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

OPENING BRIEF ON THE MERITS

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I. ISSUES PRESENTED

1. Is conversion of earned but unpaid wages a valid cause of action?

2. Even if not a valid cause of action in every context, is conversion of earned but unpaid wages a valid cause of action by a former employee plaintiff against an individual defendant who was a managing officer and controlling principal of the closely held corporate former employers?

II. SUMMARY OF ARGUMENT

The majority opinion of the Court of Appeal held that conversion of earned but unpaid wages is not a valid cause of action by a current or former employee under any circumstances. The majority reasoned that neither statutes nor prior decisions of this Court suggest that such a cause of action is cognizable, but more fundamentally, even if they did, that the tort cannot be recognized as a matter of policy, because the risk of expanding the already fertile field of employee wage litigation ultimately outweighs all other concerns. In an articulate concurring and dissenting opinion, Justice Lavin disagreed on both prongs, reasoning that recognition of the conversion tort is consistent with existing wage and conversion law in this state, and that the public policy importance of protecting worker's wages outweighs fears of expanded wage and hour litigation. Justice Lavin's concurrence and dissent is respectfully the better-reasoned opinion and more accurately reflects California public policy. This Court should reverse the majority's opinion and recognize the conversion tort in the wage context, either as a general matter, or, at the very

least, in the context of an action against a controlling principal of a closely held corporate employer, as here.

Contrary to the main pillar of the majority opinion, the policy arguments in favor of recognizing the conversion tort are exceptionally strong and outweigh fears of expanded employment litigation. California has long recognized the protection of worker's wages as a fundamental public policy of this state. (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 82, *superseded by statute on other grounds, as recognized by Elliot v. Spherion Pacific Work LLC* (C.D. Cal. 2008) 572 F.Supp.2d 1169, 1176.) "[W]ages are not ordinary debts . . . " (*In re Trombley* (1948) 31 Cal.2d 801, 809.) "[B]ecause of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due." (*Ibid.*)

This policy is reflected in the statutes enacted for the general protection of California workers, from the Legislature's first enactment of a statute enabling an employee to recover wages due under minimum wage and overtime laws in 1913 (Lab. Code § 1194; *see also Martinez v. Combs* (2010) 49 Cal.4th 35, 50, *as modified* (June 9, 2010) [examining Lab. Code § 1194]), to the recent passage of A Fair Day's Pay Act, SB 588, including Lab. Code §§ 96.8, 98, 238, 238.1 (imposing criminal liability on controlling persons of corporate employers for certain conduct in connection with failure to pay wages) and 558.1 (making controlling persons of corporate employers personally liable for non-payment of wages by statute), effective January 1, 2016. It is also reflected in the rulings

and remedies that courts have recognized for the recovery of wages: "California courts have long recognized that wage and hour laws concern not only the health and welfare of the workers themselves, but also the public health and general welfare." (Court of Appeal Opinion ("Op."), concurring and dissenting op., Lavin, J. at 4 (internal citations omitted)); *see also Wilson v. Cnty. of Santa Clara* (1977) 68 Cal.App.3d 78, 86 [recognizing that a common law cause of action may exist for the recovery of wages for mandatory trainings attended outside normal working hours].)

In this case, Plaintiff-Appellant Brett Voris ("Plaintiff" or "Voris") asks this Court to recognize another remedy for an unpaid wage claim: a claim for conversion against an employer (and specifically here, an individual controlling principal and executive of a corporate employer). While the viability of wage conversion claims against employers has been analyzed by several federal district courts interpreting California law (and reaching conflicting decisions), there is no binding decision of this Court or the Court of Appeal addressing the issue. Voris respectfully submits that recognizing the cause of action would be consistent with the existing law and trends in the courts on interpreting conversion and employment law, and also crucial to address employer misconduct more robustly than other remedies currently provide.

In 2007, Voris, a shareholder and/or employee of three startup companies that he had helped form, was ousted by his co-founders. With his employment terminated, Voris asked Greg Lampert, a controlling principal of each of these closely held companies, for payment of his earned but unpaid wages and for the share certificates

representing his equity interests. Under the control and personal direction of Lampert, the companies refused, and in 2009, Voris sued. After six years of protracted litigation, Voris eventually obtained judgments against all three startups, but Voris's conversion claims against Lampert individually were dismissed by the trial court. The dismissal of the wage conversion claims against Lampert were on the grounds that California does not recognize wages as a proper basis for a conversion claim. This ruling was affirmed by a divided panel in the Court of Appeal in 2017.

The majority opinion of the Court of Appeal determined that, *inter alia,* "if Voris's approach were credited, any claimed wage and hour violation would give rise to tort liability for conversion as well as the potential for punitive damages." (Op. at 13.) In so reasoning, however, the majority opinion failed to recognize or apply well-settled principles of tort law to the allegations of Voris's case, and it also improperly underweighted California's crucial policy of protecting employee wages. In his better-reasoned concurring and dissenting opinion, Justice Lavin noted that the law of conversion in California has evolved to recognize new forms of property, and " 'if the law of conversion can be adapted to particular types of intangible property . . . it may be appropriate to do so.' " (Op., concurring and dissenting opinion of Lavin, J. at 5 (citing *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 124).) Justice Lavin then concluded that applying conversion to earned but unpaid wage claims would be appropriate.

Especially when considering *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592 and *Cortez v. Purolator Air Filtration*

Products Co., (2000) 23 Cal.4th 163, among other modern cases in which this Court has recognized that employees have property interests in their earned but unpaid wages, this Court should hold that an action for conversion may be brought to recover such wages. With respect to Voris specifically, as argued by Lampert himself, without this determination, Voris will likely never recover his unpaid wages, despite having successfully obtained judgments against the two startups that employed him (and also against the third of which he was an equity holder but not an employee), because Lampert managed the employer startups into insolvency. (*See, e.g.,* Respondent's Brief in the Court of Appeal at 7, 9, 26, 31.) Beyond Voris, with respect to the broader context of employee protections in California, to refuse to recognize conversion of wages as a cause of action would essentially shield even bad actors who acted intentionally from established principles of common law, and do so in favor of a policy concern over the potential for proliferating litigation. This too is against California policy, a fundamental principle of which is to hold an intentional bad actor accountable, including specifically in the context of conversion. (*See, e.g., Kremen v. Cohen* (9th Cir. 2003) 337 F.3d 1024, 1036 ["[T]he common law does not stand idle while people give away the property of others") (interpreting California law on conversion].)

III. STATEMENT OF THE CASE

A. Standard of Review and Facts

The issue before the Court of Appeal was the propriety of the trial court's judgment on an order granting a motion for judgment on the pleadings on the conversion of wages issue, which is reviewed *de*

novo. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515.) Thus, the Court here has even broader discretion than otherwise to draw from the entire appellate record in considering the issues here, including facts in the appellate record not specifically recited in the Court of Appeal's opinion. (Cal. Rules of Court, rule 8.500 (c)(2); *Lonicki v. Sutter Health Cent.* (2008) 43 Cal.4th 201, 206 [summary judgment context]; *Miller v. Dep't of Corrections* (2005) 36 Cal.4th 446, 452, n. 3 [same]; *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476 [same].)

The facts as discussed in the Court of Appeal's opinion are enough to decide the issues if the Court here so chooses. (Cal. Rules of Court, rule 8.500 (c)(2).) However, part of the value of this particular case as a vehicle to examine the potentially competing policy concerns is in the non-hypothetical and stark facts as developed in a record of a complaint with allegations of specific bad conduct, fleshed out by six years of litigation and two trials. This record provides the Court with an opportunity to paint a clear picture: for example, that even on these facts, for policy reasons or otherwise, the Court is not going to recognize a conversion of wages tort, or, on the other hand, that these facts help show why the Court needs to do so to protect California's policy of sanctity of an employee's entitlement to earned wages, and why doing so is consistent with existing principles of California law. Thus, this Statement of the Case discusses some facts more specifically than discussed in the Court of Appeal's opinion, with citations to the underlying appellate record, should the Court find more specific facts helpful. (*Lonicki*, 43 Cal.4th at 206; *Miller*, 36 Cal.4th at 452, n. 3; *Merrill*, 26 Cal.4th at 476.)

B. Voris and Lampert's Business Relationships

This case arises out of the business relationship between Voris and Lampert and certain other defendants, including Ryan Bristol ("Bristol"), which defendants other than Lampert are no longer parties to the case. (Op. at 2.) In November 2005, Voris joined with Bristol and Lampert to form defendant Premier Ten Thirty-One Capital Corp. dba PropPoint ("PropPoint"), a real estate investment company. (*Id.*) Voris was an employee of PropPoint and was also supposed to be an equity holder, based on both promises of sweat equity and investment of substantial amounts of his cash savings in the entity. (*Id.* at 2-3, 16, concurring and dissenting opinion at 1-2.) Voris, Lampert, and Bristol also formed two other entities, defendants Sportfolio, Inc. ("Sportfolio") and Liquiddium Capital Partners, LLC ("Liquiddium"). (Op. at 2-3.) Voris was an employee of Sportfolio and promised equity in it as well. (Op. at 2-4, n. 2, concurring and dissenting opinion at 1-2.) Voris was to be an equity holder of Liquiddium (Op. at 2-3, n. 2), but does not allege that he was a Liquiddium employee. (1 Appellant's Appendix ("AA") 69:18-26.)

The companies here were not large corporate employers with hundreds of employees, where a high level corporate principal or managing executive might or might not have personal knowledge or responsibilities for the payment (or non-payment) of an employee's wages. (1 AA 66:24-67:2, 69:6-11, 70:21-72:9.) Rather, the entities were small, closely held companies, all three of which were controlled in whole or in part by Lampert. (1 AA 66:24-67:2, 69:6-11, 70:21-72:9, 247; 4 AA 1083:1-7.) The companies had overlapping personnel and shared the same office space, which was also Voris's

apartment. (1 AA 66:24-67:2, 69:6-11, 70:21-72:9; 4 AA 1083-1084, 1098.)

In the fall of 2006, Voris discovered financial improprieties by Bristol and Lampert, including commingling of the funds of PropPoint, Sportfolio, Liquiddium, and other companies for the individual defendants' personal benefit, as well as use of company funds to pay individual defendants' personal expenses. (Op. at 3.)

Among the specific misconduct was an intentionally false "deferred wage" scheme, whereby Voris agreed to work and did work for wages to be paid later after corporate finances allowed, based on false representations by Bristol and Lampert that the two men were also working on the same or a similar deferred wage basis, when in fact they were not but rather were paying themselves. (1 AA 68:1-28, 72:18-73:9, 76:7-13; 80:8-20; 89:19-90:17; 91:1-28; 92:10-93:15; 95:26-96:23; 100:17-101:22; 4 AA 1100-1101, 1104:11-1105:13.)

This general concept of an employee of a startup riskily providing labor for deferred wages or compensation is not limited to Voris and is recognized as a phenomenon in this state, with some history of associated mischief by corporate employers, at least worthy of both mainstream journalistic reporting and also legal writing by practitioners that regularly service the startup community. (*See, e.g.*, Appellant's Request for Judicial Notice ("RJN") filed concurrently herewith; O'Neill, Casey and Hanley Chew, *WrkRiot: Rite Of Passage Or Federal Offense?*, Law360.com, June 16, 2017, *available at* https://www.law360.com/articles/935203; Kendall, Marissa, *When startups fail: what happens when the cash runs out,* THE MERCURY NEWS, Oct. 2, 2016, *available at*

http://www.mercurynews.com/2016/10/02/when-startups-fail-what-happens-when-the-cash-runs-out/.)

Voris confronted Bristol and Lampert in the fall of 2006, the parties had a falling out, and Voris was terminated from all three companies in 2007, without recognition of or compensation for his promised equity interests in all three entities, and with substantial earned but unpaid wages owing from PropPoint and Sportfolio (specifically, $157,000). (Op. at 3.)

Lampert was not an apex corporate executive without personal involvement in Voris's termination and the affirmative decision not to pay Voris his earned wages and vested equity interests, but rather was intimately personally involved in that corporate conduct. (*See, e.g.*, 1 AA 66:24-67:2, 69:6-11, 70:21-72:9, 247; 4 AA 1083:1-7, 1082-84, 1090-92, 1094, 1098, 1100-1101, 1106-1107, 1104, 1112-1116, 1120; 6 AA 1405-1422, 1521-22.) Lampert personally participated in the negotiation of Voris's wages and equity terms (4 AA 1100-1101, 1104); Lampert was the individual who communicated and executed Voris's termination (4 AA 1112); and Lampert hovered over Voris and gloated at Voris's physical exit from the company and afterward (4 AA 1112).

C. Voris Obtains Judgments against Liquiddium and Sportfolio and files an Appeal on his Dismissed Claims Against Lampert

Voris filed suit in 2009 and the case was litigated for several years, yielding a complex procedural history. (*See* Op. at 3-6.) That history includes a prior nonpublished appellate opinion, *Voris v. Lampert*, No. B234116 (Cal. Ct. App. May 22, 2014) 2014 WL

2119993 ("*Voris I*") (affirming the trial court's grant of summary adjudication on Voris's alter ego theories, but reversing the trial court's summary judgment dismissal of Voris's conversion claims against Lampert).

The operative pleading with respect to Lampert is the First Amended Complaint ("FAC"). (1 AA 63-114.)

With respect to Voris's claim for conversion of wages, the FAC specifically alleges that Lampert intentionally prevented Voris from receiving earned but unpaid wages in the specific amounts of $91,000 from PropPoint, and $66,000 from Sportfolio. (Op., concurring and dissenting opinion of Lavin, J. at 1-2.) More specifically, the allegations include that Lampert personally participated in causing the company to hold Voris's wages and equity, both as a punitive retaliatory measure for Voris's identification of Bristol and Lampert's improper conduct, and specifically as leverage to attempt to extract a settlement and release from Voris (which Voris never gave). (1 AA 74:16-75:24, 95:26-96:23, 100:17-101:22, 102:14-20.)

On October 19, 2011, Voris obtained a judgment following jury trial, which determined that Sportfolio and Liquiddium were liable for the conversion of his equity interests in the amounts of $55,599.32 and $52,631.58, respectively. (Op. at 3-4, n. 2.) Voris's claims against Lampert, including his wage and stock conversion claims, were not tried in the October 2011 proceedings, because they were the subject of the then-still-pending appeal in *Voris I*. (Op. at 3-4; *Voris I*.)

D. Voris's Conversion Claims are Remanded to the Trial Court but then Dismissed a Second Time, and Voris Appeals

Voris tried to pursue an alter ego theory against Lampert in addition to direct intentional tort claims, but the Court of Appeal in *Voris I* upheld the trial court's determination that Voris did not have sufficient evidence to proceed against Lampert on an alter ego theory. Thus, Voris here attempted pursuit of alter ego theories and they did not help him reach Lampert.

The *Voris I* opinion, however, held that Voris might have intentional tort claims (for conversion of wages and stock) against Lampert that were not dependent on alter ego, and remanded the case to allow Voris to pursue those claims further. On remand following *Voris I*, Lampert moved for judgment on the pleadings on Voris's stock conversion and wage conversion claims. (Op. at 5.) On January 15, 2015, the trial court granted both motions as to the conversion claims against Lampert, finding neither was validly pled. (*Id.*) Voris appealed the rulings on both motions for judgment on the pleadings.

Later in 2015, Voris obtained a judgment following bench trial against PropPoint and was awarded damages of $171,951.02 plus $126,795.84 in prejudgment interest. (Op. at 5.)

Lampert represented to the Court of Appeal that all three corporate entities are insolvent, and that Voris is unlikely ever to obtain satisfaction of the judgments against the corporate entities unless Voris can also reach Lampert as an individual. (*See, e.g.*, Respondent's Brief in the Court of Appeal at 7, 9, 26, 31.) Voris argued and offered to prove that at least one of the entities,

Liquiddium (the entity in which Voris was an equity holder but not an employee), had sufficient funds to pay Voris's perfected judgment against it, but that Lampert caused Liquiddium to make disbursements in violation of Voris's judgment liens, frustrating collection. (*See* Appellant's Reply Brief in the Court of Appeal at 1-2; 2 AA 428:18-25, 463-465; 4 AA 928-929, 1107:18-27; 8 AA 1773:25-1776:22, 1874-1911, esp. at 1902-1907.) Thus, while the parties have some disagreement as to exactly why Voris's judgments against the corporate entities have not been satisfied, both sides appear to agree that if Voris is unable to reach Lampert as an individual, Voris is unlikely ever to recover his earned wages. On the other hand, by the governing allegations of the pleadings, Lampert will have paid himself wages or other distributions from the same entities, despite (and perhaps contributing to) their alleged insolvency.

On March 28, 2017, the Court of Appeal held unanimously that Voris had validly pled conversion of stock claims against Lampert and remanded those claims for further proceedings. (Op. at 16-19 and concurring and dissenting opinion of Lavin, J. at 1.) But as to Voris's wage conversion claims against Lampert, the panel was divided. The panel's majority opinion affirmed the trial court's ruling, holding that no cause of action for conversion of earned but unpaid wages exists under California law. (Op. at 8-16.)

In a concurring and dissenting opinion, Justice Lavin conducted a detailed examination of the relevant law and arguments, and stated that he would find that conversion of unpaid wages *is* a valid cause of action under California law, and that Voris has validly pled such a cause of action against Lampert. (Op., concurring and dissenting

opinion of Lavin, J.) As Justice Lavin observed, the true thrust of difference between the majority and the concurrence and dissent appears to be rooted in policy concerns: the majority is concerned that to allow a cause of action for conversion of wages would potentially lead to an increase in the intensity and complexity of wage and hour litigation in other cases, unrelated to Voris and Lampert, whereas the concurrence and dissent finds these policy fears to be unpersuasive. (*Id.* at 3.)

On May 8, 2017, Voris filed his Petition for Review to this Court on whether conversion of wages exists under California law generally and specifically against an individual controlling principal and executive in the context of a closely held corporation. On July 12, 2017, this Court unanimously granted review on the issues raised in the Petition.

IV. ARGUMENT

A. This Court Should Approve a Claim for Conversion of Earned but Unpaid Wages

The tort of conversion is an "act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." (*Oakes v. Suelynn Corp.* (1972) 24 Cal.App.3d 271, 278; *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119.) To establish conversion, the plaintiff must allege the plaintiff's right of ownership to the personal property, defendant's control of the property in a manner inconsistent with the plaintiff's rights, and damages. (*Fremont*, 148 Cal.App.4th at 119.) "Money cannot be the subject of a cause of action for

conversion unless there is a specific, identifiable sum involved[.]" *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395.

To date, there has been no controlling decision of this Court or a California Court of Appeal directly addressing the question of whether wages is a proper subject of conversion. However, authority under California law and from decisions by this Court have found that employees have a vested property interest in the wages that they earn, and failure to pay them is a legal wrong that interferes with the employee's title in those wages. This Court should therefore recognize wages as the proper subject of a conversion claim.

1. California Employees Have Vested Property Interests in the Wages They Earn

In California, wages are deemed the property of the employee and the entitlement to that property right is earned *as the labor is performed.* (*Loehr v. Ventura County Community College District* (1983) 147 Cal.App.3d 1071, 1080.) Accordingly, in this state, when an employer fails to pay wages, more than mere money is withheld; the employer has also violated a property interest in which an employee has legal title.

Cases have drawn upon this premise of wages as a property interest to allow employees to recover their earned pay beyond the remedies provided in the Labor Code. In *Cortez v. Purolator Air Filtration Prods. Co.* (2000) 23 Cal.4th 163, this Court analyzed whether a claim for unpaid wages may be brought under California's Unfair Competition Law ("UCL"), Bus. & Prof. Code § 17200, *et seq.* This Court held that unpaid wages *could* be awarded as restitution for

wrongfully acquired money or property under the UCL, even though the UCL does not authorize compensatory damages and the employees never had physical possession of their lost money or property, *i.e.*, their unpaid wages.

To reach this conclusion, the *Cortez* decision relied on the doctrine of equitable conversion. (23 Cal.4th at 178.) Under this doctrine, the Court found that employees possess *equitable title* in their earned but unpaid wages, because the employer had a legal obligation to pay them. *Ibid.* This aspect of the *Cortez* decision is significant for two reasons: first, it holds that employees are deemed entitled to possess their wages when they earn them; and second, it recognizes that recovery of unpaid wages is *not limited to remedies sounding in contract or the Labor Code.*

2. California Authority Supports an Action for Conversion to Recover Unpaid Wages

Other California cases, based on the premise of wages as property, support claims for conversion of wages. In *Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE) v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1095-96 ("*Blockbuster*"), a Court of Appeal held, *inter alia,* that a conversion cause of action was properly maintained against the employer to recover wages illegally withheld by the employer. In that case, the DLSE had brought an action against UI Video Stores (Blockbuster) to recover wages improperly withheld, when Blockbuster improperly deducted the cost of uniforms from its employees' wages. A settlement was reached with Blockbuster where it would deliver to the DLSE checks made payable to the 1,914 employees that were illegally

charged with the uniform costs. When Blockbuster delivered the checks directly to the employees instead, a significant number of the checks were returned as undeliverable. Blockbuster initially refused to turn over those returned checks to the DLSE to be deposited in California's unpaid wages fund; later, however, Blockbuster agreed to turn over the returned checks, but told its bank not to honor the funds on those checks.

The DLSE then filed suit alleging breach of the settlement agreement and conversion of the checks representing the unpaid wages. While the trial court granted Blockbuster's motion for summary judgment on the basis that "[t]he agreed payments for uniform expenses reimbursement constitutes neither wages or monetary benefits" (55 Cal.App.4th at 1089), the Court of Appeal reversed, finding that the funds constituted unpaid wages, and that DLSE could maintain its conversion cause of action of those funds as the statutory trustee standing in the shoes of the absent employees. *Id.* at 1096.

In *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, this Court addressed a narrow issue of law: the availability of a private right of action to recover gratuities improperly withheld by an employer under Lab. Code § 351. Section 351 prohibits an employer from withholding gratuities and establishes that each gratuity is "*the sole property of the employee or employees* to whom it was paid, given, or left for." (Lab. Code § 351 (emphasis added).) The court ultimately held that section 351 did not provide a private cause of action; significantly, however, this Court made clear that employees

may recover those gratuities through other means, "such as [through] a common law action for conversion." (*Id.* at 604.)

3. District Courts Interpreting California Law have Upheld Conversion of Wages Claims

Federal courts sitting in California and interpreting California law have thoughtfully analyzed *Cortez, Blockbuster, Lu,* and other cases to predict that, should this Court expressly rule on the issue, it would find that an employee can bring an action against an employer for conversion, to recover unpaid wages: there exists "clear authority under California law that employees have a vested property interest in the wages that they earn, failure to pay them is a legal wrong that interferes with the employee's title in the wages, and *an action for conversion can therefore be brought to recover unpaid wages*." (*Sims v. AT & T Mobility Servs. LLC* (E.D. Cal. 2013) 955 F.Supp.2d 1110, 1119 (*"Sims"*) (emphasis added).)

In *Sims*, a case before Judge John A. Mendez, Jr. from the Eastern District of California, an employee filed a class action complaint against his employer, alleging that the employer improperly classified him and others as exempt from state overtime and break period laws, and asserting claims of, *inter alia,* conversion of unpaid wages. The defendant moved to dismiss on the position that the Labor Code provides the exclusive remedies for unpaid wages, and that conversion is not viable for unpaid wages as a matter of law.

The district court recognized that "[w]hen a federal district court interprets state law, it is bound by the decisions of the highest state court." (955 F.Supp.2d at 1119 (citing *Vernon v. City of L.A.* (9th Cir. 1994) 27 F.3d 1385, 1391 and *Hewitt v. Joyner* (9th Cir.

1991) 940 F.2d 1561, 1565).) "Where the state supreme court has not spoken on an issue presented to a federal court, the federal court must determine what result the state supreme court would reach based on state appellate court opinions, statutes, and treatises." (*Vernon,* 27 F.3d at 1391.) Drawing from the authorities cited above, the *Sims* court then reasoned that an action for conversion can be brought to recover wages, based on employees' vested property interest in their earned but unpaid wages, and that this Court would so decide if presented with the question. (*Id.* at 1119-20.)

Judge Mendez's decision recognized that other district courts had reached different conclusions on the viability of a conversion claim for wages. (*See, e.g., Green v. Party City Corp.* (C.D. Cal. Apr. 9, 2002) No. CV–01–09681 CAS (EX) 2002 WL 553219; *Pulido v. Coca-Cola Enters., Inc.* (C.D. Cal. May 25, 2006) No. EDCV06–406 VAP (OPX), 2006 WL 1699328; *In re Wal-Mart Stores, Inc. Wage & Hour Litig.* (N.D. Cal. 2007) 505 F.Supp.2d 60; *Vasquez v. Coast Valley Roofing Inc.* (E.D. Cal. June 6, 2007) No. CV–F–07–227–OWW–DLB, 2007 WL 1660972; *Jacobs v. Genesco, Inc.* (E.D. Cal. Sept. 3, 2008) No. CIV. S–08–1666 FCD DAD, 2008 WL 7836412.) However, Judge Mendez found that those decisions largely conflicted with the holding in *Cortez*, and were also decided *before* this Court's decision in *Lu.*

Following *Sims*, two other district court cases have examined the viability of a conversion of wages claim, with both courts also scrutinizing the conflicting lines of authority as to whether California recognizes a common law claim for conversion of wages. The courts concurred with the reasoning of *Sims* and ruled that a common law

conversion of wages claim *does* exist, and that the Labor Code was *not* the exclusive remedy for an employer's unlawful withholding of wages. (*Rodriguez v. Cleansource, Inc.* (S.D. Aug. 20, 2015) 2015 WL 5007815, at *9 ["[T]his Court finds Judge Mendez's thorough opinion on the matter persuasive, and agrees that a claim for conversion based on unpaid wages and overtime is viable under California law."]; *Alvarenga v. Carlson Wagonlit Travel, Inc.* (E.D. Cal. Feb. 8, 2016) No. 115 CV01560AWIBAM, 2016 WL 466132.)

This line of authority is well-reasoned and consistent with existing California case law. Accordingly, this Court should recognize such a claim as viable.

B. The Appellate Majority Opinion's Reasoning is Flawed and Goes against Public Policy and the Clear Trend in Conversion Law

The Court of Appeal's majority opinion, however, rejected this line of authority and its reasoning. Instead, the majority determined that the claim failed because Voris had failed to allege an essential element of the tort and also because policy concerns guided the majority panel to reject "Voris's attempt to extend tort liability in this area." (Op. at 13.) Voris respectfully submits that the majority added an "entrustment" element to the conversion tort that does not exist in law (and that Voris could meet here if it did exist and if the element were properly applied), and that the majority improperly balanced competing policy concerns, underweighting California's policy in favor of strong protection of earned wages.

1. "Entrustment" is Not an Element of Conversion, and Voris could Satisfy it if it Were

Initially, the majority opinion held that the claim fails because Voris failed to plead that Lampert or the startups were "entrusted" with Voris's earnings: "[a]lthough an employer is obligated to pay an employee . . . it does not follow that an employer is *entrusted* with an employee's earnings." (Op. at 12 (emphasis added).) The majority opinion then concludes, without citation to any specific authority for such a proposition, that "the alleged failure to pay Voris the sums that he earned . . . does not give rise to a cause of action against Lampert for conversion." *Id.*

However, "[t]here is no requirement [on a conversion claim] that the money have been held in trust—only that it be misappropriated." (*Welco Elecs., Inc. v. Mora* (2014) 223 Cal.App.4th 202, 216.) (*See also* CACI No. 2100; 5 WITKIN, SUMMARY OF CAL. LAW (10th ed. 2005) Torts, § 711(2), p. 1035 ("The unauthorized transfer of property constitutes a conversion."); *cf. PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 396 ["California cases permitting an action for conversion of money *typically* involve those who have misappropriated, commingled, or misapplied specific funds held for the benefit of others" (emphasis added)].) To adequately plead conversion, Voris only needed to allege (and did allege[1]) "any act of dominion wrongfully exerted over the personal property of another inconsistent with the owner's rights thereto." (*Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 50.)

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[1] The FAC provides that Lampert, as a director or officer of PropPoint, deliberately "withheld wages rightly owed to Plaintiff[.]" (1 AA 74-75 (FAC at ¶ 53-62).)

Moreover, even assuming *arguendo* that there was such an "entrustment" requirement, as Justice Lavin noted, "although Voris's complaint does not expressly state Lampert was entrusted with Voris's wages, the allegations, broadly read (as they should be on a motion for judgment on the pleadings), are sufficient to show Lampert controlled the monies owed to or earmarked for Voris . . . " (Op., concurring an dissenting opinion of Lavin, J. at 2-3.)

Furthermore, the argument ignores the reality that employees are nearly always "entrusting" their employers with valuable property: the value of their labor. Employees almost always perform the labor first and then are paid the wages for it afterward. The employees thus necessarily must trust the employer to pay the wages after the labor value has been provided, and, Voris respectfully submits, this fundamental reality is part of what drives California policy and law that employees have a possessory interest in wages as the work is performed. (*See Cortez,* 23 Cal. 4th at 178 ["[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."].)

The majority opinion's "entrustment" element and finding that Voris did not or could not meet it, should therefore be rejected. In the alternative, Voris should be allowed leave to amend in order to expressly assert that Lampert, as a controlling officer and/or director of PropPoint and Sportfolio, *was* entrusted with Voris's wages and/or labor valued in the amount of the wages. (*See McDonald v. Superior Court* (1986) 180 Cal.App.3d 297, 303-04 [Regardless of whether a

request therefore was made, unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion]; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386 [Plaintiff can make showing of possibility to amend in the first instance to the appellate court].)

2. The Majority Opinion's Policy Concerns are Unsupported

The majority opinion next reasoned (and the true essence of the majority's opinion is) that the law of conversion should not be extended to include wages because, "if Voris's approach were credited, any claimed wage and hour violation would give rise to tort liability for conversion as well as the potential for punitive damages." (Op. at 13.) However, as Justice Lavin argued, this "parade of terribles" is insufficient to justify the majority opinion's decision. (Op., concurring and dissenting opinion of Lavin, J. at 3.)

Justice Lavin noted that well-settled principles of tort law, and the limits imposed by statute or common law on the recovery of punitive damages, already exist to provide safeguards as to employers' potential liability for such a claim: "In my view, the case by case consideration of such factors as the foreseeability of the injury and the nexus between the defendant's conduct and plaintiff's injury, together with ordinary principles of tort law, 'are fully adequate to limit recovery *without the drastic consequence of an absolute rule which bars recovery in all such cases.*' " (*Id.* at 3-4 (emphasis added) (citing *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 808 [holding that liability for negligent interference with economic relations may

extend to contractor, as contractor owed a duty of care to tenant whose business was harmed by contractor's delay in construction work]).) (*See also* Civ. Code § 3294 (requiring clear and convincing evidence of malice, oppression, or fraud to justify an award of punitive damages); *Simon v. San Paolo U.S. Holding Co.* (2005) 35 Cal.4th 1159, 1171 ["The imposition of 'grossly excessive or arbitrary' awards is constitutionally prohibited, for due process entitles a tortfeasor to 'fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.'" (citing *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559]).)

Moreover, with respect to corporate directors or employers who may be sued for conversion of wages, Lab. Code § 2802 requires an employer to defend or indemnify an employee who is sued by third persons for conduct in the course and scope of his employment. (Op., concurring and dissenting at 3.) Accordingly, with respect to individuals so sued while acting in the scope of their employment, "an employee responsible for interfering with the payment of accrued wages . . . will be protected against personal liability if the employee was acting at the direction of the employer." *Ibid.* "[I]f a corporate officer performs his duties conscientiously, and without malice, oppression, or fraud, he has nothing to fear." *Ibid.*

Justice Lavin's reasoning here is sound, and is also consistent with the principle that "[t]he legal fiction of the corporation as an independent entity *was never intended to insulate officers and directors from liability for their own tortious conduct.*" (*PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1380 *as modified on denial of*

reh'g (Apr. 7, 2000) (emphasis added) (*"Kadisha")* [citing *Frances T. v. Vill. Green Owners Assn.* (1986) 42 Cal.3d 490].) (*See also Voris I* [reversing dismissal of conversion claims against Lampert and remanding those claims to the trial court].)

In *Kadisha,* the Court of Appeal stated the rule that "[d]irectors or officers of a corporation do not incur personal liability for torts of the corporation merely by reason of their official position, unless they participate in the wrong or authorize or direct that it be done. [However], [t]hey may be liable, under the rules of tort and agency, for *tortious acts committed on behalf of the corporation.* [Citations.]" (*Kadisha, supra,* 78 Cal.App.4th at 1379 (emphasis added); *see also Frances T., supra,* 42 Cal.3d at 505 ["[D]irectors are not subordinate agents of the corporation; rather, their role is as their title suggests: *they are policy-makers who direct and ultimately control corporate conduct*" (emphasis added)."].) This liability does not does not depend on the same grounds as 'piercing the corporate veil,' on account of inadequate capitalization for instance, but rather on the officer or director's personal participation in or specific authorization of the tortious act. (*Kadisha, supra,* 78 Cal.App.4th at 1380.)

In citing to this Court's decision in *Frances T.,* the *Kadisha* court continued, "If a corporate officer or director were not liable for his or her own tortious conduct, he or she 'could inflict injuries upon others and then escape liability behind the shield of his or her representative character, even though the corporation *might be insolvent or irresponsible.*'" (*Ibid.* (Emphasis added.))

The allegations against Lampert here provide exactly the type of situation that the Court of Appeal in *Kadisha* and this Court in

Frances sought to address – where a corporate officer or director has engaged in tortious misconduct but has managed to evade liability by claiming to act on behalf of insolvent or irresponsible corporations. The imposition of tort liability here would be entirely appropriate.

For this analysis, it may also bear repeating that employees possess *equitable title* in their earned but unpaid wages. (*See Cortez, supra,* 23 Cal.4th at 178 ["[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."]; *Loehr, supra,* 147 Cal.App.3d at 1080 ["Earned but unpaid salary or wages are vested property rights, claims for which *may not be properly characterized as actions for monetary damages*" (emphasis added).].) This aspect potentially distinguishes the claim of conversion for unpaid wages from at least some other types of wage and hour claims (such as penalties) that may not necessarily entail property interests. (*See, e.g., William A. George v. TRS Staffing Sols., Inc., et al.* (C.D. Cal. Sept. 14, 2009) No. SACV09835JVSMLGX, 2009 WL 10676205, at *3 [holding that an employee does not have a vested property interest in a penalty until the employee "take[s] some action to enforce them." (citing *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, 1108)); *People v. Durbin* (1966) 64 Cal.2d 474, 479 ("No person has a vested right in an unenforced statutory penalty or forfeiture.")].)

In sum, a claim for conversion would be appropriate to address interference with an employee's title to his or her wages, and the

inherent and existing principles and limitations of tort law would likewise adequately circumscribe such employee claims for those specifically seeking redress for wrongfully withheld wages. (*See also Kremen v. Cohen* (9th Cir. 2003) 337 F.3d 1024, 1035 ["We have not "creat[ed] new tort duties" in reaching this result. *Cf. Moore v. Regents of the Univ. of Cal.,* 51 Cal.3d 120, 146, 271 Cal.Rptr. 146, 793 P.2d 479 (1990). We have only applied settled principles of conversion law to what the parties and the district court all agree is a species of property."].)

Especially when considering the allegations here (which describe an individual controlling principal of an employer who has, *inter alia,* deliberately withheld earned but unpaid wages to coerce an employee into giving up other claims (*see, e.g.,* 1 AA 74-57 [FAC at ¶¶ 53-58])),[2] Voris submits that the potential of conversion liability is

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[2] The FAC provides, in part:

> 54. Ryan Bristol and Lampert . . . retaliated against [Plaintiff Voris]. They told at least one PropPoint employee that Plaintiff's work performance was poor and that he had stolen money from the company. . . . They *refused to honor salary agreements,* or provide share certificates reflecting his ownership interests in PropPoint, Liquiddium, and Sportfolio.
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> 55. . . . [I]n . . . January 2007, Ryan Bristol and Lampert took away Plaintiff's work computer and forced him to leave the premises. . . .
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> 56. In or about February 2007, Ryan Bristol and Lampert asked Plaintiff to return to work. *To induce Plaintiff's return, Ryan Bristol and Lampert agreed to honor the prior salary and equity agreements* . . .
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> 57. During February 2007, after Plaintiff returned to work, Ryan Bristol and Lampert advised Plaintiff that his salary would be withheld unless he agreed to an unfavorable

critical for addressing such injustices. (*Cf. In re Trombley* (1948) 31 Cal.2d 801, 809-10 [holding that certain employer misconduct may amount to criminal fraud: "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."].)

3. Any Concerns regarding Potential Tort Liability for Employers are Outweighed by California Public Policy Interests

In his concurring and dissenting opinion, Justice Lavin further argued that "any burden on the part of employers arising from *potential* tort liability for conversion is outweighed by the average worker's need for the prompt and complete payment of his accrued claim." (Op., concurring and dissenting op. of Lavin, J. at 4 (emphasis in original).) Voris submits that the fundamental and well-established policy in favor of employee wage protections confirms such an overriding interest in California.

"California has long regarded the timely payment of employee wage claims as indispensable to the public welfare . . . " (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 82 *superseded by statute on other grounds, as recognized by Elliot v. Spherion Pacific Work LLC*

> separation and settlement package that would waive his claims to prior unpaid earnings and ownership interests . . . Plaintiff refused to sign such an agreement . . .
> 58. When Plaintiff was not paid in February, *he learned from PropPoint's payroll service that he had been terminated on January 31, 2007, and there was no indication that he had been rehired.*

(1 AA 74-57 (FAC at ¶¶ 53-58) (emphases added).)

(C.D. Cal. 2008) 572 F.Supp.2d. 1169, 1176.) "Delay of payment or loss of wages results in deprivation of the necessities of life, suffering inability to meet just obligations to others, and, in many cases may make the wage-earner a charge upon the public." (*Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 326.)

Accordingly, longstanding policy in California provides that "wages are not ordinary debts, that they may be preferred over other claims, and that, because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is *essential to the public welfare that he receive his pay when it is due.*" (*In re Trombley* (1948) 31 Cal.2d 801, 809 (emphasis added).) (*See also Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1147 [statute criminalizing prompt payment violations shows "the policy involves a broad public interest, not merely the interest of the employee"]; *Smith v. Rae–Venter Law Group* (2002) 29 Cal.4th 345, 360 [recognizing Lab. Code §§ 201 and 203 as implementing California's fundamental public policy regarding prompt wage payment], *superseded by statute on other grounds as recognized by Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, 673, n. 2.[3])

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[3] *See also* Op., concurring and dissenting opinion of Lavin, J. at 4:

> "[T]he Legislature's decision to criminalize certain employer violations of the overtime and minimum wage laws (Lab. Code., § 1199), including the failure to pay earned wages, reflects a determination that such conduct affects a broad public interest."

The Court of Appeal's majority opinion did not analyze the significant California policy of protecting employee wages in any depth.[4] Instead, it only briefly identified the concern over introducing a new theory of liability for wage and hour claims, which might cause litigation proliferation, and opined that Labor Code section 201 provided a sufficient remedy for the recovery of wages (Op. at 13.).

In Voris's case, statutory remedies provided under the Labor Code clearly were *not* sufficient. For instance, in his judgment against PropPoint, Voris *did* prevail on his Labor Code violation claims (9 AA 2211-2214 [court judgment against Lampert, finding in

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Section 1199 specifically provides for criminal liability not only for employers, but also any "other person acting either individually or as an officer, agent, or employee of another person . . . " (Lab. Code § 1199.) *See also Martinez v. Combs* (2010) 49 Cal.4th 35, 56, *as modified* (June 9, 2010):

> To ensure the IWC's wage orders would be obeyed, the Legislature included criminal, administrative and civil enforcement provisions in the original 1913 act. The criminal enforcement provision declared that employers who failed to pay the minimum wage, as well as officers, agents and other persons acting for such employers, would be guilty of misdemeanors. (Stats. 1913, ch. 324, § 11, p. 636.) . . . More robust versions of these enforcement provisions appear in today's Labor Code. (See §§ 1193.5 [administrative enforcement], 1193.6, 1194, 1194.2 [civil actions], 1199 [criminal liability].)

[4] The majority panel cited to *Moore v. Regents of Univ. of California* (1990) 51 Cal.3d 120, in which this Court stated that policy concerns should be addressed openly when considering new applications of tort law; however, the majority opinion only conclusorily listed expanding tort liability, and the available remedies of Lab. Code § 201 as the bases for its policy considerations, and failed to address the policy concerning protection of wages as it might weigh on the scale.

Voris's favor on the twelfth cause of action for violations of the Labor Code]); however, as a practical matter, Lampert had long emptied PropPoint's bank accounts and dissolved the company before Voris could recover.[5]

Consequently, for situations involving sophisticated, intentional misconduct by corporate agents and principals with control over an employee's wages, the Labor Code may not fully provide sufficient recompense or deterrence. Voris therefore submits that even under *Moore v. Regents of Univ. of California* (1990) 51 Cal.3d 120, policy factors should be found to weigh in favor of allowing a conversion to wages claim. (*See also* A Fair Day's Pay Act, SB 588, including Lab. Code §§ 96.8, 98, 238, 238.1 (imposing criminal liability on controlling persons of corporate employers for certain conduct in connection with failure to pay wages) and 558.1 (making controlling persons of corporate employers personally liable for non-payment of wages by statute), effective January 1, 2016).)

4. The Trend in Conversion Law Supports the Finding that Wages may be Subject to a Conversion Claim

[5] *See, e.g.,* 8 AA 1774-1776 (Declaration of Brett Voris in Opposition to Greg Lampert's Motion for Award of Attorneys' Fees and Costs); 8 AA 1908-1911 (Ex. 12 to Declaration of Brett Voris [cashier's check and note from Lampert]). In this Declaration, Voris details how Lampert had sent Voris a cashier's check for $244.18 on May 14, 2014, with a note indicating that Lampert had liquidated and closed all of the companies: "The attached are the funds that were remaining after the bankruptcy or closing of the entities and their respective bank accounts. According to the courts, it is yours."

The majority opinion's holding on this issue also goes against a decades-long trend of courts recognizing new forms of intangible property under conversion claims.

"Historically, the tort [of conversion] was limited to tangible property and did not apply to intangible property (with an exception for intangible property represented by documents, such as stock certificates). [Citation.] Modern courts, however, have permitted conversion claims against intangible interests such as checks and customer lists." (*Welco Elecs., Inc. v. Mora*, 223 (2014) 223 Cal.App.4th 202, 213 (citing *Acme Paper Co. v. Goffstein* (1954) 125 Cal.App.2d 175, 179 [defendant converted checks by signing or having a third person signing payee's name]); *Palm Springs–La Quinta Dev. Co. v. Kieberk Corp.* (1941) 46 Cal.App.2d 234 [conversion of index cards with information on potential customers, including their financial standing].) (*See also Thrifty–Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559 [leaving open question whether confidential codes to gain computer access could be converted because trespass to personal property claim existed].[6])

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[6] The appropriate scope of a conversion action as applied to intangible personal property has been the subject of scholarly and informative discussion. *See, e.g.,* HARPER, JAMES AND GRAY ON TORTS (3d ed. rev. 2006) § 2.13, p. 204–214; Comment, *Analyzing the Urge to Merge: Conversion of Intangible Property and the Merger Doctrine in the Wake of Kremen v. Cohen* (2005) 42 HOUS. L. REV. 489; 1 DOBBS, LAW OF TORTS (2001) *Direct and Intentional Interference with Property*, § 63, pp. 132-35; Comment, *The Conversion of Intangible Property: Bursting the Ancient Trover Bottle with New Wine* (1991) 1991 B.Y.U. L. REV. 1681; PROSSER AND KEETON, TORTS, (5th ed. 1984) *Intentional Interference with Property*, § 15, p. 992.

In *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 124-25 (footnotes omitted) ("*Fremont*"), the Court of Appeal analyzed a matter of first impression: whether misappropriation of net operating losses could be subject to a conversion claim. In its opinion, the Court of Appeal examined the evolution of conversion law in California and the appropriate circumstances for recognizing a new form of intangible property under the tort:

> [T]he common law of conversion, which developed initially as a remedy for the dispossession or other loss of chattel [citation], may be inappropriate for some modern intangible personal property, the unauthorized use of which can take many forms. In some circumstances, newer economic torts have developed that may better take into account the nature and uses of intangible property, the interests at stake, and the appropriate measure of damages. On the other hand, *if the law of conversion can be adapted to particular types of intangible property and will not displace other, more suitable law, it may be appropriate to do so.* (*Payne v. Elliot, supra,* 54 Cal. at pp. 340–342.) [(1880) 54 Cal.339, 340-42.]

(Emphasis added.)

Having set forth this framework, the *Fremont* court then reasoned that "[a] net operating loss is a definite amount (see 26 U.S.C. § 172(c)) that can be recorded in tax and accounting records.... The misappropriation of a net operating loss without compensation in the manner alleged in the complaint, . . . is comparable to the misappropriation of tangible personal property or shares of stock for purposes relevant here." (*Id.* at 886.) The Court of Appeal then held that a misappropriation of a net operating loss without compensation constitutes conversion: "We see no sound basis in reason to allow

recovery in tort for one but not the other." (*Ibid.*)

Other recent decisions have likewise recognized for the first time modern forms of intangible property as the proper subjects of conversion. (*See, e.g., Kremen, supra,* 337 F.3d at 1030 [Under California law, internet domain name was intangible property which could serve as basis for registrant's conversion claim against registrar]; *Welco Elecs., supra,* 223 Cal.App.4th at 214 ["Credit card, debit card, or PayPal information may be the subject of a conversion."]; *Sanowicz v. Bacal* (2015) 234 Cal.App.4th 1027, *reh'g denied* (Mar. 17, 2015), *review denied* (June 10, 2015) [real estate sales commissions]; *see also CTC Real Estate Services v. Lepe* (2006) 140 Cal.App.4th 856, 860 [on identity theft, one's personal identifying information "is a valuable asset, the misuse of which can have serious consequences to that person" and can be the object of theft].)

In *Sanowicz, supra*, 234 Cal.App.4th at 1043, the Court of Appeal examined one real estate agent's allegations regarding another real estate agent's alleged breach of an agreement to share commissions earned on certain real estate sales. After determining that such an agreement between real estate agents was not prohibited under statute, the court examined the elements of conversion generally to determine whether the plaintiff had stated a conversion claim:

> Sanowicz's allegation that Bacal converted the commissions due when Bacal allegedly received funds from the broker on the sale of Sarbonne but refused to pay Sanowicz's share to him, *and by implication exercised dominion and control over the funds to the exclusion of Sanowicz*, is consistent with this discussion of the

elements necessary to sustain a claim for conversion.

(*Id. at* 1042 (emphasis added).)

While the *Sanowicz* court did not opine as to the nature of commissions as wages, other authority strongly suggests that all or most commissions are wages.[7] The *Sanowicz* decision and others demonstrate that conversion has already proven a viable remedy to the theft of earned sums of money equivalent or or that are wages. (*See also Mendoza v. Rast Produce Co.* (2006) 140 Cal.App.4th 1395, 1405 [seller's retention of profits from selling fruit at higher price than reported to grower supported conversion claim]; *Fremont, supra,* 148 Cal.App.4th at 97.)

Given this existing body of law, to draw the line on property subject to conversion at unpaid wages would be not only potentially arbitrary, but it would also be inconsistent with the underlying principles of this tort. (*See Welco Elecs., Inc.,* 223 Cal.App.4th at 215-16 [recognizing conversion as a civil remedy for theft: "As what was found to have occurred here was a theft, the tort of conversion was an appropriate cause of action."]; *see also Kremen*, 337 F.3d at

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[7] Lab. Code § 204.1 (*i.e.*, in the context of employees of vehicle dealers) defines commissions as follows: "Commission wages are compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof." "Although section 204.1 applies specifically to employees of vehicle dealers, both parties contend, and we agree, that the statute's definition of "commission" is more generally applicable." (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 803.)

1036 ["[T]he common law does not stand idle while people give away the property of others."].)

It may also be notable that today, while wages in and of itself as a form of intangible property may not be as novel an intangible property as, for instance, an internet domain name, modern day employment situations have given rise to increasingly sophisticated wage thefts, such that recognizing a tort remedy could be critical to a harmed employee. This is especially relevant given the proliferation of startups throughout California today, and where a company's misrepresentations on the capitalization of the company and its intentional failure to pay its employees are now often perceived as "conventional Silicon Valley antics." (*See, e.g.,* RJN; O'Neill, Casey and Hanley Chew, *WrkRiot: Rite Of Passage Or Federal Offense?*, Law360.com, June 16, 2017, *available at* https://www.law360.com/articles/935203 (discussing the federal criminal fraud investigation of Silicon Valley-based startup WrkRiot, in which the founder missed payroll and fabricated wire transfer confirmations to alleviate employee concerns); Indictment at 1, *USA v. Isaac Choi* (N.D. Cal. 2017) Case 5:17-cr-00308-EJD).) Given this state's policy on protecting wages, Voris respectfully submits that it should *not* be the case that "experiences similar to those at WrkRiot are practically a 'rite of passage.'" (*Casey and Chew; see also* RJN; Kendall, Marissa, *When startups fail: what happens when the cash runs out,* THE MERCURY NEWS, Oct. 2, 2016, *available at* http://www.mercurynews.com/2016/10/02/when-startups-fail-what-happens-when-the-cash-runs-out/ (examining the impact of failed startups on founders, employees, and customers).)

Providing a conversion claim for wages therefore may provide a crucial remedy for employees in similarly vulnerable situations with respect to their misappropriated wages.

C. Liability Should Likewise Apply to Corporate Officers or Directors for the Conversion of Wages

This Court should likewise determine that a claim for conversion based on unpaid wages, as asserted against an employer principal or executive participating in such conversion, is viable under California law.

1. Corporate Officers and Directors May Already be Held Individually Liable for Tortious Misconduct

At the trial court hearing on this motion, Lampert argued that, even if conversion of wages was a viable claim, it did not extend to Lampert individually absent a finding of alter ego, and the trial court accepted this argument. (1 RT 15-17.) However, in *Voris I*, the Court of Appeal clearly ruled that Voris's conversion claims against Lampert individually are not dependent on alter ego liability, under the principles of *Granoff v. Yackle* (1961) 196 Cal.App.2d 253 and related cases. (*Voris I* at 8 [2 AA 293].) (*See also Kadisha, supra,* 78 Cal.App.4th at 1381 [holding that defendants "acting in their official capacities as officers or directors of the corporation" may be liable for the intentional torts committed on behalf of or through the corporation].) Voris therefore only needed to allege that Lampert was acting in his official capacity as an officer or director, and that he

participated in or authorized the tortious conduct, and the FAC provides such allegations.[8]

And, should this Court determine that claims for conversion of wages are viable, but limited only to especially despicable behavior by corporate employers and their controlling officers and owners, or to claims against closely held corporations, but that Voris's pleading somehow does not plead such conduct with enough specificity, Voris should be allowed leave to amend. As this Court may likely understand, allegations in pleadings do not always capture the full horror of what a plaintiff suffered, and that might be the case here with Voris's FAC.[9] Voris believes that the allegations should be sufficient to raise the conversion of wages issues as the FAC is already pled, but, where there is any possibility that a plaintiff might be able to state a claim, then leave to amend should be granted.

2. Policy Reasons Also Support a Conversion Claim for Earned but Unpaid Wages as Alleged against Officers or Directors

Finally, Voris respectfully submits that recent developments in employment law in California and beyond – cases and statutes that

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[8] The FAC provides that "Ryan Bristol and Lampert each have held substantial ownership interests in PropPoint, and have been directors and officers of the company, allowing them to collectively control the company" (1 AA 66-67 (FAC ¶ 17)), and that on PropPoint's behalf, after they unlawfully terminated him, they deliberately "withheld wages rightly owed to Plaintiff" (1 AA 74-75 (FAC at ¶ 53-62)). This is sufficient to assert a claim against Lampert personally for PropPoint's intentional torts, including conversion of wages.

[9] Voris details the extensive and extreme factual circumstances of corporate misconduct by Lampert in his declaration submitted for the bench trial against PropPoint. (4 AA 1078-1122.)

have extended liability for unpaid wages to include persons acting on an employer's behalf – also support the recognition of a common law conversion cause of action as against corporate officers or directors.

In *Boucher v. Shaw* (9th Cir. 2009) 572 F.3d 1087, the Ninth Circuit held (as other circuits had) that the FLSA's definition of "employer" includes corporate agents who have economic control or exercise control over the nature and structure of the employment relationship, based on the circumstances and economic reality of the relationship. In that case, former employees sued hotel and casino Castaways Hotel, Casino, and Bowling Center ("Castaways"), as well as Castaways' CEO, CFO, and a shareholder responsible for labor and employment managers. Castaways filed for bankruptcy, and ultimately its debts were discharged, but the Ninth Circuit then held that the bankruptcy discharge clearly did not affect the liability of the corporate agents. (*Id.* at 1093.)

In *Martinez v. Combs* (2010) 49 Cal.4th 35, *as modified* (June 9, 2010), this Court addressed the definition of "employer" for purposes of a claim for unpaid minimum wages asserted under Labor Code section 1194. There, seasonable agricultural workers sued their bankrupt employer and two produce merchants for unpaid wages. The merchants successfully moved for summary judgment, arguing that they were not liable because they did not "employ" the plaintiffs. On appeal, the Supreme Court conducted a historical and legislative analysis behind section 1194, to ascertain and effectuate the purpose of that statute, and then determined that the Industrial Welfare Commission's (IWC) wage orders are to be accorded the same weight as statutes for purposes of interpreting wage and hour claims within

the IWC's scope. (*Id.* at 52, 61.) It then held that IWC's broader regulatory definition of "employer," which provided in part that an employer is also "any person . . . who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person" (IWC wage order No. 9–2001, *Cal. Code Regs.*, tit. 8, § 11090, subd. 2(G)) should govern, versus the narrower definition of "employer" under common law.[10]

Then, in 2015, after the trial court's rulings dismissing Voris's claims and while this case has been on appeal, the California Legislature enacted SB 588, a bill dubbed "A Fair Day's Pay Act" (the "Act"), effective January 1, 2016. The Act amends the Labor Code and adds Labor Code section 558.1, which expressly defines "employer or other person acting on behalf of an employer" to include a "natural person who is an owner, director, officer, or managing agent of the employer." As a result, an employee can now bring statutory wage and hour claims against the corporate owners, directors, officers, or managing agents who violate or cause to be violated various wage and hour laws in the Labor Code and name them as individual defendants in a lawsuit.

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[10] While this ruling did not change the outcome for the plaintiffs in *Martinez,* the practical effect for California wage and hour claims was that the definition of employer significantly expands who may be held liable for wage and hour violations under sections of the Labor Code with similar terminology as those under section 1194. (*See, e.g., Castaneda v. Ensign Grp., Inc.* (2014) 229 Cal.App.4th 1015 [reversing grant of summary judgment motion and finding question of fact as to whether employer's parent company also constituted an employer under *Martinez*].)

These cases and statutes are persuasive here, not because Voris's conversion claims are governed by the Labor Code or the FLSA, but because they reflect an acknowledgment of the complexities that have emerged out of employee-employer relationships, and the vulnerable position that workers may find themselves in due to the misconduct of corporate agents with control over wages. The A Fair Day's Pay Act in particular is also exceptionally difficult to reconcile with the majority opinion's policy weighting placing risk of proliferation of litigation as a heavier weight on the policy scale than providing robust remedies for employees for unearned wages – the A Fair Day's Pay Act clearly shows that that is *not* the correct balancing of those policies, to the extent the policies even compete. Respectfully, the common law should be recognized as providing the remedies to injured employees for unpaid wages that the common law provides to everyone else for converted property: while California's definition of employer under the common law may or may not encompass officers and directors with control over employment matters, California common law does provide liability for those officers and directors under an agency theory, a vehicle to achieve a just result.

Certain other states have directly imposed personal liability on officers and directors for unpaid wages (*see, e.g., Morgan v. Kingen* (Wash. Ct. App. Div. 1, 2007) 169 P.3d 487, *aff'd,* 210 P.3d 995 (Wash. 2009) [Washington imposing liability on officers and directors, and allowing for punitive damages and attorneys' fees for "willful" violations]; *Stafford v. Puro* (7th Cir. 1995) 63 F.3d 1436 [Illinois imposing both civil and criminal liability for willful

nonpayment]; *People v. Milton C. Johnson Co.* (N.Y. City Crim. Ct. 1972) 337 N.Y.S.2d 477 [New York criminal penalties for knowing failures to pay wages].)

No binding California case has to date directly addressed the issue under common law. But, California *has* recognized wages as a vested property interest, California law exists to support the imposition of liability for conversion of wages, and California law provides that individual officers and directors may be personally liable for torts they participated in or authorized. Moreover, the development of employment law in California and beyond both reflects and promotes the growing need for protection for workers left without recourse from the common law employer.

Voris therefore respectfully requests that this Court approve of a conversion claim for unpaid wages, as asserted against an employer and also (or in the alternative, at least) against corporate officers or directors involved in such tortious conduct, at least in situations involving closely held corporate entity employers engaged in egregious behavior. The tort of conversion and California's existing public policy of protecting employee rights would be fully consistent with the recognition of such a claim.

V. CONCLUSION

There is clear authority under California law and from decisions by this Court that employees have a vested property interest in the wages that they earn, and failure to pay them is a legal wrong that interferes with the employee's title in the wages. Accordingly, this

Court should expressly approve a conversion claim for the recovery of earned but unpaid wages, and also find that conversion of wages may be asserted by employees against individual directors and officers of a closely held corporate employer.

Dated: August 10, 2017 Respectfully submitted,

By: _____
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BRETT VORIS

CERTIFICATE OF WORD COUNT

I certify pursuant to California Rules of Court 8.204 and 8.504(d) that this Opening Brief on the Merits is proportionally spaced, has a typeface of 13 points or more, contains 11,109 words, excluding the cover, the tables, the signature block, verification, and this certificate, which is less than the total number of words permitted by the Rules of Court. Counsel relies on the word count of the Microsoft Word word-processing program used to prepare this brief.

Dated: August 10, 2017

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 August 10, 2017, I served the foregoing document:

OPENING BRIEF ON THE MERITS

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

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

Executed on August 10, 2017, in Santa Monica, California.

By: _____
Regina Yeh