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July 24, 2013

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Chief Justice Tani Gorre Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Bluford v. Safeway Stores, Inc.*
No. S211498

Dear Chief Justice Cantil-Sakauye and Associate Justices:

On behalf of the Chamber of Commerce of the United States of America, we write to urge this Court to grant the pending petition for review in the above-referenced case. *Bluford* is yet another employment dispute in which a Court of Appeal has superimposed rules developed in the wage-and-hour context on a different compensation system — in this instance, holding that an employer using a productivity compensation system must separately compensate piece–rate workers at the minimum hourly wage for rest breaks — and also holding (contrary to the trial court's ruling) that a determination whether the claims are suitable for class action treatment can be based *entirely* on the plaintiff's allegations without regard to the employer's affirmative defenses. This case cries out for review.

U.S. Chamber's interest in *Bluford*.

The Chamber is the world's largest business federation, directly representing 300,000 members and, indirectly, more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of thousands of California businesses, including employers that use productivity-based compensation systems.

Because the Chamber and its members have a significant interest in the administration of civil justice in California's courts, the Chamber routinely advocates the interests of the business community by filing *amicus curiae* briefs in cases involving issues of substantial concern to American business. In that role, the Chamber has appeared many times before this Court and other courts throughout the country. The implementation of alternative compensation systems is an issue of broad and continuing importance to a wide variety of businesses in California, including drivers, the automobile and garment industries, carpet layers, telephone technicians, and various factory workers. The needs of employers, employees, and customers are all best served by rules that are well-defined and easily understood.

Review should be granted.

Under *Bluford*, employers compensating their employees based on productivity must now pay for rest breaks at an hourly rate equal to or exceeding the minimum wage, regardless of whether the employees have already been paid for those rest breaks as part of their productivity-based compensation, and notwithstanding the fact that an employee's wages over a given pay period may exceed the minimum wage for all hours worked. This issue is substantially similar to the one raised in *Gonzalez v. Downtown LA Motors,* No. S210681, in which this Court denied review on July 17, 2013.

Safeway's drivers are not hourly workers. The drivers who deliver goods from Safeway's distribution center to Safeway's stores are paid according to an agreement negotiated by their union — for every eight- or ten-hour shift, the drivers receive one unpaid 30-minute meal period, two paid 15-minute rest periods, and another paid 15-minute rest period if they work more than two hours overtime. But the drivers are not paid by the hour — their income is calculated based on (i) mileage rates applied according to the number of miles driven, the time of day the trips were taken, and the location where the trips began and ended; (ii) fixed rates for certain tasks; (iii) an hourly rate for a predetermined amount of minutes for other tasks; and (iv) an hourly rate for delays (such as breakdowns). This isn't a simple clock-in, clock-out system — the drivers manually keep detailed trip sheets and log their activities into an onboard computer system. They earn far more than the minimum hourly wage.

Wage and hour rules should not be grafted onto other compensation systems. The Chamber submits that, whatever this Court's reasons for rejecting the petition in *Downtown LA Motors*, that case illustrated the confusion in the trial and intermediate appellate courts about superimposing rules developed for one form of employee compensation (hourly rates) on other, very different forms (piece-work and other productivity systems). This case confirms that the confusion is rampant, not isolated, and getting worse.

In addition to the common wage and hour compensation system, the Labor Code authorizes several other forms of wages such as payment measured by the task, piece, commission or other form of calculation. (Lab. Code, § 200.) Employers who use these alternative systems have long understood their obligation to provide paid rest periods for their employees — but until *Downtown L.A. Motors* and now *Bluford*, these employers believed that compensation for rest periods could be included in employees' productivity-based compensation if the employee's total wages equaled or exceeded the amount the employee would have earned for the hours worked at the minimum wage hourly wage.

According to *Downtown L.A. Motors* and now *Bluford*, the productivity compensation system is flawed and non-hourly wage employees paid more than the amount the minimum hourly wage would yield must *additionally* be paid an hourly rate minimum wage for rest periods. Without this Court's intervention, employers throughout the state will lack guidance about whether their particular productivity compensation systems can continue without an hourly rate component.

In determining whether to certify a class, the trial court must consider affirmative defenses as well as the plaintiff's allegations. *Bluford* shows how, when one wrong step is taken, the next one can push the case over a cliff. Here, the Court of Appeal's refusal to accept the trial court's discretionary decision that this case is not appropriate for class certification rests on the faulty premise that a class can be certified based entirely on the plaintiffs' allegations, without regard to the issues raised by the employer's affirmative defenses. There are at least two problems with this holding — first, the trial court's ruling should have been affirmed because it in no way

constituted an abuse of discretion; second, affirmative defenses must be considered when determining whether a case is suitable for class treatment.

The *Bluford* opinion highlights an existing conflict among the Courts of Appeal about which factors to consider in determining whether a community of interest exists sufficient to justify class certification. Here, the Court of Appeal, although paying lip service to the trial court's discretion vis-à-vis the certification ruling, nevertheless reweighed the evidence, then considered only the plaintiff's allegations and ignored Safeway's affirmative defenses. Relying on *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323 — a run-of-the-mill wage and hour case that was also at the heart of the *Downtown LA Motors* opinion — *Bluford* holds that, in a productivity based compensation system, rest periods must be separately compensated at an hourly rate without regard to the net effect on the resulting rate of compensation to the drivers. (Slip Opn. 8, 10.)

Both as to the plaintiff's rest period *and* meal break claims, the Court of Appeal refused to consider Safeway's evidence that drivers were already paid for their rest periods as part of their collectively-bargained compensation system, and simply accepted plaintiff's allegations that Safeway's purported failure "as a matter of policy" to provide second meal periods, standing alone, made the case suitable for class certification. (Slip Opn. 11.)

Although this Court said very plainly in *Brinker Restaurant Corp v. Superior Court* (2012) 53 Cal.4th 1004, 1021, that the party advocating class treatment must, among other things, demonstrate a well-defined community of interest and substantial benefits from certification that render proceeding as a class superior to the alternatives, the Courts of Appeal have all too often ignored these considerations when certifying classes where individual issues raised by affirmative defenses make it clear that the case is *not* suitable for class treatment. (E.g., *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 234; *Bradley v. Networkers Internat. LLC* (2012 211 Cal.App.4th 1129, 1151; *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1299; *Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 98.)

As the petition for review makes clear, another line of cases *does* credit affirmative defenses as part of the individual issue inquiry, thereby creating a direct conflict in the law justifying this Court's intervention. (E.g., *Morgan v.*

Wet Seal, Inc. (2012) 210 Cal.App.4th 1341, 1358; *Thompson v. Automobile Club of Southern California* (2013) __ Cal.App.3d __ (2013 WL 3233260); *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450; *Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 144; *Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.) This issue is not going to go away until this Court addresses it.

For the foregoing reasons, the Chamber urges the Court to grant Safeway's petition for review.

Respectfully submitted,

MORRISON & FOERSTER, LLP
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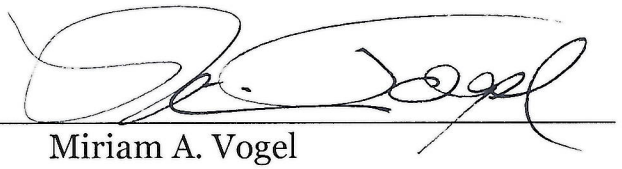
By: 
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cc: Per attached proof of service

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(Code Civ. Proc. secs. 1013(a), 2015.5)

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 707 Wilshire Boulevard, Los Angeles, California 90017-3543; I am not a party to the within cause; I am over the age of eighteen years and I am readily familiar with Morrison & Foerster's practice for collection and processing of correspondence for mailing with the United States Postal Service and know that in the ordinary course of Morrison & Foerster's business practice the document described below will be deposited with the United States Postal Service on the same date that it is placed at Morrison & Foerster with postage thereon fully prepaid for collection and mailing.

I further declare that on the date hereof I served a copy of:

LETTER DATED JULY 24, 2013 FROM MIRIAM A. VOGEL ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA ADDRESSED TO CHIEF JUSTICE TANI GORRE CANTIL-SAKAUYE AND ASSOCIATE JUSTICES, SUPREME COURT OF CALIFORNIA

on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and mailing at Morrison & Foerster LLP, 707 Wilshire Boulevard, Los Angeles, California 90017-3543, in accordance with Morrison & Foerster's ordinary business practices:

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

Executed at Los Angeles, California, July 24, 2013.

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