08-55276

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY MILLIGAN
Plaintiff - Appellant,

v.

AMERICAN AIRLINES, INC.
Defendant - Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-03688-R (Ssx)
HONORABLE MANUEL L. REAL, DISTRICT JUDGE

BRIEF OF *AMICI CURIAE* IN SUPPORT OF POSITION OF DEFENDANT-APPELLEE AMERICAN AIRLINES, INC. AND AFFIRMANCE OF THE JUDGMENT
(Consent Obtained Per F.R.A.P. 29(a))

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Dated: October 15, 2008

Respectfully Submitted,

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AMICUS BRIEF FILED WITH THE PARTIES' CONSENT

Based upon the written consent of plaintiff-appellant Mary Milligan ("Milligan") and defendant-appellee American Airlines, Inc. ("American"), and pursuant to the authority of Rule 29(a) of the Federal Rules of Appellate Procedure, the Employers Group, the California Employment Law Council and the Chamber of Commerce of the United States of America (collectively "Employer Amici") submit the following amicus curiae brief in support of American's position.

STATEMENT OF INTEREST OF THE EMPLOYER AMICI

The Employers Group is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,500 California employers of all sizes and every industry, which collectively employ nearly 3 million employees. The Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, the Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships. The Employers Group also provides on-line, telephonic, and in-company human resources consulting services

to its members.

Because of its collective experience in employment matters, including its appearance as amicus curiae in state and federal forums over many decades, the Employers Group is uniquely able to assess both the impact and implications of the legal issues presented in employment cases such as this one. The Employers Group has been an amicus in many of the most significant cases involving California employment law.

The California Employment Law Council ("CELC") is a voluntary, nonprofit organization that works to foster reasonable, equitable, and progressive rules of employment law. CELC's membership comprises more than 50 private-sector employers, including representatives from many different sectors of the nation's economy (aerospace, automotive, banking, technology, construction, energy, manufacturing, telecommunications, and others). CELC's members include some of the nation's most prominent companies, and collectively they employ in excess of half-a-million Californians. CELC has been granted leave to participate as amicus curiae in many of California's leading employment cases.

The Chamber of Commerce of the United States of America is the world's largest business federation representing an underlying membership of more than 3 million businesses of all sizes, sectors, and regions. It includes hundreds of associations, thousands of local chambers, and more than 100 American Chambers of Commerce in 91 countries. Its mission statement is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity, and responsibility. In furtherance of that mission, the U.S. Chamber opposes legal rules that impose undue and unfair costs on doing business – including the costs that result from unnecessary employment disputes. The U.S. Chamber has served as amicus curiae or as a party in numerous cases before the United States Supreme Court, this Court and the California Supreme Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is a graphic example of the current propensity of many California employees, aided and/or fueled by their lawyers, to pursue massive class action lawsuits over the most trivial of issues. In this case, a former American Airlines employee sued on behalf of herself and thousands of former and current employees, seeking to collect up to

the $4,000 per person statutory maximum penalty for alleged violations of the statute (Calif. Labor Code § 226) which requires employers to provide informative wage statements (sometimes known as "pay stubs") to their employees. Even if American violated the statute – and it is highly debatable whether it did – its violations were exceedingly trivial, and plaintiff-appellant Milligan suffered no injury from the purported violations.

Milligan complains that American's wage statements did not contain American's address even though she (and undoubtedly almost every other member of the proposed class) fully knew that information. She also complains that although the wage statements showed the appropriate gross pay subtotal for each pay rate worked and the hours worked at that rate, American allegedly violated the statute because it did not also provide the applicable hourly rate. Such figure of course can be determined by a simple arithmetical calculation – dividing the gross pay by the hours worked – and, in any event, the employee needs to know that information to verify the accuracy of the wage totals. For these "transgressions," plaintiff and her class action lawyer sought to collect penalties against American for upwards of $20,000,000. The district

court properly granted summary judgment to American.

The California employer community, represented here by the Employer Amici, could not be more unified in its conviction that runaway penalty claims, for what are at best alleged trivial technical violations, are contrary not only to the interests of employers, but also to those of California employees, California consumers and society at large.

Whereas the appeal raises several distinct issues, each of which is thoroughly briefed by American, the Employer Amici believe they can be of most assistance to the Court by expanding upon the argument concerning the meaning and application of the "suffering injury" requirement of Labor Code Section 226(e). We demonstrate that this provision tracks the established principle of California tort law that to possess a valid cause of action, a plaintiff must establish that he or she suffered actual injury or damage as the result of the defendant's conduct. Many California cases confirm that this is indeed the law. Absent suffering legally cognizable damage, there is no cause of action under Section 226(e).

In ruling in this case, the Court should be aware that this case is not an isolated lawsuit, but rather a common example of many

class action or other mass suits now pending in the State which seek extremely large monetary awards for very small technical alleged wage statement violations. Although there have been some sensible federal and state trial court decisions on the subject, this appears to be the first case presenting the Section 226 "suffering injury" issue for appellate court resolution.

If correctly decided, this Court's decision will help stem the tide of this new genre of unwarranted class action litigation. If wrongfully decided, the decision will be extremely detrimental to California employers without providing any discernible benefit to California employees. The Employer Amici thus urge the Court to conclude that "suffering injury" means suffering legally cognizable damage and that the type of injury alleged here by the plaintiff does not come close to meeting the actual injury requirement.

ARGUMENT

I

SECTION 226(e) DOES NOT AUTHORIZE PENALTIES FOR STATUTORY VIOLATIONS WHICH DO NOT CAUSE LEGALLY COGNIZABLE DAMAGE

Labor Code Section 226(e) authorizes monetary relief only when there is a "knowing and intentional failure by an employer to comply with [the requirements of] subdivision (a)" – and then *only* to an employee "suffering injury" as a result of such failure. Such a plaintiff is "entitled to recover the greater of all actual damages or fifty ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars ($4,000)."

Section 226(e) imposes a statutory penalty containing an actual injury requirement. The penalty is not triggered merely by a violation of Section 226(a).

A. Because the Minimum Monetary Remedy is a Statutory Penalty, "Suffering Injury" Must Be Interpreted Narrowly to Require Actual Injury

1. The Minimum Payment is a Penalty

In interpreting the meaning of the "suffering injury" requirement of Section 226(e), it is important to first confirm that the minimum monetary payment prescribed by that section ($50 for the initial pay period and $100 for subsequent pay periods) is a statutory penalty.

There can be no real dispute about this fact. In prescribing the payment due, Section 226(e) states that it shall not exceed "an aggregate *penalty* of four thousand dollars ($4,000)." (Emphasis added.) The California Supreme Court has explained in no uncertain terms that the payment is indeed a penalty. *See Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1108 (2007)("The Legislature's decision not to label the [missed meal - Labor Code § 226.7] payment a penalty is particularly instructive because it simultaneously established penalties explicitly labeled as such in provisions of Bill No. 2509 related to sections 203.1 and 226"). Other California cases likewise have stated that this payment *is* a penalty. *See, e.g., Cicairos v. Summit Logistics, Inc.*,133 Cal.App.4th 949, 954 (2005) ("[e]mployers who knowingly and

intentionally fail to comply with [§ 226(a)] are subject to monetary penalties and are guilty of a misdemeanor"); *Dunlap v. Bank of America,* 142 Cal.App.3d 330, 340 (2006).

As *Murphy* held, whether the California Legislature elects to characterize a statutory payment as a penalty is a critical factor in determining whether or not it *is* a penalty. 40 Cal.4th at 1108. Thus, because the statute expressly characterizes the payment as a "penalty," even without *Murphy* already having concluded that the minimum Section 226(e) payment is a "penalty," this Court would have been obligated to conclude that it is a penalty.

Further, the conclusion that the Section 226(e) minimum payment is a penalty is consistent with the traditional functional definition of a penalty, i.e., a sum of money which "an individual is allowed to recover against a wrong-doer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained, or one which is given to the individual and the state as a punishment for some act which is in the nature of a public wrong." *Los Angeles County v. Ballerino*, 99 Cal. 593, 596 (1893). *Accord, e.g., San Diego County v. Milotz*, 46 Cal.2d 761, 765 (1956) (statutory payment obligation was

a "penalty" because it required payment of "an arbitrary pecuniary punishment" "by reason of [the defendant's] noncompliance with the [statutory] requirements and without any reference whatever to the question of damages"). While, as explained below, Section 226(e) requires that the plaintiff must suffer legally cognizable damage as the threshold for awarding the penalty, the up to $4,000 per person aggregate penalty is awarded without regard to any showing that the plaintiff was injured to that extent.

2. Penalty Provisions Are Construed Narrowly

Once it is determined that the minimum payment awardable under Section 226(e) is a penalty, it follows that the remedy provision in that subsection – including the "suffering injury" requirement – must be interpreted narrowly. In California, courts must "adopt the narrowest construction" of the penalty clause of a regulatory statute to "which it is reasonably susceptible in the light of its legislative purpose." *Hale v. Morgan,* 22 Cal.3d 388, 405 (1978); *Tos v. Mayfair Packing Co.,* 160 Cal.App.3d 67, 78 (1984); *People v. Mobil Oil Corp.,* 143 Cal.App.3d 261, 276 (1983); *compare Lungren v. Superior Court,* 14 Cal.4th 294, 313-314 (1996)(drawing distinction between interpretation

of regulatory statutes which prescribe civil penalties for a violation and of the separate, but related "penalty clauses" that delineate the applicable penalties).[1/]

If, as next demonstrated, Section 226(e) is reasonably susceptible of the interpretation which American and the Employer Amici urge, then it *must* be interpreted in the manner which precludes the imposition of statutory penalties in this instance. Instead, it must be interpreted to require that the plaintiff suffer legally cognizable injury.

[1/] This rule of narrow construction has constitutional underpinnings. Statutory penalties violate due process where, for example, they are "mandatory, mechanical, potentially limitless in [their] effect regardless of circumstance, and capable of serious abuse." *Hale v. Morgan, supra,* 22 Cal.3d at 404; see also, e.g., *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal.4th 707, 828-32 (2005) (a civil penalty is unconstitutional if it violates the "principle of proportionality"– which includes an examination of the defendant's culpability – or the party bringing the suit delayed action so as to "accumulate" a massive penalty). For this reason, courts "look[]with disfavor on ever-mounting penalties and have narrowly construed the statutes which either require or permit them." *Hale, supra,* 22 Cal.3d at 401; *Balmoral Hotel Tenants Assn. v. Lee,* 226 Cal.App.3d 686, 691 (1990)(construing statutory penalty provisions narrowly in order to avoid "serious constitutional questions").

B. In Order to Be Eligible For the Section 226(e) Statutory Penalty, the Plaintiff Must Have Suffered Legally Cognizable Injury

Milligan argues that any employee who receives a non-compliant wage statement automatically suffers injury and, therefore, asserts that the "suffering injury" requirement of Section 226(e) is essentially meaningless. American, on the other hand, persuasively demonstrates that "suffering injury" logically must have an intended meaning.[2] The Employer Amici agree with American that "suffering injury" means suffering *legally cognizable damage*.

Before turning to California law, it is instructive to consider the analogous ruling of the United States Supreme Court in *Doe v. Chao,* 540 U.S. 614, 621-24 (2004), that there is no automatic recovery of minimum statutory payments under the Privacy Act merely upon proof of an intentional or wilful violation of that statute. The Supreme Court squarely *rejected* the plaintiff's argument – similar to the one advanced here – that "any plaintiff adversely affected by an intentional or willful

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[2] The Employer Amici do not repeat American's arguments as to, for example, the informative analysis of the legislative history of Section 226(e).

violation [is entitled] to the $1,000 minimum on proof of nothing more than a statutory violation." *Id.* at 620. It held that the Government had the "better side of the argument" – "the minimum guarantee goes only to victims who prove some actual damages." *Id.*

In rejecting liability, the Supreme Court found that the plaintiff's argument was "at odds with the traditional understanding that tort recovery requires not only wrongful act plus causation reaching to the plaintiff, but proof of some harm for which damages can reasonably be assessed." 540 U.S. at 621. In looking to common law remedies for defamation – which the Court found to have some analogy to the privacy interests protected by the federal statute – *Doe v. Chao* commented that "it was hardly unprecedented for Congress to make a guaranteed minimum contingent upon some showing of actual damages, thereby avoiding giveaways to plaintiffs with nothing more than 'abstract injuries.'" *Id.* at 625-626.

The high court also considered and rejected an argument very similar to the one raised by Milligan, i.e., that "it would have been illogical for Congress to create a cause of action for anyone who suffers an adverse effect from intentional or willful agency action, then deny

recovery without actual damages." The court's response was "right on": "A subsequent provision requires proof of intent or willfulness in addition to adverse effect, and if the specific state of mind must be proven additionally, it is equally consistent with logic to require some actual damages as well." *Id.* at 623-624.

It is an established principle of California tort law rule that "harm or injury to the plaintiff is an essential element of a ripe cause of action in negligence or strict liability." *Buttram v. Owens-Corning Fiberglas Corp.*, 16 Cal.4th 520, 531, n. 4 (1997). By the same token, "resulting damage" is an essential element of a fraud cause of action. *Hunter v. Up-Right, Inc.*, 6 Cal.4th 1174, 1185 (1993). Following the reasoning of *Doe v. Chao,* the alleged failure to provide a legally compliant wage statement under Labor Code Section 226(a) and the resulting monetary remedy under Section 226(e) is comparable to a tort infringing upon a plaintiff's property rights which requires a showing of actual harm.

As the California Supreme Court has held, "'[w]rongful act' and 'injury' are not synonymous. (Citations.) The word 'injury' signifies both the negligent cause and the damaging effect of the alleged wrongful

act and not the act itself." *Steketee v. Lintz, Williams & Rothberg,* 38 Cal.3d 46, 54 (1985).

In a fairly recent case, the California Supreme Court determined that a plaintiff did not "suffer injury" even though the defendant had violated the law. *Frye v. Tenderloin Housing Clinic, Inc.*, 38 Cal.4th 23 (2006). The court affirmed judgment on the pleadings against a client of a public interest housing legal clinic who contended that the clinic had illegally failed to register with the State Bar. Judgment was affirmed because, in light of the clinic's repayment to him of legal fees, the plaintiff "***did not suffer injury***." *Id.* at 48-49 (emphasis added). Thus, the high court concluded that "injury" is synonymous with "damage" or "harm." *See also, e.g., Fresno Unified Sch. Dist. v. Workers' Comp. Appeals Bd.*, 84 Cal.App.4th 1295, 1307 (2000)(the clear meaning of the term "injury" is "hurt," "damage," or "harm").

In another relatively recent decision, in the context of concluding that the plaintiff did not have a viable cause of action in tort for trespass to chattels, the California Supreme Court equated "injury" to actual damage or harm. *See Intel Corp. v. Hamidi*, 30 Cal.4th 1342 (2003). In upholding summary judgment for the defendant, the court

ruled that a claim for trespass to chattels cannot succeed unless the defendant's conduct "***caused some injury***" to the chattel or to the plaintiff's rights in it, i.e., ***an interference is not "actionable. . . without a showing of harm.***" *Id.* at 1351-52 (emphasis added). Thus, in the context of determining whether a plaintiff satisfies all elements of her cause of action, "injury" necessarily means something more than that the plaintiff merely was the victim of a legal violation.

Yet another example of this principle is reflected in *Budd v. Nixen,* 6 Cal.3d 195, 200 (1971), a case which held that an essential element of a legal malpractice claim is "actual loss or damage resulting from the professional's negligence" and that "[i]f the allegedly negligent conduct does not cause damage, it generates no cause of action in tort." *Budd v. Nixen* further explained that "[t]he mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm - not yet realized - does not suffice to create a cause of action for negligence." *Id. See also, e.g. Aas v. Superior Court*, 24 Cal.4th 627, 646 (2000) ("appreciable, nonspeculative, present injury is an essential element of a tort cause of action"); *Romano v. Rockwell Internat., Inc.*, 14 Cal.4th 479, 500-503 (1996) (plaintiff suffered

appreciable harm sufficient to support a tort claim for wrongful discharge only upon actual termination rather than upon prospective notification).

The interchangeability between actual "damage," "harm" and "injury" in determining whether a plaintiff possesses a valid cause of action is exemplified by the fact that the Legislature, in codifying *Budd v. Nixen,* provided that the limitations period for legal malpractice claims does not start if "the plaintiff has not sustained ***actual injury***." Calif. Code of Civil Proc., § 340.6(a)(1)(emphasis added); *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison,* 18 Cal.4th 739, 743 (1998)("nominal damages, speculative harm, and the mere threat of future harm are not actual injury").

Based on this authority, it is readily apparent that the "suffering injury" requirement of Labor Code Section 226(e) was intended to incorporate the longstanding requirement of California tort law that a plaintiff must suffer injury in order to possess a complete cause of action. "Injury" clearly means legally cognizable damage. A legal violation, without more, is *not* "injury."

Contrary to Milligan's argument, *Wang v. Chinese Daily News, Inc.*, 435 F.Supp.2d 1042, 1050 (C.D.Cal.2006), is not persuasive

authority to the contrary. *Wang* did not hold that any violation of section 226(a) constitutes "injury."[3/]

A more-reasoned decision is *Elliot v. Spherion Pacific Work, LLC,* __ F.Supp.2d __, 2008 WL 3851814 (C.D. Cal. 2008,) involving another class action suit brought by Milligan's lawyer, which addressed the Section 226(e) "suffering injury" requirement. Judge Collins found that even had there been a technical violation of the statute[4/], there could have been no penalty imposed because the plaintiff had not "suffer[ed] injury" within the meaning of Section 226(e). "By employing the term 'suffering injury,' the statute clearly requires that an employee is not

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[3/] As explained at pp. 28-33 below, *Wang* did suggest an expansive, yet unthinking application of "injury." Because the decision was bereft of any analysis as to what "suffering injury" means, it is not persuasive authority that this Court should follow and, in light of the controlling California precedent relied upon by American and the Employer Amici, is bound to reject.

Other cases cited by Milligan equally fail to support her position. *See, e.g., Zavala v. Scott Bros. Dairy, Inc.*, 143 Cal.App.4th 585 (2006)(court denies motion to compel arbitration of section 226 claims without in any way mentioning Section 226(e) and/or its "suffering injury" requirement).

[4/] Judge Collins was faced with a claimed violation equally as trivial as those alleged against American. The issue there was "whether, by referring to itself on the wage statements with the truncated name 'Spherion Pacific Work, LLC,' rather than with its complete name 'Spherion Pacific Workforce, LLC,'" the employer had violated Section 226(a).

eligible to recover for violations of section 226(a) *unless* he or she demonstrates some injury from the employer's violation." *Id.* at *11. *Accord, Kimoto v. McDonald's Corp.*, 2008 WL 4069611 *6 (C.D.Cal. 2008)("the plain language of § 226(e). . . clearly limits the right to bring a cause of action to those who have suffered an injury").[5/]

It also might be argued that the Section 226(e) payment is a form of nominal damages and, thus, the statute can be interpreted as not requiring any type of actual injury. But such argument, if made, would have no merit. "Nominal damages" cannot be awarded under California law when, as here, the law requires that a plaintiff suffer actual injury to have a valid cause of action. *See, e.g., Intel, supra,* 30 Cal.4th at 1351-1352; *Fields v. Napa Milling Co.*, 164 Cal.App.2d 442, 446 (1958) (nominal damages denied because "[n]ominal damages, to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred").

[5/] *Spherion* distinguished *Wang* without consideration whether *Wang* correctly applied California law. *See* p. 28, n.11 below. *Kimoto* suggeted an incorrect application of what might constitute a violation and/or injury under Section 226 in some cases, but having no possible impact on the present case. *See* pp. 29-30 and n. 13 below.

As explained in *Avina v. Spurlock*, 28 Cal.App.3d 1086 (1972), which also confirms that "injury" is distinct from an invasion of rights:

> "Nominal damages are properly awarded in two circumstances: (1) Where there is no loss or injury to be compensated but where the law still recognizes a technical invasion of a plaintiff's rights or a breach of a defendant's duty; and (2) although there have been real, actual injury and damages suffered by a plaintiff, the extent of plaintiff's injury and damages cannot be determined from the evidence presented."

28 Cal.App.3d at 1088. These circumstances clearly are *not* presented here because (1) Section 226(e) requires actual injury for there to be a cause of action; and (2) there is no actual injury here, whether calculable or incalculable.

Further, the argument that the minimum statutory damages of $50 for the first non-compliant statement and $100 for subsequent ones is a form of "nominal damages" is otherwise specious. The provision for up to a total of $4,000 penalty per employee, based on an on-going harmless wage statement defect (such as failing to list an employer's

address) is anything but "nominal."[6] *See, e.g., Broads v. Mead*, 159 Cal.765, 768 (1911)(reducing nominal damages award from $100 to $1 because "[o]ne dollar is the amount usually adjudged where only nominal damages are allowed"); *Avina v. Spurlock, supra,* 28 Cal.App.3d at 1088-89 (damages reduced to $1).

Thus, Milligan's automatic penalty argument is non-meritorious as a matter of law. Absent being able to plead and prove that she suffered legally cognizable damage, she is not entitled to pursue Section 226(e) statutory penalties.

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[6] We do not suggest that a plaintiff is actually entitled to up to $4,000 for a single on-going defect, but simply acknowledge at this point that this is what Milligan and other plaintiffs claim the statute permits.

II

MILLIGAN'S ALLEGED "INJURY" IN THIS CASE DOES NOT COME CLOSE TO CONSTITUTING LEGALLY COGNIZABLE DAMAGE

A. The Failure to Include the Applicable Hourly Rate Did Not Cause Milligan to Suffer Actual Injury

1. The Court Should Consider the Damage Question in Light of the Likelihood that There was No Statutory Violation

American's summary judgment motion did not address the merit's of Milligan's claims that it technically violated Section 226(a) by failing to include the applicable hourly rate and its address on her pay stubs. In her opening brief, however, Milligan seeks to demonstrate that there *was* a violation. (AOB, pp. 22-23.) Specifically, Milligan relies on a opinion letter of the California Division of Labor Standards Enforcement ("DLSE") which she says supports her position that the failure to include the applicable hourly rate is a violation.

Milligan fails to apprise the Court that DLSE opinion letters of this sort are California Administrative Procedure Act-violative "underground regulations" which are entitled to "no deference." *See, e.g., Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 562-563,

574 (2007); *Morning Star Co. v. State Board of Equalization*, 38 Cal.4th 324, 334-35 (2006); *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal.4th 557, 574-75 (1996); *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1212 (2008). Further, such letters have no persuasive value when they do not provide any sound analysis and overlook relevant rules of law. *People v. Cole*, 38 Cal.4th 964, 987 (2006)(informal administrative interpretations were not based on "careful consideration" of the "precise issue" before the court); *Church v. Jamison*, 143 Cal.App.4th 1568, 1580 (2006)(DLSE opinion "did not consider all of the relevant rules of law").

Although the DLSE letter cited by Milligan is readily distinguishable[7], it otherwise completely failed to consider the

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[7] The DLSE letter, like the pay stubs at issue in *Wang, supra,* 435 F.Supp.2d 1042, addressed pay stubs that listed 86.67 hours as the hours worked on the employees' bi-monthly pay stubs even though the number of work days and non-overtime work hours consistently varied from one pay period to another. This was not a situation, like ours, where allegedly missing information could be calculated by a simple arithmetic calculation. Nor did it involve a situation, like that presented here, where the employee actually needed to already know the information at issue to be able to obtain the benefit of the statute at all. *See* p. 26 below.

The cases that Milligan cites, which in turn quoted from the DLSE letter, have no bearing on the issue raised in this case. *Zavala, supra,* 143 Cal.App.4th at 591-592, did so only as background discussion leading to a ruling that the claim based on Section 226 was not arbitrable. *Cicairos,*

"substantial compliance" doctrine, the well-settled California rule that courts do not "insist[] on literal compliance [with a statute] in the situation in which the party seeking to escape his obligation [via a forfeiture] has received the full protection which the statute contemplates." *Asdourian v. Araj*, 38 Cal.3d 276, 283 (1985), quoting *Latipace, Inc. v. Superior Court*, 64 Cal.2d 278, 279-80 (1966). *See also, e.g., Costa v. Superior Court*, 37 Cal.4th 986, 1019 (2006); *Sharon S. v. Superior Court,* 31 Cal.4th 417, 428 (2003).

In a highly analogous case, a purchaser of an automobile unsuccessfully attempted to invoke alleged technical violations of a consumer-protective statute regulating sales of motor vehicles as grounds for rescinding the contract and requiring the seller to refund the purchase price. *Stasher v. Harger-Haldeman,* 58 Cal.2d 23 (1962). As here, the "obvious purpose" of the statute was to make "full disclosures" so as to avoid incorrect transactions. *Id.* at p. 29. The court

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supra, 133 Cal.App.4th at 955, found that the employer's wage statements were "confusing" and "it [was] not clear that they reflect accurate information." The defects in *Cicairos* were not remotely similar to the present case where the only failure was to provide simple arithmetic to "show" the applicable hourly rate when the total earned and total hours were provided in easy-to-read fashion.

held that it was *not* appropriate to "give plaintiff an undeserved windfall at defendant's expense and in disregard of the true intent of the Legislature" simply "because of mere unsubstantial imperfections in complying with the letter (while fully complying with the substance and spirit)" of the statute. *Id.* at p. 33.[8]

Here, there can be no doubt that American substantially complied with Section 226(a). The obvious purpose of requiring a listing of the applicable hourly rate, hours worked and gross pay subtotals is so that an employee may verify that the pay check has been correctly computed. In the situation where there is 100% literal compliance with the statute, an employee still must know his or her hourly rate(s) and hours worked, so as to be able to verify that the employer has utilized such rate(s) and hours and then computed each subtotal, and in turn then calculated the grand gross wage total, correctly. To be able to

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[8] *Stasher* explained that "[s]ubstantial compliance. . . means *actual* compliance in respect to the substance essential to every reasonable objective of the statute. But when there is such actual compliance as to all matters of substance then mere technical imperfections of form or variations in mode of expression by the seller. . . should not be given the stature of noncompliance and thereby transformed into a windfall for an unscrupulous and designing buyer." 58 Cal.2d at 29. Statutes of this type will not be permitted to "enrich" parties in "cases of purely formal violations." *Id.* at 30.

verify the accuracy of the employer's computations, the employee must be able to multiply and add.[9/]

Omitting the hourly rate, while including the other information, is a meaningless omission. Because the employee must know his or her hourly rate(s) to be able to verify the accuracy of the employer's calculations, he/she can and should simply employ such rate and then perform the exact multiplication and addition calculations needed if the wage statement was 100% literally compliant.[10/] The substantial compliance rule is satisfied when, as here, the plaintiff at most need only

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[9/] As a simple example, assume an employee was paid $10 for straight time, and $15 for time and a half overtime, worked 8 hours of straight time and 2 hours of overtime. A literally compliant wage statement would show the following:

Hourly Rate	Hours Worked	Gross
$10	8	$80
$15	2	$30
		$110 - Total

To verify that the $80, $30 and $110 figures are correct, the employee must know the information in the first two columns, must do two multiplications to verify that the subtotals are correct and then must do an addition to confirm that the $110 total is correct.

[10/] The employee must insert the $10 and $15 rates showing in fn. 9, based on his or her own knowledge, and then do the verifying calculations. Assuming that he/she cannot remember the rate, but can recognize it when it is seen, then there is the need to do one more simple arithmetic calculation, i.e. $80 divided by 8 = $10 per hour and $30 divided by 2 = $15 per hour.

perform an additional simple arithmetic calculation beyond the calculations that the statute contemplates must otherwise be performed. *See Stasher v. Harger-Haldeman, supra,* 58 Cal.2d at 31 (auto sale contract substantially complied with statute even where one of the specified numbers was incorrect, noting that plaintiff did not claim that she had "any doubts whatever as to the amount that defendant was charging them"; distinguishing prior case where the omitted figure was "far more more complex and difficult to compute than any here in issue").

2. The Omission of the Hourly Rates Did Not Cause Milligan to Suffer Any Legally Cognizable Damage

Even if the substantial compliance rule did not negate Milligan's claim that it was a violation of Section 226(a) to have failed to list the applicable hourly rate(s), there is no basis for her assertion that this alleged violation automatically caused her to "suffer[] injury" within the meaning of Section 226(e). Milligan asserts that being compelled to perform elementary arithmetic calculations constitutes "injury." (AOB, pp. 22-24.) The argument on its face is not only absurd, but it is also unsupported by the record that she needed to perform any additional calculations to verify the accuracy of her paychecks other than the

calculations that the statute assumes an employee necessarily must perform. *See* p. 26 & fns. 9, 10 above. She does not claim any other form of actual injury.

The cases upon which Milligan relies do not support the contention that being required to perform elementary arithmetic calculations beyond those contemplated by the statute constitute "injury." *Wang, supra,* 435 F.Supp.2d at 1050-1051, dealt with a situation where there was highly material information missing from the wage statements. *Wang* did not analyze the meaning of "injury," as was required. *See also Perez v. Safety-Kleen Systems, Inc.*, 2007 WL 1848037 *9 (N.D. Cal. 2007)(following *Wang* in a case involving similar and thus also readily distinguishable facts).[11]

In addition, there was no legal basis for the "throw away" comments by Judge Marshall in *Wang* that an employee suffers injury if (1) he or she *might not* have been paid overtime to which he or

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[11] It is noted that in *Spherion, supra,* 2008 WL 3851814 *11, in ruling that there was no violation of Section 226(a) and, in any event, no injury suffered under Section 226(e), Judge Collins distinguished *Wang* and *Perez* without addressing whether those decisions were right or wrong on their facts. Nothing in *Spherion* signified any approval of those decisions.

she was entitled or (2) needs to reconstruct time and pay records.[12] Nor was there any sound basis for the portion of the ruling in *Kimoto, supra,* 2008 WL 4069611 at *6, also distinguishable from the present case, that the employer defendant's alleged failure to provide for the payment of all

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[12] The unsound nature of Judge Marshall's legal analysis in *Wang* can further be seen by noting her comment that "[e]ven if Plaintiffs were unable to prove injury pursuant to Section 226(e), the finding of a violation of Section 226(a) would entitle Plaintiffs to injunctive relief." 435 F.Supp.2d at 1050, n. 6; *see also Kimoto, supra,* 2008 WL 4069611 at *11.

This statement overlooked that under California law, in order to obtain injunctive relief under either a statutory or common law claim, the plaintiff not only needs to plead and prove *injury*, but must establish "irreparable injury." *See* Appellee Brief, pp. 54-55, citing *Intel Corp. v. Hamidi*, *supra,* 30 Cal. 4th at 1352; *Laurel Heights Improvement Ass'n of S.F., Inc. v. Regents of the Univ. of Cal.*, 47 Cal. 3d 376, 423 (1988) (relying on "traditional equitable principles" in deciding whether injunctive relief under a statute is appropriate); *DVD Copy Control Ass'n Inc. v. Bunner*, 116 Cal. App. 4th 241, 250 (2004) (unless the plaintiff is a public entity, she must show irreparable injury to obtain injunctive relief).

See also, e.g., Weinberger v. Romero-Barcelo, 456 U.S. 305, 311 (1982)(cited with approval in *Laurel Heights*; injunction for statutory violation or otherwise is *not* a remedy "to restrain an act the injurious consequences of which are merely trifling"); *Owner Operator Independent Drivers Ass'n, Inc. v. Swift Transp. Co., Inc.*, 367 F.3d 1108, 1111 (9th Cir. 2004) ("Federal courts usually apply 'traditional' equitable principles to petitions for injunctive relief that seek to prevent or deter statutory violations"; although statute "clearly authorizes injunctive relief, it plainly does not, 'in so many words, or by a necessary and inescapable inference,' require an injunction to issue to prevent violations of the [statute] irrespective of traditional equitable considerations"; detailed discussion of *Romero-Barcelo*).

wages due might have caused "injury" under Section 226(e).[13/]

Contrary to what *Wang* seemingly suggested, and *Perez* echoed, a *possible* underpayment of wages due does not constitute *actual* harm, and thus does not constitute "injury," because "appreciable, nonspeculative, present injury is an essential element of a tort cause of action." *Aas v. Superior Court*, *supra,* 24 Cal.4th at 646; *Romano v. Rockwell Internat., Inc.*, *supra,* 14 Cal.4th at 500-503; *Ventura County Humane Society v. Holloway*, 40 Cal.App.3d 897, 906-907 (1974)("it is black-letter law that damages may not be based upon sheer speculation or surmise, and the mere possibility or even probability that damage will result from wrongful conduct does not render it actionable").

[13/] It is noted that in many, if not most, of the many pending California and recently concluded "wage and hour" class actions, plaintiffs tack on Section 226 penalty claims based simply on the fact that the pay check, while compliant with the wage statement disclosure requirements, did not include all the wages the law required. These claims are clearly invalid because Section 226(a) is intended to provide employees with the basis for understanding how the pay given to them was calculated, not a guarantee that all contractual or statutory wages due have been paid.

Thus, even assuming that the pay check was for a lesser amount than required by statute or contract, that does not give rise to a claim for penalties under Section 226(e) even though it might very well give rise to a claim for penalties under other Labor Code provisions, including Labor Code Sections 210 (for contractual wages) and 558 (statutory overtime).

If, as *Romano* held, even an employee who is notified of an impending termination does not then suffer "injury," then the mere fact – not even alleged in this case – that the plaintiff suffered a *possible* underpayment of wages, by itself, clearly cannot give rise to any "injury" for purposes of section 226(e).[14/]

"Confusion" is of course inherently improbable under the alleged facts of this case and Milligan admitted none actually occurred. Given that an employee needs to know their applicable hourly rate in order to derive the benefits of the statutory disclosures and/or can easily derive the rate by a simple arithmetic calculation, *see* p. 27 above, there is no possible basis for a claim of "confusion."

In any event, "confusion" falls short of the "severe" or "substantial" emotional distress that is required before damages may be imposed in comparable tort cases. *Burgess v. Superior Court*, 2 Cal.4th 1064, 1073, n. 6 (1992)(in tort actions, "emotional distress

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[14/] *Villacres v. ABM Industries Inc.*, 2008 WL 2676397 *3 (C.D.Cal. 2008), aptly observed that when the plaintiffs do not "challenge the amounts of their pay and do not otherwise have to reconstruct their pay records for purposes of this litigation, they do not appear to have a basis for alleging the type of injury under section 226(e) recognized by courts."

suffered [must] be 'serious'"); *Lee v Bank of America*, 218 Cal.App.3d 914, 920 (1990)(in tort action for wrongful dishonor of a check, "more than an allegation of a 'subjective state of discomfort' is required"). If one must allege and prove "severe" emotional distress to recover damages for the wrongful dishonoring of a check, it easily follows that mere "confusion" resulting from receipt of a payroll statement that allegedly does not fully comply to the "t" with the statutory requirements does not constitute the requisite "injury" to qualify for penalties under Section 226(e).[15/]

B. The Failure to Include American's Address Did Not Cause Milligan to Suffer Any Actual Injury

Other than asserting that a violation of Section 226(a) automatically triggers Section 226(e) penalties, Milligan presents next to no argument to support a contention that she suffered actual injury as the result of American not putting its address on her wage statements. Her

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[15/] A finding that alleged "confusion" does not constitute "injury" within the meaning of section 226(e) is additionally supported by the rule that emotional harm is not compensable if it arises from breach of a duty related only to economic interests. *Erlich v. Menezes*, 21 Cal.4th 543, 554-55 (1999). A failure to provide wage statements containing the information required by section 226(a) is clearly a breach of a duty related only to economic interests.

only argument is that an employee suffers injury when he or she is "forced to dig out the required information from sources other than his or her pay stubs" or is "compelled to look to sources other than the pay stub itself for the information." (AOB, p. 21.) She does not even claim that she had to do so.

This argument is patently absurd particularly where, as here, it was proven on summary judgment that the employee was perfectly aware of her employer's address. Clearly, Milligan suffered no injury as the result of the technical violation resulting from American's failure to have listed its address on the wage statements.

CONCLUSION

As demonstrated by American and the Employer Amici, an employee seeking to obtain penalties under Labor Code Section 226(e) must plead and prove that she suffered legally cognizable damage as the result of a knowing and intentional violation of Section 226(a). Because American demonstrated that Milligan's claim failed to satisfy this standard, summary judgment on the Section 226 claim was properly granted. The judgment should be affirmed.

Dated: October 15, 2008

Respectfully Submitted,

NATIONAL CHAMBER LITIGATION CENTER, INC.
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CERTIFICATE OF COMPLIANCE

The within amicus curiae brief is proportionately spaced, has a 14 font and contains 6,933 words. This representation is made in reliance on the "word count" feature in the Word Perfect word processing program utilized to prepare this brief.

Dated: October 15, 2008

Respectfully Submitted,

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the Employers Group,
the California Employment Law
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of America

PROOF OF SERVICE BY MAIL

I am a member of the Bar of this Court and have my office in the County of Los Angeles, State of California. I am over the age of eighteen years and am not a party to this action; my business address is 11377 West Olympic Boulevard, Suite 900, Los Angeles, California 90064.

On October 15, 2008, I served the within **BRIEF OF AMICI CURIAE IN SUPPORT OF POSITION OF DEFENDANT-APPELLEE AMERICAN AIRLINES, INC. AND AFFIRMANCE OF THE JUDGEMENT** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Alan Harris David Zelenski Harris & Ruble 5455 Wilshire Blvd., Suite 1800 Los Angeles, CA 90036	Robert Jon Hendricks Larry M. Lawrence Morgan, Lewis & Bockius LLP 300 South Grand Avenue, 22nd Floor Los Angeles CA 90071-3132
Jennifer White-Sperling Morgan, Lewis & Bockius LLP 5 Park Plaza, Suite 1750 Irvine CA 92614-3508	

The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

I declare under penalty of perjury that the above is true and correct and that this declaration was executed on October 15, 2008, at Los Angeles, California.

Steven Drapkin
Type or Print Name

Signature