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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

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REPLY BRIEF ON THE MERITS

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I. INTRODUCTION

In his Answering Brief on the Merits ("AB"), Respondent Greg Lampert argues that this Court's express recognition of a wage conversion claim would be creating a "brand new remedy" in tort from "fundamentally contractual obligations" (AB at 17); one "incompatible" with existing California law (*id.* at 8); and that would have a "significant, negative" impact on employment litigation (*id.* at 14).

These arguments are legally incorrect and overlook longstanding California policy, including as reaffirmed by recent legislation expressly expanding the definition of "employer" in the unpaid wage context to include individual corporate owners and managing agents, like Respondent was here – the A Fair Day's Pay Act,[1] which the Answering Brief never mentions once.

Many of Respondent's arguments are also drawn from factual situations not at issue here, including Respondent's lead argument against the purported "tortification" of contractual relationships. This is not a case where an employee is seeking to make tortious an employer's breach of an as-yet-mutually-unperformed set of promises, such as for continued future employment. This case is about work already fully performed by the employee that the employer intentionally did not pay for, and specifically here as part of a designed scheme by the Respondent to profit individually by shedding

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[1] S.B. 588, 2015-2016 Reg. Sess. (Cal. 2015), 2015 Cal. State. Ch. 803, *available at* http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB588.

the unpaid wage obligations in corporate bankruptcy or other insolvency.

Even aside from such intentional nefariousness, the law is already clear that where the employee's side of the contract is no longer executory (where the employee has already done the work), the employer's obligation to pay the wages goes beyond mere contract: the employee enjoys a vested property right in the unpaid wages as the employee performs the work. It is thus already the law that the employee's right to have earned wages delivered is a property right beyond mere contractual expectation, and the protection of which is a prime California public policy. The real question here is: does California truly recognize it as a full-fledged property interest capable of being stolen (converted) by the employer or the employer's individual owners or managing agents?

Unless the answer is "yes," earned wages will not truly be employee property in the full or even ordinary sense of the meaning of "property," and California's strong public policy of protecting employees' earned wages will be undermined.

Beyond being consistent with existing law and policy, the remedy is sorely needed. Nowhere in his Answering Brief does Lampert, or the majority opinion of the Court of Appeal, ever contest that wage theft is a pervasive problem in California, despite a variety of existing remedies. Indeed, it is not an unreasonable stretch to say that the fundamental concern of the appellate majority, and that Lampert plays on heavily, is essentially that wage theft by employers is _so_ widespread that if employees actually had the simplest, most

direct tool available to address it themselves – a common law cause of action for conversion – the judicial system would be overwhelmed.

But Lampert's Answering Brief itself strongly suggests that the result might be the opposite and actually reduce the burden on the judicial system, by reducing the incidence of employer wage theft in the first place. Lampert's "due process" argument strongly implies that he engaged in his conscious management strategy of not paying Voris for earned wages because Lampert (mistakenly) believed that the law would allow this conduct – that California would see it as a fair policy bargain to let Lampert intentionally manage his companies by not paying employees for labor already performed and then leave the mess to corporate insolvency, with Lampert individually untouchable by a private cause of action by the employee in tort.

No one looking at California's policy history could truly believe California would favor allowing corporate employers to manage their financial affairs by planning not to pay employees their earned wages and then to declare bankruptcy. Lampert's real argument is that he exploited a loophole, fair and square. But common law torts exist in parallel to statutory remedies in part exactly for such situations: to give courts the tools and flexibility to address schemes like Lampert's, which seek to take advantage of statutory loopholes faster than the Legislature can close them. Common law torts have always served this function, and there is no reason to exempt Lampert from common law conversion liability and every reason not to do so – including the deterrent effect it might very well provide and that might reduce employment litigation, not expand it.

II. ARGUMENT

A. Recognizing a Conversion Claim for the Recovery of Earned but Unpaid Wages Would be Fully Consistent with California Public Policy and Principles of Tort Law

Initially, the Answering Brief relies on *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654 and *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503 to argue against providing any tort remedy to claims arising from an employment relationship, as a disfavored "tortification" of a contractual relationship. The Answering Brief misapplies both *Foley* and *Applied Equipment Corp.* on multiple grounds.

1. The Distinctions Between Tort and Contract Law

In *Foley*, this Court examined, *inter alia,* the differences between tort and contract law:

> The distinction between tort and contract is well grounded in common law, and divergent objectives underlie the remedies created in the two areas. Whereas contract actions are created to enforce the intentions of the parties to the agreement, tort law is primarily designed to vindicate "social policy."

(*Id.* at 683 [citing to PROSSER, LAW OF TORTS (4th ed. 1971) p. 613].) In other words, where contract law concerns only the interests of the parties to the contract, tort law seeks to promote society's interests, which often go well beyond – and may even be unrelated to – any agreement between the parties. (*See* Christopher W. Arledge, *When Does a Contract Breach Also Give Rise to a Tort Claim? A Primer for Practitioners* (July 2006) ORANGE COUNTY LAWYER, at p. 42.)

Where the defendant breaches a duty only based on the parties' contract, the duty is limited to the parties' private interests, and therefore the plaintiff only has only contract remedies. But where the contractual breach also violates fundamental principles of public policy, then that breach also constitutes a tort. (*Ibid.*; *see also Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515 ["Conduct amounting to a breach of contract becomes tortious only when it also violates an independent duty arising from principles of tort law."]; *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 176 ["The duties of conduct which give rise to them are imposed by law, and are based primarily on social policy, and not necessarily based upon the will or intention of the parties . . ."].)

With these distinctions in mind, the *Foley* Court examined, among other issues: (1) whether the plaintiff had a tort claim for wrongful termination against his former employer, who allegedly fired him for reporting that another employee was under criminal investigation; and (2) whether the plaintiff had a tort claim for breach of the implied covenant of good faith and fair dealing, for firing the employee without cause. In other words, as to both claims, the obligations that the employee was seeking to enforce in *Foley* were about the parties' mutual *future* conduct: that the employer would allow the employee to work *in the future*; the employee would do the work *in the future*; and the employee would then be paid for that *future* work.

After analyzing the history and nature of those claims and the policy implications in recognizing the employee's requested remedies regarding such alleged mutually executory (future) obligations, the

majority opinion held that (1) "there was no substantial public policy prohibiting an employer from discharging an employee for [reporting information relevant to the employer's interest]" to support the employee's claim for tortious discharge in contravention of public policy (*Foley, supra,* 47 Cal.3d at 380); and (2) "tort remedies are not available for breach of the implied covenant in an employment contract to employees who allege they have been discharged in violation of the covenant" (*id.* at 239-40). In other words, the *Foley* court found no California social policy supporting imposition of tort liability for the employer cutting off the contractual *future* of the relationship: there was no policy interest in employees having permanent employment, for example (and indeed, the baseline California policy is to the contrary, that employment is presumptively "at will", *see* Cal. Lab. Code § 2922).

Here, the Court is addressing an altogether different tort claim, and for a different duty: whether an employee may assert a conversion claim against an employer who fails to pay the employee's *already earned* wages. Unlike alleged permanent or continued employment, which is fundamentally against established California policy, the duty to pay employees for earned wages is an exceptionally strong one.

2. The Duty to Pay Earned Wages is a Fundamental Public Policy in this State

California courts have long recognized that wage and hours laws "concern not only the health and welfare of the workers themselves, but also the public health and general welfare." (*California Grape Etc. League v. Industrial Welfare Com.* (1969) 268

Cal.App.2d 692, 703.) Courts have accordingly recognized tort remedies where there is a violation of this duty.

Gould v. Maryland Sound Indus., Inc. (1995) 31 Cal.App.4th 1137 discusses the duty to pay wages in the context of a wrongful termination, and like the facts here and again different from *Foley*, *where the work at issue had already been performed.* In *Gould*, the plaintiff employee alleged that his employer terminated him to avoid paying him his accrued wages – wages for work the employee had already performed -- and also in retaliation for reporting to management that the employer was violating overtime wage laws with other workers (again, violations of the duty to pay employees for *work already performed*).

In discussing whether the plaintiff in *Gould* was wrongfully discharged in violation of public policy, the Court of Appeal stated:

> [T]he prompt payment of wages due an employee is a *fundamental public policy of this state.* "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." (Lab.Code, § 201.) . . . In *Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831, 837, 187 Cal.Rptr. 449, 654 P.2d 219, the court stated, "Public policy has long favored the 'full and prompt payment of wages due an employee.' . . . (Italics added; citations omitted.) Thus, the prompt payment of wages serves "society's *interests ... through a more stable job market, in which its most important policies are safeguarded.*"

(*Id.* at 1147 (emphasis added).)

After this analysis, the *Gould* Court addressed the allegations before it: "From the foregoing statutes and case law we conclude if [employer] MSI discharged Gould in order to avoid paying him the

commissions, vacation pay, and other amounts he had earned [*i.e.*, for work that the employee had already performed], *it violated a fundamental public policy of this state*." (*Id.* at 1148 (emphasis added).) It therefore reversed the trial court's dismissal of the wrongful discharge tort claim, expressly recognizing the policy importance of paying employees for work they have already done.

The *Gould* Court also rejected the defendant employer's arguments that *Foley* required a different result: "The present case has public policy implications which were not present in *Foley* . . . Gould informed MSI about ongoing conduct [specifically, failure to pay employees for work already performed] which was not only inimical to the public health and general welfare but also illegal" (*Id.* at 725.) Cases following *Gould* have likewise affirmed the existence of tort remedies stemming from an employer's failure to pay wages for labor already performed (or, similarly, for reimbursement of employer expenses already incurred by the employee).[2] Such recognition is wholly consistent with the policy objectives of tort law, and with the policy primacy that California places on paying employees for labor already performed.

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[2] *See, e.g., Vasquez v. Franklin Mgmt. Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 830 (employer's refusal to reimburse work expenses can support tortious wrongful discharge claim). *See also In re Jercich* (9th Cir. 2001) 238 F.3d 1202 (Debtor-employer's deliberate breach of contract, in electing not to pay wages owed to his employee even though he had funds to do so, violated fundamental policy of California law and rose to level of tort, thereby making such a debt non-dischargeable).

Given that the failure to pay earned wages is recognized as a violation of public policy and a basis for tort claims, it should also be directly actionable through a common law conversion claim. (*See also Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 105 (Mosk, J., concurring and dissenting opinion) [in analyzing the tortious breaches of contract outside the insurance context, but within "the malleable and continuously evolving nature of tort law," Judge Mosk stated that such tortious breaches "may be found when . . . the breach is accompanied by a traditional common law tort, *such as fraud or conversion. . .*" (emphasis added)].)

3. Employees Have Vested Property Interests in their Unpaid Wages

Respondent simply ignores the already established principle of California law that property interests in wages are conferred to employees when and as they perform labor. As set forth in the Opening Brief on the Merits ("OB"), statutes and case law recognize the premise of wages as property. (*See, e.g., Loehr v. Ventura County Community College District* (1983) 147 Cal.App.3d 1071, 1080 ["Earned but unpaid salary or wages are vested property rights"]; Cal. Lab. Code § 351 ["Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for."].) *Cortez v. Purolator Air Filtration Prod. Co.* (2000) 23 Cal.4th 163, 178 expressly recognized wages as the property of the employee: "[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."[3]

For the notion of wages as property to be truly meaningful, the Court should recognize wages as a basis for a conversion claim – what would be the meaning of recognizing earned wages as a property interest if it were property that essentially was legally incapable of being stolen? The tort of conversion itself is intended to recognize property rights as well as remedy the violation of such rights. (*See Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, 120 [Conversion "has been developed into a remedy for the conversion of every species of personal property"].)

Nevertheless, Respondent argues that because the employment relationship is "fundamentally contractual," employees should not be able to assert conversion claims against their employers. (AB at 9.) But that a contractual employment relationship may exist in no way fundamentally prohibits the assertion of tort claims that may arise in that relationship. (*See Lazar v. Superior Court* (1996) 12 Cal.4th 631, 646 [rejecting employer's argument that "we restricted or abandoned traditional tort remedies in the employment context."].)

Courts have long recognized conversion claims with other forms of property in the employment context. (*See, e.g., Dep't of Indus. Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084

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[3] *See also Pineda v. Bank of Am., N.A.* (2010) 50 Cal.4th 1389, 1402 (recognizing employees' vested property interest in unpaid wages arises out of *the employees'* action, *i.e.,* their labor – in contrast to section 203 penalties).

[employee reimbursement checks]; *Haro v. Ibarra* (2009) 180 Cal.4th 823 [shares of stocks]; *Angelica Textile Servs., Inc. v. Park* (2013) 220 Cal.App.4th 495, as modified (Oct. 29, 2013), as modified on denial of reh'g (Nov. 7, 2013) [trade secrets].)

4. That Property Interests Were Created by Contract Does Not Inherently Limit the Property Owner to Contract Remedies

Finally, Respondent's argument also depends on the fallacy that the way a property interest was initially created limits whether the property can ever be converted, at least if a contract was involved at some point in the transaction. Many forms of property interests are created pursuant to a contractual relationship. For instance, a corporate stock can be the subject of common law conversion claims, even though the promise to deliver the stock in exchange for some consideration begins as contractual. The purchase of a new automobile almost always involves a written contract between the automobile buyer and the dealer. But, as soon as the promisee has earned that stock, or as soon as the buyer has paid the purchase price and acquired title in the vehicle, the property can be legally converted – stolen. That the owner in such circumstances might also be able to sue the promisor for breach of contract does not in any way lessen the law's recognition that if a property interest has vested in the plaintiff, regardless of whether the property interest was created pursuant to a contract or not, the plaintiff can sue for conversion.

B. The Existence of Remedies under the Labor Code and the Potential Impact on Existing Employment Litigation Do Not Outweigh the Need for a Tort Remedy for Earned but Unpaid Wages

1. Wage Theft is a Pervasive Problem in California

After inaccurately dismissing the obligation to pay wages for work already performed as a mere contractual obligation, the Answering Brief then sets forth a laundry list of Labor Code sections to argue that existing statutory remedies are sufficient to protect California employees. (*See* AB at 11-13.) Thereafter, Respondent describes a parade of horribles in the event employees may reach beyond those statutory remedies. (*Id.* at 14-15.) These arguments are also unpersuasive.

In *Moore v. Regents of Univ. of California* (1990) 51 Cal.3d 120, this Court addressed whether a patient may have a conversion claim in his human cell samples that were later used for research and to produce a patented cell line. In its analysis, the Court made clear that its decision, a matter of first impression, required careful balancing of policy considerations: "[I]t is especially important to face those concerns and address them openly." (*Id.* at 135.)

Respondent cites to *Moore*, but then fails to conduct the analysis that *Moore* teaches: whether a policy of "overriding importance" is implicated. (*Moore,* 51 Cal.3d at 160.) The answer here is clearly yes.

The Opening Brief discusses the problem of earned but unpaid wages, *inter alia,* in the context of Silicon Valley startups (*see, e.g.,* OB at 42); but such misconduct is a far wider ranging issue than just in the startup landscape. "[W]age theft is incredibly pervasive, highly damaging, and inadequately addressed by existing enforcement mechanisms. It occurs in every industry and in every state, affecting millions of people of all job types, incomes, education levels, races,

and origins." (Matthew Fritz-Mauer, *Lofty Laws, Broken Promises: Wage Theft and the Degradation of Low-Wage Workers* (2016) 20 EMP. RTS. & EMP. POL'Y J. 71, 73).[4]

In *Lofty Laws, Broken Promises,* Fritz-Mauer explores California's history of the failure to pay wages (using the term "wage theft"), as well as the wide "gap" between the intention of written employment laws and the realities of what California employees (and low-wage employees in particular) face in attempting to collect on their unpaid wages. Among other findings, Fritz-Mauer notes that while California has a history of progressive labor laws, in practice, those laws do not necessarily result in meaningful justice for workers:

> [T]he practical application of California law does not favor employees who suffer from wage theft, but instead provides a distinct advantage to unscrupulous employers who would steal from their workers. The end result is that California law fails to adequately help and protect workers.

(*Id.* at 116.)

Accordingly, that protective legislation already exists does not necessarily demonstrate that existing remedies for workers are

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[4] *See also* Appellant's Request for Judicial Notice ("RJN") filed concurrently herewith; Dominic Fracassa, *Why wage theft is a serious problem in California*, S.F. CHRONICLE (May 26, 2017), http://www.sfchronicle.com/business/article/Wage-theft-costs-low-paid-California-workers-2-11177052.php ["Each year, minimum-wage violations by California employers sap the state's workforce of nearly $2 billion in earnings, increasing the financial vulnerability of already at-risk populations and creating a drag on the state's overall economic health."].)

sufficient.[5] For example, while the Wage Theft Protections Act of 2011[6] empowers the California Labor Commission to impose criminal sanctions on abusive employers, "[e]xamples of the government criminally prosecuting wage violators are relatively rare" and "sometimes the employers are punished lightly considering the gravity of their crimes." (*Lofty Laws, Broken Promises, supra* at 107.) Another example is that, despite the existence of statutory penalties for wage and hour violations, "modest" failure-to-pay penalties have been found to not actually reduce the incidence of wage theft. (*Id.* at 117.[7])

Perhaps the most compelling demonstration of the limitations to existing legislative remedies, however, is that California workers and the Division of Labor Standards Enforcement ("DLSE"), the agency designated to enforce labor law compliance, are often unable to

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[5] As discussed further *infra,* California did recently pass the A Fair Day's Pay Act of 2016, a bill which, *inter alia,* extends liability to certain individual employer agents. A Fair Day's Pay Act, S.B. 588, 2015-2016 Reg. Sess. (Cal. 2015), 2015 Cal. State. Ch. 803, *available at* http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB588.

[6] Wage Theft Prevention Act of 2011, A.B. 469, 2011-12 Reg. Sess. (Cal. 2011), 2011 Cal. Stat. ch. 655.

[7] Citing Daniel J. Galvin, *How to Get Paid What You're Owed, in Three Easy Steps. (Okay, Maybe Not so Easy.)*, WASH. POST (Sept. 6, 2015), https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/09/06/how-to-get-paid-what-youre-owed-in-three-easy-steps-okay-maybe-not-so-easy/; *see* RJN.

collect on the judgments they do receive. In a 2013 study entitled *Hollow Victories: The Crisis in Collecting Unpaid Wages for California's Workers*, researchers analyzed data from the DLSE from 2008 to 2011.[8] The study found that during that period, claimants received judgments or settlements totaling over $390 million but were only able to collect on $165 million, or 42%. When excluding settlements (in which the likelihood of an employer voluntarily paying is much higher) from those figures, the collection amount drops to $42 million, or a mere 15%.

The "shocking percentage of workers" who are unable to collect on their unpaid wages illustrates the challenges that employees face. (*Lofty Laws, Broken Promises, supra* at pp. 103-04.) Fritz-Mauer explains plainly why the recovery percentage is so low: "recalcitrant employers are able to evade responsibility for their actions with relative ease, and both the DLSE and successful claimants have lacked effective enforcement tools." (*Id.* at 104-05.) (*See also* Section II, Part C, *infra* [addressing potential liability of individuals].)

2. A Clearly Recognized Wage Conversion Claim Would Provide a Much-Needed Cumulative Remedy for Wage Theft

California courts have frequently rejected the "contention that the rule permitting the maintenance of the action would be impractical

[8] Eunice Hyunhye Cho, et al., Nat'l Emp't Law Project, *Hollow Victories: The Crisis In Collecting Unpaid Wages For California's Workers* (2013), http://ccaucla-laborcenter.electricembers.net/wp-content/uploads/downloads/2014/04/HollowVictories.pdf; *see* RJN.

to administer and would flood the courts with litigation [as being] but an argument that the courts are incapable of performing their appointed tasks . . ." (*Emden v. Vitz* (1948) 88 Cal.App.2d 313, 319.)[9] In the context of the significant and pervasive problem of wage theft in California – and the larger impacts wage theft has on workers and the economy – these considerations may actually emphasize the need for more effective, additional remedies to address wage theft.

Lampert's own Answering Brief also strongly implies, including by his "due process" argument, that clear recognition of a common law wage conversion claim might actually sharply *reduce* the amount of employment litigation burdening the State's judicial system: the implication of Lampert's due process argument is that he would not have caused the companies here to fail to pay the wages in the first place if he had only had clearer guidance from this Court. The clear prospect of common law tort liability thus could serve as a powerful deterrent for unscrupulous employers. Enhanced civil damages via punitive or emotional distress damages in egregious cases could also provide incentive for attorneys to represent employees who might not otherwise be able to pursue such claims in private actions, as well additional deterrence to creative wage evasion by employers. Not least, a common law conversion remedy could

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[9] *See also Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1057:

> Courts not only compromise their basic responsibility to decide the merits of each case individually but destroy the public's confidence in them by using the broad broom of "administrative convenience" to sweep away a class of claims a number of which are admittedly meritorious.

help address the gap that exists between the intent of legislation and the "hollow victories" that result from it.

Even if clear recognition of a common law wage conversion claim did not deter all unscrupulous employers, it might nonetheless still greatly reduce the burden on the judicial system. Indeed, one of the reasons why the present litigation has been so complex is precisely because there has not been a clear answer on the viability of a common law wage conversion claim; if there had been, this case might have been resolved earlier, and with less expenditure of judicial resources trying to assess exactly in which box to place Lampert's intentional act of causing his companies not to pay Voris – or, as Lampert's "due process" argument suggests, Lampert might just have paid Voris for his work in the first place.

Finally, employees, as well as courts, could vastly benefit from the greater flexibility of a common law tort remedy, which may allow them to assert and recognize different circumstances or forms of wage theft that may not have been anticipated or directly addressed by the Legislature, and which the Legislature may never be able to stay ahead of fully on its own. (*See, e.g., Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394 ["This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law."].) "[T]he mere fact that the claim is novel will not of itself operate as a bar to the remedy." (*Soldano v. O'Daniels* (1983) 141 Cal.App.3d 443, 454-55 (internal citation omitted).)

Respondent cites to *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592 apparently to argue that the Court should only recognize a conversion claim where no equivalent statutory right

exists: "Allowing a conversion claim where the Labor Code provides no private right of action at all to protect aggrieved employees makes logical sense[.]" (AB 17.) But this Court has already held that the Labor Code does not provide the exclusive remedies for unpaid wages, and that it is no bar to cumulative remedies. (*See Cortez v. Purolator Air Filtration Prods. Co.* (2000) 23 Cal.4th 163 [employees may bring a Bus. & Prof. § 17203 claim for the restitution of unpaid wages]; *see also Rojo v. Kliger* (1990) 52 Cal.3d 65, 79-80 [if a right existed at common law, a statutory remedy is generally cumulative, even if the remedy is comprehensive.].) Moreover, *Lu* actually illustrates exactly how in certain circumstances the Labor Code can fall short. In *Lu,* this Court determined that Lab. Code § 351[10] did not provide employees with a private cause of action. But in so holding, this Court also recognized that in situations where an employer has unlawfully misappropriated those gratuities, a conversion claim should be available: "To the extent that an employee may be entitled to certain misappropriated gratuities, we see no apparent reason why other remedies, such as a common law tort of conversion, may not be available under appropriate circumstances." (*Id.* at 603-04.) As recognized by *Sims v. AT & T Mobility Servs. LLC* (E.D. Cal. 2013) 955 F.Supp.2d 1110, 1119, "it logically follows that employees hold legal title to their earned but unpaid wages in a manner that is

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[10] Lab. Code § 351 provides in relevant part, "Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for."

indistinguishable from the legal title to their gratuities created by Labor Code § 351."

3. Existing Tort Law Principles Would Safeguard against Improper Imposition of Conversion Liability

Notably, Respondent does not respond to Justice Lavan's concurring and dissenting opinion, which directly addresses the majority opinion's concerns about the threat of punitive damages liability (and which logic could also apply to the threat of emotional distress damages). (*See* Court of Appeal Opinion ("Op."), concurring and dissenting opinion of Lavin, J., at 4.) In arguing for recognition of a wage conversion claim, Justice Lavan wrote that the California policy of protecting worker wages overrode such concerns of imposing tort liability onto employers (*ibid.*), and that existing tort law principles safeguard the proper imposition of such liability (*id.* at 3).

C. A Wage Conversion Claim Could and Should Facilitate Personal Liability for an Employer's Individual Agents Who Have Engaged in Wrongful Misconduct

1. A Wage Conversion Claim Could Allow Voris Finally to Recover his Wages

This Court should also recognize that conversion tort liability may extend to individuals acting on behalf of corporate employers, consistent with what has already been decided in this case by *Voris I*.[11] As discussed in the Opening Brief, should a wage conversion claim be recognized, it would enable employees such as Voris to

[11] *Voris v. Lampert*, No. B234116 (Cal. Ct. App. May 22, 2014) 2014 WL 2119993.

recover directly from individual officers, directors, and other agents involved in the misconduct "under the rules of tort and agency, for tortious acts committed on behalf of the corporation." (*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 595.)

The need for such liability is clear. As mentioned above, in California and elsewhere, many employers avoid liability for unpaid wages by simply abandoning, transferring or selling their businesses, even where there is a judgment ordering them to pay. "The threat of the seizure of assets is meaningless where employers have abandoned, transferred, or sold their businesses." (*Hollow Victories,* 14.) That employers engage in such misconduct was also recognized by the California Legislature in passing the "A Fair Day's Pay Act" (the "Act").[12] In its bill analysis, the Legislature expressly references *Hollow Victories* and other studies to justify extending liability to persons acting on behalf of an employer. (Sen. Rules. Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 588 (2015-2016 Reg. Sess.) as amended Sept. 8, 2015, 8, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB588.)

Confusingly, Respondent appears to have overlooked (or is intentionally avoiding discussion of) the Act, despite the Opening Brief's discussions of it. For instance, Respondent claims that "[t]he Labor Code statutes reflect a deliberate decision not to impose

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[12] S.B. 588, 2015-2016 Reg. Sess. (Cal. 2015), 2015 Cal. State. Ch. 803, http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB588

personal liability on corporate officers and directors through private damages actions . . ." (AB at 22.) But, for example, the Act added Lab. Code § 558.1 to provide that "[a]ny employer or other person acting on behalf of an employer, who violates, or causes to be violated ... Sections 203, 226, 226.7, . . . 1194, or 2802 ... may be held liable as the employer for such violation" (Lab. Code § 558.1(a)), and that "the term 'other person acting on behalf of an employer' is . . . a natural person who is an owner, director, officer, or managing agent of the employer (*id.,* § 558.1(b)). Those referenced sections in turn permit employees to recover unpaid wages in a civil action. (*See, e.g., Carter v. Rasier-CA, LLC* (N.D. Cal. Sept. 15, 2017) No. 17-CV-00003-HSG, 2017 WL 4098858, at *5, n.1.) Accordingly, the Labor Code now *does* reflect the deliberate intention of the Legislature to impose personal liability on certain corporate agents for unpaid wages.

Unfortunately here, the Act cannot help Voris directly, as the law is not retroactive.[13] But the policy reasons cited to support the enactment of the Act also support the recognition of a common law claim that would facilitate the imposition of liability on individual corporate agents.[14]

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[13] "[A] new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287.) The Act contains no indication that it operates retroactively.

[14] There is no dispute that Voris as yet has never obtained any judgment of liability against Lampert. The Answering Brief at page

2. **Alter Ego Liability is Not the Only Theory to Recover from a Corporate Employee for Tortious Misconduct**

In the Answering Brief, Respondent appears willfully ignorant of the principle in tort law generally, and as already clearly decided against Lampert in this case by *Voris I*, that individual actors *can* be held liable for acts done on behalf of a corporate entity in the absence of a finding of alter ego liability: "When a judgment debtor is insolvent, adding a common law claim . . . is necessarily futile." (AB 16.) But a common law claim would *not* be futile if an employee could assert a claim against the solvent individual tortfeasor.

Again, the common law recognizes that a corporation (or other business entity) may only act through its individual agents (*see, e.g., Acco Contractors, Inc. v. McNamara & Peepe Lumber Co.* (1976) 63 Cal.App.3d 292, 296), and that "[t]he legal fiction of the corporation . . . *was never intended to insulate officers and directors from liability*

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16 points out a typographical error in the Opening Brief at page 36, where a parenthetical citing the 2015 judgment against PropPoint erroneously describes it as a judgment against *Lampert*. Despite the error, the context of the full sentence made it clear: "For instance, in his judgment against PropPoint, Voris *did* prevail on his Labor Code violation claims (99 AA 2211-2214 [court judgment against Lampert [*sic*, PropPoint]. . .]). Respondent argues that Voris was attempting to "claim that he obtained a judgment against Lampert" (AB 16). But Voris's appeal here acknowledges that Lampert prevailed on Voris's wage conversion claims due to failure to state a claim. On the distinct question of whether any *findings* in Voris's judgments might be binding against Lampert, that remains to be determined. As the Court of Appeal decided in this case and which Lampert did not appeal, on remand the trial court must still hear and address Voris's argument that Lampert is bound by the findings of the prior judgments by *res judicata* and/or collateral estoppel.

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) (*Kadisha*) (emphasis added) [citing *Frances T. v. Vill. Green Owners Assn.* (1986) 42 Cal.3d 490 (*Frances T.*].). The well-founded principles in agency and tort law provide that a corporate agent can and should be liable for tortious misconduct even in the absence of alter ego liability, as *Kadisha* and *Frances T.* have recognized.[15] (*See Kadisha, supra,* 78 Cal.App.4th at 1380 ["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.*'" (Emphasis added.)].)

Accordingly, if a corporate employer is insolvent because an agent has engaged in misconduct on the employer's behalf, a common law tort claim could very well allow a judgment creditor meaningful

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[15] Respondent argues that *Frances T.* is inapplicable because that plaintiff "suffered physical injury, not pecuniary harm." (AB at 24.) The Court of Appeal has expressly rejected this argument: "[D]efendants contend: . . . there is no liability for nonfeasance causing *only pecuniary harm* . . . [W]e disagree." *Kadisha,* 78 Cal.App.4th at 1379, *as modified on denial of reh'g* (Apr. 7, 2000) (emphasis added). Respondent nevertheless cites to *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249 to support that mere "pecuniary harm" does not warrant tort liability. (AB at 24.) But that case does not support that broad proposition, as Lamden merely found the facts in dispute in *Lamden* to generally be too far afield from *Frances T.* for the latter case to be controlling, without any indication of abrogating or overruling *Kadisha*. (*Id.* at 267.)

recovery. (Or, even better, such liability would hopefully deter would-be individual wrongdoers from engaging in such misconduct in the first place.)

3. California Does Impose Tort Liability on Individual Managers of Corporate Employers for Acts Outside of the Scope of Legitimate Employee Management

The Answering Brief mischaracterizes the combined holdings and teachings of *Reynolds v. Bement* (2005) 36 Cal.4th 1075 and *Martinez v. Combs* (2010) 49 Cal.4th 35 to argue inaccurately that this Court has already determined that individual managers of corporate employers may not be held liable for a corporate employer's failure to pay earned wages under any theory. This Court has never so held, and to the extent that *Reynolds* might have ever been so interpreted, any such interpretation was clearly expressly abrogated by *Martinez*.

Reynolds specifically reviewed the issue of whether an employee may assert, against individual corporate agents, an unpaid wage claim *under Lab. Code § 1194*, specifically for failure to pay employees statutorily required overtime by misclassifying them as exempt. *Reynolds* looked to common law employment law principles to conclude that there was no cause of action against individual corporate agents for failure to pay employees statutorily required overtime compensation, because common law did not support such individual corporate agents as within the statutory or regulatory definition of "employer" for purposes of a section 1194 cause of action.

Reynolds was thus always ultimately about statutory claims, and specifically for unpaid overtime. As the Answering Brief

partially recognizes, the *Reynolds* opinion was also expressly abrogated by this Court by *Martinez.* However, the Answering Brief inaccurately mischaracterizes the extent of the abrogration as narrow, leaving *Reynolds* largely intact, when in fact the opposite is true and *Martinez* expressly states that *Reynolds* was broadly abrogated and only continues to be good law for a single, exceedingly limited proposition:

> In sum, we hold that the applicable wage order's definitions of the employment relationship do apply in actions under section 1194. The opinion in *Reynolds*, *supra*, 36 Cal.4th 1075, 32 Cal.Rptr.3d 483, 116 P.3d 1162, properly holds that the IWC's definition of "employer" does not impose liability on individual corporate agents acting within the scope of their agency. (Reynolds, at p. 1086, 32 Cal.Rptr.3d 483, 116 P.3d 1162.) *The opinion should not be read more broadly than that.*

(*Martinez*, 49 Cal.4th at 66 (emphasis added).)

Reynolds therefore no longer controls whether any type of claim under the common law may be asserted, if *Reynolds* even ever did. It is also highly doubtful that to read *Reynolds* as ever intending to preclude absolutely any common law claim against an individual corporate agent for failure to pay any kind of wages to an employee would ever have been an accurate read of that case. Rather, what *Reynolds* appears to have discussed in part with respect to the common law (and notably in *dicta*) is that a corporate agent does not become personally liable, even for tortious acts of their corporate employer "merely by reason of their official position." (*Reynolds, supra,* 36 Cal.4th at 1087-88.) But *Reynolds* then goes on to recognize that if something more is present, "individual corporate

agents [can be] liable [including in a Berman hearing before the Labor Commissioner] for unpaid wages when such liability is proven on established common law or statutory theories." (*Id.* at 1089.)

Thus, even before it was broadly abrogated by *Martinez, Reynolds* never limited or conflict with the holding in *Kadisha* or *Voris I* that corporate agents may nevertheless be liable *for their own tortious misconduct.*

Here, Lampert is at the extreme end of the spectrum of corporate agent behavior –Lampert intentionally and maliciously planned to and did personally profit as an individual through an intentional scheme to take Voris's labor without ever paying for it and Lampert personally conceived and directly executed the scheme. Thus, it is more accurate to say that Lampert here seeks absolute immunity from even the most egregious intentionally tortious conduct by virtue of his corporate position.

If there is an existing opinion of this Court to look to for guidance on where and how to draw the lines on whether an individual corporate agent might be allowed some form of immunity for their conduct on behalf of an employer, it is *Reno v. Baird* (1998) 18 Cal.4th 640. In *Reno*, this Court analyzed whether individual supervisors within an employer company may be liable for wrongful termination claims. In rejecting this extension of liability, this Court noted that to hold otherwise would be to subject all supervisory agents "to the ever-present threat of a lawsuit each time they make a personnel decision." (*Id.* at 663.)

However, the Court in *Reno* also observed that in contrast, supervisory agents *can* be individually liable for sexual harassment,

even if done in the course of their duties for the employer. As the *Reno* decision explains, the basis for the opposite treatment on individual supervisory liability is two-fold: (1) the potential legitimacy of the type of action and how integral it is to the supervisor's duties (supervisors must necessarily engage in employee termination decisions as part of their ordinary job duties, while there is never a legitimate supervisory job duty of sexual harassment), and (2) the Legislature's policy intentions (the Legislature intended to hold individual supervisors liable for sexual harassment under the Government Code, and expressly refrained from enacting the same type of provision with respect to Government Code violations other than sexual harassment).

Certainly at least with respect to the level of involvement and intentionality here by Lampert in the wage theft, the situation is far more like sexual harassment than wrongful termination. There is no legitimate employer discretion under California law or policy for an employer to decide not to pay an employee their earned wages, and certainly never to do so with premeditation. An employer simply cannot disregard its duty to provide prompt payment of earned wages. (*See* Lab. Code § 216(a).) This contrasts with, for instance, an employer's promise not to discharge an employee without good cause – such a duty may be modified by contract. (*See, e.g.,* Hon. Ming W. Chin, et al., *B. Wrongful Discharge in Violation of Public Policy (Tameny Claims)*, CAL. PRAC. GUIDE EMPLOYMENT LITIG. CH. 5(I)-B (The Rutter Group Dec. 2017) ["In determining whether such a policy is involved, courts consider whether the employer and employee could circumvent the policy by way of agreement." (citing *Lagatree v. Luce,*

Forward, Hamilton & Scripps (1999) 74 Cal.App.4th 1105, 1112.) And, again, like sexual harassment, the Legislature clearly intends that individual corporate agents should be liable for non-payment of wages.[16]

4. Respondent's "Due Process" Argument Should be Rejected

Respondents' final last-ditch argument is that, should this Court recognize a conversion claim, that it would be violating Respondent's "federal due process rights by imposing liability retroactively." (AB at 21.) This argument has no merit. Despite Respondent's mischaracterizations, this Court's recognition of a wage conversion claim would not constitute a "new common law cause of action." (*Id.* at 22.) (*See, e.g. Kremen v. Cohen* (9th Cir. 2003) 337 F.3d 1024, 1035 [in acknowledging a conversion of internet domain name, the Ninth Circuit stated, "We have not "creat[ed] new tort duties" in reaching this result . . . We have only applied settled principles of conversion law to *what the parties and the district court all agree is a species of property*." (Emphasis added.)].) Even assuming *arguendo* that this Court were to wholly create a new common law tort claim, it would not violate Respondent's federal due process rights. "Due process requires that a criminal statute give fair warning of conduct which it prohibits." U.S.C.A. Const. Amend. 14. Here, numerous laws, including criminal laws, already provide notice to Respondent that wage theft is unlawful. Moreover, California courts have previously rejected arguments by employers that penalties imposed

[16] *See* Note 12, *supra.*

for failure to pay wages violated Fourteenth Amendment rights. (*See Moore v. Indian Spring Channel Gold Mining Co.* (1918) 37 Cal.App. 370, 380.)[17]

Third, and relatedly, it is a maxim of California jurisprudence that "[f]or every wrong there is a remedy." (Civ. Code, § 3523.) In California, "[e]very person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights." (*Id.* at § 1708.) Further, in *Dillon v. Legg* (1968) 68 Cal.2d 728, 739, this Court provided, "[W]e cannot let the difficulties of adjudication frustrate the principle that there be a remedy for every substantial wrong."

Here, substantial wrongs were committed by PropPoint and Sportfolio against Voris at the intentional direction of Lampert, and those substantial wrongs were in violation of clear, longstanding laws, as demonstrated by the judgments entered against those entities in Voris's favor. Any complaint by Respondent of prejudice would not

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[17] In *Moore v. Indian Spring Channel Gold Mining Co.* an employer argued that St.1911, p. 1268, as amended by St.1915, p. 299 (California's first statute governing worker rights, and which was later recodified into the Labor Code) violated, *inter alia,* his Fourteenth Amendment due process rights. The Court found that the statute was not violative of U.S.C.A. Const. Amend. 14:

> The law imposes no unreasonable burden upon the employer, for, operating as it does in the future, and disturbing no vested right, he must, and it is but fair that he should, make provision to pay his employé before hiring him, failing in which he should pay the penalty. . . . We can discover no ground for holding the act . . . violated the Fourteenth Amendment of the national Constitution.

(*Id.* at 380-81.)

be from lack of awareness that his alleged misconduct constituted "substantial wrongdoing," but instead from an assumption that he could affirmatively "inflict injuries upon others and then escape liability behind the shield of his . . . representative character." (*Frances T., supra,* 42 Cal.3d at p. 505.) This would be contrary to the aims of California tort law, corporations law, and public policy.

D. Other States Have Recognized Wage Conversion Claims

From Voris's research, the states of Florida, Georgia, Illinois, Iowa, Michigan, and North Dakota recognize conversion as a tort remedy for unpaid wages. (*See, e.g., Ocean Club Cmty. Ass'n, Inc. v. Curtis* (Fla. Dist. Ct. App. 2006) 935 So.2d 513 [under Florida law, tennis director entitled to attorneys' fees and costs for prevailing on a wage conversion claim against tennis club]; *Bell Fin. Co. v. Johnson* (1984) 180 Ga. 567 (under Georgia law, assignee of wages may sue assigning employee for conversion); *Dempsey Bros. Dairies v. Blalock* (1984) 173 Ga.App.7, 8 ["We find nothing in the [Fair Labor Standards] Act that precludes appellee from exercising his state statutory right to proceed against appellant for the tortious conversion of his wages . . ."]; *Giles v. Gen. Motors Corp.* (2003) 344 Ill.App.3d 1191 [under Illinois law, that employer withheld income under court order did not prevent holding it liable for conversion of claims of employee]; *Becker v. Longinaker* (Iowa Ct. App. 2010) 784 N.W.2d 202 [Court of Appeal issuing remittitur on damages awarded for conversion of wages in appeal of denial of motion for judgment notwithstanding the verdict]; *Cork v. Applebee's of Michigan, Inc.* (2000) 239 Mich.App.311 [Under Michigan law,

restaurant servers' failure to exhaust administrative remedies with the Department of Labor under the Wages and Fringe Benefits Act did not require dismissal of their common-law claims against employer for conversion]; *Cabrera v. Ekema* (2005) 265 Mich.App. 402 [discovery dispute of employees' action to recover back pay for wages under claims of violations of Fair Labor Standards Act, Employee Right to Know Act, breach of contract, unjust enrichment, and conversion]; *Jordet v. Jordet* (2015) 2015 ND 76 [under North Dakota law, genuine issue of material fact existed as to whether husband was wrongfully deprived of his property when his wages were garnished, thereby precluding summary judgment on his conversion claim].)

There are a small number of states that appear to expressly reject a wage conversion claim (including Alabama, Kansas, Louisiana, Minnesota, and Missouri). The remaining 39 states appear to either have no case law directly addressing the issue, or only federal court decisions interpreting state law.[18] (*See, e.g., Nakahata v. New York–Presbyterian Healthcare System, Inc.* (S.D.N.Y. Jan. 28, 2011) 2011 WL 321186, at *6 [dismissing claim for conversion of unpaid wages "because New York requires the plaintiff to have ownership, possession, or control of the money before its conversion."]; *Carpenters Combined Funds ex rel. Klein v. Klingman*

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[18] Certain states have nuanced positions on the claim. For instance, Maryland provides that conversion of wages may be viable, but only if the specific wages are kept separately, *i.e.*, those wages have not been commingled with other funds. (*See Allied Inv. Corp. v. Jasen* (1999) 354 Md. 547, 566 [731 A.2d 957, 967].)

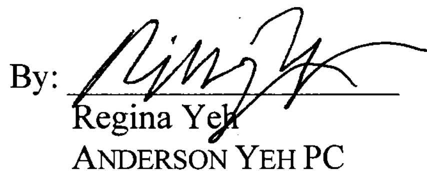
7 (W.D. Pa. Jan. 11, 2011) No. 2:10-CV-63, 2011 WL 92083 [granting plaintiff worker union summary judgment on claims for conversion of wages under Pennsylvania law].[19])

While these out-of-state and federal authorities are not controlling to this Court, the survey demonstrates that a wage conversion claim is not a "brand new remedy" in American tort jurisprudence, nor would such recognition be a radical departure from remedies that employees in other states have available to them.

III. CONCLUSION

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

Dated: February 2, 2018 Respectfully submitted,

By: 
Regina Yeh
ANDERSON YEH PC

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BRETT VORIS

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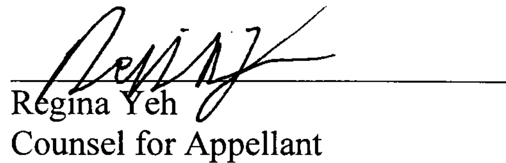
[19] Additionally, federal courts have recognized a conversion of wages claim under the state laws of New Jersey and Oregon. (*See, e.g., McGown v. Silverman & Borenstein, PLLC* (D. Del. Feb. 7, 2014) No. 13-CV-748-RGA/MPT, 2014 WL 545903, at *4 ["Control over money may satisfy the requirements for conversion under New Jersey Law."]; *Mackey v. Uttamchandani* (D. Or. June 30, 2014) No. 3:13–cv–00065–AC, 2014 WL 3809487, at *18 [Under Oregon law, "Plaintiffs have alleged a superior right to possession of the . . ."].)

CERTIFICATE OF WORD COUNT

I certify pursuant to California Rules of Court 8.204 and 8.504(c) that this Reply Brief on the Merits is proportionally spaced, has a typeface of 13 points or more, contains 8,369 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: February 2, 2018



Regina Yeh
Counsel for Appellant

CERTIFICATE OF SERVICE

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

On February 2, 2018, I served the foregoing document:

REPLY 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.

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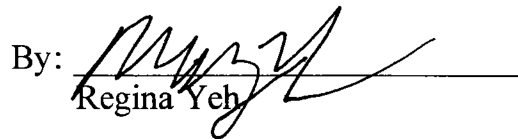

By: ______________________
Regina Yeh