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,
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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"].)