2nd Civil No. B254489

IN THE COURT OF APPEAL OF THE STATE OF

CALIFORNIA SECOND APPELLATE DISTRICT

DIVISION FOUR

NICOLLETTE SHERIDAN,

Plaintiff and Appellant,

v.

TOUCHSTONE TELEVISION PRODUCTIONS, LLC,

Defendant and Appellant.

Appeal from the Superior Court of Los Angeles County
Case No. BC 435248, Honorable Michael L. Stern

APPELLANT'S REPLY BRIEF

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INTRODUCTION

A casual reading of Touchstone's brief might lead one to think that legions of cases are arrayed against Sheridan's argument that no exhaustion requirement applies to Labor Code section 98.7. But once one looks behind the arguments and actually reads those cases, the illusion vanishes. Touchstone's position is unsupported and unsupportable.

Sheridan's opening brief demonstrated that as a matter of garden-variety statutory interpretation, Labor Code section 15, which defines "may" as permissive, requires a permissive reading of section 98.7. Touchstone's response doesn't cite a single case in which a court actually considered the impact of a statutory definition of "may" on whether a claimant must exhaust remedies. Its claim that two courts have specifically rejected Sheridan's view isn't true: Both cases interpret Labor Code section 15 not in the context of exhaustion, but as it applies to the discretionary decision-making power of government actors. (See pp. 8-10, *post*.) Not surprising, but utterly irrelevant, is that these cases hold that section 15 does not empower government actors to abuse their discretion.

Touchstone fares no better in other areas affecting interpretation:

- Regarding the impact of the 2014 statutory amendments, *Satyadi v. West Contra Costa Healthcare District* (2014) 232 Cal.App.4th 1022 (review den. Mar. 18, 2015) (*Satyadi*)—the only Court of Appeal decision on the subject that has remained published—squarely supports Sheridan. It holds that

the amendments clarified existing law and that therefore a claimant need not exhaust Labor Code section 98.7's administrative remedy.

- Touchstone's sole authority for urging the Court to ignore Labor Code section 98.7, subdivision (f)—which instructs that the remedy in section 98.7 does not preclude an employee from pursuing any other right or remedy—expressly declined to consider the issue. (See p. 15, *post*.)

- One of Touchstone's own cases undermines its claim that the Court should ignore the Labor Commissioner's understanding of section 98.7: The case states that the Commissioner's interpretation of a statute that he or she is charged with enforcing deserves substantial weight. (See p. 19, *post*.)

- Touchstone ignores that *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311 (*Campbell*) states a rule of *implication*. If the Court concludes that the Legislature intended Labor Code section 98.7 to be permissive, then neither *Campbell* nor any other case permits a court to imply an exhaustion requirement.

Finally, Touchstone misunderstands Sheridan's argument that section 98.7 does not comport with due process. Sheridan doesn't claim that due process dictates any particular procedure or requires what Touchstone calls a "full-blown" evidentiary hearing. Rather, as

Touchstone's own authorities confirm, an administrative remedy must satisfy certain criteria *in order to impose a duty to exhaust it*: The claimant must have a right to some kind of hearing, and the process must lead to an adjudication. Section 98.7 provides neither.

The Court should reverse and let Sheridan to take her case to trial.

ARGUMENT

I. LABOR CODE SECTION 98.7 CANNOT BE READ TO REQUIRE A CLAIMANT TO EXHAUST ADMINISTRATIVE REMEDIES BEFORE FILING SUIT.

A. Touchstone Fails To Demonstrate That Section 98.7 Has Ever Required Exhaustion.

1. Touchstone provides no basis for ignoring section 98.7's express language, other interpretational aids, and on-point California law.

a. Section 98.7's express language requires reading "may" as permissive.

As the opening brief demonstrated (§ II.A.), the analysis of whether Labor Code section 98.7 requires exhaustion must begin with the statute's permissive language.[1]

An employee "may"—not "must"—file a claim with the Labor Commissioner. (§ 98.7, subd. (a).) The statute's remedies "do not preclude an employee from pursuing any other rights and remedies under any other law." (§ 98.7, subd. (f).) Under section 6312, an employee who believes that he or she has suffered discrimination in violation of sections 6310 or 6311 "may"—not "must"—"file a complaint with the Labor Commissioner pursuant to Section 98.7."

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[1] Further undesignated statutory citations are to the Labor Code.

Because section 15 instructs that "'may' is permissive," there is no room for a contrary interpretation. Not only that, but because the Legislature used both "may" and "shall" throughout section 98.7, the Court "'may fairly infer the Legislature intended mandatory and discretionary meanings, respectively.'" (*Tarrant Bell Property, LLC v. Superior Court* (2011) 51 Cal.4th 538, 542, citation omitted.) There is accordingly no textual basis for implying a requirement that an employee exhaust section 98.7's administrative procedures before filing suit.

Touchstone's primary response is to cite a number of cases stating that in the exhaustion-of-remedies context, "may" actually does mean "must." (RB 10-18.) But *not one* of these cases considered the impact of a *statutory* definition of "may." "The subtle yet elementary precept of the common law is that the law is in the holding, i.e., in the application of doctrine and precedent on the facts of the case." (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1061-1062.) Judged by this principle, there is no relevant law in the holdings of Touchstone's cases.

b. *Morton*, its antecedents, and its progeny are not controlling.

The opening brief demonstrated that although a few cases have held that "may" means "must," they are readily distinguishable—and questionable, to boot. (AOB § II.A.4.) Instead of addressing the opening brief's arguments on this point, Touchstone's footnote response (RB 15-16, fn. 2) boils down to "Those courts said it, so it must be right." It isn't right.

The key decisions are *Morton v. Superior Court* (1970) 9 Cal.App.3d 977, 985 (*Morton*) and *Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 734 (*Williams*), which on this point cites only *Morton*. Neither case involved a *legislative directive* that "may" is permissive. And *Morton*'s rationale—that "may" simply means that an employee "is not required to file a grievance if he does not wish to do so" (9 Cal.App.3d at p. 982)—makes no sense. (See AOB 21-23.)

Instead of addressing these fundamental problems, Touchstone says only that *Williams* relied on other authorities besides *Morton*. (RB 15-16, fn. 2.) But Touchstone doesn't discuss those other authorities, and for good reason: They have nothing to do with the *Williams/Morton* holding. (See AOB 21-22 & fn. 4.)

The cases are *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280 (*Abelleira*), *Park 'N Fly of San Francisco, Inc. v. City of South San Francisco* (1987) 188 Cal.App.3d 1201 (*Park 'N Fly*) and *Woodard v. Broadway Fed. S. & L. Assn.* (1952) 111 Cal.App.2d 218 (*Woodard*) (string-cited at RB 15-16 & fn. 2; see AOB 22-23, fn. 4 [distinguishing *Park 'N Fly* and *Woodard*]). None involved a statutory definition of "may." And while *Williams* correctly states that all three involved permissive language (*Williams*, *supra*, 121 Cal.App.4th at p. 733), none even considered, much less decided, whether "may" means "must."

Abelleira articulated the general exhaustion rule (see 17 Cal.2d at pp. 292-293) and became the seminal case on the point in California, but

the specific issue before the Court was not whether "may" could mean "must"; it was whether the administrative remedy had, in fact, been exhausted (*id*. at pp. 295-296). In *Park 'N Fly* and *Woodard*, the issue was whether an administrative remedy was adequate or existed at all—in *Park 'N Fly*, whether the remedy could encompass a constitutional challenge to the ordinance at issue (188 Cal.App.3d at pp. 1207-1209), and in *Woodard*, whether the Federal Home Loan Bank Board had jurisdiction over a savings and loan election dispute (111 Cal.App.2d at pp. 220-225).

Touchstone cites one other may-means-must decision, *Marquez v. Gourley* (2002) 102 Cal.App.4th 710 (*Marquez*). (RB 14; see AOB 23, fn. 5.) There, the court held that "[a] driver who wishes to obtain judicial review of a suspension decision must first request an administrative hearing before the DMV under [Vehicle Code] section 13558," notwithstanding that the statute says that the driver "may" request a hearing. (102 Cal.App.4th at pp. 712-714.) But the court never considered the impact of the Vehicle Code's definition of "may," which, like other statutory definitions cited in this brief, defines it as permissive. (Veh. Code, § 15.) And the court relied for its holding on the dubious rationale that originated in *Morton*, *supra*, 9 Cal.App.3d 977—that "may" only means that the driver isn't *required* to seek relief from the suspension of his or her license. (102 Cal.App.4th at p. 714, citing *Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232, 1240 [relying solely on *Morton* for this point; plaintiff didn't argue permissiveness, but rather sought to avoid exhaustion by arguing futility].)

Not one of these decisions even considers whether, much less holds that, a court can ignore a statutory directive that "may" is permissive. And not one of the decisions that actually considers whether "may" can mean "must" offers any rationale beyond *Morton*'s meaningless statement that "may" means only that a claimant isn't required to seek relief.

c. The only two decisions Touchstone cites that actually consider a statutory definition of "may" involve government actors, not claimants, and have nothing to do with exhaustion of administrative remedies.

Touchstone wrongly chides Sheridan for not mentioning two cases that Touchstone says "have specifically discussed section 15 and have rejected Sheridan's reading of that statute." (RB 19.) Although it's true that both cases discuss section 15, the issues they address do not bear even a superficial resemblance to the issues presented here. That Touchstone could find nothing closer to our case underscores the correctness of Sheridan's position.

Both *Garcia v. Industrial Acc. Commission* (1958) 162 Cal.App.2d 761 (*Garcia*) and *Starving Students, Inc. v. Dept. of Industrial Relations* (2005) 125 Cal.App.4th 1357 (*Starving Students*) stand for—and only for—the unremarkable proposition that *an administrative agency* may not abuse its discretion, even where a statute says that the agency "may" take a particular action.

Garcia involved section 4903, which is part of the Workers' Compensation Act's compensation provisions. It states that the Workers Compensation Appeals Board (then the Industrial Accident Commission) "may" allow a lien for a reasonable attorney's fee for legal services pertaining to a compensation claim. (*Garcia*, *supra*, 162 Cal.App.2d at pp. 764-765.) As Touchstone's own quotation from this case shows, the court's holding was that despite section 15's permissive language, the statute "'[did] not invest the commission with power arbitrarily to disallow a proven lien.'" (RB 19, quoting *Garcia*, *supra*, 162 Cal.App.2d at p. 765.) The court rejected the commission's disallowance of a lien as "arbitrary and inequitable." (162 Cal.App.2d at p. 766.)

Starving Students involved section 3227.1, under which the Director of Industrial Relations "may" withdraw a penalty assessment. (*Starving Students*, *supra*, 125 Cal.App.4th at p. 1365.) The court stated that despite section 15's permissive definition, "[i]n context, the word 'may' in Labor Code section 3727.1 does not invest the director with discretion to refuse to withdraw a penalty assessment shown to have been issued erroneously." (*Id*. at p. 1366, fn. 5, quoted at RB 20.)

The issue in both of these cases was thus whether the use of "may" in a statute conferred unbridled discretion upon *a government actor* acting in a quasi-adjudicatory capacity. Of course the answer was "no." The cases do not come close to supporting Touchstone's argument that when interpreting "may" in sections 98.7 and 6312, a court can ignore the Legislature's unambiguous directive in section 15 that "may" is permissive.

Quite the opposite: They confirm that "may" *is* permissive, but that it operates within well-known boundaries that generally prevent *government agencies and courts* from "arbitrary and inequitable" decision-making. (*Garcia*, *supra*, 162 Cal.App.2d at p. 766.) No such boundaries limit *an individual's* decision whether to pursue a permissive administrative remedy.

d. None of Touchstone's remaining decisions allows the Court to ignore section 15's directive that "may" is permissive.

Touchstone cites several other cases that, like those discussed above, are inapposite because they don't address the issue presented here. We discuss the cases in the order in which Touchstone cites them.

Styne v. Stevens (2001) 26 Cal.4th 42 (RB 12) (*Styne*): Touchstone correctly states that the Court found exhaustion mandatory under the Talent Agencies Act, but it fails to note the statute's key language: "In cases of controversy arising under this chapter, the parties involved *shall* refer the matters in dispute to the Labor Commissioner, who *shall* hear and determine the same . . . ." (Lab. Code, § 1700.44, subd. (a), italics added.) The case did not even concern whether exhaustion was required, but rather whether the requirement applied to defenses. (26 Cal.4th at pp. 56-57.)

Rojo v. Kliger (1990) 52 Cal.3d 65 (RB 13): The parties did not dispute that exhaustion was required before a party could bring a civil action asserting a cause of action under FEHA—hardly surprising, since the

statute expressly requires a claimant to obtain a right-to-sue letter before proceeding with a civil suit under the act. (*Id*. at p. 83.) The dispute was rather whether exhaustion was required for common-law claims, and the Court held it was not. (*Id*. at p. 88 ["exhaustion is not required before filing a civil action for damages alleging nonstatutory causes of action"].)

Tomlinson v. County of Alameda (2012) 54 Cal.4th 281 (RB 13): The petitioners sought to overturn the approval of a subdivision without having raised certain objections in a hearing, which is an explicit exhaustion requirement under the California Environmental Quality Act. (*Id*. at pp. 288-289.) The question wasn't whether the statute required exhaustion, but whether the requirement applied to the particular procedural setting. (*Id*. at pp. 289-291.) There is no parallel with the present case.

Flores v. Los Angeles Turf Club, Inc. (1961) 55 Cal.2d 736 (RB 13): Acting pursuant to Business and Professions Code section 19561.5, a racetrack ejected a bookmaker, who sought an injunction against his future exclusion or ejection. (*Id*. at pp. 738-739.) The statute provided that any person ejected from a racetrack "'may apply to the board for a hearing on the question whether such rule is applicable to him . . . subject to review by any court of competent jurisdiction.'" (*Id.* at p. 739, ellipsis in original.) Then, as now, the Business and Professions Code contained a definition of "shall" and "may" identical to the Labor Code's. (Bus. & Prof. Code, § 19.) But in affirming the trial court's dismissal of the action for failure to exhaust the statute's administrative remedy, the Supreme Court never mentioned the definition, and the decision's rationale had nothing to do

with permissive versus mandatory language. Instead, the Court reasoned that because the Legislature had passed a "comprehensive scheme of legislation designed to regulate almost every aspect of legalized horse racing and wagering" (55 Cal.2d at p. 746) and had expressly provided for judicial review of the administrative decision, the courts lacked jurisdiction to hear claims in the first instance. "In the instant case, the provision in section 19561.5 for judicial review of board determinations would appear *a fortiori* to make exhaustion of that statutory remedy prerequisite to judicial action, at least with respect to relief against future acts." (*Id.* at p. 747.) The deciding factor was therefore not "may" versus "shall," but rather what the Court saw as the necessary implication of the provision for judicial review of the outcome of the administrative hearing. (*Ibid*.) There is no similar provision for judicial *review* of any action by the Labor Commissioner in section 98.7—a trial de novo is not review.

County of Los Angeles v. Farmers Ins. Exchange (1982) 132 Cal.App.3d 77 (*Farmers*) (RB 14-15): Here, too, the governing code contained the conventional definition of "shall" and "may" (Ins. Code, § 16); and here, too, the court neither discussed nor even cited the provision. It mentioned the supposed rule that "permissive" means "mandatory" only in passing. (132 Cal.App.3d at p. 86, citing *Morton*, *supra*, 9 Cal.App.3d at p. 985.) Apart from that in-passing mention, the decision bears no resemblance to the present case. It involved the plaintiffs' challenge to the insurance company defendants' rating practices, which under Insurance Code section 1858 is a matter than can be brought

before the Insurance Commissioner. (132 Cal.App.3d at p. 82.) The plaintiffs' argument wasn't that this procedure was permissive, but rather that the procedure was inadequate and that they had, in fact, exhausted their remedies. (*Ibid*.) The Court of Appeal disagreed, holding that the remedies available to the Commissioner under the Insurance Code made the administrative remedy adequate. (*Id*. at pp. 86-87.)

In addressing the adequacy of the remedy, *Farmers* noted an aspect of the case that makes it very different from this one—the Insurance Commissioner's power to take corrective action, impose penalties, and even revoke an insurer's certificate of authority. (*Farmers*, *supra*, 132 Cal.App.3d at p. 87; see Ins. Code, § 1858.6 [Commissioner's actions subject to judicial review].) The Labor Commissioner possesses no comparable sweeping powers in connection with discrimination claims; indeed, as we demonstrated in the opening brief (§ III) and recapitulate below (§ II, *post*), an employer can ignore the Commissioner's rulings, forcing the Commissioner and/or the employee to take the matter to court.

People v. Coit Ranch, Inc. (1962) 204 Cal.App.2d 52 (string-cited at RB 16): The principal issue was not permissive vs. mandatory—the Court of Appeal disposed of that issue in a single sentence stating the general rule (*id*. at p. 58 ["the rule of non-exhaustion is applied even though the administrative remedy is couched in permissive language"]), and the case did not involve a statutory definition. The central exhaustion-related issues were whether a party had to exhaust administrative remedies in order to assert that an agricultural tax assessment was invalid in its entirety (*id*. at

pp. 57-59) or that the governing statute was unconstitutional (*id*. at pp. 59-60).

* * *

Touchstone's apparently exhaustive effort to find cases involving mandated permissive language yielded nothing. Most of its cases do not even address the issue of mandatory versus permissive language. The two cases besides *Morton* that do—*Marquez* and *Williams*—merely repeat *Morton*'s flawed analysis. No authority justifies ignoring section 15's directive that "may" is permissive.

2. Section 98.7, subdivision (f), further confirms that the administrative remedy is permissive.

Touchstone also finds itself with little to say in response to Sheridan's point that section 98.7, subdivision (f)—under which "[t]he rights and remedies provided by this section do not preclude an employee from pursuing any other rights and remedies under any other law"—bars finding an exhaustion requirement.

The use of the word "other," Touchstone argues, "means that the Labor Code remedies are not the only remedies available to an employee," but that an employee asserting a claim *under the Labor Code* must exhaust available administrative remedies before proceeding to court. (RB 21.) Touchstone's interpretation is hardly obvious. *Lloyd v. County of Los Angeles* (2009) 172 Cal.App.4th 320 (*Lloyd*) concluded just the opposite. Rejecting an exhaustion requirement, the court observed that, given the

language of subdivision (f), "it would appear Labor Code section 98.7 merely provides the employee with an additional remedy, which the employee may choose to pursue." (*Id*. at p. 331.)

Touchstone offers no relevant authority for its reading of the statute. It cites *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1704 (*Leibert*) (RB 21); but there, because it rejected the plaintiff's statutory claims on procedural grounds (see 32 Cal.App.4th at pp. 1698-1702), the court expressly declined to decide whether an aggrieved employee could file a lawsuit under the statute without first exhausting the administrative remedy. (*Id.* at p. 1704 ["Given the procedural posture of this case (see, *ante*, p. 1698), we are not called upon to decide whether exhaustion of the Labor Code administrative remedies is in fact a precondition to bringing a direct statutory cause of action"].) What *Leibert* did hold was that a failure to exhaust administrative remedies does not bar nonstatutory causes of action. (*Id*. at pp. 1702-1707.) Among other things, the court noted that *Rojo v. Kliger*'s exhaustion doctrine did not apply in the employment area because none of the policy considerations underlying the doctrine—for example, "a paramount need for specialized agency fact-finding expertise"—were furthered by its application to employment-related claims. (32 Cal.App.4th at p. 1705, citing *Rojo v. Kliger*, *supra*, 52 Cal.3d at p. 88.)

Touchstone's interpretation of section 98.7, subdivision (f), echoes *Morton*'s implausible reading of "may" in the statute as merely advice to

aggrieved employees that they have the right to choose to grin and bear the discrimination they suffer and do nothing about it. The Legislature hardly needed to remind employees that the Labor Code remedies are not the only remedies available to them. This is particularly true in light of the legislative history of section 98.7, which confirms that the Legislature understood that "[e]xisting law" gave an aggrieved employee the right to sue in a civil action, and that the remedy provided in section 98.7 was to be "in addition" to those already existing rights. (AOB 16-17.)

3. Touchstone fails to refute Sheridan's demonstration that extrinsic interpretational aids confirm the permissive interpretation of section 98.7.

As the opening brief showed (AOB 16), to the extent "may" is ambiguous the Court will "look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340, citations omitted.) Touchstone ignores some of Sheridan's arguments and fails to refute the rest.

Legislative history. The Legislative Counsel's Digest for the 1978 enactment of section 98.7 stated that "[e]xisting law" prohibited discrimination against an employee who was participating in any

proceeding concerning the enforcement of laws relating to wages, hours and working conditions, and "permit[ted] an employee to commence a civil or administrative action" against an employer who violated those provisions. (Stats. 1978, ch. 1250, p. 1345.) The Digest also stated that "[t]his bill would, *in addition*, permit any employee, who believes that he or she has been discharged or otherwise discriminated against for filing a bona fide complaint or instituting any proceeding alleging a violation of any rights under the jurisdiction of the Labor Commissioner to file a complaint with the Labor Commission . . . ." (*Ibid*., italics added.)

Touchstone doesn't mention this unequivocal statement of intent by the Legislature. Instead, it focuses on a language change from section 98.7's predecessor, former section 1196.1, under which an employee "'may commence a civil action, or an available administrative action . . . .'" (RB 16-17.) According to Touchstone, section 98.7 "omitted the employee's option of commencing a civil action . . . ." (RB 17.) But reading between the lines cannot trump the Legislature's express declaration.

Besides, if Touchstone's argument were correct, Touchstone would have to acknowledge that what the Legislature removed, it restored when it enacted subdivision (f) in 1985. (Stats. 1985, ch. 1479, p. 218.) Touchstone cannot have it both ways. It cannot on the one hand argue that the Legislature intended to *eliminate* the option of a civil suit when it created section 98.7, while arguing that the Legislature acknowledged that civil suits *could* be filed as part of "other" remedies under section 98.7,

subdivision (f). The statute makes sense when it is read to create a new, additional administrative remedy that has no bearing on the employee's right to commence a civil action.

Ostensible objects to be achieved and evils to be remedied. Touchstone likely doesn't mention this topic because one cannot credibly argue that the purposes of section 98.7 could be served by limiting employees' remedies. The entire history of the Labor Code reflects the expansion of employee rights, and section 98.7 is no exception. Employees have always been able to sue for discrimination, but they couldn't always enlist the assistance of the Labor Commissioner. It defies reason to suggest that a Legislature seeking to enhance employees' ability to seek relief from discrimination would restrict available remedies and, in the process, burden both employees and the Labor Commissioner by requiring the Labor Commissioner to vet every claim. That would transform section 98.7 into an *obstacle* to relief, a result that "would inevitably have frustrated the manifest purposes of the legislation as a whole or led to absurd results." (*People v. Belleci* (1979) 24 Cal.3d 879, 884.)

Contemporaneous administrative construction. Touchstone takes issue with the position of the Labor Commissioner's Division of Labor Standards Enforcement (DLSE), which agrees with Sheridan that exhaustion of the section 98.7 procedures is not a prerequisite to asserting a statutory claim in a civil action. (RB 21-24.) In essence, Touchstone argues that the DLSE misunderstands *Campbell*, *supra*, 35 Cal.4th 311.

The opening brief acknowledges that the DLSE's opinions do not have the force of law. (AOB 18; see RB 22.) But it is also important to recognize that the DLSE is not just another group of lawyers offering an interpretation of section 98.7. As our Supreme Court observed in one of Touchstone's cases, the Labor Commissioner's "interpretation of a statute he is charged with enforcing deserves substantial weight." (*Styne*, *supra*, 26 Cal.4th at p. 53.)

The Labor Commissioner, who surely knows about the practical aspects of pursuing claims administratively, observed that "in light of the large volume of retaliation claims processed by the DLSE, it does not make any sense to require a complainant, who is represented by counsel, and is ready and able to bring a claim in court, to file a claim with the Labor Commissioner." (*Creighton v. City of Livingston* (E.D.Cal. Oct. 7, 2009, No. CV-F-08-1507 OWW/SMS) 2009 WL 3246825, *4-6, quoting DLSE Oct. 12, 2007 opn. letter.) That is entirely consistent with the indisputable fact that in section 98.7 the Legislature sought to expand, rather than restrict, employee rights. The DLSE's opinion underscores that the Legislature could not have intended for the Labor Commissioner to serve as a gatekeeper for claims by aggrieved employees who are ready and able to file a civil proceeding. Viewed in this light, the DLSE's position that section 98.7 provides only a permissive remedy is persuasive and entitled to consideration.

B. Touchstone Cannot Avoid The Legislature's Definitive Statement That Section 98.7 Never Had Any Exhaustion Requirement.

1. The present state of the case law.

The opening brief showed that while the parties were litigating the exhaustion issue in the trial court, the Legislature passed two statutes stating that employees need not exhaust administrative remedies unless the statute under which they wish to bring an action expressly requires exhaustion. (AOB 13-14, citing §§ 98.7, subd. (g) & 244, subd. (a).) The brief also showed that in the course of enacting these statutes, the Legislature repeatedly and consistently referred to them as *clarifying* existing law, so that the usual rule against retroactive application does not apply. (AOB § II.B.; see *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 471-472 ["'a statute that merely *clarifies*, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment' 'because the true meaning of the statute remains the same,' [citations]," italics in original] (*McClung*).)

There is only one published decision on this issue that still remains published: *Satyadi*, *supra*, 232 Cal.App.4th 1022. It held that, as "clarifying amendments," the new statutes "may be applied to this case, and their application poses no problem of retroactivity." (*Id.* at pp. 1032, 1033.) In reaching this result, the court considered the state of the law before the statutes' enactment. (*Id*. at p. 1032.) It summarized the state of

the law as being that "[t]he only California appellate court to consider whether a party was required to exhaust the section 98.7 remedy before filing suit under section 1102.5 had concluded exhaustion was not required" (*ibid*., citing *Lloyd*, *supra*, 172 Cal.App.4th at p. 332); that "many federal courts" had interpreted *Campbell*, *supra*, 35 Cal.4th 311 as requiring exhaustion (*ibid*.); but that "in fact *Campbell* was silent on the matter" (*ibid*.). This satisfied the court that preexisting law did not require exhaustion, and "[w]e therefore hold the amendments did not change the law regarding exhaustion of that remedy." (*Ibid*.)[2]

Touchstone's entire discussion of *Satyadi* is to note that it relied on *Lloyd*, *supra*, 172 Cal.App.4th 320, which Touchstone claims was incorrectly decided. (RB 24-25.) But the issue in *Satyadi* wasn't *Lloyd*'s correctness as such. Regardless of whether one disagreed with *Lloyd*, the fact was that "prior to the Legislature's amendments to the Labor Code, California case law did not require exhaustion of the section 98.7 remedy." (*Satyadi*, *supra*, 232 Cal.App.4th at p. 1032.) That fact eliminated the possibility that the amendments changed the law.

We recognize that *Satyadi* does not bind this Court, which must make its own determination of whether the amendments changed or merely

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[2] *Satyadi* involved a violation of section 1102.5, which bars retaliation against whistle-blowers rather than retaliation against those who complain about workplace safety, which comes under section 6310. The distinction is immaterial to this appeal, since section 98.7 is available for both. Section 1102.5 does not contain any remedial provisions.

clarified prior law. But Touchstone has offered nothing that supports rejecting clarification.

2. Because the Supreme Court had not "finally and definitively" determined that section 98.7 has an exhaustion requirement, nothing barred the Legislature from clarifying the statute.

Touchstone tries to avoid the recent amendments by arguing that our Supreme Court "'finally and definitively' interpreted the law governing exhaustion of administrative remedies" in *Campbell* and other opinions. (RB 32-33.) According to Touchstone, this means that the Legislature lacked the power to clarify section 98.7. (*Ibid*.) But the rule Touchstone cites applies only when the Supreme Court has finally and definitively interpreted *a particular statute*, not when it has merely rendered an opinion in a general area of the law, like Touchstone's amorphous "law governing exhaustion of administrative remedies." (RB 32; see *McClung*, *supra*, 34 Cal.4th at 473 ["It is true that if the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later Legislature as to what an earlier Legislature intended is entitled to consideration"].) The Supreme Court has never directly addressed, let alone "finally and definitively" decided, whether sections 98.7, 6310 and 6312 require exhaustion of administrative remedies before an aggrieved employee can bring a section 6310 claim in court. Certainly *Campbell* decided no such issue—the decision cites none of the statutes.

Touchstone incorrectly asserts that *Campbell* "cited with approval *Hentzel v. Singer* (1982) 138 Cal.App.3d 290 (*Hentzel*), which applied this rule [that litigants must exhaust administrative remedies provided by statute] in the context of section 6310 and the predecessor to section 98.7." (RB 33.) In fact, *Hentzel* said just the opposite: "[S]ection 6312"—which provides for the submission of section 6310 claims to the Labor Commissioner pursuant to section 98.7—"contains no requirement for exhaustion," and the court refused to imply one. (*Hentzel*, *supra*, 138 Cal.App.3d at pp. 303-304.)

Styne, *supra*, 26 Cal.4th 42, which Touchstone also cites as a final and definitive interpretation of the law by the Supreme Court, is even farther afield. As noted above (p. 10, *ante*), the case did not involve sections 98.7 or 6312 but rather the Talent Agencies Act, whose relevant provisions *expressly* make exhaustion *mandatory*. (§ 1700.44, subd. (a) ["the parties involved *shall* refer the matters in dispute to the Labor Commissioner, who *shall* hear and determine the same . . . ," italics added].) But *Styne* does remind us that when the Legislature wants to make exhaustion mandatory, it knows what language to use.

Finally, it is hard to imagine a clearer demonstration of the absence of a final and definitive interpretation of section 98.7—as well as showing the pressing need for legislative clarification—than the ongoing split among the federal decisions. Where a state's highest court has not decided a particular issue, "a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions,

decisions from other jurisdictions, statutes, treatises, and restatements as guidance." (*In re Kirkland* (9th Cir. 1990) 915 F.2d 1236, 1239, citations omitted.) *Campbell* led some courts to predict that our Supreme Court would find an exhaustion requirement in section 98.7. But since the Court had not actually done so, other federal courts turned to the "intermediate appellate court decision[]" in *Lloyd*. (*Ibid*.) In the face of these disparate results, it is not reasonable to argue that there was anything final or definitive about *Campbell*.

Touchstone also argues that it is up to the courts, not the Legislature, to decide whether a statute clarifies or changes existing law. (RB 31-32.) Maybe so, but the fact is that in making this decision, the courts regularly look to the Legislature's intent as expressed in the legislative history. Indeed, in Touchstone's lead authority, *In re Marriage of McClellan* (2005) 130 Cal.App.4th 247, immediately after Touchstone's lengthy block quotation (RB 31-32) the court said: "Applying this approach, we first review the legislative history to determine whether in amending Family Code section 155 the Legislature believed it was merely clarifying existing law." (130 Cal.App.4th at p. 256.) It then proceeded to review the legislative history, and after concluding that an intermediate decision "departed from existing law," it held that the amendment was only a clarification. (*Id*. at p. 257; see also *GTE Sprint Communications Corp. v. State Bd. of Equalization* (1991) 1 Cal.App.4th 827, 833-835 [in concluding that an amendment was a clarification, court relied on statements in legislative history].)

As for *Peralta Community College Dist. v. Fair Employment & Housing Com*. (1990) 52 Cal.3d 40 (quoted at RB 32), its statement that "[t]he declaration of a later Legislature is of little weight" (52 Cal.3d at p. 52) must be taken in context. Immediately following that language, the Court noted: "This is especially true when, as here, such declared intent is without objective support in either the language or history of the legislation and (until recently) is contrary as well to the practice of the affected agency." (*Ibid*.) Here, both the legislative history of section 98.7 and the Labor Commissioner's practice directly support the Legislature's declaration that the 2014 legislation clarified existing law.

3. The legislative history of the amendments confirms that they clarify existing law.

a. Senator Steinberg's comments are both relevant and persuasive.

Senator Darrell Steinberg, the author of Senate Bill 666, stated unequivocally in his letter to the Assembly Committee on Labor and Employment that section 244 subdivision (a) "clarifies" that exhaustion is not required unless the particular Labor Code section expressly requires it, and that the Legislature is clarifying that implying an exhaustion requirement under the "inapposite reasoning in *Campbell"* is misreading the statute. (5AA 28/1099.) Far from neutralizing this evidence, the decisions Touchstone cites strongly confirm its relevance, and they don't

even come close to supporting Touchstone's statement that "the views of a single legislator carry no weight at all." (RB 33.)

In *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, in which the Court found that a statutory amendment was a clarification, *the only evidence* of legislative history was a letter written by a single assemblyperson. (*Id*. at p. 591 ["Apart from the Hayes letter, the legislative history is silent"].) Assemblyperson Hayes had written to the Senate's President Pro Tempore "voic[ing] his view that the amendment was intended to operate retroactively, and observ[ing] that he had so argued in obtaining passage of the bill." (*Id*. at pp. 588-589.) By way of a Senate resolution, the letter was printed in the Senate Journal. (*Id*. at pp. 588-589 & fn. 5.) This is what made the letter relevant: "[A]lthough the letter is irrelevant to the extent that it merely reflects the personal views of Assemblyman Hayes, *it is quite relevant to the extent that it evidences the understanding of the Legislature as a whole*." (*Id*. at pp. 589-590, italics added ["Debates surrounding the enactment of a bill may illuminate its interpretation"].) A fortiori, Senator Steinberg's statements to the Assembly Committee on Labor and Employment are "relevant" and "may illuminate" the interpretation of the amendments.

b. There is ample other evidence that the Legislature understood it was clarifying existing law.

Senator Steinberg was not a lone voice. The Legislature's intention appears throughout the legislative history of the amendments. (AOB § II.B.1., citing Senate Judiciary Committee Report for SB 666; analysis of SB 666 prepared for the Assembly Committee on Judiciary; Report of Senate Judiciary Committee on Assembly Bill 263, which added subdivision (g) to section 98.7.) Touchstone's characterization of this history is inaccurate.

According to Touchstone, the Senate Judiciary Committee Report on SB 666 stated that "the Labor Code's *existing* provisions 'require the employee or applicant to first file a claim against the employer with the Labor Commissioner, and other statutes authorize the claimant to either file a complaint with the Labor Commissioner or file a civil action.'" (RB 35, quoting 3AA 28/530, italics in RB.) But the language that Touchstone chose to paraphrase actually said that "[v]arious statutes under the Labor Code"—not "the Labor Code's *existing* provisions"—"require the employee or applicant to first file a claim against the employer . . . ." (3AA 28/530.) In other words: Some statutes were mandatory, while others are permissive—a good reason to clarify the law.

Nor does the report state, as Touchstone says in another paraphrase, "that the proposed legislation would *change* existing law by clarifying"

(RB 35, italics added) that an employee need not exhaust administrative remedies—the word "change" does not appear in the relevant portion of the report. (3AA 28/530.) The relevant language states in full: "This bill would clarify that an employee or job applicant is not required to exhaust administrative remedies or procedures in order to bring a civil action under any provision of the Labor Code, *unless the provisions under which the action is brought expressly requires [sic] exhaustion of an administrative remedy.*" (3AA 28/530, underlining in original, italics added.) Again, a fair reading of this language is that the Legislature, recognizing that some statutes expressly require exhaustion (e.g., Lab. Code, § 1700.44, the subject of *Styne*, *supra*, 26 Cal.4th 42) and others don't, sought to *clarify* that exhaustion is not required unless the statute expressly requires it.

Touchstone similarly misreads the Senate Judiciary Committee Report analyzing AB 263, which added subdivision (g) to section 98.7. According to Touchstone, the report lists "as one of the 'CHANGES TO EXISTING LAW' the provision stating 'that an employee is not required to exhaust administrative remedies . . . .'" (RB 35.) But, as the opening brief explained, the heading "CHANGES TO EXISTING LAW" is followed by a long section of the report that discusses the broad changes AB 263 made to the law with respect to an entirely different topic—unfair immigration-related practices. (AOB 26, discussing 6AA 29/1475-1479.) Throughout the "CHANGES TO EXISTING LAW" section of the report, there are numerous descriptions of indisputable changes—for example, a new definition of "unfair immigration-related practice" and new penalties

against employers for violation of the law. (6AA 29/1476.) But on the subject of exhaustion, the report specifically uses the word "clarify." (*Ibid*. ["This bill would clarify that an employee is not required to exhaust administrative remedies . . . to enforce the above prohibition," underlining in original.]) Small wonder that Touchstone ends this portion of its brief with a plea that the Court ignore the legislative history entirely. (RB 36.)

Touchstone also suggests that the Legislature didn't act promptly enough and that indeed the amendments weren't even a reaction to existing law. (RB 34-35.) But there is no deadline for action, and Touchstone misunderstands the Legislature's reaction to *Campbell*. Touchstone is correct that "[t]he Supreme Court's interpretation of the law cannot be second guessed by the Legislature" (RB 34), but the Legislature did no such thing. Senator Steinberg did not suggest that he thought *Campbell* was wrong, but rather that judges who found exhaustion were "sometimes following inapposite"—meaning inapplicable or inappropriate, not incorrect—"reasoning in [*Campbell*]." (5AA 28/1099.) *Campbell*'s reasoning was indeed "inapposite" to determining exhaustion under section 98.7, which not only wasn't involved in *Campbell* but also is expressly permissive.

The 2014 amendments were clarifications, nothing more or less. They require a permissive interpretation of section 98.7.

C. If The Court Interprets Section 98.7 As Permissive, *Campbell* Cannot Apply.

Touchstone's brief ultimately boils down to its claim that this case is governed by the exhaustion principles articulated in *Campbell*, *supra*, 35 Cal. 4th 311. But, as the opening brief explained, *Campbell* addresses the situation in which a court must decide *whether to imply* an exhaustion requirement. (AOB 40, citing *Campbell*, *supra*, 35 Cal.4th at p. 328.) If the relevant statute *actually addresses* the question—if it either expressly or by interpretation *states* that the administrative remedy is either permissive or mandatory—the courts have no role to play, because there is no room for implication. (*Scottsdale Indemnity Company v. National Continental Insurance Company* (2014) 229 Cal.App.4th 1166, 1172 [referring to "the elementary principle that a court cannot add or subtract words to or from the statute"].)

If—in light of not only of section 98.7's language but also the extrinsic factors noted above, particularly its policy goals (which Touchstone doesn't mention)—the Court interprets section 98.7 as permissive, it need not, and indeed cannot properly, consider whether to imply an exhaustion requirement.

II. UNDER LONG-SETTLED LAW, SECTION 98.7'S ADMINISTRATIVE PROCEDURES ARE INSUFFICIENTLY COMPLETE TO REQUIRE EXHAUSTION.

A. Touchstone Fails To Recognize The Special Focus Of "Due Process" In The Context Of Exhaustion.

As the opening brief demonstrated, it has long been settled that in order for a claimant to be required to exhaust an administrative remedy, the remedy must be adequate, in that it must meet the requirements of due process. (AOB § III.A.) Touchstone focuses on the components of due process that usually receive the most attention—notice and an opportunity to be heard—without acknowledging that these are not the only components that matter.

1. To be adequate, an administrative remedy must provide for a hearing and a binding decision.

The courts demand more than notice and an opportunity to be heard in order to impose an exhaustion requirement: The administrative remedy must include *an adjudication of the claim*. As the Supreme Court stated in *Endler v. Schutzbank* (1968) 68 Cal.2d 162 (*Endler*)—a case that Touchstone does not discuss but to which it attributes the Supreme Court's "formal[] recogni[tion]" of the due process requirement (RB 43)—exhaustion does not apply unless "the statute or regulation under which such review is offered 'establishes clearly defined machinery for the

submission, evaluation *and resolution* of complaints by aggrieved parties.'" (68 Cal.2d at p. 168, italics added, internal citation omitted.)

Contrary to Touchstone's argument, Sheridan's complaint about section 98.7 isn't that it fails to provide, in Touchstone's words, a "full-blown evidentiary hearing" (RB 37) or "full-blown trial" (RB 40). Sheridan has identified more fundamental failings. While section 98.7 does allow claims to be submitted and requires an investigation, the claimant has no *right* to anything else. She has no right to *any* kind of hearing, "full-blown" or otherwise.[3] And most importantly, she has no right to a "resolution of [her] complaint[]," because the Commissioner has no power to issue a binding decision. (See AOB § III.B.; § II.B., *post*.)

The absence of a binding decision—"binding" in the sense that it is subject to court review on only limited bases (e.g., Code Civ. Proc., §§ 1094.5 [administrative orders], 1286.2 [arbitration awards])—is especially problematic. An administrative procedure, even one that involves a "full-blown" evidentiary hearing, is not a *remedy*. It is the means by which one *obtains* a remedy. If the end product is a non-binding

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[3] Section 98.7, subdivision (b) provides the procedure. It requires the investigation of every claim and the submission of an investigation report to the Labor Commissioner. But there is no requirement of a hearing: "The Labor Commissioner *may* hold an investigative hearing whenever the Labor Commissioner determines, after review of the investigation report, that a hearing is necessary to fully establish the facts. In the hearing the investigation report shall be made a part of the record and the complainant and respondent shall have the opportunity to present further evidence. The Labor Commissioner shall issue, serve, and enforce any necessary subpoenas." (*Id*., italics added.)

decision that compels a party to go to court and start anew in order to obtain relief, then the remedy is not just inadequate—it is non-existent.

The absence of a decision was central to the court's rejection of an exhaustion argument in *City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210. The case arose from a dispute over the calculation of retirement benefits for members of the Oakland Police and Fire Retirement System. (*Id*. at p. 215.) An employees' association claimed that the City of Oakland had not exhausted available administrative remedies before going to court because it had not requested a hearing before the Oakland Police and Fire Retirement Board. (*Id*. at p. 234.) The Court of Appeal disagreed, holding that there was no exhaustion requirement because the remedy was inadequate. (*Id*. at p. 236.) The reason was that the governing City Charter provision "[did] not require the Board to do anything in response to the submissions or testimony received by it at the hearing. Thus, the procedure does not provide for the acceptance, evaluation and *resolution* of disputes." (*Id*. at p. 237, italics in original.) The court grounded this result on multiple cases reaching essentially the same conclusion. (*Id*. at pp. 237-238.)

These results make sense. One of the standard reasons for the exhaustion requirement is that it "promotes judicial economy." (*Campbell*, *supra*, 35 Cal.4th at p. 322.) But unless the administrative procedure yields a binding decision, requiring exhaustion actually undermines that goal. There is no reason to believe that requiring everyone to first stop by the Labor Commissioner's office will reduce the number of cases that courts

have to hear. Far more likely is that employers like Touchstone will routinely reject every significant adverse result—or maybe every adverse result, since employers generally have more resources and staying power than employees—and seek de novo review. Far from promoting judicial economy, the result would be duplicative litigation, to say nothing of delaying final adjudications by many months, if not years.

2. Touchstone reads the governing cases too narrowly.

Because Touchstone focuses only on general principles governing the right to notice and a hearing, it overlooks these gaps in section 98.7's procedure, both in its discussion of Sheridan's cases and in the additional cases it cites.

For example, Touchstone's reading of *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328 (*Glendale*) (see RB 41-42) is far too narrow, because it ignores the context of the portion of the decision it discusses. The Court began that portion this way: "The requirement of exhaustion of administrative remedies does not apply if the remedy is inadequate. [Citations.] The city's grievance procedure is inadequate to the resolution of the present controversy *in two respects*." (15 Cal.3d at p. 342, italics added.) The first reason, as Touchstone correctly notes, was that the grievance procedure did not cover the dispute over the ordinance in question. (*Ibid*.) But the second reason was that the procedure was inadequate—not because it was "tailored for the settlement of minor *individual* grievances" (*ibid*., italics in original), but because of

the way in which it was so tailored: It "provide[d] merely for the submission of a grievance form, *without the taking of testimony*, the submission of legal briefs, or *resolution by an impartial finder of fact*" (*ibid*., italics added). That the procedure was tailored for individual grievances may have explained why it was informal, but the Court's focus was on the procedure's *inadequacy*. Regardless of why the city had enacted this procedure, it did not suffice to require *anyone* to exhaust remedies. It is therefore not correct to say, as Touchstone does, that the Court implied that the procedure was adequate for the resolution of individual grievances. (RB 42.) There was no such implication; the Court *held* that the remedy was not adequate *to require exhaustion*.

Far from "simply follow[ing] *Glendale*," as Touchstone claims (RB 42), if anything *Sunnyvale Public Safety Officers Assn. v. City of Sunnyvale* (1976) 55 Cal.App.3d 732 (*Sunnyvale*) expanded on *Glendale*'s holding. While the dispute was procedurally similar to that in *Glendale*, the court did not make the comparison that *Glendale* did between informal employee dispute resolution procedures and a more complex dispute (in *Sunnyvale*, the validity of a memorandum of understanding). Instead, it detailed the *procedural* reasons why the employee grievance process was inadequate to require exhaustion: It *"does not provide for a hearing* before the city council, the body charged with final determination in this matter. It provides only that the city council shall make a final determination based on a recommendation by an advisory arbitration panel. *It does not specifically provide for the taking of testimony or the submission of legal*

briefs as required by *Glendale*. In addition, *it does not provide the parties a direct opportunity to be heard before the city council*. These deficiencies make the administrative remedy ineffective." (*Id*. at p. 736, italics added.) These deficiencies were not specific to the dispute in the case. They made the *process* inadequate.

Touchstone's statement that *James v. Marinship Corp.* (1944) 25 Cal.2d 721 (*James*) "did not address the form of due process an agency must provide for the exhaustion doctrine to apply" (RB 43) betrays its unduly limited view of the issue. There, the Court held that the remedy in question "[was] not such a complete and adequate administrative remedy as is contemplated by the rule invoked" (viz., the failure to exhaust administrative remedies). (*Id*. at p. 744.) The Court then proceeded to describe the Fair Employment Practice Committee's investigative procedure and noted that—very much like the Labor Commissioner under section 98.7—"[t]he parties are entitled to no hearings, and hearings are held 'only after the members of the Committee have agreed upon such action . . .'" and that the committee "apparently has no direct means of enforcing its orders . . . ." (*Ibid*.) While noncompliance could be certified to the President of the United States, ultimately "the committee is an advisory body . . . ." (*Id*. at p. 745.) Regardless of whether the inadequate-remedy exception to the exhaustion requirement "was not formally recognized until 1968" (RB 43), *James* squarely held that the absence of "a complete and adequate administrative remedy" (25 Cal.2d at p. 744)—

one that included both a hearing and a final, enforceable determination—eliminated the need for exhaustion.

Touchstone's reading of *Ahmadi-Kashani v. Regents of University of California* (2008) 159 Cal.App.4th 449 (RB 43-44) is likewise overly narrow. It's true that the central question was whether under FEHA the sexual harassment plaintiff could abandon an administrative procedure that she had initiated, and the court held that she could. (159 Cal.App.4th at p. 452.) But Touchstone fails to note a central feature of the court's holding: The plaintiff had no right to initiate a binding arbitration, and even if she had the right, the result of the arbitration would not have been entitled to binding effect. (*Ibid*.) And the pre-arbitration meeting "included no provisions for sworn testimony[;] . . . no opportunity for cross-examination, for the questioning of third-party witnesses, or for the admission or consideration of other evidence"; no record of the meeting; and no opportunity to question the alleged harasser. (*Id*. at p. 458.) There was not, in other words, anything like a quasi-adjudicative process. These reasons, taken together, were what led the court to conclude that the plaintiff could properly abandon the process.

3. None of Touchstone's additional authorities holds that an administrative procedure without a decision is adequate.

Touchstone's additional cases provide no support for its position, because none required exhaustion of an administrative remedy that failed to provide for a binding adjudication. For example, in *Bernstein v. Smutz* (1947) 83 Cal.App.2d 108 (cited at RB 37), the court observed: "We have not been cited to any case, and we have found none, holding that resort must be had to an administrative agency *when the agency has no power to act*." (*Id*. at p. 115, italics added.) As for *Jonathan Neil & Associates, Inc. v. Jones* (2004) 33 Cal.4th 917 (RB 38-39), Touchstone concedes that the decision addressed primary jurisdiction, not exhaustion of remedies. But in any case, the decision states that "in the case of exhaustion, *the administrative agency must initially decide the 'entire controversy*'" (*id*. at p. 933, italics added), and the governing regulation stated that the administrative decision is "eventually appealable to the Insurance Commissioner, who will then 'render *a decision which shall be binding upon all parties*'" (*id*. at p. 934, italics added).

Touchstone's venture into the realm of the "fair procedure" doctrine that governs disputes over membership in private organizations like hospital staffs (RB 39-40) similarly adds nothing to its case. With one exception, none of the cases involved exhaustion, and without exception, none involved an administrative procedure that failed to lead to a final decision. Exhaustion was an issue in *Bollengier v. Doctors Medical Center*

(1990) 222 Cal.App.3d 1115, but the hospital's administrative procedure unquestionably included a final decision by its governing body. (*Id*. at p. 1126.) Indeed, the court found a failure of exhaustion precisely "because a final administrative decision has not been rendered." (*Id*. at p. 1131.) And the detailed statutory embodiment of fair procedure as it applies to physicians unquestionably requires a final decision. (See generally Bus. & Prof. Code, § 809.1 et seq.)

B. Section 98.7 Lacks The Elements Necessary To Require Exhaustion.

Section 98.7's administrative procedure falls short of basic due process in several ways.

It is deficient because it is in practical effect closer to an opportunity for informal resolution of the employee's grievance, and does not "provide for a 'quasi-judicial' hearing with sufficient due process to generate a legally binding result." (*Ahmadi-Kashani v. Regents of University of California*, *supra*, 159 Cal.App.4th 449, 452.) The procedure "does not provide the parties a direct opportunity to be heard before the [Commissioner]." (*Sunnyvale*, *supra*, 55 Cal.App.3d at p. 736.) It "provides merely for the submission of a grievance form, without the taking of testimony, the submission of legal briefs, or resolution by an impartial finder of fact . . . ." (*Glendale*, *supra*, 15 Cal.3d at p. 342.)

And even if all of these aspects were deemed adequate, at the end of the process there is no binding decision—the Labor Commissioner "has no

direct means of enforcing [his or her] orders . . . ." (*James*, *supra*, 25 Cal.2d at p. 744.) In *Endler*'s words, section 98.7 provides no "machinery" for the "*resolution* of complaints by aggrieved parties." (*Endler*, *supra*, 68 Cal.2d at p. 168, italics added.)

Touchstone's argument that section 98.7 really does provide due process (RB § II.B.) reflects its continuing misapprehension of what is at issue. The question is not whether it was *possible* for Sheridan to resolve her claim before the Commissioner without resort to the courts. It was certainly *possible* that the Labor Commissioner, even without an investigation, would order Touchstone to reimburse Sheridan and that Touchstone would voluntarily agree to do so, much in the way it is possible that a mediation under the auspices of the Labor Commissioner could resolve Sheridan's claim.

The issue, properly stated, is whether the administrative remedy under section 98.7 constitutes the sort of remedy that a party *must* exhaust before invoking the assistance of the courts. A remedy that does not "'establish[] clearly defined machinery for the submission, evaluation *and resolution* of complaints by aggrieved parties'" is not "the sort of 'remedy' which a party must exhaust before invoking the assistance of the courts . . . ." (*Endler*, *supra*, 68 Cal.2d at p. 168.) *Endler* held that a hearing before the Commissioner of Corporations "that would be 'without prejudice to the rights of the parties' and that would bind the commissioner only at his own discretion" did not constitute the sort of remedy that a party had to exhaust. (*Ibid*.) Section 98.7 is the same: Because both the

employee and employer can go through the section 98.7 procedure without prejudice to their right to start the process over again in a court proceeding, the procedures under section 98.7 are not "the sort of 'remedy' which a party must exhaust."

Touchstone's contention that the availability of de novo review by all parties establishes adequacy of the administrative remedy (RB 46-49) disproves itself. If one must go outside the administrative remedy in order to achieve "'resolution of complaints by aggrieved parties'" (*Endler*, *supra*, 68 Cal.2d at p. 168), then the administrative remedy *cannot* be adequate. The administrative remedy *itself* must provide that resolution.

Although *Collier & Wallis, Ltd. v. Astor* (1937) 9 Cal.2d 202 (RB 47) seems to run counter to this view, it is atypical. It involved a predecessor of section 1700.44 (addressed in *Styne*, *supra*, 26 Cal.4th 42) that, like section 1700.44, unequivocally *mandated* exhaustion of the administrative remedy, and *mandated* a decision by the Labor Commissioner, albeit non-binding: "'In all cases of controversy arising under this act the parties involved *shall* refer the matter in dispute to the commissioner of labor, who *shall* hear and determine the same subject to an appeal within ten days to the Superior Court where the same shall be heard *de novo*.'" (9 Cal.2d at p. 204, italics added.) This kind of statute might well overcome the judge-made—and common-sense—requirement that the administrative procedure must yield a binding decision. But it would not be appropriate to extend the case beyond its facts, particularly given the unique entertainment-industry background of the statute: "The requirement

in question is simply an administrative measure, due to the peculiar and unusual nature of the business carried on by private employment agencies. The abuses which have grown up in this line of business have long been recognized and have been subject to both legislative action and judicial decision." (*Id*. at pp. 205-206.)

If an administrative procedure provides no actual, real-world remedy because it cannot culminate in a binding decision, then there is no "remedy" to exhaust. That is the case with section 98.7.

CONCLUSION

The Labor Code's unequivocal language, the Legislature's 2014 affirmation of that language in 2014, and the plain absence of an adequate administrative remedy in section 98.7 combine to demonstrate that section 98.7 has never had an exhaustion requirement. The judgment must be reversed.

Dated: June 29, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **APPELLANT'S REPLY BRIEF** contains **9,770 words**, not including the tables of contents and authorities, the caption page, signature blocks, the verification or this certification page, as counted by the word processing program used to generate it.

Dated: June 29, 2015

Robin Meadow

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On June 29, 2015, I served the foregoing document described as: **APPELLANT'S REPLY BRIEF;** on the parties in this action by serving:

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Charice L. Lawrie