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April 25, 2012

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

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

Dear Honorable Justices:

Pursuant to California Rules of Court, Rule 8.500(g), we respectfully submit this amicus curiae letter in support of the Petition for Review filed on March 19, 2012 in *Duran, et al. v. U.S. Bank National Association.*

We urge the Court to grant review in this matter in light of this Court's recent decision in *Brinker Restaurant Corp. v. Superior Court*, 2012 WL 1216356 (April 12, 2012). The concurring opinion in *Brinker* is in direct contrast to the holding of *Duran*, and review is therefore necessary to clarify important issues addressed in these cases regarding the maintenance and certifiability of class actions throughout the State.

In *Brinker*, Justice Werdegar wrote a concurring opinion in which she offered guidance on the future manageability of class actions, specifically, what the Court's opinion in *Brinker* should not be interpreted as saying. *Brinker,* at p. 26 (Werdegar, J., concurring). Justice Werdegar starts off by stating that the Court has historically endorsed "a variety of methods that render collective actions judicially manageable." *Id.* Justice Werdegar then discusses a number of issues that should not stand to bar the maintenance of a class action.

To begin, Justice Werdegar states that it is an employer's duty not only to provide meal periods to its employees, but also to maintain records of meal periods. *Id.* at 27. If an employer

fails to maintain records establishing that a meal period was taken, there is a rebuttable presumption that no meal period was provided. *Id.* The employer cannot defeat a plaintiff's attempt at certification and cannot escape liability for failing to provide meal periods by failing to record them. Similarly, if an employer argues that an employee had waived his or her meal period, it is the obligation of the employer to establish and the plaintiff to refute this, not the other way around. *Id.* The employer cannot create an impediment to class certification by requiring the employee to disprove waiver. Rather, "the burden is on the employer…to plead and prove it." *Id.*

Justice Werdegar then goes on to clarify that it is the well-settled law that individual issues on damages will rarely, if ever, stand as a bar to certification. *Id.* Arguing that class actions are a necessary vehicle to vindicate substantive rights, especially with regard to small value claims, Justice Werdegar stresses, "to decertify a class on the issue of damages or restitution may well be effectively to sound the death-knell of the class action device." *Id.*

Finally, and most significant to the matter at hand, Justice Werdegar provides specific instructions to the lower courts that representative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability:

"[W]e have encouraged the use of a variety of methods to enable individual claims that might otherwise go unpursued to be vindicated, and to avoid windfalls to defendants that harm many in small amounts rather than a few in large amounts. (See Sav-*On Drug Stores, Inc. v. Superior Court, supra,* 34 Cal.4th at pp. 339-340; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 714-715.) Representative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability. (See, e.g., *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 749-755 [upholding as consistent with due process the use of surveys and statistical analysis to measure a defendant's aggregate liability under the IWC's wage orders]; *Dilts v. Penske Logistics, LLC* (S.D.Cal. 2010) 267 F.R.D. 625, 638 [certifying a meal break subclass because liability could be established through employer records and representative testimony, and class damages could be established through statistical sampling and selective direct evidence]; see generally *Sav-On,* at p. 333 & fn. 6).) "[S]tatistical inference offers a means of vindicating the policy underlying the Industrial Welfare Commission's wage orders without clogging the courts or deterring small claimants with the cost

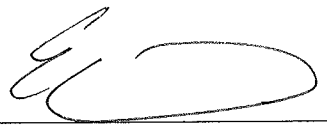
of litigation." (*Bell,* at p. 751.) Given these settled principles, Brinker has not shown the defense it raises, waiver, would render a certified class categorically unmanageable." *Id.* at 28.

Conversely, in *Duran*, the court suggests that statistics, surveys, and representative evidence may not be used to establish class-wide liability where a defendant may be able to avoid liability as to certain class members through individualized proof. This holding is extremely problematic in light of the *Brinker* concurrence for two reasons: 1) Justice Werdegar specifically emphasized that "representative testimony, surveys, and statistical analysis" are all available to establish liability; and 2) Justice Werdegar emphasized that individual damages questions should not bar certification.

The language in Justice Werdegar's concurrence strongly indicates that it was not the Court's intent in *Brinker* to create an impossible or more difficult path to certification, but simply to clarify and make more manageable the issues surrounding it. The language in *Duran*, in contrast, creates a barrier to certification by eliminating all previously reliable and efficient methods of establishing liability, the effect of which would be the "death-knell of the class action device," precisely what Justice Werdegar warded against. Here we have a decision by the First Appellate Decision that directly contravenes the opinion and guidance of this Court. For this reason, we respectfully request that the Court grant review in this matter.

Respectfully submitted,

KINGSLEY & KINGSLEY, APC



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1st District Court of Appeal, Div. 1
Honorable Robert B. Freedman, Alameda County Superior Court