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 BRIEF ON THE MERITS

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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: September 24, 2018

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

By: _____

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Justin Kim ("Kim") presented this question to the Court: "*Whether an employee who is authorized to pursue a claim under the Private Attorneys General Act [PAGA] loses standing as an 'aggrieved employee' under PAGA by dismissing his individual claims against an employer.*" (Petition at p. 7.; Opening Brief at p. 8.) Kim claims that once he was allegedly aggrieved, he could never lose standing as a representative to pursue PAGA claims, even after he voluntarily settled and dismissed his individual Labor Code claims with prejudice. The trial court and Court of Appeal rejected Kim's perpetual standing argument. This Court should reach the same conclusion for four reasons.

First, this Court's standing precedent requires it to affirm the Court of Appeal's decision. According to this Court, "PAGA imposes a standing requirement; to bring an action, one must have suffered harm." (*Williams v. Superior Court* (2017) 3 Cal. 5th 531, 558.) This Court also ruled there is no such thing as perpetual standing. A party can lose standing after the complaint is filed. (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal. 4th 223, 233 ["standing must exist at all times until judgment is entered and not just on the date the complaint is filed."]) Because of this Court's clear precedent on standing principles, courts addressing this issue have all reached the same conclusion. Representative standing ceases to exist

under PAGA once the representative's individual Labor Code claims are barred.

Second, Kim's perpetual standing argument also violates this Court's precedent regarding *res judicata* and retraxit. A dismissal with prejudice following a settlement operates as a retraxit constituting an adjudication on the merits invoking the principles of *res judicata*. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal. 4th 788, 793, 798; *Torrey Pines Bank v. Superior Court* (1989) 216 Cal. App. 3d 813, 822.) Retraxit bars further litigation on the same subject matter between the parties. When Kim dismissed his individual Labor Code claims with prejudice, he lost the right to litigate the same underlying Labor Code violations as a matter of law.[1]

Third, Kim's perpetual standing rule violates public policy. It encourages shake down lawsuits and endless litigation by people who have no remaining injury to redress. It discourages settlement by undermining the peace of mind and the finality litigants seek when negotiating a compromise.

Fourth and finally, Kim's position is legally indefensible. He asks the Court to reverse its own precedent based upon false doomsday scenarios he invented. This Court should not reject its own precedent for shaky conjecture

[1] Only Kim lost his rights as a PAGA representative. PAGA does not limit the number of authorized representatives that can pursue a PAGA claim.

about future happenings. (*See Reno v. Baird* (1998) 18 Cal.4th 640, 654 [rejecting parade of horribles arguments as "Chicken Little-esque"].)

For these reasons and those that follow, the Court should affirm the Court of Appeal's decision and the trial court's judgment in favor of Reins International California, Inc. ("Reins").

II. STATEMENT OF THE CASE

Kim is a former employee of Reins. Reins operates several Japanese Yakiniku restaurants throughout California. On March 13, 2014, Kim filed a putative class action against Reins. (1 AA 14-29.) The operative First Amended Complaint alleged multiple violations of the Labor Code and a claim for violations of California's Business and Professions Code ("UCL claim"). (1 AA 45-60.) Kim brought claims for unpaid wages and overtime, failure to provide meal and rest breaks, failure to provide lawful wage statements, and failure to pay wages upon termination. (*Ibid.*) He pursued class claims on behalf of himself and other "Training Managers." (1 AA 46 at ¶ 6; 1 AA 50 at ¶ 26.)[2] Kim also pursued a representative action for civil penalties under PAGA. (1 AA 45, 58.) The crux of Kim's lawsuit was that Reins misclassified him and other Training Managers as exempt during a 60-day training period. (1 AA 49 at ¶ 19.)

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

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

Kim and Reins agreed to arbitrate all claims between them, on an individual basis. (1 AA 86-90.) Reins moved to compel arbitration of Kim's individual claims, dismiss the class claims, and stay the PAGA claim pending arbitration. (1 AA 63-76.) In January 2015, the trial court dismissed class claims, compelled all claims to arbitration except the PAGA claim and the injunctive relief portion of Kim's UCL claim. It stayed the PAGA claim pending arbitration. (1 AA 247-262.)

B. Kim Settled His Individual Labor Code Claims and Dismissed Them with Prejudice

The case proceeded to individual arbitration. (*See* 2 AA 282-283.) During arbitration, Reins offered Kim a statutory offer to compromise under Code of Civil Procedure section 998 ("998 Offer"). The 998 Offer gave Kim $20,000 plus attorney fees in exchange for dismissal of his individual claims with prejudice. (2 AA 343-344.) Kim accepted the 998 Offer. (2 AA 345-346.) Kim was represented by counsel when he did so. (*Ibid.*) Kim and his counsel asked the trial court to dismiss each of his individual causes of action, *with prejudice*. (2 AA 285 at ¶ 2, 289.) On November 9, 2015, the trial court granted the request. It dismissed Kim's individual claims with prejudice and Kim's class claims without prejudice. (2 AA 395.)

C. The Trial Court Granted Summary Adjudication on Kim's PAGA Claim Because He Was No Longer an Aggrieved Employee

After Kim accepted payment and dismissed his individual Labor Code claims with prejudice, he tried to further litigate the same Labor Code violations through the PAGA mechanism. Reins moved for summary adjudication on Kim's PAGA claim ("Motion"). (2 AA 296-304.) On August 16, 2016, the trial court granted the Motion. It concluded Kim did not have standing to pursue PAGA penalties for the alleged Labor Code violations he suffered once he dismissed 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.) On October 3, 2016, the trial court entered judgment in favor of Reins. (2 AA 446-447.)

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

Kim appealed the trial court's summary adjudication order and the resulting 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 considered this issue: "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, *review granted* (Mar. 28, 2018.) The Court of Appeal answered this question "no" and affirmed the trial court's decision. It examined PAGA and its legislative history. The Court of Appeal 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 p. 1058.) It 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.*) After this dismissal, Kim no longer met the definition of "aggrieved employee." He lacked standing to maintain a PAGA action. (*Id.* at p. 1058-59.)

E. This Court Granted Review

Kim presented this question for review by this Court: "Whether an employee who is authorized to pursue a claim under [PAGA] loses standing as an 'aggrieved employee' under PAGA by dismissing his individual claims against an employer."[3] (Petition at p. 7; Opening Brief at p. 8.) On March 28, 2018, this Court granted Kim's petition for review.

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[3] Kim did not indicate his voluntary dismissal was "with prejudice" when he framed the issue for this Court. This is a distinction with a difference. As discussed more fully below, a dismissal with prejudice precludes further litigation of the dismissed claims and the related subject matter.

III. THIS COURT SHOULD AFFIRM THE COURT OF APPEAL'S JUDGMENT IN FAVOR OF REINS

A. Kim Lost Standing to Pursue His PAGA Claim By Dismissing His Underlying Labor Code Claims With Prejudice

i. In Representative Actions, Standing Must Exist At All Times Through Judgment

As this Court held, standing is a requirement for every case. (*McKinney v. Oxnard Union High Sch. Dist. Bd. of Trustees* (1982) 31 Cal. 3d 79, 90 ["It is elementary that a plaintiff who lacks standing cannot state a valid cause of action."].) This Court also held there is no such thing as perpetual standing for someone who was only aggrieved at the start of litigation: "*standing must exist at all times until judgment is entered and not just on the date the complaint is filed.*" (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal. 4th 223, 233 [emphasis added] [collecting cases].) Even if a party has standing at the outset of a case, the party may lose standing while the case is pending. (*See id.* [Plaintiff initially had standing under prior version of the UCL, but lost standing when California amended the UCL's standing requirement to require injury].)

Class and representative actions are not exempt from these standing requirements. As in all other cases, standing for the named representative plaintiff must exist until judgment is entered. If the representative settles and dismisses his or her individual claim, he or she loses standing to sue in a representative capacity.

In the wage and hour class action context, this principle is exemplified by *Watkins v. Wachovia Corporation* (2009) 172 Cal. App. 4th 1576. In *Watkins*, the named plaintiff voluntarily settled her wage claim. The Court of Appeal concluded "the settlement of [plaintiff's] claims deprives her of standing to represent the class." (*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 [internal citations omitted] [emphasis added].)

The result is the same for representative standing in collective wage and hour actions under the Federal Labor Standards Act ("FLSA"). *Camesi v. University of Pittsburgh Medical Center* (3d Cir. 2013) 729 F.3d 239, 247 illustrates the point. In *Camesi*, the named plaintiffs voluntarily dismissed their individual claims with prejudice during the pendency of the action. The Third Circuit held representative standing was lost: "[Plaintiffs'] voluntary dismissal of their [FLSA] claims with prejudice—has not only extinguished Appellants' individual claims, but also any residual representational interest that they may have once had." (*Id.*)

ii. In PAGA Representative Actions, the Standing Requirements Are No Different

When it comes to standing, PAGA does not differ from other wage and hour representative litigation. PAGA is "simply a procedural statute allowing an aggrieved employee to recover civil penalties" for underlying Labor Code violations. (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal. 4th 993, 1003.) Because PAGA "does not create property rights or any other substantive rights," representative PAGA litigation must be brought by someone with viable individual Labor Code claims to pursue. (*Ibid.*)

To have standing to sue under PAGA, "one must have suffered harm" under the Labor Code. (*Williams v. Superior Court* (2017) 3 Cal. 5th 531, 558.) PAGA further provides "civil penalties may be recovered through a civil action brought *by an aggrieved employee on behalf of himself or herself and* other current or former employees." (Lab. Code § 2699, subd. (a) [emphasis added].) The Legislature used the conjunctive term "and," not the disjunctive term "or." (*Ibid.*) This means PAGA representatives cannot bring cases on their own behalf, *or* solely on behalf of others. PAGA representatives must have their own underlying Labor Code claims *and* then they may sue on behalf of others.

For these reasons, courts have dismissed representative PAGA claims once a representative's underlying Labor Code claims are barred:

- In *Villacres v. ABM Industries, Incorporated* (2010) 189 Cal. App. 4th 562, 569, the Court of Appeal affirmed the trial court's grant of summary judgment for the employer. The court barred the plaintiff from seeking a PAGA claim due to resolving the underlying Labor Code claims in the prior lawsuit. (*Id.* at 569.)

- In *Shook v. Indian River Transport Company* (9th Cir. 2018) 756 F App'x 589, 590, the Ninth Circuit found that plaintiffs "lack[ed] viable Labor Code-based claims against [their employer]" because they were not employed during the period in question. Given the absence of viable Labor Code claims, the court held the plaintiffs "cannot be PAGA representatives" because they "lack standing to bring such claims." (*Id.*)

- In *Holak v. K Mart Corporation* (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, the court dismissed the plaintiff's PAGA claim because she did not suffer the harm alleged in one claim and the other claim was defective due to failure to exhaust her administrative remedies. The court found that given these facts, plaintiff "does not have standing to maintain this PAGA action." (*Id.* at *6.)

- 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 the plaintiff's PAGA claim because the operative complaint alleged no underlying Labor Code violations. The court found "a bare PAGA claim fails in the absence of underlying ... California Labor Code claims." *Id.*

- In *Pinder v. Employment Development Department* (E.D. Cal. 2017) 227 F. Supp. 3d 1123, 1152, the court found the defendant was entitled to judgment on the plaintiff's PAGA claim because the underlying Labor Code claims "failed as a matter of law."

- In *Boon v. Canon Business 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."

- In *Gofron v. Picsel Technologies, Incorporated* (N.D. Cal. 2011) 804 F. Supp. 2d 1030, 1043, the defendant argued the plaintiff "lack[ed] standing" to bring a PAGA claim because he no longer had viable Labor Code claims. The court agreed 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.'" (*Id.*)

- 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 the plaintiff "did not prove at trial he was an aggrieved employee ... [he] may not pursue a representative action under PAGA."

In each case, the plaintiffs alleged they were aggrieved by a Labor Code violation at one point. But their right to sue as a representative under PAGA was contingent upon them having a viable injury to redress through judgment. (Lab. Code § 2699, subd. (a).) As soon as the representative's underlying Labor Code claims lacked viability, they lost representative standing to pursue claims under PAGA.

iii. PAGA Was Drafted to Allow Representative Standing By Only Persons Who Still Seek a Remedy for Labor Code Violations

When the Senate originally introduced PAGA, it did not define the term "aggrieved employee." (*See* Respondent's Motion for Judicial Notice ["MJN"], Ex. A [Sen. Bill No. 796 [2003-2004 Reg. Sess.] as introduced February 21, 2003].) But the author of PAGA, Senator Joseph L. Dunn, amended the bill to define this term. He did so "to address concerns that the bill might invite frivolous suits." (MJN, Ex. B [Sen. Judiciary Com., Rep. on Sen. Bill No. 796 [2003-2004 Reg. Sess.] as amended April 22, 2003, p. 7].) Senator Dunn wrote:

> Only Persons Who Have Actually Been Harmed May Bring An Action to Enforce The Civil Penalties. *Mindful of the recent, well-publicized allegations of private plaintiff abuse of the UCL,*

> the sponsors state that they have attempted to craft a private right of action that will not be subject to such abuse. Unlike the UCL, *this bill would not permit private actions by persons who suffered no harm from the alleged wrongful act.* Instead, private suits for Labor Code violations could be brought *only by an employee or former employee of the alleged violator against whom the alleged violation was committed.*

(MJN, Ex. C [Assem. Comm. on Judiciary, Rep. on Sen. Bill No. 796 [2003-2004 Reg. Sess.] as amended May 12, 2003, p. 4] [emphasis added].)

The Senate Committee on Labor and Industrial Relations confirmed PAGA's injury requirement. The Committee wrote: "[U]nlike the [UCL], *this bill entitles an individual* to act in the capacity of [private attorneys general] *to seek remedy of a labor law violation solely because they have been aggrieved* by that violation." (MJN, Ex. D [Sen. Comm. on Labor and Industrial Relations, Rep. on Sen. Bill No. 796 [2003-2004 Reg. Sess.] as amended March 26, 2003, p. 4] [emphasis added].)

The concerns with misuse of PAGA were so prevalent the Legislature then amended it to "protect[] businesses from shakedown lawsuits..." In 2004, the Legislature added an exhaustion requirement. It also provided employers with an opportunity to cure certain violations. (MJN, Ex. F [Sen. Rules Comm., Off. Of Sen. Floor Analyses, Rep. on Sen. Bill 1809 [2003-2004 Reg. Sess.] as amended July 27, 2004, p. 5].)[4]

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[4] The Legislature has since further amended PAGA to add additional cure provisions. (Lab. Code § 2699, subd. (d).)

PAGA's legislative history and amendments clarify it was intended to help aggrieved employees *find a remedy* for Labor Code violations. It was not intended to allow employees who settled, resolved, and dismissed their potential claims an unfettered right to sue on behalf of others.

iv. The Legislature's Use of Past Tense When Defining Who Qualifies as an "Aggrieved Employee" Did Not Create a Perpetual Standing Rule

Under PAGA, the Legislature defined an "aggrieved employee" as "any person who *was employed* by the alleged violator and against whom one or more of the alleged [Labor Code] violations *was committed*." (Lab. Code, § 2699, subd. (c) [emphasis added].)

Kim contends the use of the past tense in this definition proves that once he was allegedly "aggrieved," he could never lose PAGA standing. Stated otherwise, so long as the defendant employed the plaintiff and the plaintiff suffered a Labor Code violation in the past, Kim argues the plaintiff can always serve as a PAGA representative regardless of whether he or she dismisses his or her underlying Labor Code claims with prejudice.

Kim's perpetual standing argument is readily overcome by PAGA's legislative history and this Court's own precedent. "A court's overriding purpose in construing a statute is to give the statute a reasonable construction conforming to the Legislature's intent." (*Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal. App. 5th 385, 390 [internal citations omitted].) The Legislature included a standing requirement in PAGA to avoid shakedown lawsuits that

were then plaguing the UCL, not to allow perpetual standing by people who already settled and dismissed their individual claims.

Common sense also undercuts Kim's argument. No doubt, the Legislature used the past tense to define an "aggrieved employee" with PAGA standing because standing must exist before a plaintiff sues. The Legislature did not want people suing pre-injury, especially if it intended to avoid shakedown litigation.

Most significantly, this Court's precedent proves the use of the past tense when defining an "aggrieved employee" does not mean standing continues after individual Labor Code claims are barred. Standing defenses are "jurisdictional challenges and may be raised at any time in the proceeding." (*Common Cause v. Board of Supervisors* (1989) 49 Cal. 3d 432, 438.) Similar to PAGA, the UCL limits standing to any "person who *has suffered injury* in fact and *has lost* money or property as a result thereof." (Bus & Prof. Code, § 17204 [emphasis added].) The UCL was amended to add this standing requirement in 2004, the same year the Legislature enacted PAGA.[5] (2004 Cal. Legis. Serv. Prop. 64 [Proposition 64] [West].)

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[5] Similar to PAGA's standing requirement, the purpose of the UCL's standing initiative (Proposition 64) was "prot[ecting] small businesses from frivolous lawsuits" generated by "[s]hakedown lawyers [who] 'appoint' themselves to act like the Attorney General...." (*In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 317 [citing Prop. 64 Voter Information Guide, Gen. Elec. (Nov. 2, 2004) Argument in Favor of Prop. 64, p. 40].)

In both PAGA and the UCL, the Legislature used the past tense to limit representative standing to people injured or aggrieved. Interpreting this language, this Court has ruled the UCL requires a representative to have standing "at all times" throughout the litigation, from the time of filing through judgment. (*Mervyns, LLC, supra,* 39 Cal. 4th at p. 233). This Court has repeatedly cited its *Mervyn's* decision with approval. And, this Court reads the standing requirements under the UCL and PAGA in a parallel manner: "[b]oth the unfair competition law and the Labor Code Private Attorneys General Act of 2004 require a plaintiff to have suffered injury resulting from an unlawful action: under the unfair competition law by unfair acts or practices; under [PAGA], by violations of the Labor Code." (*Amalgamated Transit Union, supra,* 46 Cal. 4th at p. 1001 [brackets added].) As a result, PAGA's legislative history, common sense and this Court's prior precedent suggest PAGA standing must be maintained through judgment even though "aggrieved employee" is defined in the past tense.

Kim ignores this Court's precedent cited above. Instead, he claims there is no requirement for a plaintiff to "maintain viable individual claims" simply because PAGA does not expressly state as much. (Opening Brief at p. 16.) He cites no authority for this argument. There is none.[6]

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[6] Kim's failure to cite pertinent legal authority is sufficient reason to reject his argument outright. (*Murphy v. Murphy* (2008) 164 Cal. App. 4th 376, 405.)

This Court's precedent tells us, when a statute is silent on an issue, the canons of statutory interpretation dictate it does not overturn established law. Instead, the failure of the Legislature to address an issue is "indicative of an intent to leave the law as it stands." (*Estate of McDill* (1975) 14 Cal. 3d 831, 837-38.) The law was clear in 2004 when the Legislature drafted PAGA's standing requirement. This Court had already ruled standing was a jurisdictional requirement and must exist through judgment. (*Common Cause, supra*, 49 Cal. 3d at 438.) This Court's holding in *Mervyn's* was no different and simply followed the Court's prior precedent.

In sum, PAGA standing must be maintained through judgment and Kim has cited no authority to the contrary. Because Kim dismissed his individual Labor Code claims with prejudice, he lacked standing through judgment. His PAGA claim had to be dismissed.

B. Settlement and Dismissal With Prejudice of Kim's Labor Code Claims Bars Subsequent Litigation on the Same Subject Matter

Kim's PAGA claim fails for a second, independent reason. Kim voluntarily dismissed his Labor Code claims with prejudice. (2 AA 287 at ¶ 11; 289; 395.) The legal effect of doing so is clear. A plaintiff who settles and dismisses his or her claims cannot re-litigate them. (*Goddard v. Sec. Title Ins. & Guar. Co.* (1939) 14 Cal. 2d 47, 55 [a dismissal with prejudice, under a "consent or stipulation of the parties, after compromise or settlement of the suit," is "of course a bar to a subsequent suit"].)

"A dismissal with prejudice is the modern name for a common law retraxit." (*Rice v. Crow* (2000) 81 Cal. App. 4th 725, 733; *Torrey Pines Bank v. Superior Court* (1989) 216 Cal. App. 3d 813, 820; *Datta v. Staab* (1959) 173 Cal. App. 2d 613, 620-21.) A retraxit "amounts to a decision on the merits and as such is a bar to further litigation on the same subject matter between the parties." (*Rice, supra,* 81 Cal. App. 4th at pp. 733-34 [quoting *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal. 3d 287, 312] [emphasis omitted].) The preclusion applies to the plaintiff and those in privity with the plaintiff. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal. 4th 788, 797-98.)

In *Boeken,* 48 Cal. 4th at p. 798, this Court unequivocally held: "Once plaintiff [dismissed her claims with prejudice], the primary right and the breach of duty (together, the cause of action) had been adjudicated in defendant's favor." (*Ibid.* [brackets added].) The Court held that, regardless of the reason why a court entered a dismissal, "a dismissal with prejudice is the equivalent of a final judgment on the merits, barring the entire cause of action." (*Id.* at p. 793.)

The bar resulting from a dismissal with prejudice is broad. It is as strong as a judgment on the merits and it applies to claims based on the same subject matter, same injury, or same right. A dismissal with prejudice "bars any future action on the same subject matter...The bar raised by a dismissal with prejudice is equal, under the doctrine of *res judicata,* to the bar raised

by a judgment on the merits." (*Torrey Pines Bank, supra*, 216 Cal. App. 3d at p. 820-21.) "[A] judgment for the defendant is a bar to a subsequent action by the plaintiff based *on the same injury to the same right, even though he presents a different legal ground for relief.*" (*Ibid.* [emphasis added]; *see also Boeken, supra*, 48 Cal. 4th at p. 798.)

A dismissal with prejudice on individual claims also prevents a plaintiff from suing in a representative capacity in wage and hour litigation. For example, a plaintiff cannot prosecute a collective action under the FLSA after releasing and dismissing the underlying claims. In *Rangel v. PLS Check Cashers of California, Inc.* (9th Cir. Aug. 16, 2018) 899 F.3d 1106, 1111, the plaintiff was part of a class action settlement releasing California wage and hour claims. The Ninth Circuit found that *res judicata* barred the plaintiff from pursuing a subsequent FLSA collective action due to the settlement because "[t]he same injuries to the same rights are at issue in both cases." (*Id.*) The federal courts of appeals have reached the same result when plaintiffs voluntarily dismiss their individual claims with prejudice. (*Camesi, supra*, 729 F.3d at p. 247.)

Similarly, a plaintiff who settles his or her individual wage claims cannot pursue a class claim based on those settled claims. In *Watkins, supra,* 172 Cal. App. 4th at p. 1581, the plaintiff voluntarily settled her wage claim. The Court of Appeal held because of this settlement, she could no longer pursue her class claims. (*Id.* at p. 1588-89.)

The Court of Appeal has applied these same *res judicata* principles in PAGA lawsuits. In *Villacres v. ABM Industries, Inc.* (2010) 189 Cal. App. 4th 562, 569, 587, an employee was part of a putative class that resolved all Labor Code claims but did not explicitly resolve PAGA claims. The court approved the settlement and judgment was entered on the underlying Labor Code claims. (*Id.* at p. 569.) The plaintiff then attempted to serve as a PAGA representative by suing the same employer, based on the same underlying Labor Code violations. (*Id.* at pp. 569, 578.) The trial court barred the plaintiff from pursuing a PAGA representative action. (*Id.* at p. 569.) The Court of Appeal affirmed. (*Id.* at p. 569, 575-593.)

The effect of Kim's dismissal with prejudice of his Labor Code claims is clear and does not differ from the outcomes described above. (2 AA 285 at ¶ 2, 345-347, 395.) Dismissal with prejudice of Kim's individual wage claims precludes him from litigating claims based on the same subject matter.

The subject matter of Kim's individual Labor Code claims and his PAGA claim is the same. PAGA is "simply a procedural statute" allowing an aggrieved employee to seek penalties "for underlying Labor Code violations." (*Amalgamated Transit, supra*, 46 Cal. 4th at p. 1003-04.) In his Complaint, Kim seeks PAGA penalties "as a result of the acts alleged above" detailed in his individual Labor Code causes of action. (1 AA 58 at ¶ 68.) Because he is barred from litigating the underlying Labor Code claims, he cannot litigate them through the PAGA procedural mechanism.

Kim counters by claiming the judgment against him does not bind the State's rights to pursue a PAGA claim. (Opening Brief at pp. 34-35.) He cites *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal. 4th 348 which holds: "[t]he government entity on whose behalf the plaintiff files [a PAGA] suit is always the real party in interest in the suit." (*Id.* at p. 382.) The Trial Court, Court of Appeal, and Reins all agree on that basic principle. (Opening Brief at p. 34; *Reins, supra,* 18 Cal. App. 5th at p. 1057.) But that principle does not apply to save Kim's PAGA claim.

Nobody has claimed the State's right to pursue civil penalties is barred by dismissal with prejudice of Kim's Labor Code claims. And, nobody has claimed Kim's dismissal with prejudice bars PAGA litigation by other aggrieved employees. (*Reins, supra,* 18 Cal. App. 5th at p. 1059 ["Reins acknowledges that 'Kim's voluntary dismissal of his Labor Code claims with prejudice impacts his PAGA standing only. It does not affect other employees.'"] [citing Reins' Court of Appeal Answering Brief at p. 20].)

Reins argued and the trial court and Court of Appeal both agreed, PAGA claims may only be pursued by an aggrieved employee *"on behalf of himself or herself and* other current or former employees." (Lab. Code, § 2699, subd. (a) [emphasis added]; *Reins, supra,* 18 Cal. App. 5th at p. 1057.) If Kim cannot pursue his own PAGA claim for the reasons outlined above, he is barred from suing on behalf of the State and others through the PAGA mechanism.

C. The Court of Appeal's Ruling Aligns With Public Policy Considerations

Public policy has a narrowly prescribed role before this Court: "aside from constitutional policy, the Legislature, and not the courts, is vested with the responsibility to declare the public policy of the state. (*Green v. Ralee Engineering Co.* (1998) 19 Cal. 4th 66, 71-72; *see also AIU Ins. Co. v. Superior Court* (1990) 51 Cal. 3d 807, 818, 824, fn. 10; *Hentzel v. Singer Co.* (1982) 138 Cal. App. 3d 290, 297 [Courts must not "mistake their own predilections for public policy which deserves recognition at law"].) The Court of Appeal's decision closely aligns with California public policies declared by the Legislature.

For instance, public policy "*strongly favors* and encourages settlements" and the fact there must be an end to litigation through finality of judgments. (*Stambaugh v. Superior Court* (1976) 62 Cal. App. 3d 231, 236 [settlement]; *Jorgensen v. Jorgensen* (1948) 32 Cal. 2d 13, 18 [finality of judgment].) To that end, the Legislature authorized Section 998 offers "to encourage the settlement of lawsuits prior to trial" and "avoid the time delays and economic waste associated with trials." (*Martinez v. Brownco Constr. Co.* (2013) 56 Cal. 4th 1014, 1019.) Reins and Kim utilized a Section 998 offer to resolve Kim's individual claims. This was entirely consistent with the public policy behind such offers.

Section 998 encourages employers to make reasonable settlement offers that fully compensate an employee and their attorney, prior to trial, to avoid unnecessary litigation. Section 998 offers discourage litigation and avoid court clogging by litigants and their attorneys who want to fight even though they have no actual dispute or injury left to redress.[7] Ending Kim's litigation against Reins (after he and his attorney got paid in full under the 998 Offer), furthers the strong public policies supporting settlement and finality of judgments. The Court of Appeal's decision did just that.

Kim's perpetual standing rule undermines the foregoing policies. If a plaintiff can never lose standing to pursue a representative PAGA claim even after settling, releasing, and dismissing underlying Labor Code claims, the employer would have little incentive to utilize Section 998 offers in the wage and hour context. The plaintiff who is made whole could pocket the settlement, pay himself and his attorney, and continue to litigate on behalf of a group of actually "aggrieved employees." Someone who has no interest in the outcome of the litigation would be litigating on behalf of the State and others, who presumably did. This is precisely the result California sought to avoid when voters added a standing requirement to the UCL and when the Legislature included a standing requirement in PAGA. (MJN, Ex. C, p. 4;

[7] The record is void of any indication Kim or his attorney sought to rescind the 998 Offer or offered to refund the settlement. They never did.

Ex. D, p. 4; 2004 Cal. Legis. Serv. Prop. 64 [Proposition 64] Findings and Declarations of Purpose, § 1(e).)

IV. KIM'S ARGUMENTS ARE LEGALLY UNSUPPORTED, VIOLATE THIS COURT'S PRECEDENT, AND CONTAIN EXAGGERATED DOOMSDAY SCENARIOS

Kim's position is legally indefensible. He asks the Court to reverse its own precedent without mentioning it, much less distinguishing it. Finally, he makes exaggerated and misguided policy arguments based upon false doomsday scenarios.

A. Kim's Proposed Rule for PAGA Standing is Legally Unsupported

i. The California False Claims Act Is Inapplicable Because It Has No Injury Requirement

Kim argues he can dismiss his individual claims and still serve as a representative under PAGA, by analogizing PAGA with *qui tam* actions under the California False Claims Act ("CFCA"). He cites to *Iskanian*, which states "[a] PAGA representative action is ... *a type of qui tam* action." (*Iskanian, supra*, 59 Cal. 4th at p. 382 [emphasis added].) Kim takes his CFCA analogy too far.

The CFCA and PAGA are similar because they allow persons to seek recovery on behalf of the State of California. But when it comes to standing, PAGA is the reverse of the CFCA. In *Rothschild v. Tyco International (US), Inc.* (2000) 83 Cal. App. 4th 488, the Court of Appeal explained a CFCA plaintiff "is not asserting a right held by herself or other individuals, but is

acting on behalf of the government." (*Id.* at pp. 499–500.) Thus, a plaintiff bringing a CFCA action need not have any individual injury whatsoever and acts solely on behalf of the government. (*See ibid.*) The UCL plaintiff, on the other hand, "asserts a wholly separate and distinct *injury* to herself and other individuals." (*Id.* at p. 500 [emphasis added].) Because the UCL claim in *Rothschild* concerned personal injury and the CFCA claim concerned injury to the government and not the person, the court held the subsequent UCL claim was distinct from and not barred by the prior CFCA action.

The analysis is not the same here. Unlike the CFCA, PAGA requires injury to the person suing. Under PAGA, an "aggrieved employee" must advance the underlying Labor Code claim "on behalf of *himself or herself*" *and* others, in the conjunctive. (Lab. Code § 2699, subd. (a) [emphasis added].) This is why Kim lost standing to sue on behalf of others when he dismissed his underlying Labor Code claims with prejudice. He had no injury left to remedy. Because the CFCA is different than PAGA, Kim's reliance on *Rothschild* is misplaced.

ii. ***Huff* and *Lopez* Are Inapplicable Because Neither Case Supports PAGA Standing When All Labor Code Claims Have Been Dismissed With Prejudice**

Kim claims the Court of Appeal's ruling cannot be harmonized with *Lopez v. Friant & Associates, LLC* (2017) 15 Cal. App. 5th 773, *review denied* (Jan. 10, 2018) and *Huff v. Securitas Sec. Servs. USA, Inc.* (2018) 23

Cal. App. 5th 745, *review denied* (Aug. 8, 2018). (Opening Brief at pp. 22, 31-33.) His reference to these Court of Appeal decisions is curious.

In *Lopez*, the Court of Appeal held a plaintiff seeking *civil* PAGA penalties under Labor Code section 226(a) did not need to establish the "knowing and intentional" and "injury" requirements to recover statutory penalties under Labor Code section 226(e). (*Id.* at 778-79.) The court's holding was based on the distinction between statutory penalties under the Labor Code, and civil penalties under PAGA. The court explicitly stated "a claim for ... 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].) Since the "knowing and intentional" and "injury" requirements were only needed to recover statutory penalties, the court held they did not apply to civil penalties under PAGA. (*Lopez, supra*, 15 Cal. App. 5th at 781.)

Lopez hurts Kim and helps Reins. In *Lopez*, PAGA standing was not an issue. *Lopez* concerned a single cause of action under PAGA. (*Lopez, supra,* 15 Cal. App. 5th at p. 777 ["Plaintiff's sole cause of action seeks recovery of civil penalties under PAGA."]) The plaintiff still had an unredressed injury as individual claims arising from the defective wage statements had never been settled or dismissed with prejudice. In contrast to *Lopez*, Kim settled and dismissed his individual Labor Code claims with prejudice. This bars him from litigating them, regardless of whether he is seeking statutory or civil penalties.

Huff v. Securitas Security Services USA, Incorporated (2018) 23 Cal. App. 5th 745, *review denied* (Aug. 8, 2018) also helps Reins. First, *Huff* undercuts Kim's False Claims Act analogy: "a PAGA suit differs from a pure *qui tam* action (such as under the Federal False Claims Act) in that PAGA's standing requirement prevents the general public from bringing an action." (*Id.* at p. 757.) Second, in *Huff*, the question was whether an employee *aggrieved by at least one Labor Code violation*, could pursue penalties for other Labor Code violations that affected other employees. The *Huff* court answered this question "yes" because the language in PAGA defines an "aggrieved employee" as "*a person affected by at least one Labor Code violation* committed by an employer." (*Id.* at p. 754 [emphasis added].) Unlike *Huff*, Kim is not affected by any of the Labor Code violations that form the basis of his PAGA claim because he got paid in full, under a settlement, and dismissed his right to pursue those claims, with prejudice.

iii. Kim's Private Right of Action Analogy Fails

Kim claims he maintained PAGA standing after dismissing his Labor Code claims simply because PAGA creates penalties for Labor Code provisions that otherwise have no private right of action. (Opening Brief at pp. 24-26.) Kim never raised this argument before the trial court or Court of Appeal. So, the argument is not properly before this Court. (*In re Marriage of Modnick* (1983) 33 Cal. 3d 897, 913, n. 15.)

Moreover, this is a faulty comparison. Whether a private right of action exists for all Labor Code penalties recoverable under PAGA is irrelevant to the issue before this Court, which is representative standing under PAGA. Whether someone has representative standing under PAGA depends on whether the employee has a continuing injury to redress via the PAGA mechanism, through the time of judgment. An injury could give rise to a private right of action under the Labor Code. It might not. But even where there is no private right of action, one must have suffered a violation of the Labor Code to proceed under PAGA's "aggrieved employee" requirement. Once the injury has been redressed through settlement, payment in full, and a dismissal with prejudice that precludes further litigation of the issue, it is no longer a continuing injury capable of redress through PAGA.

iv. Recent Authority Regarding Federal Class Certification Appeals Is Inapplicable

Kim may argue he retains standing to sue despite resolving his individual claims based on a recent federal district court decision. (*See Amey v. Cinemark USA Inc.* (N.D. Cal. Aug. 17, 2018) No. 13-cv-05669-WHO, 2018 WL 3956326, at *1.) *Amey* is a unique construct of federal law related to class certification appeals.

Under federal law, there is no immediate right to appeal a denial of class certification. (*Watkins v. Wachovia Corp.* (2009) 172 Cal. App. 4th 1576, 1591.) A plaintiff must litigate to judgment before pursuing an appeal.

To avoid unnecessary trials to facilitate an appeal, federal courts created a judicial exception to standing rules when the parties to agree the plaintiff may appeal notwithstanding an individual settlement. (*Amey,* 2018 WL 3956326, at *5 [citing *Narouz v. Charter Commc'ns* (9th Cir. 2010) 591 F.3d 1261, 1265].) In stark contrast to federal law, denial of class certification is immediately appealable in California state courts. (*Watkins, supra*, 172 Cal. App. 4th at p. 1591.) A plaintiff does not have to litigate through judgment to appeal a denial of class certification. For this reason, California courts have not created special standing rules to allow for these appeals. They instead hold that plaintiffs lose standing to pursue a class action once they resolve their individual claims. (*Id.*)

Of course, class certification is not an issue in PAGA cases. (*Arias v. Superior Court* (2009) 46 Cal. 4th 969.) And this case does not concern appeal of a class certification denial. The special standing exception in *Amey* does not apply.

B. Kim's Public Policy Arguments Are Based on False Doomsday Scenarios

i. PAGA Was Not "Vitiated As An Enforcement Mechanism" Since The State's Rights Were Not Impacted

Kim claims the lower court rulings "undermine important worker protections" and "vitiate PAGA as an enforcement mechanism." (Opening Brief at § E.) He further contends the Court of Appeal's ruling makes PAGA

"illusory" because "an employer can secure a PAGA dismissal by settling with the state's authorized representative, instead of with the state." (*Id.* at p. 37.) None of this is true.

As the Court of Appeal correctly held, Kim's voluntary dismissal of his Labor Code claims impacts his PAGA standing only. (*Kim, supra*, 18 Cal. App. 5th at 1059.) It did not eliminate the rights of others or the State to pursue PAGA claims. (*Id.* ["Kim's voluntary dismissal of his Labor Code claims with prejudice impacts his PAGA standing only. It does not affect other employees," or "prevent the state's claims from moving forward"].)

Following the Court of Appeal's decision, the State's settlement rights are still protected. A settlement sufficient to prevent the State of California and other aggrieved employees from pursuing PAGA penalties must go through the formal procedures outlined in PAGA. Any settlement of a PAGA action must be approved by the court and a copy of a proposed settlement must be provided to the LWDA at the same time it is submitted to the court. (Cal. Lab. Code § 2699, subd. (l)(2).) In this manner, PAGA expressly includes protections and mandates that two separate governmental entities (the court and LWDA) will review any PAGA settlement that might bind the State or other aggrieved employees who might come forward.

ii. Use of a Section 998 Offer Does Not Violate Public Policy By Creating a "Bind That the Legislature Never Intended"

Kim claims "[c]onditioning PAGA standing on individual claims forces employees into a bind that the Legislature never intended—either give up a potentially sizeable amount of money (in this case, $20,000 plus attorney fees) or take the money but give up the state's claim." (Opening Brief at p. 38.) This is another false doomsday scenario, especially for someone in Kim's situation.

First, Kim was never asked to give up "the state's claim." He was offered full payment for his claim, and he willingly accepted that deal. The State's PAGA claim remained viable after Kim dismissed his individual claim with prejudice.

Moreover, Kim was not put in a bind. Kim was given over thirty days to consider the 998 Offer. He was represented by skilled counsel when he settled his individual Labor Code claims for $20,000 plus attorney fees. (2 AA 345-347.) Kim acknowledged this was a "sizeable amount." (Opening Brief at p. 38.) He never argued the deal was unfair, coercive, or made under duress. And, there is nothing in the record to suggest Kim or his counsel tried to rescind the agreement or return the sizeable sums received. This was a voluntary settlement gladly accepted by someone represented by counsel.

When Kim complains of the "bind" he was in upon receiving Reins' 998 Offer, he is really complaining about the use of Section 998 as a strategy

to encourage settlement. The Legislature declares the public policy of the state, not Kim or his counsel. (*Green, supra*, 19 Cal. 4th at pp. 71-72.) California encourages settlements and the use of Section 998 offers to resolve disputes prior to trial. (*Martinez, supra*, 56 Cal. 4th at p. 1019.) Kim's opinion on the wisdom of this policy is immaterial.

Kim also suggests it *would be* contrary to public policy *if* Reins offered settlements to many people instead of litigating every PAGA claim. (Opening Brief at p. 37.) That is not a public policy argument. It is a false hypothetical. The record is devoid of any evidence that other employees made the same allegations that Kim made. There is no evidence that other PAGA claims were presented, or that Reins made Section 998 offers to countless other PAGA representatives. It did not happen. And this Court should not be ruling based on a parade of horribles imagined by Kim, in his mind's eye. Kim's argument is precisely the type of "Chicken Little-esque" argument this Court routinely rejects. (*See Reno v. Baird* (1998) 18 Cal. 4th 640, 654.) It should do so again here.

iii. The Court of Appeal's Decision Does Not Touch on *Iskanian*, Much Less Abrogate It

Finally, Kim claims the Court of Appeal's ruling "creates a loophole to this Court's rule against PAGA waivers, announced in *Iskanian*." (Opening Brief at p. 37.) He argues *Iskanian* is undermined because "[a]ll an employer needs to do is compel arbitration of individual claims, and the

PAGA dismissal will follow." (*Id.* at p. 40.) He concludes, "the Court of Appeal's rule would bar the state's authorized representative from taking up the PAGA case again because arbitration resolved the 'viable' individual Labor Code grievances necessary for standing." (*Id.* at p. 41.)

This is another argument based on false imaginings. 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 p. 1059 [emphasis added].) Kim assumes the Court of Appeal's decision extended beyond the settlement and dismissal issue. It did not.

Kim's hypothetical also suffers from broken rationale. If a plaintiff has an arbitration agreement and a PAGA claim, and the individual claim is compelled to arbitration, that plaintiff may always litigate instead of settling. If the plaintiff prevails in arbitration, the employee would establish aggrieved status for purposes of PAGA. Thus, Kim's suggestion that a "PAGA dismissal will follow" every time individual claims are compelled to arbitration is a feigned concern.

More important, this Court's public policy concerns in *Iskanian* are absent here. *Iskanian* held pre-dispute waivers of PAGA claims violated public policy. (*Iskanian, supra,* 59 Cal. 4th at p. 383 ["...employees are free to choose whether or not to bring PAGA actions when they are aware of

Labor Code violations... *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.*"] [internal citations omitted] [emphasis added].) This case does not concern a mandatory pre-dispute PAGA waiver that all employees were forced to sign, so the rule does not apply. It instead involves a post-dispute, voluntary settlement with one employee, using the Section 998 mechanism.

To the extent *Iskanian* is applicable, it undercuts Kim's position. *Iskanian* held employees are "free to choose" if they want to pursue PAGA actions once they are aware of the alleged Labor Code violations. (*Id.*) When Kim received the 998 Offer, he was represented by counsel, presumably aware of this Court's precedent regarding representative standing. Kim could have rejected the 998 Offer, litigated his individual claims, and maintained standing as a PAGA representative. Instead, he chose to settle for a sizeable sum. There is no public policy in *Iskanian* that allows Kim to accept a 998 Offer, willingly dismiss his individual claims with prejudice, but avoid the effect of his decision.

V. CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeal.

Respectfully submitted,

Dated: September 24, 2018

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

By: _____

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CERTIFICATE OF COMPLIANCE

I, Spencer C. Skeen, prepared Respondent's Answer Brief on the Merits and certify that the "word count" on the Microsoft Word program used to prepare the brief determined the text of the brief consists of 7,969 words, exclusive of the title page, tables of contents and authorities, this certificate, and the proof of service.

Dated: September 24, 2018

Spencer C. Skeen

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PROOF OF SERVICE

JUSTIN KIM VS. REINS INTERNATIONAL CALIFORNIA, INC.
Supreme Court Case No. 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.

On September 24, 2018, I served the following document(s):

REINS INTERNATIONAL CALIFORNIA, INC.'S ANSWER BRIEF ON THE MERITS

by placing ☐ (the original) ☒ (a true copy thereof) in a sealed envelope addressed as stated on the attached mailing list.

☒ **BY MAIL:** I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Ogletree, Deakins, Nash, Smoak & Stewart P.C.'s practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

☐ **BY MAIL:** I deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid at 4370 La Jolla Village Drive, Suite 990, San Diego, California 92122.

☒ **BY OVERNIGHT DELIVERY:** I placed the sealed envelope(s) or package(s) designated by the express service carrier for collection and overnight delivery by following the ordinary business practices of Ogletree, Deakins, Nash, Smoak & Stewart P.C., San Diego, California. I am readily familiar with Ogletree, Deakins, Nash, Smoak & Stewart P.C.'s practice for collecting and processing of correspondence for overnight delivery, said practice being that, in the ordinary course of business, correspondence for overnight delivery is deposited with delivery fees paid or provided for at the carrier's express service offices for next-day delivery.

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- ☐ [State Court motion, opposition or reply only] in accordance with Code of Civil Procedure section 1005(b):

☐ [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 September 24, 2018, San Diego, California.

Erika Schmidt
Type or Print Name

Signature

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