NO. S071934

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

ROSALBA CORTEZ,

Plaintiff, Appellant and Respondent

vs.

PUROLATOR PRODUCTS AIR FILTRATION COMPANY,

Defendant, Respondent and Appellant.

After a decision by the Court of Appeal of the State of California, First Appellate District, Division Two, Nos. A075456, A078523, Sonoma County No. SC V 206319

[PROPOSED] BRIEF OF AMICI CURIAE ASIAN LAW CAUCUS, INC., EAST SAN JOSE COMMUNITY LAW CENTER, EMPLOYMENT LAW CENTER – A PROJECT OF THE LEGAL AID SOCIETY OF SAN FRANCISCO, LA RAZA CENTRO LEGAL, THE IMPACT FUND, AND WOMEN'S EMPLOYMENT RIGHTS CLINIC – GOLDEN GATE UNIVERSITY SCHOOL OF LAW, IN SUPPORT OF PLAINTIFF ROSALBA CORTEZ

To the Honorable Ronald M. George, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Asian Law Caucus, Inc., East San Jose Community Law Center, Employment Law Center – a Project of the Legal Aid Society of San Francisco, La Raza Centro Legal, The Impact Fund, and Women's Employment Rights Clinic – Golden Gate University School of Law respectfully submit brief of amici curiae in support of Plaintiff Rosalba Cortez.

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I. INTRODUCTION

California does not tolerate businesses engaging in any practices that are forbidden by law. As a result, the Legislature passed the Unfair Competition Law ("UCL"), Business and Professions Code section 17200, et seq., to protect the general public as well as business competitors against "unfair competition," which is defined broadly to include "any unlawful, unfair or fraudulent business act or practice …" (Bus. & Prof. Code § 17200. See also*, Committee on Children's Television, Inc.* v. *General Foods Corp.* (1983) 35 Cal.3d 197, 210-11 [197 Cal.Rptr. 783].) "The Legislature intended this 'sweeping language' to include 'anything that can properly be called a business practice and that at the same time is forbidden by law.'" (*Stop Youth Addiction, Inc.* v. *Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 560 [71 Cal.Rptr.2d 731], quoting*, Bank of the West* v. *Superior Court* (1992) 2 Cal.4th 1257, 1266 [10 Cal.Rptr.2d 538], and *Barquis* v. *Merchants Collection Assn.* (1972) 7 Cal.3d 94, 109-11, 113 [101 Cal.Rptr. 745], interpreting former Cal. Civ. Code § 3369.)

The UCL fulfills its substantial goals by authorizing courts to compel wrongdoing businesses to disgorge all benefits and "restore to any person in interest any money" that "may have been acquired by means of such unfair competition." (Bus. & Prof. Code § 17203; *ABC Internat. Traders, Inc.* v. *Matsushita Electric Corp.* (1997) 14 Cal.4th 1247, 1270-71 [61 Cal.Rptr.2d 112].) The UCL's remedies are designed to deprive wrongdoing businesses of any economic benefit, advantage or incentive that they might otherwise gain over their law-abiding counterparts. (*Stop Youth Addiction, supra*, 17 Cal.4th at p. 575 fn. 11.) As this Court has noted, "'[t]o permit the [retention of even] a portion of the illicit profits, would impair the full impact of the deterrent force that is essential if adequate enforcement [of the law] is to be achieved.'" (*Bank of the West,*

supra, 2 Cal.4th at p. 1267, quoting, *Fletcher* v. *Security Pacific National Bank* (1979) 23 Cal.3d 442, 451 [153 Cal.Rptr. 28].)

Actions to enforce the UCL are not brought solely by the government. Instead, the Legislature found deterrence of unlawful, fraudulent or unfair business practices so important that it provided a mechanism whereby "any unlawful business practice ... may be redressed by a private action charging unfair competition in violation of Business and Professions Code sections 17200 and 17203." (*Committee on Children's Television, supra,* 35 Cal.3d at pp. 210-11.) To ensure that the spectrum of unlawful business activity is adequately policed, the Legislature expressly authorized any interested person to bring an action to prosecute unfair competition claims "for the interests of ... the general public," even when the private plaintiff has suffered no direct injury from the unlawful business practice. (Bus. & Prof. Code § 17204; *Stop Youth Addiction, supra,* 17 Cal.4th at pp. 561-62, 576.)

The decision of the appellate court in this case is entirely consistent with the UCL's language and purpose. The appellate court found correctly that the measure of restitution (in this case, the amount of overtime wages that Petitioner Purolator Products Air Filtration Company (hereinafter "Purolator") withheld from its employees) should be flexible so that the trial court can order the defendant to disgorge all gains flowing from its illegal activity and make whole the victims of the defendant's illegal practice. The appellate court further applied the UCL's plain language when the court concluded that class action procedures are not necessary to protect the due process rights of defendants or non-parties in actions to enforce the UCL on behalf of the general public. The appellate court's decision also vindicates the UCL's purpose by holding that a defendant's supposed "good faith" or ignorance that its practice was indeed illegal does not allow the defendant to "keep the fruits of its …unlawful conduct."

(*ABC Internat. Traders, supra*, 14 Cal.4th at p. 1271.) Finally, the appellate court interpreted the UCL as it is written when the court held that the four-year statute of limitations set forth plainly in California Business and Professions Code section 17208 applies to actions that seek to remedy unlawful business practices. The conclusion of the court below thus ensures that Purolator and other companies like it do not enjoy an unfair advantage over their competitors or exploit the public by engaging in unlawful business conduct.

II. THE COURT OF APPEAL HELD CORRECTLY THAT THE RESTITUTIONARY REMEDY UNDER BUSINESS AND PROFESSIONS CODE SECTION 17203 MAY BE BASED UPON THE OVERTIME BACKPAY PUROLATOR ILLEGALLY WITHHELD FROM ITS EMPLOYEES

Purolator takes issue with the appellate court's determination that restitution in this case should equal the amount of overtime backpay that Purolator failed to pay its employees. Purolator's objection is based upon its insistence that overtime backpay is per se damages, and those damages cannot be awarded under section 17203. Purolator's distinction between restitution and damages in this case is one of semantics but not substance.[1]

Although an award of wages may constitute "damages" in another context, here the remedy fits squarely within the equitable relief afforded by section 17203: "orders or judgments . . . to restore to any person in interest any money or property, real or personal, which may have been

[1] Semantic distinctions between "damages" and "restitution" offer little guidance here because in certain circumstances the monetary recovery that a plaintiff seeks could be characterized as either "damages" or "restitution," depending upon the function that the relief serves. (See, e.g., *Fletcher, supra,* 23 Cal.3d 442 (plaintiffs filed a breach of contract claim for damages and a request for restitution under the unfair trade practice laws, in order to recover bank's interest overcharges.).)

acquired by means of such unfair competition." (Bus. & Prof. Code § 17203.) An order compelling payment of the overtime wages that defendant failed to pay its employees serves section 17203's dual purposes of disgorgement and restitution. It accurately measures the ill-gotten gains that Purolator must disgorge, and it restores what Purolator has wrongfully withheld from its employees. (See *Fletcher, supra*, 23 Cal.3d at pp. 449, 451.) The appellate court's holding that overtime backpay is an appropriate measure of disgorgement and restitution under section 17203 is correct.

A. Ordering Purolator to Pay Overtime Backpay Pursuant to Business and Professions Code Section 17203 Serves the Statute's Restitutionary and Deterrent Purposes.

While the courts have often used "restitution" and "disgorgement" synonymously (*ABC Internat. Traders, supra*, 14 Cal.4th at p. 1268), restitution and disgorgement remain distinct concepts: disgorgement insures that the wrongdoer does not benefit from his or her wrong, while restitution restores the victim to the place he or she would have occupied had the defendant not committed the wrongful act. (*SEC* v. *Tome* (2nd Cir. 1987) 833 F.2d 1086, 1096, cert. den., 486 U.S. 1015 (1988); *SEC* v. *Huffman* (5th Cir. 1993) 996 F.2d 800, 802.) One remedy may indeed advance the other. (See *Fletcher, supra*, 23 Cal.3d at p. 452 (trial court may order restitution to plaintiffs in order to foreclose defendant's retention of any wrongful gains).)

This Court has instructed that *total* disgorgement of wrongful benefits is necessary to deter businesses from violating the law. (*Fletcher, supra*, 23 Cal.3d at p. 451.)[2] Under federal securities trading jurisprudence,

[2] Disgorgement is a common enforcement mechanism under the Federal Trade Commission Act ("FTCA") (15 U.S.C. § 45, et seq.), which became a model for the UCL (*Bank of the West, supra*, 2 Cal.4th at p. 1264), and the federal securities regulations. (See, e.g., *FTC* v. *Pantron I Corp*. (9th Cir. 1994) 33 F.3d 1088,

disgorgement need not be figured with precision; rather, it need only be a reasonable approximation of the benefits causally connected to the violation. (*SEC* v. *First City Fin. Corp., Ltd.* (D.C. Cir. 1989) 890 F.2d 1215, 1231-32; *SEC* v. *Patel* (2nd Cir. 1995) 61 F.3d 137, 139.) Such benefits may be measured as the expense the defendant saved by violating the law. (See *Tilghman* v. *Proctor* (1888) 125 U.S. 136, 146 [8 S.Ct. 894] ("[T]he unauthorized use by the defendant of a patented process produced a definite saving in the cost of manufacture, he must account to the patentee for the amount so saved.").)

Restitution, the other purpose behind section 17203, serves to restore the status quo by awarding an amount that would put plaintiff in as good a position as he or she would have been but for the wrong. (*People* v. *Martinson* (1986) 188 Cal.App.3d 894, 900 [233 Cal.Rptr. 617]. See also, *Jaffe* v. *Cranford Ins. Co.* (1985) 168 Cal.App.3d 930, 935 [214 Cal.Rptr. 567], cited with approval, *Bank of the West, supra*, 2 Cal.4th at p. 1268.)

The appellate court's finding that restitution is properly measured by the amount of overtime backpay Purolator owes its employees carries out both of section 17203's purposes. This result denies Purolator unjust

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(continued …)

1102-03, cert. den., 514 U.S. 1083 [115 S.Ct. 1794] (1995), *FTC* v. *Gem Merchandising Corp.* (11th Cir. 1996) 87 F.3d 466, 469-70.) Disgorgement has also been ordered to remedy a variety of securities violations. (See, e.g., *SEC* v. *First City Fin. Corp*. (D.C. Cir. 1989) 890 F.2d 1215, 1230 (violation of section 13(d) disclosure requirements); *SEC* v. *Tome, supra*, 833 F.2d at p.1096 (insider trading).) Disgorgement under these federal statutes serves the same purpose of deterring illegal activity that underlies the UCL. (See *FTC* v. *Febre* (7th Cir. 1997) 128 F.3d 530, 537; *SEC* v. *First Pacific Bancorp* (9th Cir. 1998) 142 F.3d 1186, 1191, cert. den. sub nom., ___ S.Ct. ___, 1999 WL 24685 (1999); *SEC* v. *Fischbach Corp.* (2nd Cir. 1997) 133 F.3d 170, 175.) Federal law also requires the defendant to disgorge all gains flowing from its illegal activities. (*SEC* v. *Cross Fin. Services, Inc.* (C.D. Cal. 1995) 908 F.Supp. 718, 734; *SEC* v. *Lund* (C.D. Cal. 1983) 570 F.Supp. 1397, 1404.)

enrichment, as it requires Purolator to disgorge the withheld overtime pay, which constitutes the ill-gotten gains Purolator realized from its illegal overtime practice. Ordering backpay for all employees, not just Cortez, serves to measure accurately and to insure that all of Purolator's ill-gotten gains are disgorged, as Purolator's unlawful practices saved it from paying overtime compensation to all of its employees. Similarly, an order requiring Purolator to pay the overtime backpay serves to restore fully Cortez and her fellow employees by giving them what Purolator wrongfully withheld from them. Ordering backpay thereby effectuates full enforcement of the UCL and should deter future violations of the Labor Code.

B. Unlike "Damages," Overtime Backpay Serves a Restitutionary Function Because It Remedies a Public, Not a Private, Wrong.

Courts have long held that backpay may serve as an equitable, rather than a legal, remedy. As such, the appellate court's use of overtime backpay as a measure of restitution does not run afoul of this Court's prohibition on ordering damages as a remedy for violations of section 17200. (See *Cortez* v. *Purolator Air Filtration Prod., Inc.* (1998) 64 Cal.App.4th ___ [75 Cal.Rptr.2d 551], citing, *Teamsters* v. *Terry* (1990) 494 U.S. 558, 570, 573 [110 S.Ct. 1339] (backpay awards may be restitutionary in nature where they vindicate public, and not simply private, interests).)

Like other equitable remedies available under Business and Professions Code section 17203, overtime backpay vindicates a public, and not simply a private, right. (*Marshall* v. *Chala Enterprises, Inc.* (9th Cir. 1981) 645 F.2d 799, 802-03; *Martin* v. *Tango's Restaurant, Inc.* (1st Cir.

1992) 969 F.2d 1319, 1324.)[3] Under both federal and California law, overtime premiums are intended to promote broad social goals of spreading employment more widely through the workforce by deterring employers from requiring employees to work long hours and by compensating workers for the strain of working overtime. (*Ibid.; Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572, 577-78 [62 S.Ct. 1216], rehg. den., 317 U.S. 706 [63 S.Ct. 76] (1942); *California Manufacturers Assn.* v. *Industrial Welfare Com.* (1980) 109 Cal.App.3d 95, 111 [167 Cal.Rptr. 203].) Additionally, like section 17203's equitable relief, overtime backpay awards serve to level the playing field for competitors by denying any competitive edge to businesses that seek to lower labor costs by denying overtime pay to their workers. (See *Martin* v. *Tango, supra*, 969 F.2d at p. 1324.)

The vindication of these public interests distinguishes overtime backpay from the purely compensatory "damages" claims for wages referenced in authorities cited by Purolator. (Purolator Open. Brief at p. 22, citing, *Californians for Population Stabilization* v. *Hewlett-Packard Co.* (1997) 58 Cal.App.4th 273, 295 [67 Cal.Rptr.2d 621]; *Tippet* v. *Terich* (1995) 37 Cal.App.4th 1517, 1537 [44 Cal.Rptr.2d 862].) In each case the court's one-line observation that unpaid wages were "damages" was overly broad and constitutes obiter dicta. (*Californians, supra*, 58 Cal.App.4th at p. 295; *Tippet, supra*, 37 Cal.App.4th at pp. 1537, 1538.). Neither court found that the defendant had engaged in a section 17200 violation, and

[3] The overtime entitlements provided by California law and regulations parallel generally those of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207. (*Alcala* v. *Western Ag Enterprises* (1986) 182 Cal.App.3d 546, 550 [227 Cal.Rptr. 453].) Consequently, depending on the specific provisions at issue, cases interpreting FLSA may be persuasive in interpreting California overtime law. (*Ibid*.)

questions about appropriate remedies were therefore not at issue. (*Ibid.*) Furthermore, *Californians'* and *Tippet's* conclusory characterizations of wage claims in the context of private contract disputes ignores the fact that backpay may serve an equitable function depending upon the circumstances of the case. As noted by the United States Supreme Court, backpay that serves a public purpose may be deemed restitution rather than damages. (*Teamsters* v. *Terry*, *supra*, 494 U.S. at 570, 573.) Overtime backpay in this case would vindicate the public interests underlying the UCL and the Labor Code's overtime provisions. Overtime backpay therefore constitutes a proper restitutionary remedy under Business and Professions Code section 17203.

III. THE COURT OF APPEAL HELD CORRECTLY THAT CLASS ACTION PROCEDURES ARE NOT NEEDED TO PROTECT THE DUE PROCESS RIGHTS OF DEFENDANTS OR NON-PARTIES IN BUSINESS AND PROFESSIONS CODE SECTION 17200 ACTIONS BROUGHT FOR THE INTERESTS OF THE GENERAL PUBLIC.

Purolator insists, without authority, that actions to enforce Business and Professions Code section 17200 for the interests of the general public must be brought as class actions in order to satisfy due process concerns. Purolator's position directly conflicts with the plain language of the UCL and the great discretion courts have when deciding class certification issues. Additionally, Purolator's argument that class notice must be provided in any action to enforce section 17200 for the public interest misapprehends the requirements of class action procedures. Furthermore, Purolator's purely speculative concerns about the preclusive effect of a section 17200 action may be satisfied either by a court offsetting the amount of benefits disgorged from a defendant in the first action from any

amounts a defendant might owe in future litigation over the same business practice, or by a court's application of traditional res judicata principles.

Resort to class action procedures in every section 17200 case brought for the interests of the public is simply not necessary to protect defendants from future section 17200 claims involving the same unlawful business practice. As such, the Court should leave it to the trial court's broad discretion to fashion the remedy for UCL violations and decide whether, under the particular circumstances before it, a section 17200 case brought to enforce the interests of the public should be subject to class treatment.

A. The Plain Terms of Business and Professions Code Section 17204 Authorize Individual Plaintiffs to Bring Non-Class Actions to Enforce Section 17200 for the Interests of the General Public.

The UCL's plain language dispels Purolator's assertion that actions to enforce Business and Professions Code section 17200 for the interests of the general public must be brought as class actions. When interpreting a statute, the court's role is to "ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted." (Cal. Code of Civ. Proc. § 1858.) "If there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs. ... Where the statute is clear, courts will not interpret away clear language in favor of an ambiguity that does not exist.'" (*People* v. *Coronado* (1995) 12 Cal.4th 145, 151 [48 Cal.Rptr.2d 77], cert. den., ___ U.S. ___ [117 S.Ct. 104] (1996), quoting, *Lennane* v. *Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268 [36 Cal.Rptr.2d 563].)

Business and Professions Code section 17204 makes no mention of class actions. Indeed, it specifically allows "any person" prosecuting the

UCL to bring the case "for the interests of itself, its members *or* the general public." (Bus. & Prof. Code § 17204 (emphasis added). See also, *Stop Youth Addiction, supra*, 17 Cal.4th at p. 567.) That the Legislature used the disjunctive in section 17204 indicates that the Legislature meant to designate such parties in the alternative. As this Court held recently, this language shows that in order to bring a case under the UCL, the private plaintiff need not have suffered *any* injury before he or she can sue on behalf of others. (*Stop Youth Addiction, supra*, 17 Cal.4th at pp. 567, 578.)

Thus, the language of the statute makes clear that any individual may act as a private attorney general to prosecute violations of section 17200 for the interests of the general public, and to do so in actions that do not involve class action procedures. Requiring that class action prerequisites be met before an individual may bring an action on behalf of the public to enforce section 17200 runs counter to the plain language of the statute and "inserts what has been omitted" from the statute's terms. (Cal. Code Civ. Proc. § 1858.)

1. The Purpose of the Unfair Competition Law Is Served by Individuals Acting as Private Attorneys General on the Public's Behalf.

Requiring all section 17200 actions brought for the general public to be class actions would also defeat the UCL's purpose. As section 17204 makes clear, the Legislature authorized individuals to act as private attorneys general to ensure that unlawful business practices are policed adequately. Imposing a class action requirement in all such cases would substantially dilute one of the Legislature's designated enforcement tools.

Unlike section 17200 actions for the general public that may be prosecuted by an uninjured plaintiff, class actions can only be prosecuted by a plaintiff who has suffered an injury that is common to and typical of the injury suffered by the group that the plaintiff seeks to represent.

(*Richmond* v. *Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470 [174 Cal.Rptr. 515.) Thus, requiring that section 17200 lawsuits for the public interest be brought as class actions would repeal by implication the portion of section 17204 that authorizes "any person," even those who have not been personally aggrieved by an unlawful business practice, to bring section 17200 actions for the general public's interests. The Legislature could not have intended this consequence.

Additionally, nothing in Business and Professions Code section 17204 indicates that the Legislature intended to impose procedural prerequisites on private attorneys general that it did not place on the government when it enforces the UCL. When the attorney general or district attorneys bring actions to enforce Business and Profession Code section 17200 and to recover restitution on behalf of the public, they need not satisfy class action requirements. (See e.g., *People* v. *Pacific Land Research Co.* (1977) 20 Cal.3d 10, 17 [141 Cal.Rptr. 20] (state action for restitution and other relief on behalf of vendees who purchased land that defendant unlawfully subdivided); *People* v. *Superior Court (Jayhill)* (1973) 9 Cal.3d 283, 286 [107 Cal. Rptr. 192] (state action for injunction, restitution, and penalties against sellers of encyclopedias and other publications on behalf of customers solicited by fraudulent sales presentations); *People* v. *Thomas Shelton Powers M.D., Inc.,* (1992) 2 Cal.App.4th 330, 341-43 [3 Cal.Rptr.2d 34] (quoted with approval in *ABC Internat. Traders, supra*, 14 Cal.4th at p. 1270) (state action against real estate developer for selling designated low and moderate-income housing units at illegally high prices; court of appeal held that disgorgement of profits to either to direct victims or to an interested entity or third party is appropriate).) The appellate court below was correct in holding that private attorneys general need not satisfy class action requirements in section 17200 actions for the general public's interests.

B. Due Process Does Not Require Notice or Opt-Out Rights in All Business and Professions Code Section 17200 Actions Brought on Behalf of the General Public.

Purolator insists upon a strict rule requiring courts to impose class action procedures on section 17200 actions that seek restitution for the general public, because, according to Purolator, class action procedures are essential to protect the due process rights of non-joined parties to notice and an opportunity to opt-out of the action. (Purolator Open. Brief at p. 30.) Purolator's position disregards the considerable discretion with which trial courts are vested when deciding whether to certify a class and, if so, whether a class action should be mandatory, without opt-out rights, or permissive. (*Richmond* v. *Dart, supra,* 29 Cal.3d at p. 470; *Fletcher, supra,* 23 Cal.3d at p. 454;[4] *Frazier* v. *City of Richmond* (1986) 184 Cal.App.3d 1491, 1500 [228 Cal.Rptr. 376].)

The statutory basis for class actions in California state courts is set forth in California Code of Civil Procedure section 382, which provides as follows:

> [W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

[4] In *Fletcher*, this Court held that trial courts have broad discretion both in deciding class certification questions and in fashioning a remedies that will effectively deter businesses from engaging in unfair trade practices. *Fletcher*, *supra,* 23 Cal.3d at pp. 450-51, 454. In the twenty years since the Court decided *Fletcher*, the Legislature has amended section 17200, et seq., but has not restricted trial courts' discretion in ordering remedies or deciding class certification issues. In fact, as this Court noted recently, "whenever the Legislature has acted to amend the UCL, it has done so only to *expand* its scope, never to narrow it." (*Stop Youth Addiction, supra,* 17 Cal.4th at p. 570 (emphasis in original).)

This rule does not address the circumstances under which a trial court should afford opt-out rights to class members. In the absence of relevant state precedents trial courts are urged to follow the procedures prescribed in rule 23 of the Federal Rules of Civil Procedure (28 U.S.C.) for conducting class actions. (*Green* v. *Obledo* (1981) 29 Cal.3d 126, 145, 146 [172 Cal.Rptr. 206].) Pursuant to rule 23, class notice and opt-out rights depend upon the type of class action sought.

Rule 23 of the Federal Rules of Civil Procedure (28 U.S.C.) describes different types of class actions and defines their corresponding notice and opt-out rights. (Fed. Rules Civ. Proc., rule 23(b) and (c) (28 U.S.C.).) In cases such as the one at hand, where the relief sought is primarily equitable and the defendant has acted "on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole" (hereinafter "rule 23(b)(2) class actions"), class notice and opt-out rights are not required. (Fed. Rules Civ. Proc., rule 23(b)(2) and (c) (28 U.S.C.)[5] The homogeneity characteristic of rule 23(b)(2) class actions affords courts the discretion to dispense with notice to the class and bind all members to any judgment on the merits without an opportunity to opt out of the class. (*Bell* v. *American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1605, 1608 [277 Cal.Rptr. 583]; *Arnold* v. *United Artists Theatre Circuit*, *Inc*. (N.D.

[5] Rule 23(b)(2) does not apply to actions that "relate exclusively or predominantly to monetary damages." (Advisory Committee Notes to 1966 Amendment to rule 23 of Fed. Rules Civ. Proc. (28 U.S.C.).) Instead, such actions will be certified under rule 23(b)(3) if the court finds that the "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." (Fed. Rules Civ. Proc., rule 23(b)(3).) The trial court is required to provide class members with notice and an opportunity to opt out of rule 23(b)(3) class actions prior to judgment on the merits. (Fed. Rules Civ. Proc., rule 23(c)(2).)

Cal. 1994) 158 F.R.D. 439, 451; see also*, Frazier, supra,* 184 Cal.App.3d at pp. 1500-01 (in cases involving primarily declaratory, injunctive or mandamus relief, the court has discretion not to provide notice of any kind to class members).)[6]

Class cohesiveness and homogeneity of class members' interests are present when the class challenges a defendant's pattern of illegal activity or systemic practice, rather than challenging individual actions taken by a defendant against each class member separately. For example, class actions challenging employment policies, patterns or practices of discrimination are among the types of cases that rule 23's drafters contemplated would be certified under rule 23(b)(2). Advisory Committee Notes to 1966 Amendment to rule 23 of the Fed. Rules Civ. Proc. (28 U.S.C.).) Even where such cases seek classwide monetary relief, they may be certified under rule 23(b)(2) when the monetary relief is equitable in nature, or where monetary damages are not the whole or predominant relief sought. (See *Linney* v. *Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1240 (due process requires the option to opt-out only in the limited set of claims that are wholly or predominately for money damages); Advisory Committee Notes, *supra* (rule 23(b)(2) (does not extend to cases in which the relief "relates exclusively or predominantly to money damages.").)

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[6] Where an action would qualify under more than one subsection of rule 23(b), courts favor certification under rule 23(b)(2) because, "by compelling inclusion, such actions promote 'judicial economy, consistency of result and binding adjudication more effectively than 23(b)(3).'" (*Arnold, supra*, 158 F.R.D. at p. 451, quoting*, Robinson* v. *Union Carbide Corp.* (5th Cir.) 544 F.2d 1258, 1260, cert. den., 434 U.S. 822 [98 S.Ct. 65] (1977); *Bell* v. *American Title, supra*, 226 Cal.App.3d at p. 1608 (if an action can be maintained under either rule 23(b)(2) or (b)(3), the court should order that the suit be certified pursuant to rule 23(b)(2) so that the judgment will have res judicata effect as to all class members, since no member has the right to opt out of a (b)(2) suit.).)

As the United States Supreme Court explained in *Teamsters* v. *Terry*, an award of monetary relief is not necessarily *legal* relief or damages. Instead, monetary relief is equitable when it is "restitutionary, such as in 'action[s] for disgorgement of improper profits.'" (*Terry, supra,* 494 U.S. at p. 570 (citation omitted). See also, *Albemarle Paper Co.* v. *Moody* (1975) 422 U.S. 405, 417-18 [95 S.Ct. 2362] (monetary equitable relief which spurs employers to change their unlawful employment practices and makes whole the victims of that illegal practice is essentially injunctive relief.).) As such, the equitable remedy of back pay has long been available in rule 23(b)(2) class actions, where the class members do not receive notice of the pendency of the action or an opportunity to opt out. (*Probe* v. *State Teachers' Retirement System* (9th Cir.) 780 F.2d 766, 780, cert. den., 476 U.S. 1170 (1986); *Arnold, supra*, 158 F.R.D. at pp. 450-51.)

Applying these concepts to the instant case leads to the conclusion that if the trial court had to certify this case as a class action, certification under the terms of rule 23(b)(2) would be appropriate. Plaintiff Cortez's lawsuit stems from Purolator's failure to pay overtime for the four ten-hour day workweek -- an employment policy that affected all of Purolator's employees in a uniform way. Plaintiff Cortez's complaint requested injunctive relief, as well as restitution and disgorgement. (See *Cortez, supra* [75 Cal.Rptr.2d at p. 555].)[7] Furthermore, the monetary relief

[7] The fact that the trial court concluded, in light of Purolator's conversion back to a standard five-day schedule, that injunctive relief would not be granted in this case has no impact on whether the relief plaintiff Cortez sought is predominantly injunctive, thereby bringing this case within the scope of rule 23(b)(2). "The basic nature of a ... suit is not altered merely because the [defendant's] change of ... policy prior to [adjudication of the merits of the lawsuit] has obviated the need for injunctive relief. The conduct of the [defendant] is still answerable 'on the grounds generally applicable to the class,' and the relief sought is still 'relief with respect to the class as a whole' [as required under (b)(2)]." (*Arnold, supra*, 158

plaintiff Cortez seeks is equitable, because it is designed to deter future violations of the Labor Code and make whole the victims of Purolator's unlawful employment policy. Thus, even if this case were certified as a class action, class members would not be entitled to notice or an opportunity to opt-out of the case.[8]

Courts must carefully weigh the respective burdens and benefits of class certification and allow the maintenance of a class action only if the party seeking class certification establishes that a class action will provide substantial benefits to both the litigants and the court. (*City of San Jose* v. *Superior Court* (1974) 12 Cal.3d 447, 459-60 [115 Cal.Rptr. 797]; *Blue Chip Stamps* v. *Superior Court* (1976) 18 Cal.3d 381, 385 [134 Cal.Rptr. 393].) California courts have found that the streamlined procedures available under section 17204 may often be superior to class actions for affording section 17203's broad equitable relief to non-parties. (See, e.g., *Caro* v. *Proctor and Gamble Co.* (1993) 18 Cal.App.4th 644, 661 [22 Cal.Rptr.2d 419] (in a suit arising under Bus. & Prof. Code § 17200, the court is empowered to grant equitable relief, including restitution in favor of absent persons, without certifying a class action; as such, class treatment may not be superior to an individual action under those statutes); *Dean Witter Reynolds, Inc.* v. *Superior Court* (1989) 211 Cal.App.3d 758, 773

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F.R.D. at pp. 455-56, quoting, *Wetzel* v. *Liberty Mutual Insurance Co.* (3d Cir.) 508 F.2d 239, 251, cert. den., 421 U.S. 1011, 95 S.Ct. 2415 (1975).)

[8] Additionally, defendant's due process discovery rights are not affected by whether a section 17200 case is certified as a class action or not. Once a case is certified as a class action, discovery proceeds as in any other civil action, where the defendant is entitled to reasonable discovery of relevant evidence regarding plaintiffs' claims and the witnesses and documents that support those claims. (See *Southern California Edison Co.* v. *Superior Court* (1972) 7 Cal.3d 832, 843 [103 Cal.Rptr. 709].)

[259 Cal.Rptr. 789] (in contrast to the streamlined procedure that the Legislature expressly provided for section 17200 actions, the management of a class action can be a difficult legal and administrative task; section 17203 empowers a court to grant "equitable relief, including restitution in favor of absent persons, without certifying a class action."). Accord, *Fletcher, supra*, 23 Cal.3d at p. 454 (recognizing that an individual action brought for the interests of the general public "may eliminate the potentially significant expense of pretrial certification and notice, and thus may frequently be a preferable procedure to a class action ...").)[9] While

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[9] Purolator relies upon *Bronco Wine* v. *Logoluso Farms* (1989) 214 Cal.App.3d 699 [262 Cal.Rptr. 899], to support its position that a plaintiff in a section 17200 action cannot recover restitution on behalf of the general public outside of a class action. However, the *Bronco Wine* court expressly declined to reach that issue. (*Ibid*. at p. 720.) Furthermore, the facts in *Bronco Wine* make it more like a rule 23(b)(3) class action (where notice and opt-out rights are required before the judgment can bind the class), than an action under rule 23(b)(2) (where the defendant has acted in a way that is generally applicable to the class). Specifically, the case involved individualized questions about contract damages that affected the non-party growers in different ways, because each grower had a separate contract that contained different terms. Each non-party grower's claim for "restitution damages" involved a complicated, individual-specific calculus. The court found that because of these differences, the non-party growers' substantial rights were not represented in that action. (*Ibid.* at pp. 715-19.)

Additionally, Purolator's reliance upon *Phillips Petroleum Co.* v. *Shutts* (1985) 472 U.S. 797 [105 S.Ct. 2965], cert. den., 487 U.S. 1223 [108 S.Ct. 2883] (1988) and *Home Savings and Loan Assn.* v. *Superior Court* (1974) 42 Cal.App.3d 1006 [117 Cal.Rptr. 485] is similarly misplaced. In *Shutts*, the Court held that in a class action for money damages brought in state court on behalf of out-of-state residents, due process requires that these absent class members be afforded notice and opt-out rights before they could be bound by the judgment. (472 U.S. at p. 812.) The Court's holding was expressly limited "to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief." (*Ibid.* at pp. 811-12 fn.3.) Moreover, in *Home Savings*, the claim for class damages predominated over the request for declaratory relief. The court in *Home Savings* never addressed the question of *whether* notice was required, but instead simply referred

class certification might arguably be appropriate in some section 17200 cases, Purolator cannot show that certifying a class in this case, where equitable relief is the predominant remedy, would benefit the litigants or the court.

D. A Class Need Not Be Certified for Defendant to Enjoy Protection Against Future Business and Professions Code Section 17200 Claims.

Purolator suggests that class certification is necessary in cases like this one in order to stave off multiple lawsuits and payments over the same business practices. Such wholly speculative fears are unlikely to materialize. The UCL's call for total disgorgement and restitution, as well as traditional res judicata principles, well equip courts to arrest such a parade of horribles without employing the class action procedure.

3. Payment of Overtime Backpay to All Affected Employees Should Avoid Future Litigation Over the Same Unlawful Practices.

Purolator repeatedly argues that, absent class certification to bind employees other than Cortez, it could face further section 17200 suits for "restitution" of overtime backpay and even be made to pay multiple times for the same wrongs. The mechanisms of disgorgement and restitution make such a scenario unlikely.

A defendant cannot be ordered to disgorge the same ill-gotten gains more than once. (See *Litton Industries, Inc.* v. *Lehman Brothers Kuhn Loeb Inc.* (S.D.N.Y. 1990) 734 F.Supp. 1071, 1076 (once ill-gotten gains have been disgorged to the SEC, "there remains no unjust enrichment and, therefore, no basis for further disgorgement in a private action."); *National*

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to rule 23(c)(2) of the Federal Rules of Civil Procedure (28 U.S.C.), which specifies the notice required in rule 23(b)(3) actions.

Westminister Bancorp N.J. v. *Leone* (D.N.J. 1988) 702 F.Supp. 1132, 1140.) Similarly, to the extent a defendant has made whole the victims of its unlawful acts, those amounts paid would bar or at least serve as an offset in future litigation over the same practices. (See *SEC* v. *Lorin* (S.D.N.Y. 1994) 869 F.Supp. 1117, 1129 (securities law violators are not susceptible to both disgorgement sought by SEC in civil enforcement action and the compensation sought by private parties in rule 10b-5 actions); *SEC* v. *Penn. Central Co.* (E.D. Pa. 1976) 425 F.Supp. 593, 599 ("To the extent that defendants have made restitution [to the victims], the amounts paid would serve to offset part or all of a[n] [SEC] judgment for disgorgement.").)

Future litigation over Purolator's failure to pay overtime for the four-day workweek is improbable precisely because the appellate court's order supports total disgorgement of Purolator's wrongful profits and restoration of all victims of Purolator's unlawful employment practice. Similar to the SEC's recovery on behalf of defrauded investors' interest in the above referenced cases, plaintiff Cortez has brought a section 17200 claim in a representative capacity and stands to restore her fellow employees who have been denied overtime compensation. If Purolator is made to pay *all* overtime backpay that it owes to all of its affected employees, then Purolator can raise offset or show that nothing more is due should future litigation be brought over the same unlawful practices.

4. Class Certification Is Not Needed to Protect a Prevailing Defendant in a Business and Professions Code Section 17200 Claim from Subsequent Actions Over the Same Business Practices.

The potential application of res judicata principles should further allay Purolator's fears that defendants will be subjected to repeated litigation of Business and Professions Code section 17200 claims absent class certification. As exemplified most recently in *American International*

Industries v. *Superior Court* (Feb. 26, 1999) 99 C.D.O.S. 1526 (attached hereto for the Court's convenience), resolution of a section 17200 claim in a prior action can, under certain circumstances, preclude subsequent litigation of the same claim.

The *American International Industries* opinion addresses the preclusive effect that can be given to a stipulated judgment arising from a non-class settlement of a section 17200 claim. In the first action, a nonprofit environmental corporation brought a section 17200 claim on behalf of the general public for alleged exposure to lead acetate without adequate warning. (99 C.D.O.S. at p. 1527.) The parties and the state Attorney General agreed to a stipulated judgment that resolved the section 17200 claim and ordered restitution. Prior to settlement of the first lawsuit, individuals brought a second lawsuit against the same defendants and alleged many of the same claims brought in the first suit, including the Business and Professions Code section 17200 claim.

The appellate court held that the section 17200 action, among others, was barred by the stipulated judgment in the first suit. The appellate court found that the plaintiff nonprofit group and Attorney General were in "privity" with the plaintiffs in the second suit, because the nonprofit group and Attorney General shared the same community of interest as the plaintiffs in the second suit, those interests had been adequately represented in the first suit, and the plaintiffs in the second suit could have reasonably expected to be bound by the prior adjudication. (99 C.D.O.S. at p. 1529, citing, *Citizens for Open Access to Sand and Tide, Inc. (COAST)* v. *Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1070 [71 Cal.Rptr.2d 77], review denied.)[10] The appellate court specifically rejected the contention that

[10] Courts have applied these same principles to preclude relitigation of representative-type actions. (See, e.g., *COAST, supra,* 60 Cal.App.4th at p. 1072

plaintiffs' due process rights would be violated if they were bound by the terms of a non-class settlement in the first action.

The *American International Industries* decision thus teaches that, through careful application of res judicata principles, multiple litigation of section 17200 claims can be avoided without resort to the class action process. Given that Purolator's fears of subsequent litigation are purely speculative at this point, the Court need not and should not define what preclusive effect may be given to a judgment in the action before it. Nonetheless, the *American International Industries* decision underscores that Purolator's anxiety is not well founded.

IV. THE COURT OF APPEAL HELD CORRECTLY THAT A DEFENDANT WHO HAS VIOLATED THE LAW IN THE COURSE OF DOING BUSINESS CANNOT MITIGATE ITS EXPOSURE TO RESTITUTION UNDER BUSINESS AND PROFESSIONS CODE SECTION 17203 BY CLAIMING THAT ITS ILLEGAL CONDUCT WAS IN GOOD FAITH.

Purolator does not dispute its liability for violating the UCL. (Purolator Open. Brief at pp. 13-14, 18.) Purolator asserts, however, that its "good faith" should mitigate the amount of restitution it owes pursuant to

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(judgments pursuant to settlement agreements between state entities and private property owners settling property issues and establishing a public easement precluded relitigation of the same issues in a subsequent suit brought by public interest group deemed in privity with the state entities); *Rynsburger* v. *Dairymen's Fertilizer Co-op., Inc.* (1968) 266 Cal.App.2d 269, 278 [72 Cal.Rptr.2d 102] (private citizens bringing private nuisance suit barred by judgment against cities in prior suit seeking to establish a public nuisance); *Los Angeles Branch NAACP* v. *Los Angeles Unified School Dist.* (9th Cir. 1984) 750 F.2d 731, 741, cert. den., 474 U.S. 919 [106 S.Ct. 247] (1985) (judgment against one class of school children in a school desegregation case precluded relitigation of same issues in subsequent suit on behalf of a different class of school children).

section 17203 as a result of its unlawful business practice. (See *Ibid.* at pp. 1-2, 3, 10, 11, 18.) Purolator's position is contrary to the terms of section 17203 and would undermine the UCL's deterrent effect by allowing the offender to keep the fruits of its unlawful conduct. (See *ABC Internat. Traders, supra,* 14 Cal. 4th at p. 1270.) Furthermore, Purolator's argument relies upon an overly simplistic recitation of traditional equitable maxims. It ignores that section 17203 restricts the courts' traditional discretion to deny equitable relief and that the Legislature did so to ensure that the UCL's important public purposes are effectuated.

A. Purolator's Proposed "Good Faith" Defense to Restitution Is Contrary to the UCL's Language and Purpose of Deterring Unlawful Business Practices.

Principles of equity cannot be used as a means to avoid the mandate of a statute. (*Estate of McInnis* (1986) 182 Cal.App.3d 949, 958 [227 Cal.Rptr. 604]; *Ghory* v. *Al-Lahham* (1989) 209 Cal.App.3d 1487, 1492 [257 Cal.Rptr. 924]. See also, *Timberline, Inc.* v. *Jaisinghani* (1997) 54 Cal.App.4th 1361, 1368 fn. 5 [64 Cal.Rptr.2d 4] (a court of equity cannot "lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly.").) Section 17203 mandates that courts "prevent the use or employment … of any practice which constitutes unfair competition" and that courts "restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." (Bus. & Prof. Code § 17203.)[11] In interpreting section

[11] Purolator contends that the language of § 17203 is "not … mandatory." (Purolator Open. Brief at p. 15.) This is misleading. While the statute contains the word "may," that simply indicates that the Legislature granted courts broad discretion to make whatever orders or judgments the courts determine will accomplish the goals of deterring the wrongful business practice and restoring to persons in interest all money or property that the defendant gained from the wrongful practice. (See *Albemarle, supra,* 422 U.S. at p. 416. See also, *Fletcher, supra*, 23 Cal.3d at pp. 450-52.) According to the plain language of the statute,

17203, this Court has declared that when the act or practice of "unfair competition" complained about is *unlawful*, it is enjoinable. (*Barquis, supra*, 7 Cal.3d at p. 112. See also*, People* v. *Cappuccio, Inc.* (1988) 204 Cal.App.3d 750, 763 [251 Cal.Rptr. 657] ("[i]rrespective of the asserted fairness of the practice, it is in fact unlawful and therefore enjoinable.").) Similarly, as demonstrated below, if an act is unlawful and therefore enjoinable under section 17203, it gives rise to restitution irrespective of the defendant's good faith.

In *Fletcher, supra*, 23 Cal.3d at pp. 449-50, this Court applied these principles to its analysis of the equitable relief, including restitution, available under Bus. & Prof. Code section 17535, which uses "language similar to that of section 17203." (*ABC Internat. Traders, supra,* 14 Cal.4th at p. 1269.)[12] The Court in essence rejected the notion that the defendant could claim the equitable defense of unclean hands to mitigate the amount of restitution it owed as a result of its unlawful trade practice. Specifically, the Court refused to require the plaintiff to prove that he or she had no knowledge of the illegality of the trade practice in order to obtain restitution under the statute. In making this ruling, the Court reasoned that the statute's disgorgement, deterrence and restitutionary purposes would be thwarted if plaintiffs had to make "the often impossible showing of the

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while the courts have discretion to determine the method of achieving those goals, accomplishment of goals themselves is mandatory.

[12] Like Business and Professions Code section 17203, section 17535 authorizes courts to "make such orders or judgments … as may be necessary to prevent the use or employment … of any practices which violate this chapter [regarding unlawful trade practices] or which 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 any practice in this chapter declared to be unlawful." (Bus. & Prof. Code § 17535.)

individual's lack of knowledge of the fraudulent practice in each transaction" before the court could order restitution. (*Fletcher, supra,* 23 Cal.3d at p. 451.)

For the same reasons that this Court concluded that a trial court may order restitution without inquiring into the plaintiff's state of mind, an inquiry into the defendant's state of mind should also be irrelevant. First, the language of section 17203 calls for no such inquiry. Second, it may be extremely burdensome for plaintiffs to show that a defendant acted with knowledge or bad intent when it violated the law. Moreover, it would defeat the purpose of the UCL to allow a wrongdoing business to retain the considerable benefits of its unlawful conduct simply because the plaintiff was unable to make "the often impossible showing" that the defendant's illegal practice was knowing or intentional. Unlawful business practices are not rendered "lawful" by a defendant's lack of intent. If a defendant has benefited from its illegal conduct, the law requires that the gains from this illegal conduct be disgorged, whether or not the defendant's conduct was ignorant or intentional. Purolator's proposed good faith defense to a disgorgement or restitution award would unduly narrow the breadth of the UCL and improperly insert qualifying provisions not included in section 17203. (See *Stop Youth Addiction, supra,* 17 Cal.4th at p. 573.)

B. Because Business and Professions Code Section 17203 Expressly Authorizes Restitution, Courts Must Order Restitution When the Underlying Statutory Violation Is Found.

Purolator's argument that traditional rules of equity allow a trial court to consider the defendant's good faith when calculating the amount of restitution due is fundamentally flawed. Purolator overlooks that the courts' equitable discretion is limited where the Legislature has expressly authorized equitable relief as a remedy for statutory violations. Section

17203 is one of those statutes. As such, contrary to Purolator's assertion, a court's decision whether to order restitution pursuant to section 17203 as a remedy for the defendant's unlawful business practice is not simply a matter of balancing the equities.[13]

While restitution is not an automatic or mandatory remedy, it, like injunctive relief, is one of the remedies a court may invoke to remedy unlawful business practices. (Bus. & Prof. Code § 17203.) The scheme of section 17203 recognizes that there may be cases that call for one remedy but not another, and the choice is left to the trial court's sound discretion. (See note 11, *supra*.) In making that choice, however, a court must measure its discretion against the objectives and purposes of the UCL. (See *Hecht Co.* v. *Bowles* (1944) 321 U.S. 321, 331 [64 S.Ct. 587] (when

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[13] Purolator relies upon inapposite authorities to support its argument that courts may balance traditional equities when ordering restitution to remedy an unlawful business practice under section 17203. Purolator cites *Tustin Community Hospital, Inc.* v. *Santa Ana Community Hospital Assn.* (1979) 89 Cal.App.3d 889, [153 Cal.Rptr. 76], which recognizes laches and estoppel as equitable defenses to a claim for remedies for unfair competition. However, *Tustin* is not a case brought pursuant to section 17200, but is instead a common law unfair competition case. Furthermore, the remedies requested in that case were not authorized by statute but were simply requested as part of the court's inherent equitable authority. Similarly, in support of Purolator's claim that "restitutionary relief" under section 17203 "is not automatic" (Purolator Open. Brief at p. 18, Purolator Reply at p. 5), Purolator mistakenly relies upon this Court's decision in *Ghirardo* v. *Antonioli* (1996) 14 Cal.4th 39 [57 Cal.Rptr.2d 687], another case involving traditional equitable remedies instead of remedies authorized by the UCL or any other statute. In that case, the Court addressed traditional principles of unjust enrichment and stated that "a party who does not know about another's mistake, and has no reason to suspect it, may not be required to give up the benefit if he or she also relied upon it to his or her detriment." (*Ghirardo, supra,* 14 Cal.4th at p. 51.) Purolator insists that this "is exactly what occurred in this case." (Purolator Open. Brief at p. 19.) Purolator is incorrect. Purolator did not rely upon Servodyne's mistake to its *detriment*. Instead, Purolator obtained the benefit of numerous hours of its employees' time for which Purolator did not pay the statutory wage. As the Court in *Ghirardo* also reasoned, "the party benefiting from a mistake of fact may not be entitled to retain what amounts to a mere windfall." (14 Cal.4th at p. 52.)

exercising discretion to grant or deny injunctive relief, judicial discretion "must be exercised in light of the large objectives of the Act" and "should reflect an acute awareness of the [legislative] admonition" in the statute at issue); *Albemarle, supra*, 422 U.S. at p. 417 (trial court's remedial discretion must be measured against the purposes that inform the statute that has been violated*); In re Marriage of Van Hook* (1983) 147 Cal.App.3d 970, 984-85 [195 Cal.Rptr. 541] (adopting federal rule that "'where an injunction is authorized by statute it is unnecessary for plaintiff to plead and prove the existence of the usual equitable grounds…[i]t is enough if the requirements of the statute are satisfied.'"), quoting, *Atchison Topeka and Santa Fe Ry. Co.* v. *Lennen* (10th Cir. 1981) 640 F.2d 255, 260.)

In *Albemarle*, the United States Supreme Court expressly rejected "good faith" as a factor to consider when ordering equitable relief against a defendant who had violated the equal employment opportunity provisions of the Civil Rights Act of 1964, 42 U.S.C. section 2000e-5 ("Title VII"). Title VII specifically authorizes courts to order back pay as one of the equitable remedies the courts "may" invoke in their discretion when the Act has been violated. (42 U.S.C. § 2000e-5(g).) The Court explained that the purposes of back pay awards under Title VII are to cause employers to eliminate unlawful employment practices and to place the victims of discrimination in as near a situation they would have occupied had the wrong not been committed. (*Albemarle, supra*, 422 U.S. at pp. 417-18.) Thus, "'Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.'" (*Ibid.,* at p. 422, quoting, *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 432 [91 S.Ct. 849] (emphasis in original).)

In order to further instruct the trial courts on how to exercise their equitable discretion in light of Title VII's remedial purposes, the Court held that "given a finding of unlawful discrimination, back pay should be denied

only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." (*Albemarle, supra*, 422 U.S. at p. 421.) Pursuant to this rule, the Court concluded that defendant's supposed lack of bad faith in breaching Title VII[14] was not a sufficient reason for denying back pay. (*Ibid.,* at p. 422.) The Court reasoned that "a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.'" (*Ibid*.)

This Court should adopt a similar rule to guide the trial courts when exercising their discretion to order monetary equitable relief under Business and Professions Code section 17203. As does Title VII, section 17203 expressly provides that courts "may" order monetary equitable relief to remedy violations of the UCL. Furthermore, the UCL is directed toward the consequences of the unlawful business practice, not the defendant's motivation. The purposes of restitution provided by section 17203 are twofold: (1) to eliminate unlawful business practices and (2) to return the profits earned from the unlawful business practice to any person in interest so that both the violator and its victims will be placed in as near a situation they would have occupied had the wrong not been committed. (See Bus. & Prof. Code § 17203; *Stop Youth Addiction, supra,* 17 Cal.4th at p. 575 fn. 11; *Bank of the West, supra,* 2 Cal.4th at p. 1267.) Thus, in order to effectuate those purposes, trial courts cannot deny restitution on the basis that the defendant's violation of the law was in "good faith."

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[14] Like Purolator in the instant case, Albemarle claimed that its breach of Title VII was not in bad faith because it was unaware that Title VII outlawed seniority systems that had a racially discriminatory impact, and Albemarle had taken some steps to eliminate strict racial segregation in some of its work departments. (*Albemarle, supra,* 422 U.S. at p. 422 fn. 15.)

If this Court were to accept Purolator's position that a defendant's state of mind should be factored into the calculation of restitution (Purolator Open. Brief at p. 18 fn. 10), then the "central statutory purposes" of the UCL to deter illegal business practices by authorizing courts to disgorge *all* moneys obtained by the unlawful business practice would be thwarted, and the wrongdoing defendant would be allowed to retain what amounts to a mere windfall of illicit profits. (See *Bank of the West, supra,* 2 Cal.4th at p. 1267. See also, *ABC Intern. Traders, supra,* 14 Cal.4th at p. 1270.) This would undoubtedly encourage, rather than deter, unlawful business practices and would reward businesses whose ignorance of the legal requirements under which they operate leads them to violate the law.

V. THE COURT OF APPEAL HELD CORRECTLY THAT THE APPLICABLE STATUTE OF LIMITATIONS FOR UCL CLAIMS FOR RESTITUTION IS FOUR YEARS.

Purolator "does not dispute that the specific remedies available under Business and Professions Code section 17203 are governed by the four-year statute of limitations set forth in section 17208." (Purolator Open. Brief at p. 29.) Nevertheless, Purolator argues that the three year statute of limitations applicable to Labor Code violations should apply here, because restitution in this case is based upon the amount of overtime wages that Purolator withheld from its employees. Purolator's argument ignores the difference between the remedies available under the Labor Code and the monetary relief authorized by section 17203.

Plaintiff Cortez claims that Purolator's failure to pay overtime wages for the ninth and tenth hours per day that it required its employees to work violates the California Labor Code. This illegal withholding of overtime wages forms the basis of Plaintiff Cortez's Labor Code *and* UCL claims, because the UCL essentially "borrows violations of other laws and treats

these violations, when committed pursuant to business activity, as unlawful practices independently actionable under section 17200 et seq. and subject to distinct remedies provided thereunder." (*Farmers Ins. Exchange* v. *Superior Court* (1992) 2 Cal.4th 377, 383 [6 Cal.Rptr.2d 487].)

While the UCL borrows violations of other laws and treats them as independent violations of the UCL, it does not borrow the underlying laws' statutes of limitations or remedial provisions. Instead, the UCL expressly provides that "[a]ny action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued."[15] (Bus. & Prof. Code § 17208.) This statute is clear and unambiguous -- the Legislature made a deliberate choice to apply a specific four-year statute of limitation to UCL claims. (See *People* v. *Coronado, supra,* 12 Cal.4th at p. 151.) The Labor Code, on the other hand, does not contain a specific statute of limitations. Violations of the Labor Code are therefore governed by the three-year general statute of limitations for statutory liability contained in California Code of Civil Procedure section 338(a). It is a fundamental rule of statutory construction that a specific statute dealing with a particular subject controls and takes priority over a conflicting general statute. (*Lake* v. *Reed* (1997) 16 Cal.4th 448, 464 [65 Cal.Rptr.2d 860].) Accordingly, the UCL's four-year statute governs plaintiff's UCL claim.

Additionally, the remedies provided by section 17203, including injunctions, appointment of receivers, restitution and disgorgement (Bus. & Prof. Code § 17203) "are cumulative to each other and to the remedies or penalties available under all other laws of this state." (Bus. & Prof. Code §

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[15] The second clause of section 17208 ("no cause of action barred under existing law on the effective date of this section shall be revived by its enactment") simply means that the law did not apply retroactively to revive claims that were already stale in 1977, when the statute was enacted.

17205.) Consequently, in an action such as the one at bar, the defendant may be liable for Labor Code remedies including backpay, penalties and interest in addition to the UCL's remedies.

As this Court long ago explained, "[t]he bar of the statute of limitations … affects the remedy only and does not impair the obligation." (*Mitchell* v. *Automobile Owners Indemnity Underwriters* (1941) 19 Cal. 2d 1, 4 [137 A.L.R. 923]; see also*, Chase Securities Corp.* v. *Donaldson* (1945) 325 U.S. 304, 314 [65 S.Ct. 1137] ("statutes of limitation go to matters of remedy, not to destruction of fundamental rights.").) Thus, the statute of limitations for the Labor Code limits Purolator's liability for overtime backpay and penalties under the Labor Code to no earlier than November 1990, or three years prior to the date that plaintiff filed her lawsuit. (See *Cortez, supra,* 75 Cal.Rptr.2d at p. 555.) But that statute of limitations does not impair Purolator's obligation to have refrained from illegal acts of unfair competition for the four-year limitation period stated in section 17208. As such, section 17208 authorizes the trial court to order disgorgement and restitution of all benefits Purolator earned from its Labor Code violation since four years prior to the filing of Cortez's lawsuit, or back to November 1989.

VI. CONCLUSION

The decision of the court of appeal comports fully with the language and purpose of the UCL. The decision correctly ensures that Purolator will not retain the wrongful profits Purolator earned from its failure to pay overtime to its workers, it provides that the victims of Purolator's unlawful business practice will be made whole, and it guarantees that these

objectives will be accomplished in the efficient manner that the Legislature intended. For these reasons, the appellate court's decision should be affirmed.

Dated March ____, 1999 Respectfully submitted,

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