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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NANCY LOUIE, on behalf of herself and others similarly situated,)	CASE NO. CV 06-3752 MMM (SSx)
)	
Plaintiffs,)	ORDER GRANTING DEFENDANT’S
)	MOTIONS TO DISMISS FIRST AMENDED
vs.)	COMPLAINT
)	
McCORMICK & SCHMICK)	
RESTAURANT CORP., and DOES 1)	
through 50, inclusive,)	
)	
Defendants.)	
)	

On March 15, 2006, plaintiff Nancy Louie filed a complaint in Los Angeles Superior Court against her former employer, McCormick & Schmick. Louie sued on her own behalf and on behalf of all individuals similarly situated. McCormick & Schmick removed the action to this court on June 15, 2006, invoking jurisdiction under the Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4(a), 119 Stat. 9 (codified in relevant part at 28 U.S.C. 1332(d)(2)).

On July 3, 2006, plaintiff filed a first amended complaint asserting three causes of action. The first claim alleges that defendant’s tip-sharing arrangement, in which Louie was required to participate as a former employee, violates California Labor Code § 351 because it mandates that servers share tips with bartenders who do not provide direct table service to patrons. The second and third claims assert violations of California’s Unfair Competition Law (“UCL”), California Business & Professions Code

1 §§ 17200 et seq., and the Labor Code Private Attorney General Act, California Labor Code §§ 2698 et
2 seq. Both claims are based on McCormick & Schmick’s purported violation of Labor Code § 351.
3 McCormick & Schmick filed a motion to dismiss Louie’s complaint on June 16, 2006. Although the
4 amended complaint was filed after the motion to dismiss, the parties by stipulation asked that the motion
5 be deemed directed to the amended complaint. The court agreed to this procedure on July 14, 2006.
6

7 **I. FACTUAL BACKGROUND**

8 Louie previously worked for McCormick & Schmick, a restaurant chain with multiple locations
9 in California, as a server.¹ In this capacity, she was allegedly required to pay “bartenders a percentage
10 of [her] tips” even when they “did not offer direct table service to her customers.”² Louie asserts that
11 under Labor Code § 351, only employees “who provide direct table service to customers” may
12 participate in a tip-sharing arrangement, and that bartenders, who provide “nominal or no direct table
13 service” to a server’s customers, are not eligible to receive a percentage of the tips.³
14

15 **II. DISCUSSION**

16 **A. Legal Standard Governing Motions To Dismiss Under Rule 12(b)(6)**

17 A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. A
18 court may not dismiss a complaint for failure to state a claim “unless it appears beyond doubt that the
19 plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v.*
20 *Gibson*, 355 U.S. 41, 45-46 (1957); see also, e.g., *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir.
21 1997). Thus, a Rule 12(b)(6) dismissal is proper only where plaintiff “lack[s] . . . a cognizable legal
22 theory” or fails to allege “sufficient facts [to support] . . . a cognizable legal theory.” *Balistreri v.*
23 *Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). Generally, a court considers only the
24 allegations of the complaint and attached exhibits in deciding a Rule 12(b)(6) motion. *Hal Roach*
25

26 ¹First Amended Complaint, ¶ 6-8.

27 ²*Id.*, ¶12

28 ³*Id.*, ¶ 25-29.

1 *Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n. 19 (9th Cir.1990). Documents that
2 are proper subjects of judicial notice can be considered, however, without converting the motion into
3 one for summary judgment. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir.1986).⁴ The
4 court must accept all factual allegations pleaded in the complaint as true, and must construe them and
5 draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mutual Ins.*
6 *Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996); *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995). It need not,
7 however, accept as true unreasonable inferences or conclusory legal allegations cast in the form of
8 factual allegations. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

9 **B. Whether Defendant’s Mandatory Tip-Pooling Arrangement Violates California**

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13 ⁴Under Rule 201 of the Federal Rules of Evidence, the court may take judicial notice of the
14 records of state courts, the legislative history of state statutes, and the records of state administrative
15 agencies. See, e.g., *Alpha III, Inc. v. City of San Diego*, No. 04-56482, 2006 WL 1876853, *1 (9th Cir.
16 June 29, 2006) (Unpub. Disp.) (“We take judicial notice of the state court’s written opinions and final
17 judgment. . .”); *Chaker v. Crogan*, 428 F.3d 1215, 1223 n. 8 (9th Cir. 2005) (granting plaintiff’s request
18 to take judicial notice of the legislative history of a state statute); *Lee v. City of Los Angeles*, 250 F.3d
19 668, 689 (9th Cir.2001) (explaining that a court may judicially notice undisputed matters of public
20 record but not disputed facts stated therein); *Kottle v. N.W. Kidney Centers*, 146 F.3d 1056, 1064 n. 7
21 (9th Cir. 1998) (holding that state health department records were proper subjects of judicial notice);
22 *Estate of Blue v. County of Los Angeles*, 120 F.3d 982, 984 (9th Cir. 1997) (noting that a court “may
23 properly take judicial notice of the papers filed” in both federal and state court proceedings); *United*
24 *States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992)
25 (“[W]e may take notice of proceedings in other courts, both within and without the federal judicial
26 system, if those proceedings have a direct relation to matters at issue. The proceedings before the
27 California Superior Court are ‘directly related’ to this appeal and may in fact be dispositive.
28 Accordingly, we take notice of that court’s final judgment . . .,” citations and internal quotation marks
omitted); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (observing
that the court may take judicial notice of the records and reports of state administrative bodies),
overruled on other grounds by *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104 (1991).

Therefore, the court grants Louie’s request that it take judicial notice of certain portions of the
legislative history of Labor Code § 351, as well as various opinion letters issued by federal and state
regulatory agencies regarding the legality of mandatory tip-pooling arrangements. In addition, the court
grants defendant’s request for judicial notice of the Los Angeles Superior Court’s Order Granting
Defendant’s Motion for Judgment on the Pleadings in *Farmer et al. v. American Restaurant Group, Inc.*
et al., No. BC 349068 (filed Sept. 19, 2006), as well as the caption pages of sixteen complaints filed by
Louie’s attorney in Superior Court. Each complaint alleges that mandatory tip-pooling arrangements
violate California law.

1 **Labor Code § 351⁵**

2 Louie alleges that, during the period she worked at McCormick & Schmick, the restaurant
3 mandated that she share a portion of the tips left by the patrons she served with non-managerial
4 employees who did not directly service those patrons at their tables. She contends this violates Labor
5 Code § 351, which provides, in relevant part:

6 “‘No employer or agent shall collect, take, or receive any gratuity or a part thereof that
7 is paid, given to, or left for an employee by a patron, or deduct any amount from wages
8 due an employee on account of a gratuity, or require an employee to credit the amount,
9 or any part thereof, of a gratuity against and as a part of the wages due the employee
10 from the employer. Every gratuity is hereby declared to be the sole property of the
11 employee or employees to whom it was paid, given, or left for.’” CAL. LABOR CODE §
12 351

13 Two California appellate courts⁶ have held that the statute does not prohibit mandatory tip-pooling

15 ⁵Louie’s first cause of action alleges that, “[p]ursuant to the provisions of Labor Code § 351, [she
16 is] entitled to recover the tips that were paid out in an amount [to] be proven.” (First Amended
17 Complaint, ¶ 29.) It is doubtful that Louie can recover under Labor Code § 351. See *Matoff v. Brinker*
18 *Restaurant Corp.*, 439 F.Supp.2d 1035, 1037 (C.D. Cal. 2006) (holding that there is no private right of
19 action under § 351 and dismissing a claim brought directly under that statute). McCormick & Schmick
20 did not seek dismissal of Louie’s § 351 claim on this basis, and, given the court’s disposition of this
21 motion, it declines to address the issue *sua sponte*. Whether or not there is a private right of action
under § 351, an employee may seek relief for violations of the statute under the UCL, Business &
22 Professions Code §§ 17200 et seq., see *Matoff*, 439 F.Supp.2d at 1037-38, or the Labor Code Private
Attorney General Act, Labor Code §§ 2698 et seq., and Louie has pled both types of claims in this
23 action. (First Amended Complaint, ¶¶ 30-44.)

24 ⁶“‘In a diversity case, where the state’s highest court has not decided an issue, the task of the
25 federal courts is to predict how the state high court would resolve it.’” *Westlands Water Dist. v. Amoco*
26 *Chemical Co.*, 953 F.2d 1109, 1111 (9th Cir. 1991) (quoting *Air-Sea Forwarders, Inc. v. Air Asia Co.,*
27 *Ltd.*, 880 F.2d 176, 186 (9th Cir.1989) (alterations original, internal quotation marks omitted). The
28 California Supreme Court has not addressed the issue raised by defendant’s motion to dismiss, and the
court must therefore predict how it would rule. “When an intermediate appellate court has ruled on an
issue, [however,] and the state supreme court has not yet ruled on it, [a federal court sitting in diversity
should] follow the intermediate court’s decision ‘unless there is convincing evidence that the state
supreme court would decide differently.’” *Id.* (quoting *State Farm Fire & Casualty Co. v. Abraio*, 874
F.2d 619, 621 (9th Cir. 1989)). Neither party has presented “convincing evidence” that the California
Supreme Court’s analysis of the validity of tip-sharing arrangements under Labor Code § 351 would

1 arrangements. See *Leighton v. Old Heidelberg, Ltd.*, 219 Cal.App.3d 1062 (1990); see also *Jameson*
2 *v. Five Feet Restaurants, Inc.*, 107 Cal.App.4th 138 (2003). The court in *Leighton* analyzed the
3 statutory language, and concluded:

4 “While the language of the statute expressly prohibits various employer practices, there
5 is no mention therein of employer-mandated tip pooling, or of any kind of tip pooling
6 among employees. Tip pooling has been around for a long time, as has section 351, and
7 had the Legislature intended to prohibit or regulate such practice, it could have easily
8 done so, just as it prohibited the various enumerated employer practices. Further, we find
9 nothing in the legislative history of section 351 or related sections, which precludes such
10 an arrangement.” *Leighton*, 219 Cal.App.3d at 1067.

11 Similarly, the court in *Jameson* stated that “[t]ip pooling is permissible under California law if an
12 employer or agent does not take any part of a gratuity given to an employee by a patron or otherwise
13 violate section 351.” *Jameson*, 107 Cal.App.4th at 141; see also *id.* at 143 (“Tip pooling is permissible
14 as long as it does not run afoul of the prohibitions contained in section 351”); *id.* at 145 (“Under section
15 351, tip pooling is only permitted among employees who are neither employers nor agents under section
16 350”).

17 These cases are consistent with the court’s own interpretation of the statute. Section 351
18 prohibits an employer or its agent from taking any portion of a tip left by a patron for an employee, from
19 deducting the amount of the tip from wages paid to the employee, and from requiring that the employee
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22 differ from the analysis of the California appellate courts, and the court believes that the Supreme Court
23 would not construe the statute differently. This is especially true here because, as explained *infra*, when
24 the California legislature recently amended § 351, see 2000 Cal. Legis. Serv. ch. 876 (A.B. 2509)
25 (West), it failed to address the legality of tip pooling. “[W]hen . . . the Legislature undertakes to amend
26 a statute which has been the subject of judicial construction’ ‘it is presumed that the Legislature was
27 fully cognizant of such construction,’” and, by electing not to alter the construction, implicitly approved
28 it. See *People v. Garcia*, 39 Cal.4th 1070, 1087-88 (2006) (quoting *Palos Verdes Faculty Ass’n v.*
Palos Verdes Peninsula Unified Sch. Dist., 21 Cal.3d 650, 659 (1978)). Thus, even if the California
Supreme Court might, as a matter of first impression, have construed Labor Code § 351 differently than
the *Leighton* court, the court concludes that it would nonetheless affirm *Leighton*’s holding, given the
intervening decision of the state legislature not to address the legality of tip pooling in amending § 351.

1 credit all or part of the tip to wages due from the employer.⁷ It does not prohibit tip sharing among
2 employees who are neither employers nor agents. See *id.* at 145. Thus, the fact that an employer
3 requires a server to pool tips with other service employees who do not hire, fire, supervise or control
4 their co-workers does not constitute a “taking” as that term is used in § 351. See *Leighton*, 219
5 Cal.App.3d at 1068 (stating that an employer that mandated tip pooling did “not ‘take, collect, or
6 receive’ as its own any part of a gratuity left by a patron,” and “reject[ing] plaintiff’s contention that
7 employer-mandated tip pooling constitute[d] a prohibited ‘taking’ by the employer within the meaning
8 of section 351” because “[s]uch a construction [was] a strained one, outside of the ambit of the definition
9 of the word ‘take’ contemplated by the Legislature in drafting the statute”).⁸

11 ⁷As noted in *Jameson*, Labor Code § 350 defines employer as “every person engaged in any
12 business or enterprise in this state that has one or more persons in service under any appointment,
13 contract of hire, or apprenticeship, express or implied, oral or written, irrespective of whether the person
14 is the owner of the business or is operating on a concessionaire or other basis.” *Jameson*, 107
15 Cal.App.4th at 143 (quoting CAL. LABOR CODE § 350). An agent is a “person other than the employer
16 having the authority to hire or discharge any employee or supervise, direct, or control the acts of
17 employees.” *Id.*

16 ⁸Louie argues that the last sentence of the statute, which states that tips are the “sole property
17 of the employee or employees” for whom they are left, demonstrates that mandatory tip sharing with
18 bartenders is prohibited. The court does not find this logic persuasive. Statutory language must be
19 interpreted in light of the statute as a whole. See, e.g., *Curle v. Superior Court*, 24 Cal.4th 1057, 1063
20 (2001) (stating that courts must construe “portions of a statute in the context of the entire statute and the
21 statutory scheme of which it is a part”); *Ailanto Properties, Inc. v. City of Half Moon Bay*, 142
22 Cal.App.4th 572, 582 (2006) (“We do not examine th[e statutory] language in isolation, but in the
23 context of the statutory framework as a whole in order to determine its scope and purpose and to
24 harmonize the various parts of the enactment”). In the context of § 351, it is apparent that the reference
25 to tips being the “sole property” of the employees means that the tips are the employees’, rather than
26 the employer’s, property. See *Leighton*, 219 Cal.App.3d at 1068-69 (stating that “the legislative intent
27 reflected in the history of the statute, was to ensure that employees, not employers, receive the full
28 benefit of gratuities that patrons intend for the sole benefit of those employees who serve them,” that,
“[c]onsistent with this, the Legislature declared a gratuity to be the ‘sole property’ of the ‘employee or
employees’ for whom it was left by the tipping patron,” and that a server’s argument that tip pooling
constituted a taking was “unsound because it is based on the erroneous assumption that the entire tip left
by the patron is the waitress’s personal property”); see *id.* at 1069 (“[T]he average diner has little or no
idea and does not really care who benefits from the gratuity he leaves, as long as the employer does not
pocket it, because he rewards for good service no matter which one of the employees directly servicing
the table renders it. This, and the near impossibility of being able to determine the intent of departed
diners in leaving a tip, in our view, account for the Legislature’s use of the term ‘employees’ in
declaring that ‘[e]very such gratuity is hereby declared to be the sole property of the employee or

1 Citing *Leighton*, Louie urges that the court adopt a narrower construction of § 351 – i.e., that to
2 be legal, tip-pooling arrangements must be limited to employees who directly serve patrons at their
3 tables.⁹ So construed, Louie asserts, § 351 outlaws mandatory tip sharing between servers and
4 bartenders, irrespective of whether tipping customers order alcoholic beverages from the bar.¹⁰
5 *Leighton* does contain some language that might be read to support the stringent table service/non-
6 table service distinction that Louie advocates. See, e.g., *id.* at 1067 (describing tip sharing as a
7 standard industry practice in which the “restaurant employer . . . pools and distributes [a tip] among
8 those employees who *directly provide table service* to a [tipping] patron,” emphasis added); *id.* at
9 1069 (“[The average diner] rewards for good service no matter which one of the employees *directly*
10 *servicing the table* renders it,” emphasis added). The court, however, cannot afford these passages
11 the significance that Louie suggests they should have.

12 The California Supreme Court has consistently instructed that “the language of an opinion
13 must be construed with reference to the facts presented by the case, and [that] the positive authority
14 of a decision is coextensive only with such facts.” *Brown v. Kelly Broadcasting Co.*, 48 Cal.3d 711,
15 734-735 (1989) (quoting *River Farms Co. v. Superior Court*, 131 Cal.App. 365, 369 (1933)); see

16 _____
17 employees to whom it was paid, given, or left for”).

18 The legislative history of the statute cited by Louie underscores the fact that the legislature
19 intended to ensure that employers did not take tips intended for employees, and that it was not focused
20 on tip sharing among service workers. See Senate Committee on Industrial Relations, Analysis of SB
21 10, June 7, 1973 (“Current law provides that the employer may take all of the gratuities or may share
22 in the gratuity provided that he posts a notice in a conspicuous place indicating that such be the case.
23 . . . The proposed legislation would spell out that gratuities are the sole property of the employee and
24 the employer would be prohibited from taking any part of them or crediting any part of them against
25 wages that might be due”); Senate Committee on Industrial Relations, Analysis of SB 10, August 30,
26 1973 (“The bill in its present form deletes the authority of an employer from receiving any of the tips
27 left by the patron, and spells out that such tips are the sole property of the employee or employees for
28 whom they are left”).

⁹Plaintiff’s Opposition to Defendant’s Motion to Dismiss (“Pl.’s Opp.”) at 5-8.

¹⁰See, e.g., *id.* at 6 (“Bartenders who are not seen and do not interact with the customers do not
provide a direct customer service”); *id.* at 7 (“[B]artenders do **not** contribute to the service of the patron.
They do not come into direct contact with the patrons of the restaurant. Patrons do not tip the kitchen
staff for a well cooked meal, and likewise, they do not intend to tip the bartenders when their [drinks]
. . . are served by the [] waiter”).

1 also *Colmanares v. Braemar County Club, Inc.*, 29 Cal.4th 1019, 1029 (2003) (“Language used in
2 any opinion is of course to be understood in the light of the facts and the issue then before the court
3 . . . ,” quoting *People v. Scheid*, 16 Cal.4th 1, 17 (1997)); *Vons Companies, Inc. v. United States*
4 *Fire Ins. Co.*, 78 Cal.App.4th 52, 60 (2000) (“[I]t is important to remember that the language of an
5 opinion must be construed in light of the facts of the particular case. . .”).

6 The tip-pooling arrangement the *Leighton* court sanctioned under § 351 expressly provided
7 that bartenders would receive five percent of all servers’ tips. See *id.* at 1068 n. 2 (noting that the
8 challenged tip-pooling arrangement required “payment of 15 percent of a gratuity to the busboy and
9 5 percent to the bartender”); see also *id.* at 1075-76 (Johnson, J., dissenting) (noting that plaintiff
10 was fired for refusing to share her tips with both busboys *and bartenders*, who were entitled to tip
11 sharing “even where customers did not order any drinks from the bar”). In addition, in support of
12 her opposition to defendant’s motion for summary judgment, *Leighton* submitted a declaration in
13 which she stated that she shared tips with bartenders “to keep her job,” although she felt that “the
14 tips were hers to do with as she pleased.” *Id.* at 1066. Her complaint, moreover, expressly sought
15 “repayment of all monies paid by her to busboys *and bartenders* under [the] employer-mandated tip
16 pooling arrangement.” *Id.* at 1065 (emphasis added). As a result, *Leighton*’s holding that Labor
17 Code § 351 does not prohibit tip-pooling arrangements must be construed with reference to the fact
18 that the arrangement there at issue mandated that bartenders receive five percent of all tips left by
19 patrons, and accordingly must be read as sanctioning such an arrangement.¹¹

20
21 ¹¹*Matoff* is not to the contrary. As noted earlier, the court in that case concluded that plaintiff
22 could not state a Labor Code § 351 claim because there was no private right of action under the statute.
23 See *Matoff*, 439 F.Supp.2d at 1037. The court declined to dismiss plaintiff’s Business & Professions
24 Code § 17200 claim, however, noting that a violation of § 351 could constitute an “unlawful” act
25 actionable under the UCL. *Id.* at 1037-38. In this regard, the court stated:

26 “While mandatory tip pooling has been found not to violate section 351 when the
27 participants in the pool directly serve customers, see *Leighton v. Old Heidelberg, Ltd.*,
28 219 Cal.App.3d 1062 . . . (1990), Plaintiff has alleged that servers in Defendant’s
restaurants were required to share tips with bartenders who did not provide such direct
service. Because the tip pool is mandatory, if it is unlawful, it may constitute an
employer’s unlawful taking of employee’s tips within the meaning of section 351.
Although section 351 does not create a private right of action, the California Supreme
Court has expressly rejected the notion that ‘a private plaintiff lacks UCL standing

1 There is an additional reason why the court cannot accept Louie’s table service/non-table
2 service distinction. The language in *Leighton* on which Louie relies is incompatible with the
3 rationale underlying the court’s opinion. The *Leighton* court recognized the inherent difficulty of
4 determining how gratuities left by a restaurant’s patrons should be distributed among its various
5 service employees. See, e.g., *id.* at 1069 (noting “the near impossibility of being able to determine
6 the intent of departed diners in leaving a tip”); *id.* at 1070 (noting that, were the first employee who
7 arrives at a departed patron’s table entitled to pocket any gratuity left, “one employee would be
8 depriving the other of the use of his or her own personal property”). By highlighting in its opinion
9 the service provided by busboys, the court illustrated the inequity of a system that deems all
10 gratuities left by tipping patrons to be the exclusive property of the servers who wait on the tipping
11 patrons’ tables. See *id.* at 1070 n. 5 (“[F]air[ness] . . . require[s] a waitress to share the tip with the
12 busboy who buses her table, for were it not for the busboy, the work ordinarily performed by him
13 would fall upon the waitress who, in addition to her own work, would have the responsibility of his
14 duties”). Recognizing the need to ensure that all service employees share equitably in gratuities left
15 by tipping patrons, the court concluded that restaurant owners must have discretion to determine
16 how a tip-sharing arrangement should operate:

17 “An employer must be able to exercise control over his business to ensure an
18 equitable sharing of gratuities in order to promote peace and harmony among
19 employees and provide good service to the public. To deprive a restaurateur of the
20 ability to regulate and control the conduct of his own business, leaves the door open
21 to anarchy in the restaurant industry. It is for this very reason that employer
22 mandated tip pooling among employees has been a long-standing practice

24 whenever the conduct alleged to constitute unfair competition violates a statute for the
25 direct enforcement of which there is no private right of action.” *Id.* at 1038.

26 As the language of the opinion makes clear, the court did not address whether the mandatory sharing
27 of tips with bartenders was unlawful. See *id.* (“if it is unlawful,” the tip pool “may constitute an . . .
28 unlawful taking”). Rather, it focused on the fact that the absence of a private right of action under § 351
did not preclude a plaintiff from asserting that a violation of the statute gave rise to a claim under the
UCL.

1 establishing a policy in the industry which permits the employer to operate a well run,
2 well ordered restaurant business.” *Id.* at 1071.

3 In making this observation, the court did not impose any restrictions on the tip-pooling arrangements
4 that restaurant owners could devise, other than the § 351-mandated requirement that only *service*
5 *employees* receive gratuities “to the exclusion of the employer.” *Id.* at 1070; see also *Jameson*, 107
6 Cal.App.4th at 145 (“Under section 351, tip pooling is only permitted among employees who are
7 neither employers nor agents under section 350”).

8 As a result, the court disagrees with Louie’s interpretation of *Leighton*, and concludes that
9 the decision expressly sanctions the type of tip-sharing arrangement at issue here. However, even
10 were *Leighton*’s holding more limited – such that it only sanctioned tip sharing among employees
11 who physically provide direct table service to restaurant patrons – the court would still grant
12 defendant’s motion to dismiss because it concludes that the California Supreme Court would hold
13 that the type of tip-sharing arrangement at issue here is legal under § 351.¹²

14 Under California law, “[l]ong-standing, consistent administrative construction of a statute by
15 those charged with its administration, particularly where interested parties have acquiesced in the
16 interpretation, is entitled to great weight and should not be disturbed unless clearly erroneous.” *Rizzo*
17 *v. Bd. of Trustees*, 27 Cal.App.4th 853, 861 (1994); see also *Yamaha Corp. of America v. State Bd. of*
18 *Equalization*, 19 Cal.4th 1, 21 (1998) (Mosk, J., concurring) (noting that “[t]his principle has been
19 affirmed on numerous occasions by this court and the Courts of Appeal” and collecting cases). This
20 principle applies not only to formally promulgated regulations under the state Administrative Procedure
21 Act, CAL. GOV’T CODE §§ 11340-11529, but also to informal guidance contained in “staff attorney
22 opinions and other expressions short of formal, quasi-legislative regulations.” *Yamaha Corp. of*
23 *America*, 19 Cal.4th at 21; see also *Tidewater Marine, Inc. v. Bradshaw*, 14 Cal.4th 557, 576 (1996) (“If
24 an issue is important, then presumably it will come before the agency either in an adjudication or in a

25
26 ¹²Even if *Leighton* holds only that § 351 permits tip sharing among restaurant employees who
27 provide direct table service to patrons, it does not, by implication, prohibit the type of tip-sharing
28 arrangement at issue here. As a result, even if plaintiff’s reading of *Leighton* were correct, the court
would still be required to predict how the California Supreme Court would resolve the legality of tip
sharing between servers and bartenders under § 351. See *supra*, note 6.

1 request for advice. By publicizing a summary of its decisions and advice letters, the agency can provide
2 some guidance to the public, as well as agency staff. . .”).

3 As Justice Mosk observed in his concurring opinion in *Yamaha Corp.*, “two reasons have been
4 advanced for this principle” of deference to longstanding administrative construction of statutes:

5 “First, ‘When an administrative interpretation is of long standing and has remained
6 uniform, it is likely that numerous transactions have been entered into in reliance
7 thereon, and it could be invalidated only at the cost of major readjustments and extensive
8 litigation’ [quoting *Whitcomb Hotel, Inc. v. Cal. Employment Comm’n*, 24 Cal.2d 753,
9 757 (1944)]. Second . . . ‘a presumption that the Legislature is aware of an
10 administrative construction of a statute should be applied if the agency’s interpretation
11 of the statutory provisions is of such longstanding duration that the Legislature may be
12 presumed to know of it’ [quoting *Moore v. Cal. State Bd. of Accountancy*, 2 Cal.4th 999,
13 1017-18 (1992)]. As the Court of Appeal has further articulated: ‘[L]awmakers are
14 presumed to be aware of long-standing administrative practice and, thus, the reenactment
15 of a provision, or the failure to substantially modify a provision, is a strong indication
16 the administrative practice was consistent with underlying legislative intent’” [quoting
17 *Rizzo v. Board of Trustees*, 27 Cal.App.4th 853, 862 (1994)].” *Yamaha Corp. of*
18 *America*, 19 Cal.4th at 21-22 (Mosk, J., concurring) (citations and internal quotation
19 marks omitted).

20 See also *id.* at 22 (noting “the reality that the administrative agency – by virtue of the necessity of
21 performing its administrative functions – creates a body of de facto law in the interstices of statutory
22 law, which is relied on by the business community and the general public to order their affairs and, after
23 a sufficient passage of time, is presumptively accepted by the Legislature”).

24 Here, both parties cite advisories issued by the California Division of Labor Standards
25 Enforcement (“DLSE”).¹³ DLSE is the state agency that adjudicates wage claims, investigates

26
27 ¹³Defendant references Chapter 19 of the *DLSE Enforcement Policies and Procedures Manual*
28 (rev. ed. 2002), available at <http://www.dir.ca.gov/dlse/Manual-Instructions.htm>, which in turn discusses
the two DLSE opinion letters attached as Exhibits 4 and 5 to Louie’s request for judicial notice.

1 discrimination and public-work complaints, and enforces the Labor Code and Industrial Welfare
2 Commission orders. See CAL. LABOR CODE §§ 82-83. These DLSE advisories sanction tip-pooling
3 arrangements in which bartenders and other “front room” employees in the customer’s “chain of
4 service” receive an equitable portion of customer gratuities “*based on the number of hours . . . worked*”
5 rather than on some estimation of the “direct table service” they provide to tipping patrons. DLSE
6 OPINION LETTER 2005.09.08 (emphasis added). The 2005 opinion letter, for example, states that non-
7 managerial restaurant employees may participate in tip pools so long as they “contribute in the chain
8 of service bargained for by the patron, pursuant to industry custom.” The letter specifies that, in the
9 restaurant industry, “waitpersons, buspersons, *bartenders*, hostesses, wine stewards and ‘front room’
10 chefs” are among those who may participate in tip pooling. See *id.* (emphasis added). The 1998 opinion
11 letter is even clearer. There, the DLSE recognized that

12 “the purpose of tip pooling is to ensure a fair distribution of gratuities among those
13 employees who provide direct table service to customers. . . . The prevailing industry
14 practice distributes the overwhelming majority of all pooled gratuities to waiters and
15 waitresses, followed by a smaller percentage to busboys, and still a smaller percentage
16 to other categories of employees who provide limited direct table service (i.e.,
17 bartenders, hostesses, and maitre d’s). *This practice reflects, in an admittedly inexact*
18 *way, the extent to which these categories of employees contribute in providing direct*
19 *table service to a restaurant’s customers.* It is this rough correlation that makes tip
20 pooling a fair and equitable system, and that satisfies the requirement, set out in Labor
21 Code § 351, that every gratuity is ‘the sole property of the employee or employees to
22 whom it was paid, given, or left for.’” See DLSE OPINION LETTER 1998.12.28-1
23 (emphasis added).

24 See also *id.* (recognizing that “an employer must have the necessary discretion and latitude to implement
25 a tip pooling distribution that is appropriate to circumstances that may be unique to a particular
26 restaurant,” and opining that § 351 only prohibits tip-sharing arrangements that are “patently unfair or
27 unreasonable”).

28 Given these opinions, the court concludes that, even if *Leighton* validated tip sharing only

1 among restaurant employees who physically service patrons' tables, the California Supreme Court
2 would defer to DLSE's reasonable administrative interpretations of § 351. See, e.g., *Yamaha Corp. of*
3 *America*, 19 Cal.4th at 21 (Mosk, J., concurring) (noting that courts should defer "to administrative
4 practices embodied in staff attorney opinions and other expressions short of formal, quasi-legislative
5 regulations"). This conclusion is reinforced by the fact that the California legislature amended § 351
6 in 2000, adding a provision that requires restaurant employers who "permit[] patrons to pay gratuities
7 by credit card" to "pay the employees the full amount of the gratuity that the patron indicated on the
8 credit card slip, without any deductions for any credit card payment processing fees or costs that may
9 be charged to the employer by the credit card company." 2000 Cal. Legis. Serv. ch. 876 (A.B. 2509)
10 (West) (codified at CAL. LABOR CODE § 351). As part of this statutory revision, the legislature made
11 a number of non-substantive, syntactic changes to the portion of § 351 at issue here. See *id.* It did not,
12 however, amend the statute to prohibit the sharing of tips with bartenders and other employees who do
13 not physically provide direct table service. Because "lawmakers are presumed to be aware of
14 long-standing administrative practice . . . , the reenactment of a provision, or the failure to substantially
15 modify a provision, is a strong indication the administrative practice was consistent with underlying
16 legislative intent." *Rizzo*, 27 Cal.App.4th at 862 (1994). Applying this principle here, the California
17 legislature's failure to prohibit tip sharing with bartenders and other indirect service employees indicates
18 that it endorses the DLSE's interpretation of § 351, and that the California Supreme Court would
19 therefore do likewise. Cf. *Leighton*, 219 Cal.App.3d at 1067 ("Tip pooling has been around a long time,
20 as has section 351, and had the Legislature intended to prohibit or regulate such practice, it could have
21 easily done so, just as it prohibited the various . . . employer practices [enumerated in the statute]").

22 Additionally, given the widespread nature of the tip-sharing practice that Louie challenges, the
23 court concludes that the California Supreme Court would decline to impose the substantial liability¹⁴ on
24 private industry that Louie's suggested interpretation of § 351 would entail. A California appellate court
25 recently expressed such a concern in declining to adopt a novel interpretation of Labor Code § 221 that

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27 ¹⁴McCormick & Schmick allegedly employed only 604 individuals in California during the
28 putative class period. (Notice of Removal at 4.) It estimates, however, that if Louie's interpretation of
§ 351 were found to be correct, it would be exposed to more than \$6 million in liability. (*Id.* at 5-6.)

1 would have prohibited a widespread practice in the newspaper telesales industry. See *Steinhebel v. Los*
2 *Angeles Times Communications, LLC*, 126 Cal. App. 4th 696 (2005) (holding that chargebacks of
3 advanced commissions when a customer cancels a subscription do not constitute the unlawful repayment
4 of wages under § 221). In an observation that is directly relevant here, the *Steinhebel* court stated:

5 “No prior case has held the [challenged] practice to violate the California Labor Code,
6 and we are pointed to no statute that expressly bars such a practice. In view of its
7 widespread nature, we are loath to hold the Labor Code bars such a practice by
8 implication.” *Id.* at 709.

9 This rationale applies with greater force in this case, as the DLSE has expressly sanctioned the type of
10 tip-sharing arrangement Louie challenges. DLSE is the state agency that enforces the Labor Code. As
11 a result, in crafting tip-sharing arrangements that include bartenders, restaurants such as McCormick
12 & Schmick presumably relied on the DLSE’s pronouncements in the belief that such tip-sharing
13 arrangements comply with California law. See *Tidewater Marine, Inc.*, 14 Cal.4th at 576 (noting that
14 regulatory agencies, by “publicizing a summary of its decisions and advice letters,” provide “guidance
15 to the public” on “important” issues). Because § 351 does not expressly prohibit this widespread
16 industry practice, the court concludes that the Supreme Court would not interpret the statute to bar it
17 were it presented with the question.

18 Consequently, the court finds – either as a matter of controlling California authority under
19 *Leighton and Jameson*, or based on a prediction as to how the California Supreme Court would rule
20 were it presented with the issue – that restaurants may, in compliance with § 351, require servers to
21 share tips with non-managerial employees such as bartenders who routinely contribute to the service
22 of patrons, whether or not such employees provides any service, direct or indirect, to a particular
23 server’s customers. McCormick & Schmick’s motion to dismiss Louie’s § 351 claim is therefore
24 granted.

25 C. Plaintiff’s Remaining Claims

26 McCormick & Schmick contends, and Louie does not dispute, that the viability of her
27 remaining causes of action – for violation of the UCL, Business & Professions Code §§ 17200 et
28 seq., and the Labor Code Private Attorneys General Act, Labor Code §§ 2698 et seq. – depends on

1 her ability to state a claim under § 351.¹⁵ The court agrees. See, e.g., *Steinhebel*, 126 Cal.App.4th
2 at 712 (“While an employer’s policy or practice that violates the Labor Code may also be held an
3 ‘unlawful business practice’ under Business and Professions Code section 17200 et seq., where, as
4 here, an employer’s policy is lawful and permissible, there is no basis for relief under the unfair
5 competition law,” citations omitted); CAL. LABOR CODE § 2699(a) (authorizing an “aggrieved
6 employee” to collect civil penalties under Labor Code where employer has violated any of its
7 provisions). Because the court has determined that Louie has failed to state a claim for violation of
8 Labor Code § 351, it accordingly grants defendant’s motion to dismiss her remaining causes of
9 action.

11 III. CONCLUSION

12 For the foregoing reasons, defendant’s motion to dismiss is granted. Generally, when the court
13 determines that a complaint must be dismissed, it liberally grants leave to amend so that plaintiff may
14 make a further attempt to state a cognizable claim for relief. Where, however, a claim fails as a matter
15 of law, granting leave to amend would be futile. See, e.g., *McQuillion v. Schwarzenegger*, 369 F.3d
16 1091, 1099 (9th Cir.2004) (“Leave to amend should be granted unless the pleading could not possibly
17 be cured by the allegation of other facts. . .”); *Cahill*, 80 F.3d 336, 339 (9th Cir. 1996). Because this
18 is the case here, the court dismisses Louie’s complaint with prejudice.

19
20 DATED: October 16, 2006

21 _____
MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

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23
24
25
26 _____
27 ¹⁵Def.’s Mem. at 3; see also Def.’s Reply at 11 (“Plaintiff’s counsel do not dispute that, if an
28 employer lawfully may require its servers to share some of the tips left at the dinner tables with the
bartenders, then this whole case should be dismissed”).

