Case No. S246711

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ZB, N.A. and ZIONS BANCORPORATION,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO,

Respondent;

KALETHIA LAWSON,

Real Party In Interest.

After a Decision by the Court of Appeal
Fourth Appellate District, Division One
Case Nos. D071279 & D071376 (Consolidated)

PETITIONERS' SUPPLEMENTAL BRIEF RE: NEW AUTHORITIES

[Cal. Rules of Court, Rule 8.520(d)(2)]

RUTAN & TUCKER, LLP
JAMES L. MORRIS (SBN 109674)
*BRIAN C. SINCLAIR (SBN 180145)
GERARD M. MOONEY (SBN 222137)
611 Anton Boulevard, Suite 1400
Costa Mesa, California 92626-1931
Telephone: 714-641-5100
Facsimile: 714-546-9035

Attorneys for Petitioners
ZB, N.A. and ZIONS BANCORPORATION

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I. INTRODUCTION

Pursuant to rule 8.520(d) of the California Rules of Court, Petitioners submit this supplemental brief addressing the following two decisions that were issued after Petitioners filed their Reply Brief on the merits:

1. *Zakaryan v. The Men's Wearhouse, Inc.* (2019) 33 Cal.App.5th 659 ("*Zakaryan*"), issued on March 28, 2019.
2. *Lamps Plus, Inc. v. Varela* (2019) ___ U.S. ___, 139 S.Ct. 1407, 203 L.Ed.2d 636 ("*Lamps Plus*"), decided on April 24, 2019.

The *Zakaryan* decision applied California's "primary rights theory" to conclude that a PAGA claim asserting a violation of Labor Code section 558 cannot be divided into two claims – one seeking the $50/$100 penalty and the other seeking unpaid wages. (*Zakaryan*, 33 Cal.App.5th at pp. 671-673.) Therefore, the *Zakaryan* court reasoned that because *Iskanian* precludes forced arbitration of PAGA claims, the unpaid wages portion is no more subject to arbitration than the $50/$100 civil penalties portion. (*Id.* at pp. 673-676.) The *Zakaryan* decision, like the Ninth Circuit's opinion in *Lamps Plus* before it was reversed by the Supreme Court, relied on California public policies despite contrary precedent from the United States Supreme Court and California Supreme Court permitting claim splitting under the Federal Arbitration Act ("FAA"). (*See Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1088 ("*Broughton*") [holding that "the strong policy

in both federal and state law for arbitrating private disputes" requires splitting of "arbitrable and inarbitrable remedies derived from the same statutory claim"], *citing Dean Witter Reynolds, Inc. v. Byrd* (1985) 470 U.S. 213, 221 ("Byrd") [holding that the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement"][emphasis in original].)[1] The *Zakaryan* court ignored this settled law.

In the recent *Lamps Plus* decision, the United Sates Supreme Court again reaffirmed that the FAA supersedes state law rules and state public policies that interfere with arbitration. (*Lamps Plus*, 139 S.Ct. at pp. 1417-1418.) In *Lamps Plus*, the United States Supreme Court reversed a ruling by the Ninth Circuit Court of Appeals that relied on a California rule (*contra proferentem*) derived from "public policy considerations." (*Id.* at pp. 1416-1419.) *Lamps Plus* holds that state court rules that interfere with arbitration – including judicially created rules that interfere with arbitration – are preempted by the FAA. (*Ibid.*) The *Lawson* and *Zakaryan* decisions are judicially created rules that are hostile to, or interfere with, arbitration of claims seeking individual, victim-specific remedies (here, unpaid wages).

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[1] As Petitioners explained in footnote 4 of their Reply Brief, some courts have questioned the continued validity of *Broughton's* holding that injunctive relief claims under the Consumer Legal Remedies Act are not subject to arbitration. This Court's reasoning regarding piecemeal arbitration, however, remains good law. (*McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 966.)

Therefore, both decisions violate settled United States Supreme Court precedent interpreting the FAA.

II. ARGUMENT

A. The *Zakaryan* decision is inconsistent with the Federal Arbitration Act and California law.

In *Zakaryan*, as in the present action, the plaintiff filed a PAGA action asserting various violations of the Labor Code. After the Fifth Appellate District decided *Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, defendant "filed a motion to compel arbitration of the portion of plaintiff's PAGA claim seeking reimbursement of underpaid wages." (*Zakaryan*, 33 Cal.App.5th at p. 666.) After the trial court denied the motion, defendant appealed. (*Ibid.*) The Court of Appeal, Second Appellate District, affirmed on three grounds: (1) California law does not permit claim splitting under the primary rights theory; (2) the unpaid wages portion of Labor Code section 558 is a "civil penalty" paid to the LWDA, not to individual employees; and (3) splitting the remedies allowed by section 558 "cannot be squared with the law governing arbitration." (*Id.*, at pp. 671-676.) As we explain below, these three grounds misinterpret federal and California law.

1. The FAA preempts California's claim-splitting rule.

The first basis relied upon by the *Zakaryan* court for affirming the trial court was that "[s]plitting a PAGA claim into two claims – a claim for underpaid wages and a claim for the $50/$100 per-pay-period penalties

PAGA incorporates from section 558 – runs afoul of the primary rights doctrine because it impermissibly divides a single primary right." (*Id.*, at pp. 671-672.) California's claim-splitting rule is preempted by the FAA, which requires claim splitting. (*Byrd, supra*, 470 U.S. at p. 221 [holding that the FAA "requires piecemeal resolution when necessary to give effect to an arbitration agreement"]; *McGill, supra*, 2 Cal.5th at p. 966 [explaining that the California Supreme Court "extended this principle to piecemeal litigation of 'arbitrable and inarbitrable **remedies** derived from the same statutory claim'"][emphasis added], *quoting Broughton*, 21 Cal.4th at p. 1088.)

Specifically, in *Broughton*, this Court concluded that under the FAA, a single claim under the CLRA seeking damages and public injunctive relief could be split, with the arbitrable damages remedy sent to arbitration and the non-arbitrable injunctive relief portion litigated in court. (*Broughton*, 21 Cal.4th at pp. 1072, 1079-1084.) The FAA's rule allowing claim splitting and piecemeal litigation preempts California's contrary claim-splitting rule. (*Ibid.*; *see also McGill*, 2 Cal.5th at p. 966 [holding that splitting of claims is required under the FAA if a portion of the claim is arbitrable]; *County of Solano v. Lionsgate Corp.* (2005) 126 Cal.App.4th 741, 747-748 ["When there are 'arbitrable claims and inarbitrable **remedies** derived from the same statutory claim,' the arbitrable claims should be severed from those that are inarbitrable and sent to arbitration" [emphasis added], *quoting Broughton*, 21 Cal.4th at p. 1088.)

Hence, the claim-splitting rule relied upon by the *Zakaryan* court is preempted by the FAA.

2. The *Zakaryan* decision misinterprets Labor Code section 558.

Zakaryan also refused to compel arbitration of the unpaid wages portion of the section 558 claim, concluding that the unpaid wages are "civil penalties" payable 75% to the State and 25% to aggrieved employees under PAGA. (*Zakaryan*, *supra*, 33 Cal.App.5th at pp. 673-676.) The *Zakaryan* court explained that the underpaid wages are not a separate remedy from the $50/$100 penalty under section 558, but rather one of two "components of a singular 'civil penalty' that is recoverable in a PAGA action." (*Id.* at p. 675.) This conclusion relies on *Thurman v. Bayshore Transit Management., Inc.* (2012) 203 Cal.App.4th 1112 ("*Thurman*"), but misinterprets section 558 in doing so.

First, *Zakaryan* ignores the Legislature's conclusion that the unpaid wages remedy in section 558 is **not** a "penalty," but rather constitutes unpaid "overtime compensation" owed to employees. Specifically, in Labor Code section 1197.1, the Legislature imposed a bonding requirement to appeal a citation issued by the Labor Commissioner under section 558. (Lab. Code, § 1197.1(c)(3).) The bond must be "equal to the total amount of any . . . overtime compensation that are due and owing as determined pursuant to subdivision (b) of section 558," but the "**bond amount shall not include**

amounts for penalties." (Lab. Code, § 1197.1(c)(3) [emphasis added].) The Legislature clearly understood when it adopted this bonding requirement that the underpaid overtime wages were not "penalties" under section 558.[2]

Second, *Zakaryan* ignores the legislative history of section 558, as well as agency interpretations, both of which repeatedly explain that the civil penalty under section 558 is only the $50/$100 amounts. (*See* sections II.A.1 and II.A.2 of Petitioners' Answer to Amicus Brief filed by CELA [explaining legislative history and agency interpretations that the $50/$100 amounts under section 558 constitute civil penalties, while the underpaid wages constitute restitution of wages].) The legislative history and agency interpretations are consistent with the Legislature's recognition in section 1197.1 that unpaid overtime wages under section 558 are "in addition" to the civil penalty, contrary to the holding in *Zakaryan* that the unpaid wages are a component of a "singular 'civil penalty.'" (*Zakaryan*, 33 Cal.App.5th at p. 675.)

Third, the *Zakaryan* court's reasoning creates the exact "unintended, absurd consequences" Petitioners warned about in their Answer to CELA's amicus brief. (*See In re Lana S.* (2012) 207 Cal.App.4th 94, 108 [explaining that a statute "should not be given a literal meaning if to do so would create

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[2] *Thurman* was decided before the bonding requirement and, therefore, did not have the benefit of the Legislature's interpretation in section 1197.1.

unintended, absurd consequences" [internal quotations and citation omitted]; *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1105 ["Courts may, of course, disregard even plain language which leads to absurd results or contravenes clear evidence of a contrary legislative intent."]. Specifically, *Zakaryan* concludes that even though section 558 expressly states that underpaid wages "shall be paid to the affected employee[,]" when sought as part of a PAGA action, "PAGA's allocation rule trumps section 558's" allocation rule – i.e., under PAGA, 75% of the underpaid wages are paid to the State of California. (*Zakaryan*, 33 Cal.App.5th at p. 674.)

Zakaryan recognizes that this allocation rule is a departure from the *Lawson* decision, which held that employees are entitled to 100% of the underpaid wages. (*Id.* at p. 677; disagreeing with *Lawson v. ZB, N.A.* (2017) 18 Cal.App.5th 705, 721, 724-725 [following *Thurman's* holding that underpaid wages are part of civil penalty, but 100% gets paid to the affected employees].) When it adopted section 558, the Legislature could not have intended that employers would be on the hook twice for the same underpaid wages – once as civil penalties under section 558 and separately as unpaid wages owed directly to employees. Likewise, the Legislature could not have intended when it adopted PAGA that employees forfeit 75% of their underpaid wages recovered under section 558.

The *Zakaryan* and *Thurman* decisions, both of which hold that the underpaid wages are a component of the civil penalty under section 558, are

contrary to the Legislature's interpretation of section 558, the legislative history of 558, and agency interpretations of section 558. Therefore, *Zakaryan* and *Thurman* should be abrogated, in which case this Court need not even address the more difficult FAA preemption issue.

3. The *Zakaryan* decision misinterprets *Iskanian*.

The *Zakaryan* court also held that sending the unpaid wages remedy under Labor Code section 558 to arbitration "eviscerates *Iskanian's* mandate because it sends the chief issue underlying a PAGA claim – that is, whether an employer violated labor law (thereby entitling the employee to underpaid wages) – to arbitration." (*Zakaryan*, 33 Cal.App.5th at p. 676.) This conclusion is incorrect for two reasons.

First, as we explained in prior briefs, this Court has already recognized an exception to the general rule of non-arbitrability of PAGA claims when an employee seeks "victim-specific relief" on behalf of other employees subject to arbitration agreements. (*Iskanian v. CLS Transportation Los Angeles* (2014) 59 Cal.4th 348, 387-88 ("*Iskanian*") [*referencing AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 ("*Concepcion*")].) Here, Labor Code section 558 expressly provides that the unpaid wages are victim-specific relief by requiring the wages to "be paid to affected employees." (Labor Code § 558(a)(3).)

Second, as explained in detail above, the FAA mandates that the "chief issue" underlying an arbitrable claim be sent to arbitration, even if the

action involves non-arbitrable claims that could be impacted by the arbitration decision. (See *Broughton*, *supra*, 21 Cal.4th at p. 1088 ["when a suit contains both arbitrable and inarbitrable claims, the arbitrable claims should be severed from those that are inarbitrable and sent to arbitration"].) The "arbitration rule" adopted by *Zakaryan* is contrary to the FAA and California procedural rules governing arbitration. (*See, e.g., Franco v. Arakelian Enterprises, Inc.* (2015) 234 Cal.App.4th 947, 966 [explaining that the purpose of requiring a stay of trial court proceedings "is to preserve the status quo until the arbitration is resolved, preventing any continuing trial court proceedings from disrupting and rendering ineffective the arbitrator's jurisdiction to decide the issues that are subject to arbitration"]; *Gilmore v. Shearson/American Express, Inc.* (S.D.N.Y. 1987) 668 F.Supp. 314, 321, fn. 11 ["where the factual allegations underlying the arbitrable and nonarbitrable claims are identical, a stay may be warranted by considerations of judicial economy and convenience because a plaintiff's success at arbitration may render litigation of the nonarbitrable claims unnecessary"].)

Once again, the *Zakaryan* court misinterpreted and misapplied the FAA and California law governing arbitration.

B. The *Lamps Plus* decision requires that the underpaid wages claim be arbitrated on an individual basis.

In the several years since *Iskanian* was decided, the United States Supreme Court has reaffirmed in numerous opinions the supremacy of the

FAA over state law rules (including judicially created rules) that impose obstacles to arbitration. *Lamps Plus*, the most recent of these decisions, reversed a ruling by the Ninth Circuit Court of Appeals that relied on California "public policy considerations" that interfered with the parties' agreement to arbitrate the dispute on an individual basis. (*Lamps Plus*, *supra*, 139 S.Ct. at pp. 1417-1418.) The United States Supreme Court reiterated in *Lamps Plus* that the FAA preempts state law "rules 'that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'" (*Id.* at p. 1622, *quoting Epic Sys. Corp. v. Lewis* (2018) 138 S. Ct. 1612, 1622.) While neither *Lamps Plus* nor *Epic Systems* directly addressed the arbitrability of PAGA claims, their reasoning calls into question the continued viability of the *Iskanian* rule prohibiting arbitration of a PAGA claims on an individual basis. (*See McGovern v. United States Bank N.A.* (S.D.Cal. 2019) 362 F.Supp.3d 850, 862 fn.5 ("*McGovern*") [explaining that *Epic Systems* cannot be reconciled with *Sakkab v. Luxottica Retail N. Am., Inc.* (9th Cir. 2015) 803 F.3d 425, 432 ("*Sakkab*"),[3] which held that the FAA's savings clause applied to the waiver of representative claims under PAGA because the rule applied "regardless of whether the waiver appears in an arbitration agreement or a

[3] *Sakkab* concluded that the "*Iskanian* rule" was grounds for the revocation of "any contract," which brought the rule under the FAA's savings clause. (*Sakkab*, 803 F.3d at p. 432.)

non-arbitration agreement"]; *but see Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602, 620 [holding that *Epic Systems* did not overrule *Iskanian*].)

The *Lawson* decision and the *Zakaryan* decision, both of which reject arbitration of unpaid wages claims under section 558, are inconsistent with *Lamps Plus*, *Epic Systems*, *Concepcion*, and numerous other United States Supreme Court decisions that prohibit states from adopting a rule that "prohibit[s] parties from private streamlined bilateral arbitration seeking relief intended to redress only the plaintiff's claims, [which] 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (*McGovern*, 362 F.Supp.3d at p. 864, *quoting Concepcion, supra*, 563 U.S. at p. 353.)

The dissenting opinion in *Sakkab* foreshadowed that the *Iskanian* rule (now, as expanded by *Lawson* and *Zakaryan*) would not withstand scrutiny under the FAA, warning:

> The majority holds that its decision "is bolstered by the PAGA's central role in enforcing California's labor laws" and that "[b]oth the PAGA statute and the *Iskanian* rule reflect California's judgment about how best to enforce its labor laws." Maj. Op. at 28. However, under *Concepcion*, "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 131 S. Ct. at 1753. . . . Thus, if a state law violates or frustrates the FAA, the state law must give way, even if such a decision prevents the state's interest from being vindicated. . . . Therefore, because the *Iskanian* rule serves as an obstacle to the objectives of the FAA, the desirability and importance of the rule to the State's policies and purposes cannot save it. . . . A state may not

> insulate causes of action from arbitration by declaring that the purposes of the statute can only be satisfied via class, representative, or collective action. If the rule conflicts with the objectives of the FAA, the state rule must give way. *Concepcion*, 131 S. Ct. at 1753.

(*Sakkab*, 803 F.3d at pp. 448-450 [N. R. Smith, dissenting].)

Lamps Plus reaffirms that state law rules that "target arbitration" or frustrate the objectives of the FAA will not stand. (*Lamps Plus*, 139 S.Ct. at pp. 1417-1418; *see also Epic Systems*, 138 S.Ct. at p. 1632 [holding that the strong public policy allowing "concerted activities" under the National Labor Relations Act and collective actions under the federal Fair Labor Standards Act must yield to the FAA's requirement that arbitration agreements be enforced according to their terms].)

The *Lawson* decision is irreconcilable with *Lamps Plus*, *Epic Systems*, and *Concepcion.*

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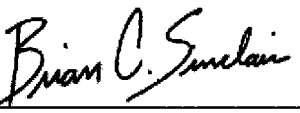
III. CONCLUSION

This Court should (1) find that the underpaid wages component of Labor Code section 558 is not part of the "civil penalties" recoverable under PAGA; and (2) enforce the Arbitration Agreement according to its terms, thus requiring Lawson to arbitrate her underpaid wages claim on an individual basis.

Dated: May 23, 2019

RUTAN & TUCKER, LLP
JAMES L. MORRIS
BRIAN C. SINCLAIR
GERARD M. MOONEY

By: 

Brian C. Sinclair
Counsel for Petitioners ZB, N.A.
and ZIONS BANCORPORATION

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies, pursuant to Rule 8.520(d)(2) of the California Rules of Court, that the enclosed "Supplemental Brief Re: New Authorities" is produced using 13-point Times New Roman type (including footnotes) and contains approximately 2,777 words, which is less than the 2,800 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: May 23, 2019

RUTAN & TUCKER, LLP
JAMES L. MORRIS
BRIAN C. SINCLAIR
GERARD M. MOONEY

By: Brian C. Sinclair
Brian C. Sinclair
Counsel for Petitioners ZB, N.A.
and ZIONS BANCORPORATION

PROOF OF SERVICE

KALETHIA LAWSON v. CALIFORNIA BANK & TRUST, et al.
Supreme Court of California Case No. S246711
San Diego Superior Court Case No. 37-2016-00005578-CU-OE-CTL
Court of Appeal Fourth Appellate District, Div. One, Case Nos. D071376 & D071279

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-1931.

On May 23, 2019, I served on the interested parties in said action the within:

PETITIONERS' SUPPLEMENTAL BRIEF RE: NEW AUTHORITIES

as stated below:

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[✓] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 23, 2019, at Costa Mesa, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Marie Lee
(Type or print name)

Marie Lee
(Signature)

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KALETHIA LAWSON v. CALIFORNIA BANK & TRUST, et al.
Supreme Court of California Case No. S246711
San Diego Superior Court Case No. 37-2016-00005578-CU-OE-CTL
Court of Appeal Fourth Appellate District, Div. One, Case Nos. D071376 & D071279

Edwin Aiwazian Arby Aiwazian Joanna Ghosh LAWYERS *for* JUSTICE, PC 410 West Arden Avenue, Suite 203 Glendale, CA 91203	***Counsel for Plaintiff and Real Party in Interest, KALETHIA LAWSON***
Michael Rubin Kristin M. Garcia ALTSHULER BERZON LLP 177 Post Street, Suite 300 San Francisco, CA 94108	***Counsel for Plaintiff and Real Party in Interest, KALETHIA LAWSON***
Bryan J. Schwartz Logan T. Talbot Eduard R. Meleshinsky DeCarol A. Davis CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION 1330 Broadway, Suite 1630 Oakland, CA 94612	***Attorneys for Amicus Curiae, CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION***
Robert A. Olsen Cynthia E. Tobisman GREINES, MARTIN, STEIN & RICHLAND LLP 5900 Wilshire Boulevard, 12th Fl. Los Angeles, CA 90036	***Attorneys for Amicus Curiae, CALIFORNIA NEW CAR DEALERS ASSOCIATION***
Apalla U. Chopra Andrew Lichtenstein O'MELVENY & MYERS LLP 400 South Hope Srteet Los Angeles, CA 90071	***Attorneys for Amicus Curiae. THE CALIFORNIA GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL***

Adam J. Karr
Ryan W. Rutledge
Kelly Wood
O'MELVENY & MYERS LLP
610 Newport Center Drive, 17th Floor
Newport Beach, CA 92660

Attorneys for Amicus Curiae. THE CALIFORNIA GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL

Office of the Attorney General
for the State of California
600 West Broadway, Suite 1800
San Diego, CA 92101-3702

Clerk of the Court
Court of Appeal, Fourth District, Div. 1
750 B Street, Suite 300
San Diego, CA 92101

****Via TrueFiling***

Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

****Electronically Submitted (Original + 8 copies Via Overnight Mail)***