S227228

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

Michael Williams, an individual,

Plaintiff and Appellant,

v.

**Superior Court of California
for the County of Los Angeles,**

Respondent.

Marshalls of CA, LLC,
Real Party in Interest.

After a Decision by the Court of Appeal,
Second Appellate District, Division One
Case No. B259967

Los Angeles County Superior Court, Case No. BC503806,
Judge William F. Highberger

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF REAL PARTY IN INTEREST MARSHALLS OF CA, LLC

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*Mary-Christine Sungaila (#156795)
Martin M. Ellison (#292060)
HAYNES AND BOONE, LLP
600 Anton Boulevard, Suite 700
Costa Mesa, California 92626
Tel: 949-202-3000 • Fax: 949-202-3001
mc.sungaila@haynesboone.com
martin.ellison@haynesboone.com

Attorneys for *Amicus Curiae*
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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

TO THE HONORABLE CHIEF JUSTICE:

Under rule 8.520(f) of the California Rules of Court, the International Association of Defense Counsel (IADC) requests permission to file the attached *amicus curiae* brief in support of real party in interest Marshalls of CA, LLC.

INTEREST OF AMICUS CURIAE; HOW THE *AMICUS CURIAE* BRIEF WILL ASSIST THE COURT

Amicus curiae International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of representative actions, which are increasingly global in reach.

The IADC maintains an abiding interest in the law of representative actions. This interest is exemplified by its *amicus* participation in several recent cases involving private class actions and *parens patriae* cases, including *The Procter & Gamble Co. v. Dino Rikos*, U.S. Supreme Court Case No. 15-835 (cert. pet.

pending), and *Exxon Mobil Corp. v. State of New Hampshire*, U.S. Supreme Court Case No. 15-933 (cert. petition pending).

In this case the Court has agreed to determine the scope of discovery available to a plaintiff in a different kind of representative action: a case brought under the Private Attorneys General Act of 2004 (Lab. Code, §§ 2698 et seq.). The resolution of this issue implicates broader policy concerns applicable to all representative actions. It also raises some unique practical and policy considerations that the IADC urges this Court to consider as it makes its ruling. As we explain in the accompanying brief, the trial court here properly exercised its inherent powers to structure discovery in a way that is desirable from a public policy perspective and similar in many ways to the kinds of investigations that the State itself would conduct or insist upon if it had the resources to do so. The arguments we present are complementary to, but not duplicative of, the briefing submitted by real party in interest Marshalls of CA, LLC.

NO PARTY OR COUNSEL FOR A PARTY AUTHORED OR CONTRIBUTED TO THIS BRIEF

The IADC provides the following disclosures required by rule 8.520(f)(4) of the California Rules of Court: (1) no party or

counsel for a party in this appeal authored or contributed to the funding of this brief, and (2) no one other than *amicus curiae* or its counsel in this case made a monetary contribution intended to fund the preparation or submission of this brief.

CONCLUSION

For the foregoing reasons, the IADC requests that the Court permit the filing of the attached *amicus curiae* brief in support of real party in interest Marshalls of CA, LLC.

DATED: May 3, 2016

Respectfully submitted,

HAYNES AND BOONE, LLP

By: _____
Mary-Christine Sungaila
Martin M. Ellison

Attorneys for *Amicus Curiae*
International Association of
Defense Counsel

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AMICUS CURIAE BRIEF

INTRODUCTION

Marshalls' brief on the merits provides a number of reasons why the trial court's discovery order should be affirmed. In this *amicus curiae* brief, we discuss several additional, practical considerations that support the trial court's decision, focusing on the first issue presented—whether a plaintiff in a Private Attorneys General Act (PAGA) action should be entitled to

statewide discovery at the outset of litigation. We explain why the discovery proceedings ordered by the trial court here are (1) a proper exercise of the trial court's inherent powers, (2) desirable from a public policy perspective, and (3) similar in many ways to the kinds of labor investigations that the State itself would conduct or insist upon if it had the resources to do so. Accordingly, we urge this Court to affirm the decision of the trial court and the Court of Appeal.

BACKGROUND

This appeal revolves around a single interrogatory that Michael Williams propounded on Marshalls during the early stages of his lawsuit. Williams worked as an assistant manager in Marshalls' Costa Mesa store, one of about 130 Marshalls locations across the State. (PA100, PA033.) After less than a year of employment, he filed an unverified complaint against Marshalls asserting one cause of action—a PAGA claim—for alleged violations of the State's meal-and-rest-break and business-expense-reimbursement laws.[1] (PA006-019.) In early 2014, with discovery at a nascent stage and Williams not yet

[1] Appellant since filed a Second Amended Complaint. (PA006-019.)

having been deposed,[2] Williams served a first set of special interrogatories on Marshalls. (PA034.) One of the interrogatories (the one at issue here) sought the names and the employment and contact information of "each and every person who is or was employed by [Marshalls] in California as a non-exempt employee at any time" since one year before Williams filed his complaint. (PA054.)

Marshalls objected to the interrogatory and refused to respond on the grounds that the request exceeded the scope of permissible discovery, created an undue burden on the producing party, and sought information that violated the privacy interests of its employees. (PA059-060.) Williams moved to compel a further response. (PA027-044.)

After extensive briefing and a lengthy hearing, the trial court partially granted Williams' motion to compel. (PA229-230, PA231-272.) Recognizing the "massive" scale of the discovery request—information for about 16,000 Marshalls employees across 130 stores statewide—and noting the substantial costs associated with compliance, the trial court held that statewide

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[2] Williams postponed his deposition for over a year for medical reasons.

discovery should not begin immediately. (PA229-230, PA231-272.) The trial court did, however, order Marshalls to produce the requested information for the employees in the Costa Mesa store in which Williams worked (subject to a *Belaire-West* notice and opt-out). (PA229.) The trial court also advised the parties that it would allow the requested statewide discovery after Williams had been deposed and adduced "more than nothing" to show that his claims have "factual merit." (PA261-262.) The trial court explained that this requirement was intended to be a "low bar," but nonetheless one sufficient to justify the efforts and expenses that full compliance with the discovery requests would require. (*Ibid.*)

The Court of Appeal affirmed, and this Court granted review.

LEGAL DISCUSSION

A. The Trial Court's Discovery Order Was a Proper Exercise of Its Inherent Authority to Control the Proceedings Before It.

This Court has long recognized that trial courts possess "fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953,

967.) These powers, "derived from the state Constitution" (*Cottle v. Super. Ct.* (1992) 3 Cal.App.4th 1367, 1377), and embodied in the California Code of Civil Procedure (Code Civ. Proc., § 128, subd. (a)), have consistently been interpreted by this Court to (1) apply to discovery procedures, and (2) vest trial courts with wide discretion with regard to discovery (see *John B. v. Super. Ct.* (2006) 38 Cal.4th 1177, 1186 [quoting *Pacific Tel. & Tel. Co. v. Super. Ct.* (1970) 2 Cal.3d 161, 171] ["In reviewing an order of a superior court granting discovery, we recognize at the threshold that the discovery statutes vest a wide discretion in the trial court in granting or denying discovery. . . ."], internal quotations omitted).

The breadth of the trial court's inherent authority to control discovery proceedings is underscored by the deferential abuse of discretion standard of review applied to its decisions. (*Greyhound Corp. v. Super. Ct.* (1961) 56 Cal.2d 355, 378-379; *Obregon v. Super. Ct.* (1998) 67 Cal.App.4th 424, 431-432 [citing *Hartbrodt v. Burke* (1996) 42 Cal.App.4th 168, 175 and Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs 1 (The Rutter Group 1997) ¶ 8:15 et seq.].) Where a trial court has adequately considered and reasonably weighed the facts before it, its decision

to grant or deny any discovery request—even a request for "relevant" information—will not be disturbed. (*Greyhound Corp., supra*, 56 Cal.2d at p. 382) As this Court explained in *Greyhound Corp. v. Superior Court*, trial courts are also within their discretion to "grant partial disclosure [of sought-after information], disclosure in another form, or disclosure *only in the event that the party seeking the information undertakes certain specified burdens which appear just under the circumstances.*" (*Ibid.*, emphasis added.)

Here, the trial court allowed Williams to obtain through preliminary discovery the identifying information of other employees in his Costa Mesa store (i.e., the trial court "grant[ed] partial disclosure"). (PA229-230.) The trial court then conditioned Williams' receipt of broader statewide discovery upon his meeting the "low bar" of appearing for deposition and adducing "more than nothing" to support his claims of alleged "systematic, company-wide" illegal policies (i.e., it required Appellant to "undertake[] certain specified burdens which appear[ed] just under the circumstances" before opening the door to additional costly discovery). (PA261-262.) Given the nascent stage of Williams' lawsuit and the uncertainty surrounding Williams'

allegations of "statewide" violations,[3] this discovery plan was "eminently reasonable," as noted by the Court of Appeal. (Typed opn. at pp. 4-5.) Indeed, the trial court's approach balanced California's liberal policy of granting discovery against the competing concerns in the case and structured Williams' receipt of information in a way that made good, practical sense.

Williams goes to great lengths to convince this Court otherwise. He argues, for example, that the trial court and the Court of Appeal have entirely denied him the right to investigate his claims. (See AOB at p. 24 ["[T]he Court of Appeal's decision forces PAGA plaintiffs to litigate without any way of knowing the extent of the employer's Labor Code violations. . . ."]; accord *id.* at pp. 9, 10, 12, 17, 30; Reply Br. at p. 1 [arguing that the trial court's discretion does not permit "categorically deny[ing] discovery"].) Not so. Neither court deprived Williams of any investigatory tools; the trial court merely imposed, and the Court of Appeal affirmed, a measure of reasonableness in how and when those tools are used.

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[3] Williams concedes in his brief that he has not yet investigated his claims of a company-wide policy of violating the Labor Code. (AOB at pp. 30-34.)

"Reasonableness" is a well-established limitation on discovery requests, both in the context of private litigation and in the case of subpoenas issued by the State in a labor investigation. (See Code Civ. Proc., § 2017.020 [authorizing courts to "limit the scope" of unduly burdensome, expensive, or intrusive discovery requests]; *Greyhound, supra*, 56 Cal.2d at p. 384 [instructing courts to "weigh the relative importance of the information sought against the hardship which its production might entail"]; *Obregon, supra*, 67 Cal.App.4th at p. 434 [encouraging trial courts to enforce the "right to discovery wherever reasonable and possible"]; *Craib v. Bulmash* (1989) 49 Cal.3d 475, 483-484 [evaluating the "reasonableness" of the State's subpoena in a labor investigation].) The trial court was therefore well within its inherent authority, and did not abuse its discretion, by structuring discovery proceedings in the way that it did.

B. By Structuring Discovery Proceedings as It Did, the Trial Court Aligned Itself with the Investigatory Practices That the State Itself Typically Implements.

One indicator of the reasonableness of the trial court's order is that the resulting discovery proceedings look a lot like a State-run labor investigation. The trial court required Williams to sit for deposition before obtaining broader discovery. This

requirement parallels methods likely to be used by the Labor Commissioner during an investigation, because—as indicated in the handbook published by the Bureau of Field Enforcement (BOFE), the agency assigned to investigate purported wage-and-hour violations—one of the first steps BOFE will take after receiving a complaint of a labor violation is to gather more information from the allegedly aggrieved employee who submitted the complaint. (Cal. Bureau of Field Enforcement, *Report a Labor Violation to the California Labor Commissioner's Bureau of Field Enforcement* (June 2014), at p. 4, <https://www.dir.ca.gov/dlse/PubsTemp/DLSE%20Brochures/Report%20a%20Labor%20Violation%20to%20the%20California%20Labor/Brochure-BOFE_WEB-EN.pdf> [as of Apr. 22, 2016].)

The declaration of Miles Locker,[4] who served in the DLSE for sixteen years in such positions as Chief Counsel to the Labor Commissioner (PA156-161), also illustrates the similarities between the trial court's order and a typical State labor investigation. Mr. Locker describes one statewide Labor Commissioner investigation that "began with a BOFE

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[4] Mr. Locker's declaration was submitted by Williams in support of his motion to compel a further response to Williams' interrogatory. (PA156.)

investigation of just two . . . restaurants, which together did not employ more than 200 employees." (PA160-161.) It was not until BOFE conducted a small-scale inquiry into the practices at these two restaurants and developed a hint of more "systemic violations" that it began issuing statewide subpoenas and deposing persons most knowledgeable into the employer's statewide practices. (PA161.) The investigation resulted in the state obtaining roughly $10 million in penalties from a company that employed over 30,000 people. (PA160-161.)

The foregoing example is emblematic of Mr. Locker's overall suggested approach to State labor investigations: "first sampling [employment records] for multiple locations, and if the sampled records reveal systemic Statewide violations, [obtaining] complete records for all locations within the State." (PA160.) It is also virtually identical to what the trial court has done with its discovery order. By granting Williams access to the contact and employment information of the employees in Marshalls' Costa Mesa store, and then conditioning further statewide discovery upon Williams' adducing "more than nothing" to substantiate his claims of "systematic, widespread" illegal policies at Marshalls,

the trial court aligned the proceedings before it with the State's typical investigatory process.[5]

Mr. Locker's declaration therefore illustrates an important point: Government investigators exercise judgment in how they scale discovery and develop cases, and often cooperate with employers to tailor the scope of their inquiries. (See, e.g., Brittany Blackburn Koch, *Dealing with the DOL (Department of Labor) at Your Door, Part II* (Feb. 5, 2014) The National Law Review <http://www.natlawreview.com/article/dealing-dol-department-labor-your-door-part-ii> [as of Apr. 22, 2016].) Thus, Williams' urging this Court to empower him to wield the full power of the State in order to compel immediate statewide discovery and "properly investigate" his claims seems misplaced. (See AOB at pp. 2, 38.) Williams claims that he wants his lawsuit

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[5] Williams characterizes Mr. Locker as endorsing statewide discovery at the outset of litigation, as if this were a tactic frequently used by the State. (AOB at p. 39.) He paraphrases Mr. Locker as stating that "the DLSE us[ed] its subpoena power to obtain statewide employee records for [an employer's] workforce of 30,000 California employees, based only on its belief that the employer had committed Labor Code violations throughout its many California locations." (AOB at p. 39.) But Williams omits Mr. Locker's testimony that the DLSE only formed a belief that the employer had committed statewide Labor Code violations after first conducting an inquiry into just two of the employer's restaurants (consisting of around 200 people, or roughly 0.6% of the 30,000 employees in the state). (PA160-161.)

to proceed like a State-run investigation, but under the trial court's orders it already is.

C. The Incremental Discovery Process Ordered by the Trial Court Makes Good Policy Sense.

The PAGA was created to "augment the enforcement abilities of the Labor Commissioner," to "achieve maximum compliance with state labor laws," and to aid the State in curbing an "underground economy" that causes billions of dollars in tax losses per year. (*Iskanian v. CLS Transp. L.A., LLC* (2014) 59 Cal.4th 348, 379; *Dunlap v. Super. Ct.* (2006) 142 Cal.App.4th 330, 337 [quoting Sen. Rules Com., Off. of Sen. Floor Analyses, analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.)].) But as the Labor Commissioner's office itself recognized in a recent budget request for additional resources to create a PAGA oversight unit, PAGA settlements to date have resulted in the State and other injured employees being "shortchanged," both in terms of monetary recovery and meaningful modifications to employment practices. (State of Cal. Budget Change Proposal (Dec. 2015) Submitted by the Lab. and Workforce Development Agency and the Dept. of Industrial Relations, at p. 3, <http://web1a.esd.dof.ca.

gov/Documents/bcp/1617/FY1617_ORG7350_BCP474.pdf> [as of Apr. 22, 2016] [hereafter Budget Change Proposal].)

The cause of this problem is that litigation costs in a PAGA case often end up driving settlement negotiations more than the statutory penalties at issue. (See *Obregon*, *supra*, 67 Cal.App.4th at pp. 434-435 [recognizing that "unfeasible levels of expense might force resolution on a basis other than the merits"].) Faced with substantial and imminent discovery costs, most defendants will decide to use that money to settle their cases instead of addressing the substance of plaintiffs' claims. (*Ibid.*) Because private plaintiffs receive a portion of the settlement proceeds in a PAGA case (see *Iskanian*, *supra*, 59 Cal.4th at p. 380 [citing Lab. Code, § 2699, subd. (i)] [noting that 25% of the civil penalties recovered from an employer go to the "aggrieved employees"]), they are incentivized to seek early settlements based on inflated litigation costs rather than spend the time to uncover labor violations (and therefore civil penalties) that may or may not be of greater value. (See Budget Change Proposal, *supra*, at p. 4 ["[P]rotracted litigation [in PAGA cases] creates strong incentives to settle in a way that best protects the interests of the actual

plaintiffs and their attorneys, while discounting the claims and interests of other employee class members."].)

In the absence of State oversight of PAGA litigants, trial courts should be encouraged to use their inherent powers to guard against the effects of these incentives, and to protect the interests of the State and third party aggrieved employees. Ordering discovery to proceed incrementally—as the trial court did here—facilitates that purpose. Conversely, allowing private plaintiffs to drive broad discovery at the outset of a case will only encourage the exploitation of PAGA claims, and impede the PAGA's potential to have any meaningful real-world impact in the workplace.

Moreover, as this Court has repeatedly held, once a settlement agreement in a PAGA case has been finalized and results in a judgment, it will bind both the government and the groups of employees on whose behalf the plaintiff purported to initiate his or her claims. (See *Iskanian, supra*, 59 Cal.4th at p. 381 [quoting *Arias v. Super. Ct.* (2009) 46 Cal.4th 969, 986] ["[W]ith respect to the recovery of civil penalties, nonparty employees as well as the government are bound by the judgment in an action brought under the [PAGA]. . . ."].) Given this binding

effect, it makes sense for trial courts to carefully and incrementally sketch out the boundaries of PAGA plaintiffs' claims and the discovery available to them, just as the trial court did here. Denying trial courts the discretion to structure discovery—as Williams asks this Court to do—will only propagate the "shortchanging" of the State and third-party employees.

CONCLUSION

For the foregoing reasons, and those expressed by real party in interest Marshalls of CA, LLC in the merits briefing, this Court should uphold the Court of Appeal and remand this matter for discovery to proceed according to the trial court's order.

Dated: May 3, 2016

Respectfully submitted,

HAYNES AND BOONE, LLP

By: _____
Mary-Christine Sungaila
Martin M. Ellison

Attorneys for *Amicus Curiae* International Association of Defense Counsel

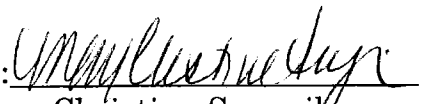
CERTIFICATE OF WORD COUNT

The undersigned certifies that, pursuant to the word count feature of the word processing program used to prepare this brief, it contains 2,655 words, exclusive of the matters that may be omitted under rule 8.520(c)(3).

DATED: May 3, 2016

Respectfully submitted,

HAYNES AND BOONE, LLP

By: 
Mary-Christine Sungaila
Martin M. Ellison

Attorneys for *Amicus Curiae* International Association of Defense Counsel

PROOF OF SERVICE
(CCP § 1013(a) and 2015.5)

I, the undersigned, am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. I am employed with the law offices of Haynes and Boone, LLP and my business address is 600 Anton Blvd., Suite 700, Costa Mesa, California 92626.

On May 3, 2016, I served the foregoing document entitled **APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF REAL PARTY IN INTEREST MARSHALLS OF CA, LLC** on all appearing and/or interested parties in this action by placing a true copy thereof enclosed in a sealed envelope, addressed as follows and in the manner so indicated:

Glenn A. Danas Ryan H. Wu Robert J. Drexler, Jr. Liana C. Carter Stan Karas Melissa Grant CAPSTONE LAW APC 1840 Century Park East, Suite 450 Los Angeles, CA 90067	*Attorneys for Plaintiff and Appellant Michael Williams*
Honorable William F. Highberger Superior Court of Los Angeles County 600 South Commonwealth Avenue Los Angeles, CA 90005	*Superior Court of Los Angeles County: Respondent* Civil Case No. BC503806
Frederick Bennett Superior Court of Los Angeles County 111 North Hill Street, Room 546 Los Angeles, CA 90012	*Superior Court of Los Angeles County: Respondent* Civil Case No. BC503806

Robert G. Hulteng Joshua J. Cliffe Emily E. O'Connor Scott D. Helsinger LITLER MENDELSON, PC 650 California Street, 20th Floor San Francisco, CA 94108 Amy Todd-Gher Kyle W. Nageotte LITLER MENDELSON, PC 501 West Broadway, Suite 900 San Diego, CA 92101	*Attorneys for Real Party in Interest Marshalls of CA, LLC*

☒ **[BY MAIL]** I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Costa Mesa, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after date of deposit for mailing this affidavit.

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

Executed on May 3, 2016, at Costa Mesa, California.

Breean Cordova