SUPREME COURT COPY

No. S170758

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JORGE A. PINEDA

Plaintiff and Appellant,

vs.

BANK OF AMERICA, N.A.,

Defendant and Respondent.

SUPREME COURT
FILED

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

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

PETITIONER'S REPLY BRIEF ON THE MERITS

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

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. No Reasonable Basis Supports Exclusion Of Lawsuits For Penalty Wages Alone From The Special Limitations Provision Of Labor Code Section 203 2

A. Section 203 Does Not Differentiate Between Lawsuits For Penalty Wages With A Claim For Unpaid Wages And Lawsuits For Penalty Wages Alone 3

B. No Legislative History Reflects An Intent To Make The Special Limitations Provision In Section 203 Inapplicable To Lawsuits For Penalty Wages Alone 5

C. Public Policy Does Not Support The Exclusion Of Lawsuits For Penalty Wages Alone From The Special Limitations Provision Of Section 203 8

1. A One Year Limitations Period Gives Employers Incentive To Delay Payment Of Final Wages Beyond One Year 10

2. Public Policy Requires That Statutes Of Limitation Be Construed Strictly 12

3. An Employer May Not Benefit From Making Late Payment Of Final Wages 12

4. Retroactive Change To A One Year Limitations Period Does Not Benefit Employees 15

II. Money Owed To Employees Under Section 203 That Is Wrongfully Retained By An Employer Cab Be Recovered As Restitution Under The Unfair Competition Law 16

A. Money Owed That Is Wrongfully Withheld Is Money Wrongfully Acquired 16

B. Cases Involving Civil Penalties Or Discretionary Statutory Penalties Do Not Refute That Employees Owed Penalty Wages Under Section 203 Have A Property Interest In The Money Owed To Them 18

C. Pineda Need Not Prove His Allegations To State A Viable Cause Of Action For Restitution 22

D. The Statutory Repeal Rule Does Not Determine The Existence Of A Property Interest That Supports A Claim For Restitution Under The UCL 25

E. The Assignability Of Claims For Penalty Wages Confirms That Employees Have A Property Interest In Penalty Wages Owed Under Section 203 29

CONCLUSION 32

CERTIFICATE OF WORD COUNT 33

TABLE OF AUTHORITIES

STATE CASES

Amalgamated Transit Union v. Superior Court
(2009) ___ Cal.4th ___, 2009 WL 1838972 30

Anderson v. Byrnes
(1898) 122 Cal. 272 22

Cortez v. Purolator Air Filtration Products Co.
(2000) 23 Cal.4th 163 . . . . 16, 17, 18, 23

County of San Bernardino v. Ranger Ins. Co.
(1995) 34 Cal.App.4th 1140 . . . . 20, 21

Earley v. Superior Court
(2000) 79 Cal.App.4th 1420 7

Fox v. Ethicon Endo-Surgery, Inc.
(2005) 35 Cal.4th 797 12

Governing Board of Rialto Unified School District v. Mann
(1977) 18 Cal.3d 819 26

Kasky v. Nike, Inc.
(2002) 27 Cal.4th 939 . . . . 18, 19

Korea Supply Co. v. Lockheed Martin Corp.
(2003) 29 Cal.4th 1134 . . . . 17, 18, 23, 29

Martin v. Going
(1922) 57 Cal.App. 631 31

McCoy v. Superior Court
(2007) 157 Cal.App.4th 225 . . . . 5, 14

Moore v. Indian Spring Channel Gold Mining Co.
(1918) 37 Cal.App. 370 7

Moss v. Smith
(1916) 171 Cal. 777 26

Murphy v. Kenneth Cole Productions, Inc.
(2007) 40 Cal.4th 1094 .... 7, 8, 20

Napa State Hopsital v. Flaherty
(1901) 134 Cal. 315 26

People v. Durbin
(1966) 64 Cal.2d 474 .... 20, 21, 25

People ex rel. Dept. of Conservation v. Triplett
(1996) 48 Cal.App.4th 233 12

People v. One 1953 Buick 2-Door
(1962) 57 Cal.2d 358 21

Reese v. Wal-Mart Stores, Inc.
(1999) 73 Cal.App.4th 1225 19

Sevilla v. Stearns-Roger, Inc.
(1980) 101 Cal.App.3d 608 12

South Coast Regional Commission v. Gordon
(1987) 84 Cal.App.3d 612 25

STATUTES

Business and Professions Code

§17203 31
§17204 30

Civil Code

§309 26
§954 .... 30, 31

Code of Civil Procedure

§340(a) 2, 20

Education Code

§13403 26

Health and Safety Code

§11361.7 26

Labor Code

§203 . . . . *passim*
§218 . . . . 29, 31
§218.5 7
§226.7 20
§2699 30
§1194 7

Penal Code

§1305 21

INTRODUCTION

Bank of America urges the Court to carve out from the special limitations provision of Labor Code Section 203 lawsuits for penalty wages alone. The Court has no reason for doing so.

- The plain language of Section 203 does not differentiate between lawsuits for penalty wages with a claim for unpaid wages and lawsuits for penalty wages alone.
- No legislative history even hints at a desire by the legislature to make the special limitations provision of Section 203 inapplicable to lawsuits for penalty wages alone.
- Public policy does not support the retroactive shortening of the special limitations period for a lawsuit for penalty wages, in the case of a lawsuit for penalty wages alone, that would result from an employer's belated payment of final wages.

With respect to the restitution issue, Bank of America's arguments ultimately have no merit because Section 203, unlike other penalty statutes, imposes a mandatory obligation to pay money which gives rise to a property interest in the money owed. By not paying money that was owed to Pineda under Section 203 -- money that

Pineda had the right to possess -- Bank of America wrongfully acquired that money at Pineda's expense. To prevent Bank of America's unjust enrichment from wrongful retention of the money owed under to Pineda under Section 203, Pineda can recover the money owed to him as restitution under the Unfair Competition Law.

ARGUMENT

I. No Reasonable Basis Supports Exclusion Of Lawsuits For Penalty Wages Alone From The Special Limitations Provision Of Labor Code Section 203

Bank of America concedes that penalty statutes prescribing their own limitations period fall outside the scope of Section 340(a) of the Code of Civil Procedure. Bank of America further concedes that lawsuits for penalty wages accompanied by claims for unpaid wages are not subject to the one year limitations period applicable to penalty statutes generally. Bank of America contends, however, that with respect to lawsuits for penalty wages alone, Section 203 does not constitute a special limitations period. Bank of America's position has no merit. No reasonable basis supports Bank of America's unfounded attempt to carve out lawsuits for penalty wages alone from the special limitations provision of Section 203.

A. Section 203 Does Not Differentiate Between Lawsuits For Penalty Wages With A Claim For Unpaid Wages And Lawsuits For Penalty Wages Alone

Bank of America cannot point to any language in Section 203 that expressly distinguishes a lawsuit for penalty wages accompanied by a claim for unpaid wages from a lawsuit for penalty wages alone. No such language exists. Section 203 expressly provides that "Suit may be filed for these penalties . . ." within the prescribed limitations period. There is only one cause of action described in Section 203 - a lawsuit to recover penalty wages. The plain language of Section 203 simply cannot be read as excluding from its special limitations provision the subset of lawsuits for penalty wages alone.

Faced with the lack of any express statutory language to support its position, Bank of America tries to infer an exclusion from the language "before the expiration of the statute of limitations on an action for the wages from which the penalties arise." But nothing in Section 203 expressly or impliedly requires that an action for unpaid wages actually be filed along with an action for penalty wages for the special limitations provision of Section 203 to apply. The words "an action for the wages" clearly refer to a lawsuit in the abstract.

Bank of America contends that, when a plaintiff files a lawsuit for penalty wages alone, no purpose can be served by tying the limitations period to the limitations period for an action for wages. This argument has no merit because Bank of America misunderstands the fundamental purpose of Section 203's reference to "an action for the wages." That language makes the limitations period under Section 203 the same as the limitations period for whatever action for unpaid wages accrued upon the employer's nonpayment of wages. Reference to an action for unpaid wages that accrues, for the purpose of determining what limitations period applies at the time of accrual, provides no basis for inferring that Section 203 does not apply unless an action for unpaid wages is actually filed. The limitations period for an action for penalty wages is defined at the same time that cause of action accrues and a cause of action for unpaid wages accrues -- immediately upon nonpayment of wages at the time of termination -- whether or not the plaintiff ever makes a claim for unpaid wages.

If the legislature had wanted the special limitations period in Section 203 to apply only to "hybrid" lawsuits for penalty wages with a claim for unpaid wages, or had not wanted the special limitations

period in Section 203 to apply to lawsuits for penalty wages alone, it surely would have said so in plain (or at least plainer) language. It did not. Instead, the legislature made the special limitations provision in Section 203 expressly applicable to lawsuits "for these penalties." Reading into Section 203 an inference that contradicts the plain language of the statute is not reasonable and must be rejected.

B. No Legislative History Reflects An Intent To Make The Special Limitations Provision In Section 203 Inapplicable To Lawsuits For Penalty Wages Alone

Bank of America has not brought to this Court's attention a shred of legislative history that supports its interpretation of Section 203. Bank of America relies instead on *McCoy v. Superior Court* (2007) 157 Cal.App.4th 225 for the proposition that the legislature enacted the special limitations provision in Section 203 "to provide convenience to plaintiffs in hybrid actions, not to expand the period to bring-penalty only suits." (Answer Br. p. 17). But *McCoy* does not cite to any legislative history to substantiate its conclusions about legislative intent either. There simply is no legislative history that suggests an intent by the legislature to exclude from the special limitations provision of Section 203 lawsuits for penalty wages alone.

The only piece of legislative history that sheds any light on the subject is the 1939 Annual Report issued by the Department of Industrial Relations. This report indicates that the purpose of the limitations provision in Section 203 was to provide "the same length of time for the collection of penalties for non-payment of wages as has always been allowed for the collection of wages themselves." Request for Judicial Notice, Raymond Decl. Ex. A, p. 6, Ex. B. p. 11.

The description of legislative intent in the 1939 Annual Report makes no reference to convenience or a difference between lawsuits for penalty wages with a claim for unpaid wages and lawsuits for penalty wages alone. The only possible conclusion about legislative intent that can be drawn is that the legislature intended that a special limitations period, and not the one year limitations period for penalty statutes generally, would apply in all lawsuits for penalty wages under Section 203.

Bank of America tries to diminish the import of the Annual Report by arguing that a lawsuit under Section 203 for penalty wages alone does not involve "nonpayment" of wages. Bank of America is wrong. Late payment of wages, i.e., a failure to pay wages timely

upon termination, constitutes nonpayment of the wages at the time of termination. As explained in *Moore v. Indian Spring Channel Gold Mining Co.* (1918) 37 Cal.App. 370, 377, the obligation to pay penalty wages arises from "the non-performance of a duty the employer owes to his employe[e]." Late payment of final wages clearly constitutes nonpayment of wages at the time of termination in violation of the employer's legal duty to pay final wages timely.

The fact that late payment of final wages necessarily equates with nonpayment of wages at the time of termination also undermines Bank of America's attempt to minimize the import of *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094. In *Murphy*, this Court concluded that the legislature intended lawsuits for penalty wages to be governed by the special limitations period in Section 203 and not the one year limitations period that applies to penalty statutes generally.[1] The Court's reference to the limitations period applicable

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[1] *Murphy* compels rejection of Bank of America's suggestion that penalty wages under Section 203 can only be recovered for late payment of contractual wages. *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, relied on by Bank of America, does not even remotely stand for that proposition. *Earley* merely holds that Labor Code Section 1194, and not Labor Code Section 218.5, governs the award of attorney's fees in an action for unpaid overtime wages.

when an employer "fails to pay" wages due upon termination applies equally to an employer never paying final wages and an employer paying final wages late. Under either scenario, the employer fails to pay wages at the time of termination and it is the nonpayment of wages at the time of termination, the failure to pay final wages timely, that gives rise to the employee's cause of action for penalty wages.

This Court concluded correctly in *Murphy* that the legislature intended to provide a special limitations period for lawsuits under Section 203. The Court has no reason to reach a different conclusion here. Neither the plain language of the statute nor legislative history suggests that the legislature intended to carve out from the special limitations provision of Section 203 lawsuits for penalty wages alone.

C. Public Policy Does Not Support The Exclusion Of Lawsuits For Penalty Wages Alone From The Special Limitations Provision Of Section 203

As a threshold matter, Bank of America's public policy arguments suffer from an overarching flaw. Bank of America fundamentally relies on the erroneous premise that the one year limitations period, applicable to penalty statutes generally, presumptively applies to a lawsuit for penalty wages. Bank of

America thus frames the inquiry as whether public policy supports expanding the one year limitations period for a lawsuit for penalty wages alone. Phrasing the issue in that manner wrongly assumes that the limitations period is one year to begin with, and that erroneous assumption improperly places on Pineda the burden of proving an exception to the general rule to extend the one year limitations period.

Bank of America has it backwards. The legislature clearly intended that the limitations period for a lawsuit for penalty wages under Section 203 is not one year. If the plain language of Section 203 alone does not suffice to resolve the statute of limitations issue, the question becomes whether public policy supports excluding from the special limitations period for lawsuits under Section 203 the discrete subset of lawsuits for penalty wages alone.

In other words, Pineda does not bear of burden of proving an exception to the one year limitations period. It is Bank of America who must demonstrate why the special limitations period does not apply in this case. As discussed below, Bank of America fails to provide any policy justification for excluding from the special limitations provision of Section 203 lawsuits for penalty wages alone.

1. A One Year Limitations Period Gives Employers Incentive To Delay Payment Of Final Wages Beyond One Year

Bank of America contends that a one year limitations period enhances an employer's incentive to make prompt payment of final wages. It does not. As set forth in Pineda's opening brief, the ability of an employer to shorten the limitations period to one year retroactively, and thus negate an employee's right to sue for penalty wages, provides an incentive to delay payment of final wages.

Bank of America also posits that "it is entirely reasonable to have one statute of limitations where an employer pays all wages due (one year) and a longer period when an employer does not (two, three, or four)." (Answer Br. p. 19). Similarly, Bank of America contends that, when an employee's final wages have been paid, "the rationale for a longer limitations period does not exist." (Answer Br. p. 21). These arguments, however, make no sense because the limitations period applicable to a cause of action under Section 203, just like the limitations period applicable to any other cause of action, cannot be determined in hindsight. The limitations period for a cause of action must be determined when the cause of action accrues.

A cause of action under Section 203 accrues immediately upon nonpayment of wages at the time of termination. Thus, when a cause of action under Section 203 accrues, there cannot be a statute of limitations that applies "when an employee's final wages have been paid." By definition, the cause of action accrues upon nonpayment of wages at the time of termination, and late payment of wages has not yet occurred! Events that occur after a cause of action under Section 203 accrues, like belated payment of final wages, cannot determine or change the limitations period that applied at the time of accrual.

Bank of America suggests that a limitations period can change due to tolling, incapacity or other reasons. But, deferring the accrual of a cause of action, or tolling the running of a limitations period after a cause of action accrues, merely lengthens the time within which the plaintiff can bring suit. Neither deferred accrual nor tolling has an effect on the length of the limitations period that exists at the time the cause of action accrues. In none of the cases relied on by Bank of America did the limitations period itself actually change, and none of them involve a statute of limitations that was retroactively shortened by an event that occurred after the cause of action initially accrued.

2. Public Policy Requires That Statutes Of Limitation Be Construed Strictly

Bank of America invokes the maxim that penalty statutes should be construed strictly. But this principle is irrelevant because the statute of limitations issue before this Court does not involve a dispute over the substantive provisions of Section 203. This case involves a dispute over which limitations period applies. Thus, more apt than the policy requiring strict construction of penalty statutes is the policy that statutes of limitations "should be strictly construed to avoid forfeiture of a plaintiff's rights." *Sevilla v. Stearns-Roger, Inc.* (1980) 101 Cal.App.3d 608, 611; *accord, People ex rel. Dept. of Conservation v. Triplett* (1996) 48 Cal.App.4th 233, 251. *See also, Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 (public policy favors "disposition of cases on the merits rather than on procedural grounds"). Pineda, not Bank of America, is entitled to the benefit of any doubt regarding the statute of limitations issue.

3. An Employer May Not Benefit From Making Late Payment Of Final Wages

Unable to deny that, under its interpretation of Section 203, the employer's late payment of final wages retroactively shortens the

limitations period for a lawsuit under Section 203, Bank of America nevertheless contends that an employer gains no advantage from such misconduct. This contention has no merit whatsoever. Clearly, the employer benefits from a shorter limitations period, and paying final wages later than required by law constitutes misconduct. Public policy simply does not allow violation of the law to be rewarded.

For precisely this reason, Bank of America's next contention – that a one year limitations period provides sufficient incentive for employers to pay final wages promptly – is irrelevant. Whether or not the length of a limitations period to sue for a penalty provides an employer with sufficient incentive to comply with the law (a dubious proposition to begin with), public policy still does not allow an employer to be rewarded for violating the law.

Moreover, the legislature has already decided that employees should have more than one year to bring lawsuits for penalty wages. If the Court finds considerations of public policy necessary to resolve the statute of limitations issue, the question becomes whether public policy would be served by concluding that the legislature did not intend for the special limitations provision in Section 203 to apply to

lawsuits for penalty wages alone. Bank of America's arguments about incentives do not remotely address the problem of rewarding an employer, by shortening the limitations period for a lawsuit under Section 203, just because the employer paid final wages late.

Bank of America next contends that once this Court rules, all will know how long employees have to sue for penalty wages in a lawsuit for penalty wages alone. Bank of America utterly fails to explain, however, how the Court's resolution of this issue in and of itself supports Bank of America's interpretation of Section 203.

Finally, relying on *McCoy*, Bank of America contends that no evidence demonstrates the likelihood of an employer purposely delaying payment of final wages for at least a year in order to cut off an employee's right, retroactively, to sue for penalty wages. But, like the court of appeal in *McCoy*, Bank of America misses the point. The interpretation of Section 203 adopted in *McCoy* empowers an employer to violate Section 203 with absolute impunity. By paying final wages more than one year late, the employer can negate the employee's ability to sue under Section 203 to vindicate his or her right to prompt payment of wages. Public policy cannot allow this.

4. Retroactive Change To A One Year Limitations Period Does Not Benefit Employees

In connection with arguing that a limitations period can change based on events occurring after accrual, Bank of America contends that a retroactively shorter limitations period somehow "works to the employee's benefit." (Answer Br. p. 23). That is pure nonsense. Obviously, a shorter limitations period inures to an employee's detriment. A shorter limitations period gives an employee less time to bring a lawsuit to vindicate his or her legal rights. Moreover, when the limitations period becomes shorter retroactively after one year, an employees permanently loses his or her right to sue for penalty wages. Under no set of circumstances can a retroactive shortening of the limitations period under Section 203 benefit employees.

Ultimately, Bank of America has no answer for the indisputable fact that its interpretation of Section 203 rewards an employer who pays final wages late by retroactively shortening the limitations period for a lawsuit for penalty wages, and allows an employer to deprive employees paid final wage late the ability to vindicate their legal rights. Public policy does not support the interpretation of Section 203 urged by Bank of America.

II. Money Owed To Employees Under Section 203 That Is Wrongfully Retained By An Employer Can Be Recovered As Restitution Under The Unfair Competition Law

Bank of America misapprehends much of Pineda's argument. Pineda does not contend that penalty wages owed under Section 203 can be recovered as restitution because they are wages. Pineda contends that penalty wages can be recovered as restitution because, unlike virtually every other kind of penalty, their payment is mandated by statute. Since penalty wages must be paid when the employer willfully fails to pay final wages in a timely manner, late paid employees have the right to possess the penalty wages owed to them. That ownership interest suffices as the predicate for restitution under the Unfair Competition Law ("UCL").

A. Money Owed That Is Wrongfully Withheld Is Money Wrongfully Acquired

Bank of America contends that penalty wages cannot be recovered as restitution because they are not "taken" from employees (Answer Br. p. 27). In the same vein, Bank of America contends that, since penalty wages do not compensate employees for labor, "there is nothing to restore" (Answer Br. p. 38). These arguments have no merit because this Court made clear in *Cortez v. Purolator Air*

Filtration Products Co. (2000) 23 Cal.4th 163 that restitution "is not limited only to money or property that was once in the possession" of the plaintiff. *Cortez*, 23 Cal.4th at 178. The Court explained that the scope of restitution broadly encompasses any "quantifiable sums one owes to another" whether or not ever physically possessed by the plaintiff. *Cortez*, 23 Cal.4th at 178.

Bank of America misreads *Cortez*. The Court did not hold that unpaid wages could be recovered as restitution because they were earned. Nor did the Court hold that unpaid wages could be recovered as restitution because the employer had wrongfully acquired labor. The Court held that unpaid wages could be recovered as restitution because they were owed, and the employer wrongfully acquired – by retaining for itself – the money it was required to pay the employees for their labor. The employer thus enriched itself by keeping money the employees were entitled to possess. As explained by this Court in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149, the "order for restitution [in *Cortez*] served to restore to the plaintiffs funds that were directly owed to them by the defendant." *Korea Supply*, 29 Cal.4th at 1150.

In *Cortez*, the wages were owed because they were earned. Here, penalty wages are owed because Section 203 mandates that they "shall" be paid when the employer willfully fails to pay final wages in a timely manner. In both cases, it is because the employer keeps for itself money employees are entitled to possess that the employer wrongfully acquires money "belonging in good conscience to the plaintiff." *Korea Supply*, 29 Cal.4th at 1150.

B. Cases Involving Civil Penalties Or Discretionary Statutory Penalties Do Not Refute That Employees Owed Penalty Wages Under Section 203 Have A Property Interest In The Money Owed To Them

The authorities Bank of America relies on for the proposition that statutory penalties cannot be recovered as restitution are inapposite. In *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, the Court did not address whether a statutory penalty could be recovered as restitution under the UCL. Holding that commercial speech could be regulated to suppress false or misleading advertising, the Court, in summarizing remedies under the UCL, noted that a public prosecutor, unlike a private plaintiff, can recover "civil penalties."

Civil penalties differ materially from penalty wages that are owed under Section 203. Civil penalties are not due and payable until

awarded by a court. Penalty wages under Section 203, on the other hand, become due and payable upon the employer's willful failure to pay final wages in a timely manner. *Kasky* has nothing to do with statutory penalties in general or penalty wages in particular.

Nor is *Reese v. Wal-Mart Stores, Inc.* (1999) 73 Cal.App.4th 1225 apposite. *Reese* involved claims for statutory damages under the Unruh Civil Rights Act. Like civil penalties, an award of statutory damages under the Unruh Civil Rights Act is subject to the discretion of the court or jury. In contrast, Section 203 does not allow for any discretion. Once the employer willfully fails to pay an employee final wages timely upon termination, the employer's obligation to pay penalty wages becomes mandatory.

The restitution issue before this Court ultimately turns on whether, due to the mandate of Section 203, employees have a property interest in penalty wages owed to them. None of the state court cases relied on by Bank of America confront this issue. Nor do any of the federal court cases involving Section 203. In each case, the federal court reasoned that penalty wages are not wages and concluded *ipso facto* that penalty wages, just because they are a

penalty, cannot be recovered as restitution. In his opening brief, Pineda discusses at length how the penal nature of penalty wages does not in and of itself take penalty wages out from the scope of restitution. Bank of America does not respond to these arguments.

Instead, Bank of America contends that the right to a penalty does not vest until after a successful enforcement action. This argument has no merit because none of the authorities relied on for this proposition discuss whether property rights arise under a penalty statute that, like Section 203, mandates payment of the penalty.

In *Murphy v. v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, the Court held that additional pay under Labor Code Section 226.7 constitutes wages, and not a penalty, such that claims under Section 226.7 are not governed by the one year limitations period under Section 340(a) of the Code of Civil Procedure. In *dicta*, the Court contrasted vesting of penalties under the statutory repeal rule with the mandatory obligation to pay money under Section 226.7. As discussed in Pineda's opening brief, *Murphy* supports Pineda.

Both *People v. Durbin* (1966) 64 Cal.2d 474 and *County of San Bernardino v. Ranger Ins. Co.* (1995) 34 Cal.App.4th 1140 involve

Penal Code Section 1305, which as originally enacted gave a trial court discretion to discharge a forfeiture of bail, but as later amended required a trial court to discharge a forfeiture of bail under certain circumstances. In both cases, it was held that the amendment of the statute applied retroactively. Neither *Durbin* nor *County of San Bernardino* has anything to do with property rights arising from a statutory obligation to pay money.

People v. One 1953 Buick 2-Door (1962) 57 Cal.2d 358 involved an amendment to laws regarding the forfeiture of vehicles used to transport narcotics. Prior to amendment, relief from a forfeiture required the legal owner of a vehicle under a conditional sales contract to have conducted a reasonable investigation of the purchaser's moral responsibility, character and reputation. The reasonable investigation requirement was deleted by amendment. The Court held that the revised statute applied to the case at hand even though the conditional sales contract was entered into prior to amendment of the forfeiture laws. Like the cases discussed above, *One 1953 Buick 2-Door* has nothing to do with property rights arising from a statutory obligation to pay money.

Finally, in *Anderson v. Byrnes* (1898) 122 Cal. 272, the Court ruled that the statute at issue was penal in nature, such that its repeal precluded its enforcement. The statute provided that a stockholder may recover the sum of one thousand dollars as liquidated damages based on a corporation's failure to comply with the law. *Anderson* does not involve a statutory obligation to pay money but involves a statute, unlike Section 203, that permits a penalty to be awarded.

In sum, no case holds that a statutory obligation to pay money does not give rise to a property interest, and no case refutes that the obligation to pay penalty wages under Section 203 creates a property interest that supports a claim for restitution under the UCL.

C. Pineda Need Not Prove His Allegations To State A Viable Cause Of Action For Restitution

In connection with its arguments about penalties not vesting until after a successful enforcement action, Bank of America contends that Pineda cannot state a viable claim for restitution without proving the elements of his Section 203 claim first. That is not, and cannot be, the law. Under Bank of America's theory, no plaintiff could ever state a viable claim for restitution without proving first that, as alleged, the defendant violated the law and owed the plaintiff money.

Bank of America tries to get around the ordinary standard for evaluating the legal sufficiency of a complaint by asserting that, under the UCL, "the plaintiff must have more than a potentially valid claim." (Answer Br. p. 36). Bank of America does not cite any authority for this proposition because there is none. In *Korea Supply*, the Court used the word "vested" to distinguish between money the plaintiff allegedly had a right to possess (such as the wages in *Cortez*) and money with respect to which the plaintiff, at best, only had an expectancy interest. Neither this Court, nor any other, has ever held that the legal sufficiency of a claim for restitution challenged by demurrer or motion for judgment on the pleadings depends on proof.

Bank of America's attempt to explain how its theory would not conflict with *Cortez* illustrates how its misguided arguments about proof rely on taking the word "vested" as used in *Korea Supply* entirely out of context. Bank of America contends that earned wages are vested property rights even without a lawsuit to recover them. But, just because a plaintiff who brings a lawsuit to recover unpaid wages asserts in the complaint that wages were earned and owed does not make those allegations true. For example, an employer can defeat

a cause of action for unpaid wages by showing that the wages were not actually earned (such as where the employee did not actually work the hours claimed to be worked), the wages were not actually owed (such as where the employee seeks to recover overtime wages but the employee is actually exempt), or the wages were already paid. In every such case, it is the employee's allegation that wages are owed to the employee and must therefore be paid that creates the alleged ownership interest that supports a claim for restitution.

Here, there is no dispute that Pineda's substantive allegations suffice to state a viable claim that Bank of America willfully failed to pay Pineda his final wages in a timely manner such that Pineda is owed and entitled to possess penalty wages under Section 203. The issue before this Court is whether these allegations state a legally viable claim for restitution under the UCL. Bank of America cannot challenge the legal sufficiency of Pineda's claims by disputing his allegations or contending that Pineda has not yet proven the central contention that Bank of America owes him money. Whether or not Pineda will ultimately prevail at trial has nothing to do with the viability of the allegations in Pineda's complaint.

D. The Statutory Repeal Rule Does Not Determine The Existence Of A Property Interest That Supports A Claim For Restitution Under The UCL

The statutory repeal rule does not apply to this case because neither Section 203 nor the UCL has been repealed. This Court has no occasion to employ "[t]he test to be applied in giving the effect to be given the repeal of penalty and forfeiture statutes." *Durbin*, 64 Cal.2d at 478-79. The Court granted review to decide whether the obligation of an employer to pay penalty wages under Section 203 gives employees owed the penalty wages a right to possess them, or an ownership interest in them, that supports a claim for restitution. Bank of America's reliance on the statutory repeal rule is entirely misplaced because none of the cases applying that rule have anything to do with the concept of a property interest under the UCL.

South Coast Regional Commission v. Gordon (1987) 84 Cal.App.3d 612 involved repeal of the California Coastal Zone Conservation Act of 1972 and the enactment of the California Coastal Act of 1976. The court held that civil penalties could be imposed against the defendant under the 1972 Act because the 1976 Act was a substantial re-enactment of the 1972 Act, but that attorney's fees

could not be awarded to the plaintiff because there was no provision for attorney's fees in the 1976 Act.

Napa State Hopsital v. Flaherty (1901) 134 Cal. 315 involved repeal of the Insanity Law of 1889 upon enactment of the Insanity Law of 1897. The court held that, after passage of the newer law, the plaintiff no longer had the capacity to sue.

In *Governing Board of Rialto Unified School District v. Mann* (1977) 18 Cal.3d 819, a teacher convicted for possession of marijuana was dismissed from his position under Education Code Section 13403, which authorized dismissal of a teacher for conviction of a felony or any crime involving moral turpitude. During the pendency of the teacher's appeal, the legislature enacted Health and Safety Code Section 11361.7, which prohibited dismissal of a teacher on the basis of a conviction for possession of marijuana if more than two years had elapsed from the date of conviction. The court ruled that, under the new law, the school district did not have the right to dismiss the teacher because his conviction was more than two years old.

Moss v. Smith (1916) 171 Cal. 777 involved repeal of Civil Code Section 309. The Court held that repeal of the statute left the

plaintiff without any ability to pursue the claim that had previously been authorized by the statute.

None of these cases involving repeal of a statute, or any others invoking the statutory repeal rule, support Bank of America's contention that, just because Section 203 can be repealed, penalty wages owed under Section 203 cannot be recovered as restitution under the UCL. Bank of America confuses the concept of a vested right which survives repeal of a statute with a property interest sufficient to support a claim for restitution under the UCL based on the right to possess money that is due and payable.

Bank of America cannot overcome the disastrous effect its misguided application of the statutory repeal rule would have on the UCL by eviscerating any claim for restitution based on violation of a statute. Bank of America asserts that a claim for overtime wages would not be affected because "the right to overtime wages vests when those wages are earned." (Answer Br. p. 40). But this statement assumes that, in fact, the wages were earned. As discussed above, an employer can defend against a claim for unpaid wages on the grounds that the wages, in fact, were not earned. Under the

statutory repeal rule relied on by Bank of America, a plaintiff who sues for overtime wages but does not obtain a final judgment before repeal of the overtime laws can no longer proceed with that claim.

Bank of America asserts without any basis whatsoever that repeal of the right to overtime wages would have no impact on the right to recover overtime wages. Every one of the cases involving the statutory repeal rule cited by Bank of America explains that, absent a savings clause, repeal of a statute destroys the statutory remedy.

Nor can Bank of America explain how any of the other statutory provisions cited in Pineda's opening brief would survive as a basis for restitution under the UCL if the statutory repeal rule determined whether or not an interest was "vested." Instead, Bank of America tries to distinguish these statutes on the grounds they require repayment of money. But that distinction makes no difference. The statutory repeal rule applies to any right created solely by statute.

Finally, Bank of America points out that the statutory repeal rule does not affect common law rights. But preservation of common law rights has nothing to do with loss of statutory rights. Under Bank of America's theory of law, the statutory repeal rule would wipe out

every claim for restitution under the UCL based on violation of a statute. That cannot be what this Court contemplated when it used the word "vested" in *Korea Supply*. Whatever the meaning of the word "vested" may be when used in the context of the statutory repeal rule, an employee's right to possess penalty wages owed under Section 203 after the employer willfully fails to pay final wages upon termination is "vested" under *Korea Supply*.

E. The Assignability Of Claims For Penalty Wages Confirms That Employees Have A Property Interest In Penalty Wages Owed Under Section 203

Bank of America contends that the obligation to pay penalty wages under Section 203 cannot give rise to a property interest because claims for penalty wages are not assignable. This contention has no merit because Labor Code Section 218 expressly provides that claims for penalty wages under Section 203 are assignable:

> Nothing in this article shall limit the authority of the district attorney of any county or prosecuting attorney of any city to prosecute actions, either civil or criminal, for violations of this article or to enforce the provisions thereof independently and without specific direction of the division. Nothing in this article shall limit the right of any wage claimant to sue directly <u>or through an assignee</u> for any wages <u>or penalty</u> due him under this article. (Emphasis added).

Contrary to Bank of America's last ditch contention, the Court did not hold in *Amalgamated Transit Union v. Superior Court* (2009) ___ Cal.4th ___, 2009 WL 1838972 that penalty wages under Section 203 are not assignable under Civil Code Section 954. Nor did the Court hold that penalty wages under Section 203, or any other statutory penalties, are not assignable because the plaintiff has no property interest in them. In *Amalgamated*, the Court first held that claims under the UCL could not be brought by an assignee because Business and Professions Code Section 17204 requires the plaintiff in a UCL action to have suffered injury in fact and lost money or property as a result of unfair competition. The Court then held that civil penalties under the Labor Code Private Attorney's General Act ("PAGA") could not be brought by an assignee because Labor Code Section 2699 requires that a cause of action for civil penalties under PAGA be brought by an "aggrieved employee." Neither of the Court's holdings address whether an employee owed penalty wages under Section 203 has a property right in those penalty wages.

In *dicta*, the Court did make reference to the general rule that "the right to a statutory penalty may not be assigned." However,

Labor Code Section 218 supersedes that general rule. In accordance with Section 218, the courts have long recognized that claims for penalty wages can be assigned. *See*, *Martin v. Going* (1922) 57 Cal.App. 631, 635 (assignment of labor claim can preserve right to penalty wages that accrued prior to the date of assignment).

By providing expressly in Section 218 that claims for wages and penalties may be pursued by an assignee, the legislature has confirmed that employees owed penalty wages under Section 203 have a property interest in the penalty wages owed to them. Civil Code Section 954 limits assignment of causes of action to those "arising out of the violation of a right of property, or out of an obligation." Consequently, the legislature cannot have made claims for penalty wages assignable under Section 218 unless they arose out of violation of an employee's ownership or property rights.

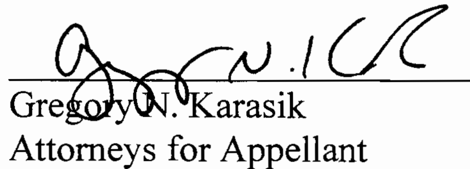
Section 218 leaves no room for doubt. Employees owed penalty wages under Section 203 have an assignable property interest in those penalty wages which constitutes an "interest" in money or property under Business and Professions Code Section 17203 that supports a cause of action for restitution under the UCL.

CONCLUSION

Pineda is entitled to pursue his claims for penalty wages against Bank of America under both the Labor Code and the UCL. Pineda's claim under Section 203 was not time-barred by a one year limitations period and Pineda stated a viable cause of action for restitution of money wrongfully acquired by means of unfair competition. Because the court of appeal decided both the statute of limitations issue and the restitution issue incorrectly, the judgment against Pineda should be reversed so he can vindicate his right to prompt payment of wages and prevent Bank of America from being unjustly enriched by its wrongful retention of the penalty wages that, under Section 203, Bank of America was required to pay to Pineda.

July 17, 2009

SPIRO MOSS LLP

By: 

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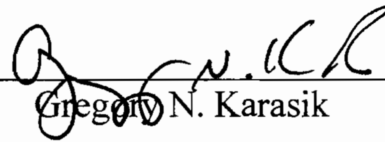
CERTIFICATE OF WORD COUNT

The undersigned counsel certifies that the text of this reply brief uses a proportionately spaced Times New Roman 14-point typeface, and that the text herein consists of 6,584 words as counted by the word processing program used to generate this brief.

Dated: July 17, 2009



Gregory N. Karasik

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 July 17, 2009 declarant served the **PETITIONER'S REPLY BRIEF ON THE MERITS** 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 17th day of July, 2009 at Los Angeles, California.

Cole Oliver

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