SUPREME COURT COPY

S 171442

In the Supreme Court

OF THE

State of California

LOUIE HUNG KWEI LU
Plaintiff and ~~Petitioner~~, Applnt

v.

HAWAIIAN GARDENS CASINO, INC., Et. al.
Defendants and Respondents

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

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

HAWAIIAN GARDENS CASINO'S ANSWERING BRIEF ON THE MERITS

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Respondent Hawaiian Gardens Casino, Inc. ("HGC" or the "Casino") submits its Answering Brief on the Merits:

I. INTRODUCTION

The Court granted review to decide a narrow issue: Whether there is a private right of action for violation of Labor Code Section 351 which prohibits employers from "collecting, taking or receiving" gratuities from employees. As the trial court and the Court of Appeal recognized, the answer is no. (Labor Code §§ 350 *et seq.*). A violation of Labor Code section 351 is a misdemeanor punishable by fine and/or imprisonment. (Labor Code § 354).[1] Nothing in Section 351 allows a private citizen to sue for damages. To the contrary, Labor Code section 355 expressly provides: "[t]he Department of Industrial Relations ("DIR") shall enforce the provisions of this Article." (Labor Code § 355).

The Legislature's refusal to create a private right of action under Section 351 comports with the express purpose for enacting the tipping laws, namely "to prevent fraud upon the public in connection with the practice of tipping . . . . (Labor Code § 356). Private enforcement of the law would not further the statute's express purpose. As the Court of Appeal

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[1] All references are to the California Labor Code, unless otherwise specified.

observed, the question of whether Section 351 contains a private right of action is "primarily one of legislative intent." (Court of Appeal Decision ("COA"), p. 7)

California law is well settled that a right to bring a private civil action under a regulatory statute is not automatic. 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." (*Vikco Insurance Services, Inc. v. Ohio Indemnity Co.* (1999) 70 Cal. App. 4th 55, 62). Where the Legislature intends to create a private right of action, it will do so with "clear, understandable, unmistakable terms, as it has done in numerous other statutes." (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal. 3d 287, 294-95, citing *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal. 3d 880, 896-97 [dissent]).

By arguing for a private right of action Plaintiff Louie Hung Kwei Lu ("Lu") ignores this clear legislative intent and these well-established rules of statutory construction. The language of the statutory scheme of which Section 351 is part provides for criminal sanctions for a violation, and creates an administrative remedy with sole enforcement power by the DIR. It does not provide for a private right of action (although many other

Labor Code provisions expressly do so). Moreover, nothing in the legislative history suggests the Legislature intended to confer a private right of action under Section 351. In arguing for the opposite conclusion, Lu relies only on conjecture about the "logical implications" of the statute. A private right action is not needed to effectuate the statute's express purpose of preventing fraud on the tipping public.

A private right of action is not necessary even if, as Lu contends, the 1973 amendments conferred a "property right" upon employees. Aggrieved employees are not without remedies to seek redress for alleged tipping violations. First, Labor Code § 355 vests the DIR with enforcement power to effectuate the statute's purpose. Second, as Lu demonstrated in his complaint, employees can bring claims under common law (*e.g.*, conversion) and other provisions of the Labor Code for the same alleged conduct. Third, the Court of Appeal noted that the Private Attorney General Act, Labor Code Sections 2698, *et seq.* ("PAGA"), provides parties a private right of action for Labor Code violations that do not provide for private actions. (COA, pp. 9-10).[2] "The Legislature's enactment of PAGA effectively ends the discussion. PAGA contemplates that employees bring actions ***under*** *PAGA*, to enforce rights granted by ***other provisions of the***

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[2] In keeping with Lu's citation format, "CT" refers to Clerk's Transcript, and "OB" refer to Lu's Opening Brief.

Labor Code." It therefore concluded that "[t]he enactment of PAGA as an enforcement vehicle implies a legislative recognition that a direct private right of action under section [ ] 351 . . . is not viable." (COA Dec., p. 10 [emphasis in original]).

For these reasons, there is no legal basis for finding a private right of action under Section 351.

II. STATEMENT OF FACTS

Lu worked as a card dealer for the Casino from December 1997 to August 30, 2003 (Vol. 5 CT 1094-1095). In November 2002, Lu filed a class action lawsuit against the Casino and Ron Sarabi, the Casino's General Manager, challenging the Casino's tip pool policy.[3] California law permits fair and reasonable tip pooling among employees who provide direct service to customers.

A. Tip Pool Policy.

HGC has a written tip pool policy which governs employees who are eligible for its tip pool. (Vol. 5 CT 1100.) The tip pool policy requires Dealers to contribute a portion of the tips they receive each day into a tip

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[3] Sarabi was dismissed as a defendant in late January 2006. (Vol. 15 CT 3211-3212).

pool which is then distributed to other employees who provide direct customer service. The Casino takes nothing from the tip pool.

This tip pool policy is legal under California law, and the agency authorized by Section 351 to enforce its provisions, the California Division of Labor Standards Enforcement (Labor Code § 355), has approved the implementation of virtually identical tip pool programs. Moreover, Lu testified that during his employment he understood that tips were given to him by patrons for the services they had been provided and recognized that "tips are gifts; I don't earn them." (Vol. 9 CT 1895)

B. The HGC tip pool is conducted on the honor system and only eligible employees may participate.

Casino employees who deal card games to patrons are called "Dealers." (Vol. 9 CT 1892). A Dealer, like a waiter in a restaurant or the individual who drives a car at the car wash, acts as the front-line of service to patrons. HGC patrons frequently leave tips in the form of chips with the Dealers, who in turn contribute a portion of those tips to the Casino tip pool. (*Id.*). HGC requires its dealers to contribute or "drop" 15% to 20% of the tips they receive each day to the tip pool. (Vol. 9 CT 1893). The amount each Dealer contributes varies depending upon the type of card games. (Vol. 9 CT 1892).

HGC does not count the tips each Dealer has at the end of his or her shift, nor does it verify that the Dealer contributed the required percentage. (Vol. 9 CT 1894). The HGC tip pool is conducted on the honor system. (Vol. 9 CT 1893-1894). After contributing to the tip pool, each Dealer keeps the remainder of the chips he or she received in tips that day. (Vol. 9 CT 1893).

C. The Casino does not use any of the tip pool proceeds for its own use.

The tips collected by the Casino are deposited into a tip pool account for distribution to other eligible tipped employees. The money is paid only to employees who provide direct customer service to patrons. (Vol. 9 CT 1894). The small percentage of tips collected from each Dealer is distributed among several classifications of other employees who also provide direct service to patrons. These employees include Customer Service Representatives (also known as "CSRs" or "floormen"), game rotation coordinators, game registration persons, chip runners (also known as chip service personnel), porters, concierges, chip registration persons, and hosts. (Vol. 5 CT 1096). The Casino tip pool participants are not employers or HGC agents. (Vol. 9 CT 1894-1895). This policy specifically forbids employers, managers, or supervisors to receive money from the pool. (COA, p. 3)

The Casino does not keep any money for its own use or use tip pool money to offset or pay the wages of any employees. (Vol. 9 CT 1893). HGC does not "charge" employees who receive tip pool proceeds to offset the administrative cost of handling the tip pool. (Vol. 9 CT 1893). The tips Casino employees receive from the pool are in addition to their wages. (Vol. 9 CT 1896).

D. Dealers are paid wages by the Casino and tips are given by the patrons.

In addition to their tips, all Dealers are paid and receive a paycheck every two weeks for at least the minimum hourly wage. (Vol. 9 CT 1892). In fact, Lu admits that at all times, he received at least the minimum wage, and at no time did any employee at the Casino ever receive less than the prevailing minimum wage. (Vol. 9 CT 1896). The tips every Dealer receives are significantly in excess of the minimum wage on a biweekly, monthly and annual basis. (Vol. 9 CT 1893). For example, Lu testified that, on average, he took home between $150 and $500 per day in tips. (Vol. 9 CT 1896).

III. PROCEDURAL HISTORY

A. Trial Court Proceedings

Lu filed his complaint on November 27, 2002 (Vol. 1 CT 20). It named HGC and Sarabi as defendants on seven causes of action: (1)

Violation of Section 221; (2) Violation of Section 351; (3) Violation of Section 450; (4) Violation of Section 1197; (5) Violation of Business & Professions Code Section 17200; (6) Conversion; and (7) Violation of Section 2802. (Vol. 1 CT 20).

On October 12, 2004, the trial court certified a class of all persons who were employed by the Casino in the position of "Dealer" between November 27, 1999 and the date the Notice of Pendency of Class Action was to be mailed to class members. (Vol. 6 CT 1235-1236). Thereafter, through rulings on a series of motions brought by HGC and Sarabi, the trial court dismissed all seven of causes of action as follows:

- On May 31, 2005, the court granted HGC's Motion for Judgment on the Pleadings as to the Second and Third Causes of Action for violation of Sections 351 and 450, respectively, on the ground there is no private right of action under sections 351 and 450. (Vol. 15 CT 3280; *see also* Vol. 8 CT 1718).

- On October 13, 2005, the court granted HGC's Motion for Summary Adjudication as to the First and Fourth Causes of Action for violation of Sections 221 and 1197, respectively, on the grounds that tips are not wages, and there was no

evidence that employees were paid less than the minimum wage. (Vol. 15 CT 3281).

- On December 8, 2005, the court granted HGC's Motion for Summary Adjudication as to the Seventh Cause of Action for violation of Section 2802 on the grounds that tips are not "expenses" as defined by Section 2802. (Vol. 15 CT 3281).

- On January 25, 2006, the court granted HGC's Motion for Summary Adjudication as to the Sixth Cause of Action for Conversion on the grounds there was no evidence the Casino had converted anything. (Vol. 15 CT 3281).

- On January 26, 2006, the court dismissed Ron Sarabi as a defendant pursuant to stipulation and after notice to the class and no opposition from class members. (Vol. 15 CT 3211-3212).

- On June 13, 2006, the court granted HGC's Motion for Judgment on the Pleadings as to the Fifth Cause of Action for violation of Business & Professions Code Section 17200 by HGC because it was based on all of the other causes of action which had already been dismissed and there was no evidence

of an unfair, fraudulent or unlawful business practice. (Vol. 15 CT 3263).

Thereafter, the trial court entered judgment against Lu and the class. (Vol. 15 CT 3280). Notice of entry was filed on September 12, 2006 (Vol. 15 CT 3285), and the Notice of Appeal was filed on October 2, 2006 (Vol. 15 CT 3297).

B. Court of Appeal

On January 22, 2009, the Court of Appeal affirmed the trial court's holding of no private right of action under Labor Code Section 351. (COA, pp. 2, 23). The Court of Appeal affirmed all of the trial court's orders except the dismissal of the Business & Profession Code § 17200 cause of action. The court remanded that claim finding that it may be predicated on an alleged Section 351 violation and that a determination had to be made as to whether certain participants in the tip pool were "agents," as defined by Labor Code Section 350. (COA, pp. 21-23).

IV. THERE IS NO PRIVATE RIGHT OF ACTION UNDER LABOR CODE SECTION 351

A. California Courts Employ The "Legislative Intent" Approach To Statutory Construction.

It is well-settled under California law that the "[a]doption 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." (*Vikco Ins. Servs., Inc.,* 70 Cal. App. 4th at 62, citing *Moradi-Shalal,* 46 Cal. 3d at 294-95). Where the Legislature intends to create a private right of action, it does so with "clear, understandable, unmistakable terms, as it has done in numerous other statutes...." (*Moradi-Shalal*, 46 Cal. 3d at 294-95, citing *Royal Globe Ins. Co.,* 23 Cal. 3d at 896-97 [dissent]; see also *Violante v. Communities Southwest Dev. & Constr. Co.* (2006) 138 Cal. App. 4th 972 [denying a private right of action by a subcontractor's employee against a prime contractor where "[t]he entire statutory framework gives no indication of [such] a private right of action....]).

To determine whether a private remedy exists under a statute, California courts endeavor to ascertain the intent of the Legislature so as to effectuate the purpose of the law, considering: (1) whether the language of the statute provides for a private right of action; and (2) whether there are any indicia that the Legislature intended to create such a remedy. (*Vikco*, 70 Cal. App. 4th at 61 (internal citations omitted)]); see also *Schaefer v. Williams* (1993) 15 Cal. App. 4th 1243, 1248 ["if the Legislature had intended to create such a private action, it would have done so by clear and

direct language"]; *Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal. App. 4th 121, 123 [holding that the legislative intent approach, which "examines the wording of the statute, its legislative history, its statutory context and similar factors, and asks whether the Legislature intended to create a new private right to sue by enacting the statute" is the proper test for determining whether a statute creates a private right of action.][4].

The general rule for interpreting statutes must be kept in mind. As noted in *Vikco*, this provision provides:

> In the construction of a statute..., the office of the Judge is simply to ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

(*Vikco*, 70 Cal. App. 4th at 61, citing Code of Civil Procedure § 1858).

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[4] *Crusader* affirmatively rejected any analysis which looks beyond the intent of the Legislature to create a private right of action, even where the Legislature "simply did not consider the possibility of creating a new private right to sue...". (*See Crusader,* 54 Cal. App. 4th at 123 [rejecting the Restatement approach for determining whether a regulatory statute creates a private right of action]). Where the Legislature did not consider the possibility of creating a new private right to sue, then the Legislature cannot have had an intent to create a new private right to sue.

For these reasons, which are more thoroughly discussed below, there is no basis on which this Court could infer that the Legislature intended to provide for a private remedy for Sections 351.

B. There Is No Basis On Which The Court Could Infer The Existence Of A Private Remedy For Violations Of Section 351.

1. The plain statutory language of Section 351 does not permit a private right of action.

Under the plain meaning of the relevant statutory language and unambiguous language of Section 351, no private right of action exists. The tipping laws are set forth in Labor Code Sections 350-356. (Article 1 "Gratuities" [Chapter 3 "Privileges and Prerequisites," Part 1 "Compensation," Division 2 "Employment Regulation and Supervision"]). Throughout these provisions, the Legislature took care to make clear that this is a self-standing article devoted to the narrow issue of gratuities. Section 355 states that the DIR shall enforce the provisions of this article. In addition, a violation of Section 351 is a misdemeanor, punishable with fines and/or imprisonment. (*See* Labor Code §§ 354, 355). Nothing in the statute authorizes a private citizen to sue under Section 351.

2. There is no indication the Legislature intended to create a private right of action for alleged violations of Section 351.

It is clear that where the Legislature has seen fit to provide a private right of action as to Labor Code violations, it has done so expressly. (*See,*

e.g., Labor Code §§ 218.5 [unlawful withholding of wages], 255 [wages due seasonal workers], 972 [fraudulent solicitation of employees], 1194 [failure to pay minimum wage and overtime compensation], 1404 [failure to give proper notice re layoffs], and 2752 [unlawful absence of written agreements between out-of-state employers and specified commissioned employees]). It did not do so in Section 351.

Despite spending several pages of his Opening Brief discussing the evolution of Section 351 (OB, pp. 17-23), Lu does not cite to anything in the legislative history demonstrating Legislature's intent to create a private right of action.[5] Instead, Lu's arguments are merely speculation about what he believes to be "logical" or "implied" by the language of the statute, particularly following the 1973 amendment, when tips were declared to be the "sole property" of employees. Nothing in the relevant legislative history, including the 1973-75 amendments, even mentions a private right

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[5] Lu relies extensively on the summary and analysis of the legislative history of Section 351 contained in *Henning v. Industrial Welfare Commission* (1988) 46 Cal. 3d 1262. *Henning*, however, did not create a private right of action for violation of Sections 351. In *Henning*, the issue before the California Supreme Court was whether Section 351 barred the Industrial Welfare Commission's ("IWC") establishment of a two-tier minimum wage system containing a lower alternative minimum wage for certain tipped employees. This Court held that it did not, but not because of any issue concerning the right of an individual to file a private action, but because the IWC's interpretation of Section 351 to allow a "tip credit" for minimum wage, violated the statute.

of action to enforce Section 351. (*Crusader*, 54 Cal. App. 4th at 133 "[W]hen neither the language nor the history of a statute indicates an intent to create a new private right to sue, a party contending for judicial recognition of such a right bears a heavy, perhaps insurmountable, burden of persuasion."). If the Legislature intended to confer a property right and a private right of action, it would have done so expressly.

3. A private right of action is not necessary to effectuate the intended purpose of Section 351.

a. Section 351 Has An Administrative Enforcement Scheme

"When a regulatory statute provides for enforcement by an administrative agency, California courts generally conclude the Legislature intended the administrative remedy to be exclusive, unless the statutory language or legislative history clearly indicates otherwise." (*Matoff v. Brinker Rest. Corp.* (C.D. Cal. 2006) 439 F.Supp.2d 1035, 1037 [citing *Vikco*, 70 Cal. App. 4th at 62-63; *Moradi-Shalal*, 46 Cal. 3d at 294-295]). Here, the Legislature directed the DIR to enforce Section 351. This, coupled with the fact there is no other indication the Legislature intended to create a Section 351 private cause of action conclusively demonstrates that the only remedy under Section 351 is enforcement by the DIR.

b. A Private Right Of Action Would Not Further The Statute's Express Purpose

The Legislature's repeated refusal to create a private right of action also comports with the express purpose for enacting the tipping laws in the first place: "[T]he purpose of this article is to prevent fraud upon the public in connection with the practice of tipping and [the Legislature expressly] declares that the article is passed for a public reason..." (Labor Code § 356 [emphasis added]). The public is adequately protected by DIR enforcement and imposition of criminal sanctions.

c. The 1973 Amendments

Lu devotes much of the Opening Brief discussing what he terms the "radical change" in the "purpose" of the tipping laws with the 1973 amendments. (*See*, *e.g.*, OB, p. 1). He argues that because the amendments declared tips to be the property of the employee, it would be "absurd" not to imply a private right of action to enforce this right. (OB, p. 2). This leap in logic cannot be reconciled with a variety of other Labor Code sections, some of which create a private right of action while others do not. First, the Legislature has repeatedly chosen not to amend Section 356 which sets forth the express purpose of the statutory scheme "to prevent fraud upon the public." It was passed for a public reason. The Legislature's intent was clear: to protect the public. Even assuming as Lu argues that the purpose of the amendments were to protect employees, the Legislature has

nevertheless chosen not to provide a private right of action. Instead as explained above, employees have other private avenues of relief.

Spanning the past 70 years, the Legislature has addressed the tipping laws through a series of amendments, proposed amendments, legal comment, and debate. For example, Section 351 was codified in 1937 (from pre-existing 1929 law) and substantively amended in 1965, 1973-75, 1983 and 2000. Throughout that time, the Legislature has continued to vest the DIR with the sole authority to "protect employees" under this statute. Section 355, entitled, "Enforcement of Article," states that the DIR "shall enforce the provisions of this article," and "collect fines and pay them to the State Treasury." Notably, the most recent amendment in 2000 was part of a much larger review in which the Legislature contemplated a private right of action for some Labor Code provisions but not for others.

In those instances, where the Legislature has created a private right of action for Labor Code violations, it has done so unambiguously.[6] Surely, if the Legislature had intended to create a private right of action under

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[6] Section 218.5 [unlawful withholding of wages], Section 255 [wages due seasonal workers], Section 972 [fraudulent solicitation of employees], Section 1194 [failure to pay minimum wage and overtime compensation], Section 1404 [failure to give proper notice re layoffs], and Section 2752 [unlawful absence of written agreements between out-of-state employers and specified commissioned employees].

Labor Code Section 351, it would have added the few words necessary to do so.

The language in the seminal case regarding private rights of action, *Moradi-Shalal*, 46 Cal. 3d at 254-255 (citing with approval the language in the *Royal Globe* dissent), fits squarely within this case:

> "[I]f the Legislature truly had intended to grant...claimants a private cause of action against an insurer for failing to settle claims against the insured, 'then surely much more direct and precise language would have been selected' . . . to the effect that administrative proceedings under the act would not 'relieve or absolve' an insurer from civil liability 'under the laws of this State.' . . . '**[O]ne would reasonably have expected that the Legislature simply would have directly imposed such liability in clear, understandable, unmistakable terms, as it has done in numerous other statutes.'"

(*Moradi-Shalal,* 46 Cal.3d at 294-295, citing *Royal Globe Ins. Co.,* 23 Cal. 3d at 896-897 (dissent) [emphasis added]).

d. Employees Have Adequate Remedies To Address Tipping Violations

Lu argues that given the "property right" he alleges was created by the 1973 amendments, private litigants are implicitly allowed to file civil actions to enforce these rights. He contends that it would be an "absurd" and "cruel joke" to preclude employees from suing directly under Section

351, because this would result in a "right without a remedy." (OB, pp. 2, 9-10, 22, 45). This proposition has no legal basis and ignores the statutory directive that the DIR "shall enforce" the statute and ignores other statutes that provide employees with several avenues for private redress.

This Court rejected an almost identical argument made in a constitutional tort case upon which Lu relies heavily. (*Katzberg v. Regents of the University of California* (2002) 29 Cal. 4th 300). In that case, the plaintiff argued that the due process clause of the California Constitution vested in him a liberty interest, and therefore, if he were not allowed to sue for damages for a violation of that interest, the clause's adoption would be a "vain and meaningless act" and "any other construction [of the provision] would...make its language a mere mockery." *Id.* at 321. This Court replied: "We are unpersuaded. Even if the due process right embodied in article I, section 7(a) is enforceable only through an action for injunctive or declaratory relief, and not by an action for damages, this constitutional provision is hardly rendered innocuous or empty." (*Katzberg*, 29 Cal. 4th at 321).

Likewise, few would argue that the constitutionally protected liberty interest is less significant than the tipping interests addressed in Sections 350 to 356. There are many other remedies to address Section 351

violations. First, the statutory scheme gives the DIR sole enforcement power. (Labor Code § § 354, 355). Second, Lu's complaint alleges several other Labor Code causes of action based on the same alleged conduct and seeks precisely the same damages sought for the alleged Section 351 violation. (Vol. 1 CT 20). Third, in upholding the trial court's ruling that no private right of action exists, the Court of Appeal noted that Lu may sue under PAGA to enforce Section 351 violations. (COA, pp. 9-10). PAGA provides a means for employees to seek redress for violations of virtually any section of the Labor Code that does not provide a private right of action. Lu made a calculated decision not to assert a PAGA claim in this case and that decision has consequences. For all of these reasons, employees have adequate remedies to address tipping violations even though there is no private right of action under Section 351.

C. Other Authorities Have Concluded That Section 351 Does Not Permit A Private Right Of Action.

Throughout the statute's 70 year history, there is no published opinion from a California state court holding that Section 351 provides a private right of action.[7] Moreover, administrative and federal opinions

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[7] Shortly after the *Lu* Court of Appeal affirmed the trial court's ruling below that there is no private right of action under Section 351, the First Appellate District issued its opinion in *Grodensky v. Artichoke Joe's*, finding that a private right of action exists. This Court granted review in that case on June 24, 2009.

interpreting Section 351 have concluded that it does not provide a private right of action.

In *Matoff v. Brinker Restaurant Corp.* (C.D. Cal. 2006) 439 F. Supp. 2d 1035, 1036-37, the defendant sought to dismiss a claim for violation of Section 351 on the ground there is no private right of action under that statute. The district court reviewed Section 351, as well as the California authorities instructing how to determine whether a private right of action exists, and concluded: [T]he statute provides for administrative enforcement and a remedy other than private damages or restitution. We know of no legislative history . . . that demonstrates a legislative intent to create a private right to sue. Therefore, we conclude that California Labor Code § 351 does not contain a private right of action. *Id.* at 1037.

D. Lu's Attempts To Distinguish The *Moradi-Shalal* Line Of Cases And Substitute The "Restatement Test" Are Without Merit

Implicitly acknowledging he cannot prevail under the governing "legislative intent" approach, Lu spends most of the Opening Brief advocating for use of the disfavored "Restatement Test." Under that approach a court may imply a private right of action in tort absent any indication that the Legislature did not so intend. (OB, pp. 23-35); (*Middlesex v. Insurance Co. v. Mann* (1981) 124 Cal. App. 3d 558, 570 (citing Restatement 2d Torts § 874A). Lu, however, has not cited any

opinion by this Court that applies the Restatement of Tort principles in the context of statutory construction, such as the Labor Code. To the contrary, after making a comprehensive review of the case law, the Second District observed that the Restatement approach "has never been followed by the Supreme Court." (*Crusader,* 54 Cal. App. 4th at 135).

Lu downplays the significance of the controlling legislative intent analysis by attempting to distinguish *Moradi-Shalal* and its progeny on their facts and by offering a handful of tangentially relevant cases that offer no real support for his argument. (OB, pp. 23-34). As an initial matter, Lu's attempt to distinguish *Moradi-Shalal* and *Vikco* is not well taken. It is not the factual context of these cases that impact the outcome here, rather it is the analytical framework that governs the statutory construction necessary to determine whether a private right of action exists. Each statute is analyzed by its own terms and, if necessary, its relevant legislative history. [8]

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[8] Lu's factual analysis of *Moradi-Shalal* and the case it overruled, *Royal Globe*, is rendered even less helpful by Lu's extensive focus on the problems and adverse consequences that arose under *Royal Globe* (which had found a private right of action under Insurance Code § 790.3). *Moradi-Shalal*'s analysis of those difficulties arose in the application of *stare decisis* – its determination regarding whether it had grounds to overrule the prior case. (*Moradi-Shalal*, 46 Cal. 3d at 296-297).

For the reasons set forth below, the Restatement approach is not applicable to this case. Moreover, even if this Court were to employ this disfavored test, the requirements to imply a private right of action under Section 351 are not met. No matter which analytical framework is used, no private right of action exists.

1. Even if the Restatement approach were otherwise viable, it is inapplicable here because the Legislature has clearly demonstrated its intent that Section 351 contains no private right of action.

In most cases, the Restatement approach follows the Legislative intent approach. However, when it is clear the Legislature simply never contemplated the possible creation of a private right to sue, the Restatement approach allows the court itself to create a new private right to sue, even if the Legislature never considered creation of such right, if the court is of the opinion that a private right to sue is "appropriate" and "needed." (*Crusader,* 54 Cal. App. 4th at 123-124 [emphasis added]).

Given the multiple amendments to Section 351 and significant legislative comment and debate, it can hardly be argued that the Legislature simply "did not consider" whether there should be a private right of action under Section 351. Accordingly, the Restatement approach is not applicable.

2. The Restatement approach is disfavored in California.

The Restatement approach, which flies in the face of *Moradi-Shalal* by permitting courts to imply a private right of action even with no indication of legislative intent to do so, was created nearly 30 years ago in *Middlesex v. Insurance Co. v. Mann* (1981) 124 Cal. App. 3d 558, 570 (citing Restatement 2d Torts § 874A). Under this approach, a court may imply a private right of action if it determines: "(1) the plaintiff belongs to the class of persons the statute is intended to protect; (2) a private remedy will appropriately further the purpose of the legislation; *and* (3) such a remedy appears to be needed to assure the effectiveness of the statute." (*Jacobellis v. State Farm Fire and Casualty Company* (9th Cir. 1997) 120 F. 3d 171, 174, citing *Middlesex*, 124 Cal. App. 3d at 570).

Relying on a federal case citing *Middlesex* (without analysis), Lu argues that "[b]efore *Moradi-Shalal*, California adopted the Restatement test for determining whether a private cause of action could be implied by a statute." (*Jacobellis v. State Farm Fire and Casualty Company*, (9th Cir. 1997) 120 F. 3d 171); (OB, p. 30). At best this is an overstatement. The Restatement approach has had very limited applicability in California and has never been used to construe Legislative intent into a statute. And, in any event it has effectively been superseded by *Moradi-Shalal*. (*Id.* at 174-75; *Crusader*, 54 Cal. App. 4th at 135; *Arriaga v. Loma Linda University*

(1992) 10 Cal. App. 4th 1556, 1564). Moreover, tort remedies have never applied to the Labor Code and the Legislature has historically distinguished between statutory provisions that confer a private right of action and those that do not. Thus, the Restatement approach is limited to tort actions, which are not present in this case.

After making a comprehensive review of this Court's cases which "regularly employ" the legislative intent approach, the Second District has expressly held that "the Restatement approach is not valid in California to the extent that it deviates from the legislative intent approach." (*Crusader,* 54 Cal. App. 4th at 125). Thus, a private right of action must not be "implied." *Crusader* found further support for its holding in California Code of Civil Procedure Section 1858, which provides that "a judge may not insert what has been omitted from a statute." (*Id.* at 125). "If the Legislature simply did not consider the possibility of creating a new private right to sue, then the Legislature cannot have had an intent to create a new private right to sue." (*Id.* at 127).[9]

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[9] In rejecting the Restatement approach in favor of the legislative intent test, the *Crusader* court further explained: A mode of analysis which provides that a statute does not create a private right to sue except when the Legislature so intended does not diminish justice – it simply declines to distort a statute beyond the bounds of the legislative intent that created it.

More significantly, neither *Moradi-Shalal* or *Royal Globe* (both of which used the legislative intent approach, albeit with different conclusions) even mentioned the Restatement approach. (*Id.* at 131). Also, "*Middlesex* was decided before *Moradi-Shalal* and has never been followed by the Supreme Court." (*Id.* at 133, 135). Thus, the legislative intent approach is the applicable test in California and accordingly, a statute contains a private right of action only if the statutory language or legislative history affirmatively indicates such an intent.

3. No private right of action may be implied to Section 351 even under the Restatement approach because it is not "needed" to assure the effectiveness of the statute.

Even under the Restatement approach, California courts do not imply a private right of action unless it is determined that it "is *needed* to assure the effectiveness of a statute." (*Arriaga,* 10 Cal. App. 4th at 1564) [emphasis in original]. In *Arriaga*, the court held that the existence of a comprehensive administrative enforcement scheme and other remedial theories to compensate for the alleged injuries assured the effectiveness of

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As *Moradi-Shalal* noted, available common law remedies are not limited by legislative intent analysis. (*Id.* at 134).

the statute in question, and therefore declined to imply a private right of action. (*Id.*).[10]

Similar factors are present here. First, the Legislature gave the DIR the authority to enforce Section 351 in order to carry out the statute's express public purpose of protecting the public against fraud. (Labor Code § 356). Second, Lu has alleged several other causes of action under the Labor Code and common law based on the same conduct and seeking the same damages. Third, PAGA provides private enforcement for tipping violations. (COA, pp. 9-10).

4. The cases Lu cites in support of the Restatement approach are unpersuasive.

a. *Goehring v. Chapman University* (2004) 121 Cal. App. 4th 353

Lu's discussion of *Goehring v. Chapman University* is based on a series of faulty assumptions that *Moradi-Shalal* has "limited applicability" and only applies "to a case where the Legislature created specific rights in Plaintiffs that would otherwise go unenforced." (OB, p. 27); (*Goehring v.*

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[10] *Crusader* explained, the "Restatement standards for determining whether a statute creates a private right to sue have arguably been superseded by *Moradi-Shalal*; even if *Middlesex* survived *Moradi-Shalal*, [there is] no private right of action where there is a comprehensive regulatory scheme to address a problem and the statute does not provide for a right of action." (*Crusader*, 54 Cal. App. 4th at 137, citing *Arriaga* at 1564).

Chapman University (2004) 121 Cal. App. 4th 353). This conclusory statement is based in part on Lu's ineffective attempt to distinguish *Moradi-Shalal* on its facts. Again, however, it is not the factual context of that case that is relevant here; it is the legal framework for statutory construction. Even assuming as Lu argues, that employees have a property right in gratuities, that right would not go "unenforced" in the absence of a private right of action under Section 351.

b. *Jacobellis v. State Farm Fire and Casualty Company* (9th Cir. 1997) 120 F. 3d 171

Lu also cites *Jacobellis v. State Farm Fire and Casualty Company*, (9th Cir. 1997) 120 F. 3d 171 as support for the proposition that the Restatement approach is viable in California. There, the Ninth Circuit held that a private cause of action existed under the Earthquake Insurance Act. Although the *Jacobellis* court distinguished the facts of *Moradi-Shalal*, it applied the same legal factors: "Whereas application of these factors compelled the court's decision against a private right of action in *Moradi-Shalal*, application of the same factors compels the opposite conclusion in the case at hand." (*Id.* at 174).

Unlike the statute at issue in *Moradi-Shalal*, the Earthquake Insurance Act does not provide for any enforcement. The *Jacobellis* court reasoned there would be no remedy if no private right of action were

implied. (*Id.*). The Ninth Circuit explained that implying a private right of action would not create the confusion and unintended adverse consequences that resulted from *Royal Globe* (which was overruled by *Moradi-Shalal*). (*Id.*).

Questioning whether the Restatement approach was still "appropriate" in the wake of *Moradi-Shalal*, the Ninth Circuit cited one Court of Appeal opinion from the 1960s in maintaining that "California courts have implied a private right of action where such a right was necessary to enforce a statute that was intended to protect an aggrieved party." (*Id.* at 174-175, citing *Faria v. San Jacinto Unified School District* (1966) 50 Cal. App. 4th 1939, 1947). On this basis, the court observed that the Restatement approach may still be "useful." At most, then the *Jacobellis* analysis carries little authoritative weight and is not binding on California courts in any event.

c. *Katzberg v. Regents of the University of California* (2002) 29 Cal. 4th 300

In arguing that the Court should ignore the legislative intent test and apply the Restatement approach, Lu relies heavily on this Court's opinion in *Katzberg v. Regents of the University of California* (2002) 29 Cal. 4th 300);

(OB, pp. 33-35).[11] *Katzberg* is a constitutional tort action dealing with a public employee's liberty interest under the due process clause, and as such, its analysis has little relevance to this case. *Katzberg* is relevant for use in analyzing whether it is appropriate to recognize a tort action for damages for a constitutional violation (a "constitutional tort"). (*Id.* at 317). The Court did not apply this test, or recommend its use, for construction or interpretation of regulatory statutes such as Section 351. Section 351 is in a self-contained article comprised of seven sections that establish rules and authorizes fines to protect the public.

Although the *Katzberg* Court acknowledged that the plaintiff had a liberty interest that was violated by the conduct in question, it nevertheless held that an action for damages was not available because there was no

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[11] In addition to the other problems with Lu's *Katzberg* analysis, he also quoted a line from the case out of context, that, standing alone, is misleading. Lu argued that the *Katzberg* court invoked the Restatement approach (obscuring the fact that the analysis was in the *constitutional tort* context) in finding that "although it could not discover any basis for concluding that a damages remedy was contemplated or reasonably might be inferred, it had 'not discovered any basis for concluding that a damages remedy was intended to be foreclosed.'" (OB, pp. 33-34, citing *Katzberg*, 29 Cal. 4th at 324).

Katzberg did not imply a private right of action on that basis. In fact, the court held that there was no private right to seek damages. (*Id.* at 329). Rather, this statement by the *Katzberg* court was made only in the context of the first step of a multi-part analysis. Only because the intent was not affirmatively set forth or affirmatively foreclosed did the court consider other factors such as the adequacy of existing remedies. (*Id.*)

basis from which to infer an intent to create such a remedy. To the extent the *Katzberg* analysis is useful, it supports the conclusion that no private right of action should be implied into Section 351. Here, it does not follow that this Court should imply a private right of action under Section 351 simply because the 1973 amendments may have conferred a property right to employees in their tips.[12]

V. THE COURT SHOULD DISREGARD LU'S ARGUMENTS THAT ADDRESS ISSUES NOT PRESENTED FOR REVIEW

In the last several pages of the Opening Brief, Lu attempts to expand his arguments beyond the scope of the narrow issue on review. Couching his argument in terms of a "*Katzberg* analysis," Lu implores this Court to examine the adequacy of other remedies in determining whether to imply a private right of action. (OB, p. 35). He then discusses the substance of his other claims that were dismissed by the trial court or those he could have brought, such as breach of contract, conversion, PAGA, and violation of Labor Code Sections 221 and 1194. (OB at 35-42).

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[12] In discussing U.S. Supreme Court authority analyzing the right to bring constitutional tort actions under various other provisions of the United States constitution, the *Katzberg* court observed: "[In recent cases], [t]he [high] court has found that the absence of a 'complete' alternative remedy will not support an action for damages, so long as a 'meaningful' alternative remedy in state or federal law is available." (*Katzberg*, 29 Cal. 4th at 309, citing *Bush v. Lucas* (1983) 462 U.S. 367 and *Schweiker v. Chilicky*, (1988) 487 U.S. 412). This point further undercuts Lu's argument that other available remedies are insufficient.

The Court did not certify any other issues. Moreover, Lu's discussion of these other remedies supports the Casino's position that he has other private remedies. In any event, under the Restatement approach, if other adequate remedies exist, even if they are not "complete" remedies, a court is precluded from implying a private right of action where the intent to do so cannot be discerned from legislative intent. (*Katzberg*, 29 Cal. 4th at 325-327 ["[t]he availability of these adequate alternative remedies militates against judicial creation of a tort cause of action for damages in the circumstances presented"]).[13]

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[13] To the extent to which this Court may be inclined to entertain argument on these points, HGC respectfully requests the opportunity to submit additional briefing.

VI. CONCLUSION

For all of the foregoing reasons and based on the authorities cited herein, Hawaiian Gardens Casino respectfully requests that this Court affirm the Court of Appeal's decision that Labor Code Section 351 provides no private right of action.

Dated: October 29, 2009

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CERTIFICATE OF COMPLIANCE

WITH RULE 8.204(c) OF THE

CALIFORNIA RULES OF COURT

I certify that pursuant to Rule 8.204(c) of the California Rules of Court, the foregoing Answering Brief On The Merits contains 7,393 words, exclusive of the table of contents, table of citations, and this certificate.

Dated: October 29, 2009

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within entitled action; my business address is 333 South Hope Street, 48th Floor, Los Angeles, California 90071-1448.

On **October 30, 2009**, I served the following document(s) described as: **HAWAIIAN GARDENS CASINO'S ANSWERING BRIEF ON THE MERITS** n the interested party(ies) in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

See Attached Service List

☒ **BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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☒ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **October 30, 2009**, at Los Angeles, California.

Lynda G. Johnson

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