

**HARRIS & KAUFMAN**  
ATTORNEYS AT LAW

William E. Harris  
Matthew A. Kaufman

VALLEY EXECUTIVE TOWER  
15260 VENTURA BOULEVARD  
SUITE 2250  
SHERMAN OAKS, CA 91403  
TELEPHONE (818) 990-1999  
FAX (818) 990-1966

Writer's Email Address  
mkaufman@harriskaufman.com

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Honorable Tani Cantil-Sakauye, Chief Justice  
and the Associate Justices  
California Supreme Court  
350 McAllister Street  
San Francisco, CA 94102-4797

**VIA OVERNIGHT MAIL**

Re: Amicus Brief Supporting Petition For Review  
*Duran, et al. v. U.S. Bank National Association*  
California Supreme Court Case No. S200923

Dear Chief Justice Cantil-Sakauye and the Associate Justices:

Pursuant to California Rule of Court 8.500(g), Anthony Syphus submits this letter in support of Sam Duran's petition for review filed on March 19, 2012, in *Duran, et al. v. U.S. Bank National Association* ("*Duran*"). Mr. Syphus urges this Court to grant review of and ultimately reverse or substantially modify *Duran*.

Anthony Syphus is the plaintiff in *Syphus v. Sunswept LLC*, Los Angeles County Superior Court case no. BC 453497. His complaint alleges class-action causes of action for, among other things, failure to pay minimum wages and overtime compensation. The *Duran* decision adversely impacts his case because, among other things, it reverses the burden of proof in an overtime pay class action and places improper evidentiary hurdles in the way of his recovery of damages for unpaid wages for himself and the class.

Mr. Syphus' case is like numerous others in my practice over the last 15 years; though substantial and important to him, his wage claims alone are not large enough to

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justify the litigation to recover them even with the possibility of recovering attorney's fees. He is a waiter at a restaurant and cannot afford to hire an attorney on an hourly basis. An attorney working on a contingency-fee basis cannot afford to prosecute his case unless his claim and the claims of others could be aggregated in a class action. Thus, people like Mr. Syphus rely on the class action device to protect their wages.

*Duran* will frustrate employees' enforcement their rights to wages. Under *Duran*, even where an employer "willfully" misclassifies a class of employees, it can insist on individual determinations of liability and damages for each class member. 203 Cal. App. 4th at 254-255. Presently, the burdens of budget cuts and impending court closures threaten our court system, and putting on an individual case for hundreds of class members is not realistic. Thus, the practical burdens of enforcing employees' wage rights will result in no enforcement. The laws might as well be wiped off the books.

*Duran* will wrongly interfere with an employee's individual cases for unpaid minimum wages or overtime pay. It reverses the burden of proof on an important issue for these cases, the exemption. The exemption from minimum wages and overtime pay is the employer's affirmative defense, i.e., the employer must prove that the employee is not entitled minimum wages or overtime pay. See *Sav-On Drug Stores, Inc. v. Sup. Ct.* (2004) 34 Cal. 4th 319, 338. But *Duran* reverses a plaintiff's verdict because of the failure of proof on the exemption. That was the employer's burden, not the plaintiff's. The effect of *Duran* is that employees must prove they were nonexempt – the opposite of this Court's ruling in *Sav-on*. See *id.* ["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."]

*Duran* turns this error of substantive law into a procedural error threatening the use of the class action device for people like Mr. Syphus. *Duran* decertified the class because of errors already made in the trial. Even if the trial court erred in the trial, it certainly does not justify decertifying the class – without giving the plaintiffs an opportunity to remedy the errors. In decertifying a class, *Duran* becomes authority that plaintiffs must certify a class by showing the classification policy was wrong as to all class members – again the opposite of *Sav-on*. See *id.*

*Duran* makes the class action litigation unfair to employees. *Duran* strongly implies that that class plaintiffs cannot use statistical evidence to prove certification issues or liability. See 203 Cal. App. 4th at 265 at fn 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

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Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity* (1993) 46 Vand. L.Rev. 561, 597.] Case law already supports the employer's use of statistical evidence in opposition to class certification. E.g., *Keller v. Tuesday Morning Inc.* (2009) 179 Cal. App. 4th 1389, 1393. Thus, *Duran* makes class-action litigation an unlevel playing field for employees – employers can use statistical evidence in the certification and liability phases, but employees cannot. While *Duran* states that plaintiffs can use statistical evidence “in appropriate cases,” its analysis makes it hard to envision such a case. 203 Cal. App. 4<sup>th</sup> at 265.

*Duran* has another policy implication. Damages for unpaid wages can be based on reasonable estimates where the employer did not keep records as required by law. *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727-728. But *Duran* elevates the employer's due process rights above the employees' rights to wages. No doubt employers will argue that *Duran* shows that an employer's due process rights trumps the use of reasonable estimates to show damages under *Hernandez v. Mendoza*.

For these reasons, Anthony Syphus urges the Court to grant review of and ultimately reverse or substantially modify *Duran*.

Respectfully submitted,

HARRIS & KAUFMAN



By: Matthew A. Kaufman, attorneys for  
Anthony Syphus

Encl: 12 copies per CRC 8.44(a)