SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, CIVIL COMPLEX CENTER

AMANDA QUILES, HEATHER TURMAN, and KIMBERLY DANG, individually, on behalf of all other similarly situated, and on behalf of the general public,

Plaintiffs,

v.

KOJI'S JAPAN INCORPORATED dba Koji's Shabu Shabu and Koji's Sushi & Shabu Shabu, ARTHUR J. PARENT, Jr.

Defendants.

No. 30-2010-00425532

REVISED STATEMENT OF DECISION FOLLOWING RETRIAL OF PHASE 1 ISSUES

1. INTRODUCTION

This class action lawsuit is based on alleged wage and hour violations committed by Koji's Japan, Inc. ("Koji's") against its employees. As a result of Koji's bankruptcy, Plaintiffs have focused their attention on two other defendants--Koji's owner, Arthur J. Parent ("Parent"), and A.J. Parent Company, Inc., dba America's Printer ("America's Printer")--based on their alleged joint employer/alter ego status. A first phase trial was conducted in January and February, 2015. In April 2015 this Court issued its statement of decision following a bench trial that was limited to the alter ego and joint employer questions. The appeal of that ruling

resulted in a Court of Appeal decision, *Turman v. Superior Court* (2017) 17 Cal. App. 5th 969 (hereinafter "*Turman*"), remanding the case to this Court.

Upon remand, the parties agreed that with respect to the alter ego/joint employer issues, no new evidence was needed and that the Court could decide the Phase 1 portion of the case based on the record from the 2015 bench trial. The parties submitted new post-trial briefs, as well as excerpts of evidence, in support of their positions.

The Court issued a Tentative Decision on April 20, 2018. Thereafter, both parties filed requests for a Statement of Decision. In reviewing those requests, the Court concluded that the Tentative Decision, as modified below, sufficed as a Statement of Decision in that it set forth the legal and factual bases for the principal controverted issues at trial. *See, e.g., Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal. App. 3d 1126, 1130; *Golden Eagle Ins. Co. v. Foremost Ins. Co*. (1993) 20 Cal. App. 4th 1372, 1379-80. Following that determination, the parties submitted objections to the Statement of Decision. Those objections were followed by supplemental briefs at the request of the Court.

Initially, the Court will address several points raised in the parties' requests for a statement of decision. First and foremost, Plaintiffs question whether the Court should have tried and decided this case before Defendants provided formal discovery responses pertaining to the alter ego issue. The Court is perplexed by this question inasmuch as (1) the parties informed the Court that they wanted the retrial of the Phase 1 issues to be limited to briefs based on the record from the 2015 trial, (2) they, not the Court, stipulated to a briefing schedule for the retrial (ROA 2111--indeed, Plaintiffs' counsel drafted the stipulation), (3) neither of Plaintiffs' two trial briefs suggested that the retrial should be deferred pending Defendants' discovery responses, and (4) as far as the Court can recall (lacking actual transcripts), not once during the various hearings either before or after issuance of the remittitur did Plaintiffs' counsel indicate that the trial should

not go forward when it did. Under these circumstances, Plaintiffs' apparent argument (albeit in the form of a question) regarding the retrial being premature is deemed waived.

Plaintiffs' request for statement of decision also asks for a ruling on the legal standard for determining employer/joint employer status for each of the wage and hour claims asserted in the lawsuit. Indeed, the Court's failure to do so in 2015, at least as to certain causes of action, was highlighted by the Court of Appeal in *Turman*. Although the Court believes that the Tentative Decision corrected this deficiency, the below discussion includes some additional consideration of these issues.

2. JOINT EMPLOYER ISSUES

A. Parent's Liability as a Joint Employer for Violations of IWC Order No. 5-2001 and Labor Code Section 1194

As explained by the court of appeal in its *Turman* decision, the definition of "Employer" is broad:

> IWC wage order No. 5-2001, which applies to the restaurant industry and thus to plaintiffs as former employees in that industry, defines "Employer" as any person "who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." (Cal. Code Regs., tit. 8, § 11050, subd. 2(H).) That wage order further states the term "employ" means "to engage, suffer, or permit to work." (*Id.*, § 11050, subd. 2(E).)
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> In *Martinez [v. Combs (2010)]* 49 Cal.4th 35 at page 64, 109 Cal.Rptr.3d 514, 231 P.3d 259, the California Supreme Court held that the definition of employer contained in IWC wage orders applies to actions seeking recovery

of unpaid minimum wages under section 1194. After analyzing the history of the wage orders and their language, and applying the rules of statutory interpretation, the Supreme Court articulated the following definition to determine who might have liability as an employer for unpaid minimum wages under the Labor Code: "To employ, then, under the IWC's definition, has three alternative definitions. It means: (a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship." [emphasis added] (*Martinez, supra,* 49 Cal.4th at p. 64, 109 Cal.Rptr.3d 514, 231 P.3d 259.)

The Supreme Court stated the alternative definitions of employer are sufficiently broad to encompass a proprietor who employs a worker by contract, permits work by acquiescence, or suffers work to be performed by a failure to hinder. (*Martinez, supra,* 49 Cal.4th at p. 69, 109 Cal.Rptr.3d 514, 231 P.3d 259.) Furthermore, "[a] proprietor who knows that persons are working in his or her business without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, while having the power to do so." (*Ibid.*)

Turman, supra, at 982.

Applying these definitions to the four causes of action in the Fifth Amended Complaint (first, fourth, fifth and seventh) asserting violations of IWC Order No. 5-2001 and Labor Code § 1194, the Court finds that Parent was a joint employer with Koji's.

Initially, the Court reaffirms its earlier conclusion that Parent has joint employer liability with respect to Plaintiffs' federal claims under the Fair Labor

Standards Act (FLSA). Applying the so-called "economic reality" test (*see Futrell v. Payday California, Inc.* (2010) 190 Cal. App. 4th 1419, 1435), the Court finds that (1) Parent had the power to hire and fire employees (e.g., Quiles and various restaurant managers, including Parent's ex-wife), (2) he controlled conditions of employment (e.g., he approved changes to the employee manual, approved the use of an arbitration agreement, approved the implementation of a timekeeping system, and resolved employee complaints about managers), (3) he determined pay rates (e.g., approving David Wagner's pay, a $1.50 per hour raise for Turman, and a recommendation to convert some managers from salaried to hourly), and (4) he had the authority to control the maintaining of employment records.

This finding is significant because, as the Court of Appeal found, determinations of joint employer liability under state law depend on "similar factors applicable to federal joint employer liability." *Turman, supra* at 987. Indeed, the above listed factors support a finding of joint employer status under state law.

In the Court's view, Parent qualifies as a joint employer of Koji's under at least two, if not all three, of the tests identified by the *Martinez* court. Parent was the founder, sole owner, sole director and President of Koji's. As demonstrated above, he exercised control over the wages, hours and working conditions of Koji's employees. The fact that he often delegated some of these responsibilities to his managers does not mean that he did not exercise control over them. To the contrary, as illustrated by actions such as his instructing a manager to fire Quiles following the filing of this action, his approval of employee manual changes and his involvement in multiple decisions regarding compensation issues, Parent did more than just retain the power to control restaurant employees--he actually exercised that control.

The foregoing evidence also supports the conclusion that Parent "engaged {employees] thereby creating a common law employment relationship."

Martinez, supra at 64. As one court has opined:

> Under the common law, " '[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.' " (*Borello, supra,* 48 Cal.3d at p. 350, 256 Cal.Rptr. 543, 769 P.2d 399, quoting *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946, 88 Cal.Rptr. 175, 471 P.2d 975; accord, *Empire Star Mines Co. v. Cal. Emp. Com.* (1946) 28 Cal.2d 33, 43, 168 P.2d 686.) What matters is whether the hirer "retains all *necessary* control" over its operations. (*Borello,* at p. 357, 256 Cal.Rptr. 543, 769 P.2d 399.) . . . . "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because "[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370, 232 P.2d 241;*** Significantly, what matters under the common law is not how much control a hirer *exercises,* but how much control the hirer retains the *right* to exercise. [emphasis added]

Ayala v. Antelope Valley Newspapers, Inc. (2014) 59 Cal. 4th 522, 532-33.

Here, it is clear that Parent had the power to hire and fire, and, further, that he did so from time to time. Accordingly, the Court concludes that Parent was a joint employer with Koji's with respect to the four state law claims for violations of Labor Code § 1194 and IWC Order No. 5-2001.

The foregoing ruling is in line with the California Supreme Court's decision on April 30, 2018 in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal. 5th 903. That ruling expanded on *Martinez* in the context of determining employee v. independent contractor status for claims brought pursuant to IWC wage orders. That decision supports the conclusion that Parent also qualified as a joint employer under the *Martinez* "suffer or permit" prong.

B. Parent's Liability Under Labor Code Section 351

Plaintiffs' sixth cause of action alleges a violation of Labor Code Section 351, which prohibits an employer or an agent from collecting, taking or receiving a gratuity left for an employee by a patron. The same conduct also forms the basis for Plaintiffs' claim brought pursuant to Business & Professions Code § 17200. Labor Code Section 350(a) provides the following definition of employer: "Employer means every person engaged in any business or enterprise in this state that has one or more persons in service under any appointment, contract of hire, or apprenticeship, express or implied, oral or written, irrespective of whether the person is the owner of the business or is operating on a concessionaire or other basis." Section 350(d) defines agent as follows: "Agent means every person other than the employer having the authority to hire or discharge any employee or supervise, direct, or control the acts of employees."

The foregoing broad definition of "agent" clearly encompasses Parent even if he somehow did not qualify as an "employer" under Section 350(a). Parent's authority to hire and fire clearly brings him within the scope of this statute and makes him directly liable for alleged violations.

C. Parent's Liability Under Business & Professions Code Section 17200

Plaintiffs' ninth cause of action alleges a separate violation of the unfair competition law, B&P Code § 17200, for the alleged wage and hour violations. Inasmuch as Parent is a joint employer under *Martinez* for purposes of the Labor Code violations, then it is logical that he also should be considered the joint employer of the employees to the extent that those same Labor Code violations form the basis of the Section 17200 claim. (*See Aleksick v. 7-Eleven* (2012) 205 Cal. App. 4th 1176, 1185.) In the tentative Statement of Decision, the Court focused on the portion of Section 17200 which provides that "an owner or officer of a

corporation may be individually liable under the [UCL] if he or she actively and directly participates in the unfair business practice." *Bradstreet v. Wong* (2008) 161 Cal. App. 4th 1440, 1458. As stated by the court in *Emery v. Visa International Service Ass'n* (2002) 95 Cal. App. 4th 952:

> We need go no further than to remind plaintiff that his unfair practices claim under section 17200 cannot be predicated on vicarious liability. "The concept of vicarious liability has no application to actions brought under the unfair business practices act." (*People v. Toomey* (1984) 157 Cal.App.3d 1, 14 [203 Cal.Rptr. 642] (*Toomey*).) *A defendant's liability must be based on his personal "participation in the unlawful practices" and "unbridled control" over the practices that are found to violate section 17200 or 17500.* (*Toomey, supra*, 157 Cal.App.3d at p. 15; emphasis added)

Emery v. Visa International Service Ass'n, supra, at 960.

Significantly, unlike the present case, neither *Broadstreet* nor *Emery* involved joint employer findings. In the case at hand, the Court need not rely solely on owner involvement in the wage and hour violations since, as noted above, there is direct liability against Parent as the joint employer of the affected employees.

That being said, there also is sufficient evidence of Parent's involvement under the "active and direct participation" standard. As stated in the *Turman* decision: "Indeed, if proven to be a joint employer, for example, Parent would have had a duty to ensure that all his employees were being paid properly and provided required rest and meal periods and, like Koji's, he would be liable to the class for wage and hour violations." *Turman, supra*, 226 Cal. Rptr. at 195. This duty, combined with the previously-cited evidence of Parent's control over conditions of employment (i.e., the employee handbook, arbitration agreement, termination of employees), support a finding regarding his active and direct involvement. Accordingly, to the extent that "active and direct participation" were to be an

issue, there is evidence that supplies that element. In short, the Court's previous finding that Parent was not directly and actively involved in the wage and hour violations missed the mark. For the reasons stated, he is liable under Section 17200.

D. Parent's Liability on the PAGA Cause of Action

Plaintiffs' twelfth cause of action is brought pursuant to PAGA which Plaintiffs argue authorizes the recovery of penalties under Labor Code § 558(a), which provides: "Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty . . . ."

As set forth above, the Court has concluded that, under the *Martinez* standard, Parent qualified as a joint employer of the Koji's employees. As with the 17200 cause of action, because Parent has been found to be the joint employer as to Labor Code violations, and because Section 558 provides for civil penalties for those same violations, it makes little sense to apply a different standard to the PAGA cause of action. Moreover, as noted above, in light of Parent's control of Koji's operations (including his duty to prevent wage and hour violations), he also qualifies as "a person acting on behalf of an employer who violates, or causes to be violated" various Labor Code provisions. Accordingly, Parent may be held liable on the PAGA cause of action.

ALTER EGO ISSUES

The second portion of this phase of the trial involved Plaintiffs' efforts to hold Parent and America's Printer liable for Koji's obligations on an alter ego theory. The alter ego doctrine is described as follows:

> Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct

> liabilities and obligations. [Citations.] A corporate identity may be disregarded—the 'corporate veil' pierced—where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. [Citation.] Under the alter ego doctrine, then, when the corporate form is *used* to perpetrate a fraud, circumvent a statute, *or accomplish some other wrongful or inequitable purpose*, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners. [Citations.]

Sonora Diamond Corp. v. Superior Court (2000) 83 Cal.App.4th 523, 538 ((*Sonora*), italics added.)

As stated in *Turman*, "Two requirements must be met to invoke the alter ego doctrine: (1) "[T]here must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist"; and (2) "there must be an *inequitable result* if the acts in question are treated as those of the corporation alone. (*Sonora, supra,* 83 Cal.App.4th at p. 538, 99 Cal.Rptr.2d 824, italics added.)" *Turman, supra*, at p. 980-81.

In its ruling following the initial trial on the alter ego/joint employer issues, this Court found that Plaintiffs "arguably" had established the first prong of the analysis, but failed to establish the second prong. As to the second prong, the Court of Appeal found that this Court had failed to apply the correct standard in assessing the defendants' conduct.

In revisiting this issue now, the Court again finds that the evidence supports the conclusion that Koji's, Parent and America's Printer had a sufficient unity of interest and ownership to satisfy the first prong of the alter ego test. Among other things, the evidence demonstrates that Parent was the sole owner,

officer and director of both Koji's and America's Printer, Koji's and America's Printer shared corporate headquarters, bookkeepers, accountants, human resources functions and attorneys, and America's Printer paid various expenses for Koji's, including, significantly, paying Koji's employees and administering their health insurance. Also, Koji's used America's Printer's facilities (e.g., storage, phone, computers) without paying for them, and received multiple cash infusions from both Parent and America's Printer with no loan or repayment agreements or interest charged. The lack of some corporate formalities on the part of Koji's is further evidence of alter ego status.

In terms of the element of undercapitalization, the evidence establishes that Koji's initially was capitalized with $100,000 from Parent, which was in addition to the $2.7 million he invested to build out the restaurants. At least from 2000 to 2006, there is no evidence that Koji's did not have sufficient funds to meet its day to day operations. Starting in 2006, Koji's relied in part on cash infusions from America's Printer and Parent to meet its obligations. The decision to close Koji's in 2012 occurred when it was time to decide whether to renew its leases.

Plaintiffs claim the evidence shows that Koji's was undercapitalized as of 2006, and that this fact should be considered in applying the alter ego doctrine. Defendants respond by pointing out that "undercapitalization" as used in the context of alter ego analysis refers not to situations when an ongoing business is failing and needs cash infusions to survive, but rather to instances such as when an owner withdraws cash from a business thereby making it unlikely that the business will be able to meet its basic obligations.

In the case at hand, there is no evidence that Koji's was undercapitalized when it opened or for the first 5 or 6 years of its existence. Starting in 2006 and continuing for the next 5 years or so (during the height of the recession), Koji's needed cash infusions from Parent and America's Printer to maintain day to day operations. The need for such cash infusions does not necessarily equate with a

finding of undercapitalization. Rather, the situation here is akin to what the court found in *Sonora Diamond Corp., supra* at 546: "Sonora Mining was adequately capitalized at the outset and regularly funded, by intercompany loans, when operational losses made cash infusions necessary. It was formed with the intention of making a profit; that it did not do so was the result of market and production factors, not intentional acts on the part of Diamond calculated to render Sonora Mining insolvent."

There is no evidence that Parent or others took steps to render Koji's insolvent or strip away assets needed to satisfy creditors. Nor is there evidence that Koji's was organized in such a way that it was likely to fail. Accordingly, the Court concludes that Plaintiff has failed to establish that Koji's was undercapitalized.

Notwithstanding the lack of proof on this one issue, the Court still finds that Plaintiffs have satisfied the first prong of the alter ego test. As to the second prong, "there must be an inequitable result if the acts in question are treated as those of the corporation alone." *Sonora Diamond Corp., supra* at 538. Significantly, "The alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. Difficulty in enforcing a judgment or collecting a debt does not satisfy this standard." *Id*. at 539.

Plaintiffs argue that the inequitable result in this case consists of the inability of Koji's to pay for the alleged wage and hour violations that occurred at the restaurants—in Plaintiffs' words "wage theft is inequitable." (Plaintiffs' post-trial brief p. 15) The Court agrees with this quoted statement *in the abstract*. After all, virtually every violation of employment/labor laws would fit most definitions of "inequitable" or "unfair." In the Court's view, however, the term "inequitable" in an alter ego context does not refer to the alleged wrongdoing of the entity that is

unable to satisfy a creditor's debt (Koji's here). Rather, it refers to the corporate owners (Parent and America's Printer) "hid[ing] behind the corporate form" to avoid potential liability. *Id*. at 539. Here, even though Koji's purported acts of "wage theft" perhaps qualify as inequitable in a general sense, the evidence—particularly the lack of a showing of undercapitalization—does not support the conclusion that Parent or America's Printer were using the corporate form to avoid potential liability. In short, because of the failure of Plaintiffs to satisfy the second prong of the alter ego analysis, the Court declines to apply the alter ego doctrine in this case.

Along these lines, this Court, having reviewed the record of the first phase trial in 2015, agrees and adopts the following findings from this Court's February 10, 2015 minute order:

> Here, the court does not find that Parent or America's Printer abused Koji's corporate privilege. When Parent formed Koji's he invested substantial capital in the form of cash and tenant improvements. For the first 5 or 6 years Koji's was self-sufficient. Stock was issued and annual corporate minutes were maintained. There was no evidence that Parent or America's Printer syphoned money from Koji's, paid personal expenses with corporate funds, or created the corporation to shield himself or America's Printer from a liability they expected. Indeed, the evidence was Parent never even took a draw or salary from Koji's.
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> The transfer of money from America's Printer to Koji's, including the occasional payment to its managers, was the opposite of abusing the corporate privilege. Instead of taking funds away from Koji's and its creditors, Parent and America's Printer sank additional money into the

business hoping to weather the economic storm the entire economy endured at that time. If there were other shareholders of America's Printer perhaps they could complain that America's Printer's money was being used to shore up another entity, but certainly hypothetical shareholders of Koji's could not complain. It was not an abuse of *Koji's* corporate privilege. In *Sonora* plaintiff argued that a parent corporation was the *alter ego* of a subsidiary because it made many cash advances to its subsidiary. The court held in part "...misconduct or injustice was not proved by the many advances made by Diamond for the benefit of Sonora Mining because none were shown to have been made with a fraudulent or deceptive intent.(Citations omitted.) The parent is not 'exposed to liability for the obligations of [the subsidiary] when [the parent] contributes funds to [the subsidiary] for the purpose of assisting [the subsidiary] in meeting its financial obligations and not for the purpose of perpetrating a fraud.' (Citations omitted.)" *Sonora Diamond Corporation, supra,* at p. 539.

In this case America's Printer contributed funds to Koji's for the purpose of meeting its financial obligations and not for the purpose of perpetrating a fraud [or other unjust or inequitable conduct]. Likewise, the fact that America's Printer let Koji's bookkeeper maintain an office and storage space at America's Printer's facility in Buena Park without paying rent is another form of support flowing from America's Printer to Koji's, not the other way around. What was Koji's expected to do, decline free space and instead subtract from its bottom-line by renting space from an unrelated landlord? Parent had available space at his America's Printers facility. From a practical standpoint it would be absurd to expect him to pay rent to a third party landlord when he had the ability to provide space over which he already had control.

Plaintiffs argued that instead of shoring up Koji's when the economy turned south, Parent and America's Printer should have closed Koji's sooner rather than continuing to "cheat" Koji's employees longer. However, this argument is made with the benefit of hindsight. The court is persuaded that had Parent been able to predict the length and depth of the economic downturn he might have considered closing the restaurants sooner instead of investing more money in them. He clearly was trying to weather the storm and hoped that when the economy turned around, Koji's would resume making money rather than losing it. He had made a substantial investment in Koji's and had every incentive to protect that investment. Also, if given the choice, the court doubts the employees would have relished the prospect of being laid off sooner than they were.

The foregoing findings and conclusions will be incorporated into future rulings in this case.

Dated: July 31, 2018

Will D. Claster

WILLIAM D. CLASTER
Superior Court Judge