

Case No. S269456
IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE ex rel. LILIA GARCIA-BROWER, as Labor
Commissioner, etc.,
Plaintiff and Appellant

v.

KOLLA’S, INC. et al.,
Defendant and Respondent.

Fourth Appellate District, Division Three, Case No. G057831

Orange County Superior Court, Dept. C34
Case No. 30-2017-00950004-CU-WT-CJC
The Honorable Martha K. Gooding, Judge

SUPPLEMENTAL BRIEF REGARDING NEW AUTHORITY

State of California, Department of Industrial Relations,
Division of Labor Standards Enforcement

Nicholas Patrick Seitz, SBN 287568
nseitz@dir.ca.gov
464 W. 4th Street, Suite 348
San Bernardino, CA 92401
Tel: 909-521-3853 · Fax: 415-703-4807

Attorney for Plaintiff, Appellant, and Petitioner
LILIA GARCIA-BROWER

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INTRODUCTION

The Labor Commissioner respectfully submits this supplemental brief under California Rules of Court, rule 8.520, subdivision (d) to identify new authority that was not available in time to be included in the Labor Commissioner's briefs on the merits. *Killgore v. SpecPro Professional Services* (9th Cir. 2022) 51 F.4th 973 holds that Labor Code section 1102.5, subdivision (b) protects the disclosure of wrongdoing directly to wrongdoers, and by implication the disclosure of known information. *Killgore* rejected the contrary interpretation by *Mize-Kurzman v. Marin Community College District* (2012) 202 Cal.App.4th 832 (reporting known information is not a protected disclosure), and instead followed *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811 and *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538 (reporting known wrongdoing is a protected disclosure). This tacitly disapproved *Rodriguez v. Laboratory Corporation of America* (C.D. Cal. 2022) __ F.Supp.3d __ [2022 WL 4597420] and *Cleveland v. Ludwig Institute for Cancer Research Ltd.* (S.D. Cal. July 20, 2022) __ F.Supp.3d __ [2022 WL 2835842], previous district court decisions following *Mize-Kurzman*. *Killgore* broadly construed section 1102.5 to afford workers "independent avenues" to disclose unlawful activity, based on the plain statutory language and the legislative history indicating an intent to expand whistleblower protections.

ARGUMENT

I. *Killgore* Rejects *Mize-Kurzman* and Follows *Jaramillo* and *Hager* in Holding Section 1102.5(b) Protects the Disclosure of Known Wrongdoing

Contrary to *Mize-Kurzman* and the majority below, *Killgore* followed *Jaramillo* and *Hager* to hold that section 1102.5(b) protects the disclosure of known information. (*Killgore, supra*, 51 F.4th at pp. 987-988.) The

plaintiff in *Killgore* was allegedly terminated for complaining about violations of law directly to a wrongdoer. (*Id.*, at p. 986.) Based on *Mize-Kurzman*, the district court determined the complaints were unprotected because the wrongdoer already knew about the violations. (*Id.*, at p. 987.) The Ninth Circuit held this was a misapplication of California law. (*Id.*, at p. 988.) Discussing *Jaramillo* and *Hager*, the Court observed California courts have held the disclosure of known wrongdoing is protected under section 1102.5(b). (*Id.*, at pp. 987-989.) The Court also noted the Federal Circuit precedent that *Mize-Kurzman* followed “is to the direct contrary” of California precedent and “has itself been superseded by amendments to the federal Whistleblower Protection Act.” (*Id.*, at pp. 987-988; see also OBOM, p. 27 [discussing the amendments’ clarification of what constitutes a protected disclosure].) The Court concluded the disclosure of known wrongdoing is protected under the statute. (*Killgore, supra*, 51 F.4th at p. 988.) *Killgore*’s holding in this regard tacitly rejects *Rodriguez* (as appointed counsel concedes) and *Cleveland*, previous district court decisions following *Mize-Kurzman*, on which appointed counsel heavily relies. *Rodriguez* and *Cleveland* were wrongly decided for the same reasons as *Mize-Kurzman*. (See OBOM, pp. 24-29.)

II. *Killgore* Supports Broadly Construing Section 1102.5 to Afford Workers Independent Avenues to Report Wrongdoing Based on the Plain Statutory Language and the Legislative History Expanding Whistleblower Protections

Killgore rejected the proposition that for internal complaints, “a protected disclosure must be made to ‘a person with authority over the employee’ *who also* has the authority to ‘investigate, discover, or correct’ the violation.” (*Killgore, supra*, 51 F.4th at p. 984 [original emphasis].) The district court had determined that complaints the plaintiff made to his

supervisor were not protected because the supervisor was not “a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance.” (*Id.*, at p. 983.) The Ninth Circuit reasoned that “the clause ‘who has authority to investigate, discover, or correct the violation or noncompliance’ modifies only the immediately preceding phrase— ‘another employee,’ ” and that “a ‘person with authority over the employee’ ” is separate. (*Ibid.*) This plain language interpretation undermined a key part of appointed counsel’s argument for construing section 1102.5(b) not to cover the disclosure of known wrongdoing. In appointed counsel’s view, the statutory language shows a protected internal complaint “is made to someone in a position to fix the violation.” (ABOM, pp. 30-31.) Theorizing that one who knows about or is responsible for a violation is unlikely to correct it, appointed counsel reasons that section 1102.5(b) does not protect the disclosure of known wrongdoing. (*Ibid.*) *Killgore* holds though that an employee’s disclosure to “a person with authority over the employee” is covered under the plain statutory language whether or not the person can “investigate, discover, or correct” the violation. (*Killgore, supra*, 51 F.4th at p. 986.) *Killgore* thus exposes appointed counsel’s flawed reasoning.

In addition to section 1102.5(b)’s plain language, the Ninth Circuit in *Killgore* reversed the district court based on the legislative intent reflected in the “expansion of protections and remedies for whistleblowers” in section 1102.5 and related statutes. (*Killgore, supra*, 51 F.4th at p. 985.) The Court concluded that section 1102.5(b) must be construed to “provid[e] independent avenues for employees to disclose potential violations of law,” which serves the “broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation.” (*Ibid.*)

This reference to the legislative history is noteworthy. Besides the plain language of the statute, the Labor Commissioner has similarly argued that section 1102.5(b) should be construed to protect the disclosure of known wrongdoing based on the Legislature’s repeated expansion of whistleblower protections in this and other statutes. (OBOM, pp. 9-12; 29-32.) *Killgore* thus supports a broad interpretation affording workers greater opportunities to “blow the whistle” in furtherance of the legislative intent to encourage reporting of wrongdoing. By contrast, a narrow interpretation exposing workers to potential retaliation for reporting plainly undermines this legislative intent.

CONCLUSION

Based on the foregoing, in addition to the plain language, legislative history, and remedial purposes of section 1102.5(b) discussed in the Labor Commissioner’s Opening Brief on the Merits and Reply Brief, the Labor Commissioner requests that the Court hold that a protected “disclosure” under the statute occurs even if the person or agency to whom a report is made already knows about the unlawful activity.

Dated: January 4, 2023

STATE OF CALIFORNIA,
DEPARTMENT OF INDUSTRIAL
RELATIONS, DIVISION OF LABOR
STANDARDS ENFORCEMENT

/s/ Nicholas Patrick Seitz

Nicholas Patrick Seitz
Attorney for Plaintiff,
Appellant, and Petitioner
LILIA GARCIA-BROWER

CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that the enclosed brief is produced using 13-point Times New Roman type, including in footnotes, and contains approximately 984 words, which is less than the total words permitted by the California Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: January 4, 2023

STATE OF CALIFORNIA,
DEPARTMENT OF INDUSTRIAL
RELATIONS, DIVISION OF LABOR
STANDARDS ENFORCEMENT

/s/ Nicholas Patrick Seitz

Nicholas Patrick Seitz
Attorney for Plaintiff,
Appellant, and Petitioner
LILIA GARCIA-BROWER

PROOF OF SERVICE

Garcia-Brower v. Kolla's, Inc.
California Supreme Court, Case No. S269456
Fourth District Court of Appeal, Division Three, Case No. G057831
Orange County Superior Court, Case No. 30-2017-00950004-CU-WT-CJC

I, Judith Rojas, declare as follows:

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Kolla's, Inc.
c/o Gonzalo Sanalla Estrada
23716 Marlin CV
Laguna Niguel, CA 92677

Gonzalo Sanalla Estrada
23716 Marlin CV
Laguna Niguel, CA 92677

Hon. Martha K. Gooding
Orange County Superior Court,
Dept. C34
Clerk of the Superior Court
700 Civic Center Drive West
Santa Ana, CA 92701

Fourth District Court of Appeal,
Division Three
Clerk/Executive Officer of the
Court of Appeal
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

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*Christopher D. Hu, Esq.
505 Sansome Street, Suite 375
San Francisco, CA 94111-3175
Phone: (415) 462-5600
Fax: (844) 497-6592
E-mail: chu@horvitzlevy.com

Fourth District Court of Appeal,
Division Three
Clerk/Executive Officer of the
Court of Appeal
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

✓ **By electronic service.** I electronically served the document to the person(s) at the electronic service address(es) below.

Bradley S. Pauley, Esq.
3601 West Olive Ave., 8th Floor
Burbank, CA 91505-4681
Phone: (818) 995-0800
Fax: (844) 497-6592
E-mail: bpauley@horvitzlevy.com

Beth J. Jay, Esq.
505 Sansome Street, Suite 375
San Francisco, CA 94111-3175
Phone: (415) 462-5600
Fax: (844) 497-6592
E-mail: bjay@horvitzlevy.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at County of San Diego, State of California, on January 4, 2023.



Judith Rojas, Declarant

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
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Case Name: **GARCIA-BROWER v. KOLLA'S**

Case Number: **S269456**

Lower Court Case Number: **G057831**

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Signature

Seitz, Nicholas (287568)

Last Name, First Name (PNum)

DLSE Legal

Law Firm