IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JINSHU "JOHN" ZHANG

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES,

Respondent.

DENTONS U.S. LLP; MICHAEL T. MCNAMARA; EDWARD J. REICH

Real Parties in Interest.

S. Ct No. S277736

Court of Appeal No. B314386

Los Angeles Superior Court
Case No. 21STCV19442

The Hon. David Sotelo
Los Angeles Superior Court
Dept. 40
Telephone: (213) 633-0160

REPLY IN SUPPORT OF PETITION FOR REVIEW

From a Published Opinion Denying a Petition for a Writ of Mandate by the Court of Appeal, Second Appellate District, Division 8

After an Order of the Los Angeles Superior Court
Date of Order: August 17, 2021
Proceeding Held: Motion to Stay Litigation

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

In his petition, petitioner Jinshu "John" Zhang identified six independent reasons why this Court should accept his petition and order full briefing. In their answer, real parties in interest (collectively, "Dentons") collapse their response to these six reasons into largely the same basic argument: that the parties' supposedly clear and unmistakable delegation clause must be enforced first, before Labor Code section 925—which means that any California employees with employment agreements containing a boilerplate clause that purports to delegate issues of arbitrability to out-of-state arbitrators necessarily lose their right under Section 925 to adjudicate their employment dispute first and only in California.

But Dentons' preferred result is directly contrary to the express language and purpose of Section 925. Section 925 was specifically designed to protect California employees from the cost, expense and inherent unfairness of being dragged by better funded employers to out-of-state venues, often the employers' home turfs. The statute was also designed to protect these same employees from having non-California law applied to their disputes with these employers. If Dentons' position and the Court of Appeal's Opinion are accepted, these employees are stripped of these rights. Using the microcosm of this case as an example, it means that petitioner—who at all relevant times worked and resided in California—now must incur the cost and expense of defending himself in a New York arbitration and subject to New York's legal interpretations and the competing

policies of the two states. That outcome is directly contrary to Section 925.

Indeed, the subtext to this entire dispute—and why employers nationwide are watching—is that employers such as Dentons want to escape the fair but stringent requirements to enforceability of arbitration clauses set forth in this Court's seminal opinion in *Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*). These requirements are perceived as being potentially the most employee-friendly in the nation, which is why employers nationwide do not want to subject their arbitration clauses to the *Armendariz* standard. The Court of Appeal's Opinion gives them a clear and easy roadmap to avoid that scrutiny.

Dentons' Answer never adequately addresses this issue and only cites to *Armendariz* to note that the enforceability of the arbitration provision under that law is not relevant to this stage of the proceedings. (Answer at p. 15.) But it *is* relevant at this stage because the interplay between Section 925 and Code of Civil Procedure section 1281.4 will often dictate whose state law applies and, with it, whether the employee is entitled to the protections of *Armendariz.* Again, using this case as an example, the parties are fighting this Section 925 issue so vociferously because petitioner seeks to invoke its protections and to have the enforceability of the arbitration provision decided in California by a California decisionmaker, while Dentons wants to eliminate these protections and prefers that the issue be resolved in New York by a New York arbitrator.

Thus, the interplay between Labor Code section 925 and Code of Civil Procedure section 1281.4 will have important and potentially outcome-determinative ramifications not only on petitioner, but on California employees statewide. While the Answer attempts to dismiss the importance of this interplay because the issue "has not even *arisen* in other cases . . ." (Answer at p. 9 (emphasis in original)), that is one of the main points of this petition: The issue is something that cannot be meaningfully addressed except through expensive and time-consuming writ review—an expense and process that many if not most California employees simply cannot afford.

Rather than address these real and practical problems with the Court of Appeal's decision, Dentons spends considerable space suggesting that petitioner engaged in wrongful conduct, an implicit argument that petitioner is therefore unworthy of this Court's intervention. (*See, e.g.*, Answer at p. 5 (accusing petitioner essentially of attempted theft).) Such accusations are not only objectively wrong and unsupported by Dentons' evidentiary citation, but they are irrelevant to the petition.[1]

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[1] And if the equities matter, they favor petitioner. Dentons contends that it fired petitioner because he supposedly "went behind the firm's back" to "divert nearly the whole [contingency] fee directly to his own bank account." (Answer at p. 5.) But that is not what happened, and the timeline of events proves the point. As alleged in petitioner's First Amended Complaint, from March through early April 2021, petitioner engaged in open, direct and often written negotiations with Dentons CEO (real party in interest Michael McNamara) over the appropriate compensation petitioner should receive from the $30+ million contingency fee petitioner brought into the firm. At Dentons'

Whether this Court should accept writ review is not about the impact on petitioner but about its impact on the thousands of California employees statewide who work for companies based out of state. The Court of Appeal's Opinion will not only strip many of these employees of their right to resolve their disputes in California, but, if they lose the choice of law analysis (and some surely will), will also strip them of their rights to later adjudicate the legality of their arbitration provisions under this Court's reasoning in *Armendariz*.

The Court is being presented with a petition that raises significant issues not only for the courts, employers and employees operating and working in California, but for the numerous courts nationwide who are independently wrestling with Section 925 without meaningful guidance from this Court. That guidance is necessary to ensure that California employees receive the protections the statute was specifically designed to

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request, the negotiations were tabled. *Three weeks later,* on April 26, 2021, petitioner discovered that McNamara had caused Dentons to forge a stock transfer request under the client's name, without the client's knowledge and permission, attempting to secretly transfer client assets to Dentons. On April 30, 2021, Petitioner reported McNamara's conduct to all twelve members of Dentons' board. On May 5, 2021, without any investigation or even response to petitioner, Dentons fired him and immediately commenced arbitration, while simultaneously demanding absolute confidentiality regarding the dispute. (I RE 142; 144-148; see also 1 RE 126.) Tellingly, immediately after petitioner's lawsuit became public, McNamara was abruptly and without public explanation relieved of his CEO position. (1 RE 106; *see also Bloomberg: "Dentons Mum on Sudden CEO Ouster* (https://news.bloomberglaw.com/business-and-practice/dentons-mum-on-sudden-ceo-ouster-while-defending-his-success).

provide. The Court should grant the petition and order full briefing.

THE COURT SHOULD GRANT REVIEW

A. Petitioner's Grounds For Review Remain Valid

While Dentons attempts to downplay the six grounds the petition sets forth in favor of review, all of them are valid, and collectively, present a compelling case why this Court should grant the petition. We respond to each of Dentons' responsive arguments in the same order presented in Dentons' Answer.

1. Dentons contends that "Nobody is evading section 925" (Answer at p. 12), but Dentons argument is disingenuous. What Dentons means is that under the Opinion, an out-of-state arbitrator must still take up *a portion* of Section 925 by resolving the factual issue of whether that person fits within the definition of an employee under California law. To Dentons, this partial application is enough. Yet, Section 925 provides California employees with the right to keep their *entire* dispute—be it litigation or arbitration—*in California* and *under California law*, not just portions of the dispute. *See* Section 925(a)(1) and (b).

If an employee has to start outside of California and be subject to non-California law—as Dentons and the Opinion favor—Section 925 has already been evaded. As an employee protection statute, Section 925 is premised on the Legislature's conclusion that a non-California forum and non-California law are likely to be less favorable to a California employee. By surrendering the issue of the applicability of Section 925 to an

out-of-state forum, the Opinion already gives the employer an unfair upper hand.

And even in cases where the employee has the ability to shoulder the expense of adjudicating this stage in another forum, manages to win the threshold employment issue, and then gets the dispute sent back to California, that does not solve the problem. By then, the employee already incurred the time and expense of adjudicating the issue out of state, which is expressly contrary to the purpose of the statute. The legislative history specifically addresses this issue: "Given the expense and burden of going to another forum, this ultimately means that an employee is unlikely to vindicate his or her legal rights." (1PE at p. 493.)

And Dentons' position also presupposes that the employee has the wherewithal to litigate or arbitrate in an out-of-state forum. Some employees will just give up and not pursue the claim. This is what employers are counting on—the emotional and financial drag of out-of-state adjudications on employees' conviction and ability to pursue their rights. Forcing a first round of litigation (at least) outside of California favors the more financially solvent party in nearly every instance—and here, that is almost universally the employer.

And Dentons' citation to what happened in New York confuses subject matter jurisdiction with personal jurisdiction. (Ans. at p. 13.) Section 925 deprives any out-of-state forum of jurisdiction to adjudicate any aspect of a California employee's dispute with his or her employer. Section 1281.4 requires a

foreign forum to possess "competent jurisdiction" before it can force arbitration out of California. With Section 925's express right to invalidate contract clauses that serve as a basis for the foreign forum's jurisdiction, an employer seeking to stay a case under Section 1281.4 must, in the face of a Section 925 invocation, demonstrate some other basis for the foreign court to have jurisdiction over the employee. If the employer cannot, the foreign jurisdiction is not competent—on a personal jurisdiction basis—to resolve the motion to compel arbitration.

Otherwise, the employee is immediately dragged out of state; an outcome directly contrary to Section 925's protections. Section 925 expressly gives the employee the power to invalidate "[a]ny provision of a contract" that forces the employee to "adjudicate outside of California a claim arising in California." Section 925(a)(1) and (b). Even where delegation clauses are "clear and unmistakable" (which petitioner contests here)[2] such clauses only go to the issue of arbitrability, not to whether California has the right to allow employees to invalidate forum selection clauses that serve as the only basis for a foreign court to assume jurisdiction over those employees for purposes of hearing a petition to compel arbitration.

If petitioner is right and the forum selection clause is invalidated, all this means is that California courts will be the

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[2] In fact, petitioner has disputed the validity of the delegation clause from the beginning. The reason the issue was not briefed below is merely because, in Dentons' Motion to Stay, *Dentons never raised or otherwise relied on the delegation clause.* (1 RE 6-15.)

only court with jurisdiction to hear and rule on any petition to compel arbitration. This cannot possibly impact the Federal Arbitration Act. Thus, in a limited sense, Dentons is correct: "someone must decide" the threshold employee issue. (Answer at p. 10.) But to effectuate Section 925's express purpose, that issue must be resolved in the first instance by California courts.

2. Dentons also fails to rebut petitioner's arguments that the Opinion favors employers over employees, and separately and unfairly splits California employees into two categories: those engaged in litigation and those engaged in arbitration. (Pet. At 10-11.) In the petition, petitioner explained that the Opinion favors employers because it allows them to *enforce* forum selection clause through the courts, but simultaneously strips employees of their right to contest the very same forum selection clauses through the very same courts. Dentons has no response to this argument whatsoever. Nor could it because that is the straightforward import of the Opinion. That outcome is fundamentally unfair and violative of the equal treatment principle reconfirmed in the U.S. Supreme Court's recent case. *Morgan v. Sundance* (2022) 142 S.Ct. 1708, 1713 (*Morgan*).

Similarly, if under Section 1281.4 or otherwise, Section 925 permits an out-of-state action to force a California employee to submit to an out-of-state arbitration, whereas no out-of-state action is allowed to force a California employee to submit to an out-of-state court litigation, some California employees are treated differently than other California employees. Such uneven treatment separately violates *Morgan*.

Dentons' only response is to argue that at least petitioner is not being treated differently because he supposedly agreed to the delegation clause. (Answer at p. 13.) But that is a dodge. Even assuming there existed a clear, unmistakable and binding delegation clause, the Court is not being asked to accept this petition based only on its potential impact on petitioner; the Court is being asked to accept the petition because of its potential impact on all California employees. As for that broader disparate impact, Dentons again has no answer. Even were the Court to focus on petitioner alone, the impact on him remains disparate, as he is being treated differently than other California employees.

Nor does *Preston v. Ferrer* (2000) 552 U.S. 346 (*Preston*) suggest a different answer to this problem. In *Preston*, the issue was, in *the face of an uncontested arbitration provision*, who decides the ultimate issue of whether the plaintiff acted as a personal manager or a talent agent. *Id.* at 352. The choice was between an arbitrator and the California Labor Commissioner. The plaintiff in *Preston* argued that the California Labor Commission had exclusive jurisdiction to decide whether a person was acting as a talent agent, and therefore the talent agent issue should be sent to the Labor Commission. The case was thus deciding a relatively narrow and straightforward issue: In the face of an uncontested arbitration provision, did the FAA preempt the Labor Commissioner's exclusive authority to rule on the issue? The answer was yes. But here, this is not a question of preemption over exclusive jurisdiction. This is a question of

whether, because of Section 925's invalidation of the forum selection clause, a foreign forum (be it an arbitrator or a court) has personal jurisdiction over the employee *at all*. As a result, *Preston* does not assist the analysis.

3. Dentons also does not meaningfully rebut that Section 1281.4 stay motions will deprive California employees of the full protections of the law, and especially the protections this Court outlined in *Armendariz*. All Dentons argues here is that arbitrators routinely resolve threshold questions of arbitrability. (Answer at p.15.)

But Denton's argument again misses the point. Dentons' position and the Opinion's reasoning fail to adequately address the purpose of Section 925—which is to level the playing field for employers and employees by ensuring that *all* disputes—whether in arbitration or litigation—are litigated locally and under California law. One way the Legislature gave employees that power was to give them the right to void any forum selection clauses so that the employers could not drag employees across the country as a condition to the employees being able to assert in California their rights against their employers. Dentons is now doing exactly that, and the Court of Appeal's Opinion is announcing to the employment world that such tactics are fair game. In so doing, the rights of California employees are being trampled.

Dentons is also just wrong when it suggests that petitioner is asking the Court "to treat the delegation clause as if it didn't exist." (Answer at p. 16.) That is not petitioner's position.

Instead, the delegation clause may well come into play, just not at this stage. At this stage, the issue is whether employers can defeat Section 925's protections by the simple expedient of filing a Section 1281.4 motion, even when the employee invoked Section 925's protections to render the reviewing foreign court incompetent to hear the petition to compel arbitration.

Indeed, the proof that Dentons and other employers are seeking to circumvent *Armendariz* is in what happened here. At the time Dentons filed its petition to compel arbitration in New York, this case had already been filed and served, and the parties were engaged in extensive motion practice. Dentons could have obviated this entire jurisdictional battle if it had just filed its petition to compel arbitration in this existing litigation. It did not do that precisely because it was and is seeking what it perceives as a better forum—and better law—for its motion. In other words, Dentons filed in New York to get around California courts and their familiarity with *Armendariz* and their perceived hostility to arbitration clauses. The Court of Appeal's decision ratified that conduct and all but assured—absent this Court's intervention—that other employers will adopt the same playbook.

4. In his petition, petitioner offers the straightforward proposition that trial courts could benefit from this Court's guidance on Section 925 and its interplay with Section 1281.4, and especially how the trial courts should proceed when the employee's employment status is disputed. (Pet. at p. 12.) Petitioner also described the various and different ways courts have tried to address it to date. (Pet. at pp. 35-37.)

In response, Dentons offers that guidance is "precisely what the Court of Appeal provided." (Answer at p. 16.) But did it? The Court of Appeal effectively rested most of its Opinion on the existence of the delegation clause, but in so doing, it almost completely ignored the very issue that this Court asked it to consider: the interplay between Sections 925 and 1281.4. Moreover, as to the guidance the Opinion did give, it only provides it for the subset of cases where there is a valid delegation clause. This Court may not agree with that guidance, but even if it does, having this Court's definitive ruling on the issue will still be very helpful to trial courts and litigants. It will also put the Legislature on notice of how its statute is being implemented (or circumvented). All of this is beneficial, as it helps to clear up inconsistencies in the statutes and allows the law to continue to evolve.

Dentons also counters that any unfairness in the application of the statute in particular instances can be remedied by Section 925's fee-shifting provision. (Answer at pp. 16-17.) But this once again assumes that the California employees that are unfairly impacted by an employer's gamesmanship have the financial wherewithal to hire out-of-state lawyers, travel across country, win the Section 925 issue in front of a non-California practitioner, and then return to California to seek fees and continue litigating the case. As discussed previously—and as expressed by the Legislature—by that point, at least some deserving employees will not have had the resources to continue the fight and will have lost their rights, not on the merits, but

because the employers had the ability to game the system and use a war of attrition to defeat otherwise meritorious claims.

5. Where petitioner asserted that review was appropriate because Section 925 reflects a fundamental public policy of California (Pet. at p. 12), Dentons responds that this public policy has "no bearing on the issue before the Court" and that "Nobody is understating or ignoring section 925." (Answer at p. 17.) But this is just not accurate. Despite the clear language of Section 925, California employees are being dragged into courts and arbitrations across the country. Indeed, Dentons apparently counted all of the reported Section 925 cases and calculates them as totaling to 109. (Answer at p. 9.) At least 30 of those cases are from outside of California, which means that in each case, a California employee was dragged out of state. And these are just the reported decisions.

Even the Opinion does not seem to give full credit to California's public policy, ultimately concluding that petitioner's position gets too close to the FAA and that the Legislature's mandate that Section 925 be applied broadly "does not bear on the question of who is to decide" the employee question." (Opn. At p. 15, fn. 3.)

But California has an express public policy in favor of keeping employers from moving their disputes with California employees out of state. Review will help ensure that this public policy is being adequately safeguarded.

6. Finally, Dentons does not dispute that this issue can only come to this Court's attention via writ review. Still, Dentons

cannot resist the temptation to attack anyway, and avers that this factor does not weigh in favor of the Court ordering full briefing because petitioner's questions "*were* answered. He just doesn't like those answers." (Answer at p. 18 (emphasis added).) But this is just another partial answer. Yes, the Court of Appeal gave an answer. No, it was not complete. No, it did not address the interplay between Sections 925 and 1281.4 (the original question presented). And no, petitioner does not believe the Court of Appeal's answer was correct.

But whether correct or not, Dentons does not dispute that this case presents a rare situation where the employee has the emotional and financial wherewithal to take this issue all the way up to this Court (twice). Dentons also does not dispute that the case has been exhaustively briefed, and the issues are ripe for resolution. Petitioner respectfully suggests that, regardless of whether the Opinion got it right, this Court's review and final decision will be beneficial to the courts, employers, employees and practitioners not only in California, but nationwide (and even worldwide when foreign employers are involved).

B. The Court Should Grant An Immediate Stay

Dentons argues that the Court should not enter a stay while it considers this petition because the expense of recommencing the arbitration is "de minimis." Dentons offers no reasoning or citation to support this statement and the suggestion is at best callous. Petitioner is one person fighting against the self-described largest law firm in the world. That law firm brings with it effectively unlimited resources. Dentons has hired two of the other largest law firms in the country to

represent them. The time and expense of recommencing arbitration may be "de minimis" to Dentons, but it is certainly not de minimis to petitioner.

Dentons also claims that as "a practical matter, all that might happen in the near term" is that the parties will hold a hearing to establish a briefing schedule. (Answer at p. 18.) Tellingly, Dentons does not commit to doing only that, and its statement is pure speculation. But even accepting Dentons' statement at face value, then Dentons has effectively admitted that it will suffer no prejudice from an immediate stay. After all, the only thing that might happen in the near term is that the parties will hold a hearing to establish a briefing schedule. If that scheduling hearing gets put on hold during the period this Court considers this petition, Dentons cannot be prejudiced by it. The Court should issue the stay.

CONCLUSION

Section 925 presents an evolving area of law that could greatly benefit from this Court's review. As we stated in our petition, doing so will provide invaluable guidance to the bench and bar on how to navigate early forum battles involving Section 925, conserve court resources by providing further certainty in the law and streamlining future disputes, and give notice to the Legislature of any deficiency or unanticipated outcomes in the application of Sections 925 and 1281.4 that may need its attention. And if petitioner is right, the Court's ultimate decision

will serve to benefit California employees statewide. We urge the Court to accept review.

Respectfully submitted,

Dated: January 13, 2023

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.504(d)(1), I certify that this **REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW** contains 3,892 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Respectfully submitted,

Dated: January 13, 2023

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA

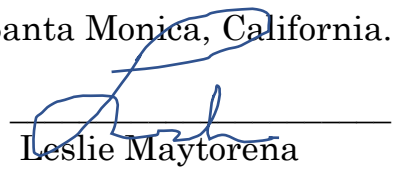
COUNTY OF LOS ANGELES

I, Leslie Maytorena, declare that I am, and was at the time of service of the papers herein referred to, over the age of 18 and not a party to the within action or proceedings. My business address is 100 Wilshire Boulevard, Suite 1300, Santa Monica, CA 90401, which is located in the county in which the within-mentioned mailing occurred. On January 13, 2023, I served: **REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW** in the manner specified below on the interested parties listed on the SERVICE LIST.

[X] BY ELECTRONIC TRANSMISSION: The above-referenced document listed above was posted directly on the TrueFiling website at https://www.truefiling.com via electronic transmission for service on counsel at the electronic-email addresses indicated in the attached Service List.

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

Executed on January 13, 2023, at Santa Monica, California.



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