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February 15, 2008

VIA HAND DELIVERY

Honorable Chief Justice and Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Bell v. Superior Court (Cox)*, 158 Cal.App.4th 147 (2007)
Case Nos. B199605, S160423, Request for Depublication of
Court of Appeal Opinion published on Dec. 20, 2007

Dear Honorable Justices:

Pursuant to Rule of Court 8.1125, I write on behalf of Adam Hohnbaum, Illya Haase, Romeo Osorio, Amanda June Rader, and Santana Alvarado to request depublication of the Court of Appeal's opinion in *Bell v. Superior Court (Cox)*, 158 Cal.App.4th 147 (2007) (case no. B199605, Second Appellate District, Division Three). The *Bell* opinion was ordered published on December 20, 2007 and became final on approximately January 19, 2008. A petition for review was filed with this Court on January 29, 2008 (case no. S160423). This depublication request is timely filed within 30 days after the opinion became final. *See* Rule of Court 8.1125(a)(4).

Statement of Interest and Summary of Reasons Why The Opinion Should Not Be Published

Adam Hohnbaum, Illya Haase, Romeo Osorio, Amanda June Rader, and Santana Alvarado are plaintiffs in a meal period and rest break class action that has already made its way up to this Court once. *See Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, no. S157479. The trial court granted class certification of their meal period, rest break, and off-the-clock claims, and the defendant filed a writ petition. The Court of Appeal issued an unpublished opinion reversing the class certification order, which this Court ordered vacated on October 31, 2007. The matter is still pending before the Court of Appeal for the Fourth Appellate District, Division One, which has received supplemental briefing but has yet to issue a new opinion. *See Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, no. D049331.

Mr. Hohnbaum and his co-plaintiffs seek depublication of *Bell* for two reasons.

First, the single sentence in which the opinion addresses class certification of the meal period and rest break claims (158 Cal.App.4th at 170) contains no analysis of the relevant decisional law, such as Cicairos v. Summit Logistics, Inc., 133 Cal.App.4th 949 (2005), and therefore "could lead to unanticipated misuse as precedent." See Eisenberg, Horvitz & Weiner, California Practice Guide: Civil Appeals & Writs §11:180.1 (The Rutter Group 2005). Because the opinion failed to analyze the "ensure" vs. "make available" question at all, much less correctly, the opinion "contains misleading or incorrect language that might cause confusion"—another ground for depublication. California Civil Appellate Practice, §21.17 (CEB 3d ed. 1996).

Second, depublication will prevent confusion among the trial courts respecting the "ascertainability" element of certification. The *Bell* opinion has the same problems as were pointed out in a depublication request filed on February 7, 2007 regarding *Sony Electronics, Inc. v. Superior Court*, 145 Cal.App.4th 1086 (2006) (depublished). This Court granted that request and depublished the *Sony* opinion on March 21, 2007. *Sony Electronics v. Superior Court (Hapner)*, no. S150066. Like the depublished *Sony* opinion, the *Bell* opinion misinterprets *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal.App.4th 908 (2001) and thus incorrectly disapproves class definitions that are entirely proper.

For either or both of these reasons, the *Bell* opinion should be depublished.

The *Bell* Opinion's No-Analysis Paragraph on Certification of Meal Periods and Rest Breaks Is Misleading and Subject to Misuse As Precedent

The Court of Appeal's discussion of whether the trial court correctly denied certification of the meal period and rest break claims consists of a single paragraph:

> Before the trial court, plaintiffs argued that Cox had an unwritten policy of scheduling too much work to allow drivers to take meal and rest breaks. Cox responded with evidence that: (1) routes are assigned with sufficient time for drivers to take breaks; (2) drivers are trained to take breaks; and (3) some drivers do take breaks. Cox's evidence provides substantial evidence that there is no uniform policy or practice forbidding or preventing breaks, *and that any driver who did not take the necessary breaks did so for reasons which require independent adjudication.* We therefore affirm the trial court's conclusion that common issues do not predominate.

Bell, 158 Cal.App.4th at 170 (emphasis added).

The paragraph does not discuss the language of either Labor Code section 226.7(a) or paragraph 11 of the Wage Orders.[1] Nor does it mention *Cicairos*, the only published California opinion to interpret these provisions. In fact, *Cicairos* is not mentioned anywhere in the *Bell* opinion.

As this Court is well aware,[2] in *Cicairos*, the Third District held that an employer's "obligation to provide ... an adequate meal period is not satisfied by assuming that the meal periods were taken, because *employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty.'* " *Cicairos*, 133 Cal.App.4th at 962-63 (quoting DLSE Opinion Letter, 01/28/02, at 1) (emphasis added).

The *Bell* court's language (italicized above) might be characterized as a holding that the "reasons" why the class members "did not take the necessary breaks" are relevant to deciding whether an employer violated section 226.7 or the Wage Orders. However, *Bell* does not even mention or quote the language of those provisions, and it wholly ignores *Cicairos*—a decision that is plainly relevant to any California court construing the employer's duties respecting meal periods. Under *Cicairos*, it would be unnecessary to consider any "reasons" why an employee "did not take the necessary breaks," because if the break was not taken, the employer failed to satisfy its "affirmative obligation" to relieve its workers of all duty.

Bell also ignored two other recent decisions relevant to this question. *Compare Perez v. Safety-Kleen Systems, Inc.*, 2007 WL 1848037 (N.D. Cal. Jun. 27, 2007) (following *Cicairos*; employers "must do something affirmative" to ensure that employees receive their statutorily-mandated meal periods) *with White v. Starbucks Corp.*, 497 F.Supp.2d 1080 (N.D. Cal. Jul. 2, 2007) (refusing to follow *Cicairos*; "the California Supreme Court, if faced with this

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[1] Paragraph 11(A) of the Wage Orders states: "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee." The language governing the truck drivers in *Bell* and the restaurant workers in *Brinker* is identical. *Compare* Wage Order 5 (8 Cal. Code Regs. §11050 (¶11(A)) *with* Wage Order 9 (8 Cal. Code Regs. §11090 (¶11(A)).

[2] The question of whether meal periods must be "ensured" or merely "made available" has been raised in at least two other prior petitions for review by this Court. *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, no. S157479 (filed Oct. 22, 2007); *RadioShack Corp. v. Superior Court (Brookler)*, no. S158083 (filed Nov. 8, 2007). In the unpublished *Brinker* opinion (since ordered vacated), the Court of Appeal ignored *Cicairos*, whereas in *RadioShack*, the Court of Appeal followed *Cicairos*.

issue, would require only that an employer *offer* meal breaks, without forcing employers actively to ensure that workers are taking these breaks." (emphasis original)).

Perhaps unaware of *Cicairos* or the other case authorities, the *Bell* court issued an opinion devoid of any analysis of the law governing meal periods and rest breaks, and ended up including language that could arguably be interpreted in a manner contrary to *Cicairos*. Now that the opinion has been published, it is subject to misuse as a precedent.

Indeed, *Bell* has already been so mis-cited. For example, in the *Brinker* case, in a supplemental brief filed with the Court of Appeal on January 31, 2007, the defendant asserted that "the Second District recently assumed in an opinion affirming the trial court's decision denying certification of a meal period class that meals need only be provided, not ensured." *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, no. D049331, Brinker's Response to Plaintiffs' Supplemental Brief, filed Jan. 31, 2007, at 4 (citing *Bell*, 158 Cal.App.4th at 170).[3] The defendant further argued that "[t]he *Bell* court thus assumed that meal periods must be provided—not ensured—and decided that plaintiffs' claims were not susceptible to class treatment because of employees' ability to decline meal periods." *Id.* at 8 (citing *Bell*, 158 Cal.App.4th at 170).

But the *Bell* court did not offer any interpretation of the actual language of the Labor Code or Wage Orders in support of any such conclusion, nor did it discuss *Cicairos* or the federal district court decisions, *White* and *Perez*, which did. Any "holding" or "assumption" in *Bell* on the "ensure" vs. "make available" point cannot be characterized as a considered or advised one.

As this Court already knows, the question of whether meal periods must be "ensured" or merely "made available" is being actively litigated in numerous class actions across the state. Indeed, two petitions for review raising this question have already reached this Court,[4] and it remains pending before other Courts of Appeal.[5] In *Bell*, the Court of Appeal had an opportunity to provide guidance to litigants and lower courts, but it failed to do so. It made no attempt to genuinely analyze the "ensure" vs. "make available" question. It engaged in no effort

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[3] Mr. Hohnbaum *et al.* respectfully ask the Court to take judicial notice of the cited portions of Brinker's supplemental brief. A true and correct copy of the relevant pages from this brief are attached hereto as Exhibit A.

[4] *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, no. S157479 (filed Oct. 22, 2007); *RadioShack Corp. v. Superior Court (Brookler)*, no. S158083 (filed Nov. 8, 2007).

[5] *See, e.g., Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, no. D049331 (Fourth Appellate District, Division One); *Savaglio v. Wal-Mart Stores, Inc.*, nos. A116458, A116459, A116886 (First Appellate District, Division Four).

to reach a reasoned conclusion on the issue after discussing all the relevant statutory and regulatory language and analyzing the pertinent case law.

Under such circumstances, the opinion should be depublished. If it is not, it will only serve to confuse the parties to the pending cases and the lower courts who are handling them. It will continue to be misused as a precedent on a point that it did not truly address or resolve.

Accordingly, Mr. Hohnbaum and his fellow plaintiffs respectfully ask this Court to depublish the *Bell* opinion.

The *Bell* Opinion's Erroneous Interpretation of the "Ascertainability" Prong of Class Certification Will Lead to Confusion Among Lower Courts

The second reason *Bell* should be depublished relates to its incorrect interpretation of the "ascertainability" element of class certification.

When it ruled on class certification, the trial court in *Bell* determined that, "under the class definition proposed by plaintiffs' counsel, the litigation would require a fact-specific merits-based determination of each potential class member's claims to determine whether that individual is a member of the class." 158 Cal.App.4th at 163. In reviewing that part of the ruling, the Court of Appeal described the law in this way:

> Ascertainability can best be achieved "by defining the class in terms of objective characteristics and common transactional facts," rather than defining it in such a way that proposed class members must establish the merits of their case in order to be considered part of the class. (*Hicks v. Kaufman & Broad Home Corp.*, *supra*, 89 Cal.App.4th at pp. 914-915, 107 Cal.Rptr.2d 761.) However, if the named plaintiff improperly incorporates the merits in the definition of the class, "the court itself can and should redefine the class where the evidence before it shows a redefined class would be ascertainable." (*Id.* at p. 916, 107 Cal.Rptr.2d 761.) Class certification can be denied for an unascertainable class when the proposed definition is overbroad and the plaintiff offers no means by which only those class members who have claims can be identified from those who should not be included in the class. (*Akkerman v. Mecta Corp., Inc.* (2007) 152 Cal.App.4th 1094, 1100-1101, 62 Cal.Rptr.3d 39 [class defined as all patients in California who received electroconvulsive therapy with defendant's device is overbroad when the claim is for insufficient

> warnings and there is no way to determine which patients relied on defendant's warnings as opposed to those provided by their physicians or consent forms].)

Id. at 166-67. The Court of Appeal determined that "[t]o the extent plaintiffs' proposed definitions of the class improperly incorporated the merits of the claim, the trial court should have redefined the class." *Id.* at 168.

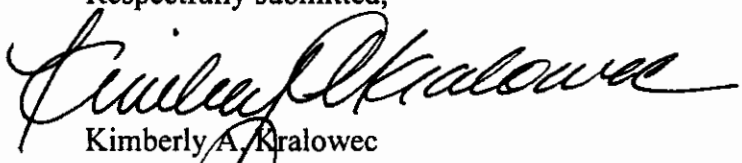
The problem with this ruling is that it misinterprets *Hicks* and confuses the necessity of a determination of merits *at the ascertainment stage* from simply describing an ultimately ascertainable class, which is what is necessary to satisfy the ascertainability element *at the class certification stage*. The *Bell* opinion suffers from the very same flaws pointed out in the depublication request filed, and granted, in *Sony*. For the Court's convenience, a copy of the depublication request in *Sony* is attached hereto as Exhibit B. *See also Sony Electronics v. Superior Court (Hapner)*, no. S150066.

The *Bell* opinion should be depublished for all of the same reasons that depublication was granted in *Sony*.

Conclusion

For the reasons discussed above, this Court is respectfully asked to depublish the Court of Appeal's opinion in *Bell*. Alternatively, the Court should grant partial depublication of the meal period and rest break discussion (part 5 of the opinion's "DISCUSSION" section, 158 Cal.App.4th at 170-71). As a third alternative, the Court should grant the petition for review and take up the "ensure" vs. "make available" question.

Respectfully submitted,



Kimberly A. Kralowec
(State Bar No. 163158)

Enclosures

cc: See attached proof of service

PROOF OF SERVICE

I, the undersigned, state that I am a permanent resident of the United States and am employed in the City and County of San Francisco, State of California; that I am over the age of eighteen (18) years and not a party to the within action; that I am employed at Schubert & Reed LLP, Three Embarcadero Center, Suite 1650, San Francisco, California 94111; that on the date set out below, I served a true copy of the attached

LETTER TO SUPREME COURT DATED FEBRUARY 15, 2008 (DEPUBLICATION REQUEST)

on the person(s) listed below by placing said copy enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mailbox at San Francisco, California, addressed as follows:

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Counsel for Brinker Restaurant Corporation (Courtesy Copy)

Clerk
California Court of Appeal for the
Second Appellate District, Division Three
Ronald Reagan State Building
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Los Angeles, CA 90013

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

Executed this 15th day of February, 2008 in San Francisco, California.

Pamela Lee

EXHIBIT A

D049331

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC., and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P., a Delaware Corporation and DOES 1 through 500, inclusive,

Petitioners and Defendants,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,

Respondent.

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE RADER, and SANTANA ALVARADO and ROES 1 through 500, inclusive on behalf of themselves and all others similarly situated, and on behalf of the general public,

Plaintiffs and Real Parties in Interest.

WRIT FROM SAN DIEGO SUPERIOR COURT
HON. PATRICIA A. Y. COWETT, JUDGE
CASE NO. GIC834348

BRINKER'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF

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ATTORNEYS FOR PETITIONERS,
BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC., AND BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.

A conclusion that employers need only provide meal periods would be consistent with all existing case authority on point. As this Court noted (Slip Op., pp. 39-40), the United States District Court for the Northern District of California held last year in *White v. Starbucks Corp.* (N.D. Cal. 2007) 497 F. Supp.2d 1080, that the California Supreme Court, "if faced with this issue, would require only that an employer *offer* meal breaks, without forcing employers actively to ensure that workers are taking these breaks." (*Id.* at pp. 1088-1089, original emphasis.) Likewise, the Second District recently assumed in an opinion affirming the trial court's decision denying certification of a meal period class that meals need only be provided, not ensured. (*Bell v. Superior Court* (2007) 158 Cal.App.4th 147, 170.)

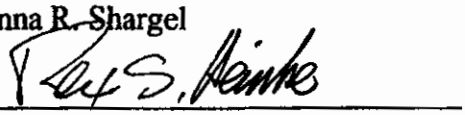
While Plaintiffs claim – as they have previously (see, e.g., Plaintiffs' Return by Way of Answer to Petition for Writ of Mandate, Prohibition, Certiorari, or Other Appropriate Relief ("Return"), p. 50; Plaintiffs' July 6, 2007 letter to this Court) – that a decision that meal periods need only be provided would contradict the Third District's decision in *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 and the Northern District's decision in *Perez v. Safety-Kleen Systems, Inc.* (N.D. Cal., June 27, 2007, Nos. C 05-5338, 07-0886) 2007 WL 1848037 (Supp. Brief, pp. 10-11), their arguments remain misguided. As the Northern District explained in *White*, the *Cicairos* employer maintained management policies and corporate systems that prevented it from satisfying its obligation to *provide* meal periods, having instituted, for example, an on-board computer system that monitored its truck driver employees' activities without including an activity code for meal periods. (*White, supra*, 497 F.Supp.2d at p. 1089 [citing *Cicairos, supra*, 133 Cal.App.4th at p. 962].) The *Cicairos* employer also "pressured drivers to make more than one trip daily, making it harder to stop for lunch." (*Ibid.* [citing *Cicairos, supra*, 133

Recently, in *Bell v. Superior Court*, the Second District affirmed a trial court's denial of class certification with respect to plaintiffs' meal and rest period claims. Plaintiff truck drivers argued that their employer "had an unwritten policy of scheduling too much work to allow drivers to take meal and rest breaks." (*Bell, supra*, 158 Cal.App.4th at p. 170.) Presented with declarations indicating that "some employees were permitted to take, and did take, meal and rest breaks, while others did not," and with no evidence of a company-wide policy prohibiting rest or meal periods, the trial court held that individual issues predominated. (*Id.* at p. 160.) The Court of Appeal affirmed, finding "substantial evidence that there is no uniform policy or practice forbidding or preventing breaks, and that *any driver who did not take the necessary breaks did so for reasons which require independent adjudication.*" (*Id.* at p. 170, emphasis added.) The *Bell* court thus assumed that meal periods must be provided – not ensured – and decided that plaintiffs' claims were not susceptible to class treatment because of employees' ability to decline meal periods. Decisions from other jurisdictions agree. (See, e.g., *Petty v. Wal-Mart Stores, Inc.* (Ohio Ct. App. 2002) 773 N.E.2d 576, 582 [affirming trial court's denial of class certification because "some [employees] purposely chose not to take their breaks and meals for reasons unrelated to work, e.g., some wanted to leave work early, so they skipped breaks and meals, and one putative plaintiff who was trying to quit smoking did not take breaks in order to avoid the temptation to smoke"]; *Jackson v. Wal-Mart Stores, Inc.* (Mich. Ct. App., Nov. 29, 2005, No. 258498) 2005 WL 3191394, *5 [affirming trial court's denial of class certification because plaintiffs' meal period claims would necessarily require inquiries into whether "potential class members were expressly required by their supervisors" to forego a break, or whether they "simply chose to do so for a number of personal reasons"].)

Respectfully submitted,

Dated: January 31, 2008

AKIN GUMP STRAUSS HAUER & FELD LLP
Rex S. Heinke
Karen J. Kubin
Johanna R. Shargel

By 
Rex S. Heinke

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BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC., AND BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.

EXHIBIT B

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ATTORNEYS AT LAW

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ALEXANDER I. DYCHTER*

S150066

February 6, 2007

Chief Justice Ronald M. George
Associate Justices Baxter, Chin,
Kennard, Werdeger, Moreno & Corrigan
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303

Re: Request for Depublication
Sony Electronics, Inc. v. Superior Court
D048468, Fourth Appellate District, Division One

Dear Honorable Justices:

This letter is written under rule 8.1125(a), California Rules of Court, requesting depublication by the Supreme Court of *Sony Electronics, Inc. v. Superior Court* D048468, (2006) 145 Cal.App.4th 1086 (*Sony*). The publication order of *Sony* is dated December 18, 2006. This request is thus timely filed under rule 8.1125(a) within 30 days following the January 17, 2007 date of finality of the opinion pursuant to rule 8.264(b)(5). The time for filing a Petition for Review elapsed on January 27, 2007 pursuant to rule 8.500(e) without the parties having sought Review.

DESCRIPTION OF REQUESTING PARTY'S INTEREST AND REASON WHY OPINION SHOULD NOT BE PUBLISHED

I am the author of *Cohelan on California Class Actions* (The Expert Series) (Thomson-West 2006), and I represent consumer, employee, and corporate plaintiffs in California class actions. I have submitted one prior request for depublication of a Court of Appeal decision, *Gattuso v. Harte-Hanks Shoppers, Inc.*, B167037, (2005) 133 Cal.App.4th 985, currently under review by this Court.

I periodically review and compile the State's published body of class action law for my book, a yearly-updated procedural guide for practitioners published since 1997. This role necessitates this depublication request to prevent likely confusion among trial courts ruling on class certification motions state-wide following the *Sony* decision. Mistaking

"ascertainability" for "ascertainment," *Sony* pronounces a new rule affecting all class actions by prohibiting so-called "fail safe" class definitions (definitions that include the alleged violation in defining the class) on the basis that a merits determination is necessary to establish the ascertainability component for class certification. This ruling sets forth an incorrect legal standard contrary to established case law from this Court in *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695 [*Daar*] that differentiates between "ascertainability" necessary for class certification and "ascertainment" of the class in later proceedings following a determination of liability.

Relying on foreign authority and a mistaken interpretation of *Hicks v. Kaufman & Broad* (2001) 89 Cal.App.4th 908 [*Hicks*], a case in which my firm was class counsel, the Court of Appeal mistakes the necessity of a determination of merits at the ascertainment stage from simply describing an ultimately ascertainable class, the requirement necessary to meet the ascertainability requirement at the certification stage. Had the Court of Appeal followed *Daar*, apposite Ninth Circuit authority in *Vizcaino v. United States Dist. Court*, 173 F.3d 713, 721-722 (9th Cir. 1999) renouncing the "fail safe" class definition prohibition, and the multitude of California cases certifying classes with definitions including the violation alleged, it would not have rendered its erroneous opinion.

Sony's new ascertainability standard is contrary to well-accepted principles established in published cases from this Court and the California Courts of Appeal. If left as a published opinion, *Sony* threatens to contradict decades of solid case law on these issues and result in trial courts failing to certify classes that should be certified. It should, therefore, be depublished.

FACTS AND PROCEDURAL HISTORY

In *Sony*, the purchaser of a Sony notebook computer alleged that Sony had marketed and distributed GRX Series Notebook computers, knowing that the computers had defective memory chip sockets, but without disclosing such defects to consumers. The complaint asserted causes of action for violation of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.), false advertising, violations of the Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.), breach of express warranty and violations of the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.). Plaintiff moved for certification of a proposed class of consumers consisting of "all persons or entities in the United States who purchased Sony Vaio GRX Series Notebook Computers." Plaintiff contended that the computers suffered from a soldering defect which prevented many, but not all, from properly "booting" (i.e., starting the operating system when turned on) or utilizing their memory.
(*Sony*, *supra*, 145 Cal.App.4th at pp. 1089-1090.)

Pertinent to ascertainability, Sony argued the proposed class was not ascertainable because it included persons who lacked viable claims (including persons whose computers do not have any defects, persons who had their computers repaired under warranty or persons who bought their computers used, "as is" or in a refurbished condition), in addition to those whose computers suffered from the alleged defect. (*Id* at p. 1091).

The trial court declined to certify the class as defined but *sua sponte* certified a class as follows:

> All persons or entities in the United States who are original purchasers of Sony Vaio GRX Notebook computers from Sony or from an authorized reseller, and in which the memory connector pins for either of the two memory slots were inadequately soldered[,] impeding the recognition of installed memory causing boot failures, and other problems. Excluded from this Class are the following: (1) [Sony] (including its affiliates, employees, officers and directors); (2) persons or entities which distribute or sell Sony Vaio GRX Notebook computers; (3) the Court; and (4) purchasers who had the solder points repaired by Sony at no cost under the express warranty and who no longer experience boot failures and other problems related to inadequate soldering of the memory connector pins.

(*Id.*)

Sony petitioned for mandate seeking reversal of the certification order. Sony argued the partial class certified was not ascertainable because the class definition was not based on objective criteria, but instead on the issue of ultimate liability, i.e., whether a particular person's notebook computer contained a soldering defect. (*Id.* at p. 1095.) The Court of Appeal granted the Petition, relying on *Intratex Gas Co. v. Beeson* (Tex. 2000) 22 S.W.3d 398 [43 Tex. Sup. Ct. J. 489] (*Intratex*) and *Hicks*. The court essentially interpreted these cases to find class definitions fundamentally flawed if not defined using objective criteria such that class membership would not be ascertainable until after a determination of liability.

The court found the class definition of purchasers of "inadequately soldered" notebooks flawed:

> the class definition requires a merits-based determination in order to establish whether a particular GRX Series Notebook owner is a member of the class. The members of such a class are thus not readily identifiable so as to permit appropriate notice to be given and the definition would not permit persons who

receive notice of this action to determine whether they are part of the class.

(*Id.* at p. 1096.)

Somewhat contradictorily, the Court of Appeal implies, if not suggests, that an ascertainable class could have been defined to include all purchasers of certain notebook computers manufactured in Spring and Summer 2002 and with motherboards manufactured in Japan, as well as purchasers who experienced memory or "no boot" problems (though these do not specifically describe allegations of statutory violations). (*Id.* at p. 1097.)

THE COURT'S CONFUSION REGARDING ASCERTAINABILITY CREATES AN ERRONEOUS, NEW LEGAL STANDARD THAT SUPPORTS DEPUBLICATION

"Ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata." (*Hicks, supra*, 89 Cal.App.4th at 914, citing *City of San Jose v. Superior Court* (1974) 12 Cal. 3d 447, 454; *Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695, 704, 706 [*Daar*]; and Cohelan on California Class Actions (1997 ed.) section 2.02, pages 2-2 to 2-3.) Following this standard, "A class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify him or herself as having a right to recover based on the description." (*Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828.) There is no prohibition against including factual circumstances involving liability violations in the description provided individuals can identify themselves after liability is established, and in fact it is common to do so.

Ascertainability issues concern (1) the class definition, (2) the size of the class, and (3) the means of identifying class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 326 [*Sav-On*].)

In essence, *Sony* holds that if a merits determination must be made before a class member can be ascertained, a class definition that includes the violation alleged does not define an ascertainable class. However, *Sony* mistakes "ascertainability" with "ascertainment," which is not part of the class certification process.

Daar v. Yellow Cab Co. (1967) 67 Cal.2d 695, in which purchasers of script alleged they were charged excessive meter rates, establishes that a procedure for ascertaining class members at the certification stage is neither necessary nor appropriate.

> Defendant apparently fails to distinguish between the necessity of establishing the existence of an ascertainable class and the necessity of identifying the individual members of such class as a prerequisite to a class suit. If the existence of an ascertainable class has been shown, there is no need to identify its individual members in order to bind all members by the judgment. The fact that the class members are unidentifiable at this point will not preclude a complete determination of the issues affecting the class. Presumably an accounting in the suit at bench will determine the total amount of the alleged overcharges; any judgment will be binding on all the users of taxicabs within the prior four years. However, no one may recover his separate damages until he comes forward, identifies himself and proves the amount thereof.

(*Daar*, 67 Cal.2d at 705.)

Thus, all that is required is that the class be *ascertainable,* that is, defined in such a way that members may be ascertained (individually identified) after a liability determination for purposes of being notified of the judgment and for res judicata. Class members whose notebooks were "inadequately soldered" resulting in booting problems would thus be able "come forward and identify himself." Thus the class as defined by the trial court in *Sony* would be ascertainable pursuant to *Daar*.

The Ninth Circuit also conclusively refutes *Sony's* analysis, rejecting the argument that a definition that includes the violation is impermissibly "circular." *Vizcaino v. United States Dist. Court*, 173 F.3d 713, 721-722 (9th Cir. 1999) states as follows:

> The district court's position that "unusual circumstances" permit redefinition of the class after decision on the merits lacks legal support and is erroneous. . . .The "unusual circumstances" rather seem to arise from the district court's perception that the class it previously certified is "circular," i.e., that it relies on a legal conclusion to define membership in the class. According to the court, "common law employees are plaintiffs, and plaintiffs are common law employees." But the court's reading reflects a misconception. It is implicit in the definition of the class that its members are persons who claim to have been (or to be) common law employees who were denied ESPP benefits. That under this definition ultimate success may turn on resolution of a disputed legal issue does not make it circular. In *Forbush v. J.C. Penney Co.*, 994 F.2d 1101 (5th Cir. 1993), the court, dealing with an analogous situation, said:
>
> Penney asserts that this definition is hopelessly "circular," as the

> court must first determine whether an employee's pension benefits were improperly reduced before that person may be said to be a member of the class. This argument is meritless and, if accepted, would preclude certification of just about any class of persons alleging injury from a particular action. These persons are linked by this common complaint, and the possibility that some may fail to prevail on their individual claims will not defeat class membership.
> *Id.* at 1105.

Vizcaino concluded that the definition linking employees by their common claim to have been denied benefits "is no more circular than defining a class of employees by their common claim to have been injured by their employer's unlawful actions." (*Id.*, referencing *Vaszlavik v. Storage Tech. Corp.*, 183 F.R.D. 264, 267 (D. Colo. 1998) [certifying plaintiffs' class defined by description of plaintiffs' legal claim]; see, also *Hilao v. Estate of Marcos* (9th Cir. 1996) 103 F.3d 767, 774 [certified class defined as "All current civilian citizens of the Republic of the Philippines, their heirs and beneficiaries, who between 1972 and 1986 were tortured, summarily executed or disappeared while in the custody of military or paramilitary groups"])

In other words, it is implicit in every class definition that its members be persons who suffered the harm alleged in the case. Including the description of the violation in class definition or otherwise defining the class in terms of liability is permissible and does not invoke a premature merits determination.

Many California and federal cases are in accord, certifying classes and consistently not finding it "fatal" for definitions to include the violation alleged. (See, e.g., *Hicks*, *supra*, 89 Cal.App.4th at p. 915 ["A class is still ascertainable even if the definition pleads ultimate facts or conclusions of law"]; *Stephens*, 193 Cal.App.3d 411, 416 [class certified of "women who, since 1978, were, are or will be qualified to hold a reserve department manager position ... but have been denied the opportunity to do so because of their sex"]. *Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 952, 960 [The definition–persons who owned policies issued by defendant "which were purchased as a result of deceptive or fraudulent sales practices described herein . . . and were thereby harmed"–described the class sufficiently enough to make it ascertainable]; *Stephens v. Montgomery Ward* (1987) 193 Cal.App.3d 411, 415 [class of women excluded from holding managerial positions]; *Dukes v. Wal-Mart, Inc.* (9th Cir. Feb. 6, 2007) ___F.3d 1333, 1340 [class defined as "All women employed at any Wal-Mart domestic retail store at any time since December 26, 1998 who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and

practices"]; *Slaven v. BP America, Inc.* (C.D.Cal. 2000) 190 F.R.D. 649 [class certified of persons with interest in real or personal property "who have suffered or will suffer economic damage as a result of the oil spill and/or the ensuing clean-up effort"].) Class actions are thus regularly certified with classes defined in terms of liability.

In *Clothesrigger, Inc. v. GTE Corp.* (1987) 191 Cal.App.3d 605, telephone subscribers sought recovery of overcharges for improper long distance charges. The proposed class was defined as "all persons nationwide subscribing to Sprint since January 1, 1981, who were charged for one or more unanswered long distance calls." The court specifically found this an ascertainable class, despite being framed to consist solely of those subscribers who had been improperly charged long distance fees:

> Plainly such class is ascertainable. Individual subscribers know whether they were charged for unanswered calls and must prove they were so charged. No individual may recover separate damages until he comes forward, identifies himself as a class member and proves the amount of his damages. The necessity for class members to prove their own damages does not mean the class is not ascertainable. In *Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695, 706 [63 Cal.Rptr. 724, 433 P.2d 732], the California Supreme Court stated: "Defendant apparently fails to distinguish between the necessity of establishing the existence of an ascertainable class and the necessity of identifying the individual members of such class as a prerequisite to a class suit. If the existence of an ascertainable class has been shown, there is no need to identify its individual members in order to bind all members by the judgment. The fact that the class members are unidentifiable at this point will not preclude a complete determination of the issues affecting the class. Presumably an accounting in the suit at bench will determine the total amount of the alleged overcharges; any judgment will be binding on all the users of taxicabs within the prior four years. However, no one may recover his separate damages until he comes forward, identifies himself and proves the amount thereof.

(*Id.* at p. 611.) *GTE* confirms the established California procedure pursuant to *Daar* permitting a class to proceed to a liability determination prior to identification of the class members, authorizing class members to come forward subsequently to establish their eligibility for class inclusion and the amount of individual damages. (See, also *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319 [*Sav-On*] [determination of which employees were misclassified as exempt from overtime pay and hence included in the class would not take place until after certification].)

Sony relies on the inapposite Texas *Intranex* case and a misreading of *Hicks*. The Texas Supreme Court in *Intranex* found that a class defined as "natural gas producers whose gas was purchased by Intratex between 1978 and 1988 in less than ratable proportions" was not ascertainable until after a determination of liability. While that may constitute grounds against certification in Texas, it is not the law in California. .

Sony states that the court in *Hicks* "was faced with this precise issue and rejected the plaintiffs' proposed liability-based class definition as lacking in the requisite ascertainability." (*Sony, supra,* 145 Cal.App.4th at p. 1096.) This understanding of *Hicks* is backwards. The court actually found that there was an ascertainable class of homeowners whose concrete slabs were potentially defective but ruled that the trial court's requirement that they demonstrate slab failure for class membership was not proper under warranty law. In *Hicks*, the trial court had made an erroneous ruling on demurrer limiting warranty claims to potential class members with homes in which a product had "failed" and caused "manifest damage." (*Hicks*, 89 Cal.App.4th at p. 916.) Plaintiff therefore included the trial court's limitation in the class definition. The Court of Appeal found as a matter of substantive warranty law that failure and manifest damage were *not* required; therefore, the class definition requiring them to be included in the class was improper. (*Id.* at 926.) The court did not make the ruling advanced by *Sony* that the reason the definition was improper was because it defined the class on the basis of the inclusion of ultimate facts to be proven. The reason the Court of Appeal found it improper was because the trial court had erred in finding those ultimate facts needed to be proven at all.

In fact, *Hicks* states specifically the opposite of the principle enunciated in *Sony*: "A class is still ascertainable even if the definition pleads ultimate facts or conclusions of law"

THE APPLICATION OF AN IMPROPER STANDARD FOR ASCERTAINABILITY WARRANTS DEPUBLICATION TO PRESERVE PUBLIC POLICY SUPPORTING CLASS RELIEF

Though the broad-based rule *Sony* implicates and its partial overruling of *Daar* cannot stand, it is noteworthy that plaintiffs in *Sony* submitted critical objective evidence of notebook computers suffering from failure rates ten times that accepted by the manufacturer, with 60 to 70 percent of models sent to Sony for repair suffering from "no boot" problems. (*Sony, supra,* 145 Cal.App.4th at 1090.) Such evidence is indicative of a need for remedial action through the class vehicle. Public policy concerns require that in the face of such evidence, companies not be allowed to avoid liability by hiding behind a rule cutting off class rights with an arbitrary and overly broad rule limiting language used in defining the class.

The situation is similar to one in which a group, but not all, of a company's employees suffer Labor Code violations, such as failure to pay minimum wages, failure to pay overtime to a subset of employees who do not spend more than half their time performing exempt tasks, or failure to reimburse all reasonable and necessary expenses. If plaintiffs submit evidence of widespread violations and define a class limited to those who failed to be reimbursed or failed to receive overtime due, such a definition might run afoul of *Sony*. The result would be a class ascertainable pursuant to *Daar* standards being denied certification following *Sony*, and a company improperly avoiding class liability.

The new standard set forth by *Sony* creates the unintended consequence of broad misapplication to deny certification by trial courts. This incorrect legal standard, if allowed to stand, carries the potential of adversely affecting ongoing and future class actions statewide.

A trial court ruling on class certification supported by substantial evidence will not be disturbed "unless (1) improper criteria were used; or (2) erroneous legal assumptions were made." (*Sav-on*, *supra*, 34 Cal.4th at pp. 326-327.) *Sony's* analysis of the "ascertainability" issue suffers from both these flaws and should thus be depublished.

Finally, as to the analysis of ascertainability, the opinion does not qualify for publication under the grounds set forth in rule 8.1105(b).

Based on the foregoing, we respectfully request depublication of the *Sony* opinion.

Thank you for your consideration of this request.

Very truly yours,
COHELAN & KHOURY

Timothy D. Cohelan

TDC/mds
enclosure
cc: Service on All Counsel

PROOF OF SERVICE

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is Cohelan & Khoury, 605 "C" Street, Suite 200, San Diego, California 92101-5305.

On February 6, 2007, I served the foregoing documents described as **REQUEST FOR DEPUBLICATION** on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

I then served each document in the manner described below:

[XX] **BY MAIL:** I placed each for deposit in the United States Postal Service this same day, at my business address shown above, following ordinary business practices.

[ ] **BY FAX:** I transmitted the foregoing document(s) by facsimile to the party identified above by using the facsimile number indicated. Said transmission(s) were verified as complete and without error.

[ ] **BY UNITED PARCEL SERVICE:** I placed each envelope for deposit in the nearest United Parcel Service drop box for pick up this same day and for "next day air" delivery.

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

Executed February 6, 2007 at San Diego, California.

Amber Worden

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