SUPREME COURT COPY

CASE NO. S227228

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MICHAEL WILLIAMS, an individual.,
Petitioner,

v.

SUPERIOR COURT OF CALIFORINA
FOR THE COUNTY OF LOS ANGELES,
Respondent.

SUPREME COURT
FILED

MAY 17 2016

Frank A. McGuire Clerk

Deputy

Court of Appeal of the State of California
2nd Civil No. B259967

Superior Court of the State of California
County of Los Angeles

The Honorable William F. Highberger, Judge Presiding
Civil Case No. BC503806

REQUEST TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS' POSITION AND BRIEF OF AMICUS CURIAE BY CALIFORNIA APARTMENT ASSOCIATION IN SUPPORT OF REAL PARTY IN INTEREST MARSHALLS OF CA, LLC

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IN SUPPORT OF RESPONDENTS' POSITION**

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Counsel for Amicus Curiae
CALIFORNIA APARTMENT ASSOCIATION

Pursuant to Rule 8.520(f) of the California Rules of Court, *amicus curiae* California Apartment Association ("CAA"), hereby respectfully requests leave to file the attached brief of *Amicus Curiae* in support of Real Party in Interest Marshalls of Ca., LLC ("Marshalls") as to the issues presented on appeal made by Petitioner Michael Williams ("Mr. Williams") to this Supreme Court.

CAA is the largest rental housing trade association in the country, representing more than fifty thousand (50,000) property owners and housing operators who are responsible for nearly two million (2,000,000) rental housing units throughout California. CAA provides its membership with support, information and educational resources relevant to all aspects of California's rental housing industry. CAA members are business people, employers and landlords who are subject to strict business, employment and housing legal standards in California. CAA members have been exposed to class action lawsuits and victimized by PAG litigants as both a wide scale employer of workers in the housing industry and as a landlord. CAA members have experienced firsthand the abuse of the California's class action, PAG and discovery statutes as discussed herein.

Counsel for CAA has studied the briefs filed on behalf of the parties and is familiar with the issues involved in this action. There are three

reasons why CAA has an interest in this matter sufficient to justify its submission of an amicus brief as follows:

First, the issues presented in this case directly affect CAA and its members. Specifically, there is a case currently pending before this Supreme Court which involves one of CAA's members and boasts striking similarities to the case at bar: *Prometheus Real Estate Group, Inc. v. Superior Court of the State of California, County of San Mateo* ("the Prometheus Case").[1] It is foreseeable that this case may lay to rest the same issues pending in the Prometheus Case without affording members of the rental housing industry the opportunity to be heard. For this reason, CAA seeks to be heard.

Second, as business operators, employers and landlords in California, members of CAA are subject to strict legal duties. One of the most important legal duties CAA members must execute is the duty to protect the privacy of its employees and tenants. CAA seeks to offer its representative perspective to assist this Supreme Court in understanding the numerous privacy statutes drafted and codified by the California Legislature which apply to employers and landlords as well as many other business industries. CAA seeks to be heard on this issue to provide this Supreme Court with a compelling basis on which the Court may balance

[1]First District Court of Appeal, Division Four, Case No. A147293; San Mateo County Superior Court Case No. CIV 531264, The Honorable Judge Susan Irene Etezadi presiding.

yesteryear's liberally construed discovery statutes with competing and compelling modern-day privacy statutes.

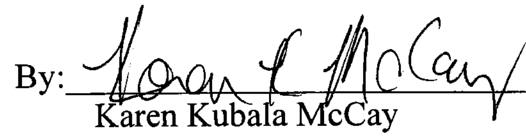
Third, CAA members are victims of the California plaintiffs' bar and advocacy groups, a savvy and opportunistic collection of representatives, who use pawn litigants cloaked in the label of the "private attorney general" to abuse California's PAG and class action statutes to the disadvantage of CAA members. CAA is seeking to be heard on this issue as a plea to this Supreme Court's for assistance in limiting abuses that accompany PAG and class action litigation so that plaintiff advocates who abuse California's discovery statutes to improperly add monetary value to unsubstantiated claims (in employment and housing cases alike) are not permitted to proceed through litigation unrestricted.

Pursuant to Rule 8.520(f)(4)(A)(i) of the California Rules of Court, the undersigned applicants represent that this brief was authored by those listed on this document on behalf of CAA. No party or counsel for a party to the pending appeal authored the applicant amicus brief or financially contributed to its preparation or submission.

For the foregoing reasons, CAA respectfully requests that the Court accept the attached brief for filing in this case.

DATED: May 6, 2016

PAHL & MCCAY
A Professional Corporation

By: 
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CALIFORNIA APARTMENT
ASSOCIATION

PROOF OF SERVICE

I am a citizen of the United States and an employee of the County aforesaid. I am over the age of eighteen years and not a party to the within action. My business address is 225 West Santa Clara Street, Suite 1500, San Jose, California 95113-1752. On the date mentioned below, I caused a true copy(ies) of the following document(s) to be served on the parties below using the method(s) checked:

REQUEST TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS' POSITION

On the Addressee(s) below named in said action by:

☐ First Class Mail. I am familiar with the regular mail collection and processing practices of the business. The mail will be deposited with the United States Postal Service on the same day following ordinary business practices. I enclosed the above-mentioned document(s) in a sealed envelope with postage thereon fully prepaid in the United States Post Office mail box at San Jose, California.

☐ Facsimile at the fax numbers shown after each name below.

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Civil Case No.: BC503806

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Superior Court of Los Angeles County
Respondent
Civil Case No.: BC503806

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on May 6, 2016, at San Jose, California.

Michelle Garcia

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Pursuant to California Rule of Court 8.520(f), and the leave sought in the Request to File Brief of Amicus Curiae submitted concurrently herewith, the California Apartment Association ("CAA") respectfully submits this brief as Amicus Curiae in support of the positions of Respondent Real Party in Interest Marshalls of Ca., LLC ("Marshalls") as to the issues presented on the appeal made on behalf of Petitioner Michael Williams ("Mr. Williams") to this Supreme Court.

I.

INTRODUCTION TO THE AMICUS

This case does not involve the plight of mistreated employees of Marshalls who are unable to unite in a putative class action at the hands of an oppressive employer. This case involves discovery abuse, litigation tactics and an attack on California's heralded right to privacy by those who have craftily exploited California's private attorney general ("PAG") and class action statutes under the guise of ideology. The issues presented by this case are not limited to California's labor and employment bar or its retail industry. This case has broad implications for California's rental housing industry and the landlord/tenant bar as well.

CAA is the largest rental housing trade association in the country, representing more than fifty thousand (50,000) property owners and housing operators who are responsible for nearly two million (2,000,000) rental housing units throughout California. CAA provides its membership

with support, information and educational resources relevant to all aspects of California's rental housing industry. CAA members are business people, employers and landlords who are subject to strict business, employment and housing legal standards in California. CAA members have been exposed to class action lawsuits and victimized by PAG litigants as both a wide scale employer of workers in the housing industry and as a landlord. CAA members have experienced firsthand the abuse of the California's class action, PAG and discovery statutes as discussed herein.

There are three major reasons why CAA opposes Mr. Williams' arguments to this Supreme Court in favor of a decision granting him access to the private contact information of thousands of California workers employed by Marshalls sufficient to justify CAA's submission of an amicus brief.

First, the issues presented in this case directly affect CAA and its members. Specifically, there is a case currently pending before this Supreme Court which involves one of CAA's members and boasts striking similarities to the case at bar: *Prometheus Real Estate Group, Inc. v. Superior Court of the State of California, County of San Mateo* ("the Prometheus Case").[1] It is foreseeable that this case may lay to rest the same issues pending in the Prometheus Case without affording members of the

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rental housing industry the opportunity to be heard. For this reason, CAA seeks to be heard.

Second, as business operators, employers and landlords in California, members of CAA are subject to strict legal duties. One of the most important legal duties CAA members must execute is the duty to protect the privacy of its employees and tenants. CAA seeks to offer its representative perspective to assist this Supreme Court in understanding the numerous privacy statutes drafted and codified by the California Legislature which apply to employers and landlords as well as many other business industries. CAA seeks to be heard on this issue to provide this Supreme Court with a compelling basis on which the Court may balance yesteryear's liberally construed discovery statutes with competing and compelling modern-day privacy statutes.

Third, CAA members are victims of the California plaintiffs' bar and advocacy groups, a savvy and opportunistic collection of representatives, who use pawn litigants cloaked in the label of the "private attorney general" to abuse California's PAG and class action statutes to the disadvantage of CAA members. CAA is seeking to be heard on this issue as a plea to this Supreme Court's for assistance in limiting abuses that accompany PAG and class action litigation so that plaintiff advocates who abuse California's discovery statutes to improperly add monetary value to unsubstantiated

claims (in employment and housing cases alike) are not permitted to proceed through litigation unrestricted.

II.

BRIEF STATEMENT OF RELEVANT FACTS

CAA includes the following summary of relevant facts in order to highlight facts relevant to the purposes of this Amicus Brief.

A. UNVERIFIED ALLEGATIONS BY A PRIVATE ATTORNEY GENERAL

From 2012 to 2013, Mr. Williams was a non-exempt hourly-paid employee at Marshalls. In 2013, counsel for Mr. Williams filed an unverified complaint in the subject action under the California Labor Code Private Attorney General Act against Marshalls alleging Labor Code violations. In doing so, counsel for Mr. Williams claims that Marshalls (a) failed to properly provide meal and rest periods to Mr. Williams "***and other aggrieved employees,***" (b) failed to provide accurate wage statements "***and other aggrieved employees,***" (c) failed to reimburse Mr. Williams "***and other aggrieved employees,***" and (d) failed to pay all earned wages to Mr. Williams "***and other aggrieved employees***."

B. INDISCRIMINATE INTERROGATORY DEMAND FOR PRIVATE INFORMATION

In an attempt to grow the representative action, counsel for Mr. Williams sought protected private contact information of

approximately 16,000 non-party employees who worked for Marshalls in California since 2012 by way of the following special interrogatory:

> Set forth the first, middle and last name, employee identification number, each position held, the dates each position was held, the dates of employment, the last known address, and all known telephone numbers of each and every person who is or was employed by Defendant Marshalls of CA, LLC in California as a non-exempt employee at any time since March 22, 2012.[2]

Marshalls dutifully objected to the special interrogatory contending the interrogatory was overbroad and was a violation of legitimate privacy interests of non-party employees. Marshalls also maintained that the information sought required a showing that the Marshalls' employees were, in fact, "***other aggrieved parties***" within the meaning of PAGA.

The parties met and conferred to no avail. Counsel for Mr. Williams filed a Motion to Compel.

C. THE TRIAL COURT'S "PHASED DISCOVERY" RULING

The Trial Court held that Marshall's was not required to produce the requested contact information for all employees at its 129 California stores. Instead, the Trial Court order a "phased discovery" solution to the parties' dispute whereby Mr. Williams could initially obtain *some* of the requested contact information (Marshalls was ordered to produce the requested

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[2]The Court of Appeals later described this special interrogatory as an effort by counsel for Mr. Williams to "wage litigation rather than facilitate it." [App. Op. Brf. at p. 12 citing *William v. Sup. Ct. (Marshalls of CA, LLC)*, 236 Cal.App.4th 1151, 1157.]

contact information for employees at Marshalls' Costa Mesa store only) while Mr. Williams substantiated the allegations in his complaint in order to justify a court order to compel further private contact information for additional Marshalls' employees beyond the Costa Mesa store. The idea behind the Trial Court's reasonable "phased discovery" ruling was to release the private information *incrementally* as Mr. Williams was able to prove its direct correlation with the allegations set forth in the unverified complaint throughout discovery.

Mr. Williams appealed the Trial Court's ruling.

D. THE APPELLATE COURT'S AFFIRMATION OF THE TRIAL COURT'S "PHASED DISCOVERY" RULING

Thereafter, the Court of Appeal affirmed the Trial Court's "Phased discovery" ruling. The Court of Appeal reiterated its concerns about compelling Marshalls to provide private information for 16,000 of its non-party employees upon nothing more than the filing of a unverified PAG complaint. The Court of Appeal indicated that Mr. Williams needed to substantiate his allegations that there were "***other aggrieved parties***" by way of a deposition prior to the issuance of an order to compel Marshalls to submit the private information demanded for all 16,000 non-party employees throughout California.

Thereafter, Mr. Williams failed to proceed with his deposition.

III.

ISSUE ADDRESSED IN THIS AMICUS CURIAE BRIEF

Should this Supreme Court issue a decision instructing all California Trial Courts faced with PAG/class action discovery demands for the release of private information about non-parties to fashion prudently incremental "phased discovery" plans which only compel the production of private information protected under California's Constitution and privacy statutes upon the substantiation of material allegations supporting the same?

IV.

ARGUMENT

A. THE PROMETHEUS CASE

Prometheus Real Estate Group, Inc. v. Superior Court of the State of California, County of San Mateo is a class action involving a discovery dispute between Prometheus Real Estate Group, Inc. and its former employee Marie Commick who was terminated for embezzlement and fraud. In November 2014, a California class action lawsuit was filed against Prometheus alleging Labor Code violations with Ms. Commick acting as class representative.[3]

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[3]Plaintiff Marie Commick's class action claims include (1) unpaid overtime, (2) unpaid meal period premiums, (3) unpaid rest break premiums, (4) unpaid minimum wages, (5) untimely final wage payments, (6) untimely payment of wages, (7) non-compliant wage statements, (8) failure to keep payrolls records, (9) unreimbursed business expenses, and

During discovery, Prometheus was served with a special interrogatory seeking the names, home addresses, business addresses, personal email addresses, business email addresses and fax numbers of undiscovered prospective class members employed by Prometheus since November 2010. Prometheus objected to the interrogatory contending the information sought was protected private information. Prometheus also stated the request was unduly burdensome and overbroad, especially in light of the fact that the class had not been certified.

Prometheus was served with a Motion to Compel.

Prometheus deposed Ms. Commick and confirmed many of the claims alleged in the complaint on which the class action was premised were unsubstantiated.

The Trial Court granted the Motion to Compel and issued an order instructing Prometheus to provide all the private contact information requested subject to an opt out notice despite concrete indications that the allegations set forth in the complaint were unsubstantiated.

Disappointed by the outcome of the Trial Court's decision and alarmed by the associated costs and the potential far-reaching effects of the Trial Court's ruling, Prometheus petitioned the Fourth Division Court of Appeal for a Writ of Mandate. The Court of Appeal ultimately denied the Writ of Mandate.

Prometheus then filed a Petition for Review to this Supreme Court which was granted and stayed pending the outcome of the subject case.

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(10) violation of California's Business & Professions Code sections 17200, *et seq.*

Given the similarity of facts and issues presented in the Prometheus Case and the subject case, CAA demonstrates that the issues before this Supreme Court are directly relevant to CAA members. Further, CAA maintains that the issues before this Supreme Court will foreseeably expand and extend to the broader rental housing industry where landlords are exposed to California Department of Fair Employment and Housing (DFEH) complaints, United States Department of Housing and Urban Development (HUD) complaints, private party actions, tenant association/organization actions, class actions and representative PAG actions on a regular basis and at a great expense. For these reasons, and others set forth *infra*, CAA requests that this Supreme Court instruct the Prometheus Trial Court, and *all* California Trial Courts, faced with PAG/class action discovery demands for the release of private information about non-parties to fashion prudently incremental "phased discovery" plans which only compel the production of private information protected under California's Constitution and privacy statutes upon the substantiation of material allegations supporting the same.

B. THE PUSH TO SACRIFICE CALIFORNIA'S RIGHT TO PRIVACY

Mr. Williams contends he is unconditionally entitled to the private contact information (names, employee identification, work history, home addresses and telephone numbers) of approximately 16,000 Marshalls employees statewide simply by virtue of the fact that he filed an unverified

complaint with self-authenticating good faith allegations[4] contending that Marshalls instituted statewide practices amounting to Labor Code violations. Mr. Williams contends that as a PAG and the representative litigant in the putative class action, he should be afforded greater discovery accommodation than other litigants because he is acting in "proxy" for the State in enforcing its Labor Code in the interest of the public. These contentions are dangerous to Californians and grant the California plaintiffs' bar an unwarranted power ripe for abuse and exploitation.

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[4]The allegations set forth in a complaint are subject to the pleading good faith requirements of California Code of Civil Procedure section 128.7(b)(1) and (3) as follows:

> (b) By presenting to the court, whether by signing, filing, submitting, or later advocating, ***a pleading, petition***, written notice of motion, or other similar paper, ***an attorney*** or unrepresented party ***is certifying*** that ***to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,*** all of the following conditions are met:
>
> (1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or ***needless increase in the cost of litigation***.*****
>
> (3) The ***allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery***.

In reality, there is no indication that Mr. Williams knows anything about Marshalls' statewide Labor Code practices and policies.[5] In reality, ***counsel*** for Mr. Williams (Capstone Law APC)[6] filed an unverified complaint making unsubstantiated allegations regarding their ***hope/conjecture/speculation*** that Marshalls engaged in statewide Labor Code violations in an effort to frugally obtain contact information for 16,000 Marshalls employees in order to grow a class action for counsel's own financial benefit. In reality, there is no real "public interest" being exchanged for the requested forfeiture of the right to privacy at issue; there is only greed. In reality, discovery costs have ranked as the top litigation concern for major corporate defendants for over ten years and frequently results in nuisance-value settlement of cases lacking genuine merit:

> That the ***unchecked rise in discovery costs*** has attracted the attention of corporations, which now list discovery as their ***most pressing concern when litigation*** is imminent. [Fulbright and Jaworski LLP, Litigation Trends Survey

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[5]To date, Mr. Williams has failed to verify or substantiate any of the allegations set forth in his complaint. Mr. Williams failed to appear for his deposition as suggested by the Trial Court and has not even provided a declaration. [Marshall's Ans. Brief, pp. 7-8]

[6]Capstone Law is a profitable plaintiffs' class action labor and employment law firm that touts on its website that it has "negotiated millions of dollars in settlements." The Capstone Law website also submits that it files class action lawsuits extending to a variety of industries: "***Capstone litigates cases on behalf of employees across a broad range of industries, including retail, food services, medical, insurance, banking and securities, among others.***" This is further indication of the far-reaching effects of the subject case.

Findings 2 (2006).] ***This concern is well founded***. Discovery costs in U.S. commercial litigation are growing at an exponential rate; estimates indicate they reached $700 million in 2004, $1.8 billion in 2006 and $2.9 billion in 2007. [Faced with Data Explosion, Firms Tap Temp Attorneys, Fulton Co. Daily Report, October 17, 2005.] ***Of course, these figures do not account for the billions of dollars that corporations pay each year to settle frivolous lawsuits owing to discovery abuse***.[7]

It is with these realities in mind, that CAA urges this Supreme Court to reject Mr. Williams' contentions because reliance on the same will likely have a far reaching effect on many California industries including, but not limited to, the housing industry.

1. California's Statutorily8 Protected Right To Privacy v. Discovery Abuse

There can be no doubt that California champions the right to privacy. The California State Constitution, Article 1, Section 1, grants Californians an "inalienable right" to pursue and obtain privacy. This Constitutional right has never been more important than in the current age

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[7]John H. Beisner, on behalf of the U.S. Chamber Institute for Legal Reform, *The Center Cannot Hold—The Need for Effective Reform of the U.S. Civil Discovery Process,* May 13, 2010, pp. 21-22 [available at www.uscourts.gov/file/document/centre-cannot-hold-need-effective-reform-us-civil-discovery-process]

[8]CAA acknowledges and defers to the thorough California case law briefing pertaining to *Hill v. National Collegiate Athletic Assoc.*, 7 Cal. 4th 1 (1994) and *Pioneer Electronics (USA), Inc. v. Superior Ct.*, 40 Cal. 4th 360 (2007) and their progeny submitted by the parties to the pending action. CAA seeks to supplement the case law analysis with reference to statutory law as it demonstrates the California Legislature's manifestation of the need for protection to the right to privacy--even in the face of liberally construed discovery statutes.

of the computerization of every facet of society. The California Legislature, through its statutes, has clearly manifested its ongoing intent to protect Californians' right to privacy.

Pursuant to California Business and Professions Code sections 17590-17594, Californians can put their residential and cellular telephone numbers on a national do-not-call list to avoid unwanted intrusion into their homes and personal lives. California Business and Professions Code sections 17590(a) states:

> There is a ***compelling state interest to protect the privacy of residential or wireless telephone subscribers*** who wish to avoid unsolicited and unwanted telephone solicitations.

California Public Utilities Code section 2891.1 requires a subscriber's express permission before a cell phone service provider can list the subscriber's number in a directory to prevent unwanted telephone intrusion into their homes and personal lives. California Public Utilities Code section 2891.1(a) states in relevant part:

> Notwithstanding Section 2891, a telephone corporation selling or licensing lists of residential subscribers ***shall not include the telephone number of any subscriber assigned an unlisted or unpublished access number.***

California Business and Professions Code section 17538.41 prohibits the sending of unsolicited text messages to cell phones or pagers to prevent

unwanted solicitation for goods, services and political causes. California Business and Professions Code sections 17538.41(a)(1) states:

> (a)(1) Except as provided in subdivision (b), (c), (d) , or (e), no person, entity conducting business, candidate, or political committee in this state shall transmit, or cause to be transmitted, a text message advertisement to a mobile telephone services handset, pager, or two-way messaging device that is equipped with short message capability or any similar capability allowing the transmission of text messages.
>
> A text message advertisement is a message, the principal purpose of which is to promote the sale of goods or ***services***, or to ***promote a political purpose or objective***, to the recipient, and consisting of advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, ***services***, or extension of credit, or ***advertising material for political purposes***.

In addition, California Health and Safety Code sections 103525, 103525.5, 103526, 103526.5, 103527, and 103528 charge a tariff to generate funds for the protection of private information and impose a duty to protect Californians' private information listed on birth and death certificates to prevent fraudulent misuse of private information. Further, California Health and Safety Code sections 103527(a) and (b) provide for the appointment of a State Committee assigned with the task to protect individual privacy:

> (a) The State Registrar shall appoint a Vital Records Protection Advisory Committee to study and make recommendations ***to protect individual privacy***, inhibit identity theft, and prevent fraud involving birth, death, and marriage certificates while providing needed access to birth,

> death, and marriage record information to those seeking it for legitimate purposes. The committee shall have the following duties:
>
> (1) Review and make recommendations as to the adequacy of procedures ***to safeguard individual privacy*** and prevent fraud, while ensuring appropriate access to birth, death, and marriage records.

California Civil Code sections 56.20-56.37 impose a duty to ensure confidentiality and to protect Californians' private information in the medical industry. California Civil Code section 56.20(a) states:

> Each employer who receives medical information shall establish appropriate procedures to ensure ***the confidentiality and protection from unauthorized use and disclosure of that information***. These procedures may include, but are not limited to, instruction regarding ***confidentiality*** of employees and agents handling files containing medical information, and ***security systems restricting access*** to files containing medical information.

California Civil Code sections 1798.82 imposes a duty on California businesses to protect Californians' computerized personal information and to promptly report any security breach:

> Any person or business that conducts business in California, and that owns or licenses computerized data that includes ***personal information***, shall disclose any breach of the security of the system following discovery or notification of the ***breach in the security of the data to any resident of California whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person***. The disclosure shall be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement, as provided in subdivision (c), or any measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system.

Each of these statutes confirm the California Legislature's ongoing and concerted intent to safeguard the right to privacy. There can be no doubt that the California Legislature seeks to protect information and records which contain private contact information including an individual's name, address, telephone number and email by the enactment of the above referenced statutes.

Counsel for Mr. Williams cannot legitimately argue that the California Legislature intended to sacrifice California's statutory privacy rights and obligations in favor of liberally construed discovery statutes to entitle PAG litigants to expand their putative class actions for financial gain. A PAG's desire to obtain the private contact information in order to expand an unsubstantiated putative class action is ***not*** a compelling State interest warranting a forfeiture of California's touted privacy rights. Given California's numerous and proliferating privacy statutes, this Supreme Court has ample reason to temper sweeping litigation demands for private information based on unsubstantiated allegations pled under the toothless requirement of California Code of Civil Procedure section 128.7.

The solution to balancing California's right to privacy with the ever-present potential for discovery abuse is the very "phased discovery" plan proposed by the Trial Court and affirmed by the Court of Appeals in the subject case. For these reasons, CAA requests that this Supreme Court

instruct *all* California Trial Courts faced with PAG/class action discovery demands for the release of private information about non-parties to fashion incremental "phased discovery" plans, which only compel the production of private information protected under California's Constitution and privacy statutes upon the substantiation of material allegations supporting the same.

2. Anyone Can Call Himself a "Private Attorney General"[9]

PAG Mr. Williams would have this Supreme Court believe he is a champion of oppressed Marshalls employees throughout California. Mr. Williams is the self-proclaimed "state's proxy" in the enforcement of California's Labor Code against Marshalls and, as such, Mr. Williams contends he is entitled to special consideration in the acquisition of voluminous and private information during the discovery process at the great time and expense of Marshalls. Mr. Williams' PAG arguments are transparent, disingenuous and belied by the context in which PAG statutes emerged in the law.

The legal concept of a PAG was first recognized in 1943 when Judge Jerome Frank concluded that Congress could authorize a private citizen to file a suit even if the sole purpose were to vindicate a public

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[9] William B. Rubenstein, *On What A "Private Attorney General" Is—And Why It Matters*, Vanderbilt Law Review, 2004, Vol. 57:6:2129 at p. 2130; referencing Geoffrey C. Hazard, Jr., *Modeling Class Counsel*, 81 NEB. L. REV 1397, 1399.

interest.[10] The historical evolution of the concept of private lawyers supplementing the enforcement of public laws thereafter is probative to Mr. Williams' arguments. The theory of the "private attorney general" was barely addressed during the 1940s and 1950s, but it began to take root in the 1960s.[11] By the 1970s, the concept of PAG exploded because it became a sanctioned method for attorneys to collect fees:

> The phrase [Private Attorney General] explodes in the 1970s not because of the public law litigation but because it takes root in new attorney's fees statutes and doctrines. ***Once loosed as a matter of money, the private attorney general concept's diffusion was limited only by the imagination of the lawyers seeking attorneys' fees.***[12]

Frequently, the real motive behind PAG litigation is money and the real parties behind PAG representative litigants are plaintiffs lawyers seeking to grow their action to increase their prospects of financial recovery in the name of "protecting the public interest."[13] Scholars have long acknowledged this brutal reality:

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[10]*Assoc. Indus. Of New York v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943).

[11]William B. Rubenstein, *On What A "Private Attorney General" Is—And Why It Matters,* Vanderbilt Law Review, 2004, Vol. 57:6:2129 at p. 2135.

[12]Id. at p. 2050-2151.

[13]In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741(1975), the majority opinion written by Justice Rehnquist indicts federal representative litigants in class actions for abuses to the discovery process as follows:

> The ***potential for possible abuse of the liberal discovery*** provisions of the Federal Rules of Civil Procedure may likewise exist in

> ***[P]laintiffs' attorneys are risk-averse entrepreneurs, attempting to maintain diversified portfolios of case investments.*** For such business people, cases that government attorneys have already deemed relatively meritorious are attractive investments. It is likely the government has undertaken significant investigation before pursuing its action. The private attorney can free – ride on these efforts, reaping the benefits of the government's factual investigation and reducing her own investment in expensive fact discovery. Better still, non-mutual offensive issue preclusion provides a cheap and simple way to take advantage of any issues litigated and determined against the defendant. ***Such coattail class actions present a vision of the supplemental attorney general that is a strong public/weak private vision. The only supplemental function performed by this private attorney general is that of multiplying wrongdoers penalties: she provides no independent search skills, no special litigation savvy, and no nonpoliticized incentives. She simply piles on and runs up the tab.***[14]

> [securities fraud] type of case to a greater extent than they do in other litigation. *****
> To the extent that this process eventually produces relevant evidence which is useful in determining the merits of the claims asserted by the parties, it bears the imprimatur of those Rules and of the many cases liberally interpreting them. ***But to the extent that it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.***
> ***Yet to broadly expand the class of plaintiffs who may sue under Rule 10b-5 [securities fraud] would appear to encourage the least appealing aspect of the use of the discovery rules.***

[14]William B. Rubenstein, *On What A "Private Attorney General" Is—And Why It Matters,* Vanderbilt Law Review, 2004, Vol. 57:6:2129 at p. 2050-51; referencing John C. Coffee, Jr., *Rescuing The Private Attorney General: Why Model of the Lawyer as Bounty Hunter is Not Working,* 42 MD. L. REV 215, 223-24 (1983); see also John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions,* 86 Columbia Law Rev. 669, 704-12.

Indeed, some economists opine that the financial incentive that accompanies PAG litigation is so enticing, the net result amounts to "overenforcement and excess deterrence."[15]

There are no special requirements to qualify as a PAG. Mr. Williams openly admits the ease with which a litigant can qualify as a PAG as follows:

> There are only three requirements for bringing representative PAGA claims: (1) the PAGA plaintiff was 'employed by the alleged violator;' (2) the PAGA plaintiff complained with section 2699.3(a)'s notice and administrative exhaustion requirements and pled his or her compliance therewith; and (3) 'one or more of the alleged violations was committed' against the PAGA plaintiff. [Footnote omitted] Aside from the administrative exhaustion requirement, pleading sufficient facts alone will suffice to establish PAGA standing. [16]

While the undertakings of genuine PAG litigation has an admitted societal value, genuine PAG litigants are few and far between.[17] Further, the genuineness and merits of each PAG claim vary from case to case.[18]

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[15]John C. Coffee, Jr., *Rescuing The Private Attorney General: Why Model of the Lawyer as Bounty Hunter is Not Working,* 42 MD. L. REV 215, 220 citing Landes & Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1 (1975).

[16]App. Op. Br. at p. 32-33.

[17]John C. Coffee, Jr., *Rescuing The Private Attorney General: Why Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV 215, 223.

[18] William B. Rubenstein, *On What A "Private Attorney General" Is—And Why It Matters*, Vanderbilt Law Review, 2004, Vol. 57:6:2129 at 2156 wherein Professor of Law William B. Rubenstein presents a rubric in order to classify the several types of PAG that appear in litigation.

Because of the acknowledged manipulation of the PAG concept, there should be no special consideration afforded to self-proclaimed PAGs during the discovery process of litigation.

What Petitioner is seeking from this Supreme Court will permit pawn litigants who are cloaked by savvy attorneys with the label of the "private attorney general" to abuse California's PAG statutes. History tells this Supreme Court that the vast majority of PAG and class action litigants are not ideological legal martyrs fighting for societal just causes, but rather, businesspeople seeking to capitalize on legal investments. CAA seeks to protect a trial court's discretion to limit abuses that accompany PAG litigation so that plaintiffs' attorneys and advocacy groups who abuse California's discovery statutes to improperly add monetary value to claims (*in housing and employment cases alike*) are not permitted to proceed into litigation without reasonable limitations.

V.

CONCLUSION

For the reasons set forth herein, CAA requests that this Supreme Court instruct *all* California Trial Courts, faced with PAG/class action discovery demands for the release of private information about non-parties to fashion prudently incremental "phased discovery" plans which only compel the production of private information protected under California's Constitution

and privacy statutes upon the substantiation of material allegations supporting the same.

Respectfully submitted,

DATED: May 6, 2016

PAHL & MCCAY
A Professional Corporation

By:
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Counsel for Amicus Curiae
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CERTIFICATE OF WORD COUNT

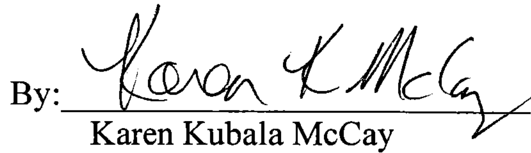
As required by Supreme Court Rule 33.1(h), I certify that the *Brief of The California Apartment Association as Amicus Curiae in Support of Real Party in Interest Marshalls of CA, llc*, in its entirety, contains **5,205** words, below the limit provided by Supreme Court Rule 33.1(g).

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

Respectfully submitted,

DATED: May 6, 2016

PAHL & MCCAY
A Professional Corporation

By: 
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PROOF OF SERVICE

I am a citizen of the United States and an employee of the County aforesaid. I am over the age of eighteen years and not a party to the within action. My business address is 225 West Santa Clara Street, Suite 1500, San Jose, California 95113-1752. On the date mentioned below, I caused a true copy(ies) of the following document(s) to be served on the parties below using the method(s) checked:

BRIEF OF *AMICUS CURIAE* BY CALIFORNIA APARTMENT ASSOCIATION IN SUPPORT OF REAL PARTY IN INTEREST MARSHALLS OF CA, LLC

On the Addressee(s) below named in said action by:

- ☐ First Class Mail. I am familiar with the regular mail collection and processing practices of the business. The mail will be deposited with the United States Postal Service on the same day following ordinary business practices. I enclosed the above-mentioned document(s) in a sealed envelope with postage thereon fully prepaid in the United States Post Office mail box at San Jose, California.
- ☐ Facsimile at the fax numbers shown after each name below.
- ☐ By Personal Delivery.
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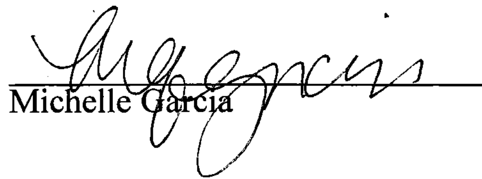
Hon. William F. Highberger Los Angeles Superior Court Central Civil West Courthouse 600 South Commonwealth Ave. Los Angeles, CA 90005	**Superior Court of Los Angeles County Respondent Civil Case No.: BC503806**

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on May 6, 2016, at San Jose, California.



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