SUPREME COURT COPY

S 171442

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LOUIE HUNG KWEI LU, et al.

Plaintiff and Appellant,

vs.

HAWAIIAN GARDENS CASINO, et al.,

Defendants and ~~Appellees.~~ Respondents

CRC 8.25(b)

SUPREME COURT
FILED

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DEPUTY

COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION THREE
COURT OF APPEAL CASE NO. B 194209

LOS ANGELES SUPERIOR COURT, CASE NO. BC 286164
THE HONORABLE DAVID MINNING

PETITIONER'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED FOR REVIEW

Does Labor Code §351, which prohibits employers from taking "any gratuity or part thereof that is paid, given to, or left for an employee by a patron" create a private right of action for employees?

INTRODUCTION

The Court has granted review to decide a significant issue--the right of working men and women to protect their "sole property", their tips, from the grasp of their employers.

There was a significant sea change in the rights of tipped employees in California in 1973 with the amendment of Labor Code §351.

Up until 1973, employers and tipped employees were free to contract with each other in a manner that allowed employers to take or take control of all or part of an employee's tip income as a condition of employment so long as the public was notified. It was a "notice" law. With the passage of the amendments of Labor Code §351 in 1973 and the years that followed, the direction of the law was completely transformed from a law strictly intended to protect the tipping public, to a law that also created an inviolable right in employees to tips given to them by patrons, a right that could not be contracted away.

No longer could employers, with the passage of the amendments,

demand of employees, that they part with their tips as part of the employment relationship.

In our system of jurisprudence, property rights are sacrosanct. The Legislature declared, with the passage of Labor Code §351, that tips are the "sole property" of the employees they are given to. To suggest, as the Court of Appeal did in this case, that the Legislature declared tips the "sole property" of their recipients and prohibited employers from taking any portion of tips, without implying a private right of action to enforce the property rights granted, is absurd. It is tantamount to saying that the Legislature wanted to perpetrate a cruel joke on members of California's tipped work force.

"The very essence of civil liberty certainly consists of the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison* (1803) 1 Cranch 137, 163

The property rights of workers are no less worthy of protection than the property rights of their employers, and therefore, it is rational and appropriate to either find that the Legislature intended through the passage of Labor Code §351 that tipped employees can sue their employers when those employers unlawfully take, collect or receive their tips, or, if the Court is disposed to finding that the Legislature did not consider the issue, to authorize a right to sue in order to avoid rendering the "sole property rights" of tipped workers

a nullity.

FACTS

Hawaiian Gardens operates over 100 tables where customers pay to play games of chance. At the time of this lawsuit it employed approximately 650 Dealers (COA Dec. at 2).[1] Every two weeks, the casino gives Dealers pay checks for the minimum wage times hours worked (COA Dec. Pg. 3). The casino takes 15%-20% of Dealers' tips pursuant to what it characterizes "tip pool" policy, and deposits the money into a bank account. It funds in part, the income from work of other employees, including poker rotation coordinators and customer service representatives "floor men" with the money taken from Dealers. (COA Dec. Pg. 3). The tips at issue are given to Dealers directly by patrons in a context where patrons openly tip other employees (COA Dec. 15-16; CT Vol.11 2379, and CT Vol 1 CT 153:3-5, Vol. 1 CT 135:15-25; Vol. 1 CT 221: 21-25.)

The Court of Appeal found that there was a question of fact as to whether some of the "tip pool" recipients were agents as that term is defined by Labor Code §350. (COA Dec. Pg. 22). After reviewing the evidence presented by the Plaintiff Class, the Court of Appeal stated:

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[1]The abbreviation "CT" refers to the Clerk's Transcript; COA Dec. Refers to the Court of Appeal Decision

"In our view, these facts give rise to a triable factual issue about whether customer service representatives, who receive distributions from the employer-mandated tip pool under the policy, have the authority to, and do 'supervise, direct, or control the acts of' dealers. If so, they would be 'agents' as defined by Labor Code §350, subdivision (d) and their participation in the tip pool would contravene the prohibitions of §351. (*Jameson, supra*, 107 Cal.App.4th at p. 141.)" (COA Dec. 22-23).

The Court of Appeal found there was no private right of action to sue for violation of Labor Code §351. (COA Dec.6-11), but held that a UCL Cause of Action predicated on §351 could proceed. (COA Dec. 11, 21-23).

PROCEDURAL HISTORY

On November 22, 2002, Louie Lu ("Lu") filed his Class Action Complaint against Hawaiian Gardens Casino, Inc. ("HG"), alleging that the policy and practice at HG that compelled dealers to give up not less than 15% of their tips violates their right, under Labor Code §221, not to be compelled to kickback wages previously paid; their rights under Labor Code §351 not to have tips given to them by patrons "taken, collected or received by" their employer; their rights under Labor Code §1194 to be paid the minimum wage, under §450 not to have to purchase from their employer the privilege to work, their common law right not to have their property converted, their

rights under Business and Professions Code §17200, not to be subjected to unfair competition, and their rights to be reimbursed for expenses they incur as a condition of their employment (Labor Code §2802). (Vol. 1 CT 20-36).

On October 12, 2004, the Court certified a Class of all persons who were employed by HG in the position of dealer between November 27, 1999 and the date that the Notice of Pendency of class action was to be mailed to class members (Vol. 6 CT 1235-1236).

Between the Plaintiff's filing of the Motion for Class Certification, and the Court's ruling, Defendant solicited settlements from a number of what were then potential class members, in exchange for releases of the claims alleged in the Complaint (See generally Vol. 4 CT 762-1032).

Through rulings on a series of motions, the Court dismissed all seven of the class' Causes of Action. Those rulings, culminated in a Judgment of dismissal.

The first Motion was a Motion for Judgment on the Pleadings as to the Second and Third Causes of Action, seeking relief for violation of Labor Code §§351 and 450. The Court granted HG's motion on the theory that the class did not have a private right of action for violation of those Code Sections (Vol. 8 CT 1591, CT 1718).

On July 15, 2005, HG moved for summary adjudication as to the First

Cause of Action for violation of Labor Code §221, and the Fourth Cause of Action for violation of Labor Code §1197 on the grounds that Lu had not alleged facts showing that HG violated the anti-kickback laws or the minimum wage law (Vol. 8 CT 1724), essentially holding, in adopting the "moving papers":

1) That required payment of money to an employer each shift worked after each pay day, is not a kick-back of wages in violation of Labor Code §221 so long as the source of the money used for the kick-back was tips; and

2) That even if "taking" of tips for "agents" may be illegal, that there is not a minimum wage violation when the net **paid to an employee** by an employer, wage check minus illegally taken tips, is less then the minimum wage times hours worked so long as the wage check covers the minimum wage. (Vol. 12 CT 2450)

On August 31, 2005, HG filed a Motion for Summary Adjudication as to the Seventh Cause of Action for violation of Labor Code §2802 (Vol. 9 CT 1872). The Court granted the Motion (Vol. 15 CT 3288: 4-5).

On September 20, 2005 HG filed a Motion for Summary Adjudication as to the Sixth Cause of Action for Conversion of Dealers' Tip Property, on the ground that Plaintiff failed to set forth any facts demonstrating conversion (Vol. 10 CT 1998). The motion was granted on January 25, 2006 (RT D-1-5).

On March 29, 2006 HG filed a Summary Adjudication Motion as to the Business and Professions Code §17200, Fifth Cause of Action, on two grounds, failure to set forth facts, and a claim that "tip pools" are legal (Vol. 15 CT 3217-3218). The factual predicate for the motion was limited to the fact of dismissal of all other causes of action and the allegations in the Complaint (Vol. 15 CT 3217-3228). The Court granted the motion on June 13, 2006 (Vol. 15 CT 3263).

On June 29, 2006, the Parties entered into a Stipulation acknowledging that as of that date, nothing remained to be done in the Trial Court except entry of Judgment. (Vol. 15 CT 3264-3265).

On September 7, 2006, the Court entered Judgment against Plaintiff and the Class on the Complaint in its entirety (Vol. 15 CT 3281). Notice of Entry was filed on September 12, 2006 (Vol. 15 CT 3285), and the Notice of Appeal was filed on October 2, 2006 (Vol. 15 CT 3297).

On January 22, 2009 the Court of Appeal issued its opinion upholding the trial court's rulings except on the issue of whether there was a triable issue of fact as to the UCL Cause of Action on account of the question of fact as to whether certain recipients of income funded by tips taken from Dealers were "agents" as defined in Labor Code §350. (COA Dec. 21-23) On February 11, 2009 the Court of Appeal issued an Order Modifying Opinion, Change In

Judgment.

Appellant petitioned the Supreme Court for Review. While the Petition was pending, the Court of Appeal for the first Appellate District, on March 11, 2009, decided *Grodensky v. Artichoke Joe's*. On the issue of whether a private right of action existed under Labor Code §351, the *Grodensky* court disagreed with and criticized the *Lu* Court of Appeal decision.

On April 29, 2009, this Court granted review in this case. On June 24, 2009, this Court granted review in *Grodensky,* S 172237.

STANDARD OF REVIEW

Whether the Dealers' class may maintain a private right of action under Labor Code §351 is a question subject to *de novo* review. *Vikco Ins. Services Inc. v. Ohio Indemnity Co.* (1999) 70 Cal.App.4th 55, 67; *Ghirardo v. Antonioli* (1994) 8 Cal. 4th 791-799.

ARGUMENT

I.

APPLICABLE PRINCIPLES OF STATUTORY CONSTRUCTION

Well established principles of statutory construction provide the framework for determining whether tipped employees have a private right of action under Labor Code §351. The Court's fundamental task in statutory

construction "is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." *Estate of Griswold* (2001) 25 Cal.4th 904, 910. Here, the Legislature clearly intended to create a definite property right in tipped workers, and an obligation on Employers to refrain from using their positions to expropriate, from employees, any portion of their tips.

"[Courts] begin by examining the statutory language, giving the words their usual and ordinary meaning." (*Id.* at p. 911) "If the terms of the statute are unambiguous, [courts] presume the lawmakers meant what they said, and the plain meaning of the language governs." (*Ibid.*)

"Additionally, however, [courts] must consider the [statutory language] in the context of the entire statute [citation] and the statutory scheme of which it is a part." (*Phelps v. Stostad* (1997) 16 Cal.4th 23, 32)

Here, Labor Code §351 is silent as to the right of a tipped employee to bring an action. However, that silence occurred in a context where the Legislature created a definitive property right in one group of Californians, tipped workers, and imposed an express prohibition on their employers in connection with that property right. The nature of the rights and obligations created, standing alone, warrants an inference that the Legislature intended to provide tipped employees access to the Courts to enforce their rights and recover tips they are unlawfully deprived of. Otherwise the rights and

obligations are meaningless.

When a statute lacks clarity, a court may look to extrinsic sources and must strive to arrive at a construction "with a view towards promoting rather than defeating the statute's general purposes." *People v. Montes* (2003) 31 Cal.4th 350, 356. A court should "adopt the interpretation that is more consistent with broader legal principles and is likely to have the fairer and more predictable consequences." *Escobedo v. Estate of Snider* (1997) 14 Cal.4th 1214, 1226.

Here, with the Legislature expressly declaring gratuities the "sole property" of the employees they are given to, and prohibiting employer taking of those gratuities, the "fair and predictable consequence" is that an employee would have access to the Courts to recover any gratuities their employer unlawfully took from them.

A court may also consider "the impact of an interpretation on public policy." *Mejia v. Reed* (2003) 31 Cal.4th 657, 663. "Where uncertainty exists consideration should be given to the consequences that will flow from a particular result." *Dyna-Med, Inc. v. Fair Employment and Housing Commission* (1987) 43 Cal.3d 1379, 1387. In every case, a court must try to avoid results that are anomalous, absurd, unjust or oppressive. *See, Bonnell v. Medical Board of California* (2003) 31 Cal.4th 1255, 1263; *Equilon*

Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 64; *Citizens Utility Company of California v. Superior Court* (1963) 59 Cal.2d 805, 811. Clearly, the Court of Appeal decision in this case provides an unjust, anomalous and oppressive result, in holding that that tipped employees have no effective means at law, to secure the return of money unlawfully taken from them.

" 'When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear.' [Citations.] Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." *Phelps, supra* 16 Cal.4th at 32.

"[I]f a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation]." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735)

When the language is ambiguous, Courts may consider a variety of extrinsic aids, including the purpose of the statute, legislative history, and public policy. (*Coalition of Concerned Communities, Inc v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) In Section IV below, we review the relevant history of Labor Code §351.

II.

THE LEGISLATURE CAN EXPLICITLY OR IMPLICITLY CREATE A PRIVATE RIGHT OF ACTION

A statute creates a private right of action if the enacting body so intended. (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 305), however, as will be demonstrated, infra, in certain circumstances, it is not inappropriate for Courts to provide the right to seek relief to persons the law was intended to protect, when a Legislative intent to provide such a right is not discernible.

Decisions subsequent to *Moradi-Shalal*, *supra* have held that a law provides a private right of action only if the statutory language or its legislative history indicates such an intent. (*Vikco Ins. Services, Inc. v. Ohio Indemnity Co., supra,* 70 Cal.App.4th at p. 62; *Crusader Ins. Co. v. Scottsdale Ins. Co., supra,* 54 Cal.App.4th at pp. 132-133, 135-137, 62 Cal.Rptr.2d 620.) When regulatory statutes provide a comprehensive scheme for enforcement by an administrative agency, the courts ordinarily conclude that the Legislature intended the administrative remedy to be exclusive. (*Vikco,supra* at p. 66)

Here, review of the evolution of the law clearly establishes that the Legislature implicitly created a private cause of action with the 1970's amendments to Labor Code §351. The Legislature did not provide a

comprehensive scheme for enforcement by an administrative agency. Additionally, even if this Court were to find a lack of Legislative thought relative to the enforcement issue, the Court should provide a private right of action, because otherwise there would be the anomalous situation of a clear property right without the means to enforce it.

III.

THE RELEVANT STATUTES

Labor Code §351, as amended, went from a Notice to the Public law to a law that created property rights in tipped workers that could not be undermined by their employers. It states: "No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer. Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for...."

Labor Code §354, enacted in 1937, long before the amendments, provides: "Any employer who violates any provision of this article [including §351] is guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars ($1,000) or by imprisonment for not exceeding 60 days, or

both." Labor Code §355, also enacted in 1937 authorizes criminal enforcement of Labor Code §351 by the Department of Industrial Relations. Specifically, Labor Code §355 reads: "The Department of Industrial Relations shall enforce the provisions of this article. All fines collected under this article shall be paid into the State treasury and credited to the general fund."

The original policy underlying the statute enacted in 1937, is articulated in Labor Code §356: "The Legislature expressly declares that the purpose of this article is to prevent fraud upon the public in connection with the practice of tipping and declares that this article is passed for a public reason and can not be contravened by a private agreement. As a part of the social public policy of this State, this article is binding upon all departments of the State."

The DIR's authority is limited to its law enforcement authority to prosecute employers for misdemeanor violations, and if successful, fine or imprison them. That enforcement mechanism was put in place when the law was a Notice to the Public law that required establishments that employed tipped workers to notify the public about any uses such establishments made of their employees' tips. The Legislature essentially deputized the Department of Industrial Relations to police compliance with notice laws, and charge law violators with crimes in order to prevent a fraud upon the tipping public.

At no time, either before or after the amendments making tips the

property of the workers they are given to, did the Legislature expand the authority of the Department of Industrial Relations, and give it the authority to recover gratuities wrongfully taken by an employer from tipped workers.

IV.

THE EVOLUTION OF CALIFORNIA TIP LEGISLATION COMPELS THE CONCLUSION THAT THE LEGISLATURE, AFTER 1973, CONTEMPLATED A PRIVATE RIGHT OF ACTION FOR ENFORCEMENT OF LABOR CODE §351

It cannot be disputed that creating a property right in tipped employees that cannot be waived by contract is a significant modification in the law that occurred without a concomitant change in the Department of Industrial Relations' powers relative to law enforcement.

It is clear, from the Court of Appeal decision, that the Court did not take an extensive look at the legislative history; nor did it even consider the significance of an amendment articulating for the first time, that tips, as a matter of law are the property of the employees they are given to, and that employers are prohibited from taking, collecting or receiving any portion of such tips.

A close look at the Legislative history is warranted because the Legislative declaration of a property right in tips, coupled with the prohibition

on taking tips in the Labor Code §351 amendment, combined with silence as to a methodology to recover tips unlawfully taken, makes the statute, at a minimum, ambiguous as to the "private right of action" issue.

It cannot be lost on this Court, that the subject amendments were enacted 15 years prior to *Moradi-Shalal,supra*, when Legislators, presumed to know the law, had good reason to believe that if they created a property right there was a remedy. At the time, Code of Civil Procedure §30 provided, as it does now: "A civil action is prosecuted by one party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong."

With the DIR's authority extending only to criminal enforcement, any civil action to enforce the "sole property" right at issue, can only be taken by an employee.[2]

One has to ask: Would the Legislature create rights as definitive as those set forth in Labor Code §351, with the intent that tipped employees would be powerless to protect those rights?

It would not be unreasonable to conclude that, in 1973, pre- *Moradi-*

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[2] See also Code of Civil Procedure §22, which reads: "An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." We also note the maxim contained in Civil Code §3523: "For every wrong there is a remedy."

Shalal, that a Legislature specifically providing an employee with a property interest in his or her tips, standing alone, intended to give employees a private cause of action to enforce that right. However, since the statute does not expressly declare that a private right of action exists, and no case has considered the significance of adding this right to the statute, the statute may be considered ambiguous and examination of the Legislative history and other Labor Code statutes, to discern the Legislature's intent, is warranted.

In *Henning, v. Industrial Welfare Com.* (1988) 46 Cal.3d 1262, this Court reviewed the history of Labor Code §351 to determine whether a two-tiered minimum wage system for employees who receive tips was barred under the statute. The *Henning* court noted that, in 1917, the Legislature enacted the statute that was the precursor of Labor Code §351. (*Henning, supra,* at p. 1270). This statute prohibited an employer from collecting any tips, but the Supreme Court struck the 1917 statute down as violating principles of substantive due process. (*Henning, supra,* at pp. 1270-1271 citing *In re Farb* (1918) 178 Cal. 592, 598. In response, the Legislature enacted the statutes of 1929, which specified that whenever employers demanded a portion of any employee's tip they must provide notice of the policy in a conspicuous place. (*Henning, supra,* at p. 1271, 252 Cal.Rptr. 278, 762 P.2d 442). The policy underlying the statutes was "'to prevent fraud upon the public in

connection with the practice of tipping....' " (*Henning, supra,* at p. 1271. The statutes of 1929 also provided that the Department of Industrial Relations "shall enforce the provisions hereof and all fines imposed and collected thereunder shall be paid into the state treasury and credited to the general fund".

In 1937, the Legislature codified, with some modifications, the relevant provisions of the statutes of 1929, as sections 351, 352, 355, and 356 of the Labor Code. Labor Code §351 remained a notice statute and simply required the employer to post any notice of a policy of collecting the employees' tips. (*Henning, supra,* 46 Cal.3d at pp. 1271-1272. Section 352 required the notice set forth the extent to which the employees were required by the employer to accept tips instead of wages. (*Henning, supra,* at p. 1272). Section 356 reiterated that the purpose of the statute was to prevent fraud upon the public. (*Henning, supra,* at p. 1272. Labor Code §355 provided that the Department of Industrial Relations "shall enforce the provisions of this article." It further stated that all fines collected should be paid into the state treasury and credited to the general fund. A violation of Labor Code §§351 and 356 resulted in a misdemeanor punishment but did "not render void the [employment] agreement [between the employer and employee] with respect to the ownership or application of the tips." (*Anders v. State Board of Equalization* (1947) 82

Cal.App.2d 88, 97, 185 P.2d 883.)

Labor Code §§351 and 352 were amended in 1965, but they remained notice statutes. In 1968, the Industrial Welfare Commission (IWC) established a "tip credit" system, which permitted an employer to credit gratuities towards the minimum wage. (*Henning, supra,* 46 Cal.3d at pp. 1272-1273, 252 Cal.Rptr. 278, 762 P.2d 442.)

In 1965, the Legislature amended Labor Code §§350 and 351 to indicate that the employer must post the notice of taking the employees' tips in a conspicuous place. (*Henning, supra,* 46 Cal.3d at p. 1272, 252 Cal.Rptr. 278, 762 P.2d 442.) The law since 1937 and before 1965 merely provided that the notice had to be posted. The amended statutes provided that unless notice was conspicuously posted, the employer could not take any part of the gratuities. (Former Labor Code §§350 and 351.)

In 1972, Assemblyman Leroy F. Greene introduced a bill to amend former Labor Code §351 to remove the notice provision and to declare that every gratuity is the sole property of the employee. (*Henning, supra,* 46 Cal.3d at p. 1273. "The opinion of the Legislative Counsel on the effect of [this bill] was in relevant part as follows. '[This bill], as introduced, would delete provisions of law that now, broadly speaking, enable employers to obtain the benefit (as, in effect, the payment of wages) of tips and other gratuities

received by their employees, and thereby prohibit an employer from receiving such a benefit.' " (*Ibid.*) Additionally, the opinion stated that the regulations permitting tip crediting would be invalid. (*Ibid.*) Assemblyman Greene wrote the following statement in a memorandum: "The basis for this legislation would appear to be that tips or gratuities are given for **individual** excellence of service above and beyond the basic duties of the employment, and as such, the *employer has no vested right* to consider tips a part of wages." (Italics added.) This bill, however, "died" in committee. (*Henning, supra,* at p. 1273. [Emphasis added])

The following year, in 1973, Assemblyman Greene introduced Assembly Bill No. 10, 1973-1974 Regular Session (Assem. Bill 10), which was identical in relevant part to the bill introduced the prior year. (*Henning, supra,* 46 Cal.3d at p. 1273.) The Legislature retained the provision declaring tips to be the employee's property, but added a provision to preserve the validating of the tip credit system. (*Id.* at p. 1274.) Former Labor Code §351 stated in relevant part: " 'No employer or agent shall collect, take, or receive any gratuity or a part thereof, paid, given to or left for an employee by a patron, or deduct any amount from wages due an employee on account of such gratuity, or require an employee to credit the amount ... due the employee from the employer, *except to the extent that may be permitted by a valid regulation*

of the California Division of Industrial Welfare....Every such gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for [*sic*].' " *Henning, supra,* at p. 1274.

In 1974, the Legislature again considered a bill that would amend Labor Code §351 to bar any crediting of tips. (*Henning, supra,* 46 Cal.3d at p. 1275.) A memorandum by the senate Committee on Industrial Relations stated that " '[t]he effect of this bill would be to require employers to pay employees at least the minimum wage regardless of the amount of tips the employees receive.' " *Henning, supra,* at p. 1275.) In 1975, the Legislature amended the statute by deleting the crediting exception and thereby revoking the authority of the IWC to allow an employer to obtain the benefit of tips received by its employees. (*Henning, supra,* at p. 1275.)

A careful consideration of this legislative history supports a conclusion that by 1975 the Legislature provided employees with a private right of action to recover any tips unlawfully taken by their employers. In 1929, when tips were not considered the property of the employees, employers could take a portion of the tips as long as they provided notice of this practice to the public. The policy concern was that the public should be aware that the employees were not receiving all of the tip money. The law gave the DIR the authority to protect the tipping public's interest and the DIR could prosecute the employer

for any violation of the notice or record keeping requirements. Violations resulted in a misdemeanor punishment.

Assemblyman Greene, however, made it plain that the purpose of amending Labor Code §351 to strike the notice provision and to prohibit an employer from collecting any of the tip money was to make it clear that the employer did not have a vested interest in, or any right to, the tip money. No corresponding legislation expanded the authority of the Department of Industrial Relations to prosecute an action to recover tips expropriated by employers from their employees. Thus, the only way for an employee to recover tip money unlawfully taken by an employer would be for the employee to bring his or her own civil action. Accordingly, it would be absurd to believe that the Legislature, in a pre- *Moradi-Shalal, supra* world, did not intend access to the courts to enforce the property right it declared.[3]

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[3] A significant aspect of the context within which Labor Code §351 was amended was a decision by this Court that a claimed violation of a Labor Code provision is a breach of contract action, because Labor Code provisions are deemed a part of the employment contract. See discussion of *Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal. 2d 481, at page 36 herein. At a minimum, the Legislators who amended Labor Code §351 intended that, with its passage, tipped employees could sue for violations of Labor Code §351 pursuant to *Lockheed.*

V.

MORADI-SHALAL V. FIREMAN'S FUND INSURANCE COMPANIES (1988) 46 Cal.3d 287

Any analysis of whether or not a pre-*Moradi-Shalal, supra* 46 Cal.3d 287, statute provides a private right of action cannot simply ignore *Moradi-Shalal,* and the cases that succeeded it.

In assessing the instant case, one might query; Would *Moradi-Shalal* have been decided differently if the law at issue created a right personal to someone in Ms. Moradi-Shalal's circumstances, and an obligation of Defendant directly to persons in her circumstance, along the lines of the rights and obligations created in Labor Code §351?

The law at issue in *Moradi-Shalal* was clearly regulatory– intended to generally regulate the behavior of insurers in claims handling towards **third parties** who did not have a contractual relationship with the insurers. (See fn. 2 *Moradi-Shalal,* p. 292-293). It did not, in any sense, declare a discrete property interest in a group of Californians, and a discrete obligation on the part of other Californians to leave that property alone. Different than the instant case, there was nothing in *Moradi-Shalal* akin to the implied in fact contractual employer-employee relationship, at issue here, between the Plaintiff and the Defendant insurer in *Moradi-Shalal.* There was no

contractual relationship between the parties in *Moradi-Shalal* necessarily impacted by the law at issue in that case.

Embracing the dissent from *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880, the *Moradi-Shalal* Court held that if the Legislature truly had intended to grant ***third party claimants*** a private cause of action against an insurer for failing to settle claims against the insured, "then surely much more direct and precise language would have been selected."

Another important factor in *Moradi-Shalal* was the statutes reference to a pattern of misconduct as a predicate to a violation. Such pattern requirement, the Court concluded, in adopting the *Royal Globe* dissent, was not consistent with finding that a private cause of action would be available for one act of inappropriate conduct by an insurer to a third party.

In *Moradi-Shalal*, *supra* 46 Cal.3d at 300, the Court referenced Legislative History, uncovered subsequent to *Royal Globe Ins. Co., supra*, that the Legislative Analyst's report, and Legislative Counsel's digest accompanying the proposed Bill, expressly referenced the available administrative enforcement scheme. No such references to administrative enforcement for the recovery of expropriated tips can be found in the Legislative History accompanying the "sole property" amendment to Labor Code §351.

In *Moradi-Shalal*, this Court went to great lengths to explain how the *Royal Globe* decision had spawned extremely adverse consequences, *Id.*, at 301, and presented analytical difficulties that forced lower Courts to make quasi-legislative decisions. *Id*, at 303-304. In stark contrast, neither of these consequences would result from upholding a private Cause of Action for enforcement of Labor Code §351 in its current form.

Ultimately, *Moradi-Shalal* overruled *Royal Globe* for a combination of reasons.

- *Points raised by the Royal Globe dissent.*
- Adverse scholarly comment.
- Available Legislative History.
- Lack of intent to create a private right of action.
- The consequences to society regarding the confusion and uncertainty growing out of the application of *Royal Globe*. (*Moradi-Shalal*, *supra*, 46 Cal.3d at 304).

The Court went on to point out how there were substantial administrative sanctions that insurers could be made to endure, notwithstanding the lack of a private right of action. *Id,* at 304.

Applying the "no private right of action" holding under Insurance Code §790.3, from *Moradi-Shalal*, *supra*, to Labor Code §351 would be a stretch

beyond, and not supported by, reason. The Labor Code §351 amendments basically and expressly deprived Employers of rights they theretofore enjoyed to a share of tips, or all tips, if they notified the public, and created a complete right to said tips in the employees the tipping public gives them to. The Insurance Code section in *Moradi-Shalal*, *supra* merely established rules of behavior in claim handling. It did not, overnight, radically change ownership rights in property.

Vikco Insurance Services, Inc. v. Ohio Indemnity (1999) 70 Cal.App.4th 55 is, like *Moradi-Shalal*, so far removed from the facts of the instant case, that its "no private right of action" holding should not influence the outcome herein.[4]

The *Vikco* case did not eliminate a historic right employers had to claim property of employees as a condition of employment; and declare a "sole property right" in working men and women that could not be modified by Agreement. Furthermore, *Vikco* created exhaustive administrative remedies designed to address the rights the law at issue created with a hearing procedure carried out pursuant to the Administrative Procedure Act (*Id.*, at 64-

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[4] Appellant also contends that *Vikco* was wrongly decided. The law at issue in *Vikco* clearly created rights related to the contract between an insurance agency and a carrier. At a minimum, Plaintiff should have been allowed to sue for violation of a law that became a part of its contract in the absence of an enforceable agreement to waive the law.

65 and fn 6.)

Goehring v. Chapman University (2004 121 Cal.App 4th 353, 375-379, should inform the decision herein. *Goehring* demonstrates the limited applicability of *Moradi-Shalal* to a case where the Legislature created specific rights in Plaintiffs that would otherwise go unenforced.

In distinguishing *Moradi-Shalal*, the Court in *Goehring* emphasized that with the frequent unfair practice predicate to a violation of the Insurance Code in *Moradi-Shalal*, the Legislature could not have intended a private right of action for an isolated violation. *Goehring, supra* 121 Cal.App.4th at 375. It also noted how the *Moradi-Shalal* decision was driven in part by adverse consequences and analytical difficulties caused by *Royal Globe*. *Id.,* at 378.

In upholding the private right of action under Business and Professions Code §6000 et seq., in *Goehring*, the Court noted that the "adverse consequences" and "analytical difficulties that emanated from *Royal Globe* would not occur if the Court found a private right of action under the Business and Professions Code at issue. "Section 6001 succinctly sets forth disclosure requirements and the law school's compliance or noncompliance is readily ascertainable." *Id.,* at 378. Similarly, in this case, Labor Code §351 succinctly sets forth the prohibitions barring employers from taking, collecting and receiving any portion of tips and sets forth the property rights of tip recipients

in tips given to them. The problems engendered by a *Royal Globe* decision will not occur in this case if tipped employees have a right to recover what is properly theirs.

Finally, the Court in *Goehring*, *supra*, at 121 Cal.App.4th at 378 contrasted *Moradi-Shalal*'s administrative procedures with those available in *Goehring*, pointing out that the administrative procedures in *Goehring* did not provide a mechanism for the refunds that the law contemplates.

Similarly here, the prohibition on taking, collecting and receiving with the "sole property language" in Labor Code §351, clearly contemplate that if tips are taken in violation of the prohibition, those whose property was taken should be able to recover the property. The Labor Code §354 criminal enforcement procedure does not include a procedure for recovery of unlawfully expropriated tips.

One difference between *Goehring* and the instant case is that in *Goehring*, a law school's failure to disclose, per the law's express terms, triggered a right to a tuition refund. The Court in part relied on the "refund" language in the law as indicative of a right to a private right of action. *Id.*, at 378-379. Here, comparable express language does not exist; however, that fact should not diminish the rights of "tipped employees". The Legislature did not have to declare a tipped employee's right to recover money unlawfully

taken, because it is axiomatic that the owner of money wrongfully taken is entitled to its return. In *Goehring,* the "refund" at issue was necessarily a statutorily created remedy.

VI.

JACOBELLIS V. STATE FARM FIRE AND CASUALTY (1997) 120 F.3d 171 PROVIDES A COMPELLING ANALYTICAL FRAMEWORK

In *Jacobellis, supra,* 120 F.3d 171, decided after *Moradi-Shalal*, the Ninth Circuit was confronted with a statute that required insurance carriers to offer earthquake coverage *Id.,* at 173. Plaintiffs contended that they were not offered such coverage. After the Northridge earthquake, they sued. The district Court dismissed, holding that there was no private right of action.

The Ninth Circuit deemed its task to determine how the California Supreme Court would rule under the circumstances. *Id.* at 173.

The Court held *Moradi-Shalal* did not apply for the following reasons:

In *Moradi-Shalal* the law provided for Insurance Commissioner enforcement in the form of cease and desist orders. Here, as in *Jacobellis*, no such civil administrative remedy exists to secure the return of the money taken. *Jacobellis* referenced *Faria v. San Jacinto Unified School District* (1966) 50 Cal.App.4th 1939, 1947 for the proposition that "for every wrong there is a remedy." California Civil Code §3523.

In *Jacobellis*, *supra* 120 F.3d at 174 the Court further referenced that, as in this case, the analytical difficulties and adverse consequences of finding a "private right" in *Moradi-Shalal,* were not a problem.

Correctly, the Court in *Jacobellis* pointed out how *Moradi-Shalal* did not hold that Courts should never imply a private right of action in the face of Legislative silence:

"II. Restatement Test

Before *Moradi-Shalal,* California adopted the Restatement test for determining whether a private cause of action could be implied from a statute. *See Middlesex Ins. Co. v. Mann,* 124 Cal.App.3d 558, 570, (1981) (citing Rest.2d Torts § 874A). In order to imply a private right of action under *Middlesex,* a court must determine: (1) the plaintiff belongs to the class of persons the statute is intended to protect; (2) a private remedy will appropriately further the purpose of the legislation; and (3) such a remedy appears to be needed to assure the effectiveness of the statute. *Id.*"

"The California courts have not clearly determined whether this analysis is still appropriate after *Moradi-Shalal. See Arriaga v. Loma Linda Univ.,* 10 Cal.App.4th 1556, 1564 (1992) (finding no private right of action under *Moradi-Shalal* or *Middlesex*). However, California courts have implied a private right of action where such a right was necessary to enforce a statute

that was intended to protect the aggrieved party. *Faria,* 50 Cal.App.4th at 1947. In the absence of the concerns avoided by the *Moradi-Shalal* court and in a case, such as this one, where the statute evidences a legislative intent to provide a right to a class of persons, we believe that the *Middlesex* test is still useful for evaluating the appropriateness of a private cause of action. Applying this test, we hold the Earthquake Insurance Act provides a private right of action."

"First, residential property owners were the class that the Earthquake Insurance Act's offer requirements were designed to protect. The *Jacobellises* claim to be insureds who did not receive offers of earthquake coverage with their homeowners insurance policy and were therefore harmed by uninsured earthquake damage. Thus, they are plaintiffs within the class of persons the legislation was designed to protect."

"Second, a private remedy is appropriate to further the purpose of the legislation. The legislation provided a right for the *Jacobellises*, but did not explicitly provide a means to enforce that right. Therefore, a private right of action is needed to further the protective purpose of the legislation. Such a right is also appropriate because it does not raise the kinds of practical and analytical difficulties that were raised by the cases which created a private right of action under the Unfair Insurance Practices Act, before these cases

were overturned by *Moradi-Shalal.*"

"Third, a private right of action is needed to assure the effectiveness of the protective aspect of the statute. Although the legislative intent to clarify insurer liability for damage sustained by an earthquake where there is no specific earthquake coverage is served and effectuated without implying a private right of action, the protection of insureds and promotion of awareness of earthquake insurance coverage as intended by the legislature necessitates a method of enforcement that compensates aggrieved insureds." *Id.* at 174-175.

Here, the same analysis applies:

First, tipped employees were the Class that the amendments to Labor Code §351 were intended to protect. *Henning, supra* 46 Cal.3d at 1278.

Second, a private remedy is appropriate to further the purpose of the Legislation. The law provided a right to tips, but did not provide an explicit means to enforce that right. A private right of action is needed to protect the property rights of tipped workers.

Third, a private right of action is needed to assure the effectiveness of the protective aspect of the law.

This action provides the Court with a clear opportunity to delineate the boundaries of *Maradi-Shalal* applicability in a context where, if the Court finds the Legislature did not imply a private right of action, such a private right

of action should be implied by the Court because of the clear personal right to tips created, and the clear coincident obligation placed on employers.

VII

KATZBERG V. REGENTS OF THE UNIVERSITY OF CALIFORNIA (2002) 29 CAL.4TH 300 CONFIRMED THE VIABILITY OF THE RESTATEMENT APPROACH

In *Jacobellis, supra,* the 9th Circuit held that the Restatement Approach to determining the propriety of establishing a private right of action, survived *Moradi-Shalal* in California. In *Katzberg, supra* 29 Cal. 4th 300, 324-325 this court confirmed, in the context of rights bestowed by the Constitution, the viability of the Restatement approach. " ' When a legislative [or constitutional] provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, *the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision,* accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.' (Rest.2d Torts, 874A, bracketed material and italics added." *Katzberg, supra* 29 Cal 4th at 324-325.

Katzberg, supra invoked the Restatement approach when it found in the

context of that case, that although it could not discover any basis for concluding that a damages remedy was contemplated or reasonably might be inferred, it had "not discovered any basis for concluding that a damages remedy was intended to be foreclosed." *Id,* 29 Cal. 4th at 324.

Here, if the Court ultimately finds that it cannot infer from the amendments to Labor Code §351 that the Legislature intended or foreclosed a private right of action, *Katzberg* teaches that the Court could still recognize a private right of action to remedy the asserted statutory violation.

Recognition of the Restatement approach led the Court to consider the following Restatement criteria assessed in determination of whether a cause of action should be recognized. : "adequacy of existing remedies" *Id*, 29 Cal. 4th at 325- 327; "the extent to which a [private right of] action would change established tort law" *Id*, 29 Cal. 4th at 327-328; "the nature of the provision [here Labor Code §351] and the significance of the purpose that it seeks to effectuate" *Id*, 29 Cal. 4th at 328; "whether special factors would counsel hesitation in recognizing such a damages action". *Id*, 29 Cal. 4th at 329. None of these factors is dispositive; however, findings against a private right of action on the basis of the first 3, made analysis of the final criterion unnecessary in *Katzberg*. *Id*, 29 Cal. 4th at 329.

A. Availability Other Remedies

Speculation as to the possibility of other remedies would not suffice. It is necessary in the *Katzberg* analysis to determine if they exist.

1. Business and Professions 17200

The Court of Appeal acknowledged a remedy under Business and Professions Code §17200 et seq., using Labor Code §351 as a predicate. The inadequacy of such a remedy is obvious. In the context of a deprivation to rights to private property, there can be no room to indulge the equitable defenses available in a UCL remedy analysis. Once the tip money is taken, if there was a direct cause of action for damages under §351, equitable defenses and other affirmative defenses unique to 17200 Causes of Action, could not be invoked, and Plaintiffs could achieve appropriate relief against the wrongdoer for damages.[5]

2. Breach of Contract

Appellant acknowledges a Breach of Contract Cause of Action arises from the violation of any Labor Code Section, including Labor Code §351. In fact, the Cause of Action for violation of Labor Code §351 in the complaint

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[5] Should the Court find, in its *Katzberg* analysis, that Business and Professions Code, §17200 et seq provides an alternative remedy, it should note that relief against the employer who takes tips and pays them to others is not barred as a consequence of the payment of the tips, to others.

was a *de facto* breach of Contract Claim. As a matter of law, the Employer/Employee relationship in California is contractual. *Guz v. Bechtel National, Inc.* (2000) 24 Cal. 4th 317, 335. See also Labor Code §2750. The contractual duties of the employer implicitly include performance of mandatory statutory duties. *Bell v. Farmers' Insurance Exchange* (2006) 135 Cal. App. 4th 1138, 1147-1149.

This Court, in *Edwards II v. Arthur Andersen LLP* (2008) 44 Cal. 4th 937, referenced the following, in support of incorporating Labor Code §2804 into an employment agreement:

" ' " '[A]ll applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into the contract and form a part of it, without any stipulations to that effect, as if they were expressly referred to and incorporated.' [citation]"'(*Torrance v. Workers' Comp. Appeals Bd.* (1982) 32 Cal. 3d 371, 378..." *Edwards II ,supra* 44 Cal. 4th 937, 954-955.

In *Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal. 2d 481, this Court explicitly held that a Cause of Action for violation of a Labor Code Section, because the provisions of the Code are part of the employment contract, is a breach of contract cause of action. *Id*, at 486.

The *Lockheed* case is especially relevant to the analysis in this action,

because it represents this Court's view, at the time of the enactment of the Labor Code §351 amendments, that Labor Code enactments or changes automatically carry with them a Cause of action for breach of contract for violation of the law. Violation of Labor Code §351 is per se, violation of the employment contract. The Code section carries with it an automatic private right of action for breach of contract, and did so when drafted.

3. Conversion

The Common Law Tort of Conversion may also provide a remedy that has to be looked at in the *Katzberg* analysis. The elements of conversion are Plaintiff's ownership right, defendant's act of dominion wrongfully asserted over the personal property of another, and damages.

The personal property element exists here. At common law, tips were the property of their recipients. Long before the Legislature amended Labor Code §351, tips were considered the property of employee. The 1973 amendment reiterated the common law property determination, and prevented employers from entering into contracts to deprive employees of their tips.

In 1920, this Court in *In re Farb* (1920) 178 Cal. 592, was confronted with a statute that presumed tips belonged to the employee recipients, a statute that made it a misdemeanor for employers to take an employee's tips. The Court, in its decision, described the tips as the "personal earnings of the

employee". In its decision, since repudiated,[6] the Court found it an unconstitutional impairment of contract to prevent an employee from contracting with an employer to give the employer his tips in exchange for the opportunity to keep on working. Implicitly, *In re Farb* found that the right to the tips, unless contracted away by the recipient, resided with the employee recipients. The "Notice" laws that were in place from 1929 until the 1973 amendment continued the common law recognition of tips as inherently employee property. If tips were not the property of the recipients, why have a law that required tippers to be apprised of the Employer contract to take them from their owners?

The United States Supreme Court expressly recognized that tips given to an employee are that employee's property years before the amendments to Labor Code §351: "In a business where tipping is customary, in the absence of an explicit contrary understanding, tips belong to the recipients." *Williams v. Jacksonville Terminal Co.* (1942) 315 U.S. 386, 397. The Supreme Court cited *Harris v. Kansas City Terminal Ry Co.* (D.C.Mo 1941), 36 F.Supp. 434, which expressly referred to tips as the "property of the employee."

With the Court of Appeal finding that there is a question of fact as to whether the Casino's dominion, per its tip taking policy, over the tip amount

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6 *California Drive-In Restaurant Ass'n v. Clark* (1943) 22 Cal.2d 287, 295

that it turned over to Customer Service representatives, may have violated Labor Code §351, the "unlawful dominion over the property of others" element of conversion has been met. The damages element is self-evident. Unwarranted interference with Dealers' property, irrespective of intent, constitutes conversion. *Poggi v. Scott* (1914) 167 Cal. 372, 375.

4. Violation of Wage Laws

In the *Katzberg* analysis of alternative remedies, wage laws come into play. Labor Code §1194 provides employees a cause of action to recover minimum wages when an employer fails to pay the minimum wage. An employer's obligation to pay the minimum wage to an employee exists irrespective of the amount of tips the employee receives. *Henning, supra,* 46 Cal. 3d 1262, 1278. and *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 690,730.

As stated by this Court in *Industrial Welfare Commission, supra*, 27 Cal.3d at 730: "[T]he Legislature contemplated that the enactment would insure that tips received by an employee would not reduce an employer's minimum wage obligation, **either directly or indirectly**." [Emphasis added]

Here, it is undisputed that the wage checks given to the Dealers were equal to the minimum wage rate in effect times the hours worked. If the trial Court finds, on remand, that Hawaiian Gardens could not take the amount of

tips that it expropriated from Dealers daily that it paid to *agents*, the net it paid to the Dealers, given the illegal taking of tips, was below the lawful minimum it was obligated to pay. (e.g. Minimum wage check for $6.75 per hour during part of the class period, minus $1.00 per hour taken by Hawaiian Gardens from each Dealer in violation of §351 because of payment of that $1.00 per hour to an "agent", equals net actual pay of $5.75 per hour). Per the "indirect" reduction in minimum wage payments that this Court stated Labor Code §351 was intended to eliminate, illegal tip taking gives rise to a minimum wage violation for which there is a private right of action. Labor Code §1194.

That illegal tip taking has an impact on true wages, giving rise to wage claims, is not a novel idea. See *California Drive-In, supra,* (1943) 22 Cal. 2d at 293, where the Court held that taking any portion of an employee's tips, while giving the employee a check for the minimum wage is an improper subterfuge by which the reality is that the employer is using tip taking to pay the wage." See also Opinions of The Attorney General, Vol. 3 Jan-June 1944, Opinion NS-5373; 29 C.F.R. 531.35; and *Winans v. W.A.S. Inc.* (1989) 112 Wash.2d 529.

5. Labor Code §221

Under Labor Code §218, employees have causes of action arising from, inter alia, violations of Labor Code §221, the anti-kickback law. *Katzberg*

analysis, therefore, compels a look at §221. Day in and day out, after each pay day, Dealers are required to turn over a portion of their tips to the Casino. Labor Code §221 condemns the kickback of any amount of wages theretofore paid. The Casino's "tip pool" policy, to the extent it requires employees to illegally turn over money (e.g. to fund payments by the casino to "agents") daily from their tips to the casino, constitutes an unlawful kickback. "Wages" are an amount of money. Labor Code §200. Hawaiian Gardens requires Dealers to turn over after each payday (each shift), an amount of money. The requirement is a kickback violative of Labor Code §221. There is no requirement in the law, that, for a kickback to be illegal, it has to be traced back to a cashed wage check. Requiring an employee to unlawfully pay any amount of money to an employer after pay day is an illegal kickback. See *Kerr's Catering v. Dept. of Industrial Relations* (1962) 57 Cal. 2d 319, 325 - 328; and *Hudgins v. Neiman Marcus* (1995) 34 Cal. App. 4th 1109, 1118-1119.

In 29 CFR 531.35 and 29 CFR 531.36, the Department of Labor, in the context of Federal wage laws, made it very clear that illegally forcing an employee to pay any money to an employer is an illegal kickback. "....The wage requirements of the Act will not be met where the employee 'kicks-back' **directly or indirectly** to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true

if the kick-back is made in cash or other than cash...." 29 CFR 531.35.

6. PAGA Does Not Provide A Remedy Which Should Negatively Impact The Assessment Of Whether A Private Right of Action Should Be Imposed

PAGA, Labor Code §2698 et seq. deputizes employees to seek Civil Penalties payable to the State (25% to aggrieved employees) for violations of the Labor Code. In the *Katzberg* analysis, it should not be treated as an alternative remedy that weighs against finding a private right of action. It does not serve the obvious remedial requirement for a violation of §351, the return of tips wrongfully appropriated by employers. Further, it does not supercede other remedies, specifically encouraging them through Labor Code §2699(g)(1).

B. Providing A Private Right Of Action Will Not Change Established Tort Law

The second *Katzberg* Restatement criteria, impact on tort law, is a non-factor in the assessment of allowing a private right of action for violations of Labor Code §351. Such a cause of action is not substantively different than finding a conversion cause of action applicable, and not inconsistent with a breach of contract action for the breach that a violation of the law constitutes under *Lockheed, supra* (1946) 28 Cal. 2d 481, and *Edwards II, supra* (2008)

44 Cal. 4th 937.

C. The Nature Of Labor Code §351 And the Significant Purpose It Effectuates Cries Out For An Enforcement Mechanism

The third and fourth *Katzberg* Restatement criteria clearly support providing tipped employees the opportunity to enforce the provisions of Labor Code §351. Work place income, irrespective of source, is of critical importance to all working men and women. Creating a prohibition that precludes employers from taking tips from the tipped workforce effectuated a huge swing in employee rights, with significant income ramifications. The enactment is meaningless absent a real opportunity being provided to employees to recover tips illegally taken from them by their employers.

There are no special factors counseling hesitation in recognizing a damages action. As incomplete, UCL causes of action are in the vindication of rights under Labor Code §351, experience under the UCL establishes that there are no special impediments that make access to courts ill-advised in the context of claims arising for violations of Labor Code §351.

VII

CONCLUSION

Article I Section 3(a) of the California Constitution provides in relevant

part: "The people have the right to . . . petition government for the redress of grievances. . ."

In this regard, the California Constitution is consistent with and borrows from the United States Constitution, First Amendment right to petition government for redress of grievances.

The right to petition embraces the right to avail oneself of the Court system. *Jersey v. John Muir Medical Center* (2002) 97 Cal.App.4th 814, 821. *California Motor Transport Co. v. Trucking Unlimited* (1972) 404 U.S. 508, 510.

Clearly, these Constitutional principles must inform the analysis of the rights of tipped employees to bring an action for violation of Labor Code §351.

At the time the "sole property" and "employer prohibition" sections of Labor Code §351 were enacted, *Moradi-Shalal, supra* had not been the law, the United States Supreme Court had just stated in *California Motor Transport Co., supra* 404 U.S. at 510 that "the right of access to the Courts is indeed but one aspect of the [First Amendment] right of petition," and the state of California law was, and remains, that a violation of a Labor Code section creates a right of action for breach of the employment contract, *Lockheed, supra* 28 Cal.2d at 486.

Given this context, it is by no means a stretch to conclude that it is clear

that in enacting the Labor Code Amendments, the Legislature contemplated private enforcement of Labor Code §351.

The limited authority of the DIR pursuant to Labor Code §354, and the fact that back in 1973 the private litigant UCL option was far from what it is today. (e.g. Business and Professions Code §17203 was not enacted until 1977), also enhance the likelihood that the Legislature contemplated a private right of action.

To conclude that the Legislative did not contemplate a private right of action to enforce Labor Code §351 suggests the absurd proposition that the Legislature intended to declare a right and prohibition without a remedy.

However, even if the Court were to hold that the Legislature did not implicitly authorize or foreclose private enforcement, it is appropriate for this Court to authorize private enforcement pursuant to a *Katzberg*, *supra* 29 Cal.4th 300 analysis.

DATED: July 20, 2009

By:_____
DENNIS F. MOSS
Attorney for Petitioner

RULE 14 CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief of Appellants' is produced using 13-point Roman type including footnotes and contains approximately 10,006 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: July 20, 2009

By: _____

DENNIS F. MOSS
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DECLARATION OF SERVICE BY MAIL

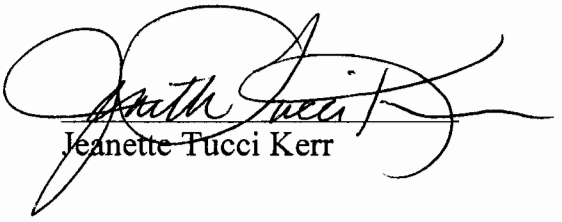
I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 11377 W. Olympic Boulevard, Fifth Floor, Los Angeles, California 90064-1683.

2. That on July 20, 2009 declarant served the **PETITIONER'S OPENING BRIEF ON THE MERITS** by depositing a true copy thereof in a United States mail box at Los Angeles, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 20th day of July, 2009 at Los Angeles, California.



Jeanette Tucci Kerr

LOUIE HUNG KWEI LU, et al. v. HAWAIIAN GARDENS CASINO, et al.

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