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April 24, 2012

VIA OVERNIGHT 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 District, Division One

Dear Honorable Justices:

California Employment Lawyers Association (CELA), as *amicus curiae,* respectfully requests that this Court grant the pending Petition for Review in *Duran v Unites States Bank, National Assn* ("*Duran*").

I. CELA'S INTEREST

CELA is an organization of California attorneys whose members represent employees in a wide range of employment cases, including wage and hour class actions similar to *Duran.* CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of public policies set forth in the California Labor Code, including by advocating for effective labor law enforcement procedures such as class actions in appropriate cases. Opinions such as *Duran* that seriously erode established procedures for class-wide proof of claims on the basis of representative evidence extrapolated to absent class members are those which CELA maintains require strict scrutiny by this Court. CELA has taken a leading role in advancing and protecting the rights of employees by, among other things, submitting amicus briefs and letters on issues affecting the rights of California employees. By letter dated April 6, 2012, CELA has also requested this Court depublish *Duran.*

II. REASONS FOR REVIEW

Issue Number Three in the Petition for Review poses the following unresolved question that CELA believes is critical for this Court to answer:

> **Can statistical sampling, surveys, and other forms of representative evidence be used to prove class-wide liability in a wage and hour misclassification action?**

Implicit in this issue is the question whether such proof can be used to establish *proportionate* liability when the company is liable to less than 100% of the class, *viz.*, to a percentage of employees who meet the qualifications for the applicable overtime exemption. The answer to this question, in turn, necessarily implicates more than misclassification cases, encompassing all wage and hour class cases in which the potential exists for widespread, though not 100% homogeneous, non-compliance. CELA asks this Court to grant plenary review of *Duran* for all the reasons set forth in the Petition for Review, but will focus on the need for Review to resolve the conflict created by *Duran* in ruling explicitly that representative evidence may not be used to establish liability, at least not to establish proportionate liability when there is something less than 100% uniformity. This new standard conflicts with language in *Sav-On Drugs, Inc. v. Superior Court* (2004) 34 Cal.4th 319 (*Sav-On*) supporting its use, and cannot be squared with the Supreme Court's recent decision in *Brinker Restaurant Corp. v. Superior Court* (2012) ___ Cal.4th ____ (Brinker) reversing the Court of Appeal's decision reversing class certification based on its erroneous view that individual differences somehow precluded class certification of the meal and rest period claims in that case, as well as Justice Werdegar's explicit statements to the contrary in her recent concurring opinion in *Brinker.*

As the situation currently stands, *Duran* (and its inconsistency with *Sav-On* and *Brinker*) creates confusion making it impossible for employees to know whether they can take the risk of serving as a class representative for the purpose of vindicating their overtime rights. Such service has become a high risk indeed at a time when prospective employers with access to public information may elect not to hire employees who have served as class action representatives in cases against employers. Given the confusion created by *Duran*, courts and practitioners are also without definitive guidance as to the proper standard for certifying and trying wage and hour class action cases[1].

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[1] *Cf.*: "Representative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability" (*Brinker* (Werdegar, J., Concurring), Slip.Op. at p.2, with: "First, a case presenting a defense of exempt status or other issues turning on individualized facts – like how or where employees spend their time – should not be certified for class treatment. Second, if such a case is certified, employers must be able to present evidence by or about individual members of the class to meet their burden of proving the exemption. Third, Duran provides a reminder of the serious – and as yet insurmountable – obstacles to proving liability on the basis of statistical extrapolations" (February 12, 2012 Littler weblog entry, available at http://www.littler.com/publication-press/publication/trial-formula-rejected-and-15m-overtime-judgment-overturned); see, also, Brinker rest period ruling is "consistent with the narrow, defense-view of class certification—i.e., that certification is proper only where there is a single policy or practice that can be judged collectively lawful or unlawful." (Sheppard Mullin weblog, available at

Accordingly, CELA supports Review for the purposes of resolving these important questions.

III. ARGUMENT

REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER REPRESENTATIVE EVIDENCE MAY BE UTILIZED TO ESTABLISH PROPORTIONATE CLASS-WIDE LIABILITY IN WAGE AND HOUR CLASS ACTIONS

If not outright prohibiting the use of representative evidence to establish proportionate liability when some members of the class do not prevail on the merits, *Duran* calls this process into question. The opinion is rife with statements deriding such proof, contrary to established class action procedure that preceded it.

Duran rejected the use of a sample of testifying class members extrapolated to absent class members to assess liability: "courts are generally skeptical of the use of representative sampling to determine liability, even in cases in which plaintiffs have proposed using expert testimony and statistical calculations as the foundations for setting the sample size." *Duran* at 245; see, also, *Id.* at 256: "*Dunbar v. Albertson's, Inc.* . . supports the view that the use of sampling to extrapolate liability in an exemption context can be problematic"; *Id.* at 266: "*Hilao's* use of this sampling procedure to determine both liability and monetary recovery appears to be entirely unprecedented"; *Id.* at 263 n.72: "[U]nder current law sampling is a practical option only at the damages stage. There is no conceptual obstacle to using sampling to measure liability, but it would require a major change in tort law." (quoting (Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity* (1993) 46 Vand. L.Rev. 561, 597.)

Both prior to and after the issuance of the seminal *Sav-On* decision, practitioners have submitted trial plans relying upon the use of representative evidence to establish both proportionate liability and commensurate damages in overtime misclassification and other wage and hour class cases. A class of managers proving a claim of overtime misclassification on the basis of having to perform hourly tasks in excess of the time spent on managerial tasks would present a plan to establish through a class survey administered by qualified experts or testimony from a statistically validated and reliable representative sample of employees the percentage of the class misclassified, as well as the average overtime hours worked. This statistical information would be extrapolated class-wide, establishing the proportion of the class the employer misclassified, with aggregate damages adjusted to match the percentage of employees misclassified. To use a simple example, if a survey or representative testimony showed 75% of a 500-employee class was misclassified and aggregate damages of $10,000,000 if 100% of the class were misclassified, the jury or court would award a $7,500,000 judgment. The distribution based on individual class members demonstrating their eligibility and the allocation of aggregate damages would

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http://www.laboremploymentlawblog.com/wage-and-hour-brinker-clarifies-california-law-on-meal-and-rest-periods-in-a-proemployer-direction.html /).

be subject to subsequent court proceedings "that do[] not directly concern the defendant." *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 759 (*Bell*) (citation omitted).

Sav-On is consistent with this approach. This Court found a class trial appropriate even in the face of disputed evidence as to whether misclassification was defendant's "policy and practice" and "operational standardization . . . and classification based on job descriptions alone resulted in widespread de facto misclassification." *Sav-On*, at 330. Use of the term "widespread" as opposed to "uniform" reveals this Court authorized a class trial on representative evidence even if liability were not established as to 100% of the class. Also contradicted by *Duran*, the certification was affirmed and the Court of Appeal reversed despite defendant's evidentiary contention that "the actual tasks performed by class members and the amount of time spent on those tasks vary significantly from manager to manager and cannot be adjudicated on a class-wide basis." *Sav-On* at 331.

With regard to establishing affirmative defenses to liability, *Sav-On* envisioned the defendant would do so with representative evidence, not testimony by all absent class members:

> Unquestionably, as the Court of Appeal observed, defendant is entitled to defend against plaintiffs' complaint by attempting to demonstrate wide variations in the types of stores and, consequently, in the types of activities and amounts of time per workweek the OM's and AM's in those stores spent on different types of activities. . . . A reasonable court, even allowing for individualized damage determinations, could conclude that, to the extent plaintiffs are able to demonstrate pursuant to either scenario that misclassification was the rule rather than the exception, a class action would be the most efficient means of resolving class members' overtime claims.

Sav-On, at 330. Consistent with these principles, *Sav-On* quoted the long-standing class action principle that "a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her *eligibility for recovery* or as to the amount of his or her damages." *Id*, at 333, quoting *Employment Development Dept. v. Superior Court* (1981) 30 Cal.3d 256, 266, italics added. Establishing "eligibility" for recovery requires proof of the defendant's liability. Moreover, use of that term of necessity indicates that ultimately not everyone in the class may be eligible for recovery, and that the use of representative evidence to establish liability statistically as to the corresponding percentage of the class is not foreclosed by this prospect. An example of this occurred in the *Bell* trial, prior to *Sav*-On, in which the jury awarded class recovery and certification was affirmed even where the representative evidence showed that the defendant was not liable to nine percent of the class, who had worked no overtime. See *Bell,* 115 Cal.App.4th at 743.

Cases following *Sav-On* are in accord. For example, in *Dunbar v Alberston's, Inc.* (2006) 141 Cal.App.4th 1422 (*Dunbar*) the court of appeal affirmed denial of class certification to a putative class of supermarket managers. Plaintiff contended the trial court "mistakenly believed that, as a matter of law, a class could not be certified because there were individual issues of liability" (the amount of time spent by class members on exempt versus nonexempt tasks). *Id.* at 1431. The court of appeal did not

find that the trial court committed such error, implicitly endorsing the propriety of class certification where individual liability issues exist as to some subset of the class provided extrapolation can be made from a representative set of class members to the absent class members:

> But the presence of individual liability issues was only one factor, not the controlling factor, in the court's decision. The most important consideration, in the court's view, was the significant variation in the grocery managers' work from store to store and week to week. In light of that variation, the court evidently believed that very particularized individual liability determinations would be necessary. ¶ Accordingly, the court's decision was not based on the mere presence of individual liability issues; it turned on the nature of those issues as shown by defendant's evidence.

Id.

Dunbar is explicit that surveys and other representative evidence are appropriate to assess class liability where findings as to a sample can reasonably be extrapolated to absent class members—without requiring that these tools are limited to cases in which 100% liability as an all or nothing proposition is at stake:

> [T]he record does not establish that the court failed to consider the use of exemplar plaintiffs, survey results, subclassing, or the other means plaintiff mentioned of managing individual issues. The court impliedly rejected those proposals in concluding that findings as to one grocery manager could not reasonably be extrapolated to others given the variation in their work.

Id. at 1432, see, also, *Id.,* n.2 ("the court was referring to extrapolation from any member of the putative class, not just from plaintiff.") In other words, where it is possible to extrapolate from one or more employee to others without the aggravated concern in *Dunbar* as to the level of variations in work, liability *can* be formulated based on representative evidence. Since nearly every job involves some variations of work among a group of employees, the amount of variation that would prevent class certification and trial is a matter of fact left to the trial court's discretion. *Duran* does not follow that settled premise, permanently decertifying the class on the basis of evidence that some percentage of the class may have been properly classified as exempt. *Duran* at 274 [denial of decertification based on "erroneous *legal assumption* that a finding of liability due to misclassification could be determined by extrapolating the findings based on the [representative witness group] to the entire class…; it violated USB's right to present relevant evidence in its defense" (emphasis added).]. That ruling is at odds with *Sav-On*:

> [D]efendant's proposed reading of *Ramirez* would require, essentially, that a certification proponent in an overtime class action prove the *entire class* was nonexempt whenever a defendant raises the affirmative defense of exemption. But in *Ramirez* itself we recognized that "the assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the

> employee's exemption." Were we to require as a prerequisite to certification that plaintiffs demonstrate defendant's classification policy was, as the Court of Appeal put it, either "*right as to all members of the class or wrong as to all members of the class*," we effectively would reverse that burden. Ramirez is no authority for such a requirement, *nor does the logic of predominance require it.*

Sav-On at 228, emphasis added, citations omitted.

Duran's reversal of the denial of decertification based on its disagreement with proportionate liability assessed through representative evidence also conflicts with *Weinstat v. Dentsply Internat., Inc.* (2010) 180 Cal.App.4th 1213, 1224 [class proponent need not establish standing (injury) as to each absent class member in action (like *Duran*) under Business & Professions Code sections 17200 et seq.].

Justice Werdegar's concurring opinion in *Brinker* affirming the use of representative evidence to establish proportionate liability is in accord, characterizing the following as "settled principles":

> 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 .)

Brinker (Werdegar, J., Concurring), Slip Op. at p. 2. *Duran* attempts to distinguish *Dilts v. Penske Logistics, LLC* (*Dilts*) as not supporting the use of representative evidence to establish liability in exemption cases. *Duran* at 264-265. But that is not correct either, as *Dilts* relies on *Morgan* for its conclusion. "As to liability, the use of statistical sampling, at least when paired with persuasive direct evidence, is an acceptable method of proof in a class action. See generally *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 the duties of store managers in trial of misclassification action)." *Dilts v. Penske Logistics, LLC* (S.D. Cal. 2010) 267 F.R.D. 625, 638. Moreover, *Duran's* analysis of *Dilts* directly contradicts Justice Werdegar's persuasive concurrence in *Brinker.*

What *Duran* ignores is the fact that the presence of individualized issues, or the admission of *some* individualized testimony evidence, does not implicate *predominating* individual questions. Questions individualized to specific employees are inherent in most, if not all, class actions. The question is how they are managed. *Sav-On* provides a long citation of cases this Court finds as

supportive of statistical and representative testimony for managing individual issues. *Sav-On*, 34 Cal.4th at p. 333, n.6. As a practical matter, there is no other way to try the liability aspect of a class case except with "representative evidence." And this Court has never restricted the use of representative evidence to cases in which the determination of liability is an all or nothing proposition. Indeed, in Sav-On, the Supreme Court approvingly cited *Bell* in which representative evidence showed that 91% of the class was deprived of statutorily mandated overtime pay. *Sav-On* at 333. As to whether the defendant's right to individual proof warrants the permanent decertification *Duran* ordered, that is a matter of the trial court's province according to *Sav-On*, not the court of appeal:

> 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.

Sav-On at 335, citations omitted.

Cases cited with approval by this Court implicitly follow the formulation *Duran* rejects. See *Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1303-1305, cited in *Brinker*; *Bell, supra,* cited in *Sav-On.* These cases certified classes, finding individual issues in classifying employees or determining labor violations for various types of employees were manageable in the face of predominating common questions, with no requirement that there be 100% homogeneity among the class as to liability. Non-misclassification cases follow the same formula. For example, in *Dilts*, cited with approval in *Brinker*, the court certified claims for violations of Labor Code 226.7 and for automatically deducting meal period time that was not always taken but never restored. The court did so even though liability would not be established equally to all class members, authorizing a representative sample of the class to be surveyed to assess proportionate liability and damages and the results extrapolated class wide. *Dilts*, 267 F.R.D. at 638.

Duran also cites to a passage from the U.S Supreme Court opinion in *Wal-Mart, Stores, Inc. v Dukes* (2011) 131 S.Ct. 2541, 2561 (*Dukes*) to support its departure from *Sav-On* (and now *Brinker*). *Dukes* is a wholly inapposite Title VII employment discrimination case, certified and adjudicated under unique statutory procedures inapplicable to other cases. Yet according to *Duran*, class actions based on representative evidence used to establish the proportionate amount of anything less than 100% liability constitute "trials by formula," now purportedly abolished by *Dukes in all cases*.

Duran leans heavily on Judge Patel's defective certification denial on remand after Ninth Circuit reversal of certification of an outside sales class claiming overtime exemption misclassification in *In re Wells Fargo Home Mortgage Overtime Pay Litigation* (N.D. Cal. 2010) 268 F.R.D. 604 (*Wells Fargo II*). Close examination of that case reveals an uncritical analysis of the case law upon which it, in turn, relied. According to Judge Patel, "[t]he court has been unable to locate any case in which a court

permitted a plaintiff to establish the nonexempt status of class members, especially with respect to the outside sales exemption, through statistical evidence or representative testimony." *Id.* quoting *Wells Fargo II* at 612. In fact the opposite was true. *Morgan v. Family Dollar Stores, Inc.* (11th Cir. 2008) 551 F.3d 1233, 1247, 1276 (*Morgan*) is such a case (though it dealt with the executive exemption).

Wells Fargo II ruled that it would be improper to certify a class if sampling indicated, for example, that one out of every ten class members was exempt, because the fact finder could not separate out which employee qualified without separate mini-trials. *Id. Wells Fargo II* then went on to misconstrue *Morgan* as being strictly related to using representative testimony for establishing *damages*. To the contrary, *Morgan* expressly involved a *liability* determination for a nationwide group of retail store managers based on representative testimony extrapolated to the entire class. Remarkably, even though *Wells Fargo II* cites to *Morgan*, it overlooks the fact that retail store managers were found to be non-exempt at trial after presentation of representative sample of seven store managers who worked at 50 out of 6,000 nationwide stores, along with testimony from district managers, corporate executives, payroll officials, and expert witnesses, *Morgan*, at 1247, 1276.

Wells Fargo II also neglected in this part of its analysis to consider *Sav-On*, a certified class as to which plaintiff would utilize representative proof at trial and the only way the defendant could meet its burden of proof to establish exempt status of the retail managers would be through representative evidence, not by having every certified class member testify. Its conclusion that representative testimony could not be used in outside sales exemption cases is also inconsistent with other certified exemption class actions,[2] in which courts have by certifying classes implicitly found that addressing the amount of time class members spent managing or performing hourly tasks was to be presented at trial through representative evidence (either a survey or a random sample of testifying employees), not having every class member testify at trial.

Duran then conflates *Dukes*—in which the "trial by formula" concept was rejected in a Rule *23(b)(2)* employment discrimination trial *where the defendant would have been precluded from its statutory entitlement to litigating individualized determinations of each employee's eligibility for backpay*--with Judge Patel's decision in *Wells Fargo II* in which neither of those distinguishing factors was present. A trial pursuant to Rule 23(b)(2) pertains to an injunctive or declaratory relief class permitting only limited incidental damages, involving an entirely different trial procedure than one under Rule 23(b)(3). Rule 23(b)(2) permits class certification when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole." During the liability phase of a (b)(2) trial, the class can meet its burden to prove that a pattern or practice of differential treatment is the regular rather than the unusual practice by producing statistical evidence demonstrating

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[2] See, e.g., *Krzesniak v. Cendant Corp.* (N.D. Cal. 2007) 2007 U.S. Dist LEXIS 47518 [certified class of car rental store managers]; *Alba v. Papa John's USA, Inc.* (C.D. Cal. 2007) 2007 U.S. Dist. LEXIS 28079, 19-21 [certified class of salaried restaurant managers and hourly employees], *Tierno v. Rite-Aid Corporation* (N.D. Cal. 2006) 2006 U.S. Dist. LEXIS 71794 [certified class of store managers].

disparities in treatment, typically supplemented with evidence related to individual incidents of discrimination. See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336-340 (1977) [52 L.Ed. 2d 396, 97 S.Ct. 1843]; Conte, 8 Newberg on Class Actions 4th § 24:124 (4th ed. 2002-2102). The burden then shifts to the defendant to show as to the class as a whole that plaintiffs' evidence is deficiently inaccurate or insignificant. *Id.* However, Title VII also permits an employer to "show that it took an adverse employment action against an employee for any reason other than discrimination, the court cannot order the "hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay." §2000e–5(g)(2)(A)." Established procedure provides for additional trial proceedings to establish the scope of individual relief when a plaintiff seeks reinstatement or backpay after establishing a pattern or practice of discrimination. *Teamsters*, 431 U. S., at 361. In these subsequent individualized proceedings, the defendant may defend individual claims by demonstrating legitimate reasons for the employment opportunity denial. *Id* at 362.

Thus, *Dukes* rejected efforts to use the (b)(2) procedure to formulate a back pay award by extrapolating the percentage of claims determined to be valid from a sample set applied to the entire remaining class, with the number of (presumptively) valid claims multiplied by the average backpay award in the sample set to arrive at the entire class recovery—*without the further individualized trial court proceedings* set out in *Teamsters.* It is this "trial by formula" process that the U.S. Supreme Court rejected in *Dukes*, one preventing the defendant from introducing evidence to defend against individual backpay awards in rebuttal to the plaintiffs' proportionate class-wide extrapolation of representative evidence. In *Duran*, there is no dispute that U.S. Bank was permitted to put on evidence to rebut the representative testimony by the class. See *Duran* at 231-235.

Judge Patel's *Wells Fargo II* ruling, by contrast, preempted the defendant's right to defend the action following a statistical extrapolation by ruling that the extrapolation was an improper procedure if any portion of the class were found properly exempt from overtime pay. That ruling was contrary to accepted procedure for assessing proportionate class-wide liability, in which a representative sample is extrapolated class-wide, even in cases in which the representative sample establishes less than 100% of the class is eligible for recovery.

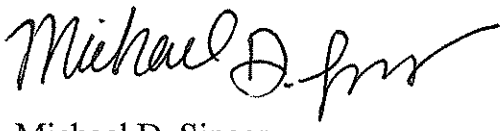
There is simply no rule of California class action procedure precluding class certification solely because some class members may not prevail on the merits. See *Sav-On* at 329 [widespread de facto misclassification sufficient]; see, also, *Weinstat v. Dentsply Internat., Inc.*, *supra*, 180 Cal.App.4th at 1235 ["the possibility that a defendant may be able to defeat the showing of an element of a cause of action ' "as to a few individual class members[,] does not transform the common question into a multitude of individual ones ... ." ' " (citation omitted)]. The opposite rule—that class actions are proper even if the defendant can establish the absence of liability to some portion of the class--is a more reasonable formulation, and it is one that supports the use of the class action vehicle to confront endemic, even if not uniform, workplace non-compliance with labor laws that might otherwise remain unaddressed.

The unintended consequence of a procedure limiting the use or representative evidence only to assess liability to an entire class, and not the statistical proportion where less than all class members can establish their eligibility, is that cases that need to be litigated as class actions will not qualify. Courts will refuse to certify classes if the defendant presents a single "happy camper[3]" declaration purporting to defeat liability as to any percentage of the class.

The continuing problem that requires this Court's resolution through a grant of Review in *Duran* is the co-opting of *Dukes'* inapposite Rule 23(b)(2) "trial by formula" prohibition into a Rule 23(b)(3)-based C.C.P. 382 rule prohibiting extrapolated representative evidence to assess proportionate class liability. The danger exists absent Review that classes that should be certified will not be, and vindication of workplace rights will be impeded, due to the improper co-opting of *Dukes* by courts such as *Duran* and weblog writers selectively excerpting and overstating the significance of comments in passing by this Court, such as those in *Brinker*[4].

Thank you for your consideration of this request.

Very truly yours,
COHELAN KHOURY & SINGER and
CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION



Michael D. Singer

cc: Service List on All Counsel
California Employment Lawyers Association
Court of Appeal, First Appellate District, Division One

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[3] See *Creely v. HCR ManorCare, Inc.* (N.D. Ohio 2011) 789 F.Supp. 2d 819, 840 ("happy camper" affidavits of little use at conditional certification stage of Fair Labor Standards Act proceedings).

[4] See, e.g., weblog comment on *Brinker's* ruling affirming the denial of certification for off-the-clock claims: "Implicit in this ruling is a determination that the case could not have been tried using a "Trial by Formula" approach of sampling a subset of the class, determining how much they worked off the clock, and extrapolating the results to the broader class. Furthermore, the focus on a lawful policy means that, in most cases where an employer's policy is for employees to record all of their time and never work when clocked out, class certification of an off-the-clock claim will be impossible." Sheppard Mullin weblog, http://www.laboremploymentlawblog.com/wage-and-hour-brinker-clarifies-california-law-on-meal-and-rest-periods-in-a-proemployer-direction.html.

PROOF OF SERVICE

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is Cohelan Khoury & Singer, 605 "C" Street, Suite 200, San Diego, California 92101-5305.

On April 24, 2012, I served the foregoing documents described as **Amicus Curiae Supporting Review** on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

I then served each document in the manner described below:

[XX] **BY MAIL:** I placed each for deposit in the United States Postal Service this same day, at my business address shown above, following ordinary business practices.

[ ] **BY FAX**: I transmitted the foregoing document(s) by facsimile to the party identified above by using the facsimile number indicated. Said transmission(s) were verified as complete and without error.

[ ] **BY UNITED PARCEL SERVICE:** I placed each envelope for deposit in the nearest United Parcel Service drop box for pick up this same day and for "next day air" delivery.

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

Executed April 24, 2012 at San Diego, California.

Amber Worden

Amber Worden

SERVICE LIST

Duran v. United States Bank, National Assn.

Case No. S200923

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