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April 20, 2012

Via U.S. Mail

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

Re: ***Duran vs. U.S. Bank National Association***
Supreme Court Case No. S200923

Subject: Amicus Curiae Letter in Support of Petition for Review of a Decision of the Court of Appeal for the First Appellate District in Case Nos. A12557 and A126827

Dear Chief Justice Cantil Sakauye and Honorable Associate Justices

This correspondence is submitted in support of the "Petition for Review" filed by Plaintiff Sam Duran, *et al.*, in the above-referenced matter. It is authorized by CAL. RULE OF COURT, RULE 8.500(g).

INTRODUCTORY COMMENTS

This Court, only a few days ago, reasserted in general terms, the importance of the class action device, and specifically interjected those comments in an opinion which alleged violations of the CALIFORNIA LABOR CODE *(Brinker Restaurant Corp. v Superior Court* [April 12, 2012, S166350 ____ Cal.4th ____ LEXIS 3149] (*Brinker*)). The anticipation of the *Brinker* decision, validates the extent to which the courts, and the attorney bar, rely upon this Court's guidance.

At the same time, the *Brinker* opinion also demonstrates the importance of, and the magnitude toward which, appellate opinions shape business policy, and arguments advanced by attorneys in the trial courts. Quite simply, appellate opinions are cited, and relied upon, by attorneys every day who are *advocating* their position. It is during this zealousness of representation, that a singular appellate opinion can be misconstrued, cited out of factual context, or unintentionally cited for a proposition which would not be embraced by this Court. Because of our resolute reliance upon judicial precedent, when an appellate opinion does not make it clear that it is limited to its facts, or

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otherwise sets forth a position which is contrary to a position previously adopted by this Court, the appellate opinion wreaks havoc with business decisions, the attorney bar, and the trial courts.

Obviously, based upon the hierarchy of the courts, an appellate opinion which is very fact specific, if not accepted for review by this Court, results in years of adversarial argument and supposition. In these economic times [Los Angeles County alone will now close 56 courtrooms] it seems prudent to provide guidance to counsel and the courts, particularly in areas of the law which are "heavily" litigated. It is this author's opinion, that wage and hour issues, and particular the issues addressed in *Duran*, would fall into such a category.

WHO WE ARE

I am a partner with the firm of Arias Ozzello & Gignac, while based in Los Angeles and Santa Barbara, our boutique practice extends to matters litigated throughout the state. I believe our firm brings a unique perspective to the issues set forth by the appellate court in *Duran*, as we have: [1] litigated through trial several class action employee misclassification cases; [2] currently have several employee misclassification cases pending before both the state and federal judiciary; and, [3] are currently litigating employee misclassification cases where a class action was originally certified, and subsequently decertified on the grounds that common questions would not "predominate".[1]

In the later category, of the 67 cases yet to be set for trial, the court is in a time and economic quandary. The parties face 204 weeks [3.9 years] of trials on the issue of whether the employer misclassified its employees. As the court has already indicated that the trials will not go "back to back," these matters will be pending for years — the number of which is anyone's guess.

So the question becomes: who addresses the due process rights of the employee? As witness contact information is lost over time, as wages are now potentially withheld for what could well exceed a decade, as class members pass away in the natural order, — where is the due process afforded to the employee?

The First District Court of Appeal in *Duran*, referencing the due process rights *of the employer*, and citing this Court, noted:

> "'That a procedure is efficient and moves cases through the system is admirable, but even more important is for the courts to provide fair and accessible justice.'"[2]

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[1] Upon decertification, there were 136 individual cases. Of those, 68 have been settled, one has gone to trial [3 weeks] and 67 have yet to be set for trial.

[2] *Duran, supra*, 263 Cal.App.4th at 261, *citing, Elkins v. Superior Court* (2007) 41 Cal. 4th, 337, 1336

Efficient access to the courts must be equally available to the employee, and the class device persists as the most efficient avenue.

WHY DURAN SHOULD BE REVIEWED

The review of the *Duran* opinion is the next logical step for this Court. It is "necessary to secure uniformity of decision or to settle an important question of law." CAL. RULES OF COURT, RULE 8.500(b)(1). Here, both reasons are equally applicable.

Specifically, with respect to class cases which address an employer's misclassification of its employees, this Court must reconcile the *Duran* opinion with *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, and *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785. [Even a re-affirmation from this Court that *Ramirez* did not address class certification issues, would bring clarity to matters that are litigated and briefed *ad nauseam* every day in the trial courts.] To the extent that *Duran* is interpreted to preclude class certification unless there is 100% homogenity, then review is warranted.[3]

Second, to the extent that the opinion below stands for the proposition that liability can never be established [whether in a misclassification case or otherwise] through at least the partial use of statistical sampling/evidence, then review is again appropriate.

This Court taught us in *Sav-On* that courts should look to the "theory of recovery" in assessing whether class certification is appropriate. Even in the employee misclassification cases. The *Sav-On* Court noted:

> "In any event, 'a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her *eligibility for recovery or* as to the amount of his or her damages.'" (*Employment Development Dept. v. Superior Court* (1981) 30 Cal.3d 256, 266, 178 Cal.Rptr. 612, 636 P .2d 575.)
>
> "Defendant sweepingly asserts, without support, that the portion of plaintiffs' evidence that focused on defendant's class-wide policies and practices, rather than on 'whether each class member is meeting the employer's reasonable expectations,' is irrelevant to the predominance issue. But defendant does not suggest any per se bar exists to certification based partly on pattern and practice evidence or similar evidence of a defendant's class-wide behavior. California courts and others have in a wide variety of contexts considered pattern and practice evidence, *statistical*

[3] The willful misclassification of persons in the workforce is a matter of significant public concern, as evidenced by the newly enacted amendments to the CAL LABOR CODE §§ 226.8, 2753 [misclassification of employees as independent contractors.]

> *evidence, sampling evidence,* expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate. Indeed, as the Court of Appeal recently recognized, the use of statistical sampling in an overtime class action "does not dispense with proof of damages but rather offers a different method of proof (*Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 750, 9 Cal.Rptr.3d 544)." [Emphasis added.]

Sav-On, supra, 20 Cal.4th at 333.[4] These dictates were recently affirmed by Justice Werdegar in her concurring opinion in *Brinker. Brinker Restaurant Corp. v. Superior Court* (April 12, 2012, S166350) ____ Cal.4th ____ [2012 WL 1216356, at * 27-28] (con. opn. of Werdegar, J. [pp. 3-4]) ("Representative testimony, surveys, and statistical analysis are all available as tools to render manageability determinations of the extent of liability.").)

But, the fact remains, that while *Sav-On* refused to extend *Ramirez* "to shield employees from an action challenging a type of illegality that our decision in that case [*Ramirez*] was actually designed to prevent," the *Duran* opinion does just that.[5]

The *Duran* court, admitted that it could never envision any set of circumstances which would put the *Sav-On* directives into practice at the trial level. The First District in its Opinion below, concluded:

> "At this juncture, we need not speculate as to whether a workable trial plan could have been devised to account for these individual inquiries. In view of the many courts that have considered this problem at the classification stage, it is doubtful that such a plan could be successfully implemented."

Duran, supra, 203 Cal.App.4th at 275.[6]

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[4] *Sav-On* continued to instruct:

> "Pre-dominance is, a comparative concept, and the necessity for class members to individually ***establish eligibility*** and damages not mean individual facts predominate." [citations omitted.] *Sav-On , supra,* 2 Cal.4th at 334.

[5] *See, Sav-On, supra,* 34 Cal. 4th at 337.

[6] The *Duran* court recognized that the burden of proof regarding the application of the outside salesperson exemption, as any exempt status, is on the employer. Despite recognizing this fact, and even when an employer intentionally misclassifies with impunity and without consequence its employees, the *Duran* court would relieve the employer of any burden to track employee work-time.

Should the trial court in *Duran* have required the parties to demonstrate eligibility of non-exempt status for each employee? Should the trial court in Duran simply allowed all relevant and non-repetitive evidence, whether statistical or otherwise? Need a trial court only establish a foundation for the statistical evidence that results in a certain "acceptable" margin of error? Has the opinion in *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. ____, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 negated the functionality of *Sav-On*?

While this author would agree that an employee's individual circumstances in misclassification cases may dictate that an employer retains the right to assert an exemption defense as to every potential class members, it does not follow that class treatment and statistical analysis at trial cannot accomplish this goal or otherwise is inappropriate. And, while this author does not agree with the narrow interpretation by the *Duran* court of *Walsh v. IKON Office Solutions, Inc.*, (2007) 148 Cal.App.4th 1440; *Dunbar v. Albertson's, Inc.*, (2006) 141 Cal.App.4th 1422 and *In re Wells Fargo Home Mortgage Overtime Pay Lit.*, (9th Cir. 2009) 571 F.3d 953, the fact remains that the Opinion below demonstrates that the trial courts require guidance when the *Sav-On* factors need to be applied at the trial stage.

These are pro-active times. This is a pro-active Court. Guidance here is critical.

Very truly yours,

ARIAS, OZZELLO & GIGNAC, LLP

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DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 6701 Center Drive West, 14th Fl., Los Angeles, California 90045.

2. That on April 20, 2012, declarant served the **AMICUS CURIAE LETTER** by depositing a true copy thereof in a United States mailbox at Los Angeles, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed below:

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3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this twentieth day of April, 2012, at Los Angeles, California.

MARK A. OZZELLO