Case No. S246711

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ZB, N.A. and ZIONS BANCORPORATION,

Petitioners,

v.

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

Respondent;

KALETHIA LAWSON,

Real Party In Interest.

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

OPPOSITION TO MOTION FOR JUDICIAL NOTICE

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I. INTRODUCTION

Petitioners ZB, N.A. and Zions Bancorporation ("Petitioners") respectfully submit their Opposition to the Motion for Judicial Notice ("MJN") filed by Real Party in Interest Kalethia Lawson ("Lawson"), on the grounds that (1) the exhibits to the MJN were not presented to the trial court or appellate court and, therefore, are not part of the record; (2) the exhibits are not relevant to the issue before the Court; and (3) the statutes at issue are clear and, therefore, do not require the Court to consider legislative history or public policy.

II. ARGUMENT

A. The Court should deny the Motion for Judicial Notice because the materials were not presented to the trial court or appellate court and, therefore, are not part of the record.

In her MJN, Lawson requests that the Court take judicial notice of various legislative and government agency documents. None of these materials was presented to the trial court or appellate court and, therefore, these materials are not part of the record. "Reviewing courts generally do not take judicial notice of evidence not presented to the trial court." (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444 n.3; see also *Cassidy v. California Bd. of Accountancy* (2013) 220 Cal.App.4th 620, 628 [explaining that "appellate court is . . . confined in its review to the proceedings which took place in the court below and are brought up for review in a properly prepared record on appeal"][internal quotations and citation omitted].)

This limitation applies to legislative and government agency documents:

> The District has requested that we take judicial notice of various documents, namely, two newspaper articles, the District's financial report, the Governor's budget summary (fiscal year 2011–2012), and other documents regarding California's public schools. These documents

> were not part of the record considered below by the trial court. The District's request for judicial notice is therefore denied.

(*Bullis Charter School v. Los Altos School Dist.* (2011) 200 Cal.App.4th 1022, 1043.)

Accordingly, the MJN should be denied.

B. The Court should deny the Motion for Judicial Notice because the materials are not relevant to the issue before the Court.

Lawson has submitted the exhibits to the MJN because she deems them instructive regarding California's public policy and the "legislative purpose . . . of a statute as it was understood at the time of passage." (See MJN, p. 4.) Petitioners object on the grounds that these documents are irrelevant to the issue before the Court. (*Am. Cemwood Corp. v. Am. Home Assurance Co.* (2001) 87 Cal.App.4th 431, 441, n.7 ["Although a court may judicially notice a variety of matters (EVID. CODE, § 450 et seq.), only *relevant* material may be noticed."].)

While the exhibits are related to Lawson's claims – insofar as some of her claims arise under Labor Code § 558 and the PAGA (LABOR CODE §§ 2698 *et seq.*) – they are not relevant to the issue before the Court: whether seeking recovery of individualized lost wages as civil penalties under Labor Code section 558 falls within the preemptive scope of the Federal Arbitration Act (the "FAA"). Focusing on legislative history and public policy and "parsing the language in the California statutes does not determine the scope of the federal statute, which ultimately is the legislation that controls whether a particular claim by Employee is subject to arbitration." (*Esparza v. KS Industries, L.P.* (2017)13 Cal.App.5th 1228, 1245-1246.)

Indeed, the United States Supreme Court has determined that worker protection statutes – even those that evince a strong public policy – do not override the preemptive scope of the FAA: "The policy may be debatable

but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written." (*Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612, 1632.) Therefore, public policy and legislative intent are irrelevant when analyzing whether the FAA preempts state law. (See *Kindred Nursing Ctrs. Ltd. P'ship v. Clark* (2017) 137 S.Ct. 1421, 1426 [holding that states cannot adopt laws "prohibit[ing] outright the arbitration of a particular type of claim."]; *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 351 ["States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."].)

Lawson's justification for the MJN is misplaced since the intent and purpose of California's Legislature and governmental agencies cannot override the preemptive scope of the FAA. Accordingly, the MJN should be denied.

C. The motion should be denied because the statutes at issue do not require the Court to consider legislative history or public policy.

Lawson requests that the Court take judicial notice of various legislative and government agency documents to assist in its interpretation of the interplay of the FAA, the PAGA, and Labor Code § 558. This is unnecessary. "If there is only one reasonable construction of statutory language, then we need not consider the legislative history and other extrinsic aids in determining the statute's legislative purpose." (*Suarez v. City of Corona* (2014) 229 Cal.App.4th 325, 331-332.) Here, the three statutes at issue are clear.

First, there is no ambiguity that the FAA requires enforcement of arbitration agreements:

> an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(9 U.S.C. § 2; see also *Epic Systems Corp. v. Lewis*, 138 S.Ct. at 1632 ["Congress has instructed that arbitration agreements like those before us must be enforced as written."].)

Second, the plain text of Labor Code § 558 provides that any unpaid wages recovered under the statute are payable 100% to affected employees:

> Wages recovered pursuant to this section shall be paid to the affected employee.

(LABOR CODE § 558(a)(3).) Hence, the State of California unambiguously lacks any direct financial interest in wages recovered under Section 558.

Third, the PAGA statute states, in pertinent part, that the claim is brought by an employee on behalf of herself or herself and other employees:

> any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency . . . . may, as an alternative, be recovered ***through a civil action*** brought by an aggrieved employee ***on behalf of himself or herself and other current or former employees*** . . . .

[LABOR CODE § 2699(a); emphasis added.]

Hence, no ambiguity exists in the language of any of the statutes at issue in this dispute that would require the Court to review legislative history or public policy.

III. CONCLUSION

For the foregoing reasons, the Court should deny the MJN.

Respectfully submitted,

Dated: July 24, 2018

RUTAN & TUCKER, LLP

By: Brian C. Sinclair

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

[PROPOSED] ORDER ON RESPONDENT'S REQUEST FOR JUDICIAL NOTICE

Pursuant to Rule 8.252(a) of the California Rules of Court and Evidence Code sections 459 and 350, Respondent's Motion for Judicial Notice in Support of Answering Brief filed on July 9, 2018, is DENIED. The Court denies judicial notice of all exhibits attached to the Declaration of Kristin M. Garcia.

Dated: _____

_____
Justice of the California Supreme Court

PROOF OF SERVICE

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

STATE OF CALIFORNIA, COUNTY OF ORANGE

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

On July 24, 2018, I served on the interested parties in said action the within:

OPPOSITION TO MOTION FOR JUDICIAL NOTICE

as stated below:

SEE ATTACHED SERVICE LIST

[✓] **(BY OVERNIGHT DELIVERY)** by depositing in a box or other facility regularly maintained by FedEx, an express service carrier, or delivering to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed as shown above, with fees for overnight delivery provided for or paid.

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

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

Executed on July 24, 2018, at Costa Mesa, California.

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

Marie Lee
(Type or print name)

Marie Lee
(Signature)

SERVICE LIST

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

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