

S170758 OUTLINE COURT COPY

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

=====

JORGE A. PINEDA

Plaintiff and Appellant,

vs.

BANK OF AMERICA, N.A.,

Defendant and Respondent,

SUPREME COURT
FILED

FEB 25 2009

Frederick K. Onirich Clerk

Deputy

=====

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

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

=====

PETITION FOR REVIEW

=====

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

=====

SPIRO MOSS BARNES LLP
Gregory N. Karasik, Esq. (State Bar No. 115834)
11377 W. Olympic Blvd., 5th Floor, Los Angeles, CA 90064-1683
Telephone (310) 235-2468; Fax (310) 235-2456

Attorneys for Petitioner
JORGE A. PINEDA

**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

PETITION FOR REVIEW

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

SPIRO MOSS BARNES LLP
Gregory N. Karasik, Esq. (State Bar No. 115834)
11377 W. Olympic Blvd., 5th Floor, Los Angeles, CA 90064-1683
Telephone (310) 235-2468; Fax (310) 235-2456

Attorneys for Petitioner
JORGE A. PINEDA

TABLE OF CONTENTS

ISSUES PRESENTED FOR REVIEW 1

INTRODUCTION 2

PROCEDURAL HISTORY 5

I. Trial Court Proceedings 5

II. Court Of Appeal Proceedings 10

REASONS WHY REVIEW SHOULD BE GRANTED 11

I. The Court Should Grant Review To Decide How Long
An Employee Has To Sue For Penalty Wages Alone 12

A. Determining How Long An Employee Has To Sue For
Penalty Wages Alone Is Vital For Implementing Public
Policy In Favor Of Prompt Payment Of Wages 13

B. The Court Of Appeal Did Not Follow Precedent 16

II. The Court Should Grant Review To Decide Whether
Penalty Wages Owed Under Labor Code Section 203
Can Be Recovered As Restitution Under the UCL 21

A. Determining The Scope Of Restitution Under The UCL
Is Vital For Preventing And Remediating The Unjust
Enrichment That Results From Unfair Competition . 22

B. Misapplication Of The Statutory Repeal Rule To
Preclude Restitution Of Money Owed By Statute
Would Undermine The UCL 24

CONCLUSION 28

CERTIFICATE OF WORD COUNT 29

TABLE OF AUTHORITIES

CASES

ABC International Traders, Inc. v. Matsushita Electric Corp. (1997) 14 Cal.4th 1247	22
Bank of the West v. Superior Court (1992) 2 Cal.4th 1254	23
Bunch v. Coachella Water Valley District (1989) 214 Cal.App.3d 203	17
California Coastal Commission v. Office of Admin. Law (1989) 210 Cal.App.3d 758	17
Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal.4th 163	<i>passim</i>
Cuadra v. Millan (1988) 17 Cal.4th 855	13
Great Western Shows, Inc. v. County of Los Angeles (2002) 27 Cal.4th 853	11
In re Trombley (1948) 31 Cal.3d 801	13
Juarez v. Arcadia Financial , Ltd. (2007) 152 Cal.App.4th 889	22
Kerr's Catering Service v. Department of Industrial Relations (1962) 57 Cal.2d 319	13
Kraus v. Trinity Management Services, Inc. (2002) 23 Cal.4th 116	21, 22

Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134	<i>passim</i>
Lance Camper Manufacturing Corp. v. Republic Indemnity Co. (1996) 44 Cal.App.4th 194	25
La Sala v. American Savings & Loan Association (1971) 5 Cal.3d 864	8
McCoy v. Superior Court (2007) 157 Cal.App.4th 225	6, 7, 8, 9
Murphy v. Kenneth Cole Productions, Inc. (2007) 40 Cal.4th 1094	<i>passim</i>
Napa State Hospital v. Flaherty (1901) 134 Cal. 315	20
Oppenheimer v. Sunkist Growers, Inc. (1957) 152 Cal.App.2d Supp. 897	2
People v. Davis (1905) 147 Cal. 346	11
People v. Durbin (1996) 64 Cal.2d 474	20
People v. Randle (2005) 35 Cal.4th 987	11
Pioneer Electronics (USA), Inc. v. Superior Court (2007) 40 Cal.4th 360	9
Sargoy v. Resolution Trust Corp. (1992) 8 Cal.App.4th 1039	17
Smith v. County of Los Angeles (1989) 214 Cal.App.3d 266	18

Smith v. Superior Court (2006) 39 Cal.4th 77	13
Wise v. Pacific Gas and Electric Co. (2005) 132 Cal.App.4th 725	25
Younger v. Superior Court (1978) 21 Cal.3d 102	20

STATUTES

Business and Professions Code

§ 17203	1, 19, 23
---------------	-----------

Code of Civil Procedure

§ 340(a)	1, 3
----------------	------

Labor Code

§ 201	6
§ 202	6
§ 203	<i>passim</i>

CALIFORNIA RULES OF COURT

Rule 8.500(b)(1)	11, 12
------------------------	--------

MISCELLANEOUS

Restatement, Restitution § 1	22
------------------------------------	----

ISSUES PRESENTED FOR REVIEW

1. The Statute of Limitations Issue: When an employee files an action to recover wages that “shall continue as a penalty” under Labor Code Section 203 as a result of the employer’s late payment of final wages, but does not concurrently seek to recover any other unpaid wages, is the statute of limitations for the action to recover penalty wages one year pursuant to Section 340(a) of the Code of Civil Procedure, or is the statute of limitations for the action to recover penalty wages longer than one year pursuant to the provision in Labor Code Section 203 stating that “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”?

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

This case presents the Court with important questions of law decided wrongly in an opinion certified for partial publication after various interested parties stressed the need for guidance on recurring issues of widespread import. Correct resolution of these issues is vital for implementing the fundamental public policy in favor of prompt payment of wages and allowing victims of unfair competition to recover restitution to prevent unjust enrichment.

Labor Code Section 203 provides a remedy to employees who do not receive their final wages promptly. Under Section 203, “the wages of the employee shall continue as a penalty” for up to thirty days when the employer willfully fails to pay the employee’s final wages in a timely manner. Employees have the right to pursue the penalty wages mandated by Section 203, and vindicate their 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, the court of appeal undermined the fundamental public policy in favor of prompt payment of wages by interpreting Section 203 wrongly, in two different ways, contrary to the plain language of the statute and the precedential decisions of this Court. First, the court held that when an employee seeks to recover penalty wages under Section 203 alone, i.e. without concurrently seeking any other unpaid wages, the statute of limitations for the lawsuit is not governed by the provision in Section 203 stating that “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.” Refusing to abide this Court’s instructive recognition in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094 that the legislature plainly intended that Section 203 prescribe its own statute of limitations for actions to recover penalty wages, and that such suits were therefore not governed by the one year limitations period under Section 340(a) of the Code of Civil Procedure, the court ruled that *Murphy* was not controlling and the one year limitations period under Section 340(a) applies when the plaintiff seeks to recover “only” penalty wages under Section 203 (Opinion, p. 4).

Second, in the portion of its opinion certified for publication, the court ruled that a plaintiff cannot recover penalty wages owed under Section 203 as restitution under the Unfair Competition Law (“UCL”). Ignoring the plain language of Section 203 expressly mandating that wages “shall continue as a penalty” when the employer fails to pay final wages in a timely manner, the court reasoned that restitution was not available because “there is no automatic right to the penalty.” (Opinion, p. 10).

This erroneous conclusion resulted from a gross misapplication of the statutory repeal rule, which has nothing to do with the scope of restitution under the UCL. Failing to appreciate that penalty wages must be paid under Section 203 when the employer fails to pay final wages promptly, the court’s ruling on the restitution issue cannot be reconciled with this Court’s decisions in *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178 (restitution available to recover money “due and payable” under the Labor Code) and *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149 (plaintiff has a vested interest in, and can recover as restitution under the UCL, money “directly owed” to the plaintiff).

This Court should grant review of one or both of the important questions of law raised herein to ensure that employees are not deprived the opportunity to vindicate their rights to prompt payment of wages. The court of appeal's ruling gives employees far less time to seek redress for late payment of wages, by seeking to recover penalty wages alone, than intended by the legislature. Moreover, the court's misapplication of the statutory repeal rule in the published portion of its opinion threatens to eviscerate the remedy of restitution under the UCL. Review by this Court is necessary to preserve, for countless employees, access to justice for late payment of wages.

PROCEDURAL HISTORY

I. Trial Court Proceedings

Plaintiff Jorge A. Pineda ("Plaintiff") filed the complaint on October 22, 2007. (ROA 1-7).¹ Plaintiff alleges that he resigned from his employment with defendant Bank of America ("Defendant") on May 11, 2006 after giving two weeks advance notice and that Defendant, instead of paying Plaintiff his final wages when due upon

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.

resignation, did not pay him his final wages until May 15, 2006.

(Complaint ¶ 5; ROA 2).

Plaintiff contends that Defendant's failure to pay him final wages in a timely manner resulted from Defendant's policy or practice of paying terminated employees their final wages without regard for the time payment is due under Labor Code Section 201 or 202. (Complaint ¶ 15; ROA 5). On behalf of a class of employees who, like Plaintiff, worked for Defendant in California and were not paid final wages timely upon termination, Plaintiff asserted a cause of action for penalty wages under Labor Code Section 203 and a cause of action for restitution under the UCL of the penalty wages that were directly owed and payable to class members under Section 203.

On November 27, 2007, more than a month after Plaintiff filed the complaint, Division Three of the Fourth District Court of Appeal ruled in *McCoy v. Superior Court* (2007) 157 Cal.App.4th 225 that the statute of limitations for a claim under Section 203 for penalty wages alone, i.e., where the plaintiff does not also seek to recover unpaid back wages, is one year. On February 13, 2008, this Court denied review of *McCoy*.

Following this development, Defendant filed a motion for judgment on the pleadings. (ROA 58-74). Defendant contended that, in light of *McCoy*, Plaintiff's cause of action under Labor Code Section 203 was barred by the one year statute of limitations. Defendant also contended that, as a matter of law, Plaintiff could not seek to recover penalty wages as restitution under the UCL.

In opposition, Plaintiff acknowledged that *McCoy* obligated the trial court to conclude that Plaintiff's cause of action under Labor Code Section 203 was time barred. In doing so, however, Plaintiff maintained that *McCoy* was wrongly decided and expressly reserved the right to challenge on appeal any order premised on *McCoy*. (Opposition, p.1, n. 2; ROA 97).

With respect to restitution, Plaintiff argued that he did have a viable claim under the UCL because penalty wages owed under Section 203, while serving a penal purpose, are directly payable to employees just like other wages such that employees have a vested ownership interest in penalty wages. Plaintiff contended that Supreme Court precedents dictated this result and pointed out that, in another case brought by Plaintiff's counsel, a Superior Court judge

had ruled that penalty wages could be sought as restitution under the UCL. (Opposition Ex. 1; ROA 111-113).

Finally, Plaintiff requested leave to amend in the event the trial court ruled that Plaintiff did not have a viable claim under the UCL. Plaintiff argued that, under the principles established by this Court in *La Sala v. American Savings & Loan Association* (1971) 5 Cal.3d 864 and its progeny, Plaintiff was entitled to amend the complaint to substitute in his place a suitable class representative, i.e., one not barred by limitations, who could proceed with the cause of action against Defendant under Section 203.

In support of his request for leave to amend, Plaintiff contended that he had the right to take discovery to learn the identity and location of other class members and Plaintiff submitted a declaration attesting to the fact that, shortly after this Court denied review of *McCoy*, Plaintiff commenced efforts to acquire that information. (Karasik Declaration; ROA 79-92). Plaintiff propounded interrogatories in April 2008 (to which Plaintiff had not yet received responses) and, prior to this formal discovery, Plaintiff discussed with Defendant (without reaching a final agreement) the

possibility of Defendant providing the name and address of class members through an “opt out” approach similar to the procedure approved by this Court in *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360.

On May 22, 2008, the court issued a tentative ruling (delivered to the parties electronically) to grant Defendant’s motion in its entirety. (ROA 187). The court ruled that *McCoy* was dispositive of the cause of action under Section 203 and that Plaintiff had not stated a viable claim for restitution under the UCL. The court then denied leave to amend with the following explanation:

As to leave to amend, given that plaintiff has had several months to locate a substitute plaintiff class representative and has thus far been unable to do so, if I granted leave to amend, this case would effectively become a lawsuit in search of a plaintiff, which while within my discretion to allow, I fail to see why I should. Plaintiff and his counsel have known since late November 2007 that there were serious questions as to the viability of the plaintiff as a class representative.

Without waiving his right to challenge any aspect of the Superior Court's order on appeal, Plaintiff submitted on the tentative ruling and, following submission of proposed orders by both Plaintiff and Defendant, the tentative ruling ultimately became the court's final ruling on June 16, 2008. (ROA 185-186). Plaintiff timely filed his notice of appeal on June 19, 2008. (ROA 189).

II. Court Of Appeal Proceedings

Following briefing and oral argument, the court of appeal initially issued an opinion on December 22, 2008. Affirming the judgment in favor of Defendant, the court ruled that the statute of limitations for plaintiff's cause of action under Labor Code Section 203 was one year, Plaintiff did not have a viable cause of action under the UCL, and that the trial court had not abused its discretion in denying Plaintiff leave to amend. The court did not certify for publication any part of this initial opinion.

Thereafter, Defendant, the Employer's Group, and Ralphs Grocery Company, a defendant in another class action lawsuit seeking recovery of penalty wages, requested the court to publish all or part of its opinion. On January 21, 2009, the court granted

rehearing on its own motion and issued a revised opinion (copy attached as Exhibit 1). The court affirmed judgment for Defendant on the same grounds as before, but certified for publication the introductory portion of its opinion and the section of the opinion rejecting Plaintiff's claim for restitution under the UCL. Since the court had already granted rehearing on its own motion, Plaintiff did not file a petition for rehearing. The court of appeal's published opinion became final on February 20, 2009.

REASONS WHY REVIEW SHOULD BE GRANTED

Under Rule 8.500(b)(1) of the California Rules of Court, review is appropriate to decide an "important question of law" not previously decided by the Court. *People v. Randle* (2005) 35 Cal.4th 987, 1002; *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 859. Review is also appropriate to "secure uniformity of decision." Review for this reason enables the Court's supervision and control over district courts of appeal "to secure harmony and uniformity in the decisions, their conformity to the settled rules and principles of law, a uniform rule of decision throughout the state." *People v. Davis* (1905) 147 Cal. 346, 348.

Both prongs of Rule 8.500(b)(1) provide grounds for review of the statute of limitations issue presented by Plaintiff, and both prongs of Rule 8.500(b)(1) provide grounds for review of the restitution issue presented by Plaintiff. Each issue presents an important question of law, and the court of appeal decided each issue incorrectly by failing to conform to this Court's precedents.² The dire ramifications of the court of appeal's erroneous rulings, to employees throughout the state of California, cry out for review.

I. The Court Should Grant Review To Decide How Long An Employee Has To Sue For Penalty Wages Alone

Both the statute of limitations issue and the restitution issue fundamentally involve how long an employee has to sue for penalty wages alone, i.e. without also seeking to recover other unpaid wages. The Court should grant review to settle this important question of law the court of appeal decided incorrectly.

² Plaintiff maintains that the court of appeal also ruled contrary to this Court's precedents in upholding the trial court's order denying Plaintiff leave to amend, but does not seek review of that aspect of the court's decision. While the scope of a trial court's discretion to deny leave to amend for the purpose of substituting a class representative is an important issue worthy of review, reversal of the court of appeal on the statute of limitations issue or the restitution issue would render the leave to amend issue moot.

A. Determining How Long An Employee Has To Sue For Penalty Wages Alone Is Vital For Implementing Public Policy In Favor Of Prompt Payment Of Wages

Labor Code Section 203 implements 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. The Court has expressly recognized that the prompt payment of an wages is a societal concern “essential to the public welfare.” *In re Trombley* (1948) 31 Cal.3d 801, 809. *See also, Cuadra v. Millan* (1988) 17 Cal.4th 855, 871 (review in case involving remedy for unpaid wages appropriate where “the issue affects a substantial segment of the workforce so its prompt resolution is clearly in the public interest”).

Review is necessary to implement this fundamental public policy by determining how long an employee has to bring a lawsuit for recovery of penalty wages owed under Section 203. Whether Section 203 provides its own statute of limitations for such lawsuits, and whether penalty wages can be recovered as restitution under the UCL, dictate the applicable limitations period.

Each of the requests for publication submitted to the court of appeal attests to the importance of determining the proper claims period in actions seeking recovery of penalty wages. Ralphs, for example, requested publication because the court decided issues “of widespread and unquestionable importance to employers and employees in this state.” (Ralphs pub. req. p. 1).

The importance of the time period for bringing a lawsuit for penalty wages alone is magnified by the fact that, because Section 203 provides for a maximum recovery of thirty days worth of penalty wages, claims for penalty wages alone are typically small and not pursued on an individual basis. Instead, such claims are almost always brought in connection with class action lawsuits.

In fact, in the last few years class action lawsuits for penalty wages have been filed against many large and well known employers in California, including Aramark, Bank of America, Bridgestone, Brinks, Citibank, Kaiser, Staples, Target, United Parcel Service and Wells Fargo. As the economy worsens and more employees lose their jobs, the number of class actions filed on behalf of employees paid their final wages late will only increase.

Precisely because there have been so many class action lawsuits for penalty wages in recent years, the Employers Group recognized that the issues in this case are exceptionally important because they have arisen in “an increasing number of lawsuits” and “California employers are clearly facing a sharp rise in wage-hour class-action lawsuits.” (Employers Group pub. req. p. 2). The grounds for publication invoked by the Employers Group, as well as by Defendant and Ralphs, equally support review by this Court. Clarifying how long an employee has to sue for penalty wages alone “is of paramount public importance” (Employers Group pub. req. p. 2), involves “an issue of recurring significance” (Defendant’s pub. req. p. 1), and “would provide much needed guidance on this important issue” (Ralphs pub. req. p. 3).

The ramifications of the court of appeal’s opinion illustrate the importance of the issues in this case. Effectively ruling that actions for penalty wages alone can only be brought within a one year limitations period, the court of appeal deprived Plaintiff and thousands of similarly situated employees the ability to sue Defendant in a class action for penalty wages. Moreover, the published portion

of the court's opinion, as a precedent that must be followed by trial courts, will deprive countless other employees the ability to bring a lawsuit to recover penalty wages alone beyond a one year limitations period. Wrongfully denying a day in court to so many employees who merely wish to vindicate their rights to prompt payment of wages results in a vast miscarriage of justice.

B. The Court Of Appeal Did Not Follow Precedent

The court of appeal's failure to follow the precedential decisions of this Court provides additional reason for this Court to determine how long an employee has to sue for penalty wages alone. With respect to the statute of limitations issue, the court of appeal did not follow *Murphy*. With respect to the restitution issue, the court of appeal did not follow *Cortez* and *Korea Supply*.

In *Murphy*, this Court clearly and cogently explained that the legislature did not intend claims under Section 203 to be governed by a one year period of limitations:

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. . . .

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.

The court of appeal erroneously declined to follow *Murphy*, and improperly agreed with the court of appeal's decision in *McCoy* instead, on the grounds that the foregoing passage constitutes dicta. Supreme Court dicta may not be "blithely ignored" but is ordinarily considered "persuasive" and entitled to "serious respect." *Bunch v. Coachella Water Valley District* (1989) 214 Cal.App.3d 203, 212. Thus, "even dicta of the Supreme Court should not be disregarded by an intermediate court without a compelling reason." *California Coastal Commission v. Office of Admin. Law* (1989) 210 Cal.App.3d 758, 763. "Merely characterizing the Supreme Court's reasoning as dicta does not mean that such reasoning is wrong, unreasonable, or should not be followed." *Sargoy v. Resolution Trust Corp.* (1992) 8

Cal.App.4th 1039, 1045. Dicta may not be rejected without a compelling reason but should be followed “where it demonstrates a thorough analysis of the issue or reflects compelling logic.” *Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 297.

In *Cortez* and *Korea Supply*, this Court ruled that restitution under the UCL encompasses money “due and payable” or “directly owed” to a victim of unfair competition. These holdings squarely apply to penalty wages owed under Section 203 because an employer who willfully fails to pay wages in a timely manner must pay the penalty wages. Judge Velasquez of the Orange County Superior Court understood the import of this Court’s precedents when he ruled that penalty wages could be pursued as restitution under the UCL:

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).

Despite the clear mandate of Section 203 that “the wages of the employee shall continue as a penalty” when the employer willfully fails to pay wages in a timely manner, the court of appeal found *Cortez* and *Korea Supply* inapplicable because, under the statutory repeal rule articulated in *Murphy*, “the right to a penalty . . . does not vest until someone has taken an action to enforce it.” *Murphy*, 40 Cal.4th at 1108. The court of appeal thus concluded that “there is no automatic right to the penalty.” (Opinion, p. 10).

The court erred because the statutory repeal rule has nothing to do with the concept of a vested “interest” under Business and Professions Code Section 17203 that supports a claim for restitution. The statutory repeal rule explains that 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; *Younger v. Superior Court* (1978) 21 Cal.3d 102, 109. Determining whether a right is vested for the purposes of the statutory repeal rule is “the test to be applied in giving the effect to be given the repeal of penalty and forfeiture statutes.” *People v. Durbin* (1996) 64 Cal.2d 474, 478-79. The statutory repeal rule simply has no applicability in cases, like this one, that do not involve a repeal of a statutory remedy.

In sum, the court of appeal erred by dismissing as dicta the explication in *Murphy* of the legislature’s intent when it enacted the statute of limitations language in Section 203, and the court of appeal erred by relying on the statutory repeal rule as grounds for not following *Cortez* and *Korea Supply*. The Court should grant review of the court of appeal’s erroneous rulings to secure the uniformity of decision required by adherence to this Court’s precedents.³

³ Not mentioned by the court of appeal in its opinion, but noted by Defendant in its request for publication (Defendant pub. req. p. 2), there is an unpublished appellate decision from the Second District Court of Appeal that disagrees with and criticizes *McCoy*. Although this Court denied a request for publication in that case, the conflict of opinions on the statute of limitations issue nevertheless remains.

II. The Court Should Grant Review To Decide Whether Penalty Wages Owed Under Labor Code Section 203 Can Be Recovered As Restitution Under The UCL

The Court should grant review to decide whether penalty wages can be recovered as restitution under the UCL. The restitution issue involves the scope of “an interest” in money or property that serves as the subject of restitution. Whether penalty wages can be recovered as restitution ultimately turns on whether the employee seeking recovery of penalty wages has an “ownership” interest in the penalty wages. *See, Kraus v. Trinity Management Services, Inc.* (2002) 23 Cal.4th 116, 127; *Korea Supply*, 29 Cal.4th at 1149.

Determining the scope of restitution is vital for enforcing the UCL to prevent and provide a remedy for the unjust enrichment that would otherwise result from unfair competition. In *Cortez*, the Court granted review to decide whether unpaid overtime wages could be recovered as restitution under the UCL. Review should now be granted to determine whether unpaid penalty wages also fall within the scope of restitution. Review is also needed to correct the court of appeal’s misapplication of the statutory repeal rule that threatens to preclude recovery under the UCL of money owed pursuant to statute.

A. Determining The Scope Of Restitution Under The UCL Is Vital For Preventing And Remediating The Unjust Enrichment That Results From Unfair Competition

Restitution under the UCL prevents unjust enrichment by restoring money rightfully belonging to one person that was wrongfully acquired by another. An order for restitution under the UCL compels a defendant “to return money obtained through an unfair business practices to those persons in interest from whom the property was taken.” *Kraus*, 23 Cal.4th at 126-27. Restitution thus serves “to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.” *Korea Supply*, 29 Cal.4th at 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”). Consistent with this Court’s pronouncements, *Juarez v. Arcadia Financial, Ltd.* (2007) 152 Cal.App.4th 889 succinctly summarizes the basic premise for restitution under the UCL: “[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.” *Juarez*, 152 Cal.App.4th at 913 (citing Restatement, Restitution § 1).

Determining the scope of restitution available under Business and Professions Code Section 17203 is vital to enforcement of the UCL. 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. This purpose cannot be served by erroneous court of appeal rulings that restrict the contours of restitution too narrowly. Victims of unfair competition should not be left without redress, and perpetrators of unfair competition should not be allowed to retain their ill-gotten gains, for lack of this Court’s guidance on the scope of restitution.

The impact of the court of appeal’s ruling underscores the need for review in this case. The court of appeal’s opinion leaves thousands of employees without the ability to seek recovery of unpaid penalty wages owed to them, and allows Defendant to reap the benefit of not paying penalty wages it was required by statute to pay. The Court should grant review to ensure that employees paid their final wages late do have recourse under the UCL to prevent and remedy their employers’ wrongful retention of penalty wages.

B. Misapplication Of The Statutory Repeal Rule To Preclude Restitution Of Money Owed By Statute Would Undermine The UCL

The court of appeal's misapplication of the statutory repeal rule threatens to undermine the UCL by precluding restitution of any money owed by statute. If the statutory repeal rule governed the scope of restitution under the UCL, money owed to a person by statute could never give rise to a "vested interest" sufficient to support a claim for restitution because the legislature could repeal the statutory basis for the obligation before a final judgment.

For example, because the legislature can repeal the statutory right to overtime wages, an employee's claim for overtime wages is not "vested" for the purposes of the statutory repeal rule. Thus, if the statutory repeal rule defined the scope of restitution, an employee could not seek unpaid overtime wages as restitution under the UCL.

But, under *Cortez*, that is not the law. Employees can sue to recover unpaid wages as restitution under the UCL despite the fact that an employee's right to receive overtime wages exists only by statute, and despite the fact that the legislature has the ability to eliminate the statutory right to overtime wages whenever it wishes to

do so. *Cortez* demonstrates that the statutory repeal rule has nothing to do with the scope of restitution under the UCL and cannot be used to preclude restitution of money owed by statute.

The court of appeal's use of the statutory repeal rule to define the scope of restitution not only conflicts with *Cortez*, but departs from other well settled principles of law. Allowing the scope of restitution to depend on whether or not a right is "vested" under the statutory repeal rule confuses the legal sufficiency of the plaintiff's claim with the plaintiff's ability to prove his or her claim at trial.

Plaintiff filed an appeal after the trial court, in granting Defendant's motion for judgment on the pleadings, ruled that Plaintiff failed to state a viable cause of action for restitution under the UCL. For the purposes of determining whether the trial court ruled correctly on the restitution issue, the court of appeal was required to assume the truth of Plaintiff's allegations. *See, Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 198; *Wise v. Pacific Gas and Electric Co.* (2005) 132 Cal.App.4th 725, 738. Accordingly, Plaintiff's allegations that Defendant willfully failed to pay final wages in a timely manner and was therefore legally

obligated to pay penalty wages, and that as a result penalty wages were directly owed to Plaintiff and other class members, were necessarily deemed admitted and could not be controverted on appeal.

By relying on the statutory repeal rule, the court of appeal erroneously failed to assume the truth of Plaintiff's allegations. The court ruled that Plaintiff did not have an "automatic right" to penalty wages because, in order to recover penalty wages, an employee "must first bring an enforcement action and establish that the employer willfully failed to timely pay his or her wages." (Opinion, p. 10). In essence, the court ruled that Plaintiff did not have a viable claim for restitution of penalty wages under the UCL because Plaintiff would have to prove his claim for penalty wages at trial!

Considering the elements of a cause of action for overtime wages illustrates the absurdity of the court of appeal's analysis. Under *Cortez*, an employee who asserts a claim for unpaid overtime wages can clearly pursue a cause of action for restitution under the UCL. Yet, at trial, the employee must prove all the elements of the claim in order to recover the restitution sought. 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* demonstrates that the plaintiff's ability to prove all the elements of a claim for restitution of unpaid overtime wages has no bearing on the viability of the cause of action. Similarly, whether or not a plaintiff can ultimately prove at trial all the elements of a claim for restitution of penalty wages cannot determine the viability of the cause of action.

In sum, the court of appeal's misapplication of the statutory repeal rule to determine the scope of restitution makes no sense and would preclude restitution of money owed by statute contrary to this Court's holding in *Cortez*. If the Court does not grant review to decide whether penalty wages can be recovered as restitution under the UCL, trial courts will necessarily follow the same erroneous path that wrongfully limits the scope of restitution under the UCL. This Court should grant review to secure uniformity of decision on the important restitution issue and prevent the perpetuation of misguided legal analysis that threatens to undermine the UCL by precluding restitution of money owed pursuant to statute.

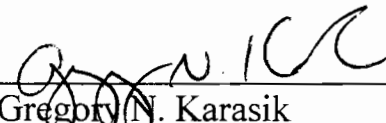
CONCLUSION

Plaintiff respectfully requests the Court to grant review and decide how long an employee has to sue for penalty wages alone and/or whether penalty wages owed under the Labor Code can be recovered as restitution under the UCL. Correction of the court of appeal's erroneous rulings on these important questions of law is needed to preserve the ability of employees to vindicate their rights to prompt payment of final wages and prevent evisceration of the UCL.

Dated: February 24, 2009

SPIRO MOSS BARNES LLP

By:

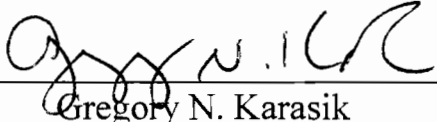


Gregory N. Karasik
Attorneys for Petitioner

CERTIFICATE OF WORD COUNT

The undersigned counsel certifies that the text of this petition for review uses a proportionately spaced Times New Roman 14-point typeface and consists of 5,549 words as counted by the word processing program used to generate this petition for review.

Dated: February 24, 2009



Gregory N. Karasik



CERTIFIED FOR PARTIAL PUBLICATION*
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

JORGE A. PINEDA,
Plaintiff and Appellant,
v.
BANK OF AMERICA, N.A.,
Defendant and Respondent.

A122022

(City & County of San Francisco
Super. Ct. No. 468417)

Plaintiff Jorge A. Pineda appeals an adverse judgment entered after the trial court granted a motion for judgment on the pleadings by defendant Bank of America, N.A. He contends that the court applied the wrong statute of limitations to his claim under Labor Code¹ section 203 for penalties incurred for the late payment of wages; that the court erred in concluding that section 203 penalties are not restitution within the meaning of Business and Professions Code section 17203; and that the court abused its discretion in denying him leave to amend. In the unpublished portion of this opinion we adopt the conclusion reached in *McCoy v. Superior Court* (2007) 157 Cal.App.4th 225, 233, that the extended statute of limitations for the recovery of section 203 penalties found in that section applies only if the penalties are sought in conjunction with an action for recovery of the unpaid wages. Since plaintiff here acknowledges that all wages due were paid before this action was filed, we reject his contention that the court erred in applying the one-year statute of limitations for an action upon a statute for a penalty found in Code of Civil Procedure section 340, subdivision (a), and we also reject the contention that the

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts 2 and 3 of the Discussion.

¹ All statutory references are to the Labor Code unless otherwise noted.

court abused its discretion in denying plaintiff leave to amend his complaint. In the published portion of the opinion we affirm the trial court's conclusion that section 203 penalties may not be recovered as restitution under Business and Professions Code section 17203.

Factual and Procedural Background

Plaintiff's complaint, filed on October 22, 2007, alleges that "Plaintiff was employed by defendant Bank of America within the three-year period preceding the filing of the complaint Plaintiff gave Bank of America two weeks advance notice of his resignation, which occurred on May 11, 2006. Bank of America did not pay him his final pay until May 15, 2006." Plaintiff seeks to represent a class of persons formerly employed by Bank of America "whose final wage payment occurred after their last day of employment." His first cause of action alleges that "Bank of America failed to pay plaintiff and members of the class final wages timely upon separation from employment in accordance with Labor Code section 201 or 202" and that as a result of Bank of America's conduct, "plaintiff and members of the class are entitled to recover the full amount of their continuation wages under Labor Code section 203" Plaintiff's second cause of action alleges that "[t]he unlawful conduct of Bank of America alleged herein constitutes unfair competition within the meaning of Business and Professions Code section 17200." As a result of the unfair competition, the pleading continues, "plaintiff and members of the class were deprived of their rights to timely payment of final wages . . . and were not paid continuation wages owed to them under Labor Code section 203." The complaint seeks "restitution of all the unpaid continuation wages" owed to plaintiff and other class members under Labor Code section 203.

The trial court ultimately granted defendant's motion for judgment on the pleadings. The trial court concluded that plaintiff's claim under the Labor Code was barred by the one-year statute of limitations for the recovery of a penalty prescribed by Code of Civil Procedure section 340, subdivision (a), and that plaintiff could not allege a cause of action under the Unfair Competition Law (UCL) because section 203 penalties are not recoverable as restitution under Business and Professions Code section 17203.

The court denied plaintiff leave to amend to substitute a new plaintiff in the first cause of action. Plaintiff filed a timely notice of appeal.

Discussion

1. *Standard of Review*

“The standard of review for a motion for judgment on the pleadings is the same as that for a general demurrer: We treat the pleadings as admitting all of the material facts properly pleaded, but not any contentions, deductions or conclusions of fact or law contained therein. . . . We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any theory.” (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298.)

2. *Plaintiff's claim for penalties under section 203 is barred by the statute of limitations.*

Section 202, subdivision (a) provides in relevant part: “If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.” Under section 203, “If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefore is commenced; but the wages shall not continue for more than 30 days. . . . [¶] 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.” The statute of limitations on an action to recover unpaid wages under section 202 is three years. (Code Civ. Proc., § 338, subd. (a); *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1108-1109 (*Murphy*).) Plaintiff argues that the three-year statute of limitations is applicable to this action by virtue of section 203.

In *McCoy v. Superior Court* (2007) 157 Cal.App.4th 225, 233 (*McCoy*), the court held that the extended statute of limitations set forth in section 203 applies only if the

penalties are sought in conjunction with an action for the unpaid wages. If the action seeks to recover only waiting time penalties under section 203, the one-year statute of limitations found in Code of Civil Procedure section 340, subdivision (a) applies. Code of Civil Procedure section 340, subdivision (a) sets forth a one-year statute of limitations for “[a]n action upon a statute for a penalty or forfeiture, if the action is given to an individual . . . except if the statute imposing it prescribes a different limitation.”

Section 203 is a “statute for a penalty” within the meaning of Code of Civil Procedure section 340, subdivision (a). (*Murphy, supra*, 40 Cal.4th at p. 1108 [“section 203 establishes that the unpaid wages continue to accrue as a ‘penalty’ ”]; *McCoy, supra*, 157 Cal.App.4th at p. 229.)

In *McCoy*, the court found that the limitations language of section 203, subdivision (b) is ambiguous as to whether it applies to an action for penalties alone. Relying on legislative intent and its understanding of the purpose and language of the statute, the court concluded that the limitations period is extended under subdivision (b) only when penalties are sought in conjunction with an action for unpaid wages. “Section 203 was enacted to give employees additional time to sue for waiting time penalties when they also bring an action for late wages.” (*McCoy, supra*, 157 Cal.App.4th at p. 233.) The court reasoned: “Provision for a waiting time penalty serves as an inducement to pay wages timely. Allowing for recovery of such a penalty as part of an action for payment of back wages is consistent with that intent. Within this framework, making the statute of limitations coincident for both the wages and the penalty furthers the statute’s purpose. It would be unwieldy if an employee were required to bring an action for the penalties within one year but have a longer time to sue for unpaid wages [T]he language of the statute, i.e., that suit for penalties may be filed before expiration of the statute of limitations ‘on *an action for the wages* from which the penalties arise’ (italics added [in *McCoy*]), and its intent make clear that the concurrent statute of limitations for wages and penalties was enacted more for an employee’s convenience than for the purpose of establishing a time to independently recover a penalty without regard to whether and when the back wages were paid.” (*Id.* at pp. 229-230.) When an employee has been paid

his wages, there is no reason and there was no intent to allow the employee to delay more than a year before filing an action for waiting time penalties alone. We agree with the reasoning in *McCoy*. Although far from clear, the language of the statute implies that there is in fact “an action for the wages from which the penalties arise” for section 203, subdivision (b) to apply.

Contrary to plaintiff’s argument, this interpretation does not allow an employer to use the statute of limitations as an offensive tool to defeat a former employee’s claims for penalties by delaying payment of the unpaid wages until more than one year from the termination of employment, nor does it provide an incentive for the employer to delay payment of the unpaid wages for that reason. “If an employer waits to pay wages beyond one year, he is subject to a longer statute of limitations for the penalty than if he pays sooner before a wage claim is filed.” (*McCoy, supra*, 157 Cal.App.4th at p. 230.)

We also agree with *McCoy* that the dictum in *Murphy, supra*, 40 Cal.4th at pages 1108-1109 (“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”) does not require a contrary conclusion. (*McCoy, supra*, 157 Cal.App.4th at p. 233.) The issue under consideration in *Murphy* was whether the additional hour of pay that section 226.7 requires an employer to pay an employee denied a mandatory meal or rest period constitutes wages subject to the three-year statute of limitations or a penalty subject to the one-year statute. As the *McCoy* court stated, the language of the opinion “does not purport to distinguish between an action where both wages and a waiting time penalty are sought as opposed to one for penalties only ‘An appellate decision is not authority for everything said in the court’s opinion but only “for the points actually involved and actually decided.” ’ ” (*McCoy, supra*, at p. 233.)

Pineda’s complaint, filed on October 22, 2007, alleges that he was paid his final wages on May 15, 2006, and he makes no claim for the payment of any additional wages. Accordingly, section 203, subdivision (b) does not apply and the one-year statute of limitations governs. Therefore, the court ruled correctly that the cause of action for penalties is barred by the statute of limitations.

3. ***The trial court did not abuse its discretion in denying plaintiff leave to amend.***

Plaintiff argues in the alternative that if his personal claim under section 203 is barred by the statute of limitations, the trial court erred in denying him leave to amend to substitute a suitable class plaintiff. Under Code of Civil Procedure section 473, subdivision (a)(1), “The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party” In general, courts liberally allow amendments to a complaint for the purpose of permitting a plaintiff who lacks or has lost standing to substitute as plaintiff the true real parties in interest. (*CashCall, Inc. v. Superior Court* (2008) 159 Cal.App.4th 273.) “Leave to amend a complaint is thus entrusted to the sound discretion of the trial court. ‘ . . . The exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse. More importantly, the discretion to be exercised is that of the trial court, not that of the reviewing court. Thus, even if the reviewing court might have ruled otherwise in the first instance, the trial court’s order will yet not be reversed unless, as a matter of law, it is not supported by the record.’ ” (*Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal.App.4th 497, 506.)

Here, the trial court explained that “given that plaintiff has had several months to locate a substitute plaintiff/class representative and had thus far been unable to do so, if I granted leave to amend, this case would effectively become a lawsuit in search of a plaintiff, which while within my discretion to allow, I fail to see why I should. Plaintiff and his counsel have known since late November 2007 [when *McCoy* was decided] that there were serious questions as to the viability of the plaintiff as a class representative.” Plaintiff argues that he cannot be faulted for failing to locate a proper plaintiff because the use of pre-certification discovery to locate a suitable class representative is common and proper. (*Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 300-301 [In deciding whether to order precertification discovery of the identities of potential class members, a “trial court must . . . expressly identify any potential abuses of the class action procedure that may be created if the discovery is permitted, and weigh the danger of such abuses against the rights of the parties under the circumstances”]; *Best Buy Stores, L.P. v.*

Superior Court (2006) 137 Cal.App.4th 772, 779 [“Discovery to ascertain a suitable class representative is proper”]; *CashCall, Inc. v. Superior Court, supra*, 159 Cal.App.4th at pp. 288-289.) He also argues that he had no obligation to locate a substitute plaintiff until the court granted defendant’s motion.

That it would have been within the court’s discretion to allow pre-certification discovery to ascertain the identity of other members of the putative class does not compel the conclusion that the court abused its discretion in denying leave to amend. Pineda was reasonably put on notice of the need to identify a substitute plaintiff six months prior to the hearing, when *McCoy* was decided, but failed to do so. Plaintiff reports that he began negotiating with defendant regarding pre-certification discovery shortly after the Supreme Court denied review of *McCoy* in February 2008. Plaintiff propounded interrogatories requesting the names and addresses of class members. However, although the interrogatories were past due prior to the submission of his points and authorities opposing the motion for judgment on the pleadings, he did not move to compel responses prior to the court’s ruling. In light of plaintiff’s failure to pursue discovery diligently, his reliance on the need for pre-certification discovery is not persuasive. While plaintiff surely had the right to wait until the court ruled, he was not relieved of the risks associated with such a strategy. Moreover, it was also relevant to the exercise of the court’s discretion that the action was still in its infancy, so that the effect of the dismissal was not to cause substantial time and expense of extended pretrial proceedings to be wasted. On balance, we cannot say that the court abused its discretion in denying plaintiff leave to amend.

4. Penalties under section 203 cannot be recovered as restitution under the UCL.

Plaintiff’s second cause of action alleges that defendant’s failure to pay his final wages immediately upon termination constitutes an unfair business practice within the meaning of the UCL. As set forth above, plaintiff’s complaint does not seek restitution of unpaid wages. He seeks only “restitution of all the unpaid continuation wages owed under Labor Code section 203.” The trial court granted defendant’s motion for judgment on the pleadings on the ground that continuation wages made payable by section 203 are

a penalty, rather than wages, the recovery of which does not constitute restitution within the meaning of Business and Professions Code section 17203.²

“A UCL action is an equitable action by means of which a plaintiff may recover money or property obtained from the plaintiff or persons represented by the plaintiff through unfair or unlawful business practices. It is not an all-purpose substitute for a tort or contract action. ‘[D]amages are not available under [Business and Professions Code] section 17203.’ ” (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 173; *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1150.)

Unpaid wages can be recovered as restitution pursuant to Business and Professions Code section 17203. “[A]n order that a business pay to an employee wages unlawfully withheld is consistent with the legislative intent underlying the authorization in [Business and Professions Code] section 17203 for orders necessary to restore to a person in interest money or property acquired by means of an unfair business practice.” (*Cortez v. Purolator Air Filtration Products Co.*, *supra*, 23 Cal.4th at p. 178.) “The concept of restoration or restitution, as used in the UCL, is not limited only to the return of money or property that was once in the possession of that person. The commonly understood meaning of ‘restore’ includes a return of property to a person from whom it was acquired [citation], but earned wages that are due and payable pursuant to section 200 et seq. of the Labor Code are as much the property of the employee who has given his or her labor to the employer in exchange for that property as is property a person surrenders through an unfair business practice. An order that earned wages be paid is therefore a restitution remedy authorized by the UCL. The order is not one for payment of damages.” (*Id.* at p. 178.)

² Business and Professions Code section 17203 provides in pertinent part: “Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.”

Penalties under section 203, however, are not imposed as compensation for the labor of the employee, but are triggered by the employer's willful failure to timely pay the wages that have been earned. As the court explained in *Tomlinson v. Indymac Bank, F.S.B.* (C.D.Cal. 2005) 359 F.Supp.2d 891, 895, "the remedy contained in Section 203 is a penalty because Section 203 does not merely compel [the employer] to restore the *status quo ante* by compensating Plaintiffs for the time they worked; rather, it acts as a penalty by punishing [the employer] for willfully withholding the wages and forces [the employer] to pay Plaintiffs an additional amount. This type of payment clearly is not restitutionary, and thus cannot be recovered under the UCL." (See also *Montecino v. Spherion Corp.* (C.D.Cal. 2006) 427 F.Supp.2d 965, 967 ["§ 203 payments are clearly a penalty, and thus cannot be claimed pursuant to the UCL"]; *In re Wal-Mart Stores, Inc. Wage and Hour Litigation* (N.D.Cal. 2007) 505 F.Supp.2d 609, 619; *Murphy*, *supra*, 40 Cal.4th at pp. 1108-1109.)³

Plaintiff argues that section 203 penalties are recoverable as restitution not for the employee's past services, but for a vested property interest wrongly retained by the employer. Plaintiff suggests that an employee has a vested right to receive the penalty that arises immediately upon the employer's willful failure to pay final wages upon termination. Relying on *Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, 29 Cal.4th at page 1150, the plaintiff suggests that the employee's interest in the penalty payment can "be likened to 'property' converted by [the employer] that can now be the subject of a constructive trust." However, in *Korea Supply*, the court reiterated that "[t]o create a constructive trust, there must be a res, an 'identifiable kind of property or entitlement in defendant's hands.' [Citation.] As the United States Supreme Court recently said, a constructive trust requires 'money or property identified as belonging in good conscience to the plaintiff [which can] clearly be traced to particular funds or property in the

³ We note that in *Cortez v. Purolator Air Filtration Products Co.*, *supra*, 23 Cal.4th at pages 169-170, the plaintiff sought to recover waiting time penalties in conjunction with her claim for unpaid wages under the Labor Code but did not seek to recover such penalties as restitution under the UCL.

defendant's possession.' ” (*Ibid.*) Despite plaintiff's creative attempt to recharacterize the liability imposed by the statute, section 203 penalties do not meet this definition. There is no automatic right to the penalty. The employee must first bring an enforcement action and establish that the employer willfully failed to timely pay his or her wages. (*Murphy, supra*, 40 Cal.4th at p. 1108 [“Labor Code provisions imposing penalties state that employers are ‘subject to’ penalties and the employee or Labor Commissioner must first take some action to enforce them. The right to a penalty . . . does not vest until someone has taken action to enforce it”]; see also *People v. Durbin* (1966) 64 Cal.2d 474, 479 [“No person has a vested right in an unenforced statutory penalty or forfeiture”].)

Hence, the trial court properly granted defendant's motion for judgment on the pleadings with regard to plaintiff's second cause of action.

Disposition

The judgment is affirmed. Defendant is to recover its costs on appeal.

Pollak, Acting P. J.

We concur:

Siggins, J.

Jenkins, J.

Trial court: City & County of San Francisco

Trial judge: Hon. Harold E. Kahn

Counsel for plaintiff and appellant: SPIRO MOSS BARNES LLP
Gregory N. Karasik

Counsel for defendant and respondent: PAUL, HASTINGS, JANOFSKY & WALKER LLP
Maria A. Audero
Stephen P. Sonnenberg

DECLARATION OF SERVICE BY MAIL

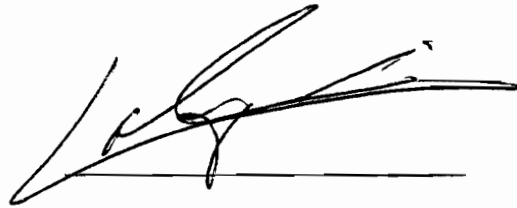
I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 11377 W. Olympic Boulevard, Fifth Floor, Los Angeles, California 90064-1683.

2. That on February 24, 2009 declarant served the **PETITION FOR REVIEW** by depositing a true copy thereof in a United States mail box at Los Angeles, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 24th day of February, 2009 at Los Angeles, California.

A handwritten signature in black ink, appearing to read 'Cole Oliver', written over a horizontal line.

Cole Oliver

Jorge A. Pineda v. Bank of America
Service List - 10/08/2008

Counsel for Defendant and Respondent, Bank of America

Maria Audero
PAUL HASTINGS
515 South Flower Street
Twenty-Fifth Floor
Los Angeles, CA 90071
Telephone: (213) 683-6000
Facsimile: (213) 627-0705

Steven Sonnenberg
PAUL HASTINGS
Park Avenue Tower
75 E. 55th Street, First Floor
New York, NY 10022
Telephone: (212) 318-6000
Facsimile: (212) 319-4090

Other Interested Persons

San Francisco County District
Attorney
Hall of Justice
850 Bryant Street, Room 322
San Francisco, CA 94103
Telephone: (415) 553-1751

San Francisco Superior Court
The Honorable Harold E. Kahn
Department 604
400 Mcallister St # 103
San Francisco, CA 94102

Ronald A. Reiter
Supervising Deputy Attorney
General
Consumer Law Section
Office of the Attorney General
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102
Telephone: (415) 703-5500

California Court of Appeal
First Appellate District
Division Three
350 McAllister Street
San Francisco, CA 94102

