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April 4, 2012

VIA OVERNIGHT DELIVERY

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

Re: **Request for Depublication** (Cal. Rules of Court, rule 8.1125(a))
Duran v United States Bank, National Assn.
(2012) 203 Cal.App.4th 212
Supreme Court Case No. S200923
A125557 & A126827 Court of Appeal, First Appellate District, Division One

Dear Honorable Justices:

California Employment Lawyers Association (CELA) respectfully requests depublication of *Duran v United States Bank, National Assn* ("*Duran*"). The order to publish the *Duran* opinion was filed on February 6, 2012. The Petition for Review was filed March 19, 2012. This depublication request is timely filed within 30 days after the opinion became final on March 7, 2012. See Rule of Court 8.1125(a)(4).

I. CELA'S INTEREST

CELA is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including wage and hour class actions similar to *Duran*. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of public policies set forth in the California Labor Code, including by advocating for effective labor law enforcement procedures such as class actions in appropriate cases. CELA has taken a leading role in advancing and protecting the rights of California employees by, among other things, submitting amicus briefs and letters on issues affecting those rights, including Supreme Court amicus briefs in *Murphy v. Kenneth Cole Productions, Inc.* and *Gentry v. Superior Court*, as well as numerous requests for publication or depublication of opinions.

By separate amicus letter to be filed following this Court's issuance of the decision in *Brinker Restaurant Corp. v. Superior Court*, CELA will also be asking for review to be granted under Rule of Court 8.500(g). CELA seeks review to allow this Court to provide lower courts, and employers, employees, and their counsel, with definitive, uncontradicted authority on an issue central to enforcement of workplace protections through the class action vehicle, acknowledged by this Court to be an important public policy protection. Should the Court not grant review, CELA requests the Court depublish *Duran* to enable practitioners to rely on the established procedures in the published body of law with which it conflicts.

II. REASONS FOR DEPUBLICATION

CELA seeks depublication of *Duran* for the following reasons:

1. CELA's class action practitioners have followed *Sav-On Drugs, Inc. v Superior Court* (2004) 34 Cal.4th 319 (*Sav-On*) and *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715 (*Bell*) to authorize wage and hour class liability and damages trials through the presentation of representative evidence extrapolated to absent class members. *Duran* contradicts *Sav-On* by restricting the use of representative evidence to proof of damages and foreclosing its use in exemption cases without affording the defendant the right to assert a defense against every absent class member individually rather than utilizing representative evidence. If that contradiction is accurate, the Court must review *Duran* to resolve it, or, at least, depublish it because it creates confusion and is inconsistent with established law favoring class actions where defendants' pay practices result in "widespread [though *not* universal] de facto misclassification" of workers and permitting the use of reliable representative and statistical evidence to prove liability in wage and hour class actions;

2. If the decision does not stand for the propositions that representative evidence is limited to proof of damages and a defendant has the due process right in every misclassification trial to assert defenses against each class member individually, then *Duran* exists as nothing more than a court of appeal taking anomalous exception to the manner in which a single trial was conducted, setting forth nothing qualifying the opinion for publication under Rule 8.1105(c);

3. *Duran* relies on questionable federal trial court decisions for its conclusions; and

4. *Duran* contravenes *Sav-On* and appellate standards of review by reweighing the evidence, decertifying the class, and attempting to terminate the case without further proceedings rather than remanding for a new trial.

III. PROCEDURAL HISTORY

The procedural history is set out in full in the pending Petition for Review. Briefly, business banking officers challenged their classification as overtime exempt under the outside sales exemption on the basis of defendant's policies and practices requiring them to perform more than half their duties inside company premises. The trial court certified a class of 260 employees. Over the defendant's staunch objection to the entire premise of class-wide trial adjudication and its refusal to provide any input into a trial plan, the trial court adopted a trial plan based on the representative testimony of a random sample of class members, whose testimony as to the nature of work and amount of overtime hours was extrapolated to absent class members in the manner the trial court determined to be envisioned by *Sav-On* and *Bell*. Plaintiffs also relied on substantial non-statistical evidence in support of the finding of liability including the fact that Defendant never had an expectation that its banking employees were to be outside salespeople. The trial was conducted in equity to the bench, resulting in a statement of decision in favor of the class, finding them non-exempt and awarding restitution for back overtime wages and interest.

The Court of Appeal reversed. Drawing its authority *from a federal trial court opinion*[1], *Duran* determined that a defendant's due process right to present defenses as to duties performed extended to every absent class member: "when 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." *Duran*, 203 Cal.App.4th at 255. Because the court found the defendant was precluded by manner in which the trial court conducted the trial from presenting those defenses against every potential class member, the court applied those defenses itself, reversed the judgment, determined that the matter had to be decertified, and terminated the matter, foreclosing any further class proceedings that may have been re-tried to address the due process concerns enunciated. *Duran* disapproved of the accepted use of representative evidence of class non-exempt status statistically extrapolated to absent class members, the method approved by *Sav-On* and a long line of state and federal cases utilizing such proof. Said the court, "representative sampling may not be used to prevent employers from asserting individualized affirmative defenses in cases where they are entitled to do so." *Duran*, 203 Cal.App.4th at 259. *Duran* then drew a conclusion that endorses an employer's ability to evade class action liability by creating individualized issues through the practice of

[1] *Jimenez v. Domino's Pizza, Inc.* (C.D.Cal. 2006) 238 F.R.D. 241, 253.

failing to monitor or track employees as to whether they are performing exempt or non-exempt functions: "If this is the case, however, it follows that the only way to determine with certainty if an individual BBO spent more time inside or outside the office would be to question him or her individually." *Id.* at 262. That untenable conclusion strikes at the heart of wage and hour class actions.

IV. ARGUMENT

A. *Duran* Must Either be Reviewed as Contradictory to *Sav-On* or Depublished

Duran sets up a convenient tautology: A defendant has the right to individually call absent class members to defend an overtime misclassification action, and to do so would create individualized issues requiring permanent decertification. The Court purported to limit its analysis to the facts of the case, but its analysis has a long reach by virtue of publication of the opinion[2].

Duran's finding that the defendant in an overtime misclassification trial has the due process right to independently examine the entire body of absent class members rather than to defend a representative action trial with representative evidence flatly contradicts the procedure for trying class cases on representative evidence and statistical extrapolation embraced by *Sav-On*. The impact of such a ruling unhinging accepted class action procedure has already reached trial court practice, with *Duran* defense counsel invoking its purported right to subpoena every absent class member as current defense counsel in a class misclassification action being tried in San Diego Superior Court, *Puchalski v Taco Bell Corp.*, SDSC No. GIC 870429. *Duran* must therefore either be reviewed or depublished.

This Court has long observed the propriety under California law of class action trials. By their nature, such trials are conducted by presentation of a statistically validated sample or other representative evidence to establish liability and damages that is extrapolated to absent class members. The idea that all class members are subject to testify is flatly inconsistent with the concept of representative evidence. Indeed, Justice Werdegar recently reminded practitioners that the entire premise of class actions arises

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[2] "Plaintiffs declare: 'At bottom, this appeal is about whether the class action will survive as an effective method to try wage and hour misclassification cases.' We doubt the situation is quite this dire." *Duran* at 263. Despite its disclaimer of "dire" consequences, the *Duran* offers no explanation how liability can ever be tried without extrapolated representative evidence of any sort as an acceptable form of class-wide proof when a defendant has an alleged due process right to call every single member of the class.

out of the common law doctrine of "virtual representation." See *Arias v Superior Court* (2009) 46 Cal.4th 969, 988-989 (Werdegar, J., Concurring) [Section 382 actually codifies not class action procedure but the common law doctrine of virtual representation. (*Weaver v. Pasadena Tournament of Roses* (1948) 32 Cal.2d 833, 837.) Under the doctrine, a person who was not a party to an action was deemed to have been virtually represented, and thus bound by the judgment, if his or her interests had received adequate representation by a party. (See, e.g., *Bernhard v. Wall* (1921) 184 Cal. 612, 629.) The modern law of class actions evolved out of virtual representation] (footnote omitted).

Within this body of jurisprudence, this Court issued the opinion authored by Justice Werdegar in *Sav-On*, applying principles of virtual representation in the modern wage and hour class action context. This Court found a class trial appropriate even in the fact of disputed evidence as to whether misclassification was defendant's "policy and practice" and "operational standardization . . . and classification based on job descriptions alone resulted in widespread de facto misclassification." *Sav-On*, at 330. Use of the term "widespread" as opposed to "uniform" reveals this Court authorized the class action vehicle even if liability would not obtain to 100% of the class.

With regard to establishing affirmative defenses to liability, *Sav-On* envisioned the defendant would do so with representative evidence, not testimony by all absent class members:

> Unquestionably, as the Court of Appeal observed, defendant is entitled to defend against plaintiffs' complaint by attempting to demonstrate wide variations in the types of stores and, consequently, in the types of activities and amounts of time per workweek the OM's and AM's in those stores spent on different types of activities. . . . A reasonable court, even allowing for individualized damage determinations, could conclude that, to the extent plaintiffs are able to demonstrate pursuant to either scenario that misclassification was the rule rather than the exception, a class action would be the most efficient means of resolving class members' overtime claims.

Sav-On, at 330. Consistent with these principles, *Sav-On* quoted the long-standing class action principle that "a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her *eligibility for recovery* or as to the amount of his or her damages." *Id*, at 333, quoting *Employment Development Dept. v. Superior Court* (1981) 30 Cal.3d 256, 266, italics added. Establishing "eligibility" for recovery requires proof of the defendant's liability. Moreover, the use of term of necessity indicates that ultimately not everyone in the class

may be eligible for recovery, and that the use of representative evidence to establish liability statistically as to the corresponding percentage of the class is not foreclosed by this prospect. An example of this occurred in the *Bell* trial, in which the jury awarded class recovery and certification was affirmed even where the representative evidence showed that the defendant was not liable to 9 percent of the class, who had worked no overtime. See *Bell,* 115 Cal.App.4th at 743.

Decades of authority nationwide and in California approve class action trial methodology utilizing statistical and representative evidence. Survey, statistical, and representative testimony are an accepted methodology to assist the trier of fact in establishing liability and damages. Footnote 6 of *Sav-On* presents a long citation of cases this Court finds as supportive of statistical and representative testimony. (*Sav-On*, 34 Cal.4th at p. 333, n.6 ["See, e.g., *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 337-340 (1977) [52 L.Ed. 2d 396, 97 S.Ct. 1843] (statistics bolstered by specific incidents "are equally competent in proving employment discrimination"); *Lockheed*, *supra*, 29 Cal.4th at pages 1106-1108 ("well sampling and other hydrological data" about "the pattern and degree of contamination" could, but was insufficient to, support "a theory that a defendant's negligence has necessitated increased or different monitoring for all, or nearly all, exposed individuals"); *Reyes v. Board of Supervisors*, 196 Cal.App.3d 1263, 1279 (1987) [242 Cal. Rptr. 339] (certification of class action for wrongfully denied welfare benefits proper because "whether the County applied an unlawful sanctioning process" to deny eligibility "can be proved by reviewing the County's regulations, ... the standard practices followed in making sanctioning decisions, as well as a sampling of representative cases"); *Stephens v. Montgomery Ward*, 193 Cal.App.3d 411, 421 (1987)[238 Cal.Rptr. 602] (certification proponent satisfied commonality requirement with statistical data and analysis of retail chain's corporate structure supporting allegations respecting centralized control over employment decisions); see also *In re Simon II Litig.*, 211 F.R.D. 86, 146-151 (E.D.N.Y. 2002) (tobacco case listing state, high court, other federal, and secondary authorities concluding aggregate proof is "consistent with the defendants' Constitutional rights and legally available to support plaintiffs' state law claims")"]; see, also *Capitol People First v. Department of Developmental Services* (2007) 156 Cal.App.4th 676, ["Over the years, numerous courts have approved the use of statistics, sampling, policies, administrative practices, anecdotal evidence, deposition testimony and the like to prove classwide behavior on the part of defendants]; *Employment Development Dept. v. Superior Court* (1981) 30 Cal.3d 256, 265-266; *Alch v. Superior Court* (2004) 122 Cal.App.4th 339 [noting that in employment discrimination class actions, plaintiffs " 'normally seek to establish a pattern or practice of discriminatory intent by combining statistical and nonstatistical evidence, the latter most commonly consisting of anecdotal evidence of individual instances of discriminatory treatment' "]; *Bell*, 115 Cal.App.4th at 750

[referring to statistical sampling as "a different method of proof" and "a particular form of expert testimony"].

As the Court is undoubtedly well aware, *Bell*, cited with approval in *Sav-On* and *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 464, set the standard for using survey and statistical evidence for aggregate proof by expert and representative testimony in wage and hour class action trials. *Bell* looked to the long history of representative trials in collective actions under the Fair Labor Standards Act (FLSA) without the type of individualized proof *Duran* requires for trial:

> We note that the use of statistical sampling in the present case is analogous to FLSA precedents that allow back pay to nontestifying claimants. By basing relief on evidence of a pattern or practice, these decisions have also relieved some employees of the procedural necessity of making individual proof.

Bell, 115 Cal.App.4th at 750.

Discussing due process, *Bell* noted a general "growing acceptance of scientific statistical methodology in judicial decisions and scholarship," finding:

> "[s]tatistical assessments are prominent in many kinds of cases, ranging from antitrust to voting rights. Citing varied uses of statistics, the court in *In re Chevron U.S.A., Inc., supra*, 109 F.3d 1016, 1020, observes, "The applicability of inferential statistics have long been recognized by the courts." Underlying the contemporary reliance on the methodology of inferential statistics is a recognition that "[e]xperts have developed appropriate modeling techniques for reaching statistically significant and reliable conclusions."

Id. at 754 (citations and footnote omitted).

In addition to limiting the applicability of *Sav*-On to a decision on class certification and not trial,[3] Duran incorrectly portrays *Bell* as a case in which statistics were used only to establish damages, not liability. Statistics were not used in *Bell* to prove that defendant insurer had misclassified its claims representatives as exempt administrative employees but were used to establish through random representative testimony that 91% of the class members had been deprived of overtime pay, an issue of

[3] *Duran*, at 273-274.

liability, and the aggregate amount of overtime hours, that is, damages. The issue of overtime exemption misclassification, decided on summary adjudication in *Bell*, was in itself not actionable on a liability basis without further proof of defendant's liability for unpaid overtime hours.

By definition, "virtual" representation does not mean "actual" representation, hence representative trials do not involve examination of everyone bound by the judgment, whether called by the class or defense. "Due process" afforded the defense is implicit in its ability to challenge the representative evidence on a representative, not individual, basis. If every class member is subject to being called to testify, the case is not a class action. *Duran* is entirely wrong on this point, contrary to *Sav-On*, and must be reviewed or depublished on this basis as likely to create confusion in the trial courts.

B. *Duran* fails to meet the standards for publication in Rule of Court, Rule 8.1105(c)

If this Court finds *Sav-On* and *Duran* consistent such that review is not warranted, *Duran* fails to meet the standards for publication in Rule of Court, Rule 8.1105(c). The opinion concerns trial of a wage and hour overtime exemption misclassification class action using representative evidence extrapolated to absent class members. *Duran* neither creates a new rule of law for trying such cases (unless practitioners are to follow a new rule that class cases cannot be tried on representative evidence and all class members must testify to satisfy the defendant's alleged due process rights), applies the established rules of *Sav-On* and *Bell* to a set of facts different as to exemption in any significant manner, or modifies, explains, or criticizes existing class trial procedure. With the expansion of class action practice in recent years, and its impact on large segments of the public, nearly any class action involves a legal issue of "continuing public interest." This final basis does not justify publication of all class action opinions, and *Duran* is not the exceptional case falling under its purview.

C. *Duran* Must be Depublished for its Reliance on Questionable Federal Trial Court Decisions

Duran must also be depublished for its reliance on two poorly-reasoned federal trial court decisions, Judge Selna's certification denial of a manager's misclassification action in *Jimenez v Domino's*, *supra*, and Judge Patel's certification denial on remand after Ninth Circuit reversal of certification of an outside sales class claiming overtime exemption misclassification in *In re Wells Fargo Home Mortgage Overtime Pay Litigation* (N.D. Cal. 2010) 268 F.R.D. 604 (*Wells Fargo II*).

Duran cites *Jimenez* for the proposition that "when 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." *Duran*, at 255. *Jimenez,*[4]however, is simply a case contrary to other trial courts certifying overtime exemption classes under Rule 23[5] in which a trial judge in the exercise of discretion over whether a class action is a superior remedy for trying a case in his courtroom could not understand how a class action judgment would be supported if even one class member was found to be exempt. Evident in the statement "surveys and statistics may establish whether uniform classification was improper but will not be helpful in determining whether each general manager himself was wrongly classified or not," Judge Selna simply rejected the notion that representative evidence can be extrapolated to absent class members where answers to individual questions in the sample may be less than 100% homogeneous. *Jimenez*, *supra*, 238 F.R.D. at 253. *Sav-On* explicitly rejected the notion that in order to certify a class, all class members must be identical: "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. *Ramirez* is no authority for such a requirement, nor does the logic of predominance require it." *Sav-On* at 338.

As noted by this Court in *Sav-On*, "[p]redominance is a comparative concept, and the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate. Individual issues do not render class certification inappropriate so long as such issues may effectively be managed." *Sav-On* at 335 (internal quotations and citations omitted).

Duran also leans on *Wells Fargo II* as "particularly instructive." *Duran* at 257. Close examination of that case reveals an uncritical analysis of the case law upon which it, in turn, relied. According to Judge Patel, "[t]he court has been unable to locate any case in which a court permitted a plaintiff to establish the nonexempt status of class members, especially with respect to the outside sales exemption, through statistical evidence or representative testimony." *Id.* quoting *Wells Fargo II* at 612. In fact the opposite was true. *Morgan v. Family Dollar Stores, Inc.* (11th Cir. 2008) 551 F.3d 1233, 1247, 1276 (*Morgan*) is such a case (though it dealt with the executive exemption).

Wells Fargo II ruled that it would be improper to certify a class if sampling indicated, for example, that one out of every ten class members was exempt, because the

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[4] The undersigned represented the plaintiffs in *Jimenez*.
[5] See footnote 4, *infra*.

fact finder could not separate out which employee qualified without separate mini-trials. *Id. Wells Fargo II* then went on to misconstrue *Morgan* as being strictly related to using representative testimony for establishing *damages*. To the contrary, *Morgan* expressly involved a *liability* determination for a nationwide group of retail store managers based on representative testimony extrapolated to the entire class. Remarkably, even though *Wells Fargo II* cites to *Morgan*, it overlooks the fact that retail store managers were found to be non-exempt at trial after presentation of representative sample of seven store managers who worked at 50 out of 6,000 nationwide stores, along with testimony from district managers, corporate executives, payroll officials, and expert witnesses, *Morgan*, at 1247, 1276.

Wells Fargo II also neglected in this part of its analysis to consider *Sav-On*, a certified class as to which plaintiff would utilize representative proof at trial and the only way the defendant could meet its burden of proof to establish exempt status of the retail managers would be through representative evidence, not by having every certified class member testify. Its conclusion that representative testimony could not be used in outside sales exemption cases is also inconsistent with other certified exemption class actions,[6] in which courts have by certifying classes implicitly found that addressing the amount of time class members spent managing or performing hourly tasks was to be presented at trial through representative evidence (either a survey or a random sample of testifying employees), not having every class member testify at trial.

Other federal trial court decisions under Rule 23 make clear that *Jimenez* and *Wells Fargo II* are off track. The suggestion that "how each class member spent his or her day" implicates a predominating, individualized affirmative defense in every case simply cannot stand.

> Rule 23 does not set forth a test for when common issues "predominate," "[n]or have the courts developed any ready quantitative or qualitative test for determining whether the common questions satisfy the rule's test." Wright & Miller, 7AA Fed. Prac. and Proc. § 1778. Wright & Miller describe the issue as one for "pragmatic" determination, noting that "predominate" should not be equated with "determinative". *Id.* ("Therefore,

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[6] See, e.g., **Error! Main Document Only.***Krzesniak v. Cendant Corp.* (N.D. Cal. 2007) 2007 U.S. Dist LEXIS 47518 [certified class of car rental store managers]; *Alba v. Papa John's USA, Inc.* (C.D. Cal. 2007) 2007 U.S. Dist. LEXIS 28079, 19-21 [certified class of salaried restaurant managers and hourly employees], *Tierno v. Rite-Aid Corporation* (N.D. Cal. 2006) 2006 U.S. Dist. LEXIS 71794 [certified class of store managers].

> when one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered properly under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages *or some affirmative defenses peculiar to individual class members.")*

Mazza v. Am. Honda Motor Co. (C.D. Cal. 2008) 254 F.R.D. 610, 619-620 (emphasis added). Under this standard, even if a court under its particular record finds the element under *Ramirez v Yosemite Water* (1999) 20 Cal.4th 785, 798 requiring a defendant to prove its affirmative defense by establishing its employees performed exempt tasks more than 50% of the time the "determinative" factor, other central issues common to the class may predominate, such as those the trial court in *Duran* found predominating.

Finally, *Duran* attempts to distinguish *Dilts v. Penske Logistics, LLC* (S.D.Cal. 2010) 267 F.R.D. 625, 638 as not supporting the use of representative evidence to establish liability in exemption cases. *Duran* at 264-265. But that is not correct either, as *Dilts* relies on *Morgan* for its conclusion. "As to liability, the use of statistical sampling, at least when paired with persuasive direct evidence, is an acceptable method of proof in a class action. See generally *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1276-80 (11th Cir. 2008) (accepting a trial court's extrapolation to absent class members from representative testimony about the duties of store managers)." *Id.*

Consequently, *Duran* should be depublished in order to ensure practitioners are not constricted by *Duran's* selective reliance on questionable federal authority which flatly contradicts established California precedent.

D. Reweighing Evidence And Terminating The Case Contravened Sav-On And Required Remand

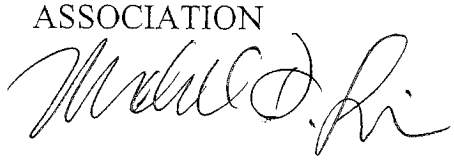
Re-weighing the evidence (here, a grouping of self-serving declarations from absent class members supporting the defense obtained under highly questionable circumstances), *Duran* decertified the class under its view that a class action with less than 100% homogeneity among class members cannot be tried. That decision was based on the same conflicting evidence the trial court determined it could manage in a class trial. In so doing, *Duran* usurped a critical function reserved for trial court discretion.

In *Sav-On*, and in the numerous overtime exemption misclassification class cases this court has declined, upon request, to depublish or review following *Sav-On*,[7] this Court has consistently upheld the discretion of the trial court to make certification decisions in the face of conflicting evidence. See, e.g, *Sav-On* at 331 ("But the trial court was within its discretion to credit plaintiffs' evidence on these points over defendant's, and we have no authority to substitute our own judgment for the trial court's respecting this or any other conflict in the evidence"). Duran's failure to observe this line of authority renders it unsuitable for publication.

Moreover, *Duran's* failure to remand the case for proceedings consistent with its certification and due process analysis is an issue currently under review in *Brinker Restaurant Corp. v. Superior Court*[8]. Consequently, *Duran* should be depublished in favor of the analysis of this issue by this Court in the upcoming *Brinker* decision.

Thank you for your consideration of this request.

Very truly yours,
COHELAN KHOURY & SINGER and
CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION



Michael D. Singer

cc: Service List on All Counsel
California Employment Lawyers Association
Court of Appeal, First Appellate District, Division One

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[7] CELA has sponsored such requests in several cases, e.g., *Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422 (depublication); *Keller v. Tuesday Morning, Inc.* (2009) 179 Cal.App.4th 1389 (depublication); *Home Depot Overtime Cases* (2007) 2007 Cal. App. Unpub. LEXIS 9403 (review).

[8] 6. Standard of Appellate Review Issue: When an appellate court reviews an order *granting* class certification, does the appellate court prejudicially err by: (a) deciding issues not enmeshed with the class certification requirements; (b) applying newly-announced legal standards to the facts, then reversing the class certification order with prejudice, instead of remanding for the certification proponent to attempt to meet the new standards, and for the trial court to apply the new standards to the facts in the first instance; or (c) reweighing the evidence instead of reviewing the trial court's predominance finding.