No. S100136

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Korea Supply Company,

Plaintiff and Appellant,

v.

Lockheed Martin Corporation, Lockheed Martin Tactical Systems, Inc., and Linda Kim,

Defendants and Respondents.

APPLICATION AND PROPOSED AMICUS BRIEF OF WASHINGTON LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF DEFENDANTS LOCKHEED MARTIN CORPORATION AND LOCKHEED MARTIN TACTICAL SYSTEMS, INC.

From a Decision of the California Court of Appeal
Second Appellate District, Division Four, No. B136410

James C. Martin (Cal. Bar No. 83719)
Christina J. Imre (Cal. Bar No. 96496)
Michael K. Brown (Cal. Bar No. 104252)
CROSBY, HEAFEY, ROACH & MAY
Professional Corporation
355 South Grand Ave., Suite 2900
Los Angeles, CA 90071
Telephone: (213) 457-8000
Facsimile: (213) 457-8080

Daniel J. Popeo
Richard A. Samp
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, D.C. 20036
Telephone: (202) 588-0302

Attorneys for Amici Curiae Washington Legal Foundation and National Association of Independent Insurers

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APPLICATION TO FILE BRIEF OF AMICUS CURIAE

AND STATEMENT OF INTEREST OF AMICI CURIAE

Pursuant to California Rule of Court 13, the Washington Legal Foundation (WLF) and the National Association of Independent Insurers (NAII) hereby request permission to file the accompanying amicus curiae brief.

WLF is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide, including many in California. WLF regularly appears as amicus curiae in cases raising important legal questions affecting American businesses. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *BMW v. Gore*, 517 U.S. 559 (1996); *Lockheed Martin Corporation v. State of California*, S088458 (2000); *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429 (2000); *Artigilio v. Corning Inc.,* 18 Cal. 4th 604 (1998); *America Online, Inc. v. Superior Court*, 90 Cal. App. 4th (2001), *review denied*, 2001 Cal. LEXIS 7051 (2001); *Ruskind v. Morgan Stanley Dean Witter & Co.,* 80 Cal. App. 4th 345 (2000), *review denied*, 2000 Cal. LEXIS 6583 (2000).

WLF's Legal Studies Division also publishes critical analyses on important issues in the development of the law, including articles dealing with California's unfair competition statutes. *See, e.g.,* Sacks & Fogel*, California High Court Frowns On Nationwide Class Actions* (WLF Legal Backgrounder) (June 1, 2001); Crudo, *Ruling Offers Hope*

To Targets Of California's "Little FTC Act" (WLF Legal Opinion Letter) (Jan. 7, 2000); Axelrad & Perrochet, *California's "Little FTC Act": Benefitting Consumers, Or Lawyers?* (WLF Legal Backgrounder) (Dec. 4, 1998); Stern, *State High Court Can Rein In California's "Little FTC Act"* (WLF Legal Opinion Letter) (Dec. 4, 1998).

NAII is a national insurance trade association representing more than 690 property and casualty insurance companies across the country. NAII member companies range in size from large national companies to regional companies to companies writing in a single state. The purposes of NAII are to promote the economic, legislative and public standing of its members and the insurance industry; to provide a forum for discussion of problems which are of common concern to its members; to keep members informed of regulatory and legislative developments; and to serve the public interest through appropriate activities including the promotion of safety and security of persons and property. NAII is headquartered in Des Plaines, Illinois and maintains four regional offices and an office in Washington, D.C. NAII also retains legislative counsel in every state.

NAII has more than 690 members whose insurance writings represent 31 percent of the country's total property and casualty market. In 2000, NAII had 217 member companies writing insurance in the state of California accounting for more than 28 percent of the total insurance business in California. This amounts to more than $10 billion in premium in the state. In 2000, NAII had 75 member

companies writing multiple peril insurance in the state of California for 13.5 percent of that total business. This amounts to more than $408 million in premiums in the state. Thirty-eight NAII members are domiciled in California. Given this presence in the California marketplace, NAII and its members have a substantial interest in the issues presented in this case.

The growing number of published opinions implicating and analyzing California's Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200 et seq.) underscores its ever-widening impact. With liberal standing requirements and relaxed liability standards, the statute is no favorite of California's businesses. While businesses appreciate its competitive and consumer protection functions, the statute has evolved into a vehicle promoting vexatious and harassing litigation that is costly to resolve. *See* Cranston & Phelps, *California's Consumer Protection Law Stacks The Deck Too Heavily Against Business*, The Recorder (April 7, 1999); *Bounty Hunting*, California Law Business (June 30, 1997); Fellmeth, *Unfair Competition Act Enforcement By Agencies, Prosecutors, And Private Litigants: Who's On First?* 15 Cal. Regulatory L. Rptr. 1 (Winter 1995); Chilton & Stern *California's Unfair Business Practices Statutes: Settling The "Nonclass Class" And Fighting The "Two Front War,"* 12 Civ. Lit. L. Rep. 95

(CEB 1990); Howard, *Former Civil Code Section 3369, A Study In Judicial Interpretation,* 30 Hast. L. J. 703 (1979).

In *Kraus v. Trinity Management Services, Inc.,* 23 Cal. 4th 116 (2000), and *Cortez v. Purolator Air Filtration Products Co.,* 23 Cal. 4th 163 (2000), this Court undertook to define the scope of relief available under one of the UCL's remedial provisions – Cal. Bus. & Prof. Code § 17203. In doing so, this Court held that in a non-class action brought under the UCL, monetary relief under Section 17203 is limited to the restoration of money or property to those from whom the money or property was unlawfully acquired or to whom the money or property is lawfully owed. The court below construed Section 17203 to provide for a disgorgement remedy that goes beyond the plain language of the statute and misperceives the import and effect of this Court's reasoning in *Kraus* and *Cortez*.

Under the lower court's ruling, disgorgement of money or property may be ordered without regard for whether the proceeding is brought as a class action or whether the plaintiff had an ownership interest in the money or property to be disgorged. Further, no apparent limitations on this unprecedented right to disgorgement are set forth in the court's opinion. This disgorgement remedy thus

materially expands the scope of relief available under Section 17203 and contravenes the well-established proposition that damages are not available under the UCL. Given the UCL's liberal standing requirements, the spectre of multiple lawsuits in a variety of contexts seeking damages disguised as "disgorgement" is deeply troubling. The result reached below accordingly presents a severe and unwarranted economic threat to companies doing business in California.

Amici have reviewed the parties' merits briefs in this Court, as well as in the Court of Appeal. They also have reviewed the Petition for Review, the Answer to the Petition, and the various letters filed with this Court in conjunction with the petition. Amici believe that their participation can assist the Court by adding a further perspective on the implications and effects of the disgorgement remedy erroneously adopted by the Court of Appeal.

Dated: June 4, 2002.

Respectfully submitted,

WASHINGTON LEGAL FOUNDATION

CROSBY, HEAFEY, ROACH & MAY
Professional Corporation

By: _____
James C. Martin
Attorneys for Amici Curiae

WLF and National Association
of Independent Insurers

BRIEF OF AMICI CURIAE

I

INTRODUCTION

California's Unfair Competition Law (Cal. Bus & Prof. Code §§ 17200 et seq.) has a long-established role in protecting competitive and consumer interests. *See Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 209 (1983); *Barquis v. Merchants Collection Assn.*, 7 Cal. 3d 94, 109-11 (1972); *South Bay Chevrolet v. General Motors Acceptance Corp.,* 72 Cal. App. 4th 861, 877-78 (1999) (and cases cited); *see also* Papageorge*, The Unfair Competition Statute: California's Sleeping Giant Awakes, 4 Whit. L. Rev. 561 (1982).*

In considering the reach and effect of this statutory scheme, this Court has noted that particular deference must be paid to the express language of the UCL's code sections themselves. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.,* 17 Cal. 4th 553, 577-78 (1998). This statutory language is the most persuasive indication of the Legislature's intent in enacting of the UCL. *See Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4th 116, 128-29 (2000).

One issue presented for review here concerns the proper construction of a remedial provision in the UCL — Cal. Bus. & Prof. Code § 17203. More specifically, the issue focuses on the scope of the monetary relief authorized by Section 17203 in a non-class action. The court below held that, consistent with the UCL's deterrent purpose, Section 17203 should be construed to provide for

disgorgement of any ill-gotten gains to any plaintiff who could demonstrate that those gains had been obtained in violation of the UCL. That was so whether the case was brought as a class action, or whether any money or property actually had been unlawfully acquired from the plaintiff, or whether the plaintiff purported to represent anyone from whom the money or property had been unlawfully acquired. The court below found direct support for its expansive disgorgement remedy in this Court's opinion in *Kraus*, as well as its companion opinion in *Cortez v. Purolator Air Filtration Products Co.,* 23 Cal. 4th 163 (2000).

But closer analysis reveals that the lower court's reasoning is flawed in two important respects.

First, notwithstanding the UCL's deterrent purpose, Section 17203 expressly limits the monetary relief available in representative UCL actions like this one.[1] Consistent with Section 17203's plain language, in a representative action, monetary restitution can only be made to those from whom money or property was unlawfully acquired and thus, by parity of reasoning, to those to

[1] Section 17203 permits a court: "to make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition. . . ." The section also empowers a court: "to make such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."

whom such money or property should be lawfully restored. *See* n.1 *supra.*

Second, in *Kraus* and *Cortez*, this Court did not purport to hold that Section 17203 compelled disgorgement of any ill-gotten gains irrespective of whether those gains were shown to have been acquired from the prospective plaintiff. On the contrary, in both *Kraus* and *Cortez,* this Court declined to extend the scope of relief available in a representative action beyond restoring money or property to those who had a direct ownership interest in the money or property.

Section 17203's plain language accordingly cannot be reconciled with the disgorgement remedy authorized by the court below. It is undisputed that the disgorgement remedy at issue here *does not* serve to restore any money or property unlawfully obtained from the plaintiff. And, the reality is that the defendants here *did not*, by virtue of any allegedly unlawful practice, obtain *any* money or property from the plaintiff.

Plaintiff nevertheless argues that if this more limited construction of Section 17203 is embraced, defendants will escape with their ill-gotten gains and profit from their duplicitous conduct. Accordingly, the avowed deterrent purpose of the UCL must be brought to bear and the disgorgement remedy should be adopted. This rationale does not, however, provide a colorable basis on which to fashion a disgorgement remedy particularly in light of the limiting

language in Section 17203. Under the guise of construction, courts are not at liberty to add to or amend a statute's plain meaning. Further, adhering to Section 17203's plain language in determining the relief available does not, as plaintiff would have it, somehow conflict with the UCL's deterrent purpose. The UCL's deterrent purpose instead must be determined, not by implication, but rather from the statutory language itself.

Section 17203 accomplishes the Legislature's intention by restoring money or property to those from whom it was unlawfully acquired. In the absence of further legislative directive, the purpose of the statutory scheme can be extended only as far as its language will allow. This Court prudently embraced that view in *Kraus* and *Cortez* and, for a number of sound legal and policy reasons highlighted below, amici urge it to embrace that view again here.

II

ARGUMENT

A. The UCL Provides Ancillary Restitutionary Relief Only To Those From Whom Money Or Property Has Been Unlawfully Acquired In Violation Of The Provisions Of The Statute

In attempting to defend the result reached below, plaintiff primarily extracts language from this Court's opinions emphasizing the considerable equitable powers courts enjoy in dealing with conduct

violative of the UCL. Plaintiff's reliance on the broad language in these opinions is understandable, but ultimately misplaced. Cases are not authority for propositions not directly addressed or actually considered. E.g., *Trope v. Katz*, 11 Cal. 4th 274, 284 (1995). With that self-limiting principle in mind, a careful reading of the cited opinions reveals that none of them expressly hold that the expansive disgorgement remedy adopted below falls within Section 17203's express terms.

For example, *People v. Superior Court (Jayhill),* 9 Cal. 3d 283 (1973), among the earliest of plaintiff's cited decisions, does not support the remedy plaintiff seeks. *Jayhill* involved unfair business practices employed in the sale of encyclopedias. In response to a complaint brought by the Attorney General, the trial court authorized the pursuit of injunctive relief, but struck all other forms of relief sought, including a refund for the victimized customers. This Court reversed that order, finding that the broad equitable powers conferred by the UCL encompassed the ability to restore the status quo -- which this Court then defined as the power to order defendants to "make restitution to the customers who had been defrauded. [Citations.]" *Id*. at 287.

Jayhill was followed a few years later by another of plaintiff's cases of choice, *Fletcher v. Security Pacific Nat. Bank*, 23 Cal. 3d 442 (1979). *Fletcher* too is more limited than plaintiff implies. The principal issue raised in *Fletcher* concerned the proof necessary to

obtain restitutionary relief for class members who allegedly had paid unlawful interest rates. The defendant bank argued that in order to obtain restitution under the UCL, each customer had to prove he or she had been defrauded by the allegedly unlawful practice. This need for individualized proof, in turn, compelled the rejection of a class action to resolve the controversy. This Court disagreed.

This Court reasoned, as it had in *Jayhill*, that the UCL conferred broad authority on trial courts to deter unlawful practices. This included the ability to compel return of money obtained in violation of the UCL. *Id*. at 450. Given the procedural economies to be achieved in a class action, this Court then refused to require individualized proof by each prospective plaintiff before restitution of the money could be ordered. *Id.* at 451-54. *Fletcher*, like *Jayhill*, thus does not endorse the expansive disgorgement remedy urged by plaintiff. It too described the authorized remedy only in terms of money that had been unlawfully acquired from the plaintiff or from those whom the plaintiff purported to represent.

As plaintiff correctly notes, after *Fletcher***,** this Court has continued to reiterate the UCL's broad deterrent purpose to protect consumers and businesses alike from unlawful competitive practices. Yet, none of these cases called on this Court to determine the scope of the monetary relief available consistent with the language in Section 17203. Rather, these cases simply made clear that a right to restitution did exist by virtue of the language of Section 17203. *See*

ABC International Traders, Inc. v. Matsushita Elec. Corp. of America, 14 Cal. 4th 1247, 1269-71 (1992) (rejecting proposition that restitutionary relief is not available under UCL in the absence of request for injunctive relief); *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1266-72 (1992) (quoting *Fletcher* and explaining why the costs of a restitutionary remedy under UCL are not insurable); *Committee on Children's Television, Inc.*, 35 Cal. 3d at 208-11 (citing *Fletcher* and noting that courts can order restitution under UCL to prevent employment of unfair business practices).

Prior to *Kraus* and *Cortez*, however, several lower courts did wrestle with issues related directly to the scope of the monetary relief available. One line of authority placed particular significance on Section 17203's reference to the restoration of money or property unlawfully acquired [*see* n.1 *supra*] in defining the monetary relief available:

> We think it significant that the Legislature chose to use the word 'restore' in labeling that which an offending defendant may be ordered to do. The verb, as defined by the Oxford English Dictionary, means '[t]o give back, to make return or restitution of (anything previously taken away or lost).' [Citation.] Taken in the context of the statutory scheme, the definition suggests that section 17203 operates only to return to a person those *measurable amounts* which are *wrongfully taken* by means of an unfair business practice.

Day v. AT&T Corp., 63 Cal. App. 4th 325, 338-39 (1998) (emphasis in original).

Day involved the allegedly deceptive practice of rounding up charges on phone cards. The Court of Appeal held that while the practice might be enjoinable, there was no lawful basis to force the defendant to disgorge their allegedly illicit profits from the practice. In response to plaintiffs' claims that ordering restitution would serve to deter further unlawful conduct, the court reasoned that "in the absence of a measurable loss the section [17203] does not allow the imposition of a monetary sanction merely to achieve this deterrent effect. Nor is the section intended as a punitive provision, though it may have that sting when properly applied to restore a victim to wholeness."[2] *Id*. at 339 (footnote omitted).

Other cases placed greater reliance on the UCL's deterrent purpose, also reflected in Section 17203. Consistent with that emphasis, these courts extended the monetary relief beyond restoring money or property wrongfully acquired, to disgorgement of any allegedly ill-gotten gains. *See People v. Thomas Shelton Powers, M.D., Inc.*, 2 Cal. App. 4th 330, 340-41 (1992) (relying on language from *Fletcher* to authorize the disgorgement of profits obtained by selling moderate income housing at excessive prices); *People ex rel.*

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[2] *See MAI Systems Corp v. UIPS*, 856 F. Supp. 538, 542 (N.D. Cal. 1994) (restitutionary remedy only available to defendant's over-charged customers); *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 757-58 (N.D. Cal. 1993) (restitution requires that the defendant have taken something of value from the plaintiff); *see also Prata v. Superior Court*, 91 Cal. App. 4th 1128, 1139 (2001) (plaintiff had a right to seek restitution of finance and interest charges if any were incurred by him).

Smith v. Parkmerced Co., 198 Cal. App. 3d 683, 692-93 (1988) (relying on language from *Jayhill* to support refund of security deposits for tenants who could not be located to an independent tenants organization).

In *Powers*, the defendant objected to the disgorgement remedy because that remedy, as ordered, went beyond the return of funds to specifically identifiable victims of the alleged practice. The appellate court found this distinction to be irrelevant. Under what it perceived to be the mandate of the controlling law, the court reasoned that the alleged wrongdoer had to be prevented from retaining any illicit gains. The only open question was where the profits should go. *Powers*, 2 Cal. App. 4th at 343.

These disparate lines of reasoning left lower courts in a quandary. On the one hand, cases like *Day* limited the monetary relief available under Section 17203 to the restoration of money or property to those from whom the money or property had been unlawfully obtained. On the other, cases like *Powers* seemingly authorized orders forcing a defendant to disgorge any money or property allegedly obtained in violation of the UCL, without regard to whether the money or property would be restored to a person from whom it had been unlawfully obtained.

In *Kraus* and *Cortez,* this Court stepped in and shed some much needed light on the scope of the Court's equitable powers to award monetary relief under Section 17203.

In *Kraus*, this Court confronted a UCL representative action brought by tenants to recover security deposits. The trial court ordered restitution to the tenants and, as had been done in *Powers*, without class certification, disgorgement of the remaining unlawfully collected amounts into a fluid recovery fund. On appeal and in this Court, the defendants argued that Section 17203 did not authorize any form of restitutionary relief beyond restoration of money or property to those from whom it had been unlawfully obtained.

In addressing this dispute over the scope of the available remedy, this Court first noted a fundamental difference between "restitution" and "disgorgement." "Restitution" would compel a defendant to return money or property obtained by an unfair business practice to those from whom it was taken. *Kraus,* 23 Cal. 4th at 126-27. "Disgorgement," in contrast, could compel a defendant to surrender all money or property (including profits) obtained through an unfair business practice even though it was not restored to the person from whom it was obtained or others similarly situated. *Id.*

Having noted the difference, this Court went on to more narrowly frame the issue before it: "We have not been asked before to consider whether a fluid recovery remedy, a remedy that is

necessary only when a defendant must disgorge money that is not to be returned to the persons from whom they were obtained, is authorized by the UCL."[3] *Kraus*, 23 Cal. 4th at 127. The Court found its answer in the language of the statute: "The Legislature has not expressly authorized fluid recovery in UCL actions, where restitution to a person in interest is the only monetary remedy for violation of the UCL described in section 17203." *Id.* at 128.

Pivotal to this Court's reasoning was Section 17203's use of the phrasing "to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition". *Kraus*, 23 Cal. 4th at 129. Given that phrasing, this Court found that restitution "is the only monetary remedy expressly authorized by section 17203." *Id.* at 129. Further, this Court elsewhere had defined "restitution" as limited to the "return of money obtained through an unfair business practice to those persons interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person." *Id.* at 126-27.

Section 17203's remedial language had not, as this Court further observed, been extended further by any of its prior decisions,

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[3] In making this observation, this Court took note, as amici do here, of the limited reach of its prior opinions. *Kraus*, 23 Cal. 4th at 131-34. This Court made similar observations in *Cortez*. *Cortez*, 23 Cal. 4th at 175-77.

most notably *Jayhill* and *Fletcher*. *Jayhill* authorized restitution only to those consumers shown to have been defrauded by the unlawful practice at issue. *Fletcher* too defined the statute's remedial purpose in light of the restoration of money to those from whom it had been wrongfully acquired. *Kraus*, 23 Cal. 4th at 132-34. And while noting that more expansive orders for disgorgement may have a greater deterrent force, this Court refused to expand the language of Section 17203 based solely on that deterrent purpose:

> In sum, the Legislature has not expressly authorized monetary relief other than restitution in UCL actions, but has authorized disgorgement into a fluid recovery fund in class actions. Although the Legislature is well aware of the distinction between class actions and representative actions, it has not done so for representative UCL actions. Inasmuch as the Legislature has spoken, any further extension of the fluid recovery remedy should come from the Legislature, not as the dissent argues, from this court.

Kraus, 23 Cal. 4th at 137.

Cortez involved a former employee's action against her former employer for failure to pay overtime wages. The primary issue concerned whether unlawfully withheld wages fell within the scope of "restitution" as authorized by Section 17203. This Court construed the Section's scope the same way it had in *Kraus*. Thus, the concept of "restitution" again was defined in terms of restoring money or property to someone from whom it had been unlawfully acquired. *Cortez,* 23 Cal. 4th at 177. This Court then explained that withheld,

but earned, wages fit within this definition because they were lawfully owed to the employee. By ordering restitution of the withheld wages, a court simply was restoring those wages to one to who had an ownership interest in them. *Id*. at 177-78.

But just as it had in *Kraus*, this Court refused to extend Section 17203's remedial scope beyond the "return" of the wages to those to whom they were owed. When the plaintiff argued for a disgorgement remedy for the benefit of non-parties, this Court responded that any sort of fluid recovery is not authorized in a UCL action that is not certified as a class action. More specifically, it then found that: "For that reason the trial court may not make an order for disgorgement of all benefits defendant may have received from failing to pay overtime wages. It may only order restitution to persons from whom money or property has been unfairly or unlawfully obtained." *Cortez*, 23 Cal. 4th at 172.

Kraus and *Cortez* will no doubt be subject to future judicial construction. But on one point both cases provide a clarion message: In an individual or representative action brought under the UCL, monetary relief under Section 17203 is limited to the restoration of money or property to one from whom it has been unlawfully obtained or to one to whom such money or property is lawfully owed. No further monetary relief is either authorized or warranted. *See Watson Laboratories, Inc. v. Rhone-Poulene Rorer*, 178 F. Supp. 2d 1099, 1121-22 (C.D. Cal. 2001) (so construing *Kraus* and *Cortez* and

declining to award lost profits damages under Section 17203 as a form of disgorgement evidenced by unjust enrichment).

The court below nevertheless construed Section 17203 to allow disgorgement of money or property without regard to whether that money or property had been unlawfully acquired from the plaintiff. In fact, the complaint's affirmative allegations here demonstrate that the monetary relief sought had not been obtained from the plaintiff. As support for this construction, the court below primarily looked to that portion of *Kraus* where this Court defined the concept of "disgorgement." What the court below overlooked was the import of this Court's reasoning *after* setting forth this definition.

Once it had defined "disgorgement," this Court thus went on to make it clear that disgorgement is not even relevant under the UCL outside of the confines of a class action. Further, as far as representative actions like this one are concerned, this Court went on to make it equally clear that the monetary relief available is confined -- by virtue of Section 17203's plain language -- to the return of money or property to a person or entity from whom it was unlawfully acquired.

Cortez, in turn, did not expand Section 17203's reach. There, this Court brought unlawfully withheld wages within the definition of "restitution." But having made that determination, it also limited the right to restitution in the same fashion as it had in *Kraus*

(return of money or property to those from whom it was unlawfully acquired). It also found, as it had in *Kraus*, that restitution as so defined was the only monetary relief authorized by Section 17203. Neither case accordingly can be read to endorse the disgorgement remedy adopted below. The reasoning in both cases expressly rejects such relief.

B. The Language Of Section 17203 Should Not Be Expanded Beyond What The Legislature Plainly Intended To Authorize The Disgorgement Remedy Adopted By The Court Of Appeal

Plaintiff does not make any serious attempt to justify the disgorgement relief sanctioned below under Section 17203's language dealing with the restoration of unlawfully acquired money or property. Plaintiff instead discounts that language and emphasizes the broad equitable powers granted to fashion injunctive or other orders to prevent unfair competition. (*See* n.1 *supra*) When those equitable powers are combined with the UCL's deterrent purpose, so the argument goes, trial courts should be given the flexibility to order disgorgement so that individuals or entities will not profit from their unlawful activities.

But this Court rejected those very same overtures in *Kraus* and *Cortez* as a basis on which to expand the monetary relief authorized by Section 17203. For a number of very sound legal and

policy reasons, amici urge this Court to follow that same path and reject the disgorgement remedy adopted below.

First, there is no uncertainty here. The UCL is an integrated statutory scheme and its construction cannot be divorced from the specific terms of Section 17203. Section 17203, moreover, specifically limits a trial court's remedial powers where an award of monetary relief is concerned. That sort of specific directive is controlling [*Digital Biometrics, Inc. v. Anthony*, 13 Cal. App. 4th 1145, 1160 (1993)], including with respect to the monetary remedy provided. *See Anderson v. California Faculty Ass'n,* 25 Cal. App. 4th 207, 217 (1994) ("where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies").

Second, there is no ambiguity here. The limit on the monetary relief authorized by Section 17203 – i.e., to the restoration of money or property to those from whom it was unlawfully acquired -- is dictated by the Section's express terms. The fact that the express language does not provide for disgorgement is no reason to disavow it. On the contrary, the plain language of the statute should be credited in this context as it would be in any other. *Stahl v. Wells Fargo Bank, N.A.,* 63 Cal. App. 4th 396, 402 (1998) (in looking at the language of a statute, the Legislature is perceived to have "meant what it said"; that is why a statute's plain meaning must govern); *Wilson v. Safeway Stores, Inc.*, 52 Cal. App. 4th 267, 271 (1997) (in determining the impact of a statute's plain language, courts "should

not speculate that the Legislature meant something other than what it said").

Third, although the UCL is remedial in purpose, there is no "remedial statute" exception that vitiates a statute's otherwise plain meaning. *See Simpson v. Unemployment Ins. Comp. App. Bd.*, 187 Cal. App. 3d 342, 351 (1986) ("Liberality of interpretation cannot accomplish an end outside the terms of the statute, however desirable such a result might be.") Thus, even when a statute is to be liberally construed, a preference for liberal construction cannot override or enlarge its plain meaning. *See Apartment Association of Los Angeles County, Inc. v. City of Los Angeles*, 24 Cal. 4th 830, 844-45 (2001); *Estate of Tkachuk*, 73 Cal. App. 3d 14, 18 (1977).

There is, moreover, no "policy implementation" exception to the plain meaning rule either. Where the Legislature has expressly addressed an issue or problem, a court "cannot enlarge the plain terms of the statute in pursuit of [an] underlying policy." *Cathay Bank v. Fidelity National Title Ins Co.*, 46 Cal. App. 4th 266, 271 (1996); *accord San Diego Commerce v. San Diego Daily Transcript*, 40 Cal. App. 4th 1229, 1235 (1995); *Grubb & Ellis v. Bello*, 19 Cal. App. 4th 231, 239 (1993).

Nor is there some reservoir of "equitable" powers that allows a court to expand a limited legislative directive. "Once the Legislature has evidenced an intent to comprehensively define the

contours of a particular field. . . such complex policy determinations must plainly remain beyond the reach of [the courts'] equitable jurisdiction. [Citation.]" *Williams v. City of Belvedere*, 72 Cal. App. 4th 84, 93 (1999).

These various aspects of judicial restraint are a fundamental tenet of the doctrine of separation of powers. *See Stahl*, 63 Cal. App. 4th at 402 (and cases cited). Thus, under the guise of construction, courts should not add to or subtract from what the Legislature intends. *See Loan Ass'n v. City of Los Angeles,* 11 Cal. 4th 342, 349-51 (1995); *Wells Fargo Bank v. Superior Court*, 53 Cal. 3d 1082, 1097-99 (1991). Whatever "may be thought of the wisdom, expediency or policy" of a legislative act, a court has "no power to rewrite the statute to make it conform to a presumed intention that is not expressed. [Citation.]" *County of Santa Clara v. Perry*, 18 Cal. App. 4th 435, 446 (1998); *accord Kleitman v. Superior Court*, 74 Cal. App. 4th 324, 334 (1999).

So it should be here. Given the express limitations on monetary relief built into Section 17203, there should be no impetus to go further and craft a disgorgement remedy the Legislature did not see fit to provide. Rather, the plain language of the Section should be adhered to just as *Kraus* and *Cortez* command. Going further not only risks violation of the separation of powers principle, but it also risks undermining what the Legislature actually intended as far as the remedial scope of Section 17203 is concerned.

As this Court has recognized, the UCL is not an all-purpose substitute for contract or tort causes of action, and therefore should not be expanded to promote recovery beyond its intended reach. *Cortez,* 23 Cal. 4th at 173. Here, the impetus for plaintiff's disgorgement remedy is a lost business opportunity for which it wants to be paid. But relabeling that lost opportunity as an ill-gotten gain purportedly subject to disgorgement does not change its essence. "Compensation for a lost business opportunity is a measure of damages and not restitution to the alleged victims." *MAI Systems Corporation,* 856 F. Supp. at 542. Yet, damages "are not available under Section 17203." *Cortez*, 23 Cal. 4th at 173 (and cases cited). Plaintiff thus invites this Court to accomplish indirectly precisely what the Legislature refused to allow directly. *See Bank of the West,* 2 Cal. 4th at 1266-73 (refusing to characterize a restitutionary award under Section 17203 as "damages" in order to promote insurability); *Baugh,* 828 F. Supp. at 957-58 (refusing to permit emotional distress damage claim to be labeled as "restitution" and made recoverable under Section 17203).

Expanding the statute to encompass the disgorgement remedy recognized below also carries serious consequences for the orderly development of law. This Court has taken pains in a variety of contexts to set limits on the elements of business tort theories. *See* e.g., *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85, 102-03 (1995) (limiting recovery for allegedly tortious breach of contract based on the need for stability and predictability in commercial affairs

and because of potential for excessive tort damage recoveries); *Applied Equip. Corp. v. Litton Saudi Arabia, Ltd.,* 7 Cal. 4th 503, 520 (1994) (rejecting tort liability against a contracting party for inducing breach of contract in part because the imposition of such liability could deprive businesses of the opportunity to respond to changing economic conditions or make them reluctant to enter contracts); *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1106 (1993) ("fraud on the market" theory rejected in part because it is "important that businesses be freed from potential liabilities of infinite duration in order that corporations may determine with some reasonable certainty what their financial situation is as of any given point of time."). That work will be undone if the disgorgement remedy is authorized here. Given the UCL's liberal standing requirements and relaxed liability standards, plaintiffs will be incentivized to recast their traditional theories (breach of contract and the like) as UCL violations. They will then pursue their damage claims as some form of disgorgement of ill-gotten profits or gains.

The problem is compounded because the disgorgement remedy authorized below has no apparent limitations. It invites lawsuits by any member of the public (consistent with the UCL's broad standing provisions) to force a targeted defendant to part with any money or property that can be described as having been unlawfully obtained. There is no requirement that the money or property have come from the prospective plaintiff in the first instance. Nor is there any limit on the number of times the remedy can be

sought or any limit on the monetary relief available. The spectre of multiple disgorgement actions brought by those with no connection to the alleged wrong seeking to be paid some undefined measure of purportedly ill-gotten gains is irrational and unfair. This sort of unprincipled wealth transfer is foreign to our system of jurisprudence and raises substantial constitutional concerns. No matter what California's interest in regulating unfair competition, repetitive and unlimited disgorgement awards would go too far. *Cf. Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18, 113 L. Ed. 2d 1, 19-20 (1991) (unlimited jury or judicial discretion in fixing of punitive damages "may invite extreme results that jar one's constitutional sensibilities"); *and see BMW of North America v. Gore,* 517 U.S. 559, 574, 585, 134 L. Ed. 2d 809, 826, 831 (1996) (elementary constitutional notions of fairness dictate that an individual receive notice of the severity of state-imposed punishment); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430, 432, 129 L. Ed. 2d 336, 348, 350 (1994) (abrogation of traditional common law protections raises a presumption of unconstitutionality under the Due Process Clause).

Given these ramifications, perhaps the obvious bears repeating: the proposed disgorgement remedy compels a drastic change in the statutory language and thereby effects a change in the law. Because this change necessarily invokes "complex policy choices affecting all of society," it should be left to the Legislature. *Moore v. Regents of Univ. of Cal.* 51 Cal. 3d 120, 147 (1990), *cert. denied*, 499 U.S. 936 (1991). Moreover, where, as here, the right to

relief is already governed by statute, *Moore*'s admonition supporting judicial deference carries the greatest force:

> As a general rule, questions of public policy are for the legislative branch to determine; the courts may not declare public policy when the legislature has spoken on the subject. [Citation.] "[W]hether the Legislature has adopted what we might think to be the wisest and most suitable means of accomplishing its objects," is not the court's concern. [Citation.]

Riley v. Southwest Marine, Inc., 203 Cal. App. 3d 1242, 1258 (1988); *accord Rosas v. Dishong*, 67 Cal. App. 4th 815, 823 (1998) ("it is for the Legislature, not the courts, to pass on the social wisdom of an enactment. And, if there is a flaw in the statutory scheme, it is up to the Legislature, not the courts, to correct it. [Citation]").

The UCL is and will remain a meaningful consumer and competitive protection tool without expanding it to include an unmanageable disgorgement remedy that the Legislature wisely elected not to provide. Amici urge this Court to reject that remedy and keep Section 17203's provision for monetary relief within its intended bounds.

III

CONCLUSION

The UCL's remedial purpose is amply fulfilled by its injunctive and restitutionary features. To the extent that plaintiff

wants redress for its lost business opportunity, the answer is not to amend the statute. Instead, plaintiff must look elsewhere to other causes of action. In the meantime, the expansive disgorgement remedy recognized below should be rejected.

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Respectfully submitted,

WASHINGTON LEGAL FOUNDATION

CROSBY, HEAFEY, ROACH & MAY
Professional Corporation

By: _____
James C. Martin
Attorneys for Amici Curiae
Washington Legal Foundation
and National Association of
Independent Insurers

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