S 171442

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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LOUIE HUNG KWEI LU, et al.

Plaintiff and Appellant,

vs.

HAWAIIAN GARDENS CASINO, et al.,

Defendants and Appellees.

==========

COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION THREE
COURT OF APPEAL CASE NO. B 194209

LOS ANGELES SUPERIOR COURT, CASE NO. BC 286164
THE HONORABLE DAVID MINNING

==========

PETITIONER'S REPLY BRIEF ON THE MERITS

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Service on Attorney General and District Attorney required by Bus. & Prof. Code, § 17209

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INTRODUCTION

The Court is faced with the question of whether tipped employees can sue their employers when their employers, in direct violation of Labor Code § 351, unlawfully take, collect, and receive their tips, their sole property.

In reply to Respondent's Brief, Appellant will address the following:

- Respondent Hawaiian Gardens' Answering Brief contains a series of statements that mischaracterize the legal context within which this case is being decided.
- The history of Labor Code § 351 establishes the basis upon which this Court should infer a Legislative intent to provide a private right of action.
- The Restatement test applies if the Court cannot discern a legislative intent to provide or not provide a private right of action.
- In applying the Restatement test, the Court should review alternative avenues of redress, notwithstanding Respondent's failure to specifically address the issue.

- PAGA does not preclude a finding that employees can sue for the return of their property.

ARGUMENT

I. TIP POOLS ARE NOT BEFORE THE COURT IN THIS CASE; HOWEVER, RECENT TIP POOL DECISIONS INFORM THE CONTEXT WITHIN WHICH THIS CASE WILL BE DECIDED

The issue before this Court is whether or not Labor Code § 351 creates a private cause of action for tipped employees against employers who take, collect or receive a portion of *their* tips, their sole property.

The issue, as posed by the Court, assumes the possibility of a violation of Labor Code § 351, and asks if there is a remedy. It does not address the propriety of "tip pools". Yet, Respondent's Opening Brief gratuitously puts the issue of tip pools into play by asserting that "California law permits fair and reasonable tip pooling among employees who provide direct service to customers." Respondent's Answering Brief (RAB, pg. 4).

To the extent that the case law surrounding Labor Code § 351

may conceivably impact the decision as to whether there is a private right of action, clarification of the "tip pool" issue is necessary.

Only where the tipper intends that all the employees in the so-called "tip pool" receive a portion of the tip, does California law permit fair and reasonable tip pooling among employees.

On June 17, 2009, this Court denied review in *Budrow v. Dave & Buster's of California* (2009) 171 Cal.App.4th 875, which held that:

> "Ultimately, the decision about which employees are to participate in the tip pool must be based on a reasonable assessment of the patrons' intentions. **It is, in the final analysis, the patron who decides to whom the tip is to be paid, given to or left for.' It is those intentions that must be anticipated in deciding which employees are to participate in the tip pool."** *Id.,* at 883. (Emphasis added).

In the California cardroom context, it has been alleged, and not disproven, that the tips at issue are given exclusively to Dealers, driven by the Dealer's role in providing winning cards, not by the

overall service of a variety of employees. It has also been alleged, and not disproven, that patrons of cardrooms separately tip other categories of employees, other than the Dealers, as they see fit, including employees who the cardrooms pay in part with misappropriated tip money given by patrons exclusively to Dealers. These facts belie the conclusion that the tips taken from the Dealers are intended for others.

With, patron intent, per *Budrow, supra*, "ultimately" the test, *Hawaiian Gardens'* assumption that in every tipping context, without proof of patron intent, all tips are meant for multiple categories of employees, is not warranted.[1]

Budrow, supra 171 Cal.App.4th at 883, goes on to point out, that in the restaurant industry, there cannot be one rule that fits all restaurants, "there must be flexibility in determining the employees that the tip was 'paid, given to, or left for.'"

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[1]The Court of Appeal decision in this case was rendered before *Budrow* found "assessment" of patron intent the key to who can be included in a "tip pool". Cf. *Etheridge v. Reins* (2009) 172 Cal.App.4th 908, where the "chain of service", not tipper intent controlled, and dishwashers, without evidence or an assessment of tipper intent to tip them, are by virtue of the decision entitled to receive a portion of tips left by patrons.

In another recent case, *Chau v. Starbucks* (2009) 174 Cal.App.4th 688, (review denied September 9, 2009), the parties did not dispute the *Starbucks* customers put money in the tip boxes for *all* of the employees who provide service to the customer, the "entire team" (*Id.,* 174 Cal.App.4th at 697).

Here, in stark contrast, there is an unresolved dispute as to who winning players intend tips to go to when they give chips to dealers each time they win a hand of poker while separately tipping non-dealer categories of employees as they see fit. *Chau*, like *Budrow* recognized the need to vindicate patron intent.

In *Chau,* where the Court found the parties agreed that the tips left in the box were meant for a group that included shift supervisors, the Court held that patron intent is at the core of the law:

> "It would be inconsistent with the purpose of the statute to *require* an employer to disregard the customer's intent . . ." *Id.*, 174 Cal.App.4th at 699.[2]

Chau, supra 174 Cal.App.4th at 703 goes on to point out that if an

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[2]When the Court of Appeal herein rendered its decision, *Chau* had yet to be decided.

employer requires an employee "barista" to share any tips *specifically given to him* with another, section 351 is violated.

> "*Starbucks* effectuates the customer's intent and does not permit the misappropriation of gratuities intended for a certain employee or employees." *Id.* at 703.
>
> "Under section 351, when a customer pays an employee a gratuity, the employee may not be forced to give his or her employer (or employer's agent) the tip or any portion of the tip." *Id.* at 705.

The foregoing, although not central to the issue at hand, provides the current operative case law context for Labor Code § 351.

In this regard, Respondent's assertion, at this stage of the litigation, that "The Casino takes nothing from the tip pool" (RAB, pg. 5) must also be disregarded. If it is "ultimately" concluded that the tips at issue were meant for dealers, and not for other categories, the Casino illegally takes tips from Dealers. Its use of the dealers' property to pay others, does not excuse its behavior.

II. THE LEGISLATURE NECESSARILY INTENDED A PRIVATE RIGHT OF ACTION

Respondent's Brief is dismissive of the contention that it would be absurd for the Legislature not to have contemplated a private right of action when amending Labor Code § 351 in the 1970's. Respondent's position, that such a cause of action was not intended is clearly contrary to reason.

As pointed out in the Appellant's Opening Brief, the amendments to Labor Code § 351 effected a radical transformation of the law form a law in which employers could take all or some of an employee's tips so long as the tipping public was notified, to a law that declared tips to be the sole property of the persons they are given to, and a law that prohibited employers from taking, collecting or receiving any portion of such tips.

Juxtaposing the law with Respondent's position clearly implicates the implausibility of Respondent's position that the Legislature intended tips to be the sole property of a class of Californians without the means to recover them if stolen by their employer.

- The law provides that tips given to workers are their sole property. Labor Code § 351.
- The law provides that employers, cannot take, collect, or receive any portion of tips given to others. Labor Code § 351.
- Tipped employees cannot sue to recover their tips, sole property, if their employer illegally takes them. (Respondent's position).

Respondent's position suggests that even though the Legislature made clear that tips are the property of tipped employees, and employers cannot take any portion of them, if an employer unlawfully takes tips, the sole property of an employee, the employee does not have a legal right to compel return of that property, and the best an employee can hope for is criminal prosecution of the employer at the direction of an administrative agency. Labor Code § 355. The doctrine that laws should not be read to result in absurdities necessarily precludes the interpretation that Respondent has espoused.

In the absence of express Legislative history on the topic of private right of action, the irrationality and futility of the Legislature creating a property right and a clear prohibition without a remedy, if

there is a violation, must inform the Court's analysis of Legislative intent. Here, that intent is necessarily an intent to empower property owners to recover their property when those expressly prohibited from taking it, ignore the law.

In declaring tips the property of a Class of Californians, the Legislature implicitly provided that Class with the rights property owners have historically enjoyed to sue the wrongdoer over a wrongful taking or trespass of their property.

By expressly stating in the statute that every gratuity is "the sole property of the employee or employees to whom it was paid, given, or left for" (Labor Code, § 351), the Legislature necessarily implied that employees have a private right of action; otherwise, the statute provides the employee with an unenforceable right. Code of Civil Procedure § 30 provides: "A civil action is prosecuted by one party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong." The Department of Industrial Relations has no authority to enforce an employee's property interest. Consequently, any civil action to enforce the property right against an employer who has unlawfully taken an

employee's tips can only be taken by an employee.

A careful consideration of the Legislative history supports a conclusion that the Legislature, in 1973, intended to provide employees with a private right of action to recover any tips unlawfully taken by their employers. In 1929, when tips were not considered the property of the employees, employers could take a portion of the tips as long as they provided notice of this practice to the public. The policy concern was that the public should be aware that the employees were not receiving all of the tip money The statutes gave the Department of Industrial Relations the authority to protect the public's interest and the agency could prosecute the employer for any violation of the notice or record keeping requirements. Violations resulted in a misdeameanor punishment.

Assemblyman Greene, however, made it plain that the purpose of amending Labor Code § 351 to strike the notice provision and to prohibit an employer from collecting any of the tip money was to make it clear that the employer did not have a vested interest in this money. No corresponding legislation expanded the authority of the Department of Industrial Relations to prosecute an action to enforce or

recover this newly created property interest of the employees. *Henning v. Industrial Welfare Comm'n* (1988) 46 Cal.3d 1262, 1278-1280.

Thus, the only way for an employee to recover money unlawfully taken by an employer would be for the employee to bring his or her own civil action. Accordingly, it would be an absurd construction to interpret the statute as giving an employee a property right in the gratuity with no means of enforcing that right.

III. RESPONDENT'S REPEATED ASSERTION THAT LABOR CODE § 350 ET SEQ. WAS DESIGNED TO PROTECT THE TIPPING PUBLIC, DOES NOT DIMINISH THIS COURT'S FINDING THAT THE AMENDMENTS TO LABOR CODE § 351 WERE DESIGNED TO CREATE RIGHTS IN A CLASS OF TIPPED WORKING WOMEN AND MEN.

Respondent repeatedly points to Labor Code § 356 as the reason for the enactment of Labor Code § 351, even in its present form. (RAG, pgs. 1, 3, 16, 27). It does so, obviously cognizant of the fact that it would not be a stretch for this Court to conclude that, when

the Legislature went to the effort of declaring tips the sole property of those persons they are given to, and expressly prohibiting employers from taking, collecting or receiving any portion of those tips, that implicit in such Legislative prerogative was a right on the part of tipped working men and women to recover tip income improperly taken from them by their employers.

Respondent's focus on Labor Code § 356, ignores this Court's conclusions regarding the purpose of the law in its present form.

While the interests of the tipping public remain one of the purposes of Labor Code § 351, Respondent ignores this Court's appropriate recognition that the amendments of Labor Code § 351 created rights in tipped employees. *Henning v. Industrial Welfare Comm'n* (1988) 46 Cal.3d 1262, 1280.

The Defendant in *Henning* took the same position that *Hawaiian Gardens* is taking here by invoking Labor Code § 356 as the sole purpose of Labor Code § 351. This Court held that the contention that Labor Code § 356 provides the "sole purpose" for Labor Code § 351 is "without merit." *Id.*, 46 Cal.3d at 1280. It further noted:

> "We do not disregard the Legislature's declaration of purpose in section 356. But we cannot consider it 'definitive': the declaration was enacted in 1929 and was codified in 1937, when section 351 was simply a 'notice' statute' it has remained unchanged since 1937, but in the meantime section 351 has been radically amended into a statute establishing substantive public policy without any 'notice' requirement whatever." *Id.*, 46 Cal.3d at 1280.

That "radical amendment" created a "public policy" which declared tips the "sole property" of tipped workers and prohibited employers from taking said property. To ignore this aspect of the purpose of the amendments, is to ignore this Court's well-reasoned analysis of the transformation of Labor Code § 351 in *Henning, supra* 46 Cal.3d at 1278-1280.

> "[W]e discern the legislative intent underlying the provision as it now stands to be as follows. Broadly, the Legislature has declared that tips belong to the employee and the IWC may not permit an employer to obtain the benefit of such tips by paying a tipped employee a wage

lower than he would be obligated to pay if the employee did not receive tips." *Id.,* 46 Cal.3d at 1278.

The Court went on to cite the Legislative Counsel's declaration that the amendments would delete provisions that now enable employers to obtain the benefit (as, in effect, the payment of wages) of tips and other gratuities received by their employees, and thereby prohibit an employer from receiving such a benefit. *Id.*, at 1278.

> "Our reading receives further support from A.B. 10: 'AB 10 prohibits an employer from taking any tip given by a patron to his employee and prohibits an employer from requiring that such tip be credited against wages.' (Assem. Com. on Labor Relations, mem. on A.B. 10, *supra*, at p.1.)" *Id.,* at 1278-1279.

There is no question as this Court recognized, that the purpose of Labor Code § 351 expanded dramatically with the amendments that declared sole property rights in tipped employees. With the creation of those rights, and the public policy they reflect, there is necessarily an intended right to sue over violations. To hold otherwise, would be to assume that the Legislature created a discrete property right in tipped

workers, and express prohibitions applicable to their employers, without a meaningful remedy.

IV. ***THE RESTATEMENT TEST SHOULD BE INVOKED IF THE COURT CANNOT DISCERN WHETHER OR NOT THE LEGISLATURE INTENDED TO PROVIDE TIPPED EMPLOYEES THE RIGHT TO RECOVER THEIR PROPERTY.***

Although Appellant firmly believes that the Legislature necessarily intended a private right of action by creating a property right, if the Court cannot conclude that the Legislature intended such to be the case, the Court's analysis should not end.

Respondents rely extensively on *Crusader Insurance Company v. Scottsdale Insurance Company* (1977) 54 Cal.App.4th 121, for the proposition that California does not adhere to the Restatement Second of Torts approach to determining whether a private right of action should be applied to a statute that does not express, one way or another, whether there is a private right of action to enforce the statute. *Crusader*, states:

"[W]e will conclude that the Restatement approach is not

valid in California to the extent that it deviates from the legislative intent approach." *Id.,* 54 Cal.App.4th 125.

In so ruling, the *Crusader* Court of Appeal relied extensively on its reading of *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, which it read as the Supreme Court's rejection of the Restatement Approach and adoption of the "legislative intent" approach. *Id.,* 54 Cal.App.4th at 131-133.

Less than six months prior to the decision in *Crusader*, a different district of the Court of Appeal, also in a post-*Moradi-Shalal* case, *Faria v. San Jacinto Unified School District* (1996), 50 Cal.App.4th 1939, approved the Restatement Test rejected by Crusader:

> "The general rule is that '[f]or every wrong there is a remedy.' (Civ. Code § 3525.) In accordance with that principle, '[t]he violation of a statute gives to any person within the statute's protection a right of action to recover damages caused by its violation." (*Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist.* (1976) 65 Cal.App.3d 121, 131; accord, *County of Los*

Angeles v. City of Alhambra (1980) 27 Cal.3d 184, 195)

'Where a new right is created by statute, the party aggrieved by its violation is confined to the statutory remedy if one is provided [citation]; otherwise any appropriate common law remedy may be resorted to." *(Palo Alto-Meno Park Yellow Cab Co., supra,* at p. 131.) A private right of action is an appropriate remedy when it is "'needed to assure the effectiveness of the provision. . . .'" (*Middlesex Ins. Co. v. Mann* (1981) 124 Cal.App.3d 558, 570, quoting from Rest.2d Torts, § 874A.; but cf. *Arriaga v. Loma Linda University* (1992) 10 Cal.App.4th 1556, 1564. [questioning *Middlesex*].) Even when the statute expressly provides for criminal sanctions, damages may be available. (*Montalvo v. Zamora* (1970) 7 Cal.App.3d 69, 76." *Faria, supra* 50 Cal.App.4th at 1947-1948.

The case relied on in *Faria, supra, Middlesex Ins. Co. v. Mann* (1981) 124 Cal.App.3d 558, is much more akin to the instant case than *Crusader.* In *Middlesex*, the Court found that the statute at issue was

directed to protecting a class of persons, and prohibited or regulated conduct of others relative to that class in a context not unlike this case, where the Legislature created a protected class of tipped employees, and a regulated class of their employers. In *Middlesex*, *supra*, the Court held:

> "[T]he appropriate rule is the general rule stated in Restatement Second of Torts, section 874A: 'When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.' " *Id.,* 124 Cal.App.3d at 570.

Goehring v. Chapman University (2004) 121 Cal.App.4th 353, 378 citing *Jacobellis v. State Farm Fire and Casualty Co.* (9th Cir.

1997) 120 F.3d 171, 174, similarly did not adhere to *Crusader's* premise that *Moradi-Shalal* precludes judicial implication of a private right of action.

Jacobellis distinguishes *Moradi-Shalal.*

After referencing the Restatement Test, and *Middlesex Ins. Co. v. Mann* (1981) 124 Cal.App.3d 558, the Court held:

> "In the absence of the concerns avoided by the *Moradi-Shalal* court and in a case, such as this one, where the statute ***evidences a legislative intent to provide a right to a class of persons, we believe that the Middlesex test [Restatement] is still useful for evaluating the appropriateness of a private cause of action."*** Jacobellis, supra 120 F.3d at 173. [Emphasis added]

Ultimately, *Katzberg v. The Regents of the Univ. of California,* (2002) 29 Cal.4th 300, in its embrace of the Restatement test, trumps *Crusader.*

In *Katzberg*, this Court, after an exhaustive analysis, found that nothing in the text of article 1, section 7(a), of the California Constitution, nor any evidence in the history of that section,

established a basis upon which the Court could imply a right to seek damages. *Id.,* 29 Cal.4th at 318-324.

However, that determination did not end the Court's inquiry. The Court then applied the Restatement Second Test, which recognizes that:

> "'When a legislative [or constitutional] provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, *the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision,* accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action." (Rest.2d Torts, § 874A, bracketed material and italics added.)" *Id.,* 29 Cal.4th at 324-325.

Since the Court in *Katzberg, supra* was dealing with a constitutional provision, it did not expressly state that it would apply the Restatement Test in the context of a statute. However, there is no

compelling reason why the use of the Restatement test, which expressly references Legislature created provisions of law, should be limited to Legislation enacted by voters in the Constitution.

Respondent *Hawaiian Gardens* posits no policy reason that would justify limiting *Katzberg* to Constitutional provisions; and no such policy reasons exist.

V. RESPONDENT FAILED TO ADDRESS THE ALTERNATIVE REMEDY ASPECT OF THE RESTATEMENT TEST

In Appellant's Opening Brief, Appellant addressed the alternative remedy aspect of the Restatement test, discussing Labor Code § 221, Labor Code § 1194, Breach of Contract, and Conversion Causes of Action to vindicate rights expressed in Labor Code § 351. Respondent did not confront these alternatives head on, at once stating that Appellant has these alternative remedies (RAB, pg. 26-27, 32), yet noting that the Court of Appeal upheld the dismissal of those of the causes of action asserted below, and this Court limited its review. (RAB 31-32).

Unquestionably, the Restatement test, with its requirement that

Courts look at alternative remedies, puts Appellant and Respondent in awkward positions.

Obviously, Appellant would support a finding, which he believes appropriate, that taking tips from an employee while providing him with checks for no more than the minimum wage is violation of an employer's obligation to pay the minimum wage. (i.e. the net paid with the illegal tip taking is less than the minimum wage). Such a finding would give rise to a cause of action under Labor Code § 1194, with the prospect of double damages under Labor Code § 1194.2, and attorney's fees under Labor Code § 1194. Yet, such a finding might jeopardize a finding under the Restatement test, that a cause of action for violation of Labor Code § 351 should be implied because alternative causes of action are not available.

Similarly, Appellant would embrace findings that alternatives to implying a cause of action can be found in breach of contract and conversion claims, or claims that the payments Dealers are required to pay from their tips each day are kickbacks prohibited by Labor Code § 221.

On the other hand, Respondent would not necessarily be

pleased with a finding that the Court refrained from imposing a cause of action under the Restatement test because it finds that relief is available to the class under breach of contract, minimum wage, conversion and Labor Code § 221 causes of action.

Respondent's failure to address the alternative causes of action, and suggestion that this Court similarly not address alternatives, is not warranted if the Court determines that it cannot discern whether the Legislature implicitly created a cause of action with the amendments to Labor Code § 351, and must apply the Restatement test.

Throughout this litigation Appellant has asserted that Hawaiian Gardens' tip taking violated minimum wage laws, Labor code § 221, Labor Code § 2802, Labor Code § 450, and the common law prohibitions against conversion. See *Court of Appeal Decision, passim*. Additionally, California law clearly supports the proposition that violations of Labor Code provisions that regulate employer and employee conduct give rise to breach of contract actions. (See Appellant's Opening Brief, pgs. 34-35). If the Court does not conclude a Legislative intent exists to provide a cause of action, proper application of the Restatement test requires review of these

alternatives.

VI. PAGA DOES NOT UNDERMINE A CONCLUSION THAT TIPPED EMPLOYEES CAN MAINTAIN AN ACTION TO RECOVER TIPS IMPROPERLY TAKEN FROM THEM

Respondent asserts that the Labor Code Private Attorneys General Act of 2004 (PAGA; Lab Code, § 2698 et seq.) provides further support for its holding that Labor Code section 351 confers no right of action on private parties to recover tips taken from them by their employers. In relevant part, PAGA provides:

> "Notwithstanding any other provision of law, any provision of [the Labor Code] that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency [the Agency] or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees

pursuant to the procedures specified in Section 2699.3."

(Labor Code, § 2699, subd. (a).)

PAGA establishes a default penalty and a right of action for an aggrieved employee to recover, principally for the state, for violations of "all provisions of [the Labor Code] except those for which a civil penalty is specifically provided...." (Labor Code, § 2699, subds. (f) & (g)(1).) Employees also have the right "to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part." (Labor Code, § 2699, subd. (g)(1).)

Respondent concludes that PAGA as an enforcement vehicle enacted 30 years after the Labor Code § 351 amendments implies a Legislative recognition that a direct, private cause of action under Labor Code § 351 to recover property owned by and illegally taken from employees by their employers is not viable. This contention is wrong. PAGA "empowers or deputizes an aggrieved employee to sue for civil penalties 'on behalf of himself or herself and other current or former employees' (§ 2699, subd. (a)), as an alternative to [Agency] enforcement. . . ." (*Dunlap v. Superior Court* (2006) 142

Cal.App.4th330, 337, 47 Cal.Rptr.3d 614.) Here, Appellant is not suing for civil penalties. The availability of civil penalties, most of which are paid to the state, through a law passed well after the amendments to Labor Code § 351, cannot be read to preclude an action to recover tip money wrongfully taken. Recovery of stolen tips and recovery of civil penalties are mutually exclusive concepts. "An employee plaintiff suing, . . . under the Labor Code Private Attorneys General Act of 2004, does so as the proxy or agent of the state's labor law enforcement agencies. The act's declared purpose is to supplement enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves. (Stats.2003, ch. 906, § 1 [Legislature's findings and declarations].) In a lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies-namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency. (Lab.Code, § 2699 subds. (A), (f); see 95 Cal.Rptr.3d p. 596, 209 P.3d p. 930, *ante*.). . . 75 percent of any civil penalties recovered must be distributed to the Labor and Workforce Development Agency (*Id.*, §

2699, subd. (i)).

* * *

The act authorizes a representative action only for the purpose of seeking statutory penalties for Labor Code violations (Lab.Code, § 2699, subds. (a), (g)), and an action to recover civil penalties 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties' (*People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 17, 141 Cal.Rptr. 20, 569 P.2d 125)." *Arias vs. Superior Court* (2009) 46 Cal.4th 969, 986.

Clearly PAGA remedies cannot inform the Court's analysis herein.

CONCLUSION

For the foregoing reasons, and those set forth in Appellant's Opening Brief, Louie Lu and the Class he represents requests that this Court reverse the Court of Appeal, and not perpetrate the illegitimate notion that the Legislature expressly declared property rights in employees and expressly declared prohibitions applicable to

employers without intending that there be a legal remedy.

DATED: December 22, 2009

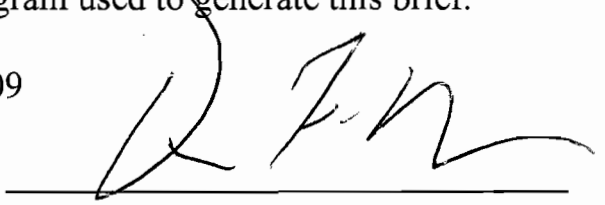
SPIRO MOSS LLP

By: _____
DENNIS F. MOSS

CERTIFICATE OF WORD COUNT

The undersigned counsel certifies that the text of this reply brief uses a proportionately spaced Times New Roman 14-point typeface, and that the text herein consists of 4762 words as counted by the word processing program used to generate this brief.

Dated: December 22, 2009



Dennis F. Moss

DECLARATION OF SERVICE BY MAIL

LOUIE HUNG KWEI LU et al. v. HAWAIIAN GARDENS CASINO, INC. et al.
Court of Appeal of the State of California
Second Appellate District Case No. B194209
(Los Angeles Superior Court Case No. BC 286164)

I am over the age of eighteen years and not a party to the within action. My business address is 11377 W. Olympic Blvd., Fifth Floor, Los Angeles, CA 90064-1683. I am employed at that address at the firm of **Spiro Moss LLP**.

On the date set forth below I served the document(s) described as **PETITIONER'S REPLY BRIEF ON THE MERITS** on all the interested parties in this action, by placing: [ ] the original [xx] true copies thereof enclosed in sealed envelopes, addressed as follows, which addresses are the addresses last given by the respective addressees on any document filed in the above case and served on **Spiro Moss LLP**:

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Executed at Los Angeles County, California, on December 22, 2009.

Jeanette Tucci Kerr