Nos. B243788 and B247392

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION 1

JENNIFER AUGUSTUS, Individually and on Behalf of All Similarly Situated Individuals,

Plaintiff and Appellee,

v.

ABM SECURITY SERVICES, INC., formerly d.b.a. AMERICAN COMMERCIAL SECURITY SERVICES, INC.,

Defendant and Appellant.

On Appeal From The Los Angeles Superior Court
The Honorable John Wiley, Jr.
Nos. BC336416, BC345918 and CG5444421

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INTRODUCTION

Based on a legal theory never endorsed by any other court, and despite extensive evidence of uninjured class members who received exactly the rest breaks required under California law, the trial court certified a sweeping class and awarded over 14,000 class members with vastly divergent experiences a total of nearly $90 million without even holding a trial. The trial court's unprecedented summary-judgment ruling defies law and reason, and should be reversed.

The trial court reached this absurd result by ruling that if an employee carries a radio or cell phone during a rest break, and thus could *potentially* be called back to work in an emergency, the employer has, as a matter of law, failed to provide a lawful rest break. Under the trial court's theory, it is entirely irrelevant whether an employee is ever actually called back to work, or whether an employee whose break is interrupted due to an emergency may restart the break. Instead, according to the trial court, the mere *potential* for interruption is as illegal as the actual denial of a rest break. There is absolutely no basis in California law for the trial court's dramatic distortion of the Labor Code's rest break requirement.

The record is full of examples of uninjured class members who will receive damages for rest breaks they never actually missed. Jesse Wallace, an ABM security guard at an office building in San Francisco, was five minutes into his rest break one morning in 2003 when he was called back to the building to respond to a medical emergency. (23JA6771.) He escorted an emergency team of firefighters up the elevator, and when the emergency was over he took a new, uninterrupted 20-minute rest break. (23JA6772.) That was the only time Wallace was called back from a break during the 10 years he worked at ABM. (23JA6771.) Yet the trial court's ruling compensates Wallace for "missing" his morning rest break not only on that day in 2003, but also for *every other day* he worked at ABM, even though *none* of his other breaks were actually interrupted.

Jesse Wallace is not alone:

- Johan Nowack carried a walkie-talkie on his rest breaks, but he was *never* called back to work during a break. (24JA6806.)
- Jesse Wright was *never* told to interrupt a break in the event of an emergency, but would occasionally hear about an emergency on his radio and *voluntarily* head to the scene. (23JA6779.)
- David Swagerty *did not carry* his radio with him on rest breaks at all. (24JA6814; see also 24JA6815.).

Brushing aside these facts and the genuine disputes they created, the trial court concluded that all class members were not provided with a *single* rest break during the entirety of their employment, and therefore were entitled to additional compensation for *every* day they were employed by ABM.

These windfall awards to uninjured class members follow from the trial court's manifest misinterpretation of California law. The trial court erroneously conflated two distinct legal questions—whether on-call time is compensable as "time worked," and whether an on-call rest break can constitute a legal rest break—and completely disregarded the fact that rest breaks in California are already compensable time. It cited no authority for the proposition that requiring employees to carry radios or remain on call during rest breaks rendered the otherwise compliant breaks illegal. And the trial court's ruling squarely conflicts with the decisions of other courts and the persuasive guidance of the Division of Labor Standards Enforcement ("DLSE"). This fundamental error of law requires reversal.

Even if on-call rest breaks were *per se* illegal under California law (which they are not), the trial court's grant of summary judgment

should still be reversed because it is readily apparent that there are numerous disputed issues of material fact that can be resolved only through a trial. ABM's written policies authorized employees to take rest breaks as required by California law. And ample evidence shows that, in practice, whether class members were required to carry a radio or to respond to emergencies during rest breaks varied widely from location to location. Yet rather than credit this evidence, as it should have, the trial court disregarded it and instead drew a purportedly "reasonable inference" *against the non-moving party*, ABM, that every single rest break provided to class members was actually on-call and thus *per se* illegal. (Mot. for Judicial Notice, Evangelis Decl., Ex. A at p. 2.) This inference, which contradicts the actual testimony of numerous class members, rests almost exclusively on the trial court's erroneous interpretation of snippets from the deposition testimony of a single ABM manager.

The trial court also erred in certifying the class because Plaintiffs failed to prove that ABM has a policy requiring on-call rest breaks that was uniformly applied across the entire class. Without any "glue" binding the class together, adjudicating this case will require myriad individualized inquiries: Plaintiffs will have to show whether

each individual employee was required to carry a radio or cell phone on rest breaks, actually carried a radio or cell phone on rest breaks, and was required to respond to emergencies on rest breaks. They will also have to show for each employee whether any such "requirements" were actually enforced through disciplinary action, and whether that employee's practice reflected compliance with mandatory policies or instead voluntary action that ABM simply recommended or permitted. The need for these individual determinations reflects a substantial "'dissimilarity'" within the class that impedes the "'joint resolution of class members' claims through a unified proceeding.'" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1022, fn. 5, quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof* (2009) 84 N.Y.U. L.Rev. 97, 131.)

* * *

The trial court's baseless and unprecedented interpretation of the rest break requirement would cripple California companies without providing any appreciable benefit to employees. If the trial court's decision is upheld, companies will be forced to banish employees from the worksite and prohibit them from carrying even

their personal cell phones during rest breaks. The ironic result would be a substantial *reduction* of employees' freedom during rest breaks. But even if this myopic view of the law were correct (and it is not), entry of summary judgment was unwarranted and classwide adjudication is impossible. The trial court's decision should be reversed.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. ABM's Operations In California

ABM employs thousands of security guards at residential, retail, commercial office, and industrial sites across California. (See 10JA2965–2966.) At some sites—called "168 hour" locations—only a single guard works at any given time. (See, e.g., 10JA2966.) At larger sites, multiple ABM guards are on duty. (See 10JA2759 [approximately 75 ABM guards assigned to a single large office building].) At many sites, ABM employs "rover" officers who relieve other guards during their meal and rest periods. (See, e.g., 9JA2660.)

B. The Named Plaintiffs

Jennifer Augustus worked as a security guard for ABM at multiple sites. (11JA3063.) Notably, Augustus was for a time a

"relief supervisor," and in that role she "would relieve people for breaks." (4JA1011.)

Emmanuel Davis worked as a security guard at a building with retail space and commercial offices in San Francisco. (8JA2308.) Davis claimed that he was not provided with rest breaks while he worked at ABM, but he testified that he took "about ten" informal cigarette breaks over the course of a normal work day. (11JA3076.)

Delores Hall worked for ABM for 13 years until 2006. (See 4JA1127; 4JA1119.) Hall's employee handbook stated that her "supervisor" would "schedule[] meal and break periods," but she claimed that she was unaware of this policy and that her supervisor in fact did not do so. (4JA1125.)

C. ABM's Provision Of Rest Breaks

ABM produced significant evidence that it provided rest breaks to the vast majority, if not all, of its security guards.

ABM's written rest break policies informed guards that they were "authorize[d] and permit[ed]"to take rest breaks "as required by California law." (9JA2418; see also 3JA628.) And, in fact, numerous ABM guards stated in declarations that they received rest breaks. (See, e.g., 10JA2933 ["each day I take two rest breaks to use the

bathroom or step outside for some fresh air"]; 10JA2946 ["I always receive 15 minute rest periods" twice per shift]; 11JA2995 ["I take my scheduled meal and rest breaks every day"].) In many locations, rovers like Augustus herself were employed specifically to give guards an opportunity to take breaks. (E.g., 11JA3012–3013; 4JA1011; 9JA2660.)

Class member depositions revealed that while some employees believed they were required to carry radios and respond to calls during breaks (24JA6838), others did not carry their radios with them at all (24JA6814-24JA6815). Class members who did respond to emergencies during breaks could re-start and take their breaks without interruption after the emergency subsided. (See, e.g., 24JA6828; 24JA6833–6834.)

To counter this evidence, Plaintiffs relied on the deposition testimony of a few ABM managers, most significantly Fred Setayesh, an ABM senior branch manager designated as the person most knowledgeable on topics including ABM's rest break policies and procedures. (23JA6622.) Setayesh testified that some employees at *single-guard sites* would not be relieved from all duties during breaks. (See 11JA3098 ["I said they're not relieved from all duties, but they

are – they can take their breaks"]; 12JA3504 ["[t]hey would not be relieved from all duties, but they would be taking a break as they need"].)

Plaintiffs also noted that ABM sought (and received) from the DLSE two exemptions from the rest break requirement for some sites. (See 10JA2821.) The first exemption applied at 170 remote locations, effective from December 27, 2006 to December 26, 2007. (10JA2822.) Setayesh testified that ABM complied with "the applicable wage order provisions for rest breaks" before the exemption, and did not change its rest break practices even after it received the exemption. (10JA2818–2819.)

On August 1, 2009, the DLSE granted ABM's request for renewal of its exemption, effective through July 31, 2010, but limited this exemption to swing- and night-shift security guards, leaving out day-shift guards at small or remote sites. (12JA3367.) ABM did not take advantage of this exemption, believing it would be difficult to administer. (See 13JA3756.)

In connection with the renewal request, the DLSE investigated ABM's rest break practices at some Northern California sites. (13JA3622.) The DLSE's report found that ABM provided morning,

but not afternoon, rest breaks to its employees at the investigated sites. (*Ibid.*) But the DLSE acknowledged that "[m]ost of the job sites of ABM are located in [the] Southern California area," and did not purport to make any findings about ABM's rest break policies and practices across the entire state. (*Ibid.*)

II. PROCEDURAL HISTORY

A. Plaintiffs' Claims

In 2005 and 2006, the named Plaintiffs filed three separate putative class actions alleging meal- and rest-break violations that entitled them to damages under the Labor Code and restitution and injunctive relief under the Unfair Competition Law, Bus. & Prof. Code § 17200. (1JA1.) After the cases were related and consolidated, Plaintiffs filed a "Master Complaint" alleging that ABM "failed to provide net ten minute rest periods for work shifts exceeding four hours . . . and/or uninterrupted, unrestricted meal periods of not less than thirty minutes for work shifts exceeding five hours." (1JA79.)

B. Initial Discovery And Class Certification

Discovery revealed that ABM employees' experiences with respect to meal and rest breaks varied widely. For example, Vasile Chicu stated that he "always receive[d]" two "15 minute rest periods" in addition to his 30-minute meal break. (10JA2946.) By contrast,

Emanuel Davis testified that he "never" took a formal rest break, although he did go outside to smoke while on his shift. (11JA3076–3077.)

In their September 2008 motion for class certification, Plaintiffs claimed that employees had been required to carry radios or cell phones and respond to emergency calls on their breaks, and argued that these requirements invalidated every employee's rest breaks. (See 1JA124–125.) Based largely on Setayesh's testimony, Plaintiffs contended that *every* rest break was potentially subject to interruption and therefore on call and *per se* invalid. (See 1JA124–126.)

In a February 27, 2009 order, the trial court (Judge Lichtman) certified a class of all ABM employees who worked "in any security guard position in California at any time during the period from July 12, 2001 through entry of judgment . . . [and] who worked a shift exceeding four (4) hours or major fraction thereof without being authorized and permitted to take an uninterrupted rest period of net ten (10) minutes per each four (4) hours or major fraction thereof worked and [had] not been paid one additional hour of pay at the employee's regular rate of compensation for each work day that the

rest period was not provided." (7JA1999–2000.) The cursory order was not accompanied by a full written opinion. (7JA2000.)[1]

C. The Trial Court Grants Plaintiffs' Motion For Summary Adjudication On The Rest Break Claim

After class certification, the case was reassigned to Judge Kuhl. (7JA2032.) On July 16, 2010, Plaintiffs and ABM filed cross-motions for summary judgment or summary adjudication. Both sides sought summary adjudication of the rest break claim, and ABM moved in the alternative for decertification.[2] (10JA2684; 7JA2051.)

On December 23, 2010, the trial court (Judge Kuhl) granted Plaintiffs' motion for summary adjudication of the rest break claim. (13JA3765.) Relying on cases holding that time spent on call was compensable "time worked," the court endorsed Plaintiffs' argument

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[1] The class definition excluded employees who had been paid statutory penalties for meal and rest period violations and employees in the rest period subclass who had worked at sites covered by ABM's rest period exemption. (7JA1999–2000.) The trial court also certified a class of security guards in California who "worked a shift of more than five (5) hours without being afforded an uninterrupted, unrestricted meal period of not less than 30 minutes." (7JA1999.) Plaintiffs' meal period claims, which were subsequently decertified, are not at issue in this appeal.

[2] ABM also moved for summary judgment on the meal period claim. (7JA2051.)

that the mere possibility of interruption rendered a guard on duty during a rest break. (13JA3758–3760.) The trial court applied the compensable-time standard to determine the validity of rest breaks, because "otherwise a 'rest period' would be part of the work day for which the employer would be required to pay wages in any event." (13JA3760.) The trial court thus found that ABM had "policies mak[ing] all rest breaks subject to interruption in case of an emergency or in case a guard is needed." (13JA3757.) ABM's motion for decertification of the rest break class was denied without explanation. (See 13JA3764–3765.)

D. The Parties Engage In Further Discovery

Following Judge Kuhl's summary adjudication ruling, the case was reassigned to Judge Elias. (See 13JA3770.) ABM requested and received permission to take class member depositions focused on the core legal issue raised by the summary adjudication order: whether every ABM security guard was on call for every rest break he received during the class period. (See 20JA5850; 3RT5102:11–16; 3RT5105:12–18.) Judge Elias also redefined the class period as extending from July 12, 2001 through July 1, 2011. (14JA3926.)

E. The Trial Court Grants Plaintiffs' Motion For Summary Judgment On The Rest Break Claim And Awards Damages And Attorneys' Fees

The case was next reassigned from Judge Elias to Judge Wiley. (14JA3931.) On February 8, 2012, Plaintiffs moved for summary judgment, this time seeking damages. (14JA3940.) Concurrently, ABM moved to decertify the class, arguing that Plaintiffs' proposed trial plan violated Due Process and amounted to an impermissible "Trial by Formula," *Wal-Mart Stores, Inc. v. Dukes* (2011) --- U.S. ---, 131 S.Ct. 2541 (*Dukes*), because it prevented ABM from asserting defenses to individual claims. (20JA5717.) ABM argued that class member depositions showed "differing applications" of the alleged "policy found to be impermissible in [Judge Kuhl's] Order," which necessitated individualized inquiries that in turn prohibited classwide adjudication. (*Ibid.*)

Before the July 6, 2012 hearing on the parties' motions, the trial court concluded in a written tentative opinion that "if you are on call, you are not on break." (Mot. for Judicial Notice, Evangelis Decl., Ex. A at p. 1.) The tentative opinion, which claimed the issue called for a "simple analysis," dismissed as insignificant employee testimony showing variations in the rest breaks received by class members. (*Id.*

at p. 2.) The court noted that David Swagerty, who had testified that he did not carry a radio on his breaks, might be "hail[ed] back to work" by other means, and "[t]he reasonable inference" was that all class members' "situation[s]" actually "conform[ed] to the general pattern of evidence, which is that [ABM] required all its workers to be on-call during their breaks." (*Id.* at p. 2.) At the hearing, the court stated, "I'm going to stand by the tentative in all respects." (3RT6335.)

The trial court also denied ABM's motion to decertify the class. *Dukes* was, "in [the court's] view," irrelevant because here "management [said,] 'we have a uniform policy against freeing our workers from all duties during their breaks.'" (3RT6308.) The court further stated that this was "a 15,000-person one-issue case" that was "perfect for class treatment." (*Id.* at p. 6326.)

On July 6, 2012, the trial court granted Plaintiffs' motion, and awarded Plaintiffs $89,742,126.00 (27JA7838–7841), which included $55,887,565.00 in statutory damages pursuant to Labor Code section 226.7, $31,204,465.00 in pre-judgment interest, and $2,650,096.00 in waiting time penalties pursuant to Labor Code section 203. (*Ibid.*)

Judgment was entered on July 31, 2012, and ABM filed a timely notice of appeal on August 29, 2012. (*Ibid.*; 27JA7892–7896.)

On February 15, 2013, the trial court awarded Plaintiffs' attorneys 30% of the common fund—nearly $27 million—and $4,455,336.88 in fees under Code of Civil Procedure section 1021.5. (30JA8769). An amended judgment was entered on February 22, 2013, and ABM filed a timely notice of appeal on March 8, 2013. (30JA8775–8778; 30JA8792–8796.)

On April 30, 2013, this Court consolidated these appeals. (Order Consolidating Appeals [Apr. 30, 2013].)

STANDARD OF REVIEW

On appeal from a grant of summary judgment, the court "review[s] the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel Nat., Inc.* (2000) 24 Cal.4th 317, 334.) Summary judgment may be granted only if "'all the papers submitted show' that 'there is no triable issue as to any material fact.'" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843, quoting Code Civ. Proc., § 437c, subd. (c).) The court must

view all submitted evidence "in the light most favorable to the opposing party." (*Ibid.*)

A trial court's class certification ruling is reviewed for abuse of discretion. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1022 (*Brinker*).) "[T]he trial court's finding that common issues predominate generally is reviewed for substantial evidence." (*Ibid.*) Evidence is "substantial" if it is "not qualified, tentative, and conclusionary but, rather, of ponderable legal significance . . . reasonable in nature, credible, and of solid value." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 329, quotation marks and citations omitted; see also *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652 [substantial evidence is not "merely an appellate incantation designed to conjure up an affirmance"]; *Kuhn v. Dept. of Gen. Services* (1994) 22 Cal.App.4th 1627, 1633, quoting *Bowman v. Bd. of Pension Commissioners* (1984) 155 Cal.App.3d 937, 944 [["[T]his does not mean we must blindly seize any evidence . . . in order to affirm the judgment. . . . 'A decision supported by a mere scintilla of evidence need not be affirmed on review.'"].) Moreover, a "decision that rests on an error

of law is an abuse of discretion." (*Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 939.)

Finally, where, as here, an appellant contends that "the criteria for an award of attorney fees" were not satisfied, the award is reviewed de novo. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.)

ARGUMENT

I. THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT SHOULD BE REVERSED BECAUSE AN ON-CALL REST BREAK IS NOT *PER SE* ILLEGAL

The classwide judgment entered below rests on a faulty legal premise: that "if you are on call, you are not on break." (Mot. for Judicial Notice, Evangelis Decl., Ex. A at pp. 1–2.) Far from "[having] been the law for many years" (*ibid.*), the trial court's unprecedented rule that on-call rest breaks are illegal *per se* finds no support whatsoever in law or logic. California courts have repeatedly held that an employee's use of a pager or cell phone while on call—the fact central to the trial court's decision here—actually militates *against* a determination that an employee was working.

The trial court's sweeping conclusion that ABM failed to provide *any* of its over 14,000 security guards even a single compliant

rest break depended on the erroneous assumption (contrary to the evidence) that ABM's "policies make all rest breaks subject to interruption in case of an emergency or in case a guard is needed." (13JA3757.) The trial court concluded that "[b]ecause a guard must be available for these situations," "guards must keep their cell phones and pagers on" and "remain on call." (13JA3757–3758.)

Citing two cases for the proposition that "the time an employee is on duty and subject to call is compensable work time" (*ibid.*), the court jumped to the conclusion that so long as guards "remain on call," "it is irrelevant that an employee . . . may engage in leisure activities during [rest] breaks" (13JA3759–3760). That rest breaks were rarely interrupted, or that guards used breaks for "non-work related activities . . . such as smoking cigarettes, surfing the internet, reading a newspaper or book, having a cup of coffee, etc." was irrelevant. (13JA3757–3758.) Instead, the court reasoned, "[w]hat is relevant is whether the employee remains subject to the control of an employer," because "a rest period must not be subject to employer control; otherwise a 'rest period' would be part of the work day for which the employer would be required to pay wages in any event." (13JA3760.) And "because [ABM's security guards] remain on call,"

the court posited, "the guards are *always* subject to [ABM's] control," (13JA3758, italics added), and no guard *ever* took a legally compliant rest break (13JA3761). "Put simply"—the trial court later explained—"if you are on call, you are not on break." (Mot. for Judicial Notice, Evangelis Decl., Ex. A at p. 1.)

Because the trial court's summary judgment and class certification rulings are premised on clear legal errors, including application of the wrong legal test, the Court should reverse summary judgment and certification of the rest break class.

A. California Law Allows Greater Restrictions On Rest Breaks Than On Non-Compensable Time

The trial court erroneously conflated two distinct questions under California law: first, whether on-call time is compensable as "time worked"; and second, whether an on-call rest break is sufficiently "off duty." By statute, of course, rest breaks are *always* compensable as "hours worked." (Cal. Code Regs., tit. 8, § 11040, subd. (12)(A) ["Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages"].) Whether a rest break constitutes "compensable work time" therefore says nothing about whether that rest break is legally compliant. (13JA3758.)

The rule that rest breaks are *always* compensable would make no sense if rest breaks could not be more restricted than non-work time. Indeed, that a rest break lasts just 10 minutes implies certain reasonable restrictions not present during non-work hours. For example, no employee could use her 10-minute break to go to the movies or attend a basketball game—things she would be free to do when not at work. And the short duration of any rest break necessarily imposes certain geographic restrictions: An employee working in Pasadena could not use his 10-minute break to go for a stroll on the Santa Monica Pier or even a hike in Griffith Park—options open to him during non-work hours. But he *could* use a rest break to step outside for a cigarette, take a short walk or run a quick errand—all things that ABM guards, *including one of the named plaintiffs*, could do during their rest breaks. (E.g., 10JA2923; 11JA3076; 11JA3006–3007; 24JA6804.)

Moreover, the Wage Order's requirement that "[s]uitable resting facilities shall be provided . . . and shall be available to employees during work hours" would be pointless if the law also required that employees be impossible to contact during their breaks, as the trial court ruled here. (Cal. Code. Regs., tit. 8, § 11040, subd.

(13)(B); see Mot. for Judicial Notice, Evangelis Decl., Ex. A at p. 2; see also Dept. Industrial Relations, DLSE Opn. Letter No. 2002.01.28 (Jan. 28, 2002) p.1 [recognizing that "rest periods differ from meal periods" in that employees must be allowed to "leave the employer's premises" during meal periods].) Indeed, a rule *requiring* that employees stay out of earshot during breaks would, perversely, *restrict* employees' freedom. (See *Brinker*, *supra*, 53 Cal.4th at pp. 1038–1039 ["Indeed, the obligation to ensure employees do no work may in some instances be inconsistent with the fundamental employer obligations associated with a meal break: to relieve the employee of all duty and relinquish any employer control over the employee and how he or she spends the time"].)

Likely for these reasons, in *Temple v. Guardsmark* (N.D.Cal. Feb. 22, 2011, No. C 09-02124 SI) 2011 WL 723611, the Northern District of California explained that an "'on call' rest period is acceptable" under California law. (*Id.* at p. *6 [guards who infrequently "needed to respond in case of emergency," and in that event "would receive another uninterrupted rest period," received valid breaks].) Similarly, in *White v. Salvation Army* (Wash. Ct. App. 2003) 75 P.3d 990, 995, the Washington Court of Appeals held that

while that state's rest-period statute required "relief from work or exertion" during rest periods, employers could keep employees on call during rest periods to respond to telephone calls and customer needs.

The paid rest break requirement also would make little sense if rest breaks could not be more restricted than off-duty *meal* periods, which need not be paid. (See Cal. Code Regs., tit. 8, § 11040, subd. (11)(A).)[3] Yet federal courts applying the Fair Labor Standards Act's ("FLSA") analogous meal-period provisions, including in cases involving security guards,[4] have concluded that meal periods may be on call.[5]

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[3] In *Brinker*, the Supreme Court held that an employer satisfies its obligation to provide *meal* periods "if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so." (53 Cal.4th at p. 1040.) The Court explained that it could not "delineate the full range of approaches that in each instance might be sufficient to satisfy the law" because "[w]hat will suffice may vary from industry to industry." (*Ibid.*) *Brinker* did not address the proper standard for assessing the legality of rest breaks, let alone what would suffice within the security industry.

[4] (E.g., *Agner v. United States* (1985) 8 Cl. Ct. 635 [government security guards' meal periods were duty-free even though guards were required to carry radios and respond to emergency calls, because radios actually *enhanced* guards' freedom]; *Kaczmerak v. Mt. Sinai Medical Center* (E.D.Wisc. Feb. 24, 1988, No. 86-C-0472) 1988 WL 81633 [rejecting FLSA claims of guards required

[Footnote continued on next page]

B. The Compensable-Time Cases Cited By The Trial Court Are Irrelevant To The Adequacy Of The Rest Breaks ABM Provided

The trial court's unprecedented decision was based on two inapposite cases that say nothing whatsoever about whether minimally restricted paid rest breaks are permissible, but instead consider whether employees' tightly restricted sleep and travel time must be compensated. (13JA3758–3760.)

In *Morrillon v. Royal Packing Co.* (2000) 22 Cal.4th 575, the Supreme Court held that "time agricultural employees are required to spend traveling on their employer's buses is compensable time . . .

[Footnote continued from previous page]

to listen to radios and respond to emergencies during meal breaks even where interruptions occurred several times each month].)

[5] (E.g., *Roy v. County of Lexington* (4th Cir. 1998) 141 F.3d 533, 544–545 [firefighters and police officers were "completely relieved from duty" where they had "no official responsibilities during [meal periods] other than to respond to" emergencies]; *Barefield v. Village of Winnetka* (7th Cir. 1996) 81 F.3d 704, 707, 710–711 [employees who had to "remain in radio or telephone contact, remain in or near . . . Winnetka, use an official patrol car to travel, and remain in uniform" had valid meal periods]; *Blaney v. Charlotte-Mecklenburg Hospital Authority* (W.D.N.C. Sept. 16, 2011, No. 10-CV-592-FDW-DSC) 2011 WL 4351631, at p. *6 [break where nurses required "to be 'on call' during a meal break [by carrying pagers], where there is no actual interruption" valid under FLSA].)

because they are 'subject to the control of an employer' and do not also have to be 'suffered or permitted to work' during this travel period." (*Id.* at p. 578.) There, Royal, "required [employees] to meet" at specified "assembly areas" to be transported, "in buses that Royal provided and paid for," to and from the fields where they worked. (*Id.* at p. 579). "Royal's work rules prohibited employees from using their own transportation to get to and from the fields." (*Ibid.*) The employees were "under [Royal's] control during the required bus ride" because they could not "use 'the time effectively for [their] own purposes'"—they "could not drop off their children at school, stop for breakfast before work, or run other errands requiring the use of a car" by virtue of "travel that the employer specifically compels and controls." (*Id.* at pp. 586–587.)

The second case the trial court relied upon, *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, also says nothing about the validity of rest breaks. There, the Court of Appeal held that employees at group homes must be paid for on-premises sleep time. (*Id.* at pp. 23–24.) The employer, ARC, "required the employees to stay at the group home for an overnight work shift. From 10 p.m. to 6 a.m., the employees were on call but

ARC allowed them to sleep," "[t]ypically . . . in the group home's study room," which "generally contained a telephone." (*Id.* at p. 24.) The court concluded that, during that time, the employees were "required to be at the employer's premises and subject to the employer's control" and therefore must be compensated. (*Id.* at p. 30.)

Whatever *Morillon* or *Aguilar* concluded about when travel time or sleep time is compensable, neither case says anything about whether the *paid rest breaks* ABM allegedly provided were adequate. Indeed, the entire point of the analysis in these cases was to answer a question—whether an employer was required to compensate employees for their time—that is simply not at issue in the rest break context, where employers are required by law to pay for all time spent on rest breaks. And neither case remotely supports the broad *per se* rule that the trial court extrapolated from them—that on-call rest breaks are impermissible because they are "compensable work time." (See 13JA3758.) In short, because all rest breaks are compensable, these cases are irrelevant.

C. Even If Compensable-Time Analysis Were Relevant Here, The Trial Court's Decision Was Erroneous

Even if a rest break's legal sufficiency did turn on whether it constitutes "compensable work time" (which it does not), the trial court's compensable-time analysis is itself fatally flawed. As explained above, the trial court concluded (despite contrary evidence, see *post*, pp. 38–42) that all guards "remain[ed] on call" during breaks, and every break therefore constituted "compensable work time"—regardless of what any guard actually did during a break, and even if that break was never interrupted. (13JA3757–3760.) But that "simple analysis" (Mot. for Judicial Notice, Evangelis Decl., Ex. A at p. 2)—through which the trial court concluded that the millions of rest breaks ABM provided were all inadequate—conflicts with California law, which considers many factors to determine whether on-call time is even compensable.

1. Whether On-Call Time Is Compensable Depends On A Fact-Specific, Multi-Factor Analysis

The Court of Appeal has explained that "[o]n-call waiting time *may be* compensable if it is spent primarily for the benefit of the employer." (*Gomez v. Lincare* (2009) 173 Cal.App.4th 508, 523 (*Gomez*), italics added; citing *Armour & Co. v. Wantock* (1944) 323

U.S. 125, 132.) "[W]hether the on-call waiting time is spent predominantly for the employer's benefit depends on two considerations: (1) the parties' agreement, and (2) the degree to which the employee is free to engage in personal activities." (*Ibid.*, citing *Owens v. Local No. 169, Assn. of Western Pulp & Paper Workers* (9th Cir. 1992) 971 F.2d 347, 350–355 (*Owens*).) That second consideration, in turn, depends on "a nonexclusive list of factors, *none* of which is dispositive . . . : '(1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employee's movements; (3) whether the *frequency* of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities; (6) whether use of a pager could *ease* restrictions; and (7) whether the employee had *actually* engaged in personal activities during call-in time.'" (*Ibid.*, italics added; quoting *Owens*, 971 F.2d at p. 351; accord *Seymore v. Metson Marine, Inc.* (2011) 194 Cal.App.4th 361, 374 (*Seymore*); *Mendiola v. CPS Security Solutions, Inc.* (2013) 217 Cal.App.4th 851, 865–866 (*Mendiola*).)

The DLSE applies similar factors. (E.g., Dept. Industrial Relations, DLSE Opn. Letter No. 1993.03.31 (Mar. 31, 1993) p.4 ["such factors as (1) geographical restrictions on employees' movements; (2) required response time; (3) the nature of the employment; and, (4) the extent the employer's policy would impact on personal activities during on-call time, must all be considered"]; Dept. Industrial Relations, DLSE Opn. Letter No. 1994.02.16 (Feb. 16, 1994) p. 4 [same]; Dept. Industrial Relations, DLSE Opn. Letter No. 1998.12.28 (Dec. 28, 1998) p. 4 [considering similar factors]). Moreover, the DLSE has repeatedly refused to "take the position that simply requiring [a] worker to respond to call backs is so inherently intrusive as to require a finding that the worker is under the control of the employer." (DLSE Opn. Letter No. 1993.03.31 at p. 4; DLSE Opn. Letter No. 1994.02.16 at p. 4.) And, consistent with California courts' conclusion that "use of a pager could *ease* restrictions" on on-call employees (e.g., *Gomez*, *supra*, 173 Cal.App.4th at p. 523, italics added), the DLSE has repeatedly affirmed that "the simple requirement that the employee wear a beeper and respond to calls, without more, is not so inherently intrusive as to require a finding that the employee is subject to the employer's control so as to require the

employee be paid for all hours the beeper is worn" (DLSE Opn. Letter No. 1998.12.28 at p. 4); accord Dept. Industrial Relations, DLSE Enforcement Policies & Interpretations Manual (June 2002 rev.) § 47.5.5).

Thus, in *Gomez v. Lincare, Inc.*, *supra*, the Court of Appeal rejected medical service representatives' claims for compensation "for the entire time they were on call during the evenings and weekends waiting for patient calls, but when they were *not* actually responding to pages telephonically or in person." (173 Cal.App.4th at p. 523.) The court explained that "Lincare's written on-call policy provided . . . : 'The Service Representative on-call will be available via telephone or company-provided beeper to provide service at all times as follows: [¶] ▪ Telephone response within 30 minutes [¶] ▪ On-site response within 2[] hours as necessary.'" (*Ibid.*) Applying the "nonexclusive list of factors" detailed above, the court determined "that the on-call waiting time did not unduly restrict plaintiffs' ability to engage in personal activities." (*Id.* at pp. 523–524.) It observed that "[p]laintiffs were provided pagers by Lincare," and "[p]laintiff's depositions confirmed that they had engaged in some personal activities while on call[.]" (*Id.* at p. 524.)

By contrast, in *Seymore v. Metson Marine, Inc.*, *supra*, the court held that employees who "worked consecutive 14-day 'hitches' on Metson's ships"—and were required to sleep onboard the ships—were entitled to compensation for *part* of their daily "off-duty standby time." (194 Cal.App.4th at pp. 365, 375.) Several of "the factors articulated in the federal *Owens* decision and embraced in *Gomez*" pointed *away from* "employer control": Employees could read, watch television or surf the Internet aboard ship, and could leave the ship to run personal errands. (*Id.* at p. 375.) But there was "one critical difference" from cases in which on-call time was found not to be compensable: "in none of those cases was the employee required to sleep at the employer's premises." (*Id.* at p. 376)

Likewise, in *Mendiola*, *supra*—where "trailer guards" were "expected to spend the night at their assigned job-site" so they could "be available to investigate alarms and other suspicious circumstances and to prevent vandalism and theft"—the court, weighing the *Gomez* factors, concluded that the guards' on-call time was so restricted as to be compensable. (217 Cal.App.4th at p. 854.) "Most important" was the court's conclusion that the guards did not "enjoy the normal freedoms of a typical off-duty worker, as they [were] forbidden to

have children, pets or alcohol in the trailers [or to] entertain or visit with adult friends or family without special permission." (*Id.* at p. 869.)

Federal courts apply the same multi-factor analysis to determine whether time is compensable under the FLSA. In *Berry v. County of Sonoma* (9th Cir. 1994) 30 F.3d 1174, for example, the Ninth Circuit held that coroners were not entitled to compensation for on-call time, reasoning that "'the employee . . . [need not] have substantially the same flexibility or freedom as he would have if not on call, else all or almost all on-call time would be working time, a proposition that the settled case law and the administrative guidelines clearly reject.'" (*Id.* at pp. 1182–1183, quoting *Owens*, *supra*, 971 F.2d at pp. 350–351.) The court "conclude[d] the coroners' use of pagers *eases* restrictions while on-call and permits them to more easily pursue personal activities," and emphasized that "[t]he inquiry is . . . whether [employees] *actually* engage in personal activities during on-call" time. (*Id.* at pp. 1184–1185, italics added.) Indeed, "in the vast majority of reported cases dealing with on-call time, the hours were

held non-compensable under the FLSA." (*Brekke v. City of Blackduck* (D.Minn. 1997) 984 F.Supp. 1209, 1220.)[6]

2. The Trial Court Failed To Apply The Multi-Factor Analysis For Determining Whether On-Call Time Is Compensable

Even if compensable-time cases were relevant to assessing the validity of rest breaks (which they are not), the trial court failed to apply the multi-factor analysis California law requires. Instead, the trial court reached the unprecedented and erroneous conclusion that on-call rest breaks——i.e., rest breaks that potentially might be interrupted—are *always* impermissible. This conclusion turned California's compensable-time analysis on its head: Simply carrying a radio, pager, or cell phone—which California courts have concluded

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[6] (See, e.g., *Rutlin v. Prime Succession* (6th Cir. 2000) 220 F.3d 737, 744 [funeral director who received 15–20 calls per night did not face "restrictions . . . so onerous as to require compensation" for on-call time]; *Gilligan v. City of Emporia* (10th Cir. 1993) 986 F.2d 410 [utility employees not entitled to compensation for on-call time even though required to wear pager and subject to discipline for failure to comply]; *Bright v. Houston Northwest Medical Center Survivor, Inc.* (5th Cir. 1991) 934 F.2d 671 [en banc] [no liability for employer even though employee was always on call and was required to carry pager at all times]; *Henry v. Med-Staff, Inc.* (C.D.Cal. July 5, 2007, No. SA CV 05-603 DOC ANX), 2007 WL 1998653, at pp. *8–11 [employees not entitled to compensation for on-call waiting time under FLSA because they rarely worked during on-call periods, and provision of cell phones "weighs against compensating on-call time on an hourly basis"].)

"could *ease* restrictions" on on-call employees (*Gomez*, *supra*, 173 Cal.App.4th at p. 523, italics added; see also *Seymore*, *supra*, 194 Cal.App.4th at p. 374; *Mendiola*, *supra*, 217 Cal.App.4th at pp. 865–866)—*by itself* invalidated guards' rest breaks. (See 13JA3757–3758.)

Although the court acknowledged that one witness, David Swaggerty, "testified [at his deposition] that he did not carry a radio on certain 'breaks,'" it nonetheless concluded "there is no evidence that while on 'break' he was off-call or off-duty." (Mot. for Judicial Notice, Evangelis Decl., Ex. A at p. 2.) It reasoned that "[t]here are many alternatives to the radio for hailing a person back to work: cell phone, pager, fetching, hailing, and so on"; on that basis, the court concluded that ABM "required all its workers to be on call during their breaks, and so these on-call breaks are all legally invalid." (*Ibid.*) That conclusion starkly conflicts with California law.

So, too, does the trial court's disregard for the other *Gomez* factors. For example, while *Gomez* holds that one relevant factor is "whether the frequency of calls was unduly restrictive" (*Gomez*, *supra*, 173 Cal.App.4th at p. 523), the trial court ignored evidence "that interruptions are so rare that [ABM's] guards [were] effectively

getting their breaks" (13JA3757; see also *Seymore*, *supra*, 194 Cal.App.4th at p. 375 ["emergencies were rare and . . . plaintiffs were seldom called back to the ship"]). A second *Gomez* factor asks "whether the employee had actually engaged in personal activities during call-in time" (*Gomez*, 173 Cal.App.4th at p. 523), but the trial court inexplicably concluded that "it is irrelevant that an employee may read or engage in other personal activities during 'down time'" (13JA3760).

Of course, some *Gomez* factors are clearly irrelevant in the rest-break context. As explained above, as a practical matter, the short duration of rest breaks *itself* imposes "geographical restrictions on employee's movements" and, by definition, "fixe[s]" an employee's required response time. (*Gomez*, *supra*, 173 Cal.App.4th at p. 523.) And the most "critical" factor—whether employees are "required to sleep at the employer's premises" (*Seymore*, *supra*, 194 Cal.App.4th at p. 376)—has no practical application to rest breaks.

Nonetheless, to the extent cases from the compensable-time context are relevant, the trial court's failure to even cite, let alone weigh, the *Gomez* factors constituted plain legal error. And its conclusion that because *some* guards may have carried cell phones or

pagers, *all* rest breaks were necessarily invalid—even though California courts have found that cell phones or pagers may "*ease* restrictions" on on-call time—only compounded its grievous mistake. (*Gomez*, *supra*, 173 Cal.App.4th at p. 523, italics added.)

* * *

The trial court's unprecedented rule that on-call rest breaks are necessarily invalid is contrary to California law and rests on a fundamental misunderstanding of compensable-time cases that are inapposite in any event. Under *any* reasonable test (compensable-time or otherwise)—and even accepting as true Plaintiffs' allegation that ABM provided only on-call rest breaks—ABM satisfied its obligation to provide rest breaks. Accordingly, the Court should reverse the grant of summary judgment and certification of the rest break class.

II. THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT SHOULD ALSO BE REVERSED BECAUSE TRIABLE ISSUES OF MATERIAL FACT EXIST

Even if the trial court were correct that California law imposes a *per se* prohibition on-call rest breaks (which it does not), summary judgment against ABM would still be unwarranted because evidence in the record creates numerous triable issues of material fact, including:

- Whether ABM had a uniform policy requiring *every* class member to carry radios or cell phones and stay on call during rest breaks;
- Whether any such policy was uniformly enforced;
- Whether all class members *actually* took on-call rest breaks *every* day of their employment at ABM; and
- Whether employees were subject to discipline for failing to carry radios or respond to calls on rest breaks.

Despite their burden on summary judgment, Plaintiffs never even attempted to prove that *every* rest break ABM provided to class members was in fact an on-call break. Plaintiffs introduced no evidence that ABM had uniform "policies" mandating that employees carry radios or cell phones or remain on call during rest breaks. Instead, Plaintiffs mischaracterized the testimony of ABM manager Fred Setayesh that *some* employees, at *some* locations, were required to be on call as a purported "admission" that ABM had a uniform policy requiring *all* class members to remain on call during rest breaks. The trial court adopted this distorted view of the evidence, resting its ruling on a supposed "acknowledgment" that ABM never made and "policies" that never existed. (See 13JA3757.)

On a motion for summary judgment, the moving party "bears [the] burden of production to make a prima facie showing of the nonexistence of any genuine issue of material fact." (*Aguilar v.*

or 4:05 p.m. breaks, do you carry your radio? A. No."].)[7] Stephen Powell testified that he had the option to put his radio away before rest breaks. (14JA3902.) Stephen Kamau testified that "[e]very day, someone comes to relieve [him] for rest and meal breaks" and that on these breaks he is able "to go outside" and "walk around" or "get something to eat at Subway or some other place." (11JA3006–3007.) Albert Carey declared that he had "never been refused a rest or lunch break," that he took his breaks "every day," that he would "go to the break room, step outside, or sit in the nearby plaza during these breaks," and that he "d[id] not do any work during these breaks." (3JA843.) And Johan Nowack testified that he would go across the street from his building during his morning rest break to place an order at a café or taco truck so that he could pick up his order at lunch and without waiting in line. (24JA6804).)

ABM employees (including those who carried radios on breaks) did not uniformly testify that they were required to respond to emergencies during rest breaks. Stephen Powell testified that he knew

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[7] ABM's employee handbook noted that "[p]ortable two-way radios" would be supplied at only "*some* duty stations." (2JA549, italics added.) In addition, the handbook prohibited employees from carrying personal pagers. (2JA548.)

of no policy that would require him to respond to emergencies if he were on break. (24JA6828.) Jesse Wright, who did carry a radio, testified that he was not required to respond to emergencies while on breaks, but in some instances had *voluntarily* chosen to respond. (See 23JA6779.) Rather than being "called off break" by an ABM manager, Wright would "hear about it and . . . just go . . . . [He] never had [a supervisor] go, ['']I need you to go to wherever.['']" (*Ibid.*) And even though Johan Nowack carried a radio, he was never called back from a rest break. (24JA6806.) He testified that when he took a break, another officer "relieve[d]" him of his duties. (*Ibid.*)

ABM's managers corroborated this evidence. Fred Setayesh emphasized repeatedly that ABM's practice with respect to on-call rest breaks varied depending on the location and circumstances of the job site. (See *ante*, at pp. 7–8) Glenn Gilmore, ABM's Regional Vice President for Northern California, testified that ABM's rest break policies "depend[] on the kind of location we are servicing, because we don't operate the exact same way." (6JA1570.) Milan Morgan, a site manager, testified that ABM did not "all the time" have a way to reach an employee during a break. (23JA6762.) Asked specifically

whether employees "don't have radios," he responded: "Not all the locations, no." (*Ibid.*)[8]

Moreover, ABM's written policies authorized employees to take rest breaks as required by law. ABM's "New Hire Orientation" materials stated that "[ABM] authorizes and permits employee to take your paid, 10-minute rest break as required by California law," but nowhere required employees to remain on call during rest breaks. (9JA2412, 2418.) ABM's employee handbook similarly omits any reference to on-call rest breaks. (12JA3512–3538.) Thus, the only evidence of ABM's actual rest break policies in the record

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[8] The trial court erroneously excluded this deposition testimony on the basis that it lacked foundation. (See Mot. for Judicial Notice, Evangelis Decl., Ex. A at 2; 3RT6322:1–4.) But evidence established that Morgan was an ABM manager who was "responsible for approximately 30 accounts in the Los Angeles area" for which he "overs[aw] all security operations." (5JA1331.) Moreover, Morgan "regularly visit[ed] the accounts under [his] supervision" and "talk[ed] to the officers who work[ed] at these accounts to ensure there [were] no problems, and that they [were] performing their job duties in compliance with company policy." (*Ibid.*) Because a reasonable jury could have concluded that Morgan had personal knowledge of guards' use of radios at different ABM locations, ABM met its burden to present "evidence sufficient to sustain" such a finding. (Evid. Code, § 403.) Therefore, under any standard of review, the trial court's exclusion of this testimony was erroneous. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535.)

demonstrates that it provided precisely the rest breaks required by law.

The trial court nonetheless assumed that *every* ABM employee was denied a rest break *every* single day. That assumption was wrong: Plaintiffs never proved that ABM had a uniform policy requiring rest breaks to be on call, much less that such a policy was uniformly implemented, and thus failed to satisfy their burden on summary judgment. And even if they had, ABM's affirmative evidence demonstrates there are genuine issues of material fact as to when and whether individual employees were denied statutorily compliant rest breaks.

B. Plaintiffs Failed To Satisfy Their Burden To Show That There Are No Triable Issues Of Material Fact

Plaintiffs never presented actual evidence showing that every class member was on call for every rest break provided by ABM. Nonetheless, they sought—and received—damages as though this showing had been made, largely by mischaracterizing snippets of deposition testimony.

1. Fred Setayesh's Deposition

Plaintiffs relied heavily on the deposition testimony of ABM manager Fred Setayesh. They claimed that Setayesh had testified that

"ABM ha[d] a uniform company-wide policy requiring all security guards to remain on duty during their rest breaks," that this was true regardless of how many guards worked at a particular location, and that "the circumstances regarding the security guards' rest breaks were the same both before and after the exemption was granted." (10JA2693.) Plaintiffs argued that Setayesh's testimony alone *proved* that "ABM's security guards [were] required to remain on duty for their entire shift," and that this policy had "always" been in effect "at every one of ABM's locations." (*Ibid.*) The trial court adopted this theory wholesale, stating that ABM "acknowledge[d] that a guard's rest break is always an on-duty rest break" and that "Defendant's policies make all rest breaks subject to interruption in case of an emergency or in case a guard is needed." (13JA3757.) Plaintiffs, however, misconstrued Setayesh's testimony in three critical ways.

First, although Setayesh did state that employees are "not relieved from all duties" on breaks, the context of the statement demonstrates that he was referring only to employees who worked at single-guard sites for which ABM had sought a rest-break exemption from the DLSE; he did not describe the rest breaks provided to *all* employees during the entire class period. (See 11JA3098.) Even

Plaintiffs' counsel understood this: She subsequently asked whether Setayesh's statement was "true for officers at the locations with multiple officers which are not listed in the application for exemption." (11JA3099.) Setayesh responded: "I would say it var[ies] because it depends on the number of the multi-officers." (*Ibid.*) He emphasized that "[i]t could really vary from scenario to scenario, location to location" (11JA3100); "it may vary from scenario to scenario," "[t]hey vary from the time frame of the day," and "[i]t may vary from the location" (11JA3101); and "there is no stand [sic] rule that if something happen[s], everybody should respond," (*ibid.*).[9]

Second, Setayesh's statements *never* established that ABM had "policies" that made "all rest breaks subject to interruption."

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[9] Setayesh's agreement that at "all locations" where there was a "requirement or rule that" employees "would respond to a call," employees "would respond to a call if it is required regardless of what they were doing at the time," also says nothing about the experiences of all class members. (11JA3101.) This testimony simply affirms a truism: Where there was a "requirement" that employees respond to emergency calls, they were "required" to respond. Moreover, even if this testimony were more than a tautology, it is certainly ambiguous and conflicts with Setayesh's emphatic testimony that whether officers were relieved from all duties for rest breaks varied by location.

(13JA3757.) In fact, Setayesh did not describe any ABM *policy* during rest breaks. Yet Plaintiffs' only evidence that ABM had a uniform policy not to provide duty-free rest breaks was Setayesh's statement discussed above that *some* employees were not, in fact, "relieved of all duties." (10JA2693.) This statement did not describe any ABM policy; at most, it assessed the actual experience of the subset of ABM employees who worked at single-guard locations covered by the DLSE exemption.

Moreover, the parties did submit evidence of ABM's *actual* written rest break policies. As described above, those policies said nothing about on-call breaks, and authorized guards to take rest breaks as required by California law. (See *ante*, at pp. 7–8.)

Third, even if Setayesh had purported to describe a uniform rest break policy (which he did not), Plaintiffs still could not rely on his testimony because it would constitute an inadmissible legal conclusion. (See *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1179 [testimony from city's "person most knowledgeable" that ordinance was ambiguous constituted inadmissible legal opinion]. Whether Setayesh, who is not a lawyer, believed that being "on call" constitutes being "on duty" is irrelevant

to the Court's independent determination of that question: Plaintiffs cannot short-circuit the Court's application of law to facts simply by introducing Setayesh's statement as conclusive evidence of both.

2. Sarah Knight's Deposition

Plaintiffs also relied on the deposition of Sarah Knight, a regional human resources manager for ABM, to argue that security guards were "advised during orientation that they are 'continually on duty.'" (12JA3478.) As with Setayesh's testimony, Plaintiffs misconstrued Knight's testimony.

Knight was asked whether she included 'information regarding meal and/or rest breaks" in employee orientations. (10JA2844.) She responded that during the sessions she tells employees they "might be required to take an on duty *meal break*," and that "there is an expectation that if there's an emergency that they would have to respond to that emergency and then resume their *meal break*." (*Ibid.*, italics added.) Knight did not mention rest breaks in her answer.

After several intervening questions, however, Plaintiffs' counsel asked: "You testified that you instruct security officers during orientation that the expectation . . . is that their meal *or rest breaks* may be interrupted, correct?" (10JA2854, italics added.)

ABM's counsel objected, correctly, that Plaintiffs' counsel misstated Knight's prior testimony—in which she did not state that she told employees that rest breaks could be interrupted—and that the question was compound. Yet from Knight's one-word response to this ambiguous question ("Correct"), Plaintiffs infer that every ABM employee was instructed that *rest breaks* could be interrupted at orientation. Knight's purported admission is nothing more than an ambiguous statement that Plaintiffs' counsel elicited by misrepresenting her prior testimony, and it cannot form the basis for classwide summary judgment.

Moreover, Plaintiffs' assertion that employees were "advised during orientation that they are 'continually on duty'" (12JA3478) conflates the purported "admission" described above with another, similarly unpersuasive snippet. Knight was asked whether employees "taking an on-duty meal or rest break" were "considered" to have "deserted their post." (10JA2847.) When she responded "No," Plaintiffs' counsel asked, "Is that because they are deemed to be continually on duty based on the expectation that if an emergency occurs, that they will interrupt their meal or rest break and come to respond to the emergency?" (*Ibid.*) ABM's counsel objected—again,

correctly—that the question posed an incomplete hypothetical and called for a legal conclusion, and Knight responded "Yes." (*Ibid.*) But Knight's response to this ambiguous question proves nothing. Whatever ABM employees were "deemed" to be, Knight did not testify that they were instructed to remain "continually on duty" at their orientations. Viewing this evidence in *any* light, it fails to "corroborate[]" Plaintiffs' assertion that ABM denied every class member a rest break during every work day at ABM. (12JA3478.)

3. ABM's Employee Handbook

Plaintiffs claimed ABM's employee handbook "confirm[s]" the purported "policy" requiring guards to remain on duty during rest breaks. (12JA3478.) But this evidence is irrelevant: There is *no* mention of any such policy in the handbook, and the statement Plaintiffs quote addresses meal periods, not rest breaks.

4. ABM's Purported "Judicial Admissions"

Plaintiffs also claimed that ABM acknowledged it had a uniform policy requiring on-call rest breaks through two so-called "judicial admissions." (26JA7459.) Neither statement Plaintiffs cited below constitutes such an "admission."

The first statement is irrelevant because it referred only to meal period claims. At oral argument on Plaintiffs' motion for summary

adjudication, ABM's counsel stated that guards "remain on duty" and that ABM "keep[s] them on duty." (3RT4538:26-28.) In the next sentence, however, counsel made clear that he was describing the company's practice only with respect to meal periods: "That's why my client pays the extra half hour for their lunch." (3RT4539:1–2.) This supposed "admission" says nothing about ABM's rest period practices or policies.

Plaintiffs also seized on the following passage from ABM's summary judgment opposition brief:

> To date, Plaintiffs have not shown that any member of the Class was forced to forego a rest break. Rather, all they have shown is the policy required them to carry their radios with them during rest breaks and they were subject to the possibility of being interrupted during their rest break.

(22JA6312–6313.) Plaintiffs claimed this was a conclusive admission that ABM had a policy requiring employees to carry radios and respond to emergencies during rest breaks, but it is nothing of the sort: It simply recognizes findings that the trial court had *already made in the case*. (See 13JA3757.) ABM disagreed with these findings, objected to them when they were made, and challenges them in this appeal.

5. The DLSE Report On ABM's Rest Break Exemption Application

Finally, Plaintiffs argued that the DLSE's investigative report established a classwide failure to provide rest breaks. (12JA3478.) Yet like Plaintiffs' other evidence, the DLSE report does not document any classwide policy or practice of denying rest breaks. In fact, it casts doubt on the substantive argument underpinning Plaintiffs' entire case.

The DLSE report was based on employee interviews conducted in Northern California. (13JA3622.) It found that ABM did "have a break person to relieve" the day-shift security officers, but that it did "not give pm [rest] breaks to day shift employees" or relieve night-shift employees. (*Ibid*). Yet this report covered only a small subset of class members. The DLSE presumably only investigated ABM locations where exemptions had been sought, not a random selection of all sites. (*Ibid.*) Moreover, the report noted that "[m]ost of the job sites of ABM are located in [the] Southern California area and no information was provided for that area." (*Ibid.*) Thus, the report did not purport to describe practices at every ABM location and cannot provide classwide evidence supporting summary judgment.

Moreover, if Plaintiffs' on-call theory were right, then the DLSE would have concluded that ABM failed to provide *any* rest breaks. Yet the report found nothing wrong with ABM's provision of morning rest breaks to day-shift employees. In the DLSE's opinion, a rest break was "given" where a reliever assumed an employee's duties during a break, regardless whether the employee continued to carry a radio or could be called back to work in the event of an emergency. (*Ibid.*) The "views of the DLSE" were therefore *not* "consistent with" Plaintiff's contention that employees who carried radios were not adequately provided rest breaks. (13JA3760.) Quite the opposite: Where an employee is permitted to pursue personal activities and not required to perform any work, his break complies with the Labor Code.

III. THE TRIAL COURT'S CERTIFICATION OF THE REST BREAK CLASS SHOULD BE REVERSED

The above discussion shows that (a) the only uniform policy was ABM's policy requiring rest breaks be afforded to all employees; (b) there is no evidence that ABM had a uniform policy requiring all class members to carry radios or cell phones or otherwise remain on call during rest breaks; and (c) ABM's rest break practices varied widely among class members depending, among other things, on the

number of guards at a worksite. Plaintiffs' key "evidence"—the testimony of ABM manager Fred Setayesh—shows the opposite of commonality: Setayesh testified that the nature of the rest breaks ABM provided "may vary from scenario to scenario," "vary from the time frame of the day," and "vary from the location." (11JA3101.) Because of these variations, and the lack of any uniform rest break practices, class adjudication is impermissible. (See *Brinker*, *supra*, 53 Cal.4th at p. 1051 [certification properly vacated where "neither a common policy nor a common method of proof is apparent"].) There is simply no way consistent with Due Process to resolve Plaintiffs' rest break claim on a classwide basis. The trial court's class certification decision should therefore be reversed.

A. The Trial Court Erred In Concluding That The Community Of Interest Requirement Was Satisfied

To obtain class certification, Plaintiffs had the burden to establish both commonality and a predominance of common questions. (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089 (*Fireside Bank*), citing Code Civ. Proc., § 382.) "[A] common question predominates when 'determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" (*City of San Diego v. Haas* (2012) 207 Cal.App.4th

472, 501, quoting *Dukes, supra,* 131 S.Ct. at p. 2551.) "'What matters to class certification is not the raising of common 'questions'—even [in] droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" (*Lopez v. Brown* (2013) 217 Cal.App.4th 1114, 1129, quoting *Dukes*, *supra*, 131 S.Ct. at p. 2551.) Without some "glue" holding together individualized questions, it is impossible to produce a common answer. (*Dukes*, *supra*, 131 S.Ct. at p. 2552.)

The trial court abused its discretion when it certified (and twice refused to decertify) the rest break class because there was no "glue"—such as substantial evidence of a policy or practice requiring on-call rest breaks that was uniformly applied to the entire class—that would make classwide adjudication of Plaintiffs' claims manageable. There is no evidence—let alone substantial evidence—of any classwide ABM policy requiring all employees to carry radios or cell phones or otherwise remain on call during rest breaks. (See *ante*, at pp. 38–51.) Indeed, Plaintiffs' primary evidence—Setayesh's deposition testimony—proves the opposite. (See *ante*, at pp. 42–46.) And the only evidence in the record of any ABM policy concerning rest breaks showed a policy "consistent with state law." (*Brinker*,

supra, 53 Cal.4th at p. 1051 [off-the-clock work claim improperly certified because policy was legal]; see also *Dukes*, *supra*, 131 S.Ct. at p. 2553 [emphasizing that "Wal-Mart's announced policy forbids sex discrimination"].)

Moreover, even if ABM had the common rest break policy Plaintiffs imagine (which it did not), the mere existence of such a policy—without proof that it was *uniformly applied* in practice—cannot satisfy the community of interest requirement. (See *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1461–1462 (*Walsh*) [uniform policy of classifying workers as exempt, standing alone, did not necessarily permit class certification]; *In re Wells Fargo Home Mortg. Overtime Pay Litigation* (9th Cir. 2009) 571 F.3d 953, 957–958 [same].) What matters is not what policy ABM allegedly may have adopted, but whether this policy was actually applied uniformly to the entire class. (See *Roby v. McKesson Corp.* (2010) 47 Cal.4th 686, 714, fn. 11 [liability is dependent upon *application* of a policy, "not the mere adoption of the policy itself"]; *Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 989 [emphasizing need to assess how "policies and procedures actually impact the potential class"].)

Class member testimony confirms that, even if it existed, the alleged rest break policy plainly *was not* applied uniformly to all employees. For example, David Swagerty testified that he did not take his radio with him on his rest breaks. (24JA6815.) And Stephen Powell testified that he was not required to respond to an emergency if he was on a rest break. (24JA6828.) This "'dissimilarity . . . undercut[s] the prospects for joint resolution of class members' claims through a unified proceeding.'" (*Brinker*, *supra*, 53 Cal.4th at p. 1022, fn. 5, quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof* (2009) 84 N.Y.U. L.Rev. 97, 131; accord, *Dukes*, *supra*, 131 S.Ct. at p. 2551–2552.)

"[W]here no substantial evidence points to a uniform, companywide policy," establishing "liability would have had to continue in an employee-by-employee fashion." (*Brinker*, *supra*, 53 Cal.4th at p. 1052; see also, e.g., *Wang v. Chinese Daily News, Inc.* (9th Cir. Sept. 3, 2013, Nos. 08-55483, 08-56740) --- F.3d ----, 2013 WL 4712728 at p. *3 (*Wang*) [vacating certification of wage-and-hour class of around 200 employees after *Dukes* because there were "potentially significant differences among the class members" that could "'impede the generation of common answers'"].) Where, as

here, "a case turns on individualized proof of injury, separate trials are in order." (*In re Rail Freight Fuel Surcharge Antitrust Litigation* (D.C. Cir. Aug. 9, 2013, No. 12-7085) --- F.3d ----, 2013 WL 4038561, at p. *5 [failure of common evidence to establish injury to all class members "would shred plaintiffs' case for certification"]; see also *Comcast Corp. v. Behrend* (2013) --- U.S. ----, 133 S.Ct. 1426, 1433 ["individual damage calculations will inevitably overwhelm questions common to the class"].)

Properly resolving Plaintiffs' claims will require thousands of individualized inquiries incompatible with classwide adjudication. For each class member, the following questions at minimum must be answered:

- Was the employee required to carry a radio or cell phone on all rest breaks?
- Did the employee actually carry a radio or cell phone on every rest break?
- Was the employee required to respond to emergencies during all rest breaks?
- Did the employee actually respond to emergencies on rest breaks? If no, were there any negative repercussions or was this "requirement" not actually enforced?
- Did the employee voluntarily choose to carry a radio or cell phone and to end rest breaks when emergencies occurred?

- What harm (if any) did employees suffer if they were required to carry a radio or cell phone on rest breaks and respond to emergencies?

These questions cannot be answered on a classwide basis because there is no uniform policy or other method of common proof in this case; instead, this case is rife with "potentially significant differences among the class members" that demand employee-by-employee adjudication and preclude certification. (*Wang*, *supra*, 2013 WL 4712728 at p. *3.) Because "neither a common policy nor a common method of proof is apparent," the trial court's certification ruling must be reversed. (*Brinker*, *supra*, 53 Cal.4th at p. 1051.)[10]

These necessary, individualized questions starkly distinguish this case from *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220 ("*Faulkinbury*"). In *Faulkinbury*, the defendant *admitted* that its uniform company policy required every employee to

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[10] Significantly, unlike in *Brinker*, where the Supreme Court found that a class was properly certified because the employer conceded the existence of a common, classwide policy, ABM has never conceded that it had a classwide policy requiring all breaks to be on call, that was uniformly applied to the entire class. (See *Brinker*, *supra*, 53 Cal.4th at p. 1033 ["Brinker conceded at the class certification hearing the existence of, a common, uniform rest break policy. The rest break policy was established at Brinker's corporate headquarters; it is equally applicable to all Brinker employees."].)

sign an on-duty meal period agreement, and that those on-duty agreements constituted the company's policy regard meal breaks. (*Id.* at p. 233.) By contrast, ABM never admitted that it adopted or implemented a uniform policy mandating on-call rest breaks, and the overwhelming evidence discussed above refutes the notion that such a uniform policy existed. (See *ante*, at pp. 38–51.) And unlike the defendants in *Faulkinbury*, which had *no* formal rest break policy (*Faulkinbury*, *supra*, 216 Cal.App.4th at p. 236), ABM's written policy expressly authorized its employees to take rest breaks as required under California law.[11]

B. Classwide Adjudication Would Violate ABM's Due Process Right To Present Every Available Defense.

The Supreme Court has long recognized that "class actions may create injustice" and "deprive a litigant of a constitutional right" if they "preclude a defendant from defending each individual claim to its fullest." (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447,

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[11] To the extent that *Faulkinbury* could be read to endorse the proposition that material differences in class members' actual experiences are irrelevant to class certification, it would squarely conflict with numerous other wage-and-hour class certification decisions that emphasize the need for individualized inquiries absent a policy that was uniformly applied to the entire class, including *Brinker*, *Wang*, and *Dailey*. (See *ante*, at pp. 54–56.)

458 (*City of San Jose*).) Thus, courts considering whether to certify a class action must be careful not to "[a]lter[] the substantive law to accommodate procedure," as that "would be to confuse the means with the ends—to sacrifice the goal for the going." (*Id.* at p. 462.) Indeed, "[d]ue process requires that there be an opportunity to present every available defense." (*Lindsey v. Normet* (1972) 405 U.S. 56, 66, quoting *American Surety Co. v. Baldwin* (1932) 287 U.S. 156, 168.) But when a class action is improperly certified despite the existence of unmanageable individual issues, the defendant is deprived of its right to the present its valid defenses to individual claims.

Certifying a class where commonality is lacking—as the trial court did here—risks violating Due Process by altering substantive law and eliminating defenses. (See *Dukes*, *supra*, 131 S.Ct. at pp. 2560–2561 ["[A] class cannot be certified on the premise that [a defendant] will not be entitled to litigate its . . . defenses to individual claims."]; *Carrera v. Bayer Corp.* (3d Cir. Aug. 21, 2013, No. 12-2621) --- F.3d ----, 2013 WL 4437225, at p. *4 ["A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues."].) That is exactly

what happened here: Class certification—and the classwide summary judgment granted without any individualized analysis—was even worse than the "Trial by Formula" premised on statistical sampling that the U.S. Supreme Court unanimously rejected in *Dukes*. (See *id.* at p. 2561.) Indeed, ABM was deprived of a trial entirely, despite numerous individualized disputed issues of material fact.

The trial court's sweeping grant of classwide summary judgment relieved Plaintiffs of their burden of proving each element of their claims, and precluded ABM from raising its individualized defenses to liability. It was premised on the baseless assumption that ABM required every class member to carry a radio or cell phone or otherwise respond to emergencies during rest breaks. (See Mot. for Judicial Notice, Evangelis Decl., Ex. A at pp. 1–2.) The record, however, shows that certain class members were not subject to on-call rest breaks, and thus were not entitled to recover even under Plaintiffs' erroneous theory of liability. (See *ante*, at pp. 38–51.) Yet ABM was impermissibly deprived of an opportunity to present this individualized evidence at trial. (See *City of San Jose*, *supra*, 12 Cal.3d at p. 458; *Dukes*, *supra*, 131 S.Ct. at pp. 2560–2561.)

ABM was also forced to pay damages to class members who suffered no harm, in violation of Due Process. Class members who were not on call during their rest breaks received a windfall even though they have suffered no actual injury. The damages award does not compensate these uninjured class members; instead, it is an excessive statutory penalty that violates Due Process. (See, e.g., *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 574, fn. 22 (*Gore*) ["[T]he basic protection against 'judgments without notice' afforded by the Due Process Clause is implicated by civil *penalties*."]; *Hale v. Morgan* (1978) 22 Cal.3d 388 [statute providing a penalty against a landlord, recoverable by a tenant, for willfully depriving the tenant of utility services, violated both the state and federal constitutions as applied].)[12] Yet because the trial court relied on a

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[12] Although the California Supreme Court in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, concluded for purposes of determining the applicable statute of limitations that compensation for missed rest breaks constitutes a premium "wage" rather than a "penalty," the label a state gives to an award of damages is irrelevant for purposes of Due Process. (See *Giaccio v. Pennsylvania* (1966) 382 U.S. 399, 402–403 [invalidating statute authorizing juries to impose costs of prosecutions on acquitted defendants, holding that statute "whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague"]; *Gilbert v. DaimlerChrysler Corp.* (Mich. 2004) 685 N.W.2d 391,

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shortcut to resolve this case, ABM was never allowed to advance this defense below. (See *Broussard v. Meineke Discount Muffler Shops, Inc.* (4th Cir. 1998) 155 F.3d 331, 343 ["that [a] shortcut was necessary in order for th[e] suit to proceed as a class action should have been a caution signal to the district court" that classwide adjudication was inappropriate].) Because Plaintiffs' rest break claim cannot be permissibly tried on a classwide basis, the Court should reverse the trial court's order certifying the rest break class.

IV. THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES UNDER CODE OF CIVIL PROCEDURE SECTION 1021.5 WAS ERRONEOUS AND SHOULD BE REVERSED

In addition to $27 million from the common fund, the trial court awarded Plaintiffs' counsel nearly $4.5 million in *additional* attorneys' fees under Code of Civil Procedure section 1021.5. (30JA8769.) This duplicative award contravened the California Supreme Court's recent construction of Labor Code section 226.7 in

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400, fn. 22 ["While *State Farm* dealt with punitive damage awards, the due process concerns articulated [there] are arguably at play regardless of the label given to damage awards."].)

Kirby v. Immoos Fire Protection, Inc. (2012) 53 Cal.4th 1244, and in any event, the section 1021.5 factors were not satisfied here.

A. Section 1021.5 Fee Shifting Does Not Apply

The Supreme Court recently held that "the Legislature intended [Labor Code] section 226.7 claims to be governed by the default American rule that each side must cover its own attorney's fees." (*Kirby*, *supra*, 53 Cal.App.4th at 1259.) Despite this binding ruling, the trial court imposed fee shifting under Code of Civil Procedure section 1021.5 to force ABM to further compensate Plaintiffs' counsel for obtaining classwide recovery under Labor Code section 226.7. (See 13JA3755.) The section 1021.5 attorneys' fee award was squarely inconsistent with *Kirby*, and it should be reversed.

In *Kirby*, plaintiffs alleged Labor Code and Unfair Competition Law violations. (53 Cal.App.4th at p. 1249.) After class certification was denied and plaintiffs dismissed their claims, one of the defendants moved for attorneys' fees under Labor Code section 218.5, arguing that its two-way fee-shifting provision applied to section 226.7 claims. (*Ibid.*) The trial court awarded fees and the Court of Appeal affirmed, but the Supreme Court reversed. (*Id.* at p. 1250.)

The Supreme Court scrutinized the legislative history of section 226.7 and concluded that the two-way fee-shifting provision under section 218.5 was inapplicable. (*Id.* at pp. 1258–1259.) The Court emphasized that the Legislature "extensively considered including a one-way fee-shifting provision in favor of prevailing employees in Section 226.7," but passed the law only after "it was amended for the final time" to remove the fee-shifting clause. (*Id.* at p. 1258.) The Court thus held that "the Legislature intended section 226.7 claims to be governed by the default American rule that each side must cover its own attorney's fees." (*Id.* at p. 1259.)

Kirby is directly on point. Because the specific provision under which Plaintiffs recovered imposes a rule against fee shifting, fee shifting is inappropriate here. This is so even though *Kirby* did not address an award under Code of Civil Procedure section 1021.5: Where the legislature considered, but rejected, a fee shifting provision in enacting the statute, it would defeat the legislative purpose to allow a prior, more general statute to trump that clear legislative decision.[13]

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[13] Of course, Plaintiffs could have brought this case under the Labor Code Private Attorneys General Act, split any recovery they obtained with the State, and availed themselves of its attorneys'

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B. Even If It Applies, Section 1021.5's Statutory Criteria Are Not Satisfied

Code of Civil Procedure section 1021.5 permits a court to "award attorneys' fees to a successful party" only if "the necessity and financial burden of private enforcement . . . are such as to make the award appropriate." The trial court, however, never found—and could not have found—that this factor was satisfied.

The "financial burden of private enforcement" renders an award appropriate only where the "estimated value of the case at the time the vital litigation decisions [are] being made" does not "exceed[] by a substantial margin the actual litigation costs." (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1215–1216, quotation marks and citation omitted.) Here, the expected value of the case dwarfed the litigation costs. Plaintiffs were awarded nearly $90 million. The trial court awarded a 1.5 multiplier to account for the risk of failure while

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fees provision. (See Lab. Code, § 2699, subd. (g)(1).) Plaintiffs, however, chose instead to bring their claims under Labor Code section 226.7—a statute that allows a plaintiff to keep any recovery in full, but under which the Legislature intended all parties to bear their own costs (as *Kirby* makes clear). To nonetheless allow fee-shifting here would frustrate the Legislature's carefully crafted incentive structure for private actions under the Labor Code.

calculating the section 1021.5 award (30JA8807), which indicates an estimated 67% probability that Plaintiffs would prevail. The expected value of the lawsuit was therefore approximately $60 million. The trial court also calculated the actual litigation cost to Plaintiffs to be only $3 million. The expected value of the lawsuit thus exceeded the costs of the litigation by nearly $57 million dollars, or nearly 2000 percent. Indisputably, this is a "substantial margin."

Indeed, this margin far exceeds those in cases where courts have denied fees under section 1021.5. (See, e.g., *Satrap v. Pacific Gas & Electric Co.* (1996) 42 Cal.App.4th 72, 78–80 [$3 million settlement offer demonstrated sufficient incentive for plaintiffs to incur $1.2 million in legal fees]; *Pacific Mutual Life Insurance Co. v. State Bd. of Equalization* (1996) 41 Cal.App.4th 1153, 1165 [$600,000 claim was sufficient economic incentive to incur $168,000 in attorneys' fees].) The prospect of the enormous common fund recovery available in this case was more than adequate to assure Plaintiffs access to competent counsel. (See *Lyons v. Chinese Hospital Assn.* (2006) 136 Cal.App.4th 1331, 1343 ["The statute's purpose is to encourage public interest litigation that might otherwise be too costly to pursue."].)

CONCLUSION

Because on-call rest breaks are plainly permissible under California law, the Court should reverse the trial court's grant of summary judgment and reverse the trial court's order certifying the rest break class. In the alternative, the Court should reverse the trial court's grant of summary judgment because, even if on-call rest breaks are *per se* illegal (which they are not), triable issues of material fact exist. And the Court should also reverse the trial court's order certifying the rest break class because these triable issues cannot be resolved on a classwide basis. The Court should also reverse the trial court's award of attorneys' fees under Code of Civil Procedure section 1021.5.

DATED: September 9, 2013

Respectfully submitted,

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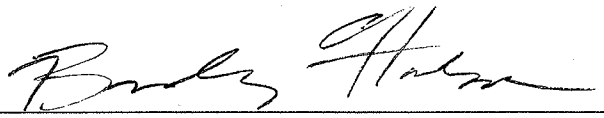
CERTIFICATE OF WORD COUNT

Pursuant to rule 8.204(c), of the California Rules of Court, the undersigned hereby certifies that the foregoing Appellant's Opening Brief is in 14-point Times New Roman font and contains 13,571 words, according to the word count generated by the computer program used to produce the brief.



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PROOF OF SERVICE

I, Kathlene Crutchfield, declare as follows:

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, CA 90071-3197, in said County and State.

On September 9, 2013, I served the following document(s):

(1) APPELLANT'S OPENING BRIEF

(2) JOINT APPENDIX [VOLUMES 1–31]

on the parties as stated below as follows:

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Unless otherwise noted on the attached Service List, **BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing set forth in this declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 9, 2013 at Los Angeles, California.

Kathlene Crutchfield

Kathlene Crutchfield

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