

Case No. S244630

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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

Plaintiff and Appellant,

v.

**KEN KHO,**

Real Party in Interest,

SUPREME COURT  
**FILED**

APR 19 2018

Jorge Navarrete Clerk

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Deputy

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**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 a Decision of the Court of Appeal, Case No. A147564,  
First Appellate District, Division One

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

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**APPLICATION FOR LEAVE TO FILE REPLY IN SUPPORT OF  
MOTION FOR JUDICIAL NOTICE; [PROPOSED] REPLY IN  
SUPPORT OF MOTION FOR JUDICIAL NOTICE**

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Attorneys for Intervenor and Appellant, **LABOR COMMISSIONER**

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**APPLICATION FOR LEAVE TO FILE REPLY IN SUPPORT OF  
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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND  
TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA  
SUPREME COURT:

Please take notice that the Labor Commissioner hereby respectfully requests that the Court accept the reply in support of motion for judicial notice submitted here.

**[PROPOSED] REPLY IN SUPPORT OF MOTION FOR  
JUDICIAL NOTICE**

The Labor Commissioner's motion for judicial notice should be granted in full. The matters offered are needed to provide this Court with a full record on appeal, are not reasonably subject to dispute, and are all subject to judicial notice.<sup>1</sup>

**A. Exhibits 1 to 18 Are Not Reasonably Subject to Dispute and  
Should be Judicially Noticed**

OTO generally opposes the Labor Commissioner's motion for judicial notice, stating it "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." (OTO Opp'n at 2.)<sup>2</sup>

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<sup>1</sup> CT refers to the Clerk's Transcript, followed by the Bates page number and (if applicable) line numbers. RT refers to the Reporter's Transcript, followed by the Bates page number and (if applicable) line numbers.

<sup>2</sup> The "exceptional circumstances" rule generally has been applied to matters that arise after a trial court has issued a judgment. (See *California School Boards Assn. v. State* (2011) 192 Cal.App.4th 770, 803 [denying judicial notice of recently enacted legislation and reports created after trial court

The Labor Commissioner has met the exceptional circumstances rule with respect to Exhibits 1 to 18. As OTO acknowledges, the trial court here was aware of the de novo filings (that is, Exhibits 1 to 12) when it rendered its decisions on the motion to vacate the Labor Commissioner's Order, Decision or Award and on the motion for reconsideration on the motion to vacate. (CT 84; CT 97; RT 18:26–19:17; RT 2:23–3:15; RT 9:27–14:14.) Because OTO filed the de novo appeal under a separate case number, the records were not included in the appellate record. They are, however, relevant to the motion to vacate.

Further, though the records in Exhibits 13 to 18 came into existence after the trial court entered judgment in this matter, the records are all part of the same case and are needed to complete the record on appeal. Thus, exceptional circumstances exist to judicially notice the records.

In support of its opposition to judicial notice of Exhibits 1 through 18, OTO cites to *Vons Companies, Inc. v. Seabest Foods, Inc.*, (1996) 14 Cal.4th 434, 444 fn. 3. There, this Court denied a request for judicial notice of postjudgment deposition testimony and manuals referenced in a franchise agreement offered to show cross-defendants were required to prepare hamburgers in a specific manner. Though the *Vons* Court did not discuss the reason it found no exceptional circumstances applied, an objection to the

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entered judgment]; *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 29 [denying judicial notice of documents evidencing events that occurred long after trial court entered judgment subject of appeal].)

documents' admission could well have been that such documents would not have been subject to judicial notice in front of the trial court.

But this Court has routinely granted judicial notice on appeal where the matters at issue are not reasonably subject to dispute. (See *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800 [judicial notice of postjudgment insolvency was proper where such evidence was not in dispute, as Court did not usurp fact finding role of trial court]; *People v. Belcher* (1974) 11 Cal.3d 91, 95 [granting judicial notice of federal indictment under Evidence Code § 452(d), but denying judicial notice of counsel's affidavit where it was not presented to trial court]; *People v. Hardy* (1992) 2 Cal.4th 86, 134–135, as modified on denial of reh'g (May 14, 1992) [noting Evidence Code § 459 contemplates situations in which judicial notice may be taken of matters not presented to trial court and granting judicial notice of court files of separate lawsuits]; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1350 [granting judicial notice of files and records in prior proceeding related to claim at issue]; *Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 293 [granting judicial notice of portions of state budget acts and Governor's budget summaries].)

Here, the records in Exhibits 1 through 18 are subject to judicial notice under Evidence Code § 452(d) and are not reasonably subject to dispute. OTO does not challenge them on either of those grounds. The records are highly relevant and should be judicially noticed.

**B. The Request for Judicial Notice of Exhibit 19 Should be Granted as to Two Specific Facts**

The Labor Commissioner intends to cite Exhibit 19 for the limited purposes of showing: (1) as of 2013, over 30,000 wage claims are filed every year with the State Labor Commissioner (Exhibit 19 at 86) and (2) in 2012 the Labor Commissioner awarded wage claimants over \$85,000,000 in decisions issued following Berman hearings (*Id.* at 87). The Labor Commissioner's office produced the Exhibit 19 report and it is therefore subject to judicial notice under Evidence Code § 452(c). The report should be judicially noticed for these limited purposes.

**C. The Labor Commissioner's Request for Judicial Notice of Exhibits 20 to 21 is Limited to the Existence of the Material Posted on the Labor Commissioner's Website, Not the Truth of the Materials**

In its prior decisions discussing the unconscionability of arbitration agreements that exact Berman waivers, this Court has examined the Berman procedures and benefits in detail. (*Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, 672–674, cert. granted, judgment vacated (2011) 565 U.S. 973); *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 11-28-1130.) Here, the Berman procedure instructions available on the Labor Commissioner's website, which make up Exhibits 20 and 21, help to provide a full picture of the Berman process and are highly relevant to this Court's unconscionability inquiry.


Importantly, the Labor Commissioner does not seek judicial notice of the truth of the materials posted on the Commissioner's website in 2014 and 2018. Rather, the request is limited to notice the fact that the instructions and materials existed on the website. The existence of the materials is subject to judicial notice under Evidence Code § 452(c). Given that these materials' existence is not reasonably subject to dispute and given their relevance, this Court should find exceptional circumstances are present and grant the request for judicial notice.

**D. Exhibit 22 Should be Judicially Noticed, as it Consists Entirely of Regulations that are Not Reasonably Subject to Dispute**

As noted above, this Court routinely grants judicial notice of matters not reasonably subject to dispute. Again, the existence of the regulations making up Exhibit 22 is not in dispute and the regulations are subject to judicial notice under Evidence Code § 452(b). Exhibit 22 should therefore be judicially noticed.

For the reasons set forth above, the Labor Commissioner respectfully requests the Court to grant the motion for judicial notice.

Dated: April 9, 2018

By:   
Miles E. Locker  
Theresa Bichsel

Attorneys for Intervenor and Appellant,  
LABOR COMMISSIONER

**PROOF OF SERVICE BY MAIL AND ELECTRONIC**

**SERVICE BY E-MAIL**

One Toyota of Oakland v. Kho  
Alameda Superior Court Case No.: RG15781961  
First District Court of Appeal Case No.: A147564  
Supreme Court Case No.: S244630

I, Mary Ann Galapon, do hereby declare that I am employed in the county of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 455 Golden Gate Avenue, 9th Floor, San Francisco, California, 94102.

On April 9, 2018, I served the following document(s):

**APPLICATION FOR LEAVE TO FILE REPLY IN  
SUPPORT OF MOTION FOR JUDICIAL NOTICE;  
[PROPOSED] REPLY IN SUPPORT OF MOTION FOR  
JUDICIAL NOTICE**

X by placing a true copy thereof in sealed FedEx envelopes for Standard Overnight delivery with all fees prepaid and addressed as follows:

1st District Court of Appeal  
350 McAllister Street  
San Francisco, CA 94102

Honorable Evelio Grillo  
Clerk of the Superior Court  
Alameda County Superior Court  
2233 Shoreline Drive  
Department 303, 2<sup>nd</sup> Floor  
Alameda, CA 94501

X by transmitting a PDF version of this document to each of the following using the e-mail addresses indicated below:

WEINBERG, ROGER & ROSENFELD  
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct.

Executed this 9th day of April, 2018, at San Francisco, California.

  
\_\_\_\_\_  
Mary Ann Galapon