SUPREME COURT COPY

CASE NO. S227228

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MICHAEL WILLIAMS, an individual,
Petitioner,

v.

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

SUPREME COURT
FILED

MAY 17 2016

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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

APPLICATION TO FILE BRIEF OF *AMICUS CURIAE* PROMETHEUS REAL ESTATE GROUP, INC. IN SUPPORT OF REAL PARTY IN INTEREST MARSHALLS OF CA, LLC

Lisa Barnett Sween (SBN 191155)
Natalja M. Fulton (SBN 254858)
Dylan B. Carp (SBA 196846)
Douglas G.A. Johnston (SBN 268880)
JACKSON LEWIS P.C.
50 California Street, 9th Floor
San Francisco, CA 94111
Telephone: (415) 394-9400/ Facsimile: (415) 394-9401
Email: carpd@jacksonlewis.com

Counsel for *Amicus Curiae*
PROMETHEUS REAL ESTATE GROUP, INC.

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CLERK SUPREME COURT

Prometheus Real Estate Group, Inc. ("Prometheus") applies for leave to file the accompanying *amicus curiae* brief in support of Marshalls of CA, LLC under rule 8.520(f) of the California Rules of Court. Prometheus is familiar with the content of the parties' briefs.

Prometheus, a real estate development company headquartered in San Mateo and employing people throughout California, is the Petitioner in a matter pending in this Court, *Prometheus Real Estate Group Inc. v. Superior Court*, S232576. On March 9, 2016, this Court granted review in *Prometheus*, and deferred further action pending the consideration and disposition of a related issue in *Williams*, under Cal. Rules of Court, rule 8.512(d)(2). *Prometheus* raises fundamentally the same privacy issue to that in *Williams*, in the context of a class action, as opposed to a non-class representative action under PAGA. However, this distinction is not relevant in the context at issue—both are representative actions in which the named plaintiff seeks the names and personal contact information of every former and current non-exempt employee in California without any showing of state-wide or class-wide violations. Indeed, the facts in *Prometheus* are even more compelling since the plaintiff in *Prometheus* has not worked for Prometheus for years, yet seeks over *five* years' worth of personal contact information about every former and current non-exempt employee.

Prometheus seeks to file this brief to provide the Court with a class action litigant's perspective on the privacy issue raised in *Williams*. Prometheus has no interest in or connection with any of the parties in this case.

Dated: May 6, 2016

Respectfully submitted,

JACKSON LEWIS P.C.

By:

Lisa Barnett Sween
Natalja M. Fulton
Dylan B. Carp
Douglas G.A. Johnston

Counsel for *Amicus Curiae*,
PROMETHEUS REAL ESTATE GROUP, INC.

4844-8812-8304, v. 1

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Douglas G.A. Johnston (SBN 268880)

JACKSON LEWIS P.C.
50 California Street, 9th Floor
San Francisco, CA 94111
Telephone: (415) 394-9400/ Facsimile: (415) 394-9401
Email: carpd@jacksonlewis.com

Counsel for *Amicus Curiae*
PROMETHEUS REAL ESTATE GROUP, INC.

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I. Introduction

Prometheus Real Estate Group, Inc. ("Prometheus") welcomes the opportunity to address as amicus curiae the important public interest this case represents on these issues:

- In a purported representative PAGA[1] action under the California Labor Code, are the names and personal contact information of every former and current non-exempt employee of Marshalls in California over a two year period subject to California's constitutional right to privacy or is this information simply "routine" or "basic" discovery of contact information of percipient witnesses subject only to a general relevance inquiry without any further analysis?

- If such information is subject to California's constitutional right to privacy, does the named Plaintiff's allegation of a PAGA violation in an unverified complaint entitle Plaintiff to discovery of the names and personal contact information of every former and current non-exempt employee of Marshalls in California over a two year period, notwithstanding the employees' constitutional right to privacy, without any showing of any state-wide violation?

- If a balancing test is applied in this context, must Plaintiff demonstrate that the invasion of the former and current employees' right to

[1] California Labor Code Private Attorneys General Act of 2004 ("PAGA")

privacy in their names and contact information must further a compelling interest?

This matter is important since it affects all California employers and their employees. Once the disclosure of the employees' identity and personal information occurs, the resultant harm to their constitutional privacy rights cannot be undone.

II. Summary of Argument

Petitioner Michael Williams contends that the employees of Real Party in Interest Marshalls of CA, LLC have no constitutional right to privacy in their names and contact information under the three-part framework set forth in *Hill v. National Collegiate Athletic Assoc.* (1994) 7 Cal.4th 1. This is so, according to Williams, because this Court held in *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360 that consumers who disclosed their names and contact information while complaining about a defective product have no such right to privacy. Accordingly, Williams contends that he is automatically entitled to discover the names and personal contact information of every former and current non-exempt employee of Marshalls in California for two years, simply because he filed a lawsuit on a putative representative basis. Williams argues that these employees are percipient non-party witnesses, even though he has not proffered any evidence of a statewide violation, and even though the vast majority of the employees never worked with Williams or

even at the same location as Williams. Williams' contention has no merit for each of the following reasons.

First, this Court has already recognized that employees, unlike consumers who have disclosed their personal information in a complaint about a defective product, do have a privacy right in their names and contact information that makes it appropriate for courts to balance employees' right to privacy against the desire of a putative representative plaintiff for their information. (*Pioneer, supra,* 40 Cal.4th at p. 371 [citing with approval *Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 300-301].)

Second, in any event, unlike complaining consumers, employees' privacy right in their names and contact information satisfies the three-part framework of *Hill.* Because employees do not voluntarily disclose their names and contact information, their right to privacy in that information is fundamentally more robust than the interest of consumers who voluntarily disclosed that information while complaining about a defective product.

Third, because Williams proffered no evidence of a statewide violation, and in light of the strength of Marshalls' employees' right to privacy, the Trial Court struck the right balance in limiting disclosure initially to the store where Williams was employed. As numerous federal district courts in California have held, the statewide disclosure of

employees' names and contact information under these circumstances, as Williams seeks, would unduly invade their privacy.

III. The amicus

Prometheus, a real estate development company headquartered in San Mateo and employing people throughout California, is the Petitioner in a matter pending in this Court, *Prometheus Real Estate Group Inc. v. Superior Court*, S232576. On March 9, 2016, this Court granted review in *Prometheus*, and deferred further action pending the consideration and disposition of a related issue in *Williams*, under Cal. Rules of Court, rule 8.512(d)(2). *Prometheus* raises fundamentally the same privacy issue to that in *Williams*, in the context of a class action, as opposed to a non-class representative action under PAGA. However, this distinction is not relevant in the context at issue—both are representative actions in which the named plaintiff seeks the names and personal contact information of every former and current non-exempt employee in California without any showing of state-wide or class-wide violations. Indeed, the facts in *Prometheus* are even more compelling since the plaintiff in *Prometheus* has not worked for Prometheus for years, yet seeks over *five* years' worth of personal contact information about every former and current non-exempt employee.

Prometheus seeks to file this brief to provide the Court with a class action litigant's perspective on the privacy issue raised in *Williams*.

Prometheus has no interest in or connection with any of the parties in this case.

IV. Argument

A. *Pioneer* held that the three-part framework in *Hill* applies to discovery requests for names and personal contact information.

In *Pioneer, supra,* 40 Cal.4th at p. 370, this Court held that a constitutional privacy objection to discovery of individuals' names and contact information is governed by *Hill, supra,* 7 Cal.4th 1. "*Hill* sets forth in detail the analytical framework for assessing claims of invasion of privacy under the state Constitution." (*Pioneer, supra*, 40 Cal.4th at p. 370.) The three-part framework is as follows: "First, the claimant must possess a 'legally protected privacy interest.'" (*Id.* [quoting *Hill, supra,* 7 Cal.4th at p. 35].) "Second, *Hill* teaches that the privacy claimant must possess a reasonable expectation of privacy under the particular circumstances...'" (*Id.* [quoting *Hill, supra,* 7 Cal.4th at p. 36].) "Third, *Hill* explains that the invasion of privacy complained of must be 'serious' in nature, scope, and actual or potential impact to constitute an 'egregious' breach of social norms, for trivial invasions afford no cause of action." (*Id.* at p. 371 [quoting *Hill, supra,* 7 Cal.4th at p. 37].)

If the above three-part framework is satisfied, then a balancing test is applied. "Assuming that a claimant has met the foregoing *Hill* criteria for

invasion of a privacy interest, that interest must be measured against other competing or countervailing interests in a balancing test." (*Id.*) "Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests." (*Id.*) "Protective measures, safeguards and other alternatives may minimize the privacy intrusion." (*Id.*)

B. The names and contact information of employees qualify for protection under *Hill*, unlike information about consumers who complained about a defective product addressed in *Pioneer*.

1. *Pioneer* acknowledged that unlike information about complaining consumers, employee names and contact information satisfy the three-part *Hill* framework.

Pioneer recognized that, unlike the consumer information at issue there, employee names and contact information satisfy the three *Hill* elements. *Pioneer* explained:

> Assuming that a claimant has met the foregoing *Hill* criteria for invasion of a privacy interest, that interest must be measured against other competing or countervailing interests in a "balancing test." (*Hill, supra, 7 Cal.4th at p. 37*; see *Parris v. Superior Court, supra, 109 Cal.App.4th at pp. 300-*

> *301* [balancing privacy rights of putative class members against discovery rights of civil litigants]; see also *Britt v. Superior Court (1978) 20 Cal.3d 844, 855-856 [143 Cal. Rptr. 695, 574 P.2d 766]* [balancing right of associational privacy with discovery rights of litigants]; *Valley Bank, supra, 15 Cal.3d at p. 657* [balancing test in bank customer privacy case]; *Planned Parenthood Golden Gate v. Superior Court, supra, 83 Cal. App. 3d at pp. 358-369* [balancing associational privacy rights].)

(*Pioneer, supra*, 40 Cal.4th at p. 371.) In each of two respects, the above citation to *Parris* establishes that employee names and contact information qualify for protection under *Hill*.

First, similar to this case, *Parris* involved a plaintiff's attempt to discover the names and contact information of the defendant's current and former employees in a putative class action alleging Labor Code violations. (*Parris, supra,* 109 Cal.App.4th at p. 290.) As the parenthetical in the above quotation states, the appellate court remanded with instructions to the trial court to balance the privacy rights of the putative class members against the discovery rights of the plaintiff. (*Parris, supra*, 109 Cal.App.4th at pp. 300-301.) Accordingly, *Pioneer* recognized that employee names and contact information qualify for privacy protection

under *Hill*, requiring the balancing called for in the next step of the *Hill* analysis.

Second, *Pioneer* listed *Parris* ahead of three other cases involving privacy rights significant enough to require balancing of the right against a litigant's desire for information: *Britt, supra,* 20 Cal.3d at p. 848 [privacy right not "to disclose extensive and intimate details of both their own and others' activities in various local political associations"]; *Valley Bank, supra,* 15 Cal.3d at p. 654 [privacy right not to disclose private bank information]; *Planned Parenthood, supra*, 83 Cal.App.4th at p. 359 [privacy right not to disclose names and addresses of staff and volunteers of organization that provides abortion services]. As such, *Pioneer* recognized that the right to privacy protection of employee name and contact information is on par with the protection afforded the significant privacy interests in *Britt*, *Valley Bank* and *Planned Parenthood.*

In light of the above, it is established that employee names and contact information qualify for protection under the three elements of *Hill.*

2. Because "a man's home is his castle," employee names and contact information satisfy *Hill's* first element: a legally protected privacy interest.

Regarding the first *Hill* element, California and federal decisional law establish individuals have a "privacy right to be free in one's home from unwanted communication." (*Pioneer, supra*, 40 Cal.4th at p. 367

[citing *Hill v. Colorado* (2000) 530 U.S. 703, 716].) The U.S. Supreme Court has recognized that right in numerous cases. For example, in *United States Department of Defense v. Federal Labor Relations Authority* (1994) 510 U.S. 487, 500-501, the Supreme Court held an exclusive bargaining representative did not have the right to obtain unit members' names and contact information via the Freedom of Information Act, recognizing that "[m]any people simply do not want to be disturbed at home by work-related matters," and recognizing too "the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." And in *Rowan v. United States Post Office Department* (1970) 397 U.S. 728, 736-737, the Supreme Court upheld against a First Amendment challenge the constitutionality of a statute limiting unsolicited mailing to the home, recognizing "[t]he ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality."

Similarly, numerous California Court of Appeal opinions recognize individuals' privacy rights in their names and addresses. In *Life Technologies Corp. v. Superior Court* (2011) 197 Cal.App.4th 640, 653, the court of appeal reversed a trial court order requiring the disclosure of the names, addresses and telephone numbers of certain employees assertedly needed for the plaintiff's disparate impact discrimination claim, in part on the ground that "individuals have a substantial interest in the privacy of their home." In *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th

1008, 1011, 1019, the Court of Appeal held the California Public Records Act does not require a city to disclose the names, addresses, and telephone numbers of person who have made complaints to the city about municipal airport noise, in part because "individuals have a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail." And in *Planned Parenthood, supra*, 83 Cal.App.4th at pp. 350, 359, the court of appeal reversed a trial court order requiring the disclosure, pursuant to a protective order, of the names, residential addresses and telephone numbers of the defendant's staff and volunteers who have knowledge relevant to the litigation, in part because the order "impinges on nonparties' residential privacy interests by compelling disclosure of residential addresses and telephone numbers," noting that "individuals have a substantial interest in the privacy of their home."

Accordingly, *Hill*'s first element is satisfied.

3. Because employees' disclosure of their personal information to employers is mandatory not voluntary, *Hill*'s second element is satisfied: employees have a reasonable expectation of privacy.

Employees have a reasonable expectation of privacy in their names and contact information. In California, employees do not voluntarily divulge their personal information to their employers. Rather, California

law requires employers to gather this information about their employees. (Lab. Code section 1174, subd. (c) ["Every person employing labor in this state shall...[k]eep a record showing the names and addresses of all employees employed..."].) To paraphrase *Pioneer*, an employer, as custodian of the relevant information, "has standing to assert the privacy interests of its [employees] in the identifying information they gave to" the employer. (*Pioneer, supra*, 40 Cal.4th at p. 368.) Moreover, "[i]n the case of a record which is compiled without a person's consent, or with his consent because of some legal requirement and where the subject of the record has a right that access to that record be restricted, the relationship between the custodian of the record and the person who is the subject of the record is analogous to that of attorney-client," and "[t]he custodian has the right, in fact the duty, to resist attempts at unauthorized disclosure and the person who is the subject of the record is entitled to expect that his right will be thus asserted." (*Craig v. Municipal Court* (1979) 100 Cal.App.3d 69, 77.) Accordingly, employees have a reasonable expectation that their names and contact information will be kept private by their employer.

In this regard, employees' expectation of privacy is fundamentally more robust than the expectations of the consumers at issue in *Pioneer*. There, the consumers voluntarily disclosed their names and contact information in complaints sent to the seller of an allegedly defective DVD player. (*Pioneer, supra*, 40 Cal.4th at p. 364.) That voluntary disclosure

was dispositive in this Court's conclusion that the consumers had a reduced expectation of privacy in the information. This Court reasoned that "it seems unlikely that these customers, *having already voluntarily disclosed their identifying information to that company in the hope of obtaining some form of relief*, would have a reasonable expectation that such information would be kept private and withheld from a class action plaintiff who possibly seeks similar relief for other Pioneer customers, unless the customer expressly consented to such disclosure." (*Id.* [first emphasis added, second emphasis removed].) "If anything, these complainants might reasonably expect, and even hope, that their names and addresses would be given to any such class action plaintiff." (*Id.*)

Accordingly, employees (unlike complaining consumers) have a reasonable expectation in the privacy of their names and contact information.

4. Because employees do not voluntarily disclose their personal information, *Hill*'s third element is satisfied: compelled disclosure is a serious invasion.

Unlike compelled disclosure of *complaining consumers'* personal information, compelled disclosure of *employees'* personal information is a serious invasion of their privacy. *Pioneer* held the compelled production of complaining consumers' personal information, subject to the right to opt out, was not a serious invasion of their privacy "for much the same reasons

that Pioneer customers had a reduced expectation of privacy." (*Pioneer, supra*, 40 Cal.4th at p. 372.) In particular, the discovery order under review "merely called for disclosure of contact information *already voluntarily disclosed* to Pioneer." (*Id.* [emphasis added].)

Here, in contrast, employees do not voluntarily disclose their personal contact information to their employers. Rather, employers are compelled to collect the information, and employees have a reasonable expectation that their employers will keep their personal information private. Moreover, as the Court of Appeal below noted, compelled disclosure of employees' personal contact information invades "the employees' right to be free from unwanted attention and perhaps fear of retaliation from an employer." (*Williams v. Superior Court* (2015) 236 Cal.App.4th 1151, 1159.)

Although *Pioneer* noted that "[c]ontact information regarding the identity of potential class members is *generally* discoverable," 40 Cal.4th at p. 373 [emphasis added] [citing *Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 820-21, 836, and *Budget Finance Plan v. Superior Court* (1973) 34 Cal.App.3d 794, 799-800], neither involved the disclosure of employee names and contact information. Rather, *Bartold* involved a putative class action on behalf of homeowners whose title was allegedly wrongfully clouded, 81 Cal.App.4th at p. 823, and *Budget* involved a putative class action on behalf of parties to retail installment sales contracts,

34 Cal.App.3d at p. 796. And in any event, neither addressed an employee's right to privacy. Rather, *Bartold* involved an overbreadth challenge: "if the challenged discovery requests were overbroad, the trial court should have restricted discovery rather than prohibiting it." (81 Cal.App.4th at p. 836.) And in *Budget*, the court held the plaintiff was permitted to serve interrogatories even though the defendant's demurrer had been sustained with leave to amend; the interrogatories themselves however were "not presently challenged as to form or as to relevance in their particulars." (34 Cal.App.3d at pp. 797-798.)

Accordingly, compelled disclosure of employees' names and personal contact information is a serious invasion of their privacy.

C. Because Williams did not proffer any evidence of a statewide violation, the lower courts struck the appropriate balance between employees' privacy rights and his discovery interest.

The parties dispute the appropriate formulation of the *Hill* balancing test to apply in this context. Marshalls contends that the invasion of its employees' right to privacy in their names and contact information must further a "compelling interest," Marshalls Brief at p. 54 [citing *Lantz v Superior Court* (1994) 28 Cal.App.4th 1839], whereas Williams contends the court "must weigh countervailing interests presented by the defendant and the plaintiff's rebuttal to those countervailing interests," without any

need for the plaintiff to demonstrate a "compelling interest." Williams Reply Brief at p. 32. As explained below, Marshalls' formulation is correct, but under either formulation, the lower courts struck the appropriate balance.

1. Disclosure of employee names and contact information should be compelled only if it is narrowly tailored to further a compelling interest.

When the compelled disclosure of employee names and contact information is at issue, the disclosure should be ordered only where it is narrowly tailored to further a compelling interest. (*Life Technologies, supra*, 197 Cal.App.4th at pp. 652-653.) "The public interest in preserving confidential, personnel information generally outweighs a private litigant's interest in obtaining that information." (*Life Technologies, supra*, 197 Cal.App.4th at p. 652 [citing *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 530].) "A showing of relevancy may be enough to cause the court to balance the compelling public need for discovery against the fundamental right of privacy." (*Id.* [citing *Mendez v. Superior Court* (1988) 206 Cal.App.3d 557, 567].) "However, the balance will favor privacy for confidential information in third party personnel files unless the litigant can show a compelling need for the particular documents and that the information cannot reasonably be obtained through depositions or from nonconfidential sources." (*Id.* [citing *El Dorado Savings & Loan Assn. v.

Superior Court (1987) 190 Cal.App.3d 342, 346] [emphasis deleted].) "Even when the balance does weigh in favor of disclosure, *the scope of disclosure must be narrowly circumscribed.*" (*Id.* [citing *Harding Lawson Associates v. Superior Court* (1992) 10 Cal.App.4th 7, 10] [emphasis in original].)

Accordingly, the appropriate balancing test to apply here is whether the compelled disclosure is narrowly tailored to further a compelling interest.

2. Because Williams proffered no evidence of a statewide violation, the lower courts appropriately limited disclosure no matter which formulation of the test applies.

The Trial Court and Court of Appeal properly limited disclosure of employee names and contact information no matter which formulation of the balancing test applies, given Williams' inability to proffer any evidence of a statewide violation. As the Court of Appeal correctly reasoned, because Williams proffered no evidence of a statewide violation, he has a "practically nonexistent" interest in obtaining employee names and contact information on a statewide basis. *A fortiori*, Williams does not have a compelling interest in obtaining statewide information.

Moreover, because Williams' interest in obtaining statewide information is practically nonexistent, the Trial Court and Court of Appeal

properly limited disclosure initially to the store where he worked, as compelled disclosure statewide—even with an opt-out notice—would not further a legitimate interest. As the Court of Appeal reasoned, once the initial disclosure of information regarding employees who worked at his store has been made, Williams will then have the opportunity to show he has an interest in obtaining broader discovery. But at this stage, compelling disclosure of employee names and contact information on a statewide basis would further no legitimate interest, with or without an opt-out notice. And if, as Prometheus contends, the invasion must be "narrowly tailored" to further a legitimate interest, *Life Technologies, supra*, 197 Cal.App.4th at pp. 652-653, then *a fortiori* the Trial Court and Court of Appeal were correct in holding Williams is not entitled to statewide employee information at this time, with or without an opt-out notice.

Although Williams relies heavily on *Pioneer* in requesting statewide employee information, but both the legal issue and the facts in *Pioneer* were critically different from those here. The legal issue in Pioneer was whether an opt-out or opt-in notice was appropriate in the consumer context.

The facts in *Pioneer* were fundamentally different from the facts here. In *Pioneer*, the consumers had complained about alleged wrongdoing and, in so doing, voluntarily disclosed their names and contact information. Here, in contrast, Williams seeks discovery of the names and contact

information of Marshalls' employees who did not voluntarily disclose their information. Because the facts are so different, each reason *Pioneer* gave for its decision has no salience here.

First, *Pioneer* reasoned, "in a real sense, many of Pioneer's *complaining customers* would be *percipient witnesses* to relevant defects in the DVD players." (*Pioneer, supra*, 40 Cal.4th at p. 374 [first emphasis added, second emphasis in original].) Here, in contrast, because Williams has proffered no evidence of a statewide violation yet seeks information about all nonexempt employees regardless of position, job duties, or location, there is no evidence that any of Marshalls' statewide employees would be percipient witnesses relevant to Williams' Labor Code claims.

Second, *Pioneer* reasoned, "[f]rom a standpoint of fairness to the litigants in prosecuting or defending the forthcoming class action, Pioneer would possess a significant advantage if it could retain for its own exclusive use and benefit the contact information of those customers *who complained* regarding its product." (*Pioneer, supra*, 40 Cal.4th at p. 374 [emphasis added].) Here, however, because Williams seeks discovery regarding all Marshalls' non-exempt employees in California and, moreover, has proffered no evidence they suffered a violation, there is no unfair advantage to either litigant by keeping employee information private.

Third, *Pioneer* reasoned, "[i]t makes little sense to make it more difficult for plaintiff to contact them [*i.e.* the complaining consumers] by

insisting they first affirmatively contact Pioneer as a condition to releasing the same contact information *they already divulged long ago*." (*Pioneer*, *supra*, 40 Cal.4th at p. 374 [brackets added, emphases altered]." But here, Marshalls' employees were required to disclose their information under California law, and did not do so voluntarily as the complaining consumers did in *Pioneer*.

Fourth, *Pioneer* reasoned that Code of Civil Procedure section 1985.3 permits discovery of a consumer's records held by entities such as banks, lending institutions and utilities if the consumer is given prior notice and an opportunity to object or seek a protective order, but the court of appeal's requirement of an opt-in notice could "override this and similar statutory provisions and restrict law enforcement efforts in investigating and prosecuting consumer and investor fraud, elder financial abuse schemes, food and drug hazards, and breaches of consumer product warranty, health, and safety standards, until written consents appear from affected persons whose identifying information is sought." (*Pioneer*, *supra*, 40 Cal.4th at p. 374.) Here, because neither party is requesting an opt-in notice, this reasoning has no application.

Finally, *Pioneer* reasoned that use of an opt-in notice, "by preventing or substantially delaying identification of witnesses and potential class members, could make it more difficult to obtain class certification, thereby reducing the effectiveness of class actions as a means

to provide relief in consumer protection cases." (*Pioneer, supra*, 40 Cal.4th at p. 374.) Here, again, because neither party requests use of an opt-in notice, this reasoning is inapplicable. Nor does the Trial Court's order prevent identification of potential class members; rather, the order simply limits the scope of discovery at this time to the store where Williams worked. Nor in any fair sense does the Trial Court's order "delay" identification of "potential class members," and certainly not in the manner *Pioneer* used those terms. In *Pioneer*, the complaining consumers were "potential class members" in a meaningful sense because they identified themselves as being harmed by the defendant's product. Here, in contrast, Williams seeks information about Marshalls' employees statewide solely because he has filed a lawsuit; and Williams has proffered no evidence that they have been harmed.

For all the above reasons, the lower courts reached the appropriate balance between Marshalls' employees' right to privacy in their information and Williams' desire for that information.

D. Numerous federal district courts have struck the same balance as the Trial Court.

Numerous federal district courts in California have held where, as here, a putative representative plaintiff proffers no evidence of a statewide violation, yet seeks statewide discovery of employees' names and contact information, the appropriate balance between the employees' right to

privacy and the plaintiff's desire for their information is to limit the scope of disclosure to the location where the plaintiff worked.[2] For example, in *Nguyen v. Baxter Healthcare Corp.* (C.D. Cal. 2011) 275 F.R.D. 503, 504, the plaintiff brought a putative class action alleging failure to provide compliant meal periods and pay stubs. The court held that the plaintiff stated a *prima facie* case for class relief, and accordingly was entitled to some class discovery. (*Id.* at p. 507.) However, based in part on the "privacy interests of putative class members" identified in *Pioneer*, *Nguyen* held the plaintiff failed to justify discovery beyond the Irvine facility where she worked. (*Id.* at pp. 506-08.) The court noted that the plaintiff admitted she "never worked at any other Baxter facility than the facility located in Irvine; she has no knowledge of the operations other than the Irvine location; she does not know how work is scheduled at other locations; she does not know the meal period practices at other locations; and, she does not know the shift differential or pay rate or pay issues involving any of the other Baxter locations"; and "she knows nothing at all about any of the other Baxter locations." (*Id.* at pp. 507-08.) The court rejected as "pure speculation" the plaintiff's contention that "if supervisors at the Irvine facility did not follow company guidelines regarding meal breaks and wage

[2] California courts may look for guidance to the federal rules of civil procedure and to the federal cases interpreting them. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 239-40.)

statements, then it is reasonable to assume that supervisors at other facilities must also have violated these same guidelines." (*Id.* at p. 508.)

Further, the court reasoned that "[b]ecause Plaintiff has failed to produce any evidence of company-wide violations, and Defendant admittedly has produced contrary evidence showing company-wide policies consistent with California law, there is no basis at this time to require discovery beyond the Irvine facility where Plaintiff worked." (*Id.* at 508.) The court noted, however, that "[i]f Plaintiff discovers evidence of violations at other facilities or company-wide violations in the future, she may seek to expand the scope of discovery at that time." (*Id.*)

Other California federal district courts have made essentially identical holdings, limiting discovery of putative class member information to solely the facility or store where the named plaintiff worked to protect employees' privacy where the plaintiff proffered no evidence of a class-wide violation. (*See, e.g., Coleman v. Jenny Craig, Inc.* (S.D. Cal. June 12, 2103) 2013 U.S. Dist. LEXIS 82815, *35 ["Plaintiff's testimony that the alleged improper practices occurred at every center throughout the country is admittedly an assumption that the Court finds insufficient to justify expanding discovery beyond Plaintiff's market"]; *Franco v. Bank of America* (S.D. Cal. Dec. 1, 2009) 2009 U.S. Dist. LEXIS 111873, *10-*11 ["Plaintiff has not provided sufficient facts to support his claim of a company-wide policy and practice by Defendant to withhold regular and

overtime wages from its employees, especially in light of Defendant's evidence of contrary company-wide policies. While the allegations in Plaintiff's declaration support his request for the contact information of the approximately 100 current and former employees in the branch offices where Plaintiff worked, it does not support his request for the contact information of the approximately 27,000 such employees located throughout California"]; *Martinet v. Spherion Atlantic Enterprises, LLC* (S.D. Cal. June 20, 2008) 2008 U.S. Dist. LEXIS 48113, *6-*7; *Delodder v. Aerotek, Inc.* (C.D. Cal. Dec. 18, 2009) 2009 U.S. Dist. LEXIS 132250, *7-*9.)

E. The intermediate court cases Williams cites do not support him since three addressed opt-in vs. opt-out notices and the fourth addressed whether class certification was required to compel class contact information, and Williams ignores a case that upheld the privacy rights of employees.

Williams cites four court of appeal cases decided after *Pioneer* that applied *Hill* to discovery disputes. (*Williams Opening Brief at pp. 61-67* [citing *Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242; *Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App.4th 554; *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325; and *Crab Addison, Inc. v. Superior Court* (2008) 169 Cal.App.4th 958].) However, none of these

four cases addressed the issues presented in this case. In *Puerto, supra*, 158 Cal.App.4th at pp. 1252-60, the court held the trial court abused its discretion in using an opt-in notice for the production of addresses and telephone numbers for percipient witnesses whose names the defendant already disclosed. In *Belaire-West, supra*, 149 Cal.App.4th at pp. 558-62, the court held the trial court acted within its discretion in using an opt-out notice rather than an opt-in notice for the production of names, addresses and telephone numbers of current and former employees. In *Lee, supra*, 166 Cal.App.4th at pp. 1331, 1336-38, the court held the trial court abused its discretion in denying a motion to compel the names and contact information of employees on the ground it was "premature" until a class had been certified. And in *Crab Addison, supra,* 169 Cal.App.4th at pp. 970-75, the court held an employer's use of release forms did not require the trial court to use an opt-in notice for the production of employees' names and contact information. Accordingly, none of these cases' holdings or reasoning apply here or contradict the Trial Court's holding. (*Styne v. Stevens* (2001) 26 Cal.4th 42, 57 ["An opinion is not authority for a point not raised, considered, or resolved therein"].)

Moreover, Williams fails to acknowledge an intermediate court opinion decided after *Pioneer* that applied *Hill* to reverse on privacy grounds a trial court's order compelling production of employee names and addresses: *Life Technologies, supra*, 197 Cal.App.4th at pp. 653-54. In *Life*

Technologies, the plaintiff sued for wrongful termination because of his age and retaliation. (197 Cal.App.4th at p. 644.) The trial court granted plaintiff's motion to compel the employer to provide certain employees' names, addresses and telephone numbers, evidently to facilitate the plaintiff's showing of disparate impact. (*Id.* at pp. 648-49.) The court of appeal reversed. The court of appeal reasoned, "[c]ourts have frequently recognized that individuals have a substantial interest in the privacy of their home." (*Id.* at p. 653.) The court noted that "nothing in the record suggests all of the employees/former employees as to whom contact information is sought were witnesses to the discriminatory and retaliatory acts he allegedly suffered." (*Id.*) "Nor are these employees/former employees potential class members *who previously self-identified.*" (*Id.* at p. 654 [emphasis added] [citing *Pioneer, supra*].) In particular, the court reasoned that, unlike the complaining consumers in *Pioneer* who sent their information to the vendor, "[t]he third party employees/former employees whose personnel information is sought by [plaintiff] have not placed themselves in a comparable situation." (*Id.*)[3]

Accordingly, no intermediate court opinion supports Williams' contention on appeal.

[3] The court also stated that other recent class action cases "do not support the sweeping disclosure of individual-specific confidential information sought here." (*Life Technologies, supra*, 197 Cal.App.4th at p. 654 [citing *Crab Addison, supra*, and *Lee, supra*].)

V. Conclusion

This Court should affirm the Trial Court's order on the ground employees' right to privacy satisfies the three-part framework of *Hill*, and the Trial Court struck the appropriate balance between their privacy and Williams' interest in discovery in light of Williams' failure to proffer any evidence of a statewide violation.

Dated: May 6, 2016

Respectfully submitted,

JACKSON LEWIS P.C.

By:

Lisa Barnett Sween
Natalja M. Fulton
Dylan B. Carp
Douglas G.A. Johnston

Counsel for *Amicus Curiae*,
PROMETHEUS REAL ESTATE GROUP, INC.

CERTIFICATE OF WORD COUNT

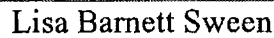
(California Rule of Court, Rule 8.204(c))

The text of this brief, including the footnotes but excluding the cover page, tables, this certificate, and the attached proof of service, consists of 5,530 words as counted by the word processing program, Word 2010, used to generate this brief.

Dated: May 6, 2016

Respectfully submitted,

JACKSON LEWIS P.C.

By: 

Lisa Barnett Sween
Natalja M. Fulton
Dylan B. Carp
Douglas G.A. Johnston

Counsel for *Amicus Curiae*,
PROMETHEUS REAL ESTATE GROUP, INC.

CASE NO. S227228

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MICHAEL WILLIAMS, an individual,
Petitioner,

v.

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

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

PROOF OF SERVICE OF *AMICUS CURIAE* PROMETHEUS REAL ESTATE GROUP, INC. IN SUPPORT OF REAL PARTY IN INTEREST MARSHALLS OF CA, LLC

Lisa Barnett Sween (SBN 191155)
Natalja M. Fulton (SBN 254858)
Dylan B. Carp (SBA 196846)
Douglas G.A. Johnston (SBN 268880)
JACKSON LEWIS P.C.
50 California Street, 9th Floor
San Francisco, CA 94111
Telephone: (415) 394-9400/ Facsimile: (415) 394-9401
Email: carpd@jacksonlewis.com

Counsel for *Amicus Curiae*
PROMETHEUS REAL ESTATE GROUP, INC.

I am employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 50 California Street, 9th Floor, San Francisco, California 94111. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On May 6, 2016, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

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BRIEF OF AMICUS CURIAE PROMETHEUS REAL ESTATE GROUP, INC. IN SUPPORT OF REAL PARTY IN INTEREST MARSHALLS OF CA, LLC

in a sealed envelope, postage fully paid, addressed as follows:

Jennifer Grock, Esq. Brian Van Vleck, Esq. VAN FLECK TURNER & WALLER LLP 6310 San Vicente Blvd., Suite 430 Los Angeles, CA 90048	Attorneys for Plaintiff Albert Ebo
Glenn A. Danas, Esq. Robert Drexler, Esq. Liana Carter, Esq. Stan Karas, Esq. Ryan Wu, Esq. CAPSTONE LAW APC 1840 Century Park East, Suite 450 Los Angeles, CA 90067	Attorneys for Plaintiff and Appellant Michael Williams

ROBERT G. HULTENG
LITTLER MENDELSON, P.C.
650 Calfiornia Street, 20th Floor
San Francisco, CA 94108-2693

Attorneys for Real Party in Interest
MARSHALLS OF CA, LLC

Amy Todd-Gher
Kyle W. Nageotte
LITTLER MENDELSON, P.C.
501 West Broadway, Suite 900
San Diego, CA 92101

Attorneys for Real Party in Interest
MARSHALLS OF CA, LLC

Clerk
Court of Appeal
Second Appellate District
Division Seven
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Court of Appeal
Case No. B259967

Clerk
Los Angeles County Superior Court
111 North Hill Street
Los Angeles, CA 90012

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

Hon. William F. Highberger
Los Angeles County Superior Court
Central Civil West Courthouse
600 South Commonwealth Avenue
Los Angeles, CA 90005

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

Attorney General
Appellate Coordinator
Office of the Attorney General
Consumer Law Section
300 S. Spring Street
Los Angeles, CA 90013-1230

District Attorney's Office
County of Los Angeles
320 West Temple Street, #540

Los Angeles, CA 90012

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on May 6, 2016, at San Francisco, California.

Donna Karbach