

Case No. S262634

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT ZOLLY, RAY MCFADDEN AND STEPHEN CLAYTON

Plaintiffs-Appellants,

v.

CITY OF OAKLAND

Defendant-Respondent

**PETITIONER CITY OF OAKLAND'S OPPOSITION TO REQUEST FOR
JUDICIAL NOTICE OF AMICI CURIAE REUBEN ZADEH, MABLE
CHU, AND HERB NADEL**

After a Published Decision from the Court of Appeal
First Appellate District Court Case No. A154986
Alameda County Superior Court Case No. RG16821376

Cedric C. Chao (SBN 76045)
CHAO ADR, PC
50 California Street
Suite 1500
San Francisco, CA 94111
cedric.chao@chao-adr.com
Tel: (415) 293-8088

Stanley J. Panikowski (SBN 224232)
Jeanette Barzelay (SBN 261780)
DLA PIPER LLP (US)
555 Mission Street, 24th Floor
San Francisco, CA 94105
stanley.panikowski@us.dlapiper.com
jeanette.barzelay@us.dlapiper.com
Tel: (415) 836-2500
Fax: (415) 836-2501

Barbara Parker (SBN 69722)
Doryanna Moreno (SBN 140976)
Maria Bee (SBN 167716)
Celso Ortiz (SBN 95838)
Zoe Savitsky (SBN 281616)
OAKLAND CITY ATTORNEY'S
OFFICE
City Hall, 6th Floor
1 Frank Ogawa Plaza
Oakland, CA 94612
bparker@oaklandcityattorney.org
dmoreno@oaklandcityattorney.org
mbee@oaklandcityattorney.org
cortiz@oaklandcityattorney.org
zsavitsky@oaklandcityattorney.org
Tel: (510) 238-3601
Fax: (510) 238-6500

Attorneys for Petitioner CITY OF OAKLAND

TABLE OF CONTENTS

| | <u>Page(s)</u> |
|---|-----------------------|
| TABLE OF CONTENTS | 2 |
| TABLE OF AUTHORITIES..... | 3 |
| OPPOSITION TO MOTION FOR JUDICIAL NOTICE..... | 4 |

TABLE OF AUTHORITIES

| | <u>Page(s)</u> |
|---|-----------------------|
| CASES | |
| <i>AL Holding Co. v. O'Brien & Hicks, Inc.</i> (1999) 75 Cal.App.4th 1310 | 6, 7 |
| <i>County Sanitation Dist. No. 2 v. County of Kern</i> (2005) 127 Cal.App.4th 1544 | 6 |
| OTHER AUTHORITIES | |
| California Rules of Court | |
| 8.54..... | 5 |
| 8.252..... | 5 |

OPPOSITION TO MOTION FOR JUDICIAL NOTICE

Petitioner City of Oakland (“Oakland”) submits this opposition to the Request for Judicial Notice (“Zadeh RJN”) filed by Amici Curiae Reuben Zadeh, Mable Chu, and Herb Nadel (the “Zadeh Amici”). On April 22, 2022, four days after the last date for supplemental briefing as ordered by the Court, the Zadeh Amici filed an untimely request asking this Court to take judicial notice of *over 600 pages* of purported legislative history materials concerning California Vehicle Code sections 9400.7 and 9400.8. Those statutes have no bearing on the fundamental question at issue here: whether a contractual *franchise fee* is exempt from the definition of “tax” under the California Constitution. (See generally Oakland’s June 3, 2021 Answer to Zadeh Amicus Brief (“Oakland Zadeh Answer”).) Indeed, neither Vehicle Code 9400.8 nor its legislative history materials are relevant. They reflect no intent to interfere with a local government’s legally and factually distinct ability to exact contractual franchise fees that may encompass the right to use the local government’s property, including streets and other rights of way, consistent with independent historical jurisprudence governing franchises and franchise fees.¹ (*Id.* at 11-13.)

¹ The Zadeh Amici incorrectly argue that Oakland’s franchise fees are paid solely for “the use of city streets for their primary purpose of transportation.” (Zadeh Amici Supp. Br. at 1.) In fact, Oakland’s franchise fees are paid in exchange for the right to purchase valuable local government property interests – *i.e.*, exclusive waste-hauling franchises – which include but are

Oakland opposes the Zadeh RJN on two grounds. First, the Zadeh RJN is improper, unsupported, and fails to comply with California Rules of Court 8.54 and 8.252. Second, it is untimely and prejudicial.

On the first ground, to obtain judicial notice by a reviewing court under California Evidence Code section 459, a party must serve and file a motion that states, among other things: “(A) Why the matter to be noticed is relevant to the appeal; (B) Whether the matter to be noticed was presented to the trial court and, if so, whether judicial notice was taken by that court; [and] (C) If judicial notice of the matter was not taken by the trial court, why the matter is subject to judicial notice under Evidence Code section 451, 452, or 453[.]” Cal. R. Ct. 8.252(a)(2). In addition, any motion presented to a reviewing court must “stat[e] the grounds and the relief requested” and “be accompanied by a memorandum.” Cal. R. Ct. 8.54.

The Zadeh RJN does not satisfy these procedural requirements. The Zadeh Amici ask the Court to take notice of a list of materials under Evidence Code sections 451 or 452, but they fail to explain *why* those materials are properly subject to judicial notice under either section of the Evidence Code, neither of which clearly permits doing so. Likewise, the Zadeh Amici contend that “[t]hese materials contain information relevant to the Court’s

not limited to the right to use city streets for the purpose of providing services to Oakland residents and earning profit therefrom. (See, e.g., Oakland Opening Supp. Br. at 2-4.)

consideration in the matter on review,” Zadeh RJN p. 4, but they fail to explain *how* the materials are relevant generally, let alone which specific documents or sections of documents within the 600 pages submitted contain relevant information. Indeed, the Zadeh Amici provide little more than a list of documents, without the required memorandum or other support to justify their request.

Here, as Oakland has established, Vehicle Code sections 9400.7 and 9400.8 are not relevant to the “franchise fee versus tax” question presently before this Court. Those Vehicle Code statutes are part of an entirely separate “statutory scheme that regulates fees based on vehicle weight” and prohibits local agencies from charging fees on “legal loads,” *i.e.*, weight-based fees. (*County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1621-22.) That statutory scheme has no direct bearing on a city’s or county’s ability to charge contractual franchise fees for the use and/or purchase of their property in carrying out a public utility or public service franchise. (See Oakland Zadeh Answer at 11-13.) Accordingly, this Court must decline to take judicial notice of the requested material because it is not relevant. (See, e.g., *AL Holding Co. v. O’Brien & Hicks, Inc.* (1999) 75 Cal.App.4th 1310, 1313 fn. 2.)²

² Although Oakland filed a Motion for Judicial Notice of certain legislative history materials for Vehicle Code section 9400.8, it did so because those materials are relevant to counter the Zadeh Amici’s arguments concerning

Moreover, the Zadeh Amici are asking this Court to do more than take judicial notice of the *existence* of the legislative history materials they attach to the Zadeh RJN. The Zadeh Amici want this Court to notice the statements made therein as reflecting the actual intent and proper interpretation of Vehicle Code sections 9400.7 and 9400.8. But courts may not take judicial notice of “the truthfulness or proper interpretation of the contents of a document,” only its existence. (*Id.*)

On the second ground, the Zadeh RJN is untimely and prejudicial. The Zadeh Amici filed the Zadeh RJN on April 22, 2022, four days after the last deadline to file supplemental briefing under the Court’s March 11 Order, and nearly one year after principal briefing in this case was completed. The Zadeh Amici raised their arguments concerning Vehicle Code section 9400.8 in the late-filed amicus brief they submitted to the Court on April 28, 2021, which Oakland rebutted on June 3, 2021. The time to seek judicial notice related to those issues was one year ago, not in response to the Court’s request for limited supplemental briefing. This unexplained delay is prejudicial to the parties and the Court, who must now review over 600 pages of material to be fully apprised of all matters that may be raised at oral argument. The Court should not allow the Zadeh Amici’s repeated delays and late filings by

the application and relevance of that statute on this appeal. (See Oakland Zadeh Answer at 13, fn. 3.) Oakland maintains that Vehicle Code section 9400.8 is not relevant to this appeal at all, and the Zadeh Amici’s arguments on that point should be disregarded.

granting judicial notice of irrelevant materials inappropriate for judicial notice at this late stage.

For these reasons, Oakland respectfully requests that the Court deny the Zadeh RJN.

Dated: May 4, 2022

Respectfully submitted,

/s/ Cedric Chao

Cedric Chao
CHAO ADR, PC

/s/ Barbara Parker

Barbara Parker
Oakland City Attorney

Attorneys for Petitioner
CITY OF OAKLAND

CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I served the following document(s) described as:

PETITIONER CITY OF OAKLAND'S OPPOSITION TO REQUEST FOR JUDICIAL NOTICE OF AMICI CURIAE REUBEN ZADEH, MABLE CHU, AND HERB NADEL

by providing a true and correct copy of the aforementioned document(s) on the interested parties in this action identified as follows and by the means designated below:

Service List

| | |
|-------------------|--|
| Andrew M. Zacks | az@zpflaw.com |
| Paul J. Katz | paul@katzappellatelaw.com |
| Lutfi Kharuf | lutfi.kharuf@bbklaw.com |
| Laura Dougherty | laura@hjta.org |
| Adrienne Weil | aweil@mtc.ca.gov |
| Monica Haymond | mhaymond@orrick.com |
| Cara Jenkins | cara.jenkins@lc.ca.gov |
| Ethan Fallon | efallon@orrick.com |
| Jason Litt | jlitt@horvitzlevy.com |
| Jeremy Rosen | jrosen@horvitzlevy.com |
| Joanna Gin | joanna.gin@bbklaw.com |
| Joshua Nelson | Joshua.Nelson@bbklaw.com |
| Joshua McDaniel | jmcdaniel@horvitzlevy.com |
| Larry Peluso | firm@pelusolaw.net |
| Robin Johansen | rjohansen@olsonremcho.com |
| Thomas A. Willis | twillis@olsonremcho.com |
| Margaret Prinzing | mprinzing@olsonremcho.com |
| Timothy Bittle | tim@hjta.org |
| Kathleen Kane | kkane@bayareametro.gov |
| David Brennan | dbrennan@orrick.com |
| Brian S. Kabateck | bsk@kbklawyers.com |

BY ELECTRONIC SERVICE – [L.R. 5[II](i)] A TrueFiling user's registration to participate in electronic filing pursuant to this rule constitutes consent to electronic service or delivery of all documents by any other TrueFiling user in the Proceeding or by the court. (Cal. R. 8.71.)

Executed this 4th day of May, 2022.

/s/ Cedric Chao
Cedric Chao
CHAO ADR, PC
Attorneys for Petitioner
CITY OF OAKLAND

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **ZOLLY v. CITY OF
OAKLAND**

Case Number: **S262634**

Lower Court Case Number: **A154986**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **cedric.chao@chao-adr.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

| Filing Type | Document Title |
|-------------|---|
| OPPOSITION | 2022.05.04 Zolly - Opposition to Motion for Judicial Notice |

Service Recipients:

| Person Served | Email Address | Type | Date / Time |
|---|-----------------------------------|---------|------------------------|
| Cara Jenkins Office of Legislative Counsel 271432 | cara.jenkins@lc.ca.gov | e-Serve | 5/4/2022 2:56:16 PM |
| Zoe Savitsky Oakland City Attorney's Office | zsavitsky@oaklandcityattorney.org | e-Serve | 5/4/2022 2:56:16 PM |
| Cedric Chao CHAO ADR, PC 76045 | cedric.chao@chao-adr.com | e-Serve | 5/4/2022 2:56:16 PM |
| Barbara Parker Office of the City Attorney | bjparker@oaklandcityattorney.org | e-Serve | 5/4/2022 2:56:16 PM |
| Adrienne Weil Metropolitan Transportation Commission | aweil@mtc.ca.gov | e-Serve | 5/4/2022 2:56:16 PM |
| Brian Kabateck Kabateck Brown Kellner, LLP 152054 | bsk@kbklawyers.com | e-Serve | 5/4/2022 2:56:16 PM |
| Larry Peluso Peluso Law Group, PC | pelusolaw@gmail.com | e-Serve | 5/4/2022 2:56:16 PM |
| Eric Shumsky Orrick Herrington Sutcliffe LLP 206164 | eshumsky@orrick.com | e-Serve | 5/4/2022 2:56:16 PM |
| Richard Kellner KELLNER LAW GROUP PC 171416 | rlk@kbklawyers.com | e-Serve | 5/4/2022 2:56:16 PM |
| Joanna Gin Best Best & Krieger LLP 323715 | joanna.gin@bbklaw.com | e-Serve | 5/4/2022 2:56:16 PM |
| Jeanette Barzelay DLA Piper LLP | jeanette.barzelay@dlapiper.com | e-Serve | 5/4/2022 2:56:16 PM |

| | | | |
|--|---------------------------------|---------|------------------------|
| 261780 | | | |
| Jason Litt Horvitz & Levy LLP 163743 | jlitt@horvitzlevy.com | e-Serve | 5/4/2022 2:56:16 PM |
| Robin Johansen Olson Remcho LLP 79084 | rjohansen@olsonremcho.com | e-Serve | 5/4/2022 2:56:16 PM |
| Monica Haymond Orrick Herrington & Sutcliffe LLP 314098 | mhaymond@orrick.com | e-Serve | 5/4/2022 2:56:16 PM |
| Andrew Zacks Zacks Freedman & Patterson, PC 147794 | AZ@zfplaw.com | e-Serve | 5/4/2022 2:56:16 PM |
| Claudia Peach Best Best & Krieger LLP | claudia.peach@bbklaw.com | e-Serve | 5/4/2022 2:56:16 PM |
| Brian Goldman Orrick, Herrington & Sutcliffe LLP 279435 | brian.goldman@orrick.com | e-Serve | 5/4/2022 2:56:16 PM |
| Beth Jay Horvitz & Levy, LLP 53820 | bjay@horvitzlevy.com | e-Serve | 5/4/2022 2:56:16 PM |
| Timothy Bittle Howard Jarvis Taxpayers Foundation 112300 | tim@hjta.org | e-Serve | 5/4/2022 2:56:16 PM |
| Barbara Parker Office of Oakland City Attorney 69722 | bparker@oaklandcityattorney.org | e-Serve | 5/4/2022 2:56:16 PM |
| Joshua Nelson Best Best & Krieger LLP 260803 | Joshua.Nelson@bbklaw.com | e-Serve | 5/4/2022 2:56:16 PM |
| Larry Peluso Peluso Law Group, PC 281380 | firm@pelusolaw.net | e-Serve | 5/4/2022 2:56:16 PM |
| Joshua Mcdaniel Horvitz & Levy LLP 286348 | jmcdaniel@horvitzlevy.com | e-Serve | 5/4/2022 2:56:16 PM |
| Lutfi Kharuf Best Best & Krieger 268432 | lutfi.Kharuf@bbklaw.com | e-Serve | 5/4/2022 2:56:16 PM |
| Robin Johansen Remcho, Johansen & Purcell, LLP 79084 | rjohansen@rjp.com | e-Serve | 5/4/2022 2:56:16 PM |
| Maria Bee Office of the City Attorney | mbee@oaklandcityattorney.org | e-Serve | 5/4/2022 2:56:16 PM |
| Paul Katz Katz Appellate Law PC 243932 | paul@katzappellatelaw.com | e-Serve | 5/4/2022 2:56:16 PM |
| Jeremy Rosen Horvitz & Levy LLP 192473 | jrosen@horvitzlevy.com | e-Serve | 5/4/2022 2:56:16 PM |

| | | | |
|--|-------------------------------------|---------|------------------------|
| Stanley Panikowski DLA PIPER LLP (US) | stanley.spanikowski@us.dlapiper.com | e-Serve | 5/4/2022 2:56:16 PM |
| Kathleen Kane | kkane@bayareametro.gov | e-Serve | 5/4/2022 2:56:16 PM |
| David Brennan | dbrennan@orrick.com | e-Serve | 5/4/2022 2:56:16 PM |
| Dawn Bierman | dawn.bierman@us.dlapiper.com | e-Serve | 5/4/2022 2:56:16 PM |

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

5/4/2022

Date

/s/Cedric Chao

Signature

Chao, Cedric (76045)

Last Name, First Name (PNum)

Chao ADR, PC

Law Firm