No. S170758

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JORGE A. PINEDA,

Plaintiff, Appellant and Petitioner,

vs.

BANK OF AMERICA, N.A.,

Defendant and Respondent.

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

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

ANSWER BRIEF ON THE MERITS OF RESPONDENT BANK OF AMERICA, N.A.

Service on the State Attorney General and
District Attorney for the City and County of San Francisco
Required by California Business & Professions Code Section 17209

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I. INTRODUCTION

Petitioner Jorge Pineda concedes that he (and the putative class he seeks to represent) has been paid every dollar of wages owed. He seeks to recover only statutory penalties for alleged late payment of wages under Labor Code section 203. No one disputes that persons like Pineda may sue to seek those penalties. The only issue here is whether a special, extended limitations period applies to such suits, even though all wages have been paid in full. Pineda contends that, because Bank of America allegedly paid him his final wages four *days* late, he should be able to wait up to four *years* to assert a claim for a penalty.

The trial court and the court of appeal correctly rejected that contention. Those courts applied the one-year limitations period for statutory penalties set forth in California Code of Civil Procedure section 340(a). Both lower courts also held that section 203 penalties are not recoverable as a restitutionary remedy under the California Unfair Competition Law ("UCL"). Section 203 penalties do not vest automatically, but only after a plaintiff's affirmative act of bringing an enforcement action and demonstrating a willful failure to pay wages due. Accordingly, Pineda's interest in a section 203 penalty at best is contingent and does not give rise to a restitutionary remedy of the sort the UCL allows. Because the Bank did not unlawfully "acquire" anything at Pineda's expense, there is nothing to restore to Pineda through restitution.

Because the legal issues in this case were properly resolved below, this Court should affirm the lower courts' decision. Neither Labor Code section 203 nor the UCL creates a special, extended limitations period for actions seeking only penalties.

II. STATEMENT OF THE CASE

Pineda resigned his employment at Bank of America, N.A. (the Bank) effective Thursday, May 11, 2006. He alleges that he provided the Bank with two weeks' advance notice of his resignation, but that he did not receive his final wages until Monday, May 15, 2006, four calendar days (two business days) after his last day of work.

Nearly a year and one-half later, on October 22, 2007, Pineda sued on behalf of himself and other bank employees who allegedly did not timely receive their final wages. Pineda conceded that he and the putative class members are not owed any wages. Instead, Pineda seeks statutory penalties associated with the alleged late payment of final wages, through causes of action under both California Labor Code section 203 and the UCL.

The Bank moved for judgment on the pleadings on the grounds that (i) Pineda's section 203 claim is time barred, and (ii) he failed to state a claim under the UCL. The trial court granted the Bank's motion.

The court of appeal affirmed on December 22, 2008. The court certified the opinion for partial publication on January 21, 2009. *See* 170 Cal. App. 4th 388 (2009).

In the unpublished portion of the opinion, the court reaffirmed the reasoning of *McCoy v. Superior Court*, 157 Cal. App. 4th 225 (2007), *review denied*, 2008 LEXIS 1548 (Feb. 13, 2008), and held that Pineda's individual claim was barred by the one-year limitations period for penalties in Code of Civil Procedure section 340(a). *See* 170 Cal. App. 4th at 391.

In the published portion of its opinion, the court held that Pineda could not recover penalties as restitution under the UCL. Because "the remedy contained in Section 203 . . . acts as a penalty . . . and forces [the employer] to pay Plaintiffs an additional amount," the court explained, "[t]his type of payment clearly is not restitutionary, and thus cannot be recovered under the UCL." *Id.* at 393-94 (quoting *Tomlinson v. Indymac Bank, F.S.B.*, 359 F. Supp. 2d 891, 895 (C.D. Cal. 2005)) (first alteration in original).

Pineda timely petitioned for review. This Court granted the petition on April 22, 2009.

III. SUMMARY OF THE ARGUMENT

The court of appeal properly held that section 203 payments are penalties, not wages, and thus are subject to a one-year limitations period under section 340(a) of the Code of Civil Procedure. The plain language of the relevant statutes, indicia of legislative intent, considerations of public policy, and decisions of this Court and others, all support the court of appeal's conclusion that Labor Code section 203 does not extend the one-year statute of limitations in penalty-only actions. Pineda's argument that the applicable limitations period is two, three, or four years — depending on the underlying legal theory that plaintiffs would have asserted, had wages remained unpaid — should be rejected.

The court of appeal also correctly held that statutory waiting-time penalties are not available under the UCL. Because any claim to section 203 penalties does not vest until after an enforcement action is brought, and a willful failure to pay wages is established, the Bank has not "acquired" any property belonging to Pineda. Thus, there is nothing to restore through restitution, which is the only remedy the UCL allows.

IV. STANDARD OF REVIEW

A motion for judgment on the pleadings tests the legal sufficiency of a cause of action. *See Pang v. Beverly Hosp., Inc.*, 79 Cal. App. 4th 986, 989 (2000). Appellate courts review judgments on the pleadings *de novo*. *Stone Street Capital, LLC v. Cal. State Lottery Comm'n*, 165 Cal. App. 4th 109, 116 (2008).

V. BOTH OF PINEDA'S CLAIMS FAIL AS A MATTER OF LAW

The court of appeal correctly held that Pineda's claim for section 203 penalties is time barred because it was filed outside the one-year limitations period set forth in Code of Civil Procedure section 340(a), and section 203 penalties are not recoverable under the UCL. The Bank addresses the claims in Sections A and B below, respectively.

A. Pineda's Claim For Waiting-Time Penalties Under Section 203 Is Time Barred.

Where, as here, a plaintiff sues only for statutory penalties, the one-year limitations period for penalties established by Code of Civil Procedure section 340(a) applies. Pineda's claim, that section 203 expands the statute of limitations for penalty-only suits, fails for the reasons stated below.

1. A one-year limitations period presumptively applies to actions for penalties.

a. Section 203 provides for penalties, not wages.

Section 203 exemplifies the Legislature's ability to create a penalty through explicit statutory language. *See* CAL. LAB. CODE § 203 ("If an employer willfully fails to pay . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue *as a penalty* . . . .") (emphasis supplied). As this Court recently explained in *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007), "the Legislature certainly knows how to impose a penalty when it wants to, having established penalties in many Labor Code statutes by using the word 'penalty.'" *Id.* at 1107. Although *Murphy* addressed section 226.7 payments for missed meal and rest periods, its discussion of section 203 is instructive. In holding that section 226.7 payments constitute wages rather than penalties, the Court contrasted that provision with section 203, which "unambiguously" created a penalty. *Id.* at 1109.

Numerous other decisions are to the same effect. *See Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 169 (2000) (distinguishing between earned overtime wages, which constitute restitution that may be recovered under the UCL, and section 203 penalties); *Oppenheimer v. Sunkist*

Growers, Inc., 153 Cal. App. 2d Supp. 897, 900 (1957) (failure to timely pay the section 203 penalty does not allow further section 203 penalties to accrue because the initial award was a penalty, not a wage); *McCoy*, 157 Cal. App. 4th at 231-32 ("[T]he statute specifically and plainly labels the penalty as such and cases have confirmed the meaning."); *Caliber Bodyworks, Inc. v. Superior Court*, 134 Cal. App. 4th 365, 377 (2005) ("An example of [a statutory penalty] is section 203."); *Montecino v. Spherion Corp.*, 427 F. Supp. 2d 965, 967 (C.D. Cal. 2006) (striking UCL claim based on section 203; "The Court finds that § 203 payments are clearly a penalty . . . ."); *Tomlinson*, 359 F. Supp. 2d at 895 (granting motion for judgment on the pleadings as to UCL claim based on section 203; "[T]he remedy contained in Section 203 is a penalty . . . .").

b. The statute of limitations on penalty claims is one year, unless a specific exception applies.

The limitations period for statutory penalties normally is one year. CAL. CIV. PROC. CODE § 340(a) (individuals have one year to file "[a]n action upon a statute for a penalty or forfeiture, if the action is given to an individual, or to an individual and the state, except if the statute imposing it prescribes a different limitation").

Pineda therefore bears the burden of proving an exception to the one-year limitations period. *See Permanente Med. Group/Kaiser Found. Hosps. v. WCAB*, 171 Cal. App. 3d 1171, 1184 (1985) (where a party "asserts exemptions, exceptions, or other matters which will avoid the statute of limitations, the burden is on the claimant" to demonstrate them); *New Amsterdam Cas. Co. v. Indus. Accident Comm'n*, 66 Cal. App. 86, 89-90 (1924) (same).

2. No exception to section 340(a) applies here.

a. Section 203(b) extends the limitations period for persons who sue for both wages and penalties.

Pineda relies on Labor Code section 203(b), but that section does not create an exception to the one-year limitations period. That section provides: "Suit may be filed for these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise." Section 203(b) does not apply here; instead, section 340(a) does. Because Pineda has been paid all wages due, there *is no* "action for the wages from which the penalties arise."

The court of appeal correctly found that "the extended statute of limitations for the recovery of section 203 penalties found in that section applies

only if the penalties are sought in conjunction with an action for recovery of the unpaid wages. . . . [W]e reject [Plaintiff's] contention that the court erred in applying the one-year statute of limitations for an action upon a statute for a penalty found in Code of Civil Procedure section 340, subdivision (a) . . . ." 170 Cal. App. 4th at 391; *accord McCoy*, 157 Cal. App. 4th at 233 ("The Labor Code does not contain a statute of limitations for a waiting-time penalty. Thus we turn to section 340(a), the generally applicable statute of limitations for penalties. Section 203 was enacted to give employees additional time to sue for waiting-time penalties *when they also bring an action for late wages.* Nothing in the statute otherwise negates the one-year period in section 340(a).") (emphasis supplied).

b. Section 203 does not extend the one-year limitations period in penalty-only suits.

The language of section 203 is clear: (i) it creates a statutory penalty for failure to timely pay wages upon termination of employment, and (ii) it extends the one-year limitations period where (unlike here) the plaintiff also asserts "an action for *the wages* from which the penalties arise." CAL. LAB. CODE § 203(b) (emphasis supplied). However, it does *not* otherwise extend the one-year statute of limitations that applies to claims solely for penalties. Plaintiff's arguments to the contrary lack merit.

(1) The phrase "action for the wages" applies to actual lawsuits for unpaid wages.

Pineda concedes that he cannot file "an action for the wages from which the penalties arise" because all wages have been paid. (Br. at 6.) Pineda alleges only that the Bank failed to pay those wages in a timely manner. Section 203(b) is inapplicable. The statute of limitations for "an action for *the wages* from which the penalties arise" plays no role here, because no wages remain unpaid; this suit seeks penalties only.

Pineda contends that section 203(b) nevertheless should apply. His argument in effect would rewrite the statute to read:

> Suit may be filed for these penalties at any time before the expiration of the statue of limitations on an action for the wages from which the penalties arise *or for an action for wages that plaintiff could have brought, but for the employer's payment of them.*

Had the Legislature intended the limitations period for penalty claims to trace claims that an employee *could* have brought in other circumstances, it would have said that. The Legislature did not, instead creating a special limitations period only when there is "an action for the wages."

As Pineda acknowledges, a court may not rewrite a statute to accomplish a purpose that the statute's language does not. *See, e.g.*, *City & County of San Francisco v. Int'l Union of Operating Eng'rs, Local 39*, 151 Cal. App. 4th 938, 945 (2007) ("We may not add language to a statute that is not otherwise present."); *Wolski v. Fremont Inv. & Loan*, 127 Cal. App. 4th 347, 352-53 (2005) ("[O]ur function 'is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted.'") (citation omitted).

For this reason, *McCoy* rejected precisely the same argument that Pineda raises here. 157 Cal. App. 4th at 232 ("[Plaintiff] maintains that the language 'an action for the wages from which the penalties arise' means that the section 203 limitations period applies where an action '*could have been brought* to recover wages.' This construction violates rules of statutory interpretation.") (emphasis in original).

(2) The term "action" does not refer to hypothetical lawsuits that at some point could have been brought.

Pineda contends that the Legislature's use of the word "action," rather than the word "lawsuit," signifies its intent to provide for an extended

limitations period for suits for penalties alone. (Br. at 16-18.) An "action," under Pineda's reading, may be brought even where a "lawsuit" for wages is not available.

Such an argument ignores the plain meaning of "action." The dictionary defines "action" as "[a] judicial proceeding whose purpose is to obtain relief at the hands of a court," AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 7 (4th ed. 2006) — in other words, a lawsuit. *Accord* BLACK'S LAW DICTIONARY 31 (8th ed. 2004) (an "action" is "[a] civil or criminal judicial proceeding"). An "action" for penalties is the same thing as a "lawsuit" for penalties. Where a lawsuit for wages is unavailable — as is the case here, because the employer already has paid all wages due — no "action" seeking penalties may be brought beyond the one-year statute of limitations for penalties.

Section 203(a) itself confirms that the Legislature used the common meaning of the term "action." Subsection (a) reads: "[T]he wages of an employee shall continue as a penalty from the due date thereof at the same rate until paid or until an *action* therefor is commenced . . . ." The term "action" in section 203(a) refers to an actual lawsuit. *See Cuadra v. Millan*, 17 Cal. 4th 855, 870 (1998) ("the commencement of an 'action' within the meaning of section 203" is a civil lawsuit), *overruled on other grounds*, *Samuels v. Mix*, 22 Cal. 4th 1, 16 & n.4 (1999); Division of Labor Standards Enforcement, ENFORCEMENT POLICY &

INTERPRETIVE MANUAL § 4.5 (May 2002) ("Filing a claim with the Labor Commissioner is not considered the filing of an action [for purposes of section 203]."). The Legislature would not have used the same term in section 203(b) unless it intended it to have the same meaning. *See, e.g., Stillwell v. State Bar of Cal.*, 29 Cal. 2d 119, 123 (1946) ("[W]hen a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law."). What "action" means is a suit to recover wages, nothing else.

(3) Pineda's quibble over the use of "an" rather than "the" does not illuminate the Legislature's intent.

Pineda argues that the term "an action" in section 203(b) is broader than the term "the action," and that by using the former, the Legislature expanded the limitations period for penalty-only actions. The argument is unconvincing on its face, as "an" can imply a limitation just as easily as "the." *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) ("[T]he article 'a' before 'law or regulation' implies a discreteness . . . ."). The term "an action" here refers to an accompanying lawsuit for the underlying unpaid wages. It is irrelevant that the term "the action" would have accomplished the same result.

Moreover, the preceding subsection, section 203(a), also uses the term "an action." There the term signifies an actual lawsuit for wages, not a hypothetical one that could have existed. Had the Legislature intended to refer to an actual lawsuit in one subsection and a hypothetical lawsuit in another, it would have used different terms to do so. *See, e.g.*, *Stillwell*, 29 Cal. 2d at 123.

(4) The Legislature created a derivative limitations period for actions for penalties and wages for the plaintiff's convenience, not to extend the limitations period for penalty-only suits.

Pineda also argues that an action for penalties arises at the same time as an action for the underlying unpaid wages, and that the limitations period for each should be determinable simultaneously. (Br. at 21.) Pineda offers no authority for this purported rule, and such a rule would not advance his case in any event.

The limitations period for penalties *is* determinable at the time it arises: Section 340(a) provides a presumptive one-year limitations period. It is only in the special case — where an employer fails to pay the underlying wages due — that the limitations period is extended. In actions seeking recovery of both

wages and penalties ("hybrid actions"), the limitations period for an action to recover penalties is tied to the limitations period for the underlying wages. That is sensible and convenient, as in a hybrid action the claims can and will be tried together.

In a case that solely seeks penalties, however, that rationale disappears. As *McCoy* explained:

> It would be unwieldy if an employee were required to bring an action for the penalties within one year but have a longer time to sue for unpaid wages, although litigants are often faced with such conflicting deadlines in other civil actions. But the language of the statute . . . and its intent make clear that the concurrent statute of limitations for wages and penalties was enacted more for an employee's convenience than for the purpose of establishing a time to independently recover a penalty without regard to whether and when the back wages were paid.

157 Cal. App. 4th at 229-30.

Moreover, hybrid actions require inquiry into the underlying obligation to pay wages. In hybrid actions, the question of whether the wages are *due* necessarily precedes the question of whether the wages are *late*. Whether the wages are *due* depends on the alleged source of the obligation to pay them (oral contract, written contract, statute). The limitations period for such actions are different. *See, e.g.*, CAL. CIV. PROC. CODE § 339 (setting limitations period at two

years, when the source of the obligation is an oral contract); *id.* § 338 (three years, for obligations under statute); *id.* § 337 (four years, where obligation is founded on written contract).[1]

Where a suit for the underlying wages is impossible, because all wages due have already been paid, the only question to resolve is whether an employer *willfully* paid wages late. This question has nothing to do with the source of the underlying wage obligation. There is no reason that a plaintiff whose (now-nonexistent) wage claim would have been based on an oral contract should have a shorter limitations period to sue for penalties than a plaintiff whose (now-nonexistent) wage claim would have been based on a written contract.

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[1] The instant case does not present the question, but it should not be forgotten that section 203 penalties attach only to late payment of a specific type of wages — contractual wages — not to wages generally. *Earley v. Superior Court*, 79 Cal. App. 4th 1420 (2000), so teaches. In that case, the court of appeal decided whether Labor Code section 218.5 — which provides an attorney's fee entitlement for prevailing parties in actions for the nonpayment of "wages" — was applicable to statutory overtime claims. The court held that it was not. Under section 218.5, "wages" are compensation agreed upon by contract, while overtime is a statutory obligation. In a 2000 amendment to section 218.5, the Legislature expressly approved the holding in *Earley*. *See* Stats. 200, c. 876, § 11 (amendments were "intended to reflect the holding" of *Earley*). "Wages" has the same meaning under section 203 as it does under section 218.5, *see Stillwell*, 29 Cal. 2d at 123 ("when a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law"), and thus late payment of statutory (as opposed to contractual) wages cannot trigger section 203 penalties at all.

The Legislature could not have intended so anomalous a result. Rather, the purpose of the derivative structure of section 203 is to provide convenience to plaintiffs in hybrid actions, not to expand the period to bring penalty-only suits.

c. A one-year statute of limitations is entirely consistent with public policy.

(1) The policy underlying section 203 is to induce payment of earned wages, not to provide employees a windfall where all wages have been paid.

Fifty years of cases establish that the purpose of section 203 is to secure the prompt payment of wages, and not to create or expand claims solely for penalties. *Oppenheimer v. Sunkist Growers, Inc.*, 153 Cal. App. 2d Supp. 897 (1957), explains the Legislature's intent:

> The purpose of [Labor Code sections 201-203] is to compel the prompt payment of earned wages. Such a statute is to be strictly construed and it should not be extended to provide for penalty wages after the earned wages have been paid. . . . *[T]he plain object and purpose of this statute is to secure for the employe[e] the prompt payment of the wages due* by visiting upon the [employer] a penalty until the same are paid. *The*

> *primary intent of this statute is not to secure the payment of a penalty, but the payment of wages*; and, by the provision of the statute, it is stipulated that the penalty shall continue until the wages are paid. When the wages are paid, therefore, the penalty ceases. . . .

Id. at 898-99 (emphasis supplied; internal citations and quotation marks omitted; fourth alteration in original); *accord McCoy*, 157 Cal. App. 4th at 231 ("The remedy intended by section 203 is prompt payment of wages . . . ."); *id.* at 229 ("[The purpose of . . . § 203 is to compel the prompt payment of earned wages."), *citing* Cal. Dep't Indus. Relations, Enrolled Bill Rep. on Sen. Bill No. 1071, 1997-1998 Reg. Sess., at 2 (July 10, 1997).

An expanded limitations period for penalty-only suits would not enhance the incentive to make prompt payment, because by definition wages already have been paid. As *McCoy* recognized:

> The remedy intended by section 203 is prompt payment of wages and the penalty is only an inducement. Once 30 days have elapsed and wages have not been paid the incentive is lost. Allowing another three or four years' time to sue for the penalty does nothing to ensure promptness.

157 Cal. App. 4th at 231.

It therefore is entirely reasonable to have one statute of limitations where an employer pays all wages due (one year) and a longer period when an employer does not (two, three, or four). The longer statute of limitations logically applies in the latter case but not the former. Where the employer has paid the wages, the purpose of the statute already has been accomplished; where the employer has not paid, the purpose remains unsatisfied.

The purported Department of Industrial Relations report that Pineda attempted to interject does not prove otherwise.[2] Even the portion of the report that Pineda cites lends no support to his position, as it states only that the bill "extends the time within which suit may be filed for the collection of penalties imposed for *non-payment of wages.*" (Br. at 13.) This case does not involve nonpayment of wages. Where all wages have been paid, and an employee pursues only penalties, section 203 creates no exception from section 340(a)'s one-year limitations period.

(2) Penalty statutes are to be construed strictly.

Pineda is incorrect in asserting that section 203 is to be construed liberally. To be sure, courts generally construe *remedial* statutes broadly, but a

[2] As a threshold matter the report is not a proper subject for judicial notice, or in the alternative is entitled to little or no weight, as the Bank demonstrated in its Opposition to the Request for Judicial Notice, filed June 8, 2009.

penalty provision like this one is not remedial. *See Oppenheimer*, 153 Cal. App. 2d Supp. at 899 (Labor Code sections 201-03 "must be given a reasonable, although necessarily strict, construction"); *Barnhill v. Robert Saunders & Co.*, 125 Cal. App. 3d 1, 7 (1981) ("The purpose of section 203 is to compel the prompt payment of earned wages; the section is to be given a reasonable but strict construction.").

None of the cases Pineda cites (Br. at 30) in support of liberal construction dealt with Labor Code section 203 or any other statutory penalty. *See Murphy*, 40 Cal. 4th at 1103 (construing section 226.7, dealing with wages); *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 340 (2004) (construing overtime laws, dealing with wages); *Ramirez v. Yosemite Water Co.* 20 Cal. 4th 785, 794 (1999) (same); *Lusardi Constr. Co. v. Aubry*, 1 Cal. 4th 976, 987-88 (1992) (construing prevailing-wage law).

(3) It is only sensible that an employer may avoid an extended limitations period by fulfilling its obligation to pay wages.

Pineda hypothesizes that, under the court of appeal's rule, an employer could "benefit" from a one-year limitations period by waiting a year, and then paying wages due. (Br. at 28.) This argument is unpersuasive.

First, even in plaintiff's fanciful hypothetical, an employer would gain no "advantage" from "misconduct." Rather, by engaging in the very conduct that section 203 encourages — paying all wages due — the employer would have satisfied the purpose for which section 203 exists. In Pineda's hypothetical, employee Smith never receives his wages, and is subject to a three-year limitations period. Employee Jones does receive his wages, and is subject to a one-year limitations period. There is nothing anomalous about that; there is good reason why a special, extended limitations period applies when an employer fails to pay wages due. Where wages have been paid, as in Jones' case, the rationale for a longer limitations period does not exist.

Second, the one-year limitations period already provides proper incentives to both parties. It encourages employers to pay wages promptly, and (as shown above) an extended limitations period would provide no additional incentive. *See McCoy*, 157 Cal. App. 4th at 231. Moreover, it encourages plaintiffs to bring claims promptly, which is an independent California public policy. *See, e.g., Beal Bank, SSB v. Arter & Hadden, LLP*, 42 Cal. 4th 503, 512 (2007) (the statute of limitations is designed to ensure "prompt assertion of known claims").

Third, neither Pineda here nor the employee about which he hypothesizes has been duped. Once this Court rules, all will know that a one-year

limitations period presumptively applies, and that an employee seeking a penalty acts at his or her peril in allowing that period to lapse. The limitations period under section 340(a) is presumptively one year, and that period is extended only by defendant's failure to pay wages due. Thus, no employee should detrimentally rely on a longer limitations period, as it is only in the unusual case in which wages remain unpaid that the special rule of Labor Code section 203(b) applies.

Fourth, Pineda presents no evidence that his hypothesized scenario is likely to occur in practice. *McCoy*, 157 Cal. App. 4th at 230-31 ("[T]here is no suggestion in the statute that the Legislature was concerned with plaintiff's hypothetical course of events."; "[A] Legislature . . . must be regarded as having had in mind the actual conditions to which the act will apply; that is, the customs and usages of such industry or activity.") (*quoting Wolski v. Fremont Inv. & Loan*, 127 Cal. App. 4th 347, 353 (2005)) (internal quotation marks omitted). As *McCoy* noted, a different hypothetical — one that comports with the allegations here — is more real-world:

> Assume an employer paid wages five days or even 31 days after they were due. It is not reasonable to assume the Legislature intended an employee would be able to wait for three or four years to sue for the associated waiting time penalty instead of within one year pursuant to section 340(a).

157 Cal. App. 4th at 231.

d. Limitations periods may be determined by reference to a condition subsequent, and such an approach is appropriate here.

Pineda argues that a one-year limitations period means that the limitation period can "change." (Br. at 20-24.) There is no flaw in that.

First, as just noted, the "change" works to the employee's benefit. The presumptive limitations period for a penalty is one year under section 340(a). Section 203(b) extends the limitations period when the wages remain unpaid, but the employee is the beneficiary of the extension, not the victim. Limitations periods are extended in a host of contexts — tolling, incapacity, continuing violation, and others — without prejudice to (and indeed to assist) the plaintiff. *See Cuadra v. Millan*, 17 Cal. 4th 855, 864-65 & n.11 (1998) (compiling numerous statutes that postpone the accrual of a cause of action), *overruled on other grounds*, *Samuels v. Mix*, 22 Cal. 4th 1, 16 & n.4 (1999). The plaintiff is the beneficiary of the extension, and the employer has no grounds to object to it. *See, e.g.*, *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798, 822 (2001) (extending the limitations period in a continuing-violation case; "[T]he employer, who has created or permitted the [legal violation], should not be able to complain of [any] delay . . . .").

Second, the Legislature has the freedom to create statutes of limitation that rely on conditions subsequent, including conditions subsequent that are outside the control of the plaintiff. Under the Fair Employment and Housing Act, for example, the statute of limitations to file suit for discrimination begins to run, not when the allegedly unlawful practice occurs, but upon issuance of a right-to-sue letter by the Department of Fair Employment and Housing. CAL. GOV'T CODE § 12965(b). Although this approach to determining the limitations period adds complexity, it is appropriate because it furthers the purpose of the statute: It enables the DFEH "to obtain voluntary compliance with the law," *Soldinger v. Northwest Airlines, Inc.*, 51 Cal. App. 4th 345, 381 (1996) — which is exactly the purpose of section 203 penalties.

e. The dictum in *Murphy* does not address the limitations period applicable to this case.

Pineda cites language from *Murphy*, 40 Cal. 4th 1094 (2007), but that case has no bearing on this one. *Murphy* states that when an employer "*fails to pay* an employee who has quit or been discharged . . . a suit seeking to enforce the section 203 penalty would be subject to the same three-year statute of limitations as an action to recover wages." *Id.* at 1108-09 (emphasis added). The Court did not specify whether it was referring to suits for wages and penalties, or suits for penalties alone.

Moreover, the language from *Murphy* is dictum. The Court decided in that case only whether the additional payments for meal and rest period requirements constitute wages. It did not reach any holding regarding section 203, as Pineda himself concedes. (Br. at 12 ("[T]he Court in *Murphy* did not resolve any dispute over the statute of limitations for claims under Section 203 . . . .").) Such dictum is not authority for a proposition not considered in a case.[3] For this reason, both *McCoy* and the court of appeal decision here correctly declined to accord significance to the *Murphy* dictum. *See* 157 Cal. App. 4th at 233 (stating that "the statement is dicta" and that "[a]n appellate decision is not authority for everything said in the court's opinion but only 'for those points actually involved and actually decided'") (citation and some quotation marks omitted).

Section 203(b) does not create an exception to the presumptive one-year limitations period in suits that seek only penalties. As shown above, the

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[3] *See Santisas v. Goodin*, 17 Cal. 4th 599, 620 (1998) ("An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.'") (citation omitted); *Ginns v. Savage*, 61 Cal. 2d 520, 524 n.2 (1964) ("Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered."); *S. Cal. Enters. v. D.N. & E. Walter & Co.*, 78 Cal. App. 2d 750, 757 (1947) ("A litigant cannot find shelter under a rule announced in a decision that is inapplicable to a different factual situation in his own case, nor may a decision of a court be rested on quotations from previous opinions that are not pertinent by reason of dissimilarity of facts in the cited cases and those in the case under consideration.").

language of the statute, public policy, and decisions of this Court and others demonstrate that a one-year period applies.

B. Pineda May Not Recover Penalties Under California's UCL.

Pineda contends that he may recover the penalties allegedly owed under section 203 as restitution under the UCL, and obtain a four-year limitations period. *See* CAL. BUS. & PROF. CODE § 17208. That is not correct. The only monetary remedy permitted under the UCL is restitution: restoration to a plaintiff of something unlawfully acquired. As Pineda has no vested right to section 203 penalties, there is nothing to restore to him. He has no claim for penalties under the UCL.

1. Monetary relief under the UCL is limited to restitution.

The UCL expressly limits monetary relief to restitution:

> The court may make such orders or judgments . . . as may be necessary to *restore* to any person in interest any money or property, real or personal, which may have been *acquired* by means of such unfair competition.

Id. § 17203 (emphasis added). The "restore prong of section 17203" demonstrates that the Legislature "intended to limit the available monetary remedies under the

Act" to restitution. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1147-48 (2003).

Courts consistently have affirmed that restitution is the only monetary remedy available under the UCL. *Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal. 4th 116, 126 (2000) (relief under the UCL is available to "restore to the parties in interest money or property taken by means of unfair competition"); *Cel-Tech Commc'ns., Inc. v. L.A. Cellular Tel.*, 20 Cal. 4th 163, 179 (1999) (under the UCL, "[p]revailing plaintiffs are generally limited to injunctive relief and restitution"; "Plaintiffs may not receive damages, . . . or attorney fees."); *Alch v. Superior Court*, 122 Cal. App. 4th 339, 404 (2004) ("The courts have not, however, expressly permitted any form of monetary relief [under the UCL] that is not restitutionary in nature."); *Tomlinson v. Indymac Bank*, 359 F. Supp. 2d 891, 894 (C.D. Cal. 2005) (referring to "over a decade of California Supreme Court precedent that limits an individual's monetary relief under the UCL to restitution").

2. To "restore" property under the UCL, the property at issue previously must have been the plaintiff's.

Something that has not been taken cannot be restored. *Cortez*, 23 Cal. 4th at 177 (restitution is appropriate only for "money that once had been in

the possession of the person to whom it [is] to be restored. The status quo ante to be achieved by the restitution order was to again place the victim in possession of that money.").

To be sure, the restoration requirement does not mean that a plaintiff previously must have held the funds in his hands or bank account. But to "possess" funds under *Cortez*, a plaintiff needs more than hope or expectation of eventually obtaining them. He or she must have an *ownership interest* or *vested right* in the property. *Kraus*, 23 Cal. 4th at 126-27 ("persons in interest" means "persons who had an ownership interest in the property").

Cortez illustrates this principle. In *Cortez*, the plaintiff alleged that for nearly three years she and other manufacturing workers at her plant regularly worked 10-hour days, and that they were not paid overtime. She sued under both the California Labor Code and section 17200, claiming that she was entitled to overtime wages as restitution.

This Court held that restitution is available for *earned wages*, because wages become the property of the employee in exchange for work performed:

> *[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. An order that *earned wages* be paid is therefore a restitutionary remedy authorized by the UCL.

Kraus, 23 Cal. 4th at 178 (emphasis added); *accord id.* ("'Earned but unpaid salary or wages are vested property rights . . . .'") (citation omitted). The wages may be obtained through restitution, *Cortez* held, because the employee already was entitled to them.

Cortez did not hold that penalties may constitute restitution, or (as Pineda now argues) that restitution extends to any monies that potentially might come due or payable. (Br. at 39.) Indeed, the Court's rationale forecloses such an extension. In *Cortez*, restitution was proper only because the employer had wrongfully acquired something from the employee (her labor), thus providing the employee a vested interest in the corollary wages. Where there is no vested right or ownership interest, there can be no restitution.

3. Section 203 penalties do not qualify as a restitutionary remedy.

This Court and others consistently have recognized that a claim for statutory penalties does not seek restitution under the UCL. *See, e.g., Kasky v.*

Nike, Inc., 27 Cal. 4th 939, 950 (2002) ("In a suit under the UCL, a public prosecutor may collect civil penalties, but a private plaintiff's remedies are 'generally limited to injunctive relief and restitution.'") (citation omitted); *Reese v. Wal-Mart Stores, Inc.*, 73 Cal. App. 4th 1225, 1240 n.8 (1999) (under the UCL, providing restitution as "equitable relief would not include the statutory penalties offered under [other statutes]").

Penalties under section 203 are subject to the same rule, and for good reason. They do not "restore" to a plaintiff anything in which the plaintiff has a vested interest. Rather, such payments provide a penalty *in addition to* the wages that plaintiff actually earned:

> [T]he remedy contained in Section 203 is a penalty because Section 203 does not merely compel [defendant] to restore the *status quo ante* by compensating Plaintiffs for the time they worked; rather, it acts as a penalty by punishing [defendant] for willfully withholding the wages and forces [defendant] to pay Plaintiffs an additional amount. This type of payment clearly is not restitutionary, and thus cannot be recovered under the UCL.

Tomlinson, 359 F. Supp. 2d at 895.

All other decisions directly addressing the issue agree. *See Plata v. Darbun Enters.*, 2009 U.S. Dist. LEXIS 30626, at *10 n.8 (S.D. Cal. Apr. 9, 2009) ("[T]he language of Cal. Labor Code § 203 makes clear such additional wages are

a penalty and not compensatory in nature.") (emphasis deleted); *Villegas v. J.P. Morgan Chase & Co.*, 2009 U.S. Dist. LEXIS 19265, at *16 (N.D. Cal. Mar. 6, 2009) ("'claims pursuant to Labor Code §§ 203 and 226 cannot support a § 17200 claim'"; granting motion to dismiss 17200 claims based on sections 203 and 226) (citation omitted); *Rubin v. Wal-Mart Stores, Inc.*, 599 F. Supp. 2d 1176, 1179 (N.D. Cal. 2009) ("[N]either Section 203 nor Section 226 can provide a basis for a Section 17200 claim, given that both statutes provide for a *penalty*, rather than wages."; motion to dismiss granted); *Montecino v. Spherion Corp.*, 427 F. Supp. 2d 965, 967 (C.D. Cal. 2006) ("The Court finds that § 203 payments are clearly a penalty, and thus cannot be claimed pursuant to the UCL."; motion to strike claim for penalties under UCL granted); *In re Wal-Mart Stores, Inc. Wage & Hour Lit.*, 505 F. Supp. 2d 609, 619 (N.D. Cal. 2007) (claims pursuant to section 203 cannot support a section 17200 claim; motion to dismiss granted).

4. Pineda's attempt to re-cast section 203 penalties as wages is without merit.

Pineda contends that penalties are analogous to wages, and should be subject to identical rules. (Br. at 40-42.) He is incorrect. These penalties do not arise and vest immediately, but only after a successful enforcement action, in which plaintiff proves a willful failure to pay. Moreover, even if section 203 penalties did arise and vest immediately, that would not make restitution

appropriate. Pineda has been paid all wages due. He has given nothing to the Bank with respect to these penalties, so there is nothing to restore to him.

a. The right to waiting-time penalties does not vest until after a successful enforcement action.

Section 203 penalties are not self-executing. In order to obtain a section 203 penalty, an employee must first bring — and then prevail in — an enforcement action against the employer. *See Murphy*, 40 Cal. 4th at 1108 ("The right to a penalty . . . does not vest until someone has taken action to enforce it.") (citing *People v. Durbin*, 64 Cal. 2d 474, 479 (1966)); *People v. One 1953 Buick 2-Door*, 57 Cal. 2d 358, 365-66 (1962) (same); *Anderson v. Byrnes*, 122 Cal. 272, 274 (1898) ("'[N]o person has a vested right in an unenforced penalty . . . .'"); *County of San Bernardino v. Ranger Ins. Co.*, 34 Cal. App. 4th 1140, 1149 (1995) (same). Simply put, "'[a] statutory remedy does not vest *until final judgment*.'" *Id.* at 1149 (citation omitted; alteration in original; emphasis supplied).

A section 203 penalty case requires that plaintiff demonstrate certain underlying — and normally contested — facts. To obtain a section 203 penalty, a plaintiff must establish that the employer "willfully" failed to timely pay wages due. *See* 8 CAL. CODE REGS. § 13520 (2009) ("[A] good faith dispute that any wages are due will preclude imposition of waiting-time penalties under Section

203."); *Road Sprinkler Fitters Local Union No. 669 v. G&G Fire Sprinklers, Inc.*, 102 Cal. App. 4th 765, 781, 782 (2002) ("[S]ection 203 requires the payment of an additional penalty if the employer *willfully* fails to comply with section 202."; "An employer's good faith mistaken belief that wages are not owed may negate a finding of willfulness."); *Barnhill v. Robert Saunders & Co.*, 125 Cal. App. 3d 1, 8-9 (1981) (plaintiff was not entitled to section 203 penalties because the employer had a good faith belief that it had the right to off-set the final wages owed by the employee's debt to it); *Hagin v. Pac. Gas & Elec. Co.*, 152 Cal. App. 2d 93, 98 (1957) (payment to plaintiff 27 days after his discharge did not trigger section 203 penalties); *In re Trombley*, 31 Cal. 2d 801, 808 (1948) (a dispute in good faith as to whether any wages were due would be a defense to an action for such penalties); *see also Chindarah v. Pick Up Stix, Inc.*, 171 Cal. App. 4th 796, 802 (2009) ("[W]ages are not 'due' if there is a good faith dispute as to whether they are owed.").

Other possible defenses exist as well. Wages are not immediately due unless they are immediately calculable. Division of Labor Standards Enforcement, ENFORCEMENT POLICIES & PROCEDURES MANUAL § 4.6 (2002) ("There are situations where wages (i.e., some commissions) are not immediately calculable until after termination and, thus, are not due until that time."). And an employer will not be liable under section 203 if an employee "secrets or absents himself or herself to avoid payment to him or her" or "refuses to receive the

payment when fully tendered to him or her." CAL. LAB. CODE § 203(a). Indeed, the employee must take the affirmative step of returning to the workplace to receive payment. "Every employee who is discharged shall be paid at the place of discharge, and every employee who quits shall be paid at the office or agency of the employer in the county where the employee has been performing labor." *Id.* § 208; *see also Noble v. Draper*, 160 Cal. App. 4th 1, 8 (2008) (penalties not available where employee "did not return for his last paycheck or leave a mailing address").

All these issues must be adjudicated before an employee becomes entitled to any penalty recovery. Thus, section 203 penalties are *not* self-executing. *See Lemon v. L.A. Terminal Ry. Co.*, 38 Cal. App. 2d 659, 674 (1940) ("[F]orfeitures resulting from a statute which imposes a penalty for violation of a statutory duty . . . cannot be completely self-executing so as to divest the owner of his property without a judicial determination of the facts constituting the forfeiture.").[4] As a result, a plaintiff lacks an ownership interest in a section 203

[4] *Pacific Hospital of Long Beach v. Lackner*, 90 Cal. App. 3d 294, 297-98 (1979), cited by Pineda (Br. at 40), even if correctly decided, lends no support to his argument that employees have an immediate ownership interest in section 203 penalties. There the court held that a hospital acquired a piece of property pursuant to a sales transaction when the "right to it has become fixed by a final and enforceable agreement." *Id.* But the right to section 203 penalties is determined not by agreement, but by statute — and, as shown above, a statute that contains still-to-be-proven elements and possible defenses.

penalty.[5] The plaintiff at most has only an "expectancy" or "contingent interest" in these penalties — and that is not enough. *See Korea Supply*, 29 Cal. 4th at 1149-50 (finding the plaintiff's sales commission was "merely a contingent interest" and "[s]uch an attenuated expectancy cannot, as [plaintiff] contends, be likened to 'property' converted by [defendant] that can now be the subject of a constructive trust").[6]

Pineda argues, however, that "having to prove liability at trial can never preclude a plaintiff from stating a viable cause of action." (Br. at 60.) In that, Pineda confuses the rule for adjudicating demurrers with the special

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[5] Pineda argues that a Civil Code provision regarding pre-judgment interest supplies the definition of "vesting." (Br. at 43.) But this definition of "vesting" — coming "due and payable" — is not the test that this Court has applied in its UCL cases. *Cortez* turned, not on the fact that wages were arguably "due," but rather that the employer had acquired something from the employee (labor), and failed to return it (in the form of wages). Moreover, even if "due and payable" were the test, Pineda provides no sound argument as to why section 203 penalties would meet it, since the penalties are neither "due" nor "payable" until a willfulness finding has been made and the matter adjudicated. *Oppenheimer*, the only case Pineda cites, provides no support for his position. It states that payment of final wages does not preclude the employee from recovering the penalty, but says nothing of when that penalty becomes "due" or "payable." 53 Cal. App. 2d Supp. at 899.

[6] Pineda cites two cases for the proposition that a dispute over liability does not negate a vested right of recovery. (Br. at 61, *citing Olson v. Cory*, 35 Cal. 3d 390, 402 (1983), *and Esgro Cent., Inc. v. Gen. Ins. Co.*, 20 Cal. App. 3d 1054, 1060 (1971).) *Olson* and *Esgro* do not stand for this proposition, nor do they otherwise support Pineda's position. Both cases address only whether the requirement of "damages certain" was met in claims under Civil Code section 3287, which provides for interest on a judgment. Whether an entitlement comprises a sufficiently liquidated sum to give rise to interest has no bearing on when a right to section 203 penalties vests.

requirements for UCL claims. In order to state a UCL claim, the plaintiff must have more than a potentially valid claim; the plaintiff must have a *vested* right or ownership interest in the property sought. Since there is no vested right in section 203 penalties unless and until a successful enforcement action is brought, there can be no viable UCL claim for such penalties.[7]

Thus, it is not at all instructive that *Cortez* permitted an action for unpaid wages under the UCL without requiring a finding of liability. Earned wages are vested property rights absent any affirmative act by the employee to recover them. While an employee may not *recover* his property until liability is found, his *entitlement to it* vested when the wages are earned, through the employee's labor. By contrast, where an employee has no vested right, as here, no UCL action will lie.

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[7] Pineda is likewise incorrect that the Bank lacks the ability to dispute the allegation that it was obligated to pay Pineda penalties under section 203. (Br. at 60.) He argues that his Complaint alleged that the Bank is obligated to pay penalties, and that that this allegation, for purposes of a defense motion for judgment on the pleadings, must be deemed admitted. Not so. While *facts* alleged in the complaint are deemed admitted, *liability and legal conclusions* are not. *See, e.g., Pang v. Beverly Hosp.*, 79 Cal. App. 4th 986, 989 (2000) ("All material facts that were properly pleaded are deemed true, but not contentions, deductions, or conclusions of fact or law.").

b. Pineda gave nothing in exchange for the purported penalties.

Even if a right to recover section 203 penalties were automatic and arose immediately upon nonpayment (which it is not and does not), such penalties still would not constitute restitution. Under *Cortez*, it was not sufficient that the right to payment arose immediately and without adjudication. Rather, the Court relied on the fact that plaintiff had "given . . . her labor to the employer in exchange" for wages, which had not been paid. 23 Cal. 4th at 178. Restitution was proper because the employer wrongfully acquired the employee's labor.

Pineda may argue that he gave labor, too. The dispositive response is that Pineda was paid for it, at the agreed-upon rate. Indeed, a section 203 penalty can never be compensation for labor, because such penalties by definition do not attach until after termination, when compensable labor ceased. Pineda gave nothing for, and did nothing to obtain, the claim for penalties he now asserts.[8]

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[8] Pineda cites no case stating that the purpose of a section 203 penalty is to compensate an employee for his or her labor. He directs the Court to *Moore v. Indian Spring Channel Gold Mining Co.*, 37 Cal. App. 370, 377 (1918), but there the court used the term "compensate" simply to mean "pay." The court did not use the term in the relevant sense of providing funds *in exchange* for something else, because the plaintiffs had not provided the employer with anything. The Court said only "you shall compensate him for your wrong." *Id.*

Pineda argues that the availability of restitution does not turn on "why the obligation to pay the money arose." (Br. at 52.) In fact, however, the source of the underlying obligation was central to this Court's analysis in *Cortez*. If the obligation to pay arises because the employee has *given* something to the employer, restitution may be available. *See Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 340 (1998) ("The offending party must have obtained something to which it was not entitled and the victim must have given up something which he or she was entitled to keep."). If the obligation to pay arose for some other reason, there is no restitutionary remedy.

In the case of section 203 penalties, the employee has not given the employer anything for which he has not been paid. There is nothing to restore. Accordingly, the penalties do not qualify as restitution.[9]

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[9] *County of San Bernardino v. Walsh*, 158 Cal. App. 4th 533 (2007), cited by Pineda (Br. at 53-54), does not suggest otherwise. The case was not brought under the UCL, so the court had no statutory restrictions preventing it from finding that "unjust enrichment . . . is broader than mere 'restoration' of what the plaintiff lost.'" *Id.* at 542. Under the UCL, such an expansive reading is foreclosed by the statutory language: "[t]he court may make such orders or judgments . . . *as may be necessary to restore* . . . ." CAL. BUS. & PROF. CODE § 17203 (emphasis supplied). *See also Kraus*, 23 Cal. 4th at 126 (relief under the UCL is available to "*restore* to the parties in interest money or property taken by means of unfair competition") (emphasis supplied); *Korea Supply*, 29 Cal. 4th at 1147-48 (the "restore prong of section 17203" shows that the Legislature "intended to limit the available monetary remedies under the [A]ct"; "A court cannot, under the equitable powers of section 17203, award whatever form of monetary relief it believes might deter unfair practices.").

c. No person has a vested right in statutory penalties.

(1) The "statutory repeal rule" forecloses any argument that 203 penalties vest immediately.

Unenforced penalties under section 203 may be repealed at any time. Such a repeal would extinguish any claim upon which no final judgment has been entered. In *South Coast Regional Comm'n v. Gordon*, 84 Cal. App. 3d 612 (1978), the court explained this "statutory repeal" rule:

> [I]t has been held in a long line of cases that the repeal of a statute creating a penalty, running to either an individual or the state, at any time before final judgment, extinguishes the right to recover the penalty. The same rule applies to remedial statutes unknown to the common law . . . . The justification for this rule is that all statutory remedies are pursued with full realization that the Legislature may abolish the right to recover at any time.

Id. at 619 (citations and quotation marks omitted). *See also Napa State Hosp. v. Flaherty*, 134 Cal. 315, 317 (1901) ("It is a rule of almost universal application, that, where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession, or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause."); *Governing Board of Rialto Unified*

Sch. Dist. v. Mann, 18 Cal. 3d 819, 829 (1977) ("[W]hen a pending action rests solely on a statutory basis, and *when no rights have vested under the statute*, 'a repeal of such a statute without a saving clause will terminate all pending actions based thereon.'") (citation omitted); *Moss v. Smith*, 171 Cal. 777, 788 (1916) ("where a right is created solely by a statute, . . . *and such right is still inchoate, and not reduced to possession*, or perfected by final judgment, the repeal of the statute destroys the remedy . . . .") (emphasis supplied).

Because the section 203 penalty may be repealed at any time, Pineda's penalty claim has not vested. It matters not that there is no serious proposal actually to repeal section 203. The test is not the likelihood of repeal, but the theoretical possibility of it, and what effect repeal would have on unadjudicated claims. Because, if there were such a repeal, section 203 penalties not yet adjudicated could no longer be recovered, it follows that they are not a vested right in the first place.

Pineda errs in contending that the statutory repeal rule would make unpaid overtime wages unrecoverable as restitution under the UCL. (Br. at 46.) He is incorrect. The right to overtime wages vests when those wages are earned. *See Cortez*, 23 Cal. 4th at 167 ("'Earned but unpaid salary or wages are vested property rights . . . .'"), *quoting Loehr v. Ventura County Cmty. Coll. Dist.*, 147 Cal. App. 3d 1071, 1080 (1983). The Legislature could, of course, repeal the

overtime statutes, but doing so would have no impact on the status of the right to overtime wages that previously were earned and vested. Because employees have a vested right in their wages when the work is performed, these wages may be restored to them through a UCL action whether the overtime laws are repealed or not.

Pineda cites a long list of additional statutory provisions, claiming that application of the statutory repeal rule would likewise remove them from the reach of the UCL. (Br. at 47-49.) Again he is incorrect. Each of the statutes he cites provides a statutory mechanism for *repayment* of money that a plaintiff previously possessed. *See* CAL. CIV. CODE § 1723 (providing for *refund* of purchase price to buyer); *id.* § 1749.5(f) (providing for *refund* of purchase price of gift certification); *id.* § 1812.54 (providing for *refund* of money owed upon cancellation of contract for dance studio lessons); *id.* § 1812.89(a)(2) (providing for *refund* of prepayments for health studio services); *id.* § 1812.118 (providing for *refund* of monies paid by buyer of discount buying services); *id.* § 1812.625(b) (providing for *return* of security deposit to consumer); *id.* § 1950.5(g) (providing for *return* of security deposit to tenant). These are not penalties; each of these provisions provides for *restoration* of property that had previously been in the possession of the aggrieved party. Subsequent repeal of these statutes would not

change the fact that the aggrieved party once had possession. As there is property to restore, a UCL action in those cases presumably would be proper.[10]

None of these statutes is analogous to section 203. Where a party is seeking only a statutory penalty, he or she never had possession. Nothing can be restored, because nothing was had and lost in the first place. There is nothing to *restore* until his or her interest in the penalties vests, and section 203 penalties do not vest unless and until they are assessed and liability for them is shown.

(2) <u>The unassignability of section 203 penalties further demonstrates that penalties are not the property of a claimant.</u>

This Court recently held that claims for section 203 penalties are not assignable under Civil Code section 954. *Amalgamated Transit Union v. Superior Court*, ___ Cal. 4th ___, 2009 Cal. LEXIS 6015 (June 29, 2009). This Court noted

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[10] Some of these statutes differ from section 203 penalties for another reason as well. In *Gordon*, the court said that the statutory-repeal rule applies where Legislatures create novel remedies. The statutory-repeal rule applies only to actions for penalties (like section 203 penalties) based on "remedial statutes unknown to the common law." 84 Cal. App. 3d at 619. Civil Code sections 1812.625(b) and 1950.5(g), by contrast, likely fall outside the rule of *Gordon*. These provisions merely clarify that in any rental transaction involving a security deposit, the lessor or landlord implicitly promises to return that deposit upon termination of the lease. Because these provisions have a common-law antecedent, they arguably could still serve as the basis for a UCL action.

that section 954 normally provides a broad right of transferability of claims. A claim is transferable if it "arises out of a legal obligation or a violation of a property right." *Id.* at *14. However, this Court held, section 203 and 226.7 penalties were not transferable under section 954. "[A]n aggrieved employee cannot assign a claim for statutory penalties because the employee does not own an assignable interest." *Id.* at *15. *See also Esposti v. Rivers Bros., Inc.*, 207 Cal. 570, 573 (1929) (action to recover statutory penalties not assignable).

If an action to recover section 203 penalties implicated a property right, section 954 would make it transferable, just as an employee's wages may be assigned under California Labor Code section 300. But, as *Amalgamated Transit* made clear, section 203 penalties, like other statutory penalties, are not transferable because the plaintiff has no property interest in them.

Lloyd v. First National Bank of Russell, 5 Kan. App. 512 (1897), which this Court expressly approved in *Esposito*, 207 Cal. at 573, further demonstrates this relationship between property rights and transferability. There, the court held that penalties for usurious interest ordinarily are not assignable. Once a judgment is entered for these penalties, however, assignment becomes proper. "While we hold that the claim for usury was not assignable, yet, as soon as it was reduced to a judgment, the nature of the claim was changed. The

judgment partook of a different nature from a bare, naked, open claim . . . ." 5 Kan. App. at 515.

If a plaintiff owned or had a vested right to unenforced section 203 penalties, causes of action to recover these penalties would be assignable. As *Amalgamated Transit* held, they are not. Any expectancy he has in such penalties is too remote and inchoate to constitute an ownership interest that could give rise to a claim for restitution under the UCL.

VI. CONCLUSION

For the foregoing reasons, the judgment of the trial court and court of appeal should be affirmed.

Respectfully submitted,

DATED: July 7, 2009

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CERTIFICATE OF WORD COUNT

The undersigned counsel certifies that the text of this answer brief uses a proportionately spaced Times New Roman 13-point typeface, and that the text of this brief consists of 10,273 words as counted by the word processing program used to generate it.

DATED: July 7, 2009

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Supreme Court Case No. S170758
Jorge A. Pineda v. Bank of America, N.A.

PROOF OF SERVICE

I, the undersigned, state:

I am a citizen of the United States and am employed in the City and County of San Francisco, State of California. I am over the age of 18 years, and not a party to the within action. My business address is 55 Second Street, Twenty-Fourth Floor, San Francisco, California 94105-3441.

On July 7, 2009, I served the foregoing document(s) described as:

ANSWER BRIEF ON THE MERITS OF RESPONDENT BANK OF AMERICA, N.A.

on the interested parties by placing true and correct copies thereof in envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

☐ **VIA UPS OVERNIGHT MAIL**: By delivering such document(s) to an overnight mail service or an authorized courier in a sealed envelope or package designated by the express service courier addressed to the person(s) on whom it is to be served.

☒ **VIA U.S. MAIL**: I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice such sealed envelope(s) would be deposited with the U.S. Postal Service on July 7, 2009 with postage thereon fully prepaid, at San Francisco, California.

☐ **VIA PERSONAL DELIVERY**: By causing to be personally delivered such sealed envelope(s) by hand to the parties listed on the attached service list by ***JOSHCO. ATTORNEY SERVICES***.

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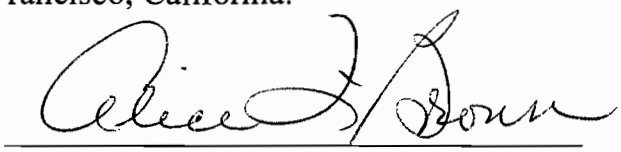
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 7, 2009, at San Francisco, California.



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