Case No. S246711

In the

Supreme Court

of the

State of California

ZB, N.A. and ZIONS BANCORPORATION,
Defendants and Petitioners,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,
Respondent,

KALETHIA LAWSON,
Plaintiff and Real Party In Interest.

After an Opinion from the Court of Appeal, Fourth Appellate District, Division One, published on December 19, 2017 and modified on December 21, 2017, Appellate Case Nos. D071279 and D071376 (Consolidated)

Appeal from the Superior Court of California, County of San Diego, Hon. Judge Joel M. Pressman's Minute Order, given on September 30, 2016 in Dept. C-66, San Diego Superior Court Case No. 37-2016-00005578-CU-OE-CTL

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

For the reasons discussed herein, the Petition for Review ("Petition") fails to demonstrate that review is warranted pursuant to subsection 1 of California Rule of Court 8.500(b). The Court of Appeal's Opinion is sound and consistent with the law. There is no irreconcilable conflict between the Court of Appeal's Opinion and the opinion in *Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228 ("*Esparza*"). Furthermore, the Court of Appeal's Opinion does not contravene *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 ("*Concepcion*") or *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 ("*Iskanian*").

Petitioners would have the Court believe that review presents an opportunity to set things right, but on closer look it is clear that there is no error to address and what Petitioners are really asking the Court to do is legislate from the bench and create complexity where there is none. Review by this Court is not necessary to settle an important question of law. The Petition does not present a court-created error or an unsound basis for the Court of Appeal's decision, so as to warrant reexamination of either the Court of Appeal's Opinion, the Superior Court's Order, or this Court's precedent which support both the Court of Appeal's Opinion and Superior Court's Order. See, *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal. 4th 489, 503-504; *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296-297; *Cianci v. Superior Court*

(1985) 40 Cal.3d 903, 924; *People v. Anderson* (1987) 43 Cal.3d 1104, 1139.

On review, it is presumed that the lower court made all necessary findings to support its decision which is the subject of the appeal. *See Michael U. v. Jaime B.* (1985) 39 Cal.3d 787, 792-793; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564. If the decision below is correct on any theory, then it must be affirmed regardless of the lower court's reasoning and regardless of whether such basis was actually invoked. *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329; *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.

The Petition states that, by compelling representative arbitration of the matter carved-out, the Superior Court committed "an error of law, which the Court of Appeal compounded by way of its Opinion[.]" (Petition, p. 27). These are strong words coming from Petitioners ZB, N.A. and Zions Bancorporation ("Petitioners"), after they invoked a representative action waiver that is, by law, unenforceable. Petitioners sought an order compelling arbitration and got one, and then commenced an appeal in which they argued that they wanted to be in a court of law and to "avoid [] being forced to arbitrate matters" (*albeit*, only if it was determined that the carved-out matter must be viable on a representative basis—which it is, by law). (Petitioners' Reply Brief, p. 11). For the reasons discussed herein, the attribution of legal error to the Court of Appeal is unfair and without

basis. Petitioners have failed to raise any grounds for review and their Petition should be denied in its entirety.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

Kalethia Lawson ("Plaintiff" or "Respondent"), plaintiff and real party in interest[1] on appeal, commenced employment with Petitioners in approximately June 2013. (AA I:009). While Respondent was still employed by Petitioners, on February 19, 2016, she commenced the underlying representative action asserting a single cause of action under the Private Attorneys General Act of 2004, California Labor Code section 2698, *et seq*. ("PAGA"), as a proxy of the state, after exhausting the notice requirement provided by the statute. (AA I:009).

Respondent Lawson's single PAGA cause of action is predicated upon Petitioners' violations of multiple provisions of the California Labor Code ("Labor Code") with respect to their hourly-paid or non-exempt employees in California. (AA I:006-019). The action seeks "civil penalties pursuant to California Labor Code sections 2699(a), (f), and (g) and 558 plus costs/expenses and attorneys' fees" for violations of multiple provisions of the Labor Code and "[f]or such other and further relief as the Court may deem equitable and appropriate." (AA I:019). Included among

[1] Respondent only identifies herself as the "real party in interest" for purposes of complying with the party designation requirement set forth in California Rule of Court 8.504(b)(6).

the civil penalties sought, are "unpaid wages and premium wages per California Labor Code section 558[.]" (AA I:009, 014, 017-019). Namely, the "unpaid wages" and "premium wages" that Plaintiff seeks to recover are those civil penalties authorized by the Labor Code, for which the measure of the penalties is, to some extent, unpaid or underpaid wages, which are recoverable through a PAGA action. [2] (AA I:014).

On or about August 3, 2016, Petitioners filed their Notice of Motion and Motion of Defendants ZB, N.A. and Zions Bancorporation to Compel Plaintiff to Submit Her Claim for Victim-Specific Relief to Individual Arbitration and to Stay this Action ("Motion to Compel Arbitration"). (AA I:020-036). By way of the motion, Petitioners sought to carve out the undenominated component of the civil penalty sought by Respondent Lawson based on Labor Code section 558, from the denominated component of the civil penalty provided by the section and also sought by Respondent, and compel it to individual arbitration. [3]

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[2] Labor Code section 558 provides for a civil penalty that consists of: an initial violation penalty amount of $50 plus an amount sufficient to recover underpaid wages, as well as a subsequent violation penalty amount of $100 plus an amount sufficient to recover underpaid wages. Cal. Lab. Code § 558(a)(1)-(2).

[3] Petitioners sought to compel individual arbitration of the portion of the civil penalty which equals "an amount sufficient to recover underpaid wages." Cal. Lab. Code § 558(a)(1)-(2).

Respondent Lawson contended that, and continues to contend that, Petitioners failed to meet their burden as moving parties to demonstrate contract formation with respect to the arbitration agreement, in their moving papers, and Respondent Lawson contended that Petitioners' account of the facts and circumstances relating to contract formation are directly controverted by the record. Nevertheless, the Superior Court found that Petitioner Lawson had "agreed to be bound by an arbitration agreement[.]" (Exhibit 1, p. 2).

Petitioners sought enforcement of the terms in the arbitration agreement which purport to subject "any legal controversy or claim" arising out of an employee's employment to "binding arbitration," and prohibit any "claims by different claimants" from being "combined in a single arbitration" or claims for "relief on behalf of someone else" ("representative action waiver"). (AA I:026, 050-051, 063-064). Relying on the representative action waiver, Petitioners requested that the Superior Court find that the arbitration agreement and representative action waiver were enforceable as to Plaintiff Lawson's request for the underpaid wages portion of the civil penalty available under Labor Code section 558(a)(1)-(2).

The arbitration agreement that Petitioners sought to enforce also included a severance clause and provided that the representative action waiver did not apply to arbitration if specific state law provides otherwise.

Respondent raised the issues of severance and the express exception to the representative action waiver, that was triggered by *Iskanian*, to the Superior Court. (AA, I:052, 065; AA, I:119; AA, I:124-125). Importantly, Petitioner Lawson also argued, *inter alia*, that the arbitration agreement was unconscionable and unenforceable, and that, under *Iskanian*, the representative action waiver could not operate to prevent a PAGA claim from being viable on a representative basis in any forum.

On September 30, 2016, the Superior Court issued an order bifurcating the portion of the civil penalty sought by Petitioner Lawson for "unpaid wages and premium wages per California Labor Code section 558" and compelling that issue to arbitration on a representative basis, and staying the remainder of the action "for a period of 90 days."[4] ("Superior Court's Order") (Exhibit 1, p. 3).[5]

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[4] On January 13, 2017, the Superior Court held a case management conference and, due to Petitioners' then-pending Writ Petition and Direct Appeal, extended the stay of the remainder of the PAGA action to June 23, 2017 and set continued case management conference for the same day. On June 23, 2017, the Superior Court held a case management conference and extended the stay of the remainder of the action to November 17, 2017 and set a continued case management conference for the same date. On November 17, 2017, the Superior Court held a case management conference and continued the stay to March 2, 2018 and set a Hearing Re: Review of Appeal Status.

[5] The Superior Court's Order was issued by Honorable Judge Joel M. Pressman who retired in 2017.

On October 27, 2016 Petitioners commenced an appeal[6] of the Superior Court's Order ("Direct Appeal"), however on November 14, 2016, the Court of Appeal sought an explanation as to why the Superior Court's Order was appealable. (AA, II:383).

On October 27, 2016, while the Direct Appeal was pending, and despite the Superior Court's Order of arbitration on a representative basis, Petitioners made a demand for commencement of an individual consumer arbitration and submitted it to JAMS.

On November 22, 2016, Petitioners responded to the Court of Appeal's inquiry regarding the appealability of the Superior Court's Order. On November 29, 2016, Petitioners also filed a Petition for Writ of Mandate[7], requesting that the Superior Court's Order be vacated and that the Superior Court be directed to enter a new and different order granting Petitioners' Motion to Compel Arbitration on an individual basis ("Writ Petition").[8]

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[6] California Court of Appeal, Fourth Appellate District, Division One, Case No. D071279

[7] California Court of Appeal, Fourth Appellate District, Division One, Case No. D071376.

[8] On December 1, 2016, the Court of Appeal determined that the Direct Appeal may proceed and stated that the parties should address the issue of appealability in their respective appellate briefing and that the Court of Appeal may consider the issue during the pendency of the Direct Appeal. On December 7, 2016, the Court of Appeal determined that the Writ Appeal will be considered at the same time as the Direct Appeal.

On November 30, 2016 Petitioners informed JAMS that commencement of arbitration should be stayed until the Court of Appeal rules on the Writ Petition and Direct Appeal. To date, no arbitration has commenced nor has a letter of commencement of arbitration been issued by JAMS.

After extensive briefing on the issue of whether or not the Superior Court's Order is appealable, the merits of the Direct Appeal and Writ Petition, and also the potential application of *Esparza*, the Court of Appeal held oral argument with respect to the Writ Petition on November 14, 2017.

At the oral argument, in their closing remarks, Petitioners specifically conceded that, if the Court of Appeal were inclined to find that a proceeding on the underpaid wages portion of the penalty under Labor Code section 558, pursuant to PAGA, should be a representative proceeding, then Petitioners desire to have such a proceeding in court and not in arbitration.

On December 19, 2017, having considered papers submitted by both parties and their oral arguments, the Court of Appeal issued a published opinion dismissing the Direct Appeal[9], granting the Writ Petition, and

[9] The Court of Appeal determined that it had no appellate jurisdiction over the Superior Court's Order, but nevertheless reached the merits of Petitioners' contentions regarding the Superior Court's Order by disposition of the Writ Petition.

issuing a writ directing that the Superior Court's Order be vacated ("Court of Appeal's Opinion").

III. WHY REVIEW SHOULD NOT BE GRANTED

The Petition does not present an irreconcilable conflict of law or important question of law that must be resolved.

A. Petitioners Conceded That They Desire to Proceed In Court.

Petitioners want to choose their forum based on the scope of the claim that they will have to answer to. Petitioners tried to obtain an order compelling arbitration of the carved-out matter on an individual basis, although the carved-out matter is only pursuable through a PAGA action, and a PAGA action is representative in nature. Their attempt to obtain an order compelling arbitration resulted in an order compelling representative arbitration.

Before the Court of Appeal, Petitioners took the position that adjudication of the "representative claims" will be time consuming and expensive, and that the judicial forum is the appropriate forum for these claims. (Petitioners' Reply Brief, p. 11). During their closing remarks at oral argument, Petitioners specifically stated to the distinguished panel of judges, that, if the Court of Appeal were inclined to find that a proceeding on the underpaid wages portion of the Labor Code section 558 penalty, under PAGA, should be a representative proceeding, then Petitioners desired to have such a proceeding take place in court and not in

arbitration. Petitioners did all of this to avoid a decision by the Court of Appeal that would leave in place the order compelling arbitration on a representative basis. Petitioners conceded that they wish to answer a representative claim in a court of law and not in the arbitral forum, therefore, to the extent that they now contend that it was error for the Court of Appeal to give them just that, Petitioners invited the error. *People v. Bunyard* (1988) 45 Cal.3d 1189, 1234; *Jentick v. Pac. Gas & Elec. Co.* (1941) 18 Cal.2d 117, 121.

B. Petitioners Misconstrue and Misrepresent the Record Below.

1. Petitioners Misconstrue the Court of Appeal's Opinion.

Petitioners misrepresent the Court of Appeal's decision. For example, the Petitioners represent that the Court of Appeal's Opinion "hold(s) that none of Lawson's claims is subject to arbitration." (Petition, p. 32). However, the only thing that Petitioners moved to compel to arbitration was a specific sub-component of the civil penalty available under Labor Code section 558 and Petitioners did not seek to compel anything else to arbitration. Thus, on appeal the Court of Appeal was not determining the arbitrability of the remainder of the action. This representation is also disingenuous because Respondent Lawson only asserts a representative PAGA claim and Petitioners have indicated that they desire to answer such a representative claim in the judicial forum. (See §§ II, III.A, *infra*; Reply Brief, p. 11).

Another example, the Court of Appeal did not find that Lawson's action was asserting "unpaid wages claims[.]" (Petition, p. 27). Instead, the Court of Appeal referenced that the Superior Court treated Respondent as having done so, and the Court of Appeal otherwise consistently acknowledged that Respondent Lawson sought the recovery of civil penalties, and referenced the undenominated portion of the civil penalty under Labor Code section 558, for "underpaid wages," as being an indivisible part of the claim for civil penalties. (Opinion, pp. 3-4, 18-19, and 23).

2. The Court of Appeal Did Not Adopt a Sliding Scale Rule or Additional Evidentiary Burden With Respect to Motions to Compel Arbitration.

In arriving at its decision, the Court of Appeal carefully examined this Court's prior decisions in other cases (e.g., Opinion, pp. 9-11, 14-16, and 21-23). It also examined the California Labor Code (e.g., *Id.* at pp. 8, 18) to assure "that PAGA claims are enforced under the circumstances contemplated by the Legislature. (See *Babb v. Superior Court* (1971) 3 Cal.3d 841, 851.)" (*Id.*)

Petitioners take the statements of the Court of Appeal out of context to contend that the Court of Appeal adopted a sliding scale rule and announced an additional evidentiary burden that must be met to obtain an order compelling arbitration. The Court of Appeal did not make such

holdings or reach such conclusions. The Court of Appeal noted the following, in response to Petitioners' arguments:

> "Here, there is nothing in the record which suggests the predominate amounts recovered under section 558 will be in the form of underpaid wages payable to employees; indeed, we note that with respect to the meal break and rest break violations alleged by Lawson, while section 558 provides either a $50 or $100 assessment for each violation during a pay period, Lawson only alleges an underpaid wage loss of one hour's wages for each violation. Thus, depending upon how many violations occurred during a pay period and the effected employees' rate of pay, it is quite possible that, at least as to the rest break and meal break allegations, the underpaid wage portion of any recovery will fall within the 25 percent range implicitly approved by the court in *Iskanian*." (Opinion, p. 22).
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> "[T]here is no basis upon which to conclude that recovery under the statute will largely go to individual employees[.]" (*Id.*)

The picture that Petitioners paint has no support when one looks at the *actual* decision of the Court of Appeal.

In fact, the Petition acknowledges that the Court of Appeal did not actually reach the holdings and conclusions that Petitioners attribute to it. Purported holdings and conclusions adopting sliding-scale rules and evidentiary burdens are completely absent from Section II.D of the Petition which purports to describe the holdings and conclusions of the Court of Appeal. (Petition, pp. 17-19).

Petitioners sought to carve out the undenominated portion of the civil penalty available under Labor Code section 558 from the denominated

portion provided by that section, and treat it as a discrete and independent matter that could be separately adjudicated. However, the Court of Appeal noted that, by law, the penalties at issue can only be recovered by the Labor Commissioner or by an aggrieved employee through a PAGA action. The Court of Appeal also noted that the larger picture did not reflect that the penalties to be recovered by the PAGA action would not primarily go to the state. The Court of Appeal did not issue sliding scale rules or create evidentiary burdens, instead, it pointed out logical flaws and provided observations consistent with the law.

Petitioners' arguments in the Superior Court and on appeal begged the question. Petitioners assumed that in order for the state to be a real party in interest with respect to the undenominated underpaid wages portion of the civil penalty sought based on Labor Code section 558(a)(1)-(2), the primary concern would be whether 100% of that specific portion of the civil penalty would be split between the state and aggrieved employees. Petitioners placed a metaphorical microscope in front of the Court of Appeal and asked the Court of Appeal to peer through the viewfinder to observe that the "State would not share in any of" the underpaid wages portion of the civil penalty recovered pursuant to Labor Code section 558(a)(3). However, in response, the Court of Appeal adjusted the level of magnification and zoomed out—remarking that it was logically possible that penalties recovered under Labor Code section 558 could be split so as

to have the state receive 75% and aggrieved employees receive 25% (the "75-25 split") of the amount recovered based on Labor Code section 558.

The Court of Appeal was simply observing the logical parameters of the arguments presented by Petitioners with respect to the 75-25 split. Petitioners would have this Court believe that the Court of Appeal's decision would prevent an "employer who denied liability altogether" from "ever mov[ing] to compel arbitration, since the employer would be unable to establish that any underpaid wages recovery would predominate over any civil penalties recovery[.]" (Petition, p. 35). However, this is untrue. The Court of Appeal only made observations about the undenominated portion of the civil penalty under Labor Code section 558 vis-à-vis the denominated portion of the civil penalty because Petitioners were trying to dissect and carve out the undenominated portion on the notion that it is not pursuable through a PAGA action because the 75-25 split does not apply to it. The Court of Appeal's observations in response to this specific line of argument does not formally establish a legal or factual standard that all employers must now satisfy "in order for employers to obtain an order for arbitration[.]" (Petition, p. 35).

Petitioners contend that the Court of Appeal adopted a framework that is impractical, i.e. requiring an employer to develop the record and prove the breakdown of the amount to be paid to the state versus employees. However, the Court of Appeal did not do this—instead, the

Court of Appeal was illustrating that invoking the 75-25 split as a basis for demarcating the proper scope of what is or is not recoverable through a PAGA claim, does not make sense. After all, Petitioners acknowledge that the PAGA statute authorizes a court to determine the amount of monetary penalties to be assessed, and in doing so, to award a lesser amount, and the monetary amount at issue "cannot be known until the trial court renders a judgment in the action." (Petition, pp. 37-38).

Already, this Court has taken the position that plaintiffs will not be required to prove-up their case before being allowed to proceed in the litigation of a PAGA action. *Williams v. Superior Court (Marshalls of CA, LLC)* (2017) 3 Cal. 5th 531, 539 ("Hurdles that impede the effective prosecution of representative PAGA actions undermine the Legislative objectives.").

In *Williams (Marshalls of CA, LLC)*, the Court concluded that "[t]hese purposes would be ill served by presuming, notwithstanding the failure explicitly to so indicate in the text, that deputized aggrieved employees must satisfy a PAGA-specific heightened proof standard at the threshold, before discovery." *Id*. at 546. Similarly, the purposes of the PAGA would be ill-served, and clearly stated legislative objectives would be undermined, if, notwithstanding the failure explicitly to so indicate in the legislative text, it is determined that deputized aggrieved employees are prevented from pursuing the underpaid wages portion of Labor Code

section 558's civil penalty on a representative basis. This is especially so, given that both the Labor Code and California courts have defined the remedy afforded by Labor Code section 558 to be a civil penalty. Cal. Lab. Code §§ 558(a) and 2699(a); *Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1144-1148; *Reynolds v. Bement* (2005) 36 Cal.4th 1075. See also, § III.E, *infra*.

Consistent with the law, the Court of Appeal was, essentially, rejecting Petitioners' position that a court should determine, at the outset, that there is no way the monetary amount to be recovered for the civil penalty under Labor Code section 558 would work out to a 75-25 split if successful. Put simply, the Court of Appeal was just pointing out the flaws in the superstructure that forms the crux of Petitioners' argument in support of dissecting the PAGA claim and requiring individual arbitration of the underpaid wages portion of the civil penalty available under Labor Code section 558.

3. The Superior Court Did Not Stay the Remainder of the PAGA Action.

Petitioners repeatedly represented in their Writ Petition and Direct Appeal that "the Superior Court stayed the 'civil penalties aspect of this case […]' pending the arbitration of the unpaid wages portion of the action[,]" which is incorrect. (Petition, Exhibit 1, pp. 1-3; Writ Petition, pp. 46-47; Opening Brief, pp. 30-31). Petitioners, again, make this incorrect

representation in the Petition for Review. (Petition, p. 23). Petitioners are aware this is incorrect, not only because the Superior Court's Order speaks for itself, but because Respondent Lawson specifically pointed out the misstatement on appeal. (Respondent's Letter Brief, pp. 7-8). Although Petitioners sought a stay of the remainder of the action as a part of the Motion to Compel Arbitration, the Superior Court did not stay the remainder of the action pending arbitration of the matter ordered to arbitration. Instead, the Superior Court ordered a 90-day stay that was not conditioned upon or otherwise pegged to arbitration.

C. There is No Conflict Between the Court of Appeal's Opinion and *Concepcion* or *Iskanian*.

While the Petition raises conflict with *Concepcion* as a question presented for review (Petition, p. 6), and purports to rely on the holding in *Concepcion* (Petition, p. 7), the Petition does not actually explain how the Court of Appeal's Opinion conflicts with *Concepcion*.

Petitioners present a false dichotomy, under which *Concepcion* and the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq*., "require[] California Courts to enforce arbitration agreements" (which is not correct), otherwise the claim at issue must fit into a so-called, tightly-fitted exception to *Concepcion* (under *Iskanian*[10]), in order to avoid FAA preemption.

[10] References to an *Iskanian* exception within the Petition are confusing. Some references to an *Iskanian* exception imply that Petitioners are

(Petition, p. 7).

However, Petitioners ignore that, under *Concepcion*, preemption of state law by the FAA arises when a law applies only to arbitration, derives its meaning from the fact that an agreement to arbitrate is at issue, or is applied in a fashion that disfavors arbitration. *AT&T Mobility LLC, v. Concepcion* (2011) 563 U.S. 333, 339 and 341; *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 962. That is not the case here. The Court of Appeal's Opinion does not single out arbitration and disfavor it. Under the FAA, an arbitration agreement is *as enforceable as any other contract (but not more so than any other contract)*, and courts are required to place arbitration agreements *on an equal footing* with other contracts—the Court of Appeal's Opinion is consistent with this. *McGill* at 962 and 964 (citing *Concepcion* at 339, *Prima Paint v. Floor & Conklin* (1967) 388 U.S. 395, at 404, fn. 12, and *Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 68).

The Court of Appeal's Opinion treats arbitration agreements just like any other contracts between private parties that do not, at the time of contracting, act as agents that are authorized to bind the state. To conclude

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referring to an exception to *Iskanian* that would operate to allow a PAGA waiver to be enforceable with respect to a claim for so-called "victim-specific" relief. Other references to an *Iskanian* exception imply that the Petitioners are referring to an exception to *Concepcion*. In this instance, Respondent Lawson is using the latter concept.

that an agreement can bind the state, which is the real party in interest with respect to a PAGA claim, merely because it is an arbitration agreement, would be contrary to Congress's intent to put arbitration agreements on an equal footing with other contracts. *McGill*, 2 Cal.5th at 962 and 964 (citing *Prima Paint* at 404, fn. 12 and *Arthur Andersen, LLP v. Carlisle* (2009) 556 U.S. 624, at 630-631).

Petitioners also ignore key parts of this Court's decision in *Iskanian*:

> "Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the state, which alleges directly or through its agents- either the Labor and Workforce Development Agency or aggrieved employees- that the employer has violated the Labor Code." *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 386.

In *Iskanian* the Court recognized that the state is the real party in interest in a PAGA action, the PAGA litigant acts as a proxy or agent of the state when commencing and pursuing a PAGA action, PAGA is a substantive interest of the state and has a public purpose, and a pre-dispute agreement to which the state is not a party cannot operate to prevent a PAGA claim from being viable on a representative basis in any forum. *Iskanian* at 382-391. The Court also noted:

> "[T]he FAA aims to promote arbitration of claims belonging to the private parties to an arbitration agreement. It does not aim to promote arbitration of claims belonging to a government agency, and that is no less true when such a claim is brought by a statutorily designated proxy for the agency as when the claim is brought by the agency itself. The

> fundamental character of the claim as a public enforcement action is the same in both instances […] [and its] sole purpose is to vindicate the Labor and Workforce Development Agency's interest in enforcing the Labor Code[.]" *Id.* at 388.

The Court of Appeal's Opinion correctly notes that the state is not bound by an employee's prior agreement, including any waiver of the right to bring a representative action, and places the arbitration agreement at issue on an equal footing with other contracts, treating it as enforceable and subject to invalidation to the same extent as any other contract. (Exhibit A, pp. 7 and 23). The Court of Appeal noted:

> "[I]n bringing her PAGA claim Lawson was acting on behalf of the state and the state has not agreed to arbitrate its claim. Hence, it is clear Lawson's claim is outside the scope of the arbitration agreement she signed[.]" (Opinion, p. 7);

This is in line with other decisions by the Court of Appeal which this Court and the United States Supreme Court have declined to review. See, e.g. *Betancourt v. Prudential Overall Supply* (2017) 9 Cal.App.5th 439, *cert. denied.*

By law, a representative PAGA claim is not subject to being dissected to create an individual claim, cannot be waived by way of a pre-dispute agreement, and must be *viable on a representative basis in some forum. Iskanian, supra,* 59 Cal.4th at 348, 360, 380, and 383-84; *Perez v. U-Haul Co. of California* (2016) 3 Cal.App.5th 408, 417-19; *Hernandez v. Ross Stores* (2016) 7 Cal.App.5th 171; *Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, *cert denied*; *Williams, supra*, 237 Cal.App.4th

642 at 645-47; *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1124; *Securitas Security Services USA, Inc. v. Superior Court* (2015) 234 Cal.App.4th 1109, 1118-21; *Poublon v. C.H. Robinson Co.*, (9th Cir. 2017) 846 F.3d 1251, 1263-64, 1274; *Mohamed v. Uber Techs., Inc.* (9th Cir. 2016) 836 F.3d 1102; *Sakkab v. Luxottica Retail N. Am., Inc*. (9th Cir. 2015) 803 F. 3d 425, 427-34. As such, there is no conflict between the Court of Appeal's Opinion and *Concepcion, Iskanian,* or their progeny.

D. The State is the Real Party In Interest With Respect to the PAGA Claim, Including and Not Limited to, the Underpaid Wages Portion of the Civil Penalty Available Under Labor Code Section 558.

Respondent Lawson did not "admit" that she and not the state is the real party in interest with respect to the underpaid wages portion of the civil penalty under Labor Code section 558 (Petition, p. 24). Respondent has maintained, and continues to maintain, that the state is the real party in interest.[11]

Petitioners contend that the Superior Court implicitly recognized, concluded, and accepted that Respondent Lawson and not the state is the "real party in interest" for the underpaid wages portion of the civil penalty

[11] Petitioners reference a portion of the Reporter's Transcript from the hearing of their Motion to Compel Arbitration wherein undersigned counsel for Respondent confirmed, in response to questioning by the Superior Court, that employees receive the underpaid wages portion of the civil penalty under Labor Code section 558. This does not reflect an admission that Respondent and not the State is the real party in interest.

under Labor Code section 558 (Petition, pp. 23, 26, and 27), however the Superior Court's Order does not reflect such a finding. Additionally, the Court of Appeal's Opinion makes no reference to the "real party in interest" issue, except to make reference to the phrase as a part of a block quote of *Iskanian*. (Opinion, p. 14). Nevertheless, Petitioners contend there is a legal error because the state is not the real party in interest, and Respondent Lawson is the real party in interest, with respect to the underpaid wages portion of the civil penalty under Labor Code section 558.

Here, Plaintiff does not assert an unpaid wage claim or a claim for victim specific-relief, contrary to Petitioners' contention. Instead, Plaintiff asserts a sole cause of action under PAGA, and as part of that cause of action, Plaintiff seeks civil penalties, including among other things, the civil penalty authorized by Labor Code section 558. By law, the penalty that is available under Labor Code section 558 is a *civil penalty*, even though a portion of the penalty is supposed to be in an amount that is sufficient to recover underpaid wages. See, e.g. *Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1144-1148; *Reynolds v. Bement* (2005) 36 Cal.4th 1075. Importantly, outside of PAGA, the civil penalty authorized by Labor Code section 558, like other civil penalties, is not recoverable by an individual and is only recoverable by the state.

A PAGA claim is the "legal interest of" the state's labor agency, and seeks to assert the rights of the state's labor agency and pursue the "claims

of" the state's labor agency to pursue penalties against employers. *Iskanian*, 59 Cal.4th at 380-382. A PAGA claim is representative in nature, is always brought on behalf of the state, functions as a substitute for an action brought by the government itself, and the government is always the real party in interest. *Id*. This is so even in the context of the underpaid wage civil penalty authorized by Labor Code section 558.

Immediately after articulating, what Petitioners contend is the *Iskanian* exception for "victim-specific relief," this Court stated:

> "[I]mportantly, a PAGA litigant's status as 'the proxy or agent' of the state [citation omitted] is not merely semantic; it reflects a PAGA litigant's substantive role in enforcing our labor laws on behalf of state law enforcement agencies." *Iskanian*, 59 Cal.4th at 388.

In other words, this Court already explained that the role of a plaintiff in a PAGA action, as a proxy and agent of the state, cannot be ignored on the grounds that it is mere semantics. The purpose and structure of the PAGA statute is that:

> "'In a lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency. [Citations.] . . . [Thus, a]n action to recover civil penalties 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties' [Citation.]…The government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit." *Iskanian*, 59 Cal.4th at 380-382.

For these reasons, "an employee's right to bring a PAGA action is unwaivable." *Iskanian*, 59 Cal.4th at 380.

In the absence of a PAGA action, the Labor and Workforce Development Agency would assess and collect the "underpaid wages" portion of the civil penalty under Labor Code section 558, which would then be "paid" to aggrieved employees (to the extent that they can be located). Cal. Lab. Code § 558(a)(3). The state's interest is the enforcement of the law, and enforcement deters violation of the wage and hour laws, which not only saves the state money, but, arguably, results in more revenue for the state. The state is no less a beneficiary and real party in interest when a plaintiff acts as a proxy to do the same by way of a PAGA action.[12]

This is why in *Iskanian*, it was determined that a representative action waiver is unenforceable, irrespective of whether the plaintiff retains the right to arbitrate the PAGA claim on an individual basis on behalf of himself and the state:

> "[A] prohibition of representative claims frustrates the PAGA's objectives . . . [because] a single-claimant arbitration . . . or individual penalties will not result in the penalties contemplated under the PAGA to punish and deter employer

[12] Notably, purported "individual" or "victim-specific" issues do not prevent the state from being able to recover civil penalties on behalf of aggrieved employees, that involve wages as their measure. *Arias v. Superior Court* (2009) 46 Cal.4th 969, 985-86; *Ochoa-Hernandez v. CJADERS Foods, Inc.* (N.D. Cal. Apr. 2, 2010) 2010 WL 1340777, at *4.

> practices that violate the rights of numerous employees under the Labor Code. That plaintiff and other employees might be able to bring individual claims for Labor Code violations in separate arbitrations does not serve the purpose of the PAGA[.]" *Iskanian, supra,* 59 Cal.4th at pp. 383-384.

In *Iskanian,* the California Supreme Court made clear that requiring an employee to bring a PAGA claim in his or her "individual" capacity, rather than in a "representative" capacity, would undermine the purpose of the statute. *Id*. This is no less true with respect to a request for the civil penalty available under Labor Code section 558.

E. The Court of Appeal's Opinion Is Consistent with Decisions by this Court and the California Labor Code.

Petitioners also take issue with the Court of Appeal's interpretation of Labor Code section 558 and its interplay with PAGA. However, the Court of Appeal's Opinion refrains from frustrating and obscuring, and is consistent with, the legislatively-created framework of the Labor Code and PAGA as well as decisions of this Court.

The plain language of Labor Code section 558 makes clear that the undenominated portion for underpaid wages is part-and-parcel of the civil penalty provided by that section. Cal. Lab. Code § 558(a). Furthermore, in *Reynolds v. Bement*, this Court determined that, while there was no private right of action to pursue the civil penalty under Labor Code section 558 (which includes an amount equal to underpaid wages), PAGA was an "avenue" for seeking enforcement of state labor laws and recovery of such

monetary penalties. *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1085 (abrogated on other grounds in *Martinez v. Combs* (2010) 49 Cal.4th 35). *Reynolds* also reflects this Court's construction of the plain meaning of the statute, as providing that the civil penalty specified in Labor Code section 558 consists of both an assessment of $50 for initial violations or $100 for subsequent violations and an amount sufficient to recover underpaid wages. *Reynolds*, 36 Cal.4th 1075 at 1087–1089.[13]

Iskanian also confirms that civil penalties that have wages as their measure are not the same as statutory damages and are properly pursued through a PAGA action. The Court stated that case law clarifies the distinction between civil penalties recoverable through PAGA and statutory damages, quoting language from *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, recognizing that penalties under Labor Code section 256, which provides a civil penalty equal to "wages of the employee," are civil penalties recoverable through PAGA." *Iskanian* at 381.

Thus, the Court of Appeal's Opinion is consistent with the plain language of Labor Code section 558 and prior decisions by this Court. It is also consistent with the PAGA statute, which provides the circumstances

[13] More recently, the Court has also referred to Labor Code section 558 as providing "civil penalties" in *Mendoza v. Nordstrom* (2017) 2 Cal.5th 1074, 1083.

under which an individual person *becomes* an authorized agent of the state who may pursue a claim for penalties and remedies pursuant to PAGA. See, Cal. Lab. Code § 2699.3.

F. The Court of Appeal's Opinion Can Be Reconciled With *Esparza*.

Esparza describes the nature of PAGA claims as those which "can *only* be brought by the state or its representatives, where any resulting judgment is binding on the state" and monetary penalties also go to the state. *Esparza*, 13 Cal.App.5th at 1246 (quoting *Iskanian* at 388, italics added). These conditions are met here. A "demand for 'civil penalties,' previously enforceable only by the state's labor law enforcement agencies" is "distinct from the statutory damages to which employees may be entitled in their individual capacities." *Iskanian* at 381. Outside of PAGA, only the state can pursue the underpaid wage portion of the civil penalty available under California Labor Code section 558, and the plain language of the Labor Code does reflect that the state has a role and interest with respect to funds recovered pursuant to California Labor Code section 558. See, e.g., Cal. Lab. Code § 96.7 (providing that wages or benefits collected on behalf of employees may be deposited in the General Fund).

The other portions of the *Esparza* decision which Petitioners reference as being irreconcilable with the Court of Appeal's Opinion are *dicta* that is specifically tailored to the unique circumstances of the *Esparza*

case. These unique circumstances must be considered so that the statements contained in the *Esparza* decision can be seen properly, in context. The plaintiff therein commenced his action by way of a complaint that was styled as a "Complaint for Damages" and did not actually allege a sole PAGA cause of action until the first amended complaint was filed one month later (which was also styled as a "First Amended Complaint for Damages").[14] By contrast, the complaint at hand is a complaint for enforcement and not for damages (AA I:006), seeks civil penalties (AA I:13 & 19), and only references in one place that the conduct alleged also caused injuries and damages (AA I:10). In *Esparza*, it was unclear whether the plaintiff therein was pursuing "the recovery of unpaid wages pursuant to Labor Code section 558" and the Court of Appeal remanded the matter to allow the plaintiff to unambiguously state his intention. *Esparza*, 13 Cal.App.5th at 1246-47.

The *Esparza* court did not consider or issue a holding regarding the enforceability of the arbitration agreement at issue or a representative action waiver—this is because plaintiff did not challenge the validity of or enforceability of the arbitration agreement and there was no representative

[14] A review of the briefing and citations to the record in *Esparza* indicate this. 2016 CA App. Ct. Briefs LEXIS 497, **5-6.

action waiver at issue in the matter. *Id.* at 1235, 1239.[15] Plaintiff therein also failed to raise many issues in the trial court, pertaining to contract formation and multiple factors that may have rendered the agreement unconscionable or otherwise unenforceable. *Id.* at 1237-38. As such, the very specific circumstances in *Esparza* led the court to frame its analysis on appeal as it did.

While the *Esparza* court seems to indicate that the state has no interest in enforcement in the context of a PAGA claim seeking the underpaid wages civil penalty under Labor Code section 558, because of a perceived lack of "financial interest" of the state in amounts recovered, this is mere *dicta*. It should also be noted that what is financial reality is nuanced; while on a granular level "100 percent of the 'amount sufficient to recover underpaid wages' is paid to the affected employee" (*Esparza*, 13 Cal.App.5th at 1245, the state nevertheless does have an interest in and derive a benefit from the recovery of the penalty under Labor Code section 558. See, §§ III.B.2 and III.F, *infra*.

The purpose of PAGA as an enforcement tool, and not a mere means of raising funds for the state, was reconfirmed by the Court recently in *Williams v. Superior Court*. *Williams v. Superior Court (Marshalls of CA,*

[15] See also, Appellant Petitioner's Initial Brief, 2016 CA App. Ct. Briefs LEXIS 497, **6-7.

LLC) (2017) 3 Cal. 5th 531, 538-545. The Court has noted that:

> "PAGA was intended to advance the state's public policy of affording employees workplaces free of Labor Code violations, notwithstanding the inability of state agencies to monitor every employer or industry. [citation] By expanding the universe of those who might enforce the law, and the sanctions violators might be subject to, the Legislature sought to remediate present violations and deter future ones." *Id.* at 546 (citing to *Iskanian* at 379 and *Arias v. Superior Court* (2009) 46 Cal.4th 969, 980-981).
>
> "Representative PAGA actions directly enforce *the state's* interest in penalizing and deterring employers who violate California's labor laws" *Id.* at 548 (citing to *Iskanian* at 387 and *Arias* at 980-981) (internal quotation omitted) (emphasis in original).

Pursuit of the civil penalty authorized by Labor Code section 558 on a representative basis through a PAGA action is in line with the PAGA's objectives of assisting the state with, and expanding the universe of, labor law enforcement, remedying underenforcement, and directly enforcing the state's interest in remediating present violations and penalizing and deterring future violations of California's labor laws by employers. *Williams (Marshalls of CA, LLC)*, *supra*, at 538, 542-43, 546, and 548.

As such, it is clear that by law, a PAGA claim must be viable in *some forum* on a representative basis, and that pursuit of the civil penalty authorized by Labor Code section 558 is no exception to this rule.

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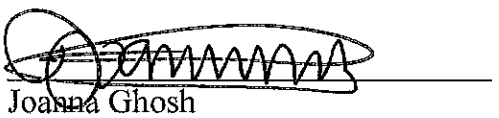
IV. CONCLUSION

For all of the reasons discussed herein, Petitioners do not demonstrate that there is any irreconcilable conflict of law, important question of law, or error in the Court of Appeal's decision, that warrants this Court's review. The Petition fails to establish any grounds for review and this Court should deny it in its entirety. Should this Court determine that there is good cause for review, the Court is respectfully requested not to order depublication of the Court of Appeal's Opinion pending review.

Dated: February 15, 2018

Respectfully submitted,

Lawyers *for* Justice, PC

By: 

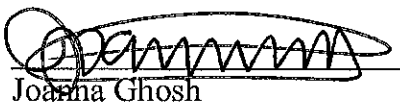
Joanna Ghosh
Attorneys for Plaintiff and Real Party In Interest KALETHIA LAWSON

CERTIFICATION OF WORD COUNT

(Cal. Rules of Court, rules 8.204(c)(1), 8.504)

I, the undersigned counsel, certify that this brief consists of 7,429 words exclusive of those portions of the brief specified in California Rules of Court, rule 8.504(d), relying on the word count of the Microsoft Word 2016 computer program used to prepare the brief.

Dated: February 15, 2018 Lawyers *for* Justice, PC

By: 

Joanna Ghosh
Attorneys for Plaintiff and Real Party In Interest KALETHIA LAWSON

EXHIBIT 1

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 09/30/2016 TIME: 01:30:00 PM DEPT: C-66

JUDICIAL OFFICER PRESIDING: Joel M. Pressman
CLERK: Lori Urie
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2016-00005578-CU-OE-CTL** CASE INIT.DATE: 02/19/2016
CASE TITLE: **Lawson vs. California Bank & Trust [IMAGED]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Other employment

APPEARANCES

The Court, having taken the above-entitled matter under submission on 09/30/16 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Defendants California Bank & Trust and Zions Bancorporation's Motion to Compel Plaintiff to Submit Her Claim for "Victim-Specific Relief" to Individual Arbitration and the Stay this Action is GRANTED.

This is a PAGA-only complaint. Plaintiff is seeking to recover civil penalties against Defendants, *including unpaid wages and premium wages per California Labor Code section 558 against Defendants*.

Based on Iskanian v. CLS Transp. Los Angeles, LLC (2015) 59 Cal. 4th 348, PAGA claims – at least those that seek to recover civil penalties where a portion goes to the state - are exempt from coverage by the FAA. The unique issue in this case is whether the a non-pre-empted PAGA claim includes claims made under Labor Code Section 558(a)(1), which allows recovery of "an amount sufficient to recover underpaid wages" in addition to statutory civil penalties. (Defendants, using language adopted from Iskanian, refers to this as "victim specific relief.") Under Thurman v. Bayshore Transit Management, Inc. (2012) 203 Cal.App.4th 1112, 1148, "an aggrieved employed acting as the LWDA's proxy or agent by bringing a PAGA action may likewise recover underpaid wages as a civil penalty under section 558. The Court in Thurman also held, consistent with the express requirements of Labor Code 558(a)(3), that the "wages recovered pursuant to this section shall be paid to the affected employee," and not the state. (Hence, the phrase "victim specific relief.") Thurman did not decide the breadth of the FAA preemption. Iskanian did not reference Labor Code 558 directly and the Court recognized that it reached its no-FAA preemption holding as to the PAGA claim and remedy on the theory that all the claims at issue were requests for civil penalties and payable to the state (subject to a 25% bounty for the named plaintiff and/or named plaintiff and aggrieved co-workers). The Court's rationale was that the PAGA-penalty case was a type of qui tam action.

A significant part of the relief plaintiff is seeking in this case is under 558(a) and (3) which would not meet the traditional definition of a true qui tam action. "Traditionally, the requirements for enforcement by a citizen in a qui tam action have been (1) that the statute exacts a penalty; (2) that part of the penalty

be paid to the informer; and (3) that, in some way, the informer be authorized to bring suit to recover the penalty." Iskanian, supra, 59 Cal.4th at 382 citing Sanders v. Pacific Gas & Elec. Co. (1975) 53 Cal.App.3d 661, 671. The "penalty" under 558(a)(3) is paid entirely to the employee – not the state.

Further, the Court in Iskanian stated: "Our opinion today would not permit a state to circumvent the FAA by, for example, deputizing employee A to bring a suit for the individual damages claims of employees B, C, and D. This pursuit of victim-specific relief by a party to an arbitration agreement on behalf of other parties to an arbitration agreement would be tantamount to a private class action, whatever the designation given by the Legislature. Under Concepcion, such an action could not be maintained in the face of a class waiver. Here, importantly, a PAGA litigant's status as "the proxy or agent" of the state [citation omitted] is not merely semantic; it reflects a PAGA litigant's substantive role in enforcing our labor laws on behalf of state law enforcement agencies. Our FAA holding applies specifically to a state law rule barring pre-dispute waiver of an employee's right to bring an action that can only be brought by the state or its representatives, where any resulting judgment is binding on the state and any monetary penalties largely go to state coffers." Iskanian, supra 59 Cal. 4th at 387–88. In this case, the monetary "penalty" for the violation of Labor Code 558(a)(3) is going to the employees – not the state. Thurman holds: "wages recovered pursuant to Labor Code 558(a)(3) shall be paid to the affected employee." Therefore, it appears that claims brought for recovery under Labor Code 558(a)(3) and qualitatively different from PAGA claims brought where civil penalties go to the state would still be arbitrable.

The Court finds that plaintiff agreed to be bound by an arbitration agreement. The first paragraph of the Arbitration Agreement at issue specifies that all employment-related claims are subject to binding arbitration:

"Any legal controversy or claim arising out of your employment with the Company or with Zions or Zions Entities, which is not otherwise governed by an arbitration provision, and that cannot be satisfactorily resolved through negotiation or mediation, shall be resolved, upon election by you or the Company, Zions or Zions Entities, by binding arbitration pursuant to this arbitration provision and the code of procedures of the American Arbitration Association (AAA)."

The Arbitration Agreement also contains an explicit class action waiver:

"[C]laims by different claimants against the Company, Zions and Zions Entities or by the Company against different employees, former employees, or applicants, may not be combined in a single arbitration. Unless specific state law states otherwise, no arbitration can be brought as a class action (in which a claimant seeks to represent the legal interests of or obtain relief for a larger group), and the parties recognize that the arbitrator has no authority to hear an arbitration either against or on behalf of a class."
(Exs. 3 and 6)

The Court finds evidence that the Arbitration Agreement was presented to Lawson as part of the Employee Handbook on two occasions. First, it was presented to Lawson when she was first hired, and again as part of an update to the Employee Handbook. (Gilbert Decl. ¶¶ 5, 8; Exs. 3 and 6.) Both the 2013 and 2014 handbook acknowledgment forms – referred to as the Statement Of Compliance With The Employee Handbook – specifically referred to the mandatory arbitration policy in bold, uppercase text that is readily apparent to the employee.

Lawson testified at her deposition that she acknowledged her agreement to be bound by arbitration. (Ex. 19, pp. 275; Supp. Sinclair Decl. paragraph 2, Ex. 13) But the fact that Lawson chose not the read the clause at issue is not determinative. An arbitration clause within a contract may be binding on a party even if the party never actually read the clause. Harris .v TAP Worldwide, LLC (2016) 248 Cal.App.4th 373, 383.

The Court does not find that the terms of the arbitration agreement are uncertain. The Statement of Compliance made clear that the arbitration agreement could not be modified, except upon notice to the employee. (Ex. 6, p.35)

Nor can the Court find that the agreement is procedurally or substantively unconscionable. As stated above, the Court is bound to follow California Supreme Court law on the issue of class action waivers. Any claim that the National Labor Relations Act precludes the enforcement of the Agreement has been rejected. Iskanian, supra, 59 Cal.4th at 366–374. (Declaring class action waivers in arbitration agreements are enforceable and rejecting argument that the National Labor Relation Act requires a contrary result); Richards v. Ernst & Young, LLP, 744 F.3d 1072, 1075 n. 3 (9th Cir.2013); Ortiz v. Hobby Lobby Stores, Inc., 52 F.Supp.3d 1070, 1082–83 (E.D.Cal.2014); Miguel v. JPMorgan Chase Bank, N.A., 2013 WL 452418, at *9 (C.D.Cal. Feb. 5, 2013). The holding of Morris v. Ernst & Young, LLP (2016) may be is not binding. People v. Camacho (2000) 23 Cal.4th 824, 830, fn.1. This Court is bound by the California Supreme Court opinion of Iskanian, supra, 59 Cal.4th 348. Therein, the Court held that the NLRA does not override the FAA mandate that arbitration agreements be enforced according to their terms. Id. at 373-374.

The Court also does not find that the attorney fees and costs provisions in the arbitration agreement are unconscionable. The agreement requires $100 to initiate arbitration – less than the cost of a civil action in Court. Costs and fees are determined as part of the award and requires the arbitrator to apply California law in awarding them.

The Court also does not find that defendants waived arbitration by conducting discovery. Lawson agreed in writing prior to the deposition that her deposition would not constitute a waiver of arbitration. (Supp. Sinclair Decl. paragraph 3) Defendant ZB has served one request for production, which the Court finds is not prejudicial to constitute a waiver of the right to arbitrate and does not impair plaintiff's right to a fair hearing in arbitration.

Based on this ruling, the Court bifurcates this issue of unpaid wages and premium wages per California Labor Code section 558 against Defendants and compels that issue to arbitration. This is a representative action. PAGA, by its very nature, is a representative statute. Therefore, the Court sends the claim under Labor Code Section 558 to arbitration as a representative action.

The civil penalties aspect of this case (traditional qui tam action) is stayed for a period of 90 days.

The Status Conference (Civil) is scheduled for 01/13/2017 at 10:00AM before Judge Joel M. Pressman.

The Civil Case Management Conference set for 11/18/16 at 08:30 am is vacated.

The Motion Hearing (Civil) set for 11/04/16 at 10:30 am is vacated.

Judge Joel M. Pressman

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 410 Arden Avenue, Suite 203, Glendale, California 91203.

On February 15, 2018, I served the document(s) described as follows: **ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

James L. Morris
Brian C. Sinclair
Gerard M. Mooney
611 Anton Boulevard, Suite 1400
Costa Mesa, California 92626-1931

Attorneys for Petitioners and Defendants
ZB, N.A. and ZIONSBANCORPORATION

(service pursuant to Cal. R. Ct. 8.25(a))

[X] **AN ELECTRONIC COPY BY TRUEFILING ELECTRONIC E-SERVICE SYSTEM:**
I transmitted via the Internet a true copy(s) of the above-entitled document(s) through the California Supreme Court's Mandatory Electronic Filing System via the TrueFiling Portal and concurrently caused the above-entitled document(s) to be sent to the recipients listed above pursuant to the E-Service List maintained by and as it exists on that database. This will constitute service of the above-listed document(s).

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

(service pursuant to Cal. R. Ct. 8.29(c))

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fees fully pre-paid for Next Day Golden State Overnight (GSO) delivery, and caused it to be delivered to a Golden State Overnight (GSO) drop-off box before 8:00 p.m. on the stated date.

Clerk of the Court
California Court of Appeal, Fourth Appellate District, Division 1
750 B Street, Suite 300
San Diego, California 92101

(service pursuant to Cal. R. Ct. 8.500(f)(1))

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Clerk of the Court
Superior Court of California, County of San Diego
330 West Broadway
San Diego, California 92101

(service pursuant to Cal. R. Ct. 8.500(f)(1))

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

(submission of unbound copy)

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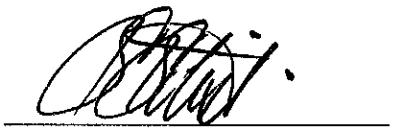
[X] STATE

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

Executed on February 15, 2018, at Glendale, California.



Suzana Solis

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **LAWSON v. ZB, N.A.**
Case Number: **S246711**
Lower Court Case Number: **D071279**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **joanna@lfjpc.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
ANSWER TO PETITION FOR REVIEW (WITH ONE TIME RESPONSIVE FILING FEE)	Answer to Petition for Review

Service Recipients:

Person Served	Email Address	Type	Date / Time
Brian Sinclair Rutan & Tucker LLP 180145	bsinclair@rutan.com	e-Service	2/15/2018 6:23:53 PM
Edwin Aiwazian Lawyers for Justice, PC 00232943	edwin@lfjpc.com	e-Service	2/15/2018 6:23:53 PM
Joanna Ghosh LAWYERS for JUSTICE, PC 272479	joanna@lfjpc.com	e-Service	2/15/2018 6:23:53 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

--
Date

/s/Joanna Ghosh
Signature

Ghosh, Joanna (272479)
Last Name, First Name (PNum)

LAWYERS for JUSTICE, PC
Law Firm