2d Civil No. B225186

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JOSEPH HILL,

Appellant,

vs.

SULLIVAN MOTOR CARS, LLC;
LEPRECHAUN, LLC,

Respondents.

Appeal from Los Angeles Superior Court
Case No. BC378222
Honorable Elizabeth Rita Miller

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: B225186

Case Name: Hill v. Sullivan Motor Cars, LLC; Leprechaun, LLC

Please check the applicable box:

[ ] There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

[X] Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
Michael Sullivan	Owner of 10% or more of Sullivan Motor Cars, LLC
Kerry Sullivan Morgan	Owner of 10% or more of Sullivan Motor Cars, LLC
Toyota Santa Monica	DBA of Sullivan Motor Cars, LLC
Scion Santa Monica	DBA of Sullivan Motor Cars, LLC
Mitsubishi Santa Monica	Former DBA of Leprechaun, LLC

Please attach additional sheets with Entity or Person Information if necessary.

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

Cases	Page
Fretland v. County of Humboldt (1999) 69 Cal.App.4th 1478	14
Friddle v. Epstein (1993) 16 Cal.App.4th 1649	24
Hernandez v. Vitamin Shoppe Industries Inc. (2009) 174 Cal.App.4th 1441	37
In re Aaron B. (1996) 46 Cal.App.4th 843	37
Jaimez v. DAIOHS USA, Inc. (2010) 181 Cal.App.4th 1286	18-19, 22
Jones v. Lodge At Torrey Pines Partnership (2008) 42 Cal.4th 1158	18
Kagan v. Gibraltar Sav. & Loan Assn. (1984) 35 Cal.3d 582	39
Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc. (2005) 133 Cal.App.4th 26	25
Kisliuk v. ADT Sec. Services, Inc. (C.D. Cal. 2008) 263 F.R.D. 544	22-24
Kleffman v. Vonage Holdings Corp. (2010) 49 Cal.4th 334	21
La Sala v. American Sav. & Loan Assn. (1971) 5 Cal.3d 864	37, 38
Lieberman v. KCOP Television, Inc. (2003) 110 Cal.App.4th 156	24

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

INTRODUCTION

A certified class of employees claimed that their wage statements violated the Labor Code because although the statements separately listed regular hours worked and overtime hours worked, the two numbers were not added together for an overall total. After the trial court granted summary judgment for the employers, the class representative voluntarily dismissed the entire case as to all parties with prejudice. That dismissal bars this appeal on jurisdictional grounds. But even if it did not, the class's theory fails on its merits.

The class's theory is that its members were denied complete wage statements because they had to add together regular hours and overtime hours—both of which appeared on the face of the wage statements—to determine the overall total hours worked. This Division recently rejected an identical claim in *Morgan v. United Retail, Inc.* (2010) 186 Cal.App.4th 1136, holding that Labor Code section 226, subdivision (a) does not require that wage statements include a separate line showing the overall total hours worked. *Morgan* supports the employers' position that there was no section 226 violation here. The grant of summary judgment for the employers was proper.

Even without *Morgan*, the employers were entitled to summary judgment. Labor Code section 226, subdivision (e) imposes employer liability only where "[a]n employee [1] suffer[s] injury as a result of [2] a knowing and intentional failure by an employer to comply with subdivision (a) . . . ." The class could not make either showing. It claims that the injury requirement is satisfied whenever an employer violates section 226. But that reasoning is circular and would make the statute's express "injury" requirement superfluous. That's not how statutes are read.

The class's assertion that there was a "knowing and intentional" violation of section 226, subdivision (a) likewise fails to give effect to the

statutory language. A "knowing" violation requires, at a minimum, an intent to conceal or obfuscate the required information. There was no such violation here: Aside from the class's "total hours worked" theory, it does not claim that the wage statements were inaccurate or incomplete. No information was obscured.

Each of these missing elements of the class's claim provides an alternative, independent ground for affirmance.

Finally, there is no basis for the class's fallback argument for limiting the judgment's scope to the class representative in his individual capacity. Contrary to the Opening Brief's representation, the employers moved for summary judgment against class representative Joseph Hill in both his individual *and* class capacities. There is no requirement that notice of a pending summary judgment motion be given to absent, represented class members, and Hill never sought any such notice. Likewise, the trial court properly did not amend the complaint to substitute a new class representative, as neither Hill nor the class ever asked.

If the appeal is not dismissed for lack of jurisdiction, the judgment should be affirmed.

STATEMENT OF FACTS AND OF THE CASE

A. Hill Works For Several Years As A Salesperson At Leprechaun, LLC And Sullivan Motor Cars, LLC.

Plaintiff and appellant Joseph Hill was a salesperson at defendant and respondent car dealerships, Leprechaun, LLC and Sullivan Motor Cars, LLC (collectively, "Sullivan"). (3 Appellant's Appendix (AA) 875.)[1] Hill was paid commissions on sales he generated. (3 AA 877; see also 1 AA 307.) The law requires that commission-based employees earn more than 1.5 times the applicable minimum wage for the hours they work. (Industrial Welf. Com. Order 7-2001(3)(D); 29 U.S.C. § 207(i).) Sullivan checks employees' hours to ensure that they meet this standard. (3 AA 879.)

Sullivan uses a hand-scanner system to track its employees' hours. (3 AA 878.) Sullivan forwards the information that it obtains to a third-party payroll service, Automatic Data Processing, Inc. (ADP). (3 AA 879.) ADP generates wage statements and paychecks based on the information provided by Sullivan. (3 AA 879-880.)

Hourly employees' wage statements have always shown the number of hours worked at the regular pay rate and the number of hours at the overtime rate. (3 AA 880; 2 AA 566, 576, 627-630, 634, 636-639.)[2] Commission-based employees have always received attachments to their pay stubs that show the number of hours worked and whether they earned more than 1.5 times the applicable minimum wage via commissions. (3 AA 881-882; 2 AA 566, 576-577, 580-581.) But prior to this lawsuit, the

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[1] Leprechaun, LLC did business as Mitsubishi Santa Monica, and Sullivan Motor Cars, LLC does business as Toyota Santa Monica and Scion Santa Monica. (1 AA 161, 282; 3 AA 785-786.)

[2] The class took disparate positions in the trial court as to whether this information was always provided, but ultimately conceded that it was. (See pp. 13-14 & fn. 7, *post*.) The Opening Brief does not assert otherwise.

wage statements did not have a separate line showing the *combined* total regular and overtime hours worked in a pay period. (3 AA 891-892.) Sullivan's management was not aware that Sullivan had to provide the combined total. (3 AA 890; 2 AA 562, 566, 576.)

B. Hill Sues His Former Employers, Alleging A Putative Class Action For Wage And Hour Violations Including Failure To Provide Complete Itemized Wage Statements.

Hill stopped working for Sullivan in March 2007. (3 AA 887-888.) He sued Sullivan several months later on behalf of himself and a putative class of other employees. (1 AA 1, 4.)

Relevant to this appeal, Hill alleged that Sullivan had failed to comply with Labor Code section 226, subdivision (a) ("section 226(a)").[3] Section 226(a) requires employers to provide an itemized wage statement showing the "total hours worked by the employee"and "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee." The complaint alleged that Sullivan's wage statements did not show the overall total hours worked. (1 AA 14.)

The complaint sought relief under section 226, subdivision (e) ("section 226(e)"), which entitles "[a]n employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) . . . to recover the greater of all actual damages" or statutory penalties. The only "injury" that the complaint alleged was the failure to provide wage statements that complied with section 226(a). (1 AA 14.)

Hill alleged other causes of action including unpaid overtime, meal and rest break violations, and unreimbursed business expenses. (1 AA 6-16.)

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[3] Unless otherwise specified, all further statutory citations are to the Labor Code.

C. After Hill Files This Lawsuit, Sullivan Adds A Separate "Total Hours Worked" Line To Its Wage Statements.

In response to Hill's suit, and as a precautionary measure, Sullivan asked ADP to add a line showing the overall total hours worked on each wage statement. (3 AA 891-892.) ADP informed Sullivan that for commission-based employees, its software was not capable of both correctly processing the 1.5 times the minimum wage alternative and also providing total number of hours worked. (3 AA 892.) Sullivan now manually adds the total number of regular hours worked and the total number of overtime hours worked, and its wage statements include the cumulative total of all hours worked. (3 AA 892, 1014.)

D. The Trial Court Certifies A Class On The Wage Statement Claims, But Denies Certification On Hill's Other Claims.

Hill moved to certify a class as to all causes of action in the complaint. (1 AA 19-54.) The court only certified a class of employees as to the section 226 cause of action and as to the cause of action for violation of Business and Professions Code section 17200, limited to claims arising from violations of section 226. (2 AA 461-462.) It denied certification as to all other causes of action. (2 AA 462.)

E. The Trial Court Grants Summary Judgment On The Certified Wage Statement Claims, Holding That The Class Could Not Show Actual Injury.

Sullivan moved for summary judgment on the only claims that the trial court certified for class treatment, i.e., the wage statement claims. (2 AA 542-553.) Its motion sought judgment against Hill in both his individual and representative capacities. (2 AA 542 [seeking summary judgment "against Plaintiff, individually and on behalf of the class claims (hereinafter referred to as 'Plaintiff')"].)

Sullivan identified the complaint's theory as resting solely on wage statement formatting—specifically, that a wage statement violates section 226(a) if it shows the number of hours worked at the regular pay rate and the number of hours worked at the overtime rate, but does not expressly add the two sets of hours together. (2 AA 549.) Sullivan argued that even assuming *arguendo* that failing to add the two numbers together violated the statute, the claims were without merit because the class could not establish that the alleged violation either resulted in injury or was knowing and intentional, both of which are requirements under section 226(e). (2 AA 544, 549-552.)

The class opposed summary judgment. (3 AA 706-726.) It did not dispute Sullivan's characterization of its theory as resting solely on the absence of a separate "total hours worked" line. (3 AA 712.) The class argued instead that section 226(e) does not require any injury beyond the mere fact of receiving an incomplete wage statement, and that Sullivan's failure to total the overall hours established a knowing and intentional violation. (3 AA 719-724.) In the alternative, it asserted a triable fact dispute as to actual injury. (3 AA 725.)[4]

[4] The class raised various evidentiary objections that the trial court did not rule on. (3 AA 867-873.) The objections were presumptively overruled. (*Reid v. Google* (2010) 50 Cal.4th 512, 534.) The class has not challenged the presumed evidentiary rulings on appeal, and it may not do so in its reply brief. (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1122 ["(a)ppellant has the burden of demonstrating both that the

(continued...)

At the summary judgment hearing, counsel for the class reaffirmed that the class's only complaint was that the wage statements did not show the overall total hours worked. (3 AA 1023 [class counsel, in response to court's question of what was wrong with the wage statements other than the failure to add two numbers together: "That's what we say is wrong with the wage statement"], 1025 [class's counsel: "Yes, the 8 (regular hours) is there, Yes, 2 (overtime hours) is there. The 10 (total hours) should be there"].)

The court granted summary judgment for the employers on the wage statement claims. (3 AA 1037-1038.) It held that the class members "cannot establish the essential element of 'injury' for purposes of Labor Code § 226 Claims." (3 AA 1038.) Therefore, the class members could not prevail on either the section 226 claim or the Business and Professions Code section 17200 claim, which was predicated on a violation of section 226. (*Ibid.*) The trial court separately rejected Sullivan's interpretation of section 226(e)'s "knowing and intentional" requirement.

F. After Judgment Is Entered Against The Class, Hill Voluntarily Dismisses The Entire Case As To All Parties With Prejudice, Then Appeals.

On May 4, 2010, the court entered judgment on the class claims. (Respondents' Appendix (RA) 1.) Hill thereafter asked the clerk to dismiss the "[e]ntire action of all parties and all causes of action" with prejudice. (RA 3 [request for dismissal filed June 3, 2010].) Two weeks after dismissing the entire case, Hill purported to appeal from the summary judgment. (RA 6 [notice of appeal dated June 18, 2010].)

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[4] (...continued)
evidence at issue was erroneously admitted, and that the error was prejudicial"]; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 ["Issues not raised in an appellant's brief are deemed waived or abandoned"].)

STATEMENT OF APPEALABILITY: HILL'S PRE-APPEAL DISMISSAL OF THE ENTIRE ACTION LEAVES THIS COURT WITHOUT JURISDICTION TO DECIDE THE APPEAL; IN ANY EVENT, AS TO THE CLASS THE APPEAL IS NOT TIMELY.

Hill purports to appeal from a summary judgment entered on May 4, 2010. (Appellant's Opening Brief (AOB) 2.) But between that date and when he filed a notice of appeal, Hill voluntarily dismissed the entire case with prejudice. That dismissal bars this appeal, as we now explain.

Hill alleged eight causes of action against Sullivan. (1 AA 1.) The trial court certified two causes of action for class treatment and denied certification as to the others. (2 AA 461-462.) The trial court granted summary judgment on the class claims on September 30, 2009. (3 AA 1030.) It entered a formal order and judgment to that effect on May 4, 2010. (3 AA 1037-1038.) A month later, on June 3, 2010, Hill requested that the clerk dismiss the "[e]ntire action of all parties and all causes of action" with prejudice. (RA 3.)[5] The clerk dismissed the action as requested. (*Ibid.*) Only then did Hill purport to appeal from the summary judgment. (RA 6 [notice of appeal dated June 18, 2010].)

Hill thus dismissed the *entire* action as to *all* parties prior to appealing. That dismissal precludes the current appeal. "'A wilful dismissal terminates the action for all time and affords the appellate court no jurisdiction to review rulings on demurrers or motions made prior to the

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[5] After the court granted summary judgment on the class claims, Hill and Sullivan settled all of Hill's uncertified individual claims. The settlement agreement (not in the record) excluded the certified wage statement claims. But in dismissing "the entire" action a month later "with prejudice" on behalf of "all parties" Hill did not reserve any claims, nor did he distinguish between his personal claims—including the wage statement claims that fell under the aegis of the class action—and any class claims. (RA 3.)

dismissal.' (Citation.)" (*Yancey v. Fink* (1991) 226 Cal.App.3d 1334, 1343 [appellant "divest(ed) us of whatever jurisdiction we might have had by voluntarily dismissing the entire action" after the trial court sustained a demurrer without leave to amend].)

Hill may assert that the class is entitled to appeal because he dismissed the case only to expedite an appeal of the summary judgment ruling. The record does not support that claim. First, Hill did not specify any reason for the dismissal, nor did he limit his dismissal to his individual claims. He simply dismissed the entire action of "all parties." (Compare *Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1012 [permitting appeal where parties agreed that dismissal was entered with stipulation that appeal was to follow].) Second, Hill and the class could have appealed without dismissing the entire case. That is because the summary judgment appealed from disposed of all of the class claims and so "prevent[ed] further proceedings as a class action." (*Wilner v. Sunset Life Insurance Co.* (2000) 78 Cal.App.4th 952, 957 & fn. 1 [appeal by named plaintiff from order that sustained demurrer as to class claims but overruled demurrer to other non-class claims].) Hill therefore did not have to dismiss the entire case on behalf of all parties in order to proceed with this appeal, and the cases permitting a post-dismissal appeal in that situation are inapposite.

The appeal should be dismissed as to the class for another reason as well: It is untimely. The clerk served notice of entry of the minute order granting summary judgment on September 30, 2009. (3 AA 1030-1031.) Unlike the normal situation where an ensuing judgment is required for an appeal, an order which has the effect of dismissing a class action suit is appealable immediately. (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 485, fn. 9 [order sustaining a demurrer to class action allegations was immediately appealable]; but see *Los Altos Golf and*

Country Club v. County of Santa Clara (2008) 165 Cal.App.4th 198, 202 [concluding, without discussing death knell doctrine, that order sustaining demurrer to putative class claims was not appealable and construing appeal to be from the subsequent judgment].) But Hill did not file a notice of appeal until after the entry of a formal judgment more than eight months later. (RA 6.) To the extent that the minute order was immediately appealable as to the class, that notice of appeal came too late. (Cal. Rules of Court, rule 8.104(a)(1), (f) [notice of appeal must be filed within 60 days after superior court clerk serves notice of entry of an appealable order].) The class, thus, lost the right to challenge the order granting summary judgment. (*Stephen v. Enterprise Rent-A-Car* (1991) 235 Cal.App.3d 806, 811 ["Because California allows direct appeals of death-knell orders, a plaintiff who fails to appeal from one loses forever the right to attack it"].)

The appeal should be dismissed for lack of jurisdiction.

ARGUMENT

The trial court granted summary judgment because the class cannot prove the essential elements of its wage statement claim. (Code Civ. Proc., § 437c, subds. (a), (o).) This Court's review is de novo. (*Wiener v. Southcoast Childcare Centers* (2004) 32 Cal.4th 1138, 1142.) It must affirm if the result is correct on *any* legal ground, including, so long as the parties have an opportunity to brief the issue, a ground not relied upon by the trial court. (Code Civ. Proc., § 437c, subd. (m)(2); *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694; *Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 975.)

There are multiple, independent grounds for affirmance here. The class cannot prove any of its section 226 claim's three critical elements: a statutory violation, injury, and Sullivan's knowledge of, and intent to commit, the alleged violation. (§ 226, subds. (a), (e).) As such, Sullivan was entitled to summary judgment both on the section 226 claim and on the related Business and Professions Code section 17200 claim.

I. THE JUDGMENT MUST BE AFFIRMED BECAUSE THE WAGE STATEMENTS SHOWED THE TOTAL HOURS WORKED.

The pleadings define the scope of the issues for summary judgment purposes. (*Physicians Committee for Responsible Medicine v. McDonald's Corp*. (2010) 187 Cal.App.4th 554, 568.) Here, what the class alleged was that the wage statements failed to show the "total hours worked" as required by section 226(a). (1 AA 14.) This Division's recent decision in *Morgan v. United Retail, Inc.* establishes that the claimed defect does *not* violate section 226(a).

A. As This Division Recently Held In *Morgan v. United Retail, Inc.*, Labor Code Section 226, Subdivision (a) Does Not Require Wage Statements To Include A Separate Line Combining The Total Hours Worked At The Regular Rate And At The Overtime Rate.

Section 226(a) requires a wage statement "showing . . . total hours worked by the employee . . . ." (§ 226(a)(2).) This Division recently held that the "total hours" requirement is satisfied so long as a wage statement shows the total regular hours and the total overtime hours, which the employee could add together to determine the total overall hours. (*Morgan v. United Retail, Inc.*, *supra*, 186 Cal.App.4th 1136, 1139.) In a thorough and well-reasoned opinion, *Morgan* expressly rejected the plaintiff's argument—identical to the one raised here—that wage statements also must include a separate overall total hours worked line. (*Id*. at pp. 1138-1139.)

Morgan began with section 226(a)'s plain language requiring that a wage statement "show" the total hours worked. (186 Cal.App.4th at p. 1146.) The dictionary defines "show" as, among other things, "'to make evident or apparent: serve as the means to reveal or make visible,'" and defines "total" as "'complete in details' or 'constituting an entire number or amount.'" (*Ibid.*) "Based on the plain and commonsense meaning of these words, . . . wage statements [showing regular and overtime hours but not totaling the two] complied with section 226 by 'showing . . . total hours worked.' (§ 226, subd. (a)(2))." (186 Cal.App.4th at p. 1146.) That is because the wage statements accurately listed the total number of regular hours and the total number of overtime hours worked by the employee, and the employee could add the two figures together to arrive at the sum of total hours worked. (*Id.* at p. 1147.) Nothing in the plain language of section 226(a) requires "that wage statements which accurately list the total

regular hours and overtime hours worked during the pay period must also contain a separate category with the sum of those two figures." (*Ibid.*)

Morgan's reading of section 226(a) is consistent with the interpretation adopted by the Department of Industrial Relations, Division of Labor Standards and Enforcement (DLSE). (186 Cal.App.4th at p. 1047.) The DLSE is the state agency authorized to interpret California wage and hour laws. (*Id*. at p. 1145, fn. 5.) Its construction is entitled to "consideration and respect." (*Id.* at p. 1047.) Its website provides an exemplar itemized wage statement complying with section 226(a). (*Ibid*.) Notably, the exemplar "separately lists the total regular hours and total overtime hours worked during the pay period, but does not include an additional line with the sum of all hours worked." (*Ibid.*; see DLSE web site <http://www.dir.ca.gov/dlse/PayStub.pdf> [as of Dec. 7, 2010].) The wage statements at issue in *Morgan* followed the same format. That sufficiently complied with section 226's requirement to show total hours worked.

B. *Morgan* Compels Affirmance.

1. The class conceded that the class members' wage statements showed the hours worked at the regular rate and the hours worked at any overtime rate.

The complaint here alleged that the class's wage statements did not show the total actual number of hours worked as required by section 226(a). (1 AA 14.) At the summary judgment hearing, the class's counsel conceded that the absence of a separate line showing the overall total hours is the *only* alleged section 226(a) violation. (3 AA 1012 [Sullivan's counsel explaining pleaded theory], 1023 [class's counsel agreeing that the alleged deficiency in the wage statements is that they list total regular rate hours and total overtime rate hours, but do not add the two categories together], 1025 [same].) The "total hours worked" line is also the only piece of

purportedly missing information argued in the opening brief. (See, e.g., AOB 4.) Any other claim has been waived. (*Reyes v. Kosha*, *supra*, 65 Cal.App.4th 451, 466, fn. 6 ["Issues not raised in an appellant's brief are deemed waived or abandoned"]; *Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1489 [new theories cannot be raised in reply].) Thus, the issue in this appeal is identical to the issue in *Morgan*: Whether a wage statement has to provide a separate overall "total hours worked" line.[6]

2. The wage statement issue here is indistinguishable from that in *Morgan*.

The wage statements that Sullivan issued to its employees showed the actual number of regular hours worked and the actual number of overtime hours worked. (2 AA 580-581, 636-639.)[7] Under *Morgan*, that satisfies section 226(a)'s requirement of "showing . . . the total hours worked . . . ." (186 Cal.App.4th at p. 1149.)

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[6] The complaint also alleged that wage statements did not show employees' full social security number and the full name of their employer. (1 AA 14, 34; 3 AA 712.) The class has waived these claims by failing to raise them in its Opening Brief. (*Reyes v. Kosha*, *supra*, 65 Cal.App.4th at p. 466, fn. 6; *Fretland v. County of Humboldt*, *supra*, 69 Cal.App.4th at p. 1489.) The claims would also fail on their merits. The wage statements indisputably showed the last four digits of each employee's social security number, which is all that section 226 requires. (3 AA 768-778; § 226(a)(7).) And the only claim regarding the employer's name is that Sullivan omitted the designation "LLC," a minor omission that the class has not shown violates section 226(a). (*Elliot v. Spherion Pacific Work LLC* (C.D. Cal. 2008) 572 F.Supp.2d 1169, 1179-1180 [employer's use of a "slightly truncated form" of its name does not violate section 226(a)].)

[7] Some wage statements in the record also include a separate overall "total hours worked" line. (2 AA 580-581, 636-639.) Sullivan added that line in response to this suit (3 AA 891-892) but the statements otherwise reflect the pre-lawsuit format. Although the wage statements issued to commission-based employees may appear not to show any hours worked (3 AA 768), the record reflects that these statements included an attachment showing that information. (2 AA 566, 576-577, 580-581; 3 AA 1023, 1025 [class's counsel conceding that the statements showed regular and overtime hours worked].)

Although *Morgan* involved hourly employees whereas some class members here were paid on commission, that is a distinction without a difference. *Morgan* did not turn on whether the employees were hourly or commission-based, but rather on the fact that the wage statements "provided the employees with the essential information for verifying that they were being properly paid for all hours worked." (*Ibid.*) Here, the absence of a separate "total hours worked" line on a commission-based employee's wage statement did not prevent the employee from verifying proper payment. Commission-based employees were paid on commission as long as the commission amounted to at least 1.5 times the applicable minimum wage. (3 AA 881-882.) The class's counsel conceded that the wage statements showed the total hours worked at each pay rate. (3 AA 1025.) Commission-based employees could have added the two numbers together to determine whether they were paid more than 1.5 times the minimum wage. The wage statements thus contained the essential information for verifying proper payment.

3. Because the class cannot prove the alleged Labor Code section 226, subdivision (a) violation, Sullivan is entitled to summary judgment.

The wage statement claims are premised on section 226(e). Whatever else that provision means (see pp. 16-34, *post*), there can be no dispute that at the very least, it requires a showing that the employer failed to comply with section 226(a). The class cannot make that showing. This inability is an independent basis for affirming summary judgment for Sullivan. (Code Civ. Proc., § 437c, subd. (o) [cause of action has no merit if one or more elements cannot be established]; *Carnes v. Superior Court*, *supra*, 126 Cal.App.4th 688, 694 [reviewing court must affirm summary judgment if it is correct for any reason].)

II. EVEN IF THE WAGE STATEMENTS DID NOT SHOW THE TOTAL HOURS WORKED, THE JUDGMENT MUST BE AFFIRMED BECAUSE THE CLASS CANNOT SHOW EITHER ACTUAL INJURY OR A KNOWING AND INTENTIONAL VIOLATION.

To recover under section 226(e), "[a]n employee [must] suffer[ ] injury as a result of a knowing and intentional failure by an employer to comply with" section 226(a). Thus, in addition to a section 226(a) violation, an employee also must demonstrate: (1) injury resulting from the employer's failure to provide a complete wage statement *and* (2) that the employer's failure was knowing and intentional. (§ 226(e).) The class cannot satisfy either criterion.

A. Labor Code Section 226, Subdivision (e) Requires Actual Injury Resulting From An Incomplete Wage Statement.

As to the injury requirement, the class contends that an incomplete wage statement, in itself, is the required injury. (AOB 7, 11, 16.) Such a reading would render the phrase "suffering injury as a result of" in section 226(e) meaningless surplusage. Well-settled rules of statutory construction bar such a reading.

1. Both the statute's plain language and the rules of statutory construction dictate an actual injury requirement.

What constitutes an injury for section 226(e)'s purposes is first and foremost a question of statutory interpretation. Statutory interpretation, of course, begins with the statute's words. (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 639-640.) The interpretation should give meaning to every word of a statute and should avoid a construction making any word surplusage. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 249.) If the words of the statute are clear and unambiguous, "the plain meaning of the

statute governs." (*Meyer v. Sprint Spectrum, L.P.*, *supra*, 45 Cal.4th at p. 640, quotation marks omitted.)

Section 226(e) indisputably requires that "[a]n employee suffer[] injury as a result of" certain violations of section 226(a). If, as the class argues, the section 226(a) violation *is* the injury, there would have been no reason for the Legislature to include the phrase "suffering injury as a result of . . . ." As a federal district court considering this precise issue pointed out, the Legislature could simply have provided that "'Any employee whose employer fails to comply with subdivision (a) is entitled to recover.'" (*Elliot v. Spherion Pacific Work, LLC*, *supra*, 572 F.Supp.2d 1169, 1181 [holding that an employee must show injury beyond the mere receipt of an incomplete wage statement].) Instead, the Legislature required an "injury."

Notably, other provisions relating to section 226 demonstrate that the Legislature in fact knows how to permit enforcement without requiring an injury. "Any employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty" to be enforced by the Labor Commissioner. (§ 226.3.) "An employee may also bring an action for injunctive relief to ensure compliance with" section 226. (§ 226, subd. (g).) And "[a] failure by an employer to permit a current or former employee to inspect or copy records within the time set forth in [section 226,] subdivision (c) entitles the current or former employee or the Labor Commissioner to recover a seven-hundred-fifty-dollar ($750) penalty from the employer." (§ 226, subd. (f).) None of these enforcement mechanisms requires a separate resulting injury.

Section 226(e), by contrast, makes its remedies available only to an employee *suffering injury as a result of* the violation.

"Where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning. [Citation.]" (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117.) The addition of the "injury"

requirement to section 226(e) presumably has significance. (*Cooley v. Superior Court, supra*, 29 Cal.4th at p. 249 [meaning should be given to every word of a statute].) The added requirement must provide an element beyond just the section 226(a) violation that suffices in other contexts.

The class's reading would make recovery automatic whenever an employer violates section 226(a), rendering the phrase "suffering injury as a result of" surplusage. But "[a] construction that renders some statutory language surplusage or redundant is to be avoided." (*Bernard v. Foley* (2006) 39 Cal.4th 794, 810-811, citation omitted; accord *Jones v. Lodge At Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1184 [interpretation of statute that would render words surplusage and meaningless is disfavored].)

Sullivan's interpretation, by contrast, gives full effect to the phrase "suffering injury as a result of" by allowing employees to recover only if they actually suffer an injury from an incomplete wage statement. It is the only reading consistent with the statutory language and statutory construction rules. (See *Elliot v. Spherion Pacific Work, LLC, supra*, 572 F.Supp.2d at p. 1181 [rejecting section 226(e) construction that would permit employees to recover without an actual injury, as it would "violate() the canons of statutory construction requiring the Court to 'give effect to statutes according to the usual, ordinary import of the language used in framing . . . (to) give significance . . . to every word, phrase, sentence and part of an act . . . (and avoiding) a construction making some words surplusage'"]; *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1306 [summarizing *Elliot* as holding that "there must be some injury in order to recover damages"].)

Plain meaning and statutory construction canons unequivocally resolve the issue against the class's interpretation.

2. The California Supreme Court has interpreted similar language to require actual injury.

No published California decision has squarely addressed section 226(e)'s injury requirement.[8] The California Supreme Court's interpretation of similar language in another context, however, supports Sullivan's position that "suffering injury as a result of" means that a plaintiff must suffer some injury beyond the statutory violation itself.

Meyer v. Sprint Spectrum L.P., supra, 45 Cal.4th 634, is strikingly parallel. At issue was a California Consumer Legal Remedies Act ("CLRA") provision that allows suit by any consumer who "suffers any damage as a result of" an unconscionable consumer contract provision. (45 Cal.4th at p. 640.) *Meyer* held that the plaintiffs did not have CLRA standing unless they suffered damage beyond being subjected to an unconscionable contract provision (there, an arbitration agreement with restricted remedial measures). (*Ibid.*) Reasoning that the statute "speaks plainly about the use of an unlawful practice *causing or resulting in some sort of damage*," *Meyer* rejected the plaintiffs' argument that a CLRA violation in itself sufficed. (*Id.* at p. 641, italics added.) The statutory language in *Meyer*—directly comparable to that here—required that "not only must the consumer be exposed to an unlawful practice, but some kind of damage must result." (*Ibid.*) Otherwise, the Legislature would have omitted the "as a result of" causal link and instead would have allowed any consumer subjected to a CLRA violation to sue. (*Ibid.*) Because the

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[8] The closest published California authority on point is *Jaimez v. DAIOHS USA, Inc., supra*, 181 Cal.App.4th 1286, an appeal from a class certification ruling. In response to the defendant's argument that individual issues predominated because section 226(e) requires plaintiffs to establish an "actual injury," *Jaimez* observed that "[t]wo recent federal court cases addressed the same [actual injury] issue and set a fairly minimal standard for the requisite injury." (*Id.* at p. 1306.) *Jaimez* discusses the federal cases with seeming approval but does not independently analyze the injury requirement. (*Id.* at pp. 1306-1307.)

plaintiffs had not alleged actual damage, the Supreme Court affirmed an order sustaining a demurrer to their complaint. (*Id.* at p. 638.)

Meyer is instructive here. Section 226(e) makes remedies available to a plaintiff who suffers injury *resulting from* a statutory violation. *Meyer* interpreted indistinguishable statutory language. (45 Cal.4th at p. 641.) In doing so, it effectively rejected the class's statutory-violation-equals-the-required-injury position. The claimed violation must have had some independent consequence. Here, that means that the incomplete or inaccurate wage statement must have actually injured the employee.

3. The class's contrary arguments are unfounded.

The Opening Brief does not dispute that the class's section 226(e) interpretation would render the phrase "suffering injury as a result of" superfluous. Rather, it simply insists that a section 226(a) violation in and of itself constitutes a sufficient injury to allow an employee to recover section 226(e) statutory penalties. (AOB 7-16.) Its arguments are unavailing.

a. The class's definitional arguments do not compel its "injury" interpretation.

The class relies on the definition of "injury" in other contexts to argue that a "deprivation of a legal right"—the section 226(a) violation itself—satisfies section 226(e)'s injury requirement. There are several flaws in this approach.

- "Injury" has multiple meanings in ordinary usage. In fact, each of the dictionaries that the class cites (AOB 9 & fn. 31) also defines "injury" to include harm or damage, a definition that supports Sullivan's interpretation.[9] The fact that the dictionaries *also* define "injury" to include

[9] (See Black's Law Dict. (8th ed. 2004) p. 801, col. 1 ["Any harm or damage"]; Merriam-Webster's Dict., available at

(continued...)

the violation of another's legal right does not establish that the Legislature intended that definition over others.

- The class's reliance on dictionary definitions without regard to statutory context is unfounded. (*Kleffman v. Vonage Holdings Corp*. (2010) 49 Cal.4th 334, 342-343 [rejecting "approach, including . . . reliance on dictionaries . . . to define the word [at issue, which] overlooks the [contrasting] language of the provision[s]" in the very same statute].) Statutory context prevails over isolated dictionary definitions. (*Ibid*.) Section 226(e) does not just require an injury; it requires an "injury as a result of" a failure to comply with section 226(a). An actual injury requirement gives meaning to the entire phrase; the class's interpretation does not. (See pp. 16-19, *ante*.)

- The injury definitions in the Restatement and a collateral estoppel case (*Migliori v. Boeing North American, Inc.* (C.D. Cal. 2000) 97 F.Supp.2d 1001) (AOB 10-11) are unilluminating, as there is no indication that the Legislature relied on them. To the extent that the meaning of "injury" in other contexts is relevant, our Supreme Court has interpreted it to refer to both a wrongful act *and* the resulting injury, not just the wrongful act. (*Steketee v. Lintz, Williams & Rothberg* (1985) 38 Cal.3d 46, 54 [as used in medical malpractice statute of limitations, "'injury' signifies both the negligent cause and the damaging effect of the alleged wrongful act and not the act itself. (Citation.) The date of injury could be much later than the date of the wrongful act where the plaintiff suffers no physical harm until months or years after the wrongful act"].)

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[9] (...continued)
<http://www.merriam-webster.com/dictionary/injury> ["an act that damages or hurts"; "hurt, damage, or loss sustained"] (as of Dec. 7, 2010); American Heritage Dict. of the English Language (4th ed. 2000), p. 902, col. 2 ["Damage or harm done to or suffered by a person or thing"].)

- It makes no difference that one federal district court adopted the class's definition argument. (AOB 9, citing *Kisliuk v. ADT Sec. Services, Inc.* (C.D. Cal. 2008) 263 F.R.D. 544.) That court did not rely on California case law (there was none on point), but rather speculated as to what a California court might decide. Federal court decisions on matters of California law are not binding. (*Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988, 1001, fn. 10.) In any event, another federal district court decision *rejects* the class's interpretation for the same reasons discussed above—and, unlike *Kisliuk*, it has been favorably cited by published California authority. (See *Elliot v. Spherion Pacific Work, LLC, supra,* 572 F.Supp.2d 1169, 1181, discussed in *Jaimez v. DAIOHS USA, Inc., supra,* 181 Cal.App.4th 1286, 1306.)

The class's other textual argument, that "injury" must mean something other than "actual damages" because section 226(e) uses both terms (AOB 10-11), does not stand up to scrutiny. Section 226(e) permits an employee "suffering injury" to recover "the greater of all actual damages" or statutory penalties. Requiring an injury beyond the fact of an incomplete wage statement does not make injury synonymous with actual damages. The "injury" is the prerequisite to recovery; "actual damages" describes the consequences of that injury and a measure of recovery. Section 226(e) affords a recovery where the employee can prove injury but for whatever reason cannot prove damage beyond the statutory penalty amount. There is a difference between the *fact* of injury (typically required for recovery) and proof of an amount of damages. (See *Ericson v. Playgirl, Inc.* (1977) 73 Cal.App.3d 850, 859 [allowing recovery of nominal damages where fact of injury was established but amount was uncertain].)

b. The injury requirement is not a mere standing substitute, nor is it affected by the availability of statutory penalties.

The class next asserts that the phrase "an employee suffering injury" is a standing requirement that limits who can recover under section 226(e). (AOB 11-12.) That assertion begs the question: Which employees may recover? The answer under the plain language of the statute: an employee who suffers an "injury" beyond the statutory violation itself.

This interpretation is the only one that gives meaning to the "suffering injury" requirement. That is because unless a statute provides otherwise, only an aggrieved real party may prosecute a suit. (Code Civ. Proc., § 367 ["Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute"].) This default rule means that even without an express injury requirement, only an employee who received a non-compliant wage statement would be able to seek a remedy for that violation. (*Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1220 ["Under California law, a plaintiff generally has standing if he or she is able to allege some invasion of a legally protected interest"].) The Legislature nonetheless added the "suffering injury" requirement. If that requirement means anything, it must further limit who can sue. (Cf. *id.* at p. 1225 [disabled plaintiff who did not personally seek access to facility had no standing to sue for damages under the California Disabled Persons Act].)

For its contrary position, the class relies on the district court opinion in *Kisliuk v. ADT Sec. Services, Inc., supra*, 263 F.R.D. 544. (AOB 12.) *Kisliuk*, however, glosses over section 226(e)'s actual language. It concludes that section 226(e) "narrow[ed] the universe of those who have standing to sue under the statute to those whose injury flows from intentional violation of Section 226(a)." (263 F.R.D. at pp. 548-549) That might explain why the statute requires an *intentional* failure to comply, but it does not explain why the statute also refers to "an employee suffering injury as a result of" that failure.

The class next argues, relying on California Invasion of Privacy Act cases, that "it is a general principle" that proof of actual damages is not required to sue for a statutory penalty. (See AOB 12-13, citing *Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, *Ribas v. Clark* (1985) 38 Cal.3d 355, and *Friddle v. Epstein* (1993) 16 Cal.App.4th 1649.)[10] Cases involving surreptitious recording do not establish a "general principle" for all statutory penalties. They are distinctive in that surreptitious recording inherently involves an "affront to human dignity." (*Friddle v. Epstein, supra*, 16 Cal.App.4th at pp. 1660-1661.) Receipt of an incomplete wage statement is not an inherent affront to anything. Moreover, the surreptitious recording decisions do not purport to decide the meaning of an injury requirement in all statutory schemes. (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 127 [cases are not authority for propositions not considered].)

c. There is no reason to resort to legislative history, but in any event, it does not support the class's interpretation.

As discussed above, section 226(e) unambiguously requires plaintiffs to have suffered actual injury from an incomplete or inaccurate wage statement. Where, as here, a statute is unambiguous, there is no reason to resort to legislative history to interpret it. (*River Garden Retirement Home v. Franchise Tax Bd.* (2010) 186 Cal.App.4th 922, 942.) This principle renders the class's legislative history argument (AOB 13-15) inapposite.

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[10] The sole non-Invasion of Privacy Act case cited in the opening brief's discussion of statutory penalties, *Roth v. Cottrell* (1952) 112 Cal.App.2d 621 (cited at AOB 12), did not involve a statutory penalty. *Roth* was a suit for damages based on the defendant allegedly obstructing the plaintiff's easement. (112 Cal.App.2d at p. 623.) It defined the word "injury" in a discussion of whether the plaintiff's suit was an action for injury to real property for purposes of the statute of limitations. (*Id.* at pp. 624-625.)

Even if legislative history were relevant, the first two items that the Opening Brief cites—a statement by the bill's author and a letter from him to the governor (Hill's Request for Judicial Notice, Exs. 2, 3)—are not cognizable because they do not "shed light on the collegial view of the Legislature as a whole." (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 30, 39 [statements by bill's author or letters from author to governor are improper legislative history without an indication that the views were made known to the whole Legislature], italics omitted.)

The third item, a Senate report, may be cognizable, but it does not support the class's position. The Senate report says only that an "aggrieved employee" may recover. (Hill's Request for Judicial Notice, Ex. 4.) The class argues that the Labor Code Private Attorneys General Act (PAGA) defines "aggrieved" as "'any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.'" (AOB 14-15, quoting § 2699, subd. (c).) But PAGA was not enacted until 2004, four years *after* the Senate report. (§ 2698 ["This part shall be known and may be cited as the Labor Code Private Attorneys General Act *of 2004*," italics added].) The Senate report could not have intended to invoke a definition of "aggrieved" that did not then exist. Moreover, the Legislature did not use the term "aggrieved" in section 226. It instead limited recovery to employees suffering *injury* as a result of a failure to comply with section 226(a). That phrasing requires an injury from the incomplete wage statement, not just being "aggrieved."

Murphy v. Kenneth Cole Productions, Inc. (2007) 40 Cal.4th 1094 (cited at AOB 15) is equally unilluminating. The class cites *Murphy* as confirming that the Legislature intended to impose a penalty without regard to actual damages. That may be true, to the extent that an employee can recover a penalty even if his actual damages are minimal or non-economic.

(§ 226(e) [employee can recover "the greater of" actual damages or statutory penalty]; *Murphy*, *supra*, 40 Cal.4th at p. 1113 [observing that wage and hour violations can cause noneconomic harm such as increased stress].) But that does not mean that an employee can recover the penalty even if he has no injury at all. Section 226(e) plainly states that he cannot. Injury and measurable actual damages are not the same.

d. There are a myriad of ways to enforce section 226, subdivision (a) while still giving full effect to section 226, subdivision (e)'s injury requirement.

The class's final argument, that requiring an actual injury would make section 226(a) "almost unenforceable," is a vast overstatement. There are at least three ways of enforcing section 226(a) that require no injury: An employee may "bring an action for injunctive relief to ensure compliance with this section, and is entitled to an award of costs and reasonable attorney's fees." (§ 226, subd. (g).) The Labor Commissioner may recover from any employer who violates section 226 civil penalties of $250 per employee in an initial citation, and $1,000 per employee for later citations. (§ 226.3.) And any employer who knowingly and intentionally violates section 226 is guilty of a misdemeanor and subject to a fine, or imprisonment, or both. (§ 226.6.) In short, both employees and the Labor Commissioner have tools with which to enforce section 226 even when a violation causes no injury.

The class's assertion would be an overstatement even if section 226(e) were the only way to enforce section 226(a). It may be difficult to prove actual injury from a technical formatting violation. For more serious violations, though—where, for example, a wage statement inaccurately reports the number of hours worked—an employee can prove actual injury in the form of lost wages. (E.g., *Wang v. Chinese Daily News*,

Inc. (C.D. Cal. 2006) 435 F.Supp.2d 1042, 1051 [where wage statement violated section 226(a) by listing 86.66 hours regardless of hours actually worked and by not showing the pay rate, employees suffered injury because they might not be paid overtime to which they were entitled].) It is entirely reasonable that the Legislature did not want employees suing for statutory penalties over technical formatting issues.[11] (Cf. *Meyer v. Sprint Spectrum LP, supra,* 45 Cal.4th at p. 646 [actual injury requirement in CLRA indicates that "the Legislature did not want the costs of a lawsuit to be incurred when no damage could yet be demonstrated"].) On the other hand, the Legislature provided real remedies where there is real harm or injury. (§ 226(e).) The prospect of damages or statutory penalties in the latter situation is an additional tool for inducing employers to comply with section 226(a)'s requirements.

4. The class cannot establish actual injury resulting from the absence of an overall total hours summation.

Hill's complaint alleged no actual injury, only that he was denied his right to receive a properly formatted wage statement. (1 AA 14.) At the summary judgment stage and on appeal, the class asserts that Hill was confused and had to do arithmetic to determine his total hours worked. (AOB 16.) There is no evidence supporting this theory. Even if there were, the supposed injury would not be cognizable under section 226(e).

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[11] The Labor Commissioner may impose penalties for formatting violations that cause no actual injury, but has discretion to excuse inadvertent violations. (§ 226.3) And an employee can seek injunctive relief despite not suffering actual injury (§ 226, subd. (g)), but in that situation, as here, an employer can make technical adjustments to eliminate any issue with little litigation cost.

a. There is no evidence that any class member was confused (or reasonably should have been confused) by the lack of a separate category showing the overall total hours worked.

The class conceded that the wage statements showed the total hours worked at the regular rate and the total hours worked at the overtime rate, and that its only complaint is that there was no separate category combining those two numbers. (See pp. 13-14, *ante*.) It asserts on appeal that having to add the two numbers together confused Hill and constituted an injury. (AOB 16 & fn. 39.) But the only *evidence* it cites is Hill's deposition testimony that he did not get "a time slip" and therefore did not know if he was paid as much in commissions as he would have been paid based on his hours worked. (AOB 4, fns. 16-17; 3 AA 725 & fn. 28, 740.) This testimony relates to an abandoned claim (see pp. 13-14, *ante*) that some employees had no information about their hours at all. It does not establish that Hill or any class member was confused by having to add together two lines on a wage statement (one showing total hours at the regular rate and one showing total hours at any overtime rate).

An exchange during the summary judgment hearing confirms that Hill's alleged confusion did not result from the absence of a separate category showing the overall total hours worked. The class's counsel told the trial court, "[Hill's] saying *this isn't confusion about the wage statement*. This is confusion about is my commission the right amount; am I getting paid the right amount." (3 AA 1023, italics added.) The court asked, "What does that have to do with what they did on the wage statement?" (*Ibid.*) Counsel responded that the wage statement failed to show the overall total hours worked, but did not describe any connection between that omission and Hill's alleged confusion. (*Ibid*.) Nor could he

have established a connection: There was no evidence for such a claim, which would have been implausible given that the class alleged only a formatting violation. (See 3 AA 1027 [Sullivan's counsel noting absence of a declaration by Hill that the wage statement prevented him from knowing the total hours that he worked].)

b. The cases cited in the Opening Brief do not establish that having to add two numbers together constitutes "injury" for purposes of section 226, subdivision (e).

The class's claim would fail even if there were evidence that Hill was confused by having to add two numbers to determine his overall total hours worked. The cases cited in the Opening Brief (AOB 16-17) do not establish that this type of simple arithmetic, using accurate information provided on a wage statement, constitutes a cognizable injury under section 226(e).

Cicairos v. Summit Logistics, Inc. (2005) 133 Cal.App.4th 949, involved wage statements that always listed 40 hours per week regardless of how many hours an employee actually worked. (*Id.* at pp. 956, 960-961 [noting also that earning statement for one week showed 28.90 "hours" of "activity" and 1260.90 "hours" of "mileage" and for another week showed 2282.31 "hours" of "activity" at a "rate" of .3].) *Cicairos* held that because the wage statements did not accurately report how many hours the plaintiff employees worked, "the defendant failed to provide the plaintiffs with itemized wage statements that meet the requirements of Labor Code section 226." (133 Cal.App.4th at pp. 960-961.)

Contrary to the Opening Brief's claim (AOB 16), *Cicairos* did not hold that the plaintiffs' resulting confusion satisfied section 226(e)'s injury requirement. *Cicairos* did not discuss the injury requirement at all. Therefore, it provides no support for the class. (*Silverbrand v. County of*

Los Angeles, supra, 46 Cal.4th at p. 127 [decisions are not authority for propositions not discussed therein].) *Cicairos* is also distinguishable on its facts: Here, unlike there, the wage statements accurately reported the hours worked during each pay period.

Wang v. Chinese Daily News, Inc., supra, 435 F.Supp.2d 1042, is likewise distinguishable on its facts. In *Wang*, it was undisputed that the wage statements always showed 86.66 hours regardless of the actual hours worked. (*Ibid.* at p. 1050.) The statements also included no hourly wage rate. (*Ibid.*) The court found that these failures to comply with section 226(a) injured the plaintiffs, who might not have been paid overtime to which they were entitled and who did not have the information they needed to challenge the overtime pay rate. (435 F.Supp.2d at p. 1050.) The plaintiffs had to resort to reconstructing time and pay records to determine what they should have been paid. (*Id.* at pp. 1050-1051.) That endeavor could require substantial time and resources if employees' wage statements did not accurately reflect their hours and their employer did not have records succinctly reporting the information. The court's recognition that having to invest such time and resources could constitute an injury does not establish that having to do *any* minor arithmetic operation entitles an employee to recover under section 226(e).

The class's injury claim pales in comparison to *Cicairos* and *Wang*. The complaint here is not that the wage statements failed to accurately reflect the actual hours worked; it is only that class members had to add two numbers—both of which appeared on the wage statement—to determine their overall total hours. No authority establishes that having to do that minimal level of arithmetic is a cognizable injury under section 226(e). Indeed, *Morgan* holds that it is not even a violation of section 226(a).

B. Even If It Could Show Injury, The Class Could Not Recover Because Sullivan Did Not Knowingly And

Intentionally Fail To Include Required Information On The Wage Statements.

Section 226(e) only permits recovery for an employer's "knowing and intentional" failure to comply with section 226(a). If section 226(a) requires wage statements to include a separate category showing the total combined regular and overtime hours, Sullivan's failure to comply with the requirement was not knowing and intentional.

Sullivan's wage statements tracked the format of the exemplar wage statement on the DLSE website. (See pp. 13-15, *ante*; <http://www.dir.ca.gov/dlse/PayStub.pdf> [as of Dec. 7, 2010].) There is no published authority calling that format into question or otherwise indicating that wage statements have to include a separate line showing the overall total hours worked. In fact, the only published authority indicates that there is no such requirement. (*Morgan v. United Retail, Inc., supra*, 186 Cal.App.4th 1136, 1144, 1149 [deciding as a matter of first impression in June 2010 that section 226(a) does not require a separate overall total].) Sullivan cannot have knowingly failed to comply with section 226(a)—much less done so intentionally—when all available information indicated that it *had* complied.

The undisputed evidence supports this conclusion. Sullivan uses a computerized system for the purpose of accurately tracking its employees' hours. (3 AA 877-879.) It forwards the information it gathers to ADP, a third-party payroll service. (3 AA 879, 881.) ADP then generates earnings statements and paychecks for Sullivan's employees. (3 AA 879.) Members of Sullivan's management believed ADP would tell them if the statements failed to list any required information, and were unaware that the statements had to include a separate line for overall total hours. (3 AA 890; 2 AA 562, 566, 571-572, 576.) Once Hill brought the issue to Sullivan's attention by filing this lawsuit, Sullivan erred on the side of caution by arranging for its

wage statements to include a separate line showing the overall total hours. (3 AA 892.) Sullivan's response was consistent with testimony from its business manager and office manager that "[i]t has always been Sullivan's policy to include all of the required information on employee wage statements." (2 AA 566, 576.)

The class's primary response to this showing in the trial court was to claim that "knowing and intentional" refers to knowledge of what information is provided to employees, not of what section 226(a) requires. (3 AA 715-718 [arguing that ignorance or a mistake of law is not a defense].) It described the relevant inquiry as whether Sullivan had a method of calculating total hours worked and whether it transmitted records of the total hours worked to ADP. (3 AA 718.) Assuming *arguendo* that the class framed the inquiry correctly, Sullivan undeniably met that standard. Sullivan recorded the hours that employees worked, and passed the data along to ADP. (3 AA 877-879, 891.) This data allowed ADP to determine the total hours worked at the regular rate and the total hours worked at any overtime rate. By definition, Sullivan must also have provided ADP with the information to determine the overall total hours: Sullivan or ADP simply had to add the two subtotals together. There thus can be no question that Sullivan did transmit records of its employees' overall total hours to ADP.

Meanwhile, there is no evidence that Sullivan intended to obscure or conceal the total hours worked. At most, the evidence shows an oversight. If "knowing and intentional" is to have any meaning, it has to mean that the employer knows and intends that certain information not be provided to the employee. There is no evidence of such malfeasance by Sullivan.

The facts here contrast starkly with the only section 226(e) cases that the class cited in the trial court on the "knowing and intentional" issue. (3 AA 717-718.) In those cases, the employers knowingly did not provide a

wage statement showing the actual hours worked: In *Wang v. Chinese Daily News, Inc., supra*, 435 F.Supp. 2d 1042, the wage statement always showed 86.66 hours regardless of hours actually worked. The employer knew that. (*Id.* at p. 1050 & fn. 5.) In *Perez v. Safety-Kleen Systems, Inc.* (N.D. Cal. 2008) 253 F.R.D. 508, the wage statements likewise showed a standard number of hours regardless of what actually transpired; the employer admitted that it did not even have a method for calculating how many hours an employee worked in a given day. (*Id.* at p. 517.) And in *Cornn v. United Parcel Service, Inc.* (N.D. Cal. Feb. 22, 2006, No. C03-2001-THE) 2006 U.S. Dist. LEXIS 9013, the employer always deducted a standard lunch period, ignoring the amount of time that employees actually took for lunch. (*Id.* at p. *5.) Further, in *Wang* and *Perez*, the employer did not correct the alleged violation even after the lawsuit was filed. (435 F.Supp.2d at p. 1051; 253 F.R.D. at p. 517.) It is not surprising that the federal district courts confronted with these facts refused to grant summary judgment for the employers.

Evidence of a consistent practice of using pro forma hours can demonstrate that an employer knowingly and intentionally is not providing accurate, required information. It establishes an *intent* to keep information from the employee (regardless whether the employer knows that doing so is unlawful). Such a practice is markedly different from the inadvertent failure (if there is one) to meet all technical formatting rules.

Sullivan gathered and reported the actual hours worked to ADP, its wage statements followed the format suggested by the DLSE, and it added an additional line showing the overall total hours worked in direct response to Hill's allegation that section 226(a) required it to do so. There is no evidence that Sullivan intended to keep wage or hour information from the

employees. On these facts, the class cannot establish that any failure to comply with section 226(a) was knowing and intentional.[12]

[12] ADP's Major Accounts Agreement, which the class cited in the trial court, does not change the analysis. (3 AA 718, fn. 19.) Sullivan objected to the Agreement on the grounds that, among other things, it lacked foundation, was not properly authenticated, and was hearsay. (3 AA 968.) Sullivan's written objections preserved the issue for appellate review. (*Reid v. Google*, *supra*, 50 Cal.4th 512, 534.) The trial court abused its discretion in implicitly overruling Sullivan's objections. The class presented no evidence authenticating the Major Accounts Agreement, as required by Evidence Code section 1401, subdivision (a). The copy in the record is unsigned, and although Sullivan assertedly produced it in discovery, there is no evidence that Sullivan's management was aware of it, much less that they actually agreed to it. The class also did not present a declaration from anyone at ADP confirming the content of the Agreement, nor did it establish that the Agreement fell within any exception to the

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III. THE PROCEDURAL ARGUMENTS, IMPROPERLY RAISED FOR THE FIRST TIME ON APPEAL, PROVIDE NO BASIS FOR REVERSAL.

In a new theory on appeal, the class argues that the trial court should at most have granted summary judgment as to Hill personally and allowed a new class representative to continue the litigation. (AOB 17-20.) This argument is a non-starter, both procedurally and substantively.

A. The Trial Court Was Not Restricted To Granting Summary Judgment Only As To Hill Individually.

1. Hill opposed the summary judgment motion on behalf of the whole class.

The class's assertion that Sullivan moved for summary judgment only against Hill individually is so contrary to the record as to be frivolous. (AOB 17-18.)

Sullivan's notice of motion stated that Sullivan would move for summary judgment "against Plaintiff, *individually and on behalf of the class claims* (hereinafter referred to as 'Plaintiff') alleged in the Seventh and Eighth Causes of Action of the Complaint, which were certified as to the class by the Court on October 29, 2008 . . . ." (2 AA 542, italics added.) The motion itself asserted that "Summary Judgment/Summary Adjudication in favor of Sullivan, and against Plaintiff, *on behalf of himself and as class*

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[12] (...continued)
hearsay rule. (Evid. Code, § 1200.) The Agreement, thus, was inadmissible and cannot be considered.

Moreover, even if the Agreement were admissible, it would establish at most that Sullivan had an obligation to comply with applicable laws. (3 AA 853.) Whether Sullivan had such an obligation does not impact whether it reasonably relied on ADP, a professional payroll service, to produce wage statements that complied with applicable laws and to inform it if its wage statements were missing any required information. If anything, the Agreement is an exculpatory attempt by ADP, nothing more.

representative, is appropriate." (2 AA 544, italics added; see also 2 AA 553 [motion requesting judgment "against *Plaintiffs*, and in favor of Sullivan," italics added].)

Hill, as class representative, understood that the summary judgment motion implicated the whole class's entitlement to relief: The opposition to summary judgment argued in several places that the "Wage Statement Class" or "Class Members" had suffered an injury and so were entitled to damages or statutory penalties. (E.g., 3 AA 719 [argument heading: "The *Wage Statement Class* Suffered 'Injury' Within the Meaning of Section 226," italics added], 721-722 ["Defendants' failure to comply with Section 226(a)'s disclosure requirements is an injury to *Class Members*, and as a result Plaintiff *and Class Members* may be entitled to actual damages or statutory penalties," italics added, original italics omitted], 724 [arguing that even if injury requires actual harm, "a disputed issue of material fact exists as to whether the *Class Members* were harmed by Defendants' failure to disclose information," italics added].) In short, Hill, as class representative, knew that Sullivan sought summary judgment on the ground that the class members as a whole could not show that they were entitled to relief, and he attempted to show a triable dispute of fact on that issue. When he, as class representative, failed to do so, the court properly granted summary judgment against the whole class.

2. Absent class members need not receive notice of a pending summary judgment.

The class argues for the first time on appeal that someone (it does not specify who) had to notify absent class members before the court entered summary judgment against them. (AOB 18-19.) The class waived that argument by failing to raise it—or even to mention notice—in the trial court. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846 ["'a party is precluded from urging on appeal any point not raised in the trial court'"].)

The notice argument is also unsupported by authority. Two of the cases cited in the Opening Brief address the requirement that absent class members get notice of a proposed settlement as to which they can opt in or out. (See *Hernandez v. Vitamin Shoppe Industries Inc.* (2009) 174 Cal.App.4th 1441, 1454 and *Silber v. Mabon* (9th Cir. 1992) 957 F.2d 697, 701-702, cited at AOB 18.) There was no class-wide settlement here. The other case the Opening Brief cites deals with notice of a ruling that the named plaintiff no longer adequately represents the class because the defendant has granted that plaintiff (but no other class member) the relief he sought. (*La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 870-872, cited at AOB 18-19.) Again, there was no such ruling here.

The trial court did not dismiss the class claims based on an agreement between the named plaintiff and the defendant; it granted summary judgment on the ground that the class members could not establish an element of their claims. (3 AA 1038.) The class has identified no authority requiring pre-judgment notice to the absent class members in this situation, i.e., regarding every potentially dispositive motion where the class is represented.

B. The Class Never Asked The Trial Court For Leave To Amend The Complaint To Substitute A New Class Representative.

The class argues that the court failed to permit it to amend the complaint by substituting a new class representative. (AOB 19-20.) Asserting that the trial court "failed to permit" an amendment implies that the class requested leave to amend and that the trial court refused the request. But the class does not cite any such request in the record. That is not surprising, as there was none. Hill, as class representative, did not mention amending the complaint in the summary judgment opposition (3 AA 706-726) or at the summary judgment hearing (3 AA 1009-1028).

Nor is there any indication that the class sought leave to amend in the six months between the court's minute order granting summary judgment and the actual entry of judgment. (See 3 AA 1030 [minute order dated Sept. 30, 2009]; RA 1-2 [judgment entered May 4, 2010].)

Having failed to request leave to amend in the trial court, the class cannot seek reversal on that ground in this Court: It is well-settled that "'[a]n appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been but was not presented to the lower court by some appropriate method . . . .' (Citation.)" (*Doers v. Golden Gate Bridge, Highway& Transp. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1.)

Even if leave to amend had been sought, the trial court properly could have denied the request. The complaint's central legal theory was wrong: The wage statements do not violate section 226(a). (See pp. 11-16, *ante*.) If there was a violation, it was not knowing and intentional, and no employee would be able to show any resulting actual injury. (See pp. 16-34, *ante*.) Any plaintiff who stepped into Hill's shoes would be unable to prove the class's claims for the same reasons. That fact distinguishes this case from the authorities that the Opening Brief cites, all of which involve a change in the law or the facts that made the original named plaintiff unsuitable to represent the class.[13] Here, the problem is not with the

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[13] (See *La Sala v. American Sav. & Loan Assn., supra*, 5 Cal.3d 864 [defendant granted named plaintiff the relief he had sought]; *Branick v. Downey Sav. & Loan Ass'n* (2006) 39 Cal.4th 235 [named plaintiff no longer had standing in light of Proposition 64, which limited standing to sue under Business & Professions Code section 17200]; *Kagan v. Gibraltar Sav. & Loan Assn.* (1984) 35 Cal.3d 582 [named plaintiff informally obtained individual relief on claim under CLRA]; *Safeco Ins. Co. of America v. Superior Court* (2009) 173 Cal.App.4th 814 [named plaintiff did not have standing in light of Proposition 64]; *Best Buy Stores, L.P. v.*

(continued...)

specific plaintiff but rather with the theory at the heart of the class claims. Where that is the case, it makes no sense to compel the trial court to permit substitution of a new named plaintiff—particularly where no one has asked it to do so. There is no ground for reversal here.

[13] (...continued)
Superior Court (2006) 137 Cal.App.4th 772 [named plaintiff could not proceed because a conflict of interest prohibits a lawyer from serving both as a class representative and class counsel], all cited at AOB 19.)

CONCLUSION

The trial court correctly granted summary judgment on the certified wage statement claims. The wage statements at issue showed the total hours worked as required by section 226(a). Even if the wage statements were somehow incomplete, the only formatting violation that the class alleged caused no actual injury, nor was it knowing and intentional. These are at least three independent bases for affirmance. The class's last minute attempt to limit the summary judgment to Hill in his individual capacity is unavailing. The judgment should be affirmed as to the entire case.

Dated: December 16, 2010

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), the attached Respondents' Brief was produced using 13-point Times New Roman type style and contains **11,379** words not including the tables of contents and authorities, caption page, or this Certification page, as counted by the word processing program used to generate it.

Dated: December 16, 2010

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