No. S244630

FILED WITH PERMISSION

**IN THE SUPREME COURT OF CALIFORNIA**

OTO, LLC an Arizona Limited Liability Company, *dba* ONE TOYOTA OF OAKLAND, ONE SCION OF OAKLAND

*Plaintiff and Respondent,*

**v.**

KEN KHO

*Real Party in Interest,*

JULIE A. SU IN HER OFFICIAL CAPACITY AS THE STATE OF CALIFORNIA LABOR COMMISSIONER, DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA

*Intervenor and Appellant.*



*After decision by the Court of Appeal, First Appellate District, Division 1*
*Case No. A147564*

*Appeal from the Alameda County Superior Court*
*Case No. RG15781961, The Honorable Evelio Grillo, Judge*

# OPPOSITION TO LABOR COMMISSIONER'S MOTION FOR JUDICIAL NOTICE

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## OPPOSITION TO MOTION FOR JUDICIAL NOTICE

In a belated attempt to remedy the failure to introduce complete evidence of the wage claim procedures and so-called Berman rights in the trial court, Intervenor and Appellant Julie A. Su in her official capacity as the State of California Labor Commissioner (the "Labor Commissioner") asks this Court to take judicial notice of 22 exhibits. However, the Labor Commissioner's Motion fails to establish the existence of exceptional circumstances for deviation from the normal rule that an appellate court will consider only matters which were part of the record at the time the judgment was entered. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444 fn. 3.) As a result, the Motion for Judicial Notice must be denied in its entirety.

### A. Appellant's Motion for Judicial Notice Must Be Denied as None of the Documents Were Presented to the Superior Court or the Court of Appeal.

When reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered. (*California School Boards Assn. v. State* (2011) 192 Cal.App.4th 770, 803.) "It is a fundamental principle of appellate law that our review of the trial court's decision must be based on the evidence before the court at the time it rendered its decision." (*Id.*) As this Court recognized in *Vons Companies, Inc. v. Seabest Foods, Inc, supra*:

> Reviewing courts generally do not take judicial notice of evidence not presented to the trial court. Rather, normally "when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered." (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813.) No exceptional

> circumstances exist that would justify deviating from that rule....

(*Id.*, 14 Cal.4th at 444 fn. 3 [denying request for judicial notice of post-judgment deposition testimony].)

> This rule preserves an orderly system of appellate procedure by preventing litigants from circumventing the normal sequence of litigation. However, the rule is somewhat flexible; courts have not hesitated to consider postjudgment events when legislative changes have occurred subsequent to a judgment (*Complete Serv. Bur. v. San Diego Med. Soc.* (1954) 43 Cal.2d 201, 207, 272 P.2d 497; *Tulare Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489, 527–528, 45 P.2d 972) or when subsequent events have caused issues to become moot (*Estate of Henry* (1960) 181 Cal.App.2d 173, 176, 5 Cal.Rptr. 582 [death of a party abated a nonsurvivable cause of action] ).

(*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813 [judicial notice of insurance company's insolvency appropriate because fact is not in dispute and prompt determination avoids necessity for repetitive litigation of issues that have been fully briefed].)

In the present Motion, the Labor Commissioner fails to provide any showing of the existence of exceptional circumstances which would make judicial notice appropriate. Rather, the proffered reasons for each of the requests—that the material is necessary for a complete understanding of the so-called Berman rights—merely accentuates Appellants' failure to proffer available evidence to the trial court. Indeed, the Labor Commissioner should have anticipated the need to present such evidence in the trial court given this Court's remand in *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 ("*Sonic II*") to consider the merits of Moreno's unconscionability defense. In light of the lack of such

exceptional circumstances in this case, the Motion for Judicial Notice must be denied in its entirety.

### B. Judicial Notice of the De Novo Appeal Court Records (Exhibits 1 through 18) Must be Denied.

The Labor Commissioner proffers two reasons in support of the request for judicial notice of the de novo appeal court records contained in Exhibits 1 through 18. First, the Labor Commissioner asserts that the "proceedings demonstrate the protections the Berman process afforded Kho, including OTO's obligation to post an undertaking with the superior court as a prerequisite to appealing the Labor Commissioner's Order, Decision or Award (ODA) and the Labor Commissioner's free legal representation of Kho on appeal." (Motion pages 2-3.)

However, the specific items referred to are required by statute so that no demonstration of these protections is necessary. (See Labor Code sec. 98.2(b) ["As a condition to filing an appeal pursuant to this section, an employer shall first post an undertaking with the reviewing court in the amount of the order, decision, or award."]; see also Labor Code sec. 98.4 [Labor Commissioner representation of claimant in de novo proceedings].) Moreover, the record on appeal already reflects that the trial court was aware of both the posting of the required undertaking. (CT 0084; CT 0097) Thus, judicial notice is not required to establish either of these items.

Second, the Labor Commissioner asserts that "the proceedings elucidate the consequences of the trial court's order vacating the Labor Commissioner's ODA, principally the trial court's release of OTO's appeal undertaking and Kho's loss of the Labor Commissioner's representation on appeal." (Motion page 3.) The trial court entered its

orders on December 11, 2015 (CT 00202; CT 00207) and denied the Labor Commissioner's motion for reconsideration on February 3, 2016 (CT 00294). Exhibits 13 through 18, which include the order releasing the appeal bond, post-date the orders that are the subject of this appeal. No party has appealed from that order. In light of the "fundamental principle of appellate law that our review of the trial court's decision must be based on the evidence before the court at the time it rendered its decision" (*California School Boards Assn. v. State, supra,* 192 Cal.App.4th at 803), the request for judicial notice of these subsequent matters must be denied.

### C. As No "Official Web Site" Provision Exists for Judicial Notice in California, Appellant's Motion for Judicial Notice of Exhibits 19 through 21 Must Be Denied.

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evid.C. sec. 450.) Section 451 of the Evidence Code sets forth matters which must be judicially noticed. Section 452 provides discretionary judicial notice for certain matters not embraced within section 451. The Labor Commissioner posits that judicial notice may be taken of the material in Exhibits 19 through 21 pursuant to subdivision (c) of section 452, which permits discretionary judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." (Evid.C. sec. 452(c).)

However, the Labor Commissioner's request that this Court take judicial notice of Exhibits 19 through 21—consisting of material obtained from internet websites maintained by the State of California, Department of Industrial Relations, Division of Labor Standards Enforcement ("DLSE")—erroneously conflates the ***existence*** of the

material on government websites with the ***official acts*** of an executive department of a state agency under Evidence Code section 452(c). However, California courts have rejected attempts to judicially notice material printed out from a website maintained by a government agency.

In *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, the defendant sought judicial notice of a purchase and sale agreement posted on a website maintained by the FDIC, which the defendant referred to as "an 'official governmental agency,' apparently believing this fact alone makes the legal significance of the Agreement subject to judicial notice." (*Id.* at 889.) The Court of Appeal rejected this contention, finding that there is "no 'official Web site' provision for judicial notice in California." (*Id.*)

In *L.B. Research & Education Foundation v. UCLA Foundation* (2005) 130 Cal.App.4th 171, both parties submitted requests to the court of appeal for judicial notice comprised of printouts from various websites maintained by UCLA and the University of California. In rejecting these requests, the court stated:

> However tantalizing this public information might be, it is plainly subject to interpretation and for that reason not subject to judicial notice or to our consideration in reviewing the trial court's order granting a motion for judgment on the pleadings. (Evid.Code, §§ 451, 452; *Comings v. State Bd. of Education* (1972) 23 Cal.App.3d 94, 102, 100 Cal.Rptr. 73 [improper to judicially notice fact subject to reasonable dispute]; cf. *McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 162, 86 Cal.Rptr.2d 645.)

(*L.B. Research & Education Foundation v. UCLA Foundation, supra,* 130 Cal.App.4th at 180, fn. 2.)

Even if this Court were to take judicial notice of the existence of the proffered material from the DLSE's internet websites, the factual content of those sites cannot be judicially noticed. In *Searles Valley Minerals Operations, Inc. v. State Bd. Of Equalization* (2008) 160 Cal.App.4th 514, taxpayers who produced and sold electricity to California requested judicial notice of materials contained on website pages of American Coal Foundation and United States Department of Energy under Evidence Code section 452, subdivision (h), which permits a court to take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (*Id.* at 519.) The court held that the request was properly denied, stating that while "it might be appropriate to take judicial notice of *the existence* of the Web sites, the same is not true of their factual content." (*Id.* [italics in original].) As another court stated, "Simply because information is on the Internet does not mean that it is not reasonably subject to dispute." (*Huitt v. Southern California Gas Co.* (2010) 188 Cal.App.4th 1586, 1605, fn. 10.)

1. The content of the May 2013 Report on the State of the Division of Labor Standards Enforcement (Exhibit 19) is not an official act subject to judicial notice.

Exhibit 19 consists of a May 2013 Report on the State of the Division of Labor Standards Enforcement prepared by the Labor Commissioner and maintained on the DLSE's web site. The 50 page document (inclusive of prefatory material) self-reports on the Labor Commissioner's purported accomplishments over the preceding two year period.

In *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, overruled on another ground in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276, this Court denied the plaintiff's request to take judicial notice of a report of the United States Surgeon General and a report to the California Department of Health Service:

> While courts may notice official acts and public records, "we do not take judicial notice of the truth of all matters stated therein." [Citations.] "[T]he taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom."

(*Mangini v. R.J. Reynolds Tobacco Co., supra,* at pp. 1063–1064; see also *Ragland v. U.S. Bank Nat. Ass.* (2012) 209 Cal.App.4th 182, 194 [declining to take judicial notice of audit report issued by the Office of the Inspector General of the U.S. Department of the Treasury].)

The Motion seeks more than judicial notice of the existence of the report. Rather, the Labor Commissioner seeks to have this Court take judicial notice of the contents of the report, which purportedly "provides details on the Labor Commissioner's wage claim adjudication process, also known as the Berman process, and the Berman process benefits that do not exist in OTO's arbitration forum. (Motion at page 4.) In light of *Mangini* and *Ragland, supra*, the request must be denied.

2. The historical and current content of the DLSE's web site on how to file a wage claim (Exhibits 20 and 21) is not an official act subject to judicial notice.

Exhibit 20 provides historical content from the DLSE's web site as it purportedly existed in 2014 regarding how to file a wage claim. Exhibit 21 provides similar content from the DLSE's current web site. The Labor Commissioner contends that the materials are relevant because they demonstrate the assistance Kho and other employees could receive from the Labor Commissioner's office in filing a wage claim." (See Motion at pp. 6 and 7.)

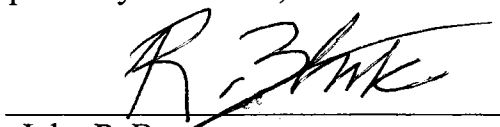
The Labor Commissioner fails to provide any legal authority or evidence that its maintenance of an informational web site in the internet is an "official act" subject to judicial notice under Evidence Code section 452(c). (See *Jolley v. Chase Home Finance, LLC, supra,* 213 Cal.App.4th at 889 (there is "no 'official Web site' provision for judicial notice in California.") Moreover, under *Mangini* and *Ragland, supra*, there is simply no basis for taking judicial notice of the content of the websites to establish the truth of the matter contained in the web pages. Accordingly, the Court should deny the Labor Commissioner's request for judicial notice of Exhibits 20 and 21.

## CONCLUSION

The Labor Commissioner fails to establish the existence of any exceptional circumstances which would justify this Court taking judicial notice of any of the documents proffered by the Motion for Judicial Notice. None of the documents were presented to either the trial court or the Court of Appeal despite this Court's holding in *Sonic II* which squarely

placed the burden on the party opposing a petition to compel arbitration to support their unconscionability analysis with evidence of the nature of the arbitration proceedings. Accordingly, the Motion for Judicial Notice must be denied in its entirety.

Respectfully submitted,



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**PROOF OF SERVICE**
**(C.C.P. § 1013)**

I, Kathryn M. Cherry, hereby declare and state:

1. I am engaged by the law firm of FINE, BOGGS & PERKINS LLP, whose address is 300 Rancheros Drive, Suite 375, San Marcos, California, and I am not a party to the cause, and I am over the age of eighteen years.

2. On March 20, 2018, I served the following document in the manner described below:

**OPPOSITION TO LABOR COMMISSIONER'S MOTION FOR JUDICIAL NOTICE**

**BY FIRST-CLASS MAIL.** I am readily familiar with the firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and said correspondence is deposited with the United States Postal Service the same day, postage pre-paid, in a sealed envelope.

On the interested parties in this action by addressing true copies thereof as follows:

- **CLERK OF THE COURT OF APPEAL**
  California Court of Appeal, First District, Division One
  350 McAllister Street
  San Francisco, California 94102

- **CLERK OF THE SUPERIOR COURT**
  Alameda County Superior Court
  1225 Fallon Street
  Oakland, California 94612

- **DIVISION OF LABOR STANDARDS ENFORCEMENT**
  Department of Industrial Relations
  State of California
  Mr. Miles Locker
  Ms. Theresa Bichsel
  455 Golden Gate Avenue, 9th Floor
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- **WEINBERG, ROGER & ROSENFELD**
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- **KEN BACMENG KHO**
  1650 Vida Court
  San Leandro, California 94579

**BY ELECTRONIC SERVICE.** By electronically mailing a true and correct copy through Fine, Boggs & Perkins, LLP's electronic mail system from kcherry@employerlawyers.com to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed at San Marcos, California, on Tuesday, March 20, 2018

Kathryn M Cherry

Kathryn M. Cherry