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**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

Deputy

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

RESPONDENT'S SUPPLEMENTAL BRIEF

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Pursuant to California Rule of Court 8.520(d), Respondent Reins International California, Inc. (“Reins”) submits this supplemental brief. The brief is based on new authority regarding the Private Attorneys General Act (“PAGA”) Reins discovered in preparing for oral argument (which was just set), and was not available at the time it filed its Answer Brief on the Merits.

The below authorities further support that this Court affirm the Court of Appeal’s decision and the trial court’s judgment in favor of Reins. They confirm that (1) to maintain claims under PAGA, an employee must maintain standing throughout the lawsuit; (2) where the underlying Labor Code claims are barred, so too are the PAGA claims based on them; and (3) that an employee may lose the ability to pursue PAGA claims by his or her own conduct.

I. **CABRERA V. CVS RX SERVICES, INCORPORATED (N.D. CAL. SEPT. 25, 2018) NO. C 17-05803 WHA, 2018 WL 4585678**

In *Cabrera v. CVS Rx Services, Incorporated* (N.D. Cal. Sept. 25, 2018) No. C 17-05803 WHA, 2018 WL 4585678, the court concluded the plaintiffs could not sue under PAGA because their post-litigation conduct divested them of standing. The plaintiffs originally brought class claims under the Labor Code in addition to their PAGA claims. (*Id.* at *1.) Faced with a motion to compel arbitration, plaintiffs dropped all of their putative class claims, leaving only their representative PAGA claim. (*Id.* at *1.) Through counsel, they explained in court that plaintiffs “[gave] up their

individual rights for those individual damages,” and represented they were not going to re-file their individual claims in any other court. (*Id.* at *2 [brackets in original].) As a result, defendant argued plaintiffs were no longer “aggrieved” under PAGA because they waived their right to pursue claims for individual Labor Code violations.

After reviewing the Court of Appeal’s opinion in this case and other authority, the court agreed. Relying on *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1003, it found PAGA is a procedural device only, and confers no substantive rights. As such, plaintiffs’ PAGA claim was derivative of the underlying Labor Code claims. (*Id.* at *2 n. 2.) Because plaintiffs had abandoned and waived their individual Labor Code claims, the court found they were no longer “aggrieved employees” and “lack standing to sue under PAGA.” (*Id.* at *2.)

Cabrera is significant for three reasons. *First*, it follows a long line of cases holding a plaintiff cannot continue pursuing PAGA claims when their individual Labor Code claims are barred. (See, e.g., *Villacres v. ABM Industries, Inc.* (2010) 189 Cal. App. 4th 562, 569; *Shook v. Indian River Transport Co.* (9th Cir. 2018) 756 F App’x 589, 590; *Holak v. K Mart Corp.* (E.D. Cal. May 19, 2015) No. 1:12-cv-00304 AWI-MJS, 2015 WL 2384895, at *4-6, *motion to certify appeal denied* (E.D. Cal. Aug. 11, 2015) 2015 WL 4756000; *Wentz v. Taco Bell Corp.* (E.D. Cal. Dec. 4, 2012) No. 12-cv-1813 LJO DLB, 2012 WL 6021367, at *5; *Pinder v. Employment Development*

Department (E.D. Cal. 2017) 227 F. Supp. 3d 1123, 1152; *Boon v. Canon Business Solutions, Inc.* (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; *Gofron v. Picsel Tech., Inc.* (N.D. Cal. 2011) 804 F. Supp. 2d 1030, 1043; *Molina v. Dollar Tree Stores, Inc.* (C.D. Cal. May 19, 2014), No. 12-cv-01428- BRO FFMX, 2014 WL 2048171, at *14; *Fobroy v. Video Only, Inc.* (N.D. Cal. Nov. 14, 2014) No. C-13-4082 EMC, 2014 WL 6306708, at *5.)

Second, Cabrera holds a plaintiff can lose standing to pursue PAGA claims over time, even if standing existed at some point prior. This is consistent with established California Supreme Court law, which holds that 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.”]) For this reason, the *Cabrera* court found that representative standing under PAGA ceased to exist once the representative’s individual Labor Code claims were barred.

Third, Cabrera establishes that a plaintiff can waive his or her right to pursue PAGA claims based on his or her own conduct. In *Cabrera*, plaintiffs waived their right to pursue representative claims by dismissing their individual claims, and renouncing their right to bring them in open court. (*Cabrera*, 2018 WL 4585678, at *1-3.) Other cases similarly hold that

an individual can waive his or her right to bring PAGA claims based on conduct. (See, e.g., *Pole v. Estenson Logistics* (C.D. Cal. Aug. 10, 2016) No. CV 15-07196 DDP (Ex) 2016 WL 4238635, at *4 [an individual can “waive their own right to bring PAGA claims”].)

Kim’s claims are barred for the same reasons. He voluntarily settled and dismissed his individual Labor Code claims *with prejudice*. He made this decision while represented by able counsel and received valuable consideration (\$20,000, plus attorney fees) for doing so. Pursuant to the rationale in *Cabrera*, since Kim’s underlying individual claims are barred, Kim no longer has stanbooding to pursue PAGA claims. The authority previously cited by Reins further supports this result. (See also, *Alvarez v. AutoZone, Inc.*, (C.D. Cal. July 8, 2015) No. cv-14-02471-VAP (SPx), 2015 U.S. Dist. LEXIS 190210, at *6 [“If some of Plaintiff’s individual claims were dismissed during arbitration, a different representative would need to bring the dismissed claims under PAGA because Plaintiff could not assert to be an ‘aggrieved employee’ with respect to those claims as required by the statute.”]; *Romo v. CBRE Group, Inc.* (C.D. Cal. Oct. 2018) No. 8:18-cv-00237-JLS-KES, 2018 WL 4802152, at *11 [“[i]f Plaintiff is determined not to be an aggrieved employee under PAGA, because either he settles his individual claims during the pendency of the arbitration or Defendant’s policies and practices are found to comply with the law, then the PAGA claim should be dismissed.”].)

II. **DONAHUE V. AMN SERVICES, LLC (2018) 29 CAL.APP.5TH 1068**

In *Donahue v. AMN Services, LLC* (2018) 29 Cal.App.5th 1068, 1100 review granted (Mar. 27, 2019)¹ the trial court found Plaintiff's underlying individual Labor Code claims failed. As a result, the trial court found that the PAGA claims based on these failed claims must also fail. (*Id.* at 1100-01.) The Court of Appeal agreed. It found that given plaintiff did not have a viable Labor Code claim, "Donahue did not establish that *she* was an aggrieved employee—a prerequisite to asserting a PAGA claim." (*Id.* at 1101.) It therefore affirmed summary adjudication in favor of defendant on plaintiff's PAGA claim. (*Id.* at 1099-1102.)

In finding that PAGA claims could not persist absent viable individual claims, the Court of Appeal distinguished both *Lopez v. Friant & Associates, LLC* (2017) 15 Cal.App.5th 773 and *Huff v. Securitas Sec. Servs. USA, Inc.* (2018) 23 Cal. App. 5th 745, review denied (Aug. 8, 2018). Specifically, the Court of Appeal found that if Plaintiff's individual claims for wage statement violations were barred, *Lopez* would not save her PAGA claim. It explained *Lopez* merely held that a claim for wage statement penalties under PAGA did not require an employee to meet the knowing and intentional violation provision of Labor Code Section 226(e). (*Id.* at 1101.) Nevertheless, where

¹ *Donahue* is being reviewed by this Court. It remains citable as persuasive authority under California Rule of Court 8.1115.

the plaintiff could not pursue a viable wage statement claim under Labor Code Section 226(a), her PAGA claim too must fail (*Id.* at 1102.) Similarly, the Court of Appeal found *Huff* inapplicable. Because plaintiff could not establish she “experienced *any*...Labor Code violation,” she did not retain standing to pursue her claims under *Huff*. (*Id.* at 1102-1103.) *Huff* simply held that a PAGA plaintiff must “be affected by at least one Labor Code violation” to have standing. (*Id.* at 1103.) However, where plaintiff “did not establish...she suffered a Labor Code violation,” the *Donahue* court held she could not maintain her PAGA claims. (*Id.*)

Donahue is significant because it is California appellate court authority following a line of cases holding a plaintiff cannot pursue PAGA claims once the individual Labor Code claims become barred. Further, the Court of Appeal rejected identical arguments Kim made based on *Lopez* and *Huff*. Kim argued because of *Lopez* and *Huff*, his PAGA claims should not be dismissed. But as noted in Reins’ Answer Brief, neither controls the outcome here. “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” under Labor Code Section 226(a) or (e).” (Answer Brief, p. 33.) “[I]n *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.’ 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.” (Answer Brief, p. 34 [internal citations omitted and emphasis in original].)

Just like in *Donahue*, Kim’s underlying Labor Code claims are barred. As a result his PAGA claim based on these claims must also fail.

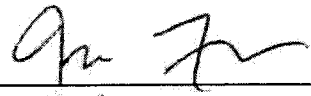
III. CONCLUSION

For the foregoing reasons, Reins respectfully requests the Court consider this Supplemental Brief concerning authority not available to Reins at the time of its Answer Brief, and affirm the judgment of the Court of Appeal.

Respectfully submitted,

Dated: December 19, 2019

OGLETREE, DEAKINS, NASH,
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By: 

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CERTIFICATE OF COMPLIANCE

I, Jesse C. Ferrantella, 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 1,643 words, exclusive of the title page, tables of contents and authorities, this certificate, and the proof of service. This is below the 2,800 word limit for Supplemental Briefs set forth by California Rule of Court 8.520(d)(2).

Dated: December 19, 2019



Jesse C. Ferrantella

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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.

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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 December 19, 2019, San Diego, California.

Mariana DeSaracho

Type or Print Name



Signature

40565555.1