

COHELAN & KHOURY
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ATTORNEYS AT LAW

TIMOTHY D. COHELAN,* APLC
ISAM C. KHOURY, APC
DIANA M. KHOURY
MICHAEL D. SINGER•

605 "C" STREET, SUITE 200
SAN DIEGO, CALIFORNIA 92101-5305
Telephone: (619) 595-3001
Facsimile: (619) 595-3000

KIMBERLY D. NEILSON
EVA K. WOJTALEWSKI
CHRISTOPHER A. OLSEN

(* Also admitted in the District of Columbia)
(• Also admitted in Colorado)

www.cohelankhoury.com

March 13, 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
Letter Opposing Request for Depublication;
Amicus Curiae letter in Support of Petition for Review
National Steel and Supply Co. v. Superior Court (Godinez)
S141278

Dear Honorable Justices:

This letter is submitted by California Employment Lawyers Association (CELA) opposing the February 21, 2006 request for depublication and under rule 28(g), California Rules of Court, and as amicus curiae supporting the pending Petition for Review in the matter of *National Steel and Supply Co. v. Superior Court (Godinez)*, S141278, Court of Appeal, Fourth Appellate District, Division One D046692 [*"National Steel"*].

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.

REASON THE COURT SHOULD NOT MERELY DEPUBLISH AND SHOULD GRANT REVIEW

Due to conflicting decisions in trial courts and courts of appeal regarding the applicable statute of limitations for employee claims for denied rest and meal period compensation, CELA seeks a definitive ruling by this Court. Such ruling can only

transpire if the Court grants full review of *National Steel* and does not solely depublish or 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). 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.”

Murphy determined that the hour of pay is a “penalty” subject to a one-year statute of limitations. *National Steel* determined that the hour of pay is paid as a wage and is thus subject to a three-year statute of limitations.

CELA believes it is critical that the Court grant review of *National Steel*, rather than depublish the case. This will avoid any misinterpretation by the inferior courts pending the decision in *Murphy* that depublication constitutes, prematurely and without complete analysis, a forecasting of this Court’s inclination to support the one-year limitations period decided in *Murphy*.

Perhaps even more importantly, CELA requests that the Court grant full review of *National Steel*, rather than merely grant and hold pending disposition of *Murphy*. *National Steel* involves an important issue not raised in *Murphy*: whether restitution of unpaid sums owed to employees under Section 226.7 for working through rest and meal periods is appropriate under the Unfair Competition Law (UCL), Business & Professions Code sections 17200 *et seq.* *National Steel* determined that such claims could be brought under the UCL, carrying the four-year limitations period under Business & Professions Code section 17208.

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

Because both the letter requesting depublication and the Petition for Review contain misstatements of the law regarding the reach of the UCL with respect to statutory penalties, CELA presents a brief rebuttal in further support of a grant of review on this important issue.

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

Betraying a misunderstanding of Business & Professions Code sections 17202 and 17203, both the depublication letter¹ and Petition for Review² advance misinterpretations of this Court's opinions in *Cortez* and *Korea Supply* arguing that statutory penalties may not be recovered under the UCL. No such language appears anywhere in these cases. In fact, the Court refers to restitution as "monetary penalties." (*Korea Supply, supra*, 29 Cal.4th at 1148 ["The fact that the "restore" prong of section 17203 is the only reference to monetary penalties in this section indicates that the Legislature intended to limit the available monetary remedies under the act."].)

Rather, the *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

¹ The February 21, 2006 depublication request states at page 3, incorrectly, that *Korea Supply* "holds penalties are not subject to claims for 'restitution,'" with no pinpoint citation. No such holding appears anywhere in *Korea Supply*.

² The Petition for Review states, at page 32, "penalties are not recoverable by private parties in UCL claims," citing *Nasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950 and *Korea Supply* 29 Cal.4th at 1144-1145. This statement misconstrues "civil penalties" that are specifically provided under the UCL. In addition to being subject to a restitution order under Business & Professions Code section 17203, section 17206 provides that any person engaging in unfair competition is liable for a civil penalty not to exceed \$2,500 for each violation. However, claims for such sums may only be brought by public officials in the name of the State of California. Nothing in Section 17206 prohibits private claims for penalties other than the \$2,500 civil penalty that may be subject to restitution. The section cited from *Korea Supply* states only the accepted proposition that damages and disgorgement of profits are not recoverable under the UCL, which limits remedies to injunctive relief and restitution.

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-executing³. 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.)

³ 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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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."

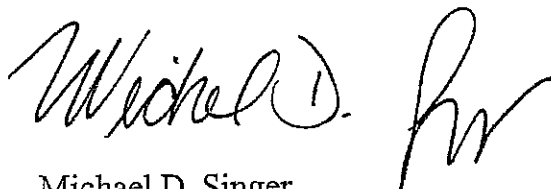
Moreover, Business & Professions Code section 17202 states that specific or preventive relief is available under the UCL to enforce a penalty involving unfair competition. CELA has found no case applying this provision and requests review in order to assess whether it may be invoked to recover unpaid penalties in addition to compel prospective compliance.

Based on the foregoing, we respectfully request the Court decline solely to depublish and instead grant full review of *National Steel*.

Thank you for your consideration of this request.

Very truly yours,

COHELAN & KHOURY for
CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

A handwritten signature in black ink, appearing to read "Michael D. Singer". The signature is written in a cursive, flowing style. The first name "Michael" is written in a larger, more prominent script, followed by "D." and "Singer".

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 March 13, 2006, I served the foregoing document described as **CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION LETTER OPPOSING REQUEST FOR DEPUBLICATION** 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 March 13, 2006 at San Diego, California.


Amber Worden

SERVICE LIST

No. D046692

San Diego Superior Court
The Hon. Patricia A.Y. Cowett
Department 67
330 West Broadway
San Diego, CA 92101

Clerk of the Superior Court

Gordon E. Krischer, Esq.
Larry Walraven, Esq.
Brian Selvan, Esq.
O'Melveny & Myers LLP
610 Newport Center Drive, 17th Floor
Newport Beach, CA 92660
(949) 760-9600 telephone;
(949) 823-6994 fax

Attorney for Petitioner National
Steel and Shipbuilding Company

Thomas Tosdal, Esq.
Fern M. Steiner, Esq.
Tosdal, Smith, Steiner & Wax
600 B Street, Suite 2100
San Diego, CA 92101

Attorneys for Real Parties in Interest
Robert Godinez, Indalecio Parra, and
John Petersen

Steven Drapkin, Esq.
Law Offices of Steven Drapkin
11377 W. Olympic Boulevard, Ste. 900
Los Angeles, CA 90064-1683
Telephone: (310) 914-7909
Facsimile: (310) 914-7959

Attorneys for *Amicus Curiae* the
Employers Group, the
California Employment Law
Council, the California Restaurant
Association, the Alliance of Motion
Picture & Television
Producers, the Airline Labor
Relations Conference and the
California Lodging Industry
Association

John L. Anderson, Esq.
Scott M. De Nardo, Esq.
Neyhart, Anderson, Flynn & Grosboll
44 Montgomery Street, Suite 2080
San Francisco, CA 94104
Telephone: (415) 677-9440

Attorneys for California Teamster
Public Affairs Council and
California Conference Board
of the Amalgamated Transit Union

Ronald A. Reiter
Supervising Deputy Attorney General
Consumer Law Section
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

District Attorney
Hall of Justice
330 W. Broadway
San Diego, CA 92101

California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Timothy P. O'Donnell, Esq.
JACKSON LEWIS LLP
199 Fremont Street, Tenth Floor
San Francisco, CA 94105

David J. Gallo, Esq.
LAW OFFICE OF DAVID J. GALLO
12702 Via Cortina, Suite 500
Del Mar, CA 92014-3769