

Case No. S244630

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

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OTO, LLC an Arizona Limited Liability Company, dba  
ONE TOYOTA OF OAKLAND, ONE SCION OF OAKLAND,  
Plaintiff and Respondent,

v.

KEN KHO,  
Real Party in Interest,

SUPREME COURT  
FILED

MAR 2 2018

Jorge Navarrete Clerk

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JULIE A. SU IN HER OFFICIAL CAPACITY AS THE STATE OF  
CALIFORNIA LABOR COMMISSIONER, DIVISION OF LABOR  
STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL  
RELATIONS, STATE OF CALIFORNIA  
Intervenor and Appellant

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Deputy

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

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

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**MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS  
AND AUTHORITIES AND DECLARATION IN SUPPORT;  
PROPOSED ORDER**

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MILES E. LOCKER (SBN 103510)  
THERESA BICHSEL (SBN 288558)  
Division of Labor Standards Enforcement  
Department of Industrial Relations  
STATE OF CALIFORNIA  
455 Golden Gate Avenue, 9<sup>th</sup> Floor  
San Francisco, California 94102  
Telephone No. (415) 703-4863

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

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

## MOTION FOR JUDICIAL NOTICE

Please take notice that, pursuant to Evidence Code §§ 459, 452 (b), (c) and (d), and California Rules of Court, rules 8.520(g), 8.252(a), the Labor Commissioner hereby moves for an order granting judicial notice of the 22 exhibits attached hereto, all of which are true and correct copies of the documents listed in the Table of Contents. This motion is based on this notice and the memorandum of points and authorities below.<sup>1</sup>

### MEMORANDUM OF POINTS AND AUTHORITIES

The Labor Commissioner respectfully requests the Court take judicial notice of 22 exhibits needed to complete the record on appeal.

A. The Court Records in One Toyota of Oakland's De Novo Appeal of the Labor Commissioner's Underlying Order, Decision or Award

Exhibits one through 18 are the documents filed in Alameda County Superior Court case number RG15785832, One Toyota of Oakland's (OTO's) Labor Code § 98.2 de novo appeal of the Labor Commissioner's Order, Decision or Award in *Ken Kho v. OTO, L.L.C. an Arizona limited liability company dba One Toyota of Oakland, One Scion of Oakland*, State Case number 07-80337 CW.

1. The De Novo Appeal Records are Relevant to this Appeal

Exhibits one through 18 are relevant to this appeal. These proceedings demonstrate the protections the Berman process afforded Kho, including

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

OTO's obligation to post an undertaking with the superior court as a prerequisite to appealing the Labor Commissioner's Order, Decision or Award (ODA) and the Labor Commissioner's free legal representation of Kho on appeal. Further, the proceedings elucidate the consequences of the trial court's order vacating the Labor Commissioner's ODA, principally the trial court's release of OTO's appeal undertaking and Kho's loss of the Labor Commissioner's representation on appeal. The de novo appeal records are needed to complete the record on appeal.

2. The De Novo Appeal Records Were Not Previously Presented for Judicial Notice

No party presented the de novo appeal records for judicial notice, either to the trial court or to the court of appeal.

3. The De Novo Appeal Court Records are Subject to Judicial Notice Under Evidence Code § 452(d)

Under Evidence Code § 452(d), judicial notice may be taken of records of any court of this state. Exhibits one through 18 are records obtained directly from the Alameda County Superior Court's website. Judicial notice of these records is thus proper.

4. The De Novo Appeal Proceedings Commenced Prior to the Underlying Trial Court Orders On Appeal

On December 11, 2015, the trial court issued its orders 1) denying OTO's petition to compel arbitration and 2) granting OTO's motion to vacate the Labor Commissioner's ODA. (CT 207-204; 249-253.)

OTO filed its de novo appeal on September 15, 2015, before the trial court issued its orders. (See Exhibit 1, attached hereto.) The court dismissed the appeal on February 5, 2016, after the trial court issued its order granting the motion to vacate. (See Exhibit 13.) Later, on December 2, 2016, OTO applied ex parte for an order releasing its Labor Code § 98.2(b) appeal deposit. (See Exhibit 14, attached hereto.) The court granted OTO's application on December 2, 2016. (See Exhibit 17, attached hereto.)

B. The May 2013 Report on the State of the Division of Labor Standards Enforcement

Exhibit 19 is an executive report from the California State Labor Commissioner on the status of the Division of Labor Standards Enforcement.

1. The Report is Relevant to this Appeal

The 2013 report provides details on the Labor Commissioner's wage claim adjudication process, also known as the Berman process, and the Berman process benefits that do not exist in OTO's arbitration forum. Under *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1142 ("*Sonic II*"), in reaching a determination on whether an arbitration agreement is unconscionable where it requires waiver of the Berman process, the Court should weigh the lost benefits of the Labor Commissioner's Berman process against the benefits gained, if any, in the supplanting arbitration forum. The report provides relevant information for the Court's analysis.

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2. The Report has not Previously Been Presented for Judicial Notice

No party presented the 2013 report for judicial notice, either to the trial court or to the court of appeal.

3. The 2013 Report is Subject to Judicial Notice Under Evidence Code § 452(c)

Under Evidence Code § 452(c), judicial notice may be taken of official acts of the executive department of any state of the United States. The May 2013 report was produced by the California State Labor Commissioner's Office and is therefore subject to judicial notice under Cal. Evid. Code § 452(c).

C. 2014 Materials from the Labor Commissioner's Website on How to File a Wage Claim

Exhibit 20 is materials taken from the Labor Commissioner's 2014 website, <http://dir.ca.gov/dlse/HowToFileWageClaim.htm>, using the internet archive, WAYBACKMACHINE, <http://archive.org/web/>. The materials provide information to wage claimants on how to file a wage claim with the Labor Commissioner's office. Specifically the materials provide detailed instructions in multiple languages on how and where claimants can file a wage claim, what types of claims can be heard in front of the Labor Commissioner, a copy of the claim form, and how claimants should prepare for a hearing. The website also provides a link to a video on the wage claim process and numerous other resources about the wage claim process.

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1. The Materials Are Relevant to This Appeal

The materials are relevant because they demonstrate the assistance Kho and other employees could receive from the Labor Commissioner's office in filing a wage claim. Under *Sonic II*, in reaching a determination on whether an arbitration agreement is unconscionable where it requires waiver of the Berman process, the Court should weigh the lost benefits of the Labor Commissioner's Berman process against the benefits gained, if any, in the supplanting arbitration forum. The materials provide relevant information for the Court's analysis.

2. The Materials have not Previously Been Presented for Judicial Notice

No party presented the materials in Exhibit 20 for judicial notice, either to the trial court or to the court of appeal.

3. The Materials are Subject to Judicial Notice Under Evidence Code § 452(c)

Under Evidence Code § 452(c), judicial notice may be taken of official acts of the executive department of any state of the United States. The materials posted on the Labor Commissioner's website were produced by the California State Labor Commissioner's Office and are therefore subject to judicial notice under Cal. Evid. Code § 452(c).

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D. 2018 Materials from the Labor Commissioner's Website on How to File a Wage Claim

Exhibit 21 is materials taken directly from the Labor Commissioner's website, <http://dir.ca.gov/dlse/HowToFileWageClaim.htm>. The materials provide information to wage claimants on how to file a wage claim with the Labor Commissioner's office.

1. The Materials Are Relevant to This Appeal

The materials are relevant to show the assistance the Labor Commissioner provides to wage claimants in filing a wage claim. Under *Sonic II*, in reaching a determination on whether an arbitration agreement is unconscionable where it requires waiver of the Berman process, the Court should weigh the lost benefits of the Labor Commissioner's Berman process against the benefits gained, if any, in the supplanting arbitration forum. The materials provide relevant information for the Court's analysis.

2. The Materials have not Previously Been Presented for Judicial Notice

No party presented the materials in Exhibit 21 for judicial notice, either to the trial court or to the court of appeal.

3. The Materials are Subject to Judicial Notice Under Evidence Code § 452(c)

Under Evidence Code § 452(c), judicial notice may be taken of official acts of the executive department of any state of the United States. The materials posted on the Labor Commissioner's website were produced by the



California State Labor Commissioner's Office and are therefore subject to judicial notice under Cal. Evid. Code § 452(c).

E. California Code of Regulations., Title 8, §§ 13500-13520

Exhibit 22 is a copy of California Code of Regulations., Title 8, §§ 13500-13520, which are the regulations governing hearings held by the Labor Commissioner under Labor Code § 98.

1. The Regulations are Relevant to this Appeal

These regulations outline the procedures used by the Labor Commissioner in conducting Labor Code § 98 hearings (Berman hearings). Under *Sonic II*, in reaching a determination on whether an arbitration agreement is unconscionable where it requires waiver of the Berman process, the Court should weigh the lost benefits of the Labor Commissioner's Berman process against the benefits gained, if any, in the supplanting arbitration forum. The Berman process regulations provide relevant information for the Court's analysis.

2. The Materials have not Previously Been Presented for Judicial Notice

No party presented the materials in Exhibit 22 for judicial notice, either to the trial court or to the court of appeal.

3. The Materials are Subject to Judicial Notice Under Evidence Code § 452(b)

Under Evidence Code § 452(b), judicial notice may be taken of Regulations and legislative enactments issued by or under the authority of any

public entity in the United States. Labor Code § 98.8 specifically articulates DLSE hearings will be conducted in accordance with the rules and regulations set forth by the Labor Commissioner, which consist of Cal. Code Regs., tit. 8, §§ 13500-13520. These regulations are therefore subject to judicial notice under Cal. Evid. Code § 452(b).

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

Dated: March 1, 2018

By: 

Miles E. Locker  
Theresa Bichsel

Attorneys for Intervenor and Appellant,  
LABOR COMMISSIONER

## DECLARATION OF THERESA BICHSEL

I, Theresa Bichsel, declare as follows:

1. I am co-counsel of record for the Labor Commissioner in the above referenced case. I have personal knowledge of the matters stated below and if called upon to testify, would testify competently as to them.

2. Exhibits 1-18 are true and correct copies of the documents available on the Alameda County Superior Court's website in case number RG15785832.

3. Exhibit 19 is a true and correct copy of the May 2013 Report on the State of the Division of Labor Standards Enforcement. The report is available on the internet at,

[http://www.dir.ca.gov/DLSE/Publications/DLSE\\_Report2013.pdf](http://www.dir.ca.gov/DLSE/Publications/DLSE_Report2013.pdf).

4. Exhibit 20 is a true and correct copy of materials available through the WAYBACKMACHINE, <http://archive.org/web/>, using the California State Labor Commissioner's website,

<https://www.dir.ca.gov/dlse/HowToFileWageClaim.htm>. The materials are available at:

<https://web.archive.org/web/20141001154330/https://www.dir.ca.gov/dlse/HowToFileWageClaim.htm>.

5. Exhibit 21 is a true and correct copy of materials available on the California State Labor Commissioner's website,

<https://www.dir.ca.gov/dlse/HowToFileWageClaim.htm>.

6. Exhibit 22 is a true and copy of the regulations posted by the California Department of Industrial Relations, available at:  
[https://www.dir.ca.gov/t8/ch6sb6\\_5a1.html](https://www.dir.ca.gov/t8/ch6sb6_5a1.html)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at San Francisco, California on March 1, 2018.

  
Theresa Bichsel

**PROPOSED ORDER GRANTING LABOR COMMISSIONER'S  
MOTION FOR JUDICIAL NOTICE**

The Motion for Judicial Notice filed by the Labor Commissioner, having been filed, and grounds for judicial notice appearing warranted under Evidence Code §§ 459 and 452,

IT IS ORDERED that the Labor Commissioner's Motion is granted in full and the Court takes judicial notice of all the documents identified in and attached to the motion.

[ alternatively ]

IT IS ORDERED that the Labor Commissioner's Motion is granted, in part, and the Court takes judicial notice of the documents that are located behind the following tabs:

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Date: \_\_\_\_\_

\_\_\_\_\_  
Chief Justice

**PROOF OF SERVICE BY MAIL AND ELECTRONIC  
SERVICE BY E-MAIL**

One Toyota of Oakland v. Kho

Alameda Superior Court Case No.: RG15781961

First District Court of Appeal Case No.: A147564

Supreme Court Case  
No.: S244630

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

On March 2, 2018, I served the following document(s):

**MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS  
AND AUTHORITIES AND DECLARATION IN SUPPORT;  
PROPOSED ORDER**

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

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

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

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

WEINBERG, ROGER &  
ROSENFELD  
David A. Rosenfeld, Esq.  
[drosenfeld@unioncounsel.net](mailto:drosenfeld@unioncounsel.net)  
Caroline Cohen  
[ccohen@unioncounsel.net](mailto:ccohen@unioncounsel.net)

FINE, BOGGS & PERKINS, LLP  
[jboggs@employerlawyers.com](mailto:jboggs@employerlawyers.com)  
Roman Zhuk, Esq.  
[rzhuk@employerlawyers.com](mailto:rzhuk@employerlawyers.com)

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

Executed this 2nd day of March, 2018, at San Francisco, California.

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

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<p>Notice of Hearing Setting Master Court Trial for October 16, 2015 in Alameda County Superior Court Case Number RG15785832, Dated September 15, 2015</p>	<p>2</p>
<p>Notice of Cash Deposit Pursuant to Labor Code § 98.2(b) in Alameda County Superior Court Case Number RG15785832, Filed September 15, 2015</p>	<p>3</p>
<p>Notice of Representation of Respondent, Ken Kho in Alameda County Superior Court Case Number RG15785832, Filed September 18, 2015</p>	<p>4</p>
<p>Stipulation and Order Re: Continuance of Trial Date in Alameda County Superior Court Case Number RG15785832, Filed September 25, 2015</p>	<p>5</p>
<p>Order Granting Stipulation Re: Continuance of Trial Date in Alameda County Superior Court Case Number RG15785832, Dated October 6, 2015</p>	<p>6</p>
<p>Amended Notice of Hearing Setting Master Court Trial for February 5, 2016 in Alameda County Superior Court Case Number RG15785832, Dated October 6, 2015</p>	<p>7</p>
<p>Notice of Intent to Seek Additional Damages Filed for Ken Kho in Alameda County Superior Court Case Number RG15785832, Filed December 11, 2015</p>	<p>8</p>
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