RETAIL LITIGATION CENTER

VIA OVERNIGHT MAIL

July 31, 2013

Chief Justice Tani G. Cantil-Sakauye
and the Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: *Bluford v. Safeway Stores, Inc.;* Supreme Court Case No. S211498
Court of Appeal Case No. C066074

To The Honorable Chief Justice and the Associate Justices of the Supreme Court of California:

The **Retail Litigation Center** urges this Court to grant the petition for review in *Bluford v. Safeway Stores, Inc*.

Statement of Interest

The RLC is a public policy organization that identifies and engages in legal proceedings which affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide the courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

Ninety percent of the RLC's members have facilities in California and employ Californians. The RLC has filed amicus briefs or supporting letters in many important cases, such as: *Iskanian v. CLS Transportation of Lost Angeles,* Case No. S204032; *Gonzalez v. Downtown LA Motors,* Case No. S200923; *Duran v. U.S. Bank*, Case No. S200923: *Wal-Mart Stores, Inc. v. Dukes* (U.S. Supreme Court); *Standard Fire Insurance, Co. v. Knowles* (U.S. Supreme Court); *Comcast Corp. v. Behrend* (U.S. Supreme Court).

This Court Should Grant the Petition for Review To Consider Both the Novel Interpretation of Wage and Hour Standards and the Improperly Lax Standards for Class Certification Advanced by the Appellate Court

California has long recognized the legality and value of productivity compensation systems other than an hourly wage, including pay by piece, task, commission, or some other basis. Lab. Code § 200. This policy granting both employers and employees the ability to craft compensation that best fits their industry and mode of work goes back more than a century. Nevertheless, *Bluford* holds that an employer must *separately* pay non-hourly-paid workers an hourly wage for rest breaks they take, thus imposing a new obligation upon employers to have such workers clock in and out for rest breaks.

Under *Bluford*, any employer that compensates its employees based on productivity must now pay for rest breaks at an hourly rate equal to or exceeding the minimum wage, regardless of whether employees are already paid for those rest breaks as part of their productivity-based compensation, and regardless of whether an employee's wages over some period of time (e.g., pay period) exceed the minimum wage for all hours worked. *Bluford* goes even further than the recent *Gonzalez v. Downtown LA Motors* decision, which prohibited averaging of pay in piece-rate systems to determine whether minimum wages were paid, but did not address rest breaks.[1]

No case or statute until *Bluford* has required employers to record when employees are or are not taking their rest breaks, as the employer's obligation is only to authorize and permit rest breaks, and rest breaks can be waived by the employee. According to the *Bluford* decision, employers must now put productivity-compensated non-exempt employees "on the clock" for 10 minute rest breaks twice a day during a normal shift. This is a significant burden for employers in the retail industry for employees who are paid by commission, miles driven, or some measure of wages other than hourly.

As a practical matter, this decision also raises significant questions for how retail employers should calculate the regular rate upon which the hourly overtime premium is calculated. Should an employer use an allocation between the hourly pay for rest breaks and the non-hourly pay? How should it be allocated? Over what period of time should it be calculated? This novel rulemaking by the Court of Appeal creates a myriad of practical problems more appropriately considered by a regulatory or legislative body and deserves review by this Court.

The standard for class action certification that the court applied in *Bluford* is of even greater concern because of the large number of cases to which it could be applied. In particular, the *Bluford* decision would permit a trial court to rely on the plaintiff's allegations to determine whether the factual and legal issues can be tried together as a class and exclude defense evidence

[1] The RLC submitted the enclosed Letter in Support of the Petition for Review in the *Gonzalez* case.

that would demonstrate that the issues are individual to each employee. Indeed, in this case, the appellate court substituted this extraordinarily lax class certification approach for the more reasoned approach adopted by the trial court.

Conclusion

The Court of Appeals decision in *Bluford* creates a burdensome and impractical wage and hour rubric for employers and extends an improper standard for class action certification, both of which will have negative consequences for California employers and the economy. Accordingly, this Court should grant review so it can resolve these important issues.

Respectfully submitted,
RETAIL LITIGATION CENTER

By: _____
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President
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Cc: *See* attached Proof of Service.