S204032

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ARSHAVIR ISKANIAN,

Appellant,

vs.

CLS TRANSPORTATION LOS ANGELES, LLC, et al.,
Respondent,

After Decision By The Court Of Appeal,
Second Appellate District, Division Two
Case No. B235158
From the Superior Court for Los Angeles County
Assigned for All Purposes To Judge Robert Hess, Department 24
Case No. BC356521

RESPONDENT'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Since Respondents' Answer Brief on the Merits was filed on February 15, 2013, several relevant federal and state cases were decided, the most important of which is the U.S. Supreme Court's opinion in *American Express Co. v. Italian Colors Restaurant* (2013) 133 S.Ct. 2304 ("*American Express*"), where the Court again upheld a class waiver in an arbitration agreement. Contrary to Appellant's argument, these new cases do not exempt the Private Attorney General Act ("PAGA") from the strict application of the Federal Arbitration Act ("FAA"). Further, several courts have rejected the flawed reasoning of the National Labor Relations Board ("NLRB") that a "class action" or "representative action" is exempt from the FAA under the National Labor Relations Act ("NLRA").

This brief is submitted pursuant to California Rules of Court 8.520(d), which states that "a party may file a Supplemental Brief limited to new authorities…that were not available in time to be included in the party's brief on the merits." The new authorities here support the conclusion that the decision below should be affirmed.

II. DISCUSSION

A. The FAA Compels the Dismissal of Class and Representative Proceedings In this Case.

American Express reaffirms two important principles: (1) the FAA does not permit courts to invalidate a contractual waiver of class actions on the grounds that plaintiff's cost of individually arbitrating a statutory claim exceeds the potential recovery; and (2) the alleged "effective vindication" exception originated as dictum and does not invalidate a class waiver. The Court reaffirmed its decision in *Concepcion*, and held that plaintiffs are not "entitled to class proceedings for the vindications of statutory rights." (133 S.Ct. at p. 2309.)

1. "Prohibitive Costs" Do Not Invalidate a Class Waiver.

The Court held in *American Express* that the antitrust laws "do not guarantee an affordable procedural path to the vindication of every claim." (133 S.Ct. at p. 2309.) Similarly, California wage and hour laws do not "guarantee" class actions. But California laws **do** provide a cost free mechanism to vindicate individual claims through administrative proceedings before the Labor Commissioner, (Cal. Labor Code § 96)[1], and attorneys' fees for a successful claimant in court proceedings. (See, e.g., Cal. Labor Code §§ 218.5, 226(e), 1194(a); Cal. Code Civ. Proc. §§ 1021.5, 1033.5.)

2. Effective Vindication of an Individual's Statutory Right Does Not Require Class Treatment, and Does Not Trump the FAA.

"The 'effective vindication' exception to which [Appellants] allude originated as dictum in *Mitsubishi Motors* . . . . [but] so long as the prospective litigant effectively may vindicate [his] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function. . . ." (*American Express,* 133 S.Ct. at p. 2309.) "The fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute elimination of the *right to pursue* that remedy." (*Id.*; See also *Sutherland v. Ernst Young* (2d Cir. 2013) 726 F.3d 290 (rejecting "effective vindication" argument post *American Express* in a representative action under federal wage and hour law); *Mortensen v. Bresnan Communications* (9th Cir. 2013) 722 F.3d. 1151 (state law cannot end run FAA preemption). Thus, to the extent *Gentry* rests on the "effective vindication" rationale, *American Express* clearly indicates that *Gentry* has

[1] The Arbitration Agreement in this case does not bar the "Berman hearing" which was the subject of this Court's recent decision in *Sonic-Calabasas v. Moreno* (2013) 57 Cal.4th 1109. Nothing in that opinion supports Appellant here.

been overruled. (*American Express,* 133 S.Ct. at p. 2309. See also *Carmax Auto Superstores v. Fowler* (Feb. 24, 2014, U.S. Supreme Court Case No. 13-439, __ S.Ct.__, 2013 WL 1208111) ("Judgment vacated, and case remanded to the Court of Appeal of California... for further consideration in light of *American Express* ."). More fundamentally, *American Express* confirms that any so-called "effective-vindication doctrine" that may exist is limited to claims arising under *federal* law, and does not apply to Appellant's *state law* claims. Even the *American Express* dissent acknowledged, "a state law...could not possibly implicate the effective-vindication rule," because "[w]hen a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA's purposes and objectives." (*American Express*, 133 S.Ct. at p. 2320.) The federal courts "have no earthly interest (quite the contrary) in vindicating [a state] law" that is inconsistent with the FAA, the dissent continued, so the state law must "automatically bow" to federal law; and any effective-vindication exception that might possibly exist would "come[] into play only when the FAA is alleged to conflict with another *federal* law." (*Ibid.*)

Appellant retains his statutory right to bring his individual claims in the arbitral forum (paid for by Respondent) and to recover attorneys' fees if he prevails in arbitration.[2]

B. Recent Cases Do Not Support the Exemption of PAGA from the FAA.

1. *Urbino v. Orkin*

Appellants' Counsel filed a letter dated August 23, 2013 with this Court citing the Ninth Circuit's opinion in *Urbino v. Orkin Services* (9th

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[2] Over sixty employees opted out of the alleged class, and filed individual arbitration cases seeking PAGA remedies and attorneys' fees. *See* Volume I of I of Appellants' Motion for Judicial Notice filed on April 10, 2013, at Tab 1, Complaint and Attachment 3 to Exhibit 3 of Complaint.

Cir. 2013) 726 F.3d. 1118, arguing that the case is "consistent" with Appellants' argument regarding the PAGA claim. This is inaccurate.

The Ninth Circuit **did not** hold that the state of California is the "real party in interest" in a PAGA representative action. The court used that phase in passing to **reject** the claim that the state was a party to the case for the purpose of establishing federal diversity jurisdiction.

> "To the extent Plaintiff can – and does – assert anything but his individual interest...we are unpersuaded that such a suit, the primary benefit of which will inure to the state, satisfies the requirements of federal diversity jurisdiction. The state, as the real party in interest, is not a citizen for diversity purposes." (726 F.3d at pp. 1122-23.)

The court went on to rule that Mr. Urbino's claim was **individual** and **separate** from the claims of other employees, and that those claims could not be aggregated to satisfy the amount in controversy required for federal jurisdiction. (See *Bauman v. Chase Investment Services* (9th Cir. 2014) 2014 WL 983587 (While a PAGA representative claim does not qualify as a "class action" under federal procedure, nothing in the case suggests that a PAGA claim cannot be brought on an individual basis.).)

Thus, to the extent *Urbino* has any application to this case at all, it stands for the proposition that a PAGA case can be brought by an individual, and is not necessarily a representative action.

> "Aggrieved employees have a host of claims available to them . . . . to vindicate their employers' breaches of the California Labor Code. But all these rights are held individually. Each employee suffers a unique injury, and injury that can be redressed without the involvement of other employees." (726 F.3d at p. 1122.)

2. *Cunningham v. Leslie's Poolmart*

Cunningham v. Leslie's Poolmart Inc. (C.D. Cal. June 25, 2013) 2013 WL 3233211 ("*Cunningham*"), an unpublished District Court

Opinion, was brought to the Court's attention in Appellant's Consolidated Answer to Amicus Curiae Briefs. The case erroneously held that PAGA cannot be waived because PAGA is somehow "different" from a class action and more analogous to a qui tam action.

The agreement in *Cunningham* stated only that "[t]he Company and I" consent to arbitration. (2013 WL 3233211 at *2.) It did not involve a class or representative action waiver. (*Id.*) In any event, the *Cunningham* Court analyzed *Concepcion* and *American Express* and correctly **concluded that *Gentry* had been overruled** and that a "class action" waiver would be enforceable. The Court then strained, however, to incorrectly conclude that a PAGA representative action is significantly different from a class action, that it is a "substantive right" akin to a qui tam action, and that a PAGA claim can **only** be raised as a representative action. These findings are wrong for multiple reasons.

Cunningham relies on the false premise that there is no such thing as an individual PAGA action, and that all PAGA cases are necessarily representative actions. But employees can pursue an individual PAGA action, and waiving the representative portion of PAGA does not foreclose their individual recovery. (See *Quevedo v. Macy's, Inc.* (C.D. Cal. 2011) 798 F.Supp.2d 1122, 1141 (The "PAGA claim is arbitrable, and ... the arbitration agreement's provision barring him from bringing that claim on behalf of other employees is enforceable.").) ***Indeed, 62 of Appellant's counterparts have sought identical individual PAGA penalties in individual arbitrations***. These 62 former class members are represented by Appellant's counsel who cannot now argue that individual PAGA actions do not exist.

a. In This Context, Class And PAGA Actions Are Virtually Identical.

"Class actions and representative actions are quite similar. Both are essentially equitable in nature. They permit persons to sue on behalf of others." (*Weil,* Cal. Prac. Guide: Civil Procedure Before Trial §14:1.)

The Court in *Cunningham* relied on the erroneous notion that PAGA representative actions bear only a "superficial resemblance" to class actions because: (1) PAGA is "a law enforcement action"; (2) "a judgment or dismissal with prejudice in a representative PAGA action is not binding on non-party employees"; and (3) PAGA requires legal notice to the State prior to filing suit. (2013 WL 3233211, at *6.) These are distinctions without a difference. Though PAGA involves civil penalties, the true purpose of PAGA as well as class actions is to "protect the public," as the Court in *Cunningham* admits. Further, a judgment for civil penalties in a PAGA representative action *is* binding on non-parties. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.) Additionally, notification to the State can also be required prior to filing a class actions. (See, e.g., *Harris v. County of Orange* (9th Cir. 2012) 682 F.3d 1126, 1136 (class action plaintiff was required to exhaust administrative remedies by notifying the government of discrimination prior to filing suit.).) Therefore, when scrutinized, the supposed differences between PAGA and class actions relied on in *Cunningham* evaporate and are immaterial.

In both "class" actions and PAGA "representative" actions: (1) the named plaintiff receives a premium payment (see, e.g., *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804 (In a class action, the named plaintiff is entitled to an "incentive or enhancement award"); Cal. Labor Code § 2699(i) (25% of the recovery goes to the named plaintiff in a PAGA action)); (2) this payment is meant to enhance compliance with the law (see, e.g., *Clark*, 175 Cal.App.4th at 804

(incentive award is to induce the plaintiff to file a class action); *Dunlap v. Sup. Ct.* (2006) 142 Cal.App.4th 330, 336-337 (PAGA was adopted to enhance the enforcement abilities of the Labor Commissioner)); (3) the attorneys are entitled to fees (see, e.g., *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 129 (attorneys' fees should be fair in a class action); Cal. Labor Code § 2699(g)(1)) (prevailing employee is entitled to attorneys' fees)); (4) any settlement requires court approval (Cal. Rules of Court 3.769(a); Cal. Labor Code § 2699(l)); and (5) the "aggrieved party" is the employee.

b. The Qui Tam Analogy Is A False Analogy.

To begin, *Cunningham* disregards the fact that PAGA "***does not create property or any other substantive rights***" and "is simply a ***procedural statute***." (*Amalgamated Transit Union v. Sup. Ct.* (2009) 46 Cal.4th 993, 1003 (emphasis added).) Instead, the Court determined that PAGA is "substantive" in nature because it is akin to a qui tam action. The *Cunningham* court concluded that PAGA involves a substantive right because in both PAGA and qui tam actions, plaintiffs recover a "bounty". (2013 WL 3233211 at *7.) But this "similarity" is inconsequential. Class representatives are likewise paid incentive awards for their efforts in bringing a successful action on behalf of a class. The Court further likened PAGA to qui tam because it "does not create new substantive duties or new provisions under which liability can be found, but merely changes how existing rules are enforced." (2013 WL 3233211 at *7.) Again, this characteristic is not unique to PAGA or qui tam. Class actions are another way to enforce laws that do not create any new avenues of liabilities. The supposed similarities between PAGA and qui tam actions (which ignore the same similarities with class actions) fail to elevate PAGA from a procedural enforcement mechanism to a "substantive right" that cannot be waived.

Actually, PAGA and qui tam actions are fundamentally different. The purpose of PAGA is to protect employees, whereas the purpose of a qui tam action is to remedy an injury inflicted on government itself. (Compare, e.g., *Caliber Bodyworks Inc. v. Sup. Ct.* (2005) 134 Cal.App.4th 365, 375 (PAGA "is necessary to achieve maximum compliance with state labor laws.") with *People ex rel. Allstate Insurance v. Weitzman* (2003) 107 Cal.App.4th 534, 561, 566 (qui tam actions are to prosecute fraudulent claims made against the government).) Similarly, the aggrieved party in a PAGA action is the employee, whereas the victim in a qui tam action is the government. (Compare Cal. Labor Code § 2699(a) (an aggrieved employee may file a PAGA action) with *Weiztman*, 107 Cal.App.4th at 561, 566 (the "government is the direct victim" in a qui tam action).) Likewise, the real party in interest in a PAGA action is the employee whereas the real party in interest in a qui tam action is the government. (Compare *Dunlap, supra,* 142 Cal.App.4th at p. 337 ("[T]he PAG Act empowers or deputizes an aggrieved employee to sue for civil penalties "**on behalf of himself** or herself and other current or former employees . . .**as an alternative** to enforcement by the LWDA.") (emphasis added) with *United States ex rel. Hyatt v. Northrop Corp.* (9th Cir. 1996) 91 F.3d 1211, 1217 (The government "is always the real party in interest.").) Further, the judiciary maintains the primary responsibility over a PAGA action, whereas such control may be retained by the executive branch in a qui tam action. (Compare *Echavez v. Abercrombie and Fitch Co., Inc.* (C.D. Cal. 2012) 2012 WL 2861348, *6 (judiciary maintains control over a PAGA action) with *U.S. Ex rel. Kelly v. Boeing Co.* (9th Cir. 1993) 9 F.3d 743, 754 (the government can take "primary responsibility for prosecuting the action.").) Finally, PAGA penalties are derived from violations directed at separate individuals, whereas a qui tam penalty represents an undivided amount of damages to the government.

In any event, qui tam actions can be prospectively released. For example, in *U.S. ex rel Hall v. Teledyne Wah Chang Albany* (1997) 104 F.3d 230, 231, the federal court dismissed the qui tam action because plaintiff has already executed a release that encompassed "any future *qui tam* claims." (104 F.3d at pp. 231, 233; See *U.S. v. Swords to Plowshares* (9th Cir. 2000) 242 F.3d 385, 385 (future qui tam action was waived in the settlement and release of a prior action).) Thus, just as qui tam action can be waived, so too can a PAGA representative action be waived without impermissibly giving up a "substantive right."

C. ***D.R. Horton* Has Been Discredited.**

Four federal Courts of Appeal have rejected the decision of the NLRB in *D.R. Horton* barring class action waivers based on the supposed protection of "concerted activity". (357 N.L.R.B. 184 (2012).) Most importantly, the Fifth Circuit overruled and declined to enforce the case. (*D.R. Horton v. NLRB* (5th Cir. 2013) 737 F.3d 344, 357 (Class action procedure is "not a substantive right," and the NLRA does not even mention arbitration and does not override the FAA.).) The Second, Eighth, and Ninth Circuits have also declined to follow *D.R. Horton*. (See *Sutherland v. Ernst & Young* (2d Cir. 2013) 726 F.3d 290; *Owen v. Bristol Care* (8th Cir. 2013) 702 F. 3d 1050; *Richards v. Ernst & Young* (9th Cir. 2013) 734 F.3d 871).) Indeed, one NLRB administrative law judge has held that *D.R. Horton* "cannot be sustained" after *American Express*. (*Chesapeake Energy Corp.*, NLRB Case No. 14-CA-100530 (2013)).

III. CONCLUSION

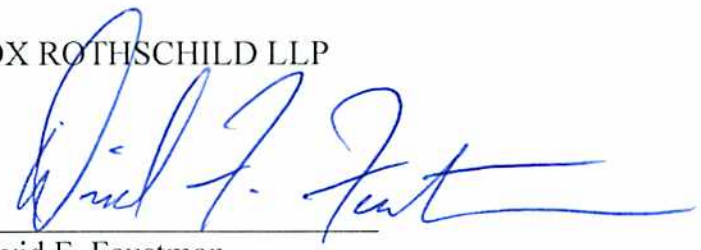
Recent cases, thus, reinforce Respondents' position on the three key issues in this case: (1) the FAA requires the enforcement of an arbitration agreement that waives class or representative actions: (2) A PAGA claim is "individual" to the claimants and can be raised and arbitrated without a

representative action; and (3) the NLRA does not ban class action waivers. The decision below should be affirmed.

Respectfully submitted,

Date: March 24, 2014

FOX ROTHSCHILD LLP



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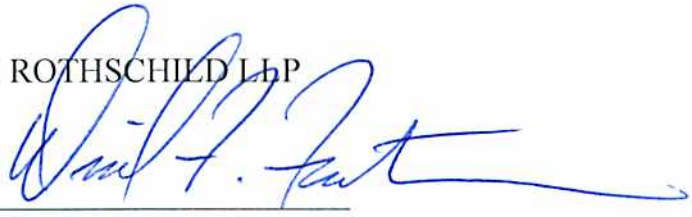
CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(f) of the California Rules of Court, the text of the Respondent's Supplemental Brief does not exceed 2,800 words. The text of the Respondent's Supplemental Brief contains 2,761 words as determined by the word counting tool of Microsoft Word, the computer program used to prepare the brief.

Date: March 24, 2014 FOX ROTHSCHILD LLP



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

Executed this 24th day of March 2014 at San Francisco, California.

Lorraine R. Harris