Case No. S 140308

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOHN PAUL MURPHY,

Plaintiff/Respondent,

vs.

KENNETH COLE PRODUCTIONS, INC.,

Defendant/Appellant

On Review from Decision of:
Court of Appeal, First District, Division 1
Consolidated Case Nos. A107219 & A108346

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF POSITION OF DEFENDANT AND APPELLANT KENNETH COLE PRODUCTIONS, INC.

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INTRODUCTION

This amicus brief, submitted by the the California Employment Law Council, the Chamber of Commerce of the United States of America, the California Chamber of Commerce, the California Restaurant Association, the Alliance of Motion Picture & Television Producers, the Airline Industrial Relations Conference and the California Lodging Industry Association (collectively the "CELC *Amici*"), addresses the swirling State-wide controversy as to the characterization of the nature of the statutory payments required by Labor Code section 226.7 for the failure to "provide" rest and/or meal breaks – are they "penalties," "wages," "damages" or some legally strange type of hybrid?

The impact of this case is momentous because billions of dollars are at stake in the innumerable class action suits pending in California seeking payments under section 226.7. Whether the limitations period is one year (if a penalty or even a hybrid), or three or perhaps even four years (if purely damages or wages), gives rise to one of the biggest financial impact issues to be decided by the Court in an employment law case in many years.

As determined by over 100 years of California case law, whether or not a claim is for a "penalty" primarily turns on a *functional analysis* of the provision, not the *label* it may or may not have been assigned by the Legislature. A statutorily-required payment is a "penalty" if it is made payable

by way of punishment for the nonperformance of an act or for the performance of an unlawful act. Another alternative hallmark of a penalty is that it permits recovery without reference to the actual damage sustained.

Because this issue turns on a *functional analysis* of Labor Code section 226.7, the trial court's ruling and plaintiff Murphy's arguments, which focus on an allegedly missing "label," are misdirected. What *is* controlling here – aside from the fact that the term "penalty" *was* prominently used in the course of the legislative history – are the virtually undisputed facts showing that (1) the purpose for which the statute was enacted was to deter employers from violating Industrial Welfare Commission ("IWC") - imposed rules regarding rest and meal periods, and (2) the monetary payment, whatever it may have been labeled, is imposed without regard to the damage, if any, suffered by the employees.

The conclusion we urge the Court to reach has been reached by an overwhelming majority of the Court of Appeal justices who have opined on the issue (many in cases on the Court's "grant and hold" docket). Aside from the unanimous decision of the First District, Division 1, in this case, finding that the payment is a penalty, the same conclusion was reached by unanimous panels in (1) *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 381, fn. 16 [Second District, Div. 7]; (2) *Mills v. Superior Court,* No. B184760, review granted, No. S141711 [Second District, Div. 5];

(3) *Banda v. Richard Bagdasarian, Inc.*, No. E035739, review granted No. S144949 [Fourth District, Div. 2]; and (4) *Chalecki v. Superior Court,* No. B187354, review granted No. S142600 [Second District, Div. 7]; *see also Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 953 [Third District][correctly characterizing payment as "penalty"]; *Hartwig v. Orchard Commercial, Inc.* (2005) Case No. 12-56901RB [Labor Commissioner Precedent Decision.) Only one decision, rendered over a strong dissent, has ruled otherwise. (*National Steel and Shipbuilding Company v. Superior Court* (*"NASSCO"*) No. D046692, review granted, No. 141278 [Fourth District, Div. 1], addressed at pp. 50-55 below.)[1]

The crispest analysis of this issue was that persuasively articulated by Justice Richard Mosk, who rejected the prominent plaintiff argument that the section 226.7 payment is analogous to overtime, noting that unlike overtime work which may be required, working through a meal period cannot be required:

> "Labor Code section 226.7, subdivision (a), prohibits an employer from requiring an employee to work during mandated meal or rest periods. Labor Code section 226.7, subdivision (b), provides the consequence of a violation of subdivision (a). The employer does not have the option to require the employee to

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[1] The weight of persuasive federal authority has reached the same conclusion. (*See Corder v. Houston's Restaurants, Inc.* (C.D. Cal. 2006) 424 F.Supp.2d 1205; *Pulido v. Coca-Cola Enterprises, Inc.* (C.D. Cal. 2006) 2006 WL 1699328; *See also Valles v. Ivy Hill Corp.* (9th Cir. 2005) 410 F.3d 1071, 1076, 1077, 1078, 1080 [repeatedly characterizing as "penalty"].) There are two wholly unpersuasive contrary district court decisions addressed at pp. 55-56 below.

> work during the meal or rest periods and pay the extra compensation. Labor Code section 226.7, subdivision (a), flatly prohibits such a requirement. A violation of that prohibition results in what can only be viewed as a penalty." (*Mills*, No. B184760 (Mosk, J. concurring).)

Justice Mosk was unquestionably correct. But there are many additional reasons to support the conclusion that these payments are penalties.

ARGUMENT

I

THE PENALTY V. WAGE ISSUE PRESENTED BY THIS CASE FAR TRANSCENDS THE VERY IMPORTANT STATUTE OF LIMITATIONS ISSUE TO BE DECIDED

Whether the limitations period for claims for Labor Code section 226.7 payments is one year (if a penalty) or three or perhaps even four years (if wages or "damages") is one of the larger financial impact issues to be decided by this Court in an employment law case in many years. Lest this case get decided with the perception in any quarter that the "only" issue at stake is a "technical" question of timeliness – one that would be inconsistent in any event with the now-settled rule that the statute of limitations is neither a "favored" nor "disfavored" defense[2] – it is important to emphasize that there are many other important related issues that will be controlled, or at least

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[2] *See, e.g., Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 396 ["the affirmative defense based on the statute of limitations should not be characterized by courts as either 'favored' or 'disfavored'"]; *Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1148.

substantially impacted, by the Court's characterization of the section 226.7-mandated payment.

- If section 226.7 payments are wages, suits might be permitted under the UCL, Business & Professions Code section 17200 et seq., thus extending the statute of limitations to *four years.* While plaintiffs now argue that UCL suits should be permitted even if section 226.7 payments are penalties, that argument has little or any viability.

- As illustrated by *Mills,* whether the payment is a penalty or wage impacts whether the employer is arguably subject to late wage payment penalties for discharged or resigning employees under Labor Code section 203, or for on going employees pursuant to sections 204 and 210.

- Similarly, whether the section 226.7 payment is a penalty or a wage has a direct bearing on whether or not employers and employees may be subjected to the reciprocal attorney fee provision for "wage" claims in Labor Code section 218.5. It also impacts the closely related provision in section 218.6 for payment of interest on wage claims.

- Whether or not the payment is a penalty may very well determine whether there is a private right of action under section 226.7. Whereas the Court is generally disinclined to imply private rights of action, particularly where as here an express right of action was *deleted* from the bill before its enactment, a finding that there is no right of action even more easily

follows when the plaintiff is seeking to assert an implied right of action to sue for a civil penalty.

- Whether or not the section 226.7 payment is a penalty also speaks significantly to whether a violation of the meal and/or rest period provisions can give rise to a claim for punitive damages under Civil Code section 3294. There have been recent highly-publicized trial court proceedings in Northern California where judgment has been entered against an employer for $57.5 million in section 226.7 payments and an *additional* $115 million in punitive damages based on the trial court's varying characterization of the payments as either "wages" or "statutory liquidated damages."

- The characterization of the payment is critical to determining whether section 226.7 should be interpreted in accordance with the rules that civil penalty provisions are to be narrowly construed as a matter of public policy. (*See Hale v. Morgan* (1978) 22 Cal.3d 388, 405 ["[b]ecause the statute is penal, we adopt the narrowest construction of its penalty clause to which it is reasonably susceptible in the light of its legislative purpose"].) Among other important, unresolved issues to be guided by the applicable rules of construction is whether section 226.7 is limited to one payment per day for all alleged meal and rest period violations in a day or permits a total of two payments (one for meal period violations and one for rest period violations).

- If the section 226.7 payment is a penalty, any potential judgment must be tempered by constitutional constraints against excessive civil penalties. (*See, e.g., People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 828-32 [a civil penalty is unconstitutional if it violates the "principle of proportionality"– which includes an examination of the defendant's culpability – or the party bringing the suit delayed action so as to "accumulate" a massive penalty].)

- Any reliance on the parallel payment provisions of the Industrial Welfare Commission Wage Orders for meal and rest period violations is wholly improper if the payment is a penalty. (*See Gilgert v. Stockton Port District* (1936) 7 Cal.2d 384, 387-91 ["we cannot believe either the people or the Legislature intended to bestow upon such agencies the power to declare penalties for the violation of the many and varied rules and ordinances they might see fit to enact"].)

- In addition, there are a number of secondary legal considerations which flow from whether or not the section 226.7 payment is a penalty. This would include, for example, whether claims for such payments are "vested" against retroactive legislative abrogation (penalties are not), whether they are assignable (penalties are not) and/or whether they may be enforced by courts from other states (penalties may not).

Therefore, while the determination whether the one-year statutory penalty statute of limitations for section 226.7 claims is extremely important, there are many other critical questions that will be impacted by how the Court characterizes section 226.7 payments.

II

FOR OVER 100 YEARS, THIS COURT HAS EMPLOYED A CLEAR AND EASY-TO-APPLY FUNCTIONAL TEST FOR DETERMINING WHETHER A STATUTORY PAYMENT IS A PENALTY

A. Whether a Claim is Subject to the One-Year Statute of Limitations for Penalties is Determined by *County of Los Angeles v. Ballerino* and its Progeny

The applicable test under California law as to whether a statute provides for a penalty for purposes of the one-year statute of limitations in Code of Civil Procedure section 340, subd. (a)[3] was formulated by this Court over 100 years ago. A "penalty" is "one which an individual is allowed to recover against a wrong-doer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained, or one which is given to the individual and the state as a punishment for some act which is in the nature of a public wrong." (*Los Angeles County v. Ballerino* (1893) 99

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[3] Section 340, subd. (a), formerly subd. (1), prescribes a one-year limitations period for "[a]n action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation."

Cal. 593, 596.) Murphy concedes that *Ballerino* provides the controlling standard for resolution of this case.

This Court has applied and explained this test on several occasions in determining that the one-year statute of limitations was applicable. The most recent occasion was *San Diego County v. Milotz* (1956) 46 Cal.2d 761, 765, where the Court relied on *Ballerino* in enforcing the one-year statute and defined a "penalty" to be "a sum of money made payable by way of punishment for the nonperformance of an act or for the performance of an unlawful act." It was determined in that case that a statutory payment obligation was a "penalty" because it required payment of "an arbitrary pecuniary punishment" "by reason of [the defendant's] noncompliance with the [statutory] requirements and without any reference whatever to the question of damages." (*Id.*)

The one-year statutory penalty statute of limitations was also found to be applicable, and enforced, by this Court in *Hansen v. Vallejo Electric Light & Power Co.* (1920) 182 Cal. 492, 495, where it was held, in reliance on *Ballerino,* that a "liquidated damages" payment for cutting off electrical service was a penalty because it "[u]nquestionably. . . provide[d] for a recovery for a wrong or injury suffered without any reference whatever to

the question of actual damage. The recovery is had even though it be conceded that there was not actual damage whatever. . ."[4]

Over the years, the Courts of Appeal have routinely applied the *Ballerino* test in enforcing the one-year penalty statute of limitations. (*Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 387; *Prudential Home Mortgage Co., Inc. v. Superior Court* (1998) 66 Cal.App.4th 1236, 1242; *Menefee v. Ostawari* (1991) 228 Cal.App.3d 239, 243; *G.H.II. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 278.)[5]

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[4] In *Ballerino,* an extra payment imposed for non-payment of taxes was held not to constitute a penalty. Many subsequent cases have applied this ruling in the unique context of taxation issues. (*See, e.g., People v. Triplett* (1996) 48 Cal.App.4th 223, 251-52, cited in Murphy Opening Brief, p. 22; *see also, e.g., Sonleitner v. Superior Court* (1958) 158 Cal.App.2d 258, 262 ["[i]t is well settled in this state that a penalty which is created by statute for failure to pay a tax assessment becomes part of the tax"]; *County of Marin Ass'n of Firefighters v. Marin County Employees Retirement Ass'n* (1994) 30 Cal.App.4th 1638, 1653.)

[5] Based on *Holland v. Nelson* (1970) 5 Cal.App.3d 308, *Menefee* stated in dictum that whether or not such damages are penalties turns on whether they are mandatory or discretionary. *Menefee* overlooked *G.H.II's* well-reasoned conclusion that *"Holland* is contrary to the weight of California authority." (147 Cal.App.3d at p. 277, fn. 14.) *See also Ashland Oil Co. v. Union Oil Co.* (Temp. Emer.. Ct. App 1977) 567 F.2d 984, 993, fn. 20, which cited a number of cases – including decisions of this Court (*Esposti v. River Bros.* (1929) 207 Cal. 570 and *Penizer v. West American Finance Co.* (1937) 10 Cal.2d 160) – where *discretionary* double or treble damages were held to be penalties for the statute of limitations. Obviously, a statutory payment may be a penalty whether it is mandatory or discretionary. (*See, e.g., Hale v. Morgan, supra,* 22 Cal.3d at pp. 398 - 400 [discussing and contrasting various types of mandatory and discretionary penalties].) Although it is unnecessary for the result in this case to do so inasmuch as the payment requirement of Labor Code section 226.7 clearly is *mandatory,* we urge the Court to disapprove *Holland v. Nelson* and like cases.

B. The Court Has Applied the *Ballerino* Test and Similar Standards in Other Legal Contexts to Find that Statutory Provisions Were Penalties

Ballerino is not confined to the statute of limitations. In *Peterson v. Ball* (1931) 213 Cal. 461, 481, based on *Ballerino,* a Corporations Code provision was held to be a penalty and therefore was not assignable as a matter of substantive law. The statute there made corporate directors liable for the full amount of debts created in excess of the value of the issued stock. It was held to be a penalty because it "could be enforced against the directors without reference to the loss sustained by the corporation as a result of the action of the directors." (*See also e.g., Esposti v. River Bros., supra,* 207 Cal. at p. 573 [claim for treble damages under usury law was a penalty and thus not assignable].)

The Court in *Moss v. Smith* (1916) 171 Cal. 777, 783-86 also relied upon *Ballerino* in considering a statute which imposed liability upon corporate directors for incurring excess debts. The Court definitively held that it did not need a "lengthy discussion"to conclude that although the statute might be remedial so far as the plaintiff creditor was concerned, it was "highly penal" or "highly punitive" so far as the director defendants were concerned. It reasoned that "this statute is of a highly penal character the moment it is construed as making the directors liable for the full amount of the excess debts

they may have authorized, regardless of loss or damage which may have been occasioned by their acts." (171 Cal. at p. 784.)

Many other examples abound. In construing the Unruh Act, which then provided for minimum statutory "damages" of $250 "regardless of the plaintiff's actual damages," the Court held: "This sum is unquestionably a penalty which the law imposes . . . The imposition is in its nature penal, having regard only to the fact that the law has been violated and its majesty outraged." (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33.) "[W]hile the law has seen fit to declare that it shall be paid to the complaining party, it might as well have directed that it be paid into the common-school fund." (*Id.*)

In connection with the conflicts of law rule that "no action may be maintained . . . to recover a penalty, the right to which is given by the law of another state," the term "penalty" was defined to mean "any law compelling a defendant to pay a plaintiff other than what is necessary to compensate him for a legal damage done him by the former." (*Miller v. Municipal Court* (1943) 22 Cal.2d 818, 837.) The Court provided examples of penalty provisions based on several sister state decisions, including provisions for double or treble damages enforceable by private parties. (*Id.*)

There are many other examples. (*Hale v. Morgan, supra,* 22 Cal.3d at p. 392 [Civil Code provision awarding trailer park tenants "[a]n amount not to exceed one hundred dollars ($100) for each day or part thereof

the landlord remains in violation constituted a 'penalty'"]; *Anderson v. Byrnes* (1898) 122 Cal. 272, 274 [although $1,000 payment in favor of stockholders against corporation for failing to comply with internal corporate obligations was labeled "liquidated damages," it was a penalty; judgment reversed since "no person has a vested right in an unenforced penalty"].)

C. The Determination Whether a Statutory Payment Constitutes a Penalty Turns on its *Function*, Not its *Label*

While plaintiffs in section 226.7 cases argue that a statute must expressly classify a payment as a "penalty" in order for it to be a penalty, this argument is contrary to a legion of California cases. Generally, legal consequences turn on *functions*, not on assigned labels. (*See Californians For Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 230-31 ["[i]n deciding whether the application of a law is prospective or retroactive, we look to function, not form"].) With a little more color, it has been said: "If it looks like a duck, walks like a duck, and sounds like a duck, it is a duck." (*People ex rel. Lockyer v. Pacific Gaming Technologies* (2000) 82 Cal.App.4th 699, 701.)

The most notable case taking the "duck" approach to the definition of a statutory "penalty" was *Hansen v. Vallejo Electric Light & Power Co., supra,* 182 Cal. 492, where the suit sought statutory "liquidated damages" for refusal to provide utility service. Applying the one-year statute

of limitations, the Court held that "this provision must be held to impose a 'penalty'. . . notwithstanding the use of the words 'liquidated damages.'" (*Id.* at p. 495.) It reasoned: "Unquestionably it provides for a recovery for a wrong or injury suffered without any reference whatever to the question of actual damage. The recovery is had even though it be conceded that there was no actual damage whatever. . . '[L]iquidated damages' . . . cannot be construed as meaning or intended to mean anything other than a penalty or forfeiture." (*Id.* at pp. 495-96.)

Similarly, in *Anderson v. Byrnes, supra,* 122 Cal. 272, the Court held that a statute which had imposed "liquidated damages" was easily determined to be a penalty. The court reasoned that it was "apparent that compensation for the actual damage done to the stockholder was not intended to be given by the act." (*Id.* at p. 276.) It further noted: "As testing the penal character of the act, we see no difference in principle if it had provided that the directors should be guilty of a misdemeanor, and punished accordingly, for a violation of its provisions, rather than providing, as it does, for the mulcting of the directors in damages in the arbitrary amount of $1,000, at the suit of any stockholder of the corporation." (*Id.* at p. 276.)

Innumerable additional examples abound where statutory payment provisions were held to constitute penalties even though the word "penalty" or a like term was not employed in the statute.

- Government Code provision requiring that court reporter "compensation . . . shall be reduced one-half if the provisions of this section . . . have not been complied with by him" is a penalty. (*San Diego County v. Milotz, supra,* 46 Cal.2d at p. 765 ["the statute must be held to provide a penalty or forfeiture for noncompliance, notwithstanding its use of the words 'shall have his compensation reduced'"].)

- Unruh Act section awarding "actual damages . . . but in no case less than two hundred and fifty dollars ($250)" "unquestionably" provided for a penalty. (*Koire, supra,* 40 Cal.3d at pp. 27, fn. 5 & 33.)

- Civil Code provision awarding trailer park tenants "[a]n amount not to exceed one hundred dollars ($100) for each day or part thereof the landlord remains in violation" constituted a "penalty." (*Hale v. Morgan, supra,* 22 Cal.3d at p. 392.)

- Business & Professions Code provision requiring law school that violated disclosure statements "to make a full refund of all fees paid by students" is a penalty. (*Goehring v. Chapman University, supra,* 121 Cal.App.4th at p. 387.)

- "[T]he settled rule in California is that statutes which provide for recovery of damages additional to actual losses incurred, such as double or treble damages, are considered penal in nature." (*G.H.I. v. MTS, Inc., supra,* 147 Cal.App.3d at p. 278 [statute of limitations]; *accord, e.g.,*

Penizer v. West American Finance Co., supra, 10 Cal.2d at p.170; Labor Code, § 230.8, subd. (d) [expressly characterizing treble damage provision to be a "civil penalty"].)

D. This Case Does Not Turn on a Labor Code Definition of "Penalty" and, In Any Event, the Labor Code Does Not Define "Penalty" Any Differently

While Murphy and other plaintiffs argue that the "penalty" determination is somehow different when a Labor Code provision is at issue, they conveniently overlook that this case is not about interpreting the meaning of the term "penalty" as it is used anywhere in the Labor Code. To the contrary, as has been clear from the start, the critical issue for decision here relates to application of "penalty," as employed in the *Code of Civil Procedure,* i.e., "penalty" as used in section 340, subd. (a). All of the talk about the Labor Code is an effort to distract the Court from the real issue presented.

Furthermore, nothing in the Labor Code or the case law construing it even remotely suggests that "penalty" has a different meaning there than in other provisions of California law. While many sections of the Labor Code do expressly impose penalties (*see, e.g.,* §§ 210 & 558), that does not mean – as Murphy urges – that less precisely-drafted statutes do not also call for payment of *penalties*. For example, although many Civil Code provisions provide expressly for imposition of penalties (*see, e.g.,* Civil Code,

§§ 52, 1794(c) & 1940.2(b)), cases have readily found other, non-specifically designated payment obligations in the Civil Code also to be penalties. (*See, e.g., Hansen, supra,* 182 Cal. at p. 495; *Koire, supra,* 40 Cal.3d at pp. 27, fn. 5 & 33.)

By the same token, *Munoz v. Kaiser Steel Corp.* (1984) 156 Cal.App.3d 965, 979, held that the double damage provision in Labor Code section 972 was a penalty even though the word "penalty" does not appear in the statute. As a further example, Labor Code section 4650 requires payment of additional workers' compensation benefits for late payment. This is a penalty notwithstanding that the word "penalty" cannot be found in the statute. (*State Comp. Ins. Fund v. Workers Comp. Appeals Bd.* (1998) 18 Cal.4th 1209, 1213-14.) And, as another example, although it has not yet been characterized in a published opinion, the statutory payment prescribed by Labor Code section 233, subd. (d), which provides for payment of "actual damages or one day's pay, which is greater" for not permitting an employee to use sick leave to care for a sick relative, unquestionably is a penalty.

The question whether or not a Labor Code provision calls for payment of a "penalty" is unrelated to the rule of "liberal construction" said to be applicable to Labor Code interpretation. The determination of whether a provision is or is not a penalty is a question of characterization of the statute, an entirely neutral type of determination. It is no more influenced by

the rule of "liberal construction" than it is impacted in the other direction by the rule of "narrow construction" of penalty statutes. The statute of limitations is neither "favored" nor "disfavored." (*See* p. 4, fn. 2 above.)

Moreover, "[a]s a rule, a command that a constitutional provision or a statute be liberally construed 'does not license either enlargement or restriction of its evident meaning.'" (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 844.) It is no different when a Labor Code provision is at issue. (*See, e.g., City of Long Beach v. Dept. of Industrial Relations* (2004) 34 Cal.4th 942, 949 ["[c]ourts will liberally construe [Labor Code] prevailing wage statutes, but they cannot interfere where the Legislature has demonstrated the ability to make its intent clear and chosen not to act"]; *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991)54 Cal.3d 288, 297 ["the rule of liberal construction stated in [Labor Code] section 3202 should not be used to defeat the overall statutory framework and fundamental rules of statutory construction"].)

The essential issue is whether or not the payments in dispute are penalties because they meet the functional definition of "penalty." If so, the one-year statute of limitations unquestionably applies to any suit to recover such penalties, just as the one-year statute undeniably applies to the many Labor Code provisions that provide for payments that are expressly called "penalties."

E. Other Plaintiff Efforts to Narrowly Define "Penalty" are Misplaced

Murphy incorrectly argues that a payment is a "penalty" only if it provides for penalty payments *in addition to* actual damages. The leading decision, however, held that a payment is a penalty if it is imposed "without reference to the actual damage sustained." (*Ballerino, supra,* 99 Cal. at p. 596.) Numerous California cases have found that payments were penalties where the payment in question was the *only* payment authorized by the statute. (*See, e.g., Koire, supra,* 40 Cal.3d at p. 33 [statute provided for payment of actual damages or penalty in lieu thereof]; *Hansen, supra,* 182 Cal. at p. 494 ["liquidated damages" remedy was penalty].)

In some cases, employee plaintiffs also argue that in order to be a penalty, a payment must be made payable to the State. This ignores, among other things, Code of Civil Proc., § 340, subd. (a) & (b), which provide a one-year statute of limitations for recovery of a penalty "given to an individual," "to an individual and the state" or "to the people of this state." This also ignores many contrary decisions. (*See, e.g., Hansen, supra,* 182 Cal. at p. 495.)

In addition, it is sometimes argued that the hallmark of a penalty is that the party to be penalized must have an intent to violate the law. This is wrong. "[C]ivil penalties. . . are [sometimes] imposed without regard

to motive and require no showing of malfeasance or intent to injure." (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147.)[6]

III

MURPHY AND OTHER PLAINTIFFS RELY ON A NUMBER OF STATE AND FEDERAL "PENALTY" DECISIONS THAT ARE EITHER CLEARLY INAPPLICABLE OR WERE INCORRECTLY DECIDED

While largely ignoring the many decisions of this Court and of the Court of Appeal that have applied the *Ballerino* test to find that California statutory payments were penalties for statute of limitations and other purposes, Murphy and other plaintiffs cite inapplicable and/or clearly erroneous decisions arising under federal employment statutes which are either not the least bit on point and/or ignored California precedent and even the clear statutory language of Code of Civil Procedure section 340, subd. (a).

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[6] In interpreting the Tort Claims Act, Government Code section 818, which immunizes public entities from "damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant," the Court distinguished between punitive damages and civil penalties. (*Kizer, supra,* 53 Cal.3d 139.) In the course of this analysis, the Court drew a highly metaphysical distinction between purpose of penalties, i.e., to "secure obedience to statutes," and of punitive damages, i.e., to deter legal violations. (*Id.* at pp. 147-48; *see also Calif. Assn. of Health Facilities v. Dept. of Health Services* (1997) 16 Cal.4th 284, 294-95.) Given that securing compliance with statutes seems *identical* to deterring statutory violations, this subtle distinction can have meaning only to the limited context in which it was articulated. Contrary to plaintiff Murphy's argument, the distinction between punitive damages and civil penalties has no bearing on the issue in this case whether section 226.7 payments are penalties, on the one hand, or wages or "damages," on the other. Indeed, the Court's explanation of the purposes and functions of civil penalties in *Kizer, supra,* 53 Cal.3d 139, underscores that section 226.7 payments unquestionably *are* civil penalties.

***Rivera v. Anaya* (9th Cir. 1984) 726 F.2d 564 and its progeny:** This decision, authored by Judge Reinhardt, rejected use of the one-year "penalty" statute of limitations based on *Huntington v. Attrill* (1892) 146 U.S. 672 and *Chavarria v. Superior Court* (1974) 40 Cal.App.3d 1073, two cases which held that states are not required by the Full Faith and Credit clause to enforce the "penal law" judgments of foreign countries and sister states in the "international sense." These cases ruled that "penal laws" are limited to suits brought by or on behalf of the government.

This legal doctrine has *no bearing at all* on the meaning of statutory "penalty" as used in Code of Civil Procedure section 340, subd. (a) or other legal contexts potentially relevant to the present case. Long ago, the Court observed that there is a difference between a statute being a "penal law" for international law purposes and being a penalty for other purposes. (*Moss v. Smith, supra,* 171 Cal. at p. 784; *see also People v. Laino* (2004) 32 Cal.4th 878, 888 [*Huntington* "carefully distinguished the words 'penal' and 'penalty,' noting that the full faith and credit clause does not obligate one state to enforce the penal laws of another state"]..) *Rivera* overlooked this clear distinction. It is highly significant that Murphy admits that the *Huntington* decision has no bearing on what constitutes a penalty under California law and disavows any reliance upon it. (Reply Brief, pp. 8-9, fn. 7.)

California law and disavows any reliance upon it. (Reply Brief, pp. 8-9, fn. 7.)[7]

Further, *Rivera* acknowledged that its ruling was inconsistent with *Hansen, supra,* 182 Cal. 492, but expressly declined to apply *Hansen* on the ground that it "appears to have been superseded by later California case law." (726 F.2d at p. 564, fn. 3.) However, *Rivera* pointed to *nothing* to justify its conclusion that the one-year statute of limitations is *limited* to suits brought by the government and ignored that *Hansen was* reaffirmed in *Milotz, supra,* 46 Cal.2d at p. 766.

Rivera was also glaringly incorrect in other respects. In ruling that the one-year statute of limitations applies only to suits brought by the government, *Rivera* totally ignored the directly contrary language in Code of Civil Procedure, § 340 which provides that the one-year time period for penalty suits applies to those brought by an "individual, or to an individual and the state." And *Rivera* strangely disregarded other prior cases, including the then-one-year-old decision in *G.H. II v. MTS, Inc., supra,* 147 Cal.App.3d at p. 277 & fn. 14, that had held that private party suits for "double" or "treble" "damages" were subject to the one-year statute of

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[7] It is noteworthy, however, that just like "penalty" is determined based on function rather than label, *see* pp. 13-16 above, the test for determining what is a "penal law" is "not by what name the statute is called by the legislature. . . but [what] it appears to the tribunal which is called upon to enforce it to be, in its essential character. . ." (*Huntington, supra,* 146 U.S. at pp. 673-74.)

limitations governing suits for penalties. (*See also Leh v. General Petroleum Corp.* (1964) 330 F.2d 28, 296-96, rev'd on other grounds, 382 U.S. 54 (1965) [holding that the one-year penalty statute applied to private party lawsuit for treble damages; cited in *Rivera* for another proposition, yet ignored on this key point]; *Ashland Oil Co. supra,* 567 F.2d at p. 991.)

Rivera and a case that followed it, ***Stone v. Travelers Corp.* (9th Cir. 1995) 58 F.3d 434, 438-39**, were deservedly disapproved in the strongest terms by the Court of Appeal in *Prudential, supra,* 66 Cal.App.4th at p. 1245. The court concluded that *Rivera* was "inexplicably incorrect," and further ruled that (1) "*Hansen* has not been superseded by later law . . . [It] is but one of a long line of California cases holding the one-year statute of limitations applies to recovery of statutory damages calculated without reference to actual harm" and (2) the doctrine applied in *Huntington* and *Chavarria* is exactly the "wrong analytical path" to take in statute of limitations cases.

***Hays v. Bank of America* (1945) 71 Cal.App.2d 301,** concluded that claims for overtime and "liquidated damages" under the FLSA were based on the employee's contract of employment and therefore were barred by a provision of the Probate Code that required timely presentation of contract claims. This conclusion is totally at odds with modern case law which holds that claims for overtime arise under statute, and not contract.

(*See, e.g., Aubry v. Goldhor* (1988) 201 Cal.App.3d 399, 404 [distinguishing *Hays*].)

Hays noted that several federal cases, including ***Overnight Motor Transp. Co. v. Missel* (1942) 316 U.S. 572**, also cited in the Opening Brief, p. 26, fn. 18, had determined that the federal provision for "liquidated damages" in the FLSA was not "penal in nature." This federal interpretation, however, has no relevance to the statute of limitations and related issues under California law relevant to Labor Code section 226.7 payments because *Missel,* which was not a statute of limitations case, relied on *Huntington v. Attrill* (*see* pp. 21-22 above). We are concerned exclusively with the meaning of the term "penalty" as defined by over 100 years of California case law.

***Martinez v. Shinn* (9th Cir. 1993) 992 F.2d 997:** This case in no way applied California law for determining whether statutory damages under a federal agricultural employment statute were or were not a "penalty," and did not consider any statute of limitations issue. The case simply dealt with the question whether the statutory damages imposed under the federal statute were excessive. The court simply stated in passing that the statutory payment was "provided not only to compensate injuries, but also to promote enforcement of the Act and deter violations." (992 F.2d at p. 999.) Significantly, however, the court characterized the payment as a *penalty.* (*Id.*)

Medrano v. D'Arrigo Brothers Co. **(N.D. Cal. 2000) 125 F.Supp.2d 1163:** This decision, enforcing the same federal statute as *Martinez,* held that the California three-year statute was applicable, rather than the two-year statute for breach of oral contract. There was no consideration given to whether the payment was a penalty, subject to the one-year statute. Further, *Medrano* relied upon the incorrect *Rivera* decision.

IV

THE PAYMENT IMPOSED BY LABOR CODE SECTION 226.7 CLEARLY IS A PENALTY

With this important detailed background as to the appropriate criteria for assessing what constitutes a "penalty" under California law, we turn to the pivotal question in this case as to whether the section 226.7 payment does or does not constitute a penalty. The answer is simple. It *is* a "penalty."

Section 226.7 provides in pertinent part that if an employer "fails to provide" an employee a meal period or rest period "in accordance with an applicable order of the [IWC]," it "shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." An evaluation of section 226.7, and the Wage Order language upon which it was based,

easily yields the conclusion that money payable pursuant thereto is a statutory penalty.

Given that the payment obligations are triggered if, and only if, an employer ***fails to provide*** meal or rest periods mandated by an applicable order of the IWC, section 226.7 indisputably provides for "a sum of money made payable . . . for the nonperformance of an act." (*San Diego County v. Milotz, supra,* 46 Cal.2d at p. 766.) The only question is whether section 226.7 provides for payment of such amounts "without reference to the actual damage sustained" *or* whether the payment is exacted as "punishment for some act which is in the nature of a public wrong." (*Prudential, supra,* 66 Cal.App.4th at p. 1242; *see also San Diego County v. Milotz, supra,* 46 Cal.2d at p.766.) Although the payment is a "penalty" if *either* condition is applicable, here it is clear that *both* alternate conditions are satisfied.

A. The Payment is Required Without Reference to Actual Damages

There can be no doubt that the payment required by section 226.7 is imposed "without reference to the actual damage sustained." In many, if not most, cases, an employee who is not provided the opportunity to take a full, timely 10-minute break (or aggregate 10-minute rest period time)[8]

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[8] Section 12 of the Wage Orders does not mandate that there be two 10-minute breaks, but instead provides that employers permit "net rest time"at the rate of 10 minutes for each four (4) hours of work.

has suffered *no actual* damage at all. The "no actual damage" conclusion is equally true with respect to many, if not most, employees who are not provided a full 30-minute, non-working, non-paid lunch, or are provided with a late meal.

Even if it is assumed that there may be *some* damage in *some* instances, the statute clearly imposes a payment – equivalent to an hour of pay – "without reference to the actual damage sustained."

Focusing initially on rest periods only, it is undisputed that the same one hour payment is required irrespective of whether (1) the employee is deprived of one break (or the aggregate equivalent), (2) is deprived of two or more breaks during a shift (or the equivalent), or (3) one or both breaks (or the equivalent) is less than a full 10 minutes. The payment enacted into law is thus wholly different than that initially proposed – a payment pegged to the length of the rest periods during which the employee was required to work. (*See* CELC RJN Ex. 6, pp. 28-29.)[9]

The lack of any relationship between "damage" and payment, i.e., penalty, is reflected by comparing the hypotheticals of (i) an employee who is asked to take only an eight minute break because of work demands

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[9] Labor Code section 226.7 was enacted by AB 2509, originally introduced on February 24, 2000. The legislative history of the bill is set forth fully in the Request for Judicial Notice of the California Employment Law Council et al, referred to below as "CELC RJN." A potentially helpful chronological summary of that history is included as Ex. 5.

and (ii) one is simply not permitted to take any break at all. Section 226.7 imposes the same payment obligation in these two instances – a *penalty.*

In addition, the fact that the payment varies with the employees' wage rates – a higher earning employee receives more for losing all or part of a break – is further evidence that the payment has nothing to do with compensating employees for the "stress" of not having a full break. To the contrary, it could well be argued that lower earning blue collar employees are frequently more disadvantaged by not having breaks in that they may be more limited from accessing restroom facilities than higher paid white collar counterparts who can readily take a quick, shorter-than-ten minute breaks.

All of the same can be true for those who may work without being provided a timely unpaid, non-working meal break. The same one hour payment applies to those who are not permitted time to eat at all, to those who are not allowed to take a full 30-minute break but do eat (and often eat while being paid), to those who must cut short their 30-minute break by 5 minutes to attend to work exigencies and get paid for that additional work time, and to those who get their meal period, but later than the strict five-hour time limit imposed by regulation.

The *penalty* nature of the payment is reflected by hypothetically considering the contrasting alternatives of an employee who is ordered to skip his or her meal and others who are asked to return a few minutes earlier than

required or are permitted to leave for lunch a few minutes beyond the five hour period for taking meals. The payment – *penalty* – is the same.

B. The Payment is Designed to Rectify a Public Wrong

Alternately, the section 226.7-required payment clearly is designed to punish employers for committing "public wrongs" by imposing a costly monetary obligation for violation of the IWC rest period and meal period regulations.

There can be no doubt that failing to comply with the IWC requirements relating to rest periods and meal periods is a "public wrong" inasmuch as the IWC industry-specific regulations are designed to foster employee protection and no employer could obtain written agreements with its employees to waive the benefits of these various regulations. (*Semore v. Poole* (1990) 217 Cal.App.3d 1087, 1097 [a policy is a "public policy" if a contract requiring an employee to waive his or her rights would be unenforceable as a violation of public policy].) This is underscored by the very title of AB 2509, the bill that enacted Labor Code section 226.7, "Employment: remedies for employment law violations" (CELC RJN Ex. 6, p. 27), and also by the fact that the Legislature has declared that Wage Order violations are misdemeanors. (Labor Code, § 1199(a).)

There also can be no doubt from the legislative history of section 226.7, and the history relating to the adoption of the Wage Order

payment provisions on which the statute relied, that the imposition of the payment obligation was prompted by the "lack of employer compliance with the. . . requirements" and that there was then an insufficient injunctive remedy to provide an "incentive" for employers to comply with the law. (*See* CELC RJN Ex. 3, pp. 9, 11-12.) This legislative purpose is the hallmark of a "penalty"– an attempt to coerce compliance with the law. (*See, e.g., San Diego County v. Milotz, supra,* 46 Cal.2d at p.766 ["[t]he purpose of the statute is clearly to provide for the prompt delivery of . . . transcripts . . . and for noncompliance therewith an arbitrary pecuniary punishment is imposed"]; *Prudential, supra,* 66 Cal.App.4th at p. 1242 ["t]he obvious statutory purpose [of the $300 sum] is to encourage prompt reconveyance by penalizing unwarranted delay"].)[10]

C. The Legislative History of AB 2509 Reflects that the Intent was to Adopt a "Penalty"

Although the *function* of a statutory payment provision is far more important to the analysis than the label chosen, it also bears emphasis that the term "penalty" was utilized repeatedly during the course of the legislative history to describe the payment obligation that was adopted by the IWC. In addition, the legislative history clearly reflects that the intended function of the payment was that of a *penalty.*

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[10] This conclusion is true whether the remedy imposed is purely penalty or purportedly intermixes penalty and compensation goals. (*See* pp. 45-48 below.)

- The Department of Industrial Relations' Enrolled Bill Report for AB 2509 reported that (1) there was no existing penalty for meal and rest period violations, comparable to the civil penalty for failing to pay overtime compensation set forth in Labor Code section 558, (2) the payment imposed by the bill was a "***penalty***" designed to encourage employers to "comply with the meal period provisions," and (3) "[w]ithout the proposed provisions there is no effective enforcement of current law." (CELC RJN Ex. 14, p. 63.)[11]

- The author of AB 2509, the Chair of the Assembly Labor and Employment Committee, characterized the payment as a "penalty" in the post-passage letter he sent to Governor Davis urging that the bill be signed into law (CELC RJN, Ex. 13, p. 53 [emphasis added]):

> "As amended, this bill codifies the actions of the IWC establishing a ***penalty*** for an employer who violates the law requiring meal and break periods. Some have questioned the authority of the IWC to adopt this penalty. AB 2509, by codifying the ***IWC's penalty level,*** serves the goals of the sponsors of this measure by providing a remedy for a violation of the law (previously there was none) and ensuring that the IWC's actions will be legally sustainable. ***The bill as***

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[11] This report is highly relevant legislative history. (*See, e.g., Elsner v. Uveges* (2004) 34 Cal.4th 915, 934, fn. 19 ["we have routinely found enrolled bill reports, prepared by a [the Department of Industrial Relations] contemporaneous with passage and before signing, instructive on matters of legislative intent"]; *Lolley v. Campbell* (2002) 28 Cal.4th 367, 375-376 [also relying on Department of Industrial Relations enrolled bill report].) We note in this regard that Murphy includes this report as Exhibit 19 to his Motion for Judicial Notice (which he states is already part of the record).

introduced had higher penalties, but has been amended to conform to the IWC levels."[12]

- Consistent with the author's report to Governor Davis, the final legislative report on AB 2509 that preceded the passage of the bill that enacted Labor Code section 226.7 likewise explained that the Senate amendment in August 2000 codified the "***lower penalty amounts***" adopted by the IWC. (CELC RJN, Ex. 12, p. 48.)

- The earlier AB 2509 legislative reports had described the initially-proposed remedies in section 226.7 as "***penalties***," referring *collectively* to both the expressly-described $50 penalty *and* the payment of twice the hourly rate for work during break time. (CELC RJN. Exs. 7-9, pp. 31-35, described in Ex. 5, p. 24.)[13]

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[12] *See, e.g., Martin v. Szeto* (2004) 32 Cal.4th 445, 450 ["[such] statements about pending legislation are entitled to consideration to the extent they constitute "a reiteration of legislative discussion and events leading to adoption of proposed amendments rather than merely an expression of personal opinion."].)

By way of explanation, on June 30, 2000, the IWC adopted the following provision: "If an employer fails to provide an employee a meal period or rest period in accordance with the applicable provisions of these orders, it shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." (CELC RJN Ex. 4, pp. 21-22.) Because the authority of the IWC to adopt a penalty had been vigorously questioned, the Legislature stepped in to enact this language as its own. AB 2509 was amended in August 2000 to substitute the IWC's language for the language in the original version of the bill as introduced in February 2000.

[13] We acknowledge that there was a Senate report that stated that the amendment to section 226.7 meant that the "[f]ailure to provide such meal and rest periods would subject an employer to paying the worker one hour of wages for each work day when rest periods were not offered." (CELC RJN Ex. 11, p. 45.) Given that the bill originated in the Assembly and the Senate amendment required the

In addition, it is very significant that in 2004 and 2005, both houses of the Legislature passed three bills to amend Labor Code section 226.7 – SB 1538, AB 755 and AB 3018 – for which the Legislative Counsel opined in *every* version of the bills that "existing law," i.e. Labor Code section 226.7, "establishes ***penalties*** for an employer's failure to provide a mandated meal or rest period." (CELC RJN Exs. 16-29.) The fact that these bills ultimately were vetoed – for reasons having nothing to do with whether the section 226.7 payment is a penalty (CELC RJN, Exs. 24, 28 & 29, pp. 108-09) – is irrelevant because the Legislative Counsel's characterization of an existing statute is equally germane whether the bill was enacted or vetoed.[14] Thus, if there were

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Assembly's final approval, the *subsequent* Assembly report describing the payments as "penalty amounts" would be entitled to far greater weight.

[14] *See Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 832 ["[t]he Legislature's adoption of subsequent, amending legislation that is ultimately vetoed may be considered as evidence of the Legislature's understanding of the unamended, existing statute"]; *Eu v. Chacon* (1976) 16 Cal.3d 465, 470-71 [examining Legislative Counsel's Digest of vetoed bill to ascertain meaning of existing statute that would have been amended had bill been signed by governor; "[a]lthough a legislative expression of the intent of an earlier act is not binding upon the courts in their construction of the prior act, that expression may be properly considered together with other factors in arriving at the true legislative intent existing when the prior act was passed"].)

There is additional, consistent evidence of legislative intent pertaining to the passage of SB 1538, including the rejection of an amendment of section 226.7 which would have altered the provision to assert that the payment is "premium pay." Specifically, prior to SB 1538's enactment by the Legislature and veto by the Governor, that bill had been amended in an attempt to characterize the section 226.7 payment as "premium pay." (CELC RJN Ex. 16 [summary]; Ex. 19, p. 78.) After vigorous opposition, this amendment was deleted. (Exs. 20, 21 & 22.) It is equally telling that the first of several versions of SB 1538, introduced and co-authored by prominent Democratic and pro-union, pro-employee legislators, explained that section

any doubt as to legislative intent as to the nature of the section 226.7 payment, this should resolve it definitively. ***It is a "penalty."***[15]

D. Past and Present State Administrative Officials, Appointed by Democratic and Republican Governors, Concur that Section 226.7 Imposes a Penalty

As already noted, *see* p. 31 & fn. 11 above, contemporaneous with the enactment of AB 2509, the head of the Department of Industrial Relations ("DIR"), joined by the head of its Division of Labor Standards Enforcement ("DLSE"), submitted an Enrolled Bill Report to Governor Davis clearly advising that the payment imposed by Labor Code section 226.7 was a "penalty" in both *function* and *label.* This was the *contemporaneous analysis* of Governor Davis' appointees, and is a highly relevant indicia used by courts to divine legislative intent. (*Elsner, supra,* 34 Cal.4th at p. 934, fn. 19.)

In addition, agencies may designate certain administrative decisions as "precedential decisions," as DLSE has recently done with respect to this exact issue. (*See Hartwig v. Orchard Commercial, Inc.,* Case No. 12-56901RB, CELC RJN Ex. 30, cited with approval in *Caliber Bodyworks,*

226.7 "sanction[s]" employers for failing to provide an employee with a rest period. (*See* Ex. 17, p. 72.)

[15] Murphy argues repeatedly that the section 226.7 payment is not a penalty because other unrelated provisions in the multi-topic bill that led to its enactment, AB 2509, expressly use the term "penalty." Given the specific history of the section 226.7 part of the bill, Murphy's argument is not the least bit persuasive.

supra, 134 Cal.App.4th at p. 381, fn. 16.) The courts owe deference to the precedential administrative decisions of such agencies. (*American Federation of Labor etc. v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1027 ["precedent decisions are akin to agency rulemaking" and courts should accept such decisions "unless [the agency's] application of legislative intent is clearly unauthorized or erroneous"]; *Styne v. Stevens* (2001) 26 Cal.4th 42, 51 [Labor Commissioner rulings].)

While employee plaintiffs and their lawyers denigrate the recent Precedent Decision as the work of the "pro-business" Schwarzenegger administration, they ignore that the predecessor leadership of DIR and DLSE, appointed by Governor Davis, concluded and advised him exactly the same thing – that the payments required by Labor Code section 226.7 are ***"PENALTIES."***

It is also sometimes argued that the DLSE has taken an inconsistent position because DLSE staff attorneys issued two opinion letters in 2003 expressing a pro-plaintiff view. The CELC *Amici* submit that reliance on these two letters as a reflection of the DLSE's "initial" position was highly erroneous given that the Demorcratic-appointed agency heads opined to Governor Davis in September 2000 *exactly the opposite.* (*See* p. 31 above.) Moreover, the staff attorney who penned one of the 2003 letters, then the DLSE's Chief Counsel, had previously issued an opinion letter dated April 2,

2001 – more than two years earlier – in which he *repeatedly* referred to the section 226.7 payment as a "penalty." (CELC RJN Ex. 33.) Thus, the *first* of the DLSE staff attorney musings is consistent with our demonstration that the payment is a *penalty.*[16]

For a cogent explanation of the DLSE's position with respect to its alleged "changing positions," we refer the Court to the *amicus* brief DLSE submitted in the *NASSCO* case. (CELC RJN Ex. **31.**) This brief amply answers the agency's critics and shows that its current position, as reflected in the *Hartwig* Precedent Decision, is fully consistent with the views expressed by Governor Davis' appointees in urging that AB 2509 be signed. The section 226.7 payment is, and has always correctly been regarded as, a ***penalty.***

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[16] Whereas the Court clearly can and must consider and give deference to both the 2000 Enrolled Bill Report and the 2005 Precedential Decision, it is highly doubtful whether it could give any weight to any of the opinion letters, whether the original 2001 letter which stated that the section 226.7 payment is a penalty or the contradictory 2003 letters which said otherwise. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 574-75 [interpretation may not be relied upon where it is not a case-specific enforcement opinion, but is instead a legal opinion of general applicability]; *see also Morning Star Co. v. State Board of Equalization* (2006) 38 Cal.4th 324, 334-35; *Conley v. Pacific Gas and Elec. Co.* (2005) 131 Cal.App.4th 260, 270; *California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 24 - 27.). This is particularly true in light of the fact that these letters were withdrawn. (CELC RJN Ex. 32.) Whereas later decisions seemingly cited letters that were similar in form to the letters in question here, there was no analysis in such cases as to whether the letters violated the standard set forth in *Tidewater* and, as such, the decisions there cannot be said to have decided an issue not therein considered.

V

CONTRARY ARGUMENTS RAISED BY MURPHY AND OTHER PLAINTIFFS ARE WITHOUT MERIT

A. The Misfocused Reliance on the Use of the Word "Pay"

Employee plaintiffs typically mistakenly place great emphasis on the wording of section 226.7 that "the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation" per day. This reliance on the phrasing of the statute does not at all alter the conclusion that the payment is a penalty.

First, and foremost, the Legislature cannot redefine a payment to be other than a penalty by calling it something else. Just as statutory "damages" or "liquidated damages" are penalties when the payment obligations have the operational earmarks of a penalty, i.e. they "quack like a penalty" (*see* pp. 13-16 above), no matter what the label, the payment would still constitute a "penalty."

Second, there is absolutely no basis for the contention that the awkward statutory terminology that an employer should "pay" employee "pay" *clearly and unambiguously* means that the payment is "wages." While "pay" undoubtedly *sometimes* carries that meaning, an examination of another closely-placed Labor Code provision reflects that the Legislature has used the term "pay" to refer to what is clearly intended to be a penalty.

Specifically, we refer the Court to Labor Code section 233, subd. (d), which provides that an employee aggrieved by the failure to receive sick leave to attend to an ill family member is entitled to "actual damages," or "one day's pay," "whichever is greater." The statutory payment of "one day's pay" in this section is unquestionably a penalty no different in function than the $50, $100 and aggregate $4,000 *penalty* payments specified by Labor Code section 226, subd. (e), that are to be paid if they are greater than "actual damages." It is also functionally identical to the minimum $250 payment construed in *Koire, supra,* 40 Cal.3d 24, to be a "penalty" where the statute imposed a remedy of "a maximum of three times the amount of actual damage, but in no case less than two hundred and fifty dollars ($250)."[17]

Just as the Legislature used "pay" in section 233, subd. (d) as a short hand for measuring the amount of a penalty, Labor Code section 203, the provision applicable to late payment of final wages to employees who are fired or quit, requires that "the wages of the employee shall continue as a *penalty* from the due date thereof at the same rate until paid . . . but the wages shall not continue for more than 30 days." The fact that section 203 refers to continued

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[17] The "pay" under section 233, subd. (d) is not conceivably "wages" because the statutory payment is for denial of a statutory right to use sick leave for care of relatives and is not for "services performed" within the meaning of Labor Code, § 200, subd. (a).

payment of "wages" does not alter the clear, expressly-stated conclusion that this mandated payment is a "penalty."

Another relevant example is the provision requiring court reporters to relinquish one-half of their contracted "compensation" for services – a word virtually synonymous with "pay" – for failing to timely comply with his or her obligations. (*See San Diego County v. Milotz, supra,* 46 Cal.2d at p. 766 [statute is a penalty "notwithstanding its use of the words 'shall have his compensation reduced'"]; *see also State Comp. Ins. Fund, supra,* 18 Cal.4th at pp. 1213-14 [Labor Code, §4650 provision that temporary disability indemnity payments "shall be increased 10 percent" for late payment is a penalty].)

The need for the Court to properly characterize the payment obligation based on its legal *function,* rather than its label, is particularly critical in this case because the statutory language in section 226.7 was derived directly from the earlier-adopted IWC payment provisions. It is highly likely that the IWC language was selected as a means of trying to circumvent the settled rule that administrative agencies do not have the power to adopt penalty provisions. In fact, the IWC Commissioner who proposed the sanction acknowledged that the IWC did not have the power to impose criminal penalties, but incorrectly argued that a civil penalty is different, which it is not.

(CELC RJN Ex. 3, pp. 14-15 ["we cannot establish new crimes. The Legislature, however, can establish crimes for violations of our wage orders, which is their prerogative, not ours"].)

Thus, the reference to "pay" in section 226.7 is easily susceptible of the interpretation that it is a penalty measured by the employee's hourly pay or wage rate, just as the penalty in section 203 is measured by the employee's daily wage rate and the section 233, subd. (d) penalty is measured by the daily pay rate.

Third, even if the Legislature and IWC had expressly categorized the required payment as employee "pay," it would still tell us nothing as to the nature of that "pay." An employee could be paid "wages," non-wage obligations or "penalties," and under any alternative, it would still be "pay" to an employee. Just as the cases routinely refer to the phrases "pay penalties" or "pay damages," there is no reason why the noun "pay" cannot have equal applicability to wages, penalties or damages. And, as demonstrated above, in Labor Code section 233, subd. (d), the Legislature clearly used the noun "pay" to refer to a penalty.

Here, the "pay" *clearly* would *not* meet the statutory definition of wages – "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." (Labor

Code, § 200, subd. (a).) ***This is because any "pay" required by section 226.7 is for the failure to provide meal and rest breaks, and is not for "labor performed."*** (*See, e.g., Steinhebel v. Los Angeles Times Communications* (2005)126 Cal.App.4th 696, 705 [advance on commissions "is not a wage"]; *Central Illinois Public Service Co. v. United States* (1978) 435 U.S. 21, 25 [reimbursement of employee travel meal expenses was not "wages" under statute that defines "wages" as "all remuneration . . . for services performed by an employee for his employer;" "many items qualify as income and yet clearly are not wages"].)

B. The Mistaken Analogy to Overtime Pay

Employee plaintiffs also vigorously argue that the section 226.7 payment for missed or infringed rest periods and meal periods is substantially similar to the "premium" paid for overtime work, e.g. time and one half the regular hourly rate for work in excess of eight (8) hours in a day or 40 hours in a week, which they note is sometimes loosely referred to in the employment law lingo as "overtime penalty." This attempted analogy is entirely misplaced and again reflects an inordinate focus on *label,* rather than upon the clearly-demonstrated *function* of the section 226.7 payment obligation. (*See* pp. 13-16 above.)

The answer is clear and obvious. It is outright *illegal* to fail to comply with applicable IWC rest period and meal period requirements, but an

employer is not similarly prohibited from assigning work to employees for more than eight hours in a day or 40 hours in a week.[18] An employer may be enjoined from denying rest periods and meal periods – a remedy that the proponents of the payment obligation acknowledged but decried as not being sufficiently effective – but there is no possible way that an employer could be prevented by court order from assigning overtime work. A failure to comply with the IWC provisions regarding meal periods and rest periods is a misdemeanor. (Labor Code, § 1199(a) [requiring employee to work "under conditions of labor prohibited by an order of the commission"].)[19]

This distinction is legally crucial because, as we have firmly established, a *penalty* is imposed for the "nonperformance of an act or for the performance of an unlawful act" or "as a punishment for some act which is in the nature of a public wrong."

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[18] Labor Code section 510, subd. (a) provides that "[e]ight hours of labor constitutes a day's work," but does not provide that it is illegal to require employees to work more than eight hours. It isn't.

[19] Murphy asserts in his reply brief, p. 5, fn. 2, that section 1199 does not apply to section 226.7 violations because it only covers violations of provisions in the same chapter. This is doubly wrong. First, section 1199 imposes misdemeanor liability for violations of IWC meal and rest period requirements, just as section 226.7 imposes civil penalties for the same violations. There is no "same chapter" rule insofar as section 1199(a) imposes misdemeanor liability for wage order violations. (*See also* Labor Code, § 553 [misdemeanor for violation of "this chapter" which *does* include meal period requirements of section 512].) It may be a misdemeanor to not pay overtime or minimum wage, but the underlying act of assigning overtime hours or putting someone to work is not at all illegal. (*See* Justice Mosk's analysis, quoted at pp. 3-4 above.)

The attempted analogy fails for another reason. Overtime compensation is given for the amount of extra work performed, whereas the rest or meal penalty payment is required for the "fail[ure] to provide" rest or meal periods as required by applicable IWC Wage Orders. It was only in the earlier version of AB 2509 that there had been a proposed payment obligation that was pegged to the length of the rest or meal period "during which the employee was required to perform any work." (*See* CELC RJN Ex. 6, p. 28.) Thus, whereas the payment in dispute here is unquestionably a sanction designed to coerce compliance with a legal requirement, i.e. a "penalty," overtime compensation is a state-imposed benefit – sometimes referred to as a "minimum labor standard" – for extra work performed.

Furthermore, while the payment in dispute is required without reference to actual damages and in that sense is an "arbitrary pecuniary punishment," overtime compensation is a benefit mathematically tied precisely to the amount of the extra work performed. That, too, is another relevant distinguishing factor.

It is also extremely significant that the September 2000 Department of Industrial Relations' Enrolled Bill Report for AB 2509, discussed at p. 31 above, likened the new "penalty" for meal and rest period violations to the civil penalty for failure to pay overtime compensation set

forth in Labor Code section 558. It did not compare it to the underlying requirement of paying overtime compensation.

The 2000 Enrolled Bill Report counters the employees' argument in yet another respect. If the IWC rest period and meal period requirements had been designed to be a means for defining the length of the normal "day's work," the failure to comply with the IWC's requirements would have been regarded as a failure to comply with provisions of IWC orders "regulating hours and days of work" within the meaning of Labor Code section 558. The Enrolled Bill Report correctly pointed out, however, section 558 applies only to "the underpayment of wages and not to meal or rest period violations." Thus, unlike overtime compensation which pays employees for extra work beyond the "day's work," the payment required by section 226.7 does not.[20]

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[20] In the event that section 226.7 and overtime payments were indistinguishable, it is entirely conceivable, as suggested by the Court of Appeal below and in *Banda,* that overtime payments would be properly classified as a penalty. Whereas it is true that *Aubry v. Goldhor, supra,* 201 Cal.App.3d 399, applied the three-year statute of limitations for an overtime claim, no issue was raised in that case as to the applicability of the one-year statutory penalty statute of limitations. *Aubry* thus is not relevant authority. (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

The same is true with respect to Murphy's repeated attempts in both his opening and reply briefs to liken the section 226.7 payment to "reporting time pay." That payment is very susceptible to being regarded as a civil penalty. But, in any event, like overtime, the reason for requiring the payment is *not* because an employer has violated a minimum labor standard, but rather because an employer has elected to engage in lawful conduct that triggers the extra payment

C. The Arguments that the Section 226.7 Payment is Purely for "Damages" or is a Hybrid Provision for "Damages" and Deterrence are Wholly Incorrect and Irrelevant

Implicitly conceding that there are some significant problems with the argument that section 226.7 payments are "wages," plaintiff Murphy has changed course before this Court to argue that the payments are some sort of statutory damages or statutory liquidated damages to compensate aggrieved employees for psychic and physical harm stemming from their not being "provided" meal and/or rest periods. He asserts that the one hour "pay" compensates for "inconvenience, lost opportunity. . . added fatigue. . . the denial of the right to. . . eat, rest, use the bathroom, schedule a doctor's appointment, go to the bank, check on a child in childcare [or] take a walk."

The argument is simply a figment of Murphy's imagination. It draws no support at all from the language of the statute or its legislative history. Nothing remotely suggests that there was a legislative intent to be awarding damages for such amorphous injuries. Given that the statutory payment applies even when employee victims claim no injury whatsoever, the theory must be rejected.[21]

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[21] We refer the Court to the examples of what kinds of minor violations of the IWC meal and rest period rules can possibly trigger the one hour penalty payment. (*See* pp.27-29 above.)

Even Murphy concedes that his theory is not fully justifiable. He acknowledges throughout his argument that there is no basis for concluding that the sole purpose of the payment is to compensate for psychic and physical damages. Instead, he asserts that there is a dual or hybrid purpose; i.e., that the statute is designed both to compensate for injuries and to secure compliance by employers with the duty to provide meal and rest periods.

But this argument fares no better. *There is not the slightest inkling that the legislative purpose was to provide damages compensation in any respect.* The entire reason for adopting the one hour penalty was to pressure employers to comply with the law, and to punish those who did not.

In any event, even if there were a basis for entertaining this dual statutory purpose construct, it has no bearing on the characterization of the statutory payment as a "penalty." The plain language of the three-year statute of limitations for statutory violations confines that provision to actions "upon a liability created by statute, ***other than a penalty or forfeiture.***" (Code of Civil Proc., § 338, subd. (a)(emphasis added).) If the payment is for a hybrid penalty/damages, it is *not* for a liability ***other than a penalty.*** (*See, e.g., Corder, supra,* 424 F.Supp.2d at p. 1209, fn.3.)

Furthermore, hybrid or not, this Court has on multiple occasions rejected efforts to characterize statutory "liquidated damages" provisions as anything other than statutory penalties.

Most significantly, in *Moss v. Smith, supra,* 171 Cal. at pp. 782-784, the Court addressed a statutory payment that had both remedial and penalty qualities and held that (1) "the moment the element of compensation for loss is eliminated, the statute itself becomes highly penal in its nature" and (2) "[t]he fact that a statute may have a remedial phase is not at all inconsistent with its being of highly punitive character." The payment was a *penalty.*[22]

As another example, in *Hansen, supra,* 182 Cal. 492, a payment of "liquidated damages" for refusal to provide utility services was unquestionably a penalty even though that (1) was the "only compensation" provided to the injured party and (2) the payment was inclusive of actual damage inflicted on the party. (*See also, e.g., Koire, supra,* 40 Cal.3d at p.

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[22] *Moss* cited *Willcox v. Edwards* (1912) 162 Cal. 455 as a statute of limitations case which had held that "under statutes similar to ours the recovery is not strictly a penalty." (171 Cal. at p. 784.) *Willcox,* however, was not a statute of limitations case and in fact held that a provision was a penalty that was subject to retroactive abrogation. It in turn referred to *Parker v. Otis* (1900) 130 Cal. 322, denying rehearing, and stated that it had there held "the constitutional provision giving the right to sue under the former section 26 of article IV to be not penal but remedial in its nature" and "therefore not barred by the [one-year penalty or forfeiture] statute of limitations." (162 Cal. at pp. 463-64.)

Parker dealt with a statute where a party who violated a prohibition against margin sales of stock was subject to suit to return the monies received in violation of the statute. The Court reasoned that the provision was "remedial" because "[t]he action is for money had and received" and "certainly the recovery cannot be said to be 'without reference to the actual damage sustained' [under the *Ballerino* test] for there is no damage except as measured by the money paid." (130 Cal. at p. 322.) This analysis has no bearing at all on the nature of the section 226.7 statutory payment. As demonstrated, under the *Ballerino* test, as applied in cases such as *Hansen, supra,* 182 Cal. 492 which involved "liquidated damages" provisions, the section 226.7 payment unquestionably is a penalty.

27, fn. 5 [provision for payment of damages, "but in no case less than $250," was a penalty]; *Hale v. Morgan, supra,* 22 Cal.3d at p. 392 [Civil Code provision awarding trailer park tenants whose utilities are cut off "[a]n amount not to exceed one hundred dollars ($100) for each day or part thereof the landlord remains in violation" constituted a "penalty"]; Labor Code, § 203 [statutory penalty for late payment of final wages is a single payment, is measured by employee wage rates and unquestionably is designed to partially compensate an employee for late payment of wages]; Labor Code, § 226, subd. (e) [expressly characterizing minimum payment as "penalty" where it clearly includes a compensatory element].)

Thus, the "damages" argument, whether based on a pure "damages" contention or some type of hybrid assertion, does not fly.

D. The Allegedly Self-Executing Nature of the Section 226.7 Payment Has Nothing to Do With Whether it is or is Not a Penalty

Murphy argues that because section 226.7 mandates that the employer shall pay the employee the statutory payments and provides no mechanism for suing to collect the monies when not paid, it is a "self-operational statute." (Opening Brief, p. 28.) He contends that "[i]n this way, meal and rest pay once again operates like other payment obligations, such as overtime [pay]. . ." (*Id.*) In Murphy's mind, this makes the section 226.7 pay just like legally "vested" wages.

This argument is absurd.

First, the lack of enforcement mechanism in section 226.7 does not at all make the provision "just like" overtime. As Murphy is well aware and refers to later in his brief, Labor Code section 1194 provides a private judicial right of action when an employer fails to comply with statutory overtime and minimum wage obligations. Those payments are not at all "self-executing" in the sense Murphy purports to read section 226.7.

Second, the alleged "self-executing" nature of section 226.7 is similar to other statutes that unquestionably do provide for penalties. Labor Code section 4650, subd. (d) requires an employer to increase a late temporary disability workers' compensation by 10 per cent. The statute states that such payment "shall be paid, *without application,* to the employee . . ." (Emphasis added.) Similarly, Labor Code section 203, the provision for penalties for late payment of wages to terminated or resigned employees, is clearly "self-executing" in the sense that the statute specifies that "the wages of employee shall continue as a penalty."

So, if this "self-executing" notion led to any conclusion, it would refute Murphy's position and instead would suggest that the payment is a penalty. But, it is a meaningless argument that leads to no conclusion, one way or the other. It is true that penalties are not "vested" rights, but Murphy's argument is based on the age-old fallacy of *assuming one's conclusion.* There

is nothing other than Murphy's bald assertion that the section 226.7 payment is "vested."

Ironically, Murphy's "self-executing" argument is based on nothing other than the fact that a provision for a private right of action in the initial version of AB 2509 was removed prior to the enactment of section 226.7. The most likely legal effect of that removal is that this leaves employees without a private judicial right of action, and instead retains enforcement of section 226.7 by the Labor Commissioner which enforces claims for wages and penalties alike. (*See, e.g., Katzberg v. Regents* (2002) 29 Cal.4th 300, 316 [determination whether there is private right of action is guided primarily by evaluation of language and history of enactment]; *Violante v. Communities Southwest Development and Const. Co.* (2006) 138 Cal.App.4th 972, 978 [no private right of action was permitted under Labor Code provision where the clear statutory language and framework provided that "it is the labor commissioner, not an employee, who pursues such claims"].) The removal of the judicial right of action certainly does not convert a claim for penalties into one for "wages."

E. The *NASSCO* Majority Decision Was Clearly Incorrect

As noted previously, only one appellate case, a 2-1 decision from San Diego, has found that the section 226.7 payment is anything other than a penalty. *NASSCO* held that the section 226.7 payment was a "a

penalty against the employer in the form of a wage to the employee" and, in the poorly-explained view of the majority, thus subject to the three-year statute of limitations.

Incorrect Hallmarks of a Wage: The *NASSCO* majority incorrectly concluded that section 226.7 payment has partial attributes of a wage.

- *NASSCO* incorrectly declared that the payment resembles a wage because section 226.7 provides for payment directly to the employee rather than to the State. (*See* pp. 19 & 22 above.)

- *NASSCO* inaptly commented that it is significant that the Legislature did not expressly label the section 226.7 payment a "penalty," and instead used the term "pay." (*See* pp. 13-16 above.)

- *NASSCO* pointed to the fact that section 226.7 is in a chapter regarding payment of wages, but overlooked that it is specifically placed right in the middle of a number of penalty provisions. (*See, e.g.*, §§ 226, subd. (e), 226.3, 227.)

- *NASSCO's* observation that the payment is a penalty in the form of wages was incorrect. In reality, it is a penalty *measured in amount* by a wage rate, just like the penalties imposed by other statutes. (*See* pp. 37-38 above.)

- *NASSCO* stated that an object of section 226.7 is to "pay employees for additional work performed during mandated meal or rest periods." Yet, it correctly otherwise noted that when an employee works during a meal period, he or she must be additionally paid for that work time as hours worked.

- *NASSCO* also referred a number of times to the alleged "self-executing" nature of the section 226.7 payment and says that this is indicative of it being a wage. Wrong. (*See* pp. 48-50 above.)

Dual Function Payment: *NASSCO* was incorrect in deciding that the section 226.7 payment is anything other than a pure penalty. But, even assuming that it correctly ruled that the section 226.7 payment is in part wage and in part penalty, it was incorrect in concluding that this removed it from being a penalty for statute of limitations purposes. (*See* pp. 45-48 above.)

The only case cited in *NASSCO* that in any way purported to support its conclusion was *Prudential, supra,* 66 Cal.App.4th at 1243, which it cited for the proposition that the "same provision may be penal to the offender and remedial to the victim." *NASSCO* inexplicably overlooked that *Prudential* held that the payment in question in the case before it was a *penalty* and was subject to the *one-year* statute of limitations. The language *NASSCO* cited was from *MacManus v. A.E. Realty Partners* (1983) 146 Cal.App.3d 275, expressly overruled by *Prudential* because it had taken the "wrong

analytical path." The *NASSCO* majority also inexplicably disregarded one of its own decisions, *Goehring v. Chapman University, supra,* 121 Cal.App.4th at p. 386, which approvingly relied upon *Prudential's* rejection of *MacManus.*

Labor Code Section 558: A particularly troubling aspect of *NASSCO* was its interpretation of Labor Code section 558. The majority concluded that it could "harmonize" sections 226.7 and 558 by concluding that the section 226.7 payment is a wage and that section 558 supplies the penalty for failure to pay that statutory wage.

This conclusion not only contradicted the *NASSCO* majority's prior finding that the payment was a "hybrid" penalty and wage, but it was manifestly incorrect. Equally troubling is that this reasoning not only serves to support the majority's quest to *quadruple* the applicable statute of limitations, but provides for imposition of double penalties for the same violation.

NASSCO did not analyze the actual language of section 558. That provision imposes a penalty for those who violate "a section of this chapter" or "any provision regulating hours and days of work in any order of the Industrial Welfare Commission."

Section 226.7, however, is *not part of the same chapter as section 558.* The chapter in which section 558 is included starts at section 500, i.e. Division 2, Part 2, Chapter 1, whereas section 226.7 is included not

only in a *different Chapter*, but also in a *different Part*, i.e., Division 2, Part 1, Chapter 1. And, as already shown at p. 44 above, the meal and rest period provisions do not regulate "days of work." To the contrary, as Governor Davis' appointees opined in urging him to sign AB 2509, section 226.7 was needed because section 558 provided a penalty for overtime violations, and *not* for violations of meal and rest period requirements.

The Alleged Lack of Need for a Short Statute of Limitations: Perhaps reflecting the sentiment of an older era that statute of limitations defenses are "disfavored" (*but see* p. 4, fn. 2 above), the *NASSCO* majority also declared that the "general purposes underlying statutes of limitations do not warrant a one-year limitations period" because employers are required to keep employee time records for a period of three-years.

This comment not only is completely contrary to proper statute of limitations analysis, which in no way is based on a case-by-case determination of "need," but it is also incorrect in its premise. Many of the claimed violations in meal and rest period cases in no way turn on information contained on time cards. For example, time cards *never* reflect – and are not required to show – whether rest breaks were or were not taken. (*See* IWC Wage Orders, § 7(A)(3).) Where employers pay employees for meal breaks, as they often do in the restaurant industry, time cards would not reflect that meal breaks were taken or the full 30-minute time period was afforded. (*Id.*)

Most importantly, as *NASSCO* acknowledges that there is no payment required "if an employee voluntarily chooses to forego a meal or rest period," time cards would not speak to such questions of intent.[23]

F. The Court Should Not Rely on Two Unpersuasive Federal District Court Decisions

In his reply brief, Murphy cites repeatedly a decision rendered in June of this year, *Wang v. Chinese Daily News, Inc.* (C.D. Cal. 2006) 435 F.Supp.2d 1042. This case started with the wholly incorrect premise that there was no contrary federal authority, *see* two cases cited at p. 3, fn. 1 above, including *Corder, supra,* 424 F.Supp.2d 1205, and then in most cursory fashion, relying solely on the *NASSCO* decision cited above, concluded that section 226.7 payments were wages. It even missed that *NASSCO* in fact had ruled (incorrectly) that the payments are "hybrid" penalties and wages.

The other decision that is entitled to no weight is *Tomlinson v. Indymac* (C.D. Cal. 2005) 359 F.Supp.2d 891. It did not address what types of payments are penalties under California law, did not apply the requisite functional analysis mandated by California law, and ignored the extremely pertinent legislative history cited in this brief. The decision of the Court of

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[23] A shorter limitations period is appropriate to address penalty claims, in part, because there are relevant considerations that may arise with respect to a court's determination whether the penalty in a given case is unconstitutional. (*See, e.g. People ex rel Lockyer v. R.J. Reynolds Tobacco Co., supra,* 37 Cal.4th at pp. 828-32.) As the employer's intent is directly relevant to this analysis, employee time cards would be wholly insufficient to mount its defense.

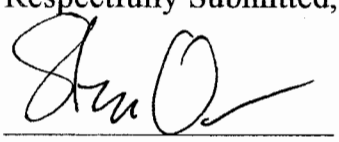
Appeal in this case, as well as in *Mills,* correctly rejected *Tomlinson's* "unpersuasive" rationale.

CONCLUSION

The question whether Labor Code section 226.7 payments constitute penalties, wages, damages, or some combination is a high stakes proposition on which billions of dollars turn. The CELC *Amici* respectfully urge the Court to find that these payments are unquestionably penalties for statute of limitations purposes, as well as for the many related purposes we have identified.

Dated: October 17, 2006

Respectfully Submitted,



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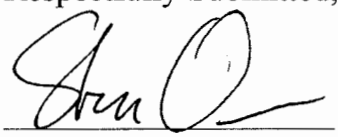
CERTIFICATE OF COMPLIANCE

The within amicus brief is proportionately spaced, has a 13 font and contains 13,985 words. This representation is made in reliance on the "word count" feature in the Word Perfect word processing program utilized to prepare this brief.

Dated: October 17, 2005

Respectfully Submitted,



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PROOF OF SERVICE

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 11377 West Olympic Boulevard, Suite 900, Los Angeles, California 90064.

On October 17, 2006, I delivered the following documents described as **BRIEF OF *AMICUS CURIAE* IN SUPPORT OF POSITION OF DEFENDANT AND APPELLANT KENNETH COLE PRODUCTIONS, INC.** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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The envelope was mailed with postage thereon fully prepaid.

I am "readily 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 1 day after date of deposit for mailing in affidavit.

I declare under penalty of perjury that the above is true and correct and that this declaration was executed on October 17, 2006, at Los Angeles, California.

Steven Drapkin
Type or Print Name

Signature