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July 21, 2006

Chief Justice Ronald M. George
Associate Justices Baxter, Chin,
Kennard, Moreno & Werdeger
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303

Re: California Employment Lawyers Association
Amicus Curiae letter in Support of Petition for Review
Banda v. Bagdasarian
S144949

Dear Honorable Justices:

This letter is submitted by California Employment Lawyers Association (CELA) as amicus curiae supporting the pending Petition for Review in the matter of *Banda v. Bagdsarian*, S141278, Court of Appeal, Fourth Appellate District, Division Two E035739 [*"Banda"*].

NATURE OF AMICUS CURIAE'S INTEREST

CELA is a statewide organization of attorneys who represent employees and employers in wage and hour, employment termination, and discrimination cases. CELA also submitted an amicus letter supporting review in the *Murphy v. Kenneth Cole Productions, Inc.* A107219 and A108346, Court of Appeal, First Appellate District [*"Murphy"*] which has been granted, as well as *National Steel and Supply Co. v. Superior Court (Godinez)*, S141278, Court of Appeal, Fourth Appellate District, Division One D046692 [*"NASSCO"*], as to which the Court has granted review and ordered the matter held pending the decision in *Murhpy*.

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REASON THE COURT SHOULD NOT MERELY GRANT AND HOLD AND SHOULD GRANT FULL REVIEW IN CONJUNCTION WITH *MURPHY*

A stream of conflicting decisions regarding the applicable statute of limitations for employee claims for denied rest and meal period compensation continues trickling from the courts. Included are conflicting claims regarding the applicability of the Unfair Competition Law, Business & Professions Code sections 17200 *et seq.* (UCL) to such claims. *National Steel* determined that claims for an employer retaining and failing to pay owed rest and meal pay are restitutionary and may thus be brought under the UCL, carrying the four-year limitations period under Business & Professions Code section 17208. The trial court in *Albertsons, Inc. v. Superior Court (Wilcox)*, S141820, review granted and held pending the decision in *Murphy*, also found a four-year statute of limitations under the UCL applicable to rest and meal period claims (writ summarily denied by the Fourth District Court of Appeal, Division One). *Banda*, by contrast, found there to be no ownership right in sums owed for unpaid rest and meal period pay, and thus restitution under the UCL was not an available remedy.

CELA believes it imperative that the Court address all issues regarding the limitations period in a definitive ruling. Because the rest and meal period claims in *Banda* are premised on the UCL, carrying a four-year statute of limitations, and the *Murphy* did not allege UCL violations, such ruling can only transpire if the Court grants full review of *Banda* and does not simply grant and hold pending the decision in *Murphy*.

This Court granted review in *Murphy* to determine whether the unpaid hour of pay owed under Labor Code section 226.7 [Section 226.7] to employees required to work through rest or meal periods is a "wage" subject to the three-year statute of limitations in Code of Civil Procedure section 338, subdivision (a), or a "penalty" subject to the one-year statute of limitations in Code of Civil Procedure section 340, subdivision (a). *Murphy* determined that the hour of pay is a "penalty" subject to a one-year statute of limitations. CELA will request permission of this Court to submit an amicus curiae brief in *Murphy* supporting the position that the hour of pay constitutes "wages."

CELA implores the Court to grant full review of *Banda* rather than merely grant and hold pending disposition of *Murphy*. *Banda* involves an important issue not raised in *Murphy*: whether restitution of unpaid sums owed but unpaid to employees under Section 226.7 for working through rest and meal periods is appropriate under the UCL.

A determination in *Murphy* that the hour of pay owed under Section 226.7 is a

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“wage” brings the remedy under the UCL pursuant to this Court’s opinion in *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 177-178 [“*Cortez*”]. However, the UCL is available to recover any sums in which an individual has a vested, ownership interest subject to restitution in matters involving unfair competition. (See *Cortez*, 23 Cal.4th at 177-178; *Korea Supply Co. v. Lockheed Martin Co.* (2003) 29 Cal.4th 1134, 1144 [*Korea Supply*].) CELA believes it important that the Court analyze whether unpaid sums owed to employees pursuant to Section 226.7 constitute vested property rights subject to restitution even if classified as statutory penalties. Further, CELA requests that the Court determine whether, if classified as a penalty, unpaid sums under Section 226.7 may be the subject of specific or preventive relief to enforce a penalty under Business & Professions Code section 17202.

**UNDER THE OPINIONS OF THIS COURT, THE UCL MAY BE INVOKED TO
RECOVER STATUTORY PENALTIES PROVIDED SUCH SUMS ARE
SUBJECT TO RESTITUTION**

Cortez and *Korea Supply* both stand for the proposition that only sums *subject to restitution* are recoverable under the UCL.

Key language defining restitution appears in *Cortez*:

The concept of restoration or restitution, as used in the UCL, is not limited only to the return of money or property that was once in the possession of that person. The commonly understood meaning of "restore" includes a return of property to a person from whom it was acquired (see Webster's New Internat. Dict. (2d ed. 1958) p. 2125), but **earned 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.

(*Cortez*, *supra*, 23 Cal.4th 178 [emphasis added]; see, also, *Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, 1080 ["Earned but unpaid salary or wages are vested property rights, claims for which may not be properly characterized as actions for monetary damages"]; *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 263 [restitutionary awards encompass quantifiable sums one person owes to another].)

The key to restitution is restoring money or property to someone with an "ownership interest." (*Kraus v. Trinity Management Services* (2000) 23 Cal.4th 116, 126-127; *Korea Supply, supra*, 29 Cal.4th at 1148 [unfairly obtained profits recoverable only "to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest"].) A "vested interest" qualifies. (*Id.* at 1149 ["restitution is broad enough to allow a plaintiff to recover money or property in which he or she has a vested interest"].)

The hour of pay is owed to the employee as soon as it is incurred under the Sections 11 and 12 of the Industrial Welfare Commission [IWC] wage orders and Section 226.7. These sections state that the employer "shall pay" the employee an hour of pay for failure to provide rest or meal periods. It is a sum set by the legislature as the remedy for "working through" rest or meal periods and is "due and payable" in the next paycheck. The regulatory and statutory scheme does not envision that employees owed sums must institute legal proceedings with the Labor Commissioner or by private suit; the obligation to pay the hour of pay is self-executing¹. Employees thus have a vested right and ownership interest in the sum subject to restitution, regardless of whether it is characterized as a "penalty" or a "wage." (See *Cortez*, 23 Cal.4th at 177-178; *Korea Supply Co. v. Lockheed Martin Co.* (2003) 29 Cal.4th 1134, 1144.)

Employers who require employees to work through rest or meal periods compound that violation by failing to pay the hour of pay owed. The company retains use of funds belonging to employees and which employees are unable to use, establishing the employees' right to restitution.

Thus, the hour of pay, owed and unpaid, is subject to restitution under Business & Professions Code section 17203 regardless of whether it is characterized as a "wage" or a "penalty."

Moreover, Business & Professions Code section 17202 states that specific or preventive relief is available under the UCL to enforce a penalty involving unfair competition. CELA has found no case applying this provision and requests review in order

¹ The original version of AB 2509, enacting Section 226.7, had provided that employers would be "subject to" a "civil penalty" of \$50 per violation and twice the employee's average hourly rate in a Berman hearing or private suit. The Senate amended the bill by replacing the remedy to one requiring that employers "shall pay" an hour of pay, the amount set by the IWC in the wage orders.

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to assess whether it may be invoked to recover unpaid penalties in addition to compel prospective compliance.

Based on the foregoing, we respectfully request the Court grant full review of *Banda* to determine whether sums owed and unpaid for rest and meal period violations may be subject to restitution claims under the UCL regardless of whether they are characterized as “wages” or “penalties.”

Thank you for your consideration of this request.

Very truly yours,

COHELAN & KHOURY for
CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION



Michael D. Singer

/MDS

cc: Service List on All Counsel

PROOF OF SERVICE

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is Cohelan & Khoury, 605 "C" Street, Suite 200, San Diego, California 92101-5305.

On July 21, 2006, I served the foregoing document described as **CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION'S AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:


SEE ATTACHED SERVICE LIST

I then served each document in the manner described below:

- BY MAIL:** I placed each for deposit in the United States Postal Service this same day, at my business address shown above, following ordinary business practices.
- BY FAX:** I transmitted the foregoing document(s) by facsimile to the party identified above by using the facsimile number indicated. Said transmission(s) were verified as complete and without error.
- BY UNITED PARCEL SERVICE:** I placed each envelope for deposit in the nearest United Parcel Service drop box for pick up this same day and for "next day air" delivery.

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

Executed July 21, 2006 at San Diego, California.


Amber Worden

SERVICE LIST

No. S144949

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