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February 21, 2014

Chief Justice Tani Cantil-Sakauye 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  
Additional Authorities

Honorable Justices:

Plaintiff/respondent Sam Duran cites the following additional authorities not contained in the briefs on file.

**Class Certification.** The following California Court of Appeal decisions reversed the denial of class certification, holding in each case that the trial court had failed to apply the proper legal analysis as set forth in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.

**1. Benton v. Telecom Network Specialists (2013) 220  
Cal.App.4th 701, rev. den. (2014).**

The plaintiffs sued Telecom Network Specialists (“TNS”) alleging meal and rest break and overtime violations. The proposed class consisted of employees who worked directly for TNS and employees who worked for staffing companies that served TNS’s customers. The plaintiffs alleged that TNS was the employer of both groups of employees and moved to certify their claims. The trial court denied certification, reasoning that the plaintiffs could not establish TNS’s liability through common proof because of the “diversity of workplace conditions” and the different policies adopted by the various companies. (*Id.* at 705.)

Reversing, the Court of Appeal held that under *Brinker*, the proper inquiry is whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment. Here the plaintiffs’ theory of recovery – as a joint employer, TNS violated wage and hour requirements by failing to adopt policies authorizing and permitting meal and rest breaks and payment of overtime – could be determined based on common evidence. “[T]he fact that individual inquiry might be necessary to determine

whether individual employees were able to take breaks despite the defendant's allegedly unlawful policy (or unlawful lack of a policy) is not a proper basis for denying certification." (*Id.* at 726.)<sup>1</sup>

**2. Jones v. Farmers Insurance Exchange (2013) 221 Cal.App.4th 986.**

The plaintiffs alleged that the employer failed to pay overtime for work performed before the official start of the work day. The trial court denied certification, finding that common issues did not predominate since *some* employees *were* paid overtime for such work and "[w]hether a particular class member would be approved for overtime ... creates individualized questions...." (*Id.* at 993.)

The Court of Appeal reversed, holding that the plaintiffs' theory of liability – the employer applied a uniform policy denying all employees compensation for preshift work – presented factual and legal questions common to all class members and amenable to class treatment. "Farmers' liability depends on the existence of such a uniform policy and its overall impact on its APD claims representatives, rather than individual damages determinations." (*Id.* at 997.)

**3. Williams v. Superior Court (2013) 221 Cal.App.4th 1353.**

The plaintiffs claimed that the employer failed to pay overtime for work performed before the start and after the end of the work day. The employer argued that there was no common pattern and that, at most, *some* employees worked off the clock. The trial court initially certified the claim but later decertified it, holding that the newly-decided *Wal-Mart Stores, Inc. v. Dukes* (2011) \_\_ U.S. \_\_, 131 S.Ct. 2541 "has changed the law" and "entitled" the employer "to litigate its defense to the claims of each individual class member," making class certification inappropriate. (221 Cal.App.4th at 1359.)

The Court of Appeal granted the plaintiffs' petition for writ of mandate, directing the trial court to vacate its decertification order and to reinstate class certification. Finding *Dukes* distinguishable both factually and legally, the Court rejected the argument that an employer could litigate its defense individually as to each class member. The Court held that class certification was proper because "[a]n unlawful practice may create commonality even if the practice affects class members differently." If some employees never worked off the clock, they were not injured by the allegedly unlawful policy but "the existence of individuality as to damages does not defeat class certification." (*Id.* at

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<sup>1</sup> The *Benton* Court relied heavily on *Faulkinbury v. Superior Court* (2013) 216 Cal.App.4th 220, which was discussed in Respondents' Answer to Amicus Curiae Briefs at pages 23-24.

1370.)

**4. Bradley v. Networkers International (2012) 150  
Cal.App.4th 268, rev. den. (2013).**

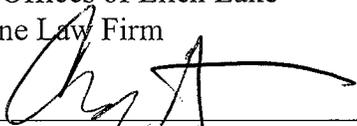
The plaintiffs alleged meal and rest break violations and failure to pay overtime. The trial court denied class certification, concluding that plaintiffs had not shown that common questions would predominate. The Court of Appeal originally affirmed, finding no abuse of discretion. This Court granted the plaintiffs' petition for review and ordered the case held pending its decision in *Brinker*.

On remand after *Brinker*, the Court of Appeal concluded that the denial of certification of the meal and rest break and overtime claims *was* an abuse of discretion. The Court held that the plaintiffs' theory of liability – that the employer violated wage and hour laws by failing to have any formal or informal policy providing for meal or rest breaks or payment of overtime – could be decided based on common proof, making class certification appropriate. The issues of which employees had missed breaks, how many breaks were missed, and the amount of overtime due were damage questions that did not preclude certification.

**Summary:** These cases demonstrate the correctness of class certification in this case. Plaintiffs' theory of recovery was that USB adopted a uniform policy that classified all BBOs as exempt and failed to provide any mechanism to determine whether BBOs actually worked outside Bank premises more than 50% of the time. Thus, USB failed to adopt a procedure to ensure that overtime was paid to non-exempt BBOs. Class certification was proper because the validity of defendant's across-the-board exemption policy could be determined on a classwide basis. This was particularly true in light of the trial court's finding that the BBO position was standardized so that the nature of the job could be proven based on common evidence. The possibility that some class members may have been properly classified as exempt was an issue of damages that would not defeat certification. (OBM 25-32; RBM 9-44; Respondents' Answer to Amicus Curiae Briefs 22-27.)

Respectfully submitted,

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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF MARIN.**

I, the undersigned, declare that I am employed in the aforesaid County, State of California. I am over the age of 18 and not a party to the within action. My business address is 100 Drakes Landing Road, Suite 275, Greenbrae, CA 94904. On February 21, 2014, I served upon the interested parties in this action the following document described as:

**PLAINTIFF/RESPONDENT SAM DURAN'S ADDITIONAL AUTHORITIES**

By placing a true and correct copy thereof enclosed in sealed envelopes addressed as stated below for processing by the following method:

**BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Greenbrae, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Timothy Freudenberger  
Alison Tsao  
Kent Sprinkle  
Carothers, DiSante & Freudenberger  
601 Montgomery Street, Suite 350  
San Francisco, CA 94111-2603

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

Executed on February 21, 2014, at Greenbrae, California.

  
Heidi Phillips