CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

In the Matter of:

Precedent BOFE
Decision No. BOFE-PD-004

Penalty Citation/Assessment

The Exclusive Poultry, Inc.;
D8 Poultry, LLC;
J.T. Foods Specialty, Inc.;
and Tony Bran, an individual,
Appeal from Civil Citations Issued
By Division of Labor
Standards Enforcement,
Department of Industrial Relations,
State Of California

DECISION

Attached is a decision in the above-captioned case issued by the Division of Labor Standards Enforcement, designated as BOFE Precedent Decision No. BOFE-PD-004 pursuant to California Government Code section 11425.60.[1]

Adopted as Precent: May 16, 2025

[1] The Court of Appeal in *Naranjo v. Spectrum Sec. Servs., Inc.*, (2022) 13 Cal. 5th 93, 122 held prejudgment interest for the "additional hour of pay" required by Labor Code §226.7 for an employer's failure to provided meal or rest breaks to employees should be calculated at 7 percent, a rate set by the California Constitution. The prejudgment interest rate for the "additional hour of pay" for meal and rest break violations utilized in PD-004 was calculated at 10 percent as PD-004 was issued prior to Court of Appeal's decision in *Naranjo*.

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
Labor Commissioner's Office
320 W. 4th Street, Suite 600
Los Angeles, CA 90013
Telephone (213) 897-1511
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BEFORE THE LABOR COMMISSIONER STATE OF CALIFORNIA

In the matter of Civil Penalty Citation/Assessment **The Exclusive Poultry, Inc.; D8 Poultry, LLC; J.T. Foods Specialty, Inc.; and Tony Bran, an individual**	CASE Number 35-CM-302050-17 Workers' Compensation Citations: WC 010501, SO 103556, SO 414874 Labor Code Citations: WA 101526, WA 101527, WA 101528, WA 101529, WA 101530, WA 101531, WA 101532, WA 101533, WA 477181, WA 477183
	Notice of Findings on Civil Penalty Citation/Assessment and Order

You are notified that findings were made by the Division of Labor Standards Enforcement on 10/25/2021. A copy of the findings is attached and served upon you by first class mail.

ORDER – Based upon the findings attached hereto the Civil Penalty Citation/Assessment is:

- ☐ **Affirmed**
- ☒ **Affirmed in part as set forth in the findings**
- ☐ **Dismissed**

You may petition for a writ of mandate from the findings to the appropriate superior court if you agree to pay any judgment and costs if the court rules against you. The writ must be taken within **forty-five (45) days of service of the Notice**. If you do not seek review of these findings, it may be filed and enforced as a judgment in an appropriate court of law.

Casey L. Raymond

CASEY RAYMOND
Hearing Officer

Dated: October 25, 2021

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

Before the Labor Commissioner of the State of California

In The Matter of: The Exclusive Poultry, Inc.; D8 Poultry, LLC; J.T. Foods Specialty, Inc.; and Tony Bran, an individual's Appeal from Civil Citations Issued by: Division of Labor Standards Enforcement, Department of Industrial Relations, State of California	**FINAL FINDINGS AND ORDER ON CITATION NUMBERS:** Workers' Compensation Citations: WC 010501, SO 103556, SO 414874 Labor Code Citations: WA 101526, WA 101527, WA 101528, WA 101529, WA 101530, WA 101531,WA 101532, WA 101533 WA 477181, WA 477183

Pursuant to the provisions of Labor Code Section 1197.1, a hearing was held in the Los Angeles Office of the Labor Commissioner and virtually on December 18-20, 2019, March 3-6, 2020, and September 29-October 1, 2020 before the undersigned hearing officer.

APPEARANCES FOR APPELLANTS:

Tony Bran, Representative for Appellants; Anthony K. McClaren, Attorney for Appellants; Tariq I. Boulad, Attorney for Appellants

APPEARANCES FOR THE DIVISION

Rick Mejia, Representative of the Division; Michael Smith, Attorney for the Division

WITNESSES

Tony Bran, Marco Arellano, Ulises Garcia, Rick Mejia, Lizbeth Alarid, Jose Antonio Camacho, Santiago Sima, Javier Sullon, Jesus Garcia, Emmanuel Garcia, Ana Jimenez, Mario Mendez, Armando Velasquez, John McDonald, Jung Hyo You, Abel Loza, Jose Pacheco

All evidence presented was taken under submission, and the parties submitted

post-hearing briefs. The hearing office provided a tentative findings and order on August 18, 2021. The parties responded with updated calculations and errata on October 15, 2021. The undersigned hearing officer now makes the following findings and order.

I. INTRODUCTION

This case arises out of the alleged failure of poultry processors in the Los Angeles area to pay their employees minimum and overtime wages, provide proper rest breaks, and ensure Workers' Compensation coverage.

Although this case involves nearly a dozen business entities, the crux of the case is straightforward: Tony Bran, a business person operating in the Los Angeles area, bought whole leg chickens from out-of-state vendors, arranged for the chicken to be processed in East Los Angeles and La Puente facilities, and then sold the processed chicken to his clients. The Division of Labor Standards Enforcement (the Division) found that the poultry processors—D-8 Foods, Inc. (D-8 Foods), Best Poultry, Inc. (Best Poultry), and M.G. Poultry, Inc. (M.G. Poultry) operating in East Los Angeles as well as Camacho Poultry LLC (Camacho Poultry) and Sullon Poultry, Inc. (Sullon Poultry) operating in La Puente—violated basic labor laws and cited Tony Bran and associated entities as liable client employers pursuant to California Labor Code Section 2810.3.

Appellants Tony Bran, J.T. Foods Specialty, Inc. (J.T. Foods), D8 Poultry, LLC (D8 Poultry), and the Exclusive Poultry, Inc. (Exclusive Poultry) now appeal those citations.

The citations are affirmed in part and dismissed in part as explained below.

II. LEGAL STANDARD FOR FINDINGS OF FACT

Labor Code Section 1174(d) requires every person using labor in the state to, *inter alia*, keep ". . . payroll records showing the hours worked daily by and the wages paid to . . . employees . . . " Wage Order 1 Section 7 states in relevant part:

> Every employer shall keep <u>accurate information</u> with respect to each employee including the following:

> (1) Full name, home address, occupation and social security number.
>
> (2) Birth date, if under 18 years, and designation as a minor.
>
> (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
>
> (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
>
> (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
>
> (6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

The California Court of Appeal for the Second District has held:

> …where the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer, not the employee. In such a situation, imprecise evidence by the employee can provide a sufficient basis for damages. (emphasis added)

Hernandez v. Mendoza, 199 Cal.App.3d 721, 727 (1988). If the employee provides "sufficient evidence to show the amount and extent of the work as a matter of just and reasonable inference[,] . . . [t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.*; *see also Furry v. E. Bay Publ'g, LLC,* 30 Cal. App. 5th 1072, 1080 (2018). Appellants acknowledge in their briefing that *Hernandez* applies here. *See, e.g.,* Resp. Closing Br. at 14-15.

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III. FINDINGS OF FACT

From May 2015 to July 2018, Tony Bran operated numerous legal entities designed to ship whole leg chicken to Los Angeles, debone or dice the chicken at poultry processors in East Los Angeles and La Puente, and then sell the processed chicken to Bran's customers. Below addresses each step of the processing.

A. BRAN ENSURED THAT LA PUENTE AND EAST LOS ANGELES FACILITIES WERE LICENSED AND EQUIPPED FOR PROCESSING.

Bran testified that he worked for J.T. Foods from 2015 to March 2017 and for Exclusive Poultry from March 2017 to July 2018. Tr. at 631-32. Bran agreed that Exclusive Poultry "took over work that JT Foods had been doing" and that he changed the name of the business from J.T. Foods to Exclusive Poultry because his dog passed away. *Id.* Although Bran's daughter was listed as the president of Exclusive Poultry, Bran admitted that he was the person in charge. Tr. at 632.

Tony Bran was the signatory on the leases for both the East Los Angeles and the La Puente facilities where the chicken was processed. Division's Exhibit 9. Bran testified that J.T. Foods and Exclusive Poultry paid all rent and utilities for those facilities. Tr. at 562, 636-37. He admitted that he would charge rent to any poultry processor that did do not process chicken for J.T. Foods or Exclusive Poultry. Tr. at 24, 399-40. Bran testified that J.T. Foods or Exclusive Poultry supplied some machinery in the East Los Angeles and La Puente facilities. Tr. at 521-522, 1610. J.T. Foods and Exclusive Poultry also kept an office in the La Puente facility rent free. Tr. at 511.

Bran explained that it was illegal for poultry processors to operate without USDA licenses. Tr. at 385. D8 Poultry owned the USDA license for the East Los Angeles facility while DBran Poultry owned the USDA license for the La Puente facility. *See* Division's Exhibit 10 at 7; Division's Exhibit 15 at 2. Bran admitted that he controlled D8 Poultry and DBran Poultry, and that each operated solely for USDA purposes. Tr. at 383-84, 607; *see also* Division's Exhibit 10 at 6 (Tony Bran listed as Owner/President of DBran), Division's Exhibit 15 at 1 (Bran listed

as the only manager for D8 Poultry). Bran testified that he charged any entity that used the license unless they conducted business with him. Tr. at 383. Bran did not charge the cited poultry processors in East Los Angeles (D-8 Foods, Best Poultry, and M.G. Poultry) or those in La Puente (Camacho Poultry and Sullon Poultry) for the use of the USDA licenses.

B. THE POULTRY PROCESSORS DEBONED THE CHICKEN.

J.T. Foods and Exclusive Poultry identified and paid for whole leg chicken to be delivered to poultry processors in East Los Angeles and La Puente. Tr. at 119, 636. Exclusive Poultry owned some of the trucks that dropped off the whole leg chicken to the poultry processors. Tr. at 119.

After the whole leg chicken came to the La Puente and East Los Angeles facilities, the poultry processors would debone the chicken. Below describes the operations of the poultry processors in the East Los Angeles and La Puente facilities.

1. Processing in the East Los Angeles Facility

From May 1, 2015 to late 2019, a poultry processor run by Jesus Garcia and, at various points, his sons Ulises[1] and Emmanuel, operated in East Los Angeles at 2433 ½ East Cesar Chavez; Los Angeles, California 90033.[2] Tr. at 951, 953. Jesus, Ulises, and Emmanuel Garcia testified to the operations of these processors as did workers Ana Jimenez, Mario Mendez, Armando Velasquez, and Abel Loza.

D-8 Foods operated in the East Los Angeles facility from its incorporation in January 2015 to its dissolution on October 24, 2016. Division's Exhibit 17. On the same day as D-8 Foods's dissolution, Jesus Garcia incorporated Best Poultry, which he dissolved on June 19, 2017. *Id.* About one month later, M.G. Poultry was incorporated. *Id.* M.G. Poultry stopped operating in late 2019. Tr. at 442, 889, 1005. These businesses operated similarly, with any notable differences discussed below.

[1] On the D-8 Foods, Inc. Certificate of Dissolution for D-8 Foods, Inc., Ulises is spelled "Ulices." However, when testifying, Mr. Garcia spelled his first name "Ulises." Tr. at 100.

[2] Jesus Garcia denied that he operated Best Poultry. However, he stated that he did operate a poultry processing business on Cesar Chavez from 2015 to 2017. Tr. at 951.

a) Daily Operations

The first step for processing at this facility (and La Puente) was for the whole leg chicken to arrive. Workers, unsurprisingly, could not bring their own chicken to process; they were therefore reliant on J.T. Foods or Exclusive Poultry to provide the product. Tr. at 468. The first call of the day for Jesus, Ulises, or Emmanuel Garcia would be to "Jorge" at the La Puente facility regarding the shipments. Tr. at 109, 515, 520. If they could not reach Jorge, they would call Tony Bran. *Id.* at 115.

The calls to Jorge or Bran were likely necessary because the trucks with the whole leg chicken did not always arrive on time. Witnesses who worked at the East Los Angeles facility testified that the trucks arrived late several times per month, although estimates of the frequency and amount of wait time varied. Tr. at 886, 902, 971, 1037, 1040, 1051-52, 1067. Emmanuel Garcia admitted the trucks arrived one-hour late two to three times per month and that, once per month, the truck would not show up at all. Tr. at 886-887. Other witnesses ranged in their recollections of the delays from 20 four to five hour delays per year to weekly delays of forty minutes to an hour. Tr. at 886-87, 902-903, 1040, 1052, 1067. The waiting time was at least the amount of the Division's estimate of twice a month for thirty minutes each time.[3] The deboners, who were paid by the piece, did not receive payment for this time.

Once whole leg chicken arrived at the facility, deboners removed the bones. To perform this work, deboners had to bring their own safety equipment and tools, with the exception of hairnets and white robes. Tr. at 873-75; 994, 1044, 1099, 1513.

After deboning the chicken, deboners deposited the processed chicken in bins for "packers" to package up for transport to J.T. Foods' or Exclusive Poultry's customers. Tr. at 819, 902, 1015, 1067. Five witnesses, including Jesus Garcia and Emmanuel Garcia, testified that packers on occasion fell behind unloading the bins, and, as a result, deboners could not perform

[3] Jesus Garcia testified that delays occurred five times per year because the city mistakenly closed certain gates. Tr. at 971. This time estimate and the reason for the delay conflict with the testimony of multiple workers as well as other managers. It is not credible.

their work. Tr. at 819, 970. The worker witnesses, Ana Jimenez, Mario Mendez, and Armando Velasquez, estimated this occurred 3-5 times per month, although they varied in their estimates of the length of each stoppage between twenty minutes and one hour. Tr. at 102, 1015-1016, 1067. The worker testimony is credible that deboners would have to wait on packers to empty the bins at least three times per month for twenty minutes each time.

At the end of the day, a supervisor would count the number of empty bags of chicken to determine the quantity of chicken a worker had deboned. Tr. at 867.

b) Meal and Rest Breaks

The East Los Angeles poultry processors did not have a written or official meal or rest break policy.

All witnesses, however, testified that workers received an unpaid thirty minute meal break, usually at 9:00am or 10:00am in the morning. Tr. at 815, 897, 966, 1014, 1065.

The witnesses consistently testified they received no more than one rest break per day. Tr. at 885-86, 906, 1509. Jimenez and Velasquez testified they did not take rest breaks at all, while Mario Mendez testified he took a single rest break if he worked a second shift. Tr. at 1014, 1057-58, 1086. Abel Loza stated he took a rest break at noon during a normal shift. Tr. at 1507-08. On the other hand, the supervisors Jesus and Emmanuel Garcia testified workers could take rest breaks at any time, although Emmanuel Garcia admitted about half of the workers did not take any breaks in addition to their meal break because they were concerned about deboning fewer chickens and therefore losing pay. Tr. at 906, 996. Jimenez, Loza, and Emmanuel Garcia testified workers had a disincentive from taking multiple unpaid breaks because they would not receive pay. Tr. at 885-86, 906, 1509.

c) Hours of Operation

Best Poultry and M.G. Poultry had two shifts Monday through Friday. Ex. 6 at 14-25 (listing first and second shift); *see also* Tr. at 467-68, 972, 945, 1010, 1024, 1060. The morning shift was 5:00am to around 1:30pm throughout 2015 and then switched to 6:00am to 2:30pm in 2016. Tr. at 467 (Jesus Garcia); 809, 813 (Emmanuel Garcia); 895-96 (Jimenez); 1006

(Mendez); 1058-59. A second shift started around 3:00pm and finished between 7:30pm and 8:00pm. Tr. at 139, 467. Workers could not work outside of the facility's set hours of operation. Tr. at 151.

Four workers presented by the Division—Jimenez, Mendez, Velasquez, and Loza—consistently and credibly testified the East Los Angeles facility also operated on Saturday.[4] Tr. at 895, 908, 935, 1006, 1013, 1058, 1485; *see also* Division's Exhibit 20a at 9 (M.G. Poultry time sheet showing Monday through Saturday workdays).[5] Emmanuel Garcia largely confirmed the workers' testimony. He estimated that deboners worked on 80% of the Saturdays and that most deboners who worked for the East Los Angeles processors would work on these Saturdays. Tr. at 105, 821-824.[6]

Workers generally stayed on the job for at least several months, although some would work only few days. Tr. at 469; *see also* Division's Exhibit 20a (showing numerous deboners working over consecutive weeks and months).

d) Worker Schedules

The East Los Angeles processors did not keep daily timesheets per employee or provide itemized wages statements to their employees. Numerous deboners at Best Poultry and M.G. Poultry, however, provided credible testimony that deboners generally worked at least an entire shift, which was around eight hours per day. Tr. at 895-96, 1008-09; 1059-60; 1486-87.

[4] Defendants contend that Armando Velasquez and Ana Jimenez lacked credibility because Armando Velasquez was an original plaintiff in the lawsuit that "triggered the fury of investigations and subsequently citations" and Ana Jimenez is his wife. At the outset, reporting a potential wage and hour violation or filing a lawsuit does by itself not make a witness less credible; arguably, being the first worker, particularly in a low-wage industry, to report violations may make a witness more credible due the risk of retaliation or blackballing. Regardless, both Velasquez and Jimenez were credible in their testimony, including their demeanor when testifying. As with the other witnesses, when their testimony was inconsistent with most other workers, the consistent testimony of several workers was credited.

[5] Although some production records cited from Division's Exhibit 20a are from immediately after the citation period, there is no evidence that the work days or hours changed. Given the lack of time records, these production records corroborate worker testimony.

[6] Jesus Garcia admitted that the poultry processor operated on Saturdays, but maintained that the poultry processor was open on Saturday only when the facility was shut down on a weekday due to a delay in the whole leg chicken shipments. Tr. at 958. This testimony lacks credibility as inconsistent with all worker witnesses as well as Emmanuel Garcia's testimony.

Several deboners in the East Los Angeles facility worked more than eight hours per day or 40 hours per week. For daily hours, the worker witnesses provided consistent testimony that at least five deboners worked 11-12 hours per day between the morning and afternoon shifts. Abel Loza testified that ten to fifteen deboners per day stayed for at least 3.5 hours of a second shift multiple days per week, including himself, Juan Loza, Mario Mendez, two people named Beatriz, Maria Valenzuela, and Noe Gutierrez. Tr. at 1487-89, 1494-95. Mario Mendez testified that he stayed 3.5 hours late three to four nights a week, as did 12-13 other workers including Maria Valenzuela, Abel Loza, and Noe Gutierrez. Tr. at 1107, 1011, 1024. Similarly, Ana Jimenez testified that at least five workers worked a second shift, including herself, Abel Loza, Juan Palomar, Mario Mendez, and Maria Herrera. Tr. at 899-900. As noted above, workers also consistently worked Saturday shifts, which pushed them over 40 hours per week.

The production records provided by the labor contractors support that deboners consistently worked two shifts per day and six days per week. *See, e.g.,* Division's Exhibit 40 at 41, 45 (showing Mario Mendez working two shifts Monday, Wednesday, Thursday for the week of August 21, 2017; Noe Gutierrez working two shifts Monday, Wednesday, Friday; Juan Loza working two shifts Wednesday, Thursday; and Beatriz Zatarin working two shifts on Wednesday and Thursday); *see also* Division's Exhibit 20a at 7 (showing Gilberto Marin, Noe Gutierrez, Alicio Navarro, Mario Mendez, Juan Loza, Marco Palomar, and Francisco Cardona working Monday through Saturday in early 2018).

e) Number of Workers

The worker witnesses consistently and credibly testified that 25 deboners worked at the same time in the East Los Angeles facility. *See* Tr. at 895, 906, 1484, 1509, 1025. Jesus Garcia and Emmanuel Garcia estimated lower, but not by much. Jesus Garcia estimated that 22-23 workers worked on average between 2015 to 2017, while Emmanuel Garcia testified that 18 deboners could work at any one time. Tr. at 803, 977.

The records available support the worker testimony. For D8 Foods and Best Poultry, the subpoenaed checks from Bran to the poultry processors are for a total amount paid equal to what

25-30 deboners could produce.[7] Additionally, M.G. Poultry production records in November 2017 show at least 38 unique deboners worked at the facility. Ex. 20a at 36-38. In January 2018, immediately after M.G. obtained Workers' Compensation, there were an additional 8 unique packers, for a total of 46 employees. *Id.* at 2, 5.[8]

f) Payment

Deboners at the East Los Angeles facility were paid by the piece and reported receiving either $2.30 and $2.35 per box of chicken cut. Division's Exhibit 46 (documenting interviews with 16 workers at the East Los Angeles facility, in which four workers stated that workers received $2.30 per box and 12 stated that they received $2.35 per box).[9] According to Jesus Garcia, workers could not negotiate for a higher rate of pay. Tr. at 468. Other employees, including the packers, were paid by the hour. *See, e.g.*, Division's Exhibit 20a at 2.

g) Workers' Compensation

M.G. Poultry did not have Workers' Compensation Insurance until December 28, 2017. *See* Exhibit 13 at 5-8 (email to Deputy Mejia from the Division showing that M.G. Poultry's Workers' Compensation Policy started on December 28, 2017); Tr. at 167 (Deputy Mejia

[7] Because the poultry processors failed to provide itemized wage statements with the piece rate paid or pieces produced, the Division had to reverse engineer the number of deboners at D8 Poultry and Best Poultry from the Bran payments. With D-8 Foods, for example, the average check from Bran totaled $19,329. Division's Exhibit 26. Given a price per box of $2.35 and an average of 60 boxes per day per employee, the total number of deboners would be around 27. ($19,329 / 60 boxes per day / 5 days per week / $2.35). Appellants maintained that deboners on average could debone far more than 60 boxes per day, but the testimony and available records from M.G. Poultry—which likely would not deviate from D-8 Foods or Best Poultry—do not support that contention. Division's Exhibit 6 (M.G Poultry records showing productivity between 30-50 boxes per shift at the East Los Angeles facility); Tr. at 852-53, 944, 1070, 1493 (worker testimony that workers could complete between 45-80 boxes per day).

[8] There were not records for December 2017, presumably because M.G. Poultry shut down based on the lack of Workers' Compensation insurance. There were additionally no records of hourly packers for November 2017 presented. Finally, at least one employee, Eduardo Medina, performed work as a deboner and packer according to the records.

[9] Calculation sheets from Ulises Garcia for the relevant time period support this rate. For example, during the week of July 17, 2017 to July 21, 2017, M.G. Poultry appeared to multiply the number of boxes by around $2.30 to reach the subtotal of the amount owed. Division's Exhibit 20a at 10.

testimony that he did not find a Workers' Compensation policy for M.G. Poultry's address through the Workers' Compensation Rating Bureau), 136 (Ulises Garcia testimony that his father sought to get a policy after the Division's inspection).[10]

2. Processing in La Puente: Camacho Poultry

Jose Antonio Camacho ("Jose Camacho") formed Camacho Poultry in July 2015. Division's Exhibit 3 at 5; Tr. at 700. He operated the business at 218 8th Avenue South, La Puente, CA 91746. *Id.* Jose Camacho was the head of the company from its founding until it stopped operating around 2018. Tr. at 229, 700-02.

The workers at Camacho Poultry both deboned chicken and diced chicken. Tr. at 232, 234-35. Jose Camacho and a worker witness, Jose Pacheco, testified that Camacho Poultry provided its workers with coats, knives, boots, and latex gloves. Tr. at 232. Some workers, including Pacheco, chose to bring their own knives and boots as well as knife sharpener and metal glove. 1578-82. Workers could not bring in their own chicken. Tr. at 248. Jose Camacho considered the deboners to be his employees. Tr. at 247.

As relevant here, Camacho Poultry had at least 12 employees at any given time during its operation. Jose Camacho admitted that he had 11 to 15 employees between August of 2015 and the beginning of 2017 and 15 employees after that time. Tr. at 700. During the Division's inspection of Camacho Poultry on December 7, 2017, Jose Camacho counted 14 employees for Deputy Rick Mejia, which Mejia then recorded in his inspection report. Tr. at 1471; Division's Exhibit 18; *see also* Division's Exhibit 5 (a late 2017 photograph where at least 12 Camacho employees are visible).

Camacho Poultry operated Monday through Friday for around eight hours a day, from 6:00am to 2:00pm – 2:30pm. Tr. at 233 (Jose Camacho testifying that there was one shift from 6:00am to 2:00pm); 1574-75 (Pacheco testifying that the shift was 6:00am to 2:30pm). Jose

[10] Appellants contend in their brief that there is not a sufficient record on who owned M.G. Poultry, Best Poultry, and D-8 Foods. The question, however, is whether those corporate entities had Workers' Compensation insurance policies. Who "owned" these business entities is not relevant to that determination.

Camacho testified that workers worked six or more hours per day. 703, 716 (Jose Camacho testifying that workers worked 6 to 8 regular hours per day and that they never worked less than 6 hours a day). Workers did not perform work outside these hours. Tr. at 233, 248; 1591. Workers had flexibility to take days off. Tr. at 727; 1578.

Camacho Poultry did not have a formal meal or rest break policy. Workers, though, generally received two breaks per day—a rest break in the morning for 15-30 minutes as well as a meal break around 11:00 am for 45 minutes to an hour. Tr. at 704-705, 713 (Jose Camacho testimony that workers received a thirty minute break in the morning and an hour break in the afternoon); 1581 (Pacheco testimony that he generally took a 15 minute break in the morning and a 45 minute break later). Workers were not paid for their breaks. Tr. at 707.[11]

Camacho Poultry paid its employees by the piece. Workers received $2.50 per box deboned and $6.00 per box sliced. Tr. at 705; 1385-86; *see also, e.g.,* Division's Exhibit 42 at 9, 25, 30, 33, 46, 107, 115.[12]

Camacho Poultry did not have Workers' Compensation insurance until after the Division's December 2017 inspection. *See* Division's Exhibit 13 at 5 (showing Camacho Poultry Workers' Compensation policy beginning on December 13, 2017); Tr. at 181, 186, 249-50.

3. Processing in La Puente: Sullon Poultry

Lizbeth Alarid incorporated Sullon Poultry on May 23, 2017. Division's Exhibit 3 at 4; Tr. at 200. Alarid was in charge of the back office operations, while Javier Sullon led the day-to-day operations at the facility. Tr. at 201; 420. The business operated in the same space as Camacho Poultry, 218 8th Avenue South, La Puente, CA 91746. *Id.*; *see also* Division's Exhibit

[11] Defendants point in their brief to Pachecho's testimony that he was paid for rest breaks. Tr. at 1582. Pachecho later clarified that he was not paid more than the piece rate. Tr. at 1590. Additionally, Jose Camacho admitted that workers did not get paid for any break time. Tr. at 707.

[12] One record provided by Camacho from some time in 2017 shows that workers received $5 per diced box for that week. Division's Exhibit 42 at 4. However, all the remaining records show that workers received $6 per diced box. Given the lack of itemized pay statements showing the piece rate and the numerous Camacho Poultry production records showing $6 per diced box, $6 per diced box is a just and reasonable inference.

5 (showing signs on the wall in the building indicating Camacho Poultry workers on one side and Sullon Poultry workers on another).

Most workers at Sullon Poultry deboned and diced chicken while a few "boxers" took the poultry from the trucks to the tables for deboning. Tr. at 200, 202, 208, 420-21. Alarid and Javier Sullon both testified that Sullon Poultry provided workers with some equipment, including knives, boots, screens, metal gloves, and aprons, although many workers brought their own tools to work. Tr. at 223, 429, 1564. Workers, however, could not bring in their own chicken to cut. Tr. at 209. Alarid, who handled the paperwork and was the owner, considered the deboners to be employees. Tr. at 207.

As relevant here, Sullon Poultry employed 10-13 employees at any given time during its operation. Tr. at 421 (Sullon testimony that there were 2 boxers and 8-11 deboners at any given time, with 13 total in 2017); 749 (Alarid testifying 11-13).

Sullon Poultry operated Monday through Friday, starting at 6:00am every day and ending between 1:00pm and 2:00pm. Tr. at 208 (Alarid testifying that the hours were 8:00am to 6:00pm); 791 (Alarid testifying to 6:00am to 1:30pm); 1557 (Javier Sullon testifying 6:00am to 1:00pm). Workers did not perform work outside these hours. Tr. at 791. Workers had flexibility to take days off. Tr. at 769; 1560. According to Javier Sullon, deboners worked on average for four to seven hours per day. Tr. at 1559.

Sullon Poultry did not have a formal meal or rest break policy. Workers, though, generally received two breaks per day—a rest break in the morning for 15 minutes and a meal break around 10:00 am for 45 minutes. Tr. at 745 (Alarid testimony); 1558 (Sullon testimony regarding 7:00am and 10:00am breaks). Workers were not paid for their breaks. Tr. at 752.

Sullon Poultry paid its deboners by the piece. The deboners received $2.50 per box deboned. Tr. at 747 (Alarid quoting $2.50 price), 1565. The boxers were paid by the hour.

Sullon Poultry did not have Workers' Compensation insurance until after the Division's December 2017 inspection. Tr. at 210 (Alarid admission), 224, 433 (Javier Sullon admission).

C. THE POULTRY PROCESSORS RECEVIED PAYMENT FROM BRAN OR MARC PROCESS FOR DEBONING.

When J.T. Foods operated between 2015 and March 2017, the poultry processors provided an invoice directly to Bran for the number of boxes they deboned. Tr. at 981. Bran paid the processor via personal checks labeled Tony Bran dba GT Foods or simply Tony Bran. *See* Division's Exhibits 26-28. Bran routinely labeled these checks "processing fee." *Id.* Bran testified that even though he wrote personal checks on behalf of J.T. Foods, J.T. Foods would then reimburse him for the entire amount as well as a commission. Tr. at 614-15. At the same time, Bran testified that GT Foods—his personal dba—owned the chicken while it was being processed. Tr. at 619.

When Exclusive Poultry began operating in 2017, a new company—Marc Process Services & Consulting Inc. ("Marc Process")—served as a middle operator. Marc Process was run by Marco Arellano, and it was based at 218 S. 8th Avenue; La Puente, California 91746, the building that Bran leased and where several of the poultry processors operated rent free. Defendant's Exhibit 1 at 1 (showing address on invoice). Bran did not charge Marc Process rent or utilities for his office in Bran's building in La Puente. Tr. at 523, 559-560.

Marc Process and Exclusive Poultry signed a contract on February 2, 2017, which states:

> Both parties agree that THE EXCLUSIVE POULTRY, INC will engaged [sic] the consulting services of MARK [sic] PROCESS SERVICES AND CONSULTING, INC. on a regular basis as to their expertise providing manpower to do the processing for THE EXCLUSIVE POULTRY, INC.

Division's Exhibit 14. Exclusive Poultry was Marc Process's only customer. Tr. at 40.

After this contract, rather than Bran paying the poultry processors in East Los Angeles and La Puente directly, the poultry processors would invoice Marc Process. Tr. at 203; s*ee also, e.g.* Appellants' Exhibit 1 at 3; Division's Exhibit 34. Marc Process would then invoice Exclusive Poultry, listing "subcontractor" processing work and adding a five percent fee labeled as an administration fee or processing fee. *See, e.g.* Appellants' Exhibit 1 at 3; Tr. at 44, 518. Exclusive Poultry wrote a check to Marc Process based on the invoice. Tr. at 41. Marc Process

would then pay the poultry processors. Tr. at 41.

The parties strongly dispute whether Marc Process owned the chicken at any point. Bran testified, and Appellants now contend, that Marc Process "owned" the whole leg chicken once it reached the East Los Angeles and La Puente facilities for processing and that Marc Process then sold the processed chicken back to Exclusive Poultry after processing. Tr. at 504-05, 514, 533. In other words, Marc Process was in charge of processing while Exclusive solely bought and sold the chicken.

Appellants' contention lacks credibility. Marc Process served as a glorified payroll processor for a single client, Exclusive Poultry. It collected the invoices from the poultry processors, added a five percent charge, and then oversaw the invoicing of Exclusive Poultry and the resulting payments to the processors. Its contract with Exclusive Poultry never mentions buying or owning the whole-leg chicken, and Arellano denies ever owning the chicken. Tr. at 75-76; 569-570; Division's Exhibit 14. There is no evidence Marc Process paid for the whole leg chicken when it arrived at the facility or sold the processed chicken to Exclusive Poultry. Bran even admitted in a previous sworn deposition that Exclusive Poultry owned the chicken while it was being deboned. Tr. at 557-559.

D. BRAN ARRANGED DELIVERY OF THE PROCESSED CHICKEN TO J.T. FOODS AND EXCLUSIVE POULTRY CUSTOMERS.

Bran would closely track the processing to ensure the processed chicken would be ready for J.T. Foods or Exclusive Poultry's customers. Tr. at 511, 602. After the poultry processors processed and packaged the chicken, J.T. Foods or Exclusive Poultry (depending on the time period) would sell the chicken to their customers. Tr. at 386, 534, 597, 603. Both J.T. Foods and Exclusive Poultry owned several trucks and employed several truck drivers that would pick up the chicken from the East Los Angeles and La Puente facilities and deliver the packaged chicken to customers. Tr. at 602, 624-25.

Although Bran admitted that J.T. Foods or Exclusive Poultry owned the chicken after it was processed, payment from customers for the processed and packaged chicken did not always

go to these entities; instead, Bran sometimes instructed his customers to write checks to the poultry processors. For example, Jung Hyo You, the President of Bran's customer Joy Creation and Supplies, testified that Bran instructed him to write checks with the payee blank and, at other times, to fill in the payee to Jose Camacho or to Camacho Poultry. Tr. at 1444-1449; *see also* Division's Exhibit 31. The checks provided by the Division confirm that even if the "for" line included JT or JT Chicken payment, Joy Creation made some checks payable directly to Camacho or left some checks blank. Division's Exhibit 31. You's testimony was credible as he had no bias or reason to lie, and the checks provided by the Division match his account.

E. INVESTIGATION AND CITATIONS

In June 2017, the Division received a notice pursuant to Labor Code Section 2699.3 of the Private Attorneys General Act from an aggrieved employee alleging wage and hour violations at the East Los Angeles poultry processors, naming Tony Bran among others as defendants. Division's Exhibit 51. The defendants are copied on the letter. *Id.* The Division exercised its right to investigate the claim and, through that investigation, also focused on the La Puente poultry processors Camacho Poultry and Sullon Poultry. In December 2017, the Division conducted in-person investigations of the East Los Angeles and La Puente Poultry processors. Tr. at 168, 179. Based on those inspections, the Division issued stop orders to operating poultry processors based on the lack of Workers' Compensation coverage. Division's Exhibit 2. The Division then conducted investigatory depositions, including Bran's, in February 2018. Tr. at 415.

The citations at issue in this hearing span five poultry processors and three upstream client employers. The Division has summarized the citations as follows:

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Case #	Time Period	Labor Contractor	Client Employer			Client Er WA Citation	WC Citation
CM-643432	5/1/15-10/24/16	D-8 Foods Inc					
	5/1/15-10/24/16		D8 Poultry, LLC			WA 101529	
	5/1/15-10/24/16			JT Specialty/ Tony Bran		WA 101533	
CM-641560	10/24/16-6/30/17	Best Poultry					
	10/24/16-6/30/17		D8 Poultry, LLC			WA 101528	
	10/24/16-3/15/17			JT Specialty/ Tony Bran		WA 101526	
	3/1/17-6/30/17				The Exclusive Poultry	WA 101527	
CM-302050	7/1/17-12/1/17	M.G. Poultry					
	7/1/17-12/1/17		D8 Poultry, LLC			WA 477183	~~*SO 103553*~~ *(withdrawn)*
	7/1/17-12/1/17				The Exclusive Poultry	WA 477181	SO 414874
CM-387293	5/1/15-12/6/17	Camacho Poultry					
	5/1/15-3/15/17			JT Specialty/ Tony Bran		WA 101531	
	3/1/17-12/6/17				The Exclusive Poultry	WA 101530	WC 010501
CM-387309	5/1/17-7/26/18	Sullon Poultry					
	5/1/17-7/26/18				The Exclusive Poultry	WA 101532	SO 103556

IV. CONCLUSIONS OF LAW

The conclusions of law section first addresses whether the entities named in the citations are client employers under Labor Code Section 2810.3. Second, it answers whether the workers at the poultry processors were independent contractors or employees entitled to the protections of the Labor Code. The section then turns to the citations regarding the failure to provide Workers' Compensation insurance and the alleged wage violations. Finally, it considers whether the Division's investigation violated Appellants' due-process rights.

A. WHETHER THE APPELLANTS SERVED AS CLIENT EMPLOYERS UNDER LABOR CODE SECTION 2810.3 FOR THE POULTRY PROCESSORS

The Division contends that J.T. Foods and Exclusive Poultry are liable as client employers of the poultry processors from May 1, 2015 to July 26, 2018 for any unpaid wages and resulting damages and penalties assessed. Additionally, the Division contends that Bran was an alter ego/single enterprise with J.T. Foods and that D8 Poultry was likewise part of a single enterprise with J.T. Foods or Exclusive Poultry for all citations where D8 Poultry is named. This section will first discuss client employer liability for J.T. Foods and Exclusive Poultry, followed by the alter ego/single enterprise theories.

1. Client Employer Liability for J.T. Foods and Exclusive Poultry

Under Labor Code section 2810.3(b), a "client employer" shares legal responsibility and civil liability with a "labor contractor" for workers supplied by the labor contractor to the client employer for payment of "wages" and failure to secure valid Workers' Compensation coverage as required by Labor Code section 3700.

"Client employer" means any business entity with a workforce of twenty-five workers or more that obtains or is provided six or more workers by "labor contractors" to perform labor within the client employer's "usual course of business." Labor Code § 2810.3(a)(1)(A), (a)(1)(B)(i)-(ii). A "labor contractor" means any individual or entity that supplies the client employer with workers to perform work within the client employer's usual course of business. Labor Code § 2810.3(a)(3).

a) J.T. Foods and Exclusive Poultry Had a Workforce of Twenty-Five Workers, At Least Six of Which Were Provided By Labor Contractors.

Here, the poultry processors acted as labor contractors that provided workers to perform labor for J.T. Foods and Exclusive Poultry throughout the citation periods of May 1, 2015 to July 26, 2018. During that entire period, the East Los Angeles contractors (D8 Foods, Best Poultry, and M.G. Poultry) provided over twenty-five workers to J.T. Foods and Exclusive Poultry. Additionally, Camacho Poultry and Sullon Poultry supplied more than 10 workers each during their periods of operation. J.T. Foods as well as Exclusive Poultry also had several truck drivers that count towards the total workforce requirement.

The total combined workforce of six or more employees provided by the poultry processors, and 26 workers or more, either directly hired by J.T. Foods or Exclusive Poultry or obtained from the poultry processors, meets the workforce thresholds for J.T. Foods and Exclusive Poultry to be client employers. Labor Code § 2810.3(a)(1)(A), (a)(1)(B)(i)-(ii).

b) The Processing Work Performed by the Poultry Processors Was In the Usual Course of Business of J.T. Foods and Exclusive Poultry.

A client employer is liable if the work performed by the supplied workers is within its usual course of business, which means the "regular and customary work of a business, performed within or upon the premises or worksite of the client employer." Labor Code § 2810.3 (a)(6).

(1) The processing work was regular and customary for J.T. Foods and Exclusive Poultry.

Despite Bran's admission in his deposition testimony that he was in the business of processing poultry, Appellants now contend that J.T. Foods and Exclusive Poultry merely bought and sold chicken, leaving the processing for the poultry processors and Marc Process. Appellants' argument is unpersuasive.

While the poultry processors provided the labor for deboning, Bran as well as J.T. Foods and Exclusive Poultry were clearly intertwined with the processors. Bran, J.T. Foods, and Exclusive Poultry paid rent and utilities for the processors at all times, and Bran—through the

companies he admittedly controlled—provided the USDA licenses necessary to process chicken. The poultry processors received whole leg chicken exclusively from J.T. Foods and Exclusive Poultry and provided the packaged, finished product exclusively to J.T. Foods and Exclusive Poultry. J.T. Foods and Exclusive Poultry owned the chicken at all times. Bran even directed some clients, such as Joy Creation, to pay J.T. Foods by writing a check to the poultry processors. In sum, the evidence and testimony support that the regular and customary work—and an essential part of the work—for J.T. Foods and Exclusive Poultry was processing whole leg chicken.

(2) The processing work was performed within or upon the premises or worksite of the client employer.

Appellants next maintain that J.T. Foods and Exclusive cannot be client employers because poultry processing work was not performed on their "premises or worksite." However, Bran signed the leases for the East Los Angeles and La Puente facilities. Bran, through J.T. Foods and Exclusive Poultry, provided the facilities rent free to the poultry processors and even purchased some of the equipment for the facilities. The work was therefore performed on the premises or worksite of the client employers.[13]

c) The Role of Marc Process Does Not Change the Analysis that J.T. Foods and Exclusive Poultry Were Client Employers.

Appellants contend that Marc Process was the true client employer and that Appellants are therefore not liable. The argument is meritless.

At the outset, Marc Process was only in business for part of 2017. Appellants fail to

[13] In a single line in the "Usual Course of Business" section of the Appellants' closing brief, Appellants make the unrelated argument that rest break premiums are not wages under Labor Code Section 2810.3 and that client employers therefore cannot be held liable for them. The Defendants do not provide any additional analysis. As explained in depth in the waiting time penalties section, the California Supreme Court has held that rest break premiums are wage remedies. *Murphy v. Kenneth Cole Prods., Inc.,* 40 Cal. 4th 1094, 1103 (2007) (determining that rest break premiums fall under the definition of wages in Section 200 after analyzing the plain language as well as the statutory and administrative history). In addition, regulations published after notice and comment confirm that the definition of wages in Labor Code Section 2810.3 include any premiums under Labor Code Section 226.7. *See* 8 C.C.R. § 13830.

explain how Marc Process would affect any client employer liability outside of that time frame.

Moreover, Appellants' argument fails because Marc Process was little more than a payroll processor. There is no credible evidence that Marc Process ever owned the chicken or provided any significant direction to the poultry processors outside of payment. Appellants controlled the USDA licenses to process chicken, paid the rent for the facilities in La Puente and East Los Angeles, and controlled the product. In other words, Marc Process, unlike Appellants, was not truly in the poultry processing business—it more resembled an outsourced human resources function, which nonetheless received free rent and utilities from Exclusive Poultry for its offices in the La Puente building.

Even assuming Marc Process operated according to its contract, its role would not change the conclusion that processing chicken was part of Appellants' usual course of business. The contract between Marc Process and Exclusive was explicit: Exclusive Poultry would utilize "the consulting services of MARK [sic] PROCESS SERVICES AND CONSULTING, INC. on a regular basis as to their expertise **providing manpower** to do the processing for THE EXCLUSIVE POULTRY, INC. (emphasis added)." Labor Code section 2810.3 concerns this very activity of when a labor contractor provides manpower—that is supplies workers—to do the work of another company.

Appellants claim that despite the plain language of the contract, the agreement in fact called for Marc Process to process the chicken while Exclusive Poultry solely bought and sold the product. Appellants' reading leaves a number of unanswered questions: If Marc Process was going to be in charge of the processing, why would it be engaged for "consulting services" and for its "expertise providing manpower"? Additionally, why would the contract specify that Marc Process was "providing manpower to do the processing *for* the Exclusive Poultry" rather than simply saying that Marc Process will sell packaged chicken to Exclusive Poultry? Appellants imagine a simple contract in which Marc Process agreed to sell processed and packaged chicken to Exclusive Poultry. That view does not match the plain language of the contract.

Finally, even if Marc Process were a client employer of the poultry processors, that does

not mean Exclusive Poultry would not also have been a client employer. Under Labor Code section 2810.3, any business entity that obtains workers to perform work in its usual course of business is a client employer, even if there are multiple layers of subcontracting. The language of Labor Code section 2810.3 nowhere states that the workers supplied by labor contractors to client employers must be the *employees* of the labor contractor. Indeed, the Legislature has proven it knows how to use the word employee when necessary, and it instead chose to use the term "worker" in Labor Code section 2810.3. *Compare, e.g.,* Labor Code §§ 226.7, 511, 1194, 1194.2, 1194.3. Under Appellants' interpretation, any employer could avoid liability by endless subcontracting—exactly what Labor Code section 2810.3 seeks to combat.

***

The Division proved that J.T. Foods and Exclusive Poultry were client employers for the poultry processors under Labor Code section 2810.3.

2. Single Enterprise Liability for Tony Bran and D8 Poultry

To support its citations naming Tony Bran as well as D8 Poultry, the Division contends that J.T. Foods and later Exclusive Poultry formed a single enterprise with Tony Bran, D8 Poultry and DBran Poultry, and that Bran and D8 Poultry are therefore liable as client employers as named in the citations.[14] We agree.

Under California law, courts apply the alter ego doctrine to determine whether a party can "pierce the corporate veil" of a defendant and hold an individual or other entity controlling the corporation liable. *Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 235 Cal. App. 3d 1220, 1248 (1991).

Courts consider two factors when applying the alter ego doctrine: "(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an

[14] Although the hearing officer finds that these entities and Bran operated as a single enterprise, this finding applies only insofar as the Division named these entities or Bran on each citation. If a party was not named on a citation, then this decision does not assess liability against the party.

inequitable result will follow." *Id.* at 1249 (internal quotation marks omitted). "Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other. Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers." *Sonora Diamond Corp. v. Superior Ct.*, 83 Cal. App. 4th 523, 538–39 (2000) (internal quotation marks omitted).

The single enterprise doctrine arises out of the same concern as alter ego that companies are serving as mere conduits for each other. As the Second Circuit Court of Appeal described in *Las Palmas*:

> Generally, alter ego liability is reserved for the parent-subsidiary relationship. However, under the single-enterprise rule, liability can be found between sister companies. The theory has been described as follows: In effect what happens is that the court, for sufficient reason, has determined that though there are two or more personalities, there is but one enterprise; and that this enterprise has been so handled that it should respond, as a whole, for the debts of certain component elements of it. The court thus has constructed for purposes of imposing liability an entity unknown to any secretary of state comprising assets and liabilities of two or more legal personalities; endowed that entity with the assets of both, and charged it with the liabilities of one or both.

Id. at 1249-50 (internal citations and quotation marks omitted).

The *Las Palmas* court provided an example of single enterprise:

> In *Pan Pacific Sash & Door Co. v. Greendale Park, Inc.* (1958) 166 Cal.App.2d 652, Appellants formed Greendale Park, Inc., and the Ralmor Corporation to build homes on undeveloped lots. Appellants transferred the real property to Greendale Park and later had that corporation contract with Ralmor for the construction. Plaintiff sold sash doors, frames and jambs to Ralmor. When Ralmor did not pay for the goods, plaintiff sued each corporation asserting they were both one and the same. The trial court entered judgment against both corporations under the alter ego theory.
>
> The Court of Appeal in *Pan Pacific* affirmed the judgment, stating:

> "Upon the basis of the ... evidence the trial court was warranted in concluding, as it did, that each corporation was but an instrumentality or conduit of the other in the prosecution of a single venture namely, the construction and sale of houses upon the tract in question. ... There was such unity of interest and ownership that the separateness of the two corporations had in effect ceased and an adherence to the fiction of a separate existence of the two corporations would, under the circumstances here present, promote injustice and make it inequitable for Greendale to escape liability for an obligation incurred as much for its benefit as for Ralmor." (166 Cal.App.2d at pp. 658-659.)

Id. at 1250.

Alter ego and single-enterprise are equitable doctrines. "Because it is founded on equitable principles, application of the alter ego is not made to depend upon prior decisions involving factual situations which appear to be similar. ... It is the general rule that the conditions under which a corporate entity may be disregarded vary according to the circumstances of each case. Whether the evidence has established that the corporate veil should be ignored is primarily a question of fact which should not be disturbed when supported by substantial evidence." *Las Palmas*, 235 Cal. App. 3d at 1248. "Because society recognizes the benefits of allowing persons and organizations to limit their business risks through incorporation, sound public policy dictates that imposition of alter ego liability be approached with caution. Nevertheless, it would be unjust to permit those who control companies to treat them as a single or unitary enterprise and then assert their corporate separateness in order to commit frauds and other misdeeds with impunity." *Id.* at 1249.

Applying the single-enterprise factors here, J.T. Foods and later Exclusive Poultry had a clear unity of interest with Tony Bran, D8 Poultry and DBran Poultry in the prosecution of a single venture: processing whole leg chicken into packaged chicken for sale. The clear unity of interest is demonstrated by each entity's failure to follow basic economic sense except if they were working jointly towards a single venture.

First, Bran's activities on behalf of the other Appellants would resemble corporate charity, if not for the common purpose of processing whole leg chicken for sale. Bran signed the leases for the La Puente and East Los Angeles facilities and brought in at least some equipment.

While Bran would logically charge rent to use his facilities in La Puente and East Los Angeles, he did not charge J.T. Foods, Exclusive Poultry, or the poultry processors for rent or utilities. Moreover, even though Bran individually was named on the leases, he testified that Exclusive Poultry "owned" the buildings, indicating that his individual assets were the same assets of Exclusive Poultry and J.T. Foods. Bran also wrote checks on behalf of J.T. Foods from his personal checkbook, using checks from Tony Bran dba GT Foods.[15]

Moreover, if appellants were truly separate entities, D8 Poultry and DBran Poultry would have charged J.T. Foods, Exclusive Poultry, or the poultry processors to use their USDA licenses. Here, however, those companies did not charge for the licenses because the poultry processors did business with companies connected to Bran. Bran did not even hide this truth, admitting that he owned and controlled D8 Poultry and DBran Poultry purely for USDA purposes.

Similar to the *Pan Pacific* case, "each [entity] was but an instrumentality or conduit of the other in the prosecution of a single venture." They all were owned and/or controlled by Tony Bran to support a single common venture. Their individual decisions made economic sense only if considering the combined assets of all rather than each entity as its own actor seeking to maximize its profit. There was a unity of interest.

Moreover, allowing any of these entities or individuals to avoid liability for citations in which they are named would lead to an inequitable result. This case concerns basic labor law violations committed against low-wage workers facing difficult and potentially dangerous working conditions. Permitting Appellants to avoid liability by atomizing their business into supposedly separate legal entities that actually operate as a coherent whole would risk persons causing labor law violations and avoiding liability by massing assets in separate legal entities. It

[15] Presumably to separate his activities from J.T. Foods, Bran testified that his dba (GT Foods) owned the chicken while it was being processed and then sold it back to J.T. Foods with a commission. Under this defense, though, Bran would still be liable as the client employer even if J.T. Foods would not be. Indeed, this defense would put Bran in the same position as Marc Process was in later—a company that Appellants label as the true client employer. Nonetheless, the testimony that Bran wrote the vast majority of checks on behalf of J.T. Foods through his personal account and was not its alter ego is unconvincing.

is not simply that employees would be unable to collect but also that the parties responsible for the labor law violations here under Labor Code section 2810.3, including Tony Bran, would face no consequences for unlawful acts.

The potential for unjust results is particularly pronounced in the context of Labor Code section 2810.3. The Legislature established client employer liability under Labor Code section 2810.3 because the law previously failed "to protect workers' rights in the shadows of the subcontracted economy" and had been "manipulated by companies that have the labor contractor provide the supervision on site to shield them from liability." AB 1897, June 23, 2014 Senate Judiciary Committee bill analysis, available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140AB1897 (accessed 11/15/20). By assessing liability against client employers, the bill aimed to "incentivize the use of responsible contractors, rather than a race to the bottom." *Id.* Allowing J.T. Foods, Exclusive, Bran, and D8 Poultry to evade liability here is exactly what Section 2810.3 seeks to avoid: individuals and companies manipulating legal contracting to avoid liability for work in their usual course of business.[16]

B. WHETHER THE POULTRY PROCESSOR WORKERS WERE EMPLOYEES OR INDEPENDENT CONTRACTORS

The parties dispute whether the poultry processor workers were employees entitled to the to the basic remedial rights of employment, including Workers' Compensation coverage, rest breaks, minimum wage, and overtime, or independent contractors who lacked such protections. Under either *Dynamex Operations W. Inc. v. Superior Court*, 4 Cal.5th 903 (2018) or S*.G. Borello & Sons, Inc. v. Department of Industrial Relations* (*Borello*) 48 Cal.3d 341 (1989), the workers were employees.[17]

[16] As separate theories, the Division states that Bran was an alter ego/single enterprise with J.T. Foods and that D8 Poultry was an alter ego of J.T. Foods and Bran and later Exclusive Poultry. The Division also contends that Bran was a joint employer of the poultry processing workers. Because we find these entities were all part of a single enterprise, we need not address these theories.

[17] In general, the ABC test applies to any claims arising out of the Wage Orders of the Industrial Welfare Commissioner and related Labor Code provisions, while *Borello* applies to

1. ABC Test

Under California Labor Code section 2775(b),

> [A] person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:
>
> (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
>
> (B) The person performs work that is outside the usual course of the hiring entity's business.
>
> (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

The "failure to satisfy *any one* of the three parts itself establishes that the worker should be treated as an employee." *Dynamex*, 4 Cal.5th at 963 (emphasis added). In other words, to find employee status, it is only necessary to find that the hiring entity cannot demonstrate any *one* part – not all three parts – of the ABC test.

Appellants fail to meet their burden under Prong B that the workers performed work outside the "usual course" of business of any of the poultry processors. For this analysis, it is unnecessary to separate out the various poultry processors. Simply, the essential business of each poultry processor was deboning chicken; chicken deboners performed the core of that work.

Despite this clear application, Appellants nevertheless maintain that the deboners "were in their own independent business of deboning" and therefore were not part of the "usual course of business" of the poultry processors.

Appellants' argument misapplies the "usual course of business" test by shifting the frame of reference from the work of the hiring entity to the workers. As the California Supreme Court

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other wage-related claims and Workers' Compensation claims arising before July 1, 2020. Labor Code § 2775(b); *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 10 Cal. 5th 944, 952 (2021) (applying *Dynamex* retroactively); *see also* Labor Code § 3351(i) (applying the ABC test to workers' compensation starting on July 1, 2020 and noting that the section would not apply retroactively). Because the workers at issue in this case were employees under either test, we do not address which claims fall under which test.

described in *Dynamex*, Prong B starts with the core function of the business and then considers whether the workers fit within that frame—in other words, Prong B (unlike Prong C) does not focus on the individual's practice of owning an independent business but rather on the fundamental work of the hiring entity. *Dynamex*, 4 Cal. 5th at 959. Thus, even if some deboners held themselves out as independent contractors, with indicia that they operated their own business, no objective observer would view poultry process workers working at a poultry processing plant as operating their own business. Moreover, if poultry processor workers were not performing work within the usual course of business of a poultry processor, it is unclear who would ever qualify as an employee of these businesses.

Appellants' argument that workers at the poultry processors customarily engaged in an independent business also fails on its own merits. No workers testified that they negotiated rates, had their own cards, brought in their own product, found their own customers, paid rent or utilities, or worked outside the scheduled hours of the facility. To the degree Appellants contend that the poultry processors did not prohibit workers from engaging in their own independent business, that contention is insufficient to meet their burden; instead, Appellants must prove that the worker in fact customarily engaged in such a business. *Id.* at 962.

In sum, the usual course of business of the poultry processors in this case was deboning chicken. The poultry processor workers performed this core task. Appellants fail to meet their burden to prove Prong B; the workers are therefore employees under the ABC test.

2. Borello

Under the *Borello* test, just as under the ABC test, it is assumed that the worker is an employee, and the hiring entity must prove that the worker is an independent contractor. *Borello*, 48 Cal. 3d at 349. ("One seeking to avoid liability has the burden of proving that persons whose services he has retained are independent contractors rather than employees.").

The *Borello* court adopted a flexible, holistic test to determine whether a worker was an employee or an independent contractor. *Yellow Cab Coop., Inc. v. Workers' Comp. Appeals Bd.*, 226 Cal. App. 3d 1288 (1991) (citing *Borello*, 48 Cal.3d at 353). "[T]he question of control

remains highly pertinent to the distinction between employees and independent contractors." *Id.* at 1297. Any analysis of the employment status, however, must "must be applied with deference to the purposes of the protective legislation." *Borello*, 48 Cal. 3d at 353; *see also Dynamex*, 4 Cal. 5th at 935 ("The *Borello* decision repeatedly emphasizes statutory purpose as the touchstone for deciding whether a particular category of workers should be considered employees rather than independent contractors for purposes of social welfare legislation."). The question of control, therefore, should not be answered in a mechanical way but should instead examine whether the hiring entity exercised all *necessary* control over the worker's operations. *Borello*, 48 Cal. 3d at 357.

To ensure the proper deference to the purposes of the legislation when determining employment status, courts have considered a variety of factors. *Id.* at 350 (noting that courts have long recognized that applying the control test "rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements"). These other factors include:

- Whether the worker performing services holds themselves out as being engaged in an occupation or business distinct from that of the employer;
- Whether the work is a regular or integral part of the employer's business;
- Whether the employer or the worker supplies the instrumentalities, tools, and the place for the worker doing the work;
- Whether the worker has invested in the business, such as in the equipment or materials required by their task;
- Whether the service provided requires a special skill;
- The kind of occupation, and whether the work is usually done under the direction of the employer or by a specialist without supervision;
- The worker's opportunity for profit or loss depending on their managerial skill;
- The length of time for which the services are to be performed;
- The degree of permanence of the working relationship;
- The method of payment, whether by time or by the job;

- Whether the worker hires their own employees;
- Whether the employer has a right to fire at will or whether a termination gives rise to an action for breach of contract; and
- Whether or not the worker and the potential employer believe they are creating an employer-employee relationship (this may be relevant, but the legal determination of employment status is not based on whether the parties believe they have an employer-employee relationship).

See generally id. at 350-51, 355; *Yellow Cab*, 225 Cal. App. 3d at 1301-02.

"[T]he individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." *Borello*, 48 Cal. 3d at 351 (internal quotation marks omitted). For example, in *JKH Enterprises, Inc. v. Dep't of Indus. Rels.*, 142 Cal. App. 4th 1046, 1051 (2006), the court affirmed that package couriers were employees of a company that claimed simply to connect companies that needed package delivery with drivers. The drivers set their own schedules, chose their own driving routes, maintained "independent contractor profiles," paid their own expenses, and did not have direct supervision. *Id.* at 1051. Nevertheless, the court upheld an administrative decision that the drivers were employees because,

> [b]y obtaining the clients in need of the service and providing the workers to conduct it, JKH retained all *necessary* control over the operation as a whole. Under *Borello*, and similar to its facts, these circumstances are enough to find an employment relationship for purposes of the Workers' Compensation Act, even in the absence of JKH exercising control over the details of the work and with JKH being more concerned with the results of the work rather than the means of its accomplishment.

Id. at 1064–65 (emphasis in original). The court noted that the driving job "did not require a high degree of skill," that workers were paid on an hourly basis, and that "several of the drivers have maintained their working relationships with JKH on the same terms for at least a couple of years." *Id.* Evaluating all the factors in light of the remedial purpose of the law, the Court upheld the determination under *Borello* that the drivers were employees.

Similarly, the workers here were employees of the poultry processors under the *Borello* test because the poultry processors retained all *necessary* control of the workers. In the three East Los Angeles poultry processors, Camacho Poultry, and Sullon Poultry, the workers could work only during the defined hours of the hiring entities. The workers relied on the processors to supply whole chicken, provide the temperature-controlled place to cut the chicken, and sell the deboned chicken to customers. Moreover, the workers could not negotiate their rates of pay, bring in their own product to cut, determine the method of cutting the chicken, or choose to sell the deboned chicken to their own clients. The workers did not hire their own employees or have the opportunity to profit based on "managerial skill." There is no indication that the workers held themselves out as independent contractors; in fact, Jose Camacho and Javier Sullon testified that their workers were employees. While some workers deboned at the facilities for only a few days, many remained for months or years. Finally, as analyzed above, the deboning of chicken was also a regular and integral part of the poultry processors business—indeed, it *was* the poultry processors' business.

The fact that the workers had flexible schedules, supplied their own tools[18], and worked on a piece rate do not outweigh the other factors. Appellants lean heavily on the idea that the workers' flexible schedules meant that they were independent contractors. Not so. In *JKH*, the employees set their own schedules, chose their own driving routes, and paid their own expenses but were still considered employees because the company controlled the inputs (the customers who wanted packages delivered) as well as the outputs (the destination of the packages). 142 Cal. App. 4th at 1051. In this case, the workers likewise could not bring in their own chicken, negotiate with different suppliers, or sell to different customers even if they had some flexibility over their schedules and brought their own tools.

Additionally, given the context of the poultry processing industry, little weight is given to

[18] The workers at the East Los Angeles poultry processors supplied their own tools. The testimony was mixed regarding Sullon Poultry and Camacho Poultry. This analysis concludes that even if the workers at each poultry processor supplied their own tools, they were still employees.

the fact that this work is done on a piece rate system. Unlike discrete jobs for which independent contractors are paid and for which managerial skill might result in higher profit from a negotiated rate, the piece rate at the poultry processors functioned as a fixed rate for regular work. Like the garment or agricultural industries, the piece rate here shows less about the employment relationship than the nature of pay in the industry.

The conclusion that the poultry processors workers are employees is consistent with the broad remedial purpose of the Workers' Compensation and basic wage-and-hour laws at issue in this case. *See Borello*, 48 Cal. 3d at 352-53; *Indus. Welfare Com. v. Superior Ct.*, 27 Cal. 3d 690, 702 (1980) ("[I]n 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."); *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1105 (2007) (holding that meal and rest breaks are part of the "remedial worker protection framework"). Failing to do so would leave low-wage workers who are clearly under the control of their employers without basic safety or wage protections.

***

For both the ABC test and the *Borello* test, Appellants ultimately ask that we consider workers in the low-wage poultry processing industry—who are potentially subject to high rates of workplace injury, deadly disease, and wage theft—as entrepreneurs easily able to negotiate rates for specialized services among various processors. We decline to embrace this fiction. The workers are employees.

C. WHETHER THE POULTRY PROCESSORS LACKED WORKERS' COMPENSATION INSURANCE

Labor Code section 3700 requires that employers secure Workers' Compensation insurance for all labor they employ. Labor Code § 3700. Where an employer has failed to secure the payment of Workers' Compensation as required by Labor Code section 3700, the Division is required to issue a stop order prohibiting the use of employee labor by such employer until the

employer's compliance with provisions of Labor Code Section 3700. Labor Code § 3710.1.

Further, Labor Code section 3722 requires the Division to issue a penalty assessment against an employer who has failed to secure Workers' Compensation insurance in an amount equal to the sum of $1,500.00 per employee or twice the amount the employer would have paid in Workers' Compensation premiums during the period the employer was uninsured, whichever is greater. Labor Code § 3722.

Labor Code section 3722(c) describes how to determine the amount the employer would have paid during the period where the employer lacked insurance. If the employer is insured or became insured before the calculation, the current insurance premium is prorated for the number of weeks the employer lacked insurance over the previous three years. Labor Code § 3722(c). If the employer remains uninsured, then the employer's payroll for all uninsured pay periods for the prior three years is multiplied by an approximated rate for the industry. *Id.* If the exact payroll for the uninsured period is not otherwise proven by a preponderance of the evidence, the payroll is approximated by multiplying the state average weekly wage by the number of employees at the time of citation. *Id.*

1. Citation SO 4148784 Against Exclusive Poultry Based on M.G. Poultry's Lack of Workers' Compensation Insurance

The Division issued citation SO 414874 against Exclusive Poultry on May 1, 2018 for $63,000 based on labor contractor M.G. Poultry's failure to cover employees with Workers' Compensation insurance from August 1, 2017 to December 1, 2017. Division's Exhibit 6. The Division reached this calculation by multiplying the 42 employees Deputy Mejia counted during the inspection by $1,500. Tr. at 170-171; *see also* Division's Exhibit 6 at 2 (noting that the $63,000 was higher than twice the amount the employer would have paid in Workers' Compensation premiums during the period the employer was uninsured and citing for the higher amount pursuant to Labor Code section 3722).

The Division met its burden of proving this citation. M.G. Poultry lacked Workers' Compensation insurance at the time of the December 2017 inspection but later acquired it as of

December 28, 2017. Division's Exhibit 13 at 5-8.

Although M.G. Poultry did not keep the required payroll records, the records provided by Ulises Garcia, the CEO of M.G. Poultry, affirm the Division's determination that M.G. Poultry had at least 42 employees. As discussed above, the records from immediately before and after the citation show there were around 38 unique deboners and 8 unique packers worked at the facility, for a total of 46 employees.

The Division proved by a preponderance of the evidence Citation SO 4148784. Because Exclusive Poultry was a client employer of M.G. Poultry at the time of the citation, it is liable for the full amount of $63,000. Labor Code § 2810.3(b)(2).

2. Citation WC 010501 Against Exclusive Poultry Based on Camacho Poultry's Lack of Workers' Compensation Insurance.

The Division issued citation WC 010501 against Exclusive Poultry on December 6, 2018 for $22,988.67 based on labor contractor Camacho Poultry's failure to cover employees with Workers' Compensation insurance from March 1, 2017 to December 7, 2017. Division's Exhibit 7. The Division orally amended the citation downward during the hearing to $21,000. Tr. at 187. The Division reached this calculation of $21,000 by multiplying $1,500 by the 14 employees at the time of the inspection.

Because Citation WC 010501 was issued after Camacho Poultry obtained Workers' Compensation insurance, the penalty equals the higher of twice the amount that the employer would have paid in Workers' Compensation insurance during the time the employer lacked coverage or $1,500 multiplied by the number of employees. Labor Code § 3722(b).

Here, the Division represented that $21,000 (14 employees * $1,500) was the higher of the two calculations. The Division has met its burden to prove this amount. Jose Camacho admitted that he had not purchased Workers' Compensation insurance before the Division's December 2017 inspection. During that same inspection, Jose Camacho assisted the Division's inspector to count 14 employees, which the inspector then recorded in his report.

The Citation is affirmed in the amount of $21,000.

3. Citation SO 103556 Against Exclusive Poultry Based on Sullon Poultry's Lack of Workers' Compensation Insurance.

The Division issued citation WC 103556 against Exclusive Poultry on December 6, 2018 for $119,101.54 based on labor contractor Sullon Poultry's failure to cover employees with Workers' Compensation insurance from May 30, 2017 to December 7, 2017. Division's Exhibit 8 at 1, 7. [19] The $119,101.54 total equals "twice the amount the employer would have paid in Workers' Compensation premiums during the period the employer was uninsured."

To determine the insurance the employer would have paid, the Division's deputy multiplied the employer's payroll for all uninsured periods of time within the last three years by the rate of insurance for the applicable industry as determined by the State Compensation Insurance Fund. Labor Code § 3722(c).

Because neither party proved the payroll for all uninsured periods of time within the last three years by a preponderance of the evidence, the Division used the state average weekly wage from the United States Department of Labor as a proxy for the payroll for one employee. *Id.* The State weekly average rate was $1,164.51. Division's Exhibit 8 at 1; Division's Exhibit 11 at 3. The Division multiplied that average weekly wage by Sullon Poultry's ten employees, for a total of $11,164.10 payroll per weekly pay period. The deputy subsequently multiplied that weekly amount by the 27 uninsured weekly payroll periods to reach a total payroll obligation of $314,417.50. Division's Exhibit 8 at 1.

The State Compensation Insurance Fund ("SCIF") determines insurance rates by each $100 of payroll. Labor Code § 3722(c) (instructing the use of SCIF rates absent other regulations). Therefore, to reach an accurate approximation of the Workers' Compensation insurance that Sullon Poultry would have been required to pay, the deputy divided $314,417.50 by 100, which rounds to $3,144.18. Division's Exhibit 8 at 1. The deputy then multiplied the

[19] The dates of violation listed Citation Number SO 103556 are May 3, 2017 to December 7, 2017. Division's Exhibit 8 at 1. Sullon Poultry was incorporated on May 23, 2017. The 27 weeks in the calculation correctly include the time period of May 30, 2017 (rather than May 3, 2017) to December 7, 2017. *Id.* at 7; Tr. at 305.

$3,144.18 by the SCIF for meat products manufacturing (industry number 2095), which is $18.94. Division's Exhibit 8 at 8. This results in a total of $59,550.77 that Sullon Poultry would have paid for Workers' Compensation insurance during the uninsured periods.

Because the statute imposes a penalty of twice the amount that would have been due in Workers' Compensation insurance, the deputy doubled the $59,550.77, for a total citation of $119,101.54. *Id.; see generally* Tr. 267-77; 297-98.

The Division's Citation is affirmed. Alarid and Javier Sullon admitted that Sullon Poultry did not have Workers' Compensation insurance from its incorporation on May 23, 2017 until December 7, 2017. The Division gave a week grace period and calculated the number of weeks form May 30, 2017 to December 7, 2017. Appellants stipulated to both the admission of Division's Exhibit 11 with the weekly average amount as well as the SCIF rate of $18.94. Tr. at 319, 327. The estimated ten employees is a conservative estimate given that it was the low-end of Javier Sullon's admission and fewer employees than Alarid estimated.

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In sum, Citation SO 414874 for $63,000, Citation WC 010501 as amended for $21,000, and Citation SO 103556 for $119,101.54 against Exclusive Poultry are affirmed.

D. WHETHER THE POULTRY PROCESSORS COMMITTED THE WAGE VIOLATIONS ALLEGED IN THE CITATIONS

The Division conducted audits on each labor contractor to determine the amounts owed in wages, damages, and penalties. Below, the decision addresses each aspect of the Division's audit and evaluates Appellants' objections to each. It then discusses additional general objections by the Appellants.

1. General Citation and Audit Descriptions

a) East Los Angeles Processors

The East Los Angeles facility had three related labor contractors on which the Division performed audits: D-8 Foods, Inc., Best Poultry, Inc., and M.G. Poultry, Inc.

(1) D-8 Foods, Inc.

The Division issued Citations WA 101529 and WA 101533 against D8 Poultry, LLC and J.T. Foods/Tony Bran respectively for the period of May 1, 2015 to October 24, 2016 for $92,250 in rest break premiums, $15,374.94 for unpaid minimum wages, $37,460.17 in liquidated damages, and $60,000 in waiting time penalties. See Division's Exhibit 23 at 3, 5. The citation states that each violation impacted 25 employees. *Id.* The auditor determined the date of the audit based on checks written by Tony Bran DBA G.T. Foods to D-8 Foods covering this time period. *See generally* Division's Exhibit 26; Tr. at 1370-1371.

Appellants dispute that 25 employees worked at D-8 Foods because Emmanuel Garcia testified there were no more than 18 workers on the East Los Angeles facility at any point and because the Division did not specify the workers owed wages during this time period.[20] As noted above, the Division proved through credible worker testimony that 25 deboners worked at any one time in the East Los Angeles facility, including during the time period for D-8 Foods.

Additionally, the Labor Commissioner has long had the authority to prosecute violations of the Labor Code even if she cannot immediately identify the names or even provide the wages obtained to the workers. Indeed, an employer has the obligation to maintain records for all of its employees. Labor Code § 1174(d). An employer cannot avoid liability by claiming that exact employees cannot be identified, when the employer's own failure to engage in proper record-keeping is why such employees cannot be named. *Hernandez*, 199 Cal.App.3d at 727.

Moreover, the Legislature specifically provided that the Labor Commissioner may receive unpaid wages on behalf of workers in recognition of the transient nature of the workforce in low-wage industries. *Dep't of Indus. Relations, Div. of Labor Standards Enf't v. Fid. Roof*

[20] The relevant number of workers will differ for each calculation. For example, for rest break premiums for D-8 Foods, the Division assumed that 25 workers missed rest breaks each day. Therefore, the Division must prove that 25 deboners worked at one time. Alternatively, waiting time penalties would apply to any worker, including deboners and packers, that quit or was laid off during the entire period of D-8 Foods. Therefore, the 25 worker assumption would be that 25 deboners worked at D-8 Foods at any point during its operation. Because the Division met its burden to establish that 25 deboners worked on a daily basis, we need not separate these analyses.

Co., 60 Cal. App. 4th 411, 426 (1997); *see also Dep't of Indus. Relations v. UI Video Stores, Inc.*, 55 Cal. App. 4th 1084, 1087 (1997) (rejecting employer's contention that the Labor Commissioner could not collect wages for workers that could not be located). Holding that the Labor Commissioner must identify each worker specifically during an enforcement action would not only benefit employers that ignored record-keeping requirements but also lead to absurd consequences—hampering the ability of the Labor Commissioner to enforce basic protections of the Labor Code for the most-transient and often lowest-wage workers. "This understanding also comports with the remedial purpose of the Labor Code and wage orders." *Donohue v. AMN Servs., LLC*, 11 Cal. 5th 58, 70 (2021).

(2) Best Poultry

The Division issued three citations to client employers based on violations at Best Poultry.

The Division issued citation WA 101526 for the period of November 14, 2016 to March 4, 2017 to J.T. Foods Specialty, Inc. and Tony Bran for $25,400.91 in rest break premiums, $22,200 in rest break civil penalties, $5,502.02 for unpaid minimum wages, $44,400 in minimum wage penalties, $2,297.75 in overtime wages, $3,450 in overtime civil penalties, $10.964.51 in liquidated damages, and $20,160 in waiting time penalties. See Division's Exhibit 24 at 5. The citation states that 49 employees were impacted by the rest break, minimum wage, and liquidated damages violations, 7 by the overtime violations, and 8 by the waiting time penalties. *Id.*

The Division issued citation WA 101527 for the period of March 5, 2017 to June 19, 2017 to Exclusive Poultry for $22,995.23 in rest break premiums, $29,550 in rest break civil penalties, $3,428.11 in minimum wages, $59,100 in minimum wage civil penalties, $2,126.25 in overtime wages, $4,500 in overtime civil penalties, $7,264.93 in liquidated damages, and $115,920 in waiting time penalties. Division's Exhibit 24 at 3. The citation states that 46 employees were impacted by the rest break, minimum wage, liquidated damages, and waiting time penalties and that 6 employees were impacted by the overtime violations. *Id.*

The Division also issued a citation for the entire time period to D8 Poultry, combining

the amounts due in citations WA 101526 and WA 101527. Division's Exhibit 24 at 7.

For the Best Poultry audit, the Division used a sample period of February 27, 2017 to April 15, 2017 because that was the only period for which the labor contractor provided records. Tr. at 1347 – 1348. Based on those records, the Division identified the employees who worked at Best Poultry during the citation periods and the average number of days and boxes of chicken that they deboned per week. Tr. at 1331; *see also, e.g.,* Division's Exhibit 41 at 4, 8, 12, 16, 19, 22, 26 (records showing Best Poultry production per employee). The Division also added Armando Velasquez as an employee in the audit based on testimony that he worked there during the citation period. Tr. at 1331.

The Division's methodology is sound. The auditor's sample period included the records available, and he determined the employees based on the records and testimony. *See Hernandez v. Mendoza*, 199 Cal.App.3d 721, 727 (1988) (holding that a just and reasonable approximation is appropriate if employers fail to maintain accurate records). The Secretary of State documents showing when Best Poultry and the client employers were in operation confirm the time frames in the citation.

(3) M.G. Poultry

The Division issued citations WA 477181 and WA 477183 to Exclusive Poultry and D8 Poultry respectively for the period of July 17, 2017 to December 2, 2017 for $19,824 in rest break premiums, $28,950 in rest break civil penalties, $57,900 in minimum wages, $38,160.74 in minimum wage civil penalties, $1,440 in overtime wages, $5,000 in overtime civil penalties, $45,293.62 in liquidated damages, and $158,760 in waiting time penalties. Division's Exhibit 25 at 3, 5. The citations state that 44 employees were impacted by the rest break, minimum wage, and liquidated damages violations, 6 by the overtime violations, and 21 by the waiting time penalties.

The Division determined the number and names of workers at M.G. Poultry by using a sample period of five weeks in July and August of 2017. Tr. at 1230. Based on those records, the Division identified the workers who worked at M.G. Poultry during the citation periods and

the average number of days and boxes of chicken that they deboned per week. *Id.*; *see also* Updated Division's Exhibit 37 38 cd Best M.G. Audit for Hearing. The Division likewise determined the time frame for the citations based on when the labor contractor operated and when the client employers were registered and in business.

b) Camacho Poultry

The Division issued two citations to client employers based on violations at Camacho Poultry.

The Division issued citation WA 101531 for the period of August 11, 2015 to March 17, 2017 to J.T. Foods and Tony Bran for $48,930 in rest break premiums, $9,000 in rest break civil penalties, $18,000 for unpaid minimum wages, $8,154.67 in minimum wage penalties, $18,477.97 in liquidated damages, and $30,240 in waiting time penalties. See Division's Exhibit 22 at 5. The citation states that 12 employees were impacted by each violation. *Id.*

The Division issued citation WA 101530 to Exclusive Poultry for the period of March 1, 2017 to December 24, 2017 for $26,970.15 in rest break premiums, $22,000 in rest break civil penalties, $3,653.85 in minimum wages, $44,000 in minimum wage civil penalties[21], $12,060.77 in liquidated damages, and $40,320 in waiting time penalties. *Id.* at 3.

For both of these audits, the Division assumed that Camacho Poultry had 12 employees working at any one time, which, as discussed in the factual findings, is a just and reasonable inference. *Hernandez*, 199 Cal.App.3d at 727. When the Division identified specific workers based on the records Camacho Poultry provided, it assigned wages, damages, and waiting time penalties to them; otherwise, the Division assigned the wages, damages, and penalties to generic workers.

c) Sullon Poultry

The Division issued Citation WA 101532 for the period of May 15, 2017 to July 26, 2018 to Exclusive Poultry for $28,560 in rest break premiums, $27,850 in rest break civil penalties,

[21] Both the original and revised calculation spreadsheets presented by the Division show the minimum wage penalties as $37,400 for the Exclusive Poultry audit based on underlying violations at Camacho Poultry despite the $44,000 listed in the citation.

$4,759.98 for unpaid minimum wages, $55,700 in minimum wage penalties, $6,146.42 in liquidated damages, and $57,720 in waiting time penalties based on violations at labor contractor Sullon Poultry. See Division's Exhibit 21 at 9. The Citation states that 23 employees were affected by each violation.

As the basis of this audit, the Division used paychecks produced from Sullon Poultry to individual employees. The audit determined start dates in two ways. First, Alarid testified to certain workers starting at Sullon Poultry's incorporation in May 2017 and continuing through the date of her deposition. Tr. at 1116; Division's Exhibit 35 at 3-4. Second, if Alarid did not identify a worker, the audit pegged a worker's start date to the week when the worker first received a check. Tr. at 1113, 1116; *see generally* Division's Exhibit 35. For end dates, the Division credited Alarid's deposition testimony on workers that continue to work at Sullon Poultry; the auditor assumed the end date for other Sullon Poultry employees was the week of their last check. Tr. at 1117. The Division also removed a period of five weeks from February 25, 2018 to April 1, 2018 when Sullon Poultry shut down. Tr. at 1117.

The calculation methodology is reasonable. Given the lack of time records, itemized wage statements, or production records, the approximation of each employee's time worked at Sullon Poultry based on production records is a just and reasonable approximation. *Hernandez*, 199 Cal.App.3d at 727. The Division also excluded time when Sullon Poultry was shut down and conservatively assumed that workers started at the time of their first check—even if some workers may have been paid in cash before that point.

2. Rest Break Violations and the Resulting Rest Break Premium and Minimum Wage Remedies for All Poultry Processors.

According to the Division, all deboners at the poultry processors worked more than six hours and were therefore entitled to two paid ten minute rest breaks. The Division alleges that each poultry processor owes deboners (1) minimum wage for an *unpaid* rest break that the deboners took and (2) a rest break premium for failing to authorize and permit a second rest break.

a) The Division's Legal Theory

(1) An Employee's Right to Rest Breaks

Employers must authorize and permit employees to take a ten-minute *paid* rest break for every four hours of work or major fraction thereof. *Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1028 (2012); Industrial Welfare Commission Wage Order 8-2001 § 12. As such, "[e]mployees are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on." *Brinker*, 53 Cal. 4th at 1029. If employers do not authorize and permit rest breaks, employees are entitled to a premium of one hour at their regular rate of pay. Cal. Labor Code § 226.7. Even if an employer fails to authorize and permit an employee from taking multiple rest breaks per day, the employee receives only one rest break premium. *Id.*

Piece-rate employees have the right to separate compensation for rest or "recovery" breaks, as the time constitutes hours worked. *Bluford v. Safeway Inc.*, 216 Cal. App. 4th 864, 872 (2013); *see also Sanchez v. Martinez*, 54 Cal. App. 5th 535, 542 (2020). The Legislature codified this requirement in Labor Code Section 226.2, which took effect on January 1, 2016. *Sanchez*, 54 Cal. App. 5th at 542 n.5 (noting that courts have found Labor Code section 226.2 to be prospective only).

(2) Authorizing and Permitting Rest Breaks for Piece-Rate Employees

Appellants challenge all assessments of rest break premiums and penalties for poultry processor workers contending that, even if the poultry processors did not pay for rest breaks, they still authorized and permitted them. The Division responds that an employer of piece-rate employees that fails to pay for rest breaks has de facto failed to authorize and permit rest breaks. We agree with the Division.

The right to rest breaks forms a critical part of the "remedial worker protection

framework" that ensures the health and safety of employees. *Kirby v. Immoos Fire Prot., Inc.*, 53 Cal. 4th 1244, 1259 (2012). Low-wage workers, such as the poultry processor employees here, are the "likeliest to suffer violations." *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094 (2007). As such, the California Supreme Court has "scrupulously guarded against encroachments on this 10-minute period." *Troester v. Starbucks Corp.*, 5 Cal. 5th 829, 844 (2018), *as modified on denial of reh'g* (Aug. 29, 2018). The concern over employer "encroachment" on rest breaks is heightened for low-wage piece-rate workers. When a piece-rate employee's entire pay is dependent upon their production, they have little incentive to take a break.

Applying these principles, California appellate courts have repeatedly protected the right of non-hourly employees to receive separate payment for rest breaks. *Bluford v. Safeway Inc.*, 216 Cal. App. 4th 864, 866 (2013) was the first appellate case to confront the issue. *Bluford* concerned the right to *paid* rest breaks for Safeway distribution drivers whose compensation was based on a combination of payment for deliveries completed based on mileage, time of day and location, fixed rates for specific tasks, and hourly rates for delays outside the drivers' control. *Id.* at 867. Even though Safeway instructed all drivers to take rest breaks per the Labor Code and wage orders, Safeway did not separately compensate for the rest break. *Id.* at 868-69. Instead, Safeway contended that its compensation program "built-in" rest break pay into the delivery rates and that it did not have to separately put "employees on the clock just to pay for rest periods." *Id.* at 872.

The court rejected Safeway's argument, relying on two premises. *Id.* at 871-72. First, under California law, "[r]est periods are considered hours worked and must be compensated." *Id.* at 872. Second, employers cannot "average" the hourly rate, but instead must directly compensate for each hour worked. *Id.* Therefore, the employer had to separately compensate the rest break premium rather than alleging it was "built-in" to a piece-rate system.

In *Vaquero v. Stoneledge Furniture LLC,* 9 Cal. App. 5th 98, 113 (2017), *as modified* (Mar. 20, 2017), the Second District Court of Appeal applied the same principle to commissioned employees, holding that they must be separately compensated for rest break premiums. The court explained:

> California law and public policy have long viewed mandatory rest periods as part of the remedial worker protection framework and require us to construe Wage Order No. 7 to best effectuate that protective intent. Indeed, the Legislature views the right to a rest period as so sacrosanct that it is unwaivable. Compensation plans that do not compensate employees directly for rest periods undermine this protective policy by discouraging employees from taking rest breaks.

Id. (internal citations and quotation marks omitted).

The *Sanchez* court extended the logic of *Bluford* and *Vaquero* by holding that non-hourly employees could seek rest break premiums for unpaid but taken rest breaks as an alternative to minimum wages. In *Sanchez*, piece-rate agricultural workers took multiple unpaid breaks per day. 54 Cal. App. 5th at 541-42. As relevant here, the court held that employees could seek the remedy of rest break premiums for this violation. 54 Cal. App. 5th at 543-44. Even though the employer "authorized" unpaid rest breaks, the *Sanchez* court concluded that the failure to separately compensate workers for rest breaks still violated the Labor Code and wage order requirement to authorize and permit a rest break. *Id.*

Consistent with this precedent, we hold that, in order to "authorize and permit" rest breaks for piece-rate workers, employers must promise to pay for those rest breaks separate from any piece rate. Without this promise to pay, employers are de facto "discouraging employees from taking rest breaks" because piece-rate employees would be sacrificing significant pay. The testimony in this case bears this theory out: both workers and management recognized that workers often did not take rest breaks for fear of losing piece-rate pay. Although pay for ten

minutes may seem like a small incentive, this pay can be critical for low-income workers taking breaks. Indeed, the California Supreme Court in *Troester* recognized that a claim for little more than $100 over a 17-month period is enough "to pay a utility bill, buy a week of groceries, or cover a month of bus fares." *Troester*, 5 Cal. 5th at 847. Therefore, even assuming deboners could take *unpaid* rest breaks, the poultry processors' failure to promise pay was a failure to authorize and permit a rest break.

b) Audit Methodology for Unpaid Rest Breaks and Missed Rest Breaks

To calculate the wages owed for the taken but unpaid rest breaks, the auditor assumed that deboners took one ten minute rest break per day worked. Unless the workers were specifically identified in production records, the auditor assumed each deboner worked five days per week, for a total of 50 minutes unpaid. *See, e..g.*, Updated Division's Exhibit 37 38 cd (noting in column F the average days per week for each employee to determine the number of rest breaks missed per week). For the total owed in minimum wages per employee, the auditor multiplied the 50 minutes of weekly unpaid time by the applicable minimum wage and the number of week-long pay periods the employee worked. Tr. at 1371. For example, in the D-8 Foods audit, "Person 1" worked 32 weeks at a minimum wage of $9 and 45 weeks at a minimum wage of $10. The calculation was therefore: (32 weeks * 50 minutes unpaid per week * $9.00 minimum wage) + (45 weeks * 50 minutes unpaid per week * 10.00 minimum wage), for a total of $615. *See* Exhibit 39.

The audits, except for D-8 Foods, also include civil penalties paid to the State of $100 per pay period per employee for failure to pay the minimum wage. Cal. Labor Code § 1197; *see also* Tr. at 1335.

The rest break premium owed for a rest break violation is one hour at the regular rate of pay. Labor Code § 226.7. To calculate the rest break premiums for the alleged failure to authorize and permit a second rest break, the auditor again assumed that employees worked five

days per week unless noted otherwise in the records. The auditor then multiplied the five days per week by the each employee's regular rate of pay. For most audits, the Division conservatively used the minimum wage; however, when the Division could determine the actual wage of the individual worker and that wage was higher than the minimum wage, the Division applied the higher wage to determine the rest break premiums. *See, e.g.,* Tr. at 1205-07 (utilizing higher wage for identified Camacho Poultry workers).

The audits, except for D-8 Foods, also include civil penalties to the State of $50 per pay period per employee for rest period violations. This assumes that each violation was an initial violation rather than a subsequent violation penalized at a higher rate. Cal. Labor Code § 558(a); *see also* Tr. at 1335.

This baseline methodology is reasonable. Given the absence of itemized wage statements or timesheets, the Division attempted to use the production records available to determine specific workers, the time frames and number of days per week that they worked, and their rate of pay. *Hernandez*, 199 Cal.App.3d at 727. Additionally, the Division generally used conservative assumptions, including assuming a minimum wage rate for the rest break premiums unless records specifically showed otherwise.

c) Appellants' critiques of the audit methodology

(1) Double Recovery

Appellants contend that even if all poultry processors failed to pay for a first rest break and to authorize and permit a second rest break, the Division may only recover a rest break premium *or* the unpaid wages for rest breaks taken but unpaid. Otherwise, Appellants contend, the Division is double counting.

Appellants' contention is unpersuasive. Here, the Division cited the poultry processors for two distinct violations: a minimum wage violation based on the failure to pay for ten minute rest breaks that employees took and a rest break premium based on the poultry processors' failure to authorize and permit a second rest break for employees who worked more than six hours. The Division does not double count because the violations stem from two separate

unlawful acts. It also does not seek wages for *both* rest breaks as well as the premium.

Sanchez does not dictate a different result. In *Sanchez*, while the court allowed employees to seek the remedy of a rest break premiums as an alternative to minimum wages for an unpaid rest break, the court refused to award both remedies for the same violation. The court reasoned that awarding both premiums and wages would be double counting, as the plaintiffs' "theories of recoveries flow from the same injury—[Defendant's] *failure to pay*" for rest breaks. *Id.* at 546 & n.8. The court reasoned that allowing for both the payment wages and the premium for the same violation would convert the rest break premium into a penalty rather than damages because all "actual losses" (the 20 minutes) would be covered by the wages—a result which would defy the California Supreme Court's holding in *Murphy* that rest break premiums are a wage remedy. *Id.* at 546.[22] The plaintiffs thus had to choose to seek either the full wages for the unpaid breaks or a rest break premium. *Id.* at 547.

As noted above, the Division's legal theory is distinguishable from *Sanchez* because the Division alleges two separate violations. The first violation is for failing to pay the minimum wage during an unpaid rest break taken by the employees (the only violation at issue in *Sanchez*). The second violation is for failing to authorize and permit a second rest break, resulting in a rest break premium. The rest break premium is not converted into a penalty, even under *Sanchez*'s holding, because the rest break premium is the only remedy requested for the failure to authorize and permit the second rest break.

(2) Common Proof

Appellants next object to Division's use of common proof for the rest break premium calculations. They cite *Gomez v. J. Jacobo Farm Lab. Contractor, Inc.*, 334 F.R.D. 234, 257 (E.D. Cal. 2019) to argue that the Division's audits fail to account for significant individualized

[22] The *Sanchez* Court's conclusion that the rest break premium would be a penalty because the actual losses would be covered by the minimum wage is perplexing. Numerous provisions of the Labor Code assign wages or damages in addition to actual losses covered and these wages or damages are not thereby converted into penalties. *See, e.g.,* Labor Code §§ 510; 1194.2. This appellate court decision is nonetheless binding.

questions regarding whether an employee was authorized and permitted to take a rest break.

In *Gomez*, farm workers sued their farm labor contractor for, *inter alia*, failure to provide rest breaks. The farm labor contractor supplied workers to work on seventy-seven different farms "owned by third-parties," meaning that the farmworkers worked at different locations under different supervisors doing different agricultural work during different seasons. *Id.* at 238. With regard to rest breaks, about a fourth of the paychecks to piece-rate workers had the required separate payment for rest breaks while some, but not all, of the remaining workers received retroactive pay for unpaid breaks and unproductive time. *Id.* at 245.

Given these variations, the *Gomez* court concluded that most employees were likely "provided with and permitted to take numerous rest breaks during their shifts" and that "to the extent that an employee was not provided with or permitted to take a rest break, such appears to be the result of the employee's particular foreperson at the time." *Id.* at 257. Given the wildly divergent working conditions and the finding that most workers likely were authorized to take rest breaks, the court declined to certify a class, noting that the rest break claims were subject to individualized proof. *Id.*

Gomez is distinguishable. The Division's audits for rest breaks concerned single facilities (rather than various farms) and a single type of worker with the same supervisors. Unlike *Gomez*, the questions regarding rest breaks at each deboning location are not inherently individualized; rather, each lends itself to determining common policies for all piece rate workers. However, simply because the citations lend themselves to proof regarding common policies does not mean the Division has met its burden to prove common violations for all its allegations. We analyze that question below with regard to each poultry processor.

d) Application to Camacho Poultry

The testimony and evidence support the Division's conclusion and resulting audit that Camacho Poultry employees (1) were not paid for their one rest break per day and (2) were not authorized and permitted to take a second paid rest break.

(1) Camacho Poultry failed to pay wages for employees' daily rest break.

As discussed in the findings of fact, Camacho Poultry deboners generally worked shifts of seven to eight hours, with Jose Camacho admitting that employees worked a minimum of six hours. Because the employees' credible testimony as well as Jose Camacho's admission proved that employees worked more than six hours per day, the employees were entitled to two rest breaks and one meal break.

To calculate the unpaid rest breaks at Camacho Poultry between May 1, 2015 and May 7, 2017, the auditor assessed 50 minutes of minimum wage per week for each unidentified employee. Division's Exhibit 36 at 5; Tr. at 1161-62. As discussed above, this methodology was reasonable.

For May 8, 2017 to December 24, 2017, the Division obtained production records enabling the auditor to identify employees and approximate their average number of days per week. *See generally* Exhibit 42. As a result, the Division could determine whether an employee worked fewer than five days per week as assumed for the time periods without production records. The Division therefore *decreased* the amount of owed minimum wage to identified employees during this time if the records showed the employee working less than five days per week. Tr. at 1206; *see also* Ex. 36 Camacho cd Camacho Audi, Checks, Withdrawals, Camacho Audit for Hearing, Tab: "Camacho Audit (The Exclusive Poultry)." This effort to provide a detailed accounting for individual employees when the records permitted—resulting in *less* liability for defendants—is a reasonable methodology.

(2) Camacho Poultry failed to authorize and permit a second rest break.

The Division has proven that Camacho Poultry did not authorize and permit a second rest

break for two reasons.

First, Camacho Poultry employees were not even permitted to take a second, *unpaid* rest break. Jose Camacho admitted that workers took one rest break per day, and no testimony suggested that employees took more than this single rest break. Along with Jose Camacho's admission, the "inexorable zero" of any workers taking a second rest break strongly suggests that workers were not authorized and permitted to take a second rest break. *Cf. Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n. 23 (1977) (noting that the complete absence of "minority line drivers" made it difficult to rebut an inference of discrimination). Second, as discussed above, even if Appellants had shown Camacho Poultry allowed workers to take a second *unpaid* break, that showing would not be sufficient to demonstrate that Camacho Poultry authorized and permitted a rest break. Because Appellants failed to promise paid rest breaks to its piece-rate employees, they did not authorize and permit the second rest break as required by law.

To reflect this violation, the Division's auditor assessed a rest break premium at the minimum wage rate for all employees except those identified by records as working from May 8, 2017 to December 24, 2017.

Similar to the minimum wage calculations, the auditor was able to perform a more specific and accurate calculation of the rest break premiums owed for the five identified employees in the production records from May 8, 2017 to December 24, 2017. For the five identified workers, the auditor determined and applied the regular rate of pay for the rest break premium rather than defaulting to the minimum wage. *See* Labor Code § 226.7 (rest break premium equals on hour at the regular rate of pay).

To determine the regular rate of pay for these employees, the auditor started with the production records, which recorded the number of boxes diced and deboned per employee. From

these records, the auditor calculated an average daily income of $194.23 per employee assuming the prices of $2.50 per box deboned and $6 per box diced. *See* Ex. 36 Camacho cd Camacho Audi, Checks, Withdrawals, Camacho Audit for Hearing, Tabs: "Camacho Boxes"; "Camacho Audit (The Exclusive Poultry)." The auditor then converted the total daily income into an average hourly rate of $24.28 per employee by assuming an eight hour day.[23] *Id.* To finalize the rest break premium calculation, the auditor multiplied the $24.28 rest break premium by the number of days per week and the weeks in the violation period the identified employees worked. *Id.*

The audit was a just and reasonable inference of the rest break premiums owed. The Division used the production records available and applied the higher hourly rate only to the five individuals identified in the record for a short period of time, a more conservative approach than applying the higher hourly wage of $24.28 to all employees.

The audits of the Exclusive Poultry and J.T. Foods based on the underlying violations at Camacho Poultry are therefore affirmed, except that the hearing officer adopts the revised calculations' lower amount of minimum wage penalties for the Exclusive Poultry audit ($37,400 rather than $44,000) and its updated liquidated damages and interests for both audits.

e) Application to Sullon Poultry

(1) Sullon Poultry failed to pay wages for employees' daily rest break.

Through the admissions of Alarid and Javier Sullon, the Division has proven that employees at Sullon Poultry worked more than 3.5 hours per day and received one rest break; however, as Alarid testified, the rest break was not paid. Appellants offer no evidence to rebut

[23] Felix Prado informed the Division's investigator that he worked seven hours a day; the Division in its audit therefore divided the daily average by seven to get his hourly wage. Tr. at 1200; *see also* Camacho audit for hearing revised 9-15-21 (part of Ex. 36 cd etc.) tab "Camacho Poultry LLC (The Exclusive Poultry, Inc.)" (noting Felix Prado worked 7 hours daily and calculating the wage due based off this daily work).

this admission by Sullon Poultry's owner. Sullon Poultry therefore unlawfully failed to pay for the rest break. *See* Labor Code § 226.2; *see also Bluford*, 216 Cal. App. 4th at 872; *Sanchez*, 54 Cal. App. 5th at 542.

Using the minimum wage as the rate of pay, the Division performed the same general calculation to determine rest break premiums and the resulting wages, damages, and penalties. As noted above, the methodology is reasonable and is affirmed.

(2) The Division failed to prove that Sullon Poultry Employees were entitled to a second rest break.

The Division failed to prove that Sullon Poultry employees worked more than six hours per day and were thus entitled to a second rest break. Unlike Jose Camacho who admitted that workers never worked less than six hours, Javier Sullon stated that employees worked four to seven hours per day. Tr. at 1558. While Alarid noted that the business hours of Sullon Poultry spanned more than six hours, she did not testify that employees consistently worked more than six hours. No workers testified from Sullon Poultry regarding their average daily work.

The Division's worker questionnaires are not sufficient on their own to overcome this testimony. The Division submitted surveys documenting the daily hours of Sullon Poultry employees based on interviews between employees and deputies from the Division. *See generally* Division's Exhibit 44. Most of these surveys indicate employees worked more than six hours a day, *see id.* at 3, 7, 15, 19; *but see id.* at 11 (5 hours per day), 23 (stating work of seven hours a day, but documenting a workweek of Monday through Friday and total hours per week of only 25-30). Testimony during the hearing, however, indicated that while the deputies interviewed the workers and wrote down the information, they did not review the questionnaires with the workers before having the workers sign the questionnaires. Tr. at 1399. We decline to put dispositive weight on these surveys given that the workers did not testify at the hearing and the possibility that a deputy erroneously recorded an answer without a worker's opportunity to review. [24]

[24] The formal rules of evidence, including the prohibition on hearsay, do not apply to informal administrative proceedings. In its comments to Evidence Code section 300, the Law

(3) The Division chose to seek a minimum wages over rest period premiums.

When piece-rate employees prove that an employer failed to separately compensate employees for rest breaks, the employees may choose to seek the rest break premium remedy or the wage remedy but not both. *Sanchez*, 54 Cal. App. 5th at 542.

In accordance with this controlling law, the hearing officer in the tentative order required that the Division choose to either seek rest period premiums or minimum wage violations. The Division chose to seek only minimum wages and submitted calculations reflecting that change. *See* Sullon Audit for hearing updated 9021 (fr. Ex 35), tab "Sullon Audit." Defendants have not objected to the calculation.

Citation WA 101532 is affirmed in part and dismissed in part, based on the unpaid minimum wages for the unpaid rest period.

f) Application to East Los Angeles Processors

(1) The Division has proven that the East Los Angeles Processors did not authorize and permit rest breaks.

Multiple East Los Angeles processor employees credibly testified that employees for D-8 Foods, Best Poultry, and M.G. Poultry worked for shifts of more than six hours, with some working more than ten hours per day. As such, East Los Angeles employees were entitled to at least two paid rest breaks per day compensated separately from the piece rate.

Similar to Sullon Poultry and Camacho Poultry, the East Los Angeles Processors lacked

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Revision Commission clarifies that "the provisions of the code do not apply to administrative proceedings ... unless some statute so provides or the agency concerned chooses to apply them." Evid. Code § 300, Law Revision Commission Comments, 1965 Addition. There is no mention of the rules of evidence in the provisions of the Government Code governing informal hearings; however, Government Code Section 11513(c) provides that a "formal administrative hearing need· not be conducted according to the technical rules relating to evidence ... Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions."

Nevertheless, the hearing officer may take into account hearsay and indicia of reliability in weighing the evidence. Here, while the surveys may be used as corroborating information, they lacked the indicia of reliability to alone prove the Division's case on this disputed issue.

a formal policy on rest breaks and did not pay for any rest breaks taken. That alone proves the processors failure to authorize and permit rest breaks as required under Industrial Welfare Commission Wage Order 8-2001 Section 12 and Labor Code Sections 226.2 and 226.7.

Additionally, no employee witness testified that they took a second rest break per day. Even Emmanuel Garcia, who claimed that employees could take as many unpaid rest breaks as they wished, acknowledged that half of the workers took *no rest breaks at all*. The worker witnesses are credible that employees did not take a second rest break. As with Camacho Poultry, even if the East Los Angeles processors could prove they paid for rest breaks, the inexorable zero employees taking a second rest break strongly suggests that they did not authorize and permit it.

The Division's assessment of rest break premiums and related civil penalties for these audits is affirmed.

> *(2) The Division has not proven that East Los Angeles employees took any paid or unpaid rest breaks; as such, the citations for minimum wages are dismissed in part.*

While the employee witnesses who worked in the East Los Angeles facility presented consistent testimony that they did not receive two rest breaks, they split on whether they received a single rest break or no rest break at all. Out of the four workers who testified, two stated that they received no rest breaks; one, that he received a rest break only when working a second shift; and another, that he consistently received one rest break. The Division in its brief acknowledges the varying testimony, explaining that the majority of deboners likely took rest breaks.

The testimony presented was insufficient to conclude that East Los Angeles employees on average took any rest breaks. Consequently, the Division has not proven that workers are owed minimum wages for unpaid rest breaks. The minimum wage penalties and premiums in the citations stemming from the East Los Angeles facility, as discussed below, must be based on other alleged minimum wage violations.

3. Minimum Wages: the East Los Angeles Processors

The Division next contends that—separate from any minimum wages due based on unpaid rest breaks—the East Los Angeles Processors owed minimum wages to deboners because deboners worked "other nonproductive time" without payment and because the total amount that deboners made per day based on piece-rate production fell below the minimum wage owed for an eight hour day.

a) Other Nonproductive Time

In a piece rate system, workers must be compensated separately for time when they are unable to perform piece rate work. *Bluford*, 216 Cal. App. 4th at 872; Labor Code § 226.2(a)(1).

As detailed in the findings of fact, the Division proved that employees were not paid for two hours per month: one hour waiting for trucks to arrive and one hour combined waiting for the packers to remove product from the bins. During this time, employees were unable to perform piece rate work because the *employer* failed to provide the raw materials or the packers had not emptied the bins. The employees were still under the employer's control as they were waiting at the factory for either product to arrive or to be packaged. *See Mendiola v. CPS Sec. Solutions*, 60 Cal. 4th 833 (2015) (holding that employees subject to the employer's control still must be compensated even if they are not working). The employees are therefore entitled to minimum wages for this time to the extent these amounts do not exceed the minimum wages alleged in the citation.

The Division did not include the minimum wages owed based on the nonproductive waiting time in its audits of the East Los Angeles processors. In its briefing, the Division asserts that these unpaid hours for unproductive time would compensate for any finding that workers in the East Los Angeles facility are not owed minimum wages for rest breaks; however, the Division did not provide specific calculations in its original briefing. As a result, the hearing officer in the tentative decision ordered the Division to recalculate the audits for the East Los Angeles Processors.

In response, the Division removed the fifty minutes per week (10 minutes per day) that it

had assessed for the minimum wage due for nonproductive time during rest breaks. The Division then calculated, consistent with this opinion, that deboners in the East Los Angeles processors spent at least 2 hours per month—or, on average, 30 minutes per week—in unpaid time under the control of the employer as described above. Assuming a five day workweek, the Division estimated that each worker had six minutes per day (or 0.10 hours) of unpaid non-productive hours. *See* Ex. 39 D8 Foods Audit – updated 9-21; Best MG Audit for Hearing Best MG Production v 9_28_2020_updated_9_3_2021, tabs: "MG Audit," "Best Poultry Audit (TEP)," and "Best Poultry Audit (JT & Bran)." The Division's methodology ensures that workers who worked fewer than five days per week receive only a prorated amount of the unpaid non-productive time, as the auditor distilled the unpaid time into daily increments.

This is a just and reasonable approximation of the unpaid nonproductive time for deboners in the East Los Angeles processors. *Hernandez*, 199 Cal.App.3d at 727. Indeed, as noted above, it is conservative in its estimates of unpaid time.

b) Daily Piece Rate Below Minimum Wage

(1) Slower Workers at Best Poultry

For Best Poultry, the Division alleges that Armando Velasquez, Eduardo Medina, Ismael Meza, and Eladio Santa Maria did not receive the proper minimum wage because they were slower than other workers and therefore did not earn enough through piece-rate production to cover the minimum wage for their eight hour work day.

To estimate the amount these slower workers made, the Division assumed a lower hourly rate of $9.00 for the identified slower employees compared to $11.74 for other employees on Citation WA 101526. It is unclear why the Division applied this lower rate to the slower workers for only this Citation.

The Division failed to meet its burden to prove that the identified employees earned less than minimum wage through piece-rate production. The Division points to testimony from one worker, Abel Loza, who identified the "slow" employees as deboning fewer boxes. Tr. at 1501-1502. Loza, however, did not specify the average number of boxes that these workers

deboned or how much "slower than average" they were. Tr. at 1502. Indeed, for the sample period for Best Poultry, Eladio Santa Maria appears to have deboned more boxes than average per day, including more boxes than Loza on February 28, 2017. *See* Division's Exhibit 37 38 cd (tab "Best Poultry Boxes," rows 3 and 15).

Aside from Loza's testimony, the Division points to Velasquez's testimony that he had cancer and that he, at least, was a "slow" worker entitled to additional minimum wage damages. Tr. at 1070-71. Velasquez, however, stated that he produced less than average for only a month and a half before August 2016, *id.*, and Citation WA101526 does not include the summer of 2016.

Because the Division failed to prove that these workers were in fact slower, it was ordered to remove these damages in the tentative decision and has done so. The awarded amounts in this decision reflect the updated calculations.

(2) Failure to Pay Minimum Wage at M.G. Poultry Based on the Piece Rate.

The Division's audit for M.G. Poultry assessed minimum wage violations based on the failure of the employer to compensate workers for the difference between the minimum wage owed for an eight hour day and the piece rate received per day.

To perform this calculation, the Division used a sample period between July and August of 2017. Based on the production records, the Division's auditor determined the average worker deboned around 31.18 boxes per day. Tr. at 1226-27, 1235; *see also* Division's Exhibit 37 38 cd Best (updated calculation). At $2.35 per box, the average worker made $73.27 per day, compared to the minimum wage of $96 owed per eight-hour day ($12 minimum wage * 8 hours per day). Tr. at 1236. The Division took the difference of $22.73 per day and multiplied that by the number of pay periods and the number of days per week each worker worked to reach the unpaid minimum wages. *Id.* at 1236.

Citing *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308, 1322 (2018), Appellants' primary objection to this analysis is that the Division's sample was unrepresentative and resulted in an inaccurate calculations.

In *Maldonado*, plaintiffs sued for unpaid overtime, among other damages, because defendants paid overtime to production workers based on an alternative workweek schedule that was not properly adopted—that is, defendants erroneously paid overtime for any hours over ten daily hours worked rather than eight daily hours worked. *Id.* at 1317. The parties disputed whether an alleged 30 minute lunch break should have been subtracted from the total overtime owed so that workers were entitled to 1.5 hours of unpaid overtime premium rather than two hours of unpaid overtime premiums. *Id.* at 1322. To support the plaintiffs' argument that employees were owed the full two hours in overtime pay, an expert hired by the plaintiffs pulled 51 time cards to evaluate whether workers took lunch and, if so, whether they took the full thirty minutes. *Id.* Based on this sampling, the expert concluded that workers often took fewer than thirty minutes for lunch. Accordingly, the expert opined that all workers were underpaid about 60 cents per shift. *Id.*

The court rejected this statistical analysis for several reasons. First, the sample was miniscule. The expert pulled only 51 line items out of a possible 56,000, "less than one-tenth of 1 percent of the data." *Id.* Second, the sample was unrepresentative. Out of the time cards examined, 20 of the 51 showed eight hour shifts, rather than the ten hour shifts at issue in the case. *Id.* Additionally, more than half of the time cards examined were from maintenance workers who were not part of the production worker class at issue. *Id.* at 1323. Finally, the expert's conclusion regarding the employer's failure to round properly for lunch periods was a non-sequitur to the certified issue. The court noted that plaintiff's expert shifted the question from whether production workers received meal breaks at all to whether the defendants rounded up to thirty minutes, an issue that not been certified. *Id.* at 1323.

Given the plaintiff's unrepresentative and flawed sample as well as the testimony of a credible defense expert, the court found plaintiff's sample "profoundly flawed" and rejected it. *Id.* at 1330 (citing *Duran v. U.S. Bank Nat'l Assn.*, 59 Cal. 4th 1, 13 (2014)).

The sample period utilized by the Division for M.G. Poultry is distinguishable from *Maldonado*. Unlike the sample in *Maldonado*, the Division's sample represented about twenty

percent of the five month citation period, far more than the 0.1% sample in *Maldonado*. Additionally, the auditor included 39 of 45 workers during that period rather than drawing a small number at random; the only reason the Division did not include all 45 was because of an ambiguous term on the production records for the six other employees that could have skewed the sample.[25] Additionally, the Division's auditor, in contrast to the plaintiff's expert in *Maldonado*, excluded packers or other workers to whom the analysis was not relevant, ensuring that the sample was not riddled with unrepresentative examples. Finally, the Appellants did not address through cross-examination, lay testimony, or expert testimony why the sample period would be unrepresentative of the larger five-month period.

In sum, the auditor's sample served as a valid approximation of work performed and damages owed.

4. Overtime: Best Poultry and M.G. Poultry

Pursuant to Labor Code Section 510:

> Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of

[25] The production records for M.G. Poultry include the number of boxes deboned per employee per day as well as a weekly total of "combos." For example, Osvaldo Ramirez is listed in the M.G. Poultry records for the week of January 1, 2018 to January 5, 2018 as having deboned 65 boxes on Monday, 56 on Wednesday, 32 on Thursday, and 60 on Friday. Division's Exhibit 20a at 1. He is also listed as deboning 32 combos for the entire week. *Id.* In the production records, the combos were added to the total number of boxes to equal the number of "cajas" per week, for a total of 245 boxes. *Id.*

The Division originally included workers who deboned combos in their calculations, assuming combos were just boxes. Given the addition of the combos to the regular boxes per week in the M.G. Poultry records, this was a reasonable assumption. In testimony, however, Bran testified that "combos" generally meant large crates of up to 50 boxes of chicken, shedding doubt on the meaning of combos in the production records. It seems unlikely that Bran was using combos in the same manner as the production records. Indeed, if Bran's definition was the same as that used in the M.G. Poultry production records, it would mean that Osvaldo Ramirez would have deboned 1,813 boxes, or over 450 per day, in the week of January 1, 2018 to January 5, 2018. That number is wildly above any estimate of daily production from any party.

Regardless, the Division post-hearing removed the six workers who were listed as having worked on combos during the sample period. As a result, the average daily number of boxes deboned per employee and resulting piece-rate pay increased; consequently, the auditor decreased the amount of minimum wages owed to each employee. This calculation is a reasonable and just inference.

> pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.

See also IWC Wage Order 8-2001 § 3(A).

The Division assessed 27 hours of overtime worked per week for Best Poultry and 15 per week for M.G. Poultry. For each calculation, the Division assumed one hour of unpaid overtime premiums per day (that is, the minimum wage multiple by half for the premium) for employees identified in the records and/or in worker testimony as working overtime. To calculate the total premiums, the Division assessed how many days per week and pay periods each of the affected individuals worked for the relevant citation period. The overtime premiums were based on the number of pay periods that the identified workers did not receive overtime pay.

The Division's calculations are affirmed. The employee testimony and the evidence presented showed that at least five—and likely ten—employees at the East Los Angeles facility worked daily overtime by staying at least 3.5 hours on the second shift after working an eight hour first shift. Even with the conservative estimate of five employees working three hours of overtime per day, workers at Best Poultry and M.G. Poultry worked fifteen hours of overtime per day. Assuming a five day workweek, that is 75 hours of daily overtime per week.

Additionally, several employees also worked weekly overtime. Although the East Los Angeles processors did not keep accurate timesheets, the production records available show at least seven workers who worked Monday through Saturday. With the conservative estimate of three employees working eight hour shifts Monday through Friday and a four-hour half shift on Saturday, employees at Best Poultry and M.G. Poultry would have 12 hours of weekly overtime.

In total, it is a reasonable and just estimate that East Los Angeles facility employees worked over 80 hours of overtime per week. The Division's far more conservative estimate of less than 30 hours of overtime worked per week, which is orders of magnitude less than the overtime worked suggested by the records and witness testimony, is a just, reasonable, and conservative approximation. The overtime citations are affirmed.

5. Liquidated Damages

Under Labor Code section 1194.2, when an employer fails to pay the minimum wage, an employer can recover liquidated damages "equal to the wages unlawfully unpaid and interest thereon."

Appellants dispute the minimum wage violations triggering liquidated damages, but do not dispute the Division's calculation of liquidated damages. Following the tentative decision, the Division recalculated liquidated damages based on the findings above and updated the liquidated damages for October 1, 2021.[26]

6. Waiting Time Penalties

Labor Code section 201(a) provides: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." Labor Code section 202(a) provides: "If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting." Labor Code section 203 provides that "[i]f an employer willfully fails to pay, without abatement or reduction, in accordance with Labor Code sections 201 [or] 202 ... any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid ... but the wages shall not continue for more than 30 days." Penalties under Labor Code section 203 (known as "waiting time penalties") are calculated on a calendar day basis without regard to the number days the employee would have worked in the 30 days following the due date for payment of final wages. *Mamika v. Barka*, 68 Cal.App.4th 487 (1998). Penalties are calculated by multiplying the employee's final per diem wage rate (the amount the employee earned in a typical workday) by the number of calendar days for which

[26] The Division stipulated to a Liquidated Damages and Interest total of $17,913.81 on Citation WA 101531 rather than $18,477.97. Tr. at 1190. That stipulated amount is affirmed with the increased amount awarded here due to the interest accrual.

penalties are owed.

An employer will not be subject to penalties under section 203 if the employer's failure to pay any wages was not "willful." The settled meaning of "willful," as used in Labor Code section 203, is that an employer has intentionally failed or refused to perform an act that which was required to be done. *Barnhill v. Saunders*, 125 Cal.App.3d 1, 7-8 (1981). There is no need to show evil purpose or an intent to defraud an employee of wages. *Id.* However, the failure to pay any wages is not considered willful if there is a good faith dispute that any wages are due. *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1201 (2008). Ignorance of established law does not constitute a good faith dispute.

The Division's assessments of waiting time penalties in the citations are affirmed except for the waiting time penalties for Sullon Poultry.

The Division assessed waiting time penalties for each worker of any poultry processor that had shut down, as all of these workers had been effectively terminated. This included every poultry processor except Sullon Poultry. When the Division could identify the workers who were working at particular location, they would specifically name that worker and assign waiting time penalties; if not, the Division would name "Person 1" or "Person 2."[27] The Division's methodology for the poultry processors no longer in business is sound. All of the employees were owed the remedy of wages, whether minimum wage or rest break premiums.

For Sullon Poultry, the Division stated in its briefing that it assessed waiting time penalties for the employees that had separated based on payroll records and the testimony of Javier Sullon and Alarid. Division's Post-Hearing Br. at 26. In its briefing, the Division

[27] Appellants argued that the waiting time penalties were double counted when audits showed the estimated number of workers as "Persons" and then identified specific employees who received waiting time penalties. For example, the Camacho Poultry audit for Tony Bran and JT Foods Specialty lists Persons 1-12 with calculations for owed wages and penalties and then includes 11 other workers at the bottom for whom the audit assesses waiting time penalties. In total, however, the audit assesses only twelve workers waiting time penalties—Persons 11 and 12 and the ten workers identified from the records who worked at Camacho Poultry and separated from employment during that time period. *See* Exhibit 36 at 5. This is a reasonable way for the Division to assess the correct total wages while identifying any workers to whom a payout should be made if the Citations are upheld. It is not double counting.

acknowledged that at least three workers, Alberto Castillo, Julia Vasquez, and Maria Cotom, continued to work for Sullon Poultry. *Id.* The Division's audit, however, assessed waiting time penalties for all 23 identified employees. Division's Exhibit 35 at 2; Division's Exhibit 21 at 9. Waiting time penalties in Citation 101532 are owed only to 20 employees, given the Division's briefing that three workers continue to work at Sullon Poultry; therefore, the amount of waiting time penalties rewarded is reduced by $7,560, to $50,160.

Citing *Naranjo v. Spectrum Sec. Servs., Inc.*, 40 Cal. App. 5th 444, 474 (2018), Appellants contend that waiting time penalties should not be assessed based on minimum wage claims or rest break premiums derivative of rest break violations.

At the outset, this contention misinterprets *Naranjo*. In *Naranjo*, the court held that an employee action under Labor Code section 226.7 does not trigger waiting time penalties. *Id.* at 474. The court reasoned that such actions are for nonprovision of meal and rest breaks rather than the nonpayment of wages as required for waiting time penalties. *Id.* at 474. The Division's citations, however, include not only claims under Labor Code Section 226.7 but also claims for unpaid wages under Labor Code Section 1197. As the *Sanchez* court explained, there are two valid theories of recovery when a piece-rate worker takes unpaid break: a claim for unpaid wages and a separate theory for rest break premiums. *See Sanchez*, 54 Cal. App. 5th at 542. Even assuming *Naranjo* is good law, all claims brought under Labor Code Section 1197 for wages would trigger waiting time penalties.

Moreover, the California Supreme Court has granted review in *Naranjo* (Case No. S258966). Consequently, the appellate court decision in *Naranjo* has no binding or precedential effect. *See* Cal. Rules of Court, Rule 8.1115(e)(2). We find the *Naranjo* court's reasoning unpersuasive and decline to follow it.

Proponents of the view that meal break premium pay constitutes "wages" within the meaning of Labor Code section 203 point to *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094 (2007), in which the Supreme Court held that in an action for payment of meal break premium pay under Labor Code section 226.7, the applicable limitations period is the

three-year period for actions for wages, rather than the one-year period for actions to recover penalties. The Court reasoned that under Labor Code section 226.7, "an employee is entitled to an additional hour of pay immediately upon being forced to miss a meal or rest break. In that way, a payment owed pursuant to section 226.7 is akin to an employee's immediate entitlement to payment of wages or for overtime .... The right to a penalty, unlike section 226.7 pay, does not vest until someone has taken action to enforce it." *Id.* at 1108 (emphasis added); see also *Esparza v. Safeway, Inc.*, 36 Cal.App.5th 42, 52 (2019) ("When unlawfully denied a meal period, an employee's interest in the premium wage vests, and the employee is immediately entitled to the premium wage without making a demand for it.").

Proponents of the view that meal break premium pay does not constitute "wages" within the meaning of Labor Code section 203 point to *Kirby v. Immoos Fire Protection, Inc.*, 53 Cal. 4th 1244 (2012), which considered whether the prevailing party in an action for meal break premium pay brought under Labor Code section 226.7 was entitled to attorneys' fees under Labor Code section 218.5, which then provided for an award of attorneys' fees to the prevailing in party in an "action brought for the nonpayment of wages." The Court held that the prevailing party, the employer, was not entitled to an award of attorneys' fees because "a section 226. 7 action is brought for the nonprovision of meal and rest breaks, not for 'the nonpayment of wages."' *Id.* at 1255.

However, the *Kirby* Court made clear that it was not overruling *Murphy*. The Court reasoned: "Our reading of section 218.5 is not at odds with our decision in *Murphy*. There ... we said that 'the additional hour of pay' remedy in section 226. 7 is a 'liability created by statute,' and that the liability is properly characterized as a wage, not a penalty. (*Murphy*, at pp. 1102, 1114.) To say that a section 226.7 remedy is a wage, however, is not to say that the legal violation triggering the remedy is nonpayment of wages.... [T]he legal violation is nonprovison of meal or rest breaks, and the object that follows the phrase 'action brought for' in section 218.5 is the alleged violation, not the desired remedy." *Kirby*, 53 Cal. 4th at 1257.

Courts have grappled with the significance of *Murphy* and *Kirby* in cases that present the

question of whether an employer's failure to provide legally compliant meal breaks, which triggers the remedy of meal break premium pay under Labor Code section 226.7, further subjects that employer to section 203 "derivative liability" for willful failure to pay the required rest break premiums timely upon separation of employment.

Ultimately, this question will be answered by the California Supreme Court in *Naranjo*. Until then, in the absence of any controlling appellate precedent, we conclude that the correct answer is provided by those federal district court decisions that have concluded that for Labor Code section 203 purposes, meal break premium pay constitutes "wages," and thus, an employer's willful failure to pay any required meal break premium pay upon an employee's separation from employment subjects the employer to Labor Code section 203 waiting time penalties. *See, e.g.*, *Karl v. Zimmer Biomet Holdings, Inc.* 2018 WL 5809428 at *10-11 (N.D. Cal. Nov. 16, 2018); *Castillo v. Bank of America National Association*, 2018 WL 1409314 at *5-6 (C.D. Cal. Feb. 1, 2018); *In re Autozone, Inc.*, 2016 WL 4208200 at *7 (N.D. Cal. Aug. 10, 2016).

Further, construing rest break premium pay as "wages" for purposes of Labor Code section 203 best effectuates the purpose of ensuring the "immediate payment" of premium pay as required under *Murphy*. Conversely, a construction of meal break premium pay as something other than "wages" within the meaning of Labor Code section 203 would encourage employers to forego payment of the premium pay unless and until an employee files and prevails in an action under Labor Code section 226.7 for such payment. Such a construction would run counter to the legislative intent behind Labor Code section 226.7.

Finally, we note that several federal district courts have likewise declined to follow the appellate court's decision in *Naranjo*, determining that the California Supreme Court was likely to reverse. *Kazi v. PNC Bank, N.A.,* 2021 WL 965372, at *22 (N.D. Cal. Mar. 15, 2021) (Spero, J., Chief Magistrate Judge); see also *Howell v. Leprino Foods Co.*, 2021 WL 168291, at *4 (E.D. Cal. Jan. 19, 2021) (declining to follow *Naranjo*).

The Division's assessment of waiting time penalties is therefore affirmed, except for the

reduction to the waiting time penalties based on violations at Sullon Poultry.

7. Pre-Judgment Interest

The Division assessed a ten percent interest on the minimum wage and the rest break premium starting at the end of the audit. The Division now alleges this amount should continue to the time of the hearing. Tr. at 1372. Appellants dispute that this interest should be assessed. We agree with the Division.

California Labor Code section 218.6 provides, "In any action brought for the nonpayment of wages, the court shall award interest on all due and unpaid wages at the rate of interest specified in subdivision (b) of Section 3289 of the Civil Code, which shall accrue from the date that the wages were due and payable as provided in Part 1 (commencing with Section 200) of Division 2."

California Civil Code section 3289(b) provides, "If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear the interest rate at a rate of 10% per annum after breach."

Although California Labor Code section 218.6 does not specifically address the recovery of wages through a citation, it is clear that it is appropriate to award prejudgment interest to unpaid wages pursuant to Civil Code section 3289 and the enactment of Labor Code section 218.6 merely clarified existing law. *Bell v. Farmers Ins. Exchange*, 135 Cal.App.4th 1138, 1141 (2006).

In *Bell*, the appellate court reviewed the award of interest under Civil Code section 3289 in a class action in which the class members were seeking overtime compensation. Specifically, the appellate court was considering whether the 10 percent prejudgment interest rate provided by Section 3289 for breach of contract actions, and incorporated in Section 218.6, should be applied retroactively. *Id.* at 1142. The *Bell* court determined that the Legislature intended to clarify existing law when it enacted Section 218.6 - specifically that the application of the ten percent prejudgment interest rate of Civil Code section 3289 to the accrual of unpaid wages was appropriate and authorized before the enactment of Section 218.6. *Id.* at 1150. Thus,

the application of the ten percent prejudgment interest rate of Civil Code section 3289 to the accrual of unpaid wages recovered via a BOFE citation is legally justified and acceptable.[28]

8. General Objections: Overlapping Damages and Overall Reliability

Appellants finally object to the calculations because there are some overlapping citations that would allegedly allow for double recovery and because the auditor made too many assumptions and/or errors throughout to prove the calculations.

The citations at issue in this hearing are the citations against the client employers. To the degree there are minor variations between the periods or damages for which the client employer and underlying labor contractors were cited, the question in this hearing is whether the Division proved the violation during the time periods in the citations at issue. As both parties agree, however, the Division is not entitled to double recovery from Appellants that have joint and several liability. Therefore, if the Division has already collected based on the citations against the labor contractors that were not challenged, the Division cannot collect against the client employers for the same violations. Similarly, when two client employers are held liable for the same time period for the same underlying violations, the client employers are jointly and severally liable and not both separately liable for duplicative amounts.

Appellants also attack the reliability of the calculations as a whole based on several mistakes in the spreadsheets, including liquidated damages calculations, the original inclusion of combos, and the overtime calculation for M.G. workers. These mistakes, which were generally revised downward, do not undermine the calculations as a whole. As noted above, the starting point for these calculations is that the labor contractors had a legal obligation to keep accurate time records and pay statements. Because the labor contractors failed to do so, the Division developed proxy calculations, using assumptions from a mix of worker testimony, production records, and payments to the processors. *See Hernandez*, 199 Cal.App.3d at 727. Given the

[28] The *Naranjo* court held that unpaid premiums accrue interest at seven percent rather than ten percent. *Naranjo*, 40 Cal. App. 5th at 475. For the reasons noted above, we find the court's reasoning unpersuasive and decline to follow it.

scope of these citations, the minor errors that were addressed by the Division during the course of the hearing or revised downward afterwards do not undermine the auditor's sound methodology and attention to detail. The auditor was credible.

***

Based on the above analysis, the Division provided revised calculations. To the extent the revised calculations for any of the citations submitted on October 15, 2021 included liability over the citation amount, the citation amounts governed, except for liquidated damages and other interest. Liquidated damages and other interest were updated to include interest until October 1, 2021.

E. WHETHER THE LABOR COMMISSIONER'S INVESTIGATORY PROCESS VIOLATED APPELLANTS' DUE-PROCESS RIGHTS

Appellants argue that their due process rights were violated because the Division's subpoena for production records issued to Bran was not reasonably relevant to the investigation, because the Division took Bran's deposition without providing him notice that Exclusive Poultry was being considered a client employer, and because the Division conducted depositions of party witnesses without informing Exclusive Poultry. Appellants' arguments are unconvincing.

1. Administrative Subpoenas for Records

First, Appellants have not proved any due process violations regarding the administrative subpoenas. At the outset, Appellants failed to submit any of the administrative subpoenas into the record or elicit testimony about the contents of the subpoenas. Appellants' briefing likewise simply asserts that the subpoenas were "not reasonably relevant to the DLSE investigation" without any further explanation. Respondent's Closing Br. at 25. Without knowing the scope of the subpoenas, Appellants' contention that the subpoenas are overbroad cannot be evaluated and sustained. Moreover, Appellants admit that they did not move to quash the subpoenas in question when they were served. *Cf.* Gov't Code §§ 7474, 11450.30. The failure to object constitutes a

waiver. *People v. Skelton*, 109 Cal. App. 3d 691, 710 (1980), *overruled on other grounds by People v. Figueroa*, 41 Cal. 3d 714, 731 (1986).

Even if the Appellants had entered the subpoenas into the record and moved to quash the subpoenas in question, the subpoenas do not appear to violate Appellants' due process based on the documents presented at hearing from the subpoenas. Under California law, administrative "subpoenas are valid if: (1) they inquire into matters the agency is authorized to investigate; (2) they are 'not too indefinite'; and (3) the information sought is 'reasonably relevant' to the investigation." *State Water Res. Control Bd. v. Baldwin & Sons, Inc.*, 45 Cal. App. 5th 40, 55 (2020) (quoting *Brovelli v. Superior Ct. of Los Angeles Cty.*, 56 Cal. 2d 524, 529 (1961)). The relevance provision is construed broadly. *Id.* at 57 ("An administrative agency is not required to meet the same standard as a party seeking discovery in pending litigation. As our Supreme Court explained in *Brovelli,* an agency's administrative investigations are similar to a grand jury proceeding, 'which does not depend on a case or controversy in order to get evidence but can investigate merely on suspicion that the law is violated, or even just because it wants assurance that it is not.'" (*quoting Brovelli*, 56 Cal. 2d at 529)).

Courts have specifically held that the Labor Commissioner retains broad power to conduct an investigation and subpoena records on any issue over which the agency has jurisdiction. *Millan v. Rest. Enterprises Grp., Inc.*, 14 Cal. App. 4th 477, 487 (1993), *as modified on denial of reh'g* (Mar. 24, 1993) (quoting *Brovelli*, 56 Cal. 2d at 529). In *Millan*, the Labor Commissioner issued a subpoena for the production of records in connection with an investigation pursuant to a provision of the Labor Code *Id.* at 483. The employer refused to produce the records, arguing that the Labor Commissioner lacked the authority to issue the subpoenas. *Id.* at 484. In affirming the superior court's ruling compelling production of the documents, the Court of Appeals held:

> . . . case law is clear that an administrative agency is empowered to conduct an investigation and subpoena records to determine whether the entity under investigation is subject to the agency's jurisdiction and whether there has been a violation of provisions which the agency is empowered to regulate.

Id. at 493.

The appellate court likewise rejected the employer's argument that the subpoena exceeded the scope of the Labor Commissioner's authority, holding:

> The documents sought are necessary so the DLSE can enforce the labor laws which it is empowered to enforce. [. . . .] As has been said by the United States Supreme Court, the power to make administrative inquiry is not derived from a judicial function but is more analogous to the power of a grand jury, which does not depend on a case or controversy in order to get evidence but can investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."

Id. at 487 (quoting *Brovelli*, 56 Cal. 2d at 529).

As in *Millan*, the documents the Labor Commissioner sought had a clear nexus to her investigation whether Appellants violated the Labor Code. At the hearing, the Division presented checks from Bran's account including from Bran to D-8 Foods and Best Poultry. The checks are relevant to Bran dba GT Foods serving as part of a single enterprise with J.T. Foods and the poultry processors providing labor to Bran. The subpoenas to Bran therefore are relevant to the wage and hour violations the Division investigated, not too indefinite, and sought information relevant to both the alleged violations and liable parties.

Admittedly, this retrospective evaluation of the subpoena based on the documents presented at hearing does not show how broad the actual subpoenas were or whether the subpoenas encompassed documents much broader than those relevant to the investigation; nevertheless, without Appellants entering the subpoenas into the record or describing them, it is the only proxy for the subpoenas' validity.

2. Deposition of Bran and Third Parties

Appellants next contend that the Division violated Bran's due process because the Division took his deposition without putting him on notice that he was a potential client employer in this case. That argument lacks credibility; even if it were true, Appellants have not proven a due process violation.

On June 5, 2017, Bran received a copy of the notice to the Labor and Workforce Development letter regarding alleged Labor Code violations against him and a number of poultry processors. Division's Exhibit 51. The Division investigated the poultry processors before Bran's deposition, and he even had a conversation with a Labor Commissioner investigator during those investigations. Given Bran's repeated interactions with the Division and him being named and copied on a notice letter for a potential Private Attorneys General Act lawsuit, it is not credible that Bran had no knowledge he was a potential defendant in the case.

To the extent Bran contends that he was not specifically notified that he might be a client employer defendant under Labor Code Section 2810.3, that allegation similarly does not constitute a due process violation. Courts have held that Appellants should be on notice of existing law. In *People ex rel. Harris v. Sunset Car Wash, LLC*, 205 Cal. App. 4th 1433, 1440-41 (2012), the Second District Court of Appeal addressed whether the California Attorney General violated the due process rights of a car wash by holding it liable for the acts of a predecessor without providing notice of the carwash successorship law in the Labor Code. The court rejected the due process challenge:

> In the context of the car washing industry, section 2066 provides the necessary notice of the potential for successor liability for labor law violations. Any entity commencing business in the industry is presumptively aware of the requirements of section 2050 et seq. California law attributes to all citizens constructive knowledge of the content of state statutes.... Presumptively aware of the potential for liability, a person or entity considering commencing a car washing business is placed on notice in section 2066 of the liability potential and may protect itself by the exercise of due diligence, indemnity agreements, or insurance.

Sunset Car Wash, 205 Cal. App. 4th at 1440–41. Just as the successor car wash should have been on notice of the relevant Labor Code provision, Bran should have been on notice of the client employer statute in Labor Code Section 2810.3. The Division had no obligation to provide him the exact Labor Code sections that he was potentially liable under during an administrative investigation.

Moreover, the Division was not required by due-process principles to warn a party of potential liability during an administrative investigation. "As has been said by the United States Supreme Court, the power to make administrative inquiry is not derived from a judicial function **but is more analogous to the power of a grand jury**, which does not depend on a case or controversy in order to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *Brovelli*, 56 Cal. 2d at 529 (emphasis added) (internal quotation marks omitted). Appellants do not cite any authority that Bran had the right to be informed of the Division's suspicions regarding potential liability before it issued a subpoena during an administrative investigation; indeed, any requirement to divulge the internal considerations of the agency may jeopardize an investigation.

Of course, this does not mean that Bran, and the other Appellants, lacked recourse to defend themselves. Bran had the protection of the Administrative Adjudication Bill of Rights, including the right to notice and an opportunity to be heard as well as to present and rebut evidence. Gov't Code § 11425.10. Here, Bran received the Division's exhibits ahead of the hearing, had the full opportunity to present and rebut evidence over more than a week of testimony, and had the opportunity to file multiple briefs. Bran therefore had the right and opportunity to defend himself as required under due-process principles.

Appellants' contention that they were denied due process because they could not participate in third party depositions fails for similar reasons. The subpoenas to third party witnesses to provide deposition testimony is similar to a grand jury requesting testimony. *Brovelli*, 56 Cal. 2d at 529; *Millan*, 14 Cal. App. 4th at 487. Again, the Division is not required to allow potential Appellants to participate in its administrative investigation.

Additionally, as the parties briefed in anticipation of this case, the Division is prohibited from even divulging information from third party witnesses, under threat of potential misdemeanor charges, unless in connection to an administrative hearing. Gov't Code §§ 11181, 11183. This confidentiality requirement protects the integrity of an investigation, including ensuring that a potentially liable party does not intimidate or interfere with witnesses, an area of

particular concern in investigations involving low-wage workers. Therefore, not only did Bran not have a right to participate in third party depositions but also the Division's attorney or deputies could have faced a criminal misdemeanor for disclosing even a transcript of an investigatory deposition unless it was in connection to the administrative hearing.

V. CONCLUSION AND ORDER

Based on the foregoing, the hearing officer ORDERS as follows:

The Worker's Compensation Citations **are affirmed as follows:**

- SO 414874 for Worker's Compensation violations against Exclusive Poultry for $63,000 is **affirmed.**
- SO 103556 for Worker's Compensation violations against Exclusive Poultry for $119,101.54 is **affirmed.**
- WC 010501 as amended against Exclusive Poultry for $21,000 is **affirmed**.

The wage citations are **affirmed in part and dismissed in part as follows:**

Citations based on violations at labor contractor Camacho Poultry are affirmed in part and dismissed in part as follows:

- Citation WA 101531 against J.T. Foods and Tony Bran based on the time period of August 11, 2015 to March 17, 2017 is **affirmed, with the exception of the updated liquidated damages and interest as of October 1, 2021.** This liquidated damages and interest calculation accounted for the Division's stipulated lower amount of underlying liquidated damages in the hearing. Based on this citation, Tony Bran and J.T. Foods are jointly and severally liable for $9,000 in rest period penalties, $48,930 in rest period premiums, $18,000 in minimum wage penalties, $8,154.67 in minimum wages, $30,240 in waiting time penalties, and $34,100.83 in liquidated damages and other interest as of October 1, 2021 for a total of **$148,425.50.**
- Citation WA 101530 against Exclusive Poultry for the period between March 1,

2017 and May 7, 2017 is affirmed in full, except for the lower amount of minimum wage penalties in the Division's calculations versus the citation and the updated liquidated damages and interest. Under this citation, Exclusive Poultry is liable for $22,000 in rest period penalties, $26,970.15 in rest period premiums, $37,400 in minimum wage penalties, $3,653.85 in minimum wages, $40,320 in waiting time penalties, and $17,145.20 in liquidated damages and other interest as of October 1, 2021 for a total of **$147,489.20.**

Citation WA 101532 against Exclusive Poultry for the period between March 1, 2017 and Citation WA 101532 based on violations at labor contractor Sullon Poultry from May 1, 2018 to July 26, 2018 **is affirmed in part and dismissed in part** based on the removal of rest period premiums and penalties and the reduction in waiting time penalties. Based on this Citation, Exclusive Poultry is liable for $55,700 in minimum wage penalties, $4,759.98 in minimum wages, $50,160 in waiting time penalties, and $6,276.65 in liquidated damages and other interest as of October 1, 2021 for a total of **$116,896.63.**

All wage citations based on the East Los Angeles Processors D-8 Foods Inc., Best Poultry, and M.G. Poultry Inc. **are affirmed in part and dismissed** in part as follows:

- D-8 Foods: Under WA 101529 and WA 101533, D8 Poultry, J.T. Foods, and Tony Bran and jointly and severally liable for violations at D-8 Foods between May 18, 2015 and November 12, 2016 for $9,225 in minimum wages, $92,250 in rest period premiums, $60,000 in waiting time penalties, and $58,822.64 in liquidated damages and interest on other wages (as of October 1, 2021) for a total of **$220,297.64.** *See* Exhibit 39 D8 Foods Audit – updated 9-21 (as adjusted for any calculation that exceeded the amount on citation).
- Best Poultry
    - Under WA 101526, J.T. Foods and Tony Bran are jointly and severally liable for violations at Best Poultry between November 14, 2016 and March 7, 2017 for $22,200 in rest period penalties, $25,400.91 in rest

period premiums, $44,400 in minimum wage penalties, $2,247.70 in minimum wages, $3,450 in overtime penalties, $2,297.75 in overtime wages, $20,160 in waiting time penalties, and $14,514.41 in liquidated damages and other interest as of October 1, 2021 for a total of **$135,053.63.**

- Under WA 101527, Exclusive Poultry is liable for violations at Best Poultry between March 2017 and June 19, 2017, for $29,550 in rest period penalties, $22,995.23 in rest period premiums, $59,100 in minimum wage penalties, $2,197.65 in minimum wages, $4,500 in overtime penalties, $2,126.25 in overtime wages, $115,920 in waiting time penalties, and $11,079.95 in liquidated damages and other interest as of October 1, 2021 for a total of **$247,469.08**.
- Under WA 101528, D8 Poultry is jointly and severally liable with Tony Bran and J.T. Foods for liability under WA 101526 and jointly and severally liable with Exclusive Poultry under WA 101527. D8 Poultry is therefore liable under these citations for $51,750 in rest period penalties, $48,396.14 in rest period premiums, $103,500 in minimum wage penalties, $4,445.35 in minimum wages, $7,950 in overtime penalties, $4,424 in overtime wages, $136,080 in waiting time penalties, and $25,594.36 in liquidated damages and other interest as of October 1, 2021 for a total of **$382,522.71**. As noted above, this is joint and several liability with other entities depending on the time frame and is not cumulative.

- M.G. Poultry: Under WA 477181 and WA477183, Exclusive Poultry and D8 Poultry are jointly and severally liable for violations at M.G. Poultry between July 17, 2017 and December 2, 2017 for $28,950 in rest period penalties, $19,824 in rest period premiums, $57,900 in minimum wage penalties, $38,160.74 in

minimum wages, $5,000 in overtime penalties, $1,440 in overtime wages, $60,480 in waiting time penalties, and $70,795.74 in liquidated damages and interest (as of October 1, 2021) for a total of **$282,550.48.**

Dated: October 25, 2021

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

By: Casey L. Raymond
CASEY RAYMOND,
Attorney for the Labor Commissioner

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

In The Matter of: The Exclusive Poultry, Inc.; D8 Poultry, LLC; J.T. Foods Specialty, Inc.; and Tony Bran, an individual's Appeal from Civil Citations Issued by: Division of Labor Standards Enforcement, Department of Industrial Relations, State of California	**CASE NO:** 35-CM-302050-17 **PROOF OF SERVICE**

PROOF OF SERVICE

I, Jhonna Lyn Estioko, declare and state as follows:

I am employed in the State of California, County of Los Angeles. I am over the age of eighteen years old and not a party to the within action; my business address is: 320 W. 4th Street, Suite 600; Los Angeles, CA 90013.

On October 25, 2021, I served the foregoing document described as: **FINAL FINDINGS AND ORDER ON CITATION NUMBERS,** on all interested parties in this action addressed as follows:

Anthony K. McClaren, Esq., Tariq I. Boulad, Esq. PERLEBERG MCCLAREN LLP 3414 S. Sepulveda Blvd., Ste. 1100 Los Angeles, CA 90034 Tel: (323) 741-6500 Fax: (323) 426-2405 akm@pmlegal.law TIB@pmlegal.law	Michael L. Smith, Esq. Division of Labor Standards Enforcement 1515 Clay Street, Suite 2206 Oakland, CA 94612 Tel: (510) 285-1781 mlsmith@dir.ca.gov

☒ **(BY CERTIFIED MAIL)** I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. This correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business at our office address in Los Angeles, California. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date of postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.

☒ **(BY E-MAIL SERVICE)** I caused such document(s) to be delivered electronically via e-mail to the e-mail address of the addressee(s) set forth above.

☒ **(STATE)** I declare under penalty of perjury, under the laws of the State of California that the above is true and correct.

Executed this 25th day of October, 2021, at Los Angeles, California.

J Estioko

Jhonna Lyn Estioko