No. S241812

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRETT VORIS,
Plaintiff and Appellant,

v.

GREG LAMPERT,
Defendant and Respondent.

After a Decision by the Court of Appeal,
Second Appellate District, Division Three, Case No. B265747

Appeal from the Superior Court for the County of Los Angeles, Case No. BC408562, The Honorable Michael L. Stern Presiding

PLAINTIFF AND APPELLANT BRETT VORIS'S ANSWER TO *AMICI CURIAE* BRIEF OF EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL

ANDERSON YEH PC
EDWARD M. ANDERSON (SBN 198183)
REGINA YEH (SBN 266019)
401 Wilshire Boulevard, 12th Floor
Santa Monica, CA 90401
(310) 496-4270
edward@andersonyehlaw.com
regina@andersonyehlaw.com

Attorneys for Plaintiff and Appellant

No. S241812

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRETT VORIS,
Plaintiff and Appellant,

v.

GREG LAMPERT,
Defendant and Respondent.

After a Decision by the Court of Appeal,
Second Appellate District, Division Three, Case No. B265747

Appeal from the Superior Court for the County of Los Angeles, Case No. BC408562, The Honorable Michael L. Stern Presiding

PLAINTIFF AND APPELLANT BRETT VORIS'S ANSWER TO *AMICI CURIAE* BRIEF OF EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL

ANDERSON YEH PC
EDWARD M. ANDERSON (SBN 198183)
REGINA YEH (SBN 266019)
401 Wilshire Boulevard, 12th Floor
Santa Monica, CA 90401
(310) 496-4270
edward@andersonyehlaw.com
regina@andersonyehlaw.com

Attorneys for Plaintiff and Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

I. INTRODUCTION

"Thou shalt not steal" is one of the most fundamental social covenants. This case puts to the Court the question of whether a bad-intentioned, willfully acting individual who controls an employee's corporate employer can be held accountable under this, one of the oldest and most basic of rules, the simplest expression of which, in the context of civil law, is the common law tort of conversion.

As discussed in prior briefing, while the question is an open one, the long-building weave of California law and policy overwhelmingly teaches that the answer to the question should be "yes," unless the Court agrees to a special hole in California's legal and social tapestry, to give the individuals who control corporate employers broad immunity from common law accountability, even for the most conscious and malicious acts of employee wage theft.

The brief from amici curiae Employers Group and California Employment Law Council (collectively the "Employers" and their brief the "Employers' Brief" or "EB") does not even attempt to defend the unquestionably egregious conduct of the thieving defendant here. Instead, the Employers essentially ask the Court to look away from that conduct, and also from the simple and ancient prohibition on stealing by providing a "backdrop" – an alternative tapestry – where employer-employee wage relations are too complicated for this Court to be allowed to touch without risking larger economic doomsdays: where earned wages are mere debts and not property at all; that regardless, the Legislature has the issue well in hand with a myriad of statutes and other codified remedies directed at the wage theft problem; and that adding common law conversion

would not be meaningful to employees or positively influence employer wage conduct.

The Employers' alternative tapestry "backdrop" is so far removed from the actual legal, policy and social situation with respect to wage theft that it repeatedly gets tangled in its own inconsistencies:

The argument that a conversion remedy would be superfluous is strongly belied by the several pages that the Employers' Brief spend arguing against conversion exactly because it would provide, among other things, the remedy of punitive damages. What the Employers' Brief obviously avoids addressing is that, if individuals controlling corporate employers faced a punitive damages possibility, they might actually cause the corporate employers to pay the employees' earned wages in the first place, such that litigations and settlements would arise less frequently.

That the existing legal and policy weave does not already provide potential inherent limits on possible abuse is also belied by the Employers' own arguments. For instance, the argument that conversion should not apply to wage and hour claims for minimum wage, overtime and rest and meal break claims (because those particular rights are new under the Labor Code and thus subject to a different analysis under the "new right—exclusive remedy" test) actually demonstrates one possible set of limiting principles if the Court were looking for any, and the case before this Court is *not* a wage and hour case. The Court has room here if it wants it to recognize a conversion tort for failure to pay earned wages *not* based on minimum wage, overtime or rest and meal break statutes, and leave the question of conversion for wage and hour claims to another day

(although Voris argues below that, at least where the wage and hour amounts are undisputed, conversion *should* still apply under such circumstances, as the earned and undisputed wages in such circumstances are still the property of the employee immediately upon being earned).

At the end of the day, the Employers' real argument is that the Court here should assume that the Legislature has the State's endemic wage theft problem handled; that the Legislature will be able to legislate new remedies for the endless innovation of bad acting employers seeking to evade effective enforcement of statutory remedies; and that the Legislature has commanded that the courts stay out of it. But none of these premises are true. The Legislature keeps enacting new laws because the wage theft problem nonetheless persists; it has always been part of the role of the courts to use the common law to close the statutory loopholes that creative or extreme tortfeasors find and expose faster than the Legislature can address them; and the Legislature could easily say that it does not want any help from the courts at common law on wage theft by expressly making the statutory scheme exclusive, but it never has. While this case provides just one example of a bad-acting employer intentionally trying to take advantage of statutory loopholes (some of which the Legislature has since tried to close), there will doubtless be others who find new and creative ways to steal workers' wages, and it is unlikely that the Legislature will ever be able to keep up without the help of the courts at common law. Especially when bad actors have shown a propensity to innovate around the specificity required in statutory rules, our state's social, legal and policy tapestry has not

hesitated to recognize and welcome the common law's ability to apply simpler and more flexible rules, which sometimes work the best as a tool for a judge to decide disputes. Indeed, our jurisprudence is clear that parallel common law causes of action are welcome even in the heavily legislated area of employer-employee relations.

In *Tameny v. Atl. Richfield Co.* (1980) 27 Cal.3d 167, this Court held that a common law tort action for wrongful discharge may lie if an employer conditions employment upon participation in unlawful conduct. An employer's obligation to refrain from discharging an employee "reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes [,] . . . a wrongful discharge suit exhibits the classic elements of a tort cause of action." (*Id.* at 176.) In so holding, the *Tameny* Court stated:

> In the last half century the rights of employees have not only been proclaimed by a mass of legislation touching upon almost every aspect of the employer-employee relationship, but *the courts have likewise evolved certain additional protections at common law.* The courts have been sensitive to the need to protect the individual employee from discriminatory exclusion from the opportunity of employment whether it be by the all-powerful union or employer. . . . *This development at common law* shows that the employer is not so absolute a sovereign of the job that there are not limits to his prerogative. One such limit at least is the present case.

(*Id.* at 178 (emphasis added, internal citations omitted).)

Not unlike the wrongful termination and wrongful retaliation claims at issue in *Tameny*, recognizing a common law claim would *not* "contravene" the Legislature's intent in enacting the Labor Code.

As had been done in *Tameny,* this Court can and should recognize a tort claim as an "additional protection[] at common law" where a fundamental social policy of this state has been violated. (*Ibid.*) Such a remedy is also sorely needed to address the very real and rampant problem of wage theft in California, and to recognize the well-established notion of wages as the duly earned property of the employee. The tort of conversion, which has been effectively applied and adapted by our courts to recognize such property interests and provide remedies for them, should be likewise approved for wages.

The Court should therefore reject the Employers' Brief arguments and recognize a wage conversion claim.

II. ARGUMENT

A. This Court Can and Should Recognize a Common Law Remedy for Earned but Unpaid Wages

The Employers' Brief begins its analysis by identifying how significant employment law is for the livelihood of California workers and indeed, for the general welfare of our state (EB at 3). It also emphasizes the difficulty of developing appropriate regulations for employment: it is "mind-bogglingly difficult" (*id.* at 4); "[t]his is hard stuff" (*ibid.*); and "the inquiry raises a lot of hard questions" (*id.* at 5).

Voris agrees on the wide-ranging significance of employment laws, and that the Legislature faces complex decisions in crafting such legislation. But the Employers' Brief's conclusions – that (1) this Court would be "contraven[ing]" the Labor Code in recognizing a common law claim for wages (EAB at 3); and (2) that "[t]ort remedies—including punitive damages—do not extend to the employment relationship" (*id.* at 10) – are demonstrably flawed.

1. Employees are Not Limited to Remedies Available under the Labor Code

It is the role of the courts, and not the Legislature, to recognize common law claims.[1] This Court has done so where there exists a violation of a fundamental public policy of this state and where statutes have not precluded other remedies.

In *Tameny v. Atl. Richfield Co* (1980) 27 Cal.3d 167, 176, this Court recognized that, despite the existence and applicability of Lab. Code §§ 2856[2] and 2922,[3] that "an employee's action for wrongful discharge . . . subjects an employer to tort liability." This liability does not stem from any employment contract or from those relevant Labor Code provisions, but instead "reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes." (*Ibid.*) In other

---

[1] *See, e.g., Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 304 ("[T]he courts retain jurisdiction to impose civil damages or other remedies against insurers in appropriate common law actions...").

[2] *Lab. Code* § 2856 declares that "(a)n employee shall substantially comply with all the directions of his employer concerning the service on which he is engaged, except where such obedience is impossible or unlawful . . . ."

"While this statute does not specifically refer to an employer's authority to discharge an employee, the statute does reflect direct legislative approval of the basic proposition that an employer enjoys no authority to direct an employee to engage in unlawful conduct." (*Tameny,* 27 Cal.3d at 174, n.8.)

[3] "Under the traditional common law rule, codified in Labor Code section 2922, an employment contract of indefinite duration is in general terminable at 'the will' of either party." (*Tameny,* 27 Cal.3d at 172.)

words, a tort remedy was recognized to vindicate the policy that employers cannot require criminal participation as a condition to employment.

In *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1155, this Court recognized that disability discrimination could form a basis of a common law wrongful discharge claim, and despite the existence of statutory schemes governing disability discrimination under the Labor Code[4] and the Fair Employment and Housing Act (FEHA).[5] In rejecting contrary rulings made by Courts of Appeal, this Court provided:

> [T]he Legislature sometimes enacts a new remedy, intending to *supplement* other remedies. (*See, e.g., Rojo, supra,* 52 Cal.3d at pp. 75, 82, 276 Cal.Rptr. 130, 801 P.2d 373 [the FEHA does not preempt common law remedies].) When courts enforce a common law remedy despite the existence of a statutory remedy, they are not "say[ing] that a different rule for the particular facts should have been written by the Legislature." (*Portillo, supra,* 131 Cal.App.3d at p. 290, 182 Cal.Rptr. 291.) They are simply saying that the common law "rule" coexists with the statutory "rule."

(*City of Moorpark*, 18 Cal.4th at 1156 (emphasis in original). *See also Stevenson v. Superior Court* (1997) 16 Cal.4th 880 [recognizing tortious wrongful discharge for age discrimination].) *City of*

---

[4] *Lab. Code* § 132a prohibits employers from discriminating against employees "who are injured in the course and scope of their employment."

[5] The FEHA, at *Gov. Code* § 12900 *et seq.*, prohibits various types of employment discrimination, including discrimination based on a disability (Gov. Code § 12921).

Moorpark and other cases therefore confirm that common law tort claims can and should be recognized alongside statutory remedies for employment-related claims.

Finally, and as more thoroughly discussed in Voris's briefs on the merits, in *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178, this Court held that an employee could bring a *Bus. & Prof. Code* § 17203 claim for restitution of unpaid wages. In so holding, the Court stated:

> [E]arned 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.*

(Emphases added.) Accordingly, this Court recognized that the Labor Code does *not* provide the exclusive remedies for unpaid wage claims for California employees.

Later in the brief, and in an attempt to discount *Cortez's* teachings, the Employers suggest that the failure to pay wages here supported a UCL claim specifically because the UCL is also a part of "California's statutory framework" and that the right to equitable remedies under the CL "must be predicated on an underlying statutory violation" (EB 19) – presumably reasoning that *Cortez* would not apply for common law wage claims. But even to make this argument, the Employers' Brief materially misstates the operation of the UCL by representing that only violations of codified legal rules such as statutes and regulations may support a UCL claim for "unlawful" business practices. This is false. Common law torts and other violations recognized in published court decisions that have not been

codified *have* been recognized as supporting those types of claims. (*See, e.g., Bondanza v. Peninsula Hosp. & Med. Ctr.* (1979) 23 Cal.3d 260, 266-268 [holding that the hospital's 33% surcharge on delinquent accounts was "unlawful" under rule previously adopted in *Garrett v. Coast & Southern Fed. Sav. & Loan Ass'n* (1973) 9 Cal.3d 731]; *CRST Van Expedited, Inc. v. Werner Enterprises, Inc.* (9th Cir. 2007) 479 F.3d 1099, 1107 [claims of employee-raiding, which stated a claim for intentional interference with contract, adequately alleged the predicate for a UCL "unlawful" act claim].)

The Court has not been careless or logically inconsistent in the tapestry it has already woven with respect to earned wages as property and its openness to recognizing that a common law claim for wage theft would not "contravene" or "displace" an applicable statute (much less constitute a "judicial fiat" (EB at 2)). This Court has recognized tort remedies even where Labor Code remedies exist, to provide a dual common law and statutory scheme for harmed employees; therefore, a tort remedy, including for wage theft, is wholly appropriate to provide "certain additional protections at common law" in an employment relationship. (*Tameny,* 27 Cal.3d at 178.)

2. The Employers' Brief Misapplies the "New Right—Exclusive Remedy" Test

In the brief, the Employers nevertheless argue that the Labor Code is the exclusive remedy to wage and hour claims, such as claims for minimum wage, overtime, and meal and rest break claims.

But as a threshold matter, the wage conversion claim at issue in Voris's case is *not* a wage and hour claim, and so the analysis is

inapposite to the facts of this case. Therefore, to the extent that the Employers are arguing that the Labor Code is the exclusive remedy for wage theft claims of the type Voris makes here – the straightforward and intentional failure to pay him at all for work that he had already performed – that is clearly not the law: the basic right to wages for work performed is not a "new" right and so the Labor Code clearly does not provide the exclusive remedy.

Nevertheless, and citing to *Rojo v. Kliger* (1990) 52 Cal.3d 65 for the "new right—exclusive remedy" test or rule, the Employers suggest that the Labor Code was meant to displace any common law remedy for any form of wage claim (EB at 16). However, an application of the test proves the opposite.

Again, an employee's right to his or her earned wages existed at common law long before the Labor Code's first enactment in 1913. "Prior to 1913, actions existed to recover unpaid wages and overtime wages at common law. Under the common law, an employee could recover unpaid wages through an action in contract or, if the contract was legally void, in quantum meruit for the value of services rendered." (*Sims v. AT & T Mobility Servs. LLC* (E.D. Cal. 2013) 955 F.Supp.2d 1110, 1116 (citing *Brown v. Crown Gold Milling Co.* (1907) 150 Cal.376, 383-84 [discussing actions for breach of an employment contract and actions in quantum meruit for recovery of the value of services rendered in employment]).) "Where an employee performed work outside of the normal scope of the employment agreement, the employee could recover in quantum meruit the value of that work in addition to his regular salary." (*Ibid.* (citing *Brown,* 150 Cal.376 at 389).)

The Employers' Brief avoids acknowledging that on this basis alone, Voris should have a common law claim. Instead, Employers argue that "[t]he right to earn wages *at a specific wage rate* is statutory" (EB 17 (emphasis added)), and that "[t]he same is true for the right to receive premium payments for short, late, or missed meal periods or rest breaks" (*ibid.*). But even assuming *arguendo* that Voris's claims were based on rights arising from wage and hour laws, the right analyzed under the new right—exclusive remedy test must be *purely* statutory creations, not in part based on rights already existing in common law: "The Labor Code's minimum wage and overtime provisions simply defined what that reasonable amount was, but *they did not create the underlying right of an employee to be paid* at a fair rate for his labor or the right of that employee to sue for reasonable compensation if he was not." (*Sims,* 955 F.Supp.2d at 1117 (emphasis added)[6]; *see also Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara Cty. Transit Dist.* (1976) 65 Cal.App.3d 121, 131 ["Where a right is given by statute it may be enforced by any appropriate method, legal or equitable." (Citation omitted.)].)

---

[6] The *Sims* Court disagreed with *Brewer v. Premier Golf Properties* (2008) 168 Cal.App.4th 1243 in its holding that the regulations under the Labor Code on pay stubs, minimum wage, and meal and rest breaks created wholly new rights. *Cf. Ward v. Severance* (1857) 7 Cal. 126, 127 [Court finding that new right, exclusive remedy rule applied for rights created "purely" from statute: "These ferries are *purely creations of the statute*, and the only penalty to which a party is subject on their infringement, is that provided by statute."].) Moreover, again, Voris's wage claims are not based on minimum wages or overtime violations. Voris alleges that he was not paid for his labor whatsoever.

If a right exists at common law, then a statutory remedy is generally cumulative, *even if the remedy is comprehensive.* (*Rojo*, 52 Cal.3d at 79-80 [holding that despite the comprehensive statutory scheme in FEHA, that statute did not preempt common law tort actions for discrimination].) Further, *Cortez* already demonstrates that the Labor Code is *not* the exclusive remedy for all types of claims arising in the employment context – including specifically with respect to wages.

As briefly discussed above, the Employers attempt to distinguish *Cortez,* arguing that its holding – that unpaid wages may also support an Unfair Competition Law ("UCL") claim – does not undermine the Labor Code's exclusivity because the UCL is also a statute. But the rule does not work this way. The "new right—exclusive remedy" rule is that:

> [W]here a new right,—one not existing at common law, is created by statute and a statutory remedy for the infringement thereof is provided, such remedy is *exclusive of all others.*

(*Hentzel v. Singer Co.* (1982) 138 Cal.App. 3d 290, 301 (citing *Orloff v. Los Angeles Turf Club* (1947) 30 Cal.2d 110, 112 (emphasis added)). *See also Monterey Cty. v. Abbott* (1888) 77 Cal. 541 ["Where a right is given and a remedy provided by statute, (or ordinance, if valid,) the remedy so provided must be pursued."].) In other words, "*exclusive of all others*" means *exclusive of other statutory remedies.* (*See, e.g., K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc.* (2009) 171 Cal.App.4th 939, 961 [On the Uniform Trade Secrets Act, "[a] claim for common law or even

statutory unfair competition may be preempted under CC [ ] § 3426.7 if it relies on the same facts as the misappropriation claim."].) The Employers also "apparently misunderstood" the new right—exclusive remedy rule in *Stevenson,* 16 Cal.4th at 901, prompting the Court to explain the rule more fully there. Voris submits that the Employers here should not further strain the rule in this case.

In short, the Employers' Brief purports to offer the "appropriate backdrop" (EB at 1) for Voris's appeal, but the Employers' alternative tapestry is deeply flawed and inconsistent, failing to acknowledge such basic principles including that the Labor Code is *not* the exclusive remedy for wage violations, as indicated in *Cortez*; it misstates that "[t]ort remedies—including punitive damages—do not extend to the employment relationship" (*id.* at 10), overlooking *Tameny* and other cases[7]; and also presumes that recognition of a tort remedy would inherently disrupt a statutory scheme, an argument rejected in *City of Moorpark.*[8]

---

[7] *Alcorn v. Anbro Eng'g, Inc.* (1970) 2 Cal.3d 493 (Intentional infliction of emotional distress when supervisor disparaged employee on his race); *Kouff v. Bethlehem-Alameda Shipyard* (1949) 90 Cal.App.2d 322 (an employee improperly discharged from his job for acting as an election poll official could maintain a tort cause of action against his employer for compensatory and punitive damages).

[8] *City of Moorpark*, 18 Cal.4th at 1156:

> When courts enforce a common law remedy despite the existence of a statutory remedy, they are not "say[ing] that a different rule for the particular facts should have been written by the Legislature." (*Portillo, supra,* 131 Cal.App.3d at p. 290, 182 Cal.Rptr. 291.) They are simply saying that the common law "rule" coexists with the statutory "rule."

Any conclusions drawn from these flawed arguments should therefore be rejected.

3. The Availability of Tort Remedies – Including Punitive Damages – Would Promote the Fundamental Policy of Protecting Workers' Wages

On punitive damages specifically, the Employers' Brief argues that the availability of such damages in and of itself would contravene the intent of the Legislature in its enactment of the Labor Code. But there are at least three problems with this argument.

First, this argument again relies on the assumption that the Legislature intended for the Labor Code to supplant all other available remedies to employees. As discussed above, that is not the case. *Tameny* expressly indicated that certain types of conduct in an employment relationship warrant the recovery of both compensatory and punitive damages: "Indeed, our court has sanctioned the imposition of punitive damages in an employee's tort action against his employer . . . in [this context and] other contexts." (*Id.*, n. 10 (emphasis added).)

Second, this argument – that the availability of punitive damage liability should weigh against imposing any tort liability whatsoever – was also made in *Tameny,* and was rejected: "[employer] cites no instance in which tort liability has been denied in an entire class of cases on the ground that punitive damages would be available in aggravated circumstances." (*Tameny*, 27 Cal.3d at 176, n. 10.)

Third, the argument entirely discounts that tort law actually has a purpose, and that the imposition of tort liability, including liability

for punitive damages, on unpaid wage claims could serve the aims of the Legislature in enacting the Labor Code.

The purpose of tort law is to vindicate "social policy." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683 (citing Prosser, LAW OF TORTS (4th ed. 1971) p. 613).) The fundamental social policy of protecting workers' wages in California, which significant portions of the Labor Code seek to protect, would overwhelmingly be served by recognition of a tort claim for a violation of workers' rights in their wages, especially one that would place direct accountability on the individuals controlling the decisions leading to the wage theft, if their conduct was so clearly and convincingly intentionally egregious to warrant punitive damages. In so following, the damages available for a tort remedy would promote the fundamental policy interest that employees should be paid for their work already performed, including above other mere contractual debts.

"In tort law, a goal of awarding compensatory damages is to *deter harmful conduct* by making the wrongdoer compensate the person harmed." (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1055 (citing 1 Dobbs, THE LAW OF TORTS (2001) § 10, p. 17) (emphasis added).) With respect to punitive damages, available for cases involving reprehensible conduct, the goal "is a public one—to punish wrongdoing and deter future misconduct by either the defendant or other potential wrongdoers." (*Bardis v. Oates* (2004) 119 Cal. App.4th 1, 25.)[9] "It should be presumed a

---

[9] *See also State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 416 ("[P]unitive damages serve a

plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." (*Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1691 (internal citation omitted).)

The Employers' Brief waxes long on the significance of employment laws on our state, but it fails to mention at all this overwhelming policy interest in protecting workers' wages, which is embedded in the Labor Code and expressly acknowledged in case law. (*See, e.g., Kerr's Catering Serv. v. Dep't of Indus. Relations* (1962) 57 Cal.2d 319, 325 ["Wages of workers in California have long been accorded a special status generally beyond the reach of claims by creditors including those of an employer. This public policy has been expressed in the *numerous statutes regulating the payment, assignment, exemption and priority of wages*. (emphasis added)"].) This fundamental policy interest should not be overlooked when assessing whether to recognize a tort remedy on it.

In *Kerr's Catering Serv. v. Dep't of Indus. Relations*, this Court analyzed whether the Industrial Welfare Commission had the authority to prohibit employers from deductions from employee wages due to cash shortages. There, the Court engaged in a

---

broader function; they are aimed at deterrence and retribution"); *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 568 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition").

thoughtful analysis of the importance of protecting wages as recognized by both the courts and the Legislature: "it is obvious that both the Legislature and our courts have accorded to wages special considerations other than merely fixing minimums, and that the purpose in doing so is based on the welfare of the wage earner." 57 Cal.2d at 330. The Court went on to state:

> An employer who knows that wages are due, has ability to pay them, and still refuses to pay them, *acts against good morals and fair dealing,* and *necessarily intentionally does an act* which prejudices the rights of his employee.

(*Id.* at 326 (emphasis added).) In other words, the policy in protecting workers' rights to their wages is so strong that any conduct that interferes with workers' rights inherently constitutes an immoral, wrongful act. Wrongful interference with an employees' wages is therefore exactly the type of conduct that should be subject to tort liability.

Should this Court recognize a wage conversion claim at least against intentionally bad-acting individuals controlling the corporate employer's clear acts of wage theft, it would be providing an additional remedy for employees that could facilitate compensation for their earned but unpaid wages, and simultaneously provide a powerful deterrent against employers, and the individuals who actually control them, from engaging in any tortious withholding of earned wages in the first place. In *Rojo,* this Court stated, "Although conference, conciliation and persuasion, together with the available administrative remedies . . . may prove effectual in many cases, in others the employer's conduct or the employee's injuries may be such

that *judicial remedies, including punitive and compensatory damages, can provide the only adequate form of relief.*" (*Rojo,* 52 Cal.3d at 80-81 (emphasis added).) If there is any "disruption" of the Labor Code occurs from the recognition of the remedy, it would be from the existence of potential tort liability prompting the individuals who actually control corporate employers to cause their corporate entities to more mindfully comply with their obligations to make full and prompt payment of earned wages, and make crystal clear that intentional decisions to fail to pay earned wages is not a valid tool for liquidity management – all consistent with the express intent of the Legislature to protect the wage rights of California employees.

B. Conversion is Adaptable to Address Wage Theft, and Therefore Conversion of Wages Should be Recognized as a Viable Claim

The remainder of the Employers' Brief largely continues to misstate the law, or repeats arguments made by Lampert without acknowledging the responsive arguments or addressing the case law that Voris raised in his briefs on the merits.

Voris addresses these remaining arguments in turn. But Voris submits that it is also notable what the Employers' Brief does *not* raise: it does not argue that a wage conversion claim would negatively impact the welfare of California, or that good faith employers could be harmed by this additional remedy (except the speculation that litigation generally might become more costly, and ignoring the possibility that there might actually be *less* wage theft in the first place if controlling individuals were more accountable under tort law). On the other hand, Voris submits that if this claim *were* recognized, it

would have a significant positive impact on the welfare of California, by addressing the widespread problem of wage theft, and providing relief for those employees where the remedies under the Labor Code fall short.

1. Under *Fremont*, the Relevant Inquiry is whether Conversion may be "Adapted" to Wages and if it would "Displace Other, More Suitable" Law

Initially, the implicit or express questions that the Employers' Brief asks – "Is the Labor Code *adequate* to recover unpaid wages?" (EB at 11) and "Is the Labor Code the most *suitable* law to address unpaid wages?" (*id.* at 14) – are not the correct ones to ask with respect to determining whether to recognize a wage conversion claim.

In the amicus curiae brief filed by Asian Americans Advancing Justice – Los Angeles, Bet Tzedek, Los Angeles Alliance for a New Economy, and the Wage Justice Center (the brief, the "Labor Brief"), these amici identified the analytical framework the Court of Appeal used in *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97 for determining whether a conversion claim may apply: "(1) whether the law of conversion can be 'adapted' to a particular type of intangible property, and (2) whether it 'displaces' other, more suitable law" (citing *Fremont,* 148 Cal.App.4th at 124).[10] In determining whether net operating losses of a business may be subject to conversion, the *Fremont* Court did *not* ask, for instance,

---

[10] The *Fremont* Court engaged in a thoughtful analysis of the reasoning in *Payne v. Elliot* (1880) 54 Cal. 339, which adapted the tort of conversion to intangible property (in that case, shares of stock), and rejecting the rule that such property subject to conversion must have be tied to tangible property.

whether the remedies available under the Insurance Code or the California Uniform Fraudulent Transfer Act (under which the plaintiff had alleged alternative claims) were "adequate", or whether those statutes were the most "suitable", as the Employers' Brief demands. Instead, the *Fremont* Court asked first whether net operating losses could constitute property that could be stolen, and then it determined that "the misappropriation of a net operating loss without compensation . . . is comparable to the misappropriation of tangible personal property or shares of stock[.]" (*Fremont,* 148 Cal.App.4th at 643.) It therefore found that a conversion claim on net operating losses is viable.

Building on *Fremont,* in *Welco Electronics, Inv. v. Mora* (2014) 223 Cal.App.4th 202, 211 (*"Welco"*), the Court of Appeal provided that "[p]roperty is a broad concept that includes 'every intangible benefit and prerogative susceptible of possession or disposition.' [Citation.]" (Citing *Kremen v. Cohen* (9th Cir. 2003) 337 F.3d 1024, 1033.) On this reasoning, the Court of Appeal found that the plaintiff had a property right in his credit card and its information, and that property was converted when the defendants wrongfully used them. "Although the parties have not cited any authority that expressly covers the facts here, our application of the tort of conversion in this case is *consistent with existing legal principles*." (*Welco,* 223 Cal.App.4th at 215.)

The reasoning in *Fremont* and *Welco* should apply to wages, in which well-recognized property interests lie. Under the existing legal principles in conversion law, this Court should recognize that earned

but unpaid wages are property belonging to an employee, and interference with that property may be subject to a conversion claim.

2. The Employers' Brief's "Displacement" Argument Fails

Despite this clear holding, the Employers' Brief cites to *Welco* presumably to suggest that a conversion claim would "displace" the Labor Code. But *Welco* provides no support for such an argument. As discussed *infra,* a common law claim would not "displace" the Labor Code; instead, the claim would "coexist" as an additional available remedy to employees. (*City of Moorpark*, 18 Cal.4th at 1156.) The Employers' Brief also cites to *Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210 (disapproved on other grounds by *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310), but this case actually highlights when such a displacement could occur – and it does not here.

In *Silvaco Data Systems,* the statutory scheme at issue, the Uniform Trade Secrets Act (UTSA), *Civ. Code* § 3426 *et seq.,* expressly provides the exclusive civil remedy for conduct falling within its terms: the UTSA should be "applied and construed to effectuate its general purpose to *make uniform the law* with respect to the subject of this title among states enacting it." (*Civ. Code* § 3426.8.) Based on this statutory language, the Court of Appeal there determined that the statute preempted a conversion of trade secrets claim. In contrast, there is no applicable parallel language in the Labor Code, and therefore no such preemption over or "displacement" of a wage conversion claim.

Outside of *Fremont* and *Welco,* courts examining the applicability of other torts likewise did not ask whether an existing statutory scheme was "adequate" or "the most suitable." For instance, in *Tameny,* this Court did not base its recognition of a tort claim on whether *Lab. Code* § 2856 was sufficient. Instead, it analyzed whether the conduct at issue – the wrongful discharge of an employee for his failure to engage in criminal behavior" – violated "a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes." (27 Cal.3d at 176.) In finding that it *did* violate such a duty, the Court therefore recognized the claim: "[A] wrongful discharge suit exhibits the classic elements of a tort cause of action." (*Ibid.*)

In *Rojo,* this Court recognized a common law wrongful discharge claim based on sex discrimination. This Court found that the alleged conduct "contravened a fundamental, substantial public policy embodied in the state Constitution, a public policy, by whatever measure, that was " 'firmly established' " (*Rojo,* 52 Cal.3d at 90.)

As Voris raised in his Reply Brief on the Merits, the failure to pay wages has likewise been recognized as a basis for a wrongful discharge claim. (*Gould v. Maryland Sound Indus., Inc.* (1995) 31 Cal.App.4th 1137 [employee alleging that employer discharged him to avoid paying accrued wages].) That failure to pay wages should itself be recognized as tortious misconduct.

3. The Employers' Brief's Proposed Framework Has No Basis in Law

Later in the brief, the Employers' Brief argues that a conversion claim should be recognized "only in the absence of a more suitable cause of action" (EB at 15). But the Employers are simply making up this test out of whole cloth. Their cited cases, *Cortez* and *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, do not support this argument whatsoever (and it is also unclear why conversion – the simple common law articulation of the time-tested and venerated human social prohibition on theft – would not actually be the most basic and suitable cause of action).

In *Lu,* Court determined that, after a thorough examination of the legislative history and language of *Lab. Code* § 351, that that statute, while prohibiting employers from taking gratuities from their employees, did not contain a private right to sue. The Court, however, provided that the employees could seek a common law claim for conversion of those tips. (*Id.* at 7.) Consequently, far from indicating that conversion should be available *only* when there are gaps in the Labor Code, *Lu* instead confirms that the Labor Code does *not* preclude common law remedies even where there are statutory provisions that govern the conduct complained of.

Cortez likewise contradicts Employers' Brief's position, as discussed *infra* at Section II(A) (pages 8-10).

Even if there were a test requiring that a common law tort be the "most suitable" remedy, it is also at the very least arguable that the tort of conversion – the common law expression of the simple, ancient prohibition against theft – is in fact the most suitable, easiest remedy to apply.

Finally, it should be noted that, were this Court to accept the argument made by the Employers here and reject a wages claim on the basis that the Labor Code exists, it would be denying the availability of a tort remedy to an entire class of cases, despite that the property rights in wages has been well established.[11] This would *not* be consistent with existing legal principles. In other words, it is Lampert and the Employers here that are asking for the extreme departure in the existing legal and policy fabric.

4. A Conversion Claim Would Address Gaps in the Laws Allowing for the Recovery of Wages

In the Labor Brief, the amici also noted:

> Workers only have a patchwork of remedies available in response to actions taken by an employer or third party during the pendency of a wage dispute or in a post-judgment setting. Remedies are particularly scarce when actions by third parties interfere with workers' ability to collect unpaid wages.

(Labor Brief at 10.) The amici provided that, while the recently enacted *Lab. Code* § 558.1 "allows *some* individuals to be held liable," it would only assist for holding those individuals liable for "underlying wage and hour violations, and then only if they were found to be "acting on behalf of the employer." (*Ibid.* (emphasis added).) In other words: there are other instances of wage theft that

---

[11] This recognized property interest in wages is also what distinguishes this case from *Moore v. Regents of University of California* (1990) 51.Cal.3d 120, where whether patients retain property rights in their excised human cells was far from settled.

still occur, and for which the provisions of the Labor Code, including Section 558.1, and other existing statutory schemes fall short.

Moreover, even where employees are successful under the existing remedial scheme, and employees obtain judgments against their employers, there is still "widespread judgment evasion." (*Id.* at 15-16.) Unscrupulous individuals who set up employer business entities and easily abandon those entities and simply create new ones to restart their business operations to avoid paying on those judgments. This is exactly what happened to Voris, and is exactly the type of conduct that a conversion claim would address.[12]

The Employers' Brief nevertheless argues that Voris and other employees have sufficient remedies (and even without Section 558.1) – and that Voris should have filed a Private Attorneys General Act ("PAGA") claim[13] – where employees can file a "representative action on behalf of him or herself and other employees" – to pursue personal liability against Lampert for his Labor Code violations.[14]

---

[12] Voris prevailed on his Labor Code violations, and has judgments against three separate entities that were controlled by Lampert (two of which judgments include damages for unpaid wages), but Lampert abandoned those companies, and simply ignored the judgments entered against the entities he controlled. (*See, e.g.,* 8 AA 1902-07 [Email dated May 12, 2013 from Greg Lampert to Brett Voris admitting violating Voris's judgment liens].)

[13] *Lab. Code* § 2698 *et seq.*

[14] The Employers' Brief also offhandedly mentions that Voris also had the remedy of alter ego liability (EB at 3). But wage theft can occur without an owner or other agent of an employer violating *any* corporate formalities, as the amici non-profit groups note. Furthermore, the remedy of alter ego liability is an extreme one. (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th

But to do so, Voris would have had to administratively burden the Labor and Workforce Development Agency ("LWDA") by asking it to investigate his claims before filing suit, and furthermore, claim a representative action (*i.e.*, allege that there were other employees who suffered as Voris did), to reach the relevant Labor Code statutes providing for individual liability.[15]

This would be conduct contravening the intent of the Legislature. The Employers' Brief's suggestion therefore only further emphasizes the limitations of the Labor Code for Voris and other employees in similar positions, if the way to pursue personal liability against an employer agent was through manipulating a representative action. The irony of the Employers' position is clear: the main risk that the Employers say they fear is more unreasonably complex,

---

523, 539 [Alter ego "is an extreme remedy, sparingly used."]; *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 306 (dis. opn. of Lucas, J.) [" 'The standards for the application of alter ego principles are high, and the imposition of [alter ego] liability ... is to be exercised reluctantly and cautiously.' "].) Unscrupulous individuals very well may be found liable under alter ego liability for wage theft, but Voris submits that employees should not have to rely on that principle alone for when an agent interferes with their wages – a more direct claim of conversion would be wholly appropriate.

[15] In *Khan v. Dunn-Edwards Corp.* (2018) 19 Cal.App.5th 804, a Court of Appeal confirmed that an individual cannot bring a PAGA claim for his or her claims only. The attorneys for Employers' Group and the California Employment Law Council should be aware of this, as their firm reported this recently on its firm's employment law and litigation blog. *See* Tim Long, Leo Moniz and Yekaterina Reyzis, *Exhaustion Matters – Don't Try Going It Alone Under PAGA,* Employment Law and Litigation (Feb. 27, 2018), https://blogs.orrick.com/employment/2018/02/27/exhaustion-matters-dont-try-going-it-alone-under-paga/#more-2019.

extended or burdensome wage litigation, but their proposed solution to avoid accountability under the simplicity of a conversion cause of action is to propose that employees instead be required to pursue complex PAGA actions to reach conduct like Lampert's, or other innovative loophole-exploiting conduct by employer-controlling individuals that may come in the future.

5. Employees Have Vested Property Interests in their Wages

The last six or so pages of the Employers' Brief are devoted to arguing that wages are no more than money owed under a contract, and therefore conversion law should not apply. But employees have *vested property interests* in their wages. The Employers' Brief wholly ignores this property interest.

In the concurring and dissenting opinion Justice Lavan made in the trial opinion stated:

> Based on *Lu* and *Cortez,* I would hold that employees have a *vested property interest in their earned wages*, that failure to pay them is a legal wrong that interferes with this property interest, and that an action for conversion may therefore be brought to recover unpaid wages.

(Court of Appeal Op., J. Lavan, concurring and dissenting, at 5-6 (emphasis added).)

This property interest in wages (as Voris discusses extensively in his briefs on the merits), which is recognized under California policy and case law, is what distinguishes wages from mere money had and received, and what makes wages an appropriate subject for a conversion claim.

III. CONCLUSION

The Employers' Brief ignores the real and pervasive problem of wage theft that exists in California (and beyond); the real-world limitations of the remedies provided under the Labor Code and other remedies available to Voris and others; the recognized property interests employees have in their wages; and the underlying and fundamental purposes and premises of tort law: to provide relief to injured parties for harm caused by others, to impose liability on parties responsible for the harm, and to deter others from committing harmful acts.

The simplest lenses are often the clearest. Voris respectfully submits that when a wage conversion claim is examined through the clearer and simpler lenses, it is easy to see that California employees should be able to bring such a claim against their employers as well as the individuals controlling such corporate employer entities who steal from them. Indeed, if we have reached the point as a society where we exempt the relatively wealthy and powerful individuals who tend to control corporate employers from the fundamental prohibition against stealing, we might want to be asking ourselves whether our society it is resting on any real social covenant at all.

Dated: April 18, 2018

Respectfully submitted,

By: _____

Edward M. Anderson
Regina Yeh
ANDERSON YEH PC

Attorneys for Plaintiff and Appellant
BRETT VORIS

CERTIFICATE OF WORD COUNT

I certify pursuant to California Rules of Court 8.204 and 8.504(c) that this PLAINTIFF AND APPELLANT BRETT VORIS'S ANSWER TO *AMICI CURIAE* BRIEF OF EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL is proportionally spaced, has a typeface of 13 points or more, contains 6,613 words, excluding the cover, the tables, the signature block, and this certificate. Counsel relies on the word count of the Microsoft Word word-processing program used to prepare this brief.

Dated: April 18, 2018

Regina Yeh
Counsel for Appellant

CERTIFICATE OF SERVICE

I, Regina Yeh, do hereby affirm I am employed in the County of Los Angeles, State of California. I am over 18 years of age and not a party to this action. My business address is Anderson Yeh PC, 401 Wilshire Blvd, 12th Floor, Santa Monica, California 90401. I am a member of the bar of this Court.

On April 18, 2018, I served the foregoing document:

PLAINTIFF AND APPELLANT BRETT VORIS'S ANSWER TO *AMICI CURIAE* BRIEF OF EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL

To the following persons by placing a true and correct copy of the document enclosed in sealed envelopes addressed as follows:

Jean H. Choi Los Angeles Alliance for a New Economy 464 Lucas Ave., Suite 202 Los Angeles, CA 90017	Co-Counsel for *Amici Curiae* Asian Americans Advancing Justice – Los Angeles, Bet Tzedek, Los Angeles Alliance for a New Economy, The Wage Justice Center
Zachary Genduso Jay Shin The Wage Justice Center 3250 Wilshire Boulevard, 13th Floor Los Angeles, CA 90010	Co-Counsel for *Amici Curiae* Asian Americans Advancing Justice – Los Angeles, Bet Tzedek, Los Angeles Alliance for a New Economy, The Wage Justice Center
Robert Cooper Wilson, Elser, Moskowitz, Edelman & Dicker LLP 555 S. Flower Street, Suite 2900 Los Angeles, CA 90071	Counsel for Defendant and Respondent Greg Lampert

Julie A. Totten Katie E. Briscoe Orrick, Herrington & Sutcliffe LLP 400 Capital Mall, Suite 3000 Sacramento, CA 95814-4497	Counsel for *Amici Curiae* Employers Group and California Employment Law Council
Court of Appeal of California Second Appellate District Division Three Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	Case No. B265747
Hon. Michael L. Stern Los Angeles Superior Court Department 62 111 N. Hill Street Los Angeles, CA 90011	Case No. BC408562

I deposited the sealed envelopes with the United States Postal Service, with postage thereon fully prepaid. I am a resident of the county where the mailing occurred. The envelope was placed in the mail at Santa Monica, California.

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

Executed on April 18, 2018, in Santa Monica, California.

By: _____
Regina Yeh