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

REAL PARTY IN INTEREST MARSHALLS OF CA, LLC'S ANSWER BRIEF ON THE MERITS

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Real Party in Interest, Marshalls of CA, LLC ("Marshalls"), hereby submits its Answer Brief on the Merits, and respectfully requests that this Court affirm the decision of the Court of Appeal.

I. ISSUES PRESENTED

(1) Is the plaintiff in a representative action under the Private Attorneys General Act of 2004 (Lab. Code, § 2698, *et seq.*) ("PAGA") entitled to discovery of names and contact information of other "aggrieved employees" on a statewide basis, based solely on allegations in the complaint, or must the plaintiff first make a reasonable showing that alleged Labor Code violations may have occurred on a statewide basis?[1]

(2) In ruling on such a request for employee contact information, should the trial court first determine whether the employees have a protectable privacy interest and, if so, balance that privacy interest against competing or countervailing interests, or is a protectable privacy interest assumed? (*See Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1; *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360.)

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[1] Marshalls understands that the statement of issues provided on this Court's website does not necessarily reflect the view of the Court, or define the specific issues that will be addressed. To that end, Marshalls has modified Issue No. 1 to more accurately capture the underlying ruling of the trial court.

II. STANDARD OF REVIEW

Management of discovery lies within the sound discretion of the trial court. A discovery order is therefore reviewed under the abuse of discretion standard. (*Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1161.) The trial court's discretion will only be disturbed when its order "exceeds the bounds of reason, all of the circumstances before it being considered." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566; *see also Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773 ("A ruling that constitutes an abuse of discretion has been described as one that is so irrational or arbitrary that no reasonable person could agree with it.") This heightened standard of review applies because, "[a] trial judge's perceptions on [discovery] matters, inherently factual in nature at least in part, must not be lightly disturbed." (*Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 431.)

The Court of Appeal here determined that the trial court did not abuse its significant discretion by partially granting and partially denying Appellant Michael Williams' ("Appellant") request for discovery of contact names, personnel information, and home addresses of over 16,000 non-party employees of Marshalls who are strangers to this litigation. The orders of the Court of Appeal and trial court should not be disturbed by this Court.

III. INTRODUCTION

By enacting the PAGA in 2004, the Legislature empowered individual employees to seek penalties for violations of the California Labor Code in the state courts. An employee who experiences a Labor Code violation, and who observes that his co-workers are also impacted by that same violation, may use the PAGA to access the judicial system. If the employee can prove the existence of an unlawful practice or policy, penalties are assessed and attorneys' fees can be rewarded.

Thus, the PAGA creates a new mechanism for enforcing rights under the Labor Code. What it does not do is vest individual employees, and their attorneys, with power to bypass normal discovery procedures. A PAGA action, like all other civil employment actions, must be managed by the trial court. It is well within the court's discretion to control discovery with due respect to the rights of all parties.

In this case, a single employee, Appellant Michael Williams, asserts statewide violations of the Labor Code by Marshalls. Based on his unverified complaint alone, he demanded the names, private contact information, home addresses and personnel information for approximately 16,000 current and former Marshalls' employees in California. The trial court exercised its discretion to allow discovery of his requested information for employees of the store where Appellant worked. At the same time, the court requested Appellant to provide further evidence

(including to appear for deposition) of an unlawful practice or policy if he wished to obtain a statewide list. The Court of Appeal affirmed the trial court's order as a proper exercise of discretion.

The PAGA does not create a license for individual employees and their attorneys to engage in fishing expeditions. The decisions of the trial court and Court of Appeal stand for the unremarkable position that plaintiffs must provide some minimum factual support for their claims before engaging in expansive discovery. Particular deference should be given to the trial court's control of discovery here, as this case remains in its infancy, with no depositions and little to no discovery taken.

The discovery request on which the trial court ruled did not even seek the identities of "percipient witnesses" or "aggrieved employees." Appellant instead served a shotgun interrogatory requesting disclosure of the employment history and contact information of all persons employed by Marshalls since March 22, 2012: "Set forth the first, middle and last name, employee identification number, each position held, the dates each position was held, the dates of employment, 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." Effectively, Appellant asked the trial court to assume that every one of the over 16,000 non-party, non-exempt Marshalls employees throughout the state of California over a four-year

time period was presumptively "aggrieved." Yet Appellant made no showing – not even a shred of evidence – that a single one of those employees had been aggrieved. The trial court correctly refused to accept this proposition. Instead, the trial court noted that Appellant and his counsel have a duty to at least preliminarily investigate their claims of wage and hour violations, before asserting a right to statewide discovery.

Appellant claims that PAGA plaintiffs are "entitled" to all of the discovery of a class action plaintiff. However, it is Appellant who decided to sidestep class action procedures and protections by bringing his PAGA-only action. Appellant seeks to turn the PAGA into a mechanism by which plaintiffs' attorneys will be incentivized to secure the broad benefits of class action discovery without being subject to any of the significant due process protections which class action procedure entails. It is one thing to require a non-party employee to turn over private information to an attorney who has fiduciary duties to the class and who may later become the employee's attorney, as happens in the class context. It is quite another to require a non-party employee to submit that same private information to a complete legal stranger.

Further, Appellant's sweeping claim -- that the public policies of the PAGA are obstructed by the trial court's exercise of discretion -- is unfounded. The Legislature never intended for PAGA plaintiffs to exceed the boundaries of the California Code of Civil Procedure. To the contrary,

the Legislature specifically acknowledged its concern that the PAGA may be abused, and, as a result, limited the use of this new statutory vehicle to persons who actually suffered from an alleged wrongful act.

Similarly, Appellant errs in his efforts to dismiss the significance of privacy rights. The Court of Appeal properly balanced the various privacy interests here, and reached the correct result. As a threshold matter, Marshalls cannot waive the privacy rights of its employees. Moreover, Marshalls' non-party employees' privacy interests in their private information clearly outweigh Appellant's tenuous interest in obtaining personal information at the outset of a lawsuit, before any discovery has been taken.

Finally, Appellant's overbroad interpretation of the PAGA would lead to an unconstitutional usurpation of the Judiciary's power, guaranteed by the California Constitution, for the court system to operate as a separate, and equal, branch of government. If Appellant is correct, and the trial court cannot limit, phase, or control discovery in PAGA actions, then the Legislature has overstepped its constitutional authority in enacting the PAGA.

IV. FACTUAL BACKGROUND

Marshalls is a nationwide retailer. Marshalls operated approximately 129 retail locations across California, and employed approximately 16,000 non-exempt Californians during the relevant time

period. (PA099 at 1:6.)[2] Marshalls employed Appellant at one retail store located in Costa Mesa, California, from approximately 2012 to 2013. (Appellant's Opening Brief ("App. Op. Br.") at 4.)

A. Appellant Filed A PAGA-Only Complaint.

On March 22, 2013, Appellant filed an unverified complaint raising one cause of action based on the PAGA, Labor Code section 2698, *et seq.* Specifically, the complaint alleges that Marshalls failed to provide meal or rest breaks and to properly reimburse business expenses, pursuant to Labor Code sections 226.7, 512, 2800, and 2802. (PA006-19.) The complaint further alleges derivative claims for failure to provide accurate wage statements and failure to pay wages under Labor Code sections 204 and 226(a). (PA015-18.)

B. Appellant Refused To Sit For His Deposition For Over Two Years.

The parties have exchanged minimal discovery, and not a single deposition has been taken in this case. In December 2014, Marshalls contacted Appellant to schedule his deposition. (PA203-05.) The deposition was scheduled to occur in January 2015, but Appellant requested a postponement. (*Id.*) Appellant was thereafter medically unavailable to sit

[2] Petitioner's Appendix for the Petition for Writ of Mandate will be referenced throughout pursuant to the Bates numbers provided by Appellant, and, where appropriate, paragraph or line numbers. Citation abbreviations for the hearing transcript contained in Petitioner's Exhibit 19 for the Petition for Writ of Mandate will be: [Bates number:line number(s).]

for his deposition for several months. (PA217-19.) Indeed, to date, Appellant has not appeared for his deposition. As a result, the record contains nothing from Appellant – no declaration, no exhibits, and no testimony.

C. Appellant Served A Special Interrogatory Seeking Private Contact, Personnel, And Home Address Information For Over 16,000 Non-Party Employees Of Marshalls.

While Appellant has refused to sit for his deposition, or provide any evidence supporting the unverified claims contained in his complaint, he nonetheless served his own discovery requests, including one special interrogatory requesting, "first, middle, and last name, employee identification number, each position held, the dates each position was held, the date of employment, 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." (PA053-54.) The request sought not only names and private contact and home address information, but also other specific employee personnel information, including employee identification numbers, positions held, dates positions were held, and dates of employment. (*Id.*) Responses to these interrogatories would necessarily contain information concerning employees' potential promotions, demotions, and separation from employment, all of which would reveal confidential personnel information. (*Id.*) Appellant's request encompasses

more than 16,000 non-exempt employees of Marshalls at 129 stores across California. (PA054.) Marshalls objected to this request on various grounds, including that the request was beyond the scope of permissible discovery and overbroad. (PA059.) Marshalls further objected that the request violated the legitimate privacy interest of its employees, who are non-parties to this action. (PA059-60.) Finally, Marshalls asserted that Appellant did not have a right to the information until he established that he had some basis to believe that employees, including Appellant himself, are "aggrieved" within the meaning of the PAGA. (PA059-60.)

V. PROCEDURAL HISTORY

A. The Trial Court Granted Appellant's Motion To Compel In Part.

Appellant filed a Motion to Compel Further Responses to Special Interrogatories, Set One, seeking Marshalls' production of all of the private contact, personnel, and home address information sought. (PA027-44.) On September 9, 2014, the trial court granted Appellant's Motion to Compel in part. (PA229-30.) The trial court recognized that the "discovery sought is massive," and ordered the production of the private contact, personnel, and home address information for the employees at the Costa Mesa store where Appellant worked, subject to a *Belaire-West* opt-out notice process. (*Id.*) Given the volume of discovery sought, the trial court stated that "it needs to exercise its prudent discretion to regulate and phase the discovery to a certain degree to manage and limit the costs of discovery." (*Id.*) The trial

court instructed that the statewide information may be ordered at a later date, subject to Appellant making at least a minimal evidentiary showing. (*Id.*)

The trial court ordered that, prior to renewing the motion to compel, Appellant first must appear for six hours of deposition. (*Id.*) The trial court made clear that it intended Appellant's burden to be a "low bar," requiring that Appellant show "more than nothing" with respect to his knowledge of alleged Labor Code violations at Costa Mesa or any other store. (PA262:8-26.) The trial court further clarified that it had California Code of Civil Procedure section 128.7 in mind in making its ruling.[3] (PA263:5-19.) The court explicitly stated that the order was, "without prejudice to the plaintiff coming back for more." (PA257:3-4.)

B. The Court Of Appeal Affirmed The Trial Court's Ruling.

The Court of Appeal found the trial court had not abused its discretion. According to the Court of Appeal, "[a]t this nascent stage of plaintiff's PAGA action there has as yet been no discovery—plaintiff has not even sat for his deposition...[n]owhere does he evince any knowledge of the practices of Marshalls at other stores, nor any fact that would lead a

[3] Section 128.7 requires that an attorney has the responsibility, when filing any court pleading, including a complaint, to validate that "... 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." (Code Civ. Proc., § 128.7(b)(3)).

reasonable person to believe he knows whether Marshalls has a uniform statewide policy. That being the case, it was eminently reasonable for the trial judge to proceed with discovery in an incremental fashion..." (*Williams v. Superior Court* (2015) 236 Cal.App.4th 1151, 1156.)

In upholding the trial court's order, and addressing the privacy concerns associated with producing the private contact, personnel, and home address information for approximately 16,000 employees, the Court of Appeal stated, "[plaintiff's] need for the discovery at this time is practically nonexistent. His first task will be to establish he was himself subjected to violations of the Labor Code." (*Id.*, at 1159.) The Court of Appeal upheld the trial court's order on the additional basis that the privacy balancing test warranted protecting the private information of non-parties. (*Id.*, at 1158-59.)

VI. LEGAL ARGUMENT

A. The Court Of Appeal Correctly Affirmed The Trial Court's Discretion To Limit And Phase Discovery.

1. Trial Courts Are Empowered With Broad Authority To Manage Discovery.

It is well settled that trial courts have broad discretion to manage discovery matters. (*See* Code Civ. Proc., § 128(a)(3); Code Civ. Proc., § 128(a)(5) (courts control conduct of any "any persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto"); *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1186 (trial

court is vested with wide discretion to grant or deny discovery that may only be disturbed upon an abuse of discretion).) California trial courts also have inherent powers, independent of statute, to control the conduct in their courtrooms, derived from two distinct sources: the courts' "equitable power derived from the historic power of equity courts" and "supervisory or administrative powers which all courts possess to enable them to carry out their duties." (*Bauguess v. Paine* (1978) 22 Cal.3d 626, 635.)

2. Trial Courts Do Not Abuse Their Substantial Discretion By Phasing PAGA Litigation To First Limit Discovery To A Plaintiff's Store Location.

Appellant asserts that he sought production of the private contact, personnel, and home address information of all of Marshalls' non-exempt employees statewide "so that he could investigate and obtain evidence to substantiate his claims." (App. Op. Br. at p. 6.) This is essentially an admission that Appellant sought to conduct a fishing expedition in search of wage and hour violations. Appellant's candor squarely presents this question: should a PAGA plaintiff be given unbridled, statewide access to the private information of over 16,000 non-party employees simply because he or she has filed a lawsuit? Or, to state the converse, should a trial court have discretion to limit and phase PAGA discovery to require some reasonable showing of potential statewide violations before permitting statewide discovery?

a. The Trial Court Was Empowered With The Discretion To Limit Overbroad Requests.

As the trial court determined, Appellant's special interrogatory seeking private information for all non-exempt employees of Marshalls throughout California was overbroad. California courts have consistently found similar interrogatories to be unenforceable. In *Obregon v. Superior Court*, *supra*, the Court of Appeal reviewed a trial court's denial of a motion to compel responses to special interrogatories, and concluded as follow:

> Here the trial judge had been presiding over discovery and other aspects of this case for some time. She had the opportunity to learn the issues in the case, to observe the practices of the attorneys, and to form judgments on the attorneys' credibility and motivations. When assessing credibility and motivation, past experience is often a prime indicator.

(*Id.* at 430-431.)

The Court also noted that, "[a]ny discovery request, even an initial one, can be misused in an attempt to generate settlement leverage by creating burden, expense, embarrassment, distraction, etc. It is a judge's responsibility to control such abuse." (*Id.* at 431) Further, when a party serves "grossly overbroad" discovery requests that do not appear "reasonably related to a legitimate discovery need," a court may draw a reasonable inference that the propounding party may be seeking to gain undue advantage. (*Id.*) Ultimately, the Court of Appeal cautioned that, "[a]

trial judge's perceptions on such matters, inherently factual in nature at least in part, must not be lightly disturbed." (*Id.*)

In *Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, the Court of Appeal considered whether the trial court abused its discretion in denying outright a motion to compel a further response to a plaintiff's interrogatories requesting that the former employer: "1. State the names and addresses of each woman employee of General Telephone Company, Hermosa Beach facility in May 1970. 2. State which of these people are still employed by General Telephone Company and where they are employed." (*Id.* at 850.) After attempting to seek the parties' agreement to modified language, the trial court denied the motion to compel. (*Id.*) The Court of Appeal affirmed the trial court's order on the basis that the interrogatories were entirely objectionable, as they sought information that was not relevant or likely to lead to the discovery of admissible evidence. (*Id.* at 851.)

Similarly, in *Ryan v. Superior Court of Los Angeles County* (1960) 186 Cal.App.2d 813, the Court of Appeal reviewed a trial court's ruling which sustained an employer's objections to an interrogatory seeking "the names and addresses of all persons who have been employed by plaintiff in the publication of all issues of plaintiff's publication." (*Id.* at 818.) The Court found that the Code of Civil Procedure "does not, in our opinion, permit any such shotgun interrogatory as that here propounded." (*Id.*)

"There must be at least some showing that the persons whose names and addresses are sought are potential witnesses as to some relevant fact." (*Id.*) Absent any such showing, the Court affirmed the trial court's ruling. (*Id.*)

Trial courts have the same substantial discretion to review discovery and make appropriate, measured rulings to control discovery in individual actions, class actions and PAGA-only actions. Here, like the interrogatories in *Obregon, Deaile,* and *Ryan,* Appellant's overbroad interrogatory seeks information that – at least at this nascent stage of the litigation – is not relevant to the subject matter of his complaint, as he demands, "first, middle, and last name, employee identification number, each position held, the dates each position was held, the date of employment, 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." (PA053-54.) The interrogatory is entirely untethered to Appellant's position, the store locations of any of the requested non-party employees, or whether any of these individuals bore witness to any of the alleged facts underlying Appellant's complaint.

For the same reasons, Appellant's reliance on California Code of Civil Procedure section 2017.010, permitting discovery of "the identity and location of persons having knowledge of any discoverable matter," is unavailing. (App. Op. Br. at p. 10-11.) Appellant's interrogatory did not

identify anyone having knowledge of a Labor Code violation. Instead, Appellant asked for a blanket list of private information for over 16,000 non-exempt employees statewide, with no indication that any of these employees could have any knowledge relating to any unlawful wage and hour practices.

For those reasons, the trial court acted within its discretion to control and phase discovery. Contrary to Appellant's assertions, neither the Court of Appeal nor the trial court denied Appellant's discovery entirely. A portion of Appellant's motion (related to the Costa Mesa store) was granted. (PA229-30.) In doing so, the trial court evaluated the legal and factual discovery issues over the course of two hearings, and following review of five briefs and supplemental briefs. (PA027-70, 094-112, 119-40, 141-44, 145-55, 163-74.) The trial court's prudent, phased approach to discovery, as affirmed by the Court of Appeal, should be upheld.

b. The Trial Court's Ruling Should Be Affirmed Because Appellant Cannot Demonstrate Prejudice.

Trial court decisions concerning discovery are made on the front lines. They are reviewed on the deferential abuse of discretion standard, recognizing the trial court's direct involvement in the discovery dispute. The burden rests with Appellant to demonstrate that the ruling below "resulted in some prejudice to [him]." (*L.A. v. Superior Court* (1961) 196 Cal.App.2d 743, 748.) "'Abuse of discretion' in allowing or denying

discovery is synonymous with 'resulting prejudice.'" (*Id.*) Absent proof of resulting prejudice, abuse of discretion cannot be shown. (*Id.*; *see also* Cal. Civ. Proc. Code § 475 ("No... decision... shall be reversed... unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and... by reason of such error, ruling, instruction, or defect, the said party... appealing sustained and suffered substantial injury...").

If Appellant believes he has been harmed by the trial court's ruling, the fault lies with him. Appellant has not substantiated his claims with any facts whatsoever. Marshalls has attempted to ascertain the basis for his claims, only to be met with Appellant's failure, for over a year now, to appear at his repeatedly-noticed deposition. If Appellant truly felt that he could support the assertions in his complaint, he could have noticed the deposition of Marshalls' "person most knowledgeable" on any number of topics, including Marshalls' meal period and rest break policies. (*See, e.g.*, Code Civ. Proc., § 2025.230.) The trial court invited him to cross a "low bar" and provide testimony—"more than nothing"—to support his alleged personal, storewide and/or statewide claims. (PA262 at 31:25-26.) Rather than attempting to make this minimal showing, Appellant chose instead to pursue multiple appeals of his case. Appellant offers no explanation as to why he has not made the minimal showing requested by the trial court. Because Appellant cannot establish prejudice, he cannot show abuse of discretion.

3. The Court Of Appeal Correctly Affirmed The Trial Court's Order On The Grounds That "Good Cause" Existed.

Appellant argues that the Court of Appeal erred by imposing a "good cause" standard on special interrogatories. Appellant notes correctly that California Code of Civil Procedure section 2030.300 does not include a "good cause" standard. (App. Op. Br. at 20.) However, the California Code of Civil Procedure also specifically empowers trial courts, on motion and for "good cause" shown, to "establish the sequence and timing of discovery for the convenience of parties and witnesses and in the interests of justice." (Code Civ. Proc., § 2019.020.) Of course, as noted by the Court of Appeal, that is precisely what the trial court did here.

Further, the trial court's order does not even mention "good cause." Instead the trial court, balancing the parties' interests, required simply that Appellant show "more than nothing" to substantiate a statewide discovery request. (PA262 at 31:25-26.) The Court of Appeal recognized the trial court's inherent discretion and the fact that civil discovery may be broad, but it is "not limitless." (*Williams*, 236 Cal.App.4th at 1156 (*citing Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 223).) The Court of Appeal found, in part, "[w]e read the [trial] court's order as paraphrasing the common requirement that discovery not be ordered absent

a showing of good cause."[4] (*Williams* at 1158.) As this Court has previously held, "[i]t has long been recognized that '[t]he term 'good cause' is not susceptible of precise definition. In fact, its definition varies with the context in which it is used.'" (*In re Lucas* (2012) 53 Cal.4th 839, 849 (citations omitted).)

Thus, the Court of Appeal is entirely consistent with the same broad understanding of "good cause" reflected in *Columbia Broadcasting System, Inc. v. Superior Court of Los Angeles County* (1968) 263 Cal.App.2d 12. In *Columbia Broadcasting,* the Court of Appeal reviewed interrogatories which bore little relevance to the claims set forth in the complaint. While acknowledging that the Code of Civil Procedure "does not require any showing of good cause for the serving and filing of interrogatories," the Court held:

> However, in deciding a motion under section 2030 the trial court must, of necessity, consider not only the stated objections to the interrogatories, but also the interrogatories themselves, as well as the pleadings, and the contentions of the interrogating party as to the purpose and validity of the interrogatories.

[4] Admittedly, the precise wording used by the Court of Appeal is not supported by California Code of Civil Procedure section 2030.210 *et seq.*, as the statute does not use the words "good cause". However, given the Court of Appeal's deference to the trial court's order (which does not refer to "good cause"), and the many other grounds upon which the Court of Appeal affirmed the trial judge, it is clear that the Court of Appeal would have reached the same result regardless.

(*Columbia Broad. System, Inc. v. Super. Ct.*, 263 Cal.App.2d at 18-19, (citing *Coy v. Superior Court, supra*, at p. 220).)

The *Columbia* court further held that, "[i]f the interrogatories stray too far and seek information which cannot reasonably serve the acknowledged purposes of pretrial discovery, the motion should be denied." In reaching this decision, the court cited to the U.S. Supreme Court's holding in *Hickman v. Taylor*, stating that, "discovery, like all matters of procedure, has ultimate and necessary boundaries." (*Id.* at 19 (*citing Hickman v. Taylor* (1947) 329 U.S. 495, 507.) The appellate court denied discovery for certain interrogatories that sought information not relevant to the subject matter of the action. (*Id.* at 26.)

Reviewing the record, hearing the parties at oral argument, balancing the parties' interests and using its discretion to reach a reasoned decision is precisely what the trial court did here, as demonstrated in its order: "[b]ecause the discovery sought is massive – the names of all current and former non-exempt employees who worked at 129 stores spread throughout California subject to a *Belaire-West* – the Court does believe it needs to exercise its prudent discretion to regulate and phase the discovery to a certain degree to manage and limit costs of discovery." (PA229-30.) Whether one calls that good cause or just common sense, the trial court articulated sufficient grounds on which to exercise its discretion.

4. The Court Of Appeal Correctly Affirmed The Trial Court's Order On The Alternative Ground That Employee Privacy Interests Outweigh Appellant's Need For Disclosure At This Preliminary Stage.

The Court of Appeal also correctly gave due weight to the privacy rights of non-party employees of Marshalls, who are strangers to this litigation. The Court of Appeal recognized California's broad right to privacy, and balanced the non-party employees' right to privacy with Appellant's need for discovery at this stage of the case. (*Williams v. Superior Court*, 236 Cal. App. 4th at 1157-58.) The Court concluded:

> Marshalls' employee's privacy interests outweigh plaintiff's need to discover their identity at this time. Those interests begin with the employees' right to be free from unwanted attention and perhaps fear of retaliation from an employer. On the other hand, plaintiff's need for the discovery at this time is practically nonexistent.
>
> (*Id.*)

The Court of Appeal reached this conclusion, in part, on the basis that Appellant had taken no steps to show that he could demonstrate any PAGA violation, much less that he could represent any other Marshalls employees in this respect. (*Id.* at 1159 ("[Appellant's] first task will be to establish he was himself subjected to violations of the Labor Code.").

The Court of Appeal's reasoning is supported not only by the *Hill* analysis, set forth more fully below, but also by the long-standing principle that an employer cannot waive the privacy rights of its employees. (*See Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 525; *Life Technologies Corp. v. Superior Court* (2011) 197 Cal.App.4th 640, 652-53;

see also Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1.) The interests of 16,000 employees, to avoid intrusion into their privacy, both at home and in their workplace, should not yield to the "practically nonexistent" interest of one employee.

B. The Court Of Appeal Correctly Affirmed The Trial Court's Ruling That A PAGA Plaintiff Cannot Secure Statewide Discovery Based On Mere Allegations Alone.

1. The Language Of The PAGA Is Unambiguous.

Appellant argues that "the Court of Appeal's decision forces PAGA plaintiffs to litigate without any way of knowing the extent of the employer's Labor Code violations" (App. Op. Br. at p. 24.) The language of the PAGA requires a plaintiff to possess actual knowledge of the specific Labor Code provisions allegedly violated, and to have facts and theories supporting those assertions, prior to filing a lawsuit. By ignoring the statute's requirements, Appellant puts the cart before the horse.

"In construing any statute, '[w]ell-established rules of statutory construction require us to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law.' We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context." (*Whaley v.*

Sony Computer Entertainment America, Inc. (2004) 121 Cal.App.4th 479, 484-485 (internal citations omitted).)

The language of the PAGA is not ambiguous. By permitting a "civil action," only after a PAGA plaintiff first sends a letter to the Labor and Workforce Development Agency ("LWDA") and provides the employer with "facts and theories" supporting his underlying claims, the statute explicitly requires a good faith investigation by the plaintiff and his counsel. This is a necessary condition precedent to the filing of a civil action under the PAGA. And, by conferring on the trial court the power to limit penalties under the PAGA, the Legislature directed that trial courts maintain control over PAGA actions. If the Legislature had intended to allow PAGA plaintiffs to file complaints with no investigation, and to then use discovery to hunt for violations, it would have done so explicitly. The Legislature, "does not, one might say, hide elephants in mouseholes." (*Jones v. Lodge at Torrey Pines Partn.* (2008) 42 Cal. 4th 1158, 1171 (*citing Whitman v. Am. Trucking Ass'ns, Inc.* (2001) 531 U.S. 457, 468).)

2. The PAGA Requires A Plaintiff To File A Civil Action In Accordance With The California Code Of Civil Procedure.

The PAGA instructs a PAGA plaintiff to: (1) exhaust his administrative remedies, and (2) then file a civil action (and submit to the Code of Civil Procedure). (*See* Lab. Code, §§ 2699.3(a), 2699.3(a)(1), and 2699(a).) If the Legislature intended to allow a PAGA plaintiff to file a

lawsuit and then immediately obtain broad, statewide discovery with no reasonable foundation, the statute would have been made that explicit. (*Id.*)

Again ignoring these requirements, Appellant asserts that he is entitled to statewide discovery of private non-party employee information based solely on his complaint. By doing so, he suggests that PAGA plaintiffs are entitled to far broader discovery than permitted by the Code of Civil Procedure. A PAGA plaintiff is not, however, entitled to "super discovery" rights. As set forth above, the language of the statute states that a PAGA plaintiff, after exhausting his administrative remedy, may file a "civil action." In so doing, he is no different than any other litigant and must follow the rules of the Code of Civil Procedure. (*See* Lab. Code, § 2699.3(a)(2)(A) ("...the aggrieved employee may commence a civil action pursuant to Section 2699...").)

3. A PAGA Plaintiff Must Provide Specific Notice Of The Facts And Theories Underlying His Allegations Prior To Filing A Lawsuit.

Shortly after its passage, the Legislature amended the PAGA to require, prior to filing a lawsuit, that an "aggrieved employee ... shall give written notice by certified mail to the [LWDA] and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation." (Lab. Code, § 2699.3(a)(1).)

The Legislature added this condition precedent into the PAGA prior to any PAGA plaintiff filing a civil action. By requiring an allegedly aggrieved employee to send a letter to the LWDA and the employer with notice of the "specific provisions" of the Labor Code allegedly violated and the "facts and theories to support the alleged violation," the Legislature clearly intended to prevent abuse. (*See* Real Party In Interest Marshalls of CA, LLC's Request for Judicial Notice ("RJN"), filed concurrently herewith, Ex. B; Sen. Rules Comm., July 27, 2004, pp. SFA1-SFA8; Assembly Comm. on Labor and Employment, May 26, 2004, pp. 1-4.) PAGA penalties cannot be a part of every civil action, but only those actions where a Plaintiff can first identify for the LWDA, and the employer, the "specific provisions," and provide the "facts and theories" supporting the alleged violation, including "facts and theories" supporting the alleged violation against other aggrieved employees. (Lab. Code, § 2699.3(a)(1).)

Since its passage, several courts have rejected PAGA claims where plaintiffs failed to adequately identify other aggrieved individuals. For example, in *Chie v. Reed Elsevier, Inc.*, the court dismissed a PAGA claim for failure to identify aggrieved employees from a pool of roughly 300 employees. (N.D.Cal. Sep. 2, 2011, No. C-11-1784 (EMC), 2011 LEXIS 99153, at **11-12 (plaintiffs did not "provide any other description of the aggrieved employees" beyond what could be ascertained through payroll records).)

Likewise, in *Jeske v. Maxim Healthcare Services, Inc.* (E.D.Cal. Jan. 10, 2012) No. CV F 11-1838 LJO JLT, 2012 U.S. Dist. LEXIS 2963, at *37), the court sustained defendants' objections to a PAGA pleading because the plaintiff did not sufficiently define the "aggrieved employees," reasoning that the complaint failed "to identify how particular aggrieved employees were subject to particular violations." Therefore, the court refused "to sanction PAGA claims for imprecisely defined aggrieved employees." (*Id.*)

4. The PAGA Authorizes Trial Courts To Limit Penalties.

The Legislature further amended the PAGA to specifically empower trial courts to reduce PAGA penalty awards in such instances where "to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (Lab. Code, § 2699(e)(2); *see also* RJN Ex. B; Sen. Rules Comm., July 27, 2004, p. SFA6.) The Legislature's grant of significant oversight powers to the trial courts is confirmation that the trial courts maintain their customary right to manage discovery matters before them. Certainly, there is nothing in the language of PAGA that limits or reduces the trial courts' discretion to manage discovery.

5. The PAGA Is A Quasi-Penal Statute And Must Be Narrowly Construed.

Penalties are the enforcement mechanism for the PAGA. (*See* Lab. Code, § 2699(f) ("For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions[.]").) As a "procedural statute allowing an aggrieved employee to recover civil penalties" (*Amalgamated Transit Union, supra*, 46 Cal. 4th 993, 1033), the PAGA is, in essence, a quasi-penal statute that must be narrowly construed. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 405 (holding a Civil Code statute assessing a penalty of $100 to be a penal statute, subject to the narrowest construction to which it is reasonably susceptible in light of the legislative purpose); *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (1998) 18 Cal.4th 1209, 1215 (although the Labor Code's workers' compensation provisions are generally liberally construed to protect employees, application of its mandatory penalty provisions must be tempered to avoid "hard or unreasonable results").)

It necessarily follows that a PAGA plaintiff cannot run roughshod over traditional civil procedure rules in pursuit of a quasi-penal recovery. Here, it is undisputed that Appellant has offered no evidence that any Labor Code violations occurred at the store where he worked, or at any other store in California. In fact, in his unverified complaint, Appellant bases his

allegations almost entirely on "information and belief." (*See* Appellant's Complaint, ¶¶ 20, 21, 22, 23, 24, 25, PA009-10.) Individuals without personal knowledge of statutory violations cannot maintain a quasi-penal action based on speculation alone. That, however, is exactly what Appellant asks this Court to sanction. The Court of Appeal did not commit reversible error when it affirmed the trial court's order requiring Appellant to make some factual showing that he was entitled to statewide discovery.

C. The Court Of Appeal Correctly Held That PAGA Plaintiffs Do Not Possess The Full Investigative Powers Of The Labor Commissioner.

1. PAGA Plaintiffs Must Operate Within The Bounds Of The California Code Of Civil Procedure.

Appellant seeks to expansively define his role as a "proxy" of the Division of Labor Standards Enforcement. While it is true that the Labor Commissioner has broad investigatory powers and duties, they are not shared by aspiring PAGA plaintiffs. (*See* Lab. Code, §§ 1193.5, 1195, 1195.5.) Appellant relies on *Craib v. Bulmash* (1989) 49 Cal.3d 475, and *Millan v. Restaurant Enterprises Group, Inc.* (1993) 14 Cal.App.4th 477, to support his claim that PAGA plaintiffs should be permitted to investigate the scope of their employers' Labor Code violations, just as the Labor Commissioner would by way of investigatory subpoenas. (App. Op. Br. at 37-40.) However, both *Craib* and *Millan* address the scope of subpoenas issued by the Labor Commissioner in an agency investigation into potential violations of the Labor Code. Government Code section 11180 empowers

the Labor Commissioner to "make investigations and prosecute actions" concerning violations of the Labor Code. These two sets of powers—to investigate and to prosecute—were not conferred upon a private litigant by passage of the PAGA. (Lab. Code, § 2699.3(a)(2)(A); *see also Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 391 ("The qui tam litigant has only his or her resources and may incur significant cost if unsuccessful.").)

Further, as this Court has made clear, a PAGA plaintiff can only recover "civil penalties that otherwise would have been assessed and collected by the [LWDA]." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986; *see also* Lab. Code, § 2699, subds. (a),(f).) Thus, the PAGA solely invests a representative plaintiff with these rights: (1) to file and pursue a civil action in California Superior Court, pursuant to the California Code of Civil Procedure; and (2) to seek penalties (and penalties only) against a defendant employer. (*See* Lab. Code, § 2699(a).)

2. Even The State Labor Commissioner Cannot Secure Statewide Discovery Without Justification.

Appellant argues that he "stands in the shoes" of the Labor Commissioner. To the extent that this is true, Appellant must also accept the due process rights conferred on employers in Labor Commissioner cases. In an action brought by the Labor Commissioner, the agency must: (1) have facts that suggest a *prima facie* case can be prosecuted; (2) know

and name for the employer all claimants who provided sufficient facts to make a *prima facie* case; and, (3) when more than one claim is joined together -- including the claims of more than one aggrieved employee -- provide the employer with written information regarding each claim. (*See* Lab. Code, § 98.3.) Significantly, the Labor Commissioner may not proceed to a hearing on behalf of multiple claimants unless no valid reason exists for separating their claims. (*See* Lab. Code, § 100.)

Thus, in a PAGA-only action, it would defy logic and would be inconsistent with the Legislature's intent, if a private plaintiff could be permitted to throw out a statewide dragnet in search of Labor Code violations without first making a showing that he or any other employee has actually suffered harm. (*See Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 221 (improper to use discovery to wage rather than facilitate litigation); *see also Jeske v. Cal. Dep't of Corr. & Rehab.* (E.D.Cal. Mar. 29, 2012) 2012 U.S. Dist. LEXIS 45508, **8-9 ("Just as the state would be prohibited from requiring an employer to provide information without any showing that the employer is engaged in Labor Code violations, Plaintiff is prohibited from conducting discovery on the off-chance that a violation has occurred.").) This is particularly true given that PAGA plaintiffs are required to first exhaust administrative requirements by articulating *with particularity* the facts and theories underlying each violation, before filing suit. (*See* Lab. Code,

§ 2699.3(c)(1); *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 374-77.)

Appellant has failed to articulate any facts establishing a Labor Code violation experienced by him, or by any other allegedly "aggrieved" employee. He did not do so in his complaint, and he has not done so through discovery. As a result, he has provided the trial court with no basis to authorize statewide discovery relating to 16,000 Marshalls employees, most of whom worked at stores where Appellant never worked, and in positions he never held. The trial court actually gave Appellant every benefit of the doubt by allowing him to obtain private contact, personnel, and home address information for the entire workforce at the retail store where Appellant worked.

3. The Legislature's Expressed Concerns About The Potential Abuse Of The PAGA Warrant A Narrow Interpretation.

The Legislature passed the PAGA in the context of the explosion of pre-Proposition 64 lawsuits under California's Unfair Competition Law ("UCL"). (RJN Ex. A; Analysis of Sen. Bill 796, Sen. Jud. Comm., April 29, 2003, pp. 4-5, 6.) Employer groups feared that plaintiffs' lawyers would use the PAGA to generate mass litigation as they had under the UCL. (*Id.* at p. 5.) However, PAGA's sponsors assured their legislative peers that the new statute would not open the flood gates for mass actions as had the UCL:

> The sponsors are mindful of the recent, well-publicized allegations of private plaintiff abuse of the UCL and have attempted to craft a private right of action that will not be subject to such abuse. First, unlike the UCL, *this bill would not open private actions up to persons who suffered no harm* from the alleged wrongful act. Instead, private suits for Labor Code violations could be brought only by an "aggrieved employee"—an employee of the alleged violator *against whom the alleged violation was committed.*

(RJN Ex. A; Analysis of Sen. Bill 796, Sen. Jud. Comm., April 29, 2003, p. 6. (Emphasis added).)

Further, the Legislature intended that the scope of PAGA actions be limited to those who had suffered harm:

> [A] private action under this bill would be brought by the employee "on behalf of himself or herself and other current or former employees" – that is, fellow employees *also harmed* by the alleged violation – instead of "on behalf of the general public," as private suits are brought under the UCL.

(RJN Ex. A; Analysis of Sen. Bill 796, Assembly Comm. on Labor and Employment, July 9, 2003, p. 5 (Emphasis added).)

The authors of PAGA clearly sought to avoid allowing employees "who suffered no harm" to bring PAGA claims. (*Id.*) Instead, "aggrieved employees" are only those who can prove actual harm from violations committed specifically against them. (*Id.*) Further, as set forth above, to bring a PAGA claim, a plaintiff must comply with the administrative hurdle of providing detailed, specific pre-suit notice of her claims to the LWDA. (RJN, Ex. B.)

Courts, in interpreting these restrictions, have rejected PAGA plaintiffs' attempts to proceed on conjecture rather than proof. (See *Chie v. Reed Elsevier, Inc.*, *supra*, at *11 (PAGA plaintiff did not "provide any other description of the aggrieved employees," and "did not give Defendants fair notice as to what the scope of the PAGA claim is"); see also *Jeske v. Maxim Healthcare Services, Inc.*, *supra*, at *37 (rejected PAGA plaintiff's attempt to represent other employees because plaintiff failed "to identify how particular aggrieved employees were subject to particular violations.").) Thus, the Legislature intended for the PAGA to protect only those employees with actual harm, *i.e.*, "aggrieved employees."

D. PAGA Plaintiffs Are Not Entitled To Expansive Statewide Discovery Under *Pioneer* And Its Progeny Because A PAGA Action Is Not A Class Action.

Appellant asserts that a PAGA plaintiff is entitled to all of the discovery rights of a class action plaintiff, relying on *Pioneer, Puerto, Crab Addison, Belaire-West*, and *Lee v. Dynamex*, all class action cases (collectively the "*Pioneer* cases").[5] (App. Op. Br. at p. 15.) However, it is Appellant who decided to sidestep class action procedures and protections by bringing his PAGA-only action. He cannot turn around and demand all the same discovery rights he might have had in a class action.

[5] Appellant actually asserts, "If anything, PAGA plaintiffs should be entitled to even *greater* discovery rights than class action plaintiffs..." (App. Op. Br. at p. 4) (emphasis in original).

As this Court held in *Arias v. Superior Court* (2009) 46 Cal.4th 969, 975, PAGA and class actions are entirely separate and distinct legal actions. (*Id.*; *see also Baumann v. Chase Inv. Servs. Corp.* (9th Cir. 2014) 747 F.3d 1117, 1122) (recognizing that "the California Supreme Court has authoritatively addressed [the] issue, holding that PAGA actions are not class actions under state law.").) They are each creatures of their own unique statutory frameworks and guiding case law. (*Arias*, *supra*, at 986-87.)

The Ninth Circuit has also recognized that class and PAGA actions are "in the end... more dissimilar than alike." (*Baumann, supra,* at 1124.) The Court rejected the employer's argument that the district court could exercise jurisdiction over a PAGA-only action under the Class Action Fairness Act of 2005, and thus remanded the case. (*Id.*) The Court found the following distinctions between PAGA actions and class actions to be critical:

- In a PAGA action, there are "no notice requirements for unnamed aggrieved employees, nor may such employees opt out of a PAGA action." (*Id.* at 1122.)
- "In a PAGA action, the court does not inquire into the named plaintiff's and class counsel's ability to fairly and adequately represent unnamed employees." (*Id.*)

- "... PAGA contains no requirements of numerosity, commonality, or typicality." (*Id.* at 1123.)
- While class actions are preclusive as to all claims that could have been brought by the class, employees in PAGA actions are permitted to pursue and recover all remedies available to them under the law, with the only exception being PAGA penalties. If the employer prevails in the action, then the non-party employees may never even receive notice of the action, or any opportunity to be heard. (*Id.*)
- Damages in class actions are "typically restitution for wrongs done to class members." (*Id.*) On the other hand, "PAGA actions instead primarily seek to vindicate the public interest in enforcement of California's labor law." (*Id.*)

"A PAGA action is at heart a civil enforcement action filed on behalf of and for the benefit of the state, not a claim for class relief." (*Id.* at 1124.) As set forth more fully below, the state's interest is the central focus of PAGA actions. An enforcement action presumes a violation. However, no violation can be presumed unless the private PAGA plaintiff first produces some evidence of it.

1. Class Actions Are Unique Procedural Devices.

A class action is a procedural device which allows one or more plaintiffs to file and prosecute a civil action on behalf of a larger group, or "class". When enacting the PAGA, the Legislature was well aware of

California's class action procedures. If it had intended to incorporate any of these procedures, it would have done so explicitly. (RJN, Ex. A; Analysis of Sen. Bill 796, Sen. Judiciary Comm., April 29, 2003, p. 6.)

California Code of Civil Procedure section 382 authorizes a class action if "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." In addition, before a class may be certified

> a party must establish the existence of both an ascertainable class and a well-defined community of interest among the class members. The community of interest requirement involves three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.

(*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 (internal quotation marks and citations omitted).)

2. Class Counsel Are Held To Heightened Ethical Standards And Must Protect The Interests Of Absent Class Members.

Class counsel has an ethical obligation to represent and protect class members' interests. (*See Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1, 12 ("[I]n certifying a class action, the Court confers on absent persons the status of litigants and 'creates an attorney-client relationship between those persons and a lawyer or group of lawyers.'"); *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930, 943 ("[H]aving undertaken to represent the class in prosecuting its claim to

recover unpaid overtime compensation, they were duty bound to use reasonable care to fully protect the interests of the class.").) Class counsel maintains an attorney-client relationship with absent class members in a certified class, and thus owes a fiduciary duty and a duty of loyalty to *all* class members. (*Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 693 (class counsel must "represent all class members . . . with such skill, prudence, and diligence.").) The attorney-client relationship alone "is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity—*uberrima fides*.' Among other things, the fiduciary relationship requires that the attorney respect his or her client's confidences. It also means that the attorney has a duty of loyalty to his or her clients." (*Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1, 11.)

In the class context, particularly given concerns about the treatment of absent class members, courts have an obligation to closely scrutinize qualifications of legal counsel, and hold them to a "heightened standard." (*Cal Pak Delivery, supra*, 52 Cal.App.4th at 11-12.) Class counsel must be qualified, experienced with class actions, and capable of adequately conducting the proposed class litigation. (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450; *Miller v. Woods* (1983) 148 Cal.App.3d 862, 874.)

3. Class Representatives Must Protect The Interests Of Absent Class Members.

A plaintiff who sues on behalf of a class represents the interests of the putative class members in addition to his own, and he assumes a fiduciary obligation to the members of the class, surrendering any right to compromise the group action in return for an individual gain. (*Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1434; *La Sala v American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 871.) Class action procedures require the court to evaluate whether the named class representatives are capable of providing informed consent, and whether they will tenaciously represent the interest of class members. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104.) To satisfy due process and *res judicata* requirements, the class representative must adequately represent and protect the class interests. (*City of San Jose v. Superior Court (Lands Unlimited)* (1974) 12 Cal.3d 447, 463.) The class representative must raise claims "reasonably expected to be raised by the members of the class." (*Id.* at 464.) Additionally, there must not exist any antagonisms or conflict between the class representative and the class members' interests. (*J.P. Morgan & Co., Inc. v. Superior Court (Heliotrope General, Inc.)* (2003) 113 Cal.App.4th 195, 212.)

4. California Courts Recognize That Class Counsel And Class Representatives Have Fiduciary Duties To Putative Class Members.

Putative class members occupy a unique role in class action litigation before a class action is certified, as they are not yet parties to the litigation and are not yet represented by class counsel. (*Atari, Inc. v. Superior Court* (1985) 166 Cal.App.3d 867.) Of course, if a plaintiff's class is certified, then all of the rights and obligations provided by the attorney-client relationship will attach. In the interim, "California courts recognize and preserve the rights of putative class members, even before the issue of certification has been determined." (*Shapell Industries, Inc. v. Superior Court* (2005) 132 Cal.App.4th 1101, 1109; *Pirjada v. Super. Ct.* (2011) 201 Cal.App.4th 1074, 1081.)

Class counsel also owes the entire class a fiduciary duty once the class complaint is filed. (*See, e.g., Jones v. GN Netcom, Inc. (In re Bluetooth Headset Prods. Liab. Litig.)* (9th Cir. 2011) 654 F.3d 935, 946 ("Prior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement."); 2 Newberg & Conte § 11.65, at 11–183; *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.* (3d Cir. 1995) 55 F.3d 768, 801 ("Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed.").)

5. Class Action Protections Do Not Apply To Non-Party Employees Under The PAGA.

Significantly, unlike class action procedures, the PAGA "does not create property rights or any other substantive rights. Nor does it impose any legal obligations. It is simply a procedural statute allowing an aggrieved employee to recover civil penalties—for Labor Code violations—that otherwise would be sought by state labor law enforcement agencies." (*Amalgamated Transit Union, Local 1756, AFL-CIO, et al. v. Superior Court* (2009) 46 Cal.4th 993, 1003; *see also Arias v. Superior Court* (2009) 46 Cal.4th 969, 975 (a PAGA action does not have to satisfy class action requirements); *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 381 ("The act authorizes a representative action only for the purpose of seeking statutory penalties for Labor Code violations."); see also Lab. Code, § 2699(a) ("[a civil penalty] may] be recovered through a civil action.").)

Accordingly, contrary to Appellant's extensive arguments, it makes perfect sense for a class representative in a putative class action to have broader discovery rights than a PAGA litigant.[6] (App. Op. Br. at 19.) PAGA and class actions operate in entirely different ways, for entirely different reasons. PAGA plaintiffs are not fiduciaries for the other allegedly aggrieved employees and have no obligation to represent their

[6] That is especially true here, where Appellant has not even established that he has a claim under the PAGA, much less that he represents anyone else.

interests. (*Baumann v. Chase Inv. Servs. Corp.* (9th Cir. 2014) 747 F.3d 1117.) An attorney for a PAGA plaintiff has no attorney-client relationship with any other employees. (*Id.* at 1119 (in a PAGA action, the court does not inquire into the named plaintiff's or class counsel's ability to fairly and adequately represent unnamed employees).)

As a result, Appellant's reliance on *Pioneer* and its progeny – cases applicable only to class actions – misses the mark. (*See* App. Op. Br. at pp. 12-15.) The 16,000 current and former employees of Marshalls here are neither parties to this lawsuit nor clients of Appellants' counsel, and they never will be. Appellant's counsel has no duty of loyalty or other fiduciary obligation to these non-party employees. Likewise, Appellant's counsel has no obligation to prove to the trial court that he is qualified or has sufficient experience to handle this PAGA action.

With respect to Appellant, unlike a class action representative, he has no fiduciary duty to the non-party employees, no obligation to place any of their interests above his own, nor any need to demonstrate that he adequately represents the interests of anyone else. As class action protections do not apply to PAGA plaintiffs, neither should the corresponding broad discovery rights. The discovery request here illustrates the inherent absurdity of Appellant's proposition, as Appellant proposes to obtain private non-party information, including home addresses, contact numbers, and personnel information, for approximately

16,000 employees, without any obligation to act on behalf of or to represent their best interests. Defendant should not be compelled to disclose confidential employee information for what would essentially be a mass marketing campaign by Appellant's counsel.

E. *Pioneer* And Its Progeny Involved More Narrowly Tailored Discovery Requests Than Appellant's Overbroad Interrogatory.

Each of the cases upon which Appellant places so much weight – the *Pioneer* cases – are also readily distinguishable because plaintiffs' discovery requests in those cases were narrower and involved a discrete group of employees. In the *Pioneer* cases, plaintiffs sought discovery that was arguably designed to identify percipient witnesses. The scope of the "class list" was limited to individuals who were subject to a particular identified practice or policy that plaintiff had reason to believe was unlawful. Appellant's sweeping interrogatory asks not for witnesses to his lawsuit, nor for employees who experienced a particular violation of wage and hour laws, but instead for "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." (PA053-54.) As drafted, Appellant's interrogatory does not request the production of any percipient witness or "aggrieved employee" information, but instead broadly seeks the private information of thousands of non-party employees who may have no information relating in any way to his alleged claims.

In *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, a consumer class action, plaintiff alleged that a specific model of Pioneer DVD player was defective. (*Id.* at 364.) He sought to represent a class of people who purchased "the same model of allegedly defective DVD player," and served document requests for unredacted copies of complaints about that DVD player previously sent to Pioneer by other customers. (*Id.*) The Court noted that, "[i]n a real sense, many of Pioneer's complaining customers would be *percipient witnesses* to relevant defects in the DVD players." (*Id.* at 374.) No employment relationship existed in this case, and thus the company had no fiduciary obligation to maintain the confidentiality of the information. Moreover, the Court noted that "it seems unlikely that these customers, having already [previously] 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 possibility seeks similar relief for other Pioneer customers, unless the customer expressly consented to the disclosure." (*Id.* at 372.) This Court affirmed the trial court's decision to order disclosure of contact information of Pioneer's complaining customers, subject to written notice and the opportunity to object to such disclosure. (*Id.* at 374-75.)

In *Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, a group of employees brought suit alleging wage and hour violations against their

former employer, Wild Oats Markets, Inc. Plaintiffs served Wild Oats with a standard Form Interrogatory 12.1, requesting that the company, "State the name, ADDRESS, and telephone number of each individual: (a) who witnessed the INCIDENT or the events occurring immediately before or after the INCIDENT; (b) who made any statement at the scene of the INCIDENT; (c) who heard any statements made about the INCIDENT by any individual at the scene; an (d) who YOU OR ANYONE ACTING ON YOUR BEHALF claim has knowledge of the INCIDENT (except for expert witnesses covered by Code of Civil Procedure section 2034)." (*Id.*at 1245-46.) The term "INCIDENT" was defined as "The alleged claims, events and causes of action set forth in plaintiff's complaint." (*Id.* at 1246.)

Wild Oats responded to the form interrogatories, identifying between 2,600 to 3,000 persons as percipient witnesses to the alleged incidents, but refused to provide their employees' addresses and phone numbers. (*Id.*) In weighing the privacy interests and ordering disclosure of contact information, the court's analysis relied heavily on the facts that (1) Wild Oats had already disclosed the names of each of the individuals and (2) Wild Oats admitted that each of the individuals on its list were percipient witnesses to the alleged claims, events, and causes of actions contained in plaintiff's complaint. (*Id.* at 1247-1259.) The court noted, "Nothing could be more ordinary in discovery than finding out the location *of identified*

witnesses so that they may be contacted and additional investigation performed." (*Id.* at 1254) (emphasis added).)

The special interrogatories at issue in *Crab Addison v. Superior Court* (2008) 169 Cal.App.4th 958, a wage and hour class action, were also more narrowly drafted. Plaintiff alleged that salaried managers of specific restaurants had been misclassified as exempt. The requested list was for the names and contact information of those salaried managers. Thus, the request was narrowly tailored to obtain disclosure of individuals who had experienced specific legal harm – i.e., the alleged misclassification. (*Id.* at 961.)

Similarly, in *Belaire –West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App.4th 554, class counsel requested contact information for the putative class in that case involving employees in only one job position, that of landscaper. (RJN, Exs. C, ¶ 31; D.) Thus, the discovery and opt-out notice at issue covered production solely of the contact information for landscapers, not for all current and former employees of the company. (*Id.*) Further, the request was based on specific factual assertions that the landscapers were all treated similarly, and in a manner that potentially violated wage and hour laws. (RJN, Ex. C.)

Finally, *Lee v. Dynamex* (2008) 166 Cal.App.4th 1325, another wage and hour class action, does not break new ground on these points. Lee, the class action plaintiff, sought to certify a specific class of independent

contractors "who personally picked up and delivered documents, packages, parcels, merchandise, and other shipments for Dynamex, Inc. in the state of California [during a specific timeframe] using their personal vehicles with Gross Vehicle Weight Ratings of less than 10,000." (*Id.* at 1331.) Lee then served interrogatories seeking the names and addresses of all drivers who met that specific definition. (*Id.* at 1330.) As in all the other *Pioneer* cases, the request was narrowly tailored, and was supported by specific facts and arguments suggesting a probable practice or policy of misclassification.

Based on the foregoing, it is understandable that the Court of Appeal did not discuss the *Pioneer* cases. In each of those cases, there was a defined group, all of whom had experienced a common practice or policy that allegedly violated the law. Here, Appellant has no idea about practices or policies at stores beyond his own. Also, as set forth above, non-party employees in PAGA actions do not have any of the fiduciary protections provided to class members, nor do they have any potential to ever become parties to the action. Class action jurisprudence is uniquely tailored to the circumstances of putative class members who already or may soon share fiduciary relationships with class counsel. Class action principles cannot be imported into the PAGA framework, where the non-parties whose information Appellant seeks will always be legal strangers.

Further, even if the reasoning of the *Pioneer* cases applied, as set forth above, Appellant's interrogatory is far too overbroad to be enforced, and falls

outside the parameters set by those cases. Unlike the *Pioneer* cases, Appellant's interrogatory, seeking information for all Marshalls' non-exempt employees statewide, does not request contact information limited to "aggrieved employees." (PA053-54.) Appellant does not assert that the individuals he seeks have knowledge of any of his claims, or of any Labor Code violations. The *Pioneer* cases, with interrogatories tailored to seeking information for actual witnesses and/or for other similarly-situated individuals who experienced a common practice or policy, are entirely inapposite.

F. The Court Of Appeal Also Correctly Affirmed The Trial Court's Ruling Because The Privacy Rights of Over 16,000 Non-Party Employees Statewide Preclude Disclosure Of Their Private Contact, Personnel, And Home Address Information Without Any Justification.

Notably, both the Court of Appeal and the trial court implemented the very *Pioneer/Belaire-West* privacy notice that Appellant requests. Appellant's true concern cannot be the *Pioneer/Belaire-West* privacy protections, as those safeguards were applied to the storewide discovery granted to him. Appellant simply objects to the scope of immediate disclosure granted – storewide, not statewide. Thus, his argument is with the appropriate limits of the scope of discovery, not privacy.

Appellant nonetheless argues that privacy rights must yield in a PAGA case. Defendant strongly disagrees. The Court of Appeal

appropriately balanced the privacy rights of the 16,000 non-party employees here against Appellant's purported need for statewide discovery.

1. The Court Of Appeal Affirmed The Trial Court's Application Of The Very Belaire-West/Pioneer Privacy Notice Appellant Requests.

For all the reasons set forth above, the *Pioneer* cases are entirely inapposite. Ironically, however, the Court of Appeal's opinion does not run afoul of *Pioneer*, as the Court of Appeal affirmed the trial court's order that the parties participate in a *Belaire-West* notice process that is consistent with *Pioneer's* reasoning. (*See Pioneer Electronics,* 40 Cal.4th at 360; *Belaire-West Landscape, Inc.*, 149 Cal.App.4th at 556.)

The trial court required that Marshalls produce private contact, personnel, and home address information for non-exempt employees from the store where Appellant worked (Costa Mesa) for the time period from March 22, 2012 to the present, subject to a *Belaire-West* notice and opt-out process. (PA229.) Because the very purpose of the *Belaire-West* process is to protect the privacy of absent class member employees and provide them with the opportunity to opt out of revealing their private information, the trial court clearly balanced competing interests. (*Id.*; *Belaire-West Landscape, Inc.*, 149 Cal.App.4th at 556.) Moreover, the trial court did so in a reasoned manner, limiting the discovery at the preliminary stage to employees of the store where Appellant worked, those who may be more likely to have

witnessed the alleged Labor Code violations about which Appellant Complains. (PA229-30.)

2. The Court Of Appeal Did Not Commit Reversible Error By Holding That Appellant Cannot Invade The Constitutional Privacy Rights Of Non-Party Employees Based On Mere Allegations Alone.

Appellant requests disclosure of private contact, personnel, and home address information for more than 16,000 non-party employees of Marshalls who are not, and never will be, parties to this action. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 975.) Such a broad, statewide request implicates significant protectable privacy interests pursuant to the first step of the three-step test in *Hill v. National Collegiate Athletic Assn.*, (1994) 7 Cal.4th 1.

The *Hill* three-part threshold test for determining whether privacy rights are at issue requires proof of "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct... constituting a serious invasion of privacy." (*Hill*, 7 Cal.4th at 39-40.) This test sets an intentionally low bar, as it is designed "to weed out claims that involve so insignificant or de minimums an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification." (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 893.)

a. Marshalls' Non-Party Employees Have A Protectable Privacy Interest In Their Private Contact, Personnel, And Home Address Information.

If the privacy rights involved are more than "trivial" or "*de minimis*," the court must engage in a balancing test that weighs the necessity of disclosure against the importance of maintaining the confidentiality of the private information at issue. (*Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 329; *Loder*, 14 Cal.4th at 891.) The interests of non-party Marshalls' employees in their residential privacy are not "trivial" or "*de minimis*." In fact, California citizens have long-recognized and substantial privacy interests in their names, home addresses, private telephone numbers, and personnel information.

As Appellant recognizes, the California Constitution contains broad and explicit privacy protections for all of its citizens:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.
>
> (Cal. Const. Art. I § 1.)

The purpose of the privacy amendment was to "provide explicit protection of the right of privacy in the state Constitution." (*Am. Acad. of Pediatrics*, *supra*, 14 Cal.4th at 326.)

The privacy interests of Marshalls' non-party employees here involve the paramount privacy right that has been recognized for over a

century: the "right to be left alone" in one's home. (Warren & Brandeis, *The Right to Privacy* (1890) 4 Harv. L. Rev. 193, 195; *see also Olmstead v. United States* (1928) 277 U.S. 438, 478 (Brandeis, J. dissenting) (describing the "right to be left alone" as "the most comprehensive of rights and the right most valued by civilized men"); *see also United States Dep't of Defense v. Federal Labor Relations Auth.* (1994) 510 U.S. 487, 501.)

Contrary to Appellant's attempts to minimize the privacy rights at issue, the residential privacy interest is well established, as the home "is accorded special consideration in our [federal] Constitution, laws, and traditions." (*United States Dep't of Defense v. Federal Labor Relations Auth., supra,* 510 U.S. at p. 501 (citations omitted).) The residential privacy interest includes an individual's right not be disturbed in his or her home by unwanted advertising or solicitation by mail. (*Rowan v. United States Post Office Dep't* (1970) 397 U.S. 728, 737.) California courts have repeatedly recognized that "individuals have a substantial interest in the privacy of their home," and that the disclosure of names, home addresses, and telephone numbers implicates this privacy interest. (*Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347, 359-360; *see also Britt v. Superior Court* (1978) 20 Cal.3d 844, 857-62 (overturning, on associational privacy grounds, discovery order compelling plaintiff to produce names of percipient witnesses who attended meetings concerning airport noise); *City of San Jose v. Superior Court* (1999) 74

Cal.App.4th 1008, 1023-24 (recognizing in California Public Records Act case that individuals "have a significant privacy interest in their names, addresses, and telephone numbers").)

The United States Supreme Court has also repeatedly underscored the importance of the substantial right to residential privacy. (*Rowan v. United States Post Office Dep't, supra*, 397 U.S. at 737 ("The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality...."); *Frisby v. Schultz* (1988) 487 U.S. 474, 484-85) (a "special benefit of the privacy all citizens enjoy within their own walls... is an ability to avoid intrusions" and that "we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes"); *Hill v. Colorado* (2000) 530 U.S. 703, 716-17 (finding that there is a "recognizable privacy interest in avoiding unwanted communication" and it has "special force in the privacy of the home".) Based on the foregoing, in the PAGA context, where plaintiffs routinely seek private, confidential information of employees who will never become parties to the litigation, trial courts should be instructed to assume that a protectable privacy interest exists.

b. Marshalls' Non-Party Employees Have A Reasonable Expectation Of Privacy In Their Private Contact, Personnel, And Home Information.

With respect to the second *Hill* factor, requiring a reasonable expectation of privacy, courts routinely recognize that employees who provide their private telephone number, home address, and personnel information to their employer as a condition of employment have a reasonable expectation that the private information given to their employer will remain confidential and will not be disseminated except as required to governmental agencies or benefit providers. (*See, e.g., Harding Lawson Associates v. Superior Court* (1992) 10 Cal.App.4th 7, 10 (recognizing privacy right in "confidential information in third party personnel files"); *see also El Dorado Savings & Loan Assoc. v. Superior Court* (1987) 190 Cal.App.3d 342; *Bd. Of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516.) As a preliminary matter, Marshalls cannot waive the privacy rights of its employees. (*Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 525; *Life Technologies Corp. v. Superior Court* (2011) 197 Cal.App.4th 640, 652-53.) Further, because "judicial discovery orders [relating to private matters] inevitably involve state-compelled disclosure of presumptively protected information, [constitutional] principles have equal application to purely private litigation." (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 856 n. 3.) Accordingly, Marshalls has the right and duty "to resist attempts at unauthorized disclosure" and its employees are entitled to expect "that [their] right[s] will be thus asserted." (*Craig v. Municipal Court* (1979) 100 Cal.App.3d 69, 77.)

c. Appellant Cannot Justify Invading The Privacy Of Marshalls' Non-Party Employees On A Statewide Basis.

In balancing Appellant's interest in widespread discovery against the privacy interests of the non-parties who are subject to the intrusion, the trial court and Court of Appeal reached the right results. Contrary to Appellant's arguments, Hill did not eviscerate the "compelling interest" standard articulated in *Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839. (*Hill*, 7 Cal.4th at 34.) *Hill* instead found that a "compelling interest" need not be shown in every case, and "[t]he particular context, i.e, the specific kind of privacy interest and the nature and seriousness of the invasion and any countervailing interests, remains the critical factor in the analysis."[7] (*Id.*) This Court has since made clear that Hill should not be "interpreted as establishing significant new requirements or hurdles that a plaintiff must meet to demonstrate a right to privacy." (*Loder v. City of Glendale*, *supra*, 14 Cal.4th at 891 (emphasis added).) Instead, this Court's long-standing constitutional analysis remains the same, and continues to balance a "privacy interest protected by the state Constitution" against "the legitimacy or strength of the defendant's justification for the conduct." (*Id.* at 894, *see also* 891.)

[7] Marshalls submits that its 16,000 employees collectively have a "compelling interest" in keeping confidential the many categories of information sought by Appellant here. These employees are not parties to this case, and none of them may be "aggrieved."

Here, the Court of Appeal appropriately balanced strong privacy rights against a need for statewide discovery that is "practically nonexistent." Given that the Court of Appeal found Appellant's justification to be so weak as to essentially equal a zero on the balancing scale, the Court of Appeal easily – and correctly – concluded that privacy interested must be honored.[8]

As set forth above, Appellant's conduct in seeking to secure the private information of over 16,000 non-parties without justification constitutes a "serious" invasion of privacy, as contemplated by the *Hill* test. (*Hill*, 7 Cal.4th at 39-40.) Moreover, invading the privacy of thousands of non-party employees must require more than a few alleged "magic words" in an unverified complaint and a filing fee. (*See* PA256:24-27.)

G. Appellant's Interpretation Of The PAGA Creates An Unconstitutional Violation Of The Separation Of Powers Doctrine.

Article VI of the California Constitution vests the judicial power of California "in the Supreme Court, courts of appeal, superior courts, and municipal courts, all of which are courts of records." (Cal. Const., art VI, § 1.) The California Constitution further expressly provides for the separation of government powers. "The powers of State government are

[8] Appellant's belated nod to a protective order or the *Belaire-West* process is unavailing. Based on the *Hill* balancing test, Appellant cannot demonstrate any need for statewide discovery at this preliminary stage of the case. He certainly cannot demonstrate any reason to overcome the recognized privacy rights of over 16,000 non-party employees. (*Hill*, 7 Cal.4th at 39-40).

legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const. of 1849, art. III. § 1, now art. III, § 3.) By virtue of their constitutional status and responsibilities, courts possess all of the inherent and implied powers necessary to function properly and effectively as a separate, and equal, branch of government. (*See Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 54; *Brydonjack v. State Bar of Cal.* (1929) 208 Cal. 439; *Ex parte Garner* (1918) 179 Cal. 409; *Nicholl v. Koster* (1910) 157 Cal. 416.)

Appellant argued before the trial court, and continues to assert in briefing to this Court, that he would have to clear "unprecedented preliminary merits hurdles to obtain 'basic discovery.'" (App. Op. Br. at 4.) If Appellant's interpretation of the PAGA is correct – which Marshalls disputes – the Legislature has improperly encroached into the province of the judicial branch. And if that is the case, the PAGA should be struck down entirely on separation of powers grounds.[9] While the Legislature may put

[9] Marshalls acknowledges that this Court addressed the separation of powers doctrine in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, and its applicability to the PAGA. However, in *Iskanian*, this Court addressed the separation of powers doctrine as applied to the Judiciary's authority to regulate attorneys in California. The argument here, pertaining to a trial court's discretion to manage cases before the court – including managing and phasing discovery – is fundamentally different. If the PAGA is interpreted to divest trial courts of the authority to have basic control of proceedings, then the Legislature has overstepped its constitutional authority.

"reasonable restrictions" upon constitutional functions of the courts, it may not impose restrictions that "defeat or materially impair the exercise of those functions." (*County of Mendocino*, *supra*, 13 Cal.4th at 52-53.) When a statute significantly interferes with judicial functions, courts do not hesitate to declare the statute unconstitutional. In *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, this Court struck down, on separation of powers grounds, a statute that purported to allow corporations to represent themselves—a statute that directly contravened a judicial rule prohibiting a person not licensed to practice law to appear in court on behalf of another person. (*Id.* at 727.) This Court stressed that "legislative enactments are valid only to the extent they do not conflict with rules ... adopted or approved by the judiciary. When conflict exists, the legislative enactment must give way." (*Id.* at 728-29.)

In contrast, those statutes that have survived constitutional challenges on separation of powers grounds have been those where the enactment either facilitated the judicial function or did not preclude the judiciary from exercising its proper constitutional role. This Court has permitted the Legislature to place reasonable regulations upon the judiciary if those restrictions are "unlikely to affect the resolution of a particular controversy or prevent a court from proceeding in accordance with its own view of the governing legal principles." (*County of Mendocino* (1996) 13 Cal.4th 45 (court furlough days imposed by Legislature did not violate the

separation of powers doctrine); *see also Obrien v. Jones* (2000) 23 Cal.4th 40 (Court upheld a statute giving executive and legislative branches authority to appoint hearing judges to the State Bar Court).)

Here, Appellant asks this Court to remove trial courts' discretion to manage and phase discovery in cases before them. That interpretation should be rejected. The PAGA does not grant a civil litigant the ability to obtain statewide discovery, invade privacy rights of non-litigants guaranteed by the California Constitution, and override a trial court's discretion to manage discovery.

VII. CONCLUSION

Appellant seeks extraordinary rights under the PAGA. He demands discovery which would not be available to a litigant in other judicial settings, including class actions. Appellant argues that he should not have to meet any burden before obtaining a statewide list of all employees. When given the opportunity to meet the "low bar" set by the trial court, Appellant not only refused to sit for his own deposition, he refused to submit even a modicum of evidence to the trial court. Instead, Appellant argues that "information and belief" allegations are enough to entitle him to private information about 16,000 individuals who are strangers to him.

More importantly, Appellant has effectively defied the trial court's right to manage discovery. The trial court here exercised its discretion to grant only part of the discovery sought by Appellant. Rather than comply,

Appellant chose to make this a test case, in the apparent hope that he can achieve "super discovery" rights for PAGA plaintiffs.

Marshalls urges that this Court deny to Appellant and his counsel the fishing expedition they seek. The trial court correctly saw through Appellant's argument that the PAGA creates sweeping new discovery rights in civil litigation. The Court of Appeal followed suit, and provided appropriate guidance to litigants and to the trial courts about how discovery should be managed under this relatively new statute. This Court should affirm that a PAGA plaintiff has the burden to establish that he and other employees are indeed "aggrieved," before the plaintiff earns the right to broad discovery. The judgment of the Court of Appeal should be affirmed.

Dated: February 16, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rules 8.204(c) and 8.486(a)(6), I certify that the forgoing ANSWER BRIEF ON THE MERITS is proportionally spaced, has a typeface of 13 points, is double-line spaced, and that the word court is 13,508 words, exclusive of the tables and contents and authorities, according to the word count function of the computer program used to prepare it.

Executed this 16th day of February, 2016, at San Francisco, California.

ROBERT G. HULTENG

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PROOF OF SERVICE

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 650 California Street, 20th Floor, San Francisco, California 94108.2693. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On February 16, 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):

REAL PARTY IN INTEREST MARSHALLS OF CA, LLC'S ANSWER BRIEF ON THE MERITS

REAL PARTY IN INTEREST MARSHALLS OF CA, LLC'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ANSWER BRIEF ON THE MERITS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF AMY TODD-GHER; PROPOSED ORDER

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

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Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

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 February 16, 2016, at San Francisco, California.

Linda K. Camanio

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