No. S200923

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SAM DURAN, MATT FITZSIMMONS, individually and on behalf of other members of the general public similarly situated,
Plaintiffs and Respondents,

v.

U.S. BANK NATIONAL ASSOCIATION,
Defendant and Appellant.

Petition for Review of a Decision of the Court of Appeal, First Appellate District, Division One, Case Nos. A12557 and A126827, Reversing Judgment and Decertifying Class in Case No. 2001-035537
Superior Court of Alameda County
Honorable Robert B. Freedman

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Before this Court, defendant/appellant U.S. Bank National Association ("USB") recites its version of the facts and proceedings below and blandly asserts that the appellate court decision in this case "did nothing more than apply well-established law." Answer to Pet. Rev., pp. 13, 27. Before this Court, USB minimizes the court of appeal's black-letter pronouncements that recognize a new due process right to raise an individualized defense to each class member's claim at trial and that deride the suggestion that statistical evidence, such as sampling, can ever be used to prove class liability.

If left to stand, the *Duran* opinion "changes the law in California," as USB's counsel argued just two months ago in support of its request to decertify another pending class action. As we outline below, *Duran* has already unsettled California class action law and has led to substantial confusion in lower courts. This confusion stems not only from the opinion's due process and statistical pronouncements but also from its reliance on federal class action and Title VII cases, such as *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. __ [180 L.Ed. 374, 131 S.Ct. 2541], that are manifestly inapplicable to California class action wage and hour cases.

This unsettled state of the law has led a large number of consumer,

civil rights, legal services and public interest groups to join the 20 amicus curiae letters in support of review in this case.

On one point, the parties agree: "there is a dearth of appellate authority" available on the conduct of class action trials under California law. USB Opposition to Request for Depublication, dated April 16, 2012, p. 2. Into this vacuum comes the *Duran* opinion, which is binding on all trial courts in the absence of other appellate authority.

ARGUMENT

I. THE *DURAN* DECISION'S SWEEPING LANGUAGE IS ALREADY HAVING A BROAD IMPACT ON WAGE AND HOUR CLASS ACTION LITIGATION.

USB's contention that *Duran* is simply a narrow, fact-specific decision that "did nothing more than apply well-established law" could not be farther from the truth. Answer to Pet. Rev., pp. 13, 27. The decision's broad and imprecise language is being expansively interpreted in the highly-charged field of wage and hour class litigation. For example, *Duran* proclaims:

- "[W]hen liability for unpaid overtime depends on an employee's individual circumstances, employer defendants retain the right to assert the exemption defense as to every potential class member." Slip Opinion ["Slip Op."], p. 48.

- "*[D]ue process* principles require individualized inquiries where

the applicability of an exemption turns on the specific circumstances of each employee, even in cases where the employer's misclassification may be willful." Slip Op., p. 49, ital. by the court.

- "[T]he use of sampling to extrapolate liability in an exemption context can be problematic." Slip. Op. , p. 50.

- "[C]ourts are generally skeptical of the use of representative sampling to determine liability. . . ." Slip Op., p. 52.

- "The same type of 'Trial by Formula' that the U.S. Supreme Court disapproved of in *Wal-Mart* is essentially what occurred in this case." "While *Wal-Mart* is not dispositive of our case, we agree with the reasoning that underlies the court's view that representative sampling may not be used to prevent employers from asserting individualized affirmative defenses in cases where they are entitled to do so." Slip Op., pp. 53-54 and fn. 65.

- "'[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 case law." Slip Op., p. 61, quoting Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity* (1993) 46 Vand. L.Rev. 561, 597.

- "At this juncture, we need not speculate as to whether a workable trial plan could have been devised to account for these individual inquiries.

In view of the many courts that have considered this problem at the classification stage, it is doubtful that such a plan could be successfully implemented." Slip Op., p. 73.

As the petition for review described, *Duran* has had a widespread impact almost from the day it was decided, with lower courts and the defense bar seizing on its perceived implications. Pet. Rev., pp. 4-5. This trend has continued in the two and one-half months since its issuance. The recent supplemental brief filed in this Court by the employers in *Brinker Restaurant Corp. v. Superior Court*, __ Cal.4th __, 2012 WL 1216356 (April 12, 2012), claimed that *Duran* established categorical new rules that (1) "'due process principles require individualized inquiries' because meal and rest period violations 'turn[] on the specific circumstances of each employee"; (2)"[w]here, as here, liability can be decided only on an employee-by-employee basis, *Duran* instructs that 'surveying, sampling, and statistics are not valid methods of determining liability"; and (3) "If individualized issues arise out of a defendant's affirmative defense, the predominance factor can be defeated." Supplemental Brief Re: *Duran v. U.S. Bank National Association*, pp. 4-5, filed Feb. 17, 2012.

Several amici curiae who filed letters in support of plaintiffs' petition for review in *Duran* cited further examples of the decision's pervasive effect:

- 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. One Los Angeles Superior Court judge opened the first case management conference in a wage and hour class action by asking, "What impact will *Duran* have on this case?" Letter from Rudy Exelrod Zieff & Lowe, dated April 25, 2012, p. 2.

- In *Zamora v. Countryside*, L.A. Superior Ct. 360026, a meal and rest break case that was certified in June 2010 and in which a motion for decertification was previously denied, the employer is now making another decertification motion based on *Duran*. Letter from Initiative Legal Group, dated April 16, 2012, p. 2.

- A labor and employment law blog predicted, "[I]f the guidance of this decision is followed, it is hard to see how many wage hour class actions that are routinely certified could actually proceed to trial." Tom Kaufman, *New California Appellate Decision May Sound the Death Knell for Many Wage/Hour Class Actions*, Labor & Employment L. Blog (Feb. 7, 2012). Letter from Goldstein, Demchak, Baller, Borgen & Dardarian, dated April 23, 2012, p. 1 fn. 1.

Although USB's counsel contend in their answer to the petition for review that *Duran* merely applied "well-established law," they are taking a very different position in other wage and hour cases. In *Puchalski v. Taco*

Bell Corp., San Diego Superior Court No. GIC870429, a certified wage and hour case that was in its second week of trial when the *Duran* decision issued on February 6, 2012, Timothy Freudenberger, USB's lead counsel in *Duran*, argued on February 9, 2012 that the *Puchalski* class should be decertified because "*Duran changes the law in California*" and "the Court can order decertification based on *new law*, which is binding on this Court." RT 2/9/2012, pp. 186-187, ital. added.

Review should be granted because the decision's sweeping and imprecise language is creating confusion and uncertainty in wage and hour litigation and more broadly in class litigation in California. See Letter from National Consumers League, dated April 19, 2012, p. 2 ["*Duran*, if not overturned or if accepted by other courts (within and without this State), will fundamentally alter the principles applied to class certification and trials in not only employment but consumer and antitrust litigation"].

II. USB'S CONTENTION THAT OUTSIDE SALESPERSON MISCLASSIFICATION CASES ARE INHERENTLY NOT SUSCEPTIBLE TO CLASS TREATMENT IS IN CONFLICT WITH *SAV-ON* AND *BRINKER.*

USB claims that *Duran* breaks no new ground because courts have uniformly held that outside salesperson misclassification claims are categorically not subject to class treatment. Answer to Pet. Rev., p. 14. That contention was rejected in *Sav-On Drug Stores, Inc. v. Superior Court*

(2004) 34 Cal.4th 319 and is inconsistent with the Court's recent *Brinker* decision.

A. *Duran* Conflicts With *Sav-On.*

In *Ramirez v. Yosemite Water Company, Inc.* (1999) 20 Cal.4th 785, an individual misclassification suit involving the outside salesperson exemption, this Court held that in determining the number of hours an employee worked in sales-related activities, the trial court should inquire into the "realistic requirements of the job," considering first and foremost, "how the employee actually spends his or her time" and then whether the employee's practice diverges from the employer's "realistic expectations." *Id.* at 802.

In *Sav-On,* the employer argued that *Ramirez* required that class certification be denied. It argued (as USB does here) that "how the employee actually spends his or her time" is an individual issue that would necessarily predominate over classwide issues. The *Sav-On* Court rejected that argument, stating:

> *"Ramirez* was not a class action and, to that extent, is not apposite. In *Ramirez*, we did not even discuss certification standards, let alone change them. Accordingly, *Ramirez* is no authority for constraining trial courts' great discretion in granting or denying certification." 34 Cal.4th at 336, citations and internal quotations omitted.

Sav-On held that *Ramirez* did not bar class certification even in a case with disputed issues about how the employees actually spend their time:

> "Presence in a particular overtime class action of the considerations reviewed in *Ramirez* does not necessarily preclude class certification. Any dispute over 'how the employee actually spends his or her time' (*Ramirez, supra*, 20 Cal.4th at p. 802), of course, has the potential to generate individual issues. But considerations such as 'the employer's realistic expectations' (*ibid.*) and 'the actual overall requirements of the job' (*ibid.*) are likely to prove susceptible of common proof." *Id.* at pp. 336-337.

The Court emphasized its point:

> "[O]ur observation in *Ramirez* that whether the employee is an outside salesperson depends 'first and foremost, [on] how the employee actually spends his or her time' (*Ramirez, supra*, at p. 802) did not create or imply a requirement that courts assess an employer's affirmative exemption defense against every class member's claim before certifying an overtime class action." *Id.* at 337.

The Court firmly rejected the contention that the plaintiffs would have to demonstrate as a prerequisite to certification that a defendant's classification policy was either right as to all members of the class or wrong as to all members of the class. *Id.* at 338.

Post-*Sav-On* California cases involving the outside sales exemption, principally *Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422 and *Walsh v. Ikon Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, imposed

no *per se* bar on class certification. Rather, in contrast to the present case, the trial courts in *Dunbar* and *Walsh denied* class certification based on an array of discretionary factors, and the appellate court *affirmed* under the broad abuse of discretion standard discussed in *Sav-On*. *Dunbar, supra,* 141 Cal.App.4th at 1430["We review the trial court's ruling for abuse of discretion"]; *Walsh, supra*, 148 Cal.App.4th at 1458 ["a reviewing court must abide by the well-established deference afforded a trial court's determination of commonality"]. Thus *Dunbar* and *Walsh* simply held that, in denying class certification, the trial courts had been within their broad discretionary powers, as reaffirmed in *Sav-On*. They did *not* hold that the trial courts would have abused their discretion by certifying the class.

USB and the court of appeal below rely on a host of federal decisions involving the outside sales exemption but, given the substantial differences in class certification standards between state and federal law, those decisions have little persuasive value.[1]

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[1] USB's particular reliance on the district court decision in *In re Wells Fargo Home Mortgage Overtime Pay Litigation* (N.D. Cal. 2010) 268 F.R.D. 604, as an example of a case that allegedly rejected representative evidence and statistical sampling in an outside sales exemption case, is misplaced. The *Wells Fargo* district court stated, in dictum, that statistics *can* be used to manage an outside sales case on a class basis. It asserted that, if the plaintiff had provided a statistical report in support of her motion for class certification, instead of just "abstract statements about what

B. *Duran* Conflicts with *Brinker.*

This Court's recent decision in *Brinker* also made clear that class certification determinations are not subject to any per se bar and that trial courts have broad discretion in the first instance to determine whether to certify a class, based on a determination whether questions of common or general interest predominate and whether any individual issues can be managed. *Brinker, supra*, at *4.

This point was particularly emphasized in the concurring opinion by Justice Werdegar, which stated that the Court's unanimous opinion did *not* endorse Brinker's argument that the question why a meal period was missed rendered meal period claims "*categorically* uncertifiable . . . for such a per se bar would be inconsistent with the law governing reporting obligations and our historic endorsement of a variety of methods that render collective actions judicially manageable." *Id.* at 27, ital. by Werdegar, J. Justice Werdegar continued:

> "While individual issues arising from an affirmative defense can in some cases support denial of certification, they pose no per se bar. (Citations.) Instead, whether in a given case affirmative defenses should lead a court to approve or reject certification will hinge on the manageability of any individual issues. (Citations.) *Ibid.*

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statistical sampling might be able to establish," the court's certification decision "may have been different." *Id.* at 612 fn. 2.

Given those settled principles, Justice Werdegar wrote, Brinker had not shown that the individualized defense it raised – waiver – would render a certified class "categorically unmanageable." "Instead, it remains for the trial court to decide on remand, *in the fullness of its discretion*, whether in this case methods exist sufficient to render class treatment manageable." *Id.* at *28, ital. by Werdegar, J.

Brinker also demonstrates that the *Duran* court erred in decertifying the class. In *Brinker*, this Court, after recognizing that its ruling had rendered the meal period subclass overinclusive, remanded to the trial court to reevaluate the meal subclass certification in light of the legal clarification. By contrast, the *Duran* court, although expressly conceding that a workable trial plan might have been devised, simply decertified the class and refused to remand to the trial court for reconsideration of class certification based on a different trial plan.[2]

III. *DURAN'S* HOLDING THAT STATISTICAL SAMPLING AND OTHER REPRESENTATIVE EVIDENCE CANNOT BE USED TO DETERMINE LIABILITY CONFLICTS WITH *BRINKER.*

Duran strongly suggested that statistical sampling and other forms of representative evidence could not be used to determine classwide liability,

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[2] Plaintiffs' petition for rehearing requested the appellate court to remand for reconsideration of class certification but the court denied the petition.

only damages. The petition for review contended that review should be granted because *Duran*'s ruling on this point was contrary to *Sav-On* and many other cases. Pet. Rev. 25-29. *Brinker* now corroborates the petition's argument.

In *Brinker*, Justice Werdegar's concurring opinion specifically emphasized the Court's "historic endorsement of a variety of methods that render collective actions judicially manageable." *Brinker, supra*, at *26. The opinion made clear that such methods could be used to prove classwide liability:

> "[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.] *Representative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability." Id.* at *28, ital. added.

The opinion then cited *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 749-755 as "upholding as consistent with due process *the use of surveys and statistical analysis to measure a defendant's aggregate liability*" and *Dilts v. Penske Logistics, LLC* (S.D.Cal. 2010 267 F.R.D. 625, 638 as "certifying a meal break subclass because *liability could be*

Pet. Rehg, pp. 3-5.

established through employer records and representative testimony . . . ." *Ibid.,* ital. added.

Although the concurring opinion was signed only by two justices, it underscores plaintiffs' point that the use of various forms of representative evidence to establish classwide liability is a live and important issue before this Court. Since *Duran* is in direct conflict with the *Brinker* concurrence, review should be granted to settle this significant question.

IV. USB FAILS TO DEMONSTRATE ANY LEGAL SUPPORT FOR *DURAN*'S UNPRECEDENTED DUE PROCESS RULING.

USB presents no legal authority supporting *Duran*'s unique holding that a defendant in a class action has a due process right to assert its affirmative defense as to every potential class member. To the extent that USB, like the court of appeal, is relying on *Wal-Mart Stores, Inc. v. Dukes, supra*, 564 U.S. __, that reliance is misplaced. *Wal-Mart*'s condemnation of a "Trial by Formula" approach was *not* based on due process, but rather on a specific statutory provision of Title VII and on federal class action law. It has no bearing here, and *Duran*'s citation to *Wal-Mart*, echoed by USB, simply increases the confusion caused by the decision.

In the absence of supporting authority, USB, like the court of appeal, bases its claim of due process denial on a distorted picture of the case's procedural history, particularly development of the trial plan. Answer to

Pet. Rev., pp. 5-10, 18-20. Both USB and the appellate court ignore the findings of the trial court and the procedural history of the case.

In devising the trial plan, the trial court sought the parties' input and cooperation. Plaintiffs submitted a proposal prepared by statistical expert Dr. Richard Drogin, but USB insisted that the only way to try the case was to have individual mini-trials on liability and damages for each of the 260 class members – a proposal which the trial court reasonably concluded was unworkable. The trial plan, including its decision to proceed with 20 randomly-chosen Representative Witness Group ["RWG"] witnesses, plus the two plaintiffs, was supported by the testimony of Dr. Drogin, who testified that it complied with accepted statistical principles. Pet. Rev., pp. 9-11, 16. At trial, every one of the RWGs testified that they worked more than half their time inside bank properties, making them nonexempt. Dr. Drogin testified that the RWGs were representative of the class and that the best interpretation was that 100 percent of the class was misclassified. *Id.*, pp. 12, 16.

Dr. Drogin recognized that, as to restitution, the trial plan would produce a margin of error of 43 percent. The trial court immediately addressed this issue by holding a hearing to discuss alternative procedures to calculate restitution that would avoid the large margin of error. The court proposed many alternatives but USB rejected them all, insisting, as

always, that it was entitled to separate trials on both liability and restitution for each class member and, if it could not have that, it would accept the trial plan's proposed methods. The trial court reasonably treated USB's response as a waiver of objection to the margin of error. Pet. Rev., pp. 15-16.

Dr. Drogin testified that, despite the large margin of error, the restitution calculation was statistically valid and accurate. *Id.*, p. 16. In any event, the trial court did not accept the sampling plan margin of error for restitution on its face, but relied on numerous other facts that mitigated the margin. *Id.*, p. 17.; 83 CT 24626-24630. The court concluded that the trial methodology was "the best procedure available under the facts of this case taking into consideration manageability issues and the parties' due process rights." *Ibid.*; 83 CT 24631.

CONCLUSION

The *Duran* opinion attempts to paint this case as an example of a trial court gone astray. The opinion portrays the trial judge as devising the trial plan without any expert backing and refusing to make any changes as the erroneous and prejudicial nature of the plan became evident. As the petition for review's Statement of the Case and the above discussion demonstrate, this is a seriously inaccurate description of the case's history, resulting from the appellate court's failure to follow the substantial

evidence rule, failure to defer to the trial court's discretionary decisions, and failure to hold USB responsible for its uncooperative litigation tactics through doctrines like waiver. Pet. Rev., pp. 9-10, 15-17, 31-32. USB, of course, adopts the court of appeal's erroneous factual approach in its factual statement and its argument.

The court of appeal could have written a narrow opinion without creating new due process doctrines or expressing broad disapproval of the role of statistics at class certification and at trial. Such an opinion, even if legally erroneous, would likely not warrant review by this Court. Instead the court below used its view of the procedural history of the case as a springboard for announcing new legal standards which are at odds with existing California law.

While such pronouncements may arguably meet the standards for publication, they are incorrect and the *Duran* opinion is already creating serious confusion in class litigation throughout the state. The issues presented by the case are real and urgent and affect many pending and future actions. The Court should grant review.

Dated: May 1, 2012

Respectfully submitted,

Law Offices of Ellen Lake
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By: Ellen Lake/HP
Ellen Lake, Counsel for
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Sam Duran, Matt Fitzsimmons

CERTIFICATE OF WORD COUNT

I certify that this reply brief contains 3,496 words, as counted by Microsoft Word, the word-processing program used to prepare it.

Heidi Phillips

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 May 1, 2012, I served upon the interested parties in this action the following document described as:

REPLY TO ANSWER TO PETITION FOR REVIEW

By placing a true and correct copy thereof enclosed in sealed envelopes addressed as stated on the attached service list 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.

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

Executed on May 1, 2012, at Greenbrae, California.

Heidi Phillips

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