IN THE SUPREME COURT OF CALIFORNIA

S171442

LOUIE HUNG KWEI LU, et al.

Plaintiff and Appellant,

vs.

HAWAIIAN GARDENS CASINO, et al.,

Defendants and Appellees

AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION 3
Case No. B194209

PETITION FOR REVIEW

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ISSUES PRESENTED

1. Does a private right of action exist to enforce Labor Code §351's proscription that an employer may not misappropriate gratuities left for or given to an employee or employees?

The published decision in this case is squarely and irreconcilably at odds with the First District, Division Two's published decision on the same point in *Grodensky v. Artichoke Joe's Casino*, Nos. A119035 & A119036 (Mar. 11, 2009); 2009 WL 607400.

2. Does Labor Code §351's prohibition that "[n]o 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," and declaration that every such gratuity is "the sole property of the employee or employees to whom it was paid, given, or left for" require an employer to ascertain tipping patron intent if it chooses to unilaterally redistribute a portion of tips given to one employee to other employees who perform services?

The published decision in this case that states among other things, that Labor Code §351 does not make a distinction based on the intent of the tipping public (Op. p.16), is at odds with the "*employee*" and the "sole property" language of Labor Code §351, Labor Code §356, and a recent decision that underscores the need to discern and respect patron intent in connection with Labor Code §351. (*Budrow v. Dave & Buster's of California* B205026, March 2, 2009; 2009 WL 503359).

3. Can the majority decision in *Leighton v. Old Heidelberg* (1990) 219 Cal.App. 3d 1062, and its ***assumptions*** regarding departing diners at restaurants be a basis for summary judgment in other tipping contexts, even when evidence is presented suggesting the real possibility that the tips at issue in these other contexts, were meant exclusively for a discrete category of employees?

The published decision in this case applied *Leighton* to a card room context where winning players tip dealers for the winning cards they deal, by handing or sliding chips to them from their winnings, where the same tippers may tip the same dealer several separate times if the tippers win several separate "hands", where the tippers separately and openly tip other employees (including employees who are paid money from the funds taken from dealers, from the "tip pool"), and where there was no evidence from which a trier of fact could discern that the tips at issue were necessarily provided for group service, rather than intended as an exclusive reward to the dealers for the winning cards.

The question of whether *Leighton* can be applied to every tipping context, irrespective of the facts, is a critical issue to hundreds of thousands of persons in California's tipped workforce, and their employers.

4. Does an employer violate its obligation **to pay** the "minimum wage", if it takes tip money from an employee each day the employee works in violation of Labor Code §351, and then on pay day, gives the employee a pay check that equals no more than the hours the employee worked, times

the minimum wage rate in effect?

The holding of the Court of Appeal in this action in connection with an employer's minimum wage payment obligations is at odds with this Court's recognition that the prohibitions enacted into Labor Code §351 in the mid-1970's were intended to prevent an employer from "directly or indirectly" using an employee's tips to fulfill its obligation to pay the minimum wage. *Industrial Welfare Comm'n v. Superior Court* (1980) 27 Cal.3d 690, 730; *Henning v. Industrial Welfare Comm'n* (1988) 46 Cal.3d 1262, 1275 -1278.

5. Do employers violate Labor Code §221 if, on every work day following and between pay days, they require employees to kickback a portion of the sum of money paid on pay day, that the employer is not otherwise entitled to, if the funds used for the kickback are "tips"?

The notion that an Employer can circumvent the anti-kick back provision of the Labor Code by forcing employees to use their tip money to fund the kickback, is at complete odds with this court's oft repeated admonition:

" '[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection.' (cite omitted)" *Ramirez v. Yosemite Water* (1999) 20 Cal.4th 785, 794.

These important, unsettled issues of law, affecting millions of

California workers and consumers have never been addressed by this Court and they have resulted in a patchwork of approaches by the Courts of Appeal.

INTRODUCTION

In *Searle v. Wyndham International, Inc.* (2002) 102 Cal.App. 4th 1327, the court observed that tipping has existed in this country since the latter half of the 19th century, and is "now a well-accepted part of our day-to-day lives." The Court found that tips are entirely gratuitous, entirely subjective and very personal. *Id.*, at 1331. The Court noted that "tips are an important part of many service employees income." *Id.*, at 1332.

"Each year according to the economist Ofer Azar diners hand over some $42 billion in tips at the nation's full-service restaurants." The New York Times Magazine, October 12, 2008. Wachter, Paul *Why Tip?*

A significant portion of that total is handed over in California[1] , and that total does not reflect numerous non-restaurant tipping contexts, where billions of other tip dollars change hands.

In Labor Code §351, the Legislature declared unequivocally that gratuities given to an employee are the employee's sole property and do not belong to the employer and are not to be controlled by the employer. It did so both to secure tipped employees' rights to what was given to them and

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[1] According to the United States Census Bureau, as of 2006, California accounted for over 12% of accommodation and food services sales and over 11.5% of private, nonfarm employment. http://quickfacts.census.gov/qfd/states/06000.html.

also to prevent a fraud upon the tipping public. (See Labor Code §356.)

This Petition involves a need for Judicial direction on how to protect the property rights of tipped employees, the tipping consumer's rights to have their tipping intentions honored, and the need of employers to clearly understand what they can and cannot do when it comes to their tipped employees, and their desire to use the property of tipped employees to fund part of the costs of employing other employees.

The need for clarity is not only compelled by the circumstances of restaurant employees and cardroom employees. Many other industries will be served by clear direction from this Court. Hair salons, hotels, cab companies, sky cap services, valet parking businesses, car washes, coffee houses, delivery companies, nail salons, barber shops, and other service businesses and their employees, will benefit from clear direction from this Court. In many tipping settings, patrons directly give tips to specific employees believing that they are rewarding those employees, never knowing, let alone intending, that the employees they tip are required to turn over a portion of those tips to the employer for redistribution to other employees.

This case clearly presents a number of issues important to a considerable portion of California's workforce, the tipping public and employers. Given the competing and unclear direction of published decisions to date, guidance is definitely needed from this Court.

The first issue raised by this Petition is whether employees have a private right of action under Labor Code § 351 to protect and enforce their

property right in gratuities outside the unique remedial scheme of the UCL Cause of Action.

The Second District, Division Three, has said, in this case, there is no private right of action available to enforce Labor Code §351. The First District, Division Two, has said there is a cause of action. Both have done so in recent, published opinions. There is a direct conflict and lack of uniformity in the law which compels resolution by this Court.

The second, and in a sense broader question embraced by issues 2. and 3. above, is how far an employer can go in allocating or redistributing gratuities given by patrons to discrete identifiable employees, to other employees whose full compensation the employer may otherwise have to fund from his own pocket?

The law in this area lacks coherence. The seminal Court of Appeal case held that a restaurant employer could allocate a tip left by a departing diner between the waiter, the busboy, and the bartender. It focused on what the Court presumed was the tipper's intent based on the Court's understanding of what occurs in restaurant settings. Two recent cases, this matter and *Grodensky v. Artichoke Joe's Casino*,(Mar. 11, 2009) 2009 WL 607400, have departed from any semblance of focus on the intent of the person providing the gratuity and have afforded employers virtual carte blanche to redistribute gratuities – even tips directly handed to specific individuals, in a context where other categories of employees are separately tipped – so long as the redistribution recipients are not managers or supervisors. A third case. *Budrow v. Dave & Buster's of California* March

2, 2009 WL 503359, made determination of tipper intent a central inquiry in these matters. Lost in the shuffle has been the meaning of the statutory phrase that a gratuity "paid, given, or left for" an employee is that employee's "sole property" which may not be interfered with by the employer, and the significance of the anti-fraud upon the tipping public language of Labor Code §356.

This Court has never addressed this issue nor what it means for a gratuity to be "paid, given, or left for an employee" or whether an employer, with its own interests, gets to unilaterally determine that employees who were not given the tips at issue, are entitled to a portion of gratuities given to others. This is an issue of widespread import affecting hundreds of thousands of workers in service industries throughout California. For workers in such industries, the treatment of income from gratuities is easily more important than the effect of missed rest or meal breaks. (See *Brinker Restaurant v. Superior Court*, No. S166350). For a large segment of the tipped employee population, tips given to them by patrons are their primary source of income, significantly more than they are paid by their employers.

The"minimum wage" issue also presents a question that deserves this Court's careful scrutiny. The prohibitions in Labor Code §351, as recognized by this Court in *Industrial Welfare Comm'n v. Superior Court* (1980) 27 Cal.3d 690 and *Henning v. Industrial Welfare Comm'n* (1988) 46 Cal.3d 1262, are intimately tied into an employer's obligation to pay employees the minimum wage to its employees irrespective of their tip income. This Court has recognized that "tips" cannot directly or indirectly

be used by an employer to avoid this obligation. In this matter, the Court of Appeal has taken the position that an illegal taking of tips from an employee coupled with a wage check for the minimum wage times hours worked, does not run afoul of an employer's obligation to pay the minimum wage, because the source of the money illegally taken is tips. This divergence from the Court's holding that the amendments to Labor Code §351 enacted in the 1970's were designed to prevent employers from using an employee's tips to pay an employee less than the minimum wage, is a conflict that needs to be addressed. This Court needs to decide that, if an employer cannot credit tip receipts against its obligation to pay minimum wages, and cannot make deductions from pay checks on account of tips to avoid its obligation to pay the minimum wage, can the employer accomplish the same result as an illegal deduction or illegal crediting, by simply taking tips from an employee every day, and thereafter, on pay day giving the employee a check for hours worked times no more than the minimum wage rate?

Labor Code §221 presents a similar issue that Californians need guidance on. Do kickbacks of a portion of wages previously paid constitute a violation of Labor Code §221 if the source of the money used to fund the kickbacks is tips? Employees and workers need to know if Labor Code §221 can be circumvented by an employer forcing an employee to use tips to fund the kickback. Can an employer condition employment on payment of a kickback of wages when the money used to fund the kickback was earned on a second job, income from interest earnings from a back account, from a cash gift that the employee received from a relative, or from tips?

The Court of Appeal ruling that a violation of Labor Code §221 has not occurred so long as tips owned by an employee are the source of money used for a kickback of wages obviously has serious ramifications beyond this case.

STATEMENT OF THE CASE

A. The Tip Redistribution Scheme.

The tipping at issue in Hawaiian Gardens Casino involves players of games of chance who bet money in those games, winning "hands" of the games being played. Upon winning a hand, the winning player tips the dealer by handing, tossing or sliding chips with cash value to the dealer. This occurs while the dealer is sitting at the gaming table with all the players dealing multiple "hands" of the game during half hour periods. (Op. 5) . After players win a hand and tip a dealer, they continue playing, and if they win, continue tipping the dealer(s). Dealers will often receive from players who win multiple times, multiple tips. Different than the ordinary restaurant experience, players openly and separately tip other employees, including "CSR's", board persons, chip sellers and others. They do this by separately handing these categories of employees tips. (Op. 5 read in conjunction with 3, 15, and 22).

There was no evidence provided by Hawaiian Gardens, or evidence referenced by the Court , that established as a matter of undisputed fact that the intent of players in handing tips to dealers after they win hands, was to

reward employees other than dealers who provided the winning hand.

Notwithstanding evidence that the tips at issue were given directly to dealers, that the tips were driven by good cards and not good service, that other categories were separately tipped, and notwithstanding the lack of evidence that the tips at issue were meant in part for persons in categories other than Dealers, the Court of Appeal validated Hawaiian Gardens "tip pool" in all respects except as to the "agent" issue. (Op.21-23)

Pursuant to a mandatory policy, Hawaiian Gardens took fifteen to twenty percent of the tips given to dealers by patrons, put the money taken into its bank account, and then paid the amount of money taken to non-dealer employees. (Op. 3) Hawaiian Gardens did not take, collect, receive and redistribute tips given by patrons to non-dealer tipped employees.

The employees whose pay is funded in part by the redistribution of tips taken from dealers, receive payments based on their job classification, not based on the amount of tips received during the shift they work on. (Op 3) The evidence referenced in the opinion did not indicate that the tip money collected on a shift was completely distributed on the same shift, because such *Leighton* -like evidence was not in the record. Thus, tips taken from dealers on a swing shift may make their way into the hands of chip sellers or CSRs working on the graveyard shift, persons the tipping patron may have never even encountered, let alone intended to tip.

Hawaiian Gardens' dealers are paid every two weeks. Throughout each week, each day that a dealer works, Hawaiian Gardens takes 15 to 20 percent of the money given to dealers by patrons. (Op.3) On pay day, for

each hour worked, Hawaiian Gardens gives the dealer a check for the minimum wage rate times hours worked (Op. 20), in essence, returning the amount of money taken during the week and adding to the returned money the amount necessary to make up the difference between the minimum wage owed and the amount returned. (e.g. If patrons give a dealer two hundred dollars ($200.00) in tips per day on average during a ten work day pay period, and did so at tables where the tip rate the dealer was required to pay was twenty percent, Hawaiian Gardens took forty dollars ($40.00) per shift or four hundred dollars ($400.00) for the two week pay period, then paid the employee a minimum wage check times hours worked. If the minimum wage was, at the time, six dollars ($6.00) per hour, the check was for four hundred eighty dollars ($480.00) for eighty hours worked. Since four hundred dollars ($400) of the pay check was equal to the tips taken from the employee before payday, the true amount paid by the employer was only eighty dollars ($80.00) for eighty hours of work, or one dollar ($1.00) per hour.)

B. The Challenge By Lu, A Card Dealer, To The Gratuity Redistribution Scheme.

Plaintiff and petitioner Lu was, at the time he filed this action, a card dealer at Hawaiian Gardens Casino. (Op.4) He brought this class action on behalf of himself and other card dealers who were required, as a condition of employment, to part with a percentage of their tips, that were then redistributed to non-dealer employees. The Class Lu sought to

represent was certified by the Trial Court. (Op.4)

Lu alleged, among other claims, that the Casino's gratuity redistribution scheme violates Labor Code §351, Labor Code §221 prohibiting kickbacks, and Labor Code §1197 requiring that Hawaiian Gardens pay dealers the minimum wage. He also alleged that Hawaiian Gardens' practices constitute conversion and unfair competition.

C. The Court of Appeal's Opinion.

In a published decision, the Court of Appeal held:

- Nothing in Labor Code §351 prohibits tip pooling in casinos. (Op.2,12)

- Labor Code §§351 and 450 do not provide employees with a private right of action to enforce the rights created by those sections. (Op.6-11)

- Labor Code §351 serves as a predicate for suits under Business & Professions Code §17200, *et seq.*(Op11)

- The Legislature eliminated any distinction between a "group tip" and a "singular tip". (Op.16)

- "Leighton rejected the argument that the permissibility of a

tip pool under Labor Code §351 would depend upon whether the patron's intention was discernable." (Op.16)

- Neither §351 nor Leighton make a distinction based on the intent of the tipping public. (Op. 16)

- The difference between handing a tip to a cardroom dealer and "leaving" a tip at a restaurant is a distinction without a legal difference. (Op.16,17)

- If an employer requires an employee to pay the employer a sum of money each work day that he works after pay day, the requirement is not a kickback in violation of § 221, so long as the source of the funds used for the kickback comes from tips. (Op.18-19)

- Even though Hawaiian Gardens took money from dealers every day they worked, since on pay day the checks given to the Dealers reflected the minimum wage rate times hours worked, there has not been a violation of Hawaiian Gardens' obligation to pay the minimum wage. (Op. 20.)

- There is a triable issue of fact on the UCL claim, as to whether or not the casino's tip pool policy violates Labor

Code §351 because there is factual support for the conclusion that persons who have the authority to supervise, direct, and control the acts of dealers receive tip pool proceeds. (Op.21-23)

The Court of Appeal ordered its Opinion modified on February 11, 2009, expressly stating that its modification affected a change in judgment. The modification made sure its UCL holding was limited to a finding that a violation of Labor Code §351 can be a predicate to a UCL Cause of Action. (App. B).

D. LU'S REHEARING PETITION

Lu petitioned for rehearing pointing out that the Court of Appeal decision granted Summary Adjudication to Hawaiian Gardens, not on the basis of factual evidence presented in support of its motion, but on the assumption that the presumptions used by the Court in *Leighton, supra,* dispose of a case involving a distinct cardroom tipping context as a matter of law. Rehearing was denied. (App.C).

WHY REVIEW IS NECESSARY

I. Review Is Necessary To Resolve A Conflict In The Published Authority Over Whether A Private Right Of Action Exists For Violation Of Labor Code §351's Proscription On Employer Misappropriation Of Gratuities.

This case holds there is no private right of action under Labor Code §351. (Op.6-11). *Grodensky v. Artichoke Joe's Casino*, 2009 WL 607400 decided a month after the *Lu* modified opinion, holds the direct contrary, expressly criticizing *Lu.* (*Grodensky, supra* 2009 WL 607400 , at 9-15) There should not be one law in Los Angeles and another in San Francisco. Although trial courts would be free to choose whether to follow the Opinion in this case or that in *Grodensky*, the result would still be confusion. There could be a private right of action in one courtroom and none in the courtroom next door. That is an untenable legal situation.

Review should be granted.

II. Review Is Necessary to Resolve Real Conflict in the Published Authority over Whether Labor Code §351 Compels a Determination of Tipper Intent, or at a Minimum, a Reasonable

Assessment of Tipper Intent, as a Predicate to Imposition of an Involuntary "Tip Pool"

"In businesses where tipping is customary, the tips, in the absence of an explicit contrary understanding, belong to the recipient." *Williams v. Jacksonville Terminal Co.* (1942) 315 US 386, 397; (See also *Herbert Laurel-Ventura, Inc. v. Laurel Ventura Holding* (1943) 58 Cal.App.2d 684, 694.

The United States Supreme Court in *Williams* anticipated Labor Code §351 in its present form. After declaring that tips belonged to the recipient, the Court went onto to say:

"Where, however, an arrangement is made by which the employee agrees to turn over the tips to the employer, **in absence of statutory interference**, no reason is perceived for its [the arrangement's] invalidity." *Williams*, *supra*, 315 U.S. at 397.

Labor Code §351 and §356 in their current form are the type of "statutory interference" referenced in *Williams*. They provide:

"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 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 who it was paid, given, or left for..." [Emphasis added]

There is no exception in the law for taking the tips of one employee or group of employees in order to meet the costs of employing other employees.

Labor Code §356 provides:

"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 cannot be contravened by a private agreement..."

The Problem: To Whom Is A Gratuity "Paid, Given To, Or Left For" And Employer Imposed Schemes To Involuntarily And Unilaterally Redistribute Gratuities

The question arises to whom is a tip given when it is left on a dining table, handed to a dealer, handed to a bellman, left for a hotel room maid, given to a cab driver, handed to a hairstylist, given to a pizza delivery person, left for a newspaper delivery person at Christmas time, handed to a

tour guide, handed to a valet, etc. The question also arises, does the answer change if there is evidence of separate tipping, or evidence of a tip motive inconsistent with a motive to reward for overall service of a group. As a matter of practice, many employees in the work place *voluntarily* share tips or gratuities amongst themselves. This practice (sometimes knows as "tipping out") is *not* at issue in this petition.

But the redistribution of tips is not always voluntary. Often employers require and enforce a redistribution. *That* is the issue in this petition: *employer-imposed* involuntary gratuity redistribution schemes. Often employers claim that such schemes are necessary for employee harmony and equity. Employees, particularly those who feel that they lose control of their property, often suspect that the true employer motive is to use gratuities given to individual employees or limited groups of employees whose combined wage and tip earnings are higher than what the Employer deems is appropriate, to fund a major part of what the labor market demands as compensation for other employees (e.g. At Hawaiian Gardens, Floor Managers also known as customer service representatives, received more money from Dealer tip redistribution, than they received in the wages paid with money not taken from dealers.) Regardless the motivation, the question is how is Labor Code §351's mandate to apply?

Appellate Court decisions do not provide clear answers.

The first case to address tipper intent, and "Tip Pools" was *Leighton v. Old Heidelberg, Ltd.* (1990) 219 Cal.App.3d 1062.

Leighton, supra, was decided by the Court of Appeal after it issued an order transferring the cause from the Appellate Department of the Superior Court. The Appellate Court "deemed the issue of the legality of employer-mandated tip pooling among employees to be of Statewide importance." *Id.*, 219 Cal.App.3d at 1065. Currently, given the state of the law, the issue remains of statewide importance.

After recognizing that a gratuity is the "sole property" of the "employee or employees" for whom it was left, the Court in *Leighton*, concluded that tips left at the conclusion of a meal in a restaurant are left for the group of people who provide service.[2]

The Court held that there was not a prohibited taking by the employer within the meaning of §351 because the tip left by the patron in a restaurant is "left" not only for the waitress but for other employees as well, and is not, therefore, the waitresses' personal property.

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[2] It probably can be judicially noticed that the Justices who decided *Leighton* had there own restaurant experiences to draw on when reaching their conclusions. There is no indication that the Justices who decided *Lu* ever won a hand of poker in a cardroom, and then handed a tip to a dealer.

Absent evidence that the tip was left for a group,[3] the Court in *Leighton* necessarily relied on assumptions:

> "**We dare say** that the average diner has little or no idea and does not really care who benefits from the gratuity he leaves, as long as employer does not pocket it, because he rewards for good service no matter which one of the employees directly servicing the table renders it." *Id.*, at 1069.

In explaining the basis of its conclusion, the Court pointed out how an attentive busboy can, as much as an attentive waitress be responsible for the tip. Id., at 1069-1070.

Nothing in *Leighton* precluded the possibility that in a different tipping context (e.g. where winning players directly hand tips to dealers and other employees are separately tipped), an employee could prove that a tip was given to him exclusively, an "employee", and not left for "employees.".

Leighton not only left undetermined what happens in a card room context, but also left undetermined how courts should look at a myriad of

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[3]The dissent pointed out: "Old Heidelberg submitted no evidence at the summary judgment hearing to support this contention about the intent of customers who leave tips." The majority did not dispute this fact.

other tipping contexts in which the facts do not mirror the Old Heidelberg restaurant. For example, *Leighton* does not answer the question of the rights of a hair salon owner to require a beautician who is handed a tip by a pleased customer, to share a portion of her tip with the person who washes the patron's hair (who the patron has separately tipped), or a cashier who the tipper never intended to tip. If the tip is intended by the tipping patron as a reward to the beautician over satisfaction with the way the styling turned out, and not for the service performed by the cashier, or the separately tipped hair washer, the question remains for this Court, can the *Leighton* assumptions apply?

Leighton also does not address the question of how far an employer can extend the presumed group intent utilized by the *Leighton* Court in a restaurant context.

Presently, the Second Appellate District has a case pending, where a restaurant employer compelled table service personnel to share a portion of tips with dishwashers, thereby reducing the amount of money the Employer had to come up with on its own, to pay dishwashers. *Etheridge v. Reins International California, Inc.*, No. B205005. In the same vein, there is a cardroom case pending in Santa Clara County where tips were shared, at one time, with surveillance persons employed by the casino.

To illustrate the need for review herein, adaptation of a section of the *Leighton* dissent to the facts in *Lu* is useful.

This Court certainly has the prerogative to overturn *Leighton*, or to be critical of the reliance in the majority opinion in *Leighton* on presumed facts regarding the state of mind of tippers at Old Heidelberg restaurant. However, irrespective of how this court ultimately views the *Leighton* majority decision, the dissent's reasoning sheds light on the need for review.[4]

An important factor in assessing precedent that seemingly gives carte blanche to employers to take portions of employee tips for redistribution to others in the name of "tip pools", or that blindly defers to employer determinations of tipper intent, is the employer's self interest in such a system. The following excerpt from the *Leighton* dissent makes this clear especially when read in conjunction with a tipping context where the tippers' intent may be a far cry from that in a departing diner context. To make the point, Petitioner substituted references to waiters or waitresses, and busboys and bartenders in the dissent text, with Dealers, Chip sellers and CSR's who receive separate tips:

"This kind of employer-enforced tip pooling is just a disguised way

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[4] Although a Petition for Review was filed in *Leighton*, it was withdrawn before the Supreme Court ruled on the Petition.

of requiring **Dealers who are handed tips by players who win** to pay the market salaries of **Chip sellers and CSR's who receive separate tips from players.** This practice benefits the employer by having others pay the salary enhancement. It may also give the employer a competitive edge in hiring and maintaining **Chip sellers and CSR's who receive separate tips from players** by being able to offer the added attraction of guaranteed tip sharing. Because the tips are distributed in accordance with the employer's directives and in part for his benefit, this exercise of dominion and control over the tips is tantamount to declaring them to be his personal property. This is logically as well as legally inconsistent with the prohibition against "taking" a portion of a gratuity and with the statutory declaration that gratuities are the "sole property" of the employee." *Id.*, *Leighton*, *supra* dissent at 1082. (Category changes for illustration and emphasis added).

The Appellate Court in *Lu* extended *Leighton* far beyond the assumed patron intent rationale that *Leighton* applied in a departing diner context, when the *Lu* court reached the following conclusions:

The statute does not distinguish between situations where a gratuity is handed to an employee or left on a table (Op.16);

The Legislature eliminated any distinction that Lu makes between the so-called 'group tip' and a singular tip (Op.16); and

Leighton rejected the argument that the permissibility of a tip pool under Labor Code §351 would depend upon whether the patron's intention was discernable (Op.16);

When *Leighton* surmises that patrons of a restaurant "reward for good service" of a group of employees, it is reaching a conclusion regarding "intent". Here, where the evidence in opposition to Hawaiian Gardens' position demonstrated that an inference can be drawn that the tips at issue were given directly to dealers as a reward for good cards, and not for group service, a clear decision needs to be provided by this Court as to whether the group tip presumption from *Leighton* is to be applied in this and in all other tipping contexts.

This Court has to decide whether the *Lu* Appellate Court decision is correct when it says that "neither §351 nor *Leighton* make a distinction based on the intent of the tipping public." (Op. p.16);

A decision by this Court is further necessitated by the decision in *Budrow v. Dave and Buster's of California, Inc.* 2009 WL 503359, where, within weeks after the decision in *Lu*, the Court, rather than ignoring patron intent as a factor, focused on patron intent.

Budrow different than *Lu*, found that before an employee can participate in a redistribution of tips, the tip must have been "been paid, given or left for the employee." 2009 WL 503359 at 2,4. Whereas, *Lu* found that *Leighton* stood for the proposition that determining "intent" of tippers was not essential. *Budrow* looked at *Leighton* completely differently, finding that "in essence the [*Leighton*] Court found that, in leaving a tip, the patron intends to tip more than just a server or waiter." *Budrow, supra* 2009 WL 503359 at 3.

The *Budrow* Court goes on to indicate that the legality of a tip pool must be tied into the general experience of "each particular establishment", 2009 WL 503359 at 4 , while *Lu* rejects the notion that tipping context matters.

Contrary to *Lu's* dismissive treatment of patron intent, the Court in *Budrow* stated:

"[T]he statutory touchstone is whether the gratuity has been 'paid, given to, or left for' the 'employee or employees'." *Budrow,supra* 2009 WL 503359 at 4.

"Ultimately, the decision about which employees are to participate in a tip pool must be based upon a reasonable assessment of the patron's intentions. It is, in the final analysis, the patron who

decides to whom the tip is to be 'paid, given to or left for.' It is those intentions that must be anticipated in deciding which employees are to participate in the tip pool." (*Budrow*, *supra* 2009 WL 503359 at 4 ; Emphasis Added).

Given the foregoing, there is a clear conflict between:

- *Lu's* findings that Labor Code §351does not distinguish between situations where a gratuity is handed to an employee or left on a table, and the *Budrow* finding that facts have to be looked at in each tip context to determine patron intent;
- *Lu's* position that the legislature eliminated any distinction that Lu makes between the so-called "group tip" and the singular tip, and *Budrow's* recognition that intent is critical, and therefore, if tips are intended for a single employee, that intent must be respected in determining the propriety of a redistribution of a portion of tips; and,
- *Lu's* position that "neither §351 or *Leighton* make a distinction based on the intent of the tipping public" and *Budrow's* position that determination of patron

> intent is the touchstone of the analysis of whether or not a tip pool is appropriate under Labor Code §351, there must be a reasonable assessment of patron intent, and **in the final analysis, it is the patron who decides to whom the tip is to be paid, given to or left for.**

Budrow stands for the proposition that the tipping context makes all the difference. If the context is one in which arguably the patron did not intend that the tip should go to anyone other than the person it was handed to, *Budrow* holds that the analysis ends there, and that tip cannot be redistributed in whole or in part. *Lu* on the other hand, takes the position that as long as people perform service for tipping patrons, the employer can redistribute a portion of the tips irrespective of provable patron intent that a tip was not for group service.

The need for review on the expansion of *Leighton*, as it relates to the divergent opinions in this case and *Budrow*, is heightened by the "tip pool" approach taken in *Grodensky, supra* 2009 WL 607400. *Grodensky* also involved Dealer tipping in a casino. The appeal followed a completed trial on the merits. With a trial on the merits, the trial court found that the tips at issue were given to "dealers." In *Grodensky,* the Court acknowledged:

"The players give tips directly to the dealer. The players stay at the

table with the dealer and, if they keep winning, they repeatedly tip the dealer. Players separately tip board persons, floor managers, shift managers and chip sellers." *Id.*, at 2009 WL 607400 at 3.

The decision alludes to the tips at issue as the "Dealers' tips" throughout: *Grodensky* 2009 WL607400 at 15,16,17,19,35, yet permits redistribution nonetheless.

The holding of *Grodensky* that, like *Lu*, is at odds with the patron intent focus in *Budrow*, is the following:

> "Grodensky and the class claim that the plain language of the statute distinguishes between gratuities 'given to an employee' and those 'left for employees' and tips for an employee or employees. However, the statute does not make such a distinction. Labor Code §351 prohibits an employee from taking any part of a gratuity that is 'paid, given to, or left for an employee.' It further states, 'every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given to or left for.' Thus, the statute indicates that a tip may be left for one employee but it may be the property of more than one employee."

This holding, that essentially a tip can be intended for one employee,

but be the property of a group of employees, is a radical deviation from the "patron intent" and "sole property" focus of *Budrow* and Labor Code §356, and even from *Leighton's* rationale that the tips that are left in a restaurant are the group's, because they were intended for the group.

Consistent with *Lu*, the *Grodensky* decision proclaims, at complete odds with *Budrow*, that: "The [*Leighton*] court's interpretation of the statute applies to all factual situations where tipping is common." *Grodensky*, at 31.

Nearly twenty years after *Leighton* was decided, its holdings have been extended in ways that are inconsistent with the tipper intent rationale that it presumed. This Court needs to step in, and at a minimum draw a rational line that places a limit on the irrational extension of *Leighton*, and settles the question as to whether or not such extensions of *Leighton*, as evidenced by *Lu* and *Grodensky* are warranted. This Court has to determine if tipper intent is to be honored (Labor Code §356); and decide if a fair inquiry is required as to whether or not a particular tipping context compels a conclusion that tips were given to and are the "sole property" of a discrete group of employees, notwithstanding the activities of other employees that employers choose to include in "a tip pool". This inquiry is particularly essential because of the very real possibility that not so selfless

employers believe certain tipped workers are overcompensated, and they see taking a portion of their tips as a way of funding part of the pay of others.

There are divergent Appellate Court views on the need to and how to discern patron intent in connection with the fraud upon the public aspects of Labor Code §356, and the "sole property" declaration in §351. That split in authority certainly supports review herein.

If, for no other reason, review is warranted here because the extension of *Leighton*, as carried out by *Lu* and *Grodensky*, could be the poster child for the admonition from this Court,

> " '[T]he language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive ***only with such facts***.'" *Brown v. Kelly Broadcasting Co.*, (1989) 48 Cal.3d 711, 734-735. (Emphasis added).

III. Review Is Necessary to Address The Clear Divergence From This Court's Pronouncement That Labor Code §351 Exists to Keep Employers From Directly Or Indirectly Using Tips To Avoid The Obligation To Pay Tipped Workers The Full Minimum Wage.

Whether or not this Court finds that there is a private action for violation of Labor Code §351, and whether or not this Court denounces the Appellate Court's extension of *Leighton*, the minimum wage issue needs to be resolved. If on remand, the trial Court were to find, for example, that $1 per hour of the tips collected from Dealers was redistributed to the "Agents" who are the subject of the remand, the question remains, has Hawaiian Gardens violated minimum wage laws by taking that $1 per hour and then, on pay day, giving the employee a check that reflects the minimum wage rate times hours worked? The Court has to decide if an employer violates the minimum wage law by giving an employee a check, for example, for the minimum wage of $6 [during part of the period covered by this action] per hour, if for each hour paid, the employer previously illegally took, on average, $1 per hour from the same employee; and therefore, only really paid the net amount of $5 per hour?

Up until the passage of the Labor Code §351 amendments declaring that Employers cannot take, collect or receive an employee's tips, and the declaration that tips are the "sole property" of the employee they are given to, the only decisions regarding tip taking by employers arose in the context of Wage Order prohibitions applicable to women and children. See *California Drive-In Restaurant Ass'n v. Clark,* (1943), 22 Cal.2nd 287; and

Opinion Of The Attorney General of California, March 27, 1944, opinion NS 5373.

The Opinion of the Attorney General was rendered at a time, before *Leighton*, when the presumption du jour was that a tip at a restaurant was for the waitress, and it was hers to share or not share as she pleased. The restaurant in the Opinion rendered by the AG, collected 25 cents from the tips of car-hop waitresses every shift, and redistributed the money collected to bus boys. The AG opinion provided, long before §351 was amended, to prohibit employer taking of tips:

> "In my opinion an involuntary agreement to pay back twenty-five cents per day out of tips received by the employee would be a violation of the Order [Administration Regulation regulating minimum wages of women employees]. When the waitress is compelled to turn over to her employer for the busboy or for any other purpose for which the employer receives a benefit a portion of her earnings, she is contributing to him the amount on her own wage. The amount in this instance is 25¢. If that is allowable, so would $3.00 per day be allowable." Attorney General Opinion, March 27, 1944, opinion NS 5373

The Attorney General then cited to *California Drive-In Restaurant*

Ass'n v. Clark, supra:

> "... if the employer retained such tips he would be in effect accomplishing indirectly that which he could not do directly, namely including the tips in the legal wage. It would be a subterfuge for him to receive all of the tips and pay the minimum wage. The end result would be counting the tips as part of the legal wage." Attorney General Opinion, March 27, 1944, opinion NS 5373.

The sentiments of the AG in 1944, uncannily track this court's analysis of the 1970's amendments to Labor Code §351, wherein this court indicated that the amendments were designed to keep Employers from using an employee's tips, sole property, for any purpose at all, and tied that analysis to an employers obligation to pay the minimum wage.

In 1972, Assemblyman Leroy Greene introduced a bill to amend former Labor Code §351 to remove the Notice to Public provisions and to declare that every gratuity is the sole property of the employee to whom it is given. *Henning, supra,* 46 Cal.3d at p. 1273. The opinion of the legislative counsel on the affect of the 1972 bill was in relevant part that the bill would delete provisions of the law that broadly speaking enabled employers to obtain the benefit of tips and other gratuities received by their employees, and thereby prohibited employers from receiving such a benefit. *Id.*, 46

Cal.3rd at p. 1273. The bill died in committee and was reintroduced in 1973 with practically identical provisions. *Henning*, *supra*, 46 Cal.3d at p. 1273. The legislature at that time enacted a provision that declared the tips to be the employee's property, but added a provision to preserve a tip credit system. (*Id.*, 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 affect 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.(Emphasis added).

In 1975, the Legislator revoked the authority of the Industrial Welfare Commission to allow employers to obtain the tips received by their employees. *Henning*, *supra*, at p.1275.

In 1980, the California Supreme Court, in *Industrial Welfare Comm. v. Superior Court* (1980) 27 Cal.3rd 690, 27 Cal. 3d, 730 remarked as to the Legislative history of the 1975 bill:

> "[W]e think that the legislative history of the 1975 bill supports the IWC's conclusion that the legislator contemplated that the enactment would ensure the tips received by an employee **WOULD NOT REDUCE AN EMPLOYER'S MINIMUM WAGE OBLIGATION**

EITHER DIRECTLY OR INDIRECTLY." (Emphasis added.)

This unconditional observation by the Supreme Court in 1980 occurred in the context of the present language of Labor Code §351 that contains three prohibitions on employer conduct, the crediting of tips against the minimum wage, making deductions from paychecks on account of tips, and the prohibition against taking and receiving any part of an employee's tips.

The 1980 decision in *Industrial Welfare Commission* was followed by the 1988 decision in *Henning v. Industrial Welfare Commission,* 46 Cal.App.3d 1262:

"[W]e discern the Legislative intent underlying the provision as it now stands to be as follows. **Broadly, the Legislature declared that the tips belong to the employee** and the IWC may not permit an employer to obtain the benefit of such tips **by paying a tipped employee a wage lower than he is obligated to pay if the employee did not receive tips**." *Id.*, 46 Cal.App.3d at 1278.(Emphasis Added).

Lu's holdiing regarding the "minimum wage" issue ignores this court's finding that Labor Code §351, in its present form, was designed to keep an employer from "directly or indirectly" using tips to avoid its obligations to pay the minimum wage. (Op. 20) It ignores the reality, that if an employer illegally takes $1 per hour from Dealers' tips to pay "agents", and then on pay day gives them a minimum wage check for $6 per hour, it

has achieved the same result as it would have achieved by paying Dealers a dollar per hour less in their checks, and using the savings to fund wages of "Agents".

Review is necessary since this Court has said that Employers cannot use tips to "indirectly" avoid their obligation to pay the minimum wage.

IV. Review Is Necessary to Eliminate The Freedom *Lu* Provides Employers to Circumvent Labor Code §221.

> "(a) 'Wages' includes all amounts for labor performed by employees of every description..." Labor Code §200.
>
> "It shall be unlawful for any employer to collect or receive from an employee any part of wages therefore paid by said employer to said employee." Labor Code §221
>
> "By enacting Labor Code §221, and retaining it as interpreted by the Courts and the IWC, the Legislature prohibited employers from using self-help to take back any part of 'wages theretofore paid' to the employee, except in very narrowly defined circumstances provided by statute." *Hudgins v. Neiman Marcus* (1995) 34 Cal.App.4th 1109, 1121.

Hawaiian Gardens paid dealers "an amount for labor performed" in

weekly paychecks, and after each pay day it compelled dealers to pay from their tips an amount of money, as a condition of the dealers' employment. If the dealer worked 10 day shifts after payday, and averaged $200 in tips per shift, he will have kicked back $400 (at 20% of tips) during that 10 days, which is "a part" of the "wages theretofore paid" in the previous pay check. If the minimum wage was $6 per hour during the previous pay period, the wages theretofore paid were $480. The $400 kicked back is a "part of wages" theretofore paid.; $400 is part of $480. Labor Code §221 has been violated.

Lu takes exception with that conclusion because tips were used to fund the kickback.(Op.18-19). This holding is dangerous. It basically gives a road map to Employers for circumvention of Labor Code §221. With *Lu's* protection, Employers can demand kickbacks from employees by merely compelling employees to fund kickbacks with earnings from a second job, a spouse's savings, interest received from a bank, a gift from a relative, or tips. A literal reading of §221, the above holding from *Hudgins, supra*, and the requirement of "liberal construction" in the interpretation and application of wage laws, clearly support review of this ill-conceived aspect of the *Lu* decision .

CONCLUSION

Gratuities are an important part of the income of many California workers. How they can be allocated or redistributed by employers without

any employee choice greatly affects millions of Californians.

The law is in conflict as whether California workers can even directly sue to recover gratuities misappropriated by their employers. And, this Court has never addressed the important, critical issues as to employers' rights to mandate redistributions of tips amongst employees. It should do so now.

Review should be granted on all issues presented.

Date:_____ Respectfully Submitted,

Spiro Moss Barness LLP

By_____

Dennis F. Moss

Attorney For Appellant

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Date: March 23, 2009

Respectfully Submitted,

Spiro Moss Barness LLP

By 

Dennis F. Moss

Attorney For Appellant

Filed 1/22/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LOUIE HUNG KWEI LU, Plaintiff and Appellant, v. HAWAIIAN GARDENS CASINO, INC. et al., Defendants and Respondents.	B194209 (Los Angeles County Super. Ct. No. BC286164)

APPEAL from a judgment of the Superior Court of Los Angeles County, David Minning, Judge. Affirmed in part; reversed in part.

Spiro Moss Barness and Dennis F. Moss for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton and Tracey A. Kennedy; Law Offices of Michael St. Denis and Michael St. Denis for Defendants and Respondents.

INTRODUCTION

In *Leighton v. Old Heidelberg, Ltd.* (1990) 219 Cal.App.3d 1062 (*Leighton*) this District Court of Appeal held that tip pooling in restaurants is not prohibited by Labor Code section 351, a statute precluding employers from obtaining access to employees' tips and gratuities. Plaintiff, a former casino dealer on behalf of a class of dealers, challenges the legality of a casino's policy requiring dealers to contribute part of the gratuities they receive to a tip pool for employees who provide service to casino patrons. No California case addresses tip pooling in casinos. Distinguishing *Leighton*, plaintiff argues that unlike restaurants where tips are left on the tables. in casinos, gratuities are handed directly to dealers, with the result that such gratuities belong solely to the dealers. The trial court granted judgment on the pleadings ruling that Labor Code sections 351 and 450 do not provide for a private cause of action. The court then granted the casino's summary judgment motions and dismissed plaintiff's causes of action under Labor Code sections 221, 1197, 2802, and the unfair competition law (Bus. & Prof. Code, § 17200 (the UCL)) on the basis there being no factual dispute, as a matter of law. the casino's mandatory tip pooling policy did not violate these statutes.

We hold that nothing in Labor Code section 351 prohibits tip pooling in casinos. We further hold, although sections 351 and 450 contain no private right to sue, that they nonetheless serve as predicates for suits under the UCL. A triable factual issue about whether some tip pool recipients are "agents" in contravention of section 351 precludes summary judgment of the UCL cause of action based on that statute only. In all other respects, summary judgment was properly granted. Accordingly, we affirm the judgment in part and reverse it in part.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant Hawaiian Gardens Casino, Inc. (the Casino) operates approximately 108 tables where customers pay to play games of chance such as poker, Pai Gow, Blackjack, and others. Opened in 1997, the Casino employed about 650 dealers at the time of this lawsuit.

The following facts are undisputed:

The Casino has a written tip pool policy that requires dealers to segregate 15 or 20 percent of the tips they receive at the close of each shift, depending on the location of the table and the game dealt. Dealers keep the remaining 80 to 85 percent of the tips they receive. The Casino's tip pool policy works on the honor system, under which it leaves to the dealers the task of calculating the amounts designated for the pool.

In accordance with the policy, the Casino deposits the tip pool money in a "tip pool bank account" for later distribution to designated employees who provide service to customers, such as the chip service people (also known as "chip runners"), poker tournament coordinators, poker rotation coordinators, hosts, customer service representatives or "floormen," and concierges. Payroll distributes the dealers' contribution to the pool participants. The tip pool policy specifically forbids employers, managers, or supervisors to receive money from the tip pool.

Every two weeks, dealers receive paychecks covering the minimum hourly wage, regardless of tips received from patrons. The Casino does not deduct from that sum the amount of tips that dealers receive. The Casino does not use the tips collected for the pool to offset or pay for the minimum-wage paychecks it issues to dealers. Nor does the Casino keep the tip pool money for its own use. The Casino does not charge dealers, or any other employee who receives tip pool proceeds, to offset the administrative costs of handling the tip pool. Dealers take home income that significantly exceeds the minimum wage.

Plaintiff, Louie Hung Kwei Lu, is the representative of a class of dealers[1] at the Casino. Lu's complaint against the Casino and its general manager, Ron Sarabi, alleged that the Casino's tip pool policy constituted a conversion of his wages, and violated employee protections contained in Labor Code section 221 (employers may not compel wage kickbacks); section 351 (employers may not take, collect or receive gratuities); section 450 (employers may not compel employees to patronize the employer); section 1197 (employers may not pay less than minimum wage); and section 2802 (employer indemnification for employee's necessary expenses). The complaint also alleged that the Casino's conduct in violating each of these cited Labor Code provisions constituted an unfair business practice under the UCL.

The Casino moved for judgment on the pleadings of the causes of action for violation of Labor Code sections 351 and 450. It argued that there is no private right to sue for violations of either Labor Code section. The trial court granted the motion.

Soon thereafter, the Casino brought successive motions for summary adjudication of the remaining causes of action. It argued that, pursuant to *Leighton, supra*, 219 Cal.App.3d 1062, tip pools are permissible in California. Therefore, the Casino observed that in opposing summary adjudication, Lu could not dispute that the Casino did not violate any of the Labor Code sections enumerated in the complaint and did not convert any property belonging to dealers. Similarly, the Casino argued, where the tip pool was permissible, its policy was not an unfair business practice in violation of the UCL.

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[1] The certified class consists of "all persons who were employed by defendant Hawaiian Gardens Casino, Inc. in the position of 'Dealer' between November 27, 1999 and the date upon which Notice of the Pendency of Class Action is mailed to class members . . . ." Lu was hired by the Casino in 1997, and left his employment with the Casino in 2003.

In opposing these motions, Lu attempted to distinguish the Casino's tip pool arrangement from that of the restaurant in *Leighton* where tips are often left on the table by the departing customer. In casinos, he asserted, dealers sit with the patrons while providing services connected with the games. Tips are handed, slid, or tossed directly to the dealers while the dealers continue to provide services. Dealers are able to thank the patrons for the tips. Sometimes patrons tip dealers several times during the same one-half hour dealing period, usually after they win a hand. Moreover, periodically, patrons openly, directly, and independently tip other employees of the Casino. Lu also provided evidence that some employees who receive tip-pool money supervise or direct dealers.

The court granted the Casino's summary adjudication motions. After judgment was entered, Lu filed his timely appeal.

CONTENTIONS[2]

Lu contends that the trial court erred in granting the Casino's motions for judgment on the pleadings and summary adjudication because the Casino's mandatory tip pool arrangement is not permitted where it is factually and legally distinguishable from tip pooling in the restaurant industry under *Leighton*.

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[2] The trial court had earlier dismissed defendant Ron Sarabi from the complaint. The Casino's general manager, Ron Sarabi, also filed a brief on appeal. Acknowledging that Lu's appellant's brief did not raise a challenge to the judgment dismissing Sarabi and his cross-complaint from the lawsuit, Sarabi nonetheless requests that we affirm that judgment on appeal on the independent ground that individuals cannot be held personally liable for wage claims. We decline Sarabi's request. First, Lu's appeal from the judgment dismissing Sarabi is untimely (Cal. Rules of Court, rule 8.104(a)) with the result we have no jurisdiction to hear it. (*Glasser v. Glasser* (1998) 64 Cal.App.4th 1004, 1010.) Second, Lu's brief does not raise any contention supported by facts and argument directed at Sarabi's dismissal and so Lu forfeited the issue. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.) Therefore, our opinion under these circumstances would be advisory only and " '[t]he rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court. [Citations.]' [Citations.]" (*Denny's, Inc. v. City of Agoura Hills* (1997) 56 Cal.App.4th 1312, 1329, fn. 10.)

DISCUSSION

1. *Lu does not have a private right to sue directly under Labor Code sections 351 and 450 but does have a cause of action under the UCL for violation of those statutes.*

The Casino argued in its motion for judgment on the pleadings that Lu's causes of action for violation of Labor Code sections 351[3] and 450[4] had to be dismissed because those statutes do not provide for private rights of action.

When reviewing an order granting judgment on the pleadings, "[w]e treat as admitted all material facts properly pleaded, give the complaint's factual allegations a liberal construction, and determine de novo whether the complaint states a cause of action under any legal theory. [Citation.] We may rely on any applicable legal theory in affirming or reversing because we ' "review the trial court's disposition of the matter, not its reasons for the disposition." ' [Citation.]" (*Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 671.)

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[3] Labor Code section 351 reads: "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. An employer that permits patrons to pay gratuities by credit card shall pay the employees the full amount of the gratuity that the patron indicated on the credit card slip, without any deductions for any credit card payment processing fees or costs that may be charged to the employer by the credit card company. Payment of gratuities made by patrons using credit cards shall be made to the employees not later than the next regular payday following the date the patron authorized the credit card payment."

[4] Labor Code section 450 reads in relevant part, "No employer, or agent or officer thereof, or other person, may compel or coerce any employee, or applicant for employment, to patronize his or her employer, or any other person, in the purchase of any thing of value." (Lab. Code, § 450, subd. (a).)

No California court has yet determined whether Labor Code sections 351 and 450 contain a private right to sue.[5] The applicable rules for making this determination are set forth in *Vikco Ins. Services, Inc. v. Ohio Indemnity Co.* (1999) 70 Cal.App.4th 55: "Adoption of a regulatory statute does not automatically create a private right to sue for damages resulting from violations of the statute. Such a private right of action exists only if the language of the statute or its legislative history *clearly* indicates the Legislature *intended* to create such a right to sue for damages. If the Legislature intends to create a private cause of action, we generally assume it will do so ' "directly[,] . . . in clear, understandable, unmistakable terms . . . ." [Citation.]' [Citations.]" (*Id.* at pp. 62-63, first italics added.)

The question whether Labor Code sections 351 and 450 contain a private right to sue is "primarily one of legislative intent. If the Legislature intended a private right of action, that usually ends the inquiry. If the Legislature intended there be no private right of action, that usually ends the inquiry. If we determine the Legislature expressed no intent on the matter either way, directly or impliedly, there is no private right of action [citation] with the possible exception that compelling reasons of public policy might require judicial recognition of such a right. [Citations, fn. omitted.]" (*Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 142.)

"In order that legislative intent be given effect, a statute should be construed with due regard for the ordinary meaning of the language used and in harmony with the whole system of law of which it is a part. [Citation.] A remedial statute must be liberally construed so as to effectuate its object and

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[5] The federal district court in *Matoff v. Brinker Restaurant Corp.* (C.D.Cal. 2006) 439 F.Supp.2d 1035 held that Labor Code section 351 does not contain a private right of action. Although we may agree with *Matoff*, "a decision of a federal district court has no precedential value in this court; at best, it is persuasive authority only. [Citations.]" (*United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, 1115.)

purpose, and to suppress the mischief at which it is directed. [Citations.]" (*California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

In our view, Labor Code sections 351 and 450 do not contain a private right to bring an action to enforce the protections contained in those provisions. Looking first at the purpose of these statutes, their goals do not clearly and unmistakably reveal the legislative intent to allow a private right of action. The stated aim of section 351 is the prevention of fraud on the public in connection with tipping (Lab. Code, § 356).[6] Additionally, "the provision was broadly intended to bar the [Industrial Welfare Commission] from permitting an employer to pay a tipped employee a wage lower than he would be obligated to pay if the employee did not receive tips; and it was more narrowly intended to bar the Commission from permitting an employer to use a 'tip credit' to pay a tipped employee a wage lower than the minimum wage he would be obligated to pay if the employee did not receive tips." (*Henning v. Industrial Welfare Com.* (1988) 46 Cal.3d 1262, 1280.)

Likewise, Labor Code "[s]ection 450 manifests a legislative intent to protect wage earners against employer coercion to purchase products or services from the employer. . . . [T]hat section is plainly part of 'the established policy of our Legislature of protecting and promoting the right of a wage earner to all wages lawfully accrued to him.' [Citation.] The Legislature evidently determined 'that the evil thus to be guarded against was sufficiently prevalent to require legislative action, and the remedy ought not to be defeated by judicial construction if that result can reasonably be avoided.' [Citation.]" (*California State Restaurant Assn. v. Whitlow, supra,* 58 Cal.App.3d at p. 347.) Neither of the stated or unstated

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[6] Labor Code section 356 reads: "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."

purposes of sections 351 and 450 gives us an indication about whether the Legislature intended that the goals of these statutes be protected solely by the State, or whether they may also be enforced in a private lawsuit.

Nor does the statutory scheme of which Labor Code sections 351 and 450 are a part indicate a legislative intent to confer a private right of enforcement. Sections 354 and 355 make the violation of section 351 a misdemeanor, punishable by a fine and imprisonment, and specify that the *Department of Industrial Relations shall enforce* the provisions of section 351. Similarly, section 451 makes the violation of section 450 a misdemeanor. Fairly read, sections 354 and 355, and by implication section 451 (which is in the same division as 351), indicate the legislative intent that sections 351 and 450 be enforceable by the State only[7] and not privately.

The Labor Code Private Attorneys General Act, sections 2698 et seq. (PAGA), further supports our view that Labor Code sections 351 and 450 themselves confer no right of action on private parties. Effective in 2004, PAGA deputizes employees to bring private actions to enforce specifically enumerated statutory rights granted by the Labor Code.[8] Section 2699.3 authorizes actions brought by aggrieved employees to obtain penalties under all of the statutes Lu

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[7] The Division of Labor Standards Enforcement (DLSE) is the state agency charged with enforcing Labor Code sections 351 and 450. A division of the Department of Industrial Relations, the DLSE enforces provisions of the Labor Code and orders, including wage orders, that are issued by the Industrial Welfare Commission. (*California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 18, citing Lab. Code, §§ 56, 95 & 1193.5, subd. (b).)

[8] Labor Code section 2698 reads in relevant part, "Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, *may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees* pursuant to the procedures specified in Section 2699.3." (Italics added.)

relies on in his complaint, provided the prerequisites of PAGA are met. (See § 2699.5.) The Legislature's enactment of PAGA affectively ends the discussion. PAGA contemplates that employees bring actions *under PAGA*, to enforce rights granted by *other provisions of the Labor Code*. PAGA does not allow employees to sue privately *directly under sections 351 and 450*. Instead, PAGA created a vehicle for private employees to seek redress for an employer's violation of specified Labor Code provisions where there is otherwise no private cause of action. (*Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330, 337.) " 'The Legislature, of course, is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof.' [Citation.]' " (*Los Angeles County Dependency Attorneys, Inc. v. Department of General Services* (2008) 161 Cal.App.4th 230, 239-240.) The enactment of PAGA as an enforcement vehicle implies a legislative recognition that a direct, private cause of action under sections 351 and 450 is not viable.

As a countervailing argument, Lu cites two cases in which he argues an employee sought private redress directly under Labor Code section 351, *Leighton, supra*, 219 Cal.App.3d 1062 and *Jameson v. Five Feet Restaurant, Inc.* (2003) 107 Cal.App.4th 138 (*Jameson*).[9] While the Legislature has not abrogated *Leighton* and *Jameson* and they remain good law, the question of whether the plaintiff had a private right of action under section 351 was not addressed in either case. *Leighton* was a wrongful termination case. " 'It is a well-established rule that an opinion is only authority for those issues actually considered or decided. [Citations.]' " (*Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070,

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[9] Contrary to Lu's assertion, the action in *California State Restaurant Assn. v. Whitlow, supra,* 58 Cal.App.3d 340 was not brought by a private party directly under Labor Code section 450. The California State Restaurant Association petitioned for writ of mandate to restrain Whitlow, in her capacity as Chief of the Division of Industrial Welfare, Department of Industrial Relations for the State of California, from instituting a new policy in connection with section 450. Other cases cited by Lu are inapposite.

1076.) And, the Legislature's failure to abrogate these cases does not constitute a direct, " ' "clear, understandable, unmistakable" ' " intent to create a private right of action in the statutory scheme. (*Vikco Ins. Services, Inc. v. Ohio Indemnity Co.*, *supra*, 70 Cal.App.4th at pp. 62-63.)

For the foregoing reasons, we conclude that Labor Code sections 351 and 450 do not contain a private right to sue and so the trial court did not err in granting the Casino's motion for judgment on the pleadings as to those two causes of action.

Nevertheless, Lu alleged a cause of action under the UCL for violation of Labor Code sections 351 and 450. " 'Virtually any law -- federal, state or local -- can serve as a predicate for an action under Business and Professions Code section 17200.' [Citation.]" (*Ticconi v. Blue Shield of California Life & Health Ins. Co.* (2008) 160 Cal.App.4th 528, 539; cf. *Louis v. McCormick & Schmick Restaurant Corp.* (C.D.Cal. 2006) 460 F.Supp.2d 1153, 1156, fn. 5; *Matoff v. Brinker Restaurant Corp.*, *supra*, 439 F.Supp.2d at pp. 1037-1038.) The UCL is a proper avenue for Lu to challenge violations of these Labor Code provisions. Therefore, we turn to the substantive question of whether the tip pool procedure here violates the Labor Code sections enumerated in the complaint such as would support UCL causes of action.

2. *The trial court properly granted summary judgment of all causes of action except that brought under the UCL predicated on Labor Code section 351.*

a. *Standard of review*

" ' "Summary judgment is granted when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court's decision to grant [defendants] summary judgment de novo." [Citation.]' [Citation.] An appellate court is not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not the rationale. [Citation.]" (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 951.)

In moving for summary judgment, "[a] defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) Once the moving party defendant meets its burden, the burden shifts to the plaintiff to show a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (p)(2).) To meet that burden, the plaintiff " ' "shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . ." ' [Citations.] Where the plaintiff fails to satisfy this burden, judgment in favor of the defendant shall be granted as a matter of law. [Citation.]" (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014.)

Our task is to "view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing [Lu's] evidentiary submission while strictly scrutinizing [the Casino's] own showing, and resolving any evidentiary doubts or ambiguities in [Lu's] favor. [Citations.]" (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768-769.) "Summary judgment will be upheld when, viewing the evidence in a light most favorable to the opponent, the evidentiary submissions conclusively negate a necessary element of plaintiff's cause of action, or show that under no hypothesis is there a material issue of fact requiring the process of a trial. [Citation.]" (*Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1024.)

b. *Casino tip pools are not prohibited by Labor Code section 351.*

As noted, Labor Code section 351 reads in relevant part, "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." (See fn. 5, *supra.*)

It has long been settled law in California that employer-mandated tip-pooling is not prohibited by Labor Code section 351. (*Leighton, supra*, 219 Cal.App.3d at p. 1067; accord, *Jameson, supra*, 107 Cal.App.4th 138, 143.) *Leighton* analyzed section 351, its legislative history, and related sections. (*Leighton, supra,* at pp. 1067-1068.) *Leighton* concluded "While the language of the statute expressly prohibits various employer practices, there is no mention therein of employer-mandated tip pooling, or of any kind of tip pooling among employees. . . . Further, we find nothing in the legislative history of section 351 or related sections, which precludes such an arrangement." And, "California has no established policy against tip pooling among employees mandated by the employer." (*Leighton, supra.* at p. 1067.)

Leighton observed that "the legislative intent reflected in the history of the statute, was to ensure that employees, not employers, receive the full benefit of gratuities that patrons intend for the sole benefit of those employees who serve them." (*Leighton, supra,* 219 Cal.App.3d at p. 1068.) According to *Leighton*, this purpose had inspired the Supreme Court to prohibit a direct or indirect reduction of an employer's minimum wage obligation corresponding to tips received by employees and to bar employers from paying tipped employees a wage below the mandated minimum. (*Ibid.*, citing *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 730 & *Henning v. Industrial Welfare Com., supra*, 46 Cal.3d 1262, 1265.) The defendant restaurant in *Leighton* had engaged in none of these practices, but instead followed a "house rule" and industry practice. (*Ibid.*)

Leighton's holding advanced the public policy behind Labor Code section 351. An established tip pooling policy encourages employees to give the best possible service which in turn enhances the employer's reputation and increases its business. (*Leighton, supra,* 219 Cal.App.3d at p. 1071.) Tip pools preserve "the employer's prerogative to run his own business," while also preventing

"dissension among employees," and "friction and quarreling, loss of good employees who cannot work in such an environment and a disruption in the kind of service the public has a right to expect. An employer must be able to exercise control over his business to ensure an equitable sharing of gratuities in order to promote peace and harmony among employees and provide good service to the public." (*Ibid.*)

We disagree with Lu that *Leighton* should be limited to its facts, namely, tip pooling in *restaurants*. Leighton was a waitress who brought a wrongful termination action against her employer after she refused to share 15 percent of her tips with the busboys and 5 percent with the bartender as required by the restaurant. (*Leighton, supra*, 219 Cal.App.3d at pp. 1066-1067.) *Leighton* cannot be read so narrowly as Lu would like. In its analysis of Labor Code section 351, the legislative history, and related statutes, *Leighton*'s statements were not restricted to restaurants. *Leighton* held that employer-mandated tip pooling is "not prohibited by Labor Code section 351," without referring to any specific industry. (*Leighton, supra,* at p. 1067.) Continuing, it stated, "[t]ip pooling has been around for a long time, as has section 351, and had the Legislature intended to prohibit or regulate such practice, it could have easily done so, just as it prohibited the various enumerated employer practices." (*Leighton, supra,* at p. 1066.) Thus, *Leighton's* holding is broad and applicable to employer-mandated tip pooling in general.

It is true that *Leighton* was influenced by the fact that "the restaurant business has long accommodated this practice which, through custom and usage, has become an industry policy or standard . . . ." (*Leighton, supra*, 219 Cal.App.3d at p. 1067.) But, the trial court here was informed that tip pooling was part of casino "industry custom." (Cf. Cal. Dept. Industrial Relations, DLSE Comr. & Chief Donna M. Dell, opn. letter, Tip Pool Policy (Sept. 8, 2005) p. 3;[10]

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[10] The parties argue at length about the precedential value of the Department's September 8, 2005, opinion letter. We conclude that it is entitled to little deference. (*State Building & Construction Trades Council of California v.*

Alford v. Harolds Club (1983) 99 Nev. 670, 673-674 [holding Nevada statute N.R.S. 608.160 restricting employers' access to employees' tips did not prohibit casino from imposing tip-pooling policy on dealers].) Lu did not dispute that fact and so it is evidence that tip-sharing arrangements in casinos are custom industrywide, with the result that the situation here is all the more analogous to *Leighton*.

Lu attempts to restrict the applicability of *Leighton* by distinguishing the manner in which casino dealers are tipped. He argues at length that *Leighton* was limited to the " 'group tip' context" in which tips in restaurants are "left" for a group of employees such as the waiters, busboys, and bartenders. By contrast, he asserts that gratuities are "handed" to dealers and are hence intended for dealers only. Casino patrons tip dealers while sitting at the dealers' tables, occasionally several times in the same half-hour shift. And, dealers are able to thank patrons for the gratuities. He further argues that other participants in the Casino's tip pool periodically are openly and independently tipped. He concludes therefore that gratuities handed to dealers are intended to be the dealers' personal property. Lu's contention is unavailing.

First, the contention is unsupported by the language of the statute. Labor Code section 351 forbids employers from taking "any gratuity or a part thereof

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Duncan (2008) 162 Cal.App.4th 289, 304.) Although the Department's opinion letter interprets a casino's tip pool policy, its opinion is not controlling on this court. (*Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 815, fn. omitted, citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 14.) However, the opinion letter does " ' "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." [Citation.]' [Citation.]" (*Ibid.*) Thus, in *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, at page 584, the court reviewed two DLSE advice letters and found support in the fact that the "DLSE interpretation [was] consistent with [its] independent analysis . . . . [Citation.]" (*Ibid.*) Although the Department's analysis in the opinion letter is consistent with our independent analysis, we cite the letter here solely for the proposition, which in any event is not disputed by Lu, that tip pools are an "industry custom."

that is paid, *given to, or left for* an employee by a patron . . . ." (Italics added.) The statute does not distinguish between situations where a gratuity is handed to an employee or left on a table. And, the statute declares "*Every* gratuity . . . to be the sole property of the *employee or employees* to whom it was paid, given, or left for." (*Ibid.*, italics added.) Thus the Legislature also eliminated any distinction that Lu makes between the so-called "group tip" and the singular tip.

Second, *Leighton* rejected the argument that the permissibility of a tip pool under Labor Code section 351 would depend on whether the patron's intention was discernible. *Leighton* responded to the same assertion thusly: "We dare say that the average diner has little or no idea and does not really care who benefits from the gratuity he leaves, as long as the employer does not pocket it, because he rewards for good service no matter which one of the employees directly servicing the table renders it. This, and the near impossibility of being able to determine the intent of departed diners in leaving a tip, in our view, account for the Legislature's use of the term 'employees' in declaring that '[e]very such gratuity is hereby declared to be the sole property of the employee or *employees* to whom it was paid, given, or left for.' (Lab. Code, § 351, italics added.) It is clear that the Legislature intended by this section to cover just such a situation." (*Leighton, supra,* 219 Cal.App.3d at p. 1069, fn. omitted.) Apart from the fact that neither section 351 nor *Leighton* make a distinction based on the intent of the tipping public, in opposing summary judgment, Lu made no factual showing that casino patrons intend tips specifically for the dealer and not for the good service received from all the employees with whom they come in contact. Thus, Lu's argument contrasting "handing" a tip directly to the casino dealer with "leaving" a tip on a restaurant table makes a distinction without a legal difference.

At bottom, Lu's entire argument here is premised on his assumption that all of the money a dealer receives in gratuities is that dealer's personal property. *Leighton* found "erroneous," the "assumption that the entire tip left by the patron is the waitress's *personal property*," not only because it is rarely obvious just

which employee a tip was intended for (*Leighton, supra,* 219 Cal.App.3d at p. 1069, italics added), but also because of *the purpose to be gained by tip pooling.* That is, where employees together provide good service, the patron will be inclined to leave a larger tip. (*Id.* at p. 1070.) As noted in *Leighton,* the Legislature used the term "*employees*" when declaring that "[e]very gratuity is hereby declared to be the sole property of the employee or *employees* to whom it was paid, given, or left for[]" (Lab. Code, § 351, italics added), indicating its recognition that a patron's experience is influenced by all of the employees with whom the patron comes in contact. (*Leighton, supra,* at pp. 1069-1070.) Moreover, as noted, the record contains undisputed evidence that tip pooling is customary in casinos. Finally, Lu as well as the other dealers in the class were informed of the tip pooling policy at the beginning of their employment and notices were posted reminding dealers of their pooling obligation. Dealers were always on notice that 15 to 20 percent of the gratuities given them by patrons did not belong to them. Lu's assumption that the gratuity a customer leaves a dealer is that dealer's personal property is not supported by the law or the facts here.

Lu has made no persuasive argument why we should not apply the reasoning of *Leighton* to authorize a tip pool in a casino. Nothing about the manner in which tips are paid to employees in the casino industry as described by Lu violates the words, legislative history, or policy behind Labor Code section 351. The purpose of section 351 is to prevent *employers* from collecting, taking, or receiving any part of a gratuity as part of the employers' daily gross receipts. (*Leighton, supra,* 219 Cal.App.3d at p. 1068.) That purpose is not contravened by allowing tip pooling in casinos. The fact that employees, other than dealers, receive tips does not undermine the stated goals of section 351. And such tipping does not occur frequently. We would not be surprised to learn that bartenders in restaurants are occasionally tipped separately even while they participate in tip pools (*Leighton, supra,* at p. 1066) and that waitresses have occasionally thanked customers for their tips. *Leighton* properly assumed that the public wants only to

be sure that employers are not pocketing the tips. (*Id.* at p. 1068.) Moreover, the salutary effect of tip pools, observed by *Leighton*, applies in the casino context. As in restaurants, a tip pool in a casino promotes good service among *all of the employees* who come in contact with the patron, which enhances the casino's reputation and increases its business. (*Id.* at p. 1071.) This arrangement allows the employer to exercise control over its business and ensure equitable sharing of gratuities among the employees who provide service to casino patrons, while preventing "dissension among employees," and "friction and quarreling, loss of good employees who cannot work in such an environment and a disruption in the kind of service the public has a right to expect." (*Ibid.*)

Having concluded that there is nothing particular about casinos that would render a casino-employer's mandatory tip-pooling arrangement a violation of Labor Code section 351, we turn to the causes of action alleged in the complaint in view of the motions for and in opposition to summary judgment.

c. *Application*

The UCL

Lu has alleged that the Casino's mandatory tip-pooling arrangement constituted an unfair business practice because it violates Labor Code sections 221, 351, 450, 1197, and 2802. (Bus. & Prof. Code, § 17200 et seq.) We address these provisions seriatim.

Labor Code Section 221

Lu alleged that the Casino's tip pool policy violates Labor Code section 221. That section reads: "It shall be unlawful for any employer to collect or receive from an employee *any part of wages* theretofore paid by said employer to said employee." (Italics added.) Lu argues that "[t]aking money from dealers on account of the fact that dealers receive tips from patrons violates the letter and 'spirit' of Labor Code [section] 221, because it is 'nothing more than a device to reduce the wage scale.' " The contention is unavailing.

Wages "include[] all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." (Lab. Code, § 200, subd. (a).)

By contrast, tips are gratuities. (Lab. Code, § 350, subd. (e).) The Labor Code defines a "gratuity" to "include[] any tip, gratuity, money, or part thereof that has been paid or given to or left for an employee by a patron of a business over and above the actual amount due the business for services rendered or for goods, food, drink, or articles sold or served to the patron." (*Ibid.*) Lu admits that "tips are gifts" that he does not earn. What is more important, Lu does not claim that tips are not wages.

There is no dispute here that *the Casino* did not receive any part of the dealers' *wages*. The money collected in the tip pool is part of the dealers' *gratuities, not part of their wages*. At least one Casino employee testified that paychecks used to distinguish between the hourly wage and the income from tips. As a matter of law, the Casino's tip-pooling arrangement did not violate Labor Code section 221.

Labor Code Section 450

As noted, Labor Code section 450 reads: "No employer, or agent or officer thereof, or other person, may compel or coerce any employee, or applicant for employment, to patronize his or her employer, or any other person, in the purchase of any thing of value." (Lab. Code, § 450, subd. (a); see fn. 6, *supra*.) Plaintiff alleges violation of this Labor Code section is an unfair business practice under the UCL. Because we have concluded as a matter of law that the tip pool's portion of gratuities are not the dealer's personal property, and because there is no factual dispute that the Casino does not keep the tip pool money for its own use, the placement of a portion of the gratuities in the pool for other employees does not amount to patronizing the Casino or the purchase of anything. Therefore, as a matter of law, the cause of action predicated on Labor Code section 450 fails.

Labor Code Section 1197

Labor Code section 1197 reads: "The minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, *and the payment of a less wage than the minimum so fixed is unlawful.*" (Italics added.) Section 351 bars a "two-tier" minimum wage system in which employers could count tips as part of the employer's minimum wage obligation. (*Henning v. Industrial Welfare Com., supra*, 46 Cal.3d at p. 1278.)

It is undisputed that the Casino gives dealers paychecks covering the minimum hourly wage *regardless* of tips received from patrons.[11] Lu did not dispute that the Casino *does not use the tips received to pay its dealers a subminimum wage*. Nor does the Casino keep the tip pool money for its own use. The Casino does not charge either dealers or employees who receive tip pool proceeds money to offset the administrative costs of handling the tip pool. Indeed, the evidence shows that the Casino pays dealers the minimum hourly wage and so Lu presented no evidence that the Casino paid its employees less than the minimum wage.[12] Therefore, as a matter of law, the Casino's tip-pooling arrangement did not run afoul of Labor Code section 1197.

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[11] Lu made a mathematical argument in an attempt to show that the tip-sharing requirement here results in the payment to dealers of a wage that is nearly half of the minimum wage. With the equation, Lu attempts to demonstrate that the Casino's policy violates the proscription against crediting tips against the employer's minimum wage obligation. (*Cal. Drive-In Restaurant Ass'n. v. Clark* (1943) 22 Cal.2d 287, 296, 299 [construing an earlier version of Lab. Code, § 351].) However, the argument is ineffective because it too is based on Lu's fallacious *assumption* that the 15 to 20 percent gratuity that is submitted to the tip pool is a *wage*.

[12] *Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, at page 322 and *Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, at page 1111 do not support Lu's contention that the Casino's tip sharing constitutes a taking of wages. Those cases involved the deduction from commissions, and commissions are defined in Labor Code section 200, subdivision (a) as wages. Likewise *California State Restaurant Assn. v. Whitlow,*

Labor Code Section 2802

Labor Code section 2802, subdivision (1) reads: "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful." (Lab. Code, § 2802, subd. (a).)

Lu alleged that dealers are entitled to indemnification from the Casino for their contributions to the tip pool. He argues such contributions are a "necessary expenditure" for dealers because they are incurred as a "direct consequence of the discharge of duties." However, as we have held, the portion of tips contributed to the tip-sharing arrangement *are not the personal property of the dealers*. Therefore, where dealers' tip pool contributions are not derived from money that is theirs alone, the contributions are not "expenditures" or "losses" incurred by the dealers. The Casino's tip pooling policy did not violate Labor Code section 2802.

Labor Code Section 351

While employer-mandated tip pooling policies are not forbidden by Labor Code section 351 (*Leighton, supra,* 219 Cal.App.3d at p. 1067), the arrangement must nonetheless not run afoul of the prohibitions in that statute. (*Jameson, supra,* 107 Cal.App.4th at p. 143.) "Tip pooling is permissible under California law if an employer or agent does not take any part of a gratuity given to an employee by a patron . . . ." (*Id.* at p. 141.)

Labor Code section 350 defines "agent" as used in section 351 as "every person other than the employer having the authority to hire or discharge any employee or supervise, direct, or control the acts of employees." (Lab. Code, § 350, subds. (a) & (d).)

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supra, 58 Cal.App.3d at page 343, and *Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084 are inapposite because they involve deductions from minimum wage, and as noted, tips are not wages.

In *Jameson*, the plaintiff-server contended that the tip pool policy violated Labor Code section 351 because it required servers to pay the floor manager 10 percent of the tips they received daily. (*Jameson, supra,* 107 Cal.App.4th at p. 143.) *Jameson* held that the plaintiff had adduced sufficient evidence at trial to support the jury finding that the floor manager was an "agent" as that term is defined by section 350 where the floor manager scheduled, supervised, and disciplined wait staff. (*Jameson, supra,* at p. 144.)

Here, in opposing summary judgment, Lu demonstrated a dispute of fact about whether some of the tip pool recipients are Casino "agents." Specifically, the Casino's written policy lists the job classifications that receive distributions from the tip pool. The list includes poker and Asian games "customer service representatives," and blackjack "senior customer service representatives." Giving all favorable inferences to the deposition testimony of Rowland Suen and Celina Wong, among others, along with Lu's own declaration (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 607), they show that customer service representatives were formally called "relief supervisors." These customer service representatives are required to write up reports about, and evaluations of, employees in their areas, including dealers, and have some input into the evaluation of the conduct of dealers and other employees. Customer service representatives respond to patrons' complaints about a dealer, criticize, direct, advise, and counsel dealers on their conduct at work, and may direct dealers to "be more careful." Wong testified that it used to be the case that she had the authority to allow an employee to leave early. Some of the people who received tip pool proceeds were "people who were in charge of the section during the shift." 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 section 350, subdivision (d) and their participation in the tip pool would contravene the prohibitions of section 351.

(*Jameson, supra*, 107 Cal.App.4th at p. 141.) Thus, although we hold, pursuant to the analysis in *Leighton,* that tip pooling in the casino industry is not prohibited by Labor Code section 351, we conclude that Lu has presented triable issues of fact about whether the Casino's tip pool policy here violates that provision, precluding summary judgment of the UCL cause of action predicated on section 351.

Conversion

Finally, to state a cause of action for conversion, the plaintiff must own or have the right to possess the property at the time it was converted. (*Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 458.) As explained, pursuant to *Leighton* and section 351, which declares that gratuities are the " 'sole property of the employee or *employees,*' " dealers here have no right to possess the entire amount of the gratuities they receive because some of the tips belong to the tip pool and its participants. (*Leighton, supra*, 219 Cal.App.3d at p. 1069.) And, Lu did not dispute that the Casino does not keep the tip pool money for its own use. Therefore, Lu cannot demonstrate a prima facie case of conversion, with the result that the trial court properly granted the Casino's motion for summary adjudication of this cause of action.

To summarize, the trial court correctly ruled that Labor Code sections 351 and 450 contain no private cause of action. The trial court also properly granted summary adjudication of all causes of action alleged in the complaint except the UCL cause of action predicated on Labor Code section 351 because triable issues of fact exist about whether "agents" participate in the tip pool.

DISPOSITION

The UCL cause of action premised on a violation of Labor Code section 351 is reversed. In all other respects, the judgment is affirmed. Each party to bear its own costs on appeal.

CERTIFIED FOR PUBLICATION

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LOUIE HUNG KWEI LU, Plaintiff and Appellant, v. HAWAIIAN GARDENS CASINO, INC. et al., Defendants and Respondents.	B194209 (Los Angeles County Super. Ct. No. BC286164) ORDER MODIFYING OPINION [CHANGE IN JUDGMENT]

THE COURT:

The opinion filed by this court on January 22, 2009 is hereby modified as follows:

On page 2, line three of the second full paragraph starting with "to sue, that they", insert the word "may" before the word "nonetheless".

On page 6, delete heading 1 and insert, "1. *Lu does not have a private right to sue directly under Labor Code sections 351 and 450 but said statutes may serve as predicates to causes of action under the UCL for violation thereof.*"

On page 11, line one of the second full paragraph starting with "Nevertheless," insert the word "possible" before the words "cause of action".

On page 11, lines seven and eight of the second full paragraph, delete the sentence starting with "The UCL is a proper avenue", and insert, "It therefore follows that sections 351 and 450 can serve as predicates for a UCL claim by Lu."

On page 11, at the end of the second full paragraph, insert "We express no opinion about whether Lu's UCL claim can withstand demurrer. We simply hold that these statutes can serve as predicates to a UCL cause of action."

On page 24, delete the first full sentence and insert, "The trial court's order granting summary adjudication with respect to the UCL cause of action premised on a violation of Labor Code section 351 is reversed with directions to deny summary adjudication of that cause of action."

The modifications affect the judgment.

Dennis F. Moss
Spiro, Moss et al.
11377 W. Olympic Boulevard
5th Floor
Los Angeles, CA 90064-1683

Case Number B194209
Division 3

Louie Hung Kwei Lu
v.
Hawaiian Gardens Casino, Inc., et al.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 3

March 05, 2009

Dennis F. Moss
Spiro, Moss et al.
11377 W. Olympic Boulevard
5th Floor
Los Angeles, CA 90064-1683

Louie Hung Kwei Lu
v.
Hawaiian Gardens Casino, Inc., et al.

B194209
Los Angeles County No. BC286164

THE COURT:

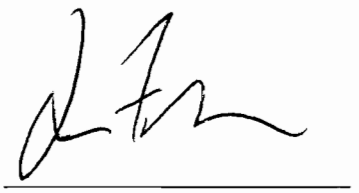
Petition for rehearing is denied.

cc: All Counsel
File

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 8381 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: March 23, 2009



Dennis F. Moss

DECLARATION OF SERVICE BY MAIL

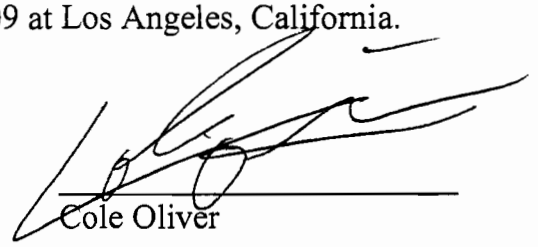
I, the undersigned, declare:

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 March 23, 2009 declarant served the PETITION FOR REVIEW 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 23rd day of MARCH, 2009 at Los Angeles, California.



Cole Oliver

LOUIE HUNG KWEI LU, et al. v. HAWAIIAN GARDENS CASINO, et al.
Service List - 7/18/2007

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