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ATTORNEYS AT LAW

March 29, 2012

Via Overnight Mail

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

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

Honorable Justices:

We write urging the Court to grant review of the above referenced decision on either a grant-and-hold or plenary basis.

For most of the past twenty-seven years our practice has been focused on representation of employees in wage and hour class action litigation. We have represented tens of thousands of employees in dozens of class actions throughout the state and federal trial and appellate courts. We represented California employees before this Court in both *Sav-on Drug Stores v. Superior Court* (2004) 34 Cal.4th 319 and *Gentry v. Superior Court* (2007) 42 Cal.4th 443. Other important decisions where we represented employees include *Rutti v. Lojack* (2010) 596 F.3d 1046 and *Crab Addison v. Superior Court* (2008) 169 Cal.App.4th 958. Our firm is one of only a small handful of firms that have tried wage and hour misclassification class actions, including a trial in the Los Angeles County Superior Court before the Hon. J. Stephen Czuleger, resulting in a phase one finding that U-Haul had misclassified all California salaried "General Managers" as exempt from overtime, and a trial in the San Diego County Superior Court

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before the Honorable Patricia Cowett, resulting in a judgment finding that *Party City* had misclassified salaried employees as exempt employees and awarding class wide damages. Also, following remand from this Court, we tried the *Sav-on Overtime Cases* in the Los Angeles County Superior Court before the Honorable Victoria G. Chaney.

In these cases trial courts are typically presented with situations where certain key facts are not in dispute. For instance,

- the employer has a uniform policy classifying a clearly defined and ascertainable group of employees – in this case Business Banking Officers ("BBOs") -- as "exempt" from certain state and/or federal laws;
- based on the employer's exemption classification the employer does not pay overtime wages for overtime hours worked;
- the employer kept no records of hours worked; and
- after a trial, the trial court determines that employees who were uniformly classified as exempt – at least those who had their cases tried -- were illegally classified by the employer as exempt employees. Thus, the employer's policy of uniformly classifying all BBOs as exempt is *illegal* in that it sweeps up non-exempt employees in its "net."

The question becomes what to do with the hundreds, sometimes thousands, of *non-testifying* employees who were classified as exempt under the employer's policy. Prior to the *Duran* decision, employers would typically meet and confer in good faith with class

counsel toward development of an appropriate class wide trial plan. This exercise frequently involved conferences attended by statistics and/or survey experts from both sides to work out random sampling procedures and methods for obtaining data from the class for the purpose of a liability and/or damage analysis (i.e., surveys, focused discovery on a randomly selected group of employees, etc.). Suddenly, following *Duran*, employers are how making an *in terrorem* argument that, since *Duran* provides them with a constitutional right to cross-examine each and every employee at trial as to the exemption affirmative defense, no other trial plan can provide them with due process.[1] This is playing out at this moment in the *Puchalski v. Taco Bell*. *Puchalski* is certified class action being tried filed on behalf of restaurant general managers pending before the Honorable Kevin Enright in San Diego County Superior Court (action number GIC870429, Dept. 74) where Defendant, Taco Bell, demands that every class member show up at trial to testify, or risk having his/her claim dismissed. Taco Bell cites to *Duran* as supporting its position that any other trial process is constitutionally infirm.[2]

The plaintiff-employees in these cases have long contended that the constitution does not guarantee the employer the right to call each member of an employee class to testify at trial. This position has resonated with many state and federal trial and appellate courts over the years. Moreover, even if such a right existed under the law this Court has

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[1] Employers actually have no interest in calling hundreds or thousands of employees to testify at trial -- an exercise that could take up years of trial time. Rather, employers feel that merely uttering the demand to call hundreds or thousands of witnesses at trial will be perceived as eviscerating all of the efficiencies of the class mechanism and cause the trial court to deny certification.

[2] Righetti Glugoski, P.C. has been appointed as one of the class counsel in *Puchalski*.

explained that there are a number of acceptable complex litigation trial methodologies that courts have developed over the years to establish class member entitlement once the court has determined that the employer's uniform exemption policy is illegal.

I have great reservations about the *Duran* court of appeal's rejection of the trial court's trial methodology – but those issues are all addressed well in the petition for review. I write *separately* to express my concern, respectfully, that the court of appeal also erred when it reached what appears to be an *ipse dixit* conclusion that the trial court had no discretion to maintain certification once the trial court's initial trial plan was rejected by the court of appeal. I reach this conclusion because the court of appeal decertified the case and gave no suggestion to the lower court that the lower court had the discretion to adopt a *different* class wide trial plan. The court of appeal's conclusion was reached without any discussion, or reasoning, as to whether any other trial methodologies *could* be developed by the lower court to preserve the efficiency and other benefits of class actions. The court of appeal appears to have determined, again without any discussion, that the trial court had no discretion to explore whether any other viable trial plans existed that may preserve the efficiency of the class mechanism and provide due process to the litigants. This conclusion -- that no other trial plan could be developed by the lower court -- is not only entirely speculative but is also in direct conflict with the teachings of *Sav-on v. Superior Court* (2004) 39 Cal.4th 319.

In *Sav-on*, this Court unanimously held that a common issue – and one that predominated -- was proper task classification. *Sav-on v. Superior Court* (2004) 39

Cal.4th 319, 337. The Court went on to foreshadow the very issue presented by the employer in *Duran*, to wit, can class certification be maintained where individual inquiries may remain after class wide issues are adjudicated? Contrary to the holding in the *Duran* case, the *Sav-on* Court explained that "courts seeking to preserve efficiency and other benefits of class actions routinely fashion methods to manage individual questions." *Sav-on v. Superior Court* (2004) 39 Cal.4th at 339.

The *Sav-On* court went on to explain that

> "[f]or decades '[t]his court has urged trial courts to be procedurally innovative' (*San Jose, supra,* 12 Cal.3d at p. 453) in managing class actions, and 'the trial court has an obligation to consider the use of … innovative procedural tools proposed by a party to certify a manageable class' (*Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 653, (citation omitted) [in class actions, "trial courts must be accorded the flexibility 'to adopt innovative procedures' "])."
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> *Sav-on* at 340.
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> Courts on occasion have conducted separate judicial or administrative mini-proceedings on individualized issues. (See, e.g., *Lamb v. United Sec. Life Co.* (S.D.Iowa 1972) 59 F.R.D. 25, 33.) Individualized hearings may sometimes efficiently be assigned to special masters. (See, e.g., *Day v. NLO* (S.D.Ohio 1994) 851 F.Supp. 869, 874–876.) Perhaps, as plaintiffs suggest, in this case each class member's particularized overtime "damages sought may be calculated according to a standard formula" (*Occidental Land, Inc., supra,* 18 Cal.3d at p. 364) based on survey results (see, e.g., *MacManus v. A.E. Realty Partners* (1988) 195 Cal.App.3d 1106, 1117; *Braun v. Wal-Mart, Inc.* (Minn.Dist.Ct.2003) 2003 WL 22990114). 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. (See *Rosack v. Volvo of America Corp., supra,* 131 Cal.App.3d at p. 761.)

Sav-on at 340 n.12.

Sav-on explains that there are many potentially viable trial plans available in class actions. Yet the *Duran* plaintiffs and the trial court were prevented from vetting any other trial plan due to the court of appeal's erroneous assumptions. The *Duran* court's implicit conclusion that no other trial plan could possibly pass muster – i.e., the trial court did not have discretion to maintain class certification to ascertain whether any other trial plan was feasible – is not supported by any discussion so we are left to ponder the basis for the appellate court's conclusion. The *Duran* court took away the trial court's discretion to implement a revised trial plan on remand – and this was improper:

> Our review of a trial court's plan for proceeding in a complex case is a deferential one that recognizes the fact that the trial judge is in a much better position than an appellate court to formulate an appropriate methodology for a trial.
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> *Bell* at p. 751 citing *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1018, (5th Cir.1997).

Likewise, the *Duran* court's premise -- that the employer was entitled to litigate each individual claim -- ignores a long line of state and federal decisions that were previously approved by it in *Bell v. Farmers Insurance Exchange*, 115 Cal.App.4th 715 (2004), which confirm that an employer does not have a due process right to call every employee to testify in a class action seeking back wages:

> "Following [*Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, (1946)] the federal courts have consistently granted back wages to non-testifying employees on the basis of a pattern or practice adduced from the testimony of other employees within their job category. As stated in *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir.1985), '[t]here is no requirement that to establish a *Mt. Clemens* pattern or practice, testimony must refer to all non-testifying employees.... [¶] ... Courts have frequently

> granted back wages under the FLSA to non-testifying employees based upon the representative testimony of a small percentage of the employees. [Citation.] The requirement is only that the testimony be fairly representational.'" *Bell* at p. 748.[3]

The *Bell* decision went on to identify a number a cases where "the courts have relied upon statistical analyses of evidence to infer wages owed to non-testifying employees within the same group as testifying claimants." *Bell* at p. 749. The court reasoned,

> If hours worked by non-testifying employees may be inferred from the testimony of other employees within a small employee group, we see no reason why it should not be allowed for a larger employee group. And if rough approximations and statistical estimates pass scrutiny for smaller groups, a scientific methodology based on a random sampling should also qualify as a 'just and reasonable inference' of uncompensated hours worked in the case at bar." *Id.* Thus, California courts have endorsed the

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[3] The *Bell* court provided a partial list of authorities where nontestifying employees were able to recover back wages in the FLSA context: "See, e.g., *Grochowski v. Phoenix Const.*, (2d Cir.2003) 318 F.3d 80, 88 ["the plaintiffs correctly point out that not all employees need testify in order to prove FLSA violations or recoup back-wages"]; *Reich v. Gateway Press, Inc,.* (3d Cir.1994) 13 F.3d 685, 701 [22 out of 70 employees testified]; *Martin v. Tony and Susan Alamo Foundation*, (8th Cir.1992) 952 F.2d 1050, 1052 [back pay to be awarded "to the nontestifying employees based on the fairly representative testimony of the testifying employees"]; *Martin v. Selker Bros., Inc,.* (3d Cir.1991) 949 F.2d 1286, 1298 [4 out of 6 employees testified]; *McLaughlin v. Ho Fat Seto,* (9th Cir.1988) 850 F.2d 586, 589 [5 out of 28 employees testified]; *Donovan v. Simmons Petroleum Corp.*, (10th Cir.1983) 725 F.2d 83, 86 [testimony of 12 former employees supported award to all former employees]; *Donovan v. Williams Oil Co.* (10th Cir.1983) 717 F.2d 503, 504-505 [testimony of 19 attendants established pattern for 34 employees at nine stations]; *Donovan v. New Floridian Hotel, Inc.,* (11th Cir.1982) 676 F.2d 468, 472 [23 employees testified out of 207 employees receiving award]; *Donovan v. Burger King Corporation* (1st Cir.1982) 672 F.2d 221, 224-225 [26 of 246 employees]; *Brennan v. General Motors Acceptance Corporation,*(5th Cir.1973) 482 F.2d 825, 829 [16 out of 26 employees testified]; *Reich v. Chez Robert, Inc.*, (D.N.J.1993) 821 F.Supp. 967, 984, 988-993 [28 out 246 testified]; *Reich v. New Mt. Pleasant Bakery* (N.D.N.Y., Sept. 13, 1993, No. 89-CV-581) 1993 WL 372270 [15 of 46 drivers testified]; *Martin v. Petroleum Sales, Inc.* (W.D.Tenn., July 9, 1992, No. 90-2453-4A) 1992 WL 439740 [10 out of 34 store managers testified]; *Marshall v. Brunner*, (W.D.Pa.1980) 500 F.Supp. 116, 122 [48 out of 93 employees testified]."

> use of proper scientific sampling to extrapolate the results to the general population. See, *Dilts v. Penske Truck Leasing Co.,* 2010 U.S. Dist. LEXIS 40568, *30-34 [rejecting defendant employers argument that it is improper to establish liability in a class action using statistical sampling and extrapolation techniques and confirming that statistical sampling is an acceptable method of proof for determining liability in class actions.]; *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1276-80 (11th Cir. 2008) [accepting a trial court's extrapolation to absent class members from representative testimony about duties of store managers]."

In summary, the conclusion of the *Duran* court rests on the faulty assumption that once a trial court chooses the wrong trial plan, then the trial court has no discretion to make corrections and fashion an appropriate alternate trial plan.

Duran is having an unsettling impact on the lower courts. The defense bar is parading the *Duran* decision before trial courts throughout California as a new rule of law rejecting the holding of this Court in *Sav-on.* According to employers and the defense bar, if defendants have a due process right to call each and every class member to testify at trial then the utility of class actions is destroyed and no case can be certified. I respectfully urge the Court to grant review in this case and provide much needed guidance to the lower courts on these issues.

Respectfully submitted,

RIGHETTI GLUGOSKI, P.C.

/s/ Matthew Righetti

Matthew Righetti

cc. See Proof of Service