

S224779

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Government Code § 6103

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Citizens for Fair REU Rates, et al.
Plaintiffs and Appellants

vs.

City of Redding, et al.
Defendants and Respondents.

SUPREME COURT
FILED

APR 03 2015

Fee Fighter LLC, et al.
Plaintiffs and Appellants

vs.

City of Redding, et al.
Defendants and Respondents.

Frank A. McGuire Clerk
Deputy

**MOTION FOR JUDICIAL NOTICE
IN SUPPORT OF REPLY
TO ANSWER TO PETITION FOR REVIEW**

Of a Published Decision of the
Third Appellate District, Case No. C071906

Reversing a Judgment of the Superior Court of
the State of California for the County of Shasta,
Case No. 171377 (Consolidated with Case No. 172960)
Honorable William D. Gallagher, Judge Presiding

*MICHAEL G. COLANTUONO (143551)
MColantuono@chwlaw.us
AMY C. SPARROW (191597)
ASparrow@chwlaw.us
MICHAEL R. COBDEN (262087)
MCobden@chwlaw.us
COLANTUONO, HIGHSMITH & WHATLEY, PC
11364 Pleasant Valley Road
Penn Valley, California 95946-9000
Telephone: (530) 432-7357
Facsimile: (530) 432-7356
Attorneys for Respondent City of Redding

**To the Honorable Chief Justice and Associate Justices of the
Supreme Court of the State of California:**

Pursuant to California Rules of Court, rule 8.252, California Evidence Code section 452, subds. (d) and (h), and section 459; Petitioner City of Redding hereby moves this Court to take judicial notice of the documents attached hereto as Exhibits I through K:

- I. Moody's Investor Services Newsletter, February 19, 2015;
- J. Petition for Writ of Mandate in *Tyler Chapman v. City of Los Angeles et al.*, Los Angeles County Superior Court Case No. BS153395;
- K. Fitch Ratings, *Ruling May Endanger Key Revenue Source for Some CA Cities*, February 11, 2015

These materials are relevant to the Reply to Answer to Petition because they demonstrate the statewide significance of the issues presented in this case. Exhibits I and K show that the municipal bond markets have taken notice of the Opinion in this case, and are unable to state conclusively what the effect of that opinion will be. Exhibit J is another example of a lower court grappling with the very questions raised here, which will look to the Court of Appeal's published Opinion in this case for guidance. These materials demonstrate that this Court should grant review to provide such guidance.

The above-listed materials were not presented to the trial court because they are relevant only to the unique questions presented in the Petition for Review.

This motion is based on the attached Memorandum of Points and Authorities, Declaration of Michael R. Cobden, and Exhibits I through K attached thereto, the complete records and files of this Court, and the accompanying proposed order granting this motion.

DATED: April 2, 2015

**COLANTUONO HIGHSMITH &
WHATLEY, PC**

A handwritten signature in black ink, appearing to read 'M. Colantuono', is written over a horizontal line.

MICHAEL G. COLANTUONO
AMY C. SPARROW
MICHAEL R. COBDEN
Attorneys for Respondent
City of Redding

MEMORANDUM OF POINTS AND AUTHORITIES

I. JUDICIAL NOTICE OF BRIEFS AND PLEADINGS IN CASES PENDING IN LOWER COURTS IS APPROPRIATE TO ESTABLISH THE SIGNIFICANCE OF A LEGAL QUESTION PRESENTED FOR REVIEW

A. General Principles of Judicial Notice

A reviewing court may take judicial notice of any matter specified in Evidence Code section 452. (Evid. Code § 459.) Pursuant to Evidence Code section 452, subdivision (d) this Court may notice “[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.” The Court may also notice “facts ... that are not reasonably subject to dispute.” (Evid. Code § 452, subd. (h).) Judicial notice of such facts are mandatory in the trial court upon request where the opposing party is permitted to raise objections and the court has enough information about the facts to make a determination that they come within a category subject to notice. (Evid. Code § 453, subd. (b).) A reviewing court is permitted to notice facts just as is a trial court. (Evid. Code § 459, subd. (a).)

“Judicial notice is the recognition and acceptance by the court, for use ... by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.” (*Lockley v. Law Office of Cantrell, Green, et al.* (2001) 91 Cal.App.4th 875, 882, citations and quotations omitted.) “The underlying theory of judicial notice is that the matter judicially

noticed is a law or fact that is **not reasonably subject to dispute.**" (*Ibid.*, original emphasis; Evid. Code § 452, subd. (h).)

B. The Court Should Notice A Relevant Published Newsletter

Published news articles are a proper subject of judicial notice. (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408 [granting judicial notice of newspaper articles demonstrating controversy over Halcion] citing Evid.Code, §§ 452, subd. (h), 459, subd. (a); *Californians for Alternatives to Toxics v. California Dept. of Pesticide Regulation* (2006) 136 Cal.App.4th 1049, 1064, fn. 5 [article regarding endangered species].) The existence of a published article is not reasonably subject to dispute. (Evid. Code § 452, subd. (h).)

Exhibit I is a newsletter article published by Moody's Investor Services, an organization which monitors and reports on financial markets including municipal bond markets. Exhibit K is a similar article by Fitch Ratings, reaching a different conclusion. The newsletter articles are not offered to prove the truth of any facts stated within them, but merely to show that the marketplace has begun to react to the Opinion in this case, and with some degree of uncertainty. Thus the articles are relevant to the point made in the Reply that the Opinion is having a generally negative effect on the marketplace, or at least has created uncertainty and controversy. (*Norgart, supra*, 21 Cal.4th at p. 408.)

C. The Court Should Notice a Pleading from a Pending State Cases

The Court should judicially notice Exhibit J as a document duly filed in California Superior Court. This document is a court record falling directly within subdivision (d) of Evidence Code section 452. Furthermore, it is a document not reasonably subject to dispute. (Evid. Code § 452, subd. (h).)

Respondent does not ask this Court to notice this document for the truth of any fact stated within it, but for the proposition that the litigants and courts involved in that case is grappling with the same or similar issues raised in this case. The document is therefore relevant to the issues raised in the Petition for Review, and should be noticed in consideration of that Petition.

CONCLUSION

The City respectfully requests this Court grant Respondent's motion to notice Exhibits I through K and consider them in support of its Petition for Review.

DATED: April 2, 2015

**COLANTUONO, HIGHSMITH &
WHATLEY, PC**



MICHAEL G. COLANTUONO
AMY C. SPARROW
MICHAEL R. COBDEN
Attorneys for Respondent
City of Redding

DECLARATION OF MICHAEL R. COBDEN
[Cal. Rules of Court, rule 8.54, subdivision (a)(2)]

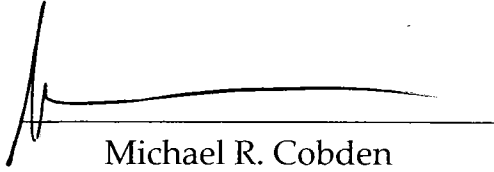
1. I am an attorney in good standing licensed to practice before the courts of this state and counsel of record for Petitioner City of Redding in this matter.

2. Attached hereto as Exhibit I is a true and correct copy of the Moody's Investor Services' newsletter published February 19, 2015. I obtained this document from the City of Redding, which received it directly from the publisher.

3. Attached hereto as Exhibit J is a true and correct copy of the Petition for Writ of Mandate in *Tyler Chapman v. City of Los Angeles*, Los Angeles County Superior Court Case Number BS153395. I obtained this document from our firm's files which we maintain in the ordinary course of business representing the City of Los Angeles.

4. Attached hereto as Exhibit K is a true and correct copy of an article published by Fitch Ratings titled "Ruling May Endanger Key Revenue Source for Some CA Cities" dated February 11, 2015. I received a copy of this article on April 2, 2015 via email from Rick Jarvis, representing amicus curiae in this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 2nd day of April, 2015.



Michael R. Cobden

[Proposed]

**ORDER TAKING JUDICIAL NOTICE OF
DOCUMENTS**

Good cause appearing, IT IS HEREBY ORDERED that Respondent City of Redding's Motion Requesting Judicial Notice is granted. IT IS ORDERED that this Court shall take judicial notice of the following:

- I. Moody's Investor Services Newsletter, February 19, 2015;
- J. Petition for Writ of Mandate in *Tyler Chapman v. City of Los Angeles et al.*, Los Angeles County Superior Court Case No. BS153395;
- K. Fitch Ratings, *Ruling May Endanger Key Revenue Source for Some CA Cities*, February 11, 2015

DATED: _____

By: _____

Chief Justice Tani Cantil-Sakauye

EXHIBIT I

SECTOR COMMENT

19 FEBRUARY 2015

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ANALYST CONTACTS

Kristina Alagar Cordero 415-274-1707
AVP-Analyst
 kristina.cordero@moodys.com

Eric Hoffmann 415-274-1702
Senior Vice President
 eric.hoffmann@moodys.com

Naomi Richman 212-553-0014
MD-Public Finance
 naomi.richman@moodys.com

California Cities

Most California Cities not Directly Affected by State Appeal Court Ruling on Redding's Electric Utility Transfer

On January 20, a California state appeals court ruled that the City of Redding's (GO unrated) transfer of payments in lieu of taxes (PILOTs) from its electric utility (A2) to the city's General Fund is potentially illegal. The ruling held that the utility's transfer to the city General Fund is a tax, and subject to Proposition 26, thus requiring a majority vote of the electorate or sufficient justification that the transfer does not exceed the cost of providing city services to the utility. The matter was remanded to the trial court for further proceedings. While on its face the ruling could have implications for at least 28 California cities that receive such transfers, we believe that a vast majority of these cities would be insulated from similar suits.

Transfers from municipally owned electric utilities can account for up to 29% of a California city's General Fund revenues, according to our survey of Moody's rated issuers. A distinguishing characteristic between most of these municipalities and Redding is that the vast majority of cities are authorized under city charter or city ordinance to make these transfers. In contrast, Redding does so under a long standing budgeting practice. This is an important and distinguishing factor because Proposition 26 allows for grandfathered transfers, for transfers that were authorized or fixed prior to 2010. While most cities have a very strong argument that their transfers are grandfathered and thus not subject to Proposition 26, the court ruled that Redding's PILOT transfer is not grandfathered.

California's Proposition 26 is a 2010 voter initiative that broadened the definition of a tax to include any levy, charge or fees imposed by a local government. Under Proposition 26, there are exclusions to the definition of a tax, including charges for a specific government service that does not exceed the reasonable cost to the local government of providing such a service. The onus is on the local government to prove that such a charge, like the PILOT payment in Redding's case, does not exceed the reasonable cost of providing general fund services to the electric utility. The Redding Electric Utility PILOT payment made up \$5.5 million in fiscal year 2014 or 7.8% of the city General Fund revenues.

Cities rarely, if ever, size PILOTs and typical electric utility transfers to their General Fund with the intent to recoup the reasonable costs of providing services. These transfers are, in some cases, greater than the cost of providing services, and often represent the amount in property taxes a municipal utility would pay if it were a taxable entity. This is the case for Redding. Alternatively, the transfer may be a fixed percentage of utility revenues.

If the transfer from their electric utility were challenged, most cities would likely argue that the transfer is exempt from Proposition 26 because it was established by city charter or ordinance passed before passage of Proposition 26. Otherwise, the city would have to justify the transfer as reasonable cost of providing services, or seek a majority vote of its electorate, in order to continue the transfer.

The city intends to file a petition for review with the California Supreme Court. If review is granted, the case will be vacated. If review is not granted, the case will be remanded to Shasta County Superior Court and the city will have the opportunity to put forth evidence and argue that some of all of the transfer from the utility does not exceed the fair and reasonable cost the city's general fund incurs for services to its electric utility.

This publication does not announce a credit rating action. For any credit ratings referenced in this publication, please see the ratings tab on the issuer/entity page on www.moodys.com for the most updated credit rating action information and rating history.

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EXHIBIT J

JAN 29 2015

Sheri R. Carter, Executive Officer/Clerk
By: Kristina Vargas, Deputy

1 RIDOUT LYON + OTTOSON, LLP
CHRISTOPHER P. RIDOUT (SBN 143931)

2 Email: c.ridout@rlollp.com

3 CALEB MARKER (SBN 269721)

Email: c.marker@rlollp.com

4 HANNAH P. BELKNAP (SBN 294155)

555 E. Ocean Blvd., Suite 500

Long Beach, CA 90802

(562) 216-7380 Telephone

(562) 216-7385 Facsimile

7 LOWE & ASSOCIATES, P.C.

STEVEN T. LOWE (SBN 122208)

Email: steven@lowelaw.com

8 KRIS S. LE FAN (SBN 278611)

Email: kris@lowelaw.com

9 11400 W. Olympic Blvd., Suite 640

Los Angeles, California 90064

(310) 477-5811 Telephone

(310) 477-7672 Facsimile

11 *Attorneys for Petitioner*

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 FOR THE COUNTY OF LOS ANGELES

By Fax

15 TYLER CHAPMAN, an individual,

16 Petitioner,

17 vs.

18 THE CITY OF LOS ANGELES; THE LOS
19 ANGELES DEPARTMENT OF WATER AND
20 POWER; LOS ANGELES DEPARTMENT OF
WATER AND POWER BOARD OF
COMMISSION, and DOES 1 to 50, inclusive,

21 Respondents.

CASE NO:

BS 153395

PETITION FOR WRIT OF MANDATE
AND COMPLAINT FOR:

1. Injunctive Relief
2. Declaratory Relief

D-82 Luis A. Lavin

24 Petitioner Tyler Chapman (hereinafter "Petitioner") brings this action, by and through his
25 undersigned counsel, on behalf of himself and all customers of the Los Angeles Department of Water
26 and Power, based upon information and belief and the investigation of counsel, except for
27 information based upon personal knowledge, and hereby alleges as follows:
28

1 7. The City's legal affairs are represented by City Attorney Michael Feuer, located at 200
2 North Main Street, 8th Floor, Los Angeles, California 90012.

3 8. Respondent LADWP is a proprietary department of the City.

4 9. Originally operating as the private Los Angeles City Water Company, the City acquired
5 LADWP in 1902 to provide water to residents and businesses and later started delivering electricity in
6 1917. LADWP is the largest combined municipal utility in the United States, providing water and
7 power service to more than 3.8 million customers in the City of Los Angeles. (2009 Survey, at i.)
8 LADWP's operating revenues in FY2013 were \$3.162 billion.

9 10. Respondent Board pursuant to § 670 of the City Charter, LADWP is governed by a five
10 member Board of Commissioners (the "Board"), which is currently comprised of the following
11 individuals: MEL LEVINE, President; WILLIAM W. FUNDERBURK, JR., Vice President; JILL
12 BANKS BARAD, Commissioner; MICHAEL F. FLEMING, Commissioner; and CHRISTINA E.
13 NOONAN, Commissioner.

14 11. The Board's individual members are appointed by the Mayor, subject to confirmation by
15 the City Council. City Charter §502(a).

16 12. Pursuant to § 675(b) of the City Charter, the Board has "the power and duty to":

17 (1) regulate and control the use, sale and distribution of water, reclaimed water,
18 surplus water, electric energy and surplus electric energy owned or controlled by
19 the City;

20 (2) grant permits for connections with the water or electric works of the City and
21 fix the charges for these connections;

22 (3) fix the rates to be charged for water, reclaimed water, surplus water, electric
23 energy or surplus electric energy for use inside or outside the City in accordance
24 with Section 676; and

25 (4) prescribe the time and the manner of payment for the collection of the rates
26 and charges for water and electric energy.

1 13. The Board is required to set said rates pursuant to § 676(a) of the City Charter, which
2 provides the following:

3 Rate Setting Procedure. Subject to approval by ordinance, rates for water,
4 reclaimed water, surplus water, electric energy and surplus energy shall be fixed
5 by the board from time to time as necessary. Except as otherwise provided in the
6 Charter, rates shall be of uniform operation for customers of similar
7 circumstances throughout the City, as near as may be, and shall be fair and
8 reasonable...

9 14. On a day-to-day basis, LADWP is led by a General Manager who is appointed by the
10 Board, subject to approval by the Mayor and City Council. City Charter §604.

11 15. The General Manager has the power and duty to: "(a) enforce all orders, rules and
12 regulations adopted by the board; (b) supervise and manage the design, construction, maintenance
13 and operation of all work or improvements authorized or ordered by the board; and (c) carry out all
14 powers and duties of the department delegated by the board." City Charter §678.

15 16. Petitioner is ignorant of the true names and capacities of Respondents sued herein as
16 DOES 1 to 50, inclusive, and therefore sue said Respondents by such fictitious names. Petitioner will
17 amend this Petition and Complaint to allege the true names and capacities of said respondents when
18 ascertained.

19 17. Petitioner is informed and believes, and based thereon alleges that each of said
20 fictitiously named Respondents acted intentionally, negligently, and/or recklessly or is responsible in
21 some manner for the occurrences herein alleged, and that each of the violations of Petitioner's rights as
22 herein alleged were proximately and legally caused by said respondent's actions.

23 18. Petitioner is informed and believes, and based thereon alleges that all of the Respondents
24 identified herein, whether identified by name or by fictitious name, were and are the agents, servants,
25 and employees of each of the remaining Respondents, and that in doing the things alleged herein were
26 acting within the purpose, course and scope of said agency, service, and/or employment and with the
27 permission, consent, authorization, and subsequent ratification of each of the remaining Respondents.
28

1 28. "LADWP's revenue requirements are determined according to a bottom-up
2 methodology, so prudent management of the individual components of its budget is paramount.
3 LADWP's revenue requirement, and thus rates requirement, is determined according to a relatively
4 straightforward calculation based on projected revenue, less operating costs, less debt service, less
5 transfer to city. If rates are designed correctly, this calculation should net to zero for all rate classes."
6 (2009 Survey, at 3-59.)

7 29. As a result, LADWP's rates were 7% higher than necessary to cover LADWP's own
8 individual components of its budget and were artificially increased to provide for a 7% transfer to the
9 City's General Fund.

10 30. In FY2013, LADWP transferred \$253 million in Power Revenue Funds to the City's
11 General Fund.

12 31. Since FY2013, the LADWP Power Revenue Funds transfers have been the sixth-largest
13 source of revenue for the City's General Fund, representing approximately 5.1% of the City's General
14 Fund.

15 32. For FY2014, the Mayor's Office notes that the LADWP estimates that it will provide a
16 "Power Revenue Transfer" of \$246.5 million to the City's General Fund. (Mayor's 2014-2015
17 Revenue Outlook, at 59.) Conversely, the Mayor's Office has budgeted \$261 million. (Id., at 3.) In
18 comparison, sales taxes generate \$374.1 million in revenue for the General Fund. (Id., at 10.)

19 33. The City has described the Power Revenue Fund transfer as a tax of sorts, noting that
20 "[t]he assumed increase [of the Power Revenue Fund transfer] is within the historical average and is
21 consistent with electric users' tax growth." (Mayor's 2014-2015 Revenue Outlook, at 12.)

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