CASE NO. S_____

SUPREME COURT OF THE STATE OF CALIFORNIA

KENNETH BLUFORD
Plaintiff and Appellant

v.

SAFEWAY STORES, INC.
Defendant and Respondent

PETITION FOR REVIEW

Court of Appeal, Third Appellate District
(C066074)

San Joaquin County Superior Court (CV028541)
The Honorable Carter P. Holly, Trial Judge

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REGULATIONS

RULES

ISSUES PRESENTED

1. An employer compensates employees based principally on productivity measures, including piece-rates, rather than hours. The collectively-bargained compensation system guarantees employees will receive wages that equal or exceed the minimum hourly wage times the total hours worked. In order to comply with the minimum wage law must the employer separately and additionally compensate employees at an hourly rate for rest periods?

This issue is related to the core issue in *Gonzalez v. Downtown LA Motors LP*, No. S210681, petition for review pending. It is also related to the wage period allocation issue pending in *Peabody v. Time Warner Cable, Inc.*, No. S204804.

2. In evaluating the community of interest criterion for class certification, is the trial court's discretion (and the appellate court's review) limited to considering the plaintiff's theory of recovery and the plaintiff's supporting declarations, or may it also consider the defendant's affirmative defenses and evidence to the extent they demonstrate the absence of a community of interest, particularly as to the question of predominance?

A conflict exists between those cases that limit review to plaintiff's theory of recovery, e.g., *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220; *Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129; *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286; *Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, and those that allow the trial

court – in its exercise of discretion – to consider the effect of affirmative defenses and defense evidence of lack of community of interest, e.g., *Thompson v. Automobile Club of Southern California* (June 27, 2013, G046759) 2013 WL 2456690 (Ordered Published); *Morgan v. Wet Seal, Inc.* (2012) 210 Cal.App.4th 1341; *Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133; *Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932; *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440.

This issue is related to the standard for class certification issue pending in *Duran v. U.S. Bank National Association*, No. S200923.

OVERVIEW

The Rest Period Hourly Wage Requirement. California employers must "authorize and permit" employees to take rest periods. They are not required to separately track rest periods or ensure employees are taking them. Rest periods count as hours worked "for which there shall be no deduction from wages."

Employers are not limited to paying hourly wages, as the Labor Code defines many forms of wages – including alternatives to hourly measurement such as payment for labor measured by time, task, piece, commission or other method of calculation. (Lab. Code, § 200). Employers that compensate employees based on productivity rather than with a straight hourly wage have long understood that they comply with the law by authorizing and permitting rest periods without deduction from productivity-based compensation, so long as the employee's total wages equal or exceed what the employee would have earned for the hours worked at the minimum wage hourly rate. Yet, the Opinion (Ex. A) holds that non-hourly wage employers who pay well above what a minimum wage hourly rate would yield must also *separately* pay an hourly rate minimum wage for rest periods taken, regardless whether compensation for rest periods is part of a negotiated overall non-hourly rate.

This Court has never addressed this issue. Indeed, this Court has never addressed minimum wage requirements in the non-hourly wage context. After years of peaceful co-existence between Labor Code section 200 and other wage rules, the Opinion has imposed a

judicially created tectonic change in California wage and hour law, without the slightest role played by this Court.

The issue affects countless businesses, scores of industries, and hundreds of thousands of employees, current and future. The Opinion has thrown California compensation systems into turmoil, causing employers throughout the State to doubt whether they can continue to compensate employees based on productivity measures rather than with an hourly rate – especially given the hurdles in tracking employees' rest breaks that under *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, they are not even required to take. The Opinion throws into question decades of settled payment practices (and longstanding non-hourly rate-setting agreements) for productivity-based compensation systems.

This issue is related to the question in *Gonzalez v. Downtown LA Motors LP*, No. S210681 (petition for review pending). In *Gonzalez*, the Court of Appeal carved out certain work from piece-rate compensation and held such work was not covered by the non-hourly rates and, thus, needed to be paid hourly no matter how greatly the non-hourly pay exceeded the minimum wage for all time worked. (*Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 40.) *Gonzalez* expressly left open its impact on rest period compensation. Here, all work was compensated by an overall productivity system, yet the Court of Appeal held that the failure to provide separate hourly pay for rest periods violated the law.

That holding demands review. (See Cal. Rules of Court, rule 8.500(b)(1).)

The Class Certification Standard. The Opinion also highlights a conflict that persists among the Courts of Appeal over the community of interest requirement for class certification. Specifically, appellate courts are in conflict with each other and federal law about whether a trial court, in exercising its discretion when assessing whether a sufficient community of interest exists, must only consider the plaintiff's theory of recovery and supporting declarations *or* may also evaluate affirmative defenses and supporting defense evidence showing that individual issues predominate. *Brinker* sought to clarify the community of interest analysis, but post-*Brinker* decisions have only exacerbated the problem.

The internally-inconsistent Opinion illustrates the conflict. On the one hand, it recognizes that the trial court had great discretion to deny certification and that predominance is a highly discretionary factual question reviewed only for substantial evidence. On the other hand, the Court of Appeal, citing *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, reweighed de novo the evidence and, based thereon, undertook an independent community of interest analysis. In so doing, the Court of Appeal chose to discount or ignore evidence undermining a predominance conclusion, relying exclusively on plaintiff's theories and evidence – even where not presented below.

The published authority is in disarray. It ranges from an almost absolute requirement to certify any facial attack on an employer's policies without considering how those policies were actually implemented in practice (e.g., *Faulkinbury*, supra, 216 Cal.App.4th at p. 234), to opinions that expressly defer to a trial court's consideration of affirmative defenses and evidence showing a de facto lack of

commonality (e.g., *Walsh*, supra, 148 Cal.App.4th at p. 1450). At the core of this conflict is whether the trial court has the ability, in the exercise of its broad discretion, to consider and weigh evidence *both* supporting and opposing class certification.

A plaintiff's class action firm explained the confusion in requesting publication of this portion of the Opinion. It noted "numerous recent published and unpublished decisions" reflecting a conflict between a rule – supposedly derived from *Sav-On*, "that the question of certification depends on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment'" (Opn. citing *Sav-On* at p. 327) – and a rule that allows "considerations of the size of the class, the complexity of the case, the sanctity of the trial court's factual analysis, or the potential necessity of individual damage calculations." (Marvin/Salzman Letter.)

Review should be granted to resolve the conflict in the law as to the analysis trial and appellate courts must use in evaluating commonality issues for class certification. This conflict affects numerous pending and future cases. It, too, demands review. (See Cal. Rules of Court, rule 8.500(b)(1).)

STATEMENT OF THE CASE

A. Factual Background

1. Plaintiff and the Putative Class Members

Safeway operates the Tracy Distribution Center, from which its truck drivers, including plaintiff, deliver products to Safeway stores across Northern California. (Opn. at 2; AA, V-10, 2301:16-2302:9.)[1]

The drivers are represented by the Teamsters Union, which has negotiated successive collective bargaining agreements with Safeway. (Opn. at 2; AA, V-10, 2301:24-2302:1.) Under the collectively-bargained agreements, drivers are principally compensated based on productivity, not an hourly wage. Safeway's Activity Based Compensation system includes (1) payment of a mileage component (i.e., the number of miles in each trip multiplied by a zone-based multiplier); (2) payment for various tasks for a pre-determined rate per task; and (3) payment of pre-determined amounts for other specified activities. (Opn. at 3; AA, V-9, 2216:9-26; V-10, 2303:16-27.)

2. Safeway's Policies Authorized and Permitted Drivers to Take Meal and Rest Periods

The collectively-bargained agreement provides all employees with two paid 15-minute rest breaks for each eight-hour shift, with an additional 15-minute break if the employee works longer. (Opn. at 2;

[1] Appellant's Appendix on appeal is cited as "AA."

AA, V-10, 2301:24-2303:14, 2332, 2429.)[2] Safeway's activity-based compensation system includes a premium to compensate drivers for rest periods. (Opn. at 9; AA, V-12, 3098, 3102-3103; AA, V-10, 2303:24-27.) By 2005, Safeway took further steps to ensure compliance with meal and rest periods, including a written certification that drivers were authorized and permitted to take meal and rest periods.[3] (Opn. at 3.)

B. Procedural Background

Plaintiff filed his class action alleging that Safeway violated the Labor Code and Industrial Welfare Commission Wage Orders by failing to provide him and other similarly-situated employees with required rest periods, meal periods and wage statements. (Opn. at 4; AA, V-1, 1-16.) Specifically, plaintiff alleged that he and other similarly-situated employees were (1) "denied off-duty meal periods and rest periods in violation of Labor Code §§ 226.7 and 512 and IWC wage order 9"; and (2) provided with inadequate wage statements in violation of Labor Code section 226 because they

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[2] As discussed below, the relevant wage orders require employers to authorize and permit rest breaks without deduction from wages.

[3] In December 2005, Safeway required drivers to expressly note on their Trip Sheets when they took their meal periods; then in July of 2006, Safeway required each driver to sign a certification on the back of his Trip Sheet confirming that he was "authorized and permitted" to take his rest breaks and that he took his meal breaks. (Opn. at 3; AA, V-10, 2308:17-28, 2571-2591; AA, V-11, 2770:6-2771:21, 2775-2812.) In 2007, Safeway informed drivers that violating the break policy would subject them to discipline. (Opn. at 3; AA, V-10, 2309:1-4.)

"fail[ed] to provide sufficient information on the piece rate earned." (Opn. at 4; AA, V-1, 1-2, 5.)

Plaintiff moved for class certification, seeking to certify three subclasses of drivers: (1) those "who were not relieved of all duty for each meal period to which they were entitled," (2) those "who were not permitted to take paid rest breaks," and (3) those "who were not provided with itemized wage statements containing all information specified in Labor Code section 226, subd. (a)." (Opn. at 4; AA, V-8, 1853.)

Safeway presented evidence that, commencing no later than 2006, it had a de facto policy of affording second meal periods. (See Opn. at 3, 12-13; AA, V-9, 2119:18-21, 2120:6-12, 2147:18-28; AA, V-8, 2101:12-17; AA, V-14, 3483:14-20.) It also presented evidence that a substantial majority of drivers had no difficulty in interpreting and reconciling their wage statements and were properly paid. (Opn. at 17.)

The trial court denied class certification. (Opn. at 4; AA, V-32, 8608-8615.) It found certification of the meal and rest break claims inappropriate because "the individual issue of class members' reasons for not taking meal or rest breaks predominate over common issues. To resolve each claim will require an individual inquiry into each episode where a break was not taken. It will be impossible to ascertain on a uniform basis what factors led each individual driver to skip a break. The plaintiff's motion is for certification of a class that would demand individualized inquiries for each driver, defeating the purpose of class certification." (*Id*.)

The trial court also denied certification of the wage statement claim, explaining that plaintiff could not show commonality because class members did not suffer any common injury from allegedly defective wage statements, as required by Labor Code section 226. On the injury requirement, the trial court found that plaintiff had not alleged any defect in the wage statements that deprived drivers of wages owed or any other common injury. (*Id*.)

Plaintiff appealed.

C. The Court of Appeal's Opinion

The Third Appellate District, in an initially unpublished opinion, reversed the trial court's denial of class certification. (Ex. A). After receiving numerous requests for publication from across the State, including from the California Labor Commissioner, the Court of Appeal ordered the Opinion partially published, including the portion addressing rest period compensation, but leaving unpublished the sections addressing meal periods and wage statements. (*Id*.) It denied separate requests to publish those sections.

1. Class Certification Analysis

Before addressing the merits of the class certification issues, the Opinion, on the one hand, recognized that on "review of a class certification order, an appellate court's inquiry is narrowly circumscribed." (Opn. at 6 [citation omitted].) Because the decision to certify a class rests squarely within the discretion of the trial court, an appellate court must "afford that decision great deference on appeal, reversing only for a manifest abuse of discretion." (*Id.*

[citation omitted].) It "must presume in favor of the certification order the existence of every fact the trial court could reasonably deduce from the record." (Opn. at 6-7, citing *Brinker Restaurant Corp. v. Superior Court*, supra, 53 Cal.4th at pp. 1021-1022.)

On the other hand, in analyzing the trial court's certification decision, the Opinion independently weighed evidence on the meal period claim (Opn. at 12-14), and expressly disregarded the evidence, presumably credited by the trial court, as to the actual predominance of individual issues to be tried on the wage statement claim (Opn. at 17). For both claims, as well as with respect to rest periods, the Opinion found that the trial court erred in exercising its discretion to deny class certification because plaintiff's theory of recovery, examined in the abstract, would support certification. (Opn. at 7, 10, 14, 17.)

2. The Merits

a. Rest Periods

The Opinion characterized plaintiff's rest period allegations as Safeway "not paying for rest breaks nor specifically accounting for them on wage statements." (Opn. at 4.)[4] Plaintiff's theory of recovery regarding rest periods, at least on appeal, was: Safeway had a legal obligation to record rest periods and to separately pay for them at an hourly rate, despite its activity-based compensation system. (See Opn. at 4, 7.)

[4] This is different from how the "class" issue was framed in the trial court, but it is how plaintiff and the Court of Appeal reframed the issue on appeal.

Based on this theory and relying on an hourly-wage employer case, *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323, the Opinion announced a new rule for non-hourly wage employers: "[R]est periods must be separately compensated in a piece-rate system" (Opn. at 8), and "must be separately paid at an hourly rate" (Opn. at 10).

The Opinion disregarded as irrelevant the substantial evidence that Safeway authorized and permitted rest periods on a classwide basis (including in the governing collective bargaining agreement) and that individualized issues predominated about whether drivers could (and did) actually take them. The Opinion also rejected Safeway's argument and evidence that drivers were paid for rest periods as part of its collectively-bargained activity-based compensation system, taking the position that such an agreement would constitute an impermissible averaging of wages. (Opn. at 8-9.) Consequently, the Court of Appeal reversed the trial court order denying certification of the rest period subclass.

b. Meal Periods

The Opinion acknowledged plaintiff had two theories of meal period liability: (1) "Safeway as a matter of policy failed to provide a required *second* meal period, at least until 2006, for drivers who worked shifts of 10 or more hours"; and (2) "Safeway did not take sufficient action to relieve drivers of work duty so they could take a meal period, such as recording and scheduling meal periods, correcting for drivers not taking meal periods, and paying meal period premiums to drivers who missed their meal periods." (Opn. at 11,

emphasis added.) The second theory of recovery is broader than the first, as it includes first meal periods. The Opinion analyzed plaintiff's first theory of recovery without addressing the second.

Weighing the evidence independently, it found Safeway's evidence of a de facto second meal period policy, when weighed against plaintiff's evidence, insufficient to establish that individual questions (i.e., whether Safeway had authorized and permitted second meal periods to drivers who worked longer than ten hours before 2006) would predominate. (Opn. at 11, 13.) Rather, the Opinion credits "Safeway's *alleged* failure as a matter of policy to provide a second meal period," standing alone, as *necessarily* making the case "suitable for class certification." (Opn. at 11, emphasis added.)

c. Wage Statements

The Opinion reversed the trial court's order denying certification of the wage statement subclass. The Court of Appeal specifically declined to "engage in [an] evidentiary battle" in assessing whether common issues would predominate that any particular driver had suffered an injury under Labor Code section 226 from inaccurate wage statements. The Opinion reasoned that plaintiff's *allegation* of deficient wage statements established commonality because the allegation applied to every wage statement issued by Safeway to its drivers; each of those drivers would have suffered an injury under Labor Code section 226 if the wage statements failed to list each of the 2,000+ required rates at which drivers' mileage was paid after identifying the amount paid and the underlying mileage. (Opn. at 15-16.) The Opinion rejected as

irrelevant Safeway's evidence that 75 percent of the numerous drivers who testified in depositions were able to verify their mileage pay from the wage statements. (Opn. at 17.)

D. The Court of Appeal Denies Rehearing

Safeway petitioned for rehearing, among other things pointing out that the Opinion had inconsistently acknowledged trial court discretion to determine factual commonality issues, but then refused to credit any of the evidence supporting the trial court's decision.

The Court of Appeal summarily denied rehearing. (Ex. B.)

WHY REVIEW SHOULD BE GRANTED

I.

IT IS CRITICAL TO THE CONTINUED VIABILITY OF PRODUCTIVITY-BASED EMPLOYEE COMPENSATION SYSTEMS IN CALIFORNIA FOR EMPLOYERS TO KNOW WHETHER THEY MUST SEPARATELY PAY AN HOURLY WAGE FOR REST PERIODS

A. Background: Employers Do Not Have to Pay Hourly Wages But They Must Pay Not Less Than Minimum Wage and "Authorize and Permit" Rest Periods Without Deduction From Wages

California has long recognized that employers may pay their workers other than by the hour. Labor Code section 200 specifically recognizes task, piece and commission basis compensation as well as other methods of calculation. Thus, an employer may compensate employees based on their productivity, e.g., miles driven, sales consummated, tasks completed, items made, produce harvested. Such compensation systems benefit both employer and employee, rewarding skill and productive, efficient effort.

At the same time, employers must pay "not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise." (E.g., IWC Wage Order No. 7, subd. 4(B).)

And, it has long been the law that employers must "authorize and permit" rest periods. (E.g., IWC Wage Order No. 7, subd. 12(a).) "Authorized rest period time shall be counted as hours worked for

which there shall be no deduction from wages." (*Id*.) But employees may choose to forego rest periods. (*Brinker Restaurant Corp. v. Superior Court*, supra, 53 Cal.4th at p. 1033.) The conundrum this case thus presents is whether a rest period taken when an employee is compensated by "task, piece, commission [or other non-hourly] basis" is somehow not counted as hours worked or deemed to be a deduction from wages if there is no separate *hourly* compensation paid for the rest period.

B. By Extending Inapplicable Hourly Wage Law, the Opinion Creates a Novel Requirement That Employers With Productivity-Based Compensation Systems Must Pay Hourly Wages for Rest Periods

Prior to the Opinion, no California court had held that an employer compensating its employees based on productivity rather than hours must separately pay them at an hourly rate for rest periods, even if the productivity-based compensation otherwise compensates for rest periods. This Court has never addressed such rest period compensation issues where the employer pays on a non-hourly, productivity basis.

But there can be no doubt: The Opinion's judicial rulemaking now requires that "rest periods must be separately compensated in a piece-rate system" (Opn. at 8), and "must be separately paid *at an hourly rate*" (Opn. at 10, emphasis added).

The Opinion follows in the footsteps of another recent opinion, *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36 (petition for review pending, No. S210681). In *Gonzalez*, the Second

District, Division Two, held that employees compensated by task or piece rate (or, by its reasoning, *any* other productivity-based alternative to an hourly wage) must pay employees hourly for "non-productive" time spent on activities that a court finds to be outside the task or piece-rate, namely time when the employee is not directly engaged in piece or other task work (e.g., employee meetings).

Both *Gonzalez* and the Opinion here reason that the requirement to separately compensate employees for non-productive time, be it administrative tasks (*Gonzalez*) or rest periods (here), is mandated by the minimum wage law requirement of payment for "all hours worked." (*Gonzalez*, supra, 215 Cal.App.4th at pp. 40, 45-52; Opn. at 8-9.) It does not matter that the employer pays far more than a minimum hourly wage would generate for all hours worked (including "non-productive" or rest period hours). (215 Cal.App.4th at pp. 51-52; Opn. at 9.)

In *Gonzalez* the "trial court did not address" and therefore the Court of Appeal specifically did "not consider, any obligation with respect to mandatory rest breaks." (215 Cal.App.4th at p. 54.) The Opinion here almost immediately stepped into that reserved issue, venturing further into previously uncharted territory.

The Opinion reaches its remarkable conclusion in two brief paragraphs without any analysis of the minimum wage law, its statutory basis, intent and history, Labor Code section 200's authorization of alternative systems to hourly pay, or the possible intersection of these provisions with the language of the California wage orders requiring employers to "authorize and permit" rest periods without deduction from wages. (Opn. at 8-9.)

Yet, the Opinion creates sweeping new rules for non-hourly wage employers. Now, these employers must (1) separately pay an undefined *hourly* wage for mandated rest periods; and (2) separately track and record rest periods in order to be able to do so. This novel judicial rulemaking upsets many decades of longstanding law that employers need only "authorize and permit" rest periods and – unlike many other aspects of compensation – do *not* have a statutory or regulatory requirement that they keep such records. It does so without any guidance about the hourly rate at which rest periods must be paid, or how employers must calculate the regular rate for overtime purposes when an employee is compensated both by hourly and productivity-based compensation.

With little analysis, both *Gonzalez* and the Opinion are premised upon *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314. *Armenta* rejected "averaging" an *hourly* employee's wages in determining whether the minimum wage requirement was met. There, the employer contracted to pay an above-minimum-wage hourly rate but refused to pay for travel time. The employer argued that the *average* wage still exceeded the minimum wage. But, *Armenta* held, the employer had not paid for all hours worked, a separate requirement.

Citing *Armenta*, the Opinion expands *Gonzalez*'s holding to require employers to separately pay *hourly* rates to piece-rate workers for non-working rest periods. (Opn. at 8-9.) The Opinion finds this result dictated by *Armenta* even though *Armenta* neither addressed rest periods nor dealt with a piece-rate compensation system. (*Id*. at 8; see *Armenta*, supra, 135 Cal.App.4th at p. 316.) And the Opinion

finds this result compelled, *despite* evidence that the collectively-bargained wage rates (i.e., mileage, piece and task compensation rates) were negotiated to reflect compensation for rest periods as part of the overall rate to be paid. (Opn. at 8-9.) In effect, the Opinion holds that no portion of a piece-rate or other non-hourly rate can be allocated to a rest period, even if that was the parties' negotiated (in this case, collectively-bargained) intent. In that regard, the issue – whether amounts paid on a piece-rate basis can compensate for rest period time – is related to that pending in *Peabody v. Time Warner Cable, Inc.*, No. S204804, regarding whether a monthly commission payment can be deemed compensation for earlier pay periods.

By applying *Armenta* to the distinctly different non-hourly rate context, *Gonzalez* and the Opinion have greatly expanded hourly wage requirements, imposing them as a *required additional* component of statutorily recognized productivity-based compensation systems. The Opinion's impact is even broader than that of *Gonzalez* as not every job may have "non-productive" time, but every employer must afford rest periods. (See http://research.lawyers.com/blogs/archives/26817-Recent-Rulings-May-Mean-the-End-for-Alternatives-to-Hourly-Pay.html [*Bluford* "has even more far-reaching implications" than *Gonzalez*].)

C. The Issue Here Is of Overwhelming Interest to California Employers, Employees and Employment in General

This case is being watched closely throughout the State, and indeed, nationally. Numerous *amici* sought publication of the Opinion arguing that it has sweeping impact. These included the California Labor Commissioner, Division of Labor Standards Enforcement (DLSE), the California Employment Lawyers Association, an association of attorneys representing employees in employment litigation, and five law firms who represent employees in class action wage and hour litigation.[5]

Amici urging publication have said:

- According to the State of California, "[t]he case is one of first impression regarding the compensation of rest periods where wages are determined by piece rate rather than an hourly wage." (DLSE Letter.)

- "Because this decision is post-*Brinker*, it carries a special and significant public interest to not just employers and employees in the State of California, but also to the attorneys and courtrooms who regularly are involved in similar claims arising in a variety of different circumstances." (Cohelan, Koury & Singer Letter.)

- "Literally thousands of employees' rights will be clarified . . . ." (Marlin/Saltzman Letter.)

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[5] These class action plaintiff's firms include Cohelan, Koury & Singer in San Diego on behalf of CELA, Capstone Law in Los Angeles, Gallenberg PC in Beverly Hills, Marlin/Saltzman, LLP in Irvine, Pollard | Bailey in Beverly Hills, and Weinberg, Roger & Rosenfeld, counsel for plaintiff and appellant here.

- The "Court's finding that 'rest periods must be separately compensated in a piece-rate system' directly affects the substantive rights of many thousands of California citizens who are paid wages by way of 'task-based' compensation policies analogous to the policy at issue in the instant case." (Pollard | Bailey Letter.)
- "The *Bluford* Opinion . . . addresses legal issues of continuing public interest, and the decision has far-reaching application." (Gallenberg PC Letter.)

A quick "Google" search reveals a score or more of blogs and legal websites that have noted the importance of the Opinion. Nor is this the only measure. On its face, the Opinion affects virtually every non-hourly wage employer and employee in California. It renders thousands of California employers using productivity-based compensation systems retroactively out of compliance, subjecting them to staggering class-wide damages. As the numerous *amicus* letters seeking review in *Gonzalez* reflect, that covers a huge swath of California businesses and employment, ranging from auto dealerships to retail to trucking to agriculture to grocers and many, many others. It also affects numerous pending cases.[6]

[6] One letter requesting publication lists six such cases: *Valdovinos v. American Logistics Co., LLC*, Orange County Superior Court, Case No. 30-2011-00470090-CU-OE-CXC (transportation piece rate system); *Roth v. CHA Hollywood Med. Ctr. LP*, Los Angeles Superior Court, Case No. BC460279 (nursing); *Espinoza v. Four Seasons Produce Packing Co., Inc.*, Ventura County Superior Court Case No. 56-2010-00381812-CU-OE-VTA (agricultural piece rate system); *Ortega v. JB Hunt Transp.*, U.S.D.C., Central Dist., Case No. CV-07-08336 MWF (FMOx) (transportation); *Bickley v. Schneider Nat'l Carriers*, U.S.D.C., Central Dist., Case No. 3:08-cv-05806-JSW (transporation); *Burnell v. Swift Transp. Co. of Arizona*

Moreover, Labor Code section 200 dates back in its current incarnation to 1937, and its endorsement of alternative pay systems goes back even further in time. The language at issue in the relevant wage orders also goes back decades without a hint of the Opinion's radical new approach. This is, in short, a very big-impact case.

D. This Court's Intervention Is Needed

As discussed above, a single hourly-wage case, *Armenta*, has now created a hydra-headed attack on the very existence of non-hourly rate compensation systems in California. *Armenta* has spawned both *Gonzalez* and the Opinion here, as well as numerous pending and federal cases.[7] Together, these decisions seriously undermine and may even destroy productivity-based wage compensation arrangements in California. These opinions threaten to occupy – and revolutionize – not only an entire area of law, but also employment throughout California, all without so much as a nod by this Court.

Until this Court speaks, the law regarding employers' obligations to compensate non-hourly employees for rest periods will

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LLC, U.S.D.C., Central Dist., EDCV10-00809-VAP (OPx) (transportation). (Marvin/Saltzman Letter.)

[7] See fn. 6, infra; *Ontiveros v. Zamora* (E.D.Cal. Feb. 20, 2009, No. CIV S-08-567) 2009 WL 425962 [auto mechanics: overtime, rest periods]; *Cardenas v. McLane Foodservices, Inc*. (C.D.Cal. 2011) 796 F.Supp.2d 1246 [truck drivers: meal periods, waiting time]; *Reinhardt v. Gemini Motor Transp.* (E.D.Cal. 2012) 869 F.Supp.2d 1158 [same]; *Quezada v. Con-Way Freight, Inc*. (N.D.Cal. July 11, 2012, No. C 09-03670 JW) 2012 WL 2347609 [truck drivers: mileage]; *Carrillo v. Schneider Logistics, Inc*. (C.D.Cal. 2011) 823 F.Supp.2d 1040 [warehouse employees].

remain unresolved. Employment attorneys representing both employees and employers must advise their clients based on the current published authority, authority that may dictate abandoning productivity-based compensation systems altogether. This may well be the last case on the issue, the death knell to productivity-based compensation as California has known it for many decades.

That is hardly a workable or just option for the thousands of employers and hundreds of thousands of employees who benefit from such systems throughout California, in numerous industries. Productivity systems benefit not just employers, but skilled, efficient and industrious employees as well. The Opinion has constrained the ability and flexibility of employers and employees to increase productivity, efficiency and employee earnings through compensation incentives; has summarily rewritten the compensation bargain reached by untold numbers of California workers; and will undoubtedly both discourage future job creation and open a new floodgate of wage and hour litigation seeking to punish employers for compensation systems that had been presumptively lawful for decades. The new rule announced by the Opinion affects numerous industries – e.g., retail, transportation, agriculture, medical, trucking, automobile, etc. – already hard-pressed in a troubled economy but still making significant contributions to a state already suffering from the second highest unemployment rate in the country.

Nor is there any reason to wait for this issue to percolate in the court system before this Court gets involved. As this Court has observed, even "unanimous agreement" among intermediate courts does not suggest that the Court should "abdicat[e] [its] role" by failing

to "[e]ngag[e] in interpretation of an area of law for the first time." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 690, fn. 28.) Nor does, or should, this Court "decide cases based on trends," like this recent "trend" rocking the very foundations of productivity-based compensation. (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1156 [giving no weight to a line of decisions that "merely followed" a decision with unpersuasive reasoning].) Here, the issue is clearly framed, and the Opinion is already causing great consternation among California employers and employees.

In light of the lengthy industrial history and practices at issue, and the multitude of employers and employees that have relied on settled practices in structuring their affairs, the disruptive effect of the Opinion renders it urgent that this Court grant review. The final word should not come from a few sentences in the Opinion citing *Armenta*, which are devoid of analysis or any careful exegesis of the governing wage orders. It should come from *this* Court after full consideration.

Review should be granted.

II.

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT IN THE LAW ABOUT A COURT'S PROPER ASSESSMENT OF COMMONALITY FOR CLASS CERTIFICATION

A. The Opinion Illustrates the Persisting Conflict Regarding the Scope of Trial Court Discretion to Consider Evidence Beyond Just the Plaintiff's Theory of the Case in Determining Class Certification Commonality

"The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Superior Court*, supra, 53 Cal.4th at p. 1021 [citations omitted].) Within its own pages, the Opinion effectively framed an ongoing debate among the intermediate appellate courts about the extent to which a trial court (and an appellate court reviewing the trial court's determination) can, in the exercise of discretion, go beyond the plaintiff's theory of recovery to determine whether common issues predominate for class certification.

The Opinion professed deference to the trial court's certification decision. (Opn. at 6.) And, it noted substantial Safeway defenses and evidence, especially as to the meal period and wage statement claims, suggesting a need for individual determination. For example, substantial trial court evidence showed that Safeway had a de facto policy of second meal periods commencing no later than

2006. (See Opn. at 3, 12-13; AA, V-9, 2119:18-21, 2120:6-12, 2147:18-28; AA, V-8, 2101:12-17; AA, V-14, 3483:14-20.) Likewise, substantial evidence showed that a substantial majority of drivers had no difficulty in interpreting and reconciling their wage statements and were properly paid. (Opn. at 17.)

But the Opinion dismissed such evidence of individuality – evidence persuasive to the trial court – as insufficient or irrelevant. (Opn. at 13, 17.) In doing so, it appears to follow the line of cases holding that only the plaintiff's theory of recovery matters, casting evidence of lack of commonality aside as a premature evaluation of the "merits" or as a mere damages determination. E.g.:

- *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 234 ["the question we address is whether (the employer's) legal liability under the theory advanced by Plaintiffs can be determined by facts common to all class members"];
- *Bradley v. Networkers Internat. LLC* (2012) 211 Cal.App.4th 1129, 1151 ["the fact that an employee may have actually taken a break or was able to eat food during the workday does not show that individual issues will predominate in the litigation"];
- *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1299 ["The trial court misapplied the [*Sav-On*] criteria, focusing on the potential conflicting issues of fact or law on an individual basis, rather than evaluating 'whether the *theory* of recovery advanced by the plaintiff is likely to prove amenable to class treatment.'" (emphasis in original)];
- *Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 98 ["Thus, to the extent the trial court's ruling was

based upon its resolution of the merits of (defendant's) proposed defense, the court abused its discretion."].

On the other side of the debate are cases holding that the trial court *does* have discretion to consider the effect of affirmative defenses and defense evidence undercutting commonality as to the nature of the legal and factual disputes likely to be presented. E.g.:

- *Morgan v. Wet Seal, Inc.* (2012) 210 Cal.App.4th 1341, 1358 ["issues affecting the merits of a case may be enmeshed with class action requirements, such as whether substantially similar questions are common to the class and predominate over individual questions or whether the claims or defenses of the representative plaintiffs are typical of class claims or defenses" (citing *Linder v. Thrifty Oil Co.* [2000] 23 Cal.4th 429, 443)];
- *Thompson v. Automobile Club of Southern California* (June 27, 2013, G046759) Opn. at 14, 2013 WL 2456690 (Ordered Published) ["Thus, the mere existence of a form contract is insufficient to determine that common issues predominate when the questions of breach and damage are essentially individual."];
- *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450 ["In examining whether common issues of law or fact predominate, the court must consider the plaintiffs legal theory of liability. The affirmative defenses of the defendant must also be considered, because a defendant may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues." (citations omitted)];

- *Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 144 [same];
- *Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941 [same].

Brinker sought to clarify the community of interest requirement by addressing the interaction between a plaintiff's theory of recovery *and* the need to assess the nature of the legal and factual disputes to be presented: "Presented with a class certification motion, a trial court must examine the plaintiff's theory of recovery, *assess the nature of the legal and factual disputes likely to be presented*, and decide whether individual or common issues predominate." (*Brinker*, supra, 53 Cal.4th at p. 1025 [emphasis added].) But post-*Brinker* decisions have only exacerbated the problem. For example, the differences between *Faulkinbury* and *Morgan*, both post-*Brinker*, are striking.

On the one hand, *Faulkinbury*, on remand after *Brinker*, vacated a prior contrary result and reversed a trial court's denial of certification as to several wage and hour classes because "*Brinker* teaches that we must focus on the policy itself and address the issue whether the legality of the *policy* can be resolved on a classwide basis." (*Faulkinbury*, supra, 216 Cal.App.4th at p. 232 [emphasis in original].) It abandoned its prior "conclu[sion] that even if [defendant's] on-duty meal break policy was unlawful, [it] would be liable only when it actually failed to provide a required off-duty meal break. *Brinker* leads us now to conclude [defendant] would be liable upon a determination that [its] uniform on-duty meal break policy was unlawful." (*Id*. at p. 235.)

Faulkinbury thus read *Brinker* as *requiring* automatic, non-discretionary class certification of pure facial attacks upon de jure wording of employer policies regardless whether, de facto, the policies were implemented and enforced in a lawful or individualized manner. It read *Brinker* as establishing a standard at odds with comparable federal law, one that turns the evidentiary burden of proof to establish commonality into a mere pleading standard, essentially negating the trial court's discretion. (See *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541, 2551 ["Rule 23 does not set forth a mere pleading standard."].)

By contrast, *Morgan*, another post-*Brinker* case, affirmed a trial court's order denying class certification in which the trial court undertook an exhaustive analysis of "voluminous evidence regarding Wet Seal's policies *and practices*." (*Morgan*, supra, 210 Cal.App.4th at p. 1346 [emphasis added].) The court rejected the contention that the trial court had erred by "ignoring [plaintiffs'] theory of liability." (*Id.* at p. 1364.) Instead, disagreeing with the *Faulkinbury* approach, *Morgan* deferred to the trial court, allowing it to determine that common policies had not led to commonly implemented unlawful practices. (*Id*. at pp. 1357-1358.)

These two cases illustrate a deep divide among the appellate courts about whether trial courts, in exercising their discretion, and appellate courts, in reviewing those determinations, can evaluate evidence showing that individual issues predominate about the effect of supposed company-wide policies, or instead are inflexibly bound by the plaintiff's pleaded and articulated theories of recovery. (See also *Duran v. U.S. Bank Nat'l Ass'n*, No. S200923 [issues include

standard for class certification in wage and hour misclassification cases].)

Absent this Court's review, confusion – among both trial and appellate courts – will persist as to the proper standard for certifying class actions.

B. This Issue, Too, Affects Many Pending and Future Cases

Unlike imposing required hourly payments for non-hourly employees' rest periods, the issue here is more procedural than substantive. But it is almost as far-reaching and its impact is widespread. As attorneys representing employees in class action litigation have recognized, the conflicting standards regarding the extent to which the plaintiff's theory of recovery, alone, is allowed to rule is often determinative in assessing commonality. Although Safeway disagrees with the analysis, it agrees with the observation of one law firm representing plaintiffs in class actions that differing procedural standards are being applied to class certification issues:

> "In numerous recent published and unpublished decisions, the simple clear directive in *Sav-On* – that the question of certification depends on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment' (*Id.* at 327) – has been pushed aside for considerations of the size of the class, the complexity of the case, the sanctity of the trial court's factual analysis, or the potential necessity of individual damage calculations." (Marvin/Salzman Letter.)

The statewide importance of the issue is palpable. It affects class certification determinations – in both trial and appellate courts –

virtually every day. The division in published post-*Brinker* authority already exists. It is not going away. The issue is real, it is timely, and it needs prompt resolution to guide trial and appellate courts in court proceedings already underway in numerous cases. (See, e.g., fn. 6, infra.)

CONCLUSION

The Court of Appeal's Opinion is revolutionary and far-reaching. It holds, in effect, that every California employer must pay hourly wages. It affects untold numbers of California businesses, employees, and the overall economic and job-creation climate of this State, all without this Court having considered or written a word on the subject.

It reflects a fundamental and enduring conflict among the appellate courts as to the proper deference, if any, to be accorded to trial courts in certifying for class treatment facial challenges to written employer policies.

This Court's resolution is desperately needed, and needed now.

This Court should grant review.

DATED: July 1, 2013

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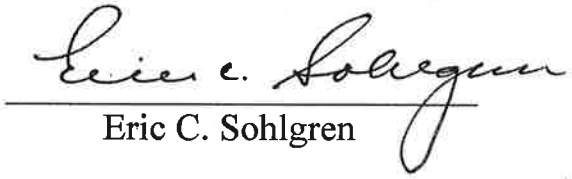
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 14(c)(1))

The text of this Petition consists of 6,948 words as counted by the Microsoft Word word-processing program used to generate the Petition.

DATED: July 1, 2013



Eric C. Sohlgren

EXHIBIT A

Filed 5/8/13; part. pub. 5/24/13 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

KENNETH BLUFORD, Plaintiff and Appellant, v. SAFEWAY STORES, INC., Defendant and Respondent.	C066074 (Super. Ct. No. CV028541)

This appeal concerns the trial court's denial of class certification in a wage and hour action. Plaintiff Kenneth Bluford sought to certify a class of plaintiffs in his action against his employer, defendant Safeway, Inc. He claims Safeway violated statutory and regulatory laws requiring it to provide its employees with paid rest periods, earned meal periods, and sufficiently itemized wage statements.

The trial court denied plaintiff's motion to certify a class. It ruled individual issues predominated over common issues on the rest period and meal period claims, and that plaintiff failed to allege a common injury resulting from the inadequate wage statements.

We reverse. Insufficient evidence supports the trial court's ruling, as common issues predominate over individual issues, and plaintiff in fact alleged a common injury resulting from the wage statements. We order the trial court to grant plaintiff's motion.

FACTS

Since 2003, Safeway has managed the operations of a distribution center in Tracy. Plaintiff is employed by Safeway as a truck driver who works out of the distribution center. He and the other drivers he sought to certify as a class deliver goods from the distribution center to Safeway stores in northern California and Nevada.[1]

Safeway's truck drivers are represented by General Teamsters Local 439, which has negotiated successive collective bargaining agreements with Safeway. The agreements included provisions regarding rest periods and meal periods. Under those provisions, Safeway was required to provide two paid rest periods of 15 minutes each for every eight- or 10-hour shift worked. Employees received an additional 15-minute paid rest period if they worked in excess of two hours overtime.

Also under the agreements, drivers were to take a 30-minute meal period on their own time. Drivers were required to take the meal period no later than five hours after their regular shift began. The first collective bargaining agreement, which ran from 2003 to 2008, did not require drivers to take a second meal period if the driver worked more than 10 hours. The second agreement, however, effective September 28, 2008, to 2011, required drivers to take a second meal period in addition to the first meal period if the

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1 Prior to 2003, the distribution center was operated by a third party, Summit Logistics, Inc., for Safeway's benefit. In *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 (*Cicairos*), we reversed the trial court's grant of summary judgment on a wage and hour claim in favor of Summit Logistics. We concluded the evidence established Summit Logistics did not provide the plaintiffs, truck drivers formerly employed by Summit Logistics, with their required meal periods, paid rest periods, and adequately itemized wage statements. In 2003, when Safeway took over control of the distribution center, it continued to utilize the same compensation structure and policies we subsequently found wanting in *Cicairos* until after that decision's release.

driver worked more than 10 hours. The driver could waive this second meal period if he had worked no more than 12 hours and had taken the first meal period.

The collective bargaining agreements also obligated Safeway to utilize what it calls an activity based compensation system to determine the drivers' wages. Pay was calculated based on (1) mileage rates applied according to the number of miles driven, the time of day the trips were taken, and the locations where the trips began and ended; (2) fixed rates for certain tasks (e.g., rates for number of pallets delivered and picked up); (3) an hourly rate for a predetermined amount of minutes for certain tasks (e.g., paid for 10 minutes at hourly rate for set-up time at each store); and (4) an hourly rate for delays (e.g., breakdowns, impassable highways, time spent at scales, or other causes beyond the driver's control).

Drivers logged their mileage and activities for each trip manually on trip sheets. They also logged their activities into an onboard computer system known as the XATA system. Through XATA, Safeway tracked the drivers' moves, including their stops. The drivers input codes into XATA to record specific reasons for delays. Neither the trip sheets nor the XATA system, however, provided a place or means to record meal or rest periods.

Beginning in 2005, after we issued our decision in *Cicairos*, Safeway took additional steps to ensure its drivers took their breaks. In December 2005, it required drivers to note on their daily trip sheets when they took their meal periods. In July 2006, it required each driver to sign a certification on the back of the trip sheets certifying he was "authorized and permitted" to take his rest periods, and that he took his meal periods. In 2007, Safeway informed drivers that failing to sign the certification on the trip sheet could result in discipline.

At all relevant times, Safeway provided the drivers with a "driver trip summary -- report of earnings" and an "earnings statement" with each paycheck. The driver trip summary listed each component of a driver's pay, and the quantity of each component for

which he was being paid. The components and quantities were paid based on the rates set in the collective bargaining agreements. The earnings statement itemized the actual components, and it expressed them in an equivalent hourly pay. However, neither the driver trip summary nor the earnings statement stated the rates by which drivers were compensated for their mileage.

Plaintiff filed his complaint as a class action in 2006. He alleged Safeway violated pertinent provisions of the Labor Code and Industrial Welfare Commission wage orders by failing to provide him and other similarly situated employees with paid rest periods, meal periods, and sufficiently itemized wage statements. Specifically, plaintiff contends Safeway violated the law by (1) not paying for rest periods nor specifically accounting for them on wage statements; (2) (a) not providing until 2006 a second meal period for drivers who worked more than 10 hours a day, and (b) not making adequate efforts until 2006 to relieve drivers of their duties for any required meal period; and (3) issuing inadequate wage statements omitting essential information that would allow a driver to determine if he had been paid the proper amount of wages owed him under the activity based compensation system.

In April 2009, plaintiff filed his motion for class certification. He sought to certify three subclasses: those drivers denied paid rest periods; those denied required meal periods; and those who received inadequate wage statements. The trial court denied the motion in July 2010. It found class members' individual reasons for not taking rest or meal periods predominated over common issues. It believed it could resolve the rest and meal period claims only by inquiring into each episode where a class member did not take a break. As to the wage statement claim, the court ruled plaintiff could not show common issues because class members did not suffer any common injury from the wage statements.

Plaintiff contends the trial court erred in refusing to certify the class, subdivided into three subclasses.

DISCUSSION

I

Standard of Review

Our Supreme Court recently described the standard of review we are to apply. "Drawing on the language of Code of Civil Procedure section 382 and federal precedent, we have articulated clear requirements for the certification of a class. The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. (Code Civ. Proc., § 382; *Fireside Bank* [*v. Superior Court* (2007) 40 Cal.4th 1069,] 1089; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435; *City of San Jose* [*v. Superior Court* (1974) 12 Cal.3d 447,] 459.) 'In turn, the "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." ' (*Fireside Bank*, at p. 1089, quoting *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.)

"Here, only a single element of class suitability, and a single aspect of the trial court's certification decision, is in dispute: whether individual questions or questions of common or general interest predominate. The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238; accord, *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) The answer hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.' (*Sav-On*, at p. 327.) A court must examine the allegations of the complaint and supporting declarations (*ibid.*) and consider whether

the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible.[2] 'As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.' (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916; accord, *Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.)

"On review of a class certification order, an appellate court's inquiry is narrowly circumscribed. 'The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.]' (*Fireside Bank v. Superior Court, supra*, 40 Cal.4th at p. 1089; see also *Hamwi v. Citinational-Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462, 472 ['So long as [the trial] court applies proper criteria and its action is founded on a rational basis, its ruling must be upheld.'].) Predominance is a factual question; accordingly, the trial court's finding that common issues predominate generally is reviewed for substantial evidence. (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at pp. 328–329.) We must '[p]resum[e] in favor of the certification order . . . the existence of every fact the trial

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2 "As one commentator has put it, 'what really matters to class certification' is 'not similarity at some unspecified level of generality but, rather, dissimilarity that has the capacity to undercut the prospects for joint resolution of class members' claims through a unified proceeding.' (Nagareda, *Class Certification in the Age of Aggregate Proof* (2009) 84 N.Y.U. L.Rev. 97, 131.)

court could reasonably deduce from the record . . . .' (*Id.* at p. 329.)" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021-1022 (*Brinker*).)

II

Certification of Rest Period Subclass

Plaintiff contends the trial court erred in refusing to certify the rest period subclass. He argues his theory of recovery is based on Safeway's policies and procedures that apply uniformly to all drivers. He asserts Safeway did not pay its drivers for rest periods because its compensation system, based on miles driven and the performance of specific tasks, did not account for rest periods or provide an ability to be paid for them. Safeway also provided no means by which an employee could verify he was paid for his rest periods. He argues these issues, common to each driver, predominate, and thus the trial court erred by concluding individual issues would predominate.

We agree with plaintiff. The trial court's denial of the rest period certification class is not supported by substantial evidence. Issues common to all drivers and Safeway predominate plaintiff's claim for rest period compensation. Indeed, the common proof demonstrates Safeway did not separately compensate drivers for their rest periods in the manner required by California law. Because the only issue remaining to be resolved for this class is damages, the class is to be certified.

Under Industrial Welfare Commission wage orders, employers are required to "authorize and permit all employees to take rest periods" at the rate of at least 10 minutes for every four hours worked. (Cal. Code Regs., tit. 8, §§ 11070, subd. 12; 11090, subd. 12.) "Authorized rest periods shall be counted as hours worked for which there shall be no deduction from wages." (*Ibid.*) Safeway's collective bargaining agreements required it to provide two 15-minute, paid rest periods for each eight- or 10-hour shift worked.

Plaintiff claims Safeway was required to compensate drivers separately for their rest periods, and that it did not because its compensation system, based on miles driven

and specific tasks performed, did not include rest periods as an item that would be reported by drivers and compensated.

Safeway asserts it complied with the wage order. It argues the wage order requires only that pay not be deducted for rest periods, and Safeway never deducted pay from its drivers for taking rest periods. It claims the wage order does not require employers who use a piece-rate or incentive-based compensation system like Safeway's to put employees on the clock just to pay for rest periods. Rather, Safeway claims, pay for rest periods is considered part of the overall piece-rate compensation.

Even if pay for rest periods is not considered part of the piece-rate compensation, Safeway claims its policy, contained in the collective bargaining agreements, was to provide paid rest periods, and that in fact it paid drivers for their rest periods. Safeway asserts the mileage rates negotiated in the collective bargaining agreements included paid time for rest periods.

There is no doubt Safeway was required to provide the drivers with paid rest periods. Employees are entitled to "a paid 10-minute rest period per four hours of work. [Citation.]" (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1104.) The wage order's requirement not to deduct wages for rest periods presumes the drivers are paid for their rest periods. And, as Safeway acknowledges, its policy was to provide paid rest periods.

However, under the rule of *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323 (*Armenta*), rest periods must be separately compensated in a piece-rate system. Rest periods are considered hours worked and must be compensated. (Cal. Code Regs., tit. 8, §§ 11070, subd. 12; 11090, subd. 12.) Under the California minimum wage law, employees must be compensated for each hour worked at either the legal minimum wage or the contractual hourly rate, and compliance cannot be determined by averaging hourly compensation. (*Ibid.*; *Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289, 297, fn. 5.)

Thus, contrary to Safeway's argument, a piece-rate compensation formula that does not compensate separately for rest periods does not comply with California minimum wage law. (See *Reinhardt v. Gemini Motor Transport* (E.D. Cal. 2012) 869 F.Supp.2d 1158, 1168 [piece-rate pay system that did not separately pay truck drivers for non-driving duties violates California law requiring compensation for each hour worked]; *Cardenas v. McLane FoodServices, Inc.* (C.D. Cal. 2011) 796 F.Supp.2d 1246, 1252 [piece-rate pay system that did not separately pay truck drivers for non-driving duties and rest periods violates California law requiring compensation for each hour worked].)

There is no dispute that Safeway's activity based compensation system did not separately compensate drivers for their rest periods. Pay was calculated based on mileage rates applied according to the number of miles driven, the time when the trips were made, and the locations where the trips began and ended. None of these components directly compensated for rest periods. Driver pay was also based on fixed rates for certain tasks and hourly rates for other tasks and delays. There is no dispute that none of these fixed rates were applied to rest periods.

Safeway counters that although it did not separately compensate for rest periods, the activity based compensation system did include compensation for rest periods. John Flanigan, one of the designers of the compensation system, testified in a deposition that the system's mileage rates and the activity rates were designed to include payment for expected rest periods. Even if that is so, it is akin to averaging pay to comply with the minimum wage law instead of separately compensating employees for their rest periods at the minimum or contractual hourly rate, and, as we have explained, it is not allowed under California labor law.

Safeway hopes to raise a defense it claims requires individual resolution for each driver, but resolution of that issue is unnecessary under controlling law. Safeway asserts plaintiff's theory of recovery is grounded in an interpretation of the collective bargaining agreements and their mileage rates, which provide for the drivers' rest periods and which

allegedly include compensation for them. As a result, Safeway argues plaintiff's claim is preempted by the federal Labor Management Relations Act (see 29 U.S.C. § 185). That act may preempt state law claims that are substantially dependent on an analysis of a collective bargaining agreement. (*Department of Fair Employment & Housing v. Verizon California, Inc.* (2003) 108 Cal.App.4th 160, 165.)

By concluding Safeway was required to separately compensate for rest periods and was precluded from building compensation into its mileage rates for rest periods, we have foreclosed any need for the trial court to interpret the collective bargaining agreements. Safeway does not dispute that the drivers' rest periods were not separately compensated. Thus, on remand, the only issue remaining to be decided on the rest period claim is the drivers' damages. Because Safeway's liability can be determined by law and facts common to all members of the class, the class will be certified even if the class members must individually prove their damages. (*Hicks v. Kaufman & Broad Home Corp. supra,* 89 Cal.App.4th at p. 916.)

Safeway asserts our holding will severely disrupt piece-rate pay systems throughout the state. Yet Safeway itself already pays drivers an hourly rate for certain defined and recorded tasks. There is no evidence that its compensation system will collapse by complying with controlling law and having to include one additional element -- rest periods -- that must be separately paid at an hourly rate.

The trial court's conclusion that individual issues will predominate is not supported by substantial evidence. Plaintiff's theory of recovery does not concern the drivers' subjective reasons for taking or not taking a rest period. Rather, it concerns Safeway's compensation system and its failure to separately compensate drivers for their rest periods. All of the disputes on the merits of this claim involve common evidence and argument, and individual damages. The rest period subclass must be certified.

III

Certification of Meal Period Subclass

Plaintiff contends the trial court erred by refusing to certify the subclass of drivers on his meal period claims. He raises two grounds of liability. He first asserts Safeway as a matter of policy failed to provide a required second meal period, at least until 2006, for drivers who worked shifts of 10 or more hours. Second, he claims Safeway did not take sufficient action to relieve drivers of work duty so they could take a meal period, such as recording and scheduling meal periods, correcting for drivers not taking meal periods, and paying meal period premiums to drivers who missed their meal periods. Plaintiff claims common issues of law and fact will predominate both of these grounds for relief, making them amenable to class adjudication.

We agree with plaintiff that his first ground for relief, Safeway's alleged failure as a matter of policy to provide a second meal period, involves common issues of law and fact and thus is suitable for class certification. The trial court's conclusion that individual issues would predominate is not supported by substantial evidence. Because we conclude the meal period class must be certified for this ground, we need not address plaintiff's second ground. The issue for the trial court was whether any of plaintiff's meal period theories of recovery were amenable to class treatment. (*Brinker, supra*, 53 Cal.4th at p. 1032.) Having found one theory the trial court erred in finding not amenable, we may reverse its order on that basis.

Labor Code section 512, subdivision (a), and the applicable wage orders (Cal. Code Regs., tit. 8, §§ 11070, subd. 11; 11090, subd. 11) require an employer to provide meal periods to its employees. In general, an employer must provide at least one 30-minute meal period to an employee who works more than five hours per day. If an employee works more than 10 hours per day, the employer must provide a second meal period of at least 30 minutes, except that if the employee works no more than 12 hours,

he and the employer may waive the second meal period so long as the first meal period was not waived. (Lab. Code, § 512, subd. (a).)[3]

An employer satisfies its obligation to provide the required meal periods "if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. . . . [¶] On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay . . . ." (*Brinker, supra*, 53 Cal.4th at pp. 1040-1041.)

Plaintiff alleges Safeway's meal period policy until 2006 did not include the required second meal period for drivers who worked more than 10 hours. He claims the collective bargaining agreements contain Safeway's only statements of policy authorizing meal periods, and the first of those agreements, as noted earlier, did not provide for second meal periods.

Safeway acknowledges the first collective bargaining agreement did not address second meal periods. However, it introduced evidence at the trial court it claims establishes that Safeway did in fact authorize second meal periods for employees who worked more than 10 hours. Three dispatchers, who served as the drivers' daily

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[3] Labor Code section 512, subdivision (a) reads: "An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived."

supervisors, declared they provided enough time in their assignments for drivers to take a second meal period if their work would exceed 10 hours. One driver, when asked in a deposition if he could stop for a second meal period if he wanted, said he could stop for three or four. Based on this evidence, Safeway asserts plaintiff's claim is not suitable for class adjudication because there was no basis for the trial court to find that Safeway uniformly failed to provide second meal periods.

This evidence, however, is insufficient. "An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not -- if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required -- it has violated the wage order and is liable." (*Brinker, supra*, 53 Cal.4th at p. 1033.) Safeway's evidence does not establish Safeway in fact authorized and permitted second meal periods to drivers who worked longer than 10 hours. There is no indication the drivers were aware they were entitled to take a second meal period if their shifts exceeded 10 hours.

And in fact, other evidence in the record indicates Safeway as a matter of policy did not authorize second meal periods. James Williams, Safeway's transportation superintendent, declared that from 1996 until October 2004, he regularly provided a letter instructing on meal periods to each driver who worked out of the Tracy distribution center. The letter informed the drivers: "You are entitled to a 30 min. break and 2 fifteen min. breaks, this time is yours and it must be logged off duty." The letter did not inform the drivers they were also entitled to a second meal period if their shift exceeded 10 hours.

Williams distributed the letter often. He gave the letter to each new driver hired by Safeway. In August 2003, when Safeway took over the distribution center, he gave a copy of the same letter to every driver. He also posted the letter in the drivers' break

room at the distribution center. In addition, he periodically instructed the dispatchers to pass out the letter during a talk with the drivers at each dispatch time throughout the day.

Thus, at least through October 2004, the drivers were routinely told by Safeway in the form of company policy that they were entitled to only one meal period. The collective bargaining agreement provided only one meal period, and the policy enforced by Safeway's transportation superintendent provided only one meal period. This is sufficient evidence of a uniform policy applied to a group of employees in violation of the wage and hour laws, and thus the claim against it is amenable to class treatment.

No substantial evidence supports the trial court's conclusion that this claim raises predominantly individual issues. No individualized issue of waiver of a second meal period ever arises if a driver was not aware he was authorized to take the break. (*Brinker, supra*, 53 Cal.4th, at p. 1033.) Resolving this claim will involve common evidence and proof, and thus can be accomplished most efficiently as a class action. The meal period subclass of drivers must be certified.

IV

Certification of Wage Statement Subclass

Plaintiff claims Safeway failed to provide wage statements, or paystubs, that comply with California law. He argues the statements do not enable employees to verify they have been properly paid, as required by Labor Code section 226.

The trial court determined plaintiff could not show commonality on this issue because "class members did not suffer any common injury from allegedly defective wage statements. Plaintiff does not allege that any defect in the wage statements deprived drivers of wages owed, and he has alleged no other common injury."

Plaintiff claims the trial court's ruling is in error because workers suffer a common injury when common elements of a wage statement cause employees difficulty in reconstructing pay records and require them to engage in mathematical computations to determine whether they were in fact paid for all hours worked. We conclude the trial

court's holding is not supported by substantial evidence, as plaintiff alleges common injury.

Labor Code section 226 requires employers to furnish employees "an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee [except for an exempt, salaried employee], (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis . . . , and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee . . . ." (Lab. Code, § 226, subd. (a).)

An employee suffering injury as a result of an employer's knowing and intentional failure to provide the required statement may recover actual damages or a statutory rate of damages. (Lab. Code, § 226, subd. (e).) "While there must be some injury in order to recover damages, a very modest showing will suffice." (*Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1306.) " 'These injuries included the possibility of not being paid overtime, employee confusion over whether they received all wages owed them, difficulty and expense involved in reconstructing pay records, and forcing employees to make mathematical computations to analyze whether the wages paid in fact compensated them for all hours worked.' " (*Ibid.*, quoting *Elliot v. Spherion Pacific Work, LLC* (C.D. Cal 2008) 572 F.Supp.2d 1169, 1181.) Both plaintiff and Safeway agree "the 'injury' [Labor Code] Section 226 was intended to prevent is the employee's inability to determine whether he has actually been paid for all work he performed."

Plaintiff alleges Safeway's wage statements do not allow a driver to determine whether the wages he was paid compensated him for all of the work he performed. Although the drivers' pay is based primarily on miles driven, the statements do not identify the rates applied to the mileage. Because the wage statements do not disclose which rates were applied to any of the miles driven, a driver, plaintiff claims, cannot determine whether he was paid accurately without engaging in cumbersome

mathematical calculations. The driver must refer to his individual trip sheets and the mileage rates contained in the collective bargaining agreements to determine if he was paid correctly for each trip. The trip sheets record the times, starting and ending locations, and distances of each segment of a trip. The collective bargaining agreements contain over 2,000 different rates that are applied based on the times and starting and ending locations of each segment of each trip. The driver must apply these rates to the information derived from the trip sheet for each segment of each trip in order to determine the pay he earned for each trip and whether he was in fact paid the correct amount. Moreover, plaintiff alleges, Safeway updated the mileage rate annually without providing drivers with the new rates. Having to recalculate mileage pay from sources outside the wage statement, plaintiff argues, is the type of injury Labor Code section 226 was enacted to prevent, and it is an injury common to all drivers due to the structure of Safeway's wage statements.

Safeway does not dispute the calculations the employees must do in order to verify their mileage pay. Rather, it argues plaintiff's allegations are only that the wage statements are inaccurate, and no injury results from mere inaccuracy. (See *Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1142-1143.) This argument misstates plaintiff's claim. Plaintiff does not claim the statements are merely inaccurate. He claims he and his fellow drivers cannot determine whether the statements are accurate without relying on other documents to perform calculations because the statements do not include all of the information Labor Code section 226 requires.

Plaintiff's argument goes to the structure of the wage statements. As a result, his and the other drivers' claims of injury on account of the wage statements will be resolved by means of common proof. The structural omissions in the wage statements, and their alleged violation of Labor Code section 226, are, like employer policies, the types of matters best resolved by class adjudication.

Safeway asserts there is no common injury. It claims that in this instance, injury can be determined only on an individualized basis to learn whether each driver in fact had to engage in extra and cumbersome calculations to verify his mileage pay. It relies on deposition testimony by various drivers to assert that 75 percent of the drivers in fact were able to verify their mileage pay from the wage statements and thus suffered no injury.

Plaintiff counters that the testimony cited by Safeway does not support its contention. The drivers cited by Safeway testified they could calculate their pay, but could do so only by relying on other sources besides the wage statements, such as their trip sheets. They also claimed these extra calculations took from 10 to 20 minutes.

We need not engage in this evidentiary battle. Plaintiff's allegation of deficient wage statements applies uniformly to every wage statement issued by Safeway to its drivers. None of them list the rates by which the drivers' mileage pay was calculated. If Labor Code section 226 requires wage statements to include those rates in wage statements, perhaps as part of its requirement to include the number of piece-rate units earned and the piece-rate applied, then plaintiff has alleged sufficient common injury for class adjudication. All of the drivers received wage statements that contained the identical alleged defects and allegedly caused the same injury.

The trial court's conclusion that plaintiff failed to allege common injury for its wage statement subclass is not supported by the evidence. The wage statement subclass must be certified.

DISPOSITION

The order denying plaintiff's motion for class certification is reversed. The matter is remanded to the trial court with instructions to grant plaintiff's motion to certify the

class, subdivided into the three subclasses. Costs on appeal are awarded to plaintiff. (Cal. Rules of Court, rule 8.278, subd. (a).)

NICHOLSON, Acting P. J.

We concur:

MAURO, J.

HOCH, J.

Filed 5/24/13

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

KENNETH BLUFORD,

Plaintiff and Appellant,

v.

SAFEWAY STORES, INC.,

Defendant and Respondent.

C066074

(Super. Ct. No. CV028541)

ORDER OF PARTIAL PUBLICATION

APPEAL from a judgment of the Superior Court of San Joaquin County, Carter P. Holly, Judge. Reversed with directions.

Weinberg, Roger & Rosenfeld, David A. Rosenfeld, Theodore Franklin, Caren P. Sencer, and Jannah V. Manansala for Plaintiff and Appellant.

Payne & Feers, James L. Payne, Jeffrey K. Brown, and James R. Moss, Jr., for Defendant and Respondent.

THE COURT:

For good cause it now appears that the opinion in the above-captioned case filed herein on May 8, 2013, should be published in the Official Reports, with the exception of parts III and IV of the Discussion. It is so ordered.

FOR THE COURT:

NICHOLSON, Acting P. J.

MAURO, J.

HOCH, J.

EXHIBIT B

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

FILED

JUN 18 2013

Court of Appeal, Third Appellate District
Deena C. Fawcett, Clerk
BY _____ Deputy

KENNETH BLUFORD,
Plaintiff and Appellant,
v.
SAFEWAY STORES, INC.,
Defendant and Respondent.

C066074
San Joaquin County
No. CV028541

BY THE COURT:

Respondent's petition for rehearing is denied.

Dated: June 18, 2013

NICHOLSON, Acting P.J.

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cc: See Mailing List

PROOF OF SERVICE

Kenneth Bluford, et al. vs. Safeway Stores Inc.
Appellate Case No.: C066074

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 years and am not a party to the within action; my business address is Jamboree Center, 4 Park Plaza, Suite 1100, Irvine, California 92614.

I am employed by Payne & Fears LLP. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service and common carriers promising overnight delivery. In the ordinary course of business, such correspondence is deposited with the United States Postal Service or the common carrier on the same day I submit it for collection and processing.

On July 1, 2013, I served the following document(s) described as **PETITION FOR REVIEW BY RESPONDENT SAFEWAY, INC.** on interested parties in this action by placing a true copy thereof enclosed in sealed envelopes, addressed as follows:

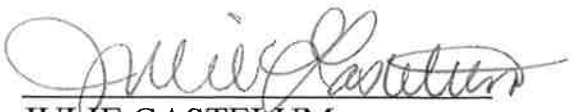
SEE ATTACHED LIST

I then deposited such envelope(s) for collection in the ordinary course of business by U.S. Mail, with postage thereon fully prepaid, for collection and mailing on the same day at 4 Park Plaza, Suite 1100, Irvine, California 92614.

I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter is more than one day after date of deposit for mailing in affidavit.

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

Executed on July 1, 2013, at Irvine, California.



JULIE GASTELUM

Kenneth Bluford, et al. vs. Safeway Stores Inc.
Appellate Case No.: C066074

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Appellate Case No.: C066074

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Case No.: CV028541