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April 25, 2012

VIA HAND DELIVERY

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

Re: **Amicus Curiae Supporting Review** (Cal. Rules of Court, rule 8.500(g))
Duran v Unites States Bank, National Assn. (2012) 203 Cal.App.4th 212
Supreme Court Case No. S200923
A125557 & A126827 Court of Appeal, First Appellate Dist., Division One

Dear Honorable Justices:

I write to respectfully request that this Court grant the pending Petition for Review in *Duran v Unites States Bank, National Assn*, (2012) 203 Cal.App.4th 212, ("*Duran*"). *Duran's* hostility to the use of representative testimony and statistical sampling in class actions, and its suggestion that the existence of affirmative defenses precludes class certification, cannot be reconciled with this Court's recent decision in *Brinker Restaurant Corp. v. Superior Court* (2012) ___Cal.4th___, 21012 WL 1216356 ("*Brinker*") or with this Court's decision in *Sav-On Drugs, Inc. v. Superior Court* (2004) 34 Cal.4th 319 (*Sav-On*). This letter is written pursuant to California Rule of Court 8.500(g).

I. Statement of Interest

My law firm has represented hundreds of thousands of employees in important wage and hour class actions, including *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715 ("*Bell*"), a case which has been cited approvingly by numerous courts,

including this Court in *Brinker* and in *Sav-On*. We continue to represent workers who have been exploited and whose only meaningful recourse is a class action lawsuit.

The *Duran* decision has already impacted our ability to pursue justice for our clients. At the very first case management conference in a wage and hour class action venued in Los Angeles County Superior Court, the judge asked, before even saying "good morning, counsel," "What impact will *Duran* have on this case?" In status conferences, class certification motions and mediations, employers are arguing that *Duran* means that wage and hour cases *cannot* be tried as class actions.

II. Argument for Review

The *gestalt* of *Duran* is that a defendant's due process rights are violated by any trial plan that relies on statistical sampling, survey evidence, or representative testimony to prove the extent of liability. That position is in direct conflict with *Sav-On, Bell,* and other cases cited approvingly by *Brinker*, including *Dilts v. Penske Logistics, LLC* (S.D. Cal. 2010) 267 F.R.D. 625. *See Brinker*, ___Cal. 4th at ___, 2012 WL1216356 at *18.

As Justice Werdegar emphasized in her concurrence in *Brinker*, "[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. [citations omitted]. Representative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability." *Id.* at *27 (Werdegar, J., concurring) (citing *Bell*, 115 Cal.App.4th at 749-755, and *Dilts,* 267 F.R.D. at 638).

In signal contrast, the Court of Appeal in *Duran* cynically observed, "we need not speculate whether a workable trial plan could have been devised to account for these individual inquiries." *Duran*, 203 Cal.App.4th at 275. In derogation of this Court's commandments in *Sav-On* and, most recently, in *Brinker,* the appellate court explicitly ignored its duty to fully explore whether "methods exist sufficient to render class treatment manageable." *Brinker, supra*, at *27 (Werdegar, J., concurring). Not only did the Court of Appeal itself refuse to consider the "variety of methods to enable individual claims that might otherwise go unpursued to be vindicated, and to avoid windfalls to defendants," it simply decertified the class and reversed the judgment without clarifying whether the trial court could revisit the issue. *Duran*, 203 Cal.App.4th at 275.

The outcome in *Duran* was driven in part by the Court of Appeal's erroneous conclusion that the defendant has a *per se* due process right to litigate its affirmative defenses on an individual basis. In reaching this conclusion, *Duran* improperly relied on and extended *dicta* from *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. ___, 131 S.Ct.

2541. Specifically, *Duran* opined that "The same type of 'Trial by Formula' disapproved of in *Wal-Mart* is essentially what occurred in this case." *Duran*, 203 Cal.App.4th at 259. The court elaborated in a footnote, "we agree with the reasoning that underlies the court's view *that representative testimony may not be used to prevent employers from asserting individualized affirmative defenses* in cases where they are entitled to do so." *Id.* at n. 65 (emphasis added).

The Duran decision is in stark contrast to this Court's holding that the assertion of individual issues by a defendant does not *per se* preclude class certification and the determination of classwide aggregate liability issues where the class claims can be managed and classwide proofs are reliable. In *Brinker*, this Court reversed the appellate court's decision opining that individual differences precluded class certification of the meal and rest period claims in that case.

Moreover, in *Sav-On,* this Court ruled that the courts are to favor class actions and be flexible and innovative in adapting class action procedures in a way that will maximize workers' capabilities of vindicating those rights, including cases where the defendants' pay practices result in "widespread [that is, not universal] de facto misclassification" of workers. *Sav-On, supra,* 34 Cal.4th at 329-30. In *Sav-On*, this Court held that: individual issues, including variation in the actual mix of duties performed by class members or differences in the amount of overtime worked, do not bar class certification as a matter of law. *Id.* at 335. This Court cited its prior decision in the *Vasquez* case in making that very point: "It may be, of course, that the trial court will determine in subsequent proceedings that some of the matters bearing on the right to recovery require separate proof by each class member. If this should occur, the applicable rule . . . is that the maintenance of the suit as a class action is not precluded so long as the issues which may be jointly tried, when compared to those requiring separate adjudication, justify the maintenance of the suit as a class action." *Id.* (quoting *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 815).

As Justice Werdegar emphasized in her concurrence in *Brinker*, "While individual issues arising from an affirmative defense can in some cases support denial of certification, they pose no per se bar." *Brinker* at *27 (Werdegar, J., concurring) (citing, *inter alia, Sav-On*, 34 Cal.4th at 334-38). Instead, whether the existence of affirmative defenses should lead a court to reject certification "will hinge on the manageability of any individual issues," which, in turn, requires the court to fully explore the use of representative testimony, surveys and other "tools to render manageable" such individual issues. *Id.* The abdication of that responsibility is a fatal flaw in *Duran.*

Duran must not be allowed to stand as good law. Review should be granted to correct the Court of Appeal's erroneous holdings. In the alternative, the *Duran* decision should be reversed and remanded in light of this Court's decision in *Brinker*, or depublished.

Very truly yours,

RUDY, EXELROD, ZIEFF & LOWE, LLP

DAVID A. LOWE

DAL/lw

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of eighteen (18) and am not a party to this action. My business address is 351 California St., Suite 700, San Francisco, California, in said County and State. On the date stated below, I served the following documents:

***AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' PETITION FOR REVIEW**

on the parties in this action as follows:

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☑ **[VIA U.S. MAIL]** I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail in San Francisco, California. I am "readily familiar" with the practice of Rudy, Exelrod, Zieff & Lowe, L.L.P. for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 25, 2012 at San Francisco, California.

Leah I. Wahlberg