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April 17, 2012

RECEIVED
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CLERK SUPREME COURT

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

Re: Petition for Review
Duran, et al. v. U.S. Bank National Association
Supreme Court Case No. S200923

Chief Justice Cantil-Sakauye and Associate Justices:

We respectfully request that the Court grant the petition for review of the opinion of the Court of Appeal in the matter *Duran, et al. v. U.S. Bank National Association* (2012) ___ Cal. App. 4th ___, Supreme Court Case No. S200923.

With our co-counsel the Law Offices of Ian Herzog and the Law Offices of Stephen Glick, who join in this request, our firm has served as class counsel in numerous class actions in the trial and appellate courts of this State as well as in the federal district courts. Many of these cases involved claims by employees for violation of the Labor Code and the Industrial Welfare Commission Wage Orders. Presently, we are counsel for the plaintiffs in several putative wage and hour class actions including: *Massie v. Ralphs Grocery Company, Inc.*, Los Angeles Superior Court Case No. BC 321144, *McLeod v. Ralphs Grocery Company, Inc.*, Los Angeles Superior Court Case No. BC 321704, *Stonebarger v. Wild Oats Markets, Inc.* Los Angeles Superior Court Case No. BC411385, *Brookler v. RadioShack Corp.*, Los Angeles Superior Court Case No. BC 313383. Reported opinions in which we have served as class and/or plaintiffs'

counsel include *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, *Prachasaisordej v. Ralphs Grocery Company, Inc.* (2007) 42 Cal.4th 217, *Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, *Harper v. 24 Hour Fitness, Inc.* (2008) 167 Cal.App.4th 966.

The *Duran* opinion represents a quite significant departure from the developed and settled jurisprudence on class certification and is already being flourished by employers in the trial courts as the headstone for the class device. Yet in the past decade, at least, both the Legislature and this Court have repeatedly confirmed the class/representative action as indispensable to fundamental public policies, litigants and the courts where the protections afforded workers in this State are at issue.

Through statutory schemes such as the Private Attorney General Act of 2004 (Labor Code § 2699 et seq.), the Legislature installed the representative action as an essential device for employees to seek redress for violations of the Labor Code. Similarly, recent cases such as *Gentry v. Superior Court* (2007) 42 Cal.4th 443 emphasize the role of the class device as a tool both to enforce legal protections for workers and provide redress for violation of these remedial statutes and regulations. (*Id.* at 462 ("... the class action not only benefits the individual litigant but serves the public interest in the enforcement of legal rights and statutory sanctions.").)

With the *Duran* opinion, trial courts and the bar are faced with a flat rejection of an entire methodology of evidence which had been specifically approved in opinions such as *Sav-on:*

> California courts and others have in a wide variety of contexts considered pattern and practice evidence, statistical 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.

Sav-on, 34 Cal.4th at 333 and fn. 6 citing *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, 337-340, 97 S.Ct. 1843, 52 L.Ed.2d 396 (statistics bolstered by specific incidents "are equally competent in proving employment discrimination"); *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1106-1108 ("well sampling and other hydrological data" about "the pattern and degree of contamination" could, but was insufficient to, support "a theory that a defendant's negligence has necessitated increased or different monitoring for all, or nearly all, exposed individuals"); *Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1279, (certification of class action for wrongfully denied welfare benefits proper because "whether the County applied an unlawful sanctioning process" to deny eligibility "can be proved by reviewing the County's regulations, . . . the standard practices followed in making sanctioning decisions, as well as a sampling of representative cases"); *Stephens v. Montgomery Ward* (1987) 193 Cal.App.3d 411, (certification proponent satisfied commonality requirement with statistical data and analysis of retail chain's corporate structure supporting allegations respecting centralized control over employment decisions); see also *In re Simon II Litig.* (E.D.N.Y.2002) 211 F.R.D. 86, 146-151 (tobacco case listing state, high court, other federal, and secondary authorities concluding aggregate proof is "consistent with the defendants' Constitutional rights and legally available to support plaintiffs' state law claims").

While the *Duran* opinion feigns the possibility that statistical evidence and like methods of proof remain viable, the vehemence of the opinion's rejection of such evidence in order to establish liability belies the opinion's language. This too, flies directly in the face of this Court's prior decisions.

Another conflict in reported decisions has been created by *Duran's* holding that due process mandates that a defendant employer be permitted to require adjudication of its affirmative defense of proper classification of employees as exempt or nonexempt on an individual basis, which this Court also already rejected:

> Contrary to defendant's implication, our observation in *Ramirez* that whether the employee is an outside salesperson depends "first and foremost, [on] how the employee actually spends his or her time" (*Ramirez, supra*, at p. 802, 85 Cal.Rptr.2d 844, 978 P.2d 2) did not create or imply a requirement that courts assess an employer's affirmative exemption defense against every class member's claim before certifying an overtime class action.

Sav-on, 34 Cal.4th at 337.

These foundations of *Gentry* and *Sav-on* are of particular import given the practical realities and issues in wage and hour class actions, especially in misclassification/overtime cases alleging violations of the Industrial Welfare Commission Wage Orders such as that at issue in *Duran*. The majority of employees in this State whose jobs are covered by Wage Orders are *presumed* to be non-exempt *i.e.*, they are presumed to be hourly employees entitled to overtime wages unless the employer established otherwise. (See *e.g.* Wage Order 7, Title 8 Cal. Code Regs. § 11070(1)(A).) Nonetheless, our experience is that employers classify large groups of employees without first ensuring the classification is in compliance with standards for the law on exempt and nonexempt classifications, without taking any measures to define the nature of the tasks they are to actually perform or the time to be spent, educating the employees on exempt and nonexempt tasks, auditing compliance with the Wage Order, etc. Yet when such a wholesale classification is challenged in a putative class action, the employers routinely assert that the classification must be litigated on an individual basis and there are innumerable individual factors to be considered. In other words, the employer defendants use the class device and the very regulations intended to protect employees, as a means to ensure the "'random and fragmentary enforcement' of the employer's legal obligation to pay overtime." (*Gentry*, 42 Cal.4th at 462 quoting *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 745, quoting *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 807.)

Finally, review of the *Duran* opinion is also warranted given the Court of Appeal's usurpation of the role of the trial court as the forum best suited to determine whether certification is warranted. In *Sav-on,* this Court affirmed the settled primacy of the trial court to make this determination: "It is not our role at this stage either to devise or to dictate the methods by which a trial court conducting a particular class action may choose to manage it." (*Sav-on*, 34 Cal. 4th at 340 citing *Rosack v. Volvo of America Corp.* (1982) 131 Cal.App.3d 741, 761.) And yet in *Duran*, a court inferior to this Court withdrew the trial court's ability to further consider the propriety of class treatment whatsoever. The *Duran* opinion does not even permit the trial court to determine, on remand, that some issues are amenable to class treatment, or that subclasses might be useful, or to employ any of the techniques for management and disposition of a case which this Court has commanded trial courts to consider and apply. (*Sav-on*, 34 Cal.4th 339.)

The foregoing is not an exhaustive analysis of the bases which justify review of the *Duran* opinion, many of which are covered in the Petition and letters from other *amici*. Nonetheless, any of these are sufficient for the grant of review by this Court, and necessary to preserve the class device in this State.

Respectfully submitted,

DANIELS, FINE, ISRAEL
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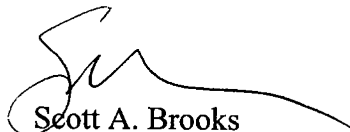


Scott A. Brooks

Proof of Service Attached

PROOF OF SERVICE

State of California)
)
County of Los Angeles)

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 1801 Century Park East, Ninth Floor, Los Angeles, California 90067. On April 17, 2012, I served the within document(s):

LETTER BRIEF

by placing a true copy thereof in sealed envelopes as stated on the attached mailing list.

[xx] **BY MAIL** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice a true copy would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

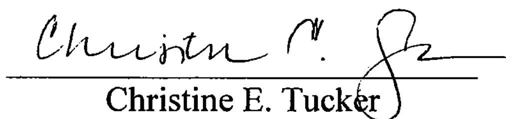
[ ] **BY PERSONAL SERVICE** I caused personal delivery by ATTORNEY SERVICE of said document(s) to the offices of the addressee(s) as set forth on the attached mailing list.

[ ] **BY OVERNIGHT DELIVERY SERVICE** I caused such envelope to be deposited with an overnight delivery service (Overnite Express/Federal Express) for delivery the next court day, or at most, within two court days of the above date.

[xx] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[ ] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 17, 2012, at Los Angeles, California.



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