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Supreme Court of California
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FILED WITH PERMISSION

Case No. S262634

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT ZOLLY, RAY MCFADDEN AND STEPHEN CLAYTON

Plaintiffs-Appellants,

v.

CITY OF OAKLAND

Defendant-Respondent

OPPOSITION TO MOTION FOR JUDICIAL NOTICE

After a Published Decision from the Court of Appeal
First Appellate District Court Case No. A154986
Alameda County Superior Court Case No. RG16821376

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Petitioner City of Oakland ("Oakland" or "the City") respectfully submits this Opposition to the Zolly Respondents' Motion for Judicial Notice ("MJN").

I. ARGUMENT

Notwithstanding having had their motion to judicially notice excerpts from a 2015-2016 Alameda County Grand Jury Final Report (the "Report") rejected by both the Superior Court and the Court of Appeal, the Zolly Respondents have filed a third motion for judicial notice ("MJN") in this Court, and then in their Answer Brief have proceeded to quote and cite from the twice-rejected Report. Moreover, contrary to black letter case law that limits judicial notice to the existence of bona fide court records, as opposed to the truth of their contents, the Zolly Respondents incorrectly assert that this Court must accept the truth of the contents of the Report. That assertion is plainly incorrect.

Not only do Respondents improperly seek judicial notice of the truth of the Report's contents, but the Report is irrelevant in any event and thus not a proper subject of judicial notice. Both the Superior Court and the Court of Appeal denied Respondents' prior requests for judicial notice of the same Report on the ground that it is immaterial to resolution of the pure legal questions at issue in these proceedings. Indeed, the MJN filed in this Court repeats Respondents' similar request to the Court of Appeal almost verbatim. Both lower courts found the Report irrelevant, and the Court of

Appeal did not rely on it in reaching the decision on review here.

Respondents' MJN should be denied.

A. The Court Should Deny the MJN Because the Report Is Irrelevant to the Pure Legal Issues Being Reviewed, as the Superior Court and the Court of Appeal Both Ruled

Respondents contend the Report is subject to judicial notice as an "official act" of the state's judicial department and a California court record under California Evidence Code sections 452(c) and (d) and section 459. Those sections grant this Court discretion to take judicial notice of:

> (c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.
>
> (d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(Cal. Evid. Code § 452; *see also* Cal. Evid. Code § 459 ("reviewing court may take judicial notice of any matter specified in Section 452").)

Even assuming the Report satisfies these threshold requirements, Respondents must also prove that the Report is relevant. "[O]nly *relevant* material may be noticed." (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal. 4th 1057, 1063 (overruled on other grounds) (emphasis in original).) Accordingly, courts routinely deny requests for judicial notice of matters irrelevant to the issues on appeal. (*See, e.g., Ragland v. U.S. Bank Nat'l Ass'n* (2012) 209 Cal. App. 4th 182, 194 (recognizing that grant deeds are judicially noticeable but refusing to take notice of grant deed because it was

“not relevant to any issue raised on appeal”).)

This threshold relevance requirement applies equally to grand jury records. (See, e.g., *People v. Curl* (2009) 46 Cal. 4th 339, 360-61 (affirming trial court’s exclusion of grand jury report because it was immaterial to appeal); *People v. Jenkins* (2000) 22 Cal.4th 900, 952-53 (*Jenkins*) (denying request to take judicial notice of grand jury report because it was not part of the record on appeal); *Reynolds v. City of Calistoga* (2014) 223 Cal. App. 4th 865, 876 fn. 8 (denying request for judicial notice of county grand jury report as irrelevant).)

Respondents have twice failed to establish that the Report is relevant and subject to judicial notice – first in the Superior Court and again in the Court of Appeal – and their verbatim arguments similarly fail here. (See 2 JA 466 & 2 JA 393 (Superior Court denying Respondents’ request for judicial notice as “not…material to the demurrer”); *Zolly v. City of Oakland* (2020) 47 Cal.App.5th 73, 78 fn. 2 (denying Respondents’ request for judicial notice because the Report was “unnecessary to resolve the issues raised in this appeal”).) Respondents contend the Report is relevant because it purportedly “supports” their “central allegation” that the franchise fees are in fact “invalid taxes” by offering “facts about Oakland’s flawed request-for-proposal process and how one of the franchise fees at issue here is disproportionately high compared to franchise fees in surrounding communities.” (MJN at 5-6.) These are the same arguments Respondents

raised and the Court of Appeal rejected in the *Zolly* opinion. As Respondents argue, the Report's relevance, if any, is as to *facts* that might be litigated on remand if their legal challenge to Oakland's franchise fees is not dismissed as a matter of *law*. This appeal presents purely legal issues subject to this Court's *de novo* review: namely, whether Oakland's challenged franchise fees constitute a "tax" under California Constitution, article XIII C, section 1, subd. (e). The Report has no bearing on the pure issues of law here and thus is irrelevant on this appeal.

Respondents' reliance on *In re Sassounian* (1995) 9 Cal. 4th 535, 539-42, is misplaced. There, a criminal defendant brought a habeas petition after a jailhouse informant recanted testimony he had offered against the defendant at trial. (*Ibid.*) The Court took judicial notice of a criminal grand jury report on the reliability of jailhouse informants. (*Id.* at 542.) The report in *Sassounian* was relevant to issues on appeal regarding the reliability and potential falsity of the testimony that led to the defendant's conviction. (*Id.* at 546.) Judicial notice was also appropriate there because, in contrast with a traditional appeal where the record is limited to matters presented to the trial court, in a habeas corpus proceeding a petitioner "appropriately may develop a record beyond the record on appeal." (*Jenkins*, 22 Cal. 4th at 952-93.) Neither of those facts is present here. The Report was not part of the record before the Superior Court or the Court of Appeal, and the purported facts it presents are not relevant to the pure issues of law before

this Court.

Moreover, apart from being irrelevant, the Report is unnecessary and duplicative. Respondents' Second Amended Complaint – the operative complaint as to which Oakland's demurrer was sustained without leave to amend and that is the subject of review on this appeal – includes allegations regarding the grand jury's supposed investigation and findings. (See 2 JA 284-86.) Those allegations are in the record before this Court.

B. Even if the Report Were Relevant, It Could Only Be Noticed for Its Existence, Not the Truth of Its Contents, Which Are Inherently Unreliable

Even if the Report were properly subject to judicial notice, the Respondents are categorically wrong in asserting that this Court must "'accept[] as true' the grand jury report's contents." (MJN at 5.) It is black letter law that courts "may take judicial notice of the *existence* of judicial opinions, court documents, and verdicts reached, [but] cannot take judicial notice of the *truth of hearsay statements* in other decisions or court files, or of the *truth of factual findings* made in another action." (*Johnson & Johnson v. Superior Court* (2011) 192 Cal.App.4th 757, 768 (emphasis added; citations omitted); *see also, e.g.*, *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1749 (refusing to take judicial notice of truth of findings in an administrative action because "a court may not take judicial notice of the truth of a factual finding made in another action").)

These limitations apply with even more force here due to the inherently unreliable nature of the grand jury proceedings summarized in the Report. The civil grand jury meetings were not public hearings but instead were held in secret, the sources of the materials and the materials themselves are unknown, and the trustworthiness of the documentary and oral materials upon which the report are based were never subject to scrutiny by cross-examination or any other truth-finding process. The report is inadmissible hearsay that would not be admitted as evidence by a trial court. (*See, e.g.*, *Williams v. Hartford Ins. Co.* (1983) 147 Cal. App. 3d 893 (grand jury testimony is inadmissible hearsay and cannot be admitted as evidence or subject of judicial notice); *Oppenheimer v. Clunie* (1904) 142 Cal. 313, 322 (county grand jury report was "hearsay…not admissible for any purpose").)

Respondents selectively quote *Crowley v. Katleman* (1994) 8 Cal. 4th 666, 672, for their flawed position that this Court must accept the Report's contents as true, despite all authority to the contrary. (MJN at 5.) *Crowley* simply holds that when reviewing an order sustaining a demurrer, courts accept as true "the properly pleaded material factual allegations of the complaint, together with facts *that may properly be judicially noticed*." (8 Cal. 4th at 672 (emphasis added).) Here, as to the Report, the only "fact" that arguably could be properly noticed is the fact that the Report exists – *not* that any of its findings or recommendations were *true*. And, the fact of

the Report's existence is irrelevant to this appeal in any event, as shown above.

II. CONCLUSION

For the above reasons, the City of Oakland respectfully asks the Court to deny Respondents' motion for judicial notice of the civil grand jury report.[1]

Dated: February 16, 2021

/s/ *Cedric Chao*
Cedric Chao
CHAO ADR, PC

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[1] Oakland respectfully requests the Court's indulgence and discretion in considering this Opposition, which is being filed after the deadline set under the relevant rules (see Cal. R. Ct. 8.54(a)(3)) but before the deadline for Oakland's reply brief. "[A] reviewing court has considerable discretion in permitting the late filing of motions and briefs" following timely filing of a notice of appeal or petition for review. (*Stratton v. First Life Nat'l Ins. Co.* (1989) 210 Cal.App.3d 1071, 1078.) The arguments Oakland raises in this Opposition are substantially the same as the arguments it previously raised in opposition to Respondents' requests for judicial notice in the Superior Court and the Court of Appeal, and there is no surprise.

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/s/ Cedric Chao
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Supreme Court of California

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/s/Cedric Chao

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