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April 23, 2012

The Honorable 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 National Association*, No. S200923
Amicus Curiae Letter

Dear Chief Justice and Associate Justices:

Pursuant to California Rule of Court 8.500, we write in support of the Petition for Review in the above-captioned matter and to respectfully urge the Court to grant review and remand for reconsideration of the class certification decision in light of *Brinker Restaurant Corp. v. Superior Court*, No. S166350, __ Cal. 4th __, 2012 WL 1216356 (Apr. 12, 2012).

I. STATEMENT OF INTEREST

Our firm has represented employees in employment class actions since 1972. For the past two decades, we have actively enforced California's worker protective wage and hour laws through the use of private class and representative actions. Such actions allow California employees to vindicate their rights under California law even if their claims are small and even though many fear retaliation by their employers and prospective employers. We drafted the primary public interest amicus briefs to this Court in *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004), *Cortez v. Purolator Products Air Filtration Co.*, 23 Cal. 4th 163 (2000), and *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575 (2000).

The Court of Appeal's fact-specific holding in *Duran v. U.S. Bank National Association*, 203 Cal. App. 4th 212 (2012), has emboldened employers to argue they have the due process right to call as many class member witnesses as they want to testify at trial.[1] Such a "right,"

[1] *See, e.g.*, Tom Kaufman, *New California Appellate Decision May Sound the Death Knell for Many Wage/Hour Class Actions*, LABOR & EMPLOYMENT L. BLOG (Feb. 7, 2012), http://www.laboremploymentlawblog.com/wage-and-hour-new-california-appellate-decision-may-sound-the-death-knell-for-many-wagehour-class-actions.html ("[I]f the guidance of this decision is followed, it is hard to see how many wage hour class actions that are routinely certified could actually proceed to trial."); *Karen Kubin et al., Duran v. U.S. Bank: The Aftershocks of the Wal-Mart Stores, Inc. v. Dukes Earthquake Hit Class Action-Happy California*, Morrison & Foerster Client Alert (Feb. 9, 2012), http://www.mofo.com/files/ Uploads/Images/120208-Duran-v-US-Bank.pdf.

however, does not actually exist, ignores the trial court's ability to limit the number of witnesses and the length of trial, Cal. Evid. Code § 352, and contravenes this Court's instructions that trial courts should be "procedurally innovative in managing class actions." *Sav-On*, 34 Cal. 4th at 339 & nn. 11 & 12 (internal quotation marks omitted).

Defendants' reading of *Duran* also runs counter to the years of Supreme Court authority recently reaffirmed in *Brinker* that class actions remain a vital instrument in protecting the rights of California workers and cannot be abolished by Defendants' interpretation of *Duran*. *See Brinker*, 2012 WL 1216356 at *13 & 25 (affirming certification of rest period claim and declining to deny certification of meal period claim due to individual questions that may arise in determining why meal periods were missed); *id.* at *27-28 (Werdegar, J., concurring).

II. THIS COURT SHOULD GRANT REVIEW AND REMAND FOR RECONSIDERATION OF CLASS CERTIFICATION IN LIGHT OF *BRINKER*

This Court's decision in *Brinker* illuminates the correct approach to class certification that the Court of Appeal failed to follow in *Duran*. Accordingly, the Court should grant the Petition for Review and instruct the Court of Appeal to remand the case to the trial court for reconsideration of the propriety of class certification in light of *Brinker*. Cal. Rule of Court 8.500(b)(4).

A. ***Brinker* Compels Remand to the Trial Court of the Factual Question of Predominance**

Brinker clarifies the role of an appellate court in reviewing a class certification decision. This Court has made clear that "[o]n review of a class certification order, an appellate court's inquiry is narrowly circumscribed." *Brinker*, 2012 WL 1216356 at *5. *Brinker* also makes clear that "[p]redominance is a factual question . . . ." *Id.* Accordingly, when *Brinker* clarified the law by holding that (1) employees need not receive a meal break every five hours and (2) employers need not ensure that employees take meal breaks, this Court remanded to the appellate court with instructions to remand to the trial court to reconsider class certification in light of that new legal landscape. *Id.* at *25 ("In light of our substantive rulings, we consider it the prudent course to remand the question of meal subclass certification to the trial court for reconsideration in light of the clarification of the law we have provided."). This Court did not conduct the predominance inquiry itself in light of its interpretation of the meal period laws because there remained factual considerations for the trial court to weigh. *See id.* at *26 (Werdegar, J., concurring) ("In returning the case for reconsideration, the opinion of the court does not endorse Brinker's argument . . . that the question why a meal period was missed renders meal period claims *categorically* uncertifiable.").

On the other hand, when the Court found that the *Brinker* plaintiffs had presented "no evidence of common policies or means of proof" with respect to their off-the-clock claims, *id.* at *1, such that proof of liability "would have had to continue in an employee-by-employee fashion," this Court held that it was proper to vacate the trial court's certification decision without a remand, *id.* at *26. In that situation, there were no additional factual considerations for

the trial court to weigh, and no new clarifications of the law that would have affected the outcome.

The Court of Appeal in *Duran* should have remanded the class certification decision but failed to do so. The *Duran* court changed the landscape of that case by holding that the trial court's use of a non-representative sample of class members to the exclusion of any other class member testimony violated the defendant's due process rights. Yet although it could "envision procedures that would have lessened the danger of an erroneous result," *Duran*, 203 Cal. App. 4th at 264, and although plaintiffs had put forth evidence of common policies and methods of common proof that the trial court could have weighed against the need for individual testimony, the Court of Appeal declined to remand the question of class certification and summarily decertified the class, *id.* at 275.

Duran's decision to decertify rather than remand to the trial court conflicts with *Brinker*'s analysis of the role of an appellate court and the limited circumstances in which remand of a class certification decision is not necessary. For this reason alone, *Brinker* requires a remand of *Duran*.

B. Remand Is Necessary to Consider the Uniform Policies that Make Certification Appropriate Under *Brinker*

Brinker confirms that class certification is proper when the plaintiffs' theory of liability asserts that a common, company-wide policy violates California's wage and hour laws. *Brinker*, 2012 WL 1216356 at *13 ("Claims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment."). The *Duran* plaintiffs alleged such a uniform policy when they alleged that their employer improperly classified each class member as exempt from the overtime laws and applied uniform job descriptions and expectations to each class member. Such collective proof can be used to demonstrate the job duties and time spent working outside the office of employees who serve the same function within a company, share job titles, and work under the same compensation structure. Although some individual inquiries about how the job is actually performed may arise, *Ramirez v. Yosemite Water Co., Inc.*, 20 Cal. 4th 785, 802 (1999), this Court has made clear that those questions do not foreclose the possibility of class certification, *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 336-37 (2004) (noting that "considerations such as 'the employer's realistic expectations' and 'the actual overall requirements of the job' are likely to prove susceptible of common proof"). As *Brinker* recognizes, even such questions as the reliance element of a fraud claim or a breach of duty may be tried using common proof and appropriate for classwide adjudication. *Brinker*, 2012 WL 1216356 at *6.

Yet the Court of Appeal in *Duran* ran afoul of *Brinker* and *Sav-On* by holding that the trial court "erred in focusing on USB's policies." *Duran*, 203 Cal. App. 4th at 274. The *Duran* court should have remanded to the trial court to reconsider the predominance question in light of all relevant factors and the court's finding that the defendant's ability to put on evidence was improperly restricted. Instead, the Court of Appeal decided the factual predominance question itself, disregarding the plaintiffs' theory of liability and the common questions it engendered and relying on a different case against U.S. Bank – involving different employees (bank managers)

and different exemptions – to find that uniform policies and expectations could not, as a matter of law, predominate over individual questions about how the job is performed. *See id.* at 274-75. This was reversible error that conflicts with this Court's instructions in *Brinker* and *Sav-On* that courts must not ignore a plaintiff's theory of liability that uniform policies and job expectations determine, in large part, how class members perform their jobs and whether they work inside or outside the office. *Brinker*, 2012 WL 1216356 at *13; *Sav-On*, 34 Cal. 4th at 336-37; *see also Brinker*, 2012 WL 1216356 at *27 (Werdegar, J., concurring) (noting that "individual issues arising from an affirmative defense can in some cases support denial of certification [but] pose no per se bar").

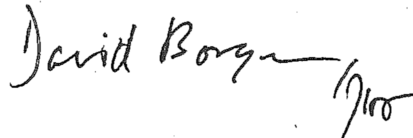
C. *Brinker* Affirms the Importance of Class Actions and the Ability to Fashion a Trial Plan Protective of the Rights of All Parties

Finally, *Duran*'s doubt that "a workable trial plan" "could be successfully implemented," *Duran*, 203 Cal. App. 4th at 275, conflicts with this Court's instructions to the lower courts that they should be creative in finding ways to both try class actions and to protect due process. This Court has historically endorsed "a variety of methods that render collective actions judicially manageable." *Brinker*, 2012 WL 1216356 at *26 (Werdegar, J., concurring); *see also Sav-On*, 34 Cal. 4th at 339-340; *Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 473 (1981) (noting that "this state has a public policy which encourages the use of the class action device"). As a result, "[r]epresentative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability." *Brinker*, 2012 WL 1216356 at *28 (Werdegar, J., concurring); *see also Sav-On*, 34 Cal. 4th at 339-40 & nn.11 & 12. Here, while the trial court's trial plan was rejected by the Court of Appeal, Plaintiffs and the absent class members should have the opportunity for the trial court to reconsider the tools endorsed by this Court to manage class actions consistent with due process.

III. CONCLUSION

For all of these reasons, we respectfully request this Court to grant the Petition for Review and instruct the Court of Appeal to remand the case to the trial court for reconsideration of class certification.

Respectfully submitted,



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PROOF OF SERVICE

Case: No. S200923
Case No. *Duran v. U.S. Bank National Association,*

STATE OF CALIFORNIA)
) SS
COUNTY OF ALAMEDA)

I have an office in the county aforesaid. I am over the age of eighteen years and not a party to the within entitled action. My business address is 300 Lakeside Drive, Suite 1000, Oakland, California 94612.

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

AMICUS CURIAE LETTER

by causing a true copy thereof to be mailed by depositing the same in a sealed envelope in the U.S. mail with postage prepaid and addressed to:

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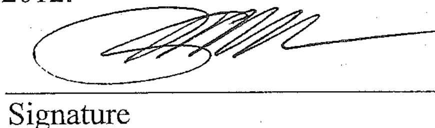
I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at Oakland, California on April 23, 2012.

CHARLOTTE NGUYEN
Printed Name


Signature

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