No. S166350

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

vs.

SUPERIOR COURT OF 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

REAL PARTIES' RESPONSE TO BRINKER'S POST-HEARING SUPPLEMENTAL BRIEF RE *DURAN V. U.S. BANK NATIONAL ASSOC.*

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I. INTRODUCTION

Nothing in *Duran v. U.S. Bank National Association*, 2012 WL 366590 (Feb. 6, 2012), *pet. for rehearing filed Feb. 21, 2012*, Nos. A12557, A126827, has any direct bearing on the issues in *Brinker*, which have already been fully briefed, and argued, and briefed again. *Duran* involved materially different legal claims and theories of proof, presented at an entirely different stage of litigation. The Court of Appeal's decision in that case simply does not stand for the proposition for which Brinker cites it.[1]

Brinker contends that *Duran* establishes a new *categorical* rule that statistics, surveys, and other forms of representative evidence may never be used to establish classwide liability in a case where a defendant might be able to avoid liability to some class members through individualized proof. *See* Brinker's Supplemental Brief re *Duran* ("Supp. Br.") at 3-4. So read, however, *Duran* would be contrary to *Sav-on Drug Stores, Inc. v. Superior Court,* 34 Cal.4th 319 (2004), and countless other cases. What Brinker purports to characterize as the Court of Appeal's holding was merely that court's description of the sweeping legal position asserted by defendant U.S. Bank, which the Court of Appeal accepted only in part, based on the unique facts of that case. *See* 2012 WL 366590 at *26 ("*USB claims* California law precludes classwide liability determinations based on evidence obtained from a representative sample in employment cases

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[1] The pending Petition for Rehearing petition in *Duran* asserts, among other things, that the Court of Appeal's statement of facts ignored the trial judge's credibility findings and drew all inferences in favor of appellant employer—the exact opposite of what substantial-evidence review requires. For purposes of this Response, though, we take the facts of *Duran* as stated in the Court of Appeal's opinion.

alleging misclassification. *USB relies on* several state and federal wage and hour class action cases for the proposition [etc.]") (emphasis added).

This Court does not need the Court of Appeal's decision in *Duran*—an overtime exemption case litigated under a flawed trial plan as described in that decision—to tell it what *Sav-on* means, or to explain how to review Judge Cowett's discretionary assessment of the facts and evidence in *Brinker*. Whatever errors the trial judge may have committed in *Duran* have little bearing on the issues presented here, which involve entirely different legal claims, factual allegations, and potential proofs, and which arise at an altogether different stage of the litigation.

II. ARGUMENT

A. Brinker Mischaracterizes the *Duran* Facts and Holding

On February 6, 2012, the First Appellate District in *Duran* reversed the judgment in that class action for unpaid overtime, concluding that the trial court had committed error by deciding, without input from either side's experts, how to structure a randomized sampling of a class of 260 bank officers to determine whether they were exempt from overtime protection under California law (which depended on whether they spent more than 50% of their time on outside sales). The Court of Appeal found three principal flaws in the trial judge's approach to statistical analysis—none of which Brinker even mentions in its summary of *Duran*, even though they were crucial to the Court of Appeal's reasoning and markedly distinct from the procedural and factual setting of the present case.

First, instead of relying on expert testimony, the trial court in *Duran* unilaterally decided that a statistically accurate sample of the 260-member class could be obtained by limiting the parties' evidence to 20 class

members whose names were, literally, drawn out of a hat.[2] Second, instead of ensuring that the universe of sampled class members was truly random, the trial court allowed four of those individuals (20% of the sample) to opt out of the class after being selected, and admitted testimony from two class members who had not been part of the randomly selected group—thus destroying randomization.[3] Third, the trial court limited the evidence to this restricted, non-randomized sample only, even after the experts agreed

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[2] *See* 2012 WL 366590 at *29 ("[T]here was no statistical foundation for the trial court's initial assumption that 20 out of 260 is a sufficient size for a representative sample by which to extrapolate either liability or damages. Neither party proposed a trial plan based solely on the selection of a representative group of plaintiffs, let alone a group of 20. The court appears to have arrived at this procedure on its own, without reliance on legal precedent or the advice of expert witnesses."); *see also id.* at *3-4 ("[T]he trial court, on his own initiative, proposed the idea of taking a sample of 20 plaintiffs.... To choose the representatives, the court proposed putting the names of all the potential class members into a 'hat' and drawing 20 names...."); *id.* at *6 (defendant's expert opined that given the class size and demographic, a 20-person sample, even if random, "'would, from a statistical perspective, be highly inaccurate and unrepresentative.'"); *id.* at *18 (plaintiffs' expert "acknowledged that the sampling procedure he had proposed at the outset of this case was not used by the trial court.").

[3] *See* 2012 WL 366590 at *35 ("the sample used as the basis for the RWG [random witness group] was not a true random sample because it included the two named plaintiffs, who were not selected as part of the initial sample"); *see also id.* at *5 (noting that "while 4 of the 20 RWG [random witness group] members had elected to opt out, only 5 of the remaining 250 absent class members had done so."); *id.* at *36 ("the plan used by the trial court was not based on appropriate modeling techniques as developed by experts.").

that the resulting margin of error in calculating overtime was 43.3%—a substantial statistical discrepancy.[4]

Brinker ignores these critical facts, which were the basis for the Court of Appeal's conclusion that the trial court's approach in *Duran* "resulted in a statistically invalid result" that U.S. Bank should have been able to challenge by presenting evidence from outside the trial court's designated sample group. *See* 2012 WL 366590 at *21.

Ignoring the unique facts on which *Duran* turned and the procedural posture in which it arose, Brinker contends that the case stands for the sweeping 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." Supp. Br. at 3-4. That is not what the Court of Appeal held (although it is how the Court of Appeal characterized *U.S. Bank's* broad argument, *see* 2012 WL 366590 at *26). Nor would any such holding have been possible to reconcile with *Sav-on,* which held that statistics, surveys, and representative evidence *are* appropriate forms of proof in class actions, if properly presented, and that "the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate." 34 Cal.4th at 334 (citations omitted); *see also id.* at 329 (substantial evidence supports trial court's finding that defendant's challenged practices result in "widespread [*i.e.*, not universal] de facto misclassification" of class members); *Bell v. Farmers Insurance Exchange,* 115 Cal.App.4th 715, 750 (2001) (*Bell III*) (representative testimony and statistical extrapolation

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[4] *See* 2012 WL 366590 at *18 ("Here, the absolute margin of error for the overtime worked by the sample plaintiffs is 5.14 hours per week, and the relative margin of error is 43.3 percent."); *see also id.* at *36.

admitted to establish liability and damages, where 9% of class worked no overtime).[5]

Given its facts, *Duran* is consistent with *Sav-on, Bell III,* and the many other cases cited in plaintiffs' prior briefs that establish that surveys, statistics, and representative evidence are admissible to establish classwide liability—either alone or in conjunction with other evidence—as long as that evidence is statistically valid (which the evidence in *Duran*, according to the Court of Appeal's description, apparently was not). If that evidence is statistically valid, there is no reason it cannot be used to establish classwide liability in an appropriate case, where the nature of the employers' challenged practices and policies are such that classwide rather than individualized issues predominate—a discretionary determination that, in the first instance, is for the trial court to make. *See, e.g., Sav-on*, 34 Cal.4th at 334 ("even if some individualized proof of such facts ultimately is required to parse class members' claims, that such will predominate in the action does not necessarily follow.... Individual issues do not render class certification inappropriate so long as such issues may effectively be

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[5] Although the Court of Appeal in *Duran* sought to distinguish *Bell* as a case in which statistics were not used to establish liability, *see* 2012 WL 366590 at *24-25, the Court of Appeal was mistaken. It is true that statistics were not used in Bell to prove that defendant insurer had *misclassified* its claims representatives as exempt administrative employees. However, misclassification itself is not actionable; plaintiffs still must prove they worked unpaid overtime hours. To prove that final element of their claim, the *Bell* plaintiffs presented a statistically validated analysis of randomly sampled class members' testimony, which established that 91% of the class worked some overtime. *See* 115 Cal.App.4th at 743-44. Because the evidence established that 9% of the class worked no overtime hours at all, defendant had no liability toward 9% of the class members, a determination that rested largely upon statistical extrapolation from representative testimony.

managed.") (citations omitted); *cf. Duran,* 2012 WL 366590 at *40 ("a class action will not be permitted if each member is required to 'litigate substantial and numerous factually unique questions' before a recovery may be allowed").

B. *Duran* is Irrelevant to this Case, Which Has Distinguishable Facts, Involves Different Legal Theories, and Stands in a Different Procedural Posture

Brinker contends, as it has throughout this litigation, that Judge Cowett abused her discretion and/or applied an incorrect legal standard in this case because, under Brinker's proposed legal standard (for the core meal period and rest break claims), "meal and rest period violations 'turn[] on the specific circumstances of each employee'—whether a particular manager pressured or forced the employee not to take a break, or whether the employee voluntarily declined it." Supp. Br. at 4, quoting *Duran,* 2012 WL 366590, at *26; *see also* Supp. Br. at 4-5 ("here, liability can be decided only on an employee-by-employee basis").

That is Brinker's position. Plaintiffs' position, as set forth in several prior briefs, reaches the opposite conclusion as to each separate claim at issue (including those, like early lunching and rest break timing, that Brinker seemingly *concedes* can be proven through classwide evidence if plaintiffs' understanding of the governing law is accepted).[6] There is no

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[6] As plaintiffs have repeatedly pointed out, most of their claims will not depend on statistical or survey evidence at all, and the certification order may be affirmed as to those claims without reaching any of Brinker's arguments in its latest supplemental brief. *See* Real Parties' Supplemental Brief on *Wal-Mart Stores, Inc. v. Dukes* (filed 10/24/12) at pp. 2-3 (succinctly summarizing these claims); *see also* OBM at 78-80, 103-105, 110, 114-115 (discussing these claims in more detail); RBM at 19-20, 32, 35, 42 (same).

reason to recite the applicable arguments yet again, other than to say that Judge Cowett had ample discretion on the facts of this case to conclude that classwide adjudication would be far more efficient than individual adjudication—as classwide adjudication is the only way to ensure that Brinker complies with its legal obligations to provide legally adequate meal periods and rest breaks under California law.[7]

Much about the Court of Appeal's approach to the issues in *Duran* is troubling, and will hopefully be addressed in response to the pending petition for rehearing in that case. For example, the Court of Appeal presented its lengthy recitation of the facts without indicating whether it was applying "substantial evidence" analysis (which it should have applied, but apparently did not, given its rejection of most of the trial court's credibility determinations and factual inferences) or some form of "harmless error/prejudice" analysis instead (which may be why it seemingly drew all inferences in defendant's favor). The Court of Appeal was also unclear about what issues remained open on remand—in particular, whether the trial court could revisit the appropriateness of class certification (and potentially formulate a new, statistically defensible trial plan) consistent with the Court of Appeal's due process analysis. What is clear, though, is that Brinker's statement of the Court of Appeal's holding

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[7] Brinker is correct that plaintiffs previously analyzed these issues in our Opening Brief on the Merits at 122-27 and our Reply Brief on the Merits at 46-49. *See* Supp. Br. at 5. More recently, plaintiffs addressed the appropriateness of class certification on the facts of this case in our Supplemental Brief on *Wal-Mart Stores, Inc. v. Dukes* (filed 10/24/11); our Answer to Amicus Curiae Brief of California Employment Law Council (filed 01/03/12); and our Reply to Brinker's Answer to Amicus Curiae Brief of California Employment Law Council (filed 01/13/12). *See also* Amicus Curiae Brief of Rogelio Hernandez (filed 02/24/11).

is wrong. The Court of Appeal in *Duran* did *not* altogether bar the use of representative and statistical evidence to establish liability in class action cases. Instead, it concluded, based on its review of the facts, that the trial court had committed prejudicial error by precluding U.S. Bank from presenting evidence to challenge the statistical validity of the sample from which the trial judge extrapolated to the class as a whole. The Court of Appeal reversed in *Duran* not because the trial court had allowed statistical proof, but because it believed that the court had allowed *unreliable* statistical proof. *See* 2012 WL 366590 at *34 ("while we do not disagree with the proposition that statistical sampling is a tool that may be utilized in appropriate cases, it does not follow that it was proper for the trial court in this case to limit presentation of USB's affirmative defense solely to the 21 members of the representative group."). Because the trial court *might* have reached a different result had it not precluded U.S. Bank from presenting additional evidence outside the narrowly designated sample, the Court of Appeal concluded that the errors were prejudicial and required reversal.[8]

In *Brinker* case, by contrast, the trial court granted class certification (before any merits discovery had been allowed (2RJN7394-95)) based on a

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[8] *See, e.g.*, 2012 WL 366590 at *26 ("USB was barred from introducing manifestly relevant evidence [that] *potentially* could have greatly mitigated the damages awarded and possibly could have defeated plaintiffs' class action claim entirely."); *id.* at *30 ("USB offered evidence that *potentially* could have prevented, at a minimum, approximately one-third of these individuals from receiving any recovery."); *id.* ("The evidence USB sought to introduce, *if deemed persuasive,* would have established that at least one-third of class was properly classified."); *id.* at *31 ("there is a *reasonable probability* that in the absence of the error, USB would have received a more favorable result."); *id.* at *32 ("the trial court's management this case created a *high risk* that USB will be compelled to pay money to absent plaintiffs who *may not* be entitled to recovery") (emphasis added throughout).

showing that common legal and factual issues predominated in *this* action. The trial court then ordered expert witness exchanges and depositions (underway when the Court of Appeal stayed all further proceedings) and set a briefing and hearing schedule on survey and statistical evidence, which was designed to lead to a trial management plan utilizing scientifically reliable survey and statistical analysis backed by Brinker's own corporate records and data. 2RJN7442-44, 7522-48. Indeed, Brinker itself acknowledged that representative and statistical evidence could be used to establish classwide factual inferences, drawing several such inferences of its own based on precisely that type of evidence. *See, e.g.*, 3PE647:3-4, 650:6-7, 661:2-3; 4PE983-989.

In this case, then, the trial court's pre-trial order granting class certification was supported by not only the proffered expert survey and statistical evidence, but also by an extensive record of Brinker's classwide meal and rest break policies; Brinker's centralized computer system recording every work and meal period; Brinker's uniform policy prohibiting a meal for each five-hour work period (*i.e.*, the "early lunching" policy) (19PE5172; 2PE440:7-18, 456:5-20); Brinker's uniform policy prohibiting rest breaks for every "4 hours *or major fraction* thereof" (19PE5172; 21PE5913:1-9); and Brinker's uniform policy prohibiting rest breaks before the first meal period where its "early lunching" policy required workers to take meal breaks soon after arriving at work (19PE5172; 21PE5913:18-5915:11).

For all of these reasons, the issues presented, the legal claims, the factual allegations, and the company-wide common proof are all substantially different from those considered in *Duran*.

III. CONCLUSION

For the reasons stated above and in plaintiffs' prior briefing, the trial court's class certification order should be affirmed in all respects.

Dated: February 27, 2012

Respectfully submitted,

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WORD COUNT CERTIFICATE

The undersigned hereby certifies that the computer program used to generate this brief indicates that the text does not exceed 2,800 words, including footnotes. *See* Cal. Rules of Court, rule 8.520(d)(2).

Dated: February 27, 2012

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PROOF OF SERVICE

I, the undersigned, hereby declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States; am over the age of 18 years; am employed by THE KRALOWEC LAW GROUP, located at 188 The Embarcadero, Suite 800, San Francisco, California 94105, whose principal attorney is a member of the State Bar of California and of the Bar of each Federal District Court within California; am not a party to the within action; and that I caused to be served a true and correct copy of the following documents in the manner indicated below:

1. REAL PARTIES' RESPONSE TO BRINKER'S POST-HEARING SUPPLEMENTAL BRIEF RE *DURAN V. U.S. BANK NATIONAL ASSOC.*; and
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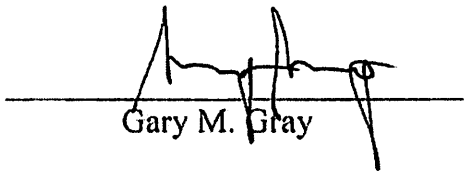

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