No. S241812

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRETT VORIS,
Plaintiff-Appellant,

v.

GREG LAMPERT,
Defendant-Respondent.

SUPREME COURT
FILED
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After an Unpublished Decision by the Court of Appeal, Second Appellate District, Division Three, Appeal No. B265747 on Appeal from Judgment of Los Angeles Superior Court Case No. BC 408562, Honorable Michael L. Stern, Trial Judge

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APPLICATION OF EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL TO FILE *AMICI CURIAE* BRIEF; *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANT-RESPONDENT GREG LAMPERT

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APPLICATION TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANT-RESPONDENT GREG LAMPERT

Pursuant to Rule 8.520(f) of the California Rules of Court, proposed *amici curiae* Employers Group and California Employment Law Council ("CELC") respectfully request permission to file the enclosed *amici curiae* brief in support of the Defendant-Respondent Greg Lampert. The proposed *amici curiae* brief offers a unique perspective on why the Court should not recognize a conversion tort claim for unpaid wages and does not seek to merely repeat the arguments in Respondent's Brief. Rather, *amici* present additional arguments and clarifications that will assist the Court in evaluating the important legal issues in this case.

STATEMENT OF INTEREST

The Employers Group is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,500 California employers of all sizes and every industry, which collectively employ nearly three million employees. The Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, the Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships. It also provides on-line, telephonic, and in-company human resources consulting services to its members.

Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal fora over many decades, the Employers Group is distinctively able to assess both the impact and implications of the legal issues presented in employment cases such as this one. The Employers Group has been involved as *amicus* in

many significant employment cases, including: *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1; *Brinker Restaurant Corporation v. Superior Court* (2012) 53 Cal.4th 1004; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512; *McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 14; *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970; *Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272; *Arias v. Superior Court* (2009) 46 Cal.4th 969; *Amalgamated Transit Union v. Superior Court* (2009) 46 Cal.4th 993; *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937; *Gentry v. Superior Court* (2007) 42 Cal.4th 443; *Prachasaisoradej v. Ralphs Grocery Company* (2007) 42 Cal.4th 217; *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094; Pi*oneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360; *Smith v. Superior Court* (2006) 39 Cal.4th 77; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028; *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264; *Reynolds v. Bement* (2005) 36 Cal.4th 1075; *Miller v. Department of Corrections* (2005) 36 Cal.4th 446; and *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319.

CELC is a voluntary, nonprofit organization that works to foster reasonable, equitable, and progressive rules of employment law. CELC's membership includes more than 80 private sector employers, including representatives from many different sectors of the nation's economy (health care, aerospace, automotive, banking, technology, construction, energy, manufacturing, telecommunications, and others). CELC's members include some of the nation's most prominent companies, and collectively they employ hundreds of thousands of Californians. CELC has been granted leave to participate as *amicus curiae* in many of California's leading employment cases, such as: *Duran*, *supra*, 59 Cal.4th 1; *Brinker*, *supra*, 53

Cal.4th 1004; *Harris v. Superior Court* (2011) 53 Cal.4th 170; *Chavez, supra*, 47 Cal.4th 970; *Hernandez, supra*, 47 Cal.4th 272; Jon*es v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158; *Murphy, supra*, 40 Cal.4th 1094; *Green v. State of California* (2007) 42 Cal.4th 2254; *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317; and *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.

No current party in this case, or counsel for any current party in this case, authored the proposed *amici curiae* brief or any part of the brief. No person or entity other than the Employers Group or CELC contributed any money to fund the preparation or submission of this brief.

Accordingly, the Employers Group and CELC respectfully request that this Court accept and file the enclosed *amici curiae* brief.

March 7, 2018

Respectfully submitted,

ORRICK, HERRINGTON &
SUTCLIFFE LLP

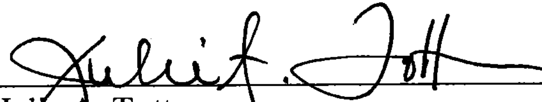

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 3

I. Creating A Claim For Conversion Of Unpaid Wages Would Contravene The Legislature's Comprehensive And Detailed Remedial Scheme In Employment Litigation. 3

A. The economic, cultural, and ethical implications of employment law are highly complex and best suited for the Legislature. 3

B. The Labor Code provides a comprehensive and highly detailed regime for remedying unpaid-wage claims. 7

II. Conversion Is Unnecessary And Inappropriate To Combat Wage Theft Amidst A Sea Of Wage Rights And Remedies In The Labor Code. 11

A. The Labor Code provides adequate remedies to recover unpaid wages. 11

B. A conversion claim cannot lie for unpaid wages because statutory framework provides a more suitable cause of action. 14

C. Statutes provide the exclusive remedy for recovering unpaid wages based on alleged minimum wage, overtime, meal period, or rest break violations. 16

III. A Simple Failure to Pay Money Owed—Including Wages—Does Not Constitute Conversion. 19

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Brewer v. Premier Golf Properties
(2008) 168 Cal.App.4th 1243 .... 8, 9, 22

Caliber Bodyworks, Inc. v. Superior Court
(2005) 134 Cal.App.4th 365 8

Caputo v. Prada USA Corp.
(C.D. Cal., Feb. 6, 2014, No. CV 12-3244 FMO (RZX))
2014 WL 12567143 8

Cates Construction, Inc. v. Talbot Partners
(1999) 21 Cal.4th 28 22

Cortez v. Purolator Air Filtration Products Co.
(2000) 23 Cal.4th 163 .... 14, 15, 17

Erlich v. Menezes
(1999) 21 Cal. 4th 543 22

Exxon Shipping Co. v. Baker
(2008) 554 U.S. 471 5

Farmers Ins. Exch. v. Zerin
(1997) 53 Cal.App.4th 445 .... 20, 21

Flores v. Los Angeles Turf Club, Inc.
(1961) 55 Cal.2d 736 15

Foley v. Interactive Data Corp.
(1988) 47 Cal.3d 654 .... 9, 21

Freeman & Mills, Inc. v. Belcher Oil Co.
(1995) 11 Cal. 4th 85 .... 9, 10

Fremont Indem. Co. v. Fremont Gen. Corp.
(2007) 148 Cal.App.4th 97 18

Green v. Party City Corp.
(C.D. Cal. Apr. 9, 2002, No. CV-01-09681 CAS (EX))
2002 WL 553219 .... 8, 17

Guz v. Bechtel Nat'l Inc.
(2000) 24 Cal.4th 317 21

Helm v. Alderwoods Grp. Inc.
(N.D. Cal. 2009) 696 F. Supp. 2d 1057 17

Hunter v. Up-Right, Inc.
(1993) 6 Cal.4th 1174 9

I. E. Associates v. Safeco Title Ins. CO.
(1985) 39 Cal.3d 281 15

Imperial Valley Co. v. Globe Grain and Milling Co.
(1921) 187 Cal. 352 20

Jacobs v. Genesco, Inc.
(E.D. Cal. Sept. 3, 2008, No. CIV-S–08–1666 FCD) 2008 WL 7836412 17

Jones v. AB Acquisition LLC
(C.D. Cal. Apr. 4, 2016, No. CV 14–8535 DSF) 2016 WL 7638188 .... 16, 17

Kim v. Westmoore Partners, Inc.
(2011) 201 Cal.App.4th 267 .... 18, 20, 21

Lee v. Hanley
(2015) 61 Cal.4th 1225 18

Lopez v. Aerotek, Inc.
(C.D. Cal. July 23, 2015, No. SACV 14–00803–CJC) 2015 WL 4504691 17

Lu v. Hawaiian Gardens Casino, Inc.
(2010) 50 Cal.4th 592 .... 14, 15

Lubner v. City of Los Angeles
(1996) 45 Cal.App.4th 525 16

Madrigal v. Tommy Bahama Grp.
(C.D. Cal. Oct. 18, 2010, No. CV 09-08924 SJO) 2010 WL 4384235 17

Martinez v. Combs
(2010) 49 Cal.4th 35 16

McKell v. Washington Mutual, Inc.
(2006) 142 Cal.App.4th 1457 .... 19, 21

Mendoza v. Ruesga
(2008) 169 Cal.App.4th 270 16

Mirkin v. Wasserman
(1993) 5 Cal.4th 1082 5

Moore v. Regents of University of California
(1990) 51 Cal.3d 120 .... 2, 13

Optional Capital, Inc. v. Das Corp.
(2014) 222 Cal.App.4th 1388 19

Patton v. Schneider Nat'l Carriers, Inc.
(C.D. Cal. June 8, 2009, No. CV0901010MMMAJWX)
2009 WL 10673060 8

PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP
(2007) 150 Cal.App.4th 384 19

Phillip Morris USA v. Williams
(2007) 127 S.Ct. 1057 5

Plummer v. Day/Eisenberg, LLP
(2010) 184 Cal.App.4th 38 20

Pulido v. Coca-Cola Enterprises, Inc.
(C.D. Cal., May 25, 2006, No. EDCV06-406VAP) 2006
WL 1699328 .... 16, 17

Reynolds v. Bement
(2005) 36 Cal.4th 1075 12

Rodrigues v. Campbell Industries
(1978) 87 Cal.App.3d 494 13

Rojo v. Kliger
(1990) 52 Cal.3d 65 .... 15, 16

Ross v. U.S. Bank Nat. Ass'n
(N.D. Cal. 2008) 542 F.Supp.2d 1014 14

Sanowicz v. Bacal
(2015) 234 Cal.App.4th 1027 20

Santiago v. Amdocs, Inc.
(N.D. Cal. Apr. 2, 2011, No. C10–4317 SI) 2011 WL
1303395 17

Scalice v. Performance Cleaning Systems
(1996) 50 Cal.App.4th 221 8

Seaman's Direct Buying Service, Inc. v. Standard Oil Co.
(1984) 36 Cal.3d 752 9

Silvaco Data Systems v. Intel Corp.
(2010) 184 Cal.App.4th 210 13

Software Design & Application Ltd. v. Hoefer & Arnett, Inc.
(1996) 49 Cal.App.4th 472, 485 19

Spragin v. McDonald's USA, LLC
(C.D. Cal. Jan. 20, 2011, No. CV1009617SVWJEMX)
2011 WL 13217960 8

Stephenson v. Superior Court
(1997) 16 Cal.4th 880 15

Thomas v. Home Depot USA, Inc.
(N.D. Cal. 2007) 527 F.Supp.2d 1003 8

Vasquez v. Coast Valley Roofing Inc.
(E.D. Cal. June 6, 2007, No. CV-F-07-227-OWW) 2007
WL 1660972 17

Vedachalam v. Tata Am. Int'l Corp.
(N.D. Cal. Feb. 4, 2010, No. C06-0963-VRW) 2010 WL
11484815 17

Voris v. Lampert
(Mar. 28, 2017, No. B265747) 2017 WL 1153334 [Lavin,
J., dis. opn.] 3

Vu v. California Commerce Club, Inc.
(1997) 58 Cal.App.4th 229 19

In re Wal-Mart Stores, Inc. Wage and Hour Litigation
(N.D. Cal. 2007) 505 F.Supp.2d 609 .... 9, 17

Watson v. Stockton Morris Plan Co.
(1939) 34 Cal.App.2d 393 20

Weiss v. Marcus
(1975) 51 Cal.App.3d 590 20

Welco Electronics, Inc. v. Mora
(2014) 223 Cal.App.4th 202 .... 13, 18, 19, 21

Statutes

California Fair Pay Act, Labor Code, § 1197.5 1

California Family Rights Act, Gov. Code, §§ 12945.1-
12945.2 1

Civ. Code, § 3294 8

Fair Employment Practices Act, Labor Code §§ 1410-1413 1

False Claims Act, 31 U.S.C. §§ 3729 – 3733 4

Labor Code .... *passim*

Private Attorneys General Act of 2004, Labor Code, §§ 2699
et seq. 11, 12

Unfair Competition Law, Business and Professions Code
§§ 17200 et seq. 15, 17

Workmen's Compensation, Insurance and Safety Act of 1913 1

Other Authorities

3 Robinson & Arkin, Litigating Tort Cases (2017) § 28:5 6

California Rules of Court Rule 8.204(c)(1) 23

Engstrom, *Private Enforcement's Pathways: Lessons from
Qui Tam Litigation* (2014) 114 Colum. L.Rev. 1913,
1924-1942, 1996-2005 5

Koenig, *The Shadow Effect of Punitive Damages on Settlements* (1998) 1998 Wis. L. Rev. 169, 179 .... 5, 6

Priest, *Punitive Damages Reform: The Case of Alabama* (1996) 56 La. L.Rev. 825, 830 5

Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform* (2002) 50 Buff. L. Rev. 103, 162 6

U.S. Department of Justice Bureau of Justice Statistics Special Report NCJ 233094 6

INTRODUCTION

This case should be viewed against the appropriate backdrop.

Beginning in the progressive era and continuing through to the present day, the Legislature has enacted a raft of laws regulating the wages of California's workers.[1] The Legislature has articulated a detailed set of substantive rules governing all manner of how and when employees are to be paid. It has specified in fine detail the range of damages and penalties that employers may face for violating those substantive rules. And it has created an elaborate enforcement regime for identifying and prosecuting those violations, including numerous private causes of action, several state administrative agencies, and, for certain employment-law violations, a bounty regime.

In the course of doing this, the Legislature has had to make difficult tradeoffs between incommensurable values. On a host of employment issues, it has had to determine how to weigh fairness against economic efficiency, job security and worker solidarity against competition with out-of-state producers, economic growth against sustainability, and so forth. The elaborate set of rules contained in the Labor Code today are the culmination of the Legislature's efforts to arrive at its preferred balance of those values.

Brett Voris's argument begins with the remarkable concession that "no controlling decision" of *any* California appellate court has recognized a right to recover for conversion of unpaid wages. (OB21.) Thus, by Voris's

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[1] (*See, e.g.*, Workmen's Compensation, Insurance and Safety Act of 1913, Law of May 26, 1913, ch. 176; Section 13 of the "uncodified 1913 act", Stats. 1913, ch. 324, § 13, p. 637 [creating the IWC and delegating power to set minimum wage]; California Family Rights Act, Gov. Code, §§ 12945.1-12945.2; Fair Employment Practices Act (FEPA), former §§ 1410-1413; California Fair Pay Act, § 1197.5.)

own account, there is no common law basis for his common law claim. But Voris is undaunted. This Court, he says, can supply the missing authority for his position. He urges this Court to embroider the Labor Code with a claim that the Legislature has not created, apparently believing that the Legislature has delegated authority to the courts to fill a hole left in the Labor Code's interstices.

That would be an extraordinary request, even if this were a case about some heretofore unforeseen circumstance. (*Cf. Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 142 [concluding "it [was] inappropriate to impose liability for conversion" where defendant used plaintiff's genetic material for medical research without his authorization].) And it is all the more bizarre in a case like this: where Voris seeks the creation of a duplicative common law claim to vindicate a right that California employment law has protected for over a century in a regulatory space where the Legislature has been exceedingly proactive. Simply put, the Labor Code is not a common law statute that delegates lawmaking authority to the courts. To the contrary, it comprises a highly detailed and finely calibrated set of rules, designed to achieve the Legislature's preferred compromise of values in a highly complex space. Creating a new claim in that space through judicial fiat would upset that balance.

Voris has also failed to show that creating a new claim for conversion of unpaid wages is necessary. The Labor Code already provides numerous means by which employees can seek unpaid wages. And that is true even in the circumstance to which Voris is most attentive: where an employer is insolvent and therefore cannot pay wages that are owed. As we explain below (at III.), the Labor Code imposes individual liability on certain corporate officers acting on behalf of an employer who cause various wage

violations to occur. And even without these provisions of the Labor Code, employees have long been able to recover wages from individuals under corporate veil-piercing principles by showing that the individuals are the employer's alter ego.

Finally, Voris's proposal for expanding the law of conversion to unpaid wages has no discernable limiting principle. By Voris's light, a plaintiff has a claim for conversion any time the plaintiff can plausibly allege that the defendant owes the plaintiff money. That cannot possibly be the law.

Amici respectfully suggests that this court should decline Voris's request to create new law in this already highly regulated space and affirm.

ARGUMENT

I. Creating A Claim For Conversion Of Unpaid Wages Would Contravene The Legislature's Comprehensive And Detailed Remedial Scheme In Employment Litigation.

As noted, Voris concedes that no California precedential decision has recognized a conversion claim for unpaid wages. Instead, Voris proposes that this Court create such a claim. One effect of that proposal is that plaintiffs may request punitive damages in every case where they can plausibly allege that their wages have not been properly paid. As explained below, such a change would work a seismic shift to the texture of employment litigation in California and is the sort of judgment that is best left to the Legislature.

A. The economic, cultural, and ethical implications of employment law are highly complex and best suited for the Legislature.

Employment law touches on some of the most fundamental aspects of life, and it is one of the primary means by which the Legislature regulates California economy. It affects not only "the health and welfare of …

workers" but also "the *public* health and *general* welfare." (*Voris v. Lampert* (Mar. 28, 2017, No. B265747) 2017 WL 1153334, *11 [Lavin, J., dis. opn.], italics added.) For individuals, the employment laws regulate who will have access to the dignity of a day's work and how much food one can put on the table. For companies, the employment laws can create predictability and stability and help industries avoid costly races to the bottom. And for California as a whole, the employment laws affect the cost and supply of goods and services produced here and thus affect the state's competitive position in an increasingly competitive global marketplace.

Determining the best set of substantive and procedural employment rules, the remedies that will be available for violations of those rules, and the right enforcement regime is a mind-bogglingly difficult and normatively fraught task.

First, consider the substantive rules. Developing the rules of employment law requires weighing tradeoffs and balancing the benefits and consequences of each rule that develops. This is hard stuff that is best done when lawmakers can consult the opinions of experts and the public—and it is because it inherently requires resolving conflicts between incommensurable values and then making difficult choices about how best to achieve those values.

Second, consider the Legislature's choice among the wide range of possible enforcement regimes. Should the Legislature rely on individual plaintiffs to defend their rights by bringing lawsuits in court? Or should the Legislature create a government agency, like the Division of Labor Standards Enforcement ("DLSE") or Labor and Workforce Development Agency ("LWDA"), to monitor employers and initiate administrative enforcement proceedings? Or should the Legislature deputize private attorneys general to

bring claims in a representative capacity and to collect bounties when lawsuits are successful, as does the federal False Claims Act or the Labor Code Private Attorneys General Act? (*See* 31 U.S.C. §§ 3729 – 3733; Lab. Code, §§ 2699 et seq.)[2] Each of these options has its own unique set of risks. If the Legislature relies on individual plaintiffs, who may fail to have a sufficient incentive to bring a lawsuit, the law may be under-enforced; if it relies on public enforcement, it may worry about the public fisc and the possibility of regulatory capture; if it relies on bounty hunters, it may burden the courts with a rising tide of frivolous lawsuits. (*See* Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation* (2014) 114 Colum. L.Rev. 1913, 1924-1942, 1996-2005.) Here again, determining how the employment laws will be enforced is a highly complicated and finely reticulated endeavor.

Third, consider the remedies available to plaintiffs who can demonstrate that their rights under the employment laws have been violated. Here, the inquiry focuses on calibrating remedies to ensure the right level of deterrence for would-be violators and the right level of compensation for aggrieved employees. And once again, the inquiry raises a lot of hard questions. Consider, as relevant here, the decision whether to allow plaintiffs to request punitive damages in certain types of lawsuits. On one hand, the availability of punitive damages may send the message that society especially disapproves of certain conduct and may further deter that conduct. On the other hand, the variable nature of punitive damage awards can produce windfalls for some plaintiffs and inequities across equally-situated

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[2] All subsequent statutory references are to the Labor Code unless otherwise indicated.

plaintiffs. (*See Exxon Shipping Co. v. Baker* (2008) 554 U.S. 471; *see also Phillip Morris USA v. Williams* (2007) 549 U.S. 346.) Further, the sheer availability of punitive damages dramatically increases the settlement value of a case and thus encourages plaintiffs (and their lawyers) to bring weaker cases to the courts. (*See Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1107 ["[W]orth considering is the effect that the prospect of punitive damages might have on the settlement value of marginal claims."]; *see also* Priest, *Punitive Damages Reform: The Case of Alabama* (1996) 56 La. L.Rev. 825, 830 ["It is obvious and indisputable that a punitive damages claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process, increasing the likelihood of litigation."]; Koenig, *The Shadow Effect of Punitive Damages on Settlements* (1998) 1998 Wis. L. Rev. 169, 179; Cohen & Kyle, Punitive Damage Awards in State Courts, 2005 (March 2011), U.S. Department of Justice Bureau of Justice Statistics Special Report NCJ 233094 [DOJ study finding that punitive damages were "requested in approximately 30% of [conversion] trials"].) The relative unpredictability of punitive damage awards also makes settlement negotiations lengthier and more complicated, even in the most basic wage claims for which damages otherwise are a matter of mathematical computation. (*See, e.g.*, 3 Robinson & Arkin, Litigating Tort Cases (2017) § 28:5 ["The mere pleading of punitive damages will automatically make the litigation of the case far more complex and time-consuming."]; Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform* (2002) 50 Buff. L. Rev. 103, 162.)[3]

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[3] Voris contends that standards of proof for recovering punitive damages and establishing tort causation are a sufficient bulwark against rogue punitive

As this brief overview suggests, employment is one of the most complicated and normatively fraught areas of the law in which the Legislature operates. It is therefore the paradigmatic subject matter for careful and sensitive legislative judgment and an appropriate place for judicial restraint.

B. The Labor Code provides a comprehensive and highly detailed regime for remedying unpaid-wage claims.

Employment law is not only the sort of field in which legislative judgment is most needed, it is also an area of law in which the Legislature has in fact been quite proactive.

The Labor Code provides a host of protections governing the wages that employees earn and how they are to be paid. Among other things, the Code sets minimum wages (§§ 1197, 1197.1), overtime pay (§ 510), employee meal periods and rest breaks (§§ 226.7, 512), timing of pay (§ 204), and elaborate pay stub requirements (§ 226). An employee may bring claims for any wages not timely paid (§ 204), and can recover wages withheld after termination or resignation (§§ 201, 202), including statutory waiting-time penalties of up to 30 days' additional wages for failing to pay all wages due upon separation (§ 203).

The Labor Code also establishes an elaborate set of remedies for vindicating rights provided under the Code. An employee paid less than the

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damage awards. (*See* RB25.) We have our doubts. But whether or not that is true, limits on *recovery* do not solve the implications that punitive damages can cause for *pleading* behavior. That plaintiffs ultimately might not *recover* punitive damages would not stop them from upping the stakes by requesting punitive damages for wage conversion. (*See The Shadow Effect of Punitive Damages on Settlements*, *supra*, 1998 Wis. L. Rev. at p. 171 ["an understanding of punitive damages awards is of less practical significance than knowledge of the impact of these verdicts on claim settlement."].)

minimum wage or required overtime may bring a civil action and recover liquidated damages. (*See* §§ 1194, 1994(a).) An employee may pursue these claims by filing an administrative wage claim with the Labor Commissioner (§ 98), as well as a civil action. The employee may seek damages, statutory penalties (*see, e.g.*, §§ 203, 226, subd. (e)), civil penalties (§§ 2699 et seq.), interest (§§ 98.1, 218.6), liquidated damages (§ 1197.4), restitution, and equitable relief. Victorious employees are entitled to attorneys' fees in wage claim cases. (§ 218.5(a) [non-payment], 1194(a) [overtime].)

The Labor Code also empowers entities such as LWDA and the Department of Labor Standards Enforcement ("DLSE") to assess penalties and secure recovery on behalf of employees. (*See, e.g.*, §§ 210 [authorizing LWDA to assess statutory penalties for violations], 96.7 [authorizing DLSE to collect unpaid wages and benefits], 558 [authorizing DLSE to assess civil penalties and recover underpaid wages from employers who violate overtime, meal period, and rest break requirements].) To relieve the administrative burden and backlog of enforcing the Labor Code, the Legislature also authorized any aggrieved employees to stand in the shoes of labor law enforcement agencies as a proxy for the State of California to prosecute Labor Code violations and pursue civil penalties otherwise obtainable only by the State. (§§ 2699 et seq.) Small wonder, then, that numerous courts have concluded that "the Labor Code provides a comprehensive and detailed remedial scheme that provides an exclusive statutory remedy." (*Thomas v. Home Depot USA, Inc.* (N.D. Cal. 2007) 527 F.Supp.2d 1003, 1010 [collecting cases]; *see also Green v. Party City Corp.* (C.D. Cal. Apr. 9, 2002, No. CV-01-09681 CAS (EX)) 2002 WL 553219, at *5 ("[T]he Labor Code provides a detailed remedial scheme for violation of

its provisions."); *Caputo v. Prada USA Corp.* (C.D. Cal., Feb. 6, 2014, No. CV 12-3244 FMO (RZX)) 2014 WL 12567143, at *7.)

Importantly here, the Labor Code does not authorize claims for punitive damages. Indeed, the Legislature chose to pursue the aims of punitive damages—punishment and deterrence—in a different way: namely, through civil and criminal penalties. (*See Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 375 fn.6 [Labor Code's civil penalties provide "meaningful deterrent to unlawful conduct"]; *Scalice v. Performance Cleaning Systems* (1996) 50 Cal.App.4th 221, 230-231 ("Labor Code includes provisions which are markedly punitive"); *see also Brewer v. Premier Golf Properties* (2008) 168 Cal.App.4th 1243, 1252 [penalties for violation of wage statutes are "punitive in nature"]; *Spragin v. McDonald's USA, LLC* (C.D. Cal. Jan. 20, 2011, No. CV1009617SVWJEMX) 2011 WL 13217960, at *2 [Labor Code penalties are punitive in nature]; *Patton v. Schneider Nat'l Carriers, Inc.* (C.D. Cal. June 8, 2009, No. CV0901010MMMAJWX) 2009 WL 10673060, at *3 [it would be "difficult to fathom how [Labor Code] penalties are not meant to 'punish' employers who willfully violate the provisions of the Labor Code"].)

By contrast, punitive damages *are* available for conversion claims. (Civ. Code, § 3294.) According to Voris, an employer can be held liable for conversion any time the employer should have paid an employee but didn't. Thus, on Voris's account, even the most routine wage case becomes a potential vehicle for a punitive damages verdict. (*In re Wal-Mart Stores, Inc. Wage and Hour Litigation* (N.D. Cal. 2007) 505 F.Supp.2d 609, 619 [allowing conversion will "transform *every* claim" into one for punitive damages]; *see id.* ["plaintiffs apparently included this [conversion] cause of action [solely] for the purpose of claiming punitive damages"]; *Brewer*,

supra, (2008) 168 Cal.App.4th at p. 1252 ["punitive damages are not recoverable" for liability premised on Labor Code violations].) But this cannot be the rule. Tort remedies—including punitive damages—do not extend to the employment relationship. (*See, e.g.*, *Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1180-1182 [tort damages not available for employer misrepresentations made to induce termination of employment]; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683-693 [refusing to extend tort remedies to wrongful termination claim, noting the employment relationship is not sufficiently similar to that of insurer and insured to warrant such judicial extension]; *see also Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal. 4th 85, 95 [discussing *Foley* and *Hunter* for the proposition that "courts should limit tort recovery in contract breach situations"].) "[T]he employment relationship is fundamentally contractual." (*Foley*, *supra*, 47 Cal.3d at p. 696.) As this Court has recognized, even limited rules extending tort liability to certain contract claims "could potentially convert every contract breach into a tort." (*Freeman & Mills*, *supra*, 11 Cal. 4th at p. 103.) In *Freeman & Mills, Inc. v. Belcher Oil Co.*, (1995) 11 Cal. 4th 85, the Court overruled its holding in *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, that tort remedies were available for a breach of contract in which the breaching party denied the existence of the contract in bad faith. *Freeman* affirmed a "general rule precluding tort recovery for noninsurance contract breach, at least in the absence of violation of 'an independent duty arising from principles of tort law' [citation] other than the bad faith denial of the existence of, or liability under, the breached contract." (*Freeman & Mills*, *supra*, 11 Cal. 4th at p. 102.) In doing so, the Court "reiterated the important differences between contract and tort theories of recovery" and cautioned that "courts should limit tort recovery in contract

breach situations." (*Id.* at p. 95.) As the Court recognized, there is a "preference for legislative rather than judicial action" in the area of remedies, and nothing prevents the Legislature from creating additional civil remedies should it see fit. (*Id.* at p. 102.) These same principles ring true here.

Creating a new claim for conversion of unpaid wages thus disrupts the Legislature's careful balancing in this area.

II. Conversion Is Unnecessary And Inappropriate To Combat Wage Theft Amidst A Sea Of Wage Rights And Remedies In The Labor Code.

Voris insists that extending the tort of conversion to unpaid wages is necessary to protect employees against insolvent employers. It isn't. Nor is it particularly helpful. A common law conversion claim for unpaid wages would merely duplicate the Labor Code's intricate web of existing wage protections, while transforming every garden-variety wage claim into a tort, potentially sustaining punitive damages.

A. The Labor Code provides adequate remedies to recover unpaid wages.

A common law wage conversion claim would be wholly redundant of statutory remedies. As set forth above, *supra*, the Labor Code provides a carefully-crafted panoply of wage rights and remedies. (*See*, *supra*, Section I.B; *see, e.g.*, Lab. Code, §§ 1197 [minimum wage], 510 [overtime pay], 201 and 202 [final pay of all wages owed upon separation], 512 [employee meal periods], 226.7 [premium pay to employees for noncompliant meal periods or rest breaks], 204 [timely pay], etc.) Employees can vindicate these wage rights in a civil or administrative action (*see* § 98), or even prosecute Labor Code violations as a private attorney general. (§§ 2699 et seq.) And the remedies are extensive. Employees may seek damages, statutory penalties (*see, e.g.*, §§ 203, 226, subd. (e)), civil penalties (§§ 2699 et seq.), interest

(§§ 98.1, 218.6), liquidated damages (§§ 1197.4, 1194.2), restitution, equitable relief, and, if victorious, attorneys' fees and costs. (§§ 218.5(a) [non-payment], 1194(a) [overtime], 2699, subd. (g)(1) [civil penalties under the Private Attorneys General Act of 2004 for myriad Labor Code violations].)

Voris does not dispute that the Labor Code's rights and remedies are complete and adequate—rather, he contends they are not complete and adequate as to *him* because he was unable to satisfy a judgment against his now-insolvent employer. With this singular end in mind, he perseverates that a wage conversion claim is necessary to allow employees to recover wages from corporate individuals—such as Lampert—where the employer cannot pay. But individual liability already exists. The Labor Code imposes individual liability on owners, officers, directors, or managing agents acting on behalf of the employer who cause any of the following: minimum wage, overtime, meal period, rest break, pay stub, timing of pay, or business expense violations, or failure to provide all wages due upon separation. (*See, supra,* I.A; *see, e.g.*, §§ 558, 558.1, 1197.1, 2802.) It also makes any individual, including, but not limited to agents, officers, or employees of another person, who causes a minimum wage violation subject to a civil penalty, restitution of wages, liquidated damages, and waiting time penalties. (*See* § 1197.1; 2699 et seq. [allowing aggrieved employees to prosecute violations in place of the LWDA].) The Legislature has even gone so far as to deter bad actors by criminalizing certain Labor Code violations. (*See, e.g.*, §§ 1175 [providing that "[a]ny person, or officer or agent thereof, is guilty of a misdemeanor" for recordkeeping violations or hindering a DLSE investigation], 1199 ["Every employer or other person acting either individually or as an officer, agent, or employee of another person is guilty

of a misdemeanor and is punishable by a fine" or imprisonment for violating maximum-hours or minimum-wage laws], 1199.5 ["Every employer or other person acting either individually or as an officer, agent, or employee of another person is guilty of a misdemeanor and is punishable by a fine" or imprisonment for violating equal pay laws].) Even absent the Labor Code, employees have long since had the ability to recover wages from individuals under corporate veil-piercing principles by showing that the individuals are the employer's alter ego. (*See Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1089, fn.10, as modified (Sept. 7, 2005) [holding that individuals may be liable under common law theories such as the alter-ego doctrine].)

Voris was not without an avenue for individual liability against Lampert—he just didn't pursue it. Voris is correct that section 558.1 individual liability did not exist at the time of his claims, but the same is not true of individual liability under sections 558 and 1197.1, which were available through a Private Attorneys General Act action. (*See* §§ 558, 558.1, 1197.1, 2699 et seq.) Any "need" for a conversion tort to recover unpaid wages from corporate individuals is circumscribed to an exceedingly narrow and ever-shrinking subset of workers: who filed claims prior to enactment of section 558.1, whose claims alleged Labor Code violations other than minimum wage, overtime, meal period, or rest break violations (which sections 558 and 1197.1 address), who won judgments against their employer but could not collect due to the employer's insolvency, who were otherwise unable to pierce the corporate veil, and whose claims—after all these years—remain pending. Any benefit derived from a wage conversion tort would inure to only a miniscule population of plaintiffs. This *de minimis* gain, if any, does not justify the judicial birth of a never-before-recognized common law wage conversion claim solely for the benefit of a few.

In light of existing statutory remedies, a conversion claim for unpaid wages would merely duplicate statutory claims.[4] This should not be permitted.

B. A conversion claim cannot lie for unpaid wages because statutory framework provides a more suitable cause of action.

The Labor Code provides not only an *adequate* remedy for wage claims, but also the most *suitable* remedy. The law of conversion does not extend to reach intangible property for which a more suitable cause of action exists. (*See, e.g., Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 210 ["[I]f 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."]; *Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 239 [rejecting conversion for trade secret on the basis that "If the plaintiff identifies no property right outside of trade secrets law, then he has no remedy outside that law, and there is nothing unsound or unjust about holding other theories superseded"].)

This principle serves as a logical boundary to prevent the ever-expanding law of conversion from circumventing Legislative efforts to define rights and remedies. Rights to intangible property are not static. As new forms of intangible property emerge, rights and remedies thereto derive from or evolve through meticulous legislation. (*See, e.g., Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 137 [property rights for excised cells are guided by "specialized statutes"].) Wages are just one form

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[4]Duplicative claims are disfavored. (*See Rodrigues v. Campbell Industries* (1978) 87 Cal.App.3d 494, 501 [demurrer may be sustained when a cause of action is duplicative and "thus adds nothing to the complaint by way of fact or theory of recovery"].)

of intangible property—one for which the Legislature has woven an intricate fabric of regulations. To overlay tort law atop this fabric would side-step the remedies that the Legislature created for recovering wages. And why stop at wages? Why not extend conversion to any array of highly-regulated intangible property for which the Legislature has delineated a more specific and suitable claim? The Court should not fashion a new common law remedy for wages where adequate, more suitable remedies already exist. (*See Ross v. U.S. Bank Nat. Ass'n* (N.D. Cal. 2008) 542 F.Supp.2d 1014, 1024 [unpaid wages due to "time-shaving" not properly subject to conversion because "the California Labor Code is adequate in providing plaintiffs appropriate remedy for this type of conduct, and the conversion claim is therefore not necessary"].)

Rejecting a wage conversion claim would be consistent with how this Court has treated the tort in other employment contexts. Indeed, this Court has addressed potential wage-*related* conversion claims only in the *absence* of a more suitable cause of action. (*See, e.g., Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 603-604 [noting that, "under appropriate circumstances" and where an employee had no private cause of action under the Labor Code to recover misappropriated gratuities, the lack of statutory cause of action did not foreclose the availability of other remedies, such as a common law action for conversion]; *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178 [noting that equity recognizes "equitable conversion," but omitting any further discussion or application of such doctrine].) Moreover, *Lu* and *Cortez* do not provide any basis for creating a common law conversion claim for unpaid wages. Neither case involved a conversion claim. Unlike claims for allegedly unpaid wages wherein the employee claims to have never received the wages, *Lu* involved

a casino card dealer who received tips from customers and was then required to hand over a portion to the casino. (*Lu*, *supra*, 50 Cal.4th at p. 595.) In other words, *Lu* involved an actual taking of wages that the card dealer already had in his possession. Also, part of the Court's analysis focused on the lack of private right of action by which the card dealer could recover his tips. (*See id.* at pp. 603-604.) It was on this basis that the Court, in dicta, discussed potential alternative remedies, including potential conversion "under appropriate circumstances." (*Ibid.*) *Cortez* confirmed that wages may be recovered in restitution under the Unfair Competition Law. (*See Cortez, supra,* 23 Cal.4th 163.) There, the Court did not authorize conversion for unpaid wages, but merely stated that, under principles of equity and equitable conversion, "wages are property of the employee within the contemplation of the UCL." (*Id.* at p. 178.) Neither *Lu* nor *Cortez* support the finding of a common law claim for conversion of unpaid wages.

C. Statutes provide the exclusive remedy for recovering unpaid wages based on alleged minimum wage, overtime, meal period, or rest break violations.

As applied to wage claims based on alleged minimum wage, overtime, meal period, or rest break violations, among others, the Labor Code provides the *exclusive* remedy. In determining whether a statutory scheme provides the exclusive means by which a right can be pursued and remedied, this Court asks two questions: (1) is the right at issue created by statute?; and (2) has the Legislature provided "a comprehensive and detailed remedial scheme" adequate for enforcing the right? (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 79 ["[W]here a statute creates a right that did not exist at common law and provides for a comprehensive and detailed remedial scheme for its enforcement, the statutory remedy is exclusive."].) This test—sometimes

called the "new right—exclusive remedy" doctrine—preserves the separation of powers between the judiciary and Legislature. (*See Stephenson v. Superior Court* (1997) 16 Cal.4th 880, 889.) This is because "general and comprehensive legislation, where course of conduct, parties, things affected, limitations and exceptions are minutely described, indicates a legislative intent that the statute should totally supersede and replace the common law dealing with the subject matter." (*I. E. Associates v. Safeco Title Ins. CO.* (1985) 39 Cal.3d 281, 285; *see also Flores v. Los Angeles Turf Club, Inc.* (1961) 55 Cal.2d 736, 746-45 ["pervasive" statutory scheme, "designed to regulated almost every aspect" of subject, demonstrated legislature's intent to supplant common law].)

The first inquiry is whether the specific right is "new." (*See, e.g., Lubner v. City of Los Angeles* (1996) 45 Cal.App.4th 525, 528-29 [right for artist to sue for loss of reputation arising from *negligent* destruction of artwork was new despite that common law recognized claims for *intentional* destruction].) The right to earn wages at a specific wage rate is statutory. For example, while employees could, at times, recover the *value* of services rendered at common law under a contract theory, they had no right to be paid at any particular *minimum* wage. The same is true for the right to receive premium payments for short, late, or missed meal periods or rest breaks. It was only when the Labor Code was enacted in 1913 that California employment law began to provide the "necessary legal basis for an action by an employee to recover unpaid minimum wages" and rights such as overtime, meal periods, and rest breaks. (*Martinez v. Combs* (2010) 49 Cal.4th 35, 53, 56 ["[n]o state's law provided for a minimum wage before 1912"]; *Pulido v. Coca-Cola Enterprises, Inc.* (C.D. Cal., May 25, 2006, No. EDCV06-

406VAP) 2006 WL 1699328, at *9 [right to meal and rest breaks created by statute].)

To determine exclusivity, courts look to the statute for indications that the Legislature intended to "occupy the field" in question. (*Mendoza v. Ruesga* (2008) 169 Cal.App.4th 270, 287; *see also Rojo*, *supra*, 52 Cal.3d at p. 80 [noting statutes "supplant the common law" if the "Legislature intended to cover the entire subject"].) As set forth above, the Legislature has created an extensive remedial scheme involving the Labor Code, the Industrial Welfare Commission, and related laws to address disputes regarding wages. Examining California's statutory remedies for wage violations, myriad opinions have concluded that they were intended to be exclusive of any parallel common law remedies.[5] (*See Jones v. AB Acquisition LLC* (C.D. Cal. Apr. 4, 2016, No. CV 14–8535 DSF) 2016 WL 7638188, at *5.)

[5] The majority of courts to examine the issue have rejected conversion claims for unpaid wages, finding that California's statutory framework provides the exclusive remedy. (*See, e.g.*, *Jones*, *supra*, 2016 WL 7638188, at p. *5 [rejecting conversion claim for unpaid wages because "statutory remedies are generally the exclusive remedy for wage violations"]; *Lopez v. Aerotek, Inc.* (C.D. Cal. July 23, 2015, No. SACV 14–00803–CJC) 2015 WL 4504691, at *3 [same]; *Santiago v. Amdocs, Inc.* (N.D. Cal. Apr. 2, 2011, No. C10–4317 SI) 2011 WL 1303395, at *3–4 [same]; *Madrigal v. Tommy Bahama Grp.* (C.D. Cal. Oct. 18, 2010, No. CV 09-08924 SJO) 2010 WL 4384235, at *6–7 [same]; *Vedachalam v. Tata Am. Int'l Corp.* (N.D. Cal. Feb. 4, 2010, No. C06-0963-VRW) 2010 WL 11484815, at *4 [same]; *Helm v. Alderwoods Grp. Inc.* (N.D. Cal. 2009) 696 F. Supp. 2d 1057, 1076 [same]; *Jacobs v. Genesco, Inc.* (E.D. Cal. Sept. 3, 2008, No. CIV-S–08–1666 FCD) 2008 WL 7836412 [same]; *Vasquez v. Coast Valley Roofing Inc.* (E.D. Cal. June 6, 2007, No. CV-F-07-227-OWW) 2007 WL 1660972, *5-10 [same]; *In re Wal–Mart Stores, Inc. Wage & Hour Litig.* (N.D. Cal. 2007) 505 F. Supp. 2d 609, 618–19 [same]; *Pulido v. Coca–Cola Enters. Inc.* (C.D. Cal. May 25, 2006, No. EDCV06-406VAP) 2006 WL 1699328 [same]; *Green v. Party City Corp.* (C.D. Cal. Apr. 9, 2002, No. CV-01-09681 CAS) 2002 WL 553219, at *5 [same].)

Moreover, that wages are recoverable as restitution under the Unfair Competition Law ("UCL"), Business and Professions Code sections 17200 et seq., under *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, does not destroy exclusivity. Rather, *Cortez*, reinforces that statutory remedies are the proper vehicle for recovering wages. The right to pursue equitable wage remedies under the UCL is statutory and must be predicated on an underlying statutory violation, which, for wages, would be a Labor Code violation. That is, the UCL statutory remedy relies on a Labor Code violation in providing restitution of wages. Thus, California's statutory framework provides the exclusive means by which employees may pursue alleged rights to unpaid wages predicated on rights that did not exist at common law—e.g., minimum wage, overtime pay, or premium pay for noncompliant meal periods or rest breaks.

Voris has not shown that conversion would provide anything of substance beyond existing statutory remedies. To avoid duplicating or eclipsing more suitable Labor Code claims, the Court should reject Voris's plea for a new wage conversion claim.

III. A Simple Failure to Pay Money Owed—Including Wages—Does Not Constitute Conversion.

Since the dawn of time, humans have entered into agreements and failed to make good on their promises. Yet, Voris submits that this age-old tradition should now be a tort. He urges that, because employees have a property right to wages, an employer commits conversion whenever it fails to pay wages as they are earned. But this is just failure to pay money owed—the employer being a debtor and the employee a creditor. By this reasoning, any failure to pay money owed—every broken promise or deal gone wrong—

would be a tort. This is not and has never been the law. And if adopted, that rule would for the first time extend tort liability to mere debt.

" 'Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages.' " (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240, quoting *Welco Elecs.*, *supra*, 223 Cal.App.4th at p. 214.) In establishing these elements, "both the property and the owner's rights of possession and exclusive use [must be] sufficiently definite and certain." (*Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, 125.) When the property at issue is money, "a cause of action for conversion ... can be stated only where a defendant interferes with the plaintiff's *possessory interest* in a specific, identifiable sum, such as when a trustee or agent misappropriates the money entrusted to him." (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 284, italics in original; *ibid.* ["simple creditor-debtor relationship ... do[es] not constitute a claim defendants interfered with [plaintiff's] possession of a specific, identifiable sum of money."]; *see also Optional Capital, Inc. v. Das Corp.* (2014) 222 Cal.App.4th 1388, 1401 ["unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment, money cannot be the subject of a cause of action for conversion."].) On the other hand, a "generalized claim for money [is] not actionable as conversion." (*Vu v. California Commerce Club, Inc.* (1997) 58 Cal.App.4th 229, 235.)

While money owed might be in an identifiable *amount*, it is not a sum capable of identification for purposes of conversion because a plaintiff's right of possession and *exclusive use* of that money is not sufficiently definite

and certain when based on only a failure to pay. Unlike other forms of intangible property, money is fungible. Multiple creditors may stand in line for the debtor's same general fund. This is not true where a converter takes a bag of money from the plaintiff, receives money from the plaintiff in trust, or obtains money acting as an agent for the plaintiff's benefit. For this reason, the possessory interest in money claimed in debt is materially different from money obtained from the plaintiff in trust or for the exclusive benefit of the plaintiff. Courts have recognized this distinction: "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*." (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395–396, italics added; *see also Welco Elecs., supra*, 223 Cal.App.4th at p. 216; *Haigler, supra*, 18 Cal.2d at p. 681 [conversion by real estate broker acting as agent]; *Software Design & Application Ltd. v. Hoefer & Arnett, Inc.* (1996) 49 Cal.App.4th 472, 485 [no conversion where money was allegedly misappropriated "without any indication that it was held in trust for" plaintiff]; *McKell, supra*, 142 Cal.App.4th at pp. 1491–1492 [no conversion where bank overcharged customers for third-party fees and retained the difference because bank had no duty to distribute those funds to the third parties]; *Fischer, supra*, 50 Cal.App.4th at pp. 1072–1074 [conversion where sales agent misappropriated proceeds from consignment sale of farm products]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 599 [attorney's claim for fees from proceeds of settlement subject to lien]; *Watson v. Stockton Morris Plan Co.* (1939) 34 Cal.App.2d 393, 403 [savings and loan issued duplicate passbook and delivered funds to third party].)

In contrast, courts have recognized that a "simple failure to pay money owed does not constitute conversion." (*Kim*, *supra*, 201 Cal.App.4th at p. 284; *see also Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 45, as modified on denial of reh'g (May 21, 2010) [contractual right to payment insufficient for conversion]; *Farmers Ins. Exch. v. Zerin* (1997) 53 Cal.App.4th 445, 452 ["a mere contractual right of payment, without more, will not suffice" to state a conversion claim]; *Sanowicz v. Bacal* (2015) 234 Cal.App.4th 1027, 1041 [same].) This is not a new construct. California courts have long recognized that, "as a general rule … where the relationship of debtor and creditor only exists, conversion of the funds representing the indebtedness will not lie against the debtor, unless he holds the deposit in a fiduciary capacity and is bound to return to the owner of the identical money." (*Watson v. Stockton Morris Plan Co.* (1939) 34 Cal.App.2d 393, 403.) This Court's decision in *Imperial Valley Co. v. Globe Grain and Milling Co.* (1921) 187 Cal. 352, reflects this principle. There, a tenant entered into an agreement to raise crops on leased land and to pay the landlord one-fourth of the crop as rental. (*Id.* at pp. 353-354.) The tenant sold the entire crop and used all of the proceeds to pay other debts. (*Ibid.*) The landlord brought an action for conversion. (*Ibid.*) This Court concluded the only cause of action the landlord stated was for unpaid rent—not conversion—because the rental agreement only established the measure of damages for breach of contract. (*Id.* at p. 355.)

Voris overlooks that a failure to pay does not amount to conversion. Instead, he cites *Welco*, *supra*, 223 Cal.App.4th 202, for the proposition that there is no "entrustment" element for conversion. (OB27, citing *Welco*, at p. 216.) But *Welco Electrics* does not say that. And it does not support conversion based on a failure to pay. In that case, the "intangible property

converted was [the] plaintiff's credit card or its number and a portion of [the] plaintiff's credit card account," not money itself. (*Id.* at p. 216.) Recognizing this distinction, the court opined that, even if the allegedly converted property had been money, conversion of money requires something more than a simple failure to pay money owed. (*See id.* at pp. 214, 216-217.) The court acknowledged cases holding "that a conversion claim fails because the simple failure to pay money owed does not constitute conversion," but merely distinguished *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, and *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, on grounds that they were "not applicable here, because in those cases, *there was no taking of intangible property*." (*Welco Electrics*, at p. 214, italics added.) Under *Welco Electrics*, conversion of money requires some misappropriation in the form of an actual taking of the money at issue.

Moreover, permitting conversion for a failure to pay money owed would eviscerate the distinction between contract and tort. Claims for failure to pay money owed sound in contract, not tort. (*See Farmers Ins. Exch. v. Zerin* (1997) 53 Cal.App.4th 445, 452.) Claims for unpaid wages are no exception. As this Court has stated, "the employment relationship is fundamentally contractual." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 696; *Guz v. Bechtel Nat'l Inc.* (2000) 24 Cal.4th 317, 352 [In the employment context, "an implied covenant theory affords no separate *measure of recovery*, such as tort damages."].) Longstanding principles guide that "[t]he breach of an obligation arising out of an employment contract, even when the obligation is implied in law … does not support tort recoveries." (*Brewer v. Premier Golf Properties* (2008) 168 Cal.App.4th 1243, 1244-45, 1254.) Indeed, this Court has cautioned against permitting a

party to pursue tort remedies for contract claims or otherwise obliterating the distinction between contracts and torts. (*See Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 46; *Erlich v. Menezes* (1999) 21 Cal. 4th 543, 551.)

The logical extension of allowing conversion of unpaid wages is that every conceivable debt or failure to pay money owed would then amount to a tort. The Court should resist Voris's invitation to broaden conversion to unpaid wages, which has never before been recognized in California.

CONCLUSION

For the reasons stated above, this Court should hold that an employee may not maintain an action for conversion of unpaid wages.

March 7, 2018

Respectfully submitted,

ORRICK, HERRINGTON &
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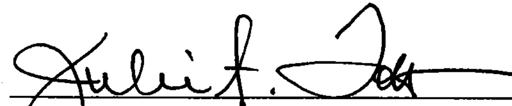

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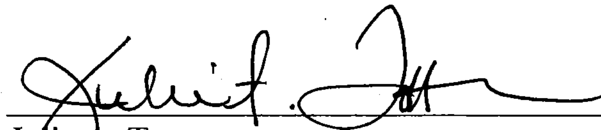
CERTIFICATE OF COMPLIANCE

The undersigned counsel for *amici curiae* the Employers Group, pursuant to Rule 8.204(c)(1) of the California Rules of Court, certifies that this *amici curiae* brief contains 9437 words, as counted by the word count of the computer program used to prepare the brief.

Dated: March 7, 2018

ORRICK, HERRINGTON & SUTCLIFFE LLP



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PROOF OF SERVICE BY MAIL

I am a citizen of the United States, over eighteen years old, and not a party to this action. My place of employment and business address is Orrick, Herrington & Sutcliffe LLP, 400 Capitol Mall, Suite 3000, Sacramento, California 95814.

On March 7, 2018, I served the following document: **APPLICATION OF EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL TO FILE *AMICI CURIAE* BRIEF; *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANT-RESPONDENT GREG LAMPERT** on the interested parties in this action by placing a true and correct copy thereof in a sealed envelope addressed as follows:

Edward M. Anderson
Regina Yeh
ANDERSON YEH PC
401 Wilshire Boulevard, 12th Floor
Santa Monica, CA 90401

Attorneys for Plaintiff and Appellant, Brett Voris

Robert Cooper
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
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Attorneys for Defendant and Respondent, Greg Lampert

Court of Appeal of California
Second Appellate District
Division Three
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Case No. B265747

Honorable Michael L. Stern
Los Angeles Superior Court
Department 62
111 N. Hill Street
Los Angeles, CA 90012

Case No. BC408562

I am employed in the county from which the mailing occurred. On the date indicated above, I placed the sealed envelopes for collection and mailing at this firm's office business address indicated above. I am readily familiar with this firm's practice for the collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the firm's correspondence would be deposited with the United States Postal Service on this same date with postage thereon fully prepaid in the ordinary course of business.

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

Executed on March 7, 2018 at Sacramento, California.

ORRICK, HERRINGTON & SUTCLIFFE LLP

Jeanette Ponce