S166350

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC., and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.,
Petitioners,

v.

THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO,
Respondent.

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE RADER, and SANTANA ALVARADO,
Real Parties in Interest.

PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, CASE NO. D049331, GRANTING A WRIT OF MANDATE TO THE SUPERIOR COURT FOR THE COUNTY OF SAN DIEGO, CASE NO. GIC834348, HONORABLE PATRICIA A.Y. COWETT, JUDGE

APPLICATION FOR LEAVE TO FILE POST-HEARING SUPPLEMENTAL BRIEF RE: *DURAN v. U.S. BANK NATIONAL ASSOCIATION*; [PROPOSED] SUPPLEMENTAL BRIEF

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APPLICATION FOR LEAVE TO FILE POST-HEARING SUPPLEMENTAL BRIEF RE: *DURAN V. U.S. BANK NATIONAL ASSOCIATION*

Brinker Restaurant Corporation, Brinker International, Inc., and Brinker International Payroll Company, L.P. ("Brinker") hereby respectfully request leave to file this supplemental brief bringing to this Court's attention a recent California Court of Appeal decision, *Duran v. U.S. Bank National Association* (Feb. 6, 2012, A125557) 2012 WL 366590, which addresses a critical issue in this case: whether claims that depend on individualized inquiries can be decided by way of survey, statistical, or other representative evidence. (Brinker's Answer Brief on the Merits, pp. 3, 105-118.)

The *Duran* decision is appropriately raised at this juncture because it was issued on February 6, 2012, after the November 8, 2011 oral argument before this Court.

Dated: February 14, 2012

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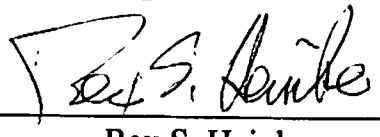
By 
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[PROPOSED] SUPPLEMENTAL BRIEF RE: *DURAN V. U.S. BANK NATIONAL ASSOCIATION*

I. THE *DURAN* DECISION

In *Duran v. U.S. Bank National Association* (Feb. 6, 2012, A125557) 2012 WL 366590, plaintiffs, banking officers, sued their employer, U.S. Bank National Association ("USB"), claiming they were improperly classified as exempt outside salespersons, and thus unlawfully denied overtime pay.[1]

In support of their motion to certify a class, plaintiffs submitted declarations from 34 current and former employees indicating they spent less than half their working time engaged in sales-related activities outside of branch offices. (*Duran, supra*, 2012 WL 366590, at *2.) USB responded that plaintiffs could not establish that common issues predominate, submitting the declarations of 75 employees testifying they regularly spent more than half their time engaged in sales activities outside USB branch offices. (*Ibid.*) The trial court certified the class. (*Ibid.*)

The trial court proposed adjudicating class-wide liability by having a sample of 20 randomly-selected plaintiffs testify at trial, and extrapolating

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[1] The applicable wage order defines an "outside salesperson" as a person "who regularly and customarily works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities" (Cal. Code Regs., tit. 8, § 11040, subd. 2(M)). (*Duran, supra*, 2012 WL 366590, at *1.)

the findings from that trial to the class. (*Duran, supra*, 2012 WL 366590, at *3.) USB countered that using representative testimony would violate its due process rights, further arguing that plaintiffs' reliance on *Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, in support of the use of representative testimony was misplaced because that case "involved the issue of class action *damages* only, and not *liability*." (*Id.* at *4, original emphasis.) Unpersuaded, the trial court overruled USB's objections, and proceeded with the representative proof trial. Over USB's objections, the trial court also excluded all testimony, evidence, or argument related to any *non*-randomly selected USB employee. (*Id.* at *6.)

After a bench trial, the trial court ruled in plaintiffs' favor, concluding that the randomly-selected employees who testified at trial had been misclassified, and were owed overtime wages. (*Duran, supra*, 2012 WL 366590, at *15.) The trial court then extrapolated this liability finding to the entire class notwithstanding the fact that it had prohibited USB from introducing evidence pertaining to employees other than the 20 randomly-selected ones who had testified at trial.

The *Duran* plaintiffs' expert, Dr. Richard Drogin, testified during the damages phase of the trial that the amount of time the randomly-selected employees had worked overtime, 11.87 hours per week, "could be reliably projected to the absent class members for purposes of calculating the restitution owed." (*Duran, supra*, 2012 WL 366590, at *18.) The trial

court adopted Dr. Drogin's overtime estimate as "reliab[le]" and awarded the class nearly $15 million. (*Duran, supra*, 2012 WL 366590, at *21.) USB moved for a new trial, arguing that the trial court's refusal to admit evidence from non-randomly selected employees violated its due process rights. (*Ibid.*) The trial court denied the motion. (*Ibid.*)

On appeal, USB claimed that the trial court's reliance on evidence derived from a small sample "to determine class-wide liability and restitution violated principles of due process . . . ." (*Duran, supra*, 2012 WL 366590, at *21.) The Court of Appeal agreed, holding that the trial management plan did not pass constitutional muster, and that the case must be decertified. (*Ibid.*)

In its opinion, the Court of Appeal explained that the trial court had mistakenly based its representative sampling methodology on *Bell*, reasoning that "we did not have occasion [in *Bell*] to consider the use of a representative sample to determine class-wide liability, since liability was not an issue on appeal. Accordingly, *the only issue we addressed was the damages calculation itself, and not whether the plaintiff employees had a right to recover damages in the first place.*" (*Duran, supra*, 2012 WL 366590, at *25, emphasis added.)

Surveying state and federal cases on point, the Court of Appeal determined that the case-law as a whole supports "the proposition that *surveying, sampling, and statistics are not valid methods of determining*

liability because representative findings can never be reasonably extrapolated to absent class members in misclassification claims given that time spent performing exempt tasks may differ between employees." (*Duran, supra*, 2012 WL 366590, at *26-28 [discussing cases], emphasis added.) It is the employer's constitutional right to assert its affirmative defense "as to every potential class member." (*Id.* at *27.)

Significantly, the Court of Appeal recognized that the trial court "essentially" used the "same type of 'Trial by Formula' that the U.S. Supreme Court disapproved of in *Wal-Mart [Stores, Inc. v. Dukes]*." (*Duran, supra*, 2012 WL 366590, at *29.) It elaborated: "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." (*Id.* at *29, fn. 65.)

II. *DURAN*'S RELEVANCE TO *BRINKER*

In *Brinker*, no less than in *Duran*, "due process principles require individualized inquiries" because meal and rest period violations "turn[] on the specific circumstances of each employee" (*Duran, supra*, 2012 WL 366590, at *26) – whether a particular manager pressured or forced the employee not to take a break, or whether the employee voluntarily declined it. Where, 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." (*Ibid.*)

Plaintiffs' contrary position (Opening Brief on the Merits ("OBM"), pp. 122-127; Reply Brief on the Merits ("RBM"), pp. 46-49) has no foothold in the law.[2] To "foreclose[] [Brinker] the opportunity to raise individual challenges to the absent class members' claims" would result in a "profound" deprivation of its due process rights. (*Duran*, *supra*, 2012 WL 366590, at *31.)

Duran also rejects the *Brinker* Plaintiffs' position (OBM, pp. 127-132; RBM, pp. 49-51) that an affirmative defense is incapable of defeating class certification. The *Duran* court held: "If individualized issues arise out of a defendant's affirmative defense, the predominance factor can be defeated." (*Duran*, *supra*, 2012 WL 366590, at *38, citing *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450; see also *Duran*, *supra*, 2012 WL 366590, at *23 [recognizing that the outside salesperson exemption, an affirmative defense, "'turns on a detailed, fact-specific determination'" of "'how the employee actually spends his or her time'"], quoting *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 790, 802.)

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[2] The *Brinker* Plaintiffs, like the *Duran* plaintiffs, relied extensively on *Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, to support their mistaken contention that liability can be established by way of representative proof. (OBM, pp. 112-113, 125.)

Finally, *Duran* undermines Plaintiffs' argument that affirming the Court of Appeal's decision in *Brinker* would sound the death knell for all class actions, obstructing the effective enforcement of California's wage and hour laws. (OBM, pp. 112-113; RBM, p. 2.) "We doubt the situation is quite this dire," the *Duran* court observed, adding that "not all such cases are doomed to failure under current law." (*Duran, supra*, 2012 WL 366590, at *32.) In any event, "we have never advocated that the expediency afforded by class action litigation should take precedence over a defendant's right to substantive and procedural due process." (*Ibid.*)

The *Duran* decision, in sum, provides well-reasoned support for Brinker's position that its liability in this case cannot be established by representative evidence, and that the meal period, rest period, and off-the-clock claims at issue cannot be adjudicated on a class basis.

Respectfully submitted,

Dated: February 14, 2012

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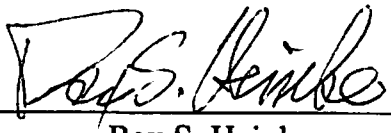
By 
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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2029 Century Park East, Suite 2400, Los Angeles, CA 90067. On February 14, 2012, I served the foregoing document described as: **APPLICATION FOR LEAVE TO FILE POST-HEARING SUPPLEMENTAL BRIEF RE: *DURAN v. U.S. BANK NATIONAL ASSOCIATION*; [PROPOSED] SUPPLEMENTAL BRIEF** on the interested parties below, using the following means:

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☒ BY UNITED STATES MAIL I enclosed the document in a sealed envelope or package addressed to the respective addresses of the parties stated above and placed the envelopes for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid at Los Angeles, California.

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

Executed on February 14, 2012, at Los Angeles, California.

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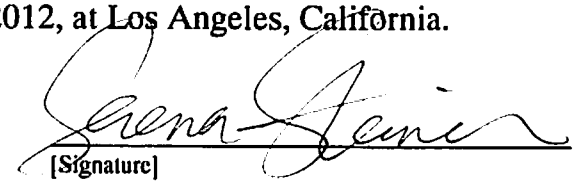
[Print Name of Person Executing Proof]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