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April 25, 2012

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

Re: *Duran v. U.S. Bank*
California Supreme Court Case No. S200923
Amicus Letter in Support of Review

Dear Chief Justice and Associate Justices:

This letter supports Plaintiffs' Petition for Review under Rule 8.500(g). This case may dramatically effect wage and hour litigation in California because employers now believe that representative and statistical evidence is not appropriate to prove both liability and damages. Indeed, employer attorneys now argue that they have a constitutional "due process" right to examine *each and every* employee at trial, and that any management plan that falls short of this is *per se* unconstitutional. *See, e.g.,* Barbara Cotter, "Pivotal new ruling on management of class actions," Los Angeles Daily Journal (Feb. 14, 2012).

I. Statement of Interest

I have practiced employment class action law since 1997. I am a co-author of one of the leading practice manuals for California Wage and Hour Law, published by the Regents of the University of California (CEB). I am also a Chapter Editor for The Fair labor Standards Act, a preeminent labor treatise published by BNA. In practice, my office files both federal and state wage and hour claims under the California Labor Code as well as the Fair Labor Standards Act. My firm maintains a healthy stable of class actions where representative and statistical evidence is vital to protect the employment rights of California workers. Without these management tools, wage and hour statutes are toothless. I have a solid interest in this case.

II. Why Review Should Be Granted

California should not have a lower standard of enforcement than federal law. Under the FLSA, representative evidence is regularly used in wage and hour cases to prove both liability and damages. *See, e.g., Martin v. Selker Bros., Inc.,* 949 F.2d 1286, 1296-98 (3d Cir. 1991) (plaintiffs could use representative testimony to make prima facie case that non-testifying employees performed some work for which they were not properly compensated); *Donavan v. Bel-Loc Diner, Inc.,* 780 F.2d 1113, 1115-16 (4th Cir. 1985) (district court properly made classwide determinations regarding whether employees received uninterrupted 30-minute breaks

based on representative testimony; approximately 30 out of 98 employees testified); *Brennan v. General Motors Acceptance Corp.,* 482 F.2d 825, 826-29 (5th Cir. 1973) (no error in permitting representative evidence to establish prima facie case that non-testifying employees worked overtime for which they were not compensated); *Takacs v. Hahn Auto. Corp.,* 1999 WL 33127976, *1 (S.D. Ohio Jan. 25, 1999) ("[C]ourts including the Sixth Circuit, have uniformly held that damages in an FLSA overtime case can be proved with testimony from a representative group of plaintiffs and, thus, without requiring each plaintiff seeking same to testify."). "Courts have allowed all employees to recover backwages on the representative testimony of 18 percent, 11 percent, or even 3.5 percent of employees." *Solis v. Best Miracle Corp.,* --- F.Supp.2d ----, 2010 WL 1766851 (C.D. Cal. May 03, 2010) (*citing McLaughlin v. Ho Fat Seto,* 850 F.2d 586, 589-90 (9th Cir. 1988); *McLaughlin v. DialAmerica Marketing,* 716 F.Supp. 812, 824 (D. N.J. 1989)(quotation marks omitted)).

Statistical sampling may also be used to determine both liability and damages issues. In a recent class certification decision, the Eastern District of California approved the use of a sampling technique to determine liability and damages for off-the-clock claims on a class-wide basis. *See Adoma v. Univ. of Phoenix, Inc.,* --- F.Supp.2d ----, No. CIV. S-10-0059 LKK/GGH, 2010 WL 3431804 at *4-8 (E.D. Cal. Aug. 31, 2010). *See also Bell v. Farmers Ins. Exchange,* 115 Cal.App.4th 715 (2004) (looking to federal authority to conclude it is appropriate to use statistical sampling and extrapolation to determine aggregate classwide damages); *Sav-On Drug Stores, Inc. v. Superior Court,* 17 Cal.Rptr.3d 906, 917-18 (2004) (*citing Bell* approvingly).

Duran shockingly rejected the very same types of management tools that have been warmly endorsed in both federal and state courts – most recently by this Court in *Brinker.*

III. Conclusion

For the following reasons, this Court should grant the Petition for Review. Alternatively, the Court should Order that *Duran* be de-published so that trial courts are not swayed into improper rulings at certification and trial.

Respectfully submitted,
DESAI LAW FIRM, P.C.

By: 
AASHISH Y. DESAI
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PROOF OF SERVICE

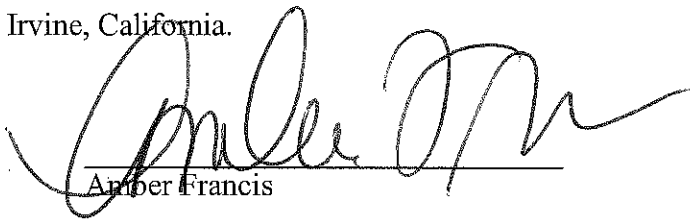
STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 8001 Irvine Center Drive, Suite 1450, Irvine, California 92618. On April 25, 2012, I served the foregoing document described as **AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as stated on the attached service list for processing by the following method:

BY MAIL – I deposited such envelope in the mail at Irvine, California. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal service on that same day with postage thereon fully prepaid at Irvine, 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.

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

Executed on April 25, 2012, at Irvine, California.



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