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April 17, 2012

Via UPS Next Day Air
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The Honorable Tani Cantil-Sakauye
Chief Justice, and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: *Duran v. U.S. Bank National Association*, No. S200923
Amicus Curiae Letter (Cal. Rule of Court 8.500(g))

Honorable Justices:

On behalf of Consumer Attorneys of California (CAOC), this letter highlights key points supporting review in this matter or, at a minimum, grant and transfer to the First District Court of Appeal to reconsider and conform to *Brinker Restaurant Corp. v. Superior Court* (Apr. 12, 2012, S166350) ___ Cal.4th ___ [2012 Cal. Lexis 3149] (*Brinker*).

I. CAOC'S INTEREST AS AMICUS CURIAE

Founded in 1961, CAOC is a voluntary non-profit membership organization of over 3,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to consumer fraud, unlawful employment practices, personal injuries and insurance bad faith. CAOC has taken a leading role in advancing and protecting the rights of consumers, employees and injured victims in both the courts and the Legislature. CAOC's advocacy has often occurred through class and other representative actions, including *Brinker* most recently. (See also *Harris v. Superior Court* (2011) 53 Cal.4th 170; *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360.)

II. DISCUSSION

A. California's Stare Decisis Makes Review Critical

Because California has no analog to Federal Rule of Civil Procedure 23, our class action procedure is largely a creature of case law. In state class suits – thus the fevered

anticipation of *Brinker* – practitioners and trial judges find their guidance in appellate precedent.

Ever since the flagship decision in *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, this Court has kept California class action procedure vibrant and coherent in a rich body of decisional law. State Court of Appeal rulings must be consistent with not just this Court's precedent, but, significantly, an intermediate decision binds ***all*** trial courts without geographic limitation, just as this Court's precedents. Because "all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction," an intermediate appellate decision issued in San Francisco, as here, applies to trial litigation in San Diego, Eureka, Lake Tahoe and every trial court in between. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Due to the nature of stare decisis in California, an outlier intermediate decision is highly disruptive. New judge-made rules, at odds with all existing state precedent, create confusion for thousands of trial judges statewide and the lawyers who appear before them. This is such a case unless this Court grants review of *Duran v. U.S. Bank National Association* (2012) 203 Cal.App.4th 212 (*Duran*), or uses other tools at its disposal to depublish it.

B. *Duran* Has Adverse Implications for All Class Actions

Class certification is "essentially a procedural" inquiry distinct from the substantive law governing a class complaint. (*Brinker*, *supra*, 2012 Cal. Lexis 3149, at p. *22, citations and internal quotation marks omitted.) Because class status is procedural, *Duran* will be cited (in fact, already has) to sow mischief in class actions across the board.

Beyond the wage-and-hour setting, many civil lawsuits stem from a contract dispute. Under *Duran*, defense litigants will likely contend that any and all defenses (affirmative or otherwise) must be litigated individually, as to each affected person. This purportedly would be necessary even if, as in *Duran* itself, the suit emanates from standardized practices of an employer or other business. For example, what about classwide disputes over the premium paid for auto insurance, or the coverage required for collision repairs? (See *Troyk v. Farmers Group* (2009) 171 Cal.App.4th 1305; *Lebrilla v. Farmers Group* (2004) 119 Cal.App.4th 1070.) What about a group of consumers defrauded by the terms of a loan? (See *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649.) Those disputes, where this Court denied review, were suitable for class treatment.

Under *Duran*'s logic, however, a straightforward class certification would be hotly contested. In some cases, certification could be denied based on nothing more than "arguably relevant evidence," red-herring defenses conjured up solely to thwart class status. (*Duran, supra*, 203 Cal.App.4th at p. 253.) The First District overlooked that assertedly individual issues "so speculated upon are not fatal to class certification." (*Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 140.)

If *Duran* is pushed to its logical extreme, few classes could be certified. *Duran* ventures down this path by suddenly calling representative evidence into question, even though class actions are inherently representative. The precept is legislative: "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend ***for the benefit of all***." (Code Civ. Proc., § 382, emphasis added.)

The circumstances in *Duran*, a certified class that went to trial, make the First District's precedent especially dangerous. A trial demands an extraordinary investment of judicial and party resources. Both sides know the stakes are high and, more often than not, the finder of fact will resolve their dispute. Appellate courts should not cavalierly discard the outcome. They certainly should not do so based on newly declared legal principles unknown to either the parties or the judge when the case was tried.

As elaborated in the petition for review, the "due process" rationale at the heart of *Duran* is an invention – a new concept for class certification resting on inapposite case law. Review is necessary to address whether vague notions of "due process" compel a grudging approach to class status that threatens to close the courthouse doors to persons whose individual claims would otherwise never be vindicated.

Indeed, *Duran* runs afoul of the settled "'public policy which encourages the use of the class action device.'" (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340, quoting *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 473.) As the Court has repeatedly stressed, "'consumer class actions and representative UCL actions serve important roles in the enforcement of consumers' rights" by "mak[ing] it economically feasible to sue when individual claims are too small to justify the expense of litigation . . . ." (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 313, quoting *Kraus v. Trinity Management Services* (2000) 23 Cal.4th 116, 126, footnote omitted.) The underlying necessity, salient in the employment context as in others, is making class actions available "to prevent a failure of justice in our judicial system." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 434.)

C. *Brinker* Compels that *Duran* Be Vacated

Review is appropriate on a plenary basis to address *Duran*'s dubious conflating of class action procedure and constitutional law, and the misunderstanding this will engender if permitted to stand. Alternatively, given the stark inconsistency between *Duran* and *Brinker*, the First District must revisit the matter. This Court may grant and transfer to the Court of Appeal to conform with *Brinker* or, as there, instruct specifically that the case be remanded to the trial court. (See Cal. Rules of Court, rules 8.500(b)(4) and 8.528(d).)

To the extent the Court of Appeal grounded its published opinion on assumptions about what *Brinker* might say on class certification in a wage-and-hour case, the intermediate panel missed wide of the mark. (See *Duran*, *supra*, 203 Cal.App.4th at p. 216 and fn. 2 [noting *Brinker* was pending].) Though more could be said on the multiple inconsistencies, two points warrant discussion here.

First, the *Duran* decision failed to afford the trial judge the deference he was due in a class action. This Court just held: "On review of a class certification order, an appellate court's inquiry is narrowly circumscribed." (*Brinker*, *supra*, 2012 Cal. Lexis 3149, at p. *19.) "Predominance is a factual question; accordingly, the trial court's finding that common issues predominate generally is reviewed for substantial evidence." (*Id.* at p. *20.) Further, the reviewing court "must '[p]resum[e] in favor of the certification order . . . the existence of every fact the trial court could reasonably deduce from the record." (*Id.* at pp. *20-*21.)

Yet, a comparison of the facts as found by the trial court in *Duran*, with the facts as characterized in the Court of Appeal opinion, reveals a lack of fidelity to these standards. Substantial evidence review is among the most deferential in appellate practice but, departing from the usual mode of review, the First District cast the record most favorably to the appellant. The panel did so by, among other things, determining which witnesses to credit and the weight to give their testimony and other aspects of the evidence. This is significant because it not only supplanted the trial court's province as finder of fact, but painted the court's handling of the matter in a false light. In net result, the panel's disregard for the substantial evidence standard of review also understated and devalued the evidence supporting the judgment for the certified class. (See Respondents' Petition for Rehearing, pp. 9-17; Petition for Review, pp. 6-19, 31-33.)

Second, if this alone were not enough to vacate the *Duran* opinion, its rejection of representative evidence to establish liability in a class action is a fatal error mandating reversal. This Court has "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." (*Brinker*, *supra*, 2012 Cal. Lexis 3149, at pp. *98-*99 (conc. opn. of Werdegar, J., joined by Liu, J.).) In particular, "[r]epresentative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of ***liability***" – not just damages. (*Id.* at p. *99, emphasis added, citing *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 749-755.) The First District thus erred by calling *Bell* "manifestly inapposite." (*Duran*, *supra*, 203 Cal.App.4th at p. 250.) The panel likewise was wrong when it sweepingly proclaimed that "courts are generally skeptical of the use of representative sampling to determine liability." (*Id.* at p. 258.)

In *Brinker*, Justice Werdegar's separate opinion to the contrary simply recited "settled principles." (*Brinker*, *supra*, 2012 Cal. Lexis 3149, at p. *100.) The concurrence (now at odds with *Duran*) is a timely reminder of those principles for lower courts, including the District Courts of Appeal, in the active realm of classwide employment litigation.

D. At the Least, *Duran* Should Be Depublished

If review is not granted on the merits or at least a grant and transfer – both of which are fully justified on this record – the Court should order that *Duran* "is not to be published." (Cal. Rules of Court, rule 8.1105(e)(2); see also rule 8.1125(c)(2).)

Duran is a discourteous critique of a conscientious trial judge applying existing precedent, in good faith, in a complex area of law. The First District suggested the trial court "'prejudge[d] the issues'" and did not "'keep an open mind.'" (*Duran*, *supra*, 203 Cal.App.4th at p. 261, fn. 68.) These are harsh things to say about any judge and, here, quite unfounded. Viewed most favorably to him or even just neutrally, the record indicates the judge sought to act consistently by hewing to the trial plan. Judicial animus toward one side is never presumed and should not be insinuated, especially by a reviewing court, without compelling support. Although publication is not permitted to foist "potential embarrassment" on the judge below, the Court of Appeal's stern rebuke in the Official Reports appears to do just that. (Cal. Rules of Court, rule 8.1105(d).)

Moreover, even before *Brinker* last week, *Duran*'s jurisprudential analysis stood on thin ice. On important questions of law worthy of this Court's attention, the opinion clashes with a wealth of California case law and decisions from other jurisdictions. (See Request for Depublication of California Employment Lawyers Association [filed Apr. 5, 2012].) The main and separate opinions in *Brinker* amount to a rejection of the First District's analysis. The long-desired clarity just provided in *Brinker* should not be undermined by *Duran*'s erroneous statements on many of the same issues.

For the reasons given, this Court should grant review on the merits or otherwise vacate the *Duran* opinion.

Respectfully submitted,

KEVIN K. GREEN
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KKG:tdv

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. That on April 17, 2012, declarant served the **AMICUS CURIAE LETTER** by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed below:

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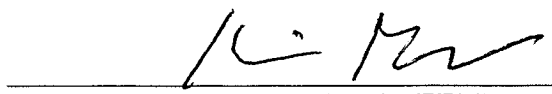
3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this seventeenth day of April, 2012, at San Diego, California.



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