SUPREME COURT COPY

No. S170758

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JORGE A. PINEDA

Plaintiff and Appellant,

vs.

BANK OF AMERICA, N.A.,

Defendant and Respondent.

Court of Appeal Case No. A122022
First Appellate District, Division Three

San Francisco Superior Court Case No. 468417
Honorable Harold E. Kahn, Judge

PETITIONER'S OPENING BRIEF ON THE MERITS

Service on Attorney General and San Francisco County District Attorney Required By Bus. & Professions Code § 17209

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2. The Restitution Issue: Does an employer's obligation to pay an employee wages that "shall continue as a penalty" under Labor Code Section 203 as a result of the employer's late payment of final wages give rise to an "interest" in money or property within the meaning of Business and Professions Code Section 17203 that allows the employee to recover the penalty wages owed under Section 203 as restitution under the Unfair Competition Law?

INTRODUCTION

The Court has granted review to decide two issues of statutory interpretation concerning penalty wages owed for late payment of final wages under Labor Code Section 203. To ensure that employees are not deprived the opportunity to vindicate their rights to prompt payment of wages in accordance with the law and public policy, the Court should decide both issues, the statute of limitations issue and the restitution issue, in favor of petitioner Jorge A. Pineda and reverse the judgment erroneously entered in favor of respondent Bank of America.

Access to justice for late payment of wages requires that the statute of limitations under Section 203, in accordance with the Legislature's clearly expressed intent, be longer than one year. Prevention of unjust enrichment, that results from an employer's retention of money belonging to former employees whose final wages were paid later than required by the Labor Code, dictates that penalty wages owed under Section 203 must be recoverable as restitution under the Unfair Competition Law ("UCL").

Section 203 provides that, when an employer willfully fails to pay the final wages of an employee in a timely manner, "the wages of the

employee shall continue as a penalty" for up to thirty days. An employee has the right to seek recovery of penalty wages mandated by Section 203, and vindicate his or her right to prompt payment of wages due, even after the employer belatedly makes payment of final wages. *See*, *Oppenheimer v. Sunkist Growers, Inc.* (1957) 152 Cal.App.2d Supp. 897, 899 (late payment of final wages "does not preclude the employee from recovering the penalty already accrued").

In this case, Pineda was wrongfully deprived the opportunity to pursue his class action claims for penalty wages against Bank of America. Pineda sought to recover penalty wages both as damages for late payment of wages under Section 203 and as restitution for unfair competition under the UCL. The trial court, which granted Bank of America judgment on the pleadings, and the court of appeal, which affirmed the judgment, ruled that: 1) Pineda's cause of action under Section 203 was barred by the one year statute of limitations under Section 340(a) of the Code of Civil Procedure; and 2) Pineda could not state a claim for unfair competition because penalty wages cannot be recovered as restitution under the UCL.

The lower court rulings on the statute of limitations issue were

wrong because the Legislature plainly intended that Section 203 prescribe its own statute of limitations for actions to recover penalty wages. The Legislature did not intend lawsuits for penalty wages to be governed by the one year limitations period under Section 340(a) of the Code of Civil Procedure.

The lower court rulings on the restitution issue were wrong because penalty wages under Section 203 must be paid when the employer willfully fails to pay final wages timely. Former employees owed penalty wages for late payment of final wages have a vested ownership interest in the penalty wages that accrues the moment the employer willfully fails to pay final wages upon termination.

Proper interpretation of Section 203, which resolves the statute of limitations issue, and proper interpretation of the phrase "interest in money or property" in Business & Professions Code Section 17203, which resolves the restitution issue, require reversal of the judgment. Pineda must be allowed to pursue claims for penalty wages under Section 203 within the limitations period set forth in Section 203 as intended by the Legislature. Pineda must also be allowed to seek restitution of penalty wages under the UCL to prevent the unjust

enrichment that would result from allowing Bank of America to wrongfully retain the money, owed to Pineda under Section 203, in which Pineda has a property interest.

Justice for Pineda and thousands of other workers in California demands that Pineda's lawsuit against Bank of America be allowed to go forward. The Court should not allow employees who are not paid final wages in a timely manner after losing their jobs to be deprived of their remedies under the Labor Code and the UCL to vindicate their right to prompt payment of wages.

FACTS

"On a defense motion for judgment on the pleadings, all facts alleged in the complaint are deemed admitted." *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 679, n.31. *See also*, *Sullivan v. City of Los Angeles* (1974) 12 Cal.3d 710, 715 n.3 (for purposes of reviewing a judgment on the pleadings, "we must accept as true" plaintiff's allegations). The following facts alleged in Pineda's complaint (ROA 1-7)[1] must be accepted as true and deemed admitted.

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[1] The abbreviation "ROA" refers to the record on appeal which, pursuant to the parties' stipulation under Rule 8.128 of the California Rules of Court, is the original superior court file.

Pineda resigned from his employment with Bank of America on May 11, 2006 after giving two weeks notice. (Complaint ¶ 4). Instead of paying Pineda his final wages when due upon resignation, as required by Labor Code Section 202, Bank of America paid Pineda his final wages four days late on May 15, 2006. (Complaint ¶ 4). Bank of America's failure to pay Pineda's final wages in a timely manner was willful (Complaint ¶ 16), which entitled Pineda to payment of penalty wages under Section 203. (Complaint ¶ 17). Bank of America did not pay Pineda the penalty wages due and payable under Section 203 but wrongfully retained that money for itself. (Complaint ¶ 18, 22, 23).

PROCEDURAL HISTORY

Pineda filed his complaint on October 22, 2007. In November 2007, the court of appeal ruled in *McCoy v. Superior Court* (2007) 157 Cal.App.4th 225 that the statute of limitations for a cause of action under Section 203 for penalty wages alone is one year. Bank of America thereafter moved for judgment on the pleadings, which was granted on June 16, 2008. (ROA 185-186).

The trial court, obligated to follow *McCoy*, ruled that Pineda's cause of action under Section 203 was time barred. Despite this Court's

ruling in *La Sala v. American Savings & Loan Association* (1971) 5 Cal.3d 864, 872, that a trial court "should" allow a named plaintiff who cannot serve as a class representative to amend the complaint to establish a suitable class representative, the trial court denied Pineda's request for leave to substitute in his place a class representative whose claims under Section 203 were not time barred. The trial court also ruled that, because penalty wages cannot be recovered as restitution, Pineda did not state a viable cause of action for unfair competition.

The court of appeal affirmed, first in an unpublished opinion issued on December 22, 2008, and then, following several requests for publication, in an opinion certified for partial publication on January 21, 2009. In the unpublished portion of its opinion, the court of appeal agreed with *McCoy* that claims for penalty wages under Section 203 alone were governed by a one year statute of limitations, and ruled that the trial court did not abuse its discretion when it denied Pineda leave to amend. In the published portion of its opinion, the court of appeal held that penalty wages under Section 203 cannot be recovered as restitution under the UCL because employees do not have a vested interest in penalty wages.

Pineda sought review of the statute of limitations issue and the restitution issue.[2] The Court granted review on April 22, 2009.

ARGUMENT

I. Whether Or Not A Plaintiff Seeks To Recover Unpaid Wages, The Statute Of Limitations For Claims Under Labor Code Section 203 Cannot Be One Year

Well established principles of statutory construction provide the framework for determining the statute of limitations applicable to claims under Section 203. The fundamental objective of statutory interpretation "is to ascertain and effectuate legislative intent." *Kimmel v. Goland* (1990) 51 Cal.3d 202, 208. With respect to statutes of limitations, a court ordinarily "must find the intention of the legislature from the statute itself." *Skidmore v. Alameda County* (1939) 13 Cal.2d 534, 540. When a statute lacks clarity, a court may look to extrinsic sources and strives to arrive at a construction "with a view towards promoting rather than defeating the statute's general purposes." *People v. Montes* (2003) 31 Cal.4th 350, 356. A court should "adopt the

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[2] Although Pineda did not seek review with respect to any issues raised by the trial court's denial of leave to amend, Pineda maintains that the trial court abused its discretion when it denied leave to amend because it failed to heed the directive of *La Sala*.

interpretation that is more consistent with broader legal principles and is likely to have the fairer and more predictable consequences." *Escobedo v. Estate of Snider* (1997) 14 Cal.4th 1214, 1226.

A court may also consider "the impact of an interpretation on public policy." *Mejia v. Reed* (2003) 31 Cal.4th 657, 663. "Where uncertainty exists consideration should be given to the consequences that will flow from a particular result." *Dyna-Med, Inc. v. Fair Employment and Housing Commission* (1987) 43 Cal.3d 1379, 1387. In every case, a court must try to avoid results that are anomalous, absurd, unjust or oppressive. *See*, *Bonnell v. Medical Board of California* (2003) 31 Cal.4th 1255, 1263; *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 64; *Citizens Utility Company of California v. Superior Court* (1963) 59 Cal.2d 805, 811.

Only one possible interpretation of Section 203 comports with these guiding principles. The statute of limitations for a claim for penalty wages under Section 203, whether or not accompanied by a claim for unpaid wages, cannot be one year.

A. The Legislature Has Made Clear That The One Year Limitations Period Applicable To Penalty Statutes Generally Does Not Apply To Claims For Penalty Wages Under Labor Code Section 203

Section 203, along with Sections 312 and 340(a) of the Code of Civil Procedure, reflects a clear legislative intent that the one year statute of limitations set forth in Section 340(a) does not apply to claims for penalty wages under Section 203. Section 312 is the introductory section of Chapter 1 (The Time Of Commencing Actions In General) of Title 2 (Of The Time of Commencing Civil Actions) of Part 2 (Of Civil Actions) of the Code of Civil Procedure. Entitled "General limitations; special cases," Section 312 provides:

> Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, **unless where, in special cases, a different limitation is prescribed by statute.** (Emphasis added).

Section 312 evinces the Legislature's decision that the general statutes of limitation set forth in the Code of Civil Procedure do not apply to all civil actions. In certain "special cases," i.e., where the Legislature has expressly prescribed a specific limitations period, general limitations periods do not apply.

Labor Code Section 203 undeniably constitutes one of these

"special cases." Section 203 prescribes a special limitations period specifically for lawsuits to recover penalty wages:

> Suit may be filed for these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise.

Section 340(a), which provides a one year limitations period for actions for a penalty generally, contains a proviso confirming that, consistent with Section 312, it does not apply to all actions for penalties. Section 340(a) expressly excludes from its scope actions for a penalty "if the statute imposing it prescribes a different limitation." Section 203, which imposes a penalty and prescribes a specific limitations period for lawsuits to recover that penalty, falls squarely into this exception. The plain language of Section 203, Section 312 and Section 340(a) reflect the Legislature's unequivocal intent to make the one year limitations period under Section 340(a) inapplicable to claims under Section 203.

The Court recognized this legislative intent in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, where it held that claims for additional pay under Labor Code Section 226.7 are not governed by the one year limitations period under Section 340(a). In reaching this

conclusion, the Court observed that the Legislature knows how to make statutes subject to the one year penalty period and how to make them fall outside the scope of Section 340(a). The Court cited Section 203 as a prime example of the Legislature's decision to create a special limitations period for a penalty that would not be governed by the general provisions of Section 340(a):

> In addition, the Legislature indicated in section 203 that it was aware it could, if it so desired, trigger a one-year statute of limitations by labeling a remedy a penalty. When an employer fails to pay an employee who has quit or been discharged, section 203 establishes that the unpaid wages continue to accrue as a "penalty" for up to 30 days. Knowing that remedies constituting penalties are typically governed by a one-year statute of limitations, the Legislature expressly provided that a suit seeking to enforce the section 203 penalty would be subject to the same three-year statute of limitations as an action to recover wages.

Murphy, 40 Cal.4th at 1108.

While the Court in *Murphy* did not resolve any dispute over the statute of limitations for claims under Section 203, such that its discussion about the limitations period for a lawsuit under Section 203 might not be considered a "holding," the Court nevertheless made a determinative analysis of legislative intent. The Court made clear that the Legislature, by providing a special statute of limitations in Section

203 itself, intended that the general limitations period in Section 340(a) did not apply to suits to recover penalty wages.

Although the statutory text plainly revealing the Legislature's intent suffices to resolve the statute of limitations issue, the Department of Industrial Relations Annual Report, June 30, 1938 - July 1, 1939, further substantiates the Legislature's intent. The Annual Report provides the following summary of Assembly Bill 2538, which added the statute of limitations proviso to Section 203 in 1939:

> Assembly Bill 2538 (Chapter 1096) extends the time within which suit may be filed for the collection of penalties imposed for non-payment of wages. In the past, a suit to collect such a penalty had to be commenced within one year, although a suit for collection of wages proper might be brought within two years or four years, depending on whether the contract of hire was oral or written. The present bill allows the same length of time for the collection of penalties for non-payment of wages as has always been allowed for the collection of wages themselves.

Request for Judicial Notice, Raymond Decl. Ex. A, p. 6, Ex. B. p. 11.

There can be no dispute. The Legislature clearly intended that the statute of limitations for lawsuits to recover penalty wages under Section 203 is not the one year period normally allowed for collecting penalties, but is the longer period available for actions to recover unpaid wages.

B. The Statute Of Limitations Proviso In Section 203 Cannot Reasonably Be Interpreted As Inapplicable To Lawsuits For Penalty Wages Alone

In *Murphy*, the Court did not specifically address claims for penalty wages under Section 203 unaccompanied by claims for unpaid wages. Seizing on this fact, the court of appeal in *McCoy* dismissed the Court's explication of legislative intent as dicta and concluded that the statute of limitations provision in Section 203 was inapplicable to lawsuits under Section 203 seeking recovery of penalty wages alone. The court of appeal in this case agreed with *McCoy*.

Both courts erred because the statute of limitations proviso in Section 203 cannot reasonably be interpreted as excluding lawsuits for penalty wages alone. Clearly, Section 203 does not expressly limit the statute of limitations for an action to recover penalty wages to those actions for penalty wages where the plaintiff also seeks to recover unpaid wages. Section 203 provides:

> **Suit may be filed for these penalties** at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise. (Emphasis added).

Section 203 unequivocally prescribes the statute of limitations for a lawsuit "for these penalties." The phrase "for these penalties" is not remotely ambiguous and cannot reasonably be interpreted to exclude lawsuits for penalty wages unaccompanied by claims for unpaid wages. The text of Section 203 simply does not differentiate between an action for penalty wages alone and an action for penalty wages brought together with an action for unpaid wages.

An interpretation of Section 203 that excludes lawsuits for penalty wages alone necessarily adds to the limitations proviso in Section 203 the additional language "except when the employee does not also bring a claim for unpaid wages." But a court may not "add to or alter" a statute "to accomplish a purpose that does not appear on the face of the statute." *Robert F. Kennedy Medical Center v. Belshe* (1996) 13 Cal.4th 748, 756. *See also, Marshall v. Packard-Bell Co.* (1951) 106 Cal.App.2d 770, 774 (a court may not create an exception to a statute of limitations where "there is no express exception" set forth in the statute itself). Since Section 203 does not require that claims for penalty wages be brought with claims for unpaid wages, lawsuits for penalty wages alone cannot be excluded from the limitations proviso.

Bank of America may contend that the Legislature did not intend the limitations proviso in Section 203 to apply to lawsuits for penalty wages alone because the limitations period is the same as for "an action for the wages from which the penalties arise." Bank of America may argue that the words "an action" mean an actual lawsuit and thus necessarily limit the limitations proviso in Section 203 to lawsuits for penalty wages where the plaintiff also sues to recover unpaid wages.

But the words "an action" in Section 203 do not have that import because they encompass all of the following possibilities:

- an action for unpaid wages that is pursued by the plaintiff;
- an action for unpaid wages that the plaintiff could pursue, but chooses not to pursue; and
- an action for unpaid wages that, because the employer belatedly pays final wages, can no longer be pursued.

All three of these scenarios fall within the meaning of the terms "an action" in Section 203 because a cause of action for unpaid wages necessarily accrues at the same time that a cause of action for penalty wages accrues. Indeed, it is only because an employer fails to pay wages upon termination, which gives rise to an action for unpaid wages,

that an employee can sue for penalty wages. For example, on May 12, 2006, Pineda could have filed both an action for unpaid wages and an action for penalty wages, as both causes of action accrued upon Bank of America's willful failure to pay him final wages on May 11, 2006.

Because an action for penalty wages necessarily accrues simultaneously with an action for unpaid wages, the statute of limitations for each action must be determinable simultaneously at the moment in time both actions accrue. Under the express provisions of Section 203, whatever statute of limitations applies to an action for unpaid wages that accrues as a result of the employer's failure to pay wages upon termination is the statute of limitations applicable to the employee's action for penalty wages that also accrues when the employer fails to pay wages upon termination.

The Legislature understood that just because an action for unpaid wages accrues, however, does not mean that an action for unpaid wages will necessarily be pursued. Thus, the Legislature used the broad words "an action" to encompass the situation where an action for unpaid wages is pursued and the situation where an action for unpaid wages is not pursued. In both cases, whether or not an action for unpaid wages is

ultimately pursued, the limitations period for the employee's claim under Section 203 is the same as the limitations period for whatever action for unpaid wages accrued upon the employer's nonpayment of wages. It is precisely because an action for unpaid wages stems from the same facts giving rise to an action for penalty wages - the employer's nonpayment of wages - that the Legislature decided to make the limitations period for a lawsuit for penalty wages the same as the limitations period for "an action for the wages from which the penalties arise." (Emphasis added).

Ultimately, Section 203 cannot be interpreted as applying only to those lawsuits for penalty wages where the plaintiff also seeks to recover unpaid wages without converting the phrase "an action for the wages from which the penalties arise" into the phrase "the action for the wages from which the penalties arise." The words "the action," unlike the words "an action," might imply a lawsuit for penalty wages brought simultaneously with a lawsuit for unpaid wages. But that is not what Section 203 provides, and the Court has no license to change the word "an" into the word "the." The Court may not alter Section 203 to accomplish a purpose "that does not appear on the face of the statute."

Robert F. Kennedy Medical Center, *supra*, 13 Cal.4th at 756.

The clear purpose of Section 203 is to provide a statute of limitations different from the one year statute of limitations set forth in Section 340(a) of the Code of Civil Procedure. It would turn legislative intent on its head to carve out from Section 203 lawsuits for penalty wages alone and apply the one year statute of limitations to that subset of lawsuits for penalty wages. The only conclusion consistent with the plain language of the statute and legislative intent is that, whether or not a plaintiff seeks to recover unpaid wages when the plaintiff sues to recover penalty wages under Section 203, the statute of limitations for the claim for penalty wages cannot be one year.

C. A One Year Limitations Period Impermissibly Allows The Statute Of Limitations To Change After Accrual Of The Cause Of Action

The Court need not resort to legislative history or other extrinsic aids to conclude that Pineda's claim under Section 203 cannot be governed by the one year limitations period in Section 340(a). In the absence of a bona fide statutory ambiguity, which would require an alternative construction of Section 203 that is reasonable (and not just proffered), the plain language of the statute controls. *See*, *Hughes v.*

Board of Architectural Examiners (1998) 17 Cal.4th 763, 776 (a statute is considered ambiguous only if capable of two constructions "both of which are reasonable"). The only reasonable interpretation of Section 203 that follows from its text allows the Court to decide the statute of limitations issue in Pineda's favor without further analysis.

While not necessary for resolving the statute of limitations issue, principles of statutory construction nevertheless bolster the conclusion that a one year limitations period cannot apply to lawsuits for penalty wages alone. A one year limitations period for lawsuits for penalty wages unaccompanied by claims for unpaid wages would defy general legal principles and lead to absurd results because that would allow the statute of limitations to change after the cause of action accrued.

A statute of limitations begins to run on the date the cause of action accrues. *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806; *Romano v. Rockwell International, Inc,* (1996) 14 Cal.4th 479, 487. This legal rule dictates that the statute of limitations for any cause of action must be determinable and fixed when the cause of action accrues. With respect to Pineda's claim for penalty wages, for example, the statute of limitations must be determined and fixed as of May 12,

2006, the date Pineda's claim for penalty wages accrued.

But that would not be the case if the limitations period for a cause of action under Section 203, which the Legislature clearly intended to be longer than one year, becomes one year when the plaintiff does not seek unpaid wages. If that were the law, the limitations period for a claim under Section 203 would change based on events, such as the employer making belated payment of final wages, occurring after the claim for penalty wages accrued.

In other words, contrary to a basic principle of law, the limitations period would be neither fixed nor determinable at the time the cause of action accrued. With respect to Pineda, for example, according to the interpretation of Section 203 announced in *McCoy* and followed here, the statute of limitations for Pineda's claim under Section 203, which was longer than one year on May 12, 2006, changed to one year on May 15, 2006 when Bank of America paid him his final wages.

Comparing the two scenarios below illustrates how anomalous results follow from applying a one year limitations period to a claim for penalty wages under Section 203 when that claim is not asserted concurrently with a claim for unpaid wages.

Employee Smith

Employer discharges Smith on January 1, 2000 without paying Smith his final wages, including unpaid overtime, upon termination. On January 1, 2002, Smith files a lawsuit against Employer which includes a claim for unpaid overtime wages and a claim for penalty wages. Smith's claim for penalty wages, filed within the three year limitations period applicable to his claim for unpaid overtime wages, is timely.

Employee Jones

Employer discharges Jones on January 1, 2000 without paying Jones his final wages, including unpaid overtime, upon termination. On June 1, 2001, Employer belatedly pays Jones all the wages that were owed to him at the time of discharge. On January 1, 2002, Jones files a lawsuit against Employer for penalty wages only. Jones' claim for penalty wages is not timely, but is barred by the one year statute of limitations.

For both Smith and Jones, an action under Section 203 for penalty wages necessarily accrued on the same day – January 2, 2000, the first day after discharge when final wages (payable on the day of discharge) became overdue. Yet, the statute of limitations under Section 203 is not

the same for Smith and Jones. The statute of limitations for Smith is three years – the same limitations period that applies to his concurrent claim for unpaid overtime wages. The statute of limitations for Jones, however, is only one year. Although the limitations period for Jones would have been longer if he had brought his lawsuit sooner, it was retroactively shortened to one year because, as a result of Employer's belated payment of wages to Jones, he can no longer assert a claim for unpaid wages along with his claim for penalty wages.

An interpretation of Section 203 that allows for the statute of limitations to change after the cause of action accrues defies the cardinal rule of statutory construction against anomalous, absurd and unjust consequences. Since Employer failed to pay final wages immediately upon discharge to both Smith and Jones the same day, they must both have the same amount of time to enforce their rights to recover penalty wages under Section 203. There cannot be different limitation periods for the same wrongful conduct against employees who, at the time their rights were violated, were similarly situated.

"A statute of limitations runs against the right of action, not against the holder of right." *Record Mach. & Tool Co. v. Pageman*

Holding Corp. (1959) 172 Cal.App.2d 164, 174. This means that statutes of limitations cannot vary based on events external to the conduct giving rise to the cause of action, and events subsequent to accrual of a cause of action cannot cause the limitations period, determined at the time of accrual, to be shortened retroactively.

These fundamental rules preclude a one year statute of limitations from applying retroactively to a claim for penalty wages under Section 203. An employer's belated payment of wages, after the employee's claim for penalty wages has already accrued, cannot shorten the statute of limitations that applied when the action for penalty wages accrued. The statute of limitations for Pineda's claim under Section 203, which was necessarily longer than one year when it accrued on May 12, 2006, cannot have been retroactively shortened to one year on May 15, 2006.

D. A One Year Limitations Period Cannot Be Reconciled With Public Policy

Considerations of public policy further compel the conclusion that claims for penalty wages under Section 203 cannot be governed by a one year limitations period. An employer may not be allowed to benefit from late payment of final wages and the Labor Code must be construed liberally in favor of employees. A one year limitations period for

penalty wages under Section 203 cannot be reconciled with either of these fundamental public policies.

1. An Employer May Not Be Allowed To Benefit From Late Payment Of Final Wages

The Court has long recognized "the public policy in favor of full and prompt payment of wages due an employee." *Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 326. This policy is "fundamental and well established." *Smith v. Superior Court* (2006) 39 Cal.4th 77, 82.

Upholding in 1918 the constitutionality of the initial "penalty wage law" (later re-codified in Section 203), the court of appeals in *Moore v. Indian Spring Channel Gold Mining Co.* (1918) 37 Cal.App. 370 was the first to elaborate on the serious harm that results when an employer does not pay wages promptly:

> Delay of payment or loss of wages results in deprivation of the necessities of life, suffering inability to meet just obligations to others, and, in many cases may make the wage earner a charge upon the public.

Moore, 37 Cal.App. at 379-80.

More than 60 years ago, this Court similarly emphasized that an

employee's timely receipt of wages when due is "essential" to the public's welfare:

> It has long been recognized that wages are not ordinary debts, that they may be preferred over other claims, and that, because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due.

In re Trombley (1948) 31 Cal.3d 801, 809.

The Court has reiterated the importance of employers paying wages promptly on numerous occasions. *See, e.g., Pressler v. Donald L. Bren Co.* (1992) 32 Cal.3d 831, 837; *Cuadra v. Millan* (1988) 17 Cal.4th 855, 871.

Section 203 exists to implement this fundamental policy. *Smith v. Superior Court* (2006) 39 Cal.4th 77, 82; *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 360. *See also*, *Oppenheimer*, *supra,* 153 Cal.App.2d at 899 (the primary intent of Section 203 "is not to secure the payment of a penalty, but the payment of wages").

A one year limitations period when an employee sues only for penalty wages, however, undermines the public policy in favor of prompt payment of wages. The shorter limitations period which results from the employer's belated payment of final wages gives employers an

incentive to delay payment of final wages and allows them to benefit from late payment of final wages.

If a one year limitations period applies to lawsuits for penalty wages alone, an employer who pays an employee his final wages more than one year after the employee's termination negates the employee's right to bring a claim under Section 203, because the limitations period becomes one year retroactively. For example, in the illustration above, Employer deprived Jones the ability to assert a timely claim under Section 203 – an ability that Jones previously had until the moment Employer belatedly paid his final wages 18 months after they were initially due!

A statutory construction of Section 203 that gives employers incentive to delay payment of wages beyond one year, by empowering them to cut off an employee's right to sue for penalty wages, cannot be upheld. That would defeat the purpose of the statute. A court cannot "emasculate" the application of a statute "under the guise of judicial interpretation." *Orpustan v. State Farm Mut. Auto. Ins. Co.* (1972) 7 Cal.3d 988, 994.

A one year limitations period also violates the fundamental

principles of equity which estop a party from taking advantage of its own misconduct to assert procedural defenses. It is well settled that estoppel lies to prevent an "inequitable resort to the statute of limitations." *County v. Santa Clara v. Vargas* (1977) 71 Cal.App.3d 510, 524. *See also*, *Bollinger v. National Fire Ins. Co. of Hartford, Conn.* (1944) 25 Cal.2d 399, 411 (equity justifies relief when defendant asserts statute of limitations in a manner that "would enable it to obtain an unconscionable advantage and enforce a forfeiture").

Fundamental fairness does not allow an employee's statutory right to sue for penalty wages to be taken away just because his or her employer, more than one year after violating Labor Code Section 201 or 202, finally pays the wages owed upon termination. An employer cannot be allowed to reap advantage from its own violation of law.

Although Bank of America did not wait a full year before paying Pineda his final wages, equitable considerations nevertheless apply because the statute of limitations does not constitute an offensive weapon to cut off claims. More than 120 years ago, this Court admonished that "the statute of limitations is to be employed as a shield, and not as a sword; as a means of defense, and not as a weapon of

attack." *Grant v. Burr* (1880) 54 Cal. 298, 300. *See also*, *People v. Grant* (1942) 52 Cal.App.2d 794, 801 (referring to this "well known doctrine").

Contrary to this fundamental principle, an employer's prerogative to reduce the statute of limitations for a claim under Section 203 by paying final wages late not only allows employers to use the statute of limitations as a sword, but gives them incentive to do so. If a one year limitations period applies to claims for penalty wages under Section 203 not brought with a wage claim, an employer who fails to pay final wages within 30 days after termination (after which penalty wages no longer accrue) has no incentive to pay final wages until more than one year after termination. The employer has reason instead to wait until more than one year passes, and then pay final wages, to cut off the employee's right to sue for penalty wages.

This result turns the fundamental public policy favoring prompt payment of wages on its head. Section 203 cannot be construed in a manner that gives employers an incentive to delay payment of wages, or allows them to benefit from doing so.

2. The Labor Code Must Be Construed Liberally In Favor Of Employees

This Court has repeatedly instructed that statutes regarding conditions of employment "are to be liberally construed with an eye to protecting employees." *Murphy*, 40 Cal.4th at 1103. *See also*, *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340; *Ramirez v. Yosemite Water Company, Inc.* (1999) 20 Cal.4th 785, 794; *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985. Interpreting Section 203 to allow for a one year limitations period defies this fundamental public policy.

As discussed above, to conclude that the one year limitations period in Section 340(a) of the Code of Civil Procedure applies to claims under Section 203 for penalty wages alone, the Court must read into Section 203 an unstated exception for those lawsuits for penalty wages not brought together with claims for unpaid wages. Such an implied exception to Section 203 would clearly disfavor employees, contrary to public policy, by affording them a shorter limitations period. Indeed, a shorter limitations period would not only harm employees paid final wages more than one year after termination, but would adversely affect those employee who could have brought a claim for unpaid wages

when they sued for penalty wages, but chose not to do so.

Public policy cannot allow the statute of limitations for a claim for penalty wages under Section 203 to be reduced just because the plaintiff chooses not to bring a claim for unpaid wages. Penalizing employees for choosing not to bring wage claims cannot possibly be reconciled with a liberal interpretation of the Labor Code.

A one year limitations period for claims under Section 203 would also be inconsistent with the primary purpose of statutes of limitations, which is to "prevent plaintiffs from asserting stale claims once evidence is no longer fresh and witnesses are no longer available." *Murphy*, 40 Cal.4th at 1114. Since employers are required to keep wage records for at least three years, a one year limitations period is not required to ensure that employers have the evidence necessary to defend against a claim for penalty wages.

In sum, public policy does not allow an interpretation of Section 203 that would disfavor employees by giving employers the ability to negate their liability for penalty wages by retroactively shortening to one year the statute of limitations for lawsuits to recover penalty wages. If this Court has any doubts about the meaning of Section 203, those

doubts must be resolved in favor of employees by concluding that they have more than one year to bring lawsuits for penalty wages, whether or not they also pursue an action for unpaid wages.

E. The Statute Of Limitations Under Section 203 Is Two, Three Or Four Years

Under Section 203, the limitations period for an action for penalty wages is the same as the limitations period for "an action for the wages from which the penalties arise." The statute of limitations under Section 203 is thus derivative – it depends on the limitations period for an action for unpaid wages that necessarily accrues at the same time the cause of action for penalty wages accrues.

The length of the limitations period for a wage claim, in turn, depends on the basis for the wage claim, or the particular legal obligation allegedly violated by the employer. Different causes of action that can be asserted in a lawsuit to recover unpaid wages are subject to different limitations periods because they are premised on different legal obligations.

For example, each of the causes of action below, all of which can serve as the basis for a wage claim, involve violation of a different legal duty governed by a different statute of limitations:

- an action for breach of oral contract – two years under Code of Civil Procedure Section 339, subdivision 1;
- an action for breach of written contract – four years under Code of Civil Procedure Section 337, subdivision 1;
- an action for failure to pay minimum or overtime wages – three years under Code of Civil Procedure Section 338(a);
- an action for unfair competition – four years under Business & Professions Code Section 17208.

Each legal theory above can be the basis for an action for unpaid wages. In *Cuadra v. Millan* (1988) 17 Cal.4th 855, the Court expressly addressed "the time in which an employee may commence a civil action for unpaid wages." *Id.* at 859. Adverting to the general statutes of limitation set forth in the Code of Civil Procedure, the Court explained that the limitations period for a particular wage claim depends on the underlying legal obligation allegedly breached by the employer:

> [I]f the action is based on a written contract of employment it must be commenced within four years after the cause of action has accrued. (*Id.*,§ 337, subd. 1). If based on an oral contract, within two years after accrual, (*Id.*, § 339, subd. 1). If based on a wage liability created by statute, within three years after accrual. (*Id.*, § 338, subd. (a)).

Cuadra, 17 Cal.4th at 859.

Several years after *Cuadra*, in *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, the Court ruled that wages can be recovered as restitution to remedy an employer's violation of its legal obligation not to engage in unfair business practices. The Court thus established that a claim for restitution of unpaid wages under the UCL also constitutes an "action to recover wages."

> We recognize that any business act or practice that violates the Labor Code through failure to pay wages is, by definition (§ 17200) an unfair business practice. It follows that an action to recover wages that might be barred if brought pursuant to Labor Code section 1194 still may be pursued as a UCL action seeking restitution pursuant to section 17203 if the failure to pay constitutes a business practice.

Cortez, 23 Cal.4th at 178-79.

Rather than tie the limitations period under Section 203 narrowly to any particular cause of action, the Legislature deliberately used the broad terminology "an action for the wages" to encompass all the possible violations of legal obligations that give rise to a lawsuit seeking recovery of unpaid wages. Under the Code of Civil Procedure, an "action" is defined as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the

punishment of a public offense." Code of Civil Proc. § 22. An "action for the wages" within the meaning of Section 203 thus encompasses any action where the object of the action is to recover unpaid wages, regardless of the specific legal duty allegedly violated by the employer.

The purpose of the derivative statute of limitations in Section 203 is evident. The Legislature plainly intended to give employees as much time to sue for penalty wages as they have to sue for unpaid wages when their actions for unpaid wages and penalty wages simultaneously accrue. It does not matter what violation of legal duty gives rise to the claim for unpaid wages, or whether or not the employee actually pursues an action for unpaid wages. When a cause of action for unpaid wages and a cause of action for penalty wages accrue as a result of the employer's failure to pay wages timely upon termination, the statute of limitations for an action for penalty wages under Section 203 is two, three or four years.

II. Employees Can Recover Penalty Wages Owed To Them As Restitution Under The UCL

Through Business & Professions Code Section 17203, the UCL authorizes a court to make any order necessary to "restore to any person in interest any money or property" acquired by means of unfair competition. Restoration of penalty wages owed to employees under

Section 203, when wrongfully retained by the employer, falls squarely within the scope of restitution under the UCL.

A. The UCL Authorizes The Return Of Money Wrongfully Acquired By Unfair Competition

The principal purpose of restitution under the UCL is "to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains." *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267. Restitution under the UCL prevents unjust enrichment by restoring money rightfully belonging to one person that was wrongfully acquired by another. "The basic premise of this type of remedy is that '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.'" *Juarez v. Arcadia Financial, Ltd.* (2007) 152 Cal.App.4th 889, 913 [citing Restatement, Restitution § 1].

This Court has consistently described the remedy of restitution under the UCL in terms embodying these basic equitable principles. An order for restitution under the UCL is an order "compelling a UCL defendant to return money obtained through an unfair business practices to those persons in interest from whom the property was taken." *Kraus v. Trinity Management Srvices, Inc.* (2002) 23 Cal.4th 116, 126-27.

"The object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149. *See also, ABC International Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal.4th 1247, 1271 (UCL authorizes a trial court "to order restitution of money lost through acts of unfair competition").

Because restitution serves to prevent wrongdoers from retaining their ill-gotten gains, restitution "is not limited only to money or property that was once in the possession" of the plaintiff. *Cortez*, 23 Cal.4th at 178. The scope of restitution broadly encompasses any "quantifiable sums one owes to another" whether or not ever physically possessed by the plaintiff. *Cortez*, 23 Cal.4th at 178. Restitution does not require a plaintiff to have had actual physical possession of money lost, but prevents unjust enrichment by allowing the plaintiff to recover money or property acquired by the defendant "belonging in good conscience to the plaintiff." *Korea Supply*, 29 Cal.4th at 1150. *See also, County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 542 ("Many instances of liability based on unjust enrichment . . . do not involve the restoration of anything the claimant previously possessed").

Restitution under the UCL is equivalent to imposition of a constructive trust. "A constructive trust is an involuntary equitable trust created by operation of law as a remedy to compel the transfer of property from the person wrongfully holding it to the rightful owner." *Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 990. "The essence of the theory of constructive trust is to prevent unjust enrichment and to prevent a person from taking advantage of his or her own wrongdoing." *Id. Accord, PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 398.

These equitable principles are codified in Civil Code Sections 2223 and 2224. Section 2223 provides that "one who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner." Section 2224 provides that one who wrongfully "gains a thing" is an involuntary trustee "of the thing gained, for the benefit of the person who would otherwise have had it." *See*, *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 600 ("a constructive trust may be imposed in practically any case where there is a wrongful acquisition or detention of property to which another is entitled").

Equating restitution with imposition of a constructive trust, this

Court explained in *Cortez* that equity "regards that which ought to have been done as done" and "recognizes equitable conversion." *Cortez*, 23 Cal.4th at 178. Reiterating that a person need not have actual possession of money before it can be wrongfully acquired by another, the Court made clear in *Korea Supply* that a constructive trust merely requires the wrongful acquisition of "money or property identified as belonging in good conscience to the plaintiff." *Korea Supply*, 29 Cal.4th at 1150.

By imposing a constructive trust, an order for restitution ensures that people who are owed money actually receive the money belonging to them. In *Cortez*, for example, the Court ruled that unpaid wages could be recovered as restitution under the UCL because the wages were "due and payable" under the Labor Code. *Cortez*, 23 Cal.4th at 178. As explained in *Korea Supply*, the "order for restitution [in *Cortez*] served to restore to the plaintiffs funds that were directly owed to them by the defendant." *Korea Supply*, 29 Cal.4th at 1150. Thus, the plaintiff was entitled to seek restitution of money in *Cortez*, despite never having had actual possession of the money, because the plaintiff had constructive possession of the money. In other words, the plaintiff had the right to

possess the money the defendant was legally obligated to pay him.

B. Employees Owed Penalty Wages Have An Ownership Interest In That Money Because It Is Owed To Them

Restitution under the UCL is available to a person who has "an interest" in money or property acquired by unfair competition. The term "interest" means an "ownership interest," *Kraus*, 23 Cal.3d at 127, which includes "any right, title, or estate in property." *Id.* at 127, n.11.

Employees have an ownership interest in penalty wages owed to them under Section 203. Section 203 mandates that, when the employer willfully fails to pay an employee final wages timely, "the wages of an employee shall continue." Employers do not have discretion under Section 203. Labor Code Section 15 dictates that, for the purposes of the Labor Code, "'shall' is mandatory." Accordingly, an employee's entitlement to money under Section 203 arises immediately upon the employer's willful failure to pay final wages upon termination. *Cf.*, *Pacific Hospital of Long Beach v. Lackner* (1979) 90 Cal.App.3d 294, 297-298 (property "acquired" as soon as "right to it has become fixed" even though "transfer of property is to be delayed").

Employees do not have a mere "expectancy" in money owed to them under Section 203. "The term expectancy describes the interest of

a person who merely foresees that he might receive a future beneficence." *In re Marriage of Brown* (1976) 15 Cal.3d 838, 844-45. Employees have an ownership interest in penalty wages owed to them under Section 203 because that money is "due and payable" and "directly owed to them." *Cortez*, 23 Cal.4th at 178.

Entitled to possess and use the penalty wages owed to them under Section 203, employees have an enforceable property right in that money. "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others" and "the thing of which there may be ownership is called property." Civil Code § 654. *See also, Liberty Mutual Fire Insurance Co. v. McKenzie* (2001) 88 Cal.App.4th 681, 689 (the term "own" means "to have or possess as property").

This Court should adopt the reasoning of Orange County Superior Court Judge David Velasquez who recognized that employees have an ownership interest in penalty wages owed to them under Section 203 indistinguishable from their ownership interest in wages owed to them under other provisions of the Labor Code:

> The employee is not required to do anything affirmative - take action - in order to be entitled to the continuing right to wages. The right to the waiting time penalty is self-executing, i.e., the employee's right to payment of the

> waiting time penalty arises immediately upon the satisfaction of the condition precedent, late payment of the last wages due to the employee at the time of termination from employment. In that respect, because the waiting time penalty becomes immediately due and payable to the employee, the right to receive the penalty becomes a vested property right of the employee and the proper subject of restitution.

(ROA 112).

This reasoning comports with case law explaining the concept of a "vested" property right. With respect to property rights, the word "vested" does not mean permanent or non-forfeitable. Rather, as used by this Court in *Korea Supply*, the word "vested" means acquired or possessed. *Korea Supply* abides with many cases holding that, in the context of property rights, the word "vested" generally denotes "a right already possessed . . . or legitimately acquired." *Harlow v. Carleson* (1976) 16 Cal.3d 731, 735; *see also, Bixby v. Pierno* (1971) 4 Cal.3d 130, 144 (right is "vested" if "it has been acquired by the individual"); *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34 (right "vested" when "legitimately acquired").

In *Korea Supply*, this Court recognized that a property interest in money is acquired or becomes "vested" when the plaintiff becomes entitled to receive the money. The Court explained that the property

interest required for restitution is satisfied when the monetary relief sought represents "a quantifiable sum owed by defendants to the plaintiff." *Korea Supply*, 29 Cal.4th at 1150. For this reason, the Court in *Korea Supply* identified the existence of a monetary obligation giving rise to the right of possession as the rationale for its ruling in *Cortez*. The Court explained in *Korea Supply* that restitution was properly ordered in *Cortez* "to restore to the plaintiffs funds that were directly owed to them by the defendant." *Id.*

Civil Code Section 3287(a) illustrates the meaning of the word "vested" in the context of property rights. Section 3287(a) provides for the recovery of pre-judgment interest when the plaintiff's right to recover damages certain "is vested in him upon a particular day." Under Section 3287(a), the right to recover money "vests" immediately on the day the money "becomes due and payable." *Budget Finance Plan v. Sav-on Food Club* (1955) 44 Cal.2d 565, 572, n.6; *see also*, *Imperial County v. Adams* (1933) 117 Cal.App. 220, 230 ("law awards interest upon money from the time it becomes due and payable"); *Flynn v. California Casket Co.* 105 Cal.App.2d 196, 208 (law awards interest on debt "from the time it becomes due and payable").

Penalty wages owed under Section 203 first become due and payable immediately upon willful nonpayment of final wages, and the employer's liability continues to accrue each day (up to a maximum of 30 days) until the employer finally pays the employee's wages. *See*, *Oppenheimer*, *supra*, 53 Cal.App.2d Supp. at 899 (payment of final wages terminates accumulation of liability under Section 203 but does "not preclude the employee from recovering the penalty already accrued"). An employee's right to receive penalty wages owed under Section 203 thus "vests" just like all other monetary obligations that become due and payable "vest." *See*, *e.g.*, *Currie v. Workers' Comp Appeals Bd.* (2001) 24 Cal.4th 1109, 1115 (salary payments "became vested as of the dates they accrued"); *Tripp v. Swoap* (1976) 17 Cal.3d 671, 682 (right to receive welfare benefits "vests in the recipient on the first day of his entitlement"). *See also*, *Arvin Union School Dist. v. Ross* (1985) 176 Cal.App.3d 189, 200 ("obligation to pay in a debtor" creates "a vested interest in a creditor").

An employer's obligation to pay penalty wages under Section 203 does not materially differ from any other legal obligation to pay money which gives rise to an ownership interest in the money owed. *Cortez*

and *Korea Supply* compel the conclusion that, when penalty wages become due and payable upon the employer's willful nonpayment of final wages at the time of termination, they can be sought as restitution under the UCL to prevent the employer from wrongfully retaining them at the employee's expense. Penalty wages owed under Section 203 for late payment of final wages constitute money "belonging in good conscience" to the employee entitled to receive the penalty wages. *Korea Supply*, 29 Cal.4th at 1150.

C. The Statutory Repeal Rule Is Irrelevant To The Concept Of A Vested Interest In Money Or Property Under The UCL

In *Murphy*, the Court stated that "the right to a penalty does not vest until someone has taken action to enforce it." *Murphy*, 40 Cal.4th at 1108. This dicta reflects the "statutory repeal rule," under which the repeal of a statutory right destroys the remedy under the statute unless the remedy has already been obtained or perfected by a final judgment. *See, e.g., Napa State Hospital v. Flaherty* (1901) 134 Cal. 315, 317.

People v. Durbin (1996) 64 Cal.2d 474, the case cited in *Murphy* as the source for the Court's statement about the vesting of penalties, makes clear how the statement from *Durbin* arose in the context of

explaining the statutory repeal rule:

> **The test to be applied in giving the effect to be given the repeal of penalty and forfeiture statutes** is whether the rights affected are vested or inchoate. No person has a vested right in an unenforced statutory penalty or forfeiture. (Emphasis added).

Durbin, 64 Cal.2d at 478-79.

The statutory repeal rule has no bearing on the ownership interest required for restitution under the UCL. If it did, violation of a statutory obligation to pay money could never serve as a predicate for restitution under the UCL. That would substantially eviscerate the UCL contrary to long standing precedent and clear legislative intent.

For example, if the term "vested" as used in *Korea Supply* had the same meaning as the word "vested" for the purposes of the statutory repeal rule, unpaid overtime wages would not be recoverable as restitution under the UCL. The right to overtime wages exists only by statute, and the Legislature can eliminate the statutory right to overtime wages whenever it wishes to do so. This Court's ruling in *Cortez*, that unpaid overtime wages can be recovered as restitution, clearly demonstrates that the statutory repeal rule has nothing to do with a "vested interest" within the meaning of the UCL.

The obligation to pay overtime wages under the Labor Code is just one example of a statutory obligation to pay money. There are many. The following list of statutes represents a tiny fraction of the laws requiring one person to pay money to another:

- Civil Code § 1723 - retail seller who fails to post its no refund or no exchange policy must refund purchase price to buyer if goods returned within 30 days after purchase;
- Civil Code § 1749.5(f) - issuer of gift certificate must provide refund to persons who provided funds towards purchase of gift certificate to be redeemed by recipient when recipient does not redeem the funds by purchasing a gift certificate;
- Civil Code § 1812.54 - dance studio must refund money owed to dance student upon cancellation of contract for dance studio lessons within ten days of cancellation notice;
- Civil Code § 1812.89(a)(2) - party agreeing to provide health studio services shall refund prepayments for services that cannot be received because of death or disability;
- Civil Code § 1812.118 - seller of discount buying services must refund monies paid by buyer of services if contract is cancelled

within three days;

- Civil Code § 1812.215 - seller of assisted marketing services must refund monies paid by purchaser if contract voided for seller's non-compliance with law;
- Civil Code § 1812.304 - seller of membership camping services must refund monies paid by purchaser within ten days of cancellation of contract by purchaser;
- Civil Code § 1812.518 - job listing service must refund advance fees paid by job seeker if job listing service does not supply at least three employment opportunities within seven days after execution of contract;
- Civil Code § 1812.532 - nurse registry must repay fees collected from a nurse for an assignment if nurse fails to obtain the assignment or is not paid for the assignment;
- Civil Code § 1812.625(b) - lessor under rental-purchase agreement must return security deposit to consumer (less the amounts deducted for loss or repairs) after taking possession of the property from the consumer;
- Civil Code § 1950.5(g) - landlord must return remaining portion

of security deposit (after appropriate deductions) to tenant after termination of tenancy.

If the statutory repeal rule determined the scope of an "interest in money or property" within the meaning of the UCL, no cause of action for restitution would lie for violation of any of the statutory obligations to pay money listed above. Nor could there be a viable cause of action for restitution based on violation of Civil Code Section 1712, which requires restoration of a thing wrongfully acquired by one without the consent of its owner; or Civil Code Section 1895, which requires the return of a thing lent for a specified time or purpose.

Application of the statutory repeal rule to determine the scope of a "vested interest" under the UCL makes no sense and would eviscerate the UCL. Restitution cannot be unavailable for violation of statutes mandating return of money or property just because, under the statutory repeal rule, those statutory obligations can be repealed.

It is apparent that the meaning of the word "vested" depends entirely on context. For the purposes of the statutory repeal rule, the right of an employee to sue for penalty wages under Section 203 is not "vested" under *Murphy* or *Durbin* because the Legislature can repeal

Section 203. But, for the purposes of an ownership interest under the UCL, the right to possess penalty wages owed under Section 203 accrues when the employer willfully fails to pay final wages upon termination and is "vested" under *Korea Supply*.

D. Unjust Enrichment Is Not Limited To Acquisition Of Money Previously In The Plaintiff's Possession

Bank of America may contend that penalty wages cannot be recovered as restitution because Pineda did not pay any money to Bank of America that can be restored to him. This Court has made clear, however, that restitution under the UCL "is not limited only to the return of money or property that was once in the possession" of the plaintiff. *Cortez*, 23 Cal.4th at 178. Restitution extends broadly to the "restoration" or "return" of any money or property in which the plaintiff has an ownership interest whether or not paid by the plaintiff to the defendant.

In *Cortez*, for example, the plaintiff had the right to possess unpaid wages which were "due and payable" under the Labor Code because "equity regards that which ought to have been done as done (Civ. Code § 3259) and thus recognizes equitable conversion." *Cortez*, 23 Cal.4th at 178. In other words, the plaintiff was entitled to seek

restitution of money in *Cortez* that he never actually possessed because equity deemed the plaintiff to have possessed the money.

Bank of America may also contend that Pineda cannot be made whole by restitution of penalty wages because Pineda did not "earn" penalty wages by performing labor. This argument would have no merit because an obligation to pay wages is not the only kind of debt that can give rise to a claim for restitution. There are numerous ways in which a legal obligation to pay money can arise. A legal debt encompasses "any sort of obligation to pay money." *Pacific Freight Lines v. Pioneer Express Co.* (1940) 39 Cal.App.2d 609, 615. The numerous statutes referenced above illustrate legal obligations to pay money that have nothing to do with earned wages.

For this reason, the Court did not limit restitution in *Cortez* to particular obligations to pay money. The Court explained instead that restitution encompasses any "quantifiable sums one owes to another." *Cortez*, 23 Cal.4th at 178. Restitution of money owed is a form of "restitutive damages," which consist of "quantifiable amounts of money due an injured private party from another party to compensate for the pecuniary loss directly resulting from the second party's violation of

law." *Walnut Creek Manor v. Fair Employment & Housing Commission* (1991) 54 Cal.3d 245, 263.

The availability of restitution to prevent a debtor from retaining money owed to another cannot turn on why the obligation to pay the money arose. Whether the money is owed because the plaintiff earned wages, as in *Cortez*, or because a statute mandates the payment of money for another reason, all that matters is that the plaintiff is owed money. Restitution can be recovered whenever a defendant violates a legal obligation to pay money to the plaintiff because the plaintiff has constructive possession of, or an equitable interest in, the money owed, and the defendant would be unjustly enriched by retention of the money.

Bank of America may also contend that restitution of penalty wages cannot be ordered because, even if Bank of America owed penalty wages to Pineda, Bank of America legitimately acquired the funds that would be used to pay the penalty wages. This argument has no merit because unjust enrichment does not require receipt of funds from an external source. Unjust enrichment can result simply from not making a payment of money owed to someone, just like the employer's failure to pay the wages that were owed to employees in *Cortez*. In

Ghirardo v. Antonioli (1996) 14 Cal.4th 39, the Court explained that benefitting from a saved expense can constitute unjust enrichment just like receipt of money or property:

> Under the law of restitution, an individual may be required to make restitution if he is unjustly enriched at the expense of another. (Rest., Restitution, § 1, p. 12). A person is enriched if he receives a benefit at another's expense (*Id.*, com. a, p. 12). The term "benefit" "denotes any form of advantage." (*Id.*, com. b, p. 12). Thus, a benefit is conferred not only when one adds to the property of another, but also when one saves the other from expense or loss.

Ghirardo, 14 Cal.4th at 51.

Here, Bank of America enriched itself by reaping the benefit of a saved expense – the money retained by Bank of America as a result of not paying the penalty wages owed to Pineda and other employees under Section 203. The fundamental principles of fairness that courts long ago relied on to devise restitution as an equitable remedy to prevent unjust enrichment apply squarely to Pineda's claims. When considering claims for restitution to prevent unjust enrichment, "[t]he emphasis is on the wrongdoer's enrichment, not the victim's loss." *County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 542.

County of San Bernardino exemplifies how restitution serves to

prevent unjust enrichment whether or not it compensate for loss. Upholding an award for unjust enrichment based on disgorgement of the amount by which the defendants were unjustly enriched instead of on the amount the plaintiff lost, the court elaborated on the broad scope of restitution:

> The principle of unjust enrichment, however, is broader than mere "restoration" of what the plaintiff lost. Many instances of "liability based on unjust enrichment . . . do not involve the restoration of anything the claimant previously possessed . . . including cases involving the disgorgement of profits . . . wrongfully obtained." [citation omitted]. "The public policy of this state does not permit one to 'take advantage of his own wrong'" regardless of whether the other party suffers actual damage. [citation omitted]. Where "a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust . . . [t]he defendant may be under a duty to give to the plaintiff the amount by which [defendant] has been enriched." [citing Restatement, Restitution, § 1, com. e].

County of San Bernardino, 158 Cal.App.4th at 542.

The law is clear. Restitution does not require the plaintiff to lose money previously in his or her possession, and a plaintiff need not pay money to the defendant for the defendant to be unjustly enriched at the plaintiff's expense. Pineda's attempt to recover the money owed to him under Section 203, to prevent Bank of America from being unjustly

enriched by its wrongful retention of that money, fits perfectly within the contours of restitution.

E. The Fact That Labor Code Section 203 Serves A Penal Purpose Does Not Foreclose Restitution

Money owed for late payment of final wages under Section 203 constitutes wages that "continue as a penalty." Pineda acknowledges that penalty wages owed under Section 203 thus serve a penal purpose. The prospect of liability for additional wages undeniably gives employers "an inducement to pay wages timely." *McCoy*, 157 Cal.App.4th at 229.

The mere fact that penalty wages under Section 203 serve a penal purpose, however, does not preclude their recovery as restitution under the UCL. This Court has never held that statutory penalties cannot be recovered as restitution. To the contrary, the Court has recognized that restitution under the UCL, just like penalties, serves a deterrent purpose. In *Bank of the West*, the Court explained that restitution is properly ordered "to deter future violations of the unfair trade practice statute." *Bank of the West*, 2 Cal.4th at 1267. *See also*, *People v. Toomey* (1984) 157 Cal.App.3d 1, 26 (restitution "is designated to penalize a defendant for past unlawful conduct and thereby deter future violations").

People v. Beaumont Inv., Ltd. (2003) 111 Cal.App.4th 102 illustrates how restitution under the UCL may serve a penal purpose by having a "deterrent value." *Beaumont*, 111 Cal.App.4th at 135. Upholding the trial court's order requiring the defendant to disgorge unauthorized rents wrongfully acquired from mobile home tenants, the court followed *Bank of the West* by rejecting explicitly the notion that restitution under the UCL must be intended solely to benefit the victim of unlawful business practices:

> statutory restitution is not solely "intended to benefit the [victims] by the return of money, but instead is designed to penalize a defendant for past unlawful conduct and thereby deter future violations" [citations omitted].

Beaumont, 111 Cal.App.4th at 135.

Case law thus demonstrates that neither penal purpose nor deterrent effect precludes restitution so long as the requirements for restitution are otherwise met. Indeed, various forms of wages which are clearly recoverable as restitution, including overtime and the additional hour of pay for missed meal periods under Labor Code Section 226.7, "have a corollary disincentive aspect in addition to [their] central

compensatory purpose." *Murphy*, *supra*, 40 Cal.4th at 1110. Statutes requiring an employer to pay additional or premium wages "serve a secondary function of shaping employer conduct." *Id.* at 1109.

The fact that additional or premium wages provide monetary disincentives against unlawful employer conduct does not mean that those monies, when unpaid and owed to employees, cannot be recovered as restitution. Similarly, the fact that an employer's desire to avoid liability for additional wages induces timely payment of wages does not mean that, when penalty wages under Section 203 are owed but unpaid to employees, that money cannot be recovered as restitution.

The dual nature of penalty wages under Section 203, which serve both a penal and a compensatory purpose, bolsters the conclusion that they can be recovered as restitution under the UCL. The compensatory nature of penalty wages was recognized long ago by the court of appeal in *Moore*. The court first described the employer's obligation to pay penalty wages as compensatory: "he must compensate the wage-earner by way of penalty." *Moore*, 37 Cal.App. at 374. In view of this compensatory purpose, the court went on to liken the penalty wage statute to others that "are held not to be penal, but remedial." *Id.* at 375.

Summarizing the law, the court again stressed how penalty wages provide compensation for wrongdoing:

> The Payment of Wages Act fixes a penalty for the non-performance of a duty the employer owes to his employe[e]. It simply says to the employer: You shall not have the services of your employe[e] without making provision for the payment of his wages within a reasonable time after they are due, and if you default you shall compensate him for your wrong.

Moore, 37 Cal.App. at 377 (emphasis added). *See also*, *State of California v. City and County of San Francisco* (1979) 94 Cal.App.3d 522, 531 ("penalties are designed to deter as well as compensate"); *People ex rel. State Air Resources Board v. Wilmshurst* (1999) 68 Cal.App.4th 1332, 1351 (a penalty serves the dual purposes of "disgorging illicit gains and obtaining recompense)."

This Court has similarly recognized that, while penalties serve a penal purpose because they provide disincentives for wrongful conduct, they also serve the compensatory purpose of providing "satisfaction for the wrong or injury suffered" or "recovery of damages in addition to actual losses incurred." *Murphy*, 40 Cal.4th at 1104. Statutory penalties payable to victims of wrongdoing fall squarely within the ambit of Civil Code Section 3274, which provides that "compensation is the relief

provided by the law of this State for the violation of private rights, and the means for securing their obedience." Penalty wages under Section 203, described by the Legislature as "the wages of the employee [that] shall continue as a penalty," comprise both penal relief to shape employer conduct and compensatory relief to redress the injury suffered by employees not paid their final wages promptly upon termination.

Ultimately, there is no basis for excluding from the scope of restitution a statutory penalty that deters misconduct as long as the person seeking restitution has an ownership interest in the money owed as a penalty. When a defendant retains money owed to another, the defendant can be ordered to give the unpaid money to its rightful owner. It does not matter why the money was owed in the first place. All that matters is that the person seeking restitution under the UCL has an ownership interest in the money. The right to receive penalty wages owed under Section 203 satisfies the property interest predicate for restitution despite the penal purpose of Section 203.

F. Plaintiff Does Not Have To Prove Liability In Order To State A Viable Cause Of Action For Restitution

Bank of America may contend that, since Pineda must prove that Bank of America acted willfully to recover penalty wages under Section

203, Pineda cannot have an interest in penalty wages that is "vested." For two reasons, any such argument has no merit.

First, as a procedural matter, Bank of America cannot dispute the allegations that it was obligated to pay Pineda penalty wages under Section 203. "On a defense motion for judgment on the pleadings, all facts alleged in the complaint are deemed admitted." *Fisher v. City of Berkeley, supra,* 37 Cal.3d at 679, n.31. On review, Pineda's allegations must be accepted "as true." *Sullivan v. City of Los Angeles, supra,* 12 Cal.3d at 715 n.3.

Second, an argument that the viability of a cause of action depends on proof makes no sense. Having to prove liability at trial can never preclude a plaintiff from stating a viable cause of action. A plaintiff may not prevail at trial, but that has nothing to do with the legal sufficiency of his or her allegations. A demurrer or motion for judgment on the pleadings challenges the viability of a cause of action as a matter of law without regard to proof.

This Court's ruling in *Cortez* demonstrates that liability need not be proven to establish the viability of a cause of action for restitution under the UCL. *Cortez* holds that an employee can pursue a cause of

action for restitution of unpaid wages under the UCL. Yet, to recover restitution of unpaid wages after trial, the employee must prove all the elements of his or her overtime claim. The employee must prove that: 1) he or she worked overtime hours; and 2) he or she was not paid overtime wages. The employee might also have to overcome the employer's affirmative defense that the employee was exempt from overtime requirements. *Cortez* leaves no room for doubt that requirements of proof to establish liability have no bearing on the sufficiency of allegations to state a viable cause of action.

An argument that having to prove liability defeats "vesting" resembles the notion, repeatedly rejected by the courts, that a right to recover money is not "vested" within the meaning of Civil Code Section 3287(a) when the defendant disputes liability. That is not the law. *See, e.g., Olson v. Cory* (1983) 35 Cal.3d 390, 402; *Esgro Central, Inc. v. General Ins. Co.* (1971) 20 Cal.App.3d 1054, 1060. As long as the amount of damages is certain or capable of being made certain, the plaintiff is entitled to seek pre-judgment interest under Section 3287(a). Whether or not the plaintiff can prove the defendant's liability at trial, and ultimately recover interest, does not determine whether the

plaintiff's has a "vested" right to seek interest. The plaintiff's allegations alone dictate the existence of a "vested" interest.

Similarly here, whether or not Pineda can ultimately prove Bank of America's liability for penalty wages at trial cannot determine the viability of Pineda's cause of action under the UCL. Pineda alleges that Bank of America wrongfully withheld money belonging to Pineda that Bank of America must pay to Pineda under Section 203. These allegations state a viable cause of action under the UCL for restitution of money owed to Pineda – in this case penalty wages – in which Pineda has an ownership interest.

G. Recovery Of Penalty Wages As Restitution Under The UCL Does Not Threaten To Expand Monetary Remedies Under The UCL Beyond Equitable Relief Necessary To Prevent Unjust Enrichment

Bank of America may contend that allowing penalty wages owed under Section 203 to be recovered as restitution under the UCL will somehow expand the scope of monetary relief available under the UCL beyond the contours of restitution. This argument has no merit because Pineda seeks no more and no less than restitution. Claims for tort or contract damages, where the plaintiff suffers loss but the defendant is not unjustly enriched at the plaintiff's expense, remain outside the scope

of restitution. Damages that compensate for loss but, because they do not prevent unjust enrichment, do not also provide equitable relief, remain unavailable under the UCL.

Nor would allowing penalty wages owed under Section 203 to be recovered as restitution in a UCL action threaten to make all penalties or penalties in general recoverable under the UCL. The language of Section 203 differs from the typical penalty statute which leaves it up to a court or jury to decide whether or not to impose a penalty. Under Section 203, payment of penalty wages is mandatory. In *Murphy*, this Court recognized the difference between Labor Code Section 226.7, a statute mandating additional pay for missed meal and rest periods, and statutes that make penalties payable only at the discretion of an adjudicative entity upon the completion of an enforcement action:

> Under the amended version of section 226.7, an employee is entitled to the additional hour of pay immediately upon being forced to miss a rest or meal period. In that way, a payment owed under section 226.7 is akin to an employee's immediate entitlement to payment of wages for overtime. (Citation omitted). By contrast, Labor Code provisions imposing penalties state that employers are "subject to" penalties and the employee or the Labor Commissioner must first take some action to enforce them.

Murphy, 40 Cal.4th at 1108.

Section 203 does not provide that an employer "is subject to," "is liable for," or "may be assessed" a penalty. Section 203 mandates that wages "shall continue" when the employer wilfully fails to pay final wages timely upon termination. The imperative of Section 203 is identical to the imperative in Labor Code Section 226.7 that "the employer shall pay" additional wages upon failure to provide a meal or rest period. In both cases, the mandatory nature of the payment, which gives rise to the employee's immediate entitlement to receive the money owed, is "akin to an employee's immediate entitlement to payment of wages for overtime." *Murphy*, 40 Cal.4th at 1108.

The unique language of Section 203, mandating that wages "shall continue," distinguishes Section 203 from virtually every other penalty statute. Unlike other penalties, penalty wages under Section 203 are owed to employees immediately upon the employer's willful failure to pay wages timely upon termination. That gives employees owed penalty wages a vested property interest in those penalties and the right to seek recovery of the penalty wages owed to them as restitution under the UCL. Allowing penalty wages to be recovered as restitution does not remotely threaten to expand the scope of monetary relief available under

the UCL beyond the equitable remedy of restitution necessary to prevent unjust enrichment.

CONCLUSION

The trial court and court of appeal decided both the statute of limitations issue and the restitution issue incorrectly. This Court should conclude that the statute of limitations under Section 203, even when the plaintiff does not seek to recover unpaid wages, is not one year pursuant to Section 340(a) of the Code of Civil Procedure, but is two, three or four years according to Section 203. The Court should also hold that penalty wages owed under Section 203 can be recovered as restitution under the UCL. The judgment against Pineda should be reversed so he can pursue his class action claims against Bank of America, on behalf of himself and other employees not paid final wages timely upon termination, to vindicate their rights to prompt payment of wages.

Dated: May 21, 2009 SPIRO MOSS LLP

By: _____
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CERTIFICATE OF WORD COUNT

The undersigned counsel certifies that the text of this opening brief uses a proportionately spaced Times New Roman 14-point typeface and consists of 13,602 words as counted by the word processing program used to generate this opening brief.

Dated: May 21, 2009

Gregory N. Karasik

PROOF OF SERVICE

Re: Case Number S170758
Case Title Jorge A. Pineda v. Bank of America, N.A.

I hereby declare that I am a citizen of the United States, am over 18 years of age, and am/am not a party in the above-entitled action. I am employed in/reside in the County of Los Angeles and my business/residence address is 11377 W. Olympic Boulevard, Fifth Floor
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On May 21, 2009, I served the attached document described as a Petitioner's Opening Brief on the Merits

on the parties in the above-named case. I did this by enclosing true copies of the document in sealed envelopes with postage fully prepaid thereon. I then placed the envelopes in a U.S. Postal Service mailbox in Los Angeles, California, addressed as follows:

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I, Cole Oliver, declare under penalty of perjury that the foregoing is true and correct.

Executed on May 21, 2009, at Los Angeles, California.

Signature

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