No. **S234969**

Ninth Circuit No. 14-55530

In the
Supreme Court of California

DOUGLAS TROESTER, et al.,

Plaintiff – Appellant – Petitioner,

vs.

STARBUCKS CORPORATION, et al.,

Defendants – Appellees.

ON GRANT OF REQUEST TO DECIDE ISSUE PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.548

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
HON. GARY ALLEN FEESS, PRESIDING
DISTRICT COURT CASE NO. 2:12-CV-07677-GAF-PJW

PETITIONER'S REPLY BRIEF ON THE MERITS

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I. INTRODUCTION

In his Opening Brief, Petitioner/Plaintiff Douglas Troester demonstrated that a *de minimis* excuse to the obligation to pay all wages for all hours worked does not apply to violations of California wage and hour law:

- California's statutory and regulatory requirements mandate payment for ***all*** hours worked, not ***almost all*** hours worked. Lab. Code §§ 510, 1197; Wage Order No. 5 §§ 3(A)(1) and (4)(A). The Fair Labor Standards Act, 29 U.S.C. 201, *et seq*. ("FLSA"), in contrast, contains no similarly broad requirement, instead mandating payment for all hours worked only in specific instances.
- As this Court has often held, federal law is only incorporated into California's wage and hour regulatory framework when the IWC *expressly* intends that result. *See, e.g., Mendiola v. CPS Sec. Solutions, Inc.,* 60 Cal. 4th 833, 843 (2015). For example, in Wage Order 5's definition of "hours worked," the IWC states, "Within the health care industry, the term 'hours worked' means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, ***as interpreted in accordance with the provisions of the Fair Labor Standards Act***." (Emphasis added.) If the IWC wanted to follow the FLSA in other ways, it would have said so.
- California law already incorporates a clearly-defined mechanism that effectively prevents the risks identified by Defendant Starbucks Corporation ("Starbucks"): It is only when (1) employees are under an

employer's control or (2) the employer knew or should have known that the work was occurring that an employer incurs an obligation to pay. *Morillion v. Royal Packing Company*, 22 Cal. 4th 575, 585 (2000) ("The words 'suffer' and 'permit' as used in the statute mean 'with the knowledge of the employer.'").

- The public policy of the State of California, as declared by the Legislature and the IWC, is the protection of employees. *Augustus v. ABM Sec. Servs., Inc.*, 2 Cal. 5th 257, 262 (2016). The California Legislature has, in numerous ways, implemented stronger employee protections than the FLSA's, precluding importation of federal standards that would weaken California's employee protections.

Defendant failed to refute these propositions that are dispositive of the Question Presented for Review. Lacking any means to directly address the Legislature's enactments, the IWC's regulations, and this Court's decisions, Defendant, instead, touts federal law, claiming that California Courts look to federal law for guidance *where there is no conflict between state and federal law*. But here, California has implemented an employee-protection framework that exceeds federal protections and defines the obligation to compensate to negate the need for a judicially created *de minimis* defense to wage payment obligations.

To support its claim that California Courts look to federal law for guidance, Defendant asserts that the policies embodied by the FLSA are as protective of employees as those existing under California law. However, Defendant was unable to identify any relevant provision of the FLSA that is not surpassed by protections

present under California law, and many of the protections existing under California law are nowhere found under federal law. For example, the FLSA, unlike California's Labor Code, does not contain within its text a blanket requirement of payment for all hours worked in all industries. Rather, the only such obligation found anywhere in the FLSA is explicitly limited to certain employment contracts, collective bargaining agreements, and seamen on American vessels. FLSA §§ 206(a)(3), 207(b)(2), and 207(f)(1). Had the United States congress wanted to require payment for all hours worked in all industries, it would not have confined such language to such specifically enumerated categories of employees. Moreover, Defendant also relies on *non-binding* DOL regulations to make claims about what the FLSA provides, rather than the FLSA itself. The federal *de minimis* excuse has never been "a backbone" of California wage and hour law, and federal wage and hour laws are substantially weaker than those implemented by California.

Next, Defendant chastises Plaintiff for arguing that the FLSA's *de minimis* defense is a creature of federal law, saying it also existed in California "since at least the adoption of the Civil Code in 1872." (Respondent's Answer, at 17-18.) Defendant then recounts California cases decided over the years that address a *de minimis* concept without ever noting that the "broad range of cases" mentioned do not include *any* decision addressing claims arising under the Labor Code. In short, Defendant misconstrues Plaintiff's argument. The question before this Court is specifically whether the *de minimis* excuse applies to the wage payment provisions of the California Labor Code – not California law in general, or even the entire Labor Code.

Defendant does not cite a single California State wage and hour decision that applies the *de minimis* excuse to the obligation to pay all wages owed pursuant to the Labor Code or IWC Wage Orders. Even if California law generally acknowledges a concept of "trifles" under Civil Code § 3533, no California case has decided that time amounting to hours of work in the aggregate is a trifle under the California Labor Code, just as a rule of trifles is rejected in other contexts under California law. And, fatal to Defendant's entire argument about California's treatment of "trifles," it has long been recognized that Civil Code § 3533 does not apply in instances where permanent rights are at issue and even nominal damages will carry costs. *Kenyon v. Western Union Tel. Co*., 100 Cal. 454, 458-59 (1893).

Starbucks persists, claiming that California Courts have applied the *de minimis* rule in California wage and hour disputes. Yet, Defendant only lists one California State appellate decision as proof of this "backbone" of the California Labor Code to support its premise that California wage and hour law includes the *de minimis* defense. Defendant's lone citation, *Gomez v. Lincare*, considered a *de minimis* defense to a claim for *promissory estoppel*, not a claim under the California Labor Code. *Gomez v. Lincare, Inc.*, 173 Cal. App. 4th 508, 526-528 (2009). In short, Defendant would have this Court hold that a generalized maxim of jurisprudence, Civil Code § 3533, reflects a Legislative intent to apply the FLSA's *de minimis* defense to the unwaivable obligation to pay for all hours worked, supplanting the comprehensive body of statutes, regulations, and interpreting Court decisions that make up California's wage and hour framework. And Defendant would have this Court so hold, despite the fact that wage and hour-specific defenses and limitations

have been enacted as part of various Labor Code provisions whenever the Legislature concluded that such limitations or defenses are appropriate.

Defendant also argues that the DLSE's non-controlling opinion about a *de minimis* excuse should control despite contrary California law. But, as Defendant tacitly acknowledges, the DLSE's construction cannot supplant clear laws, regulations, and binding constructions of them. *Tidewater Marine Western Inc. v. Bradshaw*, 14 Cal. 4th 557, 574 (1996); *Mendiola*, 60 Cal. 4th at 848. The DLSE derives its *de minimis* excuse from *Lindow*, not from published California State decisions. *See* DLSE Enforcement Manual §§ 46.6.1, 47.2.1, 47.2.1.1, 48.1.9, and 48.1.9.1. The DLSE fails to offer any reasoning for why it has done so. Thus, it provides no reason for this Court to conjure the *de minimis* excuse from the contrary express language of the Labor Code and the IWC. That the DLSE was wrong in this instance for quite some time does not change the outcome.

Even assuming, *arguendo*, that Defendant was correct that the FLSA had the same express requirement to pay for all hours worked, it is understandable that Justice Scalia would question whether there is a *de minimis* test under federal law at all. It is not an absurd result for an employee to expect payment of wages for all time worked that an employer can track, whether it is a few hours or even a few minutes. In the aggregate, small amounts of unpaid time every day can add up to a significant sum of money that an employee is entitled to expect from the employer. Defendant does not dispute that Plaintiff may not have been paid for time aggregating to hours, based on all of time he spent on short tasks over the course of his employment. (*See* Respondent's Answer, at 10, n. 1.) Plaintiff does not sue over "split second"

increments as Defendant suggests. (Respondent's Answer, at 13.) The trial court acknowledged in the summary judgment proceedings that Troester's closing tasks took minutes to perform at times. Indeed, Defendant concedes that many of Troester's closing tasks involved up to 10 minutes to complete. Answering Brief, at 11. On other days, Troester spent less time on closing tasks. However, it makes no difference that the tasks, considered one at a time, took a relatively small amount of time to perform. California law calls for payment of "all time" worked and does not exempt arguably short periods from this rule.

The trial court's finding that Starbucks "could not feasibly capture the time at issue" was refuted by the record. In opposition to Defendant's summary judgment motion, Plaintiff supplied evidence that, late in the relevant time period, Starbucks had changed its timekeeping apparatus to capture the time periods in question, separating out two previously interdependent systems. (3 ER 437, 442-443, 474-475, 503-509; 4 ER 574-575, 577-578, 691, 755-760). As it was possible to capture the time, there is no rational basis for such work periods to go unpaid, whether the periods were "incidental" or "inevitable."

Finally, having no clear way to deny the laws that define California's wage and hour obligations, Defendant decries the "absurdities" that would result if it actually had to pay its employees for all of the time it controlled them or knew that they were working. Defendant just ignores the cumulative effect of withholding minutes of pay every day from employees, instead pejoratively characterizing such payments as mere trifles or "seconds," even after admitting elsewhere in its Answering Brief that more than mere seconds are at issue in this case. California's

"control" or "knew or should have known" standards prevent the nonsensical outcomes that Defendant attempts to conjure.

As explained in Plaintiff's Opening Brief, and not refuted by Defendant, California's wage payment statutes and Wage Orders are clear. There is no basis for creating an exception to those requirements, undermining the policies embodied by statute and regulation, while injecting needless complexity into an employee's attempt to ascertain what work is entitled to compensation. The Labor Code and the Wage Orders already include a bright line rule – employers must pay for all hours worked. This Court should hold, consistent with Labor Code §§ 510, 1194, and 1197, consistent with the IWC Wage Orders, and consistent with this Court's many decisions, that there is no *de minimis* excuse to claims for unpaid wages under California law.

II. DISCUSSION

A. Defendant Failed to Identify Any California Court Decision Applying the *De Minimis* Excuse to California's Wage and Hour Laws and Regulations

In its Answering Brief, Starbucks claims that a *de minimis* rule exists, fully formed, as part of California's wage and hour law and that the *de minimis* rule arising under the FLSA that is applied by federal courts adjudicating wage and hour claims is not a federal rule at all, citing numerous "California" cases that use the term "*de minimis*." But, not one of the cases identified by Defendant considered wages owed pursuant to California's Labor Code. Instead, Defendant cites cases concerning jury deliberations (*People v. Armstrong*), union representation (*Claremont Police Offers*

Ass'n v. City of Claremont), construction defects (*Connell v. Higgins*), real property (*Wolf v. Prosser*), vehicle sales (*Bermudez v. Fulton Auto Depot, LLC*), community property (*In re Marriage of Crook*), damages arising from opening junk mail (*Harris v. Time, Inc*.), prejudgment interest (*Overholser v. Glynn*), and commercial contracts for the sale of eggs (*Nye & Nisson v. Week Lumber Co*.). Missing from Defendant's list is *any* decision by a California Court applied to a claim arising under California's Labor Code.

Defendant then builds an argument based upon a false premise. First Defendant argues, "Given California's longstanding adoption of the *de minimis* rule, it is not surprising that many courts have applied the *de minimis* rule to wage and hour claims under California law." (Answering Brief, at 19.) However, as established by Plaintiff's Opening Brief, and not rebutted, there is no omnibus "*de minimis* rule" under California law.

Next, Defendant cites a list of court decisions which purport to be examples of where "many courts have applied the *de minimis* rule to wage and hour claims under California law." But, immediately evident is the fact that all but one of the cited cases are *federal court* decisions. And the only California court decision in Defendant's list of "many courts" does not apply the *federal de minimis* excuse arising under the FLSA to any California wage and hour claim. Rather, *Gomez v. Lincare* rejects a *de minimis* defense in a discussion entitled, "Seventh Cause of Action—Promissory Estoppel." *Gomez,* 173 Cal. App. 4th 508 at 526. Moreover, the only authority cited within that portion of the opinion is the federal decision of *Lindow*, showing that there is no independent *de minimis* defense under California law that applies to wage and

hour claims.

Even if *Gomez* had applied a *de minimis* defense to a California wage and hour claim, which it indisputably did not do, *Gomez* is not controlling for multiple reasons. First, *Gomez* did not address a contention that California does not recognize a *de minimis* defense. "Cases are not authority for propositions not decided." *Machado v. Superior Court*, 148 Cal.App.4th 875, 881 (2007). Second, other Courts of Appeal are free to disagree with *Gomez* and would be bound only by a decision from this Court. *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455 (1962). Third, federal courts are not bound by the decisions of intermediate appellate courts if there is reason to believe that the state's highest court would rule differently. *E.g., In re KF Diaries, Inc. & Affiliates*, 224 F.3d 922, 924 (9th Cir. 2000): "Our decision is solely guided by California law as we believe the California Supreme Court would apply it." As the Ninth Circuit noted in the certification order, this Court has repeatedly cautioned against importing less protective federal standards into California wage and hour law. *E.g., Mendiola*, 60 Cal.4th at 842-43.

Where Defendant argues that a *de minimis* rule already exists under California law, what Defendant really seeks is a determination that a generalized maxim of jurisprudence, Civil Code § 3533, reflects a clear Legislative intent to create a defense to the unwaivable obligation to pay for all hours worked and supplants California's meticulous wage and hour framework. Even if California law generically acknowledges a concept of "trifles" under Civil Code § 3533, no California case has decided that time worked is a trifle under the California Labor Code. This is simply one of many specific contexts where that rule does not apply. For example, the

"maxim that the law will not be concerned with trifles does not, ordinarily, apply to violation of a contractual right." *Sweet v. Johnson*, 169 Cal. App. 2d 630, 632 (1959), citing *Kenyon v. Western Union Tel. Co.*, 100 Cal. 454 (1893). That contract law disregards the general maxim regarding trifles is particularly instructive, as the payment of wages has much in common with contractual obligations.

Another context where the concept of "trifles" is not controlling is found in the realm of real property. In that context, this Court has recognized for more than a century that small values are not always *de minimis* to the injured plaintiff:

> The value of the omitted land, upon the basis of the purchase price, respondent points out is $83; but ***we cannot agree with respondent that, because these are the facts, equity will treat the omitted land as a minute discrepancy of no material importance***. The price or value of omitted lands is, of course, an element in determining whether or not equity will take cognizance of a suit to recover the omitted portion. Backus v. Jeffrey, 47 Mich. 127, 10 N. W. 138. But in a suit for land, it is by no means the all-controlling and determinative consideration. The omitted land may be of great importance to the value of plaintiff's remaining land. ***It may have a peculiar value, pretium affectionis, in plaintiff's eyes***.

Danielson v. Neal, 164 Cal. 748, 750–51 (1913) (emphasis added). And in the realm of taxes, this Court has held that a sale to the State of California for $0.50 more than was owed in taxes was void and did not convey title. *Hall v. Park Bank of Los Angeles*, 165 Cal. 356, 359 (1913).

Beyond just contractual obligations, *Kenyon* explains the uniting thread that defeats Defendant's theory. *Kenyon* reasoned that, in addition to the fact that the *de minimis* concept normally has no application in the arena of contract law, the *de miminis* concept does not apply where a permanent right is infringed and an award of even nominal damages would carry costs. *Kenyon*, 100 Cal. at 458-59. In the

contexts of wages, real property transactions, tax obligations, and contractual obligations, permanent rights exist, and even nominal damage awards carry costs. Thus, in the context of the obligation to pay all wages for all hours worked, the concept of trifles must similarly be rejected because the Legislature and IWC have concluded that such a concept is inappropriately applied here, where the prevailing employee is entitled to recover fees *and* costs in any suit to recover an unpaid wage.

The very foundations of Defendant's arguments are faulty; this Court should expressly hold that California's standard for when employee activity constitutes compensable work time is not the same as federal law, is not controlled by the federal *de minimis* excuse, and cannot be controlled by the generic concept stated in Civil Code § 3533, which does not apply in instances where permanent rights are at issue and even nominal damages will carry costs.

B. Defendant Incorrectly Suggests That California Follows the FLSA as Its Default Rule

Defendant asserts that this Court must look to federal law for guidance on issues of *state* wage and hour law, stating, "[T]here is no conflict between state and federal law, so this Court should look to federal law – *Anderson* and *Lindow* – for guidance on adopting and applying a de minimis rule." (Answering Brief, at 20.) As explained below, Defendant is simply wrong as to its premise that California and federal law are not in conflict as to the payment of *all* wages for *all* hours worked.

1. The FLSA Is Not Helpful Due to Conflicts Between State and Federal Wage and Hour Laws.

Defendant incorrectly suggests that the text of the FLSA itself contains a broad requirement that all hours worked must be compensated. (Answering Brief, at 21,

citing 29 U.S.C. § 207(b)(2).) In fact, the FLSA, unlike California's Labor Code, does ***not*** contain within its text a blanket requirement of payment for all hours worked in all industries. Instead, the only instances where the FLSA *explicitly* requires payment for "all" hours worked are found in clauses concerning certain employment contracts, collective bargaining agreements, and seamen on American vessels. FLSA §§ 206(a)(3), 207(b)(2), and 207(f)(1). Had the United States congress wanted to require payment for *all* hours worked in *all* industries, it would not have expressly limited the requirement. The federal wage and hour laws are substantially weaker than those implemented by California, placing them in conflict with the greater protections imposed under California law.

Instead, in support of its claim that California and federal law are not in conflict as to the payment of wages, Defendant cites to federal regulations, which are not controlling authority under federal law, to support its argument that both the FLSA and California contain identical requirements to pay for "all" hours worked. Citing 29 C.F.R. § 778.223, Defendant quotes from a fragment of the regulation in a parenthetical. (Answering Brief, at 21 ["an employee must be compensated for *all* hours worked"].) But Defendant omits that 29 C.F.R. § 778.223 was effective on ***January 23, 1981***, as issued in 46 Fed. Reg. 7313, long after *Anderson v. Mt Clements Pottery Co*., 328 U.S. 680 (1946) was decided, creating a *de minimis* defense as part of the FLSA. Thus, when 29 C.F.R. § 778.223 was issued, the Department of Labor was bound by the *Anderson* decision and the *federal* regulation was necessarily constrained. But no such decision constrained the IWC's implementation of Labor Code provisions in the Wage Orders.

Defendant also ignores the fact that the *de minimis* doctrine has been expressly included in federal regulations at 29 C.F.R. § 785.47:

> In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are de minimis. (*Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680 (1946)) This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. ***An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him***.

29 C.F.R. 785.47 (Emphasis added).[1] Nothing analogous exists within California's Labor Code or the IWC's Wage Orders. It is therefore incorrect to suggest that "all" means the same thing under state and federal law. Thus, it is necessarily wrong to contend that there is no conflict between state and federal law in this regard, which renders Defendant's plea that "this Court should look to federal law – *Anderson* and *Lindow* – for guidance on adopting and applying a de minimis rule" a nullity.

Even Defendant's supposedly supportive citations leave it hoist by its own petard. For example, at page 20 of its Answering Brief, Defendant quotes *See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889 (2012), from its discussion about the propriety of timeclock rounding, as saying, "***In the absence of controlling or conflicting California law***, California courts ***generally*** look to federal regulations under the FLSA for ***guidance***." *See's Candy*, at 903 (emphasis added).

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[1] In Appellant's Opening Brief, the regulation was erroneously cited as 24 C.F.R. 785.47.

But here, since California law conflicts with the weaker obligation to pay for ***non-de minimis*** hours worked under federal law, the FLSA (which imposes a lesser standard of employee protection) must not be consulted for guidance as it has none to offer.

2. The Basis for the Court's Decision in *See's Candy* Is Also a Basis to Reject the *De Minimis* Defense.

Defendant's Answering Brief focuses on innocuous excerpts from *Anderson* and *Lindow* which, construing the federal standard, concluded that employees could not be paid for time worked work by application of the *de minimis* excuse even though the time was "otherwise" compensable. (Answering Brief, at 21.) Compensable means: "Being such as to entitle or warrant compensation." American Heritage Dict. (5th ed. 2017). Compensation, in turn, means: "Something, such as money, given or received as payment or reparation, as for a service or loss." *Id*. If time worked is not the same as time paid by operation of the federal *de minimis* excuse, then it also seems true that the time not paid is not literally compensable, and the definition of compensable carries a different meaning under federal law. There is no basis in the Labor Code or the IWC Wage Orders to conclude that such a distinction is appropriate or was intended under California law.

Nevertheless, Defendant persists, arguing that the *de minimis* excuse is not concerned with whether the time is compensable. Rather, the *de minimis* excuse is concerned with whether short periods of [otherwise] compensable time must be paid. To buttress this elusive distinction, Defendant relies on *See's Candy* to claim that "time rounding, like the *de minimis* rule, is grounded in practicality and efficiency, designed to compensate employee hours as precisely as possible without imposing an

undue burden on employers, even if that means not every employee will ultimately be paid for every single minute that she works." (Answering Brief, at 22.) But *See's Candy* said:

> Assuming a rounding-over-time policy is neutral, ***both facially and as applied***, the practice is proper under California law because its net effect is to permit employers to efficiently calculate hours worked ***without imposing <u>any</u> burden on employees***.

See's Candy, at 903 (emphasis added). The Court went on to state:

> Fundamentally, the question whether *all* wages have been paid is different from the issue of how an employer calculates the number of hours worked and thus *what wages are owed.*

See's Candy, at 905. Clearly, the court was concerned that any rounding system must ensure *all* wages are paid "without imposing any burden on employees." Applying such logic, there is no room for application of the *de minimis* excuse to payment of wages for time worked, deny wages for "all hours worked," and as a result, lay a burden on workers, however slight.

In spite of the contrary objectives of the *de minimis* excuse and California rounding jurisprudence, Defendant conflates the two concepts to permit an employer to deny wages for *compensable* time. Such an outcome flies against the logic of *See's Candy* and is nonsensical because, if worktime need not be paid, it is not compensable And, if it is not compensable, it need not be paid. Rounding, as conceived of by *See's Candy* at least, is one *practical* method to ensure that workers are paid for *all* of their work (if the rounding system is neutral both facially ***and*** as applied). While one policy behind rounding is to pay for all hours worked, the *de minimis* excuse advocated by Defendant contravenes it. In fact, Defendant's *de minimis* excuse would directly contradict the purpose underlying the *See's Candy* court's analysis of

rounding.

C. Defendant's Efforts to Explain Away This Court's Prior Precedent Regarding the IWC Wage Orders Are Unpersuasive

"We have observed 'that where the IWC intended the FLSA to apply to wage orders, it has specifically so stated.'" *Mendiola*, 60 Cal. 4th at 847 n. 17, citing *Morillion*, 22 Cal. 4th at 592.

1. This Court Recognizes That "The IWC Knows How to Expressly Incorporate Federal Law and Regulations When It Desires to Do So."

On the differences between the degrees of protection for employees under federal and state wage and hour law, *Mendiola* said:

> Federal regulations provide a level of employee protection that a state may not derogate. Nevertheless, California is free to offer greater protection.

Mendiola, 60 Cal. 4th at 843. But, Defendant simply dismisses this Court's repeated recognition that California habitually exceeds federal standards, contending that, in *Mendiola*, this Court *only* declined to find a federal standard incorporated into a Wage Order because the IWC "expressly incorporated federal standards in some wage orders but not in Wage Order 4. . . ." (Answering Brief, at 24.) Defendant ignores other reasons stated by this Court, which also said, "[O]ther language in Wage Order 4 demonstrates that the IWC knew how to explicitly incorporate federal law and regulations when it wished to do so." *Mendiola*, 60 Cal. 4th at 843; *see also Mendiola*, 60 Cal. 4th at 847 n. 17 ("***Wage Order 4 itself demonstrates that the IWC knows how to expressly incorporate federal law and regulations when it desires to do so***."). In other words, even limited to the Wage Order at issue, *Mendiola* observed

that the IWC did, in fact, expressly indicate when it intended to incorporate any element of federal law as a guiding standard under California wage and hour law. Defendant's attempt to distinguish away *Mendiola* requires willful blindness towards the clearest of observations – that "the IWC knew how to explicitly incorporate federal law and regulations when it wished to do so." *Ibid*. Concluding the discussion, *Mendiola* said:

> The language chosen by the IWC does not support CPS's argument that a broad importation was intended. Indeed, it supports the contrary conclusion: The IWC intended to import federal rules only in those circumstances to which the IWC made specific reference.

Ibid. Defendant has identified nothing in either the Labor Code or the governing IWC Wage Order that suggests the IWC intended to import a defense that would significantly reduce protections provided to employees under California law. No such presumption exists if it would in any way lessen employee protection:

> Because application of part 785.22 would "eliminate[ ] substantial protections to employees," we decline to import it into Wage Order 4 by implication.

Mendiola, 60 Cal. 4th at 847. Furthermore, just as *Mendiola* held, a "contrary result would have a dramatic impact" in California, where periods of time up to ten minutes or more per day that employers were previously obligated to pay for would suddenly become uncompensated work time.

2. <u>This Court Recognizes That Similarities Between State and Federal Wage and Hour Laws Are Not Grounds to Impair the State's Stronger Employee Protections</u>

Ramirez v. Yosemite Water Co., 20 Cal. 4th 785 (1999) also recognizes that California wage and hour laws frequently provide greater protections than those supplied under the FLSA:

> The IWC's wage orders, although at times patterned after federal regulations, also sometimes provide greater protection than is provided under federal law in the Fair Labor Standards Act (FLSA) and accompanying federal regulations. (See, e.g., *Tidewater, supra,* 14 Cal.4th at pp. 566–567, 59 Cal.Rptr.2d 186, 927 P.2d 296 [seamen entitled to overtime under wage order despite exemption from FLSA]

Ramirez, 20 Cal. 4th at 795. "The FLSA explicitly permits greater employee protection under state law." *Id*., at 795. But, in attempting to distinguish away *Ramirez*, Defendant again suggests that federal law defines California's wage and hour protections for employees in any instance where they do not "substantially differ." (Answering Brief, at 23.) Defendant again goes too far.

Ramirez thoroughly considered an argument that similarity of language in an IWC Wage Order should be construed as adopting the federal construction of a term in common use under federal law (in that case, the "outside salesperson" exemption) – and rejected it. Describing the contention, *Ramirez* said:

> Because the term "outside salesperson" was used nowhere else in California law, Yosemite argues that it is logical to infer that the Legislature intended to fully incorporate the federal definition. Yosemite therefore concludes that the IWC exceeded its legislative mandate by adopting a regulation that is narrower than the federal one.

Ramirez, 20 Cal. 4th at 798. *Ramirez* unequivocally rejected that contention:

> In the absence of statutory language or legislative history to the contrary, we have no reason to presume that the Legislature, in delegating broad regulatory authority to the IWC, obliged the agency to follow in each particular a federal regulatory agency's interpretation of a common term.

Ramirez, 20 Cal. 4th at 800. *Ramirez* did not limit its holding to the term at issue. Rather, *Ramirez* broadly explained that there is no presumption that, absent statutory language or legislative history to the contrary, the IWC's Wage Orders should be construed as incorporating federal standards.

A similar result in this case is even easier to reach. Unlike in *Ramirez*, where a term in use under federal law was used, with a different definition, by California law, the *de minimis* excuse is nowhere mentioned in either the Labor Code or the IWC Wage Orders. The *de minimis* excuse was not incorporated *at all* under California wage and hour law. To find otherwise would dilute the protections imposed by California law, a result that must be rejected by this Court.

3. This Court Has Determined That It Is Routinely Erroneous to Interpret IWC Wage Orders with Federal Regulations.

Defendant also argues that *Morillion* cannot apply here because *Morillion* addresses a conflict between state law and the Portal-to-Portal Act. Defendant's contention ignores the analysis in *Morillion*.

First, as recognized by *Morillion*, there are "substantial" differences in the way that employees are compensated for "hours worked" under state and federal law:

> While one of our lower courts has recognized the "parallel" nature of the federal and state definitions of "hours worked" (*Monzon, supra,* 224 Cal.App.3d at p. 46, 273 Cal.Rptr. 615), the DLSE has underscored the substantial differences between the federal and state definitions in numerous advice letters.

Morillion, 22 Cal. 4th at 589–90. Defendant overlooks this difference, arguing that compensation obligations are all but identical, where *Morillion* identified express differences between federal and state law:

> The California Labor Code and IWC wage orders do not contain an express exemption for travel time similar to that of the Portal–to–Portal Act.

Morillion, 22 Cal. 4th at 590. Here, not only does the "knew or should have known" standard of compensable work time exist under California but not federal law, the *de minimis* excuse is incorporated into DOL regulatory interpretations of the FLSA,

where no *de minimis* excuse has *ever* appeared within the Labor Code or the IWC Wage Orders. And, as discussed above, at Part II.B., the FLSA itself contains no broad requirement to pay for *all* hours worked, setting aside the divergent approaches to what constitutes compensable hours worked.[2]

After recognizing the substantial differences between state and federal law, *Morillion* required "convincing evidence" of the IWC's intention to adopt a federal standard before a court can presume to import a standard reducing employee protections:

> Absent convincing evidence of the IWC's intent to adopt the federal standard for determining whether time spent traveling is compensable under state law, we decline to import any federal standard, which expressly eliminates substantial protections to employees, by implication. Accordingly, we do not give much weight to the federal authority on which the Court of Appeal relied.

Morillion, 22 Cal. 4th at 592. Such a rule follows settled principles:

> Moreover, our departure from the federal authority is entirely consistent with the recognized principle that state law may provide employees greater protection than the FLSA.

Morillion, 22 Cal. 4th at 592, citing *Ramirez, supra,* 20 Cal.4th at 795. A similar rule, applied here, precludes importation of the federal *de minimis* excuse into California wage and hour law where there is no evidence, let alone convincing evidence, that the Legislature or the IWC intended to do so.

Limiting the use of federal wage and hour law as a basis for construing state law is consistent with the goal of preventing erosion of the strongly remedial nature of California's employee protections:

Indeed, we have recognized that "past decisions additionally teach that

[2] See also, discussion at Part II.B.1, above.

> in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection."

Morillion, 22 Cal. 4th at 592, citing *Indus. Welfare Com. v. Superior Court*, 27 Cal. 3d 690, 702 (1980). Again, the IWC expressly incorporates the FLSA only in those specific instances where it intended to do so:

> Finally, we note that where the IWC intended the FLSA to apply to ***wage orders***, it has specifically so stated.

Morillion, 22 Cal. 4th at 592 (emphasis added). This observation in *Morillion* was not limited to the singular wage order involved in that case. Rather, *Morillion* referred to "wage orders" in the plural when describing IWC actions, refuting Defendant's suggestion that *Morillion* is inapplicable here. Lest there be any doubt, *Morillion* said:

> Moreover, we recently disapproved of using federal regulations extensively to interpret a California wage order, without recognizing and appreciating the critical differences in the state scheme.

Morillion, 22 Cal. 4th at 593. Given that some federal courts have concluded that as much as 20 minutes of work per day in two ten-minute segments is non-compensable as *de minimis*, the federal *de minimis* excuse critically diverges from California's strong protections for employees.

D. The *De Minimis* Excuse Will Permit Systemic Wage Underpayments to Low Wage Workers

1. This Is Not a Controversy Over Wages for "Seconds" Worked.

Defendant peppers its discussion with references to "seconds" of unpaid time. The purpose behind the choice of such language is transparent; Defendant proposes a logical fallacy to convince this Court to disregard precedent, California statutes, and

enabling regulations, holding out of concern alone that a *de minimis* excuse must be ladled on top of existing tests for the compensability of time worked to avoid the risks that Defendant describes. Either a *de minimis* excuse exists as a doctrine within California's wage and hour laws (P), or it does not (Q). According to Defendant, Q is very scary, hence P is true. The argument is invalid. Defendant's appeal seeks to exploit unrealistic concerns to create support for it preferred outcome, namely P.[3]

While Defendant's repeated retreat to arguments turning on "seconds" of unpaid time is part of a logical fallacy that is invalid because it lacks evidentiary support and invokes implausible outcomes, it does suggest a question as to the alternative. Is it reasonable to worry that California Courts might disregard a test like the federal test articulated in *Lindow*, imposing instead an anti-employee, bright line rule that simply declares ten minutes to be the threshold of compensability? The answer to that question is "***yes***." Here, despite *Lindow*, the district court held that daily time periods of ten minutes *are de minimis* as a matter of law. And, despite *Lindow*'s multi-factor approach (and despite *Rutti v. Lojack Corp*., 596 F.3d 1046 (9th Cir. 2010) having been decided prior to many of the cases listed below), many federal district courts in the Ninth Circuit have effectively ignored *Lindow* and applied a fixed ten-minute rule. *Farris v. County of Riverside*, 667 F.Supp.2d 1151, 1165 (C.D. Cal. 2009) (granting summary judgment against sheriff's deputies on claim for time spent donning and doffing uniforms because "10 minutes is the

[3] Defendant's argument also suffers from the false dilemma fallacy. Defendant pretends that without a *de minimis* excuse under California law, there is no protection from theoretical absurdities. That, too, is false, as demonstrated by way of example below.

standard threshold for determining whether something is *de minimis*"); *Perez v. Wells Fargo*, 2015 WL 1887534 *8 (N.D. Cal. 2015) (granting motion to dismiss based on 10 minute rule holding that plaintiff would need to allege he was regularly underpaid 20 minutes of time); *Waine Golston v. Time Warner Newhouse*, 2013 WL 1285535 *5 (S.D. Cal. 2013): " Many courts have found ten minutes per day is de minimis . . . 2 to 15 minutes is negligible and not compensable"; *Apperson v. Exxon Corp.*, 1979 WL 1979, *10 (E.D. Cal. 1979) (granting summary judgment where employees worked on average 10 minutes of uncompensated time each day). These decisions, and may others issued within the Ninth Circuit, offer no explanation as to how ten minutes (or more) of free work per day by an employee is consistent with *Lindow*'s test that the Ninth Circuit describes as reflecting "a *balance* between requiring an employer to pay for activities it requires of its employees and the need to avoid '*split-second absurdities*'." *Rutti*, 596 F.3d at 1057 (emphasis added). There is no balance as the rule is routinely applied by these courts; employees simply lose ten (or more) minutes of pay a day.[4]

The record here confirms that more than "split-second absurdities" were at issue. Appellant lost wages while performing the store close procedure. (3 ER 442–443, 474–475, 503–505, 508–513, 519–521; 4 ER 574–575, 755–760.) This equates to unpaid hours that Appellant worked in the aggregate. (E.g., 3 ER 443, 475.) Hours,

[4] It also bears emphasizing that, contrary to federal law, California wage and hour law expressly declares ten minutes to be a *non-de minimis* measure of time, mandating ten-minute rest breaks for shifts of sufficient length. If a California employer must figure out how to monitor ten-minute rest breaks, even in difficult circumstances, then it can figure out how to compensate all the minutes an employee works each day.

or even days, worth of pay is not a small amount of wages for any worker, especially workers like Appellant, whose wage rates are near the legal minimum.

For its part, Defendant fails to provide any meaningful number of exemplar cases that focused on "seconds" of time and fails to demonstrate that its hypothesized harm is likely to occur, or rise beyond the level of extreme aberration if it does. In fact, the only decision even approaching the concern raised by Defendant is *Corbin v. Time Warner Entm't-Advance/Newhouse P'ship*, 821 F.3d 1069 (9th Cir. 2016). But, as noted below, the outcome would likely have been the same in *Corbin* if California's "knew or should have known" test was applied to the facts.

Thus, neither the record in this case, nor decisions addressing unpaid time, supports the notion that litigation over a few seconds of pay is a substantial problem (or even a minor problem) for California Courts. However, reported decisions *do* confirm that abuses of employees are likely to occur if a *de minimis* excuse like the federal rule applied incorrectly here is imported into California's wage and hour law. How, then, do we avoid "split-second absurdities" under existing California law? California law provides a two-fold answer. First, under California law, it is only when (1) employees are under an employer's control or (2) the employer knew or should have known that the work was occurring that an employer incurs an obligation to pay. *Morillion*, 22 Cal. 4th at 585. Most of the theorized "absurdities" are avoided with this rule alone. Second, under California law, ties go to the employee. That is, it is the policy of California to err on the side of providing maximum wage and hour protections to employees, and that policy also dispenses with many arguments about "absurdities."

2. California Law Already Provides Clear and Flexible Rules Defining When an Employer Must Pay for Time Worked.

In evaluating whether California's existing wage and hour framework provides an adequate solution to the "absurdities" question raised by Defendant, one of Defendant's authorities shows that there is no need for another layer of employer protection. In *Corbin v. Time Warner Entm't-Advance/Newhouse P'ship*, 821 F.3d 1069 (9th Cir. 2016), the plaintiff alleged that on ***one*** occasion he worked for ***one*** minute before opening the timekeeping software and clocking in for work:

> One minute represents the total amount of time for which Corbin alleges he was not compensated as he once mistakenly opened an auxiliary computer program before clocking into TWEAN's timekeeping software platform.

Corbin, 821 F.3d at 1073. The Ninth Circuit affirmed a finding that the one minute of unpaid time was *de minimis*. But, under California's approach, and assuming that the plaintiff was not acting under the employer's control when he made his ***one*** timeclock error, there is nothing in *Corbin* that suggests defendant Time Warner "knew or should have known that the work was occurring" when plaintiff Corbin started an auxiliary program before clocking into the timekeeping system. Thus, a California Court could find that, in the absence of evidence that Time Warner "knew or should have known that the work was occurring," there was no obligation triggered to compensate the plaintiff for it. Further, and again assuming that the plaintiff in *Corbin* was not acting under the employer's control when he made his ***one*** error, there would be no obligation to pay under the "control" test.[5] Under the "control"

[5] Of course, if Time Warner directed an employee to start software other than the timekeeping system first, that time, though not captured by the timekeeping system, would be compensable under both the "control" test and the "knew or should have

test, since off-the-clock work was likely prohibited, and there was no evidence cited in *Corbin* that the employer told him to work before clocking in (thereby circumventing a prohibition on off-the-clock work), Corbin was not under the employer's control. Thus, the outcome in *Corbin* would be correct under California law for a reason different than the application of the federal *de minimis* excuse but sufficient nonetheless to avoid an absurdity.

Also, in those few hypothetical instances where it is unclear whether the employer should be viewed as having incurred an obligation to compensate employees, it is the policy of California's labor laws, as repeatedly recognized by this Court, to provide *maximum* protection for employees:

> When construing the Labor Code and wage orders, we adopt the construction that best gives effect to the purpose of the Legislature and the IWC. [Citations.] Time and again, we have characterized that purpose as the protection of employees—particularly given the extent of legislative concern about working conditions, wages, and hours when the Legislature enacted key portions of the Labor Code. [Citations.] In furtherance of that purpose, we liberally construe the Labor Code and wage orders to favor the protection of employees. [Citations.]

Augustus v. ABM Sec. Servs., Inc., 2 Cal. 5th 257, 262 (2016) (citations omitted). Thus, even in instances of work that some might view as very small, California's declared policy is that such time must be compensated where (1) employees are under an employer's control or (2) the employer knew or should have known that the work was occurring. *Morillion*, 22 Cal. 4th at 585. Importing the federal *de minimis* excuse is anathema to that declared policy.

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known" test. An employer cannot affirmatively direct employee activity to preclude them from receiving compensation for all time worked.

It bears repeating that small amounts add up. Assuming there are 261 working days in a year, a ten minute daily *de minimis* rule would permit employers up to 43 hours of unpaid work per employee every year. That cannot be the law in a state which has a fundamental public policy of payment of wages in full.

E. This Is Not a Controversy Over Whether to Pay Employees for "Leaving" the Store

On several occasions, Defendant describes Plaintiff as seeking to be paid for "leaving" the store. (Answering Brief, at 9, 31.) This characterization is unsupported. The Ninth Circuit summarized what actually occurred in its Order Certifying a Question to the Supreme Court of California:

> Appellant submitted evidence that, during the relevant alleged class period, Starbucks' computer software required him to clock out on every closing shift before initiating the software's "close store procedure" on a separate computer terminal in the back office. The close store procedure transmitted daily sales, profit and loss, and store inventory data to Starbucks' corporate headquarters. After Appellant completed this task, he activated the alarm, exited the store, and locked the front door. Appellant also submitted evidence that, per Starbucks' policy, he walked his co-workers to their cars. In addition, Appellant submitted evidence that he occasionally reopened the store to allow employees to retrieve items they left behind, waited with employees for their rides to arrive, or brought in store patio furniture mistakenly left outside.

(June 2, 2016 Order of the Ninth Circuit, at 4.) Working on a computer in the back office and then setting an alarm and locking the door is not "leaving" the store; those tasks constitute time under the control of the employer (which created a timekeeping system, *later changed*, that required Plaintiff to clock out *before* completing additional tasks for his employer). Presumably Plaintiff would have been disciplined and potentially fired if he failed to complete the "close store procedure" or set the

alarm or lock the door. Plaintiff was also under Defendant's control when he walked co-workers to their car. And Plaintiff was under Defendant's control when he brought in patio furniture, yet another task that that is not "leaving" the store. Thus, Plaintiff remained under Starbuck's *control* despite clocking out, Defendant knew it, and that time was time worked for which Plaintiff should have been paid.

F. The DLSE's Conclusions Do Not Supplant California Statutes and Regulations

Defendant places inordinate reliance on the DLSE's view of whether the federal *de minimis* excuse was incorporated into California's employee-protective wage and hour framework. As this Court has said before, "The DLSE's past views offer little help in resolving the issue here." *Mendiola*, 60 Cal. 4th at 848. Where, as here, there is no evidence suggesting that federal courts' construction of federal wage and hour law was intended to be incorporated into California's wage and hour laws and regulations, the DLSE's opinion on that front is of no value:

> [W]hile the DLSE is charged with administering and enforcing California's labor laws, it is the Legislature and the IWC that possess the authority to enact laws and promulgate wage orders. (*Aguilar, supra,* 234 Cal.App.3d at p. 26, 285 Cal.Rptr. 515.)
>
> There is no evidence that the IWC intended to incorporate part 785.22 into Wage Order 4.

Id. There is nothing within the Labor Code or the IWC's Wage Orders that even hints at incorporation of the *de minimis* excuse within California's wage and hour laws. Certainly, the DLSE did nothing other than cite *federal* law. This Court should take no guidance from the DLSE's unsupported and unexplained adoption of a federal defense to a federal law, when every objective measure – including the language of the Labor Code, the language of the Wage Orders, the presumptions applied to IWC

importation of federal standards, and the substantial differences between federal and state approaches to compensable work time – all points to the contrary result.

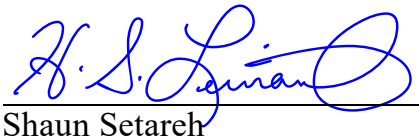
III. CONCLUSION

Based on the plain language of the applicable statutes and Wage Orders, precedent rejecting the importation of federal standards into California law where federal and California standards conflict, and precedent rejecting application of Civil Code § 3533 in comparable circumstances, this Court should rule that there is no *de minimis* excuse available to employers in California.

Dated: March 15, 2017.

Respectfully submitted,

SETAREH LAW GROUP

By: 

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CERTIFICATIONS

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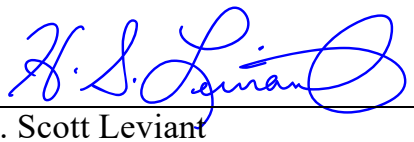
By: 

H. Scott Leviant

CERTIFICATE OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 9495 Wilshire Blvd., Suite 907, Beverly Hills, CA 90212.

2. That on March 16, 2017 declarant served the PETITIONER'S REPLY BRIEF ON THE MERITS by depositing a true copy thereof in a United States mail box at Beverly Hills, California in a sealed envelope with postage fully prepaid and addressed to the parties listed as follows:

Rex S. Heinke
Mark R. Curiel
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3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of March 2017 at Beverly Hills, California.

By: 
H. Scott Leviant

CERTIFICATE OF CONFORMITY WITH ELECTRONIC BRIEF

[NOT INCLUDED IN ELECTRONIC COPY]

I hereby certify that the Reply Brief to which this Certificate of Conformity is attached is, aside from the attachment of this Certificate, identical in all respects to the electronically filed Reply Brief submitted using the Court's Electronic upload website.

The paper copies of the Reply Brief were printed from the PDF file generated by Microsoft Word, the program in which the original Reply Brief was created.

Dated: March 16, 2017. SETAREH LAW GROUP

By: _____
H. Scott Leviant