal.App.5th 154, 164-165*. In a careful and well-reasoned decision three court of appeals' justices unanimously held that Plaintiff employee can under the circumstances of the case maintain causes of action against the payroll-service provider ADP, for negligence, negligent misrepresentation, and on a third party beneficiary theory. ADP's allegation that lines of responsibility are somehow blurred by holding, essentially, that ADP & other payroll service providers are not immune for their negligent conduct, stems from Defendants' failure to comprehend the interrelationships between the applicable legal principles. In a unanimous decision the court of appeal implicitly rejected Defendants' claim that the Labor Code provides the exclusive remedy for all claims that in some way relate to the payment of wages. According to its own terms, the Labor Code only provides exclusive remedies in the area of workers' compensation. Defendants' unwillingness to accept this conclusion has resulted in a brief containing dozens of references to the Labor Code, where contract and tort law principles are at issue.

Appellate Opinion/The Factual Basis For The Third-Party Beneficiary Claim

The Court of Appeal held that "When an employer enters into a contract with a service provider by which the provider is to take over the employer's payroll

tasks, including the preparation of the payrolls themselves, the employees constitute third party creditor beneficiaries of the contract between the employer and service provider" *Goonewardene v. ADP, LLC (2016) 5 Cal.App.5th 154, 173.*

Applying this statement of the law to the facts, the court accurately noted, "The gravamen of its allegations is that Altour engaged ADP to discharge Altour's wage-related legal duties to its employees, that is, Altour's obligations under the Labor Code and applicable wage orders to accurately calculate employees' wages, fully distribute those wages in a timely manner, and provide employees with accurate earnings statements", *Id.*

The 6AC alleges that ADP, in its advertising, "expressly offers to partner with employers for their mutual benefit and for the benefit of employees." The 6AC further alleges that "Altour and ADP entered into an unwritten contract whereby ADP provided payroll calculation, records maintenance, legal advice and a host of related services to Altour for the benefit of Altour and its employees in the general area of employee wages and benefits." In this regard, the 6AC contains specific allegations that ADP provided services directly to Altour employees. The 6AC alleges that under the agreement, ADP added the hours on appellant's time cards, calculated her earnings, and provided her with earnings statements in connection with her compensation. Additionally, ADP allegedly was responsible for determining whether appellant was to receive overtime or double time in

accordance with applicable labor laws. The 6AC thus alleges that Altour employees such as appellant are, at a minimum, third party creditor beneficiaries of the unwritten agreement.", *Id.*

"The 6AC further alleges that ADP breached its contractual obligations relating to Altour's wage-related duties to appellant, and that appellant suffered damages as a result...the 6AC asserts that appellant was denied full compensation because ADP repeatedly failed to determine that she was owed overtime or double time pay, and otherwise provided inadequate earnings statements. Regarding these matters, the 6AC expressly attributes some of that alleged misconduct to ADP's own errors and misapplication of the applicable wage orders, rather than to mistakes in earnings data transmitted by Altour. Appellant has thus stated a breach of contract claim against ADP as a third party creditor beneficiary", *Id at 174.*

PLAINTIFF'S THIRD-PARTY BENEFICIARY CLAIMS

1. Supreme Court Treatment of Third-Party Beneficiary Claims in Similar Context

In *Martinez v. Combs (2010) 49 Cal.4th 35, 77* the Court simply found that the third-party beneficiary claim asserted had "no factual basis", and that "[n]othing in the rules of law concerning third party beneficiaries permits us to rewrite the contract to impose on Apio [the promisor] an obligation to pay wages

that it never undertook." The Court did not find that such claims were barred as a matter of law.

2. Donee and Creditor Beneficiaries

In California third party beneficiaries are categorized as either creditor beneficiaries or donee beneficiaries. *Unite Here Local 30 v. Department of Parks & Recreation,194 Cal.App.4th 1200 (2011)* [citing *Martinez v. Socoma Companies, Inc. (1974) 11 Cal.3d 394, 400*] The court of appeal found that Plaintiff was a creditor beneficiary. As ADP's payment would "discharge some form of legal duty owed to the beneficiary [employee] by the promisee [Altour], the categorization is obviously correct.

The effect of such a designation, it seems, is to make it more likely that a third-party beneficiary claim is valid. While the intention to benefit a donee beneficiary may not be evident from a recitation of the promisor's obligations, it is more likely that, where the promisee seeks to discharge an obligation to a creditor, the promisor will be aware of that intention. See *Isbrandtsen Co. v. Local 1291 of International Longshoremen's Ass'n (1953) 204 F.2d 495*: "Williston, Corbin, and the Restatement make a distinction between donee and creditor beneficiaries in this regard; 'intent to benefit' should be an operative factor only in the case of donee beneficiaries. Restatement, Contracts, § 133; Williston, op. cit. supra, § 356A; Corbin, op. cit. supra, §§ 776-777."

3. 'Intent' in Third-Party Beneficiary Claims

Martinez v. Combs, supra at 77, a case with somewhat similar facts, cites *Hess v. Ford Motor Co. (2002) 27 Cal.4th 516, 524* and Civ.Code, § 1559 for guidance regarding the intent analysis. *Hess* however involves the interpretation of a written agreement and reiterates rules for interpreting written agreements.

The standard test for a third-party beneficiary was stated in *Spinks v. Equity Residential Briarwood Apartments (2009) 171 Cal.App.4th 1004* as follows: [T]o be an express third party beneficiary, a person "'need not be named or identified individually,'" as it is sufficient that the contract shows he or she "'is a member of a class of persons for whose benefit it was made.'"

Given that the parties are presumed to intend the consequences of the performance of the contract, *Johnson v. Holmes Tuttle Lincoln–Merc. (1958) 160 Cal.App.2d 290, 297,* it is clear that the intent in this case includes providing Plaintiff and her co-workers with the benefit of accurate wage statements and properly calculated pay. While the agreement was oral, no such agreement could be articulated without specific reference to employees as comprising the class of beneficiaries. While there is always room for artful phrasing and argument as to 'the consequences' of performance, a natural and obviously correct phrasing here is that 'the consequences include Altour's relief from performing payroll tasks and the employees' receipt of earnings statements and wages.' An equally useful test

appears in *Chung Kee v. Davidson, (1887) 73 Cal. 522, 525-526*, "It is not necessary that the parties for whose benefit the contract has been made should be named in the contract. It must appear, however, *by the direct terms* of the contract, that it was made *for the benefit* of such parties" (emphases added). Any agreement between ADP and Altour must involve preparing earnings statements *for employees*. The emphasis on 'direct terms' seems apt, as it will be the rare case that an incidental beneficiary is identified in the terms of the agreement.

ADP counsel typically refers to the intent of the parties generally, though the only legally relevant question is *Altour's* intent. "Corbin states: "In third party cases, the right of such party does not depend upon the purpose, motive, or intent of the promisor." (9 Corbin on Contracts (2002) § 776, p. 14.)", *Souza v. Westlands Water Dist. (2006) 135 Cal.App.4th 879*. "Insofar as intent to benefit a third person is important in determining his right to bring an action under a contract, it is sufficient that the promisor must have understood that the promisee had such intent," *Lucas v. Hamm, 56 Cal.2d 583, 591 (1961), [*citing Rest., Contracts, 133, subds. 1(a) and 1(b); 4 Corbin on Contracts (1951) pp. 16-18; 2 Williston on Contracts (3d ed. 1959) pp. 836-839].

ADP is not suitably positioned to make arguments regarding Altour's intent, particularly on demurrer and in violation of well-established rules for evaluating a pleading, though in any event it is Plaintiff's impression from discovery

propounded to Altour that in making the agreement Altour to provide a benefit to Altour employees, and that Altour faulted ADP for failing to provide such a benefit. Moreover, ADP of course realizes that Altour is required by law to compensate employees for their labor, and to provide earnings statements. There are always many ways to describe an intention, in varying degrees of detail and scope. Though even accepting arguendo a contrived phrasing that 'Altour only intended to benefit itself', any company benefits from paying its employees in a manner required by law and the intention necessarily includes providing benefits to employees.

Even under the Restatement Second of Contracts, "which is not binding", *Lake Almanor Associates LP v. Huffman-Broadway Group, Inc., 178 Cal. App. 4th 1194, fn. 2; fn.3* a third party will qualify as an intended beneficiary where "the circumstances indicate that the promisee...intends to give the beneficiary the benefit of the promised performance." *Spinks. supra at 1023, citing Rest.2d., supra, § 302(1)(b), p. 440.*

The court of appeal correctly, perhaps even obviously, correctly applied the law as it pertains to third-party beneficiaries.

The same result can also be reached from an analysis of the concept of intent, "`Intent, in its legal sense, is quite distinct from motive. It is defined as the purpose to use a particular means to effect a certain result. Motive is the reason

which leads the mind to desire that result.'" *Hamill v. Maryland Cas. Co., 209 F.2d 338 (1954).* Altour employed ADP to provide earnings statements and wage calculations for Altour employees; therefore Altour intended that its employees would received this benefit.

Defendants' critique rests in part on the validity of the Third-Party Beneficiary Doctrine itself: "The problem thus becomes one of line-drawing" OB p. 22; "The First Restatement's "donee" and "creditor" classifications became "the subject of severe criticism primarily for being misleading because of the overlap and difficulty in classification in many cases", OB p. 24. This is not such a case, and it not necessary to re-write the law of third-party beneficiaries to reach the correct result in this case, as Plaintiff is a third-party beneficiary by any of the common statements of the law.

Defendants cite a 25 year old essay, M.A. Eisenberg, Third-Party Beneficiaries (1992) 92 Colum. L. Rev. 1358, 1378, for the proposition that "some cases *impose a requirement* that an intent to benefit the third party be "clear," "express," or "definite," and some require that an intent to benefit the third party be found in the language of the contract itself", OB p. 26 (emphasis added).

The Eisenberg essay reviews approximately a dozen California cases, none more recent than 1983, dealing with wills, government contracts, construction

contracts, public utilities, HUD tenants, Federal Economic Opportunity claimants, and life insurance. Not a single case relates to the payment of wages.

The cases cited above demonstrate third-party beneficiary law does not require an express intent to benefit in California. There is a difference between a court 'imposing a requirement', and providing a reason for its holding and Plaintiff doubts the characterization is accurate at all. Though this is a tangential point; what is important is that California has no such requirement, having sensibly replaced such formalisms in favor of contextualized analyses.

ADP counsel admits that "ascertaining intent requires not only close scrutiny of contract terms but consideration of surrounding circumstances and course of performance", page 34, simultaneously criticizing the established judicial standards while acknowledging the need for them.

In violation of an agreement between counsel the ADP Defendants refused to produce any documents in the discovery that occurred while the demurrer was pending, though refer to the allegations of the 6th AC--incorporated by the court of appeal into its analysis and sufficiently detailed to warrant the holding--as "glib, nonspecific allegations of an unwritten contract", OB p. 27.

New Right/New Remedies

Conflating the new rights/new remedies doctrine with the economic loss doctrine, ADP counsel avers, "A breach of the statutory obligation is a breach of

contract that will not support tort damages beyond those contained in the statute", OB p. 15. The principles applicable to tort recovery in a contract setting are discussed below. The new rights/exclusive remedy doctrine traces back at least as far as *Russell v. Pacific Ry. Co. (1896) 113 Cal. 258*. The doctrine has undergone slight modifications since that time; a recent and Plaintiff believes accurate expression by the California Supreme Court, slightly weakening the rule may be found in *Rojo v. Kliger (1990) 52 Cal.3d 65, 79*: "As a general rule, where a statute creates a right that did not exist at common law and provides a comprehensive and detailed remedial scheme for its enforcement, the statutory remedy is exclusive." The court in *Brewer v. Premier Golf Properties (2008) 168 Cal.App.4th 1243* stated the rule as 'the remedy provided in the statute 'is exclusive of all others unless the statutory remedy is inadequate.' In *Orloff v. Los Angeles Turf Club (1947) 30 Cal.2d 110, 112–113,* the Court analyzed the rule as follows: "The only basis for holding that such an exclusion was intended, would be an assumption by this court that other remedies are excluded, or the drawing of an inference to that effect by reason of some rule of statutory construction. The rule of statutory interpretation here invoked is a corollary of, a consequence flowing from, or a specific application of, the general common-law rule of statutory construction that statutes in derogation of the common law will be strictly construed." There are of course competing rules of construction.

Here the new rights question can be approached two ways: 1) did the legislature intend that Labor Code 226 would provide the exclusive remedy for all misstatements of an employee's wage and hour calculations, or 2) would a cause for negligent misrepresentation have arisen at common law against an employer or payroll contractor for misstating information relating to rate of pay and hours worked?

As regards the first question, the Court "must harmonize the various parts of the enactments by considering them in the context of the statutory framework as a whole", *People v. Cole (2006) 38 Cal.4th 964, 974-975*. Taking the Labor Code as a whole as comprising the relevant enactments, it is beyond question that the legislature wrote an exclusive remedies provision in the Labor Code only with regard to worker's compensation actions.

As regards the second question, the court of appeal answered the question of whether liability for misstatements and inaccurate pay would result in ADP liability at common law by providing an analysis relying on common law tort principles. There is also no question but that the right to receive accurate pay predates the Labor Code, and that the Labor Code does not provide the exclusive remedies for unpaid wages, *Cortez v. Purolator Air Filtration Prods. Co., 23 Cal.4th 163 (2000)*. Defendant mischaracterizes the holding of *Grodensky v. Artichoke Joe's Casino (2009) 171 Cal.App.4th 1399* as "Labor Code provides

exclusive remedy for wage-and-hour violations" *OB p. 20.* In *Grodensky* the court merely stated "While we are not aware of any California cases on point, federal courts have held that the Labor Code provides a comprehensive and detailed remedial scheme that provides an exclusive statutory remedy." The statement is in any event incorrect and in Plaintiff's view part of a pattern of the erroneous application of California labor law principles in federal court. *Grodensky* was rejected by *Lu v. Hawaiian Gardens Casino, Inc. 2010 50 Cal.4th 592, 603-604*, in which the Court stated, in a circumstance where the statute did not provide a private cause of action, "we see no apparent reason why other remedies, such as a common law action for conversion, may not be available *under appropriate circumstances*. [citations] (*emphasis added*). The general assumption should be that the legislature does not write legislation with a goal of eliminating common law remedies.

Cortez is clear that a right of action for unpaid wages has its origins in common law An action to receive an accurate accounting rests on a corollary right. In California the tort of negligent misrepresentation dates back at least to 1931, *Washington Lumber and Millwork Co. v. McGuire, 213 Cal. 13*, 6 years before the enactment of the Labor Code. ADP's cite to *Brewer* is not on point; whether the Labor Code created new meal and rest break rights has nothing to do with a right to accurate wage payment.

ADP's Other Arguments Point by Point

1. ADP argues that ADP cannot 'discharge' Altour's obligations, and therefore Plaintiff cannot be a creditor beneficiary, OB p. 28. The most common definition of 'discharge' is to remove a burden, and, had ADP acted responsibly, it would have relieved Altour of the burden of the obligation, as a matter of fact, if not any legal obligation. ADP's overly technical argument also assumes that, if Plaintiff cannot be categorized as a donee or creditor beneficiary, she cannot be a third-party beneficiary at all--even where there the requisite intention is shown. See David M. Summers, Third Party Beneficiaries and the Restatement (Second) of Contracts, 67 Cornell L. Rev. 880, 884 (1982) ("The inadequacies of the categorical approach prompted a varied judicial response. Some courts interpreted the categories restrictively; other courts allowed third party recovery despite the categories, oftentimes to achieve an equitable result"). Even were ADP correct, the Court could simply be to treat Plaintiff as a donee beneficiary, or adopt the second Restatement view and focus directly on intent in all cases.

2. ADP asserts, "The 6AC alleges that ADP provides "services" that assist Altour with wage payments and statements", and that the "allegations are *not* that ADP discharges, or renders substitute fulfillment, of Altour's wage-and-hour duties", OB p. 29. The concept of 'substitute fulfillment' is a product of Defendants' own judicial philosophy, unsupported by case law. The argument should be regarded as

forfeited for **lack of *any* citation to legal authority**; see *In re S.C. (2006) 138 Cal.App.4th 396, 408; Atchley v. City of Fresno (1984) 151 Cal.App.3d 635, 647* ; see also *Kensington Rock Island L.P. v. American Eagle Historic Partners, 921 F.2d 122, 124-25 (7th Cir. 1990)* (referring to argument made in a 'perfunctory and underdeveloped' manner). Though in either event further amendment adding a claim that ADP agreed to discharge Altour's obligations in fact, would cure any such pleading defect.

3. In an attempt to fix a misleading picture in the minds of the Court, on six separate occasions Defendants assure the court that ADP does nothing more than perform 'a ministerial task' in providing payroll services; OB pp. 7, 30, 32, 45, 47, 51. The actual quote from *Futrell v. Payday California, Inc., (2010) 190 Cal.App.4th 1419, 1432,* is "The preparation of payroll is largely a ministerial task, albeit a complex task in today's marketplace", along with a reference to "ministerial tasks of calculating pay and tax withholding". The question in Futrell was whether the Defendant had enough responsibility for wages to be held liable as an employer or on a principal-agent theory. Holding a Payroll-Service Provider ("PSP"), even one performing 'ministerial tasks', liable on a third-party beneficiary theory is entirely compatible with Futrell.

Moreover, the statement 'preparation of payroll' perhaps suggests nothing more than addition, multiplication, and check-printing. Plaintiff does not believe,

and did not allege, that ADP's duties are so limited. Calculating pay under the FLSA and Labor Code requires an understanding of overtime rules under various IWC orders, as well as regular rate under the FLSA and CFR. The task is so difficult that, in Plaintiff's view, the rules of calculation are stated inaccurately more often than not. See, e.g., US DOL/Wage & Hour Division Fact Sheet #54 https://www.dol.gov/whd/regs/compliance/whdfs54.htm: "A common error in calculating overtime pay by health care employers involve the failure to include bonuses, shift differentials and other types of compensation in the regular rate of pay." To the extent that it is obliged to perform regular rate calculations by the workweek (which it by all evidence has never done) ADP's role is more accurately described as practicing law, and poorly, without a license.

4. ADP finds it relevant that in third-party beneficiary cases noted by the court of appeal, "the contracts addressed discrete transactions over which the promisor took control", OB p. 30. There is no legal authority offered for the distinction drawn, and no reason to assume that a Defendant cannot be liable for actions within its sphere of responsibility, however defined.

The argument that payroll service providers provide services similar to "payroll department employees" and thus should not be liable is undercut to some degree by the recent enactment of Labor Code § 558.1, making at least some corporate personnel liable for Labor Code violations, in part by the absurdity of

equating a PSP such as ADP with payroll department employees, particularly given ADP's representations. Perhaps more to the point, there is no rule excepting a PSP from liability as a third-party beneficiary where the legal tests are met.

Beyond that, Defendants' parade of horribles argument, i.e. that "lawyers, accountants, banks and others" might be liable on similar grounds is speculative, unsupported by the language employed by the court of appeal, and contrary to the case law method. ADP counsel may as well state that he is opposed to the application of norms utilized everywhere else as to what constitutes decent or responsible behavior, and also opposed to ensuring that employees are accurately paid, even though prompt and accurate payment of wages is a high priority in the state.

5. Defendant's claim that "A third-party beneficiary relationship does not exist as to service providers unless the *principal purpose* of the promisee (employer) in hiring the promisor (service provider) is to benefit the third party (employee) instead of the promisee (employer)", OB p. 30, is unsupported by case law and Plaintiff has found no contract case outside of the legal malpractice arena, with its sharply circumscribed rules for liability, stating that liability does not attach where the purpose is, say, prominent and important though not 'primary', and a few cases directly contradicting this ADP-made rule; see *Stanton v. Santa Ana Sugar Company, 84 Cal. App. 206, 209; Miles v. Miles, (1926) 77 Cal. App. 219, 228.*