No. S271721

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

TINA TURRIETA,
Plaintiff-Respondent,

v.

LYFT, INC.,
Defendant-Respondent.

After A Decision By The Court Of Appeal,
Second Appellate District, Division Four
Case No. B304701

After An Appeal From the Superior Court of Los Angeles County
Hon. Dennis J. Landin
Case No. BC714153

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Proposed amicus California Employment Lawyers Association ("CELA") requests leave to file the accompanying amicus curiae brief in support of appellant Brandon Olson.

Interest of the Amicus Curiae

CELA is an organization of approximately 1,200 California attorneys whose members primarily represent employees in a wide range of employment law cases, including Private Attorneys General Act ("PAGA") actions similar to those at issue in this appeal. CELA and its members have a substantial interest in ensuring the vindication of public policies codified in the California Labor Code, including PAGA. CELA members also have an interest in ensuring that PAGA settlements are fair and consistent with PAGA's purposes of deterring wage theft and bolstering the State's ability to enforce the Labor Code.

CELA has taken a leading role in advancing and protecting the rights of California workers, including by submitting amicus briefs and appearing before this Court in employment rights cases such as *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal. 5th 858; *Kim v. Reins Intl. Cal., Inc.* (2020) 9 Cal.5th 73; *Frlekin v. Apple, Inc.* (2020) 8 Cal.5th 1038; *Troester v. Starbucks, Corp.* (2018) 5 Cal.5th 829; *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903; *Augustus v. ABM Securities Services, Inc.* (2016) 2 Cal.5th 257; *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522; *Iskanian v. CLS Transp. Los Angeles,*

LLC (2014) 59 Cal.4th 348; and *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.

How the Proposed Amicus Brief Will Assist the Court

The issue raised in this appeal is whether a PAGA plaintiff has the right to object, intervene, or move to vacate a judgment when a settlement in an overlapping case extinguishes her claims. This brief provides the unique perspective of plaintiffs' attorneys who have extensive expertise litigating PAGA actions on behalf of the State. It discusses the practical implications that would result from prohibiting plaintiffs in overlapping PAGA cases to object, or to become parties with standing to appeal through intervention or moving to vacate the judgment.

The brief also urges the Court to adopt an approach that will encourage appellate courts to create robust jurisprudence around PAGA settlements, similar to the jurisprudence that California's appellate courts have already created for class action settlements. Trial courts and parties need guidance on how to evaluate PAGA settlements because the PAGA statute contains no criteria for settlement approval and there are relatively few cases that discuss PAGA settlements, particularly where there are overlapping cases.

Conclusion

For the foregoing reasons, the Court should grant amicus curiae CELA's application for leave to file the attached amicus brief.

No party's counsel authored the brief in whole or in part or contributed money intended to fund preparing or submitting the

brief. No person, other than amicus curiae, contributed money intended to fund preparing or submitting the brief. All parties to this appeal have consented to the filing of this brief.

DATED: July 11, 2022

Respectfully submitted,

By: /s/ Lauren Teukolsky
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I. INTRODUCTION

One of PAGA's unique features is that multiple plaintiffs can be deputized by the State to pursue the same claims against an employer. This feature has created opportunities for cooperation: multiple State proxies share resources and form a united front to investigate and litigate violations of the Labor Code, maximizing the benefit to the State. But this feature has also created perverse opportunities for competition: employers play multiple State proxies against each other, exploiting a lack of coordination and choosing to deal with the State proxy willing to release the most claims possible for the lowest penalty amount.

The latter situation, where the defendant engages in plaintiff-shopping, is commonly termed a "reverse auction" because the settlement goes to the lowest bidder. The practice is antithetical to PAGA's purpose of augmenting the State's limited enforcement of the Labor Code, and deterring future violations. Not only do reverse auctions lower the penalty amounts that the State is able to collect, but they also create untenable risks that push honorable, hard-working plaintiffs' attorneys out of PAGA enforcement, undermining the market for private enforcement that the Legislature intended to create by including a fee-shifting provision. In the words of one CELA member: "Attorneys cannot and will not make the enormous investments of time and money required in cases of this kind if everything they've done takes only a last-minute side-deal to derail."

In 2017, CELA attorneys started reporting that certain defense firms were orchestrating reverse auctions in PAGA cases

with overlapping claims. CELA attorneys expressed disbelief and frustration as defendants settled out cases the CELA attorneys had been working on for years with latecomers who had done comparatively little work. In 2019, as reports of reverse auctions increased dramatically, CELA created a Reverse Auction Task Force to study the problem and make proposals for fixing it. In 2020, CELA adopted a Reverse Auction Policy, with the goal of encouraging cooperation and coordination among plaintiffs with overlapping cases.

This appeal raises two related questions. First, does a State proxy in a competing PAGA case have the right to object to a settlement that the proxy views as deficient? And second, do the provisions of the Code of Civil Procedure that govern the right to intervene and the right to move to vacate a judgment apply to the competing State proxies where a settlement would extinguish their case?

This brief explores the dire consequences of answering these questions "no." The first part of this brief describes a typical reverse auction fact pattern. It is based on real-life reports from CELA members about their experiences with reverse auctions. The second part discusses CELA's efforts to combat reverse auctions. The third part discusses the most compelling reasons why a PAGA plaintiff whose case is extinguished by a settlement in an overlapping case should be permitted to object, intervene, and move to vacate the judgment. To rule otherwise would encourage destructive reverse auction and top-filing practices that reward unscrupulous behavior,

immunize almost all PAGA settlements from appellate court review, and undermine the market for private enforcement of the Labor Code created by the inclusion of a fee-shifting provision in PAGA.

II. TERMINOLOGY

This brief uses certain terminology that must be defined in this context.

A "PAGA-only" case refers to a case in which a single representative PAGA claim for penalties is filed, with no class action or other types of claims. Plaintiffs' lawyers often file PAGA-only claims because their clients have been forced to waive their class action claims via a mandatory arbitration agreement.

A "reverse auction" occurs when there are two or more class action or representative PAGA cases with overlapping claims, and the defendant chooses to settle with the plaintiff who is willing to exchange the broadest release of claims for the lowest price. The defendant typically settles with the "weaker" plaintiff, cutting out the "stronger" or better-positioned plaintiff. A reverse auction does not require collusion—in some instances, the settling plaintiff is unaware of the existence of an overlapping lawsuit.

Many CELA members prefer the term "plaintiff shopping" to "reverse auction" because the former term explains the phenomenon more accurately. The term "plaintiff shopping" focuses on the actions of the defendant, typically the only player with full knowledge of all of the overlapping cases, and the one who orchestrates the circumstances in which a reverse auction

can occur—for example, by failing to file a notice of related case, concealing the existence of overlapping cases from plaintiffs and the court, failing to seek abatement or coordination of later-filed overlapping cases, scheduling serial mediations with each plaintiff to shop for the one willing to accept the lowest settlement price, or cutting certain plaintiffs out of settlement negotiations until it benefits the defendant to include them.

The term "top-filing" means the practice of filing a class action or PAGA lawsuit even though a previous lawsuit with identical or similar claims has already been filed against the same defendant. Top-filing can be intentional or inadvertent.

III. SUMMARY OF ARGUMENT

Does a plaintiff in a representative action filed under the Private Attorneys General Act have the right to intervene, or object to, or move to vacate, a judgment in a related action that purports to settle the claims that plaintiff has brought on behalf of the State?

CELA urges the Court to answer this question "yes." The public interest is far better served by permitting a plaintiff in an overlapping PAGA case to object to a settlement extinguishing that plaintiff's case, and to become a party with standing to appeal through intervention or moving to vacate a judgment.

Objectors are often in the best position to identify defects in a collective, representative, or class action settlement. In the PAGA context, the LWDA does not have enough resources to review all of the proposed settlements it receives, and almost never weighs in on the propriety of a settlement. CELA is aware

of fewer than a dozen instances in the nearly 20 years since PAGA was enacted in which the LWDA has appeared at the trial court to object to or comment on a PAGA settlement. The LWDA has stated that it relies on competing PAGA plaintiffs to raise objections if a settlement is inadequate. Trial courts are entitled to complete information about a settlement, including whether it releases claims in an overlapping case that is stronger and more developed than the settling case. Otherwise, they will be missing crucial information to determine whether a settlement is fair and consistent with the purposes of PAGA.

If objections are not permitted, plaintiffs' attorneys who engage in reverse auction and top-filing practices will be emboldened to continue these destructive practices, which are bad for workers and undermine robust efforts by honorable attorneys to enforce the Labor Code. Defendants will have every incentive to play plaintiffs in overlapping cases against each other, driving down settlement value and rewarding the plaintiff who is willing to provide the broadest release for the least value.

By contrast, permitting objections, and preserving the possibility of appellate review, serves to deter reverse auction and top-filing practices. Defendants will know that their efforts to orchestrate a reverse auction will be called out by plaintiffs in overlapping cases, and top-filing plaintiffs will know their efforts to settle out another plaintiff's case by riding the coattails of another plaintiff's work will be scrutinized by the court.

Prohibiting intervention and motions to vacate will make (almost) all PAGA settlements appeal-proof. The settling parties

themselves will not file appeals. Plaintiffs in overlapping cases would not have standing to appeal. Appellate courts could review PAGA settlement approvals only if the LWDA itself objected and then filed an appeal. This happens extremely rarely, which means that almost all PAGA settlement approvals would lose appellate court oversight. Once trial courts, plaintiffs, and defendants know that an appellate court will likely never review any settlement approval decisions, there will be little incentive to engage in a rigorous process to ensure that the settlement was fair and consistent with the goals of PAGA. This result would be contrary to the State's interest in robust enforcement of the Labor Code, and contrary to the purposes of PAGA.

Appellate court review, and the development of much-needed PAGA settlement jurisprudence, can be accomplished only if this Court reverses the Court of Appeal and concludes that a competing PAGA plaintiff may become a party with standing to appeal by intervening or moving to vacate the judgment.

IV. PART ONE: A VIEW FROM THE TRENCHES

This section describes a typical reverse auction situation. It is based on reports that CELA members have made over the years. Names and identifying information have been changed.

Shauna has been a private public interest attorney for 20 years. Most of her solo civil rights practice focuses on representing low-wage workers in wage theft and discrimination cases. Shauna does not charge her clients hourly. Many of them would not be able to afford her even if she deeply discounted her hourly rate. Instead, Shauna earns income through fee-shifting

statutes that allow her to seek attorneys' fees from a defendant when she wins a case. Shauna uses case income to operate her firm, including advancing case costs that can exceed six figures.

One of the fee-shifting statutes that Shauna uses is PAGA. Through its fee-shifting provision, Labor Code § 2699(g)(1), PAGA has created a marketplace to incentivize attorneys like Shauna to augment the State's enforcement of the Labor Code.

In 2018, a group of nurses employed by a private hospital sought Shauna's help. They reported that the Hospital was understaffed, and they were unable to take breaks because they had no coverage. They worked 12-hour shifts, and their inability to take breaks was dangerous for patients. When they requested premium pay for missed breaks, supervisors bullied them.

The practice was uniform and widespread, but the nurses had signed arbitration agreements with class action waivers. Shauna filed a PAGA-only case in Superior Court because there was no other avenue available to achieve systematic relief for the violations of the Labor Code. Shauna also represented 15 nurses in individual arbitrations, where they could pursue their Labor Code § 226.7 claims for missed breaks.

Right after Shauna filed, the Hospital invited her to attend a mediation. Shauna paid an expert to review payroll data and to prepare a damages model. At mediation, the Hospital offered a small amount to settle all of the claims. Shauna and her clients rejected the settlement as too low.

The trial court stayed the PAGA claim pending arbitration of 15 individual claims. Shauna spent hundreds of hours on

discovery, taking multiple depositions and reviewing thousands of pages of employment records. During the two years that Shauna spent on discovery, she turned away a number of other promising cases.

The first five individual claims went to arbitration three years after the first meeting. The nurses told Shauna that the Hospital had finally hired break nurses, and they were now getting breaks without interruption. The Hospital had also trained its supervisors not to retaliate against anyone who requested premium pay. The nurses believed these important policy changes resulted from Shauna's work on the PAGA action.

Two weeks after the first five arbitration hearings concluded, Shauna appeared for a routine status conference in the PAGA action. The Hospital's lawyer told the court that the Hospital had reached a settlement of the PAGA claim with a different plaintiff's lawyer in a separate PAGA case, and would be filing a motion for settlement approval in a matter of weeks. The other case had been filed in a different court, so the approval motion would be heard by a different judge. The Hospital's lawyer told the court that the settlement would encompass the PAGA case that Shauna had filed, and they would seek dismissal of Shauna's PAGA case if approval was granted. The court ordered the Hospital to provide a copy of the settlement approval papers to both Shauna and the court.

The Hospital's announcement to the trial court was the first time another case was mentioned, let alone the settlement of a heavily-litigated PAGA case.

When the settlement approval motion was filed one week later, Shauna learned that an attorney had filed a similar PAGA action against the Hospital on behalf of a single nurse 10 months after Shauna filed her case. The Hospital had not filed a notice of related case. The approval papers did not mention Shauna's case, which meant the judge in the second-filed case would have no idea that the Hospital had settled out her PAGA case.

Shauna saw that the settlement amount was $300,000, including a request for $100,000 in attorneys' fees. Though the PAGA claims in her case were broader, the other settlement released plead and unplead claims extending back an additional 12 months so that it captured the time period encompassed in Shauna's PAGA case.

It wasn't clear from the approval papers how much work the other plaintiffs' firm had actually done. The plaintiff in the second case did not arbitrate her individual claims. There was no indication that the other attorney had done any discovery. The other attorney said that he relied exclusively on a report prepared by the Hospital's expert about the value of the break claims.

Shauna realized that if the settlement was approved, she would not share in any of the attorneys' fees in the PAGA case, even though her work had paved the way for the settlement, and had caused the Hospital to change its unlawful practices.

Shauna's expert calculated the maximum PAGA penalties at $25 million, not including fees—far higher than the

approximately $200,000 that would be allocated to penalties after the other attorney's $100,000 fees were paid.

Shauna filed an objection to the PAGA settlement, and also filed a motion to intervene, asking to become a party to the settling lawsuit. If the court granted approval, Shauna wanted the ability to request attorneys' fees, given that her work had been a catalyst for the PAGA settlement, and she had turned away several fee-generating cases to work on this case. If the court denied approval, Shauna wanted to be involved in prosecuting the PAGA claim and included in any future settlement negotiations.

Shauna's objection explained how she was far better positioned than the other case to obtain a favorable settlement from the Hospital on behalf of the State. She alone was deputized to act on behalf of the State with respect to certain valuable claims, and her diligence in prosecuting all the claims was apparent on the record. She also pointed out that the Hospital had failed to notify either her or the court of the existence of the second-filed case, in violation of California Rule of Court 3.300, further evidence that the Hospital had orchestrated a reverse auction after she refused to accept the paltry settlement offer the Hospital had previously made to her.

Before the approval hearing, each of Shauna's five clients prevailed on their arbitration claims. She submitted the arbitrator's rulings to the court to support her objection and to demonstrate that the settlement amount was far too low given the strength on the merits of the underlying Labor Code

violations. The other attorney had argued in the approval papers that the $300,000 settlement was adequate because the break claims were relatively weak.

***

This is a "choose your own adventure" story.[1]

Should the trial court be required to consider Shauna's objections? Should the trial court even get to hear from Shauna or know about her case? Should an appellate court ever get to hear Shauna's story, or review the trial court's approval of the settlement? This Court gets to choose the ending.

V. PART TWO: CELA'S EFFORTS TO END REVERSE AUCTIONS

A. Reverse Auctions Begin to Emerge in 2017

In 2017, CELA members started reporting a new phenomenon of being "reverse auctioned." The initial reports were sporadic, and the phrase "reverse auction" was still a foreign concept to most attorneys. Reverse auctions in PAGA-only cases were relatively easy to accomplish in 2017. Unlike class action settlements, which usually require notice and a right to opt out to satisfy due process concerns, PAGA settlements lacked comparable protections. The PAGA statute itself says only that courts must "review and approve" settlements, but does not provide courts with any criteria. (*See* Labor Code § 2699(l)(2).)

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[1] *Choose Your Own Adventure* was a popular children's series during the 1980s and 1990s. "The stories are formatted so that, after a couple of pages of reading, the protagonist faces two or three options, each of which leads to more options, and then to one of many endings." *See* https://en.wikipedia.org/wiki/Choose_Your_Own_Adventure.

As of 2017, there were no appellate decisions discussing the standards for PAGA settlement approval, and trial courts had not adopted any informal guidelines for evaluating PAGA settlements.

In the absence of guidance, many courts approved PAGA settlements presented to them by way of a stipulation and proposed order, without the need for a noticed motion. Some courts approved PAGA settlements by way of *ex parte* applications. For example, in *Starks v. Vortex Indus., Inc.* (2020) 268 Cal. Rptr. 3d 274, 280, *review denied and ordered not to be officially published* (Dec. 16, 2020), the "[Defendant] Vortex and [Plaintiff] Starks filed a joint *ex parte* application for court approval of the settlement agreement. They did not give notice of the application or a copy of the settlement agreement to [the plaintiff in an overlapping PAGA case] or any other aggrieved employee of Vortex."

Like any rational economic actor, defendants took advantage of the lack of notice and the dearth of appellate guidance to start using reverse auctions as a strategy to resolve cases at significantly discounted rates. CELA members reported hearing defense attorneys at employment conferences touting the use of reverse auctions as a legitimate tool to settle PAGA cases at discounted rates.

B. In 2019, CELA Creates a Reverse Auction Task Force

In early 2019, the CELA Board authorized the creation of a Reverse Auction Task Force to assess the growing phenomenon of reverse auctions. A small group of CELA members with significant class action and PAGA experience began investigating the scope of the problem, encouraging CELA members who had been reverse auctioned to report their experiences confidentially to the Task Force.

Here are the comments of CELA members who have been affected by reverse auctions and top-filing practices:[2]

- "I was just reversed auctioned in a PAGA case where other lawyers have come in and done no discovery while we have been litigating for several years."
- "We put three years of work into our class action case only to find out that a plaintiff in another case settled out our claims even though he never alleged any class claims in his complaint, and didn't do any discovery or any other work on the class claims. We were the ones who did all the discovery and paid for costs in the case. It's just so disheartening."
- "[M]y case was 40 days from trial when [another plaintiff] settled by amending their complaint to insert my client's PAGA claims. My co-counsel and I are out of pocket over $85,000 in expert and deposition expenses. . . This is going

[2] The author of this brief received permission from CELA members to use each of these quotes.

to become a huge issue where defendants will just pick the least aggressive law firm to settle the case with and eliminate all their liability."

- "I had a top-filer who tried to settle out the PAGA claims in my case even though his PAGA notice didn't even cover most of the PAGA claims he was trying to settle. He didn't do any work on the PAGA claims. Thankfully, the court let me intervene and did not end up approving the settlement."
- "[W]e litigated a class case for more than three years and the case settled days after being filed by another plaintiff with the new plaintiff waiving the statute of limitations just to encompass our case."
- "I am being filed on top more and more, even when I am close to mediation. I know it is frustrating for everyone. The problem is when you have a bunch of filers, defense counsel will call all of us and ask if we want to go to mediation without the others."
- "I am currently involved in a case where … I have engaged in formal discovery, completed the *Belaire* process, interviewed numerous class members, and scheduled a mediation … After going through all that, last week I learned about a … top filing [by another plaintiffs' firm]…. [The top-filing attorneys] didn't even say anything to me, even though over one month ago they filed their [Initial Status Conference] statement which has my case referenced as a related case, and they were ordered to file

a notice of related case. They never filed a notice of related case."

- "So . . . [defense firm] convinced another attorney to add a PAGA claim, and is attempting to settle the case so as to moot our case. The settlement is awaiting court approval. We just got wind of this, and advised [defense firm] of the unethical nature of what they did."
- "Reverse auctions are an existential threat to PAGA's effectiveness. If years of litigation in a [high-value] case can be undercut a few weeks before trial by a case settling for one percent of that, it is not just the impacted workers, the LWDA and the attorneys who are harmed. It is workers throughout California as a whole, because the one remaining tool for group-wide enforcement will have been rendered ineffective. Attorneys cannot and will not make the enormous investments of time and money required in cases of this kind if everything they've done takes only a last-minute side-deal to derail."

C. Task Force Findings on Reverse Auctions

The Task Force received more than 20 reverse auction reports from CELA members in the 2020-2021 time period, suggesting that the use of reverse auctions is a growing trend. This is surely an undercount because CELA does not receive reports from non-members, and many CELA members are not comfortable reporting what they perceive to be misconduct by fellow plaintiffs' attorneys.

The Task Force found that a general consensus among CELA wage-and-hour practitioners that reverse auction and top-filing practices have dramatically increased since the phenomenon started in about 2017. The Task Force concluded that these trends are bad for CELA members, bad for California workers, and bad for the State. The Task Force specifically identified the following harms that result from reverse auctions:

1. They improperly drive down settlement value.
2. They drive up litigation costs, because plaintiffs have to spend resources engaging in side disputes with other plaintiffs.
3. They harm the State by decreasing the LWDA's recovery of penalties for violations of the law. This in turn weakens the LWDA's enforcement and monitoring efforts.
4. They clog the judicial system with additional case filings and increased litigation within cases.
5. They allow defendants to pit plaintiffs' lawyers against each other, causing a deterioration in civility and trust within the bar.
6. They degrade the respect that judges, mediators, other attorneys, and the public have for lawyers.
7. They undermine the public policy supporting fee-shifting statutes by granting fees to only the "settling" lawyer, regardless of the work performed in the other cases.
8. They result in a destabilization and degeneration of the market for legal services by pushing competent, honorable lawyers out of the market.

D. The CELA Board Adopts a Reverse Auction Policy in 2020 With the Goal of Encouraging Cooperation Among Plaintiffs' Lawyers and Advancing the State's Interests in Robust Labor Enforcement

After more than a year of investigation, the Task Force presented the CELA Board with a proposed Reverse Auction Policy, which the Board approved in October 2020. (Appendix A.)[3] The central purpose of the Policy is to encourage cooperation among CELA members when they represent plaintiffs in cases with overlapping claims. Cooperation and coordination among plaintiffs is good for workers and the State because defendants cannot attempt to settle with one plaintiff under threat of moving on to a second plaintiff if a low-value offer is not accepted. (Appendix A, at § 3.5.1 ["Plaintiffs' counsel's shared goal should be to exert maximum litigation pressure on the defendant to achieve the best outcome for the workers."].) Cooperation is good for the courts: it reduces the number of objections, motions to intervene, and appeals filed by competing plaintiffs. Cooperation also protects the State's interests in enforcing the Labor Code and deterring future violations.

The Policy suggests a number of "best practices" for plaintiffs' attorneys to follow. It encourages CELA members to search for already-existing cases with overlapping claims to avoid top-filing. If CELA members learned that they have

[3] The CELA Reverse Auctions Policy (October 8, 2020) is also available at www.cela.org/ReverseAuctions.

inadvertently top-filed, the Policy encourages them to reach out to the plaintiffs' lawyer in the other case to discuss how to proceed. If the first-filed case is already well-developed, the top-filing attorney should consider voluntarily staying their case and waiting until the first-filed case has resolved. If CELA members have overlapping cases that are both fairly well-developed, the Policy encourages them to work together. The Policy encourages all parties with overlapping cases to be included in any mediation that might result in the settlement of the overlapping claims.

CELA requires all members to sign a pledge to abide by the Reverse Auction Policy. CELA has also developed a mechanism to discipline CELA members who engage in reverse auctions of other CELA members.

CELA has taken these steps in part because courts have proven unwilling to discourage reverse auctions. For example, trial courts rarely, if ever, sanction defendants for failing to give notice of related and overlapping PAGA cases, as required by California Rule of Court 3.300. As in the case at hand, courts are reluctant to coordinate overlapping cases and appoint lead counsel. While some individual trial courts have taken affirmative steps to issue guidance on the settlement of PAGA claims, most have not. The appellate courts have provided little guidance to trial courts on evaluating PAGA settlements, resulting in widely varying procedures across California.

Turrieta is the first PAGA settlement approval case to come before the California Supreme Court. From CELA's perspective, the Court is at a critical juncture. If the Court holds that parties

in overlapping cases have no right to object, intervene, or move to vacate a judgment that extinguishes their case, the Court will cut off most avenues for appellate review of PAGA settlements. As discussed in the next section, such a result would be contrary to the purpose of PAGA and would encourage harmful reverse auction and top-filing practices.

VI. PART THREE: A RULING THAT A COMPETING STATE PROXY HAS NO RIGHT TO BECOME A PARTY THROUGH INTERVENTION OR MOVING TO VACATE THE JUDGMENT WOULD CONTRAVENE PUBLIC POLICY IN FAVOR OF ROBUST LABOR CODE ENFORCEMENT

A. Trial courts will lose access to crucial information if objections and intervenors are disallowed

The first practical effect of a ruling prohibiting objections and intervenors is that trial courts will lose access to crucial information about the settlement. When courts review PAGA settlements, they rely entirely on the information presented to them by the settling parties. Although the LWDA is given notice of the settlement, it almost never objects. Based on CELA's investigation, the LWDA has appeared in the trial court no more than a dozen times—ever. LWDA admittedly lacks the resources to review settlements or file objections, let alone on the timeframe contemplated by many parties filing for settlement approval.

In 2020, a CELA member sent an email to the LWDA asking if its failure to object after receiving a proposed settlement agreement meant that it approved of the settlement. (Appendix B.) The LWDA responded:

> We do not have the resources to be able to provide any opinion on the proposed settlement or issues raised in support of or opposition to approval of the proposed settlement.
>
> As detailed in the Budget Change Proposal, it is virtually impossible for the LWDA to evaluate each proposed settlement, or to comment or object to every inadequate PAGA settlement. The LWDA also lacks the resources to actively litigate through conclusion court orders or judgments that erroneously approve PAGA settlements.
>
> The LWDA's failure to comment, object, or appeal with respect to a PAGA settlement should not be viewed as evidence that the LWDA agrees with the settlement or believes the settlement should be, or should have been, approved. Instead, and among other things, ***the LWDA can and does rely on PAGA agents in overlapping cases to bring settlement defects to a court's attention and to otherwise protect the State's interests from the dangers of inadequate or overbroad settlements.***

(*See* Appendix B [emphasis added].) The LWDA's inability to review most settlements means that the trial court is entirely dependent on the settling parties to provide information about the settlement.

There is currently no requirement that settling parties disclose the existence of overlapping cases when seeking settlement approval. The PAGA statute does not require it, nor

do any appellate court decisions or the California Rules of Court.[4] If objections and motions to intervene are prohibited, a trial court will *never* learn that a settlement has extinguished a stronger, more-developed case. In the above example, absent the right to object, the trial court would not have learned that the settlement extinguished Shauna's far more developed PAGA case. CELA urges the Court to adopt a rule that favors a fulsome, complete record for the trial court to determine whether a PAGA settlement is fair and consistent with the purposes of PAGA.

B. Appellate courts are authorized to require trial courts to consider objections to PAGA settlements

Lyft argues that PAGA's "plain language" prohibits plaintiffs in overlapping PAGA cases to submit objections. (Lyft's Answer Brief, at 21-25.) But PAGA is silent on the settlement approval process, saying only that the court must "review and approve" settlements. This case thus raises the question about how to interpret that phrase.

To answer this question, the Court should look to the class action context, where *most* of the requirements for settlement approval come not from Federal Rule of Civil Procedure 23 or California Code of Civil Procedure § 382, but from appellate court decisions such as *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, and *Kullar v. Foot Locker Retail, Inc.* (2008) 168

[4] Such disclosures arguably fall within an attorney's duty of candor to the tribunal, *see* Cal. R. Prof. Cond. 3.3, but this requirement has not been addressed by any appellate court to date.

Cal.App.4th 116. These decisions offer extensive, detailed requirements for trial courts in considering class action settlements, including instructing courts to consider, *inter alia*, the strength of the plaintiff's case, the risk of continued litigation, and the reaction of class members to the settlement. They must also ensure that the settlement is not the product of collusion.

The absence of enumerated requirements in the PAGA statute is no impediment to this Court clarifying what the settlement approval process requires, based on well-established statutory construction principles, like the Legislature's purpose in enacting PAGA, the public policy of construing Labor Code provisions broadly to protect employees, fairness, and the inherent authority of courts to manage their dockets.

C. Prohibiting intervention and motions to vacate would make PAGA settlement approvals appeal-proof

The example above demonstrates the risk of adopting Lyft's position. Prohibiting Shauna from intervening or moving to vacate the judgment would have the effect of making the Hospital's settlement immune from appeal. (*See Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 267 [non-parties may become parties to a class action with standing to appeal a settlement approval order only by seeking intervention or filing a motion to vacate the judgment].) The only conceivable way an order approving a PAGA settlement would be reviewed is if the LWDA objected and sought to intervene, and then appealed if it thought that settlement approval was erroneous. This happens

exceedingly rarely, and, as described above, the LWDA simply does not have the resources to seek intervention in the hundreds of PAGA settlements that are submitted for approval every year.

A ruling that competing deputized plaintiffs have no right to intervene or vacate a judgment will extinguish appellate review of cases and stifle appellate jurisprudence of PAGA settlements. Experienced PAGA attorneys who practice in multiple jurisdictions report that there is a confusing patchwork of procedures and standards in place for the review of PAGA settlements. Important and novel questions about the administration of PAGA settlements will likely *never* be answered by an appellate court if this Court rules that parties in overlapping PAGA cases cannot become parties with standing to appeal through intervention or moving to vacate the judgment.

Equally troublesome, prohibiting objections and making PAGA approvals appeal-proof will encourage reverse auction and top-filing practices. Defendants who know that competing PAGA plaintiffs have no right to object or appeal will have every incentive to orchestrate reverse auctions and get the broadest release and lowest settlement possible from the weakest plaintiff. Unscrupulous plaintiffs' attorneys will be emboldened to find a well-developed PAGA case, quietly file a copycat case, and approach the defendant about settlement. The plaintiffs whose case is extinguished will not be able to alert the court that there might be a problem with the settlement. Appellate courts will never learn about these unsavory practices because there will be

virtually no appeals. Such an outcome would undermine PAGA's purpose and CELA's extensive efforts to combat reverse auctions.

D. Encouraging Reverse Auctions and Top-Filing Will Drive Out Honorable Attorneys and Undermine the Existence of a Functioning Market for Labor Code Enforcement

Finally, precluding objections or appeals of PAGA settlements will drive honorable attorneys out of the market for PAGA enforcement. After Shauna was top-filed and reverse auctioned in her nurses' case, she went into a deep funk. She had agreed to take on the case in part because PAGA is a fee-shifting statute. Attorneys like her who put a significant amount of work into a public interest case, and who prevail, are supposed to be compensated for their time. This is why the California Legislature created fee-shifting statutes in the first place. (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 583 ["Attorneys considering whether to undertake cases that vindicate fundamental public policies may require statutory assurance that, if they obtain a favorable result for their client, they will actually receive the reasonable attorney fees provided for by the Legislature. . . ."); *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1289 ["[T]he private attorney general doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private

actions to enforce such important public policies will as a practical matter frequently be infeasible."].)

Shauna had turned away other promising fee-generating cases, like FEHA discrimination cases, during the two years she worked almost exclusively on the nurses' case. She had also sunk $25,000 in costs, most of which she could not recoup. Meanwhile, she watched as another plaintiffs' attorney collected $100,000 in fees for doing little work other than file a copycat lawsuit, attend a mediation, and seek settlement approval. The trial court's refusal to hear her objections or allow her to intervene meant that trial courts probably would not protect her PAGA fees in the future. The appellate court couldn't help her either: she had no standing to appeal.

Shauna decided never to put herself in this position again. If the courts weren't going to protect her hard work in PAGA cases, and were going to let latecomers extinguish her case in the blink of an eye without even hearing her objections, then Shauna was not going to take on any PAGA cases ever again.

If this Court does not permit attorneys like Shauna to object, or to become parties with standing to appeal by seeking to intervene or vacate the judgment, then honorable, hard-working attorneys are going to stop taking PAGA cases. Instead, attorneys who routinely top-file other PAGA plaintiffs, and who negotiate secret low-value settlements rather than litigate aggressively, will overwhelmingly become the private enforcers of the Labor Code. Such an outcome would be a travesty.

VII. CONCLUSION

The Court has the opportunity in this case to create a rule that encourages cooperation among the plaintiffs' employment bar, and strengthens the important public policy of the State of California to eliminate wage theft and deter violations of the Labor Code. Those who engage in top-filing and reverse auction practices must understand that their unscrupulous practices will receive scrutiny from the trial court and appellate courts. This can be accomplished only if this Court reverses the opinion of the California Court of Appeal and rules that a PAGA plaintiff whose case is extinguished by a settlement in an overlapping case has the right to object to the settlement, to intervene, and to file a motion to vacate the judgment.

DATED: July 11, 2022

Respectfully submitted,

By: /s/ Lauren Teukolsky
Lauren Teukolsky
TEUKOLSKY LAW, APC

Attorney for Amicus Curiae California Employment Lawyers Association

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Cal. Rules of Court, rule 8.204, subd.(c)(1). The brief has been prepared in 13-point Times New Roman font. The wordcount is 6,290 words based on the word count of the program used to prepare the brief

By: /s/ Lauren Teukolsky
Lauren Teukolsky
TEUKOLSKY LAW, APC

PROOF OF SERVICE

I, the undersigned, declare that I am a citizen of the United States, over the age of 18 years, reside in Pasadena, California, and not a party to the within action. My business address is TEUKOLSKY LAW, APC, 201 S. Lake Ave., Ste. 305, Pasadena, CA 91101.

On the date set forth below, I caused a copy of the following to be served:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION AND BRIEF OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

on the following interested parties in this action via the **TrueFiling portal:** I filed such document(s) via TrueFiling, thus sending an electronic copy of the filing and effecting service pursuant to CRC 8.212(b)(1), (c).

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Attorney for California Employment Lawyers Association, Depublication Requestor	Jennifer R. Kramer Jennifer Kramer Legal APC 801 South Figueroa St., Suite 1130 Los Angeles, CA 90017-2573

Additionally, because I submitted to TrueFiling an electronic copy of the document to the California Supreme Court, it satisfies any service requirement to the California Court of Appeal.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on the 11th day of July, 2022, in Pasadena, CA.

By: /s/ Lauren Teukolsky
Lauren Teukolsky
TEUKOLSKY LAW, APC

PROOF OF SERVICE

I, the undersigned, declare that I am a citizen of the United States, over the age of 18 years, reside in San Francisco, California, and not a party to the within action. My business address is ALTSHULER BERZON LLP, 177 Post St., Suite 300, San Francisco, CA 94108.

On the date set forth below, I caused a copy of the following to be served:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION AND BRIEF OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

on the following interested parties in this action via

U.S. Mail: I placed the envelope, sealed and with first-class postage fully prepaid, for collection and mailing following our ordinary business practices. I am readily familiar with the practice of the firm for the collection and processing of correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Mail Postal Service in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

Clerk of the Court, *Los Angeles Superior Court*	Hon. Dennis J. Landin c/o Clerk of the Court Los Angeles Superior Court 111 N. Hill Street Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on the 11th day of July, 2022, in San Francisco, CA.

By: /s/ Desiree Medina
Desiree Medina

APPENDIX A

The CELA Reverse Auctions Policy

October 8, 2020

1. What Is the Problem and Why Does It Matter? What Is a Reverse Auction?

§ 1.1. Introduction. The "reverse auction" is a significant and increasing obstacle to the vindication of workers' rights. It is a procedural gambit that defendants use to drive down case value through a "divide and conquer" strategy, pitting plaintiffs' lawyers against each other. Specifically, a reverse auction is when the defendant realizes (or fabricates) a situation of multiple overlapping class/collective/representative cases, selects the more receptive party to negotiate with, and settles with them at a reduced price. Given the multiple overlapping cases, the defendant has artificially increased bargaining power, since it always has the option of turning away from the negotiations with one plaintiff in favor of negotiating with the other plaintiff, and both plaintiffs know this, so they suffer an abnormal pressure to accept below-market settlement terms. The plaintiffs know that there is significant risk that the other plaintiff, with whom they are not coordinating, may underbid them. Knowing that half a loaf is better than none, the plaintiff is under pressure to take half a loaf. And knowing that, the other plaintiff is under pressure to take a quarter loaf. And so on.

Reverse auctions may occur even when plaintiff's counsel are unaware of other actions, as the defendant manipulates them without their appreciation of the significance of the settlement scope. Only defendants and their counsel know all the actions that have been filed against the company and the claims in each action. Defendants can use this information asymmetry to their advantage, sharing information selectively with different sets of plaintiffs' counsel to optimize their leverage to settle all claims. Employment claims can be varied and complex, and different theories can be pursued to obtain the same or similar relief under a single claim. This complexity creates opportunities for multiple theories of liability to be released via a single claim (e.g., missed meal periods and unpaid work time under Labor Code § 510).

Representative action settlements are complex, with multi-page memorandums of understanding and 30- to 50-page settlement agreements. While the major terms of the settlement are hammered out by the mediator at the mediation session, the final settlement agreement involves weeks or months of negotiations, and defendants generally try to expand the scope of the release as much as possible. But the expansion of the release is just one issue among many being negotiated (e.g., timing of payment, plan of allocation, tax treatment of awards, PAGA allocation, confidentiality issues, and various other provisions for which defendants argue that are unfavorable to workers), and subtle changes to the release language may not seem as significant as other edits during the negotiations. If plaintiffs' counsel are not aware of or attentive to the interests of class members in another class action, they can unwittingly participate in a reverse auction. Similarly, courts have a fiduciary obligation to protect the absent class members' interests, but they too may lack complete knowledge or appreciation of the significant of overlapping actions. Without full information and understanding of the dynamics, courts can (and have) approve settlements that harm workers because they include reverse auction elements.

While a reverse auction may involve collusion between a defendant and a plaintiff, such overt misconduct is extremely rare and is present in only a tiny fraction of reverse auctions. As

the commentators and caselaw recognize, collusion is not a necessary component for a reverse auction. Rather, a reverse auction results from the defendant's exploitation of the structural circumstance of overlapping cases to leverage an unreasonably cheap settlement.

§ 1.2. Where do reverse auctions occur? Reverse auctions can occur in any type of representative action (e.g., a class action, PAGA representative action, FLSA collective action, etc.) asserting any kind of right (e.g., wage and hour, discrimination, etc.). Many reverse auctions have occurred in other fields (e.g., consumer), and in recent years they have become more common in employment law, including both wage and hour and discrimination cases, particularly as more and more attorneys begin handling employment class actions and finding clients becomes easier via social media. CELA members have increasingly raised the alarm on listservs, in discussions, and at conferences that the reverse auction is proliferating a key weapon in the management lawyer "playbook," and members describe increasing conflicts with other CELA members and non-members in reverse auction scenarios that harm California's workers.

§ 1.3. What are the consequences of reverse auctions? Reverse auctions harm workers in several ways. First, they drive down settlement value. Second, they drive up litigation costs, because plaintiffs not only have to engage in the usual adversarial litigation with the defendant, but they also have to spend resources protecting against and engaging in side disputes with other plaintiffs. Third, reverse auctions harm the State by decreasing the LWDA's recovery of penalties for violations of the law. This in turn weakens the LWDA's enforcement and monitoring efforts. Fourth, reverse auctions clog the judicial system with additional case filings and increased litigation within cases, as competing plaintiffs spar with each other. Fifth, reverse auctions harm CELA members because they allow defendants to pit plaintiffs' lawyers against each other, causing a deterioration in civility and trust within the bar. This disintegration of relationships between individuals threatens to despoil the strong, collaborative spirit of CELA and the plaintiffs' bar. Sixth, reverse auctions degrade the respect that judges, mediators, other attorneys, and the public have for plaintiffs' lawyers, as they see plaintiffs' lawyers failing to cooperate, undermining each other, and squabbling over money and case control. Seventh, reverse auctions cause CELA members to lose fees and costs incurred during years of hard work, when the case is stripped away from them by a latecomer. Eighth, all of these harms together result in a destabilization and degeneration of the market for legal services by pushing competent, honorable lawyers out of the market.

2. Statement of Principles

§ 2.1. What is the purpose of this policy?

The CELA Reverse Auctions Subcommittee's goals are

1. To advance worker welfare
2. To ensure that the tools used to advance worker welfare – e.g., the class action device, PAGA, the Labor Code, etc. – are protected and robust
3. To promote civility among members of the plaintiffs' bar and within CELA
4. To protect the ability of CELA members to efficiently litigate their clients' claims and achieve the best outcomes for their clients.
5. To use the CELA platform to educate mediators, arbitrators, and judges.

In the Subcommittee's view, worker interests are paramount and that, regardless of outcome, plaintiffs' attorneys should take efforts to ensure workers' rights are best served and protected.

These guidelines attempt to achieve those goals by incentivizing respectful, collegial, cooperative, and efficient interactions between members of the plaintiffs' bar generally and within CELA specifically. In particular, these guidelines seek to limit reverse auctions and protect workers and worker advocates from this particular defense tactic.

§ 2.2. How can one tell when there is a reverse auction?

Determining what is a reverse auction is often challenging, because case valuation hinges on calculating exposure, assessing risk, and gauging bargaining power, which in turn depends on interpreting countless subjective and objective factors in the context of what is usually a fairly complex case. Factors can include:

1. **Knowledge.** Plaintiffs' counsel's efforts taken to identify overlapping cases before filing their own case and their awareness of the specific overlapping case at issue
2. **Notice.** Plaintiffs' and defendants' prompt notice to the courts, litigants, and mediators about the potential overlap
3. **Cooperation.** Plaintiffs' counsel's efforts to seek cooperation, collaboration, and coordination of cases with other plaintiffs' counsel
4. **Inclusion.** Plaintiffs', defendants', mediators', and courts' efforts to ensure that all counsel in all overlapping cases are included in settlement discussions from the beginning
5. **Work performed.** The amount and quality of work performed by plaintiffs' counsel in different cases (e.g., discovery, key motions)
6. **Timing.** The time delay between filing of the Overlapping Claims
7. **Litigation strength.** The strength of plaintiffs' litigation position in different cases (e.g., class certification denied, key motions won or lost)
8. **Eliminating overlap.** Plaintiffs', defendants', and mediators' efforts to ensure a carve-out of overlapping claims in settlement releases so that prosecution of overlapping actions may continue despite a settlement in one action
9. **Expansion of scope.** Sudden expansion of the scope of the Class definition leading up to settlement
10. **Settlement strength.** The strength of the settlement (primarily, the total exposure for all claims, including the Overlapping Claims, compared to the actual settlement recovery, as well as other relief such as injunctive relief, as well as other terms such as confidentiality, reversion, claims process, plan of allocation, etc.)
11. **Fees and costs.** Plaintiffs' counsel's agreement to a fair allocation of fees and costs among all counsel

3. Guidelines for Conduct

CELA urges that the following guidelines be followed in situations involving Representative Actions (defined below) in which there are Overlapping Claims (defined below).

As a community of workers' rights advocates that prides itself on collaborative efforts in the service of justice, CELA operates from the assumption that its members are devoted to the pursuit of justice, ethical conduct, and cooperation. CELA members respect each other's work and time invested in advocating for their clients and the cause of justice. These guidelines are designed to promote workers' rights advocates efforts to work alongside each other in a spirit of camaraderie and, specifically, to promote adoption of best practices to identify overlapping cases and resolving overlaps in a way that is in the best interests of workers.

§ 3.1. Definitions

§ 3.1.1. Definition of "Representative Action" and "Class." This Policy addresses all types of representative actions, because the nature of the reverse auction harm is that it allows for a release of claims for absent individuals (usually, individuals with whom no attorney has a signed retainer agreement) whom multiple attorneys seek to represent. Examples of such actions are class actions, FLSA collective actions, and PAGA actions. In this Policy, such actions are referred to as "Representative Actions." For ease of reference, this Policy uses the terms "Class" and "Class members" to refer to the group of individuals sought to be represented, where as a class, a collective, a group of aggrieved employees in a PAGA action, or some other situation. Similarly, the term Class definition is used to refer to the definition of the group of individuals sought to be represented, regardless of whether it is in a class action or other Representative Action context.

Representative Actions often have multiple components in a hybrid structure, such as a class action with a PAGA claim or a class action with a collective action claim, or all three together.

§ 3.1.2. Definition of "Overlapping Claims." For purposes of the Policy, an overlap is a situation where there are multiple Representative Actions, and the Class definitions overlap in a more-than-insignificant way (e.g., a 1% overlap is likely insignificant; a 10% overlap is likely not), with respect to particular claims being asserted, in a manner that the release of claims in one action could reasonably be expected to compromise claims in the other action (e.g., assertion of off-the-clock claims and rest break claims likely satisfies this element, and overtime misclassification claims under state law and federal law likely satisfy this claim, and wage statement claims and late payment claims likely satisfy this element, whereas gender discrimination and race discrimination claims likely do not). In this Policy, "Overlapping Claims" means claims on behalf of some (or all) of the same individuals in multiple cases that overlap in a more-than-insignificant way. Claims may overlap even where named defendants are not identical.

§ 3.1.3. Definition of "cases." The term "cases" in this Policy should be construed broadly to embrace all forms of seeking relief from a defendant, including not only filed court cases but also arbitrations, agency charges, PAGA letters, demand letters, prelitigation negotiations, etc.

§ 3.2. Investigation. When an attorney ("Attorney B") is considering pursuing claims on a representative basis, they should diligently search for cases involving Overlapping Claims. Sources include lists of publicly filed cases in state and federal court, the LWDA's PAGA notice database, SEC filings, etc.

§ 3.3. Response to awareness of overlap. If Attorney B learns that their case (Case B) overlaps with a case (Case A) brought by another attorney (Attorney A), Attorney B should contact Attorney A to attempt to amicably negotiate the overlap. This discussion will help both attorneys to determine whether and how to proceed with the cases.

§ 3.4. Discussion of overlap and determination of "case strength." First, the attorneys should discuss their cases to determine whether there truly are Overlapping Claims and if so, the strength of each case. "Case strength" gauges the relative strength of the two cases' litigation positions. Case strength can be determined by consideration of how long the case has

been on file, procedural posture, progress made in prosecuting the claims, work performed for the benefit of the Class members, litigation obstacles overcome, venue, the court's rulings in this and other cases, reasonable inferences regarding the court's future rulings, remaining hurdles, whether the claims have been diligently prosecuted or abandoned, and other factors. Both attorneys should describe their cases with precision, including (a) the Class definition (positions at issue, locations at issue, time period at issue) and which claims they actually intend to pursue, (b) the case strength, and (c) any other relevant factors.

To the extent that a Class definition is vague, ambiguous, facially overbroad (i.e., too broad to have any realistic chance at proceeding to judgment in adversarial litigation), otherwise ill-defined, or broader than what an attorney actually intends to pursue, the attorney has an obligation to define the Class more rigorously to identify true areas of overlap, and take reasonable steps to memorialize that Class definition in their case (e.g., by correspondence with the defendant or court filing).

Both attorneys should approach this discussion with candor, communicating in a forthcoming, honest, detailed, and cooperative manner.

§ 3.5. Resolution of overlap. Then, if there are Overlapping Claims, the attorneys should strive to resolve who will move forward in asserting which Overlapping Claims through an explicit written agreement. Options include the following:

§ 3.5.1. Cooperation. Plaintiffs' counsel in different cases asserting Overlapping Claims should cooperate and coordinate as much as reasonably possible. This may include one or more the following: formal coordination (e.g., JCCP, MDL), formal consolidation of cases, pursuit of all claims in a single case (and dismissal of the other case), sharing information, sharing discovery, serving each other with pleadings, alerting each other to important developments, maintaining open communication in a spirit of candor, etc. They may, for example, enter into an agreement that confirms allocation of work responsibilities, allocation of fees and costs, etc.

Plaintiffs' counsel's shared goal should be to exert maximum litigation pressure on the defendant to achieve the best outcome for the workers.

§ 3.5.2. Deference. Where feasible, the attorneys should agree that one case will voluntarily defer to the other case as to the Overlapping Claims, so that the overlap is eliminated or is no obstacle to both cases moving forward. To the extent that it is difficult for the attorneys to agree, the best practice is for the case in a weaker position (based on the factors listed in § 3.4) to defer to the stronger case.

Deferring generally entails voluntarily carving the Overlapping Claims out of one's case, no longer pursuing them, and not allowing the defendant to entice plaintiffs' counsel to settle the Overlapping Claims.

Deferring does not preclude an individual plaintiff from pursuing Overlapping Claims individually (since the purpose of these rules is to protect against abuses in the settlement of Representative claims).

The practical consequence of deference may be a partial or complete stay, a partial or complete dismissal of the claims in one case (i.e., there are no significant claims left to litigate because they all overlap), in which case plaintiffs' counsel in that case should offer to introduce

the client[s] to the other attorney, so that the client[s] can consider representation by the other attorney.

§ 3.5.3. Judicial resolution. Where the attorneys cannot agree on deference or cooperation, and both attorneys seek to prosecute the Overlapping Claims, the attorneys should present the question of case leadership to the court[s] (preferably jointly, but if necessary individually), so that the court can impose a leadership structure for purposes of prosecution of all Overlapping Claims (akin to an MDL or JCCP leadership determination). Where plaintiffs' counsel cannot agree, courts are encouraged to craft a leadership structure for plaintiffs' counsel at the outset of the case, consistent with the structure and principles embodied by Fed. R. Civ. P. 23(g) (empowering federal courts to designate interim class counsel before addressing class certification), in all representative actions (not just class actions), to promote coordination and cooperation and limit the danger of reverse auctions. Any such leadership decision should confer unique responsibility to represent the relevant Class, including settlement authority. In other words, where a leadership decision has been made, plaintiffs' counsel who are not deemed to be interim class counsel[1] should not act on behalf of the class. For example, they should not speak for the class in settlement negotiations.

All plaintiffs' counsel and defendants should respect these decisions regarding designation of interim class counsel, whether made by plaintiffs' counsel or a court.

§ 3.6. Memorialization of the resolution. Regardless of the resolution in § 3.5, each attorney should immediately confirm the result in writing. Failure to do so may cast doubt on whether the attorney was acting in good faith.

§ 3.7. Client notice. If deference is appropriate (per § 3.5.2), regardless of whether the attorneys agree that one should defer, the attorney for the weaker case should inform their client[s] of the pendency of the other case, describe the Overlapping Claims, provide a copy of the operative complaint, and provide the plaintiffs' counsel's contact information, so that the client[s] can make an informed decision whether to consult that attorney regarding the overlapping claims.

§ 3.8. Related case notices. If any plaintiff or defendant learns that there are any Overlapping Claims in multiple filed cases, they should immediately file a notice of related case in their case, regardless of the particular requirements of the applicable court rules.

§ 3.9. Litigation. As early as feasible, e.g., at the initial case management conference, plaintiffs and defendants should inform the court about this Policy and state that they intend to abide by it.

§ 3.10. Settlement discussions

§ 3.10.1. Participation in discussions. If interim class counsel have been designated, only they should lead settlement discussions on behalf of the workers. If interim class counsel have not been designated, when a plaintiff or defendant considers settlement discussions, they should do everything reasonably possible to ensure to include in the settlement discussions (including the choice of mediator, scheduling mediation, etc.) all plaintiffs' counsel pursuing Overlapping Claims, though plaintiffs' counsel with weaker cases (as defined in § 3.4) need not be included. If a mediation is scheduled, all plaintiffs and defendants should

[1] "Interim class counsel" includes interim PAGA counsel, interim collective counsel, or the like.

immediately inform all attorneys pursuing Overlapping Claims of the mediation date, time, and location and invite them to attend, though plaintiffs' counsel with weaker cases need not be included.

§ 3.10.2. Certifications by parties. Mediators are encouraged to require plaintiffs and defendants scheduling mediation of Representative Actions to each separately certify, at the moment they schedule the mediation, that they have invited all plaintiffs asserting Overlapping Claims to the mediation, though plaintiffs' counsel with weaker cases (as defined in § 3.4) need not be included. When scheduling mediation, the parties should agree on the general scope of the release, i.e., the list of claims, the class definition[s], and the defendant[s] to be considered for settlement discussions. This agreement need not include the specific terms or contours of the release.

§ 3.10.3. Certifications by mediators. Mediators are encouraged to confirm that they will not facilitate reverse auctions, and that if they become aware that Overlapping Claims are being negotiated, they will insist on the participation of all plaintiffs asserting such claims in any settlement discussions, though plaintiffs' counsel with weaker cases (as defined in § 3.4) need not be included. CELA will maintain a list of mediators who abide by these guidelines for the benefit of attorneys looking for mediators.

§ 3.10.4. Overbroad releases. Plaintiffs and defendants should not settle claims that are time-barred under the statute of limitations applicable in the case being settled or claims not included in the operative complaint of the case being settled, and mediators should not facilitate agreements that purport to release such claims. Releases of claims or limitations periods covered in other cases without plaintiffs' representatives involved in the settlement are particularly disfavored.

§ 3.11. Settlement agreements. Plaintiffs and defendants should not enter into settlement agreements of any kind (including informal agreements, term sheets, memorandums of understanding, etc.) that purport to release Overlapping Claims without the participation of all plaintiffs pursuing such claims in all settlement discussions, though plaintiffs' counsel with weaker cases (as defined in § 3.4) need not be included.

§ 3.12. Settlement approval

§ 3.12.1. Overlapping Claims are a factor. In settlement approval papers, Plaintiffs and defendants should describe whether there are Overlapping Claims being asserted against the defendant. The absence of such claims should be presented as a factor supporting settlement approval. The presence of such claims should be carefully addressed in detail.

§ 3.12.2. Settlement approval by motion. Representative settlements should only be approved on noticed motion (e.g., not through stipulation). Normally, where there are Overlapping Claims, neither plaintiffs nor defendants should request, and courts should not grant, requests to shorten time absent unusual circumstances or agreement of all plaintiffs' counsel, including any not included in the settlement.

§ 3.12.3. Presumption against approval where some plaintiffs' counsel not involved. If there are multiple cases involving Overlapping Claims, and some plaintiffs' counsel are not signatories to the settlement agreement (other than plaintiffs' counsel with weaker cases (as defined in § 3.4)), there should be a presumption against settlement approval. In such circumstances, because of the nature of reverse auction bargaining power disparities, it is likely

that the settlement terms are unreasonably favorable to the defendant. In such circumstances, it is likely that the result that best protects the Class members' interests is for the court to deny settlement approval motions with instructions to renegotiate the terms with all plaintiffs' counsel (other than plaintiffs' counsel with weaker cases (as defined in § 3.4)) fully participating. Alternately, in a circumstance where the settlement could be used to delay or prevent a significant event in a parallel action asserting Overlapping Claims (e.g., a motion for summary judgment, class certification, trial, etc.), the court should defer ruling on the settlement approval motion, stay the to-be-settled action, and allow the parallel action to proceed to resolution of that significant event, then rule on the settlement approval motion.

§ 3.12.4. Litigation after collapse of a settlement. If the court's caution in protecting Class members from the possibility of a reverse auction results in the settlement collapsing, the court should use its case management power and other tools to encourage plaintiffs' counsel to cooperate and collaborate. In many instances, designation of interim Class counsel (or the appropriate equivalent in a non-class context) may be necessary, possibly on contested motion. While such a step may not directly implicate the merits and may be uncomfortable, it is often necessary to ensure that the Class gets the best representation possible and the danger of a future reverse auction is averted.

4. Conclusion

In conclusion, the Subcommittee hopes that these guidelines will help facilitate cooperation among plaintiffs' counsel and minimize the occurrence of reverse auctions, thereby ensuring that the substantive laws enacted by state and federal legislators are properly enforced by plaintiffs' counsel for the benefit of workers.

APPENDIX B

RE: PAGA Settlement Briefing

1 message

Kelly, Patricia@DIR <PKelly@dir.ca.gov> Thu, Nov 12, 2020 at 10:57 AM
To: Jennifer Kramer <jennifer@laborlex.com>, "Balter, David@DIR" <DBalter@dir.ca.gov>

Dear Ms. Kramer-

We do not have the resources to be able to provide any opinion on the proposed settlement or issues raised in support of or opposition to approval of the proposed settlement.

As detailed in the Budget Change Proposal, it is virtually impossible for the LWDA to evaluate each proposed settlement, or to comment or object to every inadequate PAGA settlement. The LWDA also lacks the resources to actively litigate through conclusion court orders or judgments that erroneously approve PAGA settlements.

The LWDA's failure to comment, object, or appeal with respect to a PAGA settlement should not be viewed as evidence that the LWDA agrees with the settlement or believes the settlement should be, or should have been, approved. Instead, and among other things, the LWDA can and does rely on PAGA agents in overlapping cases to bring settlement defects to a court's attention and to otherwise protect the State's interests from the dangers of inadequate or overbroad settlements.

Patricia M. Kelly

Attorney

Department of Industrial Relations

Division of Labor Standards Enforcement

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From: Jennifer Kramer <jennifer@laborlex.com>
Sent: Wednesday, November 11, 2020 9:40 AM
To: Balter, David@DIR <DBalter@dir.ca.gov>
Cc: Kelly, Patricia@DIR <PKelly@dir.ca.gov>
Subject: Re: PAGA Settlement Briefing

Good morning,

I hope this finds you both well. I wanted to follow-up as to the status of your office's review of proposed PAGA settlement in *Chalian* v. CVS. As a reminder,

my firm represents plaintiffs in the *Hyams* v. CVS case, which properly exhausted claims with the LWDA under Labor Code sections 850-851.

The *Chalian* Plaintiffs' have filed a motion seeking approval of the PAGA settlement. Their main argument is that the LWDA has not objected to the proposed settlement. ECF 180, p. 27:16-17. I know that you are likely very busy but if we could get a statement that it is not the intent of the LWDA to equate silence with approval that would be greatly appreciated.

The *Chalian* Plaintiffs are also taking the position that claims not exhausted with the LWDA may be released. *Id*. at p. 26:7-27:3. It would be helpful to have a statement that this is not a correct application of the PAGA.

Thank you for your time.

Jennifer Kramer

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **TURRIETA v. LYFT (SEIFU)**
Case Number: **S271721**
Lower Court Case Number: **B304701**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **lauren@teuklaw.com**

3. I served by email a copy of the following document(s) indicated below:

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

7/11/2022

Date

/s/Lauren Teukolsky

Signature

Teukolsky, Lauren (211381)

Last Name, First Name (PNum)

Teukolsky Law, APC

Law Firm