S219434

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

KRISTIN HALL

Plaintiff and Appellant,

v.

RITE AID CORPORATION

Defendant and Respondent.

Court of Appeal No. D062909
Fourth Appellate District, Division One

After An Appeal From the Superior Court For The State of California,
County of San Diego, Case No. 37-2009-00087938-CU-OE-CTL,
Hon. Joan Lewis

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Rite Aid's petition presents two questions for review: (1) Whether, at the class certification stage, a claim that a uniform employment policy is unlawful deprives a trial court of discretion to address a threshold legal question necessary to decide whether class certification is appropriate; and (2) Whether the phrase "nature of the work" in section 14(A) of Wage Order 7-2001 refers to the employee's job "as a whole" or to one or more discrete duties. (Petition at 3.)

The first issue does not warrant review because this Court's precedent already establishes the principle that a trial court considering class certification must resolve any legal issues that are truly "necessary" to determine the appropriateness of certification. (*See, e.g., Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1024-1025.) The corollary principle is equally well-established: when class certification can be determined *without* resolving a disputed legal issue, the trial court should *not* decide that issue at the class certification stage. (*See, e.g., Ayala v. Antelope Valley Newspapers* (2014) ____ Cal.4th ____, 2014 Cal. LEXIS 4649, at *22 ["The key to deciding whether a merits resolution is permitted, then, is whether certification 'depends upon' the disputed issue."].) The legal issue raised by Rite Aid's first question presented, then, does not warrant plenary review because this Court has already resolved it, repeatedly, in a series of decisions explaining when trial courts may, and

may not, decide merits issues in the course of ruling on a motion for class certification.

The Court of Appeal below properly applied that settled principle in holding that the trial court had erred in deciding a merits issue (concerning the scope and meaning of Wage Order 7-2001 §14) whose resolution was *not* necessary in determining whether to grant class certification. (*Hall v. Rite Aid Corp.* (2014) 226 Cal.App.4th 278, 294.) Closely adhering to the analytic framework for class certification motions set forth in *Brinker* and several similar cases, the Court of Appeal first observed that Rite Aid had a *uniform policy* applicable to all Cashier/Clerks concerning suitable seating under §14 (which Rite Aid did not dispute). (*Hall*, at p. 292; *compare, Brinker*, 53 Cal.4th at p. 1033 [plaintiff "presented evidence of, and indeed Brinker conceded at the class certification hearing the existence of, a common, uniform rest break policy."].) Next, the Court of Appeal articulated plaintiff's *theory of recovery* as it related to that policy—that Rite Aid's classwide seating policy was unlawful because it deprived Cashier-Clerk class members of seats when performing checkout functions at the Rite Aid cash register stations, in violation of the requirement in §14 that "[*a*]*ll* working employees *shall* be provided with suitable seats *when* the nature of the work reasonably permits the use of seats." (*Hall*, at p. 292, italics added; *compare, Brinker,* at p. 1032 [one of plaintiff's theories of recovery was that Brinker "adopted a uniform corporate rest

break policy that violates Wage Order No. 5 because it fail[ed] to give full effect to the 'major fraction' language of subdivision 12(A)."].) Although Rite Aid disagreed with plaintiff's position that the nature of the Cashier/Clerks' work reasonably permits the use of seats, and argued in opposition that its obligation to provide seats depends not only on the tasks performed at the checkout cash register stations but on all other tasks performed at different times elsewhere in the store as well, the Court of Appeal properly concluded it was not necessary to resolve that common classwide issue of statutory construction at the class certification stage because, under plaintiff's theory of recovery, liability could be proved (or disproved) based on classwide evidence. (*Hall*, at p. 292; *compare, Brinker,* at p. 1023 [the court should "assum[e] for purposes of the certification motion that any claims have merit [citation]."]; *id.* at p. 1021 [predominance 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."], quoting *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327.) Rite Aid may have preferred a different outcome, but it cannot reasonably dispute that the Court of Appeal's analysis mirrored the analysis required by this Court in *Brinker*.

Rite Aid's second question does not warrant plenary review either. The question of statutory construction that Rite Aid asks the Court to decide—concerning the meaning of Wage Order 7-2001 §14(A)—is

already before this Court in another case, on certified questions from the Ninth Circuit, and briefing in that case is nearly complete. (*See Kilby v. CVS Pharmacy, Inc.*, S215614.) Rite Aid states that plenary review of that statutory construction issue would enable "dozens of trial courts across the state" to know what substantive law to apply when faced with similar cases (Petition at 32), but that guidance will be forthcoming in *Kilby* whether review is granted in this case or not. Nor is there any reason to issue a grant-and-hold order—which would effectively de-publish the Court of Appeal's decision—because: (1) the standards for de-publication have not been satisfied; and (2) the trial court in this case has already stayed all further proceedings, pursuant to the stipulation of the parties, pending the outcome of *Kilby*. (A copy of the trial court's order staying the litigation is attached to this Answer as Exhibit A.) A grant-and-hold order would therefore have no effect on the prosecution of this action, but would serve merely as an indirect, but unwarranted, de-publication order.

PROCEDURAL BACKGROUND

Plaintiff contends that the nature of checkout work performed by Cashier/Clerks at Rite Aid's front-end registers reasonably permits the use of seats within the meaning of IWC Wage Order No. 7-2001 §14(A), and that Rite Aid is therefore legally obligated to provide suitable seats for its Cashier/Clerks to use, at their option, when they are performing checkout functions at those cash registers.

In April 2011, Rite Aid moved for summary judgment. Rite Aid contended that it was entitled to judgment as a matter of law because "Section 14 obligates employers to provide a seat only when the nature of the work *in relation to the job as a whole* reasonably permits the use of seats." (1 JA 82, italics in original.) In opposition, plaintiff argued that §14 requires Rite Aid to provide seats to its Cashier/Clerks when operating a cash register, regardless of what other duties those Cashier/Clerks might be asked to perform when assigned to other tasks in other parts of the store. (1 JA 134.) The trial court denied Rite Aid's motion for summary judgment, holding that §14(A) does not require covered workers to show that their "job as a whole" permits the use of seats. (2 JA 315.)

Plaintiff subsequently moved for class certification. Plaintiff argued that class certification is appropriate because checkout work at the front-end cash registers is an essential job function of every Rite Aid Cashier/Clerk, and that the tasks performed at those cash registers are identical for all Cashier/Clerks (*e.g.,* scanning, bagging, processing transactions, and providing a receipt) (2 JA 328-330; JA Documents Filed Under Seal 348-350), such that common issues predominate over any individual issues (2 JA 335-338). In opposition, Rite Aid again contended that §14(A) applies only if the job "as a whole" reasonably permits the use of seats, and then argued that because its Cashier/Clerks perform a variety of duties other than checkout work, for differing amounts of time in its

different stores, there are no common or predominating classwide issues. (3 JA 730-747.) The trial court granted class certification, consistent with plaintiff's theory of recovery, finding that common questions of law and fact predominate. (12 JA 3378-3379.)

One year later, however, based on a summary judgment ruling entered by the district court in *Kilby v. CVS Pharmacy, Inc.* (S.D. Cal. May 31, 2012) 2012 U.S. Dist. LEXIS 76507 (16 JA 4578-4582), the trial court in this case changed its mind and concluded that plaintiff's theory of recovery actually lacks merit because §14 requires an employer to provide seating only when its employees' job "as a whole" reasonably permits the use of seats. Based on that legal conclusion, and citing variations in the job duties performed by Rite Aid Cashier/Clerks when not checking out customers at the front-end cash registers, the trial court held that common issues do not predominate after all, and it decertified the class. (20 JA 5535-5536; 5551-5552.)

The Court of Appeal reversed, and appropriately so. Applying the analytic framework of *Brinker*, the Court of Appeal held that Rite Aid's motion for decertification should have been decided without resolving the merits dispute concerning the proper interpretation of §14. In *Brinker*, this Court concluded that it was not necessary to resolve a legal dispute over the meaning of the rest break wage order provision because plaintiffs' theory of recovery—that Brinker's uniform employment policy, when "measured

against wage order requirements, allegedly violates the law"—was "by its nature a common question eminently suited for class treatment." (*Brinker, supra*, 53 Cal.4th at p. 1033.) Similarly, in the instant case, the Court of Appeal concluded that it was not necessary to resolve the dispute over the meaning of §14, because plaintiff's theory of recovery—that Rite Aid's uniform employment policy, when measured against wage order requirements, allegedly violates the law—is similarly amenable to common proof and class treatment. (*Hall*, 226 Cal.App.4th at p. 292.) As explained below, the Court of Appeal's decision represents an unexceptional application of settled principles governing class certification. The prerequisites for review are not satisfied.

THE ANALYTIC FRAMEWORK FOR CLASS CERTIFICATION

"The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.'" (*Brinker, supra,* 53 Cal.4th at p. 1023, quoting *Sav-On,* 34 Cal.4th at p. 327.) The question is not whether the plaintiff has stated a cause of action or will prevail on the merits, but rather whether the requirements of class certification are met. (*Brinker*, at p. 1023, *citing Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 178.) The court must focus on the plaintiff's theory of recovery so that, for purposes of the certification motion, the plaintiff's claim is assumed to have merit. (*Brinker*, at p. 1023.) Even if there are disputed issues, "in many instances, whether

class certification is appropriate or inappropriate may be determined irrespective of which party is correct[.]" (*Id.* at p. 1023.) "To the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them." (*Id.* at p. 1025.) However, because of problems arising from one-way intervention, a court should "eschew resolution of such issues unless necessary." (*Ibid.*) "The key to deciding whether a merits resolution is permitted [] is whether certification 'depends upon' the disputed issue." (*Ayala*, ____ Cal.4th ____, 2014 Cal. LEXIS 4649, at *22.)

Brinker illustrates the proper application of these class certification principles—as both parties agree. In the context of a dispute concerning the meaning of a wage order provision governing rest breaks, *Brinker* held that certification of the rest break subclass could be determined *without* resolving the parties' legal dispute over interpretation of the wage order provision. (*Brinker*, at p. 1033.) It was not necessary to resolve that legal issue because "[t]he [plaintiff's] theory of liability—that Brinker has a uniform policy, and that that policy, measured against wage order requirements, allegedly violates the law—is by its nature a common question eminently suited for class treatment." (*Ibid.*)

ARGUMENT

I. THE COURT OF APPEAL'S DECISION DOES NOT CREATE A SPLIT OF AUTHORITY

Trying to manufacture some ground for plenary review, Rite Aid argues that the Court of Appeal's decision creates a "split of authority" with *Morgan v. Wet Seal, Inc.* (2012) 210 Cal.App.4th 1341 and *Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974. (Petition at 23.) There is no split of authority.

A. *Morgan v. Wet Seal, Inc.*

In *Morgan*, employees of the Wet Seal retail apparel chain alleged that their employer forced them to purchase and wear Wet Seal apparel, shoes, and accessories as a condition of employment and without reimbursement (the dress code claim), and that it required those employees to use personal vehicles for company business without reimbursement (the travel expense reimbursement claim). (*Morgan*, 210 Cal.App.4th at p. 1345.) In support of their motion for class certification, plaintiffs argued that the challenged practices were reflected in written policies applicable to all putative class members, and they submitted declarations generally stating that a manager told them at the time of hiring that employees were expected or required to dress in Wet Seal merchandise, or "words to that effect." (*Id.* at pp. 1346, 1350-1351.) Plaintiffs' declarations also indicated that some employees engaged in work-related travel to other stores but

were not aware of a reimbursement policy and did not receive reimbursement. (*Ibid.*) Defendant submitted declarations of other employees generally stating that they had never been required to wear Wet Seal apparel and that they had no unreimbursed business-related expenses. (*Id.* at p. 1351.)

In evaluating the motion for class certification, the trial court concluded that defendant's written policies on their face did *not* require employees to purchase Wet Seal clothing and did *not* prescribe what employees were required to wear, so that resolution of plaintiffs' dress code claim would ultimately turn on what each employee was told by his or her store manager, how each employee interpreted what was said, and what, if anything, the employee did in response. (*Morgan*, at pp. 1356-1357.) Lacking a common policy or practice, the trial court concluded that plaintiffs' theory of liability was not reasonably susceptible to common proof. (*Id.* at p. 1357.) On the travel expense reimbursement claim, Wet Seal had a written policy by which it committed to reimburse all such expenses. (*Ibid.*) Plaintiffs themselves characterized the alleged failure to reimburse expenses as "hit or miss," and the evidence showed that many employees had received reimbursement. (*Id.* at pp. 1358-1358.) Based on that evidence, the trial court concluded that individual issues would predominate as to the reimbursement issue as well. (*Id.* at p. 1358.)

Morgan is not at all analogous to the instant case. In *Morgan*, the Court of Appeal noted that plaintiffs had failed to produce substantial evidence of a companywide policy or practice. (*Id.* at p. 1362.) In contrast, in the instant case as in *Brinker*, the evidence of a companywide policy and practice was undisputed.

Rite Aid points out that, in *Morgan*, the trial court referred to the language of the wage order provisions at issue and (regarding the dress code claim) to the Department of Labor Standards Enforcement's definition of the term "uniform" (which definition plaintiffs did not dispute). (*Morgan*, at pp. 1359-1360.) Rite Aid characterizes those references as evidence that the trial court in *Morgan* resolved a disputed legal issue. (Petition at 21.) The *Morgan* opinion shows otherwise. The *Morgan* court noted that in determining whether a cause of action is suitable for resolution on a classwide basis, the trial court must "assum[e] its merit," and also stated that plaintiffs had "fail[ed] to explain how the trial court interpreted Wage Order 7 'against' them." (*Id.* at p. 1359.) Thus, *Morgan* is not analogous to the instant case and there is no split of authority.

B. *Dailey v. Sears, Roebuck & Co.*

Dailey involved a claim that managers and assistant managers of Sears auto center stores were misclassified as exempt employees, and it also involved derivative meal period and rest break claims. Plaintiff's principal theory of liability was that Sears implemented uniform policies

and practices that resulted in their misclassification. (*Dailey*, 214 Cal.App.4th at p. 992.) The trial court found, however, that the evidence supported Sears' position that the alleged policies and practices either did not exist or, if they did, that those policies and practices did not have the effect of requiring managers or assistant managers to engage primarily in exempt work. (*Id.* at pp. 992-997.) On the meal period/rest break claim, the trial court similarly concluded, and the Court of Appeal agreed, that there was no substantial evidence that Sears employed any policy or widespread practice to deprive nonexempt employees of meal periods or rest breaks. (*Id.* at pp. 1000-1002.) Hence, those claims were not amenable to class treatment.

* * * *

Morgan and *Dailey* thus stand for the unremarkable proposition that evidence of a uniform policy or widespread practice is an important component in showing that alleged employment violations are amenable to common proof on a classwide basis. Defendants in *Morgan* and *Dailey* had no such uniform policy and practice. Here, the evidence shows that Rite Aid does have such a uniform policy. There is no split of authority.

II. THE COURT OF APPEAL'S DECISION IS NOT CONTRARY TO *BRINKER*

A. The Court of Appeal Did Not Hold That a Court May Never Decide a Disputed Legal Issue at Class Certification

Rite Aid's second argument is that the Court of Appeal adopted a rule that a trial court may *never* address a legal issue at the class certification stage. (Petition at 11, 22, 25.) That characterization is simply wrong.

The Court of Appeal readily acknowledged—and in fact, quoted—*Brinker*'s explanation that "[t]o the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them." (*Hall*, 226 Cal.App.4th at p. 288, quoting *Brinker*, 53 Cal.4th at p. 1025.) The Court of Appeal also acknowledged *Brinker*'s statement that if resolution of a legal issue is *not* necessary to decide the class certification motion, the issue should be deferred and resolved at another stage of the lawsuit. (*Hall*, at pp. 287-288.) In this respect, the Court of Appeal's decision is entirely consistent with *Brinker* and with other controlling authority. (*See Ayala*, ____ Cal.4th ____, 2014 Cal. LEXIS 4649, at *22 ["The key to deciding whether a merits resolution is permitted, then, is whether certification 'depends upon' the disputed issue."].)

B. The Court of Appeal Properly Analyzed *Bradley*, *Faulkinbury*, and *Benton*

In addition to *Brinker*, the Court of Appeal carefully reviewed the class certification analysis in three post-*Brinker* cases: *Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129; *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220; and *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701. Like *Brinker*, those cases hold that the proper focus at the class certification stage is whether plaintiff's theory of recovery is likely to prove amenable to class treatment. The Court of Appeal noted that in each case, the respective courts "assiduously adhered to *Brinker*'s admonition to defer any determination of the legal merits of a plaintiff's proffered theory at the class certification stage." (*Hall*, 226 Cal.App.4th at p. 289.)

Rite Aid attempts to distinguish *Bradley*, *Faulkinbury*, and *Benton* by portraying them as cases in which the uniform policies at issue were "facially invalid" and thus "dispositive of the issue of liability" based upon "settled legal principles." (Petition at 27.) Rite Aid's attempt to limit class certification to employment policies that are facially unlawful is not supported by anything in *Brinker* and it contradicts *Bradley*, *Faulkinbury*, and *Benton*. For example, in *Faulkinbury*, defendant's employer required all security guard employees to sign an on-duty meal break agreement. Such agreements are lawful when the "nature of the work" prevents

employees from being relieved of all duty. Framed in Rite Aid's argument, there is nothing "facially" unlawful about a policy requiring on-duty meal breaks. Such a policy is unlawful only if the "nature of the work" does not prevent employees from being relieved of all duty. Even though there was no "facial" illegality, the *Faulkinbury* court held that the meal break claim must be certified, reserving for trial the merits issue of whether the nature of the work actually prevented employees from being relieved of all duty so as to render the policy unlawful. (*Faulkinbury*, 216 Cal.App.4th at pp. 233-236.)

Similarly, in *Benton*, the Court of Appeal did not pass on the legality or illegality of the defendant's break policy (or lack of a policy), but only on whether plaintiff's theory of recovery was amenable to class treatment. (*Benton*, 220 Cal.App.4th at p. 726.) The legality or illegality of that policy was an issue for resolution in another context.

In summary, contrary to Rite Aid's argument, the Court of Appeal properly considered *Bradley*, *Faulkinbury*, and *Benton*, and their conformity with *Brinker*. (*Hall*, 226 Cal.App.4th at pp. 289-290, 293.) There is no reason for review by this Court.

III. THE COMPLEXITY OF CLASS ACTION LITIGATION DOES NOT JUSTIFY USING THE CLASS CERTIFICATION MOTION TO ELIMINATE CASES PERCEIVED AS LACKING SUBSTANTIVE MERIT

Rite Aid's third argument is that because class actions are "complex, time-consuming, and costly," trial courts should be encouraged to use the class certification stage as an opportunity to eliminate cases perceived to lack substantive merit. (Petition at 28-32.) This argument ignores the unique procedural role of class certification motions, and the concerns about one-way intervention that this Court has repeatedly emphasized over the years. (*See, e.g., Sav-On*, 34 Cal.4th at p. 326 ["The certification question is 'essentially a procedural one that does not ask whether an action is meritorious.'"], quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th at pp. 439-440; *Brinker*, 53 Cal.4th at p. 1023 ["A class certification motion is not a license for a free-floating inquiry into the validity of the complaint's allegations; rather, resolution of disputes over the merits of a case generally must be postponed until after class certification has been decided [citation], with the court assuming for purposes of the certification motion that any claims have merit [citation]."]; *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1083-1086 [explaining concern for potential one-way intervention, and the consequent importance of the "orderly conduct of putative class action cases."].)

If a defendant wishes to challenge the legal or factual merits of a claim, there are other motions—demurrers, motions for judgment on the pleadings, motions for summary judgment—designed specifically for that purpose. Indeed, the Court of Appeal recognized the availability of other motions by which Rite Aid could challenge the legal sufficiency of plaintiff's claim. (*Hall*, 226 Cal.App.4th at pp. 296-297.)

Rite Aid's proposal for sweeping merits review at class certification would upend settled class certification jurisprudence developed over many decades. It is true, of course, that class action litigation can be complex and expensive. But that is all the more reason for courts to adhere to the proper analytic framework attendant to class certification motions.

IV. REVIEW IS NOT NECESSARY TO INTERPRET THE WAGE ORDER

Rite Aid's final argument is that this Court should grant review to interpret Wage Order No. 7-2001 §14(A). No such review *in this* case is necessary because this Court already has on its docket certified questions from the Ninth Circuit concerning the proper interpretation of §14. (*Kilby v. CVS Pharmacy, Inc.*, No. S215614.) The result in *Kilby* will provide guidance for the Ninth Circuit and for state courts with pending suitable seating claims. A grant-and-hold order is also unnecessary because the trial court in this case has stayed further proceedings pending the resolution of *Kilby*.

ISSUE FOR CONSIDERATION IF REVIEW IS GRANTED

For the reasons set forth above, Rite Aid's Petition for Review should be denied in its entirety. Nevertheless, to avoid any potential argument of waiver in the unlikely event this Court were to grant review, plaintiff requests that *if* this Court grants plenary review, and *if* on plenary review this Court holds that the trial court acted within its discretion and applied the correct legal standards in ordering decertification, this Court should *also* review on the merits the additional portion of the trial court's order that precluded plaintiff from pursuing this action as non-class representative action under the Labor Code Private Attorneys General Act of 2004, Lab. Code § 2698 *et seq.* ("PAGA"). (*See Arias v. Superior Court* (2009) 46 Cal.4th 969, 981 [PAGA action may be brought as a class action or as a non-class representative action]; *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) ___ Cal.4th ___, 2014 Cal. LEXIS 4318, at *47-49.) Plaintiff should be entitled to pursue the seating claim alleged in this case on a classwide basis. But even if the class were properly decertified, she should be entitled at a minimum to pursue that claim under PAGA on a representative action basis.

CONCLUSION

For the foregoing reasons, Rite Aid's Petition for Review should be denied.

Dated: July 10, 2014

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify pursuant to Rule 8.204(c) of the California Rules of Court that the Answer to Petition for Review contains 4,061 words, excluding the cover, the tables, the signature block and this certificate, which is less than the number of words permitted by the Rules of Court. Counsel relies on the word count of the word-processing program used to prepare this brief.

Dated: July 10, 2014

JAMES T. HANNINK

646657.6

Exhibit A

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

KRISTIN HALL, Plaintiff, vs. RITE AID CORPORATION, and DOES 1-50, inclusive, Defendants.	No. 37-2009-00087938-CU-OE-CTL **NOTICE OF ENTRY OF ORDER RE STIPULATION STAYING ACTION**

TO PLAINTIFF AND HER ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 10, 2014, the Court entered its Order Re Stipulation Staying Action, a true and correct copy of which is attached to this notice.

Dated: June 16, 2014.

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FILED
Clerk of the Superior Court
JUN 10 2014
By: R. LINDSEY-COOPER, Deputy

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

KRISTIN HALL, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

RITE AID CORPORATION, and DOES 1-50, inclusive,

Defendants.

No. 37-2009-00087938-CU-OE-CTL

STIPULATION AND ~~[PROPOSED]~~ ORDER STAYING ACTION

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STIPULATION

Plaintiff Kristin Hall and defendant Rite Aid Corporation ("Rite Aid"), by and through their respective undersigned counsel, hereby stipulate as follows:

1. This action is brought under the Labor Code Private Attorneys General Act ("PAGA"), Cal. Lab. Code § 2698 *et seq.*, for penalties based on the claim that Rite Aid was required under section 14(A) of Wage Order 7-2001 to provide seats to its front-end Cashier/Clerks while working and failed to do so.

2. In October 2011, the Court granted plaintiff's motion for class certification, certifying a class consisting of "[a]ll individuals who were employed by Rite Aid as Cashier/Clerks in the State of California at any time since March 12, 2008."

3. In May 2012, weeks before trial, the Court agreed to allow Rite Aid to file a motion for decertification.

4. On October 29, 2012, relying upon *Kilby v. CVS Pharmacy, Inc.*, 09CV2051-MMA KSC, 2012 WL 1132854 (S.D. Cal. Apr. 4, 2012) and 2012 WL 1969284 (S.D. Cal. May 31, 2012), the Court granted Rite Aid's motion for decertification of the class. The *Kilby* court construed section 14 of Wage Order 7-2001 to mean that the "nature of the work" performed by an employee must be considered in light of that individual's entire range of duties. Under this interpretation, the *Kilby* court denied class certification. The Court adopted *Kilby*'s interpretation of "nature of the work" and similarly concluded that certification was not appropriate in this case because it would involve an "individual-by-individual analysis."

5. Plaintiff appealed. On May 2, 2014, the California Court of Appeal, Fourth Appellate District, reversed the Court's October 29, 2012 order decertifying the class and remanded for further proceedings. The Court of Appeal held that the court prematurely assessed the merits of plaintiff's theory. The Court of Appeal did not address the Court's interpretation of section 14's "nature of the work" language.

6. Although the opinion initially was unpublished, on May 16, 2014, the Court of Appeal ordered that the opinion be published. That means that the Court of Appeal's decision does not become final until June 15, 2014, and that Rite Aid's deadline for filing a petition for

review with the California Supreme Court is June 25, 2014 (ten days after the decision becomes final). Cal. Rule Ct. 8.264(b)(3), 8.500(e)(1). Rite Aid intends to petition the Supreme Court for review.

7. Between the time of plaintiff's appeal and the Court of Appeal's reversal, the California Supreme Court decided to resolve important issues regarding the legal interpretation of section 14. On December 31, 2013, upon reviewing the decisions in *Kilby* and *Henderson v. JPMorgan Chase Bank*, No. CV 11-3428 PSG (C.D. Cal. March 4, 2013) (denying class certification, relying upon *Kilby*), the Ninth Circuit Court of Appeals requested that the California Supreme Court exercise its discretion to decide several certified questions, including the proper interpretation of section 14's "nature of the work" language. *See Kilby v. CVS Pharmacy, Inc.*, 739 F.3d 1192 (9th Cir. 2013). On March 12, 2014, the California Supreme Court granted the request for certification. No. S215614.

8. The parties have conferred and agree that pending the outcome of (a) Rite Aid's petition for review with the California Supreme Court and (b) the Supreme Court's decision in *Kilby*, this action should be stayed so that this Court will have the benefit of the Supreme Court's definitive interpretation of section 14 before embarking on further proceedings in this action.

9. Accordingly, the parties jointly request this Court to enter an order vacating all pre-trial dates in the action and staying the entire action pending the outcome (a) Rite Aid's petition for review with the California Supreme Court and (b) the Supreme Court's decision in *Kilby*. Pursuant to C.C.P. §583.340(b), the period during which the stay is in effect shall be excluded from computation of the time within which an action must be brought to trial. Within 30 days after the later of the California Supreme Court's decisions becomes final, the parties will report back to this Court, and the Court may convene a further status conference to lift the stay and schedule new pre-trial and trial dates as appropriate.

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Dated: May 30 2014.

JAMES F. CLAPP
JAMES T. HANNINK
ZACH P. DOSTART
DOSTART CLAPP & COVENEY, LLP

KEVIN J. McINERNEY

MATTHEW RIGHETTI
RIGHETTI GLUGOSKI, P.C.

By: _____
Kevin J. McInerney
Attorneys for Plaintiff Kristin Hall

Dated: May 30 2014.

JEFFREY D. WOHL
RISHI N. SHARMA
REGAN A.W. HERALD
PETER A. COOPER
PAUL HASTINGS LLP

By: _____
Jeffrey D. Wohl
Attorneys for Defendant
Rite Aid Corporation

ORDER

On the stipulation of the parties, and good cause appearing therefor,

IT IS ORDERED that all pre-trial dates in the action be and hereby are VACATED and that this action be and hereby is STAYED pending the outcome (a) Rite Aid's petition for review with the California Supreme Court of the California Court of Appeal's decision in this matter of May 16, 2014, and (b) the Supreme Court's decision in *Kilby v. CVS Pharmacy*, Case No. S215614. Within 30 days after the later of the California Supreme Court's decisions becomes final, the parties will report back to this Court, and the Court will convene a further status conference to lift the stay and schedule new pre-trial and trial dates as appropriate.

Dated: ~~May~~ June 10, 2014.

JOAN M. LEWIS

Joan M. Lewis
Judge of the Superior Court

PROOF OF SERVICE

I am more than 18 years old and not a party to this action. My place of employment and business address is 55 Second Street, 24th Floor, San Francisco, California 94105.

On June 16, 2014, I served the foregoing document described as:

- **NOTICE OF ENTRY OF ORDER ON STIPULATION STAYING ACTION**

on the interested parties by placing true and correct copies thereof in envelopes addressed as follows:

James F. Clapp
Zachariah P. Dostart
James T. Hannink
Dostart Clapp & Coveney, LLP
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☐ **VIA OVERNIGHT MAIL:**

VIA UNITED PARCEL SERVICE: By delivering such documents to an overnight mail service or an authorized courier in a sealed envelope or package designated by the express service courier addressed to the persons on whom they are to be served.

☒ **VIA U.S. MAIL:**

The envelopes were then sealed. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice such sealed envelope(s) would be deposited with the U.S. Postal Service on June 16, 2014 with postage thereon fully prepaid, at San Francisco, California.

☐ **VIA PERSONAL DELIVERY:**

I personally delivered such sealed envelope(s) by hand to the offices of the addressee(s) pursuant to CCP § 1011.

☐ **VIA FACSIMILE:**

The facsimile transmission report indicated that the transmission was complete and without error. The facsimile was transmitted to the facsimile numbers indicated above on June 16, 2014.

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

Executed on June 16, 2014, at San Francisco, California.

Meredith Mitchell

PROOF OF SERVICE

CASE NAME: *Kristin Hall v. Rite Aid Corporation*
CASE NO.: S219434

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Diego, State of California. My business address is 4370 La Jolla Village Drive, Suite 970, San Diego, CA 92122-1253.

On July 10, 2014, I served true copies of the following document: **ANSWER TO PETITION FOR REVIEW** on the parties by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

BY HAND DELIVERY: I caused such document to be delivered by hand to the office of the addressees listed below.

Jeffrey D. Wohl
Rishi N. Sharma
Regan A. W. Herald
PAUL HASTINGS LLP
55 Second Street, 24th Floor
San Francisco, CA 94105-3441
Attorneys for Defendant-Respondent

Clerk of the Superior Court
Superior Court of California
County of San Diego
Hall of Justice
330 W. Broadway
Department 65
San Diego, CA 92101
Trial Court

BY ELECTRONIC TRANSMISSION: I caused a copy of the document to be sent from e-mail address dlouden@sdlaw.com to the persons listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Clerk of the Court of Appeal
California Court of Appeal
Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101

BY MAIL: I enclosed the document in a sealed envelope or package addressed to the persons at the addresses listed below and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Dostart Clapp & Coveney, LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

Kevin J. McInerney
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Attorney for Plaintiff-Appellant

Michael Rubin
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Attorney for Plaintiff-Appellant

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 10, 2014, at San Diego, California.

Doneca L. Louden