No. S246911

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JUSTIN KIM,
Plaintiff and Appellant

vs.

REINS INTERNATIONAL CALIFORNIA, INC.
Defendant and Respondent

Appeal Upon a Decision of the Court of Appeal
Second Appellate District, Division Four
Case No. B278642

Appeal from a Judgment of the Superior Court of Los Angeles County
Case No. BC539194

Honorable Kenneth R. Freeman, Judge Presiding

ANSWER TO PETITION FOR REVIEW

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, Rule 8.208)

Under California Rules of Court Rule 8.208, Defendant Reins International California, Inc. certifies that Reins International USA Co. Ltd. owns 100% of Defendant Reins International California, Inc. There is no other person that has a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in Rule 8.208(e)(2).

Dated: February 26, 2018

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In a reasoned and unanimous decision, the Court of Appeal found Petitioner Justin Kim ("Kim") lacked standing to pursue a representative claim for penalties under the Private Attorneys General Act ("PAGA") after he dismissed his underlying Labor Code claims with prejudice. In its decision, the court carefully considered PAGA's language, analyzed its legislative history and the relevant authority. The Court of Appeal's decision reaffirms the basic principle that a plaintiff must have standing to pursue representative claims under PAGA. This foundational principle is basic and well-settled.

Kim's Petition for Review ("Petition") raises the same flawed arguments he advanced before the Court of Appeal. Kim fails to explain why his case meets the requirements for review under California Rule of Court 8.500(b)(1). It does not. Under Rule 8.500(b)(1), this Court may review the Court of Appeal's decision "[w]hen necessary to secure uniformity of decision or settle an important question of law." Neither ground exists.

First, the Court of Appeal's decision does not raise an important question of law for this Court to settle because it is already well-established that a plaintiff must have standing to sue. (Code Civ. Proc., § 367.) Moreover, this Court has already established that "PAGA imposes a standing requirement." (*Williams v. Superior Court* (2017) 3 Cal.5th 431,

558.) Only "aggrieved employees" have standing to pursue PAGA claims. (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal. 4th 993, 1005.) The reason is that PAGA "does not create ... any other substantive rights." (*Id.* at 1003.) It is simply a procedural statute that only permits "an '***aggrieved employee***'...." to sue for *underlying* Labor Code violations. (*Id.* at 1004 [emphasis added].) Once Kim dismissed his underlying Labor Code claims *with prejudice*, those claims were conclusively settled and resolved. As a consequence, the Court of Appeal correctly held Kim could no longer claim to be "aggrieved" under PAGA and he lacked standing to prosecute his PAGA claims. The Court of Appeal's holding is unremarkable. It is consistent with well-established standing principles, PAGA's legislative history, and this Court's own precedent. The Court does not need to grant review to reaffirm these already settled principles.

Second, review is not necessary to secure uniformity with other decisions. The Court of Appeal's decision does not create a conflict between appellate districts. Every court that has addressed the issue has held a plaintiff cannot maintain a PAGA claim once his or her individual claims were resolved or barred. Kim's Petition does not cite a single case that has reached a different result. There is none.

For these reasons and those that follow, the Court should deny Kim's Petition.

II. FACTUAL AND PROCEDURAL HISTORY

A. The Court Dismissed Class Claims, Ordered Kim's Individual Claims to Arbitration and Stayed His PAGA Claims.

Kim is a former employee of Reins. On March 13, 2014, he filed a putative class action lawsuit against Reins. The operative complaint alleged multiple violations of the Labor Code and claims for violations of California's Business and Professions Code ("UCL claim"). Kim also pursued a representative action for civil penalties under PAGA. (1 AA 45-60.)[1]

While employed, Kim agreed to arbitrate the claims at issue with Reins on an individual basis. (1 AA 86-90.) Reins thus moved to compel arbitration of his individual claims, dismiss class claims and stay the PAGA claims pending arbitration. (1 AA 63-76.) On January 16, 2015, the trial court issued an order dismissing class claims and compelling arbitration as to all claims except the PAGA claim and UCL claim for injunctive relief. It stayed the PAGA claim pending arbitration. (1 AA 247-262.)

B. Kim Resolved His Individual Labor Code Claims in Their Entirety and Dismissed Them with Prejudice.

The case then proceeded to individual arbitration of Kim's Labor Code claims. (*See* 2 AA 282-283.) During arbitration, Reins offered Kim a statutory offer to compromise under Code of Civil Procedure section 998

[1] "AA" refers to Kim's Appendix of Record filed in the Court of Appeal. The citation format refers to the volume and page number in the Appendix.

("998 Offer") which required dismissal of his individual claims with prejudice. Kim accepted Reins' 998 Offer. (2 AA 345-347.) As a result, Kim requested the trial court dismiss all of his individual causes of action (including his Labor Code and UCL claims), *with prejudice*. (2 AA 285 at ¶ 2.) The request for dismissal stated "the only cause of action remaining in the [FAC] is Cause of Action Number Seven for PAGA penalties." (2 AA 287 at ¶ 12.)

On November 9, 2015, the Court issued an order dismissing Kim's individual claims with prejudice and dismissing Kim's putative class claims without prejudice. (2 AA 395.)

C. The Trial Court Granted Reins' Motion for Summary Adjudication on Kim's PAGA Claim

On June 1, 2016, Reins filed a motion for summary adjudication on Kim's PAGA action ("Motion"). (2 AA 313 at ¶ 12.) On August 16, 2016, the trial court ruled on Reins' Motion. It concluded Kim did not have standing to pursue his PAGA claims after dismissing his individual Labor Code claims with prejudice. (2 AA 441-445.) It explained that "[Kim], once he dismissed his claims with prejudice pursuant to the §998 offer ... no longer is aggrieved." (2 AA 444.) Ultimately, on October 3, 2016, the trial court entered judgment in Reins' favor. (2 AA 446-447.)

D. The Court of Appeal Unanimously Affirmed the Trial Court's Order.

Kim appealed the trial court's order and judgment. (2 AA 462.) On

December 29, 2017, the Court of Appeal issued a unanimous decision affirming the trial court's ruling. The Court of Appeal specified that the sole issue presented was: "After an employee plaintiff has settled and dismissed individual Labor Code causes of action against the employer defendant, does the plaintiff remain an 'aggrieved employee' with standing to maintain a PAGA cause of action?" (*Kim v. Reins Int'l California, Inc.*, (2017) 18 Cal. App. 5th 1052, 1056.)

In affirming, the Court of Appeal examined the applicable authority and PAGA's legislative history. It explained: "PAGA was not intended to allow an action to be prosecuted by any person who did not have a grievance against his or her employer for Labor Code violations." (*Id.* at 1058.). The court found that "by accepting the settlement and dismissing his individual claims against Reins with prejudice, Kim essentially acknowledged that he no longer maintained any viable Labor Code-based claims against Reins." (*Ibid.*) Consequently, after he dismissed his claims with prejudice, Kim no longer met the definition of "aggrieved employee." He thus lacked standing to maintain a PAGA action. (*Id.* at 1058-59.)

Kim sought review from this Court on February 6, 2018.

III. THE COURT SHOULD NOT GRANT REVIEW BECAUSE THIS ACTION DOES NOT MEET THE REQUIREMENTS OF CALIFORNIA RULE 8-500(B)(1).

California Rule of Court 8.500(b)(1) limits the type of case appropriate for review. It provides: "The Supreme Court may order review

of a Court of Appeal decision ... [w]hen necessary to secure uniformity of decision or settle an important question of law." (*Id.*) Supreme Court review is limited. Review is intended to rectify disputes between the courts of appeal or resolve a pressing issue of public importance. It is *not* intended merely to review the merits of the decision of the Court of Appeal. *See* 9 Witkin, CAL. PROC. 5th (2008) Appeal, § 915, p. 976 (no right to Supreme Court review "on the merits of the decision alone"); *People v. Davis*, 147 Cal. 346, 348 (1907).

Kim's petition does not meet this limited standard.

A. Review Is Not Needed To Settle an Important Question of Law.

Kim contends that the Court of Appeal's decision raises important questions about PAGA's standing requirement. He frames the issue as "whether PAGA's standing provision prevents an employee from continuing to serve as a PAGA representative once his individual claims for Labor Code violations are redressed." (Petition at 11.) The Court of Appeal held that it did. But its decision was neither earth-shattering nor odd, and does not need to be "settled" by this Court. The decision applied bedrock standing law to PAGA, which indisputably has a standing requirement.

It is well-established that a plaintiff must have standing to sue. (Code Civ. Proc., § 367 ["Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute"].) It is

equally clear that once a plaintiff dismisses claims with prejudice, those claims are barred from further prosecution. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal. 4th 788, 793 ["dismissal with prejudice is the equivalent of a final judgment on the merits, barring the entire cause of action"].)

These principles have been applied in the class and representative action context. For example, in *Watkins v. Wachovia Corporation* (2009) 172 Cal. App. 4th 1576, plaintiff voluntarily settled her wage claim. The Court of Appeal found that due to her settlement, she "no longer ha[d] standing to pursue [her] appeal." (*Id.* at 1581.) It explained:

> Watkins assumes, however, that her 'class claim' for unpaid overtime wages has independent vitality and can continue after she has settled her 'individual claim' for the same wages. The argument reflects a misunderstanding of the nature of a class action.... '[T]he right of a litigant to employ [class action procedure] is a procedural right only, ancillary to the litigation of substantive claims. Should these substantive claims become moot ..., by settlement of all personal claims for example, the court retains no jurisdiction over the controversy of the individual plaintiffs.'

(*Id.* at 1588-89 [emphasis in original] [internal citations omitted].)

These principles of law are not altered simply because Kim alleged a PAGA action. Under Supreme Court precedent, PAGA has a standing requirement. (*Williams, supra,* 3 Cal. 5th at 558 ["PAGA imposes a standing requirement; to bring an action, one must have suffered harm."]) This high Court has held PAGA confers no "property rights or any other substantive rights." (*Amalgamated Transit Union, supra*, 46 Cal. 4th at

1003.) Like other class or representative vehicles, it is "simply a *procedural statute* allowing an *aggrieved employee* to recover civil penalties" for underlying Labor Code violations. (*Id.* [emphasis added].) The fact that an employee must be "aggrieved" to have standing to sue under PAGA is clearly established by PAGA's Legislative History and codified in the statute. (Lab. Code § 2699(c); Reins' Renewed Motion for Judicial Notice, Ex. C [Assem. Com. on Judiciary, Rep. on Sen. Bill No. 796 [2003-2004 Reg. Sess.] as amended May 12, 2003, p. 15].)

Applying these well-settled standing principles, the Court of Appeal found that "by accepting the settlement and dismissing his individual claims against Reins with prejudice, Kim essentially acknowledged that he no longer maintained any viable Labor Code-based claims against Reins." (*Kim, supra*, 18 Cal. App. 5th at 1058.) Consequently, Kim no longer met the definition of "aggrieved employee" and lacked standing to maintain a PAGA action against Reins.

There is nothing surprising about the Court of Appeal's holding. Kim characterizes the Court of Appeal's opinion as a doomsday decision that "could spell the end of litigation under [PAGA]." (Petition at 7.) Not so. The Court of Appeal's holding was "confined to the specific circumstances at issue in this case: Kim asserted both individual Labor Code claims and a PAGA claim in the same lawsuit, and he voluntarily chose to settle and dismiss his individual Labor Code claims with

prejudice." (*Kim, supra*, 18 Cal. App. 5th at 1059.) The Court of Appeal made clear in its ruling, Kim's voluntary dismissal of his Labor Code claims impacts *his PAGA standing only*. (*Id.*) It explained: "Kim's dismissal affects only *Kim's* standing as PAGA representative—it does not reflect on the veracity of the PAGA allegations asserted in Kim's complaint, nor the ability of any aggrieved employee in a position substantially similar to Kim's to assert such PAGA claims." (*Id.*)

In short, upholding PAGA's standing requirement will not end PAGA litigation as we know it. People who have not settled and dismissed their individual Labor Code claims can still bring *representative* PAGA claims. They can seek penalties on behalf of "similarly aggrieved" people who have not settled their claims. This is precisely as it should be for a representative claim. PAGA does not allow people who have no claim to seek penalties on behalf of those that do; nor does it allow those that have a viable claim to seek penalties on behalf of those whose claims are barred.[2]

For these reasons, this case does not raise an important legal question that warrants this Court's review.

B. Review is Not Needed to Secure Unanimity of Decisions Because the Court of Appeal's Decision is in Accord with Every Court that has Addressed this Issue.

The Court of Appeal's decision is consistent with prior judicial

[2] In *Villacres v. ABM Industries, Inc.* (2010) 189 Cal. App. 4th 562, the Court of Appeal held a class action settlement of Labor Code claims barred a later PAGA claim based on the same or similar Labor Code violations.

decisions and creates no conflict between courts. Essentially, Kim argues that once an employee alleges he or she was aggrieved, he or she remains an "aggrieved employee" in perpetuity under PAGA regardless of whether the individual claim is legally barred or facially invalid. But every court that has addressed the issue has held that an employee is not "aggrieved" and thus lacks standing to sue under PAGA when substantive or procedural defenses exist to the underlying Labor Code claims:

- In *Villacres*, *supra*, 189 Cal. App. 4th at 569, 587, an employee was part of a putative class that resolved all Labor Code claims but did not explicitly resolve PAGA claims. The class settlement was approved and funded. (*Id.* at 569.) Plaintiff then brought a PAGA action against the same employer based on the same underlying violations of the Labor Code. (*Id.* at 569, 578.) The trial court granted summary judgment in favor of employer, finding plaintiff was barred from seeking PAGA claims due to the resolution of claims in the prior lawsuit. (*Id.* at 569.) The Court of Appeal affirmed. (*Id.*)

- In *Holak v. K Mart Corp.* (E.D. Cal. May 19, 2015) No. 1:12-cv-00304 AWI-MJS, 2015 WL 2384895, at *4-6, *motion to certify appeal denied* (E.D. Cal. Aug. 11, 2015) 2015 WL 4756000, plaintiff's PAGA claim was dismissed because the underlying Labor Code claims were time-barred. That court *did not* find that the PAGA claims could proceed because Holak was once the victim of Labor Code violations, no matter

how far back the violations occurred. Instead, it found that Holak was "not an aggrieved employee ...because none of the violations ... were committed against her" within the limitations period. *Id.* at *6. Holak thus "lack[ed] standing" to pursue a PAGA claim. *Id.* at *4.

- In *Wentz v. Taco Bell Corporation* (E.D. Cal. Dec. 4, 2012) No. 12-cv-1813 LJO DLB, 2012 WL 6021367, at *5, the court dismissed plaintiff's PAGA claim because the operative complaint alleged no underlying Labor Code violations. The court agreed with defendant's argument that "a bare PAGA claim fails in the absence of underlying wage and hour and California Labor Code claims." *Id.*

- In *Pinder v. Employment Dev. Department* (E.D. Cal. Jan. 5, 2017) No. 2:13-CV-00817 TLN-DB, 2017 WL 56863, at *22, the court determined defendant was entitled to judgment on plaintiff's PAGA claim because the underlying Labor Code claims "failed as a matter of law."

- In *Boon v. Canon Bus. Solutions, Incorporated* (C.D. Cal. May 21, 2012) No. 11-cv-08206 R (CWX), 2012 WL 12848589, at *1, *rev'd and remanded on other grounds* (9th Cir. 2015) 592 F. App'x 631, the court held "[w]here the Court has ruled against the plaintiff on all of his underlying claims for violation of California Labor Code, he is not an aggrieved employee and therefore may not bring a PAGA claim on behalf of himself or others."

- In *Gofron v. Picsel Technologies, Incorporated* (N.D. Cal. 2011) 804 F. Supp. 2d 1030, 1043, the court held that "[b]ecause the Court has granted summary judgment against [plaintiff] on her underlying claims for violations of the California Labor Code, she does not meet the definition of an 'aggrieved employee.' Accordingly, [defendants'] motion for summary judgment on [plaintiff's PAGA claim] is granted."

- In *Molina v. Dollar Tree Stores, Incorporated* (C.D. Cal. May 19, 2014), No. 12-cv-01428- BRO FFMX, 2014 WL 2048171, at *14, the court held since plaintiff "did not prove at trial he was an aggrieved employee ... [he] may not pursue a representative action under PAGA."

These decisions are uniform. They do not differentiate *why* the plaintiff's Labor Code claims are barred. So long as the underlying Labor Code claims cannot be advanced—whether for substantive or procedural reasons—the courts consistently find plaintiffs lack standing to pursue PAGA claims.

The Court of Appeal's decision is in line with these cases. It is consistent with general principles of standing law. The court ruled:

> [B]y accepting the settlement and dismissing his individual claims against Reins with prejudice, Kim essentially acknowledged that he no longer maintained any viable Labor Code-based claims against Reins. As a result, following the dismissal with prejudice Kim no longer met the definition of "aggrieved employee" under PAGA. Kim therefore did not have standing to maintain a PAGA action against Reins....

(*Kim, supra*, 18 Cal. App. 5th at 1058–1059.)

Kim has not cited to a single case where a court has reached a different conclusion.[3] Thus, this Court's review is not necessary to resolve any conflicting authorities.

(1) Kim Cannot Create "Inconsistencies within PAGA" by Misreading Prior Authorities.

In the absence of cases that conflict with the Court of Appeal's decision, Kim claims that the decision results in "inconsistencies" with other PAGA decisions. (Petition at 8.) Kim claims that the Court of Appeal's ruling is inconsistent with the rulings in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal. 4th 348, *Williams, supra*, 3 Cal. 5th 531, *Lopez v. Friant & Associates, LLC* (2017) 15 Cal. App. 5th 773, *review denied* (Jan. 10, 2018), and *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal. 4th 592, 595. But a closer review of these decisions reveals that they are inapposite, and do not create any inconsistency.

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[3] The other "standing" provisions Kim cites are inapposite. For example, Kim references the federal False Claims Act ("FCA"), but the FCA expressly confers standing based on the United States' alleged injury, even though the plaintiff has suffered no injury in fact. (*Vermont Agency of Nat. Resources v. United States ex rel. Stevens* (2000) 529 U.S. 765, 773-74.) PAGA, on the other hand, has an aggrieved employee requirement. Similarly, Kim references *Wallace v. GEICO General Insurance Co.* (2010) 183 Cal. App. 4th 1390, but *Wallace* and other so-called "pick off" cases are concerned with the public policy implications of allowing a defendant "to defeat class status by forcing an *involuntary settlement*." (emphasis added). However, as noted in *Watkins,* 172 Cal. App. 4th at 1591, "[t]here are no public policy interests implicated by a settlement *voluntarily* accepted," and "it is illogical to import the law governing 'pick off' cases into the context of a *voluntary settlement*." (emphasis added). The "pick off" cases have no bearing on this case because Kim voluntarily agreed to settle his claims when he was represented by counsel.

Iskanian v. CLS Transp. Los Angeles, LLC

Just as he did before the Court of Appeal, Kim incorrectly claims the Court of Appeal's decision "flouts" and "creates an end around *Iskanian*." In *Iskanian*, this Court concluded that a *pre-dispute* arbitration agreement "requiring an employee *as a condition of employment* to give up the right to bring representative PAGA actions in any forum is contrary to public policy." (*Iskanian, supra,* 59 Cal. 4th at 360 [emphasis added].) The Court explained that such a pre-dispute agreement is unenforceable because it "has as its 'object ... indirectly, to exempt [the employer] from responsibility for [its] own ... violation of law.'" (*Id.* at 383 [quoting Civ. Code, § 1668; brackets in original].)

Iskanian is inapplicable. It concerned the pre-dispute waiver of PAGA claims. Kim dismissed his individual Labor Code claims *after* this dispute arose, so the issue of pre-dispute waivers raised in *Iskanian* was not even implicated. Unlike pre-dispute waivers, the "object" of Reins' post-dispute 998 Offer was to resolve *disputed* claims. Reins paid Kim to resolve the matter so it cannot be argued that the object of the 998 Offer was to exempt Reins from violations of the law. Kim accepted the 998 Offer while represented by counsel. Kim's post-dispute dismissal of claims does not implicate the same public policy concerns raised in *Iskanian.*[4]

[4] In *Iskanian*, this Court clarified that a post-dispute decision not to pursue claims is outside the scope of its holding. (See *Iskanian, supra*, 59 Cal. 4th

Furthermore, as the Court of Appeal correctly noted, "Kim's lack of PAGA standing is unrelated to the court's order to arbitrate the individual claims." (*Kim*, *supra*, 18 Cal. App. 5th at 1059.) It explained the result would have been the same "in the absence of any arbitration agreement." (*Ibid.*) Either way, once Kim settled and dismissed his individual claims, he lacked standing to pursue PAGA claims. For these reasons, the Court of Appeal's ruling is not inconsistent with *Iskanian*.

Williams v. Superior Court

Kim also relies on this Court's ruling in *Williams*, *supra*, 3 Cal. 5th 531. He claims that under *Williams*, merely alleging harm under PAGA is sufficient to confer standing at the outset of a case. (3 Cal. 5th at 546.) Kim argues the Court of Appeal's opinion is inconsistent to the extent it "imposes an additional requirement" that a PAGA representative *maintain* standing to continue the lawsuit. (Petition at 12.)

Williams is also inapposite. The question in *Williams* was "the scope of discovery available in PAGA actions." Defendant argued discovery "should be limited until after a plaintiff has supplied proof of alleged violations." (*Williams*, 3 Cal. 5th at 545.) The Court disagreed. It explained

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at 383 ["Of course, employees are free to choose whether or not to bring PAGA actions when they are aware of Labor Code violations. (See *Armendariz, supra,* 24 Cal. 4th at 103, fn. 8 [*waivers freely made after a dispute has arisen are not necessarily contrary to public policy*].) But it is contrary to public policy for an employment agreement to eliminate this choice altogether by requiring employees to waive the right to bring a PAGA action *before any dispute arises*."] [emphasis added].)

that PAGA's standing provision does not evidence "a legislative intent to impose a heightened preliminary proof requirement." (*Id.* at 546.)

This case is not about a preliminary proof requirement for PAGA discovery. Kim's underlying Labor Code claims were resolved and dismissed with prejudice. Consistent with *Williams*, the Court of Appeal stated that by alleging he was a "person against whom Labor Code violations were committed...it appears that Kim was an aggrieved employee at the time his complaint was filed." (*Kim, supra*, 18 Cal. App. 5th 1052, 1058.) But just because these allegations were sufficient at the outset does not mean Kim was forever imbued with standing. "Each element of standing must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., *with the manner and degree of evidence required at the successive stages of the litigation.*" (*Kwikset Corp. v. Superior Court* (2011) 51 Cal. 4th 310, 327 [internal citations omitted] [emphasis added].) Kim could not maintain standing once his underlying claims were dismissed. *Williams* does not address nor contradict the Court of Appeal's holding that a plaintiff may lose standing once he or she dismisses individual Labor Code claims with prejudice.

Lu v. Hawaiian Gardens Casino, Inc.

In *Lu, supra,* 50 Cal. 4th at 603-04, this Court held that Labor Code Section 351, which prohibits employers from taking employee gratuities, does not create a private right of action. However, Kim contends Section

351 can give rise to an action under PAGA, since it is one of the Labor Code provisions enumerated under Labor Code Section 2699.5. Kim argues this creates an inconsistency between the Court of Appeal's decision and the "aggrieved employee" requirement. (Petition at 15-16.)

This is another straw man argument. *Lu* simply stated there was no *private* right of action under Labor Code Section 351. It held this claim could only be pursued by the Labor Commissioner. Such recovery is allowed under PAGA because PAGA allows the employee to step *into the shoes* of the LWDA to recover civil penalties on *behalf of the state* for underlying Labor Code violations. (*See Iskanian, supra*, 59 Cal. 4th at 382.)

Thus, Kim is conflating two concepts. The concept at issue here is whether an employee remains "aggrieved" under PAGA after settling and dismissing his or her individual Labor Code claims. The concept in *Lu* was whether individuals have a *private right of action* for an individual claim under the Labor Code, separate and apart from PAGA. These are distinct inquiries. *Lu's* holding with respect to a private right of action has no bearing on PAGA, nor its aggrieved employee requirement.

Lopez v. Friant & Associates, LLC

Kim claims that under *Lopez* "a PAGA claim for wage statement violations can proceed without the evidence necessary to prove an individual violation." (Petition at 16.) He further argues that *Lopez* stands for the proposition that "an employee may pursue a PAGA action for civil

penalties even if he lacks proof of the elements necessary to proceed on his own right...." (*Id.*) Kim's reading of *Lopez* is wrong.

In *Lopez*, the Court of Appeal held that a plaintiff, who was seeking ***civil*** PAGA penalties for alleged violations of Labor Code Section 226(a), did not need to establish the "knowing and intentional" violation or "injury" requirements required for recovering ***statutory*** penalties under Labor Code Section 226(e)(1). (*Lopez, supra*, 15 Cal. App. 5th at 778-79.) The court's holding was based on the distinction between claims for statutory penalties and civil penalties under PAGA. It explicitly stated that "a claim for damages or statutory penalties under section 226(e) is *not* the same as a PAGA claim for violation of section 226(a)." (*Id.* at 787 [emphasis in original]; *see also Iskanian*, 59 Cal. 4th at 381 [recovery of civil penalties are "distinct from the statutory damages to which employees may be entitled in their individual capacities"].) Since the "knowing and intentional" and "injury" requirements were only found in Labor Code Section 226's provisions relating to *statutory* penalties, the court held those requirements only applied "to an action for statutory damages under section 226(e)." (*Id.* at 781.)

Kim's suggestion that *Lopez* somehow allows a plaintiff to prosecute a PAGA claim without an *underlying* Labor Code violation is absurd. No court has read *Lopez* in this manner. Kim stands alone in his interpretation. *Lopez* deals with differences in elements between claims for statutory and

civil penalties. It does not eradicate the standing requirement under PAGA. Here, the Court of Appeal noted "PAGA was not intended to allow an action to be prosecuted by any person who did not have a grievance against his or her employer for Labor Code violations." (*Kim*, *supra*, 18 Cal. App. 5th at 1058.) By dismissing his individual claims, Kim no longer maintained any viable Labor Code-based claims against Reins. (*Id.* at 1058.) In other words, it was Kim's inability to pursue *any* underlying Labor Code violations, not the differences between civil and statutory penalty claims, that precluded him from maintaining his PAGA action.

In sum, the Court of Appeal's decision did not create any conflict in authority that would require this Court's review "to secure uniformity of decision."

IV. CONCLUSION

For the foregoing reasons, the Court should deny appellant's Petition for Review.

Respectfully submitted,

Dated: February 26, 2018

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: _____

Spencer C. Skeen
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CERTIFICATE OF COMPLIANCE

I, Spencer C. Skeen, prepared Respondent's Answer to Petition for Review and certify that the "word count" on the Microsoft Word program used to prepare the brief determined the text of the brief consists of 4,293 words, exclusive of the title page, tables, this certificate, and proof of service.

Dated: February 26, 2018

Spencer C. Skeen

33112473.1

PROOF OF SERVICE
JUSTIN KIM VS. REINS INTERNATIONAL CALIFORNIA, INC.
Supreme Court Case #S246911

I am and was at all times herein mentioned over the age of 18 years and not a party to the action in which this service is made. At all times herein mentioned I have been employed in the County of San Diego in the office of a member of the bar of this court at whose direction the service was made. My business address is 4370 La Jolla Village Drive, Suite 990, San Diego, California 92122.

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1. ANSWER TO PETITION FOR REVIEW

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- ☐ [Federal Court] in accordance with the written confirmation of counsel in this action and order of the court:

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☒ (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 26, 2018, San Diego, California.

Susan Frost
Type or Print Name

Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **KIM v. REINS INTERNATIONAL CALIFORNIA**
Case Number: **S246911**
Lower Court Case Number: **B278642**

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: **spencer.skeen@ogletreedeakins.com**

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