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May 19, 2020

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Second Appellate District, Division Eight  
300 S. Spring Street  
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Re: ***Betancourt v. OS Restaurant Services, LLC, et. al.***  
Court of Appeal Case No. B293625  
Request for Publication; Opinion filed April 30, 2020,

Honorable Justices:

Pursuant to Rules 8.1105 and 8.1120 of the California Rules of Court, the Association of Southern California Defense Counsel (“ASCDC”) writes to urge the Court to order publication of its opinion in this case.

**ORANGE COUNTY**

David J. Byassee  
Lisa J. McMains

**Interest of the Requesting Organization**

ASCDC is the nation’s largest and preeminent regional organization of lawyers who specialize in defending civil actions. It has over 1,000 attorneys in Central and Southern California, among whom are some of the leading trial and appellate lawyers of California’s civil defense bar. The ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in appellate matters, the ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted

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support, including a forum for the exchange of information and ideas. It has appeared as amicus curiae in numerous cases before both the California Supreme Court [e.g., *Perry v. Bakewell* (2017) 2 Cal.5th 536; *Howell v. Hamilton Meats & Provisions* (2011) 52 Cal.4th 541; *Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512] and the Courts of Appeal [e.g., *Burlage v. Superior Court* (2009) 178 Cal.App.4th 524].

### **Why The Opinion Deserves Publication**

Publication of this opinion would be appropriate and helpful in the development and clarification of important California wage and hour law and the award of attorneys' fees in relation to such claims. The Court's opinion meets the standards for publication in multiple ways.

The decision “[a]ppplies an existing rule of law to a set of facts significantly different from those stated in published opinions,” (Cal. Rules of Court, rule 8.1105(c)(2)), and “[a]ddresses an apparent conflict in the law,” (Cal. Rules of Court, rule 8.1105(c)(5)) in that the court’s opinion relies on, among other things, pre-trial settlement offers in order to determine whether a party is entitled to recover attorney’s fees. (Typed opn. 14 & fn. 5.) There is currently a split of published authority on whether a trial court can consider settlement offers in deciding a motion for attorney’s fees. (Compare *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447 [trial court properly considered “settlement negotiations” when losing defendant made no offer] and *Meister v. Regents of University of California* (1998) 67 Cal.App.4th 437, 450, 452 [court may consider settlement history in determining reasonableness of attorney fees] with *Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal.App.4th 418, 422, 424-426 [court cannot consider informal settlement offers made during a mediation].) While this issue usually arises in determining the *amount* of fees, this court relied on the settlement offer to determine a party’s *entitlement* to fees.

The decision further “. . . explains with reasons an existing rule of law,” (Cal. Rules of Court, rule 8.1105(c)(3)), as it addresses the right of a prevailing plaintiff to recovery of attorneys’ fees in actions and claims for nonpayment of wages arising under *Labor Code* § 218.5(a) but not for actions and claims for failure to provide meal or rest periods per *Labor Code* § 226.7 and the important decision of *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244 (*Kirby*). The principles discussed in *Kirby* remain hotly debated topics in the courts as evidenced particularly by the *Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.4th 444, 474, review granted & depublication denied, Jan. 2, 2020 S258966, matter pending before the Supreme Court. This decision, consistent with the Court of Appeal’s decision in *Naranjo* and related decision in *Ling v. P.F. Chang’s China Bistro, Inc.* (2016) 245 Cal.App.4th 1242 (collectively involving claims for waiting time penalties for meal and rest period and wage statement violations), should be published to reiterate and demonstrate the California Legislature’s intent to differentiate between the nonpayment of wages and

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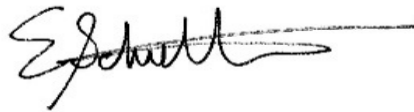
other claims, and the distinction between when penalties and, as here, attorneys' fees are appropriate.

Finally, the decision "[i]nvolves a legal issue of continuing public interest" (Cal. Rules of Court, rule 8.1105(c)(6)) because the entitlement to attorneys' fees in employment cases in California is of the utmost importance to employers and their counsel and employees and their (almost always) contingency-fee counsel. The importance of further guidance and clarification as to what claims could or could not potentially expose an employer to hundreds of thousands of dollars, if not more, of liability for contingency lodestar fees cannot be underestimated.

For these reasons, ASCDC urge this Court to certify its Betancourt opinion for publication.

Respectfully submitted,

**BALLARD, ROSENBERG, GOLPER  
& SAVITT, LLP**  
ERIC C. SCHWETTMANN



By: \_\_\_\_\_  
Eric C. Schwettmann

Attorneys for Requesting Party  
**ASSOCIATION OF SOUTHERN CALIFORNIA  
DEFENSE COUNSEL**

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 15760 Ventura Boulevard, Eighteenth Floor, Encino, CA 91436.

On May 20, 2020, I served true copies of the following document(s) described as **REQUEST FOR PUBLICATION** on the interested parties in this action as follows:

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**BY USING THE TRUE FILING, WEB-BASED, E-SERVICE AND E-FILING SYSTEM:** I caused to be served the foregoing document(s) on all interested parties listed on the TrueFiling e-service system with regard to the matter of *Betancourt v. OS Restaurant Services, LLC, et al.* matter, Court of Appeal Case No. B293625.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 20, 2020, at Encino, California.

\_\_\_\_\_  
/s/ Karen J. Thomson  
Karen J. Thomson