Case No. **A115068**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

TINA O'DELL

Plaintiff and Appellant,

vs.

INTERNATIONAL ASSET SYSTEMS USA LIMITED

Defendant and Respondent.

Appeal from the Superior Court for the County of Alameda
Civil Case. No. RG06254576
The Honorable Wynne Carvill, Judge

AMICUS CURIAE REPLY BRIEF ON BEHALF OF THE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

FILED ON BEHALF OF PLAINTIFF/APPELLANT TINA O'DELL

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TO THE HONORABLE PRESIDING JUSTICE and Associate Justices of the Court of Appeal:

The non-profit organization California Employment Lawyers Association respectfully requests permission to file this reply brief as amici curiae, submitted herewith, in support of Plaintiff/Appellant, Tina O'Dell under Rule 8.200 of the California Rules of Court.

I

INTRODUCTION

The Respondent has retained *amicus curiae*, the Employer's Group ("Amicus EG"), to argue against *amicus curiae*, California Employment Lawyers Association ("Amicus CELA") in the instant case. Amicus CELA provides this Reply Brief to respond to several errors in the arguments put forward by Amicus EG.

This Court should reject the novel argument that all Labor Code anti-waiver statutes apply only to prospective, not to retrospective, waivers, an argument with no foundation in law. This Court should recognize that the Legislature has already weighed the public policy favoring waivers and releases against the public policy for paying full wages, and the weight has come down in favor of denying the use of waivers and releases for unpaid wages. This Court should also recognize and follow the reasoning of all but

one federal circuit, that wages owed under the FLSA may only be absolutely waived or released when "supervised" by the agency or court with jurisdiction over those wages.

II

THE LABOR CODE BARS WAIVERS OF OWED WAGES WHETHER SUCH WAIVERS ARE PROSPECTIVE OR RETROSPECTIVE

Respondent's Amicus EG, argues that this Court should sanction waivers of minimum wage and overtime rights, so long as the waivers are retrospective, and not prospective. Amicus EG properly cites the law that prospective waivers of statutorily protected rights render such rights as "nugatory." *County of Riverside v. Superior Court* (2002) 27 Cal.4th 793, 202. Amicus EG, however, improperly implies that the Labor Code provisions that disallow waivers, do allow retrospective waivers.

First, had the Legislature wanted to create the novel distinction proposed by Amicus EG, the Legislature certainly would have made that distinction clear in enacting the Labor Code provisions.

Instead of the language that actually exists, Labor Code §206.5 would have read: "No employer shall require the *prospective* execution of any release of any claim or right on account of wages due ...." Labor Code

§219(a) would have read: "[N]o provision of this article can in any way be contravened or set aside by a private *prospective* agreement, whether written, oral, or implied." Labor Code §356 would have read: "The Legislature expressly declares that the purpose of this article is to prevent fraud upon the public ... and declares that this article ... cannot be contravened by a *prospective* private agreement." Labor Code §1194(a) would have read: "Notwithstanding any *prospective* agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation ... is entitled to recovery in a civil action the unpaid balance of the full amount of the minimum wage or overtime compensation ...." Labor Code §2804 would have read: "Any *prospective* contract or agreement, express or implied, made by any employee to waive the benefits of this article ... is null and void."

In determining what the Legislature intended by wording the Labor Code, it is well-settled that the words of the statute, where clear and unambiguous, end the inquiry. "If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs." *People v. Snook* (1997) 16 Cal.4th 1210, 1215, reaffirmed in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103. Amicus EG's attempt to remake what the Legislature has repeatedly made

clear about such waivers, is simply an attempt at revisionist history.

Next, Amicus EG claims each employee can "protect herself from exploitation by conducting a thorough investigation and obtaining legal advice ... [which will] enabl[e] her to bargain for consideration which she deems be fair." Again, the Labor Codes do not proscribe what is "fair" but rather what is "legal." "Fair" to whom? Has Amicus EG forgotten the laws of this State? Amicus EG has certainly forgotten the determination of our courts that employees never bargain on an equal footing for minimum wages and overtime: "Wages are not ordinary debts ... [B]ecause of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay." *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492, citing from *Pressler v. Donald L. Bren* (1982) 32 Cal.3d 831, 837.

III

WAGE WAIVERS AND RELEASES DIFFER BY STATUTE FROM WAIVERS AND RELEASES UNDER OTHER STATUTES

Amicus EG suggests that Amicus CELA is opposed to all settlements and releases between employers and employees. That simply is not

the case. Amicus CELA merely opposes settlements and releases that contravene the statutes and cause employees to receive less than minimally mandated wages and overtime.

First, Amicus EG argues nothing is wrong with an employer paying less than the required minimum wages or overtime wages, so long as a "release" of claims is executed after the violations occurred. Under Amicus EG's rationale, the employer can still avoid payment of these legally required wages by substituting the "release" for the payment of those wages. This situation recommended by Amicus EG is the exact situation proscribed by the various statutes condemning such private agreements.

Next, while Amicus EG analogizes wage "releases" to other types of contractually permitted waivers and releases, the analogy is inapposite. Employees are free to release their claims and damage calculations under the Fair Employment & Housing Act ("FEHA"), Title VII of the Civil Rights Act ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), and other tort theories. Amicus CELA admits as much. However, none of these statutes contains language like the language at issue here from the California Labor Code.

To be comparable to the Labor Code, the FEHA, Title VII, and ADEA would need to have analogous language such as: "Any contract or

agreement made by an employee to waive the benefits of this statute for less than a jury would determine as the value of the discrimination damages is null and void." However, those statutes, along with the various employment tort laws in California, have no such language. Only the California Labor Code is vested with such language.

Next, Amicus EG argues that the public policy in favor "settlement, avoidance of litigation, and repose" is somehow equal to the public policy favoring payment of minimally mandated wages. The problem with this argument is that the Legislature has already weighed such public policies on waivers and releases against the public policy on wages owed under the Labor Code. And the weight has come down solidly in favor of denying the use of waivers and releases when it comes to unpaid wages.

There is good reason the Legislature has weighed the public policy in favor of wages as much heavier than the policy favoring waivers and releases. "Wages, in turn, are jealously protected by statutes for the benefit of employees." *Boothby v. Atlas Mechanical, Inc.* (1992) 6 Cal.App.4th 1595, 1601. Violations of the Labor Code are misdemeanor crimes, not simply violations of contractual obligations. See for example, Labor Code §206.5; §218; §225; and §354. The obligation to pay wages is not, as Amicus EG would suggest, simply an ordinary contract debt. See *Mamika*

v. Barca infra.

Finally, Amicus EG fails to address the fact that its proposed waivers and releases, when failing to remit required wages, are simply void as against public policy under Civil Code § §1668. "All contracts which have for their object ...violation of law ... are against public policy."

IV

FEDERAL LAW IS CONSISTENT IN PROVIDING THE ANALOGOUS MECHANISM FOR INFORMALLY RESOLVING WAGES OWED

Amicus EG misunderstands Amicus CELA's position with regard to settlements and waivers under the FLSA. Amicus CELA's position is that only waivers and releases "supervised" by the California Div. of Labor Standards Enforcement or the Courts escape the Labor Code proscriptions, because only "supervised" waivers and releases ensure the mandates of the Labor Code are enforced. Unsupervised waivers may always be challenged as null and void, because employers have no self-interest in ensuring employees receive the full wages to which they are entitled.

Amicus EG has misinterpreted the federal cases it purports support its claim that all waivers and releases, not simply those supervised by proper authorities, are valid under the Fair Labor Standards Act ("FLSA").

Amicus EG asserts that *Coventry v. United States Steel Corp.*, 856 F.2d 514, 521 (3rd Cir. 1988) supports its position that all FLSA releases are valid. In that Age Discrimination in Employment Act ("ADEA") case, the question arose as to how much of the enforcement mechanism for the ADEA had been carried over from the FLSA The Third Circuit first noted: "[T]he principal rights that the FLSA was designed to protect - minimum wages and maximum work hours - effect ***a public policy that Congress intended to be absolute.*** Validation of releases that allowed employers and employees to compromise those rights would undermine the statute itself." *Id.* at FN. 8. In dicta, the Third Circuit noted FLSA factual disputes could be resolved by releases, only after the "***rights***" guaranteed by the FLSA were secured. *Id.* [Emphasis added]

Both the *Coventry* case and the *Runyon v. National Cash Register Corp.*, 787 F.2d 1039, 1044 (6th Cir. 1986) case dealt with the issue of ADEA discrimination claims. Their comments about the FLSA were dicta. *Runyon*, however, did point out that FLSA settlements could occur, so long as the rights under the FLSA were secured. "In Barrentine and Alamo the Court reiterated the well known problems arising from the unequal bargaining positions of employers and employees, 105 S.Ct. at 1962, and 'sub-standard wages and oppressive working hours," 450 U.S. at 739, 101 S.Ct.

at 1444. FLSA cases implicate these concerns to a significantly greater degree than do ADEA cases." The *Runyon* Court pointed out that their Plaintiff was not one of those intended to be protected by the FLSA, so the FLSA restrictions on waivers and releases should not apply.

In contrast to all the other federal circuits, only the Fifth Circuit Court of Appeals has stood alone in holding bona fide factual FLSA disputes can be resolved via private settlement waivers and releases. Amicus EG's cited case, *Martinez v. Bohls Bearing Equip.Co.*, 361 F.Supp.2d 608 (W.D. Texas 2005) details that judge's summary of the Fifth Circuit's history in dealing with this issue. As Judge Martinez noted, "Unlike in the Fifth Circuit cases just discussed, cases in other Circuits have found the legislation amending the FLSA as establishing a mandatory process for compromising FLSA claims accruing after May 14, 1947." *Martinez* at 627. With regard to the *Runyon* case, Judge Martinez noted, "The [*Runyon*] Court refrained, however, from specifically stating that it viewed purely private compromises under the FLSA as permissible. The Court noted that the purposes behind the enactment of the ADEA and the FLSA were 'obviously different'..."

The unpublished case of *Morris v. Penn Life Ins. Co.*, 1989 U.S. Dist. LEXIS 1690 (D. Pa. Feb. 21, 1989), decided under the federal Equal

Pay Act, should also not control. In this unpublished decision, the court elected to followed the reasoning in *Runyon*. That Judge's reasoning was that since Plaintiff Morris (like the Plaintiff in *Runyon*) was not among those wage earners whose wages Congress intended to protect by the FLSA, the requirements for a "supervised" FLSA release simply did not apply.

In sum, all the federal circuits reviewing wages owed under the FLSA, except for the Fifth Circuit (covering Texas, Louisiana, and Mississippi), have held that waivers and releases regarding wages owed may be challenged as ineffective. Amicus CELA urges this court to follow the reasoning from these non-Firth Circuit Courts.

V

CONCLUSION

Prospective versus retrospective waivers are not distinguished under California's Labor Code, and the Legislature has weighed public policy favoring repose against public policy regarding payment of full wages. The weight has come down in favor of paying full wages. The reasoning of all but one federal circuit, that wages owed under the FLSA may only be absolutely waived or released when "supervised" by the agency or court with jurisdiction over those wages, should form the basis for the use of wavers and releases in California.

Dated: September 10, 2007

Respectfully submitted,

By:_____
Richard D. Schramm
Employment Rights Attorneys
Attorney for Amicus Curiae,
California Employment Lawyers Association

CERTIFICATE OF COMPLIANCE

PURSUANT TO RULE OF COURT 8.204(c)(1)

I, Richard D. Schramm declare:

1. I am an attorney at law duly licensed to practice before all the Courts of the State of California and am counsel with Employment Rights Attorneys, attorneys of record for *Amicus Curiae* California Employment Lawyers Association.

2. According to the computer program used to prepare this brief, the word count of this brief including footnotes but excluding this certificate, is 2,065 words.

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

EXECUTED this September 10, 2007, at Santa Clara County, California.

Richard D. Schramm

PROOF OF SERVICE

I am employed by the Law Offices of EMPLOYMENT RIGHTS ATTORNEYS, at 46 South First Street, San Jose, CA 94113. I am over the age of 18 and not a party to the within action.

On **September 10, 2007,** following ordinary business practice, I caused the following document(s):

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FILED ON BEHALF OF PLAINTIFF/APPELLANT TINA O'DELL

to be served on the interested parties in this action, by delivering a true and correct copy to the following person(s) in the following manner:

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Sarah Osterhaus