No. S246711

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

Kalethia Lawson,
Plaintiff and Appellant

v.

ZB, N.A. et al.,
Defendants and Respondents

Application To File Amicus Curiae Brief And Proposed Brief Of The California New Car Dealers Association In Support Of Defendants And Respondents ZB N.A. et el.

After a Decision by the Court of Appeal, Fourth Appellate District, Division One
Nos. D071279, D071376
Published at 18 Cal.App.5th 705

San Diego County Superior Court
The Honorable Joel M. Pressman, Judge
Case No. 37-2016-00005578

GREINES, MARTIN, STEIN & RICHLAND LLP
*Robert A. Olson, Bar No. 109374
Cynthia E. Tobisman, Bar No. 197983
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
rolson@gmsr.com; ctobisman@gmsr.com

Attorneys for Amicus Curiae
California New Car Dealers Association

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rolson@gmsr.com; ctobisman@gmsr.com

Attorneys for Amicus Curiae
California New Car Dealers Association

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Application For Leave To File Amicus Curiae Brief

Pursuant to California Rules of Court, rule 8.520(f), the California New Car Dealers Association (CNCDA) respectfully requests leave to file the attached amicus curiae brief in support of defendants and respondents ZB, N.A. and Zions Bancorporation.

CNCDA is a nonprofit corporation organized to protect and advance the interests of franchised new vehicle dealers in California. CNCDA has roughly 1,100 dealer-members. These members sell and lease new vehicles; they also engage in automotive service, repair and part sales. CNCDA frequently files amicus curiae briefs in cases such as this that implicate the important concerns of its dealer-members.

California's franchised new vehicle dealers have about 140,000 employees—i.e., over 100 employees per dealership on average. Their total payroll is over $8.5 billion annually. (*CNCDA 2018 Economic Impact Report* <https://www.cncda.org/wp-content/uploads/2018-Economic-Impact-Report.pdf> [as of Aug. 9, 2018].)

Disputes regarding enforcement of arbitration provisions in employment agreements are a common drag on dealer-members' businesses. (E.g. *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 [vehicle dealer petition to compel arbitration in employment agreement].) As major California employers, CNCDA's dealer-members have a direct interest in ensuring that California's employment laws are fairly and properly construed,

including that arbitration provisions in employment agreements are properly enforced.

For many CNCDA member-dealers unwarranted employment claims, especially where they can be unilaterally multiplied through PAGA, are a serious threat to their continuing viability as businesses.

CNCDA's counsel have reviewed the briefing in this matter and believe that CNCDA can provide an important broader perspective regarding the proper operation of the Private Attorneys General Act, Labor Code, § 2699.

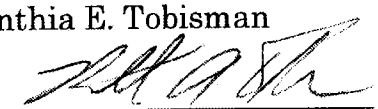
CNCDA has entirely funded the preparation and submission of its brief without any monetary contribution from any other person or entity. This brief is solely the work of counsel representing CNCDA. (See Cal. Rules of Court, rule 8.520(f)(4).)

For all of these reasons, CNCDA respectfully requests leave to file the accompanying Amicus Curiae Brief of the California New Car Dealers Association in support of defendants and respondents ZB, N.A. and Zions Bancorporation.

Dated: August 14, 2018

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson
Cynthia E. Tobisman

By: 
Robert A. Olson
Attorneys for Amicus Curiae California New Car Dealers Association

Amicus Curiae Brief Of
The California New Car Dealers Association
Introduction

The parties' briefing only lightly touches on a critical assumption underlying the issue before this Court: that in a Private Attorneys General Act (PAGA), Labor Code, section 2699 action, a plaintiff may recover his own and others' unpaid wages as a "civil penalty." But this Court has never so held, nor should it. The Courts of Appeal are in conflict on the issue. (Compare *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112 [followed here by the same Court of Appeal division] with *Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228.) The better view is that unpaid wages are *not* civil penalties—and thus cannot be pursued under PAGA.

PAGA was intended to allow plaintiffs to pursue claims for civil penalties that the State did not have the time or resources to pursue. PAGA was not intended to convert individual unpaid wage claims into some sort of State-possessed penalty claim. Nor was it intended to create a quasi-class action for unpaid wages by private individuals standing in the State's shoes, but without due process class action protections and stripped of any binding arbitration agreements.

Recognizing that individual unpaid wage claims cannot be litigated under a PAGA process is consistent with this Court's holding in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 381 (*Iskanian*) that the Federal Arbitration Act (FAA) does not apply to true State-function civil penalty PAGA claims. *Iskanian* proceeded no further than that. It reached the boundary of PAGA.

If PAGA does not extend to individual unpaid wage claims, as this brief demonstrates, there is no need to address the FAA. But if PAGA does encompass individual unpaid wage claims, then the FAA must apply to those claims. The FAA's directive that arbitration provisions are to be honored as written cannot be defeated by the simple expedient of assigning those claims to the State and then having the State, through PAGA, reassign the claims back to their original holders. The FAA does not permit parties or states to launder arbitration clauses out of existence.

With the overly broad interpretation promoted by the plaintiff here and adopted by the Court of Appeal, PAGA poses the same threat to small businesses that an overly broad interpretation of Business and Professions Code section 17200 did. The Legislature expressly sought to avoid such a result. PAGA must be confined to the boundaries that the Legislature

understood and intended—boundaries that are consistent with, rather than violative of, federal law.

Argument

I. The Private Attorneys General Act (PAGA) does not deputize individuals to recover their own or other individuals' unpaid wages under the guise of "civil penalties."

Labor Code section 558 (section 558) allows the State, as an ancillary part of a civil-penalties enforcement action, to collect employees' unpaid wages. Plaintiff takes the position that by doing so, section 558 relabels unpaid wages as civil penalties. She reasons that when a plaintiff steps into the State's shoes under PAGA, she may seek her unpaid wages, as well as those of others as transubstantiated penalties. Her syllogism is: (a) section 558 labels unpaid wages as, and thereby transforms them into, civil penalties; (b) PAGA allows individuals to pursue civil penalties in the State's stead; (c) therefore, PAGA allows individual plaintiffs to seek unpaid wages (their own and co-workers') under its auspices.

Neither section 558 nor PAGA supports plaintiff's syllogism. There is no indication that the Legislature intended to breach the clear distinction between civil penalties (which can be pursued under PAGA) and an individual's claim to unpaid wages (which cannot be pursued under PAGA). The present case, which involves individual unpaid wages, thus falls outside of PAGA.

A. Labor Code section 558 does not transform individuals' unpaid wages claims into "civil penalties."

In enacting section 558, the Legislature did not contemplate that unpaid wage claims would constitute "civil penalties" that could be enforced by private individuals under PAGA. That is apparent from section 558's plain language, which directs that any employer who violates a statutory or Industrial Welfare Commission mandate "shall be subject to a civil penalty as follows:

> (1) For any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid *in addition to* an amount sufficient to recover underpaid wages.
>
> (2) For each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid *in addition to* an amount sufficient to recover underpaid wages.

(Lab. Code, § 558, subd. (a), italics added.)

Thus, on its face, the statute draws a distinction between the civil penalty of a specific amount ($50 or $100, as applicable) and the employee's non-civil-penalty recovery (unpaid wages).

The civil penalty is the amount "in addition to," that is, on top of, unpaid wages, not unpaid wages themselves.

Lest there be any doubt that the unpaid wages are not part of the civil penalty, section 558 mandates that a claim to unpaid wages is not the *State*'s claim but the individual employee's claim: "(3) Wages recovered pursuant to this section shall be paid *to the affected employee*." (Lab. Code, § 558, subd. (a)(3), italics added.) That unpaid wages go to the employee, not the State, is a clear indication that those amounts are not civil penalties because civil penalties are payments *to the State*.

Esparza v. KS Industries, L.P., supra, recognized the difference between civil penalties and unpaid wages. Because unpaid wages belong to and are paid to the employee, they are *not* a civil penalty. (13 Cal.App 5th at pp. 1241-1243.) "Civil penalties are paid largely into the state treasury. Thus, the state receives proceeds when civil penalties are imposed. In contrast, civil penalties do not include recoveries that could have been obtained by individual employees suing in their individual capacities—that is, victim-specific relief." (*Id.* at pp. 1242-1243; citations omitted; see *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103-1104, 1108-1109 [additional pay *due to employee* for missed meal or rest break under Lab. Code,

§ 226.7 is wages, *not a penalty* subject to a shorter one-year statute of limitations]; *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 679 [because a civil penalty is distinct from damages, PAGA plaintiff need not show his own injury from a willful and knowing violation of Labor Code section 226, as would be required for damages]; *Lopez v. Friant & Associates, LLC* (2017) 15 Cal.App.5th 773, 780 [same]; cf. Bus. & Prof. Code, § 17206 [civil penalties are amounts recoverable only by governmental entities].)

Iskanian, supra, 59 Cal.4th at p. 381 draws the same distinction: "The civil penalties recovered *on behalf of the state* under the PAGA are distinct from the *statutory damages to which employees may be entitled in their individual capacities.*" (Italics added.)

Section 558's legislative history confirms that the $50 or $100 was the only civil penalty contemplated. It contains no mention of collected unpaid wages being part of the civil penalty amount.[1] Rather, *every* time the legislative history discusses what constitutes the new civil penalty, the *sole* reference is to

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[1] The legislative history of section 558 is available at <http://leginfo.legislature.ca.gov/faces/billSearchClient.xhtml> (A.B. 60, session year 1999-2000).

"new civil penalties of $50 per employee for each pay period for a first violation, and $100 per employee for each per pay period for subsequent violations of the Chapter." (Assem. Com. on Labor & Employment, Rep. on Assem. Bill No. 60 (1999-2000 Reg. Sess.) Mar. 17, 1999, p. 5; Assem. Com. on Appropriations, Rep. on Assem. Bill No. 60 (1999-2000 Reg. Sess.) Apr. 21, 1999, p. 3.)[2] There is *no* mention of unpaid wage amounts. Thus, in enacting section 558, the Legislature did not contemplate that it was transforming unpaid wage amounts into a civil penalty.

That unpaid wages are not a "civil penalty" is also buttressed by the many statutes defining a "civil penalty" as a specified dollar sum, not an amount that is measurable by a particular individual's damages. (E.g, Bus. & Prof. Code, §§ 17206 [civil penalty of $2,500], 17536 [same]; Civ. Code, §§ 52 [civil penalty of $25,000], 56.36 [individual may recover damages; public officer acting in the name of the people may recover civil penalties ranging from $1,000 to $250,000]; Gov. Code, § 12651 [civil penalties from $5,500 to $11,000]; Health & Saf. Code, § 25249.7 [up to $2,500]; Lab. Code, §§ 225.5 [$100 to $200], 226.3

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[2] Attached at the end of this brief, per Cal. Rules Court, rule 8.204(d).

[$250 to $1,000], 226.8 [$5,000 to $25,000], 1021 [$200 per day], 1288 [$5,000 to $10,000], 1403 [$500], 6428 [up to $25,000].)

There are, of course, exceptions and outliers. Any statutory compilation as massive as California's Codes is bound to have the occasional inconsistency. But the general rule, proved by the exceptions, is that civil penalties are dollar-denominated amounts, just like the $50 and $100 amounts in section 558. The pervasive use in the Codes of "civil penalty" to refer to a dollar amount, collectible by a governmental officer, means that such was by far the most likely understanding that the Legislature had in enacting section 558.

Finally, that unpaid wages are not part of a "civil penalty" is also supported by an analogous statute: Labor Code section 225.5, which directs the Labor Commission to recover $100 (first violation) or $200 plus 25 percent of any amount unlawfully withheld (subsequent violations) as part of a hearing to recover unpaid wages. Under section 225.5, the civil penalty (a dollar amount or a dollar amount plus an additional amount measured by, but on top of, unpaid wages) is the amount *over and above* the unpaid wages being sought. Again, this is the most likely concept that the Legislature had in mind in enacting section 558.

There is no indication that the Legislature in enacting section 558 intended to transmute unpaid wages from damages to civil penalties.

B. Nothing in PAGA suggests that it was intended to reach individual claims for unpaid wages.

As just shown, plaintiff's syllogism falls apart because section 558's mere mention of unpaid wages does not magically turn such unpaid wages into civil penalties. But plaintiff's syllogism falls apart for another reason too: Nothing in PAGA or its legislative history suggests that it was intended to convert an individual's claims for unpaid wages into a "civil penalty" enforceable by a current or former co-worker.

PAGA is not a vehicle for bringing representative claims for unpaid wages. There is such a vehicle: *class actions*. Class actions are designed to permit a group of employees to pursue unpaid wage damages claims where stringent standards of commonality and representation are met. Class actions are the proper vehicle for pursuing such claims because class actions are constrained by a body of case law ensuring due process when an individual seeks to champion the potentially factually divergent claims of numerous other individuals who may have differing interests. By contrast, PAGA simply allows an individual to act as a private attorney general as to *civil penalties*. It stands

outside of due process concerns because it is pursuing the State's claims, not individuals' and contains none of the class action procedural protections.

PAGA does create its own, gap-filling civil penalties. It piggybacks on existing statutory civil penalties when such are defined and available under other Labor Code sections. But when no such civil penalty has been specified for a violation, PAGA imposes "civil penalties" *defined as* dollar-denominated amounts, $100, $200, or $500. (Lab. Code, § 2699, subds. (f)(1) & (2).) So PAGA itself recognizes that civil penalties are dollar-denominated sums. There is no hint that PAGA has anything to do with unpaid wages themselves, whether under section 558 (section 558 is not mentioned in PAGA's legislative history) or otherwise. And there is no hint that the Legislature meant for PAGA to be a backdoor method for pursuing what would otherwise be class action damages claims for unpaid wages. PAGA's legislative history nowhere mentions collecting unpaid wages.

Plaintiff's semantic theory of PAGA liability for unpaid wages boils down to an assertion of an unintended consequence of potentially loose language in section 558 coupled with broad language in PAGA. But neither statute was intended to

transmute unpaid wage claims into a State-owned right that could then be transferred to individuals standing in the State's shoes.

Plaintiff argues that the statutory language could be so construed if read in the abstract. But that is not how statutes are interpreted. Indeed, plaintiff's theory runs afoul of the established rules of statutory construction.

First, the purpose of statutory construction is to effectuate what the Legislature intended, not what it did not intend or did not foresee. "[I]t is settled that the language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the Legislature did not intend. To this extent, therefore, intent prevails over the letter of the law and the letter will be read in accordance with the spirit of the enactment. [Citation.]" (*In re Michele D.* (2002) 29 Cal.4th 600, 606.) Although statutory enactments do, inevitably, sometimes have unintended consequences, such not-thought-through consequences should be limited and avoided as much as possible, not sought out or multiplied, as plaintiff's theory would do here.

Second, plaintiff's construct creates a statutory conflict as to what happens to any unpaid wages that are collected in the action. Section 558 sensibly directs that any unpaid wages "shall

be paid *to the affected employee.*" (Subd. (a)(3), italics added.) But PAGA directs that under its scheme "civil penalties recovered by aggrieved employees shall be distributed ... 75 percent to the Labor and Workforce Development Agency" and "25 percent to the aggrieved employees." (Lab. Code, § 2699, subd. (i); see *id.* subd. (j) [in circumstance not applicable here, Labor and Workforce Development Agency receives entire civil penalty amount].) The legislators were told 25 percent of the civil penalties "would be divided between all identified employees aggrieved by the violation, instead of being retained by a single plaintiff." (Sen. Judiciary Com., Rep. on Sen. Bill No. 796 (2003-2004 Reg. Sess.) Apr. 29, 2003, p. 8.)[3]

So, which is it? Does the affected employee receive all of her unpaid wages or only 25 percent, escheating the other 75 percent to the State and sharing the remaining 25 percent with all other affected employees? The latter scenario is what PAGA dictates should occur if plaintiff is correct that unpaid wages are PAGA "civil penalties." Yet, that cannot be what the Legislature intended. Depriving aggrieved employees of

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[3] Found at <http://leginfo.legislature.ca.gov/faces /billSearchClient.xhtml> (S.B. 796, session year 2003-2004). Again, a copy is attached at the end of this brief.

75 percent of their unpaid wages and requiring them to split the other 25 percent with co-workers would offend due process, depriving the aggrieved employee of a property interest without notice or opportunity to be heard.

Employees have a property interest in their unpaid wages. (See *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178 ["earned wages that are due and payable pursuant to section 200 et seq. of the Labor Code are as much the property of the employee who has given his or her labor to the employer in exchange for that property as is property a person surrenders through an unfair business practice"].) Due process requires notice and an opportunity to be heard, as is the case in class actions, before an employee is deprived of such a property interest in unpaid wages. (See *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811-812 [due process notice and opportunity to be heard requirements apply to class actions].)

The whole reason that an absent employee is bound, without notice and an opportunity to be heard, by the result of a PAGA action is because the PAGA plaintiff is limited to seeking only what *the State* has the right to recover. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.) Due process does not allow giving 75 percent of an absent employee's individual property

interest in unpaid wages to the State and distributing the remaining 25 percent among other employees just because someone beat the absent employee to the punch in filing suit. But that is what PAGA requires if unpaid wages are PAGA "civil penalties."

It is no answer to say that unpaid wages can be civil penalties under PAGA for one purpose but not for another. "It is an established rule of judicial construction that when a term appears in different parts of the same act, or in related sections of the same code, the term should be construed as having the same meaning in each instance." (*People v. Ruiz* (2018) 4 Cal.5th 1100, 1113, citation and internal quotation marks omitted.) This means that if unpaid wages are deemed a "civil penalty" for one purpose (PAGA enforcement), they must also be for another purpose (distribution). Unpaid wages cannot be both a "civil penalty" and *not* "civil penalties" in the same statute. (Compare Lab. Code, § 2699 subds. (a) & (i).) They must be one or the other.[4]

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[4] Treating unpaid wages as a true civil penalty further creates a statute of limitations conundrum. A wage claim has a three-year statute of limitations, but a civil penalty has a one-year statute of limitations. (See *Murphy v. Kenneth Cole Productions, Inc.*, *supra*, 40 Cal.4th 1094 [treating additional pay for missed meal

There is an easy way to reconcile the tension between PAGA and section 558 as to what happens to collected amounts: Unpaid wages are not PAGA civil penalties for *either* purpose, enforcement or distribution. That reconciliation is entirely consistent with the more limited meaning generally given to the term "civil penalties" and with the legislative history of section 558, in which only the $50 and $100 specific amounts are identified as newly added "civil penalties."

In sum, neither section 558 nor PAGA ever intended to treat individual employees' unpaid wages as a "civil penalty." Unpaid wages may not be pursued in a PAGA action.

II. To the extent PAGA allows individuals to pursue an unpaid wages remedy, the Federal Arbitration Act applies.

The simple answer in this case is that, as just discussed, PAGA does not reach individuals' unpaid wages. To the extent

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or rest break under Lab. Code, § 226.7 as wages subject to three-year statute, not a penalty subject to a one-year statute]; *Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 978 [one-year statute of limitations applies to civil penalty enforceable by private individual].) As to an individual's wage claim, a three-year statute would apply. If the State sought to collect those same unpaid wages as a "civil penalty" under section 558, a one-year statute would apply. When the individual takes back her wage claim as a PAGA claim, would a one-year or three-year statute apply?

that PAGA is construed otherwise and then used to strip away otherwise valid and enforceable arbitration provisions from individuals' unpaid wages claims, such a construction of PAGA would run afoul of the FAA. Individual employees (and employers) may desire an expedient resolution of wage claims as provided by arbitration. PAGA (which has no class opt-out option) could deprive them of that option. That is a result that the FAA does not countenance.

The reach and supremacy of the FAA is well established. The United States Supreme Court has repeatedly struck down state attempts (either legislative or judicial) to evade the federal command that arbitration provisions in contracts (at least contracts affecting interstate commerce) be enforced as written. (E.g., *Kindred Nursing Centers Ltd. Partnership v. Clark* (2017) 137 S.Ct. 1421 [state statute requiring powers of attorney to expressly grant right to waive jury trial, effectively to enter into an arbitration agreement, invalid under FAA]; *DIRECTV, Inc. v. Imburgia* (2015) 136 S.Ct. 463 [under FAA, California law invalidating class arbitration waivers ineffective even though arbitration provision included proviso that it was inoperable if "law of your state" made class arbitration waiver unenforceable]; *Marmet Health Care Center, Inc. v. Brown* (2012) 565 U.S. 530 [FAA preempts state law barring predispute agreements to

arbitrate personal injury or wrongful death claims against nursing homes]; *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 [FAA requires enforcement, as written, of class action waivers in arbitration agreements; such waivers cannot be categorically deemed by states to be unconscionable].) And that is just in the last decade.

Accordingly, there can be no doubt that the FAA would invalidate a state rule (statutory or otherwise) that the assignment of a contract claim would void an arbitration provision (a result that would not obtain for the assignment of contract rights generally). It must be equally inconceivable that a state law that allowed an individual to assign a claim subject to arbitration to the state and the state to then re-assign the claim back to the individual without an arbitration provision would pass FAA muster. It would not matter if the state said that it was taking the claim as a "civil penalty."

But that is effectively what the plaintiff argues here. She argues that by having her claim pass through the State and then back to her, the arbitration provision is laundered out of the contract. Here's how the mechanism supposedly works:

First, the State steps into individuals' shoes, obtaining the right to seek unpaid wages under section 558, effectively an assignment by operation of law.

Second, the individuals then step into the State's shoes under PAGA, taking back the same unpaid wages claim that had been potentially under the State's auspices, effectively having their own claims reassigned back to them.

The whole matter is circular: The State nominally steps into individuals' shoes to seek unpaid wages. The individuals then step into the State's shoes under PAGA to seek their own unpaid wages. In this context PAGA is a nullity. To the extent that this process functions to strip away an otherwise valid arbitration provision, leaving a party that had been subject to arbitration no longer subject to arbitration, it undoubtedly violates the FAA.

There can be little doubt that the Legislature did not intend or contemplate such an arbitration-stripping function for PAGA. Arbitration is not mentioned anywhere in PAGA's statutory history. This arbitration-stripping function is the creation of plaintiff's (and other creative parties' and counsels') unintended-consequences construct. But whether intended or accidental, such a mechanism violates the FAA.

As well briefed by ZB, N.A., here, *Iskanian, supra*, 59 Cal.4th 348, is not to the contrary. *Iskanian* addresses the true civil penalties recoverable under PAGA (e.g., statutory dollar amounts), *not* unpaid wages under section 558.

The bottom line: PAGA violates the FAA if it is construed as a mechanism that circularly launders unpaid wages claims with the effect of stripping them of attached arbitration rights.

III. An overly broad PAGA interpretation leads to abuses comparable to those that resulted from an overly broad interpretation of Business and Professions Code section 17200—a result the Legislature expressly sought to avoid.

California has been down the road of overbroad statutory readings before with Business and Professions Code section 17200. That experience led to Proposition 64 and to PAGA limiting the potential private plaintiffs to aggrieved employees.

But even that has not stopped the explosion in PAGA claims. (See, e.g., Michael Saltsman, *Private Attorneys General Act is another burden to California small businesses* (June 4, 2017) <https://www.ocregister.com/2017/06/04/private-attorneys-general-act-is-another-burden-to-california-small-businesses> [as of Aug. 9, 2018].) According to the Legislative Analyst's Office, PAGA notices ballooned from 4,430 in 2010 to 6,307 in 2014.

(*The 2016-17 Budget: Labor Code Private Attorneys General Act resources* (Mar. 25, 2016) Legislative Analyst's Office <https://lao.ca.gov/Publications/Report/3403> [as of Aug. 9, 2018].)[5] A large percentage of individual claims for unpaid wages are now filed as representative PAGA actions. The trial courts are flooded with PAGA filings, most of which, as quasi-class actions, are deemed complex. (see Cal. Rules of Court, rule 3.400(c)(6).)

The explosion in PAGA claims is not surprising, as the mere filing of a PAGA claim has an in terrorem effect. Those suing employers are advised to include PAGA claims because "[t]he ability to recover large civil penalties and attorneys' fees from employers can create important leverage in PAGA cases." (Lisa P. Mak, *PAGA Procedural Amendments: Same statute, new requirements for Labor Code violations* (Feb. 2017) Plaintiff Magazine <https://www.plaintiffmagazine.com/item/paga-procedural-amendments> [as of Aug. 9, 2018].) Evading class action due process protections is what generates many PAGA unpaid wages claims: "A major benefit of PAGA actions is that

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[5] Ironically, the huge increase in PAGA notices has put a strain on administrative resources, triggering the need for budget increases—the exact problem PAGA was supposed to resolve.

plaintiffs do not need to satisfy the strict and often onerous class-certification requirements of traditional class actions." (*Ibid.*)

This wasn't supposed to happen. The legislative history reflects that "[t]he sponsors [of PAGA] are mindful of the recent, well-publicized allegations of private plaintiff abuse of the UCL [Bus. & Prof. Code, § 17200], and have attempted to craft a private right of action that will not be subject to such abuse." (Sen. Judiciary Com., Rep. on Sen. Bill No. 796 (2003-2004 Reg. Sess.) Apr. 29, 2003, p. 7.)[6] To that end, the limitation of the PAGA plaintiff's distribution to 25 percent of the recovery was supposed to be a brake on untoward lawsuits. But that brake disappears if PAGA is extended to unpaid wage claims and the affected employee keeps 100 percent of collected unpaid wages, as under section 558.

At a minimum, the legislative understanding and sentiment that there should be and would be self-dampening brakes on PAGA lawsuits counsels for a restrained interpretation when an attempt is made to push PAGA to its limits and beyond.

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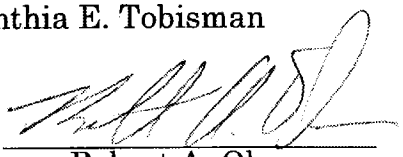
[6] Found at <http://leginfo.legislature.ca.gov/faces /billSearchClient.xhtml> (S.B. 796, session year 2003-2004), copy attached.

Conclusion

For all of these reasons, the California New Car Dealers Association urges this Court to reverse the Court of Appeal's decision in this matter and remand this matter with directions that it affirm the trial court's order compelling arbitration. In doing so, this Court should disapprove *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, to the extent that *Thurman* holds that a PAGA plaintiff may pursue unpaid wage claims.

Dated: August 14, 2018

Respectfully submitted,
GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson
Cynthia E. Tobisman

By: 
Robert A. Olson

Attorneys for Amicus Curiae California New Car Dealers Association

Certification

Pursuant to California Rules of Court, rule 8.504(d)(1), I certify that this **Application To File Amicus Curiae Brief And Proposed Brief Of The California New Car Dealers Association In Support Of Defendant And Respondent** contains **4,701** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: August 14, 2018

Robert A. Olson

Attachment Per

California Rules of Court, rule 8.204(b)

1. Assembly Committee on Labor & Employment Rep. on Assem. Bill No. 60 (1999-2000 Reg. Sess.) Mar. 17, 1999

2. Assembly Committee on Appropriations Rep. on Assem. Bill No. 60 (1999-2000 Reg. Sess.) Apr. 21, 1999

3. Senate Judiciary Committee, Rep. on Sen. Bill No. 796 (2003-2004 Reg. Sess.) Apr. 29, 2003

Date of Hearing: March 17, 1999

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT
Darrell Steinberg, Chair
AB 60 (Knox) - As Amended: March 15, 1999

SUBJECT : Wages and hours: daily and weekly overtime.

SUMMARY : Establishes a framework for the payment of daily overtime compensation: time and one half pay after eight hours of daily work; up to four hours of make-up time per week without payment of overtime compensation; the adoption through an employee election of an alternative work week schedule or menu of schedules offered by an employer. Specifically, this bill :

1) Codifies the payment of daily overtime compensation at a rate of one and one half (1) times regular pay after eight hours of daily work and 40 hours of weekly work; at a rate of twice regular pay after 12 hours of daily work and eight hours of work on the seventh day of any workweek. This bill deletes the authority of parties to a contract to otherwise expressly stipulate the number of hours that constitute a day's work.

2) Establishes a procedure for an employer to propose an alternative workweek schedule or a menu of alternative workweek schedules, which may be approved by a 2/3 vote of affected employees. An alternative workweek schedule established pursuant to this procedure could allow up to 10 hours of daily work before overtime compensation is required. The procedure includes:

   a) Approval upon a 2/3 vote by secret ballot of affected employees in a designated work unit;

   b) Specific written notice and disclosures by the employer to the affected employees concerning the proposal;

   c) Supervision of the election by a neutral third party from a list established by the Labor Commissioner upon written request by an employee;

   d) Review by the Labor Commissioner of the designation of a "work unit" upon written request of an employee.

   Establishes procedures for the repeal of an alternative

animals, crops, or agricultural lands;

b) For employees of a common carrier engaged in or connected with the movement of any train;

c) For employees of a commercial (non-passenger) fishing boat;

d) For student employees, camp counselors, or program counselors of an organized camp;

e) For employees of certain 24-Hour manufacturing facilities with preexisting workweek arrangements.

1) Codifies the current wage order requirement for meal periods after five hours of work, and adds a requirement for a second meal period after 10 hours of work.

2) Adds new civil penalties of $50 per employee for each pay period for a first violation, and $100 per employee for each per pay period for subsequent violations of the Chapter. The bill also consolidates procedures for enforcing such requirements.

EXISTING LAW

1) Provides under the California Constitution (Art. XIV 1) authority for the Legislature to:

(a) Enact statutes governing the general welfare of employees including hours of work; and,

(b) Confer on a commission legislative, executive and judicial powers for those purposes.

Under this authority, the Legislature has adopted general and specific statutes concerning hours of work, and the Legislature has conferred those powers to the IWC.

1) Provides, by statute, that eight hours of labor constitute a day's work, unless it is otherwise stipulated by parties to a contract; and further provides that employees are entitled to one day's rest in seven. The statutes further provide that these requirements do not apply to work performed:

a) In the necessary care of animals, crops or agricultural

Date of Hearing: April 21, 1999

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Carole Migden, Chairwoman

AB 60 (Knox) - As Amended: March 22, 1999

Policy Committee: Labor and Employment Vote: 6-3

Urgency: No State Mandated Local Program: Yes Reimbursable: No

SUMMARY :

This bill enacts the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999, which generally provides that employees shall be paid overtime at specified rates for hours worked in excess of eight hours in one day.

FISCAL EFFECT :

The Department of Industrial Relations (DIR) estimates that this bill would result in costs to its Division of Labor Standards Enforcement (DLSE) of up to $1 million to review and process increased numbers of overtime wage claims and alternative workweek requests. DIR estimates that these costs would be offset by revenues generated from the civil penalties authorized by the bill.

KEY PROVISIONS :

The bill includes the following key provisions:

1) Premium Overtime Pay

a) Except for an employee working pursuant to an alternative workweek schedule, the bill provides that employees must be compensated for hours worked in excess of eight hours in one day at the rate of 1- the employee's regular rate of pay, and for hours worked in excess of 12 hours in one day at the rate of twice the employee's regular rate of pay.

b) Deletes the authority of parties to a contract to

workweek in which the time was lost, may not be counted towards the total hours worked in a day for purposes of overtime requirements.

b) Provides an exception from the overtime pay requirements for administrative, executive, professional or other classes of salaried employees, providing that the employee earns at least three times the state minimum wage and is primarily engaged in duties that meet the test of the exemption.

c) Deletes the authority of the IWC to establish new exemptions after July 1, 2000.

d) Exempts from the overtime pay requirements employees covered by a collective bargaining agreement that requires premium wage rates for all overtime hours worked and establishes a wage rate of not less than 30% more than the state minimum wage.

e) Repeals statutory provisions governing daily and weekly overtime requirements for employees of ski establishments, licensed commercial passenger fishing boats, licensed hospitals, and stables.

f) Retains specific statutory exemptions from daily and weekly overtime requirements for agricultural employees, employees of a common carrier (train), employees of a commercial (non-passenger) fishing boat, student employees, camp counselors, or program counselors of an organized camp, and for employees of certain 24-hour manufacturing facilities with preexisting workweek arrangements.

4) Meal Periods

a) Codifies the IWC wage order requirement for meal periods after five hours of work, and imposes a second meal period requirement after 10 hours of work, subject to certain exemptions.

5) Penalties

a) Authorizes new civil penalties of $50 per employee for each pay period for a first violation of the overtime pay requirements of the bill, and $100 per employee for each

pay period for subsequent violations. The bill assigns enforcement responsibilities to the Labor Commissioner.

COMMENTS :

1) Background . The California Constitution authorizes the Legislature to enact statutes governing the general welfare of employees, including hours of work, and to confer to a commission legislative, executive and judicial powers for such purposes. The Legislature has both adopted statutes governing hours of work and conferred authority over these matters to the Industrial Welfare Commission (IWC). There currently are 15 IWC wage orders governing wages, work hours and working conditions in specific industries.

2) Elimination Of Daily Overtime . Effective January 1, 1998, the IWC amended five wage orders to eliminate daily overtime for any number of hours worked in the following industries or occupational groups: (1) manufacturing; (2) professional, clerical, mechanical and similar occupations; (3) public housekeeping industry; (4) mercantile industry; and (5) transportation industry. Bill supporters estimate that these wage orders have eliminated up to $1 billion in daily overtime pay for eight million workers.

3) Arguments In Support . Supporters state the elimination of the eight-hour day has severely cut incomes of employees in the five industries covered by the amended IWC wage orders, particularly for part-time workers that fail to qualify for premium pay under the 40-hour workweek. Additionally, proponents cite studies that have linked long work hours to increased accident rates, and note the damage to family life that occurs when one or both parents are kept away from home on an extended basis. Finally, proponents argue that the alternative work schedule provisions of the bill afford sufficient flexibility to unconventional workplaces, as long as consent of employees is achieved.

4) Arguments in Opposition . Opponents maintain the alternative workweek provisions of the bill do not provide sufficient flexibility to employers in unconventional workplaces, particularly for small and start-up businesses that may not be able to afford the overtime pay premiums imposed by the bill. If the bill causes such businesses to fail or move out of state, the bill will ultimately will hurt both business and

SENATE JUDICIARY COMMITTEE
Martha M. Escutia, Chair
2003-2004 Regular Session

SB 796 S
Senator Dunn B
As Amended April 22, 2003
Hearing Date: April 29, 2003 7
Labor Code 9
CJW 6

SUBJECT

Employment

DESCRIPTION

This bill would allow employees to sue their employers for civil penalties for employment law violations, and upon prevailing, to recover costs and attorneys' fees. The bill is intended to augment the enforcement abilities of the Labor Commissioner by creating an alternative "private attorney general" system for labor law enforcement.

This analysis reflects author's amendments to be offered in Committee.

BACKGROUND

California's Labor Code is enforced by the state Labor and Workforce Development Agency (LWDA) and its various boards and departments, which may assess and collect civil penalties for specified violations of the code. Some Labor Code sections also provide for criminal sanctions, which may be obtained through actions by the Attorney General and other public prosecutors.

In 2001, the Assembly Committee on Labor and Employment held hearings about the effectiveness and efficiency of the enforcement of wage and hour laws by the Department of Industrial Relations (DIR), one of four subdivisions of the LWDA. The Committee reported that in fiscal year 2001-2002, the Legislature appropriated over $42 million to

(more)

> Section 17200 when it sued thousands of small businesses for minor violations and demanded settlements in order to avoid costly litigation.

The California Chamber of Commerce argues that, since the bill would award attorneys' fees to prevailing employees, but not to employers when they prevail, SB 796 would clog already-overburdened courts because there would be no disincentive to pursue meritless claims.

The California Employment Law Council states that the the Labor Code contains "innumerable penalty provisions, many of which would be applicable to minor and inadvertent actions." Under current law, however, the prospect of excessive penalties is mitigated by prosecutorial discretion, which would disappear under SB 796:

> If, for example, a large employer inadvertently omitted a piece of information on a paycheck, a "private attorney general" could sue for penalties that could reach staggering amounts if . . . the inadvertent deletion of information on a paycheck went on for some time.

5. Sponsors say bill has been drafted to avoid abuse of private actions

The sponsors are mindful of the recent, well-publicized allegations of private plaintiff abuse of the UCL, and have attempted to craft a private right of action that will not be subject to such abuse. First, unlike the UCL, this bill would not open private actions up to persons who suffered no harm from the alleged wrongful act. Instead, private suits for Labor Code violations could be brought only by an "aggrieved employee" - an employee of the alleged violator against whom the alleged violation was committed. (Labor Code violators who are not employers would be subject to suit only by the LWDA or by public prosecutors.)

Second, a private action under this bill would be brought by the employee "on behalf of himself or herself or others" - that is, fellow employees also harmed by the alleged violation - instead of "on behalf of the general public," as private suits are brought under the UCL.

This would dispense with the issue of res judicata ("finality of the judgment") that is the subject of some criticism of private UCL actions. An action on behalf of other aggrieved employees would be final as to those plaintiffs, and an employer would not have to be concerned with future suits on the same issues by someone else "on behalf of the general public."

Third, the proposed civil penalties are relatively low, most of the penalty recovery would be divided between the LWDA (25 percent) and the General Fund (50 percent), and the remaining 25 percent would be divided between all identified employees aggrieved by the violation, instead of being retained by a single plaintiff. This distribution of penalties would discourage any potential plaintiff from bringing suit over minor violations in order to collect a "bounty" in civil penalties.

Finally, the bill provides that no private action may be brought when the LWDA or any of its subdivisions initiates proceedings to collect penalties on the same facts and under the same code provisions.

6. Author's amendments

In order to address concerns that the bill might invite frivolous suits or impose excessive penalties, and pursuant to discussions between the sponsors and Committee staff, the author has agreed to accept the following amendments to clarify the bill's intended scope of its private right of action and the assessment and distribution of its civil penalties:

(a) To clarify who would qualify as an "aggrieved employee" entitled to bring a private action under this section, the author will define the term as follows (at page 2, line 38):

"For purposes of this part, an aggrieved employee means any person employed by the alleged violator within the period covered by the applicable statute of limitations against whom one or more of the violations alleged in the action was committed."

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On August 14, 2018, I served the foregoing document described as: **APPLICATION TO FILE AMICUS CURIAE BRIEF AND PROPOSED BRIEF OF THE CALIFORNIA NEW CAR DEALERS ASSOCIATION IN SUPPORT OF DEFENDANTS AND RESPONDENTS ZB N.A. et al.** on the parties in this action by serving:

Edwin Aiwazian
Arby Aiwazian
Joanna Ghosh
Lawyers for Justice, PC
410 Arden Avenue, Suite 203
Glendale, CA 91203

Michael Rubin
Kristin Marie Garcia
Altshuler Berzon, LLP
177 Post Street, Suite 300
San Francisco, CA 94108

Plaintiff and Respondent Kalethia Lawson

Brian Christopher Sinclair
Rutan & Tucker LLP
611 Anton Boulevard, Fourteenth Floor
Costa Mesa, CA 92626-7681

Defendants and Appellants ZB, N.A. and Zions Bancorporation

(X) By Mail: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit. Executed on August 14, 2018, at Los Angeles, California.

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

Monique N. Aguirre